

From Usages of Merchants to Default Rules: Practices of Trade, *Ius Commune* and Urban Law in Early Modern Antwerp

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*In sixteenth-century Antwerp, commercial contracts were supported with refined government-made rules that brought techniques, usages and customs practised by merchants to the level of sophisticated law. Because no body of unwritten substantive law on commerce existed and because commercial practices were often too rudimentary from a legal perspective, in the 1500s detailed and balanced normative precepts on contracts of trade came to be crafted. When in the first decades of the sixteenth century more and more foreign merchants visited Antwerp, its rulers gradually started supplementing and upgrading practices of merchants to default rules regarding contracts, with materials and concepts drawn from the *ius commune*. In the second half of the sixteenth century, the use of civil law not only further determined the contents of the default rules that were imposed by the Antwerp aldermen, but it also lay at the basis of a change in the latter's policy of establishing precepts of urban law. After 1550, the philosophy of rationality and exhaustiveness found within civil law writings, the appreciation of which was triggered by political and economic factors, was reflected in wide-ranging collections of Antwerp law that covered many legal questions regarding commercial arrangements.*

I. INTRODUCTION: ANTWERP AND THE HISTORY OF COMMERCIAL LAW (LATE MIDDLE AGES AND EARLY MODERN PERIOD)

1. *Lex mercatoria and beyond: the state of research on the history of commercial law*

For both the late Middle Ages and the early modern period, the relation between governmental precepts (i.e. rules of law applied in the courts) regarding commercial agreements and related situations, on the one hand, and usages and customs of merchants on the other, remains by and large unclear. Over recent years earlier

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speculations as to the existence, from the twelfth century onwards, of a substantial set of internationally uniform yet unwritten rules for commerce, of a *lex mercatoria*, have been questioned.¹ It is now accepted that expressions such as *ius mercatorum*, *lex mercatoria*, ‘law merchant’ or *lei de lestaple*, which were inserted into thirteenth- and fourteenth-century documents, have often and unjustifiably been considered as references to a body of substantive commercial law. The aforementioned formulas, or comparable data drawn from source materials of the late Middle Ages, are nonetheless still often suspected of alluding to principles, terminology or customs which were shared among merchants across borders and that covered rules of contract.² However, such ideas are being challenged by authors pointing to a common use of the phrases in question in relation to equitable judgment and aspects of procedure, the latter of which often differed from one place to another.³

As for the early modern period, opinions concerning commercial law are divergent mostly with regard to the relative importance of legislation, civil law and customs of merchants. Supporters of a late medieval international and customary law of commerce have stated that the latter disappeared in the course of the sixteenth, seventeenth or eighteenth centuries, when it was being replaced by national legislation of (protectionist) states.⁴ Others have argued that throughout the early modern period customs of merchants remained the most important source of commercial law because merchants used new techniques and contracts when circumventing ordinances and statutes which prohibited mercantile practices.⁵ For a long time, and in line with these views, not much attention was being paid to academic law. If mentioned, it was considered to have been too technical and cumbersome to provide or sustain rules regarding commercial contracts. Some have contended that legal literature on commercial themes, and the arguments and terminology found within such writings, predominantly served as intellectual embellishment of substantive customs of merchants.⁶

¹H.J. Berman, *The Formation of the Western Legal Tradition*, Cambridge, MA, 1983, 333–336; L.E. Trakman, *The Law Merchant. The Evolution of Commercial Law*, Littleton, CO, 1983, 7–21. Economists have argued that in the late Middle Ages a law merchant served as a mechanism in which ‘private judges’ without coercive power concentrated and communicated information regarding the reputation and good faith of merchants, in order to lower transaction costs. See P.R. Milgrom, D.C. North and B.R. Weingast, ‘The Role of Institutions in the Revival of Trade, Part I: The Medieval Law Merchant’, 2 *Economics and Politics* (1990), 1–23.

²C. Donahue, ‘Medieval and Early Modern Lex Mercatoria. An Attempt at the *Probatio Diabolica*’, 5 *Chicago Journal of International Law* (2004–05), 21–37, at 29; E. Kadens, ‘Order within Law, Variety within Custom. The Character of the Medieval Merchant Law’, 5 *Chicago Journal of International Law* (2004–05), 39–66, at 56; K.O. Scherner, ‘Lex mercatoria – Realität, Geschichtsbild oder Vision’, 118 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung* (2001), 148–167, at 156.

³A. Cordes, ‘À la recherche d’une *Lex mercatoria* au Moyen Âge’, in O.G. Oexle and P. Monnet, eds., *Stadt und Recht im Mittelalter. La ville et le droit au Moyen Âge*, Göttingen, 2003, 117–132, at 122–123 and 125–126; K.D. Lerch, ‘Vom Kerbholz zur Konzernbilanz. Wege und Holzwege zu einem autonomen Recht der *global economy*’, 5 *Rechtsgeschichte* (2004), 107–127, at 112–124; S.E. Sachs, ‘From St. Ives to Cyberspace. The Modern Distortion of Medieval “Law Merchant”’, 21 *American University International Law Review* (2006), 685–812, at 755–761.

⁴See the literature summarised in A.D. Kessler, *A Revolution in Commerce. The Parisian Merchant Court and the Rise of Commercial Society in Eighteenth-Century France*, New Haven, 2007, 100–101.

⁵J. Hilaire, *Introduction historique au droit commercial*, Paris, 1986, 273–276.

⁶V. Piergiovanni, ‘Courts and Commercial Law at the Beginning of the Modern Age’, in V. Piergiovanni, ed., *The Courts and the Development of Commercial Law*, Berlin, 1987, 11–21, at 19–21; V. Piergiovanni,

However, over recent years the impact of legal literature on early modern continental European law concerning commerce has been acknowledged. Procedural rules, theories and principles of law have been identified as elements of civil law that accommodated rules regarding trade. It is now clear that the former allowed the integration of merchants' practices and customs into the sphere of the *ius commune*. Learned law made it possible to legally underpin usages and customs of merchants as *iura propria*.⁷ However, even authors underscoring such arguments have examined mostly civil law writings, and they have not usually extended their research to the judicial and legislative practice of cities of trade. As a result, it is tempting to consider usages of merchants as more or less complete normative precepts that were entered into the legal literature and law of the early modern period with few alterations.

A change of perspective, towards local legal practice, reveals important additional nuances. Indeed, any research concerning the relation between mercantile usages and civil law in early modern times must take into account what was done in local tribunals and by municipal governments. In areas north of the Alps, the application of civil law at local level was a typical Renaissance phenomenon of the fifteenth, sixteenth and seventeenth centuries. In the 1500s and 1600s, cities in those territories, and among them Antwerp and Amsterdam in the Netherlands, were at the forefront of international commerce. The process of writing down previously unwritten rules that were thus imposed in court practice was also characteristic of those areas in the aforementioned periods,⁸ and it was related to the reception of academic law. Because early modern collections of law that were drafted in cities of commerce frequently listed sections concerning commercial arrangements, such compilations must be examined when assessing the connections between merchants' customs and government-made law, the latter of which interacted with civil law.

2. *Early modern Antwerp law as evidence of the influence of civil law on rules regarding trade*

Sixteenth-century Antwerp, which is for the period between 1520 and 1565 generally considered to have been the leading commercial metropolis of the West, provides an

⁷'Diritto commerciale nel diritto medievale e moderno', in *Digesto delle Discipline Privatische. Sezione commerciale*, vol.4, Turin, 1989, 333–345, at 343. Also stressing that usages of trade were rephrased in learned terminology is J. Hilaire, 'Réflexions sur l'héritage romain dans le droit du commerce au Moyen Âge', 70 *Tijdschrift voor Rechtsgeschiedenis* (2002), 213–228, at 223–224.

⁸C. Donahue, 'Benvenuto Stracca's *De Mercatura*: Was There a *Lex Mercatoria* in Sixteenth-Century Italy?', and A. Wijffels, 'Business Relations Between Merchants in Sixteenth-Century Belgian Practice-Orientated Civil Law Literature', in V. Piergiovanni, ed., *From Lex Mercatoria to Commercial Law*, Berlin, 2004, respectively 69–120, at 109–110 and 255–290.

⁹On fifteenth- and sixteenth-century German *Stadt-* and *Landrechte*, see T. Holzborn, *Die Geschichte der Gesetzespublikation – insbesondere von den Anfängen des Buchdrucks um 1450 bis zur Einführung von Gesetzesblättern im 19. Jahrhundert*, Berlin, 2003, 44–94. For the history of French *coutumes*, consult R. Filhol, 'La rédaction des Coutumes en France aux XVe et XVIe siècles', in J. Gilissen, ed., *La rédaction des coutumes dans le passé et le présent*, Brussels, 1962, 63–78 and M. Grinberg, *Écrire les coutumes. Les droits seigneuriaux en France, XVIe–XVIIe siècle*, Paris, 2006. Developments in the Netherlands are described in J. Gilissen, 'Les phases de la codification et de l'homologation des coutumes dans les XVII provinces des Pays-Bas', 18 *Tijdschrift voor Rechtsgeschiedenis* (1950), 36–67 and 239–290.

interesting test case for research on such matters. After 1480, a continuous increase in the numbers of jurists employed by and embedded in the government of Antwerp coincided with the coming of international commerce to that city. Graduates with law degrees working for the Antwerp aldermen, who were the rulers of the city, promoted a learned transformation of practices and usages concerning commercial contracts and situations. This was pursued within the framework of an older court-based system. Together the Antwerp aldermen formed the City Council, which *inter alia* issued urban ordinances, and also the City Court, which adjudicated disputes.⁹ Early modern Antwerp rules regarding commercial contracts, and the texts mentioning them, were closely related to what happened in the City Court. In the fifteenth century, the Antwerp City Court had had an endorsing function as to agreements, and it had decided foremost on their enforcement. In the sixteenth and seventeenth centuries, the aldermen of Antwerp gradually formulated more default rules regarding commercial contracts. Because in the latter periods the aldermen both adjudicated disputes and determined the applicable norms of law, the processes of judging and law-making were closely intertwined. Hereafter, it will be made clear that the process of establishing precepts by means of different sources of Antwerp law, such as testimonials from *turbe*-inquiries, certificates of law, urban ordinances and compilations of law, cannot be separated from the adjudicating function of the Antwerp aldermen.

Civil law clearly influenced the solutions that were imposed by the Antwerp aldermen even as early as the first decade of the 1500s. After 1550, it also influenced the contents of collections of Antwerp private law, which were drafted under the direction of the Antwerp aldermen and following royal orders.¹⁰ They contained provisions regarding agreements that were characteristically signed and concluded at the Antwerp Exchange, such as bills obligatory, bills of exchange, marine insurance policies and partnership contracts. The articles in those law books had been organised systematically and they were more or less complete, for their compilers had – in the spirit of the *ius commune* – intended to provide answers to all possible legal questions arising from the use of commercial contracts.

It will be made clear that Antwerp data of the fifteenth and early sixteenth centuries contains no traces of any collection of pre-existing customs that were known and practised by merchants. Customs of merchants, in the sense of normative principles and rules that were considered to be default norms for contracts, were easily integrated into the law of the city of Antwerp. Even though customs had legal content, they were always adapted and upgraded to the higher legal level of civil law, of which the concepts, principles and ideas served to design a theoretically sound urban law of Antwerp with regard to commerce. This was also the case for merchants' usages and contractual conventions, which were simply habitual ways of proceeding

⁹There were minor differences as to composition between the City Council and the City Court. In civil cases, the City Court was presided over by only one of the two royal officers residing in Antwerp, i.e. the *amman*, whereas also the other one, the *écoutète* (*schout*), was a member of the City Council.

¹⁰Such compilations were called '*costuymen*' ((written) customs), but they contained rules and principles that had been drawn from many sources of law, and in particular from legal doctrine. Many authors have considered such collections as enactments exclusively of norms of customary law, but that was not the case. In order to avoid confusion the label 'written customs' will not be used hereafter.

that were not considered as being prescribed by custom. They were usually not detailed enough for use in the courts. Many of them were based on good faith among those involved, but they did not envisage the legal consequences of many situations that might occur. The supplementing and elaboration of such usages was even more important than for the already mentioned customs of merchants. As a result, the major constituent of the Antwerp urban law of commerce was the *ius commune*. When crafting legislation, the Antwerp rulers respected what went on in the urban markets and at the Antwerp Exchange, but they always relied on civil law when making practices of trade into concrete and legally acceptable provisions of law. Civil law facilitated an adaptation of the basic materials provided by merchants, to precepts that were useful for jurists. In their completed form, which had been moulded in civil law, such precepts of law entailed theoretical backing for hypotheses that had not been foreseen by merchants.¹¹

Civil law influences on the Antwerp law on commerce worked at different levels, and with varying speed and intensity through time.¹² In a first phase, approximately between 1480 and 1550, civil law coloured the Antwerp institutions and law. The City Court of aldermen continued its earlier policy of support for commercial contracts in a new way. In the fifteenth century, merchants could have their agreements authenticated by the Antwerp rulers, who issued letters endorsing contracts. In the 1400s, the urban law had contained but few default rules for such agreements and it had consisted mostly of precepts concerning the enforcement of certified contracts. When in the 1480s the procedural technique of *enquêtes par turbe* was applied in Antwerp, producing evidential testimonials as to the existence and application of legal rules, and when more foreign merchants visited its market, the Antwerp aldermen registered declarations that had been delivered at *enquêtes* and in which urban law regarding commercial contracts had been established. Already in this period, roughly between 1480 and 1550, civil law served to improve techniques, conventions and rules of trade, and it brought such practices within a legal-theoretical spectrum. Merchants were but seldom involved in this process. Instead, it was jurists and experienced legal practitioners who crafted the rules that applied to commercial contracts. In the period until approximately 1550, it was mainly a judiciary-focused approach of the Antwerp aldermen that provided ad hoc answers to questions that arose in lawsuits. Judgments were also still commonly based on provisions of the

¹¹These legal developments caused an internal as well as foreign success of the government-made Antwerp law regarding mercantile contracts. See, for the influence of Antwerp legal solutions on early seventeenth-century Amsterdam, D. De ruysscher, 'Antwerp Commercial Legislation in Amsterdam in the 17th Century. Legal Transplant or Jumping Board?', 77 *Tijdschrift voor Rechtsgeschiedenis* (2009), 459–479, and as to the Antwerp origins of seventeenth-century legislation and doctrine regarding financial instruments in German territories, D. De ruysscher, 'Innovating Financial Law in the Early Modern Netherlands and Europe: Transfers of Commercial Paper and Recourse Liability in Legislation and *Ius Commune* (Sixteenth to Eighteenth Centuries)', 19 *European Review of Private Law* (2011), 505–518.

¹²Hereafter, influences from the law of other cities and territories that were not mentioned in civil law writings, and which were sometimes received in Antwerp law, are not taken into account. For examples of legal rules from Hanseatic areas and Italian cities with regard to bankruptcy, see D. De ruysscher, 'Designing the Limits of Creditworthiness. Insolvency in Antwerp Bankruptcy Legislation and Practice (16th–17th Centuries)', 76 *Tijdschrift voor Rechtsgeschiedenis* (2008), 307–327, 315 and 318.

contract and on rules regarding enforcement rather than on precepts of law, as had been the case in the fifteenth century.

In a second period, starting around the middle of the sixteenth century and ending in 1608, the royal policy of homologation of local law prompted a self-confident policy in the Antwerp aldermen, who now fully embraced the *ius commune*. They more actively decided which default rules applied to commercial agreements, something which also responded to the fact that more informal agreements were often drawn up between merchants having no shared background. More precepts as to the contents of contracts were devised and the Antwerp leaders drafted exhaustive compilations of urban law. These collections were not issued in the form of urban or royal ordinances, even though they had many characteristics of legislation. They were for the most part guidelines for the forensic practice of the City Court.

The compilations of Antwerp law were easily adapted in the light of new circumstances, and the Antwerp City Court could maintain its flexible approach towards law. In a third period, coinciding with the seventeenth century for the most part, the influence of the monarch was minimal, and within the City Court the Antwerp aldermen pursued a policy of adapting the urban law to new commercial needs. As a result, they sought to refine the rules of earlier compilations of Antwerp law, and especially those of the 1608 collection, which had proved too formalistic and unwieldy for commerce. After 1608, no new collections of law were made, and again the Antwerp aldermen implemented a court-based programme.

In the second part of this paper, the Antwerp law on commercial arrangements in the fifteenth century is examined. A third section analyses the Antwerp urban rules of commerce dating from the period between around 1480 and 1608. A fourth one considers the seventeenth-century interplay between the urban law and innovations of commerce.

II. FIFTEENTH-CENTURY ANTWERP URBAN LAW: ENFORCEMENT OF CONTRACTS RATHER THAN DEFAULT RULES

From the haphazardly recorded and admittedly scarce source materials referring to rules that were imposed by the Antwerp aldermen during the 1400s, it is nonetheless evident that in its judgments the Antwerp City Court of aldermen used categories of contracts with labels such as *coop* (sale), *procuratie* (mandate) and *geselschap* (partnership).¹³ However, in spite of the use of categories, very few default rules concerning contracts can be found in the relevant sources. Some legal provisions regarding sale were inserted into the *Keurboeck*, which is a collection of Antwerp judgments and ordinances dating from the fourteenth and fifteenth centuries, but not much more on substantive law regarding commercial contracts can be found.¹⁴ This is

¹³An early fifteenth-century collection of comments and citations of judgments of the Antwerp City Court was drawn up by alderman Willem de Moelnere. See E.I. Strubbe and E. Spillemaeckers, eds., “De Antwerpse rechtsaantekeningen” van Willem de Moelnere’, 18 *Bulletin de la commission royale pour la publication des anciennes lois et ordonnances de Belgique* (1954), 7–148.

¹⁴The *Keurboeck* has been published in G. De Longé, ed., *Coutumes du pays et duché de Brabant. Quartier d’Anvers. Coutumes de la ville d’Anvers*, vol. 1, Brussels, 1870, 2–89 (hereafter *Keurboeck*). For an analysis

for two reasons. First, there was a certain subjective nature to the default rules concerning contracts. Second was the attitude of the Antwerp aldermen, who generously endorsed agreements in relation to which no established general rules existed. They counterbalanced this policy by imposing many detailed precepts of law regarding the enforcement of contracts and the recovery of debts.

Some precepts containing default rules for contracts were written into charters that were granted to merchants. Such privileges mentioned rules that were typically used among groups of merchants of the same nationality (*nations*), and that had to be respected by urban officials, by citizens and inhabitants of the city, and by traders from other groups. In 1296 and 1305, such constitutions were made for English merchants visiting Antwerp. They provided, for example, what was to be done when hidden defects were detected in sold merchandise.¹⁵ It can be presumed that such and other rules regarding contracts were applied in settlements of disputes that were reached within the *nations* of merchants for which they had been written down, or between mediating *bonnes gens* when such organisations could not intervene because of the involvement of outsiders.¹⁶ Therefore, the urban law did not have to provide many rules regarding commercial contracts. Precepts of the kind mentioned appeared more in charters that were accorded to merchant organisations than in texts reflecting the urban law that was applied in the City Court of aldermen. Even so, such provisions regarding the contents of contracts were rare.

This also resulted from the endorsing mechanism that was provided by the Antwerp City Court. The Antwerp aldermen authenticated declarations and agreements in certificates (*certificatiën*) and in so-called aldermen's letters (*schepenbrieven*). Certificates were handed out, officially confirming statements of parties to a contract, as to delays in their performance for example or regarding situations such as the arrival and delivery of merchandise.¹⁷ Aldermen's letters certified promises (*gheloften*), agreements (*voirwairden*) and security contracts. They were a privileged type of legal document. Enforcement of the debt written in an aldermen's letter was possible with speedier proceedings than those applying in relation to private, unregistered contracts. When acting as judges, the aldermen 'read', i.e. confirmed, the letters that they had issued

and dating of its sections, see F. Blockmans, 'Het vroegste officiële ambachtswezen te Antwerpen', 8 *Bijdragen voor de Geschiedenis der Nederlanden* (1954), 161–201.

¹⁵H. Obreen, ed., 'Une charte brabançonne inédite de 1296 en faveur des marchands anglais', 80 *Bulletin de la commission royale d'histoire* (1911), 528–557, at 545.

¹⁶Given the absence of source materials on the functioning of fifteenth-century Antwerp *nations* of merchants, a cautious comparison can be made with the situation in contemporary Bruges. There, *nations* of merchants only settled conflicts between members. It was customary that in disputes between merchants of different geographical origins the City Court endorsed agreements between the litigants that had been drawn up by so-called *arbiters*. The latter, who were often merchants as well, are to be considered as mediators rather than as arbitrators. They inspected evidential documents, and they applied rules that were not under discussion. They usually intervened in lawsuits in which the claimant sued on the contract, and they were not asked to solve disputes as to the contents of norms (see also hereafter, for the Antwerp practice). See L. Gilliodts-Van Severen, ed., *Cartulaire de l'ancienne estaple de Bruges*, vol.2, Bruges, 1905, 18 (26 Oct. 1453) and 41–42 (16 June 1456).

¹⁷G. Asaert, 'De oudste certificatiën van de stad Antwerpen (1468–1482)', 132 *Bulletin de la commission royale d'histoire* (1966), 261–263; R. Doehaerd, *Études anversoises. Documents sur le commerce international à Anvers, 1488–1514*, Paris, 1963, vol.1, 9–15.

earlier.¹⁸ Indeed, the absence of substantive urban rules as to the contents of contracts ensued from a policy of the Antwerp rulers generously authenticating commercial agreements, without imposing limits on their contents.

This lenient position was compensated for through the application of many detailed rules with regard to enforcement. Most precepts of fifteenth-century Antwerp law dealt with questions of seizure, apprehension, detention of debtors and public sale of assets. Upon breach of a contractual obligation, a creditor could resort to various means of coercion against the debtor. The *Keurboeck* provides, for example, that innkeepers need not prolong the giving of credit against their will. They were authorised to pursue outstanding debts with *panding*, which involved the expropriation of a debtor's property.¹⁹ For merchants, their privileges commonly provided detailed exceptions to general principles of attachment, apprehension and imprisonment. For instance, merchants who were members of officially recognised *nations* could not be subjected to deprivations of their liberty.²⁰ Another restriction concerned the Antwerp fairs. Old debts were not to be recovered during the so-called 'freedom of the market' (*marktvrijheid*), which spanned the weeks surrounding the fairs of Whitsun and St Bavo in October. Only contracts that had been made at a fair, or debts that had been confirmed for its occasion, could be enforced during the fairs.²¹ Outside these periods, seizure of assets imposed upon merchants was possible, but had to be lifted if property was given as pledge. For this purpose, the City Court controlled seizures of assets. They had to be registered. The creditor had to substantiate his claim in the courtroom, and if he succeeded in proving his rights, the seized assets were sold publicly.²²

The Antwerp rules summarised above do not hint at the existence of a commercial law. This is clear from other factors: there was a lack of legal concepts, and a failure to cite any source of commercial law. Because charters for traders were linked to the status of merchants, the precepts therein might to a limited extent be considered a *ius mercatorum*. The latter notion appears in tenth- and eleventh-century constitutions of German territories,²³ and it is sometimes reserved for medieval commercial law in general when it is defined as a collection of rules for specific groups of merchants, or for those having the status of professional trader.²⁴ However, no explicit categorisation or terminology of this sort can be found in late medieval Antwerp texts. Antwerp charters of merchants contain some exceptions to the procedural rules that were generally applied by the City Court. Charters stipulated that English traders were to be judged at the first introductory session of the court, for

¹⁸P. Godding, 'Les conflits à propos des lettres échevinales des villes brabançonnnes (XVe–XVIIIe siècles)', 22 *Tijdschrift voor Rechtsgeschiedenis* (1954), 308–353, at 308–317; R.C. Van Caenegem, 'La preuve dans l'ancien droit belge des origines à la fin du XVIIIe siècle', in *La preuve. Deuxième partie. Moyen Âge et Temps modernes*, Brussels, 1963, 375–430, at 405–407.

¹⁹*Keurboeck*, 20 (s.53/3).

²⁰Antwerp City Archives (hereafter ACA), Privilegiekamer, 1063/2 (30 April 1409) and 79, fo.237 (4 July 1474).

²¹ACA, Vierschaar, 5, s.139–143 and 60, s.141–145.

²²Strubbe and Spillemaeckers, "'De Antwerpse rechtsaantekeningen'", 22 and 31.

²³K. Kröschell, 'Bemerkungen zum "Kaufmannsrecht" in den ottonisch-salischen Markturkunden', in K. Düwel, ed., *Der Handel des frühen Mittelalters*, Göttingen, 1985, 418–430.

²⁴A. Cordes, 'The Search for a Medieval *Lex mercatoria*', 5 *Oxford University Comparative Law Forum* (2003), text after footnote 26.

example.²⁵ However, the contents of such legal provisions were not labelled as a merchants' procedure. Substantive commercial law is not evidenced by the aforementioned documents either. With the exception of the precepts regarding fairs, no distinction was made between commercial and other situations or agreements. Furthermore, no references are found to legal sources outside the Antwerp law. Precepts that were imposed by the City Court were mentioned as court law or as the 'law of the Antwerp citizens'.²⁶ Admittedly, the virtual absence of detailed default rules regarding the contents of commercial contracts in the Antwerp law of this period, and even the lack of concepts such as *ius mercatorum* in Antwerp judgments on the enforcement of contracts, does not mean per se that there was no separate collection of 'commercial' default rules applying to contracts of merchants. However, the fact that not a single reference was made to norms of that sort corresponds with data from the first half of the sixteenth century and thereafter (see below). It can therefore be concluded that fifteenth-century Antwerp law regarding agreements – commercial and other – focused nearly exclusively on the enforcement, with pledges and expropriation, of contracts that had been authenticated by the City Court.

In the sixteenth century, the system thus described changed completely. Already in the first decades of the 1500s, growing legal sophistication within the Antwerp government brought about the replacement of the method of individual attachment with a collective bankruptcy system involving all the debtor's contractual parties, a system which was in many respects based on concepts that had been drawn from civil law. Also, at around the same time, the City Court of aldermen started establishing more default rules regarding the contents of commercial agreements, many of which had not been in use in Antwerp in the fifteenth century. Later, around the middle of the sixteenth century, many commercial contracts involved traders being members of different *nations* and their agreements more commonly had the form of notarial and private instruments, which were no longer stamped by the City Court of aldermen. The dwindling control of the Antwerp rulers on merchants in this respect, and on the public notaries residing in the city and delivering notarial contracts regarding commercial subjects, contributed to a desire for an exhaustive urban law, which was above all triggered by the central government ordering the writing of compilations of local precepts. None of these changes of context hindered the older flexible attitude of the Antwerp City Court towards commercial practice and towards agreements of merchants. Already in the early 1500s, the latter's usages and customs, many of which had formerly been unknown in the city, had been integrated within the urban law, when they were filled in and supported with concepts and precepts stemming from civil law, and after 1550 they were further and more exhaustively reworked into wide-ranging collections of provisions of law.

²⁵ACA, Privilegiekamer, 1046 (1315).

²⁶The notions of *vierschaarrecht* (court law) or *recht van den poorteren van Antwerpen* (law of the Antwerp citizens) were used. See F. De Nave, 'Een Antwerpse rechtsoptekening uit het begin van de 15de eeuw', 30 *Bulletin de la commission royale pour la publication des anciennes lois et ordonnances de Belgique* (1982), 6 (s.8). This document is an early fifteenth-century compilation of Antwerp rules. A 1390 list of Antwerp judicial decisions relating to fair disputes was given the title of 'citizens' law'. See 'Clementynboeck, 1288–1414', 25 *Antwerpsch Archievenblad*, 1st series (*s.d.*), 217.

III. CRAFTING MERCHANTS' USAGES INTO ANTWERP LAW (C. 1480–1608)

1. *Civil law and usages of commerce in a court-based system (c. 1480–c. 1550)*

In the first years of the sixteenth century, Antwerp took the lead in the European distribution of merchandise coming from the new Atlantic trade. In 1508, the Portuguese *feitoria de Flandes* was installed there, and Antwerp was awarded a monopoly for the storage of spices and pepper brought to north-west Europe by Portuguese ships.²⁷ Already before the end of the first decade of the sixteenth century, Italian and Spanish merchants came over from Bruges, which was in decline for political and economic reasons.²⁸ Following such immigration, contracts that had not been known in Antwerp before that time trickled into its market. This phenomenon went hand in hand with the introduction of foreign usages regarding such contracts. In the early 1530s, for example, marine insurance contracts were drafted in Antwerp. The first insurance policies that were signed in those years reflect older insurance usages of Barcelona, Burgos and Bruges.²⁹ A similar process of importation of commercial practices, usages and customs concerned bills of exchange, which Italian merchants drew on their correspondents working in Antwerp.³⁰ In the 1520s, Italian-style commission trade was also introduced in Antwerp. It was an arrangement that was based upon discretion: the agent was not to communicate that he acted on behalf of a principal. When the merchandise belonging to the latter was sold, the agent kept a percentage of the negotiated price, as a reward for his service.³¹

This use of new commercial contracts and techniques, in the period approximately between 1480 and 1550, had a considerable impact on the Antwerp law. The Antwerp authorities early on endorsed many of the newly applied arrangements in aldermen's letters and *certificatiën*, and also in the context of hearing lawsuits.³² Testimonial declarations on rules regarding commercial agreements were soon accepted as proof of law. After 1480, the French technique of inquiries on law, of *enquêtes par turbe* (*turben* in Dutch), came into use in Antwerp. When a question of law was brought up in the courtroom, the aldermen selected ten or more persons for an interview on the contents and the application of adduced rules. This technique allowed litigants to evidence unwritten rules that were important in light of their case. Merchants could apply for such an *enquête*, and traders could in principle be questioned, if the aldermen decided to call them as witnesses.³³ As for the contents of such testimonials,

²⁷H. Van der Wee, *The Growth of the Antwerp Market and the European Economy (Fourteenth–Sixteenth Centuries)*, vol.2, The Hague, 1963, 129.

²⁸*Ibid.*, 89–111.

²⁹C. Verlinden, 'Code d'assurances maritimes selon la coutume d'Anvers, promulgué par le consulat espagnol de Bruges en 1569', 16 *Bulletin de la commission royale pour la publication des anciennes lois et ordonnances de Belgique* (1950), 38–41. See also H.L.V. De Groote, *De zeeassurantie te Antwerpen en te Brugge in de zestiende eeuw*, Antwerp, 1975, 57–58.

³⁰H. Van der Wee, 'Anvers et les innovations de la technique financière aux XVIe et XVIIe siècles', 22 *Annales: économies, sociétés, civilisations* (1967), 1067–89, at 1082–84.

³¹Van der Wee, *The Growth of the Antwerp Market*, vol.2, 325–326.

³²E.g. Doehaerd, *Études anversoises*, vol.2, 73 (*certificatie* regarding a bill obligatory to bearer, 8 July 1491).

³³According to Flemish procedural law of the fifteenth and early sixteenth centuries, which served as the example for Antwerp, no special status or profession of the witnesses was required. Yet the attestants

there were few requirements. The declarations of the witnesses interviewed had to make clear that the adduced rule had been applied over a certain period of time. Where it had been in use (in court, on the market, in contractual practice), and whether this was mentioned in the statement, was of no relevance for the validity of the *turbe*.³⁴ In practice, the declarations made at *turben* hinted at rules that had been applied in judgments of the City Court, or they established a new principle or rule of urban law. As for *turben* regarding commercial arrangements, they mostly had the latter purpose. The Antwerp aldermen indeed used *turben* to set forth precepts of urban law. They decided who was consulted, and they recorded questionnaires and answers of the interviews that had been held at *turben* into official ledgers, the so-called *turbeboeken*. This enactment was particularly crucial for newly formed urban rules, which often concerned commercial agreements and situations. Over the years, the registration of testimonials of rules that were considered to be relevant facilitated the production of evidence concerning previously attested urban rules.

Even though the most important, *turben* were not the only method of determining the urban rules regarding merchants' practices and contracts. The costs that were involved in organising an *enquête par turbe* meant that exceptionally, if the circumstances of the case allowed it and if the person adducing a custom or usage of merchants in court without setting up a *turbe* inquiry was deemed trustworthy, the Antwerp aldermen could accept that commissioners who had been appointed for checking evidence could advise on a usage or custom of merchants. In the first half of the sixteenth century, delegation to commissioners, often being merchants, was common in lawsuits involving the recovery of mercantile debts. In such cases commissioners inspected the proof, in particular the books of the merchants concerned, and they submitted a report on the facts of the affair to the aldermen. The latter thereupon 'decided what the law was'.³⁵ Questions of law were indeed, in principle and in practice, only seldom delegated to commissioners. A rare example dates from 1544. In that year, a dispute regarding six marine insurance contracts before the Antwerp City Court turned around a legal rule. It was unclear whether the insured had to submit proof of loss of an insured vessel, or whether it was customary that such evidence was no longer required when the ship had been lost for more than a year. The

had to be 'notable, old and wise'. See J. Gilissen, 'La preuve de la coutume dans l'ancien droit belge', in G. Despy, ed., *Hommage au professeur Paul Bonenfant (1899–1965). Études d'histoire médiévale dédiées à sa mémoire par les anciens élèves de son séminaire à l'Université Libre de Bruxelles*, Brussels, 1965, 563–594, at 568–569. In the 1470s, William van der Tannerijen, who had been secretary of the city of Antwerp in the 1450s, referred to the contemporary Flemish rules, but also mentioned witnesses as being *coustumiers*, i.e. specialists of local law. However, it does not seem that he considered legal expertise to be a condition for participation in a *turbe*. See W. Van der Tannerijen, *Boec van der loopender practijken der Raidtcameren van Brabant*, vol.1, E. Strubbe, ed., Brussels, 1952, 8.

³⁴Such requirements were not mentioned by Philip Wielant, the Bruges jurist who in the first decades of the sixteenth century commented on Flemish procedural law. See F. Wielant, *Briève instruction en causes civiles*, L.H.J. Sicking and C.H. Van Rhee, eds., Brussels, 2009, 204–205. Van der Tannerijen does not mention any prerequisites in this respect either.

³⁵Commissioners of this kind were commonly called *arbiters* or *goede mannen* (good men, 'boni vires' (sic)). As in Bruges, they were mediators rather than arbitrators. For an example of delegation of the assessment of proof onto commissioners of this sort, with the specification that the aldermen would decide on the legal issues, see ACA, Vierschaar, 1232, fo.260 (11 Feb. 1500 (n.s.)).

claimant, who sought payment of the insurance indemnity, stated that the latter rule was a 'usage and custom of the Exchange'. The Antwerp aldermen installed a committee consisting of two university graduates, probably jurists, and an unspecified number of merchants. The committee handed over a report and its members were consulted by the aldermen, also – so it seems – regarding the adduced custom or usage of merchants. It appears that the aldermen accepted that this custom or usage indeed existed, that it was a default rule and that it applied to the case, since the defendant was condemned to payment.³⁶ However, because in the first half of the sixteenth century such judicial delegations as to legal issues were virtually non-existent, and because other techniques of making Antwerp law such as the issuing of urban ordinances or public statements as to law were not, or at least very seldom, used, the organisation of *turben* and the registration of declarations made are nevertheless to be considered the most important means by which the Antwerp law was established in that period.

Between 1500 and 1530, fourteen testimonial declarations relating to commercial issues were registered in the Antwerp *turbeboeken*. As for the other *turbe*-statements that were inserted into the *turbeboeken* in those years, they were deemed to contain important rules that were new, or that could not be found in older source materials on Antwerp law. It is a surprising fact that of the fourteen *turbe*-declarations regarding commercial contracts and related situations, not one referred to customs, to practices or to the commercial nature of the confirmed rules. Instead, in all fourteen cases the witnesses labelled the rules that had been invoked in court, and which they confirmed, as belonging to urban law or as being imposed by the Antwerp City Court. For *turben* on bankruptcy that were organised after the Antwerp aldermen had regulated this matter with ordinances of 1516 and 1518 (see hereafter), this is not surprising.³⁷ With regard to other rules, and in particular those concerning letters obligatory made out to bearer,³⁸ the statements demonstrate an early acknowledgement of newly used merchants' practices by the Antwerp aldermen. In general, the description of rules as pertaining to the urban law reflected the absorption and reworking of usages of merchants under the direction of the Antwerp City Court in the early 1500s.

Also, the testimonial statements made at *turben* make clear that the establishment of urban rules concerning commercial contracts was done virtually without the participation of merchants. All witnesses at the mentioned *turben* were former aldermen, legal practitioners (advocates, proctors or public notaries) or officers working for the Antwerp government (town pensionaries or law clerks). In the period from 1500 to 1530, not one merchant took part in such inquiries.³⁹ Therefore, it is evident that the aldermen, when choosing the witnesses to be questioned on legal issues regarding

³⁶ACA, Vierschaar, 1239, fo.117v and fo.138v (19 July 1544).

³⁷ACA, Vierschaar, 68, fo.32v (18 May 1519), fo.36 (19 Sept. 1521), fo.39 (7 May 1522) and fo.42 (2 Jan. 1526 (n.s.)).

³⁸ACA, Vierschaar, 68, fo.13 (7 June 1507) and fo.23v (1 Dec. 1507).

³⁹ACA, Vierschaar, 68, fo.12v (c.1508), fo.13 (7 June 1507), fo.17v (15 Oct. 1509), fo.23v (1 Dec. 1507), fo.32v (18 May 1519), fo.34 (1 June 1520), fo.35 (1 June 1520), fo.36 (19 Sept. 1521), fo.39 (7 May 1522), fo.42 (2 Jan. 1526 (n.s.)), fo.61v (2 June 1526), fo.62v (c.1526), fo.73 (c.1527) and fo.74 (1528 or 1529).

commercial arrangements, did not consider merchants to be qualified for this. More recent testimonies on law, too, support this conclusion. Between 1530 and 1560, ten statements on commercial contracts and situations made at *turben* were written into the *turbeboeken*. They include rules on bankruptcy, agency, bills of exchange and partnership.⁴⁰ Again, it was mostly jurists working within the ranks of or for the Antwerp aldermen who gave their opinions. Yet, also, though only on one occasion, merchants participated in an interview alongside legal practitioners, and labelled rules regarding commercial contracts as urban law.⁴¹ In none of these declarations did the witnesses invoke commercial customs, customs of merchants, mercantile practices, nor did they refer to precepts with such indications. They all mentioned that the Antwerp City Court imposed the rule under discussion, or that it was Antwerp law.

From the contents of the mentioned *turbe*-declarations, it is also evident that the acknowledgment of practices of trade regarding commercial arrangements went hand in hand with legal structuring and contextualisation. The formulation of rules based on usages of merchants in the *turbe*-statements not merely comprised the rephrasing of existing customs of merchants into the language of the Antwerp City Court. It entailed more than that. The jurists and legal practitioners attesting rules of the city of Antwerp that relied on practices and even customs of merchants remodelled the latter using academic terminology with legal-theoretical implications and which could not have been used among merchants. At a 1507 *turbe*, for example, former Antwerp aldermen, advocates and proctors affirmed that written acknowledgements of debt (letters obligatory) containing a bearer clause could be given as payment. The holder of such a bearer bill was to collect his debt from the person who had signed the document, and the former was considered to be the lawful claimant of the debt contained in the bill. The jurists and legal practitioners making these statements sought reference points within the civil law. A holder was therefore named *cessionarius*, which was an expression pointing to the doctrinal concept of *cessio*, of a transfer of claims. Also the notion of *adiectacie* was used, which referred to the Roman law *adiectus solutionis causa*.⁴² In the early 1500s, claims based on bearer clauses were considered to be not in conformity with the *ius commune*. However, an *adiectus solutionis causa* could lawfully keep an amount received even though he was not entitled to the claim or debt for which it was paid.⁴³ As a result, that notion could, in a broad interpretation, serve as the basis for holder rights in Antwerp law. Even when precepts of Antwerp law were crafted that went against the contents of civil law, the latter still served to underpin them theoretically and

⁴⁰ACA, Vierschaar, 68, fo.92 (22 Sept. 1531), fo.96 (9 May 1536), fo.102v (7 April 1540 (n.s.)), fo.109 (18 Aug. 1541), fo.141 (23 May 1554), fo.156 (9 Nov. 1542) and fo.159 (1551); ACA, Vierschaar, 69, fo.9 (17 Jan. 1535 (n.s.)), fo.10v (4 May 1542) and fo.25v (19 April 1559).

⁴¹ACA, Vierschaar, 68, fo.96 (9 May 1536).

⁴²ACA, Vierschaar, 68, fo.13 (7 June 1507). On contemporary doctrinal views relating to *cessio*, see G. Astuti, 'Cessione (premesse storica)', in *Enciclopedia del diritto*, vol.6, Milan, 1960, 805–822.

⁴³R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Cape Town, 1990, 752–753.

terminologically. The lasting uneasiness displayed by the contemporary academic law in its attitude to bearer documents explains why the Antwerp aldermen, even in the second half of the sixteenth century, frequently had to confirm that letters obligatory to bearer were legally sound according to Antwerp law.⁴⁴ In the early 1500s, the rights of the holder of a bill made out to bearer had most probably been a firm custom of merchants in Antwerp. The integration of such a custom, with its more or less workable legal contents, into the urban law nonetheless went together with the adding of legal abstraction and links to doctrinal concepts that were not known by merchants, and which could explain hypotheses as yet unprecedented in mercantile practice. That is why legal practitioners were asked to decide issues of law that were brought up in lawsuits, for their expertise went beyond what mercantile contracts or usages of merchants delivered as answers to legal questions. It would not have been useful to ask merchants to clarify their practices when legal problems accompanying the latter had not been foreseen.

The same mechanisms of crafting usages and customs of merchants into urban law through the use of civil law were applied in urban ordinances, which were scarcely used in matters of Antwerp private law. Ordinances of 1516 and 1518 instituted a new collective bankruptcy system. They provided that all assets of a bankrupt should be divided among his creditors, and that first attachment did not bring about rights of priority in the collective debt recovery proceedings that were started against a bankrupt's estate.⁴⁵ These urban ordinances, and the rules that were soon afterwards added to them in judicial practice and which were confirmed in *turbe*-statements, clearly show how the *ius commune* served to tackle the needs of the increasingly internationally oriented Antwerp market and how it added sophistication to the older fifteenth-century precepts regarding expropriation. The idea of collectivity in proceedings against a bankrupt had been imposed in legislation of Italian cities. Before it came to be acknowledged as part of the Antwerp system of debt recovery, it is probable that many merchants trading in Antwerp shared the conviction that creditors ought to be paid rateably following the insolvency of a debtor. For its implementation, however, the Antwerp City Court had to adapt its law. At a *turbe* that was organised in 1525, the underlying purposes of the mentioned urban ordinances were expressed in terms of civil law. The witnesses, all being legal practitioners, stated that a bankrupt's assets were affected by his failure, that these resources entered *in communem massam creditorum*, and that the proceeds of the public sale were *pro rata portione*. The latter formula reflects doctrinal views that were found in contemporary legal literature.⁴⁶

⁴⁴ACA, Vierschaar, 69, fo.59v (21 June 1567) and fo.76v (24 Nov. 1572); G. De Longé, ed., *Coutumes du pays et duché de Brabant. Quartier d'Anvers. Coutumes de la ville d'Anvers*, vol.2, Brussels, 1871 (hereafter *Antwerp 1582 Costuymen*), 398 (ch.53, s.6); G. De Longé, ed., *Coutumes du pays et duché de Brabant. Quartier d'Anvers. Coutumes de la ville d'Anvers*, vol.3–4, Brussels, 1872–74 (vol.4 is hereafter referred to as *Antwerp 1608 Costuymen*), 12 (part 4, ch.2, s.7).

⁴⁵See for an evaluation of the contents of these ordinances, De ruysscher, 'Designing the Limits of Creditworthiness', 310–313.

⁴⁶ACA, Vierschaar, 68, fo.42 (2 Jan. 1526 (n.s.)). The notion '*pro rata portione*' was used in the Justinianic sources. See, for example, D. 38,2,20,3. The concept '*massa communis creditorum*' appeared in Italian city

In the period between 1530 and 1550, when commercial arrangements slowly spread among larger groups of merchants, more contracts involved merchants belonging to different organisations. As a result, the Antwerp City Court of aldermen, which was the sole institution that could adjudicate on such agreements, attracted more litigation that was started by merchants, and many such cases concerned ‘international’ contracts between merchants.⁴⁷ However, in this period, the degree of integration of the Antwerp market was still relatively low, and the aldermen set forth but few default rules regarding commercial contracts. It was a remnant of the earlier, fifteenth-century approach that in their judgments they decided mostly according to the contract, or when this could not be done, by imposing an oath upon claimant or defendant that ascertained whether they were of good faith.⁴⁸ It was, all in all, exceptional that *turben* concerning commercial arrangements were organised. Virtually no texts revealing the Antwerp law regarding commercial contracts were drawn up around this time, but the one existing and dating from this period, the so-called ‘Golden Book’ of the early 1530s, contains few default rules regarding commercial contracts. This compilation of some 156 sections, which was probably written by a public officer and which was never made public, provides rules for commerce, but mostly concerning bankruptcy, debt recovery and hierarchy of claims.⁴⁹ In the first half of the sixteenth century, to a large extent, the older views of the urban government prevailed. It was only after 1550 that a further integration of the Antwerp market contributed to a fundamental reversal in policy as to lawmaking.

2. *Exhaustive legal compilations and the philosophy of civil law (c. 1550–1608)*

After 1550, the Antwerp aldermen developed a more active policy of establishing precepts regarding commercial contracts. First, they issued official statements on such norms, and more attention was paid to the participation of merchants in *turben* establishing urban rules concerning mercantile arrangements. Thereafter, and starting around 1570, came the writing of chapters on commercial contracts in detailed and extensive collections of urban law.

Particularly in the 1560s, the Antwerp rulers issued several official statements regarding urban rules on commercial contracts. Such certificates of law were bound together with *turbe*-declarations into the *turbeboeken* because they were considered official records of rules of Antwerp law.⁵⁰ It was new that the aldermen no longer only directed and registered important testimonials delivered in lawsuits but now

ordinances, and supposedly had been used in civil law literature dating from before 1500. See U. Santarelli, *Per la storia del fallimento nelle legislazioni italiane dell'età intermedia*, Padoa, 1964, 109–113 and 195.

⁴⁷I refer to provisional conclusions reached by Jeroen Puttevils (University of Antwerp), who has examined the ledgers containing the extended sentences of the Antwerp City Court of 1505 and 1544 in great detail. He found out that in 1505 twenty-one sentences out of ninety-two (22.8 per cent) concerned commerce between citizens or merchants, whereas in 1544 this was so for 177 sentences out of 583 (30.4 per cent).

⁴⁸See, for example, for the imposing of an oath in such a case, ACA, Vierschaar, 1239, fo.117v (19 July 1544).

⁴⁹*Keurboeck*, 378–427.

⁵⁰ACA, Vierschaar, 68, fo.159 (c. 1551); ACA, Vierschaar, 69, fo.34v (2 Dec. 1561), fo.37v (29 Oct. 1561), fo.38v (24 Dec. 1561), fo.39v (16 Feb. 1561 (n.s.)), fo.43v (28 Aug. 1563), fo.45v (30 May 1564), fo.50v (16 May 1565), fo.52 (17 Oct. 1566), fo.59v (21 June 1567), fo.60 (1 June 1568), fo.60v (26 June 1568), fo.66v (17 Dec. 1569) and fo.163 (28 Aug. 1563).

also proactively determined what precepts of law applied to commercial contracts that were made in the city. This process was a response to specific circumstances in the Antwerp market. It led to the realisation of ambitions implicit within the *ius commune*, but was triggered by efforts of the royal government to certify local law. It was the latter actions that after some time resulted in thorough collections of rules of Antwerp law, containing articles on commercial contracts.

In 1531, following the French example, the Privy Council of Emperor Charles V ordered that municipalities in the Netherlands write down the private law rules imposed on their citizens. Compilations called *costuymen* were to be submitted to the nearby provincial court, which would examine the projects and formulate advice on their approval. If accepted, the *cahiers* were confirmed in a royal ordinance as the law of the locality. These measures were intended to overcome uncertainties as to the contents of unwritten law, and they formed an attempt at centralising the scattered legal landscape of the Netherlands.⁵¹ They are evidence of the cooperation between the local and central levels of government in the sixteenth-century Netherlands, and the homologation of local law must be considered against that background. The royal agenda stimulated a strengthening of the Antwerp urban law, which nonetheless by and large remained separate from royal legislation.

In 1548, a text bundling some older ordinances of the Antwerp aldermen on private law and procedural issues was sent in as Antwerp *costuymen*. Its quality is not high and it contains virtually no articles on commercial contracts. For reasons unknown, it never received royal validation and the Antwerp aldermen eventually withdrew it. In July 1570, following reminders of the 1531 order made by the governor-general, Alva, the Antwerp government handed in a revised version of the 1548 collection, containing some chapters on the commercial contracts of marine insurance and bills of exchange.⁵² They attest to the ambition of the Antwerp aldermen to create substantial sets of rules with respect to the contracts that were commonly used by merchants residing in the city, but the relevant sections in those chapters were far from comprehensive. Moreover, for reasons unknown, again they did not receive royal approval, and thus remained unofficial. However, in Antwerp, they preserved their function as guidelines for the judges in the City Court, and for citizens and for those trading in the city they gave some certainty as to which precepts were applied there. Yet they did not have the formal force of a royal or even urban ordinance.

⁵¹J. Gilissen, 'La rédaction des coutumes en Belgique aux XVIe et XVIIe siècles', in J. Gilissen, ed., *La rédaction des coutumes dans le passé et le présent*, Brussels, 1962, 98–102. These orders were part of a broader policy of royal support for local government and trade. In the 1530s and 1540s, Charles V had issued some ordinances imposing rules on contracts of partnership, letters obligatory to bearer and bills of exchange. These laws, which mostly involved the recovery of debts, had for the large part been asked for by the community of merchants in Antwerp, and they had been confirmed by or petitioned with the support of the Antwerp aldermen. See O. De Smedt, 'De keizerlijke verordeningen van 1537 en 1539 op de obligaties en wisselbrieven. Eenige kanttekeningen', 3 *Nederlandsche Historiebladen* (1940), 15–35, at 16–21. After 1550, only marine insurance remained the object of new royal legislation, which was negotiated between the royal institutions, the Antwerp aldermen and the community of merchants of Antwerp.

⁵²F. Stevens, *Revolutie en notariaat. Antwerpen 1794–1814*, Assen, 1994, 21–24.

As a result of all this, after 1550 the City Court could continue with its former approach towards contractual conventions and usages of merchants. In this period *turben* remained important. However, also in the declarations produced at *turben* that were registered after 1550 the changing attitudes of the Antwerp rulers are clear. Some *turbe*-statements that were written down after 1560 specify rules as being applied among merchants,⁵³ or as ‘customs of the city and of the Exchange’.⁵⁴ The latter notion, which had occasionally been used in the 1540s (see above), referred to the 1531 Antwerp Exchange building where merchants and brokers met, and it points to the integration of the Antwerp market where membership of *nations* and differences in geographical origins of merchants had become less and less relevant. Such a description was one of the formulas that were sometimes added to the rules brought up in testimonials at *turben* and that were focusing on the application of norms by and among merchants.⁵⁵ The notion of ‘customs of the Exchange of Antwerp’ also appeared in Antwerp marine insurance contracts starting from the 1560s.⁵⁶

In the period after 1560 merchants were invited to *turben* more often than before, albeit still only occasionally. In three of the twenty *turben* regarding commercial issues that were organised between 1560 and 1582, only merchants were witnesses.⁵⁷ The notion of ‘customs of the Exchange’ was exclusively used by witnesses being merchants, and not by legal practitioners or civil servants. The latter merely pointed to a use of urban precepts by and among merchants. This was due to the closed character of the community at the Exchange, to which advocates, proctors and officers had no access. The thematic changes in the formulation of rules of commerce in the statements made at *turben*, and also in those produced by merchants, did not concern sources of law. Declarations at *turben* mentioned ‘customs of the city and of the Exchange’.⁵⁸ The witnesses at *turben* merely stressed that the precept referred to was imposed by the City Court and applied among merchants.

The involvement of merchants in *turbe*-inquiries followed from the Antwerp rulers’ ambition to catch new usages of merchants in the nets of the urban law. This programme had been sparked by the royal orders mentioned above, but it also attempted to provide answers to a further integration of the Antwerp market and to the problems that came with it. In the 1530s and even more in the 1540s, commercial agreements and techniques, in particular partnership contracts and marine insurance, had slowly gained acceptance with other merchants, and they had spread outside the circles of the immigrants who had introduced them. A clear example of this dispersal

⁵³ACA, Vierschaar, 69, fo.51v (10 July 1566) and fo.68v (22 Dec. 1569).

⁵⁴ACA, Vierschaar, 69, fo.18 (29 May 1571); ACA, Vierschaar, 69, fo.208 (7 June 1582).

⁵⁵ACA, Vierschaar, 69, fo.68v (22 Dec. 1569) ‘... *este vray que en ladite ville d’Anvers indistinctement a estre observe especiallement entre marchans et negociants en ladite ville ...*’; ACA, Vierschaar, 69, fo.51v (10 July 1566) ‘... *e sempre stato in uso e osservato da marchanti in questa sopradetta città ...*’.

⁵⁶De Groote, *De zeeassurantie*, 113–114; J.P. van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800*, Cape Town, 1998, vol.1, 251.

⁵⁷ACA, Vierschaar, 69, fo.18 (29 May 1571), fo.51v (10 July 1566) and fo.208 (7 June 1582).

⁵⁸ACA, Vierschaar, 69, fo.18 (29 May 1571) ‘... *que es costumbre en este dicha ciudad d’Emberes y bolsa dell’ entre los mercaderes ...*’; ACA, Vierschaar, 69, fo.208 (7 June 1582) ‘... *naevolgende de costume deser stadt ende borse der selver ...*’ (‘... following the custom of this city and of its Exchange ...’).

of commercial contracts and techniques relates to bookkeeping. At first, Italian companies working in Antwerp practised double-entry bookkeeping. With a 1543 treatise, Jan Ympyn Christoffel, who was a teacher in an Antwerp business school, heralded the Venetian method of double-entry bookkeeping. At that same time, other Antwerp manuals still took the single-entry variety operated by South German companies as a standard. However, new editions of the latter guides were published in the 1550s and 1560s, and these updated versions followed Christoffel's example by promoting the Venetian style.⁵⁹

Also, in the 1550s and 1560s, privately written agreements, which were not offered to the aldermen or public notaries for registration, became more popular. Such contracts, foremost concerning marine insurance and partnerships, more commonly contained innovative provisions, which resulted in discussions on fraud and applicable rules.⁶⁰ The expansion of trading relations outside earlier established networks and organisations added to the complexity of commerce.⁶¹ All these developments made it necessary for the Antwerp aldermen to establish more detailed default rules, since it became less feasible to decide on the basis of the express terms of individual contracts.⁶² It was these events that created fertile ground for the implementation of an exhaustive legislative approach towards commercial contracts. The claim that all facts of life could be expressed in comprehensive and detailed legal precepts was implicit in writings of civil law. The aldermen's ambition to create all-inclusive provisions of law applying to contracts of merchants was therefore also the realisation of the academic idea that law was written, systematic and rational.⁶³ As a result of all this, it was after 1550 that the influence of *ius commune* in Antwerp rose to its highest level.⁶⁴

The period between 1580 and 1610 marked the highpoint of Antwerp commercial legislation. In those years, two compilations with numerous sections on commercial topics were devised. In 1578, the Antwerp government decided to compose a new law book, acting this time on its own initiative and not following invitations from the royal government.⁶⁵ The new collection was printed in the last months of 1582 and these

⁵⁹R. De Roover, 'Aux origines d'une technique intellectuelle: la formation et l'expansion de la comptabilité à partie double', 60 *Annales d'histoire économique et sociale* (1937), 171–193 and 270–298, at 284–287.

⁶⁰On indications as to the growing number of private and unregistered contracts of marine insurance, see van Niekerk, *The Development*, vol.1, 468–470.

⁶¹Clues in this respect can be found in complaints brought forward at *Hansetage* since 1562, regarding partnerships between Hanseatic and non-Hanseatic merchants in Antwerp. See K.-P. Zöllner, 'Zur Stellung der Hansekontore in der zweiten Hälfte des 16. Jahrhunderts', in K. Fritze, E. Müller-Mertens, J. Schildhauer and E. Voigt, eds., *Neue Hansische Studien*, Berlin, 1970, 323–340, at 325–326 and 328–329. Some of those contracts were studied in E. Wijnroks, *Handel tussen Rusland en de Nederlanden, 1560–1640*, Hilversum, 2003, 65–156.

⁶²For details concerning the attitude of the Antwerp aldermen towards public notaries, and the failure after the middle of the sixteenth century of their strategy to subject the latter to their control, see D. De ruysscher, 'Over Themis en Mercurius. Handelsgebruiken en-recht in Antwerpen (vijftiende-zeventiende eeuw)', 88 *Revue belge de philologie et d'histoire* (2010), 1123–26.

⁶³M. Bellomo, *The Common Legal Past of Europe, 1000–1800*, Washington, 1995, 152–156.

⁶⁴The developments as to substantive law had a parallel in the tactics of the Antwerp aldermen when imposing their appellate jurisdiction on *nations* of merchants, even though most of them enjoyed immunity of jurisdiction by ducal privilege.

⁶⁵ACA, Privilegiekamer, 552, fo.204 (18 July 1578).

Consuetudines Impressae grew to become the standard text of Antwerp private law. It contains a chapter on partnership, and groups many articles on bills of exchange and bankruptcy that had not been contained in the 1570 collection.⁶⁶ The 1582 compilation was the first to list extensive legal provisions regarding the most popular commercial contracts. It is therefore somewhat ironic that, when it was being completed, Antwerp's Golden Age had already come to an end. The uprising of the northern provinces of the Netherlands, which Antwerp joined in the early 1580s, also sealed the fate of the 1582 law book. It was a Calvinistic Antwerp government that issued the 1582 text. This Protestant rule did not last very long. In September 1585, following the Spanish conquest of Antwerp, a new Council of Catholic aldermen was installed, which in May 1586 took the decision to outlaw the 1582 collection of Antwerp law. At the same time, a committee of jurists and urban officers was given the task of writing a new urban law compilation.⁶⁷

The latter project was finished in 1608, when an elaborate text was presented. It contains 3643 sections, which are divided into seven parts. Its legal provisions on commercial law encompass nearly one-third of the total, or 1124 sections in eighteen chapters, a number contrasting with the 111 sections on corresponding matters in the 1582 *costuymen*. Newly covered subjects included bottomry and topics of agency.⁶⁸ Shortly after the submission of the 1608 collection, the Antwerp aldermen sought a provisional confirmation and publication of the chapters containing commercial precepts. In February 1609, a royal licence to print them was obtained, but the compilation was never formally homologated as royal law.⁶⁹ In March 1609, the Antwerp aldermen publicly imposed the use of the sections on commerce in the City Court.⁷⁰ In spite of this public order, the 1608 compilation was not promulgated in the form of an urban ordinance. It remained thus rather a collection of instructions and guidelines for forensic practice.

This was also the case for the 1582 collection, which notwithstanding its condemnation was used more often. The 1608 compilation was seldom applied in contractual and judicial practice. For nearly every commercial subject, the 1582 collection remained dominant as a source book for arguments in advocates' pleadings, also after its abrogation in 1586 and even after 1609. The reason for this was twofold. The 1608 text had not been printed, and because its manuscript was of considerable size, limited availability soon prevented it from being consulted on every occasion.⁷¹ Another problem was posed by its contents, because it was not continuous with the default rules established earlier. Many of the solutions in the 1608 compilation were formalistic. The 1608 compilers insisted on mandatory clauses in marine insurance contracts, for example, and they even required a declaration of the insured's good faith for any suit upon an insurance

⁶⁶*Antwerp 1582 Costuymen*, 392–396 (partnership), 408–412 (bills of exchange) and 528–556 (bankruptcy).

⁶⁷ACA, Privilegiekamer, 558, fo.112v (30 May 1586).

⁶⁸*Antwerp 1608 Costuymen*, 188–198 (agency) and 326–328 (bottomry).

⁶⁹ACA, Vierschaar, 64.

⁷⁰*Ibid.*, 55.

⁷¹Stevens, *Revolutie en notariaat*, 28.

contract.⁷² These precepts were new and they had not been practised by merchants or imposed in judgments before. Near the end of the seventeenth century, the Antwerp government gradually accepted the factual situation that the 1582 law book had prevailed. Even before that time, and after 1633, the Antwerp aldermen no longer insisted on royal endorsement of the 1608 text,⁷³ and in the later decades of the 1600s they even cited the 1582 law book themselves.⁷⁴ In the seventeenth century, the fact that the collections of Antwerp law had not been confirmed as royal law made it possible for the Antwerp aldermen to flexibly adapt their contents in judgments imposed by the City Court.

The 1582 and 1608 compilations did not refer to the insights, conventions or usages of merchants, not even with regard to such contracts as bills of exchange and marine insurance, for which relatively few *turbe*-statements or other legal texts could be used as sources of legal argument. The 1582 and 1608 law books for the first time detailed many rules on those arrangements, as they were conceived to be more or less exhaustive legal guidebooks for the commercial arrangements described therein. This again demonstrates the Antwerp legislator's newly found determination in designing commercial precepts, which had begun with the issuing of statements of law in the 1560s and which culminated in the ample 1608 collection. As mentioned, this search for comprehensive and detailed legal rules was a further effect of the *ius commune*, and above all of its philosophy. The Antwerp compilation committees consisted nearly entirely of jurists, who were either urban officers or advocates. Most of them held licentiates or doctorates in civil law, or in both canon and civil law.⁷⁵ The texts which they compiled attest to their education, in content as well as in scope. As had been the practice before, the compilers did not merely insert or copy customs of merchants into the written Antwerp law. Even when clear customs were at hand, they adopted solutions from civil law in order to rephrase and adapt them.

Some practices of merchants were deemed not appropriate or too contrary to legal theory to be accepted without adaptations. However, it was all in all very rare that the Antwerp legislator used civil law precepts as a buffer against practised commercial customs.⁷⁶ For nearly all matters, as had been done in the first half of the sixteenth

⁷²*Antwerp 1608 Costuymen*, 310 (part 4, ch.11, s.266).

⁷³A last attempt was made in the early 1630s, but in 1633 the efforts stopped. See ACA, Privilegiekamer, 579, fo.22v (14 July 1633), fo.23 (23 July 1633) and fo.25 (9 Aug. 1633).

⁷⁴In 1694, the aldermen asked the royal Council of Brabant to enact a section of the 1582 compilation in a royal law. See ACA, Privilegiekamer, 2819, ad annum (18 Jan. 1694).

⁷⁵M. Gotzen, 'De costumiere bronnen voor de studie van het oud-Antwerpsch burgerlijk recht', 39 *Rechtskundig tijdschrift voor België* (1949), 3–16, at 13–14. The names of the compilers were compared with data on their education that had been brought together in H. De Ridder-Simoens, 'De universitaire vorming van de Brabantse stadsmagistraat en stadsfunktionarissen, Leuven en Antwerpen, 1430–1580', in *Het culturele leven in de Brabantse steden van de 15de tot de 18de eeuw*, 's-Hertogenbosch, 1978, 21–126.

⁷⁶For some examples, refer to D. De ruysscher, 'Law Merchant in the Mould. The Transfer and Transformation of Commercial Practices into Antwerp Customary Law (16th–17th Centuries)', in V. Duss, N. Linder, e.a., eds., Munich, 2006, 433–445. This contribution insists on the Antwerp rulers' adaptation of customs of merchants, and it is – since it was a first report of ongoing research – less concerned with the supportive function of civil law concepts and theory. In this publication, customs of merchants were also, unjustly, considered as being part of a body of law.

century, civil law solutions provided flexibility and security, and they supported customs and usages of merchants. This is evident in the provisions of law regarding partnership that were written into the Antwerp compilations, which leaned heavily on *ius commune* writings and which provided a framework for partnership agreements. Such precepts were considered to be non-mandatory statutes: they were imposed only in the absence of a provision in the partnership contract.⁷⁷ In the Antwerp commercial practice of those days, associations between merchants were predominantly started with written agreements. The contents of the contract could freely deviate from most urban rules on partnership, and a great number of partnership agreements did so.⁷⁸ Another example, of a more substantive auxiliary use of civil law rules in response to certain commercial situations, relates to restaurant tickets. Participants in an inn gathering, which was commonly organised after the signing of a contract, were presumed to belong to a partnership. Therefore, they were held liable *in solidum* for the payment of the bill for the meal. This precept was clearly construed as protection for innkeepers.⁷⁹

IV. UPGRADING MERCANTILE USAGES IN THE SEVENTEENTH CENTURY

The Antwerp legislators clearly accepted and legally supported most innovations of commercial practice. Measures of the aldermen opposing merchants' practices were altogether scarce. In many instances, after some time, initial worries were overcome. The aldermen acknowledged commercial techniques that had been forbidden by earlier Antwerp governments. In the second half of the seventeenth century, for example, it was a usage of merchants that an insured could omit details on the presence of consumables in the insured cargo, if the clause 'perishable or not perishable' was inserted into the marine insurance contract. Although this practice went against sections of the 1582 and 1608 compilations of Antwerp law, in the 1650s and 1670s an urban rule allowing it was nonetheless attested. The aldermen registered *turbe*-declarations building on this usage into the *turbeboeken*.⁸⁰ Furthermore, when acting as judges, the aldermen often implicitly accepted practices that had been proscribed earlier by allowing suits on banned contractual terms. In the course of the seventeenth century, for example, the Antwerp City Court heard lawsuits regarding bills of exchange that had been drawn by way of *ricorsa*, which involved a mechanism of drawing and redrawing as a method of payment of such bills, even though older ordinances of the Antwerp aldermen had forbidden that technique.⁸¹

⁷⁷*Antwerp 1582 Costuymen*, 392–396 (ch.52).

⁷⁸A typical example regards clauses in partnership contracts providing that the agent of the firm can only engage in contracts to a maximum amount. This was a contractual remedy, clearly derogating from the civil law and from the urban rule that partners were liable *in solidum* for debts incurred for the firm. See e.g. ACA, Processen, B 2057, contract of 5 July 1650.

⁷⁹*Antwerp 1582 Costuymen*, 394–396 (ch.52, s.9).

⁸⁰ACA, Vierschaar, 70, fo.160 (31 May 1652) and 71, fo.28v (29 Dec. 1677 and 5 Jan. 1678).

⁸¹E.g. ACA, Processen, B 1200 (1675–77). See for bans of exchange by means of *ricorsa*, ACA, Privilegiekamer, 918, fo.135 (29 Feb. 1600) and fo.141 (21 Dec. 1600).

Most of the Antwerp precepts in *turbe*-statements and law books concerning commerce were inspired by or relied on practices of trade, but civil law marked the concrete outcome of the process of lawmaking. It has already been suggested that this was not an imposed policy. Merchants as well wanted detailed and sophisticated urban rules regarding their contracts. Apart from what has been said about the formalistic and intrusive nature of the 1608 collection, virtually no complaints of merchants on the contents of urban default rules can be found. In the sixteenth century, rules in the Antwerp urban law corresponded to a large extent with what was going on in the Antwerp market. This is also clear in the consistency of marine insurance contracts between the 1570 and 1582 Antwerp law collections, for example. Only after 1608 did marine insurance policies derogate from the new and cumbersome provisions in the compilation of that year, but after 1650 the City Court of aldermen adapted its policy in favour of the merchants.⁸²

Another indication of a friendly reception of the government-made precepts by merchants is the low numbers of references that were made to mercantile usages or customs of merchants before the Antwerp City Court. From a sample of 639 case files dating from between 1585 and 1715 that were brought in the Antwerp City Court, 120 relate to contracts on commerce. In only nine of these 120 dossiers were commercial usages cited. By contrast, written pleadings in those case files teem with references to urban law and to civil law. Of the 120 files, no fewer than eighty contain citations of civil law writings. These references mostly regarded issues in relation to which the compilations of Antwerp legislation had remained close to the civil law. Citations of urban law or of sections of the compilations of Antwerp law can be found in forty-one files, five of which contain civil law arguments as well.⁸³ These proportions of citations of legal sources show that after 1585, for legal questions on commerce, advocates found what they needed in the written sources of Antwerp law, and that they were not often obliged to prove customs. Admittedly, there was a certain tendency among advocates to stretch civil and urban law concepts in order to make them explain applications of commercial contracts for which no express written precepts existed. This was due to an understandable reluctance to test the judges' views on novel matters; an opting for well-known legal sources served to make new usages acceptable. However, this technique of legal argument was rather rare.⁸⁴ Customs or usages regarding commercial innovations were not left unmentioned or unproven because they were disguised within arguments of written, learned or urban, law. On the contrary, the official urban rules, which were based on civil law, closely followed commercial practices, and such broad interpretations were unnecessary.

⁸²See n.80.

⁸³The sample was randomly drawn from 16,247 case files, which constitute the collection of preserved dossiers for the mentioned period and which can be found in ACA, Processen, and ACA, Processen Supplement.

⁸⁴An example is the broad interpretation of the concept of *procurator in rem suam* in order to sustain the powers of holders to sell their bills of exchange. See e.g. ACA, Processen, B 1637, *antwoord* (1 March 1611), article 2. However, this closely followed what in the early 1500s had been stated about the rights of holders of letters obligatory made out to bearer.

In the 1600s, the Antwerp aldermen absorbed other commercial novelties into their law. In the 1610s, the technique of indorsing bills of exchange became generally practised in Antwerp.⁸⁵ It encompassed the passing on of a bill of exchange to someone who was not mentioned in the instrument. This went together with the writing of a note on the reverse of the bill, in which the new holder was appointed as legitimate claimant. The latter could acquire the bill in payment of an existing debt, or as a buyer at a discount, taking a chance on the claim in the bill.⁸⁶ The 1608 compilation had already supported third parties receiving bills of exchange. It had provided that a bill was not to be revoked if the holder had been given authorisation to keep what he collected on the bill.⁸⁷ This precept fostered an interpretation by advocates that transactions of bills of exchange were legally permissible.⁸⁸ That was contrary to the early seventeenth-century civil law, which still promoted the bipartite conception of a bill of exchange as cementing a loan between the remitter and the drawer only. The remitter or lender was deemed to be the only creditor of the bill, and the receiver his agent.⁸⁹ Yet the Antwerp rulers soon approved indorsement. A 1630 certificate of the Antwerp aldermen formally recognised the technique as urban law, in academic terminology. Indorsees were to be considered lawful claimants.⁹⁰ In 1647 officially registered *turbe*-statements testified that according to the urban law every transferor of the bill, as well as the drawer, remained liable if the bill was not paid.⁹¹ By 1650, the Antwerp law had thus completely acknowledged the newly developed method of indorsement. This was very early compared with other commercial centres in Western Europe. In the German financial cities of Augsburg, Nuremberg and Frankfurt, indorsement was legally accepted only after 1665. In many Italian city-states, bans against transfers of bills of exchange lasted into the 1700s.⁹²

In the seventeenth century, mechanisms for integrating new usages of merchants into the Antwerp law, such as the registration of *turbe*-declarations and the issuing of certificates of law, which had been used in the 1500s, were thus still intact. However, the 1600s were different in a nearly complete absence of royal support of the Antwerp law, and in a slowing down of commercial innovation. After the license to print of 1609, the royal influence in the Antwerp legal scene faded away. No new orders to submit compilations were issued, and neither were there new royal ordinances on commercial arrangements. The enactment of Antwerp urban law was altogether not

⁸⁵R. De Roover, *L'évolution de la lettre de change XIVe–XVIIIe siècle*, Paris, 1953, 99–100.

⁸⁶*Ibid.*, 119–142.

⁸⁷*Antwerp 1608 Costuymen*, 28 (part 4, ch.3, s.30) and 34 (part 4, ch.3, s.49).

⁸⁸ACA, Processen, B 1637 (1611) and ACA, Processen Supplement, 2002 (1606) and 5667 (1609).

⁸⁹E.g. S. Scaccia, *Tractatus de commerciis et cambio . . .*, Frankfurt am Main, 1648 (1st ed. 1619), 399 (part 2, glossa 7, no.3).

⁹⁰ACA, Vierschaar, 70, fo.41 (9 July 1630). ‘*acceptator alicuius cambii scedulae . . . obligatus solvere . . . ipsi, qui est et ulterius inventus fuerit, die solutionis habere actionem, et nominatus esse ad recipiendum per nominatione prima aut procuracionem, aut per inscriptionem in dorso eiusdem scedulae, illius qui invenitur habere potestatem recipiendi, aut committendi . . .*’.

⁹¹ACA, Vierschaar, 70, fo.149v and fo.224 (9 July 1647).

⁹²A. Amend-Traut, *Wechselverbindlichkeiten vor dem Reichskammergericht. Praktiziertes Zivilrecht in der Frühen Neuzeit*, Cologne, 2009, 266–274; J. Schneider, ‘Messen, Banken und Börsen (15.–18. Jahrhundert)’, in *Banchi pubblici, banchi privati e monti di pietà nell’Europa preindustriale. Amministrazione, tecniche operative e ruoli economici*, vol.2, Genoa, 1991, 133–169, at 150–153.

very different from previous periods. The City Court remained central in the Antwerp urban legal system. As a result, the aldermen could adapt default rules in view of new developments with which they were confronted in lawsuits. However, and this was another difference with the sixteenth century, it was no longer urgent. There were relatively few commercial innovations that had to be promoted to the level of urban law. Of the twenty-seven certificates of law on commercial arrangements dating from between 1550 and 1715, only seven were issued after 1608.⁹³ After 1660, no more certificates of law on commercial issues were made. Some eighty-seven testimonials of *turben* dating from between 1500 and 1715 that were registered in the *turbeboeken* deal with questions relating to commercial contracts or proceedings that were commonly used by merchants, such as bankruptcy. Thirty-nine of them (or 45 per cent) date from after 1608. However, when the contents of the latter testimonies are more closely examined, it is evident that very few of these declarations contain rules not having been mentioned before in testimonials, certificates or compilations. Thirty-two of the thirty-nine registered *turbe*-declarations on commercial themes dating from after 1608 contain statements confirming that sections of the compilations were still applied by the City Court. The percentage of *turbe*-testimonials of this kind had been much smaller in the period up to 1582, because only after that year had the compilations of Antwerp law contained more or less complete sections on most mercantile matters. Of the forty-four *turbe*-declarations on commercial arrangements between 1500 and 1582, twenty-six (or 59 per cent) had provided new rules, even though these were all presented as urban law.

Only seven testimonies on commercial arrangements (or 18 per cent of the *turbe*-statements regarding commerce that were registered after 1608) point to rules not figuring in older texts.⁹⁴ The latter declarations show the same characteristics as older *turbe*-testimonials on commercial usages. The seven *turben* mentioned all involved merchant witnesses. It had become normal practice to let traders testify about their innovative usages since the Antwerp aldermen had broadened their legal views with regard to commercial contracts after 1550. The urban rules that were reflecting usages of merchants were described with notions such as ‘the mercantile style of the city’, ‘the style of the Exchange’ or as ‘customs of the city and the Exchange’. The rules acknowledging the usages were never presented as common principles applying in an area larger than the Antwerp jurisdiction, or as belonging to a distinct source of commercial law. The merchant witnesses underscored the local application of the attested norms.⁹⁵

Before final conclusions can be drawn, a critical assessment must be made of all the documentary evidence analysed above. It must be determined if it can yield

⁹³ACA, Vierschaar, 70, fo.40v (24 Oct. 1630), fo.41 (9 July 1630), fo.105v (15 Jan. 1643), fo.106 (14 Feb. 1641), fo.151v (21 March 1648), fo.190v (13 Dec. 1658) and fo.191 (18 Dec. 1658).

⁹⁴ACA, Vierschaar, 70, fo.89 (9 Feb. 1637), fo.142 (1646), fo.149v, fo.224 (9 July 1647) and fo.160 (31 May 1652); ACA, Vierschaar, 71, fo.25 (11 July 1676), fo.14v (21 April 1672) and fo.19v (16 and 18 June 1674).

⁹⁵E.g. ACA, Vierschaar, 71, fo.25 (11 July 1676) ‘... volgende de stiel mercantiel binnen dese stadt geobserveert ...’ (‘... according to the mercantile style observed in this city ...’), 71, fo.14v (21 April 1672) ‘... dat het is een gemeijne stil mercantil binnen dese stadt Antwerpen van alle oude tyde geplogten ...’ (‘... that it is a common mercantile style within this city of Antwerp and used of old ...’).

insights into the usages and customs of merchants before their implementation in government-made law, as well as where they remained outside the scope of the latter. Since customs and usages were unwritten, it might be argued that the few *turbe*-statements and other texts dating from the period approximately between 1480 and 1560 and revealing legal rules regarding commercial contracts that were in use in Antwerp, conceal the fact that the Antwerp aldermen mostly applied legally sufficient customs of merchants without referring to them in their judgments or sources of urban law. Also, when rules regarding commercial arrangements such as letters obligatory to bearer were described as ‘law of the city’, that might reflect an academic bias towards formulating customs of merchants as local law.⁹⁶

Against the latter point it is to be argued that although *turbe*-inquiries on law were held specifically in order to detail rules that applied or were to be used in the Antwerp City Court and Antwerp legal practitioners were aware of that, nothing prevented merchant-witnesses from emphasising their customs as being of more than local application, or as not pertaining to urban law. They did not do this. A possible filtering by law clerks drafting the declarations of witnesses is not a likely explanation, since the statements of merchants were far from stereotyped and they were often written down in their native language, even in Italian and Spanish.⁹⁷ Furthermore, and this goes against the point first mentioned above, the fact remains that virtually no merchants participated in *turben* up until the 1560s. If customs of merchants were a source of sixteenth-century Antwerp law in their own right, the contrary was to be expected. Virtually no Antwerp aldermen came from merchant families in this period, so if the Antwerp City Court had implicitly applied customs of merchants as common rules, more external advice would have been sought.⁹⁸

Furthermore, there are important arguments against the hypothesis that the Antwerp aldermen and legal practitioners applied customs of merchants in a pure form but without mentioning this. The ‘Golden Book’ of the 1530s, for example, which served as an internal reference book containing precepts of Antwerp law, reflects by and large the contents of the *turbe*-statements that had been registered up until that time. There are other clues as well, namely that until about 1550, but also later, not much more existed by way of rules regarding commercial agreements than the urban ones themselves. The commentary on the 1582 Antwerp law compilation by Henry de Moy, who was secretary of the city and the main compiler of that law book, makes virtually no reference to customs or usages of merchants in the parts that describe the chapters concerning commercial agreements, even though they were extensive. It suggests that the chapters of the 1582 compilation and its new rules regarding partnership, marine insurance and bills of exchange had been assembled from older written sources of Antwerp law and from civil law writings, and that they had not been written by or following the advice of

⁹⁶This possibility of ‘reduction’ was suggested in Wijffels, ‘Business Relations’, 289–290.

⁹⁷See ACA, V, 69, fo.18 (29 May 1571) and fo.51v (10 July 1566).

⁹⁸In the period between 1520 and 1555, the Antwerp City Council consisted mostly of members of patrician families, and only a few high-flying businessmen were able to gain access to this institution. See K. Wouters, ‘Een open oligarchie? De machtsstructuur in de Antwerpse magistratuur tijdens de periode 1520–1555’, 82 *Revue belge de philologie et d’histoire* (2004), 915.

merchants.⁹⁹ Moreover, the contents of descriptions of norms regarding commercial contracts as predominantly being rules of Antwerp law, which can be found in the registered *turbe*-declarations, correspond with materials in pleadings of advocates in cases that were brought in the Antwerp City Court.

V. CONCLUSION

Considering all this, it is a fair characterisation that commercial practices and usages formed at best a small undercurrent of the early modern Antwerp law, in both the sixteenth and the seventeenth centuries. Indeed, there is no evidence suggesting that they constituted a collection of clear and well-defined rules and principles with a proper rationale, existing independently from the urban law of Antwerp, which is nonetheless what theories about a medieval and early modern *lex mercatoria* suggest. It is evident that the rules regarding commercial contracts that were mentioned in Antwerp *turbe*-statements were defined as local and urban, because of the more or less complete support of customs and usages of merchants by urban law, which nonetheless contained rules that had been crafted using adapted and transformed elements from commercial practice.

The latter process ensued from the influence of civil law. In the sixteenth century, the growing numbers of jurists working for the Antwerp government profoundly changed the features of the Antwerp law. The jurists devised legal rules with respect to commercial contracts. The process of creation of norms involved the redefining, elaboration, supplementing and adaptation of existing commercial practices, usages and customs of merchants into workable, balanced and suitable rules. Conventions of trade and even customs of merchants were the raw materials for jurists forging concrete measures. After 1500, the shift in the legal system that occurred with the growing influence of civil law determined the Antwerp law with regard to commercial agreements and related situations. After 1550, the intention of the Antwerp aldermen to craft legal provisions concerning all commercial contracts that were known in the city reflected an implicit programme of drawing on legal doctrine so as to capture the whole commercial reality in juridical terminology, even though it was prompted by royal orders and responded to developments in the Antwerp market. The new self-confidence of the Antwerp aldermen after 1550 made it possible to consider new usages of merchants as urban law, which was done in certificates of law and by allowing merchants to participate in the creation of urban rules. Cooperation did not serve to copy existing commercial rules into official law, but merely to provide the core elements with which the jurists could work. That this was done only after 1550, and not in the early sixteenth century, ensued from a new policy as to the formulation and enactment of urban law, which itself was caused by political and economic factors. Even though more default rules concerning commercial agreements had become necessary after 1550, because of the integration of the Antwerp market and innovations in contractual practice, the *ius commune* underlay the compilation of extensive Antwerp precepts regarding commercial agreements. The Antwerp

⁹⁹ACA, Vierschaar, 22, fos.428–449.

example suggests that it is likely that early modern commercial law, requiring a level of detailed treatment and legal refinement to make possible appropriate judgments on commercial agreements, never existed outside the sphere of influence of university-trained jurists. On the contrary, rules regarding commercial agreements formed an integral part of the applied civil law, which made rules of trade suitable for the new challenges posed by commerce.

Commercial conventions and also customs of merchants derived sophistication from this process of legal reworking, and, even for merchants recognising the basic elements of their arrangements and usages in rules of Antwerp law, it would have been incorrect to consider the latter as anything else but urban law. Establishing rules of Antwerp law regarding commercial agreements was a necessary process, for those rules settled problems that could not be solved with usages and customs of merchants. It can be presumed from the evidence analysed that in the sixteenth century and thereafter, before the integration and remodelling of commercial practices into Antwerp law, there were but very few mercantile customs and even fewer usages of merchants negotiating in Antwerp which could have been applied by the Antwerp judges in their original form. It can also be suspected that there were not many more usages and customs of merchants than those reflected in registered *turbe*-testimonials, urban ordinances, statements of law and compilations of precepts.¹⁰⁰ As a result, one may say that the City Court of Antwerp did not apply customs of merchants, but that the customs of merchants trading in Antwerp were the default rules imposed by the Antwerp City Court within a civil law framework.

¹⁰⁰Further research is necessary as to the relative proportions of customs and usages, and for which types of mercantile contract they existed. The terminology used in the sources stemming from the Antwerp City Court of aldermen ('usage and custom', 'usage', 'custom') is not detailed and consistent enough for this purpose. It seems that only sources drawn up in commercial practice can shed light on these points. It can be suspected that in the second half of the sixteenth century the Antwerp aldermen reworked more usages than customs. Most of the latter had supposedly been acknowledged before that time. Also, customs might have been linked rather to standardised (e.g. bills obligatory, bills of exchange) and informal contracts (e.g. agency, commission trade) than to contracts with contents that were negotiated and which were not standardised (e.g. partnership and marine insurance contracts). The latter were more common after 1550. For the former, relatively few default rules were required, and one could easily sue on the contract alone. For the latter, the opposite is more likely.