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Foundation Myth as legal formant: The medieval Law Merchant and the new *Lex Mercatoria**

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I. Introduction

‘Once upon a time, in the days before the misguided nation-state had become all-
powerful, there was a Golden Age. In that blessed era, people traded with each other
using an international, harmonious system of commercial law, the law merchant, a
product of necessity and free will, formed by traders independently of any political
authority. But as the nation-state grew and grew, this system was slowly stifled. Its rules
were absorbed by municipal legal systems. Its spirit was quashed. Now, after centuries of
darkness, a new dawn is breaking. The *lex mercatoria* is being reborn in a new guise
through the heroic efforts of arbitral tribunals, intergovernmental organisations, private
international associations, commercial custom and the pressures associated with free
trade and the free movement of capital. In this brave new world, people will live together
in harmony and peace. International commercial transactions will be governed by one
regime, built up outside the constricting barriers of the nation-state.’

1

* A preliminary version of this work was presented at the Society of Legal Scholars Conference, Oxford, 2003. The author is grateful to participants for their comments. The usual caveat applies. Comments (to nf4@soas.ac.uk) are very welcome.

It should go without saying that the preceding paragraph is an exaggeration and a parody. 2
However, like most parodies, it contains a grain of truth. And, it is submitted, the
thinking and emotions underlying the motivations of some people concerned with the
new *lex mercatoria* are not too far removed from those evoked. They are just concealed
in more moderate and measured prose, or even more effectively concealed in silence and
assumptions.

One could quote numerous passages on this point. Three will suffice. According to 3
Cicero:

*Non erit alia lex Romae alia Athenis; alia nunc alia posthac; sed et apud omnes gentes et
omni tempore una eademque lex obtinebit.* (There shall not be one law at Rome and
another at Athens; one now and another afterwards; but one and the same law shall apply
among all peoples and at every time.)¹

A fairly typical modern passage refers to: 4

a world-wide convergence of economic and political values that portend a possible,
though distant, future world in which human beings will look upon themselves as part of
a single humane civilization comprised of a single human race.²

Another author, from an earlier period, claimed that: 5

the cultivation and expansion of [the exchange of commodities between nations have]
established an inter-racial and international dependence that has given to civilization its
greatest impetus.³

It can be seen that the sentiments and the style of these quotations are not too far 6
removed from the exaggeratedly purple prose used above. Now, the authors just cited
may have a point about the new *lex mercatoria*. No opinion is advanced on that issue
herein, other than to point out that much of our technological progress has a less romantic
origin, ie our penchant for killing members of our own and other species. The mass
production of standardised manufactured parts, for example, was first invented in order
to make reliable and easily repaired firearms for the American West. This piece deals
with a different issue: the distortion of the truth about the medieval law merchant, a
distortion which is used in order to legitimise the new *lex mercatoria*, a distortion which

1 Cicero *De Republica* 3.22.33, cited in *Luke v Lyde* (1759) 2 Burr 882 at 887, English Reports (97) 61;
cited in turn in RM Goode *Commercial Law* (Penguin Harmondsworth 1995) at 1212.

2 AY Seita 'Globalization and the Convergence of Values' 30 Cornell International Law Journal (1997)
429 at 429, quoted in L Mistelis 'Regulatory Aspects: Globalisation, Harmonisation, Legal
Transplants, and Law Reform - Some Fundamental Observations' 34 International Lawyer (2000)
1055 at 1057.

3 C Kerr 'The Origin and Development of the Law Merchant' 15 Virginia Law Review (1928-1929)
350 at 367.

is perpetuated and reinforced by the practice of referring to the international and legal character of the law merchant in practically every discussion of the topic.

II. Terminology

Firstly, a word on terminology. It will be necessary to refer on numerous occasions to the old and the new *leges mercatoriae*, so we need to find some way of distinguishing between the two. It has become traditional to use '*lex mercatoria*' rather than 'law merchant' when speaking of the new phenomenon. It therefore seems logical to use 'law merchant' when referring to its alleged precursor. 7

III. The law merchant as an international legal system

Most writing about the law merchant makes, *inter alia*, two significant claims: 8

1. it was law; and
2. it was international, ie the rules were uniform across national boundaries.

An unstated assumption underlying these claims, which, as we shall see later, is of considerable importance, is that it constituted one body of rules. 9

At first glance, there seems to be abundant and eminent authority for these propositions, including no less a scholar than Holdsworth, who describes the law merchant as a: 'species of *jus gentium*',⁴ a kind of law which is international in character and which does not derive from national authority. An early statement is that of Dr Robert Stillington who compared the law merchant to natural law: 'which is a universal law throughout the world'.⁵ According to another author: 'It was really Law, and it was really International.'⁶ Such sentiments have a long history, and have been put forward by numerous writers, including the oft-quoted 17th century authors Malynes and Davies.⁷ 10

However, there is a significant body of scholarship, produced by equally eminent authors, which takes quite a different view.⁸ 11

4 WS Holdsworth *A History of English Law* (3rd ed Methuen London 1924) I: 528-529.

5 *The Carrier's Case* (1473) YB Pas 13 Edw IV, 9, pl 5; Selden Soc (64) 30, 32, cited in JH Baker 'The Law Merchant and the Common Law' 38 CLJ (1979) 295 at 299.

6 AT Carter 'Early History of the Law Merchant in England' 17 LQR (1901) 232 at 232.

7 G Malynes *Consuetudo, Vel, Lex mercatoria: Or, the Ancient Law-Merchant* (Professional Books Limited London 1981 originally published 1685); J Davies 'The Question Concerning Impositions' in A Grosart (ed) *The Works in Verse and Prose of Sir John Davies* (Blackburn 1869-1876).

8 The following section deals with the older scholarship. The topic has recently experienced something of a revival; see the references below, as well as various articles in Volume 5, *Chicago Journal of International Law* (2004). In particular, Kadens has come, by a rather different route, to very similar conclusions as reached herein on the nature of the law merchant (E Kadens 'Order within Law,

On the question of the status of the law merchant as law, Ewart, writing just over a century ago, replied to an article by Burdick setting out what has become the more traditional analysis.⁹ Ewart maintained that the law merchant was: ‘nothing but a heterogeneous lot of loose undigested customs, which it is impossible to dignify with the name of a body of law’.¹⁰ Using Burdick’s own research, he pointed out that in the 17th and the first half of the 18th century in England the law merchant had to be proved in court in the same way as we now prove foreign law, ie as a fact. This is no different from the way in which commercial usage is now proved, but nobody would refer to such usage as law.¹¹ In 1979 Baker wrote that: ‘it is far from clear that this law merchant was conceived of as a distinct body of substantive law’.¹² 12

Further support for these propositions comes from the fact that many ‘merchant’ courts were simply ordinary courts which also did commercial business. The Fair Court of St Ives, for example, should not be considered as: ‘a special court for merchants, but rather as a seigneurial court whose business is primarily commercial in nature’.¹³ Another such court dealt in 1373 with a prosecution of London tailors arising from a rowdy football match.¹⁴ It is also clear that the notion that the common law courts did not deal with commercial matters is wrong:¹⁵ for example, we know that in the 13th and early 14th centuries it was possible to use the law merchant in the king’s courts.¹⁶ 13

Variety within Custom: The Character of the Medieval Merchant Law’ 5 *Chicago Journal of International Law* (2004) 39-66).

9 FM Burdick ‘What Is the Law Merchant?’ 2 *Columbia Law Review* (1902) 470, an article prompted by J Ewart *An Exposition of the Principles of Estoppel by Representation* (Chicago 1900). A detailed debunking of the conventional view can be found in JS Rogers *The Early History of the Law of Bills and Notes: A Study of the Origins of Anglo-American Commercial Law* (Cambridge University Press Cambridge 1995) at 153-160.

10 JS Ewart ‘What Is the Law Merchant?’ 3 *Columbia Law Review* (1903) 135 at 138.

11 *Ibid.*

12 JH Baker ‘The Law Merchant and the Common Law’ 38 *CLJ* (1979) 295 at 299. Cockburn CJ, giving judgment in 1875, explained that the English version of the law merchant was: ‘neither more nor less than the usages of merchants and traders ... ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law’. *Goodwin v Robarts* (1875) LR 10 Ex 337, cited in F Tudsbery ‘Law Merchant and the Common Law’ 34 *LQR* (1918) 392 at 391.

13 Sachs *op cit* at 6.

14 AH Thomas and PE Jones (ed) *Calendar of Plea and Memoranda Rolls ... Of the City of London* (Cambridge University Press Cambridge 1926-1961) 2: 152 (1373).

15 Rogers *op cit* at 12-20.

16 Baker *op cit* at 300.

Nor could it be said that the law merchant was international, even as a body of customs. 14
In the 1928-1929 volume of the *Virginia Law Review* Kerr refers to Davies': 'decided misconception of the Law Merchant, in that he regarded its features to be of universal uniformity and application'.¹⁷ Returning to the Fair Court of St Ives, Sachs has shown that, as regards those disputes appearing before the court in the period 1270-1374, the customs of merchants were so local and varied that: 'If one were to ignore the areas of law for which the variations were substantial, very little of a shared "law merchant" would remain.' Any international uniformity would be: 'better explained as a result of the convergent evolution of local customs, rather than as a conscious expansion of a single body of law across Europe'.¹⁸

Where the law merchant did differ markedly from national systems was in procedure. 15
'The medieval law merchant was not so much a corpus of mercantile practice or commercial law as an expeditious procedure especially adapted for the needs of men who could not tarry for the common law.'¹⁹ Cordes refers to: 'a more rational law of evidence and a swifter procedure for the summoning of defendants'.²⁰ Rogers refers to the term 'law merchant' as having in medieval times: 'little more content than the notion that cases involving travelling merchants should be resolved expeditiously'.²¹

It should also be borne in mind that those statements quoted in support of the conventional view: 'appear in works written to advance some particular political objective',²² a weakness to which some present-day writing is not immune. The political motive of Sir John Davies was the support of the first Stuart monarchs to levy revenue by the use of the royal prerogative, ie without the need to obtain the consent of Parliament. Davies' argument was that the restriction on the royal prerogative was imposed by the common law. If trade was not governed by the common law, but the law merchant, then the king was entitled to levy revenue on foreign trade. As Rogers points out, the argument is fallacious, since 'the common law' which produced the ban he disliked was constitutional law, not the private law which would govern commercial transactions, but the quality of the argument is not the point.²³ Another important political motive was the

17 Kerr op cit.

18 Sachs op cit at 8.

19 Baker op cit at 300, citing F Bickley (ed) *The Little Red Book of Bristol* (Bristol 1900) I at 57, 58.

20 A Cordes 'The Search for a Medieval *Lex Mercatoria*' 5 Oxford University Comparative Law Forum (2003) text after note 17. The reader is referred particularly to this article, in which Cordes arrives at similar views to those expressed herein on the veracity of the 'conventional' account, although different routes were taken to reach the destination (the author was unaware of Cordes' work during the initial formulation of this piece) and different uses were made of it thereafter.

21 Rogers op cit at 151; see also 19-27.

22 Ibid at 154.

23 Rogers op cit at 156-158.

civilians' desire to prove the superiority of their system in the struggle to protect their Admiralty Court jurisdiction from the common lawyers.²⁴

Even if they did not have an ulterior motive, the authors can all too easily be misunderstood. According to Rogers, what some interpret as statements of historical fact were really expressions of the belief that: 'the rules developed within all legal systems on commercial matters should be and could be at least generally consistent'.²⁵ 17

IV. Multivalence, Bivalence and Reification

So who is right? Before attempting to provide an answer, it is worthwhile stopping for a moment to ask whether this is the correct question to ask. In so doing, we need to look at the concepts of reification and multivalence/bivalence.²⁶ 18

To deal with the latter point first. The evils associated with bivalence are perhaps some of the most pervasive but also some of the least appreciated of the pitfalls of logical argument. One area where these evils are to be commonly found is the field of academic debate such as the one above. 19

Bivalence is a black and white, yes/no way of looking at the world. The bivalent observer divides reality up into neat categories with sharp edges. Things are either in a category or out of it. Bivalence is sometimes called 'Aristotelian', despite the fact that Aristotle could not have invented it, since it is a characteristic of the way our minds work.²⁷ We use it for a very good reason. It combines simplicity with efficiency, allowing the finite resources of our brains to deal economically with the potentially infinite and multi-dimensional complexity of the world around us. For example, rather than having to deal with a huge number of types of animals, we can use bivalence to place them into two categories, tame (therefore safe) and wild (therefore dangerous). 20

However, the slicing up of the universe into bivalently manageable chunks is necessarily an approximation and a distortion, even if that fact is hidden by the ease and clarity of some categorisations. As Einstein put it: 'So far as the laws of mathematics refer to 21

24 Ibid at 158-159.

25 Ibid at 169.

26 On multivalence see B Kosko *Fuzzy Thinking: The New Science of Fuzzy Logic* (HarperCollins London 1994). Multivalence has various names. Philosophers tend to call it 'vagueness'. Scientists use 'fuzziness' or 'fuzzy logic' or 'multivalence'. Since another meaning of the word 'fuzzy' has negative overtones, 'multivalent' and 'multivalence' have been preferred in this work.

27 One passage quoted in support of the appellation is: 'Everything must either be or not be, whether in the present or in the future.' Aristotle *De Interpretatione* 19a27-30. Philosophers refer to 'the Law of Bivalence', according to which a proposition is either true or it is false.

reality, they are not certain. And so far as they are certain, they do not refer to reality'.²⁸
So if we rely unthinkingly on bivalence we can easily be misled.

To return to our example, anyone who has brought up a child knows that when she comes 22
into contact with dogs for the first time she will react with a bivalent categorisation.
Depending on the quality of the initial experience, dogs will either be all feared or all
loved. She will then have to be taught that this categorisation is inaccurate, and that dogs
can in fact be classified anywhere along a spectrum from extreme safety to extreme
danger; and that even that classification has to be modified in some circumstances, such
as mealtimes, when even the friendliest animal can react in a dangerous way.

In other words, she has to be taught a more accurate multivalent approach, in which 23
reality is viewed in terms of categories of numerous intersecting types, all of which are
spectra with fuzzy edges, very similar, indeed, to the spectrum of visible light, in which
colours merge into each other with no sharp boundaries.

When used in logical argument, bivalence carries the risk of leading us into a sterile 24
search for the 'right' category for a given phenomenon, and all too often into time-
wasting debates with colleagues who take the opposite view, when in fact we should be
applying a multivalent approach, categorising not by placing a phenomenon inside or
outside a clearly defined box but by assessing the fuzzily defined area that that
phenomenon covers on one or more spectra, the particular spectrum or spectra used being
chosen according to the purpose of that particular classification.

Unfortunately, bivalence is the tacit assumption underlying many an academic discourse 25
such as that set out above. Here perhaps it is legitimate to lay some of the blame on
Aristotle, given his influence on the study of logic and his specific espousal of bivalence.
The result is a strong tradition in its favour, a tradition which is all the stronger for hardly
ever being expressed, let alone discussed, outside the philosophy classroom. This
tradition is reinforced by a deep-seated feeling that bivalence leads to precision, despite
the fact that multivalence is in reality much more precise.²⁹

It is important to note, though, that in many instances multivalence leads to a clear 26
categorisation. Therefore the results of the two approaches can look very similar. A full-
grown, healthy tiger falls squarely into the category of 'dangerous animal' whichever
method is used.

28 A Einstein 'Geometry and Experience' in A Einstein *Sidelights on Relativity* (ed) (trans GB Jeffery
and W Perrett (Methuen & Co London 1922) 252, cited in Kosko op cit at 3.

29 Indeed, it may well be that the criticism commonly levelled at the academic approach that it is
'impractical' is often in reality founded on an unconscious dissatisfaction with the bivalence which
pervades that method.

To deal now with reification.

27

Reification is the making of a linguistic ‘thing’ (Latin *res*) out of a situation or group of phenomena. An understanding of the way it works, its limitations and its potential to mislead can be very useful. However, it is so embedded in our language that it is difficult to think outside it and impossible to express oneself without using it (for example, this passage is full of it, indeed the word ‘reification’ is itself a reification). Therefore it is rarely considered. We think with it and inside the bounds set by it, not outside it or about it. It is therefore all too easy to fall into unconscious error as a result of erroneous reification. One such mistake is to classify several phenomena which resemble each other somewhat as one ‘thing’ when in fact they are quite distinct, creating an unjustified illusion of unity

Let us apply these arguments to the present issues.

28

As far as multivalence is concerned, it seems worthwhile to consider the possibility that the discussion above falls into the trap of chasing the chimera of a bivalent solution to a multivalent problem. For instance, we have seen that one much debated question is whether the law merchant was ‘law’, a question which is phrased in bivalent terms and invites a bivalent answer. If it ‘is’ custom, it *cannot* be ‘law’, and vice versa.

In a more accurate, multivalent approach, we would try to find the fuzzily delimited area occupied by the law merchant on the spectrum of normative regimes, part of which is labelled ‘law’, and which is itself fuzzily delimited, merging imperceptibly into custom.

29

The same considerations apply to the question of whether the law merchant was ‘international’ in character.

30

If we free ourselves from the shackles of bivalence and the sterile arguments it creates, we can start to investigate the much more interesting and relevant issues of the *degree* to which the law merchant was ‘law-like’ or ‘international’.

31

As far as the misuse of reification is concerned, we need to re-examine the assumption, implicit in the very foundations of the question being examined, that the law merchant was one ‘thing’. One possibility which deserves further consideration is that there were many ‘laws merchant’. By way of example, we can consider a hypothesis in which the substantive (as opposed to the procedural) law merchant might have been composed of three broad strands: the general commercial, the maritime, and the banking.

32

If this is correct, the general commercial part, relating to such matters as sale of goods and partnership, was the ‘heterogeneous lot of loose undigested customs’, with some commonality in general principle but admitting considerable local variation in detail; maritime law was quite different in origins and nature and might have been more

33

homogenous;³⁰ and the law of banking was international in the sense of deriving from the coherent practice of a community of financiers spread across Western Europe.³¹

This conclusion sits reasonably well with that put forward by Kadens, that the law merchant was: ‘not a single, uniform, essentially private legal system, but rather *iura mercatorum*, the laws of merchants’.³² 34

V. The Law Merchant as Foundation Myth for the *Lex mercatoria*

It seems, then, that the depiction of the law merchant as an international legal system (in the sense of that expression as used by the apologists for the *lex mercatoria*) is false. In Kadens’ words the law merchant was: ‘unlike that portrayed either in the traditional legal history or in much of the recent international commercial law scholarship’.³³ 35

However, that conclusion needs to be qualified and explained. The parameters of what might be called the ‘traditional’ discussion have been misleadingly set in two ways, firstly by using bivalence, secondly by misusing reification and grouping together phenomena which should be considered separately. So the answer to the question: Was the law merchant an international legal system? is that a better question would be: 36

Where do we place the various commercial norms of the period on the spectrum of dispute resolution and facilitatory norms/mechanisms?

This conclusion, rather than being the end of a discussion, is the start of a much more fruitful one which explores the complexity of the various phenomena included in the term ‘the law merchant’. 37

30 The homogeneity issue is controversial. According to Carter, maritime law was a truly transnational system: Carter op cit at 232-235. Lord Mansfield seemed to be of this opinion, since it was a maritime case in which he quoted Cicero on a rosy future of legal uniformity: Others disagree. Cordes, for example, has produced convincing evidence which challenges this view: Cordes op cit at para 24.

31 For instance, the practice relating to international payments may well have led to a certain similarity in the way different legal systems dealt with those issues. See Rogers op cit Chapter 2 (Early Exchange Transactions: Commercial Practice). On the early history of banking see AP Usher ‘The Origins of Banking: the Primitive Bank of Deposit: 1200-1600’ (1939) 4 Economic History Review 399. Usher refers (at 409) to the: ‘relative uniformity of practice’ established in the 13th century, a uniformity which he attributes to the influence of Roman law. On the history of banking generally see A Teichova et al (eds) 1997 *Banking, Trade and Industry: Europe, America and Asia from the Thirteenth to the Twentieth Century* (Cambridge University Press Cambridge 1997). Here too, though, there are problems, because we know that: ‘the English judges and lawyers necessarily built the law of bills from native materials’. Rogers op cit at 167.

32 Kadens op cit at 43.

33 Kadens op cit at 42-43. She maintains that it did ‘exist’.

Another question then arises. Why is the erroneous view the mainstream one? After all, it is not as if the heretical³⁴ scholarship is new (see the dates given above, much of it is a century old or more), nor that it was produced by little-known scholars, nor that it is to be found only in inaccessible places, nor that it is somehow strange or unconventional. The work of eminent scholars such as Professor Sir John Baker (one of our most eminent legal historians) can hardly be described as maverick. 38

Part of the answer may be that commercial lawyers are rarely much interested in legal history, and even fewer of them, if any, are legal historians. Therefore it would be a rare commercial author who would go beyond Holdsworth and the only books on the subject.³⁵ Since these all put forward the erroneous view, that is what is repeated. Another part of the answer is that repetition is often mistaken for proof of truth. If you say something often enough and loudly enough, people start believing you. Once launched, the process is self-sustaining, because those who repeat the mantra unwittingly add to the force of repetition. Sachs tellingly refers to this phenomenon in the context of the historiography of the law merchant as: ‘a child’s game of “Telephone,” with one generation interpreting the works of previous authors and then the next interpreting the interpretations’.³⁶ 39

Another part of the answer is surely the fact that the erroneous view is the ideologically convenient one. We live in a time when commerce, and particularly international commerce, is seen as a Good Thing,³⁷ bearing the torch of Western civilisation around the world, and state intervention is seen as a Bad Thing. So an international system of law developed independently of governments must be a very Good Thing indeed. And however open our minds are at the start of a quest for the nature of the law merchant, if we come across something which confirms our thinking, we are not likely to carry on searching on the off-chance of coming across something disagreeable which challenges our beliefs. 40

Yet another part of the answer, linked to the ideological aspect and rather more intriguing, may well lie in the essential role of myths in the formation of any human system. In a modern context, the phenomenon is most obvious in the creation and maintenance of positive group identity. Examples abound. In the United Kingdom, the 41

34 Kadens calls it the ‘revisionist’ view: Ibid at 41.

35 LE Trakman *The Law Merchant: The Evolution of Commercial Law* (FB Rothman Littleton 1983) and WA Bewes *The Romance of the Law Merchant* (Sweet & Maxwell London 1923). The author must confess that he too believed the myth until he stumbled on the truth whilst conducting research in another area.

36 Sachs op cit.

37 For the concepts of a Good Thing and a Bad Thing, see WC Sellar et al 1066 and All That: A Memorable History of England, Comprising All the Parts You Can Remember, Including 103 Good Things, 5 Bad Kings and 2 Genuine Dates (Eighth ed Methuen London 1930).

memory of the Battle of Britain is continually reinforced in order to stress our heroic and selfless origins, while other events such as the bombing of Dresden are quietly, but very effectively, minimised and side-lined by a comparative lack of attention and emphasis. In France, the contribution of the Free French forces in the liberation from Nazi occupation is constantly overstated in order to restore the self-respect damaged by the defeat of 1940, and provide a 'victory' as a historical base for the 5th Republic. Joseph of Arimathea's coming to England with the Holy Grail and planting the famous thorn tree in Glastonbury gave a considerable boost to Christianity in the Britain of the Dark Ages. The migration of Aeneas to Italy to lay the foundations of the greatness of Rome, which was later to take its revenge on the Greek victors of Troy, was viewed as so important a propaganda tool by Augustus that he commissioned Virgil to write the *Aeneid* about it.

Foundation myths serve various purposes.³⁸ One of their main functions is to make people feel proud of their group because it is special, important and superior to other people's. The idea that Joseph of Arimathea thought Britain worth visiting gave it a special status, elevating it from a remote barbarian territory with no connection to the Holy Land to an important place in the eyes of British and other Christians. The England football team might be beaten by the German football team with monotonous regularity, but English fans can derive consolation by telling themselves that the United Kingdom won the Battle of Britain. 42

The architects of such myths achieve their objective by distorting the truth, firstly by careful selection of the most favourable people and events as 'typical' of the relevant group and, where necessary, changing history to add romance and spice. Often the myths use the ancient past, because an ancient heritage gives respectability, and they also usually contain a strong moral and justificatory element. The *Aeneid*, for example, could be used to justify the conquest of the Greeks by the culturally backward Romans. 43

The view of the law merchant as an international legal system is such a foundation myth, the foundation myth of the *lex mercatoria*. It appears as such in the writings of Schmitthoff, who describes it as: 'a body of truly international rules',³⁹ the clear implication being that the existence in the past of an international commercial legal order is a valuable precedent for the creation of its new equivalent. It provides the legitimacy and respectability of ancient heritage and carries with it the implication of efficiency, because it seems to be logical that, if it worked before, it can work now. The *lex mercatoria* has: 'the *robor antiquitatis*, the vigour of (old) age, [which] seems to 44

38 There is a voluminous literature on foundation myths and their close relatives, creation myths. See, for example, M-L von Franz *Creation Myths* (Rev ed Shambhala Boston 1995); DA Leeming and MA Leeming *A Dictionary of Creation Myths* (Oxford University Press Oxford 1995).

39 CM Schmitthoff 'International Business Law, a New Law Merchant' in R St J MacDonald (ed) *Current Law and Social Problems* (University of Toronto Press Toronto 1961) 1292 at 131.

strengthen the authority of a set of legal rules'.⁴⁰ It provides an attractive element of past adventures, and it is no accident that Bewes' book is entitled '*The Romance of the Law Merchant*', nor that the initial passages of Kerr's article are hardly less purple in style than the pastiche at the beginning of this work.⁴¹

Tellingly, it is a system of order formed out of the dark chaos of medieval political and legal fragmentation, an aspect of the discourse which indicates an affiliation to a particular type of foundation myth, a creation myth.⁴² Such myths commonly relate the coming of order out of darkness and chaos, a darkness peopled with monsters who are always trying to restore the world to its primeval disordered state.⁴³ 45

An additional advantage given by the myth is the moral element, caricatured in the first paragraph of this piece as the 'good' independent, free merchant against the 'bad' oppressive state, strengthening the moral legitimacy of the *lex mercatoria*. 46

Hence the almost ritual reference to the law merchant as an international legal order in modern writing. Myth has become legal formant.⁴⁴ 47

VI. Conclusion

Various lessons can be drawn from all this. 48

First, truth is more complex than fiction, and we need better techniques for dealing with it. One way to find such better methods is to be aware of the reasons behind, and the limitations of, our analytical tools. Bivalent analyses and bivalent disputes are all too often sterile and time-wasting. Their use is understandable, because academics work in a tradition of teaching, and teachers must simplify and categorise in order to reduce a confusing, multi-dimensional, nuanced, and sometimes apparently contradictory reality to structures and principles.⁴⁵ However, although the bivalent method can be useful in certain circumstances, we must also recognise it for what it is, no more than a useful approximation and first step, which carries the risk of misleading us.

40 Cordes op cit text after note 13. Cordes points out that the age of a legal system can also be used against its reinstatement.

41 Bewes op cit; Kerr op cit.

42 A myth which purports to explain cosmogony.

43 A point made in WW Arthen 'Paganism and Myths of Creation: A Ritual of Transformation' 6 Fireheart, available at <http://www.earthspirit.org/fireheart/fhpmyth.html>, text after note 8.

44 On legal formants see R Sacco 'Legal Formants: A Dynamic Approach to Comparative Law' 39 American Journal of Comparative Law (1991) 1 & 343. The expression is used here in a very broad sense as a factor which influences legal thinking.

45 It is no accident that the Institutes of Gaius, the book which lies at the origin of the principled, structured approach to legal studies in the civilian tradition, was written by a teacher.

Second, constant vigilance is our best protection against error. As an immensely experienced practitioner used to say to the generations of articled clerks he trained (including the author): ‘A good solicitor is always suspicious and never shows it’.⁴⁶ The same could be said of academic lawyers. However, in a world of Research Assessment Exercises, growing student numbers, and all sorts of other demands on our time, the pressure to produce quickly is immense, so we often rely on the work of others. Much of the time this is a perfectly legitimate technique, and is a usually efficient and fairly safe means of increasing the speed of production, especially when the information being used comes from outside our own field. But there are pitfalls, some of which are clearly demonstrated in the area discussed herein. 49

Third, the discussion highlights the fact that we do not know very much about commercial law history (with some notable exceptions, of course), and it would be worthwhile finding out more. The benefits of a more accurate assessment of the law merchant have been stressed herein, but many other advantages would accrue from greater knowledge of this field. 50

What is the best way to increase our knowledge of the subject? Cordes points out that the temptation to produce a grand overview should be resisted, and gives the example of Levin Goldschmidt making three attempts and failing to finish any of them.⁴⁷ He makes some suggestions for future research into the history of commercial law in such individual and more specialised topics as: ‘the law of shipping and of transport, of fairs and of transfer of payments, of trade guilds and societies’,⁴⁸ to which one might add the issue of the possible interactions between the various legal systems in the Mediterranean, including in particular Byzantine, Islamic and Jewish law. Potential PhD students, as well as academic colleagues, please note: there is no shortage of topics. In the investigation of these areas, cooperation between commercial lawyers and legal historians could be of great value. 51

Such studies could well be of considerable interest for the formation of modern commercial law. Rogers gives the example of the law of negotiable instruments, which according to him relies on a conceptual structure which is: ‘a relic of the past and fundamentally ill-suited even to the paper-based cheque system’, let alone to a system based on electronic storage. Concerning his book on the history of bills and notes he observes that: ‘Ironically, the concern for the future of commercial law led me to examine its past.’⁴⁹ 52

46 Fenwick Wilson, a solicitor at Coward (later Clifford) Chance.

47 Cordes op cit text after note 37.

48 Ibid at para 20.

49 Rogers op cit at xi-xii.

Finally, truth is better than fiction. Myths are fun, and they can be effective tools in achieving certain objectives. But the achievement of those objectives is realised by means of distortion, omission and lies. It may be comforting to look back to a mythical, rose-tinted past in a bid to help us construct a better future, but in fact the past was in many ways no better than the present. Often it was considerably worse. The true character of the idea of the law merchant as an autonomous, international system of law, perpetuated for various reasons in the literature and the rhetoric of the *lex mercatoria*, needs to be recognised. The prevailing view is: ‘both inconsistent and unhistorical... a superficial use of history, motivated by an attempt to back a certain line of argument in favour of one side in a current juridical discussion, but not supported by evidence from historical sources’.⁵⁰ Indeed, the more closely one looks at the law merchant, the more it seems to resemble the patchwork quilt of interacting norms and dispute resolution mechanisms which we have today: ‘a layer of laws and practices that included legislative mandates, broad-reaching customs, and narrow trade usages’.⁵¹

If we are to produce sustainable harmonisation in the eminently practical world of international commerce, we need to keep our feet firmly on solid ground and understand the multivalent complexity of what really happened in the past. A true account of the law merchant should be far more instructive than any fairy story. If we rely on myth rather than truth, we will be led astray⁵² by dreams of something which never existed, and miss benefiting from the advantages of an accurate account. So let us stop repeating the old falsehoods and embark on the more difficult, but more interesting and enlightening task of establishing an accurate picture of the history of commercial law.

50 Cordes op cit: first part of the quotation from text after note 12, the second from text after note 36.

51 Kadens op cit at 63. She describes the ‘*iura mercatorum* as: bundles of public privileges and private practices, public statutes and private customs sheltered under the umbrella concept of merchant law by their association with a particular sort of supra-local trade and the people who carried it out. Some customary norms were similar over large areas; many were local or regional or even specific to particular trade groups. In addition, this was not a purely customary regime independent of local law and local courts but a hybrid creation dependent upon a scaffolding of legislation and intimately tied to local municipal and guild law’. Take the example of maritime law. The law was created by a combination of merchant activity with successive municipal legal activity, such as that of Rhodes (*Lex Rhodia*), Catalonia (*Llibre del Consolat de Mar*), Oléron (a small island off the Atlantic coast of France; the *Rôles d’Oléron*) the Hanseatic League and France (*Ordonnance de Commerce*), creating an internationally focused regime within the context of jurisdictions; and even in this area of the law, ‘internationally focused’ did not necessarily mean ‘international’ in the sense of universally applicable or even homogenous (Cordes op cit at para 24).

52 And we will mislead others. The false information contained in the traditional view has already leaked out. See, for example, P Milgrom et al ‘The Role of Institutions in the Revival of Trade: The Medieval Law Merchant, Private Judges and the Champagne Fairs’ 2 *Economics and Politics* (1990) at 2, an error repeated in EP Schwartz *Essays in the Positive Political Theory of Judicial Institutions* (Stanford University 1993) at 82. The example is cited in Sachs op cit at 117.