

THE MANY LIVES—AND FACES—OF *LEX MERCATORIA*: HISTORY AS GENEALOGY IN INTERNATIONAL BUSINESS LAW

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“Lex mercatoria is a venerable old lady who has twice disappeared from the face of the earth and twice been resuscitated.”¹

I

INTRODUCTION

For over a half century, it has been claimed that cross-border business transactions are governed by a transnational body of norms specific to international trade, generally known as *lex mercatoria*, the “law merchant.” This legal phenomenon is in fact often described as the “new” *lex mercatoria*, as distinguished from the “ancient” law merchant, which purportedly flourished in medieval and early modern Europe.

Reading about *lex mercatoria* is reminiscent of the proverbial *Arlésienne*: we never get to see her but everyone talks about her.² In fact, many have *denied lex mercatoria’s* existence.³ Between skeptics and “mercatorists,” a veritable *lex*

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1. Berthold Goldman, *Lex Mercatoria*, 3 FORUM INTERNATIONALE 3, 3 (Nov. 1983).

2. In French, the expression *l’Arlésienne* (as in *jouer l’Arlésienne*) refers to someone about whom there is much talk but who never shows herself. It originates from a famous drama revolving around the doomed love of a young man for a girl from Arles: whereas everyone talks about her, *l’Arlésienne* never appears on stage. See ALPHONSE DAUDET, *L’ARLÉSIENNE: PIÈCE EN TROIS ACTES ET CINQ TABLEAUX* (1872).

3. See, e.g., Jean-Denis Bredin, *La loi du juge*, in *LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES: ÉTUDES OFFERTES A BERTHOLD GOLDMAN* 15 (1982); George Delaume, *The Myth of Lex Mercatoria and State Contracts*, in *LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT* 77 (Thomas Carbonneau ed., 1990); Paul Lagarde, *Approche critique de la lex mercatoria*, in *LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES: ÉTUDES OFFERTES A BERTHOLD GOLDMAN* 125 (1982); The Rt. Hon. Lord Justice Michael Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, 4 *ARB. INT’L* 86 (1988); Charalambos Pamboukis, *Lex Mercatoria: An International Régime Without State?*, 46 *REVUE HELLÉNIQUE DE DROIT INTERNATIONAL* 261, 262–63 (1993). As to the negative reaction of, especially, Anglo-American

mercatoria discourse has been created.⁴ Alongside doctrinal lawyers from several legal fields (the vibrant new field of international business law, the conflict of laws, commercial law, even contract law), the discourse has come to involve an increased number of legal theorists—including socio-legal scholars⁵ and legal economists of various stripes.⁶

A. What Is *Lex Mercatoria*?

Lex mercatoria has been variously described by its advocates as “a set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law,”⁷ a “regime for international trade, spontaneously and progressively produced by the *societas mercatorum*,”⁸ “a single autonomous body of law created by the international business community,”⁹ “a hybrid legal system finding its sources both in national or international law and in the vaguely defined region of general principles . . . called ‘Transnational law’”¹⁰—but also as “[the] phenomenon of uniform rules serving uniform needs of international business and economic co-operation,”¹¹ or as consisting of “all law

practitioners, see YVES DEZALAY & BRYANT GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 41 n.19 (1996) (“These people are deciding by the seat of their pants. There’s no such thing as the *lex mercatoria*.” (quoting a “well known English QC from the commercial bar”); “And we don’t want *lex mercatoria*. We want to know what law it is. In fact we want to know which procedural law it is. We don’t want to leave it up to the arbitrator.” (quoting an unidentified “American lawyer in Paris”)).

4. The diversity of opinion is illustrated in the essays contained in *LEX MERCATORIA AND ARBITRATION*, *supra* note 3, and in *THE PRACTICE OF TRANSNATIONAL LAW* (Klaus-Peter Berger ed., 2001). See also FILALI OSMAN, *LES PRINCIPES GÉNÉRAUX DE LA LEX MERCATORIA: CONTRIBUTION À L’ETUDE D’UN ORDRE JURIDIQUE ANATIONAL* (1992); KLAUS-PETER BERGER, *THE CREEPING CODIFICATION OF THE LEX MERCATORIA* (1999).

5. See, e.g., Gunther Teubner, “*Global Bukowina*”: *Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* 3 (Gunther Teubner ed., 1997) [hereinafter *Global Bukowina*]; Gunther Teubner, *Breaking Frames: Economic Globalization and the Emergence of Lex Mercatoria*, 5 *EUR. J. SOC. TH.* 199 (2002); Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 *EUR. L. J.* 400, 400 (2002); Joanna Jemielna, *Legitimation Arguments in the Lex Mercatoria Cases*, 18 *INT’L J. FOR THE SEMIOTICS OF LAW* 175 (2005). For a summary and excellent restatement of the issues involved, see Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 *IND. J. GLOBAL LEG. STUD.* 447 (2007).

6. See, e.g., Robert Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 *INT’L REV. L. & ECON.* 215, 216–17 (1994); Bruce Benson, *The Spontaneous Evolution of Commercial Law*, 55 *S. ECON. J.* 644 (1989). Cf. AVNER GREIF, *INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE* (2006).

7. Berthold Goldman, *The Applicable Law: General Principles of Law—the Lex Mercatoria*, in *CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION* 113, 116 (Julian Lew ed., 1986).

8. Berthold Goldman, *Introduction*, in *LEX MERCATORIA AND ARBITRATION*, *supra* note 3, at xviii.

9. Bernardo Cremades & Steven Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of the of International Commercial Transactions*, 2 *B.U. INT’L L. REV.* 317, 324 (1984).

10. Horacio Grigera Naón, in *THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS* 89, 90 (Norbert Horn ed., 1982) [hereinafter *TRANSNATIONAL LAW*].

11. Norbert Horn, *Introduction*, in *TRANSNATIONAL LAW*, *supra* note 10, at 14.

stemming from or under the influence of transnational sources of law and regulating acts or events that transcend national frontiers.”¹²

The divergence of opinion is noticeable even at the level of definition. There is disagreement as to the legal nature of *lex mercatoria* (is it a “legal system” complete with its metanorms, a “body of law” less systematic but rather coherent, or a “phenomenon”?), as to the process of its creation (spontaneous or evolutionary), and as to the lawmaking role of business actors themselves. The main dividing line concerns the relationship of *lex mercatoria* with state law and more generally the states system. There are two main camps: the former—call them “purists” or “autonomists”—insist on the “a-national” or “stateless” character of *lex mercatoria*. The latter—call them “integrationists”—insist on the ability to “freely combine elements from national and non-national law.”¹³

For all these approaches to come together under the banner of *lex mercatoria*, there must be a common cause, and some value in the name itself.¹⁴ Indeed, all mercatorists seem to share a minimum degree of commitment to, and desire for, the existence of certain norms (and dispute-settlement mechanisms) distinct from—and possibly transcending—“traditional” state law and “municipal” legal forms and institutions. Such normative commitment is not limited to doctrinal lawyers; even socio-legal theorists, such as Gunther Teubner, who appear uninterested in the optimal regulation of international commerce by itself, look to *lex mercatoria* as a key example of the existence of stateless, autopoietic, or global regimes.¹⁵ But not everyone under the banner views *lex mercatoria* as the inevitable adversary of state law. For some, it seems to epitomize a sensibility of legal cosmopolitanism—as in the comparative consideration of foreign legal material, or in evocations of “natural” law.¹⁶

In the end, regardless of whether an autonomous legal system of transnational commercial law exists now or shall exist in the near future, today *lex mercatoria* exists as a concept, with strong resonance and powerful symbolic capital. It is this power that is reflected not only in the interest of theorists, but also in modern pronouncements of *lex mercatoria* spin-offs, such as the *lex*

12. Norbert Horn, *The Use of Transnational Law in the Contract Law of International Trade and Finance*, in *THE PRACTICE OF TRANSNATIONAL LAW*, *supra* note 4, at 67.

13. Michaels, *supra* note 5. Michaels demonstrates the pervasiveness of this opposition in contemporary discussion, but the dividing line cuts across time more than he indicates, as is shown by the comparison here of Schmitthoff and Goldman.

14. The terms “transnational law” and “transnational commercial law” have been used in recent years interchangeably with *lex mercatoria*. See, e.g., Joachim Bonnell, *The Unidroit Principles and Transnational Law*, in *THE PRACTICE OF TRANSNATIONAL LAW*, *supra* note 4, at 23.

15. See, e.g., Teubner, *Global Bukowina*, *supra* note 5, at 3.

16. See, e.g., Friedrich Juenger, *The Lex Mercatoria and Private International Law*, 60 *LA. L. REV.* 1133, 1135, 1143 (2000) (claiming that medieval tribunals “elaborated [rules] by means of the comparative method,” then referring to Lord Mansfield and especially to Justice Story as “firm believer[s] in the existence of a supranational law of commerce, as shown by his opinion in *Swift v. Tyson*.”). See also Friedrich Juenger, *Some Random Remarks from Overseas*, in *THE PRACTICE OF TRANSNATIONAL LAW*, *supra* note 4, at 81, 82–86 (reprising this narrative and lambasting the lack of use of foreign legal material in American law schools and conflicts cases and how this must change).

informatica or even a *lex sportiva*.¹⁷ It is also this symbolic power that raises stakes—political stakes—as to who will regulate cross-border transactions (and how), or as to whether the notions of “states system” and “state law” should be disposed of, defended, or reshaped. But this power also raises jurisprudential stakes—as to the need for scholars and policy considerations in the arena of commercial law, or as to the form the rules of international trade should take.

B. The Historiography of *Lex Mercatoria*

Historical imagery plays an important part in the *lex mercatoria* discourse. Claiming that mercantile rules derive from a merchant community and transcend time and space has been, in fact, a phenomenon older than *lex mercatoria* itself—perhaps as old as the assertion of some scholarly or institutional autonomy for commercial affairs.¹⁸ In the early twentieth century, almost forty years before the articulation of the modern *lex mercatoria* concept, the aptly entitled book *The Romance of the Law Merchant*

transports us in the ships of Hiram with cargoes of gold and ivory, apes and peacocks, carries us in voyages along the Mediterranean and beyond trading for the Carthaginians, finds us making voyages in the Euxine in joint adventure with Greeks, when our disputes will be determined by retaining the leaders of the Commercial Court at Athens, of whom Demosthenes is most in request: and will take us to all the fairs and markets of Europe: and expose us to the special customs of our old English towns.¹⁹

Modern literature often invokes images of the “ancient” law merchant: autonomous, cosmopolitan, transnational.²⁰ Such imagery is created both through comprehensive historical accounts and by casual references to a common historical consciousness.²¹ Invocations of the ancient law merchant are also recurring in the modern conflict-of-laws literature, as well as in domestic commercial law.²² They permeate the historical narratives in comparative law

17. For an overview of the former, see Fabrizio Marrella & Christopher S. Yoo, *Is Open Software the New Lex Mercatoria?*, 47 VA. J. INT'L L. 807, 808 (2007). See also *id.* at 822 n.62 (listing proposed spinoff *leges*). As to the latter, see Ken Foster, *Is There a Global Sports Law?*, 2 ENT. L. 1 (2003).

18. See, e.g., GERARD MALYNES, *MERCHANT, CONSUETUDO VEL LEX MERCATORIA OR THE ANCIENT LAW-MERCHANT* 2 (1622) (referencing the Old Testament).

19. Rt. Hon. Sir Richard Atkin, *Foreword* to WYNDHAM ANSTIS BEWES, *THE ROMANCE OF THE LAW MERCHANT* iv (1923).

20. See, e.g., Marrella & Yoo, *supra* note 17, at 811–12; ANA M. LÓPEZ RODRÍGUEZ, *LEX MERCATORIA AND HARMONIZATION OF CONTRACT LAW IN THE EU* 87 (2003) (“[There] emerged ‘a body of truly customary rules governing the cosmopolitan community of international merchants’ on the high seas and in the conduct of fairs. Merchants had in fact created a superior law, the *lex mercatoria*, *ius mercatorum* or law merchant, which constituted a solid legal basis for the great development of commerce in the Middle Ages. For several hundred years uniform rules of law, those of the law merchant, were applied throughout the market tribunals of the various European trade centers.”).

21. See, e.g., LEON TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 7, 7–21 (1983); FILIP DE LY, *INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA* 7, 8–20 (1991); Irineu Strenger, *La notion de lex mercatoria en droit du commerce international*, 227 RECUEIL DES COURS 207, 253–60 (1991); FRANCESCO GALGANO, *LEX MERCATORIA* (2001).

22. See FRIEDRICH JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* 15–16 (1993).

and in doctrinal legal history.²³ The ancient law merchant even serves as case-study material for economic theorists.²⁴

The evocation of a *lex mercatoria* genealogy can be more powerful than the present-day concept itself, as it invites less controversy among doctrinal lawyers in the mainstream of the discourse. “History” adds to the symbolic capital of *lex mercatoria* and confers on it (and stakeholders) a venerable pedigree. It also provides a blueprint for the future, as the modern *lex mercatoria* is presented in the genealogical narratives as either the reincarnation (rebirth) of the ancient law merchant or as the result of its evolution.²⁵

The power of this historical imagery masks its weak historical validation. Especially in recent years, a number of legal historians have refuted much of *lex mercatoria* genealogy, providing alternative stories about the legal treatment of commerce in medieval and early modern Europe.²⁶ However, such historical revisionism has so far made few inroads among mercatorists or even in the mainstream of international business law: the romance of the law merchant still casts a powerful spell.

That the mercatorists’ historical imagery persists in spite of these refutations suggests that what matters, for the debate, is not so much what actually happened, but what projections into the past align best with present circumstances and what constructions of the past are used to justify explanations of the present.

This article illustrates twin points. First, far from being an extrinsic display of erudition, historical imagery about the ancient law merchant is employed to legitimate modern notions as to what the governance of international business transactions should be. Second, such historical imagery is almost as diverse as the divergent conceptions and agendas within the mercatorist coalition. A close

23. See, e.g., HAROLD BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 333 (1983).

24. See Cooter, *supra* note 6, at 216; Paul R. Milgrom, Douglass C. North & Barry R. Weingast, *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 *ECON. & POL.* 1, 4–6 (1990).

25. See, e.g., Leon Trakman, *From the Medieval Law Merchant to E-Merchant Law*, 53 *U. TORONTO L.J.* 265, 269–70 (2003).

26. On the medieval law merchant, see Albert Cordes, *The Search for a Medieval Lex Mercatoria*, 5 *OXFORD UNIV. COMP. LAW FORUM* (2003), available at <http://ouclf.iuscomp.org/articles/cordes.shtml> (last visited June 9, 2008); Charles Donahue, *Benvenuto Stracca’s De Mercatura: Was There a Lex Mercatoria in Sixteenth-Century Italy?*, in *FROM LEX MERCATORIA TO COMMERCIAL LAW* 69, 69 (Vito Piergiovanni ed., 2005); Charles Donahue, *Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica*, 5 *CHI. J. INT’L L.* 21, 21 (2004); Charles Donahue, *Equity in the Courts of Merchants*, 72 *TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS* 1, 1 (2004); Nicholas Foster, *Foundation Myth as Legal Formant: The Medieval Law Merchant and the New Lex Mercatoria*, *FORUM HISTORIAE JURIS*, available at <http://www.forhistiur.de/zitat/0503foster.htm> (last visited June 9, 2008); JAMES ROGERS, *THE EARLY HISTORY OF THE LAW OF BILLS AND NOTES: A STUDY OF THE ORIGINS OF ANGLO-AMERICAN COMMERCIAL LAW* (1995) (providing a comprehensive revisionist story of Anglo-American mercantile law from the medieval royal courts to the nineteenth century); Stephen M. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval ‘Law Merchant’*, 21 *AM. U. INT’L L. REV.* 685, 685–86 (2006); see generally *LEX MERCATORIA AND LEGAL PLURALISM: A LATE THIRTEENTH-CENTURY TREATISE AND ITS AFTERLIFE* (Mary Elizabeth Basile et al. eds., 1998) (providing a comprehensive account of the concept of law merchant as well as the detailed analysis of what may be the oldest treatise on mercantile law).

examination of mercatorist historical narratives will allow us to scrutinize the efforts at legitimation and to better understand the normative agenda and the structure of arguments employed in the *lex mercatoria* discourse.²⁷

To illustrate these points, this article examines in detail two paradigmatic narratives of *lex mercatoria* historiography: the principal historical accounts provided by the two founding fathers of the modern *lex mercatoria*, Clive Schmitthoff and Berthold Goldman.²⁸ These two historical accounts come from two classic essays providing a comprehensive outlook of the authors' respective worldviews and normative projects: genealogical narratives form a vital part of the argument in both essays.²⁹

Schmitthoff and Goldman were instrumental in the formation and shaping of the *lex mercatoria* discourse from its beginnings in the early 1960s until the late 1980s. More generally, they played important roles in the academic elaboration of international commercial law and international commercial arbitration.³⁰ They are also regarded as emblematic of the two basic approaches to *lex mercatoria*—with Schmitthoff emphasizing the use of state and nonstate sources, and Goldman insisting on the stateless (a-national) character of *lex mercatoria*.

27. The article also forms part of a broader project of studying the historiography of private international law. See Nikitas Hatzimihail, *Pages of History: Friedrich Juenger and the Historical Consciousness of Modern Private International Law*, in TRADITION AND INNOVATION OF PRIVATE INTERNATIONAL LAW AT THE BEGINNING OF THE THIRD MILLENNIUM 81 (L. Perezniesto Castro et al. eds., 2006); Nikitas Hatzimihail, *On Mapping the Conceptual Battlefield of Private International Law*, 13 HAGUE Y.B. INT'L L. 57 (2000); NIKITAS HATZIMIHAIL, PRE-CLASSICAL CONFLICT OF LAWS (forthcoming 2009).

28. See, e.g., Charalambos Pamboukis, *Lex mercatoria reconsiderée*, in LE DROIT INTERNATIONAL PRIVE, ESPRIT ET METHODES: MELANGES EN L'HONNEUR DE PAUL LAGARDE 565, 568–69 (2005). The claim of Schmitthoff and Goldman as founding fathers is universally acknowledged. On the contrary, any claims of a third nominee have been sporadic and localized: the Yugoslav Alexander Goldstajjn, who participated in Schmitthoff's East–West projects, has not had an enduring legacy; Philippe Kahn was Goldman's doctoral student and successor as head of the so-called “Dijon school”: his doctoral work on international sales law (with his reference to a “*société internationale des commerçants*”) is regarded as foundational. PHILIPPE KAHN, LA VENTE COMMERCIALE INTERNATIONALE (1964).

29. Clive Schmitthoff, *The Unification of the Law of International Trade*, 1968 J. BUS. L. 105, 105–09 (1968); Berthold Goldman, *Lex Mercatoria*, 3 FORUM INTERNATIONALE 3, 3–7 (Nov. 1983).

30. Goldman and Schmitthoff may also be seen as representatives of the two western legal cultures—“Cartesian logic” and “Anglo-American pragmatism”—regarded as having long been opposed to each other and finally joined in the world of international arbitration and transnational business law. Both were extremely prolific during a prolonged period, and in fact the ideas and rhetoric of both evolved over time. Each created “schools”—both in the “substantive” sense of propagating ideas and adherents and in the “formal” sense of fostering institutional centers of research on transnational commercial law. Their intellectual contribution to the field is almost matched by their status in its genealogy.

II

CLIVE SCHMITTHOFF: LAW MERCHANT AS EVER-EVOLVING (AND ALL-ENCOMPASSING)

A. Clive Schmitthoff Situated

Clive M. Schmitthoff (1903–1990) started his academic career in German commercial law. In 1933, he migrated to England, effectively starting anew.³¹ Although he also published, mainly in the 1940s, in comparative law and the conflict of laws,³² Schmitthoff's principal field of academic work remained in commercial law properly speaking, and he indeed contributed to its development as an academic field in the United Kingdom. In 1957, he founded the *Journal of Business Law* (remaining at its helm until his death). *Schmitthoff's Export Trade*, now in its eleventh edition, remains to this day one of the best textbooks on international business law, rich on detail yet friendly to the novice student.³³ He was also active in legal practice, establishing a reputation in international commercial arbitration and participating in international-law cases such as *Barcelona Traction*.³⁴

Schmitthoff eventually became involved in attempts by the United Nations to build a new framework for international economic relations. He was the main drafter of the 1966 Report of the UN Secretary-General to the UN General Assembly on the *Progressive Development of the Law of International Trade*—the report that triggered the creation of the United Nations Commission on International Trade Law (UNCITRAL).³⁵

Unlike Goldman, Schmitthoff made no direct contribution to legal theory. He was, after all, a German émigré in the metropolis of legal pragmatism—England. Yet Schmitthoff's *normative* agenda was more ambitious, or at least more explicit and concrete, than Goldman's.

Schmitthoff's *lex mercatoria* first appears in the context of the East–West divide. Indeed, the London Conference on the Sources of the Law of International Trade, which gave rise to a foundational collection of essays, was conceived with this divide in mind.³⁶ Schmitthoff viewed the “political” gap

31. See John N. Adams, *Clive M. Schmitthoff (1903–1990)*, in *JURISTS UPROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH CENTURY BRITAIN* (Jack Beatson & Reinhard Zimmermann eds., 2004); See also Frank Woolbridge, *Professor Clive Schmitthoff*, *J. BUS. L.* 459 (1990).

32. See generally Clive M. Schmitthoff, *The Science of Comparative Law*, 7 *CAMBRIDGE L.J.* 94 (1939); CLIVE SCHMITTHOFF, *THE ENGLISH CONFLICT OF LAWS* (3d ed. 1954). The work had three editions until 1954 and was quite popular with students.

33. CAROLE MURRAY ET AL., *SCHMITTHOFF'S EXPORT TRADE: THE LAW AND PRACTICE OF INTERNATIONAL TRADE* (2007).

34. *Barcelona Traction, Light & Power Co., Ltd.*, 1970 *I.C.J. Rep.* 3.

35. Secretary-General, *Progressive Development of the Law of International Trade: Report of the Secretary-General of the United Nations*, U.N. Doc. A/6396 (1966).

36. See Clive M. Schmitthoff, *Introduction*, in *THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* ix (Clive M. Schmitthoff ed., 1964) [hereinafter *INTERNATIONAL TRADE*]; Clive M. Schmitthoff, *The Law of International Trade, its Growth, Formulation and Operation*, in *INTERNATIONAL TRADE*, *supra* at 3. Reference to the conference as a whole, with special reference to

between East and West as having poisoned the “municipal” theory of private law.³⁷ His goal was to construct the law of international trade as a bridge over that gap. He notes that the modern law merchant is “practically the same in all countries of the world. Its similarity transcends the division of the world into countries of free-market economy and centrally planned economy and of common law or Roman law tradition.”³⁸

According to Schmitthoff, unification in 1968 proceeds through the work of various institutions, “some of [which] are intergovernmental agencies and others [which] are voluntary organizations of non-governmental character.”³⁹ Schmitthoff’s criterion for judging the organizations he lists—which range from COMECON to the International Law Association⁴⁰—is not their nature or degree of politicization, but the extent to which they have been successful in furthering the goal of unification. Admittedly, and despite some great successes, “[e]ach of these organizations has a limited aim and a limited membership,”⁴¹ namely among countries belonging to the same economic system or the same region,⁴² which is why he hails the creation of the UNCITRAL.⁴³

Schmitthoff is not concerned with the “purity” in the sources of the new law merchant. The law of international trade is “derived from two sources . . . international legislation and international commercial custom.”⁴⁴ Schmitthoff acknowledges the possibility that “regional unification and national legislation might retard the possibility of achieving a global unification of international trade law,” but “partial success on the regional and national level is preferable to total failure.”⁴⁵ “There is no doubt that the resulting picture, from the viewpoint of the legal academician, will be bewildering and of startling novelty,”⁴⁶ but then

Schmitthoff’s general report, is the first footnote in Goldman’s *Frontières du droit et lex mercatoria*. Goldman, *infra* note 88, at 177.

37. See Schmitthoff, *supra* note 36, at ix, 3.

38. Schmitthoff, *supra* note 29, at 109.

39. *Id.* at 112.

40. See *id.* at 112–13. The intergovernmental agency list consists of “the Rome International Institute for the Unification of Private Law” (UNIDROIT), the Hague Conference on Private International Law, “the Council for Mutual Economic Aid” (COMECON), and the United Nations Economic Commission for Europe. The nongovernmental organizations listed are the International Chamber of Commerce in Paris, the *Comité Maritime International* in Antwerp, and the International Law Association in London.

41. *Id.* at 112.

42. *Id.* at 113 (“These limitations to countries adhering to the same economic system or being situated in the same region were in the past a sort of strength enabling the international organizations to produce viable and practical solutions to problems of international trade, but since the beginning of the sixties it has become evident that their isolationism and lack of coordination was out of tune with the growing demand for international cooperation.”).

43. See Schmitthoff, *supra* note 29, at 113–19 (concluding with a quotation of the Indian Endre Ustor hailing “the painless birth of UNCITRAL” as “a sign of international solidarity, a beacon of hope and of trust of peace”).

44. *Id.* at 109.

45. *Id.* at 112.

46. *Id.* at 111–12.

the concept of a global and universal code of international trade law introduced into the national laws of all countries is not only unrealistic at the present juncture but might easily become a straitjacket which could slow down the growth of commercial practices and usages and could stifle the continued creation of customary law by the international business community.⁴⁷

In other words, Schmitthoff would certainly have something rather than nothing, and may in fact prefer many somethings to one, single, big everything. To defend his approach and inspire confidence in the project, he provides a historical tale leading logically to this “entirely new phenomenon.”⁴⁸

B. A Story of Evolution

Schmitthoff’s tale is of the development of international commercial law in three “phases.”

The re-awakening of the international conscience has led to a new phase in the development of the law of international trade. International commercial law has developed in three stages. It arose in the Middle Ages in the form of the law merchant, a *body of truly international customary rules governing the cosmopolitan community of international merchants* who traveled through the civilized world from port to port and fair to fair. The second phase began with the *incorporation of the law merchant into the national systems of law*, a process which, though *universal*, was carried out in the various countries at different times and for different reasons. The third phase is contemporary; it aims at the *unification of international trade law on an international level* and has given rise to a new law merchant which reflects the international spirit of our time in the political and economic sphere.⁴⁹

1. The Middle Ages: The Vision of Community

Schmitthoff presents medieval mercantile law as a body, a complex of customary rules that are truly international. These rules were thus not created by political institutions and sovereigns of “local” scope. Indeed, they catered to the community of international merchants, who were cosmopolitan—probably in spirit and certainly in their needs.⁵⁰ Schmitthoff quotes the comparative-law professor lawyer Rudolf Schlesinger to the effect that “cosmopolitan in nature and inherently superior to the general law, the law merchant by the end of the medieval period had become the very foundation of an expanding commerce throughout the Western world.”⁵¹ Indeed, the “remarkable feature,” what effectively pieces together these four factors, is that this “old law merchant was . . . developed by the international business community itself and not by lawyers.”⁵² Even the notary public becomes less of a lawyer in Schmitthoff’s narrative, referred to as “that ubiquitous and versatile medieval practitioner in whose hands lay a good deal of commercial legal work.”⁵³

47. *Id.* at 112.

48. Schmitthoff, *supra* note 29, at 112.

49. *Id.* at 105–06 (emphasis added).

50. *Id.* at 106.

51. *Id.* at 107 (quoting RUDOLF B. SCHLESINGER, *COMPARATIVE LAW* 185 (2d ed. 1960)).

52. *Id.* at 106.

53. Schmitthoff, *supra* note 29, at 106.

The medieval law merchant “owed its international character mainly to four factors: the *unifying effect* of the law of the fairs . . . the universality of the customs of the sea, the special courts dealing with commercial disputes, and the activities of the notary public.”⁵⁴ The law of the fairs, Schmitthoff emphasizes, was “almost as universal as the law of the church.”⁵⁵ This bold statement is associated in effect with the third factor, the special courts: “International merchants sat in the courts of piepowder and of the ports in so-called half-tongue juries, [that is,] juries consisting as to one-half of native and the other half of foreign merchants.”⁵⁶

The second factor is the “universality of the customs of the sea”—a universality that extends across time as well as space. Again, the laws in question are the product of merchants themselves, without intervention by the state (or any intervention by jurists):

The customs of the sea which originated with the Phoenicians and Greeks, were collected as the laws of Rhodes between A.D. 600 to 800; they were then developed into the *Consulado del Mar*, which became the maritime code of the Mediterranean, spread to the Atlantic as the judgments of Oléron (1160) which became the foundation of English maritime law, and further north to the Baltic where they were known as the Sea Laws of Visby. Professor Wormser rightly observes that “the explanation of this universality is . . . that the sea law was developed by merchants themselves and was not the law of territorial princes.”⁵⁷

The key legal concept in Schmitthoff’s story of medieval *lex mercatoria* is custom: we read of the customs of the sea, of an international customary law. The use of the term is not accidental: at the time when Schmitthoff wrote, custom was an accepted source of law in all major legal traditions, as well as in international law.⁵⁸ Even in the context of decolonization, the concept of custom by itself caused less hostility and fear of a “Western bias” than the “general principles of law.”⁵⁹ The legal definition of custom includes both effective practice over a long period and the awareness by those who follow the customary rule that they are bound by it (*opinio juris*). In continental legal history, bodies of customary law were eventually written down and even, at subsequent stages, turned into statutory law.⁶⁰

Schmitthoff himself presents international commercial custom as “consist[ing] of commercial usages and practices . . . so widely accepted that it has been possible to formulate them as authoritative texts.” His invocation of custom explains, and is triggered by, the emphasis given by the narrative on the role of the imagined “international business community” and the subsequent downplaying of the role of lawyers. In this understanding, traced back to German Romantic ideas about law, custom is the product of long practice and

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. See Statute of the International Court of Justice art. 38(1)(b) (1946).

59. *Id.* art. 38(1)(c) (referring to “general principles of law recognized by civilized countries”).

60. See, e.g., John P. Dawson, *The Codification of French Customs*, 38 MICH. L. REV. 765 (1940).

legal consciousness by the community; lawyers only come after the fact to give it formal legal shape.

Schmitthoff has provided us with a theory about the legal nature of the medieval law merchant and the production process of *lex mercatoria*'s many norms. But he provides little discussion of how systematic, and complete, this law merchant was. Further down in Schmitthoff's text, medieval mercantile law is likened to modern-day international law, and its rules are called "of haphazard and casual provenance,"⁶¹ but these ideas are not really elaborated—we should perhaps not read into them more than Schmitthoff's affirmation that the medieval law merchant is only the beginning of the story.

2. The Early Modern Era: The Community of Merchants Meets the Nation-State

We are thus led to the second phase, between the seventeenth and nineteenth centuries, when the juridification of the law merchant takes place: "In the second period of its development this cosmopolitan and universal law merchant was incorporated into the national laws of the various states."⁶² Schmitthoff's key concept here is incorporation. The law merchant is "incorporated" into national law, codified, and perhaps given more systematic structure and better effectiveness. Schmitthoff expresses no regrets, whether because he understands the inevitability of overall "national integration," or because this incorporation provides positive qualities to the law merchant.

The incorporation process was "carried out in the various countries at different times and for different reasons"⁶³—Napoleon's Code de Commerce of 1807, English common law under Lord Mansfield, the German Uniform Commercial Code of 1861⁶⁴—but was nonetheless "universal."⁶⁵ Incorporation did not mean absorption (or even integration): "even in this period of national integration commercial law did not lose entirely its international character."⁶⁶ To prove the point, Schmitthoff deliberately puts together statements from different periods to emphasize the persistence of the law merchant and its spirit—one from Lord Mansfield in making use of civilian doctrines, one from Pollock almost three centuries later.⁶⁷

Incorporation does not mean, however, that the merchant spirit is dead. Having driven through his main point, Schmitthoff notes the continuing creative role of the merchants: "[T]he law-creating custom of the international business community was as active as in the Middle Ages."⁶⁸ Here, then, is continuity as well as progress in the evolution of international business law.

61. Schmitthoff, *supra* note 29, at 108–09.

62. *Id.* at 107.

63. *Id.* at 106.

64. *Id.* at 107.

65. *Id.* at 106.

66. Schmitthoff, *supra* note 29, at 107.

67. *Id.*

68. *Id.*

Schmitthoff's account brings together, in harmony, state law and mercantile practice.

Schmitthoff's evolutionary narrative legitimizes the synthesis of state law, intergovernmental instruments, and international business practice. On the one hand, to the extent that national mercantile laws did work, and incorporated international commercial custom, it was not a problem to accept state law—national and international—as an integral part of the new law merchant, as well as to defend the plurality of institutions creating and sources constituting the law of international trade. On the other hand, Schmitthoff's story of a living law merchant continuing to exist under the skin of national legislation legitimates the existence of, and need for, an autonomous law merchant.

3. The Contemporary Phase: A Synthesis

In 1957, Schmitthoff proclaimed the beginning of a third phase that looks, on first impression, like the first: “We are beginning to rediscover the international character of commercial law and the circle now completes itself: the general trend of commercial law everywhere is to move away from the restrictions of national law to a universal, international conception of the law of international trade.”⁶⁹

But this is not a full circle: the new law merchant is not a copy of the old law merchant; rather, Schmitthoff's third phase comes as the synthesis of the first and second. First, it combines the nonstate character of the first with the state character of the second phase: “[T]he modern law of international trade is not a branch of international law; it does not form part of the *ius gentium*, but it is applied in every national jurisdiction by tolerance of the national sovereign whose public policy may override or qualify a particular rule of that law.”⁷⁰ Second, it combines the plural character of the first phase with the systematic one of the second: “[T]he modern law of international trade is not of haphazard and casual provenance but consists of norms, practices, or usages expressed in a number of authoritative texts. These texts have been compiled by international organizations and agencies.”⁷¹

C. Schmitthoff's Progress Narrative

Schmitthoff's modern law of international trade is “derived from two sources . . . international legislation and international commercial custom.”⁷² His historical narrative aims at legitimating both, and then joining them as parts of a coherent system. The first step is to assert the historical pedigree of international commercial custom—of international mercantile practice (autonomous from the state apparatus) producing norms. The second step is to legitimate the use of authoritative texts, which is fit into the story by his account

69. *Id.* at 108 (quoting Clive Schmitthoff, *Modern Trends in English Commercial Law*, TIDSKRIFT UTGIVEN AV JURISDISKA FÖRENINGEN FINLAND 354 (1957)).

70. *Id.* at 108–09.

71. Schmitthoff, *supra* note 29, at 109.

72. *Id.*

of incorporation and coexistence of mercantile practice and state action. To this effect, Schmitthoff provides an optimistic tale of evolution, a progress narrative. Each phase in this narrative takes things up, adds qualities, and expands the geographical scope of mercantile law. Everybody has a place in the narrative: merchant communities, mainly, but also practitioners, visionary judges, and savvy legislators.

Schmitthoff further uses history to describe and defend his vision of the modern law merchant as an “entirely new phenomenon”⁷³ with its own “strange, synthetic character.”⁷⁴ Apart from practical considerations, Schmitthoff favors this complexity as a matter of principle: a “global and universal code of international trade law . . . might . . . become a straitjacket which could slow down the growth of commercial practices and usages and could stifle the continued creation of customary law by the international business community.”⁷⁵ He accordingly calls for his readers to “forget the Victorian predilection of orderliness” and “take [the new law merchant] as what it was in the Middle Ages and what it will be again: unsystematic, complex and multiform, but of bewildering vigour, realism and originality.”⁷⁶ Medieval imagery is here used to liberate the new law merchant from the conceptual rigors of the immediate past, and possibly the present.

III

BERTHOLD GOLDMAN: LIVES AND DEATHS OF A (STATELESS) *LEX MERCATORIA*

A. Berthold Goldman Situated

Berthold Goldman (1913–1993) was born in Romania but received his legal education in France, obtaining his doctorate in civil law and then becoming a professor of private law.⁷⁷ Although his interests ranged from commercial law proper to international law, Goldman was a private international lawyer by training. Goldman served for a long time as codirector of the *Journal du Droit International*. Also known as *Clunet*, this journal has, since its establishment in 1874, been a major conduit of intellectual trends in private and public international law, and it remains alone among the major international journals of the continent in bringing together both of these sister disciplines. Over time, Goldman’s interest shifted to European and international business law.⁷⁸ In the 1960s, he produced an original treatise on European commercial law that has

73. *Id.* at 112.

74. *Id.* at 111.

75. *Id.* at 112.

76. Schmitthoff, *supra* note 29, at 112.

77. See L'ACTUALITÉ DE LA PENSÉE DE BERTHOLD GOLDMAN: DROIT COMMERCIAL INTERNATIONAL ET EUROPÉEN (Philippe Fouchard & Louis Vogel, eds., 2004), and especially the biographical tributes at 11–13, 15–18.

78. See, e.g., Berthold Goldman, *The Convention Between the Member States of the European Economic Community on the Mutual Recognition of Companies and Legal Persons*, 6 COMMON MKT. L. REV. 104 (1968–1969).

been continued to this day.⁷⁹ But Goldman's main interest was in international commercial arbitration,⁸⁰ and he acquired a formidable reputation in arbitration practice as one of the leading "grand old men" of that milieu.⁸¹

Goldman was probably motivated to invent *lex mercatoria* as a legal system by both practical and theoretical concerns. He was probably less preoccupied than Schmitthoff with the Cold War divide between East and West, or the contrast between continental law and common law. He was, however, very much involved in the postcolonial conflicts between North and South.⁸² There was a notable desire by western lawyers to affirm the existence of a law "common" to North and South governing international business transactions—whether by defending the suitability and neutrality of the existing "metropolitan" law or by elaborating a truly neutral or common law.⁸³ Moreover, the era of decolonization had seen several politically charged investment disputes, in which the application of the host state's law could be seen as prejudicial to the interests of the other party. Indeed, the origins of *lex mercatoria* case law are traced to arbitral awards such as the petroleum cases opposing Arab countries and the big oil companies.⁸⁴ Goldman did himself provide a few examples of such efforts: one example originally neglected by his disciples and recently restored to a prominent place in the genealogy of the modern *lex mercatoria* is a small piece, written during the Suez crisis, presenting the Suez Company as a truly international legal entity, rather than one of Egyptian, English, French, or mixed nationality.⁸⁵ More generally, if the Schmitthoffian attitude was positivist and called for concrete legislative initiatives, many in Goldman's milieu tried to solve the same problem by abstracting "general principles": this may be attributed partly to their own academic sensibilities, partly to the pressing problems (pending cases) they were faced with.

79. BERTHOLD GOLDMAN, *DROIT COMMERCIAL EUROPÉEN* (5th ed. 1994).

80. See, e.g., Berthold Goldman, *Arbitrage international et droit commun des nations*, *REVUE DE L'ARBITRAGE* 115 (1956) [hereinafter *Arbitrage*]. Near the end of his life, Goldman copublished with his former students Philip Fouchard and Emmanuel Gaillard a seminal treatise on international commercial arbitration. See PHILIP FOUCHARD, *TRAITÉ DE L'ARBITRAGE COMMERCIAL INTERNATIONAL* (1996).

81. Several references to Goldman's status in the arbitration world can be found sprinkled in DEZALAY & GARTH, *supra* note 3, at 53, 83 n.43.

82. Goldman's first professorial position had been in French Indochina (Vietnam). In those days before the unraveling of the French empire, the first appointment of many professors after passing the *aggregation* examination was in the colonies.

83. See, e.g., the ad hoc award of July 2, 1956, by Messrs. Ripert and Panchaud, *Société Européenne d'études et d'entreprises v. République fédérale de Yougoslavie*, 86 *JOURNAL DU DROIT INTERNATIONAL* 1074 (1959), and the award of August 23, 1958, *Aramco v. Saudi Arabia*, 27 *INT'L L. REP.* 173 (1963) (both awards mentioned by Goldman, *infra* note 88, at 183–84). See also the ad hoc award of January 19, 1977, *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic*, 17 *INT'L LEG. MATERIALS* 3 (1978); ICC Award No.1434, 103 *JOURNAL DU DROIT INTERNATIONAL* 978 (1976).

84. See DEZALAY & GARTH, *supra* note 3, at 85–86; Amr Shalakany, *Arbitration and the Third World*, 41 *HARV. INT'L L. J.* 419, 443–45 (2000).

85. See Berthold Goldman, *La compagnie de Suez, Société internationale*, *LE MONDE*, Oct. 4, 1956, at 3, available at <http://tldb.uni-koeln.de/static/monde.shtml> (last visited June 9, 2008).

Another set of considerations also weighed in with Goldman and his disciples—internationalist, private international lawyers by training, living the aftermath of the crisis of classical private—and public—international law. In the interwar period, the original, late-nineteenth-century internationalist projects of establishing a uniform conflict-of-laws regime had been fatally challenged. In the postwar era, the conflicts mainstream, like Henri Battifol, attempted to reconstruct the classical paradigm around a pragmatic internationalism.⁸⁶ Goldman and like-minded colleagues drew on interwar ideas about legal pluralism, corporatism, and even natural-law ideas.⁸⁷

The text regarded as the manifesto of *lex mercatoria* was the 1964 essay, *Frontières du droit et lex mercatoria* (*Frontiers of Law and Lex Mercatoria*), that Goldman published, symptomatically of his theoretical bent, in the French legal-theory yearbook *Archives de Philosophie du Droit*.⁸⁸ In that essay, Goldman asserted that each *lex mercatoria* rule was a legal norm on its own.⁸⁹ He emphasized the “spontaneous,” “private” origin of these *lex mercatoria* rules, which were growing in number and acquiring their own structures.⁹⁰

Establishing beyond any reasonable doubt the juridical character of *lex mercatoria* norms was only the first step for Goldman. In subsequent works, he came to insist on the idea that *lex mercatoria* was acquiring the characteristics of a legal system or “legal order” (*ordre juridique*), which are the “specificity” (distinctness) of the rules that compose it, as well as of the social group in relation to whose activity they appear; the operation of these rules as a whole (*ensemble*); and the existence of organs capable of applying them.⁹¹

B. A Story of Rebirth

In a cyclical narrative, the main idea or construct has its glory days; then comes its decline, due to extrinsic or intrinsic factors, to be eventually followed by its return to the forefront. Cyclical narratives are a subcategory of repetition narratives, which tell the story of a legal field in terms of an idea or a conflict between contrasting notions persisting, or recurring, through time. If the demise is due to intrinsic factors, as in the case of a legal doctrine whose weaknesses were exposed, the main idea would have to mutate somehow. The strictest form

86. See, e.g., HENRI BATIFFOL, *ASPECTS PHILOSOPHIQUES DU DROIT INTERNATIONAL PRIVÉ* (1956).

87. See, e.g., SANTI ROMANO, *L'ORDRE JURIDIQUE* (Lucien François & Pierre Gothot trans., 1975) (an early classic work on legal pluralism). On natural law, reference is often made to Phocion Franceskakis, *Droit naturel et droit international privé*, in 1 *MÉLANGES OFFERTS À JACQUES MAURY* 113, 129 (1960). But see Goldman, *Arbitrage*, *supra* note 80, at 115–16.

88. Berthold Goldman, *Frontières du droit et lex mercatoria*, 9 *ARCHIVES DE PHILOSOPHIE DU DROIT* 177 (1964).

89. *Id.* at 189.

90. *Id.*; See also Goldman, *supra* note 7, at 114.

91. Berthold Goldman, *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives*, *JOURNAL DU DROIT INTERNATIONAL* 475, 499 (1979). See also Berthold Goldman, *Une bataille judiciaire autour de la lex mercatoria: L'affaire Norsolor*, 1983 *REVUE DE L'ARBITRAGE* 379, 406 (“L'ordre juridique est un ensemble de règles spécifiques et d'organes aptes à les appliquer . . . qui émerge de la formation de l'activité d'un groupe social lui-même spécifique.”).

of a cyclical narrative, however, attributes the demise of the main idea to extrinsic factors—the change of material circumstances, or the rise of hostile ideologies.

Goldman's historical account provides a characteristic example of a cyclical narrative. Schmitthoff's three consecutive phases are here replaced by three recurring lives:

Lex mercatoria is a venerable old lady who has twice disappeared from the face of the earth and twice been resuscitated. At the present moment, she still must content with some growth pains ordinarily associated with youth. My topic today is principally these problems of adolescence which lex mercatoria is currently confronting.⁹²

For Goldman, *lex mercatoria* is, even metaphorically speaking, a person: this implies a tangible identity and a personality. *Lex mercatoria* has moreover been the same person throughout—hence she is a “venerable old lady.” All the same, she presently undergoes “youthful growth pains.”⁹³ Why this apparent contradiction? Because she has twice “disappeared” from the face of the Earth—and then twice come back. Something—or someone—must have caused her near death, and possibly something—or someone—else may have helped in resuscitating her.⁹⁴ Cyclical narratives tend to either affirm the inevitability of such revivals or to provide a moral tale of the struggle facing the friends in order to prevent the need for a new “resuscitation”—or to convey both messages, more or less subliminally.

1. *Ius gentium*: The Birth

In Goldman's narrative it is not medieval mercantile law but the Roman *ius gentium* that attracts our main attention—three times as much space is devoted to Roman law than to its subsequent decline and revival combined. *Ius gentium* is called “the illustrious precursor” of *lex mercatoria*.⁹⁵ To bolster this claim, Goldman invokes lengthy passages from an essay by Phocion Francescakis—one of the most eminent figures in postwar, French private international law—on natural law and private international law.⁹⁶ Considering that the essay aimed at providing classical conflict of laws with a philosophical foundation transcending strict state-minded positivism, there is a subtle irony in its being used to support what eventually became an outright challenge to the conflict of laws.

In referring to the *ius gentium*, Goldman reprises the notion of a private-international-law system different from, and more ancient than, the traditional

92. Goldman, *supra* note 29, at 3.

93. *Id.* at 23.

94. OXFORD ENGLISH DICTIONARY 766 (2d ed. 1989), “resuscitate” (“[t]o restore (a person) to life (physical or spiritual) or to consciousness”).

95. Goldman, *supra* note 29, at 3.

96. Francescakis, *supra* note 87, at 129. Francescakis was codirector with Henri Batiffol of the *Revue Critique de Droit International Privé*, perhaps the most prestigious journal in the field. Mentor to many among the younger generations of private international lawyers, Francescakis was an influential exponent of the “pluralism of methods” theory which has marked modern European private international law.

choice of law. He is also interested in the influences that this “body of laws” drew from natural law. But he is most explicit in his fascination with the idea of Roman “reception of an *international custom of commercial law*.”⁹⁷ For Goldman, the *praetor peregrinus* (who for some of Goldman’s contemporaries provided an early model of the judge applying *lois de police*⁹⁸) is “this representative of Roman authority” who “doubtless borrowed from the customs of international commerce and from the less formalistic elements of the Roman law itself.”⁹⁹ In fact, despite Goldman’s assurance, there is little historical evidence—but a lot of speculation—as to what *ius gentium* really was. Focus shifts to the customs of international commerce from which the *praetor* borrowed. But Goldman’s custom is not like Schmitthoff’s: while the lawmaking authority of the *praetor* is sidelined, no mention is made here of merchants or legal actors. What interests Goldman is the body of law itself. Indeed, *ius gentium* is “understood as a formally autonomous source of law.” As such, it

by and large lost its distinctiveness when the Antonian Constitution of 212 A.D. accorded Roman citizenship to all inhabitants of the Empire [and thereby extended *ius civile* to all private relations in the Empire]. This was its first death. It was, however, not a real death, because *ius gentium* had by then penetrated the domain exclusively reserved for *ius civile*. It thereby enriched—and occasionally entirely supplanted—the traditional institutions of *ius civile*.¹⁰⁰

But “[t]his common law of nations fell victim . . . to the breakup of the Roman world and its legal system, and to the disintegration of international economic relations that characterized the early Middle Ages.”¹⁰¹

So this is the first, effective death of *lex mercatoria*: the “common law of nations f[alling] victim” to political circumstances—the “breakup of the Roman world and its legal system,” and the “disintegration of international economic relations” (note, “disintegration,” not, for example, “decline” in scope).¹⁰² Such misfortune may justifiably make us weary of the political and the state structures: having become part of state law, our transnational customary law disintegrated with it.

2. Middle Ages: The Revival

Goldman dedicates far less space to medieval mercantile law: it is after all the “rebirth” of the ancient cosmopolitan law.¹⁰³ Moreover, reference is made to manifestations (“it was manifest”) of the *lex mercatoria* under different names: “the *ley merchant*, in England, the *droit de foires* in France . . . , the *ius mercatorum* conceived in Italy, and the commercial usages codified in France by Jacques Savary at the end of the seventeenth century and fifty years later by his

97. Goldman, *supra* note 29, at 3.

98. See, e.g., HENRI BATIFFOL & PAUL LAGARDE, *DROIT INTERNATIONAL PRIVÉ* 21 (1993).

99. Goldman, *supra* note 29, at 3.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

son.”¹⁰⁴ This seems to be a single legal phenomenon manifested in distinct form (and name) in different places.

Whereas Goldman sounds romantic in his references to the *lex mercatoria* and legal cosmopolitanism, he demonstrates none of the lyricism shown by Schmitthoff-the-pragmatist toward mobile merchants. In fact, Goldman makes no reference to merchants. The law simply appears—just like Goldman’s *ius gentium*, it is the product of a rather spontaneous process. But the focus here is less on professional merchants than in other images of spontaneous law.

3. Early Modern Era: The Specter of State Law

As Goldman’s second period coincides with Schmitthoff’s first, so his next period coincides with Schmitthoff’s second phase. Goldman’s outlook, however, is grimmer: “a new period of hibernation awaited.”¹⁰⁵ Hibernation may mark a subtle change from the invocations of death and near death; but the general idea is precisely to emphasize simultaneously the mortal perils and the survival through time of *lex mercatoria*. The dark character of what is to befall *lex mercatoria* in the early modern era is better illustrated as Goldman contrasts the imperial Roman “unification of a legal and . . . national character—as that engendered by the Constitution of Caracalla” (which still maintained a “common law of nations” as well as the continuing influence of the *ius gentium*) with the early-modern destruction of legal community by the “progressive affirmation of the power of individual States.”¹⁰⁶ There is no mention of the terms “nation” or “national”—only subsequently, in the nineteenth century, is there talk of “national particularities.”¹⁰⁷ The rival here is the Leviathan, not the nations: “In France, this development was marked by the codification of Colbert in 1673 of laws for terrestrial commerce, and, in 1681, for maritime commerce.”¹⁰⁸

What Schmitthoff fit into a progress narrative, Goldman invokes as an example of regress. It is also interesting that, although it is commonly accepted that the Crown’s ordinances were based on Savary’s private codifications, Goldman makes no such allusions. The line between merchant custom and state law appears absolute, and the mediating role of lawyers fades out.

The low point in this story comes in the nineteenth century, as the “emergence and reinforcement of national particularities” leads to the “subjection of international economic relations to State laws.”¹⁰⁹ These state laws are designated by conflict-of-laws rules “such . . . as each State had established by itself.”¹¹⁰ Here again, Goldman draws an opposition in absolute terms, in which conflicts rules are on the side of the Leviathan. Missing from his

104. Goldman, *supra* note 29, at 3–4.

105. *Id.* at 4.

106. *Id.*

107. *Id.*

108. *Id.*

109. Goldman, *supra* note 29, at 4.

110. *Id.*

picture is the internationalism of nineteenth-century conflict of laws—ironically, a movement in which the law journal directed by Goldman (then named *Journal de Droit International Privé*) was pivotal.

Goldman's narrative is one of a variety of "internationalist" stories of the rise of "legal nationalism" that comes to permeate conflict of laws and that may be linked, depending on the perspective of the narrator, on trade protectionism, political nationalism, et cetera.¹¹¹ But Goldman does not seem to have a strong political agenda against the nation-state. What he does care about, however, is the formal source of legal rules and the creation of a stateless legal regime. Schmitthoff insisted on the image of incorporation of merchant law, with the state providing a protective shell, in order to further his normative agenda of producing authoritative texts by bringing together customary rules, mercantile practice, and state legislation. Goldman spins instead a cautionary tale, in which state law, followed by legal particularism, can only corrupt the law merchant.

4. *Lex Mercatoria Rediviva*

Goldman's narrative leads to the next episode, in which leading lawyers from both East and West "discover" that "the way in which international commerce is regulated today . . . is as unsatisfactory as it can be."¹¹² The only lengthy quotation in Goldman's entire article studied here is a passage in that vein by René David, calling that state of affairs "an affront to reason . . . a source of shame for jurists."¹¹³ The Romanian Tudor Popescu is also quoted, calling for a "uniform law of international commerce" as a necessary implication of the "establishment of a new international economic order."¹¹⁴ However, although united in their desire, the two authors take radically different perspectives: David "accords great importance to transnational customary law, spontaneously engendered by the interaction of merchants in international trade"¹¹⁵ (and progressing even without the lawyers). Popescu, "faithful to socialist notions of law" would accept only international treaties.¹¹⁶ Schmitthoff, as we have seen, would seek to integrate both views in one coherent whole.¹¹⁷ But where does Goldman stand? Unlike Popescu, he does regard customary law as a valid source and in fact alleges that David "in his virulence did not take into account the second rebirth and the incipient evolution of transnational customary law"—by which he means principally

111. See generally ENRST RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* (1960) (writing from a perspective advocating internationalism within conflict of laws); JEAN-LOUIS HALPERIN, *ENTRE NATIONALISME JURIDIQUE ET COMMUNAUTÉ DE DROIT* (1999) (providing an example of a modern, "polemical" narrative).

112. Goldman, *supra* note 29, at 4 (quoting René David, *Opening Report*, in *NEW DIRECTIONS IN INTERNATIONAL TRADE* 5 (1977)).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. See Schmitthoff, *supra* note 29, at 111–12. See also Goldman, *supra* note 29, at 6.

standard and model contracts—since the early twentieth century.¹¹⁸ He is, on the contrary, less interested in state-based sources of international trade law, and criticizes Schmitthoff's broad definition of *lex mercatoria* for not providing an answer to the "specific problems of transnational commercial custom."¹¹⁹ Goldman is more concerned with whether "general principles of law and principles of international law" form "part of *lex mercatoria*"—a problem to which he devotes the rest of his article, invoking legal theory and listing cases in which *lex mercatoria* was accepted as a source by state laws and courts.¹²⁰ Through this detailed discussion, there is barely any explicit reference to merchants as norm creators; it is to arbitral awards that Goldman turns in rebutting skeptics' argument that no *societas mercatorum* exists.¹²¹ "Custom," although an everpresent notion, appears in very abstract terms: discussion revolves around principles applied (that is, accepted) in arbitral awards, and their acknowledgement by state courts (and legislation) through these awards' enforcement.¹²²

C. Goldman's Circles

Goldman would determine "the ambit of *lex mercatoria*" by reference to "its origin and its customary, and thus spontaneous, nature," rather than to the "object of its constituent elements."¹²³ Obviously, even in a text written twenty years after his *Frontiers* essay, Goldman maintains a purist perspective, as far as the role of state sources is concerned. But what are we to make of his reference to the customary nature of *lex mercatoria*? His equation of customary with spontaneous, especially, seems different from the traditional understanding of custom as the result of long, conscious practice—but it is also different from the notion of a spontaneous "order without law" promoted by legal economists: Goldman's notion is more abstract, and more legalist.¹²⁴

Goldman's historical narrative plays into both themes. It reflects his "purist" perspective on the sources of *lex mercatoria*. Unlike Schmitthoff's tale of evolution and synthesis, here is a tale of ups and downs, lives and (near) deaths. The "lives" take place in those periods in which an international or supranational law of universal ambit flourishes unhindered and acknowledged by state law. The "deaths" come when the international community disintegrates and competing political entities claim control over international commerce and mercantile law.

The narrative also reflects Goldman's abstract notion of what *lex mercatoria* is—an abstractness hidden behind, as well as unveiled by, his personification metaphor. There are recurring references to a body of law, but no explicit

118. Goldman, *supra* note 29, at 4–5.

119. *Id.* at 6.

120. *Id.* at 7–23.

121. *Id.* at 18–19.

122. *Id.* at 19–23.

123. Goldman, *supra* note 29, at 6.

124. *Id.* Cf. Benson, *supra* note 6, at 646–51.

reference to merchant, or legal, practitioners. Goldman's *lex mercatoria* is "spontaneous" in that it simply appears: there is no account of its gradual creation.

IV

CONCLUSION

In the beginning of this article, reference was made to the *Arlésienne*—the young lady who never appears on stage in the theatrical play named after her, allowing us to imagine her as we would like.¹²⁵ *Lex mercatoria*—a concept often personified—has allowed its many advocates a similar freedom. Their accounts of past lives of *lex mercatoria* reflect—and in their turn nourish—their visions and normative projects.

This article studied the accounts of the two founding fathers of *lex mercatoria*, who are also identified with the two principal approaches within the mercatorist coalition. Schmitthoff sought to construct a uniform law of international trade with merchant customs and trade practices alongside international instruments, and possibly national legislation. He even suggested that such coexistence may allow for better growth and adaptability of international business law in the long run. Goldman was, on the contrary, preoccupied with providing a theory of an autonomous legal system independent from (while respected by) state legal systems (including intergovernmental institutions). Both are in effect seeking to provide theoretical foundations for something: Schmitthoff seeks a foundation for international legislative initiatives and for "vertical" academic treatment of international business law. Goldman seeks a legal justification for arbitrators using their good judgment, their knowledge of, and "feel" for the law.

All this is reflected in their historical narratives. Schmitthoff offers an account of evolution and synthesis: his emphasis is less on the "law merchant" as a single entity, and more on its constituent parts and stakeholders. Goldman, to the contrary, puts a more abstract idea of a single cosmopolitan law in the center of his story. In Schmitthoff we can imagine pictures of mobile merchants engaged in transnational commerce; eminent lawyers—who systematize, incorporate, codify, and legislate—also make cameo appearances. In Goldman, the only being who looks alive is the personified *lex mercatoria*—a venerable lady. In Goldman's account, merchants exist only in terms of a *societas mercatorum* that in turn exists only as the creator or foundation of the *lex mercatoria*: even his invocation of the *ius gentium* (omitted in Schmitthoff's narrative) may be explained in these terms. This does not mean, however, that Goldman espouses Platonic idealism: his vision of the *lex mercatoria* legitimates the role of specific professional groups among academics and practitioners active in international business law and commercial arbitration.

125. See *supra* note 2 and accompanying text.

Competing as they may appear, the two narratives do share a lot. They do not differ in their basic facts (medieval customary law, early modern incorporation by state law, low-key persistence of innovative mercantile practice, postwar resurgence of transnational commercial law). They share this normative commitment to the autonomous regulation of transnational business, which is characteristic of all mercatorists. They also share, along with most mercatorist literature, their basic sentiment—what another author calls “the romance of the law merchant.”¹²⁶

126. BEWES, *supra* note 19, at iv.