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LEX MERCATORIA AND WORLD TRADE ORGANISATION LAW IN RELATION TO INTERNATIONAL COMMERCIAL CONTRACTS.

INTRODUCTION

The world's resources are not evenly distributed. There is great disparity in the location of agricultural, mineral wealth, fresh water, etc. For animals, a simple way of going around this is through constant migration. Thus animals are always in a state of migration to and from where the needed resources are available. The human situation is markedly different. Since the end of the hunting and gathering stage, humans have adopted a settled place of abode. This is determined by the predominance of one form of resources or the other, but certainly not all. The way of meeting the scarce resources is through trade. Thus from the medieval times to the present day, commercial activity has been the fulcrum of human relations.

Various rules have guided this intricate web of relationship from the ancient to the modern day. This essay will pursue the question of the relationship of the Lex Mercatoria and World Trade Organisation (WTO) Law in relation to international commercial contracts. Starting with a historical description of the ancient Lex Mercatoria, it will turn to the theory of a modern Lex Mercatoria and its relationship with domestic/national laws and regulations. The WTO Law will also be examined in relation to its sources, principles, implementation, and how it affects international commercial contracts.

It will hereby be demonstrated that the WTO Law influences and promotes the Lex Mercatoria. That there is a relationship between WTO Law and international contract. Also, that there is a possibility of cross – fertilization of ideas between the WTO Law and the Lex Mercatoria, in relation to international contracts. That though largely okay, an amendment of the WTO rules will make them more amenable to the implementation of international contract law. And finally, that as they stand the WTO rules cannot be directly applied in the interpretation or enforcement

of international contract. The natural starting point for this discussion is the concept of the Lex Mercatoria.

THE MEDIEVAL LEX MERCATORIA

The history of the Law Merchant or Lex Mercatoria is the history of private international law which grew in great degree out of the transactions between different individuals of various nationalities. The exact time and place of its origin is uncertain. But many writers have stated that it began in Italy in the central part of the middle ages. But investigation of early documents show that it goes back much further, for instance, to the time when the Arabs dominated the Mediterranean.⁽¹⁾ But they invented little and many of the terms which they used came from the Romans, Greeks, and Phoenicians, who for many hundreds of years monopolized the sea commerce.

The first work on Merchant Law in England was written by Gerald Malynes, published in 1622 entitled “*Consultudo Vel Lex Mercatoria*” or the Ancient Law Merchant.⁽²⁾ In his preface, he stated that he had titled it Lex Mercatoria instead of Jus Mercatorium because it is customary law provided by the authority of all kingdom and common wealth’s and not a law established by the sovereign of any place. Blackstone stated that the affairs of commerce were regulated by a law of their own called the Law Merchant or Lex Mercatoria, which all nations agree in and took notice of, and it is particularly held to be part of the law of England which justifies the causes of merchants and the general rules which obtains in all commercial contracts. Still later, Lord Mansfield stated that mercantile law is not of a particular country but the law of all nations.⁽³⁾

The Lex Mercatoria was a special law for the merchant class that grew first in the Italian cities and then spread to France, Spain and the rest of Europe including England.⁽⁴⁾ Trade was above all pursued in the great markets, fairs and seaports which were the main trading places. The merchants trading across boundaries and transporting practices into foreign markets had a mobility that carried with it a mobility of local custom from region to region. Towns and markets. Soon reduced local practices into regulatory codes and the laws of particular towns, usually those that were trade centers inevitably grew into dominant codes of customs of vast proportions.⁽⁵⁾ The Lex Mercatoria governing a special class of people (merchants) in special places (markets, fairs and seaports) was distinct from local, feudal, royal and ecclesiastical law.

Its special characteristics were that it was first of all transnational. Secondly, it was based on a common origin and a faithful reflection of the mercantile customs. Thirdly, it was not administered (at least initially) by professional judges but by the merchants themselves. It was developed and promoted by mercantile cooperation and the special jurisdiction of the mercantile courts, business practice and the special courts of the great markets and fairs. Fourthly, its procedure was speedy and informal. Finally, as overriding principles, it emphasized freedom of contract and decision of case *ex aequo et bono*.⁽⁷⁾ As such, it reflected perfectly will the commercial need to promote trade based upon freedom and recognized the capacity of the merchants to regulate their own affairs through their custom, usages and practices.

However, this system of “loose” rules was progressively co-opted and embodied into various national statutes. With this rationalization and codification of commercial law, a developing commercial law flexible, universal and transnational in character ceased to exist. Surely the incorporation of the law merchant into different national systems added an international dimension to these system without which the commercial needs of the various states could hardly have been served. Yet national commercial law lost the cosmopolitan dimension and became increasingly divorced from experience of the merchants which was often coupled with a hostility towards mercantile custom.⁽⁸⁾

THE MODERN LEX MERCATORIA

Merchant law was not yet dead. The will for world trade was stronger than national restriction and limitations of commercial law-enacted by various states. Merchants created international legal structures and instruments that had to be recognized by national legal systems in order to reach a common base for international trade relations. Furthermore, non-governmental institutions like the international chamber of commerce.⁽⁹⁾ Started in the 1920s to foster international trade law by developing uniform standard rules and procedures. Thus there emerged a trend of re-discovering the international character of commercial law and to move away from the restrictions of national law to a universal, international conception of international trade law.

However, the complexities of the modern world by all standards surpasses those of the medieval period when the Lex Mercatoria flourished. The idea of a modern Lex Mercatoria received at best a cautious welcome. The main point of criticism being that it is not a 'law'. The Lex Mercatoria not only lacks a methodological base and a legal system supporting it, it is also dependent on national legal systems to work efficiently. Moreover, it does not have any state authority from which it can derive its binding force. As such, it is argued, it cannot govern a contract because a contract concluded in private parties must be based on the municipal law of some state. That usages of international trade only acquire the character of law to the extent that they are incorporated into a national legal system, either expressly or tacitly. Just being available for interpretation or amplification of contractual clauses does not make them law. ⁽¹⁰⁾

The second strong argument very often preferred against the Lex Mercatoria as an autonomous body of law is its incompleteness, vagueness and incoherence. ⁽¹¹⁾ That is, what constitutes this alleged body of law? Where is it to be found? The general principles and rules which are reflected in the law of all trading nations and which are said to constitute the core of the Lex Mercatoria are to be distilled by means of comparative analysis of representative national laws. Yet which rules and principles are common to a generality of nations? Considering the diversity of national legal systems (Civil Law, Common Law, Islamic Law) and the vast number of states, one will most likely find only very few principles that are truly common to a representative number of legal systems. ⁽¹²⁾ Those principles that may finally be identified are often too general and too broad to solve any, but the simplest problem, let alone a complex commercial dispute. ⁽¹³⁾ The often cited principles of good faith, or *pacta sunt servanda* are an such abstract principles. They gain color by supplementing rules and explanatory decision, in the various legal system. Those supplementary clarifications will however, rarely be general. ⁽¹⁴⁾ It is against this background of criticism of the re-emerging Lex Mercatoria that the international institute for the unification of private law published its "principles of international; commercial contracts" in 1994 (Hereafter called the UNIDROIT principles).

THE UNIDROIT PRINCIPLES

The idea was inspired by the American Restatement of the law of contract, according to which the international law of contract was meant to be elaborated in a comparative approach, summarized and structured. ⁽¹⁵⁾ Principles were to be laid down that were common to the existing national legal system and or which seemed best adapted to meet the needs of international

commercial contracts. As such the aim was to “establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied”.⁽¹⁶⁾

As already outlined, for the principles to be a new *Lex Mercatoria*, they must first of all meet the characteristics of a true Law merchant. Recalling the main features of the substantive Law merchant of the medieval times, one would expect the principles to be transnational, based on a common origin, a faithful reflection of the mercantile customs and particularly responsive to commercial needs.

There is no doubt that the principles fulfill the criterion of being ‘transnational and “based on common origin” since they neither belong to any national legal system nor do they reflect the rules and principles of any one single national legal orders. Instead, they are detached from any national legal context. This has enabled the principles to root in the Anglo-American “Common Law” as well as in the civil law tradition’.⁽¹⁷⁾

Apart from being transnational and common in origin, the principles also pay special attention to usages and customs when determining the rights and duties of the parties to each individual contract. Indeed the openness to usages and customs is considered an essential element underlining the idea of the principles.⁽¹⁸⁾ Article 1.8 in the general terms of the principles provides in essence that usages may not only be binding when they have been agreed upon between the parties, but also in the absence of any such agreement.⁽¹⁹⁾ The principles refer to usages also in several other articles. With this openness to customs and usages, the principles become responsive to new commercial practices, legal instruments and devices developed by the merchant community.

This is particularly important for the principles as written transnational law and as a simple instantaneous reflection of common legal rules. In order to avoid the typical dilemma of codification of law, which with the fixation of the legal rules become static at some time, the principles have to provide a mechanism that maintain its pliancy. This mechanism may be seen in the responsiveness to customs and usages. Hence the openness keep the principles as a set

of rules flexible in the sense of a “law in action” and thus particularly adaptable to commercial needs.⁽²⁰⁾

The principles are also “user – friendly”. They are central short, and concise, clearly arranged and with its simple language, explanations and practical examples easily understandable. They not only offer a lingua franca⁽²¹⁾ to facilitate negotiation and therefore cross-border trade, but they also render unnecessary the time-consuming search for the foreign legal rules or ‘general international principles’ (where such are applicable).

The conclusion is that the principles are not only transnational, based on a common origin and responsive to practices and usages, but also very adaptable to commercial needs and the world of international trade. Hence they fulfill the criteria of the law merchant. Yet whether they can really qualify as “the new Mercatoria” remain to be seen. Two factors are crucial. On one hand, the way in which the principle are being interpreted and further developed must be uniform and autonomous. On the other hand, they need to be applied! One main element of the success of the Lex Mercatoria in the medieval times was its general and broad acceptance among the merchant community. Accordingly, for the principles to flourish as new Lex Mercatoria, merchants, lawyers, arbitrators (and possibly judges) have to incorporate them in their legal activities.

THE WORLD TRADE ORGANISATION LAW

The World Trade Organisation (WTO) came into being in 1995. It is the successor to the General Agreement on Trade and Tariffs (GATT) established in the wake of the Second World War.⁽²²⁾ The system was developed through a series of trade negotiation or rounds held under the GATT. The first rounds dealt mainly with tariffs reduction but later negotiation included other areas such as anti-dumping and non-tariff measures. The last round, the 1986 – 1994 Uruguay round led to the WTO’s creation.

The negotiations did not end there some continued after the end of the Uruguay round. In February 1997, agreement was reached on telecommunication services with 69 governments agreeing to wide ranging liberalization measures that went beyond those agreed in the Uruguay round. In the same year, 40 governments successfully concluded negotiations for tariff free trade

in information technology products, and to others concluded a financial services deal covering more than 95% of trade in banking, insurance, securities and financial information. ⁽²³⁾

In 2000, new talks started on agriculture and services. These have been incorporated into a broader work programme, the Doha Development Agenda (DDA) launched at the fourth WTO ministerial conference in Doha, Qatar, in November 2001. The Agenda added negotiations and other work on non agricultural tariffs, trade , and environment, WTO rules such as anti-dumping and subsidies, investment, competition policy, trade facilitation, transparency in government procurement, intellectual property and a range of issues raised by developing countries as difficulties they face in implementing the present WTO agreements.

THE WTO AGREEMENT

The WTO agreements (the rules) are the result of negotiations between members countries. The current set i.e. the GATT is now the WTO's principal rule book for trade in goods. The Uruguay Round also created new rules for dealing with trade in relevant aspects of intellectual property, dispute settlement and trade policy reviews. The complete set runs to some 30,000 pages consisting of about 60 agreements and separate commitments called schedules made by individual members in specific areas such as lower customs duty rates.

Though these agreements, WTO rules operate a non-discriminatory trading system that spells out their rights and their obligations. Each country receives guarantees that its exports will be treated fairly and consistently in other countries markets. Each promise to do same for imports into its own market. The system also gives developing countries some flexibility in implementing their commitments.

Perhaps the most notable of these is the dispute settlement. Dispute settlements the central pillar of the multilateral trading system and the WTO's unique contribution to the stability of the global economy. Without a means of settling disputes the rules – based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly defined rules with time tables for completing a case.

Disputes in the WTO are essentially about broken promises. WTO members have agreed that if they believe fellow-members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally. This means abiding by the agreed procedure and respecting judgments. This is fundamental as it encourages countries to settle their differences through consultation. Failing that, they can follow a carefully mapped out, stage by stage procedure that includes the possibility of a ruling by a panel of experts and the chance to appeal the ruling on legal grounds. Confidence in the system is borne out by the sheer number of cases brought to the WTO. Around 300 in 8 years compared to 300 disputes dealt with during the entire life of the GATT (1947 – 1994).

THE LEX MERCATORIA AND THE WTO LAW

The merchant in medieval times was a “stranger” within a population predominantly consisting of peasants and knights. He was a stranger not only metaphorically because of his different way of life, but also literally since he had to seek justice and defend his rights before foreign courts, especially in the entire orally organized phases of trade history. ⁽²⁴⁾ Here, emphasis was on procedure and the privileges the merchants desired depended significantly on the civil procedure of the court in which he was conducting his trade. Within the rigid common law system of actions based on fixed writs, this main goal was to extend his option as plaintiff to submit evidence, in particular claims for money debts under the writ of debt and covenant. On the continent, the Merchant mainly strive to be allowed to defend an action by oath without having to resort to other parties to confirm that oath.

The modern concept of Lex Mercatoria as contained in the UNIDROIT Principles is also basically aimed at the individual. The principles were drafted by a working group that was specifically formed for this purpose. Its members, representing all different legal and socio-economic systems were leading experts in the area of comparative law and international trade law. It is important to note that they were not appointed as representatives of their governments but in their individual capacities. ⁽²⁵⁾

Thus the entire concept of Lex Mercatoria both in the medieval and in this modern period places individual rights in trade issues at its helm. While in earlier times the rights as existed in

various jurisdictions ascribed to individual merchants who submitted to it, in this modern era the harmonization and consolidation of these rights to make them generally acceptable in the goal.

The WTO Law is based on agreement between several independent countries with the aim of promoting international trade and to restrict unnecessary obstacles to international trade, in particular non-trade barriers. Its sphere of influence is generally in inter-state relationship especially its 149 member states. The aim is to promote a liberal trading system based on the rule of law. This seems to be succeeding as many developed countries now significantly decrease or actually scrap tariffs on imports from least developed countries (LDCs).

In the Doha declaration, the WTO member government committed themselves to the objective of duty-free, quota –free market access to LDCs products and to consider additional measures to improve market access for these exports. Also, the WTO agreements contain special provision which give developing countries special rights. These special provisions include for example, longer time periods for implementing agreements and commitments or measures to increase trading opportunities for development.

Thus, like the Lex Mercatoria, the WTO Law seeks to promote international trade through the application of rules certain to either parties and as much as possible devoid of national flavors and bias. However a major distinction in their approach is that the Lex Mercatoria directs its efforts specifically at the individual merchant who finds himself in a ‘strange’ land. But the WTO seeks to liberalize all aspects of world trade from governing rules to tariffs, to dispute settlement by harnessing state members. In a way, both the Lex Mercatoria and the WTO may be considered as different means to one end; the promotion of international commercial contracts.

CONCLUSION

The main result of this essay may be summarized in the following submissions.

First of all, the WTO does influence and promote Lex Mercatoria. This may be gleaned from their end objectives. Both aim at freer trade especially in international commercial contracts. Also, while the Lex Mercatoria had trade simpliciter as its theme, the WTO law encompasses both trade and other ancillary issues like the environment, technology transfer, intellectual property etc. In reality, the WTO law is an expression of the Lex Mercatoria ideals which is the

protection of international contract entered by individuals irrespective of their countries of origin.

Secondly, there is indeed more than a passing relationship between the WTO law and international contract law. Both apply to more than one nationality at once. They are in essence an embodiment of one principle, that of fair global trade based on just and equitable means. Based on this, there is a great possibility of cross-fertilization and co-fertilization of ideas as in the case of dispute settlement. This is because the WTO law believes in the multilateral system of dispute settlement instead of the unilateral action. This is also true of the *Lex Mercatoria* which even in the medieval times grew out of a culture of submission to arbitration in a 'foreign law' laid by a merchant.

Thirdly, it is submitted that the WTO rules as they stand should be amended to better implement the principles of international contract law. The reason being that there is a general feeling of unease surrounding WTO activities. It is variously described as being against the poor by supporting American/Western interests via trade instruments. That it is against the environment by declaring environment protection measures as "barriers to trade" etc. However these may be unfounded as the evidence of unprecedented world trade can be ascribed to the activities of the WTO. China's recent entry into the organisation is a sign of its acceptability.

Despite these, the WTO rules place undue emphasis on country members. The rules should be amended in relevant places to take care of individual interest as is the case under international contract law. In a similar vein, joining the WTO is a hurdle for some aspirants. For instance, a country joining the WTO has to agree to bilateral deals with existing members who are interested. This privilege can be used to frustrate some aspirants like the recent case of Russia and the United States of America.

Fourthly, the WTO rules and dispute settlement body decisions actually influence *Lex Mercatoria*. This is because being decisions of an independent arbiter arrived at by consensus, it represents a statement of international law applied to international commercial relations albeit between country members. This, in most cases presents a direction of international commercial law on that subject matter. It is invariably that the *Lex Mercatoria* will take the cue.

Finally, as they stand the WTO law cannot be used in interpretation or enforcement of international contracts. They merely set general guidelines on trade relations among member countries but do not go into the specifics of individual international contracts.

From the foregoing discussion there is a possible overlap between WTO law and Lex Mercatoria since both advocate, and indeed intend to promote fair international trade relations. The goal is to move the world's resources from one human settlement s to the next in exchange for some valuable consideration to balance the resource disparity earlier alluded to, and to make a living for the merchants.

END NOTES

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