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Thomas SCHULTZ*

I. Introduction

From the first days of law school, lawyers are taught to subsume facts under legal concepts in order to draw legal consequences from specific cases. Scientists are similarly taught to apply general definitions to individual instances in order to characterize them as belonging to the category of which the definition is the gatekeeper. This is how we establish legal and scientific truths, from which further consequences can then safely be derived. Infringing this rule amounts to a fundamental methodological error that invalidates or at least strongly weakens any inferred statement. Surprisingly, there is one legal question in relation to which this rule is usually, if not constantly, broken, which barely triggers any criticism or even reaction: it is the question of whether the *lex mercatoria* is law or not. The memorable 'trench warfare' that characterized the debate on this question in its earlier days,[1] with arguments fired across the line but little progress made, and the

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[1] LAGARDE P., 'Approche critique de la lex mercatoria', in: *Le droit des relations économiques internationales: Études offertes à Berthold Goldman*, Paris 1982, p. 125.

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current relative scantiness of reflective effort on the matter, are doubtlessly due, in part, to this non-observance of proper scientific methodology.

The purpose of this article is thus to focus on the applicable analytical framework to determine the jural character of the *lex mercatoria*, or, in other words, the concepts of law and a legal system. It is there indeed that lies the most striking weakness of the contribution – which is otherwise permanently valuable – made to the debate by international lawyers. To be sure, the abstract questions of what law and a legal system are, how they are to be defined, and how they relate to each other, are barely ever given serious consideration in these circles when discussing the *lex mercatoria*. Arbitration specialists are usually quite prompt in criticizing non-specialists for failing to understand and rely on the relevant literature – and so they should, as the latter generally underestimate the complexity of the field. But the same specialists seem to think that they can dispense with following their own advice when it comes to the juridicity of the *lex mercatoria*, as they barely mention any relevant literature on the concepts of law and a legal system, in spite of the role the concepts hold for the question with which they are dealing. Often, authors refer to an unexplained and even undefined 'traditional' concept of law, thereby avoiding much criticism on account of the embarrassment that readers feel because of their ignorance of this traditional, and thus supposedly well-known, concept.[2] At best, one finds a few references to Santi Romano in the French literature on the topic.[3] Romano is of course an important author, but his work is quite limited. Relying solely on it is somewhat meager if one considers the more pregnant international scholarship, be it Italian (such as Norberto Bobbio), British (such as H.L.A. Hart, Joseph Raz and Matthew Kramer), Belgian (such as François Ost and Michel van de Kerchove), French (such as Jacques Chevallier), Austrian (such as Hans Kelsen), German (such as Gunther Teubner) or American (such as Lon Fuller and Paul Bohannan) – all authors whose works have direct importance for the issues as stake here and will be used in the present article. Just as one cannot seriously discuss key issues pertaining to the field of international commercial arbitration while ignoring the work of authors such as Pierre Lalive, Lord Mustill,

[2] FOUCHARD P./ GAILLARD E./GOLDMAN B., *Traité de l'arbitrage commercial international*, English edn., Paris 1996, English edn. 1999 with John Savage, para. 1450: 'the criteria which traditionally defined the existence of a legal order'. See similarly, GOLDMAN B., 'Lex Mercatoria', in: *Forum Internationale* 1983, p. 19, arguing that the *lex mercatoria* is not equity, as it may lead to inequitable results, and therefore 'it is manifest that [it] has the status of law'.

[3] KASSIS A., *Théorie générale des usages du commerce,* Paris 1984; OSMAN F., *Les principes généraux de la Lex mercatoria: contribution à l'étude d'un ordre juridique anational*, Paris 1992, p. 357 *et seq*.; FOUCHARD P./GAILLARD E./GOLDMAN B. (note 2), para. 1450. A notable exception is DEUMIER P., *Le droit spontané*, Paris 2002, p. 324 *et seq.* On the role played by Santi Romano in the theoretical construction of the *lex mercatoria* – whose impact and status seem to largely explain the acceptability under the social rules of French legal academia of referring to his theoretical construction alone –, see the comments made during a colloquium held in Paris in 2001 by Philippe Kahn, as transcribed in GHÉRARI H./SZUREK S. (eds), *L'émergence de la société civile internationale*, Paris 2003, pp. 266-268.

Gabrielle Kaufmann-Kohler, Emmanuel Gaillard, Philippe Fouchard, William Park and many others, one cannot seriously discuss key issues pertaining to the field of legal theory while ignoring, and referring to, the works of authors such as those mentioned hereabove.

The question of the definition of law and a legal system are questions of legal theory. On such a topic, it obviously is legal theory that should teach international lawyers. Legal theorists are there to provide the definitions, the concepts; international lawyers are there to apply them to individual instances, to subsume the facts under the concepts.

The question of the juridicity of the *lex mercatoria* matters in at least three respects. First, the label of 'law' carries with it certain qualities that we have come to associate with, and expect from, that which is jural. On the one hand, these qualities relate to autonomy and supremacy. As Joseph Raz puts it summarily:

> 'There can be human societies which are not governed by law at all. But if a society is subjected to a legal system then that system is the most important institutionalized system to which it is subjected.'[4]

On the other hand, the qualities associated with law relate to the legitimacy and the quality of the mode of governance that uses, as a regulatory instrument, a normative set that deserves to be called law: we now face the rule of law as a moral-political ideal. The fundamental attributes of law – which Fuller famously has called the 'inner morality of law'[5] – become here principles of political morality.[6] To put it simply, qualifying the *lex mercatoria* as law would convey the idea that it is regulatorily important (that it directs behavior in a significant way) and that it constitutes a morally and politically estimable mode of governance for the *societas mercatorum*. This is what is generally considered the political debate behind the *lex mercatoria*, as such qualities of a normative system legitimize and even encourage a policy of non-intervention on the part of external institutions.[7]

Second, the question of the juridicity of the *lex mercatoria* has led to amendments in a number of national arbitration laws and procedural rules of arbitration institutions (which will be briefly reviewed in this article), opting for a reference to 'rules of law' as the applicable 'law' instead of 'a law'. The issue was the controversy on the question whether the *lex mercatoria* constitutes a legal system – which is what 'a law' would refer to. The locution 'rules of law' was thus introduced as a means to provide that the *lex mercatoria* is applicable as a set of

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[4] RAZ J., *Practical Reason and Norms*, Oxford 1999, p. 154.

[5] FULLER L., *The Morality of Law*, rev edn, New Haven 1969, pp. 33-41.

[6] KRAMER M.H., *Objectivity and the Rule of Law*, Cambridge 2007, p. 142 *et seq*.

[7] It is likely against this presumption of the moral-political estimableness of the *lex mercatoria* that certain authors have reacted (more or less accurately) by pointing to a possible hegemony of the West using the *lex mercatoria* as an instrumentality of power. See, *e.g.*, TOOPE SJ, *Mixed International Arbitration: Studies in Arbitration Between States and Private Persons*, Cambridge 1990, p. 96: 'It would appear that the so-called *lex mercatoria* is largely an effort to legitimise as «law» the economic interests of Western corporations.'

legal rules, whether they collectively form a legal system or not. As we will see, this theoretical construction of 'rules of law' not being a 'legal system' turns out not to withstand close scrutiny and appears to be a scientifically unworkable compromise.

Third, legal pluralists use the *lex mercatoria* as the prime example of legal systems outside the State, as the starting point informing most reflections on non-national legal orders, such as the *lex sportiva*.[8] For instance, a PhD thesis pushing for a pluralistic view of law in the field of arbitration or international law would typically be exposed to severe criticism if it did not use the *lex mercatoria* as the initial proof-of-concept in the argumentation. Legal pluralists generally assume that there is at least one clear manifestation of non-State law, and that this manifestation is the *lex mercatoria*. The *lex mercatoria* is the flagship of legal pluralism.[9]

The approach of this article will be based on what remains the most practicable view of law: legal positivism. Eager critics might quickly argue that this amounts to a preconception that prejudges the entire debate, insofar as legal positivism simply excludes any law outside the State. Such critics, however, might be slightly misinformed: legal positivism cannot be reduced to this classical Benthamian and Austinian monistic construction of law (law as the exclusive product of the modern State), directly opposed to legal pluralism. Legal positivism, as we will briefly see, has many branches. The branch that I follow relies on the proposition (which is fundamental throughout legal positivism) that a rule of law, in order to be a rule of law, must be posited, that is selected by the officials of the relevant legal system, in accordance with the system's rule of recognition. This approach admits of non-State law; it is compatible with legal pluralism, which, to be sure, is a necessary condition (though not a sufficient one) to admit of the *lex mercatoria* as law.[10]

This article is divided into three Parts, which reflect the three main views of the nature of the *lex mercatoria*, in an order that starts with the most watered-down acceptance of the *lex mercatoria* and ends with the most ambitious one. It may be pointed out that these different views of the *lex mercatoria* are assessed not according to their appeal, workable character, or popularity in practice, but only with respect to their accuracy as theoretical constructs. Part I examines the idea that the

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[8] See, *e.g.*, LATTY F., *La lex sportiva*, Leiden 2007, p. 12 *et seq*.

[9] This is in particular so with regard to the branch of legal pluralism chiefly incarnated by the School of Dijon – the school of thought led by Berthold Goldman, Philippe Kahn, Philippe Fouchard and Eric Loquin (who all were or are based in Dijon), which first coined the idea of the rebirth of the *lex mercatoria* and, on this basis, strongly argued in favour of the recognition of non-state arbitral legal systems. For a lively account of the development of the School of Dijon, see Philippe Kahn's comments made during the Paris 2001 colloquium, in GHÉRARI H/SZUREK S. (note 3), pp. 266-268.

[10] See, *e.g.*, JACQUET J.-M./DELEBECQUE P./CORNELOUP S., *Droit du commerce international*, Paris 2007, pp. 59–60: 'l'admission de la juridicité de la *lex mercatoria* suppose une adhésion à la théorie du pluralisme juridique, récusant le rôle exclusif de l'Etat dans la production du droit.'

lex mercatoria is merely a method of decision making used by arbitrators. This view relies on the idea that the *lex mercatoria* is a method of rule-selection, according to which rules are extracted from other legal systems (typically national ones), reinterpreted and adapted to international commerce, and applied in this new guise. The analysis will show that this view implicitly and necessarily relies on the idea that the *lex mercatoria* is, in fact, a legal system of its own. Part II delves into the view that the *lex mercatoria* is not a legal system, but merely a set of legal rules. The discussion will show that this view is fundamentally flawed, inasmuch as that which makes rules legal is their belonging to a legal system, which legal system is necessarily the *lex mercatoria* itself. Part III then critically analyzes the *lex mercatoria* as a legal system of its own, and concludes that it fails to meet certain requirements of structure and that its normative contents lack certain formal qualities, which all are essential features of a legal system. The article concludes that the *lex mercatoria* is not law, that it is in and of itself devoid of jural character, that it is not an instance of legal pluralism.

II. The *Lex Mercatoria* as a Method

The *lex mercatoria* is notorious for the difficulty faced by its proponents to come up with a defined set of rules that is rich and complete enough for it to be considered meaningful.[11] One way out of this issue, which at first appears sound and convincing, is to argue that the *lex mercatoria* is not actually a set of rules, but rather a method or technique of decision-making.[12]

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[11] GAILLARD E., 'Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules', in: *ICSID Review - Foreign Investment Law Journal* 1995, p. 224: 'The transnational rules method is often criticized because of the perceived difficulty of determining the content of the rules with any precision.' See also MUSTILL M., 'The New Lex Mercatoria: The First Twenty-Five Years', in: *Arbitration International* 1988 p. 110 *et seq*., listing a total of 20 principles or rules forming the *lex mercatoria* – an almost meaningless amount compared to the normative wealth of national laws. See further HIGHET K., 'The Enigma of the Lex Mercatoria', in: *Tulane Law Review* 1989, p. 623: 'It is conceded by proponents of the lex that «[i]t is not possible to provide an exhaustive list of all the elements of the "law merchant."»'. This is true. It is not even possible to supply more than a meager inventory, loaded with vagueness and charged with logical or analytical legal error.' See further KASSIS A., 'L'arbitre, les conflits de lois et la lex mercatoria', in: ANTAKI N./PRUJINER A. (eds), *Actes du premier colloque sur l'arbitrage commercial international*, Montreal 1986, p. 136; LANGEN E., *Transnational Commercial Law*, Leiden 1973; SCHMITTHOFF C., 'The Unification of the Law of International Trade', in: CHENG C.-J. (ed), *Schmitthoff's Selected Essays on International Trade Law*, Deventer, 1988.

[12] GAILLARD E., 'Transnational Law: A Legal System of a Method of Decision Making?', in: *Arbitration International* 2001, p. 64: 'This understanding of transnational law [as a method of decision-making] presents a distinct advantage over the view which reduces it to a list, for it eliminates the criticism based on the alleged paucity of the list.'

What then does it mean exactly to argue that the *lex mercatoria* is a 'method of decision-making'? Fouchard, Gaillard and Goldman wrote in this respect that 'it cannot be too strongly emphasized that applying transnational rules involves understanding and implementing a method, rather than drawing up a list of the general principles of international commercial law.'[13] They claim that this method for the selection of rules is the 'true test of the effectiveness of *lex mercatoria* as an instrument for resolving disputes in international trade'.[14] In substance, the idea is that the conduct that the *lex mercatoria* commands may not be identifiable *in abstracto* by scholars, but will certainly be recognized by the arbitrator when he or she has to apply the *lex mercatoria*, which thus makes the *lex mercatoria* effective. The *lex mercatoria* is, in the approach discussed here, not viewed as a defined and readily available list of norms, but as a method used to identify those norms. This appears in even clearer focus in another contribution of Emmanuel Gaillard, where he wrote that 'the transnational rules [forming the *lex mercatoria*] do not result from a list but from a method.'[15] (The rules, it may be noted, *result* from the method.) He then specifies what this method consists of in the following words: 'in the absence of determinations on the method by the parties themselves, the counsels and arbitrators must make a comparative law analysis so as to identify the applicable rule or rules.'[16] 'Whatever the level of detail of the question posed', he goes on, 'the method is capable of providing a solution, in the same way that a national law would'.[17] Similarly, Lowenfeld's position is that the *lex mercatoria* is 'a source of law made up of custom, convention, precedent, and many national laws. . . . [It is] an alternative to a conflict of laws search.'[18] It is thus meant to be

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Others have called it the 'functional approach': see REDFERN A./HUNTER M., *Law and Practice of International Commercial Arbitration*, 4th edn, London 2004, para. 2-62.

[13] FOUCHARD P./GAILLARD E./GOLDMAN B. (note 2), para. 1455.

[14] *Ibid*.

[15] GAILLARD E., 'Thirty Years of Lex Mercatoria' (note 11), p. 224: 'transnational rules are a method, not a list'. See also GAILLARD E., 'Transnational Law' (note 12), p. 62: 'The other approach to defining the contents of transnational law is to view transnational law as a method of decision-making, rather than as a list.'

[16] GAILLARD E., 'Thirty Years of Lex Mercatoria' (note 11), p. 226: 'Failing a clear indication by the parties as to how the applicable transnational rules are to be determined, . . . the process [of the *lex mercatoria*] involves counsel and arbitrators carrying out an analysis of comparative law in order to establish the relevant rule or rules.' See also GAILLARD E., 'Transnational Law' (note 12), pp. 62-63: 'This approach consists, in any given case, of deriving the substantive solution to the legal issue at hand not from a particular law selected by a traditional choice-of-law process, but from a comparative law analysis which will enable the arbitrators to apply the rule which is the most widely accepted, as opposed to a rule which may be peculiar to a legal system or less widely recognized.'

[17] GAILLARD E., 'Thirty Years of Lex Mercatoria' (note 11), p. 226: 'However detailed the question at issue, the transnational rules method will produce a solution, in the same way as national laws.'

[18] LOWENFELD A.F., 'Lex Mercatoria: An Arbitrator's View', in: *Arbitration International* 1990, p. 143 *et seq*.

equivalent to a conflict of laws search, at least in certain respects. The author, indeed, appears to consider that the *lex mercatoria* is a normative mechanism that allows us to identify or recognize the applicable norms, akin to a set of rules of conflict of laws. A similar position can be ascribed to Ole Lando, who wrote that the *lex mercatoria* 'has the advantage that it does away with the choice-of-law process which many lawyers abhor'.[19] It is here conceived of as a process of norm selection that replaces choice of law rules.[20] In essence, to rephrase what has already been said in terms that might now advance this article's thesis, what all these views of the *lex mercatoria* have in common is that it is conceived of as a normative process towards the selection of norms: if one is to apply the *lex mercatoria*, one is to identify rules and principles by means of a certain method.

What implications does this have on the examination of the *lex mercatoria*'s jural character? Before addressing the question, two seemingly germane points must be made. First, the *lex mercatoria*, even as a method, is meant to be a jural phenomenon, and not a mere social ordering of the *societas mercatorum*. As Lord Mustill writes, the *lex mercatoria* is not meant to be an 'expedient for deciding according to «non-law»'[21] For Lowenfeld, '[i]t is important to emphasize that *lex mercatoria* is not *amiable composition*'.[22] Second, the *lex mercatoria*, even as a method, is conceived of as something more than the sum of its constitutive parts.[23]

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[19] LANDO O., 'The Lex Mercatoria in International Commercial Arbitration', in: *I.C.L.Q.* 1985, p. 754.

[20] Lowenfeld and Lando disagree on the point whether the *lex mercatoria* replaces or displaces the choice of law process: see LOWENFELD A.F. (note 18), p. 145: '[The *lex mercatoria*] is, in other words, an additional option in the search for the applicable law, not an alternative to that search.' This debate has no implication on the fact that the *lex mercatoria* is understood as a method for the selection of norms and the difference between the positions of the two authors is thus one that does not make a difference for the purposes of the present study.

[21] MUSTILL M. (note 11), p. 92.

[22] LOWENFELD A.F. (note 18), p. 141.

[23] *Cf.* GAILLARD E., 'La distinction des principes généraux du droit et des usages du commerce international', in: *Études offertes à Pierre Bellet*, Paris 1991, p. 205: '[O]n tiendra provisoirement pour acquis qu'il est possible en pratique de dégager de telles règles d'une analyse de droit comparé ou de diverses sources internationales et que ces règles ne se limitent pas à des principes si généraux qu'ils se retrouvent dans tous les droits . . . ce qui les priverait de tout intérêt.' See also BUCHER A./TSCHANZ P.-Y. *International Arbitration in Switzerland*, Basle 1988, p. 105, who refer to the 'application of rules of law which are recognized in international trade independently from their enactment by any given state.' See also POUDRET J.-F./BESSON S., *Comparative Law of International Arbitration*, 2nd edn, London 2007, paras 696-697: '[A]lthough they claim to refer to an autonomous legal order, adherents of the *lex mercatoria* do not hesitate to use rules derived from other legal systems. . . . The generality of these principles does . . . have the advantage of constituting a reservoir into which arbitrators may dip in order to infer particular or new rules applicable to the case at hand. To this extent this source overlaps with arbitral practice ['jurisprudence arbitrale' in the original French version], which is a sort of modern praetorian law. . . . In short, we have

This is meant in the sense that when an arbitrator is required to apply the *lex mercatoria*, he would fail his or her task if, after having made the comparative law analysis or followed any other relevant norm-identification process, he or she applied, strictly speaking, rule X of national legal system A, plus rule Y of national system B, plus rule Z of national legal C, and so on, where X, Y and Z have in substance the same content, which content is thus given a transnational character. Instead, he or she must distill the norm by following the relevant method[24] (recall that the transnational rules *result* from the method) and apply the result as a norm *of its own*,[25] as a norm that does not draw its jural character and its normative force from one of the national legal systems within which it exists, but from somewhere else.

If the *lex mercatoria* is meant to be a method towards the identification of a set of legal norms in application of which the dispute will be resolved, where does the legal character of these norms come from? An initial answer would seem to be that it comes from the different national legal systems and international law.[26] In the light of the immediately preceding discussion, this answer appears to be wrong. When an award rendered in application of the *lex mercatoria* is made, it is meant to be binding not because rules X, Y and Z, belonging to discrete national legal systems, international conventions, customary international law or other sources, command the legal solution embodied in the award. It is meant to be binding because a transnational rule (selected in application of the *lex mercatoria* method, effectively resulting from it) commands it.[27] This appears quite clearly in Lord

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seen that the *lex mercatoria* draws its norms from heterogeneous sources of unequal value derived from various legal systems'.

[24] *Cf.* MUSTILL M. (note 11), p. 92: 'Although the essence of the lex mercatoria is its detachment from national legal systems, it is quite clear from the literature that some, at least, of its rules are to be ascertained by a process of distilling several national laws.'

[25] Whether the resulting norm is considered to have been crafted, discovered or identified by the arbitrator is irrelevant. What matters is that it is the result of an application of the method of the *lex mercatoria*, that the norm has been 'imported', whatever its origin, into the *lex mercatoria* in application of its method. Further on the 'reception' of a norm in the 'transnational order', see KAHN P., 'Les principes généraux du droit devant les arbitres du commerce international', in: *Clunet* 1989, pp. 326–327.

[26] Based specifically on international law, their juridicity would, according to this view (which the author does not subscribe to), stem from treaty and customary law as generalized through the concept of general principles of law (Art. 38(1)(c) ICJ Statute): MALANCZUK P., *Akehurst's Modern Introduction to International Law*, 7th ed, London 1997, pp. 48-49: 'general principles of international law . . . are not so much a source of law as a method of using existing sources – extending existing rules by analogy, inferring the existence of broad principles from more specific rules by means of inductive reasoning, and so on' (in other words, the *lex mercatoria* would be a method referring to a method (the general principles of international law) referring to treaty and customary law).

[27] *Cf. Akehurst's Introduction* (note 26), p. 50: 'In the case of «internationalized contracts» between a state and foreign companies, the purpose of referring to general principles . . . is primarily . . . to prefer to trust the arbitrator's (s') discretion to discover relevant rules

Mustill's exposition of the matter, when he writes that 'the rules of the *lex mercatoria* have a normative value which is independent of any one national legal system.'[28] Ole Lando takes the same position: 'the binding force of the *lex mercatoria* does not depend on the fact that it is made and promulgated by state authorities but that it is recognized as an autonomous norm system by the business community and by state authorities'.[29] Similarly, Andreas Bucher and Pierre-Yves Tschanz wrote that '[i]nternational contracts and awards often refer to principles or rules the binding force of which does not result from any national rule of law.'[30] The same position is further implicit in the arguments of many authors who focus not on the source of juridicity but on the inventory of the norms that constitute the *lex mercatoria*.[31]

It is the same phenomenon as when a national court relies on a comparative law analysis to reach a decision, in which case the normative value of the rule according to which the decision is made results from the national legal system of the court in question (by dint of judicial law-making), not from those legal systems where the solution was found.[32] To put it differently, arbitrators applying the *lex mercatoria* extract rules and principles from various national legal systems, and possibly from the international legal system, then assemble and combine them, and maybe reinterpret or, as Gabrielle Kaufmann-Kohler would say, 'transnationalize them' to better adapt them to international commerce.[33] The norms are then applied

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of law creatively, rather than being at the mercy of the contracting state's national legislation.'

[28] MUSTILL M. (note 11), p. 88. See also FOUCHARD P./GAILLARD E./GOLDMAN B. (note 2), para. 1447: 'To denote rules other than those of a given jurisdiction, we shall use the generic expression *lex mercatoria*.'

[29] LANDO O. (note 19), p. 752.

[30] BUCHER A./TSCHANZ P.-Y. (note 23), p. 105.

[31] See, *e.g.*, LAGARDE (note 1), p. 128: 'Un inventaire scrupuleux des normes de la *lex mercatoria* doit exclure les règles de droit matériel international de nature étatique ou interétatique. Le critère ici doit être formel et non matériel. . . . L'originalité de la *lex mercatoria* est d'être du droit [adopté sans contrainte de l'Etat], créé par la *societas mercatorum*, et c'est donc en dehors des sources étatiques qu'il faut en chercher les manifestations.'

[32] See, *e.g.*, ANDENAS M./FAIRGRIEVE D., 'Finding a Common Language for Open Legal Systems', in: CANIVET G./ANDENAS M./FAIRGRIEVE D. (eds), *Comparative Law Before the Courts*, London 2004, p. xxviii.

[33] KAUFMANN-KOHLER G., 'Arbitral Precedent: Dream, Necessity, or Excuse?', in: *Arbitration International* 2007, p. 364: '[A]rbitrators have an inclination to «transnationalize» the rules they apply, either because they are subject to no meaningful controls when it comes to the merits, they act in a transnational environment, or they are themselves very often from different legal cultures. . . . [T]he purpose of transnationalization is to remove the dispute from the ambit of a possibly inadequate national law.' See also KAUFMANN-KOHLER G., 'Le contrat et son droit devant l'arbitre international', in: *Le contrat dans tous ses états*, Bern 2004 and CARBONNEAU T., 'Arbitral Law-Making', in: *Michigan Journal of International Law* 2004, pp. 1203-1204: '[Arbitrators] retain the authority to mold the chosen law to the specific circumstances of the litigation. . . . The content of the

in this new quality. In the process, as the expositions of the various quotations above show, the arbitrators tear these rules and principles away from their original source of juridicity, namely the national legal systems and possibly the international legal system.

In other words, this means that, in the current approach, an arbitrator applying the *lex mercatoria* applies *a law* and not merely *law*,[34] the difference being that the former is a given instantiation of the latter, marked by an element of cohesion to be discussed later on. 'Law' can refer to a disparate collection of rules belonging to discrete legal systems (typically national ones) from which they would derive their juridicity. An arbitrator applying national law α to the validity of the arbitration agreement, national law β as the law governing the arbitration and national law γ to the substance of the dispute would in this sense be applying law (or laws), but not a law. The same holds true if the parties have elected several national laws that apply each to one specific legal question (e.g. contractual versus non-contractual responsibility, validity of a patent versus validity of a license), a process better known as '*dépeçage*'.[35] 'A law', by contrast, is an organic totality that is the source of its own juridicity. Brutally simplifying for the sake of clarity, the idea is that the *lex mercatoria* is, in the current approach, understood as being the result of mixing up an array of national legal systems and using the resulting product as a new normative entity.

These points will inform the answer one may give to the question asked above: what is a method of selection of rules in the arsenal of conceptual instruments available to examine or assess the jural character of a normative phenomenon? Asked differently and in the light of the developments just made, the question hopefully will spark an obvious answer for anyone with a basic knowledge of legal theory: what is something that determines which norms belong to a law? The answer of course lies in Hart's distinction between primary and secondary rules.[36] It may be recalled that primary rules are rules of conduct, providing what the

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governing *lex*, however chosen, is quite malleable then, with the degree of malleability being determined by the arbitrator's ingenuity.' (references omitted).

[34] The contention made here may be in contradiction with those legal provisions – introduced specifically in France, the Netherlands and Switzerland in order to circumvent the question of the *lex mercatoria*'s nature as a legal system – that allow the arbitrator to apply 'rules of law', as opposed to 'the law' or 'a law'. It is hopefully obvious that what legal provisions, that is certain legal systems, say has no bearing on an analytical examination of what is law (and not 'a law'). The question, which reflects the second main view of the *lex mercatoria* (*i.e.* that it is a set of rules), will be examined in further detail in the following main section. See also GAILLARD E., 'Transnational Law' (note 12), pp. 62-63: 'one may be tempted to conclude that, where the relevant arbitration rules or arbitration statute mandates the arbitrators to select the «law» applicable to the dispute, as opposed to mere «rules of law», it is nonetheless open to them to select . . . transnational rules as «the law» applicable to the dispute.'

[35] BERGER K.P., *International Economic Arbitration*, Deventer 1993, pp. 492-493; FOUCHARD P./GAILLARD E./GOLDMAN B. (note 2), para. 1436.

[36] HART H.L.A., *The Concept of Law*, 2nd edn, Oxford 1994, p. 91 *et seq*.

addressees are obliged to do, whereas secondary rules determine the pedigree that primary rules must have in order to be binding within the legal system to which the secondary rule belongs – as such it is more precisely called a secondary rule of recognition. Secondary rules are what constitute the 'element of cohesion' adumbrated above when distinguishing between law and a law.

This means that a method of rule selection is nothing more and nothing less than a norm (a norm is a statement that contains prescriptions or imperatives,[37] therefore a method is a norm) of recognition of other norms, or rather a rule of recognition.[38] Indeed, the *lex mercatoria* as a method of rule selection fits quite neatly under the definition of a rule of recognition. As Matthew Kramer writes,

> [T]he Rule of Recognition in any legal system exists as a set of normative pre-suppositions that underlie and structure the law-ascertaining behavior of the system's officials. It is an array of norms on the basis of which the officials determine what counts as legally binding and what does not.[39]

Precisely, the *lex mercatoria* as a method of rule selection underlies and structures the law-ascertaining behavior of arbitrators when they decide a case in application of the *lex mercatoria*. The *lex mercatoria* as a method determines what will count as legally binding and what will not.

The presence of such secondary norms – regardless of their level of precision or opacity – is precisely what characterizes a legal system as opposed to a social normative system.[40] This implies that the view according to which the *lex mercatoria* is a method for the selection of rules towards the constitution of a law with its own autarkic juridicity relies in fact, at its most foundational level, on the assumption that the *lex mercatoria* is a legal system, the contours of which are

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[37] See, *e.g.*, KRAMER M.H., *In Defense of Legal Positivism: Law Without Trimmings*, Oxford 1999, p. 80.

[38] The same conclusion is suggested by another passage by Emmanuel Gaillard, where he writes that the '*lex mercatoria* should be defined today by its sources . . . as opposed to its content': GAILLARD E., 'Transnational Law' (note 12), p. 62. A definition according to sources is a definition according to the object of secondary rules of recognition; a secondary rule defines the pedigree that a norm must have, that, is where it comes from, *i.e.* what are its possible recognized sources. A national legal system, for instance, is typically defined by its sources, by what the officials of the legal system in question say belongs to the system and what does not; it is not generally defined by any content of any rule. A non-legal normative system, on the other hand – that is one that does not have secondary rules of recognition – cannot be defined by its sources, as the sources are left undefined by the lack of secondary rules.

[39] KRAMER M.H., 'Of Final Things: Morality as One of The Ultimate Determinants of Legal Validity', in: *Law and Philosophy* 2005, p. 57.

[40] See, *e.g.*, HART H.L.A. (note 36), p. 91 *et seq.*; BOBBIO N., 'Ancora sulle norme primarie e norme secondarie', in: *Rivista di filosofia* 1968, p. 35; BOHANNAN P., 'The Differing Realms of the Law', in: *American Anthropologist*, pp. 34-37; VAN DE KERCHOVE M./OST F., *Legal System Between Order and Disorder*, Oxford 1994, p. 110.

delimited by the method of norm selection.[41] The arbitrator is the official of the *lex mercatoria*'s legal system who, in application of the secondary rule of recognition that is the method, determines which norms belong to the system.[42]

We have thus progressed from noting that the *lex mercatoria* must be a law, even in the approach that considers it to be merely a method, to concluding that the *lex mercatoria*, by dint of logical necessity following from the most generally agreed understanding of what law is, must rely on the assumption that it is a legal system of its own.[43]

III. The *Lex Mercatoria* as a Set of Legal Rules

The second main view of the *lex mercatoria* considers it to be a repertoire of legal rules, but not a legal system. This view is not necessarily divorced in practice from

[41] This hopefully constitutes a reply to the question posed by Poudret and Besson with respect to Emmanuel Gaillard's method approach: 'Besides, can a method constitute a legal system?'

[42] See further text accompanying notes 161–173 below. *Cf.* FADLALLAH I., 'Le projet de convention sur la vente de marchandises', in: *Clunet* 1979, p. 766: 'La *lex mercatoria* peut être conçue restrictivement, si on ne la renvoie pas au néant, comme limitée aux normes propres spontanément secretées par le commerce international. Mais un système ne se réduit pas à ce qu'il a inventé. Reconnu, il s'étend à l'ensemble des règles et pratiques qu'il intègre, quelle qu'en soit la provenance'; LOQUIN E., 'Où en est la lex mercatoria?', in: LEBEN C./LOQUIN E./SALEM M. (eds), *Souveraineté étatique et marchés internationaux à la fin du 20e siècle - Mélanges en l'honneur de Philippe Kahn*, Paris 2000, pp. 25-26, who explains Emmanuel Gaillard's position in the following terms: 'Cette méthode relève de ce que l'on pourrait appeler 'un darwinisme juridique'. Il s'agit de sélectionner, à travers toutes les sources du droit, les règles qui sont les plus aptes à satisfaire les besoins du commerce international. C'est l'appropriation de la règle à ces besoins qui explique sa *réception* dans la *lex mercatoria*' (emphasis is mine). See also TEUBNER G., 'Breaking Frames: The Global Interplay of Legal and Social Systems', in: *Am. J. Comp. L.* 1997, p. 151, who asks the question: 'What are the secondary rules which would recognize the primary rules of *Lex mercatoria* and distinguish them from mere professional norms?' For theoretical developments on how the arbitrator can be the criterion of juridicity, see for instance the parallel in VAN DE KERCHOVE M./OST F., *Le droit ou les paradoxes du jeu*, Paris 1992, p. 179 ('L'intervention du juge à la fois l'indice et l'opérateur principal de la juridicité.')

[43] The following progression in Emmanuel Gaillard's argumentation is interesting in this regard: he first asks how 'the transnational rules methodology compares with the application of a fully fledged legal order' (GAILLARD E., 'Transnational Law' (note 12), p. 65), which means that he assumes that the *lex mercatoria* is not a fully fledged legal order (one does not compare A and B if assuming that A is an instance of B). He then lists four features that he argues are necessary and sufficient for a normative system to be a legal system and applies these features to the *lex mercatoria* as a method. He concludes that 'if not a genuine legal order, transnational rules do perform, in actual practice, a function strikingly similar to that of a genuine legal order' (at 71).

the first approach just examined, but can and should nonetheless be distinguished analytically. The main conceptual difference resides in the obliqueness, in the preceding approach (method) as opposed to the current one (repertoire), of the reliance on readily identifiable rules, which proceeds in the preceding approach through the intermediary step of the 'method'. This difference sheds some additional light on the general question of the nature of the *lex mercatoria*, as will become plain in the later discussion of this matter.

The view of the *lex mercatoria* as a set of legal rules but not a legal system was, for instance, the dominant position before the publication of Berthold Goldman's first famous article on the *lex mercatoria*,[44] which started the 'trench warfare'[45] or 'war of faith'[46] that characterized the subsequent discussions of the *lex mercatoria*.[47] It is also the position, more or less explicitly, of more contemporary authors.[48] In essence, the position can be attributed to all those who evoke and

[44] GOLDMAN B., 'Frontières du droit et lex mercatoria', in: *Archives de philosophie du droit* 1964, p. 177. It might be recalled that the second famous article by Goldman on this matter is GOLDMAN B., 'La Lex Mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives', in: *Clunet* 1979, p. 475.

[45] LAGARDE (note 1), p. 125.

[46] TEUBNER (note 42), p. 150.

[47] For representative writings reflecting the dominant position before Goldman, see, *e.g.*, JESSUP P., *Transnational Law*, New Haven 1956, p. 2: 'I shall use, instead of 'international law' the term 'transnational law' to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories' (and the comments thereupon by ABI-SAAB G., 'Cours général de droit international public', in: *Hague Lectures* 1987/207, p. 123; SCHMITTHOFF C., 'International Business Law: A New Law Merchant', in: *Current Law and Social Problems* 1961, p. 129 ('autonomous body of law'). A few years later, Schmitthoff characterized the *lex mercatoria* as a legal field ('*Rechtsgebiet*'), which even more clearly reflects the idea of a collection of legal rules which do not form, together, a legal system: SCHMITTHOFF C., 'Das neue Recht des Welthandels', in: *RabelsZ* 1964, p. 48.

[48] See, *e.g.*, POUDRET J.-F./BESSON S. (note 23), paras 697, 704: 'We are thus unable to discern an autonomous legal system', 'the *lex mercatoria* by no means constitutes a specific law . . . occupying a place of its own alongside national legal systems and the interstate legal order. It is rather a convenient name for *rules drawn from pre-existing . . . sources*'; PAULSSON J., 'La Lex Mercatoria dans l'arbitrage CCI', in: *Revue de l'arbitrage* 1990, p. 55; LOWENFELD A.F. (note 18), p. 144. See also HORN N., 'Uniformity and Diversity in the Law of International Commercial Contracts', in: HORN N./SCHMITTHOFF C. (eds), *The Transnational Law of International Commercial Transactions*, Deventer 1982, p. 14: '«transnational law» describes an actual uniformity or similarity of rules . . . This phenomenon of uniform rules serving uniform needs of international business . . . is today commonly labelled *lex mercatoria*'. The position is also implicitly present in Emmanuel Gaillard's early writings: Gaillard 'La distinction des principes généraux du droit et des usages du commerce international' and Berthold Goldman's own theory also hinted at this conception in GOLDMAN B., 'La Lex Mercatoria dans les contrats' (note 44), p. 21: '[International transactions] may perfectly well be governed by a body of specific rules, including transnational custom, general principles of law and arbitral case law. It makes *no difference if this*

recognize the existence of 'principles and rules of transnational law'[49] in the realm of international trade and commerce, while denying that they constitute a legal system.[50] It is, above all, the position taken by those texts that have introduced the language 'rules of law' instead of (or in addition to) 'the law' or 'a law'[51] – such as certain national arbitration laws[52] and institutional arbitration rules,[53] the UNCITRAL Model Law,[54] and the Washington Convention.[55]

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body of rules is not part of a legal order comporting its own legislative and judicial organs. Within this body of rules, the general principles of law are not only those referred to in Article 38(a) of the Statute of the International Court of Justice; there may be added to it principles progressively established by the general and constant usage of international trade.' (emphasis added). See also LOQUIN E., 'Où en est la lex mercatoria?' (note 42), p. 25: 'une *collection* de règles d'origine variable rassemblées sur le *seul* fondement de leur adéquation aux besoins du commerce international' (emphasis added).

[49] See, *e.g.*, BUCHER A./TSCHANZ P.-Y. (note 23), p. 198.

[50] Admittedly, many writings reveal a certain hesitation or confusion through the adjunction, in their rejection of the *lex mercatoria* as a legal system, of adjectives such as 'complete,' 'self-sufficient,' 'autonomous,' 'real', or 'genuine.' For an analysis of such language, in related contexts, see ROBERTS S., 'After Government? On Representing Law Without the State', in: *Modern Law Review* 2005, pp. 19-20.

[51] See, *e.g.*, GAILLARD E., 'Transnational Law' (note 12), pp. 65: 'this language («rules of law») . . . was in fact specifically intended to bypass the issue of whether *lex mercatoria* or general principles qualify as a genuine legal order.' REDFERN A./HUNTER M. (note 12), para. 2-71: 'The reference to «rules of law», rather than to «law» or «a system of law» is a coded reference to the applicability of appropriate legal rules, even though these may fall short of being an established and autonomous system of law.' POUDRET J.-F./BESSON S. (note 23), paras 679, 704: 'To the extent that it authorises the parties or the arbitrators . . . to apply rules of law and not merely a law, arbitration law today allows arbitrators to take the various constitutive elements of the *lex mercatoria* into consideration'.

[52] For instance the laws of the Germany (§ 1051 ZPO), Italy (Art. 834 al. 1 CPCI), the Netherlands (Art. 1054 WBR), France (Art. 1496 NCPC, Decree No.81-500 of May 12, 1981), Switzerland (Art. 187 PIL Act), and possibly Belgium (Art. 1700 Belgian Judicial Code, which refers to 'règles de droit', a language interpreted by some authors as meaning 'rules of law' outside a national legal system – *e.g.* DE BOURNONVILLE P., *Droit judiciaire: l'arbitrage*, Brussels 2000, p. 231 – and by others as meaning a national law – *e.g.* HUYS M./KEUTGEN G., *L'arbitrage en droit belge et international*, Brussels 1981.

[53] For instance the ICC Arbitration Rules (Art.17.1), LCIA Rules (Art. 22.3), International Arbitration Rules of the AAA (Art. 28.1), the WIPO Arbitration Rules (Art. 59.1).

[54] For instance the UNCITRAL Model Law (Art. 28: '1. The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute . . . 2. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.').

[55] Art. 42: 'The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties'.

It is quite uncontroversial that a repertoire of rules that are 'recognized in international trade independently from their enactment by any given state'[56] does indeed exist,[57] which is not to say that there is no controversy on the contents of the rules or principles that make up the *lex mercatoria*.[58] It may further be uncontentious that there have been 'countless applications of transnational rules by international arbitrators since far before the debate over the concept even began'.[59] One remains on relatively safe ground when asserting that there exists a 'discrete body of transnational commercial norms,'[60] that transnational commercial rules can effectively be uncovered, being 'drawn from international arbitral and contract practice, backed up by comprehensive comparative references'.[61] Klaus Peter Berger, among others, indeed appears to have satisfactorily established the existence of such rules through his empirical studies.[62] It seems fair to say, as he does, that the *lex mercatoria* is consequently 'capable of being codified in norm-like principles and rules together with commentary-like explanations, thus providing international legal practitioners with a means to apply the *lex mercatoria* in everyday legal practice.'[63] Or, as Harold Berman and Felix Dasser argue, whatever our theoretical framework is, it 'should not stop us from seeing what is right in front of our noses', namely 'the factual existence' of rules and principles that are applied in practice.[64] In sum, the question of whether the *lex mercatoria* exists as a set of rules seems to deserve a positive answer – which is of course not to prejudge the ascer-

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[56] BUCHER A./TSCHANZ P.-Y. (note 23), p. 105.

[57] See DE LY F., 'Emerging New Perspectives Regarding Lex Mercatoria in an Era of Increasing Globalization', in: *Festschrift für Otto Sandrock zum 70 Geburtstag*, Heidelberg 2000, p. 182. See also BOWDEN P., 'L'interdiction de se contredire au détriment d'autrui (estoppel) as a Substantive Transnational Rule in International Commercial Arbitration', in: GAILLARD E. (ed), *Transnational Rules in International Commercial Arbitration*, Paris 1993, p. 127: 'The [International Law Association] Committee's approach in its continuing study of transnational law has been to step back from the highly contentious issues that arise from any theoretical consideration of transnational law, or *lex mercatoria*, as a discrete body of principles and to examine, in a pragmatic way, the application of individual identifiable principles at least as a phenomenon of international commercial arbitration, which it undoubtedly is.'

[58] The contents of the *lex mercatoria*, which are not essential to the present discussion, are examined synthetically in, e.g., POUDRET J.-F./BESSON S. (note 23), paras 696.

[59] GAILLARD E., 'Transnational Law' (note 12), p. 59.

[60] FORTIER Y., 'The New, New Lex Mercatoria, or Back to the Future', in: *Arbitration International* 2001, p. 127.

[61] *Ibid*.

[62] See BERGER K.P., *The Creeping Codification of the Lex Mercatoria*, The Hague 1999, pp. 278-311.

[63] *Ibid* p. 3.

[64] BERMAN H.J./DASSER F., 'The «New» Law Merchant and the «Old»: Sources, Content, and Legitimacy', in: CARBONNEAU T. (ed), *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant*, The Hague 1998, p. 64.

tainability of such rules by commercial actors, or their usefulness or completeness, which involve distinct questions.[65]

Would it thus be safe for *lex mercatorists* to simply back down one step and argue that, granted, the *lex mercatoria* may not exist as a legal system, but it is certainly not a mere 'doctrinal creation'[66] in its quality as a repertoire of legal rules? Does it solve or circumvent the issue to say that the *lex mercatoria* is merely a set of 'rules of law,' and not a legal system? Intuitively, one would be tempted to respond in the positive. But if such 'rules of law' are applied, not as norms of one or several specific national legal systems (which would confer to the rules the jural character flowing from their belonging to those systems), but as rules that are legal for another reason,[67] what would this reason be? Let it be said again, in different terms: if it seems quite agreeable that there are transnational commercial rules, why would they be jural, that is of a legal nature? What is it that would make such rules legal rules? As Gunther Teubner says: '*lex mercatoria*. Law or not law – that is the question!'[68]

One theoretical construction, meant to provide an answer to the question of the source of the juridicity of the *lex mercatoria* as a set of legal rules but not a

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[65] It might be pointed out at this stage that the completeness of a normative system is not a condition of its legal character. It is not because an adjudicator believes that he or she has to pronounce a *non liquet*, regardless of the frequency thereof, that the entire system should be denied its jural character. A very incomplete system would merely be quite meaningless. In addition, it is not because a normative system is not composed of very many norms that the system is necessary incomplete. Interpretative proficiency will in the vast majority of cases lead to some solution. As may be read in *Oppenheim's International Law*, in international law one will not find a 'clear and specific rule readily applicable to every international situation, but . . . every international situation is capable of being determined as a matter of law': JENNINGS R./WATTS A. (eds), *Oppenheim's International Law*, 9th ed., Harlow 1992, vol. 1, p. 13. For a similar argument with regard to the *lex mercatoria*: MERTENS H.-J., 'Das lex mercatoria-Problem', in: *Festschrift für Walter Odersky,* Berlin 1996, p. 857 *et seq.* The question of the completeness of the *lex mercatoria* is rather extensively discussed (curiously using the terminology 'self-contained regimes') in BERGER K.P., *Creeping codification* (note 62), p. 93 *et seq*.

It is another matter still that the *lex mercatoria* is not a virtually comprehensive normative system, meaning that it does not claim authority to intervene in all facets of its addressees' lives. While it is often argued by legal philosophers that virtual comprehensiveness is an essential feature of law (i.e. a condition of juridicity), I have argued elsewhere that federal legal systems should show this position to be doubtful: see SCHULTZ T., 'Private Legal Systems: What Cyberspace Might Teach Legal Theorists', in: *Yale Journal of Law & Technology* 2007, p. 187 *et seq.*

[66] DE LA PRADELLE G., 'La justice privée', in: GHERARI H./SZUREK S. (eds), *L'émergence de la société civile internationale: vers la privatisation du droit international?*, Paris 2003, p. 134.

[67] On the source of juridicity of the norms forming part of the *lex mercatoria* being neither a national legal system nor the international legal order, see text accompanying notes 26–31 above.

[68] TEUBNER (note 42), p. 156.

legal system, resides in a natural law approach or jusnaturalism. Thomas Carbonneau, for instance, considers that the *lex mercatoria*, which he maintains 'includes natural law principles', is simply 'part of the bargain in international contracts.'[69] The *lex mercatoria*, in that sense, would intrinsically be part of international commerce as a social phenomenon. Actors of international commerce would have rights flowing directly from their being actors of international commerce, regardless of the professional, social, historical and geographical context of the transaction, the will of the parties and that which is provided by any rule of positive law. These rules would simply flow from values that pre-exist human normative decisions and are independent of them.[70] Incidentally, this natural law approach led Carbonneau to argue that the *lex mercatoria* is hierarchically superior to national laws and should trump them, which is consistent with the natural law approach to private international law, an approach that survived until the 19th century.[71] Similar positions are sometimes held with respect to human rights, when it is argued that people have certain rights by the mere fact that they are human beings – jusnaturalism incarnates a liberal ethic, promoting the defense of individual liberties against political powers.[72]

In such an approach, the only determinant criterion of juridicity is the legitimacy of a rule, that is its moral estimableness or conformity with some higher moral order.[73] For example, the reasoning would be that we consider certain rights to be fundamentally legitimate (in other words morally indispensable) and that, therefore, they form part of 'natural' human rights, 'natural' international law on jurisdiction, or the 'natural' regulation of international commerce. Principles such as *pacta sunt servanda*, therefore, would typically be a legal principle, not because it may be found in every national legal system, but because it is intrinsically legitimate and morally laudable.

Such an approach faces three major issues. First, the legal norms it would produce for international commerce would be characterized by a strong paucity, as many rules necessary for the smooth operations of international commerce are not particularly estimable from a moral point of view and simply serve to coordinate behaviors (the moment of the transfer of risks in a sale of goods is an example).

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[69] CARBONNEAU T., *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant*, rev edn, Yonkers 1998, p. 16.

[70] See for instance VILLEY M., 'Le droit dans les choses', in: AMSELEK P./GRZEGORCZYK C. (eds), *Controverses autour de l'ontologie du droit*, Paris 1989.

[71] See for instance VON BAR L., *The Theory and Practice of Private International Law,* 2nd edn, Edinburgh 1892, p. 77, who explains that rules of private international law are derived 'from the nature of the subject itself". See also YNTEMA H.E., 'The Historic Bases of Private International Law', in: *Am. J. Comp. L.* 1953, p. 309. For an excellent summary and analysis, see MILLS A., 'The Private History of International Law', in: *I.C.L.Q.* 2006, pp. 33-37.

[72] BOBBIO N., *Giusnaturalismo e positivismo giuridico*, Milan 1965, p. 135 *et seq*.

[73] OST F., 'Validité', in: ARNAUD A.-J. (ed), *Dictionnaire encyclopédique de théorie et de sociologie juridique*, Paris 1988, p. 433. *Cf.* also WALDRON J., 'Normative (or Ethical) Positivism', in: COLEMAN J. (ed), *Hart's Postscript*, Oxford 2001, p. 415 *et seq*.

Second, it would hardly be workable, as what constitutes a profoundly legitimate right or what is a legitimate rule is open to much controversy. Third, morality is not a necessary element of law: there have been legal regimes in history that were clearly evil but were nonetheless generally recognized as legal regimes.[74] Such an approach to law, at least as far as the *lex mercatoria* is concerned, therefore appears unsatisfactory and inappropriate.

The second theoretical construction that may be invoked to ground the juridicity of the *lex mercatoria* as a mere set of legal rules is to take a radically pluralistic approach of law, inspired by legal realism.[75] In substance, the idea is to focus on effectiveness: a legal rule is a rule of conduct that is effective, one that is followed in practice.[76] If such an approach were adopted, the rules of the *lex mercatoria* would be those norms that are followed in practice by the *societas mercatorum*. At a first glance, one might be content with such a proposition. But a moment's thought leaves one with a sense of weariness, caused by the realization that one is losing all reference to what law is.[77] Indeed, is brushing one's teeth in the morning – a norm undoubtedly followed by the actors of *societas mercatorum* – a legal norm? Is shaking hands when a deal is done a legal norm? Where is the distinction to be drawn between legal norms and social norms?

The only approach to juridicity that truly is workable in practice for the identification of non-State law – which is also the one that corresponds to the dominant view of what law is – is legal positivism. I mean positivism here not in the classical conception of legal positivism inherited from Bentham and Austin that sees law only in States (an approach that is unduly restrictive as there is historical evidence as to the existence of law before the emergence of States[78]), but in the sense of the formal criterion of the belonging of a norm to a legal system.[79] This

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[74] See, *e.g.*, KRAMER M.H., *In Defense* (note 37), pp. 177–182, discussing Dworkin's opposite view.

[75] See, *e.g.*, SACCO R., 'Mute Law', in: *Am. J. Comp. L.* 1995, p. 455; DEL VECCHIO G., 'Sulla statualità del diritto', in: *Rivista internazionale di filosofia del diritto* 1929, p. 19; POSPISIL L.J., *Anthropology of Law: A Comparative Theory,* New York 1971, p. 96.

[76] OST F. (note 73), p. 433.

[77] See ROBERTS S. (note 50), p. 24.

[78] BERMAN H.J., *Law and Revolution: The Formation of the Western Legal Tradition,* Cambridge, MA 1983, pp. 333-356; MARMOR A., *Positive Law & Objective Values*, Oxford 2001, p. 40.

[79] On the variety of strands of legal positivism, see, *e.g.*, HART H.L.A., 'Positivism and the Separation of Law and Morals', in: *Harvard Law Review* 1958, pp. 601-602: 'the non-pejorative name «legal positivism» like most terms which are used as missiles in intellectual battles, has come to stand for a baffling multitude of different sins.' See also BOBBIO N., *Il positivismo giuridico,* Turin 1961, BOBBIO N., *Teoria dell'ordinamento giuridico,* Turin 1960. More specifically on legal positivism as state law and its origins BRECHT A., *Political Theory: The Foundations of Twentieth-Century Political Thought,* Princeton, NJ 1959. More specifically on the criteria of belonging to a system of law, VIRALLY M., *La pensée juridique,* Paris 1960, p. vii and SHINER R.A., *Norm and Nature: The Movement of Legal Thought*, Oxford 1992, p. 19. The unawareness of this variety of meanings that 'legal posi-

means that for a norm to become a legal norm it must be reinstitutionalized or restated in the formal institutions of the legal system, it must be adopted by an official of the legal system to which it then belongs (the arbitrator, in the case of the *lex mercatoria*). Using Hartian terminology, it means that the norm must pass the test set by a secondary rule of recognition. A social norm becomes legal if it is endorsed (reinstitutionalized, restated or recognized) by an institution of the legal system and such endorsement occurs according to the applicable rule of recognition (the 'method'). To apply a rule of recognition is to verify authoritatively that a norm has been taken over into the system through the operation of some formal acceptance by officials of the system in question.[80] The juridicity of a norm follows from its belonging to a legal system. Rules that do not form part of any legal order are not legal, as for instance the UNIDROIT principles are not legal rules.[81] General principles of law, as any other set of rules, cannot be legal in isolation. As François Ewald has put it, convincingly though awkwardly, 'The idea of a single legal norm has no meaning'.[82] Norms become jural when they are recognized by a legal system, which confers juridicity to these rules.[83]

In sum, the question whether the *lex mercatoria* exists as a set of rules seems clearly to deserve a positive answer. The same clarity in the answer applies to the question whether such rules are legal in nature in the absence of the *lex mer-*

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tivism' has is what has Bruno Oppetit, for instance, to speak of 'les négateurs de la *lex mercatoria* – il suffirait de dire: les positivistes': OPPETIT B., 'Le droit international privé, droit savant', in: *Hague Lectures* 1992/234, p. 331.

[80] See, *e.g.*, HART H.L.A. (note 36), p. 90 *et seq.*; BOBBIO N., 'Ancora sulle norme' (note 40); KRAMER M.H., 'Of Final Things' (note 39), p. 50; RAZ J., *The Concept of a Legal System*, 2nd edn, Oxford 1980, p. 200; GREENAWALT K., 'The Rule of Recognition and the Constitution', in: *Michigan Law Review* 1986, pp. 634–637; BOHANNAN P. (note 40); Ost F./VAN DE KERCHOVE M., *De la pyramide au réseau? Pour une théorie dialectique du droit,* Brussels 2002, p. 369.

[81] POUDRET J.-F./BESSON S. (note 23), paras 679, referring to the UNIDROIT principles as 'rules which are not laws' (a slightly awkward translation of the original French version, which reads: 'des règles non légales'). For an overview, see, *e.g.*, BLASE F., *Die Grundregeln des europäischen Vertragsrechts als Recht grenzüberschreitender Verträge,* Münster 2001, pp. 192–242. *Cf.* also JACQUET J.-M./DELEBECQUE P./CORNELOUP S. (note 10), p. 63: 'Les règles transnationales élaborées par des organismes plus ou moins liés au milieu des opérateurs échappent à tout contrôle de validité. Mais elles n'échappent pas à un contrôle de positivité qui, pour être plus diffus n'en est pas moins redoutable: il convient en effet que les contractants et les arbitres s'y réfèrent sans quoi elles demeureront lettre morte. Tel est le test de vérité des règles transnationales.' It is probably unnecessary to point out that 'legal' in this article does not mean 'relating to the field of law,' as in 'legal thinking' or 'legal tradition'. Such an understanding of the word 'legal' – in which sense the UNIDROIT are of course legal – is entirely unrelated to the present article and the question of the nature of the *lex mercatoria*.

[82] EWALD F., 'The Law of Law', in: TEUBNER G. (ed), *Autopoietic Law: A New Approach to Law and Society*, Berlin 1988, p. 36.

[83] On the different meanings of the term 'general principles of law,' see GAILLARD E., 'Transnational Law' (note 12), p. 67.

catoria being a legal system, though this time the answer is negative. Juridicity exists exclusively within a legal system; the belonging of a norm to a legal system is the necessary and sufficient condition for it to be of a legal nature. Put differently, the question of the nature of the *lex mercatoria* always boils down to this: is the *lex mercatoria* a legal system or not? This question forms the topic of the next section.

IV. The *Lex Mercatoria* as a Legal System

The third main view of the *lex mercatoria* considers it to be a legal system in its own right.[84] As has been suggested above, this conception of the *lex mercatoria* is the one that has created the most debate, but also the most interest. Legal pluralists have embraced it as the spearhead of their cause, claiming that it is 'the most successful example of global law without a state.'[85] The fact that law is most frequently, if not dominantly, equated with State law has also given the debate an important political undertone: the *lex mercatoria* is, in this approach, easily perceived as something actually equivalent to a national legal system, though global in nature and primarily destined to serve commercial actors. Such a perception opens the door to the whole debate about the vanishing sovereignty of States and the democratic legitimacy they represent, and the corresponding rise of global economic powers. In this context, the *lex mercatoria* as a legal system is often used as a pretext to argue in favor or against such shifts in the structures of power.[86] As an

[84] See, *e.g.*, GOLDMAN B., 'Frontières' (note 44); GOLDMAN B., 'La Lex Mercatoria dans les contrats' (note 44); GOLDMAN B., 'Nouvelles réflexions sur la lex mercatoria', in: *Etudes de droit international en l'honneur de Pierre Lalive*, Basle 1993; LOQUIN E., 'L'application des règles anationales dans l'arbitrage commercial international', in: *L'apport de la jurisprudence arbitrale: l'arbitrage commercial international*, Paris 1986, pp. 119-122; LOQUIN E., *L'amiable composition en droit comparé et international*, Paris 1980, pp. 308-309; KASSIS,Théorie' (note 3), p. 37 *et seq.*; OSMAN F. (note 3), p. 357 *et seq*.; KAHN P., 'Droit international économique, droit international du développement, lex mercatoria: concept juridique unique ou pluralité des ordres juridiques?', in: *Le droit des relations économiques internationales*, Paris 1982; BERGER K.P., *Creeping codification* (note 62). See also REDFERN A./HUNTER M. (note 12), para. 2-71: 'The authority of an arbitral tribunal to apply a non-national *system of law* (such as the general principles of law or the *lex mercatoria*) will depend upon (a) the agreement of the parties and (b) the provisions of the applicable law' (emphasis added) and CREMADES M./PLEHN S.L., 'The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions', in: *Boston University International Law Journal* 1984, p. 324.

[85] TEUBNER G., '«Global Bukowina»: Legal Pluralism in the World Society', in; TEUBNER G. (ed), *Global Law Without a State*, Dartmouth 1997.

[86] DE SOUSA SANTOS B., *Toward a New Legal Common Sense*, 2nd edn, London 2002, p. 90; DI ROBILANT A., 'Genealogies of Soft Law', in: *Am. J. Comp. L.* 2006, p. 499. See also ZUMBANSEN P., 'Piercing the Legal Veil: Commercial Arbitration and Transnational Law', in: *European Law Journal* 2002, p. 418 *et seq.*

object of study in itself, however, to which one applies the available analytical framework to determine whether a given instance of a legal system is indeed a legal system, the *lex mercatoria* has received surprisingly little attention. To work within a better defined framework – explaining what may substantiate or refute the thesis of the *lex mercatoria* as a legal system – might help both legal pluralists and their opponents. Such an analysis is what the current section seeks to offer.

Before moving on to the analysis itself, a caveat must be entered: the question addressed here – whether the *lex mercatoria* in and of itself is jural – is a different matter altogether from the position taken on this question by courts, or national legal systems generally.[87] Whether a court, or indeed a number of courts, and national laws consider that the *lex mercatoria* is not legal has strictly no impact on the question addressed here.[88] Just as French law cannot take away juridicity from the English legal system, for instance, it cannot take it away from the *lex mercatoria*, provided of course there is something to be taken away. The question of the recognition by one public system of another is only a question of 'relevance,' as Santi Romano called it, which in essence means that a legal system gives effect to norms belonging to another – enforcement of foreign decisions, for instance.[89] Conversely, a legal system, such as the public legal system, cannot confer juridicity to another system. It may recognize it and consider it relevant, but it does not make this other system jural; it cannot attribute juridicity to another legal system.[90] Imagine if French law, for instance, recognizes the juridical character of a given private normative order and that English law denies it, what is the juridical status

[87] It is an argument quite frequently made that the *lex mercatoria* (or 'the arbitral legal order') is a legal system because certain national courts say so (implicitly most of the time). See, *e.g.*, CLAY T., *L'arbitre*, Paris 2001, 217.

[88] Similarly, the argument that States have 'delegated their law-making authority' (CARBONNEAU T., 'A Definition of and Perspective Upon the Lex Mercatoria Debate', in: CARBONNEAU T. (ed), *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant*, rev. edn, The Hague 1998, p. 12) in this area is not relevant either, as it would merely imply that the authority to make *State* law has been delegated and, hence, that *lex mercatoria* is State law. Indeed, the State cannot delegate a power that it does not have, such as the power to make non-State law. A delegation would imply that the delegator grants his law-making powers to the delegee; the *lex mercatoria* would thus form part of what the delegator produces, in other words State law.

It may be pointed out that the approach of the current article is one that might be ascribed to analytical philosophy, i.e. it seeks to define more clearly certain words or concepts, and thereby to answer the question 'what is the *lex mercatoria*?'. It would be a different question altogether to examine the importance, efficacy, or relevance of the *lex mercatoria*, a question for which the recognition by national legal systems is important indeed.

[89] In Romano's words, relevance is the fact that 'an order's existence, content or efficacy conforms to conditions set by another one': ROMANO S., *L'ordre juridique*, Paris 1975, p. 106.

[90] See LOQUIN E., 'L'application des règles' (note 84), p. 121: 'l'attitude des Etats à l'égard de l'ordre anational est indifférente à son existence', where by 'existence' he means existence qua *legal* order.

of this private normative order? A legal system is legal on its own, or it is not legal.[91]

What then may determine whether a legal system is indeed a legal system or not? What are the criteria of juridicity? The following is based on the assumption that the essential features of a legal system may be classified in two categories: external and internal. External features are those that relate to the structure of the system and its autonomy vis-à-vis other legal systems. A legal system must for instance be sufficiently developed structurally (otherwise it is merely a system of social norms) and it must be sufficiently independent from other systems (otherwise it has no identity of its own but is merely a part of another system). Internal features are those that relate to the quality of the norms taken collectively.[92] Law intrinsically has a guiding role, orienting behavior by providing, for instance, dependable – that is predictable and consistent – landmarks for its addressees to know what the consequences of their actions will be. To fulfill this role, the norms must collectively bear certain characteristics; these are those that will be considered as internal features.

A. Structural Issues

In order to decide whether a given normative system qualifies as a legal system, it is insufficient to merely look at the norms it contains. As Norberto Bobbio stated, such a limited analysis would in essence amount to 'looking at the tree and the forest.'[93] As Paul Lagarde argues, with the *lex mercatoria* in mind: 'a legal order cannot be reduced to a set of norms, as it must also feature an element of organization, of structure, which is external and logically antecedent to the norms that follow from it'.[94] Such elements of organization and structure are what form the topic of the current section. It will discuss these elements and then examine if the *lex mercatoria* displays them.

The elements that are considered here are the following. First, a legal system needs a sustaining community. This is so because the social organization inherent in a community is a necessary (though not sufficient) condition for the existence of a legal system. As Chevallier states, '[law], aiming to act on society, is

[91] See, *e.g.*, LAGARDE (note 1), p. 139: 'si cet ordre juridique existe . . . il ne tire pas son caractère juridique de la reconnaissance que l'ordre juridique étatique lui accorde, mais de lui-même. Le droit est immanent à l'organisation sociale.'

[92] *Cf.* SCHROEDER H.P., *Die lex mercatoria arbitralis*, Munich 2007, pp. 152-159, who opposes the concept of a legal system used in classical legal positivism to a 'functional concept of the legal order', which he considers is characterized by two essential features: the 'publicity' of the norms (i.e. the 'accessibility' of the norms and the predictability of a decision rendered in application of these norms) and the 'systematic' character of the normative order.

[93] BOBBIO N., *Teoria* (note 79), p. 7.

[94] LAGARDE (note 1), p. 133.

also the product of society's determinations'.[95] Only a community provides the kind of societal structure needed for law to develop: a relatively well-organized grouping that is distinct from the rest of the world. In more jurisprudential terms, this need for a community essentially translates into the criterion of the 'social autonomy' of a legal system, meaning the requirement that there be a specific social body underlying a legal system.[96] Social autonomy is itself a necessary (though again not sufficient) condition for another condition to be fulfilled: what one may refer to as 'normative autonomy,' which is a legal system's ability to decide on what normative contents form part of it. The following expounds on these requirements and examines the *lex mercatoria* in this structural light.

1. The Societas Mercatorum

The study of the anthropology of law yields an important lesson for law outside the State, which directly informs the question of the jural character of the *lex mercatoria*. Legal anthropology teaches that a legal system is, in essence, a community's social norms, which have evolved into a well-organized, even sophisticated normative system.[97] As van de Kerchove and Ost point out, 'A legal system is . . . a subset of a social system: while every legal norm is a social norm, the converse is not true.'[98]

At the start, a legal system originates as a simple set of rules. As soon as people start to develop social bonds to form a group that is identifiable as such, norms will inevitably start to emerge.[99] Where there is human interaction, there are rules. Initially, these rules are only social norms.[100] It is only later, under certain circumstances, that these norms may develop to become more formal and better organized, with institutions emerging that have specific powers related to these norms – typically the power to state which norms form part of this ensemble, the power to apply these norms to individual cases, and the power to constrain people to comply with these norms.[101] At that stage, the initial relatively loose set of norms

[95] CHEVALLIER J., 'L'ordre juridique', in: *Le droit en procès*, Paris 1983, p. 30.

[96] See, *e.g.*, OST F./VAN DE KERCHOVE M. (note 80), pp. 189–190; ROMANO S. (note 89), p. 25.

[97] See, *e.g.*, BOHANNAN P. (note 40); BOBBIO N., 'Ancora sulle norme' (note 40); OST F./VAN DE KERCHOVE M. (note 80), pp. 367-371.

[98] VAN DE KERCHOVE M./OST F., *Legal System* (note 40), p. 110.

[99] OST F./VAN DE KERCHOVE M. (note 80), p. 368.

[100] I thereby oppose the idea of *ubi societas ibi ius* stricto sensu, that wherever there is a society, there is *ipso facto* law, as defended for instance by SACCO R. (note 75); DEL VECCHIO G. (note 75); POSPISIL L.J. (note 75).

[101] *Cf.* LOCKE J., *The Second Treatise on Civil Government*, Buffalo 1986 [1690], ch. IX, paras 124–126, who writes that in the state of nature '[t]here wants an established, settled, known law, received and allowed,' 'a known and indifferent judge' and 'power to back and support the sentence when right, and to give it due execution.'

of conduct develops into a much more formalized system of rules. In the process, its operations become closer to those of the public legal system (the archetype of a legal system).[102] The transition from social norms to legal norms takes place.[103]

The lesson that this view of the origin and emergence of law teaches is that a legal system necessarily has its roots in a 'collective social unit': a community.[104] As Jean Dabin, for instance, put it, law is 'a societal rule, emanating from the group and made for the group'.[105] In other words, law requires an underlying social organization; it cannot exist in the absence of a specific community creating and sustaining it. If we reverse the argument, it means that non-communities cannot make law. They would lack the social organization necessary to operate an organized system of norms and institutions, and such organization forms part of the definition of law.

One may further point out that the underlying social organization must form a single, comprehensive community, and not merely a plurality of assembled, socially organized spheres. A mere juxtaposition of smaller communities is unable to create one global legal system. Such smaller communities may give themselves specific rule-sets, but these rule-sets merely form specific legal systems or other forms of normative systems. They do not collectively form one overarching legal system, in the absence of one overarching organized social unit.[106] Concretely, this translates into the fact that law governs by general norms, addressed to all members of the group and not only sub-groups thereof.[107]

To use Santi Romano's words, one may recap the argument by saying that a legal system is not merely a set of rules, it is also the social body that creates these rules, which thus acquires a defining function.[108] A legal system requires a specific social body giving itself specific rules. Law only exists where a community can be identified, since it is the community – or more precisely specific institutions within

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[102] See, *e.g.*, MARMOR A. (note 78), pp. 39-42. See also LAGARDE P. (note 1), p. 134.

[103] BOHANNAN P. (note 40), pp. 34-37; BOBBIO N., 'Ancora sulle norme' (note 40), p. 39 *et seq.*; INGBER L., 'Le pluralisme juridique dans l'oeuvre des philosophes du droit', in: GILISSEN J. (ed), *Le pluralisme juridique*, Brussels 1971.

[104] PERRIN J.-F., *Sociologie empirique du droit*, Basle 1997, p. 40; GURVITCH G., *Eléments de sociologie juridique*, Paris 1940, p. 180; ROMANO S. (note 89), p. 17-18; MOORE S.F., *Law as Process. An Anthropological Approach*, London 1978, p. 54.

[105] DABIN J., *Théorie générale du droit*, rev. edn, Paris 1969, p. 98; MOORE S.F. (note 104), p. 54.

[106] See, *e.g.*, KAHN P., 'Lex mercatoria et pratique des contrats internationaux: l'expérience française', in: *Le contrat économique international*, Brussels 1975, p. 173 *et seq.*: 'il faut également que les opérateurs du marché international constituent un milieu suffisamment homogène pour que les solidarités professionnelles se fassent sentir et que s'expriment des besoins requérant des solutions juridiques cohérentes et adéquates.'

[107] See, *e.g.*, KRAMER M.H., *Objectivity* (note 6), p. 109 *et seq.* See further below, text accompanying notes 139 *et seq.*

[108] ROMANO S. (note 89), p. 13 *et seq*.

the community – that creates the law.[109] In addition, the required community must have achieved a certain level of organization. A loosely assembled number of individuals engaging in similar activities do not form a proper community, willing and able to self-govern by adopting its own norms in its own clearly identifiable law-making institutions.[110]

As Paul Lagarde famously remarked, there seems to be no well-organized global society of merchants, no *societas mercatorum.* He argues that 'the context in which international commerce evolves is itself so vast, so diverse, and so partitioned that one may seriously doubt that it can avail of a minimally organized community'.[111] According to the author, the purported *societas mercatorum*, indispensable for the existence of the *lex mercatoria*, seems to lack the required 'genuine organization in the transnational context'.[112] As he reminds us, such a genuine organization 'does not result automatically from the existence of international commercial relationships, it must be demonstrated'.[113] He concludes that the legal landscape of international commerce seems rather to be constituted of 'scattered islands of organization'[114] and the main way in which private rules emerge for international commerce is in the form of a 'plurality of corporate regulations'.[115] Arbitration practitioners and theorists alike have reached the same conclusion.[116] In

[109] That was precisely the whole issue when nations, as communities matching states and thus forming nation-states, started to be created, so as to allow for the creation of a single legal system trumping the diversity of local regulations. See, *e.g.*, ANDERSON B.R., *Imagined Communities: Reflections on the Origins and Spread of Nationalism*, London 1983; MEINECKE F., *Weltbürgertum und Nationalstaat: Studien zur Genesis des deutschen Nationalstaates*, Munich 1908, pp. 124-157; HABERMAS J., *The Postnational Constellation: Political Essays*, Cambridge 2001; ARENDT H., *The Origins of Totalitarianism*, rev. edn, London 1967.

[110] ROMANO S. (note 89), p. 18: 'une classe ou couche sociale, non pas organisée comme telle, mais résultant d'une simple affinité entre les personnes qui en font partie, n'est pas une société au sens propre.'

[111] LAGARDE (note 1), p. 138.

[112] *Ibid*.

[113] *Ibid*., pp. 138-139.

[114] *Ibid.*, p. 139.

[115] *Ibid.*, p. 136. See also DAVID R., 'Le droit du commerce international – une nouvelle tâche pour les législateurs nationaux ou une nouvelle «lex mercatoria»?', in: *New Directions in International Trade Law*, New York 1977, p. 17.

[116] REDFERN A./HUNTER M. (note 12), para. 2-58: 'There are many different communities carrying on activities which may be as diverse (and have as little in common) as the transport of goods or the establishment of an international telecommunications network. The rules of law that are relevant to these different commercial activities are in themselves likely to be very different. They may share certain basic legal concepts – such as the sanctity of contracts (*pacta sunt servanda*) – but even here different considerations are likely to apply.' RIGAUX F., 'Les situations juridiques individuelles dans un système de relativité générale', in: *Hague Lectures* 1989/213, pp. 69, 256-257; KASSIS A., 'Théorie' (note 3), p. 396; LOQUIN E., 'Où en est la lex mercatoria?' (note 42), pp. 26-27; HERRMANN G., 'The future of trade law unification', in: *Internationales Handelsrechts* 2001, p. 11; MISTELIS L., 'Is

sum, there seems to be no *societas mercatorum* and, hence, there can be no legal system specific to it, that is no *lex mercatoria*.

Critics will quickly question how it is possible to argue against the existence of the *lex mercatoria* in the face of the possibility of identifying norms of commercial conduct that are applicable and generally complied with throughout the realm of international commerce. Indeed, norms such as *pacta sunt servanda* and (some of) those identified for instance by Lord Mustill and Klaus Peter Berger present themselves as valid expressions of that which shapes the rights and duties of any person engaging in international commerce.[117] Then again, Lagarde warned us that 'the existence of non-State norms does not prove the existence of a single legal system of the merchants'.[118] He seems right. If one compares the *lex mercatoria* to national legal systems, it would seem much closer to a juxtaposition of national legal systems, where norms are produced individually by Nation-States for themselves. The fact that there are common principles between them is insufficient to allow the assertion that such national legal systems collectively constitute a transnational legal system. American, English, French, German and Swiss law have many legal principles in common, but surely no one seriously believes that these national legal systems actually form one common transnational legal system.[119] Common rules do not amount to an overarching legal system.

2. Autonomy and Jurisdictional Powers

A legal system as a legal system must display a certain degree of autonomy from its environment, so as to be able to 'regulat[e] its own creation and application', as Hans Kelsen would say.[120] To understand this requirement, it helps to envision a normative system that would be radically non-autonomous. Imagine a system whose normative content would be formulated in institutions not belonging to it, in the sense that both the recognition of the norms as part of the system and the admissible ways of modifying them would be beyond the system's control. Let us

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Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law', in: FLETCHER I./MISTELIS L./CREMONA M. (eds) *Foundations and Perspectives of International Trade Law*, London 2001, p. 23; MAYER P., *Droit international privé*, 6th edn, Montchrestien 1998, para. 25; ROBERT J., *Le phénomène transnational*, Paris 1988, p. 225.

[117] MUSTILL M. (note 11); BERGER K.P., *Creeping codification* (note 62), pp. 278-311.

[118] LAGARDE P. (note 1), p. 135.

[119] Indeed, that which determines the contours of a legal system – how far it extends, what it covers – is not the contents of its primary rules of conduct, but the contents of its secondary rules. It is the secondary rules that determine which institutions have the power to make law for which subjects. A community, through secondary norms, decides to have its own set of rules, which is the same for every member of the community. Whether these rules happen to be the same, in part or even in total, as those of another community is entirely irrelevant for the determination of the realm of a given legal system.

[120] KELSEN H., *Pure Theory of Law*, Berkeley 1967, p. 71.

further imagine that the application of these norms – which are imposed from outside the system – would also be beyond the control of the system. In other words, the administration and adjudication of these norms, for instance the determination of sanctions against their violation, would be operated by someone outside the system. To complete the picture, add to this scenario the hypothesis that the enforcement of the system's norms would depend on the collaboration of institutions outside the system, in the sense that the system's norms could possibly be denied actual effect by an entity external to the system. Such a normative system would certainly strike one as barely having any proper identity. It would be indistinguishable from its environment as an operative normative system. Hence, it could not be a distinct legal system, but merely a collection of norms drawn together from different legal systems and obeying these other systems' rules of recognition, change, and application. Such a collection of norms, because of its lack of autonomy, would have no 'faculty of self-organization', as Charles Rousseau puts it.[121] It would be unable to form a legal system of its own, though it could of course be part of another, broader legal system.[122]

What this suggests is that a legal system, in order to effectively be a legal system in its own right, must be autonomous in the formulation, application, and enforcement of the norms that constitute it. In order to achieve such autonomy, the system must be equipped with the proper institutions to this effect. Indeed, it is insufficient for a normative system to simply be formally equipped with secondary rules of recognition.[123] In addition, these rules of recognition must be efficacious, so that the legal system may effectively decide upon its borders and its delimitation vis-à-vis other systems. As François Rigaux would say, the legal system must thus have its own powers of prescription, adjudication and enforcement, which provide it with the capacity to formulate, apply and enforce its own norms.[124] A legal

[121] ROUSSEAU C., *Droit international public*, p. 407.

[122] See, *e.g.*, VAN DE KERCHOVE M./OST F., *Legal System* (note 40), p. 139-142.

[123] On this requirement of secondary rules of recognition, see, *e.g.*, *ibid* p. 141: '[t]he minimal condition on which a legal system possesses an identity in relation to another is that it is composed not only of rules of behavior, but also of a rule of recognition peculiar to it and making it possible for it to identify those rules as its own.'

[124] RIGAUX F. (note 116), p. 28: 'un ordre juridique se définit par ses institutions, auxquelles sont attribuées trois compétences . . ., la compétence législative (*jurisdiction to prescribe*), la compétence juridictionnelle (*jurisdiction to adjudicate*) et la compétence d'exécution (*jurisdiction to enforce*) . . . une proposition normative n'acquiert cette nature que si elle émane d'un pouvoir institué, et à la double condition que les contestations que peut faire naître son application soient soumises à une autorité apte à les trancher et que la décision rendue soit exécutoire, le cas échéant par la contrainte'. See also RIGAUX F., 'Souveraineté des États et arbitrage transnational', in: *Le droit des relations économiques internationales: études offertes à Berthold Goldman*, Paris 1982, p. 279: 'pour mériter la qualification d'ordre juridique, un système de relations sociales [doit] se composer de trois séries d'éléments: des règles de conduite observées par leurs destinataires, des règles de décision appliquées par un juge, des mécanismes de contrainte qui assurent l'effectivité du système.'

system is 'complete' only if it has the institutions capable of closing it off from other systems.[125]

The need for a system's own enforcement power seems particularly important because of the traditionally central role of coercive might in the concept of law – a conception of law adopted by authors as diverse as Immanuel Kant,[126] John Austin,[127] Rudolf von Jhering,[128] Max Weber,[129] Hans Kelsen[130] and John Rawls.[131] When referring to a system's own enforcement power, I mean the requirement that the norms do not, in order to obtain compliance, need to resort to any external apparatus of enforcement. 'External' implies here that the apparatus lends its coercive arm on conditions that are not determined by the private normative system.

Enforcement power is, precisely, the form of jurisdictional power that the *lex mercatoria* most certainly lacks. A commercial arbitral award, in order to gain access to coercive might, must meet the requirements set by the public legal system. The *lex mercatoria* lacks an important element of autonomy, as it still needs to rely on national courts for enforcement.[132] As Simon Roberts would say, its

[125] See, *e.g.*, VIRALLY M. (note 79), p. 200: 'un ordre juridique complet, c'est-à-dire qui dispose à la fois de sources du droit originaires, où il puise sa propre validité, et d'un appareil de contrôle et d'exécution forcée, n'est tributaire d'aucun autre ni au point de vue de la création, ni au point de vue de l'application des normes qui le composent. Dès lors, il fonctionne naturellement en se refermant sur lui-même et en n'admettant comme valables que les normes qu'il secrète. Il constitue, structurellement, un système clos.'

[126] KANT I., *The Metaphysics of Morals* [1797], Cambridge 1996, p. 25 (Section 'Introduction to the Doctrine of Right', § D. 'Right is Connected with an Autorisation to Use Coercion').

[127] AUSTIN J., *The Province of Jurisprudence Determined* [1832], Indianapolis 1998, pp. 13-14. See also, *e.g.*, KRAMER M.H., *In Defense* (note 37), p. 100: 'For Austin, legal sovereignty and thus legal authority consisted in laying down orders backed by threats of overwhelming force, in being habitually obeyed, and in habitually obeying no one.'

[128] VON JHERING R., *Law as a Means to an End* [1877–83], Boston 1913, p. 231: 'The State is society as the bearer of the regulated and disciplined coercive force. The sum total of principles according to which it thus functions by a discipline of coercion, is Law.'

[129] WEBER M., *Economy and Society* [1925], Berkeley 1978, pp. 313, 332: 'The term «guaranteed law» shall be understood to mean that there exists a coercive apparatus' and «Valid» legal norms, which are guaranteed by the coercive apparatus of the political authority'.

[130] KELSEN H. (note 120), pp. 33, 320 ('a coercive order'; '[a normative order is] 'law', if it is a coercive order, that is to say, a set of norms regulating human behaviour by attaching certain coercive acts (sanctions) as consequences to certain facts'). See also KELSEN H., *General Theory of Law and State*, Cambridge MA 1945, p. 61.

[131] RAWLS J., *A Theory of Justice*, Cambridge MA 1971, p. 235: 'A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation.'

[132] See, *e.g.*, OPPETIT B., *Théorie de l'arbitrage*, Paris 1998, p. 87. See also CRAIG W.L./PARK W.W./PAULSSON J., *International Chamber of Commerce Arbitration*, 3rd edn, Dobbs Ferry, NY 2000, p. 495; FRIEDMAN L.M., 'One World: Notes on the Emerging Legal Order', in: LIKOSKY M. (ed), *Transnational Legal Processes*, London 2002, pp. 31, 33.

'legality is routinely secured from underneath, «downwards» into the State, as it were'.[133] The *lex mercatoria* can only have as effective contents what national courts allow it to have.[134] Assuming again that only efficacious rules matter, the final and decisive rule of recognition determining which rules of conduct belong to the *lex mercatoria* is in the hands of national courts. It is controlled by the public legal system. Because of this need to rely on enforcement in state courts, the public legal system is sovereign over what may be submitted to arbitration and how, and over the norms that arbitrators may produce.[135] It might be pointed out that even Berthold Goldman himself admitted that the *lex mercatoria*, for this reason, is an 'incomplete system'.[136]

This lack of autonomy of the *lex mercatoria* as an operative legal system, in addition to the fact that it cannot be anchored in a specific community that has any real substance, makes it very difficult for the *lex mercatoria* to successfully claim its status as a normative system of its own that would be jural in nature. If these structural issues were still considered insufficient to deny the *lex mercatoria* its own juridicity, additional arguments are to be found in its normative contents. Indeed, a system of norms that would be flawless with regard to its societal basis and its autonomy, being hypothetically equipped with well-functioning internal institutions of norm formulation, norm application and norm enforcement, might still fail to be law. This scenario is precisely the one envisaged by Lon Fuller, which led him to identify what he called the 'inner morality of law',[137] which are the formal conditions that norms must collectively fulfill in order to be law. This will be the topic of the following section.

B. Formal Qualities of the Normative Contents

Heretofore, this essay has explored the essential features of law from a systemic perspective, examining certain structural issues whose absence prevents a normative system from being a legal system. We have seen that when a state of affairs exists where the purported legal system cannot be said to be the normative reflection of a community or society, or where a normative system relies heavily on (other) legal systems in order to be effective, it appears highly uncertain that it

[133] ROBERTS S. (note 50), p. 18.

[134] See, *e.g.*, VON BAR C./MANKOWSKI P., *Internationales Privatrecht*, 2nd edn, Munich 2003, p. 81.

[135] See, *e.g.*, LAGARDE P. (note 1), p. 147 *et seq.*; PAULSSON J. (note 48), p. 63 and JACQUET J.-M./DELEBECQUE P./CORNELOUP S. (note 10), pp. 59-61 (though failing to differentiate juridicity from efficacy, as they argue that the recognition of the lex mercatoria by state courts is what makes the lex jural, whereas it really is only what makes it efficacious, which does not alter its nature).

[136] GOLDMAN B., 'Nouvelles réflexions sur la lex mercatoria', in: *Études de droit international en l'honneur de Pierre Lalive*, Basle 1982, p. 249: 'cet ordre juridique n'est pas, ou n'est pas encore, complet.'

[137] FULLER L. (note 5), pp. 33-41.

qualifies as a legal system. In other words, we have focused on juridicity qua structure. But structure, even though it is a necessary condition of juridicity, is not a sufficient condition. In addition, the normative content of the system must bear certain qualities that embody the essence of what is law. The rules, collectively, must bear certain qualities, which are formal in nature. The fulfillment by the *lex mercatoria* of such requirements will form the substance of the current section. The first section below delineates these requirements of juridicity. The second then discusses what it is exactly that must meet these requirements, that is what the contents of the *lex mercatoria* are. The third section applies the requirements marked out in the first section to the contents identified in the second.

1. The Inner Morality of Law

The American legal theorist Lon Fuller famously delineated what is still largely considered to be the best exposition of the essential features of a legal system and its normative contents – though his analysis has been sharpened by subsequent treatments of the same criteria, that have clarified them and cleaned up Fuller's occasional argumentative clumsiness.[138] Fuller termed them in negative ways, listing 'eight ways to fail to make law', eight unwanted properties of a normative system that would prevent it from being jural: (1) 'every issue [being] decided on an ad hoc basis'; (2) 'failure to publicize'; (3) 'abuse of retroactive legislation'; (4) 'failure to make rules understandable'; (5) 'enactment of contradictory rules'; (6) enactment of rules that 'require conduct beyond the powers of the affected party'; (7) 'introducing such frequent changes in the rules that the subject cannot orient his action by them'; and (8) 'a failure of congruence between the rules as announced and their actual administration'.[139] These essential features of law form what Fuller called the 'inner morality of law', or the conditions that the norms must collectively fulfill in order to be law.[140]

The first two of these features, of these criteria of juridicity, are at issue with the *lex mercatoria*. In referring to them, I will follow Matthew Kramer's terminology, used in his particularly inspiring treatment of this subject-matter: 'Governance by general norms' and 'Public ascertainability'.[141] Since these two criteria considerably overlap, they will be examined together in the following paragraphs.

Lon Fuller presents the essential features of law by recounting the imaginary failings of a well-meaning but slightly dim-witted king named Rex, in his attempts to make law in order to respond to the need for proper regulation expressed by his subjects. Rex's first action when he comes to the throne is to repeal all existing law, in order to have a clean slate on which to write. He then sets about to act as the sole judge of his kingdom, hoping to work out a system of rules over

[138] See for instance KRAMER M.H., *Objectivity* (note 6), chapter 2.

[139] FULLER L. (note 5), pp. 38-39.

[140] *Ibid* pp. 42-43.

[141] KRAMER M.H., *Objectivity* (note 6), pp. 109-18, 144-53.

time, out of his purely casuistic case administration. But after a time, he realizes that he is unable to think in terms of generalizations, being busy enough deciding each individual controversy. He realizes that it is impossible to draw general rules from his patchwork decision-making activity. Aware that he would never succeed in making law this way, he sets out to draft a code. But his previous fiasco has left him with a grave lack of confidence. He thus decides to keep his code secret, its contents to be known only by him and his scrivener. His subjects, however, soon make it clear that this is no proper way to govern, at least not if he wants to rule by something that would be recognizable as law. His subjects, indeed, cannot ascertain their rights and duties.[142]

Fuller's account, as has already been suggested, embodies two essential features of law: the incompatibility between the concept of law and mere ad hocness in the administration of justice, or the need for governance by general norms, and law's essential need that its normative contents be publicized, so as to be publicly ascertainable. The imperative behind both these principles is to be ruled by laws and not men.[143]

More precisely, the first principle – governance by general norms – requires that any legal system must be constituted primarily of general norms in order to be a legal system. As Matthew Kramer puts it, it is the requirement that 'situation-specific directives are not the . . . principal means of regulating people's conduct'.[144] Such a purely casuistic approach could indeed easily become a 'higgledy-piggledy arrangement' that would, quite obviously it seems, be 'antithetical to the rule of law'.[145] The idea behind the second principle – public ascertainability – is that 'a regime of law has to render its mandates and other norms ascertainable by the people to whose conduct they apply.'[146] This requirement follows from the fact that, if the addressees of the norms are kept in the dark with respect to what the norms command, then the existence of the normative system would 'make no difference to anyone's reasoning about appropriate courses of conduct'.[147] In both cases – non-predominance of general norms and non-ascertainability by the addressees of the contents of the norms –, the addressees of the norms would be

[142] FULLER L. (note 5), pp. 34-35.

[143] See KRAMER M.H., *In Defense* (note 37), p. 51 (stating that law has a general end, 'which involves the control of human conduct *by rules*, rather than simply the control of human conduct'). *Cf.* also TAMANAHA B.Z., *On the Rule of Law*, Cambridge 2004, pp. 122-126, esp. p. 126: 'there is a vast difference between instructing persons . . . to follow or apply a relevant body of rules to a situation, versus instructing them to do as they please or to do what they consider right without regard to rules. This large difference is appropriately captured by the contrast between rule of law and rule of men.') and SCALIA A., *A Matter of Interpretation*, Princeton 1997, p. 17 ('Government of laws – of texts written down, not men').

[144] KRAMER M.H., *Objectivity* (note 6), p. 110.

[145] *Ibid.*, p. 111.

[146] *Ibid.*, p. 113.

[147] *Ibid*.

'unable to form any confident expectations on the basis of which they can interact with one another',[148] and 'no one [would] have an informed sense of what anyone else is required or permitted or empowered to do'[149].

Such an inoperative normative system could not be considered to be law, because it could not 'perform its central guiding role'[150] by providing 'dependable guideposts for self-directed action'.[151] It is indeed an intrinsic purpose of law to provide such predictable and reliable signposts for action in the form of general and ascertainable rules.[152] Fuller's principles of the inner morality of law are in essence, as Hart explained, a list of the conditions for an efficacious attainment of this end.[153]

The *lex mercatoria* does not seem to be able to carry out this fundamental purpose of law since, as was already mentioned, it fails to meet the two conditions set out above, which are essential features of the inner morality of law and thus of law itself. Before moving on to explore the issues so raised, we must pause for a minute to think about which norms form part of the *lex mercatoria* – a question that will inform the exposition of the issues just mentioned. The structure of the following reflects these two steps in the reasoning.

2. The Contents of the Lex Mercatoria

The question of the contents of the *lex mercatoria* can be answered in two ways: on the one hand in a substantial and static way, referring to primary norms of conduct, and on the other in a formal and dynamic way, focused on secondary norms and institutions.[154]

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[148] *Ibid.*, p. 112.

[149] *Ibid.*

[150] *Ibid.*, p. 118.

[151] FULLER L. (note 5), p. 229.

[152] On the idea that Fuller's precepts embody an end that is intrinsic to law, see KRAMER M.H., *In Defense* (note 37), pp. 50-51.

[153] HART H.L.A., 'Lon L. Fuller: The Morality of Law', in: *Essays in Jurisprudence and Philosophy*, Oxford 1983, pp. 350-351, 357.

[154] In substance, these two approaches correspond to the distinction made for instance by Hans Kelsen between static and dynamic systems: see KELSEN H., *Pure Theory* (note 120), pp. 196-197. In Kelsen's words, a static system is one in which norms 'are valid on the strength of their content: because their validity can be traced back to a norm under whose content the content of the norms in question can be subsumed as the particular under the general', whereas a dynamic system is one in which a given norm belongs to the system 'because it was created in a fashion determined by the basic norm – and not because it has a certain content.' The *lex mercatoria* seems to fit more squarely into the second category, as my expositions below on the role of arbitrators will tend to show. On static and dynamic normative systems, see further TROPER M., 'Système juridique et Etat', in: *Archives de philosophie du droit* 1986, p. 29 and WRÓBLEWSKI J., 'Dilemmas of the Normativistic Concept of Legal System', in: *Rechtstheorie* 1984, Beiheft 5, p. 319.

The substantial and static way of defining the norms of the *lex mercatoria* constitutes the usual approach. What it boils down to is the drawing up of a list of norms of conduct that the *lex mercatoria* arguably contains. This is the more traditional approach, initially advocated by pragmatic and skeptical practitioners, who considered that the *lex mercatoria* does not bring anything to the table because of its normative paucity.[155] More enthusiastic authors sought to reply to such arguments by providing much more extensive lists of rules of conduct that the *lex mercatoria* arguably contains.[156] This approach was soon caught in a debate on the identification of these rules, where the central question is whether a given rule does or does not belong to the *lex mercatoria*. Such an approach is relatively unrewarding for the theorist seeking to ask the more fundamental question of these norms' juridicity as *lex mercatoria*, because of the endless character of the debate and the limited consequences attached to the status of each individual rule. Norberto Bobbio's image springs back to mind: such an approach might well be constitutive of looking at the trees and missing the forest.[157]

The formal and dynamic approach to the question of the normative content of the *lex mercatoria* seems more rewarding. Such an approach relies on a dynamic identification of rules: the norms forming part of the *lex mercatoria* are the norms that the official institutions of the *lex mercatoria* have adopted. As Kelsen wrote, '*Kein Imperativ ohne Imperator*': the presence of such officials is indispensable to make law.[158] Drawing a parallel, in another context, sheds light on what such an approach implies: the contents of a given national law typically are defined by reference to what the officials (Parliament, courts, and so on) of the legal system in question have adopted. British law, for instance, is what the British legislative institutions (most notably Parliament) have adopted and what English courts and administrative agencies have said. Conversely, it is irrelevant entirely what the French *Assemblée nationale*, for instance, might consider to form part of English law. The French Parliament cannot make English law because it is not an official institution of the English legal system. Someone external to a legal system, in the sense of an institution not part of the community underlying a given legal system, cannot make law for that particular system. Also, someone who has been attributed no law-making function within a specific legal system cannot make law for that system, regardless of his or her belonging to the underlying community. For instance, German legal scholars, though part of the German nation (which is the relevant community), cannot *make* German law. German legal commentators can only do precisely that: comment, and not decide upon the contents of German law. Such seemingly trivial conclusions on the contours of a legal system may help further the debate on what forms parts of the *lex mercatoria*, which in turn allows a

[155] See, *e.g.*, MUSTILL M. (note 11).

[156] See, *e.g.*, PAULSSON J. (note 48) and BERGER K.P., *Creeping codification* (note 62).

[157] BOBBIO N., *Teoria* (note 79), p. 7.

[158] KELSEN H., *General Theory of Norms*, Oxford 1991, p. 234: 'No imperative without an imperator, no norm without a norm-positing authority, that is, no norm without an act of will of which it is the meaning.'

proper examination of the 'inner morality' of the contents of the *lex mercatoria*. The debate is furthered in one main way: it helps focus on who has an authoritative and final say, a decisionary power as to what forms part of the *lex mercatoria*. This is to ask who are the officials of the normative system of the *lex mercatoria*.[159] It is then possible to take the analysis from there to examine whether these officials act in a way comparable to King Rex's, that is whether they succeed or fail to make law.

As is stated or implied by many authors, the only officials of the *lex mercatoria*, its only organs, are the arbitrators.[160] As Bruno Oppetit writes, summarizing the dominant position, to which he globally adheres, 'it is through their recognition, application and systematization by arbitral tribunals that the non-written norms (among which one finds trade usages) that constitute this merchant law would become jural'.[161] Within the limits of international public policy, arbitrators are sovereign with regard to the determination of what the *lex mercatoria* provides.[162] That the arbitrators participate in the creation of the *lex mercatoria* is generally accepted.[163] Might there be someone else who has authoritative power to say – as opposed to merely suggest – what the contents of the *lex mercatoria* are?[164]

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[159] In other words, we are looking for what the norms of adjudication and the rule of recognition of the *lex mercatoria* provide. As Matthew Kramer describes them, 'norms of adjudication empower officials to ascertain authoritatively whether violations of the prevailing laws have occurred, [whereas] the Rule of Recognition empowers them to ascertain authoritatively the existence and contents of the laws themselves. (Of course, a law-ascertaining determination is essential for any violation-detecting determination. Consequently when the former takes place, it often is an element of the latter.' See KRAMER M.H., 'Of Final Things' (note 39), pp. 49-50. As we will see, the *lex mercatoria*'s rules of adjudication and recognition designate the same officials, namely the arbitrators, who combine the two functions of direct law ascertaining and violation detecting.

[160] PELLET A., 'La lex mercatoria, «tiers ordre juridique»? Remarques ingénues d'un internationaliste de droit public', in: *Souveraineté étatique et marchés internationaux à la fin du 20e siècle: mélanges en l'honneur de Philippe Kahn*, Paris 2000, pp. 56-57: 'les arbitres «mercatoristes» ou transnationaux . . . organes de la «*Lex Mercatoria*» (comme la Cour de la Haye est l'«organe» du droit international)'; LAGARDE P. (note 1), p. 126-127, 146: 'l'arbitre, qu'on peut considérer comme un organe de la *lex mercatoria*'. See also GOLDMAN B., 'La Lex Mercatoria dans les contrats' (note 44) and DEUMIER P. (note 3), p. 360: 'Les règles . . . inspirées de la pratique . . . sont le plus souvent formulées par des arbitres'.

[161] OPPETIT B., 'Droit savant' (note 79), p. 394, citing GOLDMAN B., 'La Lex Mercatoria dans les contrats' (note 44).

[162] On international public policy as a limit, see, *e.g.*, BUCHER A./TSCHANZ P.-Y. (note 23), p. 113.

[163] OPPETIT B., 'Droit savant' (note 79), p. 394 *et seq*.

[164] On the importance of authoritative law-ascertaining, see note 159 above. Implying that there are no other officials: DE VRIES H., 'Foreword', in: EISEMANN F. (ed), *Usages de la vente commerciale internationale - Incoterms aujourd'hui et demain*, 2nd edn, Paris 1980, p. 17: 'le commerce international est une République sans territoire, sans gouvernement et sans pouvoir législatif.'

The only two other possibilities that deserve to be considered are legal commentators and the parties themselves.

Legal commentators qua legal commentators have no power to make law. They have no decisionary power with regard to what does and what does not form part of a legal system. Legal commentators and other people who are not officials of the legal system in question can only describe its rules, as opposed to prescribe them, or comment on them as opposed to make them. When certain provisions refer to learned writers as a source of law, it is merely a recognition of their role in representatively describing the positive law and suggesting solutions *de lege ferenda*. [165] It seems manifest that legal commentators sometimes err in their work, which would be impossible if their pronouncements made the law instead of describing it, as it is an intrinsic feature of creative statements that they cannot be true or false. They can only be desirable or undesirable. (All this, of course, does not mean that learned writers do not play a more or less significant role in developing new rules of law. But to play a role in the making of the law is quite a different thing than to actually make law. The following apagogical argument hopefully makes this apparent: if one may agree with the legal realists that what a judge eats for lunch and her education by her parents influence her reasoning and thus her decision, and therefore play a role in the making of the law, it would seem odd indeed to assert that lunch and her parents make law.)[166]

One could of course conceive of a normative system in which academia is completely self-regulated, where law professors, within specific institutions of this imaginary academic system, would formulate, apply, and enforce their own rules, by which they regulate their community. In this case, the law professors would both be members of the community and would have been attributed specific law-making powers.[167] However, the situation is, precisely, quite different with regard to the *lex mercatoria*. Law professors cannot make law for the *societas mercatorum* (assuming, *arguendo*, that such a society exists), because they neither form part of the community of merchants nor have been expressly attributed any law-

[165] As Bobbio would say, when legal commentators state that certain people must do certain things, the verb 'must' is always a citation to an order given by someone else and not an order in itself. See BOBBIO N., 'Essere e dover essere nella scienza giuridica', in: BOBBIO N. (ed), *Studi per una teoria generale del diritto*, Turin 1970. See also, on the distinction between sources of law and the law itself, with a legal realism approach and by one of the fathers of this school of thought, GRAY J.C., *The Nature and Sources of the Law* [1909], Dartmouth 1997.

[166] *Cf. Akehurst's Introduction* (note 26), p. 51, describing the role of Article 38(1)(d) ICJ Statute in the following terms: 'learned writings can be evidence of customary law, but they can also play a subsidiary role in developing new rules' and DEUMIER P., 'Observations sur «la doctrine collective législatrice: une nouvelle source de droit»', in: *Revue trimestrielle de droit civil* 2006, p. 63, who makes, p. 65, an interesting distinction between the 'constraining force' of non-legal rules and their persuasive force, and another, p. 68, between legal expertise and political (in the sense of law-making) power.

[167] *Cf.* ENCINAS DE MUNAGORRI R., 'La communauté scientifique est-elle un ordre juridique?', in: *Revue trimestrielle de droit civil* 1998, p. 247.

making function. It seems plain that arbitrators applying the *lex mercatoria* to a given case are free not to follow that which academics have contended forms part of the *lex mercatoria*, which would not be possible if the norms ascertained by legal commentators were authoritative, that is binding.

This assertion about the academics' absence of power to make the *lex mercatoria* must be distinguished from the situation where law professors are appointed as arbitrators and then requested to apply – that is to make, because of the necessity to interpret and thus to create normative content – the *lex mercatoria*. Bruno Oppetit famously concluded on this basis that the *lex mercatoria* is a '*droit savant*', a learned law in the sense that arbitrators, who formulate the rules that constitute it, are essentially (or 'were essentially', in his time) academics.[168] In this situation, law professors do indeed make the *lex mercatoria*, but they do so qua arbitrators, not qua legal commentators. To contend on the basis of law professors' role as arbitrators that the *lex mercatoria* is a professors' law involves the same argumentation as to say that American law, for instance, is white, male and top-law-school law, because most members of Congress and most judges are white men from top law schools. This might be sociologically correct, but it is totally unrelated to the formal conditions on which law is made, which is what we are interested in here, as we are looking for the institutions that have law-making powers – that is, Congress – and not particular profiles of members of Congress, arbitrators and not particular profiles of arbitrators.

Again, legal scholars have a purely descriptive function. They describe what they think the *lex mercatoria* is or should be; they cannot make it. When Klaus Peter Berger, for instance, set up a database meant to contain the rules that form part of the *lex mercatoria*, he did not *make lex mercatoria*.[169] The same, incidentally, holds for groups of experts, for instance when drafting the UNIDROIT principles.[170] Their work can be a source of the *lex mercatoria* – just as foreign law is typically a source for law reforms in any country – but it is not determinative of what the *lex mercatoria* contains.

Can the parties be the officials that authoritatively decide on what forms part of the *lex mercatoria*? Let us accept again, *ex hypothesi*, that the *societas mercatorum* exists. A society always potentially has the capacity to create its own law. But in order to actually be able to do so, the society must be sufficiently organized and autonomous from its environment, in the sense that it is effectively able to formulate, apply, and enforce its own rules, and it must have clearly identifiable institutions in which the norms, which originate in the community itself, are formally restated. A normative system with no specific institutions that have the powers to formulate, apply, and enforce norms is in principle a system of social

[168] OPPETIT B., 'Droit savant' (note 79), p. 396 *et seq*.

[169] See Transnational Law Digest & Bibliography at <www.tldb.net>.

[170] See OPPETIT B., 'La notion de source du droit et le droit du commerce international', in: *Archives de philosophie du droit* 1982, p. 44: '[L'institution] ne saurait se reconnaître compétence à elle-même à l'effet de produire des règles de droit, encore faut-il que ce rôle lui ait été imparti.'

norms, and not a legal system. What marks it as legal is, precisely, the fact that *specific* institutions, which represent the community, have clearly identifiable powers of norm formulation, application, and enforcement. The members of a community, which comprise the parties to arbitration proceedings in the case of the *lex mercatoria*, always are a source of law, but they do not constitute in and of themselves the institutions where social norms are restated so as to be legal in nature.[171] In other words, although the role of the members at large of the *societas mercatorum* is important for the formation of law, it would be insufficient to look at the way they handle norms to come to the conclusion that the inner morality of their legal system is respected. Indeed, if we look only to the actions of members of the community qua members, we would only be in the presence of social norms.[172] The principles making up the inner morality of law must be met by the officials of the legal system, by those institutions specifically designated to make law.[173] In sum, we might dispense with looking at the behavior of the parties, because their actions are in themselves insufficient to create a legal system.

For a legal system to be made, the officials of the normative system in question – that is the institutions that represent the underlying community and have specific powers of rule formulation, application, or enforcement – must respect the precepts of the inner morality of law. This is what the following section expounds on.

3. The Inner Morality of the Lex Mercatoria

The preceding paragraphs propounded that the arbitrators' role in the *lex mercatoria* is crucial to the prospect of attributing it juridicity, that is of making it a legal system. Indeed, the arbitrators appear to form, collectively, the only organ, the only institution that has specific powers to authoritatively formulate and apply the rules forming part of the *lex mercatoria*. We have seen that without institutions having such powers, there can be no legal system, as the presence of such institutions is precisely what distinguishes a legal system from an unqualified social normative system.[174] In order for the arbitrators to be able to effectively play their role in the constitution of the *lex mercatoria* as a legal system, their normative contribution must conform to the precepts embodied in the inner morality of law. Indeed, if their normative production fails to meet the criteria of juridicity, they cannot be

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[171] See generally BOHANNAN P. (note 40).

[172] *Cf.* VAN DE KERCHOVE M./OST F., *Legal System* (note 40), p. 35: 'there can be a legal system only where there exist both general rules that ground the content of individual decisions and judges authorized to remedy authoritatively the imperfections inherent in those rules.'

[173] *Cf.* OPPETIT B., 'Droit savant' (note 79), p. 299: 'the power to make law [of the arbitrators] . . . is conferred upon them by the parties.'

[174] *Cf.* KRAMER M.H., 'Of Final Things' (note 39), p. 63: '*some* person or body of persons must have . . . a final say [over the existence and contents of legal norms] if a legal system is to be sustainable.'

deemed to make any normative system jural. As was already suggested above, the arbitrators' normative production fails to meet two criteria of juridicity: governance by general norms and public ascertainability.[175] The following argues why.

First of all, it must be pointed out that the arbitrators could theoretically fulfill the requirements of governance by general norms and public ascertainability. Indeed, both these essential features of law can be achieved through individual decisions. As opposed to Fuller, who considered that these criteria could only be fulfilled through direct promulgation of the (general) rules to the addressees, Matthew Kramer convincingly argues that:

> '[T]he regulation of behavior through the laying down of norms and the setting of standards . . . does not necessarily involve making those norms and standards known to [the addressees] by means other than the patterns of official approval and disapproval that implement the norms and the standards.'[176]

In other words, there is no need, with respect to the inner morality of law, for a publicly accessible code of general rules. These essential features of law may be attained through patterns of rule application by the system's officials, as the addressees of the rules could then 'infer the content of the rules by studying the patterns of the decisions which authoritatively settle disputes'.[177] However, in order for this inference of the content of the rules to effectively take place, the patterns of decisions must display certain qualities.

First, the decisions – in the current case, the awards – must be sufficiently 'plentiful and regularized to create clearly intelligible patterns' from which the addressees (that is the members of the *societas mercatorum*, whose existence is admitted *ex hypothesi*) can infer predictable and consistent rules.[178] Indeed, as arbi-

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[175] It may be pointed out that the inclusion in the analysis of governance by general norms and public ascertainability as essential features of law may go some way towards reconciling academia and practice, or law as it is conceived of and law as it is lived, the separation of which too frequently marks theoretical perceptions of law: as Lord Mustill writes, 'To the academic lawyer these considerations [about the lack of published awards and the consequent lack of public ascertainability of the contents of the *lex mercatoria*] may seem trifling. Either the *lex mercatoria* is part of an international legal order, or it is not. Either a rule forms part of the lex or it does not. The difficulties which practising lawyers in various parts of the world may experience when trying to search it out cannot alter the position. Nor, it may be said, is it a valid objection to the doctrine as an intellectual construct that the adviser may find it difficult, and often impossible, to predict whether a tribunal not yet appointed will decide to apply the *lex mercatoria*; or what kind of *lex mercatoria*, whether «macro» or «micro» or some other kind, it will be; or what sources the tribunal will consider of greatest importance; or what weight will be attached to prior awards on the same question, if any exist and can be found.' See MUSTILL M. (note 11), p. 116.

[176] KRAMER M.H., *In Defense* (note 37), p. 46.

[177] *Ibid*.

[178] KRAMER M.H., *Objectivity* (note 6), pp. 113-15. See also KRAMER M.H., *In Defense* (note 37), pp. 45-46 and, more specifically in the context of arbitration, FOUCHARD P.,

tral awards are the only authoritative vehicle for the (intermediate) expression of the contents of the *lex mercatoria*, they must be in sufficient number to allow the rules they apply to become manifest, and to allow the parties to apprise themselves (requirement of public ascertainability) of the general rules (requirement of governance by general norms) that will determine the outcome of their case. Rules that do not become manifest cannot fulfill the 'chief function of law in guiding and channeling people's conduct'.[179] As Matthew Kramer puts it,

> 'If the decisions are few and far between, or if a number of them are aberrant, they will not be adequately reliable and informative as conduits that provide indirect access to the norms that lie behind them.'

The same rationale leads to the second required quality of decisions: they must have precedential force. This precedential force may be either juridical or plainly factual. If the precedential force is juridical, that is if the officials applying the rules follow a strict doctrine of *stare decisis*, each decision in itself would amount to a publicly ascertainable and general norm – provided of course the decision is publicly available.[180] The precedential force may also be purely factual, in the sense that the officials follow a doctrine of *de facto stare decisis*: they consistently follow prior cases without any express duty to do so.[181] The absence of any doctrine of *stare decisis*, combined with the absence of other authoritative vehicles for the expression of the rules, would make it very difficult to infer the norms' contents from their applications. What matters is that all decisions be expositions of the same contents of the law, that one decision does not suggest that the law is X while another implies that it is Y. If decision makers do not follow prior cases, the risk that there be variations among the decisions seems great indeed. And, as Matthew Kramer writes,

> 'Because gaining knowledge of the contents of those norms is a far more difficult task when one's access to them is indirect rather than direct, the epistemically disruptive effects of any transformations of the norms will be greatly accentuated.'[182]

L'arbitrage commercial international, Paris 1965, p. 435 (writing on 'l'objet essentiel du droit, la prévisibilité').

[179] KRAMER M.H., *Objectivity* (note 6), p. 114. See also KRAMER M.H., *In Defense* (note 37), p. 46 (stating that the rules' addressees must be 'able to infer the content of the rules by studying the patterns of the decisions which authoritatively settle disputes').

[180] KRAMER M.H., *Objectivity* (note 6), p. 114: 'insofar as the officials' judgments and their rationales would have precedential force, those judgments and rationales themselves would constitute directly ascertainable legal norms.'

[181] See generally BHALA R., 'The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy) ', in: *American University International Law Review* 1999, pp. 940-42.

[182] KRAMER M.H., *Objectivity* (note 6), pp. 114-15.

This means that, if the application of rules to the resolution of individual disputes is the only authoritative expression of the rules, then the slightest variation in these applications would be likely to frustrate any effort in inferring the general rules from their applications. The norms would no longer be publicly ascertainable, and such a disparate collection of decisions would not collectively amount to governance by general norms. There no longer would be proper general norms ascertainable by their addressees. The *societas mercatorum*, when submitted to the *lex mercatoria*, would be governed by the arbitrators and not by law.[183]

Narrowed down as these requirements are, it will be unsurprising to most of those with only a basic knowledge of arbitration that the *lex mercatoria* largely fails to meet these requirements of the inner morality of law. Published arbitral awards applying the *lex mercatoria* are few and far between. As Lord Mustill puts it in a euphemism: 'the reported awards do not in all cases seem to sustain the wealth of commentary based upon them.'[184] The author then gives his estimate of the number of published awards in existence that are concerned with the *lex mercatoria*: 25.[185] Admittedly, Lord Mustill's estimate dates back almost 20 years, but the rhythm of publication of awards based on the *lex mercatoria* can in no way be said to have quickened to the point of involving any relevant portion of such awards. And of course, as Christine Gray and Benedict Kingsbury argue, even in the context of the international legal system where inter-State arbitral law-making clearly is recognized, 'Unpublished awards have virtually no law-making effect; also those not easily accessible or not reported in full will have little impact.'[186]

In addition, commercial arbitral awards barely have precedential force at all. More precisely, they barely have a *de facto* precedential force, as they have strictly no *de jure* precedential force in international commercial arbitration: an award

[183] *Cf.* MUSTILL M. (note 11), p. 116-117: 'If the contract expressly directs the arbitrator to apply the *lex mercatoria*, or if he conceives that the circumstances justify him in treating such a directive as implicit, he will find a way of doing so, notwithstanding the fragmentary nature of the norms so far established. But this is only a small part of the story. The purpose of a commercial legal order is to regulate transactions, not awards or judgments. What [the businessperson, that is the addressee of the *Lex Mercatoria*] requires is a legal framework, sufficient to inform him before any dispute has arisen what he can or must do next. If a dispute does arise he needs to be told whether he can insist or must yield, and how much room he has for manoeuvre. When asking such a question, the last answer which a businessman wants to hear is that it is a good question.' (references omitted).

[184] *Ibid.*, p. 114.

[185] *Ibid.*, p. 116. At p. 115, the author writes further that '[the practitioner] would be likely to look for concrete examples of situations in which the *lex mercatoria* has been applied through awards rendered in international commercial arbitrations. Here again he would be in difficulties. Thousands of such awards are made every year. Some are published under the auspices of certain arbitral institutions, but most are not. Moreover, the published awards are almost without exception concerned with the application of national laws. Few can be claimed as clear examples of the working of the *lex mercatoria* in practice.' (references omitted).

[186] GRAY C./KINGSBURY B., 'Developments in Dispute Settlement: Inter-State Arbitration Since 1945', in: *British Year Book of International Law* 1992, p. 122.

being annulled because of its disrespect of a relevant earlier arbitral award in a different dispute is entirely unheard of.[187] Sure enough, at least some authors in the field of international commercial arbitration are aware that basing argument on precedents is 'necessary to the consistency and even-handedness (and, therefore, the legitimacy) of the process'.[188] Sometimes, such authors then assert in a jolt of wishful thinking, without any evidence to support their claim, that a practice of following prior arbitral awards actually does exist widely.[189] But more candid empirical research has revealed an almost purely case-by-case approach. As Gabrielle Kaufmann-Kohler wrote in her recent comprehensive study on the role of precedent in arbitration practice: 'Aside from procedural issues perhaps, one can see no [*de facto*] precedential value . . . in commercial arbitration awards.'[190] Arbitrators typically treat each situation in isolation from any other situation,[191] typically making use of their 'sweeping freedom to apply the law that allows [them] to 'mint' the rules to take account of the specificities of each case.'[192] The result is that the applications of the *lex mercatoria* vary in the contents given to the rules to the point of being straightforwardly contradictory.[193] As Poudret and Besson put it, a reference to the *lex mercatoria* may indeed amount to a lucky dip, merely that the *lex mercatoria* is a grab bag.[194] Hence, it seems utterly unlikely that the way arbitrators decide cases – that is the only authoritative expressions of the *lex mercatoria* – really makes a difference to anyone's reasoning about appropriate

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[187] On this distinction between *de jure* and *de facto* precedential force in international commercial arbitration, see, *e.g.*, LARROUMET C., 'A propos de la jurisprudence arbitrale', *Gazette du Palais* 2006/348, p. 5 (the semantics of the debate (*de jure* vs. *de facto*), however, went unnoticed by the author). See also ICC (ed), *L'apport de la jurisprudence arbitrale*, Paris 1986; MAYER P., 'The UNIDROIT Principles in Contemporary Contract Practice', in: *ICC Bulletin – Special Supplement: UNIDROIT Principles of international commercial contracts* 2002, p. 111: 'Each arbitral award stands on its own. There is no doctrine of precedence or of stare decisis as between different awards'.

[188] CARBONNEAU T., 'Arbitral Law-Making' (note 33), p. 1205.

[189] *Ibid.*, pp. 1204-1205.

[190] KAUFMANN-KOHLER G., 'Arbitral Precedent' (note 33), p. 363.

[191] It may be noted that the situation is somewhat different in international law and inter-State arbitration, where references to earlier arbitral awards are simply 'unusual': GRAY C./KINGSBURY B. (note 186), pp. 128-129. Kaufmann-Kohler's study also extended to sports arbitration, where 'there is strong reliance on precedents . . . , which comes close to a true stare decisis doctrine', and to investment arbitration, where 'there is a progressive emergence of rules through lines of consistent cases on certain issues, though there are still contradictory outcomes on others.' See KAUFMANN-KOHLER G., 'Arbitral Precedent' (note 33), p. 363.

[192] KAUFMANN-KOHLER G., 'Arbitral Precedent' (note 33), p. 365.

[193] See for instance HIGHET K. (note 11) and DELAUME G., 'Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria', in: *Tulane Law Review* 1989, pp. 595, 602.

[194] POUDRET J.-F./BESSON S. (note 23), paras 685: 'a legal grab-bag with varying results'.

rules of conduct.[195] The *lex mercatoria* hardly can be said to direct anyone's behavior, which is a sign of the absence of an operative system of law.[196] This is acknowledged quite openly by some of the most prominent arbitrators. As Gabrielle Kaufmann-Kohler concludes, there is no need in international commerce for what is generally considered to be the heart and core of law, namely predictability and consistency. She writes:

> 'In commercial arbitration, there is no need for developing consistent rules through arbitral awards because the disputes are most often fact- and contract-driven. The outcome revolves around a unique set of facts and upon the interpretation of a unique contract that was negotiated between private actors to fit their specific needs.'[197]

On the contrary, she argues, '[t]he arbitrator's sweeping freedom to apply the law [is] in direct contradiction with the very idea of precedent'.[198] In other words, the freedom of the arbitrators with regard to how they decide on the merits of each case, and their quest for individually tailored solutions, appears to be considered beneficial for international commerce, more beneficial than the respect of the rule of law. Hence, the practice indeed looks like what Lord Mustill has called the micro *lex mercatoria*: 'a law is newly minted by the arbitrator on each occasion, with every contract subject of its own individual proper law'.[199] Mustill's 'law', of course, has nothing in common with what any jurisprudential or even analytical account of law would provide – an antiphrasis in the use of the term 'law' that can only be attributed to the author's usual humor. In sum, it is this individualism in decision making, this individualization of rules, that makes the *lex mercatoria* antithetical to the rule of law, not meeting the requirements imposed by the inner morality of law.

And so we come to the end of these different lines of argument that all led us to conclude that the *lex mercatoria* is not law, because it is not a legal system, because it cannot be a set of *legal* rules without deriving its non-State juridicity from its belonging to a non-State legal system, and because being a method of rule-selection necessarily relies on the assumption that the *lex mercatoria* is a legal system.

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[195] See also REDFERN A./HUNTER M. (note 12), para. 2-63:'Under the guise of applying the *lex mercatoria*, an arbitral tribunal may in effect pick such rules as seem to the tribunal to be just and reasonable – which may or may not be what the parties intended when they made their contract.'

[196] KRAMER M.H., *Objectivity* (note 6), p. 113.

[197] KAUFMANN-KOHLER G., 'Arbitral Precedent' (note 33), pp. 375-376.

[198] *Ibid*., p. 365.

[199] MUSTILL M. (note 11), p. 94.

V. Conclusion

Ideas, especially if they come within the realm of what is fashionable, frequently move by extremes. An extreme position is taken, forms the paradigm for one or several generations of thinkers, then to be replaced, as the fallacies attached to the extremism are revealed, by the opposite extreme position. Sometimes, the debate then settles for a position that is somewhere in the middle between these two extremes. The concept of law and its relationship to the State follow the same movement. If law has for a long time been dominantly considered to be State law and nothing else, it has more recently become fashionable to see law everywhere.[200] The current article, then, is one of those that argue for settling in the middle between these two extremes: non-State law certainly exists, but it cannot be found just everywhere. Certain conditions must be fulfilled, and these conditions must provide us with a workable definition of law. The positivist account of law used in this article appears to be one such definition. It admits of non-state law, but it does not see law everywhere. The *lex mercatoria*, in particular, is one place where law is not to be found.

This conclusion makes this article a rejoinder to the English view, which Andreas Lowenfeld describes in the following terms: 'The English view regards *lex mercatoria* as a slightly wicked misnomer (not to say contradiction in terms), on the ground that *lex mercatoria* is not law at all.'[201] Pierre Mayer caught the ensuing consequence nicely: he writes that arbitrators deciding in application of the *lex mercatoria* 'are in effect . . . decid[ing] in accordance with what they consider to be just and equitable, whilst purporting to decide in accordance with legal rules.'[202]

Arguably, in arbitral practice, this makes little difference, as arbitral awards made in application of the *lex mercatoria* are utterly unlikely to ever be successfully challenged or denied enforcement on such a theoretical ground.[203] Admittedly, the *lex mercatoria* does not need a deep and detailed theoretical analysis to work, that is to meet the goal of arbitration as defined by Lord Mustill: serve the commercial person.[204] The businessperson, indeed, barely needs the *lex mercatoria*, and much less any theoretical considerations about it, to go about his or her business. He or she is entirely justified in demanding to be left in peace, outside such

[200] ROBERTS S. (note 50), p. 2: 'during the second half of the 20th century, . . . law became increasingly seen as somehow «everywhere» in the social world, present even in the simplest aggregations; it was not necessarily linked to self-conscious regulatory activity' (references omitted).

[201] LOWENFELD A.F. (note 18), p. 134.

[202] MAYER P., 'UNIDROIT Principles' (note 187), p. 111.

[203] See generally DASSER F., *Internationale Schiedsgerichte und Lex Mercatoria*, Zurich 1989, pp. 59, 322 *et seq.*, 347 *et seq.*

[204] MUSTILL M. (note 11), p. 86.

theoretical debates.[205] From the internal point of view of businesspeople and the arbitrators serving them, the jural status of the *lex mercatoria* may indeed be of little relevance.

Nevertheless, in some instances, an external point of view must also be adopted. Scholarship that is concerned exclusively with the internal mechanics of arbitration, with what it needs to smoothly operate as a service available to the businessperson, becomes on the whole less and less sufficient. The expanding realm of arbitration exposes it increasingly to ethical and political scrutiny, and sometimes concerns – some warranted, others not. To inform these kinds of analyses, one way to proceed is to examine certain operations of arbitration in the light of what expresses a society's adherence to liberal-democratic values: the sustaining, within a society, of the rule of law.[206] To examine the juridicity of the *lex mercatoria* is one way to examine whether one specific aspect of arbitration implements the regulatory standards that are embodied in the very concept of law.[207]

[205] See MUSTILL M., 'Lex Mercatoria and Arbitration (A Discussion of the New Law Merchant)', in: *Arbitration International* 1992, p. 215.

[206] KRAMER M.H., *Objectivity* (note 6), p. 102.

[207] Gabrielle Kaufmann-Kohler's study on the role of precedents in commercial, investment and sports arbitration had precisely the same purpose, or at least a very similar one: assess how good regulation through arbitration is in these three different contexts. See KAUFMANN-KOHLER G., 'Arbitral Precedent' (note 33).