

Chicago Journal of International Law

Volume 5 | Number 1

Article 7

6-1-2004

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Recommended Citation

Fassberg, Celia Wasserstein (2004) "Lex Mercatoria - Hoist with Its Own Petard?," *Chicago Journal of International Law*. Vol. 5: No. 1, Article 7.

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Lex Mercatoria—Hoist with Its Own Petard?

Celia Wasserstein Fassberg*

I. INTRODUCTION

The modern *lex mercatoria* is unlike any other field of law. People never tire of asking whether it exists. Debates over its existence and over its nature hinge largely on its supposed autonomy and, in particular, on its purported independence of national law on the one hand and of international law on the other. It is consistently presented as a third legal system, neither national nor international, whose claim to autonomy is anchored in historical precedent and founded on necessity.

Discussions of the modern *lex mercatoria* often present it as a revival of a familiar phenomenon—the mediaeval law merchant of Western Europe. This conjures up an idyllic image of an international community of merchants interacting on the basis of shared values and customs, independent of local borders and law—a kind of self-governing transnational community. It is this model of self-governance that the idea of a modern *lex mercatoria* seeks to reinvent.

The idyll arouses a number of associations. One is that relations between merchants were governed by a set of substantive rules that were different from the ordinary rules of general application. Another is that these rules were applied only in special courts. A third is that they originated in mercantile custom. Yet another is that they were, in some sense, transnational. A final association is the threat posed to these purportedly autonomous people, laws, and institutions by more general societal legal institutions—in short, the state—culminating in the swallowing up of the law merchant in the English common law and in the European commercial codes, and its temporary demise as anything more than a historical source of national commercial law.

The modern trend toward specialisation may explain the fact that *lex mercatoria* literature hardly ever mentions historical research into the mediaeval

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law merchant in England;¹ people who deal with the law of international trade tend not to be legal historians. But the research is there. It suggests that the law merchant was not substantive, but rather procedural law, that it was neither transnational nor personal, that it was very probably not custom, that it was a part of local law, and that it was consequently never destroyed through incorporation.² These matters are disputed, and there may be no similar ideas for continental Europe, but the lack of interest in the accuracy of what is presented as a foundational model is suggestive.

For a long time, the existence of *lex mercatoria*, rather like the existence of God, seemed to depend largely on the will to believe. Much early writing on the subject was characterised by an ideological, almost mystical zeal. It was advocatory rather than descriptive or analytical. In this mode, a historical model only needs to offer ideal characteristics of the phenomenon that is advocated. It does not need to be more than an idea.

Appeals to faith were traditionally bolstered by a pragmatic argument for reinventing this model that goes more or less as follows: national commercial law does not provide for many of the problems unique to international trade; in any case, national laws differ from one another and produce uncertainty; choice-of-law rules—the technique which replaced substantive rules of mercantile behaviour—simply refer to national law, and are themselves uncertain; and merchant autonomy is the best means of producing uniform rules that respond to mercantile expectations and needs.

The literature advocating *lex mercatoria* has periodically been enhanced by attempts to provide evidence of its existence and, at the same time, to make it more accessible by formulating—or codifying—its rules. One such attempt was a series of proposals to use international law as a tool for imposing uniform special rules for international trade.³ Others have been the formulation of non-binding general principles of international commercial contract law by

¹ With the notable exception of Filip de Ly, *International Business Law and Lex Mercatoria* 16–17 (North-Holland 1992).

² See, for example, J.H. Baker, *The Law Merchant and the Common Law before 1700*, 38 *Camb L J* 295 (1979) and, more recently, M.E. Basile, et al, eds, *Lex Mercatoria and Legal Pluralism: A Late Thirteenth-Century Treatise and Its Afterlife* (Ames Foundation 1998).

³ Proposals such as those of the UNIDROIT secretariat in the 1970s to prepare general principles of contract law as a preliminary basis for a code of international world trade law, of René David to unify laws in a framework convention which would establish a Union with a legislative body virtually empowered to impose its rules on states, and of Clive Schmitthoff to replace such a Union with an Approval Committee whose decisions would pass through the General Assembly of the United Nations on their way to becoming international law. For a comprehensive survey and analysis of these efforts, see Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* 133–39 (Kluwer Law Intl 1999).

UNIDROIT,⁴ the Cornell Common Core project, the Lando Commission Principles of European Contract Law, the various ICC formulations and, finally, general lists of principles formulated by prominent scholars in the area of *lex mercatoria* such as Berthold Goldman,⁵ Lord Mustill,⁶ and most recently Klaus Peter Berger.⁷

I should like to take this opportunity of discussing the relationship of *lex mercatoria* with both national and international law to reexamine the question of its autonomy in the light of this move towards codification. I shall suggest that these relationships and the inevitable process of institutionalisation through codification undermine all claims to an autonomous *lex mercatoria* and produce the antithesis of what is offered as its model.

II. THE PERSPECTIVE OF *LEX MERCATORIA*

The relationship of *lex mercatoria* with national and international law, as seen from its own perspective, differs according to the definition of *lex mercatoria* that is used.

The early proponents of *lex mercatoria*, occupied with launching it as an idea, define *lex mercatoria* as a spontaneous emanation of customs and principles arising purely out of professional mercantile circles through mercantile activity and dispute resolution.⁸ Membership in the ranks of this *lex mercatoria* turns not only on the object of the rule's concern but also on its origin and nature. Only rules dealing with international trade and originating in mercantile custom qualify. Thus, nothing but informal custom, standardised trade terms and contractual forms, and the contents of arbitral awards qualify as *lex mercatoria*.

⁴ UNIDROIT is an independent intergovernmental organisation numbering fifty-nine member states whose purpose is to promote modernisation and harmonisation of private law among states. Its most significant contribution so far has been the Principles of International Commercial Contracts.

⁵ For example, Berthold Goldman, *The Applicable Law: General Principles of Law—The Lex Mercatoria*, in Julian D.M. Lew, ed, *Contemporary Problems in International Arbitration* 113 (Queen Mary 1986).

⁶ Rt. Hon. Lord Justice Mustill, *The New Lex Mercatoria: The First Twenty-five Years*, in Liber Amicorum for the Rt. Hon. Lord Wilberforce 149 (Clarendon 1987). Lord Mustill's list (as it is described by Berger, *The Creeping Codification* at 215 (cited in note 3)) is presented in the context of a persuasively sceptical examination of the validity of "alleged" principles of *lex mercatoria* rather than as an attempt to compile a list of his own. Berger notes this scepticism but continues to refer to the list as one of positive principles. *The Creeping Codification* at 216.

⁷ Berger, *The Creeping Codification* (cited in note 3).

⁸ A typical example is Goldman, *The Applicable Law* (cited in note 5). For his earlier work, see for example, *Frontières du droit et lex mercatoria*, in *Archives de philosophie du droit* 177 (Sirey 1964); *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives*, 106 *J de Droit Intl* [Clunet] 475 (1979); *Nouvelles réflexions sur la lex mercatoria*, in Christian Dominicé, Robert Patry, and Claude Reymond, eds, *Études de droit international en l'honneur de Pierre Lalive* 241 (Helbing & Lichtenhahn 1993).

National substantive rules specially designed for international trade, as well as uniform laws originating in international conventions—on sales, for example—are necessarily excluded from its realm, although model contracts prepared by businessmen under the auspices of international organisations and consecrated by use may be included.

This view of *lex mercatoria* clearly leaves little room for either international or national law. National and international law—in the form of a rule or as a system—can be incorporated by parties on an ad hoc basis as a supplement to *lex mercatoria* since party autonomy is one of its central principles. Rules referred to with regularity can also become a permanent feature of *lex mercatoria* in this way. But it is only by regular use in mercantile circles that national legislative or judicial rules, international conventional or customary rules, and model contracts can qualify for inclusion in the canon.

While arbitration is regarded as the ideal forum for resolution of mercantile disputes (particularly anational arbitration⁹) and voluntary compliance as the ideal mode of enforcement,¹⁰ national courts may be called upon to resolve such disputes and in so doing, to apply *lex mercatoria*. In this way, courts become a tool for enforcement of *lex mercatoria* and as a result, national rules may happen to express *lex mercatoria* principles and may even consciously adopt them. Thus, while judicial application of *lex mercatoria* (as distinct from its application in arbitration) depends on national law and is subject to mandatory national law,¹¹ *lex mercatoria* can function autonomously and can serve as an autonomous source of law for national law.

Other scholars, more occupied with specifying the substance of the *lex mercatoria* and thus making it more accessible, have produced a much wider group of rules that includes virtually any rule dealing with international economic activity. In addition to anything recognised in the purist version, they include conventional and customary rules of public international law,¹² uniform laws originating in international convention and adopted by national systems, principles formulated by organisations such as UNIDROIT, formulations of legal principles common to a large number of legal systems such as the Common Core project and possibly even resolutions, recommendations, and

⁹ Anational arbitration is arbitration carried out under the auspices of an institution like the International Chamber of Commerce.

¹⁰ See Berger, *The Creeping Codification* at 106–08 (cited in note 3).

¹¹ See Goldman, *The Applicable Law* at 114 (cited in note 5).

¹² For example, international conventions on such matters as sale of goods, such as the World Bank Convention of 1965 which provides for settlement of investment disputes between states and foreign nationals (World Bank Convention on Settlement of Investment Disputes between States and Nationals of Other States, 1965, 6556 UN Treaty Ser 159), and the customary rule that expropriation by a state of property owned by a foreign national is permitted only if it is non-discriminatory and adequately compensated.

codes of conduct emanating from international organisations, whether customary or not.¹³ The most recent proposal—for “creeping codification of *lex mercatoria*”—suggests a list that:

reproduces all those rules and principles of the *lex mercatoria* as black-letter-law which have been accepted in international arbitral and contract practice together with comprehensive comparative references. The list unifies the various sources that have fostered the evolution of a transnational commercial legal system into one single, open-end [sic! C.W.F.] set of rules and principles: The reception of general principles of law, the codification of international trade law by ‘formulating agencies’, the case law of international arbitral tribunals, the law-making forces of international model contract forms and general conditions of trade, and finally the analysis of comparative legal science.¹⁴

All of these will, of course, need constant, informal, updating.

While this more flexible definition of *lex mercatoria* is also resistant to the idea that *lex mercatoria* might be a branch of international law or that it might be enforced by international organisations,¹⁵ it is clearly willing to use the institutions of international law as a facilitating agency for formulation of existing rules. It is also receptive to the idea that international law might be a substantive source for some of its rules. While the purist version admits international law as a source only if its rules are shown to be customary, this version seems to presume that its rules (even its conventional rules) are customary and thus qualified to be regarded as part of *lex mercatoria*.

Here, too, national law can supplement *lex mercatoria* when it is incorporated ad hoc by parties to a transaction, and *lex mercatoria* can be a source of national law, often subject to its mandatory provisions and its enforcement mechanisms.¹⁶ But in this view, national law is also a major substantive source for the rules of *lex mercatoria*. While the purist view rejects any rules not originating in mercantile behaviour, the more pragmatic theorists stress the importance of principles common to all, or many, legal systems. Berger’s “creeping codification” consecrates comparative law methodology as one of the “two pillars on which the legitimacy of this list is based.”¹⁷ His list of principles relies explicitly on comparative law research and its progeny—the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, and uniform laws adopted by national legal systems—all of which

¹³ Ole Lando includes all these in *The Lex Mercatoria in International Commercial Arbitration*, 34 *Int & Comp L Q* 747 (1985).

¹⁴ Berger, *The Creeping Codification* at 210–11 (cited in note 3).

¹⁵ But see note 3.

¹⁶ See, for example, Berger, *The Creeping Codification* at 76 (cited in note 3).

¹⁷ *Id* at 220.

represent a distillation of national principles. In this view, the specific origin of the rules is far less important to their autonomy than their object.

III. THE PERSPECTIVE OF INTERNATIONAL AND NATIONAL LAW

The perspective of international and national law on the autonomy of *lex mercatoria* depends far less on the way in which *lex mercatoria* is defined. There is little of interest that can be said about international law and its perspective on *lex mercatoria*. Modern international law does deal with trade. But its primary concern is regulating trade relations between states. Trade relations between states and foreign nationals enter its ambit, but trade relations between individuals do not. These can be seen at most as a necessary complement to the all-important principle of free trade. Here, the only capacity in which international law is relevant is as a facilitator. Its organisations contribute to unifying and harmonising law relating to trade, and they sometimes produce instruments of international law—conventions. But these conventions are not designed to be enforced by international institutions and they bind only those states that choose to adhere to them.

The attitude of national law to the modern *lex mercatoria* is more complex. National legal systems observably adopt specific items of *lex mercatoria*: items from the broad definition of *lex mercatoria* might include uniform laws originating in conventions, such as those on contracts for the sale of goods; items from the narrow definition might include customary practices such as standard contract terms or institutions (c.i.f. and f.o.b. shipping terms, insurance practices, documentary credits, etc.). Either through legislation or through case law, these institutions are adopted into the national system as part of its substantive law for transnational situations. *Lex mercatoria* is in this sense a historical substantive source for national rules designed for transnational situations, just as it is said to have been a historical source for national commercial law. It is adopted, however, not because it is *lex mercatoria*, nor even because it is custom, but rather because its substance is regarded as appropriate or because its international uniformity is regarded as an advantage. Furthermore, while the origin of these institutions may be in *lex mercatoria*, once absorbed into a legal system, such rules take on a local life of their own. Uniform law conventions are not identical in different states due to optional clauses and differences in interpretation. So, too, trade terms and other contractual practices in international transactions, while common to many countries, are nevertheless frequently interpreted differently in different systems.

Absorption of *lex mercatoria* by national law has little bearing on the question whether *lex mercatoria* is autonomous, particularly when the absorption is carried out through legislation; legislative adoption is wholly a national

initiative. By contrast, judicial adoption of *lex mercatoria* rules is a direct result of merchants bringing their cases to national courts. By doing so, they raise indirect questions of autonomy.

One such question is related to the *lex mercatoria* ideal of a community of merchants that never needs to resort to national legal institutions. There should be a sufficient body of substantive law to enable them to regulate all their relations, the existence of arbitral tribunals should be sufficient to permit them to opt out of any national legal system, and there should be a social network strong enough to enforce both rules and arbitral awards. But this is not in fact what happens. Cases are often litigated in national courts. While this is the mechanism whereby individual trade terms, usages, and customs—both informal and formal—are brought before courts and sometimes absorbed into national law, it indicates the degree to which *lex mercatoria* is dependent upon national law.

Paradoxically, it is the way in which national legal systems mediate this dependence that demonstrates the extent to which they acknowledge *lex mercatoria* as an autonomous system. National legal systems have a formal set of rules for dealing with other systems. These rules are rules of private international law—conflict of laws—and they deal with three separate issues: jurisdiction to adjudicate, choice of law, and enforcement of judgments.¹⁸

One measure of the receptiveness of national systems to the typical mode of dispute resolution in mercantile life (and to private dispute resolution in general) is their attitude to arbitration, specifically to individual agreements to resolve a dispute in arbitration and to awards given in such arbitration, whether foreign or anational. Another measure is the willingness of national systems to apply substantive *lex mercatoria* (including evidence of it found in existing arbitral awards). All these depend on rules of private international law.

The attitude toward arbitration agreements is typically brought into question when a party to an arbitration agreement seeks to evade it. While some national courts have traditionally regarded it as part of their duty to protect and even to broaden their jurisdiction, this is less and less the case today. When a defendant asks a court to stay proceedings because of an arbitration clause, most national systems will grant the stay and enforce the arbitration agreement in pretty much the same way as they enforce jurisdiction clauses—agreements to

¹⁸ This reference to private international law as a means of mediating *lex mercatoria* excludes from its ambit special substantive rules for international trade which often incorporate *lex mercatoria* principles. Modern conflicts writing generally includes such rules as one of the methodologies employed by legal systems to resolve transnational disputes. For the purposes of this paper, I restrict the term conflict of laws to traditional choice-of-law rules, which apply only after mandatory forum law, its laws of immediate application and its substantive rules, have been found inapplicable.

litigate in a foreign court.¹⁹ Furthermore, they make little, if any, distinction between local and foreign or anational arbitration. So too, the *lis alibi pendens* doctrine applies to pending arbitral proceedings if the agreement is valid,²⁰ and even a foreign judgment will be denied enforcement if it was given in defiance of a valid arbitral agreement.²¹

Just as courts tend to enforce arbitral agreements and foreign judicial decisions, so too they demonstrate great willingness to enforce and to recognise as *res judicata* foreign arbitral awards. This willingness is so great that legal systems tend to enforce and recognise arbitral awards without examining them on the merits, simply on the basis that the award arose out of a valid agreement between the parties, that it is valid under the law governing the proceedings, that the process was fair, and that the arbitrator acted within his jurisdiction.²² In other words, the substance of the award—including the questions whether the appropriate law was applied and whether it was properly applied—is not an issue in enforcement, and arbitral awards are treated as if they are at least as good as products of foreign legal systems.²³

¹⁹ This depends on the validity of the arbitration clause in the eyes of the court. Systems differ on the question of which law governs the different aspects of this validity (for example, whether the issue is arbitrable, whether the agreement was made in the appropriate form, etc.). In English and French law, for example, since the clause is contractual, its substantive validity generally depends on the law of the contract of which it is part. Lawrence Collins, ed, *Dicey and Morris on the Conflict of Laws*, Rule 57 at 591 (Sweet & Maxwell 13th ed 2000); Pierre Mayer, *Droit international privé* ¶ 298 at 193 (Montchrestien 4th ed 1991). Swiss law, by contrast, permits this to be determined, alternatively, by Swiss substantive law, that is, by the *lex fori* (Swiss Federal Act on Private International Law § 178(2)). The New York Convention on the Recognition and Enforcement of Arbitral Awards, 1958, subjects this same question to the law chosen by the parties or to the law of the country in which the award was made (art V(1)(a)). For an example of judicial unwillingness to apply the *lex mercatoria* to this question even though it was held to be the law of the contract, see note 29 below.

²⁰ See, for an interesting example, *Reichhold Norway A.S.A. v Goldman Sachs International* [2000] 1 WLR 173 (CA 2000) (England).

²¹ See, for example, Andreas Bucher and Andrea Bonomi, *Droit international privé* 327 (Helbing & Lichtenhahn 2001), referring to the obligation, laid down in the New York Convention, to recognise arbitral agreements. Notably, much of the law governing the national treatment of arbitral agreements is laid down in international conventions, to which a large number of states have acceded.

²² An interesting question that has arisen in this context is whether an arbitrator who was empowered to decide *ex aequo et bono* or as *amiable compositeur* exceeds his authority when he refers to *lex mercatoria* or general principles of law. This and similar questions are enthusiastically debated in arbitration literature.

²³ See, for example, the New York Convention, 1958; Collins, ed, *Dicey and Morrison on the Conflict of Laws* at 59–63 (cited in note 19). French law does require for the enforcement of foreign judgments that the foreign judge apply the same choice of law rule as would have been applicable in France. Mayer, *Droit international privé* ¶¶ 376–80 at 245 (cited in note 19). It seems not to require this of arbitral awards.

Another measure of national receptiveness or hostility towards *lex mercatoria* is the degree to which a national court is willing to apply (as distinct from adopt) it as substantive law. Most legal systems apply foreign law quite freely in accordance with choice-of-law rules or processes.²⁴ Most systems subscribe to the view that in contracts, parties enjoy almost unfettered autonomy. This autonomy expresses itself in the ability of the parties both to regulate the content of their relationship themselves in complete detail on any model they wish and to subject it to a set of wholly foreign rules. Very few systems require that the law chosen be connected in any way to the agreement. Parties are free to choose a law for their contract either by copying out all its relevant provisions, or by referring to it by name or by referring to parts of it that they wish to incorporate.²⁵ At least as long as such provisions do not conflict with local (and possibly also international) public policy or with mandatory rules of the putative law of the contract (the law with the closest connection to the contract), such provisions will generally be enforced.²⁶ In a similar way, it is now generally accepted that parties to an arbitration agreement may subject the dispute to any system of law, and even to principles or considerations that do not constitute a positive legal system.²⁷

²⁴ In England and countries influenced by English law, foreign law is treated as fact and subject to proof, although the presumption of similarity of laws is overused to compensate for this difficulty, bringing about excessive application of local law. In European countries, foreign law is treated as law.

²⁵ Conflicts rules and literature frequently stress the distinction between the law governing a contract, through choice or otherwise, and rules incorporated into the agreement. This distinction may be particularly relevant in the context of *lex mercatoria*, whose provisions can be easily incorporated but which can probably not be chosen as a governing law.

²⁶ The (European) Rome Convention on the Law Applicable to Contractual Obligations is a representative example of the general trends in this field. 1980 OJ (L 266). For cases governed by this Convention, France has relinquished its traditional requirement that the law chosen be related to the contract.

²⁷ Even English law, which used to permit the choice only of legal systems to govern arbitral disputes (it is not clear why this should have been the case when it does not seem to have been the case in choice of law in ordinary contracts), now provides that the tribunal will decide “in accordance with the law chosen by the parties . . . or, if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal,” although in the absence of choice, the tribunal “shall apply the law determined by the conflict of rule which it considers applicable” and is not free to decide *ex aequo et bono*. Arbitration Act § 46 (1996). In France, it has been permitted for parties to choose any “rules of law” to govern their arbitration since the 1981 amendment to the Code of Civil Procedure art 1496. For a survey of the various approaches to this question (preceding the English Act of 1996), see Lando, 34 *Int'l & Comp L Q* at 747 (cited in note 13).

Consequently, the principle of autonomy that is so central to the law merchant is both shared and enforced by national legal systems.²⁸ In this way, other substantive rules of the *lex mercatoria* are also enforced by national courts when they are incorporated in the contract by the parties. If what parties wish to do is incorporate a particular rule of *lex mercatoria*, all they have to do is include it or refer to it in a way that makes it accessible. When, however, they have not thought out all the possible problems that might arise in advance and simply want to refer to *lex mercatoria* (or general principles of law) as the governing law, it is conceivable both that they will lack necessary knowledge of its content and that courts will have no immediate sense of what these require. This problem arises in a more acute form when there is no choice of law clause. Normally, in this situation, courts apply to the contract the legal system most closely related to it—on the argument that the parties probably negotiated against the background of that system, assuming that it would govern. In the absence of a clearly authorised version of the rules of *lex mercatoria*, arbitral tribunals may be willing to “localise” a contract within the *lex mercatoria* or to realise a general reference to it as a body of law, but national courts find it hard to apply such general references and have never yet identified it as the system closest to a contract.²⁹

While this difficulty results in such clauses being ignored by national courts, this is clearly a practical, not a formal, problem. The principle of party autonomy is strong enough to support the argument that what parties can incorporate explicitly they can incorporate by reference, and there can be no more coherent objection to incorporating *lex mercatoria* than to incorporating a dead system or a religious system that has no national sphere of application. Its content is simply an evidentiary matter.³⁰ It is precisely to meet this problem that codification is urged.

²⁸ It is interesting that these very choice principles, which are enshrined in the customary and codified formulations of *lex mercatoria*, are derived from national law. See, for example, Berger, *The Creeping Codification*, Principle 26 at 289 (cited in note 3).

²⁹ A case which may be a nice example of this reluctance is *Deutsche Schachtbau v Shell International Petroleum Co Ltd*, 1 App Cas 295 (HL 1990) (England), where the court applied the law of the seat of the arbitration to the question whether the arbitral agreement was valid (usually subject to the law of the contract), when the arbitral tribunal had already determined that the agreement was governed by “general principles of law.”

³⁰ Where foreign law is treated as fact, *lex mercatoria* will be no different from foreign law, whose content also depends on proof and argument. Even in systems where foreign law is treated as law, the court usually requires the parties to present their understanding of it as a means to elucidating its content.

IV. DISCUSSION

The relations discussed above provide a basis for evaluating some of the arguments offered in support of the claim that *lex mercatoria* is a necessary, substantively unique, autonomous system.

Private international law is frequently portrayed as a barrier to the benefits of *lex mercatoria*: it is said that it refers only to national laws, that its rules do not provide the certainty needed by the mercantile community and that *lex mercatoria*—a set of clear substantive rules designed for commercial activity and guaranteeing certainty—are a preferred alternative to conflicts law.³¹

This portrayal is an almost wilful misrepresentation of private international law. The principle of party autonomy so essential to international trade is a central principle of all aspects of private international law. It is expressed in the willingness of national law to acknowledge the autonomy of parties to resolve disputes outside the system, and to provide tools for enforcing that autonomy—enforcing agreements and awards irrespective of their content. It is expressed further in the willingness of almost all systems to allow parties to choose almost any national law to govern their relationship. But, as we have seen, choice-of-law rules go further and, far from referring only to national legal systems, they permit parties to create their own legal contractual and arbitral régime. There can surely be little more promoting of certainty than such broad autonomy.³² The newly formulated *lex mercatoria* rules—which tend to be undetailed and come with virtually no interpretative burden—can be no more certain than substantive rules of national law that can be verified in advance and have a huge store of interpretative detail, or than specific ad hoc regulation, and are probably a good deal less certain.³³

Curiously, it is also by virtue of private international law alone that *lex mercatoria* is granted any formal “legal” recognition and indeed that it has ever been accorded any autonomous status. As the mediaeval precedent demonstrates, *lex mercatoria* can apply within a national system as law only if it is part of the substantive law of that system, in which case it loses its autonomy, or

³¹ See, for example, Berger, *The Creeping Codification* at 2 (cited in note 3), and the seminal works on which he relies.

³² English law, for example, went so far as to make even the substantive validity of the contract turn on the law chosen by the parties, identifying that law, in the absence of explicit choice, as the one which would validate the contract. See *P. & O. Steam Navigation Co v Shand*, 12 LTR 808 (Privy Council 1865) (England). It is not, however, clear that this is still the view that would be taken, in the light of more recent formulations of the proper law.

³³ The principles enshrined in the creeping codification list are all either very general principles (such as *pacta sunt servanda*, or good faith, or *rebus sic stantibus*) that are recognized in almost all legal systems—each of which develops its particular detailed version through case law and scholarly writing, without which the general principles are either useless or so specific as to be unpersuasive as evidence of custom and of limited use in practice.

if it is incorporated through some mechanism for dealing with it as a system. To the extent that private international law replaced the substantive law merchant as a mechanism for dealing with international transactions, it provided the medium whereby *lex mercatoria* could be preserved and treated as a system.

The autonomy of *lex mercatoria* is, however, different from that of national legal orders and closer to the autonomy of a contractual legal order. It is perhaps obvious, but nonetheless significant, that while the *forum non conveniens* doctrine is, in some systems, invoked frequently in favour of foreign courts, it is never used to oust or stay jurisdiction in favour of an arbitral tribunal. If there is a valid arbitral agreement, it will generally be enforced irrespective of considerations of appropriateness; if there is none, there is no way in which the appropriateness of an arbitral tribunal can be considered. Arbitration is so linked to party consent that its institutions have no independent existence, regardless of the nature of the dispute.

So, too, while there is almost a presumption of impropriety in an English court deciding a case all of whose factual elements are related to one foreign system, there is no such presumption with respect to a mixed international case; on the contrary, the more mixed the facts, the less impropriety there is in any national system taking jurisdiction and there is no immediate sense that an anational arbitral tribunal should decide.³⁴ Arbitral tribunals are not regarded in the same way as foreign courts, as part of an autonomous system. Its fora are accorded respect only to the extent that they have been contractually agreed on.

In a similar way, *lex mercatoria* does not “exist” as do national systems of law; it exists in the way a contract exists—on an individual basis. It does not qualify as a recognised set of social norms that can be referred to as such. While for national law this is merely a practical problem, for *lex mercatoria* adherents this is an issue of autonomy. Without a coherent list of rules, no general reference to *lex mercatoria* is equivalent to a similar reference to any national system. Codification, which will make general references to it as a system realistic, seeks to bridge the gap between individual autonomy—which is not disputed—and the autonomy of *lex mercatoria* as a system of recognised social norms.

It is not unreasonable to expect that codification will make it easier to refer to *lex mercatoria* as a system. Merchants, arbitrators, and courts will have an explicit set of rules to guide behaviour and resolve disputes. If this indeed happens, the autonomy of *lex mercatoria* will be significantly enhanced. It is, however, too soon to know whether the type of codification proposed to date will have this effect. My own feeling is that courts will still refrain from using these codifications as reservoirs of rules unless they are persuaded independently that they constitute mercantile or trade custom. Even rules drawn up by quasi-formal formulating institutions such as the ICC are not recognised as

³⁴ Collins, ed, *Dicey and Morris on the Conflict of Laws* at 395 (cited in note 19).

constituting a *lex mercatoria* or an internationally binding custom and are applied only when contractually incorporated. In the absence of a national or international body whose formulations become part of local law, it is unlikely that national courts will refer to such rules as anything more than claims about the existence of customs and usages, unless of course the parties incorporate a specific list of such rules into their contract explicitly. Informal custom has a far greater chance of being implemented as a means of interpreting and completing contractual obligations.

Arbitral tribunals, which already make use of *lex mercatoria*, giving it content on their own, are more likely to employ such lists, and to the extent that they do and that their awards are enforced, these will be enforced by national courts. But when arbitral tribunals decide disputes on the basis of rules appearing in such lists, they are doing exactly what they do when they apply a legal system: they are acting as courts, interpreting rules. While this is what arbitral tribunals often do, this is surely not what merchants want when they seek the advantages of arbitration over judicial proceedings and specify that they want mercantile custom to determine their rights and obligations. So, too, why should parties to a contract prefer a vague and fluid list to any available set of familiar national rules?

The answer one would expect is that rules of *lex mercatoria* respond to real needs that national laws cannot respond to. Since codification is thus also linked to claims about the need for *lex mercatoria* and its unique nature, it is fair to ask whether it bears out these claims.

One such claim has traditionally been that *lex mercatoria* is necessary because national commercial law is inadequate for international trade. While a purist view of *lex mercatoria* could conceivably maintain this position in the sense that nothing it argues contradicts it, the more modern view represented by codified formulations can not.

In the first place, the “list” of rules is drawn up around problems which are all perfectly familiar from national legal systems. I tried without success to identify even a single rule on the list that is unique to *lex mercatoria* or that might not be found in a national legal system.³⁵ National law is clearly the structural

³⁵ The list of seventy-eight principles offered by Berger, *The Creeping Codification* at 278–311 (cited in note 3) deals with the following issues: party autonomy; good faith; *pacta sunt servanda*; the requirement that parties act reasonably in the circumstances of the case; the principle that parties are bound by usages they ought to have been aware of; the requirements of intent and specificity of terms for validity of consent; the effect of silence; whether writing is required; whether third parties can be affected detrimentally; the purpose of interpretation of a contract; validating interpretation; interpretation *contra proferentem*; interpretation in context; common intent prevails over language; meaning of “best efforts”; the importance of timely performance; the measure of time for notification; bad faith in negotiations; immoral (or fraudulent?) contracts; the relationship between a contract and arbitration clauses; the effect of bankruptcy on arbitration; unjust enrichment of one contractual party; the fate of goods handed over with knowledge of illegality;

model for modern, explicit *lex mercatoria*. No less significantly, national law also serves as a prime substantive model for the formulation of *lex mercatoria* rules. All the general principles are taken from what is said to be a common legal tradition.³⁶ In other words, not only does the codification not support the proposition that *lex mercatoria* is, and must be, anational and independent of national law, it demonstrates quite the opposite.

Another claim has traditionally been that rules of *lex mercatoria* are spontaneous³⁷ outgrowths³⁸ of commercial activity. Here, too, codification seems to fall short. The rules admitted to the codified canons are all formulated by lawyers, on the basis of national rules (formulated largely by lawyers) and uniform laws (formulated largely by lawyers) and statements of international principles and common cores (formulated largely by lawyers) through what is called “the methodology of ‘functional legal comparison.’”³⁹ Not all the principles are supported by references to arbitral awards or by references to a

force majeure; rights deriving from unlawful acts; choice of law and the closest contact; validating law in the absence of choice; changes in the chosen law; frustration; simultaneous performance—when to perform; fundamental breach and termination; set-off; assignment of claims; transfer of property belonging to third party; estoppel; ability to rely on forfeited right; *volenti non fit iniuria*; states’ ability to rely on national law to repudiate contract; currency of payment; conversion rate; risk of depreciation; good faith obligation to renegotiate in case of change of circumstances; good faith obligation to notify and cooperate; when notice of defects must be given; distribution of currency risks; how to determine price (two rules); relevance of limitation periods; agency and third-party expectations; corporate entity and those bound by its acts; agent acting *ultra-vires* (two rules); knowledge of agent attributable to principal; reasonable professional knowledge imputed to parties; special laws prevail over general laws; burden of proof on claimant; proof of contract; admissibility of circumstantial evidence; penalty clauses; damages for breach of contract (three rules); mitigation of damages; reliance on legal opinion solicited by party; interest on unpaid debts; rate of interest; compound interest; recognition of foreign corporate entities; piercing the corporate veil; corporate succession and liability; liability in pre-incorporation phase; validity of expropriation; compensation for expropriation; and value of expropriated goods (five rules).

³⁶ There is hardly a rule without a reference to at least one national legal system. Some refer to only one or two. Since legal systems differ on these questions, either a particular system or group of systems was preferred to others or the rule was formulated at such a level of generality that it is of little use. Mustill points out how many of the principles generally alleged to be commonly accepted are not recognised in common law systems and would thus not qualify. *The New Lex Mercatoria* (cited in note 6).

³⁷ In view of the frequency with which it is insisted that this quality is a defining feature of *lex mercatoria*, I thought it might be worth reminding ourselves what it means: the New Shorter Oxford Dictionary defines *spontaneous* as follows: “. . . occurring without external cause . . . coming naturally . . . unpremeditated . . . instinctive . . . produced naturally without cultivation or labour.”

³⁸ It is interesting to note how even so insightful a participant in the life of *lex mercatoria* as Lord Mustill writes (using incidentally a curiously inappropriate agricultural simile for what is so palpably a rootless, maritime activity): “. . . the *lex mercatoria* simply exists. It springs up spontaneously, in the soil of international trade. It is a growth, not a creation.” *The New Lex Mercatoria* at 153 (cited in note 6).

³⁹ Berger, *The Creeping Codification* at 44 (cited in note 3).

significant number of arbitral awards, which would seem to be necessary in order for them to qualify as growing out of commercial practice.⁴⁰ And indeed, even were this reference to arbitral awards fuller, it would surely tell us no more than that arbitral tribunals have made such decisions—we would still have no indication that they have made them because they reflect common commercial practice, or that, once made, they become common practice. Businessmen—or merchants—may support these projects in various ways and some may even be involved in them. But all the projects designed to provide a substantive resource for this anational system seem to be conscious, labour-intensive attempts, initiated and/or propelled by lawyers, to prescribe, on the basis of what is common to some indefinite number of legal systems, what businessmen (and other contracting partners) should do, rather than describing what merchants do in fact. In this sense, far from being a “spontaneous outgrowth,” it is a product, artificially manufactured by outsiders who are occupied not with recording behaviour but rather with selecting rules that should govern behaviour.⁴¹

In other words, the claims made to justify the existence of an autonomous body of *lex mercatoria* and the characteristics claimed for this autonomous body of law are undermined by the very instrument designed to enhance its autonomy, codification.

V. CONCLUSION

Examination of the reciprocal relations between *lex mercatoria* and national law (its relation with international law has proved quite uninteresting) has suggested that *lex mercatoria* in its present codified form cannot seriously be seen as a spontaneous outgrowth of mercantile behaviour unrelated to national or international law. It has also suggested that there is no foundation to the view

⁴⁰ Lord Mustill demolishes quite convincingly the supposed basis in arbitral awards of many of the rules said to exist. *The New Lex Mercatoria* at 162–66 (cited in note 6).

⁴¹ See Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy—A Preliminary Study*, 66 U Chi L Rev 710 (1999), on the process of codification of rules by trade associations and the extent to which that process, although carried out by experienced members of the association, is characterised by selection among a range of differing customs and by the desire to improve rather than by recording generally acknowledged custom. See also Jack Goldsmith and Eric Posner, *A Theory of Customary International Law*, 66 U Chi L Rev 1113 (1999), on the selective process whereby behaviour of states is categorised as custom for the purposes of public international law. One reason for the tendency to select rather than record in *lex mercatoria* may be that there is in fact no international community of merchants that is sufficiently close-knit to generate consistent and uniform modes of behaviour. Indeed, Bernstein's work on different trade rules and dispute resolution mechanisms suggests that the community of merchants, to the extent that it exists, is very fragmented and that rather than one community of merchants, there are various different communities each with its own social norms and its own ways of propagating them.

that international trade needs *lex mercatoria* as an autonomous system rather than private international law. Quite the contrary, insisting on the autonomy of *lex mercatoria* as a system propels the *lex mercatoria* movement to formulate explicit rules. This push towards formalised codification in turn requires *lex mercatoria* theorists to relax the qualifications for membership and compromise its autonomy in a way which ultimately belies the standard justification offered for its existence—the more formal and explicit the rules, the less organic, the less spontaneous, the less authentic they are.

Only the purist view that resists the temptation to codify full-blown sets of rules retains the clear distinction between national, international, and merchant law, guarantees that authentic merchant law will be applied by courts—as informal custom—and permits arbitral tribunals to deal with mercantile behaviour rather than with legal rules. It thus promotes the two, perhaps contradictory, things that merchants appear to want to have at their disposal: on the one hand, the relative certainty of law and a legal system and on the other, the freedom to opt out of that certainty in search of professional ad hoc fairness in arbitration. Codification has not borne out the claims for autonomy—on the contrary, it has undermined them. Its most impressive contribution for the time being seems to be that in manufacturing an entire “field” of law, it produces the need for greater expertise and thus more work for the few lawyers who are dedicated to its propagation.⁴²

⁴² Alan Schwartz and Robert E. Scott demonstrate in *The Political Economy of Private Legislatures*, 143 U Pa L Rev 595 (1995), that the assumption of disinterestedness attaching to private legislatures in the context of uniform laws is unfounded, and suggest that the type of rule they propose is often determined by the relative weight of the interest groups that do take part in the process. Detailed analysis of the variety of processes whereby codified rules of *lex mercatoria* are formulated might well yield interesting results in the same vein.