
THE DEVELOPMENT OF THE MODERN *LEX MERCATORIA*: A HISTORICAL PERSPECTIVE*

Marlene Wethmar-Lemmer (University of South Africa)

1 Introduction

That commonwealth of merchants hath always had a peculiar and proper law to rule and govern it; this law is called the Law Merchant whereof the law of nations do take special knowledge.¹

The nature and existence of the *lex mercatoria* have been hotly debated during the past few decades. Schmitthoff, the father of the theory of a “new *lex mercatoria*”, advocated the Roman *ius gentium* and the medieval *lex mercatoria* as predecessors of the modern *lex mercatoria*.² This averment has been criticised by numerous scholars. However, debate surrounding the *lex mercatoria* becomes irrelevant in the light of historical reality attesting to its existence from the advent of international trade.

It is a well-known fact that law does not exist in isolation from the community it serves. Thus legal and societal development may be depicted as two lines running parallel to each other. This article will provide an overview of the development of international commerce and its regulatory framework, the *lex mercatoria*. It will be illustrated that the *ius gentium* and the medieval *lex mercatoria* are but two dots on the unending line representing the history of the *lex mercatoria*.

2 The early history of commerce and commercial law

The ancient Assyrians, Egyptians, Carthaginians, Phoenicians, Greeks and Romans all played important roles in the early history of commerce.³ However, the only ancient commercial laws known to us today are those of the Greeks and the Romans. No fragments of the commercial laws of the other ancient peoples have been preserved.

* This article is based on Wethmar-Lemmer *The existence of a modern lex mercatoria* (LLM mini-thesis UJJ2005)

1 Sir John Davies *The Question Concerning Impositions* (1656) 10.

2 For a general overview of Schmitthoff's view on the *lex mercatoria*, see "International business law: a new law merchant" 1961 *Current Law and Social Problems* 129-153.

3 Register "Notes on the history of commerce and commercial law" 1913 *University of Pennsylvania Law Review* 431.

It warrants mentioning that the Phoenicians were exceptionally keen traders. They developed a maritime trade of such proportions that it was scarcely rivalled until the Middle Ages.⁴

The first commercial law of which knowledge exists today, is that of the Dorian island of Rhodos from the third century BC. Of this *Lex Rhodia* we also only have indirect knowledge through Roman law.⁵ It is probable that the *Lex Rhodia* consisted of a written text. As proof for this statement, Register correctly refers to the fact that the title of this law appears in quotation marks in Justinian's *Digest*.⁶ The *Digest* provides evidence of the fact that emperor Antoninus Pius adopted the *Lex Rhodia* into Roman law insofar as it did not conflict with the latter.⁷ Therefore the *Lex Rhodia* must have been a sophisticated body of commercial law to have been included in such a developed legal system as Roman law was at the time of Antoninus Pius.⁸

The *Lex Rhodia* is indeed the earliest preserved source of maritime law.⁹ It had a strong influence on most, if not all, legal systems of the Mediterranean countries. According to Register, it would be fair to say that the *Lex Rhodia* constituted the *ius gentium* of the seas until the Middle Ages.¹⁰

The Athenian laws, however, are the first of which we have preserved texts. The Athenians were also eager traders to such an extent that the Athenian calendar was divided into the navigable and the unnavigable season. The maritime law of Athens reached a high state of development and evidence exists of it containing provisions relating to ship owners, captains, seamen, passengers, cargo, transport, general average and bottomry.¹¹

At the outset of their history, the Romans were an agricultural people.¹² For the first two centuries¹³ they were not involved in trading by land or by sea. Soon after this, their military conquests brought them into contact with most of the nations of the then civilised world. This in turn incited trade, especially with

4 *Ibid.*

5 *D 14 2 De lege rodia iactu.*

6 Register (n 3) 432.

7 *D 14 2 9.*

8 Antoninus Pius reigned from AD 138 – 161.

9 *D 14 2 1: Paulus libro secundo sententiarum. Lege Rodia cavetur, ut, si levandae navis gratia iactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.*

10 Register (n 3) 432.

11 Register (n 3) 433.

12 According to legend, Rome was founded in 753 BC by Romulus, the first king of Rome. For a complete *excursus* on the history of Rome, see Boak & Sinnigen *A History of Rome to AD 565* (1965).

13 *Circa 750 BC – 500 BC.*

other seafaring nations. One of the most important contributing factors to the advent of Rome's international trade by sea was their rivalry with Carthage.¹⁴ Carthage's navy controlled the Mediterranean for centuries and Rome had to build a strong fleet to contend with them at sea. Rome's military feats caused an influx of foreigners and the result was that Rome soon became a cosmopolitan city.

In conscripting soldiers for her conquests, Rome took farmers away from their land and the growth of the Roman army resulted in such a decline in agrarian activity that from the later Republican period onwards Rome could no longer provide her own subsistence.¹⁵ This, of course, provided great impetus to international trade, especially the importing of consumables by Rome.

The wealth which the military conquests brought to Rome resulted in idleness which eventually led to Rome's downfall in 476 AD. The Romans became importers and consumers of the goods produced in their provinces. They no longer had the motivation to expand their own economy through invention and the development of new products.

This, however, did not detract from the sophisticated regulatory framework that Rome provided for international trade. In this regard, reference needs to be made to the *ius gentium*. The Romans drew a distinction between the law applicable to Roman citizens and the law applicable to foreigners. The former were subject to the *ius civile*¹⁶ while the *ius gentium* was applied to any dispute involving the latter.¹⁷

For purposes of a historical overview of the Roman international commercial law, attention therefore needs to be paid to the *ius gentium*. With the expansion of the Roman Empire, Roman citizens became involved with foreigners in their daily lives on an increasing basis. There were also many foreigners living in Rome. Inevitably, legal disputes arose between foreigners as well as between Roman citizens and foreigners. In 242 BC the office of the *praetor peregrinus*¹⁸ was instituted to deal with such disputes. The *praetor peregrinus* had the task

14 The First Punic War lasted from 264 BC until 241 BC and the Second Punic War from 218 BC until 201 BC, when Scipio Africanus finally defeated Carthage's general Hannibal at Zama.

15 The Republican period in Rome lasted from 509 BC until 27 BC.

16 The *ius civile* consisted of all the legal rules and legal institutions applicable to Roman citizens. See Spruit *Cunabula Iuris* (2003) 19 in this regard.

17 That is, disputes between foreigners or disputes between a foreigner and a Roman citizen.

18 The word *peregrinus* means "foreigner". Thus the *praetor peregrinus* had the task of administering justice in disputes involving foreigners, in contrast to the *praetor urbanus* who had to administer justice in disputes between Roman citizens.

of creating a body of law that would be applicable to these disputes. In order to do this, he drew heavily upon the principles of equity (*aequitas*) and substantive rules of Roman law and foreign legal systems. This system of law became known as the *ius gentium*. The *ius gentium* was characterised by the absence of formalities. With time, the *ius gentium* influenced the *ius civile*, making the latter a far less rigid and formalistic system.¹⁹ In 212 AD, Emperor Caracalla granted Roman citizenship to all inhabitants of the Roman Empire. This meant the end of the distinction between Roman citizens and foreigners. The *ius civile* and the *ius gentium* subsequently merged into one system. Since most of the principles of Roman commercial law came from the *ius gentium*, it is not surprising that many of the laws bearing on commerce are to be found in the codification of the praetorian edicts, known as the *Edictum Perpetuum*.²⁰

In summary it can be said that the main sources of Roman commercial law were the *Lex Rhodia*, the *Edictum Perpetuum*, the *Codex Theodosianus*,²¹ the *Corpus Iuris Civilis* of Justinian²² and the *Basilica* – a revision of Justinian's codification in Greek commenced by emperor Basil in Constantinople in 877.²³ In the East the *Basilica* remained the law until the Turks invaded Constantinople in 1453.

After the fall of the Western Roman Empire in 476 AD, Europe was dominated by invading barbarians. During the period that followed, known as the Middle Ages, international commerce disappeared almost completely.

3 Revival of trade in the twelfth century

The Middle Ages can be divided into two distinct periods: firstly a period of decline and the near disappearance of commerce, and secondly a period of revival from the twelfth century onwards, inspired by the Crusades.²⁴

The Crusades re-established relations between Europe and the East and had a profound impact on the growth of international commerce and production. Constantinople and the Italian cities supplied weapons and transport to the armies. The armies returning from the East introduced into Europe a taste for

19 Spruit (n 16) 20.

20 Codified in 130 AD.

21 Published in 438 AD by emperor Theodosius II in the Eastern Roman Empire and by emperor Valentine III in the Western Roman Empire.

22 This well-known codification of Roman law was undertaken by Tribonian, Justinian's Minister of Justice, from 527 to 535 AD.

23 Constantinople was the capital of the Eastern Roman empire.

24 The dates of the Crusades were: I: 1096-1099, II: 1147-1149, III: 1189- 1192, IV: 1200-1204, V: 1217-1221, VI: 1228- 1229, VII: 1248-1254, VIII: 1270. See Register (n 1) 655.

articles of the eastern civilisation. Europe and Asia Minor became acquainted. This gave momentum to ship-building, and processes for fabric and metal working were introduced from the east.²⁵

Mention needs to be made of the reception of Roman law which started in Europe during the twelfth century. The reception process was driven by the need for a more sophisticated legal system to govern complex international trade transactions as the Germanic customary law that regulated daily life during this time was not sufficient for the purpose. The reception was spearheaded by the Law School of the University of Bologna in Northern Italy, which was established late in the eleventh century. This first paradigm of the reception was known as the Glossators.²⁶ They made their important contribution to the reception process during the twelfth century. The most important exponents of this paradigm were Irnerius and Azo. Their method consisted of writing notes or *glossa* in the margins of the text of the *Corpus Iuris Civilis*. They firmly believed in the absolute authority of the text of the *Corpus Iuris Civilis*.

The second paradigm of the reception was the *Ultramontani* who did their important work during the thirteenth century in Orléans, France.²⁷ They took a more critical stance on the *Corpus Iuris Civilis*. Important scholars of this paradigm included De Revigny and De Bellaperche.

The third paradigm was known as the Commentators.²⁸ They were scholars at Bologna. The Commentators wrote long commentaries on the *Corpus Iuris Civilis* during the fourteenth century and endeavoured to explain its contradictions. They studied the *Corpus Iuris Civilis* in conjunction with municipal law. Bartolus and Baldus were the most famous exponents of this paradigm. The former is also considered to be the father of the science of international law.

The next centuries saw the rise of Humanism, the Renaissance and Enlightenment.²⁹ Throughout, legal scholars continued to study Roman law, although their approach and context varied. The Roman law influence was

25 Register (n 3) 656.

26 Thomas, Van der Merwe & Stoop *Historical Foundations of South African Private Law* (2000) 50-51.

27 *Idem* 53.

28 *Ibid.*

29 *Idem* 55-57.

eternalised by the codification of the major legal systems on the Continent during the seventeenth and eighteenth centuries.

The reception process preserved Roman law. It also ensured that all the legal systems of the Western European Continent had a Roman law basis. Most importantly for this discussion however, is the fact that the reception of Roman law had the effect of permeating all commercial custom. Thus the *lex mercatoria* from the twelfth century onwards had a decidedly Roman law character. As will be illustrated later,³⁰ even the commercial law of the common law jurisdictions was based on Roman law.

It is a well-known fact that the Roman Catholic Church wielded considerable power during the Middle Ages. Their doctrines influenced almost all aspects of daily life. The Church regularly held meetings in the bigger feudal cities. Some of the biggest commercial activities of the Middle Ages were the medieval fairs that were held in many of the feudal cities to coincide with religious festivals which attracted people from all over.³¹ These fairs became important centres for the development of commercial custom, especially in respect of bills of exchange. Another important development was the fact that the laws of particular towns, the largest trade centres, were growing into dominant codes of custom of trans-territorial proportions.³² In this way the customs of Barcelona, known as the *Consolato del Mare* (1340 AD), became an internationally recognised body of commercial custom. It certainly was the most important code of the Middle Ages.

The island of Oléron³³ produced the Rolls of Oléron in the twelfth century. They had a great influence on the development of the English Admiralty law.³⁴ These rolls consisted of a collection of precedents.

The Laws of Wisby came into existence during the latter part of the fifteenth century at Wisby on the island of Gothland in the Baltic Sea.³⁵

It is important to recognise the fact that the *Consolato del Mare*, the Rolls of Oléron and the Laws of Wisby were reflections of merchants' needs, not

30 See *infra* for a discussion of commercial law in the English common Law.

31 Trakman "The evolution of the law merchant: Our commercial heritage. Part 1: Ancient and medieval law merchant" 1980 *Journal of Maritime Law and Commerce* quotes at 8 Goldschmidt *Handbuch des Handelsrechts* (1891) 378.

32 Trakman (n 31) 14.

33 The island of Oléron lies off the west coast of France between La Rochelle and the mouth of Gironde, see Register (n 3) 670.

34 See *infra*.

35 Register (n 3) 670.

commandments issued by an external lawmaking body. As Goldschmidt aptly put it, “the legislators have copied, not dictated”.³⁶ An understanding of the nature of these commercial regulations makes for an understanding of the nature of the early *lex mercatoria*. Also of importance is the fact that commercial custom in use by far exceeded these three commercial codes. One of the distinct features of the *lex mercatoria* was its cosmopolitan character – the fact that it was not tied to local laws. It was intended to serve the needs of the whole international community and to keep up with changes in international commercial practice.

Trakman explains the interdependence or dialogue between the nature of the *lex mercatoria* and commercial practice aptly:

There was the underlying need to promote trade based upon freedom, subject to the need to pay a “just price” and subject to the need to avoid usurious interest rates. Law which mandated the nature of trade beyond this arena would create economic loss, cause social disapproval and infringe upon public welfare. Rulers who sought by means of national law to rigidify this free commerce would inhibit the success of exchanges in the market place – to the loss of both the foreign and the local merchant community. The only law which could effectively enhance the activities of merchants under these conditions would be suppletive law *ie* law which recognised the capacity of merchants to regulate their own affairs through their customs, their usages and their practices.³⁷

The question may come to mind what the medieval *lex mercatoria* encompassed apart from the three codes mentioned above. In general, the *lex mercatoria* embodied a respect for merchant practice as a primary source of regulation and the “law” as a secondary control over commerce. Good faith formed the cornerstone of international commercial agreements. Reciprocity and the threat of business sanctions compelled performance. The agreement remained the overriding force in regulating merchant conduct.

36 Trakman (Part 1) (n 31) 8.

37 Trakman (Part 1) (n 31) 5.

4 The *lex mercatoria* and its development in the common law and civil law jurisdictions from the sixteenth to the nineteenth century

The character of the *lex mercatoria* changed again in the sixteenth and seventeenth centuries, but its foundations remained intact in both the civil law and common law jurisdictions.

In the later medieval times, the *lex mercatoria* attained a cosmopolitan character, liberated from the restraints of national legal systems. However, from the sixteenth century until the nineteenth century, the *lex mercatoria* became synonymous with localised merchant practice and was no longer the sole determinant of acceptable behaviour in business affairs.³⁸ Nation states required that their internal policies and concerns be given direct consideration in the regulation of commerce. Commercial disputes were heard by domestic judges and were conducted under domestic rules of procedure, which of course differed from jurisdiction to jurisdiction. In common law jurisdictions specifically, the *lex mercatoria* or law merchant was “translated into a nationalised form, adapted in nature and content to the socio-political demands of each forum”.³⁹

During this time in Europe, merchant practices were often codified within commercial codes which bore a strong resemblance to the medieval *lex mercatoria*.⁴⁰ The commercial codes of the European states often codified trade practice. The reception of Roman law on the Continent⁴¹ once again placed the focus on Roman law concepts which had previously influenced the development of the *lex mercatoria*. The reception process in truth added support to the values underlying the *lex mercatoria*, namely freedom of contract among merchants and autonomy to conduct and regulate their own affairs. During the Renaissance,⁴² Continental legal systems embraced the long recognised *lex mercatoria*-principle of free trade.

The French legal system provides an example of direct recognition of the *lex mercatoria* principles as part of the codified framework of its domestic law.

38 Trakman “The evolution of the law merchant: Our commercial heritage. Part II: The modern law merchant” 1981 *Journal of Maritime Law and Commerce* 153.

39 Trakman (Part 2) (n 38) 154.

40 The seventeenth to nineteenth centuries saw the rise of nationalism, and along with that the notion of codifying national legal systems.

41 See *supra*.

42 The Renaissance dated roughly from 1450 – 1600.

Thus it was a principle of French law that agreements entered into in good faith should be respected by the parties and enforced in law.⁴³ Special commercial codes such as the *Ordonnance sur le Commerce*⁴⁴ and the *Ordonnance sur la Marine* of 1861 required French commercial law to give greater regard to commercial practice than to rigid legal forms and procedures.⁴⁵

In Germany, the *lex mercatoria* formed part of local customs during the sixteenth and seventeenth centuries. These customs differed from one principality to the next. In 1861 the fragmented commercial laws of the polarised local communities were blended together in the *Allgemeine Deutsche Handelsgesetzbuch* (1861). This was replaced by the *Handelsgesetzbuch* of 1897. These commercial codes incorporated the general principles of the *lex mercatoria* into German law, albeit with a distinct indigenous character.

According to Trakman,⁴⁶ the commercial and legal development in France and Germany may be seen as representative of what happened elsewhere in Europe.

From as early as 1066 AD,⁴⁷ an organised court system started to develop in England. It is therefore not surprising that, in contrast with the civil law systems, English legal development took on a decidedly casuistic character. The King's Court, which developed the old common law, was established in 1066. During the twelfth century the King's Court split into three divisions, namely the Court of the Exchequer, the Court of Common Pleas and the King's Bench. From the fourteenth century onwards, the second main court system in England, the Court of Chancery, started to develop the Law of Equity.

In 1353 the Statute of Staple was promulgated. The statute established courts in fifteen staple (market)⁴⁸ towns in England, Ireland and Wales, which became known as Courts of the Staple. The objective of instituting these staple towns was to facilitate the collection of customs duties from foreign merchants by confining trading in basic commodities to these towns.⁴⁹ The Statute also expressly provided that the Staple Courts were to apply the law merchant (*lex*

43 Trakman (Part 2) (n 38) 155. This is in line with the Roman law principle of *pacta sunt servanda*, which was absorbed into the *lex mercatoria* at an early stage of its development.

44 Codified in 1673 by the French jurist Colbert.

45 Trakman (Part 2) (n 38) 55 refers to Lyon et Renault: *Traite de Droit Commercial* (1921) for the texts of the Ordonnances mentioned above.

46 Trakman (Part 2) (n 38) 156.

47 The year that William the Conqueror, king of Normandy, took over the reign of England.

48 The word "staple" is derived from the French "*estape*" meaning a market. See Walker *The English Legal System* (1976) 61.

49 Walker (n 48) 61.

mercatoria) and not the common law.⁵⁰ The juries in the Staple Courts were composed exclusively of merchants and normally sat during the merchant fairs. The Courts of Staple, classified under the so-called “special courts”, are worth mentioning as they introduced the *lex mercatoria* into the English legal system.⁵¹

A third major court developed in the fourteenth century, namely the Court of Admiralty. Originally the Court of Admiralty only heard matters of piracy, but its jurisdiction was soon extended to include all maritime and commercial cases.⁵² During the fifteenth and sixteenth centuries the Court of Admiralty adopted the law merchant (*lex mercatoria*). This outraged many common law jurists and initiated the attack on all Roman law influences.⁵³ A strong pioneer of this movement was Sir Edward Coke. When Sir Coke became Chief Justice of the King’s Bench in 1613, the common law-courts began to assert a general jurisdiction over commercial matters at the expense of the jurisdiction of the Court of Admiralty.⁵⁴ It was exceedingly difficult to institute a successful common law action based on commercial custom. First, the custom had to exist from time immemorial to be recognised as a source of law, and secondly the custom had to apply to only a particular class of persons or to a particular place.

Although the jurisdiction of the Court of Admiralty was severely limited during the seventeenth century by Coke and his successors, the law merchant still remained in existence for practical reasons. England was a great seafaring nation and depended upon international commerce for its sustenance.⁵⁵ Commercial custom, as embodied in the *lex mercatoria*, prevailed as governing principle for international merchants. As Trakman remarks, English courts could not compete as regulators of world trade and ignore the reality of the international *lex mercatoria*.⁵⁶

During the eighteenth century, two renowned common law judges, Lord Holt and Lord Mansfield, endeavoured to solve the common law animosity towards

50 Bane “From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The progressive development of Commercial Law” 1983 *University of Miami Law Review* 351 354.

51 For a general overview of the functioning of the staple system, see Brodhurst “The merchants of the Staple” 1901 *Law Quarterly Review* 56.

52 Walker (n 48) 61 correctly refers to the fact that it had at all times been difficult to separate mercantile and maritime law.

53 Most common law jurists prided themselves on the fact that the English legal system had developed before the reception of Roman law started to take place on the Continent and therefore they felt that they need not pay any heed to Roman law.

54 Bane (n 50) 355.

55 Trakman (Part 2) (n 38) 158.

56 *Ibid.*

the *lex mercatoria*. Their work brought about the solution to the problems of common law actions based on mercantile custom and under these two judges the international law merchant / *lex mercatoria*⁵⁷ was integrated into the common law of England.⁵⁸

In his *Commentaries on the Laws of England*, first published in the eighteenth century, Blackstone⁵⁹ wrote:

No municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffic and merchandise; neither can they have a proper authority for this purpose ... For which reason the affairs of commerce are regulated by a law of their own called the law merchant or *lex mercatoria*.⁶⁰

These words, coming from such an authoritative English scholar, should be indicative of the fact that the law merchant / *lex mercatoria* was given due consideration in the English common law from the eighteenth century onwards.

As part of the British Empire, the American colonies had been ruled on the basis of the English common law. After the American Revolution, the United States chose to retain the common law, and each state adopted a reception provision to the effect that the common law, as it existed on 4 July 1776, was the governing law. Merchant practice was accorded a high status in American law. Trade practices were regarded as being enforceable without being fixed in character, limited in application or in existence since time immemorial.⁶¹ The law merchant was considered part of the common law. One state, South Dakota, expressly provided that the common law included the law merchant/*lex mercatoria*: "In this state the rules of the common law, including the law merchant, are in force."⁶²

During the era from the sixteenth to the nineteenth century, the rise of nationalism gave the *lex mercatoria* different national faces. However, this period in time shows how the *lex mercatoria* started to have true global application, across the differences in national legal systems and in civil law and common law jurisdictions.

57 Based on the practices of the merchants of both the Continent and Britain.

58 Bane (n 50) 356; Trakman (Part 2) (n 38) 159.

59 Blackstone wrote the *Commentaries on the Laws of England* (1765 – 1769).

60 Blackstone *Commentaries on the Laws of England*, Vol I 15th edition, (1809) 273, as quoted by Berger "The new law merchant and the global market place" in *The Practice of Transnational Law* (2001) 14.

61 Trakman (Part 2) (n 38) 166.

62 Bane (n 50) 363.

5 The continuing development of the modern *lex mercatoria*

The twentieth century heralded the advent of true globalism.⁶³ This once again changed the face of the *lex mercatoria*. As Schmitthoff⁶⁴ says, large parts of the *lex mercatoria* is found in international conventions. Berger also refers to this as the creeping codification of the *lex mercatoria*.⁶⁵ It may be added that the *lex mercatoria* is also found in model laws, and other documents of various forms, drafted by international organisations. These international organisations and the documents on international commercial law drafted by them warrant further discussion.

Firstly, the International Chamber of Commerce (ICC)⁶⁶ was founded in 1919 with the task of promoting trade and investment, open markets for goods and services and the free flow of capital. The founding father and first president of the ICC was the French Minister of Commerce at that time, Etienne Clementel. Originally the ICC only represented the private business sectors of Belgium, Britain, France, Italy and the United States. It has expanded dramatically over the years to become a true world business organisation with thousands of member companies in more than 130 countries.

The work of the ICC is carried out by different commissions that compile voluntary "codes" on various topics relevant to international business. The ICC focuses on self-regulation in business and is of the conviction that "business operates most effectively with a minimum of government intervention".⁶⁷ Parties to business transactions may include these voluntary "codes" in their business contracts.

Probably the best-known of these "codes" are the so-called International Commerce Terms or Incoterms. The Incoterms are standard definitions most commonly used in international sales contracts. These Incoterms govern the

63 "The evolution of an autonomous law of international trade, found on universally accepted standards of business conduct, would be one of the most important developments of legal science in our time. It would constitute a common platform for commercial lawyers from all countries, those of planned and free market economy, those from civil law and common law, and those of fully developed and developing economy, which would enable them to co-operate in the perfection of the legal mechanism of international trade" (Schmitthoff "The law of international trade, its growth, formulation and operation" in *The Sources of International Trade* (1964) 3 5).

64 Schmitthoff (n 63) 5.

65 Berger *The Creeping Codification of the Lex Mercatoria* (1997).

66 Historical Background on the ICC, [http://www.iccwbo.org/home/menu_what_is_icc.asp] (accessed on 12 July 2005).

67 [http://www.iccwbo.org/home/menu_what_is_icc.asp] (accessed on 12 July 2005).

method of delivery, provide for various modes of transportation and indicate the method employed in determining the price of the goods sold.⁶⁸

The ICC introduced the first Incoterms in 1936. Since then it has been updated six times to keep pace with the developments in international trade. The current edition is the Incoterms 2000,⁶⁹ which is also endorsed by the United Nations Commission on International Trade Law.⁷⁰

Another well-known voluntary "code" compiled by the ICC is the "Uniform Customs and Practice for Documentary Credits", known as the UCP. The first version of the UCP was drafted in 1933. The impetus for drafting the UCP was provided by the importance the documentary letter of credit achieved after the First World War as an international payment instrument. The legal relationships created by the opening of a letter of credit mostly reach across national borders which give rise to various private international law problems.⁷¹ Furthermore, as Oelofse remarks, "different practices regarding documentary credits in different countries could, in the light of the international character of this payment instrument, create difficulties".⁷² Therefore, uniformity was needed in the field of documentary letters of credit. The UCP was revised in 1951, 1962, 1974, 1983 and 1993.⁷³ The current version, known as the UCP 500, was adopted by the ICC in 1993 and entered into force on 1 January 1994. Today, most banks worldwide issue letters of credit subject to the UCP 500, and it can be said that it has gained true universal application.

Secondly, reference needs to be made to the International Institute for the Unification of Private Law, known as UNIDROIT. Today, UNIDROIT is an intergovernmental organisation with its seat in Rome. UNIDROIT came into existence in 1926 as an auxiliary organ of the League of Nations and was re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT Statute.⁷⁴ The purpose of UNIDROIT is "to study the needs and the methods for modernising, harmonising and co-ordinating private and in particular commercial law as between states and groups of states".⁷⁵ Membership of

68 Van Niekerk & Schulze *The South African Law of International Trade: Selected Topics* (2000) 48.

69 For a detailed discussion of the various Incoterms of the 2000 version, consult Ramberg *ICC Guide to Incoterms 2000* (1999).

70 See *infra* for a discussion of UNCITRAL's activities.

71 Oelofse *The Law of Documentary Letters of Credit in Comparative Perspective* (1997) 10.

72 Oelofse (n 71) 10.

73 Oelofse (n 71) 11.

74 [<http://unidroit.org/english/presentation/main.htm>] (accessed 25 April 2005).

75 *Ibid.*

UNIDROIT is restricted to states that have acceded to the Statute. The current member states include, amongst others, Argentina, Australia, Belgium, China, Denmark, France, Italy, Japan, Mexico, India, the Russian Federation, Nigeria, South Africa, the United Kingdom and the United States and this provides evidence of the fact that UNIDROIT represents a wide variety of legal, economic and political systems.

UNIDROIT is responsible for drafting instruments of varying nature. They compile “Uniform Rules” that are concerned with substantive law rules. They also draft “Model Laws” that states may take into consideration when drafting domestic legislation, “General Principles” which contracting parties may include in their contracts, and “Legal Guides”.⁷⁶

For purposes of this discussion, the most important instrument drafted by UNIDROIT is the UNIDROIT Principles of International Commercial Contracts of 1994. According to the Preamble, it sets forth general rules for international commercial contracts. These Principles may be applied when the parties have agreed that their contract will be governed by “general principles of law”, the “*lex mercatoria*” or the like. This provides proof of the fact that these Principles are regarded as being part of the *lex mercatoria*. Another salient feature of the UNIDROIT principles that accords well with the nature of the *lex mercatoria*, is the fact that the Principles “are sufficiently flexible to take account of the constantly changing circumstances brought about by the technological developments affecting cross-border trade practice”.⁷⁷

The objective of the UNIDROIT Principles is to “establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied”.⁷⁸ The international character of the Principles is enhanced by the fact that they do not contain terminology particular to a national legal system.

Thirdly, the United Nations Commission on International Trade Law (UNCITRAL) was established in 1966 by the General Assembly of the United Nations (UN) and was given the general mandate to “further the progressive harmonisation and unification of the law of international trade”.⁷⁹ The Commission is composed of sixty member states elected for a period of six

76 *Ibid.*

77 *Ibid.*

78 *Ibid.*

79 [<http://www.uncitral.org/en.index.htm>] (accessed 25 April 2005).

years⁸⁰ by the General Assembly. Membership is structured “so as to be representative of the world’s various geographic regions and its principal economic and legal systems”.⁸¹

The Commission consists of six working groups that do the preparatory work on the topics falling within the Commission’s jurisdiction. Reference will now be made to a few of UNCITRAL’s achievements.

The UNCITRAL Arbitration Rules, adopted in 1976, provides “a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship”.⁸² These Rules are used in *ad hoc* and administered arbitrations.

The United Nations Convention on the Carriage of Goods by Sea (The Hamburg Rules of 1978) “established a uniform legal regime governing the rights and obligations of shippers, carriers and consignees under a contract of carriage of goods by sea”.⁸³ It entered into force on 1 November 1992.

The United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention of 1980) “establishes a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of both parties and the remedies for the breach of contract”.⁸⁴ This convention came into force on 1 January 1998.

The UNCITRAL Model Law on International Commercial Arbitration of 1985 has the purpose of “assisting states in reforming and modernising their laws on arbitral procedure so as to take into account the particular features and needs of International Commercial Arbitration”.⁸⁵

Much work has been done by the Commission to harmonise international trade law during the twentieth century.

The introduction to the UNIDROIT Principles discussed above, provides a succinct description of the development of the *lex mercatoria* during the twentieth century:

80 South Africa’s membership expires in 2007.

81 [<http://www.uncitral.org/en/index.htm>] (accessed 25 April 2005).

82 *Ibid.*

83 *Ibid.*

84 *Ibid.*

85 *Ibid.*

Efforts towards the international unification of law have hitherto essentially taken the form of binding instruments, such as supranational legislation or international conventions or of model laws. Since these instruments often risk remaining little more than a dead letter and tend to be rather fragmentary in character, calls are increasingly being made for recourse to non-legislative means of unification or harmonisation of the law. Some of these calls are for the further development of what is termed “international commercial custom” for example through model clauses and contracts formulated by interested business circles on the basis of current trade practices and relating to specific types of transactions or particular aspects thereof.⁸⁶

During the twentieth century, large parts of the *lex mercatoria* were included in conventions, model laws and the like. It is submitted that this phenomenon is a typical example of the twentieth century euphoria with newly found globalism and awe at vast technological advances. To the twentieth century merchants it made sense to create binding global instruments containing commercial custom developed over the centuries because they had the technological means to compile, communicate and enforce it.

However, the twenty first century merchant has become accustomed to the global village and to modern technology. The international commercial community has already come to the realisation that they do not need enforceable international instruments like the international conventions for their regulation. It is submitted that the twenty first century will see the *lex mercatoria* once again becoming pure commercial custom, albeit accessible at the click of a button.

6 Conclusion

It is interesting to note that the history of the *lex mercatoria* follows a cyclic pattern. In the earliest times, when cross-border trade first started between the ancient peoples, the *lex mercatoria* soon became a reality and consisted of commercial customs which international merchants adhered to in their dealings with each other. When Rome became a world power, it spread its legal system with its sovereignty across the known world. During this time, the international commercial world was also governed by Rome, who imposed taxes, rules and regulations. The *lex mercatoria* thus became imbued with international

86 [\[http://unidroit.org/english/presentation/main.htm\]](http://unidroit.org/english/presentation/main.htm) (accessed 25 April 2005).

regulations imposed by Rome. During the Middle Ages, the *lex mercatoria* reverted back to consisting of mere commercial custom. With the rise of nationalism and the codification of national legal systems in the eighteenth and nineteenth centuries, rules of the *lex mercatoria* were assimilated into domestic legal systems. During this time the idea of state sovereignty was in the forefront and states wanted to exercise control over international trade. The twentieth century witnessed the digital explosion which heralded the advent of true globalism. At the beginning of the twenty first century, international merchants regularly conclude multibillion dollar transactions at the touch of a button.

An observation of commercial reality shows that international merchants continued to trade throughout the centuries, regardless of the external form of the rules of the *lex mercatoria*. They simply went about their business, knowing what rules they were bound to.

The *lex mercatoria* has existed since the advent of international trade. Its nature and content has been evolving continuously to keep up with the changing commercial environment and the everchanging needs of international merchants. Historical reality can attest to the fact that although the *lex mercatoria* is constantly changing, it remains in existence. It is impossible to predict the future form and content of the *lex mercatoria*. However, it may be said with certainty that, as long as international commerce exists, the *lex mercatoria* will exist.