2007

Living La Vida Lex Mercatoria

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Recommended Citation
12 Uniform Law Rev. 733 (2007)
Living *La Vida Lex Mercatoria*

Helen E. Hartnell *

I. INTRODUCTION

My two-year sojourn at the University of Cologne (2004-2006) provided an intense occasion for living *la vida lex mercatoria*. This essay explores key facets of that experience. At the outset, I approach the topic from a traditional scholarly perspective, first by offering a brief overview of theoretical debates about the *lex mercatoria*, then by arguing the need for more social scientific (and particularly empirical) research in this field. Next my focus shifts to the Willem C. Vis International Commercial Arbitration Moot (Vis Moot), and considers the role of legal education in reproducing the *lex mercatoria* as a living phenomenon. In each of these contexts, I garner and examine available empirical evidence, and suggest ways in which interdisciplinary research might enrich our knowledge of the transnational legal field. Finally, the essay takes up some broader questions that arose during my two years in Cologne, particularly relating to the extreme skepticism with which German colleagues greeted my socio-legal ¹ turn. In the spirit of carrying on the discussions that began during those years, I conclude with some comparative reflections on multi-/interdisciplinarity in the legal academy. Thus, as a whole, this essay

* Professor of Law, Golden Gate University School of Law, San Francisco (United States of America) and DAAD Gastlehrlstuhl für anglo-amerikanisches Recht, Freie Universität Berlin (Germany) (WS 2006-07). This is an updated and expanded version of a contribution made under the same title to Klaus Peter Berger / Georg Borges / Harald Herrmann / Andreas Schlüter / Ulrich Wackerbarth (Eds.), *Zivil- und Wirtschaftsrecht im Europäischen und Globalen Kontext: Festschrift für Norbert Horn zum 70. Geburtstag* — Private and Commercial Law in a European and Global Context (Berlin: De Gruyter Recht 2006), 355-376, and is republished with the kind permission of De Gruyter Recht.

¹ I use the term "socio-legal" to include the full panoply of multi- and interdisciplinary approaches to the study of law, despite the term's semantic limitations. The "law and society" tradition in the United States includes the widest imaginable range of approaches to the study of law, including but not limited to those informed by the disciplines of anthropology, economics, gender studies, history, linguistics, literature, philosophy, political science, psychology, rhetoric, and sociology. In one British scholar's view, "[s]ociological analysis of law has as its sole unifying objective the attempt to remedy the assumed inadequacy of lawyers' doctrinal analyses of law." Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (1995), 25.
combines analysis of scholarly debates, investigation of empirical data, and reflection on legal academic culture from an American perspective. To this extent, it exemplifies the best (or worst, depending on one’s predilections) eclectic tendencies of some socio-legal scholarship.

II. — *LEX MERCATORIA AND THE NEED FOR AN EMPIRICAL APPROACH*

Any argument about the “need” for an empirical approach to the *lex mercatoria* — which term I use as a synonym for “new law merchant” as developed in the post-World War II era — presupposes an initial assessment of the phenomenon. I do not begin with a legalistic definition of the term, since that approach would beg the underlying questions. Rather, I begin by briefly surveying the academic debates over *lex mercatoria*, in order to illuminate the contours of this transnational field and to identify the stakes in the often heated debates. Insofar as possible, the discussion of substance is integrated with that of the contractual, arbitral, and other contexts in which *lex mercatoria* emerges and plays its role. This tack reflects my views on the interdependent relationship between these different aspects of the phenomenon, as well as the inductive approach endemic to Common Law thinking on any legal topic.

One of the dominant debates about *lex mercatoria* concerns its nature, in particular whether it is an autonomous legal order or not. The heated academic controversies over this question express fundamental disagreements about the characteristics of the legal framework that is — or should be — available to govern international economic relations, but also refract broader jurisprudential and other theoretical concerns. My bird’s-eye view of the “autonomy” discourse yields two conclusions: first, that different authors use the terms “autonomy” (or “autonomous”) in significantly different ways; and second, that they use the same concept to address a variety of distinct (albeit inextricably related) aspects of the *lex mercatoria* phenomenon, namely its normativity (i.e., origins or sources and contents), on the one hand, and its

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2 My analysis focuses on the broader multidisciplinary debate over autonomy, rather than the narrower (but no less important) legal debate over whether *lex mercatoria* rises to the level of a legal order or system. While I recognize that these issues are linked in the minds of legal scholars, insofar as completeness and systematicity are considered prerequisites to autonomous status as a legal order, my goal here is not to rehash the legal debates, but rather to examine them from a different perspective. My approach only roughly approximates the socio-epistemological approach of Nikitas Hatzimihail, *The Many Lives – and Faces – of Lex Mercatoria: An Essay on the Genealogy of International Business Law* (2006 manuscript) (providing a detailed historiography of the *lex mercatoria* literature).
effectivity (i.e., how and whether it “works” in practice, particularly in connection with international commercial arbitration), on the other. The essential point to grasp here is that these two aspects of lex mercatoria are interdependent and mutually constitutive.\(^3\) Explicit engagement with these dimensions of the debate over the autonomy of lex mercatoria might help to break the intellectual gridlock in this field.

With regard to my first conclusion, virtually all authors agree that “autonomy” implies something that is outside the realm of the State, notwithstanding their often vastly different frames of reference. In particular, some authors use the term to mean “societal” (in the sense of referring to extra-legal norms), while others use it to mean “transnational” (in the sense of pointing beyond the nation-State). Moreover, while all authors depart from the positivist notion of the (nation-)State as the only source of law, they differ in regard to which societal actors they look to — viz., merchants or the legal profession — as sources. Finally, the term “autonomy” is sometimes used to refer narrowly to the parties’ freedom of contract, while at other times it is deployed more broadly to mean the systemic autonomy of lex mercatoria itself. This latter discrepancy ranges, in other words, from narrow concern with the liberty of economic actors themselves, to a broader concern with the power of the legal profession to disencumber economic activity (and hence also legal practice) from substantive or procedural interference by the State.

I turn now to consider the more concrete debates over the two aspects of lex mercatoria identified above — i.e., its normativity and its effectivity — which are both implicated in the autonomy discourse. The following discussion of normativity is subdivided into two parts, corresponding to what are labelled here as first- and second-order debates.

In terms of the normativity (i.e., the origins or sources) of lex mercatoria, the first-order debate concerns whether the norms arise spontaneously from — and are thus driven by the functional needs of — the business community (“self-
regulation"), or whether they arise through the intervention of the State. The first position tends to find support among a strange group of bedfellows that can be variously characterized as legal pluralists, economists, constructivists, systems theorists, and other socio-legal scholars, whereas the second position is largely the province of legal positivists and traditional private international law scholars. It is virtually impossible to disentangle objective from value-based perspectives in the context of this debate, since normative considerations are thoroughly imbricated in the theoretical presuppositions that animate the observers. That ultimate stakes are in play is reflected by the labels "religious war" and "trench warfare" that have been used in this context.


5 See, e.g., Robert Cooter, "Structural Adjudication and the New Law Merchant: A Model of Decentralized Law", 14 International Review of Law & Economics (1994), 215-231 (215) ("A community of people forms a special network whose members develop relationships with each other through repeated interactions. The modern economy creates many specialized business communities. ... Wherever there are communities, norms arise to coordinate the interaction of people. ... I refer to all such norms of business communities as the new law merchant.").

6 See, e.g., A. Claire Cutler, "Public Meets Private: The International Unification and Harmonization of Private International Trade Law", 13(1) Global Society (1999), 25-48 (discussing the unifying influence exerted by a global "mercatocracy" or merchant class and a global business culture); id., "Private international regimes and interfirm cooperation", in Rodney Bruce Hall / Thomas J. Biersteker (Eds.), The Emergence of Private Authority in Global Governance (2002), 23-40 (35) (hereinafter: Hall / Biersteker, The Emergence of Private Authority) (asserting that "the corporate world wants and is generating private, ad hoc, and discretionary standards"); William Scheuerman, "Economic Globalization and the Rule of Law", 6(1) Constellations: An International Journal of Critical and Democratic Theory (May 1999), 3-25 (arguing that "both a unifying corporate elite and the compression of time and space are obviating the need for explicit, predictable, and fixed rules").

7 See, e.g., Mathias Albert, Zur Politik der Weltwirtschaft (2002). See also Graf-Peter Callies, "Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law", 23 Zeitschrift für Rechtssozioologie (2002), 185-216 (endorsing Teubner's "reflexive law" approach to transnational law, which marks a "third way" between market and State: a civil society basically regulating itself, supported, if necessary activated, but essentially merely framed and supervised by the State," and which constitutes a synthesis of the "descriptive Systems Theory of Niklas Luhmann and the normativist Discourse Theory of Jürgen Habermas").

8 See, generally, the contributions in the following edited volumes: Volkmar Gessner / Ali Cem Budak (Eds.), Emerging Legal Certainty: Empirical Studies on the Globalization of Law (1998) (hereinafter: Gessner / Budak, Emerging Legal Certainty); Felstiner / Gessner, Rules and Networks, supra note 3.

What often gets lost in the all-or-nothing battle between these opposing camps is the possibility that norms might arise through the intervention of other civil society groups, such as legal actors. Strict adherents to either polar position on the autonomy question would assume this problem away, by assimilating legal actors either to the business community (sometimes referred to as the “community of merchants” or societas mercatorum) or to the State, and thus deny them any agency of their own. Yet history, as noted below, shows that legal actors have on occasion supported (or opposed) the lex mercatoria in the service of their own professional interests. If this third alternative is taken into account, then the all-or-nothin"g battle over the autonomy of the origin or sources of the lex mercatoria simply cannot be won in a fair fight. Indeed, the only way for one argument to prevail over the other would be on definitional grounds. Thus, if the narrow definition is adopted, according to which lex mercatoria consists only of those norms spontaneously generated within the (extra-legal) economic realm to govern its own affairs, then lex mercatoria is by definition autonomous or unconstrained by the State along this dimension. Conversely, if a broader definition is adopted, then the lex mercatoria may include positive law (e.g., domestic

10 Klaus Peter Berger, The Creeping Codification of the Lex Mercatoria (1999), 32 [hereinafter: Berger, Creeping Codification]. According to Berger, ibid., at 33, the “intrinsic evil” of the lex mercatoria doctrine is that discussions about it are “frequently too emotional and too passionate.”

11 As Dasser has aptly put it, “Are we talking about legal rules created by merchants, or legal rules created for merchants by academics, legislators and others?”: Felix Dasser, “Lex Mercatoria – Critical Comments on a Tricky Topic”, in Felstiner / Geissner, Rules and Networks, supra note 3, at 189-200 (189).

12 As for the effect of these debates within the business community itself, see Dasser, supra note 11, at 191 (“[A]sk almost any businessperson what he or she thinks of the lex mercatoria or the autonomous legal order of international commerce, and you will earn a blank stare.”).

13 Horn, who prefers the broader definition of lex mercatoria, has steered a pragmatic course around the quicksand of debates over autonomy. See, e.g., Norbert Horn, “The Use of Transnational Law in the Contract Law of International Trade and Finance”, in Berger, The Practice of Transnational Law, supra note 3, at 67-80 (73-74) [hereinafter: Horn, Transnational Law] (“We need not discuss here the controversial question of whether private parties are empowered to detach their contract entirely from the application of domestic law. Let us assume, instead, that most national laws allow at least a partial reference to internationally recognized rules or to any other set of rules as part of party autonomy.”). He knows this to be true, based on personal experience, and indeed empirical studies confirm this as fact. See also Norbert Horn, “Uniformity and Diversity in the Law of International Commercial Contracts”, in Norbert Horn / Clive M. Schmitthoff (Eds.), The Transnational Law of International Commercial Transactions (1982), 3 (16) (noting that the existence of de facto similarities of rules found in various legal
rules enabling private autonomy; the United Nations Convention on Contracts for the International Sale of Goods (CISG)), as well as other norms generated or “restated” by legal actors (e.g., the UNIDROIT Principles of International Commercial Contracts; the “Lando” Principles of European Contract Law; the lists drawn up by various scholars), and is thus not strictly autonomous.¹⁴ In the end, resolving this dispute at the definitional level is impractical, since neither camp would concede the other’s definition, and would achieve a hollow victory at best.

The second-order debate about the normativity of lex mercatoria is the more practical one concerning its actual content. Obviously the content depends on whether one adopts the first (narrow definition) or second (broad definition) position identified above, and thus on one’s views about the recognized sources of lex mercatoria norms. Those who subscribe to the narrow view (i.e., that only norms generated by business itself count) face a challenge that is theoretically straightforward, but difficult in practice, namely to identify such norms as may exist in different commercial branches or locales.¹⁵ The need for empirical studies in this context is insurmountable, if the claim that such norms exist is to be proven.¹⁶ A few studies of the practices of particular industries have been undertaken to date,¹⁷ and others systems constitute “a first step towards uniformity; but by no means can we speak here of elements of an ‘autonomous’ law of international commerce.”

¹⁴ Berger argues for an intermediate or hybrid position: lex mercatoria is an “independent, ‘third’ supranational legal system between domestic law and public international law, a legal system that is created and developed by the law-making forces of the international business community.” Berger, Creeping Codification, supra note 10, at 43.

¹⁵ The legal perspective sharply distinguishes custom and trade usages from law: “Trade usages do not have the quality of law. Together with other ‘factual legal sources’, such as general conditions of trade or customs, they constitute the first step towards the development of customary law and towards the creation of a lex mercatoria. ‘All customary law of international trade has the quality of trade usages but not all trade usages are customary law.’” Berger, Creeping Codification, supra note 10, at 41 (quoting Felix Dasser, Internationale Schiedsgerichte und Lex Mercatoria (1989), 91).


are underway. However, the prospect of distilling such universal (legal) principles as might exist from the multitude of particular customs, trade usages or other practices would be daunting, in the unlikely event that proponents of the narrow view were to undertake such a task.

In terms of content, the (primarily legal) scholars who adopt the broader definition have an easier job of it, at least insofar as there is widespread (though not complete) agreement on the major sources of hard and soft lex mercatoria norms. Horn identifies three transnational sources of such norms: international conventions and treaties; semi-official texts that remain outside any legislative procedure (e.g., the 1994 UNIDROIT Principles of International Commercial Contracts, which he identifies as the “most influential unofficial source” of lex mercatoria); and non-codified principles that may be used by lawyers when drafting international commercial and financial contracts and are recognized by courts and arbitral tribunals. Horn’s list of sources raises crucial methodological questions, which can only be touched upon here.

Berger takes up the methodological challenge in his book on the “creeping codification” of lex mercatoria, which self-consciously (but nonetheless paradoxically) opens with Oliver Wendell Holmes’ classic quote about the Common law: “The life of the law has not been logic; it has been experience.” Accordingly, Berger builds his “open-ended and flexible”
compilation or “restatement” of the “Principles, Rules and Standards of the Lex Mercatoria” on the foundational assumption that lex mercatoria is an “autonomous legal system” that is “coming into being by way of decentralized, ‘spontaneous’ law-making” in a dialectical way through the “interaction between commercial practice and the law.” Moreover, inspired by Eugen Ehrlich’s notion of the “living law”, Berger argues further that the search for legal rules and principles within this legal system “may not be reduced to a mere logical deduction from a predetermined normative system,” but much occur within an “unwritten framework of values and convictions providing and enriching it with the necessary logical consistency and internal unity.” In the end, Berger’s inductive and comparative legal

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method for ascertaining the content of the lex mercatoria is one that warms
the Common Law heart, while his invocation of Ehrlich’s “living law” tradition
bolsters my claim that empirical studies have an important role to play in this
transnational legal field. However, I caution against conflating the inductive
Common Law methodology, as a technique for distilling doctrines (i.e., prin-
ciples and rules) from what courts and arbitral tribunals have done, with the
broader socio-legal preoccupation about “law in action”, which is only
incidentally concerned with such doctrinal matters.27 Ehrlich’s “living law”
and the Common Law have strong affinities for one another, and can be
productively combined, as Berger’s approach suggests, but they are far from
equivalent.

In terms of the effectivity of the lex mercatoria (i.e., how and whether it
“works” in the context of dispute resolution), the debates over autonomy take
on a less heated, albeit no less significant character. Indeed, from a practical
perspective, the ultimate answer to the question of autonomy depends on
whether the State yields to privatized forms of dispute resolution – whether
legal or extra-legal – or insists on imposing itself upon the parties to a
commercial transaction.28 This is the quintessential lawyers’ realm, in which
debates over party autonomy are a proxy war for the struggle between
national jurisdiction and a-national (or denationalized 29) dispute resolution.
The crucial questions here are two-fold and pertain to applicable law: first,
whether parties are free to choose something other than positive (i.e., national
or international) law, such as lex mercatoria norms or ex aquo et bono

that “the reference to unwritten general principles of law has today to a large extent replaced
positivist approaches to decision-making, thereby introducing a new pluralism into the classical
and largely positivistic theory of legal sources.” Ibid., at 92.

27 As a consequence of this difference, Berger’s use of the term “law in action” is quite
different from my own understanding and usage of that term, as elaborated in note 40 infra.

28 “Market authority does not simply supplant sovereign (public) authority”; rather,
“sovereign authority accommodates the burgeoning demands for market authority by participating
in its own transformation.” Thomas J. Biersteker / Rodney Bruce Hall, “Private authority as global
governance”, in Hall / Biersteker, The Emergence of Private Authority, supra note 6, at 203-222
(209). See, generally, Dieter Martiny, “Traditional Private and Commercial Law Rules under the
Pressure of Global Transactions: The Role for an International Order”, in Felstiner / Gessner, Rules
and Networks, supra note 3, at 123-155.

29 See Michael Zürn, “Sovereignty and Law in a Denationalised World”, in Felstiner / Gessner,
Rules and Networks, supra note 3, at 39-71 (40) (preferring the term “societal
denationalisation” to “globalisation”). See also De Ly, supra note 3, at 167 (asking “whether
globalisation actually is occurring or whether we see much more denationalisation and regional
forms of internationalisation.”).
resolution of their dispute, to govern their relationship; and second, whether they may opt out (and thus evade the application) of distasteful provisions of the otherwise applicable positive law(s). Most legal scholars accept that the lex mercatoria must either yield or otherwise accommodate “the socio-economic values and policy decisions which stand behind mandatory provisions of domestic law [having] an ordre public-quality,” but not all do so.

Some empirical studies have looked at what parties (and their lawyers) actually do in their transnational contracts, but more work along these lines is needed.

30 “Schmitthoff said in 1964 that lex mercatoria applies if and so far as allowed by the national laws.” HORN, Transnational Law, supra note 13, at 80.


32 BERGER, Creeping Codification, supra note 10, at 75. Berger himself does not subscribe to this widely-accepted view, however.

33 Consistent with his role as one of the leading legal proponents of the idealistic view that lex mercatoria is an autonomous legal order, Berger argues that scholars who insist on preserving “the general notion of ordre public inherent in any domestic legal system ... misunderstand the true quality of the lex mercatoria.” BERGER, Creeping Codification, supra note 10, at 76. In lieu of the traditional (nation-State-based notion of ordre public, he argues instead that lex mercatoria should be “supplemented by the creation of an a-national, i.e. transnational ordre public” based on the existing “uniform ethical understanding in international commercial affairs,” which in his view is evidenced by the “mass of ethical and moral rules and principles” found in “the various Codes of Conduct drafted by international organizations.” Ibid., at 77.

The ultimate test of autonomy, at least from a legalistic perspective, is what arbitral tribunals and courts do in particular cases. No legal scholar would argue that arbitration itself is fully autonomous, given the role of national courts in enforcing arbitration agreements and awards (e.g., under the 1958 “New York” Convention on the Recognition and Enforcement of Foreign Arbitral Awards), as well as their ancillary (but nonetheless important) procedural roles in the context of international commercial arbitration. Here, too, some empirical studies exist, but further “law in action” studies would be welcome, both to fill in the lacuna in our knowledge about how lex mercatoria works on the ground, and to provide a basis for resolving the perennial theoretical debates.

Numerous scholars have noted with regret that empirical studies are...
few and far between in the transnational legal field. Yet the available literature, while spotty, offers ample food for thought. Here I wish to identify two types of studies, mention a few examples, and then consider the broader implications of their findings. The first type of empirical approach identifies a gap between “law in the books” (i.e., “black letter” or doctrinal law) and “law in action” (i.e., examining whether, and if so how the existing rules are deployed in practice). This approach is exemplified by two studies conducted in the United States, both of which found that the CISG was virtually unknown to courts and practitioners ten years after it had become the law of the land.

The second type of empirical study points to a different kind of gap—one between “law in academic books” and “law in action”. Three studies of this sort point toward similar conclusions. The first study was conducted by Dasser, who researched arbitral awards to find out whether lex mercatoria was actually being used to resolve cases. Dasser’s study revealed that “most of the awards do not really apply international trade usage, that is, rules created


39 Given space limits, I do not evaluate the sufficiency of the empirical evidence upon which the cited conclusions rest. The authors of one of the cited studies admit that their conclusion is based on scant empirical evidence. Gessner / Appelbaum / Felstiner, supra note 17, at 28.

40 This definition points up the key difference between my socio-legal use of the term “law in action” and Berger’s use of the same term, as already noted supra in note 27. Ehrlich’s innovation was to reach outside the formal system of law, especially as found in the Continental codes, in order to discover the operative rules of conduct prevailing in various sectors of society. From my perspective, Berger’s pluralist approach is an application of Common Law methods in a transnational context to ascertain what the rules are, given the assumption that there are no (or at least too few) “laws on the books”. I do not equate the inductive work of examining judicial or arbitral decisions, in order to ascertain the legal principles articulated there, with “empirical” studies of law in the socio-legal sense. Rather, in the U.S. context, “law in action” or empirical approaches to the study of law include virtually everything but doctrinal approaches. See, generally, Volkmar Gessner, “Globalization and Legal Certainty”, in Gessner / Budak, Emerging Legal Certainty, supra note 8, at 427-450; Stewart Macaulay / Lawrence M. Friedman / Elizabeth Mertz (Eds.), Law in Action: A Socio-Legal Reader (2007).

by merchants, but rather some general principle of law which is more an amalgamation of national laws or a fancy word for the arbitrator's subjective sense of justice. In other words, [he] found very few traces of a lex mercatoria in its original sense.” 42 These findings led Dasser to the following conclusions: “First, at least in arbitral practice, a lex mercatoria as something akin to an independent legal order does exist, but plays a marginal role. Secondly, most relevant national legal systems do not second-guess an arbitrator’s application of a non-national legal standard.” 43 Along similar lines, a second study of the legal culture of global business transactions has concluded that the “lex mercatoria, at least at the present time, seems to have far greater significance in the minds of legal scholars and sociologists of law than it does for the merchants themselves.” 44 Last but not least, the CENTRAL study, which provides a broad set of statistically significant findings based on evaluation of more than 700 usable survey instruments, reaches a similar conclusion.45

In the end, both of the foregoing sets of empirical “gap” findings appear to deal with apples and oranges, but this appearance is deceptive. Taken together, these findings raise important questions about the transnational legal field. The existence of gaps as such is hardly news. Indeed, investigating the causes and consequences of gaps between what law claims to be and how it operates in practice is a staple in the socio-legal toolkit. Whether this research approach is deployed to gain knowledge for its own sake, or in the service of particular reform or policy goals, my basic point remains the same. Neither basic knowledge can be gained, nor legal reform or other policy aims soundly served, without understanding what is happening on the ground, and why.

The first set of conclusions about the CISG pertain to the relative ignorance that prevails in a particular country about binding provisions of law.

42 Dasser, supra note 11, at 196. He updated his original 1980s study and concludes that what he discovered then still holds true. Ibid., at 198.
43 Ibid., at 198. In Dasser’s view, “the lex mercatoria is a fascinating toy. However, for businesspeople and their lawyers it is largely irrelevant, apart from the humble (but very important) trade usages. But then, ... the latter are completely different and should be called by their traditional name in order to avoid misunderstandings.” Ibid., at 198-199. See also Felix Dasser, “‘Lex Mercatoria’ Werkzeug der Praktiker oder Spielzeug der Lehre?”, 1 Schweizerische Zeitschrift für internationales und europäisches Recht (1991), 299-323.
44 Gessner / Appelbaum / Felstiner, supra note 17, at 18.
45 Berger et al., supra note 34 (noting the existence of a “substantial gap between the assumptions of lawyers who discuss the theory of transnational commercial law and the assumptions and viewpoints of international legal practice.”).
As such, these findings simultaneously explain 46 and raise questions about how to close the sizeable gap in a given setting. They also raise questions about the role of lawyers and judges in the transnational legal field. The second set of conclusions, which pertain to the academic-practice gap and raise further questions about the role of legal academics in the transnational legal field, are more ambiguous in terms of their policy implications. Thus, all of the studies noted above, despite being fundamentally different in their particulars, are linked via their broader implications, which draw attention to particular knowledge deficiencies and to the central role of legal actors in constructing the transnational legal field.

For those committed to closing the "ignorance" gap about the CISG (or other transnational norms), the most obvious solution is to spread the word. Information has become readily available through the World Wide Web, but even assuming ready access – which cannot safely be assumed in all countries where the CISG has been adopted – lawyers and dispute resolvers must first conceive of the idea of searching for norms originating outside their domestic legal order, if they are ever to find the extensive resources now available online.47 In fact, the perceived need to disseminate information about international uniform law has been on the agenda of international organizations, such as the United Nations Commission on International Trade Law (UNCITRAL) that produced the CISG, as well as of professional organizations concerned with matters of public and private international law,48 since long

46 Widespread ignorance regarding the existence of the CISG offers at best a partial explanation for the relative paucity of published U.S. judicial or arbitral decisions applying its provisions. Numerous alternative explanations can be imagined, such as the widespread "common wisdoms" that many, if not most American lawyers advise their clients to opt out of the CISG, or that merchants simply prefer arbitration. Other conceivable explanations might draw on the host of factors that are relevant to a decision whether or not to pursue a wrong by means of legal process. With regard to the latter point, albeit in a domestic rather than a transnational context, see William Felstiner / Richard L. Abel / Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...", 15 Law & Society Review (1980), 631; Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study", 28 American Sociological Review (1963), 55.


48 For example, the goal of informing practicing lawyers and judges about the CISG and
before the advent of the Internet. To take one fateful example, this topic was on the agenda at the 1992 UNCITRAL Colloquium on Uniform Commercial Law in the Twenty-First Century, where New York attorney, Michael Sher, suggested organizing a moot competition, in which students would work on a case that was governed by the CISG and presented in an arbitral forum.49 This proposal led quickly to the creation of the Willem C. Vis International Commercial Arbitration Moot, which is discussed in Part III below.

As for the academic-practice knowledge gap, different conclusions may be drawn. The first is that more and better empirical studies are desirable to bring theory into line with actual conditions. However, this is true only insofar as scholars are motivated by a scientific, inquiring spirit, rather than by normative considerations or other interests. Mention has already been made of the fact that debates over *lex mercatoria* have "religious" overtones, which implies that they are, at least in some cases, rooted in belief or ideology, and thus tantamount to tenets of faith.50 Such strong commitments seem to be the exception rather than the rule, and are commonly tempered by healthy doses of pragmatism,51 as well as by increasing acceptance among traditional legal

other uniform law, as well as other private international law issues, has been a frequent topic of discussion within the Private International Law Committee of the American Bar Association Section of International Law, which I chaired from 1989-1992, as well as the Private International Law Interest Group of the American Society of International Law, which I chaired from 1999-2003.


50 One commentator, for example, has characterized Berger’s work as embodying a “concrete ideological commitment.” HATZIMHAHL, supra note 21. For his part, Goldman – the modern progenitor of the view of *lex mercatoria* as an autonomous legal system – held the view that *lex mercatoria* was based on natural law. Berthold GOLDMAN, “Arbitrage international et droit commun des nations”, *Revue de l’arbitrage* (1956), 115-116. For an extreme example, see Harold J. BERMAN, "World Law: An Ecumenical Jurisprudence of the Holy Spirit", *Emory Public Law Research Paper*, No. 05-4 (February 2005) (proposing a jurisprudence of the emerging “world law” – which the author defines to include “many aspects of world economic law” – that would "reflect the image of the tri-une God” and re-integrate the “traditional schools of positivism, stressing will (the policies of the lawmaker), natural law stressing reason (moral values inherent in human nature), and the historical school stressing group memory (community traditions")). For a more skeptical view, see DE LY, supra note 3, at 167 (expressing doubts about universalistic notions predicated on “rationalism as a unifying factor” and describing this “conception [as] overly ambitious, unrealistic and naive”), and at 168 (noting that this approach “hides value judgement about what is desirable in international trade where different cultures may provide different answers”).

51 According to De Ly, supra note 3, at 166, the “most important development in the 1990s is that the debate is to a certain extent not reduced to religion with believers and non-
scholars and practitioners of the need for empirical studies. Yet the “let's get on with it” orientation that has taken hold among some contemporary scholars should not detract from the bottom line, which is that the professional interests of legal actors have played a key role in the emergence of and (relative) autonomy achieved within the transnational legal field. Indeed, historical 52 and sociological 53 studies demonstrate that legal professionals occasionally mobilize doctrinal arguments in a rhetorical way, in order to achieve ends that are beneficial to themselves. Thus, the second gap identified above also suggests a second possible conclusion, namely that the lex mercatoria is a professional project - a constructed legal field in which developments emerge “as a product of competition and conflict” 54 - and not just an automatic process driven by the inevitabilities of the market or the needs of commerce.

By drawing attention to the agency of legal actors in this transnational field, I do not wish to denigrate their painstaking efforts or heroic quest to develop the lex mercatoria. Rather, my aim is to suggest that their agency raises questions that are crucial to the continuing debate over the autonomous character of the lex mercatoria, as well as to a broader understanding of the role of legal actors in transnational governance, and thus deserving of further

52 See, e.g., Stephen E. Sachs, “From St. Ives to Cyberspace: The Modern Distortion of the Medieval ‘Law Merchant’”, 21(5) American University International Law Review (2006), 685. Sachs argues that the universalization of the law merchant in England in the seventeenth century was a rhetorical tool deployed in the battle between civilians and common lawyers over jurisdiction in commercial cases, in which the Common Law courts ultimately prevailed over Chancery. In that context, the civilians argued that mercantile law was separate from the law of the land, because it was part of a transnational tradition, and thus should be retained in separate courts staffed by the civilian lawyers. Ibid., at 795-801. Sachs’ account challenges the received “Romantic” vision of a universal law merchant — produced, interpreted, and enforced by a legally autonomous merchant class ….” Ibid., at 688. Rather, he argues, the “Romantic interpretation is deeply inaccurate, at least as applied to the experience of medieval England, and provides a prime example of the misuse of historical evidence in support of political ends.” Ibid., at 690.

53 See, e.g., Dezalay/Garth, supra note 38 (arguing that the lex mercatoria was created by an intellectual elite as a means of carving out a market niche for arbitration services and reducing competition from members of the local bar).

54 Pierre Bourdieu, “Foreword”, in Dezalay/Garth, supra note 38, at vii-x (vii).
study. Of course, these are not the only questions that merit sustained attention.

The extant body of empirical work, which has only been touched upon above, is beset with methodological weaknesses and full of holes. Some results are unclear or contradictory, while others suffer from insufficient attention to research design (e.g., unfocused research questions; mismatch between theory and method) or inadequate presentation of results. Moreover, given the diverse theoretical approaches and the heterogeneous scopes of the respective studies themselves, it is difficult (if not impossible) at this stage to cumulate results, though some patterns (such as the modest ones identified above) are visible. To some degree, these problems are endemic in a young field of empirical inquiry. However, greater attention to such matters could bring substantial rewards. There is, in addition, a gulf between studies that look at business practices and those that look at legal practices. This gulf could be bridged by collaborative work aimed at integrating these perspectives. Indeed, such work is necessary to adjudicate theoretical claims over the autonomy of the lex mercatoria. Another problem is that only a few cultures and branches of trade have been studied thus far. This is a glaring weakness in a transnational field, where a healthy skepticism towards universalist claims demands the broadest possible approach to the topic of the role of law in transnational commercial life. Finally, while the pragmatic turn noted above may signal that the “religious wars” over lex mercatoria are over for now, its future remains nonetheless an open book. And this book is being written to a significant degree in Vienna, as explained in the next Part of this essay.

55 While a detailed analysis of methodological problems is beyond the scope of this essay, two key problems warrant mention: first, insufficient sample size, and second, sample bias (or lack of representativeness, such as in geographical terms or in terms of the types of legal and other actors surveyed).

56 For a broad assessment of the weaknesses of existing empirical research on lex mercatoria, see Wioletta Konradi / Héctor Fis-Fierro, “Lex mercatoria in the mirror of empirical research”, 2-3 Sociologia del Diritto (2005), 23.

57 De Ly, supra note 3, at 167; see also N. Jin, “The Status of Lex Mercatoria in International Commercial Arbitration”, 7 American Review of International Arbitration (1996), 181 (attacking the universalist aspirations of the lex mercatoria from a developing country perspective, on the basis that these countries have not agreed to the rules and were not involved in their formation).

58 See, e.g., the studies of Guanxi in Felstiner / Gessner, Rules and Networks, supra note 3, at 325-420.

Rev. dr. unif. 2007
III. - THE WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT (VIS MOOT)

Since its conception in 1992, the Vis Moot has rapidly become a central event in *la vida lex mercatoria*. During my Cologne years, I had the good fortune to collaborate with numerous colleagues and students at the *Rechtszentrum für europäische und internationale Zusammenarbeit* (R.I.Z.), which *inter alia* provided high-quality international training for students, particularly via its support for University of Cologne student participation in the Vis Moot since 1995. The R.I.Z.’s far-reaching commitment to skills-oriented legal training put it at the leading edge of a revolution in German legal education that appears still to be in its infancy.\(^6\) But the Vis Moot, which began as a method for teaching the next generation of lawyers about the CISG and international commercial arbitration, has become much more. While still first and foremost an event organized for the students who take part in the competition, the Moot has also become a social practice that contributes to the development of *lex mercatoria* (broadly defined). As such, the Vis Moot – now in its fifteenth season – is a phenomenon worth taking seriously in socio-legal terms, not just because of its sheer magnitude, but also because of its role in reproducing the transnational legal field.

Compared to the *lex mercatoria*, the Vis Moot is neither controversial nor shrouded in medieval or early modern history. Indeed, the Moot has barely been noticed \(^6\) in the voluminous academic literature about transnational law, presumably owing to the dubious assumption that nothing important could happen at a student competition. I hope here to take a first step towards correcting this misconception.

The sheer number of participants in the Vis Moot is daunting for the Vienna-based organizers. From the intimate group of 11 teams that competed in the first Moot in 1993-1994,\(^{61}\) the roster has risen steadily to 178 teams participating at the fourteenth Moot in 2006-2007. All together, more than 1270 teams drawn from 281 universities in 61 countries (counting Kosovo,

\(^{59}\) For an overview of recent changes in German legal education, see Laurel S. Terry, “Living with the Bologna Process: Recommendations to the German Legal Education Community from a U.S. Perspective”, 7 German Law Journal No. 11 (1 November 2006).

\(^{60}\) Bergsten has provided an authoritative overview of the first ten years’ experience of the Vis Moot. See Eric E. Bergsten, “Ten Years of the Willem C. Vis International Commercial Arbitration Moot”, [2003] International Arbitration Law Review, 37-42. My modest additions to the foundation Bergsten already laid are based on data that he kindly provided, which I gratefully acknowledge.

\(^{61}\) I had the privilege of coaching the team from Eötvös Loránd Tudományegyetem (ELTE University) in Budapest (Hungary) at the first Vis Moot.
Montenegro and Taiwan) had participated in the Vienna-based Moot by 2007. Many institutions have sent teams to Vienna from some countries – e.g., from Australia (13), Canada (9), P.R. China (9), France (10), Germany (25), India (19), Mexico (8), Switzerland (7), Turkey (7), the United Kingdom (16), and the United States (60) – whereas virtually all law schools from some other countries have been represented at the Moot. The rate of participation among the 281 participating institutions varies. Very few of them have participated in all 14 Moots. Indeed, as of 2007, 41% of the schools had only attended once (27%) or twice (14%), and the vast majority (74%) had attended fewer than half of the Moots. Of the remaining 26% that have participated in at least half (i.e., seven or more) of the Vienna-based Moots, roughly half of those institutions are located in Europe, and the other half are located elsewhere.

Expense is surely a significant factor in each institution’s decision whether to participate in the Moot, and how often. Still, slightly more than half of the over 1270 teams that participated in the Moot during its first fourteen years travelled to Vienna from outside Europe. All together, approximately 5.3% of the teams participating in the first 14 Vienna-based Moots came from India, 5.4% from Central and Latin America (including Mexico), 5.7% from Asia, 7% from Australia and New Zealand, and 28% from Canada and the U.S. Not

62 The thirteenth (2005-2006) and fourteenth (2006-2007) Vis Moots saw a dramatic increase in the number of participating countries (from 51 in 2005 to an overall total of 61 in 2007, or a 16% jump), as well as in new universities participating (from 229 in 2005 to 281 by 2007, or an 18% jump). The new countries joining the Moot since 2005 are: Azerbaijan, El Salvador, Estonia, Georgia, Iceland, Malaysia, Montenegro, Portugal, Sri Lanka and Venezuela. Among the 52 new participating universities since 2005 are a few surprises, among them Sciences Po (France), the “social sciences university in the heart of Paris.”

63 In recent years, a “sister” competition – the “Vis (East) Moot” – has sprung up in Hong Kong, in part to facilitate participation by a broader range of teams. Since 2003-2004, the Vis (East) Moot has been conducted parallel to each year’s main Vis Moot in Vienna. The problem and rules used in Hong Kong are virtually identical to those used in Vienna, although the schedule is slightly different, in part to accommodate those who wish to participate in both Moots. The Vis (East) Moot, like the original Vienna-based Moot, has experienced rapid growth since its inception. The first Vis (East) Moot (2003-2004) involved 14 teams from six different countries, and the fourth (2006-2007) involved 46 teams from 14 different countries. As might be expected, the Vis (East) Moot attracts a relatively high percentage of participation from Asian countries, ranging from 86% in the first Vis (East) Moot (including Australia, or 71% excluding Australia), to 54% in 2006-2007 (including Australia, or 41% excluding Australia). The Vis (East) Moot has been regularly attended by teams from China, India, Indonesia, Japan and Thailand, and in 2006-2007 was joined for the first time by a team from South Korea. The declining percentage of Asian participation in the Vis (East) Moot reflects growing participation in the Vis (East) Moot by teams from Europe and the Western Hemisphere (Brazil, Canada and the U.S.). Further information about the Vis (East) Moot is available at <http://www.cisgmoot.org>.
surprisingly, the bulk of the teams have come from Europe (48.5% including Turkey). A substantial number (11.6%) of all teams that participated in the Moot by 2007 came from former East Bloc countries, and 14% of the teams came from Germany alone.

Yet despite this remarkably broad distribution, participation in the Vis Moot remains unrepresentative of the global community. Africa is sorely underrepresented at the Vis Moot. In fourteen years, only one team has come from Nigeria, and six from South Africa. Moreover, Arab countries and the Middle East are virtually absent from this event, although predominantly Muslim countries in other parts of the world – Azerbaijan, Indonesia, Kosovo, Malaysia, and Turkey – have been participating in the Vienna-based Moot in small but growing numbers (all together 2.4 % of the total number of teams).

All participating teams converge on Vienna each spring, in order to present their claims (consisting of at least four arguments per team) before a tribunal consisting of three arbitrators. While no aggregate numbers of student participants are publicly available, most teams have at least two members, and some teams consist of ten and more students, not to mention the (sometimes numerous) coaches who accompany their teams to Vienna. Former team members often become coaches in later years, and work either with or without supervision by faculty members or more experienced lawyers. As of the tenth Moot in 2002-2003, more than 3,600 students had participated in the Vis Moot, of whom many have gone on to join the Moot Alumni Association (MAA) that was founded by a group of student participants after the third Moot in 1995-1996. The MAA, which began by organizing social events for student participants during the week in Vienna, has added significant professional activities to its remit, such as publishing a professional journal (Vindobona Journal of International Commercial Law and Arbitration) and making use of its U.N. Observer status to participate in meetings of UNCITRAL and its working groups.

The Vis Moot also attracts significant professional resources. First, hundreds of legal professionals devote their time and talent to the Moot, whether as coaches, evaluators of the students’ written submissions, arbitrators judging the student’s performance in the oral competition, or all of
the above. Approximately 300 persons served in one or the other evaluative capacity (or both) at the twelfth Moot in 2004-2005. The fact that, for some participants, the Moot is a tax-deductible – and possibly even an all-expenses-paid – trip to Vienna during the opera season, is nowhere apparent in their level of commitment and enthusiasm. Second, enormous financial resources are poured into the event, whether through sponsorship by public and private donors, donation of facilities (e.g., space at the University of Vienna and at various local law firms) where the pleading rounds are held, or the costs associated with each individual’s presence in Vienna that week. Recent years have seen an explosion in social events for the professionals in attendance, mainly sponsored by Vienna law firms who invite virtually all (non-student) participants to lavish receptions held every evening of the week but one. The Vis Moot is a unique professional event, owing in large part to the multi-generational mix and the extraordinarily high level of enthusiasm and collegiality.

Taken as a whole, the Vis Moot has become one of the most important annual gatherings of the lex mercatoria and international arbitration community. The atmosphere is remarkably informal, and students have many opportunities to mix with the top lawyers, arbitrators, and professors in the field. Professional conferences are often scheduled around the Moot, as are optional special training programs for students. In some respects, the artifice of the Moot shapes events in the commercial and legal world. Elite practitioners and arbitrators schedule their own work around the Moot, and scholars race to complete pertinent publications so that they can be publicized on the Moot Website (hosted by Pace University under the stewardship of Al Kritzer), or at least distributed by hand among their colleagues in Vienna. Moreover, by focusing on cutting-edge legal issues, the Moot not only attracts scholarly debate, but can even push doctrinal change.65

The Vis Moot has more than succeeded at what it was designed to achieve. It has reached large numbers of budding and experienced legal professionals from around the globe. Students not only learn about the CISG, other hard and soft transnational legal norms, and international commercial arbitration, but also catch the internationalist spirit and idealism about lex mercatoria that permeate the event. Knowledge and experience, in this context, combine to foster belief and commitment, which in turn provide fertile grounds for further development of the transnational legal field. The Vis

65 For example, one issue in the twelfth Moot problem focused on a “glitch” in the new Swiss arbitration rules, which were quickly amended to resolve the problem.
Moot is a breeder reactor, a “communicative event” in which the “self-reproducing, worldwide legal discourse” about the lex mercatoria replicates at a geometric rate. It is not only “the place where the next arbitration generation is being raised and moulded,” but is also “a place where a true transnational culture of arbitration is being developed.” It is, each spring, the place to be, where old-timers and newcomers alike live la vida lex mercatoria to the hilt.

IV. -MULTI-/INTERDISCIPLINARITY AND THE LEGAL ACADEMY

Leaving aside the gradual acceptance among legal professionals that ever more empirical studies of the lex mercatoria would be useful, there remain starkly diverging views on the value of multi- or interdisciplinary approaches to legal topics, particularly among different academic cultures. These differences were brought home to me during conversations with colleagues in Germany, some of whom urged me in no uncertain terms to quit the socio-legal path. This advice, coming in particular from R.I.Z. Director Norbert Horn, whose scholarship spans the range from philosophical to practical and also includes a number of disciplinary cross-border forays, surprised but also provoked me to seek to understand the reasons behind such dire warnings.

My German colleagues advanced three major arguments against interdisciplinary work by legal scholars. The first is that considerations of labor-efficiency (Arbeitsökonomie) preclude anything beyond minimal borrowing across disciplinary lines. Second, institutional concerns caution against such

66 Teubner, supra note 4, at 7-8.
68 Horn’s oeuvre includes some works that incorporate perspectives gleaned from other disciplines. See, e.g., Norbert Horn, “Person und Kontinuität, Versprechen und Vertrauen: die Perspektive des Zivilrechts”, in Richard Schenk (Ed.), Kontinuität der Person: Zum Versprechen und Vertrauen (2001), 35-74 [hereinafter: Horn, Person und Kontinuität] (anthropology); Norbert Horn, “Bankwirtschaft und Bankrecht in interdisziplinärer Perspektive”, in Detlef Bierbaum / Klaus Feinen (Eds.), Bank- und Finanzwirtschaft: Strategien im Wandel (1997), 221-243 [hereinafter: Horn, Bankwirtschaft] (new economic institutionalism; economic analysis of law). More generally, Professor Horn was a member of the Direktorium of the Zentrum für interdisziplinäre Forschung at the University of Bielefeld from 1974-1981, and also served as Managing Director of the Bank Law Division of the Institut für Bankwirtschaftsrecht und Bankrecht at the University of Cologne.
69 Horn, Bankwirtschaft, supra note 68, at 227 ("Es gibt gute Gründe für diese fachliche Trennung und Arbeitsteilung. Die Problemfälle auf jedes Arbeitsgebiet ist zu gross, als dass man mehr als einen Seitenblick auf die Nachbardisziplin werfen könnte, um sich dann wieder auf das eigene Fach zu konzentrieren. ... Die interdisziplinäre Orientierung durch Beschaffung..."
endeavours. And third, some argue that the principal task of the legal academic is to address normative questions, and in particular to stay "close to practice" and seek solutions to real problems.\(^{70}\)

As to the first concern, I believe that the drive towards efficiency must yield, at least on occasion, to the yearning for deeper insight. Ohnesorge rightly argues that "[a]lthough disciplines may share so little at the level of theory that they seem to speak in different languages, when specific issues or institutions are being studied, especially in a comparative context, the contributions of views derived from radically different theoretical starting points can be crucial to full understanding."\(^{71}\) Moreover, some questions - such as the autonomy of the lex mercatoria - cannot be resolved rhetorically by the better argument, but only by evidence. Finally, in my own case, the ability to "speak" in multiple disciplinary languages is as vital as being bilingual in German and English.

As for institutional concerns, my colleagues' warnings about the dangers of the socio-legal path are surely wise in the German academic context, where there are few professional opportunities for interdisciplinary scholars.\(^{72}\)

\(^{70}\) This priority has led Horn to produce a large body of work that is extremely useful for practicing lawyers as well as for advanced students.


\(^{72}\) Leading socio-legal scholars noted in 1998 that it was "mainly [the Volkswagenstiftung's] generous support of socio-legal research which keeps empirical studies in the field of the sociology of law alive in an environment more conducive to doctrinal legal research in Germany." Gessner / Budak, in Emerging Legal Certainty, supra note 8, at xv. Socio-legal studies in Germany are often referred to as an Orchideenfach, that is, an "orchid subject" consisting of rare and exotic species that can only thrive in an artificial hot-house atmosphere. This derogatory label generally implies that the academic field in question is too specialized and "too academic" or cut off from solving problems in the "real world". I note in passing that this criticism is hardly apt when it comes to empirical studies of law (including "law in action" studies), which often have important policy implications.
despite burgeoning interest in such research.\textsuperscript{73} It is disappointing to see that socio-legal studies, to which German-language scholars have made such important theoretical contributions, have been so marginalized in Germany in recent decades. By way of contrast, socio-legal studies have experienced dramatic growth and achieved a high level of popularity during the same time frame in the Common Law world. There was a trend toward social scientific studies of law in Germany in the 1970s,\textsuperscript{75} which was at least temporally parallel, if not causally related to the take-off of this trend in the Common Law world at around the same time.\textsuperscript{76} I have no explanation at hand for the developmental trajectory in Germany,\textsuperscript{77} but can offer some thoughts on recent developments in the United States.\textsuperscript{78}

\textsuperscript{73} For example, the Zweite Nachwuchs Tagung des Berliner Arbeitskreises Rechtswirklichkeit (BAR), which was held in Halle in November 2005, was attended by some 120 persons, including a handful of the dedicated professors and Privatdozenten actively involved in law as an interdisciplinary research topic. Moreover, the Berlin 2007 Joint Meeting of the Law and Society Association and the Research Committee on Sociology of Law (International Sociological Association) drew nearly 2,500 active participants, albeit not all from Germany.

\textsuperscript{74} This discussion is based on my knowledge of legal academia in the United States, and does not presume to apply equally to Australia, Canada and the United Kingdom, where legal education is quite different. It nonetheless bears mention that socio-legal studies are also strong in those three countries, perhaps even stronger than in the U.S.

\textsuperscript{75} See U. ROHL, "Ist die Rechtswissenschaft überhaupt eine Wissenschaft" (Vortrag – Bremen, 08.07.2005), at 10 (describing the failed attempt in the 1970s by German legal academics to counter the attack on law's status as a "real science" by turning towards the social sciences). The tension between doctrinal and empirical or social scientific approaches is perhaps most pronounced in the field of constitutional or public law. Already in the 1970s, German legal scholars debated the need for social scientific studies in the field of constitutionalism. Powerful calls for multidisciplinary approaches to the topic were countered by resistance from those who feared dilution of the legal monopoly. For a contemporary study that confirms the relative lack, while simultaneously demonstrating the value of cross-disciplinary approaches to the question of constitutional amendment, see Andreas BUSCH, "Das oft geanderte Grundgesetz", in Wolfgang Merkel / Andreas Busch (Eds.), Demokratie in Ost und West: Für Klaus von Beyme (1999), 549-574.


\textsuperscript{78} For a critical view of these developments in the U.S., see Anthony D'AMATO, "Th
One possible explanation for the growth of socio-legal studies in Common Law settings, but not in Germany, relates to the status preferences of legal academics. Compared to the lofty notion of legal science (Rechtswissenschaft) that permeates the German academic enterprise, legal training in the Common Law world is of humbler origin. In the United States, for example, legal education was initially in the hands of the legal profession itself, and only gradually migrated over to the universities. “In 1800 apprenticeship was almost universal; today, school training is, practically speaking, the only real path to the bar.” Notwithstanding the dominant role of the universities, however, legal education in the United States is regulated by the legal profession via the American Bar Association (ABA), which keeps the law schools under tight rein through its power of accreditation.

Many contemporary American law professors, while not too proud to accept substantially higher salaries than those paid to their colleagues in the social sciences and humanities, would chafe at the suggestion that they toil in a vocational field. The reluctance among many U.S. legal educators to think of legal education as a “trade school” has been aggravated by increasing ABA pressure to beef up the skills training component of legal education, as well as the growing emphasis on interdisciplinary studies.

Interdisciplinary Turn in Legal Education*, Northwestern University School of Law Public Law and Legal Theory Series, No. 06-32 (2006).

79 See, generally, Rühl, supra note 75, for a discussion of the perennial debates about whether legal science (Rechtswissenschaft) is a ‘true science’. According to Rühl, ibid., at 12-14, law is a ‘cultural science’ (Kulturwissenschaft) in the sense articulated by Rickert in 1898, and characterized by interpretive methodology, in contrast to the explanatory methods employed in connection with the study of natural phenomena (Naturwissenschaft). Rickert’s dichotomy, however, does not adequately account for the social sciences, which partake of both elements. Elsewhere, Rühl characterizes legal history, legal sociology and comparative law as descriptive/explanatory “Seins-Wissenschaften” — as mere auxiliary “Hilfswissenschaften” that support but are subordinate to the “Soll-Wissenschaft” of legal dogmatics (Rechtsdogmatik). Ibid., at 10.


81 Friedman / Teubner, supra note 80, at 355.

as to regularize the status of legal writing instructors and clinicians, who historically had been treated as second-class members of the faculty and not eligible for tenure. These (often hotly contested) changes in U.S. law faculties have been accompanied by a temporally parallel change in the candidate pool and in hiring preferences for tenure-track slots on U.S. law faculties. In a nutshell, there has been a noticeable rise in the number of Ph.D. holders in the law job applicant pool, along with a rising desire on the part of law faculties to hire professors who are capable of multi- or interdisciplinary (and particularly empirical) research.

It is conceivable that these two trends are not merely coincidental, but also causally related. It may be, for example, that the U.S. legal academy is striving towards the "scientific high ground" as a reaction or form of resistance to the skills-oriented and democratizing pressures brought to bear by the ABA, or that the trend is simply a way for the legal academy to enhance its intellectual status by embracing the scientism that dominates U.S. social sciences. Whether either of these explanations are (or could ever be proven) correct, it is worth noting the paradox that legal education (or at least legal scholarship) in the U.S. (and elsewhere in the Common Law world) is edging towards a greater degree of "scientific" conceit, while German legal education and scholarship are, at the same time, placing greater emphasis on skills training.

An alternative explanation for the socio-legal trend in the United States might simply be widespread consensus on the superiority of the approach. The "sociological jurisprudence" and Legal Realist traditions of the early 20th century have pre-disposed U.S. legal educators to be sceptical of purely

83 Since the Ph.D. degree in the U.S. is not available in the field of law, the growing number of law professors with Ph.D. degrees points unambiguously towards a trend of hiring faculty members who have multidisciplinary credentials (such as in anthropology, economics, history, literature, philosophy, political science, or sociology), or who have been trained in special interdisciplinary programs (such as the University of California, Berkeley's 30-year old program in Jurisprudence and Social Policy). U.S. law doctorates are generally designated as S.J.D. or J.S.D. degrees, and it is rare for U.S. lawyers or law professors to pursue this type of advanced degree. For an historical perspective, see Gail J. HUPPER, "The Rise of an Academic Doctorate in Law: Origins Through World War II", Boston College Law School Faculty Papers, No. 196 (2007).

84 The Law and Economics movement was the vanguard of this trend in law school hiring, starting already in the 1980s. The trend towards socio-legal hiring and booming interest in empirical studies is a more recent phenomenon.

85 I point to these trends wholly on the basis of personal experience as a faculty member at various U.S. law schools since the late 1980s. I would be remiss if I did not call for empirical research to substantiate my assertions and track these developments.
doctrinal (i.e., *dogmatische*) approaches, even while most acknowledge that their role includes preparing students to pass a state bar examination at the end of their studies.\textsuperscript{86} From this perspective, legal doctrine divorced from consideration of causes and consequences is simply incomplete, in both the scientific (scholarly) and the pedagogic contexts of law as an academic discipline. Such a pedagogic approach would ill-prepare students for a life in the law, where "good legal strategies are a function of social and cultural dynamics that owe little indeed to the force of legal logic. [Rather,] the cultural, the social, and the political create possibilities for reform through litigation quite beyond those sanctioned or even hinted at by the governing legal standards." \textsuperscript{87}

Taken together, the affinity of the U.S. legal system for "outside" perspectives on law provides at best a partial explanation for the current popularity of socio-legal and empirical approaches to law, and must be combined with institutional factors, such as those noted earlier, in order to explain the trend. Yet the fact that socio-legal studies are also trendy in other Common Law countries suggests that additional factors, including legal culture, might well bear on a fuller answer to this question.

Returning once more to my German colleagues' arguments for quitting the socio-legal path, it remains to discuss the third reason, which is rooted in the notion that such work is a detour from the fundamentally normative nature of the legal academic enterprise.\textsuperscript{88} Yet the ability to answer questions about "how law should be" must, in my view, rest on solid knowledge about actual conditions of law and society, including (but not limited to) knowledge of how the economic world works. This reservation aside, I take the point that we cannot excise our own views and values from our scholarly and pedagogic

\textsuperscript{86} In contrast to Germany, where many if not most students spend substantial time at the Repetitor prior to sitting for their First State Examination, American "bar review" courses tend to be quite short.

\textsuperscript{87} Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* (2001), xiii. "What legal actors need ... is something like a cognitive map of the cultural models and other social constructs that animate thinking and decisionmaking among lawyers, judges, and laypersons alike." Ibid.

\textsuperscript{88} See, e.g., Norbert Horn, *Einführung in die Rechtswissenschaft und Rechtsphilosophie* (3. Auflage, 2004); Horn, *Person und Kontinuität*, supra note 68. See also Norbert Horn, "Codes of Conduct for MNEs and Transnational Lex Mercatoria: An International Process of Learning and Law Making", in Norbert Horn (Ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises* (1980), 45 (61) (noting as a weakness of transnational commercial law that it is developed by international commercial practice even though this practice does not necessarily meet the ethical and socio-economic standards of modern society).
activities. Indeed, much of my academic interest in legal professionals is animated by curiosity about how our personal commitments, whatever their source, affect the course of the law, and by the question "cui bono?"

V. CONCLUSIONS

Ultimately, I believe that much legal scholarship, including that devoted to lex mercatoria as well as to broader issues surrounding uniform law, results from the various commitments of past, current, and future generations of lawyers and legal academics. Professional curiosity, like so many other personal attributes, is rooted in our values and interests, however dimly we may perceive or acknowledge them. From my American (and deeply Legal Realist) perspective, the reflected vida lex mercatoria is—with apologies to Socrates—decidedly worth living, especially when combined with a skeptical empirical approach towards received wisdom.

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89 See Richard CRASWELL, “Do Trade Customs Exist”, in J.S. Kraus / S.D. Walt (Eds.), The Jurisprudential Foundations of Corporate and Commercial Law (2000), 118-148 (118-119) (arguing that the “goals, beliefs and other normative premises” of persons undertaking to identify the existence of trade customs “inevitably” play a role in this process).

90 In this regard, it strikes me as odd that some proponents of lex mercatoria identify themselves as “progressives” and label me “conservative” because I have on occasion called for the observance of some limits on party autonomy. See, e.g., Helen E. HARTNELL, “Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods”, 18 Yale Journal of International Law (1993), 1-93. This inversion of the ordinary meaning of these terms reflects the presumption of radical party autonomy that is prevalent among those committed to the transnational legal order, according to which State-imposed constraints are anathema. The term “progressive”, in their usage, takes on a neoliberal glare, while “conservative” implies an anachronistic belief in regulation by the State.