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The Role of Lex Mercatoria in the Regulation of International Trade Relations

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Abstract: This article analyzes the legal nature and the role of lex mercatoria in the regulation of international trade relations. There has been no unity in the scientific definition of the modern lex mercatoria, which causes not only theoretical but also practical problems. The above is confirmed by different scientific concepts and approaches to lex mercatoria in the field of international law, in particular defining: first, whether the lex mercatoria is an autonomous international system of law, which is beyond the scope of nationality; and secondly, the lex mercatoria regulation through international customs, practices and judicial precedents and unified regulations; and thirdly, the recognition of arbitral awards made on the basis of the rules of lex mercatoria and the possibility of parties to choose lex mercatoria as the applicable law. Based on the study it was concluded that state and nongovernmental forms of regulation of international commercial relations should not be considered by the parties in isolation from each other.

Key words: Lex mercatoria · Unification · Transnational law · Arbitration

INTRODUCTION

In Western literature the doctrine according to which international commercial contracts are governed by specific regulatory system called transnational commercial law (TCL) or the modern lex mercatoria is extensively discussed. Lawyers and economists writing about the new lex mercatoria claim that there was a "medieval lex mercatoria," too. According to them, the origins of the lex mercatoria go back to the high Middle Ages, that is, to the time between the tenth and thirteenth centuries when commerce rose from being almost nonexistent to being an important factor of economic development[1, P.427]. Other authors go even further back in time and trace the origins of the lex mercatoria in the Ancient Egypt or in the Greek and Phoenician sea trade of the Old Ages [2, P.150].

Regulation of international trade relations through non-governmental forms in recent years contributed to the meaning and value of the role of the lex mercatoria-a theory that justifies the existence of the so-called "extra-national" or "transnational contractual law of obligation", i.e. specially designed system, not only isolated from the system of national law, but also considered as an alternative to the latter one. Ralf Michaels: “A true lex mercatoria in the sense of a law created and administered by commerce itself and autonomous from the state” [3, P.449]. Friedrich K. Juenger: “Private international law (a term used here in to connote choice-of-law rules applied to international transactions) and the lex mercatoria represent radically different approaches to the same problem” [4, P.1133].

From the contents of the foregoing, it is clear that in the field of international commercial turnover the lex mercatoria has no indirect relation with national regulations, it can only supplement it. In addition, it differs from the latter one by such element as self-regulation that is deemed necessary in the activities of the participants of foreign economic activity-a kind of "international society of merchants." But as V.V. Egorov believes, "even if you recognize a trend towards the formation of lex mercatoria as an autonomous international system of law, we will not get the full clarity on the raised question" [5].

This means the lack of unity in the precise scientific definition of lex mercatoria. In particular, it is confirmed by the following. Although A.V. Smityukh justifies in his thesis that “lex mercatoria forms a non-national segment of international trade law" [6], but at the same time, he is based on the fact that it "is a part of private international law in its broadest sense, as a set of rules of different origin and nature, governing private law relations complicated by a foreign element" [6].

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However, this view can be interpreted in a different way, if we consider the private international law as part of the national (civil) law, (the Laws on Private International Law were adopted in Azerbaijan, Georgia, Ukraine, Estonia) and in this case, the author contradicts himself. However, one should agree with the fact that the private international law is an independent legal system, as is customary in the doctrine of some states, one of the sections (along with public international law) of such broad concepts (system) as "international law" [6].

Other authors consider regulation of international economic relations through the international customs, usages and judicial precedents as a key element of lex mercatoria.

Some authors question the very existence of the lex mercatoria [7. P. 575.]

The Russian researcher O.V. Ablezgova, having considered the practice of recognition of arbitral awards made on the basis of the rules of lex mercatoria (for example, the judgment on Norsolor v. Pabalk Ticaret Limited Sirketi recognized by the courts of France and Austria; the judgment on Compania Valenciana de Cementos Portland v. Primary Coal Inc. by the Court France; the judgment on Deutsche Schachtbau und Tiefbohrgesellschaft v. Shell International Petroleum Co. Ltd. By the House of Lords, UK; the judgment on Cubic Defense Sys., Inc. - Court of the U.S. state of California and others) and an analysis of part 1 (d) of Art. V of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, comes to the conclusion that the failure to use lex mercatoria as the applicable law is invalid because it distorts the will of the parties to choose the rules by which they should be allowed to debate [8].

The concept of lex mercatoria proposed by some authors have their own nuances. So, H.D. Berman and F.D. Dasser consider lex mercatoria as a collection of customary international or transnational trade law [9, P.55]. According to V.M. Shumilov the doctrine of lex mercatoria can be considered a kind of transnational law. Among its followers there are names of B. Goldman, F. Kahn, F. Fusher and others [10].

Still other researchers, such as I.S. Zykin make emphasis on the standardized regulations or international conventions (in the broad sense of the so-called "international law") and as in the above mentioned, the "customs of international trade", meaning the actual customs and usages, standard contracts and general conditions, a set of uniform rules and contractual provisions [11]. However, he notes that the proponents of the theory of lex mercatoria treat the category of "law" very broadly to include not only the requirements that are the result of rule-making, but also any regulation of social behavior, which was adopted in the community [11].

The elements of lex mercatoria include rules of public international law of international agreements, uniform laws (such as the Vienna Convention on Contracts for the International Sale of Goods of 11 April 1980), the general principles of law recognized by civilized nations (for example pacta sunt servanda), resolution, recommendations and codes of conduct adopted by international organizations such as UNCITRAL and UNIDROIT, customs and usages of international trade (for example, Incoterms and Uniform Customs and Practice for Documentary Credits ICC, as well as standard forms of contracts that have universal recognition) [12]. "In general, the emergence of the theory of lex mercatoria was the result of the progressive idea of formation and development of norms and phenomena of international commercial turnover" [5] and therefore "this development transforms, fills with new content and forms the new nature of these phenomena and standards" [5].

In this regard noting various guidelines and codes of conduct as an example, V.V. Egorov mentions that "there is no need to hurry and turn the process into the result as lex mercatoria in its modern sense is only the perfect structure not because everything is perfectly legal, but since there is more desirable than actual in it" [5].

The author agrees with the opinion of S. Bakhin, saying that currently lex mercatoria does not exist as an autonomous and complete system of legal rules and with the I.S. Zykin, who notes that "in fact lex mercatoria involves the activities of international commercial arbitration, namely that the arbiters are not bound by certain rules of law, their choice of the most suitable approach, based on the criteria of common sense and justice, giving room for arbitrary interpretations, that is, in formation of lex mercatoria we rely on arbitration practice, which in turn uses the lex mercatoria as the theoretical basis of lawmaking arbitrators" [11].

According to the authors of the textbook "Private International Law" L.P. Anufriyeva, K.A. Bekyasheva and G.K. Dmitrieva, an important role is played by international commercial arbitration: first, the parties themselves increasingly withdraw international commercial disputes from jurisdiction of national courts using arbitration clauses and present them to the international commercial arbitration and secondly, arbitration often resolve disputes not on the basis of national law, but based on lex mercatoria [13].

The possibility of parties to choose lex mercatoria as the applicable law is recognized by almost all scientists. This follows from the fact that not only the legal order of a particular state, but also the rule of law may serve as an applicable law. It is expressly provided for, in particular, in paragraph 1 of Art. 42 of Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 [14].

Variously defined TCL interaction with national and international law:

- Firstly, a reference to the lex mercatoria is legally valid if the national law allows such a reference;
- Secondly, the reference to the lex mercatoria does not mean the complete ignorance of the national law. The mandatory provisions of applicable law and order and therefore the national collision law continue to be applied. Such law determines the rule of law, apply to publicly-law of those countries with which the contract is related [15, P.103].

These scientific positions of the above authors help to formulate a conclusion that the approach to the lex mercatoria should be complex and long-term and in turn, they suggest, (and it is highlighted, in particular, by G.Y. Fedoseyeva) that "in spite of the increasing introduction into the legal system of international trade cooperation of non-governmetnal forms of regulation, substantiated by the theory of lex mercatoria, we can not ignore the objective comments and criticisms on the basic tenets of the theory expressed in the scientific environment" [16, P. 120].

In this sense, of interest is the point of view by A. Smityukh who believes that "the purpose of lex mercatoria is adaptation of international trade law to the conditions of modernity in the absence of state and international regulation of international commercial turnover" [6], i.e. the author, expressing his position, proves it not only by the fact that the lex mercatoria has independent and subsidiary application to the regulation of foreign operations, but also somewhat understates the role of governmental regulation, apparently referring to the inadequacy of many of its forms, which have already been listed in this work.

However, as we believe it is not a reason to argue that lex mercatoria, recognizing the discretion of the parties when negotiating the contractual provisions, has neither limits nor boundaries established by the state under its relevant provisions. In other words, for all the importance of autonomous and by the way, a relatively independent non-state regulation, a set of rules substantiated by this theory has limited legal scope. It also can be "cut" by the will of the participants of business practices.

CONCLUSION

Thus, summarizing the above, we can draw the following conclusion: the state and non-state forms of regulation of international commercial relations should not be considered by the parties in their isolation from each other. Taking into account the efficiency and at the same time, the weaknesses of each of these international intergovernmental and non-governmental organizations that develop them, should contribute to the further progressive combination of these mechanisms of legal regulation of commercial activity.

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