The Myth of the Lex Mercatoria*

– Historical Antecedents and Modern Misconceptions –

Kent D. Lerch**

A spectre is haunting commercial law – the spectre of the lex mercatoria. No other topic of international commercial law has been as controversial : Lex mercatoria is said to be the self-made law of international commerce, an autonomous legal order that not only supplements state commercial law, but works as a substitute for it. This idea of an autonomous global law without the state has sent „shock waves" through the traditional, positivistic doctrine of legal sources and divided the field of international business lawyers into two camps, with no middle ground between them. It is not surprising that almost every aspect of the doctrine of the lex mercatoria is highly contested, with controversies relating to the principal justification, the legal quality, the methodical basis and the democratic legitimacy of the lex mercatoria, but also the terminology used and the practical viability of the doctrine. Anyone turning to the scholarly authorities in international commercial law will be drawn into a violent war of faith : French professors zealously assert that a „societas mercatorum", a well organized and close-knit association of merchants, exists on today's world markets and acts as a legislator of lex mercatoria, while their British

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** Georg-August-Universität Göttingen

and American counterparts contemptuously declare this commercial freemasonry to be a „phantom of Sorbonne professors".

Since its inception fifty years ago, the positions on the question of whether an autonomous law merchant beyond the state existed or exists were matters of faith rather than of academic rigor, and some participants in the debate seem driven more by the wish to defend their own fields than by a disinterested search for adequate theories. Scholars and especially practitioners in commercial and arbitration law promoted lex mercatoria not least because their fields seemed to benefit from it. Scholars of conflict of laws, by contrast, abhorred the idea of a non-state law demanding recognition, not least because they feared for central tenets of their field. Empirical issues matter surprisingly little in this debate.

Conceived as a response to the problems resulting from the application of national laws to the disputes arising from international contracts, lex mercatoria proposes to be an alternative solution to contractual disputes between private parties in cross-border dealings or between a private party and a state. According to the traditional paradigm of control by the national legal systems, the conflict of laws rules, which are also of national origin, are to be applied to determine which national substantive law will govern the resolution of the disputes arising from international contracts. Lex mercatoria doctrine attempts to break this paradigm on the basis of the argument that those conflict of laws rules and national substantive laws are usually inadequate to solve the problems of international contracts and their application leads to inappropriate, uncertain or unpredictable consequences.

The origins of the doctrine of lex mercatoria can be traced back to the first stages of globalization at the beginning of the twentieth century, when foreign investors sought the right and ability to pursue their legal claims

against host states on their own behalf. While the arbitration between states is governed by public international law, the arbitration between a state and a foreign investor is considered to be an arbitration between private persons and therefore governed by a national system of law－the law of the country where the arbitration tribunal has its seat (*lex arbitri*). As the rules of private international law traditionally required the application of the law of host state as being the law of the place of performance or as the law of the state with which the contract is most closely connected, foreign investors sought to internationalize their agreements in order to avoid the application of the law of the host states and to prevent host states from abusing their superior position, which could affect the applicable law in their favor. Accordingly, they advanced the argument that the laws of host states should be interpreted, supplemented and corrected, if necessary, by the general principles of law, which are neutral and unattached to any specific jurisdiction, but a common source of both national laws and public international law.

The approach of applying "general principles" to support contract enforcement became increasingly influential in international arbitral practice, as it allowed the arbitral tribunals to cite widespread domestic legal support for the general sanctity of contractual obligations in order to justify enforcing state contracts involving nationalized property. Arbitral support for the general principles of law continued to strengthen in the years immediately following World War II and led to an academic discussion about the need and possibility of extending this approach to the resolution of disputes arising from transnational contracts between private parties. The doctrine of the lex mercatoria owes its existence to the Suez Canal crisis, when the French comparativist Berthold Goldman, law professor at the University of Dijon, published an article in *Le Monde*

dealing with the nationality of the Suez Canal Company, in which he argued that the Company was neither of Egyptian, English, French nor mixed nationality. Due to its particular capital structure, its organization and the global effects of its business activities, Goldman drew parallels between the Suez Canal Company, the World Bank, and the Red Cross and characterized the Company as an international company „directly subject to the international legal order". An „accident of legal history", these comments are seen as crucial step toward a theory of transnational commercial law. 1964 he published the essay *Frontières du droit et lex mercatoria*, in which he tried to establish the legal character of the norms of modern lex mercatoria, which he regarded as an „ensemble" of general principles and legal rules growing out of a process of spontaneous institutional law-making. He argued that this process is detached from domestic legal systems but that the law is created within the community of merchants doing cross-border trade and commerce – the *societas mercatorum.*

Genealogical narratives form a vital part of Goldman's argument, as he used a romantic vision of medieval lex mercatoria in order to show that the modern lex mercatoria exists and should be conceived to be a growth, not a creation. His historical account is the characteristic example of a cyclical narrative, which tells the story of a legal field in terms of an idea or a conflict between contrasting notions persisting, or recurring, through time:

> „Lex mercatoria is a venerable old lady who has twice disappeared from the face of the earth and twice been resuscitated. At the present moment, she still must content with some growth pains ordinarily associated with youth. My topic today is principally these problems of adolescence which lex mercatoria is currently confronting."

According to Goldman's narrative of the history of lex mercatoria, the „illustrious precursor" of lex mercatoria was the Roman ius gentium, which he understood as a formally autonomous source of law, customary and international in nature and proper to the economic relations between Roman citizens and foreigners. Ius gentium lost its distinctiveness when the Antonian Constitution accorded Roman citizenship to all inhabitants of the empire. In his view, this was the first death of lex mercatoria. It was, however, not a real death, because ius gentium had by then penetrated the domain exclusively reserved for ius civile. It thereby enriched and supplanted the traditional institutions of ius civile, before it fell victim to the breakup of the Roman world and its legal system, and to the disintegration of international economic relations that characterized the early Middle Ages. The „rebirth" of the ancient cosmopolitan law came with medieval mercantile law : „the *ley merchant* in England, the *droit de foires* in France …, the *ius mercatorum* conceived in Italy, and the commercial usages codified in France by Jacques Savary at the end of the seventeenth century and fifty years later by his son" – a single legal phenomenon manifested in distinct form and name in different places. The medieval law merchant simply appears; it is the product of a rather spontaneous process. Leviathan, the rival of this autonomous legal order, is already in sight : the early modern destruction of this legal community by „progressive affirmation of the power of individual States" leads to a new period of hibernation, with the low point being reached in the nineteenth century, when „the emergence and reinforcement of national particularities" lead to the „subjection of international economic relations to State laws", which are designated by conflict-of-laws rules „such … as each State had established by itself". He spins a cautionary tale in which state law, followed by legal particularism, can only corrupt the law

merchant. Accordingly, the next episode in Goldman's narrative is the period of Lex Mercatoria Rediviva, in which leading lawyers from both East and West „discover" that „the way in which international commerce is regulated today .. is as unsatisfactory as it can be."

Berthold Goldman would determine „the ambit of lex mercatoria" by reference to „its origin and its customary, and thus spontaneous, nature" rather than to the „object of its constituent elements. His narrative reflects his perspective on the sources of lex mercatoria. His tale is one of ups and downs, of lives and deaths, the lives taking place in those periods in which an international or supranational law of universal ambit flourishes unhindered and acknowledged by state law, while deaths come when the international community disintegrates and competing political entities claim control over international commerce and mercantile law. The narrative also reflects his abstract notion of what lex mercatoria is－an abstraction hidden behind his personification metaphor. There are recurring references to a body of law, but no explicit reference to merchant, or legal, practitioners. Goldman's lex mercatoria is „spontaneous" in that it simply appears : there is no account of its gradual creation.

While Goldman insisted on the stateless character of lex mercatoria, his counterpart in the common law world emphasized the use of state and non-state sources. The German emigré Clive M. Schmitthoff was the second driving force in the formation of the lex mercatoria doctrine, having arranged the Colloquium on The New Sources of the Law of International Trade at King's College, London in 1962, which is generally regarded as an early milestone in the academic discussion on the lex mercatoria. In his introductory speech Schmitthoff stated :

„The evolution of an autonomous law of international trade, founded on

universally accepted standards of business conduct, would be one of the most important developments of legal science in our time. It would constitute a common platform for commercial lawyers from all countries, those of planned and free market economy, those from civil law and common law, and those of fully developed and developing economy, which would enable them to co-operate in the perfection of the legal mechanism of international trade."

The expansion of international trade in a favorable period of economic recovery after the Second World War had led Schmithoff to question the adequacy of national laws in regulating international commercial contracts in view of the divide between the legal systems of the countries of planned economy and free market economy. His theory of the new law merchant concerned the Cold War divide between East and West and the contrast between continental law and common law. His goal was to construct the law of international trade as a bridge over that gap. Schmitthoff notes that the modern law merchant is „practically the same in all countries of the world. Its similarity transcends the division of the world into countries of free-market economy and centrally planned economy and of common law or Roman law tradition". To defend his approach and inspire confidence in this project, he provided a historical tale leading logically to this „entirely new phenomenon". His romantic vision of the medieval lex mercatoria also served as example and justification for the modern lex mercatoria; his tale was one of the development of international commercial law in three „phases" :

„The re-awakening of the international conscience has led to a new phase in the development of the law of international trade. International commercial law has developed in three stages. It arose in the Middle Ages in the form of

> the law merchant, *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. The second phase began with the *incorporation of the law merchant into the national systems of law*, a process which, though universal, was carried out in the various countries at different times and for different reasons. The third phase is contemporary; it aims at the *unification of international trade law on an international level* and has given rise to a new law merchant which reflects the international spirit of our time in the political and economic sphere."

Schmitthoff presents medieval mercantile law as a body, a complex of customary rules that are truly international－not created by political institutions and sovereigns of „local" scope, but catering to the community of international merchants. As it was „cosmopolitan in nature and inherently superior to the general law, the law merchant by the end of the medieval period had become the very foundation of an expanding commerce throughout the Western world." According to Schmitthoff, the medieval law merchant „owed its international character mainly to four factors : the *unifying effect* of the law of the fairs … the universality of the customs of the sea, the special courts dealing with commercial disputes, and the activities of the notary public." The law of the fairs, Schmitthoff emphasizes, was „almost as universal as the law of the church", and it was applied in special courts : „International merchants sat in the courts of piepowder and of the ports in so-called halftongue juries, [that is,] juries consisting as to one-half of native and the other half of foreign merchants." It becomes apparent, that the "remarkable feature," that links these factors with each other, is the circumstance that the „old law merchant was… developed by the international business community

itself and not by lawyers. Even the notary public becomes less of a lawyer in Schmitthoff's narrative, when he refers to him as „that ubiquitous and versatile medieval practitioner in whose hands lay a good deal of commercial legal work." The final factor is the „universality of the customs of the sea" – a universality that extends across time as well as space. Again, the laws in question are the product of merchants themselves, without intervention by the state (or any intervention by jurists):

> „The customs of the sea which originated with the Phoenicians and Greeks, were collected as the laws of Rhodes between A.D. 600 to 800; they were then developed into the Consulado del Mar, which became the maritime code of the Mediterranean, spread to the Atlantic as the judgments of Oleron (1160) which became the foundation of English maritime law, and further north to the Baltic where they were known as the Sea Laws of Visby. Professor Wormser rightly observes that „the explanation of this universality is … that the sea law was developed by merchants themselves and was not the law of territorial princes."

The key legal concept in Schmitthoff's story of the medieval lex mercatoria is custom: we read of the customs of the sea, of an international customary law. The use of the term is not accidental, since custom was an accepted source of law in all major legal traditions, as well as in international law at the time when Schmitthoff wrote; even in the context of decolonization, the concept of custom by itself caused less hostility and fear of a Western bias than the „general principles of law." Schmitthoff himself presented international commercial custom as „consist[ing] of commercial usages and practices … so widely accepted that it has been possible to formulate them as authoritative texts." His invocation of custom explains, and is triggered by, the emphasis given by

the narrative on the role of the imagined „international business community" and the subsequent downplaying of the role of lawyers. Custom is the product of long practice and legal consciousness by the community; lawyers only come after the fact to give it formal legal shape.

While Schmitthoff has provided us with a theory about the legal nature of the medieval law merchant and the production process of lex mercatoria's many norms, he did not discuss how systematic, and complete, this law merchant was; at one point he does actually liken medieval mercantile law to modern-day international law, and its rules are called „of haphazard and casual provenance", but he does not really elaborate this. Instead, he leads us to the early modern era, in which the juridification of the law merchant takes place: „In the second period of its development this cosmopolitan and universal law merchant was incorporated into the national laws of the various states." This incorporation process was „carried out in the various countries at different times and for different reasons", but was nonetheless „universal". Nor did incorporation mean absorption, for „even in this period of national integration commercial law did not lose entirely its international character" and „the law-creating custom of the international business community was as active as in the Middle Ages".

Schmitthoff's evolutionary narrative accepts state law as an integral part of the new law merchant while pointing out that a living law merchant continues to exist under the skin of national legislation. Thus the path to the present is prepared and the start of a third phase can be proclaimed: „We are beginning to rediscover the international character of commercial law and the circle now completes itself : the general trend of commercial law everywhere is to move away from the restrictions of national law to a universal, international conception of the law of international trade."

This modern law merchant is „derived from two sources … international legislation and international commercial custom". The historical narrative aims at legitimating both and joining them as parts of a coherent system. It asserts the historical pedigree of international commercial custom as norms while at the same time describing and defending Schmitthoff's vision of the modern law merchant as an „entirely new phenomenon" with its own „strange, synthetic character". Accordingly he asks his reader to „forget the Victorian predilection of orderliness" and take the new law merchant „as what it was in the Middle Ages and what it will be again : unsystematic, complex and multiform, but of bewildering vigour, realism and originality."

Medieval imagery plays an important part in the discourse on lex mercatoria. Berthold Goldman and Clive M. Schmitthoff, the founding fathers of the modern lex mercatoria, both combined the approach of transnational arbitration with the evocation of the customary mercantile law of the Middle Ages, taking into account the normative power of trade usages in private contracts as well as the general principles of law. Thus, the doctrine of modern lex mercatoria was invented by two European professors on the basis of a romantic vision of medieval lex mercatoria and transnational arbitral experience. They conjured up an idyllic image of an international community of merchants interacting on the basis of shared values and customs, independent of local borders and law－a kind of self-governing transnational community. It is this model of self-governance that the idea of a modern lex mercatoria seeks to reinvent.

While Goldman and Schmitthoffs romantic vision remained rather vague on details, Harold J. Berman managed to reinstall new vigour into the foundational myth of the lex mercatoria with the treatment of the

medieval law merchant in his popular work *Law and Revolution*. Generally acknowledged as „a great work of synthesizing scholarship", *Law and Revolution* has become the standard introduction to the history of Western law across the world. Berman 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. 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. Berman 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." Since then, Berman has been quoted as one of the main authorities legitimizing the proposition that there really was a universal lex mercatoria with a history of almost a millenium.

However, the evidence strongly suggests that Berman's classic account is 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 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. 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. 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, and full negotiability, which Berman assigns to the twelfth century, likely did not emerge until the fifteenth century. And finally, the creation of commercial courts appears to have been a development of the end of the twelfth or beginning of the thirteenth centuries.

The merchant law of the Middle Ages was rather unlike that portrayed in much of the recent international commercial law scholarship. It 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. 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.

Colin Blackburn, remembered as one of the great exponents of the common law, spoke with conviction when he wrote in 1845 that there was „no part of the history of English law more obscure than that connected with the maxim that the law merchant is part of the law of the land." Since then there have been detailed studies of the medieval law merchant and of the later development of English mercantile law, but the

precise status of the law merchant in England and the nature of the process by which it supposedly became fused with the common law remain as obscure as they were in 1845. The obscurity begins with the very concept of the „law merchant", which has been differently understood by different writers and continues to be used in widely divergent senses. It is possible to collect enough references to the *ley marchaunt or lex mercatoria* to indicate that medieval English lawyers regarded it as something different from the common law. The most famous passage is in the Year Books, where Dr. Robert Stillington is reported as saying that ley marchaunt was the same thing as *lex naturae*, „which is a universal law throughout the world."

Nevertheless, it is far from clear that this law merchant was conceived of as a distinct body of substantive law. There were no doctors *in lege mercatoria*, and even the *ius gentium* was not taught in the Schools. Most of the medieval literature consists in codes of mercantile procedure observed in particular cities and towns; and at this level, far from there having been a universal law throughout the world, the local variations seem as numerous as the coincidences. At the level of substantive principle, on the other hand, it is doubtful whether any distinctions were made at all between the law merchant and the common law. When medieval lawyers distinguished systems of „law" they usually had procedure in mind. Substantive justice was immutable, invariable and, of course, unattainable on earth; in the mortal world the quality of justice depended on the available mechanisms.

The one surviving medieval English treatise on the *lex mercatoria* makes this point very clearly. The most important source known to us is a short treatise called Lex mercatoria. Written in the late thirteenth century, around 1280, it is the earliest treatment of the law merchant. The only

copy of the treatise is found as part of a collection of material made by William de Colford, the recorder of Bristol in the 1340s, and eventually bound into The Little Red Book of Bristol, which owed its name, like many other medieval town books, to the colour of its cover and to its size. The Little Red Book contained a variation of entries regarding the law of commerce, among others one of the oldest copies of the famous Rôles d'Oléron, a collection of maritime laws from the west coast of France dating from the middle of the 13th century. It was first published in 1900 by Francis Bickley in a two-volume, partial edition, and it has been cited from that edition many times since then. Bickley did not translate the text in question however, as he realized that it presented serious difficulties. In 1962, Paul Teetor translated Bickley's text for the first time, however he did not re-edit nor reprint Bickley's text, which has long been out of print and hard to obtain. Since 1998 there is an excellent new edition and translation of Lex mercatoria by Mary Elisabeth Basile, Jane Fair Bestor, Daniel Coquillette and Charles Donahue, which has given us new insights and deeper understanding of the medieval law merchant.

Lex mercatoria is divided into twenty-one chapters and follows a clear structure : after two relatively brief chapters on the nature of mercantile law and its relationship to the common law, the author takes us through a law suit in a mercantile court, beginning with the record of the plaintiff's initial appearance and ending with attaints and the transfer of records from one mercantile courts to another for the purpose of supporting a claim of res iudicata. Overall, the treatise has a logical and clear structure, which is that of a lawsuit. The structure of the treatise thus follows the structure of an *ordo iudiciarius*, although it must not be assumed that the author was familiar with the *ordines iudiciarii*; law

teachers from the twelfth century on organized instruction along these lines, Glanvill's *Tractatus de Legibus et Consuetudinibus Angliae* being a notable early English example. The late thirteenth and early fourteenth centuries saw the production of a large amount of secular English legal literature. In addition to the well known revisions of Bracton called Fleta and Britton, there are a large number of lesser tracts that seem to be connected to law teaching of one sort or another. Most of these works concern the central royal courts at Westminster and the procedure of the royal justices in eyre, some of them, however, concern other courts as the court baron or the ecclesiastical courts. Lex mercatoria obviously belongs to this genre of instructional literature. It is a practical instruction book about courts that operate according to mercantile law, combining „precedents", i.e. sample entries for clerks recording the proceedings of the court and oral formulaw to be used by witnesses sworn before the court, with narrative instructional material giving rules for the conduct of the court. The central argument of Lex mercatoria concerns the relationship between mercantile law and common law. Within the general structure of an ordo iudiciarius, that relationship provides a frame for the exposition of material throughout the treatise. At the very beginning of the treatise we learn that mercantile law „is thought to come from the market" (a mercato provenire sentitur). While the scope of mercantile law would therefor appear to depend on the concept of a market, that concept is nowhere explained. According to the author, what we need to know is not what constitutes a market, but where markets are held. We learn that mercantile law is attached to five types of sites : cities, fairs, seaports, market-towns and boroughs.

„I. What, When, Where, Among Whom, and Concerning What It Is.

Mercantile law is thought to come from the market, and thus we first need to know where markets are held from which such laws derive. So it should be observed that such markets take place in only five [types of] place, specifically in cities, fairs, seaports, market-towns, and boroughs, and this by reason of the market."[1)]

We also learn that the timing of legal actions is integrally tied to the hourly and daily rhythms of market activity at these sites (in cities and fairs from hour to hour, in seaports from one high tide to the next, and in market-towns and boroughs from one market to the next), and that the mercantile law can entertain all pleas excepting those of land (which are within the sole competence of the royal courts of common law) :

„To these laws naturally pertain all pleas excepting only those of land."[2)]

Hence the argument is that, with this important exception, the same range of pleas can be tried in mercantile courts as in the common law courts, at least with respect to civil cases. The author continues to give an account of the procedural differences and similiarities between the two laws, an account that frames the treatise as a whole.

„II. In What Way Mercantile Law Differs from the Common Law.

The law of the market differs from the common law of the kingdom in three

1) "[I.] Que, cuando, ubi, inter quos et de quibus sit
Lex mercatoria a mercato provenire sentitur et inde primo sciendum est ubi mercatur se tenet de quo huiusmodi leges proveniunt. Unde advertendum est quod mercatum huiusmodi se habet in quinque locis tantum[,] scilicet in civitatibus, nundinis, portubus supra mare, villis mercatoriis et burgis[,] et hoc racione mercati."

2) "[I.] … Ad leges ista pertinet naturaliter omnia placita preter placita terre tantum."

general ways. First, it generally delivers itself [of a judgement] more quickly.

Second, whoever pledges someone to answer for a trespass, covenant, debt, or detinue of chattels pledges the whole debt, damages, and costs of the plaintiff, if the one pledged is convicted and does not have enough [to pay the judgement] within the bounds of the market. And if the one pledged happens to be first attached by gage or by chattels and afterwards he takes the gage away, when the market-reeve lets him take it outside the bounds of the market on account of such a pledging, the pledge should answer the court or the plaintiff for a gage of this sort or its value.

And [the law of the market] differs in a third way because it does not admit anyone to [wager of] law on the negative side, but in this law it always belongs to the plaintiff to prove, for example, by suit or by deed or both, and not to the defendant."[3)]

Three general points of difference are listed: first, mercantile law decides cases more quickly; second, the pledges in mercantile law pledge the whole debt, damages and costs of the plaintiff; and third, mercantile law does not permit wager of law on the negative side; instead it falls on the plaintiff to prove his case, by suit or deed or both.

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3) "[II.] Quomodo lex mercatoria differt a lege communi.
Lex mercati differt a communi lege regni tribus modis in genere [:] primo quod celerius deliberat se ipsam.
Secundo quod qui plegiat aliquem ad respondendum de transgressione, convencione, debito seu catallorum detencione plegiat totum debitum, dampnum et expensas querentis, si plegiatus suus convictus sit et non sufficiat infra bundas mercati, et si forte plegiatus ille primo sit attachiatus per vadium sive per catalla et postea vadium illud elongaverit vel dimissum fuerit per huiusmodi plegacionem per prepositum mercati extra bundas mercati, respondeat plegius de huiusmodi vadio seu eius precio curie seu querenti.
Et tercio modo differt in eo quod non admittit aliquem ad legem in parte negativa, sed semper in ista lege querentis est probare, ut per sectam vel per factum seu per utrumque et non defendentis."

„And with respect to other matters, such as prosecutions, defenses, essoins, defaults, delays, judgments, and executions of judgments, the same process should be used in both laws."[4)]

This assertion both explains and foreshadows the importance of the common law as a point of reference in subsequent chapters, although the relationship between the two laws turns out to be considerably more complex than this simple rehearsal of similarities and differences would suggest. The comparative concerns of Lex mercatoria make the treatise a particularly good source for considering the vexed question of the early relationship between the common law and the mercantile law. All three differences mentioned – the speed of process, the liability of pledges to answer, and the denial of wager of law – point only to procedural differences, not substantive ones. The various chapters deal with pledges to prosecute and order to attach (III.), delays and excuses for non-appearance in court (IV.), pledges of defendants who do not appear in court (V.), pleading and proof (VI.). We learn only incidentally of another another difference to the Common Law, which the author seemingly took for granted, so that he no longer specifically mentions it in his juxtaposition of lex mercatoria and Common Law:

"In every market court, every judgement ought to be rendered by merchants of the same court and not by the mayor or by the seneschal of the market."[5)]

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4) "[II.] … Et quod alia, ut quoad prosecuciones, defensiones, essonia, deflate, dilaciones, iudicia et executiones iudiciorum, observandus est idem processus in utrisque legibus."

5) "[XIII.] In omni curati mercati singula iudicia reddi debent per mercatores eiusdemcurie et non per maioremnec per senescallum mercati". The White Book of London goes even further, prescribing a jury "half of denizens and half of foreigners dwelling in the town", cf. Mary Bateson (ed.), Borough Customs. Selden Society Vol. 21. London 1906, 184.

On the other hand, the author of the treatise pays particular attention to the aspects of the procedure which lead to a swift judgment : after mentioning that the commercial courts are guided by the pace of market acticity, so that they are held hour by hour in the cities and fairs, from tide to tide in seaports and from market day to market day in the market towns and boroughs (I.), he states that the Defendant should be granted a deferment only once; otherwise he is to appear within one day respectively within an hour in cities and fairs (IV.); if the defendants defaults, his good are to be confiscated immediately, valued and sold by merchants not involved in the matter (V.), and the execution of the judgment is to be effected immediately (XIII.).

Expeditious procedure and swift judgement are certainly the hallmark of the lex mercatoria, and we hear about this from other sources too. Bracton mentions that in the Piepowder Courts of the fairs less than the fifteen days prescribed by common law may suffice for the defendant's summons :

> "Also because of persons who ought to have swift justice, as merchants, to whom justice is done piepowder, and thus, for good reason, the time of summons is shortened and sometimes provides a period of less than fifteen days".[6]

When Edward I. extended the protection of the law to all foreign merchants who came into the country with the king's permission or upon his invitation, he ordered the royal magistrates of the fairs, markets, cities and boroughs in the Carta Mercatoria of 1303 to do justice to the

6) "Item propter personas qui celerem habere debent iustitiam, sicut sunt mercatores quibus exhibetur iustitia pepoudrus, et sic ex causa moderatur tempus summonitionis et continet minus tempus quandoque quam spatium quindecim dierum", Henry de Bracton, De Legibus et Consuetudinibus Angliae. l. v. f. 334 a.

merchants, day by day and without delay :

> "All bailiffs, and ministers of fairs, cities, boroughs and market-towns, do speedy justice to the merchants aforesaid, who complain before them from day to day without delay according to the law merchant touching all and singular plaints which can be determined by the same law."[7]

Fifty years later, the English king, now Edward III., once again endeavored to bring foreign merchants into the country. He granted special protection to foreign merchants in the fifteen ports of staple for wool, leather, and lead, and in the Statute of the Staple of 1353 he stated that the merchants trading in those ports were subject to the law merchant in all matters concerning the Staple trade :

> "We have ordained and established, That the Mayors and Constables of the Staple shall have jurisdiction and cognisance within the Towns where the Staples shall be, and that all merchants coming to the Staple, their servants and household in 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 the usage of cities, boroughs or other towns; and that they shall not implead not be impleaded before the Justices of the said places in pleas of Debt, Covenant and Trespass touching the Staple".

Similar to the Little Red Book of Bristol, however, the Statute of the Staple only mentions procedural when speaking of the law merchant. Again, it is all about swift procedure :

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7) Carta Mercatoria, 31 Edw. I

"Because we have taken all the merchant strangers coming into our said realm and lands into our special protection and moreover granted to do them speedy remedy of their grievances, if any be to them done; We have ordained and established, That if any outrage or grievance be done to them in the country out of the Staple, the Justices of the place where such outrages shall be done shall do speedy justice to them according to the Law Merchant from day to day and from hour to hour, without sparing any man or to drive them to sue at the Common Law".[8)]

The swiftness of the proceedings as the most outstanding feature of the Law Merchant left a lasting impression on the English lawyers; accordingly Coke was of the opinion that the courts of the fairs were named Piepowder Courts, because they had to decide before the dust could have fallen from the merchants' feet :

"… for contracts and injuries done concerning the fair or market there shall be as speedy justice done for the advancement of trade and traffick, as the dust can fall from the foot, the proceedings there being *de hora in horam*."[9)]

Commercial litigation was a feature of the Borough courts; in the court of the Fairs it was predominant. The right to hold a fair or market, derived from the Crown, was usually accompanied by a grant of jurisdiction, and by the fifteenth century a court was assumed to be the normal incident of a fair. It was known as a Court of Piepowder to commemorate the pedlars who trailed their dusty feet (pieds poudrés or

8) Statute of the Staple, 27 Edw. III, Cap. 20
9) Sir Edward Coke, The Fourth Institutes of the Laws of England. Concerning the Jurisdiction of Courts. London 1809, 272.

pede pulverosi) from market to market, and, while open to local residents, was of peculiar interest to „stranger merchants", whether English or foreign.[10] Its jurisdiction was wide in scope and without monetary limit. The president was the steward of the manor or the mayor of thie borough to which the fair pertained, but, in its high time the law was declared by the merchants themselves. The distinctive quality of the procedure was speed which can be seen by the progress of a case heard in Colchester in 1458: The plaintiff sued for the recovery of a debt at 8 a.m., and the defendant was summoned to appear at 9 o'clock. He did not come at that hour, and the sergeant was ordered to distrain him to come at 10 o'clock, at which hour he made default. Similar defaults were recorded against him at 11 and 12 o'clock, At the latter session judgmenet was given in favour of the plaintiff, and appraisers were ordered to value the defendant's goods which had been attached. They made their report at 4 o'clock, and the goods were delivered to the plaintiff.

This expeditious procedure was the result of procedural rules prescribing close successive court sessions as well as fast summons and executions, but also the consequence of its much more informal nature, as the litigants did not have to adhere to the common law actions in their full severity and complaints could be made without the requirement of a writ. The Law Merchant thus differed significantly from the formalistic procedure of the royal courts as well as the ordinary procedure under canon law. This is also evident when Lex mercatoria denies wager of law as a means of establishing a negative. It was this rule which most often occasioned discussion in the courts of common law, because it enabled

10) "Extraneus mercator vel aliquis transiens per regnum non habens certam mansionem infra vicecomitatum sed vagans qui vocatur piepowdrous hoc est anglice dustifute", Fragmenta Collecta c. 29, cit. Charles Gross, Select Cases concerning the Law Merchant: Local Courts. Selden Society Vol. 23. London 1908, xiv.

plaintiffs to prove informal contracts by tally or suit.

According to the treatise, wager of law by the defendant is barred in mercantile actions. Proof always belongs to the party asserting the claim; the law of the market differs from the common law, „because it does not admit anyone to [wager of law] on the negative side, but in this law it always belongs to the plaintiff to prove, for example, by suit or by deed or both, and not to the defendant. This is an important claim, the more so as it was far from the actual practice of the day and as there was a great deal at stake : Ideas of proof were central to the understanding of law in this period, and any proposal for change could be perceived as threatening to the legal order.

Even in the late thirteenth century, English law (*lex*) was centered on the conduct of a lawsuit, and proof lay at its heart. The structure of legal process was shaped by the „ancient pattern of law-suit", in which judgement was not about deciding the guild or innocence of the parties -which rested in God's hands-, but rather about the choice of which side was to prove and had the appropriate means of proof. The word „law" had acquired a transferred meaning of „proof" in an earlier peroid, so that the means by which the law was manifested came to stand for law itself. The duel and the ordeal were are termed *lex* or *lex Dei* in Norman sources, and the oath itself came to be known simply as „law", lex in latin, Recht in German - the oath was „law" par excellence and still viewed with awe in the late thirteenth century.

The ancient pattern of the law-suit presupposed that civil litigation was a contest between the parties that was weighted by the assignment of proof to one side. The *Leges Henrici Primi* tell us that where someone wishes to appropriate something held in common, the party who has better evidence is „closer to proof", that is, he has the right to prove. But

if the parties are equally matched, then the person who has possession is closer to proof than the claimant. In the late thirteenth century, Fleta states this proposition as a general rule, but with a shift in application from the type of claim to the type of proof offered. When the plaintiff produces suit, the defendant can wage his law with double the number of the plaintiff's witnesses. But is done differently in cities, fairs and for merchants :

> "So that justice may be even-handed, the proof of the defendant is preferred to that of the plaintiff … And what is said about suit for proving verbal statements can be said about suit produced to prove tallies, for, if they are put forward without suit, the simple oath of the defendant will be accepted against them. The position is different, however, in cities and fairs and among merchants, in whose favour, by grace of the prince, it is granted that proof shall be the privilege of the party asserting the claim, in accordance with the law merchant, and merchants are permitted to prove, by witnesses and a jury, tallies that are repudiated."[11]

Proof is a benefit in this period and not a burden, and according to Fleta, this benefit has shifted by the rules of the mercantile law to the plaintiff, at least when he proffers a tally. Lex mercatoria is roughly contemporary with Fleta, which is dated to about 1290; both works

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11) "In paritate … iuris prius admittatur defensor quam pars actrix in probacione .. Et quod dicitur de secta ad vocem probandam dici poterit de secta producta ad tallias probandas, contra quas sine secta prolatas simplici sacramento negans erit credendum. Secus tamen erit in civitatibus et nundinis et inter mercatores, quibus ex gratia principis conceditur ob favorem mercatorum quod parti affirmative secundum legem mercatoriam erit probacio concedanda, et ipsis conceditur tallias dedictas probare per testeset per patriam", H.G. Richardson/ G.O. Sayles(Hrsg.),Fleta,seu Commentarius juris anglicani, Vol. 2. Selden Society Vol. 72. London 1955, 211 f.

express a movement to restrict the use of wager of law in the last decades of the thirteenth century. The position that they state concerning proof may well be based on the place of tallies in mercantile law. Tallies were used as receipts for money or other items rendered, such as bags of corn at a mill, and also as records of obligations to make payments. The appropriate sums were shown on the tally by notches of differing widths, depths and intervals. Like a chirograph, the English tally was a bipartite record. When the notches had been cut on the stick, to the satisfaction of both renderer and receiver, the tally was split down its length so that each party had the same record. The interlocking halves were intended to act as a check against forgery. Although the numbers on the tally were cut with a knife, the names and businesses of the parties it concerned were written in script in ink. Tallies were not a primitive survival from the preliterate past, but a sophisticated and practical record of numbers. They were more convenient to keep and store than parchments, less complex to make, and harder to forge. They were the foundation and origin of the royal financial system of the twelfth century, and were widely adopted by private accountants in the thirteenth.

There is a wealth of evidence that in mercantile law possession of a tally gave the party asserting the claim the benefit of proof. The generalization of this rule to a broad principle that proof]always belongs to the party asserting the claim may have been influenced by the similar principle in Romano-canonical procedure, with which the author of the treatise was obviously familiar. It has also been argued that this shift may have been subtly influenced by the development of arithmetical thinking, which was promoted by the expansion of trade in the thirteenth century. The increasing use of arithmetic, considered „the purest manifestation of reason", may have encouraged the use of rational methods of proof in

law, particularly in the sphere of commerce. There is considerable evidence that wager of law was perceived as an inadequate means of proof in the late thirteenth century, and borough custumals bear proof of experiments to redress the problem by substituting interrogation of witnesses. The charter of Edmund Crouchback to Leicester of 1277 describes the problems with wager of law and outlines a system of proof that look remarkably like the one described in Lex mercatoria; it seems highly likely that the author of the treatise knew that this or similar reforms were being undertaken in some courts to substitute proof by witnesses for wager at law in cases of debt.

The difference was vital in practice, but it was a once again a difference as to evidence and proof; there is no suggestion that the law merchant had its own substantive law of contract. Even more damaging to the traditional view is the discovery from twentieth-century record searching that the procedure of the law merchant was not at first regarded as being totally divorced from the procedure of the King's central courts. In the thirteenth and early fourteenth centuries it was possible for the King to empower his own justices to proceed according to the law merchant, either by special writ or by commission; and there was perhaps a body of opinion favouring the automatic application of mercantile customs as to proof, where the parties had made their contract according to the law merchant. In later medieval times, perhaps because of jury difficulties, perhaps because of the increasing insistence on due process, such cases were channelled into the King's council and the writs secundum legem mercatoriam disappeared from the books : all, that is, except the writ of account between mercantile partners, which was known to Fitzherbert and Coke.

It is against this procedural background that Dr. Stillington's remark is

to be understood. The medieval law merchant was not so much a corpus of mercantile practice or commercial law as an expeditious procedure especially adapted for the needs of men who could not tarry for the common law. It was essentially negative. Like the justice of the Chancery, it offered an exemption from or a short circuit through, the delays of due process as embodied in the forms of action and jury system of the two benches. The context of the remark was a case in the Star Chamber in 1473 arising from an alleged felony by a foreign merchant. It had been objected that felony was a matter for the common law, to which the chancellor replied that an alien merchant was not to be delayed by the common law, „but ought to sue here; and it shall be determined according to the law of nature in the Chancery, and he ought to sue there from hour to hour and from day to day for the speeding of merchants." The objection, and its answer, related solely to procedure : that is, whether the merchant should have been arraigned upon an indictment duly found by a grand jury.

Towards the end of the medieval period the local mercantile courts suffered a decline. The reasons for and the extent of that decline have yet to be firmly established, but it is possible to guess. Many of the courts came under the control of legally trained recorders or stewards who, wittingly or otherwise, may have substituted some of the formality of the common law for the flexible procedures which characterised the medieval law merchant. By early Tudor times actions of assumpsit, following exactly the formulae of Westminster Hall, are to be found even in courts of piepowder; and the records of piepowder and guildhall courts could be removed into the King's Bench by writ of error, to be subjected to judicial review by common-law standards. Although the King's Bench acknowledged the propriety of some procedural flexibility in local courts,

it would doubtless not have countenanced any appearance of arbitrariness. The early readers on the statute of *Quo Warranto*, indeed, maintained that a fair would be forfeited to the King if the piepowder jurisdiction was abused in that way :

> „If a man has a fair and abuses the court of piepowder, all the fair and the court shall be forfeited. And the court may be abused [in various ways]. If he will not suffer the party to make defence, but condemns him upon the declaration, this is abuse and forfeiture. And likewise if he will not suffer the plaintiff to reply to the bar, but bars him without answer. And likewise if he takes a trial by proofs or by eleven men, where it should be by twelve. And likewise if the party wishes to wage his law, where he ought to do it by law, and he will not suffer him to have such trial, this is a forfeiture."

The mention of special pleading, jury trial and wager of law suggests that a considerable change of practice had occurred in these courts since the thirteenth and fourteenth centuries. And there may have been other abuses than those mentioned in the quotation. The statute of 1477 concerning fair courts suggested that the courts had become so unpopular that stewards had felt the need to enlarge their jurisdiction by means of fictions, that feigned actions and embracery of jurors were rife, and that as a result merchants avoided going to those fairs where they might expect exorbitant or unfair legal action. For reasons such as these the old law merchant proved insufficiently attractive to prevent merchants having recourse to the central royal courts. Another factor in the decline of the local courts, though whether it was a cause or an effect is less clear, is the rise of the action of assumpsit for money, which made a substantial difference to the outward appearance of mercantile suits in the King's

Bench records.

By allowing use of the assumpsit formula the King's Bench took overt cognisance of a wide range of commercial transactions, including insurance and partnership agreements. No doubt the court was not averse to capturing some of the business of the admiralty and borough courts and diverting mercantile business from the Council and Chancery. Yet there is no evidence of any idea that the King's Bench was incorporating some distinct body of law merchant. There is no hint that the mercantile character of the transaction in itself made any difference to the result, nor was there a commission in these cases to proceed according to the law merchant. The law merchant was not even mentioned in the declarations. The King's Bench had merely removed the procedural barriers which had in the past prevented the two benches from enforcing such transactions in a direct way. This amounted, no doubt, to a substantial change in the common law. But it was part and parcel of the general development of assumpsit to enable the enforcement of all parol undertakings. And, since there were no set formulae in assumpsit, it was possible to adapt its forms to charge the various parties to bills of exchange. Apart from occasional use of the phrase *secundum usum mercatorum*, in none of the sixteenth -century cases was there any attempt to lay the custom of merchants in the declaration.

Altogether we must conclude that there was no „incorporation of the law merchant" into the common law before the eighteenth century. The common law had always provided remedies in commercial cases, and it adapted as fast as its formulary system would permit to the requirements of commerce. The scope of the common-law remedies, however, is only perceptible to historians after the introduction of assumpsit, which permitted far more of the facts to be placed on record. Mercantile customs

were either local facts or they were the common law of England. In so far as the judges took notice of such customs as common law, they were not taking over for their own use a preexisting body of jurisprudence. The lex mercatoria in its principal medieval sense of speedy procedure was never adopted by the common law; the substantive mercantile law, on the other hand, had no existence as a coherent system of principles before the common law itself developed the means of giving it expression.