Comparative Studies
in Continental and Anglo-American Legal History

Vergleichende Untersuchungen zur kontinentaleuropäischen
und anglo-amerikanischen Rechtsgeschichte

Band 24

From *lex mercatoria* to commercial law

Edited by

Vito Piergiovanni

Duncker & Humblot · Berlin

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Herausgegeben von

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und Reinhard Zimmermann

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VITO PIERGIOVANNI

Introduction

The series of *Comparative Studies in Continental and Anglo-American Legal History,* which hosts this volume, came into being through the endeavour of Helmut Coing and Knut Wolfgang Nörr (still the series editor). The intention was to establish a linkage – indeed, to build a bridge – between two legal cultures with much to discuss, in the conviction that historians can make an invaluable contribution to the dialogue. In keeping with this scientific intent, this book on the history of the *lex mercatoria* has been conceived as an almost obligatory intervention in a debate where epistemology and disciplinary boundaries are held in relatively scant consideration.

From this methodological perspective, it should be stressed that the book contains studies by legal historians of diverse backgrounds and cultures, although each of them is endowed with thorough knowledge of historiographical tools as applied to law. In view of the manner in which the debate on the *lex mercatoria* has developed in the past and is being conducted today, the intent of this introduction is to lay claim to competence and professionalism. Indeed, if I were asked to sum up the contents and overall significance of the articles in this book, my reply would be that they constitute a serious and methodological plea for the direct use of the legal sources, and an invitation to reason on the basis of the information that those sources furnish.

The literature on the *lex mercatoria* is a curious melange of medieval and modern legal history, commercial law, public and private international law, and comparative law, with a confusion of chronological levels and thematic juxtapositions between the present and the past. The overt purpose of many of these works is to give a reading to history, and to find in history, whatever best responds to contingent needs and to the particular ideology being propounded. A matter for discussion, as well as being a potential cause of further confusion, is the evolution that the legal sources are currently undergoing in the European Union. The temptation to establish connections on the basis of history and ancient juridical traditions is very strong; indeed, it is well-nigh irresistible.

Scholars of law and certain historians take the formative stages of commercial law as their points of departure for reflection on the ancient and contemporary history of the *lex mercatoria.* In some cases, this reflection is conducted in a manner entirely ancillary to current law. In others, it makes ideology-driven use of the

history of laws, legal science, and norms to buttress specific interpretations of both law and history, or to ground them upon tradition.

Often evident in the literature on the *lex mercatoria* is an intersection between two levels of discussion and argumentation: the former relative to the past, the latter to the present. Yet in both cases it is above all the future that the authors have in mind. For the proponents of the recovery of experiences from the past, postulating a systematic legal order signifies emphasising, in Europe, the unifying effect of Roman law both on the Continent and in England. The implication that follows from that postulate is that the future must be conditioned by this tradition of unity and universalism.

I have said that the legal historians contributing to this volume have diverse cultures and backgrounds. Yet the feature shared by their studies is a determination to unmask every attempt to make improper use of the sources of more ancient history.

As regards the *lex mercatoria,* accurate knowledge of the evolution of the law on trade and maritime and terrestrial traffic may be of assistance to the legal scholars of the twentieth and twenty-first centuries when they address the problems raised by the internationally-oriented evolution of legal and economic systems. Moreover, documentation from the past may be essential for the development of criteria with which to conduct better appraisal of the current situation of the theory and practice of commercial law.

Since the nineteenth century, and beginning with Levin Goldschmidt and his *Universalgeschichte,* legal historians have believed it possible to identify distinctive and unifying features of commercial law, and they have produced profound analyses on the matter, not only legal but also political and economic. In the mercantile field, the use of special conceptual and linguistic parameters has had to reckon with the legal and institutional context of the period in question. The custom-based practices of business raised coordination problems when they were to be applied in complex settings. Local and national institutions reacted to the imposition of external models which encouraged the development of a business community extraneous to political and economic control.

The national legal sources tended to become the sole frame of reference as they incorporated the rules on mercantile customs, and a relation was historically established between these different levels of legality that became, according to the situation, one of either cooperation or conflict.

Given that the contributors to this book are legal historians, they have naturally chosen to draw on the sources of ancient mercantile law for analysis and reflection. Their studies explore well-founded historical evidence across a broad chronological time-span from the Middle Ages until the nineteenth century, and across institutional settings different both politically and operationally. A range of themes are addressed. They either directly concern the existence of *lex mercatoria,* as in

the study by Cordes, or they relate to it through such topics as contracts, notably the *commenda* (Padoa Schioppa), or courts – instances being the *Rota Civile* of Genoa (Piergiovanni) or the Court of Antwerp (Wijfells) – the customary law of fairs (Fortunati), or that of the sea comprised in the *Roles d'Oleron* (Shephard), or Napoleonic codification (Ferrante), or nineteenth-century German legislation (Nörr and Schlecht), or the mercantile jurisprudence of Benvenuto Stracca (Donahue), or, finally, the relationship of *lex mercatoria* with legal education as personified by Story, that most versatile of jurists (Coquilette).

As the editor of this book, it is not my task in this introduction to enter into the merits of the interpretations and ideas put forward by the various contributors, especially because that they are not always in agreement. I merely point out that the book places in dialectic relation studies which, at different levels and with different outcomes, address the historical problems of the *lex mercatoria* from the point of view of the sources. There emerges from this arrangement – very substantially and somewhat unexpectedly – the central doctrinal importance of the common law as evidenced by Stracca's work and Belgian jurisprudence. Although the function and circulation of the common law are certainly not geographically circumscribed, one frequently observes, whenever an attempt is made to unduly extend the confines of *ius mercatorum,* that the only universal bodies of law known in the historical tradition since the Middle Ages have been canon and imperial law.

Closely connected with the themes just mentioned is the relationship between substantial law and procedural law within the *lex mercatoria.* This is another topic which almost all the studies in this book address, beginning with medieval examples and concluding with commercial arbitration in German legislation.

A final consideration concerns the fact that the majority of the studies deal with a branch of mercantile law which acquired its autonomy only in the late eighteenth century. I refer to maritime law, the substantial presence of which in this book prompts reflection on its function as an 'engine' of practice and legal theory. This will require re-examination of the history of medieval *ius mercatorum* in its entirety and assessment of whether, and to what extent, it originated in maritime trade.

This is not the only problem to address, however. Almost all the authors urge careful examination, using new sources, of the many aspects of the history of the *lex mercatoria* that are still controversial or unclear. It is my hope that this book will take a step forward in this direction, and for this reason as well, I wish to express my gratitude to all the authors for their valuable and expert contributions.

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