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Peter Mazzacano

The *Lex Mercatoria* as Autonomous Law

EDITORS: Peer Zumbansen (Osgoode Hall Law School, Toronto, Director, Comparative Research in Law and Political Economy, York University), John W. Cioffi (University of California at Riverside), Lindsay Krauss (Osgoode Hall Law School, Toronto, Production Editor)

Peter Mazzacano

THE *LEX MERCATORIA* AS AUTONOMOUS LAW

Abstract: This paper will consider the medieval *lex mercatoria* (Law Merchant) as a set of autonomous commercial customs, which initially materialized in the form of trade usages and practices, but were ultimately codified in national laws and international conventions, such as the UN Convention on Contracts for the International Sale of Goods (CISG). The paper will focus on the historical development of the *lex mercatoria*, and will attempt to highlight how the conventional academic debates surrounding have become irrelevant. The thrust of this paper will argue that the *lex mercatoria* is simultaneously both non-state law and state-based law. It is not created in the state; it is not created exclusively in commerce. Rather, it's created by the law itself. To borrow a term from biology, the *lex mercatoria* is autopoietic. By "autopoietic" I suggest the *lex mercatoria* is a type of autonomous organism. It's a self-contained and self-maintaining legal order. But it's not so much a body of substantive law, but rather a process whereby it organizes and produces itself. Paradoxically, in this way it's both autonomous and non-autonomous law.

Keywords: legal system, legal process, autonomy, *lex mercatoria*

JEL classification: K10, K20, K33, K40

Author Contact:

Peter Mazzacano
Visiting Professor, Director of Legal Process
Osgoode Hall Law School, York University
4700 Keele St., Toronto Ontario, M3J 1P3
Email: pmazzacano@osgoode.yorku.ca

THE *LEX MERCATORIA* AS AUTONOMOUS LAW

Peter Mazzacano *

The academic debate over the *lex mercatoria*, or medieval Law Merchant, including the contemporary incarnation known as the *new lex mercatoria*, has typically been waged between two opposing groups. There are the supporters who view the *lex mercatoria* as an autonomous global legal order and evidence of private law-making that is independent of any national sovereign. In their view, this non-state positive law emerged from a variety of functionally uniform international commercial practices. In the opposing camp are the critics of the *lex mercatoria*. This group proclaims the sovereignty of nation states and attacks the *lex mercatoria* as yet another legal fiction. Some have deemed it a phantom conjured up by a few French professors.¹ The idea of anational law is imaginary. From their most generous perspective, the *lex mercatoria* has at least a minimal link to national law. The suggestion is that the *lex mercatoria* will never develop into a genuine legal order as it lacks sovereign territory and coercive power. In addition, commercial customs and practices are incapable of creating law, as they require transformation into law by the formal act of the state.

This paper will take a position somewhere between these two opposing views. In doing so, I will attempt to transcend the conventional scholarly debates surrounding the *lex mercatoria*. I will suggest that these conventional debates have become increasingly irrelevant. My reasoning is that the ongoing debate, which has so far failed to resolve the dispute about the existence of the *lex mercatoria*, suggests that the disagreement has more to do with perspective and legal theory than it has to do with historical facts. The *lex mercatoria* is at once both non-state law and state-based law. It is not created in the state; it is not created exclusively in commerce. I don't mean to suggest that it resides in some zone between fact and fiction. But it is created by the law itself. To borrow a term from

* Visiting Professor and Director of Legal Process, Osgoode Hall Law School. This working paper was presented at the Canadian Law and Economics Association, Annual Meeting, on September 26-27, 2008, at the Faculty of Law, University of Toronto.

¹ Gunther Teubner, "Global Bukowina: Legal Pluralism in the World Society" in Gunther Teubner, ed., *Global Law Without a State* (Dartmouth: Aldershot, 1997) at 3-28

biology, as refashioned by Gunter Teubner,² the *lex mercatoria* is autopoietic.³ By autopoiesis I mean “auto (self)-creation”. This is a process where a system, such as an organism, a legal system, or a corporation, produces its own organization and maintains and constitutes itself in a space.⁴ By “autopoietic” I suggest the *lex mercatoria* is a type of autonomous organism. As Teubner⁵ and Ralf Michaels⁶ have noted, it’s a self-contained and self-maintaining legal order. Thus, the *lex mercatoria* is not so much a body of substantive law, but rather a *process* whereby it organizes and produces itself. Paradoxically, in this way it’s both autonomous and non-autonomous law.

A small but vocal group of critics insist that the *lex mercatoria* was not a legal order beyond state control. They typically point out that a contract cannot be binding, or enforced, without the legal machinery of the state. In other words, the *lex mercatoria* lacked autonomy. Some of these scholars have gone as far as to claim that the *lex mercatoria* was a myth or a “modern distortion”. These arguments revolve around varying concepts of autonomy. Indeed, the word “autonomous” is a term that is used with considerable frequency and latitude in discussions about the *lex mercatoria* and other forms of private law-making. Similarly, the term “autonomous” is often used in the literature discussing autopoietic systems. Understanding this word is crucial to our understanding of what is meant by an autonomous legal order.

² Gunter Teubner, “Global Bukowina: Legal Pluralism in the World Society” in Gunter Teubner, ed., *Global Law Without a State* (Dartmouth: Aldershot, 1997) at 3.

³ This is a pseudo-Ancient Greek word, formed through the conjunction of two ancient Greek words, “auto” meaning “self”, and “poiesis” meaning (roughly) “creation” or “production”. Poiesis is pronounced “po-E-sis”. A system is autopoietic if the parts of which it is composed interact with each other in such a way as to continually produce and maintain those parts and the relationships between them.

⁴ For example, a biological cell, a living organism, and to some extent a corporation, and a society as a whole.

⁵ Teubner, *supra* note 2. See also Gunter Teubner, “Breaking Frames: Economic Globalization and the Emergence of the *lex mercatoria*” (2002) 5 *European J. of Soc. Theory* 199.

⁶ Ralf Michaels, “The True Lex Mercatoria: Law Beyond the State” (2007) 14 *Indiana J. of Glob. Leg. Stud.* 447.

The noun “autonomy” is defined in *Black’s Law Dictionary* as “1. The right of self-government. 2. A self-governing state”.⁷ Immediately, the inadequacy of this definition is apparent. The self-governing nature of the medieval merchant class is evident in the historical record, but this group, while free to contract in commercial matters, could not be deemed a “government” or a “state”. Merchants were “autonomous” in terms of their relations with each other, as well as in commercial matters with the state. Apart from insisting that it be governed by its own merchant law in commercial matters, the merchant class had no other sovereign pretensions. They simply wished to conduct commerce from state to state without any interference from local laws. The *Black’s* definition is, thus, deficient. It does, however, lead us in another, more interesting direction. Under the phrase “*autonomy* of the parties”, *Black’s* refers us to “freedom of contract”. There, we find that freedom of contract is a doctrine where people enjoy the right to bind themselves legally. With freedom of contract, parties should not be hampered by external control, as from, for example, government interference. In other words, these are legally binding acts between individuals outside the direct control of the state. This helps us to utilize a functional definition of “autonomous”, at least within the context of private legal orders. I use the term “autonomy” with this meaning. This is from the Greek: “Auto-Nomos”. “Auto” meaning “self”, and “nomos” meaning “law”. “Autonomy” is, thus, one who gives oneself his or her own law, as in self-made law.

Based on this definition of “autonomous”, the medieval *lex mercatoria* did represent a distinctive, autonomous, private legal order that existed primarily outside the shadow of the state. What is particularly distinctive about this private legal order is the self-regulatory nature of the merchant community, especially in the areas of law-creation and dispute resolution. As Harold Berman notes, in the period between 1000 and 1200, the *lex mercatoria* evolved out of a set of loose commercial customs and into more precise, written rules—rules that were penned into commercial instruments.⁸ During this same period in Europe, the legal rights and duties under merchant law became much more uniform in its

⁷ 8th ed., s.v. “autonomy”.

⁸ Harold J. Berman, *Law and Revolution; The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983) at 341.

application across state borders.⁹ This trend towards uniformity was a gradual process, and differences in detail remained based on local law and custom. As William Mitchell notes, however, “[e]ach country, it may almost be said, each town, had its own variety of the Law Merchant, yet all were but varieties of the same species. Everywhere the leading principles and the most important rules were the same, or tended to become the same”.¹⁰

While it emerged initially from a set of commercial customs, practices and trade usages, the *lex mercatoria* ultimately evolved into a body of law that transcended state borders. The medieval *lex mercatoria* thus played, and continues to play, a crucial role in international trade, particularly in western economies. Indeed, many important rules and institutions in contemporary international trade are the results of private law-making and private institutions that had their beginnings in the medieval *lex mercatoria*. One related question to be determined is not whether the *lex mercatoria* existed or continues to exist, but rather to what extent do enhanced privatized governance arrangements diminish the importance of state-created law in international transactions? To the critics of the *lex mercatoria*, the development of private legal orders is thought to be at the expense of central law planning, state sovereignty, and more transparent and democratic forms of governance. Contrarily, state-created law is seen as disrupting, and making inefficient, what had been a functionally uniform set of customs to regulate supra-local commerce outside the framework of the state. The dialectic on the *lex mercatoria* regularly shifts from these extreme positions.

For the last millennium, the European merchant class has been interested in engaging in business transactions across jurisdictions with relative autonomy outside the confines of local state authority.¹¹ With this interest—at times a preoccupation—European merchants essentially rejected the political and legal authority of individuals or institutions that were not a part of this class. In essence, these merchants believed that only members from their own class had the authority to make and enforce

⁹ *Ibid.* at 342.

¹⁰ William Mitchell, *An Essay on the Early History of the Law Merchant* (Clark, NJ: The Lawbook Exchange, 2006 reprint ed.) (1904) at 9.

¹¹ See generally A. Claire Cutler, *Private Power and Global Authority* (Cambridge: Cambridge University Press, 2003) at 104-107.

the rules that governed their lives. The principle of legal autonomy eventually evolved into a body of rules. At the core of the *lex mercatoria* is a set of autonomous commercial customs, which materialize in the form of trade usages and commercial practices, including arbitral procedures and institutions. As Berman tells us, the *lex mercatoria*

governed a special class of people (merchants) in special places (fairs, markets, and seaports). It was distinct from local, feudal, royal, and ecclesiastical law. Its special characteristics were that 1) it was transnational; 2) its principle source was mercantile custom; 3) it was administered not by professional judges but by merchants themselves; 4) its procedure was speedy and informal; and 5) it stressed equity, in the medieval sense of fairness, as an overriding principle.¹²

These characteristics allowed the *lex mercatoria* to develop outside the traditional law-making institutions of the state. Not surprisingly, it has been described as “a uniform system of law to regulate international commercial transactions, avoiding the vagaries of differing national systems”.¹³ As Julian Lew notes, “[t]his system of law [the *lex mercatoria*] comprises the rules which have been developed to regulate and facilitate international trade relations and the customs and practices which have attained universal (or at least very extensive) recognition in international trade”.¹⁴ Even William Blackstone, writing more than 200 years ago noted the universal and autonomous character of the Law Merchant:

The affairs of commerce are regulated by a law of their own called the law Merchant or *lex mercatoria*,

¹² Herold Berman, “The Law of International Commercial Transaction (*lex mercatoria*)” (1988) 2 Emory Int’l L. Rev. 235 at 240.

¹³ Alan Redfern & Martin Hunter, *Law & Practice of International Commercial Arbitration*, 2nd ed., (London: Sweet & Maxwell, 1991) at 117.

¹⁴ Julian D.M. Lew, *Applicable Law in International Commercial Arbitration* (Dobbs Ferry, N.Y.: Oceana Publications, 1978) at 436.

of which all nations agree in and take notice of, and it is particularly held to be a part of the law of England which decides the cases of merchants by the general rules which obtain in all commercial matters relating to domestic trade, as for instance, in the drawing, the acceptance, and the transfer of Bills of Exchange.¹⁵

Judge Story would apparently agree with Blackstone. In the 1842 case of *Swift v. Tyson*, he stated that commercial law “may be truly declared in the language of Cicero [...] to be in great measure, not the law of a single country, but the commercial world”.¹⁶

The quest for predictability and uniformity in the rules of international commerce is not a modern phenomenon. Indeed, the roots of modern attempts to create a uniform transnational commercial law can be traced back more than 800 years to the beginning of the eleventh century when medieval Europe experienced a commercial resurgence that required a need for a special law to govern its commercial activities.¹⁷ The earliest known version, entitled *Lex Mercatoria*, but more commonly known as *The Little Red Book of Bristol*, has been dated *circa* 1280.¹⁸ This legal code is inextricably tied to the marketplace. Indeed, the Law Merchant appears to be a creation of the market itself. This is what Teubner would call a “founding myth”. The first sentence in the medieval treatise notes: “Mercantile law is thought to come from the market, and thus we first need to know where markets are held from which such laws derive”.¹⁹

¹⁵ William Blackstone, *Commentaries on the Laws of England I* (Portland, 1807) cited from Berman, *supra* note 13 at 342.

¹⁶ 41 U.S. (16 Pet.) 1 (1842).

¹⁷ See Errol P. Mendes, “The U.N. Sales Convention & U.S.-Canada Transactions; Enticing the World’s Largest Trading Bloc to Do Business Under a Global Sales Law” (1988) 8 J.L. & Com. 109 available at <http://cisgw3.law.pace.edu/cisg/biblio/mendes.html>.

¹⁸ Mary Elizabeth Basile *et al.*, eds. & trans., *Lex Mercatoria and Legal Pluralism: A Late Thirteenth Century Treatise and its Afterlife* (Cambridge: The Ames Foundation, 1998) at 107. This treatise, written in Latin, formed part of a collection of material compiled by William de Colford, the recorder of Bristol in the 1340s. It is sometimes also referred to as *The Little Red Book of Bristol*.

¹⁹ *Ibid.* at Ch. 1, p. 1.

From this statement is the notion that mercantile law evolved from the merchant community, and by extension it is independent of local law and authority. In its creation, the Law Merchant appears to be insulated from the state. But how can there a set of legal rules exist outside the state? As law outside the confines of the state, it is argued by some that the *lex mercatoria* is not law. There is a structural de-coupling between law-making and the political institutions of the state. But how can this private legal order produce law without the authorization of the state? This introduces the notion of the circularity of the law, as well as an apparent paradox. As merchant law, it is self-created. In other words, there is no true “beginning” point in the *lex mercatoria*. This helps to explain Teubner’s reference to a “founding myth”. It came into existence when merchants first needed a unique body of rules to govern their affairs. As Berman tells us in a chicken-or-egg manner, the medieval “commercial revolution helped to produce commercial law, but commercial law also helped to produce the commercial revolution”.²⁰ Perhaps this is why he describes the development of the *lex mercatoria* in terms of “organic growth”.²¹ The *lex mercatoria* has thus been able to create and perpetuate itself as an autonomous system beyond the confines of state-based law.

This circularity in the origins of the *lex mercatoria* appears to allow parties to contracts to do the impossible: they can create from their contracts their own non-contractual foundations.²² Thus, without the assistance of the state, merchants’ contracts were able to create their own legal order. As Ralf Michaels notes, the “contract temporalizes itself by placing itself between the past of standard terms [or customs] to which it refers and the future of adjudication”.²³ Teubner would put this in a slightly different way. To him, in an autopoietic legal order, the “beginning” is in the middle!²⁴ Teubner may be taking us to the edge here, but consider another example in the field of arbitration, known as the principle of competence-competence. The self-created institutions of commercial arbitration often have to judge the validity of contracts

²⁰ Berman, *supra* note 9 at 336.

²¹ *Ibid.* at 354.

²² Teubner, *supra* note 2 at 11.

²³ Michaels, *supra* note 7 at 450.

²⁴ *Ibid.*

between the parties. However, the arbitral body's own validity is based on the very same contract, the validity of which it's to be judging! Is this not unlike "beginning" in the "middle"?

A 1473 case involving the seizure of goods from a foreign merchant records the notion that the *lex mercatoria* is transnational in its application.²⁵ The Chancellor of the Star Chamber asserted that foreign merchants must not be judged according to English law, but rather according to "the law of nature which by some is called the law merchant, which is law universal throughout the world".²⁶ Gerard Malynes, writing in 1622, traces the existence of uniform merchant customs back to ancient Greek and biblical times, "[s]o that it plainly appeareth, that the Law Merchant, may well be as ancient as any humane Law, and more ancient than any written Law".²⁷ Its precursor may have also been the Sea Law of Rhodes²⁸ from ancient Greece, and the Roman *jus gentium*, which was the body of law that governed trade between foreigners and Roman citizens.²⁹ Eventually, the *jus gentium* proved to be much more universal in its application that Gaius and Justinian could speak of it as "the common law of mankind" and "the law in use among all nations".³⁰ However, during Malynes' time, the *lex mercatoria* had gained such a foothold in the commercial routes of Europe and the Mediterranean that he could declare, "[f]or albeit that the government of the said kingdoms and common-weales doth differ one from another: 1 In the making of lawes and ordinances for their owne government [...] yet the *Law-Merchant* hath

²⁵ Basile, *supra*, note 19 at 128.

²⁶ *Ibid.* at 128-129. The case is *Anon. v. Sheriff of London* (The Carrier's Case), YB Eas. 13 Edw. 4, fol. 9, pl. 5, in *Exchequer Chamber Cases*, 2:32.

²⁷ Gerard Malynes, *The Merchant's Almanac of 1622 or Lex Mercatoria, the Ancient Law-Merchant* (Metheglin Press ed., 1996) (1622) at 5 (spelling and grammar in the original). Malynes provides numerous references to ancient commercial laws and customs as being uniform among all trading states, from the time of Solon in ancient Greece to the publication of his *Lex Mercatoria*. He also refers to the trade endeavors of Jacob, Joseph, and Moses, as well as Minos, Lycurgus, Phalcas, and others.

²⁸ Cutler, *supra* note 12 at 113.

²⁹ Ana Mercedes Lopez Rodriguez, *Lex Mercatoria*, RETTID (2002) 46 available at <http://www.rettid.dk/artikler/20020046.pdf#search='lex%20mercatoria>.

³⁰ Andrew Stephenson, *A History of Roman Law* (Boston: Little, Brown, & Co., 1912) at 197.

always been found *semper eadem*, that is, constant and permanent without abrogation, according to her most ancient customs, concurring with the law of nations in all countries”.³¹ Indeed, one of Malynes’ themes throughout his work is that a set of ancient commercial customs grew into an autonomous and unique body of transnational law, and this legal order deals most effectively with merchants’ disputes.

With the Middle Ages came the rise of independent city-states, flourishing seaports, town markets, and boroughs that led to the flow of goods across new national borders.³² The merchants not only brought goods across borders; they also transported their unique customs and practices into foreign markets. The impetus to create or crystallize rules for merchants came from a “desire to overcome the fragmentary and obsolete rules of feudal and Roman law”, which were unsuited to the needs of international commerce.³³ Thus, trading centers began to “reduce local practices into regulatory codes” and the laws of particular towns eventually “grew into dominant codes of custom” with an international flavor.³⁴ Stimulated by the maritime trade of burgeoning seaport towns throughout Europe, the *lex mercatoria* soon acquired its “cosmopolitan character and reflected [a retreat] from local law to a universal system of law” that transcended sovereigns and national boundaries.³⁵ The end result was autonomy, or a new legal order, free from burdensome local laws and local legislators.³⁶ In other words, the *lex mercatoria* became not only an autonomous body of commercial law, but also the embodiment of commercial practices as reflected in merchant customs. States Berman: “[t]he integrity of the new system of mercantile law, that is, the structural coherence of its principles, concepts, rules, and procedures, derived mainly from the integrity and structural coherence of the mercantile community whose laws it was”.³⁷

³¹ Malynes, *supra* note 28 at 5 (grammar, spelling, and italics in the original).

³² Mendes, *supra* note 18.

³³ Rodriguez, *supra* note 30.

³⁴ Gesa Baron, *Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?* at <http://www.cisg.law.pace.edu/cisg/biblio/baron.html>.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Berman, *supra* note 9 at 354.

A unique feature of the *lex mercatoria* was that it incorporated the customs of commerce, trade fairs, markets, and maritime customs relating to trade into law.³⁸ It also had additional features, some of which were not unlike the principles adopted by its modern incarnation, such as the UN Convention on Contracts for the International Sale of Goods (or CISG), or the Model Law on International Commercial Arbitration: it was a transnational law; cross-border disputes could be administered by the market tribunals of various trade centers, rather than by professional judges and state courts; justice was quick and informal; and the law stressed equity and fairness, hence, decisions were made on the basis of *ex aequo et bono*.³⁹ These features also describe a self-contained and self-maintaining legal order. They also speak in favour of the importance of norms and values regarding merchant conduct in trade, and override the importance of adherence to a rigid code of state-made law to govern international sales transactions.

The *lex mercatoria* governed international commerce for an extremely long period, until the early seventeenth century. At this point the autonomous mercantile courts began to decline in relative importance and the *lex mercatoria* began to merge with common law.⁴⁰ The reason for this wane is attributed to the rising influence of nationalism and the quest for state sovereignty.⁴¹ The pace accelerated under the influence of Sir Edward Coke, who initiated a comprehensive common law for England and the British Empire.⁴² “During this period, the common law courts were given the power to override any decision[s] in the mercantile courts”.⁴³ The autopoietic character of the *lex mercatoria* began to dissolve. Thus, in the case of a dispute, merchants would initiate an action with the common law courts and bypass the mercantile courts altogether.

³⁸ Louise Hertwig Hayes, “A Modern Lex Mercatoria: Political Rhetoric or Substantive Progress?” (1976-1977) 3 Brook. J. Int’l L. 210 at 212-214.

³⁹ Baron, *supra* note 35.

⁴⁰ *Ibid.*

⁴¹ See e.g. Rodriguez, *supra* note 11 at 46-47.

⁴² Mendes, *supra* note 18.

⁴³ *Ibid.*

Eventually, the mercantile courts became superfluous and fell into disuse. Those that remained were eventually abolished by national laws.⁴⁴

“The customs and usages of the merchants, while still relevant, were deemed not binding in the common law courts”.⁴⁵ Instead, “they were treated as ordinary questions of fact, which had to be proved [in each] case to the satisfaction of twelve [civilian] jurors”.⁴⁶ With the blending of the *lex mercatoria* with the peculiarities of national law, the former began to lose much of its uniform and cosmopolitan character. It likely would have faded into oblivion had it not been recognized in the mid-eighteenth century by Lord Mansfield, the Chief Justice of the King’s Bench. In the case of *Pillans v. Mierop*,⁴⁷ Mansfield held that the rules of the *lex mercatoria* were questions of law to be decided by the courts, not issues of fact to be proved by the disputing parties.⁴⁸ With this ruling, the *lex mercatoria* became “an integral part of the common law”.⁴⁹

The nationalization of mercantile law, including international sales law, occurred in the nineteenth century. During this period, states began to codify commercial law rules into national legislation. They decided to take full control over international trade and developed new laws to regulate all aspects of economic relations between commercial parties.⁵⁰ Furthermore, disputes between domestic and foreign parties were to be resolved in state courts by referring to private international law.⁵¹ The emergence of these national laws, and the exclusive state court jurisdiction over commercial disputes, marked the demise of the ancient *lex mercatoria*. The self contained and self-maintaining legal order appeared to be dead. By the end of this era, this autopoietic legal organism

⁴⁴ See *ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Pillans v. Mierop*, 3 Burr. 1663, 97 E.R. 1035 (1765).

⁴⁸ Baron, *supra* note 35.

⁴⁹ *Ibid.*

⁵⁰ Imtyaz M. Sattar, “The UNIDROIT Principles of International Commercial Contracts and the Vienna Sales Convention: Competing or Completing ‘Lex Mercatoria’?”, (1999) 4 Int’l Trade & Bus. L. Ann. 13 at 14.

⁵¹ Friedrich K. Juenger, “The Lex Mercatoria and Private International Law”, (2000) 60 La. L. Rev. 1133 at 1136.

appeared to have dissolved into an array of domestic legal regimes. With nationalization and codification, a universal, developing, cosmopolitan, international commercial law seemed to cease to exist.⁵²

But by the 1900s, there were already signs that the international trade community felt unduly restricted by the array of national legal systems governing their cross-border transactions. As William Mitchell remarks, “whenever the private law is splintered into many jurisdictional fragments, the need for uniformity shows up most strongly in the field of commercial law”.⁵³ The complexity of the rules of private international law, and the obsolete character of domestic laws, failed to satisfy the business community’s need for simplicity and predictability in cross-border trade. In particular, conflict of law rules often produced results that appeared arbitrary and impractical. It also became recognized that national laws were primarily enacted to govern domestic transactions and often failed to address the unique requirements of international transactions.⁵⁴ The end result was the impairment of global trade. As Lord Justice Kennedy wrote in 1909:

The certainty of enormous gain to civilised [sic] mankind from the unification of law needs no exposition. Conceive the security and the peace of mind of the shipowner [sic], the banker, or the merchant who knows that in regard to his transactions in a foreign country the law of contract, of moveable property, and of civil wrongs is practically identical with that of his own country.⁵⁵

States soon became aware of the negative impact on international commerce by a world divided into so many legal systems. Non-

⁵² Baron, *supra* note 35.

⁵³ Mendes, *supra* note 18, citing W. Mitchell, *Essay on the Early History of the Law Merchant* (1st ed. 1969) at 90.

⁵⁴ See e.g. Rodriguez, *supra* note 30 at 51.

⁵⁵ Lord Justice Kennedy, “The Unification of Law”, (1909) 10 J. Soc’y of Comp. Legis. 21 at 214-15 reprinted in Amy H. Kastely “Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention” (1988) 8 Nw. J. Int’l L. & Bus. 574 at 583.

governmental institutions, such as the International Chamber of Commerce (“ICC”) and its International Court of Arbitration were established to address some of the flaws inherent in the national regulation of global commerce.⁵⁶ In 1926, the International Institute for the Unification of Private Law (“UNIDROIT”), an independent intergovernmental organization, was also founded as an auxiliary organ of the League of Nations. Its objective was to find methods for modernizing and harmonizing private international law between states or groups of states.⁵⁷ Following the demise of the League, UNIDROIT was re-established in 1940 and continues to work towards preparation of modern, harmonized uniform rules of private law.⁵⁸

THE MODERN *LEX MERCATORIA*

The establishment of the ICC and UNIDROIT reflected the renewed interest in—and rediscovery of—the historical, cosmopolitan character of commercial law and the desire on the part of international merchants to free themselves from the restrictions of national law.⁵⁹ States began to address this dissatisfaction by introducing international conventions and model laws in the effort to harmonize private international law across borders.⁶⁰ Considering the various economic, social, political, and legal systems of numerous participating states, the process was—and continues to be—difficult and time-consuming. However, considerable progress has been made, especially in the fields of arbitration, factoring, leasing, letters of credit, sale of goods, and contracts. These all cover areas of law originally addressed by the medieval *lex mercatoria*. In the 1960s, academics also began to question the

⁵⁶ International Chamber of Commerce, *Merchants of Peace, The ICC Story* available at <http://www.iccwbo.org/id6167/index.html>.

⁵⁷ International Institute for the Unification of Private Law (UNIDROIT), *About UNIDROIT*, <http://www.unidroit.org/english/presentation/main.htm>.

⁵⁸ See *ibid.*

⁵⁹ Mendes, *supra* note 18.

⁶⁰ See *ibid.*

effectiveness of national law in international transactions, and they also noted the revitalization of the *lex mercatoria*.⁶¹

As Ana Rodriguez notes, “[j]ust as the medieval merchants overcame feudal law, present time traders were adopting alternative solutions to avoid the application of national law to their transactions”.⁶² With the use of standardized contract clauses, self-governing contracts, trade term usages, and recourse to international commercial arbitration, merchants began to introduce their own regulatory regime, which operated autonomously, as an addendum of national law.⁶³ Indeed, some academics have suggested that the new law merchant is simply de-nationalized law.⁶⁴ This development has since become known as the *new lex mercatoria*. It is within the context of this dissatisfaction with national legal regimes, and the renaissance of the *lex mercatoria*, that the modern effort to create a uniform transnational commercial law was re-created.⁶⁵ Or is this just another founding myth, or auto self-creation?

⁶¹ Rodriguez, *supra* note 30 at 47.

⁶² *Ibid.*

⁶³ See *ibid.*

⁶⁴ See e.g. Barton S. Selden, “*Lex Mercatoria* in European and U.S. Trade Practice: Time to Take a Closer Look” (1995) 2 Ann. Surv. Int’l & Comp. L. 111. Selden provides an interesting contemporary example of de-nationalized (or internationalized) law. He notes a remarkable clause in the agreement to construct the English Channel Tunnel between Eurotunnel (the owner and operator) and Transmanche Link (the group of English and French construction companies). The clause provides that the agreement shall “be governed by and interpreted in accordance with the principles common to both English law and French law, and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals”. Selden, *ibid.* at 116.

⁶⁵ John Felemegas, “The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation”, (2001-2002) Pace Rev. of CISG 115, 130-140. See also Bernardo M. Cremades & Steven L. Plehn, “The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions” (1983-1984) B.U. Int’l L.J. 317 at 319-323.