LEX MERCATORIA IN INTERNATIONAL COMMERCIAL ARBITRATION

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ABSTRACT: *In a concise formula, lex mercatoria has been defined as being a category of international law, separate from any national legislation, and which stems from, and applies to international commercial transactions.*
Although the notion of lex mercatoria does not have a well-defined content it is still accepted in the practice of international commercial arbitration.
This study intends to analyze the concept of lex mercatoria as well as its application in the jurisprudence of international commercial arbitration.

KEY WORDS: *lex mercatoria, international commercial arbitration, general principles of law*
JEL CLASSIFICATION: *K 49*

1. THE ORIGINS OF LEX MERCATORIA

The first traces of the lex mercatoria can be found in the Roman times, when trade fairs began to play an important role in the resurgence of international commerce[1]. It seems that the itinerant merchants who traveled among these fairs grew increasingly frustrated with the nonuniformity of the laws that they confronted as they traveled from jurisdiction to jurisdiction and, in order to address these concerns, the traders spontaneously developed a uniform set of principles to resolve disputes among them[2].

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[1] See Fabrizio Marrella, Christopher S. Yoo, „Is Open Source Software the New Lex Mercatoria?", in „Virginia Journal of International Law", vol. 47:4, p. 811.
[2] See Fabrizio Marrella, Christopher S. Yoo, cited, p. 811.

The concept is also used in the twelve century, when Italy was a cornerstone for the trade in Europe and at that time the lex mercatoria was the law used between merchants[3].

During the following centuries, the lex mercatoria became part of the national law. Thus, in civil law countries, the principles previously governed by the lex mercatoria were incorporated into commercial codes, and in common law countries, the view that the lex mercatoria was part of customary transnational business law[4].

In the early 1960s, the concept of the lex mercatoria re-emerged. Considering its development, Lord Mustill stated that „Commercial arbitration exists for one purpose only: to serve the commercial man. If it fails in this, it is unworthy of serious study"[5]. The same author defines lex mercatoria : „In the first place, the lex mercatoria is anational. This concept has two facets. First, the rules governing an international commercial contract are not, at least in the absence of an express choice of law, directly derived from any one national body of substantive law. Second, the rules of the lex mercatoria have a normative value wich is independent of any one legal system. The lex mercatoria constitutes an autonomous legal order"[6].

2. THE CONCEPT OF LEX MERCATORIA

Lex mercatoria was defined in many ways.

The most ambitious, lex mercatoria was defined as a category of international law, separate from any national legal order, derived from and applicable to international commercial dealings[7].

Other authors defined lex mercatoria as an autonomous legal order, created spontaneously by parties involved in international economic relations and existing independently of national legal orders[8]. Also, the concept was characterized as a body of substantive rules concerning international trade, incorporated by national legal systems in a manner broadly similar to trade usages, and not purporting to constitute a free-standing corpus of international law[9].

Lex mercatoria was also defined as[10]: a loosely organized system of transnational legal principles, rules and standards derived from the usages, customs and practice of international commerce; general principles of law, transnational rules, a method of decision-making; customary commercial law; transnational substantive rules of law and trade usage and the method of their application to international economic transactions; a

[3] See Andrew Tweeddale, Kerern Tweeddale „Arbiration of commercial disputes. International and English Law and Practice", Oxford University Press, 2007.
[4] See Fabrizio Marrella, Christopher S. Yoo, cited, p. 812.
[5] See Andrew Tweeddale, Kerern Tweeddale, cited, p. 194.
[6] See Andrew Tweeddale, Kerern Tweeddale, cited,p. 194.
[7] See Gary Brian Born, „International Commercial Arbitration", Ed. Kluwer Law International, The Netherlands, 2009, vol. II, p. 2232.
[8]See William W. Park, "Lex mercatoria" in "Cadernos da Escola de Direito e Relações Internacionais", Curitiba, vol. 1, p. 183.
[9] See Gary Brian Born, cited, p. 2233.
[10] See Margaret L. Moses „The Principles and Practice of International Commercial Arbitration", Cambridge University Press, United States of America, 2008, p. 61.

set of substantive rules developed to regulate international trade in the business community, which are derived „not only from international commercial dealings, standard clauses, international conventions and arbitral awards but also from various sets of legal rules issued by the International Chamber of Commerce or other international organizations".

Not least, lex mercatoria has been described as "a set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law", a "regime for international trade, spontaneously and progressively produced by the societas mercatorum", "a single autonomous body of law created by the international business community", "a hibrid legal system finding its sources both in national or international law and in the vaguely defined region of general principles called "Transnational law", but also as "the phenomen of uniform rules serving uniform needs of international business and economic co-operation", or as consisting of "all law stemming from or under the influence of transnational sources of law and regulating acts or events that transcend national frontiers"[11].

It has also been suggested that the uniform laws and codified principles that can be used in all international trade contracts, provided by UNIDROIT, the ICC and the World Intelectual Property Organization are also part of the lex mercatoria[12].

3. APPLICATION OF THE LEX MERCATORIA

It was argued that many practitioners resist any reference to the lex mercatoria in their contracts, because they want a law that is accesible, clear and with an established jurisprudence[13].

Parties sometimes prefer not to have their contract governed by a national law, choosing instead the lex mercatoria. Furthermore, according to its supporters, lex mercatoria must consequently be applied when the parties have excluded any national law and have asked the arbitrators to apply only the general principles and usages of international trade[14].

Many legal systems do not refer directly to lex mercatoria, but they provide that the parties are free to select the "rules of law" applicable to their dispute[15]. This is due to the fact that Uncitral Model Law in 1958 established in article 28 that the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.

Article 187 of the 1987 Swiss Private International Law Statute provides that "the arbitral tribunal shall decide the case according to the rules of law chosen by the parties".

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[11]See Nikitas E. Hatzimihail, "The many lives—and faces—of *lex mercatoria*: history as genealogy in international business law", http://papers.ssrn.com.

[12] See Andrew Tweeddale, Kerern Tweeddale, cited, p. 196.

[13] See Margaret L. Moses, cited, p. 62.

[14] See Mauro Rubino-Sammartano „International Arbitration. Law and Practice", Ed. Kluwer Law International, The Netherlands, 2001, p. 440.

[15] See Emmanuel Gaillard, John Savage,"Fouchard, Gaillard, Goldman On International Commercial Arbitration", Ed. Kluwer Law International, 1999, p. 802.

This legal text was interpreted as giving the parties the option of applying lex mercatoria in one form or another[16].

In France, article 1496 from the New Code of Civil Procedure provided that the parties were free to select the rules of law applicable to their dispute. The commentators were unanimous in recognizing the implicit reference to transnational rules in the text[17]. Also, the French jurisprudence recognizes the concept and applicability of lex mercatoria[18].

The French Court of Cassation confirmed in its jurisprudence[19] the application of lex mercatoria, by concluding these: "the arbitrator is bound to apply the law expressly chosen by the parties or to construe their implied intention, taking into account the different nationality of the parties, the performance of the contract which was to be made in different place and that the parties had intended to submit their dispute to the general principles of international trade. The arbitrators who in any situation take into account the usages of the trade and who have not acted as amiables compositeures, have respected their terms of reference"

The 1996 Arbitration Act of England, after establishing in article 46 (1) (a) that the arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute, in its section 46 (1) (b) states that if the parties so agree, the tribunal shall decide the dispute in accordance with such other considerations as are agreed by them or determined by the tribunal.

The Romanian Civil Procedural Law provides in article 360, paragraph 1, that the arbitral tribunal will solve the dispute under the main contract and the applicable law, considering, if necessary, the commercial usage.

Therefore concerning the lex mercatoria, it was stated that the Romanian law has the tendence not to admit its existence[20]. Nevertheless, The Court of International Commercial Arbitration refered to lex mercatoria in its decisions[21].

The acceptance of the validity of general principles of law as the law governing the contract is in keeping with international arbitral practice[22]. The resolution adopted in 1979 by the Institute of International Law provided that:

"the parties may in particular choose as the proper law of the contract either one or several domestic legal systems or the principles applied in international economic relations, or international law, or a combination of these sources of law".

[16] See Emmanuel Gaillard, John Savage, cited, p. 803.
[17] See Emmanuel Gaillard, John Savage, cited, p. 803.
[18] See Jean Michel Jacquet, Philippe Delebecque, Sabine Corneloup „Droit du commerce international", Ed. Dalloz, 2007, p. 806.
[19] See Sté Polish Ocean Line v. Société Jolarsry in Mauro Rubino-Sammartano, cited, p. 443.
[20] See Ion Deleanu, Sergiu Deleanu, „The national and international arbitration", Ed. Rosetti, Bucharest, p. 438.
[21] See Award no. 145 of 27 December, 1996, published in Arbitral Commercial Jurisprudence, Bucharest, 2003, p. 10.
[22] See Emmanuel Gaillard, John Savage, cited, p. 804.

4. THE CRITICISM OF LEX MERCATORIA

Ever since its appearance, the concept of lex mercatoria has been criticized.

One of the criticism of the concept was that regarding the difficulty in ascertaining the applicable rules[23]. This criticism is particularly prevalent in common law countries[24]. Regarding this opinion it was argued that lex mercatoria is developing and the principles of lex mercatoria are becoming clearer and more developed so they can be satisfactory in practice[25].

Another criticism involves the rejection of the idea that lex mercatoria can constitute a genuine legal order in the same way as national laws or public international law[26].

Two arguments were put forward against that view[27]. First, general principles of law, which are the most important constituent of lex mercatoria, are becoming increasingly specialized in arbitral practice. Second, as long as the arbitrator can use a set of rules, whether complete or not, to avoid blindly giving effect to the terms of the contract this concept is misconceived.

5. CONCLUSIONS

It was argued that few arbitral agreements have been based on lex mercatoria and parties are usually well-advised not to select lex mercatoria as the law governing their contractual relations, first because the concept lacks the detail, comprehensiveness and predictability[28].

That can be true, but it cannot be denied that lex mercatoria can be very useful in contracts between states[29]. Thus, assume there is a commercial contract between two States, neither sovereign wants to be subject to the laws of any other sovereign, so the parties may well decide that they want the contract to be governed by general principles of international law or lex mercatoria[30].

Not least, the tendency in international commercial law is represented by a process of unification and codification, therefore in creating the 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 Incoterms (ICC

[23] See Andrew Tweeddale, Kerern Tweeddale, cited, p. 195.
[24] See Emmanuel Gaillard, John Savage, cited, p. 811.
[25]See Andrew Tweeddale, Kerern Tweeddale, cited, p. 196.
[26] See Emmanuel Gaillard, John Savage, cited, p. 808.
[27] See Emmanuel Gaillard, John Savage, cited, p. 808.
[28] See Gary Brian Born, „International Commercial Arbitration", Ed. Kluwer Law International, The Netherlands, 2009, vol. II, p. 2237.
[29] See Margaret L. Moses, cited, p. 62.
[30] See Margaret L. Moses, cited, p. 62.

1990), Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention 1958) and other significant codification[31].

Therefore, the concept and content of lex mercatoria is certainly on the way of beeing well set and not on the way of disappearing.

[31] See Tamara Milenković-Kerković "Origin, development and main features of the new lex mercatoria*",* p. 90, http://facta.junis.ni.ac.rs,.