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has the feel of two authors who were deeply involved with the project as members of the U.S. delegation.

If there is anything disappointing about the book, it may be its title. To some, "commentary and documents" may suggest a highly technical reference work suited at present to just a small circle of readers. That is not the case. To be sure, Brand and Herrup's effort will be of great value to the intimate circle of U.S. lawyers involved in the ratification process and in drafting implementing legislation in the hopes that the Obama administration will send the treaty to the Senate sometime soon. But it would be a shame if people outside this circle were to conclude that the book can gather dust until such time as the Choice-of-Court Convention enters into force. Brand and Herrup offer insightful discussion of many thorny questions in private international law. They make skillful use of comparative law in shedding light on some of the compromises that were reached.⁵ They give vivid illustrations of some of the complications of modern multilateral treaty negotiations involving federal states and regional organizations. The book is recommended reading for anyone curious about the complexities of modern multilateral treaty negotiations, and it should be considered as a supplementary text for those teaching courses in comparative law, conflict of laws, or international law.

AMALIA D. KESSLER, *A REVOLUTION IN COMMERCE: THE PARISIAN MERCHANT COURT AND THE RISE OF COMMERCIAL SOCIETY IN EIGHTEENTH-CENTURY FRANCE* (Yale University Press, 2008)

*Reviewed by Emily E. Kadens**

With this book, Amalia Kessler, Professor of Law and Helen L. Crocker Faculty Scholar at Stanford University, has made an important contribution to the history of commercial law. Deploying an impressive arsenal of primary sources, Kessler provides a detailed study of the Parisian Merchant Court in the eighteenth century. In the process, she offers more evidence about the inner workings of a commercial court and the legal relationships of merchants than any of the recent spate of works debating the existence of the so-called "law merchant."

The theory of the law merchant holds that during the pre-modern period merchant groups were completely self-regulating. They governed their transactions through uniform and universal customs developed over years of commercial practice. Disputes were adjudicated by experienced merchants chosen by those communities and

5. See, for example, their discussion of Article 11 of the convention and whether the court in which recognition is sought need recognize the entire damage award entered by the court in which litigation was initially brought (pp. 126-29).

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thus well positioned to apply the customs of the communities to which they belonged.

Most of the studies advocating or challenging this account have focused on the Middle Ages, a period for which we have relatively little hard evidence regarding commercial transactions. Ironically, little has been written on this topic with respect to the early modern era, a period for which archival documentation is comparatively abundant. This lack of attention to the sixteenth through eighteenth centuries likely reflects a belief among some adherents to the law merchant myth that by this time, government regulation of commerce had displaced the true, self-regulating law merchant. In looking at this later period, Kessler's work is the best evidence yet not only of the fallacy of the more simplistic aspects of the myth of the uniformity and universality of merchant custom but also of the fallacy of assuming that government regulation had taken over the entirety of the field of commercial law and custom.

The book concentrates on the Parisian Merchant Court, a tribunal established by royal edict in 1563 and staffed by wealthy merchants from the city's most prominent guilds. The Court had jurisdiction over many disputes between merchants, including those not directly related to commerce such as employment contracts and marriage settlements, and all (so the Court claimed) disputes concerning bills of exchange and letters obligatory. Unlike some of France's other commercial courts, the Parisian Court judges were chosen exclusively by the leading guilds without royal involvement. This somewhat unique aspect of the Parisian Court means that Kessler's exclusive focus on Paris is both a strength and a weakness. On the one hand, she is able to explain the workings of this particular court in rich detail, a contribution that is unique and important. On the other hand, one must tread carefully before assuming that her conclusions and chronology regarding the development of commercial courts and their jurisdiction can be generalized to France's other major trading cities, such as Lyon or Marseille. Commercial courts in other cities had their own histories and structures and were called upon to resolve disputes arising from trading patterns different from those in Paris.

Chronologically, the book treats the period from 1673, when the monarchy promulgated the first national commercial code, to 1791, when the revolutionary Constituent Assembly renamed and slightly reformed the commercial courts of the Old Regime, turning them into the courts which subsequently evolved into the modern *tribunaux de commerce*. Thus, in terms of the wider backdrop of French history, Kessler's decision to "frame this study" (p. 11) during the period from 1673-1791 makes a good deal of sense. However, because of the vagaries of conservation of the archival evidence, Kessler mostly looked at documents from the second half of the eighteenth century. The book's treatment of the late seventeenth century is consequently spotty. Kessler can scarcely be faulted for this, for an historian can only study evidence that exists, and for Paris the archival material is rare prior to the mid-eighteenth century. With modesty, Kessler does

not explain how extraordinarily difficult these commercial court documents are to use. The script in which they are written is sometimes barely legible and requires a great deal of training to master; the documents are full of terms of art that are a challenge to translate. Thus Kessler has done a tremendous service in making the stories locked away in these Parisian archives accessible to non-specialists.

The book's overarching theme is the move from a morally-based view of commerce as a threat to be tolerated and regulated to a market-based view celebrating its potential to serve the public interest. According to Kessler, the Parisian Court entered the eighteenth century believing that its job was to promote "virtue" among a clearly-defined body of "merchants." At the beginning of the century, commerce, she claims, was still defined by the identity of the participants: merchants. Only later did the term come to be defined through abstract concepts and associated with certain activities, regardless of who engaged in those activities. As a result, early in the century, the Court focused on regulating the potential bad behavior of these merchants, who were ideally supposed to act virtuously but who, sadly, slipped in this duty from time to time and had to be corrected through guild and police regulation and the intervention of the Court. Because of the early focus on the human element associated with commercial activity, commerce was viewed with suspicion. As fallible beings, merchants would naturally act self-interestedly, and this would be bad for commerce and the community, both because it could result in shoddy products and fraudulent transactional practices and because it could unravel the brotherly harmony that the guilds tried to promote.

By the end of the eighteenth century, however, the Court was struggling to come to terms with a changed economic landscape as new forms of business associations and negotiable instruments fundamentally altered the traditional relationships among merchants. The heart of the book consists of a series of chapters in which Kessler lays out the economic, legal, and rhetorical changes that occurred over the course of the eighteenth century that moved the Court from viewing commerce as a status-defined potential evil to be regulated by appeals to virtue to an activity that should be promoted for the public good. In the second chapter, she does a marvelous job of depicting the long-term relational contracting that eighteenth-century production techniques and informational limitations required. As Kessler then demonstrates, such details of economic life, which are too often overlooked, determined the legal approach of the Commercial Court. On account of its unmanageably large docket and its interest in preserving these relational contracts, the Court frequently delegated factfinding and even dispute resolution to arbiters, some of whom were merchants but many others of whom were parish priests. It is from the manuscript reports written by these arbiters that Kessler gleans much of her material.

The third and fourth chapters explain how the arbiters decided cases concerning sales, employment, marriage settlements, and business associations. In the strongest challenge yet to those who have

assumed that merchant courts used merchant customs as rules of decision, Kessler convincingly demonstrates that the arbiters were less concerned with applying rules than with doing equity and maintaining relationships. In fact, when faced with conflicts over such matters as bills of exchange, for which the 1673 Commercial Code provided clear rules, the arbiters often hesitated to apply those rules (which presumably were well known to them) because rigid rule application might lead to outcomes that would be inequitable and therefore potentially disruptive to the relationship of the particular parties before them.

Two changes occurred in the eighteenth century that challenged the dominance of equitable decision-making. The first, which Kessler treats in chapter four, was the move from the traditional small partnerships in which two or three men formed an association in which they each contributed capital and/or labor to organizations that Kessler calls *proto-sociétés de capitaux* in which up to ten partners purchased shares in a company with separate management and ownership. The second change, treated in chapter five, was the rise of negotiable instruments. In a society lacking paper money, negotiable paper came to serve as something very similar to cash and with nearly the same level of anonymity as the instrument passed from hand to hand. On account of these two changes, arbiters were now faced with disputants who had no relationship that needed preserving. Instead, the parties wanted the rules applied impartially and without the implied moral and value judgments of an arbiter who believed it his duty to bring about a reconciliation among the parties.

Kessler argues that this change from relational contracting to anonymous business transactions was reflected in contemporary rhetoric about commerce. She interprets early texts as advocating regulation of commerce as a necessary means of enforcing merchant virtue, while later works based their arguments for the primacy of commerce on public utility and free market principles. The evidence Kessler adduces does not fully justify this interpretation. First, one finds references to utility and the good-of-business arguments in some seventeenth century commercial treatises just as much as in late eighteenth century ones. More significantly, the documents she cites did not convince me that "virtue" is the best descriptor for the earlier commercial ideal. Much of the evidence adduced in chapter one for the virtue argument comes from published propaganda pieces written to promote a partisan point of view in struggles for control over the Court and its jurisdiction. Such partisan works cannot be taken at face value, a fact that Kessler acknowledges. Similarly, Kessler's point about the change in the meaning of commerce from that of the job of merchants to a more abstract concept associated with certain transactional activities rests in part on dictionary definitions of the word (pp. 7-8) and is open to challenge. For example, the famous and oft-reprinted early eighteenth-century commercial dictionary of Jacques Savary de Bruslons, son of one of the authors of the 1673 Commercial Code, offered a transactional approach when it defined commerce as "all exchange, sale, purchase, traffic, or negotia-

tion of merchandise, even that consisting solely of money or of paper” and then providing over a hundred pages of description of mercantile activities.¹

One could imagine telling a similar story regarding the eighteenth-century development of commercial law and attitudes toward commerce in a way that arguably might have interpreted the sources less loosely. This alternative story begins with an early preoccupation with maintaining a reputation for good faith and fair dealing (rather than the more religiously- and morally-colored “virtue”) among the small, tightly-knit community of merchants for whom personal relationships were of great importance. With the rise of increasingly anonymous ways of dealing, the older views gave way to different, more modern views of commerce in which reputation played a smaller role, good faith and fair dealing were measured with less reference to maintaining relationships, and bright line rules were more important than before. Clearly, however, this alternative narrative is offered as a minor and perhaps merely semantic quibble, for it arrives at almost exactly the same set of conclusions as Kessler does.

On account of the magnificent detail with which Kessler fills out her discussion of relational contracting and the work of the arbiters, *A Revolution in Commerce* should be of real interest to modern commercial law scholars, especially those concerned with the so-called New *Lex Mercatoria* and theories of arbitration. Kessler informs the discussion of how commercial law functioned and developed historically with greater attention to the actual workings of a commercial court and its style of dispute resolution than any previous study has done.

HEINRICH SCHOLLER, RECHT UND POLITIK IN ÄTHIOPIEN: VON DER TRADITIONELLEN MONARCHIE ZUM MODERNEN STAAT (LIT Verlag, 2008)

*Reviewed by Peter H. Sand**

This sequel to the author’s earlier collected essays¹—part German and part English—is of three-fold significance for comparative law: (1) as a first-hand account of one of the major contemporary projects for “law and development” in Africa; (2) as critical scholarly analysis of a unique “mixed legal system,” the roots of which go back to a seventeenth century trans-cultural transplant of Roman law;

1. See 1 JACQUES SAVARY DE BRUSLONS, *DICIONNAIRE UNIVERSEL DE COMMERCE* 830 (Paris: Jacques Estienne, 1723).

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1. HEINRICH SCHOLLER, *ETHIOPIAN CONSTITUTIONAL AND LEGAL DEVELOPMENT* (2005).