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MERCHANT LAW IN EASTERN EUROPEAN COUNTRIES (XIII–XV CENTURIES)

Summary. In this article trade relations and peculiarities of the legal regulation of international trade in West-Russian, Baltic, Lithuanian lands in the 13th – 15th centuries are researched. The Eastern European model of medieval Merchant Law is established.

Key words: merchant law, history of merchant law, medieval law, fair courts.

Issue. Reforming of state and legal sphere is the trend of modern Ukrainian reality, and consideration of European legal traditions is a matter of great importance while this process. So its studies are quite necessary because they may provide us an information about the origin and evolution of the main European legal institutes and thus to make it possible to analyze European experience in order to adopt the best of it. The research of the items is also useful considering that Ukraine as well as other countries of Central and Eastern Europe is also the organic part of the general European civilization though its development had some peculiarities. So the comparing of certain legal institutes' evolution in Western and Eastern European countries is the matter of both scientific and practical interest.

One of the most noticeable institutes of European law is the Merchant Law, or lex mercatoria, as it was traditionally called in Latin. It functioned in many European regions as well as in Northern Africa and Minor Asia since Middle Ages, and nowadays methods of international dispute resolution, such as international commercial arbitration, have much in common with it. So the medieval Merchant Law may be considered to be the predecessor of the modern one. Thus the importance of medieval Merchant Law's origin and specific features studying is beyond doubt.

Analysis of recent research and publications. The history and the main characteristics of Merchant Law as it functioned in Western Europe, especially in England, are quite well researched. But the unified opinion on the question hasn't been formed. The conception of Merchant Law as of the particular legal system which existed in medieval Europe has both its proponents and its opponents. Scholars established that the term "Merchant Law" was used in the late XIII century, and its using was unique to England [1]. It is worth to note that the term was mentioned in XVII century' treatise "Consuetudo, Vel *Lex Mercatoria* or The Ancient Law-Merchant" (1622) written by Gerard de Malynes and since that time it was included into scientific using. The author envisaged the Law Merchant as part of the "Law of Nations" that enshrined "the most ancient customs concurring with the Law of Nations of all Countries"; he claimed that Merchant Law was "a Customary Law approved by the authorities of all Kingdoms and Commonweals, and not a Law established by the Sovereignty of any Prince, either in the first foundation or by continuance of time" [2]. The treatise started the tradition of considering medieval Merchant Law to be a particular legal system which existed apart from the other medieval legal systems such as Minor Law, Urban Law, Canon Law etc. E.g. Harold J. Berman speculated Merchant Law as an important part of Western European legal tradition; he also made fundamental analyses of it and established its characteristics [3]. Bruce L. Benson admits the existence of Merchant Law as a special part of medieval legal system; he extends the area of its usage claiming that it was spread not only in different parts of medieval Europe but also in Maghreb or Muslim West and Judea. As for the origin of it Benson contends that it was based on custom law and also it merged some German legal norms [4]. Leon E. Trakman claims that lex mercatoria existed as a peculiar legal system which was autonomous and universal for all the Europe [5].

According to Stephen E. Sachs's approach, the Merchant Law represented a new legal order, free from the oppressive control of local laws and local lords. The scholar claims that though the king and abbot had significant authority in the establishment of legal principles, the resolution of disputes, and the enforcement of the fair court's judgments, the merchants participated in each of these areas of authority, especially in rendering judgments. At the same time researcher admits that the thesis concerning medieval Merchant Law as a universal mean of commercial self-regulation in nowadays is of more than mere historical interest; it has repeatedly been used to support various political programs as scholars attempt to craft a new means of regulating international commerce – or even regulating the Internet-based on the model of the medieval law merchant [6].

Emily Kadens is a representative of those scholars who refuses the existence of Merchant Law and considers its concept to be a unsubstantiated myth. E. Kadens suggests that medieval commerce had little space for a specialized law, and that merchants had little need for it because of both the well-developed trading infrastructure and the actions of local governments to ensure the protection of legal rights [7]. German researcher Albrecht Cordes claims that in the Middle Ages, the term "Lex mercatoria" was used in the context of advantages and privileges granted to merchants in the field of civil litigation so there was no special legal system called "Merchant Law". Thus the scholar concludes that this is quite different from the modern sense of a system of substantive trade law that cannot be traced back any further than to the seventeenth century. In English law, it stands for certain privileges in thirteenth-century legal procedure, maybe even for a separate system of judicial procedure [8].

As a great deal of medieval international trade was held by sea, the Lex Mercatoria was closely connected with maritime law. Edda Frankot who undertook a comparative study of the shipping laws which operated in Aberdeen, Danzig, Kampen, Lubeck and Revel, came to the conclusion that no one body of maritime laws were commonly applied by the courts of these towns. So she established that the political and legal environment influenced a lot on the specific of maritime law which was applied in different countries [9; p. 10].

To conclude this short review we may admit that there are different and sometimes quite opposite approaches to the issue of Merchant Law in Middle Ages.

Unsolved problems. In spite of substantial research of *lex mercatoria* institute in Western European and North American legal history science, very few modern Ukrainian scientists pay serious attention to the problem. Olena Sidorenko investigated medieval trade practice on Ukrainian lands in the trans-national context [11]. Natalya Podalyak studied the history of Hansa and its connections with Russian lands, especially with Novgorod [12]. Andriy Blanutsa determinates the most important trade partners of Ukrainian merchants and the main trends in the process [13; p. 14]. Andriy Chutkiy investigated the economical history of Ukraine since Paleolithic and gave the description of its trade in the context [15]. So the scholar managed to reconstruct the main features of Ukrainian trade during main periods of its history. But he paid his attention mainly on economical aspects of the problem. Some historical researches deal with particular issues of medieval trade in European countries. But these studies are describing the theme from historical, not from the legal position, so the legal aspect is not studied enough. Nevertheless, during XIII–XV centuries authorities of Polotsk, Vitebsk, Novgorod, Smolensk, Lithuania concluded lots of treaties with Northern European countries; analyses of their text proves that Eastern European countries were involved in general European trade and the trading rules were regulated with Merchant Law legal norms. So the reconstruction of the process of Merchant Law functioning and its peculiarities in Eastern European countries would be an issue of sufficient scientific interest and importance.

This article has an **intention** to establish the main features and characteristics of Merchant Law in Western Russian and Lithuanian-Russian lands during XIII–XV centuries.

The main body. The commercial revolution of the tenth through the thirteenth centuries involved tremendous changes in trading arrangements and conditions. Harold J. Berman contended that it was during the XI and XII centuries "that the basic concepts and institutions of <...> *lex mercatoria* <...> were formed" [3].

In XII century it was founded a merchant trade association named Hansa which functioned during more than 500 years. Hansa managed to create a tremendous trade net which was extended from London to Novgorod and from Bergen to Bruges. So it was by its very nature a supra-territorial trade which involved regular contacts between persons from different territories. The result was that over time many of the rules and practices of one community could be observed by members of other communities. Hansa made a huge contribution in legal regulation of European international trade. It is worth to mention that modern scholars consider the Merchant Law to be not the product of a single merchant guild or even a single country, but as rather universal, the creature of the transnational merchant community, establishing substantive principles and convenient procedures to govern commerce across political borders [6, p. 688; 16, p. 9]. These rules were also taken into consideration by authorities of the countries and lands which were involved into the trade. During the period of so called feudal disunity (XII – XIII centuries) Western Russ was an active member of trade relations with Northern and Western partners. Trade dealings preserved and intencified during the period of the formation of centralized states (XIV – XVI). Long-distance trade in Northern Europe was first and foremost conducted overseas, but overland trade though not as intensive was also conducted especially during the periods when sea trade on some reasons became dangerous or not available. The lands of Western Russ, Baltic and Lithuania were active participants of Northern and Central European trade. It is known that in XIV century Lviv, Galitch, Peremyshl' and other towns of Chervona (Red) Russ had tight trade connections with Hungary, Czech, Silesia; Vilnius, Polotsk, Mogilev and other Lithuanian and Western Russian (modern Ukrainian and Belorussian) towns had regular trade contacts with Riga, Konigsberg, Danzig, Frankfurt, Leipzig and other Central and Northern European towns [17]. Foreign merchants constantly visited Russian and Lithuanian towns especially when the danger of Tatar's invasion blew over and the risks were sufficiently reduced. Since XV century it was held an Armenian community in Kiev. Also in Kiev permanently lived Moldavian, Greek, Turkish, Polish merchants; Genovese merchants had a special trade house in Kiev [18, p. 25]. Siegmund Freiherr von Herberstein who visited the Grand Duchy of Lithuania in early XVI century mentioned that the main products of the country which were sold abroad were honey, wax and ash as well as resin and wood for the shipbuilding. All this products in a large number were exported to Danzig, and then to Holland [19, p. 164–181]. Western Russian (modern Ukrainian) lands were the sufficient source of bread and salt. In 1523 the Danish king Christian II was deprived of the throne and fled; it caused an anomy and distemper in the region. During the next period the Northern and the Baltic Seas were not available because of the pirates and robbers, so European countries imported salt not from England as it was usual, but from Russ.

Trade contacts were established not only with Northern, but also with Eastern and Southern countries. Western Russian (Ukrainian) merchants were active trade partners of their colleagues from Kafa, Constatinople (since 1453 – Istanbul), Suchava, Sudak [20, p. 7].

So Western Russian and Baltic merchants had tight and intensive trade and business contacts with European and Asian ones. Consequently their business relations had to be regulated. In XIII – early XIV centuries the authorities of Vitebsk, Polotsk, Smolensk, Novgorod concluded the treaties with Riga and Livonia. Certain legal norms of the treaties were concerning the rules of the trade. In the treaty of Polotsk and Vitebsk with Livonia (1264) it was established that merchants of both parts were equal trade partners in Livonia as well as in Polotsk and Vitebsk [21, p. 77]. This legal norm wasn't a new one: the same rule was established e.g. in the treaty concluded by Lubeck and Hamburg in 1230 [22, p. 40–41]. In 1265 Polotsk and Riga established a mutual tax-free transit and trade of merchants of both countries; both parts bound themselves to provide the safety of merchants [21, p. 78]. On June, 3, 1326, the cessation of hostilities treaty between Novgorod and Norway was concluded. It was established that both Russian merchants in Norway and Norwegian ones in Novgorod could move and vend freely, without any limit [23, p. 45–46]. In 1300 the same legal norm was signed in the treaty of Riga with Smolensk [24, p. 452]. In 1320 the Volodymyr Duke Andriy Yurievitch guaranteed Toryn' merchants tax-free trade all over his lands [20, p. 17]. In 1323 in order to support the Lithuanian trade the Grand Lithuanian Duke Gediminas addressed to citizens of Lubeck, Rostock, Stralsund, Greifswald, Stettin and Gotland proclaiming that foreign merchants could move and vend in Grand Duchy of Lithuania without paying any taxes [25]. This norm one can also read in the treaty signed in 1388 by Gediminas with Livonian Order [26], in 1341 Gedeminas' sons Lubart and Keistut confirmed the right of tax-free trade to Toryn' merchants [20, p. 19]. This incentive tradition was continued in Lithuanian-Russian policy in XV century. The norm was included in the treaty between Grand Lithuanian Duke Casmir and Novgorod signed in 1447 [27, p. 115–116]. This rule was established not only by European countries: in 1392 peace between Golden Orda and

Poland was concluded and both Tatar Khan Tohtamysh and Polish king Yagaillo confirmed already existing commitments to provide free of charge way to merchants from another country [28, p. 17]. So we may conclude that some legal norms were widely expanded and were recognized not only by merchants, but by authorities as well. The reason is that different merchants often had different cultural and ethnic backgrounds and different native languages; and besides, geographic distances often inhibited direct communication between merchants. Consequently it was necessary to establish rules which could be clear and close to each one. The optimal and the simplest way to form such norms was to fix the rules which were proved in legal practice to be useful, effective and necessary ones. So the source of Merchant Law's norms was a trade practice during which certain legal norms were worked out. The most typical situations became a subject of a legal regulation and legal norms purchased an aim to facilitate the trade procedure and to reach fair and mutually acceptable decision in the cases of problems. One of the typical problems was that the foreign traders often were subject to confiscations and other types of harassment if one of their countrymen had defaulted in a business transaction. So the norm which provided safety of foreign merchants' property was included e.g. in p. 6 of the treaty of the Grand Lithuanian Duke Gediminas with Livonian Order (1338) [26]. It is necessary to stress that in XIII – XIV centuries the state in modern sense of the term didn't exist yet. Their enforcement machinery was too weak to provide an effective mechanism of execution of the legal rules. So merchants within various communities had to take actions to protect themselves. They tended to travel together, formed partnerships, and engage in various kinds of mutual support. Most of these kinds of support were carried out in medieval communities and were successfully applied in Merchant Law practice. Customary communities became mutual support groups with reciprocal obligations to assist each other in the pursuit of justice against outsiders. While this may simply involve mutual defense or mutual support in pursuit and prosecution of outsiders who committed offenses against insiders [4, p. 8]. Members of the community insured one another in order to assure outsiders who might be victimized, intentionally or accidentally, by a member of the group, can expect compensation from the entire community if a community member who is the offender cannot or will not pay. This norm was typical for medieval communities all over Europe, Asia and Northern Africa; it also existed in the law of Kievan Russ and was preserved in the Lithuanian-Russian law as well as in the law of Novgorod and Pskov republics.

A typical problem in medieval trade practice was the fact that there occurred conflicts between foreign merchants and native people. So it was necessary to establish the rules which guaranteed fair unbiased decisions and quick and not expensive procedure. First of all merchants needed courts and arbitration they might trust. In Western Europe since XII century special courts (e.g. *Piepoudre* or Piepowder courts) were created; in Eastern Europe authority permitted merchants to claim for justice to local courts. In XIII–XIV century foreign merchants got the privileges to be judged by courts in their countries if both parties were foreigners. But in the treaty of the Grand Lithuanian Duke Gediminas with Livonian Order it was established that if German merchant has being robbed in Russian land or in Lithuania he would be judged there. Consequently these courts were to work out and to use legal norms and procedures clear and acceptable for each foreigner.

Only in XV century special fair or market courts were established; while giving the Magdeburg Law Lithuanian dukes often granted town's rights to hold fairs usually twice a year. Each community appointed a representative who was in charge of performing various administrative duties including taking part in the fair court.

Conclusion. So medieval trade was widely extended on Western Russian, Baltic and Lithuanian lands. As the trade was a sufficient source of income, the authorities hold incentive policy concerning foreign merchants to encourage them to come to Russian, Lithuanian and Baltic markets. During XIII–XV century authorities of regional princedoms concluded treaties with Northern, Western, Southern and Central European rulers. Legal norms which were established in these documents as well as ones which were worked out during legal practice composed the system of Merchant Law in its Eastern European version. The main issues of its regulation were establishing of tax-free trade and independent courts for merchants both foreign and domestic. Monarchs bound themselves to guarantee the safety of merchants' life and their commodity. Legal measures brought along the shaping of integral universal European legal and cultural space.

References:

1. Michaels R. The True Lex Mercatoria: Law Beyond the State / R. Michaels // Duke University School of Law. – Volume 14. Issue 2. – 2007. – P. 447 – 468.
2. Malynes G. Consuetudo, Vel Lex Mercatoria or The Ancient Law-Merchant / G. de Malynes [Електронний ресурс]. – Режим доступу : https://archive.org/details/consuetudovellex00maly.
3. Берман Г.Дж. Западная традиция права : эпоха формирования / Г.Дж. Берман / Пер. с англ. – 2-е изд. – М. : Изд-во МГУ : Издательская группа ИНФРА-М – НОРМА, 1998. – 624 с.
4. Benson B.L. Customary Commercial Law, Credibility, Contracting, and Credit in the High Middle Ages / B.L. Benson [Електронний ресурс]. – Режим доступу : http://www.masonlec.org/site/rte_uploads/files/Benson.pdf.
5. Trakman L.E. The Twenty-First-Century Law Merchant / L.E. Trakman // American Business Law Journal. – Volume 48. Issue 11. – December, 2011. – P. 775–834.
6. Sachs S.E. The 'Law Merchant' and the Fair Court of St. Ives, 1270-1324 / S.E. Sachs // Harvard University Cambridge, Massachusetts. – March, 2002 [Електронний ресурс]. – Режим доступу : http://www.stevesachs.com/papers/paper_thesis.html.
7. Kadens E. The Medieval Law Merchant: The Tyranny of a Construct / E. Kadens [Електронний ресурс]. – Режим доступу : http://jla.oxfordjournals.org/content/early/2015/06/25/jla.lav004.full.
8. Cordes A. The search for a medieval Lex mercatoria / A. Cordes // Oxford University Comparative Law Forum [Електронний ресурс]. – Режим доступу : http://ouclf.iuscomp.org/articles/cordes.shtml.
9. Frankot E. Medieval Maritime Law from Oléron to Wisby: Jurisdictions in the Law of the Sea / E. Frankot // Communities in European History: Representations, Jurisdictions, Conflicts. Edited by Juan Pan-Montojo, Frederik Pedersen. – Pisa : Pisa University Press, 2007. – P. 151–172.
10. Frankot E. Of Laws of Ships and Shipmen's : Medieval Maritime Law and its Practice in Urban Northern Europe / E. Frankot. – Edinburg : Edinburg University Press, 2012. – 223 p.
11. Сидоренко О.Ф. Українські землі у міжнародній торгівлі (IX – середина XVII ст.) / О.Ф. Сидоренко. – К. : Наук. думка, 1992. – 229 с.
12. Подаляк Н.Г. Могутня Ганза. Комерційний простір, міське життя і дипломатія XII – XVII століть / Н.Г. Подаляк. – К. : Темпора, 2009. – 360 с.
13. Блануца А.В. Привілеї на магдебурзьке право містам Великого князівства Литовського та регламентація в них питань торгівлі (друга половина XV – перша третина XVI ст.) / А.В. Блануца // Історія торгівлі, податків та мита: зб. наук. праць / [за ред. О.О. Дячка]. – Дніпропетровськ, 2007. – С. 72–78.
14. Блануца А.В. Регламентація питань торгівлі в надавчій політиці великих князів литовських в першій половині XVI ст.) / А.В. Блануца // Історія торгівлі, податків та мита: зб. наук. праць / [за ред. О.О. Дячка]. – Дніпропетровськ, 2010. – № 1 (1). – С. 90–96.
15. Чупій А.І. Нариси з економічної історії України. Книга 1. На перехресті торгових шляхів / А.І. Чупій. – К. : Темпора, 2013. – 616 с.
16. Trakman L. E. The law merchant : the evolution of commercial law / L. E. Trakman. – Littleton, Colo. : F.B. Rothman, 1983. – 195 p.

17. Щербачёв Ю.Н. Материалы по истории Древней России, хранящиеся в Копенгагене. 1326–1690 / Ю.Н. Щербачёв. – М. : Университетская типография, 1893. – 344 с.
18. Левицкий О.И. Социнианство в Польше и Юго-Западной Руси / О.И. Левицький // Киевская старина. – Т. 2. – 1882. – Апрель. – С. 25–57.
19. Герберштейн С. Записки о московитских делах / С. Герберштейн. – СПб. : Узд-во А. С. Суворина, 1908. – 467 с.
20. Торгівля на Україні, XIV – середина XVII століття: Волинь і Наддніпрянщина / АН УРСР. Археограф, комісія та ін.; Упор. В.М. Кравченко, Н.М. Яковенко; Редкол. : М.Ф. Котляр (відп. ред.) та ін. – К. : Наук. думка, 1990. – 408 с.
21. Гильдебрант Г. Немецкая контора в Полоцке / Г. Гильдебрант // Сборник материалов и статей по истории Прибалтийского края. Том II. Отделение I. Материалы и статьи по древней истории Прибалтийского края, III. – Рига, 1879. – С. 44–77.
22. Подаляк Н.Г. «Для загальної користі» : репрезентація влади і церемоніал крізь призму врегулювання фланерського питання на ганзетагах другої половини XIV ст. / Н.Г. Подаляк // Соціум. Альманах соціальної історії. Вип. 8. – С. 32–44.
23. Шаскольский И.П. Договоры Новгорода с Норвегией / И.П. Шаскольский // Исторические записки. – Т. 14. – М. : Изд.АН СССР, 1945. – С. 40 – 61.
24. Напиерский К.Е. Русско-Ливонские акты / К.Е. Напиерский. – СПб. : Типография Академии наук, 1868. – 462 с.
25. 26 мая 1323 г. Послание Гедимина гражданам Любека, Ростока, Штральзунда, Грейфсвальда, Штеттина и Готланда [Електронний ресурс]. – Режим доступу : http://www.vostlit.info/Texts/Dokumenty/Litva/XIV/Gedimin/4.phtml?id=2245
26. 2 октября 1323 г. Мирный договор Гедимина с Орденом, Датским наместником Ревельской земли, епископами и Ригой // [Електронний ресурс]. – Режим доступ у: http://www.vostlit.info/Texts/Dokumenty/Litva/XIV/Gedimin/8.phtml?id=2249
27. Грамоты Великого Новгорода и Пскова / Ин-т истории Академии наук СССР. Ленингр. отд-ние; подгот. к печати В. Г. Гейман и др.; под ред. С. Н. Валка. – М.-Л. : Издательство Академии наук СССР, 1949. – 407, [1] с.
28. Ярлык Тохтамыша : второе возвращение // Эхо веков. – № 1–2. 1998. – С. 15–17.
29. Хорошкевич А.Л. Рижские грамоты 60–70х годов XV в. из бывшего Рижского городского архива / А.Л. Хорошкевич // Археографический ежегодник за 1965 г. – М. : Наука, 1966. – С. 325–341.

Ковальова С. Г. Торгове право у країнах Східної Європи (XIII – XV ст.)

Анотація. У статті встановлено торговельні зв'язки та особливості правового регулювання міжнародної торгівлі на західноруських, прибалтійських, литовських землях у XIII – XV ст. Проаналізовано правові норми, що стимулюють товарообіг. Зроблено висновок щодо східноєвропейської моделі середньовічного торгового права.

Ключові слова: торгове право, історія торгового права, середньовічне право, ярмаркові суди.

Ковалёва С. Г. Торговое право в странах Восточной Европы (XIII – XV вв.)

Аннотация. В статье установлены торговые связи и особенности правового регулирования международной торговли на западнорусских, прибалтийских, литовских землях в XIII – XV вв. Сделаны выводы относительно восточноевропейской модели средневекового торгового права.

Ключевые слова: торговое право, история торгового права, средневековое право, ярмарочные суды.