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THE LAW MERCHANT:
The Evolution of Commercial Law

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Preface

THE PRINCIPLE OF FREE TRADE HAS PREVAILED IN LAW FOR CENTURIES. As a legal concept, freedom to contract has signified the dominance of the libertarian notion of *laissez-faire* over government intervention in business affairs. Evolving out of the economic theory of perfect competition and philosophical conceptions of free will, this sanctification of the business process has matured into a central tenet of the law governing international trade. Merchants engaged in world trade are to be free to transact business across national boundaries in accordance with their own trade design.

Yet the notion of "freedom to contract" has come under increasing fire. Motivated by a rising awareness of imperfect competition in human affairs and a philosophical suspicion of man's capacity to regulate his own dealings by way of accord, adjudicators have sometimes relaxed their vigilant consecration of international bargains. Judges have granted excuses from obligations, not because international merchants so agreed, but because the court considered such a remedy to be appropriate in the circumstances. Nonperformance has been permitted by law on the grounds that the disruption in performance allegedly arose unexpectedly and had devastating effects upon performance, beyond the control of the parties.

This book proposes that the legal diminution of the freedom to transact across national boundaries undermines the autonomy of business obligations. To permit judicial interference with private international

agreements is to disregard the internal capability of the agreement, the marketplace and the trade to regulate international business bargains.

Each chapter is geared towards these ends. Chapters 1, 2 and 3 stress the geographic, linguistic and legal barriers to trade that are encountered in transregional trade and the manner in which international merchants overcome these obstacles. Extending from medieval (Chapter 1) to modern times, (Chapters 2 and 3), they highlight the capacity of international merchants to develop uniform customs and usages to regulate their business ventures. Thereafter, Chapter 4 presents a sociological analysis of the methods that are applied by multinational oil companies to regulate nonperformance in international crude oil sales. Evolving out of a questionnaire submitted to, and interviews held with, inside legal counsel, this study examines the manner in which multinational crude oil contractors regulate and resolve contractual disputes arising from the nonperformance of their sale obligations. Chapters 5 and 6 then emphasize the difficulties that are faced by common law courts in the interpretation of international business agreements. They stress the diverse legal methods that are used by common law courts to construct legal excuses from performance (Chapter 5); and they criticize the recourse of courts to legal fictions in order to strike down business bargains (Chapter 6). In the conclusion, the book contends that free trade has traditionally served as the foundation of international business law and should continue so to serve if national and international legal systems are to respond to, rather than hinder, the progress of world trade.

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THIS BOOK HAS DRAWN, IN SOME MEASURE, FROM A SERIES OF MY articles: in particular, *The Evolution of the Law Merchant: Our Forgotten Heritage*, 12 *J. of Maritime L. & Com.* 1,153 (1980-81); *Interpreting Contracts: A Common Law Dilemma*, 59 *Canadian B. Rev.* 241 (1981); *The Nonperformance of Obligations in International Contracts for the Sale of Goods*, 29 *Oil & Gas Tax Q.* 716 (1981); and *Legal Fictions and Frustrated Contracts*, 47 *Mod. L. Rev.* (1983).

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Introduction

FOR CENTURIES THE SANCTITY OF CONTRACTS HAS DOMINATED THE regime of international trade. The agreements of merchants have been respected as a matter of sound business sense. Various reasons account for this legal sanctification of commercial freedom. Merchants in the sophisticated domain of international trade generally appreciate the nature of their own needs and the capacity of the international market to satisfy them. Indeed, their very survival in the marketplace demands that they balance together market supply and market demand, price and competition in determining the nature of their bargains. Merchants decide with whom they wish to contract and upon what terms; they determine the limits of their own requirements; and they establish the parameters of their obligations. They do so themselves. The law does not fulfill such functions for them. Within this context, the sanctity of their bargain is not merely a legal privilege; it is a commercial necessity. The business agreement, construed against the background of similar international agreements, is the most effective means towards interpersonal harmony in international trade. The contract is devised as a matter of the free will of the parties; it is reciprocal in intent; and it is adaptable in its scope of application.

The focal point of free trade therefore lies in the interaction among three concepts: marketplace, agreement and time. The marketplace is the environment in which free trade takes place. Here, merchants meet in order to exchange goods and services. Here they create the business conditions that underlie their free trade; and here they manifest their good

or bad faith as members of the business community. The agreement is the instrument of commercial interaction. It prescribes when performance is owed and when it should be excused, how it should be rendered and in what conditions it should be modified. Time is the link between market and agreement. The advent of time fosters the growth of inter-party practices. Time permits practices to crystallize into business usage and ultimately into trade custom.

Continuing experience in world trade provides a tested environment in which merchants can interact freely, choosing their trade partners and contract terms with an expanding awareness of both the marketplace and of one another. Together, market, agreement and time allow business instruments to evolve into uniform codes and documents, comprehensive in their terms and farsighted in their application to an ever-changing business world.

Even in medieval times there was abundant evidence of highly developed commercial instruments. Merchant practices gave rise to commercial paper, letters of credit and bills of exchange, all reflecting noticeable uniformity in character and design. Trading institutions were similarly well-advanced. Merchant guilds, country fairs and market cities evolved as major centers of free trade. Here merchants from Mediterranean Europe, Asia and Africa met to exchange goods and services; and here they developed their trading conventions.

Proceedings before Law Merchant tribunals had these features in common. Adjudication was essentially oral. Formal testimonies, written affidavits and extensive judgments were generally dispensed with as a matter of course. Commercial adjudicators took judicial notice of trade custom and business practice; and they avoided the delays that would otherwise arise from the administration of oaths, the tedious cross-examination of witnesses and the lengthy adjournment of proceedings.

Within this business domain, merchant institutions were translated into legal institutions. Codes of law operating at merchant centers embodied the custom of merchants; they reflected trade habits and market usages. Most importantly, in regulating transregional trade local influences subserved to the demands of the cosmopolitan trader. Such was the nature of the medieval law merchant.

This supremacy of commercial practice in the marketplace still prevails today. Just as the medieval merchants relied upon trade codes to govern their adventures, modern merchants rely on international codifications to facilitate conventional trade. Just as medieval law merchants faced the perils of the sea—storms, lightning and restraints of princes—modern trade is similarly threatened by the Acts of God and man alike. Just as medieval merchants devised their own institutional means of allocating the risks of nonperformance, merchants today also rely upon a

combination of contract negotiations, industry custom and inter-party practice to resolve impediments to their performance. The self-sufficiency of the Law Merchant therefore retains its basic ingredients today as it did yesterday: it remains transregional in character, commercial in orientation, and expeditious in intent.

With the advent of time, the agreement and the marketplace have undoubtedly grown more extensive and more complex in their spheres of application. Both affect an ever-growing range of international transactions; and both act as effective restraints on merchant abuse in transregional business. Trade codes and business contracts, commercial documents and mercantile usages demonstrate the capacity of merchants to regulate their own business affairs. Commercial contracts display farsightedness in intent; they provide in detail for performance and for nonperformance, and they specify, in carefully drafted clauses, the extent of each party's obligations. So too, trade conventions assist in the formulation of agreements. General conditions of trade facilitate the drafting of terms, while documents of title, letters of credit and contracts of insurance all facilitate the process of trade itself.

Studies of industry usage reveal the sophistication of the international trade regime and the capacity of international merchants to adapt their trade agreement to meet the demands of interdisciplinary change. For instance, international contracts for the sale of crude oil illustrate how carefully multinational oil contractors provide for both performance and nonperformance within their performance adjustment and *force majeure* clauses. These clauses specify in cautious phraseology the conditions under which performance will be altered and nonperformance will be permitted. "War clauses" grant relief from performance in such events as riots, rebellions and revolutions; "strike clauses" provide for performance relief on the occurrence of debilitating strikes, lockout and "other labor disturbances." Each nonperformance provision is carefully worded; each is couched in qualifying language; and each evolves out of prior trade experience with the risks of nonperformance.

The terms of international crude oil agreements also reflect upon market forces. For instance, they generally incorporate by reference the "practices" of the crude oil industry. They provide for price-delivery terms that are suited to the specific demands of the oil industry; and they make express choices of law and jurisdiction in response to the economic-legal requirements of the parties.

In addition, international crude oil contracts of sale demonstrate their capacity to alter with the passing of time. Specific clauses deal with adjustments in performance in the face of altered market prices, partial failures of supply, and faltering demand. "Government take" and royalty tax clauses stipulate for the exigencies of government intervention; while

excuses from performance arise in the face of such specific events as oil embargoes, the requisition of oil tankers and the blockage of international waterways. Each new international hazard produces a new contract clause; and each new clause provides for a burden previously not dealt with in explicit contract form.

The law governing international trade also echoes the conventional needs of the merchant community in various ways. International codes incorporate the practices of merchants within their terms. Arbitration proceedings embody commercial understandings within their arbitral frameworks; while conciliators and mediators resolve international disputes over nonperformance by balancing the needs, interests and concerns of merchants.

In this way, the international legal order has responded to, not displaced, the business order. International business law has evolved as a suppletive, not a mandatory, system of legal rules. What merchants ought to do as a matter of business convention frequently determines what they ought to do in law.

The evolution of international adjudication therefore demonstrates an interdependence between commercial and legal practice. Adjudicators have realized increasingly that delays in adjudication cause a loss of business; formal proceedings keep businessmen away from their daily responsibilities; while complex legal proceedings complicate business.

Yet the International Law Merchant still faces fundamental obstacles in its evolution. The Law Merchant is no longer a uniform system. Its rules have been fragmented. Some are embodied in national jurisdictions and systems of law. Others exist in the regional or international domain. Absent a single set of Law Merchant principles, complex decisions must be made: should a universal system of commercial law be developed to govern international trade; or should the Law Merchant be fragmented in nature, varying from market to market, from region to region and from jurisdiction to jurisdiction?

Answering these questions raises further obstacles. International commerce and international law are different from domestic commerce and domestic law. Common law judges and lawyers are trained in indigenous law, not in the law of international trade. The rules of evidence and procedure which they employ are geared primarily towards domestic, not international, concerns. As a result, the need for speed and informality in international business will not always prevail in common law jurisdictions where judges are better equipped to deal with domestic rather than international commerce. Nor will justice prevail when judges are unduly preoccupied with applying local public policies and indigenous legal rules to transregional business.

Common law tribunals therefore require an understanding of the

international legal process; they need to appreciate the self-sufficiency of international merchants in their commercial adventures; and they are obliged to overcome their own domestic limitations. Their interpretation of international agreements should include knowledge of the international regime itself, the type of parties involved, the nature of the industry, and the impact of world trade upon each business venture. Most importantly, common law tribunals need to appreciate that international agreements are frequently the product of skillful planning and draftsmanship; their terms are deliberate in nature; and party perceptions of nonperformance are farsighted rather than narrow in scope of application. Any judicial construction of business obligations that disregards these business "facts" is likely to place undue reliance upon legal supposition in the interpretation of international practice.

Courts in common law jurisdictions have sometimes reacted to this dilemma in an innovative manner. They have developed methods of interpreting international contracts which are flexible in nature and adaptable in application. In regulating nonperformance, they have construed agreements in the light of the business context, encompassing both the practices of the parties and the social-economic and political dynamics surrounding such agreements.

Yet the constructive techniques used by common law courts have also given rise to difficulties of interpretation. Judges in the common law system have implied terms into contracts on the basis of their own perceptions of business "fact," even though judicial perceptions of business "fact" may well differ from the conceptions held by businessmen themselves. Even more problematic, common law courts have frequently added nonperformance terms into contracts on the basis of the judge's own construction of fairness and reasonableness, though the contracting parties, as merchants, might well have disagreed with the court in the circumstances. For example, courts have excused the performance of international sales obligations on the grounds that the "object" or "foundation" of the arrangement has been "frustrated," despite the promisor's undertaking to perform through a voluntary assumption of risk, and in spite of his capacity to regulate nonperformance risks by way of consent at the time of contracting.

The sufficiency of the common law as regulator of international trade hinges upon an awareness of the peculiar strengths of international business agreements. Such agreements are adaptable in nature, just as international practice is adaptable. They are farsighted in scope of operation, just as international transactors are farsighted; and they are well developed in character, just as international business is well developed.

In this way, the combined forces of the agreement, the market and time serve as a means towards self-government in transregional com-

merce. The autonomy of the contract subsists as more than an ideal; it is the end-product of an extensive historical development in the regime of international commerce.

1

The Medieval Law Merchant

That commonwealth of merchants hath always had a peculiar and proper law to rule and govern it; this law is called the Law Merchant whereof the law of all nations do take special knowledge.

Sir John Davies, *The Question Concerning Impositions* 10 (1656).

THROUGHOUT THE EVOLUTION OF THE LAW MERCHANT,¹ THE principle of good faith² appears as the bastion of international commerce. As Bewes explains in his *Romance of the Law Merchant*: "... [A]mong merchants good faith [is] ... paramount."³ Human nature, the need for cooperation in trade, has ensured that merchants act with restraint in their mutual dealings. The risk of antagonizing a fellow merchant or losing a share of the market is a realistic reflection of business, whatever the commercial regime might comprise.⁴

No doubt, the continuity of exchange among merchants is attributable to some extent to "... fundamental decency [in] ... the common man."⁵ More importantly, however, international trade has been motivated by the inspiration of need, mutual interest, and a fear of suffering business sanctions. Thus, although the form of mercantile transactions has changed over time, the structural underpinnings of international commerce have remained the same throughout all eras. Reciprocity in trade, enforced in suppletive law in terms of the principles of consent, has continued to prevail as the basis of commerciality.⁶

The Early Law Merchant

Custom, not law, has been the fulcrum of commerce since the origins of exchange.⁷ From the earliest times, merchants have devised their own

business practices and regulated their own conduct. International trade law has been fostered by merchant custom.⁸ For example, maritime trade in the Mediterranean for centuries has been based upon merchant traditions. The *Lex Rhodia* or Rhodian Law of the third century B.C. provided an ancient codification of merchant practice within the Mediterranean community.⁹ Centuries later the same tradition prevailed. The Basilica, devised by the Eastern Emperor Basil I in the ninth century A.D., consisted of a collection of maritime rules arranged in systematic form.¹⁰ More pronouncedly, the same time period yielded the Rhodian Sea Law, which embodied a comprehensive body of merchant customs that had developed at the mercantile center of the Island of Rhodes.¹¹

The eleventh century heralded a localization of custom within specific regions. Towns and markets reduced local practices into regulatory codes.¹² Merchants began to transact business across local boundaries, transporting innovative practices in trade to foreign markets. The mobility of the merchant carried with it a mobility of local custom from region to region. The laws of particular towns, usually trade centers, inevitably grew into dominant codes of custom of trans-territorial proportions.¹³ In this way, the customs of Barcelona, known as the *Consulato del Mare* (approximately 1340 A.D.) ascended as an internationally recognized body of mercantile custom. The island of Oléron in the twelfth century produced the famous Rolls of Oléron, which had a profound effect on the evolution of English Admiralty Law.¹⁴ And the Laws of Wisby came into prominence as the third great commercial code of Europe several centuries later under Baltic influence.¹⁵ Each of these codifications exemplified the localization of custom throughout the medieval world.

The needs of sea-borne traffic led to a distinctive creation which was to dominate European trade for centuries thereafter. This creation was the cosmopolitan Law Merchant, which gained ascendancy in the twelfth and thirteenth centuries. The Law Merchant reflected the ultimate move away from local law towards a universal system of law, based upon mercantile interests. "... [T]he distinguishing peculiarity of this medieval law merchant," Thayer wrote, "was . . . its cosmopolitan character, based on a common origin and a faithful reflection of the customs of merchants."¹⁶ Gerard Malynes wrote in the Introduction to his now famed *Law Merchant*:¹⁷ "I have intituled the Booke according to the ancient name of *Lex Mercatoria* and not *Ius Mercatorum* because it is customary Law approved by the authorities of all Kingdomes and Commonweales, and not a Law established by the Soveraigntie of any Prince."

The socio-economic features which typified this ancient Law Merchant also constituted the reasons for its subsistence. There was the underlying need to promote trade based upon freedom, subject to the need to pay a "just price" and subject to the need to avoid usurious

interest rates. Law which mandated the nature of trade beyond this arena would create economic loss, cause social disapproval and infringe upon public welfare. Rulers who sought by means of national law to rigidify this free commerce would inhibit the success of exchanges in the market place—to the loss of both the foreign and the local merchant community. The only law which could effectively enhance the activities of merchants under these conditions would be suppletive law, i.e., law which recognized the capacity of merchants to regulate their own affairs through their customs, their usages, and their practices.

Actual law, where created, reflected precisely this commercial need. The *Consulato del Mare*, the Rolls of Oléron and the Laws of Wisby were a reflection of merchant desires, not legal commandments. "Out of his own needs and his own views the merchant of the Middle Ages created the Law Merchant."¹⁸ The law did little more than echo the existing sentiments of the merchant community.

The medieval European environment was in many ways ideally suited to this universalization of merchant practice into a uniform system of trade law. Europe was geographically charted. Merchants could readily traverse vast areas of the Mediterranean Sea to well-established markets and fairs,¹⁹ where the traders of Europe and North Africa gathered to exchange goods. Local rulers, princes and kings supported this growth of cosmopolitan meeting places because the trade produced local revenues in the form of taxes, levies, transportation costs and employment. Local commercial courts were therefore required, not to impede trade, but rather "... to give courage to merchant strangers to come with their wares and merchandise into the realm."²⁰ Merchants themselves found the transacting profitable, since no individual region could remain insulated from the attraction of staple commodities and novelty items emanating from distant marketplaces. Mutuality of need among communities also fostered this free trade. Supply and demand were conveniently satisfied in an unfettered exchange of goods and services.²¹ The success of the concept of freedom among merchants lay in the community enjoyment which could readily be achieved by the growth of a pliable merchant regime, uninhibited by an aloof system of preemptory law.

A utilitarian ideal in the form of maximum benefit to all—princes, merchants and consumers alike—offered the Law Merchant its most solid foundation.²² The legal entrenchment of mercantility advanced the interests of the political machinery. A mercantile system of controls promoted the profit goals of the merchants themselves and also satisfied the desires of European communities for commodities.

The form of the Law Merchant understandably encompassed a number of basic elements. As a general rule "merchant law" embodied a respect for "merchant" practice as a primary source of regulation and the

"law" as a secondary control over commerce. For example, the rule governing the performance of agreements was quite straight-forward—merchants were obliged to observe their commitments. Good faith was the essence of the mercantile agreement.²³ Reciprocity and the threat of business sanctions compelled performance. The ordinary undertakings of merchants were binding because they were "intended" to be binding, not because any law compelled such performance. Mandatory law was not to impede the self-sufficient pacts of the merchants. While in Roman law, a naked, formless promise was a *nudum pactum*,²⁴ unenforceable against the promisor,²⁵ the canonists²⁶ maintained that . . . there need only be a *causa*, a reason for agreeing, to establish the existence of a binding agreement.²⁷ Beaumanoir, writing in the thirteenth century, candidly remarked, pacts ". . . are to be kept . . ."²⁸ in canon law as obligations commanded by divine ordinance.

Yet, whether the agreement was considered binding from a religious or from a secular point of view, certain consistent responses arose out of these echoes of bygone eras. As a predominant rule, the agreement remained an overriding force in regulating mercantile conduct. All else was subservient to its dominating function as a regulator of behavior. The merchant himself was to be master of his own destiny. The agreement was not required to be formalized in any manner in order to be binding. Informal arrangements—oral promises, mere nods of the head—were adequate manifestation of intent. Commerce needed simplicity. It required freedom of communication to maintain its salient functions. Finally, the law itself was a subordinate force, a reflection of the will of the merchants. Legal rules were required to reinforce what the parties wished, not to replace their aspirations with extrinsic demands.²⁹

The faith in an unrestrained regime of international merchants was echoed throughout the evolution of merchant law. "The grandeur and significance of the medieval merchant," Goldschmidt informs us, "is that he creates his own laws out of his own needs and his own views."³⁰ Reasons were added for this adherence to merchant practice. Custom and consistent practice lay at the root of good faith. "Merchants assert," we are told, ". . . that sales made at fairs, whether made with proper legal forms or not, should be binding, since it is their custom."³¹ Consistently until the end of the Law Merchant period, the role of the law was to be interpretative of agreements, rather than creative. "In all great matters relating to commerce," Goldschmidt wrote, "the legislators have copied, not dictated."³² Merchants themselves dictated the form of controls over their trading ventures.

However, there was still a definite need for law. The diversity of international commerce diminished the self-regulating capacity of a merchant regime. Merchants were not a homogeneous group. They eman-

ated from different localities, spoke different languages and were motivated by different cultures. European traders would not invariably understand one another. Nor was there an automatic inference of trust *inter se*. Geographic distances inhibited direct communication channels. Medieval merchants found it necessary to transact through third party agents—carriers and selling and buying agents. As a result, the plurality of local customs introduced confusion into transactions; they gave rise to hostility towards foreign customs and they ultimately led to mercantile confrontations.

Yet the Law Merchant itself offered the medieval merchant an ideal solution to many of these difficulties. Legal rules were a means towards achieving uniformity of practice in trade. They entrenched mercantile practice within uniform codes, thereby reducing the diversity of local customs in favor of a universal law of trade.³³ The most viable mercantile practices were enforced in the Law Merchant so that local practices were undermined where they diverged from the Law Merchant. The method of entrenching merchant practice in law followed a distinct pattern. The Law Merchant was to evolve according to ". . . the most ancient customs, concurring with the Law of Nations of all Countrys."³⁴ Established custom lay at the foundation of the Law Merchant. The universal system of law thus sought out those customs which were "constant," those practices which were "established" and, in particular, those habits which were capable of sustaining a high level of commerce to the satisfaction of merchants, consumers and rulers alike. The law embodying such custom was required to be universal, i.e., common to all nations. In this way, merchants were to be regulated by laws of mercantile origins which were both well-established in practice and consistently applied by merchants to their own business undertakings.³⁵

Universality was implemented in the Law Merchant through a guiding device, namely, the universalizing influence associated with the concept of justice. Adjudication was to conform to international standards of justice, not merely according to the idiosyncrasy of a particular rule or judge who operated within the local jurisdiction. The merchant was entitled to rely upon standards of fairness which evolved in the light of commercial practice. He had to be free to rely confidently upon the existence of uniform rules of conduct, irrespective of the particular locality of the transaction or tribunal. Ideally, an agreement entered into in Barcelona and to be performed in Oléron was to depend upon a cosmopolitan system of law which transcended the local confines of the forum. The Law Merchant was envisaged as ". . . a system of law that [did] . . . not rest exclusively on the institutions and local customs of any particular country, but consisted of certain principles of equity and usages of trade which general convenience and a common sense of justice have established to

regulate the dealings of merchants and mariners in all the commercial countries of the civilized world."³⁶

Thus, in the notion of justice, the Law Merchant sought to promote a standard of equity which merchant courts everywhere would accept as the primary source of law. And it was in this desire to give "justice" in terms of commercial standards to merchants that commercial usage acquired its universal appeal within merchant tribunals.³⁷ This uniform standard of justice was well formulated in local tribunals. The Consuls of Bologna in 1279 determined that judgment should be *secundum quod aequum crediderint*, namely, "following what they believe is fair."³⁸ In Venice, a decree of the Council in 1287 declared that custom was to govern; failing that, the judgment was to be *secundum bonam conscientiam*, namely, to follow good conscience.³⁹ At Aquila, the consuls were to consider "... the pure and simple truth as usage and equity of merchants demanded, and as it is wont to be done in mercantile actions and affairs."⁴⁰

The principles of justice as the determining feature underlying merchant law ideally suited the needs of the merchant class in several ways. Justice embodied a standard which transcended strict legal rules as it adapted to the dynamics of trade relationships. What was just was a question of trade reality, not an automated response to a body of peremptory law. What was fair depended upon the mercantile context under study, not upon any preordained juristic result. Most importantly, this standard of justice embodied a conception of equity which was not peculiar to the indigenous values of a single forum. The justice value was based in large measure upon the commercial underpinnings of the merchants, their transactions, their trade interests and their demands of one another. Equity was to reflect the specific dynamics of their commercial undertakings, rather than respond to the idiosyncracies of the adjudicating forum. In this manner the principle of *ex aequo et bono* became entrenched in English law and elsewhere as a reflection of a "... system of equity, founded on the rules of equity and governed in all its parts by plain justice and good faith."⁴¹ The concept of justice thus provided the essential link in principle between commerce and law.

Medieval Practice

The success of merchant law did not depend on a totally undefined standard of universal justice; nor could it be subject to juristic malleability in the hands of an overindulgent tribunal if commerce was to be truly enhanced in world trade. Merchants required a particular form of justice to be administered which rendered their dealings most efficacious in the context of free trade. For instance, speed of adjudication served as a

guiding principle.⁴² Merchants required that their cases should be heard with alacrity, so as to minimize disruptions of their business affairs. Informality in legal proceedings was necessary for the expeditious dispatch of their mercantile disputes. Oral proceedings, informal testimony of witnesses and unwritten judicial decision-making were all essential ingredients in maintaining an inexpensive administration of justice.⁴³ Finally, it was important that the judges should be cognizant of merchant practice and capable of making decisions according to the dictates of commerce.⁴⁴ None of the attributes of the Law Merchant therefore existed in isolation. The Law Merchant rather sought to provide merchants with a uniform system of commercial law to resolve their disputes. Justice and fairness, speed and informality, low cost and amicability all prevailed as interdependent variables, reflective of the commercial environment under investigation. These attributes together emphasized that the primary source of the Law Merchant lay in mercantile values and practices as incorporated into law. Thus justice was to be administered, not at the leisure of the tribunal, but "... from hour to hour" and "from tide to tide," (i.e., in the interim between the arrival and departure of a sailing vessel).⁴⁵ In choosing between legal formalities and commercial usage, the need for speed of adjudication thereby forced merchant judges to promote the immediate concerns of the traders themselves, rather than indulge in detailed deliberations within the environment of a formal courtroom.

The process guiding the Law Merchant responded directly to commercial need in a number of functional ways. Justice, as evidenced above, was required to be prompt, perceptive and equitable in terms of merchant values. Institutional procedures were necessary to maintain an informal regulation of commerce. Yet adjudicative procedures were to be straightforward and not formalistic in nature. Oral arguments were to be preferred to complex written documentation. Rules of evidence were to be simple in operation so as to achieve the ready admission of evidence, the proper evaluation of the facts, and a timely award. Commercial common sense was to remain as the overriding tether upon the adjudicative process.⁴⁶

The informal nature of proceedings in merchant courts was everywhere prominent. "Its justice was prompt, its procedure summary, and often the time within which disputes must be finally settled was narrowly limited."⁴⁷ In Italy most commercial statutes—the statutes of *Brescia* (1313),⁴⁸ the *Leges Genuenses* (1403-07)⁴⁹ and the statute *Calimalae* of Florence (1302)⁵⁰—instructed the judge to adopt a summary procedure. Informal procedures were prescribed at Pisa in the maritime law arena.⁵¹ At *Marseilles*, commercial judges were specifically empowered to decide merchant disputes "summarily, without regard to the subtleties of law."⁵²

Similar aspirations prevailed among German, English and French Law Merchant tribunals.⁵³

These functional goals—informality and flexibility—underlying the Law Merchant were achieved by means of a range of institutional devices. There was an avoidance of lengthy testimony under oath.⁵⁴ And there was a willingness of adjudicators to draw upon their own experiences in the mercantile arena in reaching their determinations of fact, custom and usage.⁵⁵ Canon law reinforced this predisposition. As Clement V remarked in 1306: 'It often happens that we commit cases [to judges] . . . , and in some of them we order the procedure to be simple and plain and without formal argument and solemn rules of the ordinary procedure.'⁵⁶

A study of specific commercial cases reveals the legal devices which the merchant judges invoked to achieve these functional aims. Through the Law Merchant they devised a host of legal institutions which required no formalities. Notarial attestation was usually dispensed with and the sign manual was accepted as sufficient documentary attestation for evidentiary purposes.⁵⁷ Verbal evidence could contradict even a written document where the amount in dispute exceeded one hundred livres, although the uncorroborated oral evidence of a party was insufficient to achieve this purpose.⁵⁸ In addition, verbal agreements were sufficient to found a partnership in law.⁵⁹

The Law Merchant also established an institution which national systems of law at first did not recognize, namely, the informal "writing obligatory" by which debts were freely transferable by creditors.⁶⁰ A creditor might wish to assign a debt to enable another to collect it in his absence, or the assignor might wish to pay a debt owed by him. Formal legal institutions were not suited to the needs of merchants. Neither novation nor the use of a power of attorney could meet the demands of traders for a simple procedure in transferring debts owed. Nor was the statutory system of enrollment⁶¹ for formal bonds commercially expedient. For these reasons, merchants themselves developed the "writing obligatory"⁶²—a document not under seal, usually written by the debtor rather than by a scrivener.

The Law Merchant also eradicated other formalities associated with transactions. No formal delivery was necessary in passing the property in a thing from the seller to the purchaser. The use of an "agent" in transactions required no formal authorization. Nor did the agent acquire any independent rights and liabilities of his own. The Law Merchant generally perceived of "agency" as a factual relationship—a useful conduit pipe in establishing a link between the principal and distant merchants or carriers.⁶³

Each procedural or substantive legal rule in the Law Merchant thus had a practical genesis. The validity of a signed document lacking notarial

execution was a means of promoting speed, informality and reduced costs. The use of the informal "writing obligatory" meant that debts could be transferred without the strict procedure required by local law. Oral evidence rules sought to accomplish identical goals. The rule permitting a passing of ownership without physical delivery overcame the difficulties associated with the geographic distances between transactors. And the factual test of agency permitted merchants engaged in transactions to extend their respective responsibilities directly through their agents without complicating the transaction by the addition of a third party to the sales relationship.

The use of "merchant" judges was a further feature of the Law Merchant era.⁶⁴ Adjudicators were generally selected from the ranks of the merchant class on the basis of their commercial experience, their objectivity and their seniority within the community of merchants. The rationalization for the choice of merchants rather than lawyers is apparent from an analysis of the premises underlying the Law Merchant. A merchant judge reputedly could better evaluate commercial matters. He was equipped to assess mercantile custom. He was expected to appreciate the needs of merchants, especially their desire to attain a speedy and low-cost determination of their disputes. He was able to perceive of changing trade dynamics and the need to reach a decision in accord with the realities of business. Most significantly, the merchant judge was in a position to assess the relevance of the facts surrounding the transaction—to give justice according to the realistic needs of the merchants. Lawyers applying indigenous rules of substance and procedure were unsuitable adjudicators in merchant matters for various reasons. A lawyer who lacked traditional commercial training was necessarily tainted by a particularly legalistic perspective. He was presumably preoccupied with his duty to enforce forum law rather than rules of commerce. Furthermore, strict law as applied by lawyers involved formalities which hindered commerce. The needs of the Law Merchant were founded in commerciality first and foremost, rather than in strict legalism. Therefore, commercial judges suited the primary goals of business more readily than lawyers who were trained in matters of law *stricto sensu*, as distinguished from matters of commerce.

The evolution of the Law Merchant in medieval times demonstrates this commercial-legal orientation, its genesis and development in merchant affairs. The early Law Merchant experience itself revealed the inadequacy of a confining juridical tether upon the mercantile process. The rise of independent cities throughout Europe, with their own magistrates regulating commerce, proved to be a hindrance to the merchants of the eleventh century. Pertile postulated that the expansion of commerce and the growth of cities and towns in Northern Italy required the appoint-

control was needed to regulate commerce across regional boundaries among diverse groups of traders. Merchants who were unable to reach agreements amicably, owing to cultural and economic, linguistic and interpersonal barriers to trade, required the adjudicative assistance of an extraneous force. Yet they did not require so much compulsion as to undermine the self-sufficiency of their bargains. A balancing process became necessary. Peremptory rules were undesirable where international merchants were able to govern their own business affairs by their own customary means. Law, of necessity, had to be permissive in nature, allowing merchants to regulate their own affairs wherever possible. Only failing such self-control would the law intervene as a mandatory *ius cogens* imposed upon merchants.

The Law Merchant recognized that merchants were "... creatures of habit"⁸⁰ who had devised common sense means of regulating their business dealings. The Law Merchant enforced commercial standards, mercantile values and trade interests in its evolution—not merely as an ideal, but as a concern for expediency in trade. It strove, as a system, to attain that level of behavior to which merchants should be bound in terms of reasonable commercial standards. Nor were these circumstances underlying merchant dealings mere flights of judicial fancy. They were, rather, sound perceptions, based on the actual aspirations of merchants, their past habits and their continuous dealings *inter se*. For instance, the law of the land enforced the promises of merchants, not merely as a juridical command, but in the interest of viable trade among businessmen engaged in commercial undertakings. The Law Merchant sought to integrate custom into its decision-making process.⁸¹ Statutes in Law Merchant times were modeled upon the actual course of dealings among merchants, while merchant courts followed the dictates of trade practice in their deliberations.⁸² Judges themselves were selected from the ranks of businessmen, serving as sensitive monitors of trade usage.⁸³ They sought to dispense justice with speed, diligence and a perception of business demands. Under these commercial influences, legal rules changed in nature in response to a dynamic regime of transregional commerce.⁸⁴

Within such a regime, the law in a strict sense was primarily a secondary force. It reinforced rather than superceded the cycle of business practice. It commanded merchants to do that which they themselves had promised to do. Moreover, it generally avoided complex legal forms and mandatory controls over business that had not already been sanctioned either in custom or in commercial habit.⁸⁵

Despite the apparent strengths of the Law Merchant, its unbroken continuity span as a universal institution for the regulation of trade was challenged at times. The aspirations underlying the Law Merchant—its striving towards uniformity of law—could not always be attained. Excep-

tions, distinctions and qualifications were inevitable. Uniformity of law, a realistic ideal for the development of a single merchant regime, was not always capable of growing into a reality in the world environment. Diversity in merchant practice—differences in trade and adjudicative values—were all inevitable by-products of the growing complexity of trade across ever widening regional boundaries.⁸⁶ The medieval Law Merchant could overcome these diversities only so long as there remained a "... general similarity in economic conditions . . . and [a] predominant influence of the legal conceptions and the commercial usages of . . . merchants."⁸⁷ The alteration of any of these trade conditions carried with it a partial threat to the subsistence of the Law Merchant itself. Various problems did arise to threaten the fabric underlying this system of businessmen's law. The changing nature of trade custom was more readily accepted in certain environments than in others, due to divergencies in the backgrounds, attitudes and needs of different trade communities. Merchants with indigenous backgrounds did not always adopt the same trade practices as foreign merchants, owing to variations in their ethnic, linguistic and cultural dispositions. So too, local merchant courts were sometimes unduly influenced by local customs because of their familiarity with, or cultural preference for domestic solutions to trade disputes. Under such conditions the universality of the Law Merchant was subjected to the diversity in custom existing both among merchants and among merchant judges.⁸⁸ The localization of the Law Merchant brought forth further difficulties. There were risks flowing from the unfamiliarity with, or misuse of judicial discretion in hearings before distant merchant courts. There were problems created by an increased possibility of inconsistent results before dissimilar tribunals. There was the hazard that the low cost of mercantile proceedings would grow counterproductive insofar as the striving for inexpensive proceedings led to hasty justice.

Consequently, even at the height of the Law Merchant era, variations appeared in procedures, in rules and in attitudes among merchant courts. Inconsistent customs among the merchants themselves—and their conflicting values—led to the fragmentation of legal rules and attitudes among merchant courts. For instance, the Great Fairs of Champagne developed their own distinctive usages and customs, which diverged from practices maintained elsewhere.⁸⁹ Also non-merchant influences upon tribunals undermined the commercial foundation of the Law Merchant. Royal ordinances were often a more significant force for change at fairs and markets than merchant practice. In addition, local merchant courts were not always impartial in their treatment of foreigners. As a reprisal for discrimination in foreign jurisdictions, commercial codes prevailing in Italian cities sometimes stipulated that aliens were to receive "no better law than their own citizens would have in the alien state."⁹⁰ Elsewhere,

some merchants even refused to submit disputes to particular foreign courts on account of differences in treatment meted out within those jurisdictions. As an illustration, the Merchants of Antwerp refused to submit to the law of London,⁹¹ on the ground that the law of London discriminated against them. Finally, in some cases local merchant courts insisted that foreign merchants should bind themselves unconditionally to forum law, to the exclusion of all foreign law, even the law most familiar to one or both of the contracting parties.⁹²

The most fundamental concepts of the Law Merchant were therefore not always applied with consistency within different merchant courts. The universality of the Law Merchant succumbed to principles of law peculiar to domestic courts and legal systems. Thus the rule that agreements are binding upon the parties, codified as a principle in the *Carta Mercatoria* in England in the fourteenth century,⁹³ was partially whittled away over time by the development of exceptions and qualifications within local tribunals. For example, the Custumal of Preston allowed the seller to avoid his obligations, thereby terminating the contract, by repaying double the downpayment or "earnest" to the buyer. Alternatively, the buyer could achieve the same result by forfeiting five shillings.⁹⁴ Exceptions were declared, with differing force, in other jurisdictions.⁹⁵ As a result, the binding nature of obligations was upheld or undermined as the tribunal—and local law—deemed appropriate in the circumstances.

The consequence of these variations in the Law Merchant was a growing mistrust of the Law Merchant itself. For both merchant customs and merchant laws were now subject to adjudicative scrutiny and to juridical variation. Prices, conditions of delivery and other terms expressed in a contract could be varied by a tribunal according to the tribunal's own perceptions of mercantile practice and fairness to the parties.⁹⁶

Yet, variability in adjudicative practice did not infer that the peremptory law of the forum had completely superseded the customs of traders before merchant courts. The vast majority of decisions reached by merchant courts were still in touch with the practices of merchants themselves. Diversity of law within local courts often stemmed from the preferences of traders who appeared before such commercial bodies. Since cosmopolitan merchants attended fairs of their own choice, they themselves quite understandably influenced the development of law within each particular fair or market. German merchants thus had a significant impact upon the Fair at Ypres.⁹⁷ Other merchant courts which dealt with a wide cross-section of European, Asian and North African merchants adhered to cosmopolitan practices more pronouncedly than to the custom of a local contingent of merchants. Thus the Fair Court of St. Ives,⁹⁸ being exposed to merchants from Europe and from North

America, developed laws with a transregional flavor, based on the practices of a wide variety of merchant groups.⁹⁹ At the Fairs of Champagne¹⁰⁰ a similar cosmopolitan atmosphere gave rise to the continuity of the universal Law Merchant. In short, the emphasis given to the customs and usages of merchants fluctuated according to each market environment under investigation. As a contrast, some courts actually acknowledged that disputes should be resolved in line with usages, based not on a single Law Merchant, but on the customs of a specific place.¹⁰¹ In English law the *Carta Mercatoria*¹⁰² implicitly undermined the impact of a uniform Law Merchant by requiring disputes to be resolved in accordance with the customs of the market town where the contract was made.

In post-medieval times the Law Merchant was not ideally equipped to avoid the socio-economic threats to its foundation as a dynamic legal system. The increased complexity associated with transregional trade caused an increased proliferation of the laws regulating merchants. Cultural diversities grew more prevalent in the post-medieval era as societies evolved into nation states, thereby undermining the uniformity of the Law Merchant even further. Centralization of power in the hands of local kings forced commercial tribunals to bow down to the dictates of centralized systems of law, to dominant kings and to indigenous systems of law. As a result the uniformity, the consistency and the unimpeded continuity of the Law Merchant as a single system of law came into some question in post-medieval Europe.¹⁰³

The medieval Law Merchant is but one tool for improving the functioning of the conventional law of international trade. Yet it is an important tool; for it is the background against which conventional law arises. History is the father; our commercial law of today is the son. The ascent of commercial law into the future must hinge to some degree upon a descent into its past. In many respects, the Law Merchant is a light whose vision cannot be ignored if we are to promote productive trade across national boundaries in modern times. National states depend on a coherent body of international trade law in order to promote their domestic economies. Merchants engaged in world trade also need an organized framework upon which to construct their business ventures. Both jurists and merchants must inevitably rely to some degree upon uniform laws in order to effectuate world trade. Both must ultimately rely upon a suitable mix of commercial and legal restraints in organizing business affairs. Most importantly, both have need of a suppletive legal order that is cognizant of the dynamics of world trade and capable of unifying the practices of the international community of merchants within a coherent system of commercial practice.

2

The Modern Law Merchant

Since the time of Lord Mansfield other judges have carried on the work that he began . . . and as a result of their labors the English law is now provided with a fairly complete code of mercantile rules, and is consequently inclined to disregard the practice of other countries.

Scrutton, *General Survey of the History of the Law Merchant*, 3 Select Essays in Anglo-American Legal History 7, 15 (1909).

THE MEDIEVAL LAW MERCHANT DID NOT DIE IN THE POST-MEDIEVAL times. Rather, it was transformed in character during the sixteenth and seventeenth centuries to blend in with local influences, to reflect the policies and interests, and the procedural rules of the forum. The merchant system still maintained its influence upon the development of domestic law. In Europe, the British Isles, and later the United States, the form of merchant law which arose reflected the needs of trade in each local community of merchants and in the international community at large. Mercantile law in England evolved differently than did commercial law in Continental Europe. Yet the Law Merchant itself remained the source in both legal systems. What happened in each case was the embodiment of Law Merchant values within domestic legal systems that were in line with state policy, national interests and domestic mores. Only certain attributes of the medieval Law Merchant changed. For instance, domestic laws, by definition, were not universal in their application. Such laws varied from jurisdiction to jurisdiction. They altered in accordance with forum concerns, especially indigenous business demands. Yet the foundations of the Law Merchant—flexibility of approach and commercial orientation—remained intact in both civil and common law systems.¹

A National Law Merchant

The localization of the Law Merchant produced these alterations. National law influences meant that merchant practice was no longer the sole determinant of acceptable behavior in business affairs. Novel interests arose within state jurisdictions which demanded recognition both in fact and in law. National states inevitably required that their indigenous policies and concerns be given direct consideration in the regulation of commerce. As a result, distinctly domestic systems of law evolved as the official regulators of both domestic and international business. Local tribunals incorporated local business usages into their decisions in regulating the international community of merchants. The international commercial interests of merchants were sometimes relegated to a secondary place as the legislative and judicial systems of the state predominated.

In addition, the institution of merchant law, as administered by merchant judges within a merchant setting, was also challenged in post-medieval times. Domestic lawyers, not merchant judges, presided as the judicial agents of the state in commercial affairs. Further, procedures before such lawyers were dominated by national laws and localized procedures, rather than by international laws and transnational procedures. National systems of law also confined the law merchant by regulating merchants and non-merchants alike through a single body of forum rules. Principles of territoriality dominated both domestic and non-domestic disputes before national forums. Merchant values no longer predominated when local judges displaced the role of merchant judges at ports of convenience, in country fairs and at market guilds. Under these pressures, the Law Merchant was indeed translated into a nationalized form, adapted in nature and in content to the socio-political demands of each forum.²

On the Continent the Law Merchant suffered to a limited extent. Merchant practices were often codified within commercial codes which bore a strong resemblance to the medieval Law Merchant. Consequently, the commercial laws of European states often embodied trade practice within their legal frameworks. Social and political reforms in Europe further entrenched law merchant values. The reception of Roman Law on the Continent revitalized the Roman Law concepts which had previously influenced the evolution of the Law Merchant. The European Reformation also added support to Law Merchant values: Faith was placed in the free expression of choice among merchants, in their unbridled ability to conduct their own trade affairs through their own trade devices. Such *kaissez-faire* values acted as the cultural core of a reformed Europe. The fruits of the past were thus crystallized into a supportive logic as Renaissance

Europe grasped and adopted the principle of free trade of the Law Merchant. One primary result prevailed: The fragmentation in form of the Law Merchant did not cause its fragmentation in substance. This was the experience of Reformation Europe.³

In France, the principles of the Law Merchant appeared clearly within a codified framework of domestic law. French law provided that "agreements entered into in *bona fidei*" should be respected by both parties and enforced by law.⁴ Special commercial codes such as the *Ordonnance sur le Commerce*,⁵ developed by the jurist Colbert in 1673, required French commercial law to respond more to commercial practice than to rigid legal forms and procedures. This commercial tradition was also reflected in the *Ordonnance sur la Marine*⁶ of 1681. In these ways, customs and usages of merchants were embodied in French law, while the Law Merchant was recognized as a reality in the French legal system.

In Germany, the Law Merchant followed a slightly different course during the sixteenth and seventeenth centuries. The lack of a unified law in 'Germany' itself led to the splintering of the Law Merchant into local customs, which were somewhat different within each principality.⁷ Only in 1861 was a uniform commercial code devised within the soon-to-be unified German state.⁸ The fragmented body of merchant law was carefully blended together in legislative enactments: the *Algemeine Deutsche Handelsgesetzbuch* (1861)⁹ and the *Handelsgesetzbuch* or Commercial Code of 1897,¹⁰ which replaced the 1861 Code. As a result, the Law Merchant was received sporadically into German law. Nevertheless, here too, it was altered in form: and here too, it assumed an indigenous character.

The commercial and legal development in France and Germany was representative of what happened elsewhere on the European continent. Merchants traded across national boundaries, much as they had conducted their business in medieval times. They retained their merchant practices, and they favored the principle of free commerce unimpeded by needless legal restraint. Nationalization of econo-legal activities within domestic states really meant the nationalization of the Law Merchant itself. State codes were more convenient reflections of the ancient Laws of Wisby and Rolls of Oléron—modernized to meet continental demands within a new econo-legal convention, represented by the national state.

The Law Merchant has had differing influences upon English law. While in the 1600's it suffered a severe setback as a source of law, in 1756 it was substantially revived within the English legal system. Each stage in the history of the Law Merchant in English law is worthy of analysis in order to appreciate the role of commercial law within common law jurisdictions in modern times.

Initially, the Law Merchant had a less pervasive influence in England

than it did on the Continent. Various reasons account for this more restrictive influence of the medieval Law Merchant in England. Firstly, England did not experience the unifying effect of a reception of Roman law, itself a source of the Law Merchant. Secondly, the geographic isolation of England excluded it from the codification efforts that developed within Europe in the arena of commercial law. Finally, English law developed in the early seventeenth century into a centralized system of royal courts that rejected many of the underpinnings of an independent Law Merchant that functioned separately and apart from the royal courts of the realm.¹¹

Chief Justice Coke in 1606 is most commonly associated with limiting the role of the Law Merchant in post-medieval England. Coke, in asserting that the Law Merchant was not a universal system of merchant practice proposed that: "... the Law Merchant is part of the law of this realm"¹² Accordingly, the doors to national legal controls over international trade were suddenly opened to the king's courts. Merchants were subjected to the strict procedures of common law courts. They were bound to submit to the jurisdiction of common law judges.¹³ Merchant courts at fairs, guilds and market towns were abolished, or alternatively, they were integrated into the common law system. The jurisdiction of the Court of Admiralty was purposefully whittled away as common law courts sought absolute domination over the English system of law.¹⁴

As a result, the Law Merchant was confined in its operation in English law. Law Merchant rules grew less flexible before courts of the English realm. Merchants engaged in international trade were subjected to the ordinary law of the land. They were not readily able to rely upon the specialized rules of commercial law administered before merchant courts. This rigidifying process took various forms. Custom could no longer be adduced informally before English courts. Merchants who relied upon a trade custom had to prove the custom's existence, its certainty, its reasonableness and its accordance with the law of the realm. For example, actions on bills of exchange had to be formally pleaded, *secundum usum et consuetudinem mercatorum*, i.e., according to the use and custom of merchants.¹⁵ The freedom of merchants was restrained within such a common law system. Not uncommon among English jurists was the pronouncement that "... a general liberty of trade, without a regulation, doth more hurt than good."¹⁶ The special procedures and informal institutions of the medieval Law Merchant were conspicuously absent in the centuries that followed. Merchants who brought action against non-merchants on bills of exchange were treated as mere "gentlemen" in law, lacking the right to invoke business rationalizations for their conduct, even though bills of exchange were, inherently, merchant institutions.¹⁷ So too, trade usages were relegated to narrow issues of "fact." Juries

determined, with limited legal direction, the significance of each usage or practice within the specific context under study.¹⁸ This piecemeal approach, in effect, prevented business usage from acquiring a lasting content in law.¹⁹

By restricting the dynamic use of trade custom in various ways, the English common law courts precluded resort to the pliable framework of the Law Merchant. Either they refused to admit custom into the legal system in any form whatever, or custom was required to satisfy onerous tests of admissibility before it was received into English law. The supremacy of the law *stricto sensu* was maintained. Business usage was inadmissible in law unless it complied with stringent procedures and complex rules of evidence. Custom had to comply with rules of positive law. It had to be truly "ancient" in its origins in order to be admitted in law, and it had to be consistently practiced, notwithstanding the changing environment of business itself. As Blackburn, J. illustrated:

We must take it as admitted ... that such a custom [of treating certain types of instruments as negotiable] has prevailed of late years; but as the instruments themselves are only of recent introduction, it can be no part of the law merchant ... Nor, if the ancient law merchant annexes the incident, can any modern usage take it away.²⁰

In this way, the Law Merchant became rigid as post-medieval English judges sought to integrate the Law Merchant into the established confines of a centralized common law.

The Law Merchant and the Common Law

The flexible basis of the medieval Law Merchant, pliable in its early nature and content, was strictly confined in post-medieval England. Yet the Law Merchant still remained in existence for very practical reasons. England was a great seafaring nation. From the sixteenth to the nineteenth century it depended for its viability upon international commerce. Custom prevailed as a reality of world trade. English courts could not ignore the global impact of their commercial-legal determinations if they were to compete as regulators of world trade.

From 1856 onwards, Lord Mansfield and his disciples understandably sought to soften the rigors of the common law system in relation to the Law Merchant.²¹ Scottish in legal background, Mansfield "may truly be said to be the founder of the Commercial Law of this country" [*viz.*, England].²² In truth, Mansfield pioneered the reception into English law of an international Law Merchant, based on the practices of the merchants of both the Continent and Britain. He recognized the commercial-legal interface that is inherent in international trade. He acknowledged that, of

necessity, the common law had to recognize the dynamics of international business. With his hybrid common law-civil law education, Mansfield appreciated both British and Continental approaches towards the regulation of trade usage. As a legal historian, he was fully cognizant of the ancient Roman *Pandects*, the *Consolato del Mare*, the Laws of Wisby and Oléron, and the more modern French *Ordonnances* of his own time.²³ Striving to implement a realistic system of commercial law in England, he argued for a system of commercial law which gave due regard to business custom and trade usage. He appreciated that commercial law embodied more than mere rigid legal principles, narrowly conceived of and strictly applied to trade ventures. A durable system of commercial law, in Mansfield's view, could only survive if the dynamics of commerce were encompassed with the juridical process. Thus, in *Pillans v. Van Mierop* Mansfield depicted the common law as a monitor of the *ius gentium*, the law common to different nations, not as a law peculiar to English merchants alone.²⁴ For Mansfield, commercial law was to evolve alongside commercial practice. It was to grow out of the diverse needs of international merchants engaged in world trade and was to be incorporated into English law. As a result, "Mansfield jurymen," trained under Mansfield at Guildhall,²⁵ encouraged this partial revival of the Law Merchant. They followed Mansfield's approach towards commercial law.²⁶ They revitalized his commercial-legal perceptions of the Law Merchant.

The spirit of Lord Mansfield has continued to have its impact upon legal development, even in the twentieth century common law. Judges in common law countries have responded to merchant custom as a means of attaining meaningful progress in law. They have incorporated the conventional needs of business within their determinations. They have sought to compete with foreign systems of law in regulating the international affairs of merchants. The central design of the Law Merchant has therefore not been forgotten in the common law legal tradition. The needs of both state and citizen have demanded the embodiment of trade practice in business law. As Justice Story observed of the Law Merchant in his 1842 United States Supreme Court decision, *Swift v. Tyson*²⁷

... The Law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, ... to be in a great measure, not the law of a single country only, but of the commercial world.

While the universality of the Law Merchant has been recognized by common lawyers,²⁸ the precise impact of this system has varied in both its nature and its effect upon the common law.²⁹ For instance, it is unclear to what extent the Law Merchant has been a source of common law principles. Many developments in the common law system which appeared to have Law Merchant origins actually entered the common law via another

route. Customs which seemingly evolved out of the staple and the guild courts of the Law Merchant actually grew out of the law of equity.³⁰ Already in the seventeenth century the Court of Chancery, not the Law Merchant, was the fountainhead of equity in commercial matters. "Merchant causes were properly to be determined in the Chancery . . . for the customs of merchants are preserved chiefly by the said Court."³¹ Some judges still maintained that the Law Merchant was the true source of maritime customs in the common law system. For example, in *Kendal v. Marshall*³² Lord Justice Brett declared:

The doctrine as to stoppage *in transitu* is not founded on any contract between the parties; it is not founded on any ethical principle; but it is founded upon the custom of merchants. The right to stop *in transitu* was originally proved in evidence as a part of the custom of merchants; but it has afterwards been adopted as a matter of principle, both at law and in equity.

Other English judges concluded that the doctrine of stoppage *in transitu* had its origins in the law of equity. As a concept, stoppage *in transitu* reputedly reflected legal innovations initiated by the Lord Chancellor, the keeper of the King's conscience, rather than the common law principles of the Law Merchant. For example, the Exchequer Court stated, in *Gibson v. Carruthers*³³

In courts of equity it has been a received opinion that it [stoppage *in transitu*] was founded on some principle of common law. In courts of law it is just as much the practice to call it a principle of equity, which the common law has adopted.

It is submitted that in reality no true contradiction exists between the Law Merchant and the law of equity as sources of law. The *ius gentium*, the means whereby the Law Merchant entered English Law, is closely intertwined with principles of equity, insofar as both systems have sought to foster a system of efficacious commerce. Nor can a system of equity disregard the rationale of the Law Merchant as a source of law if justice is to be an end-product of legal development. The Law Merchant is thus one very important source of commercial law, even though other sources of law have contributed towards the development of the common law governing international trade.

The apparent clash between the Law Merchant and the law of equity, however, reveals a more subtle problem, one which is intrinsic to the growth of the Law Merchant as a source of English law. The fact that the Law Merchant lost some of its identifying characteristics in English law in effect reduces the function of the Law Merchant to an uncertain role in our common law system. It becomes unclear in what circumstances English

courts will have recourse to the institutions of the Law Merchant in deciding commercial cases. Uncertainty arises over the significance which should be attributed to mercantile principles in adapting the operation of the Law Merchant to specific trade situations. Moreover, the ambit of equity grows suspiciously vague in the event of an alleged conflict between principles of equity and precepts of the Law Merchant.

An even more basic conflict arises over the manner of the reception of the Law Merchant into English law. The Law Merchant, rather than influencing the growth of common law, has often been influenced—indeed changed in character—by the common law. Customs of the Law Merchant which were adopted into the early common law have sometimes been so rigidified in legal content that they have varied from their merchant origins. In this way, English courts have paid lip service to the precepts of the Law Merchant, while in reality undermining the flexible foundations of Law Merchant principles.³⁴ This formalization of merchant customs has assumed various forms in practice. English judges have often required that the customs of merchants must be proved “. . . to the satisfaction of twelve reasonable and ignorant jurors.”³⁵ They have required, even to this day, that trade customs must conform to stringent legal tests before they will be binding in English law. As a result, the customs of merchants must be “certain” and “consistent with law.” They must be “reasonable” and usually, they must be firmly established as practices since “time immemorial.”³⁶ In the area of negotiable instruments (a relatively modern concept), this strict legal test of custom has not been as stringently applied by English judges.³⁷ Yet the rigid definition of custom which is applied most frequently before English courts has served to suppress the spirit of flexibility that is implicit within the Law Merchant. Merchant usages have sometimes been denied the binding force of law either because they were reputedly not well established in fact or because they allegedly conflicted with positive law. They have not been recognized at times because they were in some way unclear in nature or because they were of comparatively recent origin. These legal conclusions were reached notwithstanding the fact that merchants engaged in world trade frequently relied upon such usages or practices in the conduct of their business affairs across national boundaries.

Examples of these conflicts in English law between law and business practice are numerous indeed. Maintaining that only formal bills of lading would suffice as a means of passing title to goods, English courts have sometimes refused to recognize the legal validity of a document of title which falls short of qualifying as a bill of lading but is used constantly in practice by merchants.³⁸ Similar consequences have occurred in relation to insurance documents. English courts have refused to acknowledge the binding force of documents of insurance when insurance practices failed

to conform to strict forms of law.³⁹ Moreover, English judges have formalized the law even further—adding time, cost and effort to proceedings—by requiring merchant custom to be formally pleaded in order to adduce custom before the court. “[T]he evidence of a modifying custom must be clear indeed ere the well-known incidence of such a bargain as a c.i.f. contract can be changed.”⁴⁰

Typical of this confinement of the Law Merchant in English court cases is *Biddell Bros. v. Clemens Horst Co.*⁴¹ In that case, the majority of the English Court of Appeal took a formal approach towards a well-established business usage, limiting the essential flexibility of the Law Merchant in the process. The facts were relatively uncomplicated. The English Court was required to construe the meaning of the contractual words “[t]erms net cash,” as used in a c.i.f. contract. The most obvious construction of the phrase “terms net cash” from the practical point of view of merchants engaged in a c.i.f. transaction, was “net cash against document,” that is: On the payment of the purchase price and on the receipt of the documents representing the goods, title in the goods would pass from seller to buyer. This construction of “net cash against documents” is especially useful in business transactions across geographic boundaries. By constructive delivery of documents the seller passes title to the goods, including the risk of loss, to the buyer at a conveniently early date and during the course of shipment. In addition, the seller avoids further responsibility in relation to the goods as soon as the documents representing the goods have been delivered to the buyer. The buyer in turn obtains title of the goods prior to his receipt of the goods themselves. He is thereby able to deal in the goods prior to taking physical delivery, for example by selling them in whole or in part to another while they are still in transit.

Despite these arguments of practicality, the majority of the English Court of Appeal was unwilling to construe “net cash” to mean “net cash against documents.” A formal rule was preferred. The only way title to the goods could pass from seller to buyer in law was, not by the payment of cash against documents, but by the *physical* delivery of the goods themselves to the buyer. The “net cash against documents” construction, despite its usual application to c.i.f. contracts, was rejected because the parties made no express reference to “against documents” in their contracts. Farwell, L.J.⁴² maintained that the fact that constructive delivery was “commercially reasonable” was, in and of itself, an insufficient reason to establish a valid transfer of title in law. Nor would a commercial “usage” supporting the practice of passing title against documents in a c.i.f. contract alter this legal position. Usage had to be proved by clear evidence, not by personal judgment. It has to be established by “necessity,” not by implied implication from the term c.i.f. Nor, Williams L.J. added,

was there any "clear" evidence of a custom in the Law Merchant which favored this liberal construction of "terms net cash."⁴³

The Law Merchant was therefore to be established by formal means. It was legally admissible only where merchant custom was well-established in trade and only where business usage complied with the positive law of the realm. Thus commercial practice was subordinated to the formal mandate of the common law. The forces favoring business efficacy were displaced in favor of strict legal consistency. The need for convenience in business was suppressed in the interests of a narrow legal logic. Even the reversal of this decision did not alter the formalist trend of English law. A narrow sense of positivism was firmly entrenched among English courts. Judges preferred to use a strict legal logic at the expense of variable principles of commerce. The formalities of English law thereby overrode the informalities that were associated with business practice.

Nevertheless, legal formalism was not accepted in an unbridled form by all English judges. Rigid rules of law did not pervade all common law jurisdictions. Instead, a new era of functionalism evolved in American and in Commonwealth jurisdictions in the years that followed. The need for an efficacious common law system, a variable body of legal concepts, developed into the central preoccupation of many common law realists.⁴⁴ This resurgence of the Law Merchant occurred gradually yet profoundly in the common law system. Merchant concepts crept back into the framework of English law. To an even greater extent, merchant practice was recognized as valuable in American law. As business usage grew more significant in law, judicial precedent revitalized Law Merchant values. Flexibility in commercial-legal affairs once again became a legal aspiration. Common law judges began to examine the interdisciplinary environment surrounding the law. Learned jurists demonstrated a renewed awareness of Law Merchant ideals. As Lord Devlin's remarks illustrate:

I think that the law might go further than it does in meeting the business attitude. In particular a more generous admission into the contract of custom and trade practice would be entirely in keeping with the basic principles of the Law Merchant and with the traditions which lie at the heart of the common law.⁴⁵

Nineteenth and twentieth century common law judges have recognized the spirit of the Law Merchant in various ways. Indeed, in the very case of *Biddell Bros. v. Clemens Horst Co.*,⁴⁶ cited above, there arose significant support for the commercial efficacy ideal of the Law Merchant. Kennedy, L.J., in a dissent in the Court of Appeal, emphatically rejected the legalistic construction of the term "net cash" that had been adopted by the majority. For Kennedy, the document was to be interpreted, not in terms of absolute legal rules, but according to what is "mercantilely

reasonable."⁴⁷ This common sense approach, this search for the most efficacious trade solution, induced the House of Lords to uphold the Kennedy dissent.⁴⁸

Thus the Law Merchant gradually grew more flexible in the nineteenth and twentieth centuries as English judges sought to bring English law into line with the evolving practices of merchants.

The American Experience

Like medieval merchant tribunals, American judges have also received the Law Merchant. They have examined merchant practices in the course of developing American commercial law. They have recognized that trade practices are enforceable in law even when they are not fixed in character and even when they have not existed since time immemorial.⁴⁹

Reinforced by the Uniform Commercial Code,⁵⁰ American courts have revitalized the Medieval Law Merchant in a number of respects. Firstly, the practices of businessmen themselves have served as the primary source of business law. Secondly, the legal rules governing commerce have been designed, not in a vacuum, but through the constant observation of business convention. Thirdly, motivated by a sense of realism, judges usually have avoided stultifying legal procedures and rigid rules of evidence in scrutinizing the affairs of businessmen.⁵¹ In so doing, they have recognized conventional practice in business. They have enforced commercial conventions. They have upheld trade usages, doing so even when such usages failed to conform to the formal procedures of the common law. For example, certificates of insurance have been validated in such cases as *Kunglig Järnvägsstyrelsen v. Dexter and Carpenter*,⁵² even though policies, rather than certificates, of insurance were required under the pre-existing English legal system. In rejecting the strict English approach towards insurance documents, Judge Learned Hand recognized the practical utility of certificates of insurance. Merchants engaged in both domestic and international trade repeatedly used such certificates of insurance in the expeditious conduct of trade. They were widely honored by traders and the insurance industry alike. Through this ruling, Hand obviated the legal complexities that had previously been associated with insurance policies, and at the same time enforced the existing practices of merchants. "It is the business of courts reasonably so to shape their rules of evidence as to make them suitable to the habits of mankind."⁵³

The ethic of the Law Merchant was thus recognized in this twentieth century American court. Needless inflexibility in law was avoided.⁵⁴ Acting *ex aequo et bono*, Hand reduced the formalities of the common law to

a residuary force in governing trade practices. The positive law of the realm was forced to conform to the mandate of the merchants, not vice versa.⁵⁵

An American court assumed such a practice-oriented approach in the commercial case of *Dixon, Irmaos and Cia. v. Chase National Bank*.⁵⁶ There the court accepted the practice of New York banks, which honored a seller's draft even though the seller had delivered less than a "full set" of bills of lading. Judge Swan, in maintaining that this banking practice was valid in law, adopted a common sense construction. Since one set of bills of lading had been delivered by the c.i.f. seller in good faith and since the seller had, in addition, arranged for an agent to provide a guarantee against loss, Judge Swan held that no further duty should be imposed upon the seller.⁵⁷ A rationale based on both commercial expediency and fairness between the parties underlay this decision. The seller, after all, was not at fault because the duplicate set of bills of lading did not arrive in New York, and the buyer stood to suffer no practical loss as a result of this incomplete delivery.⁵⁸ Accordingly, the existing rule of English law requiring delivery of a "full set" of bills of lading in triplicate,⁵⁹ was not followed. That rule, the court concluded, was unwieldy and harsh in practice because it disregarded a well-accepted usage among New York banks to the contrary. Delivery of less than a full set of shipment documents was deemed to be valid in law.

The commercial foundation of the medieval Law Merchant has found definite support in American jurisprudence. The behavior of merchants has acquired legal recognition. In this way, American tribunals have expanded upon the ambit of commercial custom by including an array of business practices and trade usages within the confines of the legal system. Indeed, there is the risk that the Law Merchant, as applied by American courts, might surpass even the flexibility of its medieval predecessor; for American judges have sometimes demonstrated excessive pliability by giving legal recognition either to conflicting usages or to practices of a purely local character. For example, there is the problem implicit within Hand's postulation that "words mean what the parties who use them want them to mean."⁶⁰ Words may mean very different things to different merchants, depending on their socio-cultural and legal backgrounds. So too, the legal recognition given to a local practice, while reasonable to merchants within a local community of merchants, might well be unreasonable to the international mercantile community. It may well be asked: What of the adaptability of the Law Merchant where what merchants do automatically becomes what they ought to do in law? What of the stability of the Law Merchant where the behavior of some, but not other, merchants is sanctioned in law? Indeed, the more willing our American courts are to enforce the local practices of merchants, the

greater will be their difficulty in deciding which competing practices should govern the international business transactions of merchants.⁶¹

Consequently, the Law Merchant is potentially subject to fragmentation, when a New York banking practice is upheld although it may be potentially in conflict with an international banking practice. In an extreme case, an American court that enforces the practices of some, but not other, merchants might well have to choose among a host of competing practices existing among both forum and non-forum communities of merchants. Such a judicial approach would undermine the predictability of the Law Merchant. Merchants would only be able to plan their business affairs after carefully assessing the legal and commercial practices that prevail in each competing environment. In addition, the law governing international commerce would be distinctly variable in nature, fluctuating in content according to each tribunal's conception of acceptable and unacceptable business practice.

In many respects, these abuses of the Law Merchant have not seriously undermined the efficiency of the American legal system in commercial matters. Uniformity of law has generally prevailed. Consistency of practice has usually been enforced in law.⁶² Even in the *Kunglig*⁶³ and the *Dixon*⁶⁴ decisions the primary orientation of the Law Merchant predominated as the judges sought to avoid a system of rigid construction that ignored the dynamics of commerce. Since use of certificates of insurance and acceptance of incomplete sets of bills of lading were business usages, they were upheld in law. The tribunals did enforce business conventions. They did uphold what merchants actually practiced, not simply what the courts imputed to merchants by way of narrow judicial reasoning.

Commercial legislation further jettisoned undue formalism⁶⁵ from the American legal system. Trade usages assumed a distinct legal significance and business practices became well recognized in law.⁶⁶ Thus the Uniform Commercial Code (U.C.C.)⁶⁷ gave credence, not only to traditional custom⁶⁸ per se, but also to "courses of dealing"⁶⁹ and "usages of trade"⁷⁰ that prevailed among merchants. The Code specifically rejected the English law requirement that custom must be "certain," "predictable" and in existence "since time immemorial"⁷¹ in order to be legally enforceable. Merchant practice, in order to be binding in law, had merely to be "reasonable . . . in the circumstances."⁷² The Code incorporated other Law Merchant ideologies within its framework. Like the post-medieval codes of continental Europe, the U.C.C. distinguished between commercial and non-commercial contracts. It differentiated between "merchants" and "non-merchants," between secured and unsecured transactions, and between sales and other types of contracts.⁷³ In so doing, the Code recognized a commercial regime which, like the Law Merchant, operated separately and apart from the non-commercial law of the realm. American

courts which applied the Code were bound to promote standards of business efficacy in business transactions. They were expected to attain a semblance of equity in commercial affairs.⁷⁴ The acceptance of merchant usage became implicit in the successful operation of the U.C.C. Trade usage was integral to its realistic operation. Business practice was essential to its interpretative machinery.⁷⁵ American courts were required to examine each commercial context in dispute in giving judgment. They were obliged to scrutinize the habits of merchant litigants in order to delineate the extent of each merchant's business commitment.⁷⁶

Yet the U.C.C. does not incorporate one central feature of the Law Merchant: as a body of law, the U.C.C. remains essentially a national, rather than an international codification. It was drafted by Americans to govern trade affecting Americans. As to matters of interpretation, national courts, not international tribunals, determine the scope of application of the U.C.C. American judges, not international arbitrators or conciliators, determine when the principles of the Law Merchant will prevail. They decide when Law Merchant procedures will be followed. They establish under what conditions the law of the jurisdiction will coincide with the foundations of the Law Merchant. Accordingly, the universality of the Law Merchant is only assured insofar as the court, guided by the U.C.C., is willing to adhere to the uniform customs and to the well-established usages of international trade.⁷⁷

The Law Merchant nevertheless thrives in American law, more so than elsewhere in common law jurisdictions. Under the influence of legal realism, American judges have translated merchant practice into law; they have recognized trade habit and commercial usage; and they have modeled commercial law upon the functional needs of an increasingly interdependent society of merchants.

The "nationalization" of the Law Merchant has not led to the demise of the Law Merchant within domestic systems of law. Both common and civil law systems have adopted many features of the Law Merchant within their practices. Firstly, national courts have enforced international contracts. They have respected the "law" of the contract, by complying with the commercial and the legal choices of the parties themselves in deciding commercial disputes. Secondly, national courts have interpreted such contracts in the light of international practice by incorporating business custom and trade usage into their legal analyses. Thirdly, national courts have adopted the institutions, the concepts and the doctrines of the Law Merchant within their domestic systems of law.⁷⁸

Most importantly, national systems of law have imported one salient international custom into domestic law: they have incorporated international commercial arbitration into their domestic purview; and, in the tradition of the Law Merchant, have permitted the selection of arbitrators

from the ranks of businessmen. Moreover, commercial arbitrators, like their medieval predecessors, have been schooled in business-legal practice in applying commercial remedies to international disputes.⁷⁹

The central deficiency of the Law Merchant as it now operates in national systems of law lies in the very fact of "nationalization" itself. The localization of international practice within national jurisdictions introduces the risk that Law Merchant principles will be fragmented. Nationalization means that local needs may prevail at the expense of a truly universalized body of merchant law that transcends national boundaries. A national body of commercial law regulating transregional business does undermine at least one aspect of the Law Merchant, namely, the international purview of the Law Merchant itself.

3

The International Law Merchant

Nothing is more obstructive to the even flow of international commerce than the legal development of . . . customs along purely national and isolated lines."

Philip W. Thayer, 6 Brooklyn L. Rev. 139, 154 (1936).

THE FEAR OF A PROLIFERATED LAW MERCHANT HAS LED TO THE growth of a "new" Law Merchant,¹ closely resembling its medieval forefather.² The ". . . general trend of commercial law [has been] to move away from the restrictions of national law to a universal, international conception of the law of international trade."³ Jurists who favor this tendency have emphasized the risks arising when international custom and usage are regionalized within national legal systems. "Nothing is more obstructive to the even flow of international commerce than the legal development of these customs along purely national and isolated lines."⁴ A demand has been made for ". . . an autonomous commercial law— independent of the national systems of law."⁵ Stress has been placed upon the ability of merchants to regulate their international affairs through their own business practices, their contracts, their customs and their usages. "It is necessary," as John Honnold states, "for a trader to preserve his reputation for reliability and business morality."⁶ It is appropriate, such commentators have proposed, for legal recognition to be given to a self-sufficient regime of merchants whose practices and usages guide the course of international trade.

The movement towards a universal law of international trade has a solid rationale in the conventional community of merchants. A uniform law governing international trade remains, as in medieval times, a means through which merchants can overcome ". . . the differences in the political, economic and legal systems of the world."⁷ Moreover, the ingredients

necessary to the ascendancy of a transregional Law Merchant exist today, just as they did in medieval times. A common foundation of mutual understanding among merchants is still essential to viable commercial practice across national boundaries. Just as the medieval Law Merchant revealed that the progress of law lay in the actual practices of businessmen, so conventional trade demands that law adapt to the current course of international commerce. Just as medieval adjudicators sought to ascertain the conduct of merchants within the framework of business itself, a similar obligation now rests upon the upholders of this modern Law Merchant to develop trade law on a similarly commercial foundation.⁸

One initial question must be considered in promoting a universal Law Merchant: What should be the role, if any, of national law in this universalization process? As a general rule, state courts are not bound by international standards. National judges are linked together neither by common understandings of international custom nor by an automatic receptiveness toward transnational practice. International merchants are not assured of consistency of treatment in different national forums. Rather, the relevance that is attributed to their business custom will hinge upon the particular method of construction adopted by the national court vested with jurisdiction. As a result, the advance of the Law Merchant will only be as effective as that national court is willing to permit in the circumstances.⁹

A variety of specific criticisms may be directed against a Law Merchant administered by national courts. National courts may be accused of ignoring the dynamics of transnational usage because of the seemingly uncertain character of conventional usages.¹⁰ They may be charged with misconstruing the role of law and custom in relation to international business. Just as some English judgments are questioned on the grounds that they have unduly restricted the realm of business usage, American decisions are sometimes criticized for having given an unduly wide significance to local trade practice.¹¹ In both cases the risk is a potential breakdown of international trade law. Rigidity in the interpretation of business transactions retards the development of the Law Merchant, while a too flexible construction of business usage produces inconsistency of result. A realistic Law Merchant, uniform in nature and commercially responsive in effect, must be based neither on an excessively broad nor on a needlessly narrow construction of trade convention. A truly functional Law Merchant must respond to existing uniform practices in international business itself, since the needs of the merchants themselves provide the primary content of the international regime of business.¹²

Much of this revitalized Law Merchant is already evident. Highly sophisticated contracts demonstrate the ability of merchants engaged in world trade to exercise a freedom of choice in determining the nature and

limits of their commercial obligations.¹³ International merchants have devised their own complex business relations, based on their own intricate strategies and counter-strategies and suited to their business demands and reciprocal trade needs.¹⁴ In this way international merchants have institutionalized their ventures, incorporating them within established instruments of trade, devised by merchants for the use of merchants. They have created a range of trade associations to regulate their dealings in global ventures. They have incorporated general conditions of sale into their trade agreements and they have concluded their arrangements on the basis of uniform laws of sale and well-recognized codifications of international business usage.¹⁵

The international community of merchants has assembled a formidable array of business instruments for use in their negotiations, in drafting their contracts, and in settling their business disputes.¹⁶ Trade experts have devised General Conditions of Sale for the Economic Commission for Europe (ECE), with the aim of satisfying the requirements of specific trades, operating within identifiable world markets.¹⁷ So too, the Council for Mutual Economic Aid and Assistance has devised the COMECON Conditions to guide contractors engaged, *inter alia*, in the conduct of East-West trade relations.¹⁸ Codes of trade terms, uniform in nature, have further promoted this international Law Merchant. For instance, the 'INCOTERMS'¹⁹ consist of a uniform body of price-delivery terms. Each price-delivery term, when employed by merchants engaged in international affairs is actually formulated in the light of pre-existing merchant practice. Price-delivery terms such as "c.i.f."²⁰ and "f.o.b."²¹ establish which merchant must bear the risk in the goods and which party must assume the risks associated with altered freight charges,²² modified insurance costs,²³ and variations in the time and mode of payment and delivery.²⁴ The incorporation of INCOTERMS achieves a dual purpose; it harmonizes the practices of international merchants who adopt INCOTERM definitions in their agreements²⁵ and at the same time recognizes the freedom of merchants to employ price-delivery terms in whatever manner they deem suitable to their business ventures.

Through these instruments, business usages have been blended with concepts of the common law and the civil law. Lawyers skilled in international commerce have devised trade documents which reflect national, international and regional interests. Commercial experts have striven to attain adaptability in both legal and commercial practice. Such commercial-legal activities have given rise to the Draft Uniform Law of International Sales, the ULIS.²⁶ This draft document, has sought to replace unduly complex legal concepts with an established body of principles acceptable to lawyers and businessmen alike. As a draft law, it affirms freedom of commerce in international sales. Merchants are free to

exclude the ULIS in whole or in part from their agreements if they so wish.²⁷ However, where they fail to do so, adjudicators charged with jurisdiction are obliged to apply the "principles" of the ULIS in reaching their determinations.²⁸ Most importantly, included within these ULIS "principles" is the obligation of the adjudicator to interpret sales agreements in the light of the intention of the parties, and in accordance with their practices and their actual and reasonable business usages. These "principles," reflective of the modern Law Merchant, have remained largely intact in international sales law.²⁹

Commercial arbitration, the very substratum of the Law Merchant, has also been institutionalized in conventional international trade law.³⁰ The Rules of the International Chamber of Commerce (I.C.C.) preserve an array of Law Merchant concepts.³¹ The I.C.C. Rules provide, *inter alia*, that arbitrators should be selected from different national origins, thereby preserving an international flavor in dispute resolution.³² So too, I.C.C. arbitrators are required to be experts in commercial conciliation and in international arbitration, again reviving the commercial sophistication of the merchant judge. Finally, the I.C.C. procedures provide for the speedy settlement of disputes through a flexible conciliation procedure and, failing that, an adaptable arbitral process. Here too, the ideal of an expeditious and low cost arbitration process is partially embodied in the I.C.C. Rules.³³

Yet profound difficulties still arise in establishing the parameters of an all-encompassing modern Law Merchant. National systems of law remain jealous of their jurisdiction over world trade and hesitate to lose such business to foreign systems.³⁴ Mercantile customs are often difficult to unify within a single international system of commercial law. Trade practices differ from industry to industry. Legal rules vary from legal system to legal system;³⁵ while business convention is seldom stable in the face of international, economic and social instability.³⁶ Moreover, dissimilarities in approach among legislators, administrators, judges and merchants are capable of complicating this movement towards the "harmonization" of international trade law.

Problems also arise in determining the appropriate content of this universalized Law Merchant. Jurists must determine what degree of uniformity is warranted when they establish the legal parameters of international practice. They must decide what kinds of trade usage are justified in the regulation of international business. They constantly need to reappraise the utility of commercial and legal institutions as they affect world trade.³⁷ The ascendancy of international commercial arbitration is only truly worthwhile where the process of arbitration is itself self-sufficient and responsive to business demands. International contracts of sale are only useful instruments of self-regulation where the merchants themselves are

willing and able to devise such documents with appropriate skill. The reciprocal basis of world trade is only really meaningful where merchants are ready to apply business sanctions to one another in the event of violations of their respective performance duties.³⁸

To foster world trade according to a standard of commercial practice which ignores business standards existing elsewhere is to do a disservice to any modern Law Merchant. To promote only one standard of justice representing only one group of interests at the expense of other standards and other interested groups is to subvert the very underpinnings of a modern Law Merchant. "Only deliberate regulation on the international level" Goldstajn suggested, "will make it possible to do justice, on the basis of equality, to the interests and general welfare of all members of the international community."³⁹ Suitable principles of international trade law must therefore be consciously evaluated within the context of international trade itself. Reasonableness and fairness must be interpreted in terms of actual practice, not in a commercial vacuum. No one indigenous business law should apply automatically in all commercial contexts, without regard to the diversities of international trade. No binding Law Merchant should be permitted to evolve without first appreciating the nature of business usages and the sufficiency of mercantile practices. Consequently, the regulation of international trade must ultimately be based upon careful studies of trade itself. Commercial lawyers need to appreciate the dynamics prevailing within the international trade community at large. They also need to evaluate the conditions existing within specific industries, among particular merchants who operate in identifiable socio-economic and political environments.⁴⁰ Only through such a deliberate integration of commercial-legal values can our modern commercial law revitalize the essential characteristics of its medieval predecessor—encompassing speed, low cost, convenience and a sense of justice within its parameters.

The rekindling of those essential purposes which served as the medieval Law Merchant is encouraged today. Great advantages flow from the application of a low-cost and speedy adjudicative process to business ventures across national boundaries. Moreover, the demand for uniform principles of international trade law, acceptable to the international community of merchants at large, looms ever larger in a world dominated by an uncertain balance of political-economical power.

Significant benefit arises from a legal order which enshrines the behavior of merchants. Significant disadvantage arises from the suggestion that merchants who trade across national boundaries should be subjected to legal rules that are hopelessly complex in nature and rigid in their effects upon global commerce. The international trade context reveals that international merchants are themselves very often well able to regulate

their own business dealings by recourse to their trade devices. They are often capable of employing sales contracts and trade practices, business strategies and counter-strategies in determining the limits of their own obligations in trade. The role of the modern Law Merchant lies in enhancing rather than subverting the will of a merchant community expressed in terms of business institutions.

The life of commercial law lies in the experience of merchants themselves. Commercial law is not an end in itself; rather, it is a means towards an end. It is *the way* towards continuous commerce in accordance with the design of the international community of merchants. The fact that merchants develop dissimilar practices and usages in their respective domestic trades does not prevent them from devising uniform practices in their international affairs. After all, their "contract," construed in the light of international practice, constitutes their common language and their own chosen means towards self-regulation. It embodies their mutual understandings, their *consensus ad idem*, and their expectations of one another. In this sense, the "law" of international trade is guided by a single unifying force—the agreement of the parties. This unifying force was the most dominant attribute of the medieval Law Merchant. This same unifying force should guide the international Law Merchant of the modern day.

4

International Oil Contracts

No general doctrine of excuses for nonperformance that speaks in terms of catastrophic expense or changed circumstances should be applicable where the parties have themselves included in their contract special clauses defining under what circumstances their obligations shall be discharged.

Harold J. Berman, *Excuse for Nonperformance in the Light of Contract Practice in International Trade*, 63 Colum. L. Rev. 1413, 1420 (1963).

THE OVERRIDING DESIGN OF THIS CHAPTER IS TO APPLY THE principles of the International Law Merchant to a specific trade, namely the international oil industry. The central aim is to assess the interdependence that exists between commercial practice and commercial law in multinational oil transactions. In particular, to what extent do the laws of nonperformance acquire their foundation from the business usages employed in multinational crude oil sales?

The further aim is to study the methods used by inside legal counsel employed by multinational oil companies to regulate the purchase and sale of crude oil across national boundaries. The analysis, based on a series of interview and questionnaire studies, seeks to assess the interrelationship between commercial and legal methods of governing nonperformance in multinational crude oil sales. The study is in three stages. Firstly, written contracts for the sale of crude oil are analyzed in order to establish how they affect nonperformance obligations in multinational oil sales. Secondly, the study evaluates how related performance difficulties are resolved through intercorporate settlements between multinational crude oil sellers and their international oil buyers. Thirdly, the study considers the utility of adjudication and arbitration as alternative means of resolving

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depends upon the commercial context itself. A judicial sense of equity is an unjustifiable ground for nonperformance where the contractual framework suggests that performance should be required. A promisor in a dominant bargaining position is a less likely candidate for equitable relief from performance than a promisor who is in a dependent position. A promisor who has anticipated the harm produced by a disruption of his performance is less eligible for an excuse on the equities than a promisor who suffers from an unsuspected impediment to performance. Reasonableness as a criterion is most firmly supported where the reasonable contractor is a realistic man of commerce rather than an aloof instinct of judicial creation. The common law is most effective where the rules of law that curtail performance reflect the demands of actuality that are embodied in the Law Merchant rather than the vague dictates of a legal imagination.

The utility of judicial valor or caution in relation to international trade agreements is a relative, not a constant, phenomenon. The manner of construction by courts alters as parties, markets and trade practices alter. The form of construction serves as a means towards a functional end, not an end in itself. Ultimately, the "life of the law" lies in experience itself.¹⁰⁰ It does not lie in wishful thinking; nor in dubious dreams of judicial fancy; nor in the injection of narrow state policy into international agreements. Such is not a worthy reflection upon the free trade basis of transregional commerce.

Consequently, the process of judicial investigation progresses from an analysis of the literal terms of nonperformance clauses to a synthesis of the negotiations between the parties, their past and present business understandings and their performance expectations. What merchants reasonably intend relates directly back to what they actually intend. Their probable behavior should reflect upon their actual behavior.

Implied terms are only supportable as methods of construction where the fictional basis of implied terms conforms to credible values prevailing among specific merchants within identifiable environments. The "foundations" or "objects" of agreements are only viable concepts where courts are aware of the dynamic features of business, the profit and market goals that underlie trade, the give and take that evolves in buying and selling in the marketplace. Absolute excuses from performance are only worthwhile when lesser legal remedies, in the form of adjustments in performance, have been suitably exhausted.

7

Reflections

THE LAW OF INTERNATIONAL TRADE CANNOT BE AN ALOOF JURIDICAL science, separate and apart from the actual trade framework in which international law has evolved. Business practice and the extensive history of international trade have a conventional significance in law. They serve as the basis of legal development; they are not peripheral thereto. Merchant custom is based upon merchant usage; merchant usage is the product of merchant practice; each is interdependent and each has an effect upon the application of law to business.

What merchants do in international trade is the result of what they have learned to do, what other merchants in similar positions have done in the past and what merchants should continue to do in the future in the interests of economic survival and the just allocation of resources. The legal regulation of such business activity can only truly advance when the law reflects upon, indeed embodies, merchant values. To create law in disregard of the context in which international commerce operates is to deplete the self-sufficiency of the merchant regime; it is to create a legal system in a vacuum at the expense of the practical necessities of business.

Freedom to transact is a necessary component in the evolution of international business. Merchants engaged in world trade do have the facilities to overcome trade barriers threatening their business affairs. Commercial practices facilitate their daily enterprises. Trade conventions delineate the permissibility of their business habits; while customs codify their trade adventures.

Merchants themselves create the parameters of permissibility in business. They decide what terms and conditions to integrate into their contracts on the basis of their reciprocal needs and interests; and they determine the circumstances in which their contractual obligations will cease in the face of impediments to performance. The legal system is most ideally a monitor, not an initiator of business dynamics. The cycle of trade is initiated by businessmen; the continuity of trade depends upon businessmen; and the efficiency of the entire process hinges upon their willingness to cooperate with one another in the exchange of goods and services.

Various trade mechanisms foster the attainment of a commercial-legal interface. Firstly, merchants are affected by the demand of business necessity itself. Their failure to agree or their tendency to disagree with one another gives rise to friction and friction is often the cause of lost customers and lost profits. Secondly, merchants acquire trade experience in their continuous interactions. This they manifest in their transactions within the marketplace; and this they develop over time in their mutual and collective relationships.

International traders overcome barriers to trade in specific ways. They employ the contract as the uniform expression of their joint will and they utilize well-established business conventions as the manifestation of their consent. Economic barriers to trade are subverted through the mechanism of price, supply and demand. Social barriers to trade are superseded by the growth of a business ethic in which honor and profit are rendered mutually interdependent, while political barriers to trade are offset by the dictates of economic demand and commercial survival.

The capacity of merchants to regulate their own trade affairs is readily evident in the international regime. It is evident in the history of free trade; it is depicted in the evolution of the medieval and the Modern Law Merchant; and it is especially prevalent in the nonperformance terms of international trade agreements. There, contract clauses provide for nonperformance in finite details within lists and definitions of intervening contingencies. Each clause is suitably qualified to encompass an ever widening range of disruptions; and each is farsighted in its scope of operation. "War clauses" enumerate, not only "war" itself, but an array of war-related contingencies such as riots and rebellions, civil wars and civil commotions, insurrections and revolutions, and even the hazards of the future, like nuclear war and nuclear fallout. Each contract phrase is also adaptable in its application. For instance, the word "war" is expressly qualified by the phrase "declared or undeclared" so that undeclared wars can be incorporated into the war clause as excusable contingencies.

Nonperformance clauses are even extended to include contingencies which are not expressly enumerated in the contract. For instance, residu-

ary nonperformance phrases grant relief from performance on the occurrence of "other circumstances arising beyond the control of the parties," thereby encompassing contingencies not actually enumerated in the contract itself. Moreover, "other circumstances" arising beyond control are further qualified by the words "whether or not of the same kind as enumerated [in the contract itself]." This latter phrase avoids the narrowing effect of the legal *eiusdem generis* rule. Any legal attempt to undermine this business design simply leads to contractual revisions which circumvent the effects of undesirable law.

Nonperformance clauses are therefore sophisticated devices. They regulate the expected and the unexpected, the likely and the unlikely, the anticipated and even the unanticipated. They are capable of expansion and contraction; and they change in response to law and time, place and circumstance.

Nor is the written contract the exclusive regulator of international trade. Business negotiations are important instruments in overcoming barriers to trade. They encompass the strategies and counterstrategies, the moves and the countermoves of the parties, as each party attempts to balance self-interest against the demands of the marketplace. Highly developed negotiations do much to ensure the continuity of long-term relations among distant trade partners. They assist the parties to reach consensus *ad idem*; and such consent serves as the basis for future agreement.

Inter-party settlement is also an important way of adjusting of performance obligations. Through settlement, the parties can negotiate a reduction in the quantum or moment of performance. They can do so for practical reasons: because the promisor cannot perform his obligations completely or on time; because he can only do so at great cost; or because the promisee prefers to receive part or late performance, rather than no performance at all. Moreover, the promisee may agree to such adjustments in performance for the sound reason that he himself might later require an equivalent concession from the promisor.

Each negotiated compromise is the product of a calculated assessment of the risks. The parties evaluate the likelihood of nonperformance; they consider the nature of the concession requested and they reflect on the effect of that concession upon the character of their future profits and trade relations. Inter-party settlements are therefore a valuable source of continuing harmony between international businessmen.

Ultimately, the economic environment itself determines the degree of self-sufficiency of the international community of merchants. As trade practices crystallize into commercial usages, business patterns emerge. These patterns are the product of commerce; each pattern is created by businessmen for businessmen; and each gives rise to commercial law.

Legal systems have very distinctive responsibilities in relation to free trade across national boundaries. The mandate of law supplements, rather than displaces, that which businessmen themselves have created. As an institution, business law codifies business practice. Legal rules conciliate among competing business interests. Most importantly, the law governing international trade changes as business changes.

Accordingly, the law of international trade operates at two key levels: Firstly, as a primary ordering system which establishes the legitimacy of international business practice; and secondly, as a remedial system which resolves commercial disputes between and among traders.

As a primary regulator of business, legal standards delineate the minimum legal and ethical content of commercial behavior; while legal principles establish what constitutes a contract in law. Acting in this capacity, the legal system acts as a guiding force: it supervises commercial ventures; it does not stipulate how usages should arise and what customs should evolve out of these usages.

Law as a primary ordering device is complemented by the primary ordering system of the business regime itself. Business conventions themselves coordinate the conduct of international commerce as a primary ordering machine; they prescribe the limits of effective and ineffective business action. Legitimacy as a question of law therefore depends upon legitimacy as a matter of business practice. What the law commands cannot ignore what business demands; and what is acceptable in commerce must often be accepted in law. Inevitably, the circumference of "reasonableness" is determined by the context in which the law operates: that is, the context of business itself.

Law as a remedial system exercises a corrective role. Where unfair trade practices arise, they are condemned in law; where anti-competitive activities are identified, they are juridically remedied. Most importantly, where the parties conflict over price, quality or quantity of performance, they are subjected to the adjudicative restraint of the legal system. This remedial role of law evolves when the parties are unable to reach agreement; when they are able to reach agreement but unable to interpret it; or when they are able to reach agreement only by violating primary principles of law. In each of these circumstances, the legal system seeks to remedy that which the business regime is unable to achieve for itself; it strives to promote effective interaction among merchants within a viable system of commerce. In this sense, the law is a means towards a business end; it is not an end in itself.

Acute problems still arise in the legal regulation of international commerce. Specific questions must be answered: what legal system and what tribunal should regulate international trade relations and how should such regulation be effectuated? In particular, can national law courts effectively govern non-national disputes?

National tribunals do face particular hurdles in dealing with nondomestic disputes. National law is geared primarily towards national citizens and domestic interests; international transactions transcend local concerns. National adjudicators are trained primarily in domestic law; they are not necessarily equipped to appreciate the usages of the international community of merchants. National law rules of evidence and procedure often tend to be formalistic, sometimes conflicting with the transnational demand for an informal, low-cost and speedy administration of justice. So long as national tribunals are required to take cognizance of indigenous state policies, the concerns of multi-nationalism may well suffer. So long as the promotion of international commerce is a national as well as an international aspiration, the demands of world trade should be recognized.

The common law treatment of nonperformance in international contracts depicts precisely these problems. Consider the law of "impossibility," "frustration" or "economic impracticability." Each law is developed predominantly within the domestic mold; each reflects common law reasoning; and each stems from the social-legal values of the forum. The common law permits excuses from performance when the apparent "object" of the contract has failed. That "object" may well "fail" in domestic transactions involving contractors of limited insight and income; but it is unlikely to "fail" among international merchants who both foresee and provide for nonperformance in sophisticated contract clauses. So too, domestic agreements which have become "radically different" since the date of contracting because of economic hardship may still warrant performance in international transactions. This is because the parties may have agreed to perform without excuse at the time of contracting; this decision may be reflected in the contract price; and their accord may arise from a calculated apportionment of the risks. Finally, undertakings which have become "economically impracticable" among small businessmen in domestic transactions may still remain "economically practicable" among multinational contractors operating within the international domain. To excuse one party to an international agreement from his assumed obligations on the grounds of "economic impracticability," is simply to shift that burden of nonperformance upon his co-contractor. The promisee must then bear the full cost of the promisor's nonperformance. If the loss arising from nonperformance must inevitably fall upon one contractor, surely it should fall upon he who promised to perform, not he to whom that promise was made.

Common law courts need to appreciate that international traders generally have a high level of anticipation of nonperformance risks. Intervening contingencies, unanticipated in simple transactions of a local nature, are often foreseen in the risk-inundated domain of international trade. Agreements which domestic consumers or small businessmen

cannot negotiate or draft with visionary insight, are often devised by international businessmen. Domestic consumers may justifiably be excused from their obligations in the face of severe performance disruptions; but international merchants are seldom entitled to an equivalent excuse. Sound reasons underlie the sanctity of international trade obligations. Risks of nonperformance are carefully dealt with in international agreements. The allocation of nonperformance burdens are reflected in the contract price. Each party assumes specific obligations to perform; and each implicitly promises not to renege by unilateral acts from such obligations. These risks are expressly agreed upon in international contract; they evolve out of the practices of the parties. Most importantly, they should not be undermined through the application of legal doctrine to commercial activity.

Freedom from legal interference is a necessary feature of international business where contracts are freely concluded, expertly negotiated and skillfully drafted. For common law courts to do otherwise is to interfere with the autonomy of agreements. It is also to risk losing judicial business to other jurisdictions, to foreign courts and to arbitration associations.

Consequently, in promoting a Modern Law Merchant, there is a need to sublimate national law biases in favor of multi-national interests. Common law judges require a deeper understanding of international commerce in order to effectuate, not intrude upon, commerce. In particular, they need to appreciate that international business practice is a primary source of law; how merchants act is a necessary concern in determining how they ought to act in law. The interests of justice undoubtedly warrant the institution of law which identifies how merchants bargain in business, how they settle upon price and how they determine the essential conditions of their contracts. Legal results which are unjustified in economic terms are often a hindrance to the future business activity of the court; for merchants engaged in international commerce can avoid the forum through choice of law and choice of jurisdiction clauses. Indeed, they can select legal systems and courts which better respond to their mutual needs and interests.

Various features of the common law need reform in the attainment of these ends. Common law rules of evidence and procedure tend to be far too insular in their application to international trade. Time is consumed in the presentation of pleas and counter pleas, in the preparation of written and oral testimony, and in the summoning and examining of witnesses. Procedural delays arise out of periodic adjournments; extensive time is consumed in the preparation of written judgments. Moreover, hearings in court consume the energies of corporate executives who are needed to fulfill corporate responsibilities elsewhere. Pre-trial discoveries are disruptive of business activities; publicized proceedings are a frequent source of disharmony in inter- and intra-corporate relations.

Common law courts should therefore consider these three principles in regulating international transactions. Firstly, to apply the common law in disregard of the history of international trade is to construe trade within a factual-legal vacuum. Secondly, to disregard the fact that international contracts often embody elements which are foreign to the common law is to seriously undermine the manifest will of the parties in the process of construction. Thirdly, to make assumptions as to what is "reasonable" in international trade principally on the basis of judicial supposition is to deplete the sanctity of the international agreement in favor of juridical conjecture. Suppositions about what the merchant might do in the face of devastation are not inherently unacceptable; yet they are only truly acceptable where the autonomy of the trade regime is both understood and respected in law.

Common law courts have made some positive strides in this direction. They have recognized, in part, the need to interpret international contracts in the light of trade custom; and they have embodied such understandings in their construction of business agreements. Yet this awareness still remains somewhat limited. Common law judges are not widely trained in international commerce; nor are they often exposed to the complexities of the Law Merchant. Their involvement in international commerce is frequently coincidental rather than the product of pre-planning.

Increased socio-legal studies is a necessary means towards an understanding of merchant behavior. How international traders think and act affects how they bargain and how they reach agreement. Social-cultural studies elicit information about their social backgrounds and political values. Markets studies demonstrate how domestic cultures affect their international ventures; field investigations illustrate how differences in local, regional and international environments influence their trade relations. Thus interdisciplinary studies highlight the divergent expectations of American, Japanese and Russian traders. They reveal the extent to which national and legal backgrounds influence the bargaining process. Most importantly, they show how national-legal backgrounds affect the manner in which international trade itself is conducted.

Social science analysis is a key means of integrating business with legal practice. Common law lawyers and judges alike need to understand the inner workings of commerce. They need to know how merchants and their attorneys think and act, and how their thoughts and actions are embodied in international transactions. To refrain from such studies is to exclude what merchants themselves consider to be actual or desirable trade practice. Juridical interpretation should not stray so far from commercial reality as to dissociate legal from commercial fact.

Final consideration should be given to the international process itself. Ideally, problems of national law and national jurisdiction can be resolved

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