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Evolution of International Commercial Customs (Lex Mercatoria) in European Countries of the XII-XVI Centuries

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***Abstract*—This article studies the history of international trade customs formation and development on the territory of Europe in the XII-XVII centuries, analyzes the collections of trade customs known in history. The reasons for the spread of some collections and the interest decrement to another ones are also revealed in this article. The features of the commercial customs formation in large trade medieval "corporations" are also revealed, the reasons for the first consulates appearance are reflected and options for the status of the consul are revealed. The wide use of European trade customs in Muslim countries and Asian countries is also noted by the authors. In these countries they were also actively used on the basis of agreements between the rulers of the countries and large merchant guilds. The article reflects the influence of European trade customs on the formation of Russian trade law, since the well-known trading centers of Russia. The results of this article can be used in educational, scientific and practical activities by specialists in the field of jurisprudence and the world economy, and will also be of interest to a wide range of readers interested in common history.**

Keywords—lex mercatoria, international commercial customs, international commercial law, history of INCOTERMS, history of law, international private law

I. INTRODUCTION

The issues of unifying the rules of international trade have always been acute for states. Trade, despite its long history, still has not received adequate legal regulation at the international level. At the present stage, the importance of international trade customs (lex mercatoria) is increasing again, as international trade by its nature requires universal rules [1]. However, in both foreign and Russian legal science, this term raises many questions, from its full-throated denial to endowing it with the status of a regulator, superior in force to international law.

This is evidenced by the research activity of specialists in this field M. Berezhkov, V.F. Gelbke, A.P. Grigoriev, V.P. Grigoriev, A.A. Dyakonova, I.S. Zykina, V.A. Kanashevsky, N.A. Karsakova, L.G. Klimanov, N.V. Lazareva-Patskaya, A.I. Loboda, M.V. Majorina, A.A. Merejko, G.G. Mikaelyan, N.A. Novikova, I.L. Tannenbaum, G.F. Shershenevich, H. Berman, Klaus Peter Berger, David J. Bederman, Braudel Fernand, B. Goldman, Peisson E., Pigeonneau H., Roussel A., Stephan W. Schill, Monika Martišková, Ralf Michaels, Friedrich K. Juenger, Gannagé Léna, Andreas F. Lowenfeld, Robilant di A., Tracman L. et al.

Discussions about the existence of lex mercatoria require a more detailed study of the historical side of this issue. Meanwhile, there are very few historical and legal studies on the formation and development of international commercial customs in the modern doctrine. The history of the lex mercatoria evolution during the Middle Ages has not been studied in detail. The purpose of this article is to fulfill this historiographic gap. The main objective of this article is to trace the history of the formation and development of international commercial customs (lex mercatoria) in Europe in the XII-XVI centuries. This chronological framework was not chosen by chance, as from the end of the 16th century there was a consolidation of customary rules of international trade in the national legislation of European countries, that gradually changes the status and meaning of lex mercatoria.

II. METHODOLOGY

To solve this problem authors used the methodological principles of historical knowledge, such as historicism, scientificality, objectivity, integrity and consistency along with the methods of scientific knowledge traditional for jurisprudence. The evolution of international commercial customs was viewed as an integral legal phenomenon in a specific historical period of the XII-XVI centuries in close interaction of objective and subjective factors. Study of the

formation of international commercial customs in Europe in the Middle Ages was based on general scientific methods: analysis, synthesis, comparison and generalization, which allowed the authors to analyze the main problems of the formation and development of general principles of international trade. The comparative-legal method made it possible to reveal the features of international trade regulation on the legal base, depending on the region of use of specific collections of maritime trade in medieval Europe. The authors had an opportunity not only to research but also to evaluate the results of the activity of the compilers of medieval maritime trade customs collections due to the retrospective method of study. This method also allowed to determine the effectiveness degree of decisions taken by states.

III. Results and Discussion

The fall of Roman Empire almost had no influence on a radical change of the legal framework of newly formed "barbarian states". Initially, the relations established between the new states were highly private. Its basis was the trade regulated by the norms of Roman law. Due to the jus gentium in Roman law, that made it possible to create a strong legal basis for trade relations. This legal basis covered even new forms of trade relations, unknown to Roman law. K. Gareis directly points to the joint influence of cultures and the active reception of foreign norms in the course of implementation of foreign trade [2].

These relations became a basis for the principle of free sea trade. It arises and receives its development due to those relations. This principle is extremely important for the evolution of commercial customs. However, freedom of maritime trade was not unconditional, everything depended on the presence or absence of contractual relations. The need for new forms of civil transactions also arose right in the Middle Ages [3]. The establishment of a feudal regime led to the decline of all industry in Europe, as well as all types of trade and navigation. Despite the feud between the emperors and the papacy, they all agreed on the unity for the struggle against cities and international trade. It was made because of religious fanaticism towards foreigners that caused significant harm to trade [4]. However, some Italian cities, which escaped invasion and enslavement, proclaimed sea trade as their main activity. In the Middle Ages, all maritime trade was concentrated primarily in the Mediterranean region.

Severe political problems and a rather closed sphere of activity did not allow it to be regulated de jure. Due to this situation, collections of decrees as lists of customs appeared in the field of maritime trade law. Institutions accompanying sea trade - the activities of brokers, commission agents, charterers - also receive rapid development in this period.

The activities and customs of Marseille and Barcelona deserve special attention in this area in spite the fact of their inferior to Venice, Genoa, Pisa and other Italian cities. Meanwhile, Marseille and Barcelona were successfully engaged in maritime trade. The custom was the first manifestation of trade practice. Collections of customs of that time were widely represented, but many of them had extremely local significance: Ordinamenta et consnetudo maris edita per consules civitas Frani 1063, Arles statutes 1150, Montpellier 1223, Marseille 1253, Genoa 1186, Aragon 1270 and 1340, Barcelona 1258, Breve della curia del mare 1298 and 1305, Hamburg 1301-1306, Danzig 1429, Revel 1482, Lubeck 1537, Florence statutes 1577. etc. [5].

The collection of maritime customs especially popular in western European ports "Les Rôoles ou jugements d'Oléron" was fixed in the northern seas in the late XI - early XII centuries. During the research period it`s possible to note only the Brussels Ordinance of Charles V of 1551 and Edict of Charles IX in France of 1563 as at that time in the field of merchant shipping a lot of legislative acts weren`t issued. At the same time, all these documents had a casuistic character, that allowed to solve momentary problems in private order, that was caused by an underestimation of the sea trade importance.

The Northern and the Western Europe began to develop maritime trade as the basis of economic prosperity only by the end of the Middle Ages [6]. The customs of Northern Europe became dependent on Italian trade customs and the provisions of Roman law that caused subsequently transformation into their own local statutes of the merchant class. For a calm sea trade merchants began to unite in whole flotillas, accompanied by escort vessels. In addition, the bills of exchange were intromitted by Lombard merchants and banks were organized in Venice in the 12th century along with many other important things etc. [7].

Gradual transformation of trade customs into the generally admitted law indicates its power [8]. As a special judicial system, the institution of the consulate receives a new spur in development. It is worth noting that in Roman classical law, commercial law was not detached. The direct difference between commercial and civil law appears only in the Middle Ages [9].

The formation and development of maritime trade law was connected to the appearance and development of a number of institutions, in particular, the institution of agents. The institution of agents included people in foreign state who defended the interests of their compatriots, conducting commercial affairs abroad. In the Middle Ages, trade agents began to be called consuls, who initially had the position of elected judges to resolve conflicts between merchants. Later they officially received the right to administer justice. This fact caused the development of international trade law.

A new custom has emerged: “where three merchants come together the position of consul or arbitrator is assigned to one between them, at the choice of the others [10]. Merchant guilds received the right of jurisdiction over their members, having their own judicial bodies and the right to apply not only the law, but also trade customs, right before the states got it. A distinctive feature of this period was the fact that all "new forms of transactions that manifested themselves in commercial practice, were lead under the principles of Roman and canon law" [11].

As a result of this practice, the ancient commercial law was gradually supplanted, but the new rules extended their effect extremely to the people belonging to some "corporation". At the same time, collections of maritime customs and judicial codes of sea merchant ships and consuls made it possible to develop a certain set of general basic concepts of maritime trade law. These concepts could have insignificant differences depending on local conditions [12].

All coastal cities engaged in trade made a lot of efforts to establish a consul on the territory of a foreign state. It often led to open armed conflicts between competitors. By the XII century the custom of establishing a consulate became a general rule. It is believed that the first consuls from Christians

were admitted to the Saracens in Palestine around 800 years [13].

The rapid development of the consulate shows that the trade interests overlapped religious differences. Sea trade continued even during the time of the Crusades. It is extremely difficult to establish the limits of the consuls' power. It is understood that in Muslim countries the powers of consuls were much broader than in Christian states.

At the same time, it is known that the limits of the consuls' jurisdiction were established by the monarch of the receiving part and were confirmed by a special act - capitulation. In fact, this act was unilateral and did not create any obligations. Under certain circumstances it was also canceled unilaterally [14]. The consul was empowered to decide civil and commercial matters where his compatriots were as a disputing party.

The consuls of Venice achieved significant privileges in Byzantium and the Golden Horde. The reason is their ability to deal with cases where the role of the defedent or plaintiff was taken on by a Venitian. In 1322 there was the first mention of the Venetian consul representing the commercial interests of Venice in Tana (Azov) [15]. It is known that since 1333 there was a treaty between Venice and the Tatar emperor Uzbek. According to this treaty the consul of Azov (Tana) considered commercial affairs together with the daruga – prince, i.e. consul status was extremely significant. It is assumed that all this is the result of already established relationship [16].

The consul status and powers equated to a qadi (religious judge in the Muslim community) were established in Kumanikus Code, existing in the Golden Horde at that time [17]. Moreover, the consuls could apply national law on the basis of existing agreements. In particular, representatives of the Teutonic Hansa obeyed only their own law and courts, regardless of their trade place [18].

The power of the Venetian consul in Armenian Kingdom of Cilicia is evidenced by the text of trade treaties dated 1245 and 1271. According to those treaties, the consul had the authority to deal with the affairs of the Venetians. In addition to this, the consul was regarded as a public individual who was affected only by his government and had complete independence from the receiving party [19].

Assizes de Jerusalem (1099) are concerned with the consuls and magistrates of the sea. When The Crusaders seized a part of the territory in the East, they were forced to solve numerous questions of merchants and sailors. Assizes are associated with the appearance of international maritime law [20]. It was impossible to solve maritime questions with the civil proceedings rules as the civil cases were solved by duel. The crusaders courts began to apply customary merchant law. It resulted in the appearance of a special set of laws.

Jerusalem Assizes (Assises de royaume de Jérusalem) were divided into 2 parts: baronial assizes (les assises des barons) and petty-bourgeois assizes (les assises des bourgeois). The petty-bourgeois assizes contained decrees on sea trade and were applied by consuls or maritime magistrates. Between 1162 and 1173 the Maritime Laws of the Kingdom of Jerusalem jointed the petty-bourgeois assizes body. King Amaury added material and procedural norms into the assises.

Maritime laws began from the 43d chapter of the bourgeois assizes. According to them the consideration of cases between merchants and sailors was carried out in the maritime chamber - the so-called "chain court" [21]. The significance of assizes in the formation and development of international commercial customs is ambiguous. Amory restored assizes after their lost in Cyprus, but in 1194 they were lost again and were restored by Jean-Ibelin. In 1535 the Venetians translated them into Italian, the gaps in Assizes were fulfilled by the French, Greek and Italian customs. “Jerusalem assizes” were viewed as a law book, not as the code [22].

Despite the creation of new laws, the Rhodian law still was particularly influential in the form of the Byzantine legal monument "Lex Rhodia de jactu". However, its provisions were so scanty that it was necessary to resort to other regulations of maritime trade relations. In the field of maritime trade there was an urgent need for precise and general rules, since all the monuments of medieval trade law related to maritime trade law [23].

Since the 11th century, each city that positions itself as a leader in maritime trade has its own collection of maritime customs. By the XIII century, “to consolidate maritime statutes, to regulate trade at sea, the rights and obligations of ship owners, sailors, merchants ...” became a tradition [24]. Particularly, the collection called “Tavola di Amalfi” (Tabula Amalphitana) was in its force in Amalfi [25]. However, in the XI century. other Italian cities took the lead at sea. But the popularity of this collection was quite significant, as was established later – its surviving copy was found only in 1844 in the Vienna Imperial Library [26].

The Amalfi tables of the Vienna counterpart contained 66 chapters, and all of them were devoted to the regulation of maritime trade relations [27]. The probable date of the Amalfi tables compilation is the XI-XII centuries. However, there is an assumption only of the local significance of "Tavola di Amalfi", as well as the ancient collection of sea customs of the city of Pisa - Ordo maris of the 12th century [28]. The Statutes of Pisa, published in 1160, were renewed and supplemented in 1225. At the same time, it is believed that the "case of legal settlement of maritime relations" was spread to the entire Mediterranean and the Adriatic from the Amalfi customs [29].

French doctrine recognizes the special role of the Amalfi Laws [30]. They were used until the 16th century under the Latin name "Capitula et ordinationes Curiae Maritimae nobilis civitatis Amalphe". The "conosamento" that was used in the carriage of goods and proving the fact of the contract, gained its popularity due to the texts of this collection. Later, as a document in Italian practice, "conosamento" was called "Polizza di cario".

After the fall of Amalfi, Venice, Genoa and Pisa began to share the status of the leading maritime power. The first Venice laws on navigation are almost unknown, but in 1255 the "Capitulaire nauticum" was published. It included 126 articles and regulated contracts in sea trade and issues of insurance against risks. It is worth noting that all contemporaries admired the power of the Venetian fleet and the system of merchant galleys (galero da mercato) [31]. The trade policy of Venice towards foreigners was also different.

When German merchants sold their goods in Venice, they could buy only Venetian goods, it was overseen by a special agent. For the citizens of Venice, it was forbidden to trade with the German goods in Germany, so all German merchants came to Venice in person [32]. The statutes of Split, Lezina,

Scardona and other cities were also well known in that time, but they almost completely copied the Venetian maritime customs.

The city of Marseille, a former Phoenician colony, deserves attention as in 1203, Marseille and Genoa signed an agreement on joint maritime trade [33]. Marseille had its own ancient maritime trade customs, probably related to the ancient Phoenician laws. In written form the customs were fixed in the book of the Marseille statutes (Statuts de Marseille) of 1256 as the special importance were given to them, especially in the regulation of maritime trade relations in France [34].

Most scientists prefer the well-known collection "Consulado del mare" (Consolato del mare, Consulat de la Mer, Consulatus maris), that was in force on the Mediterranean and Adriatic seas, including the Middle East. The collection included both ancient customs and the provisions of later Byzantine law. At that time this collection had no equal, in terms of the importance of its decisions [35]. In terms of content, this collection was a practical guide, included consular decrees on various issues of maritime practice, combined almost all the customs that were in force at that time in the Mediterranean.

It is supposed that, it was formed in Barcelona (in some sources Marseille was mentioned). In addition, these maritime customs could have been formed in Pisa, as its "Consuetudini di mare" nautical customs were approved by Pope Gregory VII in 1077. It is considered that the period of "Consulado del mare" formation was a fairly long period of time: from the XI to the XIV century, inclusive. This collection was not edited, but was gradually supplemented by later resolutions [36]. It was also believed that the maritime trade experts compiled their own statuti de mercanti. The synthesis of these collections in the XIV century resulted in the appearance of famous book "Il Consulate del Mare".

Even Venice changed its statutes to Il Consulate del Mare [37]. D.I. Kachenovsky argued that Barcelona is the birthplace of this collection, as the researched era had freedom of trade, regardless of faith. In addition, the courts (consuls) of Barcelona had unconditional authority among sea merchants, and the consuls' decisions eventually compiled a collection of maritime customs "Consolato del mare" [38]. The collection contained the norms of material and procedural law. It was especially noted that the Consulato del mare was not a law, but its significance was great and was recognized by all seamen of the indicated region [39].

The appearance and development of special ships – "curiae maritimae" was driven by the special relationship developed during the evolution of maritime trade. Despite its practical orientation, the Consulat did not create new legal norms, its content reflected only the maritime customs of the Mediterranean Sea that have existed since ancient times. Afterwords, this collection became the basis for the French Maritime Ordinance in 1681, as well as the French Commercial Code, and then for the legislative acts on trade in a number of European states. The great international legal significance of this collection was noted as many of its customs were confirmed by international treatises of the 13th-15th centuries [40].

In the northern seas, there were other collections, but almost all of them represent borrowings from the ones presented above (mainly also from the Oleron Law), taking into account national characteristics (supplemented by Dutch customs). The maritime trade of Germanic nations performed maritime trade quite actively, even in the 9th century. Among the partners were England (the granting of privileges to German merchants for trade in London by King Ethelred in 1000; the treaty of Frederick I with Henry II of 1157, etc.), Russia (agreements with Novgorod and Smolensk) and other northern states. A feature of German trade was that it was conducted exclusively on merchant ships provided with the necessary weapons and security.

A collection of maritime customs Les Coutumes d'Amsterdam, d'Enchuyssen et de Stavern that reproduced the Rôles d'Oléron appeared in Holland from the XIV century. Despite the compilation, Jugements de Damme and Jugements d'Amsterdam were of vital importance in the development of merchant shipping in the North of Europe [41]. However, a collection of the 15th century called "Wisby Maritime Law" (Hogeste Water-Recht tho Wisby) was of great importance in this region. Almost all the states of the Baltic basin adopted these customs, as a whole they were called "lois de Wisbuy" [42].

A.N. Stoyanov mentioned the importance of the Visby law collection, as its appearence is also disputed by the Netherlands, Denmark (Copenhagen) and Germany (Lubeck). However, the Visby rules, like many other later collections, are a compilation of the Oleron, Amsterdam and a number of other statutes [43]. Wisby law became widespread, as in the XI-XII centuries the city of Wisby became a large trade center. In 1158 the city of Lubeck founded a trading company in the city of Wisby - "hanza" - "partnership", due to the equidistance from the main seaports. In this trading company each nation had its own representative agency, and they could have a whole street or quarter.

The Wisby rules contained 66 articles, 25 of them fully reproduced the rules of Oleron, while others repeated the customs of Amsterdam. All collections are dedicated to private navigation. The Hanseatic League as a "society of German merchants" was formed when a number of port cities and trade centers of German lands (Bremen, Lubeck, Riga, Dortmund, Munster, etc.) concluded a trade agreement with Smolensk prince Mstislav Davydovich in 1229. An agreement between Smolensk, Riga, Wisby and other German cities were called "Smolensk trade truth." German and Gotland merchants had trade agreements with Novgorod back in the 10th century [44].

After 1241, when the city of Lubeck became a leader, as the natural head of the trading community it began to conclude trade agreements on behalf of "all merchants of the Roman Empire". In 1349, the court of Lübeck was proclaimed as an appeals instance for all trade cities of the union. It also included Novgorod. Maritime trade in the northern seas was almost monopolized. Since 1280 Lubeck and Visby marine forces ensured the protection of trade in the Baltic [45]. During its existence, Hansa has developed collections of commercial law called recessions.

Delegates meetings were held in Lubeck annually. Trade development and protection were the main issues. Resolutions were signed before the departure of the delegates. The first collection of recesses, the so-called "Code of the Hansa" - "Collection of resolutions (recessions) of the Hanseatic cities" (Jus Anseaticum maritimum) was issued in 1591 and revised in 1614 [46]. Court decisions were made on the basis of the

recessions, and were commented on by lawyers. These rules were systematically edited and satisfied the realities of the sea trade life. However, the code contained only certain statutes provisions of the cities included in the Hansa, that were based on Roman law.

At the end of the XVI century, one of the last private collections of maritime customs - Guidon de la mer appeared in France. Its status is somewhat different from that of previous collections, as it`s officially supplemented by decrees and ordinances of the French kings. There was an idea that "the period of customary law in the history of the maritime law ends with this particular monument" [47]. There is a version that it was compiled in France, in Normandy, in the city of Rouen, by an unknown merchant.

At the same time, it is worth to note the originality of this collection, it did not duplicate the well-known law codes as it mainly regulated the issues of insurance and the issuance of lettres de margue [48]. As noted by E.L. Limonov, in the XVI century, Guidon de la mer first mentioned the bill of lading as a document where the captain had to indicate the quantity and quality of the cargo, while the collection clearly distinguished the charter and the bill of lading [49]. The provisions of the collection were almost completely included in the ordinance of 1681. The decline of lex mercatoria is associated precisely with the strengthening of feudal power and the development of both national and international law [50].

IV. Conclusions

Prototypes of many modern sub-institutions of international trade law appeared during the researched period. Despite irreconcilable contradictions, during the Middle Ages there was an urgent need for international regulation of maritime trade. However, the rivalry between trade competitors strengthened the practice of legal piracy. In addition, only by the XV century administrative legislation has been developed in the states, as it had a significant impact on sea trade. During this period, the problem of subjection to the foreign laws in the sphere of trade was especially acute, as there was no uniform practice.

So, first the Venetian, later the Hanseatic merchants were given the right to obey exclusively their own laws. However, while some traders had such privileges, others were obliged to obey foreign laws and foreign courts. And during the period of the territorial principle dominance, even the representatives of powerful merchant guilds were forced to abandon the privileges of the national right in order to preserve trade relations with a number of states. Closer to the XVI century the principle of mutuality was developed in Europe. Francis II issued patents allowing Swedish merchants to be tried by their own courts in any conflict. He made it in France in the middle of the XVI century.

Regarding the legal basis of international trade, the following can be noted: firstly, maritime trade law was a mixture of statutory, customary and case law; secondly, a characteristic feature of the commercial law of cities, states and unions of this historical period was the wide practice of the norms borrowing, and due to the difficulty of determining the creation date of this or that collection of customs in the early Middle Ages, it is rather difficult to establish the original source; thirdly, despite the loss of its former significance, Roman law had a fundamental influence on the formation of international commercial customs; fourthly, the formation and development of the rules of international trade was significantly influenced by the own customs of each port, where the ship called along the route.

The customary unified commercial maritime law that developed in the Middle Ages became the basis of the national legislations of the European states of the 17th and subsequent centuries, while continuing its own action. It's impossible to agree with the opinion of those who deny the existence of lex mercatoria on the territory of Europe, starting from the XI century.
This article is a part of a series of articles devoted to the evolution of international commercial customs (lex mercatoria), which had a significant impact on the formation of the doctrine of private international (conflict of laws) law. The findings of the study prove the existence of non-national international trade customs (lex mercatoria). Many institutions of commercial, international, maritime and civil law have developed due to their continuous operation.

These research can be used in the further study of the application of international commercial customs, disclosure of the history of the private international law doctrine, the formation of a holistic conceptual view of the problem of the application of legal customs in the modern world, will be of interest to specialists in the field of jurisprudence and economics, as well as to a wide range of readers interested in history of Europe.

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