A Plural Account of the Transnational Law Merchant

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Abstract

The Law Merchant is depicted today as a transnational system based on merchant practice operating outside the fabric of national law. It is conceived as cosmopolitan in nature, universal in application, expertly delivered, and independent of other regulatory systems.

This article critiques these qualities attributed to the historical as well as present-day Law Merchant. It disputes that it has evolved 'spontaneously' out of merchant practice; that it is uniform in nature; and that it transcends national law. It argues instead that the Law Merchant is often fragmentary in nature and subject to disparate national and transnational influences. It challenges, in particular, unitary conceptions of 'autonomy' ascribed to the Law Merchant, presenting a pluralistic conception of Law Merchant 'autonomy' instead. It illustrates these arguments in relation to the so-called Cyberspace Law Merchant and to transnational commercial arbitration.

I. INTRODUCTION

Despite attracting voluminous commentary, a universally acceptable definition of the Law Merchant remains elusive. Since its origins in pre-medieval times, the institution and definition of the Law Merchant have undergone significant change. At its core, it encompasses a trans-regional system by which merchants regulate their own affairs irrespective of the immediate locations of those transactions or the nationalities of the merchant traders. As was echoed in *Luke v Lyde*: 'Mercantile law is not the law of a particular country but the law of all nations.'

According to this view, the Law Merchant is envisaged as cosmopolitan in nature, transnational in reach, and expeditious in its application.² Its magnificence is that it is

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- 1 Luke v Lyde (1759) 97 Eng Rep 614, 618 (KB); 2 Burr 882, 887 (Lord Mansfield).
- On the medieval Law Merchant see Gerard Malynes, Consuetudo, Vel, Lex Mercatoria, or, The Ancient Law-Merchant: In Three Parts According to the Essentials of Traffick (Lawbook Exchange, 3rd edn 2009 [1686]); W Mitchell, An Essay on the Early History of the Law Merchant (Cambridge University Press, 2011 [1904]); Leon E Trakman, The Law Merchant: The Evolution of Commercial Law (William S Hein, 1983) 7–22;

able to function efficiently and fairly as a merchant regime run by transnational merchant judges and set apart from local laws prescribed by local rulers.³ Its durability is in being able to satisfy the trans-regional interests of itinerant merchants who travel with their goods and wares from port to port, fair to fair, and market to market. Its continuity is ensured because local rulers explicitly or implicitly support its operation in their own and their subjects' economic and political interests. The result is a system of Law Merchant justice that responds to a plurality of constituencies engaged in transnational trade and investment, including itinerant merchants, domestic rulers, and local and foreign communities.⁴

Opposing these views is the proposition that the Law Merchant and merchant justice never was, nor is, distinct, uniform, cosmopolitan, trans-regional, or pluralistic in nature. Instead of being grounded in the spontaneous practices of merchants, it was, and is, territorially constrained by local rulers who regulate merchant trade within their territorial regimes.⁵ The result, at best, is a variable Law Merchant that reflects the disparate social, cultural and political values of local authorities, courts, communities and

Francis M Burdick, 'What is the Law Merchant?' (1902) 2 Columbia Law Review 470; Henry Butterworth, 'Points in the History of the Law Merchant' (1855) 23 Law Magazine, or Quarterly Review of Jurisprudence ns 1, 2 (citing Master v Miller, 4 TR 320); AT Carter, 'Early History of the Law Merchant in England' (1901) 232 Law Quarterly Review 232; Albrecht Cordes, 'The Search for a Medieval Lex Mercatoria' (2003) 5 Oxford University Comparative Law Forum 1; Keith Highet, 'The Enigma of the Lex Mercatoria' (1989) 63 Tulane Law Review 613, 616-17; Friedrich K Juenger, 'The Lex Mercatoria and Private International Law' (2000) 60 Louisiana Law Review 1133, 1134; Philip W Thayer, 'Comparative Law and the Law Merchant' (1936) 6 Brooklyn Law Review 139. For skeptical accounts of the Law Merchant, see JH Baker, 'The Law Merchant and the Common Law before 1700' (1979) 38 Cambridge Law Journal 295; John S Ewart, 'What is the Law Merchant?' (1903) 3 Columbia Law Review 135; Charles Kerr, 'The Origin and Development of the Law Merchant' (1929) 15 Virginia Law Review 350; FCD Tudsbery, 'Law Merchant and the Common Law' (1918) 34 Law Quarterly Review 392; Nicholas HD Foster, 'Foundation Myth as Legal Formant: The Medieval Law Merchant and the New Lex Mercatoria, Forum HistoriaeIuris, 18 March 2005, http://fhi. rg.mpg.de/articles/pdf-files/0503foster.pdf. On the alleged growth of a modern, new Law Merchant, see Klaus Peter Berger, The Creeping Codification of the New Lex Mercatoria (Kluwer, 2nd edn 2010); Emmanuel Gaillard, 'Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules' (1995) 10 ICSID Review: Foreign Investment Law Journal 208; Clive M Schmitthoff, 'International Business Law: A New Law Merchant' in Chia-Jui Cheng (ed), Clive M Schmitthoff's Select Essays on International Trade Law (Martinus Nijhoff, 1988) 20 [hereinafter Select Essays]; Tamara Milenković-Kerković, 'Origin, Development and Main Features of the New Lex Mercatoria' (1998) 1(5) Facta Universitatis (Economics & Organization) 87; Alec Stone Sweet, 'The New Lex Mercatoria and Transnational Governance' (2006) 13 Journal of European Public Policy 627.

- ³ See eg Trakman (n 2) 7-8 (discussing the self-regulating Law Merchant); Harold J Berman and Colin Kaufman, 'The Law of International Commercial Transactions (Lex Mercatoria)' (1978) 19 Harvard International Law Journal 221, 222-3.
- 4 It is arguable that political and economic interests in promoting trans-regional trade were also significant drivers behind the conception of a universal Law Merchant. See eg Amalia D Kessler, A Revolution in Commerce: The Parisian Merchant Court and the Rise of Commercial Society in Eighteenth-Century France (Yale University Press, 2007) 73, 86 (providing a critique of the procedural virtues associated with the 18th century Law Merchant based on the limited and nonarchival writings of a merchant, Toubeau).
- ⁵ For an excellent account of the operation of and deficiencies in the 18th century Law Merchant in France, see Kessler (n 4) (demonstrating how merchants associated with the Parisian Court helped to

merchants at distinct moments in time, place and space. Far from homogenising the divergent interests of merchants, non-merchants and local rulers into a single transnational legal order, the Law Merchant compounds such divergence.⁶

This article examines these conflicting conceptions of the Law Merchant. It scrutinises the history of the Law Merchant as a supposedly cosmopolitan system of law and its alleged transformation into a twenty-first century Law Merchant. It disputes narrow monist conceptions that are ascribed to it, underscoring the plural attributes of the Law Merchant. The purpose is to promote a functional approach towards the Law Merchant that is contemporary, that is responsive to the aspirations of transnational merchants, and that accommodates the political and social interests of modern states and their subjects.

In stressing the plural attributes of the Law Merchant, this article challenges both historical and contemporary autonomy values that are sometimes imputed to a unified system of merchant law.⁷ It disputes the economic rationale that the Law Merchant evolved spontaneously out of the practices and usages of merchants.⁸ It contests the image of a sixteenth century liberal Law Merchant that evolved naturally into our contemporary post-liberal era.⁹ It questions the extent to which the Law Merchant was uniformly 'nationalised' by nation-states in the sixteenth century and 'transnationalised' by those self-same nation-states along pluralistic lines today.¹⁰ It concludes by examining how Law Merchant values are institutionalised today, notably through the development of transnational commercial arbitration.

II. THE MANY FACES OF LAW MERCHANT AUTONOMY

The title 'Law Merchant' does not provide a complete account of how merchants currently regulate, or historically regulated, their own affairs institutionally, systemically or functionally. In addition, the notion of merchant autonomy is insufficiently capable of signifying who or what was, or is, autonomous under the Law Merchant. This section

- reconceptualise commerce and ultimately accounted for the demise of corporatism, culminating in the revolution of 1789).
- 6 The 'romance' of the Law Merchant was captured, albeit without cynicism, in the title of a widely cited book extolling its virtues: Wyndham Anstis Bewes, *The Romance of the Law Merchant* (Sweet & Maxwell, 1986 [1923]). See also Jacob Goodyear, 'The Romance of the Law Merchant' (1930) 34 *Dickinson Law Review* 218, 225 (giving a romanticised image of the Law Merchant).
- 7 See Part II
- 8 See generally David Schmidtz and Jason Brennan, A Brief History of Liberty (Wiley-Blackwell, 2010) 80–81 (analysing the interface between the history of liberty and the development of the Law Merchant); Richard A Epstein, 'Reflections on the Historical Origins and Economic Structure of the Law Merchant' (2004) 5 Chicago Journal of International Law 1, 19–20 (providing a law and economics perspective on the Law Merchant).
- 9 See Part V.
- 10 Ibid.

explores plural conceptions of autonomy to create a preliminary framework for subsequent analysis.

A. A Spontaneous Law Merchant?

The historical Law Merchant is sometimes depicted by libertarians as an exemplification of 'spontaneous ordering'. ¹¹ This rests on the proposition that merchant judges devised merchant law out of merchant practice spontaneously, or, in liberal terminology, freely and voluntarily. ¹² Central to this allegedly spontaneous ordering of trans-regional merchant law are three factors: the value placed on the autonomy of itinerant merchants to interact at will, the separation between spontaneously evolving merchant laws and peremptory laws imposed on them by municipal systems of law, and a utilitarian priority accorded to merchant laws that derived from merchant practice as distinct from superimposed sources of law. ¹³ Exemplifying the spontaneity of the historical Law Merchant is the rationale that medieval merchants freely determined the price of goods, while merchant judges decided whether that price was 'just' and 'reasonable' according to mercantile perceptions of fairness and expediency. ¹⁴

A spontaneously ordered Law Merchant also infers that merchants are autonomous in being free to conclude agreements, such as to make choices of law and arbitration to suit their mercantile expectations.¹⁵ The source of their autonomy resides in merchant responsive laws that are crafted by experienced merchant judges out of merchant usage, as distinct from domestic laws imposed on merchant practice.¹⁶ The inferred result is

- 'Spontaneous ordering' is a libertarian concept popularised by philosophers such as Hayek. See Christian Petsoulas, Hayek's Liberalism and its Origins: His Idea of Spontaneous Order and the Scottish Enlightenment (Routledge, 2001) 12–52. See generally Friedrich Hayek, The Constitution of Liberty (University of Chicago Press, 1960).
- 12 See eg Norman Barry, 'The Tradition of Spontaneous Order' (1982) 5 Literature Liberty, no 2, 7; Murray N Rothbard, 'Concepts of the Role of Intellectuals in Social Change toward Laissez Faire' (1990) 9(2) Journal of Libertarian Studies 46.
- 13 On the spontaneous ordering of the Law Merchant, see Bruce L Benson, 'The Spontaneous Evolution of Commercial Law' (1989) 55 Southern Economic Journal 644, 646–51 [hereinafter 'Commercial Law']; Bruce L Benson, 'The Spontaneous Evolution of Cyber Law: Norms, Property Rights, Contracting, Dispute Resolution and Enforcement Without the State' (2005) 1 Journal of Law, Economics & Policy 269, 298–328. On the modern foundations of such libertarian values, see Andrew Gambles, Hayek: The Iron Cage of Liberty (Westview, 1996); Ludwig Von Mises, Planning for Freedom and Other Essays and Addresses (Libertarian Press, 1952). See also John Gray, Hayek On Liberty (Basil Blackwell, 3rd edn 1998). On value preference in utilitarian philosophy, see eg John Stuart Mill, 'Utilitarianism' in JB Schneewind and Dale E Miller (eds), The Basic Writings of John Stuart Mill (Random House, 2002) 241.
- 14 See Kessler (n 4) 111–12, 211–13 (discussing 'just price' as applied to merchants in the 18th century Parisian Law Merchant); Trakman (n 2) 8 (as applied to the medieval Law Merchant).
- See generally Daniel I O'Neill et al (eds), Illusion of Consent: Engaging with Carole Pateman (Penn State University Press, 2008) (discussing the foundations of merchant autonomy in contractual consent); Leon E Trakman, 'Contracts: Legal Perspectives' in Neil J Smelser and Paul B Baltes (eds), International Encyclopedia of the Social and Behavioral Sciences vol 3(8) (Elsevier, 2001) 2715–19.
- 16 See Leon E Trakman, 'The Law Merchant' (1985) 2 Humane Studies Review 1, 1–3 (discussing the spontaneous development of merchant law out of merchant practice).

a merchant-ordered regime of rules and procedures, rooted in natural rights, ¹⁷ which respond to the discrete needs of transnational merchants in a spontaneous and efficient manner.

A contrary view is that, far from being the natural outgrowth of merchant practice, merchant laws were, and are, authorised differently by legal authorities, ¹⁸ and integrated into multifaceted legal systems through planned, not spontaneous, action. ¹⁹ The modern Law Merchant is preplanned as much as it is spontaneously combusted; it is driven by national and transnational authorities as much as by merchants. ²⁰ So conceived, the Law Merchant consists of a loose framework of uneasy compromises among the otherwise incommensurable interests of transnational merchants, domestic rulers and local communities. It entails recognising that stratified groups of merchants operating in diffuse trades are incapable of devising a self-operating or spontaneous merchant order in their own image. It acknowledges the limitations of a monist conception of freedom of contract by which transnational merchants are able to avoid national and transnational impositions on their private affairs. ²¹

- On the roots of deontological liberalism in natural law, see William A Galston, Liberal Purposes: Goods, Virtues and Diversity in the Liberal State (Cambridge University Press, 1991) 38, 191–212; Christopher Wolfe, Natural Law Liberalism (Cambridge University Press, 2006) 185–217. On the liberal foundations of modern rights theory, see Leon E Trakman and Sean Gatien, Rights and Responsibilities (University of Toronto Press, 1999) 84–98, 167–86.
- On the influence of law on the development of the Uniform Commercial Code (UCC) as a 'merchant code', see Ingrid Michelsen Hillinger, 'The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law' (1985) 73 Georgetown Law Journal 1141, 1160; Allen R Kamp, 'Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context' (1995) 59 Alberta Law Review 325, 340 (noting, for instance, that 'Llewellyn's first drafts of the Code provided for a jury composed of merchants to make [factual] determinations'); David Ray Papke, 'How the Cheyenne Indians Wrote Article 2 of the Uniform Commercial Code' (1999) 47 Buffalo Law Review 1457, 1459–60. But see Daniel A Farber, 'Toward a New Legal Realism' (2001) 68 University of Chicago Law Review 279, 299–300 (book review) (arguing that the use of experts instead of ordinary juries 'may be a drastic solution to a minor practical problem').
- Articles 1 (general) and 2 (sales) of the UCC, of which Karl Llewellyn was the primary architect, are supposedly grounded in Law Merchant tenets, especially in a functional relationship between commercial law and commercial practice. On the legal realist underpinnings of this functional relationship, see NEH Hull, Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence (University of Chicago Press, 1997) 223–77; William Twining, Karl Llewellyn and the Realist Movement (Cambridge University Press, 2nd edn 2012); Karl N Llewellyn, 'Some Realism about Realism—Responding to Dean Pound' (1931) 44 Harvard Law Review 1222, 1233–8. On an American Lex Mercatoria, see George Cairnes, An Inquiry into the Law Merchant of the United States: Or, Lex Mercatoria Americana (Law Book Exchange, 2006).
- 20 Some have challenged efficiency as a pervasive foundational value grounded in utilitarianism. See eg Ronald M Dworkin, 'Is Wealth a Value?' (1980) 9 Journal of Legal Studies 191. For a defence see eg Colin M Macleod, Liberalism, Justice, and Markets: A Critique of Liberal Equality (Clarendon, 1998) 6 (discussing fairness as basic to achieving justice); Richard A Posner, 'A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law' (1981) 9 Hofstra Law Review 775.
- 21 See further Part V.

B. The Plural Boundaries of Merchant Autonomy

The study of an evolving Law Merchant invites different accounts of its origins, operative features, and political significance. One such account is to identify the different autonomy values that are associated with it; to evaluate the range of plural meanings that are accorded to such autonomy values; and to assess the extent to which they complement or contradict one another in discrete merchant contexts.²²

Under a plural conception of the Law Merchant, the first kind of autonomy value is the alleged formal and institutional independence of the Law Merchant from other legal or merchant orders. An illustration is the formal independence of pre-medieval merchant codifications—like the Rolls of Oléron and the Laws of Rhodes—from local laws and customs. The second kind of autonomy value is the functional independence imputed to Law Merchant institutions, such as the functional independence of the eighteenth century merchant court in Paris from national law courts. The third kind of autonomy value is in ascribing substantive autonomy of merchant laws, such as in attributing the development of distinctive conceptions of the 'just price' to the Law Merchant. The fourth kind of autonomy value relates to the procedural autonomy of merchant courts, such as the procedures followed by assemblies of merchants participating in deliberations at the medieval fairs of St Ives. The fifth kind of autonomy is associated with the functionality of Law Merchant institutions, such as the functional attributes identified

- On value pluralism in commercial transactions, including the Law Merchant, see Leon E Trakman, 'Pluralism in Contract Law' (2010) 55 Buffalo Law Review 1031. Regarding attempts to assess the commensurability of values, including autonomy values, in pluralism, see eg Michael Stocker, Plural and Conflicting Values (Clarendon Press, 1990) 175–8; Bernard Williams, Moral Luck: Philosophical Papers 1973–1980 (Cambridge University Press, 1981) 71–82; David Wiggins, 'Incommensurability: Four Proposals' in Ruth Chang (ed), Incommensurability, Incomparability and Practical Reason (Harvard University Press, 1997) 52, 52–66.
- 23 See Filip De Ly, International Business Law and the Lex Mercatoria (TMC Asser Institute/Elsevier, 1992) 96, 129–30; Klaus Peter Berger, 'The New Law Merchant and the Global Market Place—A 21st Century View of Transnational Commercial Law' in Klaus Peter Berger (ed), The Practice of Transnational Law (Kluwer, 2001) 1.
- 24 See eg Malynes (n 2) 6–10. See generally Travers Twiss (ed), The Black Book of the Admiralty (Longman, 1871–6); Francis C Bickley (ed), The Little Red Book of Bristol (Hemmons and Southeran & Co, 1900); P Studer, The Oak Book of Southampton (Cox & Shorland, 1910–11); Trakman (n 2) 7–8.
- 25 See Kessler (n 4) 16–95. As for Law Merchant institutions being absorbed into, or otherwise influencing, the civil and common law systems, see eg MF Morris, An Introduction to the History of the Development of Law (J Byrne & Co, 1909; reprinted Wm S Hein, 1982) 222, 274.
- 26 See Amalia D Kessler, 'Enforcing Virtue: Social Norms and Self-Interest in an Eighteenth-Century Merchant Court' (2004) 22 Law and History Review 71, 89–90 (discussing the 'just price'); see also Trakman (n 2) 86 (discussing judicial application of fairness standards). Regarding the determination of the fair price in the 18th century Parisian Merchant Court, see Kessler (n 4) 79, 114, 131. On the influence of a broad sense of fairness upon the decisions of medieval merchant courts, see eg Trakman (n 2) 18; Stephen E Sachs, 'From St Ives to Cyberspace: The Modern Distortion of the Medieval "Law Merchant" (2006) 21 American University International Law Review 685, 760.
- 27 See Sachs (n 26) 717.

with Piepoudre, or 'dusty feet', courts in regulating merchant disputes expeditiously.²⁸ The sixth kind of autonomy derives from the presupposed independence of the Law Merchant from other systems of law, such as from Roman and canon law.²⁹

These different kinds of autonomy values do not necessarily accurately or exhaustively define the Law Merchant. Nor do they provide a fully integrated account of it. Indeed, the very insistence that the Law Merchant entails multiple and competing autonomy values entails recognising that the Law Merchant never was wholly institutionally, formally, substantively, or functionally autonomous. However, these different accounts of the autonomy of the Law Merchant underscore variable conceptions that can help to explain it, including the extent to which those conceptions may be incommensurable with one another in discrete contexts.

A plural conception of an autonomous Law Merchant also helps to elucidate, without necessarily reconciling, a heterogeneous range of culturally and politically imbued values.³¹ For example, the institutional autonomy of the medieval Law Merchant was associated with its independence as a mercantile system that functioned apart from other regulatory systems. This institutional autonomy was distinct from the autonomy of merchants who functioned within it in a medieval era preceding the creation of the liberal state.³² In contrast, the sixteenth century Law Merchant was characterised not by its institutional autonomy as a system of merchant justice, but by the autonomy of individual merchants to interact freely within it.³³ Merchants allegedly enjoyed not only the classical liberty to contract at will, but the freedom to exclude national or transnational regulation in their mutual dealings.³⁴ The supposition is that they were regulated, not by

- 28 For a fuller discussion of the Piepoudre courts, including their growth and influence in English law following the medieval Law Merchant, see Charles Gross, 'The Court of Piepowder' (1906) 20 Quarterly Journal of Economics 231, 231–47.
- ²⁹ But on the Law Merchant 'borrowing' from Roman Law, see text to n 66.
- ³⁰ See eg Baker (n 2) 299 (arguing that the Law Merchant was not autonomous in the early common law system).
- 31 See Gunther Teubner, "Global Bukowina": Legal Pluralism in the World Society' in Gunther Teubner (ed), Global Law Without a State (Dartmouth, 1997) 3 (providing an inspiring plural account of the Law Merchant). On imbedding the Law Merchant into codes of law, see Berger (n 2); Hercules Booysen, International Transactions and the International Law Merchant (Interlegal, 1995) 3–4.
- 32 cf Trakman (n 2) (discussing the contrast between autonomy in the medieval and the modern Law Merchants).
- 33 On the modern foundation of freedom of contract in consent theory, see FH Buckley, Just Exchange: A Theory of Contract (Routledge, 2005) 27 (discussing consent as an expression of free will); Ruth R Fadan and Tom Beauchamp, A History and Theory of Informed Consent (Oxford University Press, 1986); FH Buckley (ed), The Fall and Rise of Freedom of Contract (Duke University Press, 1999); James Gordley, The Philosophical Origins of Modern Contract Doctrine (Clarendon Press, 1991) 161–213.
- 34 It is arguable that civil law has not endorsed the concept of liberty to contract as readily as in common law. See HK Lücke, 'Good Faith and Contractual Performance' in PD Finn (ed), Essays on Contract (Law Book Co, 1987) 155, 170 (noting that '[t]he courageous protection of the liberty of the individual is not a dominant theme in the civilian tradition' compared to the common law); see also JH Baker, An Introduction to English Legal History (Oxford University Press, 4th edn 2002) 359 (discussing the role of freedom to contract with reference to modern standard form contracts); WJ Wagner, 'Who May Accept an

an institutionalised Law Merchant, but by their voluntarily concluded agreements³⁵ and their duties to perform those agreements 'in good faith'.³⁶

The challenge in ascribing autonomy values to the Law Merchant today is to reconcile conflicting autonomy values that extend beyond both the institutional independence of the Law Merchant and the individual autonomy of merchants themselves. ³⁷ Consider the proposition that the medieval Law Merchant represented a self-regulating institution created by merchants to govern their conduct, such as by entering into 'pacts' which medieval merchant courts enforced. A questionable inference is that medieval merchants enjoyed the capacity to conclude pacts in the absence of any understanding of modern liberty that evolved subsequently in the sixteenth century.³⁸ A further difficulty is to determine how to reconcile the rights of transnational merchants to conclude 'pacts' as 'free' agents in the sixteenth century with the institutional autonomy ascribed to the medieval Law Merchant that supposedly prevailed over their individual autonomy.³⁹ Equally difficult to reconcile is a twenty-first century Law Merchant that allegedly includes different conceptions of institutional autonomy, along with different conceptions of the autonomy of merchants to contract freely within it. 40 As an illustration, merchant 'pacts' today include complex choices of national and transnational law which transnational merchants are expected to make freely. 41 However, those 'pacts' are subject to a plethora of bilateral and multilateral trade and investment agreements that circumscribe that freedom.42

Offer: Assignability of Offers' in Rudolf B Schlesinger (ed), Formation of Contracts: A Study of the Common Core of Legal Systems (Dobbs Ferry, 1968) 913, 913 (referencing the notion of freedom to contract through the concept of offer and acceptance). On the philosophical roots of modern liberal democracies, including the rights of individuals, see eg John Dewey, Reconstruction in Philosophy (H Holt, 1920) 25–52; Irwin Edman, John Dewey: His Contribution to the American Tradition (Irwin Edwin, 1955) 86. For more on functional responses, see eg William James, Pragmatism and Other Writings (Penguin Classics, 2000).

- 35 See JH Gebhardt, 'Pacta Sunt Servanda' (1947) 10 Modern Law Review 159, 160, 170; Hans van Houtte, 'Changed Circumstances and Pacta Sunt Servanda' in Emmanuel Gaillard (ed), Transnational Rules in International Commercial Arbitration (Harvard University Press, 1993) 105.
- ³⁶ For more discussion of good faith in contracting, see text to nn 64 and 66.
- 37 These different measures of merchant autonomy are discussed in Part VI.A.
- ³⁸ See text to nn 35, 91–92 (discussing the enforcement of 'pacts', *pacta sunt servanda*); see also Sachs (n 26) 717 (addressing participation of merchant suitors in Law Merchant deliberations).
- 39 For more on the significance of pacts in the growth of transnational arbitration, see Part VI.B.
- 40 The 21st century Law Merchant is canvassed further in Part VI.
- ⁴¹ For a more detailed treatment of party autonomy in the choice of law, see eg Julian DM Lew, *Applicable Law in International Commercial Arbitration* (Oceana, 1978) 225. I address national and multilateral restrictions in the application of choices of law further in Part VI.C.
- 42 See Trakman (n 2) 10–12 (discussing the institutional regulation of medieval merchant pacts). Multilateral, regional and bilateral agreements in the 21st century are undoubtedly more complex than the pacts between medieval merchants, the treaties between local principalities, and the fealty foreign merchants showed to local potentates. But it would be an overstatement to conclude that pacts between medieval merchants were straightforward while modern investment and trade agreements are not. The complexity of agreements also hinges on the discrete socio-cultural and political context, which is not fixed in time, place or space. See Part VI.A–B.

One response is that, in a twenty-first century Law Merchant, merchants enjoy an autonomy to contract subject to how effectively and fairly they exercise that autonomy, such as how they negotiate agreements governing the settlement of their disputes. Another response is that twenty-first century transnational merchants enjoy, not *per se* autonomy rights, but privileges that regulators accord to them selectively. ⁴³ It depicts a Law Merchant that is strategically dominated by transnational merchants who have the financial resources and political influence to secure those privileges in fact.

One means of reconciling different accounts of the autonomy of transnational merchants in our post-liberal transnational order is to make a plural assessment of merchant-responsive ways of regulating their own affairs and merchant-directed ways in which regulators extend or constrain that autonomy. That plural assessment includes, among other factors, the cultural, political and economic interests of transnational merchants in shackling themselves to, or freeing themselves from, the territorial constraints of state authorities. The autonomy of a twenty-first century Law Merchant is also contingent on the reasons for and manner in which nation-states, acting unilaterally or multilaterally, regulate merchant institutions and individual merchants.

A plural inference is that the autonomy values ascribed to a twenty-first century Law Merchant stem neither wholly from autonomous merchant practices, nor solely from peremptory legal directives imposed by states on them, but from a functional permutation of values that includes but also supersedes both.

III. THE LAW MERCHANT'S HISTORICAL LEGITIMACY

The brief historical overview of the Law Merchant and its concomitant assumptions that follows is intended to provide an institutional and functional framework within which to consider competing autonomy-enhancing and autonomy-limiting values ascribed to the modern Law Merchant following the sixteenth century.

The eighteenth century jurist William Blackstone grounded the post-medieval Law Merchant of his day in merchant custom, which he viewed as universal in application, independent of municipal law and local rulers, and guided primarily, if not exclusively, by the demands of transnational trade. Blackstone stated:

⁴³ See Part VI (discussing the disparate privileges accorded to 21st century merchants).

⁴⁴ For perspectives on the changing nature of plural legal cultures, see eg Werner Menski, Comparative Law in a Global Context: The Legal Systems of Asia and Africa (Cambridge University Press, 2nd edn 2006) 37–58; David Nelken, 'Culture, Legal' in David S Clark (ed), Encyclopedia of Law and Society: American and Global Perspectives vol 1 (Sage, 2007) 369, 369–74; David Nelken, 'Using the Concept of Legal Culture' (2004) 29 Australian Journal of Legal Philosophy 1, 7.

⁴⁵ See also below, Part VI.

[A] particular system of customs ... called the custom of merchants, or lex mercatoria ... is ... allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions ... [A]s these are transactions carried on between subjects of independent states, the municipal laws of one will not be regarded by the other. 46

Blackstone identified these key autonomy values with the Law Merchant. Transnational merchants governed their own affairs through an informal, expeditious and prompt system of justice that suited their mercantile needs.⁴⁷ Merchant justice, in turn, was delivered through merchant-driven rules and procedures implemented by expert merchant judges. Blackstone's scheme included the following key attributes: (1) merchant judges were chosen from the ranks of merchants according to their knowledge of merchant practice and their standing among merchants; (2) they decided whether merchant usages were reasonable and fair; and (3) they weighed the need for predictable decisions against the virtue of responding to discrete merchant expectations.⁴⁸

Blackstone's view of the Law Merchant, arguably, was inspired as much by how he thought it ought to function as how it operated in fact. His depiction of it as a uniform body of transnational law based on merchant practice also represented it as a stable regulatory system suited to England's position as a maritime power.⁴⁹

These propositions, as I have argued elsewhere, are tenuous at best.⁵⁰ In particular, they blur the line between justifiable truths and romantic accounts of the Law Merchant. They divine rather than describe a system of merchant justice delivered by expert merchant judges through autonomous Law Merchant institutions, insulated from non-merchant influences. They also fail to recognise that the 'law' ascribed to the Law Merchant was often not peculiar to it. Concepts like *ex aequo et bono* were espoused in Roman and canon laws well before the Law Merchant; they were also propagated by merchant and non-merchant courts alike.⁵¹

- 46 William Blackstone, Commentaries on the Laws of England (Clarendon Press, 1st edn 1765-9) *45, 273.
- 47 See James Stevens Rogers, The Early History of the Law of Bills and Notes (Cambridge University Press, 1995) 21; Frederic Rockwell Sanborn, Origins of the Early English Maritime and Commercial Law (The Century Company, 1930) 326–7.
- 48 On an expert system of Law Merchant justice attuned to merchant practice, see eg Blackstone (n 46) *75 (identifying Lex Mercatoria as the custom of merchants); Blackstone (n 46) *273 (indicating that the Law Merchant is internationally recognised and has been accepted as law in England); WS Holdsworth, A History of English Law (Methuen, 1925) 528–9.
- ⁴⁹ For a challenge to this stable Law Merchant system, see Baker (n 2) 299 (arguing that, far from being distinct from the common law, common law courts adopted the Law Merchant determining when a party had established proof of a merchant usage); Tudsbery (n 2) 393 (discussing the incorporation of usages into the common law).
- 50 Leon E Trakman, 'The Twenty-First Century Law Merchant' (2011) 48(4) American Business Law Journal 775.
- 51 I have discussed ex aequo et bono more fully in prior work. See Leon E Trakman, 'Ex Aequo et Bono: Demystifying an Ancient Concept' (2008) 8 Chicago Journal of International Law 621. Black's Law Dictionary 557 (West Group, 6th edn 1990) defines ex aequo et bono as: 'in justice and fairness; according to what is just and good; according to equity and conscience.' It is doubtful that ex aequo et bono was an equitable doctrine, at least insofar as equity is deemed to be law.

Nor does the notion of merchant courts addressing merchant needs take account of the impact of local authorities on merchant proceedings. In granting licences and exemptions—to merchant guilds, fairs, markets and towns—local authorities had more than the interests of itinerant merchants in mind. They sought also to maintain stable relationships between merchants and local communities, to promote domestic employment and industry, and to preserve local laws from foreign influences. Far from being insulated from local interests, proceedings before Law Merchant courts were influenced by proceedings before local courts. Sa

A romantic image of post-medieval Law Merchant justice that depicts politically connected merchants exerting regulatory influence in the courts of kings and economic influence over guilds, fairs, and markets, invites critical analysis. With notable exceptions, such as associations of merchants organised by merchant guilds, ⁵⁴ post-medieval merchants did not wield significant political or economic influence, except within their immediate merchant circles. They were not considered aristocrats; they were predominantly regarded as commoners, although some were financed, usually anonymously, by nobles who tacitly provided them with access to circles of influence. ⁵⁵

Nor is it convincing to hold that post-medieval merchant law derived from merchant practice without also recognising that merchant law directed merchant practice. Merchant judges undoubtedly employed informal proceedings to respond to the immediate demands of merchants, such as by considering trade usages of merchants who dealt in perishable goods, and by reacting to fluctuating prices or irregular sources of supply in volatile markets. Merchant judges also sometimes decided cases *ex aequo et bono*, according to that which they considered fair and good and in response to mercantile values operating 'outside of law'. St

Finally, the proposition that the evolving Law Merchant was not really about law at all, but about merchant practice, is doubtful. Questions inevitably arise regarding the nature of merchant practices and their capacity to exhaust the law. If merchant judges

- ⁵² See Kessler (n 4) 109, 267 (discussing local authorities' influence over the 18th century Law Merchant); Sachs (n 26) 694, 695 (discussing their influence on the delivery of justice at the fairs of St Ives).
- 53 On attempts to insulate local law, including maritime law, from the dominance of English Law, see Rogers (n 47) 158–9. For local influences on the Law Merchant more generally, see Paul R Milgrom *et al*, 'The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs' in Daniel B Klein (ed), *Reputation: Studies in the Voluntary Elicitation of Good Conduct* (Michigan University Press, 1997) 243. Regarding the autonomy of merchant courts from the king in the day-to-day functioning of the Parisian Court, see Kessler (n 4) 252.
- 54 See Avner Greif *et al*, 'Coordination, Commitment, and Enforcement: The Case of the Merchant Guild' (1994) 102 *Journal of Political Economy* 744. The training of lawyers sometimes included the precepts of the law merchant. See Trakman (n 2) 28 (discussing the 'Mansfield jurymen' trained at Guildhall).
- 55 See Kessler (n 4) 173.
- It is arguable that the evolution of merchant practice into merchant law was guided by a sense of practical reason, not unlike the 'practical reason' by which common law courts make normative choices among plural values. See Joseph Raz, Engaging Reason: On the Theory of Value and Action (Oxford University Press, 1999) 46–66 (discussing 'practical reason' in legal philosophy).
- 57 On deciding ex aequo et bono, outside of the law, see above, n 51.

decided disputes according to merchant practices operating outside of law, how did those practices exhaust the law, if at all? If Law Merchant judges based their decisions on conceptions of fairness and goodness, to what extent did they derive those conceptions from merchant practice, or from precepts which transcend those practices? I have considered these questions in a recent article,⁵⁸ and will deal with them further in Parts VI and VII below in relation to an allegedly modernised Law Merchant system.

IV. THE INFLUENCE OF VALUE PLURALISM ON THE DEVELOPMENT OF THE LAW MERCHANT

According to a plural account of the medieval and post-medieval Law Merchant,⁵⁹ merchant courts did not limit themselves to merchant custom, practice or usage. They instead transposed both merchant and non-merchant practice into a loosely constituted system of law, dubbed 'the' Law Merchant. That Law Merchant, in turn, embodied a microcosm of merchant and non-merchant interests that were characterised as both informal and formal law.⁶⁰ In support of this plural account of the historical Law Merchant is the observation that it evolved incongruently over time, place and space; it varied in both form and substance from market to market, fair to fair, and port to port;⁶¹ and it impacted diffusely upon foreign merchants, local merchants and consumers alike.

A critical response to a plural conception of the post-medieval Law Merchant is that it consisted of 'nothing but a heterogeneous lot of loose undigested customs, which is impossible to dignify with the name of a body of law.'62 A more tempered account is that the substantive content of the Law Merchant was not hermetically sealed from other legal systems, but could be accounted for, however imperfectly, by the manner in which it accommodated these external influences upon it. 63 For example, the post-medieval Law Merchant was subject to universal law, or the *ius gentium*. 64 It was guided by Roman

⁵⁸ Trakman (n 50).

⁵⁹ See above, Part II.

While the concept of value pluralism was unknown in medieval times, it can nevertheless help to imbue seemingly incommensurable royal, community, religious, merchant, and other plural values. See eg George Crowder, *Liberalism and Value Pluralism* (Continuum, 2002) 49–54 (discussing incommensurability in value pluralism generally); Horace M Kalleen, *Cultural Pluralism and the American Idea: An Essay in Social Philosophy* (University of Pennsylvania Press, 1958) 19–28 (discussing cultural pluralism); Trakman (n 22) 1089–92.

⁶¹ See Nikitas E Hatzimihail, 'The Many Lives—and Faces—of Lex Mercatoria: History as Genealogy in International Business Law' (2009) 71 Law and Contemporary Problems 169.

⁶² See eg Baker (n 2) 300. But see Rogers (n 47) 20–27; Ewart (n 2) 135, 138.

⁶³ The converse is equally true, in recognising the influence that merchant practices had upon other legal systems, such as the common law. For a plural account of how business practice informs the common law of contracts, see Trakman (n 22).

⁶⁴ See eg Holdsworth (n 48). The Law Merchant is also depicted as part of a medieval ius commune. See Baker (n 2) 299 (citing The Carrier's Case (1473) YB 13 Edw 4, fol 9, Pasch, pl 5 (Eng), reprinted in (1945) 64

and canon law. 65 It relied on concepts like bono fidei agreements from Roman law. 66 It embraced concepts such as ex aequo et bono, which it applied to merchant transactions.⁶⁷ It incorporated notions like trust and confidence into merchant pacts.⁶⁸ It enforced good faith dealings between merchant parties, and it adapted doctrines such as pacta sunt servanda to render pacts binding. ⁶⁹ The post-medieval Law Merchant incorporated these different sources of law functionally according to the perceived demands of time, place and space, not limited to the demands of merchants themselves. The tempered view of a Law Merchant that was subject to diffuse external influences is credible in fact. Indeed, it is improbable that a post-medieval Law Merchant of Blackstone's era was insulated—formally, functionally, substantively or procedurally—from the dictates of local authorities, clerics, non-merchant elites or local communities. Moreover, given their dissimilar backgrounds, education, wealth and trade experiences, imputing collective authorship of the Law Merchant to merchants as a generic class is imprudent. Such an imputation disregards differences across classes of merchants, such as the application of dissimilar statutes to merchants dealing in specific staples and functioning in particular merchant guilds. The Law Merchant was also subject to disparate regulatory regimes. For instance, local authorities granted preferential treatment to select classes of merchants based on their discrete trades and the nature of their investments in the local economy.⁷⁰

Historical accounts of the Law Merchant also indicate that, while leading figures in organised trades (such as merchant guilds) influenced merchant practice, their impact on the formulation of merchant law was the exception, not the rule.⁷¹ Post-medieval

- Selden Society 30, 32 ('A universal law throughout the world')); James Gordley, 'Good Faith in Contract Law in the Medieval *ius commune*' in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press, 2000) 93, 95–103.
- 65 See eg Morris (n 25) 222.
- 66 Even such standards of good faith imputed to merchant practice did not originate in the Law Merchant, but were first developed in both Roman and canon law. See WW Buckland and Arnold D McNair, Roman Law and Common Law: A Comparison in Outline (revised by FH Lawson) (Cambridge University Press, 2nd edn 1952) 193–6; Thomas Edward Scrutton, The Influence of the Roman Law on the Law of England (CJ Clay & Son, 1885); Martin Josef Schermaier, 'Bona Fides in Roman Contract Law' in Reinhard Zimmermann and Simon Whittaker (eds), Good Faith in European Contract Law (Cambridge University Press, 2000) 63, 65; CC Turpin, 'Bonae Fidei Iudicia' (1965) Cambridge Law Journal 260; see also Peter Stein, Roman Law in European History (Cambridge University Press, 1999) 10, 73 (discussing ex fide bona in Roman law, and the use of canon law as a source of rules); Trakman (n 2) 25, 137–8 (listing further resources on the concept of good faith); Milgrom et al (n 53) 251–3 (discussing the notion of good faith by means of a statistical analysis).
- 67 On deciding cases ex aequo et bono, outside of law, see text to n 51.
- 68 On the binding force of merchant pacts in the conception of *pacta sunt servanda*, see eg Trakman (n 2) 63. See also Trakman (n 2) 17 (arguing that the 'merchants of Medieval Europe ... were unable to develop their relationships purely on the basis of joint reliance, trust and cooperation').
- 69 See above, text to nn 34 and 67 (discussing merchants' duty to perform their pacts in good faith).
- 70 See below, Part V (discussing further such preferential treatment of different merchant classes).
- 71 Guild leaders were often wealthy, influential, and skilled in drafting guild regulations and participating in guild litigation, including as merchant judges. On the reliance on guild leaders to help resolve disputes involving merchants in the 18th century Parisian Law Merchant Court, see Kessler (n 4) 79. On the significance of guild regulations in establishing, among other requirements, the 'just price', see Kessler (n 4)

merchants who occupied positions of privilege in comparatively free merchant towns, fairs and guilds realistically could enjoy only limited personal autonomy in an era in which personal freedom was circumscribed.

These challenges to the insularity of an evolving Law Merchant do not deny either that merchant courts developed laws out of merchant practice or that those laws impacted upon legal developments beyond the Law Merchant. Commercial laws, such as the 'writing obligatory' as an informal method of proving a debt, and the power of attorney as an instrument of agency, are grounded to some extent in the practices of trans-regional merchants. What is in doubt is the generalised proposition that the Law Merchant of Blackstone's time was institutionally and functionally insulated from domestic systems of law; that merchant judges invariably resolved merchant disputes expertly and efficiently; and that merchant law was determined wholly by and for transregional merchants to the exclusion of other legal, political and social influences. It is one thing to inflate post-medieval Law Merchant practices into a self-sustaining and monist system of merchant justice. It is another to treat those practices as the solitary source of merchant law, to sequester them from the 'official law' of local authorities, and to disregard the impact of a plurality of communal and local interests upon 'merchant' law.⁷² One can certainly marvel at the magnificence and resilience of Law Merchant codes like the Laws of Rhodes and the Rolls of Oléron. But one also needs to appreciate that those codes were not formulated in mercantile seclusion, but in light of local, regional and trans-regional demands.⁷³

V. THE COMPLEX AUTONOMY OF A MODERN LAW MERCHANT

A modernised Law Merchant, to the extent that it exists, is conceived as being subject to discrete unifying values. One such unifying value is the freedom of trans-regional merchants to choose among institutions, including national and transnational legal systems, as an expression of their free will. A competing but equally unitary account of the Law Merchant is that, however liberalised the sixteenth century world order had become, the resulting 'nationalised' Law Merchant replicated institutionalised autonomy values that were imbedded in its medieval roots. A third autonomy value amalgamates the first two

^{112.} See generally Oscar Gelderblom and Regina Grafe, 'The Rise, Persistence and Decline of Merchant Guilds' (2010) 40 *Journal of Interdisciplinary History* 477, 477–81, www.econ.yale.edu/seminars/echist/eh09/grafe-090413.pdf.

⁷² Illustrating the interrelationship between merchant practice and merchant law was the tendency of judges in the 18th century Parisian Law Merchant Court to reach decisions based on merchant practice while acknowledging the background influence of the official law. See eg Kessler (n 4) 102–3 (discussing the influence of 18th century merchant practices in reconceptualising commerce and undermining the corporatist logic of the French order of the day).

⁷³ See eg Trakman (n 2) 7–22.

unitary values into a Law Merchant that affirms the free choice of transnational merchants, while recognising that those choices are limited by a plurality of institutions, not limited to Law Merchant institutions.

A fourth account of the Law Merchant ascribes a series of unitary attributes to it, including that:

- A modern Law Merchant exists.
- It serves as an informal, expeditious and fair institutional system of merchant justice consistent with its medieval progeny.
- It is nationalised within domestic legal systems, such as the civil law system,⁷⁴ the English common law,⁷⁵ and the UCC in the United States.⁷⁶
- It is transnational in character, not unlike its trans-regional precursor.
- Its transnational character is expressed through international commercial codes and conventions to which states are parties, illustrated by the uniform law movement.
- A modern Law Merchant is also private.
- Its private character encompasses the autonomy of transnational merchants to conclude agreements, such as to resolve their disputes through choice of law and arbitration clauses.⁷⁷
- It is expressed privately through the practices, usages and customs of merchants.
- It is formally and substantively independent as a system of merchant law.
- It is endorsed by transnational legal, economic and political institutions, by nationstates and by stratified communities of transnational merchants alike.⁷⁸

The problem is that these attributes ascribed to the Law Merchant, inherently monist in nature, raise difficult questions. Can a modern Law Merchant be truly autonomous and uniform if nation-states modify it differently to suit their domestic requirements operating under the rubric of state sovereignty? How can a modernised Law Merchant accommodate multifaceted transnational economic and political directives, while still

⁷⁴ See generally Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta, 1992).

⁷⁵ See Frederick Pollock and Frederic William Maitland, The History of English Law Before the Time of Edward (Cambridge University Press, 2nd edn 1968) 1; Sanborn (n 47) 262–401 (early English maritime and commercial law); Baker (n 2) 296.

For the adoption of the Lex Mercatoria by American courts under the UCC, see eg Alaska Textile Co, Inc v Chase Manhattan Bank, NA, 982 F 2d 813 (2nd Cir 1992); Pribus v Bush, 173 Cal Reporter 747 (Cal Ct App 1981); Mirabile v Udoh, 399 NYS 2d 869 (NY Cit Ct 1977). For a classic American decision favouring the Lex Mercatoria, see Bank of Conway v Stary, 200 NW 505 (ND 1924); see further above, n 18.

⁷⁷ See generally Andreas F Lowenfeld, 'Lex Mercatoria: An Arbitrator's View' (1990) 6 *Arbitration International* 133.

⁷⁸ See Trakman (n 50).

being explicated as an autonomous Law Merchant system?⁷⁹ These questions are dealt with immediately below.

A. A Liberalised Law Merchant

Merchant autonomy is associated, sometimes too readily, with a modern liberal society. Merchants in modern liberal democracies often freely select local, regional, national or transnational institutions, laws and processes to govern their relationships. They make choices of law and forum, such as by excluding national—or transnational—law.80 Merchants conclude contracts in which they choose the venue of their transnational dispute, for instance, at the place where they conduct most of their business, where their key executives or witnesses are located, or at accessible venues between their respective offices. 81 Merchants also adopt institutional compromises, such as when merchants from third-party jurisdictions consent to arbitration before the International Chamber of Commerce (ICC) in Paris to resolve their disputes.⁸² However, the extent of merchant autonomy from both state and transnational incursion is contentious. 83 A unitary assumption is that merchants have, and ought to have, the inherent autonomy, as freely consenting parties, to choose national or transnational law, or neither, by incorporating preferred choice of law and jurisdiction clauses into their contracts. This is reflected in the libertarian proposition that maximum free choice is essential to the efficient flow of goods and services in transnational markets and that state and multistate regulation of those markets stultifies initiative and discourages profitable private commerce among transnational merchants.⁸⁴ However, the assumption that transnational merchants make—and are empowered to make—informed, efficient and fair choices of law must be verified, and cannot be presupposed. Whether merchant autonomy is justified in fact and law depends not only on how transnational merchants make choices, but also on

- 79 See generally A Claire Cutler, Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy (Cambridge University Press, 2003) 16–17; Harold J Berman and Felix J Dasser, 'The "New" Law Merchant and the "Old": Sources, Content, and Legitimacy' in Thomas E Carbonneau (ed), Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant (Juris, revised edn 1998) 53.
- 80 See eg Vera van Houtte, 'Consent to Arbitration through Agreement to Printed Contracts: The Continental Experience' (2000) 16 Arbitration International 1, 1–2 (treating the operation of jurisdiction clauses). But see Horacio A Grigera Naón, Choice-of-Law Problems in International Commercial Arbitration (Mohr, 1992) 60–75, 74 (arguing that arbitrators 'exercise checks and controls' on parties' choice of law).
- 81 See below, Part VI.A-B.
- 82 See generally W Laurence Craig et al, International Chamber of Commerce Arbitration (International Chamber of Commerce, 3rd edn 2000) (discussing the institutionalisation of arbitral choices by transnational parties); ICC, 'ICC Dispute Resolution Services', www.iccwbo.org/court.
- 83 See Symeon C Symeonides, 'Party Autonomy and Private-Law Making in Private International Law: The Lex Mercatoria that Isn't, Festschrift Für Kerameus (19 November 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946007. See generally Larry A DiMatteo, Law of International Contracting (Kluwer, 2nd edn 2009) ch 1.
- 84 See below, Part VI.A (discussing arguments favouring the free flow of goods and services across national boundaries).

how nation-states and transnational regulators construe the efficiency and fairness of those choices. These regulatory determinations entail taking account of the self-interest and altruism not only of the merchants making choices, but also of those who are perceptibly impacted by such choices. ⁸⁵ For example, the fact that merchants have the freedom to make choices of law still does not preclude nation-states from asserting sovereign authority over those choices, such as on domestic or transnational public policy grounds. Transnational merchants are also subject to transnational laws that are derived from the delegation or abrogation of sovereignty by nation-states.

The formal autonomy of modern merchants to exercise acts of free will also does not stem from their *per se* rights to trade or invest transnationally, but from states granting them privileges to do so. ⁸⁶ Those privileges are granted by multilateral institutions such as the World Trade Organization (WTO) and through bilateral action such as investment treaties between home and host states concluded for the benefit of each other's subjects. ⁸⁷ In each case, foreign merchants have only such entitlements as are bestowed on them through state or multistate action, as distinct from those arising as of right. ⁸⁸ These

- 85 See Leon E Trakman, 'Foreign Direct Investment: Hazard or Opportunity?' (2010) 41 George Washington International Law Review 1, 45-46 (discussing the autonomy of foreign investors under multilateral, regional and bilateral treaties). On the fair and equitable treatment of such investors, see generally Barnali Choudhury, 'Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law' (2005) 6 Journal of World Investment and Trade 297; Patrick Dumberry, 'The Quest to Define "Fair and Equitable Treatment" for Investors under International Law: The Case of the NAFTA Chapter 11 Pope & Talbot Awards' (2002) 3 Journal of World Investment and Trade 657 (analysing awards under the 'minimum standard of treatment' clause of NAFTA Chapter 11); Courtney C Kirkman, 'Fair and Equitable Treatment: Methanex v United States and the Narrowing Scope of NAFTA Article 1105' (2002) 34 Law and Policy in International Business 343; Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 Journal of World Investment and Trade 357, www.univie.ac.at/intlaw/wordpress/pdf/77. pdf; Stephen Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 British Yearbook of International Law 99; Organisation for Economic Co-operation and Development (OECD), Fair and Equitable Treatment Standard in International Investment Law, OECD Working Paper No 2004/3, 2004, www.oecd.org/dataoecd/22/53/33776498.pdf; Stephan W Schill, Fair and Equitable Treatment Under Investment Treaties as an Embodiment of the Rule of Law (Institute for International Law and Justice, Working Paper No 2006/6, 2006), www.iilj.org/publications/ documents/2006-6-GAL-Schill-web.pdf.
- 86 Charles H Brower II, 'NAFTA's Investment Chapter: Initial Thoughts about Second-Generation Rights' (2003) 36 Vanderbilt Journal of Transnational Law 1533, 1556–8, 1565 (arguing that increasing domestic concerns for economic and social rights have begun to outweigh the historical preference accorded to investors' liberty, indicating that investors' rights are not inherent in their position but, in fact, granted and regulated by both the state and contemporary social trends); David Schneiderman, 'Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise' (2009) 69 Cambridge Law Journal 231, 231. See above, Part IV.
- 87 The UN Conference on Trade and Development (UNCTAD) maintains a repository of international investment agreements. UNCTAD, *International Investment Agreements*, www.unctad.org/Templates/StartPage.asp?intItemID=2310& lang=1. See also Official Records of the General Assembly, Thirty-First Session, Supplement No 17 (A/31/17), ch V, s C, UN Commission on International Trade Law Arbitration Rules (1976).
- 88 See Trakman (n 85) 36–41 (discussing procedural and substantive limits on state power in relation to foreign investors).

restrictions on the free will of transnational merchants are grounded in the national self-interest of the signatory states. For example, foreign merchants ought to enjoy no greater autonomy than that enjoyed by domestic merchants. ⁸⁹ Insofar as states privilege transnational merchants over domestic merchants, they do so on social or economic grounds, for example in order to ensure that goods and services are available locally and to maximise the receipt of tax revenues from merchant trade. Such privileging is endemic in evolving Law Merchant precepts, as reflected in the social and economic benefits derived from privileging merchant guilds in medieval times. ⁹⁰

The particularised result is that merchant privileges derive from the manner in which nation-states choose to affirm or limit the liberalisation of merchant trade, whether those states act unilaterally or in concert with other nation-states, and whether they are motivated by self-interest or, at some level, by altruism. 91

The unifying rationale for multistate regulation is similar to the rationale for the regulation of transnational merchants by individual states: to impose public constraints on private self-ordering by such merchants. ⁹² Such multistate regulation of merchant trade is also rationalised on social or economic grounds. Multistate regulation supposedly facilitates the transparent, ordered, efficient, uniform and fair conduct of merchant trade. It implements treaty structures that govern relationships between states and foreign investors that are too complex for nation-states to regulate unilaterally. ⁹³ More contentiously, multistate regulation protects merchants from less affluent nation-states from exploitation by affluent states, as when less affluent states vote en bloc at multilateral forums.

One way of reconciling the tension between self-regulation and state or multistate regulation of trade and investment is by subscribing to the dualism associated with two interlocking social contract theories. The first social contract is between a state and its citizens, to whom the democratically elected government of that state is accountable. This accords with established liberal theories of governance, namely, that a liberal state acts in accordance with the will of its electorate.⁹⁴ The second social contract is a treaty

- 89 On the grant of such privileges, see below, Part VI.B.
- 90 See eg Trakman (n 2) 28 (addressing the licensing of merchant guilds).
- 91 See below, Part IV.C (discussing this tension, particularly between the centralisation and decentralisation of the Law Merchant along national and local lines); see also Robert D Cooter, 'Structural Adjudication and the New Law Merchant: A Model of Decentralized Law' (1994) 14 International Review of Law and Economics 215, 217; Francesco Galgano, 'The New Lex Mercatoria' (1995) 2 Annual Survey of International & Comparative Law 99, 102–9 (discussing the use of uniform contractual models to navigate the tension between national and international laws); Leon E Trakman, 'The Evolution of the Law Merchant: Our Commercial Heritage, Part II' (1981) 12 Journal of Maritime Law & Commerce 153, 169–71.
- 92 See below, Part IV.B (discussing public constraints imposed on private merchant practices).
- 93 See below, Part VI.B (setting out considerations for evaluating the multistate regulation of foreign investor practices).
- 94 See above, text to nn 33–35 (discussing the social contract and democratic theory); see also Randy E Barnett, Restoring the Lost Constitution: The Presumption of Liberty (Princeton University Press, 2004) 100–9 (arguing that the Constitution acts as a form of contract); Joseph Kary, 'Contract Law and the Social

compact, by which nation-states delegate their sovereign powers—including in relation to social contracts with their citizenry—to multilateral institutions. ⁹⁵ One result of these two social contracts is a compact by which a state reserves sovereign power over trade and investment in compliance with its duty to act for the betterment of its citizenry. The other result is that a state concludes regional or global agreements with other states to protect multilateral interests that include, but may diverge from, the domestic interests of any one treaty party, including those of its citizens.

An 'in principle' difficulty with these interlocking social contract theories arises when the delegation of sovereignty by a state to the multilateral community conflicts with its social contract with its own citizens. An ancillary difficulty occurs when differentiating between the exercise of state sovereignty by individual states, such as in states regulating foreign merchants within their jurisdiction, and states subscribing to multilateral treaties that regulate such merchants by extraterritorial means.

Reconciling these two social contracts is particularly challenging in relation to the Law Merchant. One difficulty arises from the fact that nation-states inevitably absorb—and coopt—transnational Law Merchant values into their domestic legal systems not only differently but also inconsistently. On the one side of the dualist divide, nation-states are responsible to their citizens to construe the multilateral regulation of trade and investment in accordance with national security and public order considerations, conceivably including the need to shield domestic markets from incursions by foreign investors. On the other side of the dualist divide, once states abrogate their sovereignty by treaty to multilateral institutions, they are bound by those treaties even if that entails denying rights to their own citizens as a consequence. For example, a state is bound to

- Contract: What Legal History can Teach us about the Political Theory of Hobbes and Locke' (2000) 31 Ottawa Law Review 73.
- 95 The second compact is, in effect, an extension of the first. Just as nation-states concede sovereignty by a social compact with their citizenry, they concede their residual sovereignty to the multistate community. A problem occurs when concessions that states accord to their subjects conflict with the concessions they make to other states within a multistate community. See Part V.C–D.
- 96 It is arguable that nation-states nationalise the Law Merchant uniformly in the first instance, such as by incorporating international sales conventions into their domestic legal systems. It is far less arguable that, over time, domestic institutions such as judicial bodies are likely to perpetuate that uniformity.
- 97 See eg Jürgen Kurtz, 'Adjudicating the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' (2010) 59 International and Comparative Law Quarterly 325, 330–4 (discussing public order considerations in investment arbitration); Lotfi Chedly, Arbitrage Commercial International & Ordre Public Transnational (Centre de Publication Universitaire, 2002); Santiago Gonzalez-Luna, 'Constitutional Challenges to NAFTA Chapter 11: A Mexican Perspective' in Kevin C Kennedy (ed), The First Decade of NAFTA: The Future of Free Trade in North America (Transnational, 2005) 279, 289; see also Bernardo M Cremades, 'Disputes Arising out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues' (2004) 59 Dispute Resolution Journal 78 (discussing the Calvo Doctrine, which requires foreign investors to submit investor-state disputes to domestic courts).
- 98 See Erin A O'Hara and Larry E Ribstein, *The Law Market* (Oxford University Press, 2009) 37–64 (describing how state choice-of-law rules regulate the market and attract business into that market).
- 99 See below, n 102 (discussing this delegation of sovereignty by states in preference for international trade and investment).

enforce the privileges accorded to foreign investors arising from a regional investment treaty, even if those privileges trump the rights of domestic investors under local law. 100

The dualist result is that a nation-state conceivably operates at polar extremes. At the one extreme, it accedes to a multilateral investment treaty by expressly or impliedly agreeing to apply a treaty in a manner that privileges the private investors of a treaty partner. At the other extreme, it is bound not to do so in conflict with countervailing rights arising out of a countervailing social contract with its own subjects. ¹⁰¹ The difficulty is in finding a middle ground between these extremes. That difficulty is evident when states attempt to retreat from their delegation of sovereignty to transnational institutions due to their countervailing responsibilities to local interests, as when they decline to compensate foreign investors under bilateral treaties on the ground that doing so conflicts with forum policy. ¹⁰²

Nor has the 'liberalisation' of the Law Merchant effectively resolved this tension between individual autonomy, state and multistate action. Following the displacement of feudal fiefdoms and the growth of nation-states in the sixteenth century, states incorporated merchant customs, practices and usages into their domestic commercial codes in deference to transnational merchant practice. ¹⁰³ However, they domesticated transnational merchant practice differently in response to local demands. ¹⁰⁴ These differences between a transnational and domesticated Law Merchant were never fully mediated, either conceptually or functionally. The result is an ongoing tension between nation-states not wanting to tear down bridges that grant transnational merchants access to local markets and their unwillingness to forgo their formal sovereign claims to regulate that access. What complicates the tension is dissension within the multilateral community of states over the limits of state action. That tension persists today, for example, in relation to resolving investor-state disputes. ¹⁰⁵

- 100 In customary international law, necessity is one basis for a state's taking of a foreign investment. See eg Kurtz (n 97).
- 101 Scholars have noted this interaction between national and transnational regulation of foreign investment. See eg M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 3rd edn 2010) 50–82.
- 102 This conflict between the exercise of sovereignty by states over foreign investment and their delegation of that sovereignty through bilateral, regional and multilateral agreement is implicit in implementing and applying treaties to specific cases. See eg Gary B Born, International Arbitration and Forum Selection Clauses: Drafting and Enforcing (Wolters Kluwer, 2010) 144; Antone Kassis, Theorie générale des usages du commerce: droit compare, contrats et arbitrage internationaux, lex mercatoria (Librairie Générale de Droit et de Jurisprudence, 1984) 501 (addressing the application of the forum non conveniens rule to merchant disputes).
- 103 See generally Cutler (n 79) 144–61; Trakman (n 2) 23–44 (discussing nationalisation of the Law Merchant in the 16th century).
- 104 Most prominent among these domesticated codes of merchant law and surviving in part is the French Commercial Code. See Code de Commerce [C com] (France), www.lexinter.net/ENGLISH/commercial_ code.htm.
- 105 See Sornarajah (n 101) 145–86 (discussing a challenge to the conception of international investment and the assertion of state authority over foreign investments).

B. A Uniform Law Merchant

The uniform law movement, ¹⁰⁶ evident in international codes such as the UN Convention for Contracts on the International Sale of Goods (CISG), ¹⁰⁷ and adopted by such bodies as the UN Commission for International Trade Law (UNCITRAL) ¹⁰⁸ and the ICC, asserts the need to perpetuate a universal Law Merchant. ¹⁰⁹ At issue is the ideological affirmation of a monist Law Merchant whose uniform formal attributes prevail over pluralistic conceptions of it at work. ¹¹⁰

A structural critique of the uniform law movement as a manifestation of a monist Law Merchant is that it seeks to harmonise the substantive laws and legal cultures of different national systems, without adequately focusing on the functional needs of transnational merchants. The driving force behind the uniform law movement is to reconcile competing—and often parochial—common and civil law traditions; and only secondarily to provide transnational merchants with expeditious and cost-effective rules

- 106 Two of the leaders of this uniform law movement were John Honnold and Clive Schmitthoff. See John O Honnold and Harry M Flechtner (ed), Uniform Law for International Sales under the 1980 United Nations Convention (Wolters Kluwer, 4th edn 2009); Schmitthoff (n 2); Clive M Schmitthoff, 'The Unification of the Law of International Trade' in Select Essays (n 2) 170; John Honnold, 'The Sales Convention: From Idea to Practice' (1998) 17 Journal of Law and Commerce 181; see also Bernardo M Cremades and Steven L Plehn, 'The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions' (1984) 2 Boston University International Law Journal 317.
- 107 United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980, S Treaty Doc No 98-9 (1983), 1489 UNTS 3. The full text of the CISG is available at www.uncitral.org/uncitral/en/ uncitral_texts/sale_goods/1980CISG.html.
- 108 See Jan Paulsson and Georgios Petrochilos, Revision of the UNCITRAL Arbitration Rules, www.uncitral.org/pdf/english/news/arbrules_report.pdf; UNCITRAL Arbitration Rules, UN Doc A/31/17 (1976), (1976) 15 ILM 701; UNCITRAL, Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Fifth Session, § 6, UN Doc A/CN 9/614 (5 October 2006); Gerold Herrmann, 'The UNCITRAL Arbitration Law: A Good Model of a Model Law' (1998) 3 Uniform Law Review 483.
- 109 See ICC, 'Statements, Codes and Rules', www.iccwbo.org/display7/doctype6/index.html; ICC, 'Rules and Clauses for ICC Dispute Resolution Services', www.iccwbo.org/court/arbitration/id4424/index.html.
- 110 On the identification of 21st century multilateral commercial agreements with an evolving Law Merchant, see CM Bianca and MJ Bonell, Commentary on the International Sales Law: The 1980 Vienna Sales Convention (Giuffrè, 1987) 65–94; Honnold (n 106) 70–71; Gyula Eörsi, 'Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods' (1979) 27 American Journal of Comparative Law 311; Clayton Gillette, 'The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG' (2004) 5 Chicago Journal of International Law 157; Joseph Lookofsky, 'Online with Al K' in Camilla B Anderson and Ulrich G Schroeter (eds), Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday (Wildy, Simmonds & Hill, 2008) 287; Filip de Ly, 'Sources of International Sales Law: An Eclectic Model' (2006) 25 Journal of Law and Commerce 1, 4.
- 111 For a discussion of the stress placed on harmonisation by unifying laws, see Berman and Kaufman (n 3) 221; Thomas E Carbonneau and Marc S Firestone, 'Transnational Law-Making: Assessing the Impact of the Vienna Convention and the Viability of Arbitral Adjudication' (1986) 1 *Emory Journal of International Dispute Resolution* 51, 70, 79; Cremades and Plehn (n 106); Aleksandar Goldštajn, 'Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention' in Peter Šarčević and Paul Volken (eds), *International Sale of Goods: Dubrovnik Lectures* (Oceana, 1986) 55.

governing their trade and investments.¹¹² The ideological fixation on uniformity has attenuated the accusation that uniform laws have perpetuated a dominant Western legal tradition, while marginalising customary legal traditions elsewhere.¹¹³ A further criticism is that the uniform law movement has been marginalised by a disjuncture between the aspirations of global trade bodies like the WTO,¹¹⁴ regional organisations like the European Union¹¹⁵ and the North American Free Trade Agreement (NAFTA),¹¹⁶ and fragmentary interests of nation-states that have concluded a plethora of bilateral trade and investment agreements.¹¹⁷

- 112 See Clive M Schmitthoff, 'International Business Law, A New Law Merchant' (1961) 2 Current Legal and Social Problems 129 (describing the perceived virtues of harmonised laws in the late 19th century uniform law movement, with less reflection on its pitfalls). But see Jonathan L Greenblatt and Peter R Griffin, 'Towards the Harmonization of International Arbitration Rules: Comparative Analysis of the Rules of the ICC, AAA, LCIA and CIET' (2001) 17 Arbitration International 101, 101, 109 (explaining that, while major arbitral institutions have steadily tried to harmonise arbitration rules and to dissociate themselves from national systems of law, key differences still remain that are likely to influence parties' choices of institution); Eric Posner, 'Arbitration and the Harmonization of International Commercial Law: A Defense of Mitsubishi' (1999) 39 Virginia Journal of International Law 647 (arguing that Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc, 473 US 614 (1985) harmonises the needs of domestic public policy and the need for an international commercial law).
- 113 Arguably, such harmonisation of laws is easier to accomplish among national law systems within the same immediate family, such as European civil law systems, than different legal systems, such as the common law, and harder still to reconcile with customary legal systems. See above, n 112 (dealing with international harmonisation of law). On the harmonisation of law movement in Europe, see eg Stefan Vogenauer and Stephen Weatherill (eds), The Harmonisation of European Contract Law (Hart Publishing, 2006); Klaus Peter Berger, 'Harmonisation of European Contract Law: The Influence of Comparative Law' (2001) 50 International and Comparative Law Quarterly 877; Hugh Collins, 'Good Faith in European Contract Law' (1994) 14 Oxford Journal of Legal Studies 229.
- 114 The WTO Agreement is relatively short. It consists of 16 articles containing the WTO's institutional framework. The annexes to the WTO Agreement contain all the specific multilateral agreements. See generally Yang Guohua et al, WTO Dispute Settlement Understanding: A Detailed Interpretation (Kluwer, 2005); David Palmeter et al, Dispute Settlement in the World Trade Organization: Practice and Procedure (Cambridge University Press, 2nd edn 2004); Jürgen Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents' (2009) 20 European Journal of International Law 749. A comprehensive list of publications on global commerce and the WTO can be found both in print and online. See WTO Secretariat, A Handbook on the WTO Dispute Settlement System (WTO, 2004); WTO Secretariat, The WTO Dispute Settlement System: A Collection of the Relevant Legal Texts (WTO, 2nd edn 2001); WTO, John F Henning Center for International Labor Relations, http://henningcenter.berkeley.edu/gateway/wto.html.
- 115 See Stephen Woolcock, 'The Role of Regional Agreements in Trade and Investment Regimes' in Andrew F Cooper et al (eds), Regionalisation and Global Governance: The Taming of Globalisation? (Routledge, 2008) 118, 159 (discussing regional investment agreements); see also Ernst-Ulrich Petersmann and Mark A Pollack (eds), Transatlantic Economic Disputes: The EU, the US and the WTO (Oxford University Press, 2003).
- 116 See above, n 86.
- 117 See Ryan J Bubb and Susan Rose-Ackerman, 'BITs and Bargains: Strategic Aspects of Bilateral and Multilateral Regulation of Foreign Investment' (2007) 27 International Review of Law and Economics 291, 296; Kenneth J Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 UC Davis Journal of International Law & Policy 157, 168–70.

A further critique is that efforts to devise a uniform Law Merchant lead to the perpetuation of the privileges enjoyed by wealthy states and their subjects. Wealthy trading nations of the West are perceived to remain financially dominant over global trade. One response to this perceived dominance is that developing states increasingly have sought to coopt the agendas of multilateral institutions such as the WTO, using their dominant numbers and to vote as a bloc. A counter-backlash is the tendency of wealthy trading nations to conclude bilateral trade and investment treaties in order not to have to rely on organisations such as the WTO to resolve trade disputes.

A perceived result is the partial breakdown of multilateralism as a pre-eminent means of regulating merchant trade in response to a plurality of competing state and non-state interests that are not necessarily commensurable with one another. Typically, developed states conclude bilateral agreements that not only sideline the WTO, but imbed the trade policies of a dominant treaty partner. Developing states comply in order to protect their fragile economies. The result is a multilayered twenty-first century Law Merchant in which trade and investment law have proliferated institutionally and functionally along disparate bilateral lines, ¹¹⁸ and which—as a result of conflicting state and multistate interests—is less cosmopolitan, cohesive and uniform than it has been historically. ¹¹⁹

What has emerged is a tendency on the part of states to nationalise transnational legal traditions and cultures differently, rather than seek to perpetuate an autonomous Law Merchant system. ¹²⁰ What has resulted is a pluralistic conception of the Law Mer-

- 118 See eg Tim Büthe and Helen V Milner, 'The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through International Trade Agreements?' (2008) 52 American Journal of Political Science 741 (discussing the perceived impact of bilateral investment agreements on developing states); Susan D Franck, 'The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties Have a Bright Future?' (2005) 12 UC Davis Journal of International Law & Policy 47; Andrew T Guzman, 'Why LDCs Sign Treaties that Hurt them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 Virginia Journal of International Law 639; cf Kevin C Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem?' (2003) 24 University of Pennsylvania Journal of International Economic Law 77, 152–5 (discussing sovereignty concerns of developing countries in the context of a proposed WTO agreement on investment).
- 119 For a critique of the unification of laws as futile, see eg Paul B Stephan, 'The Futility of Unification and Harmonization in International Commercial Law' (1999) 39 Virginia Journal of International Law 743, 788. See also Sherzod Saeed Khodjaev, Retaliation in the WTO Dispute Settlement System (Kluwer, 2009) 8–11; Andrew D Mitchell, Legal Principles in WTO Disputes (Cambridge University Press, 2008) 67–104; Frieder Roessler, 'Special and Differential Treatment of Developing Countries under the WTO Settlement System' in Federico Ortino and Ernst-Ulrich Petersmann (eds), The WTO Dispute Settlement System 1995–2003 (Kluwer, 2004) 87 (arguing that developing countries have difficulty utilising the WTO dispute settlement system); Isabelle Van Damme, Treaty Interpretation by the WTO Appellate Body (Oxford University Press, 2009) 8–21 (discussing WTO dispute settlement jurisdiction and what substantive law applies in such proceedings); Rüdiger Wolfrum et al (eds), WTO, Institutions and Dispute Settlement (Koninklijke Brill NV, 2006).
- 120 Even some who strongly support the harmonisation of international commercial law acknowledge this challenge. See E Allan Farnsworth, 'Modernization and Harmonization of Contract Law: An American Perspective' (2003) 8 Uniform Law Review 97, 98, 106; Arthur S Hartkamp, 'Modernisation and Harmonisation of Contract Law: Objectives, Method and Scope' (2003) 8 Uniform Law Review 81, 83–84.

chant that draws disparate lines of intersection among competing legal cultures and then applies those disparate lines differently in discrete merchant contexts. ¹²¹

VI. ANTICIPATING THE FUTURE

I have proposed elsewhere that what lies ahead is the spectre of three competing national and transnational Law Merchants in action:¹²²

- A Law Merchant that is national in nature. This includes individual states nationalising
 the Law Merchant unilaterally, primarily in their own interests, and less importantly
 in promoting the institutional autonomy of a transnational Law Merchant system.
 Such a Law Merchant is distinctly monist in nature in according primacy to the
 nationalisation of Law Merchant precepts above all other values.
- 2. A Law Merchant that is explicated by nation-states together subscribing to a transnational Law Merchant, consisting of a blend of bilateral, regional and multilateral treaties and customary international laws. Here, the transnational Law Merchant is impelled by plural macroeconomic and political interests exerted by blocs of states and multiple transnational merchants that transcend the discrete expectations of any one state or merchant community.
- 3. A Law Merchant that is based on the sixteenth century liberalised lines: it is one in which transnational merchants engage in self-regulating contractual and non-contractual behaviour, varying from maintaining trust and goodwill in their informal relationships to incorporating good faith duties into their contracts. This Law Merchant is essentially monist, in according primacy to liberal values associated with free choice; but it is tempered by recognition of limitations inhibiting the free choice of merchants engaged in transnational trade.

It is not suggested that no case can be made in favour of one or more of these three kinds of Law Merchant. What is contested is the primacy that is accorded to each in relation to the others. ¹²³ Neither state nor multistate regulation of the Law Merchant is antithetical

¹²¹ See Trakman (n 85) 44–45, 51–52 (noting the 'sociocultural traditions', 'political distinctiveness' and 'different foreign investment philosophies' that parties to NAFTA wished to sustain); Leon E Trakman, "Legal Traditions" and International Commercial Arbitration' (2006) 17 American Review of International Arbitration 1, 6–7, 23–25 (discussing the influence of cultural and legal traditions on the late 20th and 21st century Law Merchant).

¹²² Trakman (n 50).

¹²³ See Pippa Read, 'Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium' (1999) 10 American Review of International Arbitration 177 (discussing the contract between a transnational and a localised Law Merchant); Matthew Secomb, 'Shades of Delocalisation: Diversity in the Adoption of the UNCITRAL Model Law in Australia, Hong Kong and Singapore' (2000) 17 Journal of

in principle to transnational merchant practice. Law Merchant regulations in both medieval and modern times are functionally modelled, to varying degrees, on 'good practice' among merchants. The question is whether and to what extent such models are mutually compatible.

A critique of state regulation of transnational trade and investment is that states potentially privilege some merchants over others. Coupled with this is the critique that a small cadre of wealthy merchant corporations enjoy quasi-public privileges derived from their economic dominance within transnational markets.

One way of redressing these critiques in the regulation of transnational trade and investment is to subscribe to the Law Merchant as an interdependent global 'village'. 124 That village is plural in nature, encompassing a heterogeneous assembly of transnational merchants that enjoy a revitalised yet disparate structural and functional autonomy to secure access to transnational markets from which they were historically excluded. Whether this functional conception of a pluralistic Law Merchant is sustainable is best considered through illustrations of those values at work, as outlined below.

A. A Flawed Illustration: The Cyberspace Law Merchant

An idealised illustration of a self-regulated twenty-first century Law Merchant is a Cyberspace Law Merchant. The imputed underpinnings of this Law Merchant are distinctly monist: as a unifying regime of cyberspace merchants and merchant institutions. However artificial this monist imagery may be, the illustration of a Cyberspace Law Merchant is valuable in demonstrating the flaws behind such imagery and in offering pluralistic alternatives.

1. The Objects

The Cyberspace Law Merchant is depicted as self-regulating voluntary associations of merchants in cyberspace which facilitate good practice among participating cyber-merchants. For example, cyber-merchants can communicate instantly and en masse with

International Arbitration 123. See generally Julius Henry Cohen, Commercial Arbitration and the Law (D Appleton and Co, 1918) 71–83; Julian DM Lew et al, Comparative International Commercial Arbitration (Kluwer, 2003) 454; Campbell McLachlan et al, International Investment Arbitration (Oxford University Press, 2007); Philippe De Lombaerde (ed), Multilateralism, Regionalism and Bilateralism in Trade and Investment: 2006 World Report on Regional Integration (Springer, 2007); Douglas Yarn, 'The Death of ADR: A Cautionary Tale of Isomorphism through Institutionalization' (2004) 108 Penn State Law Review 929, 975–6.

- 124 Marshall McLuhan famously depicted the international 'global village'. See Marshall McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man* (University of Toronto Press, 1962) 31; Marshall McLuhan, *Understanding Media: The Extensions of Man* (McGraw-Hill, 1964) 89–105. McLuhan's thesis, well preceding the cyberspace revolution, is readily adaptable to it.
- 125 See eg Ljiljana Biukovic, 'International Commercial Arbitration in Cyberspace: Recent Developments' (2002) 22 Northwestern Journal of International Law & Business 319, 333–4; Bruce H Kobayashi and Larry

one another across cyberspace. They can share their e-market intelligence on price gouging practices, product defects, and failure of price competition in mass e-markets. ¹²⁶ They can use e-mediation and e-arbitration services to resolve disputes online in anywhere-anyplace actions, including against dominant cyber corporations. ¹²⁷

A further idealisation of a cyberspace Law Merchant is that state and multistate regulators are able to regulate the cyber-market by invigorating a globally responsive system of Law Merchant justice. For example, regulators can scrutinise exclusion-of-liability clauses in e-supply contracts to determine whether they are procedurally and substantively unconscionable. They can redress bargaining abuses by striking down unfair provisions in such contracts and prosecute antitrust violations in transnational e-commerce. 128

2. The Failings

The institutional and functional autonomy imputed to a twenty-first century private Cyberspace Law Merchant is nevertheless somewhat misplaced. It is arguable that large-scale transnational suppliers exert quasi-public control over e-markets. They erect high-cost and high-stakes economic barriers to entry;¹²⁹ they use contractual and non-

- E Ribstein, 'Uniformity, Choice of Law and Software Sales' (1999) 8 *George Mason Law Review* 261, 263, 294–6; Larry E Ribstein and Bruce H Kobayashi, 'State Regulation of Electronic Commerce' (2002) 51 *Emory Law Journal* 1, 41–46; Leon E Trakman, 'The Boundaries of Contract Law in Cyberspace' [2009] *Revue de droit des affaires internationales* 159, 161–3.
- 126 See eg A Brooke Overby, 'An Institutional Analysis of Consumer Law' (2001) 34 Vanderbilt Journal of Transnational Law 1219 (discussing the institutionalisation of consumerism in mass markets dominated by large corporations); cf Trade Fairs, Wikipedia, http://en.wikipedia.org/wiki/Trade_fair (describing international trade fairs by which usually large-scale corporations market their products and services).
- 127 See eg Esther van den Heuvel, Online Dispute Resolution as a Solution to Cross-Border E-Disputes: An Introduction to ODR, www.oecd.org/dataoecd/63/57/1878940.pdf; see also Howard Giles (ed), Law, Enforcement, Communications and Community (John Benjamins, 2002) (discussing the influence of community values on legal enforcement).
- 128 Ethan Katsh and Janet Rifkin, Online Dispute Resolution: Resolving Conflicts in Cyberspace (Jossey-Bass, 2001) 61–63 (discussing the blind bidding model in dispute resolution); Robert A Hillman, 'On-line Boilerplate: Would Mandatory Web Site Disclosure of e-Standard Terms Backfire?' in Omri Ben-Shahar (ed), Boilerplate: The Foundation of Market Contracts (Cambridge University Press, 2007) 83 [hereinafter Boilerplate]; Roger P Alford, 'The Virtual World and the Arbitration World' (2001) 18 Journal of International Arbitration 449, 453–5; David R Johnson and David Post, 'Law and Borders—The Rise of Law in Cyberspace' (1996) 48 Stanford Law Review 1367, 1378–95; A Brooke Overby, 'UNCITRAL Model Law on Electronic Commerce: Will Cyberlaw be Uniform?' (1999) 7 Tulane Journal of International and Comparative Law 219, 233; Margaret Jane Radin and R Polk Wagner, 'The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace' (1998) 73 Chicago-Kent Law Review 1295, 1296, 1313–15; Trakman (n 125) 175–80 (discussing the judicial treatment of assent in 'wrap' contracts).
- 129 See eg Bruce Greenwald and Judd Kahn, Competition Demystified: A Radically Simplified Approach to Business Strategy (Putnam Penguin, 2005) 37–51; Robert Z Lawrence, 'Towards Globally Contestable Markets' in OECD (ed), Market Access after the Uruguay Round: Investment, Competition and Technology Perspectives (OECD, 1996) 25.

contractual mechanisms to limit claims of default brought against them;¹³⁰ and they aggressively deflect challenges for having acted anti-competitively in e-markets.¹³¹

Further consternation revolves around dominant e-suppliers deploying multi-tiered processes of dispute avoidance strategically. These vary from standardising dispute resolution clauses meant to discourage time-consuming negotiations, to erecting barriers to face-to-face arbitration and commercial litigation brought against them.¹³²

A related concern is that nation-states affirm as much as they resist the quasi-public dominance of large scale e-market suppliers. States grant economic privileges to e-suppliers in order to increase tax revenues at the expense of e-market consumers. They marginalise the rights of sub-classes of e-merchants and e-consumers to equal treatment in e-markets in order to limit the state's costs of e-market regulation. They universalise 'the' Law Merchant as an abstraction in order to avoid having to devise an administrative structure to regulate it perceptibly and selectively. 133

3. An Investment Law Merchant

The so-called twenty-first century Investment Law Merchant offers a further illustration of tensions among autonomy values in the Law Merchant, among other values that are imputed to it.¹³⁴ The perceived benefit of investment treaties between nation-states

- 130 This observation, arguably, varies from Stewart Macaulay's depiction of business parties engaged in informal non-contractual business relations based on mutual trust and confidence. However, it supports the view that vulnerable business parties build trust and confidence inter se around their market vulnerabilities in relation, inter alia, to dominant e-suppliers. See Stewart Macaulay, 'Freedom from Contract: Solutions in Search of a Problem?' [2004] Wisconsin Law Review 777; Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 American Sociological Review 55, 62–67.
- 131 See eg Jens Høj, Competition Law and Policy Indicators for the OECD Countries (OECD Economics Department, Working Paper No 568, 2007), http://ideas.repec.org/p/oec/ecoaaa/568-en.html; Richard J Gilbert, 'Networks, Standards, and the Use of Market Dominance: Microsoft (1995)' in John E Kwoka, Jr and Lawrence J White (eds), The Antitrust Revolution: Economics, Competition, and Policy (Oxford University Press, 3rd edn 1998) 409.
- 132 See eg Lucian Bebchuk and Richard Posner, 'One Sided Contracts in Competitive Consumer Markets' (2006) 104 Michigan Law Review 827 (discussing barriers to dispute in mass consumer markets); Margaret Jane Radin, 'Boilerplate Today: The Rise of Modularity and the Waning of Consent' (2006) 104 Michigan Law Review 1223; Florencia Marotta-Wurgler, "'Unfair" Dispute Resolution Clauses: Much Ado about Nothing?' in Boilerplate (n 128) 45 (finding that boilerplate dispute resolution clauses do not impose hardships on consumers). See also Todd D Rakoff, 'The Law and Sociology of Boilerplate' (2006) 104 Michigan Law Review 1235, 1237–8 (discussing the social, economic and legal underpinnings of standard form contracting).
- 133 See eg Kuwait v American Independent Oil Company, 21 ILM 976, §III, para 155 (International Arbitration Tribunal 1982); Continental Shelf (Libya/Malta), Judgment, [1985] ICJ Rep 13, 39; Texaco v Libyan Arab Republic, Award on the Merits, 19 January 1977, 17 ILM 1, 13 (International Arbitration Tribunal 1978).
- 134 The most common forms of trade licences are import and export licences that are ordinarily specific to the subject matter being traded rather than the person engaged in trade. See eg William A Kerr and James D Gaisford (eds), Handbook on International Trade Policy (Edward Elgar, 2007) (discussing trade policy, including its relation to licences); see also Part IV.

stems, not from the *per se* autonomy rights of home state merchants to invest in host states, but from perceived investment preferences that transnational merchants acquire from particular investment treaties between those home and host states.¹³⁵ A challenge for a universal investment Law Merchant is in redressing tensions that arise when host states grant benefits to investors from treaty partners¹³⁶ at the expense of merchants from non-treaty states,¹³⁷ and conceivably also at the expense of domestic markets, employees, consumers and the local environment.¹³⁸ This concern is not only that these treaty privileges accorded selectively to investment merchants promote inequalities in an Investment Law Merchant; it is also that nation-states have sound economic and social reasons to perpetuate those inequalities within investment markets that are already imperfectly competitive.

- 135 This benefit comes with an attendant threat that nation-states will, on grounds of state sovereignty, decline to participate in investor-state arbitration arising from such investment treaties. See Joachim Karl, 'International Investment Arbitration: A Threat to State Sovereignty?' in Wenhua Shan et al (eds), Redefining Sovereignty in International Economic Law (Hart Publishing, 2008) 225, 232–8; M Sornarajah, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration' in Karl P Sauvant and Michael Chiswick-Patterson (eds), Appeals Mechanism in International Investment Disputes Law (Oxford University Press, 2008) 39; Amr A Shalakany, 'Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism' (2000) 41 Harvard International Law Journal 419, 438–52. For an argument that, despite limitations associated with sovereignty that states exercise over arbitration, a coherent body of international investment law is evolving, see Stephan W Schill, The Multilateralization of International Investment Law (Cambridge University Press, 2009) 241–77; Calvin A Hamilton and Paula I Rochwerger, 'Trade and Investment: Foreign Direct Investment through Bilateral and Multilateral Treaties' (2005) 18 New York International Law Review 1, 4.
- 136 See Charles N Brower and Stephan W Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 Chicago Journal of International Law 471, 473 (discussing the 'legitimacy crisis' of international investment arbitration); Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521.
- 137 However, nation-states may treat most, if not all, foreign investors as a threat to protected sectors of their domestic economies, such as agriculture, the media, and broadcasting. For a discussion of the history and difficulties faced by the WTO in unifying the global trading community, *inter alia*, on account of both protected domestic sectors and differential access granted to foreign investors, see 'WTO and Gatt Research', *LibGuides at NYU Law*, http://nyulaw.libguides.com/content.php?pid=55653&sid=428839; see also www.wto.org. Cf Leon E Trakman, 'Rejecting Investor State Arbitration in Favor of Domestic Courts: The Australian Example' (2012) 46 *Journal of World Trade* 83 (discussing the impact on developing countries of Australia's decision not to include arbitration clauses in its investment treaties).
- 138 On the perceived social-economic harm to domestic, among other interests, arising from multilateral trade agreements, see Robin Broad (ed), Global Backlash: Citizen Initiatives for a Just World Economy (Macmillan, 2002); Kent Jones, Who's Afraid of the WTO? (Oxford University Press, 2004) 48–104; Immanuel Ness, 'Community Labor Alliances: A New Paradigm in the Campaign to Organize Greengrocery Workers in New York City' in Benjamin Shepard and Ronald Hayduk (eds), From ACT UP to the WTO: Urban Protest and Community Building in the Era of Globalization (Verso, 2002) 57 (discussing the transnational immigrant workers created by regional and global integration).

B. A More Functional Illustration: Transnational Arbitration

Transnational commercial arbitration serves as a final illustration of a monist conception of a self-ordering Law Merchant at work.

1. The Objects

Supporting the conception of an institutionally and functionally autonomous twenty-first century Law Merchant is the allegedly ever-widening sphere of individual autonomy of transnational merchants to choose the form, substance and process of transnational arbitration to regulate their disputes. Their autonomy supposedly is reflected in specific observations regarding their contractual and non-contractual practices:

- 1. Transnational merchants incorporate into their contracts merchant responsive rules and procedures to govern transnational arbitration proceedings, such as fast-track arbitration, online document filing, video conferencing, and podcasted hearings.
- 2. Transnational arbitration serves as an expeditious, anywhere-anytime method of dispute resolution, enabling merchant parties and arbitrators to communicate directly with one another from diffuse locations across the globe. 139
- 3. Transnational arbitration is able to accommodate widely scattered and diverse trade and investment disputes. 140
- 4. National courts recognise transnational arbitration both formally and functionally; they sometimes require merchants to submit their disputes to it;¹⁴¹ and they ordinarily enforce arbitral awards.¹⁴²
- 139 Such services are generally now available at all leading arbitration centres. See American Arbitration Association, 'International ADR', www.adr.org/sp.asp?id=28819; ICC, 'Statements, Codes and Rules', www.iccwbo.org/display7/doctype6/index.html; London Court of International Arbitration, 'LCIA Arbitration Rules', www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx.
- 140 Leading international arbitration associations generally present themselves as 'full service' centres. See eg International Chamber of Commerce, www.iccwbo.org; American Arbitration Association, www.adr.org; London Court of International Arbitration, www.lcia.org; World Intellectual Property Organization, www. wipo.int/index.html; China International Economic and Trade Arbitration Commission, www.cietac.org/ index.cms; International Institute for Conflict Prevention and Resolution, www.cpradr.org.
- 141 See Rent-A-Center v Jackson, 130 S Ct 2772, 2777–8 (2010) (arguing that an arbitrator is distinct from a court of law); see also Matthew B Cobb, 'Domestic Courts' Obligation to Refer Parties to Arbitration' (2001) 17 Arbitration International 313 (surveying laws that obligate courts to refer disputes to arbitration).
- 142 See eg Herbert Kronke, Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention (Kluwer, 2010) 1–10; see also Symeonides (n 83) (arguing against the readiness with which American courts enforce the parties' choice of law in deference to the modern Law Merchant, particularly in employment and consumer cases). See generally Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation (Kluwer, 1981) 81–120, 233– 382 (discussing the enforcement of foreign arbitral awards under domestic law and under the New York Convention).

5. Transnational arbitrators are supposedly neutral in deciding merchant disputes between consenting parties, and operate out of neutral venues. 143

Based on these alleged factors, transnational arbitration is depicted as an informal, expert, cost-effective, expeditious process of dispute resolution. It is presented as a multi-tiered option that transnational merchants can combine with dispute prevention and avoidance measures. ¹⁴⁴

Transnational arbitration is also idealised institutionally, as widely recognised by nation-states such as the United States, Canada and Mexico under Article 2022 of NAF-TA. Arbitration is also conceived as institutionally and functionally autonomous from the parochial demands of nation-states and their domestic court systems.

Transnational arbitration allegedly also benefits from a sophisticated institutional apparatus that integrates private, national and transnational elements. For example, transnational merchants adopt private transnational models of arbitration, such as the Model Arbitration Rules promulgated by UNCITRAL. ¹⁴⁶ They incorporate the rules and procedures of transnational, regional and local arbitration centres into their private transnational contracts; they also rely on nation-states to enforce arbitral awards arrived at by arbitrators who apply those rules and procedures. ¹⁴⁷

At a universal level, transnational commercial arbitration is presented as merchantcentric, expeditious in operation, and cosmopolitan in effect. Not unlike medieval courts

- 143 See eg Pierre Lalive, 'On the Neutrality of the Arbitrator and of the Place of Arbitration' in Claude Reymond and Eugene Bucher (eds), Recueil de travaux Suisses sur l'arbitrage international (Schulthess, 1984) 23, 27.
- 144 See eg Michael Pryles, 'Multi-Tiered Dispute Resolution Clauses' (2001) 18 Journal of International Arbitration 159, 159; Leon E Trakman, 'Appropriate Conflict Management' [2001] Wisconsin Law Review 919, 925.
- 145 NAFTA, US-Canada-Mexico, 17 December 1992, 32 ILM 289, Art 2022 ('Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area'). See also James R Holbein and Donald J Musch (eds), North American Free-Trade Agreements: Chapter 11 Investor-State Arbitration (Oxford University Press, 2008); Barton Legum, 'The Innovation of Investor-State Arbitration under NAFTA' (2002) 43 Harvard International Law Journal 531; Matthew C Porterfield, 'An International Common Law of Investor Rights?' (2006) 27 University of Pennsylvania Journal of International Economic Law 79; Leon E Trakman, 'Arbitrating Investment Disputes under the NAFTA' (2001) 18 Journal of International Arbitration 385.
- 146 UNCITRAL Model Law on International Commercial Arbitration (2006), www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html; UNCITRAL Arbitration Rules (2010), www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.
- 147 For scholarly treatment of the problems of enforcing arbitral awards globally, see Francine Banner et al, 'Foreign Law in American Jurisprudence: An Empirical Study' in Donald W Jackson et al (eds), Globalizing Justice: Critical Perspectives on Transnational Law and the Cross-Border Migration of Legal Norms (SUNY Press, 2010) 27 [hereinafter Globalizing Justice]; Fabien Gélinas, 'Arbitration and the Challenge of Globalization' (2000) 17 Journal of International Arbitration 117, 120–1; David M O'Brien, 'The US Supreme Court's Use of Comparative Law in the Construction of Constitutional Rights' in Globalizing Justice, 7; Christopher A Whytock, 'Foreign Law in Domestic Courts: Different Uses, Different Implications' in Globalizing Justice, 45.

operating at fairs, towns and markets, transnational arbitration takes place at leading trade centres across the globe, such as at the ICC, headquartered in Paris;¹⁴⁸ the International Center for Dispute Resolution of the American Arbitration Association, located in New York;¹⁴⁹ and the London Court of International Arbitration, situated in London,¹⁵⁰ among many others.¹⁵¹ As a complement to these global centres, regional and local arbitration centres provide arbitration venues, rosters of arbitrators, arbitration procedures, literature on arbitration, and continuing education services leading to fellowships such as those offered under the auspices of the Chartered Institute of Arbitrators.¹⁵² These centres serve, *inter alia*, as impartial and low-cost venues that merchants select to resolve their transnational disputes.¹⁵³ Transnational arbitration centres supposedly differentiate their services from those of national courts on the basis of lower costs, faster and less formal proceedings, and the mercantile experience of presiding arbitrators whom disputing merchant parties choose at the outset.¹⁵⁴

What supposedly unifies transnational arbitration proceedings as the embodiment of Law Merchant values is their private, informal and commercial attributes. Proceedings are merchant-responsive in nature insofar as they take account of the parties' courses of dealings and usages of trade. Proceedings are not trammelled by localised requirements imposed national law courts, ¹⁵⁵ unless the parties stipulate otherwise. ¹⁵⁶ Arbitral deliberations and awards are ordinarily confidential, unlike public hearings before most domestic courts of law.

Finally, transnational arbitration is allegedly comparable to the historical Law Merchant. Private arbitration centres compete openly with one another for merchant

¹⁴⁸ See ICC, 'Statements, Codes and Rules', www.iccwbo.org/display7/doctype6/index.html.

¹⁴⁹ See American Arbitration Association, 'Major Arbitration and Mediation Rules and ADR Programs: International ADR', www.adr.org/sp.asp?id=28819.

¹⁵⁰ London Court of International Arbitration, www.lcia.org.

¹⁵¹ See Leon E Trakman, 'Arbitration Options: Turning a Morass into a Panacea' (2008) 41 University of New South Wales Law Journal 292 (discussing the variety of regional arbitration associations that have evolved globally).

¹⁵² See Chartered Institute of Arbitrators, http://www.ciarb.org.

¹⁵³ See eg Edward R Leahy and Carlos J Bianchi, 'The Changing Face of International Arbitration' (2000) 17 Journal of International Arbitration 19, 26 (explaining the cost and time efficiency of market arbitration centres); Keith Mason, Changing Attitudes in the Common Law's Response to International Commercial Arbitration (President, New South Wales Court of Appeal, Keynote Address at the International Conference on International Commercial Arbitration, 9 March 1999), www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_mason_090399; see also VV Veeder, 'The 2001 Goff Lecture—The Lawyer's Duty to Arbitrate in Good Faith' (2002) 18 Arbitration International 431 (discussing the duty of transnational arbitrators to decide in good faith).

¹⁵⁴ See Trakman (n 151) 296–7, 302 (analysing the argument that arbitration is more efficient than court proceedings, and noting that arbitration providers cater to customer demands).

¹⁵⁵ See generally Pippa Read, 'Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium' (1999) 10 American Review of International Arbitration 177; Secomb (n 123) (discussing the delocalisation of transnational arbitration from domestic legal institutions and processes).

¹⁵⁶ See Alan Redfern et al, Law and Practice of International Commercial Arbitration (Kluwer, 2nd edn 1991) 479–81 (discussing the procedural framework for transnational arbitration).

arbitration business, not unlike how courts at medieval merchant guilds and fairs competed for the business of itinerant merchants.¹⁵⁷ National courts support transnational arbitration when they recognise and enforce arbitration awards, except on such exceptional grounds as failure of natural justice. Such recognition and enforcement of arbitration awards by local courts is comparable to local courts recognising the decisions of medieval merchant judges.¹⁵⁸

However, these comparisons between Law Merchant institutions historically and transnational arbitration are overstated. In particular, the boundaries of modern transnational arbitration extend beyond disputes between transnational merchants. Nation-states submit to arbitral jurisdiction, such as in investor-state disputes brought by investors against investment treaty partners. Arbitrators appointed to decide such investor-state disputes sometimes hold states accountable for unfairly taking the property of foreign investors in violation of equitable and fair treatment; and investment arbitration proceedings and awards often are publicised. ¹⁶⁰

2. The Failures

Even the example of a monist system of transnational arbitration, closely aligned with Law Merchant precepts, is far from impregnable. Responding to the assertion that

- 157 See Earl Wolaver, 'The Historical Background of Commercial Arbitration' (1934) 83 University of Pennsylvania Law Review 132, 135–6.
- 158 See Ricky H Diwan, 'Problems Associated with the Enforcement of Arbitral Awards Revisited: Australian Consumer Protection; Conflict of Laws; an English Law Perspective' (2003) 19 Arbitration International 55, 57; Dana H Freyer, 'United States Recognition and Enforcement of Annulled Foreign Arbitral Awards: The Aftermath of the Chromalloy Case' (2000) 17 Journal of International Arbitration 1, 8–9 (discussing the boundaries delimiting the enforcement of arbitration awards); see also Alessandra Casella, 'On Market Integration and the Development of Institutions: The Case of International Commercial Arbitration' (1996) 40 European Economic Review 155, 159–62. See generally Yves Dezalay and Bryant G Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order (Chicago Series in Law and Society, 1996) (providing an overview of international commercial arbitration). But see Stefan Voigt, 'Are International Merchants Stupid?—Their Choice of Law Sheds Doubt on the Legal Origin Theory' (2008) 5 Journal of Empirical Legal Studies 1, 9 fn 7 (citing Jan Kropholler, Internationales Einheitsrecht (Tübingen, 1975)), www.ssrn.com/abstract=982202.
- 159 See Sornarajah (n 101) 334–8; Christian Tietje, International Investment Protection and Arbitration (BWV Verlag, 2008) 25, 29.
- 160 See Ibrahim FI Shihata and Antonio R Parra, 'Applicable Substantive Law in Disputes between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention' in Albert van den Berg (ed), Planning Efficient Arbitration Proceedings (Kluwer, 1996) 294, 304–5, 316; Stephan W Schill, 'Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law' (Institute for International Law and Justice, Working Paper No 2006/6) 15–20, www.iilj.org/publications/documents/2006-6-GAL-Schill-web.pdf; see also International Thunderbird Gaming Corp v Mexico, NAFTA/UNCITRAL Tribunal (26 January 2006), ¶¶192–7, http://ita.law.uvic.ca/documents/ThunderbirdAward. pdf; GAMI Investments, Inc v Mexico, UNCITRAL/NAFTA Arbitration (15 November 2004), ¶¶ 83, 122–33, http://ita.law.uvic.ca/documents/Gami.pdf; Saluka Investments BV (The Netherlands) v The Czech Republic, UNCITRAL Arbitration (17 March 2006), ¶¶ 281, 282–308, 309, www.pca-cpa.org/upload/files/SAL-CZ%20Partial%20Award%20170306.pdf. See generally Rom KL Chung, 'The Rules of Natural Justice in Arbitration' (2011) 77 International Journal of Arbitration, Mediation and Dispute Management 167.

transnational arbitration is prompt, affordable and decisive are the claims that it is complicated, expensive, and sometimes either a prelude to litigation or a mere stage in proceeding that culminates in the judicial review of an arbitral award. While transnational arbitrators are ordinarily more experienced in transnational commerce than national courts, their competence to deal with complex legal and commercial issues is also subject to contention.

Even the monist proposition that transnational arbitration is private is contestable. Despite choosing arbitration, merchant parties face a myriad of variations of it, including markedly dissimilar arbitral rules and procedures. Arbitral proceedings sometimes are unfamiliar to merchants; arbitral awards are determined ad hoc; and confidential awards do not set precedents that facilitate future merchant planning.

Furthermore, the monist depiction of transnational arbitration laws and procedures that are uniform in nature is subject to contestation in light of diverse procedures that are adopted by a plethora of local, regional and international arbitration centres. Far from

- 161 For example, the argument in favour of arbitration tribunals deciding investment disputes is usually couched as side-stepping domestic courts. However, critics debate the prospect of arbitral decisions being nullified, or varied, by local courts, notably under Chapter 11 (Investment) of NAFTA. See *Loewen Group, Inc v United States of America*, ICSID Case No ARB(AF)/98/3, (26 June 2003) (Final Merits Award), (2003) 42 ILM 811; *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2 (11 October 2002) (Final Merits Award) 42 ILM 85 (2003). See generally Bradford K Gathright, 'A Step in the Wrong Direction: The *Loewen* Finality Requirement and the Local Remedies Rule in NAFTA Chapter 11' (2005) 54 *Emory Law Journal* 1093 (discussing judicial review of the *Loewen* Chapter 11 decision); Dana Krueger, 'The Combat Zone: *Mondev International, Ltd v United States* and the Backlash against NAFTA Chapter 11' (2003) 21 *Boston University International Law Journal* 399 (arguing that, but for a technical time bar, two Tribunal decisions—*Mondev* and *Loewen*—might have prevailed over American judicial decisions).
- International Investment Law? (2009) 9 Chicago Journal of International Law 471, 489–95 (discussing the legitimacy of investment arbitration generally); Saksham Chaturvedi and Chanchal Agarwal, 'Jurisdiction to Determine Jurisdiction' (2011) 77 International Journal of Arbitration, Mediation and Dispute Management 201; Stefan Kirchner, 'Transnational Law and the Choice-of-Law Competence of Arbitral Tribunals in International Commercial Arbitration' (2007), http://papers.ssrn.com/sol3/papers. cfm?abstract_id=988677; see also John J Barceló III, 'Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective' (2003) 36 Vanderbilt Journal of Transnational Law 1115, 1118–19 (outlining various other grounds on which arbitrator jurisdiction may be challenged, such as an invalid or unenforceable arbitration clause); Pierre Lalive, 'Irresponsibility in International Commercial Arbitration' (1999) 7 Asia Pacific Law Review 161, 163 (noting the dubious competence of 'newcomer' arbitrators who lack the knowledge, know-how and experience to handle complex matters).
- 163 The contention here is that, the wider the choice and the greater the difference in experience among centres, the more complicated parties may find the task of making suitable arbitration choices and the more potentially diverse the results of such choices. See Thomas E Carbonneau, 'The Ballad of Transborder Arbitration' (2002) 56 *University of Miami Law Review* 773, 774; Trakman (n 151) 292.
- 164 See generally Theodore Eisenberg and Geoffrey P Miller, 'The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Publicly-Held Companies' Contracts' (2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927423 (discussing the ad hoc nature of arbitration as one reason for a 'flight from arbitration').

being distinct from national courts, the rules and procedures adopted by regional arbitration centres are sometimes based on the rules and procedures of national courts. 165

3. The Test

A decisive test is whether 'autonomous' transnational merchants freely choose transnational arbitration over the alternatives. Depicting such free choice, transnational merchants restrict, just as they expand, arbitral discretion through prescriptive choices of law and arbitration clauses. ¹⁶⁶ For example, they can prohibit arbitrators from deciding by *amiables composition* or *ex aequo et bono*, or otherwise outside of the law. ¹⁶⁷ They can avoid having their disputes arbitrated in jurisdictions in which the courts are likely to enforce those awards on national interest grounds. ¹⁶⁸ They can often reasonably expect that transnational commercial arbitrators have a better grasp of merchant needs than do domestic courts of law. ¹⁶⁹

Transnational commercial arbitration is nevertheless not a panacea of Law Merchant values that stands apart from diffuse national laws and domestic courts. Transnational arbitrators sometimes circumscribe the choices of law made by the merchant parties. They defer to forum law selectively on grounds that non-forum law chosen by the parties is unclear, not sufficiently widely understood, or not reasonably accessible or proven. They decline to decide *ex aequo et bono*, not only on grounds that the disputants did not

- 165 See Trakman (n 151) 292; see also Luis Abugattas Majluf, UNCTAD, Swimming in the Spaghetti Bowl: Challenges for Developing Countries Under the 'New Regionalism' (Policy Issues in International Trade and Commodities, Study Series No 27, 2004) 7, 13 (discussing the notion of 'new regionalism', its interplay with the multilateral trading system, and developing countries' favouritism for foreign investors in the context of Regional Trade Agreements).
- 166 See generally Barceló (n 162); Kirchner (n 162).
- 167 Historically, Art 38 of the Charter of the Permanent Court of International Justice provided for the Court to reach decisions *ex aequo et bono*, but jurists avoided doing so on principle. See eg *Free Zones of Upper Savoy and the District of Gex (France v Switzerland)*, 1929, PCIJ (series A) No 22, at 5–7, 21–22, 34–40 (Kellogg, J), www.icj-cij.org/pcij/serie_A/A_24/80_Zones_franches_Haute_Savoie_et_Pays_de_Gex_2e_phase_Observations_Kellogg,pdf.
- 168 See Oberlandesgericht München [OLG] [Higher Regional Court of Munich] Case No 34 Sch 10/05 (holding that ICSID arbitrators may only decide ex aequo et bono where the parties expressly authorise it).
- 169 See Robert D Cooter, 'Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant' (1996) 144 University of Pennsylvania Law Review 1643, 1648–50 (discussing the interface between party autonomy and legal regulation in complex economies). But see Sornarajah (n 101) 306 (noting that parties to treaty-based arbitration regularly seek to avoid arbitration by asserting challenges to the arbitral tribunal's jurisdiction); W Michael Reisman, 'Dallas Workshop 2001: International Arbitration and Sovereignty' (2002) 18 Arbitration International 231, 235–9.
- 170 On difficulties in establishing and applying international commercial law in arbitration proceedings in diverse legal environments, see Lalive (n 162) 163, 170. See also Amr A Shalakany, 'Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism' (2000) 41 Harvard International Law Journal 419, 425, 443 (discussing the difficulties of establishing and applying law in arbitration proceedings in diverse legal environments); Veeder (n 153).

authorise them to do so;¹⁷¹ they do so because, as arbitrators, they consider it 'lawless' to decide outside of law¹⁷² and because prominent international jurists frown on arbitral awards that are reached *ex aequo et bono*.¹⁷³ Transnational arbitrators also enforce domestic law. For example, they apply domestic consumer protection and antitrust laws in order to avoid jurisdictional challenges on national interest grounds¹⁷⁴ or challenges to their arbitral competence.¹⁷⁵ National law courts also nullify arbitration awards for violating forum public policy, such as under Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.¹⁷⁶

Finally, it is arguable that, despite the theoretical freedom of merchants to make choices of law by contract, those choices, in practice, favour merchants from developed states.¹⁷⁷ Typifying such an 'uneven playing field' is the choice of law of a dominant

- 171 For renewed interest in applying the doctrine *ex aequo et bono* to international arbitration, see ICC Task Force on Amiable Composition and ex aequo et bono (September 2005) with the mandate (1) 'to identify the essential features of *amiable composition* and of *ex aequo et bono*' and (2) to 'study the role of the arbitrators when acting as *amiable compositeurs* or when deciding *ex aequo et bono*, [particularly] jurisdictional, procedural, or substantive problems that may arise'. The Task Force is co-chaired by Edouard Bertrand (France) and Ronald King (United Kingdom). See www.iccwbo.org/policy/arbitration/id6566/ index.html. The ICC provides for arbitration *ex aequo et bono* with the consent of the parties. See ICC, International Court Rules of Arbitration, Art 17, 36 ILM 1606, 1612 (1997).
- 172 See Pierre Mayer, 'Reflections on the International Arbitrator's Duty to Apply the Law—The 2000 Freshfields Lecture' (2001) 17 Arbitration International 235, 241–7 (discussing the duty of arbitrators to apply 'the law'). But see Manfred Lachs, 'Equity in Arbitration and in Judicial Settlement of Disputes' (1993) 6 Leiden Journal of International Law 323, 325, 326–9 (arguing that 'equity is built into the legal system').
- 173 Sir Hersch Lauterpacht was a prominent jurist who shunned the use of the ex aequo et bono doctrine. See his The Development of International Law by the International Court (London, 1958) 217; Hersch Lauterpacht, The Function of Law in the International Community (Oxford University Press, 1933) 379; see also Jackson H Ralston, International Arbitration from Athens to Locarno (Stanford University Press, 1929) 22–26; WT Barbour, 'The History of Contract in Early English Equity' in Paul Vinogradoff (ed), Oxford Studies in Social and Legal History (1914) vol 4, at 1, 158–64; John EC Brierley, "Equity and Good Conscience" and Amiable Composition in Canadian Arbitration Law' (1991) 19 Canadian Business Law Journal 461, 465–8; United Nations Conference on Trade and Development, 'Dispute Settlement', International Centre for Settlement of Investment Disputes: Applicable Law (2003) 29, www.unctad.org/en/docs/edmmisc232add5_en.pdf (describing the use of the word 'equitable' in Section 9 of UNCTAD to refer to decisions ex aequo et bono as distinct from the law of equity).
- 174 See Barceló (n 162).
- 175 See Kirchner (n 162) (discussing the choice-of-law competence of transnational arbitrators); see also Kobayashi and Ribstein, 'Uniformity, Choice of Law and Software Sales' (n 125) 261; Ribstein and Kobayashi, 'State Regulation of Electronic Commerce' (n 125) 1 (discussing uniformity and choice of law).
- 176 An online version of the New York Convention is available at www.uncitral.org/uncitral/en/uncitral_texts/ arbitration/NYConvention.html. See also Albert Jan van der Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer, 1981) (analysing the New York Convention with a focus on its uniform judicial interpretation). But see Sajida A Mahdi, 'Gateway to Arbitration: Issues of Contract Formation under the UCC and the Enforceability of Arbitration Clauses Included in Standard Form Contracts Shipped with Goods' (2001) 96 *Northwestern University Law Review* 403, 418 (treating the enforceability of arbitration associated with the sale of goods under the UCC).
- 177 See Andreas F Lowenfeld, 'Lex Mercatoria: An Arbitrator's View' (1990) 6 Arbitration International 133, 146 (discussing the influence of the Western legal tradition on the institutionalisation of arbitration in

merchant's home state or primary place of business.¹⁷⁸ Global arbitration centres are located in expensive cities, which may discourage parties with limited resources from proceeding to transnational arbitration.¹⁷⁹ Complex arbitration proceedings also benefit sophisticated merchant parties that are familiar with complex models of commercial litigation.¹⁸⁰ A disproportionately high number of transnational arbitrators emanate from developed regions like Western Europe, the United Kingdom, and the United States.¹⁸¹

Nation-states, in turn, contribute to this uneven playing field by sponsoring state-directed arbitration that advantages nationals over non-nationals¹⁸² or by nullifying arbitral awards on parochial national interest grounds.¹⁸³

Ultimately, the question whether transnational arbitration in general embodies Law Merchant precepts needs to be answered in particular cases. What is clear is that it is not necessarily either institutionally or functionally autonomous from domestic institutions

- developed states in the latter half of the 20th century); Trakman (n 151) 10. See generally Naón (n 80) 60 (arguing that arbitrators will apply or consider national laws to determine whether parties exercised free choice in concluding their agreement).
- 178 This is a well-tested proposition with regard to one-sided adhesion contracts in general. See eg Friedrich Kessler, 'Contracts of Adhesion—Some Thoughts about Freedom of Contract' (1943) 43 Columbia Law Review 629, 641–2; see also Henningsen v Bloomfield Motors, Inc, 161 A 2d 69, 87 (NJ 1960) ('Extreme inequality of bargaining between buyer and seller [regarding adhesion contracts] ... is now often conspicuous. Many buyers no longer have any real choice in the matter' (quoting Lawrence Vold, Handbook of the Law of Sales (West, 2nd edn 1959) 447) (discussing judicial responses to adhesion contracting)).
- 179 These global cities include, among others, London, Paris and New York. See Trakman (n 151) 292–305; see also Yong-Shik Lee, *Reclaiming Development in the World Trading System* (Cambridge University Press, 2006) 47 (describing developing nations' difficulties in terms of attending meetings in such cities).
- 180 For instance, some parties may avoid arbitration conducted by the American Arbitration Association due to the perception of protracted hearings, lengthy delays, extensive witness examinations, and voluminous arbitral awards. See International Center for Dispute Resolution, 'American Arbitration Association: Major Arbitration and Mediation Rules and ADR Programs', www.adr.org/sp.asp?id=28819 (discussing arbitration before the International Center for Dispute Resolution of the American Arbitration Association). See also American Arbitration Association, 'International Dispute Resolution Procedures', www.adr.org/sp.asp?id=33994 (explaining the rules and procedures of the International Center for Dispute Resolution of the American Arbitration Association). See generally Kevin M Clermont and Theodore Eisenberg, 'Xenophilia in American Courts' (1996) 109 Harvard Law Review 1,120 (explaining the complexity of litigation within the US justice system). For a classical refutation of the litigation crisis in the United States, see Marc Galanter, 'Afterword: Explaining Litigation' (1975) 9 Law & Society Review 347, reprinted in part in S Goldman and A Sarat (eds), American Court Systems (Longman, 1978).
- 181 See Trakman (n 121) 1, 14.
- 182 For example, it is sometimes suggested that Chinese courts are more ready to enforce the awards derived from homespun arbitration centres like the China International Economic and Trade Arbitration Centre than those of foreign arbitration centres. See J McConnaughay and Thomas B Ginsburg (eds), International Commercial Arbitration in Asia (JurisNet LLC, 2nd edn 2006) 95–200; Jingzhou Tao, Resolving Business Disputes in China (Kluwer, 2005); see also China International Economic and Trade Arbitration Commission, www.cietac.org/index.cms.
- 183 Scholars have noted an alleged double standard by which the United States favours arbitration as a means of constraining interference by foreign governments with private investment while disfavouring arbitration filed against the US government under Chapter 11 of NAFTA. Guillermo Aguilar Alvarez and William W Park, 'The New Face of Investment Arbitration: NAFTA Chapter 11' (2003) 28 Yale Journal of International Law 365, 368–9.

and systems of law. Nor, like the historical Law Merchant, is transnational arbitration wholly 'private' or insulated from state scrutiny. Transnational arbitration also functions along a multi-tier chain of dispute resolution, and is not inevitably a self-standing dispute resolution option that supersedes all other options. That chain commences with merchants self-regulating their transnational transactions by contractual and noncontractual means. It encompasses them negotiating, conciliating or mediating their differences in the event of conflict. It sometimes culminates in civil litigation before the domestic courts of a particular nation-state. The autonomy of transnational merchants is sometimes both formally and functionally constrained by substantive laws and procedures adopted by national courts.

VII. CONCLUSION

The examples given in the latter half of this article highlight the dysfunctional relationship between the abstract ideals that underpin theories of the Law Merchant and their practical manifestations in twenty-first century merchant environments. The aim of the article is not to disparage the development of Law Merchant precepts as inherently unsound; they are not so. The aim is rather to demonstrate that a plurality of Law Merchant values exists that operate formally, institutionally and functionally differently in disparate merchant contexts.

The article does challenge Law Merchant idealism, such as the theoretical ideal of a spontaneously ordered Law Merchant in which merchants transact freely, unrestricted by intrusive state and multistate authorities. The reality is that transnational merchants are frequently subject to trade and investment entitlements that nation-states and multistate authorities grant preferentially. Scholars who treat a twenty-first century Law Merchant as the quintessence of a spontaneously self-ordered liberal Law Merchant ignore the stratified community of twenty-first century traders and investors who are only loosely conceived as 'transnational merchants'.

Abstract notions of a self-ordering and self-perpetuating Law Merchant are romantic at best. The examples of Cyberspace and Investment Law Merchants highlight this romance. A preferable approach is to recognise a plurality of Law Merchant values that serve as vibrant yet differentiated ways of resolving merchant disputes in a fair, expeditious and commercially sensitive manner. It is through this vibrancy that pluralistic Law Merchant values will have a sustainable future in the twenty-first century.

¹⁸⁴ See Kyriaki Noussia, Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law (Springer-Verlag, 2010); Anjanette H Raymond, 'Confidentiality in a Forum of Last Resort: Is the Use of Confidential Arbitration a Good Idea for Business and Society?' (2005) 16 American Review of International Arbitration 479; Leon E Trakman, 'Confidentiality in International Commercial Arbitration' (2002) 18 Arbitration International 1 (discussing the predominantly private and confidential nature of transnational arbitration).