THE CONSERVATION IN LYON
AND THE LONG TRADITION OF COUTUME AND USAGE

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 19\(^{th}\) and early 20\(^{th}\) 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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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*.


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. 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. 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. 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. 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. 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

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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.
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\textsuperscript{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\textsuperscript{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 make 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\textsuperscript{16}. In all these texts we find references to usages, even four times in the PICC\textsuperscript{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\textsuperscript{18}. The withdrawn CESL-proposal was in line with the DCFR and PECL, but dropped the requirement of reasonableness\textsuperscript{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\textsuperscript{20}.

\textsuperscript{14} P. Hellwege, Understanding Usage..., p. 131-140 (with further references).
\textsuperscript{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.
\textsuperscript{16} See for a brief summary on the applicability the preamble of the UNIDROIT PICC.
\textsuperscript{17} Art. 1.9; Art. 2.1.6, third paragraph; Art. 4.3 under f; Art. 5.1.2 under b PICC.
\textsuperscript{18} Art. 1:105, second paragraph PECL; Art. II. 1:104, second paragraph DCFR.
\textsuperscript{19} Art. 59 under d; Art. 67, second paragraph CESL.
\textsuperscript{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. 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). 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. 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.

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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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

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\(^{28}\) 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. 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. 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.

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*. 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. Probably the *Conservation* formed the inspiration for the creation of the *Juridiction Consulaires*. 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-

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ness, absence of lawyers and proctors, and the importance of equity. 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.

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 jurisdiction de la Conservation pour le bien général 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.” 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.

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. According to Joseph Vaesen it took a long time before the synergy between old mercantile custom and new juridical style returned. A similar process of “juridification” occurred in the Juridiction Consulaire in Paris. 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. This is not so strange since approximately

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.
40 Ibidem, p. 172.
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. Only 56 percent of the échevins had a background in mercantile business. 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.

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. 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. Both were considered as non-written. In the opinion of, among others, Bartolus de Saxoferrato, the tacit

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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.


consent of the majority of the community was crucial for the creation of customary law. 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. Coutume became a form of written law that derived its authority not only from the consent of the people but also from the king. 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).

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.” Usages could have different forms: it is possible, for example, to distinguish between local, industry-related and international usages. 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. And just like judicial confirmation enforced coutume in the late Middle Ages, the judgements strengthened usage in early modern times. Usage was also regarded as very important for the interpretation of legislation, written custom and contract. 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. Moreau-David, La coutume et l’usage..., pp. 138-144; V. Simon, L’inscription des usages..., p. 293.

55 J. Moreau-David, La coutume et l’usage..., p. 142.

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.67

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.68 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.69 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 “à la forme de l’ordonnance et l’usage de cette cour”. But sometimes,

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68 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.

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\textsuperscript{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 19\textsuperscript{th} and early 20\textsuperscript{th} 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 17\textsuperscript{th} 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 18\textsuperscript{th} century.

\textsuperscript{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*

SŁOWA KLUCZOWE

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