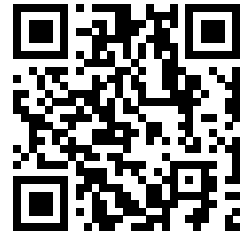


**Title:**

Berger, Klaus Peter, The New Law Merchant and the Global Market Place - A 21st Century View of Transnational Commercial Law



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A 21st Century View of Transnational Commercial Law

Professor Dr. Klaus Peter Berger, LL.M., Center for Transnational Law (CENTRAL), University of Cologne, Germany

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## **The New Law Merchant and the Global Market Place**

### **A 21st Century View of Transnational Commercial Law**

**Professor Dr. Klaus Peter Berger, LL.M., Center for Transnational Law (CENTRAL), University of Cologne, Germany**

#### **Introduction**

'The evolution of an autonomous law of international trade, founded on universally accepted standards of business conduct, would be one of the most important developments of legal science in our time. It would constitute a common platform for commercial lawyers from all countries, those of planned and free market economy, those from civil law and common law, and those of fully developed and developing economy, which would enable them to co-operate in the perfection of the legal mechanism of international trade.'

With these words, *Clive Schmitthoff* introduced the 'London Colloquium on the New Sources of the Law of International Trade' at King's College in September 1962.<sup>1</sup> This colloquium is generally regarded as the first major conference of its kind dealing with the modern *lex mercatoria*. In the preface of the conference proceedings, *Graveson*, then Dean of the Faculty of Law of King's College, emphasized that these proceedings were 'no more than an intermediate chapter in the history of this living phenomenon, the law of international trade'.<sup>2</sup>

Almost forty years later, the history book of the doctrine of transnational commercial law is far from being finished and the world is still divided between traditionalists and transnationalists.

In some parts of legal doctrine, the *lex mercatoria* is seen with substantial scepticism.<sup>3</sup> A worldwide survey among attorneys active in international commercial law conducted in 1995 revealed that most of them would strongly advise

against including a provision in the contract of their client referring to the *lex mercatoria* as the *lex contractus*.<sup>4</sup> In their opinion, transnational law does not have the 'provable' and 'definitive' quality of domestic laws:

'By these criteria, *lex mercatoria* simply has not stood up. The problem is both in its "provability", and in finding a comprehensive set of principles within the *lex mercatoria*. For problems with determining the existence of any purported principle of *lex mercatoria*, just look at its sources: practices followed since time immemorial, or at least since the roman *ius gentium*; ancient cases in dusty times; writings of erudite scholars who passed away about the time the steam engine was revolutionizing industry . . . As a collection of commercial practices, the content of *lex mercatoria* has not been discoverable in any single place . . . Nor has *lex mercatoria* been "definitive" in the sense of supplying a comprehensive set of decision-making rules which can be applied to resolve a dispute.'<sup>5</sup>

This survey was conducted by an American lawyer. Lawyers from Continental Europe seem to be more inclined to accept the idea of transnational law. In fact, it is argued that the debate about the *lex mercatoria* says much about the difference between common law and civil law thinking.<sup>6</sup>

By contrast, the UNIDROIT Principles of International Commercial Contracts have been praised as 'an authentic expression of what is usually called "*lex mercatoria*"<sup>7</sup> and as 'a kind of *ratio scripta* of an emerging supranational legal order -- a modern *lex mercatoria*'.<sup>8</sup>

In 1995, an ICC arbitral tribunal applied the *lex mercatoria* and justified this step with the following words:

'The application of international principles [of commercial law] offers many advantages. They apply in a uniform manner and independently from the particularities of domestic laws. They take into account the needs of international [commercial] relations and allow a fruitful exchange between legal systems which are frequently linked in an exaggerated manner to conceptual distinctions on one side and those who seek fair and pragmatic solutions for individual cases on the other. It is thus an ideal opportunity to apply [in this arbitration] what is more and more called the *lex mercatoria*.'<sup>9</sup>

In the channel tunnel construction contract, one of the most important infrastructure projects of the last decades in Europe, the parties from France and England agreed to a choice of law clause which called for the application of ' . . . the principles common to both English and French law, and in the absence of such common principles [the] general principles of international trade law as have been applied by national and international tribunals . . . '.<sup>10</sup> One of the lead counsel involved in the drafting of this contract described the process in the following words:

'To know the rules was not sufficient; we had to remember or learn the basic fundamentals because it was the only way we could make the French and English rules meet. On the face of it, the rules were different, sometimes even contradictory; yet, a common principle had to be found to exist. This daily miracle was made possible largely because all of us . . . decided to go beyond the mere wording of the legal provisions and find the basic principle behind them. The principles usually matched . . . Obviously we Frenchmen are absolutely certain our system is the best; our English friends had exactly the same view with respect to their own system . . . The motto between [the] lawyers became: "CARTESIAN PRAGMATISM".'<sup>11</sup>

All of these statements reveal that while the economic and political framework has changed dramatically since the early 1960s, the principal questions have remained the same: what is the status quo of the doctrine of a modern *lex mercatoria* and where are we heading? Has Cartesian pragmatism and comparative legal thinking finally won over dogmatism and legal positivism? Have we reached the stage where municipal law merely complements the self-supporting transnational legal order? What is the relationship between domestic law and the law of transnational commercial transactions at the beginning of the new millennium?

## I. The 'Milestones' of the *Lex Mercatoria* Doctrine

From the emergence of uniform legal structures in the trade relations of the Middle Ages to the present times, we can discern a number of historic 'milestones' in the development of the theory of transnational law. They provide important insights into the nature of this development. These milestones should therefore be recalled and taken into account when discussing the viability and practical usefulness of the modern theory and practice of transnational commercial law.

## 1. Malynes and Blackstone: From the Ancient Law Merchant to the Codification Wave

The ancient law merchant was based on the practices and statutes of powerful trade-guilds, customary law and the case law of the *curiae mercatorum*.<sup>12</sup>

'The men with dusty feet who plied their trades from Champagne to St. Ives, from Wye to Nuremberg, had little concern with legal differences. Their disputes were settled with the same method and dispatch in the pie powder courts of England as in the fair courts of the continent. The voices of the consuls of the sea in Genoa and Barcelona found a ready echo in the maritime tribunals of Bristol and of Ipswich, where the court sat on the beach and dispensed justice to passing mariners between tide and tide.'<sup>13</sup>

Two important milestones should be mentioned in this context. In 1622, *Gerard Malynes* defined the *lex mercatoria* in his famous treatise *Consuetudo Vel Lex Mercatoria, Or the Ancient Law-Merchant* as the 'customary law of merchants . . . , more ancient than any written law . . . [and] built upon the foundations of Reason and Justice'.<sup>14</sup> In his Commentaries on the Laws of England first published in the 18th century, *Blackstone* wrote that ' . . . no municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffic and merchandise; neither can they have a proper authority for this purpose . . . For which reason the affairs of commerce are regulated by a law of their own, called the law merchant or *lex mercatoria*'.<sup>15</sup> In despite of their similarity, there is an important intrinsic difference between these two views of the *lex mercatoria*. While *Malynes'* view was still detached from any notion of the sovereignty,<sup>16</sup> *Blackstone's* approach was no longer truly transnational but was directly linked to the powers of domestic legislatures.<sup>17</sup> With the codification wave of the 19th century, the ancient *lex mercatoria* was absorbed by the major codes of that time, the old law merchant had fallen into oblivion.<sup>18</sup>

## 2. Zitelmann: The Vision of a 'World Law'

In the late 19th and early 20th century, the enthusiasm for nationalism and the industrial revolution led to the idea of a world private law ('*Weltprivatrecht*').<sup>19</sup> Based on comprehensive comparative research among the legal systems of all civilized nations, the 'world private law' was supposed to be superior to any domestic legal system both in its formal structure and substantive content. In the view of its proponents, this law should be implemented through a treaty of public law. The idea was fostered by the birth of comparative law as an independent legal science at the First International Congress of Comparative Law which took place in Paris in 1900, the venue of the World Exposition.<sup>20</sup> In fact, it was at this congress that *Saieilles*, proponent of the French 'Natural Law School' which was influenced by the writings of *Stammler*, and *Lambert*, introduced the idea of a 'universalist view of law' by ascertaining 'general principles which are common to all civilized legal systems' ('*droit idéal relatif*', *Saieilles*) and of creating an 'International Common Law' (*Lambert*) consisting of rules which are applicable to the needs of such communities as have attained the same standard of civilization.<sup>21</sup> *Zitelmann's* progressive idea was, of course, a legal utopia. It was doomed to fail from the outset. This was due to its broad scope, covering all areas of private law, the geo-political framework of the early 20th century and the strengthening notion of sovereignty and nationalism.

Interestingly enough, *Berman* reintroduced *Zitelmann's* terminology (without referring to him) in 1995 to express the universal character of the new type of mercantile law in a dawning era of globalization:

'Indeed the word "transnational" refers back to the era of sovereign national states and indicates that it is to be transcended. It does not, however, give a new name to the new era that all humanity has entered. The right name for the new era, I submit, is "emerging world society", and the right name for the law by which it is governed is "world law".'<sup>22</sup>

## 3. Goldman, Fouchard and Kahn : The Rebirth of the Lex Mercatoria by the French School

In the late 1950s and early 1960s, the notion of transnational commercial law was revitalized by the French comparatist *Berthold Goldman*. An article by *Goldman* published in the 'Le Monde' in 1956 and dealing with the nationality of the Suez Canal Company marks the beginning of this process.<sup>23</sup> In *Goldman's* view, this company was not of Egyptian, English, French or mixed nationality even though it could be considered as a juridical person of private law. Due to its particular capital structure, its organization and its activities, he regarded this company as '*une société internationale, relevant directement de l'ordre juridique international*'. The status of the Suez Canal Company, both in terms of its legal source and its legal nature, was in his view 'essentially international'. Thus, in *Goldman's* view, the Suez Canal Company, in

despite of its 'necessarily territorial genesis and functioning', was of a private law nature but of a transnational character.

In the wake of this notion of transnationalism, *Fragistas* and *Goldstajn* published law review articles in the early 1960s, the first on the transnationalization of arbitral procedure,<sup>24</sup> the second on the evolution of an autonomous law merchant across the iron curtain.<sup>25</sup> Beginning in 1964, *Goldman* himself articulated his view on the law merchant in various articles.<sup>26</sup> In the beginning, his understanding of the *lex mercatoria* was not that of an entirely autonomous system.<sup>27</sup> Later, he argued that the new *lex mercatoria* was in fact an '*ensemble*' of general principles and legal rules growing out of a process of spontaneous, institutional lawmaking. This process is detached from domestic legal systems and escapes the realm of domestic lawmakers which is limited to the territory of the respective jurisdiction. Instead, the law is created within the community of merchants doing cross-border trade and commerce, the *societas mercatorum*.<sup>28</sup> Since he first published his view, this doctrine of an autonomous, a-national legal order of transnational commercial law, of a 'third legal system' has sent 'shock waves'<sup>29</sup> through the traditional doctrine of legal sources. His views were later developed and expanded by his academic pupils *Philippe Fouchard* in the area of international commercial arbitration ('*droit commun des nations*')<sup>30</sup> and *Philippe Kahn* in the area of international sales law<sup>31</sup> and general international contract law.<sup>32</sup> They have inspired many of those who have contributed to the study of transnational commercial law since then.<sup>33</sup>

#### 4. Clive Schmitthoff: The Power of International Arbitrators and International Formulating Agencies

The other driving force behind the revival of the *lex mercatoria* in the early 1960s was *Clive Schmitthoff*. In various articles he advocated the evolution of a system of transnational commercial law.<sup>34</sup> In his view, this modern law of international trade displayed a strong tendency towards autonomous regulation.<sup>35</sup> This development was promoted by international contract drafting and international commercial arbitration, since both areas are governed by the principle of party autonomy which leaves the necessary room for the development of transnational legal structures.<sup>36</sup> *Schmitthoff's* main emphasis, however, was on the work and influence of international formulating agencies:

'It is the formulating activity of these international agencies which inspires hope for the ultimate emergence of a fully autonomous law of international trade . . . Commercial life, . . . , is a many-splendoured thing, and out of the complementary activity of these international agencies must eventually arise the harmony of an integrated autonomous international trade law.'<sup>37</sup>

For *Schmitthoff*, the progressive liaison and cooperation between these institutions was 'the next step in the development of an autonomous law of international trade' since, in his view, the advance of an autonomous law of international trade depended 'on the willingness of the formulating agencies to co-operate, to the benefit of all trading nations'.<sup>38</sup> It is not surprising, therefore, that *Schmitthoff* was the founding father of the United Nations Commission on International Trade Law (UNCITRAL) in 1966.<sup>39</sup> UNCITRAL has as one of its primary tasks the furthering of the 'progressive harmonization and unification of the law of international trade' by coordinating 'the work of organizations active in [this] field and encouraging co-operation among them'.<sup>40</sup> It plays a major part in the 'codification' of the principles and rules of transnational commercial law.

#### 5. UNIDROIT: The Report on the 'Progressive Codification of the Law of International Trade'

In 1971, only five years after the foundation of UNCITRAL, the Secretariat of UNIDROIT presented its idea for the drafting of general principles of international contract law in its Report to UNCITRAL on the '*Progressive codification of the law of international trade*'.<sup>41</sup> The Report was prepared in four conferences of all institutions that were concerned with the unification of the law,<sup>42</sup> i.e. UNIDROIT, UNCITRAL, UNCTAD (*United Nations Commission on International Trade and Development*) and the sub-committee on Fundamental Legal Concepts as an organ of the European Committee on Legal Cooperation. Taking up *Schmitthoff's* ideas, the report called for a combined effort of all institutions and emphasized the urgent necessity to develop principles and rules of international contract law which could serve as a reference point for the construction of private contracts and international conventions without recourse to domestic laws.<sup>43</sup> The report of the UNIDROIT Secretariat emphasized that its inherent objective was to lay down the basis for a 'code of international world trade law',<sup>44</sup> i.e. for a genuine transnational legal system:

'. . . international trade needs its own ordinary law with its own particular role and full range of functions . . . The very fact that the legal relationships of international trade are international in character puts them outside the jurisdiction of municipal law and makes them governable by a law removed from any national contingencies, that is, an *ordinary law of international trade*, which alone can provide the legal framework which international trade

needs in order to develop . . . Consequently, international trade now, as much as ever, needs a real *ius commune mercatorum*, a material law that can govern international relations . . . It would be unthinkable . . . either to allow international trade to continue to be governed by a host of national laws, since that places it in an impossible position, or to leave all legal problems arising in international trade to be solved simply by practice . . . So the first task will be to prepare a draft for the general section containing the basic principles which will form the foundations and the framework of the unification.<sup>45</sup>

This comprehensive approach was intended to transform the various efforts to unify the law within certain branches of international trade into a universal, world-wide project for the creation of uniform law<sup>46</sup> for contracts of international commerce and trade. Influenced by proposals from *David*,<sup>47</sup> *Schmitthoff*,<sup>48</sup> and *Blagojevic*<sup>49</sup> made on the IV. Conference of the Institutions Concerned with the Unification of Law that was held in Rome from 22 April to 24 April 1968,<sup>50</sup> the project was geared towards the drafting of a 'Model-Basic-Code' ('*code modèle de base*'<sup>51</sup>) made up of international conventions and model laws and accompanied by special domestic statutes for international commercial contracts ('*lois uniformes*'<sup>52</sup>). Ultimately, it failed because it was not able to overcome the notion of the sovereignty of the states as the major stumbling block in the way towards uniform legal structures in international trade and commerce.<sup>53</sup>

## 6. Dezalay, Garth and Teubner: The Sociological Approach

### a. The Lex Mercatoria and the North-South Conflict

In 1996, *Dezalay*, a French sociologist and *Garth*, an American law professor and former dean of Indiana Law School, published their study on the world of international commercial arbitration.<sup>54</sup> In this context, they also dealt with the evolution of the new *lex mercatoria*, albeit in a rather provocative way. In their view, this theory was 'reinvented' by 'the powerful grand old professors from France and Switzerland'<sup>55</sup> in order to 'enable western companies to ensure - at least statistically - their domination and their profits in their business relations with ex-colonial governments'.<sup>56</sup> With this flexible and ambiguous academic tool, the 'inventors' of the *lex mercatoria* were, in the eyes of *Dezalay* and *Garth*,<sup>57</sup> able to invoke 'grand principles of law' which 'could justify a middle way' when confronted with the demands of renegotiation and expropriation in the famous oil arbitrations of the 1960s, 1970s and early 1980s.<sup>58</sup> These arbitrations were, in turn, inspired by the upcoming sovereign pride and post-colonial consciousness of the ex-colonial states in the context of the New International Economic Order<sup>59</sup> and the emerging north-south context. As a side-effect of this development, the inventors of the new law merchant also gained an 'extraordinary useful tool of promoting arbitration as a new market in handling international commercial disputes'.<sup>60</sup> With the development of new contract techniques and the accumulation of legal know-how in Third World countries, 'the time of the *lex mercatoria* is ending'.<sup>61</sup>

The problem with this study is that *Dezalay* and *Garth* have equated the traditional technique of the internationalization of state contracts by reference to 'general principles of law' or similarly vague notions of transnational law<sup>62</sup> with the imposition of Western legal doctrines on developing countries. The biased view is known from the ancient law merchant which some regard not as a genuine blend of the mercantile usages of Europe but as 'a body of customary law of Italian origin imposed on medieval traders by the predominance in European commerce of the Italian merchants'.<sup>63</sup> The choice of law clause of the Channel Tunnel Contract<sup>64</sup> reveals that this is a dangerous approach. Thus, *Dezalay* and *Garth* themselves had to concede that the *lex mercatoria* 'remains important within the international arbitration community' and might in fact serve to accommodate important Third World concerns.<sup>65</sup> It seems that *Dezalay* and *Garth* took a biased sociological approach: they focussed exclusively on the north-south conflict instead of the phenomenon of institutional rule making through the *societas mercatorum*.

### b. The Lex Mercatoria as Rulemaking at the 'Periphery' of the Legal Process

This latter position was taken by *Gunter Teubner* in his articles on 'Global Bukowina'.<sup>66</sup> In these studies, *Teubner* rightly characterized the *lex mercatoria* as a 'global law without a state'. He also pointed at the basic and fundamental reason why this doctrine is generally rejected. The notion of an autonomous transnational commercial law breaks with two classical taboos:

1. Private agreements cannot produce law without authorization or control by the states;
2. Law cannot exist and cannot be applied beyond the realm of domestic states and international relations without a 'global rule of recognition'.<sup>67</sup>

In *Teubner's* view, both arguments must be rejected. The *lex mercatoria* can be explained against a new pluralistic theory

of legal sources which acknowledges that legal rules and principles can be equally produced by political, legal or social processes. Against this theory, the *lex mercatoria* is produced at the 'periphery' of the legal process, not in the center of the traditional sovereign or international lawmaking institutions but by way of a 'self-reproducing legal discourse of global dimension' in close interaction with globally operating legal entities and transactions which are negotiated at the global level.<sup>68</sup> The force of the contractual agreement and the function of international arbitral tribunals stand in the center of this process. The contract 'makes the impossible possible' and becomes a genuine source of law.<sup>69</sup> International arbitral tribunals are the most important factors for this autonomous legal system. They provide an external control mechanism for the validation of the principles and rules which are contained in these contracts. At the same time, however, these tribunals are an 'internal product' of the contract itself due to the consensual nature of arbitration. Together with international formulating agencies like the ICC or UNIDROIT which the parties to international contracts tend to regard as 'private law makers',<sup>70</sup> these tribunals establish the necessary reflexive mechanism as the basis for any autonomous legal system.<sup>71</sup> Recognition of this 'silent revolution of the *lex mercatoria*' by domestic legislatures is only a secondary question, their recognition is not a constitutive element of a legal system.<sup>72</sup>

*Teubner* also rejects another standard argument<sup>73</sup> against the viability of the *lex mercatoria* doctrine: the relative vagueness and ambiguity of the principles and rules which are said to constitute the new law merchant. In his view, the focus on the certainty of legal rules and principles is misleading.<sup>74</sup> It is not the existence of a well structured and detailed set of legal rules and principles which decides over the viability of the doctrine of transnational law<sup>75</sup> but the acceptance of a self-organized process of the creation of law. Apart from these theoretical considerations, it is this inherent flexibility which, according to *Teubner*, allows the *lex mercatoria* to react quickly to the changes of the patterns of international commercial transactions which are taking place at such a dramatic pace today. In the case of the *lex mercatoria*, flexibility results in stability, not in legal insecurity. According to *Teubner*, the *lex mercatoria* is 'soft law', not weak law.<sup>76</sup>

## 7. UNIDROIT, Lando-Commission, CENTRAL: The New Phenomenon of the 'Creeping Codification' of Transnational Law

The last milestone relates to the phenomenon of the informal 'creeping' codification of transnational commercial law which we are facing since the summer of 1994.

In May 1994 UNIDROIT published the Principles of International Commercial Contracts.<sup>77</sup> A year later, the Commission on European Contract Law published Part I of the Principles of European Contract Law.<sup>78</sup> In December 1999 this Group published a revised and expanded version of these Principles.<sup>79</sup> The UNIDROIT Working Group is currently deliberating a new edition of the UNIDROIT Principles.<sup>80</sup> In 1996, CENTRAL published its List of Principles, Rules and Standards of the *Lex Mercatoria*.<sup>81</sup> The list, together with comprehensive references from arbitral case law, international uniform law, doctrine and domestic statutes will be available as an online database in early 2001.

These developments reflect a new and dramatic change in the discussion on the *lex mercatoria*. They stand for the phenomenon of the 'creeping codification of transnational law'.<sup>82</sup> This reflects a change of paradigm in international commercial law, a marked shift away from formal rulemaking by international formulating agencies to private codification efforts. The making of transnational commercial law is 'privatized'. In this transnational context, however, 'codification' does not mean production but 'reproduction' of the law. Private Working Groups, even when they are acting under the umbrella of a formulating agency, are not the lawmakers of the *lex mercatoria*. The new *lex mercatoria* is created by the parties to international commercial transactions and their arbitral tribunals. Thus, the UNIDROIT and Lando-Principles are not 'Re-Statements' but 'Pre-Statements' of the new *lex mercatoria*.<sup>83</sup>

The notion of Creeping Codification has two major qualities. It stands for a reversal of the traditional legal process, i.e. for the advancement of the law from below, not through the formal means of the traditional codification process but through the 'private' endeavors of academics and legal practice, sometimes under the umbrella of an international institution such as UNIDROIT.

The notion of the Creeping Codification of the law also implies a gradual development over time. The Creeping Codification is not only informal and private, it is also a slow and steady process. It is never finished and always in the process of advancement towards more workable and practical rules.<sup>84</sup> This particular quality of the Creeping Codification results from the special character of this area of law. Much more than any other area of law, transnational law is living law, developing at an enormous pace and requiring a flexible and readily adaptable regulatory framework. This particular quality of modern civil law resembles the 'ongoingness' and 'vitality' of the former *ius commune*.<sup>85</sup> It would be a mistake to capture this law in the tight meshes of a traditional codification.

## II. The Present State of the Doctrine of Transnational Law

After this look at the milestones of the *lex mercatoria*, the question remains: where are we now at the beginning of the 21st century?

### 1. The Evolution of a 'Global Market Place' and a 'Global Civil Society'

It would be far too easy to explain the present state of the doctrine of transnational commercial law with the notion of the 'globalization' of the world economy. This abstract term has become a *cliché* rather than a term with substantive content.<sup>86</sup> However, the notion of globalization may serve as a starting point for our evaluation for three reasons.

First, the transaction costs involved in the application of domestic laws to transnational commercial transactions tend to hamper the development towards globalized markets. Foreign law is regarded as the 'globalization trap'.

Secondly, globalization has to do with state sovereignty and, as we have seen, state sovereignty was one of the major stumbling blocks towards a modern law merchant.

Thirdly, the fathers of the *lex mercatoria* doctrine have always emphasized that economic factors - and above all the strive for enhanced productivity, for rationalization of production and for the reduction of transaction costs as well as the development from domestic and regional to world markets that goes along with these developments - have a significant impact on the evolution of a transnational system of law.<sup>87</sup> The proponents of transnational commercial law regard themselves as 'chroniclers of the development of international commerce and its legal framework conditions, drawing their legal conclusions from the observance of real-life phenomena'.<sup>88</sup> The dramatic economic transformations of the world economy that have taken place and are taking place today at an enormous pace relate directly to the social and economic processes 'at the periphery' of the legal process which serve as the laboratory for the creation of transnational legal structures.

There are both economic factors and legal developments which should be taken into account to evaluate the current climate for the transnationalization of commercial law. This broad view also clarifies that today, the existence of the *lex mercatoria* as an autonomous legal order cannot be explained with a single factual or legal argument such as the proliferation of general contract conditions or the normative value of trade usages. In view of the dramatic changes of the economic and geo-political conditions it requires a comprehensive view, taking into account all aspects of the modern economy.

Among the economic and geo-political factors which influence the theory of the *lex mercatoria* one should mention:

- the disappearance of the cold war and of the north-south conflict;
- the progress of European integration and the creation of a Single European Market;
- the dramatic increase of truly Transnational Corporations (TNCs) through Mega-Mergers;<sup>89</sup>
- the changing climate of global corporate culture which follows from the activities of TNCs;<sup>90</sup>
- the revolution of global communication technology;
- the rise in the use of internet and EDI/EDIFACT;
- the massive increase in global financial flows;
- the creation of 'global financial and capital markets';
- the creation of 'New International Economics of International Transactions'.<sup>91</sup>

These geo-political and economic changes have prompted a series of legal developments which are directly relevant for the transnationalization of commercial law:

- the victory of the doctrine of party autonomy;<sup>92</sup>
- the realization that in many cases, the technicalities of domestic legal rules do not fit for international trade;<sup>93</sup>
- the privatization or 'informal nature' of lawmaking both in the field of private law and public international law;<sup>94</sup>
- the increased significance of non-governmental organizations (NGOs);<sup>95</sup>
- the success of CISG and other international uniform law instruments;<sup>96</sup>
- the decreasing significance of private international law;<sup>97</sup>
- the emphasis on fairness and reasonableness in international contract law;<sup>98</sup>
- the acceptance of comparative law as an independent legal science;<sup>99</sup>
- the 'gradual convergence' of civil and common law;<sup>100</sup>
- the growth of a modern European *ius commune* and the development towards a 'European Civil Code';<sup>101</sup>

- the transnationalization of areas which have so far been reserved for domestic legislatures such as antitrust and bankruptcy law;<sup>102</sup>
- the extreme growth in the use of arbitration and alternative dispute resolution (ADR) mechanisms in international trade;<sup>103</sup>
- the equation of arbitration and state courts as genuine adjudication procedures and the emergence of a genuine arbitral case law.<sup>104</sup>

All of these factors have four common denominators: 1. the trend towards a 'global civil society';<sup>105</sup> 2. the erosion and irrelevance of national boundaries in markets which can truly be described as global and the decreasing significance of sovereignty in this area;<sup>106</sup> 3. the relative decline of state power to influence or steer national or international economic developments and 4. the strong trend towards informal approaches to international rule- and decision-making.

Thus, when we look behind the diffuse and abstract notion of 'globalization', we find a concrete phenomenon, the denationalization of the legal process both in the sphere of public international<sup>107</sup> and international commercial law.<sup>108</sup> This process has an important impact on legal theory. This relationship between global rule-making and legal theory, in turn, is of great importance for the doctrine of transnational law since 'this is one of those rare instances where practical legal decisions are directly dependant upon theoretical preconceptions.'<sup>109</sup>

## 2. The Decreasing Significance of State Sovereignty in the Traditional Theory of Legal Sources

The states' loss of their formerly dominant position in international policy- and rule-making which goes along with this process, the decreased significance of sovereignty and the freedom of the parties in international contract law have caused a reconsideration of the traditional theory of legal sources which has 'moved beyond yesteryear's narrow-minded positivism'.<sup>110</sup> A non-positivistic notion of the law is beginning to emerge.<sup>111</sup> Since the law has to take account of the complexities of society,<sup>112</sup> it is not the public reason represented by the state or by inter-governmental organizations *alone* but also the power for self-regulation and coordination of the individual and of private organizations and federations which justifies normative force. The traditional theory of legal sources which was centered around the notion of sovereignty<sup>113</sup> is being replaced by a legal pluralism which accepts that society's ability for self-organization and coordination is more than a mere factual pattern without independent legal significance. Today, it assumes a normative quality of its own.

It must be emphasized that this fundamental change of legal theory is by no means new. What we are facing today is a return to the views of the relationship between the state sovereignty and legal sources of the early 20th century, albeit in a totally different geo-political and economic setting. *Raiser*, even though being a proponent of a traditional positivistic view of the theory of legal sources, has summarized these views in his famous studies on general contract conditions as follows:

'Since it turns out to be impossible to qualify general contract conditions as parts of contracts or as parts of the traditional catalogue of the sources of objective law, the option remains to put into question the distinction between a legal norm and a legal transaction. Is the thinking correct that parties, in concluding a transaction, are merely setting a factual pattern, to which the law attributes or denies legal effect at its will? Aren't the parties themselves able to regulate their living conditions without the intermediation of the legal order of the state, *thus creating law among themselves?* . . .

From this perspective, the *principle of party autonomy* . . . means: Reluctance of the state and the legal system to intervene in the regulation of the legal relationships of private parties and instead, far reaching recognition of all specialized legal regimes, i.e. *decentralization of lawmaking* . . . It is not the decentralization of the creation of the law which displays a weakness of the state which is dangerous for legal life . . .

The state may neither reach nor claim the position as the sole guarantor of the law. He need not be concerned with the thousand written and unwritten conventions within the various social groups of society, which are secured by them through moral force, as long as these groups do not develop into a political power factor . . . In empirical reality, the degree of dependence of the transaction from the recognition of the state depends upon political and economic factors and consequently, may vary from case to case, from decade to decade.<sup>114</sup>

Similarly, *Duguit* adopted the notion of decentralized lawmaking and of the decreasing significance of the sovereign state in the theory of legal sources in the early 20th century. He emphasized that the proposition that law, being a command,



was always a unilateral act and that law and agreement were two mutually exclusive terms and that therefore, there could be no such thing as laws existing by mere agreement, cannot be considered true in the modern state.<sup>115</sup> Today, the effects of private ordering for the creation of norms by decentralized societal self-organization are verified by application of game theory and computer modelling techniques.<sup>116</sup>

### 3. The Modern Law Merchant in the Global Market Place

Under the geo-political and economic factors of the globalizing economy at the beginning of the 21st century, the decreasing significance of territoriality and the creation of a 'global civil society', this view of decentralized lawmaking, developed for the domestic level, applies with even more force for the field of contemporary international commerce and trade.<sup>117</sup> It finally opens the door for the acceptance of the *lex mercatoria* as an autonomous legal order. The dogmatic arguments which have been launched over the past forty years against the *lex mercatoria* 'are fading away'.<sup>118</sup> *Clive Schmitthoff* has rightly stated in the early 1960s that the modern international trade law, when compared with the medieval *lex mercatoria*, has one great drawback: the modern concept of the nation state which originated a legal order of numerous municipal systems.<sup>119</sup> Today, this notion of the nation state is subject to substantial change. The modern law merchant benefits from these developments. It appears as a 'spill over' of the complex institutional processes that are connected with the phenomenon of globalization.<sup>120</sup> The modern international commercial contract is no longer the object of the application of domestic law but a genuine source of law. Absent any considerations of consumer protection, international trade and commerce constitute the ideal climate for the free development of contractual structures.<sup>121</sup> It is not surprising that in view of the emergence of the 'New International Economics of International Transactions'<sup>122</sup> economic theories also serve to explain the new law merchant.<sup>123</sup>

Various factors account for this development. The 'Anti-BGB tendency'<sup>124</sup> which is inherent in these comprehensive contracts, their nature as part of a chain of similar contracts concluded by businessmen for the purpose of bringing about that particular transaction, the morality and mutual trust ('my word is my bond') of international business which turns the contractual promise into a categorical imperative,<sup>125</sup> the presumed rationality of standard contracts and general contract conditions,<sup>126</sup> the idea of the increased professional competence and responsibility of international businessmen,<sup>127</sup> the compliance control through international arbitral tribunals which, just as the contractual agreement itself derive their authority from the will of the parties, the fine-tuning of comparative law into a 'transnational rules method'<sup>128</sup> and the rule-making by international formulating agencies<sup>129</sup> and private working groups all contribute to a comprehensive legal process which ultimately results in the normative force of the principles and rules which result from it.<sup>130</sup> This autonomous law of international trade has the principal qualities which *Benson* has defined as the 'desirable characteristics' of the law merchant: 1) universal character, 2) flexibility and dynamic ability to grow, 3) informality and speed, 4) reliance on commercial custom and practice.<sup>131</sup>

## Conclusion

The geo-political climate of transnationalism and the disappearing notions of state sovereignty and territoriality at the beginning of the 21st century all work towards the evolution of a global civil society. Legal, social and economic science alike are investigating ways to overcome the territorial limits of lawmaking and law enforcement at the global level and to ensure the decentralization of rule-making and society's active role as opposed to the state sovereign. These developments and the creation of a global market place provide the breeding ground for a modern theory of transnational business law.

Today, the question is not whether 'common sense and reason are rules of law'.<sup>132</sup> The lawmaking force of the community of merchants grows out of their awareness for reasonable approaches and common sense solutions to the ever changing patterns and challenges of the transnational economy outside the ambit of domestic laws. The principles and rules which make up the *lex mercatoria* are of a normative quality, not because they are fair and reasonable from an objective perspective but because businessmen, arbitral tribunals and formulating agencies alike consider them to be fair and reasonable and act accordingly by way of self-regulation of international commerce and trade. The new law merchant applies due to its inherent rationality: '*veritas non auctoritas facit legem*'. From an economic perspective, 'private ordering' serves as a means to reduce the remaining transaction costs of and to protect the property rights exchanged in international trade.<sup>133</sup>

It is due to this form of 'Cartesian pragmatism'<sup>134</sup> that the perspective has changed from the doctrinal justification of the *lex mercatoria* to the proper codification techniques and to the question whether there are separate sets of transnational commercial law for specialized areas of international business and trade such as a '*lex petrolii*' for the international oil-industry,<sup>135</sup> a '*lex numerica*' or '*lex informatica*' for international data interchange,<sup>136</sup> a '*lex constructionis*'<sup>137</sup> for the

international construction industry and a '*lex maritima*' for international maritime practice.<sup>138</sup>

Thus, in the globalized economy of the 21st century, *Joseph Story's* 19th century vision receives a new meaning: transnational commercial law 'may be truly declared in the languages of Cicero . . . to be in great measure, not the law of a single country only, but of the commercial world. '*Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omni tempore, alia eademque lex obtinebit.*'<sup>139</sup>

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<sup>1</sup>Schmitthoff, in Schmitthoff (ed.), *The Sources of the Law of International Trade*, 1964, pp. 3, 5.

<sup>2</sup>Graveson, in Schmitthoff (ed.), *The Sources of the Law of International Trade*, 1964, pp. V, VII.

<sup>3</sup>See Molineaux, *J. Int'l Arb.* 2000, No. 1, 147: 'The opponents see the *lex mercatoria* as a sort of legal Loch Ness monster - occasionally in the headlines as a result of a purported sighting but ultimately non-existent.'

<sup>4</sup>Selden, *Ann. Surv. Int'l & Comp. L.* 1995, 111, 113 et seq.

<sup>5</sup>Selden, *ibid.*, 119 et seq.

<sup>6</sup>Tetley, *Uniform L. Rev.* 1999, 877, 888.

<sup>7</sup>Bonell, *Rebels* 56 (1992), 274, 287.

<sup>8</sup>Bonell, *RDAL* 1988, 873, 874.

<sup>9</sup>ICC Award No. 8385, *Clunet* 1997, 1061, 1066 (translation by the author); cf. also ICC Award No. 8365, *Clunet* 1997, 1078, where the tribunal developed eight principles which, in its view, form part of the *lex mercatoria*.

<sup>10</sup>Cf. Jayme, in Nicklisch (ed.), *Rechtsfragen privatfinanzierter Projekte*, 1994, pp. 65, 73; Karrer, *IPRax* 1994, 56 et seq.

<sup>11</sup>Cf. Nouel, *Int'l Bus. Lawy.* 1996, 22 et seq. [emphasis added].

<sup>12</sup>See for collections of these principles and rules the 15th century Catalonian compilation edited by the Consulate of Barcelona and known as 'The Consulate of the Sea and the "Little Red Book of Bristol"' published in the 13th century and containing the 'Roles of Oléron', a compilation of maritime principles and decisions dating back to the 11th century and the famous text on 'Incipit Lex Mercatoria, Que, Quando, Ubi, Inter Quos Et De Quibus Sit Iglesia Ferreirós', in Petit (ed.), *Del ius Mercatorum Al Derecho Mercantil*, 1997, pp. 109, 112 et seq.; Coquillette, *ibid.*, pp. 143 et seq.; cf. also Goode, *ICLQ* 1997, 1, 17.

<sup>13</sup>Thayer, *Brooklyn L. Rev.*, 1936, 139, 141.

<sup>14</sup>[Malynes. Consuetudo Vel Lex Mercatoria Or The Ancient Law-Merchant. 1622. p. 3](#) : 'Every man knewth, that for Manners and Prescriptions, there is great diversitie amongth all Nations: but for the Customs observed in the course of trafficke and commerce, there is that sympathy, concordance, and agreement, which may bee said to bee of like condition to all people, diffused and spread by right reason, and instinct of nature consisting perpetually. And these Customs are properly those observations which Merchants maintaine betweene themselves', *ibid.*, p. 8: '. . . and this Law of Merchants hitherto observed in all countries, ought in regard of commerce, to be esteemed and held in reputation as the Law of twelve Tables was amongst the Romanes. For herein you shall find every thing built upon the foundations of Reason and Justice . . .'.

<sup>15</sup>Blackstone, *Commentaries on the Laws of England*, Vol. I, 15th edn 1809, p. 273.

<sup>16</sup>See Malynes, *supra* note 14, Introduction: 'I have intituled the Booke, according to the ancient name of *Lex Mercatoria*, and not *Ius Mercatorum*, because it is a Customary Law approved by the authoritie of all Kingdomes and Commonweales, and not a Law established by the Soveraigntie of any Prince.' (emphasis added).

<sup>17</sup>See Blackstone, *supra* note 15, p. 75, note 8: 'The *lex mercatoria*, or the custom of merchants, like the *lex et consuetudo parliamenti*, describes only a great division of the law of England . . . But the expression has frequently led merchants to suppose, that all their new fashions and devices immediately become the law of the land; a notion which, perhaps, has been too much encouraged by the courts. Merchants ought to take their law from the courts, and not the courts from the merchants; and when the law is found inconvenient for the purposes of extended commerce, application ought to be made to parliament for redress.'

<sup>18</sup>Cf. for the integration of the law merchant into the English common law *Pillans and Rose v. van Mierop and Hopkins*, [1765] 3 Burr. 1663, Eng. Rep. 97, 1035 (per Lord Mansfield); cf. generally Blaurock, in Ferrari (ed.), *The Unification of International Commercial Law*, 1998, pp. 9, 10 et seq.

<sup>19</sup>Zitelmann, *Allgemeine Österreichische Gerichts-Zeitung*, 1888, 193 et seq., 201 et seq.; Klein, in *Festschrift für Ernst Zitelmann*, 1913, p. 3 et seq.

<sup>20</sup>See Gutteridge, *Comparative Law*, 2nd edn 1949, 5.

<sup>21</sup>Gutteridge, *ibid.*

<sup>22</sup>Berman, *Fordham Int'l L.J.* 1995, at 1617, 1619; see also for the new law merchant in the context of the "Global Civil Society" and the "Global Market Place" *infra* II.1.

- <sup>23</sup>Goldman, 'La Compagnie de Suez, Société Internationale', *Le Monde*, October 4, 1956, 3 (I was made aware of this article by Professor Philippe Kahn, France, at the Conference on 'International Uniform Commercial Law Conventions, Lex Mercatoria and UNIDROIT Principles', November 4, 1999 Verona University, Faculty of Law, Italy).
- <sup>24</sup>Fragistas, *Rev. crit. dr. int. pr.* 1960, 1 et seq.
- <sup>25</sup>Goldstajn, *J. Bus. L.* 1961, 12 et seq.; see also [Goldstajn, Festschrift Schmitthoff, 1973, p. 171 et seq.](#)
- <sup>26</sup>Goldman, *Frontières du droit et lex mercatoria*, *Archives de philosophie du droit* 1964, 177 et seq.; Goldman, *Trav. com. fr. dr. int. pr.* 1977-1979, 221; Goldman, *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives*, *Clunet* 1979, p. 475 et seq.; Goldman, *Festschrift P. Lalive*, 1993, p. 241 et seq.
- <sup>27</sup>[Goldman, Archives de philosophie du droit 1964, 189.](#)
- <sup>28</sup>Goldman, *Clunet* 1979, 499.
- <sup>29</sup>Lagarde, in *Le droit des relations économiques internationales, Études offertes à Berthold Goldman*, 1987, pp. 125, 150.
- <sup>30</sup>[Fouchard, L'Arbitrage Commercial International, 1965, p. 423 et seq.](#)
- <sup>31</sup>[Kahn, La Vente commerciale internationale, 1964, p. 365 et seq.](#)
- <sup>32</sup>[Kahn, in Le contrat économique international, 1975, p. 171 et seq.](#)
- <sup>33</sup>See, e.g. the extensive studies by [Dasser, Internationale Schiedsgerichte und Lex Mercatoria, 1989](#) ; De Ly, *De lex mercatoria, Inleiding op de studie van het transnationaal handelsrecht*, 1989; Osman, *Les Principes Généraux de la Lex Mercatoria*, 1992; Stein, *Lex Mercatoria, Realität und Theorie*, 1995; [Berger, The Creeping Codification of the Lex Mercatoria, 1999](#) ; see also [Horn, Das Recht der internationalen Anleihen, 1972, p. 510 et seq., p. 522 et seq.](#) , Horn, *Law & Pol'y Int'l Bus.* 1977, 753 et seq.; Lando, *34 ICLQ* 1985, 34 et seq.; Berman/Kaufmann, *Harv. Int'l L.J.* 1978, 221 et seq.; Carbonneau, *Col.J.Transnat'l.L.* 1985, 579 et seq.; [Braeckmans, TvPr. 1986, 1 et seq.](#) ; v. Struycken, in *L'évolution contemporaine du Droit des Contrats, Journées René Savatier*, 1986, p. 209; Lalive, in *Mémoire de la faculté de droit de Genève*, p. 50 et seq.; Paulsson, *Int'l Bus. Lawy.* 1990, 4 et seq.; Berman/Dasser, in Carbonneau (ed.), *Lex mercatoria and Arbitration*, pp. 21, 33 et seq.
- <sup>34</sup>Schmitthoff, *International Business Law: A New Law Merchant, Current Law and Social Problems*, 1961, p. 129 et seq.; Schmitthoff, *RabelsZ* 28 (1964), 747 et seq.; Schmitthoff, in Horn/Schmitthoff (eds), *The Transnational Law of International Commercial Transactions*, 1982, 19 et seq.
- <sup>35</sup>Schmitthoff, *supra* note 1, p. 36.
- <sup>36</sup>Schmitthoff, *International Trade Usages*, 1987, No. 71: 'Substantive law is often born in the womb of procedure. In keeping with their international character, the law which these international arbitral bodies create is transnational. It is the new lex mercatoria'; see also David, *Le Droit du Commerce International*, 1987, p. 127 et seq.
- <sup>37</sup>Schmitthoff, *supra* note 1, p. 37, see also Berman, *supra* note 22, at 1621: 'The interests that these associations represent constitute a vast infrastructure of world intercourse, involving patterns and norms of behaviour that give rise to universally recognized rights and duties.'
- <sup>38</sup>Schmitthoff, *supra* note 1, p. 38.
- <sup>39</sup>Resolution 2205 (XXI), Adopted by the General Assembly at its 1497th Plenary Meeting on December 17, 1966, 'Establishment of the United Nations Commission on International Trade Law'.
- <sup>40</sup>*Ibid.*, Art. 8 (a).
- <sup>41</sup>Cf. the Report of the UNIDROIT Secretariat on the 'Progressive codification of the law of international trade', in *United Nations Commission on International Trade Law, Yearbook I (1968-1970)*, p. 285 et seq.
- <sup>42</sup>See the survey by [Kropholler, Internationales Einheitsrecht, 1975, p. 43 et seq.](#)
- <sup>43</sup>UNIDROIT Report, *supra* note 41, *ibid.*
- <sup>44</sup>See the proposal by Schmitthoff, *JZ* 1978, 495, 498.
- <sup>45</sup>Report of the UNIDROIT Secretariat, *supra* note 41, p. 286 et seq.
- <sup>46</sup>Cf. for this definition Kropholler, *supra* note 42, p. 4.
- <sup>47</sup>David, *UNIDROIT Annuaire 1967-1968, Vol. II*, pp. 77, 87: ' . . . le nouveau droit commun doit se présenter comme un droit législatif; il ne saurait être de nos jours un droit de la doctrine'; cf. also David, *ibid.*, pp. 254, 256 et seq.
- <sup>48</sup>Schmitthoff, *UNIDROIT Annuaire 1967-1968, Vol. II*, pp. 93, 115: 'The gradual establishment of a codified world trade law, essentially identical in all national jurisdictions, can only be achieved by a series of international conventions'; see also Schmitthoff, *supra* note 1, p. 38: ' . . . [T]he convention method can likewise be used as a form of co-operation between countries of different economic structures'.
- <sup>49</sup>Blagojevic, *UNIDROIT Annuaire 1967-1968, Vol. II*, pp. 119, 139 et seq.
- <sup>50</sup>Cf. the summary of the results of the conference in UNIDROIT (ed.), *Annuaire 1967-1968, Vol. II*, p. 317 et seq., stating that the unification efforts through international agreements 'still constitute the most appropriate method for the achievement of a certain degree of uniformity in the various domestic laws'.
- <sup>51</sup>David, *supra* note 47, p. 257.
- <sup>52</sup>Cf. for this source of international uniform law Kropholler, *supra* note 42, p. 105 et seq.
- <sup>53</sup>See Berger, *supra* note 33, p. 137 et seq.
- <sup>54</sup>Dezalay/Garth, *Dealing in Virtue*, 1996.

<sup>55</sup>Ibid., p. 39.

<sup>56</sup>Ibid., p. 85 et seq.

<sup>57</sup>See for a similar view Highet, in Carbonneau (ed.), *Lex Mercatoria and Arbitration*, 2nd edn 1997, pp. 133, 142.

<sup>58</sup>See, e.g. *The Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL)*, ILM 1982, 976 et seq. (1982); *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, ILM 1978, 1 et seq. (1977); *Libyan American Oil Company (LIAMCO) v. The Government of the Libyan Arab Republic*, ILM 1981, 1 et seq. (1977); *Saudi Arabia v. Arabian American Oil Company (ARAMCO)*, ILR 1963, 117 et seq. (1958); *Sapphire International Petroleum Ltd. v. National Iranian Oil Company*, Int'l L. Rep. 1967, 136 et seq. (1963); *BP Exploration Co. (Libya) v. Government of the Libyan Arab Republic*, ILR 1979, 297 et seq.; see for an evaluation of these awards as 'typical examples of . . . misunderstood statelessness', Highet, *supra* note 57, p. 137 et seq.

<sup>59</sup>See *Declaration on Permanent Sovereignty over Natural Resources*, GA Res. 1803, 17 GAOR Supp. (No. 17) UN Doc. A/5217 (1962); *Charter of Economic Rights and Duties of States*, GA Res. 3281, 29 GAOR Supp. (No. 3) UN Doc., A/9030 (1974); see generally Jiminez de Arechaga, *Application of the Rule of State Responsibility to the Nationalization of Foreign Owned Property, Legal Aspects of the New International Economic Order* 1980, p. 220 et seq.; Horn, *JWTL* 1982, 338, 340.

<sup>60</sup>Dezalay/Garth, *supra* note 54, p. 89.

<sup>61</sup>Ibid., p. 91.

<sup>62</sup>See for a critique of the 'myth' of the *lex mercatoria* in the context of state contracts Delaume, *Tul. L. Rev.* 1989, 575 et seq.

<sup>63</sup>Gutteridge, *supra* note 20, p. 14.

<sup>64</sup>See *supra* note 10.

<sup>65</sup>Dezalay/Garth, *supra* note 54, p. 90, note 58.

<sup>66</sup>Teubner, *Rechtshistorisches Journal* 1996, 255 et seq.; Teubner, in Teubner (ed.), *Global Law without a State*, 1997; see also Lieckweg, *Wird die Globalisierung des Rechts durch Organisationen der Wirtschaft vorangetrieben?*, *Wittener Diskussionspapiere*, No. 48, 1999.

<sup>67</sup>Teubner, *Rechtshistorisches Journal* 1996, 267; see for the necessity of a 'rule of recognition' as the foundation of a legal system Hart, *The Concept of Law*, 1961, p. 97 et seq.

<sup>68</sup>Teubner, *Rechtshistorisches Journal* 1966, 268 et seq.

<sup>69</sup>Ibid., 274 et seq.; see also Lieckweg, *supra* note 66, p. 6 (the contract as a 'conditional program of global validity'); Berger, *supra* note 33, p. 105 et seq.

<sup>70</sup>See *supra* I 4. for Clive Schmitthoff's emphasis on formulating agencies and *infra* I 7. for the changing paradigm of international trade and commerce.

<sup>71</sup>Teubner, *supra* note 67, 276; see also Stein, *supra* note 33, p. 164 et seq.; Berger, *supra* note 33, p. 110.

<sup>72</sup>Ibid., p. 278 et seq.

<sup>73</sup>See Mann, *Mustill, Liber Amicorum Lord Wilberforce*, 1987, p. 149 et seq.; Berger, *supra* note 33, p. 93 et seq.; Kassis, in Ataki/Prujner (eds), *Actes du premier colloque sur l'arbitrage commercial international*, 1986, p. 138 (hinting at the law merchant's 'darkness of uncertainty, indetermination and absolute unpredictability' and at its 'total insecurity').

<sup>74</sup>Teubner, *supra* note 67, p. 271.

<sup>75</sup>After all, the notion of a code as a comprehensive legal 'system' covering 'the thousand unexpected questions' of real life ('*ius semper loquitur*') has been abandoned since the days of the Prussian General Law of the Land (*Allgemeines Landrecht*), see Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, 4th edn 1990, p. 7; Lando, in Sarcevic (ed.), *Essays on International Commercial Arbitration*, 1991, pp. 129, 149; Böckstiegel, *Der Staat als Vertragspartner ausländischer Privatunternehmen*, 1971, p. 112; Kötz, *Mod. L. Rev.* 1997, 1, 11; Berger, *supra* note 33, p. 94.

<sup>76</sup>Teubner, *supra* note 67, p. 282.

<sup>77</sup>[UNIDROIT \(ed.\), Principles of International Commercial Contracts, 1994.](#)

<sup>78</sup>Lando/Beale (eds), *The Principles of European Contract Law*, 1998.

<sup>79</sup>Lando/Beale (eds), *Principles of European Contract Law, Parts I and II Combined and Revised*, 2000.

<sup>80</sup>See [Bonell, An International Restatement of Contract Law, 2nd edn 1997, p. 255 et seq.](#)

<sup>81</sup>See Berger, *Formalisierte oder schleichende Kodifizierung des transnationalen Wirtschaftsrechts*, 1996, p. 217 et seq.; [Berger, The Creeping Codification of the Lex Mercatoria, 1999, p. 278 et seq.](#); CENTRAL (ed.), *Transnational Law in Commercial Legal Practice*, 1999, p. 146 et seq.

<sup>82</sup>See Berger, *supra* note 33, p. 210 et seq.; Berger, in CENTRAL (ed.), *Transnational Law in Commercial Legal Practice*, 1999, pp. 122, 124 et seq.; Lando, *The Harmonization of European Contract Law through a Restatement of Principles*, p. 20; Nottage, *Arb. Int'l* 2000, 53, 61.

<sup>83</sup>See for this terminology Karrer, in Honsell/Vogt/Schnyder (eds), *Internationales Privatrecht*, 1996, Art. 187, No. 71; cf. generally Canaris, in Basedow (ed.), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht*, 2000, pp. 5, 14; Berger, *supra* note 33, p. 207 et seq.; Kahn, in Bonell/Bonelli (eds), *Contratti Commerciali Internazionali E Principi*

UNIDROIT, 1997, pp. 39, 41 and 45.

<sup>84</sup>Berger, supra note 33, p. 218 et seq.

<sup>85</sup>See Zimmermann, Col.J.Europ.L. 1994/95, 63, 84 et seq.

<sup>86</sup>See generally Delbrück, Indiana Journal of Global Legal Studies 1993, 9 et seq.; Walker/Fox, Global Legal Studies Journal 1996, 375, 379 et seq.; Luhmann, Das Recht der Gesellschaft, 1993, p. 571 et seq.

<sup>87</sup>Goldstajn, supra note 25, p. 13; Kahn, supra note 31, p. 365.

<sup>88</sup>Stein, supra note 33, p. 13.

<sup>89</sup>See, e.g. the report about the Daimler/Chrysler Merger 'Shrinking the Atlantic' by Thoma/Reuter, European Counsel May 1999, 1 et seq.

<sup>90</sup>Robé, in Teubner (ed.), Global Law without a State, 1996, p. 234 et seq.

<sup>91</sup>This economic theory (NIIT) takes a transaction-oriented approach to international business and deals with the territorial limitations of lawmaking and law enforcement and the problems (coordination of economic behavior, increase of transaction costs) arising out of this phenomenon for the property rights exchanged in international trade; see Schmidtchen, *RabelsZ* 59 (1995), 56, 62 et seq.; Schmidtchen/Schmidt-Trenz, *Jahrbuch Neue Politische Ökonomie* 1990, 3 et seq.; Yarbrough/Yarbrough, *J. Inst. and Theoretical Econ.* 1994, 239 et seq.

<sup>92</sup>See Goldstajn, supra note 25, 17; Berger, *Am. Rev. Int'l Arb.* 1993, 1 et seq.

<sup>93</sup>Lando, *Int'l & Comp. L.Q.* 1985, 747, 748; Stein, supra note 33, p. 16 et seq.; Berger, supra note 33, 14 et seq.; Park, in Carbonneau (ed.), *Lex Mercatoria and Arbitration*, 2nd edn 1997, pp. 143, 151: 'No one opts to lose a dispute because of an unfair application of legal "technicalities"'; [Delaume, Law and Practice of Transnational Contracts, 1988, Preface, p. IX](#) : 'The legal context in which transnational contracts are negotiated and implemented is in the process of rapid evolution. The time is no longer where such contracts fitted into well established categories of transactions between commercial men, subject to private law, or between subjects of international law conducting business inter se. Today, a number of contractual relationships involve both subjects of private and public international law, and, with increasing frequency, a plurality of parties whose combined efforts are required for the carrying out of a single venture. Neither traditional domestic law rules nor, to the extent that they can be identified with sufficient precision, international law norms necessarily provide adequate answers to problems that they were not designed to meet in the first place'.

<sup>94</sup>See supra I.7.; see for the codification of public international law through the International Law Commission Thirlway, *International Customary Law and Codification*, 1972, p. 61 et seq.

<sup>95</sup>See Berman, supra note 22, at 1621; Hobe, *Global Legal Studies Journal*, 1997, 191 et seq.; Schoener, *Global Legal Studies Journal*, 1997, 537 et seq.; see for the activities of NGOs the homepage "[www.ngo.org](http://www.ngo.org)".

<sup>96</sup>See Ferrari, *Rev. int. dr. comp.* 1995, 985 et seq.

<sup>97</sup>See Juenger, in Carbonneau (ed.), *Lex Mercatoria and Arbitration*, 2nd edn 1997, p. 265, 276: 'The breakdown of the [conflict of law doctrine] that has long been characterized by its fixation on sovereignty and governmental interests offers room for hope'; Juenger, *The Problem with Private International Law*, 1999, p. 29 et seq.: 'Why, then, do we cling to the conventional wisdom, the idea that national law must govern international transactions and that all national laws are of equal value? Among the reasons that come to my mind there are, first and foremost, the force of habit and the hesitation to deviate from the trodden path'.

<sup>98</sup>[Nassar, Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-term International Transactions, 1995, p. 19 et seq.](#); Sharma, *N.Y.L. Sch. J. Int'l & Comp. L.* 1999, 95, 101: ' . . . the judicial reluctance to police the fairness of every commercial contract by reference to moral principles has of late witnessed a significant transformation and shift in legal mentality'; see also Art. 1.7 [UNIDROIT Principles](#) , Art. 1:201 [Lando-Principles](#) ; Berger, supra note 33, p. 165 et seq.

<sup>99</sup>See Lord Goff of Chieveley, Wilberforce Lecture, *ICLQ* 1997, 745, 748: 'Comparative law may have been the hobby of yesterday, but it is destined to become the science of tomorrow'.; Thayer, supra note 13, 154: 'The ability to envisage [through the use of comparative methodology] the legal backgrounds involved [in international commerce] . . . contributes immeasurably to the possibility of unified evolution'.; Gordley, *Am. J. Comp. L.* 1995, 555 et seq.; Merryman, *Hastings Int'l & Comp. L. Rev.* 1998, 771 et seq.

<sup>100</sup>See Marcesinis, in Marcesinis (ed.), *The Gradual Convergence*, 1994, p. 20 et seq.; Zimmermann, *ZEuP* 1993, 4, 51; Gordley, *ZEuP* 1993, 498 et seq.; Kötz, *ZEuP* 1998, 493, 497 et seq.; Blase, *Vindabona Journal*, 1999, 3, 13; see for the gradual introduction of an overriding principle of good faith as the 'pars pro toto' of the convergence phenomenon Mason, *Law Q. Rev.* 2000, 66 et seq.; Wittaker, *Law Q. Rev.* 2000, 95 et seq.; see for the gradual convergence of the case law technique in civil and common law McCormick/Summers, in McCormick/Summers (eds), *Interpreting Precedents*, 1997, pp. 531, 532: 'The caricature picture of civil law systems free from the shackles of precedent in contrast to the common law enslaved to its own past (or preserving the "good old order") is certainly no longer remotely accurate, if it ever was'.

<sup>101</sup>See [Kötz, Europäisches Vertragsrecht, Vol. I, 1996, p. V et seq.](#) ; Lando, *Europ.Rev.Pr.L.* 1997, p. 525 et seq.; Zimmermann, *Col.J.Europ.L.* 1994/95, 63 et seq.

<sup>102</sup>See for a (careful) approach towards uniform antitrust rules Weiss, *Fordham International Law Journal*, 2000, 250 et seq.; see for the vision of a 'world antitrust law' Basedow, *Weltkartellrecht*, 1998; see for a uniform European insolvency law the Council Regulation No. 1346/2000 of May 2000 on insolvency proceedings, *Official Journal of the European*

Communities, L 160, 1 et seq.

<sup>103</sup>Today, more than 90 per cent of all major international commercial contracts contain an arbitration clause, see [Berger, International Economic Arbitration, 1993, p. 12.](#)

<sup>104</sup>See Berger, J. Int'l Arb. No. 4 (1992), 5 et seq.; Tetley, in Carbonneau (ed.), *Lex Mercatoria and Arbitration*, 2nd edn 1997, p. 50 et seq.

<sup>105</sup>See generally Böhm, in Mestmäcker (ed.), *Freiheit und Ordnung in der Marktwirtschaft*, 1980, p. 105 et seq.; Schröder, *Die neue Gesellschaft/Frankfurter Hefte*, 2000, 200 et seq.; Berman, supra note 22, at 1619; see also the vision of a 'general global legal society' of von [Savigny, System des heutigen Römischen Rechts, Vol. VIII, 1849, p. 30 et seq.](#)

<sup>106</sup>Walker/Fox, supra note 86, 380.

<sup>107</sup>See Hobe, supra note 95, 207 who points at the development of a 'global society as opposed to the world of states'.

<sup>108</sup>See supra I.7.

<sup>109</sup>Teubner, supra note 66, 264.

<sup>110</sup>Juenger, in Carbonneau (ed.), *Lex Mercatoria and Arbitration*, 2nd edn 1997, pp. 265, 276; see also Berman/Dasser, supra note 33, p. 60.

<sup>111</sup>Canaris, in Basedow (ed.), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht*, 2000, pp. 5, 10 et seq.

<sup>112</sup>See for the 'normative force of fact' Jellinek, *Allgemeine Staatslehre*, 3rd edn 1929, p. 338.

<sup>113</sup>Jhering, *Der Zweck im Recht*, Vol. 1, 6th-8th edn 1923, p. 249: 'Only those rules imposed by society deserve the name of law which have behind them the force of the law or . . . the force of the sovereign state, meaning that only those rules adopt the quality of legal norms that have been vested with this effect by the sovereign state or that the state is the only source of the law' (translation by the author).

<sup>114</sup>Raiser, *Das Recht der Allgemeinen Geschäftsbedingungen*, 1935, p. 63, 74 (translated by the author).

<sup>115</sup>Duguit, *Les Transformations du Droit Public*, 1913, p. 85 et seq.; but see for a different view Allen, *Law in the Making*, 3rd edn 1939, p. 485.

<sup>116</sup>See for a fascinating 'in silico' approach to norm making Picker, *U. Chi. L. Rev.* 1997, p. 1225 et seq.

<sup>117</sup>See Berman, supra note 22, at 1620.

<sup>118</sup>[Lando, in Festschrift Till Stig Strömholm, 1997, pp. 567, 578.](#)

<sup>119</sup>Schmitthoff, supra note 1, p. 37.

<sup>120</sup>Teubner, supra note 66, 261.

<sup>121</sup>Kahn, supra note 31, p. 42.

<sup>122</sup>See supra note 91.

<sup>123</sup>Cooter, *U. Pa. L. Rev.* 1996, 1643 et seq.; Bernstein, *U. Pa. L. Rev.* 1996, 1765 et seq.; Scott, *J. Legal Stud.* 1990, 597, 613; Charny, *Harv. L. Rev.* 1990, p. 373 et seq.; Posner, *U. Chi. L. Rev.* 1996, 133, 159 et seq.

<sup>124</sup>Schmitthoff, supra note 1, p. 6 (citing Judge Lagergren).

<sup>125</sup>See Hyland, *Am. J. Comp. L.* 1992, 541, 545; see also for the 'family, friendship, firms' phenomenon in international trade which serves as a stabilizing factor for long-term 'relational' contractual relationships Schmidtchen, supra note 91, 103

<sup>126</sup>See Goldstajn, *Festschrift Schmitthoff*, 1973, pp. 171, 179: ' . . . it is a fact that Standard Contracts and the General Conditions have often been corrected through competition and therefore constitute rational solutions'.

<sup>127</sup>See Berman/Dasser, supra note 33, p. 54: 'As a general rule, merchants trading across national boundaries are deemed to have equal bargaining power and to know best what suits them'; Kahn, in Gaillard (ed.), *Transnational Rules in International Commercial Arbitration*, 1993, pp. 237, 242: 'On constatera que l'introduction de la notion de professionnalisme donne une coloration spécifique à la règle générale que le contrat tient lieu de loi aux parties'; see generally for the practical application of this principle by international arbitrators [ICC Award No. 1990, Clunet 1974, 897](#) ; [No. 1512, Clunet 1974, 905](#) ; [No. 2291, Clunet 1976, 989](#) ; [No. 2438, Clunet 1976, 969 with Note Derains, ibid., 971](#) ; [No. 3130, Clunet 1981, 932](#) ; [No. 3380, Clunet 1981, 927](#) ; [No. 5364, Clunet 1991, 1059](#) ; cf. generally Berger, supra note 33, p. 236.

<sup>128</sup>Gaillard, *Int'l Bus. Lawy.* 1999, pp. 214, 221; see also Gaillard, in van den Berg (ed.), *Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*, ICCA Congress ser. No. 7, 1989, p. 570 et seq.

<sup>129</sup>See Pfund, in Carbonneau (ed.), *Lex Mercatoria and Arbitration*, 2nd edn 1997, pp. 203, 205 et seq.

<sup>130</sup>See [Braeckmans, TvPr. 1986, 1, 16](#) ; Stein, supra note 33, p. 148 et seq.; Teubner, supra note 66, 273 et seq.; Schmidtchen, supra note 91, 101 et seq.; Galgano, *Ann. Surv. Int'l & Comp. L.* 1995, 99, 102; Gandolfi, *Rev. trimestrielle de droit civil*, 1992, 707, 710; Berman/Dasser, supra note 33, p. 54 et seq.; Ladeur, *RabelsZ* 64 (2000), 61, 98 et seq.; Berger, supra note 33, p. 105 et seq.

<sup>131</sup>Benson, *Southern Economic Journal*, 1989, 644, 654.

<sup>132</sup>But see Hightet, supra note 57, p. 142.

<sup>133</sup>Schmidtchen, supra note 91, 74.

<sup>134</sup>See supra note 11.

<sup>135</sup>See [Doak/Bishop, Yearbook Commercial Arbitration XXIII \(1998\), 1131 et seq.](#) ; see also *Ad Hoc Award The Government of the State of Kuwait v. The American Independent Oil Co. (AMINOIL) of March 24, 1982, ILM 1982, 976,*

1036.

<sup>136</sup>See Caprioli/Sorieul, *Clunet* 1997, 323, 330 et seq.; Mefford, *Indiana Journal of Global Legal Studies*, 1997, 211 et seq.

<sup>137</sup>[Molineaux, J. Int'l Arb. No. 1 1997, 55, 64 et seq.](#) ; see also Helps, *Int'l Constr. L. Rev.* 1997, 525, 537 et seq.; Bruner, *Int'l Constr. L. Rev.* 2000, 47 et seq.

<sup>138</sup>Tetley, *supra* note 104, p. 43 et seq.; see for maritime law as the core of the ancient law merchant, *supra* note 12.

<sup>139</sup>*Swift v. Tyson*, 41 US (16 Pet.) 1 (1842); see also Lord Mansfield in *Luke v. Lyde*, 2 Burr. [1759] 887: 'Mercantile law is not the law of a particular country, but the law of all nations'.