

## Conceptualizing Lex Mercatoria: Malynes, Schmitthoff and Goldman Compared

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# Conceptualizing *Lex Mercatoria*: Malynes, Schmitthoff and Goldman compared

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## Abstract

This article compares the doctrines on transnational commercial customs in Malynes' *Lex Mercatoria* (1622) and in the writings of Clive M. Schmitthoff and Berthold Goldman. It is argued that core problems in conceptualizations of *lex mercatoria* are present in all these texts. Malynes unsuccessfully attempted to reconcile a new approach of considering law merchant as *ius gentium* on the one hand, with a tradition of particular customs of trade on the other. All three authors mentioned struggled when explaining how custom emerges from contracts or practice. Malynes, Schmitthoff and Goldman tried to apply existing notions (usage, custom) in order to do so, often referring to historical arguments, but they could not bridge the fundamental differences existing between customs of trade and *ius gentium*. As a result, all three authors failed in putting forward a workable theory of *lex mercatoria*. Non-matching legal views on international business practices were cut and pasted together, as it were, and new theories on *lex mercatoria* would do well not to replicate this approach.

## Keywords

Intellectual history, commercial law, customary law, *lex mercatoria*, legal history

## I. Introduction

The doctrinal concept of *lex mercatoria* continues to defy lawyers. In the 1960s, two authors, Clive M. Schmitthoff and Berthold Goldman, proposed definitions of the customary law that relates to

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transnational commercial contracts.<sup>1</sup> Their theories on the contents and features of *lex mercatoria* are nowadays still often considered authoritative. However, these theories are far from monolithic. It will be demonstrated hereinafter that over time both Schmitthoff and Goldman adjusted their ideas and that, in spite of the frequent restatements, important problems remained unsolved.<sup>2</sup> While at present new interpretations of *lex mercatoria* continue to unfold,<sup>3</sup> the steady stream of literature on the subject still grapples with questions that were either insufficiently answered or not resolved at all in Schmitthoff's and Goldman's accounts. Moreover, the first doctrinal text on the topic, which is *Consuetudo, vel Lex Mercatoria* by Gerald Malynes (1622), was already vague on many of the issues for which Schmitthoff and Goldman later did not find adequate responses.

This article will both compare and, in so doing, scrutinize the doctrine of the three authors mentioned. The *tertium comparationis* are the informal rules that apply in transnational business environments, and which are mostly concerned with commercial contracts. The three named authors were, each in their own right, drafting concepts and theories that allowed for integrating these informal rules within the framework of existing legal concepts and law. Although these three authors provided rationales relatively independent of one another, comparison of their writings yields the conclusion that flaws in their theories result from mixing two different traditions, one belonging to a primarily theoretical strand of civil law doctrine, another to mercantile practice, that is, the customs of merchants.

In addition, the method used in this article is not only comparative but also historical. Legal history is useful for identifying thoughts that, over the passage of time, have come to be combined in theories of *lex mercatoria*. Ideas must be understood as mirroring a certain context, which is at least partly historical. Therefore, historical contextual analysis of the views that underlie

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1. Clive M. Schmitthoff (d. 1990) wrote several chapters and articles on *lex mercatoria*, starting in 1961. See C.-J. Cheng (ed.), *Clive M. Schmitthoff's Select Essays on International Trade Law* (Nijhoff, 1988). This collection comprises nearly all English writings of Schmitthoff. It does not contain C.M. Schmitthoff, 'Das neue Recht des Welthandels', 28 *Rabels Zeitschrift*, p. 47 and C.M. Schmitthoff, 'International Trade Usages', *Institute of International Business Law and Practice Newsletter* (1987). Berthold Goldman (d. 1993) presented his views in several articles and chapters, dating between 1964 and 1993: B. Goldman, 'Frontières du droit et *lex mercatoria*', 9 *Archives de philosophie du droit* (1964), p. 177; B. Goldman, 'La *lex mercatoria* dans les contrats et l'arbitrage internationaux: réalité et perspectives', 2 *Travaux du Comité français de droit international privé* ([1979] 1980), p. 221; B. Goldman, 'Lex Mercatoria', 3 *Forum Internationale* (1983), p. 3; B. Goldman, 'The Applicable Law: General Principles of Law – The Lex Mercatoria', in J.D.M. Lew (ed.), *Contemporary Problems in International Arbitration* (Springer, 1986), p. 113; B. Goldman, 'Nouvelles réflexions sur la Lex Mercatoria' in Christian Dominicé, Robert Patry and Claude Reymond (eds.), *Etudes de droit international en l'honneur de Pierre Lalive* (Helbing & Lichtenhahn, 1993), p. 241. An early opinion on the Suez Company as a company pertaining to 'the international legal order', rather than national law, was published in *Le Monde* in October 1956: B. Goldman, 'La Compagnie de Suez, compagnie internationale', *Le Monde*, 4 October 1956; see <https://www.trans-lex.org/img/monde.jpg>. The first author to use the notion 'new law merchant' was Aleksandar Goldstajn: A. Goldstajn, 'The New Law Merchant', 12 *Journal of Business Law* (1961), p. 12. Schmitthoff most probably borrowed his concept, since he cited Goldstajn in his first article on the modern *lex mercatoria*.
  2. For a thorough analysis of Goldman's and Schmitthoff's ideas, see O. Toth, *The Lex Mercatoria in Theory and Practice* (Oxford University Press, 2017), in addition to N.E. Hatzimihail, 'The Many Lives – and Faces – of Lex Mercatoria: History as Genealogy in International Business Law', 71 *Law and Contemporary Problems* (2008), p. 169. Not all of Schmitthoff's publications were analysed in this literature, which means that changes in views were not always taken into account.
  3. Without claiming to be exhaustive, one can refer to the views of Roy Goode (distinguishing transnational commercial law from *lex mercatoria*, the latter of which is customary but not universal or autonomous), Gunther Teubner (*lex mercatoria* as encompassing globalized autopoietic communications), and da Sousa Santos (the legal order of global capital).

conceptualizations of transnational customs of commerce is a necessary requirement for their proper legal analysis. Moreover, legal history is called upon as witness to the trial of *lex mercatoria* time and again.<sup>4</sup> Schmitthoff and Goldman themselves resorted to historical arguments, and this approach is still common today.<sup>5</sup> However, the historical arguments in the writings of these authors were not always correct, and they are thus open to reassessment. Accordingly, such legal-historical analysis has the potential to uncover certain unwieldy components in *lex mercatoria* concepts that were drawn from history; this then – ideally – contributes to the design of better theories for the present day.

It will be shown hereinafter that the transnational element in the doctrinal notion of *lex mercatoria* is very different from the appraisal of mercantile norms as being ‘customs’. The former idea belongs to a mostly theoretical approach of civil lawyers that became fashionable in the 17th century, and which was then connected with a new interest in international law. Later on, it was a sociological approach that referred to transnational informal norms of commerce. In the 1960s Goldman proposed a practice- and community-based *lex mercatoria*. Even though authors writing in the aforementioned traditions used the concept of ‘custom’, this notion as a doctrinal concept was not consistent with the stated theories. ‘Customs’ had been studied in civil and common law since the late Middle Ages. They were subject to specific requirements that largely precluded features of transnationality. ‘Usage’ was a term that was more flexible but often could not be used for the said purposes, either. Concepts belonging to the one or the other approach could be expanded, though not to the point that they solved the many problems intrinsic to ‘transnational customs’. The lasting inconsistencies were due to the divide existing between transnationality and custom, which is already apparent in Malynes’ *Lex Mercatoria* of 1622. As a result, present-day analysis of international business law should be wary of considering historically transmitted theories as authoritative per se.

## 2. Matching practice with law: Schmitthoff’s and Goldman’s conceptions of *lex mercatoria*

In the 1960s, Clive M. Schmitthoff portrayed *lex mercatoria* as consisting of rules that are found in treaties and in model terms of contract that were put down in writing by international agencies, such as UNIDROIT and UNCITRAL. He conceived of *lex mercatoria* mainly as written law; at first, Schmitthoff did not think of unwritten rules as being part of the *lex mercatoria*. As a result, Schmitthoff did not envisage *lex mercatoria* as being customary law. Even so, in a late publication of 1987, he seems to have been influenced by some ideas of Berthold Goldman, who since 1964 had supported a non-state-law concept of *lex mercatoria*, one consisting entirely of customs. Schmitthoff came to refer to some ‘universal trade usages’ that did not depend on state intervention, and which were not necessarily included in model terms of contract.

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4. New textbooks and monographs on international business law often integrate results of legal-historical research. See for example, M.A. Clarke et al., *Commercial Law: Text, Cases, and Materials* (Oxford University Press, 2017), p. 14; M.L. Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edition, Cambridge University Press, 2017), p. 69, footnote 24.

5. For a rather recent example, see C. Cutler, *Private Power and Global Authority. Transnational Merchant Law in the Global Political Economy* (Cambridge University Press, 2003). Even scholars that advocate for private ordering theories resort to historical arguments. See for example B.L. Benson, ‘The Law Merchant’s Story: How Romantic Is It?’, in P. Zumbansen and G.-P. Calliess (eds.), *Law, Economics and Evolutionary Theory* (Edward Elgar, 2011), p. 68.

Neither Goldman or Schmitthoff proposed convincing arguments on the creation of rules in transnational trade practice. Neither did they solve the problem of the binding nature of ‘customs’ irrespective of the awareness of actors as to their existence. With regard to these two topics, the views of the two scholars fluctuated over time. Historical arguments played an important part in their theories, not to mention affected changes in their viewpoints as well. Both authors considered the transnational commercial custom of today to be a revived version of a medieval *lex mercatoria* and, moreover, argued for or against present-day situations based on historical examples as well.

### A. Schmitthoff's hesitancy over the legal force of usages of trade

In the theories of Schmitthoff, which he proposed between 1961 and 1987, the sources of the present-day *lex mercatoria* are ‘international legislation’ and ‘international custom’. ‘International legislation’ refers to treaties and also model laws. They are the outcome of deliberate actions of states. ‘International customs’ are ‘commercial usages and practices which are so widely accepted that it has been possible to formulate them as authoritative texts’.<sup>6</sup> Schmitthoff indeed advanced a codification argument. Only customs that had been ‘formulated’ (that is, enacted) were considered as being part of *lex mercatoria*. This fixing of customs was done by international agencies, specifically, in the texts of contract terms that they issued as model terms. For a long time, Schmitthoff envisaged that practices and usages in trade are not to be labelled as ‘law’ before their articulation by international agencies.

However, in spite of his categorization of these model terms as ‘law’, Schmitthoff also stressed that their application ultimately depends on choice. ‘Customs’, as found in international model contract terms, are not to be considered a set of binding and external default rules that allow for settling disputes; only to the extent that they are deliberately adopted, explicitly or implicitly, in an agreement, do they apply in the relation between the contracting parties. Hence, they must be considered as being a part of the agreement rather than as imposed rules. As a result, for Schmitthoff (until 1987, at least) the legal force of *lex mercatoria* – as found outside ‘international legislation’ – was rooted in contractual consent.<sup>7</sup> According to Schmitthoff, the fact that ‘customs’ originate in international business practice explains why they are easily found and written down, but these origins do not support their legal force; only consent by contractual parties to apply them does.

Schmitthoff struggled when explaining why typical terms of contract were ‘customs’ – that is, had legal force – only from the moment of their enacting by international agencies and choice by contracting parties. Schmitthoff ran into trouble with his model of normativity that distinguished between practice and law. It was, for example, difficult to see why customs, if they were so abundant, depended on any fixation by international agencies. Furthermore, why was choice an additional requirement if the international custom of business was straightforward?

Confusion on the legal force of business customs is most evident in Schmitthoff's use of historical examples. At first, Schmitthoff largely interpreted the medieval *lex mercatoria* in accordance with his views on the present day. The *lex mercatoria* of the Middle Ages, according to Schmitthoff, consisted of rules that were applied with regard to contracts, the latter of which were

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6. C.M. Schmitthoff, ‘The Unification of the Law of International Trade’, 105 *The Journal of Business Law* ([1968b] 1988), p. 105, reprinted as C.M. Schmitthoff, ‘The Unification of the Law of International Trade’, in C.-J. Cheng (ed.), *Clive M. Schmitthoff's Select Essays on International Trade Law* (Nijhoff, 1988), p. 210.

7. O. Toth, *The Lex Mercatoria in Theory and Practice*, p. 34.

standardized.<sup>8</sup> These contracts were standardized by reference to shared practices in medieval international trade. The stereotypical wording of standardized contracts reflected underlying rules that were used and interpreted in the same way by merchants of different countries and regions.<sup>9</sup> Standardized contracts were the medieval twin of the ‘international custom’ of the 20th century. In the early 1960s, therefore, Schmitthoff defined *lex mercatoria* in its late-medieval form as a body of ‘customs’.<sup>10</sup> Yet in this regard, Schmitthoff was confronted with the question as to why these medieval ‘customs’ did not need ‘formulation’, in contrast to their 20th-century counterparts. Schmitthoff tried to solve this matter by adding two extra foundational ingredients: the medieval business customs derived their force from both natural law<sup>11</sup> and ‘general custom’, the latter of which was comparable to the common law in England.<sup>12</sup> These references were rather vague, however. Natural law could refer to an innate legal consciousness or internationally uniform rules or principles, but Schmitthoff was not all too clear about this concept. The phrase ‘general custom’ hinted at uniformity across jurisdictions but, of course, did not add anything in terms of explaining the legal force of custom.

The aforementioned historical arguments were not the result of in-depth historical analysis. Schmitthoff read not only Plucknett’s *Concise History of the Common Law*, which offers a nuanced history of commercial law in medieval England, but also Wyndam Bewes’ *The Romance of the Law Merchant*. The latter book depicts medieval commercial law as a body of customs, emerging and developing spontaneously, as a by-product of transactions.<sup>13</sup> Schmitthoff cited Paul Huvelin, as quoted by Bewes, for his statement that out of the essential features of the law applied at medieval fairs ‘emerges the conception of the law merchant, outside and above civil statutes and

8. C.M. Schmitthoff, ‘International Business Law: a New Law Merchant’, 2 *Current Law and Social Problems* ([1961] 1988), p. 129, reprinted as C.M. Schmitthoff, ‘International Business Law: a New Law Merchant’, in C.-J. Cheng (ed.), *Clive M. Schmitthoff’s Select Essays on International Trade Law* (Nijhoff, 1988), p. 24.

9. C.M. Schmitthoff (1988), ‘The Unification of the Law of International Trade’, in C.-J. Cheng (ed.), *Clive M. Schmitthoff’s Select Essays on International Trade Law* (Nijhoff, 1988), p. 171.

10. ‘It arose in the Middle Ages in the form of the law merchant, a body of truly international customary rules governing the cosmopolitan community of international merchants who travelled through the civilised world from port to port and fair to fair’ in C.M. Schmitthoff, ‘International Business Law: a New Law Merchant’, in C.-J. Cheng (ed.), *Clive M. Schmitthoff’s Select Essays on International Trade Law* (Nijhoff, 1988), p. 20, and in C.M. Schmitthoff, ‘The Unification of the Law of International Trade’, in C.-J. Cheng (ed.), *Clive M. Schmitthoff’s Select Essays on International Trade Law* (Nijhoff, 1988), p. 206. Also in C.M. Schmitthoff, ‘Das neue Recht des Welthandels’, 28 *Rabels Zeitschrift* (1964), p. 47: ‘In der ersten Phase . . . hatte es den Charakter eines universalen Gewohnheitsrechtes, das auf den Gebrauchen – coutumes – des internationalen Kaufmannstandes beruhte (lex mercatoria)’.

11. C.M. Schmitthoff, ‘International Business Law: a New Law Merchant’, in C.-J. Cheng (ed.), *Clive M. Schmitthoff’s Select Essays on International Trade Law*, p. 20, C.M. Schmitthoff, 28 *Rabels Zeitschrift* (1964), p. 54, C.M. Schmitthoff, ‘The Unification of the Law of International Trade’, in C.-J. Cheng (ed.), *Clive M. Schmitthoff’s Select Essays on International Trade Law*, p. 206, and also C.M. Schmitthoff, ‘The Law of International Trade’, in C.M. Schmitthoff, *Commercial Law in a Changing Economic Climate* (Sweet & Maxwell, [1981] 1988), p. 18, reprinted as C.M. Schmitthoff, ‘The Law of International Trade’, in C.-J. Cheng (ed.), *Clive M. Schmitthoff’s Select Essays on International Trade Law* (Nijhoff, 1988), p. 219. Here Schmitthoff quotes and concurs with Frederick Pollock, stating that ‘the medieval law of nature . . . claimed to be a rule of universal reasons embodied in the various forms of cosmopolitan usage’.

12. C.M. Schmitthoff, ‘International Business Law: a New Law Merchant’, in C.-J. Cheng (ed.), *Clive M. Schmitthoff’s Select Essays on International Trade Law*, p. 20, and also C.M. Schmitthoff, ‘The Law of International Trade’, in C.-J. Cheng (ed.), *Clive M. Schmitthoff’s Select Essays on International Trade Law*, p. 219.

13. W.A. Bewes, *The Romance of the Law Merchant. Being an Introduction to the Study of International and Commercial Law with Some Account of the Commerce and Fairs of the Middle Ages* (Sweet & Maxwell, 1923).

local commercial usages'.<sup>14</sup> In recent years, this theory of commercial law as materializing 'like the morning mist in the Sheffield horse market'<sup>15</sup> has become heavily criticized among legal historians. Following a thorough scrutiny of references to mercantile and commerce-related customs in medieval sources, Emily Kadens has demonstrated that customs, when referring to commercial contracts, were local and not transnational. New deals required express wording in contracts; terms of contracts could be spread over the world, but not the customs surrounding them.<sup>16</sup> Moreover, it has been underscored time and again that commercial law in the Middle Ages was found in bylaws and statutes as well, as is mentioned in Plucknett's monograph.<sup>17</sup>

The views on the medieval *lex mercatoria*, borrowed from Bewes, brought Schmitthoff to doubt his theory of legal force in international business law of his own day. He came to put more weight on what lies beneath fixed customs. From 1968 onwards, Schmitthoff stressed that in the Middle Ages *lex mercatoria* was 'unsystematic, complex and multifiform' but nonetheless relied on (uniform) principles and demonstrated vigour and originality.<sup>18</sup> In the 1970s Schmitthoff highlighted the disorganized characteristics of the medieval *lex mercatoria*, though at the same time stressed that it was based on solid ideas.<sup>19</sup>

Closely related to the problem of the compelling force of *lex mercatoria*, was the question of the legal qualities of commercial practices that were not customs. In publications of the 1970s and of the early 1980s Schmitthoff considered 'international customs' of today as encompassing enacted 'practices, usages or standards'.<sup>20</sup> Schmitthoff evoked the transition from individual practice to general practice, and therefrom the development of usages and, thereafter, customs. Occasionally Schmitthoff defined a usage as a widely applied clause of contract that can be left out of contracts because it is a part of law, and thus is in force anyway, which is not the case for a general practice.<sup>21</sup> A general practice is a generalized way of doing, which has no normative implications.

These classifications were not too far removed from German doctrine of the early 20th century, distinguishing between *Handelsübung* (i.e., general practice), *Handelsbrauch* (i.e., usage), and *Handelsgewohnheiten* (i.e., custom).<sup>22</sup> Clive Schmitthoff was a German jurist by training, after all,

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14. C.M. Schmitthoff, 'International Business Law: a New Law Merchant', in C.-J. Cheng (ed.), *Clive M. Schmitthoff's Select Essays on International Trade Law*, p. 20.
  15. W.A. Bewes, *The Romance of the Law Merchant. Being an Introduction to the Study of International and Commercial Law with Some Account of the Commerce and Fairs of the Middle Ages*, p. 8.
  16. E. Kadens, 'The Myth of the Customary Law Merchant', 90 *Texas Law Review* (2012), p. 1153.
  17. T.F.T. Plucknett, *A Concise History of the Common Law* (5th edition, Little, Brown, and Company, 1956), p. 664-665.
  18. C.M. Schmitthoff, 'The Unification or Harmonisation of Law By Means of Standard Contracts and General Conditions', in C.-J. Cheng (ed.), *Clive M. Schmitthoff's Select Essays on International Trade Law*, (Nijhoff, 1988), p. 212; C.M. Schmitthoff, 'The Legal Organisation of Commerce and its Relation to the Social Conditions', in C.M. Schmitthoff. *The Legal Organization of Commerce* (Provinsbanken, [1979] 1988), p. 16, reprinted as C.M. Schmitthoff, 'The Legal Organisation of Commerce and its Relation to the Social Conditions', in C.J. Cheng, (ed.), *Clive M. Schmitthoff's Select Essays on International Trade Law* (Nijhoff, 1988), p. 94; Schmitthoff ([1985] 1988, p. 243.
  19. C.M. Schmitthoff, 'The Legal Organisation of Commerce and its Relation to the Social Conditions', in C.J. Cheng (ed.), *Clive M. Schmitthoff's Select Essays on International Trade Law* (Nijhoff, 1988), p. 94.
  20. C.M. Schmitthoff, 'The Law of International Trade', in C.-J. Cheng (ed.), *Clive M. Schmitthoff's Select Essays on International Trade Law* (Nijhoff, 1988), p. 219.
  21. C.M. Schmitthoff, 'The Unification or Harmonisation of Law By Means of Standard Contracts and General Conditions', in C.-J. Cheng (ed.), *Clive M. Schmitthoff's Select Essays on International Trade Law*, (Nijhoff, 1988), p. 191.
  22. For an overview, see P. Hellwege, 'Handelsbrauch und Verkehrssitte', 215 *Archiv der civilistische Praxis* (2014), p. 853.

and he moved to England in 1933.<sup>23</sup> However, Schmitthoff imposed more requirements on present-day practices, even usages, for becoming ‘international custom’ than for practices in the Middle Ages. For the medieval *lex mercatoria*, in Schmitthoff’s view, the dividing line between usage and custom was very thin, because standardized contracts went together with implicit rules that had normative impact.

In 1987, Schmitthoff made his views of medieval and contemporary business custom more consistent. He labelled the above-mentioned 20th-century ‘international customs’ as ‘contractual trade usages’.<sup>24</sup> Schmitthoff argued that *lex mercatoria* had changed over the previous 20 years. The principles underlying fixed customs were now labelled ‘universal normative trade usages’. They had according to Schmitthoff become binding themselves, in the course of his lifetime. The additional ‘formulation’ by international agencies was no longer required for their normative effect. Schmitthoff considered freedom of contract and *pacta sunt servanda* as fundamental principles of *lex mercatoria*.<sup>25</sup> Schmitthoff stated that these principles constituted the ‘common core’ of the law of trading nations: they were ‘maxims universally accepted by all trading countries and derived from the *lex mercatoria*’.<sup>26</sup>

Although Schmitthoff hinted at *ius gentium*, he did not engage with the civil law doctrine on this field that had emerged since the later 16th century. Instead, he applied notions of civil law doctrine and, in the later stages of his career, extended the German concept of *Handelsbrauch* when applying it to principles instead of implied contract terms.

## B. Goldman’s sociological *lex mercatoria*

In 1987, Schmitthoff was likely influenced by Berthold Goldman. ‘Universal normative trade usages’ applied as such, irrespective of the consent of contracting parties or their formulation by international agencies, and Schmitthoff stated that they were imposed in the context of international arbitration. Arbitrators could infer the application of ‘universal normative trade usages’ from a clause of international arbitration, inserted into a business contract.<sup>27</sup>

In 1964 the French legal author Berthold Goldman had launched his definition of *lex mercatoria*, which was closely connected with international arbitration. According to Goldman, the contemporary *lex mercatoria* is a spontaneous creation. It consists only of customs, both written and unwritten. Yet Goldman rejected the codification argument. Written law is thus conceived of as evidence of customary rules, not as containing the rules themselves. The essence of *lex mercatoria* is custom.

Goldman’s approach was more sociological than theoretical. This perspective is also clear in Goldman’s historical accounts. Notwithstanding a sociological approach, Goldman underpinned his views with historical arguments. The Roman *ius gentium* was according to Goldman a

23. J.N. Adams, ‘Clive M. Schmitthoff (1903–1990)’, in J. Beatson and R. Zimmermann (eds.), *Jurists Uprooted. German-Speaking Emigré Lawyers in Twentieth-Century Britain* (Oxford University Press, 2004), p. 367.

24. C.M. Schmitthoff, *Institute of International Business Law and Practice Newsletter* (1987), p. 29.

25. Also the rule of interpretation *contra proferentem* and ‘*ut res magis valeat quam pereat*’ (clauses must be interpreted such that they have effect), the rule of ‘*venire contra factum proprium*’ (no one is assumed to act counter his own interests) and a principle of an ‘equilibrium of reciprocal undertakings’ were mentioned. See C.M. Schmitthoff, *Institute of International Business Law and Practice Newsletter* (1987), p. 47.

26. C.M. Schmitthoff, *Institute of International Business Law and Practice Newsletter* (1987), p. 29.

27. C.M. Schmitthoff, *Institute of International Business Law and Practice Newsletter* (1987), p. 43.

reception of international commercial custom, not international commercial law as such.<sup>28</sup> After *ius civile* and *ius gentium* merged, in the *Constitutio Antoniniana* (212 AD), the *lex mercatoria* of Roman times had disappeared, but it was resurrected in the Middle Ages (Goldman speaks of hibernation). With the rise of the modern state, from the 16th century onwards, it vanished again.<sup>29</sup>

The international business community was the breeding ground of *lex mercatoria*; the authority of *lex mercatoria* did not hinge on the sovereignty of states or the formulation of rules by international agencies. Its legal force was not the result of contractual consent as was the case in Schmitthoff's earlier views. For Goldman, contracts can state and elucidate *lex mercatoria*, and they can contain solutions that are eventually adopted as being *lex mercatoria*.<sup>30</sup> However, contracts are not foundational; the authority and compelling force of the *lex mercatoria* are vested in the perception of its applicability among actors in the international business community.<sup>31</sup> As a result, arbitration is much more central in Goldman's account than in Schmitthoff's. When a contract contains a clause of international arbitration, arbitrators can impose rules of *lex mercatoria* that were not part of the agreement.<sup>32</sup>

As a result of this analysis, when explaining the difference between practice and rules Goldman did not encounter the theoretical problems that Schmitthoff faced. In Goldman's model the business community decides on which practices are normative. However, this largely straightforward theory was not without problems, either. For example, Goldman grappled with his claim that in a context of internationally accepted customs, it was still mainly in contracts that rules of *lex mercatoria* could be found.<sup>33</sup> Also, even though *lex mercatoria* was binding because of its acceptance by the international business community, the *lex mercatoria* could only be applied when there was an occasion for its 'intervention'. Goldman indeed stated that there had to be a trigger for the imposing of *lex mercatoria*, as, for example, when a contract contained a clause of international arbitration.<sup>34</sup> This was a strange appraisal, considering Goldman's emphasis on the spontaneously binding nature of international business practices.

Furthermore, Goldman stuck to the civil law distinction of 'usage' versus 'custom'. Clauses of contract could according to him only be considered customs if they had been repeated so often that they had turned into law.<sup>35</sup> In this regard Goldman did not convincingly manage to explain his sociological view in conjunction with concepts of civil law. Another example of this tension between civil law approaches and a sociological account relates to Goldman's repeated mentioning of the 'sources' of *lex mercatoria*. At the same time he stressed that the legal force of rules found in

28. B. Goldman, 9 *Archives de philosophie du droit* (1964), p. 177, B. Goldman, 2 *Travaux du Comité français de droit international privé* ([1979] 1980), p. 221, and B. Goldman, 3 *Forum Internationale* (1983), p. 3.

29. B. Goldman, 9 *Archives de philosophie du droit* (1964), p. 177, B. Goldman, 2 *Travaux du Comité français de droit international privé* ([1979] 1980), p. 221, and B. Goldman, 3 *Forum Internationale* (1983), p. 3.

30. B. Goldman, 2 *Travaux du Comité français de droit international privé* ([1979] 1980), p. 221.

31. B. Goldman, 'The Applicable Law: General Principles of Law – The Lex Mercatoria', in J.D.M. Lew (ed.), *Contemporary Problems in International Arbitration* (Springer, 1986), p. 113.

32. B. Goldman, 2 *Travaux du Comité français de droit international privé* ([1979] 1980), p. 221: 'Mais plus riches de signification quant au caractère et à la fonction de la *lex mercatoria* sont les sentences qui l'appliquent directement, en l'absence même d'un accord des parties, ou en tout cas sans s'y référer'.

33. *Ibid.*

34. *Ibid.* and B. Goldman, in C. Dominicé, R. Patry and C. Reymond (eds.), *Etudes de droit international en l'honneur de Pierre Lalive* (Helbing & Lichtenhahn, 1993), p. 241.

35. B. Goldman, 2 *Travaux du Comité français de droit international privé* ([1979] 1980), p. 221.

these ‘sources’ does not derive from the source, but from the backing of these rules by the international community of business.<sup>36</sup>

### C. The impact of national traditions on Schmitthoff's and Goldman's theories

The aforementioned changing and often incomplete opinions touch upon core problems in the concept of *lex mercatoria*. Can unwritten rules of international trade be found outside the will of parties to an agreement? Is it feasible and acceptable that rules of business remain outside the scope of state practice, treaties and legislation, thus escaping the control of governments? Moreover, the relation between agreement and custom relates to the fundamental paradoxes of customary law: how can singular acts (contracts) create law? Why would contracts paraphrase custom if the latter is law, that is, a rule regulating the contract irrespective of the will of the parties to the contract and its contents?

Contextualizing the above-mentioned theories yields some additional clues as to why the views of the stated authors were not entirely coherent. These can be gleaned by analysing the requirements for customs and usages according to the national laws of these authors.<sup>37</sup> By the time Schmitthoff and Goldman coined their definitions of *lex mercatoria*, the legal interpretation of the notions of ‘custom’ and ‘usage’ in both Germany and France had resulted in complex doctrinal accounts.<sup>38</sup>

In the French legal tradition, since François Gény at the end of the 19th century, with regard to unwritten rules of commerce a distinction was made between ‘usages’ and ‘customs’. The former were contractual; they were rooted in the will of parties to an agreement. ‘Usages’ were looked upon as practices that applied within one geographical area or sector of business.<sup>39</sup> ‘Customs’ were external to the agreement and the intent of the parties. This notwithstanding, since the first decades of the 20th century, in France it became fashionable to categorize commercial and mercantile practices as ‘usages’ rather than ‘customs’.<sup>40</sup> Over the course of the 1950s and 1960s the element

36. Ibid. and B. Goldman, in C. Dominicé, R. Patry and C. Reymond (eds.), *Etudes de droit international en l'honneur de Pierre Lalive* (Helbing & Lichtenhahn, 1993), p. 241.

37. On differences of interpretation of *lex mercatoria* in European countries, see for example H. Collins, ‘Flipping Wreck: Lex Mercatoria on the Shoals of *Ius Cogens*’, in Stefan Grundmann, Florian Mösslein and Karl Riesenhuber (eds.), *Contract Governance: Dimensions in Law and Interdisciplinary Research* (Oxford University Press, 2015), p. 383 (contrasting German, French and English views).

38. Voices arguing for a restoration of the old demarcations are therefore becoming louder. See P. Hellwege, 215 *Archiv der civilistische Praxis* (2014), p. 853 and A. Le Pommelec, ‘La coutume: une référence “ambigüe” en droit civil pour le juge judiciaire’, 2 *La Revue du Centre Michel de l'Hopital* (2012), p. 108.

39. F. Gény, *Méthode d'interprétation et sources en droit privé positif*. (A. Chevalier-Marescq, 1889). See also D. Deroussin, ‘La coutume dans la doctrine civiliste après l'exégèse: un renouveau en trompe-l'oeuil?’, in F. Garnier and J. Vendrand-Voyer (eds.), *La coutume dans tous ses états* (La Mémoire du Droit, 2011), p. 173, A. Kassis, *Théorie générale des usages du commerce: droit comparé, contrats et arbitrage internationaux, lex mercatoria* (LGDJ, 1984), p. 124, and L. van Muylem, ‘Usages and Implied Terms under French and Belgian Positive Law: a Subjective Approach Tending Toward Objectivity’, in F. Gélinas (ed.), *Trade Usages and Implied Terms in the Age of Arbitration* (Oxford University Press, 2016), p. 23.

40. D. Deroussin, in F. Garnier and J. Vendrand-Voyer (eds.), *La coutume dans tous ses états* (La Mémoire du Droit, 2011), p. 173 and F. Garnier, ‘De la coutume et des usages dans la doctrine commerciale française à la fin du XIXe siècle et au début du XXe siècle’, 41 *Quaderni fiorentini per la storia del pensiero giuridico moderno* (2012), p. 11. This had been done in 17th- and 18th-century France as well: E. Richard, ‘À l'orée du droit des marchands: les parères’, 33 *Revue d'Histoire des Facultés de Droit* (2014), p. 155 and V. Simon, ‘L'inscription des usages commerciaux dans l'ordonnement juridique moderne’, 94 *Revue historique de droit français et étranger* (2016), p. 294.

of the will of parties was hollowed out; consent with established practices was presumed, and this could not be refuted (it was *iuris et de iure*).<sup>41</sup> All this provided the background for Goldman's conception of the relation between contracts and the informal norms of international business. Goldman often used the notions of 'usage' and 'custom' interchangeably.<sup>42</sup> Awareness of their existence or their binding nature, at the level of individuals making an agreement, was not required, since mercantile usages/customs in the French sense do not need such a test anyway. This made it easy for Goldman to put emphasis on the arbitrators' knowledge of which customs applied – at least if the agreement referred to international arbitration.<sup>43</sup>

By contrast, both in the English and German contexts, the bar to consider a practice or a provision of contract as custom was high, even when the practice or clause was widespread. Under common law, a custom prevails over common law if it is ancient and unchanging, but even then it cannot derogate from old, established common law. Moreover, if the custom is local, which means that it is specific and applicable to a problem for which the common law does not provide an answer, it applies – it then complements the common law, rather than derogating from it.<sup>44</sup> Furthermore, usages of trade are according to common law considered as pertaining to the contract. They are not deemed default rules binding parties that are not aware of their existence.<sup>45</sup> Under German law, comparable views prevail. A *Handelsgewohnheit* entails normative opinion coupled with long-repeated practices.<sup>46</sup> The concept of 'usage of trade' (*Handelsbrauch*) is regarded upon as 'a normative fact'. Usages of trade serve to interpret the agreement; practices can be considered binding when it is likely that parties to a contract, at the moment of their agreement, wanted their application.<sup>47</sup> The views of Schmitthoff can be explained on the basis of these doctrinal traditions. His choice for 'fixed' as opposed to 'emerging' customs is understandable when taking into consideration both the English and the German rules mentioned. Moreover, because of the high

41. An early advocate of this approach was Jean Escarra: J. Escarra, *De la valeur juridique de l'usage en droit commercial* (A. Rousseau, 1910), p. 118, 120. It was adopted in The Hague Sales Convention of 1964 (s. 9,2). The Hague Convention had been prepared by UNIDROIT. UNCITRAL was established only in 1966.

42. *Lex mercatoria* as consisting of customs (next to principles): B. Goldman, 9 *Archives de philosophie du droit* (1964), p. 177, B. Goldman, 3 *Forum Internationale* (1983), p. 3, and B. Goldman, 'The Applicable Law: General Principles of Law – The Lex Mercatoria', in J.D.M. Lew (ed.), *Contemporary Problems in International Arbitration* (Springer, 1986), p. 113. *Lex mercatoria* as consisting of usages (besides principles): B. Goldman, 2 *Travaux du Comité français de droit international privé* ([1979] 1980), p. 221 (distinguishing between usages and customs) and B. Goldman, in C. Dominicé, R. Patry and C. Reymond (eds.), *Etudes de droit international en l'honneur de Pierre Lalive* (Helbing & Lichtenhahn, 1993), p. 241 (mentioning principles, 'rules' and usages as part of *lex mercatoria*).

43. B. Goldman, 2 *Travaux du Comité français de droit international privé* ([1979] 1980), p. 221 and B. Goldman, in C. Dominicé, R. Patry and C. Reymond (eds.), *Etudes de droit international en l'honneur de Pierre Lalive* (Helbing & Lichtenhahn, 1993), p. 241.

44. W. Blackstone, *Commentaries on the Laws of England* (Strahan, 1793), p. 77. For a legal-historical analysis, J. H. Baker, *The Oxford History of the Laws of England (Volume 6)* (Oxford University Press, 2003), p. 1254 on the law merchant and the common law before 1700 and p. 1274 on 'law merchant' as a source of English law; M. Lobban, 'Custom, Common Law Reasoning and the Law of Nations in the Nineteenth Century', in A. Perreau-Saussine and J.B. Murphy (eds.), *The Nature of Customary Law* (Oxford University Press, 2007), p. 256. On the period before Blackstone, see N. Duxbury, 'Custom as Law in English Law', 76 *Cambridge Law Journal* (2017), p. 337.

45. G.R. Hall, 'Customs and Usages in England: Achieving Interpretive Accuracy by Giving Effect to Unexpressed Intent', in F. Gélinas (ed.), *Trade Usages and Implied Terms in the Age of Arbitration* (Oxford University Press, 2016), p. 3.

46. P. Hellwege, 215 *Archiv der civilistische Praxis* (2014), p. 853.

47. On the German notion of *Handelsbrauch* (§ 346 HGB), see H. Dedek, 'Not Merely Facts. Trade Usages in German Contract Law', in F. Gélinas (ed.), *Trade Usages and Implied Terms in the Age of Arbitration* (Oxford University Press, 2016), p. 81 and P. Hellwege, 215 *Archiv der civilistische Praxis* (2014), p. 853.

thresholds to label a practice a ‘custom’, unwritten rules derived from practice, even when defined as the less rigid ‘usages’, were to be based on contractual consent. Only from 1987 onwards did Schmitthoff clearly step outside the doctrinal consensus with regard to ‘usages’, in defining them as principles.

One can understand Goldman’s and Schmitthoff’s concepts of *lex mercatoria* against the canvas of their national laws on custom, but this does not solve the intrinsic problems in these authors’ theories. Hereinafter, it will be argued that similar conclusions can be drawn for the 17th century, when a theory of *lex mercatoria* was proposed for the first time.

### 3. Malynes’ *Lex Mercatoria*

Conflicting views on transnational trade custom are present in the earliest doctrinal account of *lex mercatoria*, which is *Consuetudo, vel Lex Mercatoria* by Gerald Malynes (1622). In contrast to both Goldman and Schmitthoff, Malynes thoroughly related his views on transnational commercial custom to *ius gentium*. In so doing, he aimed at blending this concept, which had been proposed among civil lawyers, with the traditional legal categories of civil law, such as custom and contract. When it came to using concepts, Malynes’ approach was particularly different from the one of Schmitthoff. The latter had applied the same above-mentioned categories of civil law but had attempted to recalibrate them so as to make them fit with a transnational, mercantile context. Malynes was more conservative than Schmitthoff and did not alter the traditional contents of legal terms.

#### A. A clustering of two traditions

Gerald Malynes, coming from a merchant’s family, was a prolific writer. He published several treatises on topics of economic and monetary policy. His book on *lex mercatoria* was well received and rather influential. In the 18th century, for example, it served as a model for Lord Mansfield’s ideas on commercial law and its relation to common law.<sup>48</sup> As a result of the book’s reputation, English legal historians of the 19th and early 20th century have looked at medieval commercial law largely through the lens of Malynes’ book.<sup>49</sup>

Malynes was the first to combine several traditions in the field of commercial law, even though they were mostly found in civilian writings. These texts elaborated on Roman law. Civil lawyers were important in England in the 16th and 17th centuries. They served as advocates in the English courts that imposed solutions inspired by continental Romanist doctrine.<sup>50</sup> One tradition related to the *ius gentium*, which had been defined by Alberico Gentili, later John Davies and, to a lesser extent, Hugo Grotius. The latter’s *De iure belli ac pacis* was published in 1625, three years after the publication of Malynes’ book, but some main ideas on the issue were already present in Grotius’ *Mare Liberum* of 1609. In the later 16th and early 17th centuries, the *ius gentium* concept received new attention and was fleshed out by civil lawyers, both on the continent and in England.

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48. A. Cordes, ‘The search for a medieval *lex mercatoria*’, 5 *Oxford University Comparative Law Forum* (2003).

49. M.E. Basile et al., *Lex mercatoria and Legal Pluralism: A Late Thirteenth-Century Treatise and Its Afterlife* (Ames Foundation, 1998), p. 165.

50. D.R. Coquillette, *The Civilian Writers of Doctors’ Commons, London. Three Centuries of Juristic Innovation in Comparative, Commercial and International Law* (Duncker & Humblot, 1988), p. 29.

The other tradition of customs of merchants pertained to local and municipal law. Such customs were considered to be exceptions to rules of municipal and regional law, very much as customs were for common law. This tradition was partly doctrinal (the notion of custom was), but the contents of these customs were – at least partially – mercantile as well. Customs of merchants were not a typical subject of academic study, but they were mentioned in legal treatises of civil law.<sup>51</sup> Closely related to this second tradition were merchant manuals. *Ars mercatoria* was a broad label for tracts that instructed traders on languages (they included dictionaries and books containing common phrases in several languages), on exchange rates, mathematics and bookkeeping. These books were not usually concerned with (transnational or national) commercial law, even though occasionally they mentioned local customs.<sup>52</sup>

Malynes conflated these traditions, which for a large part pertained to different genres of literature. Texts of *ars mercatoria* had as a genre but few connections with civil law and scholastic writings; they were practice-oriented and in fact often warned against the *apices iuris*, the finicky details with which lawyers were occupied, and which, according to the authors, obstructed trade.<sup>53</sup> The most important distinction between the named traditions was the one between the theoretical concept of *ius gentium*, found in civil law doctrine on the one hand, and customs of merchants on the other.

The label of *lex mercatoria* had been in use in England since the late 13th century. It had referred to court proceedings that were applied with regard to merchants. Such proceedings had mostly been used outside common law courts and predominantly in local courts.<sup>54</sup> Yet the municipal notion of *lex mercatoria* had migrated and become accepted as a concept in royal legislation as well (*Statute of the Staple* 1353). At first, the English term *lex mercatoria* was closely related to the 10th- and 11th-century, continental notion of *ius mercatorum*, which was a set of procedural rules, granted in princely charters, and which were exceptions to a municipal or regional legal regime.<sup>55</sup>

Notwithstanding the local characteristics of the older concept of *lex mercatoria*, Malynes considered *lex mercatoria* to be a collection of customs that were shared by all nations, and which were known and applied by merchants on an international scale. According to Malynes this *lex*

51. For an analysis of mentions of ‘*consuetudines mercatorum*’, in 16th- and 17th-century *consilia*, see A. Wijffels, ‘Business Relations Between Merchants in Sixteenth-Century Belgian Practise-Orientated Civil Law Literature’, in V. Piergiovanni (ed.), *From lex mercatoria to commercial law* (Duncker & Humblot, 2004), p. 255.

52. For an exhaustive overview of this literature, see J. Hoock, P. Jeannin and W. Kaiser (eds.), *Ars Mercatoria: Handbücher und Traktate für den Gebrauch des Kaufmanns. Manuels et traités à l’usage des marchands, 1470–1820: Eine analytische Bibliographie in 6 Bänden* (Schoöningh, 1991–2001).

53. See, for example, the treatise *Della mercatura e del mercante perfetto* (1458) by Benedetto Cotrugli: C. Carraro and G. Favero (eds.), *Benedetto Cotrugli. The Book of the Art of Trade. With scholarly essays from Niall Ferguson, Giovanni Favero, Mario Infelise, Tiziano Zanato and Vera Ribauda* (Palgrave Macmillan, 2017), p. 40: ‘He [i.e., the merchant] should live in a place where mercantile law is applied rather than the Code of Justinian, because the disputatiousness of lawyers, who are hostile to his profits, is no small problem for the merchant’. This was also mentioned regularly in civil law writings; see C. Donahue, ‘Benvenuto Stracca’s De Mercatura: Was there a Lex mercatoria in Sixteenth-Century Italy?’, in V. Piergiovanni (ed.), *From lex mercatoria to commercial law* (Duncker & Humblot, 2005), p. 69. For a comparable statement, see G. Malynes, *Lex mercatoria* (4th edition, London, 1686), p. 3.

54. M.E. Basile et al., *Lex mercatoria and Legal Pluralism: A Late Thirteenth-Century Treatise and Its Afterlife*, p. 24 and 27.

55. J. Hilaire, *Introduction historique au droit commercial* (Presses universitaires de France, 1986), p. 31 and K. Kroeschell, ‘Bemerkungen zum Kaufmannsrecht in den ottonischen-salischen Markturkunden’, in K. Düwell (ed.), *Untersuchungen zu Handel und Verkehr der vor- und frühgeschichtlichen Zeit in Mittel- und Nordeuropa (Volume 3)* (Vandenhoeck & Ruprecht, 1985), p. 418.

*mercatoria* was what others had called *ius gentium*.<sup>56</sup> This statement was an echo of views of John Davies, who before 1619 had argued that the ‘law merchant’ was part of the laws of England, separate from civil and common law, and at the same time pertaining to the law of nations.<sup>57</sup> Since the universality of merchant custom according to Malynes was more profound, he considered *lex mercatoria* identical to, in fact a better term for, *ius gentium*. ‘And these Customes are properly those obseruations which Merchants maintaine betweene themselues, and if these bee separated from the Law of Nations, the remainder of the said Law will consist but of few points.’<sup>58</sup> This opinion differed from the civil law tradition of strictly separating custom from natural law or the law of nations. That latter view was also present in England (e.g., Alberico Gentili).<sup>59</sup> In other respects, Malynes stuck to Gentili’s views. Malynes defined *lex mercatoria* as a set of customs, identical to the law of nations, but also stressed it being ‘right reason’, thus highlighting its natural law characteristics as well. It is interesting to note that this approach (of overlap in *ius gentium* and *ius naturale*, which was found in Gentili’s *De iure belli*)<sup>60</sup> had been challenged in Grotius’ accounts, who distinguished *ius naturale* from *ius gentium* – Malynes most probably knew Grotius’ *De mare liberum* (1609)<sup>61</sup> and it may have been a deliberate choice to opt for Gentili’s concept.

## B. Governmental acknowledgment and metaphoric approaches

While embracing Gentili’s views on *ius gentium-ius naturale*, Malynes ran into difficulties when merging them with the municipal concept of *lex mercatoria*. He had to explain why ‘commercial law’, often divergent across nations, and which was found in legislation as well, was not the same as ‘*lex mercatoria*’, which was customary only and transnational. For that purpose, he distinguished *lex mercatoria* from *ius mercatorum*, the latter being the law of merchants that was linked to the sovereignty of one nation only. *Ius mercatorum* consisted of nationally acknowledged customs and legislation. *Ius mercatorum* was derived from mercantile custom, but its validity depended on recognition by a monarch. The foundations and legal effect of the *lex mercatoria* were broader: it was ‘approved by the authoritie of all Kingdomes and Commonweales’ and ‘not established by the sovereignty of any Prince’.<sup>62</sup> In this respect, Malynes took another position than Gentili (and Grotius), as well as Davies, who had emphasized *ius gentium* as being ‘shared’ or

56. G. Malynes, *Lex mercatoria* (4th edition, London, 1686), Epistle dedicatorie (to the most high and mightie monarch James), and especially p. 2: ‘howbeit some doe attribute this definition [of Right Reason] vnto ius gentium, or the law of nations, which consisteth of customes, manners, and prescriptions of all nations, being of like conditions to all people, and observed by them as a law: But the matter being truely examined, we shall find it more naturally and properly belongeth to the law-merchant’.

57. J. Davies, *The Question concerning impositions, tonnage, poundage* (Twyford, 1656), p. 17: ‘Law Merchant, as it is a part of the Law of Nature and Nations, is universall and one and the same in all Countries in the World’. The book was written after 1600 but before 1619, though not published until 1656. It is assumed that Malynes read the manuscript.

58. G. Malynes, *Lex mercatoria*, To the courteous reader.

59. A. Gentili, *De iure belli* (London, 1589), lib. 1, cap. 1.

60. *Ibid.*, lib. 1, cap. 1.

61. Richard Welwood’s *An abridgement of all Sea laws* of 1613 reacted against Grotius’ *Mare Liberum*. Malynes took sides with Welwood.

62. Malynes, *Lex mercatoria*, To the courteous reader: ‘I haue intituled the booke, according to the ancient name of Lex Mercatoria, and not lus Mercatorum; because it is a customary law, approved by the authoritie of all kingdomes and common-weales, and not a law established by the soueraigntie of any prince’.

'in use' (for Gentili, because it was reason) rather than 'approved', even though this sharing implied consent as well.<sup>63</sup>

Yet even with the aforementioned distinction between *lex mercatoria* and *ius mercatorum* difficulties were not solved. Governmental recognition (this is most probably what 'approval by the authority of all kingdoms and *commonweales*' means) was typical for Malynes' conceptions of the law merchant, but it was a strange ingredient when considering Malynes' theoretical constructs as a whole. If merchant law was *ius naturale*, it did not need recognition or approval; if it was *ius gentium*, then the contents of rules and principles shared among nations were sufficient for its application. Malynes, however, emphasized the 'approval' of the *lex mercatoria* by nations. Comparable incongruities are evident in Malynes' list of arguments for why not only common law, but also equity and customs apply in England. He refers to the oath of the king to respect the customs of the realm. In the next line, though, he emphasizes that the 'ancient customs' of merchants are inexpugnable, because they 'are reason'.<sup>64</sup>

Malynes' metaphors shed more light on his ideas and conceptual framework. With a mixture of Aristotelian, Platonic and Galenic notions,<sup>65</sup> he applied body metaphors as illustrations of his views. According to Malynes, commodities are the Body of commerce; exchange between buyers and sellers represents the Soul; and the gain-seeking actions of merchants and the sovereign's control over markets belong to the Spirit.<sup>66</sup> Malynes pursued a classification of types of transactions, on the basis of this trifold scheme. Barter was a matter of the Body, purchases related to the Soul and speculative arrangements such as bills of exchange to the Spirit. Money could thus be a means of either exchange (the Soul) or speculation (the Spirit).<sup>67</sup>

In Malynes' views, the Soul encompassed Understanding and Reason, as well as Knowledge. The Soul was according to Malynes located in the blood, 'found everywhere' throughout the Body, that is everywhere in trade. Malynes envisaged exchange as the basis of trade and portrayed exchange as a matter of Reason. Therefore, trade was to be conducted with equality and equity, which were the Soul that 'infused life to traffic'. Still, the Spirit was equally important, as the faculty of the Soul. The Will related to the Spirit, which 'directed prices and values of commodities and moneys'.<sup>68</sup> In this regard, Malynes considered deliberate action as connected to the Spirit. The monarch could impose prices and in so doing managed the market, as the Spirit does with the Soul. When merchants asked a certain price for their products, this was equally an act of the Spirit, in particular of the Will. Only following negotiations would the Soul prevail over the Will, that is, when buyer and seller reached an agreement on the price.

63. A. Gentili, *De iure belli*, lib. 1, cap. 1; and H. Grotius, *The Free Sea*, (trans. R. Hakluyt) (Liberty Fund, 2004 (1609)), p. 68, 85. See also T. Toyoda, *Theory and Politics of the Law of Nations* (Brill, 2011), p. 24.

64. G. Malynes, *Lex mercatoria*, p. 321).

65. On the importance of Aristotle for Malynes, see R.A. de Roover, 'Business, banking, and economic thought in late medieval and early modern Europe', in J. Kirshner (ed.), *Selected studies of Raymond de Roover* (University of Chicago Press, 1974), p. 346, A.L. Finkelstein, *Harmony and Balance. An Intellectual History of Seventeenth-century English Economic Thought* (The University of Michigan Press, 2000), p. 26 and also J.H. Anderson, *Translating Investments: Metaphor and the Dynamics of Cultural Change in Tudor-Stuart England* (Fordham University Press, 2005), p. 166. Finkelstein considers Malynes as an adopter of Aristotelian views (also Raymond de Roover did so), whereas Anderson also stresses his originality in many respects.

66. G. Malynes, *Lex mercatoria*, p. 44, 259).

67. G. Malynes, *Lex mercatoria*, p. 295).

68. *Ibid.*, To the courteous reader and p. 44.

These opinions of Malynes corresponded with his economic views. Before the publication of *Lex Mercatoria*, Malynes had been involved in a fierce debate with Thoman Mun and Edward Misselden over the cause of the economic problems in England in the 1610s and 1620s. According to Malynes, the exchange rate of the pound sterling should be stabilized by the sovereign, whereas the latter authors claimed that trade deficits were the cause of the situation.<sup>69</sup> The Spirit was, according to Malynes, at the level of the *body politick*, metaphorically referring to the actions of the monarch; the Soul was the common good that he should preserve, which in matters of trade was the wealth of the nation but also the equality of trade between nations. In Malynes' conceptions of monetary politics, currency rates were fixed by the Spirit (i.e., by the king and in private appraisals of merchants), but the Spirit must not oppose the Soul.<sup>70</sup> The royalist agenda of civilians in the early 17th century meant that they stressed the authority of the monarch to intervene in matters commercial, such as the imposition of tariffs. Malynes clearly belonged to this group.<sup>71</sup>

The coherence of Malynes' metaphors depicting monetary politics and the function of money in international trade stands in sharp contrast to Malynes' account on customs and law. This points to the unwieldy combination of traditions in the concept of *lex mercatoria*. Malynes generally refrains from illustrating and underpinning his statements on law and custom with the same metaphors that he uses for monetary politics and trade. There is one reference to 'equity and equality' being the blood of commerce, hence the locus of the Soul, but Malynes does not explicitly connect *lex mercatoria* with the Soul. Analogies were nonetheless appropriate in some respects. Mercantile customs (that is the *lex mercatoria*, the Natural Law variety of commercial law) were the Soul of commerce. They had to be recognized throughout the world. If they were not, they were pertaining to the Spirit only, that is, to legislation or (maybe) the deliberate actions of merchants. The Soul prevails over the Spirit: *lex mercatoria* customs are to be respected. Malynes only states that when they are not observed, this is to be considered *usurpatio*, 'which is the cause that many times customs are established for laws by him or them that have power to make law'.<sup>72</sup> This referred to the civilian view that custom and legislation could not contradict natural law (also held by Gentili).<sup>73</sup> There is also an echo of Aristotelian conceptions on the relation between *ethos* and *nomos*: Malynes stresses the slow emergence of custom and describes the sudden and deliberate act that is the issuing of legislation.<sup>74</sup> Moreover, there is an implicit reference to 'an individual man is wiser than legislation but not wiser than customary law' (*Politica* 1287b). In the first pages of the treatise, Malynes explains that 'good customs' cannot be abolished by legislation; nonetheless,

69. For these controversies, see A.L. Finkelstein, *Harmony and Balance. An Intellectual History of Seventeenth-century English Economic Thought*, p. 54 and L. Magnusson, *The Political Economy of Mercantilism* (Routledge, 2015), p. 133, in addition to earlier literature: L. Muchmore, 'Gerrard de Malynes and Mercantile Economics', 14 *History of Political Economy* ([1969] 1991), p. 336. Reprinted as L. Muchmore, 'Gerrard de Malynes and Mercantile Economics', in M. Blaug (ed.), *The Early Mercantilists, Thomas Mun (1571–1641), Edward Misselden (1608–1634), Gerard de Malynes (1586–1623)* (Elgar, 1991), p. 164.

70. G. Malynes, *Lex mercatoria*, p. 15–16 and p. 213.

71. See footnote 5. On the pamphletary nature of *Lex Mercatoria*, see also P. Gauci, 'Malynes, Gerard', in H.C.G. Matthew and B. Harris (eds.), *Oxford Dictionary of National Biography (Volume 36)* (Oxford University Press, 2004), p. 380 and J.S. Rogers, *The Early History of the Law of Bills and Notes: A Study of the Origins of Anglo-American Commercial Law* (Cambridge University Press, 1995), p. 88.

72. G. Malynes, *Lex mercatoria*, p. 3).

73. A. Gentili, *De iure belli*, lib. 1, cap. 1.

74. G. Malynes, *Lex mercatoria*, p. 3).

customs do not abrogate legislation. The sovereign issuing laws must take the good customs into account, but it is not up to the individual to enforce customs that are *contra legem*.<sup>75</sup>

When looking closer at his legal opinions, it is clear that Malynes was not entirely coherent. This explains why the bodily metaphor was not used when it came to customs. Malynes vacillated between the conception of *lex mercatoria* as referring to customs of merchants (customs, even good customs, which are the customs of the *lex mercatoria*, have to be proved in courts of law<sup>76</sup>; there is divergence of rules throughout the world; customs of *lex mercatoria* cannot ignore the laws of the Prince<sup>77</sup> or common law<sup>78</sup>) and its features of natural law (*lex mercatoria* is Reason; bylaws of magistrates cannot suppress good customs<sup>79</sup>; the laws of the Prince must be in accordance with natural law<sup>80</sup>).

### C. Contracts and *lex mercatoria*

The inconsistencies within *lex mercatoria* are related to the links between custom and contracts as well. Malynes theorized that individual contracts could not oppose the *lex mercatoria*. They could provide more concrete solutions than *lex mercatoria*, though not to the detriment of the core principles of trade.<sup>81</sup> From the angle of ‘commercial law is natural law’, they could elucidate such general customs of *lex mercatoria*. However, when describing mercantile law as related to contracts, Malynes got caught up in the tradition of *ius mercatorum*, that is, the customs of merchants.

Large parts of *Consuetudo, vel Lex mercatoria* read as a merchant guide book, in the parts containing exchange rates,<sup>82</sup> weights and measures, and when summarizing best practices.<sup>83</sup> Chapters contain examples of accounts.<sup>84</sup> All these sections primarily served to provide the audience of international merchants with valuable information, and they corresponded to the *ars mercatoria* genre of literature. Moreover, in the first pages of the treatise Malynes mentions the customs of sale as pertaining to *lex mercatoria*,<sup>85</sup> but in the chapter on contracts of sale few rules are mentioned. Instead, Malynes expands on the reasonableness of the purchasing price, and lists few legal requirements for a contract of sale (among them, consent and the power to alienate).<sup>86</sup> In this regard, Malynes followed the approach of *ars mercatoria*, which had similarly been followed by some civilian authors writing on commercial law as well.<sup>87</sup> The Ancona lawyer Benvenuto Stracca counts as one example, having devised his treatise *De mercatoribus* (1554) as a compilation of rules, stemming from custom and mostly civilian doctrine, concerning strictly mercantile

75. *Ibid.*, p. 3.

76. *Ibid.*, p. 3.

77. *Ibid.*, p. 3.

78. *Ibid.*, p. 128: ‘The Law Merchant and Laws of the Sea admit of divers things not agreeable to the Common Law of the Realm, which may be better insisted on in the Court of Admiralty, than in the Courts of Common Law’.

79. *Ibid.*, p. 3.

80. *Ibid.*, p. 3.

81. *Ibid.*, p. 3.

82. For example *ibid.*, p. 14–22.

83. *Ibid.*, p. 156–157, on how to administer bad debt.

84. For example *ibid.*, p. 170.

85. *Ibid.*, p. 44.

86. *Ibid.*, p. 67–68.

87. E. Kadens, 90 *Texas Law Review* (2012), p. 1153 and E. Kadens, ‘Medieval Law Merchant: The Tyranny of a Construct’, 7 *Journal of Legal Analysis* (2015), p. 251.

problems. Sale was not considered one of them and was not analysed in depth by Stracca,<sup>88</sup> instructional manuals for merchants did not contain provisions on sale usually.<sup>89</sup>

Malynes' chapters on maritime contracts and maritime insurance are most revealing of the misconceptions that sprang from combining natural law with customs of merchants. Malynes mentions the custom of distribution of risk over many insurance underwriters and conflates this with general average (for which he cites the *Rôles d'Oléron*, which did not mention insurance but only general average).<sup>90</sup> Other customs are those concerning the insurance of particular merchandise, for which it is required that they are marked,<sup>91</sup> and the 'custom, concurring with the *Rôles d'Oléron*' that an insurance policy is underwritten for a specific journey.<sup>92</sup> However, these rules were not presented as customs in the sense of *ex ante* existing, externally applicable rules. Malynes mostly expands on the 'substance of policies' and provides a list of technical problems for which he lays out the solutions with references to 'all policies of assurance'.<sup>93</sup> Interesting in this respect is Malynes' remark that the stated custom of insurance for a specific journey is not written in policies 'for the custom herein is clear'.<sup>94</sup> It seems that nearly all Malynes' references to the substance of insurance policies were based on his idea that they served to clarify the will of parties to the contract, and that there were very few customs of insurance, in the sense of rules that were binding if contracts did not provide otherwise.

There is no trace of Malynes considering custom as anything else than *consuetudo* in the civil law tradition.<sup>95</sup> His vacillation in describing core terms of insurance policies as custom is most probably a consequence of civil lawyers defining *consuetudo* as a combination of *usus* and *consensus populi*, *usus* being repeated behavior.<sup>96</sup> For provisions of contract, even when uniform in all contracts, the notion was not considered feasible. But there is more. Malynes did consider mercantile law as customary. Standard or core terms were thus *lex mercatoria* if his perspective of 'commercial law is natural law' was taken. Therefore, his option for a separation of custom from contract refers to the 'customs of merchants' tradition, which was in line with his appraisals of monarchical powers.

Furthermore, the theoretical views on law and custom, which are mentioned in the introduction and throughout the book, at several points do not match with the contents of customs described. One example relates to 'bills of debt'. Malynes describes how letters obligatory are widely used in trade, though only on the continent. He asserts: 'This laudable custom is not practised in England'.<sup>97</sup> Malynes expands on the arrangement as an established practice of international commerce, calls it 'laudable' and 'beneficial', but he does not categorize it a part of *lex mercatoria*. Moreover, Malynes claims some mentions in the bill as requirements of 'civil law and law

88. C. Donahue, in V. Piergiovanni (ed.), *From lex mercatoria to commercial law* (Duncker & Humblot, 2005), p. 69.

89. E. Kadens, 7 *Journal of Legal Analysis* (2015), p. 251.

90. G. Malynes, *Lex mercatoria*, p. 105.

91. *Ibid.*, p. 116.

92. *Ibid.*, p. 118.

93. *Ibid.*, p. 117: 'it appeareth plainly by all policies of assurance that . . .'. An exceptional reference is made to Reason: *ibid.*, p. 116: 'there is no man with reason that will . . .'.

94. *Ibid.*, p. 118.

95. *Ibid.*, p. 3: 'A Custom (saith he [Cicero]) taketh her strength by little and little in progress of Time by a generall consent, or, of the most part'.

96. R. Garré, *Consuetudo. Das Gewohnheitsrecht in der Rechtsquellen- und Methodenlehre des späten ius commune in Italien (16.-18. Jahrhundert)* (Klostermann, 2005), p. 145.

97. G. Malynes, *Lex mercatoria*, p. 73.

merchant'.<sup>98</sup> However, Malynes does not consider the customs relating to such bills as valid in themselves. Instead, he urges for legal reform; the rules of common law regarding sealed deeds must be left in order to allow for the circulation of such bills.<sup>99</sup>

When reviewing all of the above, it is evident that Malynes lists particular customs but does not derive general custom, that is, *lex mercatoria*, from them. He emphasizes the agency of merchants and does not impose many mercantile customs onto contracts. In so doing, he enshrines himself in the tradition of considering customs of merchants as local and particular, rather than universal and as established in contractual practice. Therefore, his *Lex mercatoria* contained hybrid solutions. On the one hand, trade was based on custom that was transnational. On the other, once this was translated in concrete legal terms, Malynes stuck to the classical contents of 'custom' and 'contract'.

#### 4. Conclusion

The analysis of Malynes' treatise shows how important contextualization is in order to understand categories of doctrine. In his *Consuetudo, vel Lex mercatoria*, the law of trade is described as natural and customary law with transnational characteristics. However, rules of *lex mercatoria* derive their force as applicable law only from recognition by the authority of monarchs (the Spirit). In this respect Malynes chose to follow the tradition of 'customs of merchants', and as a result he refrained from considering the latter to be 'general customs': they had to be evidenced in court, and they could not derogate from laws of the sovereign. Malynes did not discard rules of common law with reference to the law merchant: instead, he argued for legal reform. In line with civil law literature of the continent, agreements and contracts did not create customs according to Malynes. Terms of contract can become custom, but only if they are 'approved' throughout the world.

From Malynes' writings it is clear that the blending of traditions in the *lex mercatoria* notion resulted in conceptual problems. The comparison of the ideas of Malynes, Schmitthoff and Goldman attests to the difficulty of locating *ex ante* existing, external default rules outside legislation, state practice or the choice of parties to a contract. The authors mentioned used different tactics in responding to this challenge. Whereas Malynes' work juxtaposed rhetorical and metaphoric language with legal concepts, Schmitthoff in 1987 tweaked the term of 'usages' and defined them as principles that are binding. Admittedly, Schmitthoff's early views were doctrinally in line with the civil and the common law tradition. Goldman was inspired by French doctrine on usages, which allowed for a flexible interpretation of informal norms of trade. Even so, the writings of all three authors demonstrate discrepancies when theoretical views were translated into concrete categorizations. Not only 'custom' and 'usage' proved irreconcilable with transnational norms in trade, but also the codification argument was difficult to maintain. Both Malynes and Schmitthoff aspired that 'approval', of one type or another, would make it possible to separate non-normative from normative practices, but their attempts were not successful.

The conclusion of this comparative exercise is that neither the amalgamation of traditions or the expansion of doctrinal concepts has yielded conceptual clarity on the legal force of customs of international trade, their components, or their creation. This shortfall cannot be attributed to a lack of effort or intellectual shortcomings. Rather, since the early 17th century concepts were combined

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98. *Ibid.*, p. 74.

99. *Ibid.*, p. 72–74.

that were not compatible. If customs are considered to be ‘that which is practised’, and normative force is derived therefrom, then contractual practice has a part in this explanation. However, these views cannot be imposed on a civilian or common law concept of ‘custom’, which has other characteristics. The idea that *ius gentium* could be applied to matters of trade became fused with arguments on the law of trade as consisting of ‘customs of merchants’. The latter were mentioned in practice-oriented merchant manuals, yet were very much in line with what civilians and common lawyers considered customs, that is, repeated behaviour with a very restricted scope that fills a lacuna in legislation or common law. Therefore, Malynes’, Goldman’s and Schmitthoff’s accounts should be regarded as warnings that concepts cannot be bent or adjusted when their intrinsic qualities, as accumulated throughout history, are incompatible with that which they serve to explain.

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