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THE CONCEPT AND SOURCES OF LEX MERCATORIA

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ABSTRACT

Lex mercatoria, refers to a body of principles and rules that govern international commercial transactions. Emerging as a response to the complexities and cross-border nature of modern commerce, lex mercatoria represents a set of norms derived from international customs, practices, and agreements rather than from national legal systems. This paper seeks to explore the evolution, sources, and contemporary relevance of lex mercatoria in the context of global trade.

The primary purpose of this paper is to provide a comprehensive definition of lex mercatoria and to analyze its sources. These sources encompass a variety of international instruments, such as conventions, model laws, standard contracts, and arbitration rules, which collectively contribute to the formation and application of lex mercatoria. By examining these sources, this paper aims to illustrate how lex mercatoria adapts to the evolving needs of international trade, facilitating efficient and predictable resolution of disputes across different jurisdictions.Methodologically, this study employs a doctrinal approach, synthesizing and analyzing existing legal literature, treaties, and case law related to lex mercatoria.

This paper contributes to the ongoing discourse on lex mercatoria by offering a nuanced understanding of its definition, sources, and role in shaping the landscape of international commerce. It underscores the importance of lex mercatoria in promoting uniformity and efficiency in global trade while acknowledging the need for continuous adaptation and integration with national legal frameworks.

Keywords: Lex Mercatoria, International Trade Law, Sources, Concept

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INTRODUCTION

One of the important aspects of the globalization process, which has increasingly increased its impact in recent years, is the spread of the cross-border nature of trade and the corresponding development of the idea of "united law" worldwide. The emergence of the idea of creating a common law, especially in the field of private law, has guided the efforts to establish a legal regulation regulating buying and selling relations around the world. Economists and lawyers approach this phenomenon differently. While economists advocate restricting the state's regulatory powers in the legal field, which will pave the way for companies and individuals to reach a common agreement and resolve their disputes, jurists argue that the globalization process will be completed much more effectively with consistent and uniform texts. (Zeller, 2001)

International trade and international trade organizations formed with representatives from various countries worldwide operate in a legally regulated area. This legal field consists, on the one hand, of contracts made by the parties of the contract voluntarily and binding on the parties; on the other hand, of national legal regulations to which traders are bound in some way due to the work they do, and on the other hand, of international agreements. Apart from all these, international commercial practices are legally accepted everywhere to the same or similar extent. (Oğuz, 2001, p.1)

Importance is given to studies on bringing substantive law to a more uniform state in the international arena. Efforts towards this goal continue rapidly and uninterruptedly. In this way, the belief that a system consisting of substantive legal rules that everyone will apply in resolving disputes will be accepted is becoming increasingly widespread. However, the acceptances that materialized at the end of these efforts were coercive legal instruments such as supranational legislation, international agreements, or model laws. Since such tools often carry the risk of remaining dead texts, it is recommended to resort to other tools that do not have the nature of legislation or that provide harmony in law to ensure uniformity in the field of substantive law. (Dayınlarlı, 2003, p. 203)

1. The Concept of Lex Mercatoria

Lex mercatoria, a term deeply rooted in the history of international commercial law, has gained significant traction in recent years. (6) The term itself, a fusion of the Latin words lex, meaning law, and mercatoria, meaning trade, has been widely used in international commercial literature. The universality of legal techniques in international trade, despite varying political, ideological, and economic views, has led to the development of universally accepted rules, known by various names such as lex mercatoria, law merchant, and international commercial law. (Stoecker, 1990, p. 101)

Lex mercatoria, in its simplest form, refers to general legal principles governing international commercial transactions. However, it is also a complex set of legal rules that regulate unique commercial relations between different countries. It encompasses general principles and customary rules that have organically evolved within the framework of international trade, independent of any national legal system. Some even consider it an independent legal system, shaped by the common rules of law among states engaged in international trade or involved in disputes, and by the international trade community. (Özdemir, 2003, p. 130)

Although lex mercatoria has been accepted as a general principle, material provisions, and commercial customs and traditions have recently been applied to international commercial contracts. However, there are different approaches to the definition and scope of lex mercatoria. (Ayoğlu, 2011 p. 7) However, it should be noted that although there are different opinions in terms of its definition, scope, and historical process, lex mercatoria is a fundamental issue that has a very important place in international trade and maintains its importance in practice. (Çalışkan, 2014, p. 16)

The emergence of international trade law, lex mercatoria, as an independent body of legal rules constitutes one of the most important developments in the field of law in the 20th century. As a result of this development, traditional commercial law has been divided into two parts: commercial law applied to domestic legal relations and international commercial relations. While the rules applied to domestic legal relations are based on the principle of social responsibility to protect economically weak consumers, workers, and small investors, such tendencies are generally absent in international trade law. In addition, while national commercial laws are closely tied to national laws, the tendency to move away from the obstacles of national law and to identify a common

international content predominates in international commercial law. (Özdemir, 2003, p. 131-132)

2. Historical Development of Lex Mercatoria

Lex mercatoria is not a new concept. International trade law has developed in three stages: the old lex mercatoria (Ius Gentium and medieval merchant law) process, incorporating medieval merchant law into national laws, and the modern approach process. (Özdemir, 2003, p. 132)

It is claimed that its historical roots date back to Ius Gentium and medieval merchant law. In Roman law, Ius Gentium is the law of foreigners, which consists of the rules regulating the economic relations between foreigners and Roman citizens. It is argued that since Ius Gentium is a part of Roman law, a national legal system, it is incorrect to show it as the historical beginning of lex mercatoria.

The generally accepted view is that the historical origin of lex mercatoria is medieval merchant law. International commercial relations that developed in Western Europe in the early 11th century gave rise to merchants' laws. In this context, merchants' law has developed, with the possibility of merchants creating substantive laws based on their customs and traditions and establishing special courts for resolving disputes. This development has emerged as independent, regardless of national legal systems. (Çalışkan, 2014, p. 17)

Medieval merchant law, which began to emerge with the practices developed in Europe by the international merchant community and became customary law over time, has an international character because these practices were equally accepted everywhere in Europe. This law, developed by the merchant society, began to be implemented in Italian cities and then spread throughout Europe, including France, Spain, and England. (Baron, 1998)

During this period, the feudal structure of Western European medieval society paved the way for the development of an autonomous merchant law. A feudal society is a society tied to the land and introverted. Medieval merchants, on the other hand, were geographically dynamic and, as a result, faced different and conflicting rules. However, these rules set by different authorities need to be revised to meet the needs of those

engaged in international trade. In the face of this insufficiency, merchants began to create their trading practices and set their own rules. These rules were strengthened and gained their legal basis thanks to the commercial courts established by merchants. (Stoecker, 1990, p. 102) Therefore, the historical origin of lex mercatoria is medieval merchant law. (Ayoğlu, 2011 p. 12-13) Medieval merchants' law, created by merchants independent of national legal systems to meet the requirements of international trade, forms the basis of modern lex mercatoria.

Medieval merchant law, created by merchants, was applied in Western Europe for many years and contributed to the development of international trade. However, nationalist movements and especially the increase in the codification of merchants' law in national legal systems into domestic legal rules in the 19th century played an important role in losing the influence of medieval merchants' law, and this law completely disappeared in the 20th century. As a result of such legalizations, commercial matters fell within the jurisdiction of national courts composed of non-commercial judges who apply their own procedural rules and substantive law. However, it is also obvious that this situation is different from the interests of the merchant society and the structure of cases based on international relations. (Stoecker, 1990, p. 103) The inclusion of lex mercatoria in different legal systems in this way has resulted in it becoming subject to national policies and interests and losing its feature of being a homogeneous and autonomous legal system. (Özdemir, 2003, p. 134)

States have tried to control international trade with their national legal systems and, in particular, to eliminate the problems in international trade with new national trade laws, and private international law rules have begun to be used in resolving disputes with foreign elements. However, the inadequacy of national legal systems in solving the problems of international trade, which increased especially after the Second World War, attracted attention. The new (modern) lex mercatoria came to the fore due to the complex structure of conflict of laws and rules, and their problem-solving functions do not provide the simplicity and predictability sought in international trade. (Rodriguez, 2002, p. 47)

After World War II, international trade began to expand increasingly, and even the economic recession of the early 1980s could not stop this expansion, although it slowed it down. Parallel to this development in commerce, extraordinary developments have also been experienced in science and technology. The increase in the manufacturing

of industrial and agricultural products has brought to the fore the need for much larger markets and advanced distribution systems.

The world has become a small place, especially with the discovery of new methods of transportation and communication. Even though they are geographically far from each other, trade between different nations has become easier, and thus, many new markets have been created. Merchant societies and modern states, faced with different legal systems, realized that applying independent national legal systems to international commercial transactions would hinder the development of global trade. They felt the need to create rules that would apply to all commercial transactions wherever they were made. (Stoecker, 1990, p. 104)

The adoption of common rules to be applied to international commercial transactions is one of the most important developments in the field of law in the 20th century, and this development is called the new lex mercatoria. There are three main reasons for this development towards moving away from the borders drawn by national laws. The great differences in the various legal systems make an international market impractical; national laws need to be revised to resolve issues related to international trade, and arbitration clauses are included in contracts regarding international trade. (Özdemir, 2003, p. 135)

3. Modern Theory of Lex Mercatoria

The topic of modern lex mercatoria is a fascinating one, with three distinct and compelling approaches to consider.

The first view sees lex mercatoria as an independent legal system. Goldman, the architect of the first view, describes lex mercatoria as a non-national, unique, and independent legal system created by the international commercial community. Additionally, Goldman thinks Lex Mercatoria needs improvement in its legal system. (Ayoğlu, 2011 p. 30-45)

The second view sees lex mercatoria as substantive rules in international trade and emphasizes that these rules should be a part of national legal systems. Schmitthoff, who advocates the second view, claimed that lex mercatoria is not an independent legal system but can be implemented as a part of national legal systems with their support. According to Schmitthoff, the rules applicable to international commercial relations are uniform or similar rules accepted by all states, and these constitute the modern lex mercatoria. Moreover, according to

Schmitthoff, the new lex mercatoria was formed on three basic topics. These are contracts, companies, and arbitration. There are similar regulations on these issues in all national legal systems, and the freedom of contract enjoyed by the parties plays an important role here. (Çalışkan, 2014, p. 18)

The third view is mixed and was formed by combining the views of Goldman and Schmitthoff. As a mixed view, it claims that although lex mercatoria is not an independent legal system, it receives binding powers that can be applied to the merits of the dispute, like an independent legal system, without being accepted by the international community rather than national legal systems. In other words, according to this view, lex mercatoria is not an independent legal system but a set of substantive rules specific to international trade. However, these substantive rules can be directly applied to the substance of the dispute in accordance with the general acceptance they receive in the international community outside of national legal systems. (Ayoğlu, 2011 p. 51) Authors who defend this view, such as Lando, state that in international arbitration practice, the parties are not necessarily obliged to choose a national legal system as the law to be applied to the substance of the dispute but have the opportunity to choose the "rules of law" they wish. (Çalışkan, 2014, p. 18-19)

Recent developments in the field have sparked a shift in thoughts on lex mercatoria. The focus of discussion is no longer on whether it will exist, but rather on when and how it will come into play. This shift is largely due to the discovery and reorganization of arbitration, a key tool in resolving the increasing number of commercial disputes in the new world order. (Oğuz, 2001, p. 33)

4. Sources of Lex Mercatoria

Just as there is no common definition of the concept of lex mercatoria, there is no consensus in the doctrine regarding the sources of lex mercatoria. According to one view, lex mercatoria sources are international agreements, model laws, commercial customs, and traditions. This view, put forward by Schmitthoff, is a narrow approach and lists the sources of lex mercatoria in a limited way. However, another view, which accepts the comprehensive approach put forward by Goldman and Lando, accepts general principles of law, standard contracts and general transaction conditions, codes of conduct, and arbitral decisions as sources of lex mercatoria, in addition to the sources put forward by Schmitthoff. It is appropriate to consider the sources of lex

mercatoria as comprehensive as they are generally accepted in the doctrine. (Çalışkan, 2014, p. 26)

4.1 General Principles of International Contract Law

All or most national legal systems accept the general principles of contract law and constitute one of the most basic sources of lex mercatoria. (Goldstajn, 1986) These principles are considered a source of the lex mercatoria because they are generally accepted and thus constitute a universal application. Article 38 of the Statute of the International Court of Justice states that "considering the general legal principles of civilized countries as sources of international law does not change anything in this regard." The principles expressed in this article are general principles that are also the source of lex mercatoria. (Oğuz, 2001, p. 29) It is claimed that the principles in this article are not principles related to international law but rather to national legal systems. However, some authors do not accept the general principles of contract law in the context of this article and consider these principles as accepted principles in comparative law, by the lex mercatoria's definition of substantive law rules to be applied to disputes arising from commercial contracts. (Ayoğlu, 2011 p. 123)

A rule regarding the law of contracts does not necessarily have to be accepted by all national legal systems to be accepted as a general principle. However, general principles of contract law are only sometimes easy to establish. Therefore, it should be determined whether a principle is a general principle of law by comparing legal systems regarding the general principles of contract law. (Ayoğlu, 2011 p. 124) Principles such as "agreements must be kept" (pacta sunt servanda), "good faith" (bona fide), and "autonomy of will" can be given as examples of general principles of law. In addition, the rule that in case of a fundamental breach of the contract by one party, the other party has the right to terminate is also considered among the general principles of law. (Özdemir, 2003, p. 137)

4.2 Standard Contracts

Standard contracts are model contracts frequently used by the international trade community as pre-prepared texts that contain the essential elements of the contract. (Oğuz, 2001, p. 23) These contracts are

prepared by putting in writing the common practices of employees in a certain business line and the commercial customs and traditions existing in that field. Therefore, for the parties who sign these agreements, these agreements constitute a source of lex mercatoria.

Regarding international sales law, we can give the model sales contract of the International Chamber of Commerce (ICC) as an example of standard contracts frequently used in practice. We can also give standard contracts prepared by GAFTA (The Grain and Feed Trade Association) and FOSFA (The Federation of Oils, Seeds and Fats Associations) as examples. (Çalışkan, 2014, p. 28)

4.3 Uniform Rules

Uniform rules are a set of specifications used in the contract, and the parties can add these rules to the contract or refer to them in the contract they make between themselves. In practice, there are important uniform rules regarding international sales law, especially issued by the ICC. Examples are ICC's brochure number 715, INCOTREMS (International Commercial Terms), and brochure number 600, Uniform Customs and Practice for Documentary Credits (UCP 600).

Uniform rules must be widely used in the international trade community to be considered the source of lex mercatoria. Uniform rules are generally considered as part of the contract by incorporation method. It should also be noted that uniform rules are similar to standard contracts. However, unlike standard contracts, uniform rules form a part of the contract, not the entire contract. In addition, unlike standard contracts, uniform rules only provide solutions to certain issues in the contract between the parties. (Oğuz, 2001, p. 24)

4.4 Commercial Customs and Practices

Commercial customs and practices are one of the most basic sources of lex mercatoria. International traders created commercial customs and practices to meet international trade requirements. Commercial customs and practices are also accepted as sources of law in national legal systems. However, these are generally accepted as secondary sources of law in national legal systems, and they play an important role in filling the gaps in the laws or interpreting the will of the parties. In international trade law, commercial customs and practices are considered more important and

higher-level sources. As an important source of lex mercatoria, commercial customs, and practices have an active role in international commercial law compared to national legal systems. (Çalışkan, 2014, p. 29)

Customary rules, often unwritten but widely understood and applied, are the bedrock of many trade sectors. These rules, known and adhered to by the majority of traders in a specific sector, are a testament to the practical application of commercial customs and practices. This practicality underscores their importance and relevance in the day-to-day operations of international trade. (Wilkinson, 1995, p. 110)

When we examine the important international sources on international trade law, we see that these regulations contain essential provisions regarding commercial customs and practices. For example, Article 9 of the CIGS states that "the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves." In the continuation of the same article, the parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

In addition, commercial customs and practices frequently applied by the international trade community are codified by international organizations. In this context, international organizations, especially the ICC, turn customs and practices arising from practices in a certain branch of international trade into uniform rules. As the most important example, we can give INCOTERMS issued by ICC to interpret international commercial terms. However, international organizations need to codify different practices this way. They are suitable as sources of lex mercatoria in uncodified commercial customs and practices. However, in terms of the concrete event subject to the dispute, the party claiming the existence of a commercial custom will have to prove it. (Ayoğlu, 2011 p. 166)

The most effective role of commercial customs and practices in international sales law is that they are accepted as a part of the contract within the "implied terms" theory accepted in Anglo-Saxon law. Indeed, within the scope of this theory, customs and practices that are valid in the relevant commercial sector and should be known by the parties are accepted as part of the contract, even if they are not expressly stated in the

contract. For example, in the second paragraph of Article 9 of CIGS, customs that are known or should be known by the parties are widely recognized and consistently observed in the relevant sector and are accepted as a part of the contract. (Goldstajn, 1986) Therefore, in international trade law, since commercial customs and traditions are a part of the contract, they should be applied with priority over the non-mandatory provisions of the law to be applied to the substance of the contract. (Ayoğlu, 2011 p. 169) Commercial customs and practices are used not only as a part of the contract but also in interpreting the wills of the parties and the contract's provisions. Indeed, in the 3rd paragraph of Article 8 of the CISG, it is regulated that commercial customs and traditions should be considered in interpreting the will of the parties.

Another important role of commercial customs and practices in terms of international trade law is that, when choosing arbitration as the dispute resolution method, arbitral tribunals take into account international commercial customs and practices together with the material provisions to be applied to the merits of the dispute. In international arbitration legislation, it is regulated that arbitrators must take commercial customs and traditions into account when resolving the dispute, whether or not the law to be applied to the substance of the dispute is chosen by the parties. In a dispute regarding international commercial law, arbitrators should determine the substantive provisions to be applied on the merits and consider the commercial customs and traditions applicable in the concrete case. (Çalışkan, 2014, p. 31)

4.5 International legislation

Although the term "international legislation" may seem misleading since there is no international legislature, it is an appropriate term to describe normative arrangements formed internationally and made effective in national legal systems by national legislatures. In this sense, international legislation emerges in two ways: the acceptance of multilateral international agreements by states and the formulation of model laws that states can accept. (Özdemir, 2003, p. 137)

The United Nations Commission on International Trade Law (UNCITRAL), the United Nations Conference on Trade and Development (UNCTAD), the Institute of International Law on the Unification of Private Law (UNIDROIT), the International Chamber of Commerce (ICC), and the International Center for the Settlement of Investment Disputes (ICSID) play a pivotal role in the preparation of model laws and conventions. These texts, which form one of the sources of lex mercatoria,

are particularly active in ensuring the harmonization of existing regulations in national legal systems concerning international trade law.

International organizations prepare model laws to harmonize existing regulations in national legal systems regarding international trade law. Model laws are generally accepted by the international trade community on the subject, prepared to serve as models for new regulations in national legal systems or changes to existing regulations. Therefore, model laws constitute another source of lex mercatoria. Examples of Model Laws include the 1992 Model Law on the Transfer of International Receivables and the 1996 Model Law on Electronic Commerce, prepared by UNICITRAL. (Ayoğlu, 2011 p. 175)

In international commercial law, international agreements that uniformed national legal systems and provide material provisions, especially for international commercial relations, are another important source of lex mercatoria. (Oğuz, 2001, p. 25) Although agreements can be implemented by becoming a part of domestic law if the party states duly approve them, if the country to which one of the parties to the agreement is subject does not approve the agreement, the agreement may find application as lex mercatoria, in the most appropriate legal capacity. (Ayoğlu, 2011 p. 176) Indeed, international agreements constitute an important source of lex mercatoria because they contain situations generally accepted by the international trade community.

In the realm of international trade law, the Vienna Convention on Contracts for the International Sale of Goods (CISG) holds a paramount position. This international agreement, dating back to 1980 and prepared by UNICITRAL, has been actively Convention international trade law in recent years. A dedicated section carefully examines its provisions and conflict of law rules. It is crucial to note that when a dispute arises regarding the Convention's scope of application, particularly if the rules of unconventional private law point to the law of a state that is a party to the agreement, the Convention will find its application as Convention in Article 1 (b) of the Convention. Therefore, the Convention containing the general principles regarding international sales contracts should be accepted as a source of lex mercatoria and applied by arbitrators as the most appropriate legal rule, even in cases that do not fall within its scope of application. (Audit, 1990)

4.6 Codes of Conduct

Code of conduct is another source of lex mercatoria. These texts formulate the professional and technical standards of the international business community or those operating in a certain sector of this society. There is no obligation to apply codes of conduct. The best example of a code of conduct is the ICC's International Code of Advertising Practice. Another example is the OECD Guidelines for Multinational Enterprises prepared by the OECD (Organization for Economic Cooperation and Development). (Çalışkan, 2014, p. 33)

4.7 Case Law

Case law is also one of the important sources of lex mercatoria. Case law determines the rules accepted in the international trade community and creates new rules. If the case law is published, the lex mercatoria continues its development. However, it is necessary to remember that arbitral awards are generally not published due to the principle of confidentiality in arbitration proceedings. However, in recent years, especially in international investment arbitration, the principle of confidentiality has been relaxed, and arbitral decisions have begun to be published to protect the rights of third parties. In this context, arbitral decisions have begun to play an important role in forming international trade law. (Çalışkan, 2014, p. 33)

In fact, in international arbitration proceedings in recent years, although arbitrators are not obliged to consider previous arbitral decisions as established jurisprudence (stare decisis), they frequently and effectively use old arbitral decisions in their decisions. In this case, case law is important in determining the general principles, material norms, and commercial customs and practices of lex mercatoria and constitutes an effective source of lex mercatoria.

4.8 Guidelines Prepared Using the International Restatement (Compilation) Method

One of the most important developments in international commercial law in the 20th century is the emergence of new lex mercatoria sources. These sources, developed with the international restatement (compilation) technique in contract law, have shed new light on the field. (Ayoğlu, 2011 p. 190-191) In this context, the 'Principles of

European Contract Law' prepared by the European Commission and the 'UNIDROIT Principles of International Commercial Contracts' published by UNIDROIT were prepared with the international restatement method. These texts, considered important sources of lex mercatoria, have piqued the interest of legal scholars, practitioners, and students alike.

The international restatement method was created by taking the "American Restatements" published by the American Law Institute as an example. Indeed, for example, the UNIDROIT principles were written not by the government but by lawyers working on the subject. In addition, UNIDROIT principles are a source of law that does not have binding powers like "American Restatements." UNIDROIT principles are one of the important lex mercatoria sources that determine the general principles of international commercial contracts law. (Oğuz, 2001, p. 28)

CONCLUSION

International trade has demonstrated its existence at all times and in all periods, regardless of the economic regimes of the states and who the traders are, and has made great developments in line with the rapidly increasing needs of societies. Lex mercatoria, which began to emerge spontaneously within the framework of international trade, developed in parallel with the developments in international trade and emerged as an independent set of legal rules in the 20th century. Lex mercatoria was developed by the international trade community and has a widespread application in international business life in order to fill the gap created by national laws that have become increasingly inadequate to meet the needs of rapidly increasing international commercial relations, especially after the Second World War, and to eliminate the unnecessary limitations of national laws.

The development of lex mercatoria at this stage has three features. The first is that international trade rules are remarkably similar in all national laws; the second is that national authorities ensure the application of these rules in different national jurisdictions; and the third is that these rules are formulated by international organizations.

Although the roots of this formation, known as the new lex mercatoria, are based on medieval merchant law, there are significant differences between these two laws. The first of these is the need to reconcile the new lex mercatoria with the view of national sovereignty on which the world order still depends. The second is that, unlike the

haphazard and unplanned development of medieval merchant law, the modern lex mercatoria was pre-designed by international organizations, expressed in international agreements, model laws, and documents published by institutions, thereby highlighting its global nature.

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