The debate on the existence of the lex mercatoria*

Abstract | Umongo

Academic scholars have debated for centuries about the existence of the lex mercatoria. In this article, the author examines the arguments on both sides of the debate. The critics and the proponents are systematically named, discussed and evaluated. In conclusion it is argued that the lex mercatoria does indeed exist and is a necessary tool in the international commercial world.


1 Introduction

Over the past decades, scholars from a number of different legal traditions have taken part in the fervent debate on the existence of the lex mercatoria.

Proponents of the lex mercatoria turn to the realities of international commercial practice to substantiate their views. Scholars who negate its existence, however, advance a number of diverging criticisms against it, ranging from attacks on its historical antecedents to denial of its existence as an autonomous body of law.

In this article, the arguments of both sides are discussed and evaluated.
2 Critics of the lex mercatoria

2.1 Berger

Berger\(^1\) provides us with a detailed analysis of the traditional objections levelled against the existence of the lex mercatoria. Although he is a strong proponent of the lex mercatoria doctrine himself, Berger’s responses to the objections levelled against it are very helpful when dealt with under the discussion of the objections themselves.

2.1.1 The lex mercatoria doctrine has no methodical foundation

Many scholars who oppose the existence of the lex mercatoria object that it lacks a methodical foundation.\(^2\) According to them, this makes it impossible to discern and apply the rules and principles that are said to form part of the lex mercatoria.

According to Berger,\(^3\) the lex mercatoria doctrine is closely linked to the harmonisation and unification of the law. The method employed in this harmonisation and codification process is ‘functional legal comparison’,\(^4\) which has been used to find and formulate universal principles of law. Functional legal comparison bears a close resemblance to the comparative law making technique employed by domestic legislatures in drafting contemporary legislation with an international connection. As Berger explains it:

> the analytical process of this method starts with the practical problem, and then analyses, compares and selects solutions from various major jurisdictions and presents a solution that is based on a synthesis of these various domestic laws.\(^5\)

Functional legal comparison was the law-making technique used in the drafting process of codifications such as the German, Italian and Dutch Civil Codes.

The use of this method in ascertaining the rules of the lex mercatoria ensures that the lex mercatoria and modern unification initiatives in the field of international commercial law stay in line with commercial reality. The reason for this is that the functional legal comparison method uses concrete commercial problems and realities as a starting point and then formulates legal solutions; it does not start on the premise

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2 Berger op cit (n 1) 44 refers mostly to German scholars such as Kropholler, Spieckhoff, Rehbinder and Reithmann, all of whom support this argument.
3 Berger op cit (n 1) 44.
5 Berger op cit (n 1) 45.
Functional legal comparison has been and continues to be employed to compile the principles of the lex mercatoria. It cannot be said, therefore, that the latter lacks a methodical foundation.

2.1.2 The making of the lex mercatoria does not enjoy the necessary legal publicity

According to Berger, the idea of the ‘creeping codification’ of the lex mercatoria is an answer to the publicity objection.  

Berger postulates that a ‘creeping codification’ of the lex mercatoria is occurring through the drafting of lists of rules and principles that form part of the lex mercatoria.  

This list reproduces ‘all those rules and principles of the lex mercatoria as black-letter law which have been accepted in international arbitral and contract practice

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6  Berger op cit (n 1) 46.
7  Berger op cit (n 1) 61.
8  Berger op cit (n 1) 210.
together with comprehensive comparative references. The list unifies the various sources that have fostered the evolution of a transnational commercial legal system into one single, open-end set of rules and principles.\(^9\)

Thus the codification of the lex mercatoria,\(^10\) which sets it in black-letter law, is regarded as being sufficient to assuage any publicity objections.

### 2.1.3 The lex mercatoria lacks the necessary procedural legitimacy

Scholars who claim that the lex mercatoria lacks the necessary procedural legitimacy argue that the problem of publicity brings on the lack of procedural safeguards or ‘checks and balances’ that are of paramount importance in every legal system.\(^11\)

It is a fact that international (commercial) arbitral tribunals adjudicate more than ninety percent of international commercial disputes: thus, the role of domestic courts in such disputes is minimal. Even where domestic courts retain a supervisory function over arbitration proceedings, for example the setting aside of an arbitral award, the courts may only interfere in very rare instances.\(^12\) It is deemed necessary to curb the courts’ role in international commercial arbitration to ensure speed and efficiency – the two most heralded characteristics of the process.

Berger acknowledges that the insignificant role of courts in international commercial disputes brings about a lack of procedural safeguards in the traditional sense.\(^13\) However, he proposes that the procedural legitimacy of the lex mercatoria can be derived from different sources.\(^14\) These different sources are: the ‘formulating agencies’ that are involved in the drafting and formulation of international instruments for the unification of commercial law and the international commercial arbitrators as the ‘natural judges’ of international trade and commerce.

### 2.1.4 Domestic legislatures and courts do not acknowledge the lex mercatoria

One of the arguments against the lex mercatoria is that domestic legislatures and courts frequently exhibit hostility towards the transnationalisation of the applicable law in an international commercial context.\(^15\)

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\(^9\) Ibid.

\(^10\) Ibid.

\(^11\) Berger op cit (n 1) 64.

\(^12\) For example, where an arbitrator has violated public policy.

\(^13\) Berger op cit (n 1) 65.

\(^14\) For example, UNCITRAL, UNIDROIT and the ICC.

\(^15\) Berger op cit (n 1) 78.
Those who advance this criticism refer to many decisions of European courts\textsuperscript{16} and to general principles of private international law. They point out that, when domestic courts apply the conflict of laws provisions of their lex fori, they have to ensure that the case before them is governed by substantive domestic law.\textsuperscript{17}

In answer to this criticism, Berger states that the lex mercatoria doctrine and traditional conflict of laws principles are no longer regarded as being irreconcilable.\textsuperscript{18} He regards the most important reason for this ‘approximation’ of classic private international law and the lex mercatoria to be the ‘increasing sophistication of international arbitral practice and legislation’.\textsuperscript{19} As a result, arbitrators have been freed from the constraints of domestic law. Here reference can be made to states that have reformed their arbitration legislation in accordance with the 1985 UNCITRAL Model Law on International Commercial Arbitration and the fact that these states have included in their laws special rules about the conflict of laws. These special rules allow the arbitrator freedom to apply ‘the rules of law’ instead of ‘the law’.\textsuperscript{20} Sufficient authority exists to argue that this terminology indicates that arbitrators may apply transnational legal principles such as the lex mercatoria.\textsuperscript{21}

To conclude the counter argument against this criticism of lex mercatoria, it can be said that ‘the trend towards the universal recognition of the lex mercatoria is confirmed by a long line of court decisions that have accepted arbitral awards based on general principles of transnational commercial law’.\textsuperscript{22}

2.1.5 \textit{The lex mercatoria does not have the quality of an ‘autonomous legal system’}

Berger states that the most common attack launched against the viability of the lex mercatoria doctrine is that it ‘does not constitute a “genuine” legal system’.\textsuperscript{23} This criticism bears upon the traditional reluctance to overcome the law-making monopoly of the sovereign.

However, it must be noted that the traditional meaning attached to state sover-
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eighty\textsuperscript{24} has undergone significant change over the last fifty years.

With the growth of the international economy, especially after the Second World War, the realisation dawned that, instead of placing the focus on state sovereignty, the focus should be on international co-operation. As Friedman states: ‘economically, the modernisation, automation and increasing productivity of modern industrial methods demand wider markets, impaired by those economic symbols of national sovereignty, customs, import quotas, subsidies and the like’.\textsuperscript{25} This period also saw the beginnings of a true supranational society, ‘a society in which the activities and functions of states or groups are merged in permanent international institutions’.\textsuperscript{26} According to Friedman,\textsuperscript{27} these institutions derive their status from international treaties and they are carried by the agreement and contributions of the member states. But as these institutions become more firmly established, they become ‘increasingly emancipated from the states or groups establishing them’.\textsuperscript{28} To this it can be added that most of these international institutions draw up binding documents, in various forms, be it regulations or otherwise, that create international obligations. Thus it cannot be said that sovereign states alone have law-making power.

Some of these international institutions contribute to the legal rules forming part of the codified lex mercatoria, for example UNIDROIT’s General Principles of Contract. International merchants form an international interest group that establishes merchant customs that become part of the uncodified lex mercatoria. The reality of international relations shows that sovereign states are not the only law makers and the objection that the lex mercatoria is not an autonomous legal system because it is not promulgated by a sovereign state is therefore not convincing.

Juenger says the following in this regard:

\begin{quote}

The assumption that rules and institutions cannot be called “law” unless they emanate from a sovereign is, of course, thoroughly a-historic. Long before Jean Bodin promoted the notion of sovereignty and John Austin espoused legal positivism, there was law.\textsuperscript{29}
\end{quote}

René David launches a scathing attack on the autonomy criticism against the lex mercatoria:

\begin{quote}

The lawyer’s idea which aspires to submit international trade, in every case, to one or more national systems of law is nothing but bluff. The practical men have very largely freed themselves from it, by means of standard contracts and arbitration, and states will be abandoning
\end{quote}

\textsuperscript{24} The traditional view on state sovereignty was developed by Bodin (1530 – 1596). For a discussion of his idea of state sovereignty, see J Bodin \textit{Six Books of the Commonwealth} (1955).

\textsuperscript{25} W Friedman \textit{The Changing Structure of International Law} (1964) 35.

\textsuperscript{26} Ibid.

\textsuperscript{27} Ibid.

\textsuperscript{28} Friedman op cit (n 25) 38.

\textsuperscript{29} F Juenger \textit{Selected Essays on the Conflict of Laws} (2001) 225.
neither sovereignty nor prerogatives if they open their eyes to reality and lend themselves to reconstruction of international law.\textsuperscript{30}

2.2 Turley

It is clear from his writings that Turley is strongly opposed to the idea of a lex mercatoria. His criticism is not original, however, since it is levelled against the ideas of the protagonists\textsuperscript{31} of the lex mercatoria doctrine.\textsuperscript{32}

He labels Schmitthoff’s reference to the medieval lex mercatoria as a predecessor of the modern lex mercatoria as a ‘wistful looking back on a Halycon time when the class of international merchants was left entirely to regulate itself’.\textsuperscript{33} Turley regards this idea to be inaccurate, since municipal authorities did in fact interfere with the regulation of business by imposing fiscal duties.\textsuperscript{34} Turley also refers to Schmitthoff’s statement that the modern law merchant is ‘autonomous’ and that arbitration provides a ‘practically workable degree of autonomy’\textsuperscript{35} to the law merchant. In response to this, Turley states that arbitration is neither a suitable nor an intended medium for creating, publishing or promulgating law.\textsuperscript{36}

Turley next turns his attention to Goldman’s ideas. Turley criticises Goldman’s postulation that the modern lex mercatoria derives its existence from the ius gentium of ancient Rome, but that the ius gentium’s relevance to the modern world is ‘attenuated by the fact that it existed two millennia ago, and the fact that there was an interval of five centuries following the fall of the Empire and the recorded revival of trade’.\textsuperscript{37} It is a very dangerous argument indeed to assert that the ius gentium lacks legitimacy in modern times because it existed two thousand years ago. Most modern legal systems in effect thrive on substantive law concepts developed before the ius gentium.

Turley also criticises Goldman’s sources of the lex mercatoria. First, Goldman regards the practice of using standard form contracts in different trades as adding in itself to the lex mercatoria. According to Turley, this argument has no basis, since

\textsuperscript{30} Juenger op cit (n 29) 226 refers to R David \textit{The International Unification of Private Law} (1971) 11.

\textsuperscript{31} That is on the assumption that Turley does in fact regard Schmitthoff, Goldman and Booysen as representatives of the mercatorist viewpoint.


\textsuperscript{33} Turley op cit (n 32) 457.

\textsuperscript{34} Ibid.


\textsuperscript{36} Turley op cit (n 32) 456.

\textsuperscript{37} Turley op cit (n 32) at 460.
trade associations individually and collectively have different forms of standard contracts and parties are free to adopt these contracts or to create their own. Turley also asserts that the repeated use of one type of contract can be seen as the exercise of freedom of contract. Secondly, Goldman includes ‘general principles of law’ as a source of the lex mercatoria. Turley views this as a ‘phrase of evanescent simplicity and elusive meaning’. Thirdly, Goldman refers to arbitral case law as a source. Turley levels the same criticism against this as against Schmitthoff’s assertion in this regard.

Lastly, Turley passes judgment on Booysen’s approach in as far as Booysen asserts that the lex mercatoria is part of public international law or the law of nations. Turley’s main condemnation of Booysen’s argument is that ‘it endeavours to fit the “lex” into a system of law created with different primary actors and for different purposes’.

Turley summarises his general objection against the existence of a lex mercatoria as follows:

The concept of the “lex” mercatoria is at odds with widely accepted jurisprudential concepts, particularly the role and reality of sovereign states… The content of the “lex” is confused, unascertainable and full of major gaps, some of them insoluble.

2.3 Mann

Mann attacks the lex mercatoria’s application in international commercial arbitration. He regards a link between international commercial arbitration and the place of arbitration as imperative. According to Mann, arbitrators should look to the law of the place of arbitration for conflict and procedural rules.

2.4 Lagarde

According to Lagarde, the lex mercatoria as a single legal system cannot possibly exist because there is no single international business community, but instead a num-

38 Turley op cit (n 32) at 461.
39 See 2.2 supra.
40 Turley op cit (n 32) 464.
41 Turley op cit (n 32) 474.
42 F De Ly International Business Law and Lex Mercatoria (1992) 219 refers to some of Mann’s most well-known articles, such as FA Mann ‘Internationale Schiedsgerichte und nationale Rechtsordnung’ (1968) Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 97.
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ber of sub-communities, each with their own rules. Lagarde is also strongly opposed to the so-called ‘traditional sources’ of the lex mercatoria. He argues that international conventions and international substantive rules are not sources of the lex mercatoria, but of public international law and national law. Furthermore, Lagarde negates contract clauses as sources of the lex mercatoria, since they are based on the principle of freedom of contract contained in the applicable national law. Lastly he sees ‘general principles of law’ as sources of public international law or as being derived from national law.

2.5 Kassis

De Ly regards Kassis as the most outspoken critic of the lex mercatoria theory. Kassis focused his research on the legal status of trade usages. He holds the view that trade usages are not a source of law; their status depends upon the will of the parties. Kassis argues that, because parties are allowed to derogate from usages, these usages do not form customs. Thus, according to Kassis, the mere fact that the parties know that they may contract out of usages implies that these usages are not seen as binding legal rules. Kassis concludes that trade usages are not formal sources of law and cannot be considered a source of the lex mercatoria.

2.6 Langen and other German critics

Langen emphasises the importance of general conditions and arbitration for international commercial transactions, but does not accord these autonomous status. De Ly refers to the fact that most German conflict of laws and comparative law scholars have rejected Goldman’s autonomist conception of the lex mercatoria. Many German scholars believe that choice of law is imbedded in national law and that parties may only choose the law to be applied to their contract to the extent permitted under the applicable law. A choice of general principles of law or the lex mercatoria will

44 Lagarde op cit (n 43) 128.
45 De Ly op cit (n 42) 229.
47 Kassis op cit (n 46) 381–384.
48 De Ly op cit (n 42) 236 refers to E Langen Vom Internationalen Privatrecht zum Transnationalen Handelsrecht (1969) in this regard.
49 De Ly op cit (n 42) 236.
also depend upon the applicable national law.\textsuperscript{50}

2.7 Van Delden and Van Hecke

Van Delden attacks the view that the lex mercatoria exists by claiming that there are hardly any examples of general conditions or trade usages which may be seen as genuine sources of law and that no universal principles are found which may form an autonomous lex mercatoria.\textsuperscript{51}

Van Hecke is also critical of Goldman’s lex mercatoria theory. Van Hecke is of the opinion that the sources of the lex mercatoria have become national law as a result of their integration into national legal systems and their application by national courts.\textsuperscript{52} He also criticises the lex mercatoria for having no mandatory rules, which created gaps regarding the validity of contracts or the protection of weaker parties.

3 Proponents of the lex mercatoria-doctrine and their views

3.1 The founders of the theory of a ‘new lex mercatoria’

According to De Ly, the theory of a new lex mercatoria can be traced back to four authors: Lambert, Schmitthoff, Goldman and Kahn.

During the late 1920s and early 1930s, Lambert published extensively on this topic.\textsuperscript{53} He developed the viewpoint that international merchants were self-regulatory to a certain extent inasmuch as they made law on their own through the combination of general conditions, trade usages and arbitration.

From 1954 onwards, Schmitthoff developed his theory on the new law merchant.\textsuperscript{54} According to Schmitthoff, international conventions, uniform laws and usages all have an important place in international business law.\textsuperscript{55} He emphasised that usages were no longer created solely by the behaviour of international merchants, but

\textsuperscript{50} De Ly op cit (n 42) 236 refers to German scholars such as Steindorff, Kegel, Klinke and Von Bar in this regard.
\textsuperscript{51} De Ly op cit (n 42) 239 refers to R van Delden \textit{Lex Mercatoria of Ius Commune?} (1986) in this regard.
\textsuperscript{52} De Ly op cit (n 42) 242 refers to G van Hecke \textit{Contracts subject to International or Transnational Law, International Contracts} (1981) in this regard.
\textsuperscript{53} De Ly op cit (n 42) 208 refers to E Lambert \textit{Sources du Droit Comparé au Supranational, Legislation Uniforme et Jurisprudence Comparative} (1934) in this regard.
\textsuperscript{54} CM Schmitthoff \textit{The Sources of the Law of International Trade} (1964).
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were being formulated by international organisations such as the ICC.\footnote{De Ly op cit (n 42) 209 refers to CM Schmitthoff ‘The law of international trade, its growth, formulation and operation’ in Schmitthoff (ed) The Sources of the Law of International Trade (1964) 16 in this regard.}

Schmitthoff regards the international law merchant as an autonomous legal system. By this, he does not mean that international business law exists outside national legal systems, but merely that it has some features of its own within national systems.\footnote{Schmitthoff op cit (n 54).} According to De Ly, Schmitthoff’s theory is a combination of two elements.\footnote{De Ly op cit (n 42) 209 – 210.} First, he emphasises the importance of the international origin of certain rules for the application and interpretation of international business law. Secondly, the international character of international business law promotes uniformity.

Goldman was a contemporary of Schmitthoff’s who developed his theory on the lex mercatoria during the same time. De Ly points out that a distinction needs to be drawn between Goldman’s views on substantive transnational rules, customs and usages, contracts, general principles of law and international commercial arbitration.\footnote{De Ly op cit (n 42) 210.} Goldman classified substantive transnational rules as domestic law rules that are specifically tailored to international situations and that may be followed by other jurisdictions. Originally, Goldman drew a distinction between customs and usages but later on he abandoned the distinction and regarded both as formal sources of law (the lex mercatoria).\footnote{De Ly op cit (n 42) 210 refers to B Goldman Fontières du Droit et Lex Mercatoria (1964) 189.} Goldman referred to general principles of law in international contracts and arbitral awards as sources of the lex mercatoria, their function being to fill any gaps that other sources have left. International commercial arbitration featured significantly in Goldman’s theory on the lex mercatoria. Goldman saw a great need to develop autonomous conflict rules for international commercial arbitration and did extensive research on the content of such rules.\footnote{Reference can be made to B Goldman La Lex Mercatoria dans les Contracts et l’Arbitrage Internationaux: Réalité et Perspectives (1979) to name but one of his works on international arbitration.}

Kahn\footnote{De Ly op cit (n 42) 215 refers to Kahn’s most well-known work: P Kahn La Vente Commerciale Internationale (1961).} was influenced by Goldman’s views on the lex mercatoria, but his work warrants individual mention. According to Kahn, the business community is divided into subsections that are characterised by homogeneity and solidarity. Examples of such subsections are the community of buyers and sellers and the banking community. Kahn had a sociological conception of the law, under which any organised community may create legal rules to regulate that community. Thus he saw the international business community or subsections of this community as self-regulatory be-
cause they established their own usages, general conditions, standard contract clauses 
and general principles of law. Under Goldman’s influence, Kahn called these rules 
the ‘lex mercatoria’.63

3.2 Fouchard

Fouchard was influenced by both Goldman and Kahn. He also believed in an a- 
national system that existed outside national legal systems.64 According to him, this 
legal system or lex mercatoria consisted of self-regulating rules of professional or-

64  De Ly op cit (n 42) 221 refers to P Fouchard L’arbitrage Commercial International (1965).
65  Fouchard op cit (n 64) 105.
66  Fouchard op cit (n 64) 424.
67  De Ly op cit (n 42) 224 names these authors’ most well-known works.
68  De Ly op cit (n 42) 238.
69  De Ly op cit (n 42) refers to P Sanders Codes of Conduct and Sources of Law (1982) 297–298 in this regard.

63  De Ly op cit (n 42) 216.
65  Fouchard op cit (n 64) 424.
66  Fouchard’s analysis of the process of applying general principles of law makes for an original con-
tribution to scholarly research on the lex mercatoria. He suggests that a limited number of 
legal systems could be compared, from which a common position may then be de-
duced. Preference would be given to the rule of the system most suited to the prob-
lem.66

Other French scholars in favour of the existence of a modern lex mercatoria in-
clude René David, Loussouarin, Deby-Gérard, Simon, Oppetit and Derains.67

3.3 Horn

De Ly believes Horn to be the most important German proponent of the lex mercato-
ria theory as developed by Schmitthoff. Horn believed that international business law 
formed a uniform and autonomous legal system.

3.4 Sanders

According to De Ly, Sanders was the first proponent of the lex mercatoria theory in 
the Netherlands.68 Sander’s important contribution to the theory is his analysis of the 
legal status of codes of conduct. Sanders was of the opinion that the rules contained 
in a code of conduct may be part of the lex mercatoria if they are generally adhered 
to as transnational custom or accepted as principles of law.69

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3.5 Trakman

Trakman published extensively in favour of the existence of the lex mercatoria.\(^{70}\) He emphasises the self-regulation of international merchants. He also accentuates the fact that the law merchant constantly evolves with changes in business. Trakman analyses the ancient and medieval law merchant as the predecessors of the modern law merchant.\(^{71}\) Trakman says that what merchants do in international trade today is the result of what they have learned out of what other merchants in similar positions have done in the past and what merchants should continue to do in the future in the interests of economic survival and the just allocation of resources.\(^{72}\)

Furthermore, Trakman is of the opinion that ‘merchants themselves create the parameters of permissibility in business. They decide what terms and conditions to integrate into their contracts on the basis of reciprocal needs and interests’.\(^{73}\) Trakman sees the capacity of merchants to regulate their own trade affairs as evident in the history of free trade and as depicted in the evolution of the medieval and modern law merchant.\(^{74}\)

Trakman does not believe that a single and uniform body of substantive law exists in the international domain, because international commerce itself is not uniform and varies from trade to trade.\(^{75}\) However, this does not mean that he negates the existence of the law merchant; instead, he proposes a law merchant encompassing different rules for different branches of trade and different regions.

Trakman concludes with this laudatio to the law merchant:

The resurgence of the law merchant means far more than a rekindling of the past; it means more than paying lip service to bygone institutions. The law merchant stands for continuity; it is definitive in form yet malleable in content; it is deliberate in design yet flexible in operation. Properly utilized, the law merchant represents a crucial meeting point between law and commerce. Properly applied, it serves as the herald of success and failure in the legal regula-

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73 Trakman op cit (n 72) 98.

74 Ibid.

75 Trakman op cit (n 72) 104.
3.6 Booysen

Booysen embraces a wide definition of the lex mercatoria, namely as an embodiment of all the legal norms governing the activities of persons involved in international trade.

Booysen sees the ius gentium as the predecessor of the modern lex mercatoria. He says of the debate surrounding its existence:

If the international *lex mercatoria* is seen as a jurisprudential synthesis of particular norms governing the international commercial dealings of merchants, then the debate surrounding its existence becomes irrelevant. The legal norms governing such dealings exist as a matter of fact. International commerce does not exist in a legal vacuum. The only question is how to classify these norms.

As said above, Booysen regards the lex mercatoria as being part of the law of nations, albeit the private law leg of the law of nations. He argues that it is a good thing for the lex mercatoria to be part of the law of nations, since the latter is a recognised legal system in most countries and its application in domestic law is generally governed by the national legal system.

3.7 Berger

Berger’s general view on the lex mercatoria is best expressed in the following remarks:

In the field of international commercial law a new, transnational, autonomous legal system is coming into being by way of decentralized, “spontaneous” lawmaking. This legal system is the new *lex mercatoria*. It receives impetus from public international law, uniform commercial law and domestic law without sharing the legal qualities of either of these systems.

Berger believes that, under the geo-political and economic factors of the globalising economy at the beginning of the twenty-first century, and because of the de-

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76 Trakman op cit (n 72) 105.
78 Booysen op cit (n 77) 8.
79 Under 2.2 supra.
80 Booysen op cit (n 77) 27.
81 Booysen op cit (n 77) 31.
82 Berger op cit (n 1) 112.
creasing significance of territoriality and the creation of a global civil society, the view of decentralised lawmaking gains stronger application in contemporary international commerce and trade. Berger regards this as opening the door for the acceptance of the lex mercatoria as an autonomous legal order.84 Berger reiterates that the modern international commercial contract is no longer the object of the application of domestic law, but a genuine source of law.85

With regard to the content of the lex mercatoria, Berger says that

the principles and rules which make up the lex mercatoria are of a normative quality, not because they are fair and reasonable from an objective perspective but because businessmen, arbitral tribunals and formulating agencies alike consider them to be fair and reasonable and act accordingly by way of self-regulation of international commerce and trade.86

4 An evaluation of the arguments

The criticisms discussed by Berger have already been evaluated and will not be discussed again. Turley’s criticism that the content of the lex mercatoria is confused, unascertainable and full of major gaps87 cannot be condoned in the light of the publication of the UNIDROIT Principles, the Principles of European Contract Law and the Principles, Standards and Rules of the Lex Mercatoria.

Nor can the criticism levelled against the sources of the lex mercatoria, especially the statement that international substantive rules are only sources of national law,88 be supported. It is a well-known fact that unique legal terminology is used in collections of international commercial rules in order to give them a truly universal character and to avoid legal terminology resembling that of a specific national jurisdiction.

It is also not convincing to argue that, because parties are allowed to vary or derogate from trade usages, the said usages are not customs and not a source of the lex mercatoria.89 The flexibility and adaptability of the usages and customs that form part of the lex mercatoria are what makes the latter such a successful regulatory framework for international commerce. The fact that parties can tailor the rules of the lex mercatoria to fit their specific needs makes it a truly unique and widely accepted legal system.

The most common criticism employed against the lex mercatoria, namely that it

84 Berger op cit (n 83) 19.
85 Ibid.
86 Berger op cit (n 83) 21.
87 Turley 2.2 supra.
88 Lagarde 2.4 supra.
89 Kassis 2.5 supra.
is not an autonomous legal system because it is not ordained by a sovereign state, has already been discussed at length. It can be reiterated that the proponents of the lex mercatoria from Lambert onwards advocated the idea that ‘uniform rules are not only created by legislators, intergovernmental and supranational organisations but also by businessmen and trade organisations’.

5 Conclusion

Historical reality testifies that both the Roman ius gentium and the medieval lex mercatoria are predecessors of the modern lex mercatoria. It has been shown that the lex mercatoria is widely regarded as an autonomous legal system. The international merchant community imposes its own sanctions against those who do not adhere to its rules as set forth in their lex mercatoria.

The form and content of the lex mercatoria is constantly changing to meet the needs of the international merchant community. This flexibility of the lex mercatoria is not a weakness that derogates from its status as supranational legal system, but indeed a sine qua non for regulating the ever-changing international commercial world.

90 Berger 2.1.5 supra.
92 As argued by Goldman and Booysen.
93 As argued by Trakman.