The Birth of Swedish Commercial Law in Early Modern Sweden : Sources and Historiography

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THE BIRTH OF COMMERCIAL LAW IN EARLY MODERN SWEDEN: SOURCES AND HISTORIOGRAPHY

1. Introduction

Rules governing business and merchants emerged separate from other branches of law in some European countries during the early modern period. France is the major example. A commercial court was established in Paris in 1563, and followed by two statutes, *Ordonnance sur le commerce* (1673) and *Ordonnance de la marine* (1681). Although the statutes were incomplete and in practice needed to be complemented by *ius commune* and mercantile custom, this was nevertheless an important milestone on the way towards a separate commercial law. In most countries, both procedural and substantial norms regulating commercial relations were placed under contract law and procedural law until the late eighteenth century. The Prussian Code of 1794 (*Allgemeines Preussisches Landrecht*) first introduced a separate chapter on commercial law and in fact started what became a virtual wave of commercial law codifications in the nineteenth century.[1]

Following international examples, most of the Swedish early modern legal rules that today would be observed under the label of commercial law were classified under maritime law (*sjörätt*), private law (*privaträtt*), or law of negotiable instruments (*växelrätt*). Maritime law, especially, was one of the developing fields of law in the seventeenth century because it was through sea trade that Swedish merchants most got into contact with foreign merchants and their legal regulations.

Despite the anachronism attached to it, commercial law nevertheless serves well as a descriptive historical concept. It gathers together various legal norms and practices related to different aspects of commercial life, such as company law, law of commercial instruments, transport law, insurance law, insolvency law and law of obligations (between merchants). Most importantly, commercial law serves as what comparative lawyers call *tertium comparationis* or a common denominator. It enables us to compare legal phenomena by placing them under a common umbrella, even though the legal phenomena may originally have carried different labels in different jurisdictions.

The history of Swedish commercial law remains largely unexplored by modern research, and partly just because commercial law has never been taken as the common umbrella concept. This does not mean that some of the problems, which can be understood as part of commercial law, would not

[1] Johannes Flume, "Law and Commerce: The Evolution of Codified Business Law in Europe," *Comparative Legal History* 2:1 (2014), 45–83, 50; Dave De ruysscher, *Gedisciplineerde vrijheid: Een geschiedenis van het handels- en economisch recht* (Antwerpen: Maklu, 2014), 19–25.

have been treated. Although it cannot, of course, alone remedy this problem, this article at least aims at introducing the central sources available and establishing some legal changes pertinent to the seventeenth-century Swedish business relations. The plan of this article is as follows. Part II acquaints the reader with what little literature exists and with the picture that this literature creates of the history of Swedish commercial law in the early modern period. We will see that the picture is full of lacunae and poorly updated vis-à-vis the flourishing literature of the past couple of decades in the field elsewhere. This is largely due, as stated above, to the lack of a common *tertium comparationis*. The Swedish historians, who have been interested in commercial phenomena, have not identified their research object as belonging to commercial law. Part III describes some of the essential features of the political, social and legal context necessary for the understanding of the legal change involved. As any legal history, the history of commercial law can only be understood within the complex network of social relations that surround it. Part IV introduces to the reader to an early modern body of law which can meaningfully be said to have constituted the early modern Swedish commercial law. An essential question here is to what extent and how the commercial law of the European commercial centres influenced the statutory law and legal practise (of both courts and private entities) in Sweden. Part V concludes the essential findings of the article. The conclusion will lead to another question: what kind of a connection did the general Swedish legal development of the sixteenth and seventeenth century towards a "pre-positivistic" legal order, in which statutory law came to rule from early on over other legal sources – have on commercial law, if any? Did the Swedish commercial law emerge "from the above" instead "from below"? The article will ask whether Swedish early modern commercial law as essentially a creation of the state rather than the merchants themselves.

2. Historiography of Swedish commercial law

The history of Visby Town Law has occupied a prominent place in the historiography of Swedish commercial law. The German legal historian Karl von Amira showed in his *Altschwedisches Obligationenrecht* the connections of the Visby law to the laws of Hamburg and Lübeck.[2] Most the research of the early nineteenth century followed Amira, for example Björkander, Holmbäck and Westman, who all emphasized, in addition to the influence of German law, also that of the

[2] Karl von Amira, *Nordgermanisches Obligationenrecht I: Altschwedisches Obligationenrecht* (Leipzig: Veit & Comp., 1882), 7–8.

surrounding Gotland (*Gutalagen*).[3] In the 1950s, Hasselberg then claimed that the influence of German town law was not as decisive as had thitherto been claimed but that most of the influences would have come from other parts of Scandinavia. [4]

It is not important here to determine whether they were exactly right or wrong. Instead, it is interesting to note the Visby Town Law remained the focal point of research interest for a long time, and even that research has not attracted new scholars in half a century. A major exception is the anthology that Kjell Åke Modéer in 1981 edited on the Sea Law of 1667.[5] In his book on the reception of Roman law in the practise of Svea High Court of 1967, Stig Jägerskiöld also discusses some commercial cases presenting them as examples of Roman law learning.

History of transport insurance has attracted more attention than other central areas of commercial law. Söderberg's *Försäkringsväsendets historia* [History of the insurance] (1935) was based on original sources – courts records and business archives – and remains the best work on transport insurance.[6] The first transport insurance that Söderberg mentions is the insurance taken in 1615 by a Dutch merchant De Geer, on whom E. W. Dahlgren wrote a biography. who probably took his insurance in Amsterdam. The premium that De Geer and another Dutch merchant names De Besche paid for their insurances in 1615–1618 was 2 ¼ % of the cargo value. According to the prevailing opinion, the sea insurance paragraphs of the Swedish Sea Law of 1667 followed by and large the Dutch model as well *Guidon de la mer* (ch. 1-4, 7, 12 and 15).[7]

Finland was an integral part of the Swedish realm for a rough eight centuries, before Sweden had to cede it to the Russian Empire in 1809, and Finnish legal historians have always written about Swedish legal history as their own. Themes of early modern commercial law, however, have not been an issue for Finnish scholars either. Again, exceptions prove the rule. In 1882, Axel Lille devoted a chapter for transport insurance in his book on the history of insurance.[8] Ragnar Hemmer

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[3] Adolf A. Björkander, *Till Visby stads äldre historia: ett kritiskt bidrag* (Uppsala: Almqvist & Wiksell, 1898), 7–8; Åke Holmbäck, *Ätten och arvet enligt Sveriges medeltidslagar* (Uppsala: Almqvist & Wiksell, 1911), 191; K. G. Westman, *De svenska rättskällornas historia* (Uppsala: Almqvist & Wiksell, 1912), 27.
[4] Gösta Hasselberg, *Studier rörande Visby stadslag och dess källor* (Uppsala: Almqvist & Wiksell, 1953), 354.
[5] Kjell Åke Modéer (ed.), *1667-års sjölag i ett 300-årigt perspektiv: ett rättshistoriskt symposium i Göteborg den 16–18 mars 1981* (Stockholm: Institutet för rättshistorisk forskning, 1981).
[6] Tom Söderberg, *Försäkringsväsendets historia i Sverige intill Karl Johanstiden* (Stockholm: P. A. Nordstedt & Söners Förlag, 1935).
[7] G. Granfelt, "Om försäkringsaftalets uppkomst och utveckling," *Tidskrift utgiven av juridiska föreningen i Finland JFT* (1908), 1–111, 40.
[8] Axel Lille, *Försäkringsväsendet: dess historiska utveckling och nationalekonomiska betydelse* (Helsingfors: Frenckell, 1882).

briefly mentions, in a textbook from 1967, that commercial transactions favoured the reception of Roman law, because foreigners were often involved in them, but leaves the theme of commercial law at that.[9]

3. The Economic, Social and Legal Contexts

Swedish economic history of the early modern period has been fairly well researched. Eli Hekscher, Stellan Dahlgren, Eric Thomson and others have mapped out the development of Swedish commerce in the seventeenth century and showed how commerce gradually grew to support the growing great power. In economic terms, the seventeenth-century Sweden came to depend on the Netherlands, the centre of European commerce. Since the late sixteenth century, Amsterdam had developed into the most important commercial centre of Western Europe. In 1570, the share of Dutch ships sailing through the Sound was 60 per cent, and in the beginning of the seventeenth century the amount was close to three fourths.[10] The Dutch invested capital in Sweden and introduced technological innovations and know-how in iron industry, manufacturing and other fields.[11]

During the late sixteenth and seventeenth centuries, Sweden grew from a peripheral northern kingdom to a European military might, able to exert its influence not only in northern and northern-eastern Europe but also in the territories of the Holy Roman Empire of the German Nation. Sweden was eager to match its military success in the European war fields with corresponding advances in the economic and cultural spheres.[12] The different spheres were unavoidably linked one to the other. Armies do not march without money. Arts and higher learning were needed not only to show off an image of a cultural nation to the rivals in the south. University-trained officials, knowledgeable in languages and law, were necessary to help Sweden in its diplomatic relations and to polish the national administrative and economic machinery in such a shape that they would effectively yield the necessary support for the war machine. This was the logic of an expanding early modern state.[13]

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[9] Ragnar Hemmer, *Suomen oikeushisstorian oppikirja.*
[10] Kristof Glamann, "European Trade 1500–1750," in Carlo M. Cipolla (ed.), *The Fontana Economic History of Europe: The Sixteenth and Seventeenth Centuries* (London: Fontana, 1974), 441–443.
[11] On Sweden as a semiperiphery of the world economic system, see Immanuel Wallerstein, *The modern worldsystem I: Capitalist agriculture and the origins of the European worldeconomy in the sixteenth century* (New York: Academic Press, 1974), 107–108, 214–221, 349.
[12] Stellan Dahlgren, "New Sweden: The State, the Company and Johan Risingh," in Stellan Dahlgren and Hans Norman (eds.), *The Rise and Fall of New Sweden* (Uppsala: Almqvist & Wiksell, 1988), 1–43, 2.
[13] On the logic of early modern state expansion, see Ralph Tuchtenhagen, *Zentralstaat und Provinz* (Wiesbaden: Harrassowitz, 2008), 440.

Culturally Sweden never rose to quite to the same level with its military might, but remained a European periphery. The Swedish castles on the shores of Lake Mälaren, easily reached by waterways from Stockholm, were and still are beautiful constructions, showing off the wealth of their owners. Although the difference between this Swedish heartland and most of the other parts of the realm is striking, in comparison to their counterparts in France or Germany, these dwellings of the Swedish nobility remained second-class creations. The resources were still not sufficient to allow true competition.

Law followed in much the same lines. Research has shown how the Swedish sixteenth- and seventeenth-century legal elite sought to bring law closer to the European *ius commune*. This involved staffing the newly founded high courts – themselves a legal transplant – with learned jurists[14] and introducing legal novelties of European origin in statutory law. The same occurred in all major fields, such as private law,[15] criminal law,[16] procedural law,[17] and *Polizeirecht.*[18] Swedish legal literature was born in the seventeenth century, although the literature remained insignificant in both quantity and quality up until the mid-nineteenth century.[19]

Swedish early modern law any more than Swedish economic solutions ought, however, not be seen as poor copies of their European models. Instead, they should be viewed as practical adaptations of those models to the Swedish circumstances. Most importantly for law, Sweden lacked finances necessary to maintain a corps of professional lawyers, who would have been able to make a living as advocates. In comparison to elsewhere, the bourgeoisie and the nobility were small, which meant having that the judiciary very much relied in the hands of the peasantry. Because of this, no deep-level *Rezeption* could occur. Related to this and again unlike elsewhere, the Swedish legal culture

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[14] See Mia Korpiola, "A Safe Haven in the Shadow of War? The Founding and the *raison d'être* of the New Court, Based on its Early Activity," in Mia Korpiola (ed.), *The Svea High Court in the Early Modern Period: Historical Reinterpretations and New Perspectives* (Stockholm: Institutet för rättshistorisk forskning, 2014), 55–108.
[15] See Elsa Trolle Önnerfors, *Justitia et prudentia: Rättsbildning genom rättstillämpning, Svea hovrätt och testamentmålen* (Stockholm: Institutet för rättshistorisk forskning, 2014).
[16] See Heikki Pihlajamäki, "*Executor divinarum et suarum legum*: Criminal Law and the Lutheran Reformation," in Virpi Mäkinen (ed.), *Lutheran Reformation and the Law* (Leiden: Brill, 2006), 171–204.
[17] Heikki Pihlajamäki, "Gründer, Bewahrer oder Vermittler? Die nationalen und internationalen Elemente im Rechtsdenken des Olaus Petri," in Jörn Eckert and Kjell Å. Modéer (eds.), *Juristische Fakultäten und Juristenausbildung im Ostseeraum: zweiter Rechtshistorikertag im Ostseeraum: Lund 12.–17.3.2002* (Stockholm: Institutet för rättshistorisk forskning, 2004), 29–38.
[18] Toomas Kotkas, *Royal Police Ordinances in Early Modern Sweden: The Emergence of Voluntaristic Understanding of Law* (Leiden: Brill, 2014).
[19] See Björne I-IV.

remained simple as legal sources and judiciary are concerned. Royal statutory law gained a supreme position over the other legal sources from very early on, leaving urban law, feudal law, customary law and legal literature relatively insignificant.[20] The founding of the high courts from 1614 onwards turned, in a couple of decades, the Swedish judicial system into a rather neat hierarchical system, where judicial complexities known from just about everywhere else[21] remained exceptional.[22]

4. The Sources of Swedish Commercial Law

4.1. Statutory law

As shown above, the early modern history of Swedish commercial law centred on topics such as Visby Town Law, sea law, and the reception of Roman law. The historians of Visby Town Law restricted themselves to textual comparisons between the law itself and its foreign counterparts. This was also the methodology employed in the historical articles in Modéer's anthology. Indeed, it is clear that the Sea Law of 1667 was the most important statute of Swedish commercial law produced in the early modern period. The Sea Law therefore deserves some more attention here. In addition to that it was much influenced by Dutch law, the Swedish Sea Law of 1667 was also a codification of rules that had developed along the seventeenth century. The Sea Law thus codified previous developments, not only those of legal practice but also of statute law. Indeed, there is more and plenty of legislative material to be taken into consideration. A survey of these materials should begin in the late middle ages. A privilege given to the City of Stockholm in 1436 states that whenever the town court is dealing legal cases, which "are not described and printed in law books, (the judges) may decide the case upon their oath and according to their best conscience, and the decision shall be equally lawful as written law."[23] A privilege given by King Eric XIV of 1563, again to Stockholm, was almost identical.[24]

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[20] Heikki Pihlajamäki, "'Stick to the Swedish Law': The Use of Foreign Law in Early Modern Sweden and Nineteenth-Century Finland," in Serge Dauchy, W. Hamilton Bryson, and Matthew C. Mirow (eds.), *Ratio decideni: Guiding Principles of Judicial Decisions, Volume 2: 'Foreign' Law* (Berlin: Duncker & Humblot, 2010), 169–185.
[21] See Dirk Heirbaut and Seán Donlan (eds.), *Jurisdictional Complexities* (to be published 2015).
[22] For Swedish feudal courts during the early part of the seventeenth century, see Heikki Pihlajamäki, article in Dirk Heirbaut and Seán Donlan (eds.), *Jurisdictional Complexities* (to be published 2015).
[23] "Item vare thet sva, at nokre rætte fore kome, som eigh finnas bescrifne ok uth trychte i laghbokinne, thöm mugha the rætta uppa thera edh effter thera bætsta samvit, oc skula stadhughe oc faste blifva som annor bescrifven lagh." Document 2, Riksrådets privilegiebref, Stockholm den 1 maj 1436, *Stockholms stads privilegiebref I* in Karl Hildebrand (ed.), *Urkunder till Stockholms historia* (Uppsala: K. HumanistiskaVetenskaps-samfundet, 1900), 2–7.
[24] "Till thet 25, schole borgmestere och rådh udi Stocholm, när några saker för rätte komme, som icke finnes i lagen uttrychte, ransake och döme ther um effter theres bäste samvet, och schall then dom blifve så fast som någen annen."

Cases, which could not be decided according to statutory law, were thus to be decided according to conscience. It is typical for international commercial disputes that more room was given to conscience, custom and the type of sources, which allowed for flexibility. Other interpretations are possibly, of course, since the privilege letters do not say anything about commercial cases specifically. I think it is nevertheless highly probable that commercial cases were at stake here.

This becomes even more probable when one looks at the privilege letter, which King John III issued in 1570 to the City of Stockholm. The contents of the privilege letter were otherwise similar to the two described above (the use of conscience in cases of statutory lacuna), except that these cases were now always to be appealed to the King and his Council. Even more interesting from the point of view of this article is the following part of the privilege: "when foreign cases are to heard, investigated and judged, half domestic and half foreign (judges) shall be used, so as to have the cases investigated more ably, and so that foreigners would have nothing to complain about some injustice."[25] Again, commercial cases are not specifically mentioned, but it is hard to think of any relevant class of legal cases other than mercantile ones, in which foreigners would frequently be involved and in which their law (or "foreign" law in general) would come into question as the applicable set of norms.

Statutory material from the Swedish west coast offers similar evidence. When the town of Gothenburg was being founded in the early seventeenth century, representatives of King Charles IX travelled to Amsterdam to negotiate the conditions on which Dutch immigrants would agree to move to the town. They presented the King's negotiators a list of 21 demands, which they wanted to have guaranteed as privileges. The model behind these demands was the Amsterdam town privileges. Some of the privileges had to do with the immigrants' legal position, and they were to ensure a legal immunity in relation to Swedish law. The town law was to consist of the laws

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Document 35, Erik XIV:s privilegier, Stockholm den 12 april 1563, *Stockholms stads privilegiebref I* in Karl Hildebrand (ed.), *Urkunder till Stockholms historia* (Uppsala: K. HumanistiskaVetenskaps-samfundet, 1900), 56–63, 61.

[25] "Till thet 15, schole borgemestere och rådh udi Stocholm, när några saker for rätte komme, som icke finnes i lagen uthtrychte, ransake och dömme ther um effter theris bedzte samveth. Och schal then dom blifve så fast som någen annen, doch ath appellation altidh må ske under oss och vårt elschelige rikis rådh effter Sverigis lagh; och när några främmende saker schole förhöres, ransakes och dömmes, dhå schal ther till brukes halffparten uthländske och halffparten inländske, på thet alle saker thäss schickeligere schole förhandlede varde, och ath the fremmende icke schole hafve sigh till ath beclage um någen orätt." Document 38, Johan III:s stadgar, Stockholm den 10 mars 1570. Document 35, Erik XIV:s privilegier, Stockholm den 12 april 1563, *Stockholms stads privilegiebref I* in Karl Hildebrand (ed.), *Urkunder till Stockholms historia* (Uppsala: K. HumanistiskaVetenskaps-samfundet, 1900) 71–81,76.

approved by the new inhabitants themselves and Roman law. Legal documents were to be drafted in Dutch, and the cases decided by the town court were not be appealed to anyone but the king himself.[26] The King confirmed the privileges in this form, in German, but because, for other reasons, the founding of Gothenburg was postponed until later, the privileges never entered into force.

The only other case of town privileges with comparable privileges in Sweden was Landkrona, a town situated in Scania, which had been ceded to Sweden in 1658. It was the intention of the new rulers to make the town a commercial centre for the southern part of the realm.[27] In the privileges of 1663, merchants were accorded exceptional rights when compared to other Swedish towns. Once a week 8 to 10 "reliable and honest men" ("*cordate och ärlige män*") were to convene under the leadership of the merchant burghermeister to solve commercial disputes, if both parties were willing to let them do so.[28] Unfortunately no records are preserved of this judicial organ, which seems to have amounted to not much less than a merchant court.

In international comparison, southern Europe seems different from northern continental Europe. In Italy, Spain, and France, merchants themselves were active in shaping the rules of commercial law. This was done in the merchant-run *consulados* and in the merchant courts, which emerged in many parts of southern Europe from the late middle ages onwards. The rulers were much less active in the field. The situation in north-western Europe turned largely the opposite. In Holland and England, no separate courts developed for mercantile affairs. Instead, commercial cases were usually handled by ordinary courts of law. Merchant law developed, instead, often by way of procedural privileges. It is interesting that seventeenth-century Sweden still wavered between these two models, not automatically accepting the north-western model of ordinary courts.

The powerful foreign merchants had an interest in securing commercial dispute resolution for themselves, and they managed to do that to some extent in the early seventeenth century. The procedure of commercial law cases thus became an issue. The Svea High Court handled commercial affairs by way of appeals, but it was criticized for not being expert enough in

[26] Emil Wolff, *Studier rörande Göteborgs äldsta författning* (Göteborg: Bonnier, 1894), 6–13.
[27] See Harald Nilsson, *Landskrona 1413–1963: en historisk-topografisk bekrivning* (Landskrona: Landkrona stad, 1963).
[28] Landskrona Privileges 14.3.1662, § 29; Ernst Fredrik Ivar Lagerwall, *Öfversigt af förordningar rörande Sveriges Handel och öfriga Stadsnäringar under Karl X Gustaf och Karl XI:s förmyndare, 1654–1672* (Upsala: Schultz, 1869), 81.

commercial matters. The drafters of the Sea Law of 1667 agreed on the need for a speedier procedure in sea law cases than in normal cases. The chief draftsman of the law was the Dutchman Hendrik Moucheron, who in his draft proposed a separate maritime court. The idea caused some discussion in the Council of the Realm. Some councilors thought no ordinary appeals to a high court should be allowed, but only an extraordinary remedy (*beneficium revisionis*) as in all other cases.[29] The Council finally decided that a maritime court be founded in Stockholm, but the question of the appeals instance was left open.[30]

A specialized maritime court was established in Stockholm in 1665 with the Dutchman Hendrik De Moucheron as its president and four others (Johan Risingh, Matthias Törnecrantz, Daniel Young and Hans Olofsson) as assessors. The new court, however, never began to function as its cases were instead referred to ordinary lower courts. Their decisions could then be appealed to the Commercial Collegium (*Kommerskollegium*), which so became a second-instance court for matters maritime cases and those involving vekselit. De Moucheron became an assessor of the Collegium.[31] The Commercial Collegium's history as commercial high court ended up short-lived, however, because of the commercial downhill that Sweden faced in the 1670 as a result of wars. The Commercial Collegium lost its independence was merged as a department to the Chamber Collegium (*Kammerkollegium*). One of the consequences of the merger was that the jurisdiction of the Commercial Collegium was returned to the Svea High Court. The Commercial Collegium nevertheless functioned as the commercial high court for over ten years (1667–1678), and has a well-preserved archive as part of the Swedish State Archives. It has not yet been systematically researched from the point of view of legal history. Tom Söderberg's valuable study on the insurances from 1935 demonstrates, however, that practically all insurances in late seventeenth century were taken abroad. Insurance forms that the Sea Law of 1667 either failed to mention or expressly forbid nevertheless occurred frequently in the documents. Such insurances included ship instruments, the hire of personnel as insurance object, in addition to which insurances were taken against slavery.[32]

[29] The institution of *beneficium revisionis* was regulated in the Article 35 of the Judicial Procedure Act (*Rättegångsprocessen*) of 1615, see Johan Schmedeman (ed.), *Kongl. stadgar, förordningar, bref och resolutioner, ifrån åhr 1528, in til 1701 angående justitie och executions-ährender etc.* (Uppsala, 1706), 161.
[30] Posse, 178–179.
[31] Joh. Ax. Almquist, *Kommerskollegium och riksens ständers manufakturkontor samt konsulstaten: administrativa och biografiska anteckningar* (Stockholm: P. A. Norstedt & Söner, 1912–1915), 20–21.
[32] See Söderlund, 138–140.

The eighth book of the Sea Law nevertheless created a flexible procedure for the first instance. In the cities, maritime cases were taken directly to the upper town courts. The lower courts were thus passed and times saved. Plaintiffs had the right to take appropriate defendants' property as guarantee, if the defendant was a foreigner. The plaintiff could even arrest the defendant, if he had no property or if there was a danger of escape.

In addition to the Sea Law of 1667 and the town privileges, a large amount of other statutory material pertaining to commercial relations was issued during the sixteenth and seventeenth centuries. This can best be described as falling into the category of police law (*Polizeirecht*), and it is in fact best found in the collections such as Anton von Stiernman's *Samling utaf kongl. bref, stadgar och förordningar angående Sweriges rikes commerce, politie och oeconomie uti gemen, uppå hans kongl. maj:ts nådigesta befallning giord ifrån 1523 I–VI* (1747–1775) and Johan Stiernman's *Justitiewercket.* Few of the statutes issued in these collections have anything to do with international commercial law as it is understood here in the narrow sense (see introduction), thus the statutes do not concern negotiable instruments, company forms, or insurances as such. Most of the statutes having to do with commerce lay out the basis for the mercantilist society, controlling who is to trade when and where, customs, and so on. From the point of view of the merchant organizing this everyday business activity, these regulations were of utmost important and failure to comply with them might result in fines and loss of business.[33]

As was typical for Holland and much of the north-western part of the European main land, commercial law was in Sweden developed also by way of privileges. Company law is a good example, as the first commercial companies were created by privilege (Privileges for the Commercial Company of 1619).[34] Models of company management developed along the seventeenth century and could eventually be extended to cover a wider range of commercial activity in the nineteenth century.

4.2. Legal practise

Legal practise shows that practises specific to merchant relations were developing not only by way of statutory law but also in the practise of early modern Swedish courts. Such an institution that seems to have developed in legal practice is that of "good men" (*gode män*). Good men or similar

[33] On the Swedish police law pertinent to commercial relations, see Kotkas, *Royal Police Ordinances in Early Modern Sweden*, 59–67, 131–149.

[34] Stierman I: Privilegier för Koop-Handels Compagniet (1.3.1615), 660–667.

institutions with different names existed, to be sure, already in early medieval law all over Europe.[35] In Swedish provincial laws just as in many other parts of the Europe, good men appeared as sort of inspectors, assisting the court in various tasks such as determining land borders. The Visby Town Law recognized good men in the role of arbitrators. The Law states (II.9., "*Saken to goden lyden to latende*") that whenever two or more men had a legal problem, it could left for good men to be decided. It was enough that one of the parties wished this. If the good men were "such men that the decision could be entrusted upon them," their decision would be binding. If, however, the parties or one of them did not think the good men were trustworthy, the party in doubt had to swear this upon oath. If a party consented to the jurisdiction of the good men, he could still refuse to let them decide a case up to three times; the fourth time, the good men could decide regardless of his consent.
As far as evidence was concerned, Roman-canon law is specifically referred to in the Visby Town's Law's chapter on the good men (*gode män*): it says that in the good men's procedure "full proof through witnesses" was needed. It makes sense that this was said clearly, for medieval Swedish laws typically consisted of evidence rules from different time periods. Since all provincial laws are post-1215 (after IV Lateran Council), ordeals no longer figure in these laws. Instead, oath procedures dominate, with elements of Roman-Canon rules of procedure popping up here and there. The more recent the law, the more Roman-canon procedural laws are found. It is, however, typical for medieval provincial laws, that the rules of evidence are specified in connection to each and every chapter or paragraph, because so many variations of the theme were possible. Therefore, it is logical that also the chapter on good men should say something about evidence.[36]

The jurisdiction of good men in the Visby Town Law was not, at least by the text of the law, limited to any special group of cases. The law gives the picture that good men could be used for all kinds of legal disputes. This would tune well with comparative picture of good men. They had been known all over Europe from the early middle ages onwards. Depending on which part of Europe one talks about, good men could serve as judges, mediators, arbitrators, evaluators, witness of different kinds, and experts in border disputes. They could come from all social classes but were men of good

[35] More or less identical are terms *boni vires*, *rachimburgi*, *prud'hommes*, *goede mennen*, to name but some examples. See "Conclusion," in Wendy Davies and Paul Fouracre (eds.), *The Settlement of Disputes in Early Modern Europe* (Cambridge: Cambridge University Press, 1986), 207–240, 216–217; and Karin Nehlsen-von Stryk, "Boni homines," in Albrecht Cordes et al. (eds.), *Handwörterbuch zur deutschen Rechtsgeschichte (HRG)*, vol. I, 2nd ed. (Berlin: Erich Schmidt, 2008), 644–645, www.HRGdigital.de/HRG.boni_homines.

[36] In early sixteenth-century Antwerp law, the finding of facts was customarily commissioned to *geode mennen* or *boni vires.* See Dave De ruysscher, "From Usages of Merchants to Default Rules: Practices of Trade, *Ius Commune* and Urban Law in Early Modern Antwerp," *Journal of Legal History* 33:1 (2012), 3–29, 13.

repute and experience, and in possession of at least some land. The institution of good men figures commonly in Swedish medieval legislation as well, usually evaluators or experts in border disputes.

This was no longer the case in the early modern period. In the legal practice of the sixteenth and seventeenth centuries, the institution of good men appears commonly used as experts in merchant cases, whereas the other functions of good men have disappeared.[37] At the request of a court, good men read account books in order to determine a state of complex economic relations between merchants. Judicial sources contain evidence of good men sometimes also having also decided cases as extrajudicial arbitrators before the cases ended up in court – because one of the parties was not happy with the good men's decision.

It is difficult if not impossible to assess how large a proportion of merchant cases was decided in mediation as against regular court procedure, because no original sources of the good men's procedure exist. Instead, in order to catch at least occasional glimpses of the good men's arbitration activities we need to rely on other sources for information. Thus in 1650 the Lower Town Court (*kämnerrätt*) of Turku decided a case between Thomas Jerfvi and Anders Marten. By the scarce description of the court protocol it is not easy to determine whether both parties were merchants, but judging by the circumstances it seems probable. The minutes mention a "contract" having been made between the two men on May 17, 1648. Thomas had purchased beverages from Anders's cellar, for which Anders had presented Thomas a bill of 2391 copper coins. Thomas did not think he owed Anders anything (his arguments do not appear in the protocol) and had taken the case to good men. They had recommended that Thomas pay 1562 copper coins as a compromise. Not consenting to this, Anders suit Thomas and claimed for the whole sum of the orginal bill. The court decided for in favour of the plaintiff.[38] Similarly, in a case between Benedict Kedings and his father Christian Kedings, the good men had attempted to solve the litigious debt payments between the parties. The good men, however, had not reached an acceptable solution, which led Benedict into taking the case to court. The courts also called upon a group of good men (Jochim Mergentia, Alexander Matsson, Jacob Erichsson and Peter Black). They were probably different from the first set of good men, although this cannot be concluded from the records.[39]

[37] This is not the place to discuss the disappearance of good men from their other functions, but it is most probably connected to the strengthening ties of local courts to the crown and the corresponding weakening of local communities' influence on judicial decision-making.
[38] Turun kämnerinoikeus 26.1.1650, digital archive, 31–33. The Upper Town Court (*rådstuvurätten*) confirmed the decision on February 18, 1650.
[39] Turku Upper Court 9.3.1650, 44–45 digital archive.

An example of good men acting as court's experts is taken from the records of Turku Upper Town Court from the year 1640. Thomas Martin had sued Anders Martin for unpaid debts. Anders brought to court a list of property items, with which he intended to pay the debt. The good men were entrusted evaluating the value of the goods to determine whether it was sufficient for the payment.[40]

In most cases, the names of good men do not figure in the records. From the few cases in which names appear, it may be concluded that good men were chosen because of their commercial expertise or social standing, or probably usually both combined.

Judging by the rarity of commercial cases in the general courts, it seems that many or perhaps even most of business cases were decided out of court. Sometimes these cases were, however, handled by the lower court. One often gets the picture that the court was used as a last instance or pressure device, when all other means had failed. Insurance as a theme emerged in the case of Peter Jesenhausen, who in 1642 sued his factor in Lübeck, Johan Prussman, because Jesenhausen had not received payment for the goods (tar and salmon) sent to Lübeck from Turku. It turned out that Prussman had not received the goods, because shipper Christian Keding although he had taken the goods to be shipped had not transported them. A sea letter proving this, Keding was held liable. In addition, Prussman wanted Jesenhausen to pay for the insurance which Prussman had taken to secure the goods that were to be shipped back from Lübeck to Turku.[41] Insurance was one of the issues in a case between Herman von Borgen and Rötgert Platzmann as well. Platzmann (together with Henrik von Broken and Peter Ruuth) had asked Borgen to arrange Borgen's contact in Amsterdam, Daniel Rulandt, to ship goods to Viborg. The ship sunk, but only von Borgen received money from the insurance. Platzmann thought Borgen should have arranged for Platzmann's insurance as well. Borgen – and the Court – thought otherwise, since Platzmann had not specifically asked Borgen to arrange for the insurance nor had Platzmann paid for the insurance (*asserantzpenningar*).[42]

International commerce sometimes raised questions of jurisdiction. In the previously discussed case Platzmann, Ruuth and von Broken had sued both von Borgen and Rulandt in Viborg. The Court,

[40] Turku Upper Town Court 2.11.1640, digital archive, 24.
[41] Sylvi Möller, 153.
[42] Viborg Town Upper Court May 20, 1639, digital archive, 64–66.

when deciding the case in favour of von Borgen, did not solve the case *qua* Rulandt, but instead advised the plaintiffs to turn to a court in Amsterdam. In another case from Viborg, Mårten Munstens came to court telling that a representative of a Lübeck shipper Lorents Hoon had come to him asking for payment, which was based on a decision of a Lübeck court. Munstens asked the Upper Town Court to overrule the Lübeck decision, which he believed was unlawful. The court did not take a stand on the matter.[43] At least these two cases suggest that Swedish courts were reluctant to decide cases involving foreigners (foreigners residing abroad) not to speak about overturning foreign court decisions. It is indeed not difficult to think that such judicial activism might have harmed commercial relations.

An important part of commercial law and of the everyday life of the merchant consisted of the activities of the urban commercial administration controlling trade. It was important for the merchants to comply with the rules concerning customs duties and other payments lest they run the risk of being fined. The protocols of the town courts offer a good insight into these practices, because the cases needed to go through law courts. The picture that the court protocols give is thus more complete as commercial control is concerned than what regards legal problems between merchants themselves, which often failed to reach court room but were settled completely or partly extrajudicially.

Commercial inspectors (*handelsinspektör*) were central figures in administering control measures.[44] Rotgerd Cass was Commercial Inspector in Vyborg and particularly active in the 1650s. Many of Cass's cases ended up in court as well, and his actions were not always well received. In January 1650, Cass charged in the Vyborg Upper Town Court nobleman Bernhardt Lewers for not paying due charges in tar handle. Lewers turned the charges against Cass himself claiming that Cass was not aware of all noble privileges. The court accepted this charge and sentenced Cass to a harsh fine of 100 silver dollars for causing difficulty of Lewers' business.[45]

Not all of Cass's actions ended this way though. In April of the same year, Cass charged merchant Anders Skarpenbergh for selling trinkets without having paid customs. In additions, he had refused to open the doors of his warehouse to Cass and his assistants. When they finally managed to enter

[43] Viborg Town Upper Court, Feb 8, 1640, digital archive, 72.
[44] On commercial inspectors (*handelsinspektör*, *handelsuppsyningsman*), see J. W. Ruuth, *Viborg stads historia* (Helsingfors: Helsingfors centraltryckeri och bokbinderi, 1906), 334.
[45] http://digi.narc.fi/digi/view.ka?kuid=11199560 (digital archive, 96–133).

the warehouse, Cass and the assistants found the trinket merchandise which had not been stamped for paid customs. Skarpenbergh was sentenced to a fine of 40 marks.[46]

4.3. Legal literature

Major legal writers were scarce in early modern Sweden. Of the few, the German-originated Johannes Loccenius touched upon commercial questions more than others. His *De iure maritime & navali* (1652) contained chapters on maritime insurance, transportation contracts, and companies, and there was as chapter on procedural questions regarding litigation arising from maritime contracts and commercial contracts. Loccenius, as in his other writings as well, makes frequent allusions to German, Dutch sources and other European sources. In *De iure maritime*, he refers to Pedro de Santarem's (Pedro Santerna Lusitano) *Tractatus de assecurationes*, to Hugo Grotius, to Vinnius, and to the Amsterdam and Antwerp statutes.[47]

David Nehrman (1695–1769) was by far the most renowned Swedish legal writer of the eighteenth century. In his *Inledning til then Swenska Jurisprudentiam Civilem* of 1729 (Introduction to Swedish civil law), Nehrman explains the Swedish system of company law. The company (*societas*, Sw. *bolag*) consisted of two or more people, who wished to set together their "property or work" in order to take care of commerce or other business. Whatever profit the undertaking produced, was divided between the partners, either in equal or unequal shares. According to Nehrman, several different kinds of *societates* could be distinguished, such as village association (*byalag*), värnelag and medrederskap. Nehrman suggests that not all commercial companies fit the category of *societas*, however, but that the specific customs and royal statutes need to be taken into account. A lawful contract of *societas* could be oral, but Nehrman adviced that it be made in written for the sake of the proof. The contract needed to include provisions, among other things, on much and what the partners invested in the company, what their duties were, how profit was divided and how the company was dissolved. Nehrman refers to the Roman law prohibition of *societas leonina* (D. 2.29.) but states that in Swedish law such a company is not necessarily always unlawful. A blacksmith, for instance, may want to enter such a contract with his children. If someone is allowed

[46] http://digi.narc.fi/digi/view.ka?kuid=11199613 (digital archive, 149–152). Similarly, Cass vs. Anthonius Borehardt in a case of textiles, http://digi.narc.fi/digi/view.ka?kuid=11199625 (digital archive, 161–163 and 192; Cass vs. the Lübeck merchant Henrich Thomasson, http://digi.narc.fi/digi/view.ka?kuid=11199642 (digital archive, 178); Cass vs. Bertill Ruuth, a Lübeck merchant, for trading illegally in Viborg, http://digi.narc.fi/digi/view.ka?kuid=11199691 (digital archive, 229–230); and Cass vs. Johas Fåhl and Anthonius Borehard, http://digi.narc.fi/digi/view.ka?kuid=11199642 (digital archive, 178).
[47] Johannes Loccenius, *De iure maritime & navali* (Stockholm, 1652), 18, 22, 29, 52, 55, 57, among many others.

to donate his property away, asks Nehrman, why should he not be allowed to enter a contract of *societas leonina* as well? However, if someone is persuaded into such a contract, it is void. Nehrman follows the *ius commune* insofar as the company debts are concerned. If all partners engage in a debt *in solidum*, they are also responsible for it. If, however, one partner alone had entered a contract, the company was responsible only if the contract pertained to a function that the contracting partner had been entrusted (*lex praepositionis*). The law was the same if the company had benefited from the contract (Kongl. Bref til G. Hoff=R den 12 Junij 1673).[48] Otherwise Nehrman does not touch commercial matters.

The actual Swedish legal writers thus did not devote much ink to commercial questions as a separate theme. In addition to books of law, merchant handbooks contain valuable information on commercial law, although one should be cautious not to treat them as normative sources but rather as descriptions of good merchant practice. The most important of the Swedish merchant handbooks was Erik Zettersténs work *Om allmänna handelshistorien och köpmanna-Wetenskapen (On General History of Trade and Merchant's Knowledge)* of 1769.[49] Zettersten's book came thus late in comparison to merchant manuals elsewhere in Europe. Before domestic manuals began to emerge, foreign manuals were used. Merchant families spent considerable amounts of money on foreign literature, including legal literature.[50] Studies of merchant libraries have shown that Swedish merchants frequently owned – and thus probably consulted as well – Dutch, English, German, and French handbooks. The Helsinki-based merchant Carl Jacob Dobbin owned over 450 titles, among which Jacques Savary's *Le parfait négociant* (first printed in 1675), the best known of all European handbooks, and Josh Gee's *The Trade and Navigation of Great-Britain Considered* (1755).[51]

5. Conclusions

In this presentation, I have approached the question of early modern commercial law from the point of view of Sweden, a peripheral region of Europe with relatively little sources. Learned commentaries of commercial law are scarce, court cases rarely refer to any legal sources, and legal

[48] David Nehrman, *Inledning til then Swenska Jurisprudentiam Civilem* (Lund: Ludwig Decreaux, 1729), 210–229.
[49] In general, see Jyrki Hakapää, "From Popular Law Books to Rarities of Economics: Merchants' Professional Literature in the Latter Half of the 1700s in Helsinki," in Cecilia af Forselles and Tuija Laine (eds.), *The Emergence of Finnish Book and Reading Culture in the 1700s* (Helsinki: Finnish Literary Society, 2011), 55–69.
[50] Christina Dalhede, *Handelsfamiljer på stormaktstidens Europamarknad II*: *Resor och resande i internationella förbindelser och kulturella intressen, Antwerpen, Lübeck, Göteborg och Arborga* (Partille: Warne, 2001), 476, according to which merchant families were "carriers of culture."
[51] Hakapää, "From Popular Law Books to Rarities of Economics," 61–62.

literature and merchant manuals are rare. It is time to attempt an answer to the questions I posed at the beginning. In addition to showing what sources such a study can be based, I have also sketched some lines of legal change based on what I can say at this point based on previous studies by other people and on the basis of the sources I have studied myself.

Was there something, which could conveniently be called commercial law in early modern Sweden? As my examples from both legal practice, statutory law and legal literature from the seventeenth century show, rules governing relations between merchants had developed in Sweden by the seventeenth century. To what extent the origins of those rules lay in the Middle Ages is a question I have now left aside. Did European models influence Swedish commercial law? They certainly did, both as the procedures and the substantial contents of the law are concerned, and both as regards legal literature, practice, and statutory law.

Swedish legal literature received influences from European legal literature on matters merchant – just as it has shown to have done regarding other matters. To what extent and how these influences were customized to Swedish circumstances, is an important question left unanswered in this survey. If commercial law followed the same model as private law, criminal law, or procedural law in general, one might assume that its rules were adopted in Sweden in a simplified form, without the finesses that ultimately only learned lawyers could have mastered – and of which there was a lack in Sweden.

The institution of good men found in the legal practice was clearly not a Swedish invention, but used elsewhere as well. Separate merchant courts were discussed as an alternative, and they were even established in some towns by way of privilege. The Commercial Collegium operated as an appeals instance for commercial cases for about a decade. The great line of legal change was, however, towards the model of north-western Europe, in which general courts handled all merchant cases as well. This was the situation probably by the end of the seventeenth century and certainly by 1734, when the Swedish Law of the Realm was given.

Third, did seventeenth-century general Swedish legal development touch upon law merchant in some way and if it did, how? The answer to me seems quite evident: commercial law was drawn into the same current of setting the law straight and attempting to place it into the straight-jacket of pre-codifications. The Swedish royal power had few competitors from the reformation onwards: neither the towns nor the nobility could stand up against the crown. When ecclesiastical power was

turned over to the crown after the Reformation, Swedish crown was amongst the most powerful in Europe.[52] This came to reflect in the judicial structure as well. From the early seventeenth century onwards, all courts finally became part of the same hierarchy, which culminated in the crown.

In many fields of law, the centralizing royal power of late seventeenth century wanted to clarify the law and codify it. The doors that still in the early part of seventeenth century, in the legal procedure, seemed to have been left open for foreign influences, were closed as seventeenth century drew to its close. Commercial law and the Sea Law of 1682 was no exception. The Sea Law was in fact the first in the line of important "codifications" of Swedish law seventeenth and eighteenth centuries. It was followed in 1682 by the War Articles, in 1719 by the Form of the Government, in 1723 by the Diet Statute and finally in 1734 by the Swedish Law of the Realm. This is important to note, because the Sea Law was clearly one in a series of statutes, which aimed at setting the Swedish law straight at the statutory level in all materials.[53]

This triumph of statutory law can probably best be explained in terms of politics: the period 1680–1719 was one of royal absolutism, to the interests of which the pre-eminence of royal statutory law suited well. The Law of 1734 being a product slightly out of place is actually not that way: the preparations of the Law had begun in 1686 already. The codification of rules developed in legal practice and previous statutory law thus not only concerned mercantile law but was rather an overarching phenomenon spanning all across Swedish law. The pre-eminence of statutory law can, furthermore, be explained by an almost complete lack of competing legal sources – which were very much the order of the day elsewhere in Europe.[54]

How well, again, the statutory law managed to describe or even steer legal practice, is another matter. Assuming again that commercial law followed the course of other fields, one might suppose that statutory law was fairly successful. However, without larger empirical studies I would hesitate to offer this as much more than a hypothesis.

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[52] See the articles in Virpi Mäkinen (ed.), *Lutheran Reformation and the Law* (Leiden: Brill, 2006).

[53] The concept of codification is difficult and will not be discussed here. See Heikki Pihlajamäki, "Private Law Codification, Modernization and Nationalism: A View from Critical Legal History," *Critical Analysis of Law* 2:1 (2015), 135–152.

[54] See Pihlajamäki, "Private Law Codification, Modernization and Nationalism."