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ORIGIN, DEVELOPMENT AND MAIN FEATURES OF THE NEW *LEX MERCATORIA*

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Abstract. *The parties to a foreign trade contracts and in international business transactions are apt to be concerned with the allocation of a large number of risks among themselves by means of universally understood contract terms. There are many different commercial instruments which determine who shall bear the various transportation risks , who shall bear the risk of failure to pay and of fluctuation on exchange rates, etc. All these devices and rules create the great body of customary law - lex mercatoria - which has many attributes of an autonomous legal system. Development , universality and common understanding of lex mercatoria speak on behalf the following features of lex mercatoria: 1. transnationality 2. standard forms of contracts, 3. international trade usage's as a source of lex, 4. arbitration, to which are submitted trade disputes, 5. tendency of international codification of lex mercatoria.*

1. INTRODUCTION

Despite wide and strong differences among national legal systems and between separated legal areas (*common law and civil law*), merchants and enterprises of all countries have developed a high degree of uniformity in commercial contract practices.

These contract practices and international business transactions are generally protected by the contract law of each country as well as by international conventions and by private international law. There are many devices related to allocation risks in export and import of goods which are generally understood by trading enterprises throughout the world. International trade terms relating to allocate risks of loss or damage to goods (INCOTERMS), clauses in bills of lading, in marine insurance policies and certificates, clauses in letters of credit, arbitration clauses etc., are common accepted in modern merchant community and governed by similar legal rules in almost all countries.

Internationally, **universality** and **uniformity** are the primary features of

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international contract practice, and such general similarities of practice and contract law are due in part to common commercial needs shared by all who participate in international business transactions.

Compared with the domestic trade, foreign trade usually requires the carriage of goods over relatively long distances, often by sea and involves number of parties located in different countries. Foreign trade transactions are also often large - scale transactions and they raise the possibility of suit in a foreign court or arbitration tribunal should something go wrong. Also, the procedure of domestic recognition and enforcement of foreign judicial or arbitration judgments is very complex and often, connected with the difficulties.

Cosmopolite of international trade practice and the common needs of merchants have appeared as a device which is much more inventive than the existing state law and it becomes "*spirits movens*" of new, universal international trade law - new *lex mercatoria*.

2. THE RISING AND UNIVERSALITY OF INTERNATIONAL COMMERCIAL LAW - LEX MERCATORIA

The universality of international commercial law is not due solely the fact that throughout the world, subjects who participate in export and import transactions confront common problems. It is also due to the fact that such a persons - merchants, shipowners, insurance underwriters, bankers, distributors and others, form a transnational community which has had a more or less continuous history for some nine centuries. This ancient mercantile community has been the generator of commercial law and it is the same community which is continued to develop present day mercantile law. Development of one uniform and universal mercantile law is possible through the contract practices of the mercantile community, through the common understanding and customs on which they are based, and also through the regulations of self-governing trade associations and decisions of arbitration tribunal to which their disputes are submitted.

These contract practices, understandings and customs, regulations and decisions constitute a body of customary law which is the foundation on which national and international commercial legislation has been and continues to be build.

Renaissance of the *lex mercatoria* and its arising power in the 20th. century is the answer of the modern commercial life on the the needs of the international business transactions subjects. End of the 20th. century is remarked with the phenomenon which is in Europe well known, appeared in the 11th. and 12th. century. Then, Europe experienced a commercial renaissance which was associated in part with opening of trade with the markets of the East (it was hidden, but prevalent objective of the first crusade 1095) and in part with general political and economic developments within Europe, including the rise of towns and cities as autonomous political units.

Medevial *lex mercatoria* was build from a new European trading community, which created a new system of a law to govern its commercial activities. The Roman Law, newly revived in the first universities, also dealt with various types of commercial transactions. The Roman law of sales, loans and other types of civil obligations as well as Roman law of nations (*ius gentium*), designed for whole different civilizations, had become antiquated for handling domestic and international commercial problems.

It is appeared a few compilation of maritime judgments and customs. They were, for example, Amalphitan Table - collection of maritime laws whose authority came to be acknowledged by all the city republics of Italy. About 1150, a compilation of maritime judgments by the Court of Oleron, an island of the French Atlantic cost, was adopted by the seaport towns of the Atlantic Ocean and the North Sea, including England. In the mid-fourteenth century the Consolato del Mare, a collections of the customs of the sea observed in the Consular Court of Barcelona, was accepted as a governing law in the commercial centers of the Mediterranean, including contracts of carriage of goods by sea.

At the same time, the great body of law was created governing legal order in markets and fairs. With the flourishing of commerce, the revival of law study in the universities, and the growth of legal systems, there is developed the concept a special lex mercatoria which included the customs of the markets and fairs as well as maritime customs relating to trade. There were universal trade rules and customs which was accepted as law.

Special class of people were established (merchants) in special places (markets, fairs, seaports) and they governed special merchant law different from local, feudal, royal or ecclesiastical law.

The main characteristic of medieval lex mercatoria were that:

1. it was the transnational law;
2. its principal source was mercantile custom;
3. function of judgment was governed not by professional judges but by the merchants themselves;
4. its procedure was speedy and informal;
5. as overriding principle it stressed equity - *bona fides* (good faith) in the medieval sense of fairness.

In order to facilitate commercial transactions, merchants developed various devices, some of them had have a touch of genius, such as bill of exchange. It have been established the various norms and laws which are not to be found in the older (Classical and Post-Classical) Roman law. These rules were, for example, that informal agreements could be legally binding (principle of consensualism have been born); mere possession of bearer bill of exchange established a right to payment; the good faith purchaser even of stolen goods is protected against the original owner when the goods were bought in open market, the right and obligations of one partner survive the death of the other. All of these rules were original.

In the 19th. century was started the period of national codification of commercial law (Code commerce 1807 and Handelgesetzbuch 1897). After the process of nationalization of commercial law (when it tended to lose its cosmopolitan character), the 20th. century has given a new revival of international community of merchants and its universal lex mercatoria, which is not part of any national legal system. Through their contracts (very often standard form of contracts) and more visibly through their trade associations, these various groups have created an specific legal order on a transnational level.

A large part of world trade is transacted on the basis of standard contract conditions issued by trade associations. Foreign trade contracts usually provide for submission of any dispute to arbitration, often under rules of a trade association or of the International Chamber of Commerce (I.C.C.). International convention and activity of international treaties (UNCITRAL, which has made Model Laws and Legal Guides for numerous tips of contracts) represent a process of unification and codification of the law of

international commercial transactions - new *lex mercatoria*.

This approach of universality is represented the most with Uniform Law on International Sales (Hague Convention 1964), with the 1980 United Nations Convention on Contract for the International Sale of Goods (Vienna Sales Convention), through the Uniform Customs and Practice for Documentary Credits (ICC l..r.1993), through the Incoterms (ICC 1990), UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention 1958) and other significant codification.

3. MAIN FEATURES OF NEW LEX MERCATORIA

A new merchant law is growing. Even if uniformity is not achieved completely, it would be at least sufficient for the needs of international trade.

What could be remarked as a significant features of the modern lex mercatoria:

1. **Transnationality** - International community of merchants have made in their transnational business transactions universal body of customary law, and this law – *lex mercatoria* is not part of any national legal system. Common needs shared by all merchants require for universal and transnational trade rules. Inspite of numerous tendency in legal theory which is tried to give to the *lex mercatoria* attribute of autonomy as an state law (on the facts of its own sources, codification, specific sanctions, independent judgment in form of arbitration tribunal, with speedy and informal procedure, etc.), opinion of author of this essay is that modern *lex mercatoria* is not yet an autonomous legal system. An example in order to support idea of non-autonomy of international commercial law is the follow: it is very often that parties in foreign contracts choose a national law as a governing law of their contract (choice of law clauses). This is a *prima faciae* self recognition of the non-autonomy of the lex mercatoria. In such cases judges and even arbitrators are not allowed to substitute the *lex mercatoria* for the national law chosen.

2. **Standard forms of contracts** - development of standard forms (take-it-or-leave-it contracts) is often given as an evidence of the relative autonomy of growing new law of *lex mercatoria*. There are different type of standard contract forms - standard condition drafted by individual enterprises, standard conditions issued by trade associations (for example, General Trade and Conditions for the Sale of Goods and for Machines FIDIC), and general conditions and standard form contracts drowned by international organizations (ICC, UNCITRAL...).

3. **Source of the lex are international trade usage's -** but legal doctrine did not answer on question of completely independence of those usage's of national law.

4. **Arbitration** - the most of disputes in international commercial law are settled by arbitration, an arbitral tribunal. Int. trade contracts (as well as standard contracts) usually imply choice of forum clauses and arbitration clauses. Except arbitration clause which are part of an contract, authority of arbitration could be negotiate with an separated arbitration agreement.

5. **Codification** - international codification of the *lex mercatoria* is permanent and growing process. Vienna Sales Convention, Incoterms, Uniform Customs and Practice for Documentary Credit etc. are common known codification in world of international trade. Some international standard terms such as Incoterms, rules on letter of credit, sales

transactions are often incorporated in national legal systems.

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POREKLO, RAZVOJ I OSNOVNA OBELEŽJA NOVE *LEX MERCATORIA*-E (MEĐUNARODNOG TRGOVINSKOG PRAVA)

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Za subjekte međunarodnih poslovnih transakcija kao i za stranke u međunarodnim trgovinskim ugovorima neophodno je izvanredno poznavanje uslova ugovoranja a radi prevazilaženja brojnih rizika kojih je međunarodna trgovina prepuna. Različitim trgovinskim instrumentima određuje se preuzimanje brojnih transportnih rizika , definiše se odgovornost za neisplatu, snošenje rizika promene valutnih kurseva itd. Svi ti instrumenti i pravila stvaraju korpus običajnog prava - ***lex mercatoria*** *- koje poseduje mnoge od atributa autonomnog pravnog sistema. Razvoj, univerzalnost kao i opšta prihvaćenost* ***lex mercatoria****-e stvara njena markantna obeležja: 1. transnacionalnost, 2. standardizovani ugovori, 3. međunarodni trgovinski običaji kao izvor prava, 4. arbitražno rešavanje sporova, 5. kodifikacija.*