TEL AVIV UNIVERSITY אוניברסיטת תל-אביב

THE BUCHMANN FACULTY OF LAW
THE ZVI MEITAR CENTER FOR ADVANCED LEGAL STUDIES
THE BERG INSTITUTE FOR LAW AND HISTORY

הפקולטה למשפטים ע"ש בוכמן
מרכז צבי מיתר ללימודי משפט מתקדמים
מכון ברג למשפט והיסטוריה

היסטוריה של המשפט – סדנת יגאל ארנון ושות'

The Yigal Arnon & Co. Law and History Workshop

משפט והיסטוריה – מאמרים בדרך

Law and History Working Papers

1/5775

Beyond the Myth of *Lex Mercatoria*

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Goethe Universität Frankfurt

11 March 2015

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BEYOND THE MYTH OF LEX MERCATORIA

A.

"Advocates of private ordering have fallen in love with the Middle Ages", writes the Chicago-based legal historian Emily Kadens in her 2012 essay, in which she investigates in minute detail how this love is expressed through the argumentative use of the Middle Ages in support of the new international customary trade law understood to be growing up[1]. The object of this love is certainly far removed from the historical reality; in fact it is little more than a roughly-outlined ideal of the Middle Ages, made in order to help the new law merchant on his way.

Whether he actually needs this support is beside the point: the question does not fall under the responsibility of the writer. However, it is unlikely. If, for example, it were possible to prove that the ship owners of the 13th Century in Venice and Bruges really did orientate their sea trade contracts on similar principles, this would not help with

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[1] *E. Kadens,* The Myth of the Customary Law Merchant, in: Texas Law Review Bd. 90, o.J. [2012], 1153-1206 (url: http://www.texaslrev.com/wp-content/uploads/Kadens-90-TLR-1153.pdf; 3.2.2014). Given the limited space available here, I will refrain from quoting evidence in most cases and refer the reader to my article Lex Mercatoria, in: Handwörterbuch zur deutschen Rechtsgeschichte (HRG) Bd. 3, 2. Aufl., 20. Lfg. (due for publication in 2014). (The online version of the HRG can be accessed at www.hrgdigital.de; the Goethe University has acquired a campus licence for the work.) Only works not named there are quoted here.

the question of whether today's ship owners in Rotterdam or Singapore do the same, nor with the question of whether they should do so.

In theory, this is right and a good thing. The answer to whether a private court system is truly able to solve conflicts in international commerce more quickly, fairly, justly and cost-effectively than the state judiciary, and to whether the rights of the poorer, weaker parties are appropriately protected in the process, must be found without drawing on earlier legal history. However, the obligation of pre-modern legal history is to remind us of the great leap forward in terms of civilisation that was achieved at the end of the Middle Ages, when central high courts were introduced in many European countries, together with a general ban on feuding. These courts provided the merchants, among others, with an extensive right to be heard, and they made intensive use of this new access to courts in the centuries that followed. This leads to the warning, despite all the neoliberal enthusiasm and contempt for the national state and its hierarchical justice system, not throw the baby out with the bathwater and, especially, not (in a kind of misguided theory reception) to transfer criticism of the US judiciary 1:1 to European circumstances, which are of a different type altogether. But that is a different topic entirely.

This article will not focus on once again refuting the myth of *lex mercatoria* as an international legal system of medieval trade that was created autonomously by merchants from Palermo to Aberdeen, Lisbon to Novgorod. This debate, including the most important stages in its academic history, is elucidated in parallel to this in a more suitable work.[2] Instead, it is more interesting to consider what could, in future, replace the conceptual history of the *lex mercatoria* that has already been flogged to death – simply an argument about words to a great extent.

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[2] A. *Cordes*, article on Lex Mercatoria (as fn. 1).

B.

How could research into the history of medieval trade law move forward once the blinkers of the *lex mercatoria* myth have been removed? If the dogma of the '*una lex*' that, according to a quotation from Cicero, would have applied "to all peoples and at all times"[3], the field becomes less clear, but also more colourful and multi-faceted. In retrospect, one sees how simple and clear the medieval cosmos appeared in the light of the dogma of universality. Given the changed prognoses, however, gaining an overview differentiated by areas, time, objects and, initially, source groups is essential. It is time to re-survey the map of medieval trade law.

I. Source groups and their validity

In the five months between March 1247 and July 1248 (the new year began on 25th March), the notary Giraud Amalric registered over one thousand transactions in Marseille, over half of which were company agreements[4]. In 1311, a separate department for company agreements was set up in Lübeck's register of debts, the *Niederstadtbuch*, which is unusually rich in material by Hanseatic standards. Until this special department was disbanded in 1361, it registered 268 company

[3] M.T. *Cicero,* De re publica, III 33: "Nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit. » ; J. *Burrow*, Reports of Cases adjudged in the Court of King's Bench since the Time of Lord Mansfield's coming to preside in it, Bd. 2, 1758-1761, London 1766, 882-890.

[4] L. *Blancard* (Hg.), Documents inédits sur le commerce de Marseille au Moyen Age, Bd. I, Marseille 1884. Auswertung bei G. *Lastig*, Ein Beitrag zur [sic] Handelsgeschichte und Handelsrecht in Marseille, 1908.

agreements[5] – half of Amalric's 5-month-output in 50 years! The number of surviving contracts in Marseille exceeds that of Lübeck by a factor of over one hundred. Marseille was an important port in the Latin Mediterranean, but it was not as significant as Venice or Genoa, for example; Lübeck was the most important Hanseatic city in the 14th Century. Despite this, the volume of trade in Marseille was probably larger than in Lübeck, and many of the transactions registered by Amalric also had rather low volumes. However, it seems hardly possible that one hundred times more contracts were concluded in Marseille than in Lübeck. The Mediterranean is larger than the Baltic, but not one hundred times larger. Instead it seems that a much larger proportion of contracts in Lübeck were simply verbal ones. After all, in a whole series of contracts, the parties allude to the fact that they had had a business relationship for several years already, and were now taking a capital increase or the addition of a new shareholder, for example, as an opportunity to have the contract registered in the *societates* section of the *Niederstadtbuch*.

This example shows that, even in cases that play out in a very similar period and with very similar content, a large spectrum of disparate information is to be anticipated. In addition, these contracts documented by notaries or through entries in the city register are sources with very similar functions and intentions. Taking an overview of the relevant source groups, it quickly becomes clear that it will be extremely difficult to bring the patchy, pointillist information together into an overall picture. In any event, someone looking for sources in medieval trade law would have the following objects to choose from (in roughly chronological order).

If one disregards difficult-to-interpret information in Germanic popular law and other, less useful source groups, these objects are

- privileges and privilege forms;

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[5] A. *Cordes* / K. *Friedland* / R. *Sprandel* (Hg.), Societates. Das Verzeichnis der Handelsgesellschaften im Lübecker Niederstadtbuch 1311-1361 (Quellen und Darstellungen zur hansischen Geschichte 54), 2003.

- market, fair and customs regulations;
- notices on the internal affairs of merchants' guilds;
- *ius commune* and statutory sources, among which the market and city laws provide the richest information;
- city debt registers and notarial registers (from where the aforementioned example comes);
- court rulings;
- early legal treatises and evaluations, which were not joined by specialist trade law literature until the Early Modern Age;
- and finally, from the Late Middle Ages onwards, documents written by merchants themselves, including contractual documents, letters, wills and company directories.

As an aside, it is worth noting once again that only a minority of the sources in the list could theoretically be used as evidence that merchants autonomously created trade law in a kind of medieval *lex mercatoria*. These sources originate only from later periods, and would therefore certainly be unable to play the pioneering role attributed to them in older doctrines.

There is insufficient space here to offer more than this list. However, it is sufficient to show, simply enough, how strongly the progress and result of an investigation depends on the source situation, the types of sources available and their intended message, and therefore how hopeless it would be to attempt to make 'objective' overall statements. To name just one example: Is it possible to draw conclusions about actual business practice from the provisions in the Lübeck statutes of the 13th Century? Without other sources of different types also having been handed down, this question would be impossible to answer. But in this case, we are in luck: the aforementioned *societates* directory provides the necessary cross-references. The answer is that the city law reflects reality in the immediate temporal vicinity. However, contractual practice developed further, little by little and away from the wording of the standard, without the text of the city law being altered. When, for example, Lübeck's law was copied for the German community in the city of

Wisby on Gotland in around 1340, it had therefore lost much of its relation to reality.

II. Space and time: economic areas and periodisation

Already in the Middle Ages, Europe was located in the north-western corner of the Eurasian continent. Harold Berman's theory of the specific structure of Western law since the Bologna Law School and the emergence of the *ius commune* in around 1100 is especially unconvincing for the field of trade law, as it omits the worlds of Jewish, Arab and Asian trade. Particular features of any trade law in Latin Europe would first have to be proven through comparisons with Greek and Slavic Europe, as well as with regions outside Europe. If one is to avoid Euro-centric navel-gazing, the zones of contact with the Latins' eastern and southern neighbours need to be investigated. This would include Moorish and Christian Spain; the Sicily of Frederick II; the colonies of the Italian Maritime Republics in North Africa, the Levant, Constantinople and the Black Sea; the Byzantine and later the Ottoman Empire; and the Hanseatic-Russian encounters in Novgorod. In each case and on either side, both the rules that applied to domestic trade and those governing trade across boundaries need to be examined.

A single person can clearly not be expected to possess the expertise on sources and languages, nor the sheer working capacity, required to work through this entire list. It is no wonder that Goldschmidt's *Universal History of Commercial Law* [6] was never finished. Where attempts were made, they ended in superficiality and generalisation, for example in the defence of the *lex mercatoria* doctrine. To all intents and purposes, 'Europe' is poorly suited as an investigative framework for questions of the history of trade law – it is simultaneously both too broad and too narrow.

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[6] 3rd edition, Stuttgart 1891.

So how should one proceed instead? If one starts from a working hypothesis that the most economically active regions are also the most innovative in the field of trade techniques and trade law, attention should be paid to the following dynamic economic areas:

- Upper Italy and the Latin Mediterranean
- The southern and northern Netherlands
- Southern Germany and the Alpine region
- Northern France and England
- The Hanseatic League and Northern Europe
- The Iberian peninsula

These are not necessarily contiguous legal spaces or even closed legal circles; this concept is certainly anachronistic for the Middle Ages, when most people belonged to various legal systems. Instead, greater attention must be paid to the research into economic history that evaluates these areas and their economic dynamism. However, these regions obviously did not all develop the innovatory dynamism we are focusing on here throughout the entire Middle Ages. The above list therefore shows the regions in an approximate chronological order. Periodisation across all regions is correspondingly problematic, but is essential as a tool of orientation and limitation.

'The Middle Ages' are a European category, established since the Renaissance, in which the period that had just been negotiated was seen as an intermediate age; the cultural vale of tears between Great Antiquity and the present that was finally following. The category is not a good fit for economic and trade law history, and its application carries with it the risk of Euro-centricity. There is therefore no need to remain tied to the traditional medieval eras when periodising.

- Before 1100: Flourishing trade in the Arab-Byzantine areas of the Mediterranean,
- 1100-1250: 'Commercial Revolution' following the First Crusade in the northern Italian city states,
- 1250-1350: Before the Great Plague: Rise of the north-western centres, the Champagne fairs, Bruges, Cologne, London,
- 1350-1450L Late Middle Ages; high point of Hanseatic dominance in the North,

- 1450-1550: Early capitalism[7] (in the sense of Werner Sombart), age of great discoveries and well-funded Upper German trading houses,
- 1550-1650: Shift towards Western Europe, foundation of the large East India companies.

It would now easily be possible to summarise the suggested regions and periods in a framework – a matrix – and to highlight the dynamic and creative areas and time periods within it, for example the century following the First Crusade (1100-1200) in Upper Italy and especially Venice; the hundred years before the Great Plague (1250-1350) in England and Flanders; the century of early capitalism in the Upper German trading centres of Augsburg, Ulm, Nuremberg and Frankfurt (1450-1550) etc. This would result in intersections, which could be used to test the theory that there is direct correlation between economic booms and innovative power in trade law.

III. Objects of trade law

'*Lex mercatoria*' is not only the academic category that is rejected here as too sweeping and inaccurate, but also a specific source originating in England in the late 13th Century. There, it represents a code of procedure for market courts that was a simplified version of the normal proceedings under common law. The main differences are the extremely short duration of proceedings and the relaxation of the rules of evidence. In the most important source on this concept, the "Incipit Lex Mercatoria" treatise recorded in the city of Bristol's "Little Red Book" in the 1280s, the expression "*lex mercati*" is also used as a synonym for this central term. So is this a "merchants' law"

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[7] *W. Sombart,* Der moderne Kapitalismus. Historisch-systematische Darstellung des gesamteuropäischen Wirtschaftslebens von seinen Anfängen bis zur Gegenwart, 1928. (Also in Spanish; no English translation yet.)

or a "law of the market"? Does it deal with the law of the status of the merchants in feudal society, or with special rules for disputes between visitors to the market, regardless of their status? In modern terms, does it deal with subjective or objective transactions? The difference is not important to the anonymous author of the treatise; he does not differentiate between the two. The modern observer must therefore also resist making this distinction, and certainly cannot set out any limitations between the two when defining his field of investigation. Specific, detailed studies must make this decision anew, depending on the precise task they are pursuing, but if one first intends to mark out the entire territory, it is important to deal with both merchants' and market and fair law.

There are three key fields: the procedural law of the market courts; internal merchants' law for transactions within the respective legal area; and external merchants' law, which had to be effective even for transactions across boundaries.

The oldest and most comprehensive section of commercial law is procedural law. Within this, the most important topic is the legal status of the merchant abroad, and especially before foreign courts. For example, it was the status of the merchants before foreign courts that played by far the most important role in the privileges gained by the Hanseatic merchants from the sovereigns of their foreign business partners from Portugal along Europe's northern shores to Russia. The next most important topics were exemptions from wrecking law and from collective liability for all debtors from the same city. The interests of foreign merchants are very similar everywhere: proceedings being scheduled as quickly as possible; the open possibility of being represented before a court and thus that the proceedings do not prevent continuation of the journey; equal representation in the court and especially in the jury etc.

The law of evidence, which is also handled in some detail in the aforementioned "*lex mercatoria*" treatise, is particularly interesting and exciting. In the treatise, the merchants' wishes clearly show the general development in procedural law. At a time when trial by ordeal and especially trial by battle still played a significant role, the merchants

fought for exemption from the ordeal and recognition of the defendant's oath of purgation, ideally without compurgators. As the recognition of rational evidence, predominantly records and witnesses, began to assert itself under the influence of canon law, the position of the merchants also changed in favour of the claimant. Their demands were now focused on allowing these types of evidence before the courts responsible for them, too.

Internal merchants' law refers to those matters that remain within the group, i.e. among guild members, fellow citizens or allies. One possible explanation for the great economic success of the Hanseatic League in the late Middle Ages is that it was successful in extending this internal circle a long way, ideally across the entire Hanseatic region and even beyond it into the trading stations. The feature that these matters all share is the lack of external pressure to adapt. Foreign law may act as an example, but the functioning of trading life did not depend on the application of the same rules as the neighbours. This included corporate law in a broad sense, i.e. including other contracts that governed investments (sea loans, other shareholder loans, commission transactions), as well as guardianship and, in general, all other rules of family and inheritance law that impacted on the composition of companies and other forms of business cooperation. This field includes all contracts that allowed the risk of investments to be reduced, for example insurance and deposits at domestic banks, too.

It was a different story for external merchants' law, i.e. all the rules that had to remain in place when borders were crossed. Here there was immediately an inherent necessity for assimilation, at least to the extent necessary to allow contracts with foreign parties to be reliably met and, if need be, asserted under compulsion. Regardless of whether a transaction was made with foreign guests, on trips abroad with the locals of that country, or between guests who were both on foreign soil, in order to stabilise trade, it was essential to reach agreement at the lowest common denominator, even if only to assure the foreign party of safe conduct on the outward and return journey. Therefore, here – in the case of purchase and exchange including market, fair and

stock exchange transactions, in payments and all exchange law, as well as in transport law and especially maritime law – those involved were subject to pressure to adapt, which became stronger the more intensive contact with foreign parties became. This difference in proximity to foreign law is eloquently expressed, for example, in the constant disputes between the Hanseatic merchants who were constantly at work in the trading stations, especially in Bruges and London, and their cousins at home.

C.

That was just a brief proposal – so far fleshed out mainly with Hanseatic examples – for a framework for future research into the history of trade law in the Middle Ages. But what is it good for? Does a framework like this not need to have a subordinate function and be adapted to the specific task being pursued in each case? The choice of a certain question, which would have been necessary at the beginning, has been put off until the end here, so that the opportunities for a complete overview can be defined and put up for discussion. What would Levin Goldschmidt's *Universal History of Commercial Law* look like if it were written in the 21st Century? In order to complete the work this time, one would have to either escape into superficiality[8] or limit oneself strictly to certain intersections. But which intersections to choose? One runs the risk of making random, arbitrary choices.

The framework is therefore necessary in order to demonstrate the exemplary character of the intersections. In order to prevent them amounting to nothing more than the history of the town or country and thus being devoid of any effectiveness for the overall project, it

[8] This is the route taken by the only two histories of trade law ever completed, one hundred years apart: P. *Rehme*, Geschichte des Handelsrechts, 1913 and R. *Szramkiewicz*/O. *Descamps*, Histoire du droit des affaires, 2nd Edition Paris 2013.

must be possible to locate them on the map of medieval trade law. By the same token, they are necessary in order to test the overall framework and correct it if necessary.

One obvious weakness of the model is its rigidity. Even if one is prepared to modify it based on impressions from the individual studies, in principle it remains static. Only with great difficulty can it record developments that emerge over a long time, such as the increase in literacy among merchants. Mobile trading groups and peoples, such as the Vikings, Friesians and Syrians in the Early Middle Ages, and Lombards and Cahorsins in the Late Middle Ages, and also the trading forms of the diaspora, especially the Jewish merchants who did business with relative ease across the Christian-Muslim boundary, are all also difficult to classify.

But it is precisely these weaknesses that also form the framework's strengths. Because of its stationary and inflexible nature – a kind of wooden framework – its system of coordinates allows dynamic processes to be described and even located in the overall pattern, even though this still has many white patches (and surely always will). Even if one does not know the impact a certain factor – a military victory, a climatic fluctuation, a technical innovation – had on the neighbours, the framework makes it possible to describe which changes this factor triggered for a specific region at a specific time.

It is here, and not in proving a continuity that is both doubtful and irrelevant, that earlier trade law history can make a contribution to the debate on future international trade law under the auspices of 'private ordering'. For many years, the Cologne-based trade law expert Klaus-Peter Berger has been collecting evidence for this kind of new *lex mercatoria* on his website www.translex.org and putting it into a systematic order, regardless of its origins. This is creating a synopsis of legal provisions, court rulings, decisions and academic opinions that is not far removed from the method suggested here for entering the results of individual studies. There, however, it is being done with a normative objective, with the expectation that it will allow the contours of world trade law in the future to be established little by little. This makes the job of a legal historian both easier and more

difficult. His sources may be even more scattered and harder to read and understand, but he is not expecting a specific result. His answer to the central question of the similarities and differences between the circles of trade law in the Middle Ages remains unclear.