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Conflict Resolution at a Medieval English Fair

In a symposium devoted to specialized commercial courts, it seems reasonable to ask why commercial actors use courts at all. A sizeable literature argues that traders in close-knit groups – in disparate fields like cattle ranching, cotton farming, and diamond trading – prefer to resolve disputes outside the formal legal system. These traders instead rely on voluntary institutions such as private arbitration, reputational constraints, and informal social norms¹. The basic notion is that trade itself may create incentives for honesty; anyone with a dishonest reputation will be frozen out of the marketplace². One scholar has described the “bold” claim implicit in this literature as stating “not simply that people *may* resolve their disputes cooperatively [...], but that informal norms rather than state-created law *will* order the relationships of members of close-knit groups³”.

* I am indebted to Albrecht Cordes, Charles Donahue, Matthew Madden, Amanda Schwoerke, Judge Stephen F. Williams, and the conference attendees in Roscoff for insightful suggestions.

¹ For some of the better-known examples, see *Robert C. Ellickson*, *Order Without Law. How Neighbors Settle Disputes* (Cambridge, Mass. 1991) 4 (hereinafter: *Ellickson*, *Order Without Law*); *Lisa Bernstein*, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, in: *J. Legal Stud.* 21 (1992) 115–157, 115 (hereinafter: *Bernstein*, *Diamond Industry*): “The diamond industry has systematically rejected state-created law. In its place, the sophisticated traders who dominate the industry have developed an elaborate, internal set of rules, complete with distinctive institutions and sanctions, to handle disputes among industry members.”; *Lisa Bernstein*, *Private Commercial Law in the Cotton Industry. Creating Cooperation Through Rules, Norms, and Institutions*, in: *Michigan Law Review* 99 (2001) 1724–1790; and *Avner Greif*, *Contract Enforceability and Economic Institutions in Early Trade. The Maghribi Traders’ Coalition*, in: *American Economic Review* 83 (1993) 525–548; hereinafter: *Greif*, *Maghribi*.

² See, e.g. *Greif*, *Maghribi* (n. 1) 530: “[M]erchants [in the Maghribi coalition] conditioned future employment on past conduct, practiced community punishment, and ostracized agents who were considered cheaters until they compensated the injured”. But compare *Jeremy Edwards*, *Sheilagh Ogilvie*, *Contract Enforcement, Institutions and Social Capital. The Maghribi Traders Reappraised*, in: *Economic History Review* 65 (2012) 421–444 (questioning this account), with *Avner Greif*, *The Maghribi Traders. A Reappraisal?*, in: *Economic History Review* 65 (2012) 445–469 (responding to this critique).

³ *Eric A. Feldman*, *The Tuna Court. Law and Norms in the World’s Premier Fish Market*, in: *California Law Review* 94 (2006) 313–369, 316, n. 8 (hereinafter: *Feldman*, *The Tuna Court*); see also *Lewis A. Kornhauser*, *Are There Cracks in the Foundations of Spontaneous Order?*, in: *New York University Law Review* 67 (1992) 647–673, 647 (reviewing *Ellickson*, *Order*

If this “bold” claim were true, the case for commercial courts, at least in close-knit industries, would be uncertain. But there is also reason for doubt. “Law-and-norms” scholarship has tended to define “norms” in direct opposition to “law” – for example, as “rules that govern collective behavior and that are enforced non-legally⁴”. In real life, the two are inseparable: informal norms coexist with legal rules, and voluntary or nonlegal enforcement measures coexist with legal ones⁵. Rather than a binary choice between law and norms, parties can employ a spectrum of different enforcement mechanisms, some more formal and some less so⁶. Even within the realm of ‘law’ there is often a healthy competition among different tribunals with different procedures⁷. So what we really should ask is not “do parties resolve disputes through courts or informal social norms?”, but rather, “why might parties pick some options for dispute resolution over others?”

The mercantile law of medieval England is a good test case for this kind of inquiry. For years, it has served as a favorite example of the enthusiasts of private order⁸. Medieval merchants, it is said, resolved disputes in their own private courts and under their own private law – a “law merchant” that was “voluntarily produced, voluntarily adjudicated, and voluntarily enforced⁹”. But here, too, the

Without Law [n. 1]) (“A growing literature in legal anthropology and sociology of law suggests that non-legal norms often have a greater impact on behavior than does the content of the law.”).

⁴ *Eric A. Posner*, Law, Economics, and Inefficient Norms, in: *University of Pennsylvania Law Review* 144 (1996) 1697–1744; see also *Ellickson*, Order Without Law (n. 1) 127 (defining norms as “rules that emanate [...] from social forces”, while defining “law” as “those [that emanate] from governments”); cf. *Richard H. McAdams*, The Origin, Development, and Regulation of Norms, in: *Michigan Law Review* 96 (1997) 338–433 (hereinafter: *McAdams*, Norms): “Roughly speaking, by *norms* this literature refers to informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both”.

⁵ See, e.g., *Feldman*, The Tuna Court (n. 3); see also Symposium, The Legal Construction of Norms, in: *Virginia Law Review* 86 (2000) 1577–1601.

⁶ See *Feldman*, The Tuna Court (n. 3) 356.

⁷ See, e.g., *Daniel Klerman*, Jurisdictional Competition and the Evolution of the Common Law, in: *University of Chicago Law Review* 74 (2007) 1179–1226 (hereinafter: *Klerman*, Jurisdictional Competition); *William M. Landes*, *Richard A. Posner*, Adjudication as a Private Good, in: *Journal of Legal Studies* 8 (1979) 235–284 (hereinafter: *Landes, Posner*, Adjudication as a Private Good); *Todd J. Zywicki*, The Rise and Fall of Efficiency in the Common Law. A Supply-Side Analysis, in: *Northwestern University Law Review* 97 (2003) 1551–1634 (hereinafter: *Zywicki*, Efficiency).

⁸ See, e.g., *Bruce L. Benson*, The Enterprise of Law. Justice Without the State (San Francisco 1990) (hereinafter: *Benson*, Enterprise of Law); *Harold J. Berman*, Law and Revolution (Cambridge, Mass. 1983); *Leon E. Trakman*, The Law Merchant (Littleton, Colo. 1983) (hereinafter: *Trakman*, The Law Merchant); *Amitai Aviram*, A Paradox of Spontaneous Formation. The Evolution of Private Legal Systems, in: *Yale Law & Policy Review* 22 (2004) 1–68, 4, n. 3, 5; *Bruce L. Benson*, Justice Without Government. The Merchant Courts of Medieval Europe and Their Modern Counterparts, in: *The Voluntary City*, edited by *David T. Beito* et al. (Ann Arbor 2002) 127–150 (hereinafter: *Benson*, Justice Without Government); *Zywicki*, Efficiency (n. 7) 1593–1601.

⁹ *Benson*, Justice Without Government (n. 8) 128.

truth is far more complicated, as I and many others have argued¹⁰. The merchants who traded at the fair of St. Ives, for example – one of England's largest fairs in the thirteenth and early fourteenth centuries¹¹ – often brought their disputes before a seignorial court held by the fair's owner, the Abbot of Ramsey. While not a royal court, the fair court was still very much part of the English legal structure. It is also uniquely well documented, perhaps the only one of its kind with extant records of its legal proceedings¹².

As a result, the fair court of St. Ives is well suited for the inquiry at hand. While the court was not purely a commercial tribunal¹³, it dealt mainly with commercial transactions. It also faced significant competition, as the parties were free to litigate instead before the English royal courts, a variety of local courts, or even the courts of other markets and fairs. Thus, rather than looking for a choice between formal courts and informal institutions, we can ask why merchants chose to liti-

¹⁰ See, e.g., *Albrecht Cordes*, The Search for a Medieval Lex Mercatoria, in: Oxford University Comparative Law Forum 5 (2003), <http://ouclf.iuscomp.org/articles/cordes.shtml> (hereinafter: *Cordes*, Search); *Stephen E. Sachs*, From St. Ives to Cyberspace. The Modern Distortion of the Medieval 'Law Merchant', in: American University International Law Review 21 (2006) 685–812 (hereinafter: *Sachs*, From St. Ives to Cyberspace); see also, e.g., *John Hamilton Baker*, The Law Merchant and the Common Law Before 1700, in: *John Hamilton Baker*, The Legal Profession and the Common Law (London 1986) 341–368; *Mary Elizabeth Basile* et al. (eds. and trans.), *Lex Mercatoria and Legal Pluralism* (Cambridge, Mass. 1998); *James Steven Rogers*, The Early History of the Law of Bills and Notes (Cambridge 1995) (hereinafter: *Rogers*, Notes); *Charles Donahue, Jr.*, Medieval and Early Modern Lex Mercatoria. An Attempt at the Probatio Diabolica, in: Chicago Journal of International Law 5 (2004) 21–36 (hereinafter: *Donahue*, Probatio); *Emily Kadens*, Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law, in: Chicago Journal of International Law 5 (2004) 39; *Oliver Volckart*, *Antje Mangels*, Are the Roots of the Modern Lex Mercatoria Really Medieval?, in: Southern Economic Journal 65 (1999) 427–450 (hereinafter: *Volckart*, *Mangels*, Roots). Because *Basile* et al. (eds. and trans.), *Lex Mercatoria and Legal Pluralism*, contains two separately paginated sections, the original text of the treatise will be cited as "Lex Mercatoria", while the editors' commentary will be cited as LMLP.

¹¹ See *Ellen Wedemeyer Moore*, The Fairs of Medieval England 1 (Pontifical Inst. of Mediaeval Studies, Studies and Texts 72, Toronto 1985) (hereinafter: *Moore*, The Fairs of Medieval England); *Dorothy Usher*, The Mediaeval Fair of St. Ives, in: Two Studies of Mediaeval Life (Cambridge 1953) (hereinafter: *Usher*, The Mediaeval Fair of St. Ives); see also *Avner Greif*, Institutions and Impersonal Exchange. From Communal to Individual Responsibility, in: Journal of Institutional and Theoretical Economics 158 (2002) 168–204, 189.

¹² Court rolls from St. Ives, dating from 1270 to 1324, are preserved in the Public Record Office, and portions have been published in facing-page translation. See *Charles Gross* (ed. and trans.), *Select Cases Concerning the Law Merchant*, t. 1 (Selden Society 23, London 1908) (hereinafter: 1 SCLM); *Frederic William Maitland* (ed. and trans.), *Select Pleas in Manorial and Other Seignorial Courts* (Seldon Society 2, London 1889); hereinafter: *Select Pleas*.

¹³ Like many other fair courts, the St. Ives court was used as a general tribunal for the regulation of the town during the term of the fair. See, e.g., 1 SCLM (n. 12) 30–31, 31 (describing how in 1287 "a certain carter" was fined in the fair court for accidentally knocking three tiles off a house belonging to the abbot"); cf. *Rogers*, Notes (n. 10) 25 (describing the mercantile courts as "local courts of general jurisdiction held at places where a great deal of trade took place").

gate in St. Ives as opposed to a different formal tribunal, or as opposed to relying on voluntary or private enforcement mechanisms.

The answer, I believe, is that the fair court attracted mercantile litigants through the effective coordination of legal and extralegal incentives. First, the fair court offered more than a means of applying social sanctions or adjusting reputations within a single group; it provided the coercive legal process necessary to govern haphazard interactions in a heterogeneous trading community. Its ability to project power through the cycle of English fairs could not have been matched by informal mechanisms. Second, although the fair court lacked the reach and authority of a royal court, it offered merchants greater speed and flexibility in the application of law. It did so through a participatory structure that not only included ordinary merchants in rendering decisions, but also employed substantive law and rules of procedure that relied on community knowledge rather than official fact-gathering. In competition with other courts, it managed to attract plaintiffs without favoring them so baldly as to push defendants away. The fair court of St. Ives therefore served as an example of law's interaction *with* extralegal norms, demonstrating how legal systems can succeed by making use of, and coordinating with, social norms and interests to accomplish official ends.

The Fair Court and Voluntary Enforcement

The Use of Coercive Process

The fair of St. Ives was part of a cycle of English fairs, each held at particular times of year. Itinerant merchants from across Europe visited the fairs for weeks at a time¹⁴. In the 1200s, St. Ives was a significant center for the cloth trade, although its fortunes declined under Edward I¹⁵. The merchants who traded at the fair, while perhaps not as close-knit as other groups studied by law-and-norms scholars, encountered one another frequently in different settings, often making contracts to be performed at a subsequent fair¹⁶. Thus, the opportunity existed for a system of informal dispute resolution.

The fair court also shared many features of formal judicial systems that, according to the law-and-norms literature, most litigants would rather avoid. The court was not run by the merchants themselves, but rather was owned by the Abbot of

¹⁴ See *Usher*, The Mediaeval Fair of St. Ives (n. 11) 1, 27.

¹⁵ *Lillian J. Redstone*, St. Ives, in: *The Victoria History of the Counties of England. Huntingdonshire*, edited by *William Page* et al., t. 2 (London 1932) 210–223, 216.

¹⁶ Cf. *Ellickson*, Order Without Law (n. 1) 177–178 (defining a group as “close-knit” when “informal power is broadly distributed among group members and the information pertinent to informal control circulates easily among them.”). While most merchants presumably held an equal power to boycott their fellows, access to reputational information would have been far more limited than among, say, neighbors in Shasta County.

Ramsey; it sat in his hall¹⁷, paid fines and penalties to his account¹⁸, and relied on his officials to serve process¹⁹, seize property²⁰, and enforce judgments²¹. The court employed traditional methods of proof such as compurgation, or the joint swearing of oaths, which have been described as archaic and inefficient²². It abided by strict procedural rules, which could cause a defendant to lose his case should he fail to repeat each word of the plaintiff's accusation precisely²³, or should one of his oath-helpers accidentally say the plaintiff's name in place of the defendant's²⁴. Parties frequently employed attorneys or pleaders to represent them, adding to the expense of litigation²⁵. And while the court would give litigants the opportunity to settle²⁶, it hardly encouraged arbitration; there is only a single reference in the fair court's rolls to an arbitration agreement²⁷. Even when parties tried to settle their own cases, they could only do so "saving what should be saved", preserving the abbot's right to seek a fine²⁸. And after a plaintiff won, he might then be tied up in appeals, as the other side could obtain review in the central royal courts²⁹. Why, then, did the merchants subject themselves to such a tribunal?

¹⁷ See 1 SCLM (n. 12) 67–68, 67.

¹⁸ See *Moore*, The Fairs of Medieval England (n. 11) 200–201.

¹⁹ Cf. *Bolton v. Goldsmith* (St. Ives Fair Ct. 1275), in: *Select Pleas* (n. 12) 157–158, 158 ("[The defendant] withdrew from the court in contempt of the Abbot and his bailiffs.").

²⁰ See, e.g., *Waite v. Curtrey* (St. Ives Fair Ct. 1287), in: 1 SCLM (n. 12) 29–30, 30.

²¹ See, e.g., *Dederic v. Ramsey*, *Coram Rege* Roll 221, 8 Edw. 2, m. 93d (K. B. 1315), in: *Select Cases Concerning the Law Merchant*, edited by *Hubert Hall*, t. 2 (Selden Society 46, London 1930) 86–88 (hereinafter: 2 SCLM).

²² See, e.g., *William Searle Holdsworth*, *A History of English Law*, t. 1 (London 1956) 570; accord *Trakman*, *The Law Merchant* (n. 8) 2; *Benson*, *Justice Without Government* (n. 8) 130.

²³ *Legge v. Mildenhall* (St. Ives Fair Ct. 1291), in: 1 SCLM (n. 12) 46–47. These formalities seem to have been widespread, since litigants occasionally complained of their violation. See *Bonavel v. le Moyne*, *De Banco* Roll 62, m. 40d (C. P. 1286), in: 2 SCLM (n. 21) 42–43, 42 (noting that the defendant had not used "the words of the Court used and necessary among merchants"); see also *Hubert Hall*, *Introduction*, in: 2 SCLM (n. 21) xix.

²⁴ *Langbaugh v. Bytham* (St. Ives Fair Ct. 1287), in: 1 SCLM (n. 12) 20.

²⁵ See, e.g., *Bolton v. Goldsmith* (St. Ives Fair Ct. 1275), in: *Select Pleas* (n. 12) 154–157, 155.

²⁶ See, e.g., *Colne v. Marshal* (St. Ives Fair Ct. 1287), in: 1 SCLM (n. 12) 21–24, 22.

²⁷ *St. Leonards v. Elsdon* (St. Ives Fair Ct. 1287), in: 1 SCLM (n. 12) 17–18, 17. By comparison, an eighteenth-century Parisian mercantile court – the *juridiction consulaire de Paris* – relied heavily on private arbitration to manage a docket that grew by more than 200 cases per day. See *Amalia D. Kessler*, *A Revolution in Commerce. The Parisian Merchant Court and the Rise of Commercial Society in Eighteenth-Century France* (New Haven 2007) 31–32.

²⁸ See, e.g., *Serjeant v. Foville* (St. Ives Fair Ct. 1270), in: 1 SCLM (n. 12) 1–3, 2; see also *The Manner of Holding Courts* – John de Longueville, in: *The Court Baron. Being Precedents for Use in Seignorial and Other Local Courts* edited and translated by *Frederic William Maitland*, *William Paley Baildon* (Selden Society 4, London 1891) (c. 1307) 79 ("[N]one can make compromise without the leave of the lord or his steward when a plaint has been made and gage and pledge given, except with a saving for all the lord's rights.").

²⁹ See, e.g., *Dederic v. Ramsey*, *Coram Rege* Roll 221, 8 Edw. 2, m. 93d (K. B. 1315), in: 2 SCLM (n. 21) 86–88; *Saxby v. Bedford*, *PRO Curia Regis* Roll 155, *Michaelmas*, m. 1d (K. B. 1255), in: 2 SCLM (n. 21) 5–7, 5.

The simplest answer is that St. Ives offered plaintiffs coercive legal process to enforce their claims. Many writers on medieval commerce have emphasized voluntary enforcement mechanisms, such as boycotts of traders who defied arbitral decisions³⁰. “[O]stracism by the merchant community” was certainly one way of enforcing the rules³¹, and merchants would surely think twice before extending credit to a deadbeat. But boycotts were a blunt instrument, and couldn’t always be carried out even if they were threatened³². The St. Ives rolls contain no evidence of institutional ostracism; some defendants appear repeatedly in the rolls, implying that they lived to trade again. In any case, ostracism could only work so long as the defendant would gain more from future trade than he would lose in a potential judgment³³. And it would be useless to boycott someone who couldn’t be located; in a world of geographically limited jurisdictions, traders could easily escape liability by fleeing to another town³⁴.

Even where boycotts were employed, they often required the assistance of coercion to become effective. In 1291, Thomas Lucas bought £31 worth of fish from the German merchant Arnald de Grele at the fair of Lynn, and then departed without paying. Lucas fled from Lynn “to Boston, from Boston to Lincoln, from Lincoln to Hull, from Hull to London, always promising [to pay Grele], who followed him from town to town”³⁵. The “men of his trade” complained to the London officials that “they had received great harm in the fair at Lynn”, because “no foreign merchant would make any sale before full payment was made [...], where previously they could buy £500 or £400 of goods” by a nominal down payment³⁶. The Londoners feared that “unless a speedy remedy was provided on this matter

³⁰ See, e.g., *Benson*, *Enterprise of Law* (n. 8); *Paul R. Milgrom et al.*, *The Role of Institutions in the Revival of Trade*, in: *Economics and Politics* 2, no. 1 (1990) 1–23, 20–21 (portraying mercantile courts as operating “without the benefit of state enforcement of contracts”); see also *Douglass C. North*, *Institutions, Transaction Costs, and the Rise of Merchant Empires*, in: *The Political Economy of Merchant Empires*, edited by *James D. Tracy* (Center for Early Modern History, *Studies in Comparative Early Modern History* 2, Cambridge 1991) 22–40, 30.

³¹ *Benson*, *Justice Without Government* (n. 8) 129.

³² For example, in a purported exchange of letters in 1299–1300, the fair court of Champagne (engaged in a dispute with a merchant court in London) threatened “to inhibit the land and fairs of Champagne and Brie to all your subjects and their goods”; *Cornelius Walford*, *Fairs, Past and Present* (London 1883) 257. The threat does not appear to have been carried out, even after the Champagne court’s judgment was disregarded.

³³ Thus in 1315, when Edward II sought to seize a substantial portion of the goods of Flemish merchants to compensate for injuries done by Flemish pirates, the bailiffs of St. Ives responded that no merchants from Flanders could be found within the fair, and that “[t]herefore up to the present time nothing has been done”; 1 SCLM (n. 12) 93–95, 94.

³⁴ See *S. Michel v. Troner* (St. Ives Fair Ct. 1275), in: *Select Pleas* (n. 12) 150–152, 152 (“[T]o obtain which money the said Brun and his representatives have often laboured at Boston and at Norwich and as yet have not been able to get any part thereof [...]”).

³⁵ *Grele v. Lucas* (Ch. 1292), PRO C258/1 no. 5, m. 3 (Paul Brand trans., 2003) (on file with author).

³⁶ *Grele v. Lucas* (Ch. 1292), PRO C258/1 no. 5, m. 2.

their goods in overseas parts could be arrested³⁷. Although the case does suggest a form of collective boycott by the foreign merchants, it doesn't portray these sanctions as particularly successful. The Londoners had lost their good credit, but were still *allowed* to trade with others, just on the condition that those who associate with thieves should pay in advance. Moreover, Lucas himself was judgment-proof³⁸, and his fellow merchants asked that he be arrested and held in jail "as a warning to others"³⁹. Mere loss of credit was insufficient to guarantee compliance, and the use of physical force by the authorities was necessary to make the system work.

Unlike an informal and voluntary tribunal, the fair court of St. Ives offered plaintiffs the direct use of legal force against defendants. In 1287, for instance, two feather-merchants were accused of failing to pay commissions to their agent. Unable to prove their case, they were forced to pledge "their bodies" – that is, be kept in jail – until the debt was paid⁴⁰. The St. Ives court could imprison defendants even for minor debts⁴¹, while those who "refused to be justiced ... and to stand trial" could be imprisoned as well⁴². Even if a defendant had fled, the bailiffs could distrain him by seizing his property until he appeared⁴³.

Expanding the Court's Reach

The use of coercive process is only half the story. The various mercantile courts in England had a narrow reach, and could not pursue defendants beyond their own borders. But they could magnify and extend their legal authority through existing social networks⁴⁴. The first way of doing so was by organizing merchants by community. Foreign merchants were closely identified with their home communities; they often journeyed together, lodged together, and witnessed each other's

³⁷ Grele v. Lucas (Ch. 1292), PRO C258/1 no. 5, m. 2.

³⁸ Grele v. Lucas (Ch. 1292), PRO C258/1 no. 5, m. 2 (stating that he "had nothing by which he could be attached, nor could he find sureties for a quarter of a year and more").

³⁹ Grele v. Lucas (Ch. 1292), PRO C258/1 no. 5, m. 2.

⁴⁰ Ribaud v. Russell (St. Ives Fair Ct. 1287), in: 1 SCLM (n. 12) 15–16, 16. By comparison, the central royal courts did not offer imprisonment as a typical punishment for debt until the mid-fourteenth century, see *Theodore F. T. Plucknett*, *Legislation of Edward I* (Ford Lectures 1947, Oxford 1949) 149 n. 2 (hereinafter: *Plucknett*, *Legislation of Edward I*), unless the debtor had specifically agreed to such a penalty in advance, see Statute of Acton Burnell, 1283, 11 Edw. (Eng.), in: *Statutes of the Realm*, t. 1 (London 1810) 53; Statute of Merchants, 1285, 13 Edw. (Eng.), in: *Statutes of the Realm*, t. 1, 98.

⁴¹ Ely v. Crese (St. Ives Fair Ct. 1275), in: *Select Pleas* (n. 12) 158–159 (concerning bread worth 2s.).

⁴² Benefield v. Fittleton (St. Ives Fair Ct. 1300), in: 1 SCLM (n. 12) 73–74, 74.

⁴³ See, e.g., Titchwell v. Burdon (St. Ives Fair Ct. 1293), in: 1 SCLM (n. 12) 58–59, 58.

⁴⁴ Cf. *McAdams*, *Norms* (n. 4) 346 ("Where norms govern individual behavior, one cannot correctly assess the effect of formal, state-enforced rules without understanding the informal rules also at work").

contracts⁴⁵. Should a defendant from one community not be found in the fair, under certain circumstances every other member of that community could be held liable for his unpaid debts⁴⁶. This system had obvious benefits for plaintiffs, who could seize the assets of whichever “peers [and] parceners” were nearest to hand⁴⁷, while ensuring that the defendant’s irate countrymen would seek compensation at home. It also had obvious disadvantages for trade in general, as courts were less than careful about which foreigners were being harassed⁴⁸. Particular communities often sought exemptions from the rule⁴⁹, and the system was entirely discontinued as to English subjects in 1275⁵⁰. Importantly, however, the process first required the plaintiff to pursue the defendant in the latter’s home court, and only to proceed against the community after it had made “default of justice⁵¹”. The system thus outsourced enforcement duties to the community best able to fulfill them, giving each community a strong interest in its own members’ conduct. It projected the power of each fair court through other institutions, making use of strong intra-community ties to encourage honest dealing abroad.

The St. Ives court employed social networks in a second way by requiring litigants to obtain the support of numerous others. At every stage of litigation, parties were obliged to name other persons as their pledges, who would guarantee the plaintiff’s willingness to prosecute the suit or the defendant’s ability to pay the judgment. In case of default, these pledges themselves would be fined⁵². The law of evidence, moreover, placed a high priority on avoiding “he-said, she-said” testimony as opposed to the agreement of multiple witnesses. In the absence of written evidence, plaintiffs were required to produce “suit” (or “*secta*”), a group of witnesses who would swear to the truth of their allegations⁵³. In a contract case, for example, the suit might be the “law-abiding men who were present at the

⁴⁵ See *Avner Greif*, *Institutions and the Path to the Modern Economy. Lessons from Medieval Trade* 335 (Cambridge 2006) (hereinafter: *Greif*, *Institutions*).

⁴⁶ See generally *Greif*, *Institutions* (n. 45) 328–349.

⁴⁷ The phrase can be found in *S. Michel v. Troner* (St. Ives Fair Ct. 1275), in: *Select Pleas* (n. 12) 150–152, 152.

⁴⁸ See, e.g., *Lars Boerner, Albert Ritschl*, Comment, Individual Enforcement of Collective Liability in Premodern Europe, in: *Journal of Institutional and Theoretical Economics* 158 (2002) 205–213, 206 (hereinafter: *Boerner, Ritschl*, *Individual Enforcement*); cf. *Fleta*, edited by *Henry G. Richardson, George O. Sayles*, t. 2, ch. 63 (*Selden Society* 72, 1955) (ca. 1290) (complaining that litigants were “harassing anyone who passes through”); *Volckart, Mangels, Roots* (n. 10) 445.

⁴⁹ See, e.g., *Almaine v. Flanders* (St. Ives Fair Ct. 1270), in: 1 *SCLM* (n. 12) 8–10, 9 (Ypres, an individual merchant of Lisle).

⁵⁰ Statute of Westminster I, 1275, 3 Edw., cl. 23 (Eng.), in: *Statutes of the Realm*, t. 1, 33.

⁵¹ See *Fleetbridge v. Coventry* (St. Ives Fair Ct. 1275), in: *Select Pleas* (n. 12) 145–146; *Select Pleas* (n. 12) 147 n. 1; see also 1 *SCLM* (n. 12) 94–95 (concerning a theft by Flemish pirates, which the count of Flanders did not correct); *Almaine v. Flanders* (St. Ives Fair Ct. 1270), in: 1 *SCLM* (n. 12) 9–10; see generally *Boerner, Ritschl*, *Individual Enforcement* (n. 48) 208.

⁵² See, e.g., *Armston v. Crowthorpe* (St. Ives Fair Ct. 1287), in: 1 *SCLM* (n. 12) 27–29, 27.

⁵³ See *John H. Baker*, *An Introduction to English Legal History* 362 (London 31990) (hereinafter: *Baker*, *Introduction*).

contract made between them⁵⁴. The defendant would then have the option to “wage his law” – that is, swear to his innocence along with oath-helpers (or “compurgators”), the required number of which varied from case to case and was an occasional subject of dispute⁵⁵. Alternatively, the defendant could ask for a jury inquest⁵⁶. During this period, juries were typically self-informing, and were expected to include those people who already knew most about the case. A court might impanel a jury of matrons to determine if a woman were pregnant, or a jury of fishmongers to assess food quality; likewise, mercantile matters might require a jury of merchants⁵⁷. In 1302, when a dispute arose near the end of the St. Ives fair over a cloth sale in the previous fair of Stamford, the inquest was to be held by “the merchants who were at the fair of Stamford and others⁵⁸”.

These measures ensured that legal coercion was deployed consistently with informal judgments of reputation. One known to be untrustworthy – or just traveling alone and without friends – might be unable to find pledges, or others willing to risk damnation by swearing an oath in his favor⁵⁹. The anonymity of a large, impersonal market can “strip [...] reputational constraints of their power⁶⁰”; but these procedural rules encouraged traders to operate in groups, which had their own incentives to monitor the behavior and credit-worthiness of their members⁶¹. These rules also placed responsibility for fact-gathering on the community at

⁵⁴ Fleta, t. 2, ch. 63.

⁵⁵ Compare *Tempsford v. Chaplain* (St. Ives Fair Ct. 1291), in: 1 SCLM (n. 12) 44–45 (requiring two compurgators to show that attached goods belong to another), and *Fullham v. Francis* (St. Ives Fair Ct. 1311), in: 1 SCLM (n. 12) 89–90, 89 (same), with *In re Cologne* (St. Ives Fair Ct. 1270), in: 1 SCLM (n. 12) 5–6, 5 (requiring five compurgators for this purpose).

⁵⁶ *Baker*, Introduction (n. 53) 362.

⁵⁷ See *James C. Oldham*, *The Origins of the Special Jury*, in: *The University of Chicago Law Review* 50 (1983) 137–221, 139 (describing juries composed of “experts” in a particular field) (hereinafter: *Oldham*, *Origins of the Special Jury*); see also *Ramsey v. Taylor*, *Curia Regis Roll* 146, 36 Hen. 3, m. 10, 10d (K. B. 1252), in: *Select Cases in Procedure Without Writ Under Henry III* edited and translated by *Henry G. Richardson*, *George O. Sayles* (Selden Society 60, London 1941) 30; hereinafter: *Procedure Without Writ* (impaneling a jury of twelve knights and twelve merchants to determine the abbot’s customary rights over the St. Ives fair). When a foreigner was a party, the jury would often be “of the half tongue”, with half of its members of the foreigner’s own country; the same could hold for Welshmen, Jews, and university students. *Oldham*, *Origins of the Special Jury* (this n.) 168–169.

⁵⁸ *Hoppman v. Welborne* (St. Ives Fair Ct. 1302), in: 1 SCLM (n. 12) 86–88, 87. Because those “by whom the inquest should be made [had] left the fair”, the case was held over until the next year; *ibidem*. The jurors themselves might select others who belonged on the jury; thus *Ralph Clerk* was fined 12d because, “having been elected by the jurors to be one of them, [he] would not make oath but withdrew from the court in contempt of the lord and his bailiffs”. 1 SCLM (n. 12) 83–84, 83.

⁵⁹ See, e.g., *Woodfool v. Pors* (St. Ives Fair Ct. 1295), in: 1 SCLM (n. 12) 71.

⁶⁰ *John McMillan*, *Christopher Woodruff*, *Private Order Under Dysfunctional Public Order*, in: *Michigan Law Review* 98 (2000) 2421–2458, 2423 (hereinafter: *McMillan*, *Woodruff*, *Private Order*).

⁶¹ Cf. *Bernstein*, *Diamond Industry* (n. 1) 149–150 (describing the bourses’ protections against judgment-proof debtors).

large, rather than trusting the courts to ferret out the truth from conflicting testimony.

The community's fact-gathering role extended the court's authority in a third way, by encouraging merchants to conduct their business and resolve their disputes in the open. Often parties to a commercial dispute prefer to keep the affair secret⁶²: the defendant to shield his reputation, and the plaintiff to bargain for a larger recovery. For reputational constraints to succeed, however, violations of the norm must be widely and accurately publicized, so that participants may know who deserves a bad reputation⁶³. At St. Ives, the court's public aspect helped to communicate reputational information and to extend the effect of its judgments. Thus, when Ralph of Lyons promised to repay his debt to Sir William of Hereford, he did so in front of "many other citizens, burghers, and merchants", so that there would be plenty of witnesses should Sir William sue again "wherever the said Ralph shall be found⁶⁴". Likewise, when a servant of Thomas de Toraux used a false standard of measure, "all the merchants of all the commonalties that are in the fair" were summoned to hear the case and take note⁶⁵. Even when parties settled privately, the court would still assess a fine, and the settlement's terms might be recorded in its rolls⁶⁶. Various substantive regulations also ensured transparency at the fair, punishing "forestallers" who purchased goods outside the fair's boundaries or those who sold secretly "at the backs", away from the open market⁶⁷. Only an organized body could implement such rules, for these parties obviously preferred to keep things secret. By requiring transparency, however, the court helped reputational mechanisms to function well, which in turn allowed it to rely on those mechanisms and on community knowledge in imposing sanctions. The court of St. Ives made its decisions effective only by empowering, and relying on, the community at large.

⁶² See *Bernstein*, *Diamond Industry* (n. 1) 116, 124.

⁶³ See *McMillan*, *Woodruff*, *Private Order* (n. 60) 2423, 2427 (discussing the role of private-order organizations in publicizing breaches of a norm); see also *ibidem* 2429 ("It furthers each individual's interest to let bygones be bygones. But if all do that, there is no sanction.").

⁶⁴ *Hereford v. Lyons* (St. Ives Fair Ct. 1293), in: 1 SCLM (n. 12) 62–63.

⁶⁵ *In re Toraux* (St. Ives Fair Ct. 1275), in: *Select Pleas* (n. 12) 153–154, 153; cf. *John H. le Patourel*, *Medieval Administration of the Channel Islands, 1199–1399* (London 1937) 100–101 (noting that in medieval Guernsey, contracts would be entered into in the parish church, "in the hearing of the parish", so that should the act "later be called in question, the party might 'put himself on the record of the parishioners'").

⁶⁶ Compare, e.g., *Colne v. Marshal* (St. Ives Fair Ct. 1287), in: 1 SCLM (n. 12) 21–24, 22 (in which the fine is paid by a settling defendant), with *Vernon v. Lomb* (St. Ives Fair Ct. 1293), in: 1 SCLM (n. 12) 64–65, 64 (paid by the plaintiff); see also *Grantham v. Thorney* (St. Ives Fair Ct. 1293), in: 1 SCLM (n. 12) 63–64, 63 (recording settlement terms).

⁶⁷ See 1 SCLM (n. 12) 92–93 (1312) (forestalling); *ibidem* (1270) (selling "at the backs"). There were also regulations of particular types of sales; butchers, for example, were expected to make their contracts in public, so that a competitor who heard an excessive price being charged could intervene and participate in the sale himself. See *Legge v. Mildenhall* (St. Ives Fair Ct. 1291), in: 1 SCLM (n. 12) 46–47, 46. Of course, regulations promoting transparency would also have ensured that the abbot got his due.

The Fair Court and Its Competitors

These advantages, however, were not unique to St. Ives. The “default rules” at St. Ives were supplied by “the common customary law of the realm of England”, as supplemented by “the common elements in the procedure of local courts⁶⁸”. Those whose claims arose in St. Ives could sue in royal courts (on appeal or in the first instance)⁶⁹, in county courts, or at other fairs. Indeed, compared to some of its rivals, the fair court’s reach was quite limited. While it entertained cases regardless of the status of the parties⁷⁰, the amount in controversy⁷¹, or the geographic origin of the claims⁷², its jurisdiction was fundamentally limited to those cases in which the defendant or his property could be found during the fair. If he had already left with all his goods, there was little the court could do⁷³. And certainly by

⁶⁸ *Donahue*, Probatio (n. 10) 30.

⁶⁹ See, e.g., *Dederic v. Ramsey*, Coram Rege Roll 221, 8 Edw. 2, m. 93d (K. B. 1315), in: 2 SCLM (n. 21) 86–88 (appeal); *Saxby v. Bedford*, PRO Curia Regis Roll 155, Michaelmas, m. 1d (K. B. 1255), in: 2 SCLM (n. 21) 5–7, 5 (same); *Lombe v. Clopton*, Coram Rege Roll No. 26, Michaelmas, m. 40 (K. B. 1276), in: *Select Cases in the Court of King’s Bench Under Edward I*, edited and translated by *George O. Sayles*, t. I (Selden Society 55, London 1936) 30 (a first-instance trespass suit). While the royal courts would impose a minimum amount-in-controversy requirement starting in the 1290s, see *infra* note 71, high-stakes cases continued to be litigated at St. Ives in substantial numbers.

⁷⁰ See *Sachs*, From St. Ives to Cyberspace (n. 10) 748–750.

⁷¹ In the 1290s, the rule had emerged that the royal courts would not entertain cases with less than 40s. in controversy, and the lower courts could not entertain cases involving 40s. or more. See *Robert Palmer*, *The County Courts of Medieval England, 1150–1350* (Princeton, n. J. 1982) 250–255 (hereinafter: *Palmer*, *County Courts*) (citing Statute of Gloucester, 1278, 6 Edw. (Eng.), c. 8). The court at St. Ives, however, continued to hear numerous cases involving larger sums, and some contemporaries thought it customary for mercantile courts to exceed these limits. See, e.g., *Bonavel v. le Moyne*, De Banco Roll 62, m. 40d (C. P. 1286), in: 2 SCLM (n. 21) 42–43.

⁷² Theoretically, the first Statute of Westminster in 1275 had prohibited local courts from attaching individuals’ goods for “Contracts, Covenants, and Trespasses done out of their Power and their Jurisdiction [...] nor within their Franchise where their Power is”. Statute of Westminster I, 1275, 3 Edw., cl. 35 (Eng.), in: *Statutes of the Realm*, t. 1, 33, 35. Although such actions were seen as “abuses of jurisdiction”, *Charles Gross*, Introduction, in: 1 SCLM (n. 12) xviii, and additional statutes were enacted against them, see *Statutes Made at Westminster*, 1477, 17 Edw. 4, cl. 2 (Eng.), in: *Statutes of the Realm*, t. 2, 452, 461; *An Act for Tryall of Matters in Courts of Pypowder Held in Fayres*, 1483, 1 Rich. 3, cl. 6 (Eng.), in: *Statutes of the Realm*, t. 2, 477, 480–482, the statutes had little effect at St. Ives. The general principle applied by the court appears to be that the plaintiff could sue wherever the defendant was found; faced with a judgment-proof defendant in *Gavelock v. Trot*, the court gave the plaintiff received a tally “whereby he can prosecute against the said Richard for the recovery of his said debt, wherever it seems to him most expedient”. *Gavelock v. Trot* (St. Ives Fair Ct. 1300), in: 1 SCLM (n. 12) 81–83, 83. The fair court heard cases involving contracts neither made in St. Ives nor performed there, see, e.g., *Abingdon v. Martin* (St. Ives Fair Ct. 1293), in: 1 SCLM (n. 12) 64–65, 65, as well as simple tort cases by nonnative plaintiffs arising from distant injuries, see, e.g., *Winchester v. Nailsworth* (St. Ives Fair Ct. 1315), in: 1 SCLM (n. 12) 96–97, 96.

⁷³ See, e.g., *Burton v. Walker* (St. Ives Fair Ct. 1293), in: 1 SCLM (n. 12) 56.

the thirteenth century, there was in England “much trafficking between foreign merchants and natives whose mercantile status was doubtful, and whose assets and persons were by no means entirely within the territorial jurisdiction of a local court⁷⁴”. Why, then, would merchants seeking coercive process have used a tribunal like St. Ives?

Efficiency

One important answer was the fair court’s relative speed and efficiency. As traders moved through the cycle of fairs, they often bought goods on credit, with payment to come after they themselves finished trading at the next fair in the cycle⁷⁵. Thus, St. Ives functioned not only as a “commodities market but also as an implicit capital market⁷⁶”. The longer it took for a creditor to obtain a judgment, the greater his “uncompensated loss [...] when his ability to enter into subsequent transactions [was] impaired due to lack of capital⁷⁷”. At St. Ives, neither party to a sale could predict whether he would become a plaintiff or a defendant; the buyer might not pay, while the seller might breach⁷⁸ or might deliver goods of lower quality⁷⁹. And as T.F.T. Plucknett noted, these creditors might be strangers “in a strange and often hostile community, and in a great hurry to go home⁸⁰”. Thus, the most significant problem facing merchants at St. Ives “was not so much concerned with the specific institutions of mercantile law as with the fundamental business of debt-collecting” – the need to “get the money out of a debtor who was either in difficulties himself, or just determined not to pay until he had to⁸¹”.

In the royal courts, at least, a determined defendant could hold out for a very long time. Litigation in the Court of Common Pleas, which heard most actions of debt, “might average fourteen months from initial entry to the disappearance of the case from the rolls⁸²”. After the plaintiff purchased an original writ from the Chancery, process would be served by the sheriff of the county, who had little incentive to act promptly⁸³. Once found and served, the defendant could miss several return dates before any serious punishment would follow; “[i]t was not uncommon for a year or two to pass before a defendant appeared⁸⁴”. And in the

⁷⁴ *Plucknett*, Legislation of Edward I (n. 40) 138.

⁷⁵ See, e.g., *Carlisle v. Halling* (St. Ives Fair Ct. 1291), in: 1 SCLM (n. 12) 46–47, 47.

⁷⁶ *Bernstein*, Diamond Industry (n. 1) 131.

⁷⁷ *Bernstein*, Diamond Industry (n. 1) 136.

⁷⁸ See, e.g., *Long v. English* (St. Ives Fair Ct. 1317), in: 1 SCLM (n. 12) 103–105, 104; *Carlisle*, in: 1 SCLM (n. 12) 47.

⁷⁹ See, e.g., *Barton v. Bishop* (St. Ives Fair Ct. 1291), in: 1 SCLM (n. 12) 50–51, 50; *Stanton v. Honing* (St. Ives Fair Ct. 1317), in: 1 SCLM (n. 12) 102–103, 102.

⁸⁰ *Plucknett*, Legislation of Edward I (n. 40) 139.

⁸¹ *Plucknett*, Legislation of Edward I (n. 40) 137.

⁸² *Palmer*, County Courts (n. 71) 220–221.

⁸³ *Baker*, Introduction (n. 53) 76.

⁸⁴ *Baker*, Introduction (n. 53) 78.

meantime the penalties assessed were quite minor⁸⁵. In the end, if a defendant refused to appear entirely, the royal courts still could not issue a default judgment. The worst they could do would be to declare the defendant an ‘outlaw,’ a penalty of limited effect⁸⁶ – and which in any case offered nothing to the unhappy plaintiff, who had already incurred the expense and delay of traveling to Westminster and hiring expensive counsel⁸⁷. Meanwhile the Chancery, which might have offered a rationalized procedure, had not yet emerged as a significant judicial forum⁸⁸.

The royal courts’ slow pace was recognized at the time; Edward I’s major reforms were designed not to improve the litigation process, but rather to avoid it at all costs. In 1283, the Statute of Acton Burnell enabled creditors and debtors to register their obligations and then to obtain a sealed bond⁸⁹. When the debt came due, a creditor in possession of the bond could skip litigation entirely and move straight to execution on the debt, having any of the plaintiff’s chattels seized as well as the income from certain types of land holdings. If these were insufficient, imprisonment would follow⁹⁰. In 1285, the rules were tightened in the Statute of Merchants, which made the new remedies available to nonmerchants, expanded the land holdings subject to garnishment, and called for imprisonment first and a search for the debtor’s property second⁹¹. Other reforms of this period proceeded along similar lines⁹²; but these statutes were not for everyone, as they required substantial formalities in advance.

If the royal courts were too slow, what other options did merchants have? They could have turned to more local courts, such as the county court of Huntingdonshire, which met in Huntingdon a few miles away⁹³. Litigation was faster at the county level: according to one study, 90 percent of cases were settled within six months⁹⁴. Yet county courts met only once a month, and then for one or two days at a time⁹⁵. Thus, it would meet at most twice before the merchants at St. Ives headed to the next fair. The county courts also employed the same degree of “legal technicality” as the central royal courts, but were more provincial in nature, as the

⁸⁵ *Palmer*, County Courts (n. 71) 222.

⁸⁶ *Baker*, Introduction (n. 53) 76–77.

⁸⁷ *Palmer*, County Courts (n. 71) 224.

⁸⁸ See *Baker*, Introduction (n. 53) 117–119.

⁸⁹ Statute of Acton Burnell, 1283, 11 Edw. (Eng.), in: Statutes of the Realm, t. 1, 53.

⁹⁰ *Plucknett*, Legislation of Edward I (n. 40) 138–139.

⁹¹ *Plucknett*, Legislation of Edward I (n. 40) 140 (citing Statute of Merchants, 1285, 13 Edw. (Eng.), in: Statutes of the Realm, t. 1, 98). The debtor had no opportunity to raise defenses until the writ *audita querela* was created for this purpose in 1336. See *ibidem* 145–146.

⁹² See *Plucknett*, Legislation of Edward I (n. 40) 147–150 (describing the writ *elegit*); *Plucknett*, Legislation of Edward I (n. 40) 153–155 (noting changes to the action of account).

⁹³ *Palmer*, County Courts (n. 71) 20.

⁹⁴ *Palmer*, County Courts (n. 71) 220–221.

⁹⁵ *Palmer*, County Courts (n. 71) 3–4.

suitors who rendered the judgments were drawn from among the residents of the county and need not have had any mercantile experience⁹⁶.

The fair court, by comparison, was far more sympathetic. Plaintiffs could initiate a suit by mere oral appearance⁹⁷, rather than first purchasing a writ from the Chancery⁹⁸. The court met several times a week throughout the term of the fair, and if the parties were fortunate, a case could be processed entirely in a single day⁹⁹. Essoins (or excused absences), rather than lasting an entire term of court, permitted only a single day's delay¹⁰⁰. If a suit lasted substantially beyond the end of the fair, the parties would have to wait until next year, but they could always sue in another fair instead, and occasionally transfer their suit to a different court¹⁰¹.

Unlike the royal courts, moreover, the fair court could issue a default judgment. An absent defendant's property would first be seized for one year¹⁰². If the defendant still had not appeared by the end of the next fair, the court would award judgment¹⁰³, in partial satisfaction of which the property would be delivered to the plaintiff¹⁰⁴. Once a case had been fully litigated, the fair court would order execution against the defendant's assets – so quickly, in fact, that disputes arose over whether third parties had enough time to defend their own assets against seizure¹⁰⁵. The merchants' preferences for efficiency, which might have driven them toward informal dispute resolution, instead pushed them toward the local mercantile courts¹⁰⁶.

⁹⁶ *Palmer*, County Courts (n. 71) 112; see also *ibidem* 56 (describing the suitors as “irrevocably amateur”); *ibidem* 80. Another option, the court of Hurstington hundred, would have been largely irrelevant to those trading at St. Ives. Such courts met only once every three weeks, see *Helen Cam*, *The Hundred and the Hundred Rolls* (New York 1960) 168, and its jurisdiction was roughly coextensive with that of the fair itself, see *Ramsey v. Taylor*, *Curia Regis Roll* 146, 36 Hen. 3, m. 10, 10d (K. B. 1252), in: *Procedure Without Writ* (n. 57) 27–29 (argument of counsel).

⁹⁷ See, e.g., *Holywell v. Beverley* (St. Ives Fair Ct. 1270), in: 1 SCLM (n. 12) 5–6, 5.

⁹⁸ As would have been necessary in the Court of Common Pleas. See *Baker*, Introduction (n. 53) 63; see also *ibidem* 49–51 (describing the subterfuges to which litigants would later resort to avoid purchasing a writ in the King's Bench).

⁹⁹ See, e.g., *Hamon v. Favere* (St. Ives Fair Ct. 1287), in: 1 SCLM (n. 12) 21–24, 23.

¹⁰⁰ See 1 SCLM (n. 12) 4–5 (concerning Reginald the Easterling).

¹⁰¹ See, e.g., *Boys v. Houghton* (St. Ives Fair Ct. 1316), in: 1 SCLM (n. 12) 101–102, 101 (transferring a case to the court of the market). The abbot had been granted a weekly market in St. Ives in 1293, which had its own court. See 1 SCLM (n. 12) 121 n. 1 (quoting *Cartularium monasterii de Ramesia*, t. 2 edited by *William H. Hart, Ponsonby A. Lyons* [Rolls Series 79, London 1886] 298; hereinafter: 2 *Cartul. monast. de Rames.*).

¹⁰² See, e.g., *Scaldwell v. Lincoln* (St. Ives Fair Ct. 1287), in: 1 SCLM (n. 12) 31–32, 31; *Cambridge v. Chaplain* (St. Ives Fair Ct. 1291), in: 1 SCLM (n. 12) 54–55, 54.

¹⁰³ See *Yarmouth v. Fick* (St. Ives Fair Ct. 1300), in: 1 SCLM (n. 12) 81–83, 81.

¹⁰⁴ See, e.g., *Fairhead v. Tankus* (St. Ives Fair Ct. 1295), in: 1 SCLM (n. 12) 71–72, 71; *Gavelock v. Fulletby* (St. Ives Fair Ct. 1300), in: 1 SCLM (n. 12) 81–83, 82.

¹⁰⁵ See *Dederic v. Ramsey*, *Coram Rege Roll* 221, 8 Edw. 2, m. 93d (K. B. 1315), in: 2 SCLM (n. 21) 86–88 (concerning the length of time the fair court must wait for an innocent owner to appear).

¹⁰⁶ Cf. *Bernstein*, *Diamond Industry* (n. 1) 135: “[E]xtralegal contracts are more likely to become an industry norm in situations where traditional contract remedies are likely to lead to

Institutional Structure

Efficiency would have been a strong reason to avoid the royal courts. But a second factor was the fair courts' institutional structure, which accorded greater influence to community norms. The existing mechanisms of proof would have functioned better at the local level: Westminster was "far away from the local community which provided the social sentiment to reinforce the moral qualms about perjury¹⁰⁷". Juries at St. Ives could include those present at the original transaction¹⁰⁸, a difficult prospect for a sheriff executing a royal writ many months later. More fundamentally, in the fair courts the merchants participated actively in rendering decisions. Local courts were traditionally staffed by suitors, who issued the court's judgments and were drawn from the population subject to its jurisdiction¹⁰⁹. Because the fair court's docket was primarily mercantile in nature, it was sensible to have at least some of the suitors be merchants. Indeed, merchants sat on the court along with other residents of St. Ives, and parties referred to judgments as having been granted by "award of the merchants¹¹⁰". Unlike the justices of the central royal courts, who relied on later-impaneled juries for questions of mercantile law¹¹¹, merchant suitors would have been directly familiar with the relevant rules. On particularly contentious issues they sought the opinions of "all the merchants of the said fair, both natives and foreigners, to whom judgments belong according to [mercantile law]¹¹²" – an exaggeration, of course, but an option not easily available to the royal courts, whose juries were often composed of English merchants only¹¹³. By including foreign merchants on the court, the abbot could give additional assurances of the fairness of his tribunal¹¹⁴.

Despite these differences, the fair court remained an entirely unremarkable product of the English judicial system¹¹⁵. Under the jurisprudence of the time, to

inefficiently high levels of breach of contract and the market is organized in a way that makes other methods of enforcing these agreements possible".

¹⁰⁷ *Palmer*, County Courts (n. 71) 224.

¹⁰⁸ See *supra* note 58.

¹⁰⁹ See *Frederic William Maitland*, Introduction, in: *Select Pleas* (n. 12) xi, lxxv; see also *Lincoln v. Auteyn*, Hilary, pl. 1730 (K. B. 1226), in: *Bracton's Note Book*, edited by *Frederic William Maitland*, t. 3 (London 1887) 565.

¹¹⁰ Cf. *Papworth v. Kent* (St. Ives Fair Ct. 1291), in: 1 SCLM (n. 12) 38–39, 39. The suitors were not all merchants, however. See *Swavesey v. Pope* (St. Ives Fair Ct. 1288), in: 1 SCLM (n. 12) 35–36, 35 (referring to "[t]he merchants and all others of the court").

¹¹¹ See, e.g., *Dederic*, in: 2 SCLM (n. 21) 86–88, 86.

¹¹² *Fulham v. Francis* (St. Ives Fair Ct. 1311), in: 1 SCLM (n. 12) 89–90, 90. The original Latin phrase is *secundum legem mercatoriam*; on the English translation of this phrase, see LMLP (N. 10) 7; *Rogers*, Notes (n. 10) 250.

¹¹³ See *Dederic*, in: 2 SCLM (n. 21) 86–88, 88 (impaneling merchant jurors from London, Lincoln, Winchester, and Northampton).

¹¹⁴ Towns without a domestic population of long-distance traders also had certain advantages, such as avoiding retaliation and assuring foreigners a neutral playing field. See *Greif*, Institutions (n. 45) 335–336; cf. *supra* note 57.

¹¹⁵ See *David Ibbetson*, Custom in Medieval Law, in: *The Nature of Customary Law*, edited

hold a fair was to hold a court to govern it¹¹⁶; to hold a court was to draw suitors from the population judged¹¹⁷; and to draw such suitors was frequently to apply – perhaps unintentionally – the customary law of the relevant jurisdiction¹¹⁸. Indeed, the fair court's structure enabled a more flexible application of both procedural and substantive law. As to procedure, during the period when the central royal courts still enforced oral contracts¹¹⁹, those courts generally did not attribute strong evidentiary force to an unsealed writing or to a tally, a notched stick commonly used as a record of debts. The situation was quite different in mercantile cases, in which a defendant who faced such evidence could not wage his law and was required to try the case by jury¹²⁰. (Indeed, some writers desired even stronger rules, which would have entitled the plaintiff, and not the defendant, to establish his case by oath¹²¹). As to substantive law, while the forms of writs issued by the Chancery were frozen after 1258, the fair court never attempted to

by Amanda Perreau Saussine, James Bernard Murphy (Cambridge 2007) 151–175, 167; hereinafter: *Ibbetson*, Custom in Medieval Law.

¹¹⁶ See Charter to the Abbot of Ramsey (1110), in: A Source Book for Medieval Economic History, edited by Roy C. Cave, Herbert H. Coulson (Milwaukee 1936) 119–120, 119–120 (quoting 2 Cartul. monast. de Rames. [n. 101] 101) (granting a fair “with *sac* and *soc*, [...] and with all customs such as any fair in all England has”). This phrase represented the grant of jurisdiction along with the profits of justice, and the power to compel attendance at the court. John Hudson, The Formation of the English Common Law (London 1996) 44; see also Frederick Pollock, Frederic William Maitland, The History of English Law Before the Time of Edward I, t. 1 (Cambridge 21898) 578–580.

¹¹⁷ See *supra* note 109 and accompanying text.

¹¹⁸ Cf. *Ibbetson*, Custom in Medieval Law (n. 115) 171: “[T]he merchants themselves played a larger part in [these courts] than did Westminster-trained common lawyers, and the law that they applied was refracted through the eyes of the merchant community. As in manorial courts, [...] what was custom and what was law tended to merge together”.

¹¹⁹ On the royal courts' subsequent practice of requiring a sealed deed, see Palmer, County Courts (n. 71) 208–215; Joseph Biancalana, Actions of Covenant. 1200–1330, in: Law and History Review 20 (2002) 1–57.

¹²⁰ See Maitland, Introductory Note, in: Select Pleas (n. 12) 130–137, 133: “Against a tally one could not wage one's law in cases between merchants; royal favour has conceded to them that the plaintiff who has a tally may prove his case [...]”; accord Lex Mercatoria (n. 10) 3.

¹²¹ Thus, the treatise Lex Mercatoria (n. 10) claimed that the mercantile law “does not admit anyone to [wager of] law on the negative side, but in this law it always belongs to the plaintiff to prove, for example, by suit or by deed or both, and not to the defendant”; Lex Mercatoria (n. 10) 3. This was because merchants often sold their goods on credit without tallies or writings, and it would have been “hard and very tedious and a kind of burden and continuous obstacle to them” if they were forced to record even minor transactions; Lex Mercatoria (n. 10) 3. The St. Ives court, however, fully accepted the defendant's right to wage his law, and wager of law was even defended against occasional encroachments. See, e.g., Tempsford v. Chaplain (St. Ives Fair Ct. 1291), in: 1 SCLM (n. 12) 44.

On the Continent, by contrast, the merchants “doggedly fought for the permission to maintain the oath of office of the defendant, which the church, conceiving this as an invitation to perjury, wanted to restrict”; Cordes, Search (n. 10). The church preferred the institution of trial by battle, which the merchants feared. See *ibidem* n. 20; see also Raoul C. van Caenegem, Legal History. A European Perspective (London 1990) 83–84.

squeeze cases into specific forms of action¹²². It was particularly sensitive to local custom, with the abbot's officers taking care, when they made exceptions to regulations, that the exceptions be understood as special favors rather than customary rights¹²³. The fair court also broke from particular common law rules. For example, it applied a different law of sale, in which title passed immediately upon a nominal down payment¹²⁴ (a practice recognized by the Crown in 1303¹²⁵), and it expanded the rule of "market overt" to allow purchasers to retain stolen goods if bought in good faith¹²⁶. While these exceptions to the standard legal rules did not add up to a separate *system* of mercantile law¹²⁷, as some have claimed¹²⁸, they did confer certain advantages on mercantile plaintiffs, and thus created strong incentives to litigate in the mercantile courts.

Perhaps the very success of the St. Ives court can be attributed to the jurisdictional competition it faced. The merchants who traded at St. Ives had access to other formal tribunals as well as informal reputational sanctions, and the abbot who owned the fair had an incentive to maintain or increase his fees from litigation. Some have argued that these circumstances, like those of perfectly competitive markets, generally produce wealth-maximizing outcomes¹²⁹. In the legal context, however, these circumstances tend to favor *plaintiffs*, for it is they who choose the court and for whom the jurisdictions compete – checked only by the defendants' readiness to avoid the jurisdiction entirely¹³⁰. The cycle of fairs meant that plaintiffs could use one fair court as easily as the next, while the defendants might lose a great deal by sitting out. We might then expect mercantile courts to evolve toward helping plaintiffs. The mercantile courts were also in tighter competition with each other than were the central royal courts, which had a broader docket and other constituencies to please¹³¹. Thus, we should expect the mercan-

¹²² See, e.g., *Maitland*, Introductory Note, in: Select Pleas (n. 12) 134 (citing an example in which an action for money due on a contract "is conceived as an action to obtain money 'detained and deforced by violence against the lord's peace.' It looks like an action of tort; it also looks like an action to obtain coins which already are the plaintiff's.").

¹²³ See, e.g., 1 SCLM (n. 12) 24–27, 24 (granting a narrow exception to Robert Pole).

¹²⁴ See *Tempsford v. Chaplain* (St. Ives Fair Ct. 1291), in: 1 SCLM (n. 12) 44–45, 44.

¹²⁵ See *Carta Mercatoria*, 31 Edw. 3, m. 11 (Feb. 1, 1303), in: *English Economic History*. Select Documents, edited by *Alfred E. Bland* et al. (London 1914) 211–216.

¹²⁶ At common law, a good-faith purchaser held good title to sales "in daylight in market places on market days"; *Albert K. R. Kiralfy*, Custom in Mediaeval English Law, in: *Journal of Legal History* 9 (1988) 26–39, 35. While residents of London enjoyed the privilege of having all shops treated as markets for this purpose, *ibidem*, at St. Ives even a door-to-door sale would qualify. See *Tanner v. Francis* (St. Ives Fair Ct. 1291), in: 1 SCLM (n. 12) 48–49, 48. See generally *Peter M. Smith*, Valediction to Market Overt, in: *The American Journal of Legal History* 41 (1997) 225–249, 229.

¹²⁷ See *Sachs*, From St. Ives to Cyberspace (n. 10) 730–731; see also *Cordes*, Search (n. 10).

¹²⁸ See sources cited *supra* note 8.

¹²⁹ See *Zywicki*, Efficiency (n. 7) 1608.

¹³⁰ *Landes, Posner*, Adjudication as a Private Good (n. 7) 254–255; see also *Klerman*, Jurisdictional Competition (n. 7) 1179.

¹³¹ In particular, the central royal courts dealt with many cases involving land, the period's central source and store of wealth. Given that an adverse judgment might result in the per-

tile courts to be more pro-plaintiff than the central royal courts. Indeed, this is precisely what occurred. The procedures in mercantile courts promoted the rapid resolution of disputes, with modified evidentiary and substantive rules that helped plaintiffs to establish their claims.

Yet the fair courts were by no means one-sided institutions. The suitors who rendered judgments were partially drawn from the merchant community, and their incentives were more complex than merely maximizing the abbot's revenue¹³². The merchants themselves had different preferences than litigants in general, and may well have favored rapid collection of debts over other goals. And as mentioned above, either party to a transaction *ex ante* could find himself a plaintiff or defendant *ex post*¹³³. The fair court could not have survived unless its proceedings were broadly acceptable to the population it governed – that is to say, unless its rules at least broadly coincided with the social norms and interests they were meant to promote.

The traditional picture offered by law-and-norms scholarship is a dichotomous one; disputes may be resolved by a centralized, formal 'state' or by a decentralized, informal 'society.' But in a world of plural sources of authority, it can be difficult to tell where one type of dispute resolution ends and another begins. Indeed, all attempts at resolving disputes, including those most closely bound to lawyers and courts, involve a complicated network of outside interests and social norms. Dispute-resolution mechanisms are "arrayed along a spectrum of formality"; the designation of an institution as "formal" or 'informal' depends" – and must depend – "on the answer to the question, 'Compared to what¹³⁴?'". As Eric Feldman noted in his insightful study of Tokyo's fish markets, even "members of close-knit groups" may employ formal tribunals "because legal rules and institutions can be breathtakingly fast and inexpensive¹³⁵". The key factors are the "relative strengths and weaknesses of informal norms and specialized courts", with the "design of legal institutions" being the key determinant¹³⁶.

The court of St. Ives illustrates this spectrum well. It was fully integrated into the judicial structure of the time; but like a modern commercial court, it possessed distinct rules and served a particular constituency. Moreover, its procedures met mercantile preferences for the rapid resolution of disputes while employing wider social pressures to magnify and extend its reach. Its lessons for today's courts are far from direct: the social and economic conditions faced by medieval merchants are nothing like those facing litigants today. But the most useful lesson of the St.

manent dispossession of the defendant and all his heirs, these courts were unsurprisingly predisposed to delay.

¹³² See *Sachs*, From St. Ives to Cyberspace (n. 10) 702 n. 43. The substantive innovations are especially difficult to characterize; the expansion of market overt, for example, favored purchasers but not necessarily plaintiffs.

¹³³ Cf. *Zywicki*, Efficiency (n. 7) 1608.

¹³⁴ *Feldman*, Tuna Court (n. 3) 356–357.

¹³⁵ *Feldman*, Tuna Court (n. 3) 318.

¹³⁶ *Feldman*, Tuna Court (n. 3) 320 (emphasis added).

Ives court is that formal institutions can benefit from attention to the norms and incentives of their constituents, and can do so without sacrificing their legal character.

Kurzfassung

Jüngste Studien zur Konfliktlösung im Handel haben die Rolle informeller Normen und außerrechtlicher Anreize im Vergleich zum formellen Rechtssystem betont. Dennoch dürften die Kaufleute, die mittelalterliche englische Messen aufsuchten und auf deren Beispiel als Vorläufer moderner Schlichtung man sich berufen hat, nicht diesem Modell entsprechen. Diese Kaufleute führten häufig Prozesse vor den Messegerichten, lokalen Gerichten allgemeiner Jurisdiktion, die formale Verfahren und traditionelle Beweismethoden beibehielten. Warum vertrauten diese Händler den existierenden Autoritäten mehr als ihren eigenen privaten Institutionen? Und warum zogen sie eher vor lokale als vor alternative Gerichte wie etwa die englischen königlichen Gerichtshöfe?

Dieser Beitrag untersucht die Aufzeichnungen des Messegerichts von St. Ives, einer von Englands größten und am besten dokumentierten Messen im späten 13. und frühen 14. Jahrhundert. Er legt dar, dass es dem Messegericht angesichts der Konkurrenz der Gerichte gelang, die Prozessierenden anzuziehen durch eine effektive Anordnung rechtlicher und außerrechtlicher Anreize. Es bot nicht nur Sanktionen hinsichtlich des Renommées, sondern auch den zwangsweisen Rechtsgang, der notwendig ist, um eine heterogene Handelsgemeinschaft zu leiten. Obwohl es weder die Reichweite noch die Autorität eines königlichen Gerichts besaß, bot es den Kaufleuten eine größere Geschwindigkeit und Flexibilität bei der Anwendung bestimmter Gewohnheiten, indem es eher auf das Wissen der Gemeinschaft vertraute als auf offizielle Tatsachenermittlung. Das Messegericht von St. Ives bietet ein erhellendes Beispiel der Interaktion von Recht und Gesellschaft. Es zeigt, wie fragile Rechtssysteme erfolgreich sein können, indem sie außerrechtliche Normen und Anreize zur Anwendung bringen und sich mit ihnen koordinieren, um offizielle Ziele zu erreichen.

Résumé

Des études récentes portant sur la résolution des conflits commerciaux ont souligné la place des normes informelles et des règles coutumières dans ce domaine par rapport au système de droit commun. Pourtant, les marchands qui fréquentaient les foires anglaises médiévales, dont l'exemple a été invoqué au titre de précédent pour la résolution de litiges modernes, semblent ne pas s'être inscrits dans cette tendance. Ils plaidaient fréquemment devant les cours des foires, des juridictions locales qui disposaient d'un droit de juridiction général, suivaient les règles de la

procédure de droit commun et accueillait les modes de preuve traditionnels. Pour quelle raison ces marchands préféraient-ils des juridictions existantes à leurs propres institutions particulières ? Et pourquoi se présentaient-ils devant des tribunaux locaux plutôt que devant des institutions alternatives comme les cours de justice royales ?

Cet article se propose d'étudier les registres de la cour des foires de Saint-Yves, l'une des plus importantes de l'Angleterre de la fin du XIII^e et du début du XIV^e siècle, qui présente en outre l'avantage d'être très bien documentée. Il s'attache à démontrer qu'à l'occasion des conflits de juridiction, la cour des foires a réussi à s'attirer la faveur des justiciables par le recours à des moyens juridiques comme extra-juridiques. Car la cour ne se contentait pas d'infliger des sanctions entachant la renommée de ceux qu'elle condamnait, elle disposait également de moyens coercitifs nécessaires pour encadrer une communauté des marchands, par définition hétérogène. Même s'il lui manquait l'autorité d'une cour royale, cette juridiction proposait aux commerçants l'application rapide et souple des coutumes qui leur étaient spécifiques, s'appuyant pour cela davantage sur la connaissance de la communauté que sur la réunion officielle des faits. Aussi, la cour de la foire de Saint-Yves constitue un exemple éclairant de l'interaction de la loi et de la société, démontrant ainsi de quelle manière des systèmes juridiques fragiles peuvent atteindre les objectifs qui leur sont officiellement assignés en faisant usage ou en s'inspirant de règles extra-juridiques.