Lex mercatoria
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A. Notion and Concept of Lex Mercatoria

1. The term lex mercatoria or law merchant is used to designate the concept of a national body of legal rules and principles, which are developed primarily by the international business community itself based on custom, industry practice, and — general principles of law that are applied in commercial arbitrations (Commercial Arbitration, Internationally) in order to govern transactions between private parties, as well as between private parties and States, in transborder trade, commerce, and finance. It is a reaction to the increased complexities of modern international commerce (globalization) and the inability of domestic law to provide adequate solutions that stabilize the parties’ mutual rights and obligations. The notion of lex mercatoria is mainly used in scholarly writings in private international law decisions by arbitral tribunals, domestic courts, and commercial contracts use the notion less frequently, even though the concept of a national body of rules for international commerce is increasingly recognized in legal practice (see paras 20–23 below).

2. Building on medieval precursors, lex mercatoria in scholarly writing nowadays serves as a concept, sometimes also called ‘new lex mercatoria’ or ‘new law merchant’, to describe and conceptualize the special legal rules that govern transborder commerce in practice, without being limited to the traditional sources of law and independent of the categories of national and international law. The rules described as forming part of lex mercatoria are not rules that originate from States but from industry norms and guidelines, standard clauses, model contracts, general principles of law, and rules on commercial arbitration.

3. A standard, or even a generally shared definition of the concept of lex mercatoria, however, does not exist. In scholarly writing, the notion of lex mercatoria encompasses as many understandings as there are authors writing about it. Likewise, notion, subject matter, content, and scope of the concept, as well as its legal force, its character as law, its sources, and its relation to domestic and international law are contested among proponents and opponents of lex mercatoria. At one end of the spectrum, lex mercatoria is portrayed as a proper legal system that exists entirely independently from, and therefore outside, domestic and international law, and that derives its normative force solely from the self-regulatory powers of the international business community and from the consent of parties to transborder contracts. At the other end of the spectrum, lex mercatoria is used solely as a descriptive category to capture the various instruments that govern international commerce and the rules and principles they contain, without understanding them as constituting a legal order that is independent from whatever national law grants and secures the parties’ freedom of contract. In that understanding, the instruments governing international commerce remain rooted in domestic law.

4. Independent of the many controversies, a common thread in scholarship is the insight that understanding how, and with which content, normative expectations of private parties in transborder commerce develop cannot be grasped with concepts of domestic or international law only, but requires taking into account international business practices and the contractual relations that develop on their basis. Furthermore, the concept of lex mercatoria is a distinctly legal approach to understanding and conceptualizing the normative expectations of private actors in international commercial transactions.

B. Historical Evolution

1. The Medieval Lex Mercatoria

5. Pursuant to a widely held view in scholarly writing, the medieval lex mercatoria represented a coherent, Europe-wide body of general commercial law that was developed between 1050 and 1150 by merchants, more or less universally accepted, and formalized into well-established customs. Moreover, the medieval lex mercatoria has been linked to the Roman ius gentium and is occasionally described as a precursor of international law (History of International Law, Ancient Times to 1648). The use of the term lex mercatoria itself goes back to medieval and early modern writings, most importantly the 'Little Red Book of Bristol' dating from the late 13th century and Gerard Malynes’ treatise Consuetudo Vetlex Mercatoria published in 1622. In that period, the term was introduced as a category to describe the special...
uncodified rules and customs that governed the commercial relations between foreign merchants at the large European trade fairs in continental Europe and England.

6 Similar to the various collections of maritime customs, most importantly the 14th century Consolato del Mare, a collection of maritime customs enforced in the consular court of Barcelona, lex mercatoria was considered as customary law, distinct from local laws. In addition, it was often enforced by special merchant courts that were established during trade fairs and staffed with non-professional merchant judges. The medieval lex mercatoria thus reacted to the shortcomings of the law of the Middle Ages in protecting foreign traders and responded to the need of merchants from different jurisdictions to rely on a neutral, stable, and predictable legal framework to structure their commercial relations and to resolve disputes in a neutral forum. The medieval lex mercatoria, therefore, was characterized by its relative autonomy from State law, its creation by the merchant community itself, and its implementation through special, often temporary, merchant courts.

7 More recent historical research, however, has cast doubt on whether the medieval lex mercatoria really constituted a body of law that applied uniformly across Europe, that was created autonomously by merchants for merchants, and that was entirely detached from the authority of local rulers. Although it is a historical fact that medieval trade was governed to a large extent by mercantile custom, it is doubtful that this custom was uniform all over Europe and formed a proper system of a national commercial law. Although many of the trade customs were not restricted to a specific State territory, as instances of uniform admiralty law on both sides of the Channel or the uniform transport law in Eastern France and Northern Italy illustrate, merchant customs are likely to have differed across Europe. In addition, public authority was probably more important than often portrayed. Thus, mercantile disputes were not exclusively settled by special merchants’ courts but also in permanent local courts, even though many of these courts applied merchant customs and followed special procedures for merchant disputes. Similarly, merchant transactions in the Middle Ages usually did not take place without a framework provided by State law. Local laws, for example, granted access to fairs, safe passage, and protection of merchants and their goods. In practice, the medieval lex mercatoria was therefore less a uniform and autonomous merchant law as such, but rather a body of special rules for commercial transactions that accommodated the special needs of merchants.

8 Finally, with the rise of sovereign nation-states and the age of codification of private law during the 18th and 19th centuries, the notion and concept of lex mercatoria were displaced by the idea that all law was territorial and emanated from a sovereign ruler. Instead of being rooted in an independent legal order, transborder commerce and the parties’ rights and obligations were henceforth viewed through the lens of the private law of each State. In parallel, private international law approaches developed in order to deal with conflicts of domestic laws arising out of transborder commerce (see also Hague Conference on Private International Law).

2. The New Lex Mercatoria

9 The notion and concept of lex mercatoria, however, reappeared in the 20th century, in particular in private international law scholarship. Building on earlier works in the 1920s and 1930s, including by Ernst Rabel, scholars in the late 1950s and early 1960s started focusing on how order and normative expectations developed in commercial contracts between private parties and contracts between private parties and States (→ Contracts between States and Foreign Private Law Persons), in corporate, commercial, and financial matters independent of domestic law and based on transnational industry norms and customs. Critical for advancing the modern concepts of a new lex mercatoria in the civil law tradition was the work of the ‘Dijon School’ under the direction of Berthold Goldman; its common law counterparts were headed by Clive Schmitthoff, who organized the influential 1962 Colloquium on ‘The New Sources of the Law of International Trade with Special Reference to East-West Trade’ at King’s College, London. Works by the Dijon School and the group around Schmitthoff were at the origin of a trend in private international law scholarship that came to be designated as the ‘new’ lex mercatoria, the ‘common law of international transactions’, the ‘autonomous law of world trade’, ‘droit (coutumier) du commerce international’, or ‘internationales Handelsrecht’.

C. Foundations of the New Lex Mercatoria

1. Universalization and Denationalization of International Commercial Law

10 Both Goldman and Schmitthoff shared the view that the international business community was largely self-regulated and provided important governance mechanisms for international commercial transactions based on uniform, industry-specific contractual arrangements in model contracts and standard clauses that were detached from a specific national legal system. Furthermore, they noted that disputes in international commercial transactions were largely settled not in domestic courts but through international arbitrations (→ Arbitration) that were governed by arbitration rules, such as those of the (→ International Chamber of Commerce (ICC)), that were detached from a specific domestic legal system.

11 All proponents of the new lex mercatoria thus shared a sociological approach to international commercial law. They all departed from two empirical observations: first, that the domestic and international legal framework governing international commerce lagged behind economic development as positive law was limited in its territorial range and not sufficiently developed to accommodate modern forms of international commerce and finance; and, second, that legal practice had reacted to these shortcomings by developing independent solutions based on contract that were detached from national legal rules.

(a) Shortcomings of Domestic Law and Dispute Settlement in Domestic Courts

12 First, the approach to attach all commercial transactions to a particular domestic legal system and to resolve the question of the governing law in transborder transactions through conflict of laws rules was generally viewed as inadequate for modern transborder commerce. A conflict of laws approach presented problems in providing the stability and predictability necessary for many modern international transactions, because the conflict of laws rules of different national legal systems could classify the same transactions differently and consequently subject them to different national rules with diverging substantive outcome. This danger was particularly pressing in respect of novel types of commercial and financial transactions such as letters of credit, build-and-operate transactions, securities instruments, etc. that did not conform to the standard contracts codified in domestic private law.

13 Second, national law itself was often perceived as inadequate for providing solutions to transborder commercial transactions. Thus, domestic law is often silent on the special forms of cooperation, organization, and contractual arrangements developed in international trade; they often did not conform to any of the standard contracts codified in national law. Furthermore, domestic law often did not take into account the special needs of the international business community.
Finally, private parties in transborder transactions are often also critical of dispute settlement in domestic courts and largely opt for international arbitration to resolve disputes. Domestic courts are often viewed as inadequate because of overlaps of jurisdiction in different countries, thus generating parallel proceedings, because of the perceived lack of neutrality of domestic courts vis-à-vis foreign parties, because of problems of enforcement of court judgments in foreign jurisdictions; and because of the lack of expertise of domestic judges in matters of international commerce.

(b) The Reaction of Legal Practice

Legal practice reacted to these shortcomings by developing industry-specific standard clauses and model contracts, for example in international banking, international air transportation, construction and operating agreements for industrial plants, power plants, modern services agreements, letters of credit, securities instruments, etc., and turned to commercial arbitration to resolve disputes arising out of such transactions. Most importantly, the contractual instruments in question often did not choose a specific national law as the governing law. The aggregate of rules and principles that developed on this basis was what private international law scholarship subsequently described as a new law of international trade that emerged outside the realm of domestic law. The modern lex mercatoria, in consequence, is viewed as a set of rules of conduct for cross-border transactions developed autonomously by the international business community and applied by arbitrators in case of disputes.

2. Legal Force of the New Lex Mercatoria

Lex mercatoria is not decision-making → ex aequo et bono, but the application of legal rules. It relies on party autonomy, that is, the power of parties to determine by contract the rules governing their commercial relationship. Yet, important differences between different schools of lex mercatoria prevail, in particular concerning its theoretic conception and the legitimatory basis of the rules and principles in question. In Goldman’s view, the new lex mercatoria was entirely detached from national and international law and constituted an autonomous legal order that derived its binding force from an independent source, namely party consent. Schmitthoff, by contrast, considered that the autonomy of the new lex mercatoria could only be recognized based on, and within the limits permitted by, domestic law. The relationship between the lex mercatoria and domestic law thus depends on whether to adopt Schmitthoff’s positivist concept or Goldman’s autonomist model.

3. Sources and Content of the New Lex Mercatoria

What forms part of the sources and content of the new lex mercatoria depends on the breadth individual writers attribute to the concept. The broadest understanding of the new lex mercatoria encompasses all instruments governing international transactions between private parties independent of their source. According to this broad understanding, the new lex mercatoria comprises not only the autonomously created trade usages and customs that emerge from international commercial practice, including transborder contracts, model contracts, and model clauses, such as the ICC’s INCOTERMS (2000), as well as codifications of principles of commercial law, such as the Principles of International Commercial Contracts developed by → UNIDROIT, but also international treaties dealing with commercial contracts, such as the United Nations Convention on Contracts for the International Sale of Goods (concluded 11 April 1980, entered into force 1 January 1988, 1489 UNTS 3) and other international legal instruments providing for → uniform sales law, the national law incorporating treaty-based uniform law, and international model laws, for example the Model Law on International Commercial Arbitration (21 June 1985) GAOR 40th Session Supp 17 Annex I developed by the → United Nations Commission on International Trade Law (UNCITRAL).

The narrowest view only understands those rules as pertaining to the new lex mercatoria that are entirely a national and of a customary character, that is rules emanating from the private rule-making power and self-organization of the international business community in the strict sense. This understanding excludes rules and principles enshrined in national law, even if they derive from and implement uniform law approaches. It also excludes international treaties dealing with the subject matter of the lex mercatoria, such as the Convention on the International Sale of Goods and other international treaties dealing with private international law.

Common to all views, however, is a strong focus on general principles of international commercial law that are common to several legal systems, like → pacta sunt servanda, → good faith/hona fide, rebus sic stantibus, the principle of ownership including the transferability of assets, liability for one’s own actions,谚语 duties, → unjust enrichment, respect for acquired rights, equity of treatment of creditors and shareholders, fundamental procedural protection, and international → ordre public (public policy). Methodologically, these principles can be derived from a comparative analysis of national and international legal regimes.

D. Current Situation

1. The New Lex Mercatoria in Practice

The concept of the new lex mercatoria does not only exist in academic writing. The idea of a national rules and principles detached from a specific national law also plays an increasingly important role in legal practice, even if the term lex mercatoria is rarely explicitly used as a term of art. Instead, parties to transnational contracts sometimes choose “general principles of law” as the governing law for their contractual relations and consent to resolve disputes through arbitration. Such a choice of law, in turn, is largely accepted by international arbitral tribunals as referring to the body of law designated as lex mercatoria in private international law scholarship. Furthermore, most institutional arbitration rules, such as Art. 18 (1) ICC Rules of Arbitration (1997) 36 ILM 1804), permit that, absent a choice of law by the parties, the arbitral tribunal shall apply the rules of law which it determines to be appropriate. This mandate is often understood as encompassing rules of the lex mercatoria.

In addition, many domestic arbitration laws, such as Art. 1496 French Code of Civil Procedure of 1981, permit arbitrators to apply principles of lex mercatoria absent party consent to the contrary. Likewise, some international conventions can be read as referring to lex mercatoria, Art. 10 Inter-American Convention on the Law Applicable to International Contracts (signed 17 March 1994, entered into force 15 December 1996 [1994] 33 ILM 732), for example, provides that the applicable law may include “the guidelines, customs and principles of international commercial law as well as commercial usage and practices generally accepted.”

The recognition of lex mercatoria as the governing law in dispute settlement in domestic courts, by contrast, will often collide with the approach of those courts to view the question of applicable law through the lens of private international law. For domestic courts, the application of principles of lex mercatoria will usually only come into play if the governing national law, determined by applying the conflict of
The law rules of the forum, allows the parties to make a choice to that effect. Because international commercial disputes are regularly submitted to arbitration, the application of lex mercatoria in domestic courts is, however, of rather limited practical importance.

23 Yet, several domestic courts accept that arbitral tribunals apply lex mercatoria as governing law. They do not set aside, nor refuse enforcement of, arbitral awards applying lex mercatoria as the governing law. This is the case, for example, in France, Switzerland, the United Kingdom, and the United States. This jurisprudence is often precipitated by the application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (done 10 June 1958, entered into force 7 June 1959, 330 UNTS 38. → Recognition and Enforcement of Foreign Arbitral Awards), whichlimits substantive scrutiny by domestic courts of foreign arbitral awards significantly. By consenting to arbitration, commercial parties therefore are to a large extent able to immunize themselves from domestic law.

2. Modern Codification and Renationalization Efforts

24 Much of the content of the lex mercatoria has been developed through business custom and arbitral practice, and therefore has been largely uncodified. Since the late 1960s, however, ideas of a codification of the principles of the new lex mercatoria have been discussed, most importantly in the context of → UNIDROIT. As a result, UNIDROIT first published in 1994, and since then has updated, its Principles of International Commercial Contracts (→ Commercial Contracts, UNIDROIT Principles). Drawing on comparative law, they serve as a restatement of international contract law and codify general principles of law governing international commercial contracts.

25 A similar codification project has been undertaken by the Commission on European Contract Law (also called the Lando Commission after its Chairman Ole Lando), which developed the Principles of European Contract Law (presented to the public in three parts in 1995, 1999, and 2003). These principles aim at a codification of the lex mercatoria, but have a European focus; they also serve as a basis for a project within the EU Commission to develop a European-wide contract law (the so-called Common Frame of Reference) as part of a European Civil Code.

26 Finally, the TransLex project of the Center for Transnational Law at the University of Cologne is worth mentioning. Relying on the notion of "creeping codification", it has resulted in the development of the TransLex Principles, a web-based and continuously evolving codification of principles of the lex mercatoria. It relies on a collection of rules and principles derived from comparative law, court decisions, doctrine, arbitral awards, and uniform law.

27 Depending on one’s understanding of lex mercatoria, international treaties in the area of uniform sales law, such as the Convention on the International Sale of Goods, as well as the drafting of model laws by international organizations, for example UNCITRAL, could also be viewed as instances of codifications of the respective legal principles. Such instruments, however, also constitute instances of a renationalization of the formerly purely customary principles of commercial transactions, as the international instruments in question aim at implementing uniform law approaches rooted once again in domestic law. These instruments either aim at harmonizing domestic substantive law, such as the Convention on the International Sale of Goods, or the conflict of laws rules of different countries. Most advanced in renationalizing international commercial law is the European Union with its efforts to develop a European Civil Code.

E. Criticism of the New Lex Mercatoria

28 Despite the by now relatively widespread acceptance of the concept of a national rules and principles in legal practice, the concept of lex mercatoria has stirred fervent theoretical debate in international business law and legal theory. Indeed, no topic in international business law has resulted in a comparable ideological battle between transnationalists (who support the concept) and traditionalists (who oppose it).

29 The most fervent debate is about whether the lex mercatoria can exist as a legal order that is entirely independent of both national and international law. The traditionalists argue that every legal order needs to be rooted in either domestic or international law, and can only derive binding force from a sovereign act. Party autonomy for them only is a concept recognized within the borders of domestic law. Moreover, they point out that the parties to a transnational contract depend on State power to have the lex mercatoria, if chosen, enforced. For them, lex mercatoria therefore is not autonomous from State law. Most transnationalists, by contrast, see the new lex mercatoria as an independent legal order that is based on the consent of the parties, enforced by arbitration, as well as many reputation- and community-based informal enforcement mechanisms. For them, the new lex mercatoria is an autonomous legal order that is independent from international and national law. Independent of the debate about the quality of the new lex mercatoria as law, further criticism relates to the vagueness of the content of the new lex mercatoria, the methodological difficulty to determine its content via comparative legal methods and the survey of arbitral awards, and hence its lack of predictability.

F. Evaluation

30 Lex mercatoria is best understood as an analytical framework for understanding the private law instruments that structure normative expectations in international commercial and financial transactions outside the traditional sources of domestic and international law. As such, it combines legal, sociological, and economic aspects to explain how, and on which basis, normative expectations emerge in international commerce and finance. As a scholarly approach it helps to conceptualize modern legal practice relating to international commerce and to help understand it in legal terms.

31 Whether one needs to view it as an independent legal order is a different question. For legal practice, the academic and theoretical debates about the legal nature, the sources, and the scope of the new lex mercatoria have little relevance. In practice, lex mercatoria is recognized as a viable basis for resolving international commercial disputes in international arbitration and is unopposed by domestic courts when reviewing and enforcing arbitral awards. In addition, more recent codification efforts and renewed movements towards a renationalization of international commercial law, as well as the rise of uniform law approaches, lead to more pragmatism in this context and increase the predictability of international commercial law. Furthermore, lex mercatoria and domestic and international law interact in numerous ways. Lex mercatoria, in other words, is hardly thinkable without a State-backed infrastructure. At the same time, however, domestic law, as correctly observed by the lex mercatoria movement, a body of law that is not able to explain the normative expectations and legal instruments that govern international commerce and finance. Rather, domestic law, international law, and the new lex mercatoria interact in enabling and sustaining international commerce and finance in times of an increasingly globalized economy.
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