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Towards the Quest for the Lex Mercatoria: The Contribution of the Dijon School, 1957-1964

- English Translation of the French Original -[*]

The idea of the existence of special legal rules governing international commercial relations which are created outside or adjacent to the realm of state law first emerged in the 1950s. It was expressed in a scattered and diffused way. The birth of this movement and its consolidation were the results of observations of the practices followed by the operators of international trade. In France, the idea was strongly advocated in a series of works undertaken at the Faculty of Law of Dijon between 1956 and 1964. This is the origin of the Dijon School of the *lex mercatoria*.

The first reflection on the problem was triggered by an event of international significance: the nationalization of the Suez Canal by Egyptian authorities and the subsequent expropriation of the company operating the canal, the Universal Company of the Suez Maritime Canal.

In an article published in the newspaper 'Le Monde' on 4 October 1956[1], *Berthold Goldman*, at that time Professor at the Law Faculty of Dijon, tried to demonstrate that none of the connecting factors usually used by the different national systems (seat of a company, place of incorporation, nationality of the persons controling the company) led to the attribution of an Egyptian nationality to the Company, nor even of another nationality including French or French-English. The Company was, according to him, an international company directly subject to the international legal order. His analysis was based primarily on the object and the impact of its activity. He was able to refer to some precedents, such as the Bank for International Settlements or the International Red Cross, as examples of applications of this new concept. *Berthold Goldman* took up this idea in a broader context in a study published in the Journal du Droit International (Clunet) in 1963[2].

After this first foray into a transnational legal space, *Berthold Goldman* supervised three theses at Dijon: the first about the documentary credit, the second about international commercial sales and the third about international commercial arbitration[3].

The thesis about the documentary credit was submitted by *Jean Stoufflet* and was concerned with the legal analysis of an instrument to finance international trade. It reflected on the sense and the role of the Uniform Customs and Practice for Documentary Credit (UCP) issued by the International Chamber of Commerce (ICC) in 1933.

Together with the ICC Incoterms (1936) the UCP are one of the first legal texts with a claim to universal validity developed outside the states. And that is the original aspect of the thesis: it shows how the regulation of this financial instrument was not created *ex nihilo* in a lawyer's or an administration office, but that it constitutes a synthesis of the customs and practices of banks and the practices of commerce in general, including carriers and insurers. In their drafting phase, the UCP appeared as a unique set of rules, an expression of generally recognized solutions, and as a well-balanced contractual formula. That explains why these rules and customs have been adopted by most banking institutions and domestic banks.

Based on an appraisal and evaluation of commercial practices, the UCP constitute a genuine creation by a private institution representing the international business interests of all professional branches. Leaving aside the controversies as to the nature of these rules and their legal authority, one may regard them as an expression of what would be the *lex mercatoria*.

The thesis about international sales, submitted by *Philippe Kahn*, marks without a doubt a decisive

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[*] Translated by *Thomas Claeßens* and *Klaus Peter Berger*.

[1] *See* for an English translation of this article *infra* Annex II.

[2] *Cf. supra Klaus Peter Berger*, Introduction p. 1 for a more complete account of *Berthold Goldman*'s article on Suez Canal Company.

[3] *Jean Stoufflet*, Le crédit documentaire: étude juridique d'un instrument financier du commerce international, Paris, Librairie technique 1957; *Philippe Kahn*, La vente commerciale internationale, Paris, Sirey 1961; *Philippe Fouchard*, L'arbitrage commercial international, Paris, Dalloz 1965.

stage in the process of understanding the phenomenon of the birth of an a-national law within the framework created by international economic relations.

This was not the original aim of the thesis. It was supposed to deal with the Hague Conventions, of 15 June 1955 on the Law Applicable to International Sales of Goods, and of 15 April 1958 on the Law Governing Transfer of Title [Convention on the Law Governing Transfer of Title in International Sales of Goods] and on the Jurisdiction of the Selected Forum [Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods], and, in addition, with some particularities of substantive law, such as the financing (see the thesis about the documentary credit) and the administrative regulations of foreign trade. Nothing was, at first, leading to the *lex mercatoria*.

Philippe Kahn's first documentary research was focussed on French law and showed that civil law did not know any specific rules of international sale. This researched also showed that the leading judgments of the Cour de Cassation on matters like the autonomy of will or on monetary clauses concerned disputes that arose out of contracts for carriage of goods or loans. In the same way legal doctrine, apart from maritime sales, was poorly developed[4]. This relative vacuum lead the author to search for the reasons why the most used contract in international business – and the pivotal contract for many business activities (insurances, intermediaries, transports) – was so poorly represented in the legal world. Surely enough, at this time, the French system was generally oriented towards the legal state positivism with its pyramid consisting of laws, jurisprudence, and doctrine, in which the last element had the purpose to comment on and interpret the first two. The theory of conflict of laws was sufficient to raise internal sales (governed by the Code Civil) on to the sphere of international sales (by indicating the applicable national law). No doubt some voices – if not openly disagreeing than at least at the edge of the spectrum (*Edouard Lambert*[5] and his pupils, *Georges Scelle*) – had developed broader visions of international private and public relations, but those views remained a small minority.

The answer to the question 'why this official vacuum?' was found in the works of the United Nations Economic Commission for Europe (UNECE). In order to facilitate the business relations between Western and Eastern Europe at a time when political differences separated the two blocs and paralyzed exchanges between them, the Commission's legal adviser, *Lazare Kopelmanas*, searched for a common ground on a practical plan.

He thus proposed to develop general conditions of sale, which would not be mere transpositions from the national legal orders, but which would be based on the practices and the contracts of European business operators, exporters, and importers located in the countries of Western and Eastern Europe. Working groups were set up and were composed not of government representatives, but of operators of international trade under the administration of the Commission. Rich documentation accompanied by technical reports on key issues faced by the operators made it possible to grasp the existence of a legal life outside or adjacent to the states in order to respond to specific needs [of international trade]. It was based on this observation that the Commission and its working groups, on a product by product basis, developed general conditions of sale[6].

The understanding of this approach, which is both methodical and practical, led the author of the thesis to complete his investigation by collecting and examining numerous contracts and model contracts (the CAF contract of the London Corntrade Association [today: Grain and Feed Trade Association, GAFTA], contracts for iron and steel products, agricultural, forestal and mining products, textiles, equipment etc...).

This research produced two main conclusions:

1. One can distinguish between two types of sale: the sale of non-fungible goods (capital goods) and the sale of fungible goods (production goods and consumption goods).

2. In each of these types of sales a common foundation of rules as well as more specific rules ac-

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[4] *M. Ishizaki*, Le droit corporatif des ventes de soies, les contrat-types américains et la codification lyonnaise dans leurs rapports avec les autres places, Paris, M. Giard, 1928.

[5] *Cf. supra Klaus Peter Berger*, Chapter 2 II.G.3.b.cc.(b).

[6] Supply and Erection of Plant and Machinery for Import and Export, clauses no. 188 and no. 574; contracts for the sale of cereals CIF (by sea); 8 FOB-clauses, 2 clauses; uniform sale conditions for citrus fruits (General Conditions of Sale for Fresh Fruit and Vegetables including Citrus Fruit); Export and Import of Sawn Softwood, clause no. 410.

cording to the nature of the product being sold appears.

These rules are developed and followed without direct connection to or with hostility towards state laws. They are structured and enforced through international commercial arbitration which, in a way, legitimizes them.

The author of the thesis thought he was able to prove the existence – in a sociological, not in a legal sense – of a real society of sellers and buyers of international commerce, implying that there is a veritable society of operators of international commerce beyond the thesis.

Philippe Fouchard, the author of the thesis about international commercial arbitration, would later take up this idea using a less provocative terminology, replacing 'society' with 'community'. The advantage of this step was to use a less aggressive expression *vis-à-vis* the prevailing doctrine of legal positivism, which was hostile towards any curtailment of state laws. The method followed by *Philippe Fouchard* was similar to that followed by *Philippe Kahn*: collecting documents from practice, mainly arbitration clauses included in international contracts and international arbitral awards themselves. The second point raised a particular difficulty: the confidentiality of arbitration, impeding access to significant awards apart from the big oil-related awards that the media had made public. However, there was a moderating effect insofar as, contrary to the international sale itself whose 'natural jurisdiction' was arbitration, arbitral awards could be subjected to the ordinary jurisdictions by way of an exequatur procedure or an action of nullity, judicial decisions which themselves are public.

Nevertheless, despite this difficulty, the author was able to gather a significant number of either *ad hoc* awards or awards rendered under the auspices of numerous arbitral institutions. He was equally able to collect a considerable number of arbitration rules from these institutions, which provided him with an overview of the *status quo* of international commercial arbitration as it existed at the time.

His conclusion was that an internationalization of commercial arbitration was beginning to emerge both with respect to its organization and to its functioning: non-attachment to a state (minimization of the law of the place of arbitration), autonomy of the arbitration clause, priority of procedural rules adopted by international practice thanks to arbitration rules developed by arbitral institutions, freedom of choice of law (parties and arbitrators) including the application of an a-national law by the arbitrator etc.

Among the contributions of the thesis about international arbitration, one will remember on the one hand the demonstration that arbitration was becoming the general dispute resolution mechanism for disputes arising out of international trade operations. Of equal importance was the analysis of the use of their power by the arbitrators which leads them to uncover structuring principles from the often vague contract provisions and terms and conditions used by the operators of international trade.

At this stage, the three theses combined reveal operational activities and jurisdictional activities which together open a space whose legal nature is international in the strictest of senses, suggesting the existence of a transnational (global?) legal sphere. It should be noted that at the beginning of their work, the three authors did not envisage a research project about the *lex mercatoria* at all. It was the result of their research that led them to assert, each of them with his own mode of expression, the existence of a professional juridicity in the studied field of international commerce.

It is noteworthy that the method followed in the three theses was focussed on the analysis of instruments issued by commercial practice, leading the authors to minimize, yet not to deny or forget, [the impact of] the state or interstate sources. It also appears from their observations that the notion of public policy, whether of practical or state origin, does not seem to be a concern for institutions, contracting parties or arbitrators.

The synthesis was made by *Berthold Goldman* in his contribution 'Frontiers of law and *lex mercatoria*'[7] at the Seminar on Philosophy of Law dedicated to the topic of subjective rights. Returning to his own research on the international company and the works of his pupils, he stated 'that international commercial relations, broadly defined, seem to escape from the grip of state law and even uniform law integrated into the legislation of contracting states. Instead, those relations seem to be managed and governed by norms of professional origin or customary rules, and by principles that arbitral awards discover if not develop.' It was this phenomenon that he would propose to call '*lex mercatoria*' with

[7] *Berthold Goldman*, 'Frontière du droit et lex mercatoria' in Le Droit subjectif en question, p. 177, Paris, Sirey, 1964.

the success that we know.

If the 'Dijon School' has, in this period from 1956 to 1964, provided us with the most elaborate developments, supported by undeniable justifications for the existence of a *lex mercatoria*, it must be remembered that these reflections did not happen in isolation.

At the same time, *Clive M. Schmitthoff* was coming to the identical conclusion, using the same terminology. In several countries, personalities and institutions met and pondered about this new professional law. The minutes of the discussions about the autonomy of will, conducted at the 1964 Conference of the Hague on the International Sale of Goods, are significant; and so are the works of the commission *'Droit et vie des affaires'* of the University of Liège, which would subsequently play an essential role in the development and understanding of the *lex mercatoria*.

In any case, the demonstration of the existence of a set of norms of professional origin governing international trade relations was achieved in 1964. The system received its name '*lex mercatoria*' which would be used continuously throughout its tumultuous existence – an existence whose destiny is not yet complete[8].

[8] *Philippe Kahn*, 'La lex mercatoria et son destin', in L'actualité de la pensée de Berthold Goldman p. 25, Edition Panthéon Assas 2004.