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Order within Law, Variety within Custom: The Character of the Medieval Merchant Law

Emily Kadens*

The concept of the law merchant as the embodiment of merchant customs and practices has a long history. With one nuance or another the phrase has existed since the Middle Ages, and it continues to be part of the vocabulary of modern commercial law. Article 1 of the Uniform Commercial Code permits courts to incorporate law merchant into their decisionmaking.¹ Even more explicitly, those advocating the primacy of trading norms in the adjudication of transnational commercial disputes speak of the creation of a new *lex mercatoria*, wistfully tipping their hats to a perceived medieval idyll.² Yet with all this talk, it is not entirely clear what this concept, law merchant, means—not in modern commercial law, as Lisa Bernstein and Richard Craswell have demonstrated, and not in the historical sense either.³ For, as legal historians have recently noted, the sources belie much of the traditional understanding of the law merchant on

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¹ UCC § 1-103 (West 2002) (“Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant . . . shall supplement its provisions.”); see also id § 1-102(2)(b) (“Underlying purposes and policies of this Act are . . . to permit the continued expansion of commercial practices through custom, usage and agreement of the parties . . .”).

² This use of medieval history can be observed in most recent articles on the so-called new *lex mercatoria*. See, for example, Harold J. Berman and Colin Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 Harv Intl L J 221, 224–26 (1978); L. Yves Fortier, *New Trends in Governing Law: The New, New Lex Mercatoria, or, Back to the Future*, 16 ICSID Review-Foreign Investment L J 10, 18–19 (2001) (citing Gerard Malyne’s 1622 work *Consuetudo, vel, Lex Mercatoria* and mentioning customs and usages, “some of which date back several centuries”); for supportive views of the new *lex mercatoria* itself, see for example, Klaus-Peter Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer 1999); Michael Pryles, *Application of the Lex Mercatoria in International Commercial Arbitration*, 18 Mealey’s Intl Arb Rep 21 (2003).

³ Lisa Bernstein, *The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study*, 66 U Chi L Rev 710 (1999); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U Pa L Rev 1765 (1996); Richard Craswell, *Do Trade Customs Exist?*, in Jody S. Kraus and Steven D. Walt, eds, *The Jurisprudential Foundations of Corporate and Commercial Law* 118, 118–21 (Cambridge 2000).

which contemporary jurists rely. This essay reexamines the medieval law merchant and argues that it was a significantly more complex legal phenomenon than previously assumed and that it bears many resemblances to modern commercial law.

Before putting forth a new analysis, it is useful to review the traditional, and still generally accepted, theory of the medieval law merchant.⁴ The following overview relies on the chapter Harold Berman dedicated to the law merchant in his popular work, *Law and Revolution*.⁵ Berman adhered closely to the standard history, and the accessibility of his work to non-specialists makes it a valuable starting point. He characterized mercantile law as a coherent, European-wide body of general commercial law, driven by merchants, and more or less universally accepted and formalized into well-known and well-established customs during the period from 1050 to 1150.⁶ In passing Berman acknowledged some role for urban governments and princes in furthering merchant law, but he assumed that the public authorities only entered the arena after the merchants had largely formulated and generalized their customs. In general, he saw the law merchant as spontaneously created in the thick of commerce and then self-regulating through the mechanism of merchant courts staffed by non-professional merchant judges.⁷ Berman, critically, portrayed the law merchant as a single, unitary system, which he believed was composed of certain well-defined “rights and obligations . . . consciously interpreted as constituent parts of a whole body of law, the *lex mercatoria*.”⁸

The evidence strongly suggests that Berman’s classic account is at least partly inaccurate in almost every respect. The law merchant was not a systematic law; it was not standardized across Europe; it was not synonymous with commercial law; it was not merely a creation of merchants without vital input from governments and princes. Even Berman’s periodization is suspect. While

⁴ For arguments in favor of the traditional position, see generally Harold J. Berman, *Law and Revolution: The Formation of Western Legal Tradition* 333–56 (Harvard 1983); Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law* 7–21, especially 9–17 (Fred B. Rotham 1983); Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S Econ J 644 (1989); Francis M. Burdick, *What Is the Law Merchant*, 2 Colum L Rev 470 (1902); Thomas Edward Scrutton, *General Survey of the History of the Law Merchant*, in 3 *Select Essays in Anglo-American Legal History* 7, 9–12 (Little, Brown 1909). The two standard texts cited as important in establishing this traditional view of the law merchant, W. Mitchell, *Essay on the Early History of the Law Merchant* (Burt Franklin 1969), and L. Goldschmidt, 1 *Handbuch des Handelsrechts* (Verlag von Ferdinand Enke 1891), are perhaps less committed to the notion of a universal, exclusively customary merchant law than they are sometimes believed to be.

⁵ Berman, *Law and Revolution* at 333–56 (cited in note 4).

⁶ Id at 333, 340–42. Note, however, that the evidence he adduces for this universality comes entirely from English sources dating to the fifteenth, seventeenth, and eighteenth centuries.

⁷ Id at 343–44, 346–47.

⁸ Id at 348.

we have evidence of a merchant procedure prior to the twelfth century, it is only after 1100 that documents seem to refer to a substantive merchant law.⁹ Furthermore, Berman attributed great importance to the role of fairs in creating merchant law, but the most significant of these fairs, those of Champagne, did not become international centers until after 1150.¹⁰ The invention of monetary instruments, upon the use of which so much of the standard story of the law merchant depends, also did not occur until the late twelfth to early thirteenth centuries,¹¹ and full negotiability, which Berman assigns to the twelfth century, likely did not emerge until the fifteenth century.¹² Finally, as will be discussed below, the creation of commercial courts appears to have been a development of the end of the twelfth or beginning of the thirteenth centuries.

The effect of these inaccuracies is twofold. First, they cause scholars of modern commercial law to envision the historical law merchant as a more distant evolutionary stage from present practice than it perhaps truly was. Second, because the sources raise doubts about the traditional definition of the law merchant, some historians have questioned whether there was a law merchant at all.¹³

This article re-examines the evidence for medieval merchant law and argues that an identifiable merchant law of a sort did indeed exist. Given the medieval political and legal reality, it essentially had to. But this was a merchant law unlike

⁹ Karl Kroeschell, *Bemerkungen zum "Kaufmannsrecht" in den ottonisch-salischen Markturkunden*, reprinted in Karl Kroeschell, *Studien zum frühen und mittelalterlichen deutschen Recht* 381, 394 (Duncker & Humboldt 1995) (arguing that after the twelfth century "law merchant" acquired the connotation of substantive law).

¹⁰ R.D. Face, *Techniques of Business in the Trade between the Fairs of Champagne and the South of Europe in the Twelfth and Thirteenth Centuries*, 10 *Econ Hist Rev* 427, 428 (1958); Robert-Henri Bautier, *Les foires de Champagne: recherches sur une évolution historique*, in *La Foire* 97, 110–12 (5 Recueils de la Société Jean Bodin, Dessain et Tolra 2d ed 1983).

¹¹ Edwin S. Hunt and James M. Murray, *A History of Business in Medieval Europe, 1200–1550* at 65 (Cambridge 1999).

¹² Berman, *Law and Revolution* at 350 (cited in note 4); John H. Munro, *The International Law Merchant and the Evolution of Negotiable Credit in Late-Medieval England and the Low Countries*, in *Textiles, Towns and Trade: Essays in the Economic History of Late-Medieval England and the Low Countries* 58–59, 71–75 (Variorum 1994) (explaining that prior to this point, bills could be transferred to the payee's agent by an "order" clause but were not fully negotiable with legal protections for the bearer).

¹³ These revisionists doubt whether a substantive law merchant different from the local commercial law actually existed, and, if it did, they do not believe that it was either universal or stable enough to be called a legal system. See generally John S. Ewart, *What Is the Law Merchant*, 3 *Colum L Rev* 135 (1903); J.H. Baker, *The Law Merchant and the Common Law before 1700*, 38 *Camb L J* 295 (1979); James Steven Ross, *The Early History of the Law of Bills and Notes* 20 (Cambridge 1995); Albrecht Cordes, *À la recherche d'une Lex mercatoria au Moyen Âge*, in Pierre Monet and Otto Gerhard Oexle, eds, *Stadt und Recht im Mittelalter: La ville et le droit au Moyen Âge* 117 (Vandenhoeck & Ruprecht 2003); Charles Donahue Jr., *Medieval and Early Modern Lex mercatoria: An Attempt at the probatio diabolica*, 5 *Chi J Intl L* 21 (2004).

that portrayed either in the traditional legal history or in much of the recent international commercial law scholarship. The historical *lex mercatoria* was not a single, uniform, essentially private legal system, but rather *iura mercatorum*, the laws of merchants: bundles of public privileges and private practices, public statutes and private customs sheltered under the umbrella concept of merchant law by their association with a particular sort of supra-local trade and the people who carried it out.¹⁴ Some customary norms were similar over large areas; many were local or regional or even specific to particular trade groups. In addition, this was not a purely customary regime independent of local law and local courts but a hybrid creation dependent upon a scaffolding of legislation and intimately tied to local municipal and guild law.

The discussion will proceed in three parts. Section I makes the case that a distinct set of merchant laws appeared because the character of medieval law forced merchants to acquire special legal protections. Section II develops the argument that merchant custom functioned within a framework of non-customary police power so fundamental that the customs potentially would not have succeeded in regulating commerce absent this assistance. Section III focuses on those customs, suggesting the sorts of transactions in which trade usages came into play and sketching their application in litigation. The conclusion asks what impact this alternative description of the historical merchant law might have on current thinking about commercial law.

I. THE NEED FOR MERCHANT LAW¹⁵

In his essay in the present volume, Professor Donahue argues that the phrase *lex mercatoria* did not refer to a body of customary law, and he points out that the term itself was not in use throughout Europe.¹⁶ Indeed, one can go even

¹⁴ See Heinz Mohnhaupt, "Jura mercatorum" durch Privilegien: Zur Entwicklung des Handelsrechts bei Johann Marquard (1610–1668), in Gerhard Köbler, ed, *Wegge europäischer Rechtsgeschichte* 308, 312–23 (Peter Lang 1987) (discussing Marquard's theory of merchant law as a group of special privileges held by a status group). Recently, an advocate of the new *lex mercatoria* admitted that it is not plausible to speak of a single law merchant. Klaus Peter Berger, *Einheitliche Rechtsstrukturen durch außergesetzliche Rechtsvereinheitlichung*, 54 *Juristen-Zeitung* 369, 371 (1999) ("Es ist allerdings schon problematisch, von 'der' mittelalterlichen *lex mercatoria* zu sprechen. Die darin enthaltenen Regeln, Praktiken und Gebräuche waren stets eingebunden in den individuellen Rahmen der jeweiligen Zünfte und Gilden." Berger nevertheless proceeds to take the descriptions of Gerard Malynes and Blackstone that imply a uniform law merchant and go on to speak of an "'überregionale' Recht.").

¹⁵ This brief discussion will not specifically address the question of how or when the law merchant arose but will focus on the period after the twelfth century when international commerce, fairs, and merchant guilds were already established. For a valuable contribution to the study of the earlier period, see Oliver Volckart and Antje Mangels, *Are the Roots of the Modern Lex Mercatoria Really Medieval?*, 65 *S Econ J* 427, especially 435–42 (1999).

¹⁶ Donahue, 5 *Chi J Intl L* at 28 (cited in note 13).

further and note that the terms sometimes employed to denominate a substantive body of merchant law¹⁷ are strikingly absent from the documents produced by merchants, such as contracts, bills of lading, and arbitration decisions. These texts give little indication that medieval merchants thought of their practices as anything more than “the way we do things.”

However, it is not for this reason necessary to leap all the way to the assumption that because merchants did not speak of participating in a universal, substantive merchant law, that there was no merchant law to speak of. Outsiders, such as professional jurists, judges in non-merchant courts, rulers granting privileges, and even preachers trying to reach merchant audiences did give names, like *ius mercatorum* (law of merchants) or *consuetudo mercatorum* (custom of merchants), to the cluster of coherent, if not necessarily uniform, merchant practices they encountered. Thus the English Statute of the Staple of 1353 stipulated that “all Merchants coming to the Staple . . . shall be ruled by the Law-Merchant of all Things touching the Staple, and not by the common Law of the Land, nor by Usage of Cities”¹⁸ Likewise, the renowned fourteenth-century Italian jurist, Baldus de Ubaldis, scoffed at what he called the customary practice of merchants (*ex consuetudine mercatorum*) that allowed one partner to represent the other, a practice he considered an abuse.¹⁹

¹⁷ Professor Donahue might, perhaps, be more willing to acknowledge the existence of a merchant procedure, even if not a specific law of merchant procedure. See *id.* at 31, 35. One of the earliest known uses of the phrase comes from the procedural guide entitled *Lex mercatoria* found in the so-called Little Red Book of Bristol, a compilation of texts on merchant and mercantile law, dating to circa 1280. The treatise on law merchant procedure from the Little Red Book is edited and translated in Mary Elizabeth Basile, et al, *Lex Mercatoria and Legal Pluralism: A Late Thirteenth-Century Treatise and Its Afterlife* 108 (Ames Foundation 1998). The jurist, Fleta, writing circa 1290, uses the term when talking about proving the existence of a contract. H.G. Richardson and G.O. Sayles, eds and trans, 2 *Fleta* 203, 211–12 (72 Selden Society, Bernard Quaritch 1955). A similar example is found in the record of a dispute arising in 1292 over a debt demanded of the executors of a deceased merchant by another merchant. The creditor claimed that the justices should consider the evidence of the debt—in the form of a tally—according to law merchant: “And Gosbert says that proof of his tally according to law merchant ought to be allowed in this case inasmuch as that writ comprises the whole contract of the aforesaid sale and purchase in form of law merchant” By contrast, the executors argued that, while the law merchant would have applied while the deceased merchant was alive, as long as the executors were the actual parties, proof should be presented according to the common law. G.O. Sayles, ed, 2 *Select Cases in the Court of King’s Bench under Edward I* at 69–72 (57 Selden Society, Bernard Quaritch 1938). See also Henri Pirenne, *Le “jus mercatorum” au Moyen âge*, 5 *Revue historique de droit français et étranger* 564 (1926) (collecting texts from as early as the ninth century referring to modifications made in the local procedural law to accommodate merchants); J.H. Baker, 38 *Cambridge L J* at 299–300 (cited in note 13); Cordes, *À la recherche d’une Lex mercatoria au Moyen Âge* at 122–24 (cited in note 13).

¹⁸ 1 *The Statutes of the Realm* 336 (William S. Hein 1993).

¹⁹ Goldschmidt, 1 *Handbuch des Handelsrecht* at 276 n 139 (cited in note 4) (“*ex consuetudine mercatorum unus socius scribit nomen alterius*”). Baldus similarly points out that the jurists (*doctores*) say, “a merchant can make an informal contract (*nudum pactum*), and that the private documents

These medieval references to the merchant law were more than the idealized constructs put forth by such later advocates of merchant freedom as the seventeenth-century Englishman, Gerard Malynes.²⁰ They had some meaning to the people who used them, and Donahue has not explained what that meaning was. This essay suggests that merchant law, as distinct from local commercial law, filled a gap in the customary and statutory laws of medieval Europe. It provided rules for newly evolved commercial mechanisms, and it took into account the unique position of the merchant as a trader engaged in long-distance commerce.

Medieval law was to a large extent status-based. A noble had a different personal law from a serf, a citizen of a town from a non-citizen, a cleric from a layperson, and a native from a foreigner. The merchant, as he (or she, since there were female merchants)²¹ was defined, existed in a world apart from that shared by the retailers and artisans who bought and sold locally. To these latter, local

of merchants may be given full faith [as evidence in litigation].” “[I]deo dicunt doctores quod . . . mercator possint conueniri ex nudo pacto, vel quod scriptura priuata mercatorum faciat plenam fidem.” Baldus de Ubaldis, *De Constituto* in 6/1 *Tractatus illustrium in utraque tum Pontificii, tum Caesarei juris facultate jurisconsultorum, De contractibus licitis* 38v (Venice 1584), available through microfilm at Goldsmiths'-Kress Library of Economic Literature, no 227.1-3 supp. On the same page, Baldus asks “whether merchants . . . can make statutes among themselves. And I say, yes, and that these statutes are confirmed by the common law (*iure communi*), and that it is likewise not necessary that they be confirmed by municipal law” (“*Quero, an mercatores . . . possint inter se facere statuta & dic quòd sic, & ista statuta sunt confirmata a iure communi, & ideo non est necesse, quod confirmentur per legem municipalem . . .*”). See also David L. D’Avray, *Sermons to the Upper Bourgeoisie by a Thirteenth-Century Franciscan*, in Derek Baker, ed, *The Church in Town and Countryside* 187, 197-98 (16 *Studies in Church History Series*, Oxford 1979) (citing the thirteenth-century preacher Guibert de Tournai, delivering a sermon to merchants saying, “before the fair breaks up . . . and the shout of Hale! Hale! goes up, according to the custom of the French”); Hubert Hall, ed, 2 *Select Cases concerning the Law Merchant, A.D. 1239-1633* at 56 (46 Selden Society, Bernard Quaritch 1930) (barons of the exchequer, to investigate a dispute in 1291 over the keeping of accounts for an Italian merchant, required Italian merchants to testify as experts “because the laws and customs used between merchants are . . . unknown to the Barons”); Jean Bodin, *Les six livres de la republique*, bk 3, ch 7 at 481-82 (Lyon 1593) (observing that contract disputes between merchants were in many places resolved in commercial courts precisely because merchant law was different from regular civil law).

²⁰ Gerard Malynes, 1 *Consuetudo, vel, Lex Mercatoria* (London 3d ed 1686, reprint Professional Books 1981) (expressing his views on the universality of the law merchant in the introduction “To the Courteous Reader”); but see Hubert Hall, ed, 2 *Select Cases concerning the Law Merchant, A.D. 1239-1633* at lxxxv-vi (cited in note 19) (providing a 1473 decision of the chancellor of the Star Chamber that a foreign merchant in England under a safe conduct did not sue under the law of the land but rather “according to the law of Nature, which is called by some ‘Law Merchant,’ which is law universal throughout the world.”).

²¹ F.R.P. Akehurst, *The Etablissements de Saint Louis: Thirteenth-Century Law Texts from Tours, Orléans, and Paris* 97 (Pennsylvania 1996) (under this thirteenth-century French law, a married woman had no right to an answer to her complaint in court unless she was a merchant, in which case she had a right to an answer “concerning things she had delivered from her business”).

laws and customs applied.²² No issue of jurisdiction or choice of law arose, and as neighbors, the buyer and seller did not have reason to fear that the town's laws or judges would be biased against them.

Merchants were different. By the seventeenth century at the latest, the term of art "merchant" had lost its connotation of a personal status and had begun to be applied to all those who bought and sold for a living: retailers, wholesalers, and craftsmen, regardless of whether they were involved in local or intercommunal commerce.²³ But in the Middle Ages the term denoted the middlemen wholesalers engaged in supra-local (both regional and international) trade.²⁴

Thus, for instance, in late medieval Spain, merchant courts (*consulado*) had jurisdiction over merchant contracts and disputes, but not over matters concerning retail sales or the purchase of goods for personal use or for use in one's craft.²⁵ Italian account books prior to the early fifteenth century made the identical distinction, noting whether the buyer of cloth was a merchant (who would export the product), a retailer (who would sell locally), or an artisan (who apparently bought for himself).²⁶ The sophisticated thirteenth-century Spanish legal code known as the *Siete Partidas* gives the same impression. Its fourth part contains extensive laws on buying and selling in general but also includes a short

²² Goldschmidt, 1 *Handbuch des Handelsrechts* at 127 (cited in note 4).

²³ The 1673 Commercial Ordinance of Louis XIV of France is addressed to businessmen and merchant retailers and wholesalers. [Daniel Jousse], *Nouveau commentaire sur les ordonnances des mois d'Août 1669, & Mars 1673* at 204, title 1, art 1 (Paris 1775) (containing the text of the ordinance). Another example can be found in a French dictionary of commercial terms from the eighteenth century defining a merchant as:

in general any person who trades, deals, or engages in commerce, that is, who buys, barter, or manufactures merchandise, either to sell in an open shop or in a store, or to sell at fairs or markets, or to send for his own account to foreign countries There are merchants who only sell wholesale, others who only sell retail, and others who do both

(author's translation from original French). Jacques Savary des Bruslons, 2 *Dictionnaire universel de commerce* 650 (Amsterdam 1726).

²⁴ This is also the definition generally proffered by economic historians. See, for example, Jean Meuvret, *Manuels et traités à l'usage des négociants aux premières époques de l'âge moderne*, in *Etudes d'histoire économique: recueil d'articles* 231, 231–32 (Librarie Armand Colin 1971) (distinguishing between local traders and merchants engaged in long-distance "grand commerce"); Pierre Racine, *Le marchand, un type de la société médiévale*, in *Le marchand au Moyen Age* 1, 1–3 (Société des Historiens Médiévistes de l'Enseignement Supérieur Public 1992) (distinguishing between merchants engaged in long-distance trade and retailers).

²⁵ Robert Sidney Smith, *The Spanish Guild Merchant: A History of the Consulado, 1250–1700* at 27–28 (Duke 1940).

²⁶ Raymond de Roover, *A Florentine Firm of Cloth Merchants: Management and Organization of a Sixteenth-Century Business*, in Julius Kirschner, ed, *Business, Banking, and Economic Thought in Late Medieval and Early Modern Europe* 85, 101 (Chicago 1974).

section on merchants, fairs, and tolls.²⁷ Although, following the jurists,²⁸ the law defines merchants simply as “[a]ll those who sell property and purchase it of others, with the intention of disposing of said property to someone else in order to profit by the sale . . . ,”²⁹ the remainder of the section assumes that these merchants will travel with their merchandise and equates merchants and fairs.

Historians often define the law merchant in terms of its legal content: contracts, monetary instruments, agency, etc.³⁰ But traders and artisans engaged in purely local commerce also used contracts, extended credit, and depended on agents.³¹ Instead, the critical characteristic of merchant law arguably lay in the fact that merchants either did business outside the jurisdiction of their native law or did business with other merchants who lived under different laws.³²

In the medieval legal world, however, foreigners had few rights and many disabilities.³³ Therefore, a merchant trading in a foreign city could not rely on the local law to protect him. Even if municipal law were based on the territorial as opposed to the personal principle, as some scholars have argued,³⁴ the foreign

²⁷ Robert I. Burns, ed, 4 *Las Siete Partidas: Family, Commerce, and the Sea* 1056–61 (Pennsylvania 2001) (Samuel Parsons Scott, trans).

²⁸ See also Benevenuto Stracca, *Clarissimi iurisconsulti Benevuti Straccae patritii anconitani, de mercatura, seu mercatore tractatus* 4v (Venice 1553) (“A merchant is a person who, by means of trade and trading activities for the sake of legitimate gain, often exchanges or sells goods in order to offer them for sale in their own form, not piecemeal or in an altered way.” (“*Mercator est, qui negotiationis, seu negotiationum exerendarum quaestusque liciti faciendi causa; frequenter mercem permutat, seu emit, ut easdem non minutatim, nec mutata, per se forma distrahat.*”).

²⁹ Burns, ed, 4 *Las Siete Partidas* at 1056 (cited in note 27).

³⁰ O.F. Robinson, T.D. Fergus, and W.M. Gordon, *European Legal History: Sources and Institutions* 102–04 (Butterworths 3d ed 2000); Jean Hilaire, *Introduction historique au droit commercial* 28 (Presses Universitaires de France 1986) (equating the law merchant with contracting, partnerships, exchange, credit, and bankruptcy); Berman, *Law and Revolution* at 349–50 (cited in note 4) (providing a fairly complete overview of the elements of merchant law).

³¹ See, for example, the impressive thirteenth-century compilation of customary law by Philippe de Beaumanoir, *The Coutumes de Beauvaisis of Philippe de Beaumanoir* (Pennsylvania 1992) (F.R.P. Akehurst, trans). Beaumanoir discusses real property holding companies (at ¶ 656); hiring an agent to sell wood (at ¶ 1006); and the sale of a horse (at ¶ 1096). The question of credit comes up repeatedly, especially in chapter 43 on Sureties, and in chapters 54 and 55 on Creditor’s Remedies. None of these examples concerned merchants as they have been defined here. See also Face, 10 *Econ Hist Rev* at 432 (cited in note 10) (noting that, by the early thirteenth century, agency was commonly used by small businessmen in Genoa).

³² Philip W. Thayer, *Comparative Law and the Law Merchant*, 6 *Brooklyn L Rev* 139, 141 (1936).

³³ Marguerite Boulet-Sautel, *L’Aubain dans la France coutumière du Moyen Age*, in 2 *L’Étranger* 65, 75–76, 87 (10 *Recueils de la Société Jean Bodin, Librairie Encyclopedique* 1958). See also the recent treatment by Claudia Seiring, *Fremde in der Stadt (1300–1800): die Rechtsstellung Auswärtiger in mittelalterlichen und neuzeitlichen Quellen der deutschsprachigen Schweiz* 4 (Peter Lang 1999) (the second chapter focuses on merchants).

³⁴ Volckart and Mangels, 65 *S Econ J* at 444 (cited in note 15). But this proposition is doubtful, or at least over-inclusive. Cities throughout the Middle Ages continued to distinguish between citizens—“burghers” who were paid and registered members of the commune—and mere

merchant traveling in a small cohort might not have the necessary number of oath helpers required to sustain his proof.³⁵ If he did, he still faced alderman-judges who were commonly themselves merchants and were likely to support their fellow citizen with whom they had to do business over a foreigner whom they might never again encounter.³⁶

Such disabilities have implications for the role of statutory authority in the formation of the law merchant that will be explored further in the next section. Here it is only necessary to point out that somehow merchants managed to get around both the legal disabilities imposed on strangers and the practical problems raised by transactions between merchants of different nationalities. The creation of special laws that merchants could apply amongst themselves was one part of the solution.³⁷

Separate rules for merchants engaged in long-distance commerce would have made sense in the legal landscape of the Middle Ages, but logic is not a prerequisite of historical development. If there were a particular genre of merchant law it would have to have included rules that dealt with the merchant's status as an outsider, that permitted traders coming from sometimes significantly different legal regimes to interact efficiently, and that provided new solutions or adopted existing practices to deal with the practical realities of fairs, the use of agents in foreign cities, and the danger of moving specie and merchandise across unprotected territory. That is exactly what we do find. To accomplish all this, the merchant law evolved from two sources: legislation by public authorities and the practices of merchant communities. The next section takes up the question of law, the third section that of custom.

II. ORDER WITHIN LAW

One of the earliest texts referring to merchant custom comes from the pen of the monk, Alpert of Metz, writing around 1020, who described the merchants

inhabitants. Burghers acquired certain rights that other inhabitants, and certainly foreigners, did not have. For a general discussion, see John Gilissen, *Le Statute des étrangers en Belgique du XIIIe au XXe siècle*, in 2 *L'Étranger* 231, 237 (cited in note 33); G. Des Marez, *La lettre de foire à Ypres au XIIIe siècle: Contribution à l'étude des papiers de crédit* 11, 22–23 (H. Lamertin 1901) (pointing out that thirteenth-century letters obligatory carefully noted whether the debtor was a burgher. When the debtor was not a burgher, additional safeguards were required).

³⁵ The oath was one of the most important medieval forms of proof. An individual, however, was rarely permitted to take an oath alone. He had to have a varying number of oath helpers who swore to the same thing. See R.C. van Caenegem, *Methods of Proof in Western Medieval Law*, in *Legal History: A European Perspective* 71, 77 (Hambledon Press 1991).

³⁶ Volckart and Mangels, 65 *S Econ J* at 441–42 (cited in note 15); see also 2 *Hanserecesse* 455–56 (Duncker & Humblot 1872) (letter of 1372 from German merchants living in Bruges to the Hansa council complaining of biased justice and the refusal by Bruges aldermen to respect the merchants' privileges).

³⁷ Hilaire, *Introduction historique* at 28, 30 (cited in note 30).

of the Netherlandish town of Tiel in this way: “They are hard men, unaccustomed to discipline, who judge suits not according to law but according to inclination, and they say that this is permitted and established by an imperial charter.”³⁸ This implies that the merchants’ governing law had two elements: their own customs and the Emperor’s guarantee of their right to follow them. Alpert’s description, and the reality of medieval commerce, therefore raise doubts about the accuracy of scholarship that maintains that medieval merchant customs evolved spontaneously and voluntarily, but that gives little attention to the influence of public authorities.³⁹ Although we possess no evidence to refute the theory that most substantive customs arose on their own, we do possess abundant evidence to suggest that the entire framework within which commerce took place very early depended upon—and often was restrained by—government authority. This section will examine some of the many ways in which legislators supported and meddled with supra-local trading.

Long distance commerce required a merchant to do business where he was a foreigner outside the protection of the local law. To make their territory more attractive to astute merchants who might wisely have hesitated to trade in places in which the law might not protect their dealings, lords early on granted merchants certain privileges that made commerce in their lands less precarious and more remunerative. These privileges included safe-conducts, trading rights and protections, and extraordinary remissions of normal laws.

A safe-conduct protected merchants as they traveled to and from a fair or trading center.⁴⁰ Lords took this assurance seriously, for it could determine the success or failure of commerce in their lands, and they forcefully punished those who cheated or stole from merchants. A famous example of the lengths to which a lord would go to demonstrate his commitment comes from an early eleventh-century Flemish chronicle. It recounts the story of a pack of ten knights who stole something from a merchant on his way to the fair of Thorout,

³⁸ “*Homines sunt duri et pene nulla disciplina adsuefacti, iudicia non secundum legem set secundum voluntatem decernentes, et hoc ab imperatore karta traditum et confirmatum dicunt.*” Georg Heinrich Pertz, ed, 4 *Monumenta Germaniae Historica, Scriptorum* 718 (Impensis Bibliopolii Aulici Hahniani 1841).

³⁹ See the works listed in note 4.

⁴⁰ See, for example, Beaumanoir, *Coutumes de Beauvaisis* ¶ 718 at 263 (cited in note 31):

And to protect and safeguard merchants safe passages . . . were established; and by common law, as soon as merchants set out on a safe passage, the lord of the place, to whom the safe passage belongs, has them in his protection.

Burns, ed, 4 *Siete Partidas* at 1058 (cited in note 27). The Spanish safe conduct declaration ran:

[W]e decree that all persons who resort to the fairs in our kingdoms . . . shall be safe and secure in body, property, merchandise, and all their effects both on sea and land, while they are on the way to our dominions, while they are present there, and while they are departing from our country. We also forbid anyone to dare to employ violence against them, or do them any wrong or injury whatever.

one of the fairs of the Flemish fair cycle. The count caught the thieves and hanged them in such a spectacular fashion that everyone was afraid to rob merchants thereafter. As a consequence, so the chronicler tells us, trade flourished.⁴¹

The safe conduct not only protected trade, it also shifted the assumption of risk involved in transporting goods because lords promised to reimburse merchants for whatever was stolen from them along the way, whether by brigands, by unscrupulous officials, or by other merchants.⁴² Of course, this was not a free gift. To fund such reimbursements, lords established tolls along important trading roads and customs offices at ports and borders and punished merchants who evaded them.⁴³

Once at the trading center, the merchant still required the protection of the local authority. Most fundamentally, he had to have a grant to be able to buy and sell in the first place.⁴⁴ Without such a privilege, the foreigner was liable to have his goods confiscated and his contracts dishonored. In addition, statutes and charters promised that the foreigners would not be seized for debts contracted outside the town or before the beginning of the fair. They protected the merchants from violence, and in some cases guaranteed them the right to find living quarters, or tried to prevent locals, such as porters and brokers, from defrauding the outsiders.⁴⁵

⁴¹ Herman of Tournai, *The Restoration of the Monastery of Saint Martin of Tournai* 38–39, ch 24 (Catholic 1996) (Lynn H. Nelson, trans).

⁴² See, for example, Burns, ed, 4 *Siete Partidas* at 1058 (cited in note 27) (granting merchants liberal rights of restitution); L. Gilliodts-van Severen, 1 *Cartulaire de l'ancienne estaple de Bruges* 30 (Louis de Plancke 1904) (citing an order of 1222 by the King of England to his sheriff to seize property from the merchants of Ypres, Lille, Gravelines, and Bruges to satisfy harm done by merchants of those cities to a merchant of St. Omer while he was under the king's protection); Félix Bourquelot, 2 *Études sur les foires de Champagne, sur la nature, l'étendue et les règles du commerce qui s'y faisait aux XIIe, XIIIe et XIVe siècles* 321 (Imprimerie Impériale 1865).

⁴³ See, for example, Burns, ed, 4 *Siete Partidas* at 1059 (cited in note 27).

⁴⁴ See, for example, Thomas Duffus Hardy, ed, 1/1 *Rotuli chartarum in turri Londiniensi asservati* 60–61, 182, 185 (G. Eyre and A. Spottiswoode 1837) (trading privileges granted in the early thirteenth century by the King of England to merchants of Flanders and Hainaut protecting them and permitting them to trade with the same rights as English merchants so long as they followed the laws of the land).

⁴⁵ P. Huvelin, *Essai historique sur le droit des marchés et des foires* 439, 441 (Librarie Nouvelle de Droit et de Jurisprudence 1897) (discussing the mandating of maximum prices to be charged merchants for food in order to prevent exploitation and summarizing the privileges of the peace of the fair); Burns, ed, 4 *Siete Partidas* at 1057 (cited in note 27). See also Galbert of Bruges, *The Murder of Charles the Good, Count of Flanders* 123–24, ch 16 (Harper 1967) (James Bruce Ross, trans), which records the following:

At this time merchants from all the kingdoms around Flanders had come together at Ypres . . . , where the market and all the fairs were going on; they were in the habit of carrying on their business safely under the peace and protection of the most pious count. At the same time merchants from the kingdom of the Lombards had come to the same fair When the news [of

Foreign merchants, of course, did not acquire quite as broad rights as citizens. In many towns they were permitted to exhibit their wares only in special buildings, such as cloth halls or the house rented by a foreign merchant community for use as a warehouse and showroom.⁴⁶ In fourteenth-century Venice, for instance, a German merchant had to apply for a special permit to display his cloth in a store window rather than in the windowless building (*fondaco*) provided for foreigners.⁴⁷ By contrast, the nature of long-distance commerce meant that foreigners also received certain dispensations. In Flanders, although all trade among merchants from the region was supposed to cease for the duration of the fair plus a week before and after, citizens were nonetheless still permitted to sell outside the fair to foreign merchants who were just passing through during this prohibition period.⁴⁸

Lords and town governments also granted other trade-facilitating privileges. One of the most important was the common remission of the *droit d'aubaine*, by which the property in the possession of a foreigner when he died escheated to the lord of the place of death. Merchants sought, and lords granted, complete or partial freedom from this custom, and if a lord tried to assert his right to the deceased merchant's property, other merchants from the dead man's country would complain loudly.⁴⁹

the Count's death] reached all these people from various places who had come together at the fair, they packed up their goods and fled by day and by night

See also Gilliodts-van Severen, 1 *Cartulaire de l'ancienne estaple de Bruges* at 226–31 (cited in note 42) (reproducing the privileges granted by the Count of Flanders to the English merchants in Bruges, including the right to live wherever they wished, to own a warehouse, and to arbitrate their own internal disputes and promising to regulate the town weighers and brokers).

⁴⁶ Gustave Fagniez, 1 *Documents relatifs à l'histoire de l'industrie et du commerce en France* 77–78 (Alphonse Picard et Fils 1898) (In 1151, the Count of Flanders gave the town of St. Omer, now in northern France, the right to have a guildhall in which foreign and local merchants could sell their goods. Foreign merchants were restricted to making sales at the guildhall or at the market. Citizens could sell from their own houses as well: “. . . *alienus negociator nusquam nisi in predicta domo vel in foro merces suas vendendas exponat aut vendat. Solis autem burgensibus in Gildballa, in foro seu magis velint in propria domo sua vendere liceat.*”).

⁴⁷ Robert S. Lopez and Irving W. Raymond, *Medieval Trade in the Mediterranean World: Illustrative Documents Translated with Introductions and Notes* 85 (Columbia 2001).

⁴⁸ Fagniez, 1 *Documents relatifs à l'histoire de l'industrie et du commerce en France* at 175 (cited in note 46). Merchants also acquired special dispensations that had rather less to do with commerce. At the fair of Bressieux in southeastern France, merchants could not be arrested for adultery committed during the fair. At the Cambrai fair in northern France, merchants were permitted to play gambling games like dice and cards that were normally forbidden. Huvelin, *Essai historique sur le droit des marchés et des foires* at 438 (cited in note 45).

⁴⁹ Huvelin, *Essai historique sur le droit des marchés et des foires* at 443–45 (cited in note 45); Gilliodts-van Severen, 1 *Cartulaire de l'ancienne estaple de Bruges* at 96–97 (cited in note 42) (letter of circa 1299 in which the town council of Lubeck discusses with the magistrate of Osnabruck complaints of Hansa merchants that merchants who die in Bruges are forced to give half their goods to the King of France).

Another vital service towns and fairs offered to encourage trade was the provision of official scales. Europe had nothing like a standard weight. Indeed, the base unit of measurement could vary from town to town even within the same region. From the fourteenth-century Italian merchant manual of Francesco Pegolotti to the eighteenth-century English manual of Wyndam Beawes, traders were repeatedly admonished to know the various weighing standards used in each location.⁵⁰ Nevertheless, the potential for perpetrating fraud on foreigners was apparently high. As a consequence merchants demanded, and towns and fairs provided, official scales staffed by sworn, publicly paid weighers. If towns could not guarantee accurate weighing, merchants might organize boycotts. Around 1288 and again in the fourteenth century, the German merchants of the Hanseatic League moved their base of operations in Flanders from the trading hub of Bruges to the nearby small town of Aardenburg in protest over false weighing. To convince the merchants to return, Bruges had to promise to prevent fraudulent practices and to require the town weighers to take an oath in front of the foreigners.⁵¹

A similarly important role for government officials was the provision of adjudication and enforcement mechanisms. Some scholars have assumed both that merchant disputes were nearly exclusively heard in merchant courts staffed by merchants chosen by the trading community and that these courts' enforcement mechanisms were so weak that the merchants had to rely heavily on reputation networks to convince each other to live up to contracts.⁵² Such assumptions are largely inaccurate. Indeed, of all the aspects of mercantile

⁵⁰ See generally Francesco Balducci Pegolotti, *La pratica della mercatura* (Medieval Academy 1936) (Allan Evans, ed) (recounting weights and equivalences from trading towns all over Europe); Wyndam Beawes, 1 *Lex Mercatoria* 36 (London 6th ed 1813) (listing as one of the important matters all merchants should learn, "[t]o know the agreement between the monies, weights, and measures of all parts."); see also Alison Hanham, *The Cehys and Their World: An English Merchant Family of the Fifteenth Century* 133 (Cambridge 1985), which cites the commonplace book of the early sixteenth-century English merchant, Richard Hill:

This is the weight of the nail wool at Calais, and how many nail goeth to the sack. In primis, 14 ounce maketh a pound, and 4 lb maketh a nail, and 90 nail maketh a sack of Calais weight. And so the sack of England is more than the sack at Calais by 7 English nails, the which is 14 Calais nails. And so 2 Calais nails maketh but 1 English nails.

⁵¹ Konstantin Höhlbaum, 1 *Hansisches Urkundenbuch* 305–06 (Buchhandlung des Waisenhauses 1876) (demanding, among other things, that the weigher keep his hand off the scale); Konstantin Höhlbaum, 2 *Hansisches Urkundenbuch* 138–39 (Buchhandlung des Waisenhauses 1879) (letter of aldermen of Bruges promising German merchants that the town scales and weighers will follow honest practices); see also Hall, 2 *Select Cases concerning the Law Merchant* at 76 (cited at note 19) (concerning the refusal of local authorities to abide by the *Carta Mercatoria* (1303) and weigh correctly by, among other things, zeroing the balance and requiring the weigher to keep his hand off the scale).

⁵² Paul R. Milgrom, Douglass C. North, and Barry R. Weingast, *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 *Econ & Pol* 1, 2 (1990).

activity, adjudication and enforcement may have been the most heavily affected by public involvement.

Merchant courts certainly did exist, but they do not appear to have preceded the lord or town's grant of jurisdiction.⁵³ Guild courts also existed, but the function of the early merchant guilds was primarily administrative and caritative.⁵⁴ Among other things, they ensured that their members would be protected in the face of biased courts and rapacious lords while in foreign lands. No doubt the guild arbitrated disputes between members, especially in regard to violations of guild rules. The evidence, however, suggests that when merchants litigated (as opposed to arbitrating) prior to the early to mid-thirteenth century, they did so before secular and religious courts rather than before specifically merchant courts.⁵⁵ Even at the fairs of Champagne, the epitome of the medieval merchant identity, the fair wardens did not become the dominant adjudicative body until the mid-thirteenth century.⁵⁶ In northern Europe, at least, the reason for this relatively late growth might simply have been that to ensure that they had valid contracts that would stand up in court, the merchants made use of the document-granting capacities of local public and religious officials, who then also obligated themselves as the forum for enforcement.⁵⁷ As fair wardens became more popular document granters around mid-century, the use of the fair courts increased commensurately.

Over the course of the thirteenth century, some towns and lords began to establish commercial courts with jurisdiction over merchant disputes, although the granting authority often retained some degree of control.⁵⁸ The privilege

⁵³ François Morel, *Les juridictions commerciales au Moyen-Age* 30–31 (Librarie Nouvelle de Droit et de Jurisprudence 1897).

⁵⁴ Id at 29; Steven A. Epstein, *Wage Labor and Guilds in Medieval Europe* 130–32 (North Carolina 1991); G. Espinas and H. Pirenne, *Les coutumes de la gilde marchande de Saint-Omer*, 14 *Le Moyen Age* 189 (1901) (editing one of the earliest gild statutes of northern Europe, dating to the late eleventh or early twelfth centuries, dealing predominantly with the internal relationships between guild members).

⁵⁵ Bautier, *Les foires de Champagne* at 119–20 (cited in note 10).

⁵⁶ Id at 120.

⁵⁷ Id at 122–23.

⁵⁸ See, for example, the commentary on Codex 3.13.7 at No 4 by the thirteenth-century Italian Roman law jurist, Cynus, who observed that custom mandated disputes between merchants should be heard in the court of the merchant guild. Cynus de Pistoia, 1 *In Codicem et aliquot titulos primi pandectorum tomi, id est, Digesti veteris doctissima commentaria*, title 13, rub 14, p 147 (Frankfurt 1578, reprint Bottega D'Erasmus 1964); see also Munro, *The International Law Merchant and the Evolution of Negotiable Credit* at 53 (cited in note 12) ("As early as 1285, Edward I had ordered London sheriffs to establish daily courts composed of foreign merchants to adjudicate their own commercial disputes."). However, commercial courts did not in all cases have exclusive jurisdiction over merchant disputes. English common law courts adjudicated merchant disputes even though merchant courts, known as *piec poudre* courts, existed for this purpose. Baker, 38 *Camb L J* at 302–06 (cited in note 13); James Steven Rogers, *The Early*

given to Catalan merchants by the King of Sicily in 1286 to have a court (*consulado*) is a case in point. The Catalans could choose their own judge and make their own rules. The judge had jurisdiction over civil cases arising between the Catalans, and he had the right to enforce his decisions. But appeals went to the king, who also retained jurisdiction over all criminal matters.⁵⁹ Fair courts followed a similar pattern. By the late twelfth century at the Champagne fairs, the lord (first the count of Champagne, then after 1285 the king of France) appointed wardens to act upon administrative and judicial matters in his name and serjeants, essentially policemen, to enforce the orders of the court, guard the merchandise at night, keep the peace, and deliver summonses.⁶⁰ Presumably, these fair courts did use merchant summary procedure and apply merchant customs, but they were not the purely merchant institutions that historians have sometimes assumed.

History of the Law of Bills and Notes: A Study in the Origins of Anglo-American Commercial Law 27 (Cambridge 1995).

⁵⁹ Antonio de Capmany y de Monpalau, 2 *Memorias históricas sobre la marina, comercio y artes de la antigua ciudad de Barcelona* 63 (Cámara Oficial de Comercio y Navegación annotated ed 1962) edits the relevant charter:

concedimus quod predicti cathalani in singulis terris et locis regni nostri Sicilie, illi videlicet qui sunt et erunt in terris eisdem, inter se possint eligere et statuere unum ex eis, quem idoneum et sufficientem viderint, in consulm. Qui consul questiones et causas civiles, quas inter eos moveri contigerit, vel ipsos ab aliis conveniri, audiat, examinet et debito fine decidat, et que sentencialiter decreverit, appellacione ad nos postposita, observet et faciat observari. Ita tamen, quod de questionibus criminalibus se nullatenus intromittat, et ad easdem questiones criminales manus suas aliquatenus non extendant.

An example of the consuls of the merchants of Montpellier who trade in France (Montpellier not being part of France at this time) choosing a captain who would have full authority over the Montpellier merchants while in France can be found in Fagniez, 1 *Documents relatifs à l'histoire de l'industrie et du commerce en France* 155–57 (cited in note 46).

⁶⁰ Bourquelot, 2 *Études sur les foires de Champagne* 322–24 (cited in note 42). The texts upon which Bourquelot depends come from a period from the late thirteenth to late fourteenth centuries when the fairs of Champagne were already in decline. However, Robert-Henri Bautier has come to similar conclusions based on earlier charter evidence. See Bautier, *Les foires de Champagne* at 100–02 (cited in note 10). It is not clear what role the fair merchants had in the selection of the judges. In the late thirteenth century the French law professor Jacques de Révigny, commenting on the Champagne fair judges in passing in a lecture, gave a somewhat ambiguous explanation concerning the selection of judges: “. . . in nundinis, ut audivi, sunt quidam certi mercatores qui sunt electi et iurati. Non sunt pro voluntate sua mercatores set publica auctoritate sunt electi.” (“I have heard that at the fair, there are certain merchants who are elected and sworn in. They are not merchants for their own account but elected by the public authority.”) Kees Bezemer, *What Jacques Saw: Thirteenth-Century France through the Eyes of Jacques de Révigny, Professor of Law at Orleans* 126 (Vittorio Klostermann 1997) (Bezemer’s translation, which differs only slightly from my own, is at 122). But see Gilliodts-van Severen, 1 *Cartulaire de l'ancienne estaple de Bruges* at 37 (cited in note 42) (In the charter of 1251 confirming the privileges of the merchants of the staple of Calais, the King of England allowed the “community of merchants of the staple” to elect their own mayor (*major*) and constables (*constabularii*) who had authority to hear suits arising from debts, partnerships, contracts, and other matters touching the merchants of the staple or their merchandise and to do justice according to the customs of the staple.).

An understanding of the role of public authorities in the adjudication of disputes also sheds light on the problem of enforcing court decisions. Merchants did not need to rely on their own resources alone because if they brought suit before a municipal court, the town authorities ensured enforcement of the judgment.⁶¹ If the town could not enforce a contract or judgment because the guilty merchant had fled, it might employ group reprisal and try to recover the money owed by seizing goods owned by other merchants from the same town or nation as the defaulter.⁶² In a powerful extension of this concept after around 1260, the lord of the fairs of Champagne would forbid any merchant from the same country as a defaulting debtor to come to the fair until the debt was paid.⁶³

Other aspects of mercantile law concerned the regulation of native as well as foreign merchants. Towns established trading halls so that guild and town officials could ensure that the goods traded met quality requirements. In Ghent, wealthy citizens, appointed by the aldermen and bailiff, acted as wardens (*hallebeeren*) of these halls.⁶⁴ They were responsible for monitoring and recording sales and for proceeding against defaulters.⁶⁵ Finally, in many important trading towns, merchants dominated the town councils. In Venice and Genoa, merchants ran the city to such an extent that merchant guilds were unnecessary.⁶⁶ In northern Europe, the merchant guilds tacitly shared power with the city government. For example, in Paris in the 1260s the four sworn

⁶¹ Fagniez, 1 *Documents relatifs à l'histoire de l'industrie et du commerce en France* at 171 (cited in note 46) (permitting creditors who were not paid by their debtors at the conclusion of the fair to seek enforcement from the town); Gilliodts-van Severen, 1 *Cartulaire de l'ancienne estaple de Bruges* at 16 (cited in note 42) (promising as part of the charter of privileges given by the Count of Flanders to Bruges circa 1190 that foreign merchants would have their disputes adjudicated by the town aldermen).

⁶² Huvelin, *Essai historique sur le droit des marchés et des foires* at 442–43 (cited in note 45). See further Hall, 2 *Select Cases concerning the Law Merchant* at xci (cited in note 19) (in a case from 1309–1310, a ship carrying merchandise owned by an Englishman from England to Scotland was taken and ransacked by “malefactors” from the towns of Griefswald, Stralsund, and Lubeck. The King of England had a letter sent to the aldermen of these towns asking for compensation. When the towns did not reply, the King, “not wishing to fail his merchant in this matter,” ordered goods valued at the same amount as the merchandise lost to be seized from merchants from the same towns). Merchants hated group reprisal and often sought to be exempted from it. In the English case just cited, the King specifically instructed that merchants belonging to the Hanseatic League were to be left alone. See also Gilliodts-van Severen, 1 *Cartulaire de l'ancienne estaple de Bruges* at 44 (cited in note 42) (charter of 1253 from Countess of Flanders granting German merchants freedom from group liability for debts of their countrymen).

⁶³ Bourquelot, 2 *Études sur les foires de Champagne* at 324 (cited in note 42); Bautier, *Les foires de Champagne* at 123–24 (cited in note 10).

⁶⁴ Georges Espinas and Henri Pirenne, 2 *Recueil de documents relatifs à l'histoire de l'industrie drapière en Flandre* 388 (Librarie Kiessling 1909).

⁶⁵ Id at 389.

⁶⁶ Hunt and Murray, *History of Business in Medieval Europe* at 87–90 (cited in note 11).

officials (*jurés*) of the Merchants of the Water—the long-distance trading guild—became the town's four aldermen.⁶⁷

The evidence makes clear that merchants did not always approve of interference by the local authorities. Around 1248, royal officials investigated whether Parisian merchants continued to display and sell cloth from their store windows during the period of the fair of Paris in contravention of a royal statute. The officials found that not only did many merchants openly flaunt the rule, but that they also believed themselves justified in doing so based on long-standing custom.⁶⁸ Nevertheless, in other instances merchants used their influence over public officials to write preferred mercantile practices into law. For example, the use of publicly-appointed *hallebeeren* in Ghent and the requirement that contracts over the sale of cloth be made before them grew out of a request made to the Countess of Flanders by the aldermen of the city.⁶⁹

Looking through the historical evidence, most of which, admittedly, comes from the archives of public bodies, one finds a multitude of examples in which lords and towns involved themselves in what might be thought to be the exclusive province of merchants. In 1210, for instance, the King of France promulgated a rule requiring that burghers of Paris and Rouen who wished to form a partnership swear an oath to that effect before two honest merchants.⁷⁰ In 1259 the King of Aragon decided that the consul of the cordovan merchants of Lerida should share with the consuls of Barcelona and Montpellier the task of distributing the places reserved at the fairs of Champagne for the Aragonese sellers.⁷¹

Yet no matter how deeply governments burrowed into merchant affairs, one might argue that such framework provisions supported but did not create mercantile law, and therefore should not be thought of as part of the law merchant.⁷² Indeed, legislation does not appear to have established substantive rules. These arose from custom and might from there have been taken up into statutes. But legislation and decrees did impinge deeply on how merchants did business. Furthermore, it should perhaps give one pause to consider that, of all the elements involved in the actualization of supra-local commerce, it was the legislative aspect that was most nearly universal. Princes across Europe granted

⁶⁷ David Nicholas, *The Growth of the Medieval City: From Late Antiquity to the Early Fourteenth Century* 222 (Longman 1997).

⁶⁸ Fagniez, 1 *Documents relatifs à l'histoire de l'industrie et du commerce en France* at 171–72 (cited in note 46).

⁶⁹ Espinas and Pirenne, 2 *Recueil de documents relatifs à l'histoire de l'industrie drapière en Flandre* at 382–83 (cited in note 64).

⁷⁰ Fagniez, 1 *Documents relatifs à l'histoire de l'industrie et du commerce en France* at 116 (cited in note 46).

⁷¹ Capmany, 2 *Memorias histórica sobre la marina, comercio y artes de Barcelona* at 31 (cited in note 59).

⁷² Volckart and Mangels, 65 *S Econ J* at 438 (cited in note 15).

safe-conduct privileges and did so under very similar terms. Towns north and south regulated their merchant guilds, made rules about registering agreements, prevented fraud in weighing, and ensured that goods were manufactured to certain standards. Foreign merchants always faced some restrictions on when and where they could sell their merchandise but also always received some special protections from the local authorities.

These legislative influences must be given their due place of importance in the general description of merchant law. It is incorrect to assume either that the law merchant was a purely customary law until the early modern period when central governments began to compose commercial codes or that governments got involved only after the law merchant had become a customary legal system. Governments were intertwined with commerce from the beginning of the commercial revolution of the high Middle Ages. Consequently, when nations began to write codes in the seventeenth century, they were not innovating, they were merely expanding on earlier practices.

III. VARIETY WITHIN CUSTOM

Historical surveys routinely characterize merchant law in vague universals: the law merchant was the law of monetary instruments, liberal treatment of agency, informal contracts, and new forms of partnership. These general alterations to the prevailing law were indeed vitally significant. The great fairs of Champagne, for instance, might have been unthinkable but for new credit mechanisms.⁷³ But the merchant law distinguished itself from local laws of trade in much more mundane matters as well. To understand merchant law, and to see how it relates to the modern commercial law to which it contributed, one needs to understand these layers of custom and usage that undergirded it. Furthermore, it is not enough to have some picture of the customs themselves; one need also ask where they came into play in the adjudicative process. Unpacking the character and use of merchant custom should offer a better view of how medieval society saw merchant law, but a complete portrait must await a full cataloging of customs. The following few illustrations are meant to be suggestive only.

The top layer of custom belonged to those practices that were most nearly uniform across Europe. Procedure has to take pride of place because descriptions of merchant procedure are similar across Europe.⁷⁴ Merchants could not be delayed by long and complicated proceedings. They needed their disputes resolved from day to day or from tide to tide, as the common refrain

⁷³ Face, 10 *Econ Hist Rev* at 437 (cited in note 10).

⁷⁴ See generally Basile, et al, *Lex Mercatoria and Legal Pluralism* (cited in note 17); Knut Wolfgang Nörr, *Procedure in Mercantile Matters: Some Comparative Aspects*, in Vito Piergiovanni, ed, *The Courts and the Development of Commercial Law* 195 (Duncker & Humblot 1987).

went. Nor did they want to have to prove their innocence by ordeal or trial by battle.⁷⁵ Instead, many twelfth and early thirteenth-century trading privileges speak of merchants being allowed to make their proof simply by swearing an oath.⁷⁶ Courts also permitted merchants to use documentary evidence that in other circumstances they would not have accepted.⁷⁷ Most importantly, merchant procedure was equitable procedure. It relied not on the rigor of the law but on judging “*ex aequo et bono*,” according to that which is fair and best for the parties and doing so in the simplest possible fashion.⁷⁸ By this standard, the particular needs of the parties governed a given dispute rather than strict adherence to established law or precedent.

Although substantive customs may never have attained the same degree of uniformity as procedure, some nevertheless became widespread. Merchants from northern and southern Europe established certain formalities, such as putting down a godspenny or shaking hands, to indicate when a deal had been done.⁷⁹ They also all used some form of credit, though the variety of monetary instruments employed may best be described as unity in diversity. In the south, merchants preferred bills of exchange or letters of credit, while in the north they

⁷⁵ Fagniez, 1 *Documents relatifs à l'histoire de l'industrie et du commerce en France* at 97 (cited in note 46) (privilege granted to Flemish merchants doing business in Cologne in 1198 to be free from judicial duel or ordeal).

⁷⁶ Gilliodts-van Severen, 1 *Cartulaire de l'ancienne estaple de Bruges* at 14 (cited in note 42) (A peace treaty signed in 1168 by the Counts of Flanders and of Holland provided that if any Flemish merchant passing through Holland was arrested for debt, the merchant could clear himself with oath “so that his trip will not be delayed.” If the arrester refused to accept the oath, the merchant had to be sued before his own ordinary. If the merchant was detained beyond taking the oath, the count of Holland had to pay damages.)

⁷⁷ See, for example, the discussion in Jacob Ayrer, *Historischer processus iuris* 283 (Nürnberg and Frankfurt 27th ed 1737) (with additions by Ahasuerus Fritschius) (explaining that if the civil courts refused to accept merchant books because they did not live up to *ius commune* standards of credibility, the courts would cast the books' worth as proof into doubt and that this would disturb commerce and cause merchants to cease to do business, and arguing further that, because merchant proceedings were based in equity rather than law, documents should be held only to a good faith standard).

⁷⁸ W. Endemann, *Beiträge zur Kenntnis des Handelsrechts im Mittelalter*, 5 *Zeitschrift für das Gesamte Handelsrecht* 331, 362–69 (1862).

⁷⁹ For example, one of the conditions demanded by the Hansa merchants for the reestablishment of their trading office at Bruges was that, “if anyone bought a good from another merchant and gave him the godspenny, he must receive that good . . . within three days . . . (“ . . . jof enich ander man cochte goed jegben enighen coopman ende hire up gave godspenning, dat hi dat goed ontfanghen moeste . . . binnen den darden daghe . . .”) Gilliodts-van Severen, 1 *Cartulaire de l'ancienne estaple de Bruges* at 67 (cited in note 42). See also Hall, 2 *Select Cases concerning the Law Merchant* at 64, 69 (cited in note 19) (cases from 1299 and 1303 concerning multi-year contracts for the sale of wool with the earnest money paid upon making the contract to be credited in the last year of the contract); Fagniez, 1 *Documents relatifs à l'histoire de l'industrie et du commerce en France* at 113 (cited in note 46) (citing the custom of Montpellier from 1204–1205 mandating that the sale at a market will not be valid without a handshake (*palmata*)).

used primarily letters obligatory until the fifteenth century.⁸⁰ Even rules about the use of these instruments differed slightly by locale. A bill of exchange, for example, allowed a borrower to receive money in one place and to pay it back in another in a different currency. The *usance*, the period to get the bill from, say, Venice to Bruges and to pay it, varied from place to place according to local custom.⁸¹

The fairs, especially those of Champagne, provided another source of widespread merchant custom. The lord might have created the fair officials, he might even have been responsible for the establishment of the fair cycle,⁸² but the actual administrative organization of a fair and certain substantive legal rules applied at it arose from and were governed by merchant custom. Thus, for instance, each fair had a given number of days for setting up (the entry), then a set number of days for displaying merchandise. These sale days proceeded in a particular order—for instance, cloth, then leather, then spices. No money changed hands during the period of sale; instead, the Italian merchant with spices to sell would buy his cloth from the Flemish merchant and accumulate debts, which he would try to reduce during the spice sale days by selling to the Flemings. At the end of the fair the merchants had a number of days to settle accounts.⁸³ Not infrequently, the debts carried over to later fairs, and the merchants used letters obligatory to ensure payment.⁸⁴ These sorts of mechanisms required not just administrators but also tacit agreement about the customs for honoring contracts,⁸⁵ the sort of record that constituted sufficient proof of debts, and the means of resolving disputes over merchandise.

Fair customs and the general practices with regard to monetary instruments, contracting, agency, and partnerships, most nearly approach modern ideas of binding law, but they did not exhaust the variety of medieval mercantile rules. First of all, merchants followed national customs. These customs became merchant law when the communities of foreign merchants

⁸⁰ Hunt and Murray, *History of Business in Medieval Europe* at 65, 212 (cited in note 11).

⁸¹ For more on the *usance* customs in different locations see, for example, Malynes, 1 *Consuetudo, vel, lex mercatoria* at 269 (cited in note 20); Jacques Savary, 1 *Le parfait negotiant* 150 (Paris 8th ed 1721) (“Il faut observer que pour les lettres qui seront tirées de France pour les autres Royaumes & Etats à usance, il faudra suivre leur coutume pour le temps des usances . . .”); Jousse, *Nouveau commentaire sur les ordonnances* at 267–68 (cited in note 23) (describing the customary *usance* current in different parts of Europe in the eighteenth century).

⁸² Bautier, *Les foires de Champagne* at 115–16 (cited in note 10) (expressing the theory that the fair cycle of Champagne developed as it did not for any reasons related to commerce but due to the intentional promotion by the Count of Champagne of certain fairs over others).

⁸³ Face, 10 *Econ Hist Rev* at 437 (cited in note 10).

⁸⁴ See generally Des Marez, *La lettre de foire à Ypres* (cited in note 34) (providing dozens of examples of debts assumed at one fair with the intention of paying them at another).

⁸⁵ Huvelin, *Essai historique sur le droit des marchés et des foires* 471, 481–82 (cited in note 45) (noting that the contract law of fairs was often more rigorous than that of the surrounding locale).

living in a trading city acquired rights of self-government over most non-criminal matters that arose among them.⁸⁶ The German merchants of the Hanseatic League, for example, maintained a virtual colony in Bruges. Depending on where in Germany he came from, each merchant belonged to one of three subgroups. Each subgroup elected officials to a governing council whose job it was to ensure that the member merchants residing in Bruges abided by the customs of the League.⁸⁷ Similarly, at fairs, each nation of merchants chose a captain responsible for administrative details like assigning stalls, resolving disputes between members, and carrying out the policy of the home city.⁸⁸

Guild associations functioned in much the same way. They established official pricing policies, defined quality standards and policed them, defended monopolies, and set rules about how members had to treat each other.⁸⁹ Under the fourteenth-century rules of the mercers of Blois, for instance, if one member ran out of money on his way back from a fair, the other members were required to loan him enough to get home.⁹⁰ One result of the guild rules was that foreign merchants had a good idea of what they were getting when they bought merchandise because each item had to be marked with tags indicating its origin and quality rating.⁹¹ English wools and Flemish cloths in particular had well-defined meanings known by merchants across Europe.⁹²

⁸⁶ Gilliodts-van Severen, 1 *Cartulaire de l'ancienne estaple de Bruges* at 212 (cited in note 42).

Cest assavoir que les dis marchans Dengleterre puissent avoir et aient dedens leschevinage de Bruges leurs assemblees, cours et congregations de leurs compaignons, marchans du pays Dengleterre, si souvent que il leur plaira; et que il aient pover de amender et de adrechier entre eaulx toutes manieres de contracts, convenances et trespaz entre eulx faictes touchants ala dicte compaignie sans trespaz qui touche vie ou membre; lequell sera reserve ala commune loy de ladicte ville

Id.

⁸⁷ 1 *Hanserecesse* 74–77 (Duncker & Humblot 1870) (establishing rules in 1347 to govern the Hansa community in Bruges).

⁸⁸ Bautier, *Les foires de Champagne* at 126–133 (cited in note 10) (discussing the fair captains and the organizational differences between the merchants from northern and Mediterranean towns).

⁸⁹ Epstein, *Wage Labor and Guilds in Medieval Europe* at 130–35 (cited in note 54).

⁹⁰ Gustave Fagniez, 2 *Documents relatifs à l'histoire de l'industrie et du commerce en France* 306 (Alphonse Picard et Fils 1900). On monopolies see, for example, Lopez and Raymond, *Medieval Trade in the Mediterranean World: Illustrative Documents* at 129 (cited in note 47).

⁹¹ Félix de Vigne, *Moeurs et usages des corporations de métiers de la Belgique et du nord de la France* 55, 92 (La Découvrance 1998).

⁹² Gilliodts-van Severen, 1 *Cartulaire de l'ancienne estaple de Bruges* at 705 (cited in note 42) (summarizing dispute that arose in 1449 because a buyer expected wool of *jordcxwouts* quality (wool of Yorkshire wouts) but got instead wool of *jordcxkiers* (Yorkshire) quality); Pegolotti, *La pratica della mercatura* at 280–81, 284–85 (cited in note 50) (describing the length and cost of different Flemish cloths); Hanham, *Celys and Their World* at 112–13 (cited in note 50) (describing varieties and grades of English wool). But see Gilliodts-van Severen, 1 *Cartulaire de l'ancienne estaple de Bruges* at 292 (cited in note 42) (complaint of the Hanseatic merchants in 1379

Finally, there were trade customs, unique to each merchant group and either local or supra-local in scope. Certain practices of the northern Italian money-changers offer an example of regional customs. The money-changers, who functioned as banks, operated on a fractional reserve system. As such, they did not like paying out cash, so if one wished to make a book transfer of money, the changers charged no commission, but if the changer had to pay out in coin, he did charge.⁹³ On a more local level, in Lucca, when the changers paid out cash, the coins were sealed in wax packets color-coded to the coin's value, showing that the coins had been weighed and valued by experts, and saving the merchant the bother of checking them himself.⁹⁴

By contrast, the customs of English wool merchants regarding the packing of wool for shipment after it was purchased from growers provide an example of more generalized trade practices. Wool was packed in standard-sized bales known as sarplers, pokes, pockets, and blots. In the process of packing, a sworn wool-sorter would sort the wool by quality and mark each bale with the wool-merchant's mark, the bale number, and letters showing quality and the place from which the wool came. Bales containing better quality wool were marked on top, and those containing lesser quality on the side. When the bales were sold, they were weighed in the presence of both buyer and seller, the buyer taking a standard rebate of a certain amount of weight per sarpler to account for the canvas in which the wool was packed.⁹⁵ This downstream buyer might buy a load of wool based only on samples shown him out of a selection of the bales. He then bought on the good faith assumption that the rest of the wool was of like quality and resold to others on his word alone. If the original seller turned out to have acted in bad faith, the middleman "stood in peril of death" at the hands of a foreign tribunal.⁹⁶

If a wool buyer took a sorter before the wool merchant guild on a charge of negligent packing, the question would revolve around the customs of the trade. If the governor of the Hanseatic merchants in Bruges heard a dispute about whether one member of the community had stolen away the client of another member, he would look to the Hansa rules. Within such private legal systems, the application of private law or custom is neither surprising nor of broad relevance. By contrast, some of the legitimacy of the medieval merchant law as a precursor to the means of adjudicating modern commercial suits rests in the role merchant law (as opposed to local commercial law) played in public

that Flemish cloths bearing the official seal guaranteeing they met the established standard were not of the required dimensions).

⁹³ Lopez and Raymond, *Medieval Trade in the Mediterranean World* at 147 (cited in note 47).

⁹⁴ *Id.* at 148–50.

⁹⁵ Hanham, *Ceys and Their World* at 118–19 (cited in note 50).

⁹⁶ Hall, 2 *Select Cases concerning the Law Merchant* at 28–29 (cited in note 19).

courts. It appears that courts and arbitration panels looked to merchant customs in at least three circumstances: when deciding what procedure to follow, when they could not easily apply the rule that the law of the place of contracting controlled⁹⁷ (either because the proper forum was not obvious or because the forum did not have laws that governed the matter at hand), and when resolving a dispute required recourse to some information or practice outside the four corners of the contract. Since procedure has already been touched upon above, the focus here will be on the two uses of substantive merchant custom.

Local civil courts could and did decide cases involving merchants without apparent recourse to merchant law. The late twelfth-century privileges of the Flemish merchants trading in Cologne stipulated that if a Fleming was accused of non-payment of a debt, he would be tried according to Cologne law.⁹⁸ Similarly, when the provost of Paris—responsible for hearing commercial disputes—decided a case about lost merchandise between a wool merchant and the carter whom he had hired to transport a load of wool to a fair, the lengthy decision did not make specific reference to a merchant law of assignment of risk.⁹⁹ But debts and negligence were not problems limited to merchants; letters of exchange and like mechanisms of international commerce by and large were, and local commercial law did not necessarily have statutes or customs that spoke to these questions.

An example from 1448 suggests how complicated disputes over the international credit system could become.¹⁰⁰ Felix de Faignano, merchant of Milan living in London, made a complaint in Bruges against Asselin, merchant of Genoa, before two merchant arbitrators, one from Genoa and the other from Lucca. The complaint stated that Felix drafted three bills of exchange in London for Asselin, amounting to the sum of 1,840 Genoese florins. Odo Rau, living in Genoa, was supposed to repay Felix through the account of Simon Franchois and Paul Maziolin, merchants living in Bruges. But Odo challenged Felix's request for repayment, sending it back to London and refusing to pay on the bills. When the person to whom Asselin had negotiated the bills came to Felix for payment, he paid both the principal and the accrued interest (*changes et rechanges*). In the meantime, Felix had in his possession some silk cloth belonging to Simon and Paul, and he sold a portion of it to pay off part of the debt. The arbitrators heard testimony, examined the documentary record, and consulted experts before deciding that Asselin owed Felix the 1,840 florins plus the interest

⁹⁷ Hans Thieme, *Die Rechtsstellung der Fremden in Deutschland vom 11. bis zum 18. Jahrhundert*, in 2 *L'Étranger* 201, 212 (cited in note 33); Des Marez, *La lettre de foire à Ypres* at 22 (cited in note 34).

⁹⁸ Fagniez, 1 *Documents relatifs à l'histoire de l'industrie et du commerce en France* at 97 (cited in note 46).

⁹⁹ Fagniez, 2 *Documents relatifs à l'histoire de l'industrie et du commerce en France* at 22–25 (cited in note 90).

¹⁰⁰ Gilliodts-van Severen, 1 *Cartulaire de l'ancienne estaple de Bruges* at 685–89 (cited in note 42).

minus the amount Felix had obtained from selling the silk. The aldermanic court of Bruges approved the decision. Significantly, not only did the Bruges aldermen not hear the case themselves, but the arbitrators were also Italians like the parties. The feeling likely was that only Italian merchants had the necessary expertise to decide a dispute between other Italians over bills of exchange.

Most of the time merchants brought a dispute before a court, the matter could be resolved simply by applying local law or common sense. But sometimes the court could only interpret the contract by reference to special meanings or practices prevalent within the trade, such as merchandise quality, whether a contract had been made in the first place, or how its authenticity could be proved. In these instances the court polled merchant experts. An English court investigating the ownership of alum that had been shipped to England from Bordeaux wrote to Bordeaux to inquire whether merchants of that city followed the custom of preparing “a certain tripartite writing” when freighting merchandise on another’s ship.¹⁰¹ In another English case, the plaintiff claimed that the seal on the document that the defendant offered as an affirmative defense had been forged. Merchants were called in and informed the court that merchant custom did not rely on seals because they were indeed too easily forged.¹⁰² In Montpellier in 1326, a dispute arose over the quality of some saffron. As custom required in such a situation, the judges of the commercial court called upon the town’s custodians of merchandise—who were considered particularly well qualified to judge because they were “merchants and sellers of pepper”—to inspect the saffron and to give the court their expert opinion.¹⁰³

However, a late example provided by Malynes shows that merchant experts did not always succeed in “finding” custom. He describes a friend who, while coincidentally witnessing a transaction between a seller he knew and a buyer he did not, was asked by the seller whether he, the friend, was an honest and creditworthy man. The friend responded that he was. The sale was consummated, and the buyer gave a letter obligatory in lieu of money. When the buyer failed to honor the note, the seller called upon the friend to pay as a surety for the transaction based on his statement at the time of the sale. The case went before a jury of merchants who could not agree on the custom—perhaps because there was none—so the court turned to Roman law and there found support for holding the friend liable.¹⁰⁴

The fact that customs were local or trade-specific did not mean that they had no effect on commerce in general. The Italian wool buyer in England followed English customs; the Fleming who purchased a bill of exchange in

¹⁰¹ Hall, 2 *Select Cases concerning the Law Merchant* at 15 (cited in note 19).

¹⁰² *Id.* at 21.

¹⁰³ Lopez and Raymond, *Medieval Trade in the Mediterranean World* at 270–71 (cited in note 47).

¹⁰⁴ Malynes, 1 *Consuetudo, vel, lex mercatoria* at 69 (cited in note 20).

Paris followed the local *usage*. One of the prevailing tropes in works by merchants on trade practices is the discussion of the rules one must follow in different locales. Knowing those rules and working within them was part of how a trader abided by the law merchant. When disputes arose about customs, whether the nearly universal or the local ones, courts assumed that the merchants parties had knowledge of the practices. Consequently, they believed they could rely on merchant experts to give them guidance on how to resolve the disagreement.

IV. CONCLUSION

What does the alternative theory of the law merchant proposed in this paper have to say to contemporary debates about merchant custom and commercial law? First, it suggests that the merchant law of medieval Europe was never some magnificent private legal system that permitted merchants to achieve great efficiencies by leaving them alone to pursue market opportunities. Instead, merchant law was perhaps from the first a symbiosis of practices and legislation. Pure custom did not suddenly become corrupted by the intrusion of government interference in the early modern era of codification. Those “intrusions” had been present all along.

However, when he drafted the Uniform Commercial Code, Karl Llewellyn’s “starting place” was the traditional theory of the medieval law merchant in which merchant law had once been uniform, universal and entirely customary.¹⁰⁵ The UCC incorporation doctrine reflects this presumption and is in part justified by it.¹⁰⁶ If, as this article suggests, that presumption is inaccurate, our explanation for the form our commercial law takes is at best incomplete.

Second, once we see the medieval law merchant as a layer of laws and practices that included legislative mandates, broad-reaching customs, and narrow trade usages, it begins to look very much like modern commercial law, and we may be able to draw some general conclusions about the nature of commercial law based on these similarities. They may indicate that Western commercial law characteristically includes input from both statutes and merchant practice. Custom held a dominant role in the Middle Ages, but even in a society dominated by customary law and acculturated to the flexibility that it demanded,¹⁰⁷ custom alone could not regulate trade. This might suggest that

¹⁰⁵ Douglas G. Baird, *Llewellyn’s Heirs*, 62 *La L Rev* 1287, 1290 (2002).

¹⁰⁶ See, for example, UCC § 2-202 cmt 2.

¹⁰⁷ Certainly the learned jurists expected a great degree of constancy from custom. The thirteenth-century French jurist, Jacques de Révigny, for instance, defined custom as a repeated act accepted by the tacit consent of the majority of the people over time and established as custom by being challenged by a contrary act. L. Waelkens, ed, *La théorie de la coutume chez Jacques de Révigny: Edition et analyse de sa répétition sur la loi De quibus (D 1, 3, 32)* at 484–88 (E.J. Brill 1984). However, not even Révigny believed that judicial decisions established custom. *Id* at 487. Lay

medieval merchant law illustrates an outside limit on the extent of custom a workable system can allow. In addition, commercial law in the West may characteristically include different layers of custom and usage, ranging from the most localized practices to those of an entire country or even beyond. In this case, medieval merchant law might demonstrate how well commerce can function when these layers of customs remain non-universal.¹⁰⁸

Third, in the medieval merchant law, just as in modern commercial law, two sorts of courts heard disputes. In some situations, merchants turned to what seem to have amounted to private mercantile legal systems using equitable procedure to apply merchant custom. Sources of merchant adjudication included fair courts, guild courts, specialized commercial courts, and commercial arbitration. In these fora, the question of good faith dominated, and custom was one source for demonstrating it.

Yet, what much of the legal historical scholarship on the medieval merchant law has largely overlooked is that merchants, at least in northern Europe, also used a second sort of court—that of the town, the prince, or the Church, in other words, noncommercial courts. Furthermore, it seems unlikely that the merchants found themselves in these courts unwillingly, for the civil courts provided the strongest enforcement mechanisms and had the most authority. But once in a civil court, the hierarchy of applicable law appears to have altered. The first question may still have been one of basic fairness—which would have been consistent with the view of law in a customary law society—but the second step was probably most often to look at the governing local law. Only if that source failed to provide a means to resolve the dispute did the judges look to merchant custom.¹⁰⁹ This order strongly resembles the hierarchy a recent article proposed as best reflecting that used to decide American commercial disputes.¹¹⁰ Thus the medieval merchant law may not only tell us

people seemed to have viewed custom as a highly flexible, equitable form of law. See, for example, Maria Dobozy, trans, *The Saxon Mirror: A Sachsenspiegel of the Fourteenth Century* 14 (Pennsylvania 1999) (arguing that precedent has no force under a customary regime); see also, Beaumanoir, *The Coutumes de Beauvaisis of Philippe de Beaumanoir* at 245–46, ¶ 677 (cited in note 31) (describing opposing decisions reached on the question of whether standing crops were personalty or realty and discussing the equitable reasoning of the jurors in coming to opposite conclusions).

¹⁰⁸ See by way of comparison the trade groups discussed by Bernstein that were able to carry on commerce even though, once they tried to establish uniform rules, it rapidly became apparent how divergent the practices of their members were. Bernstein, 66 U Chi L Rev at 715 (cited in note 3).

¹⁰⁹ See Gilliodts-van Severen, 1 *Cartulaire de l'ancienne estaple de Bruges* at 226–31 (cited in note 42) (reproducing a judicial decision announced by the aldermen of Bruges recounting the claim of the defendant that he abided by the law of surety “according to the custom of merchants and the laws, customs, and usages of the aforesaid town of Bruges”).

¹¹⁰ Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 Colum L Rev 1710, 1714 (1997).

that commercial law traditionally receives input from both custom and legislation, but that it traditionally employs two means of dispute resolution: the private and the public fora, with each applying law in a slightly different way.

