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# Selection of a-national sources (the lex mercatoria) as law applicable to international

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There is no doubt, that globalization is the main paradigm involving almost all spheres of our life today, particularly, such spheres as economy and law are also fundamentally impacted by this phenomenon. While there are myriads of legal regulations prescribed by different private international law in different legal systems, the complexity of global trade engenders non-state rules, the so-called *new lex mercatoria*, which tends to replace national regulations by non-state ones. [1] Therefore, a national legal system can be considered as a recipient of globalization and, frequently, it may imply transnational rules into state codes.

Moreover, the situation mentioned above is also applicable to private international law, which is the department of national law and which arises because different territorial jurisdictions exist which have different laws. As it is commonly known in private international law, the law applicable to the contracts is determined by the party autonomy rather than by governmental interests except cases involving mandatory provisions. Consequently, all that remains to the state is to recognize the results of such a parties' choice and to enforce it. Furthermore, businessmen and commercial parties frequently prefer arbitration associations instead of state courts, for example, the London Court of International Arbitration (LCIA), which operates under LCIA Rules, its arbitration rules, which are suitable for many disputes. Such a choice is made due to many factors, such as costs, professionality of arbitrators and flexibility of procedure. While some rules become transnational, other rules from the *new lex mercatoria* can be incorporated into national legal system, so, the distinction between private and public law is the question of the states' choice and its historical development does not depend on paradigm.

To determine pros and cons of the choice of a-national sources as law applicable to contracts, we need to answer the question: what is the up-to-date concept of the *new lex mercatoria* and how is it incorporated into contracts? Do courts recognize clauses which prescribe the *lex mercatoria* as the law governing a contract as binding in practice?

To begin with, the phenomenon of the *lex mercatoria* has been discussed by scholars all over the world for about half a century. [2] The reason for that is that there is a misunderstanding of the terminology. For instance, one term in one legal system can mean not the same thing as in another one, so people with different backgrounds can understand it differently. Another difficulty related to the *lex mercatoria* is that there are still no developed studies of the *lex mercatoria* by global scholarly community but only a few one-sided analyses.

Proponents of the *new lex mercatoria* state that commercial transactions should be governed by the law to which parties agreed even if this law cannot be attributed to any legal national system. Thus, they adopted two principal approaches to support it. Firstly, they have found proofs in case law that courts enforce parties' agreement where the *lex mercatoria* is chosen as applicable law to a contract. Secondly, they say, that the *lex mercatoria* derives from medieval "law merchant", which also illustrated the rules regulating cross-border commerce

and consisted of substantive principles and convenient procedures, and was independent from the contemporary legal framework of states. [4]

Whereas opponents reject these arguments and declare that application and interpretation of a-national rules in global trade are little more than "wishful thinking" [2]. These debates seem to be controversial and complicated, but the concept of the *lex mercatoria* was put forward by outstanding legal scholars, such as Berthold Goldman, who called it a "universal law" and demonstrated its effectiveness [3]. Furthermore, reflection of the *lex mercatoria* can be found in the UNIDROIT Principles, the Principles of European Contract Law set up by Ole Lando (PECL), the International commercial terms (Incoterms), and so on.

There are many sources of the *lex mercatoria*, such as trade usages and customs, general principles of law, uniform laws and international conventions regulating international commerce, public international law, comparative analysis of national laws, and international conventions. But legal scholars and non-national international trade organizations have limited them in order to reach the stability of international commerce, to deal with the uncertainty arising from the absence of an effective authority in this sphere. [4]

There is a great number of famous cases, which demonstrates the usage of the *lex mercatoria* in international arbitration. [7,8] Thus, when does the *lex mercatoria* apply? It must be noted that the *lex mercatoria* has not yet laid claim to the whole territory of potential disputes arising from international commerce. Thus, the *lex mercatoria* has rarely been applied where the issues are those of consent, fraud in the making of a contract, and so on. Besides, there appears to be no instance in which the *lex mercatoria* has been invoked in a case of pure delict. Moreover, once it is accepted that the *lex mercatoria* may on occasion have to be applied to some aspects of a dispute, whereas national law is applied to others, the practical attractions seem to be less apparent. [6]

To conclude, it is too early to say whether a new paradigm will replace the national regulation of contracts that has shaped our thinking about law over the last centuries. According to available sources, it is surprisingly how little has been done to identify the criteria which distinguish those transactions, which are governed by the *lex mercatoria* from those which are not. [6] Some legal scholars consider the *lex mercatoria* as a potential bargaining tools in contract negotiations, others still believe that it is difficult to imagine a more dangerous and undesirable ill-founded view that the *lex mercatoria*. [2] All in all, once theoretical basis of the *lex mercatoria* is clarified, it seems to stand a much better chance during contract negotiations than domestic legal rules.

**Источники и литература**

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