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Lex Mercatoria

SREESANKAR. M[1] AND RIAMOL AJOY[2]

ABSTRACT

The need for state involvement in matters of international trade is indispensable. Without the intervention of the state, the ability of parties who belong to different legal systems to enter into contract, keeping in mind a plethora of cultural, linguistic and religious differences, is utterly hindered. Especially when taking into consideration, the growth of international trade and the lack of a forum that is unaffected by borders, the question of deciding the appropriate Lex Causae arises.

Yet even so, private entities have dealt with these problems without the intervention of the government. This practice by private entities holds its ground as a crucial element for the growth of international private law. The practice is referred to as 'Lex Mercatoria', or merchant law.

As time progressed, the relevance of Lex Mercatoria has changed. However, the scope of the applicability and importance of Lex Mercatoria can be used as a catalyst for change in matters regarding international trade laws and hence the importance of studying Lex Mercatoria for seeking reforms in international trade cannot be disputed.

I. OBJECTIVES:

- To identify the validity of Lex Mercatoria as a source of law.
- To study the changes in Lex Mercatoria and its applicability in the modern scenario.
- To propose a pragmatic approach towards problems that arise in transnational trade.

II. RESEARCH METHODOLOGY:

The paper analyses the growth and usage and changes in Lex Mercatoria and how it can be applied to the modern scenario to be plausibly used as a method of finding solutions to the problems that arise in transnational trade.

III. ORIGINALITY:

The concept of Lex Mercatoria is usually not given the importance it rightly deserves because of the reluctance of jurists to accept it as a source of law. This paper brings to the table a

[1] Author is a student of School of Legal Studies, CUSAT, India.
[2] Author is a student of School of Legal Studies, CUSAT, India.

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different perspective to solve the problems that arise in international trade laws.

IV. INTRODUCTION

Lex Mercatoria was a phenomenon of international customary law. As globalization began to gather widespread acceptance, world trade and communications became more dependent, this increased the emphasis on a particular type of substantive international law, based primarily upon the common trade usages, customs and practices among merchants, also universally recognized principles of law such as pacta sunt servanda. This new law is quite appropriate in an increasingly dependent global community, with enhanced technology and communications and a more harmonized social and political agenda. The new paradigm facilitates the greatly increased volume of international business and accommodates more involvement of nation-states as parties to multinational business.

After the medieval age, there emerged a trend of rediscovering the international character of the commercial law and to manoeuvre away from the restrictions of national law to a universal, more global conception of international trade law. This trend was driven by the business community and it is understood as the new Lex Mercatoria.

The essence of Lex Mercatoria as a mode of governance is moderately enabled by the skulking codification of this law. The additional traders and dispute resolvers actually use this law, the more its autonomy from alternate sources of law.

Projects to codify transnational contract law have bloomed in recent times. The most vital of these are run by independent institutes chaired by practitioners and academics, who have created draft codes for commerce with global and regional reach. The new wave began in the 1970s once the International Institute for the Unification of Private Law began work on what would become the UNIDROIT Principles of International Commercial Contracts that purports to be the most comprehensive code for international commerce.

V. WHAT IS LEX MERCATORIA?

The most commonly used definition for Lex Mercatoria and as accepted by Courts is,

"The body of rules of international commerce which have been developed by the customs in the field of commerce."

The term Lex Mercatoria is derived from Latin and it transcribes to Merchant Law and is a term used by merchants in the medieval period to refer to commercial law.

VI. HISTORY OF LEX MERCATORIA:

The formation of Lex Mercatoria is stems from a very long time ago, the medieval period. It is related with the oversea trade that was conducted mainly in Greece, Egypt, Phoenicia, and especially Rome.

Jus gentium, the rule of law that applies to all nations, was created in Rome. The main reason of the creation of this law was for expansion of the Roman Empire and the fact that the existed law could not cover anymore all the newly created legal relationships, with particular emphasis on trade. Initially, it was a law which was applied to the legal relationships between the foreigners and the Roman citizens, later on just among the Roman citizens, and gradually jus gentium in fact disappeared in practice. This was caused by the changes which occurred during those times in Rome´s history when all the free in Rome gained the citizenship and it had been no more as unique as before. However according to the law it remained a part of the legal institutions of jus civile[3].

Jus Gentium implicitly guaranteed flexibility of rights, adaptable business norms and customs. After the autumn of the Roman Empire, the states were ready to create their own rules concerning the principle of territoriality. This principle means each state has its own law which each person located on its territory has got to obey consistently with the principles of the sovereignty[4]. The Law introduced and executed by the Roman Empire, alongside commercial and business practices, was later replicated and re-introduced by the Byzantine Empire and a few Arabic countries.

There existed a plethora of factors which contributed to Lex Mercatoria in the medieval times: the conclusion of influence of the Arabic Empire within the Mediterranean, the blossoming of the port cities, crusades, the general revival of trade Europe, and therefore the migration of the merchants who were using the trade rights and commercial practices of their own territory, and therefore the creation of a new social class – the middle class.

The medieval feudal law didn't govern the situations where some problems related to international trade could occur; they were the gild institutions and therefore the merchants who gave rise to a special law of international trade because they needed to make sure of their trade. Lex Mercatoria consisted of the business practices agreed by traders during a particular area.

The establishment of the special courts in the 12th and 13th century was of particular importance because they were established in areas where markets were held to solve trade

[3] Rozehnalová, 1994, p.13-14
[4] Prusák, 1997, p.58-59

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disputes and the application of Lex Mercatoria took place in France, Italy, and England[5]. The arbitration proceedings were conducted by the most respected persons from among merchants to ensure that each case would be understood and judged primarily by the prevalent customs and traditions, thus Lex Mercatoria was applied for a specific territory. It is a consequence of the fact that the cases were analysed by respected persons from those Countries that have been mentioned earlier as these Countries boasted the elite group of merchants.

In the case of identified defaults and violations of law, there are imposition of monetary fines. The merchants usually paid a fine for the sole business reason they wanted to maintain their good reputation, which was at that time of the utmost importance. Otherwise, they might lose their esteemed partners of trade or worse, they might be cast out from the community which protected them[6].

Lex Mercatoria can be known as a specialised field of law which governs only a portion of the system and a selected type of relationships, mainly the trade relationships. It was totally different from the Feudal law or Canonic law, which were more general and it had been equally applicable to all those who fell within its jurisdiction.

VII. GROWTH OF THE NEW LEX MERCATORIA.

International trade generally has been subject to a variety of domestic legal systems, mainly with reference to the principles of private international law. This means that those disputes arising out of international sales contracts are settled, keeping in view the doctrines followed while determining conflicts of law such as the Lex loci contractus (where a contract has been made), or the Lex loci solutionis (where contract has been performed), or the Lex fori (law of the forum)[7]. This variety of the varied legal systems applied has hindered the evolution of a definite and uniform code of Lex Mercatoria. Such legal diversity creates uncertainty and imposes additional transactional costs to the parties tied by contract.[8]

The idea of a unified international trade law denotes the resuscitation of an early trend towards unification that maybe be traced to the Middle Ages and which gave rise to the "law merchant". Traditionally, international trade law developed in three stages: the previous "law merchant", its integration into local municipal systems of law and, finally, the increase in the new "law

[5] Rozehnalová, 1994, p.198
[6] Mangels, 1999
[7] Kenneth C. Randall, John E. Norris, A New Paradigm for International Business Transactions, Washington University Law Review, 1993.
[8] Ole Lando, The Lex Mercatoria in International Commercial Arbitration, available at www.journals.canbridge.org

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merchant".[9]

The new Lex Mercatoria shares certain features that are common to both capitalist and socialist economies thus giving international commercial law its best chance ever to attain uniformity. There has been several calls for the formation of a brand new Lex Mercatoria in order to overcome the "anarchy upon which international relationships are primarily based." At the end of the 1920's, Ernst Rabel suggested to the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) that it began the work for the unification of the law of international sales of goods. It's to be noted, that while the previous "law merchant" had developed from usage and practice, the new "law merchant" is the results of careful and, at times, political deliberations and compromises by massive international organisations and diplomats. This is often essential considering the dynamic shifting of trends throughout the modern era.[10]

UNIDROIT decided to appoint a commission with the objective of achieving that goal and eventually in 1935, the primary draft of a uniform law on the sale of goods was formed. Although the events of World War II interrupted the development of this work, in 1951, a brand new draft uniform law was presented in a conference at The Hague. On April 1964, twenty-eight States took part in a Diplomatic Conference held at The Hague and approved two Conventions, giving rise to the Uniform Law on the International Sale of Goods (ULIS), and consequently the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).[11]

The efforts for unification of the law of sales on a global level sustained, however, in 1966, the United Nations established the United Nations Commission on International Trade Law (UNCITRAL), giving it the object of promoting the harmonisation and unification of international trade law. Thus, indicating a brand new approach to the formulation of modern international trade law.[12]

VIII. The United Nations Convention on Contracts for the International Sale of Goods, 1980 as the future of Lex Mercatoria.

The United Nations Convention on Contracts for the International Sale of Goods (1980)

[9] Filip De Ly, International Business Law and Lex Mercatoria, North-Holland, London, 1992.
[10] Philip Hackney, Is the United Nation Convention on International Sale of Goods Achieving Uniformity?, Louisiana Law Review (Winter 2001).
[11] Ibid.
[12] Klaus Peter Berger, The Lex Mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contracts available at www.heinonline.org

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[hereinafter referred to as CISG] indicates the most recent attempt to unify international sales law.

The Lex Mercatoria can be seen as the world's first uniform law, though in an uncodified form. Merchants have long developed usage and practices that have given them the ability to communicate with one another irrespective of the distractions that existed by the tinges of culture, language, and national legal systems. Successful unification of sales law necessitates a body of rules that is specific to the event at hand and void of unnecessary legal jargon. Arbitrators incline towards to making decisions based on pro-arbitration laws, such as equity and fairness, than on any predisposition toward a domestic law. [13]

IX. THE PROBLEMS FACED IN FORMING A UNIFORM CODE.

Numerous scholars have raised the general problem of ambiguous text of CISG additionally because of the troubles faced in interpretation, which are inherent in attempts to draft a uniform international law with binding effect. This problem is especially evident within the case of the battle of forums. It is also witnessed that the courts, particularly those from the Common Law countries, in most of the cases interpret CISG keeping in view their domestic law without consideration of either the "autonomous interpretation" requirement under the CISG, or international CISG case law.[14] Consequently these "homesick courts" twist the CISG rules and principles in plenty of battle of forum cases, starting from divergent solutions based on multi-interpretation of CISG, to the negligence of parts of CISG, or the reference to CISG as a support solely, or even the whole disregard of CISG existence.[15]

The "nationalistic interpretation" by the courts is dangerous to the formation of uniformity of the objectives of CISG as a result of its potential to forum shopping. This causes another problem which threatens the gap-filling mechanism under CISG, the courts are abusing their domestic law and their domestic ideas to "fill the gaps" of CISG even when CISG already offers either specific principles to manage those issues.[16]

X. FORMATION OF UNIDROIT PRINCIPLES: A GENERAL BODY OF LAWS OF INTERNATIONAL TRADE.

In May 1994, fifteen years of preparation paid off as the International Institute for the

[13] M. J. Bonell, An International Restatement of Contract Law, CISG Database, Pace Institute of International Commercial Law

[14] Nguyen Trung Nam, Future of Harmonisation and Unification in Contract Law Regarding "Battle of Forms", September 2009.

[15] Guiliani v. Invar Manufacturing 2007 WL 2758802.

[16] Ole Lando, The Lex Mercatoria in International Commercial Arbitration, available at www.journals.canbridge.org

Unification of Private Law (UNIDROIT) held a conference in Rome which produced the official text of the Principles of International Commercial Contracts. As stated in the Preamble, these principles are established with an aim to create therein, "general rules" of international commercial contracts. It represents a system of rules of contract law which are common to existing domestic legal systems or best modified to the special requirements of international commercial transactions.[17]

XI. THE POTENTIAL OF UNIDROIT PRINCIPLES.

For the UNIDROIT Principles to be a brand new Lex Mercatoria, the primary criterion is to satisfy the characteristics of a true law merchant. Recalling the main features of the substantive law merchant of the middle ages, one would therefore want to expect the Principles to be transnational, based on a common source, a true reflection of the mercantile customs and particularly responsive to the commercial needs. There is no doubt that the Principles satisfy the criterion of being "transnational" and "based on common source". The Principles neither belong to any domestic legal system nor do they replicate the rules and principles of one single domestic legal order. They were designed to be applicable on international contracts throughout the world irrespective of legal tradition or economic and political environment. The seek for legal ideas and principles common to the various national and international legal systems was done by means of comparative analysis, and for each article, many national approaches were considered. [18]

The Principles are "user-friendly" as much as they're neutral, concise and clearly arranged with its straight forward language, explanations and practical examples are easily understandable. They not only offer a lingua franca to facilitate negotiations and therefore cross-border trade, but they also reduce time-consuming search for the foreign legal rules or "general international principles" in the case that those were the laws that were chosen as the applicable law[19]. It can be said that the Principles are not only effective with reference to its transnational character, based on a common source and responsive to practices and usages, but also it is very adaptable to the needs of commerce and the world of international trade therefore, they fulfil the factors of a law merchant.

[17] Klaus Peter Berger, The Lex Mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contracts available at www.heinonline.org
[18] Gesa Baron, Do the UNIDROIT Principles of International Commercial Contracts form a new Lex Mercatoria? CISG Database, Pace Institute of International Commercial Law
[19] M. J. Bonell, An International Restatement of Contract Law, at 14.

XII. UNIDROIT PRINCIPLES, 2016: DOES IT DO ENOUGH?

The principles formulated in the 2016 conference held at Hamburg, Germany provide a number of clauses that assist parties to a contract in terms of clearing ambiguities that may arise as a result of a multitude of factors that are present in the practice of international trade. The principles again call for general principles of contract by including rules with regard to various key elements of a contract including formation, termination, interpretation, etc.

The principles also highlight rules to be followed in cases of conflicts regarding forum and also aids the parties to choose an applicable law where such law cannot be decided by mutual consent.

The law also keeps in mind the situations where there might be a plurality of obligors or obligees. The law states that the obligation is joint and several with respect to obligors whereas in the case of obligees, the obligation is to be assessed on the basis of the share of the claims of such obligees.

However, as observed time and time again, these principles are not binding in nature and are subject to the domestic law and cannot override it.

XIII. CONCLUSION.

Since the concept of a brand new Lex Mercatoria was introduced a couple of decades ago, it has sparked a very controversial debate between those in favour and other people against the Lex Mercatoria.

Authors and commentators are divided into two camps i.e., “Mercatorists” and “anti-Mercatorists”. Their key differences conclude with the question on whether or not the Lex Mercatoria may be a true body of law distinct and autonomous from domestic legal systems and whether or not, the parties to a contract can validly choose the Lex Mercatoria as the law relating to their contract by including a choice of law clause referring to that Lex Mercatoria as the correct law of the contract.

Many authors doubt that there's a new Lex Mercatoria within the sense of an international commercial law autonomous from any other domestic state law. They deny its existence in any useful sense and which is beneficial for solving commercial disputes. Arguments were put forward to support this view however, the pivotal point of criticism refers to the fact that Lex Mercatoria as close to law as it is, is not “law”. The Lex Mercatoria not only lacks a methodological base and a legal system supporting it and is dependent on national legal systems to work efficiently, it also does not have any state authority wherein its binding force

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can be derived.

The authors in favour of the Lex Mercatoria, defend the Lex Mercatoria as being a law, the refusal of the "anti-Mercatorists" to simply accept it as an autonomous body of law curtails from a jurisprudence of positivism which is based on the theory that all law is derived from the will of the sovereign state.

Who decides the legitimacy of this concept? There are valid arguments in support of both side which brings us to no definite conclusion. Therefore the status of Lex Mercatoria as a legitimate source of law distinct and autonomous from national legal systems stands on debatable grounds with arguments each supporting and dissenting the same and hence remains uncertain.

However, the debate has gone on for far too long and the search for answers have become drier. The concept of a codified transnational trade law is optimistic for the sole purpose that there are a plethora of factors involved in doing so. These factors arise out of the cultural and geographical differences that different states of the world have come to embrace. Hence to draw a straight line through a multitude of differences is naïve and hence the work of international organizations in shortlisting certain fundamentals of trade such as contracts and building upon a codified law for the same is commendable and is the right path towards attaining anything near to a codified transnational trade law.

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