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The Rebirth of the Lex Mercatoria

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In the late 1950s and early 1960s, the notion of transnational commercial law was revitalized by the French comparatist Berthold Goldman (image). An article by Goldman published in the 'Le Monde' in 1956 and dealing with the nationality of the Suez Canal Company marks the beginning of this process. In Goldman's view, this company was not of Egyptian, English, French or mixed nationality even though it could be considered as a juridical person of private law. Due to its particular capital structure, its organization and its activities, he regarded this company as 'une société internationale, relevant directement de l'ordre juridique international'. The status of the Suez Canal Company, both in terms of its legal source and its legal nature, was in his view 'essentially international'. Thus, in Goldman's view, the Suez Canal Company, in despite of its 'necessarily territorial genesis and functioning', was of a private law nature but of a transnational character.

In the wake of this notion of transnationalism, Fragistas and Goldstajn published law review articles in the early 1960s, the first on the transnationalization of arbitral procedure, the second on the evolution of an autonomous law merchant across the iron curtain. Beginning in 1964, Goldman himself articulated his view on the law merchant in various articles. At the outset of his groundbreaking article in the Archives de philosophie du droit of 1964 he made reference to the collection of materials of the Colloquium on "The New Sources of the Law of International Trade", arranged at King's College, London by the International Association of Legal Science in September 1964 and in particular to the "rapport général" of Professor Clive M. Schmitthoff. Goldman himself had not been present at the London Colloquium. His article ended with the statement:

"One is confronted with the difficulty that the lex mercatoria is not a complete legal system, and one may add that it does not concern a group that is politically organized, which alone can be invested with a irresistible coercive force. But that does not appear as sufficient to contest that certain of those norms of which the lex mercatoria is composed – and in reality all with the exception of those model-contracts drafted by a single enterprise – are clearly general rules of law (and not simply individual norms 'annexed' to a rule of domestic law which recognizes the binding force of contracts)...

The lex mercatoria is therefore well situated, both with respect to substance and to form, in the domain of the law; it remains to be verified whether the interests which it seeks to satisfy are sufficiently balanced to guarantee the legitimacy of its rules. But that is, as Kipling would say, another story."

In the beginning, his understanding of the lex mercatoria was not that of an entirely autonomous system. Later, he argued that the new lex mercatoria was in fact an 'ensemble' of general principles and legal rules growing out of a process of spontaneous, institutional lawmaking. This process is detached from domestic legal systems and escapes the realm of domestic lawmakers which is limited to the territory of the respective jurisdiction. Instead, the law is created within the community of merchants doing cross-border trade and commerce, the societas mercatorum. From the very beginning, Goldman also emphasized the role of international arbitral tribunals in the discovery and development of the new lex mercatoria:
“Charged with the decision of disputes of international commerce, the arbitrators…when they refer to specific norms having their roots in the contract …. (model contracts, codified usages,..) cannot always limit themselves with that reference: a background of general principles is often indispensible for them, even if they do not always refer to it explicitly.

Experience shows that often they do not search [for a solution] in a domestic legal system or an international convention, but in a ‘customary law’ of international trade – lex mercatoria – of which it is useless to determine whether they discover or develop it, because both approaches are intimately intertwined, as in any case in which a judge performs such an activity.”

Since he first published his view, this doctrine of an autonomous, a-national legal order of transnational commercial law, of a ‘third legal system’ has sent 'shock waves' through the traditional doctrine of legal sources. His views were later developed and expanded by his academic pupils Philippe Fouchard in the area of international commercial arbitration (‘droit commun des nations’)11 and Philippe Kahn in the area of international sales law12 and general international contract law13. At a conference on transnational commercial law at the Faculty of Law, University of Verona, Italy in November 1999, Philippe Kahn reported from his memories that they did not "(re-)invent" the lex mercatoria in the 1960s but that the idea evolved from their academic work on international sales and contract law and international corporation law.

They have inspired many of those who have contributed to the study of transnational commercial law since then14.

1Goldman, La Compagnie de Suez, société internationale, Le Monde, October 4, 1956, 3 (I was made aware of this article by Professor Philippe Kahn, France, at the Conference on 'International Uniform Commercial Law Conventions, Lex Mercatoria and Unidroit Principles', November 4, 1999 Verona University, Faculty of Law, Italy).
2Fragistas, Rev.crit.dr.int.pr. 1960, 1 et seq.
5Schmitthoff, The Law of International Trade - Its Growth, Formulation and Operation, in: Schmitthoff (ed.), The Sources of the law of International Trade, 1964, at 3 et seq; this conference is generally regarded as a milestone in the academic discussion on the new law merchant.
6Goldman, Archives de philosophie du droit 1964, at 192. (Translation from French)
7Goldman, Archives de philosophie du droit 1964, 189: "Be that as it may, it seems to us that character of the rules may not be refused as part of the constitutive elements of the lex mercatoria, even though it does not constitute an entirely autonomous system”.
8Goldman, Clunet 1979, 49.9
9Goldman, Frontieres du droit et “lex mercatoria”, Archives de philosophie du droit 1964, p. 181,183 (Translation from French)
12Kahn, La Vente commerciale internationale, 1964, p. 365 et seq.
13Kahn, in: Le contrat économique international, 1975, p. 171 et seq.