Borders of the Early Modern *Ius Commune*

England, Venice, and Scandinavia

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Chapter 10

Gerard Malynes and the "Ancient Law-Merchant"

A View on the *ius commune* from the Borders

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Borderlands

In 1622, the Dutch merchant Gerard Malynes published in London a treatise devoted to the "Ancient Law-Merchant", which, according to the subtitle, was "Necessarie for all Statesmen, Iudges, Magistrates, Temporall and Ciuile Lawyers, Mint-men, Merchants, Marriners, and all others negotiating in all places of the World".[1] It stated:

> the *Law-Merchant* … doth properly consist of the Custome of Merchants in the course of Trafficke, and is approued by all Nations, according to the definition of Cicero, *Vera Lex est recta Ratio, Natura congruens, diffusa in Omnes, Constans, Sempiterna*.[2]

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1 Gerard Malynes, *Consuetudo, vel Lex Mercatoria, or The Ancient Law-Merchant*, London, Printed by Adam Islip, Anno Dom. 1622. This first edition, which was used for writing this chapter, is available online: https://quod.lib.umich.edu/cgi/t/text/text-idx?c=eebo;idno=A06786.0001.001. Two other editions followed in 1636 and 1686 (if we consider the 1629 and 1656 versions to be simple reprints). See Stefania Gialdroni, "Gerard Malynes e la questione della lex mercatoria", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung*, 126 (2009), 38–69, at 48–49. In the last edition, designated as the third in the frontispiece, three other treatises followed that of Malynes. These were *Lex Mercatoria*: *The Jurisdiction of the Admiralty of England Asserted* by Richard Zouch, Doctor of the Civil Laws, and late Judge of the Admiralty; *The Ancient Sea Laws of Oleron, Wisby, and the Hanse-Towns, still in force: Rendered into English for the use of Navigators* by G. Miege, Gent; and *The Sovereignty of the British Seas, proved by Records, History, and the Municipal Laws of this Kingdom* by Sir John Buroughs, late Keeper of the Records of the Tower of London. The 1686 edition is also available online: https://archive.org/details/consuetudovellex00maly.

2 Malynes, *Lex Mercatoria*, 1622, *To the covrteovs rerder*. The quotation is taken from: Cicero, *De re publica*, 3.6.

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And that:

> the *Law-Merchant* hath alwaies beene found *semper eadem*, that is, constant and permanent without abrogation, according to her most auncient customes, concurring with the law of nations in all countries.[3]

In 1697, about ten years after the publication of the third and last edition of Malynes's *Lex Mercatoria*, Daniel Defoe expressed an opposite opinion about mercantile law:

> The Affairs of Merchants are accompanied with such variety of Circumstances, such new and unusual Contingencies, which change and differ in every Age, with a multitude of Niceties and Punctilio's [sic]; and those again altering as the Customs and Usages of Countries and States do alter; that it has been found impracticable to make any Laws that could extend to all Cases.[4]

Although better known as the author of *Robinson Crusoe* and other masterpieces of English literature, Defoe was also a merchant who travelled around Europe, dealt in many commodities, and became an economic theorist.[5] Defoe and Malynes had at least three things in common: they both had Flemish origins (Malynes was born in Antwerp, and Defoe's father, James Foe, was a successful tallow-chandler of Flemish descent who devoted his later years to overseas trade[6]); they are both considered to be mercantilists[7]; and they both had bad luck in their commercial activities, despite their shared passion for economics. However, their opinions on the diffusion and efficacy of mercantile customs were, as we have seen, very different.

Their contrasting points of view should not surprise us: few issues in the history of commercial law have given rise to such a variety of opinions as the

3 Malynes, *Lex Mercatoria*, 1622, *To the most high and mightie monarch Iames.*

4 Daniel Defoe, *An Essay Upon Projects*, London, printed by R.R. for Tho. Cockerill, at the Three Legs in the Poultrey, 1697, *Of a Court-Merchant*, 307. Available online here: https://quod.lib.umich.edu/cgi/t/text/text-idx?c=eebo;idno=A37427.0001.001. It was Defoe's first book, and his earliest major contribution to political and social thought: D.N. DeLuna, "The Publication of Defoe's *Essay upon Projects*", *The Papers of the Bibliographical Society of America*, 87:4 (December 1993), 503.

5 John J. Richetti, *The Life of Daniel Defoe: A Critical Biography* (Chichester: Wiley Blackwell, 2015), chap. 5.

6 Richetti, *The Life of Daniel Defoe*, 2.

7 John Richetti, reporting Maximilian E. Novak's opinion, affirms that Defoe cannot be considered a proto-capitalist as he supported the state control of commerce, and, thus, he should be defined instead as a mercantilist: Richetti, *The Life of Daniel* Defoe, 144–145. Malynes is, in fact, commonly known as one of the main English "early mercantilists". See, for example, *The Early Mercantilists: Thomas Mun (1571–1641), Edward Misselden (1608–1634), Gerard de Malynes (1586–1623)*, ed. by Mark Blaug (Aldershot: Elgar, 1991).

existence of a body of customary commercial laws uniformly and universally applied across medieval and early modern Europe.[8] This body of laws is usually defined as *lex mercatoria*,[9] even though that locution was unknown until the end of the early modern period[10] outside of England, where it first appeared in the title of a short treatise (*Incipit lex mercatoria*, 1280 ca.) included in the *Little Red Book of Bristol*,[11] reappearing about 340 years later in Gerard Malynes's masterpiece: *Consuetudo, vel, Lex Mercatoria: or, the Ancient Law-Merchant*.[12] According to Malynes, this expression described a customary law "approued by the authoritie of all Kingdomes and Commonweales", while *ius mercatorum* was a law established by the authority of a sovereign.[13]

Whereas it has been demonstrated that, as far as university education and practice in the courts of the Church, the Admiralty, and the courts of equity are concerned, "the amalgam of Roman and canon law now generally known as the *ius commune* … has undoubtedly played a role in the history of England and in the development of Anglo-American law",[14] up until now the role played by the *ius commune* in the development of English *commercial* law has been overlooked.

The aim of this chapter is therefore to analyze this neglected issue from the privileged point of view of "the standard English-language work on the law

8 For an intellectual history of the concept of *lex mercatoria* with a comprehensive overview of the literature devoted to this never-ending debate, see Dave De ruysscher, "La *lex mercatoria* contextualizée: tracer son parcours intellectuel", *Revue Historique de Droit Français et Étranger*, 90:4 (oct.–dec. 2012), 499–515, in particular Footnote 2. See also Stefania Gialdroni, "Il law merchant nella storiografia giuridica del Novecento: Una rassegna bibliografica", in *Forum Historiae Iuris* (14 August 2008): .

9 See, for example, Albrecht Cordes, "Auf der Suche nach der Rechtswirklichkeit der mittelalterlichen Lex Mercatoria", *Zeitschrift der Savigny Stiftung, Germanistische Abteilung*, 118:1 (2001), 168–184.

10 Maura Fortunati, "La *lex mercatoria* nella tradizione e nella recente ricostruzione storico giuridica", *Sociologia del diritto*, 2:3 (2005), 29–41, at 33.

11 The "Little Red Book of Bristol" is a collection of texts that were considered useful for the merchants of Bristol (such as statutes, privileges, and oaths) mostly dated between 1344 and 1410. It also includes mercantile laws such as the *Roles d'Olerón* (the eleventh century) and the short treatise *Incipit lex mercatoria*: D.R. Coquillette, "Incipit lex mercatoria, que, quando, ubi, inter quos et de quibus sit: el tratado de Lex Mercatoria en el Little Red Book de Bristol (ca. 1280 a.D.)", in *Del ius mercatorum al derecho mercantil, III Seminario de historia del derecho privado: Sitges, 28–30 de mayo 1992*, ed. by Carlos Petit (Madrid: Marcial Pons, Ediciones Jurídicas y Sociales, 1997), 145–228, at 145–146.

12 Paul R. Teetor, "England's Earliest Treatise on the Law Merchant: The Essay on *Lex Mercatoria* from *The Little Red Book of Bristol* (circa 1280 AD)", *The American Journal of Legal History*, 6:2 (Apr. 1962), 178–210, at 180.

13 Malynes, *Lex Mercatoria*, 1622, *To the covrteovs rerder*.

14 R.H. Helmholz, *The Ius Commune in England: Four Studies* (Oxford: Oxford University Press, 2001), 3. See also: Paul Vinogradoff, *Roman Law in Medieval Europe* (Union: The Lawbook Exchange, 2001, first ed. 1909), 104–105.

merchant",[15] one of the most famous treatises written for the use of merchants in early modern Europe. As both commercial law and England's common law were "at the borders" of the *ius commune*, Malynes's treatise provides a unique insight into two "borderlands".

About Gerard Malynes and His Works

Malynes's father was a mint master who immigrated in the 1550s (probably from Lancashire) to the Low Countries.[16] Gerard was born in Antwerp, although we do not know exactly when.[17] By 1585, he was in London, where he remained for the rest of his life, pursuing his (often disastrous) commercial adventures, writing his treatises, and working as a consultant for commercial matters for Queen Elizabeth I and King James I.[18] He maintained a strong relationship with his fatherland, being a member of the city's Dutch church, marrying Marie, the daughter of his Dutch business partner, Guilliam van Ameyden, and remaining registered in the list of foreign residents.[19] However, he was also strongly integrated in London, being very much engaged in the empowerment of England's monetary policy, working as an informer for the Crown, proposing a number of reforms, and writing treatises.

In 1586, he became Commissioner of Trade in the Low Countries,[20] but not long afterwards his personal economic problems began: "in the 1590s he became embroiled in a series of legal disputes which threatened to ruin him completely".[21] The most serious of these disputes seems to be that involving the Dutch merchant John Honger, who accused him and his father-in-law of having stolen a sum of money (£18,000) that he had entrusted to them as his factors in England. Although Malynes declared that, on the contrary, Honger owed him a huge amount of money, he still went to prison several times between 1590 and 1596. In 1600, thanks to his contacts in government (in particular

15 Perry Gauci, "Malynes [Malines, de Malines], Gerard [Garret, Gerald] (fl. 1586–1641), merchant and writer on economics", in *Oxford Dictionary of National Biography*, 23 September 2004, https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-17912

16 See, for example, Gauci, "Malynes". Raymond de Roover thought instead that he was a Dutch merchant who immigrated to England for religious or business reasons, probably belonging to the family van Mechelen, who invented those English ancestors in order to appear as much as possible a loyal subject to the Crown: Raymond de Roover, "Gerard de Malynes as an Economic Writer: From Scholasticism to Mercantilism", in *Business, Banking, and Economic Thought in Late Medieval and Early Modern Europe: Selected Studies of Raymond de Roover*, ed. by Julius Kirshner (Chicago: University of Chicago Press, 1974), 346–366, at 347–348.

17 Gauci, "Malynes".

18 Gialdroni, "Gerard Malynes", 45–46.

19 Gauci, "Malynes"; de Roover, "Gerard de Malynes", 347.

20 William Holdsworth, *A History of English Law*, vol. 5 (London: Methuen, 1924), 131.

21 Gauci, "Malynes". See also: Andrea Finkelstein, "Gerard Malynes and Edward Misselden: The Learned Library of a Seventeenth Century Merchant", *Book History*, 3 (2000), 1–20, at 3.

Sir Robert Cecil), he obtained royal protection "for special considerations", which was renewed in 1607. In 1609, he was appointed Commissioner on Mint Affairs, but his projects and business initiatives continued to go so badly that, in 1619, the Privy Council prohibited him from using the royal protection from 1607, and he had to go to debtor's prison again. There is no further record of him after 1641, when he submitted a last petition to the House of Commons. According to Perry Gauci, his decision to become a writer was in part due to his personal misfortunes.[22]

The works *Saint George for England, Allegorically Described* and *A Treatise on the Canker of England's Commonwealth* were published in 1601, and the treatise *England's View on the Unmasking of two Paradoxes* in 1603.[23] But his golden years came about two decades later. In the same year in which he published his treatise on the Law-Merchant (1622), he also published his most famous economic treatise, *The Maintenance of Free Trade*, which was a reply to Edward Misselden's *Free Trade, or the Means to Make Trade Florish* (1622). In 1623, he published *The Center of the Circle of Commerce*, which again was a reply to a work by Misselden published earlier that year: *The Circle of Commerce: Or the Balance of Trade*.

Lex Mercatoria was edited three times (1622, 1636, and 1686) if we consider the 1629 and 1656 versions to be simple reprints. Only the first two could have been published while Malynes was still alive. His first printer was Adam Islip, who was also responsible for the 1629 reprint and the second edition of 1636. In this edition, the bookseller, Nic(h)olas Bourn(e), was also written on the frontispiece. In 1656, the printer was William Hunt and the bookseller still Bourne. In 1686, four booksellers were specified but no printer. In 1667, Samuel Pepys still recommended this book as an excellent present for a young man that had to start a career as a merchant (in this case in the East Indies),[24] providing evidence for William Letwin's statement that it was "the most popular merchants' handbook of its time".[25]

During his long life, Malynes worked as a merchant, an interpreter, a writer, and a spy, but he never became a jurist. Nevertheless, one of his most influential works was devoted to legal issues, and although he focused on legal issues

22 Gauci, "Malynes".

23 Other works circulated only as manuscripts, such as "A Treatise of Tripartite Exchange" (1610). More information on Malynes's works can be found here: Lynn Muchmore, "Gerrard de Malynes and Mercantile Economics", *History of Political Economy*, 1:2 (1969), 336–358.

24 Sunday, 15 December 1667: "her son Francke being there, now upon the point of his going to the East Indys, I did give him "Lex Mercatoria", and my wife my old pair of tweezers, which are pretty, and my book an excellent one for him": https://www.pepysdiary.com/diary/1667/12/15/. This website makes available online the following edition: Samuel Pepys, *The Diary of Samuel Pepys*, transcribed by Mynors Bright, edited with additions by Henry B. Wheatley (London: Bell and Sons, 1893–1899), 8 vols.

25 William Letwin, *The Origins of Scientific Economics. English Economic Thought 1660–1776* (London: Routledge, 2003, first ed. 1963), 101.

peculiar to merchants, on several occasions he had to contend with the wider and international legal context in which merchants operated. He thus could not completely avoid the *ius commune*.

On the "Doctors and Learned of the Ciuile Law" and Their Doctrines

In his masterpiece *Consuetudo, vel, Lex Mercatoria: or, the Ancient Law-Merchant*, Malynes repeated over and over that the law-merchant was a universal and eternal customary law that had nothing to do with civil law (i.e., the *ius commune*). His mistrust and contempt for the "doctors and learned of the ciuile Law" is evident from the beginning of the treatise. He threw together, in no particular order,[26] Justinian, Roman jurists (e.g., Ulpian, Paulus, Papinian, Julianus, Pomponius, Celsus), glossators (Azo, Accursius), commentators (e.g., Bartolus, Baldus, and Jason of Mayno), humanists (e.g., Alciatus and Budeus), and some of the first commercial law writers (such as Benvenuto Stracca and Pedro de Santarém). They were all guilty of writing "many long discourses and volumes of bookes", which had nothing to do with the mechanisms of mercantile transactions, and of losing themselves in:

> quillets and distinctions ouer-curious and precise…, full of *Apicis* [sic] *iuris,* which themselues haue noted to bee subtilties, saying, *Apicis* [sic] *iuris sunt quae subtilitatem quandam respiciunt magis quam facti veritaetem*.[27]

He could rely on prestigious precedents: for example, by the second half of the fourteenth century, the famous commentator Baldus De Ubaldis had already noted that, when it came to mercantile affairs, it was necessary to keep to the truth of the facts and customs of merchants, putting aside the *apices iuris*.[28] Malynes often repeated his critiques, for example, when discussing monopolies, accusing civilians of making the Latin word *monopolium* (which they borrowed from Greek) difficult to understand by giving it so many different

26 Malynes, *Lex Mercatoria*, 1622, Part I, Chap. I: "An induction to *Lex Mercatoria*, or the Law-Merchant, and the antiquitie thereof", 5: *Bartolus, Baldus, Iustinian, Vlpian, Paule the Iurisconsulse, Papinian, Benvenuto Straccha, Petrus Santerne, Ioannes Inder, Balduinus de Vbald, Rodericus Suarez, Iason, Angell, Andrias Tiraquell, Alciatus, Budeus, Alexander Perusius, Pomponius, Incolaus Boertius, Azo, Celsus, Rusinus, Mansilius, Sillimanus, Accursius, Franciscus Aretinus, Grisogonus, Lotharius, Iulianus.*

27 Ibid.

28 Baldus De Ubaldis, *Consilia*, vol. V, cons. 400, n. 10: *inter mercatores non convenit de iuris apicibus disputare, sed de mera veritate et consuetudine mercantie*; see also cons. 466, n. 4: *item in causis mercatorum, ubi de bona fide agitur, non congruit de iuris apicibus disputare*. Both *consilia* quoted in: Umberto Santarelli, *Mercanti e società tra mercanti*, 3rd ed. (Torino: Giappichelli, 1998), 58.

definitions.[29] He implied that the ambiguity of the term was a result of the stubbornness of the civil lawyers, whom he treated almost as a single entity throughout the treatise: there was no need to specify who said what and when, it being better to use "the ordinary name of Ciuilians in generall, without naming any particular Author, to auoid ambiguitie and vncertaintie".[30]

However, although he argued that their "determinations" could "giue but little satisfaction to instruct merchants"[31] and despite claiming to be the first to provide really useful information for those eager to thoroughly understand mercantile activities, he still added the civilians' opinions to his account of merchants' customs. The only explicit reason he provided was to "giue satisfaction to the learned and judicious",[32] but this is clearly unsatisfactory. We will return to this in the conclusion.

Continuing his critique of the civil lawyers, he stated that: "They doe more regard certaine subtilties than the trueth of the fact or matter".[33] In particular, as we already underlined, they focused a lot on definitions, which were completely useless to Malynes's aims,[34] or, at least, this is what he claimed. They asked, for example,[35] what a merchant was and what "merchandising" (*mercatura*) was; whether someone who had bought and sold something just once should be considered a merchant; whether "merchandising" and "negotiating" were the same thing; whether a usurer could be considered a merchant; whether retail sales should be considered merchandising; whether clergymen and gentlemen who bought and sold should be considered merchants; in what cases a merchant could become a usurer; whether horse-sellers should be considered merchants; whether a "shop-keeper trading beyond the seas and at home" was a merchant; and whether a young man dwelling with a merchant should also be considered a merchant. And the list of questions went on: Could a merchant trade and perform promises with "Turkes, Heathens, Barbarians, and Infidels"?; Could a merchant lie?; Was education a requisite for becoming a merchant?; Could a merchant deal with prohibited commodities?[36]

As mentioned above, even though he judged those questions "unnecessarie", he reported what seemed to him to be the civilians' opinions on many issues, starting from their basic definitions. A merchant, for example, was someone who continually dealt in buying and selling commodities (also by

29 Malynes, *Lex Mercatoria*, 1622, Part I, Chap. XVLL: "Of Associations, Monopolies, Engrossings, and Forestallings, 213.
30 Malynes, *Lex Mercatoria*, 1622, Part I, Chap. I, 8.
31 Ibid., 6.
32 Ibid., 8.
33 Ibid., 5.
34 Ibid.: "And other the like questions which I hold to be vnnecessarie to trouble Merchants braines withal".
35 We have not reported the complete list of Malynes questions and have not respected the exact order of the questions: ibid., 5–6.
36 Ibid., 5–6.

way of permutation), both at home and abroad, and should be honest and trustworthy. However, other categories were excluded from being merchants:

> Clergie men, Noblemen, Gentlemen, Souldiors, Counsellors at the laws both Ecclesiasticall and Temporall, publicke officers and magistrates, franticke persons and mad men, youthes vnder yeares, orphanes, lunatickes and fooles, all these are exempted to be merchants: But sonnes and seruants may deale in merchandise with their fathers and masters.[37]

Furthermore, the civilians also specified that those who went bankrupt, gave up their commercial activities, or were prohibited from trading because of offenses they had committed would cease to be a merchant.

After having reported what a merchant was, Malynes referred to Plato and Cicero in order to define "merchandise". In general, his treatise is full of references to philosophers and writers from antiquity.[38]

> *Plato* saieth, That merchandise is two fold, namely, *ad victum & vestitum*, of things for the backe and for the bellie, as belonging to the bodie of man; and of things concerning the mind of man, as learning of musicke, and other arts bought for money, and sold againe to others for money; and this distinction is in regard of man, but farre from that matter of trafficke and commerce which is comprehended vnder Commutatiue iustice, whereof *Cicero* speaketh.[39]

He added that the civilians argued that merchandise is made up of movable things, with the exception of holy things, prohibited wares, and weapons for enemies and infidels. However, this was not the information that a merchant really needed. There was a gap in the literature on merchants and merchandise and he would fill it. He thus made a list of twelve things that a merchant should *really* know[40]:

1. Arithmetic (including the correct computation of time and the "mystery" of numbers);
2. weights and measures;
3. geometry, cosmography, and mathematic;

37 Ibid., 6.

38 For example, Cicero is quoted eleven times, Aristotle ten, Pliny six, Plato five, Seneca four, Pythagoras and the Pythagoreans three, Plutarch two and Virgil one. The erudition shown by Malynes in his works was analyzed here: Finkelstein, "Gerard Malynes", 5–8.

39 Malynes, *Lex Mercatoria*, 1622, Part I, Chap. I, 6. Plato, *Sophist;* see, for example, George Grote, *Plato, and Other Companions of Sokrates*, vol. 2 (London: John Murray, 1865), 404. When quoting Cicero, Malynes probably refers to *De Inventione*, 2.160.

40 Malynes, *Lex Mercatoria*, 1622, Part I, Chap. I, 6–7.

4. the "three Essential parts of traffick": "Commodities, Money, and Exchange for money by Billes of exchange";
5. the characteristics of the principal commodities of all countries;
6. the customs used for buying and selling;
7. the delivering of money at interest "or vpon Botomary, or vpon liues, annuities, or pensions in nature of rent, &c.";
8. the sea-laws;
9. the tolls and "all kinds of impositions to be paid for the import and export of commodities";
10. "insurances";
11. accounting; and
12. the Rules to be Applied in Cases of Dispute between Merchants.

Although civil law did not explicitly appear in this list, the civilians' opinions were often considered relevant, for example, when it came to analyzing commodities, promises, usury, and disputes resolution.

About Commodities

The opinion of the "Doctors of the Ciuile Law" was mentioned to describe the different kinds of commodities typical of several countries. Without making any direct reference to a specific author, Malynes clearly quoted Pomponius when he proposed the distinction between things that are "contained of one spirit" (*Quod continetur vno spiritu*), like a man or a stone; things that are made of several things joined together (*Quod ex pluribus inter se, coherentibus constat*), like a building or a ship; and things that are made up of several things that are distant from one another (*Quod ex distantibus constat*), like a people or a legion.[41] But he considered this distinction to be incomplete and of no particular use to merchants.

However, when it came to bartering, Malynes referred to the opinion of the civilians again. He attributed to them the definition of permutation, and he pointed out that they also called it a permutation in cases in which there was a scarcity of gold and silver and, as a result, the value of the commodities exceeded the money paid for them: "they do call that a permutation, and denie the same to be an emption by their distinctions".[42] He again referenced their opinions in relation to buying and selling.[43] Evidently this issue was (and

41 D. 41.3.30 (Pomponius *libro 30 ad Sabinum*) pr.: *tria autem genera sunt corporum, unum, quod continetur uno spiritu et Graece henomènon vocatur, ut homo tignum lapis et similia: alterum, quod ex contingentibus, hoc est pluribus inter se cohaerentibus constat, quod synemmènon vocatur, ut aedificium navis armarium: tertium, quod ex distantibus constat, ut corpora plura non soluta, sed uni nomini subiecta, veluti populus legio grex.*

42 Malynes, *Lex Mercatoria*, 1622, Part I, Chap. VIII: "Of Commutation or Bartring of Commodities", 83.

43 Ibid., Chap. IX: "Of ordinarie buyings and sellings of Commodities".

is) of particular importance for commerce, and so Malynes took it seriously. Among the eleven necessary conditions he listed, there were: consent; power to buy and sell; honesty; lawfulness; irrevocability; and the goal of buying in order to resell.[44]

As in many other cases, morality (which often overlapped with the concepts of divine law and natural law) was absolutely central for Malynes.[45] For example, a sale was unjust in cases in which the buyer was not an expert in the commodities, in cases in which they were in need or were obliged to buy, and, it seems, in cases in which they were persuaded to buy at a higher price than the merchandise was worth, if this is the correct interpretation of the following sentence: "that persuasiue reasons be ommitted, which cause the partie to buy deerer".[46] And it is on this last issue that the civilians were again referred to: according to them, by common estimation it was unjust to sell something for more than it was worth. Or better, they stated that there were two just options, either to buy at the right price or to buy at a very cheap price (bargain), but, in the latter case, the commodities had to be sold in an open market or a shop; thus, we could say, in broad daylight. Furthermore, the civilians argued that the seller could not increase the price but could decrease it if the buyer satisfied him sooner.[47]

About Promises

When writing about the efficacy of a *nudum pactum*, i.e., an agreement made without consideration, which was therefore unenforceable, Malynes called the civilians into play again. Bare covenants were not binding, but there were exceptions: *Nudae pactio obligationem non parit, exceptionem parit*.[48] In the case of suretyships, for example, a merchant could guarantee the obligation of another merchant "without quillets or titles of the law, to auoid interruption of trafficke".[49] This was true to such an extent that a "merchant may also be come in the nature of a Suretie vnawares, or vnknown vnto him"[50] as

44 Ibid., 92.
45 Finkelstein, "Gerard Malynes", 6.
46 Malynes, *Lex Mercatoria*, 1622, Part I, Chap. IX, 92.
47 Ibid.: "The Ciuilians … do admit that a man may sell deerer vnto an expert man, than vnto a simple man; and to sell deerer than the thing is worth by common estimation, is adiudged by them to be alwaies vniust: as also to vse reasons and inducements to sell wares the deerer, neither is the seller to demand or expect any thing aboue the price agreed vpon. And intreating hereof, they make large discourses, which I do admit to handle for the reasons aforesaid".
48 Malynes is quoting the Digest again, this time Ulpian: D.2.14.7.4: *nuda pactio obligationem non parit, sed parit exceptionem*.
49 Malynes, *Lex Mercatoria*, 1622, Part I, Chap. X: "Of Suretiship and Merchants Promises", 93.
50 Ibid., 94.

happened to a friend of his at the famous Frankfurt fair.[51] Malynes's account paints a very interesting picture of merchant activities abroad.

The story goes like this: Malynes's friend went to a merchant's warehouse to do some business and there met another merchant whom he knew, who was negotiating to buy a parcel of silk from the owner of the warehouse. As the owner did not know the buyer, he asked Malynes's friend "whether he were a good man and of credit, and he answered he was".[52] So the bargain was concluded, but, instead of paying cash, the buyer presented a "bill obligatorie" (a promissory note) to be paid on the occasion of the next fair. However, the buyer did not show up and Malynes's friend was asked to pay for him, even though he did not remember acting as a guarantor. He replied, in his defense, that no claim could rise from a bare covenant: *nudum pactum ex quo non oritur actio*. To solve the dispute, other merchants' opinions were asked, but they differed so drastically that, in the end, they decided that "the Ciuile Law was to determine the same".[53] According to what Malynes calls the "title *de mandato consilij*" of the said (civil) law, his friend had to pay on the spot. In theory, he then became the payee, although in practice he did not recover anything because the fraudulent merchant became insolvent. The moral of this story, according to Malynes, was that his friend should have said something like: "He is taken or reputed to be a good man of credit, or, I take him to be so". This way, he would have been "cleered by the law, and the custome of merchants".[54] However, another question remains open. Where can we find the title *De mandato consilij*? If it were a title belonging to Justinian's *Corpus Iuris Civilis* it would be a very interesting case of *ius commune* playing a resolutive role in a merchants' dispute. But this is not the case. The Digest and the Institutions make reference to a particular kind of mandate (*mandatum tua gratia*) made in the sole interest of the agent, only to state that it has no binding force.[55] This is exactly the opposite of what happened at the Frankfurt fair. On the other hand, we can find this kind of mandate in the Statutes of Lübeck, which was the law adopted in the towns belonging to the Hansa and which worked as a kind of mercantile common law in northern Germany.[56]

51 Michael Rothmann, *Die Frankfurter Messen im Mittelalter*, Frankfurter Historische Abhandlungen, 40 (Stuttgart: Steiner, 1998).

52 Malynes, *Lex Mercatoria*, 1622, Part I, Chap. X, 94.

53 Ibid.

54 Ibid.

55 The fragment to be found in the Digest is taken from Gaius's Institutions: D.17.1.2.6. The passage of Justianian's *Institutiones* is almost identical: Inst. 3.26.6. See Gialdroni, *Gerard Malynes*, 2009, 56–57.

56 Lib. III, Tit. X, Art. I des Lübischen Rechts: *De Mandato Consilii. Vom Befehl, welcher Rechtsweise geschieht: Wil jemand einem Fremden sein Gut nicht verkauffen, und ein ander steht dabey und sagt: Ihr möget es ihm wol vertrauen, die Bezahlung wird euch wol: Wird der Verkäuffer von dem Käuffer nicht bezahlt, so muß der derjenige zahlen, welcher den Frembden loben that, dadurch der Verkäuffer verühret worde*. More details, especially about the *mandatum tua gratia*, can be found in Gialdroni "Gerard Malynes", 56. On the use of the Lübeck law in the

This story tells us at least three things: that Malynes's "civilians" could apparently use a municipal (written) law rather that the *Corpus Iuris Civilis* to solve a dispute; that a German law referring to mercantile transactions was unknown in England (therefore denying that universality of mercantile customs that Malynes so enthusiastically sustained); and that ultimately the law-merchant was not so informal, for if only his friend had used the right words, if only he had said "I take him" to be a man of credit, he would have been safe.

About Usury

Malynes, who was clearly concerned about moral issues, was particularly troubled by usury, and he devoted four chapters of the second part of his treatise to the matter.[57] Here he really had the opportunity to demonstrate his erudition.[58] He started with the Bible[59] and with an etymological analysis of the Hebrew word *Neshech*. Then came a list of saints and their opinions about usury: Jerome ("There is no difference betwixt Vsurie, Fraud, and violent Robbing"); Augustine ("An Vsurer is he said to be who doth demand more in money, or any other thing else, than he hath deliuered"); Ambrose ("If any man take Vsurie he doth commit extortion, rapin and pillage, and shall not liue the life"); and Bernard ("the Vsuror is a theefe in law, because the Ciuile Law telleth him before hand what it is that he must rob from others, as who should say, such Lawes as permit Vsurors are lawfull theeueries").[60]

After the Bible and the Church fathers, came canon[61] and civil law. With reference to the last, he quoted the opinion of the greatest commentators of the fourteenth century and of one of the leading canon law scholars of the fifteenth century. Malynes claimed that according to Baldus, "Vsurie is a gainefull piracie, contrarie to nature, vpon the loane of any thing that consisteth vpon Number, Weight, and Measure", while Bartolus said that "all Vsurie is

whole area of the Hansa, see Albrecht Cordes, *Spätmittelalterlicher Gesellschaftshandel im Hanseraum* (Köln: Böhlau, 1998); Albrecht Cordes, *Der Bardewiksche Codex des Lübischen Rechts von 1294, Band 3. Rechtshistorischer Kommentar*, ed. by Natalija Ganina, Albrecht Cordes, Jan Lokers (Oppenheim am Rehin: Nünnerich-Asmus Verlag & Media, 2022), 9.

57 Malynes, *Lex Mercatoria*, 1622, Part II, Chap. X: "Of the Lawes and Prohibitions against Vsurie"; Chap. XI: "Of vsurie politicke, and moneys deliuered at interest"; Chap. XII: "Of intollerable Vsurie, and Lombards"; Chap. XV: "Of vsurious Contracts".

58 Finkelstein, "Gerard Malynes", 5.

59 Exodus 22:25 and Leviticus 25:35.

60 Malynes, *Lex Mercatoria*, 1622, Part II, Chap. X, 325.

61 "Decretals and Clementines, made by diuers Popes, are directly against Vsurie. *Alexander* the Pope doth straightly forbid all Vsurie, not onely vnto the Clergie, but also vnto the Layitie. In the booke *Sextus Decretalium, Gregorie* the tenth Bishop of Rome of that name, saieth, We (being desirous to stop the gulfe or whirlepooles of Vsurie committed, which doth deuoure soules, and vtterly wasteth wealth) do command vpon the threatnings of Gods curse, that the constitution of the latter Concile set forth against Vsurors be without any violation at all, fully & wholly obserued: and therupon a prohibition is made, That no Corporation, Colledge, or Vniuersitie shall let any house or dwelling place to any stranger Vsuror": Ibid., 326.

vtterly forbidden, and offensiue to God and man". This opinion was also confirmed by "Panormitane", i.e. Nicolò de' Tudeschi.

At this point Malynes went back in time, reporting the opinion of Greek philosophers (Plato and Aristotle) and legislators (Lycurgus and Solon), as well as of the "Romans": from the Twelve Tables to authors, such as Tacitus, Cato, and Cicero, to emperors, such as Antoninus Pius, Alexander Severus, and Vespasian. This digression into antiquity is suddenly interrupted by a reference to Emperor Charles V, who:

> at an assembly at Augusta in Germanie, did conclude with the assent of the whole Empire, That no manner of contract that had any fellowship with Vsurie should be allowed; but rather that all Vsurie should be auoided for euer, and be neuer more vsed, and if any were found to haue made any such contract, the same man to forfeit to the Magistrate or ordinarie Iudge, the fourth part of his principall summe.[62]

The conclusion was that usury, meaning the lending of money at *any* interest, was:

> condemned and forbidden by the holy Scripture, the Imperiall Lawes, Ciuile and Canon Lawes, ancient Fathers, Decretals, learned Philosophers, eloquent Orators, Historiographers, and Law-giuers.[63]

However, in the following chapter, Malynes had to admit that "the practise of it is most vsuall in many Kingdomes and Common-weales, and the Lawes are also made accordingly", in particular English law admitted a rate interest of 10%, even though:

> the preamble of the said Statute Law in the narratiue part saith, That whereas Vsurie is against all Diuine and Humane Lawes, yet tenne vpon the hundreth is tollerated to be taken for the yeare, which by way of forfeiture in the nature of a punishment may be sued for by the Law: but if there bee neuer so little taken aboue the said rate of tenne vpon the hundreth for the yeare, the principle is lost and treble damages.[64]

He continued his analysis of the problem and his list of examples (from Justinian Law to the national laws of countries such as the Republic of Venice, the Low Countries, Poland, Lithuania, and Prussia), but it is important to note that Malynes also included Thomas Wilson within the category of the

62 Ibid. 327.
63 Ibid.
64 Malynes, *Lex Mercatoria*, 1622, Part II, Chap. XI, 329.

"civilians".[65] Wilson was a politician and a statesman who also served as a diplomat in Portugal and in the Low Countries during the reign of Queen Elizabeth I, as well as a religious reformer, a humanist educated at Eton College and at King's College (Cambridge), the translator of Demostenes' orations from Greek into English, an economist, and a civil lawyer. After a period spent in Padua studying Greek (1555) and one year of imprisonment for heresy in Rome (1558–59), he went to Ferrara "where he stayed long enough to obtain from the university a degree in civil law".[66] He also published "A Discourse upon Usury by way of Dialogue and Orations" (1572),[67] which was considered "the standard anti-interest tract of his days"[68] and was based on the discourse that he gave on the matter to the House of Commons on 19 April 1571.[69] Following Wilson, Malynes excluded from the category of usury three Roman law contracts: *mutuum* ("where my goods are made thine"); *locatio* ("where a thing is put forth or letten to hire, the propertie still remaining in the owner"); and *commodatum* ("to be a letting or lending without alteration of the propertie also, but free without any gaine at all").[70] In those cases, he said, there was no lending and where there was no lending there was no usury. Wilson was a layman writing on an issue considered to be pivotal by theologians and canon lawyers. His awareness of the various facets of the problem of usury was evident in his dialogue involving a merchant, a preacher, and a (civil) lawyer.[71] Wilson's writing style is incredibly redundant and almost nonsensical to the modern reader. Malynes took what he thought was essential from the chapter devoted to the "Ciuilians or Doctours oration".[72] Not just one definition but many, even though the first one that Wilson provided summarized them all: "Usurye is whatsoeuer is taken for lone aboue the principall".[73] However, Malynes preferred to provide concrete examples, such as the following:

65 Albert J. Schmidt, "Thomas Wilson, Tudor Scholar-Statesman", *The Huntington Library Quarterly*, 3 (1957), 205, 2018, at 205–209.

66 Ibid., 208.

67 See, for example, the 1925 edition: Thomas Wilson, *A Discourse upon Usury (1572)*, edited with a historical introduction by R.H. Tawney (London: Bell, 1925). The text is now available online: https://quod.lib.umich.edu/cgi/t/text/text-idx?c=eebo;idno=A15541.0001.001.

68 Finkelstein, "Gerard Malynes", 5.

69 Russel H. Wagner, "Thomas Wilson's Speech against Usury", *Quarterly Journal of Speech*, 38:1 (1952), 13–22, at 13.

70 Malynes, *Lex Mercatoria*, 1622, Part II, Chap. XV, 349.

71 The seventh paragraph of Wilson's "Discourse" is entitled: "A Communicacion or Speache betvvene the riche worldly merchant, the godly & zealous preacher, the temporal and ciuile lawyers, towchynge vsurie, or the lone of money for gayne".

72 This is the title of the twelfth paragraph of Wilson's "Discourse".

73 Wilson, "A Discourse", 84.

> I doe sell commodities vnto a man for six moneths at a reasonable price, and afterwards he payeth me in readie money, deducting the interest for the time after the rate of ten in the hundreth, this is Vsurie.
>
> I doe deliuer old Wheat to receiue new; if I doe deliuer the same for gaine, and assure my selfe of benefit, I am an Vsurer.I doe feare the fall of money, and therefore doe deliuer my money to another man, to haue as much at sixe moneths after, according as the money was then currant when I paied it; this is Vsurie.[74]

In conclusion, although he described the civilians' opinions, including those of Wilson, as "quillets and distinctions ouer-curious and precise",[75] he seemed obliged to take them into account.

On Dispute Resolution

Given that a reference to the "ciuilians" or the "ciuil law" is present in almost all chapters in which the customs of merchants were described, this was also the case when it came to controversies. In Chapter XIV, Part III,[76] Malynes listed the way in which merchants' disputes could be solved. Seafaring cases should be determined by the Admiralty Court, while other merchants' disputes could be resolved in three ways: by means of arbitrators chosen by the parties ("to end their differences with breuitie and expedition and auoid suits in law which vnto Mechants are inconuenient"); by merchants courts[77]; by means of "the ciuile or imperiall law" or by the laws of the different kingdoms, and therefore, one might infer, by means of ordinary tribunals.[78] Nevertheless, he argued that the law-merchant was "predominant and ouerruling for all nations do frame and direct their iudgement thereafter".[79] There were two main reasons for this widespread observance of the law-merchant: its antiquity and its rightfulness. And to support the latter point, he quoted the "three generall precepts of all

74 Malynes, *Lex Mercatoria*, 1622, Part II, Chap. XV, 350–351.

75 Ibid., Part I, Chap. I, 5.

76 Ibid., Part III, Chap. XIV: "Of the determination of Sea-faring Causes". Notwithstanding the title of the chapter, Malynes listed here how all merchants' disputes could be solved.

77 "The Ciuilians hauing considered of this Office of Prior and Consulls established in many places of France, Italie, and Germanie": Malynes, *Lex Mercatoria*, 1622, Part III, Chap. XVI: "Of the Merchants Courts, or office of Prior and Consuls", 451. And also: "Hereupon *Benvenuto Straccha* the Ciuilian maketh a treatise, *Quomodo procedendum sit in causis Mercatorum*, of the manner to proceed in Merchants affaires, wherein are many vniuersall things propounded which are easier, but particular things are commonly more truer, by his owne obseruation; and he concludeth that the decrees of Merchants need no other confirmation or approbation": Ibid., 452.

78 Ibid. Part III, Chap. XIV, 443.

79 Ibid., 443–444.

lawes", which he attributed to "Caius" and to "Tribonianus" rather than to Ulpian: *Honeste viuere, Alterum non laedere, & Ius suum cuique tribuere*.[80]

When describing the "imperiall lawes" and the "fundamentall Lawes of kingdoms and common-wales", Malynes suddenly erupts into an apologia for laws, displaying an unexpected faith in justice, if not in humanity:

> All lawes are tending in substance to the vpholding of trueth, maintaining of justice, to defend the feeble from the mightie, or the suppressing of iniuries, and to roote out the wicked from amongst the good, prescribing how to liue honestly, to hurt no man wilfully, and to render euerie man his due carefully, furthering what is right, and prohibiting what is wrong; summarily to be vnderstood according to the saying of our sauiour Christ What you will haue men to do vnto you, do the same vnto them.[81]

Only at this point, he specifies that there are three kinds of laws: the law of nature; the law of nations; and the civil law, "which is an abridgement, derogating many illicentious customes which grew by peruersnesse and corruptnesse of nature, and is termed Peculiar, vsed by one kind of people, called the Imperiall Law".[82] He then describes the laws and the rules applied to conflict resolution in England, Aragon, France, and Germany with the aim to demonstrate only that national laws were variable and that only the customary law-merchant was "constant and permanent".[83]

To sum up, as trade was "the sole peaceable instrument to inrich kingdomes and common-weales, by the meanes of *Equalitie* and *Equitie*", it was the best example of commutative justice. And, because of its stability, the best way to perform trade was by means of the law-merchant.[84]

Conclusion

In the 501 pages of Malynes's masterpiece, the word "ciuil(l)ian(s)" is used forty-six times in total, the words "ciuile lawyer(s)" two times, and the expression "ciuile law(es)" forty times. These numbers seem to reveal something more than simply giving "satisfaction to the learned and judicious",[85] as Malynes claimed at the beginning of his treatise. We will propose three theories that might explain those numbers.

80 D. 1.1.10pr.

81 Malynes, *Lex Mercatoria*, 1622, Part III, Chap. XVII: "Of the Lawes of seuerall Countries, whereby the Differences and Controuersies of Merchants are determined", 461.

82 Ibid., 461.

83 Malynes, *Lex Mercatoria*, 1622, *To the most high and mightie monarch Iames.*

84 Ibid.

85 Malynes, *Lex Mercatoria*, 1622, 8.

According to the first theory, which is the most *formal*, even though his experience in mercantile affairs was pivotal for his audience, Malynes had to make reference to the civilians and their doctrines to gain authority. This might be the reason why we can find citations of ancient philosophers and jurists also in other works aimed at a readership of merchants, such as the book on the "art of trade" written by the Ragusan merchant Benedetto Cotrugli in 1458 (but first published in 1573 under the title *Della mercatura e del mercante perfetto*), where we can find many citations of ancient philosophers (Aristotle and Cicero above all), the Bible, and both civil and canon law.[86] Ugo Tucci, in editing Cotrugli's treatise in 1990, noted that there is only an apparent plurality of references, as much of the material turns out to be "second-hand", due to the fact that in that period there was limited access to a wide range of texts and, in any case, it was common to quote them through the filter of systematic collections of *exempla* and other sacred and secular repertories.[87] The same could be supposed for Malynes about whose education we know nothing.[88] It has been assumed that as a child he attended the school of the Dutch church in London, where he would have been taught Latin, reading, writing, arithmetic, and accounting both in Dutch and in English, but after that he was probably self-taught.[89]

There is thus an important difference between Cotrugli and Malynes. The former studied law in Bologna before becoming a merchant in Venice, Florence, Barcelona, Aigues-Mortes, and finally Naples, where he was admitted to the royal court led by the Aragonese household and where he frequented a humanistic entourage.[90] Even if he interrupted his studies to devote himself to commerce,[91] he had a different background to Malynes and made explicit his aim of giving some order to such an important and useful subject as

86 Benedetto Cotrugli, *Della mercatura et del mercante perfetto*, Vinegia, all'Elefanta, 1573; see also the modern editions: Benedetto Cotrugli, *Il libro dell'arte di mercatura*, ed. by Ugo Tucci (Venezia: Arsenale, 1990); Benedetto Cotrugli, *Libro de l'arte de la mercatura*, ed. by Vera Ribaudo (Venezia: Edizioni Ca' Foscari, 2016), available online. As part of the same project that led to this online critical edition, the first English translation of the treatise was also created: Benedetto Cotrugli, *The Book of the Art of Trade*, ed. by Carlo Carraro and Giovanni Favero (Cham: Palgrave Macmillan, 2017).

87 Cotrugli, *Il libro*, ed. by Tucci, 1990, 52.

88 Andrea Finkelstein claims that Malynes declared that he used the *Noctes Atticae*, therefore admitting to using secondhand citations: Finkelstein, "Gerard Malynes", 6.

89 Ibid., 5.

90 Tiziano Zanato, *Premessa*, in Cotrugli, *Libro*, ed. by Ribaudo (2016), 1–12.

91 *diremo de l'arte di mercatura quello che per cotidiano exercitio mediante l'ingegno intrinseco sapemo e sentimo, possa che li fati e la fortuna permiseno che in sul più bello del nostro philosophare io fui raputo da lo studio e rimpiantato ne la mercatura. La quale per necesità mi convéne seguire, et abandonare l'amenità e la armonia dolcie de lo studi, a lo quale ero totalmente dedito*: Cotrugli, *Libro*, ed. by Ribaudo, 2016, *Prefatio*, 38.

the art of trade, which not only was in the hands of ignorant and undisciplined people, but was also neglected by the learned (or wise).[92]

The second theory is more *political*. It has been claimed that Malynes's aim in writing his treatise on the law-merchant was to demonstrate the existence of a body of customary, transnational commercial laws at a moment in which the functions of the Court of Admiralty were under threat from the common law courts. As Maura Fortunati has pointed out, in an attempt to persuade the common law judges to apply the rules that were in use at the Court of Admiralty, English merchants argued for the existence of a legal system that had been and remained in force in all countries and at all times, regardless of the wishes of individual national legislators.[93] This powerful court had become unpopular due to the struggle between the Stuarts and Parliament at that time, as well as due to the closeness of the Admiralty to the sovereign (a closeness that can be traced, among other things, to the fact that the proceeds deriving from fines, from the sale of goods that fell into the sea as a result of shipwrecks, and from taxes imposed on merchants had to be divided between the Lord High Admiral and the sovereign themselves).

England's exceptional commercial and maritime expansion during Queen Elizabeth I's reign had exaggerated the importance of the Admiralty, prompting a reaction from the common lawyers led by Sir Edward Coke. The reasons for this battle (finally won by the common lawyers at the end of the seventeenth century) are complex, and they are probably not limited to the desire of the common law courts to gain more economic power or the desire of Parliament to oppose a court so close to the sovereign, but should perhaps also be traced back to the suspicion the common lawyers had of a court steeped so heavily in Romanist principles.[94] If this theory is correct, then Malynes's many references to the civilians acquires another meaning: although he did not like them, in comparison to the common lawyers they were the lesser of two evils.

The final theory is, in a certain sense, the most *juridical*. It could be argued that even though Malynes was a merchant (and not a lawyer) and even though he was publishing his treatise in England (rather than on the continent) he could not ignore the opinion of the civilians. It could be that this continuous reference to civil law simply reveals what Francesco Galgano stated in his book devoted to the *lex mercatoria*: that commercial law is not, and has never been,

92 *dolsemi che questa arte tanto necesaria et tanto bisognosa et utille sia diventa in mano de li indocti et indisciplinati homini, et governata senza modo, senza ordene, con abusione et senza legie, et da li savii posposta et pretermisa*; Ibid.

93 Fortunati, "La lex mercatoria", 35. A similar interpretation can be found in: Karl Otto Scherner, "Lex mercatoria: Realität, Geschchtsbild oder Vision?", *Zeitschrift der Savigny Stiftung, Germanistische Abteilung*, 118 (2001), 148–167, at 160–161; Cordes, "Auf der Suche", 175–176.

94 "The Admiralty was watched by the common-law judges with that jealousy and suspicion which they bestowed on all jurisdictions tainted with Romanism": John H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths LexisNexis, 2002), 123.

the law of commerce, as far as it does not regulate (and has never regulated) all mercantile transactions. In synthesis, contracts and obligations taken from civil law have always contributed to the regulation of commerce.[95]

According to Malynes, "the *Law-Merchant* hath alwaies beene found *semper eadem*, that is, constant and permanent without abrogation", while Defoe declared: "The Affairs of Merchants are accompanied with such variety of Circumstances …, that it has been found impracticable to make any Laws that could extend to all Cases". But although they had different opinions when defining the law to be applied to commercial transactions, they did have something in common: neither made any explicit reference to the *ius commune*. The latter was not something that merchants could acknowledge or even accept because it would have called into question the autonomy of merchants and of their law. However, the analysis of Malynes's treatise seems to reveal that even outside the borders of the *ius commune*, within the framework of commerce, Roman law, as transmitted through the medieval reflections on Justinian's *Corpus Iuris Civilis*, could not be avoided. Maybe the European *ius commune* (which included canon law, so important for some issues, such as in the case of usury) was the common legal background that allowed merchants to understand each other and that could not be ignored when it came to commercial transactions, which are, and have always been, transnational by definition.

95 Francesco Galgano, *Lex mercatoria* (Bologna: Il Mulino, 2001), 10. For a comprehensive list of the supporters and opponents of the idea of the autonomy of commercial law: Raffaele Teti, *Un diritto per gli imprenditori: Il diritto commerciale dalle codificazioni ottocentesche al Codice Civile del 1942* (Roma: Donzelli, 2018), 82–83.

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