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ORIGINAL ARTICLE

The Twentieth-Century Origins of the Medieval Lex Mercatoria Thesis

Jake Dyble

Dipartimento di Diritto Privato e Critica del Diritto, Università di Padova, Padua, Italy
Email: jakedyble1@gmail.com

Abstract

This article reappraises the early intellectual formation of the medieval "lex mercatoria" thesis: the idea that the international merchants of medieval Europe (or perhaps beyond) enjoyed a universal, autonomous, and customary body of commercial law created and administered by themselves. The debate over its existence, raging for at least 120 years, shows no signs of slowing, in part because the idea is of undoubted usefulness to both proponents (so-called "mercatorists") and critics. The article offers a new account of the origins of this idea and looks to disaggregate different mercatorist conceptions. Revising the conventional genealogy that traces the theory through the work of Berthold Goldman to the nineteenth-century German scholar Levin Goldschmidt, who is much misunderstood in Anglophone scholarship, it argues that the idea's powerful re-emergence in the second half of the twentieth century was mediated through two distinct channels, one centred around the British-German jurist Clive Schmitthoff and the other around the British historian William Mitchell. The latter yoked Goldschmidt's emphasis on the medieval merchant class as a source of legal innovation to a thoroughly Anglophone concept: the "law merchant". Critics, however, have engaged primarily with Schmitthoff's conception, whose "strong" mercatorist argument was not only unusually forthright but reoriented the debate to focus on commercial law's supposed autonomy from the law of territorial states, an even less plausible proposition in historical terms.

An intellectual history, to paraphrase the words of Istvan Hont, is most helpful when it unmasks impasses and eliminates repetitive patterns of controversy.[1] This article reconstructs the emergence of the "medieval lex mercatoria" thesis

[1] Istvan Hont, *Jealousy of Trade: International Competition and the Nation-state in Historical Perspective* (Cambridge MA: Harvard University Press, 2010), 4–5.

with precisely these aims in mind. In particular, it looks at works written before the take-off of the "new lex mercatoria" movement in the 1960s. The medieval lex mercatoria thesis is usually portrayed by skeptical historians as nothing more than this movement's foundation myth.[2] Yet though it has undoubtedly played this role, this cannot be the whole story, since it is also claimed that proponents of a medieval lex mercatoria—so-called "mercatorists"—can draw on a long tradition of scholarship stretching into the 1890s. Reconstructing this earlier "chain of citation" and exposing the alterations that took place during transmission are not simply a matter of providing a more accurate intellectual scholarly genealogy. By disaggregating different articulations of the medieval lex mercatoria theory, we are better able to understand both the idea's longevity and its flaws.

There can certainly be few controversies more unyielding than the idea that the international merchants of medieval Europe (or perhaps beyond) enjoyed their own universal and customary commercial law, free from outside interference, created and administered by those same merchants themselves. The medieval lex mercatoria (or "law merchant") is not only an idea that certain legal scholars love: it is the idea that historians of trade love to hate, with the invented tradition of the medieval lex mercatoria "myth" providing robust justification for their archival research, so far producing virtually no evidence of universal customary law. The idea persists, kept alive by proponents and critics alike, and the debate has now been intermittently raging for at least 120 years to the point that even pointing out its apparent insolubility is something of a repetitive scholarly trope.[3] Historians usually attribute the mercatorists' refusal to be persuaded by their arguments to the sheer attractiveness of the lex mercatoria idea: "such is the allure of these postulates," writes Francesca Trivellato, "that in certain scholarly camps they have resisted persuasive refutations at the hand of… legal historians."[4] Emily Kadens portrays her opponents as almost literally in thrall to the idea, noting the "strong hold" and even "tyranny" that this "favourite construct" exercises over believers, curiously impervious to historical argument.[5]

[2] Originally coined by Nicholas Foster in "Foundation Myth as Legal Formant: The Medieval Law Merchant and the New Lex Mercatoria," *Forum Historiae Iuris* (2005), URL: https://forhistiur.net/2005-03-foster/ accessed 4 July 2023; Stephen E. Sachs, "From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant'", *American University International Law Review* 21 (2006): 688; Emily Kadens, "The Myth of the Customary Law Merchant," *Texas Law Review* 90 (2012): 1157.

[3] Charles Donahue, "Medieval and Early Modern Lex Mercatoria: An Attempt at the *Probatio Diabolica*," *Chicago Journal of International Law* 5 (2004): 22; Albrecht Cordes, "Conflicts in 13th Century Maritime Law: A Comparison between Five European Ports," *Oxford University Comparative Law Forum* (2020): Paragraph 1. The first scholarly attack on the concept can be found in John S. Ewart, *An Exposition of the Principles of Estoppel by Misrepresentation* (Chicago: Callaghan and Company, 1900), 373–4.

[4] Francesca Trivellato, "'Usages and Customs of the Sea': Étienne Cleirac and the Making of Maritime Law in Seventeenth-Century France," *Tijdschrift Voor Rechtsgeschiedenis/Revue d'histoire du droit/The Legal History Review* 84 (2016): 196.

[5] Emily Kadens, "The Medieval Law Merchant: The Tyranny of a Construct," *Journal of Legal Analysis* 7 (2015): 251.

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The medieval lex mercatoria idea supposedly enjoys a long scholarly pedigree stretching back to the "*Volksgeist*-influenced scholar Levin Goldschmidt" in the late nineteenth century.[6] Ricardo Galliano Court expresses this widely held view when he claims that the term lex mercatoria was originally "coined in the classic, Levin Goldschmidt, *Handbuch des Handelsrechts*… [before] others took on the mantle [sic]: William Mitchell, at the turn of the twentieth century, Berthold Goldman in the 1960s, Harold Berman in the 1980s, and Leon Trakman and Bruce Benson in the 80s and 90s. Each one cites the last in chronology [sic] all the way back to Goldschmidt."[7] Yet while it is certainly true that Goldschmidt is cited by many mercatorist accounts, Goldschmidt was not a mercatorist himself. There were rather two largely independent channels of transmission, both very much rooted in an Anglophone context. It was rather the little-known English scholar William Mitchell who explicitly gave new scholarly credibility to the notion, yoking Goldschmidt's rather open statements to the pre-existing Anglophone term "lex mercatoria." Mitchell's ideas were of considerable importance for later respectable authorities such as Harold Berman. The vision of the lex mercatoria offered by Clive Schmitthoff in the early 1960s, meanwhile, which many critics have taken as typical, provides quite a different iteration of the idea and draws on a different set of sources.

By reassessing these works and their relationship to one another, it becomes clear how the mercatorist account was modified in ways that made it progressively less plausible whilst simultaneously creating the appearance of a solid mass of scholarship supporting it. Different arguments and concerns prevailed over time. An early interest in the lex mercatoria's autonomy from private law, from the English common law, and then from the *ius commune*, was reoriented by Clive Schmitthoff to become autonomy from the law of territorial states—a far less plausible proposition. Moreover, re-examining the work of William Mitchell—the most detailed and historically aware of mercatorist accounts—brings us to the heart of the problem of the less extreme "soft" mercatorist argument, which claims that medieval merchant law was "largely" customary and "essentially" the same everywhere. A long-term, open-ended process of change by which merchant practices gradually furnished new legal principles is taken as evidence that a coherent body of law (or even an entirely separate legal system) actually existed at some specific point in time.

The Tyrant and the Critics: The Medieval Lex Mercatoria Argument and the Case Against It

Before diving into specific articulations of the theory and how these relate to each other, let us first state more clearly what is meant by the medieval lex

[6] Kadens, "The Myth," 1168; 1180.

[7] Ricardo Galliano Court, "Honore et Utile: The Approaches and Practice of Sixteenth-Century Genoese Merchant Custom," in *Understanding the Sources of Early Modern and Modern Commercial Law: Courts, Statutes, Contracts, and Legal Scholarship*, eds Heikki Pihlajamäki, Albrecht Cordes, Serge Dauchy, and Dave De ruysscher (Leiden: Brill, 2018), 59.

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mercatoria thesis. Characterizations by both mercatorists and skeptics revolve around three broad principal claims, asserted to varying degrees by different authors and expressed using diverse terminology that is not always precisely deployed. First, it is claimed that the medieval lex mercatoria was "universal" (or sometimes uniform, cosmopolitan, international, or transnational); second, that it was autonomous from other legal and political orders (a body of law, independent, a private-ordering solution); and finally, that it was rooted in custom (and/or usage and/or practice), which was largely or wholly unwritten. These claims are rarely spelled out so prosaically. It is a well-observed fact that the lex mercatoria is frequently endowed with considerable "romance" by its proponents, and its exposition often takes the form of a one-dimensional tale in which geography and chronology are curiously compressed or absent entirely.[8]

It is undeniable that this idea holds a special appeal for those who are invested in the idea of a modern system of commercial justice independent of the national state. It has proved germane to legal scholars of a libertarian bent, for instance, who contend that "private ordering" has always produced more efficient outcomes than state-backed justice.[9] The medieval lex mercatoria idea has also been promoted by legal scholars connected to the world of international commercial arbitration—the "French School of International Arbitration" in particular—who argue that we are witnessing the emergence of a "new lex mercatoria."[10] In the 1960s, these scholars, impressed by the growing tendency of multinational companies to turn to arbitral tribunals rather than national commercial courts, began outlining a bold vision of an autonomous commercial law no longer dependent on the national state and transcending its boundaries, with decisions based on the shared practices of international commerce. Finally, the lex mercatoria idea also displays a clear spiritual affinity with the Law and Economics and New Institutional Economics movements that emerged around the same time. The depth of the engagement with the medieval lex mercatoria thesis on the part of these scholars should not be exaggerated. Apart from a single 1990 article by Douglass North and Barry Weingast on the

[8] On the 'romance', see Nikitas E. Hatzimihail, "The Many Lives and Faces of Lex Mercatoria: History as Genealogy in International Business Law," *Law and Contemporary Problems* 71 (2008): 172; Donahue, "Medieval and Early Modern Lex Mercatoria," 37; Sachs, "From St. Ives to Cyberspace," 688; Foster, "Foundation Myth," paragraph 46; and particularly Wyndham Anstis Bewes, *The Romance of the Law Merchant: Being an Introduction to the Study of International and Commercial Law, with Some Account of the Commerce and Fairs of the Middle Ages* (London: Sweet and Maxwell, 1923). On the temporal compression see Kadens, "The Tyranny," 258–9; on the implicit Eurocentrism see Neilesh Bose and Victor Ramraj, "Lex Mercatoria, Legal Pluralism, and the Modern State through the Lens of the East India Company, 1600–1757," *Comparative Studies of South Asia, Africa and the Middle East* 60 (2020): 278.

[9] Bruce Benson, *Enterprise of Law: Justice Without the State* (Independent Institute: Oakland, 1990), 87–98: Bruce Benson "Customary Law as a Social Construct: International Commercial Law," *Constitutional Political Economy* 3 (1992): 1–27.

[10] See Orsolya Toth, *The Lex Mercatoria in Theory and Practice* (Oxford: Oxford University Press, 2017), 6–30 for the state of the art regarding the new lex mercatoria debate. For a list of lex mercatoria proponents, Kadens "The Myth," 1153, note 1. On the French School, see Mikaël Schinazi, *The Three Ages of International Commercial Arbitration* (Cambridge: Cambridge University Press, 2021), 202–32.

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medieval Champagne fairs, Law and Economics has not engaged intensively with the medieval lex mercatoria thesis.[11] It is, however, cited extensively in passing.[12] Similarly, it is also recalled as a successful example of spontaneous order by adherents of the Austrian school of economics.[13]

Most critics maintain that the medieval lex mercatoria can assume such importance precisely because the details remain unexamined. For almost all historians, primed to spot an invented tradition a mile away, the medieval tale referenced by such theorists is nothing more than a myth that reinforces the shaky edifice of the new lex mercatoria by imbuing it with historical plausibility.[14] Historians meanwhile have both offered empirical evidence for the nonexistence of the lex mercatoria and have argued that customs do not lend themselves to universality since they are usually defined retroactively in locally specific ways.[15] It has also been shown that the phrase itself originally gained currency in a very specific historical context. The term is not found in continental Europe in the Middle Ages, but only in England.[16] English sources that do use the term refer almost exclusively to special procedures for merchants rather than substantive rules.[17] The substantive element was instead imputed during the early modern period in response to growing jurisdictional tensions. From the beginning of the seventeenth century onward, the jurisdiction of the High Court of the Admiralty, a court staffed by university-educated lawyers versed in civil and canon law, was successfully challenged by English common lawyers. [18] It was in this increasingly hostile context that civil lawyers like Thomas Ridley attempted to defend the status

[11] Paul Milgrom, Douglass North, and Barry Weingast: "The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs," *Economics and Politics* 2 (1990): 1–23; cf. Jeremy Edwards and Sheilagh Ogilvie, "What Lessons for Economic Development Can We Draw from the Champagne Fairs?," *Explorations in Economic History* 49 (2012): 131–48. Law and Economics has actually been criticised for not engaging extensively with 'non-legal orders' like the lex mercatoria: see Robert Ellickson, *Order without Law: How Neighbours settle Disputes* (Cambridge MA: Harvard University Press, 1995), 137.

[12] William Landes and Richard Posner, "Adjudication as a Private Good," *The Journal of Legal Studies* 8 (1979): 257–8.

[13] Edward Stringham, "On the Origins of Stockmarkets" in *The Oxford Handbook of Austrian Economics*, eds. Christopher Coyne and Peter Boettke (Oxford: Oxford University Press, 2015), 335–6; P. McNamara and L.Hunt, *Liberalism, Conservatism, and Hayek's Idea of Spontaneous Order* (New York: Palgrave MacMillan, 2007), 140.

[14] Emily Kadens, "The Myth," 1157; Foster, "Foundation Myth".

[15] Dave De ruysscher, "Conceptualizing Lex Mercatoria: Malynes, Schmitthoff and Goldman Compared," *Maastricht Journal of European and Comparative Law* 27 (2020): 465–83: Kadens, "The Myth," 1161–2.

[16] Maura Fortunati, "La lex mercatoria nella tradizione e nella recente ricostruzione storico-giuridica," *Sociologia del Diritto* 2 (2005): 33

[17] Dave De ruysscher, "La lex mercatoria contextualisée: tracer son parcours intellectual," *Revue Historique de Droit Français et Étranger* 90 (2012): 501–2.

[18] See Daniel Coquillette, "Legal Ideology and Incorporation II: Sir Thomas Ridley, Charles Molloy, and the Literary Battle for the Law Merchant, 1607–1676," *Boston University Law Review* 61 (1981): 315–71; *Lex Mercatoria and Legal Pluralism: A Late Thirteenth-Century Treatise and its Afterlife*, eds. Mary Elizabeth Basile, Jane Fair Bestor, Daniel R. Coquillette, and Charles Donahue Jr. (Cambridge MA: Ames Foundation, 1998), 128–62.

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quo by arguing that the law merchant was a special body of transnational law belonging to the *ius civile*, which was akin to natural law. The *Consuetudo vel Lex Mercatoria* of the merchant Gerard Malynes (1622), attempting to frame the lex mercatoria as a type of *ius gentium* simultaneously based in custom, was likewise a product of this febrile context.[19] A strong tradition in English legal historiography would then claim that this "law merchant" was "incorporated" into the common law by Lord Mansfield in the late eighteenth century. In actual fact, as John Baker has shown, this supposed incorporation was nothing more than the crystallization of principles that had previously been left up to the common sense of common law juries.[20] Mansfield's influential characterization of commercial law as a universal law of nature was rather a way of justifying his own reforms, inspired by his extensive investigations into foreign maritime law.[21]

The case against the medieval lex mercatoria is considered so conclusive that some historians have begun to express frustration with its eternal recurrence as the bogeyman of commercial-legal history. Ralf Michaels argues that the mercatorists are not, at heart, particularly interested in "what actually happened."[22] Instead, their medieval past is a kind of imaginarium or thought experiment that helps proponents to better envisage a non-state legal order. Historians, meanwhile, "have worthier theorists among themselves than [these] legal medievalists."[23] Albrecht Cordes has likewise encouraged historians to break away from the lex mercatoria paradigm rather than continue to let its presentist concerns dictate the direction of historical research.[24] One could be forgiven for concluding that, even for many of the critics, the medieval lex mercatoria is an idea too useful to fail, providing legal-historical studies with both a raison d'être and an easy target.

To begin breaking this impasse, let us begin by observing that current scholarship leaves us with a missing link between an early modern English "law merchant" tradition that culminates with Mansfield in the late eighteenth century, and a modern tradition of mercatorist historiography that supposedly begins with the work of Levin Goldschmidt a century later. It is not implausible that the lex mercatoria thesis should have made its way to late-nineteenth-century Germany where it was subsequently remodeled. In the event; however, the direction of travel was more the other way around. Continental ideas, making no claims for a lex mercatoria, were seized upon by an English scholar who yoked them to a preexisting Anglophone concept.

[19] Stefania Gialdroni, "Gerard Malynes e la questione della lex mercatoria," *Zeitschrift Der Savigny-Stiftung Für Rechtsgeschichte (ZSS)* 126 (2009): 248–64; De ruysscher, "Conceptualizing Lex Mercatoria," 475–80.

[20] J. H. Baker, "The Law Merchant and the Common Law before 1700," *The Cambridge Law Journal* 38 (1979): 295–322.

[21] Karl Otto Scherner, "V. Lex mercatoria–Realität, Geschichtsbild oder Vision?," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung* 118 (2001): 163–4.

[22] Ralf Michaels, "Legal Medievalism in Lex Mercatoria Scholarship," *Texas Law Review (See Also)* 90 (2012): 268.

[23] Michaels, "Legal Medievalism," 268.

[24] Albrecht Cordes, "The Search for a Medieval Lex Mercatoria," *Oxford University Comparative Law Forum* 5 (2003), between notes 37 and 38.

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Levin Goldschmidt and the *Universalgeschichte des Handelsrechts*

The idea that Goldschmidt stands at the head of the modern mercatorist tradition is widely held. According to Emily Kadens, the lex mercatoria, "an invention of the nineteenth and twentieth centuries," had appeared "in the famous history of commercial law by the *Volksgeist*-influenced scholar."[25] Goldschmidt is the first in a chronological list of "classic proponents" of the lex mercatoria for Francesca Trivellato and Stefania Gialdroni, whilst Stephen Sachs states that Goldschmidt "may have done more than anyone to revive scholarly interest in the medieval law merchant."[26] Of these statements, it is Sachs that comes closest to the truth. Goldschmidt, a giant of nineteenth-century German jurisprudence, unintentionally provided an important fillip to later mercatorist writings but was no mercatorist himself.[27] In this respect, his widespread characterization in Anglophone scholarship as a *Volksgeist*-inspired scholar obsessed with customary law is misleading.

Interpreting Goldschmidt's *Universalgeschichte des Handelsrechts* (Universal History of Commercial Law) (1891) is certainly not straightforward.[28] Erudite, verbose, a fondness for generalizations bordering on the gnomic: not for nothing was the work described as a "bazaar of commercial law in which everyone finds what he is looking for."[29] To complicate matters further, the work was never finished.[30] Though certain phrases in the universal history certainly seem to support a mercatorist view *avant la lettre* when viewed in isolation, the impression in the recent historiography that Goldschmidt created the mercatorist argument needs some serious correction. First, and most obviously, it should be noted that Goldschmidt never used the phrase "lex mercatoria" in his history. At most, Goldschmidt occasionally talked of a *ius mercatorum* (a law of merchants).[31] Nor does he outline the concept without labeling it as such. Analyzing his work in relation to the three key claims of the medieval lex mercatoria thesis—uniform, autonomous, and customary—we find that his history cannot be made to wholeheartedly support any of these propositions.

Though Goldschmidt does use the adjective "universal," he does this in connection with all commercial law and not just its medieval variant. Moreover, he always immediately qualifies this usage. Goldschmidt certainly did not think

[25] Kadens, "The Myth," 1168, 1180.

[26] Trivellato, "'Usages and Customs'," 195, note 3; Sachs, "From St. Ives to Cyberspace," 800–1; Stefania Gialdroni, "Il law merchant nella storiografia giuridica del Novecento: una rassegna bibliografica," *Forum Historiae Iuris* (2008), URL: https://forhistiur.net/legacy/articles/0808gialdroni.html, accessed 30 July 2024.

[27] See also the argument put forward by De ruysscher, "La lex mercatoria," 511.

[28] Cf. Kadens, "The Myth," 1168.

[29] Quoted in Karl Otto Scherner, "Goldschmidts universum" in *Ins Wasser geworfen und Ozeane durchquert': Festschrift für Knut Wolfgang Nörr,* eds. Knut Wolfgang Nörr et al. (Cologne: Böhlau, 2003), 866. This remark, made by Otto Stobbe, is found in an obituary of Goldschmidt, and was thus presumably intended as a compliment.

[30] Lothar Weyhe, *Levin Goldschmidt, Ein Gelehrtenleben in Deutschland* (Berlin: Duncker & Humbolt, 1996), 439.

[31] Goldschmidt, *Universalgeschichte*, 126.

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that medieval merchants all held to the same rules. Though he writes at one point that "commercial usage, local (or territorial) in origin gradually becomes in large part universal," he immediately observes that "the opposite also takes place, that universal commercial usage is quite often fixed locally and thus differently, thanks to statutes, single laws, and codifications."[32] Similarly, he writes that thanks to "more-or-less local commercial usage" and "local statutory law" there develops "the character and name of a [medieval] commercial law common to all the mercantile world," and that to the "universal imperial law (Roman)" and "universal canonical law" can be added "a modern law of commerce no less, one might say, universal."[33] However, Goldschmidt then remarks that "given the idiosyncrasy of medieval legal education and legal tradition, we should not exaggerate the concept of universality [...] more important than the statistical demonstration of particular uniformity is the discovery of the original, perhaps localized germs of legal ideas fully developed later."[34]

The same point can be made regarding the autonomy of commercial law. Here too, Goldschmidt's rhetoric seems to pull in multiple directions. One of Goldschmidt's most quoted assertions is that "the greatness of the medieval commercial class and its importance as a model for all time consists in its having created its own law derived from its own needs and concepts."[35] This would be quoted by later mercatorist readers like William Mitchell to support their views.[36] Yet against this apparently definitive statement about the mercantile authorship of medieval commercial law must be weighed more nuanced remarks recognizing, among other things, a considerable role for the renascent Roman law: "This re-flourishing commerce [of the high medieval period] initially found its norm in part in the Roman law": though the "intricate roman-canonical procedural law" was energetically resisted, "Roman private commercial law in its principal content found a ready welcome."[37] Goldschmidt is also forced to admit that the *ius mercatorum* "was not true and proper commercial law in a technical sense."[38] Here too, the idea that medieval merchants "created [their] own law" from their own concepts must apparently be taken with a large grain of salt. Goldschmidt was in any case certainly not thinking of commercial law's autonomy from the law of territorial states: quite the opposite, since he sees the statutes of medieval city-states as the primary vehicle through which the socially dominant merchant class expressed their interests.[39]

As the preceding quotations make clear, Goldschmidt did not give pre-eminence to customs in his account. This has, however, been imputed

[32] Ibid., 126.
[33] Ibid., 240.
[34] Ibid., 240.
[35] Ibid., 142.
[36] William Mitchell, *An Essay on the Early History of the Law Merchant: Being the Yorke Prize Essay for the Year 1903* (Cambridge: Cambridge University Press, 1904), 10.
[37] Goldschmidt, *Universalgeschichte*, 124–5; 131–2.
[38] Ibid., 128–9.
[39] Ibid., 126–7.

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through a mischaracterization of Goldschmidt in Anglophone scholarship. Since the *Universalgeschichte* has never been translated into English, Anglophone commentary on the subject has been much influenced by James Whitman's portrait of Goldschmidt as a Romantic Germanist, intent on recovering the customary *Volksgeist* behind commercial law.[40] Since the Romantic Germanists tended to emphasize the importance of folk customs, it is assumed that Goldschmidt must have done something similar. In actual fact, however, the substance of this characterization is lacking, and "*Volksgeist*" is not a key Goldschmidtian concept.

It should be remembered that Whitman's interest was not Goldschmidt per se, but the influence of German scholarship more generally on Karl Llewellyn, an important figure in the drafting of the US Uniform Commercial Code. Llewellyn, in turn, seems to have been interested not in the *Universalgeschichte* but one of Goldschmidt's very early works, the *Kritik des Entwurfs eines Handelsgesetzbuchs für die Preussischen Staaten and Gutachten über den Entwurf eines Deutschen Handelsgesetzbuchs* (criticism of the draft of a commercial code for the Prussian states and report on the draft of a German commercial code), first published in 1857, 35 years before the *Universalgeschichte*.[41] Moreover, the *Kritik* fails to demonstrate Goldschmidt's supposed Romantic and Germanist credentials. The quotation indicated by Whitman simply highlights the danger that emerges when an "altered will of the people [*Volk*]" encounters "the inflexible will of the legislator," a standard historicist warning about the perils of codification.[42]

The idea of the *Universalgeschichte* as the product of frustrated Germanism makes particularly little sense. "Germanic" legal influences are mentioned, but these are conceived of as "strongly modifying" Roman law institutes rather than being the origin of commercial law per se.[43] Roman law and the laws of the medieval Italian towns are much more important sources. A crude proxy of this is the space Goldschmidt dedicates to "Germanic" influences (around four pages) compared to Roman jurisprudence (39 pages) and the law of medieval Italy (at least 58 pages).[44] Far from fetishizing the *Volksgeist*, Goldschmidt was known to contemporaries as a particular admirer of Roman law. Max Pappenheim, a former pupil, called him "a Romanist in body and soul," an odd epithet for any would-be champion of Romantic Germanism.[45] Indeed,

[40] James Whitman, "Commercial Law and the American Volk: A Note on Llewellyn's German sources for the Uniform Commercial Code," *The Yale Law Journal* 97 (1987): 156–75. This characterization, citing Whitman, can be found in Kadens, "The Myth," 1168, 1180; Trivellato, "'Usages and Customs'," 195, note 3; Sachs, "From St. Ives to Cyberspace," 800–1. Basile et al., *Lex Mercatoria*, 164.

[41] Whitman, "Commercial Law and the American Volk," 158; 165.

[42] Ibid., 158. The second edition of the *Handbuch des Handelsrechts* is also cited in support, but I can find no similar quote there.

[43] Goldschmidt, *Universalgeschichte*, 132–7.

[44] Ibid., 50–89; 142–200.

[45] See Stefania Gialdroni, "Roman Law, Commercial Law and Levin Goldschmidt's Legacy" in *Law and Economic Performance in the Roman World*, eds Koenraad Verboven and Paul Erdkamp (Leiden: Brill, 2023), 253.

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Pappenheim even felt the need to criticize Goldschmidt on account of the fact that he "did not always do full justice to the part played by Germanic legal thought in the development of our current law!"[46] Finally, we might consider that a mission to connect commercial law to the will of a Romantically constituted German *Volk* runs counter to Goldschmidt's multiple references to the "cosmopolitanism" of commercial law. The point of the "universal" history was precisely to show how it was the product of different times, places, and traditions rather than being connected to a specific *Volk*.[47]

Our reading of the *Universalgeschichte* must take account of German codification debates but in their updated, late-nineteenth-century form. The label "historicist" might be fairly applied, but Goldschmidt was hardly an implacable enemy of codification or even a reluctant forced convert. After all, he had been influential not only on the development of the General German Commercial Code (ADHGB) but also on the monumental codification project of the century, the German Civil Code (BGB).[48] Though it effectively became a stand-alone work, the *Universalgeschichte* was originally intended as a preface to a new edition of Goldschmidt's *Handbuch des Handelsrechts*, which was in turn designed to accompany the ADHGB.[49] Customs were not the be-all and end-all for Goldschmidt. Instead, historical awareness of the origins of legal institutes was intended as a prophylactic against the potential rigidity introduced by codification.[50] This is one of the principal reasons the reasons that Goldschmidt places emphasis on the creativity of the medieval merchant class and their development of new legal concepts, as one of the most startling examples of how societal change demands legal adaptation.

Another key issue that connects the *Universalgeschichte* and German codification is the distinction between commercial law and private law. Goldschmidt, to his great chagrin, was not invited to work on the BGB directly, which was still an ongoing project in the 1880s and 1890s. He had, however, been the decisive influence on its preliminary committee in 1874.[51] Thanks to Goldschmidt, it was decided that the ADHGB should not be incorporated into the BGB but should remain as a separate code.[52] This was not necessarily a self-evident choice, however. The autonomy of commercial law from civil law has always been partial and debatable since many "mercantile" activities tend to be undertaken across society and might better be understood simply as institutes of general private law. I would therefore suggest that an important impulse in

[46] Max Pappenheim, "Goldschmidt, Levin" in *Allgemeine Deutsche Biographie* 49 (1904): 438–448 [Online-Version]; URL: https://www.deutsche-biographie.de/sfz27855.html#adbcontent accessed 31 July 2024.

[47] Goldschmidt, *Universalgeschichte*, 16–17.

[48] Karsten Schmidt, "Levin Goldschmidt (1829–1897): Levin Goldschmidt in Berlin – Eine Skizze über die Berliner Universitätsjahre 1875–1897," in *Festschrift 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin: Geschichte, Gegenwart und Zukunft*, eds. Stefan Grundmann, Michael Kloepfer, and Christof Paulus (Berlin: De Gruyter, 2010), 329, 337; Weyhe, *Levin Goldschmidt*, 119.

[49] See Scherner, "Goldschmidts universum," 871.

[50] Gialdroni, "Levin Goldschmidt's Legacy," 254.

[51] Schmidt, "Levin Goldschmidt," 329–30; Weyhe, *Levin Goldschmidt*, 119.

[52] Weyhe, *Levin Goldschmidt*, 117.

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the *Universalgeschichte* is to elucidate the historical relationship between commercial and civil law and, ultimately, to defend the decision to keep the former separate. As Goldschmidt points out in his introduction, principles invented in a strictly mercantile ambit gradually spread to become part of the general civil law, but thanks to continuous innovation in the upper echelons of the commercial world it can never be completely subsumed: "we can compare [commercial law] to a glacier: in the lower regions, it melts and unifies with the general mass of rainwater [civil law], whilst in the upper regions new ice continues to form."[53] The medieval period was not the beginning of a static and unchanging law merchant, but it was the beginning of *merchant law* as an autonomous branch of private civil law, with new legal principles that ran counter to some principles in the renascent Roman law.[54] The aspects of Goldschmidt's work that interested later mercatorist readers—universality, and the role of unwritten customs—were present, albeit most ambiguously, but they were not central for Goldschmidt who was more interested in legal innovation. His paradoxical emphasis on both "universality" and local variety should probably be connected with his belief that law had an "inherent unity"—that legal provisions tended to coalesce around certain solutions—while still needing to respond to time and place.[55]

Overall, then, it is misleading to label Goldschmidt as the first modern mercatorist. To be sure, his work provided plenty of seemingly amenable material, with vague talk of commercial law's "universality" and a medieval merchant class that made "its own" customary law. We might even say that the *Universalgeschichte* is beset by the same tendency toward outright self-contradiction that characterizes many mercatorist accounts (medieval commercial law was "universal" despite local differences; it was customary, except when it was not).[56] Nevertheless, it cannot be said that Goldschmidt proved or looked to prove the existence of an autonomous, customary merchant law of universal application. At most, he highlighted, in rather unclear and highfalutin terms, the importance of a historical process whereby a class of bourgeois merchants created new legal principles that went counter to principles established in other legal orders like Roman law and the law of the Church. He then confusingly labeled these principles "universal" but admitted that they were not actually uniform or even necessarily widespread. We will see how this process was then recast by others to prove the existence of an autonomous legal system in its own right.

William Mitchell's *Essay on the Early History of the Law Merchant*

If anybody can claim to be the first modern mercatorist, it is the somewhat elusive figure of William Mitchell.[57] Though this British historian is regularly

[53] Goldschmidt, *Universalgeschichte*, 12; 128.
[54] Ibid., 142.
[55] Gialdroni, "Levin Goldschmidt's Legacy," 254.
[56] Kadens. "The Tyranny," 257.
[57] Mitchell, *Law Merchant*.

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cited by mercatorists, there is a surprising and almost complete lack of information available about him.[58] His sole contribution to scholarship appears to be a slim volume entitled *An Essay on the Early History of the Law Merchant*, for which he won the Yorke Prize in 1903. Mitchell was in fact an unknown before the publication of his prize essay, written while he was still a history undergraduate at Cambridge in his late twenties. Previously he had worked as a schoolmaster at a series of provincial English grammar schools and a "*College du Commerce*" in Brussels.[59] On the back of his success, he was made a fellow of Christ's College, Cambridge in 1905, but he vacated the fellowship in 1908 after a scandal centering on his relationship with an undergraduate, and he died prematurely in 1912 without producing further major work.[60] His essay would be reprinted in New York in 1969, probably on the basis of the burgeoning new interest in the law merchant. It is one of the most influential texts in the mercatorist tradition as well as one of the more historically aware accounts.

The attraction of Mitchell's essay lay in the way that he used the latest continental scholarship to defend an old Anglophone commonplace which had recently become the object of new interest and scrutiny. The terms "lex mercatoria" and "law merchant" did not go away after the eighteenth century. Many nineteenth-century works make reference to a medieval lex mercatoria or law merchant as a form of private international law that had later become part of the common law.[61] However, such references were brief, and it does not appear that the term attracted particular interest or controversy ("what were its rules – whether it was other than merchants' view of what was fair and customary – is not clear" wrote John William Smith in his influential *Compendium of Merchant Law*).[62] F.W. Maitland and Frederick Pollock mention the law merchant in similar terms in their *History of English Law*.[63]

Interest then intensified in the 1890s, in part due to the decision to create a separate commercial court for England and Wales, which began its work in 1895.[64] The discovery of the thirteenth-century treatise entitled "Lex Mercatoria" contained within the "Little Red Book of Bristol" in 1899 provided

[58] Kadens, "The Myth," 1168, main text and note 71; John Linarelli, "Global Legal Pluralism and Commercial Law," in *The Oxford Handbook of Global Legal Pluralism*, ed. Paul Schiff Berman (Oxford: Oxford University Press, 2020), 697; Galliano Court, "Honore et Utile," 59; Basile et al., *Lex Mercatoria*, 167–8; Sachs, "From St. Ives to Cyberspace," 791, 801.

[59] J.L. Dawson, "ACAD – A Cambridge Alumni Database," URL: https://venn.lib.cam.ac.uk/Documents/acad/enter.html, accessed 4 July 2023.

[60] Frederic William Maitland, Cecil Herbert Stuart Fifoot, *The Letters of Frederic William Maitland*, vol. 1, 423; "Don and Undergraduate," *Daily News (London)* (26 September 1907).

[61] E.g. Colin Blackburn, *A Treatise on the Effect of the Contract of Sale* (London: Benning and Co., 1845), 207–8; George Spence, *The Equitable Jurisdiction of the Court of Chancery* (London: Stevens and Norton, 1846), 247–8; Robert Philmore, *Commentaries Upon International Law,* 4 vols, 2nd edn (London: Butterworths, 1874), vol. 4, 623–4; John William Smith, *A Compendium of Mercantile Law*, 2 vols, 10th edn (London: Stevens and Sons, 1890), vol. 1, lxiv–lxxii.

[62] Smith, *Mercantile Law*, vol. 1, lxxii.

[63] Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2 vols. (Cambridge: Cambridge University Press, 1895), 1, 450; See De ruysscher, "La Lex Mercatoria," 511.

[64] Basile et al., *Lex Mercatoria*, 164–7.

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a further fillip and further publications on the lex mercatoria followed.[65] At the same time, some skeptical Anglophone voices had started to call the entire notion of a separate lex mercatoria into question. The Canadian lawyer John Ewart had only criticized the lex mercatoria discourse in passing in 1900, but his remarks clearly made enough impact to occasion a spirited defense from Francis Burdick in the pages of *Columbia Law Review*, prompting a further riposte from Ewart.[66]

Mitchell's essay was an explicit attempt—perhaps the first since that of Gerard Malynes in 1622—to argue that "in spite of its vagueness, the law merchant existed."[67] His account of the lex mercatoria is not the extreme version that would be articulated later. Mitchell is happy to recognise "Roman law" as the "basis of the law merchant" and also recognize the role of the royal ordinance.[68] There was, moreover, "no strictly uniform system of mercantile law in the early Middle Ages" and "sometimes the variations in the Law were of far-reaching importance."[69] Indeed "the law merchant [...] was vague and indefinite" on many points.[70] Nevertheless, any differences were "minor" and "customs and usages... remained the decisive factor in [its] development."[71]

Mitchell's introductory chapter ("General Characteristics") asserts that the law merchant was largely customary in nature, had a strongly marked "international" character, used summary procedure, and centered on equity and good faith.[72] The argument that such a lex mercatoria "really existed," however, effectively stands on two claims. First, there had been a "successful assertion of new principles of law" by merchants in the face of Roman, feudal, canon, and common law (still not, we might note, in the face of state law, as most modern-day mercatorists maintain).[73] These new principles included "the principles of representation, the negotiability of bills of exchange, the liability of the real property of the debtor for his debts [...] and a new commercial contract, insurance".[74] "These rules and doctrines" writes Mitchell, "distinct, it must be repeated, from the common law, were the Law Merchant."

Mitchell cannot rest his case here, however. A number of "distinct laws and principles" cannot on their own justify the use of the single term "law merchant." Mitchell's sources present something of a problem in this respect. Some medieval documents such as the 1120 Freiburg Charter make reference to "the law of merchants"—the 1353 Statute of the Staple in England even talks of a "law merchant"—but they do not give any indication about what the content

[65] Ibid.

[66] Ewart, *An Exposition*, 373–4; Francis Burdick, "What is the Law Merchant?," *Columbia Law Review* 2 (1902): 470–85. Ewart then published a further response, "What Is the Law Merchant?," *Columbia Law Review* 3 (1903): 135–54.

[67] Mitchell, *Law Merchant*, 8–9.

[68] Ibid., 160; 2.

[69] Ibid., 2.

[70] Ibid., 8.

[71] Ibid., 161.

[72] Ibid., 10–21.

[73] Ibid., 156.

[74] Ibid., 157–8.

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of this law might be.[75] The only partial exception is the "lex mercatoria" treatise contained in the *Little Red Book of Bristol*, but even this tract contains mostly procedural information, and only once is Mitchell able to cite it as evidence of one of his "new legal principles."[76] Other sources, such as Italian guild and town statutes, make plenty of reference to substantive rules on commerce but make no mention of a "law of merchants."[77] It is for this reason that Mitchell must insist, immediately after equating the law merchant with these new principles of law, on their universality: "everywhere the leading principles and the most important rules were the same."[78] Mitchell needs to invoke the universality of the law merchant because it justifies the extension of a label found in only a tiny minority of the sources.

The fact that merchants' rules were not actually identical everywhere—a fact Mitchell spends the first six pages of his essay acknowledging—is thus something of a problem, and it is for this reason that he must engage in some verbal gymnastics (the law merchant "existed" but was "vague" and differences were "minor").[79] A deeper issue, however, is that the lex mercatoria's having "existed" at some putative but unspecified fixed point in time is made to rest on two ongoing historical processes that took place over very long periods and were, moreover, unfinished. First, Mitchell must acknowledge that the "move towards uniformity" was "incomplete". The assertion of new legal principles, meanwhile, is entirely open-ended, and Mitchell relies on a very dubious teleology to declare it as having reached its apotheosis before the end of the medieval period: "in the sixteenth-century… all the great principles that mark the commercial law of modern times had been evolved and successfully asserted".[80]

To gloss over this difficulty, the essay is organized not chronologically but thematically, with "The Rise of the Law Merchant," "The Courts of the Law Merchant," "Persons," and "Sales and Contracts" being the respective chapter headings. This thematic organization suggests a body of law that might be examined component by component, but the internal structure of each chapter actually describes long-term change over time. Even "The Rise of the Law Merchant" covers a period from the charters of the tenth and eleven centuries to the fifteenth-century statutes of the Lombard towns. The lex mercatoria is thus rising across virtually the entire medieval period. But has it ever fully risen? When Mitchell concludes by saying that "the whole history of Law Merchant [sic] in Europe during the Middle Ages was characterized by a constant advance towards uniformity and by the successful assertion of new principles of law" he is effectively performing a sleight of hand, because the two things that "characterise" the law merchant's history are also the two aspects that supposedly constitute the thing itself.[81]

[75] Ibid., 28; 113.
[76] Ibid., 84–5.
[77] Ibid., 35.
[78] Ibid., 9.
[79] Ibid., 8; 10.
[80] Ibid., 157.
[81] Ibid., 156.

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The first step of this argument was not new. The idea that merchants developed new and highly influential legal principles was derived from Goldschmidt and other continental authorities.[82] Another important influence on Mitchell was the work of the young French jurist Paul-Louis Huvelin, whose doctoral thesis was entitled *Essai historique sur le droit des marchés et des foires* (Historical Essay on the Law of Markets and Fairs) (1897).[83] Huvelin sought to demonstrate the importance of his chosen subject by arguing that a series of legal innovations developed in the context of the fairs gradually spread to society at large. The fairs had even helped to bring about world peace as safeguards offered for foreigners were progressively extended over ever larger areas. This argument was also heavily influenced by a reading of Goldschmidt (referenced over 200 times).[84] Huvelin notes a "tendency to uniformity" in the law of the fairs, but pushes this to a hyperbolic pitch in his conclusion when he states that "the law [of the fairs]… is a universal law… and so emerges the concept of a law of merchants (*droit des marchands*) that remains outside and above the civil statutes and local commercial usages."[85] However, this one moment of rhetorical excess is not substantiated in the main body of the thesis. Huvelin uses the word "*universelle*" in the essay fairly indiscriminately in order to indicate any development with trans-regional implications: the fairs of Champagne and Lyon, for example, are described as having a "universal importance" because they attracted traders from far-flung places.[86]

Mitchell's account was the only one that attempted an explicit proof of the lex mercatoria, and the thesis was to have substantial influence. It was particularly important for Harold Berman, who was, in turn, the main source for mercatorists of the 1980s and 90s, including Bruce Benson and Leon Trakman.[87] Though Berman had already written about the medieval lex mercatoria in 1978, his most sustained engagement with the idea came in his 1983 work *Law and Revolution* where he outlined a "soft" mercatorist account predominantly based on Mitchell, who he quotes in the main body of the text. Merchant law was left "largely, though not entirely, to the merchants

[82] Goldschmidt, *Universalgeschichte*, 134, 269; Mitchell, *Law Merchant*, 129. See also Mitchell's acknowledgements, *Law Merchant*, "Preface".

[83] Paul-Louis Huvelin, *Essai historique sur le droit des marchés et des foires* (Paris: A. Rousseau, 1897).

[84] Huvelin, *Essai historique*, 5, note 1: 'The very remarkable *Universalgeschichte des Handelsrechts*, to which we will often have cause to refer'.

[85] Huvelin, *Essai historique*, 596.

[86] Huvelin, *Essai historique*, 20; 241.

[87] Harold J. Berman and Colin Kaufman, "The Law of International Commercial Transactions (Lex Mercatoria)," *Harvard International Law Journal* 19 (1978): 221–77; Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge MA: Harvard University Press, 1983), 333–56; Leon E. Trakman, "The Evolution of the Law Merchant: Our Commercial Heritage–Part I: Ancient and Medieval Law Merchant," *Journal of Maritime Law and Commerce* 12 (1980): 1–24; Leon E. Trakman, *Law Merchant: The Evolution of Commercial Law* (Littleton: Rothman & Co., 1983); Benson, *Enterprise of Law*, 87–98: Bruce Benson "Customary Law," 1–27. Benson cites Trakman and Mitchell: Kadens says he cites Wyndham Bewes but I could not find evidence of this, cf. Kadens, "The Myth," 1169, note 71. Trakman cites a great deal of literature through it is not clear whether he considered everything which he cited: the stand-out influence is Berman who provided 'useful comments on a preliminary draft' of Trakman's first article: see Trakman, "The Evolution," 1.

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themselves". Customs displayed "differences of detail". The lex mercatoria was not "universal," though it did have a "universal character".[88] It should be noted that there is no particular interest in the lex mercatoria's autonomy from state or city law. For Berman, the real importance of the lex mercatoria was its creativity: the fact that merchants themselves created "the basic concepts and institutions of modern Western mercantile law," the "capitalist law par excellence".[89] Like Goldschmidt—whose work is sometimes cited directly—Berman is thus more interested in the long-term emergence of legal principles rather than the way that medieval merchants resolved their disputes. Yet the use of the single term "law merchant" and a more explicit and unqualified insistence that these principles "were seen as a distinct and coherent system" suggest that these principles amounted to a separate system of justice.[90]

Clive Schmitthoff and Wyndham Bewes

The one Anglophone writer who was not particularly influenced by Mitchell's work was ironically the one responsible for popularizing the idea of the medieval lex mercatoria in the first place: Clive Schmitthoff. Schmitthoff's conception is quite different from most other articulations of the lex mercatoria theory, since, unlike Berman, he wished to avoid writing a history of "Western capitalist" mercantile law. It was for this reason that he seized upon the amenable work of Wyndham Bewes, which otherwise would probably not have played a particularly important role in mercatorist historiography.

The current consensus in the literature on the lex mercatoria is that the two "founding fathers" of the new lex mercatoria movement were Clive Schmitthoff, a German legal scholar who had emigrated to Britain in the 1930s, and Berthold Goldman, who was born in Romania but would pass his professional career in France.[91] However, the equal weight given to the two figures for "new" mercatorist ideas does not hold with regard to the medieval lex mercatoria. For Goldman, the medieval past was of little importance until a very late stage, by which time the medieval lex mercatoria idea was already well-rooted. Goldman's relationship with the lex mercatoria concept arguably began *avant la lettre* in 1956 when he published an article in *Le Monde* condemning the nationalization of the Suez Canal company on the grounds that it was "an international company… directly subject to the international order".[92] His first scholarly contribution on the lex mercatoria,

[88] Berman, *Law and Revolution*, 341–2.

[89] Ibid., 333.

[90] Ibid., 348.

[91] Hatzimihail, "The Many Lives," 174; Schinazi, *The Three Ages*, 204; De ruysscher, "Conceptualizing Lex Mercatoria," 465; Linarelli, "Global Legal Pluralism," 720–1. Aleksandr Goldstajn is sometimes mentioned in connection with the 'founding' of new lex mercatoria: see his "The New Law Merchant," *Journal of Business Law* 12 (1961): 12–7. The article makes no reference to the historical lex mercatoria, however.

[92] Berthold Goldman, "La Compagnie de Suez: société internationale," *Le Monde* (4 October 1956), URL: https://www.trans-lex.org/9/_/goldman-berthold-le-monde-p-3/, accessed 19 May 2023.

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however, was not to come until 1964.[93] Even at this stage, Goldman talked little of history, constraining himself to observing only that "the 19th century saw, not the birth, but the rebirth of common professional usages regarding international sales (because already in previous ages, international commerce had followed its own norms: whether one thinks of transactions between citizens and travellers, which were probably the origin of the contracts of good faith of the Roman law, or the *ius mercatorum* and the law of the fairs of the late Middle Ages and the beginning of the early modern period)".[94]

Whilst even this brief reference to the past could imbue the new lex mercatoria with an important venerability, Goldman himself had clearly not yet reflected seriously on the "old" lex mercatoria, and it is difficult to argue that this was a load-bearing wall of his argument. It was not until a much later 1983 essay that Goldman would publish the historical account of the lex mercatoria that is usually cited by historians (and it should be noted that this is also rather short).[95] By this time the medieval lex mercatoria thesis was already well established thanks to influential works by Harold Berman (1978, 1983) and Leon Trakman (1980, 1983), neither of whom cite Goldman's earlier work.[96] Goldman at this stage was probably paraphrasing claims he had heard elsewhere: indeed, it seems Schmitthoff's activities were the indirect source. There is no citation that directly indicates from whence Goldman derived his historical views as they existed in 1964, but the first footnote of the essay directs the reader to "all the documents of the Colloquium on the new sources of international commercial law," organized in London in September 1962 by the International Association of Legal Sciences, and "in particular the general report by Mr. Clive M. Schmitthoff".[97]

Schmitthoff had prefigured this meeting with an essay published in 1961: this is usually taken as the starting point of his engagement with the lex mercatoria.[98] Here he described a "law merchant" that was a "body of truly international customary rules" governing the cosmopolitan community of international merchants who traveled through the civilized world, "from port to port and fair to fair".[99] This characterization seems to have been inspired by just two of the four scholars that Schmitthoff cites in its support. The 1961 essay takes extended quotations from Rudolf Schlesinger's *Comparative Law* (1960) and Paul-Louis Huvelin's *Essai*, while a footnote for the "history of the law merchant" directs readers toward Theodore Plucknett's *A Concise History of the Common Law* (5th edn, 1956), and Wyndham Bewes's *The Romance of the Law*

[93] De ruysscher, "Conceptualizing Lex Mercatoria," 465.

[94] Berthold Goldman, "Frontières du droit et lex mercatoria," *Archives de philosophie du droit* 9 (1964): 179.

[95] Berthold Goldman, "Lex mercatoria," *Forum Internationale* 3 (1983): 1–24.

[96] See note 87.

[97] Goldman, "Frontières du droit," 179.

[98] Clive Schmitthoff, "International Business Law: A New Law Merchant," *Current Law and Social Problems* 22 (1961); De ruysscher, "Conceptualizing Lex Mercatoria," 468; Kadens, "The Myth," 1155; Hatzimihail, "The Many Lives," 174.

[99] Schmitthoff, "International Business Law," 131.

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Merchant (1923).[100] It is unlikely that Plucknett's work was an important source of inspiration, however. Pluncknett's short, 13-page chapter entitled "Law Merchant and Equity" is also cited by Schlesinger.[101] It is thus possible that Schmitthoff never read the text and simply took the reference directly from Schlesinger's work: Plunknett was fairly skeptical regarding the existence of a lex mercatoria, and Schmitthoff's misspelling of his name in the citation hardly suggests a close engagement with the text.[102] A similar thing seems to have happened with Paul-Louis Huvelin, whom Schmitthoff probably knew only through the work of Wyndham Bewes. Schmitthoff gives the wrong date of publication and erroneously refers to this quote as being the production of a "Professor M. Huvelin" (the abbreviation "M. Huvelin" is used by Bewes but presumably to mean "Monsieur").[103] There are no page numbers given. These may be simple mistakes, of course, but it certainly seems probable that Schmitthoff had not actually consulted the original but had gleaned everything through Bewes, whose translation he uses word-for-word.[104]

The 1961 article thus drew primarily on just two authors: German-American comparative lawyer Rudolf Schlesinger and the British barrister Wyndham Bewes. The more sober of the two accounts is provided by Schmitthoff's contemporary, Schlesinger. However, there are key differences between Schmitthoff's account and Schlesinger's. Schlesinger's treatment does talk of a "customary" law he calls the "law merchant". But this three-page passage in Schlesinger's book has very little to do with the mercatorist argument. Like Goldschmidt, his purpose in these few pages is merely to illustrate how there was already a distinction between general civil law and commercial law before the separate codes of the nineteenth century. Moreover, he makes two assertions that go completely contrary to Schmitthoff's conception: "[The] liberal rule of conflict of laws made it incumbent upon the courts dealing with commercial matters to familiarize themselves with the *statuta* of many trades and countries, with the result that by this practical use of 'comparative law' the commercial customs and laws of the Western world became more and more unified".[105] Schlesinger's law merchant is thus not only reliant on written instruments but was, at best, merely "more and more unified" in the circumscribed context of the "Western world". How much stronger is Schmitthoff's law merchant, a "truly international body of customary rules," which was spread not through writing and courts but through merchants themselves?

[100] Schmitthoff, "International Business Law," 132–3, 135; Rudolf B. Schlesinger, *Comparative Law: Cases, Text, Materials*, 2nd edn (London: Stevens, 1960), 184–5; Huvelin, *Essai historique*; Theodore Plucknett, *A Concise History of the Common Law*, 5th edn (London: Butterworth, 1956), 657–74; Bewes, *The Romance*.

[101] Schmitthoff, "International Business Law," 132, esp. note 7; Schlesinger, *Comparative Law*, 184.

[102] See De ruysscher, "Conceptualizing Lex Mercatoria," 469.

[103] Bewes, *The Romance*, 137.

[104] Schmitthoff, "International Business Law," 133; Bewes, *The Romance*, 138; Huvelin, *Essai historique*, 596.

[105] Schlesinger, *Comparative Law*, 185. His cited source for this idea is Paul Rehme, "Geschichte des Handelsrechts" in *Handbuch des gesamten Handelsrechts*, ed. Victor Ehrenberg (Leipzig: Reisland, 1913).

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Schmitthoff's departure from Schlesigner's account can be fully explained by his own precise purposes in publishing the article, directly presaging the 1962 colloquium. This was attended by fifteen global experts in international commercial law (Goldman not among them) with the explicit aim of bridging Cold War divides in commercial law between East and West. In his closing remarks, Schmitthoff argued that the Cold War international scene "was not the first division of the world" but had been prefigured by "the religious divisions of the Middle Ages and the Thirty Years' War" and that the "lex mercatoria was one way of moving forward to overcome division".[106] Yet this was not necessarily a widely shared view among participants. The only contributor to make sustained reference to the pre-modern past was Professor John Honnold, speaking on English and American commercial law, who mentioned the "merchants' courts which were adjuncts of the great fairs," which displayed "essential similarity to modern arbitration".[107] Honnold, however, was no mercatorist, going on to state (perhaps seeking to temper Schmitthoff's new-found enthusiasm) that it was "easy to overstate the evidence on the extent to which the so-called [medieval] lex mercatoria embodied uniform rules for international trade," that even the laws of the sea "were not fully uniform," and that in many cases the merchants' "law" was probably no more than a "decision out of hand".[108] In short, he frames medieval mercantile dispute resolution as arbitral rather than legal. Scholars from communist countries, meanwhile, were skeptical of the whole project. The conference report notes their anxiety that the lex mercatoria was merely "a basis for perpetuating Western patterns in public international law" under the guise of cosmopolitanism.[109]

The lex mercatoria of Schlesinger's account was inadequate for the task of legitimizing Schmitthoff's new project in the face of these accusations. The lex mercatoria could not be framed as a product of the "Western world" lest Schmitthoff risk his brainchild being decried as a Western ruse to make international trade law in its own image. Hence, Schlesinger's "Western world" becomes the "civilized world."[110] Gone are references to guild and city statutes. A gradual comparison and agglomeration of written rules was too long and incomplete a process for Schmitthoff. Hence time, already invoked only vaguely by Schlesinger's uncertain chronology, becomes completely one-dimensional in Schmitthoff's account: the lex mercatoria has no birth or adolescence but emerges fully formed, and, crucially, without the need to write anything down. Most importantly, Schmitthoff re-oriented the "autonomy" of the lex mercatoria. Now, for the first time, the issue was about its relation to the positive law of territorial states rather than its distinctiveness from other medieval legal orders.

[106] David Godwin Sarre, "A Note on the Discussions of the Colloquium," in Schmitthoff, *The Sources*, 284.

[107] John Honnold, "The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law," in Schmitthoff, *The Sources*, 70.

[108] Honnold, "The Influence," 71.

[109] John Honnold, "Reports: International Association of Legal Science: London Colloqium on New Sources of Law of International Trade," *The American Journal of Comparative Law* 11 (1962): 690.

[110] Schmitthoff, "International Business Law," 131.

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Much more conducive to making such an argument was Wyndham Bewes's *The Romance of the Law Merchant*, a highly idiosyncratic work that might have fallen out of historical consciousness completely had Schmitthoff not stumbled upon its opportune arguments.[111] As Dave De Ruysscher has noted, Bewes's 1923 essay emphasized a customary law merchant that was developed through transactions rather than through any written conduits.[112] According to Bewes, "merchants carried their law, as it were, in the same consignment as their goods, and both law and goods remained in the places where they traded."[113] Though all commentators on this text (beginning with the author of the foreword) have understood the "romance" of the title to mean "an emotional attraction or aura," Bewes's title is probably intended to suggest a medieval, chivalric romance—a *romanzo*—thus personifying the lex mercatoria as an epic, itinerant hero who travels across the world.[114] This was a history that Schmitthoff could more readily use, for one of Bewes's main aims was "to show, perhaps for the first time, that for some at least of our mercantile law we are indebted to the East," i.e., the Arabic-speaking world, thus providing the non-Western provenance for the lex mercatoria that Schmitthoff desperately needed. Though Bewes perhaps deserves some credit for a refreshing and entirely atypical departure from Eurocentricism, his evidence for the law merchant's Eastern origins goes no further than a rather desultory list of commercial terms of Arabic etymology of which few can be properly considered legal.[115] Nor does Bewes give the Arabs any credit on this score, as they "indeed invented little"; rather these laws had been passed in an unbroken chain from the Romans, the Greeks, and Phoenicians.[116]

This argument seems to be almost entirely of Bewes's own devising: none of his main sources advance a similar argument. Only Huvelin's work on the fairs is cited extensively; indeed, for his conclusion, Bewes simply copies out a section from the conclusion of Huvelin's doctoral thesis.[117] William Mitchell's "excellent work on the law merchant," though warmly praised, is only cited twice; the "incomplete German work" of Goldschmidt just once.[118] But not even Huvelin conceded a serious role for the Arabophone world in the development of Western commercial law, a fact which Bewes seems to have derived from a book on etymology.[119] It is likewise difficult to say what Bewes hoped to achieve by publishing the work. Though he criticizes those who too confidently assumed that the law merchant had arisen "in Italy in the central part of the Middle Ages [and] was chiefly founded on the Roman law," he mentions no

[111] There is no genealogical connection between the Wyndham Bewes of *The Romance of the Law Merchant* and the Wyndham Beawes who published *Lex Mercatoria Rediviva: Or, The Merchant's Directory* (Dublin: James Williams, 1752). This is apparently sheer coincidence.

[112] De ruysscher, "Conceptualizing Lex Mercatoria," 469.

[113] Bewes, *The Romance*, vi.

[114] Ibid., iii–iv. See also note 8.

[115] Ibid., 10.

[116] Ibid., 2.

[117] Ibid., 137–8.

[118] Ibid., 18–9; 30: 93.

[119] Ibid., 10.

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intellectual sparring partner by name and, beyond noting that the division between civil and commercial jurisdiction still presented some "jealousy" and "confusion," makes no reference to any contemporary debate or issue.[120] Having evinced no apparent interest in commercial law history in the prewar period, Bewes seems to have become interested in international private law in the 1920s as a member of the Grotius Society and the International Law Association.[121] Beyond this, the work appears mostly *sui generis*, even eccentric.

Though Bewes was Schmitthoff's chief source, his work was not the source of Schmitthoff's interest. This crystallized between 1956 (a year in which Schmitthoff published an essay on conflict of laws making no mention of the law merchant, new or medieval) and 1957, the year in which he gave a talk at Helsinki University, which would be published under the innocuous title, "Modern Trends in English Commercial Law."[122] In the 1956 essay, Schmitthoff had concluded that conflict of laws had to be "retrieved from the narrow compass of nationalism" but placed his faith in the comparative method as the solution, that "great discipline founded on the existence of similarities between the legal systems of the world."[123] By 1957, he was making much bolder claims, noting that at the end of the Middle Ages "commercial law moved from the level of international, universal, cosmopolitan custom into the orbit of the national law of England until, in the 18th century, it finally became part of it."[124] He quotes Lord Mansfield to the effect that "mercantile law, in this respect [i.e. as a kind of natural law of mankind], is the same all over the world."[125] Schmitthoff was thus inspired not by continental scholarship but by another British jurist with cosmopolitan interests: Lord Mansfield.

Conclusion

The difficulty of convincing mercatorists goes deeper than mere intransigence on the part of opponents. The insolubility of the debate is in part a question of the ambivalent language in which some mercatorists have couched their arguments. Writers like Mitchell and Berman claim that the lex mercatoria was merely "near-universal" and uniform in its most important principles. They claim that the lex mercatoria was meaningfully distinct from other legal orders even if it was not wholly separate from their influence. This "soft" mercatorist approach is thus able to dismiss individual empirical attacks on the lex mercatoria's universality whilst continuing to assert its "existence" as a distinct

[120] Ibid., vi; 1–2.

[121] W.R. Bisschop, "In Memoriam: Wyndham Anstis Bewes," *Transactions of the Grotius Society* 28 (1942): viii–ix; Wyndham Anstis Bewes, "The Treaties of Montevideo (1889)," *Transactions of the Grotius Society* 6 (1920): 59–79.

[122] Clive Schmitthoff, "Modern Trends in English Commercial Law," republished in *Clive M. Schmitthoff's Select Essays on International Trade Law*, ed. Chia-Jiu Cheng (Dortrecht/Boston/London: Nijhoff, 1988), 3–37.

[123] Clive Schmitthoff, "Conflict Avoidance in Practice and Theory," *Law and Contemporary Problems* 21 (1956): 461.

[124] Schmitthoff, "Modern Trends," 6.

[125] Ibid., 6.

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body of law or legal system. Mercatorists can retreat onto the low hill of the "near-" qualifier, from where "trivial" evidence provided by historians on the basis of case studies—concerning different maritime average procedures, freight rate contributions, or the periods of grace on a bill of exchange—is unlikely to hit its mark.

Against this soft mercatorist argument, several points should be made. Most importantly, even this "soft" lex mercatoria fails as a buttress for the new lex mercatoria project, which tends to come unstuck at exactly the level of difference that is dismissed as minor for the law merchant of the medieval past. In a 1936 article, for example, Philip W. Thayer of Harvard Law School speaks warmly of the medieval law merchant, quoting William Mitchell to the effect that it only suffered from "minor differences." He then goes on to lament how, in the present day, "perplexities" result from "fundamental" disagreements between national laws, such as whether delivery is a prerequisite for the passing of title. What makes medieval differences "minor" and the contemporary ones "fundamental" is not considered.[126]

Second of all, the existence of some legal principles for merchants, identified as exceptions to the general civil law, should not be confused with the existence of a "law merchant" as a complete and distinct system of universally understood rules that merchants used to resolve their disputes. It is undeniable that medieval merchants did create new legal principles adapted to their own needs, and that these principles spread across political boundaries to enjoy a certain "transnational" validity. Some merchants did gradually adopt rules—concerning solidary liability or the protection of a *bona fide* buyer, for instance—that went contrary to principles expressed in Roman law.[127] Yet the geographical spread of such principles in the Middle Ages was limited, and the distinctiveness and internal coherence of "merchant" legal culture should not be exaggerated.[128] As Rodolfo Savelli puts it, there was a great "permeability" between the world of merchants and professional Roman-law-educated jurists and no independent "mercantile" cultural sphere had emerged by the sixteenth century.[129] Works like that of Goldschmidt, which were primarily concerned with drawing the distinction between commercial law and the more general civil law, have had lex mercatoria read back into them retrospectively. The transformation of "merchant law" into the "law merchant" has been achieved in part through a temporal compression that gives the impression that all of these new legal principles existed simultaneously by the end of the medieval period.[130] Instead, there was a long and ongoing process of change took place that could hardly be declared complete by the sixteenth century. It was William

[126] Philip Thayer, "Comparative Law and the Law Merchant," *Brooklyn Law Review* 6 (1936), 141, note 11; 149.

[127] Mitchell, *Law Merchant*, 98–9.

[128] Kadens, "The Tyranny," 270.

[129] Rodolfo Savelli, "Modelli giuridici e cultura mercantile tra XVI e XVII secolo" in *Cultures et formations négociantes dans l'Europe moderne*, eds. Franco Angiolini and Daniel Roche (Paris: Editions de l'école des hautes études en sciences sociales, 1995), 403–4.

[130] Kadens, "The Tyranny," 258.

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Mitchell who first performed this rhetorical sleight of hand, and it from this work that the ostensibly more coherent soft mercatorism has taken its lead.

Investigating the vertical chain of "unbroken" citations that stretches over one hundred years from Bruce Benson to Levin Goldschmidt serves, in reality, to highlight the quite different lex mercatorias that have been presented in order to advance different agendas. The main point of difference is what the lex mercatoria is taken to be "autonomous" from. Goldschmidt—not really a mercatorist in any meaningful sense—was interested in the distinctiveness of commercial law from general civil law. Regarding the medieval period, he stresses the invention of new principles distinct from those of Roman and Canon law. Mitchell was particularly interested in the law merchant's distinctiveness from the English Common Law and the Roman Law, while Wyndham Bewes stressed its distance only from the latter. For Schmitthoff (emblematic of the lex mercatoria thesis for most writers), autonomy from the law of territorial states was the key point. For later theorists like Benson, it was the lex mercatoria's independence from the state in any form. If historians wish to continue engaging with the lex mercatoria thesis as a framework for their own research, therefore, one essential question to ask is: autonomous from what?

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