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Book review "Making Commercial Law Through Practice"

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Book review : Cranston, R. 2021. *Making Commercial Law Through Practice, 1830-1970*. Cambridge: Cambridge University Press, 483p.

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At least part of the discipline of economic historians now accepts that the law matters. What is not always clear is *why* it matters and, more precisely, *how* it actually weighs on economic activity or on economic behaviors. For many, the perspective remains strongly macroscopic, following for instance the “Legal Origins” debate of the early 2000s: in which it was shown that, other things being equal, a country that belongs to the Common Law family fares significantly better than others in terms of GDP level, credit intermediation or private entrepreneurship. Yet, in these regressions, “legal origins” were, in fact, simply a dummy variable. And you can’t pack much history into a dummy, or much law for that matter.

In fact, the law should first be observed at the micro-level: in the contracts, in the operations of markets, in the resolution of disputes, or in the way public regulators interact with private agents. This is the approach defended by Ross Cranston, a legal historian, as he explores the legal practice of (English) merchants, bankers, lawyers and judges between 1830 and 1970, though primarily between the 1870s and the First World War.

The first main point of interest in *Making Commercial Law* is thus the detailed analysis of how English law and English courts shaped the normative environment within which markets expanded, in England and in a large part of the world. What is most striking here is the often-considerable distance observed between State-sanctioned law (precedents and statutes) and the specific rules and usages of merchants, which were typically formalized and enforced by the many private trade associations. The willingness of courts to defer to these rules and practices has a long history that goes back at least to the times of Lord Mansfield, Chief Justice between 1754 and 1788. But the non-regulated character of markets also conditioned the capacity to ground them on largely self-standing, self-enforced private legal orders. On this count, the first introductory chapter (pp. 1-60) should be a must-read for any historian with even a passing interest in the operations of nineteenth century markets, or in the way the Common Law shaped those markets—and not as a dummy variable.

Chapter three, on agents and agency, is also a treasure trove for applied microeconomists because of the great variety of examples that are analyzed, both on the domestic scene (e.g. brokers) and on the international one. For instance, the pages on the expansion of Jardine Matheson, formed as a trading house in Canton in 1832, are particularly interesting for the connection they make between legal innovations and the imperial context (pp. 173-185). On the other hand, the case of trade in manufactured goods (chapter four), with its focus on locomotives and wagons, sheds less light on the broader experience of cross-border contracting. Chapter five on trade and investment finance, hence merchant banks, is a good introduction to a subject that has already attracted considerable attention from historians of finance in general and the City in particular.

The two most interesting chapters are, however, about the commodity markets—hence Britain’s import trade—with an emphasis on agricultural products (cotton, corn, tea, rubber, etc.). Chapter two deals with the exchanges per se, the clearing houses and futures trading, while chapter five is about the international dimension of contracting. The novelty here stems from the wealth of archives Cranston draws on which, so far, have attracted little attention. In particular he relies on the case of

the London Corn Trade Association, which was indeed the model for many other private market operators.

The key instrument of these associations was their portfolio of standard sale contracts, which were each finely adjusted to the specifics of a given exporting region as well as the shipping conditions or quality standards. But these contracts also included a comprehensive set of market rules, including the arbitration of disputes, and they were tightly articulated to shipping, insurance and trade finance contracts. As a whole, they offered to merchants the services of a largely self-contained, watertight, “contractual vehicle” fully adequate to trade across a hugely diverse and often fractured international geography. On this point, Cranston could have analyzed in more detail how this construction responded to a conscious attempt by the trade associations to limit outside legal or political interference, especially by foreign officials (governments, judges, regulators, etc). These associations thus worked as “transaction cost engineers” and ended up offering a safe and constructive alternative to the by-default, cumbersome strategy of relying on judicial cooperation and the so-called rules of conflict of laws.

Two other dimensions could have been developed further in this otherwise extremely well-researched, if sometimes meticulous, book. One is about the essential role played in these commodity markets by raw market power: most substantial merchant houses in the world could simply not afford to be blacklisted in London or Liverpool. In turn, this gatekeeping power gave to the trade associations a self-standing capacity to regulate transactions, to extend trading lines across the world and to enforce market discipline. There is thus a foundational dimension of market power in this nineteenth century model of global market governance.

Lastly, this book often tends to present markets and their regulation in a rather pacified, or irenic, perspective. Conflicts among professions or between exporting and importing regions are mentioned, but the political economic dimension of trade and market regulation is not much developed. For instance, trade associations were in the hands of London-based elite merchants, whose vested interests cannot be assumed to always have been convergent with those of market participants in general. Regulatory capture was clearly a threat. Similarly, at the international level, these private legal orders formalized a status quo between the various parties to the commodity trade, within which they could bargain and trade with remarkable contractual safety. Still, the limits of this status quo were constantly challenged and tested, primarily by foreigners. The image of near-perfection that these models of private governance may give should not conceal the contested and often brutal character of this global era.