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**Self-regulation in Private Law  
in Japan and Germany**

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# ***Lex Mercatoria* and Self-Regulation in Transnational Perspective**

*Yuko Nishitani\**

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## I. INTRODUCTION

In today's globalized world, cross-border activities of individuals, corporations and other actors are increasing and expanding remarkably, giving rise to various cross-border legal relationships. The legislative power that used to be concentrated on sovereign states has gradually eroded. Various norms are developing at supranational, international or regional levels. While sovereign states certainly remain the most important stakeholders in fulfilling the function of law-making, regulation and adjudication, states are continuously diminishing their autonomy and becoming interconnected and interdependent, as the examples of the European Union (EU) and the World Trade Organization (WTO) show.<sup>1</sup>

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1 See, *inter alia*, R. MICHAELS, *Transnationalizing Comparative Law*, *Maastricht Journal of European and Comparative Law* 23 (2016) 352; Y. NISHITANI, *Global na chitsujo keisei no tame no kadai: kokusai-hō to kokusai shihō no kyōdō o mezashite* [Contemporary challenges for global ordering: Bridging between public and private international law], *Ronkyū Jurisuto* 23 (2017) 43; *idem*, *Global-ka to kokusai shihō: Kokusai kazoku-hō no shiten kara* [Private international law in the era of globalization: from a viewpoint of private international family law], *Hōritsu Jihō* 1103 (2016) 70.

At the same time, various non-state private actors – such as multinational enterprises, business organizations or entities, associations, NGOs, religious communities, international organizations or other bodies – are increasingly generating autonomous or customary norms as non-state law (or anational law) through their cross-border activities. These norms often fulfill the function of “self-regulation” of private actors, independently of sovereign states. With an increasing number of non-state norms, their validity, efficacy and self-regulatory function, as well as their relationship with state law is being questioned. Some authors even claim the existence of an autonomous transnational legal order that is separate from any national legal system.<sup>2</sup> With a gradual erosion of state sovereignty, the divide between public and private starts blurring. In various sectors, public law and private law increasingly blend or overlap to cooperate to fulfill a regulatory function. This requires us to reconsider the relationship between law and the state or the society, and between the state and global markets.<sup>3</sup>

It is, of course, a difficult and challenging task to establish a sophisticated legal theory for such a complex new phenomenon. As a preliminary attempt to tackle these issues, the underlying paper envisages an analysis of the functioning and nature of “*lex mercatoria*” as a non-state law for cross-border transactions from a viewpoint of self-regulation. This study focuses on self-regulation as self-regulation represents the efficacy of non-state law constituted by organizations or entities other than the states. Against this background, this paper first examines the notion of *lex mercatoria* as autonomous non-state law and the various modalities of self-regulation (II.). Second, this study analyzes the legal nature of *lex mercatoria*, particularly its legal validity and efficacy (III.). Third, aspects of dispute resolution are investigated as a method of implementing *lex mercatoria* to govern cross-

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- 2 H. MUIR WATT, Private International Law beyond the Schism, *Transnational Legal Theory* 2-3 (2011) 390 ff.
- 3 P. ZUMBANSEN, Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism, in: Handl/Zekoll/Zumbansen (eds.), *Beyond Territoriality. Transnational Legal Authority in an Age of Globalization* (Leiden/Boston 2012) 70, 81 ff.; see also Y. ASANO, *Hō-riron ni okeru global hō-tagenshugi no ichiduke* [The place of global legal pluralism in legal theory], in: Asano et al. (eds.), *Global-ka to kōhō shihō kankei no saihei* [Globalization and the restructuring of the relationship between public law and private law] (Tōkyō 2015) 110 ff.; *idem*, *Shihō riron kara hō-tagenshugi he: Hō no global-ka ni okeru kōhō shihō no kubun no saihei* [From private law theory to legal pluralism: Restructuring the divide between public law and private law in globalization of law] (*Shihō riron*), *ibid.*, 305 ff.; T. FUJITANI, *Global-ka to kōhō shihō no saihei: Global-ka no moto deno-hō to tōchi no aratana kankei* [Globalization and the restructuring of public law and private law: New relationship between law and regulation in the face of globalization], *ibid.*, 333 ff.

border transactions in arbitration and litigation (IV). Some final remarks will conclude this paper (V).

## II. SELF-REGULATION IN CROSS-BORDER TRANSACTIONS

### 1. *Notion of Lex Mercatoria*

The notion of *lex mercatoria* has been used and defined differently by various authors. The divergent contour and scope of *lex mercatoria* reflects the divergent position of these authors, as well as the evolution and expansion of non-state norms in cross-border transactions.<sup>4</sup>

The origin of *lex mercatoria* is often ascribed to the uniform customary merchant law that developed around the Mediterranean in the Middle Ages in Europe.<sup>5</sup> Yet, even the proponents of the ancient *lex mercatoria* have so far failed to provide sufficient accounts for their claim. Such historical facts are difficult to prove or disprove,<sup>6</sup> considering that trade was carried out only by a small group of privileged merchants and the available sources are mostly limited to procedural rules and documents of mercantile courts.<sup>7</sup> The debate on ancient merchant law should rather be understood as an additional historical argument brought about by contemporary authors<sup>8</sup> to justify the revival of non-codified law.<sup>9</sup>

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- 4 U. STEIN, *Lex Mercatoria. Realität und Theorie* (Frankfurt/Main 1995) 1 ff., 13 ff.
  - 5 N. JANSEN, *Legal Pluralism in Europe: National Laws, European Legislation, and Non-legislative Codifications*, in: Niglia (ed.), *Pluralism and European Private Law* (Oxford et al. 2013) 109 ff.
  - 6 R. MICHAELS, *Legal Medievalism in Lex Mercatoria Scholarship*, *Texas Law Review* 90 (2012) 261 ff. Proponents of the ancient *lex mercatoria* are, for example, L. E. TRAKMAN, *The Medieval Law Merchant* (1983), in: Bernstein/Parisi (eds.), *Customary Law and Economics* (Cheltenham et al. 2014) 75 ff. On the other hand, opponents denying the ancient *lex mercatoria* are, for example, A. CORDES, *Auf der Suche nach der Rechtswirklichkeit der mittelalterlichen Lex mercatoria*, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 118 (2001) 172 ff.; K. O. SCHERNER, *Lex mercatoria – Realität, Geschichtsbild oder Vision?*, *ibid.*, 148 ff.; E. KADENS, *The Empirical and Theoretical Underpinnings of the Law Merchant: Order within Law, Variety within Custom: The Character of the Medieval Merchant Law*, *Chicago Journal of International Law* 5 (2004) 39 ff.; *idem*, *The Myth of the Customary Law Merchant*, *Texas Law Review* 90 (2012) 153 ff. For an overall state of discussion, see G.-P. CALLIESS, *Lex mercatoria*, *ZenTra Working Papers in Transnational Studies* 52 (2015) 3 ff. (available at <https://www.ssrn.com/en/>).
  - 7 See G. DE MALYNES, *Consuetudo, vel lex mercatoria or the ancient law-merchant* (London 1622, reprinted in 1997); W. BEAWES, *Lex mercatoria: or a complete code of commercial law* (6<sup>th</sup> ed., London 1813).
  - 8 See, e.g., K.-P. BERGER, *The Creeping Codification of the New Lex Mercatoria* (2<sup>nd</sup> ed., Alphen aan den Rijn 2010).

In Europe of the 19<sup>th</sup> century, subsequently to the era of *ius commune*, legislative power was concentrated in the modern nation states.<sup>10</sup> Yet, as early as the turn of the 20<sup>th</sup> century, the state's exclusive authority of law-making was starting to be questioned by *Eugen Ehrlich* in his "free legal theory" (1903)<sup>11</sup> and by *Santi Romano* in the theory of legal orders (1918).<sup>12</sup> A Japanese author, *Masaichiro Ishizaki*, investigated in 1928 the silk trade run by silk associations in New York and Lyon. He observed that these closed communities dispensed with state law, as their transactions were governed by trade usage and standard contractual terms, financed without an official banking system, and subject to autonomous dispute resolution by arbitration.<sup>13</sup> Furthermore, *Ernst Rabel* and *Edouard Lambert*, as proponents of comparative and uniform law, put forth work referring to non-state norms as a method of private law unification.<sup>14</sup> *Großmann-Doerth* also observed that cross-border sales contracts were governed by general terms and conditions prepared by merchants, which constituted an autonomous normative order in his eyes.<sup>15</sup>

From the beginning of the 1960s, the academic discussion on *lex mercatoria* flourished in France, the UK and some other countries. It was the time where unification of commercial law by treaties encountered difficulties due to the West-East divide as an antagonistic "capitalism vs. communism," and the North-South divide as an antagonistic "developed countries vs.

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9 MICHAELS, *supra* note 6, 262 ff.

10 A. PADOA SCHIOPPA, *Storia del diritto in Europa. Dal medioevo all'età contemporanea* (Bologna 2007) 456 ff.

11 E. EHRLICH, *Freie Rechtsfindung und Freie Rechtswissenschaft* (Leipzig 1903; reprint 1973) 34 ff.

12 S. ROMANO, *L'ordre juridique* (Paris 2012) (traduction française de la 2<sup>e</sup> édition de *l'Ordinamento giuridico. Studi sul concetto, le fonti e i caratteri del diritto* (Pisa 1918)) 77 ff.

13 M. ISHIZAKI, *Le droit corporative international de la vente des soies: Les contrats-types américaines et la codification lyonnaise dans leurs rapports avec les usages des autres places*, Vol. 1-3 (Paris 1928); see F. OSMAN, *La contribution de Masaichiro Ishizaki à la doctrine de la Lex Mercatoria*, in: Jaluzot (ed.), *Droit japonais, droit français. Quel dialogue?* (Geneva 2014) 79 ff.

14 E. RABEL, *Observations sur l'utilité d'une unification du droit de la vente au point de vue des besoins du commerce international*, in: Leser (ed.), *Ernst Rabel Gesammelte Aufsätze*, Vol. 3 (Tübingen 1967) 477 ff. (first published in 1935); *idem*, *L'unification du droit de la vente internationale, ses rapports avec les formulaires ou contrats-types des divers commerces*, *ibid.*, 646 ff. (first published in 1938); E. LAMBERT, *Introduction: La fonction du droit civil comparé*, Vol. 1 (Paris 1903) 109 ff.

15 H. GROSSMANN-DOERTH, *Das Recht des Überseeaufufs*, Vol. 1 (Mannheim et al. 1930) 42 ff.; see also *idem*, *Selbstgeschaffenes Recht der Wirtschaft und staatliches Recht* (Freiburg 1933) 26.

developing countries”.<sup>16</sup> Against this background, *lex mercatoria* as an autonomous non-state law appeared a feasible alternative.<sup>17</sup>

In 1961, *Goldman* asserted the existence of *lex mercatoria* as “customary law” in cross-border commercial transactions. He considered *lex mercatoria* as a law of the *tertium genus*, independent of domestic law and international law.<sup>18</sup> Thus, for *Goldman*, *lex mercatoria* primarily concerned (i) general principles of law, such as “*pacta sunt servanda*” and good faith, and (ii) commercial customs, trade usage, standard contractual terms and other customary norms. On the other hand, *Schmitthoff* called autonomous commercial norms the new merchant law.<sup>19</sup> Thus, he included also “international legislation” into the category of *lex mercatoria*, in addition to the (i) general principles of law and (ii) customary norms. For *Schmitthoff*, the category of international legislation encompassed (iii) uniform commercial rules adopted by formulating agencies,<sup>20</sup> such as the Uniform Rules for Documentary Credits (UCP)<sup>21</sup> and the INCOTERMS,<sup>22</sup> and (iv) uniform law conventions, such as the 1924/68 Hague-Visby-Rules on bill of lading.<sup>23</sup>

Since the 1990s, uniform commercial rules are no longer limited to sectorial norms without systematics. Rather, they also include comprehensive

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16 See R. DAVID, *The International Unification of Private Law*, in: *International Encyclopedia of Comparative Law* (1972) 5-41 ff.; J. KROPHOLLER, *Einheitsrecht* (Tübingen 1975) 78 ff., 225 ff., 344 f.; Y. NISHITANI, *Hō-tōitsu no tenkai to hi-kokkahō no igi* [Evolution of uniform law and the impact of non-state law], *Minshōhō Zasshi* 153-5 (2017) 667 ff.

17 CALLIESS, *supra* note 6, 9.

18 For *Goldman*, *lex mercatoria* was “droit coutumier du commerce international”: B. GOLDMAN, *The New Law Merchant*, *Journal of Business Law* 1961, pp. 12 ff.; *idem*, *Frontière du droit et «lex mercatoria»*, *Archives de philosophie du droit* 9 (1964) 187 ff.

19 C. SCHMITTHOFF, *International Business Law: A New Law Merchant* (“Law Merchant”), in: Cheng (ed.), *Selected Essays on International Trade Law* (Dordrecht 1988) 20 ff.; *idem*, *The Law of International Trade, Its Growth, Formulation and Operation* (“International Trade”), *Ibid.* 165 ff.

20 For formulating agencies, see, *inter alia*, International Institute for the Unification of Private Law (UNIDROIT) (<http://www.unidroit.org/>); United Nations Commission on International Trade Law (UNCITRAL) (<https://www.uncitral.org/>); International Chamber of Commerce (ICC) (<http://www.iccwbo.org/>).

21 Uniform Customs and Practice for Documentary Credits (the latest version is UCP600 adopted in 2007).

22 Rules for the Use of Domestic and International Trade Terms (the latest version is INCOTERMS 2010).

23 International Convention for the unification of certain rules of law relating to bills of lading, Brussels, 25 August 1924 (“Hague Rules”); Protocol to amend the International Convention for the unification of certain rules of law relating to bills of

private codification, such as the 1994 UNIDROIT Principles (UPICC)<sup>24</sup> followed by the 1995 Principles of European Contract Law (PECL).<sup>25</sup> At the same time, uniform law conventions have been increasing in various areas. The most successful one is certainly the 1980 Vienna Sales Convention (CISG),<sup>26</sup> which has so far gained 89 Contracting States including Japan.<sup>27</sup> While the majority of authors only regard customary, unwritten norms as *lex mercatoria*,<sup>28</sup> others adopt a broader notion of *lex mercatoria* that encompasses also the UPICC and the CISG.<sup>29</sup>

Today, following expanding international investment agreements (IIAs) and arbitration in state-investor disputes,<sup>30</sup> the sources of *lex mercatoria* also extend to public international law. Further, in international financial regulation, soft law instruments like Basel III (2010/17)<sup>31</sup> and the IOSCO Principles<sup>32</sup> play an important role.<sup>33</sup> Some religious laws should be includ-

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lading signed at Brussels on 25 August 1924, Brussels, 23 February 1968 (“Visby Rules”); SDR Protocol, Brussels 21 December 1979.

- 24 UNIDROIT Principles on International Commercial Contracts (UPICC) (the latest version is 2016), available at <http://www.unidroit.org/>.
- 25 O. LANDO/H. BEALE (eds.), *Principles of European Contract Law, Parts I & II* (2000); O. LANDO/E. CLIVE/A. PRÜM/R. ZIMMERMANN (eds.), *Principles of European Contract Law, Part III* (2003); see also the 2009 Draft Common Frame of Reference (DCFR) at von Bar/Clive/Schulte-Nölke et al. (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Munich 2009), available at [https://www.law.kuleuven.be/personal/mstorme/2009\\_02\\_DCFR\\_OutlineEdition.pdf](https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf).
- 26 United Nations Convention on Contracts for the International Sale of Goods (CISG), Vienna, 11 April 1980.
- 27 See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html).
- 28 STEIN, *supra* note 4, 184 ff.; see also 2005 Commission Proposal for the Rome I Regulation (see *infra*).
- 29 See, e.g., J. H. DALHUISEN, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law*, Vol. 1 (6<sup>th</sup> ed., Oxford et al. 2013) 349 ff.; A. TAKAKUWA, *Kokusai shō-torihiki-hō* [International Business Law] (3<sup>rd</sup> ed., Tōkyō 2010) 70; H. KANSAKU, *Global na shihon shijō ni okeru soft law to nihon-hō heno eikyō* [Soft law in the global market and its influence on Japanese law], in: Dogauchi (ed.), *Gendai-hō no dōtai* [Dynamics of contemporary law], Vol. 4: *Kokusai shakai no hendō to hō* [Dynamics in international society and law] (Tōkyō 2015) 67; T. MORISHITA, *Lex mercatoria to kokusai kin-yū* [Lex mercatoria and international financing], *ibid.*, 98 ff.
- 30 A. KOTERA (ed.), *Kokusai tōshi kyōtei: Chūsai ni yoru hōteki hogo* [International investment agreements: legal protection by arbitration] (Tōkyō 2010) 2 ff.
- 31 Basel Committee on Banking Supervision.
- 32 Objectives and Principles of Securities Regulation of the IOSCO (International Organization of Securities Commissions) (<https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf>).
- 33 KANSAKU, *supra* note 29, 75 ff.

ed in *lex mercatoria* as well. Jewish law particularly serves as self-regulatory norms for transactions in Jewish communities,<sup>34</sup> and Islamic law as autonomous norms of financing with the prohibition of interests in the Middle East and Malaysia.<sup>35</sup> Ultimately, one author even includes any kind of “knowledge practices” – institutions, actors, doctrines, ideas and material documents – as a feature of global private law.<sup>36</sup>

These various components of *lex mercatoria* represent the contemporary phenomena that non-state norms accrue and compound multiple layers along with state law. With a view to subsuming plurality of legal norms and analyzing self-regulatory functions of non-state law, the underlying study follows a broader notion of *lex mercatoria*. Thus, the reference to *lex mercatoria* includes the entire range of non-state norms addressing cross-border transactions between private parties, including private codification like the UPICC and the PECL, as well as uniform law treaties like the CISG.<sup>37</sup>

## 2. Self-Regulatory Regimes

With the expansion of non-state norms, self-regulatory regimes are emerging in certain sectors. Early on, non-state law in maritime transport of goods has developed to serve for self-regulation (*lex maritima*). The 1877 York-Antwerp Rules on general average adopted by the CMI<sup>38</sup> have, in particular, often been employed and revised. Also, standard terms called the “Gencon C/P” on voyage charters produced by the BIMCO in 1922<sup>39</sup> have usually been relied on as self-regulatory norms.<sup>40</sup>

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34 A. LEVINE (ed.), *The Oxford Handbook of Judaism and Economics* (Oxford 2011) 372 ff., 507 ff.

35 See, *inter alia*, Y. MOROZUMI, *Islam-hō ni okeru shin-yō to ‘risoku’ kinshi* (Tōkyō 2011) 49 ff.; ISLAM KINYŪ KENTŌ-KAI (ed.), *Islam kinyū: Shikumi to dōkō* [Islamic financing: structure and tendencies] (Tōkyō 2008) 22 ff.; E. YOSHIDA, *Islam kinyū nyūmon* [Introduction to Islamic financing] (Tōkyō 2007) 16 ff.

36 A. RILES, *The Anti-Network. Private Global Governance, Legal Knowledge, and the Legitimacy of the State*, in: Jansen / Michaels (eds.), *Beyond the State. Rethinking Private Law* (Tübingen 2008) 185.

37 Also KANSAKU, *supra* note 29, 67.

38 They had first been adopted as 1864 York Rules (the latest version is the “York-Antwerp Rules 2016”). For a thorough analysis of law-making activities of the CMI (Comité Maritime International), see T. FUJITA, *Kokusai shō-torihiki ni okeru kihan keisei: Bankoku kaihō-kai o rei toshite* [Law-making in cross-border business transactions: taking the CMI as an example], *Soft Law Kenkyū* 12 (2008) 107 ff.

39 “Uniform General Charter” of the BIMCO (Baltic and International Maritime Conference) (the latest version is Gencon C/P 1994).

40 G.-P. CALLIESS/H. HOFFMANN/J. M. MERTENS, *The Transnationaliation of Commercial Law*, ZenTra Working Papers in Transnational Studies No. 04/2012, p. 9.

Notably, state-induced self-regulation may be requested when autonomous regulation does not suffice, as in the case of the 1924 Hague Rules on bill of lading.<sup>41</sup> The International Law Association (ILA) had adopted the corresponding norms to restrict the carrier's exemption clauses as a non-binding instrument in 1921. These model provisions were expected to be voluntarily incorporated into bills of lading by carriers. However, because there were no sanctions other than *de facto* pressure by banks or insurers, carriers would not adopt these rules, and thus incur liability for fear of losing out in the competition against other carriers.<sup>42</sup> Thus, the 1921 Hague Rules had to be transformed into the 1924 Convention as a legally binding instrument, with a view to formalizing regulation by the state.<sup>43</sup> Arguably, some forms of self-regulation in certain sectors do not work without the involvement of the state.

On the other hand, for international swaps and derivative transactions, an autonomous community of interests has been established by the International Swaps and Derivatives Association (ISDA).<sup>44</sup> The ISDA is a private body with highly professional knowledge, engaged in commercial activities, detached from any domestic market regulation or state law. International swap dealings are usually governed by the ISDA Master Agreement. This has usually prevented the intervention of state bankruptcy law, as collateral arrangements are requested and the payment is refused in case of insolvency.<sup>45</sup> The ISDA has yielded an autonomous system and even influenced negotiations and the adoption of conventions on securities held with an intermediary at the Hague Conference on Private International Law (HCCH)<sup>46</sup> and UNIDROIT.<sup>47</sup> Within the system of the ISDA, collateral is *de facto* governed by New York law or English law pursuant to the parties' choice of law.<sup>48</sup> In this sector, the state can hardly exercise regulation by solely applying securities law extraterritorially.<sup>49</sup>

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41 See *supra* note 23.

42 S. D. COLE, *The Hague Rules 1921 Explained* (London 1922).

43 M. A. CLARKE, *Aspects of the Hague Rules. A Comparative Study in English and French Law* (The Hague 1976) 3 ff.

44 International Swaps and Derivatives Association (ISDA).

45 RILES, *supra* note 36, 186 ff.

46 Hague Conference on Private International Law (HCCH).

47 Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, 5 July 2006; UNIDROIT Convention on Substantive Rules for Intermediated Securities, Geneva, 9 October 2009; see RILES, *supra* note 36, 193 (note 33 ff.).

48 RILES, *supra* note 36, 204 f.

49 N. MATSUO, *Kinyū shōhin torihiki-hō* [Law on securities transactions] (4<sup>th</sup> ed., Tōkyō 2016) 84 ff.; KANSAKU, *supra* note 29, 77 ff.

For Internet domain names, the ICANN<sup>50</sup> has adopted a specific dispute resolution policy (UDRP) and UDRP-Rules.<sup>51</sup> The UDRP-Rules are being implemented in a complex network of governance,<sup>52</sup> constituting *lex digitalis* as non-state law. Although the UDRP-Rules are based on contracts, the system is not entirely voluntary, as there is no alternative for a domain name.<sup>53</sup> As Kozuka rightly contends, the ICANN creates *de facto* an exclusive right for the use of a domain name, like intellectual property with *erga omnes* effects.<sup>54</sup>

In the sports sector, the so-called *lex sportiva* is gradually emerging.<sup>55</sup> For the purpose of dispute resolution, the Court of Arbitration for Sport (CAS)<sup>56</sup> offers a unique venue and yields jurisprudence on disputes over the methods of selecting or disciplining athletes and authorizing their commercial activities by the IOC<sup>57</sup> and other sport associations or entities. For particular sectors like football, the Fédération Internationale de Football Association (FIFA)<sup>58</sup> has strict control over the national associations and players. The autonomous, self-regulatory norms adopted by FIFA are referred to in resolving various legal questions.

The Commercial Court of St. Gallen in Switzerland rendered a notable judgment on 12 November 2004.<sup>59</sup> In this case, the plaintiff Swiss company entered into contract with the defendant Greek company on the transfer of a football player. There was an exclusive choice of court clause in favor of the Commercial Court of St. Gallen in Switzerland. As the law governing the contract, the parties selected the FIFA Rules and Swiss law. Four years later, dispute arose as to the payment of transfer fee. While the limitation period was 10

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50 Internet Corporation for Assigned Names and Numbers (ICANN) (<https://www.icann.org/>).

51 Uniform Domain Name Dispute Resolution Policy (UDRP) (<https://www.icann.org/>).

52 E. M. WEITZENBOECK, Hybrid net: the regulatory framework of ICANN and the DNS, *International Journal of Law and Information Technology* 22-1 (2014) 49 ff.

53 G. SPINDLER, Private Rechtssetzung in IT-Märkten, in: Zimmermann (ed.), *Globalisierung und Entstaatlichung des Rechts*, Vol. 2 (Tübingen 2008) 23.

54 S. KOZUKA, *Keisei shutai no gawa kara mita soft law: soft law o keisei suru 'dantai'* [Soft law observed from a viewpoint of its constituents: 'entities' creating soft law], in: T. Fujita (ed.), *Soft law no kiso riron* [Fundamental theories of soft law] (Tōkyō 2008) 107 ff.

55 A. RÖTHEL, Lex mercatoria, lex sportiva, lex technical – Private Rechtssetzung jenseits des Nationalstaates?, *Juristenzeitung (JZ)* 2007, 755.

56 Court of Arbitration for Sport (CAS) (<http://www.tas-cas.org/>).

57 International Olympic Committee (IOC) (<https://www.olympic.org/the-ioc>).

58 Fédération Internationale de Football Association (FIFA) (<http://www.fifa.com/>).

59 Handelsgericht St. Gallen (Switzerland), 12 November 2004 (<http://www.unilex.info/case.cfm?id=1123>).

years pursuant to Swiss law (Art. 127 OR), the FIFA Rules restricted it to two years. The question was, therefore, whether the FIFA Rules prevailed over the limitation period under Swiss law and time-bared the underlying claim.

The Commercial Court of St. Gallen affirmed this question and dismissed the claim by applying the FIFA Rules as the law governing the contract, allegedly following the majority of Swiss authors that allow the choice of non-state law (Art. 166 (1) IPRG).<sup>60</sup> Thus, the FIFA Rules were given priority to the Swiss law on the limitation period, although as a matter of substantive law this provision cannot be derogated from by the parties' agreement (Art. 129 OR). This decision was ultimately overruled by the Swiss Federal Supreme Court on 20 December 2005, which held that the FIFA Rules were only incorporated into the contract (*materiellrechtliche Verweisung*) and could not go beyond the Swiss mandatory rules.<sup>61</sup> Nevertheless, the decision of the Commercial Court of St. Gallen remains a remarkable example of state acknowledgement of *lex mercatoria* as prevailing over state law, thus respecting the self-regulation of an autonomous entity.

### 3. Reasoning

As has been discussed, *lex mercatoria* may play an important role for self-regulation in various sectors. Needless to say, employing *lex mercatoria* has various advantages, such as flexibility, efficiency, reflecting sector-specific expertise and fulfilling a model function. As the reverse side of the coin, we observe the limitations of state law. State law is primarily geared toward domestic cases and does not necessarily fit cross-border transactions. The legislature can hardly keep up with rapid economic, social or technical developments.<sup>62</sup> Nor can the legislature always act expeditiously to take necessary measures. Particularly in the areas of international swap transactions or Internet domain names, the state has neither effective tools for regulation nor expertise for sophisticated law-making. The self-regulatory schemes by *lex mercatoria* in cross-border transactions may respond better to the need of businesses and global markets, and form a valid substitute for unsuitable and inefficient state law.<sup>63</sup>

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60 For the academic opinion that allows the choice of non-state law as a body of rules, K. SIEHR, *Das Internationale Privatrecht der Schweiz* (Zürich 2002) 232; M. AMSTUTZ/N. P. VOGT/M. WANG, Art. 116 IPRG, in: Honsell/Vogt/Schnyder (eds.), *Kommentar zum schweizerischen Privatrecht: Internationales Privatrecht* (Basel 1996) para. 21.

61 Bundesgericht (Switzerland), 20 December 2005 (<http://www.unilex.info/case.cfm?id=1124>).

62 See J.-H. BINDER, *Regulierungsinstrumente und Regulierungsstrategien im Kapitalgesellschaftsrecht* (Tübingen 2012) 284 ff.

63 KOZUKA, *supra* note 54, 106 ff.

However, *lex mercatoria* as non-state law has also certain flaws, as it is not provided with democratic legitimacy. Nor does it necessarily cater to fair, appropriate, balanced, transparent, ascertainable or comprehensive norms. *Lex mercatoria* may also be made advantageous for some stakeholders in particular sectors. Thus, granting third-party effects to *lex mercatoria* may cause externalities and require careful assessment.<sup>64</sup> These aspects should be considered when discussing the legal validity and eligibility of *lex mercatoria* to govern the contract.

### III. LEGAL VALIDITY OF *LEX MERCATORIA*

#### 1. *Lex Mercatoria and Legal Sources*

Can we then consider *lex mercatoria* as “law”? How can we recognize the legal validity of non-state norms and emancipate “law” from the “state”?<sup>65</sup>

The “pure theory of law” advocated by *Kelsen*<sup>66</sup> or the “concept of law” expounded by *Hart*<sup>67</sup> in principle attributed a legal validity limited to norms deriving from the legitimate legislative authority of sovereign states. Since legally valid norms ought to emanate from the “fundamental norm” (*Grundnorm*) or be legally recognized by state law, customary or other norms that emerge in society or within a community do not primarily qualify as law. While a comparable positivist position is still supported by the majority of authors today,<sup>68</sup> other authors emphasize the legal validity of non-state norms to capture all legal phenomena beyond the state. Such a fundamental question in legal philosophy cannot be answered right away. The analysis below at least attempts to give some reflections.

##### a) *Customary Law*

*Goldman* and other authors assert the legal nature of *lex mercatoria* by qualifying it as customary law.<sup>69</sup> In fact, if certain norms embody commer-

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64 But in some cases, behaviors according to internal custom of an entity can be acknowledged and respected by the court (UCC § 4-103 (c)). T. FUJITA/T. MATSUMURA, *Jiritsu-teki chitsujo no keizai-gaku* [The economics of an independent order], in: Fujita (ed.), *Soft law no kiso riron* [Fundamental theories of soft law] (Tōkyō 2008) 35 ff.

65 S. TANAKA, *Gendai hōri-gaku* [Contemporary legal theory] (Tōkyō 2011) 89 ff.

66 H. KELSEN, *Reine Rechtslehre* (Wien 1960) 196 ff.

67 H. L. A. HART, *The Concept of Law* (3<sup>rd</sup> ed., Oxford 2012), cited from the Japanese translation by Yasuo Hasebe (Tōkyō 2014) 60 ff.

68 See N. JANSEN/R. MICHALES, *Private Law and the State. Comparative Perceptions and Historical Observations*, in: Jansen/Michaels (eds.), *Beyond the State. Re-thinking Private Law* (Tübingen 2008) 16 ff.

cial customs or trade usage and become *opinio juris*, they generally qualify as customary law within the realm of state law.<sup>70</sup> *Goldman*, however, failed to give empirical evidence that *lex mercatoria* has indeed become customary law at the global level. Nor did he demonstrate the legitimacy of *lex mercatoria* as law.<sup>71</sup>

Notably, some Japanese authors contend that even commercial customs other than *opinio juris* constitute legal sources within the state law system since the 2005 amendment of Article 1 (2) of the Japanese Commercial Code.<sup>72</sup> It is different from § 346 of the German HGB, which solely refers to commercial customs to interpret and assess the effects of the parties' acts, without qualifying commercial customs as adjudicatory norms.<sup>73</sup>

Nevertheless, we ought to be reminded that contemporary *lex mercatoria* largely consists of "private lawmaking".<sup>74</sup> The UCP, the INCOTERMS or the UPICC are not commercial customs or trade usage.<sup>75</sup> Interestingly enough, the Tokyo District Court decided on 29 May 1987 that referring to the UCP has become a commercial custom in letter of credit transactions in Japan. Thus, the plaintiff company was held to be bound by the UCP, although the

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- 69 GOLDMAN, *Lex mercatoria*, *supra* note 18, 183; also H. TAKI, *Kokusai chūsai to kokusai torihiki-hō* [International arbitration and international business law] (Tōkyō 1999) 108 ff.
- 70 Art. 3 of the Act on the General Rules on the Application of Laws ("AGRAL"), Law No. 78 of 21 June 2006; Art. 1 (2) Commercial Code.
- 71 G. TEUBNER, 'Global Bukowina': Legal Pluralism in the World Society, in: Teubner (ed.), *Global Law Without a State* (Aldershot 1997) 9.
- 72 Notably, after Art. 1 (2) Japanese Commercial Code altered the wording from "shō-kanshū-hō" ("commercial customary law") to "shō-kanshū" ("commercial customs"), academic opinions are divided. Some authors advocate that customary norms can be legally valid without "*opinio juris*", see S. OCHIAI/C. OTSUKA/T. YAMASHITA, *Shōhō* [Commercial law], Vol. 1: *Sōsoku & shōkōi* [General part & commercial acts] (5<sup>th</sup> ed., Tōkyō 2013) 24; M. TANABE, *Shōhō sōsoku & shōkōi-hō* [General part of commercial law & commercial acts] (3<sup>rd</sup> ed., Tōkyō 2011) 33ff. Other authors require "*opinio juris*" to ascribe legal validity to customary norms, see M. KONDO, *Shōhō sōsoku & shōkōi-hō* [General part of commercial law & law of commercial acts] (6<sup>th</sup> ed., Tōkyō 2013) 11; T. FUJITA, *Kihan no shiteki keisei to kokka ni yoru enforcement: shōkan-shū & torihiki kankō o sozai to shite* [Private lawmaking and implementation by the state: with the example of commercial customs & trade usage], *Soft Law Kenkyū* 6 (2006) 8 ff.).
- 73 BAUMBACH/HOPT, *Handelsgesetzbuch* (37<sup>th</sup> ed., Munich 2016) § 346 HGB, para. 1 ff.
- 74 P. LAGARDE, *Approche critique de la lex mercatoria*, in: *Mélanges Berthold Goldman* (1982) 139 ff.; TEUBNER, *supra* note 71, 9, 17.
- 75 A. TAKAKUWA, *Kokusai torihiki ni okeru shihō no tōitsu to kokusai shihō* [Private law unification and private international law in cross-border business transactions] (Tōkyō 2005) 101; FUJITA, *supra* note 38, 114.

managing director was not informed of the UCP.<sup>76</sup> In this decision, the judge actually said that not the *content* of the UCP, but only the *practice of referring to* the UCP had become a commercial custom. The UCP was first adopted in 1933 to unify rules on letter of credit transactions across the Atlantic, when export from the U.S. to Europe was expanding. Since then, the UCP has been revised six times by experts in financial sectors from all over the world, who gathered at the International Chamber of Commerce (ICC) to develop expedient rules and give guidance to letter of credit transactions. The UCP ought to be primarily understood as an “autonomous” non-state law, rather than a commercial custom or trade usage.<sup>77</sup> Consequently, the legal validity of *lex mercatoria* cannot logically be maintained simply by relying on its nature as customary law or commercial customs.

#### b) Corporatism

As mentioned above, *Ishizaki* observed that silk associations in Lyon and New York established autonomous norms for their transactions without the involvement of official state law.<sup>78</sup> Based on his study, *Ishizaki* ascribed legal validity to norms created by a self-regulating community or entity other than the state. His view largely coincided with the legal “corporatism” advocated by *Santi Romano*, who considered that various entities beyond or within the state – such as the international community, church, enterprise, school and family – constituted autonomous legal systems.<sup>79</sup> It is true that certain non-state norms may well function *de facto* as binding rules within an autonomous, independent collectivity. Yet, such a corporative law can only emerge in a close-knit community of merchants, where people know each other and have mutual trust. These settings would generally not correspond to the reality of contemporary cross-border mass transactions in global markets. Hence, the legal validity of *lex mercatoria* cannot be justified by definition based on the legal corporatism.<sup>80</sup>

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76 Tōkyō District Court, 29 May 1987, Kinyū Shōji Hanrei 781, 38 = Kinyū Hōmu Jijō 1186, 84.

77 Y. NISHITANI, *Kokusai shiharai to soft law: shin-yōjō tōitsu kisoku no igi to hōteki seishitsu* [International payment and soft law: The meaning and legal nature of ‘Uniform Customs and Practice for Documentary Credits’], in: Kotera/Dogauchi (eds.), *Kokusai shakai to soft law* [International Community and Soft Law] (Tōkyō 2008) 215 ff.; for further detail on the UCP, see BAUMBACH/HOPT, *supra* note 73, BankGesch (7), K/1 ff.

78 ISHIZAKI, *supra* note 13, Vol. 2, pp. 350 ff.

79 ROMANO, *supra* note 12, 77 ff.

80 TEUBNER, *supra* note 71, 18.

c) *Self-Validating Legal System*

*Schmitthoff* used to put forth that *lex mercatoria* constitutes an autonomous body of law. Insofar as *lex mercatoria* governs the contract, there is no “*contrat sans lois*” in his view. However, *Schmitthoff* sought the ultimate legitimacy of *lex mercatoria* in state law,<sup>81</sup> which was an obvious contradiction.

Instead, *Teubner* asserted the validity of “*contrat sans lois*” by relying on the network theory. *Teubner* contended that states and non-state actors constitute their own normative regimes in parallel. In his view, global contracts do not presuppose a pre-existing legal system, as they are self-validating and self-legitimizing. Contracting is held as an autopoietic legal source on equal footing as state law. For *Teubner*, legal validity is provided by private actors as quasi-legislative institutions through arbitration as quasi-courts. It is a system of “private adjudication, private legislation and private contracting”.<sup>82</sup>

This construct of “reflexive mechanism”<sup>83</sup> reminds us of the *Messageries maritimes* decision of the Court of Appeal of Paris dated 24 April 1940.<sup>84</sup> This French decision notably declared the gold clause as valid despite the prohibitive measures of Canada, on the ground that the parties can exclude any state law for international contracts. This argument drew upon ex-Article 1134 (now Art. 1103) of the French Civil Code, which stipulates that “contracts which are lawfully formed have the binding force of legislation for those who have made them”.<sup>85</sup> However, the reflexive mechanism cannot duly expound why the parties have the absolute authority to exclude all mandatory rules of the state by simply concluding an international contract. Nor can the reflexive mechanism draw external criteria to define the validity of objective law. Without normative value prescriptions, public policy and public interest would be undermined in the international community.

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81 SCHMITTHOFF, *Law Merchant*, *supra* note 19, 34 ff.; *idem*, *International Trade*, *supra* note 19, 148 ff., 165 ff.

82 TEUBNER, *supra* note 71, 18; also G. TEUBNER/A. FISCHER-LESCANO, *Wandel der Rolle des Rechts in Zeiten der Globalisierung: Fragmentierung, Konstitutionalisierung und Vernetzung globaler Rechtsregimes*, in: Murakami/Marutschke/Riesenhuber (eds.), *Globalisierung und Recht. Beiträge Japans und Deutschlands zu einer internationalen Rechtsordnung im 21. Jahrhundert* (Berlin 2007) 15 ff.; A. FISCHER-LESCANO/G. TEUBNER, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts (“Regime”)* (Frankfurt/Main 2006) 57 ff.; see D. YOKOMIZO, *Funsō shori ni okeru shiteki jichi* [Party autonomy in dispute resolution], *Kokusai Shihō Nenpō* 15 (2013) 118.

83 For this expression, see STEIN, *supra* note 4, 164 ff.

84 Cour d’appel de Paris, 24 avril 1940 [Messageries maritimes], *Receuil Dalloz Sirey* 1942.2.29, note *Niboyet*.

85 This provision stipulates as follows: “Les contrats légalement formés tiennent lieu de loi à ceux qui les ont faits.” For an English translation, see [http://www.textes.justice.gouv.fr/art\\_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf](http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf).

Ultimately, the French Supreme Court decided on 21 June 1950<sup>86</sup> that the underlying contract be localized in a state legal system. At the same time, the court granted the validity of the gold clause by having resort to French public policy.<sup>87</sup>

d) *Sociological and Anthropological Concepts of Law*

Some recent authors like *Asano* advocate legal pluralism, justifying the legal validity of non-state norms by the character of private law. Pursuant to this opinion, norms created by private actors are legally valid, as these norms regulate activities of private parties in a neutral way without involving moral or political values. Civil society is separated from the political sphere.<sup>88</sup> Other authors, *Suehiro* and *Tanaka*, also held certain non-state norms – such as collective bargaining agreements, labor guidelines and general terms of contracts – as legally valid.<sup>89</sup> Social norms that uniformly bind a certain group of people entering into the relationship are held to qualify as law.<sup>90</sup> This idea recognizes legal validity on the basis of the sociological findings that certain norms prescribe and regulate people’s behavior.<sup>91</sup>

Similarly from a viewpoint of legal anthropology, *Chiba* and other authors put forth legal pluralism based on the binary code of state law and non-state law, or “official law” and “unofficial law”.<sup>92</sup> These authors attrib-

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86 The French *Cour de cassation* dismissed the appeal, but with a different reasoning. The justices contended that international contracts are always subject to a certain state law. *Cour de cassation*, 21 juin 1950 [Messageries maritimes], *Revue critique de droit international privé* 1950, 609, note *Batiffol*; *Receuil Dalloz Sirey* 1952.1.1, note *Niboyet*.

87 Y. NISHITANI, *Lex Mercatoria to jishu kisei* [Lex Mercatoria and self-regulation], *Hōgaku Ronsō* 180-5/6 (2017) 353 ff.; *idem, supra* note 16, *Minshōhō Zasshi* 153-6 (2017) 101 ff.

88 ASANO, *Shihō riron, supra* note 3, 306 ff.; *idem*, *Self-regulations and Constitutional Law in Japan as Seen from the Perspective of Legal Pluralism*, in this book, *supra* Chapter 3.

89 I. SUEHIRO, *Hōritsu shakai-gaku* [Legal sociology], in: Rokumoto/Yoshida (eds.), *Suehiro Izutarō to nihon no hō-shakai-gaku* [Izutarō Suehiro and legal sociology in Japan] (Tōkyō 2007) 87 ff.; TANAKA, *supra* note 65, 82.

90 TANAKA, *supra* note 65, 82. *Tanaka* does not consider sanction or commandment as necessary factor of the nature of law, along the lines of “living law” by *Eugen Ehrlich*.

91 See J. GRIFFITHS, *What is Legal Pluralism?*, *Journal of Legal Pluralism* 24 (1986) 38 f.; S. E. MERRY, *Legal Pluralism*, *Law & Society Review* 22-5 (1988) 889 ff.

92 M. CHIBA, *Hō-bunka no frontier* [Frontiers of legal culture] (Tōkyō 1991) 174 ff.; *idem*, *Hō-bunka heno yume* [Ideals of legal culture] (Tōkyō 2015) 17 ff.; T. TSUNODA et al. (eds.), *Hō-bunka-ron no tenkai: hō-shutai no dynamics* (*Chiba*

ute legal validity to indigenous norms grounded in customs, tradition or religions in non-Western countries including former colonies, as well as to contemporary autonomous norms within a business entity, religious community, ethnic minority or other collectivities.<sup>93</sup> Following these ideas, global private governance regimes set up by the ISDA for swap transactions or by the ICANN for domain names may well qualify as “law” by virtue of their uniform binding effects.

Nevertheless, these sociological or anthropological constructs only serve to describe the facts that soft law *is* being abided by in a certain community. This does not yet explain *why* normative validity or legitimacy is provided by the simple fact that certain norms are abided by in society.<sup>94</sup> Nor does it define the nature of law grounded on objective criteria. In fact, if legal validity is attributed solely by the function of prescribing people’s behavior, even social norms lacking in efficiency and transparency can be regarded as “law”, independently of their normative values. This may well readily justify self-regulation by private actors and even jeopardize individual rights by granting third-party effects.

It is notable that the UPICC provides for mandatory rules, such as “good faith and fair dealing” (Art. 1.7 UPICC), unlike the CISG and other non-binding instruments. However, the UPICC deduces the mandatory rules (Art. 1.4 UPICC) and the effects of breaching mandatory rules (Art. 3.3.1 UPICC) from the state law governing the contract, which is designated by private international law. Consequently, even the UPICC seeks its ultimate authority in state law and can hardly be considered as a self-sufficient normative system.<sup>95</sup>

#### e) *Recognition*

Instead of the reflexive mechanism or the sociological or anthropological accounts of legal pluralism, *Michaels* asserts a mutual recognition of legal systems. In his view, as the state has so far exclusively determined “what constitutes state law”, private bodies or religious communities also define auton-

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*Masaji sensei tsuitō*) [Developments of legal culture: dynamics of legal subjects: Liber memorialis Masaji Chiba] (Tōkyō 2015) 5 ff.

93 See also B. Z. TAMANAHA, A Framework for Pluralistic Socio-Legal Arenas, in: Foblets et al. (eds.), *Cultural Diversity and the Law: State Responses from Around the World* (Brussels 2010) 381 ff.; P. SHAH, *Legal Pluralism in Conflict. Coping with Cultural Diversity in Law* (London 2005) 2 ff.

94 R. MICHAELS, Was ist nichtstaatliches Recht? Eine Einführung (“Nichtstaatliches Recht”), in: Calliess (ed.), *Transnationales Recht* (Tübingen 2014) 49 ff.; *idem*, The Re-statement of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism, *Wayne Law Review* 51 (2005) 1221 ff.

95 NISHITANI, *supra* note 87, 357.

omously “what is law”. Each legal system ought to determine as the first step whether it considers itself as “law”, and if yes, as the second step whether it also recognizes other legal systems as “law”. Reciprocal recognition is required for non-state norms to qualify as “law”. Thus, non-state norms are furnished with legal validity, insofar as they are perceived as autonomous legal norms by states or other private actors on ground of tertiary rules.<sup>96</sup>

The construct of the mutual recognition of legal systems presupposes the relativity and relationality of state and non-state legal systems. It cannot deduce objective, self-sufficient criteria for defining legal validity. Nor can it create hierarchical orders between the normative systems or justify shared values in the international community. This position would unduly give a *carte blanche* to each legal system in providing its own rules and deciding on whether to recognize other legal systems. In view of global governance, it would rather be desirable that certain normative preconditions for public interest and common goods be respected universally.

## 2. *Lex Mercatoria as the Governing Law in Private International Law*

Arguably, various attempts to prove the legal validity of non-state law including *lex mercatoria* have not yielded a fruitful result yet. The question of what is “law” depends on the legal theory, the author’s position and the *zeitgeist*. The answer often depends on the time and place. The idea of uniting “law” and “authority” in the doctrine of natural law<sup>97</sup> or the doctrine of *Volksggeist* of the historical school of law<sup>98</sup> was grounded on a particular position at a certain moment in the history. They can hardly serve as the basis of the contemporary *lex mercatoria*, after the modern state law system was founded in the respective nation state.<sup>99</sup>

In considering how *lex mercatoria* ought to be applied and put into force, we should turn to the function of private international law. The conventional method of private international law goes back to *Savigny*. His doctrine relies on the construct that one territorial state law is chosen out of several conflicting territorial state laws to regulate a cross-border legal

96 MICHAELS, *Nichtstaatliches Recht*, *supra* note 94, 52 ff.; *idem*, What is Non-State Law? A Primer, in: Helfand (ed.), *Negotiating State and Non-State Law. The Challenge of Global and Local Legal Pluralism* (Cambridge 2015) 55 ff.; *idem*, Law and Recognition – Towards a Relational Concept of Law, in: N. ROUGHAN/A. HALPIN (eds.), *In Pursuit of Pluralist Jurisprudence* (Cambridge 2017) 107 ff.

97 PADOA SCHIOPPA, *supra* note 10, 329 ff.; F. WIEACKER (translated into Japanese by Rokuya Suzuki), *Kinsei shihō-shi: tokuni doitsu ni okeru hatten wo koryo shite* [Modern private law history: in view of the developments in Germany] (Tōkyō 1961) 267 ff.

98 PADOA SCHIOPPA, *supra* note 10, 502 ff.; WIEACKER, *supra* note 97, 469 ff.

99 MICHAELS, *Nichtstaatliches Recht*, *supra* note 94, 47 ff.

relationship. The applicable law is determined by searching for the state with which the relevant legal relationship has the closest connection, i.e., the “seat” (*Sitz*).<sup>100</sup> As a metaphor, a global contract can be imagined as a balloon flying in the air, and private international law seeks to capture it to localize and anchor it in the territory of a certain state. According to the conventional view, potentially applicable laws are limited to state laws emanating from the authority of sovereign states. Judges representing the state judicial authority are held to apply solely state law. Not only positivists like *Christian von Bar* and *Lagarde*,<sup>101</sup> but also *Mayer*,<sup>102</sup> who advocates the theory of legal orders, takes a comparable view by relying on state law.

However, this presupposition does not necessarily apply to arbitration as a mechanism of private dispute resolution based on the parties’ agreement. Also, for litigation before state courts, the eligibility of non-state law to govern the contract can theoretically be granted independently of the legal validity of *lex mercatoria*. This is a policy decision of private international law, which can be taken independently of whether *lex mercatoria* is regarded as legitimate “law” in legal theory.<sup>103</sup> Even norms without legal validity can qualify as the applicable law when authorized as such by private international law. There is no preemptive argument against including *lex mercatoria* into the “law” governing the contract.<sup>104</sup> How should we then treat *lex mercatoria* in dispute resolution?

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100 F. C. VON SAVIGNY, *System des heutigen römischen Rechts*, Vol. 8 (Berlin 1849) 2 ff.

101 C. VON BAR/P. MANKOWSKI, *Internationales Privatrecht*, Vol. 1 (2<sup>nd</sup> ed., Munich 2003) § 2 para. 75; LAGARDE, *supra* note 74, 125.

102 See P. MAYER, *Le phénomène de la coordination des ordres juridiques étatiques en droit privé*, *Recueil des cours* 327 (2007) 9 ff.; also D. YOKOMIZO, *Teishoku-hō no taishō tonaru ‘hō’ ni kansuru jakkan no kōsatsu: joron teki kentō* [Some reflections on the concept of ‘law’ as the object of conflict of laws], *Tsukuba Law Journal* 6 (2009) 19 ff.

103 R. MICHAELS, Preamble I, in: Vogenauer (ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2<sup>nd</sup> ed., Oxford 2015) para. 50.

104 Y. TAMEIKE, *Kokusai shihō kōgi* [Lecture on private international law] (3<sup>rd</sup> ed., Tōkyō 2005) 367; for the current state of discussion, see Y. NISHITANI, *Party Autonomy in Contemporary Private International Law – The Hague Principles on Choice of Law and East Asia*, *Japanese Yearbook of International Law* 59 (2016) 312 ff.

IV. DISPUTE RESOLUTION AND *LEX MERCATORIA*I. *Arbitration*a) *General Remarks*

Certain sectors with sophisticated self-regulation, such as ICANN and CAS, frequently have particular settings for dispute resolution. Otherwise, the framework of international commercial arbitration is often used for an autonomous dispute resolution in cross-border transactions. Arbitration in a narrow sense is a method of dispute resolution conducted by arbitrators as third parties, on the ground of the parties' agreement to arbitrate and be bound by the award rendered by the arbitrators. It is a kind of private judiciary.<sup>105</sup>

Particularly in Asia, international commercial arbitration is rapidly gaining importance along with its economic growth. Compared with litigation, advantages of arbitration lie in its simplicity, expeditiousness, expertise, confidentiality and flexibility.<sup>106</sup> Moreover, the cross-border effectiveness of arbitral awards is ensured by the 1958 New York Convention,<sup>107</sup> which has gained 157 Contracting States so far,<sup>108</sup> whereas the recognition and enforcement of Japanese judgments are generally prevented in China,<sup>109</sup>

105 K. YAMAMOTO/A. YAMADA, *ADR & chūsai-hō* [Alternative dispute resolution & arbitration law] (2<sup>nd</sup> ed., Tōkyō 2015) 290 ff.

106 YAMAMOTO/YAMADA, *supra* note 105, 291.

107 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958. Notably, the recognition and enforcement of foreign arbitral awards can also be effected pursuant to Art. 45 and 46 Japanese Arbitration Act and bilateral treaties, such as Art. 8 (4) of the 1974 China-Japan Trade Agreement. See Osaka District Court, 25 March 2011, Hanrei Jihō 2122, 106; Tōkyō District Court, 19 June 1995, Hanrei Timuzu 919, 252; Yokohama District Court, 25 August 1999, Hanrei Jihō 1707, 146. For further detail, see A. TAKAKUWA, *Kokusai shōji chūsai-hō no kenkyū* [Studies on international commercial arbitration law] (Tōkyō 2000) 163 ff.

108 See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

109 The People's Republic of China ("China") requires reciprocity for the recognition and enforcement of foreign judgments (see Arts. 281 and 282 of the Chinese Civil Procedure Code) except for divorce judgments. While the case law used to require international treaties to guarantee reciprocity (33 bilateral treaties serve this purpose), the position has softened to grant reciprocity if the foreign state has already recognized and enforced a Chinese judgment. This has happened so far with Germany, Singapore and the U.S. Due to lack of reciprocity so far, however, there is no mutual recognition and enforcement of foreign judgments between Japan and China or the Republic of Korea and China. The People's Supreme Court denied reciprocity with Japan in its answer of 26 June 1994 in the "*Gomi Akira*" case (1994 Question in civil matters No. 72), which was followed by the Intermediate People's Court of Dalian City in its decision of 5 November 1994. In response, Japanese courts also denied reciprocity with China

Indonesia, Thailand, Vietnam and India.<sup>110</sup> Nor does the judicial system of newly developing countries always guarantee transparency and certainty. Thus, Japanese companies often refer to arbitration abroad for their cross-border transactions in Asia.<sup>111</sup>

The most important venues for arbitration in Asia are China, Hong Kong and Singapore. According to the statistics from 2016,<sup>112</sup> the total number of new cases at CIETAC (China) was 2,183, out of which 485 were cross-border cases.<sup>113</sup> It is less than 1,050 at the AAA/ICDR (U.S.)<sup>114</sup> and 966 at the ICA (ICC arbitration),<sup>115</sup> but outnumbers 303 at the LCIA (U.K.).<sup>116</sup> Also the HKIAC (Hong Kong) received 460 new cases, out of which 262 were cross-border cases,<sup>117</sup> and the SIAC (Singapore) 343 new cases, of which 80% were international cases.<sup>118</sup> The 2015 survey of White & Case

(Art. 118 No. 4 of the Japanese Civil Procedure Code) and refused their recognition and enforcement. Osaka High Court, 9 April 2003, Hanrei Jihō 1841, 111; Tōkyō High Court, 25 November 2015 (see the lower court decision of Tōkyō District Court, 20 March 2015, 2015WLJPCA03208001).

For further detail, see Y. GUO, Country Report: The People's Republic of China, in: Chong (ed.), *Recognition and Enforcement of Foreign Judgments in Asia* (Singapore 2017) 56 ff.; Q. HE, The Recognition and Enforcement of Foreign Judgments between the United States and China: A Study of *Sanlian v Robinson*, *Tsinghua China Law Review* 6 (2013) 32 f.; W. ZHANG, Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the 'Due Service Requirement' and the 'Principle of Reciprocity', *Chinese Journal of International Law* 12 (2013) 152 ff.; *idem*, Recognition of Foreign Judgments in China: The Essentials and Strategies, *Yearbook of Private International Law* 15 (2013/14) 329 ff.; *idem*, Sino-Foreign Recognition and Enforcement of Judgments: A Promising 'Follow-Suit' Model?, *Chinese Journal of International Law* 16 (2017) 515 ff.

110 T. AWATA (ed.), *Asia kokusai shōji chūsai no jitsumu* [Practice of international commercial arbitration in Asia] (Tōkyō 2014) 64 ff.

111 The number of cases, in which Japan is chosen as the situs of arbitration, is very small. Even at the Japan Commercial Arbitration Association (JCAA) that is representative for cross-border cases, the total number of arbitration cases was limited to 16 (2016), 21 (2015), 14 (2014), 26 (2013), 15 (2012) and 22 (2011) (see [https://www.jcaa.or.jp/jcaa/docs/h28\\_1.pdf](https://www.jcaa.or.jp/jcaa/docs/h28_1.pdf)). For its background, see YAMAMOTO/YAMADA, *supra* note 105, 297 ff.

112 For comprehensive statistics, see <https://globalarbitrationnews.com/international-arbitration-statistics-2016-busy-times-for-arbitral-institutions/>.

113 China International Economic and Trade Arbitration Commission (<http://www.cietac.org/?l=en>).

114 American Arbitration Association/International Centre for Dispute Resolution (<http://www.icdr.org/>).

115 ICC International Court of Arbitration (<http://www.iccwbo.org/>).

116 London Court of International Arbitration (<http://www.lcia.org/>).

117 Hong Kong International Arbitration Centre (<http://hkiac.org/>).

118 Singapore International Arbitration Centre (<http://www.siac.org.sg/>).

on international arbitration<sup>119</sup> indicates that the most frequently chosen seats – outside the U.S. and China – were London (45% of the cases surveyed) and Paris (37%), whereas Hong Kong (22%) and Singapore (19%) were rapidly catching up. The HKIAC and SIAC are gaining popularity due to their legislation in favor of arbitration,<sup>120</sup> as well as the improvement of hearing facilities and local arbitral institutions and the availability of highly qualified arbitrators.<sup>121</sup>

Arbitration is a private adjudicatory mechanism. This justifies the arbitral tribunal rendering an award based on the law chosen by the parties, or even *ex aequo et bono* once entitled by the parties. Thus, in determining the law governing the merits of the dispute, extensive party autonomy has been granted in Article 28 (1) of the 1985 UNCITRAL Model Law (“Model Law”),<sup>122</sup> which also allows the choice of non-state law (“rules of law”).<sup>123</sup> The Model Law has been adopted in 78 States (109 jurisdictions),<sup>124</sup> including Germany and Japan. Article 36 (1) of the Japanese Arbitration Act follows the provision of Article 28 (1) Model Law.<sup>125</sup> Also the arbitration rules of the ICC<sup>126</sup> and other arbitral institutions grant a broad scope of choice of law, including the selection of non-state law.<sup>127</sup> Consequently, the eligibility

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119 White & Case and Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (see <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>).

120 For Singapore, see 2001 Arbitration Act, Chap. 10 (amended in 2002); 1994 International Arbitration Act, Chap. 143A (amended in 2002); for Hong Kong, see 2011 Arbitration Ordinance, Chap. 609 (amended in 2014); see J. CHOONG/R. WEERAMANTRY (eds.), *The Hong Kong Arbitration Ordinance. Commentary and Annotations* (2<sup>nd</sup> ed., Hong Kong 2015) para. 4.00 ff.; A. LO, *International Arbitration in Hong Kong*, in: Balthasar (ed.), *International Commercial Arbitration* (Munich et al. 2016) § 11, para. 70 ff.

121 See also G. CUNIBERTI, *The Laws of Asian International Business Transactions*, *Pacific Rim Law & Policy Journal* 25 (2016) 35 ff.

122 Art. 28 (1) of the UNCITRAL Model Law on International Commercial Arbitration of 21 June 1985 (with amendments adopted on 7 July 2006) (see <http://www.uncitral.org/>).

123 N. BLACKABY/C. PARTASIDES et al. (eds.), *Redfern and Hunter on International Arbitration* (6<sup>th</sup> ed., Oxford et al. 2015) para. 3.99.

124 See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html).

125 M. KONDO et al. (eds.), *Arbitration Law of Japan* (Tōkyō 2004) 193 ff.

126 Art. 21 (1) of the 2017 ICC Rules of Arbitration (see <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>)

127 See I. RADIC, *Feasibility Study on the Choice of Law in International Contracts – Special Focus on International Arbitration* (Preliminary Document No. 22 C of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the HCCH), available at <http://www.hcch.net/>; L. GAMA JR./G. SAUMIER,

of *lex mercatoria* as the law applicable to cross-border contracts is an established principle as regards international arbitration.<sup>128</sup>

However, whether the parties actually choose non-state law is a different question. According to the “UNI-Lex” database,<sup>129</sup> there were only 21 cases where the UPICC was applied upon explicit choice of the parties, whereas in 76 cases the arbitrators applied or indirectly referred to the UPICC in the absence of choice of law. Even the UPICC as a well-known, established and widely recognized instrument is seldom chosen in arbitration.<sup>130</sup> In commercial arbitration in Asia, cases choosing *lex mercatoria* are rare. Chinese law is usually chosen when the seat is China, and English law when the seat is Hong Kong or Singapore. In disputes between a U.S. company and an Asian company, New York law is chosen with a preferred seat in the U.S.<sup>131</sup> Despite the eligibility of non-state law in arbitration, the parties hesitate to deviate from the usual practice based on state law.

However, in certain sectors that have a developed form of self-regulation, such as in international swap transactions, the parties may well behave differently, selecting non-state law. Actually, in the case of the ICANN and CAS that have an established dispute resolution mechanism, *lex mercatoria* mostly serves as the norms of adjudication.<sup>132</sup>

#### b) *Relation to the State*

Among recent authors, the opinion that an autonomous legal order of arbitration is emerging independently of the conventional state legal order is gaining support.<sup>133</sup> Yet, although arbitration constitutes a private adjudicatory mecha-

Non-State Law in the (Proposed) Hague Principles on Choice of Law in International Contracts, *El derecho internacional privado en los procesos de integración regional* (San José 2011) 45 ff.; NISHITANI, *supra* note 104, 316 f.

128 See BLACKABY/PARTASIDES et al., *supra* note 123, para. 3.97 ff.; S. BALTHASAR (ed.), *International Commercial Arbitration* (Munich et al. 2016) § 1, para. 65.

129 <http://www.unilex.info/>.

130 See CALLIESS, *supra* note 6, 11; F. DASSER, *Mouse or Monster? Some Facts and Figures on the lex mercatoria*, in: Zimmermann (ed.), *Globalisierung und Entstaatlichung des Rechts*, Vol. 2 (Tübingen 2008) 139 ff.; R. MICHAELS, *The UNIDROIT Principles as Global Background Law*, *Uniform Law Review* 19 (2014) 643 ff.

131 CUNIBERTI, *supra* note 121, 35 ff.

132 Among the total number of 1,236 cases handled by the CAS, 644 cases concern football where usually the FIFA Rules are applied (see <http://jurisprudence.tas-cas.org/Shared%20Documents/Forms/PerSport.aspx>).

133 E. GAILLARD, *Aspects philosophiques du droit de l'arbitrage international* (Leiden/Boston 2008 [livre de poche]) 83 ff.; M. WELLER, *Mandatory Elements of the Choice-of-Law Process in International Arbitration: Some Reflections on Teubnerian and Kelsenian Legal Theory*, in: Gottschalk/Michaels/Rühl/von Hein (eds.), *Conflict of Laws in a Globalized World* (Cambridge et al. 2007) 256 ff.

nism, it is not an entirely stand-alone, self-sufficient legal institution. Rather, the state provides assistance *ex ante*, where necessary, and also controls *ex post*. The state court can, in particular, be asked to appoint arbitrators,<sup>134</sup> determine the authority of the arbitral tribunal,<sup>135</sup> order evidence submission<sup>136</sup> or interim measures.<sup>137</sup> Furthermore, arbitral awards that have serious defects can exceptionally be set aside by the court of the seat under strict conditions.<sup>138</sup> Once an arbitral award is rendered, enforcement as a coercive measure can only be effected by the state.<sup>139</sup> Thus, the system of arbitration is grounded on cooperation and coordination with the state legal system.

Although the self-regulation by *lex mercatoria* has various advantages, an absolute autonomy of the parties would allow circumvention of any mandatory rules and undermine the regulatory authority of the state.<sup>140</sup> Even in cross-border transactions, public interest ought to be recognized, where necessary.<sup>141</sup> It is generally acknowledged that arbitral tribunals have, just like the judiciary of the state, the authority and duty to exclude an inappropriate governing law in light of public policy and to apply or give effect to overriding mandatory rules for the sake of public interest and social, political or economic order. The U.S. Supreme Court and the European Court of Justice have confirmed the applicability of anti-trust law by arbitral tribunals,<sup>142</sup> which seems to be followed in practice.<sup>143</sup> As a result, the state law cooperates and coordinates with the legal order of arbitration, while upholding the regulatory authority inherent in the state.

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134 Art. 9 Model Law; Art. 17 (5)(6) Japanese Arbitration Act.

135 Art. 11 (4)(5) Model Law; Art. 23 (5) Japanese Arbitration Act.

136 Art. 16 (3) Model Law; Art. 35 Japanese Arbitration Act.

137 Art. 27 Model Law; Art. 15 Japanese Arbitration Act.

138 Art. 44 Japanese Arbitration Act; for a conflict of interests case, see Japanese Supreme Court, 12 December 2017, Saiban-sho Jihō 1690, 6.

139 Art. 45 and 46 Japanese Arbitration Act.

140 G.-P. CALLIESS/M. RENNER, *Between Law and Social Norms: The Evolution of Global Governance*, *Ratio Juris* 22-2 (2009) 272 ff.

141 Traditional conflict of laws method of public policy to exclude the application of an inappropriate law, or the unilateral application of or reference to overriding mandatory rules or *lois de police* ought to be guaranteed. For an excellent analysis of the interaction between party autonomy and regulation, see S. FRANCO, *Party Autonomy and Regulation – Public Interests in Private International Law*, *Japanese Yearbook of International Law* 59 (2016) 251 ff.

142 U.S. Supreme Court, 2 July 1985, 473 U.S. 614 [*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*]; see also U.S. Court of Appeal (9th Cir), 30 April 1999, 175 f. 3d 716 [*Simula, Inc. v. Autoliv, Inc.*]; CJEU, 1 June 1999, Case C-126/97 [*Eco Swiss Ltd. v Benetton International NV*].

## 2. Litigation

### a) Choice of Non-State Law

Unlike in arbitration, the state has generally not yet accepted the choice of non-state law in litigation, even though academics are becoming more responsive to it.<sup>144</sup> The majority of Japanese authors deny the choice of non-state law, on the grounds that mandatory rules should not be circumvented, the function of private international law is limited to resolving conflicts of state laws, or the wording of Article 7 AGRAL that allows choice of law solely designates territorial state law.<sup>145</sup>

Also in other countries, the right to choose non-state law has generally not yet been granted.<sup>146</sup> In enacting the Rome I Regulation,<sup>147</sup> the European Commission proposed in 2005 that the parties be entitled to also choose

143 CALLIESS/HOFMANN/MERTENS, *supra* note 40, 11. It is, however, still disputed whether the seat of arbitration, the expected place of enforcing the arbitral award or any other place ought to provide the criteria for public policy or overriding mandatory rules.

144 For Japanese authors, see T. MORISHITA, *Kokusai shō-torihiki ni okeru hi-kokka-hō no kinō to tekiyō* [Functioning and application of non-state law in cross-border commercial transactions], *Kokusai-hō Gaikō Zasshi* 107-1 (2008) 35 ff.; S. NAKANO, *Hi-kokka-hō no junkyo-hō tekikaku-sei: kokusai shihō-teki sokumen kara mita lex mercatoria* [The eligibility of non-state law: *Lex mercatoria* from a viewpoint of private international law], CDAMS Discussion Paper (2004) 6 ff., available at <http://www.lib.kobe-u.ac.jp/repository/80100028.pdf>; N. TAKASUGI, *Kokusai shihō ni okeru shin-yōjō tōitsu kisoku no toriatsukai* [The treatment of the uniform customs and practice for documentary credits in private international law], *Tezukayama Hōgaku* 5 (2001) 111 ff.; *idem*, *Kokusai kaihatsu keiyaku to kokusai shihō: anteika jōkō no yūkō-sei to hi-kokka-hō no junkyo-hō tekikaku-sei* [Cross-border development contracts and private international law: stabilization clause and the applicability of non-state law], *Ōsaka Daigaku Hōgaku* 52 (3/4) (2002) 1022 f.; M. YAMATE, *Lex mercatoria ni tsuite no ichi-kōsatsu: sono seisei to tenkai oyobi tekiyō process* [A reflection on *lex mercatoria*: Its emergence and developments as well as the application process], *Hōgaku Zasshi* 33 (3) (1987) 539 ff.; *idem*, *Lex mercatoria ni tsuite: kokusai torihiki keiyaku kisei-kihan no dokuji-sei to sono hōteki seishitsu* [*Lex mercatoria*: The independency of legal norms governing international commercial contracts and their legal nature], *Tōhoku Gakuin Daigaku Ronshū* 34 (1989) 131 ff.; for further reference, see NISHITANI, *supra* note 104, 336 ff.

145 See, *inter alia*, Y. NAKANISHI, *Article 7* [Art. 7 AGRAL], in: Sakurada/Dogauchi (eds.), *Chūshaku kokusai shihō* [Commentary on private international law], Vol. 1 (Tōkyō 2011) 188 ff.; M. DOGAUCHI, *Kokusai keiyaku jitsumu no tame no yobō hōgaku: junkyo-hō, saiban kankatsu, chūsai jōkō* [Preventive jurisprudence for international contractual practice: Applicable law, adjudicatory jurisdiction and arbitration clause] (Tōkyō 2012) 38, 88 ff.; TAKAKUWA, *supra* note 29, 70 ff.; J. YOKOYAMA, *Kokusai shihō* [Private international law] (Tōkyō 2012) 164.

“the principles and rules of the substantive law of contract recognized internationally or in the Community”, which included the UPICC and PECL in addition to the envisaged optional instrument of the EU.<sup>148</sup> Yet, because this proposal was ultimately discarded due to the objection of the Council, European authors see generally no more room for the choice of non-state law under Rome I.<sup>149</sup> Also case law in various countries, including that of England,<sup>150</sup> have generally denied the eligibility of non-state law.

Nevertheless, it ought to be considered that party autonomy is a particular conflicts rule to subjectively designate the applicable law by relying on the parties’ intent. Once the legislature takes a policy decision to qualify non-state law as eligible applicable law, there is no preemptive argument against it.<sup>151</sup> The admissibility of a choice of non-state law in arbitration can logically be extended without much ado to litigation.

The choice of *lex mercatoria* also makes sense as regards commercial contracts that are largely determined by the autonomy of the parties in substantive law. The choice of non-state law used to be criticized for authorizing “private legislation” or creating “*contrats sans loi*”, as it would allow the parties to circumvent any mandatory rules to govern their contract.<sup>152</sup> In international contracts, however, there is no predetermined single applicable law indicating their centre of gravity, so a *fraus legis* cannot be an is-

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146 See R. MICHAELS, Preamble I: Purpose of the PICC, in: Vogenauer/Kleinheisterkamp (eds.), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (Oxford 2009) para. 49 ff.

147 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *O.J.* 2008, L 177/6.

148 Art. 3 (2) of the European Commission Proposal (Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), 15.12.2005, COM (2005) 650 final, 2005/0261 (COD)).

149 Cf. Recital 13 Rome I; see A. V. DICEY/J. H. C. MORRIS/L. COLLINS, *Conflict of Laws*, Vol. 2, (15<sup>th</sup> ed., London 2012) para. 32-039 ff., 049 ff.; R. PLENDER/M. WILDERSPIN, *The European Private International Law é of Obligations* (4<sup>th</sup> ed., London 2015) para. 6-011 ff.; P. MAYER/V. HEUZÉ, *Droit international privé* (11<sup>th</sup> ed., Paris 2014) para. 740 ff.; D. BUREAU/H. MUIR WATT, *Droit international privé* (3<sup>rd</sup> ed., Paris 2014) para. 896; *Nomos-Kommentar/LEIBLE*, *Rom-Verordnungen*, Vol. 6 (Baden-Baden 2014) Art. 3 Rome I, para. 34; C. REITHMANN/D. MARTINY, *Internationales Vertragsrecht* (7<sup>th</sup> ed., Cologne 2010) para. 98 ff.

150 *Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain EC* [2004] 4 All ER 1072 (Islamic law); *Halpern v Halpern* [2006] 3 All ER 1139 (Jewish law). However, for arbitration, the choice of Islamic law has been approved. See *Musawi v R.E. International (UK) Ltd et al.* [2007] EWHC 2981 (Ch).

151 TAMEIKE, *supra* note 104, 367.

152 MAYER/HEUZÉ, *supra* note 149, para. 740.

sue.<sup>153</sup> Even under the current private international law system, the parties can select any state law, without questioning its completeness, modernity or legitimacy, and exclude *de facto* a number of mandatory rules by choosing more than one law (“*dépeçage*”). The choice of *lex mercatoria* does not create a legal vacuum, as non-state law itself substitutes state law and is provided with legally binding force by the mandate of private international law.<sup>154</sup> Thus, the parties’ intent no longer merely qualifies as a factor connecting the legal relationship with the governing legal system, but the foundation for non-state norms to become “applicable”.

Furthermore, the choice of *lex mercatoria* provides practical advantages. It serves to accommodate the parties’ needs and expectations in cross-border transactions by providing neutral, suitable and predictable norms in the relevant sectors,<sup>155</sup> which will ultimately reduce the transaction cost.<sup>156</sup> Unlike in the 1960s where the discussion on *lex mercatoria* flourished by *Goldman* and *Schmitthoff*, the UPICC or the PECL have existed since the 1990s, and constitute a complete set of reasonable contractual rules adapted for private ordering. The eligibility of pluralistic non-state norms may well enhance normative competition through interactions of private actors, possibly resulting in an integration or convergence of concurring norms over the longer term.<sup>157</sup> Arguably, accepting the choice of *lex mercatoria* is an

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153 Cf. R. MICHAELS, Die Struktur der kollisionsrechtlichen Durchsetzung einfach zwingender Normen, in: Liber Amicorum Claus Schurig zum 70. Geburtstag (Munich 2012) 191 ff.

154 L. G. RADICATI DI BROZOLO, Non-National Rules and Conflicts of Laws: Reflections in Light of the UNIDROIT and Hague Principles, *Rivista di diritto internazionale private e processuale* 48 (2012) 858; G. SAUMIER, Designating the UNIDROIT Principles in International Dispute Resolution, *Uniform Law Review* 17 (2012) 542 f.

155 O. LANDO, The Draft Hague Principles on the Choice of Law in International Contracts and Rome I, in: *Mélanges en l’honneur de Hans van Loon* (Cambridge et al. 2013) 306; B. FAUVARQUE-COSSON, Un nouvel instrument du droit souple international. Le ‘projet de Principes de la Haye sur le choix de la loi applicable en matière de contrats internationaux’, *Dalloz* 2013, p. 2187.

156 P. ZUMBANSEN, *Lex mercatoria: Zum Geltungsanspruch transnationalen Rechts*, *The Rabel Journal of Comparative and International Private Law (RabelsZ)* 67 (2003) 673; J. BASEDOW, *Lex Mercatoria* and the Private International Law of Contracts in Economic Perspective, in: Basedow/Kono (eds.), *An Economic Analysis of Private International Law* (Tübingen 2006) 60 ff.

157 See G. RÜHL, The Choice of Law Framework for Efficient Regulatory Competition in Contract Law, in: Eidenmüller (ed.), *Regulatory Competition in Contract Law and Dispute Resolution* (Munich et al. 2013) 291 ff. However, *Vogenaue* indicates that such regulatory competition is not occurring in the field of contract law. S. VOGENAUE, *Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence*, *European Review of Private Law* 21 (2013) 13 ff.

appropriate method to deal with global legal pluralism and prescribe cross-border commercial transactions.<sup>158</sup>

In fact, the 1994 Mexico Convention, which is in force in Mexico and Venezuela, is often understood as allowing the designation of non-state law *per se*,<sup>159</sup> so is the 2001 statute of the State of Oregon in the U.S.<sup>160</sup> Some court decisions in Tunisia and Columbia,<sup>161</sup> as well as in Switzerland,<sup>162</sup>

158 See, *inter alia*, J. BASEDOW, *The Law of Open Societies: Private Ordering and Public Regulation of International Relations: General Course on Private International Law*, *Recueil des cours* 360 (2013) 200 ff.; *idem*, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws* (Leiden 2015) paras. 254 ff.; K. BOELE-WOELKI, *Party Autonomy in Litigation and Arbitration in View of the Hague Principles on Choice of Law in International Commercial Contracts*, *Recueil des cours* 379 (2016) 68; NISHITANI, *supra* note 104, 339 ff.

159 *Inter-American Convention on the Law Applicable to International Contracts*, signed at Mexico, D.F., Mexico, on 17 March 1994. The authors who assert the choice of non-state law rely on Art. 9 (2) and Art. 10 of the Mexico Convention. F. K. JUENGER, *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons*, *American Journal of Comparative Law* 42 (1994) 391 ff.; *idem.*, *Contract Choice of Law in the Americas*, *American Journal of Comparative Law* 45 (1997) 204 ff.; *idem.*, *The lex mercatoria and private international law*, *Uniform Law Review* 5 (2000) 182 ff.; D. P. FERNÁNDEZ ARROYO, *Derecho internacional privado interamericano: Evolución y perspectivas* (Buenos Aires 2003) 60 ff.; L. GAMA Jr., *Contratos internacionais à luz dos Princípios do UNIDROIT 2004: soft law, arbitragem e jurisdição* (Rio de Janeiro et al. 2006) 431 ff.; J. A. MORENO RODRÍGUEZ, *Los contratos y La Haya: ¿ancla al pasado o puente al futuro?*, in: Basedow et al. (eds.), *¿Cómo se codifica hoy el derecho comercial internacional?* (Asunción/Paraguay 2010) 321 ff. Notably, however, there are also authors who deny the eligibility of non-state law on the ground of Art. 17 of the Mexico Convention. N. DE ARAUJO, *Contratos internacionais. Autonomia da vontade: Mercosul e convenções internacionais* (3<sup>rd</sup> ed., Rio de Janeiro et al. 2004) 192 ff.; A. BOGGIANO, *Curso de derecho internacional privado. Derecho de las relaciones privadas internacionales* (4<sup>th</sup> ed., Buenos Aires 2003) 698 ff.

160 *Oregon Revised Statutes* 81.120 (2001), *Comments* 3 to Section 7 (reprinted in: James A.R. Nafziger, *Oregon's Conflicts Law Applicable to Contracts*, *Willamette Law Review* 38 (2002) 421); S. C. SYMEONIDES, *Codifying Choice of Law for Contracts: The Oregon Experience*, *The Rabel Journal of Comparative and International Private Law (RabelsZ)* 67 (2003) 737 ff.; MICHAELS, *supra* note 103, para. 70; *idem.*, *Non-State Law in the Hague Principles on Choice of Law in International Commercial Contracts ("Non-State Law")*, in: Purnhagen/Rott (eds.), *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Heidelberg et al. 2014) 45 ff.

161 For the choice of the UCP 400 in Tunisia, see *Court d'appel de Tunis*, 9 April 2001 (décision n° 48119), *Journal du droit international* 2005, p. 1067, note *Sami Bostanji*; for the eligibility of non-state law in general in Columbia, see *Corte Suprema de Justicia*, 21 February 2012 (n° 11001-3103-040-2006-00537-01, available at <http://www.unilex.info/case.cfm?id=1709>).

have granted the choice of non-state law. In 2015, the HCCH adopted the “Hague Principles on Choice of Law in International Commercial Contracts” (HP)<sup>163</sup> as the first non-binding instrument and granted the right to choose non-state law (Art. 3 HP). While Article 3 HP restricts the eligible non-state law to the “rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules” like the CISG or UPICC,<sup>164</sup> the 2015 statute of Paraguay that incorporated the HP removed these requirements and granted the eligibility of any non-state law for the sake of legal certainty and predictability.<sup>165</sup> Currently, the Australian Parliament is contemplating implementing the HP.<sup>166</sup> The outcome is being awaited with great interest and curiosity.

*b) Coordination with Arbitration*

As a result of these developments, the possibility of choice of *lex mercatoria* established in arbitration has been gradually extended to litigation. This will also avoid non-state law holding an elusive position depending on the dispute resolution mechanism. This accords with the recent tendency in international commercial arbitration, which generally provides for adversarial proceedings to guarantee the parties’ right to be heard and renders an award not *ex aequo et bono* but on a legal basis, coming closer to litigation.<sup>167</sup>

Notably, some jurisdictions have started providing new dispute resolution mechanisms that transcend the conventional threshold between litigation and arbitration. In addition to particular commercial courts that exist in Switzerland and other countries,<sup>168</sup> the Singapore International Commercial

162 See *supra* note 59.

163 Available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=135](http://www.hcch.net/index_en.php?act=conventions.text&cid=135); for a detailed analysis, see NISHITANI, *supra* note 104, 309 ff. (with further references).

164 Commentary to the Hague Principles on Choice of Law in International Commercial Contracts, para. 3.4 ff.; for a thorough criticism of this provision, see MICHAELS, Non-State Law, *supra* note 160, 56 ff.

165 Paraguay Ley n° 5393-2015 sobre derecho aplicable a los contratos internacionales, *Gaceta Oficial* n° 13, 20 January 2015.

166 Australia’s Accession to the Convention on Choice of Court Agreements (The Hague, 30 June 2005), [2016] ATNIF 23, National Interests Analysis [2016] ATNIA 7 with attachment on consultation.

167 Y. TANIGUCHI/I. SUZUKI, *Kokusai shōji chūsai no hō to jitsumu* [Law and practice of international commercial arbitration] (Tōkyō 2016) 19 ff.

168 Commercial Court of Zurich has two professional judges and three representatives of the trade and industry as “commercial judges”. DASSER, *supra* note 130, 132. A similar system is being contemplated in Germany (Bundestag Document No. 17/2163). CALLIESS/HOFFMAN/MERTENS, *supra* note 40, 14.

Court (SICC)<sup>169</sup> is a remarkable court system specialized in cross-border commercial transactions. The SICC has even appointed, beside a number of Singaporean judges, also foreign judges from Japan, Hong Kong, England, Australia and France to make its judiciary internationally balanced and attractive to business communities in the world.

Furthermore, the United Arab Emirates (UAE) established the Dubai International Financial Centre (DIFC) Courts in 2004 and the DIFC-LCIA Arbitration Centre in 2008.<sup>170</sup> The DIFC Courts are authorized to convert DIFC-LCIA arbitral awards into DIFC judgments to facilitate their enforcement within the UAE. What is more, in 2015 the UAE introduced a mechanism that allows DIFC Courts to convert their judgments into an arbitral award upon the parties' agreement,<sup>171</sup> with a view to ensuring its enforcement abroad pursuant to the 1958 New York Convention. Once provided with appropriate settings to efficiently enforce judgments, state courts may well play a comparably important role as arbitral tribunals in cross-border transactions.

The phenomenon that the arbitration and state judiciary cross over and cooperate represents the relativization of state sovereignty and the constitution of private legal order in the era of globalization. This may well be a plausible ground to extend the eligibility of *lex mercatoria* also to state courts.

## V. CONCLUSION

As this paper expounded, *lex mercatoria* as autonomous, self-regulatory norms created by non-state actors may well cooperate with or complement state law.<sup>172</sup> With the increasing importance of non-state norms, some authors even talk about the emergence of autonomous transnational legal order outside the realm of the state.<sup>173</sup> As in the case of the ICANN and the CAS, there are a growing number of sectors that are better administered by non-state actors through self-regulation than by the state, owing to their expertise, efficiency and acceptance within the relevant sector. In such close-knit closed communities, dispute resolution may well better function

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169 Singapore International Commercial Court (SICC), available at <http://www.sicc.gov.sg/>.

170 The DIFC Courts were established by the Law No. 12 of 2004 of the United Arab Emirates (UAE) (see <http://difccourts.ae/>). Furthermore, the DIFC-LCIA Arbitration Centre was established in 2008 as a joint-venture between the DIFC and the London Court of International Arbitration (LCIA) (see <http://www.difc-lcia.org/>).

171 See DIFC Courts Practice Direction No. 2 of 2015 ("Referral of Judgment Payment Disputes to Arbitration"), available at <http://difccourts.ae/>.

172 KANSAKU, *supra* note 29, 71 ff.

173 MUIR WATT, *supra* note 2, 390 ff.

through their internal informal settings rather than outside mechanisms of arbitration or litigation.<sup>174</sup>

However, the existence of such high profile *lex mercatoria* seems to be limited to certain sectors. Even today, the usual conduct of transactions or prevalent business models may still be very much influenced by local practice and customs. In automobile production in Japan, for example, *Toyota* is locally established and has small companies in the local area depending on and producing parts for *Toyota* as the giant enterprise, even though the final products are sold in global markets. *Nissan*, on the other hand, is integrated in the global supply chain, so its commercial transactions are geared toward international clients.<sup>175</sup> Arguably, the emergence of uniform transnational commercial law is sectorial. It very much depends on the size of the community and the homogeneity of the participating members.<sup>176</sup>

It cannot yet be predicted whether the denationalization and juxtaposition of various non-state norms will lead to legal fragmentation without a fixed hierarchy of norms or focal point, as *Teubner* observes.<sup>177</sup> It is, however, safe to assume that private international law can play a role to resolve conflicts of norms between state law and non-state law, or among various non-state norms in pluralistic communities.<sup>178</sup> At the same time, even

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174 See the U.S. case studies on the diamond and cotton industry at L. BERNSTEIN, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, *Journal of Legal Studies* 21 (1992) 115 ff.; *idem*, *Private Commercial law in the Cotton Industry: Value Creation through Rules, Norms, and Institutions*, *Michigan Law Review* 99 (2001) 1724 ff.; also as to the dispute resolution mechanism for farmers in Shasta County, see R. ELLICKSON, *Order Without Law: How Neighbors Settle Disputes* (1991).

175 As Feldman presents (E. A. FELDMAN, *The Tuna Court: Law and Norms in the World's Premier Fish Market*, *California Law Review* 94 (2006) 313 ff.), the Tuna Court at the *Tsukiji* Wholesale Market in Tōkyō is a semi-official adjudicatory setting under the auspices of the Tōkyō Metropolitan Government. Tuna traders with troubles in transactions at the famous *Tsukiji* Market can refer to the Tuna Court located within the marketplace, where a decision is rendered immediately by experts. The dispute resolution functions well. Tōkyō Metropolitan Wholesale Market Sanitation Inspection Station, Inspection Division at the *Tsukiji* Market (<http://www.fuku.shihoken.metro.tokyo.jp/itiba/kensajo/sum10.html>).

176 FUJITA/MATSUMURA, *supra* note 64, 14 ff.

177 TEUBNER, *supra* note 71, 15; FISCHER-LESCANO/TEUBNER, *Regime*, *supra* note 82, 57 ff.

178 P. SCHIFF BERMAN, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (Cambridge et al. 2012) pp. 41 ff.; MUIR WATT, *supra* note 2, 390 ff.; D. YOKOMIZO, *Global-ka jidai no teishoku-hō* [Conflict of laws in the era of globalization], in: Asano et al. (eds.), *Global-ka to kōhō/shihō kankei no saihen* [Globalization and the restructuring of the relationship between public law and private law] (Tōkyō 2015) 111 ff.

though an exclusive governance of sovereign states cannot be expected, the authority and regulatory functions of the states ought to be secured through coordination and cooperation with non-state actors in light of global justice.<sup>179</sup> This would require rethinking methods of global governance to safeguard fundamental values and public interest, as the slogan says “from government to governance”.<sup>180</sup>

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179 See the contributions at: *Kokkyō o koeru seigi – sono genri to seido* [Justice beyond state borders – Its principles and institutions], *Hō-tetsugaku nenpō* [The Annals of Legal Philosophy] 2012, pp. 1 ff.

180 ZUMBANSEN, *supra* note 3, 81 ff.