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THE *CONSERVATION* IN LYON AND THE LONG TRADITION OF *COUTUME* AND *USAGE*[1]

1. INTRODUCTION

The French words *coutume* and *usage* have a long, difficult and important history in mercantile law. It is often questioned if there is enough reason to distinguish between both these words[2]. At first sight this question goes back to the heydays of French juridical doctrine in the late 19th and early 20th century[3]. In 1893 the Italian author Cesare Vivante gave a thorough analysis of the relation between *usage* and *contract*. He distinguishes between *usages législatifs* (customs with normative force), *usages interprétatifs* (customs with normative force since parties agreed on them), and *usages techniques* (mere practices without normativity)[4]. His work was translated into French and in 1898 Edmond-Eugène Thaller argued that the implied contract terms could be a form of a general or branch-related custom[5]. Beside the similarities, there are also some important differences between the ideas of Vivante and Thaller. François Gény attempts at

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[2] See, for example, in the French context: M. Pedamon, *Y a-t-il lieu de distinguer les usages et les coutumes en droit commercial,* "Revue trimestrielle de droit commercial" 1959, pp. 335-357. For the Belgian and Dutch context: D. De ruysscher, C.M. in 't Veld, *De gewoonte in het Nederlands en Belgisch Economisch Privaatrecht (19de-21ste eeuw),* "Tijdschrift voor Privaatrecht" 2017, issue 2-3, pp. 417-454. For the German context: Ph. Hellwege, *Handelsbrauch und Verkehrssitte,* "Archiv für civilistische Praxis" 2014, issue 6, pp. 853-887.

[3] F. Garnier, *De la coutume et des usages dans la doctrine commerciale française à la fin du XIXe siècle et au début du XXe siècle,* "Quaderni fiorentini per la storia del pensiero giuridico moderno" 2012, Vol. 41, issue 1, pp. 299-327; D. Deroussin, *La coutume dans la doctrine civiliste après l'exégese: un renouveau en trompe l'œil?*, (in:) F. Garnier, J. Vendrand-Royer (eds.), *Éditions la Mémoire du Droit,* Paris 2013, pp. 173-216.

[4] C. Vivante, *Traité de droit commercial* J. Escarra (transl.), Vol. I, Paris 1910, pp. 87-96.

[5] E.E. Thaller, *Traité élémentaire de droit commercial,* Paris 1898, pp. 42-43.

an influential overarching approach. For Gény *coutume* was the repeated behaviour of a certain group of merchants combined with "*un sentiment juridique*"[6]. Contract terms were not customs but *usages conventionnels,* which were only normative if the consensus of the will between parties could be proved.

Defining *coutume* and *usage* was not only a curious hobby of French legal theorists a century ago. On the contrary, in this contribution I start with stressing the importance of both terms for today's international private law and for the concept of a modern law merchant (paragraph 2). I will demonstrate that the difference between *coutume* and *usage* coincides with two strains of theorizing on mercantile law. This will also provide the theoretical framework for the second part of this contribution (paragraphs 3-4). In these paragraphs I would like to trace the legal history of *coutume* and *usage* back to early modern times. To do so, it is necessary to find the institutions and sources where we have to search for the meaning of *coutume* and *usage*.

On the one hand there exists already some literature on the French history of *coutume* and *usage* mainly based on broad-ranging juridical dictionaries and commentaries like the *Dictionnaire de droit et de pratique* (1789) of Claude-Joseph de Ferrière[7]. We can nevertheless not take for granted that merchants and juridical practitioners in each mercantile town had the same opinions as the writers of handbooks, dictionaries and commentaries[8]. On the other hand, we must therefore turn our attention towards the history of the locations where merchants argued about their customs on a daily basis. From this perspective, the most natural places to investigate are probably the mercantile courts established in several French cities. One of the oldest and most renowned mercantile courts was the *Tribunal de la Conservation* in Lyon, a city that was famous for its fairs and its silk trade. In this contribution I will draw some long lines through legal history and bring together the early modern history of *coutume* and *usage* and the institutional history of the *Conservation*.

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[6] F. Gény, *Méthode d'interprétation et sources en droit privé positif,* Paris 1899, pp. 320, 359.

[7] See for example: V. Simon, *L'inscription des usages commerciaux dans l'ordonnancement juridique moderne,* "Revue historique de droit français et étranger" 2016, p. 280 *et seqq*.; J. Moreau-David, *La coutume et l'usage en France de la rédaction officielle des coutumes au code civil: les avatars de la norme coutumière,* "Revue d'histoire des facultés de droit et de la science juridique" 1997, p. 125-157. Cf. C.-J. De Ferrière, *Dictionnaire de droit et de pratique*, Vol. 1-2, Paris 1769.

[8] Cf. the analysis of the merchants manuals in early modern Antwerp: D. De ruysscher, *How Normative Were Merchant Guidebooks? Of Customs, Practices and ... Good Advice (Antwerp, 16th century),* (in:) H. Pihlajamäki, A. Cordes, S. Dauchy, D. De ruysscher (eds.), *Understanding the Sources of Early Modern and Modern Commercial Law,* Dordrecht 2018, pp. 144-165.

2. COUTUME AND USAGE IN THE MODERN LAW MERCHANT

After the World War II, legal scholars and institutions started to work hard on the harmonization and unification of mercantile private law[9]. Several (draft) treaties and texts, especially on contract law, are addressing the position and meaning of *usage* (usage) and *coutume* (custom) in a mercantile context. In those texts two ways of thinking on customary law can be roughly recognized[10]. Some texts are prescribing that usages are only normative when they can be derived from the agreement between parties. Other texts declare usages normative even when contracting parties didn't have any knowledge of them.

The United Nations Convention on the International Sales of Goods (CISG), ratified by 85 states including both industrial nations and developing countries, is the most prominent text in the first category. This treaty regulates the sales of goods that are not bought for "personal, family or household use" (Art. 2 of the CISG). In principle the CISG applies to international sales contracts between parties in the states bound by the convention, unless the parties agreed on excluding CISG[11]. The CISG has been widely applied in international commercial transactions over the past 30 years and many decisions of courts and arbitral tribunals are available[12]. Art. 9, first paragraph, of CISG states that "parties are bound by any usage to which they have agreed and by any practices which they have established between themselves". Moreover, the second paragraph stipulates that "the parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely concerned". It follows from these formulations that usages are already existing practices with a certain duration, frequency and distribution in a group or category of business players. The practices have a much narrower scope and are related to a repeated course of dealings between the same contracting parties[13]. Usages do not apply between practices unless 1) they have been agreed between parties, 2) they are existing practices between parties, and 3) they are (or should be) known to parties and

[9] See on the harmonization of sales law for example: P. Huber, *Comparative Sales Law,* (in:) M. Reinmann, R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law,* Oxford 2008, pp. 937-967.

[10] P. Hellwege, *Understanding Usage in International Contract Law Harmonization,* "The American Journal of Comparative Law" 2018, pp. 127-174.

[11] See Art. 6 CISG. It is often claimed that in practice many parties made use of the possibility to exclude the CISG.

[12] P Huber, *Comparative Sales Law...,* p. 939.

[13] See on the concepts of usage and practice in CISG: L. Graffi, *Remarks on Trade Usages and Business Practices in International Sales Law,* "Journal of Law and Commerce" 2011, Vol. 29, issue 2, p. 275.

are regularly observed in comparable contracts in the relevant trade sector. Some authors argue for a normative understanding of usage in Art. 9, but a vast majority believe that Art. 9 is not concerned with the acknowledgement of legal norms or customary law, but rather with the determination of the content of the parties' agreement[14]. The underlying rationale of the usage is what parties could expect from each other. Therefore we can call the approach of the CISG to usages "contractual" or "subjective", although this subjectivity is nuanced by the fact that it is sometimes sufficient that parties only should have known the usages[15].

Especially newer texts, such as the UNIDROIT Principles of International Commercial Contract (PICC), the Draft Common Frame of Reference (DCFR), the Principles of European Contract Law (PECL) and the (withdrawn and therefore less important) proposal of Common European Sales Law (CESL), belong to the second category. These texts have no legislative force, but parties are allowed to declare them applicable to their contract. Sometimes the texts are also relevant when parties didn't made a choice for the specific text or when parties have referred to general commercial principles in their contract. They are also intended to serve as a model for the national legislators[16]. In all these texts we find references to usages, even four times in the PICC[17]. Out of these four, the reference in Art. 1.9 is the most fundamental. According to this article, usages are binding between parties if 1) parties agreed on them, 2) they are existing practice between parties, or 3) the usage is widely known, regularly used by other parties in the same branch and that their application is reasonable. In the European texts (DCFR and PECL) the requirements of familiarity with and regular use of the usage are combined into one: usages should be considered generally applicable to persons in the same situation[18]. The withdrawn CESL-proposal was in line with the DCFR and PECL, but dropped the requirement of reasonableness[19]. None of these texts requires parties to be aware of usages before they could be applied to their contract. On the contrary, they assume that usages are normative regardless of whether these usages can be derived from the consensus or the expectations of contracting parties[20].

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[14] P. Hellwege, *Understanding Usage...,* p. 131-140 (with further references).

[15] Cf. L. Graffi, *Remarks on Trade Usages*..., pp. 277-295. For Graffi the subjectiviness of the CISG is a question of evidence that differs from case to case. But when usages were found in the INCOTERMS, Uniform Custom and Practice for Documentary Credit and Letters of Confirmation he defends that parties must have had knowledge of the usages before they were applicable.

[16] See for a brief summary on the applicability the preamble of the UNIDROIT PICC.

[17] Art. 1.9; Art. 2.1.6, third paragraph; Art. 4.3 under f; Art. 5.1.2 under b PICC.

[18] Art. 1:105, second paragraph PECL; Art. II. 1:104, second paragraph DCFR.

[19] Art. 59 under d; Art. 67, second paragraph CESL.

[20] P. Hellwege, *Understanding Usage*..., pp. 139-142.

Both strains of thinking about usages in these quasi-legislative texts are reflecting different views of legal scholars on mercantile law and its history. In the 1960s jurists were facing new economic theories of free-trade, fast grow of international commerce and increasing international (legislative) cooperation. As a result of these developments they started speculating about a modern law merchant: a body of international trade law that was not based on state-law. Some of the theorists had quite romantic ideas on the law merchants, but others were more realistic[21]. According to the proponents of the romantic version merchants were organically developing an uniform, coherent and universal system of mercantile law without intervention of the states (in the Middle Ages as well as in modern times)[22]. The customary norms were understood as unwritten by nature. The aforementioned quasi-legislative texts of international contract law were only considered as a form of evidence of already existing customary rules. It was, naturally, this version of the law merchant that has been fiercely contested in literature, especially for the many flaws in its far-reaching historical claims[23]. Consequently, Clive M. Schmitthoff, one of the first who presented his views on this topic, became more cautious in his opinions soon. He argued that the modern law merchant was based on legislative texts of national and international agencies and that there didn't exist customary law outside these texts and outside contracts merchants themselves agreed on[24].

In other words, there seems to be a conceptual line from the development of the concept of *coutume* in the late 19th century, via the more romantic theorists of the modern *lex mercatoria* in the 1960s, 1970s and 1980s, to the DCFR, PECL and CESL. In their view customary law, understood as normative regardless of the agreements of business partners, was constitutive for major medieval, early modern, and recent developments in mercantile law. There is, however, also

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[21] Elcin distinguishes between a realistic and romantic version of the Old Law Merchant: M. Elcin, *Lex Mercatoria in International Arbitration Theory and Practice,* Florence 2012, pp. 12-22. See also: D. De ruysscher, *Conceptualizing International Trade Law (Lex Mercatoria): Malynes, Schmitthoff and Goldman Compared*, unpublished draft paper 2018.

[22] Representatives of the romantic law merchant are for example B. Goldman, *Frontières du droit et lex mercatoria,* "Archives de philosphie du droit" 1964, pp. 177-192; H.J. Berman, *Law and Revolution. The formation of the Western legal tradition,* Cambridge 1983; and B.L. Benson, *The Enterprise of Law. Justice Without the State,* Oakland 2011.

[23] Most prominently by Kadens: E. Kadens, *Order within Law, Variety within Custom: The Character of the Medieval Merchant Law*, "Chicago Journal of International Law" 2004, pp. 39-65; E. Kadens, *The Myth of the Customary Law Merchant*, "Texas Law Review" 2012, pp. 1153-1206; E. Kadens, *The Medieval Law Merchant: the Tyranny of a Construct*, "Journal of Legal Analysis" 2015, pp. 251-289. He, however, builds on older criticism.

[24] See for the articles of Schmitthoff: C.-J. Cheng (ed.), *Clive M. Schmitthoff's Select Essays on International Trade Law,* Dordrecht 1988. See also D. De ruysscher, *Conceptualizing International Trade Law*..., pp. 3-4.

a concurrent line from the *usages interprétatifs* of Vivante and the *usages conventionnels* of Gény to Schmitthoff and the CISG. They see customary law especially at work in the contracts of merchants. Proponents of both traditions have projected their opinions on an old (medieval, early modern) *lex mercatoria*. It is therefore not allowed to end our legal-historical analysis with the French doctrine of the late 19th and early 20th centuries. Is it possible to trace both traditions further back into history?

3. THE INSTITUTIONAL HISTORY OF THE CONSERVATION IN LYON

Proponents of the theory on the old law merchant have claimed that the annual fairs and the specialized mercantile courts were the *loci classici* of *usage* and *coutume*[25]. Annual fairs were the main hubs in the system of medieval trade. It was at those fairs that international merchants met each other. After the decline of the annual fairs in Champagne and Brie, a system of fairs was built in Geneva and Lyon in the late Middle Ages. The geographical location of the city and fairs of Geneva and Lyon was perfect for connecting the trade between transalpine Europe and the Italian peninsula. These fairs were an attractive instrument for economic policy and public powers sought to exert control over it. For this reason, the privileges of the fairs in Lyon were extended between 1419 and 1462: from the right to organize two fairs of six days to the right to organise four fairs of fifteen days[26]. Not only the length but also the elimination of the competitive fairs in Geneva played a major role in the success of trade in Lyon[27]. Louis XI wanted also to attract international merchants and allowed them (except their arch enemy, the English) for instance to stay in Lyon between the markets and to bring and take their own money with them[28].

Since 1463 the privileges of the fairs were protected by the *Conservateur des privilèges et foires de Lyon*. The *juges-conservateurs* started to settle the disputes between merchants at the fairs *"sans long process et figures de plaids"* after

[25] M. Fortunati, *The fairs between lex mercatoria and ius mercatorum,* (in:) V. Piergiovanni (ed.), *From Lex Mercatoria to Commercial Law,* Berlin 2005, pp. 143-164.

[26] M. Guyaz, *Histoire des institutions municipales de Lyon avant 1789,* Lyon 1884, p. 169 *et seqq*.; M.E. Fayard, *Études sur les anciennes juridictions lyonnaises,* Lyon 1863, p. 3 *et seqq*.; J. Vaesen, *La juridiction commerciale à Lyon sous l'ancien régime,* Lyon 1879, p. 5 .

[27] M.E. Fayard, *Études sur les anciennes...,* p. 4; M. Guyaz, *Histoire des institutions...,* pp. 169-170.

[28] M.E. Fayard, *Études sur les anciennes*..., p. 5.

parties attempted to reach a settlement before the *prud'hommes*. The procedures were not only short, but also free of charge. Naturally, the merchants appreciated these short, quick, and low-cost procedures[29]. At first sight these developments seem in line with the claims of the theorists of the old law merchant according to whom international law between merchants developed especially at the informal procedures of the market courts. But on a closer inspection they overlooked the enormous participation of the people at the fairs[30]. If it is true that a system of trade rules – Jean Hilaire speaks about *"un veritable droit des foires"* – was developed, these new-developed rules were probably local instead of international since local merchants vastly outnumbered foreigners at the fairs[31].

The *Conservation* is an exception in the judiciary system in ancient France. The two most important distinctions were made between ordinary and extraordinary tribunals and between two hierarchical categories: *les Cours* and *les Juridictions*[32]. *Although prima facie* the *Conservation* seemed an early predecessor of the *Juridiction Consulaire* (an extraordinary jurisdiction), further investigation shows that the *Conservation* did not fit in each of these categories at all: it was an extra-extraordinary jurisdiction. After the establishment of the *Bourse* in Toulouse (1549) and the first *Juridiction Consulaire* in Paris (1563) a whole network of these mercantile jurisdictions was enrolled over many French cities[33]. Probably the *Conservation* formed the inspiration for the creation of the *Juridiction Consulaires*[34]. At least they shared several features: 1) their jurisdiction was in principle limited to commercial acts by merchants, 2) appeal was only possible in cases about more than 500 livres (and even then the execution of the preliminary sentence does not have to wait for the appeal), 3) procedure was characterised by shortness, cheap-

[29] *Ibidem,* pp. 6-7; J. Vaesen, *La juridiction commerciale...,* p. 172. Cf. J. Hilaire, *Introduction historique au droit commercial,* Paris 1986, p. 32 *et seqq*.; M. Fortunati, *The fairs between*..., p. 146.

[30] F. Braudel, *Beschaving, economie en kapitalisme. Het spel van de handel,* E. Gratema *et al*. (transl.) Amsterdam 1989, p. 77.

[31] J. Hilaire, *Introduction historique*..., p. 32. See for the argument of the internationality of the merchants at the fairs: E. Kadens, *The Medieval Law Merchant...,* p. 262.

[32] R. Mousnier, *Les institutions de la France sous la monarchie absolue (1598-1789),* Paris 2005, p. 823 et *seqq*.

[33] See on the establishment of the *juridictions consulaires:* E. Glasson, *Les juges et consuls des marchands,* "Nouvelle revue historique de droit français et étranger" 1897, pp. 5-38; A. Lefas, *De l'origine des juridictions consulaires des marchands de France,* "Revue historique de droit français et étranger" 1924, pp. 83-120; J. Hilaire, *Introduction: Perspectives historiques de la juridiction commerciale,* "Histoire de la justice" 2007, pp. 9-16; D. De ruysscher, *Gedisciplineerde vrijheid. Een geschiedenis van handels- en economisch recht,* Antwerpen 2014, p. 36 *et seqq*.

[34] The first model of the juridictions consulaires came also from Italy: J. Hilaire, *Introduction: Perspectives...,* p. 9; J. Hilaire, *Perspectives historiques de l'élection des juges consulaires,* (in:) J. Krynen (ed.), *L'élection des juges. Étude historique française et contemporaine,* Paris 1999, p. 139 *et seqq*.

ness, absence of lawyers and proctors, and the importance of equity[35]. Beside these similarities there were also differences. So was, for example, the *Conservation* in the 17th and 18th century also competent in bankruptcy. Moreover, judges were appointed by the king and the consuls of Lyon (before 1655) whereas in the *Juridictions Consulaires* lay judges were elected by their peers[36].

The characteristics of the *Conservation* changed tremendously in 1655. Since then the *Conservation* came almost completely under the power of the *Municipalité* (consisting of the *prévôt* and four *échevins*): "En 1655 les prévôts des marchands et échevins de la ville (…) offrirent d'exercer, d'une manière gratuite et sommaire, la juridiction de la Conservation pour le bien general du commerce. Après avoir acquis pour 130,000 livres l'office de juge conservateur, pour 63,000 livres celui du lieutenant, pour 42,000 livres celui du greffier, et après avoir payé 6,000 livres à chacun des avocats du Roi, ils demandèrent la réunion au corps consulaire de cette juridiction"[37]. In this newly formed *Tribunal de la Conservation* the *prévôt,* the four *échevins,* two judges appointed by the king, and four judges appointed by the consulate itself, served as judges in almost all mercantile cases in Lyon. Consequently, the city government became very influential in the *Tribunal de la Conservation*. Although the jurisdiction preserved some of its previous properties (e.g. the judges did not earn emoluments), the procedural style became almost identical to every other court in France[38].

It is uncertain if the *Tribunal de la Conservation* hereafter was a "normal" *Juridiction Consulaire.* What is clear, though, is that the city-governmental takeover triggered a "juridification" of procedure: from this moment on procedures were, for example, started in an almost roman-canonical style with a request, commission or libel[39]. According to Joseph Vaesen it took a long time before the synergy between old mercantile custom and new juridical style returned[40]. A similar process of "juridification" occurred in the *Juridiction Consulaire* in Paris[41]. In the 18th-century sentences of the *Tribunal de la Conservation* we find many references to different kinds of legislation, something of which the judges were apparently well aware[42]. This is not so strange since approximately

[35] A. Lefas, *De l'origine…,* pp. 86-88; J. Hilaire, *Introduction historique…,* p. 73. Cf. Mousnier, *Les institutions…,* pp. 867-868.

[36] A. Lefas, *De l'origine…,* pp. 92-93.

[37] M.E. Fayard, *Études sur les anciennes…,* p. 17.

[38] J. Vaesen, *La juridiction commerciale…,* p. 172.

[39] *Ibidem,* p. 172 *et seqq.*

[40] *Ibidem,* p. 172.

[41] A.D. Kessler, *A Revolution in Commerce. The Parisian Merchant Court and the Rise of Commercial Society in Eighteenth-Century France,* New Haven 2007, p. 65 *et seqq.*

[42] Municipal Archives Lyon, Series FF, 435-563. This series goes back to the governmental takeover of 1655.

20 percent of the *échevins* and the other (appointed) judges (belonging to the same social class) served as lawyers before they became *échevins* and probably many more graduated in law[43]. Only 56 percent of the *échevins* had a background in mercantile business[44]. Traditionally, there was no place for proctors and lawyers in the French mercantile courts, but in the 18th century most of the parties who seriously wished to defend themselves (and thus appeared at the hearings) were hiring (at least) a proctor for representation and juridical help[45].

4. EARLY MODERN USAGE AND COUTUME IN FRANCE AND LYON

The establishment of the fairs in Lyon and the process of homologation initiated by the French king Charles II, were a result of the same centralization politics. It is therefore not surprising that both developments took place in the same period. Art. 125 of the Ordonnance Montil-les-Tours (1454) stated that customs, usages and styles should be written down in order to help parties in proving the existence of customary law, to accelerate and simplify the procedures[46]. The process of homologation has an enormous influence on the character of customary law. Before the beginning of this process, in medieval legal doctrine, *coutume* was normally regarded as normative and *usage* has a mere factual character, although practice would have ignored this theoretical distinction[47]. Both were considered as non-written. In the opinion of, among others, Bartolus de Saxoferrato, the tacit

[43] M. Garden, *Lyon et les lyonnais au XVIIIe siècle,* Paris 1970, p. 490 *et seqq*.; see also on the elites of Lyon V. de Valous, *Les origines des familles consulaires de la ville de Lyon,* Lyon 1863; and V. de Valous, *Essai d'un nobiliaire Lyonnais ou rôle des familles nobles,* Lyon 1865.

[44] *Ibidem*.

[45] Many were not appearing at the hearings. Municipal Archives Lyon, Series FF, 435-563. At the *Juridiction Consulaire* in Paris we see the same trend: A.D. Kessler, *A Revolution in Commerce...,* pp. 32-33.

[46] According to the text of Article 125: "Nous voulons abréger les procez et litiges d'entre nos subjectz et les relever de mises et despens, et mettre certaineté es jugemens tant que faire se pourra, et oster toutes matières de variations et contrariétez, ordonnons (…) que les coustumes, usages et stiles de tous les pays de nostre royaume, soyent rédigez et mis en enscrit". See also on the process of the homologation in France: R. Filhol, *La rédaction des coutumes en France aux XVe et XVIe siècles,* (in:) J. Gilissen, *La rédaction des coutumes dans le passé et dans le présent,* Brussels 1962, pp. 63-85; A. Lebrun, *La coutume. Ses sources – son autorité en droit privé,* Paris 1932, pp. 71-87.

[47] See on the development of coutume and usage: L. Mayali, *La coutume dans la doctrine romaniste au Moyen Age,* (in:) *Recueils de la Société Jean Bodin: La Coutume*, Vol. 52*,* Brussels 1990, pp. 11-31.

consent of the majority of the community was crucial for the creation of customary law[48]. Since the redaction of customary law, the royal opinion became important for the recognition of custom and, consequently, the character of *coutume* became increasingly similar to the enacted law[49]. *Coutume* became a form of written law that derived its authority not only from the consent of the people but also from the king[50]. Since a substantial part of the influential *Ordonnance sur le commerce* (1673) was based on older customs, this ordonnance should be regarded as the pinnacle of the homologation process (although the redaction of local customs went on until the start of the French Revolution in 1789)[51].

The changing nature of *coutume* had consequences for the conception of *usage* as well. During the 17th and 18th century, *usage* became the name for non-written *coutume*. The end of this trend is marked by Claude-Joseph de Ferrière, who applies the medieval definition of *consuetudo* (custom) on *usage*: "Ainsi, parmi nous, usage est le droit français non écrit, qui s'est introduit imperceptiblement par le tacite consentement des peuples et qui par le longue habitude s'est acquis la force et l'autorité de la loi"[52]. *Usages* could have different forms: it is possible, for example, to distinguish between local, industry-related and international *usages*[53]. It is self-evident that the theory of the old law merchant was mainly based on the latter type. *Usage* was not merely factual anymore, but obtained normative force. Their precise place in the hierarchy of legal norms remains often unclear: in theory, for example, the normative force of an older ordonnance or written *coutume* was stronger than that of a newer *usage*, but in several cases *usage* prevailed over an obsolete ordonnance or custom[54]. And just like judicial confirmation enforced *coutume* in the late Middle Ages, the judgements strengthened *usage* in early modern times[55]. *Usage* was also regarded as very important for the interpretation of legislation, written custom and contract[56]. Merchants were struggling with

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[48] See the famous definition of Bartolus according to which customs are "repeated behaviour to which the relevant majority of the community had tacitly consented to be bound to perform", (in:) *In primam digesti veteris partem commentaria,* Venice 1590, pp. 17-21 (commentary and repetitio on Dig. 1.3.32). See also L. Mayali, *La coutume dans la doctrine...,* p. 21; and V. Simon, *L'inscription des usages...,* p. 280.

[49] A. Lebrun, *La coutume ...,* p. 79 *et seqq*.

[50] J. Moreau-David, *La coutume et l'usage...,* p. 132 *et seqq*.

[51] V. Simon, *L'inscription des usages*..., p. 281 *et seqq*.

[52] C.J. de Ferrière, *Dictionnaire*..., Vol. II, p. 716.

[53] V. Simon, *L'inscription des usages*..., pp. 277-278.

[54] A. Lebrun, *La coutume*..., pp. 114-115; J. Moureau-David, *La coutume et l'usage*..., pp. 138-144, V. Simon, *L'inscription des usages*..., p. 293.

[55] J. Moureau-David, *La coutume et l'usage*..., p. 142.

[56] P. Challine, *Méthode générale pour l'intelligence des coutumes,* Paris 1666, pp. 14-15; L. Boullenois, *Dissertation sur les questions qui naissent de la contrariété des lois et des coutumes,* Paris 1732, p. 26.

usage. From the archives in Lyon, but from literature as well, we know that it was very difficult to provide sufficient evidence for the existence of the *usage*. Since the *Ordonnance civile* (1667) (with some exceptions applicable on mercantile cases too) abolished the *enquête par turbe*, parties had to proof *usages* through *parères* or *actes de notoriété*[57].

Earlier in this contribution we have concluded that a process of juridification started at the *Conservation* in the second half of the 17th century. Does this juridification process imply that the opinions about *coutume* and *usage* were in line with the doctrinal conceptions? Although the documents of a yearly 400 procedures (on average) were available in the Municipal Archives of Lyon, this question is not so easy to answer. The vast majority of the early-18th century cases is about small-scale contract disputes, concerning most commonly the sale of goods and services between the local traders or craftsmen[58]. The *Conservation* wasn't reserved to *négociants* or merchants anymore: in the sentences we see several skippers, soldiers, bakers, butchers, surgeons, clergymen and nobles litigating before the *Conservation*. Amalia Kessler has argued that this was caused by the system of book-debts that was very important for 18th-century local economy[59]. A key feature of this system was that individual transactions frequently took the form of oral agreements. Those oral agreements, however, couldn't be enforced by civil jurisdictions because civil law disallowed the use of any evidence other than a writing to prove the existence of a contract. These rules of civil law were not applicable to mercantile law and therefore many tried to enforce their oral agreements before the *Conservation*. But, from this perspective it remains strange that a very significant number of lawsuits was resolved by a default judgement – a problem that couldn't be resolved by simply stating that the absent parties sought to litigate the same case for another court. Because of the oral agreements we expected that parties refer more often to *usage* (unwritten) than to *coutume* (written). This expectation is confirmed by the sentences of the early 18th century.

Nonetheless, the references to customary law are not always in line with the doctrinal conceptions. Sentences regularly refer to *usage* in a very general way. In the many default cases the judges almost always concluded to a conviction or acquittal "*a la forme de l'ordonnance et l'usage de cette cour*". But sometimes,

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[57] J. Moreau-David, *Actes de notoriété, coutume et usage dans l'ancien régime,* (in:) V. Gazeau, J.M. Augustin (eds.), *Coutumes, doctrine et droit savant,* Paris 2007, pp. 167-180; E. Richard, *À l'orée du droit des marchands: les parères,* "Revue d'histoire des facultés de droit et de la culture juridique" 2014, pp. 155-217. That parères were abundantly used in Lyon was already known by Jacques Savary.

[58] Most parties came from Lyon or the region of Lyon. There were only a few international litigants each year. Cf. for the Parisian Merchant Court: A.D. Kessler, *A Revolution in Commerce...,* p. 58.

[59] *Ibidem,* p. 58-61.

for example in the case between Antoine Dusand and the brothers Pierre and Nicholas Georgeaut about the sale of two cows and a goat for a price of 86 livres, the word *usage* in this standard formula is replaced by *coutume* for no apparent reason[60]. This example points in the direction that the words *coutume* and *usage* were not always used in the strict doctrinal way, but that they were interchangeable when used in a rather vague sense.

5. CONCLUSION

We have seen that *coutume* and *usage* had an important position in contemporary thinking about customary mercantile law. There are legal scholars who believe that customary mercantile law develops mainly through the written texts of international agencies and repeated contract clauses in cross-border trade. In their opinion customary mercantile law is built on *usage,* as defined by Vivante, Thaller and Gény in the late 19th and early 20th century. Their opinions, however, are more close to *coutume* as conceived in early modern France. Others believe that customary mercantile law tacitly find its way in the unwritten practices of international merchants. Customary law is mostly unwritten and by no means derived from agreements: it is normative on its own. Their conception of customary law is therefore closely related to the early modern understanding of *usage*.

In the early modern period homologation of customs on behalf of the French king led to *coutume* finding its way into the sphere of written law, while *usage* acquired a normative meaning. In practice, however, we cannot simply draw major conclusions from this. In fact, the institutional history of the *Conservation* forces us to reduce the scope of the theory of the (old) law merchant. First of all, it turns out that the *Conservation* in Lyon juridified rapidly during the second half of the 17th century as a result of the governmental takeover (and, consequently, lost his typical "mercantile character"). Secondly, most cases before the *Conservation* were reflecting local economy rather than international trade. Finally, the procedures at the *Conservation* demonstrate that, despite the juridification process, the distinction between *coutume* and *usage* was not always used in a refined way according to the latest doctrinal insights in the early 18th century.

[60] *Dusand vs. Georgeaut*, 19-6-1722, Municipal Archives Lyon, Serie FF, 559.

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Summary

In this contribution I am tracing the legal history of the concepts *coutume* and *usage* back from today's international mercantile law to the *Tribunal de la Conservation* in early modern Lyon. From the late 19th century some theorists were regarding *usage* as normative when it could be derived from the consensus between contracting parties. We find this conception of *usage*, for example, in the CISG. On the other hand, the more romantical strain of theorists on the law merchant was stressing that customary law was normative regardless of the possibility to derive it from the parties' agreements. In early modern Lyon merchants were invoking *usages* (and to a lesser extent also *coutumes*) at the *Conservation* frequently. Because of the juridification of this tribunal in the late 17th century, we expected that the use of the words *coutume* and *usage* was in line with the doctrinal conceptions of their days (according to which *coutume* was a form of written normative customary law and *usage* was a non-written normative customary law). This, however, was not always the case: sometimes the judges of the *Conservation* were using the words in a rather loose sense.

KEYWORDS

mercantile customary law, merchant court in Lyon, *lex mercatoria, usage, coutume*

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zwyczajowe prawo handlowe, sąd handlowy w Lyonie, *lex mercatoria, usage, coutume*