Do Codification and Private International Law Leave Room for a New Law Merchant?

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Imagine that merchants from two different countries—let us say the United States and France—enter into a contract. What law governs their transnational business transaction? One possibility is the law of some country—for instance, the law of the country of which one of the merchants is a citizen, or perhaps the law of a third country that both merchants have selected. Alternatively, their contract could be governed by a distinctive body of international business law that is not tied to any single nation-state. Such a body of law has been variously dubbed the “new law merchant” and “modern lex mercatoria” by many of its contemporary proponents.¹

Though a rose by any other name may still be a rose, the moniker lex mercatoria has proven to be of particular significance within the scholarly community. One group of scholars has claimed that a distinctive body of merchant law known as lex mercatoria dates back to the middle ages, if not to Roman times.² This distinguished historical pedigree has been used to bolster the case for the new law merchant.³ Others have challenged the linkage between the new law merchant and the lex mercatoria of old by arguing that there is no historical evidence that there ever was a law merchant.⁴ If true, this would mean that there is no precedent with which the new law merchant can ally itself.

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¹ See, for example, Klaus Peter Berger, The Creeping Codification of the Lex Mercatoria 10–14, 32–33 (Kluwer Law Int'l 1999). As will be discussed below, lex mercatoria has been said to serve other purposes.

² See id; Charles Donahue, Jr., Medieval and Early Modern Lex mercatoria: An Attempt at the probatio diabolica, 5 Chi J Intl L 21 (2004) (reporting this view of the lex mercatoria, but ultimately expressing doubt as to whether the lex mercatoria ever existed as an historical matter).

³ See, for example, Berger, The Creeping Codification at 1–2 (cited in note 1).

⁴ See, for example, Donahue, 5 Chi J Intl L at 21 (cited in note 2).
Professor Fassberg’s intriguing and excellent paper contests the connection between the new law merchant and historical lex mercatoria in a novel, jurisprudential manner. She makes the elegant point that the method of advancing the new law merchant that is advocated by some of its most important contemporary proponents—codification of the modern lex mercatoria—is inconsistent with these proponents’ conception of the historical lex mercatoria. Specifically, whereas the historical lex mercatoria is claimed to have been a spontaneous creation of the merchants themselves that reflected merchant needs and norms, codification is a product of non-merchants (mostly lawyers) that primarily utilizes established legal techniques for identifying lex mercatoria’s content. Moreover, whereas the historical lex mercatoria typically is described as having been independent of national legal systems, the substantive content of the proposed code of lex mercatoria comprises traditional legal principles that are found in national legal systems.

Professor Fassberg’s argument is a fatal blow against the attempt to ground the new law merchant on the precedent of a historical lex mercatoria characterized as a body of spontaneous, merchant-created norms and practices that stands apart from national legal systems. One must be careful, however, not to misread Professor Fassberg’s paper as standing for the proposition that codification is per se incompatible with all plausible conceptions of what constituted the essential core of the historical lex mercatoria. Indeed, a casual examination of the lex mercatoria literature discloses three distinct goals that lex mercatoria has been said to advance, only one of which is undermined by Professor Fassberg’s jurisprudential argument.

Let us begin by identifying three different conceptions of what constituted the historical lex mercatoria. First, lex mercatoria has been hailed as having comprised novel business solutions that addressed challenges unique to international merchants that traditional law was unable to resolve.

Second, lex mercatoria has been said to refer not to substantive law, but to the streamlined dispute resolution processes that were required by itinerant merchants who

6 The techniques include comparative legal analysis. See, for example, Berger, The Creeping Codification at 210–11 (cited in note 1).
7 See Fassberg, 5 Chi J Intl L at 67 (cited in note 5).
8 For instance, scholars with as divergent approaches to lex mercatoria as Charles Donahue and Emily Kadens concurred at this conference that bills of exchange were a new creation, outside the framework of traditional sources of local law, and necessitated by the trade patterns of medieval itinerant merchants.
Codification, Choice of Law, and the New Law Merchant

Stayed only briefly in any single location. Third, it has been said that *lex mercatoria* was the solution to the choice-of-law difficulty that otherwise would have arisen when parties from multiple jurisdictions transacted. On this view, *lex mercatoria* was a body of law distinct from any single national legal system that governed such multi-jurisdiction transactions.

Now consider the relationship each of these conceptions of *lex mercatoria* bears to the related claims that *lex mercatoria* was a spontaneous creation of merchants that stood apart from national legal systems. The notion that *lex mercatoria* was the spontaneous creation of merchants themselves—a conception that seems inconsistent with contemporary efforts to codify a new law merchant—has some conceptual affinity with the conception of *lex mercatoria* as a source of novel substantive solutions. After all, if traditional sources of law were unable to provide the needed solutions, it is plausible to suggest that the merchants solved the problems themselves, and in so doing created a body of "law" that was independent of the state. Whether merchant law is created spontaneously by merchants, however, is wholly irrelevant to the conception of historical *lex mercatoria* as a streamlined dispute-resolution system. Similarly, if historical *lex mercatoria* short-circuited choice-of-law difficulties by providing a single body of law that governed transnational transactions, then the fact that the authors of the modern *lex mercatoria* are lawyers rather than merchants does not undercut the claim that the new law merchant is a descendent of the historical law merchant. Moreover, as will shortly be elaborated, it is possible to have a legal system that is both independent of national legal systems (in the sense of being a distinct, anational body of law that applies to multi-jurisdiction transactions, thereby eliminating choice-of-law problems) and that draws its principles from national legal systems. Accordingly, the fact that the new law

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11 Of course, even within the conception of *lex mercatoria* as having provided novel substantive solutions, it is not logically necessary that the solutions arose from merchants themselves. Solutions could have come from scholars or practicing attorneys, for example.

12 I put the term "law" in quotation marks in recognition of the fact that this might not be understood as being real law under all schools of jurisprudence. See, for example, John Austin, *Province of Jurisprudence Determined* 30 (Prometheus 2000) ("[C]ustomary laws, considered as positive law, are not commands. And, consequently, customary laws, considered as positive law, are not laws or rules properly so called."). This Comment declines to adopt an Austinian conception of law.

13 See below at 87.
merchant is drafted by lawyers and comprises legal principles drawn from national legal systems does not necessarily mean that the new law merchant is unrelated to the historical *lex mercatoria* conceptualized as a solution to choice-of-law quandaries.

Given the murky historical record, it might be useful to de-couple the “historical” *lex mercatoria* from the contemporary law merchant and to ask two functional questions: Is there a need for a new law merchant? If so, does codification cut against the modern *lex mercatoria*’s satisfaction of these wants? Though Professor Fassberg did not aim to answer these functional questions, her paper sheds important light on them. After explaining how, I hope to foreclose a possible misreading of Professor Fassberg’s analysis, which (mistakenly) could be read as providing a firm “no” to the first question and a “yes” to the second.\(^{14}\)

First, Professor Fassberg makes the important point that contemporary choice-of-law doctrines almost always respect party autonomy. If the contract indicates that the transaction is to be governed by French law, or even by an identifiable set of rules that are not the creation of any particular country, courts typically will honor the parties’ election.\(^{15}\) The target of Professor Fassberg’s comment is an important *lex mercatoria* proponent who has overstated the unpredictability of contemporary choice-of-law doctrines in his effort to show a need for a new law merchant,\(^{16}\) and her critique is well taken.

But does choice-of-laws’ party autonomy principle eliminate the need for a new law merchant as a functional matter? Not necessarily. To begin, party autonomy has no bearing on *lex mercatoria* as a provider of novel substantive solutions. If there indeed are unique problems faced by merchants that ordinary law has not yet resolved—and I take no position on the ultimately empirical question of whether this is so—then the private international law rules concerning party autonomy do not undercut the need for a modern *lex mercatoria*.

Moreover, even if contemporary law contains all solutions to the challenges faced by international merchants, there might be benefits to a uniform substantive law merchant that jettisoned the need for the parties to choose which law should apply. Unfettered choice among numerous options could lead to high transaction costs associated with legal research (as each party tries to identify the law most favorable to its side of the transaction) and negotiation; it might be cheaper and more efficient if there were a single, widely recognized

\(^{14}\) Although a “no” to the first question technically makes the second question irrelevant, Professor Fassberg’s paper was not directed to answering the functionalist questions raised here and could be understood as providing an answer to the second question as well as a response in the negative to the first.

\(^{15}\) See Fassberg, 5 Chi J Intl L at 73–76 (cited in note 5).

\(^{16}\) See id at 75 (criticizing Klaus Peter Berger).
body of law that governed international transactions. Furthermore, there might be information asymmetries, asymmetries in bargaining power, and the like that counsel against a regime in which the parties to the transaction are left to “choose the law that is to govern them.”

Finally, there remain uncertainties as to which substantive law will be applied under the contemporary private international law rules of party autonomy. Nomenclature notwithstanding, private international law is a matter of domestic law and accordingly varies from country to country. Moreover, the law of virtually all countries permits a court to refuse to apply a foreign law, even one chosen by the parties, if enforcement would violate the “public policy” of the jurisdiction in which the lawsuit is brought. Also, some countries require that there be some connection between the chosen law and the forum. These aspects of private international law generate uncertainties as to whether a body of law selected by the parties will in fact be applied, leading to litigation and other related inefficiencies. Such costs could be lessened, if not eliminated, if a uniform body of substantive merchant law governed international transactions.

Consider next whether codification functionally undermines the benefits that the new law merchant might provide. Professor Fassberg notes that one prominent scholar has propounded a code that comprises seventy-eight principles, all of which are found in national legal systems. Such a dependence no doubt undermines a conception of modern lex mercatoria as the provider of novel substantive solutions to problems unique to international merchants. That the principles are found in national systems, however, does not thwart modern lex mercatoria’s potential for providing a uniform substantive law that

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17 For what may appear to be a contrary view that stresses the efficiency benefits of party autonomy in domestic choice of law, see Erin A. O’Brien and Larry E. Ribstein, From Politics to Efficiency in Choice of Law, 67 U Chi L Rev 1151 (2000). O’Brien and Ribstein’s analysis, however, compares the costs of party autonomy against the costs of a system in which there are multiple systems of law that potentially could govern, not only one (as would be the case with lex mercatoria). For that reason, their analysis would not appear to bear upon the present discussion.

18 The description of international choice-of-law principles that follows in this paragraph is drawn from Professor Fassberg’s clear description of the black letter law of private international law. See Fassberg, 5 Chi J Intl L at 73–76 (cited in note 5).

19 It is less likely that any single country would find that such a body of law violated its public policy.

20 See Fassberg, 5 Chi J Intl L at 79 n 35 (cited in note 5).

21 Codification has an uncertain effect on lex mercatoria understood as a system of streamlined dispute resolution. If the decisionmakers viewed the code as a checklist of factors that might be taken into account, then codification need not complicate the decisionmaking process. On the other hand, streamlined resolution would suffer if decisionmakers labored to determine how the competing principles found in the list ought to be harmonized and sought to create a system of precedent so as to obtain consistent results across disputes.
short-circuits the choice-of-law challenges that otherwise would inhere in such multi-jurisdiction transactions.\textsuperscript{22}

This might seem paradoxical. One might ask, “How could a list of principles derived from national legal systems be the basis for the creation of a body of uniform substantive law that stands apart from national legal systems such that it could be the anational law that governs transnational transactions?”

The answer is that what characterizes a substantive legal system is not just the principles it endorses, but the scope that is given to each principle. The latter includes how competing principles are harmonized when they come into conflict with one another. For instance, while the legal systems of both Germany and the United States contain free speech principles, the scope of this principle is far broader in the US.\textsuperscript{23} For an example closer to home, consider the Indian Civil Rights Act (“ICRA”).\textsuperscript{24} Although the United States Constitution does not apply to Indian tribes, the ICRA imposes statutory limitations on tribal governments that track the language of the Bill of Rights. The United States Supreme Court has held, however, that tribal courts are not bound by federal courts’ interpretations of the Bill of Rights when the tribal courts construe the ICRA. The substantive limitations to which tribes are subject accordingly are different from those that apply to state governments. As such, the legal system that governs tribal governments is distinct from what applies to the States despite the fact that both are governed by legal principles that are described by identical words (“free speech,” “due process,” and so forth).

From this it follows that the mere fact that a proposed codification of \textit{lex mercatoria} contains principles drawn from national legal systems does not foreclose the possibility that the code could give rise to a distinctive legal system that could solve the complex choice-of-law problems generated by international mercantile activity. Of course, to say that codifying national legal norms does not foreclose the development of a distinctive body of law merchant does not mean that such a determinate system of law necessarily will emerge. Whether there is a systematic definition of the principles that over time gives rise to determinate and ascertainable duties and rights turns on whether there are

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  \item \textsuperscript{22} To be sure, such a \textit{lex mercatoria} would introduce new, difficult questions such as what constitutes a multi-jurisdictional transaction that triggered application of the \textit{lex mercatoria}. On balance, though, the benefits of a system of uniform law governing international transactions might well outweigh the costs (once such a system of law is developed, at least).
  \item \textsuperscript{23} See, for example, David P. Currie, \textit{The Constitution of the Federal Republic of Germany} 237–43 (Chicago 1994) (“Examination of the German law of free expression reminds one once again how easily two well-intentioned societies, starting from substantially identical premises, can arrive at significantly different results.”).
  \item \textsuperscript{24} Demonstration of all that follows in this paragraph can be found in Mark D. Rosen, \textit{The Radical Possibility of Limited Community-Based Interpretation of the Constitution}, 43 Wm & Mary L Rev 927, 936–41 (2002).
\end{itemize}
institutions that are capable of translating the general principles into determinate requirements. Unfortunately, the principal advocate for codifying a modern lex mercatoria does not appear to have taken account of this very important fact.25

Finally, it is essential to make clear that the discussion here should not be understood as suggesting that codification of a new law merchant at this point in time is desirable. I simply am showing that codification is not per se inconsistent with a new law merchant. Whether codification at this time is wise is an entirely different question that lies far beyond this brief Comment's scope.26 * * *

To return to the questions that compose this Comment's title, it would appear that neither codification nor the party-autonomy principles of private international law preclude a role for a new law merchant. Although lawyer-led codification is inconsistent with lex mercatoria understood as a spontaneous creation of merchants themselves, codification is not inconsistent with a law merchant that constitutes a solution to international choice-of-law problems or that serves as a streamlined dispute resolution mechanism. Nor do the contemporary party-autonomy principles found in private international law obviate the need for a new law merchant that could provide a single, determinate body of law governing international transactions. This is the case because party autonomy is not always respected; the extent to which it is respected still varies from country to country; and even if party autonomy were always respected, a uniform body of substantive law might be preferable to a regime under which merchants can choose the law that is to govern their transaction. Moreover, it is possible that a modern lex mercatoria is needed to solve problems peculiar to international merchants that have not been adequately addressed by national legal systems.

In the end, though both history and jurisprudence illuminate many facets of lex mercatoria, neither can answer the question of whether a new law merchant is desirable from a functional perspective. Answering that turns on hard empirics of a sort one would not expect to find in a paper such as Professor Fassberg's (much less a commentary such as this), but that would appropriately be found in the scholarly books that advocate the development of a modern lex mercatoria.27

25 See Berger, The Creeping Codification at 206–29 (cited in note 1) (advancing his proposal that lex mercatoria be codified without taking into account such institutional considerations).

26 For a discussion of the merits and demerits of codification, as well as an explanation of four different types of codifications, see Mark D. Rosen, What Has Happened to the Common Law?-Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development, 1994 Wis L Rev 1119.

27 Surprisingly, advocates of a new law merchant have not produced such evidence. See, for example, Berger, The Creeping Codification at 9–17 (cited in note 1). In fact, there is evidence that is arguably to the contrary: "A recent worldwide survey among attorneys active in international
Should a need for a new law merchant be established, much careful work remains in determining the best approach to develop the modern lex mercatoria. While advocates of the new law merchant can rest assured that the codification they have suggested is not flatly incompatible with lex mercatoria, this by no means amounts to a ringing endorsement of the attempt to codify a new law merchant at this time. At the very least, advocates of codification must be certain that there are institutions in place that can systematically particularize the application of the various general principles that compose the new law merchant so that the new law merchant can be developed into a comprehensive and determinate system over time.

Commercial law has revealed that most of them would strongly advise against including a provision in the contract of their client referring to the lex mercatoria as the lex contractus." Id at 5. Perhaps this is because the lex mercatoria is not sufficiently definite and developed at this point in time. Id. Or perhaps this is because lex mercatoria is not necessary today.