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NIJHOFF

TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 84 (2016) 193-224
REVUE D'HISTOIRE DU DROIT 84 (2016) 193-224
THE LEGAL HISTORY REVIEW 84 (2016) 193-224

brill.com/lega

'Usages and Customs of the Sea'

Étienne Cleirac and the making of maritime law in seventeenth-century France

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Summary

This article focuses on an influential but today little-known book first published in Bordeaux in 1647 and later reprinted in multiple editions: Étienne Cleirac's *Us et coustumes de la mer* (Usages and Customs of the Sea). It is the earliest and most extensive vernacular treatise on maritime law composed in early modern Europe, assembling and commenting on a large body of legal norms issued from the twelfth century to the then present, including the Laws of Wisby, the Judgements of Oléron, and a great many French regional and royal compilations of maritime law. The importance of this text is threefold. At the most basic, it helps us reconstruct the process through which doctrine and scholarship on European maritime law developed in the seventeenth and eighteenth centuries. It also brings new evidence to bear on controversial scholarly debates about the so-called *lex mercatoria*, its supposedly private and cosmopolitan nature, and its transition from the medieval to the early modern period. Finally, it sheds new light on the intersection of law, politics, and socio-economic transformations in France during the half-century before the proclamation of the *Ordonnance de commerce* (1673) and the *Ordonnance de la marine* (1681).

Keywords

Étienne Cleirac – maritime law – customs – *lex mercatoria* –Judgements of Oléron – Laws of Wisby – *Guidon de la mer*

* Albrecht Cordes and Emily Kadens kindly commented on an earlier draft and Guillaume Calafat lent his expertise at a later stage. When no reference to an English-language text appears in the footnote, the translation is mine.

 | DOI 10.1163/15718190-08412P06

1 Introduction

This article analyses an annotated compilation of maritime laws published in French in the mid-seventeenth century, which recent literature has unjustly neglected, and the context in which it was produced. In so doing, it pursues three goals. By reconstructing the book's textual bases and fortune, it contributes to a better understanding of the process through which doctrine and scholarship on European maritime law developed in the seventeenth and eighteenth centuries. Secondly, by highlighting the comparative method that is inherent in such a compilation, it revisits spirited scholarly debates about the supposed uniformity and autonomy of medieval commercial and maritime law and its early modern legacies. Finally, it places maritime law at the heart of the intellectual debates and the political and socio-economic transformations that were underway in Richelieu's France, and thus on the period that preceded the promulgation of the *Ordonnance de commerce* (1673) and the *Ordonnance de la marine* (1681), which are often discussed in isolation from earlier developments.

Nothing like *Us et coustumes de la mer* (Usages and Customs of the Sea) existed when it first appeared in Bordeaux in 1647: a vernacular publication that assembled, translated, and commented on legal norms about maritime trade issued in western and northern Europe from the twelfth century to the then present[1]. Its author, Étienne Cleirac, was a provincial lawyer with a broad humanistic education, a law degree, and extensive professional experience in the city's Admiralty court and the regional appeals court, the *parlement* of Bordeaux. A prolific if unwieldy writer, Cleirac conceived an eclectic work that today stands out as a rare document of the legal and intellectual underpinnings of the early phase of commercialization of French society and politics[2].

1 Estienne Cleirac, *Us et coustumes de la mer, divisées en trois parties*, I: *De la navigation*, II: *Du commerce naval & contracts maritimes*, III: *De la iurisdiction de la marine. Avec un traicté des termes de marine & reglemens de la navigation des fleuves & rivieres*, Bordeaux 1647. 'Estienne' is the old spelling of Étienne. Since the 1661 edition of this book is far more easily accessible than the 1647 edition (see *infra*, n. 18), I will give the page references from both editions and will refer to them as *UCM 1647* and *UCM 1661*, respectively. A Dutch compilation published less than ten years earlier also assembled a great many sources of maritime law, but confined its scope to those northern European norms that pertained to Amsterdam most directly, contained only minimal annotations, and did not enjoy the same editorial fortune: *Handtvesten, ofte Privilegien, Handelingen, Costumen, ende Willekeuren der Stadt Aemstelredam*, Amsterdam 1639.

2 My work builds and expands on A. Gros, *L'oeuvre de Cleirac en droit maritime*, [Thèse pour le doctorat], Bordeaux 1924. The entry on Cleirac in É. Féret (ed.), *Statistique générale*,

His immediate goal was to gain the attention of Richelieu and his entourage, by making available in one single volume essential collections of maritime law, including the Judgements of Oléron and the Laws of Wisby, as well as a repertoire of French royal decrees on the subject. In the process, Cleirac not only handed statesmen and legal professionals a valuable work at a time when maritime trade was a growing concern in everyday life and politics, but also bequeathed to jurists and scholars a standard reference text. The book also had a significant unintended consequence. By virtue of assembling and annotating among the most important customs, decrees, and formularies pertaining to maritime law issued in the late medieval and early modern period across western and northern Europe, Cleirac brought to light the many points of convergence and the differences between customary and positive norms that informed the adjudication of disputes over maritime affairs within the French kingdom and across state lines.

2 Scholarly myths and textual tradition

Repeated scholarly interventions aimed at dispelling the 'myth' of a medieval *lex mercatoria* are a measure of the myth's resilience. This tenacity owes a great deal to the appeal exerted on different constituencies by two primary attributes of this supposedly coherent legal system: its uniformity across political boundaries (what is often referred to as the 'universal' or 'cosmopolitan' character of the *lex mercatoria*) and its private-order nature (this is, a law administered by merchants for merchants and thus unencumbered by lengthy procedures and legal counsel)[3]. Among the scholars most wedded to the

topographique, scientifique, administrative, industrielle, commerciale, agricole, historique, archéologique et biographique du Département de la Gironde, 3 vols., Bordeaux 1889, vol. 3, part 1, p. 145 cites a text by P.V. Labraque-Bordenave, titled *L'histoire d'Étienne Cleirac et du barreau pendant la Fronde*, Bordeaux 1882, which is also mentioned in: Actes de l'Académie nationale des sciences, belles-lettres et arts de Bordeaux, 43 (1881), p. 14. The text remains unpublished but is summarized in A. Gros, *Contribution à la biographie et à l'étude des œuvres d'Étienne Cleirac d'après un manuscript de Labraque-Bordanave*, Revue générale de droit, de la législation et de la jurisprudence en France et à l'étranger, 51 (1927), p. 42–53, 126–133. A recent encyclopedia entry summarized existing information: G. Guyon, *Étienne de Cleirac (1583–1657)*, Revista europea de derecho de la navigación marítima y aeronáutica, 24 (2007), p. 3668–3669.

3 Classic proponents of these views include L. Goldschmidt, *Universalgeschichte des Handelsrechts*, Erlangen 1868 (this was the first of a planned three-volume work, *Handbuch des Handelsrechts*, that was never completed); F.M. Burdick, *What is the Law Merchant?*, Columbia Law Review, 2 (1902), p. 470–485; W. Mitchell, *An essay on the early history of the Law Merchant*, Cambridge 1904; W.A. Bewes, *The romance of the Law Merchant*, London 1923; B.

existence of a transnational and autonomous medieval *lex mercatoria* are legal historians and theorists with a libertarian streak and new institutional economic historians convinced of the fundamental economic rationality of legal norms. Both groups, however diverse, turn to the High Middle Ages as a paradigmatic time of weak state power and rising merchant classes[4]. The idea of a private and cross-state *lex mercatoria* thus sustains influential reinterpretations of the history of medieval European trade by economists and political scientists[5].

Such is the allure of these postulates that in certain scholarly camps, they have resisted persuasive refutations at the hand of those legal historians who scrutinize the textual tradition that supposedly undergirds them[6]. The gulf

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Goldman, *Frontières du droit et* lex mercatoria, Archives de philosophie du droit, 9 (1964), p. 177–192; H.J. Berman and C. Kaufman, *The Law of international commercial transactions*, Harvard International Law Journal, 19 (1978), p. 221–277; H.J. Berman, *Law and revolution, The formation of the Western legal tradition*, Cambridge 1983, p. 333–346; L.E. Trackman, *The Law Merchant, The evolution of commercial law*, Littleton 1983; B.L. Benson, *The spontaneous evolution of commercial law*, Southern Economic Journal, 55 (1989), p. 644–661, reprinted in: Reputation, Studies in the voluntary elicitation of good conduct, ed. D.B. Klein, Ann Arbor 1997, p. 165–190. Many more references can be found on the website of the CENTRAL's Transnational Law Digest & Bibliography: <http://tldb.uni-koeln.de/TLDB.html> (accessed on 24 June 2015). For the term 'myth' in relation to accounts of the medieval *lex mercatoria*, see N.H.D. Foster, *Foundation myth as legal formant, The Medieval Law Merchant and the new* lex mercatoria, Forum Historiae Iuris (2005), available at <http://www.forhistiur.de/zitat/0503foster.htm> (accessed on 24 June 2015), and E. Kadens, *The myth of the customary Law Merchant*, Texas Law Review, 90 (2012), p. 1153–1206.

4 For Trackman, 'History *does* provide lessons for the future' and can therefore inspire a modern-day, self-regulatory approach to international law: *The Law Merchant* (*supra*, n. 3), p. 17. For a critical assessment of these tendentious readings of the Middle Ages, see S.E. Sachs, *From St. Ives to cyberspace, The modern distortion of the Medieval 'Law Merchant'*, American University International Law Review, 21 (2006), p. 685–812.

5 Questionable accounts by Benson (*The spontaneous evolution* [*supra*, n. 3]) and Trackman (*The Law Merchant* [*supra*, n. 3]) are cited as authoritative syntheses in P.R. Milgrom, D.C. North, B.R. Weingast, *The role of institutions in the revival of trade, The Law Merchant, private judges, and the Champagne Fairs*, Economics and politics, 2 (1990), p. 4–5. For an alternative view, which shows the degree to which royal, local, and corporate authorities intervened in the administration of justice at the Fairs of Champagne, see J. Edwards and S. Ogilvie, *What lessons for economic development can we draw from the Champagne Fairs*, Explorations in economic history, 49 (2012), p. 131–148.

6 Two volumes edited by V. Piergiovanni, collectively and more forcefully in specific contributions, refute the empirical and theoretical validity of those claims: Piergiovanni (ed.), *The courts and the development of commercial law*, Berlin 1987 and Piergiovanni (ed.), *From lex mercatoria to commercial law*, Berlin 2005. Among a much larger bibliography, see also J.H.

separating theoretically-inflected from textually-focused scholarship on the *lex mercatoria* is such that it can discourage any new attempts at renewing the cross-disciplinary conversation. Yet the stakes are too high for this dialogue to be put on hold. A focus on Cleirac's work contributes three salient elements to these on-going scholarly debates. First and foremost, by putting side-by-side multiple sources of maritime customs, legislation, and jurisprudence, *Us et coustumes de la mer* unwittingly provided the blueprint for the kind of comparative textual analysis that modern scholars engage in. I say unwittingly because Cleirac's stated goal was not to assess the universality of the *lex mercatoria*, and yet his intellectual labours generated cogent evidence that disputes the existence of a trans-national and self-enforcing medieval maritime law.

The second and related point that an examination of *Us et coustumes de la mer* highlights concerns the transition from the medieval to the early modern periods. Proponents of the existence and merits of a medieval *lex mercatoria* bemoan the turn to codification that intensified in the seventeenth century. They describe the early modern period as one during which the *lex mercatoria* was subjugated to the demands of a centralized state and ceased to respond to the needs of merchants themselves and, as a consequence, lost 'its transnational flavour'[7]. As another scholar put it, the 'process of nationalization of commercial law' was synonymous with 'its increasing divorce from experience'[8]. This narrative distorts the history of medieval legal institutions in multiple ways, because it overestimates the autonomy of medieval commercial courts, the degree of self-policing exerted by merchants, and the contrast between commercial and civil law. It also idealizes the degree of coherence and homogeneity of the customary norms that governed contractual agreements and forms of conflict resolution in medieval trade. In a rare and probing

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Baker, *The Law Merchant and the Common Law before 1700*, Cambridge Law Journal, 38 (1979), p. 295–322; M.E. Basile *et alii* (eds.), *Lex Mercatoria and legal pluralism*, *A late thirteenth-century treatise and its afterlife*, Cambridge, MA 1998, p. 123–178; K.-O. Scherner, *Lex mercatoria*, *Realität, Geschichtsbild oder Vision*?, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte germ. Abt., 118 (2001), p. 148–167; A. Cordes, *Auf der Suche nach der Rechtswirklichkeit der mittelalterlichen Lex Mercatoria*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte germ. Abt., 118 (2001), p. 168–184; Ch. Donahue Jr., *Medieval and early modern lex mercatoria, An attempt at the* probatio diabolica, Chicago Journal of International Law, 39 (2004), p. 21–36; and E. Kadens, *Order within law, variety within customs, The character of Medieval merchant law*, Chicago Journal of International Law, 39 (2004), p. 39–65.

7 Trackman, *The Law Merchant* (*supra*, n. 3), p. 17 (citation), 21, 23–27. See also F. Gargano, *Storia del diritto commerciale*, Bologna 1976, p. 55–67.

8 Berman and Kaufman, *The Law of international commercial transactions* (*supra*, n. 3), p. 227.

examination of these issues with regard to Old Regime France, Emily Kadens has already shown that pre-existing commercial 'customs' could not have served as a firm foundation for the 1673 *Ordonnance de commerce*, Europe's earliest national codification in this area of the law, if nothing else because those 'customs' were far from uniform[9].

Cleirac's *Us et coustumes de la mer* dates to the transitional period between the establishment in France of specialized, corporate commercial tribunals (*juridictions consulaires*) in 1563 and the issuing of the first comprehensive royal decrees not only on commercial but also on maritime law (*Ordonnance de la marine*, 1681). Commercial tribunals had merchants as judges and adjudicated according to the fast and summary procedure that relied primarily on merchants' oral testimonies – a procedure that was defined in negative terms by what it ought to avoid (*sine strepitu et figura iudicii*) and admitted only a minimal amount of written evidence (normally merchants' declarations of what constituted standard practice in any given time and place). When disputes between merchants reached civil courts in appeal or in cities where no commercial tribunal existed, trained judges adjudicated them. Cleirac wished to offer those judges the instruments to settle legal disputes among merchants, seafarers, and insurance underwriters, and at the same time to collect the material necessary for royal authorities to issue new and more congruent ordinances. This is not to say that codification was a foregone conclusion – in France, it obviously responded to specific political interests linked to the consolidation of absolutism, was long in the making, and followed, more than it subverted, established merchant practices. Rather, what needs to be emphasised here is that the lack of codification did not serve the *gens d'affaires* as well as proponents of the existence of a medieval *lex mercatoria* claim. Cleirac's commentaries highlight both the similarities and the discrepancies between canonical regulations of maritime law issued in different regions of Europe and therefore reveal the extent to which those regulations provided potentially conflicting grounds on which to litigate a contract in a foreign court.

Finally, and as a further caveat to all the scholarly debates mentioned so far, Cleirac's *Us et coustumes de la mer* forces us to re-examine the relationship between commercial and maritime law as it was understood at the time. It is not always clear whether proponents of the existence of a medieval *lex mercatoria* use the same rubric to refer to both, or even how much this question matters to them. The ambiguity was inseparable from the nature of the subject and

9 E. Kadens, *Kaufmännisches Gewohnheitsrecht und das französische Handelsgesetzbuch von 1673*, in: *Akten des 36. Deutschen Rechtshistorikertages, Halle an der Saale, 10–14 September 2006*, ed. R. Lieberwirth and H. Lück, Baden-Baden 2008, p. 260–278.

not merely a question of nomenclature. Starting with Benvenuto Stracca (Ancona, 1509–1578), the earliest European treatise on commercial and maritime jurisprudence, specialized literature often treated the two side by side[10]. Over the following two centuries, the two fields became increasingly autonomous but continued to overlap in both theory and practice. Since even sceptics in matters of *lex mercatoria* admit that maritime law, in spite of variations across time and place, displayed more common elements than commercial law, the lack of homogeneity and the evolution of maritime law provide an even more stringent test case against the mercatorists' views[11].

It should be noted that the expression *lex mercatoria* was used infrequently, particularly on the Continent. Thus it does not appear in *Us et coustumes de la mer*, while Cleirac's commentaries sometimes juxtapose contracts pertaining to maritime and to commercial law, such as when he draws an analogy between bills of exchange and marine insurance[12]. Equally important is to stress that *Us et coustumes de la mer* questions the boundaries between private and public law in the conception of the norms concerning maritime affairs. Theorists of the *lex mercatoria* focus their attention on private contracts, such as bills of exchange, marine insurance, freight, and bills of lading. In fact, there were areas of maritime law, beginning with the law of wreck, which always involved sovereign political authorities. The texts and commentaries assembled by Cleirac reveal the contiguity between private contracts, including jettison (the legally prescribed sequence by which mariners should offload part of the cargo in the hope of preventing worse losses due to inclement weather) and

10 Benvenuto Stracca, *De mercatura seu mercatore tractatus*, Venice 1553. On this treatise, see A. Lattes, *Lo Stracca giureconsulto*, Rivista di diritto commerciale, 7 (1909), p. 624–649 and Ch. Donahue Jr., *Benvenuto Stracca's De mercatura, Was there a lex mercatoria in sixteenth-century Italy?*, in: Piergiovanni (ed.), From lex mercatoria to commercial law (*supra*, n. 6), p. 69–120.

11 Donahue draws a sharp line between the *lex mercatoria*, whose existence he contests, and the *ius maritimum*, whose provisions, he argues, shared significant commonalities across time and space: *Medieval and early modern lex mercatoria* (*supra*, n. 6), p. 75. Different scholarly views of the boundaries between maritime and commercial law are discussed in V. Piergiovanni, *La storiografia del diritto marittimo*, in: La storiografia marittima in Italia e in Spagna in età moderna e contemporanea, Tendenze, orientamenti, linee evolutive, ed. A. Di Vittorio *et al.*, Bari 2001, p. 1–10.

12 Cleirac, *UCM 1647*, p. 224–228; *UCM 1661*, p. 218–223. The contiguity between marine insurance and bills of exchange also appears in the English-language commercial literature that adopts the expression *lex mercatoria*: Gerard Malynes, *Consuetudo, vel lex mercatoria or the ancient Law Merchant*, London 1622; Wyndham Beawes, *Lex mercatoria rediviva, or, The merchant's directory*, London 1751; Giles Jacob, *Lex mercatoria, or, The merchant's companion*, London 1718.

the law of wreck (the rules for assigning ownership and salvagers' compensation after the goods of a sunken ship turned up along a coastal beach). Since Late Antiquity, the Rhodian Law (D. 14, 2,9) assigned to local lords a fraction of the goods retrieved from the sea, placing the law of wreck at the intersection of maritime customs and positive law[13]. Moreover, since many shipwrecks occurred in foreign territories, they also gave rise to potentially intractable diplomatic negotiations. Several sections of Cleirac's commentaries, as we shall see, address this concern in the aftermath of a dramatic shipwreck that occurred off the coast of Bordeaux in 1627. They thus take stock of the coexistence of multiple sources of law – late medieval collections of maritime customs, French regional customs sanctioning feudal prerogatives, and more recent royal legislation– that influenced domestic and international negotiations over the property rights of any recovered cargo.

3 A forgotten bestseller

Us et coustumes de la mer was a massive and momentous endeavour. The first section comprises the Judgments of Oléron, the Laws of Wisby, and the rules of the Hanseatic League from 1591 (but incorrectly dated to 1597). The second section reproduces three body of norms concerning marine insurance: the *Guidon de la mer*, issued in Rouen some fifty years earlier, those promulgated by Philip II in Antwerp in 1563 (inaccurately dated to 1593), and an ordinance published in Amsterdam in 1598. The volume's third and last section consists of a redacted and copiously annotated version of the 1584 royal edict on the jurisdiction of the Admiralty of France over internal and seaborne navigation in times of war and peace, the so-called Code Henri, after King Henry III (r. 1574–1589). Unfortunately, Cleirac never explains the criteria that informed his selection of normative texts nor the status of different bodies of law in Bordeaux, although we know that the Judgements of Oléron were used by the city's adjudicating courts and that at times regional customs clashed with royal decrees, as in matters of the law of wreck (*droit de bris et naufrage*)[14]. Noticeable is the

13 R. Melikan, *Shippers, salvors, and sovereigns, Competing interests in the Medieval Law of Shipwreck*, Journal of Legal History, 11 (1990), p. 165–182.

14 M. Bochaca, *Les juridictions bordelaises compétentes pour 'fait de marchandises' avant la création de la juridiction consulaire (milieu XV^e–milieu XVI^e siècle)*, in: Les tribunaux de commerce, Genèse et enjeux d'une institution, Paris 2007, p. 37–43; Y.-M. Bercé, *L'affaire des caraques échouées (1627) et le droit de naufrage*, in: État, marine et société, Hommage à Jean Meyer, ed. Martine Acerra *et al.*, Paris 1995, p. 15–24; F. Trivellato, '*Amphibious*

absence of the most well-known medieval collection of maritime customs from Southern Europe, Barcelona's *Llibre del consolat de mar* (composed around 1340 and first printed in Catalan in 1494), but it is reasonable to attribute this omission to the fact that a French translation had recently appeared[15]. In appendix to *Us et coustumes de la mer*, the publisher reproduced a more modest piece of writing that Cleirac had composed a decade earlier: *Explication des termes de marine*[16]. This booklet was a rudimentary vocabulary of terms pertaining to maritime trade and contracts, accompanied by a description of flags used by ships of different states, and belonged to an emerging genre of maritime and naval dictionaries[17].

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power', The Law of Wreck, maritime customs, and sovereignty in Richelieu's France, Law and History Review, 33 (2015), p. 915–944.

15 *Le Livre du Consulat ... nouvellement traduict de language espaignol & italien en françois*, trans. François Mayssoni, Aix-en-Provence 1577. The translation was financed by a merchant from Marseille, Guillaume Giraud, and first printed in 600 copies: W. Kaiser, *Ars mercatoria, Möglichkeiten und Grenzen einer analytischen Bibliographie und Datebank*, in: Ars mercatoria, Eine analytische Bibliographie, ed. J. Hoock, P. Jeannin, and W. Kaiser, 3 vols. Paderborn 2001, vol. 3, p. 16 n. 35. It was then re-issued in a second edition: *Le Consulat ... traduict de language espaignol & italien en françois*, trans. François Mayssoni, Aix-en-Provence 1635. Cleirac references the *Consolat* in his commentary on multiple occasions. The first citation appears in the notes to article 1 of the *Guidon de la mer*, where Cleirac mentions the 'ordinances of the wise man of Barcelona of 1484' (*sic*) that were later included in the *Consolat* as chapter 337, ordering that all marine insurance contracts be registered with a public notary ('Item ordenaren los Consellers que totes les seguretats se hagen à fer, ab cartes publiques preses por notaris publics'): *UCM 1647*, p. 229; *UCM 1661*, p. 224. In the 1635 French translation, this chapter appears as number 349: *Le Livre du Consulat* (*supra*), 1635, p. 214–215. On two other occasions does Cleirac refer to the *Consolat* as dating from 1484 (*UCM 1647*, p. 239, 246). Elsewhere he refers to it simply as 'le Consulat'. The citations in Catalan and the discrepancy between the chapter order in *Us et coustumes de la mer* and in the French translation suggest that Cleirac cited from the Catalan version of the *Consolat*. For a comparison between the Judgments of Oléron and the Barcelona's *Consolat*, see J. Schweitzer, *Schiffer und Schiffsmann in den Rôles d'Oléron und im Llibre del Consolat de Mar, Ein Vergleich zweier mittelalterlicher Seerechtsquellen*, Frankfurt am Main 2007.

16 Estienne Cleirac, *Explication des termes de marine employez dans les edicts, ordonnances, & reglemens de l'Admirauté, Ensemble les Noms propres des Nauires, de leur Parties, & l'vsage d'icelles, l'Artillerie Navale, les liurees ou couleurs des Estendards & Pauillons de ceux qui voguent sur les Mers*, Paris 1636.

17 Cleirac maintains that the Jesuit and naval chaplain Georges Fournier borrowed generously from his booklet in order to compose a more systematic treatment of the subject: *Explication* (*supra*, n. 16), p. 2. See also Fournier, *Hydrographie contenant la theorie et la pratique de toutes les parties de la navigation*, Paris 1643. Later in the century, French works

Today virtually forgotten, at the time Cleirac's *Us et coustumes de la mer* was an editorial success. Printed in-quarto (not a pocket-book size but one suitable for large print-runs), the 1647 edition is a voluminous text of 576 pages, plus index and appendixes. An expanded edition appeared in Bordeaux in 1661 in at least 1,200 copies, which was an extraordinarily high print-run for any non-religious book and all the more so for one devoted to maritime law[18]. It was then re-issued with minimal additions four additional times: in Paris in 1665, in Rouen in 1671 and 1682, and in Amsterdam in 1788[19]. The first section was also translated into English in 1686, with the title *The Ancient Sea-laws of Oleron, Wisby and the Hanse-towns still in force*, and later reprinted at the end of Gerard Malynes's *Consuetudo, vel lex mercatoria* (first published in 1622), one of the most popular English-language merchant manuals[20]. It was thus Cleirac who

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on all aspects of navigation became more frequent. E.g., C.R. Dassié, *L'architecture navale*, Paris 1677 and *Le routier des Indes orientales et occidentales*, Paris 1677. The latter opens with a short terminological note (p. 1–3). Cleirac does not seem to have known two then recent English-language antecedents: John Smith's *An Accidence, or The path-way to experience*, London 1626 and *A Sea-Grammar*, London 1627. A former explorer and leader of the English colony in Virginia, Smith authored several other publications and maps. See K. Ordahl Kupperman (ed.), *John Smit, A select edition of his writings*, Chapel Hill 1988.

18 The 1661 print-run is recorded in a notarial deed involving the printer transcribed in: Archives historiques du département de la Gironde, 25 (1887), p. 419–420. The Bordeaux publisher Millanges produced two revised editions in 1661. They both carry the same title and the same pagination: *Us et coustumes de la mer, divisées en trois parties… le tout reveu, corrigé & augmenté par l'autheur en cette derniere edition*. One version has a coloured frontispiece and more decorations; the printer's information says: 'En la Boutique de Millanges Chez Guillaume Taupinard, Marchand Libraire'. The other has a black-and-white frontispiece and fewer decorations; the printer here is described as: 'Par Iacques Mongiorn Millanges, imprimeur ordinaire du roy'. As a term of comparison, consider that in 1528, the first edition of Baldassar Castiglione's *Courtier*, one of early modern Europe's veritable bestsellers, appeared in 1,030 copies and in the following two centuries was reissued in roughly 62 editions and countless translations: P. Burke, *The fortunes of the Courtier, The European reception of Castiglione's Cortegiano*, University Park 1995, p. 40–41.

19 In the 1671 Rouen edition of *Us et coustumes de la mer*, the editors' dedication to the president of the *parlement* of Normandy and eighty-seven pages of pertinent royal and regional decrees replaced Cleirac's dedication to the regent queen. Judging from how rare the 1788 edition is in today's library holdings, its print-run must have been significantly lower than the previous ones. By then, more reliable French compilations had become available (see n. 81).

20 Guy Miege, *The ancient sea-laws of Oleron, Wisby and the Hanse-towns still in force, taken out of a French book, intitled, Les us & coustumes de la mer*, London 1686. Starting in 1686, Malynes's *Consuetudo, vel lex mercatoria* was printed together with a number of other 'tracts'. On an earlier English translation of the Judgments of Oléron, see n. 60. Cleirac is

provided, through the mid-nineteenth century, the reference text of the thirteenth-century Judgments of Oléron, redacted somewhere in the Southwest of France and one of the most influential corpora of maritime customs across western and northern Europe during the High Middle Ages and beyond[21].

Multi-layered academic traditions account for why, in spite of its wide circulation at the time, *Us et coustumes de la mer* has fallen into near oblivion. A compiler more than a theorist, Cleirac was a nearly exact contemporary of Hugo Grotius (1583–1645) and yet lacked Grotius' original mind and eloquence. His work stood on the sidelines of the so-called battle of the books, which pitched Grotius' arguments in favour of the freedom of the sea against a host of distinguished opponents and occupied some of Europe's great minds for decades. As a compiler, Cleirac was also less systematic and philologically accurate than later authors engaged in analogous enterprises, notably Jean-Marie Pardessus three centuries later. Once Pardessus' and other more substantial collections appeared, it became easier to forget that until that moment, *Us et coustumes de la mer* had been the single most comprehensive repository of maritime laws available in print[22]. In addition, Cleirac's volume sits uncomfortably at the crossroads of multiple genres and is thus difficult to classify. It

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also a reference point for the compilation by Alexander Justice, *A general treatise of the dominion of the sea*, London 1705, and its multiple re-editions.

21 It is via Cleirac that the Judgments of Oléron were also translated into Dutch, German, and Italian: Pieter Leclercq, *Algemeene verhandeling van de heerschappy der zee, en een compleet lichaam van de zee-rechten*, Amsterdam 1757; Johann Andreas Engelbrecht, *Corpus iuris nautici, oder, Sammlung aller seerechte*, Lübeck 1790; *Biblioteca di gius nautico*, 2 vols., Florence 1785, vol. 1, p. 40–153.

22 J.-M. Pardessus, *Collection de lois maritimes antérieures au XVIII^e siècle*, 6 vols., Paris 1828–1845; Pardessus, *Us et coutumes coustumes de la mer, ou Collection des usages maritimes des peuples de l'antiquité et du Moyen Age*, 2 vols., Paris 1847. See also n. 81. Gros attributes the obscurity in which Cleirac's name has fallen to two factors: his son's political ostracism (on which more below) and the unreliability of some of his statements; Gros, *L'oeuvre de Cleirac* (*supra*, n. 2), p. 180–185. These are arguably only among some of the reasons affecting his legacy. Gros and Bonnecase are the two twentieth-century scholars who have celebrated Cleirac the most, in spite of his imprecisions: J. Bonnecase, *Traité de droit commercial maritime*, 2 vols., Paris 1922, vol. 1, p. 155. Very few authors wrote on maritime law in vernacular before Cleirac. William Welwood's *The sea-law of Scotland*, Edinburgh 1590 and *An abridgement of all sea-lawes*, London 1613 defended Scotland's rights over its territorial waters against Grotius' theories of the freedom of the sea but offered little by way of textual editions. The 1639 Dutch compilation *Handtvesten* (*supra*, n. 1), assembled a broad range of northern European texts, including the Laws of Wisby, the ordinances of the Hanseatic League, and a vast array of statutory norms issued in the Low Countries, but did not include a version of the Judgments of Oléron or other French texts.

draws from the Roman law tradition, but is not a Latin tract on maritime law that mimics the works of glossators: the disorganized nature of Cleirac's annotations, which mix legitimate and unpredictable references, pales in comparison to the rigor of earlier and contemporary treatises by jurists like Stracca, the Portuguese Pedro de Santarém, the Roman Sigismondo Scaccia, and the Genoese Raffaele della Torre, all of whom wrote in Latin[23]. *Us et coustumes de la mer* abounds in both factual information, such as contractual formularies, and moralizing tales about credit, but is neither a merchant manual nor a confessor manual. If its hybrid nature has relegated *Us et coustumes de la mer* to the margins of modern scholarship, its success at the time is evidence of the relevance of its undertaking: it translated and digested for a broad reading public concerns about the world of commerce that were located at the confluence of law, theology, humanism, and practical merchant culture[24].

Eclectic as it may have appeared, today this volume opens for us a rare window onto the rise of commercial interests in the French state and society of the early-seventeenth century[25]. Old Regime France remains an important and yet neglected chapter in the history of European commercial and maritime law. We do not possess any study of the daily operations of those corporate commercial tribunals that had been created since 1563, and their relation to the

23 Petrus Santerna, *Tractatus de assecurationibus et sponsionibus mercatorum*, Venice 1522 (first ed. 1488); Scaccia, *Tractatus de commerciis, et cambio*, Rome 1619; Della Torre, *Tractatus de cambiis*, Genoa 1641. In the same year as Cleirac's *Us et coustumes de la mer* was first published, a commentary on the *Lex Rhodia de iactu* was included in *V. Cl. Petri Peckii in titt. Dig. & Cod. ad rem nauticam pertinentes, commentarii, Quibus nunc accedunt notæ cum ampla dote variarum circa rem navalem observationum, beneficio Arnoldi Vinnii, J.C. Item ius navale Rhodiorum Græc.-Lat. indexque geminus*, Amsterdam 1647, p. 188–297. Quintyn Weytsen's short and popular treatise on damage was then still only available in Dutch, *Tractaet van avarien*, Amsterdam, 1617, but would soon be translated into French (1651) and Latin (1672).

24 On the osmosis of law, theology, and merchant culture in the Continental literature on commercial and maritime law in the sixteenth and early seventeenth centuries, see R. Savelli, *Modelli giuridici e cultura mercantile tra XVI e XVII secolo*, Materiali per una storia della cultura giuridica, 18 (1988), p. 3–24.

25 As historians have become increasingly interested in the overseas dimension of early modern France, they have focused primarily on the eighteenth century. For important but rare exceptions to this trend, see, in particular, G. Huppert, *Les bourgeois gentilshommes, An essay on the definition of elites in Renaissance France*, Chicago 1977; A. Lespagnol, *Messieurs de Saint-Malo, Une élite négociante au temps de Louis XIV*, Saint-Malo 1990; G. Saupin, *Nantes au XVII^e siècle, Vie politique et société urbaine*, Rennes 1996; G.K. Brunelle, *The New World merchants of Rouen, 1559–1630*, Kirksville 1991; and J. Parsons, *Making money in sixteenth-century France, Currency, culture, and the state*, Ithaca 2014.

jurisdictions of both admiralty courts and civil tribunals is still poorly understood. More generally, the period before the reforms initiated by Finance Minister Jean-Baptiste Colbert (r. 1665–83) has attracted little interest by scholars of French commercial and maritime law[26].

Cleirac's *Us et coustumes de la mer* throws new light on the changing culture and politics of commerce in the period when Armand du Plessis, Cardinal and Duke of Richelieu, chief minister of France from 1624 to 1642 and, after 1628, Grand Master of the Navy and Commerce, promoted a more aggressive presence of his country in overseas trade in an arduous attempt to compete with the Dutch and the English. At home, Richelieu's manifold interventions aimed at this objective included drafting the provisions concerning commerce and navigation in an ambitious (if ill-fated) reform project, the 1629 Code Michau, which included new measures promoting the nobility's involvement in long-distance trade[27]. Meanwhile, his foreign policy made the Cardinal acutely aware of the way in which maritime law, and the law of wreck in particular, intersected with his attempts to consolidate royal power over provincial autonomies. As we will see, Richelieu found himself overseeing a major controversy about the law of wreck that erupted along the Spanish-French borders and spurred Cleirac into action. An Atlantic port-city in its incipient booming phase, Bordeaux thus represents an important laboratory from which to observe the unfolding of major historical changes in French and European society.

4 A lone author in troubled times

Biographical information about Étienne Cleirac is meagre but helps us to decipher aspects of his writing. He was born in Bordeaux in 1583, the year when Montaigne was re-elected mayor of the city and while the violence that raged across France during the wars of religion had come to a brief, temporary halt.

26 Valuable but partial contributions in J.-L. Lafon, *Les Députés du Commerce et l'Ordonnance de Mars 1673, Les jurisdictions consulaires; principe et compétance*, Paris 1979 and *Les tribunaux de commerce* (*supra*, n. 14). For the working of the Parisian commercial tribunal during the eighteenth century, see A.D. Kessler, *A revolution in commerce, The Parisian Merchant Court and the rise of commercial society in eighteenth-century France*, New Haven 2004.

27 Isambert *et alii*, *Recueil général des anciennes lois françaises, depuis l'an 420 jusq'à la révolution de 1789*, 29 vols., Paris 1821–1833, vol. 16, p. 223–344; L. Kadlec, *Le 'Code Michau', La réformation selon le garde des sceaux Michel de Marillac*, Les Dossiers du Grihl: La vie de Michel de Marillac et les expériences politiques du garde des sceaux (2012), available online at <http://dossiersgrihl.revues.org/5317#ftn1> (accessed on 24 June 2015).

Both his father and his brother were members of the lower legal professions while his godfather was a merchant with the title of *bourgeois*, which conferred fiscal privileges and social prestige[28]. He studied at the *Collège de Guyenne*, one of the most renowned humanist secondary schools in the kingdom, where both Montaigne and Joseph Scaliger had been educated[29]. In 1616 he acquired the status of *bourgeois* and two years later he married Jeanne Plasse, with whom he had three daughters and one son, Raymond[30].

For most of his professional career, Cleirac served as a barrister in the city's highest court: 'advocat en la cour de parlement de Bordeaux'[31]. In that capacity, he performed a variety of legal services: he offered legal advice to clients,

28 Cleirac's baptismal record lists his father as 'maistre Hélies de Cleyrac, procureur en la Cour' and his mother as 'Françoise Le Roy'. A simple 'procureur', roughly a solicitor, stood a step below an 'avocat' in the professional hierarchy: D. Bell, *Lawyers and citizens*, *The making of a political elite in Old Regime France*, New York 1994, p. 29–30. The 'de' before Cleyrac suggests a pretence of noble heritage by a family that does not appear to have joined the rank of nobility. His godfather was listed as 'monsieur Estienne de La Roche, bourgeois et marchand'. When his son was born, Cleirac asked his brother Raymond, a 'procureur au siège presidential de Guyenne', to be a godfather. These baptismal records are transcribed in: Archives historiques du department de la Gironde, 25 (1889), p. 389–390.

29 Boys could enter the Collège de Guyenne at the age of six or seven. For the following ten years, they would be instructed according to the curriculum of Renaissance grammar schools, which included French, Latin, some Greek, arithmetics, and history. At the end of the first ten years, students were admitted to a two-year university program in the *Faculté des Arts*, where they were initiated to Aristotelian logic and natural philosophy. W.H. Woodward, *Studies in education during the age of the Renaissance, 1400–1600*, Cambridge, MA 1906, p. 138–151.

30 *Le livre des bourgeois de Bordeaux, XVII^e et XVIII^e siècles*, Bordeaux 1898, p. 32. One daughter, Françoise, married a judge in the royal fiscal court ('monsieur maistre Jean de Castagne, conseiller du Roy en la Court des Aydes'). All information about his family is drawn from Cleirac's two testaments and one codicil, which are reproduced in: Archives historiques du department de la Gironde, 25 (1889), p. 390–401.

31 Cleirac is identified as such both in his son's baptismal record of 1622 and on the frontispiece of his *Usance du négoce ou commerce de la banque des lettres de change*, Bordeaux 1656. In theory, the qualification of 'avocat au parlement' indicated a practicing barrister, while that of 'avocat en parlement' referred to all those who obtained a law degree and had performed their oath. In practice, however, the two labels were often used interchangeably: Bell, *Lawyers and citizens* (*supra*, n. 28), p. 28. French *parlements* were tribunals that adjudicated criminal and civil suits in appeal, but also issued their own decrees (*arrêts de règlement*) and oversaw the enactment and enforcement of royal edicts. Bordeaux's *parlement* extended its jurisdiction over the fourth largest area in the kingdom.

prepared written or oral briefs about a specific case or a question of law, acted as arbiter in private disputes, and could be employed for ad hoc purposes by other institutions[32]. For at least a few years in the late 1620s, as we will see, he also served as royal solicitor (*procureur du roy*) at the Admiralty of Bordeaux. Cleirac died in 1657 after having spent his entire life and career in his hometown and its surroundings. The inventory of his possessions drafted at his death suggests a household of comfortable means: he owned three pieces of real estate in town as well as houses, arable lands, and vineyards in the hinterland. He had also assembled an impressive library of 671 books, whose titles the inventory regrettably omits[33].

In the preface to his *Usance du négoce*, a short treatise on private banking and usury published a year before his death, Cleirac looks back on his life and alludes to two important autobiographical details. He composed *Usance du négoce*, he tells us, in the aftermath of an inclement tempest and during a period of 'disordered movements' in the province of Guyenne[34]. The former reference is to the massive shipwreck of eight Portuguese royal ships and their rich cargo in the Gulf of Biscay in January 1627. The recovery efforts were complex and delicate, and Richelieu became embroiled in protracted negotiations with provincial French authorities, on the one hand, and representatives of the Spanish king, on the other (Portugal was then under Spanish rule). Employed in the service of the crown's administration at the Admiralty of Bordeaux,

32 Since *parlements* adjudicated cases in appeal on the basis of written evidence, rarely did barristers appear in court for cross-examinations and the like. They also only dealt with civil suits because criminal cases did not involve legal counselling. On the social standing, professional functions, and political role of *avocats* in Old Regime France, see Bell, *Lawyers and citizens* (*supra*, n. 28); M. Gresset, *Gens de justice à Besançon, de la conquête par Louis XIV à la Révolution française (1674–1789)*, 2 vols., Paris 1978; M.P. Breen, *Law, City, and King, Legal culture, municipal politics and state formation in early modern Dijon*, Rochester 2007.

33 Cleirac was buried in the family tomb in the Church of Saint-Siméon, which is no longer standing. The inventory of his possessions lists the library holdings by genre: 84 works of mathematics, 49 of history, 36 of political theory, 32 of medicine, and 539 without any specification: Archives départementales de la Guyenne, 3E3212, fols. 690r–715r. See also L. Coste, *Mille avocats du grand siècle, Le barreau de Bordeaux de 1589 à 1715*, Lignan-de-Bordeaux 2003, p. 72. By contrast, Richelieu's personal library at his death counted 250 titles. The full list appears in J. Wollenberg, *Richelieu, Staatsräson und Kircheninteresse, Zur Legitimation der Politik des Kardinalpremiers*, Bielefeld 1977, p. 327–330.

34 Cleirac, *Usance du négoce* (*supra*, n. 31), preface, p. 3. Two more editions of this work appeared in Paris (1659) and Bordeaux (1670). The numeration of p. 1–9 is repeated twice in the 1656 and 1659 editions, while in the 1670 edition the preface appears in non-numbered pages.

Cleirac assisted Richelieu's emissaries, François de Fortia and Abel de Servien, in the extensive reconnaissance aimed to establish the ownership of the surviving cargo and the compensation due to costal feudal lords and to those who helped in the salvage operations[35]. The experience marked Cleirac profoundly, to the point that it appears to have been the main motivation behind his writing.

By 'disordered movements' Cleirac meant the war of the Fronde, which pitched segments of the French aristocracy against the monarchic party, and the particularly violent and devastating manifestations of this armed and political conflict in Bordeaux, where a prolonged urban revolt known as the Ormée (1651–1653) tore the city apart[36]. Cleirac laments having been persecuted by the very same persons from whom he expected protection – a vague hint that likely refers to the royal authorities whom he had served during the shipwreck crisis and who presumably marginalized him because of his son's prominent involvement in the Ormée. In such circumstances, Cleirac found comfort in an old humanist trope: fleeing the turmoil and disruption of public life, he sought refuge in the countryside, where he devoted himself to scholarship[37].

During the quarter century that separates the shipwreck of 1627 from the Ormée, Cleirac tended to the composition of his chief work, *Us et coustumes de la mer*, as well as its revisions and other writings. In the preface to *Usance du négoce*, which appeared in 1656, he boasted authorship of three treatises

35 Cleirac, *Usance du négoce* (*supra*, n. 31), p. 4. Both Fortia and Servien were members of the King's Council. Servien went on to being appointed first *intendent* of Guyenne in 1628, then president of the *parlement* of Bordeaux in 1630, and later to higher profile diplomatic and military positions in the kingdom, ending up as a leading French diplomat at the negotiations of the Treaty of Westphalia in 1648; P. Grillon (ed.), *Les papiers de Richelieu, Section politique intérieure, correspondence et papiers d'État*, 6 vols., Paris 1975–1997, vol. 2, p. 225–226. See also *supra*, n. 14.

36 A. Westrich, *The Ormée of Bordeaux, A revolution during the Fronde*, Baltimore 1972; Ch. Jouhaud, *Mazarinades, La Fronde des mots*, Paris 1985; W. Beik, *Urban protest in seventeenth-century France, The culture of retribution*, Cambridge 1997.

37 Cleirac, *Usance du négoce* (*supra*, n. 31), preface, p. 4; Gros, *L'oeuvre de Cleirac* (*supra*, n. 2), p. 183–184. Cleirac was probably graced by the Amnesty of 1653 and thus able to return to Bordeaux, while his son was not. In his first testament, he reproaches Raymond for his public conduct, and specifically for plotting against the king's power ('contre le service du Roy'). Eventually, however, Cleirac pardoned Raymond and bequeathed him his portion of the inheritance. Other contemporary sources attest to Raymond's participation in an ill-fated attempt to assassinate a prominent royalist orchestrated from Spain: A. Communay (ed.), *L'Ormée à Bordeaux d'apres le journal inédit de J. de Filhot*, Bordeaux 1887, p. 61–62.

('traités'): one on banking and bills of exchange (a reference to *Usance du négoce* itself), one on coastal navigation rights ('droict de coste') and the contraband of ambergris (which is arguably how Cleirac refers to his *Us et coustumes de la mer*), and one on French trade and consular jurisdiction in the Ottoman Empire. The latter appears to be lost[38].

Throughout his published works, Cleirac made his monarchic allegiance and Catholic devotion clear. Even before he had to distance himself from his son's rebellious actions, he dedicated *Us et coustumes de la mer* to Anne of Austria, regent queen of France (r. 1643–1651), and infused it with praises for Richelieu, praises that only became more frequent in the book's second edition and elsewhere[39]. Already *Explication des termes de la marine* (1636) was dedicated to the archbishop of Bordeaux, Henri d'Escouleau de Sourdis, who followed his older brother François in the office and rose to prominence as a leading figure of the Catholic party as well as the commander-in-chief of the royal navy fighting the Huguenots and an opponent of the all-powerful governor of Guyenne,

38 Cleirac, *Usance du négoce* (*supra*, n. 31), preface, p. 4. The manuscript that forms the basis of *Us et coustumes de la mer* shows that Cleirac was assembling material on the capitulations granted by the Ottoman Empire to the French crown: 'Ordonnances et coustumes de la mer, colligées par M. Estienne Cleirac, advocat en la Cour', Bibliothèque municipale, Bordeaux, Ms. 381, p. 385–90. This manuscript is only a rough draft of the published text. The latter was completed after 1644, since it cites an edict of 20 August 1644 (*UCM 1647*, p. 431). The preface to *Usance du négoce* indicates that Cleirac continued to work on his earlier treatise after its first publication in 1647 and authored the many additions that appeared in the 1661 edition. Thus, for example, an ordinance of January 1639 about the public education in maritime matters appears in the second but not in the first edition (*UCM 1661*, p. 480). Ambergris, the natural product of sperm whales and among the most precious aromatic and medical products imported from South Asia, is mentioned in a few instances across Cleirac's works. On its properties as perfume, cooking essence, and medicament, see *Usance du négoce* (*supra*, n. 31), preface, p. 5–6. On whale fishing in the Gulf of Biscay, see *UCM 1647*, p. 140–155; *UCM 1661*, p. 141–155. On the recovery of ambergris from wrecked ships, see *UCM 1647*, p. 122; *UCM 1661*, p. 120–121 and André Rebsomen, *Le droit d'ambre gris sur la côte au pays de Buch* (*Gironde*), Académie de Marine, Communications et mémoires, 11 (1932), p. 65–71. For a contemporaneous description that attributes to ambergris the power to cure sterility, 'melancholy' (a recognized illness with social and political implications in the seventeenth century), and even physical paralysis, see Nicolas Chevalier, *Description de la piece d'ambre gris que la Chambre d'Amsterdam a receuë des Indes Orientales, pesant 182 livres, avec un petit traité de son origine & de sa vertue*, Amsterdam 1620, p. 37, 63–66.

39 In 1656, Cleirac described his *Us et coustumes de la mer* as a work compiled for Richelieu's benefit; *Usance du négoce* (*supra*, n. 31), preface, p. 7.

Jean-Louis Nogaret de La Valette, duc d'Épernon (1544–1642)[40]. In the divided Southwest, Cleirac's embrace of the monarchic cause was coupled with the loyalty to Bordeaux's civic spirit, typical of the city's professional elites. One of the sonnets that adorns the *Us et coustumes de la mer*'s second edition is signed by Geoffroy Gay, a priest and prolific writer in both Latin and the vernacular, as well as a voice of those intellectual milieux whose profound sense of municipal independence harboured the seeds of the Ormée[41]. As we will see, this fervent patriotism declined in a regional key infused Cleirac's commentaries on maritime law, and particularly his reading of the Judgments of Oléron, but was also common among writers of maritime and commercial subjects.

From this sketchy portrait, we gather that Cleirac belonged neither to the feudal aristocracy nor to the nobility of robe that had begun to occupy the highest venal offices in the municipal, provincial, and royal administration. Rather, he filled the growing ranks of those who used the legal profession as an avenue of upward mobility. When he turned his attention to the study of maritime law, he was steeped in humanistic culture and Roman law. His first-hand experience was as a lawyer in the court of Admiralty and the *parlement*, not as a merchant, a ship-owner or a marine insurance underwriter. Unlike many in his profession, especially in the Southwest, he remained a devout Catholic and loyal monarchist, though he was also connected to the circle of provincial intellectuals who nourished a vibrant and independent urban culture in Bordeaux.

An obsessive and idiosyncratic compiler more than an original and systematic thinker, Cleirac made knowledge of maritime law accessible to a wider public in seventeenth-century France. His near contemporary Claude Barthélemy de Morisot also dedicated his treatise on maritime law to Richelieu but chose to write in Latin and to intervene in the learned and consequential diatribe ignited by Grotius in order to marshal new weapons in favour of French sovereignty over the sea[42]. Before both Cleirac and Morisot, the Huguenot writer Lancelot-Voisin de La Popelinière (1541–1608) had garnered attention for a compelling if narrower work on the history of the Admiralty of France and its

40 R. Boutruche (ed.), *Bordeaux de 1453 à 1715*, Bordeaux 1966, p. 376–379; A. James, *The navy and government in early modern France 1572–1661*, Suffolk 2004, p. 11.

41 Ch. Jouhaud, *Geoffroy Gay, Une lecture de la Fronde bordelaise*, Annales du Midi, 91 (1979), p. 273–295.

42 Claude Barthélemy de Morisot, *Orbis maritimi, sive Rerum in mari et littoribus gestarum generalis historia*, 4 vols., Dijon 1643. See also G. Calafat, *Une mer jalousée, Juridictions maritimes, ports francs et régulation du commerce en Méditerranée (1590–1740)*, [Ph.D. thesis], Université Paris I and Università di Pisa 2013, p. 233–238.

legal prerogatives, composed in French after the take of La Rochelle[43]. Overall, maritime law was captivating more and more minds during Cleirac's lifetime, and even France's preeminent man of letters, Nicolas-Claude Fabri de Peiresc (1580–1637), displayed more than a passing interest in the field in the 1620s[44]. Perhaps in search of social affirmation, the Bordeaux lawyer pursued tenaciously the publication of *Us et coustumes de la mer*, which would leave a mark on growing jurisprudential and doctrinal debates on the subject.

5 A jumbled but timely work

Two surviving manuscripts and his published works prove Cleirac to be an avid reader and a productive, if undisciplined, writer. His commentaries in *Us et coustumes de la mer* are often muddled even by the rhetorical and editorial standards of the time. Nevertheless, the book's immediate success is evidence of just how pressing the concerns it addressed were for a broad audience.

Cleirac cites two motivations that guided him in his undertaking: the desire to make navigation laws available to judges of sovereign courts, and thus part and parcel of the sources on the basis of which disputes were adjudicated, and the commitment to elevating the reputation of all people who work at sea ('fils de Neptune') so they should not be regarded as unrefined and loathsome ('grossiers et méprisables'), but could acquire the dignity accorded to those who work the land ('fils de la Terre')[45]. While the Portuguese and the Dutch appeared to Cleirac to be well versed in all matters pertaining to overseas trade, he found that the inhabitants of the French Atlantic coast, no less than the Swedes, Germans, and others whom he met while employed at the Admiralty of Bordeaux, were rather ignorant, or, in his words, more inclined to consume alcohol and tobacco than capable of handling the astrolabe and other navigation instruments[46].

43 Henri Lancelot-Voisin, sieur de La Popelinière, *L'Amiral de France, et par occasion, de celuy des autres nations, tant vieiles que nouvelles*, Paris 1584; G. Martinière, *Autour de Popelinière*, in: Coligny, les protestants et la mer, ed. M. Acerra and G. Martinière, Paris 1997, p. 45–50.

44 P.N. Miller, *Peiresc's History of Provence, Antiquarianism and the discovery of a Medieval Mediterrranean*, Philadelphia 2011, p. 41.

45 Dedication in Cleirac, *UCM 1647* and *UCM 1661*. In the 1671 and subsequent editions, this dedication is replaced by one to the president of the *parlement* of Normandy (see also n. 19).

46 Cleirac, *UCM 1661*, p. 486. Oddly, Cleirac does not mention the English and the Scots, who were then a more conspicuous foreign presence in Bordeaux.

The dignity of commerce was a touchstone of lively debates and reform initiatives, including the Code Michau. Among the Code's 461 articles, many concerned French trade and manufacturing. Not all articles became law, but they lay the foundation for future ordinances. They proposed to revise of the sixteenth-century *loi de dérogeance*, which deprived aristocrats who trafficked in merchandise, practiced law or were involved in any manual labour of their noble privileges (including their fiscal exemptions); conversely, they allowed for the ennoblement of anyone who built and manned a vessel of over 200 tons for at least five years and for those merchants who served as consuls (art. 452)[47]. Intellectual efforts to link commerce to 'civility' and classical antiquity accompanied these legal schemes[48]. Less known than contemporary French authors of early treatises of political economy, notably Montchrestien, Cleirac embedded a revaluation of commerce not only in humanist and political theories, but also in concrete changes in the world around him. He calls mathematics and cosmography 'noble sciences'[49]. To counter the tendency among talented young men who graduate from *collèges* and universities to become medical doctors, he proposes that free public instruction be given in the art of navigation to channel the aspirations of the youth[50].

47 See *supra*, n. 27. A new decree, in 1669, abolished the *loi de dérogeance* for noblemen involved in maritime trade and in 1701 the prerogative was extended to all noblemen investing in wholesale trade, whether overseas or overland: A.D. Kessler, *A 'question of name', Merchant-Court jurisdiction and the origin of the noblesse commerçante*, in: A vast and useful art, The Gustave Gimon Collection of French political economy, ed. M.J. Parrine, Stanford 2004, p. 62 n. 12.

48 Adapting Hans Baron's well-known thesis about the alignment of commercial interests and 'civic humanism', a scholar speaks of 'commercial humanism' for the French intellectual debates of the early seventeenth century, when several authors sought to confer social legitimation to commercial activities in a society in which, unlike in England and the United Provinces, commerce tended to be associated with undignified professions or the rapaciousness of state financiers. H. Clark, *Commerce, the virtues, and the public sphere in early seventeenth-century France*, French Historical Studies, 21 (1998), p. 415–450.

49 Cleirac, *UCM 1647*, p. 492; *UCM 1661*, p. 479. On the honour of merchants and bankers who pursued legitimate investments, see also Cleirac, *Usance du négoce* (*supra*, n. 31), p. 15–17. Antoine de Montchrestien, *Traicté de l'economie politique*, Rouen 1615.

50 Cleirac, *UCM 1661*, p. 487–489. The Code Michau announced the creation of such free schools across France's port cities. Similar appeals can be found in English navigational tracts of the time. See W.F.J. Mörzer Bruyns, *Research in the history of navigation, Its role in maritime history*, International Journal of Maritime History, 21 (2009), p. 261–286 and R. Blakemore, *Navigational instruments as cultural artefacts, c. 1550–1650*, Journal for Maritime Research, 14 (2012), p. 31–44.

For a practicing lawyer like Cleirac, the intellectual project of conferring respectability to commerce and navigation was inseparable from the effort to establish the legal rules on the basis of which those activities could be performed. This enterprise led him to step outside the confines of his formal education, centered on the Romanistic tradition and French positive law, to collect and annotate statutory collections, legislation, and commentaries on maritime law with which he had become acquainted during his time serving the Admiralty of Guyenne. With little precedent for what he set to accomplish, he also improvised the intellectual tools necessary to produce a critical edition of maritime laws.

The title of his work – 'usages and customs '– points in two directions. On the one hand, expressions like 'merchant customs', 'the customs of the sea,' and the like were common currency in the commercial parlance of the time. They recurred in the mercantile literature as well as in actual lawsuits. Even when invoked instrumentally by litigants, however, they referred to standards that were commonly adopted in one or a few specific localities, with no claim to genuine universality, and thus required collations and comparisons. On the other hand, in Old Regime France, the word 'customs' also had a more specific meaning, indicating the customary law that had long dominated in the northern provinces of the kingdom (*pays de droit coutumier*), though also existed in the southern regions (*pays de droit écrit*), where Roman law prevailed. The product of multiple revisions and redactions, these ancient *coutumes* formed the object of intense study in the sixteenth and seventeenth centuries, when they became a bone of contention in the monarchy's efforts to expand its legal and jurisdictional authority at the expense of seigniorial rights[51]. As Donald Kelly puts it succinctly, 'the idea of custom [was] situated at the very storm centre of modern political and constitutional debates', in France perhaps even more than elsewhere[52]. Thus in 1576, the theorist of royal absolutism Jean Bodin tried to present the difference between 'customs' and 'law' in a neutral, objective manner, but in so doing also revealed his preference: customs emerge slowly and acquire force over time, while laws are born in a precise moment and their strength derives from that of the sovereign body or the sovereign in-

51 French kings began to mandate the written compilation of all *coutumiers* after the end of the Hundreds Years' War: M. Grinberg, *Écrire les coutumes, Les droit seigneuriaux en France, XVI^e–XVIII^e siècle*, Paris 2006.

52 R. Kelly, '*Second nature*', *The idea of custom in European law, society, and culture*, in: The transmission of culture in early modern Europe, ed. A. Grafton and A. Blair, Philadelphia 1998, p. 136.

dividual who emanates them; conversely, customs linger on while laws can be abolished abruptly[53].

These long-standing debates about the role of 'customs' in the making of French absolutism have not included mercantile customs, but *Us et coustumes de la mer* shows that the latter, too, were part and parcel of the remaking of the kingdom's political and legal order. Steeped as any French legal scholar of his time was in these debates, the young Cleirac also annotated the customs of Guyenne, probably from a copy held in the library of Montaigne's estate[54]. In keeping with the legal tradition of continental Europe, *Us et coustumes de la mer* categorized maritime customs neither as civil law (*ius commune*) nor as natural law (*ius naturale*), but as belonging to the law of nations (*ius gentium*), which supposedly embraced humanity as a whole[55]. Therefore, consistent with a hierarchy traceable to the *Lex Rhodia de iactu*, which Cleirac dates to Emperors Augustus (r. 27BC–14AD) and Antoninus (r. 138–161), he placed the law of nations ('le droit des gens'), such as the Judgments of Oléron, the Law of Wisby, and the ordinances of the Hanseatic League, in a subordinate position to Roman law, royal edicts, and the decrees (*arrêts de règlement*) issued by the French *parlements*[56]. In other words, his original contribution consists not in a theoretical treatment of maritime customs and law in relation to the other sources of law but in the pride of place he conferred to the topic and the production of textual editions and commentaries with a large appeal.

Similarly, his valorisation of international trade as a vehicle of 'reciprocal and peaceful communication' between diverse people across the globe, whom God has endowed with different 'graces and riches', was a commonplace of

53 Jean Bodin, *Les six livres de la république*, Paris 1576, p. 198 (book 1, chap. XI).

54 'Coustumier de Guyenne, nommé Roolle de la ville de Bordeaux, contenent partie des privileges, franchises, lois, moeurs et formes de vivre des anciens Bordelais, sur lequel la coustume reformée en l'an 1520 a été extraite. Tiré de l'Estude de Messire Michel de Montaigne, autheur des essais avec quelques notes pour l'intelligence et l'explication tant du langage que de l'histoire, adjoutées par Monsieur Estienne Cleirac, advocat en parlement'. This manuscript survives in a nineteenth-century copy preserved in the Bibliothèque de l'Université de Bordeaux-4, Ms. 5. Its date *ante quam* is 1636. On the manuscript, see H. Barckhausen (ed.), *Livres de coutumes*, Bordeaux 1890, p. xxxii; A. Tournon, *Montaigne, La glosse et l'Essai*, Lyon 1983, p. 196–197. On the publication and study of municipal and regional *coutumes* in seventeenth-century Bordeaux, see G. Guyon, *Les textes de la Coutume de Bordeaux et leurs éditions*, Revue française d'histoire du livre, 47 (1978), p. 319–414.

55 Stracca had defined the law of merchants as *ius gentium*: *De mercatura* (*supra*, n. 10), part IV, p. 66. For Malynes, the 'law merchant' was nearly coincidental with the *ius gentium*: *Consuetudo* (*supra*, n. 12), p. 3 and Basile, *Lex mercatoria* (*supra*, n. 6), p. 139–140.

56 Cleirac, *UCM 1647*, p. 6; *UCM 1661*, p. 6.

Thomistic thought with growing resonance more than a stand in raging controversies about the freedom of the sea. Imbued with Roman law, Renaissance juridical culture, and the theology of the School of Salamanca, Cleirac followed Tommaso de Vio aka Cardinal Cajetan (1469–1534) and Martín Azpilcueta aka Doctor Navarrus (1492–1586) in defining the moral boundaries of credit and maintained a traditional Aristotelian understanding of the law of nations[57]. Only in the second edition of *Us et coustumes de la mer*, and for minor details about marine insurance rather than philosophical principles, did he turn to Hugo Grotius' *De iure belli ac pacis* (first published in 1625)[58].

Even as a compiler, Cleirac was often murky in his bibliographical reference system, so much so that it is not always possible to identify the exact provenance of the texts he reproduces, redacts or translates[59]. The section on the

57 Cleirac, *UCM 1647*, p. 225; *UCM 1661*, p. 219. Cajetan alone is cited in the 1647 edition.

58 Cleirac cites from *De iure belli ac pacis*, book 2, chap. 12, nos. 25 and 23 (*UCM 1661*, p. 31, 250). No mention is made to Grotius' *Mare liberum*, which appeared anonymously in 1609 and with proper author's identification in 1618, in spite of its success in France: E. Thomson, *France's Grotian moment?, Hugo Grotius and Cardinal Richelieu's commercial statecraft*, French History, 21 (2007), p. 377–394; Calafat, *Une mer jalousée* (*supra*, n. 42), p. 24–26. Grotius' treatise on prize booty, *De iure praedae* (1604–1605), remained a manuscript until 1864 and was unknown to Cleirac, although it influenced French eighteenth-century debates on commerce: A. Fraser Terjanian, *Commerce and its discontent in eighteenth-century French political thought*, Cambridge 2013, p. 96–97, 120–24.

59 Cleirac writes that the Laws of Wisby and the Hanseatic regulations have been 'translated from German to French' (*UCM 1647*, p. 165, 199; *UCM 1661*, p. 165, 196). No mention of a translation appears at the start of the Amsterdam's insurance norms (*UCM 1647*, p. 386; *UCM 1661*, p. 363). It remains unclear, however, whether Cleirac knew German or Dutch, since throughout his commentaries, all references and citations are in French, Italian, Spanish or Latin. What follows is my attempt to identify the sources of the texts that Cleirac reproduced or (had) translated. His version of the Judgments of Oléron counts 47 articles, with the last 22 (arts. 26–47) concerning wreck and jettison (*UCM 1647*, p. 9–159; *UCM 1661*, p. 9–160). It is derived from Pierre Garcie, *Le grant routtier*, Poitiers [1520], but makes no mention of the fact, addressed by Garcie, that the Judgments' last section was a later addition: Pardessus, *Collection de lois maritimes* (*supra*, n. 22), vol. 1, p. 312–320. See also n. 62. The Laws of Wisby (*UCM 1647*, p. 165–188; *UCM 1661*, p. 165–185), the 1563 imperial ordinance on marine insurance contracts at the Antwerp's Exchange (*UCM 1647*, p. 374–385; *UCM 1661*, p. 354–362), the orders of the Hanseatic League of 1591 (*UCM 1647*, p. 199–218; *UCM 1661*, p. 196–212), and the 1589 Amsterdam regulation of marine (*UCM 1647*, p. 386–402; *UCM 1661*, p. 363–376) could all be found in *Handtvesten* (*supra*, n. 1), p. 417–424, 444–448, 451–457, 191–195, respectively. The 1598 Dutch ordinance also circulated in print as *Ordonnantie ende willekeuren by den heeren vande gherechte der stadt Amstelreddamme ghemaeckt op tstuck vande asseurantie*, Amsterdam 1598. The *Guidon de la mer* (*UCM 1647*, p. 223–366; *UCM 1661*, p. 213–347) existed in previous stand-alone editions.

Judgments of Oléron proved to be the most influential in the reception of *Us et coustumes de la mer* and had a significant impact on the historical study of the doctrine of maritime law, although the commentaries on the 1584 edict on the Admiralty's jurisdiction, by virtue of assembling a variety of earlier and subsequent French laws, likely served a more practical function in the everyday administration of justice and the drafting of the 1681 ordinance[60]. Disputing earlier claims, which John Selden (1584–1654) had recently reiterated, Cleirac asserted the French (rather than English) origins of the Judgments of Oléron, insisting, for example, on the Gascon inflection of their language[61]. This chau-

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Pardessus dates it to the late sixteenth century: *Collection* (*supra*, n. 22), vol. 4, p. 370 n. 3. I consulted *Guidon, stile et usance des marchands qui mettent à la mer*, Rouen 1608, which is identical to Cleirac's. Since Cleirac explained that he had chosen to include it because available editions were deficient, he may have consulted an older edition that no longer survives. The last section of Cleirac's book, entitled 'Iurisdiction de la Marine ou d'Amirauté', draws largely from the 1584 royal edict on the Admiralty of France: cf. Isambert, *Recueil général* (*supra*, n. 27), vol. 14, p. 556–590. It also includes (*UCM 1647*, p. 546–553; *UCM 1661*, p. 550–555) a summary of a previous collection of the royal codes pertaining to the Admiralty of France: cf. Antoine Fontanon, *Les edicts et ordonnances des rois de France, depuis Louys VI. dit le Gros, jusques à present*, 4 vols., Paris 1585, vol. 3, p. 9–30. It ends with decrees from different epochs concerning river navigation (*UCM 1647*, p. 554–576; *UCM 1661*, p. 556–598).

60 Much ink has been spilled to understand the textual history of the Judgments of Oléron and their diffusion across Northern Europe. Modern reconstructions of these vicissitudes are in K.-F. Krieger, *Ursprung und Wurzeln der Rôles d'Oléron*, Köln 1970; M. Serna Vallejo, *La historiografía sobre los Rôles d'Oléron* (*siglos XV a XX*), Anuario de historia del derecho español, 70 (2000), p. 471–498, reprinted in: Homenaje a Luis Rojo Ajuria: escritos jurídicos, Santander 2002, p. 543–566; J.W. Shephard, *The Rôles d'Oléron, A lex mercatoria of the sea*?, in: From lex mercatoria to commercial law (*supra*, n. 6), p. 207–253. The earliest printed version of the Judgments of Oléron appeared under the title of *Jugemens de la mer* (26 articles) in *Coustumes de Bretagne*, Lantreguer 1485. A longer version, which included later additions, was published in Garcie's *Le grant routtier* and rendered in English by Robert Copland, *The Rutter of the Sea*, London 1557; see D.W. Waters (ed.), *The Rutters of the sea, The sailing directions of Pierre Garcie; A study of the first English and French printed sailing directions, with Facsimile Reproduction*, New Haven 1967, p. 38–39. The modern English translation and critical edition of the Judgments of Oléron is in Sir T. Twiss (ed.), *Monumenta juridica, The Black Book of the Admiralty*, 4 vols., London 1871–76, vol. 1, p. 89–131.

61 In Cleirac's narrative, returning from her pilgrimage to the Holy Land (a factual occurrence), Eleanor of Aquitaine (d. 1204) learnt of the existence of the Barcelona *Consolat* and, recognizing its merits, issued an analogous set of rules for the region of Guyenne. After her marriage to Henry II of England, their son Richard, Duke of Guyenne and King

vinistic argument may seem to contrast with the proto-internationalism that many have come to associate with the transnational character of maritime law. In fact, chauvinism was common among writers of maritime subjects and assured Cleirac considerable fame among specialists, who kept on debating the correct attribution and philological reconstruction of the Judgments of Oléron[62]. A pronounced regionalism informs all of *Us et coustumes de la mer*, as evidenced by the allegation that mariners from Capbreton and the French Basque region paved the way for the exploration of eastern Canada a hundred years before Christopher Columbus sailed across the Atlantic[63]. Having asserted the French origins of Judgments of Oléron, Cleirac proceeded to dispute Swedish writers such as Joannes Magnus and Olaus Magnus (archbishops of Uppsala from 1488 to 1544 and from 1490 to 1557, respectively) and to maintain that the Laws of Wisby (the town on the island of Gotland, in the North Sea, known for its fourteenth-century rules of navigation) were modelled on those

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of England as Richard I, expanded the text and introduced it across the Channel. John Selden by contrast attributed the text to King Richard alone: Selden, *Mare clausum seu de dominio maris libri duo*, London 1635, p. 254–255 (book II, chap. XXIV). Cleirac (*UCM 1647*, p. 3; *UCM 1661*, p. 2) borrowed his conclusion from Morisot, *Orbis maritimi historia* (*supra*, n. 42), vol. 3, p. 457 (book II, chap. XVIII). Subsequent English-language authors continued to claim that it was King Richard I who issued the Judgments of Oléron. E.g., John Godolphin, *Synegoros thalassios, A view of the admiral jurisdiction*, London 1661, p. 14; John Exton, *The maritime dicaeologie, or, Sea-jurisdiction of England*, London 1664, p. 16; Philip Meadows, *Observations concerning the dominion and sovereignty of the seas*, London 1689, p. 27; Ephraim Chambers's *Cyclopaedia*, 2 vols., London 1728, vol. 2, p. 660.

62 Cleirac's name figures frequently in association with the Judgments of Oléron and their supposedly French authorship. E.g., Antonio de Capmany y de Montpalau, *Codigo de las costumbres marítimas de Barcelona*, 2 vols., Madrid 1791, vol. 1, p. xxvi; S.-P. Boulay-Paty, *Cours de droit commercial maritime, d'après les principes et suivant l'ordre du Code de Commerce*, 4 vols., Paris 1834, vol. 1, p. 70, 72, 75; A. Desjardins, *Introduction historique à l'étude du droit commercial maritime*, Paris 1890, p. 146.

63 If it were impossible to prove that the French were the first to land in the West Indies, Cleirac wrote, it should at least be admitted that the first pilot to guide Columbus was a Basque familiar with Newfoundland (*UCM 1647*, p. 151; *UCM 1661*, p. 152). The textual evidence for this claim came from Corneille Wytfliet, *Histoire universelle des Indes Orientales et Occidentales*, Douay 1605, p. 1–3. While admitting that Cleirac seems animated by a desire to exalt his compatriots, some local historians today continue to cite him to prove that Basque and French mariners were involved in early transatlantic ventures. E.g., Y. Jacob, *Jacques Cartier, De Saint-Malo au Saint-Laurent*, [Paris] 1984, p. 37.

of Oléron[64]. The rules issued by the Hansa, in his rendition, were little more than an expansion of those of Wisby[65].

More surprising than his patriotism is the range of genres from which Cleirac drew his annotations, which spans a wider spectrum than most merchant manuals or legal treatises. He relied on a striking short list of authors of maritime jurisprudence and the *ars mercatoria*: Juan de Hevia Bolaños, Mathias Maréschal, Pieter Peck, Santarém, John Selden, Stracca, and the sentences of the Genoese Rota[66]. Benedetto Cotrugli's and Gian Dominico Peri's merchant manuals or Scaccia's and della Torre's treatises on lending contracts are among the authoritative works by Italian authors that one would expect to find in a commentary on maritime law written on the Continent in the first half of the seventeenth century but these do not figure in *Us et coustumes de la mer*[67]. Instead, consistent with his legal education, Cleirac appears versed in the great collections of Roman law and their medieval commentators as well as in French regional customs. Prominent Renaissance jurists like Andrea Alciato (1492–1550), Charles du Moulin (1500–1566), Jacques Cujas (1522–1590), and

64 Cleirac, *UCM 1647*, p. 4–5; *UCM 1661*, p. 5. The modern English translation and critical edition of the Laws of Wisby are in Twiss, *Monumenta juridica* (*supra*, n. 60), vol. 4, p. 265–284. Note that German and Dutch writers disputed Cleirac, arguing that the Judgments of Oléron were in fact a copy of the laws of Wisby or the Flemish Judgments of the Sea: Pardessus, *Collection* (*supra*, n. 22), vol. 1, p. 283.

65 In truth, Cleirac expressed admiration for the Hanseatic League in contrast to what he reported as being a common disparaging opinion (largely derived from Tacitus) among French scholars who regarded all Northerners as rustic and barbarian, 'des Rustres et des Barbares' (*UCM 1647*, p. 190; *UCM 1661*, p. 186).

66 Here and in the next footnote I cite the first edition of these authors' works. Juan de Hevia Bolaños, *Curia filipica*, Madrid 1619; Bolaños, *Segunda parte de la Curia filipica*, Valladolid 1629; Mathias Maréschal, *Tracté des changes et rechanges licites, et illicites*, Paris 1625; Santarém, *Tractatus de assecurationibus* (*supra*, n. 23); Selden, *Mare clausum* (*supra*, n. 61). The sentences of Genoa's high tribunal (the Rota, founded in 1528) constituted one of the most authoritative sources of commercial law in the Continent prior to 1673. The first printed edition appeared in 1582. I was able to consult a later one: *De mercatura decisiones, et tractatus varii, et de rebus ad eam pertinentibus*, Cologne 1622. On Peck, see *supra*, n. 23. On Stracca, see *supra*, n. 10.

67 Cotrugli (1416–1469) was a merchant and writer from Dubrovnik, then named Ragusa. A printed edition of his merchant manual first appeared in Venice and was later re-issued multiple times, but also existed in French translation: Benedetto Cotrugli, *Della mercatura et del mercante*, Venice 1573; *Traicté de la merchandise, et du parfaict marchant … traduict de l'Italien de Benoît Cotrugli Raugean, par Jean Boyron*, Lyon 1582. The first of Peri's three volumes was published nearly a decade before *Us et coustume de la mer*: Peri, *Il negotiante*, Genoa 1638. Scaccia, *Tractatus de commerciis* (*supra*, n. 23); Della Torre, *Tractatus de cambiis* (*supra*, n. 23).

Charles Loyseau (1566–1627) figure next to French scholars and lawyers with expertise in local statutes and *coutumes*[68].

But the distinctive feature of Cleirac's commentaries is the juxtaposition of a dazzling variety of citations, ranging from greater and lesser Roman and Greek authors to the Old and New Testament, Church Fathers, saints, theologians, medieval chroniclers like Jean Froissart and Matthew of Paris, antiquarians, geographers, towering humanists like Gerolamo Cardano and Joseph Scaliger, novelists and poets like Dante, Boccaccio, and Ariosto, historians like Nicole Gilles and Étienne Pasquier, not to speak of collections of proverbs and travellers' accounts. Only when he added verses from the Qur'an (in a recent French translation) and the thirteenth-century Arthurian poem known as *Les prophecies de Merlin* to the second edition did Cleirac feel compelled to state that these 'ignorant and ridiculous' authors are important not for what they say but for what they reveal about their superstition[69]. Otherwise, he roams freely across disparate sources. Cleirac's innumerable citations are normally identifiable and accurate, though in at least a few remarkable cases, they have gained him the reputation of someone who let his imagination run wild[70]. This eclecticism gives *Us et coustumes de la mer* a flavour of dilettantism. But it also reflects the wide-ranging and non-dogmatic interests of the many jurists, lawyers, notaries, and government employees who wrote about the law but whom legal scholars have sidelined in favour of recognized authors in constructing the Western legal canon[71]. In turn, it indicates that interest in maritime law in the early seventeenth century was hardly confined to technical and legalistic debates and was nourished instead by history and theology as well.

68 Across his commentaries, Cleirac mentions the following French *coutumes*: those of Amiens, Arc, Bordeaux, Bayonne, Bourgogne, Labour (Normandy), Nivernais, Orléans, Paris, and Tours. Note that the Roman Inquisition had censored du Moulin's works as early as 1559, but its jurisdiction did not extend to France. Today, several of his books are available in the rare book section of Bordeaux's municipal library.

69 Cleirac, *UCM 1661*, p. 8. *L'Alcoran de Mahomet, translaté d'arabe en français par le sieur Du Ryer*, Paris 1647; *Histoire de la vie, miracles, enchentemens et prophecies de Merlin*, Paris 1498. An eight-page printed list of all authors cited in *Us et coustumes de la mer* is undated and without place of publication, but its print type suggests it was compiled before 1800. It is further evidence of the fortune met by this work at the time: 'Table alphabétique des livres et des auteurs cites par Cleirac, dans les Us et Coustumes de la Mer'. I located only one surviving copy in the Bibliothèque Nationale de France, Paris, FP–2710.

70 F. Trivellato, *Credit, honor, and the early modern French legend of the Jewish invention of bills of exchange*, Journal of Modern History, 84 (2012), p. 289–334.

71 R. Savelli, *In tema di storia della cultura giuridica moderna, 'strade maestre' e 'sentieri dimenticati'*, in: Scopi e metodi della storia del diritto e formazione del giurista europeo, ed. L. Garofalo, Napoli 2007, p. 98.

6 *E pluribus unum*?

Albeit with rudimentary philological tools, Cleirac advanced textual criticism and historical analysis in the field of maritime law by anticipating what became the parallel analysis of different collections aimed at establishing where they converge, depart or borrow from one another[72]. Not unlike modern scholars, whose painstaking efforts are animated by larger concerns, Cleirac had his own agenda: studying maritime customs and laws meant to give a pedigree to a subject that still lacked respectability but also, more opportunistically, to ingratiate those authorities, and crown officials in particular, who were interested in systematizing this area of the law[73].

Most commentaries in *Us et coustumes de la mer* fulfil two functions: they explicate the meaning of archaic or technical terms used in the original (or translated) texts and compare norms about specific subjects across various bodies of law. As mentioned, interspersed with his legal commentaries are moralizing digressions drawn from proverbs, literary citations, travel accounts, and religious texts[74]. Though unsystematic, these annotations highlight both

72 The transmission of legal norms across time and place is a venerable scholarly topic, even though in 2004 Donahue could still bemoan the paucity of modern studies that trace the similarities and differences between medieval bodies of maritime and commercial norms: *Benvenuto Stracca's De mercatura* (*supra*, n. 10), p. 75. In general, scholars engaged in systematic comparisons between various bodies of maritime law circulating across Europe and the Mediterranean have little sympathy for the arguments of the believers in the universality of the *lex mercatoria*. For a few recent examples of this type of scholarship concerning Northern Europe, see G. Landwehr, *Die Haverei in den mittelalterlichen deutschen Seerechtsquellen*, Hamburg 1985; H. de Schepper and J.-M. Cauchies, *Justicie, gracie en wetgeving, Juridische instrumenten van de landsheerlijke macht in de Nederlanden, 1200–1600*, in: Beleid en bestuur in de oude Nederlanden, Liber amicorum Prof. Dr. M. Baelde, ed. Hugo Soly and René Vermeir, Gent 1993, p. 127–181; A. Graßman and C. Jahnke (eds.), *Seerecht im Hanseraum des 15. Jahrhunderts, Edition und Kommentar zum Flandrischen Copiar Nr. 9*, Lübeck 2003; E. Frankot, '*Of Laws of Ships and Shipmen*', *Medieval maritime law and its practice in urban Northern Europe*, Edinburgh 2012.

73 Cf. E.M. Thomson, *Commerce, law and erudite culture, The mechanics of Théodore Godefroy's service to Cardinal Richelieu*, Journal of the History of Ideas, 68 (2007), p. 407–427.

74 The tendency to digress is most pronounced in an unusually long and meandering comment to chapter 1.1 of the *Guidon de la mer*, which is tangential to the article's subject (the legal definition of marine insurance contracts) and inspired a widespread, if unsubstantiated, belief in the Jewish invention of marine insurance and bills of exchange, which was designed to condemn as 'usurious' the financial practices that both instruments could elicit: Trivellato, *Credit, honor, and the early modern French legend* (*supra*, n. 70). Already in chapter 1.2, however, Cleirac returns to a more focused comparison, finding the rule

parallels and discrepancies between authoritative texts. The fruit of this analysis would, Cleirac hoped, assist French royal authorities in their continued effort to re-order the subject of maritime law. His commentaries are thus most extensive and methodical in the third section of *Us et coustumes de la mer*, which covers the royal edicts pertaining to the Admiralty of France. But more than a coherent evolutionary process of codification, the volume as a whole mirrors a state of affairs in which heterogeneity dominated maritime law both within France and across European states.

Thus, for example, Cleirac informs us that the *Guidon de la mer*, the Catalan *Consulat*, and Amsterdam's customs allowed someone to insure a lost property, although each prescribed different criteria by which to calculate how much time could elapse between when the loss became known to the parties involved and when they signed the insurance contract; by contrast, Antwerp's customs, a sentence of the Genoese Rota, and Santarém's authoritative treatise on marine insurance considered such a contract null[75]. Similar examples could be multiplied. They are all hard to square with theories about the autonomy and universal character of the *lex mercatoria*. Normative discrepancies made even an essential private contract for long-distance trade like marine insurance the object of contentious litigation across political borders.

Moreover, certain areas of maritime law, namely the law of wreck, embroiled not only the private contracting parties directly involved in the shipping business but also sovereign political authorities. The encroachment of politics in the *lex mercatoria* was thus not an infringement of its spirit but the anticipated effect of certain of its norms. Premium insurance, general average, freightage, jettison, and the law of wreck, in particular, were closely linked to one another in a chain that made the boundaries between private maritime contracts and public law necessarily porous. A good portion of Cleirac's commentaries are devoted to jettison and the law of wreck, in part because of his personal involvement, noted above, in the complex and contentious recovery efforts that followed the sinking of the Portuguese carracks returning from Asia along the south-western coast of France in 1627. In annotating chapter 5.23 of the *Guidon de la mer*, Cleirac compares it to article 8.12 of the Judgments of Oléron and to a host of other norms concerning the ship-captains' and insurers' obligations for the portion of the cargo jettisoned in the sea[76]. Furthermore, commenting the same article in the Judgments of Oléron, he not only

about the prohibition of using verbal agreements for maritime insurance to be in agreement with the Barcelona's *Consulat*. Cleirac, *UCM 1647*, p. 228–229; *UCM 1661*, p. 223–224.

75 Cleirac, *UCM 1647*, p. 255–257; *UCM 1661*, p. 249–251.

76 Cleirac, *UCM 1647*, p. 269–270; *UCM 1661*, p. 262.

recapitulates a great variety of norms about jettison accessible to him in print, but he also adds some derived from the oral testimonies he collected when, as a royal solicitor at the Admiralty court in Bordeaux, he interrogated the survivors of the 1627 disaster. Those depositions relayed the existence of particular Portuguese rules about jettison applying to the portion of the cargo that belonged to the royal monopoly[77]. Cleirac thus documents the persistence in the seventeenth century of the intractable variety of norms about jettison and wrecks that modern scholars have detailed for medieval Europe and the Mediterranean[78].

In short, when we compare the textual evidence provided by Cleirac against claims about the private and cosmopolitan nature of medieval maritime law, we are struck by a double bind. In principle, the circulation of published collections of maritime law after the sixteenth century should have augmented the uniformity across different regions. In practice, experts at the time took the heterogeneity of merchant customs for granted.

7 Conclusion

Unconventional among the French literature of the seventeenth century, *Us et coustumes de la mer* did not resist the test of time when compared to Grotius's great works nor did it carry the prestige of lesser seventeenth-century treatises of maritime jurisprudence written in Latin[79]. But precisely its unconventional quality as a vernacular compilation and commentary on French and foreign norms for the conduct of overseas trade made it valuable for a great many readers. Both Lord Mansfield and Thomas Jefferson owned a copy of *Us et coustumes de la mer*[80]. Throughout the nineteenth-century, it served as a standard

77 Cleirac, *UCM 1647*, p. 36–50; *UCM 1661*, p. 34–47.

78 Melikan, *Shippers, salvors, and sovereigns* (*supra*, n. 13); O.R. Constable, *The problem of Jettison in Medieval Mediterranean maritime law*, Journal of Medieval History, 20 (1994), p. 207–220; H.S. Khalilieh, *Islamic maritime law, An introduction*, Leiden 1998, p. 88–97, 109–115; Frankot, '*Of Laws of Ships and Shipmen*' (*supra*, n. 72), p. 27–52.

79 E.g., Johannes Loccenius, *De jure maritimo et navali libri tres*, Holmiae 1650; Francesco Rocco, *De navibus et naulo*, Amsterdam 1708 (but first written in Naples in 1655); Johann Marquart, *Tractatus politico-juridicus de iure mercatorum et commerciorum singulari*, Frankfurt 1662. For other thematic treatises in Latin, see *supra*, n. 23.

80 Mansfield appears to have consulted Cleirac's *Us et coustumes de la mer* (in the 1671 Rouen edition) particularly as a source for the *Guidon de la mer*, which was not included in the abridged English translation of the said work: C.P. Rodgers, *Continental literature and the development of the Common Law by King's Bench, c. 1750–1800*, in: The courts and the

reference for everyone in the field, not least the then principal French scholar of maritime law, Jean-Marie Pardessus, who stole its title when re-issuing his monumental collection of maritime laws[81]. Specialists writing in English, Italian, and German also often turned to Cleirac[82]. His last passing moment of fame was likely a brief mention in a U.S. Supreme Court decision of 1949[83].

To restore *Us et coustumes de la mer* to the place it deserves in the history of European maritime law yields important insights. Today, the legal history of European maritime and commercial law before the twentieth century tends to focus either on the Middle Ages or on the Napoleonic codifications. Colbert's two comprehensive ordinances from the last quarter of the seventeenth century stand out as lonely achievements of the intermediate period[84]. A separate study may wish to determine the extent to which Cleirac's compilation served as a source for the 1681 ordinance[85]. Here, I stressed how *Us et coustumes de la*

development of commercial law (*supra*, n. 6), p. 175. The holdings of Jefferson's library can be consulted at <http://www.librarything.com/profile/ThomasJefferson> (accessed on 24 June 2015).

81 Pardessus, *Us et coutumes de la mer* (*supra*, n. 22), vol. 1, p. 8 (for the acknowledgment of his debt to Cleirac). Before Pardessus, French specialists of maritime law were particularly prone to eulogize Cleirac: René-Josué Valin, *Nouveau commentaire sur l'ordonnance de la marine, du mois d'août 1681*, 2 vols., La Rochelle 1760; Balthazard-Marie Émerigon, *Traité des assurances et contrats à la grosse*, 2 vols., Marseilles 1783.

82 Authoritative examples include Domenico Alberto Azuni, *Sistema universale dei principj del diritto marittimo dell'Europa*, 2 vols., Florence 1795–1796, which was also translated into both French and English; Ch. Abbott, *A treatise of the law relative to merchant ships and seamen*, Philadelphia 1802; D. Maclachlan, *A treatise on the Law of Merchant Shipping*, London 1860; Rudolf Wagner and Max Pappenheim, *Handbuch des Seerechts*, 3 vols., Leipzig 1918, vol. 1, p. 102; F. Perels, *Das internationale öffentliche Seerecht der Gegenwart*, Berlin 1882.

83 Farrell *v* United States 336 U.S. 511 (1949). According to the database <http://law.justia.com> (accessed on 24 June 2015), *Us et coustumes de la mer* has been cited in eleven U.S. Supreme Court cases starting in 1839.

84 Even the literature that focuses on France alone, whether in authoritative syntheses or in the recent works of scholars of the legal history of Old Regime France, overlooks the formative period before the seventeenth-century codifications. J. Hilaire, *Introduction historique au droit commercial*, Paris 1986; R. Szramkiewicz, *Histoire du droit des affaires*, 1989; Kadens, *Kaufmännisches Gewohnheitsrecht*; Kessler, *A 'question of name'* (*supra*, n. 47) and *A revolution in commerce* (*supra*, n. 26).

85 Gros posits that Cleirac exerted a remarkable influence on French jurists: *L'oeuvre de Cleirac* (*supra*, n. 2). In reviewing the process that led to the 1681 ordinance, Jean Chadelat laments the neglect of maritime law as a subject of inquiry in France at that time and singles out Cleirac's work as one of the few sources available for the compilation of the *ordonnance de la marine*, even as he calls it 'mediocre' (a judgment attributable in part to

mer offers a vivid portrait of the intellectual and political debates concerning maritime law and merchant culture that were underway in the half century that preceded Colbert's legislative interventions, at a moment when commerce became the locus of profound transformations in both the domestic and the international arenas.

I also emphasized how, in the process of selecting and annotating authoritative sources of law and jurisprudence on the subject, Cleirac brought to the surface the discrepancy between statutory norms about commerce and navigation from different times and places, as well as the still partial process of homogenization of the norms promulgated by the French crown. Finally, the texts he included and his commentaries demonstrate a capacious understanding of maritime law that comprised both private contracts, such as marine insurance or freight payment, and public law, such as that governing the title of ownership of debris recovered from shipwrecks. In light of this evidence, it seems imperative to reinstate Cleirac's *Us et coustumes de la mer* to the position it once held among the sources that inform our investigations of the historical significance of maritime and commercial law in medieval and early modern Europe.

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anachronistic standards and in part to the author's partiality for codification): Chadelat, *L'élaboration de l'ordonnance de la marine d'août 1681*, Revue historique de droit français et étranger, 32 (1954), p. 77. For a recent contribution that begins to reconstruct the evolution of French maritime law before 1681, see B. Allaire, *Between Oléron and Colbert, The evolution of French maritime law until the seventeenth century*, in: Law, labour and Empire, Comparative perspectives on seafarers, c. 1500–1800, ed. Maria Fusaro *et al.*, New York 2015, p. 79–99.