FACULTY OF JURIDICAL SCIENCES

Lecture-11

Lex Mercatoria and Codification of International Trade Law

Lex Mercatoria is the Latin expression for a body of trading principles used by merchants throughout Europe in the medieval. Literally, it means “merchant law”. It evolved as a system of custom and practice, which was enforced through a system of merchant courts along the main trade routes. It functioned as the international law of commerce. It emphasized contractual freedom, alienability of property, while shunning legal technicalities and deciding cases.

History of Lex Mercatoria

The notion of Lex Mercatoria is not new. Some say that it has its precursor in the Roman gentium, the body of law that regulated the economic relations between foreigners and Roman citizens. Others go 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. In any case, it is in the Law Merchant of the middle Ages where the historical roots of the Lex Mercatoria can truly be found. The flourishing of international economic relations in Western Europe at the beginning of the 11th century caused the formation of the ‘Law Merchant’, a cosmopolitan mercantile law based upon customs and applied to cross-border disputes by the market tribunals of the various European trade centers. This law resulted from the effort of the medieval trade community to overcome the obsolete rules of feudal and Roman law which could not respond to the needs of the new international commerce. Merchants created a superior law, which constituted a solid legal basis for the great expansion of commerce in the middle Ages. For almost 800 years, uniform rules of law, those of the law merchant were applied throughout Western Europe among traders.

Many of the laws of the Lex Mercatoria were established to evade inconvenient rules of common law. An example in this regard is that a man could not give what he himself has not. In other words, a man who has no title to goods cannot give title. Hence, when a person buys an object, for him to be sure that he is the rightful owner of the title; he had to enquire into the title of that thing back to its remote possessors, to make sure that no one in the chain of title had obtained it by fraud. However, as per the laws of Lex Mercatoria, commercial business “cannot be carried on if we have to enquire into the title of everybody who comes to us with the documents of title.” The Law merchant established certain documents or chooses in actions which were transferable by delivery and endorsement or by delivery so that the holder could sue in his own name and which passed good title to the transferee who took them in good faith, notwithstanding the transferor had no title. They could be sued on by their holder in his own name and were not affected by previous lack of title. This instrument was the original negotiable instrument. Hence,

it can be rightly said that the law of negotiable instruments is founded mostly upon the laws of Lex Mercatoria.

With the rise of nationalism and the codification period of the 19th century the ‘law merchant’ was incorporated into the municipal laws of each country. These laws blended with the national laws and thus lost its uniform character. When the states took over International trade, the new mercantile laws were applied to regulate international relations.

The development of international trade after World War II showed some of the defects of the traditional regulation of international contracts. The complexity of the private international law and obsolete character of domestic laws did not rectify these flaws. The supremacy of national law in international economic relations began to be questioned. It was then the present traders started adopting alternative solutions to avoid the application of national law to their transactions. By means of standard clauses, self-regulatory contracts, trade usages and by recourse to international commercial arbitration, traders were creating their own regulatory framework independently from national law, which can be called the new Lex Mercatoria.

Sources of the Lex Mercatoria

The Lex Mercatoria can be defined as a body of principles which is different in its origin and content, created by traders to serve the requisites of international trade. There are many concepts of Lex Mercatoria as it has been discussed by many thinkers dealing with the subject.

When relating Lex Mercatoria with national law, there are 2 views that are prevalent, i.e., the autonomist and positivist concepts. As per the autonomous concept, Lex Mercatoria is having an autonomous character, independent from any national system of law. Hence, it can be rightly said that it is a set of general principles, and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to any particular national system of law. The positivist concept regards Lex Mercatoria as a body of rules, transnational in their origin, but which exists by virtue of state laws, which give them effect. For the supporters of this view, Lex Mercatoria is ultimately founded on national law.

With regard to its substantive quality, there are three main concepts of Lex Mercatoria. The first one views Lex Mercatoria as an autonomous legal order. The second one conceives it as a body of rules capable of operating as an alternative to an otherwise applicable national law. The last concept characterizes Lex Mercatoria as a conglomerate of usages and expectations in international trade, which may complement the otherwise applicable law.

The concept of Lex Mercatoria is usually linked with other concepts, which may be similar or alternative. Some thinkers refer to transnational law as a synonym of the Lex Mercatoria. Transnational law, however, is a very wide subject which is composed of all law regulating boundaries actions or events, including private and public international law and other rules not

fitting into those categories. The Lex Mercatoria is a much narrower concept which is used to indicate that part of transnational law which is unwritten.

The Theory of Lex Mercatoria

It could be said that the theory of Lex Mercatoria is highly controversial. Some authors even deny its existence. Those who are against the concept of Lex Mercatoria are of the view that it lacks generality and predictability and that it is vague and incomplete. According to them, Lex Mercatoria lacks generality due to the existing diversity of standard contracts and trade usages. Therefore, each standard contract and trade usages reflects the sense of justice of the different trades or professions, being too diverse to constitute a homogeneous legal source.

Similarly, the solutions reached by arbitrators in the application and possibly, in the creation of Lex Mercatoria only concern the current dispute, not being extrapolable to the generality of international trade. Few awards are published, making the outcome of future disputes difficult to predict. Hence, businessmen and arbitrators are not able to refer precedents for guidance, and arbitrators cannot be expected to apply customary law principles consistently. The Lex Mercatoria is furthermore accused of being vague and incomplete. Claims have been made that there are very few general principles of trade law that can be universally recognized; those very few are as basic and fundamental as to be useless. Even the proponents of the concept of Lex Mercatoria have agreed that it is incomplete. Lex Mercatoria does not provide an answer for legal issues such as validity, capacity, or contract form. Anyway, the major obstacle to the theory of the Lex Mercatoria is its lack of binding force. It falls within the traditional definition of law. It does not result from the command of the sovereign as it has not been enacted by a parliament or endorsed in an international convention. However, many have argued from the point of legal pluralism that the Lex Mercatoria belongs to the domain of law. The concept of law largely departs from the notion of sanction and social organizations and is capable of producing its own rules. Some have objected to this position claiming that legal rules have an obligatory nature. The rules enacted by the legislator have an intrinsic binding force, whereas customary rules require opinion iris, the feeling to be bound. This does not happen in the case of the purported rules of the Lex Mercatoria. Trade usages are a product of party autonomy; they are contractual practices generally observed and used as a proof of the will of the parties. The latter may therefore exclude their application by an express stipulation of the contract. Those in support of Lex Mercatoria have counter-attacked such a statement by noting that societies Mercatoria has mechanisms of coercion to obtain compliance with its rules such as black lists, damage to commercial reputation or withdrawal from trade associations' members' rights. This result in the merchants actually feeling bound to observe the rules of the Lex Mercatoria.

Finally, it has to be noted that even if some of the elements may be described as legal rules, the Lex Mercatoria does not have the quality of a legal system. The societies Mercatoria cannot present its convictions and notions in a systematic order, as there is not a single international community of merchants but a plurality instead. At the most, there are only principia Mercatoria.