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Genesis of International Commercial Custom (Lex Mercatoria): the Role of Rôles d'Oléron

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***Abstract*—In this article, the authors made an attempt to appraise the role and significance of the Roules d'Oleron in the formation of lex mercatoria as a special legal phenomenon on a par with the conflict of law, as well as in the development of both the national law of European countries and the norms of international trade law. It was made in a historical retrospective as historically, lex mercatoria came into existence arbitrarily, but its efficiency, timeliness and flexibility guaranteed long life. The authors identified the reasons for appearance and popularity of the Roules d'Oleron, as well as their further transformation into a broader form - lex mercatoria. Based on the analysis of various points of view, the authors come to the conclusion that the Roules d'Oleron became the basis of international commercial customs, that reflected not only in urban (statutory) law, but also in the legislation of the states of medieval Europe. The peculiarities of the content not only of the Roules d'Oleron, but also of the collections of trade customs derived from it are also highlighted and described. The article reveals various doctrinal approaches in terms of determining the significance of the Roules d'Oleron in formation of medieval legislation, as well as the preservation of its strength up to the present day.**

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

I. INTRODUCTION

The issue of legal support for commercial activities which is an important part of active development of international business at the present stage should be managed first. However, the problem of unifying the rules of world trade has always been acute for mankind since the creation of the first trade relations between nations.

Despite the fact that an effective system of generally recognized rules of international trade, called "Lex Mercatoria" had already existed in our history and it stood the test of time, the creation of unified rules for the regulation of international business still continues. Unfortunately, many opponents still believe that lex mercatoria is nothing more than a myth.

The truth in this issue can be established only with the help of deep comprehensive historical research that deals with the process of formation and development of the rules. Today these rules are known as INCOTERMS, that mistakenly considered only since the creation of the first collection in 1936.

However, it`s impossible to go against the importance of detailed international transport research as its formation begins in ancient times. Nonetheless this search is extremely difficult owing to the absence of written original sources and unified understanding of the term lex mercatoria.

It`s proved by scientific efforts of such specialists as V.A. Kanashevsky, I.S. Zykin, M.V. Majorina, N.A. Novikova, I.A. Getman-Pavlova, J.O. Alimova, E.N. Puzyreva, A.I. Loboda, A.A. Merezhko, Stephan W Schill, Monika Martišková, Ralf Michaels, Friedrich K. Juenger, Klaus Peter Berger, Gannagé Léna, Andreas F. Lowenfeld, David J. Bederman, Robilant di A., H. Berman, B. Goldman etc. However, the lex mercatoria and private international law research is incomprehensive. The reason is very little attention paid to the history of the issue in legal doctrine. In such a case, we should pay attention to the medieval statement that has become a legal formula «stylus mercatorum et consuetudo debet praevalere jure communi», and to the unexceptionable statement that «The Law of the Sea has been from the earliest times exceptional to the Law of the Land. No nation has ever claimed to exercise jurisdiction over the open see on the ground of exclusive possession. The sea has thus been exempt from legislation in the sense of the word, in which it is said to impose upon a subject the will» [1]. The purpose of this article is to fulfill this historiographic gap. The main objective of the

article is to trace the evolution of the international trade customs at the stage of their first writing and spreading in European countries.

II. METHODOLOGY

To solve this problem, the authors used traditional methods of scientific knowledge, including the dialectical method, that made it possible to identify not only the causes of genesis, but also the very fact of the existence of lex mercatoria. It was also used to consider it in conjunction with other legal phenomena. The historical and legal methods contributed to the disclosure of the lex mercatoria genesis problem. It also conduced the identification of the formation and evolution reasons of various legal institutions in the field of international trade legal regulation. The comparative and legal methods made it possible to reveal the features of international trade legal regulation, depending on the region of lex mercatoria usage.

III. RESULTS AND DISCUSSION

As noted by P.P. Tsitovich, all "the most important monuments of medieval commercial law mainly relate to maritime commercial law" [2]. Upwards XI century, each city presenting itself as a leader in maritime trade had its own collection of maritime customs. But closer to the XIII century it became a tradition to "consolidate maritime statutes, to regulate trade at sea, the rights and obligations of ship owners, sailors, merchants ..." [3].

In the late XI - early XII centuries. a collection of maritime customs, that extended its effect to sea voyages in the ocean and northern seas appeared in the late XI - early XII centuries. D.I. Kachenovsky suggested that these laws appeared in western Europe earlier than Consolato (approximately 11th century). They included customs and judicial decisions, that recorded at the end of each article - "tel est le jugement" [4]. The collection was called "Les Rôles ou jugements d'Oléron" and was especially popular in western European ports. There is no exact information about the collection origin. There is a legend that the French queen Eleanor of Aquitaine, wife of Louis VII, accompanied her husband to the Holy Land.

There they saw the Consolato del mare in its force. The Roules d'Oleron were drawn up by the Queen's order and named after the island of Oleron, her favorite island. It is believed that the Roules d'Oleron are the first written European maritime code based on ancient customs - the Rhodes Maritime Law. Right this period the center of international maritime trade was replaced from the Mediterranean towards the north. The island of Oleron became the main center where the Guild of Maritime Trade was placed. And disputes between merchants were also considered here. Afterwards Eleanor married the English king Henry III, she is the mother of Richard the Lion heart, so English writers dispute the nationality of the collection among the French [5; 6]. According to K. Berger, the publishing of the Oléron Scrolls could be associated not with Eleanor, but with her son - Richard: «However, the English Fasciculus de superioritate maris of 1339 contains a document stating that it was Eleanore's son, King Richard I ("the Lionheart"), who formulated the Rôles ("ley Olyroun") while on passage from the Holy Land. Alternatively, he may also have simply approved the work of the Queen Regent after his return» [7].

Nevertheless, the Roules d'Oleron formed the basis of maritime commercial law of many European states, including the states of the Hanseatic League. It also had some influence on Russian law.

Probably, it was also a private collection of practical (judicial) decisions [8], which were selected to regulate the most important issues in the field of maritime transport and trade. In reliance on the text language, this collection is attributed to French authors of the XI-XIII centuries. Despite its popularity, relating to the content it was far below the Consulado del mar, including 56 articles in later periods [9]. According to L. Otfeil, in the original version there were 25 articles, 10 more articles are attributed to the British. After that, when it was actively used in Spain and Flanders, it was supplemented with the remaining provisions. So, the Rules of Oleron included 46 articles when they were in force in France during the XVI century [10].

P.P. Tsitovich claimed that only 25 articles were added much later [11]. The researchers noted that, at core, Roules d'Oleron is a list of the sea law customs (expressed in judicial decisions) that were in force during its formation period on the Atlantic coast. However, the functionality of this collection contributed to its further spreading. In the Middle Age this collection wasn`t adopted only by France, England, Prussia, Castile but by many other countries. It was used as the basis for their national legislation. In the United States, even today, ships refer to Oleron's maritime customs [12].

Its compilations are known under the name of the Amsterdam or Enhuizen and Saverne laws. The importance of the Oleron Laws as the fundamental principle of Visby law, the Hanseatic-Teutonic regulations "Flemish and Amsterdam customs", the "Black Book" of the Admiralty was also confirmed by A.I. Dolivo-Dobrovolsky. He was referring to the fact that it is useless to speculate about the content of the lost collections of Trani, the Pisa Ordo maris and Tabula Amalphitana. Moreover, it`s useless to consider the ancient foundations of the Marseilles Statutes of the year 1256 and the distorted Jerusalem Assizes of 1099, although “elements of the doctrine about the responsibility of ship owners" that are already outlined in them [13]. The epic character of the Law of Oleron was also noted. It was expressed in the presence of blank pages for additional entries.

According to T. Twiss, the Roules d’Oleron provisions are nothing more than the results of legal proceedings. As before Oleron became a part of Great Britain on the basis of the Eleanor and Henry II marriage, the community of Oleron was granted a number of privileges, one of which was the dispensation of judicial power in maritime matters, according to the sea customs, merchant and maritime customs. According to the available written evidence (manuscript No. 227 of the Bodleian Library of Oxford dated by 1344), such justice was carried out on Oleron until the end of the XIV century [14].

"The Black Book of the Admiralty " the Code of Maritime Commercial Law of England in early XIII-XVII centuries is directly associated with the Roules d’Oleron. There are different variants of the book content. As even the book that was published by T. Twiss [15] on these customs was not reliable. The fact is that the original version of the "Black Book of the Admiralty" was kept in the archives of the Admiralty of England until 1874 and was not available, as it was considered lost.

Everyone referred to the ancient translation from French by the edition of "Rutter of the See", dated by 1536 until the

end of the XIX century. The Black Book peculiarity was in absence of the word "customs" in the title like other collections. Section "C" of the Black Book was called " Sea Sentences" and included 34 articles. The phrase "Such a judgment" at the end of each clause distinguishes the English collection of customs. For the most part, the articles of the Black Book repeated the provisions of the Roules d'Oleron.

Since the Black Book was unavailable for a long time, there were about ten manuscripts (manuscripts from the Black Book), which were used by sailors: the Bodleian manuscript of the beginning of the XIV century (22 articles) - storage area is Bodleian Library in Oxford; Rawlinson's manuscript of the XIV century (24 articles) - a copy of the Laws of Oleron from the archives of the Guilds House of London, storage place is the Bodleian Library; Selden's manuscript of the 15th century - storage area is also Bodleian Library; Oleron version from 1344 - Bodleian Library; Vespasianus manuscript of the 15th century - storage area is the British Museum; Gascon version - Manuscript of the British Museum; Garcie P. Le Grant Routier 1483 (46th articles) and others.

In addition, the laws of Oleron were applied much earlier than the report of the royal judges was made to the reign of Edward III, who officially introduced these customs. The archives of London contain a copy of the Roules d'Oleron, made in 1314, as well as the second copy of the scrolls, which was included in the collection of acts called the "Book of Horn" in 1311. These provisions were actively used in English commercial courts, since there was already a clause in the Black Book about the operation of the law of King John on the captain right to sell a part of the cargo to cover necessary expenses. In addition, according to the well-known Domesday Book, all the courts of the coastal English cities applied customary law, deciding cases between merchants and sailors.

The Roules d'Oleron were also used in France, in particular, in the ordinance of Charles V of 1364, they are recommended to be used in courts to decide commercial cases involving Castilians in the ports of Leura and Garfleur. Moreover, a single text of the Roules d'Oleron was adopted in Europe in the XVII century. It happened due to the popularity of the publication in 1641, the work of the French Lawyer E. Kleirak under the title "Les Us et Coustumes de la Mer". Flanders also borrowed an early version of Oleron's Law, as the Judgments of Damme contains the first 24 articles of the scrolls without any changes. In German trade centers, in particular, in Bruges at the end of the XIV century the so-called "Purple Book" was put into operation. According to the compilers, its content is an exact copy of the Roules d'Oleron.

There was no development of trade legislation, that considered the norms on maritime transport until the end of the 17th century. In the maritime states, there were a significant number of legal acts regulating contractual relations. The generally accepted Rôles d'Oléron no longer meet modern requirements, despite editions and additions. By the end of the 17th century the French Ordinance of 1681 gained the popularity. But another set of customs was taken as the basis of the ordinance.

IV. CONCLUSIONS

The custom appeared in the form of consolidation of the most useful and effective experience of mankind in a certain area. And as the first and ancient form it is essential to the formation of both national and international law. Its role was changing at different times, but had never been canceled or challenged. On the principle that the written legislation had already been existed, maritime customs continued their ubiquitous action, and the states laws contained a reference to the operation of these rules. The importance of the Roules d'Oleron in the development of both international trade relations and in the formation of branches of international and national law is undeniable [16].

Meanwhile, T.A. Batrova points out that lex mercatoria ceased to be a universal law for merchants already in the Middle Ages and even then lost its significance as a legal regulator of relations [17]. This position is also supported by S. Sachs, who asserts that the merchants in the Middle Ages used mainly legislative acts - the Merchant Charter of 1303 and the Statute of the Market of 1353 [18].

However, these rigid positions contravene the surviving sources of law enforcement practice, where the provisions of trade customs were actively used in the decisions of fair courts [19]. Modern commercial practice also stands for the importance of trade customs, where the model contracts formulated on the basis of the experience of international trade associations in the lead, not the norms of international or national legislation. [20].

Despite the fact that the French Ordonance of 1681 constituted the basis of international legal regulation in the field of trade, based on the work of the lawyer Etienne Kleirak, who summarized the customs of the maritime law. It`s worth noting that most of the customs from the Oleron Scroll still were included in the final text of The Ordinance of 1681. Moreover, being quite widespread in medieval Europe, the Roules d'Oleron in one way or another had a direct impact on the formation of both city (statutory) law and the national commercial law of all European countries.

The systematic editing of Rôles d'Oléron confirms the frequency of its use. It also supports the fact that Rôles d'Oléron were always brought in line with the requirements of the times and the changed conditions of maritime trade owing to the establishment of three key principles - freedom of the sea, independence of states and freedom of trade. As a result, these key principles allowed not only the maritime trade development but also the development of international maritime law in general.

This study is one of the elements of a scientific work devoted to a deep study of the history of the international commercial customs development. It also allows to determine the place and role of Rôles d'Oléron in the formation of not only the rules, but also the doctrine of private international law. These studies can be used in the further study of the international commercial customs application, disclosure of the INCOTERMS rules history and the UNIDROIT principles, the formation of a holistic conceptual view on the problem of the legal customs application in the modern world.

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