Which is the Lie: The Mask, or my Face? The Theory of Lex Mercatoria, an 'Autonomous'International System in Disguise

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Commerce and trade are fundamental activities of our society. The moment we started trading with each other was so impactful, that the author considers it the most important revolution in the history of mankind. Time flew by, and as our society and existence developed and reached more sophisticated forms, trading developed accordingly and became more and more elaborate and interdependent, thus more complex as well. The power keeping balance in society is law itself, therefore, in order to keep trading activities under control, there was a need for a specific branch of law administering trade, which, by time, became more and more international. One of the essential questions regarding that specific branch of law was the problem of its sources – if there are solutions, we need to find their origin and implement them, and if there isn't any, we need to come up with these solutions. One possibility was an idea which emerged centuries ago, probably drawing its influence from Roman law[1]. Lex Mercatoria – the law of the merchants. It is highly contested nowadays whether it is a medieval myth or a commonly accepted system, but the debate slowly loses its relevance. The Law Merchant is a frequently used governing law in international commercial contracts, and also functions as an instrument for settling disputes through arbitration. It is a body of law that emerged from an idea of rules made by merchants for merchants. Let us think about blockchain – a technology highly decentralized –, and we understand the need behind the result. International business is a cooperative game, and the states are progressively interfering players in it. It is not so appealing to play the game by the rules created by certain players themselves. But do we have better alternatives? Lots proclaim that Lex Mercatoria can be one, but after more than 50 years we still do not know how it should work. Is it a list or a method? A method or a list?

Keywords: Lex Mercatoria, sources of international business law, sources of international commercial law, commercial arbitration, list method, functional method, European Union, rule of law, commercial litigation, soft law, transnational Law.

As it was stated by Louis XIV of France "*[Je] mettrais plutôt toute l'Europe d'accord que deux femmes"*.[2] More than 300 years ago, we slowly reached the point where European countries did not need more conciliation. The creation of the European Union was arguably the success of the last century for the continent. But as time passes, new legal challenges arise, and as the initial and controversial affirmation of Louis XIVlost its relevance, we are still not sure which side of an inequation can be reserved for most of these challenges. One of those can be considered the problem of Lex Mercatoria.[3] Probably, the international business community can follow the pattern of the EU,

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[1] See the article by Professor Donahue arguing strongly against any link of Lex Mercatoria with Roman Law. Donahue, Charles Jr., *Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica* Chicago Journal of International Law: Vol. 5: No. 1, Article 5, 2004, p. 22.

[2] Honoré Gabriel Riqueti, comte de Mirabeau, *Esprit de Mirabeau*, éd. F. Buisson, 1804, vol. 1, p. 246. [„I could sooner reconcile all Europe than two women."]

[3] In that article I used the expressions 'transnational law', 'Law Merchant', 'general principles of international trade' and 'Lex Mercatoria' interchangeably. See Gyula, Fábián, *Nemzetközi Jog*. Editura Hamangiu, Bucharest, 2018. p. 3; About Lex Mercatoria generally see Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999), para. 1443 et seq. Jan Hendrik Dalhuisen, *The New Lex Mercatoria:*

which means a certain degree of integration, but it still remains a question whether the international business community and sovereign states can be reconciled sooner, or the affirmation of Louis XIV can no longer be stated. Hence, this article aims to argue beside the former.

If we regard the economic point of view as the starting point and take into account e.g. the *magnum opus*[4] of Adam Smith, we come to the conclusion that with international commerce, at the end of the day, everyone is better off. However, to guarantee the equity, transparency and sustainability of international commercial transactions, there is a need for regulations and provisions governing international trade. A significant part of these regulations are the so called '*lois de police'*[5]and *jus cogens*[6] international imperative norms. Even though they are international economic law norms, they also regulate international commerce, these public norms are of reduced effect due to the private nature of international commercial law. As it is widely acknowledged, it is a characteristic of the private law domain that everything which is not expressly forbidden should be allowed, accepted, or at least tolerated. Therefore, the principle of party autonomy sets forth that the contracting parties are free to agree upon an applicable law[7], a law which might be elaborated by a sovereignty (*lex loci*), by an international organization, or one that might be created through other means, such as consuetudo, which is the process of how legal acts become accepted as usages.

If we return to our initial perspective and focus on the validity and efficacy of commercial transactions, the finality of the law-making process should be, beside others, the creation and elaboration of a legal system which cumulatively guarantees the lowest possible burden for the economic agents and the sanctioning possibilities needed to enforce it[8]. Such systems were created over the centuries, but there is one which remained functional even after more than five hundred years. Or did it? Lex Mercatoria, or otherwise the 'Law Merchant', is a body of commercial law and customary commercial law[9] elaborated by practitioners and scholars to establish 'best practices' for international commercial transactions, also recognized by arbitral tribunals if the given conditions are met[10]. Lex Mercatoria went through its own evolution, and even though it reincarnated in the 20th century,[11] it lost its widespread application and became the subject of doctrinal disputes. In the case of Lex Mercatoria, there is no middle passage – it is either vehemently criticized, or assessed as an important and globally accepted body of regulations. It is questionable though, if the abovementioned finality can be obtained with the assistance of Lex Mercatoria.

By taking into account potential perspectives[12]of Lex Mercatoria and the possible counterarguments for the deficiencies acclaimed by the doctrine, the article intends to clarify certain potential issues with respect to the Law Merchant. In the first part, the nature and evolution of the Law Merchant is detailed furtherly. The second part focuses on the main question to be answered – how can Lex Mercatoria be a functioning legal system? We are all aware that the Merchant is used in practice either as a list or a method. Both views have proponents, arguments and counter-arguments, but if the debate will not be settled once and for all, it can impede the evolution of a source

An Emerging Challenge to Legal Systems in Cross-Border Transactions, 2016.
Available at SSRN: https://ssrn.com/abstract=2871354 or http://dx.doi.org/10.2139/ssrn.2871354 (13. September 2019).

[4] Smith, Adam, and Edwin Cannan. *An inquiry into the nature and causes of the wealth of nations*. London: Methuen, 1922.

[5] Gimenez-Corte, Cristián, *Lex Mercatoria, International Arbitration and Independent Guarantees: Transnational Law and HowNation States Lost theMonopoly of Legitimate Enforcement*. Transnational Legal Theory, Volume 3, Number 4, 2012, p. 349.

[6] Gyula, Fábián, op. cit. p. 5; Keith Highet, *Enigma of the Lex Mercatoria*, 63 Tulane Law Review 613 (1988-1989), p. 626;

[7] Alina Oprea, *Observații privind principiul autonomiei voinței* în *dreptul internațional privat al contractelor*, Revista română de drept privat, Nr. 5/2012.

[8] See Martin P. Golding, *Philosophy of Law, Pearson,1975. pp. 6-17., regarding enforceability as a criteria for the existence of a legal system.*

[9] Guilhelm Julia, *Lex Magica: A Lex Mercatoria Reflection*, 37 Thomes Jefferson Law Reveviw 125, 2014, pp. 125-126.

[10] Orsolya, Tóth, *Applying the Lex Mercatoria in Arbitration: The search for a „Natural Connection*, in New Horizons of International Arbitration, Issue 5, Moscow, 2019,p. 168 et seq. Carmen Tamara Ungureanu, *Lex Mercatoria in International Trade Contracts*, 62 Analele Stiintifice Ale Universitatii Alexandru Ioan Cuza Din Iasi Stiinte Juridice 5 (2016), p. 9 et seq. About choice of court agreements and enforceability against third parties, see Alina Oprea, *Regards sur opposabilité à l'égard des tiers des conventions attributives de juridiction dans les litiges internationaux*, Perspectives of Business Law Journal, Volume 5, Issue 1, November 2016 p. 33-46.

[11] Francesco Galgano, *The New Lex Mercatoria*, *Annual Survey of International and Comparative* Law, *No*. 2, 99, 1995,; Clive Schmitthoff, The *unification of the law of international trade law* collected in Cheng (ed) Clive Schmitthoffs Select Essays on International Trade Law, 1988, pp. 170-171; Michael Pryles, *Application of the Lex Mercatoria in International Commercial Arbitration*, 31 University of New South Wales Law Journal, No. 319, 2008, p. 319;Ross Cranston, *Theorizing Transnational Commercial Law*, 42 Texas International Law Journal 597, 2007, p. 603.; Francesco Galgano, *Globalizáció a jog tükrében – A gazdaság jogi elemzése*, Fordította: Metzinger Péter, HVG-ORAC, Budapest, 2006,p. 58.

[12] Bhupinder S. Chimni, *Third World Approach to International Law - A Manifesto, Brazilian Journal of International Law*, No. 15, 2018, p. 42 et seq.

of international business law. Therefore, the second part asks the question: which one is the lie? The third part presents arguments for the application of transnational rules in international commercial arbitration (hereinafter 'ICA' or arbitration) in lack of a governing law, and assesses certain disputed areas where it would be advisable to rethink the old rule and perspective. The fourth part discusses the potential application of Lex Mercatoria by national courts andcertain flaws to berepairedif that practice becomes widespread, as proposed by Professor Petsche[13]. The fifthpart raises potential questions in relation to the future of the Merchant, and presents international economic and political processes having the potential to be beneficial or disruptive in the long run.

During the last 70 years Lex Mercatoria became a myth between theorists. As professor N. Hatzimihail stated in an article, it is just like the Arlésienne known through the proverbs: a concept recognized and mentioned by everyone from the international commercial community, and met only by a few of us[14]. Even if some of us met it, we do not know it's true identity. We might have seen the mask, we might have seen the face. But have we seen the Merchant itself?

1. The Stage is Set – The Short History and Nature of the Merchant

1.1. About the Artist – How does Lex MercatoriaLook Like?

First, it has to be noted that the author is currently discussing the 'new Lex Mercatoria', as known by the majority of the doctrine. With all due respect to the authors who devoted a part of their research for the topic of the medieval Lex Mercatoria, the debate of the issue is not a subject of the current article, and therefore the author restricts itself to make the necessary references. The old Lex Mercatoria was the subject of a debate about its mere existence, with its numerous proponents, who continuously presented the Merchant as a universally applicable law accepted and commonly used in Europe and exerting a major influence over medieval commerce, e.g. Schmitthoff[15] or Goldschmidt[16]; on the other hand, with all of their opponents and doctrinal voices who argue against or demonstrate that there are some inconsistencies or deficiencies in the theory of a medieval Lex Mercatoria, such as Professor Kadens[17], Professor Donahue[18], or Professor Cordes[19].

The debate is seemingly settled with the conclusion that the old Lex Mercatoria did not exist, or at least not in the way we think about it and about international trade law. A particular view which states that the dispute is largely mischaracterized and misunderstood, and that its research and the perspective from which medieval trade is conceived is just as the 'Telephone' game, the interpretation of the interpretations, is the article of Professor Sachs[20]. As Professor Cordes states, "But this discovery does not bear any fruits for the discussion about the future of international trade law. The question whether an old Lex Mercatoria existed 350 or 700 years ago can do little to influence the outcome of a dispute about the theoretical basis and practical value of a 21st century law of merchants as a separate body of law which is not linked to any domestic law."[21] Even though some au-

[13] Markus Petsche, *The Application of Transnational Law (Lex Mercatoria) by Domestic Courts*, Journal of Private International Law,10:3, 489-515, 2014, DOI: 10.5235/17441048.10.3.489.
[14] Hatzimihail, Nikitas Emmanuel, *The Many Lives - And Faces - Of Lex Mercatoria: History as Genealogy in International Business Law*. Law and Contemporary Problems, Vol. 71, No. 3, Summer 2008, p. 169.
[15] Schmitthoff, Clive M., The Unification…, op. cit. pp. 206-207.
[16] James Goldschmidt, *Handbuch des Handelsrechts*, 2nd ed., 1864, pp. 242-243 *apud* Whitman, James, *Commercial Law and the American Volk: A note on Llewellyn's German Sources for the Uniform Commercial Code*, Yale Law Journal, 97, 1987, p. 165.
[17] Kadens, Emily, *The Myth of the Customary Law Merchant*, Texas Law Review, Vol. 90, 2012.
[18] Charles Donahue Jr., Medieval and Early..., op. cit.
[19] Albrecht Cordes: *The search for a medieval Lex mercatoria*, Oxford University Comparative Law Forum 5, 2003. uclf.iuscomp.org (13 September 2019).
[20] Sachs, Stephen E., *From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant'*. American University International Law Review, Vol. 21, No. 5, 2006, pp. 685-812.
[21] Albrecht Cordes, op. cit.

thors built up their theory of the new Law Merchant having as a premise its existence rooted in the Middle Ages, their thought process was not totally erroneous. We shall see, that what they wanted to highlight is that the idea itself certainly existed, and there were certain forms of trade usage and merchant-made norms.

What we label as 'New Lex Mercatoria' became widespread knowledge in the legal sphere during the twentieth century, when some of the most impactful proponents[22] presented it and argued besides its use in international commercial arbitration. But the doctrine was not unanimous, as lots of scholars criticized it. To illustrate this issue, the article of Professor Cuniberti[23] has to be mentioned, and the three theories proposed by it. However, first it would be worth mentioning the findings of the Professor, who, when analysing ICC Data, discovered that a governing law was chosen in 80-85% of the cases, and only in 1-2% of the cases had the chosen governing law a non-national character[24]. To see whether the findings still persist, the author summed up the statistics of the ICC for 2017 and 2018. The application of non-national law was requested in 1.8% of the total cases in 2017, while this number was 2% in 2018. However, only in 85-90% of the cases was a governing law chosen by the parties. Transnational law was used sometimes automatically, or arbitrators reached it through contractual terms or by the parties' agreement, as stated[25]. The phenomenon of choosing general principles of international trade might have appeared in other years too.

It should be mentioned that these data only include contracts which were brought to ICC arbitration for dispute settlement, therefore, it does not illustrate completely the presence of Lex Mercatoria in commerce, since tribunals such as the London Court of International Arbitration, the Vienna International Arbitrational Court, the Arbitration Institute of The Stockholm Chamber of Commerce, etc. are not part of the ICC Structure.

However, apart from this empirical data collection, there are other surveys made to monitor the intention of potential parties of international commercial contracts to choose the Merchant as governing law. A survey[26] carried out by the Institute for Transnational Arbitration, even though with a relatively low amount of responses, had the following result regarding the UNIDROIT Principles and Lex Mercatoria: "The responses for the UNIDROIT Principles are: 6.3% always use them, 12.7% do so regularly, 46% use them occasionally, and 34.9% have never used them. The responses for Lex Mercatoria and similar notions come close: 3.2% always use them, 15.9% do so regularly, 49.2% use them occasionally, and 31.7% have never used them."[27]The sample is mostly representative with respect to geographical areas, and it may suggest that the number of contracts in which the governing law is Lex Mercatoria or similar is higher than 1 or 2%. This idea might be supported by a survey[28] carried out by Professor K. P. Berger and the Center for Transnational Law (CENTRAL Institute) with a 29.6% return rate, which found that more than one third of the selected professionals was aware of transnational law, and the number was rising to 42% with respect to ICA. Additionally, in relation to its use in the future, 440 respondents out of 639 were positive or neutral, and only slightly less than 20% rejected the idea to consider using it in their future affairs. [29]

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[22] Clive Schmitthoff – *International Business Law: A New Law Merchant*, Current Law and Social Problems, University of Toronto Press, No. 2, Current Law and Social Problems, 1961, p. 129 et seq.; Berthold Goldman –*Frontièresdu Droit et Lex Mercatoria*, 13 Archives de Philosophie du Droit 1964, at 177 et seq.;Tudor Popescu, Le Droit du Commerce International: *Une Nouvelle Tache pour les Legislateurs Nationaux ou une Nouvelle "Lex Mercatoria"?*, in: UNIDROIT (ed.), New Directions in International Trade Law, 2 Vols., New York 1977, at 21 et seq.; Aleksander Goldstajn, *The New Law Merchant*, 12 Journal of Business Law, 1961, at 12 et seq.For an overview of Lex Mercatoria theories, see Frank Baddack, *Lex Mercatoria: Scope and application of the Law Merchant in Arbitration*. LL.M. thesis, University of the Western Cape, 2005, p. 22 et seq.

[23] Cuniberti, Gilles, *Three Theories of Lex Mercatoria*, Columbia Journal of Transnational Law, Vol. 52, No. 1, 2013; University of Luxembourg Law Working Paper No. 2013-1.

[24] Ibid.

[25] ICC Dispute Resolution 2018 Statistics, at www.iccwbo.org/dr-stat2018 (9 September 2019).

[26] http://arbitrationblog.kluwerarbitration.com/2014/06/06/results-of-the-survey-on-the-use-of-soft-law-instruments-in-international-arbitration/(13 September 2019).

[27] Ibidem.

[28] As a part of the program entitled „*The Role of Merchants, their Lawyers and their Arbitral Tribunals in the Evolution and Development of Transnational Commercial Law*".

[29] Ibid.

The three theories mentioned by Cuniberti are illustrating the scepticism and the conservativism of positivists or 'traditionalists': Drahozal's signalling theory of Lex Mercatoria[30], an agency theory of Lex Mercatoria[31], and a Production cost theory of Lex Mercatoria[32]. Apart from that, a considerable part of the doctrine rejects the idea of transnational law and private governance[33]. First, there was a debate about the existence of the lex and whether it can be considered an autonomous legal system[34]. Then there were questions raised about the content of the Merchant, and about the potential methodology to be used to determine that content. Since the doctrinal opinions are that divergent, and during that half century everything and even the contrary of it was stated about Lex Mercatoria, the author considers it sufficient to take into account the fact that it exists (which is not a subject of doctrinal dispute nowadays). Even though it might seem like the emperor's new clothes[35], it is used frequently in arbitral settlements and international commercial contracts – and it definitely exists at least as an idea or principle guarding international business law.

One relevant question answered by Professor Michaels is whether Lex Mercatoria is 'state law' or 'non-state law'. The author argues that in case of foreign law, a state does not recognises the law of another state based on some "metaphysical concept of law" or inherent power of it, but simply due to a system of international comity. He concludes that the Law Merchant transcends the distinction between the two, it is rather 'non-political', and it is not "law without a state" – it is "law beyond the state"[36]. Such a perspective enables us to think creatively about the law.

Its content and the much wanted 'autonomy' of a legal system are depending on the methodology we use[37]. During the years, individuals wanted to demonstrate that their solutions are the ones offering autonomy and ensuring functionality. But is there anything more important than the concept of autonomy? For the methodological contexts, usually there are two possibilities: the list or the functional method. However, before settling the discussion, we need to put Lex Mercatoria into the international legal and economic framework.

1.2. About the Stage – Globalization, Multinational Companies and More

There is an undeniable and major change in the circumstances of international trade compared to the situation in the sixties, or to the period of time when Lex Mercatoria first started to be applied

[30] Christopher R. Drahozal, *Contracting Out of National Law*: An Empirical Look at the New Law Merchant, 80 Notre Dame Law Review 523, 2005, p. 549 et seq. The article, with all due respect, disregards only one thing: that scientific activity and research is the mean how someone becomes an expert or a professional of any given field. Also, it might be that the change of pacing of our society is there as on behind the academic interest for the topic – with globalisation, and with multi-national companies operating with budgets higher than of some countries', the evolution and the future of commercial dispute resolution – in the increasingly complex economic setting - might be a focal point of international commercial law. Even if the theory would be true, there is nothing 'unethical' in scientific activity – which might not be an impression of the signaling theory. See also 32. Emmanuel Gaillard, General Principles of the Law in International Commercial Arbitration— Challenging the Myths, World Arbitration & Mediation Review, Volume 5, No. 2, 2011. p. 170 et seq.

[31] Cuniberti, op. cit. p. 406 et seq. The theory does not give enough emphasis to two things: first of all, discretion is one of the underlying ideas behind arbitration. If the parties select arbitration, they want their dispute solved by experts of the given field, in our case of commercial law, and they want the best, most equitable solution. The arbitrators are allowed requested by these parties to solve a case based on a law or transnational law because they are the most well-prepared actors to choose which governing law is able to give the most equitable solutions for the arising problems and which rule-set is the most well adapted. On the other hand, that is one of the reasons why the parties choose arbitration –they can escape either national proceedings and domestic laws, or because they trust the experience of arbitrators in setting the right framework for the problem. Also, that practice of choosing 'Lex Mercatoria' in case of no governing law is rarely contested by the parties. Commercial agents would not accept such thing if it would not benefit them one way or another.

[32] Cuniberti, op. cit. pp. 424 et seq. ICC is a business organization, not a charitative body, therefore, it should not raise any suspicions if they offer a service – in our case, elaborating Model laws, etc. – and hope a compensation for that service. Also, through the application of 'Lex Mercatoria' the production cost might decrease, but the ICC has a much easier way to solve that problem – just include arbitration clauses in their model laws, and if they do not violate ordré public, the production cost decreased, since they do not need to take other laws into account anymore. Therefore, it seems for the author that there are more plausible explanations for that phenomenon.

[33] See, among others, Paul Lagarde, *Approche Critique de la Lex Mercatoria* in: Fouchard/Kahn/Lyon-Caen (eds.), Le Droit des Relations Économiques Internationales, Études offertes à Berthold Goldman, Paris 1982; Frederick Alexander Mann, *Lex Facit Arbitrum in International Arbitration*, in Liber Amicorum for Martin Domke (1967), at 157 et seq.; Keith Highet, op. cit.; Ian F. Turley, *Lex Mercatoria: Quo Vadis*, Journal of South African Law, 1999, p. 454 et seq..

[34] Mazzacano, Peter J., *The Autonomous Nature of the Lex Mercatoria.* 16 Vindobona Journal of International Commercial Law and Arbitration 2012. pp. 81-82.; Karimi, Mohammad and Kashani, Javad and Nassiran, Dawood, *'Lex Mercatoria' as an Independent Legal System* (October 23, 2016). Available at SSRN: https://ssrn.com/abstract=2857888(13 September 2019) p. 14 et seq.

[35] Keith Highet, op. cit. p. 616.

[36] Michaels, Ralf, The *True Lex Mercatoria: Law Beyond the State*. Indiana Journal of Global Legal Studies, Vol. 14, No. 2, 2008; Duke Law School Public Law & Legal Theory Paper No. 220. p. 461 et seq.

[37] See Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making?* Arbitration International, Volume 17, Issue 1, 2001, p. 65 et seq.; Cf. Berger, Klaus Peter. *The Creeping Codification of the New Lex Mercatoria*. Alphen aan den Rijn: Kluwer Law International, 2010, p. 115 et seq.

by arbitral tribunals[38]. It is enough to think about trade liberalization[39] incentives such as the World Trade Organization and its activities, or the deeper integration in the European Union, to realise that commercial flows which are better structured are handled by clustering business enterprises[40] with the assistance of increasingly complex global logistics,[41]offering more and more opportunities[42] and internationalizing businesses in the same time[43]. The other side of the coin is that these international transactions are frequently internalized within a multinational company or a single firm[44]. It is also worth mentioning that through information technology advancements the production is increased and the barriers ahead of international contracting are reduced to a minimum[45].

Multinational companies are one of the key elements of international trade. Most probably we are all familiar with comparisons between multinational companies and states[46]. It is interesting to see that for example Walmart, with 2.2 million employees in 2018,[47] has a higher scarcity in manpower than countries such as Slovenia or Latvia. On the other hand, Apple's worth is only topped by 16 countries[48]. Also, it is questionable whether the growth of these multinationals is as limited as it is in the case of countries. However, sooner or later the multinationals engage in economic activity between each other. The question is, if they do so, will they accept the private rules made by states, or will they try to push private and corporate governance[49] to the maximum extent?[50] Companies are also bound by the law, and it is not possible for them to avoid the applicability of any state-made rule, even if they would try.

On the other hand, arbitration is becoming more and more popular[51], and compared to the situation fifteen years ago, it became institutionalized, well-known and universally accepted by the members of the international business community.[52] Furthermore, there are promising steps towards the acceptance of transnational law by domestic courts, and the enforcement of arbitration awards remained uncontested in the majority of the cases.[53] To sum it up, it is not that challenging to see that the environment is a favourable soil for the need of private governance.

2. The Curtain Rises – Analysis of the Two Theories

The answer to 'which is the lie?' is not that obvious. Both the 'mask' and the 'face' are representing a part of the owner's true identity. The solution most probably is not just a decision between the two theories, but an analysis of their advantages and deficiencies.Therefore, the author will first analyse

[38] See Ross Cranston, *Theorizing Transnational Commercial Law*, Texas International Law Journal 42, 2007, about legal circumstances under globalization and a potential implementation of transnational commercial law. About legal pluralism and changes under Globalization, see Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, Sydney Law Review, Vol. 29, 2007.

[39] Passaris, C. E. (2006), *The Business of Globalization and the Globalization of Business*. Journal of Comparative International Management, 9(1). p. 7 et seq.

[40] Porter, M.E. (1998). *Clusters and the New Economics of Competition*. Harvard Business Review. 76: 77-90.

[41] https://www.supplychain247.com/article/study_shows_global_logistics_is_becoming_more_complex_nine_key_trends (13 September 2019).

[42] Passaris, C. E., op. cit. p. 16.

[43] Schaffer, Richard, Filiberto Agusti, and Lucien J. Dhooge. *International Business Law and Its Environment*. 10E, Cengage Learning, 2018, p. 2.

[44] Passaris, C. E., op. cit. p. 17.

[45] Idem, p. 238.

[46] https://www.businessinsider.com/25-giant-companies-that-earn-more-than-entire-countries-2018-7#revenues-from-el-corte-ingls-were-just-ahead-of-libyas-gdp-5(13 September 2019).

[47] "Walmart 10-K Report FY 2019" January 31, 2019.

[48] https://globalnews.ca/news/4367056/apple-1-trillion-market-cap/(13 September 2019).

[49] About an interesting case of Corporate Governance see Szalay, Gábor, *The impact of the lack of transparency on corporate governance: A practical example*. Corporate Law & Governance Review, vol 1, Issue 2, 2019. http://doi.org/10.22495/clgrv1i2p2. Also, about governance, transnational power and new constitutionalism, see A. Claire Cutler, *The Judicialization of Private Transnational Power and Authority*, Indiana Journal of Global Legal Studies, No. 25., 2018, p. 61 et seq.

[50] See Dunning, John H., and Sarianna M. Lundan. *Multinational Enterprises and the Global Economy. Cheltenham*, UK: Edward Elgar, 2008 p. 665 et seq. and p. 707 et seq. for a detailed view over the interaction of multinational companies and governments. Also, see Stephen J. Ware, *Private Ordering and Commercial Arbitration: Lasting Lessons from Mentschikoff*, 2019 J. Disp. Resol. 1 (2019) p. 3 et seq about private ordering.

[51] Várady T., *Választottbírói semlegesség és pártatlanság a XXI. Században*. In: Nochta Tibor, Fabó Tibor MM, editor. Ünnepi Tanulmányok Kecskés László Professor 60. Születésnapja Tiszteletére. Pécs: Pécsi Tudományegyetem Állam- és Jogtudományi Kara; 2013. pp. 561-562. For the presentation of transnational arbitration, see Mert Elcin, *Lex Mercatoria in International Arbitration: Theory and Practice*, Doctor of Law thesis, European University Institute, 2012, p. 23 et seq.

[52] Gábor Szalay, *A Brief History of International Arbitration, Its Role in the 21st Century and the Examination of the Arbitration Rules of Certain Arbitral InstitutionsWith Regards to Privacy and Confidentiality*, Analele Universității de vest din Timișoara, Seria Drept, Nr. 2, 2016, pp. 14-16.

[53] Some considerations about enforcement can be found in Angelika Emmerich-Fritsche, *Die Lex Mercatoria als transnationales Handelsrecht und Weltgesellschaftsrecht*, in: Alfred Holzer-Thieser/Stefan Roth (Ed.), Festschrift für Harald Herrmann, Versicherungsrecht – Finanzmarkt und Freiberufsrecht im Wandelwirtschaftsrechtlicher und rechtsökonomischer Analysen, 2011, p. 303-322.

the two theories separately, and then settle the dispute in the concluding remarks of this section by presenting a hybrid solution, which tries to keep most of the advantages the two methods have.

2.1. The Face Behind the Mask - Lex Mercatoria as a List

One of the first appearances of the list is an article written by Lord Justice Mustill,[54] who created a list of 20 principles said to constitute the Lex. He concluded that in such form it is incomplete and it „seems rather a modest haul"[55]. Therefore, a part of the doctrine rejected the idea of the list, because it was seemingly dysfunctional. It is extraordinarily challenging to create a list covering every possible detail of an international commercial relation, such as the formation of contracts, performance, causes making the contract void, potential penalties, hardship, or even topics which are not met that frequently, for example anticipatory repudiation[56].

However, there are attempts to create norms which can regulate contracts, alone or as a soft-law norm together with state-law. Some of the attempts to be mentioned are the Unidroit Principles of International Commercial Contracts, the 'Lando Principles' – The Principles of European Contract Law, The Common Frame of Reference or the Trans-Lex Principles. The latter is becoming the flagship of the list method – it is a list consisting of 143 Principles as of September, 2019 and the additional commentaries, materials, jurisprudence, etc. needed to help practitioners to apply the abstract norms to the given case. These principles are collected by the CENTRAL Institute[57] as part of the „Creeping Codification"[58] lead by Professor K. P. Berger.

The list method was and remains the most suitable solution as the methodology of the Lex – it offers the possibility of structuralization, has adaptability among its features, owing to the fact that a list such as the Trans-Lex Principles can be easily updated and modified to fulfil the needs of practitioners and arbitrators, moreover, it takes the least amount of inconvenience to modify. The icing on the cake in having the list as a methodology in case the parties choose the Law Merchant as the applicable law is that it can guarantee substantive neutrality[59].Apart from that, a list, even though it contains abstract provisions in the forms in which it is the most frequently elaborated, is the solution which by supplementary materials make the norms predictable enough for the ones applying them. However, the last condition of an *'ordre juridique'* might lack, and that is the completeness of a list. Even though it is highly adaptable, in case the matter of the dispute is not regulated or mentioned, the list's potential ceases to exist. It can also have additional sources[60], but without a rule for the arbitrators the practice can result in divergent decisions. That is one thing to be averted.

Even though Professor Berger states that the existence of a 'ready-made' system is not a *sine qua non* condition of application[61], we have other deficiencies with respect to the list. One such thing is the lack of continuity in jurisprudence.[62] It is common ICC practice that some cases are published, but the author considers it only a minor part of the Lex Mercatoria case law. Therefore, in the lack of underlying decisions and analysis it is quite challenging to build the list further, keep the balance between over-regularization, modify the elements which are rejected by arbitral practice and adapt the rules in accordance with commercial customs. Commercial customs are hard to discover in

[54] Mustill, Michael, *The New Lex Mercatoria: The FirstTwenty-fiveYears*, Arbitration International 1988, at 110 et seq.
[55] Ibid. at 114.
[56] See, Kyle Winnick, *International Commercial Arbitration, Anticipatory Repudiation, and the Lex Mercatoria*. Cardozo Journal of Conflict Resolution, Vol. 15, 2014, p. 853 et seq.
[57] See *Central List of Principles, Rules and Standards of the Lex Mercatoria*, in: CENTRAL (ed.), Transnational Law in Commercial Legal Practice, 1999.
[58] Berger, Klaus Peter, op. cit. p. 250 et seq.
[59] About the concept of 'substantive neutrality', see Markus A. Petsche, *International Commercial Arbitration and the Transformation of the Conflict of Laws Theory*, 18 Mich. St. U. Coll. L. J. Int'l L., 2010, p. 472 et seq. Also, about the specific needs of international commerce see p. 469 et seq., Cf. Gilles Cuniberti, op. cit, p. 388.
[60] See Yıldırım, Ahmet Cemil. *Solid, Liquid and Gas Forms of the New Lex Mercatoria: How DoThey Operate in Practice?*, Uluslararası Ticari Tahkim Ve Yeni Lex Mercatorıa, 2014, about the potential sources of the Merchant. Frank Baddack, op. cit. p. 54 et seq.
[61] Berger, Klaus Peter, op. cit. p. 117.
[62] For a general overview of international arbitration case law, see Gary Born, *International Arbitration: Cases and Materials*, Wolters Kluwer, Second ed., 2015. For considerations about Lex Mercatoria, see pp. 1019-1020.

arbitration as most cases remain unpublished,[63] but that issue shall be the subject of future studies. The list might be the face in our case – or is it just another mask?

2.2. Is it Really the Mask? – Lex Mercatoria as a Method of Decision-Making

The main proponent of the functional method is Professor Gaillard, who devotes articles which are as concise as impactful.[64]As an approach, it is an entirely different and probably more 'arbitration-tailored' way to determine the content of the Merchant. The presented argument states that the codification of the Lex in the form of a list is just a 'Mustillian misunderstanding'[65], and the correct methodology uses the Lex as a way of decision-making rather than a list or from the traditional choice-of-law process. The possible solution found by Gaillard functions as a comparative law method, in which the arbitrators have to find an applicable transnational rule and settle the dispute in accordance with it.

The search for the transnational rule should function as a comparative analysis of the relevant rules of laws selected by the parties or considered as pertinent by the arbitrators. The result is the most widely accepted rule, but the support for that rule „need not be unanimous"[66]. As the Professor states it, "The whole aim of transnational rules is not to diminish the role of national laws, but rather to *avoid having solutions that have not received sufficient support in comparative law prevail* [emphasis added] over solutions more generally accepted in the international community. This is perfectly in keeping with the intentions of parties who provide for the resolution of their disputes through the application of general principles, rather than national laws upon which they are unable to agree."[67] Furthermore, the method has, as one of its sources, other precedents of arbitral case law, but that is just one of its kind, it does not rely on jurisprudence.

The process of a decision-making method is further detailed in another context by Langen[68], who concludes that the last step is the tailoring of a proper transnational rule to the issues where the difference between the national systems is irreducible. The potential transnational rule might be the result of a middle ground or a reference to general principles of law.[69] Another doctrinal voice, Rubino-Sammartano argues for the utilization of *tronc commun*.[70]

The only question to ask is whether this methodology works according to the *ratio legis*. As a result, we get a transnational rule which is accepted by most of the relevant legal systems, and which has the most amount of support. The question is: do the parties aim for such thing when choosing the Lex as governing law? The essence of the Law Merchant lies in private governance and in the idea according to which state-made rules cannot be as suitable for the regulation of international commercial contracts and international commercial activities as the principles of international law and the rules and norms created by the '*societas mercatorum*' and its codification by different institutions. Even though these customs and principles are codified if they are beneficial for trade activity, there is a significant time gap or lagging before it gets accepted by a state, or before it gets accepted by the majority of the states. Therefore, the author suggests that with respect to the functional method, we risk to lose possible legal innovations or development realised by the merchant society or by non-governmental institutions. Even though the arbitrators take into account other

[63] Which is an advantage, but might be a concern for transparency too, see Gábor Szalay. *Arbitration and Transparency: Relations Between a Private Environment and a Fundamental Requirement*. Slovenian Arbitration Review. Vol. 6, Issue 1 (2017) pp. 17-34. For an analysis of the arbitration rules of certain arbitral institutions located in Central and Eastern Europe, see Gábor Szalay, "A brief history…", p. 16 et seq.

[64] E. Gaillard, "A Legal system…", op. cit.; Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*. ICSID Review: Foreign Investment Law Journal. 10, no. 2, 1995.

[65] Ibid. p. 224.

[66] Ibid. p. 228.

[67] Ibid. p. 229.

[68] Langen, Eugen, *Transnational Commercial Law*, A.W. Sijthoff, 1973.

[69] Idem, p. 221 et seq.

[70] Rubino-Sammartano, Mauro, *International Arbitration Law and Practice*, Kluwer Law International, 2nd rev. ed., 2001.

sources outside of state law, they are in search of the most commonly accepted rule which leaves no room for development of the existing rules. It is questionable whether with that methodology the arbitrator will choose the rule considered the most pertinent, which might have no comparative law support, or the one which gets the most support through the comparative law analysis. A decision-making process up to a challenging decision.

It is hard to create precedent of arbitral case law, since these decisions are rarely published. Therefore, it leaves room for inconsistencies on a case-by-case basis. Without guidelines from already settled disputes, there will always be concern about the content of transnational law, since the selection of applicable rule should be uniform in similar cases – such as in cases where the parties do not choose a governing law, or when they choose e.g. general principles of law applicable in Western Europe.[71]

Also, as it is stated by Goode, "No doubt it is possible after the event for an arbitrator, armed with all the relevant facts, to identify a rule of the Lex Mercatoria applicable to the case in hand. It is quite another *to extrapolate from this ex post identifiability the ex ante ability to determine that the [L]ex [M]ercatoria would be suitable as a governing law* [emphasis added] for a dispute that has not yet arisen and the nature of which may be difficult, if not impossible, to foresee"[72]. Therefore, even if the functional method would be unquestionable during its utilization by the arbitrators, it is highly questionable if the counsels of the parties not knowing the potential breaches and disputes arising from the contractual relationship, not having a clear and accessible arbitral case law will choose transnational rules to govern instead of a national law, which, if not tailored to international transactions, is at least easier to utilize, because most of the rules receive judicial interpretation.

2.3. Which is the Lie? – A Hybrid Solution

As a conclusion, drawing from the two different theories regarding the methodology to select the content of transnational law, none of the two is without considerable deficiencies. But, as it is stated hereinabove, for Lex Mercatoria to work in the long-term as a suitable governing law for the parties of any contractual relationship, there is a need to settle that dispute. The desire for predictable norms governing the contract means that transnational law can only remain the governing law choice of parties if they do not need to be concerned by such things as whether the arbitrator prefers to use the Lex as a list or as a method.

As we have seen, the list confers the structured character and the predictability needed, but its completeness will always be subject of disputes, while the functional method might be complete, through the fact that the comparative law analysis puts complete national legal systems under scrutiny. However, with regard to predictability, due to the abovementioned, we cannot affirm the lack of any problem. Therefore, a decision between the two theories is not that simple, and it comes hand in hand with both advantages and disadvantages. But why do we need to decide? Why do we think that a list and the functional method are mutually excluded? Maybe the actual lie was that we have to choose between these two. What the author suggests, is that the future methodology of Lex Mercatoria should be the combination of both, a method consisting of the utilization of the list and the comparative law analysis.

But for a hybrid-solution to function, keeping the advantages of the initial solutions and escaping their disadvantages, every element must be in place. Professor Berger states regarding the methodology of the Merchant and its balance-keeping between equity and codified written law that "[t]he application of the N[ew] L[ex] M[ercatoria] in practice therefore always oscillates between two

[71] Ibid. p. 230.

[72] Goode, Roy. *Rule, Practice, And Pragmatism In Transnational Commercial Law*, International and Comparative Law Quarterly 54, no. 3 (2005): p. 539.

extreme positions without ever reaching either"[73]. However, that oscillation is not the only one the Merchant has to fulfil. In order to function sustainably in international commercial contracts and activities, Lex Mercatoria needs also to oscillate between the two proposed methods – the functional decision-making and the 'creepingly' evolving list.

First of all, as it is highlighted above, one of the most concerning problems is that the main user of the Lex gives little to no feedback of it. Since arbitral case law remains undisclosed, the '*rationes decidendi'* cannot form a body, and therefore the rule making process is with little to no *praetorian* influence. As it is found by some authors through an international survey, the parties choosing arbitration rely while making that choice on the following characteristics of arbitration: neutrality, enforceability of the decisions under the New York Convention, confidentiality, the experience of the arbitrators in a certain area, the lack of appeal, and ultimately time-saving and cost-saving.[74] It is yet to be determined, if there is an existing solution which confers these advantages, but also offers the possibility of a system where the decision-making process and the selection of the best possible solutions for cases not codified or regulated can influence the codification and elaboration of rules and sets of norms, and *vice versa*.

The basis of the method should be a shift in institutional practice of arbitrational tribunals. The argument that Lex Mercatoria as a system lacks predictability can remain that harsh because most of the legal practice in connection with the Merchant remains confidential, and therefore the results of the doctrinal disputes and the advancements as well as the arising problems and errors through arbitration remain undiscovered and hardly have any impact on the lists. However, it is totally understandable that parties who choose to settle their disputes through arbitration prefer their confidentiality, as every bit of information can be used in case of disputes which are as technical as arbitration proceedings.[75] Also, the fact that the majority of the awards are not published[76] means that most of the parties are protected from interventions of any state or any governmental organization, due to the fact that e.g. there is an increased of number of arbitral awards in a given field. The confidentiality of arbitration is one of its fundamental characteristics, and with a change in that the system would never be the same.

Or would it? Besides the abovementioned agency theory, the author can present another theory of transnational law, the 'third party good faith theory'. Through that, the author suggests that the parties to an arbitration with Lex Mercatoria selected ex-ante or automatically as the governing law are legally interested in the continuous development and crystallization of the arbitral jurisprudence, and the motive behind the nondisclosure of the awards might be institutional. Having in mind that the most problematic part of the Merchant is the lack of predictability, and that most of the parties using Lex Mercatoria might be slightly less reluctant for its application in other contractual affairs, they have a direct legal interest to have that issue solved. However, it might be too much to ask from the parties to accept the publishing of their awards for the greater good.

But is it needed to publish these awards entirely? The only part able to provide benefits is the argumentation used to decide the given legal dispute. Therefore, institutions could easily clear every detail regarding the parties, reducing factual information to a minimal extent (only the nature of the agreement e.g. a sale, a factoring, a leasing etc. and the provenience of the parties – only to determine the possible choices regarding the governing law of the relationship). In relation to legal

[73] Berger, Klaus Peter, op. cit. p. 269.

[74] Christian Bühring-Uhle, Lars Kirchoff, Gabriele Scherer, *Arbitration and Mediation in International Business*, Kluwer, II. Kiadás, 2006, pp. 106-108.

[75] See Váradi T., op. cit. p. 562. Also, for procedural aspects of transnational law and arbitration, see Luke R. Nottage, *The Procedural Lex Mercatoria: The Past, Present and Future of International Commercial Arbitration*. Sydney Law School Research Paper No. 06/51; CDAMS Discussion PaperNo. 03/1E. December 1, 2006. Available at SSRN: https://ssrn.com/abstract=838028 or http://dx.doi.org/10.2139/ssrn.838028(13 September 2019). Also, for the presentation of IBA as a rule-maker, see David Arias, S*oft Law Rules in International Arbitration: Positive Effects and Legitimation of the IBA as a Rule-Maker*, 6 Indian Journal of Arbitration Law No. 6., 2018, p. 29 et seq. About the relation of ISDS procedures and arbitration see András Kecskés, Barnabás Ferenc, *International Commercial Arbitration and the ISDS procedures*, JURA, vol 24, 1, 2018, pp. 280-288.

[76] It must be noted that there are several journals publishing arbitral decisions, but these are only some decisions from a vast arbitral practice. The personal view of the author is that for a functioning Lex Mercatoria there is a need for the possibility to know that practice more in detail.

disputes, the main concern subject to publication would be every argumentation regarding why Lex Mercatoria should be applied, and concerning every dispute and rule determined through the utilization of a list or the comparative law method. Such publication keeps the parties relatively unidentifiable and offers to arbitral case law the much-needed direction of doctrinal disputes and arbitral practice heading towards the same direction.

Therefore, if the parties might have a direct legal interest and do not lose their confidentiality, it is probably just a trend not to publish, and therefore it is easily reversible. Arbitral case law not just gives the basis of a hybrid solution which can function without the presence of the flaws of the two theories and provide predictability in case of Lex Mercatoria, but could solve the issue of international commercial usages too – mainly the fact that it is not so incontestable whether a given commercial practice is a custom, or can be handled as a usage.

The hybrid theory should contain the main methodological instruments of both the list and the method, but it should be more than the sum of its parts. The common utilization of the two was already highlighted by Professor Berger, who argues that cross-fertilization can happen through the use of the list by international arbitral tribunals.[77] Also, it is pointed out that the 'Creeping Codification' has as an advantage the fact, that its elaboration will never be finished, but it will rather follow the international arbitral practice and the trends and practices of the international commercial flow.[78] But the over-regularization and the rigidity caused by it shall be prevented. As it is stated by Zumbansen, "for [L]ex [M]ercatoria the *point need not be a fully-fledged codification*, which were to repeat the juridification experiences of the Nation State. Indeed, transnational law does not and cannot directly follow the path of the materialization experiences that so far have taken place in the Nation State accompanying its development from the rule-of-law…".[79]The two different theories are suitable in different situations, which means that each theory might be considered as the starting point of the solution-setting depending on the legal dispute. The hybrid theory shall have as a priority the application of the solutions characterized by wide acceptance in trade customs, or usages, and domestic provisions which can make the case pertain its balance between a pure equity or a pure codification decision. If the dispute can be solved by the utilization of rules and the accompanying comparative law materials, related cases, and pertinent interpretations, the arbitrators should use the list, but with an ex-post comparative law analysis with a test in equity. The innovation or advancements in legal systems can be measured in some sort through an equity test, and therefore whenever the ex-post analysis of the solutions accepted by the parties of the Arbitration results in an unfavorable result through equity, it should be a strong sign of an outdated solution of the list.

The author considers that the use of the theory does not create any additional burden in the case of the arbitrator – due to the fact that if the arbitrator is using the comparative method, there is a need for a comparative legal analysis, and if the list is used, there is a need to analyse the given solution and ensure its reasonability. Therefore, the hybrid method would guarantee a long-term functionality of Lex Mercatoria practice.

In that regard, the publication of '*ratio decidendi'* is crucial. The combination of the two methods in that case has as a result rules which are primarily created by the international community, or have a support in the majority of relevant national laws, while also fulfill an equity criteria.

If the list does not contain any rule regarding the dispute, there is a need for the functional method to solve the problem and a comparative law analysis. However, the comparative law analysis should be finished with an ex-ante equity test, to guarantee the quasi-general acceptance and

[77] Berger, Klaus Peter, op. cit. p. 267 et seq.
[78] Idem, p. 268. However, that evolutive codification is present in other lists or model contracts as well, such as INCOTERMS, or FIDIC Contracts, but that can also be the case in relation with Unidroit Principles, which are updated over time, even though its modification requires a formal initiation within the work groups.
[79] Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, European Law Journal, Vol. 8, No. 3, 2002, p. 427.

support of the given norm as well as the pace-keeping with international commerce and with the incentives for private governance, through the equity criteria. The methodology determined by Professor Berger has as a starting point "[t]he process of adding a principle or rule starts with a concrete legal problem"[80], and the Professor continues that "[t]he corresponding legal principle or rule is then developed on the basis of the functional comparative methodology, i.e. using a topical, problem-oriented comparative approach"[81].

The only thing to be modified is the way how selected transnational rules of arbitral practice become accepted principles of Lex Mercatoria. For that case, to avoid supra-regularization of Lex Mercatoria, the elaboration of lists should happen only through principle-like provisions, since very special and technical rules can hardly be enacted, as well as their application and the exact content of the rule is controlled by the factual information and the details of the case. Such provisions under the label of the Merchant can limit arbitrator-discretion, but through the limitation of that, the balance between equity and codification will be damaged in a way that general principles of trade law lose one essential trait – the fact that parties choose it as a governing law to avoid the 'harsh' procedural and substantial technicalities of national laws.

To sum up, the author concludes that the methodologies can only function appropriately when combined, but the common utilization of the two demands stronger possibilities for case law reference, which can only be achieved through an institutional paradigm-shift. The hybrid solution makes the Lex Mercatoria an evolving and complete system[82], where there is a potential solution for every legal dispute, but that open-ended list shall be handled cautiously in order to avoid the situation where the number of potential candidates rises in a manner which diminishes the efficiency of the Lex – and a part of that efficiency was due to the discretion and often equity-based attitude of the arbitrators.

3. Our Performance Begins – Additional Arguments for the Use of Lex Mercatoria in Lack of a Governing Law

As it was mentioned above, there is a common but disputed[83] arbitral practice, that in case if there is no governing law selected by the parties to an arbitration for an international commercial relation, the arbitral tribunal shall choose a transnational law to settle the dispute. As it is stated under ICC rules, the arbitrators can determine the applicable law directly.[84] If they do not argue besides the application of any national law, there is no need to consider such things as e.g. the 'implied negative choice'[85] of the parties. The question is, whether the application of general principles of trade law is detrimental, since it is a disputed issue. Or the characteristics of the Lex can make that decision justified and beneficial?

In a situation where parties coming from different jurisdictions do not choose a governing law, the solution of the dispute through any of the two's national law would be contrary with substantive neutrality.[86] In that case, why would the utilization of a third state's law be any better than a list or a model law elaborated and published by a non-governmental organization? In that case, the third state's sovereignty is the reason why some would support the application of its law, but that cannot

[80] Berger, Klaus Peter, op. cit. p. 283.
[81] Ibid.
[82] The analysis is made only from the point of view of the legal norm. Based on what we regard as a legal system, there are other criteria to be fulfilled as well.
[83] For the view of an English barrister, Anthony Connerty, *Lex Mercatoria: Is it Relevant to International Commercial Arbitration?* Yildrim/Eskiyörük (eds.), International Commercial Arbitration and the New Lex Mercatoria, 2014, p. 120 et seq. For a detailed review of arbitral agreements and the governing law, see Alan Scott Rau, *The Agreement to Arbitrate and the 'Applicable Law*. American Review of International Arbitration (Forthcoming); Available at SSRN: https://ssrn.com/abstract=2954109 or http://dx.doi.org/10.2139/ssrn.2954109 (13 September 2019).
[84] Orsolya Tóth, op. cit. pp. 167-168.
[85] Ibid. p. 166.
[86] Markus A. Petsche, International Commercial..., op. cit.

be a pertinent argument. Sovereignty shall not mean that alegal order has a priority in application,

or that the legal dispute can be settled properly by the applicable legal provisions of that third state. The legal order which should be applied is the one which regulates the issue with the most specificity, keeping in mind the features of international trade.[87]

'Par in parem non habet imperium.' If we think about that, it is controversial to have a national legal order have 'sovereignty' over an international body of law claimed to be autonomous by a considerable part of the doctrine. To illustrate this, we can think about a dispute where one of the parties is a state or its institution. In that case, would any state accept the other state's rules to be applied? If none of the parties are state actors, the problem remains the same – since states are also parties in international commerce, why should the national law of a party be considered more convenient and fitting than a body of law elaborated by agents having at least no direct interest in international commercial dealings?

Of course, as it is noted by Tóth, "*the arbitrator's scepticism* towards the [L]ex [M]ercatoria may *distract the conflict of laws process*[emphasis added]."[88] Therefore, there is a need for a solution to ensure the application of the Merchant in such occasions, which is in the interest of the parties, due to the fact that its contents can be more and more easily determined due to doctrinal advancements, and that content is a custom-made body of law having as its scope international commercial contracts and transactions. One such way is a broader understanding of Lex Mercatoria and its methodology by arbitration practitioners, which can be greatly influenced by a more elaborate arbitration case law.

4.Shall we Dance – Shall a National Court use Lex Mercatoria as a Main Source?

The use of Lex Mercatoria can be considered established in international commercial arbitration. Even though when the Merchant shall apply is subject to disputes, it is ensured that if the parties choose it as a governing law for their contract, then the arbitral tribunal will solve the dispute accordingly. However, commercial litigation seems to reject the idea of applying mainly transnational rules during the proceedings. Professor Petsche offers a detailed view about the domestic courts' inability to apply transnational law, stating that "The application of non-national or transnational law [under the Rome I Regulation[89]] is excluded"[90], and also detailing the rules used in the United-States.[91] It is considered by the Professor, that even limited exceptions, such as the possibility for the parties to incorporate rules of transnational origin into their contract, conclude in a more complicated legal relationship, mainly because transnational rules and domestic provisions regarding international commercial contracts and international commercial relations share similarities regarding their scope and nature, and that overlap will cause inconsistencies in the application of these incorporated rules, thus it will be determined by the court which of these contravenes the law that is selected to decide the legal problems.[92]

On the other hand, "[t]he basic function of transnational law is to provide parties with an independent, comprehensive set of norms that governs all legal issues arising out of their transac-

[87] See for example Goode, Roy. "Usage and Its Reception in Transnational Commercial Law." International and Comparative Law Quarterly, vol. 46, no. 1, 1997, p. 13. et seq, arguing for the fact that international trade usages can be specific as well,
[88] Orsolya Tóth, op. cit. p. 171.
[89] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations.
[90] Markus Petsche, „The application...", op. cit. p. 493. About the same issue, see Symeonides, Symeon, *Party Autonomy and Private-Law Making in Private International Law: The Lex Mercatoria that Isn't.* Festschrift für Konstantinos D. Kerameus, Ant. N. Sakkoulas & Bruylant Publishers, 2009, pp. 1397-1423.
[91] Ibid. p. 494.
[92] Ibid. pp. 497-498.

tion."[93]Therefore, their incorporation in the contract, even if the general principles of international trade will only be utilized during interpretation, makes things more sophisticated, and therefore such provisions can hardly, if at all take advantage of transnational rules, and the self-regulatory nature of Lex Mercatoria.

Some jurisdictions accept these rules and Petsche also argues for the application of transnational rules by domestic courts, and highlights the inappropriateness of criticism[94], illustrating that there are no valid objections[95] against the allowance of the application of 'rule of law'[96] and non-state elaborated bodies of law. The two possible objections of opponents worth mentioning, and also in need of further detailing are the views according to which courts can only apply domestic law,[97] and the application of transnational rules would undermine the appellate review system.[98]

With respect to the appellate review system, it is commonly known that domestic courts handle foreign law as a matter of fact, and not as a law[99]. The problem of the appellate review can arise on an international level, which is the need for a body or an organization to be the last word regarding the interpretation and application of the Merchant. Since one of the '*raison d'etre*' of Lex Mercatoria arbitration is the possibility to settle disputes by the rules and principles which have the most support on an international level, a misinterpretation by these on a state-level can result in parallel jurisprudence and appearance of the *forum shopping*[100]. Moreover, a hybrid theory can only be used in case of arbitration or special jurisdictions, since an equity-test is not easily executable by a judge outside of a Common law jurisdiction. In case of the Vienna Convention on Contracts for the International Sale of Goods[101], it is highlighted by some authors that the lack of uniform application[102] makes the CISG less effective, with some even stating that the background problem is that the CISG is not a jurisdiction.[103] If Lex Mercatoria will ever be widely applied by domestic courts, probably we will face the same problem. Also, the problems caused by non-uniformity can influence the functioning of the whole system, therefore, considering cases where Lex Mercatoria figures are most often solved through arbitration, it is a dilemma whether the minor part of the dispute settlement solved by transnational law makes the risk worth it.

In connection with the other one, which has as a premise that courts only apply domestic law, Petsche identifies a key problem, "that a contract needs to be governed by a particular domestic law because it cannot exist in a legal 'vacuum'."[104] What the author considers as essential in that discussion is the economic criteria of an international commercial contract. From that point of view, the theory of international commercial contracts might be reassessed, since it is quite improper to decide the validity of a contract based on the rules of a state, while in the majority of cases one of the states might have direct economic or financial interest. International investment treaties are considered as the solution against these potential abuses, but these treaties do not offer protection with respect to a significant part of international commercial law. Therefore, that objection should not be accepted, and there is a need for the reconsideration of validity analysis based on a single substantive law.

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[93] Ibid.
[94] Ibid. p. 508 et seq.
[95] Ibid. p. 511 et seq.
[96] For the distinction between law and 'rule of law', see Michał König, *Non-State Law in International Commercial Arbitration*, Polish Yearbook of International Law, No. XXXV, 2015, p. 269 et seq.
[97] Ibid. p. 512.
[98] Ibid. pp. 514-515.
[99] Ibid.
[100] Francesco Galgano, Globalizáció, op. cit. pp. 85-88.
[101] 1980, United Nations Convention on Contracts for the International Sale of Goods
[102] Jan M. Smits, *Problems of Uniform Sales Law – Why the CISG May Not Promote International Trade*. Larry A. Di Matteo (ed.), International Sales Law: A Global Challenge, Cambridge 2014; Maastricht European Private Law Institute Working Paper No. 2013/1; Glavanits Judit: *How Do You Mean It, CISG? Applying The CISG More "21st Century"-Way*, In: Modernizing International Trade Law to Support Innovation and Sustainable Development: Proceedings of the Congress of the United Nations Commission on International Trade Law.Vienna, Ausztria, 2017.07.04-2017.07.06; Glavanits Judit: *A Bécsi Egyezmény magyar és nemzetközi joggyakorlata – kérdések és kétségek között*, In: Glavanits Judit, Rigó Erika, Szakály Zsófia, Wellmann Barna Bence, A nemzetközi adásvételi szerződések joggyakorlatának aktuális kérdései. Széchenyi István Egyetem Deák Ferenc Állam- és Jogtudományi Kar, 2017.
[103] Smits, Jan M., 2014, p. 609 et seq.
[104] Markus Petsche, „The application...", op. cit. p. 512.

5. The Show Never Ends – The Future of the Merchant

This section shall function only as a quick outlook on international trade law, and some events having major influence on its development. The current state of globalization (and the political debates resulting in trade wars), Brexit and certain decisions of the Court of Justice of the European Union (CJEU) can drastically change the setting of commercial law on the European Union level.

Probably, the most important is the process of rethinking the role of the economy and trade law in the globalized world. On the one hand, Professor Garcia argues that our social space "is a global market society is perhaps the most controversial characterization of the three, but in my view this is what the convergences outlined above point to."[105] On the other hand, due to certain political debates between leading economies, there is a constant decline of free-trade and common protectionist practices,[106]and that affects all of us. The decline in free-trade can cause economic agents to increase their trading activity within the framework of customs unions and common markets, and that infra-economic trade is often regulated from the perspective of trade law, meaning that these processes can appear hand-in-hand with a decreased utilization of general principles of trade law in international commercial contracts.

On a European Union level, probably the most important issue is Brexit. As it stands now, at the moment when this article is written, the United Kingdom will leave at 31st of October, and even though the prime-minister is obliged to avoid a no-deal situation, things can still go both ways. The United Kingdom leaving the European Union might be an ante-room for a period during which deeper economic and political integration can be achieved. This can be relevant from the perspective of Lex Mercatoria as well, since transnational law is frequently opposed by common law authors, and the most important proponents, with few exceptions, are all coming from civil law countries. Maybe this will mean that a potential acceptance of its utilization on the European Union level has one barrier less to pass?

Furthermore, the Achmea case, Case C-284/16 and its ulterior effect on the jurisprudence of the CJEU will be a watershed in the acceptance of arbitration and, indirectly, in the use of the Merchant. The case concluded that a provision of the bilateral investment treaty ('BIT') "ha[d] an adverse effect on the autonomy of EU law", and that "Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States". Even though the case refers to an arbitration agreement in a BIT, it is questionable whether based on that case the acceptance of intra-EU arbitration in private dealings will remain untouched, or the autonomy of the EU will also have an effect on that form of dispute settlement. This question is yet to be asked, but it is an issue outside the context of the present article, and therefore the author restricts to make the necessary references.[107]

6.This Stage is Beneath my Talent, but I Shall Elevate It – Conclusions

It is no longer disputed that the application of Lex Mercatoria is beneficial for the parties, and can enhance the substantive neutrality and fairness of an international business transaction, as well as the settlement of potential disputes arising from it. However, it is not utilized to its full potential, and even after some 70 years of its 'renaissance' there are still fundamental questions regarding its

[105] Frank Garcia, *Rethinking Trade Law in an era of Trump and Brexit*, Sorbonne Student Law Review, Vol.1, No.1, 2018, p. 118 et seq.

[106] Melchior, Arne. *Free Trade Agreements and Globalisation: In the Shadow of Brexit and Trump*. 2018. <https://doi.org/10.1007/978-3-319-92834-0>.

[107] Pohl, Jens Hillebrand, *Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?*, European Constitutional Law Review 14, no. 4 (2018): 767–791; Hess, Burkhard, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*. MPILux Research Paper 2018 (3), March 30, 2018; Nagy, Csongor István, *Intra-EU Bilateral Investment Treaties and EU Law after Achmea: 'Know Well What Leads You Forward and What Holds You Back'*. German Law Journal, Vol. 19, No. 4, 2018, pp. 981-1016; Lee, Janice, T*he Empire Strikes Back: Case Note on the CJEU Decision in Slovak Republic v. Achmea BV*, Contemporary Asia Arbitration Journal, Vol. 11, No. 1, May 2018, pp. 137-152.

application, methodology and place in international commercial law.

This article mainly assessed the methodology of transnational law. In the internationalizing world where private governance is not just a desire, but tends to become a reality, the reluctancy to non-state law shall become obsolete, since it is the legal framework which can adequately and wholly regulate and control the international commercial field. In international arbitration the Law Merchant is often excluded, due to the fact that its content is hard to define. But is it really? The article tries to debunk that claim with the presentation of a hybrid solution which contains the most important instruments of both the list and the functional method. However, a solution such as initial perspectives cannot be efficient without proper arbitral case law. In that sense, the article argues for a broader publication practice of arbitral rationale and argumentation. It has to be reaffirmed that this shall only concern legal problems and their solutions, the confidentiality of the arbitral proceedings shall be left 'untouched'.

Apart from the methodology, the paper focused on the elaboration of additional arguments in favour of the *'voie direct'* as well as with the potential application of transnational law by domestic courts. Knowing the problems what the CISG is facing, it is questionable whether that eventual application can solve problems of the parties, and if that need implies an answer from the states. However, such a measure shall be carried out with due prudence. Finally, the article mentioned some events which can determine whether or not the Law Merchant will be more widely accepted in the future.

There is one more question to be answered: which one of the methodologies is a lie? The answer is both – and none. In the current form: both, because none of them can give a proper answer regarding the exact content-setting of a transnational rule, not just during an arbitration, or in the long run, but combined. In the current form also neither, as both contain instruments and elements which contribute to the creation of an autonomous law system, and a body of law which can appropriately govern international commercial dealings. The international stage is much beneath of the talent, potential, and usefulness conferred by Lex Mercatoria. Although, to elevate it, there is a need for cross-fertilization not just between the situation of comparative law and certain lists, but between the needs of economic agents, the findings of doctrinal researchers and the arbitrators and judges (possibly with an increasing number in the future). It is a long way to go, but even Louis XIV, if he lived some 300 years later, would say that *'Je m'envais, mais la Lex Mercatoria demeurera toujours.'*