

## Customary Commercial Law, Credibility, Contracting, and Credit in the High Middle Ages, Bruce L. Benson

**ABSTRACT:** Hayek (1973, 83) pointed out that “It is in the ... law merchant, and the practices of the ports and fairs that we must chiefly seek the steps in the evolution of law which ultimately made an open society possible.” A large literature has examined this medieval *Lex Mercatoria*, or Law Merchant, much of it supporting Hayek’s contention, but there also is a growing literature criticizing the Law Merchant story. One criticism is that during the high Middle Ages, and even the late Middle Ages, non-simultaneous trades were virtually nonexistent, so issues such as credibility of promises and enforcement of contracts were not relevant. Some critics go so far as to argue that the Law Merchant literature is grossly inaccurate, and that those who have written about the system have intentionally misused evidence in order to support a particular political view. Some of these criticisms are addressed in this paper. The medieval Law Merchant was customary law, and many of the criticisms of the literature reflect a misunderstanding of customary law. Therefore, this concept and its implications for interpretation of historical evidence are explained. Aspects of trade in the high Middle Ages are then discussed, stressing the roles of contracting and credit while simultaneously emphasizing some characteristics of the Law Merchant that apparently have not been adequately explained, given recent criticisms. Finally various relationships between the medieval Law Merchant and other legal systems are examined, as these relationships also are significant sources of misunderstanding underlying some criticisms.

Writing around 1020, Alpert of Metz described merchants in the town of Tiel as “men unaccustomed to discipline, who judge suits not according to law but according to inclination...” (Pertz 1925: 118). In other words, merchants did not follow what Alpert considered to be law.<sup>1</sup> If merchants were lawless, however, they were not *rule-less*, as a monk writing around 1000 A.D., Notger of St. Gallen, suggested. He explained that ‘negotiale’ referred to a situation in which a “dispute which arise about custom: as merchants maintain that a sale made in a fair should be binding, whether it is just or unjust, since *it is their custom*” (translate and quoted by Volckart and Mangels 1999: 439; emphasis added).<sup>2</sup> Quoting from eleventh century Maghribi documents, Greif (2006: 70) similarly stressed that,

Given the state of communication and transportation technology in the eleventh century, it is not surprising that the Maghribi traders ... employed a set of cultural rules or behavior – merchants’ law ....

The importance of the merchants’ law in determining expectations about and attitudes toward an agent’s behavior is reflected in the letter written by Maymum ben Khalpha to Naharay ben Nissim. In discussing the conflict between Naharay and his agent, Maymum justifies the agent’s actions by arguing that the agent “did something which is imposed by the trade and the communication [system; what you asked him to do] contradicts the merchants’ law.” .... In another letter a “very angry” merchant accused his business associate of taking “actions [that] are not those of a merchant.”

Greif (2006: 71) also noted that numerous early documents indicate that Islamic law was not applied to merchants because merchants were subject to the “custom of the merchants”. There are even earlier documents from the first half of the ninth century suggesting that merchants in parts of Europe were using different legal procedures than those employed in local communities (Kadens 2004: 43, note 17).

Clearly, even if merchants did not follow law as Alpert saw it, some kind of *law-like* institutional arrangements existed in much of Europe and the Middle East by the beginning of the high Middle Ages (roughly 1000A.D. to 1300 A.D.) that merchants considered to be relevant to their dealings. At least

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1. Perhaps Alpert was referring to Canon law, manorial law, local customary law, or early royal law (see Berman (1983) for discussion of the variety of legal systems emerging in Europe during the twelfth century). Alpert, who was a monk, clearly did not understand the rules that formed the basis of merchant dispute resolutions [nor did he approve of merchants, noting that “They begin their drinking bouts at the crack of dawn, and the one who tells dirty jokes with the loudest voice and raises laughter and induces the vulgar folks to drink gains high praise among them” (Pertz 1925: 118)]. Most writing during this period was by monks and other clerics, of course, and they probably had little incentives to concern themselves with the rules and processes of merchant law unless they observed something that was considered to be in violation of the Church’s law.

2. Volckart and Mangels (1999: 439, note 41) suggested that the monk was referring to “just prices” rather than legalities.

some non-merchants also realized that such institutions were important. These institutional arrangements continued to evolve throughout this period, resulting in a system of rules and procedures that is usually referred to as *Lex Mercatoria*, or the "Law Merchant" in much but not all of the relevant literature, although writings about or from the medieval period often use other terms, such as "merchants' law," "custom of merchants," "customary law of merchants," "method of merchants," "the way of the trade," and "law of the fair."<sup>3</sup> Hayek (1973, 83) contended that "It is in the ... law merchant, and the practices of the ports and fairs that we must chiefly seek the steps in the evolution of law which ultimately made an open society possible."

There is a very large literature devoted to describing and analyzing the medieval *Lex Mercatoria*,<sup>4</sup> much of it supporting Hayek's contention, but there also is an expanding literature, particularly over the last decade, that is critical of the medieval Law Merchant story.<sup>5</sup> Volckart and Mangels (1999: 436) [hereafter VM] contended, for instance, that "As late as the *high and late Middle Ages* .... nonsimultaneous commercial transactions were rare if they occurred at all. Simultaneous exchanges had, however, one advantage: there was no dispute over the date of payment, the conditions of payment and so

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3. In the mid-1950s, *Lex Mercatoria* also began to be used as a label for certain rules and procedures of modern international commercial activity that arise through contracting.

4. The oldest English treatise on *Lex Mercatoria*, a chapter in *The Little Red Book of Bristol*, was written sometime around 1280 (Bickely 1900 [c.1280], Teeter 1962, Basile 1998 [c. 1280]), but the earliest known "analytical" examinations of the Law Merchant in England did not appear until the seventeenth century, with publication of Malynes (1622), Marius (1651), and Zouche (1663) [Stracca (1553) appeared earlier, in Italy]. This is not surprising since merchants themselves really had no incentives to produce or encourage such analysis. Something else had to create incentives to do so, and this occurred in England when the competition between common law and the prerogative or civil-law courts was at its peak [see Zywicki (2003)]. This was part of the competition for power between the crown and parliament, as the common law courts were aligned with Parliament and prerogative courts were associated with the crown. The common law jurists attempted to assert jurisdiction over all law in England (including merchant law) during the late sixteenth and seventeenth centuries, while the civil law courts tried to support what they considered to be their jurisdictions. Advocates for both sides produced "scholarly" arguments in an effort to substantiate their jurisdictional claims. Zouche was an Admiralty Court Judge, for instance (Coquillette 2004: 318). Admiralty was one of the prerogative courts, and Zouche (1668 [1663]) offered a detailed argument to support Admiralty's jurisdiction over merchant disputes, contending that the relevant rules were supplied by the Law Merchant. Descriptions and interpretations (based on various documents and on reasoning by analogy) of the medieval Law Merchant have continued to appear since then. For a few examples, see Mitchell (1904), Bewes (1923), Trakman (1983), Berman (1983), Benson (1989, 1990, 1999, 2010a, 2010b), and Milgrom, et al. (1990). Numerous modern legal scholars accept the description provided by this literature, including Johnson and Post (1996), Mallat (2000), Zywicki (2003), Callahan (2004), Belhorn (2005), and Levit (2005).

5. For instance, see Volckart and Margels (1999), Donahue (2004), Fassberg (2004), Kadens (2004), Drahozal (2005, 2008), and Sachs (2006). Criticisms not addressed here are being examined in detail in a book manuscript (Benson 2010c) nearing completion.

on” (emphasis added). In other words, they contended that issues such as credibility of promises and enforcement of contracts were not relevant, making it “highly problematic to speak of a medieval *lex mercatoria* when the term is meant to denote an ‘international system of commercial law’ (Benson 1989, p. 645) or an ‘integrated, developing system, a *body* of law’ (Berman 1983, p.333, italics added)” (VM 1999: 442).<sup>6</sup> Sachs (2006: 690) was even stronger in his critique, stating that “the historical experience of medieval mercantile law has been grossly misconceived. The Romantic interpretation is deeply inaccurate, at least as applied to the experience of medieval England, and provides a prime example of the misuse of historical evidence in support of political ends.” The purpose of this presentation is to address some of these criticisms.<sup>7</sup>

The medieval Law Merchant was a system of “customary law” (Benson 1989, 1999, 2010a, 2010b), and many of the criticisms of the Law-Merchant literature appear to reflect a severe lack of understanding of the concept of “customary law” as the term is used in that literature.<sup>8</sup> Therefore, Section I below explains this concept and its implications for interpretation of historical evidence. An overview of the medieval *Lex Mercatoria* is then provided in Section II. While the system has been described numerous times, the description provided here is intended to stress the roles of contracting and credit in trade during the high Middle Ages in order to address the contrast to the VM contention cited above, while simultaneously emphasizing certain characteristics of the customary Law Merchant that apparently have not been understood [or perhaps, have not been adequately explained], given some of the other recent criticisms of the medieval Law-Merchant literature. Section III concludes with an

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6. VM (1999) drew this conclusion despite the fact that they described how such a system can grow and expand, first through the development of trust and reputation effects within small groups of traders, and then through the development of intergroup reputation and support arrangements. They even cite several sources referring to the differential “legal” treatment of merchants and non-merchants.

7. Sachs (2006) makes so many incorrect criticisms of the Law Merchant literature that they cannot even begin to be addressed here, but an attempt to correct his errors is made in Benson (2010c) where numerous other critiques are also examined.

8. Much of the controversy over the Law Merchant actually is definitional (Coquillette 1987: 291-292; Donahue 2004: 27; Epstein 2004: 3-4). Basic concepts like law, customary law, and *Lex Mercatoria* itself, have been given multiple definitions (Epstein 2004, Kadens 2004, Drahozal 2005, 2008, Sacks 2006), and many of the critics define one or more of these terms differently than do the targets of their criticisms. A definition of the Law Merchant is provided below, but the alternative definitions are not addressed. Instead, criticisms arising because of definitional issues are considered in Benson (2010c).

examination of various relationships between the medieval Law Merchant and other legal systems that existed in or were developing during the high Middle Ages, as these relationships also have proven to be significant sources of some misunderstandings underlying some criticisms.

## **I. Customary Law<sup>9</sup>**

The term, customary law, has been used in many different ways (Pospisil 1971, 1978),<sup>10</sup> but it is defined here to be a system of rules of obligation and governance arrangements that spontaneously evolve from the bottom up within some community (Pospisil 1978) rather than being imposed from the top down.<sup>11</sup> As Hayek (1973: 96-97) explained, many issues of “law” are not “whether the parties have abused anybody’s will, but whether their actions have conformed to expectations which other parties had reasonably formed because they corresponded to the practices on which the everyday conduct of the members of the group was based. The significance of customs here is that they give rise to expectations that guide people’s actions, and what will be regarded as binding will therefore be those practices that everybody counts on being observed and which thereby condition the success of most activities.” In this light, in the following presentation a “rule of behavior” refers to a behavioral pattern that individuals within a community are expected to adopt and follow in their various interdependent activities and actions. The rules individuals are expected to follow influence the choices made by other individuals: rules coordinate and motivate interdependent behavior. Thus, Fuller (1981: 213) noted that, “We sometimes speak of customary law as offering an unwritten code of conduct. The word code is appropriate here because what is involved is not simply a negation, ... but of this negation, the meaning it confers on foreseeable and approved actions, which then furnish a point of orientation for ongoing interactive responses.”

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9. This section draws freely from Benson (2010a, 2010b, 2010c).

10. The term often refers to rules that are not codified, for instance, and that have been relied upon by the members of a group, unchanged “from time immemorial.” This condition often has been required for judicial recognition of customary underpinning of the common law, but this definition is not applied here. That is, customary law does not refer to the customary rules recognized by a sovereign or a court in this presentation.

11. This means that some systems of rule referred to as custom, such as “feudal custom”, are not “customary law” as defined here, because these rules have a top-down component. Pospisil (1978) labels top-down rules based on coercion and command as “authoritarian law,” a distinction employed here.

Customary law involves more than rules of behavior, however (Pospisil 1978, Benson 1988, 1989, 1990). Indeed, customary rules and procedures often can be characterized as "legal systems" from Hart's (1961) positivist perspective, with primary rules of obligation, as well as secondary rules of change, adjudication and recognition (Benson 1989, 1990). In fact, for instance, change in primary rules often characterizes bottom-up customary-law systems (Pospisil 1971, Fuller 1981, Benson 1988, 1989, 1990). If conditions change and a set of individuals decide that, for their purposes, a new behavior rule will support the pursuit of their interdependent objectives than the current rule, they can voluntarily agree to follow (contract to adopt) the new rule within their own interactions. Thus, an existing rule is replaced by a new obligation, but importantly, only for the contracting parties. This change occurs without prior consent of, or simultaneous recognition by, any other members of the relevant community beyond recognition of the rights individuals have to contract. Individuals who interact with these parties learn about their contractual innovation, however, and/or members of the community observe its results. If the results are more desirable than outcomes under older custom, the new rule can be rapidly emulated. As Fuller (1981: 224-225) explained, "If we permit ourselves to think of contract law as the 'law' that parties themselves bring into existence by their agreement, the transition from customary law to contract law becomes a very easy one indeed." In fact, contract and custom are tightly intertwined and often inseparable:

if problems arise which are left without verbal solution in the parties' contract these will commonly be resolved by asking what "standard practice" is with respect to the issues... In such a case it is difficult to know whether to say that ... the parties became subject to a governing body of customary law or to say that they have by tacit agreement incorporated standard practice into the terms of the contract.

... [Furthermore,] ... the parties may have conducted themselves toward one another in such a way that one can say that a tacit exchange of promises has taken place. Here the analogy between contract and customary law approaches identity (Fuller 1981: 176).

Negotiation (contracting) also is the most important method for initiating change in customary law (Fuller 1981: 157).

A gap in existing customary rules can also be revealed because a dispute arises. Negotiation is the primary means of dispute resolution, of course, reinforcing the contention that contracting is a primary

mechanism for initiating change in customary law. If direct negotiation fails, however, the parties to a dispute often turn to community-based arbitration or mediation. Many different procedures are observed in different customary communities (Benson 1990), so rather than explore all possibilities, medieval Law Merchants procedures are described in Sections II. Nonetheless, a new customary rule might be suggested by resulting third-party dispute resolution (Fuller 1981: 110-111). Unlike modern common law precedent, however, the resolution only applies to the parties in the dispute, just as contracts only apply to the parties to the contract. If it suggests behavior that effectively facilitates desirable interactions, the implied rule can be adopted and spread through the community. In situations where contract is widely employed, however, adjudication can be a trivial source of change. Arbitrators may look to existing practice and usage or to contractual terms, but if this does not provide guidance, they may simply apply general default rules based on equity considerations while contracting serves as the primary procedure for the initiation of new rules. This appears to be the case for much of the changes in rules of obligation in the medieval Law Merchant, as suggested below.<sup>12</sup>

Both “positive” and “negative” incentives to recognize rules and accept dispute resolutions arise in customary law. The sources of such incentives vary [e.g., family ties, friendship, common religious and/or ethic backgrounds], but they clearly include bilateral repeated dealing which creates both trust and the ability to threaten punishment with tit-for-tat strategies. More importantly, multilateral webs of interactions based on reciprocities accompanied by development of communications mechanisms and investments in reputations also enhance the potential for voluntary interaction. Such multilateral webs of interaction and communication simultaneously provide large benefits from cooperation in economic, social, and/or cultural (e.g., religious) activities and create threats of punishment by the spread of information about misbehavior, leading to social sanctions including ostracism. Examples are detailed in Section II.

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<sup>12</sup> There are other ways for new customary rules to be initiated as well. An individual may simply begin to behave in a recognizable way when she is engaged in a particular type of interaction with others, for instance, and after noticing this behavior others are likely to begin expecting it from her. The behavioral pattern is not a general rule, however, as the expectation only applies to one individual. If others emulate the behavior and it is widely adopted, then everyone will be expected to conform to that behavioral pattern under similar circumstances.

Institutionalized rules and procedures also can facilitate the expansion of inter-community interaction, but communities need not formally "merge" and accept a common set of rules that govern all interactions (Benson 1988, Pospisil 1971). Individuals from different communities only have to expect each other to recognize specific rules pertaining to the types of inter-group interactions that evolve. Indeed, a "jurisdictional hierarchy" often arises wherein each group has its own rules and procedures for intra-community relationships while a separate and possibly different set of rules and procedures apply for inter-group relations (Pospisil 1971; Benson 1988, 1990). This hierarchy does not create top down law (e.g., through appellate courts), however, as the inter-group institutions have no role in intra-community relationships [other than possibly by revealing potential rules and procedures that might be observed and emulated]. Customary law, therefore, often is "polycentric," with multiple parallel "local" (i.e., community-level) jurisdictions, as well as overlapping jurisdictions supporting various kinds of inter-community interactions. Two communities can have very different community level rules and procedures, and the inter-community arrangements may involve still different rules and procedures [people from different groups often independently come up with similar solutions to the same problem, however, and furthermore, over time, comparisons of many rules are likely to occur with the most effective rule for a particular activity being emulated], but the communities can still capture benefits of voluntary inter-community interactions despite such differences.

Customary communities also can (and generally do) become mutual support groups with reciprocal obligations to assist each other in the pursuit of justice against outsiders. While this may simply involve mutual defense or mutual support in pursuit and prosecution of outsiders who commit offenses against insiders, it can also facilitate voluntary inter-group activities. For instance, communities can develop surety arrangements when cooperative inter-group interactions become desirable. Members insure one another in order to assure outsiders who might be victimized, intentionally or accidentally, by a member of the group can expect compensation from the entire community if a community member who is the offender cannot or will not pay. The offender who initiates the inter-community conflict generally will be expected to compensate those who pay, of course, through contractual [indentured] servitude if



other means are not available. This serves as a means of maintaining a group's reputation, and increasing the credibility of members' promises to outsiders. It also illustrates that intra-group institutions can differ from intergroup institutions. Intra-community recognition is largely based on trust, reciprocities, and individual reputations, while inter-group recognition may also require group reputations, surety commitments and/or bonding.

A crucial implication of this discussion is that understanding customary law requires consideration of different sources of information than those used to understand modern state-produced law, including common law. Unfortunately, some of the most ardent critics of the Law Merchant literature (e.g., Donahue 2004, Sachs 2006) fail to recognize this. A relatively good picture of state-imposed rules might be obtained by reading legislation, administrative documents, and/or court records or opinions, but customary rules generally are not recorded, either as statutes or as judicial opinions. Some obligations may appear as contract clauses, but contracts typically do not specify widely understood practices and usage (Fuller 1981: 176). There is no reason to do so when the contracting parties recognize the same set of customary rules. Therefore, behavior itself has to be observed to conceptualize customary rules. When observation is not possible (e.g., historical systems like the medieval Law Merchant), the best one can generally do is to read contracts, and probably more importantly, letters and other documents that can reveal actual behavioral patterns beyond those specified in contracts. Such documents only provide an incomplete snapshot of customary law, however, so even if they are available, a more complete understanding requires theoretical analysis informed by examinations of other customary law systems.<sup>13</sup>

**Custom Versus Authority.** Pospisil (1971, 1978) distinguished between "legal" arrangements that evolve from the top down through command and coercion, which he called "authoritarian law," and customary law systems that evolve from the bottom up through voluntary interaction. Similarly, Hayek

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13. See Benson (1990) where well-documented customary systems are discussed to establish basic principles about customary law, before examining historical systems including the medieval Law Merchant. VM (1999) do something similar by looking first at the modern international Law Merchant before interpreting the medieval system, but they focus on differences rather than similarities, and they do not consider the actual behavior of merchants suggested by documents such as those examined in Face (1958, 1959) and Grief (1989, 1993, 2006).

(1973, 82) distinguished between “purpose-independent rules of conduct” that evolve from the bottom up and rules that are designed for a purpose and imposed from the top by “rulers”. Both Hayek’s and Pospisil’s distinction suggests that customary law may conflict with authoritarian law. Indeed, as Hayek (1973, 82) stressed, “the growth of the purpose-independent rules of conduct ... often have taken place in conflict with the aims of the rulers who tended to turn their domain into an organization proper.” When this occurs, an authority backed by coercive power may attempt to assert jurisdiction over a customary community, but this will have very different impacts, depending on the options available to members of the customary-law community. If the authority is strong enough, the customary community might be forced to accept the commands. Another possibility is that customary rules and procedures evolve that allow the customary community to avoid some and perhaps most authoritarian supervision (Bernstein 1992, Benson 1995, 2006). This may involve moving “underground,” making the customary rules and procedures difficult to observe, in order to raise the costs of enforcement for the authority. If the customary community (and its wealth) is geographically mobile, however, members may simply move outside an authority’s jurisdiction. The threat to move can significantly constrain authoritarian attempts to displace a customary system. If the sovereign wants to avoid an exodus for some reason, such as availability of tax revenues, she may even offer to assist in enforcing the customary rules, or explicitly codify them. Indeed, a sovereign may offer special privileges to members of a highly mobile customary community in order to capture benefits including revenues, perhaps directly from tribute or taxes on the customary law community, but also indirectly because of a positive impact that this community has on other less-mobile sources of wealth (e.g., land) that can more easily be controlled and taxed. Once customary behavioral rules are absorbed, and the customary procedures atrophy, an authority may amend or replace customary rules, although the ability to do so depends on the costs of reinvigorating customary institutions, on the mobility of members of the community, and on the value of the privileges granted to the community’s members.

One of Berman’s (1983) primary purposes was to illustrate that there was a plurality of distinct but interdependent legal systems in Europe during the high Middle Ages, some predominantly

authoritarian and some predominantly customary, and that an understanding of their various behavioral implications provides important insights about the interactions between these systems and the influence each had on the others (Berman 1983: 10):

The very complexity of a common legal order containing diverse legal systems contributes to legal sophistication. Which court has jurisdiction? Which law is applicable? How are legal differences to be reconciled? Behind the technical questions lay important political and economic considerations.... The pluralism of ... law, ... has been... a source of development, or growth -- legal growth as well as political and economic growth.

Also note that many of these evolving medieval legal systems, both customary and authoritarian, were polycentric. Different royal law, manorial law, urban law, local custom and merchant law applied in different areas although similar rules also were shared, and rules to facilitate intergroup interaction also were common. The impact of the interdependence of legal systems on the medieval Law Merchant is examined below, but first it is important to understand *Lex Mercatoria* itself, as in Berman (1983).

## **II. *Lex Mercatoria*: Customary Law, Credibility, Contract and Credit in the High Middle Ages<sup>14</sup>**

Substantial change occurred in Europe during the eleventh, twelfth and thirteenth centuries, the period often referred to as the high Middle Ages. With regard to economic activities and wealth creation, technological progress in agriculture (Mokyr 1990) meant that less labor was needed to produce sufficient food and clothing, individuals increasingly specialized, and many moved into towns. Trade is required with specialization, and both production and trade expanded substantially between 1000 A.D. and 1300 A.D.<sup>15</sup> As wealth increased, demands for spices, dye-stuff, cordovan and other “luxury” items available

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14. This section draws on material also presented in Benson (2010a, 2010b, 2010c).

15. Many other factors also supported the increase in productivity, specialization and trade. Population increased with increased agricultural production. In addition, the Viking threat declined dramatically, making travel safer. The Viking age had militarized much of Europe, however, and military leaders (knights) often turned their objective to one of subjugation of local communities (essentially protection rackets) when the foreign threat declined. These local “lords” also were in a position to threaten merchants, but merchants travelled together and often hired their own protection (VM 1999), and they often could avoid the jurisdictions of particularly aggressive lords. Localized powers also wanted traders to offer goods within their jurisdictions, after all, so the competition to attract fairs (discussed below) probably constrained aggression against merchants. The subjugation efforts of the local lords also created incentives for people to escape to the urban areas where they had to find work in non-agricultural production, and as these urban areas grew they became increasingly powerful and often developed their own law. In 1095 the first of the Crusades was launched, attracting many knights who joined the effort with much of their military power, reducing the localized threats against producers and merchants. In addition, new knowledge was introduced to Europe from the Middle East (e.g., better medical practices) because of the Crusades, as were enhanced tastes for the spices and other “luxuries” available in the Muslim world. The Crusades also illustrate the

in the Mediterranean [generally through trade with Middle-Eastern merchants] increased in other parts of Europe. Similarly, demand for wool and linen cloth (and some other products, such as furs) from Northern Europe increased in more southerly regions. As long-distant trade in these goods expanded, growing numbers of merchants from widely dispersed parts of Europe began trading with one another at fairs (Face 1958).<sup>16</sup> These merchants often had different cultural and ethnic backgrounds and different native languages. In addition, geographic distances often inhibited direct communication between merchants, as agents frequently represented them at fairs (see discussion below). Such transactions costs had to be reduced so merchants could insure credibility of promises and engage in contractual trading. As Greif (2006: 56) noted, “Markets do not necessarily spontaneously emerge in response to opportunities for profitable exchange. For exchange to transpire, institutions that protect property rights and provide contract enforcement must be in place.”

Sachs (2006: 706-712) contended that merchants depended on coercive authorities to provide recourse and enforcement,<sup>17</sup> but as VM (1999: 435) noted, to the degree that anything like a state existed as Europe moved into the high Middle Ages, these kinds of localized authoritarian organizations were “unable to supply the basic services of the state”, including enforcement of fundamental property and contract law. In this context, Berman (1983: 333) contended that it was during the eleventh and twelfth

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influence of the Roman Church on Europe’s population, including those with military power. Because of the strength of Christian beliefs, the “threats” the church could bring to bear (excommunication, the wrath of the Saints) served as a counter force to the secular powers that could mitigate at least some of their locally focused violence. The Church’s monasteries and abbeys were also major producers and they were anxious to engage in trade, so they also offered safe havens for fairs and supported merchants in other ways (see the discussion of adjudication below). The point is that a number of important changes occurred in Europe just before or during the early years of the high Middle Ages that enhanced both the desire for and ability to trade.

16. Fairs took place much earlier. For instance, a document from Migne (1850, 510) reproduced in Cave and Coulson (1036 [1965], 114-115) suggests that Dagobert, King of the Franks, granted a Fair to the Monks of St. Denis in 629 (there is some question about the authenticity of this document, but the Fair at St. Denis was one of the earliest in Western Europe). Fairs became more prevalent, larger, and more important during the high Middle Ages.

17. The bases for his contentions are discussed in notes 19 and 20. VM (1999: 437-440), appear to agree as they imply that guilds and the urban commercial towns had to arise before merchants were able to develop non-simultaneous transactions and that contracting did not occur until after permanent market towns developed legal arrangements. See note 24 in this context. Also see Benson (2010c) for a detailed rebuttals of both VM’s and Sachs’ contentions about the requirement for authority, whether from an urban government or a powerful lord, for the Law Merchant to succeed.

centuries "that the basic concepts and institutions of ... *lex mercatoria* ... were formed."<sup>18</sup> Indeed, credibility can be established through knowledge, trust, or recourse (Benson 1999), and merchants pursued improvements in all three.<sup>19</sup>

**Credible Promises: Repeated Dealing, Information Networks, and Reputation.** A key to understanding the incentives for medieval merchants to live up to their contractual promises and behave as expected given the behavioral rules that evolved, primarily through negotiation and emulation, is that information was spread rapidly through processes that evolved as other parts of the Law Merchant were evolving (Milgrom, et al. 1990). Thus for instance, "For diversification, traders were associated with many traders residing in different trade centers [in the eleventh century Mediterranean]. It was [or, at some point, became] customary for merchants to supply their business associates with trade-related information, which was crucial to business success" (Greif 2006: 64). This implies that incentives to behave as expected by other merchants become stronger as information about behavior spread more effectively and more widely, so behavioral rules and resulting expectations tended to spread through a merchant network. In addition, reputation for honesty became valuable.

Consider the group of Jewish merchants who moved to Tunisia, part of the Maghrib or Muslim West, in the tenth century because of political insecurity in Bagdad. When the Maghrib capital relocated to Cairo near the end of the tenth Century, the Jewish traders who followed became known as Maghribi traders. They deposited thousands of contracts, price lists, letters between traders, accounts and other documents in the *geniza* of a synagogue in Fustat (old Cairo). Greif examined these documents, and in discussing relationships between Maghribi merchants and agents, he (2006: 62-65) noted that there could

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18. This should not be taken to imply that the medieval Law Merchant arose out of nothing or that it arose immediately. As Bewes (1923: 8-11) noted, while the "great commercial development was new in European hands, it was of centuries standing in the hands of the Eastern nations.... [So] Europe may be indebted to the East for the earliest form of shipping documents, as well as for the law merchant generally." In addition, as Berman (1983: 339) and Benson (1989: 169) both pointed out, the medieval Law Merchant also was influenced by Roman commercial law [Roman commercial law was also customary law rather than authoritarian state-made law (Leoni 1961: 83; Bewes 1923: 7-8)]. The point made by Berman (1983), Benson (1989 and elsewhere), Trakman (1983), and others is that the Law Merchant began to evolve and change relatively rapidly during the early high Middle Ages, becoming more prominent and more widely known by non-merchants as well as merchants over a period of perhaps 100 to 200 years.

19. While the following discussion has examples of innovations to increase knowledge and enhance trust, the focus is on recourse: law, essentially to substitute for limited knowledge and trust.

have been a serious credibility problem: a merchant's agents were located in distant locations so monitoring agents conducting business with the merchant's capital was costly, creating an opportunity for agent embezzlement. The flow of information mentioned above provided a means of reducing these transactions costs, however, in part by providing a mechanism for agents to signal honesty. "Eleventh-century Maghribi agents generally conducted important business in the presence of other coalition members. In their reports they included the names of witnesses the merchant knew, thus enabling the merchant to verify the agent report" (Greif 2006: 65). Merchants hired the same agents repeatedly as long as information indicated agent honesty.

The importance of information and reputation went further, however, as it provided an opportunity for spontaneous, uncoordinated but effective punishment. Maghribi traders "share the belief that coalition merchants ... will reward his agent enough to keep him honest. All coalition merchants, however, are expected never to employ an agent who cheated while operating on behalf of a coalition member" (Greif 2006: 66). Greif (2006: 69) stressed that this ostracism process was not an intentionally-created and coordinated process, however; it was an "uncoordinated response of the merchants located in different trade centers." It arose as a result of the common practice of sharing information, and the behavioral reactions of merchants when they received information about dishonesty. Despite the lack of a coordinated response, Greif (2006: 66-69) cited several Maghribi documents illustrating this unorganized sanction's impacts. For instance, letters written in 1055 discussed an agent in Jerusalem accused of embezzling from a Maghribi trader. As word spread, merchants "as far away as Sicily" canceled their agency contracts with the individual.

These Maghribi practices help explain why Sachs (2006: 706) was wrong. He based his claims that merchant enforcement was essentially non-existent and that merchants depended on coercive authorities on the fact that "the fair court rolls [from one fair, St. Ives, during a very short time frame around the end of the high Middle Ages, 1270-1324] contain no evidence that such ostracism was

institutionalized;...”<sup>20</sup> Sachs (2006: 706) cited Benson’s (2002) brief discussion of ostracism as a sanction to motivate his attack on the idea of merchant enforcement through ostracism threats, but Benson has repeatedly described the evolution of ostracism as a uncoordinated spontaneous process (e.g., 1989, 1990, 1995, 1999), as suggested by Grief, and never claimed that ostracism was “institutionalized” in the sense that it was ordered by the fair courts discussed below.<sup>21</sup> Benson (e.g., 1995, 1999) does explain that a formal organization like a modern trade association can impose formal boycott sanctions, including expulsion from the organization, thereby increasing the strength of the threatened sanction, but that was clearly not his contention in his writings on the medieval Law Merchant.<sup>22</sup>

The effectiveness of the reputation (ostracism) threat is revealed by the fact that Maghribi agents and merchants were willing to sacrifice immediate gains to maintain their reputations. One revealing incident involved a contract for flax purchase. The parties agreed price was 13 dinar per load, but before the flax arrived, the price fell to eight dinar. The buyers initially refused to pay 13 dinar, but ultimately did so. Greif (2006: 68) quoted a seller’s letter: “if not [for their fear of losing their] honor ... we wouldn’t have received a thing.” Similarly, a merchant had two loads of pepper to sell, one that he owned, and one owned by a temporary partner. The pepper price in the port where the merchant was selling was very low and falling, so he sold his partner’s load for 133 quarter dinars, but did not sell his

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20. Sachs (2006: 706) continued this sentence with “indeed given that some defendants appear repeatedly in the rolls, one infers that they lived to trade again.” There are a number of flaws in this argument too. First, if an individual is repeatedly involved in disputes that go before a merchant court (adjudication processes are discussed below) but he always accepts and complies with the court ruling, he is in compliance with the Law Merchant. Second, even if the repeated defendant is perceived to be an opportunist, or as someone who imposes extra costs on trades because issues repeatedly have to be settled by a trial, the fact that an individual is able to continue to trade does not mean that he can continue to trade on the same terms. Conditional ostracism can apply, as discussed below, forcing the individual to pay higher (or accept lower) prices, or put up larger and larger bonds. Ultimately, the individual may be unable to compete and go out of business, resulting in an outcome essentially identical to ostracism.

21 Similarly, Benson did not contend that medieval merchants engaged in “collective action” (Sachs 2006: 706) in order to create an “organized boycott” (Sachs 2006: 707), and he never suggested that boycotts were initiated by “organizers” (Sachs 2006: 708).

22. . This mistake by Sachs (2006) is one of many that arises because of his lack of understanding of customary law, and resulting assumption that looking at a single court’s records (St. Ives in England) is an appropriate, and indeed sufficient, method for understanding the Law Merchant, not only during the period of the records he examined (1270-1324) but apparently for everything that came before, including the eleventh through the thirteenth centuries discussed by Berman (1983) and Benson (1989). Benson (1989, 1990) discussed later years as well but in the context of his examination of the absorption of the law merchant into authoritarian law systems. See Benson (2010c) for refutation of many other errors by Sachs (2006).

own load. The night before his pepper was to be shipped to another location, new buyers arrived, bidding up the price, and he sold at 140-142 quarter dinars. He shared the profit with the partner even though the partnership agreement did not specify doing so, and it was not being renewed: “the merchant acted honorably solely to maintain his reputation with other coalition members” (Greif 2006: 69). Greif (2006: 63) also reported that “Despite the many opportunities for agents to cheat, only a handful of documents contain allegations of misconduct.”

While the Maghribi traders quickly boycotted dishonest merchants and agents, partial or conditional ostracism also was possible and probably practiced in some merchant communities, just as it is today.<sup>23</sup> Merchants can continue trading with someone accused of misbehavior, but only if certain conditions are met that reduce the expected risk, perhaps by demanding relatively high returns [e.g., requiring higher prices if selling, or lower prices if buying] or that bonds be posted. These conditions sanction the offender by raising his costs of doing business. In all likelihood the degree of ostracism imposed by individual merchants varied based on their individual knowledge, risk preferences and business opportunities, but importantly, both complete and partial ostracism ultimately can put a merchant out of business, and repeated instances of non-cooperative behavior is likely to do so quite quickly. More importantly, however, positive incentives associated with reputation building and/or reciprocities, and the expanding opportunities for profitable trade, were the primary reasons for recognition of the Law Merchant (Trakman 1983: 10), not threats of punishment.

In a general way, VM’s (1999) arguments about the development of reputation sanctions within guilds is consistent with Greif’s (2006) evidence about the Maghribi traders. They recognized that within-group trust and reputation mechanisms can arise to facilitate non-simultaneous trade. There are important differences between VM’s and Greif’s descriptions, however, as VM contended that “Merchants were itinerant” (VM 1999: 436) and that the “merchants ... formed communities to travel together [and] to protect the property rights of their members *vis-à-vis* non-members” (VM 1999: 437). VM suggested that

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23. A modern example is the eBay reputation mechanism where sales, prices, and survivability vary significantly across sellers, depending on their feedback records, with negative feedback producing significant “punishment” but not immediate ostracism (Cabral and Hortacsu 2004: 1-2).



they were focusing on merchant groups that formed between the Rhine and the Seine, but they clearly assumed that their arguments applied to trade throughout Europe. It was not necessary for Maghribi traders to be itinerant, however, because they contracted with distant agents and with partners. Furthermore, while the purposes of this organization may have included the protection of property rights while travelling together, this does not appear to be paramount. The Maghribi traders and their agents were dispersed throughout the Mediterranean in order to facilitate trade between different locations. Given the flow of information, traders were able to learn about trading opportunities and presumably non-Maghribi traders' reputations within other dispersed networks. Indeed, the Maghribi traders or agents in each location presumably developed repeated dealing arrangements with local non-Maghribi traders, and local reputation presumably became valuable. In this way they became members of two merchant groups, the local market and the Maghribi network. A linked web of interactions based on repeated dealing and reputation would be a natural development.

An obligation to spread information was not the only rule that helped deter misbehavior. Reciprocal support in the pursuit of justice against offenders from outside a group was apparently an intra-group obligation. Thus, as *The Little Red Book of Bristol* explained, a "hue and cry" could be raised if an offender refused to abide by an adjudication decision, resisted efforts to collect debts, removed or reduced the value of disputed assets, or fled (Basile 1998 [c1280]: 25). Such cooperation did not mean that the relevant threat was violent physical punishment, however, as the purpose was to induce performance of promises or payment of compensation.

As communications about reputations become more effective and mutual support arrangements developed, much larger inter-community trading networks developed. Trade between members of different groups presumably made tit-for-tat and ostracism threats relatively weak, and VM contended that it did so to the degree that intergroup trade was always simultaneous rather than contractual. This was not the case, as demonstrated below. For one thing, with the potential for intergroup trading, the reputation of trading communities also became valuable, creating incentives to develop surety arrangements to protect group reputations and increase the credibility of members' promises. As Malynes

(1622: 93) explained,

Faith or trust is to be kept between merchants, and that also must be done without quilllets or titles of the law to avoid interruption of traffic, where in his Suretiship is to be considered according to the promise; for if it be conditional if such a man do not pay, the other to pay the same within a time, or to save him harmless: it is first to be demanded of the Principal, and if he do not pay, the Surety is to pay it without any course of law, unless he be ordered by the Court of Merchants to perform the same...<sup>24</sup>

VM believe that these kinds of group-level arrangements to make inter-group promises credible could not develop, however, because the transactions costs involved with inter-group trade could not be overcome

(1999: 442):

We demonstrated [actually, they made some assumptions and derived some conclusions, but the assumptions were flawed so the conclusions were not valid] that it was extremely difficult for merchants to enforce institutions regulating nonsimultaneous transactions between them and members of another guild or outsiders. To solve these problems, a number of political and social changes had to come about, which resulted in towns developing from feudal or ecclesiastic administrative centers into autonomous political organizations.

VM's subsequent description of the gradual displacement of the older guilds [and probably other merchant communities] by the institutions of market towns is quite good, as explained in the conclusion, but the contention that merchants could not solve the transactions costs of intergroup trading until market towns gained political power is demonstrably false. What VM failed to recognize is that the developments of market towns and relationships between them that they accurately describe do not mean that the developments described by the medieval Law Merchant literature did not also arise. That this is in fact the case can be seen by considering VM's alleged demonstration (1999: 436) that:

merchants could not afford to specialize in specific goods. As late as the high and late Middle Ages, they used to deal with anything promising a return. Given high transport and transactions costs, most merchandize consisted of luxury goods. Long distance trade in mass products did not exist. Transactions were concluded at yearly fairs, such as the one at St. Denis near Paris, or at naturally favored locations where traders met accidentally (e.g., river crossings).

Because of unstable political situations, merchants found it difficult to keep dates: The

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24. VM (1999: 445) referred to such arrangements as the application of "joint liability" for merchant groups under urban law. "Joint liability" under a coercive system of law is not the same as mutual insurance based on reciprocities under customary law, however, even though Sachs (2006: 709) assumed they are identical. In fact, joint liability imposed coercively is clearly not likely to be appreciated by foreign merchants [apparently it was widely reviled when it was demanded under urban law (VM 1999: 445; Sachs 2006: 709-710)], but it may have been an easy concept to develop for the domestic merchants who controlled urban law, because they observed and perhaps even participated in mutual insurance arrangements where a group came to the rescue of a member. Equating surety arrangements and imposed joint liability, however, reflects a misunderstanding of customary law.

likelihood of meeting a specific partner again was low. Under such conditions, nonsimultaneous commercial transactions were rare if they occurred at all. Simultaneous exchanges had, however, one advantage: there was no dispute over the date of payment, the conditions of payment and so on.

In reality, however, non-simultaneous trade between different merchant groups was the norm within the fairs [i.e., outside the jurisdictions of market towns] in much of Europe long before the end of the high Middle Ages.<sup>25</sup> Disputes arose and were resolved, and there were many relatively specialized traders.

**Non-Simultaneous Inter-Group Trade, Credit and Contracting.** Consider the Champagne Fairs, probably the most important fairs during much of the high Middle Ages. Face's (1958, 1959) examination of twelfth and thirteenth century notarial documents from Genoa and Marseilles demonstrated that non-simultaneous trade between Northern and Southern European merchants in the twelfth century (and thirteenth century) was the overwhelming dominant practice at these fairs. Indeed, Face (1958, 428) contended that "Even the most superficial examination of the Genoese documents ... indicates that as early as 1180 [the oldest documents Face found]... the yearly cycle of the six fairs of Champagne was fully developed, and that the internal divisions of the order of business at each of these fairs had been *evolved at some time long before*, and continued to regulate and to dominate all business activity" (emphasis added). The cycle of six Fairs in different Champagne towns, each lasting about 52 days, took place every year. Note in this regard that while each fair occurred once a year, six fairs in reasonably close proximity occurred sequentially so that a fair was occurring someplace in Champagne for over 300 days each year. These fairs all were organized as follows: (1) eight days of "entry" when merchants set up their shops, (2) ten days during which only cloth was traded, (3) eleven days during which cordovan (leather) goods were traded, (4) nineteen days for the trading of goods that were sold by

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25. At times it is actually difficult to know precisely when VM contended that various developments occurred. Some statements appear to apply to the entire high Middle ages and even later while in other passages they discussed developments in the tenth and eleventh centuries that are quite consistent with the story told by various authors they attack. For example, VM (1999: 439-440) claimed that "sources indicating that nonsimultaneous transactions occurred between merchants of different organizations ... are scarce and moreover ambiguous." They make this claim after discussing sources from around 1000 to 1020 A.D. (see notes 3 and 4 above), so if this is the period they are referring to, there is no quarrel in this regard: sources are indeed scarce. It does not follow that such nonsimultaneous trade did not arise, of course, but more importantly, contributors to the literature on the Law Merchant, such as Mitchell (1904: 7-9), Bewes (1923: 138), Berman (1983: 342, 350-355), and Benson (1989: 649), all clearly contend that the law merchant arrangements they discuss were largely in place around the end of the twelfth century, not the beginning of the eleventh.

weight, such as spices and dye-stuffs, and when accounts also began to be settled, and (5) four days during which the “letters of the Fair” [credit instruments; e.g., to deal with unsold goods that might be stored, or individuals who purchased more than their revenues would cover] were drawn (Face 1958: 427 and note 2).<sup>26</sup>

French, German, English or Flemish merchants from Northern Europe selling cloth to buy spices, dyes or cordovan from Southern European merchants accepted some sort of promissory note or letter of credit as payment during the first period of trading at the fairs when cloth was sold, or they simply accepted the promise to pay later made by a merchant from the Mediterranean region, sealed by a handshake or a godspenny (Kadens 2004: 57). The notes or promises could then be converted into goods from the South later during the next two trading periods, or they could be retained for later use. Similarly, the merchants from Genoa (as well as Asti, Arras, Piacenza, Lucca, Florence and other Italian commercial cities as well as other Mediterranean merchants) selling spices, dyes, or cordovan, had to buy the northern cloth before they sold their goods, so they offered promises, promissory notes or letters of credit from money lenders to buy the cloth. These notes and letters of credit were negotiable so merchants from the north could use them to buy from any merchant from the Mediterranean region. They did not have to buy from the same merchant who purchased their cloth. The end of the fair was dedicated to balancing all of the books: “it marked the climax to which the extensive buying and selling, the criss-crossing of financial exchange, had been building up, in Champagne and in far distant places as well. The floating promises generated on all sides were now liquidated” (Face 1958: 437). Clearly, trading on credit was the norm at these fairs well before the end of the high Middle Ages, in apparent contrast to VM (1999: 436).<sup>27</sup>

Commercial contracting was even more widespread, however, and more dependent on credit devices to

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26. Some other goods also were bought and sold at the Champagne fairs, such as silk. Similarly, furs which travel both north (e.g., from Spain, Africa, and Southern France) and south (martin, rabbit, and other northern furs) were bought and sold.

27. The evolution of credit arrangements was important for reasons beyond their value in facilitating non-simultaneous trade. As Jones (1987: 93) noted, for instance, the invention of the bill of exchange made “capital mobile and free. Sudden debasement of the coinage were rendered useless or counter-productive because extensive foreign exchange dealing and arbitrage would follow at once, more swiftly than when traders had been obliged to denote debts in kind in order to escape using debased coin. In this brave new world only good government could bring prosperity to the prince.”

facilitate non-simultaneous trade, than just the practices at these fairs.

Italian “caravan” merchants who traded at the Champagne Fairs were highly specialized, again in contrast to the VM (1999: 436) claim that “merchants could not afford to specialize in specific goods”. They purchased spices, dyes and/or cordovan in the Italian ports, transported those goods to the Fairs and sold them, and purchased woolen or linen cloth from Northern Europe, transported the cloth back to Italy and sold it to “*draperii*.” Furthermore, Face (1958: 429) discovered documentation demonstrating that Genoese caravan merchants bought spices, dyes and cordovan on credit from Merchants trading between the Middle East and Italy (e.g., Maghribi traders). When they returned after a fair, they made large numbers of sales of cloth to Italian *draperii*, again on credit. Since these exchanges often occurred within the market cities, VM’s contention that they were under the jurisdiction of those towns may be accurate [but see further discussion below suggesting otherwise]. If so, these urban jurisdictions did not back the use of credit at the fairs, however, and as explained below, the fairs did not fall under any other authority until the end of the high Middle Ages, in contrast to Sachs (2006).

Documents also suggest that merchants from England, Flanders and other Northern European countries did the opposite, buying cloth, transporting it to Champagne, selling it, buying spices, dyes and/or cordovan to transport back North to be sold, almost entirely through the use of credit. As Benson (1989, 1990) and Berman (1983) both stressed, the commercial revolution of the high Middle Ages was built on credit, not cash [and definitely not on simultaneous barter or gift exchange, in contrast to what VM (1999: 436) apparently assumed].

Even more contractual complexity is illustrated by the documents that Face (1958, 1959) examined. For instance, Genoese caravan merchants often did not even arrive at the Fair in time to buy cloth. Instead, the earliest documents Face reported on (recorded in the last two decades of the twelfth century and more than a century before the end of the high middle ages) demonstrated that merchants generally contracted with agents or partners, just as the Maghribi did in the Mediterranean, and these

individuals often reached the fair well in advance of the merchants themselves (Face 1958: 433).<sup>28</sup>

Indeed, they often simply stayed in Champagne moving from one fair to another, representing the Italian merchants with whom they had contracts, and furthermore,

There is no contract or credit instrument pertaining to the fair trade or to the cloth trade found in any notarial cartulary which does not indicate that the debt or settlement to a question might be paid to the creditor's agent, to his '*certo nuncio*' or '*certo misso*'. Every merchant had his agent, or perhaps several, to act in his place, to fulfill old obligations, and in many cases to undertake new ones. Agency in this sense was from the very beginning of our records employed in both Genoa and Champagne. The words '*tibi vel tuo certo misso dare et solvere promitto per me vel meum missum*' are found in contracts drawn on the fairs themselves, as well as in credit instruments payable in Genoa.

The evidence demonstrating the use of partnerships among the caravan merchants is equally extensive. "*Socii*" were frequently related, and a general participation in the family business was very common. But partnerships were by no means limited to siblings... even though the family business was the natural affiliation, and usually the most enduring, these independent arrangements were frequently outstanding. It would of course, be unnecessary in any such arrangement for both partners to be present at the same time, either in Genoa or in Champagne. (Face 1958: 431).

The Genoese documents also illustrated that Northern Merchants contracted with agents to represent them in Champagne (Face 1958: 433). Therefore, a merchant did not have to arrive on a specific date to engage in non-simultaneous trade, as VM (1999: 436) assumed when they contended that "The likelihood of meeting a specific partner again was low." A merchant's representative was at the fair with time to spare, and the caravan merchant simply had to arrive sometime before the goods he took to the fair were to be sold (if he attended the fair at all, as suggested below).

Merchants who traveled to the fair also left agents or partners to tend their affairs in Genoa.. In addition, Genoese caravan merchants had several partners on a relatively permanent basis. They also had agents and procurators representing them in various places in the north in addition to Champagne (Face 1958: 432). In fact, documents suggest that at least some merchants simply stayed in Genoa, month after month, while continually selling northern cloth, and also making large purchases of spices and other commodities on credit to send by caravans to Champagne (Face 1959: 245), once again in contrast to VM

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28. The eleventh century Maghribi traders in the Mediterranean also employed numerous agents (Grief 2006: 58-62). The *Little Red Book of Bristol* (Basile 1998[c. 1280]: 11 & 16) similarly noted that agents were employed by merchants. Also see note 26.

(1999: 436) when they suggest that all merchants were itinerant.<sup>29</sup> This was possible, in part because the merchants had contracts with partners or agents in Champagne and other important trading locations.

Merchants also had to move their goods to and from the fairs. Not surprisingly, as Face (1959) detailed, drawing on notarial records from both Genoa and Marseilles, there was widespread merchant contracting with professional freighters or “*Vectuarii*” who specialized in the transportation of trade goods to and from the fairs. Contracts between merchants and freighters, called “*lettres de voiture*,” were very common long before the end of the high Middle Ages. Documents from the twelfth century indicated that a substantial over-land freight business existed [Face (1959, 242) cited several 1191 documents]. In these contracts, the freighter acknowledged receipt of specified goods and promised to transport them to a specified destination and to reach the destination on or before some specified time (VM’s contention that “merchants found it difficult to keep dates” (1999: 436) has to at least be questioned given the willingness of freighters to make such promises and merchants to accept them). The mode of transportation was specified and the contracts often indicated that the goods were to be delivered to a particular person, generally the merchant’s agent or partner. Freight charges were specified and paid in advance. An example of such a contract is from Blancard (1884, Vol. II: 109, as reprinted in Cave and Coulson 1936 [1965]: 159-160):

April twenty-fourth in the year of the Incarnation of the Lord 1248.

We, Eustace Cazal and Peter Amiel, carriers, confess and acknowledge to you, Falcon of Acre and John Confortance of Acre, that we have had and received from you twelve full loads of brazil wood and nine of pepper and seventeen and a half of ginger for the purpose of taking them from Toulouse to Provence, to the fairs of Provence to be held in the coming May, at a price or charge of four pounds and fifteen solidi in Vienne currency

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29 The same is true for other for merchants in other locations who sent their agents out to buy or sell goods. For instance, the following is a 1248 contract written by an agent acknowledging an order on goods to be sold elsewhere (Blancard 1884, Vol. II: 232, as reprinted in Cave and Coulson 1936 [1965]: 109-110):

June tenth. In the year of the Incarnation of the Lord 1248. I, Bartholomew, son of the late Benedict of Lucca, confess and acknowledge to you Rolland Vendemmia, of Lucca, that I have had and received from you as an order twenty-three pounds and ten solidi (Genoese currency), invested in armor and in prepared silk and gold wire from Lucca and in two cross-bows, renouncing, etc.

With that order I shall go, God willing, on the next journey I make to Montpellier, by sea or by land, for the purpose of selling the said things, with God's favor and at the risk of the sea and to your profit. I promise by this agreement to repay you all the capital and the profit of the said order, retaining for myself what I expend for the transport and sale of the goods, pledging all my goods, etc.

for each of the said loads. And we confess we have had this from you in money, renouncing, etc. And we promise by this agreement to carry and look well after those said loads with our animals, without carts, and to return them to you at the beginning of those fairs and to wait upon you and do all the things which carriers are accustomed to do for merchants. Pledging all our goods, etc.; renouncing the protection of all laws, etc.

Note that contract also explicitly states that other customary duties would be performed, without specifying those duties, and that the agreement was outside the “protection of all laws”; that is, it was written in light of the customs of merchants (the Law Merchant) rather than recognized authoritarian legal arrangements such as royal or Cannon law. Clearly, the freighters’ promises to deliver were credible since these terms were present in virtually all *lettres de voiture* (Face 1959: 239). And importantly, many contracts like this one

contained a clause indicative of a long tradition, an established customs which governed the relationship between caravan merchants and *vectuarii*....

A clause of this kind, repeated word for word in four separate contracts, seems a reliable indication that by 1248 a substantial and generally known set of obligations existed to which *vectuarii* were required to adhere by custom, if not by law, in their professional dealings with merchants.... The very existence, therefore, of an acknowledged set of rules and regulations, such as that implied by the clause quoted above, makes it quite impossible that the *vectuarii* appeared suddenly in the middle of the thirteenth century as full-blown specialists in the medieval business world (Face 1959: 240-241).

Over time, new clauses were added to these contracts. For instance, the freighter might guarantee that the goods would arrive undamaged, and that the packages or bales would not be opened, as well as the number of days for the journey, and perhaps the actual route to be taken. Generally, the merchant bore the risk of loss or theft, but in some contracts, freighters took on this risk.

While VM (1999: 440) recognized that merchants used gossip to initiate within-community (e.g., gild, caravan) sanctions, information flows served many more purposes, and formal mechanisms to transmit information developed quite early. In order to learn about market conditions and coordinate activities in multiple locations with freight haulers, agents and partners, for instance, the Italian caravan merchants had to transmit information relatively quickly, and

The only feasible answer to this need was a courier service, a kind of ‘pony express’ to race back and forth on a regular schedule between the fair towns in Champagne and the chief commercial cities of northern Italy and the Mediterranean coast. Such a service existed in the second half of the thirteenth century.... Italian business houses whose representatives frequented



the fairs could avail themselves of this service on a kind of subscription basis, but in addition, both business houses and Italian cities maintained their own courier service.... Furthermore, the evidence is altogether convincing about a second point of great significance: that between 1190 and 1290 nothing new had been added to the pattern of the fair trade which would have made the services of couriers indispensable in 1290, but entirely unnecessary one hundred years earlier.... Indeed, the whole pattern of the trade, tied so closely to the order of business at the fairs, demanded the services of this courier from the start (Face 1958: 434-436).

Clearly, with dispersed agents and partners communicating through a network of couriers, merchants were able to gather a large amount of information. No doubt, much of this information was about purchases, sales, credit arrangements, estimates of demand and supply, and other factors directly related to the technical side of trade. However, it was obviously possible for merchants to gather a good deal of information about potential trading partners' reputations and/or their trading organization (e.g., gild, caravan), the trading practices and usage that applied in particular fairs, and other factors related to the personal and legal aspects of commerce.

Face (1958: 427) pointed out that "it has been difficult not to form an inaccurate and almost naïve image of the merchant who frequented these fairs." It appears that VM (1999: 436) [and Sachs (2006)] formed such an image, as their assertion that there was virtually no non-simultaneous exchange between members of different trading communities (gilds, caravans, ethnic groups such as the Maghribi traders) unless the trade took place under the jurisdiction of a market town is clearly wrong:

The whole complex structure of the commerce centering about the fairs of Champagne with its extensive use of agency and partnership, its reliance on professional freighters, and its attendant system of couriers, was based entirely on credit. Every document employed in the reconstruction of the pattern of this trade records a credit transaction; no other evidence survives. The records of merchants in Italy show that at the wholesale level only the smallest fraction of the total business done was conducted for hard cash.... But the vast majority of these documents took for granted payment by paper. This is true for as early as we have any records at all, and must therefore be true for some time prior to our earliest records.... One must look far behind that date [1180] to discover the origin of these practices. The pattern of the fair trade, with all its concomitant devices of business and financial organization, was worked out some time too early for any written records to have survived (Face 1958: 437).

The formation of trade networks and the spread of rules of contract certainly did not occur overnight. Merchant communities and their contractual arrangements evolved as commerce developed, so they evolved at different rates in different areas as commerce emerged and spread. The "commercial revolution" of the tenth through the thirteenth centuries involved tremendous changes in trading

arrangements and conditions, as VM recognized, but the institutional developments to support expanding commerce through between-group non-simultaneous trade occurred earlier than they claimed, and did not require the institutional developments they contended were necessary. Face (1958: 430) suggested that twelfth- and thirteenth-century merchants employed “A group of advanced and polished techniques of business [that] enabled them to carry out a seemingly impossible task with the utmost regularity and precision. These techniques are hinged on three factors: first, the ingenious use of partnerships, agency, and procuration; second, the integration of these devices with communication and transportation; and third, the extensive use of credit instruments in the trade.”<sup>30</sup> These techniques clearly had to be based on contracts, and a commercial system based on contracting had to have mechanisms in place to insure that most promises were credible. As Face (1958: 428) stressed, such developments had to occur much earlier than the period depicted by the records he studied [part of the twelfth and thirteenth centuries] in order for the “advanced and polished techniques” to be so well established. Face’s research is not the only source of evidence about such developments either.<sup>31</sup>

All of these developments certainly do not mean that opportunism never occurred, of course. Furthermore, one individual might accuse another of misbehavior and the other might deny it. This could occur because a guilty party denied guilt, or simply because the two parties disagreed about what rule should apply or how to deal with an unanticipated contingency. In either case, the availability of

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30. Indeed, one means of obtaining credit was to form a partnership with a money lender. This is illustrated by a contract provided in Blancard (1884, Vol. 1: 137, as reprinted in Cave and Coulson 1936 [1965]: 186-187):

In the name of the Lord. In the year of the Incarnation 1240, May eighth. Let it be known to all hearing this document read that I, Nicholas Dangiers, confess and acknowledge to you, John de Manduel, that I have had from you, by reason of our partnership, thirty pounds in royal crowns.... These thirty pounds, according to the agreement had or made between you and me I ought to look well after, and to do business with them as well as I am able, and as well as I know how in pursuit of my business of cooper, by buying and selling to your advantage and to mine. And I promise to repay to you, John de Manduel, the said thirty pounds with one half of all the profit, agreeing to pay it peaceably and without molesting you throughout the whole month of August next coming; and for the completing of this agreement I pledge to you, John de Manduel, all my goods, at present or in future in my possession, renouncing the twenty days and four months and all other delay.

This same source provides other examples of merchant partnerships to obtain capital, as well as other contracts from the first half of the thirteenth century, generally involving Marseilles-based merchants.

31. As the *Little Red Book of Bristol* (Basile 1998[c. 1280], 11), written around 1280, stated, “it is well known to all that merchants sell their goods and merchandize on credit more frequently without tallies and writings than by tallies or writing ... and also that servants and apprentices of such merchants [sell on credit] the goods and merchandise of their lords to other men in the same way” (parenthetic phrase in the translated quote). Also see notes 29 and 30.

impartial third-party dispute resolution could reduce the costs of such disagreements, and therefore, encourage contracting. After all, violence is likely to be the means of resolution in the absence of third-party options, but more importantly, violence can be a very costly method for resolving disagreements, so reliance on violence for this purpose implies that individuals would be much less likely to enter into contractual arrangements.

**Third-Party Dispute Resolution for Merchants in the High Middle Ages.** “As any practicing commercial lawyer knows, there are many ways of enforcing fair practices, and punishing unfair practices, outside the [government’s] courtroom. These patterns of informal enforcement are ‘law’ to those who operate in that context, and have been called ‘law’ for centuries” (Coquillette 2004: 298). For instance, arbitrators, generally chosen from the merchant community, were an important option (Malynes 1622 [1686]: 447-454). Not surprisingly, merchants could and did insert arbitration clauses into contracts. Face (1959: 243) discussed two fairly complex contracts from 1191 involving an individual who rented horses to a caravan merchant, for example; these contracts specified that if a horse was injured the degree of injury was to be determined by a board of arbitrators. Arbitration also was chosen after disputes arose. Consider the “Memorandum of Arbitration Concerning a Freight Charge” about a 1229 dispute in Marseilles (Blancard 1884, Vol. 1: 29, as reprinted in Cave and Coulson 1936 [1965]: 157-158):

Upon the complaint or petition which existed between Martin Castagne ... and Stephen de Manduel... on behalf of himself and his son Bernard, about the freight charge of thirty-one bundles of skins, which belonged to Paul Sicard, concerning which skins the said Martin and his associates said that they had retained them until the charge they demanded was paid; but on the other hand the said Stephen said that the charge should be paid by Paul Sicard, or by someone on his behalf, and that Bernard de Manduel, son of Stephen, had bought or otherwise acquired the said thirty-one bundles free from freight charges ... and free from all other burdens, for which charge Stephen placed twenty-four pounds in the keeping of Bernard Peter ... This money ought to be in the possession of Bernard Peter, for the charge on the thirty-one bundles if it appears that the said charge was not paid. For this charge or for the complaint about the charge Stephen and Martin have agreed before Bernard Peter and John of St. Maximin, judges chosen freely by both contestants ... both promised to submit to the judgment or decision of the judges, however the judges might wish to settle the matter according to equity, requiring the truth, and, according to what appeared from the hearing of the complaint, to disregard the due order of legal process and the solemnity of the law. The said judges, having required the truth, and having heard the testimony ... according to the wish of both parties, and having ... the said judges agreed and gave their decision as below ... according to what seemed just and honest to them. Wherefore the said

Bernard Peter and John of St. Maximin, the said judges ... absolved Stephen for himself and his son from paying the freight, ordering besides that the twenty-four pounds, which Bernard Peter had in his possession, should be restored to Stephen by Bernard, without objection by any one...  
This decision was made by the said judges in the shop of William Aicard...

This is a relatively unusual document since, as Malynes (1622 [1686]: 450) noted, medieval “Arbitrators have a determinate power to make an end of controversies in general terms, without declaration of particulars.” This was the case because of the merchants need for quick solutions to their disputes, as discussed below, and the fact that arbitrators chosen to resolve disputes had “skill and knowledge of the Customs of Merchants, which always does intend expedition” (Malynes 1622 [1686]: 450).<sup>32</sup>

Participatory merchant courts were also established at many fairs, particularly during the early years of the medieval Law Merchant. While the origins of these fairs courts, called *Piepowdre* or Pie Powder courts, are difficult to determine, surviving records from the tenth through the twelfth century do not indicate that kings or local lords created them (Bewes 1923: 14). Each group of merchants at a fair generally appointed a captain or consul to perform various administrative duties such as determining where merchant stalls would be located, but as a group, these consul also could serve as the fair court [these individuals also were often chosen to arbitrate disputes between their own group’s members] (Bewes, 1923: 14; Kaden 2004: 59). As with arbitrators, Pie Powder courts did not leave significant records, but this is not surprising since their purpose was to provide quick and equitable dispute resolution. Merchant judges had no precedent setting power, so as with arbitrators, these judges had “a determinate power to make an end of controversies in general terms, without declaration of particulars” (Malynes 1622 [1686]: 450).

*The Little Red Book of Bristol*, c. 1280 (Basile 1998) stressed that one important difference between the Law Merchant and England’s royal law was that Law Merchant disputes were resolved quickly because most merchants had to complete transactions at one fair quickly to move to the next.

This was one reason for choosing Pie Powder judges or arbitrators from among merchants attending the

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32. Malynes (1622 [1686]: 447) discussed methods of choosing arbitrators to insure unbiased adjudicators with appropriate expertise. Such expertise was also important in merchant arbitration because “good orders and customs are to be maintained as laws, and nothing is to be admitted that may infringe the Law of Merchants” (Malynes 1622 [1686]: 452).

fair (e.g., group captains/consuls). Another was that clerics, lawyers, local lords, and royal judges often had little knowledge of many commercial issues, so the risk of judicial error was lower with merchant judges, particularly when highly technical commercial issues were involved. In addition, non-merchant judges might not accept evidence that merchant judges and arbitrators respected, as Zoache (1663 [1686]: 128) observed,

At the Common Law no mans Writing can be pleaded against him, as his Act, and Deed, unless the same is sealed, and delivered: But in Suites between Merchants, Bills of Lading, and Bills of Exchange, being but Tickets, without Seals, Letters of advice, and Credence, Policies of assurance, Assignments of Debts, all which are of no force at the Common Law, are of good credit and force by the Law-Merchant. To which may be added, what Malines observes, that the bearer of such Bills, by the course amongst Merchants, shall be admitted to demand, and recover the Contracts, without Letters of Attorney, which is not admitted in the Common Law.

Consideration of such documents is illustrated in a 1242 arbitration decision regarding a 1235 contract between a Jewish merchant and a Christian merchant in Barcelona. The details of the contract and dispute are available from *Arxiu Capítular de Barcelona* (1-6-3475), but the final paragraph of the document illustrates the dispute resolution process and the evidence considered:

Over all of these issues and over the arguments made by both parties after the claims were made, we Guillem Ponç and Gerald de Marnia, jointly accepted arbitrators, having examined the proofs as they appear in the acts which were received, and having looked at Solomon's bill of sale made by Berenguer Bailiff for the quarter share of the mills, and the notes in the relevant notebook of the notary Pere Carbonell which Berenguer Bailiff made for Ramon de Plegamans of the mills and another note of the purchase which Arnau D'Arlet made from Ramon for one year, . . . having made a valid and accurate calculation of the profit of the said mills, [and having judged how much] Solomon lost from the profit which Arnau D'Arlet and his partner made in the said mills through the fault of Berenguer Bailiff, we sentence the said Berenguer de Valle and Joan de Banyeres and their wives to give Solomon and his agent 10 pounds 5 solidi which it seems to us according to the evidence that Solomon is owed from the profit for that year through the fault of Berenguer Bailiff, absolving both sides of all other claims. This sentence was given on the Kalends of September, A.D. 1242.

Many of the local authorities who successfully attracted important annual fairs over time allowed Pie Powder courts and arbitrators to function without interference. The Champagne fair courts operated for at least a century (and probably longer), for instance, before the Count appointed wardens to deal with administrative and judicial issues that the consul had been performing, an action that set the decline of these fairs in motion, as explained below. Similarly, Piervigiovanni (1995, 1998), drawing on information from fifteenth century *consiia*, concluded that merchant courts in Italy operated independently from other

tribunals, following their own procedures, and that this apparently did not change significantly until the sixteenth century.

Kadens (2004: 64) noted that “merchants, at least in northern Europe, also used a second sort of court – that of the town, the prince, or the Church, in other words, noncommercial court.” Some of the other legal systems that were evolving during the medieval period [see Berman (1983)] had relevant rules in common with the Law Merchant, or their judges offered to apply Law Merchant rules, so if a non-merchant court was willing to try the case quickly, and the court had a reputation for fair unbiased decisions, merchants certainly could and did choose to use it. Ecclesiastical courts were often available, for instance, because many of the major fairs were held at important priories and abbeys. Furthermore, as Bewes (1923: 9) noted, “the Canon law ... was the prevailing authority and would tend ... to favour simple good faith unhampered by formalities, and thus would extend its influence to the law merchant which, until damaged by legislation, rested on mutual confidence and good faith to an extent unknown in civil life. In this connection it should be remembered that in the Middle Ages the Church was a very considerable trader.” Indeed, it was in the interests of church's leaders to maintain good relationships with merchants by offering them quick and equitable dispute resolution. There were some differences between cannon law and merchant law, however, so ecclesiastical courts were not attractive alternatives for all merchant disputes.

As suggested above by the appointment of wardens for the Champagne fairs, Pie Powder courts also were taken over by authorities such as “a mayor of a corporate town. Sometimes they belonged to a lord” (Holdsworth 1903: 331). Even when Pie Powder courts were explicitly replaced by a manor (or urban) court, however, merchants often dominated dispute resolution, as the *Little Red Book of Bristol* (Basile 1998[c. 1280]: 20) explained,

In every market court, every judgment ought to be rendered by Merchants of the same court and not by the mayor or by the seneschal of the market.

And if such a mayor and seneschal take it upon themselves in any way to render judgments, although judgments do not belong to them in a court of this court, and [if] they execute the judgments or have them executed in any way whereby anyone feels aggrieved by such judgment and its execution, whether the judgment was just or unjust itself ..., the aggrieved person should have his recovery both against the mayor, seneschal, or other reeve of the same

market who acted thus and against those who execute such a judgment on their order, by a writ of trespass of the lord king, as of a matter done of their own wrong and against law and custom and against mercantile law.

A local lord might have imposed his court on a fair, but resolved merchant disputes quickly using merchant juries, or at least, advice from merchants. He might also have enforced the court rulings.

Merchants were often more than willing to have authorities enforce their law, thereby reducing costs that they might bear personally (Benson 1989), like responding to the hue and cry.<sup>33</sup>

Various local authorities may have imposed some modification over time, such as fines paid to the authority. The magnitude of the modifications probably depended on the availability of, and competition from, other potential trading locations, as well the relative attractiveness of the various locations. An authority with a particularly attractive fair location could probably depart from the Law Merchant, at least to a degree, as discussed below, capturing some of the location rents. Kings often “granted” rights to hold a fair, however, and in doing so, stated that the Law Merchant must apply.<sup>34</sup> For instance, when Frederick I Barbarossa “granted” Aachen the right to hold two fairs in 1166, the grant

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33 Such courts should not always be characterized as Law Merchant courts, however. In fact, as commerce developed and merchant communities gained wealth, local authorities and Kings increasingly attempted to assert authority over various aspects of commerce, including merchant courts, in order to increase their abilities to collect revenues or other benefits. This process is discussed further below.

34. Many examples of royal recognition of a Law Merchant have been cited in the Law Merchant literature. Sachs (2006: 780-788) misinterpreted much of the literature on this point, however, as noting the indisputable fact that various kings referred to the Law Merchant in statute often was simply intended to illustrate that there must have been something called the Law Merchant for them to refer to. Authors like Berman, Benson and Trackman did not contend that “the charter [*Carta Mercatoria*] or the statute [Statute of Staples] guaranteed a more rapid method of dispute resolution, which followed the various uses and customs of the commercial towns and fairs.” In fact, Benson (1989, 1990) argued just the opposite: that these actions were part of the process of absorbing the Law Merchant into royal law and changing it in various ways to allow more royal control over commerce. Interestingly, Sachs (2006: 726, note 128) actually recognized this point but took it out of context to support another point taken out of context. In this case he accused Trackman and Benson both of contending that merchant court decisions were “unreviewable by existing authorities” (Sachs 2006: 726). In this context, he quoted a partial statement from Benson (2002) including the phrase, “appeal was forbidden.” Benson was referring to appeal from one Law Merchant court to some other Law Merchant court, however, not appeal to an authoritarian court. In other words, as far as the merchant community was concerned, arbitration and pie powder court decisions were final. This certainly did not mean, and was never intended to mean, that a merchant could not go to an authority and ask that authority to retry the case. This would violate Law Merchant norms, as explained below, but if an authority with coercive power wanted to accept such a case, the merchant community did not have the police force or army that would be needed to prevent such a trial. Sachs also cited Benson’s brief discussion of the Statute of Staples and claims that Benson was “erroneously arguing that royal courts gained appellate jurisdiction only after the 1353 Statute of Staples” (Sachs, 2006: 726, note 128). No such claim was made in Benson, who was simply trying to illustrate royal actions that gradually led to the absorption of the Law Merchant. This is not surprising since, as Berman (1983) explained, royal law was just beginning to develop in the tenth through the twelfth centuries.

document stated (quoted in Menadier 1913: 58 as reprinted in Cave and Coulson 1936 [1965]: 121):

And so, on the advice of our nobles, we have given, out of respect for the most holy lord, the Emperor Charlemagne, this liberty to all merchants-that they may be quit and free of all toll throughout the year at these fairs in this royal place, and they may buy and sell goods freely just as they wish.

*No merchant, nor any other person, may take a merchant to court for the payment of any debt during these fairs, nor take him there for any business that was conducted before the fairs began; but if anything be done amiss during the fairs, let it be made good according to justice during the fairs.* (emphasis added).

These grants may have deterred local legal arrangements (manorial law, urban law) from interfering with the market, at least to a degree, essentially recognizing the temporary jurisdiction of the Pie Powder court. Deterrence is never perfect, of course, so such grants do not mean that such interference never happened. While merchant “justice during the fairs” often was available and recognized by royal authority to have exclusive jurisdiction, however, it should not be inferred that royal “backing,” or the backing of some other authority, was necessary for such courts to judge or for merchants in general to execute the Law Merchant.

The kings benefited from having fairs within their jurisdictions so they could collect tolls, and in some cases, taxes or fees. As commerce developed and merchant communities gained wealth, however, local authorities and Kings increasingly attempted to assert authority over various aspects of commerce, and over merchant courts, in order to increase their abilities to collect revenues, and/or to eliminate competitors for such revenues. Before considering this issue, however, one other point deserves attention.

**Universal and Polycentric.** Recall VM’s (1999: 442) statement that it is “highly problematic to speak of a medieval *lex mercatoria* when the term is meant to denote an ‘international system of commercial law’ (Benson 1989, p. 645) or an ‘integrated, developing system, a *body* of law’ (Berman 1983, p.333, italics added).” Similarly, after discussing the fact that the Statute of Staples refers to both the law merchant and the “law of Staple,” Sachs (2006: 784) stated that “The Conceptual plurality of these laws and usages does not sit easily with the vision of a single *invariant* law merchant” [emphasis added].<sup>35</sup> Universality is not synonymous with “invariant”, of course, but it must be recognized that the

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35. In his critique of the Law Merchant literature, Sachs (2006) appears to have assumed that statements by Berman,



market system consisted of many parallel-evolving-interrelated-overlapping markets, and similar polycentric arrangements characterized the evolving medieval Law-Merchant system (Benson 1999). At any point in time, variation in some rules and practices existed across merchant communities, just as they do today (Benson 1999, Kadens 2004). Some of these groups were ethnic and/or religion based, others were geographic, and still others were both (e.g., the German merchants who ultimately formed the Hanseatic League, the Jewish, Muslim and Italians merchants in the Mediterranean). The medieval Law Merchant was polycentric (Benson 1999), made up of similar but certainly not identical or “invariant,” parallel, interdependent and overlapping merchant communities. This does not mean that the most important principles of the Law Merchant were not universal, however, as Epstein (2004: 8-9) explained:

... within the appointed area of the Law Merchant no one wants to depart from the norm of freedom of contract... With that concurrence as to ends, huge sources of potential disagreement just disappear from view... There might not be perfect agreement among the practitioners of the art as to how the Law Merchant came about or what ideal customs are. But this fundamental agreement on ends was universal ... Any differences in local culture could not push anyone away from basic principles. They only influenced the second-tier questions of formality and procedure....

... [T]he trick is to increase the number of contracting opportunities.

The Law Merchant does that in line with the time-honored principle too easily forgotten, that the extent of the market determines the division of labor.

This point is very consistent with Berman, since he suggested that the “basic concepts and procedures” of the Law Merchant were in place as part of a “developing system” of law. He did not contend that all rules were the same everywhere. It is quite normal to discuss the common law system, for instance, while

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Trakman, Benson and others about universality imply absolutely identical rules about everything everywhere. This is clearly not true. First, the authors subject to his attack all recognized that merchant law varied over space and time. After all, these authors explained that the evolution of the major tenets of the Law Merchant took at least two hundred years (e.g., Berman 1983: 333). To my knowledge, none of the modern authors contended that the Law Merchant was “invariant.” Second, it must be noted that the context of Sachs’ criticism is rather odd given the literature he attacked. Berman’s (1983) book was about the “plurality” of law, after all, and one type of law that he discussed was urban law [presumably “the law of staples” refers to the law of the staples market towns]. Similarly, Benson (1989, 1990, etc.) and Trakman (1983) both discussed the competition between legal systems (plurality of law), Holdsworth (1903) emphasized that urban law dominated by merchant guilds often stifled trade and discriminated against foreign merchants, and so on. Beyond that, of course, the Statute of Staples is a “statute”. It is authoritarian law imposed from the top, and while it clearly had an impact on merchants, it was not part of the Law Merchant created through merchant interaction. Sachs (2006: 786) also contended that the “drafters of the statute – even the merchants for whom it was enacted – had specific principles in mind.” I cannot say what the drafters had in mind, but I can say that the assumption that the statute was imposed primarily for the benefit of merchants in general is highly suspect. No doubt, some merchants had some influence over parts of the statutes [primarily those who dominated the governments of the staple towns], but the statute was also intended to benefit the crown (Benson 1989: 652).

simultaneously recognizing that there are differences in various doctrines across states. Indeed, Benson (1989: 648, note 4) noted that variations persisted across space even after 200 years of evolution. Kadens (2004) echoed Epstein but with some additional specificity that is quite consistent with Berman (1983), Benson (1989, 1999) and others. She depicted the customs of the medieval merchant community as layered, and contended that the “top layer” was “similar across Europe” (Kadens 2004: 56; citing Fagniez 1898: 116). In this context, she noted that merchant disputes pretty much everywhere were resolved quickly “from day to day or from tide to tide” and that they did not employ some of the trial procedures common in other legal systems of the day, such as ordeal or trial by battle (Kadens 2004: 56-57). These procedural uniformities reflected the desire for speedy and informal dispute resolution while striving to achieve equitable solutions to problems arising from incomplete contracts. This in turn reinforced incentives to contract and trade.

One very common trial procedure in law at the time, trial by oath, was allowed, but this was not the only method of “proof” under the Law Merchant. While this method of trial appears to be unsophisticated,<sup>36</sup> it actually was quite reasonable for the time and place. Essentially, it relied on local knowledge [in the Law Merchant it depended on the reputation of merchants]. Oath-helpers knew the character of the person they were helping and were likely to know the facts of the case better than anyone else. Furthermore, individuals who had strong religious beliefs were very reluctant to swear an oath before God that was actually false. It also must be stressed that Law-Merchant courts and arbitrators did not rely exclusively on trial by oath. Testimony, various documents, and other forms of evidence were considered when available. Indeed, the Law Merchant recognized a good deal of documentary evidence that royal and ecclesiastical courts would not, as noted above (Zoache 1663 [1686]: 128; Arxiu Capítular de Barcelona 1-6-3475).

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36. Sachs (2006: 687) asked in passing, as he develops his criticism of the Medieval-Law-Merchant literature, how “the ‘law merchant’ could possibly have retained a consistent meaning across more than seven centuries. How could any institution that required oath-helpers of Gerard of Cologne [in 1270] also provide a model for the transnational regulation of Internet ‘bots’?” Apparently he did not realize that trial by oath, or compurgation, was a common practice under many legal systems in the medieval period, including the common law. Trial by oath was used in the English Ecclesiastical courts until the seventeenth century. It was substantially abolished as a common law defense in felonies by the Constitutions of Clarendon (1164), but it was still permitted in civil actions for debt. In fact, it was not officially abolished for civil trials in England until 1833, by 3 and 4 William IV, c. 42, s. 13 (Lea 1996: 75). So Sachs also should have asked, how could the common law, a system that required oath-helpers for many trials in the medieval period, and allowed them in some situations until 1833, maintain a consistent meaning across the centuries?

The importance of equity implied substantively significant similarities across Europe as well, and it is clear that many fundamental rules were widespread. Thus, while merchants in a particular location, or exclusively trading in certain markets or fairs, may not have known that many of the local rules were similar to or identical to those accepted elsewhere, there can be little doubt that merchants did, over time, find similar solutions for similar problems. As an example, Kadens (2004: 57) cited several sources to conclude that merchants throughout the major Northern and Southern trading areas indicated that a deal had been made by putting down a godspenny or by handshake. She also noted that merchants “all used some forms of credit, though the variety of monetary instruments employed may best be described as unity in diversity. In the south, merchants preferred bills of exchange or letters of credit, while in the north they used primarily letters of obligatory until the fifteenth century” (Kadens 2004: 57-58). Kadens also noted that there were some variations in how these instruments were used in different local communities, a point also recognized by Trakman (1983: 20-21) and Benson (1989: 648). Nonetheless, “the law, in its broad lines, as laid down by the merchants ... was necessarily of the international character” (Bewes 1923: 299).

Berman (1983: 350) concluded that, "a great many if not most of the structural elements of the modern system of commercial law were formed" during the high Middle Ages. Berman's (1983: 341) conclusion that the rights and obligations of merchants in their dealings with each other "became substantially more objective and less arbitrary, more precise and less loose" by 1200, and probably by 1150, appears to be quite consistent with the evidence provided by Face (1958, 1959) and Grief (1989, 1993, 2006), despite what Berman's critics have claimed. Importantly, universality of all of the specific substantive rules is not necessary for Berman's (1983) contention to be true. As the trading range of most merchants and merchant communities were limited, all it required was that the statement applied within the various communities and for intercommunity trades between specific communities like the merchants who traded in the Champagne fairs. For this to occur, information had to be provided to foreign merchants so they could behave according to local expectations. A widely accepted (universal) set of fundamental rules substantially lowered the cost of interpreting other rules, because all of the local practices and usage could be expected to be consistent with the fundamental overarching rules. Many of the local practices and usage also would have been very similar,

if not identical, particularly after inter-community trade had been going on for awhile, as profit-seeking merchants naturally looked for the rules that minimized their transactions costs.<sup>37</sup>

While merchants within various communities tended to travel together, form partnerships, and engage in various kinds of mutual support, much of the merchant trade was between members of different groups. Most trade between merchants occurred at fairs when commerce began to emerge from the dark ages, and merchants from different communities clearly came together at the major fairs, as explained above. As a result, it should not be surprising that over time many of the rules and practices of one community could be observed by members of other communities. Within-group rules evolved as merchants emulated relatively effective practices they observed. Those rules that proved to be the most effective at facilitating commercial interaction tended to supplant those which were less effective. Nonetheless, at any point in time considerable variety in rules across communities probably was the norm. Two different rules might be equally effective for instance. Also, as new issues called for solutions, they might have developed in a particular community first, so that community might have had a standard practice to deal with the issue long before another community even faced the issue. In additions, merchants predominantly trading in one area or one commodity faced different kinds of issues than merchants trading mostly in another area.<sup>38</sup> Nonetheless, as Kadens (2004: 62-63) explained,

The fact that customs were local or trade-specific did not mean that they had no effect on commerce in general. The Italian wool buyer in England followed English custom; the Fleming who purchases a bill of exchange in Paris followed the local *usance*. One of the prevailing tropes in works by merchants on trade practices is the discussion of the rules one must follow in different locales. Knowing those rules and working within them was part of how a trader abided by the law merchant. When disputes arose about customs, whether the nearly universal or the local ones, courts assumed that the merchants parties had knowledge of the practices. Consequently, they believed that they could rely on merchant experts to give them guidance on how to resolve the disagreement.

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37. The increasing interest in commerce from those with coercive power, or with sufficient political influence to benefit from such power, also was an important reason for differences in the Law Merchant's local rules. See the concluding section of this paper, and note 46 in particular.

38. Consider wool, for instance [this discussion paraphrases Kadens (2004: 60)]. Wool from England was baled in amounts of standard size. During the bale packing process, a sworn wool-sorter sorted the wool according to quality, marked each bale to indicate the wool merchant involved, the quality of the bale, the place of origin for the bale, and a specific bale number. The individual who created these bales sold them to buyers who generally did not inspect each bale. Instead, a sample out of a set of bales was examined. The expectation was that all similarly marked bales were of similar quality. These bales would then be sold to others based on the verbal guarantee of the merchant. These markings and verbal guarantees were unique to the wool trade, so they were irrelevant to other traders.

In fact, since some rules varied from place to place, itinerant consul often travelled with groups of traders of a particular nationality, specializing in determining the rules and practices in the markets and fairs they visited, and watching over the community's interests (Bewes 1923: 85). In some large markets and fairs, permanent consul representing particular nationalities apparently attended to the needs of travelling merchants, offering their services regarding local legal issues and disputes [they also apparently were sources of information about reputations: before finalizing a contract, each merchant was free to check with a consul about the behavior and reputation of the other party in the exchange (Milgrom, et al. 1990: 10-14)]. In addition, merchants also retained agents who spent much more time at particular fairs and in particular locations than the merchants themselves (Face 1958, Greif 2006), so these agents also were sources of information.

This brings up an apparent misinterpretation by Sachs (2006). He appears to believe that if the medieval Law Merchant existed then the rules of the Law Merchant (or at least many of its rules) should have been created and imposed by merchant courts as if they were modern precedents, and that fair courts should, therefore, have referred to other fair courts' rulings. After actually admitting that it is "difficult to make any conclusions about national or international similarities based primarily on court records from only one area (the fair of St. Ives) and period of time (1270-1324)" (Sachs 2006: 762), he went on to do so at great length, contending, for instance, that "one can examine the alleged universality of the law merchant in reverse: rather than ask whether courts resembled St. Ives, one can inquire to what extent St. Ives sought to follow other courts" (Sachs 2006: 763). He then contended that "The merchant courts functioned on an almost entirely independent basis; each court considered itself competent to decide cases from anywhere in the world, and showed no hesitation in doing so" (Sachs 2006: 763). Similarly, the court appears to have been reluctant to issue a "general ruling" (Sachs 2006: 757), and

if the mercantile courts were partners in the administration of a universal law merchant, one might expect some sort of organized division of labor among them. This is especially true given that cases in the St. Ives court might be simultaneously litigated elsewhere.... What principle mediated the contacts between St. Ives and its sister courts, and how were conflicts between them resolved? Some occasional mentions of external courts appear in the St. Ives rolls. However, such examples are exceedingly rare, and generally represent other aspects of court process rather than true collaboration (Sachs 2006: 765).

And again, “Although the St. Ives court was willing to pass judgment on controversies arising out of foreign cities and fairs, it did not appear to recognize the courts of those areas as participating in a special and shared transnational jurisdiction. Decisions reached in the courts of other cities or communities could be challenged and even reversed in the fair court” (Sachs 2006: 765-766). Several similar statements could be cited, but the fact is that what Sachs observed is precisely what should be expected with a polycentric customary law system. Since true merchant courts had no authority to create or impose rules, all they really did was resolve disputes by offering default rules that could be ignored in future contracts.<sup>39</sup> A decision might have occasionally suggested a useful rule that might then be adopted, but no merchant court considered its rulings to be binding on any other court or on any merchant other than the parties in the dispute for the term of the contract. Furthermore, a decision might not have been consistent with another court’s decision, but that did not mean that the other court’s ruling was “reversed.” The decision was different, but neither applied as a universal principle unless or until it was voluntarily adopted within the relevant community. In fact, local rules were understood to apply in a market or fair as long as those local rules were consistent with the overarching universal rules of the Law Merchant (see below). Merchants were free to write contracts that addressed the issue in ways that were consistent with either court’s decision or inconsistent with both – the “principles” of freedom of contract and that local rules applied in local transactions “mediated the contacts between St. Ives and its sister courts.”<sup>40</sup> Unlike modern common law courts, merchant courts had no legislative authority,<sup>41</sup> and they were not “partners” engaged in “collaboration” to create an “invariant” Law Merchant.

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39. Similarly, strong precedents observed in common law today were not part of the medieval common law. Zywicki (2003) explained that common law dispute resolutions were actually similar to Law Merchant dispute resolutions – decisions did not create hard precedent, but instead, essentially suggested default rules that people could contract around. If precedents are necessary for a system to be law, then medieval common law was not law either.

40. Merchant courts apparently communicated with one-another for advice on occasion. Another potential reason for inter-court communications was to prevent filing the same suit in more than one court: “Here let us remember the controversy between two brothers ... who went to law in Brabant for many thousand pounds, and afterwards one of them did commence suit in Flanders being another jurisdiction, whereupon he was compelled to pay a forfeiture of 4000 pounds; for in truth good orders and customs are to be maintained as laws and nothing is to be admitted that may infringe the law of Merchants” (Malyne 1622 [1686]: 452).

41. Sachs (2006: 761) believes he identifies a precedent-setting decision of the St. Ives court, but it will be evident below that the court’s decision is consistent with widespread and longstanding practice and usage.

The preceding discussion reveals many of the universal rules of the Law Merchant (and helps distinguish these rules from the many non-Law-Merchant rules that were imposed on merchant activity over time, as explained below). The following list is my characterization of such rules. It is not a list derived from a medieval source, although it reflects information from such sources, other secondary sources, and a detailed examination of literature about other customary law systems. In fact, merchants may not have consciously recognized these rules, or been able to articulate them. That is often the case with customary law. Nonetheless, by 1200 merchant behavior in commercialized Europe implies that they generally acted under universal rules such as:

- (1) respect other merchants' property rights;
- (2) respect freedom of contract, as well as freedom not to contract [thus, for instance, a contract agreed to under duress was not valid];
- (3) be honest in dealings with other merchants: for instance, accurately represent merchandise when negotiating an exchange [therefore, a contract agreed upon because of fraudulent misrepresentation was not valid];
- (4) do what you promised to do in a valid agreement, unless a subsequent voluntarily agreement alters the first contract [e.g., do not engage in opportunistic behavior by demanding changes in a contract to capture a larger portion of the gains from trade];
- (5) provide truthful information to other merchants about observed behavior of individual merchants, and if requested, provide such information under oath (see number 10 below);
- (6) learn and follow local practice and usage when trading, unless all parties to an exchange agree to behave otherwise for the term of their contract;
- (7) when trading locally with foreign merchants or domestic merchants from other regions, provide accurate information about local practice and usage relevant to the transactions;
- (8) treat all merchants attending a fair or market equitably, whether foreign or domestic;
- (9) if a dispute arises that cannot be resolved through negotiation, take the dispute to an arbitrator(s) or judge(s) who is either agreed upon by both parties [e.g., an ecclesiastical court, a

merchant arbitrator] or chosen by the relevant group of merchants [e.g., those attending a fair]; do not use violence to resolve the dispute unless the other party refuses to accept fair arbitration;

(10) accept an arbitrator(s) or judge(s) who is a reputable merchant or other adjudicator(s) [e.g., an ecclesiastical court] who will resolve the dispute quickly and equitably after considering the relevant evidence (documented terms of a contract, related documents, testimony of witnesses of an agreement) if such evidence is available; whose dispute resolution will be consistent with the customs, practices and usage that each party should have been familiar with – the universal rules that everyone knows [such as those suggested here], along with relevant local practices and usage; and who will, if necessary to reach a quick decision, recognize evidence about the reputations of the parties [oaths – recall number (5) – with the number of oath-helpers established according to local practices regarding relevant circumstances];

(11) if a dispute is taken to an arbitrator(s) or judge(s), accept and abide by the resolution proposed within the confines of the contract that generated the dispute; the same dispute is not to be taken [appealed] to another adjudicator, but the resolution need not affect future contracts with the same or another party;

(12) the terms of a particular contract and the resolution of a particular dispute do not impose rules on you or other merchants that must be followed in future interactions or contracts [although they may suggest beneficial practices for future interactions or contracts that you may choose to adopt];<sup>42</sup>

(13) support the reputable merchants in your own merchant community [guild, caravan, ethnic or national group] if called upon to protect property or assist in pursuit and collection efforts [the hue and cry]; and

(14) provide financial backing to reputable merchants from your community, and if any surety loan of this type is provided to you by others, repay or work off the loan in a timely fashion.

As with any legal system, rules were violated. Appeals to some authoritarian courts occurred, fraud was

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42. This was also the case for Common Law courts during the early centuries of its development (Zywicki 2003).



practiced, domestic merchants did not always inform foreign merchants about local practices and usage, and so on. The flow of information about such violations was vital [number (5)], as this allowed individual merchants to decide how to treat violators [e.g., ostracize, demand bonds or other terms of a contract]. There were probably other universal rules, and the importance of some of those listed probably varied over time and space. Significantly, by accepting these kinds of fundamental overarching general rules, many more specific behavioral requirements could be generated through negotiation and contracting.

### **III. Conclusions: Competition for Jurisdiction, and Alterations in the Law Merchant.**

As long as most trade took place at numerous temporary fairs, the incentives for local powers (and domestic merchants) to try to control trade were relatively weak. However, as trade expanded, some locations that had particular geographic advantages for either production or trade (e.g. access to raw materials such as ore deposits or coal, a good harbor, a relatively large cluster of wealthy customers such as a royal court), local powers realized that they could extract some of the locational rents. Domestic merchants and craftsmen, also attempting to extract locational rents, might choose to settle permanently in some of these locations, making them permanent market towns. Many grew rapidly, becoming cities of significant political importance. Politically important market towns were governed, for the most part, by merchant and craft guilds whose members located in them. Many of the rules that had evolved through Law Merchant processes were adopted by local authorities trying to attract merchants to their fairs, and by the market towns dominated by commercial interests. In fact, Kings often recognized (“granted”) legal authority (coercive power) to politically important urban governments and to other local authorities, like barons and abbots. The powers granted to recognized local authorities often included the power to set up their own courts.<sup>43</sup> When coercive power is established in a jurisdiction, however, it becomes

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43. This recognition often was accompanied by some sort of “grant” of the privilege to maintain local law and hold local courts, but this does not necessarily imply that Kings could have provided and enforced law in these localities. Local lords maintained military forces that Kings required in order to pursue their wars, and commerce was necessary in order for kings to raise funds through taxes and loans, so jurisdictional “grants” were virtually always “exchanges”. In order to maintain the military support of local lords and encourage commerce despite the taxes collected, kings recognized various privileges for lords and urban powers, including legal authority in local

possible to impose discriminatory rules from the top down (Benson 1999, 2001). And as Hayek (1973, 10) noted, “the growth of the purpose-independent rules of conduct ... often have taken place in conflict with the aims of the rulers who tended to turn their domain into an organization proper.” Many urban governments dominated by local merchants and guilds began discriminating against various foreign trading communities (Jewish traders were favorite targets) while simultaneously granting other trading groups special privileges (e.g., treating them as if they were local merchants) in exchange for similar privileges in the local bases of those groups. As Holdsworth (1903, 302) explains, when this occurred,

It was only those who belonged to the Guild Merchant who could trade freely within the town. Its conduct was sometimes so oppressive that trade was driven from the town. In fact all the various privileges, jurisdictional and administrative, which the towns possessed could be, and often were used in a manner adverse to the commercial interests of the country. The foreign merchant was hampered at every turn by the privileges of the chartered towns. They were averse to allowing him any privileges except those which they had specifically bargained to give him.

Reciprocal agreements between market towns became increasingly common with each agreeing to grant certain exclusive privileges to merchants from the other. Some of these agreements developed into multilateral and geographically extensive coalitions that discriminated in favor of merchants from the towns in the coalition. The most obvious example are the Hanseatic Cities of Northern Europe that establish near-exclusive control of trade throughout the Baltic for German merchants (Dollinger 1970).

Kings also used their coercive powers to extract revenues or political benefits from fairs, and commerce in general. As royal power expanded, for instance, French kings appointed “jurists, who, having recommenced the study of Roman law, supported the royal claims by the Digest of Justinian” (Bewes 1923: 105), displacing the Law Merchant, at least to a sufficient degree that commercial activity in France declined, shifting westward to the Rhine and eastward to direct sea routes between northern and southern traders.<sup>44</sup> Kings also found it beneficial to sell exclusive monopoly franchises, and exclude

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jurisdictions. Recall the discussion of the mobility of merchants as a constraint on local authoritarian power.

44. The Count of Champagne did not interfere with the fairs through most of the twelfth century, but toward the end of that century this began to change. Wardens were appointed to deal with administrative and judicial issues. These wardens were supported by serjeants to deliver summonses, serve as night watchmen or guards, and enforce orders of the court (Kadens 2004: 53). These courts apparently continued to apply merchant law. Some historians have dated the beginning of the decline of the Champagne fairs to the conquest of Champagne by Phillip the Bold in 1273, but in 1285 Champagne became dependant on the King of France, and Abu-Lughod (1991, 58) contended that this is

specified merchant groups such as Jewish traders, thereby gaining the support of the powerful domestic merchants who captured monopoly rents and shared them with the Kings (through franchise fees, taxes, etc.).

Some writers apparently assume that authoritarian law imposed on merchants was the Law Merchant or vice versa (e.g., VM 1999, Sachs 2006). Equating these systems is inappropriate. Citing letters reported in *The Little Red Book of Bristol (c. 1280)*, Coquillette (1987: note 21) explained that “surviving correspondence forms between one fair court and another, even fair courts of different countries, show a formula that clearly distinguishes between the law merchant ... and the town customs.” While urban and manorial (and royal) law supported many Law Merchant rules, they also imposed top-down authoritarian and discriminatory additions or alterations to extract revenues and/or provide special procedures, privileges and powers to selected individuals or groups.<sup>45</sup>

In conclusion, let us summarize the characteristics of the medieval Law Merchant as described in Bewes (1923), Berman (1983), Trackman (1983), Benson (1989, 1990, 1995, 1999,

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when “the Champagne fairs lost their edge.” The institutions established by the Count became the King’s, and fiscal exactions increased. Then in the fourteenth century, the Hundred Years War started. It continued from 1336 to 1453 although the political buildup to the war started several years earlier. The French kings require revenues to maintain their war efforts and the fairs were seen as a source of revenues. In addition, the black plague hit Europe shortly before the middle of the fourteenth century. Jews were widely blamed for the plague, and Jewish merchants were expelled from many fairs and markets, including those of Champagne. The result of the displacement of merchant law, the extraction of war revenues, the Jewish expulsion and other authoritarian controls over these fairs, along with the dangers for merchants traveling during the war, was that over time “The Rhone was deserted for the Rhine the caravan for the convoy, and so the Flemish and British markets were reached... but this is but a partial account of the change in the course of trade, for ... the greatest part of this trade became waterborne and direct” (Bewes 1923: 111).

45. The success of authoritarian efforts to capture benefits by controlling commerce, including merchant law, depended on several factors, including the degree of competition between jurisdictions (the availability of fairs or markets in other jurisdictions which were more receptive to the Law Merchant), the mobility of merchants and their wealth, and the locational advantages enjoyed by particular markets or fairs. If competition was severely limited, merchants might be forced to use authoritarian courts despite a preference for some other method of dispute resolution. As Jones (1987: 89-90) explained, however, “the ability of the market to free itself from the worst interferences by the authorities” was a distinctive characteristic of European trade. Arbitration could be used, for instance. Also recall that ancestors of the Maghribi traders moved from Bagdad to Tunisia in the tenth century because of the political situation in Bagdad (Greif 2006: 61). Similarly, German merchants representing the Hanseatic League moved out of Bruges, the Flanders trading hub, in 1288 because Bruges’ appointed weighers fraudulently falsified weighings (Kadens 2004: 51). Bruges’ government had to promise to prevent the fraud in order to get the German merchants to return. A more significant example of merchant mobility probably is the decline of the fairs of Champagne as some trade move west and maritime trade increased to the east – see note 41. Also recall note 34 and the discussion of underground activities such as smuggling.

2002, 2009), Johnson and Post (1996), Mallat (2000), Zywicki (2003), Callahan (2004), Belhorn (2005), Levit (2005), and many others. *Lex Mercatoria* of the high Middle Ages was

(1) a distinct [but not independent] system of polycentric customary law which arose and continued to evolve spontaneously from the bottom up through the interactions of merchants in pursuit of universal objectives to enhance the opportunities for contract and trade, and maintain freedom of contract; consisting of:

(2) primary rules of obligation including both long-standing custom and evolving commercial practices and usage that supported freedom of contract and increased opportunities to contract by increasing the credibility of promises; as well as secondary rules of:

(3) change initialized through negotiation (contracting), and perhaps dispute resolution, followed by voluntary emulation of those practices that best enhanced opportunities to engage in contractual trade and support freedom of contract;

(4) adjudication through processes such as mediation, arbitration, participatory courts and other courts willing to resolve merchant disputes quickly and equitably; and:

(5) recognition arising from positive incentives to expand contracting opportunities (and merchant well-being) through maintenance of repeat-dealing and reputation benefits, along with negative incentives created by spontaneous sanctions such as varying degrees of ostracism; but:

(6) this distinct system also interacted, in various complementary and/or competitive ways over time and space, with other distinct polycentric legal systems that often had objectives differing from those of the Law Merchant; and as a result:

(7) its primary and secondary rules influenced and were influenced by other legal systems.

Over time the Law Merchant was absorbed in varying degrees by the urban and royal legal

systems evolving within European States [urban law was also largely absorbed by national law in parts of Europe], at times with the consent and support of domestic merchants and at times, despite merchant resistance. This absorption often altered or replaced Law Merchant rules and procedures to the detriment of commercial activity (Trakman 1983, Benson 1989, 1990). International trade continued, to a substantial extent, to be ruled by the Law Merchant, however, as did trade within various commercial organizations and trade associations which have become increasingly prominent over the last two centuries (Benson 1995, Bernstein 1992). Over the centuries, Law Merchant rules and procedures have changed to reflect the changes in market organizations and practices, and its polycentric nature has become more pronounced (Cooter 1994, Benson 1999). Indeed, new Law Merchant systems have been severely undermined in some places and driven underground,<sup>46</sup> only to arise and evolve again whenever market systems are able to emerge (Benson 2010a).

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46 Even when royal or urban authorities declared various trading activities illegal and undermined incentives to be productive, illegal trading generally developed. The illegal traders followed practices and usage developed under their own Law Merchant processes. This underground Law Merchant would not be easily observable, of course. Leeson's (2007) examination of the rules and procedures employed within pirate communities illustrates that illegal activities are not "lawless" even though they may be engaged in activities that are illegal under the laws of nation states. The underground practices and usage were also probably stifled in various ways, and the resulting Law Merchant system may have been relatively less effective than systems that arose in environments where trade was much freer and less controlled [e.g., see de Soto's (1989) insightful discussion of the rules and processes governing the "informal" sector in Peru]. Nonetheless, as Nee (1998: 88) explained, "opposition norms" inevitably evolve as the incentives created by formal institutions and sanctions are weak relative to the incentives to pursue personal interests. For instance, as European governments attempted to establish control over maritime trade in order to tax it or to protect powerful domestic merchants' franchises and privileges, the "average merchant and seaman responded with piracy and smuggling, and a substantial part of maritime commerce was carried out in violation of the laws of some nation-state" (Rosenberg and Birdzell 1986: 92-96). Furthermore, the middle and even the upper classes willingly wore, drank, and ate smuggled goods (Rosenberg and Birdzell 1986: 93). Clearly, the royal and urban courts would not consider contract disputes involving smuggled goods that undermined their tax collection activities and/or the privileges they had given to various individual merchants, domestic merchant groups, and guilds. Contracts still arose, no doubt subject to an underground Law Merchant. Similarly, while craft guilds attempted to monopolized (cartelized) production within particular urban markets, illegal production of the goods the guild supposedly had exclusive rights to produce often occurred outside the urban boundary, with illegal (counterfeit) goods then sold to both city residents and alien merchants (Jones 1987: 99). As Jones (1987: 96) noted, "Rigidities impeding the movement and use of goods and factors of production had to be removed for economies to work efficiently. The lure of profit was sufficient in already commercialized economies to bite into the 'cake of custom' or to get around the regulations. Rigidities were less of a bar to development than residual arbitrariness, though the course of market expansion through the maze of inconveniences was not quite as that might suggest."

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