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**Breaking Frames:  
Economic Globalisation and the Emergence of *lex mercatoria***

(in: European Journal of Social Theory 5, 2002, 199-217)

*Summary: The author argues that globalization processes imply the self-deconstruction of the hierarchy of legal norms. Thus, legal pluralism is no longer only an issue for legal sociology, but becomes a challenge for legal practice itself. Traditionally, rule making by "private regimes" has been subjugated under the hierarchical frame of the national constitution. When this frame breaks, then the new frame of legal institutions can only be heterarchical. The origin of global non-state law as a sequence of recursive legal operations is an "as if", not only a founding myth as a self-observation of law, rather the legal fiction of concrete past operations. This fiction however depends on social conditions outside of legal institutions, on a historical configuration in which it is sufficiently plausible to assume that also in former times legal rules have been applied.*

*Key words:* globalisation, *lex mercatoria*, legal autopoesis

"It is difficult to imagine a more dangerous, more undesirable and more ill-founded view which denies any measure of predictability and certainty and confers upon the parties to an international commercial contract or their arbitrators powers that no system of law permits and no court could exercise" (Mann, 1984: 197).

I.

In the year of 1991 the Cour de Cassation de Paris had to take a decision which invokes the double meaning of our title. "Breaking frames" is about the violence that the frame of law and the movement of law exert upon each other. The delimitation of law breaks the law, while the law breaks its delimitations. In the case Primary Coal Incorporated v. Compania Valenciana de Cementos Portland, the Court had to decide whether or not "les seules usages du commerce international, autrement dénommés lex mercatoria" should be allowed to break the traditional frames of international private law. Should the national court recognize lex mercatoria's "private justice" as a new positive law with transnational validity? Could such an ambiguous normative phenomenon which is "between and beyond" the laws of the nation states and at the same time "between and beyond" law and society be applied by arbitration bodies according to the rules of the law of conflicts? Does it contain distinct rules and principles

of its own?<sup>1</sup> However the judges decide about lex mercatoria, it means breaking frames. Either the rigid frames of private international law are breaking transnational phenomena into a shattered multitude of national laws. Or the dynamics of the global market are breaking the narrow frames of national law and push for the recognition of a global law without the state.

Obviously, "frame" in this context means something different from its traditional sense of separating an image from the world. Frame in the sense of parergon is more than a simple static boundary between two legal orders or between law and non-law. Instead, frame as the paradox of a "clôture ouvrante"

"... is the transitory, and processual, oscillating zone of the in-between, between the internal and external, between the proper and its other, foreign (improper); it becomes the zone where translation (in its narrowest and its widest sense) takes place: parergon as the place which gives a place for the translation" (Dünkelsbühler, 1991: 208).

To be more concrete, a paradigmatic case of lex mercatoria would involve a multinational enterprise striking a huge investment contract with a developing country. The parties to the contract cannot agree on the applicable law: the enterprise fears the interventionist tendencies of the host country law while the host government cannot accept the neo-liberal framework of the multinational home-country. After several years of investment, the government of the developing country asks for an adaptation of the contract to the conditions of the world-market which have drastically changed in the meantime, and invokes the principle of unequal bargaining power as an expression of "ordre public". The arbitrators come up with a bold decision. They apply neither the law of the home country, nor that of the host country, but the lex mercatoria. In addition, they discover that this lex mercatoria contains a far-reaching "clausula rebus sic stantibus" and provides for mandatory rules of "ordre public". Thus, they uphold the claim of the developing country. How could a national judge deal with such a scandalous decision?

Now, the judge of the national court turns to the scholarly authorities in international commercial law and is surprised to be drawn into a violent "war of faith": French professors zealously assert that a secret "societas mercatorum", a well-organized and close-knit association of merchants exists on today's world markets and acts as a legislator of lex mercatoria. With cold contempt, their British and American counterparts declare this commercial freemasonry a "phantome of Sorbonne professors".<sup>2</sup>

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<sup>1)</sup> Cour d'Appel de Paris 1.9.1988, Nr. 5953, Revue de l'arbitrage 1990, 701-712; 13.7. 1989, Revue de l'arbitrage 1990, 663-674 (Lagarde); Cour de Cassation de Paris 22.10. 1991, Revue de l'arbitrage 1992, 457-461 (Lagarde).

<sup>2)</sup> Pro: Goldman, 1964; 1979; 1986; 1993; Fouchard, 1965; 1983; Kahn, 1982; 1992; Loquin, 1986; Osman, 1992; Stein, 1995. Contra: Mann, 1968; 1984; Kassis, 1984; Mustill, 1987; Delaume, 1989; Highet, 1989; Bar, 1987: 76ff.; Sandrock, 1989: 77ff.; Spickhoff, 1992; for a recent sociological analysis, Dezelay & Garth, 1995.

Our judge being aware that his question of the legal nature of lex mercatoria is one of the rare cases where legal practice directly depends on legal theory, turns to the Académie Européenne de la theorie du droit, Bruxelles, and asks for a learned opinion on the following questions which he drew directly from the legal theory textbooks:

1. In order to decide whether or not lex mercatoria is positive valid law, can you identify a Grundnorm on the global scale, if not, at least a worldwide ultimate rule of recognition?
3. What are the secondary rules which would recognize the primary rules of lex mercatoria and to distinguish them from mere professional social norms?
3. What are the foundations of lex mercatoria and which year do you determine as its date of origin?

To his great embarrassment, our judge has to find out that at the Bruxelles centre, his heroes Hans Kelsen, Herbert Hart, Maurice Hauriou, Max Weber, Theodor Geiger, Eugen Ehrlich are being treated with mild contempt as defunct theorists, while the new heroes, most of them non-lawyers - French post-structuralist philosophers, American professors of English and law, and Chilenean biologists - seem no longer be interested in his trivial questions. First, they suggest him to deconstruct lex mercatoria to pieces. They want to make him believe that this proto-commercial law is nothing but a hidden paradox, a simultaneous game and non-game, serious and non-serious, law and non-law. Then, they analyse global markets as a chaotic field with lex mercatoria as its fatal attractor. Worse, they reveal its secret relations to the unconscious and the sacred principle of filiation. Worst of all, they denounce the lawmaking of international businessmen as continuous auto-erotic activities, etc., etc. But who cares for our judge's sober real world questions?

Our judge is courageous. He delves into a book with the exotic title Law and the Game Paradoxes. After having struggled his way through 175 pages of hypercomplex formulations he suddenly utters a sigh of relief. § 5 of Section II of Chapter III entitled "Internality and externality", discusses precisely what he was looking for in the search of lex mercatoria. Indeed, he reads that his lex mercatoria is only part of a whole array of similar global phenomena: "droits transnationaux produits par divers groupes, religieux, sportifs, économiques, sociaux, humanitaires".<sup>3</sup> And he finds extensive answers to his three questions: the definition of law (question of identity), legal pluralism (question of the limits of law) and the foundation of law (question of the origin).

## II.

From the "théorie ludique du droit" our judge learns why in his search for the legal nature of lex mercatoria it is wrong to look for the Grundnorm or the ultimate rule of recognition. Like any other myth of foundation, these mythical formula of modern

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<sup>3)</sup> Kerchove & Ost, 1992: 184. Whenever the text infra gives pages by parenthesis only it refers to this text.

positivism do nothing but hide the basic circularity of law, the paradoxes of self-reference on which law is ultimately founded. In this central aspect, "la théorie ludique s'appuie sur la théorie autopoïétique". With respect to the founding paradox of law, Kerchove & Ost have constructed their game theory of law faithfully and more or less openly upon Luhmann's autopoietic theory of law (14f., 185ff.).<sup>4</sup>

But then comes the bifurcation. When the question arises how to cope with the founding paradox of law, they warn our judge. Do not follow Luhmann's rigid "systemo-functional positivism" with its exclusive and autarchic self-determination via a unique binary code (9f.). They urge him to avoid both Scylla and Charybdis, formal logics as well as systems theory. They criticize lawyers like Fletcher (1985) who still believes in the constraints of formal logics, treats legal paradoxes as fallacies of legal thought and insists that lawyers should and could "resolve" them. Equally, they criticize theorists like Luhmann who believes one can "circumvent" paradoxes by rigid techniques of deparadoxification. In their view, Luhmann is marginalizing paradoxes, creating new "obstacles épistémologiques", escaping from the "entre deux". Instead, they show our judge a totally different way of coping with legal paradoxes. Your Honour, you have "resolutely to accept the paradoxes" (14)! Instead of hiding them wherever possible you have to bring them out to the fore, to make them "vibrate" in order to do justice to the "entre deux" (15, 95ff., 185ff.).

The judge - vibrating half-reluctantly, half-willingly with the legal paradox - now poses to the théoriciens ludiques his question whether or not lex mercatoria should be considered as positive law. Accompanied by a "sourire énigmatique" (99), the game theoreticians' answer is a gentle but decisive "Oui et non, bien entendu" (111).

Hey Judge, can't you cope with ambivalence? On the one side, lex mercatoria clearly is non-law. As a bundle of commercial customs, it belongs to the "vaste ensemble de normes, 'conçues' et 'vecues' au sein du corps social, auxquelles les juges sont toujours susceptibles de conférer des effets juridiques" (180f.). On the other side, lex mercatoria clearly is law. As an expression of international general principles of law, it would be one of those "opérateur clandestins de juridicité" (181). Consequently it is, of course, both at the same time: "inside and outside, juridical and meta-juridical" (181).

Abruptly stopping the vibrations, the judge makes a last desperate attempt. He asks the game theorists for a criterion, an indicator, an operator that would help him to draw the bright line between law and non-law. The answer is quite flattering for him. Whether or not lex mercatoria is law, is a question of the "identity of law". This identity is determined by "l'intervention du juge à la fois l'indice et l'opérateur principal de la juridicité" (179). In plain English: It could be you! The criterion is you! You are caught in a circle: The rule determines the decision and the decision determines the rule. But rejoice! The circle is not vicious, it is virtuous. It helps you to escape the trap of

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<sup>4)</sup> This is the reason why Luhmann, 1993: 15, fn. 15, expresses doubts whether Kerchove & Ost's "théorie ludique" differs in substance from his constructivist systems theory. Then it comes as a certain surprise how polemically Ost (1994) is attacking system theory. Is there a hidden law which rules that theories the closer they are the more violently they attack each other?

indeterminate decisionism as well as that of a rule-determinism. How that happens? The way out is as you can expect from a "theorie du jeu": Just do it! Play!

### III.

What am I doing here? Am I attempting to criticize "law as a game" by ridiculing it? By no means, since this would amount only to self-critique and self-ridiculisation. In reality, I take law as a game more than seriously. I am convinced that "game" provides a promising paradigm for the analysis of law, particularly because it provides a double framework for fruitful analysis, the more narrow frame of social games and the wider frame of play of differences.

In its more narrow frame as a so-called non-serious activity outside the real world, game serves for law as a powerful metaphor. Importing fresh meaning to the field of analysis it brings out elements of the law that are usually suppressed by the more serious if not pompous talk about law's empire. It brings to light the fictitious, the suspended, the theatrical, the mythical, the inventive, and the playful. Kerchove & Ost break the frames of traditional "serious" legal analysis when they thoroughly, patiently and carefully exploit the game metaphor. As one can see from their rich studies, they are rewarded by new insights for the law and the legal process. The only thing I would propose to do here in addition, is to exploit the negation potential of the metaphor as well. What are the differences that distinguish the concrete social practice of law from the concrete social games?

In its second meaning, in its very general frame as a "play of differences", as a recursive process of transforming and substituting differences, I see law as a game in line with several parallel movements that attempt to construct a post-structuralist concept of law. What these movements have in common is to overcome the limitations of law as a static rule system which is so dominant in analytical jurisprudence, pure theory of law, and in institutionalism. In this respect law as "game" converges with law as "discourse" (Lyotard, 1983; Jackson, 1988), law as "discipline" (Foucault, 1975), law as "différance" (Derrida, 1990; Cornell, 1993), law as "champ" (Bourdieu, 1986) and law as "autopoietic system" (Luhmann, 1993). It is not by chance that Kerchove & Ost focus on problems which are central to all of them: indeterminacy, recursivity, reflexivity, self-reference and - above all - paradoxes. Legal autopoiesis, law as game and other forms of post-structuralist legal theory have several things in common: the linguistic turn away from positivist sociology of law, the dissolution of social and legal realities into discursivity, fragmentation and closure of multiple discourses, the non-foundational character of legal reasoning, the decentring of the legal subject, the eclectic exploitation of diverse traditions in legal thought, the preference for difference, différance and différends over unity, and most important, the foundation of law on paradoxes, antinomies and tautologies. But here the controversies begin (Teubner, 1997b, 2001b). Deconstructivism is obviously satisfied to deconstruct legal doctrine by provoking and horrifying the scholarly community with antinomies and paradoxes. Legal autopoiesis poses the somewhat sobering question: After the deconstruction?

And law as a game? In my interpretation, they are trying to find a third way, an "entre-deux" between Derrida and Luhmann. And here is the problem. The "entre deux"

might turn out to be a fatal trap. On the one side they do not share the deconstructivist gesture and want to overcome sheer destructive critique by a constructive attitude. On the other side they condemn systemic deparadoxification as a mere escape from the paradox and as a nostalgic return to origin, truth, legitimacy and power (14f.). Theirs is a heroic attitude: "accepter résolument les paradoxes". But do they develop the conceptual weapons to back their heroism? Can they avoid the serious consequences of facing the legal paradox: blockage or continuous oscillation?

"Dialectics" is what they proclaim as antidote against the vicious consequences of the paradox which is supposed to bring out its productive potential (24ff., 82ff.). I consider this as the weakest part of their otherwise brilliant oeuvre. Remember the time-honoured adage that whenever dialectics is invoked, it covers a blatant lack of analysis. There is a wide cleavage between their programme and its implementation. Their programm of "dialectics without synthesis" (91) promises that the poles of legal paradoxes can be overcome either by mediation, or by dynamic interaction between the poles (60f.). They announce this programme for their five conceptual pairs: strategy/representation, cooperation/conflict, reality/fiction, regulation/indeterminacy, internal/external. So far so good. However, if one examines the implementation, dialectics boils down to a simple compromise between the two poles. "Simultaneous presence" is their main solution, if this does not work then they opt for an oscillation between the poles over time.

If one looks for example at the conceptual pair strategy versus representation, one finds that law is both at the same time, "*à la fois instrumentale et expressive*" (133). But the solution of this ambiguity is more than disappointing. The tensions between the two poles are "resolved" either as a diachronic oscillation between them or as diverse synchronic combinations (132). Similarly the tension between cooperation and conflict is "resolved" again by their simultaneous presence: "*les intérêts de chacun sont à la fois convergents et divergents*" (142), the social structures are "*à la fois de consensus et de dissensus*", the law is "*à la fois 'irénologique' et 'polémémogène'*" (144). In this way, the tension between cooperation and conflict no longer provokes the search for creative solutions.

Thus, my main problem with theorists who play law as a game is that against their own intentions they just remain in the seductive twilight of their "entre-deux", in the ambiguous dialectics without synthesis, in the attractive ambivalences of yes and no, inside and outside, law and non-law. Their book is full of those suggestive ambiguities and ambivalences. In Kerchove & Ost's account, the paradox no longer provokes to search for new solutions. They make us believe that we can afford to remain in simultaneous presence and permanent oscillation of its poles. De facto, they renew the old "isosthenes diphtonia" of the skeptics which "due to the equivalence of contradictory things and arguments wants to achieve first a restraint and then put the soul to rest"<sup>5</sup>. There is no "serious" attempt to cope with the paradox, to take its "serious" problems - paralysis of action and collapse of cognition - "serious". Everything is play. Here we can feel how the game/play metaphor which otherwise has turned out to be so fruitful does

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<sup>5</sup>) Sextus Empiricus, Grundriß der pyrrhonischen Skepsis, Frankfurt, 1968, 94 (1,8) quoted in Welsch, 1995: 320, fn. 34.

also exert a negative influence. The metaphor supports the somewhat complacent attitude of remaining in the ambivalences of law. As attractive as this aesthetically and emotionally may be, the results for legal theory and practice are more than ambiguous. If our judge has to decide, then "anything goes" or political opportunism will dictate the results.

Is there a way out? Particularly, is there an alternative to a "deparadoxification" which in Kerchove & Ost's understanding means nothing but a rigid repression of the paradox? I would be tempted to follow the directions of "morphogenesis", a conceptual construct which has been proposed in the context of paradoxes:

'Unless one is able to escape a paradoxical situation which is what Whitehead and Russell achieved with the theory of logical types, paradoxes paralyze an observer and may lead either to a collapse of the construction of his or her world, or to a growth in complexity in his or her representation of this world. It is the latter case which could be characterized as morphogenesis'.<sup>6</sup>

What is the difference between this morphogenesis and the legal players' dialectics without synthesis? My tentative answer is that "re-entry" might be (one of) the new more complex representation of the world we are looking for. In an abstract formulation, re-entry means the reappearance of a distinction in one of the sides of the distinction itself. In the language of Spencer-Brown (1972), what separates morphogenesis and dialectics would amount to the following. Whenever we make an "observation" we create a double phenomenon, we draw a "distinction" of two sides and make an "indication" of one of them. This fundamental operation of observation as distinction and as indication is concealing a paradox. When Ost & Kerchove would recommend to resolutely accept this paradox they would deal with it via "simultaneous presence" of and "oscillation" between the two poles. Spencer-Brown would describe their thinking as either continuously "crossing" between the two sides of the distinction or "cancelling" the form itself. Obviously, these are non-productive moves.

"Re-entry" in contrast would do something more complex. The original distinction has created a form with two sides. Now, the distinction between the two sides makes a "re-entry" into one of these two sides, it re-appears in itself. The distinction enters itself after the indication of one of its sides. Then it is no longer the old distinction. It is the "representation" of the distinction within one of its poles. It is the "internalization" of the external/internal distinction. A system makes self-referential use of the distinction between self-reference and hetero-reference. The frame reappears in the picture, the boundary becomes part of the territory. This internal reconstruction of an external distinction might be one among the possible increases of complexity described in the concept of morphogenesis. It does not de-paradoxify in the simple sense of denying the paradox, nor does it playfully accept the infinite oscillations of paradox between the positive and negative value. Rather, "re-entry" transforms and maintains the paradox by reformulating its contradictions as a distinction within a distinction.

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<sup>6</sup>) Krippendorff, 1984, p 51f.

#### IV.

Back to lex mercatoria. Law or not law - that is the question! According to the traditional doctrine of legal sources, lex mercatoria, no doubt, is non-law. It may be anything, professional norms, social rules, customs, usages, contractual obligations, intra-organizational or inter-organizational agreements, arbitration awards, but not law. The distinction law/non-law is based on a hierarchy of legal rules where the higher rules legitimate the lower ones. Normative phenomena outside of this hierarchy are not law, just facts. The highest rule in our times is, after the decline of natural law, the constitution of the nation state which refers to democratic political legislation as the ultimate legitimization of legal validity. Inspite of recurrent doubts, judicial adjudication is seen as subordinated to legislation. And, inspite of even stronger recurrent doubts, contractual rule-making as well as intra-organizational rule-production is either seen as non-law or as delegated law-making which needs recognition by the official legal order. Rule making by "private governments" is thus subjugated under the hierarchical frame of the national constitution which represents the historical unity of law and state.

However, globalization breaks this frame. The recurrent doubts cannot be silenced any more, they explode in the case of lex mercatoria and other practices of "private" global norm-production (Teubner, 2001a). Lex mercatoria, the transnational law of economic transactions, is not the only case of global law without the state. It is not only the economy, but various sectors of world society that are developing a global law of their own. And they do so - as Giddens has put it - in "relative insulation" from the state, from official international politics and international public law (Giddens, 1990: 70). In the first place, internal legal regimes of multinational enterprises are a strong candidate for global law without the state (see Robé, 1997 and Muchlinski, 1997). A similar combination of globalization and informality can be found in labour law; in the lex laboris internationalis, enterprises and labour unions as private actors are dominant law-makers (see Bercusson, 1997). Technical standardization and professional self-regulation have developed tendencies toward world-wide coordination with minimal intervention of official international politics. Human Rights' discourse has become globalized and is pressing for its own law, not only from a source other than the states but against the states themselves (Bianchi, 1997). Especially in the case of human rights it would be "unbearable if the law were left to the arbitrariness of regional politics" (Luhmann, 1993: 574ff.). In the world of telecommunication we experience the Internet struggling for its own global legal regime. Similarly, in the field of ecology, there are tendencies towards legal globalization in relative insulation from state institutions. And even in the world of sports people are discussing the emergence of a "lex sportiva internationalis" (Simon, 1990; Summerer, 1990)

Due to their anational global character, all these legal regimes cannot be rooted in a national legal order. Ergo: no law. But what is the difference between a national contractual regime and an international one that would justify to call the first one law, the second one a mere fact? Here re-emerges the paradox which had been successfully suppressed in the case of national contracts and organizations. Does law as a game help? Law and non-law? Simultaneous presence or oscillation?

Obviously not. Let us then try the "re-entry". The distinction law/non-law or

legal/non-legal (not to be confounded with the legal code legal/illegal!) re-enters law (Teubner, forthcoming). This is possible only if the traditional doctrine of sources of law is reframed. Let me attempt a brief sketch how this re-framing of legal source doctrine might look like. When the frame of rule-hierarchy with constitutionally legitimated political legislation at its top breaks under the pressures of globalization, then the new frame which replaces the old frame of hierarchy can only be heterarchical: it uses the distinction between center/periphery of legal normproduction. It decenters political law-making, moves it away from its privileged place at the top of the norm-hierarchy and puts it on an equal footing with other types of social law making. In the center of the legal system are the courts with their judicial rule-making while political legislation moves to the periphery, still inside the legal system, to be sure. The distinction center/periphery, to be sure, does not recreate a hierarchy in the sense that courts now are more important than political legislation. With this distinction, the oscillation is supplemented by re-entry. With center versus periphery the law repeats, reconstructs in itself the internal/external distinction of law and politics. Legislation loses its centrality as the top of the hierarchy, it becomes peripheral, but retains the status of normproduction internal to the legal system. It is legal rule production in structural coupling with politics.

And this re-entry allows for a generalization, an expansion of the distinction law/politics into the distinction law/other social fields. The replacement of frames, from hierarchy to centre/periphery, allows to recognize other types of social rule production as law production, but only under the condition that they are produced in the periphery of the legal system in structural coupling with external social processes of rule-formation. Here we find - parallel to political legislation - many forms of rule-making by "private governments" which in reality have a highly "public" character: technical standardization, professional rule production, human rights, intra-organizational regulation, and contracting. And here our judge will identify his "lex mercatoria", no longer oscillating between law and non-law, but clearly as positive law which however - and here lurks the paradox - has its origins in its close structural coupling with non-legal rule production.

Would this not amount to a grandiose de-legitimation of law? If we decenter political legislation which is democratic after all and send it to the periphery of law on a pair with lex mercatoria, intra-organizational rules and technical standardization, are we not betraying the old European idea that any law has to be democratically legitimated if we are supposed to obey? Let me turn this argument around. If we abandon the old practice to obscure the de-facto lawmaking in all kinds of "private governments" and bring to light that what they are doing is producing positive law which we nolens-volens have to obey then we ask more urgently than before the question: What is this "private legal regime's" democratic legitimization? At the same time, we see how naive it would be to demand a formal delegatory link of private governments to the more narrow parliamentary process. Rather, we are provoked to look for new forms of democratic legitimization of private government that would bring economic, technical and professional action under public scrutiny and control. That seems to me is the liberating move that the paradox of global law without the state has actually provoked: an expansion of constitutionalism into private law production which would take into account that "private" governments are "public" governments. And the potentially fruitful analogy to traditional political democracy might lie in the rudimentary consensual elements in

contract, organisation and other extra-legal norm producing mechanism. Is a "democratization" of these rudimentary consensual elements feasible?

Thus, the answer to the judges' first question regarding the legal nature of lex mercatoria is unambiguously positive, inspite of its paradoxical character. Lex mercatoria is positive law. This is true not only from a sociological or anthropological perspective of legal pluralism but it should also be accepted from the official standpoint of legal doctrine. Underlying is the assumption that after globalization has broken the old frame of the rule hierarchy, a reframing of the legal sources doctrine as a heterarchy of peripheral normproduction, will have to take place.

## V.

Our judge had a second question. How can we identify legal norms within lex mercatoria? It is very difficult to answer this question and traditional doctrine takes this as an additional proof that the whole thing does not and cannot exist. Legal rules, so the argument runs, are elements of closed legal systems. Beyond their boundaries there cannot be any legal rules. This holds true also to the law/society boundaries. Customs, contracts, intraorganizational rules are social phenomena, not legal rules. And it holds true for the boundary between the national and the global. Any legal rules need to be rooted in the law of the nationstate. Outside there are only "phantoms of Sorbonne professors".

Kerchove & Ost criticize such rigid concepts of law as being closed against other systems. Legal positivism in its traditional form as well as in its systemo-functionalist sense, they claim, cannot deal with the ambivalences of the "relative autonomy" of law. Positivism, whether old or new, is too rigid in defining systems, elements, and boundaries. Positivism does not take into account that "between the legal system and its environment incessant exchanges take place" (180). Phenomena like lex mercatoria and other legal forms of customary societies as well as post-modern societies show that the boundaries of law are not tightly closed delimitations, but are "'frontières floues' et les 'zones de recouvrement' entre les règles juridiques et les formes non juridiques de régulation sociale."(118). They propose to re-define the legal system in a paradoxical sense in which system is nothing but a "frail and unstable configuration, only partially integrated and not totally differentiated from the surrounding systems" (102). They even dare the bold assertion that the legal system "contains" always the non-system, and that a legal system "contains" elements of different systems (102). Lex marcatoria is law that simultaneously contains society. It contains legal as well as non-legal actions and rules. Good luck for our judge!

No doubt, lex mercatoria and other post-modern legal forms create a paradoxical situation since they break the old frame of law, i.e. the stable relation between legislation and adjudication on a national scale. To insist again and again on this point is the great merit of law-as-a-game theory. But a second time we need to ask the question: Do they make productive use of the paradox? Do they find a way out of the oscillations between the legal and the social? In my view, with their formula of "relative autonomy", they suggest a strange compromise which is something like a "half-closure" of the law. And with exchange between law and society they make another strange

compromise which allows law and society to "contain" elements of each other. It is these two strange compromise which compromises their position and which ultimately blocks the "morphogenesis".

The crucial difference can be explained best in the words of François Lyotard (1983) whose postmodern theory of language games Kerchove & Ost like to cite but whose central message they tend to ignore. The différend, Lyotard's unreconcilable cleavage between language games, means that one language game does not and cannot "exchange" elements with another one. A language game can only be provoked to "link up" with a sentence that makes part of the other language game. Not an exchange takes place but a "re-enactment" of differences leading out of the infinite oscillations. Re-enactment is neither translation nor transsubstantialisation of the old element but an independent reaction to something else by which the game creates a new element. It can never do justice to the other language game, it is bound to be a tort. Thus, a language game does never "contain" elements of another game but only its own elements that were "linking up" to elements of the other game. I like to use the metaphor of "productive misunderstanding" in order to describe how different language games relate to each other (Teubner, 1992). Again we feel the absent presence of the paradox. The "mis" describe the innovation, while the "understanding" tells us that it builds on another meaning and not into the blue air.

Such a constructive distortion, such a différend, takes place in the case of lex mercatoria. The structures of global economic transactions are essentially non-legal: they build on factual chances of action and create new chances of action or of trust in future changes of chances. In ongoing business relations it is wise to keep the lawyers out. They will distort business realities (see Macaulay, 1966). Why? Not only do they replace the search for profit by the quaestio juris. Not only do they replace the cost-benefit calculus by the maxim of treating like cases alike. Worse, they misread factual chances of action as legal "property", and they misunderstand mutual trust in future behaviour as contractually binding "obligations", as "rights" and "duties". And if their rigid and formalist claims and counter-claims are re-read in the ongoing transaction relation they will destroy precarious trust relations. The difference between economic chances of action and legal property and between trust and obligations is due to their different grammar. The lawyers observe economic action under the code legal/illegal and misread economic processes and structures as sources of law. Vice versa, clever economic actors misread legal norms under the economic code as bargaining chips, as new opportunities for profit-making. We observe not exchange that leads to the mutual containment of law and the economy but a mutual distortion of law and economy. Their elements link up to each other, but nevertheless legal acts remain identifiable as against economic acts and legal norms against economic expectations.

Whenever arbitrators have constructively distorted economic realities by reading legal rules into them they have actually enacted a new positive law which is unambiguously law and nothing else. Lex mercatoria is genuinely part of the global legal system. It contains legal elements and nothing but legal elements. To be sure, the boundaries between the legal and the social are always blurring. But it is the productive misreading by the discursive practice of lex mercatoria that relentlessly defines and redefines its own boundaries. The process of "framing", of drawing the boundary, of

self-definition is never finished. It is impossible to get rid of this rest (Dünkelsbühler, 1991: 210). However, this is no longer the task for the national judge whose "recognition" of *lex mercatoria* is no longer "constitutive" for its operational existence.

## VI.

What about the judge's third question, the origin of *lex mercatoria*? Here, Kerchove & Ost make a remarkable move, something that indeed goes beyond the usual oscillation between the poles of the paradox. As we would expect now, they start by re-interpreting the foundations of law either as regressus ad infinitum or as paradox of self-reference (185f.). They continue to assert that there is an interminable oscillation between internal and external foundation of law, positivism and natural law. But then they make a "dialectical" move which comes very close to our move of "re-entry" (188f.). They point to an internal fictitious fixpoint, an "as if" foundation of law. The law acts "as if" it had been founded at a certain point in time. In this myth of foundation the external foundation of law is reconstructed internally. Morphogenesis can begin to take its course.

I wholeheartedly support this idea. This is a moment when their dialectical method produces concretely the results that their abstract program promises. I would just like to push the idea somewhat further by making use of the distinction between operation and self-observation of law. A founding myth belongs to the second category: the law describes itself by an imagery about how it has been founded. The founding myths of *lex mercatoria* might be for example the modern renaissance of its origin in the medieval merchant law. Or it could be a legislative act as a "droit corporatif" by the (obviously fictitious) corporation of merchants. But in relation to the hard-core operations of *lex mercatoria*, self-observing founding myths seem somewhat superstructural. They tell nothing about the possibility of beginning recursive operations of a legal system and under which conditions they have their "take-off".

The beginning is in the middle! It is like in the famous "Glas" by Jacques Derrida (1974) where the text has no beginning but begins in the middle of a story which had already started. Recursive operations cannot begin *ex nihilo*; they can only refer to something that does already exist. They cannot refer to something outside of their chain of recursions, it must be something within this chain to which they refer. And if this "something" does not exist they have to invent it! Law as a system of recursive legal operations can only refer to past legal operations. The solution again is an "as if", but not the fiction of a founding myth as a self-observation, rather the fiction of concrete past legal decisions as basis for recursive operations.

This "as if" solution takes the detour via supplementing a lack. The lack of identity of a non-state law needs to be supplemented by the participation of an external social in the internal legal:

"It is only the assumption of a (deficiency) as a loss which makes it possible that an original perfection - as unity -can be presupposed, which can be replaced later on. Thus, the (metaphysical logic of the) "original" identity can be perfectly reconstituted" (Dünkelsbühler, 1991: 212).

This fiction however depends on outside conditions. There must be enough non-legal meaning material which law can misunderstand as legal. There must be a historical "situation in which it is sufficiently plausible to assume that also in former times legal rules have been applied" (Luhmann, 1993: 57). A commercial practice has evolved under the chaotic conditions of the global market, or should one say, the practice has been imposed by the stronger economic interests. These practice is "transformed" into law whenever it is pretended that the expectations have a legal character to which legal decision making can refer to. An international contract has been struck outside the frame of national contract law. The strange fiction is that its expectations are law. Organizational patterns and routines have evolved within a multinational organization and the fiction is created that these rules "are" labor law. An enterprising inhabitant of the cyberspace delineates a limited chunk, asks money for access, and pretends to have created property. Arbitrators pretend in commercial disputes that old arbitration cases which have been decided according to equity, "are" precedents for them and begin to distinguish and to overrule. This is a historical situation where lex mercatoria creates its recursivity based on fictitious precedents.

These are the external conditions for the take-off. To repeat first, there must be sediments of social communication that can be used by the false memory syndrome of the law. Under the demanding influence of conflicts that press for resolution, the law searches for precedents and falsifies the sediments. No doubt that these sediments exist. But the law gives them meaning as "legal" precedents.

There are internal conditions for the take-off as well. Even if there is enough meaning material for the legal recursions to refer to, still those recursions need to free themselves from the inhibitions of the paradox of a "self-validating contract". How can we agree on a dispute resolution if we disagree on the validity of our contract? Again, Kerchove & Ost identify this paradox in their discussion of the "fable of social contract". And again, they show the infinity of "jeu de jeu", law of law which shows the impossibility of law as a closed system. And again, I would ask how do we react to the challenge of this paradox. How does lex mercatoria "unfold" the paradox of "self-regulatory contract", of "contrat sans loi"?

Kautelarjurisprudenz, the practice of international draftsmen, has found a way to conceal the paradox of self-validation in such a way that global contracts have become capable of doing the apparently impossible. Global contracts are indeed creating their non-contractual foundations themselves. They have found three ways of unfolding the paradox - time, hierarchy and externalization - that mutually support each other and make it possible, without the help of the state, for a global law of the economic periphery to create its own legal center.

In the first place, contracts themselves establish an internal hierarchy of contractual rules. They contain not only "primary rules" in the sense established by Hart (1961: 77ff.) that regulate the future behaviour of the parties, but "secondary rules" that regulate the recognition of primary rules, their identification, their interpretation and the procedures for resolving conflicts. Thus, the paradox of self-validation still exists, but it is unfolded in the separation of hierarchical levels, the levels of rules and meta-rules. The

meta-rules are autonomous as against the rules, although both have the same contractual origin. The hierarchy is "tangled", but this does not hinder the higher echelons from regulating the lower ones (Hofstadter, 1979: 684ff.; 1985: 70ff.; Suber, 1990).

Secondly, these contracts temporalize the paradox and transform the circularity of contractual self-validation into an iterative process of legal acts, into a sequence of the recursive mutual constitution of legal acts and legal structures. The present contract extends itself into the past and into the future. It refers to a pre-existing standardization of rules and it refers to the future of conflict regulation and, thus, renders the contract into one element in an ongoing selfproduction process in which the network of elements creates the very elements of the system.

Thirdly, and most importantly, the self-referential contract unfolds the contractual paradox by externalization. It externalizes the fatal self-validation of contract by referring conditions of validity and future conflicts to external "non-contractual" institutions which are nevertheless "contractual" since they are a sheer internal product of the contract itself. One of these self-created external institutions is arbitration which has to judge the validity of the contracts although its own validity is based on the very contract the validity of which it is supposed to be judging.

Here, the vicious circle of contractual self-validation is transformed into the virtuous circle of contractual arbitration. An internal circular relationship is transformed into an external one. In the circular relationship between the two institutional poles of contract and arbitration, we find the core of the emerging global legal discourse that uses the specialized binary code, legal/illegal and processes the symbol of a non-national, even of a non-international, global validity. An additional externalization of this reference to quasi-courts is the reference to quasi-legislative institutions, to the International Chamber of Commerce in Paris, the International Law Association in London, the International Maritime Commission in Antwerp and to all sorts of international business associations (Schmitthoff, 1990). Thus, transnational contracting has created "ex-nihilo" an institutional triangle of private "adjudication", "legislation" and "contracting".

Why is this externalization so important for the creation of an authentically global law? The answer is not only because it unfolds the paradox of contractual self-validation, but also because it creates dynamics of interaction between an "official" legal order and a "non-official" one, which is constitutive for modern law. It introduces an internal differentiation between organized and spontaneous law production which creates the functional equivalent of "state law" and "contracts" in national contexts (cf. Luhmann, 1993: 320ff.). Thus, arbitration bodies and private legislation change dramatically the role of the international contract itself. Although arbitration and standard contracting themselves are based on contract, they transform the contractual creation of rights and duties into "unofficial law" which is controlled and disciplined by the "official law" of the arbitration bodies. Private arbitration and private legislation become the core of a decision system which begins to build up a hierarchy of norms and of organizational bodies. It makes the reflexivity of lex mercatoria possible.

Thus, the global legal discourse finds itself on the paradox of contractual self-validation and differentiates itself into an "official" legal order and a "non-official" one. This is a double re-entry. Not only does the legal system at large reconstruct the difference between internal and external as a distinction between its center and its periphery. The periphery of law makes in itself a similar distinction between its own center - arbitration, associational general rulemaking - and its periphery - the legal transformations of economic transactions.

## VII.

What is the ultimate difference between law as a paradoxical game and law as an autopoietic system? My answer: it is the difference between a philosophical and a sociological observation of law. The difference is revealed in the power that society, culture and history exert upon law's empire. Where philosophical observers discover a free "play of differences", sociological observers see a history of elective affinities between semantics and social structure (Teubner, 1997b). What does this mean for the paradoxes of the law game?

(1) While the legal philosophers Kerchove & Ost claim to have discovered the paradoxical foundations of law, legal sociologists would make the material basis responsible and not the superstructure. They would assert that it is historical forces in society and culture that make the paradoxes emerge. They create the structural conditions that law's foundations are suddenly seen as paradoxical, among others by legal philosophers. In our case of lex mercatoria, for centuries the above-mentioned contractual paradox, the self-validation of contract as the basis of private contract and organization could remain latent. The reasons for this latency are historical. The nation state, its constitution and its law have provided the safe distinction between national legislation and adjudication which was able to absorb all forms of "private lawmaking". The emergence of the paradox was not the ingenious discovery of postmodern jurisprudence whose deconstructive techniques reveal to us all kind of ambivalences, apories, antinomies and paradoxes. Rather, it was due to hard-core social reality - in this case: fragmented globalization. The difference between a highly globalized economy and a weakly globalized politics pressed for the emergence of a global law that had no legislation, no political constitution, no politically ordered hierarchy of norms which could keep the contractual paradox latent (see Teubner, 1997b). Thirty years before La Condition Postmoderne, and fifty years before Le droit ou les paradoxes du jeu, down-to earth-practitioners of international commercial law had discovered the paradoxes of lex mercatoria. Breaking frames is the business of social forces, philosophers are not strong enough; they just observe breaking frames.

(2) While legal philosophy tells us we are free to "accept resolutely paradoxes", their contradictions, ambivalences and infinite oscillations, and that we are free to play with them according to "dialectics without synthesis", legal sociology asks us again to listen carefully to what society, history and culture whisper into our ears. They do not at all tolerate a playful paradoxification of law; they force us to understand it as a provocation for action. The provocation is unambiguous. Draw a distinction! Build new frames! Unfold the paradox! De-tautologize the tautologies! Asymmetrize the symmetries! Identify the eigenvalues in recursive processes! It is the iron law of social

self-reproduction that forces people to build new frames if the old ones are breaking.

(3) While legal philosophy encourages the dialectical imagination to play creatively with the legal paradoxes and allows for almost infinite possibilities to cope with them, legal sociology is more rigorous and selective. Again it is society, culture and history that will determine the conditions of plausibility for new distinctions that unfold the legal paradox. Thus, it remains to be seen whether legal pluralism will be socially accepted as a plausible basis for a theory of legal sources.

(4) Finally, while legal philosophy tells us that it will be able to fight all attempts to return to a paradox-free past, legal sociology suggests rather a historical process, almost a rhythmical movement, of de-framing, re-framing and de-framing... In our case of lex mercatoria, we can feel even today where society will break tomorrow the new frames of an a-national and a-political law. How can such a "private" global law avoid its re-paradoxification by "public" political processes on a global scale? Would this breaking frames of private global law in turn not provoke new distinctions of constitutional law of the world society? (see Teubner, 1998, 2000). Whether the newly built frames are breaking again is a matter of social practice. Frames do not break by themselves, it is history that breaks frames provoking us to build new ones.

But the sociological distinction of semantics and social structures that I am using here is in itself paradoxical and legal philosophers will have no problem in deconstructing this distinction. I accept this. If they are tried, philosophers will always have and should always have the last word.

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