CODIFICATION OF THE *LEX MERCATORIA*: FRIEND OR FOE?

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I. INTRODUCTION

THE *lex mercatoria* (meaning "law merchant" in Latin)[1] dates back to the 11th century, originating as customary mercantile law to resolve cross-border trade disputes between merchants.[2] It was developed and applied in Western Europe for almost 800 years, generally by "special quasi-judicial courts" that decided cases based on "the customs and practices of merchants";[3] feudal and Roman law present during this time was inadequate in governing these types of merchant transactions.[4] As states and national law began to arise during medieval times, the *lex mercatoria* fell into disuse in favor of domestic state law.[5] But in the 1960s it was revived[6] as "an informal and flexible net of rules" to be primarily applied by arbitrators, and was referred to as the "new *lex mercatoria*."[7] From the latter part of the 20th century to the present day,[8] the *lex mercatoria* has arguably transitioned into another era—the "new *lex mercatoria*"—which is signified by a move "from an amorphous and flexible soft law to an established system of law with codified legal rules . . . and strongly institutionalized court-like international arbitration."[9]

What actually constitutes the substance of the *lex mercatoria* has been

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1. Adaora Okwor, *Lex Mercatoria as Transnational Commercial Law: is the Lex Mercatoria Preferentially for the 'Mercatocracy'?, in* THEORY AND PRACTICE OF HARMONISATION 393, 394 (Mads Andenas & Camilla Baasch Andersen eds., 2011).
2. Lawrence L. Herman, *The New Multilateralism: The Shift to Private Global Regulation*, COMMENTARY NO. 360 TRADE AND INT'L POL'Y, 5–6 (2012).
3. Okwor, *supra* note 1, at 395–96.
4. *Id.*
5. *See* Herman, *supra* note 2, at 6; Okwor, *supra* note 1, at 396. *See also* Harold J. Berman & Felix J. Dasser, *The "New" Law Merchant and the "Old": Sources, Content, and Legitimacy, in* LEX MERCATORIA AND ARBITRATION 21, 22 (Thomas E. Carbonneau, ed., 1990).
6. Okwor, *supra* note 1, at 396.
7. Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447, 448 (2007). *See also* L. Yves Fortier, *The New, New Lex Mercatoria, or, Back to the Future*, 17 ARB. INT'L 121, 121 (2001).
8. The creation of the International Institute for the Unification of Private Law (UNDROIT) Principles (*see infra* note 13) in the 1990s is viewed as a signifying factor of the new *lex mercatoria*. *See* Michaels, *supra* note 7, at 448; Fortier, *supra* note 7, at 124–25.
9. Michaels, *supra* note 7, at 448.

extensively debated.[10] An assessment of what seems to encompass most current commentators' conception of *lex mercatoria* is explained by Moses: "The *lex mercatoria* is not based on any one legal system, but incorporates international commercial rules, general principles of law, standards, and trade usages."[11] Yet there is still disagreement over this point; the "purist" view of the *lex mercatoria* only includes rules derived specifically from "mercantile behavior."[12]

While an extensive paper could likely be written on the different attempts to define the *lex mercatoria*, this paper endeavours to take a pragmatic approach based on the current status of the *lex mercatoria* and issues surrounding its development. As such, this article will review key aspects of legal theory relating to how the *lex mercatoria* may fit into a legal order, and examine debates surrounding codification of the *lex mercatoria*, giving particular attention to the International Institute for the Unification of Private Law (UNIDROIT) Principles[13] and the Center for Transnational Law's (CENTRAL) Trans-Lex Principles.[14] These two codifications illustrate the current state of and approach to the development and preservation of the *lex mercatoria*. This article argues that a cautious approach to codification should be taken to ensure that the "friend" codification that has become the *lex mercatoria* by providing it with recognition and legitimacy as "law" does not become its "foe" by threatening the autonomy of merchants or the future development of the substantive *lex mercatoria*.

The order of topics of this article is as follows: Part II reviews and discusses theories of the *lex mercatoria*, with an overview of traditional theories and a more in-depth discussion of modern theories relating to the *lex mercatoria*'s role in a legal order; Part III provides an examination of the issues raised by codification of the *lex mercatoria*, including its appearance as state-like law, its vulnerability to politicization, and the impact of codification on its development; and Part IV suggests an approach to the *lex mercatoria* proceeding into the future.

10. *See* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 64–66 (2d ed. 2012).
11. *Id.* at 65. *See also* Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747, 749–50 (1985); Celia Wasserstein Fassberg, *Lex Mercatoria — Hoist with Its Own Petard?*, 5 CHI. J. INT'L L. 67, 71 (2004).
12. Fassberg, *supra* note 11, at 71.
13. *See International Institute for the Unification of Private Law*, UNIDROIT, http://www.UNIDROIT.org (last visited Apr. 2, 2014); *UNIDROIT Principles of International Commercial Contract 2010*, UNIDROIT, http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf (last visited May 2011) [*hereinafter* UNIDROIT Principles].
14. *Trans-Lex Principles*, TRANS-LEX, http://www.trans-lex.org/principles (last visited October 21, 2014).

II. THEORIES OF THE LEX MERCATORIA

A. TRADITIONAL THEORIES OF THE *LEX MERCATORIA*

The initial discourse on the modern revival of the *lex mercatoria* (the new *lex mercatoria*) was primarily focused on whether or not the *lex mercatoria* constituted law.[15] Scholars such as Goldman argued that indeed it did (or that it was coming into being),[16] while Mustill did not view *lex mercatoria* as law, but merely as a set of unpredictable principles.[17] Mustill compiled a list of twenty principles that he determined constituted the *lex mercatoria*, arguing that they were evidence that the *lex mercatoria* was insufficient to constitute law.[18] Ironically, Goldman and other proponents of the *lex mercatoria* used this same list of principles as evidence for the existence of *lex mercatoria* as law, noting that the list's contents addressed almost every issue "raised in disputes relating to international economic relations."[19] Like Mustill, Mann also could not conceive of the *lex mercatoria* as law because it was not connected to a national legal order.[20] Mann referred to the *lex mercatoria* as an excuse for arbitrators to use "palm tree justice"[21] and that it was "no more than 'a fig leaf to hide an unauthorized substitution of [the arbitrators'] own private normative preferences for . . . the properly applicable law.'"[22] Lowenfeld, on the other hand, argued that *lex mercatoria* warranted legal legitimacy only as an interpretive tool in the context of international commerce to interpret the national source as consistent "with generally accepted international understanding and usage."[23]

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15. *See* Michaels, *supra* note 7, at 449; Ulla Liukkunen, *Lex Mercatoria in International Arbitration*, *in* NORMATIVE PLURALISM AND INTERNATIONAL LAW: EXPLORING GLOBAL GOVERNANCE 201, 205–06 (Jan Klabbers & Touko Piiparinen, eds. 2013).
16. Berthold Goldman, *Introduction*, *in* LEX MERCATORIA AND ARBITRATION, XV, XV (Thomas E. Carbonneau, ed., 1990). *See also* BERTHOLD GOLDMAN, LEX MERCATORIA 7 (1983); *see* Clive M. Schmitthoff, *Nature and Evolution of the Transnational Law of Commercial Transactions*, *in* THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL CONTRACTS 19, 20 (Norbert Horn & Clive M. Schmitthoff, eds. 1982); Guenther Teubner, *'Global Bukowina': Legal Pluralism in the World Society*, *in* GLOBAL LAW WITHOUT A STATE 3, 9 (Gunther Teubner, ed. 1997); Liukkunen, *supra* note 15, at 205.
17. *See* The Rt. Hon. Lord Justice Mustill, *The New Lex Mercatoria: The First Twenty-five Years*, *in* LIBER AMICORUM FOR LORD WILBERFORCE 149, 180 – 82 (Maarten Bos & Ian Brownlie, eds. 1987) 149. *See also* Keith Highet, *The Enigma of the Lex Mercatoria*, *in* LEX MERCATORIA AND ARBITRATION 99, 100, 104 – 05 (Thomas E. Carbonneau, ed., 1990) (in agreement with Mustill).
18. Mustill, *supra* note 17, at 177–81.
19. Goldman, *supra* note 16, at xvi; *See also* Michaels, *supra* note 7, at 449.
20. F. A. Mann, *Introduction*, *in* LEX MERCATORIA AND ARBITRATION xix, xix–xxi (Thomas E. Carbonneau, ed., 1990); *see also* Teubner, *supra* note 16, at 10.
21. Mann, *supra* note 20, at xx.
22. *Id.* at xxi (quoting Professor Park).
23. Andreas F. Lowenfeld, *Lex Mercatoria: An Arbitrator's View*, *in* LEX MERCATORIA AND ARBITRATION 37, 53 (Thomas E. Carbonneau, ed., 1990).

B. Recent Theories of the *Lex Mercatoria*

Since the late 1990s, legal theory surrounding the *lex mercatoria* has evolved to a new level that better addresses the current, generally accepted reality that it is some form of law. Although the debate over the *lex mercatoria* appears far from being resolved, the utility of the legality debate is clear; the acceptance of the *lex mercatoria* as law was necessary to give it *some* legitimacy in modern commercial practice (as exemplified by the creation of codifications such as those previously mentioned). This, in turn, has facilitated the development of theoretical frameworks that attempt to conceptualize the *lex mercatoria* as law in relation to current legal systems. This is the current and necessary debate surrounding the theories discussed below; as Berger puts it, "[t]he question is no longer 'lex mercatoria: yes or no?' but rather 'lex mercatoria: when and how'?"[24] Until the answer to this question is determined, whether or not the *lex mercatoria* constitutes law is irrelevant. This is because for the *lex mercatoria* to attain true legitimacy and *function* as law, it needs to find its place in relation to already existing legal systems.

1. The Lex Mercatoria as Global Law

Teubner presents the *lex mercatoria* as having the capacity to be global legal order that is not rooted in state law—it is "without a state."[25] His theory provides a much more stable basis for the autonomous *lex mercatoria* in the current climate of a codified *lex mercatoria* and highly developed international arbitration than the customary law approach previously taken by Goldman.[26] Teubner's theory creates an entire anational legal system that parallels state legal systems, yet is completely derived from contract. His approach may be perceived as creating a more legitimate basis for the *lex mercatoria* because it creates a structure with functional similarities to state law—an already generally accepted form of legal system.

Teubner's approach is thought to be an important development of the *contrat sans loi* construct[27] (meaning self-regulatory contracts without bases in national or international law), despite the fact that he has criticized the concept as irreconcilable with "the traditional doctrine of legal sources."[28] Teubner finds a way around the "source problem" and is able to reconcile the idea of a global law without a state with traditional legal sources. He sees an entire legal order manifested by the international commercial contract.[29]

24. Klaus Peter Berger, The Creeping Codification of the New Lex Mercatoria 287 (2d ed. 2010).
25. Teubner, *supra* note 16, at 3.
26. Goldman, *supra* note 16, at xviii, 3.
27. Michaels, *supra* note 7, at 449–50.
28. Teubner, *supra* note 16, at 9.
29. *Id.* at 16.

Teubner offers a view of *lex mercatoria* in the context of global contracts without the need for domestic or international law to provide a basis for its use. Instead, he argues that the paradox of the self-validating contract underlies the creation of a global economic law (including a global conception of the *lex mercatoria*). This paradox is illustrated in the case of the *lex mercatoria*, whereby the process of contracting across national boundaries converts the contract from national to global;[30] yet, because these contracts claim transnational validity and are not associated with a particular state, they are, in effect, cut off from not only a national legal order, but also any legal order.[31] As there is no legal order to validate the existence of the contract (as there would be in a national context), the contract must validate itself. This self-validation, however, leads to a paradox of self-reference because there is no referential base or anchor of "non-contractual premises."[32] This self-referencing paradox can be seen as a "contractual version of the Cretan liar paradox,"[33] where "the positive version ('We agree that our agreement is valid') . . . is a pure tautology" and "the negative version ('We agree that our agreement is not valid') . . . leads to nothing but endless oscillation" between "valid" and "not-valid."[34]

While this paradox may seem to be an insurmountable problem—or perhaps one that is too wrapped up in philosophy to be seen as having practical relevance to transnational commercial contracting and the *lex mercatoria*—being able to recognize that it sheds light on the discomfort with the *lex mercatoria*. It illustrates why the *lex mercatoria* is seen to lack solid roots in a legal order, but its recognition also provides hope for the notion that the *lex mercatoria* may be able to obtain the much-needed legitimacy to be confidently relied upon in transnational commercial contracts.

Teubner, however, does not propose to resolve this paradox, but argues that it can be concealed in such a way that it appears to no longer exist.[35] He identifies three ways that global contracts can appear to be "deparadoxified": (1) hierarchy, (2) time, and (3) externalization. These three aspects of the global contract together enable the *lex mercatoria* to "create its own legal centre."[36] He describes the "*most perfect* 'deparadoxification'" as a "self-regulatory contract which goes far beyond one particular commercial transaction and establishes a whole private legal order with a claim to global validity," including "clauses that refer conflicts to an arbitration 'court' which is identical with the private insti-

30. *Id.* at 15.
31. *Id.*
32. *Id.*
33. *Id.* For a more detailed explanation of the Cretan liar paradox, see J. C. Beall & Michael Glanzberg, *Liar Paradox*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed. 2013), http://plato.stanford.edu/archives/ fall2013/entries/liar-paradox.
34. Teubner, *supra* note 16, at 15.
35. *Id.* at 16.
36. *Id.*

tution that was responsible for 'legislating' the model contract."[37] This is called a "closed circuit."[38]

Using this model, the three ways of de-paradoxification listed above are manifested as follows: (1) The contract creates an "internal hierarchy" by containing both "primary rules" that "regulate the future behaviour of the parties," and "secondary rules" that "regulate the recognition of primary rules" by "identification," "interpretation, and the procedures for resolving conflicts."[39] (2) The contract "temporalize[s] the paradox" by referring to both the past and the future through the recognition of a "pre-existing standardization of rules" and a "future of conflict regulation."[40] (3) The contract "externalizes the fatal self-validation . . . by referring conditions of validity to external 'non-contractual' institutions" (i.e., arbitration houses), "which are nevertheless 'contractual', since they are a sheer internal product of the contract itself."[41] This element thus transforms the "circle of contractual self-validation" into "two legal processes—contracting and arbitration."[42] Another externalization in addition to arbitration, which fills the quasi-court-like role, "is the reference to quasi-legislative institutions."[43] Teubner cites organizations such as the International Law Association in London and the International Chamber of Commerce (ICC) in Paris as such quasi-legislative institutions.[44]

Externalization is also key because it creates a distinction within the contract between a function similar to state law, which includes arbitration and standard contracting, and that of contracting within the state, which would provide for the rights and duties of the parties.[45] The effect of this is that "[p]rivate arbitration and private legislation become the core of a decision system, which begins to build up a hierarchy of norms and of organizational bodies."[46]

Teubner's approach provides greatly needed theoretical stability if one is to move forward with the idea of the *lex mercatoria* as an autonomous legal system as completely separate from the state. The circumstances surrounding the *lex mercatoria*, however, do not mirror the closed circuit model representing the "most perfect"[47] de-paradoxification. With respect to private arbitration and legislation, it is important to recognize that neither of these currently exists through some sort of uniform international entity. Parties have the choice of selecting from a number of private arbitration institutions, or even an *ad hoc* arbitrator, so the pros-

37. *Id.* (emphasis added).
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 17.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 16.

pect of developing a uniform hierarchy of norms seems remote.[48] Yet, because arbitration decisions are more regularly published and codifications now exist that can explicitly be relied upon, it may be possible for norms to be established to some degree. Some critics are skeptical of the norm-creating power of arbitral tribunals, citing "the frequent emphasis by arbitrators that equity and custom rather than law should govern their decisions . . . ."[49] In addition, the fact that arbitration is tied to national courts for recognition and appeal purposes breaks Teubner's closed circuit model because every exercise of this global law has the possibility of being undermined by national courts;[50] but this does not seem to insurmountably hamper the authority of the *lex mercatoria* as global law because national courts generally recognize arbitral awards.[51]

2. *The* Lex Mercatoria *and Its Relationship to State Law*

In contrast to Teubner, Michaels does not see the *lex mercatoria* as law "without a state,"[52] but instead as "law beyond . . . the state."[53] Although he views the idea of law without a state as an important milestone in overcoming the position "that all law is state law,"[54] Michaels argues that "[i]n perpetuating the state/non-state dichotomy, the *lex mercatoria* without a state remains within a state-focused paradigm."[55] Placing focus on the non-state, he argues, effectively makes the state the "prime criterion" for differentiating between types of law.[56]

Michaels's view is that the *lex mercatoria* will never be an autonomous law separate from the state (and nor should it be), even with the extensive advancement of codification efforts, such as the UNIDROIT Principles.[57] He notes that although arbitrators use the principles, they are only "one of the many bodies of legal rules to which they look for guidance."[58] He further argues that if the *lex mercatoria* really "were an autonomous anational law, the use of state law would require some sort of reception process."[59]

48. *See id.* at 19–20.
49. Michaels, *supra* note 7, at 455–56.
50. *See id.* at 458 (His position is that arbitration fails to achieve the "legitimacy assigned to state courts and remains firmly interdependent with domestic courts").
51. *See, e.g.*, Alec Stone Sweet, *The New Lex Mercatoria & Transnational Governance*, 13 J. EUR. PUB. POL'Y 627, 638 (2006) (stating that "the public policy and inarbitrability exceptions to the recognition and enforcement of arbitral awards, contained in the New York Convention and thus in most national statutes, are being constructed narrowly by national courts and, in some countries like the United States and France, have little practical relevance."); Leon E. Trakman, *The Twenty-First-Century Law Merchant*, 48 AM. BUS. L.J. 775, 822 (2011).
52. Teubner, *supra* note 16, at 3.
53. Michaels, *supra* note 7, at 446 (emphasis removed).
54. *Id.* at 468.
55. *Id.* at 452.
56. *Id.*
57. *Id.* at 458.
58. *Id.*
59. Michaels, *supra* note 7, at 459.

Michaels approaches the *lex mercatoria* from the perspective of commerce, saying that the debate is not about state/non-state, "but rather the distinction between economy and politics"[60]—this is in the sense of political law as constitutional and regulatory law, which are generally found within the nation state.[61] His main issue with the *lex mercatoria* "is whether its structure, its internal differentiation, reflects that of the political system or that of the economic system."[62] To illustrate, the political system is a "segmentary differentiation" because it consists of states, each "of which must perform essentially the same functions."[63] By contrast, the economic system "represents a functional differentiation" because the global economy is not based on boundaries between states, but is instead differentiated through the existence of various economic sectors.[64] A consideration of international trade indicates that boundaries between states are often of little consequence.[65]

Michaels is a proponent of this functional differentiation and believes it is the way for the *lex mercatoria* to move forward[66] because it allows for more creative thought to be developed around the *lex mercatoria*.[67] How this should translate into practice is unclear, but he does state that it "should enable us truly to imagine law . . . outside the state framework altogether."[68] Unlike Teubner, Michaels is accepting of the idea that *lex mercatoria* will never be independent from domestic law, citing that even though there are codifications such as the UNIDROIT Principles, they do not address all areas of the law (and nor should they, in his opinion);[69] the increased publication of arbitral awards does not constitute sufficient precedent. Arbitration is not seen as having the same legitimacy as state courts, which it is still dependent on.[70]

Dalhuisen, like Michaels, does not see a *lex mercatoria* without the involvement of domestic law. She argues that domestic law has a residual role in completing the *lex mercatoria* and for providing a full system for parties who seek to rely on it.[71] For Dalhuisen, "domestic law is preceded by other transnationalized norms or sources of law [this includes the *lex mercatoria*], and residually functions as transnational law itself in the international commercial and financial legal order."[72] In contrast to Michaels's approach, the employment of domestic law is elevated in character to that of the global *lex mercatoria*, but only insofar as *lex mer-*

60. *Id.* at 464.
61. *Id.*
62. *Id.*
63. *Id.* at 465.
64. *Id.*
65. Michaels, *supra* note 7, at 465.
66. *Id.* at 468.
67. *Id.*
68. *Id.*
69. *Id.* at 457.
70. *Id.* at 458.
71. JAN DALHUISEN, DALHUISEN ON TRANSNATIONAL COMPARATIVE, COMMERCIAL, FINANCIAL & TRADE LAW 322 (2010).
72. *Id.*

catoria permits—this is almost the inverse of Lowenfeld's view. Instead of domestic law being supplemented by the *lex mercatoria*, the *lex mercatoria* is supplemented by domestic law.

Dalhuisen also argues that "state courts operating in international cases should be seen as agents of the international and financial legal order, therefore as international commercial courts."[73] Her approach somewhat addresses the issue that if the *lex mercatoria* were a global law without a state, it would still be subordinate to national law, but it could potentially be a challenge for a national court acting as an international commercial court to separate itself from its national roots. Dalhuisen further argues that there should be a central highest international appeal court to guide the development of the *lex mercatoria* that would be limited to giving preliminary opinions on points of transnational law or public policy, but only when asked to do so.[74] This is an innovative notion, and one that may be viewed especially by Teubner with approval, as it would be a step toward the idea of a global judicial body.

The above discussion details recent theories that endeavour to conceptualize the *lex mercatoria* within a legal order; even after decades of debate, legal theorists have yet come to a consensus. In terms of providing a stable foundation for a completely autonomous *lex mercatoria*, if it were achievable, Teubner's approach appears to have the potential for a legal order that would be viewed as on par and not subordinate to state law; however, as mentioned, this reality seems not to be in the near future. It seems that for now the state and the *lex mercatoria* are inseparable, and the views of Michaels and Dalhuisen that recognize this participation are likely the most realistic. Michaels's approach seems to be the most in line with the nature of international commercial contract; however, it may be a challenge to conceive of the *lex mercatoria* outside of the state/non-state dichotomy, given that this dichotomy is the common paradigm through which lawyers, arbitrators, and academics view the law (as evidenced in Part III).

Commercial contracting parties are not only concerned with how the *lex mercatoria* is approached from a foundational theoretical standpoint, but they are also concerned about the actual substantive content of the *lex mercatoria* and its usefulness and viability in commercial contract. This issue has recently been addressed through the codification of principles of the *lex mercatoria*, although there is disagreement as to whether codification is the best way to advance the *lex mercatoria*.

73. *Id.* at 324.
74. *Id.*

III. CODIFICATION OF THE LEX MERCATORIA: STATUS, CONTENT, AND CONTROVERSY

A. Introduction to Codification

Codification, a marker of the era of the new *lex mercatoria*, indicates a shift from the *lex mercatoria*'s customary roots as distinct from state law, to the *lex mercatoria* as similar to state law.[75] Current codifications now go beyond Mustill's list of twenty principles. The UNIDROIT Principles and the Trans-Lex Principles, for example, are detailed rules with a capacity to function like state legislation as complete codifications of the *lex mercatoria*.[76] The state-like character is enhanced by the now more frequent publication of arbitral awards, which allows some degree of precedent.[77] Other examples of codification of the *lex mercatoria* include Incoterms, the ICC's Uniform Customs and Practice for Documentary Credits (UCP 600), the 1906 British Marine Insurance Act, the Cornell Common Core Project, the Lando Commission Principles of European Contract Law, and the Trans-Lex Principles.[78] The recent movement to codify the *lex mercatoria* appears, as might be expected, to be primarily driven by scholars from civil law jurisdictions, particularly in Europe.[79] But codification, which makes the *lex mercatoria* appear similar to state law, should not necessarily be assumed to be without adverse implications. The following subsections examine whether the codification of the *lex mercatoria* is an advantage or a detriment to its application and future development.

B. Approaches to Codification: UNIDROIT and the Trans-Lex Principles

For the purpose of illustration, this section will focus on the UNIDROIT and Trans-Lex Principles to discuss different approaches to codification. This author has selected these two approaches because they are predominant and extensive codifications that are often referred to in the debate over the *lex mercatoria*.[80] There are two key differences between the two sets of principles. First, the UNIDROIT Principles are limited to international commercial contract law, while the Trans-Lex Principles go beyond this to also include any principle that may be in-

75. Michaels, *supra* note 7, at 456.
76. *Id.*
77. *Id.*
78. *See* Berman & Dasser, *supra* note 5, at 28; Moses, *supra* note 10, at 65-66; Herman, *supra* note, 2 at 6; Fassberg, *supra* note 11, at 69; Fortier, *supra* note 7, at 124; Klaus Peter Berger, *Codification of the New Lex Mercatoria Through the Internet: The TransLex Principles at www.trans-lex.org*, *in* New Directions in International Economic Law 79 (Todd Weiler & Freya Baetens, eds. 2011).
79. John Henry Merryman & Rogelio Pérez-Perdomo, The Civil Law Tradition 31 (3d ed. 2007); *see generally* William Tetley, *Mixed Jurisdictions: Common Law vs Civil Law (Codified and Uncodified)*, 60 La. L. Rev. 678 (2000), *available at* http://www.cisg.law.pace.edu/cisg/biblio/tetley.html.
80. This is as discovered by the author's research. The author did not research non-English language sources.

volved in an international business dispute.[81] Second, the UNIDROIT Principles are developed to reflect "concepts to be found in many, if not all, legal systems" and are updated by the publication of periodic restatements,[82] while the Trans-Lex Principles are developed through the technique of creeping codification, which continually compiles rules and principles of the *lex mercatoria* that "have been accepted in international arbitral and contract practice."[83]

The Trans-Lex Principles, initiated by Berger and operated by the Center for Transnational Law (CENTRAL), were first published as a list of thirty-nine principles in 1992,[84] and by 1999 had grown to seventy-eight principles.[85] In October 2009, the list had further expanded to 128 principles;[86] currently, it contains 132 principles.[87] UNIDROIT has published three editions of its principles: the first, published in 1994, contained 120 articles; the second, published in 2004, contained 185 articles; and the third and most recent edition, published in 2010, consists of 211 articles.[88] While both the UNIDROIT and Trans-Lex principles are available online, the UNIDROIT Principles are found in a static PDF format, whereas the Trans-Lex Principles take the form of a database that enables the updating of one portion without having to "re-publish" the whole document.[89] The Trans-Lex Principles contain references for each principle that include "doctrine" (i.e., academic literature), "arbitral awards," "court decisions," "national legislation," "principles" (e.g., UNIDROIT), "international legislation," "model laws," and "model terms."[90] The UNIDROIT Principles, in contrast, take the format of stating each article followed by a "comment" section that provides further explanation (and sometimes fact-based illustrations) for application of the rule.

C. *Lex Mercatoria*: Codification and Certainty

A positive effect of codification appears to be increased legitimacy of the *lex mercatoria* because it creates a set of rules that can be more or less uniformly followed on a global basis, helping to address concerns of vagueness and uncertainty.[91] The certainty and utility provided by codification have the potential to provide a sufficient framework for arbitrators to render a decision without having to make difficult conflicts-of-law

81. Berger, *supra* note 79, at 104.
82. *See* UNIDROIT Principles, *supra* note 13, at xxiii.
83. Berger, *supra* note 79, at 82.
84. *Id.* at 99.
85. *Id.*
86. *Id.* at 103.
87. *Trans-Lex Principles*, *supra* note 14.
88. *See* UNIDROIT Principles, *supra* note 13, at vii (UNIDROIT refers to its individual rules/principles as "articles").
89. For more information on the Trans-Lex database, see Berger, *supra* note 79, at 101–03; *see also* UNIDROIT Principles, *supra* note 13.
90. *See, e.g.*, *No. 1.1.1—Good Faith and Fair Dealing in International Trade*, Trans-Lex, http://www.trans-lex.org/901000#toc-1 (last visited Oct. 21, 2014).
91. *See, e.g.*, Joachim G. Frick, Arbitration and Complex International Contracts 96 (2001); Moses, *supra* note 10, at 64.

choices between domestic states.[92] Alternatively, it is possible that the codified *lex mercatoria* could be incorporated into the conflicts-of-law doctrine as an alternative to domestic choice of law.[93]

Berger argues that the incorporation of the codified *lex mercatoria* into the conflicts of law doctrine would ensure that arbitration decisions based on *lex mercatoria* would not be set aside by courts.[94] It has also been argued that courts may be less likely to set aside an arbitration decision when it is based on codified *lex mercatoria* principles because as the use of the principles increases, courts will develop familiarity with its contents.[95] But as mentioned, given that courts generally uphold arbitration decisions without examining the merits in close detail, the utility of these arguments in the context of the recognition of arbitral decisions is questionable.

On the other hand, in the arbitration context, codification of the *lex mercatoria* may have a real and direct effect on how and if the *lex mercatoria* is to be utilized and relied upon. Frick argues that a lack of clearly defined rules "creates uncertainty in arbitral decision making," resulting in parties being "unable to predict confidently the legality of their action before arbitration."[96] But not all critics take this view, noting that skilled courts or arbitrators may be able to adjust rules or facts to achieve a desired result. And since identifiable principles of the *lex mercatoria* can be found in its common usage or customary form, codification does not provide additional certainty or foreseeability of outcome.[97]

1. Certainty and the UNIDROIT and Trans-Lex Principles

From the standpoint of practitioners, the idea that the *lex mercatoria* should not be codified may be a cause for concern because the customary approach to the *lex mercatoria* has been said to struggle "both in its 'provability,' and in finding a comprehensive set of principles."[98] While codification may be viewed as transforming the *lex mercatoria* from a flexible and agile legal doctrine to a more rigid one (perhaps contrary to its true nature, as discussed below), current codification initiatives have been seen as informal and pragmatic.[99]

This fear of rigidity can perhaps be alleviated to some degree when considering the UNIDROIT Principles because restatements appear to be published when needed in accordance with the evolution of the *lex mercatoria*. But this fear may be further reduced by the employment of

92. Stone Sweet, *supra* note 52, at 632, 634. Sweet also notes, "In the past two decades, a substantial literature has appeared showing that existing conflict-of-laws techniques lead to wholly unpredictable decisions." *Id.* at 632.
93. Berger, *supra* note 79, at 90.
94. *Id.*
95. Stone Sweet, *supra* note 52, at 634.
96. FRICK, *supra* note 92, at 96.
97. *See* Thomas E. Carbonneau, *The Remaking of Arbitration: Design and Destiny*, *in* LEX MERCATORIA AND ARBITRATION, 1, 13 (Thomas E. Carbonneau, ed., 1990).
98. Fortier, *supra* note 7, at 122.
99. *Id.* at 124.

the creeping codification technique of the Trans-Lex Principles, where principles are updated on the Trans-Lex website as they emerge in practice.[100] Codifications such as these can assist in addressing the needs of practitioners by providing a stable and reliable list of rules.[101]

Fortier argues that "the most important attribute of these collections is that they exist" because this enables them to be easily referred to by parties, the court, or an arbitrator.[102] He takes the position that the *lex mercatoria* needs fixing, that its uncodified form is sub-par, and that by "tackling" the *lex mercatoria* through codification, it is finally being "wrestl[ed] . . . into usable shape."[103] Although codification may assist the application of the *lex mercatoria* by providing more concrete rules for arbitrators and lawyers to cite to and rely on, not all commentators agree that codification is necessarily a positive step in its development.

D. The True Nature of the Lex Mercatoria May Be Undermined by Codification

Certainty is not the only criteria for assessing the value of the codified *lex mercatoria*. Its role as different from state law is also important; unlike the law of a state, the *lex mercatoria* does not compete for sovereignty, so if it claims to be similar, it may suffer a "competitive disadvantage."[104] The transformation of the *lex mercatoria* through codification into a form that resembles state law may present a greater risk for the *lex mercatoria* than for the state because it may lose "whatever functional advantages it has had over state-based law."[105]

Fassberg agrees with the notion that codification of the *lex mercatoria* legitimizes it as a system of recognized norms and enhances its autonomy.[106] But she thinks that this may come at a price because courts and arbitrators may "refrain from using these codifications as reservoirs of rules unless they are persuaded independently that they constitute mercantile or trade custom" and only use them if they are contractually incorporated.[107] Instead, she argues that "[i]nformal custom has a far greater chance of being implemented as a means of interpreting and completing contractual obligations" than the codifications.[108]

Codification can also be seen as contrary to the nature of the *lex mercatoria*'s customary mercantile roots.[109] This is illustrated by the fact that the codifications are formulated by *lawyers* based on national rules, uniform laws, and international principles (which are also formulated by law-

100. Berger, *supra* note 79, at 101.
101. Fortier, *supra* note 7, at 125.
102. *Id.*
103. *Id.* at 127.
104. Michaels, *supra* note 7, at 462.
105. *Id.*
106. Fassberg, *supra* note 11, at 78.
107. *Id.* at 78–79.
108. *Id.* at 79.
109. *See id.* at 80.

yers) through legal comparison, and not all of the rules are supported by references to arbitral awards—which would seem to be necessary evidence that the rules did indeed arise from commercial practice.[110] The Trans-Lex Principles, however, do provide references to arbitral awards for each rule, while the UNIDROIT Principles do not.[111] Thus, the Trans-Lex Principles may be seen to better encompass commercial practices than the UNIDROIT Principles. But determining whether an arbitral decision was made because it indeed reflects commercial practice can be unclear, and thus is still problematic.

Codification, therefore, may present a struggle between what *is evidence* of commercial practice and what *should be* commercial practice.[112] There is a concern that the drive to codify the *lex mercatoria* to assert its autonomy will then push for the creation of explicit rules of *lex mercatoria* that may not be genuine commercial practice.[113] Then, codification may affect the opposite of that which it sought to achieve; the autonomy of the *lex mercatoria* may become compromised because, in the words of Fassberg, "The more formal and explicit the rules, the less organic, the less spontaneous, the less authentic they are."[114]

The codification of the *lex mercatoria* may also negatively affect party autonomy. If the parties to a contract provide for arbitration and the application of the *lex mercatoria*, their original intent may be for the arbitral tribunal to apply general notions of order and fairness associated with the *lex mercatoria*.[115] But if the application of the *lex mercatoria* becomes synonymous with a more rigid codified regime, the parties' intentions, and thus their individual autonomy (and, by implication, the true nature of the *lex mercatoria*) may be compromised.[116]

E. Codification May Allow Politicization of the *Lex Mercatoria*

Codification also raises the concern of politicization of the *lex mercatoria* because of who decides which principles are included in a codified version of the *lex mercatoria* and which ones are not.[117] In light of the *lex mercatoria* originally being derived from merchant practice, Okwor asks a question of the UNIDROIT Principles in particular: "[h]ow [can] an organisation which is self-professedly intergovernmental produce a document which is considered [authentic] evidence of the *lex mercatoria*?"[118] This may be answered by the fact that the UNIDROIT Principles, as well as other codifications such as the Trans-Lex Principles, purport to codify

110. *Id.* at 80–81.
111. *See Trans-Lex Principles*, *supra* note 14; UNIDROIT Principles, *supra* note 13; Fassberg, *supra* note 11, at 80–81.
112. *See* Fassberg, *supra* note 11, at 80–81.
113. *See id.* at 82.
114. *Id.*
115. *See id.*
116. *See id.* at 79.
117. *See, e.g.*, *id.* at 80–81.
118. Okwor, *supra* note 1, at 397.

already existing rules of the *lex mercatoria*, and neither codification is directed by any national government.[119]

Although this goes to mitigate the politicization of the *lex mercatoria*, politicization does not necessarily need to be caused by any specific domestic state. It can occur through the non-representation of some merchant practices and usages in the codification of the *lex mercatoria*. This would have the effect of forcing some parties to follow the *lex mercatoria* as set out by other mercantile communities whose "rules" are codified.[120]

Surprisingly, instead of taking Fassberg's approach against codification, Okwor argues that codification is necessary for the *lex mercatoria* to be a "coherent system."[121] But to remedy the problem of some merchant practices being represented in the codifications, while others are not, she says that "representation has to be made of merchants in developing societies and their *lex mercatoria*."[122] This concern can be illustrated by Stone Sweet, who notes that the drafters of the UNIDROIT Principles "focused primarily on the identification and codification of general principles of contract law, principles which they could claim were common to *developed*, or '*mature*,' national systems of law."[123]

It also seems that Dalhuisen's hierarchy of *lex mercatoria* (as discussed in Part II) could potentially increase the risk of the *lex mercatoria* being influenced by politicized sources because of domestic law's residual role.[124] Domestic law "residually function[ing] as transnational law" could potentially be improperly incorporated (because it may not represent commercial custom) into the *lex mercatoria* in codified form by UNIDROIT or CENTRAL.[125] Codification, which has the effect of making a rule "official," may present a barrier to having this kind of elevated domestic law "removed" from the *lex mercatoria* once it has been codified.

The *lex mercatoria* "provides arbitrators with tools of construction,"[126] which may be amplified, especially with respect to the Trans-Lex Principles because the principles are updated regularly and are largely based on arbitral decisions. Therefore, the avenue from arbitral decision to codified *lex mercatoria* may become a direct route for the codified *lex mercatoria* to be injected with laws of a domestic legal system (or other laws or principles) that do not reflect commercial custom without sufficient scrutiny as to whether they do indeed constitute such custom. As a result, it is important that UNIDROIT and CENTRAL pay careful attention to

119. *See id.*; *Center for Transnational Law*, UNIVERSITÄT ZU KÖLN, http://www.central.uni-koeln.de/0/content/13 (last visited Apr. 2, 2014); UNIDROIT Principles, *supra* note 13.
120. Okwor, *supra* note 1, at 401.
121. *See id.* at 402.
122. *Id.*
123. Stone Sweet, *supra* note 52, at 634 (emphasis added).
124. *See* DALHUISEN, *supra* note 71, at 322.
125. *Id.*
126. Liukkunen, *supra* note 15, at 215.

the rules that they choose to include in their codifications to ensure that unwarranted politicization is not incorporated into the *lex mercatoria.*

1. Codification May Restrict Development of Lex Mercatoria

There is also another inquiry, which would be difficult to prove empirically: does codification restrict the development of the *lex mercatoria*? Although the codifications purport to be evidence of the *lex mercatoria*,[127] if they become synonymous with it, development could be restricted. If codification begins to create an environment whereby principles that are not already included are rejected, the *lex mercatoria* could cease to further develop.

While this has not been shown to be the case, it is something that is important for codification bodies, such as CENTRAL and UNIDROIT, to be aware of.[128] It is also an issue that should be brought to the attention of arbitrators, who should not be quick to reject potentially novel practices without adequate consideration, especially practices involving parties from developing or newly developed nations and unfamiliar economic sectors.

IV. CONCLUSION

The debate over where the *lex mercatoria* best fits in terms of a legal order has yet to be resolved. But this is not indicative of its lack of existence, only merely of the need to find a suitable framework for it that can be reconciled with today's legal climate. Codification makes the *lex mercatoria* appear similar to state law, and so seems to naturally fit within a legal order, such as Teubner's, with the *lex mercatoria* as a national law functioning in a similar framework to the state, but on a global level. But, while this conception of the *lex mercatoria* may seem the most natural, as mentioned, this reality is far away. Conversely, the *lex mercatoria*'s true nature as customary mercantile law should not be forgotten. An approach that is more in line with global economic processes, such as Michaels's, may be more successful in allowing the *lex mercatoria* to maintain its flexibility and un-state-like qualities.

Codification, while it may bring prominence and clarity to the *lex mercatoria*, should be approached with caution. Organizations responsible for codification, such as CENTRAL and UNIDROIT, should take care to ensure that codifications represent commercial practices as they evolve both in new economic sectors and developing nations. Care should also be taken to avoid incorporating domestic (and other) law into codifications of the *lex mercatoria*, unless it indeed does represent commercial custom. While the UNIDROIT and Trans-Lex Principles take different approaches, if the foregoing is kept in mind, then it seems that codification may have the potential to be the *lex mercatoria*'s friend and not its foe.

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127. *See* Okwor, *supra* note 1, at 400–01.
128. This author did not find any evidence of this through her research.