

The Institutional Dynamics of Early Modern

Eurasian Trade:

The Corporation and the Commenda

*Ron Harris*¹

Prepared for the Conference:

**The Economic Performance of Civilizations: Roles of Culture, Religion,
and the Law, USC February 23-24, 2007**

Draft

The first generation of new institutional economists took institutions as given and as exogenous, and studied their effect on the market and on the performance of the economy. They dealt with questions such as what types of institutions allow economic growth or, what kinds of exogenously endowed institutions facilitated the rise of the West.² In the second generation of studies, the question was how institutions developed. The initial answer was that economic change, in the form, for example, of expanding markets or new technologies, changed the incentive for

¹ Professor of Law and Legal History, School of Law, Tel Aviv University harrisr@post.tau.ac.il.

I would like to thank Timur Kuran, Naomi Lamoreaux, Adam McKeown, Madeleine Zelin and participants in ASLH 2006 Annual Meeting.

² North, Douglass C. and Thomas, Robert Paul, 1973, *The Rise of the Western World: A New Economic History*. Cambridge University Press, Cambridge, North, Douglass C. and Weingast, Barry R., 1989. *Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England*. *Journal of Economic History*, 49, 803–832. For a survey of the development of institutional theory, see: Harris, Ron, 2003. *The Encounters of Economic History and Legal History*. *Law and History Review*, 21, 297.

creating and altering institutions.³ The more advanced answer was that legal-economic institutions were not supplied submissively by the state upon demand. Scholars began to recognize the effect of political and social factors, of pre-existing institutions and legal building blocks, of historical paths and contingencies, on the development of legal-economic institutions.⁴ Elements in the environment as a whole were seen as potentially relevant, requiring theoretical modeling and empirical investigation, to the study of the dynamic evolution of institutions. In addition, a feedback loop was identified between the evolution of institutions and the performance of the economy. In other words, an attempt was made to endogenize both economic and institutional factors, in order to account for changes in both.

In recent years, a comparative perspective was added. The new comparative question was why did one environment give rise to one type of institution while another to an institution of a different type? For example, why did North African merchants organize their agency relationship in multilateral and reciprocal reputation-based coalitions while the Italians relied on bilateral and single-directional agency relationships enforced by the State?⁵ Why did the corporation develop in Europe and not in Islamic civilization?⁶ Why was the English East India Company based on a more voluntary and democratic model while the Dutch East India Company was

³ Alchian, Armen, and Harold Demsetz, 1973. The Property Rights Paradigm. *Journal of Economic History*, 174-183. Libecap, Gary, 1978. Economic Variables and the Development of the Law: The Case of Western Mineral Rights. *Journal of Economic History*, 38(2), 338-362.

⁴ Libecap, Gary D., 1989, *Contracting for Property Rights* Cambridge University Press. Rosenthal, Jean-Laurent, 1992, *The fruits of revolution : property rights, litigation, and French agriculture, 1700-1860*. Cambridge University Press, Cambridge ; New York.

⁵ Greif, Avner, 1994. Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies. *The Journal of Political Economy*, 102(5), 912-950. See also Greif, Avner, 2006b, *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade*. Cambridge University Press.

⁶ Kuran, Timur, 2005. The Absence of the Corporation in Islamic Law: Origins and Persistence *American Journal of Comparative Law*, 53(July), 785-834.

based on a more oligarchic and coercive model?⁷ Why did the US give rise to dispersed ownership of public corporations while Germany developed concentrated ownership?⁸ The general framework was still that institutions were being shaped by their environment and reciprocally shaped their environment. The comparison helped to isolate and identify the elements in each environment that molded its studied institution.

A crucial element that, in my view, is missing from this analysis is the possibility that institutions may have been imported from one environment and transplanted into another. If institutions can indeed migrate between environments then the explanation for the appearance of a specific institution in a given environment may result not only from the indigenous and reciprocal interaction between the environment and the evolving institution. It may be the outcome of a different mechanism that affects the migration of institutions and their transplantation. This is a neglected aspect in the theory of the development of legal-economic institutions. A main objective of this paper is to call attention to this neglect. I will present an example that demonstrates how our understanding of the evolution of institutions is enriched by the study of the migration and transplantation of institutions. The example is the distinct use of the business corporation and the *commenda* partnership in early modern Eurasian trade. While the corporation was used only by Europeans, the *commenda* was used in Europe, the Middle East and throughout the Indian Ocean. A comparative study of interactions between the

⁷ Ron Harris, "The distinct paths of the Dutch and the English East India Companies," work in progress.

⁸ La-Porta, Rafael, Lopez-de-Silanes, Florencio, Shleifer, Andrei and Vishny, Robert W., 1998. Law and Finance. *The Journal of Political Economy*, 106(6), 1113-1155. Roe, Mark J., Forthcoming. Legal Origins and Modern Stock Markets. *Harvard Law Review*. See also Roe, Mark J. and Gordon, Jeffrey (Eds.), 2004. *Convergence and Persistence in Corporate Governance Systems*. Cambridge University Press

different environments and the institutions developed endogenously in each is not sufficient for understanding the observed institutional pattern. Only an account that takes into account the migration and transplantation of institutions, and explains why the *commenda* migrated and the corporation did not, can provide an understanding of the institutional pattern.

I believe that a concrete contextual discussion may provide more insight than a general and abstract discussion of the migration of institutions. In order to do this, I focus in this paper on the migration of legal-economic institutions that organize maritime trade. To make things even more concrete, I analyze institutions that were applied in Eurasian trade. Merchants from at least four major civilizations - Chinese, Indian, Arab-Muslim and Western European - were involved in the early-modern Eurasian trade. They used two main routes: the overland caravan routes known as the Silk Road, and oceanic routes to and across the Indian Ocean. This paper focuses on the oceanic trade.⁹ The merchants using the oceanic routes, to and across the Indian Ocean, shipped similar goods within the same geopolitical environments using not very different maritime technologies. All merchants faced similar problems: uncertainty, high risk, high investment threshold, shortage of reliable collateral, asymmetric information between traveling merchants and passive investors, augmented agency problems, concern over the protection of their property rights by foreign rulers, and more.¹⁰

⁹ The institutional analysis of overland trade involves different sets of questions and merits a separate study.

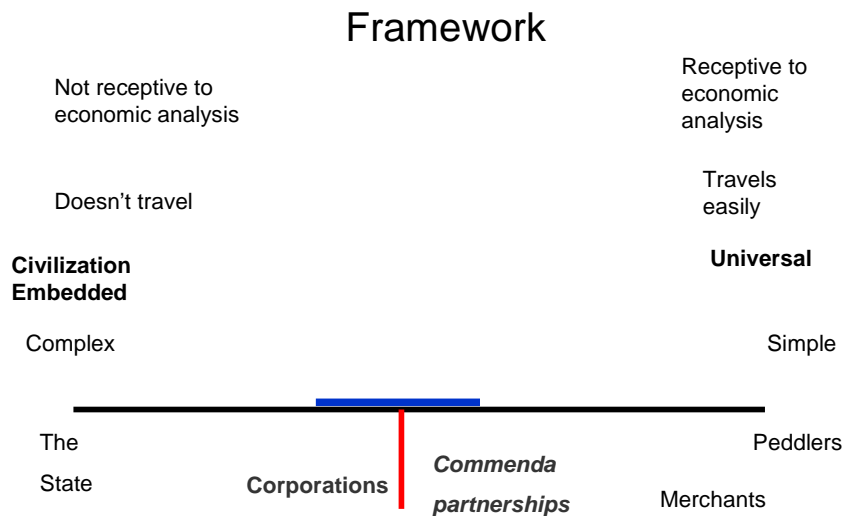
¹⁰ For a discussion of the obstacles faced by oceanic merchants see: Harris, Ron, 2005, The Formation of the East India Company as a Cooperation-Enhancing Institution.

In other words, the general question is how did each of these civilizations confront these problems and organize its trade? Did they use similar or different institutions for performing the quite similar tasks? Insofar as they used similar institutions, was this because each of them reached similar institutional designs independently, through dynamic interaction between its own unique environment and its evolving institutions? Or did some of them import and transplant institutions that were developed in other civilizations within different environments? If they did not adopt similar institutions, why were institutions that proved to be efficient in one civilization not imported by others?

The comparison among civilizations is more thought provoking than the comparison between political entities or regions within the same civilization because each civilization represents a radically different environment, political, social, cultural and religious, for the institutions to evolve in. It is also particularly intriguing because the migration of institutions from one civilization to another represents more of a challenge and is likely to provoke more insights than migration within the same civilization.

My initial framework of analysis offers a continuum. On one end lies the simplest form of trade organization: the individual peddler. The peddler moved as a passenger on board a ship from one marketplace to the next, with a small pack of goods literally on his back. Further along the continuum are the individual merchant traveling with a larger quantity of goods and selling them to wholesalers in a destination port and the merchant who does not travel with his goods but instead uses traveling agents or representatives in the destination port. Around the middle of the continuum are the partnership, the *commenda* and the business corporation, relatively complex forms of business organization, to which this paper is devoted. At the far end

is the State, as an organizer of trade. My intuition is that the State is the institution most embedded in its civilization, while the individual peddler is the least embedded.¹¹ Thus, State level institutions for the organization of Eurasian trade were developed indigenously and were fundamentally different in different civilizations. Furthermore, they didn't travel well. Institutions on the individual trader level were likely to converge and become more uniform among different civilizations, either because similar institutions emerged indigenously and independently, or because such institutions could be more easily imported and transplanted.



The more fascinating and less predictable stories can be found not at the ends of the continuum but closer to the middle. In this paper, I will focus on two such institutions, the corporation and the *commenda*. What makes them particularly

¹¹ In terms of methodology, an understanding of the organization of the State and its role in maritime trade requires answers based on the conglomerate of State, society, religion, and culture. An understanding of the individual trader and the institutions he employs requires an analysis of the basic universal building blocks of trade - contract, agency, property rights, cooperation, reputation, and information.

insightful is their radically different fate. The corporation ended up as a uniquely European institution that was not developed independently anywhere else and was not imported by any other civilization. The English and the Dutch were the first to establish corporations, the East India Companies, for Eurasian trade, and other European states followed. No other civilization developed or imported this institution in our period. The *commenda* traveled very well. It originated in Islamic law and in Middle Eastern trade practices. It was imported to most of our civilizations. It could be found anywhere from North Western Europe to India, Indonesia and China. It was in use in maritime trade all across the Indian Ocean from the Arabian Sea to the South China Sea. A major contribution of the present article is identifying the contrast in their fates. By doing so, it calls our attention to the area along the continuum around which a watershed may exist between civilization-embedded institutions and institutions that are more universal and travel easily.

On a more theoretical level, the paper demonstrates the important insights that a comparative cross-civilization institutional analysis can offer. Furthermore, it will assert the essentiality of the study of the migration of institutions between environments and civilizations for comparative institutional analysis. It does, on a more fundamental level, claim that accounting for migration of institutions is essential for the study of how the environment forms legal-economic institutions and ultimately the ways in which institutions affect economic performance. Such an account can be satisfactory only when the theoretical and empirical tools for understanding migrations are sufficiently robust.

The paper proceeds in the following way. It begins with the *commenda*, presenting its complex features, the debate about its origins and its migration pattern. It moves on to the corporation, presents the debate about its origins, points to its

centrality in European long-distance trade, asks whether non-European institutions such as the Indian *sreni*, the Muslim *waqf* or the Chinese lineage corporation were similar to the corporation and discusses the question what was unique in Europe that gave rise to the corporation. Finally, the paper addresses the question why did the *commenda* migrate while the corporation did not.

The Commenda

The characteristics of the Commenda

The basic *commenda* was a bilateral contract, involving only two parties, an investing party (called in Italy *commendator* or *stans*) and a traveling party (*tractor*). Some scholars view it as an agency contract; some as an investment contract. Yet it was a more complex institution than one may grasp at first sight. It determined the relationship between parties on several levels including investment, agency, allocation of risks, allocation of profits and creation of a separate pool of assets. It was more complex than other contemporary maritime trade contracts, such as the sea loan, the bottomry loan or the *responentia*, each of which dealt only with some of them.¹² For this reason, along the continuum I constructed above, the *commenda* is the farthest from the individual merchant and the closest to the corporation. It is more appropriate to view the *commenda* as a nexus of contracts. This section surveys the basic legal and economic features of the prototypical *commenda*.¹³

¹² Each of these contracts was a loan contract with ex-ante fixed return. They all involved an element of risk allocation. But the nature of the risk covered, the party to which it was allocated and the collateral, were different in each. These interesting contracts are beyond the scope of the present paper.

¹³ The most authoritative sources on the legal features of *Commenda*, though not necessarily on its economic features, are Max Weber, on Europe and Abraham Udovitch on Islam. See: Weber, Max, 2003, *The history of commercial partnerships in the middle ages*. Rowman & Littlefield. Udovitch, Abraham L., 1970, *Partnership and Profit in Medieval Islam*. Princeton University Press, New Jersey. For examples of *commenda* contracts of several types see: Raymond, Irving W. and Lopez, Robert S. (Eds.), 2001. *Medieval Trade In the Mediterranean World: Illustrative Documents* Columbia Univ Pr. 174 – 184.

By selecting the *commenda*, the parties adopted a standard form investment contract. The form determined what will be invested by each of them. The investing party invested only capital. That capital was used for the purchase of the trade goods and for travel-related costs. The investing party could also make part of his investment in the form of goods. The traveling party did not invest capital.

The *commenda* was also an employment contract. The traveling party invested his labor. This should be interpreted as including also expertise, information, contacts and bodily risk. The contract obliged the partner to provide his services, make the needed effort and not to shirk.

The *commenda* was also an agency contract. The traveling party was geographically separated from the investing party. He did not work under direct instructions and supervision. There was room for decision-making. The agency contract element of the *commenda* was not a standard form contract. It was drafted differently by different parties for different ventures. Theoretically, the investing party could place money in the hands of the traveling party together with very specific instructions to buy a specified quantity of a specific good in a predetermined port, only at a given price. Such a narrow mandate would turn the traveling party into a mere employee. In such a case, it is not clear why the complex *commenda* institution would be preferred over a simple employment contract. The other extreme, namely a mandate allowing the traveling party to use the money for a specific period, based on his full discretion in order to make the maximum profit, made more sense and was more widely used. Arrangements on this end of the discretion continuum placed the traveling party as the de-facto managing party, the one in control of the *commenda* assets and the trade, not a mere agent of the investing party. Thus, such the contract could be viewed as one that determines control over the business affairs. Typical

commenda contracts contained some restrictions of the mandate, but not many, and can properly be viewed as including an agency contract as part of the bundle.

The traveling party did not assume responsibility for capital invested by the investing party. In the occurrence of travel-related loss or trade-related loss, the traveling party did not have to return that part of the capital that was lost, even when it was the entire sum invested, to the investing party. In this sense, it is often said that the traveling party was acting on the account of the investing party not on his own account. Said differently, the investment was in the form of equity, not of debt. The investing party was a residual claimant and the loss of his equity investment was a risk he assumed. Yet the traveling party did assume risk for the time and effort he invested. He was not entitled to a salary, as he was not the employee of the investing party.

The traveling party would be liable toward the investing party only when he breached his agreed-upon mandate or did not act according to common merchant customs and practices. This was conceptually connected with the breach of his agency duties, not to the fact that he was doing business on his own account.

On the other hand, the traveling party would bear sole liability toward third parties. Typical liability to third parties would be contractual. A traveling party who borrowed money, bought on credit, pledged to deliver goods at a certain place, time or quality, or to buy or sell at a pre-determined price, and failed to do so, would bear responsibility toward the relevant third parties. The third party would not know the identity of the investing party and thus would not be able to sue him. But this practical reason had deeper roots. The traveling party was an agent of the investing party, only for some purposes and not for others.

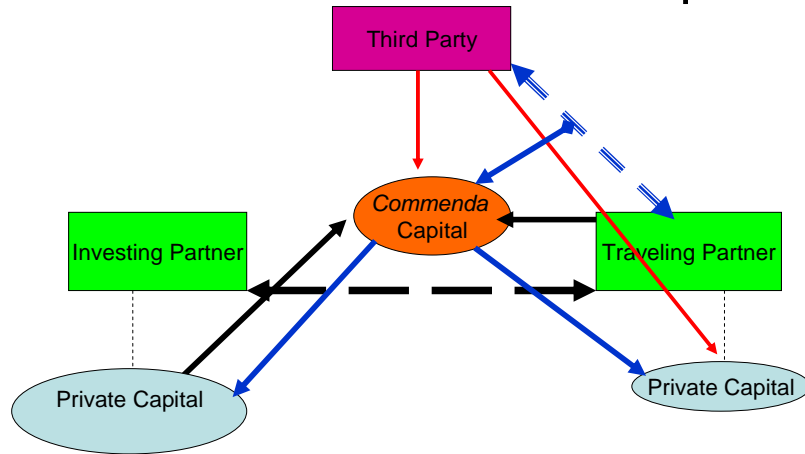
It is possible to conceptualize the *commenda* contract, using the framework developed by Hansmann, Kraakman and Squire, as creating, among other things, a new pool of assets, separate from that of either party.¹⁴ That pool was subject to liabilities distinct from those of the parties. The *commenda*'s pool of assets was reachable to creditors of the *commenda* and to creditors of the traveling party. So was the traveling party's private pool of assets. But the investing party's private pool of assets was not. The result was that the traveling party could subject the investing party to liability towards third parties only up to the sum invested in *commenda*. The investing party could not seek indemnification for such losses out of the traveling party's pool of private assets unless the traveling party infringed his mandate or failed to abide by merchants' practices. This created an asymmetric owners' shielding and an asymmetric entity shielding.¹⁵

The profits of the *commenda*, if there were such, were split between the two parties. A common arrangement was 75% to the investing partner and 25% to the traveling partner. But in different places and periods, sometimes even in the same locality when different trade destinations were involved, other splitting arrangements could be found, including 50% to each, or 2/3 and 1/3. In most jurisdictions, the split was a contractual matter, sometimes a default rule or a custom, but was not forced upon the parties as a mandatory rule.

¹⁴ Henry Hansmann, Reinier Kraakman and Richard Squire, 2006. LAW AND THE RISE OF THE FIRM. Harv. L. Rev, 1333, 119.

¹⁵ Ibid. p.

Commenda Partnership



The *commenda* had several variations. A basic variant was one in which the traveling party also invested money, typically a third of the investment.¹⁶ This affected the splitting of profits. The traveling party could, if not prohibited, create a second *commenda* in which he placed all or part of the goods in the hands of a third person who traveled to a more distant market. The traveling party of the first *commenda* became the investing party of the second. Another variation was that the subject matter of the *commenda* could be not only distinct goods but also a share in a pool of goods or in a ship. The bilateral *commenda* could appear as part of a complex multilateral system. For example, a single traveling party could pool together goods from numerous investing parties into a *commenda*. This would allow him, and them, the benefits of economy of scale. Conversely, an investing party could split his

¹⁶ Raymond, Irving W. and Lopez, Robert S. (Eds.), 2001. *Medieval Trade In the Mediterranean World: Illustrative Documents* Columbia Univ Pr. 175.

investment among several traveling parties. This would serve as a method of risk spreading.¹⁷

To sum up, the *commenda* was a complex institution. In modern terms, we can call it a nexus of contracts. It combined several issues within a single legal-economic institution. It coupled the finance of a venture with the employment of agents, the creation of a separate pool of assets, the allocation of risks, the splitting of profits and the delegation of managerial powers. The single *commenda* contract was not only a nexus of several contracts, it was itself part of a complex web of contracts. Each of the parties to that contract could, and often was, a party to other *commenda* contracts.

The debate about the Origins of the Commenda

Late nineteenth century European, particularly German, historians such as Weber and Goldschmidt, asserted that the *commenda* had its roots in Roman law, made its early appearance in vulgar Roman law of the early Middle Ages and became widespread with the revival of trade in 10th and 11th century Italy. But later studies of Europe admit that there are only a few vague hints at the existence of the *commenda*, in law or practice, before the second Crusade around the middle of the 12th century.

Historians of Islamic law, notably Udovitch, writing in the 1960s, claimed, on the other hand, that the *commenda* appeared in Islamic civilization before the rise of Islam. The earlier written evidence is in the Quran texts in the form of a story about practices resembling *commenda* trade in which Muhammad was involved. Doctrinal discussions in legal texts of an Islamic form of contract (termed interchangeably as

¹⁷The best available documentation for the multilateral use of the *commenda* is that of the contracts made in connection to the sailing of the "Saint Esprit" from Marsalis to Acre in 1248. Of 150 contracts connected to that voyage, 132 were *commenda* contracts. This is the largest depository of *commenda* contracts referring to a single voyage. For example, a single merchant on board had 13 *commenda* contracts with 11 different investing parties. For a fascinated study of these contracts, see Berlow, Rosalind, 1979. The sailing of the "Saint Esprit". The Journal of Economic History, 39, no. 2 345-362.

mudraba, *quirad* or *muqarada*) reveal an institution with all the features of a later day Italian *commenda*. Even the notable Europeanist historians of the Mediterranean trade, Lopez and Raymond, agree that the *commenda* can be found in a commercial manual published in Damascus in the late 9th or 10th century.¹⁸ Udovitch says that one can find somewhat similar institutions in Jewish (the *isqa*) and Byzantine texts (the *chreokoinonia*). But neither contains all the features that are embodied in the Islamic and Italian *commenda*. Udovitch argues that the prophetic and legal texts reflected pre-Islamic and early Islamic practices that originated in caravan and long-distance trade in and around the Arabian Peninsula. The *commenda* was an indigenously developed Arab-Islamic institution. While he admits that the study of the transmission of institutions between civilizations is a complex and elusive undertaking, he concludes that the commercial links between the Christian West and the Muslim Middle East in the 8-10th centuries provided Italian merchants with ample opportunities to import this institution from their more advanced counterparts.¹⁹

Migration of the Commenda across civilizations

From its origins in the Arab Peninsula and the Eastern Mediterranean, the *commenda* traveled both west and east. The earliest *commenda* contracts in Europe are found in Venice and Genoa in the in the late 11th and the 12th centuries. Though there is no direct evidence in the literature for the importation of the *commenda* from the East, the timing of their appearance, the fact that these contracts were first used on

¹⁸ They refer to *The Beauties of Commerce* authored by Abu al-Fadl Jafar ibn Ali. There is a controversy over the dating of the book. Udovitch, following Ritter, dates it to the 11th century. See Raymond, Irving W. and Lopez, Robert S. (Eds.), 2001. *Medieval Trade In the Mediterranean World: Illustrative Documents* Columbia Univ Pr., p. 24-25. Udovitch, Abraham L., 1970, *Partnership and Profit in Medieval Islam*. Princeton University Press, New Jersey., p. 174.

¹⁹ Udovitch, Abraham L., 1970, *Partnership and Profit in Medieval Islam*. Princeton University Press, New Jersey. See also Udovitch, Abraham L., 1962. *At the Origins of the Western Commenda: Islam, Israel, Byzantium?* *Speculum*, 37, No. 2, 198-207. Pryor speculates that the Italian *commenda* may have had its origins in Roman and Byzantine institutions, but he does not reject Udovitch's conclusion. See Pryor, John H. , 1977. *The Origins of the Commenda Contract*. *Speculum* 52(1), 5-37.

trade routes to the East around the time that Europe was exposed to the Eastern Mediterranean during the first and second crusades, suggests that it was imported and not indigenously developed. The travel of the *commenda* further west, to Spain, and north, to Germany, is well documented. There is some controversy over the question of whether the *commenda* reached England. Legal historians argue that it contradicted basic concepts of the common law and even customary law, and that the common law developed substitutes for this institution.²⁰ Economic historians, notably Postan, argue that despite the fact that the English did not use a distinct name for the *commenda*, they in fact used contracts similar in content to those of the *commenda* by the late 13th century.²¹

The eastward travel of the *commenda* is not well documented in surviving historical records. The *commenda* appears frequently in the Cairo Geniza records. These records contain correspondence and contracts dealing with the overseas trade of Cairo Jews. They reflect the wide use these merchants made of the Muslim *commenda* (qirad or mudaraba) termed in Hebrew "qirad al-goym" as distinct from the Jewish law partnership termed "qirad betorat isqa". Goitein, the leading historian of the Geniza, concludes that the Muslim *commenda* was in much more frequent use in the maritime trade of these Jewish merchants than the Jewish partnership. The earliest appearances of the *commenda* in the Geniza are from the first decades of the 11th century. They can be found in some of the oldest documents that were preserved. This is supportive evidence for the claim that the origins of the *commenda* are Muslim. The

²⁰ Postan, M.M, 1973a, Chapter 3: Partnership in English Mediaval Commerce, Medieval Trade and Finance. Cambridge University Press, Cambridge, pp. 65-71.

²¹ Postan, M.M, 1973b, Medieval Trade and Finance. Cambridge University Press, Cambridge., Chapter 3 "Partnership in English Medieval Commerce". Postan, M.M, 1951. Spread of Techniques: Italy and the Economic Development of England in the Middle Ages. The Journal of Economic History, 11(4). Holdsworth, William, 1922-1972, A History of English Law, vol. 8. Little, Brown, and company, London.

commenda was used in contracts with both Jewish and Muslim partners. Disputes were resolved according to the relevant Muslim law.²² Though the Geniza primarily reflects Mediterranean trade, it also reflects trading with India, usually via Aden. The *commenda* was a common form of contract in the India trade of Jewish Cairo merchants.²³ These traders may serve as the exporter of this institution to India. The remaining evidence for the trade of Muslim traders with India is not as complete. Yet, when such records did survive, as in the case of the documents found in the excavation site called the "Sheikh's house" in the Red Sea port of Quseir, the *commenda* was a common form. Quseir was a transit port on the route from Egypt to the Indian Ocean.²⁴ It may have been carried eastwards with these Muslim and Jewish traders. *Commenda* contracts were also used by European traders when they reached Asia, using the Cape Route, in the 16th century. Portuguese sailed on board Crown Ships taking the Crown routes (*carreiras*) to Asia.²⁵ The *commenda* was also used by the first Dutch traders who arrived in the Indian Ocean shortly before 1600, and served as the basis for pre-companies that initiated the first Dutch voyages to Asia.

The use of traveling agents was a common practice in Indian maritime trade. It was used on eastward routes to Basra, Aden and the like, and on western routes. The *Nakhuda* was either a senior traveling merchant or a representative of the ship's

²² Goitein, S. D., 1967, *A Mediterranean Society*, vol. 1, Economic Foundations. California, Berkeley. pp. 169 – 183.

²³ On the Jewish trade between Cairo and India, see Goitein, S. D., 1954. 'From the Mediterranean to India'. *Speculum*, XIX 181–197, Goitein, S. D., 1966 *Studies in Islamic History and Institutions*, Chapter 17, *Letters and Documents on the India Trade in the Medieval Times*, Goitein, S. D., 1987. 'Portrait of a Medieval India Trader: Three Letters from the Cairo Geniza'. *BSOAS*, L, pp. 449–464. See also Goitein, S. D. and Friedman, Mordechai Akiva, *Forthcoming, India Traders of the Middle Ages: Documents from the Cairo Geniza* Brill.

²⁴ Guo, Li, 2004, *Commerce, Culture and Community in a Red Sea Port in the Thirteenth Century*. Brill. P. 13, 58-66, 94-97.

²⁵ Prakash, Om, 2006, *International Consortiums, Merchant Networks and Portuguese Trade with Asia in the Early Modern Period*, Session 37 of the XIV International Economic History Congress, Helsinki.

owner. He was appointed commander of the voyage. Lesser agents were employed by other merchants and investors.²⁶ Agents were sometimes employed on fixed salary or allowed to trade privately. But contracts in which the principal and the agents split the profits and allocated the risk, *commenda* contracts, were quite common according to Das Gupta.²⁷ Chaudhuri also believes, based on scattered evidence, that *commenda* contracts were used in Indian Oceanic trade.²⁸ The institution could have been copied from Arab merchants arriving in India or imported by Muslim Gujarati merchants trading with Persia and Arabia or making the pilgrimage to Mecca.

In his travel book written around 1510, Tome Pires, one of the first Portuguese to arrive in Indonesia, provided a first-hand impression of local trade practices before the disruptive arrival of the Europeans. He reported on a practice of splitting profits and risks between merchants and junk ships owners.²⁹ The leading historians of the early modern Indonesian trade view this and other records as evidence of the use of the *commenda* in the trade between India and Indonesia, in inter-island trade, and even in trade with China.³⁰ They also mention Chinese merchants investing in *commenda* and of foreigners using *commenda* in Chinese port towns. This was the last missing link in the migration of the *commenda* from Arabia to China. There is also

²⁶ Das Gupta, Ashin, 2001, *The World of the Indian Ocean Merchant 1500-1800*. Oxford University Press. 23-33. Das-Gupta, A. and M., Pearson (Eds.), 1999. *India and the Indian ocean 1500-1800*. Oxford University Press, New Delhi

²⁷ Das Gupta, Ashin, 2001, *The World of the Indian Ocean Merchant 1500-1800*. Oxford University Press. 112.

²⁸ Chaudhuri, K.N., 1985, *Trade and civilisation in the Indian ocean - An Economic History from the Rise of Islam to 1750*. Cambridge University Press. P. 210.

²⁹ Pires, Tome, 1990, *The suma oriental of Tome Pires : an account of the East, from the Red Sea to Japan, written in Malacca and India in 1512-1515*. Asian Educational Services, New Delhi, [India].

³⁰ van-leur, J.C., 1955, *Indonesian trade and society : essays in Asian social and economic history*, vol. 1. The Hague : W. van Hoeve. 60-63, 67-68, 133, 138. Meilink-Roelofs, M.A.P, 1962, *Asian trade and european influence in the indonesian archipelago between 1500 and about 1630*. The Hague: Martinus Nijhoff. 46-51.

evidence of the use of *commenda*, or at least transactions quite similar to the *commenda*, in China, as early as the Song Dynasty (960-1279).³¹

Eventually, this complex institutional form, which was designed specifically for long-distance trade, was used by financiers and their agents from Northern Europe to the Malay-Indonesian archipelago and China.

Corporations

The Debate about Origins of the Corporation

The conception of the corporation as a separate legal entity, an association of individuals, with the capacity to own property separate from that of its individual members, to contract with third parties, to regulate its internal affairs and having a hierarchical and centralized governance structure, is a unique European conception. By the 13th and 14th centuries, the legal concept of the corporation was well defined in the high legal texts of the revived Roman law and of Canon law. The corporation was used in a variety of contexts, from Church institutions, to the organization of universities and colleges, to that of municipalities and guilds. As we shall see, other institutions, such as the English trust, the Islamic *Waqf*, the Indian *sreni* and the Chinese family lineage organizations had some, but not all or even most, of the features contained in the concept of the corporation.

A long-standing debate surrounds the early history of the corporation. I identify four different approaches in the historiography of the corporation. The first, which views the corporation as a Roman jurists' invention, was advanced by law

³¹ Yoshinobu, Shiba, 1970, *Commerce and society in Sung China*, (Translated by Mark Elvin). Ann Arbor : University of Michigan, Center for Chinese Studies. pp. 31-34; So, Billy K.L., 2000, *Prosperity, Region, and Institutions in Maritime China: The South Fukien Pattern*. Harvard University Press, Cambridge, Mass. 215-218.

scholars and historians of Roman law, such as Duff. It explains the origins of the corporation in the early period in the complexity of Roman public institutions, and in the sophistication of Roman law in its classic height.³²

The second approach argues that the corporation is a product of 11th to 13th century revivers of Roman legal scholarship. According to that view, the glossators and commentators, the interpreters of Justinian's Code, read into a few scattered statements by Roman jurists a coherent legal concept that was not recognized by contemporaries. They did so, not as a scholastic exercise, but rather to instrumentally serve the new needs of their age.³³ They responded to the changing environment, in which associations such as independent cities, universities and guilds, were of growing importance. These associations needed an institutional platform for owning property, setting governance structures, resolving disputes and the like, that the corporation provided.

The third views the corporation as a Church and canonic law invention. Berman is a typical presenter of this approach.³⁴ For him, the corporate concept was developed primarily for the organizational needs of the Roman Catholic Church. The emerging law of corporations was the constitutional law of the late mediaeval Church. It provided legitimacy and working tools to the full range of ecclesiastical organizations from the Papacy to the monastery.

The fourth sees the corporation as originating in the medieval Germanic tribal traditions. It points to the communal spirit of German tribes as evidence of corporate ideology. This view was obviously advanced by German nationalists, notably Gierke,

³² Duff, Patrick. W., 1971, *Personality in Roman Private Law*. Fred B Rothman & Co

³³ Avi-Yonah, Reuven S., 2005. *The Cyclical Transformation of the Corporate Form: A Historical Perspective on Corporate Social Responsibility* *Delaware Journal of Corporate Law* 30, 767-783.

³⁴ Berman, Harold J., 1983, *Law and Revolution: The Formation of the Western Legal Tradition* Harvard University Press.

in the late 19th century.³⁵ Unlike the Roman law and the south European Latin culture that were individualistic in their orientation, the basic Germanic orientation was toward the group, the association, the fellowship.

In this paper, the debate about the origins of the corporation plays a different role than the debate about the origin of the *commenda*. There the issue at stake was where the *commenda* started its migration, European civilization or Islamic civilization. Here it is clear that the origins are European. However, two other issues are at stake. The first is the timing of the origins. Was the corporation around, and available for importation and transplantation, since the 1st or 2nd century AD? Or was it available only since the 12th and 13th century? More concretely, was it available earlier than the *commenda*? Was it available before the formative period of Islamic law? Only the first and least widely held of the four approaches responds positively to the last two questions. The common view about timing, shared by three of the approaches, leads to the conclusion that the corporation became available only three or four centuries after the *commenda*. The second issue at stake is whether we can learn anything from the environment that gave rise to the European corporation regarding the uniqueness of that environment and the possibility that in other civilizations, a similar environment did exist and could indigenously give rise to similar institutions.

The Centrality of the Corporation in European Long-Distance Maritime Trade

By the 16th century, the European corporation was introduced in a new context, as a platform for the operation of maritime trade enterprises. It appeared in

³⁵ Von-Gierke, Otto Friedrich, 2001, *Political Theories of the Middle Age*, (Translated by Frederic and William Maitland). The Lawbook Exchange, Ltd. Von-Gierke, Otto Friedrich, 1990, *Community in Historical Perspective*. Cambridge University Press.

two basic variations. The regulated corporation was a reincarnation of the merchant guild. It did not engage in trade on its own account. It coordinated the activities of its merchant members, provided them with infrastructure, represented them vis-à-vis political entities, and supervised their compliance with price, quantity and quality directions. The regulated corporation was formed by an explicit State charter that incorporated it and granted it monopoly. The second variation, the joint-stock corporation, first appeared in England in the middle of the 16th century with the formation of the Russia (1553) and Levant (1581) Companies. It used the legal platform of the regulated corporation, and of earlier non-business corporations, and added to them the elements of pooling together of joint stock and making the investors in the stock shareholders, with rights to share in profits and voting. The joint-stock corporation performed the actual trade using its own capital and assuming risks. Its shareholders did not view the corporation as a platform for trade. They could become passive investors.

At the turn of the 17th century, the joint-stock corporation became the major institution used for organizing European trade with Asia. The formation of the English East India Company in 1600 and of the Dutch East India Company in 1602 epitomized the shift of European Eurasian trade to the corporate form of organization. The French and Danish, Ostend and Brandenburg, established East India Companies.³⁶ Even the Portuguese, who in the 16th century organized their trade as State-owned and later as State-licensed trade, formed an East India Company in 1628.³⁷ The corporation was thus the standard form of organization for European

³⁶ See Gepken-Jager, Ella, Solinge, Gerard van and Timmerman, Levinus (Eds.), 2005. VOC 1602-2002 : 400 years of company law 6. Kluwer Legal Publishers, Deventer, Netherlands

³⁷ Antunes and Torres in Gepken-Jager et al.; Disney, A.R, 1977. The First Portuguese India Company, 1628-1633. The Economic History Review, 2, 242-258.

Eurasian trade at its 17th century height. The corporate form of the EIC and the VOC is often considered a major reason for their success and for the rise of the Europeans to a position of dominance in the Eurasian oceanic trade. Steensgaard views the use of the corporation in Eurasian trade as revolutionary, compared to Asian and Portuguese trade, because it internalized military and political costs and placed investment and business decisions on a rational, profit maximizing, capitalist basis.³⁸ North views the corporation as a key institution in the rise of the West because it economized on transaction costs and spread risks.³⁹ Carlos and Nicholas view it as an efficient merger of the various links in the chain that links East Asian producers with European consumers.⁴⁰

What was Europe's Uniqueness?

Returning to the controversy over the origins of the corporation, we now move from timing to causes. We may be able infer from the agents or environment that gave rise to the European corporation whether similar agents or environmental components existed elsewhere. The more singular the European circumstances were, the less likely the corporation was to evolve indigenously elsewhere.

If we believe that the origins of the corporation are found in Roman law, we should address the question of how unique Roman law was. Was it formed in an

³⁸ Steensgaard, Niels, 1974, *The Asian Trade Revolution of the 17th Century: The East India Companies and the Decline of the Caravan Trade*. University of Chicago Press, Chicago.

³⁹North, Douglass Cecil, 1990, *Institutions, Institutional Change and Economic Performance*. Cambridge University

Press.; North, "Institutions, Transaction Costs, and the Rise of Merchant Empires" in Tracy, *The Political Economy of Merchant Empires*.

⁴⁰ Carlos, Ann M. and Nicholas, Stephen, 1988. "Giants of an Earlier Capitalism": The Chartered Trading Companies as Modern Multinationals. *Business History Review*, 62(3), 398-419, Carlos, Ann M. and Nicholas, Stephen, 1990. Agency Problems in early Chartered Companies: The case of the Hudson's Bay company. *The Journal of Economic History*, L(4), 853-875.

environment, the Roman Empire, unparalleled in other civilizations? Was the sophistication of its legal scholarship greater than that of legal scholarship elsewhere? Other civilizations, including Islamic, Chinese, Hindu and Jewish, also generated rich and sophisticated legal scholarship. Anyway, I doubt that the origin of the corporation was purely Roman.

If we place the origins of the corporation in the revival of Roman law studies in medieval Italian universities, then either the revival scholarship was unique or the environment placed unique demands on the scholars. It is implausible that the scholarship was exceptionally sophisticated in comparison to classical Roman law or to other civilizations. An explanation that points to Europe's uniqueness in that she had to develop legal concepts that could handle religious, political, economic and educational institutions not in existence elsewhere is more plausible. In order to substantiate such a claim, one would have to establish the uniqueness of Europe's cities, its universities or its guilds in terms of their need for a corporate legal platform.

The idea that the Germanic communal spirit gave rise to the Germanic fellowship ideas that eventually produced German corporate associations lost support with the rise and decline of German nationalism. It seems that communal conceptions prevailed in other civilizations at least as much as in Europe. German narratives of the 19th century leaned toward the narrative of a common Hindu-Aryan origin. It would make sense that such a common past would also lead to the existence of corporate sentiments in Hindu-Aryan cultures outside Europe.

The view that the corporation is an off spring of the Church is the most plausible in my view and most uniquely European. There were no parallels to the Roman Catholic Church in terms of the monolithic and hierarchical structure of its organization. Insofar as the Church was the main cause that led to the development of

the corporation, we would not expect the corporation to develop independently and indigenously elsewhere. This Church-based explanation can be complemented by the explanation that connects the development of the corporation to the existence in Europe of independent cities, merchant and trade guilds, and academic establishments that were nonexistent in other civilizations.

A new explanation for the appearance of corporations specifically in Europe was recently suggested by Greif. Western Europe was singular in not having a social structure based on the extended family. The dominance of the nuclear family structure in Western Europe created a vacuum that could give rise to non-family institutions of cooperation and collective action. What other civilizations managed, as we shall see below, through extended families, lineages, clans, social networks and other informal institutions, had to be formalized and legalized in the more impersonal European society. In Europe, the corporation substituted for the family.

But when we move to the fundamental level, explaining why European families were nuclear, we find ourselves back with the Church and Christianity. The nuclear European family is the outgrowth of Christianity and its marriage and inheritance laws. So in a way, Greif's explanation and Berman's come near to each other. While for Berman, the institutional structure of the Papacy and the Church made the difference; for Greif, the theological and normative family rules made the difference. But these rules, in turn, were influenced by the institutional interests of the Church.

Corporations outside Europe?

Before turning to the explanation for why the corporation evolved only in Europe and why it did not migrate from Europe to other civilizations, we should first address the question of whether there were corporations outside Europe. The

argument to be dealt with in this section is that other civilizations indigenously developed institutions that were quite similar to the corporation in features, if not in name. I will first deal with the Hindu *sreni*, then with the Islamic *waqf* and finally with the Chinese family lineage organization. This order reflects the credibility of the arguments in favor of a non-European corporate institution.

The sreni: Corporations in Ancient Hindu India

Most historians do not recognize traditional corporate-like entities in India or do not attribute business roles to such entities insofar as they existed. Recently, Khanna claimed that one could find signs of an institution with corporate features, the *sreni*, in ancient Hindu texts going back to around 800 B.C. The *sreni* existed until the arrival of Islam around 1000 A.D. and was widely used, so he argues, for economic purposes.⁴¹ This is a provocative argument. The corporate concept developed indigenously in India long before it developed anywhere else, was not imported by any other neighboring civilization, and disappeared without leaving a trace in India itself. The argument is based on several texts. It is not clear to what degree one can ascertain from these texts all the features of the *sreni*, the perseverance of these features in later periods, and the extent to which this institution was used outside the scholarly texts for economic and profit maximizing purposes. Khanna does not claim that the *sreni* was used for maritime trade or that it was used at all in the period under discussion here. For these reasons, I cannot at this stage of the research view the *sreni* as relevant to the present study. Yet this institution definitely deserves further attention in comparative institutional research.

⁴¹ Khanna, Vikramaditya S., 2005. The Economic History of Organizational Entities in Ancient India. Michigan Law and Economics Research Papers No. 05-014

The Waqf: an Islamic Law Substitute for the Corporation?

The corporation, as a legal entity detached from individual human beings, was not recognized in Islamic legal texts and is not found in use in Arab civilization. It is argued that the *waqf* was the Islamic institution that served as a substitute for the corporation. *Waqf* is often translated as charitable trust. It indeed has similarities to the English trust.⁴² The *waqf* was created by a founder, a person who endowed land and other immovable property for the advancement of a public or a family purpose. The purpose had to be considered charitable or pious. The property given to the *waqf* was inalienable. The *waqf's* purpose was advanced by enjoyment of the property itself or of the income generated by the utilization of the property. A trustee (*mutawalli*) was appointed by the founder, or according to the founder's instructions, to oversee the *waqf's* property, implement the purpose of the *waqf* and make sure that the *waqf's* beneficiaries would get their share of the usufructs. The local judge (*qadi*) served as a general supervisor of all *waqfs* (in plurality *awaqf*) within his jurisdiction.⁴³ What was the legal status of the *waqf's* property? The beneficiaries were not the owners of the property. The trustee held it in trust but did not own it. The common interpretation in the Hanafi school of Islamic law was that the property was not owned by anyone as long as it remained *waqf* property. A non-orthodox interpretation argues that the property was owned by the *waqf* and considers this an indication of the fact that the

⁴² For the supposition that the English Trust originated from the *waqf* see: Gaudiosi, Monica M., 1988. Comment: The Influence of Islamic Law of *Waqf* on the Development of the Trust in England: The Case of Merton College U. Pennsylvania L. Rev., 136, 1231. Avini, Avisheh, 1996. Comment: The Origins of the Modern English Trust Revisited. Tulane L. Rev., 70, 1139.

⁴³ Schacht, Joseph, 1983, An Introduction to Islamic Law. Oxford University Press.

waqf was a corporate entity.⁴⁴ Yet the common view is and was that the *waqf*, like the English trust, and unlike the European corporation, was unincorporated.

The earliest *waqfs* that fit the institutional structure above date from the middle of the 8th century, about a century after the birth of Islam. The Quran doesn't mention the term and doesn't exhibit the institution. It seems that there was no use or need for the institution in Arabia and that it appeared only with the spread of Islam to more populous parts of the Middle East with more advanced infrastructures. In these aspects, the *waqf* is different from the *commenda* that originated in the merchant practices of Arabia at an earlier period.

Though the *waqf* did not embody all the features of the corporation, there are some similarities between the two. It allowed the holding of a separate pool of assets. This feature meant both perpetual holding of property and a degree of entity shielding from creditors of the beneficiaries. It enabled the separation of ownership from control and the employment of agents. Because of these similarities, it could be used for some of the purposes for which corporations were used in Europe. It increasingly came into use in the 9th to 12th centuries for semi-public purposes such as the building and running of mosques, hospitals, madrasas (schools), caravansaries (roadside inns along the silk route) and for other social and charitable services.⁴⁵

However, it was not used for profit-maximizing business purposes. Neither the institutional structure of the *waqf* nor the religious expectations of its purposes facilitated such use. It is clear that the Arabs did not use it to organize their Eurasian trade. This absence limited the organizational choices for Arab trade either to the State or to *commenda*, partnerships and individual merchants and peddlers.

⁴⁴ Zahraa, Mahdi, 1995. Legal Persons in Islamic Law. Arab L. Q, 10, 195.

⁴⁵ Kuran, Timur, 2001. The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations of the Waqf System. Law and Society Review, 35, 841.

Family Lineage Corporations in China and their relevancy to Eurasian trade

The kinship organization, sometimes even called Clan Corporation, is considered by some scholars as the Chinese substitute for the European business corporation.⁴⁶ It is based on lineage and to understand it, we need to survey the attributes of lineage. Lineage is a fundamental element of Chinese society. It has received a great deal of attention from social anthropologists and social historians of China.⁴⁷ Individuals on the same genealogical patrilineal line, who maintained significant social relationships, were considered members of the same lineage. Members of the same lineage usually lived near each other, in the same community, village or set of villages. The core bond of a lineage, however, was religious. All members of the lineage, and only members of the lineage, worshipped the same ancestors. Often the common ancestral roots went back many generations. The worship ceremony involved gathering in ancestral halls and making sacrifices and other rituals. The assets, the ancestral halls, graves, genealogical lists and other resources needed for the worship were raised and held by the lineage. This property was held by a collectivity of the lineage in separation from the property that was held by each of the individual families. Some anthropologists refer to this property as corporate property and even refer to the lineage as a corporate entity.⁴⁸ Historians and

⁴⁶ Ruskola, Teemu, 2000. Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective. *Stanford Law Review*, 6, 1599.

⁴⁷ A classic discussion is: Freedman, Maurice, 1958, *Lineage Organization in Southeastern China*. The book gave rise to extensive literature, debating issues of typology, periodization, methodology, regional variations and more. For a glimpse of the literature see: Ebrey, Patricia Buckley and Watson, James (Eds.), *Kinship Organization in Late Imperial China, 1000-1940*, Faure, David, 1986, *The Structure of Chinese Rural Society: Lineage Organization and Village in the Eastern New Territories*. Oxford University Press, Hong Kong.

⁴⁸ For example Cohen, Myron L., 2004, *Writes of Passage in Late Imperial China*. In: Madeleine Zelin, Jonathan K. Ocko and Robert Gardella (Eds.), *Contract and Property in Early Modern China*. Stanford university press, Stanford, California.

lawyers, more cautious when using Western legal terminology, term them lineage estates or lineage trusts. Ancestral worship took place on lower levels as well, the family, the branch and the sub-lineage, but the lineage level worship was the most important because it represented the widest circle connected to the same ancient ancestor. The lineage was the highest social organization short of the State. Over time, it assumed political, economic, military, charitable and educational functions together with the traditional social and religious functions.

The holding of ancestral property by the lineage led over time to the use of the lineage for additional property-holding related functions. It was used for gaining some control over intergenerational transfer of property. It was used for minimizing tax payment. It was used in the economic context in support of agriculture. These functions were achieved by a combination of strategies, including marriage alliances, adoption, family naming, the invention of common ancestors, the disjoining of a branch from a lineage and the conferring of property to the lineage ancestral estate.⁴⁹ Wealthier lineages that held more common property gradually became active in manufacturing or trade, using the lineage's institutional structure for the organization of their business enterprises.⁵⁰ Business-related property was owned by the lineage. The lineage allowed, it is argued, not only the owning of common property, but also the formation of concentrated management, the appointment of agents and the division of profits. Zheng Zhenman argues that by the Ming time, some of the richer and more active lineages were transformed into what he terms "contractual lineages." These lineages were based on common interests rather than on agnatic links. They

⁴⁹ Zhenman, Zheng, 2001, Family Lineage Organization and Social Change in Ming and Qing Fujian. University of Hawaii press.

⁵⁰ A forthright statement of the role of lineage, the "patricorporation", in the rise of petty capitalism in china is to be found in Gates, Hill, 1996, China's Motor: A Thousand Years of Petty Capitalism.

actively used all the above strategies. They allowed more flexibility in deviation from traditional lineage traditions. They were based on the investment in return for a share in profits and control.⁵¹ Such shares experienced commoditization and eventually could be bought and sold. By Qing times, the organization of share based lineages, and their trust property, had become sufficiently sophisticated to allow their use in large scale business Enterprises such as the Zigong salt industry.⁵²

Family lineages were relevant for maritime trade. So, examining the case of two lineages of different standing in South Fukein, concludes that reliance on cohesive and wealthy lineage provided an enormous advantage. Merchants coming from such lineages could raise capital for maritime ventures within the lineage. They were also considered more credible by outsider equity investors, joint venturing partners, and creditors. These outside investors could turn to the lineage in case of failure or dispute for mediation and compensation. Merchants from respectable lineages were more determined to protect their reputation. A merchant from an eminent lineage was much less likely to flee the homeland leaving debts and settle elsewhere.⁵³

The lineage factor can be further assessed in terms of the widely practiced mechanism of requiring guarantors for contractual agreements as well as for maritime ventures. Under Tang and Song legal practices, the guarantors of loan or credit

⁵¹ Zhenman, Zheng, 2001, Family Lineage Organization and Social Change in Ming and Qing Fujian. University of Hawaii press. 122-142, 223-227, 241-252.

⁵² Zelin, Madeleine, 2004, Managing Multiple Ownership at the Zigong Salt Yard. In: Jonathan K.Ocko and Robert Gardella Madeleine Zelin (Ed.), Contract and Property in Early Modern China. Stanford university press, Stanford, California. See also Ruskola, Teemu, 2000. Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective. Stanford Law Review, 6, 1599, Zelin, Madeleine, 1988. Capital Accumulation and Investment Strategies in Early Modern China: The Case of the Furong Salt Yards. Late Imperial China, 9, No. 1, 79-122, Zelin, Madeleine, 2006, The Firm in Early Modern China.

⁵³ So, Billy K.L, 2000, Prosperity, Region, and Institutions in Maritime China: The South Fukien Pattern. Harvard University Press, Cambridge, Mass. 272 – 279.

contracts was responsible for the repayment of the loan if the borrowers absconded, failed to pay, or died. Even more onerous was the requirement that a voyage captain have more than one guarantor, with considerable landed property, before he could obtain an embarkation permit. These guarantors were held liable for any violation of State maritime regulations by members of the voyage and could be subject to criminal punishment. This shows that acquiring guarantors was probably expensive, but for members of a strong lineage, these costs were probably lower, especially if the guarantors were from the same lineage.

All these network, reputation and collective responsibility factors that relied on the lineage lowered the risk of investment by outsiders in the maritime venture and lowered the financial costs. However, in their corporate capacity, using the common property, the lineages themselves did not embark on maritime trade. In this sense, they were drastically different from the European joint-stock business corporations that entered Eurasian trade around 1600. Why didn't lineages serve as a major institutional platform for China's Oceanic trade? A response to this question is not yet available in the literature. I can only offer preliminary and tentative hypotheses. When Chinese Maritime trade expanded in Song times (960-1279), the lineage institution was not well adapted to commercial uses. It reached the degree of flexibility, contractual freedom and commoditization to make it applicable to maritime trade, or to industrial production, very late in its history, well into the Ming and even the Qing dynasties (16th to 18th centuries). Song Dynasty maritime ventures relied on more basic types of cooperation such as loans, joint ownership of ships or goods, partnerships and *commenda*. When China did make a leap into the Bay of Bengal and Arabia Sea, in the early Ming period (early 15th century), the State, and not individual merchants or merchant organizations, served as the organizer of these massive long-ranging

voyages. By the time the lineage was sufficiently flexible and contractual for the conduct of business within its framework, and could serve as a substitute for the European business corporation, the European merchant corporations in the Indian Ocean and South China Sea had become substantial and detrimental to Chinese maritime trade.

Explaining the divergent migration patterns

Why didn't the Corporation Migrate?

Kuran discussed in a recently published article the reasons for the absence of corporations in Islamic law. As no parallel studies exist at this stage for similar questions with respect to India and China I'll present the case of Islam as a model that can be applied with variations to these other civilizations. Kuran identifies three separate sets of issues that have to be dealt with in order to fully understand the absence of corporations in Islamic law.⁵⁴

First, why didn't Islamic law adopt the corporate concept in its formative, and supposedly more accommodating, period? The communal and family-oriented vision of early Islam did not favor the introduction of larger and more formal social and organizational forms. Larger impersonal entities could end in factionalism of the kind that is unlikely to emerge in family and tribe based entities.

The second question is why didn't Islamic law introduce the corporate form at a later stage? Here Kuran doesn't follow the conventional emphasis in European (one may say – orientalist) literature on the conservative turn in Islamic theology and jurisprudence that narrowed the canon of interpretation and objected to indigenous introduction, and even more, to the introduction from outside, of new doctrines and

⁵⁴ Kuran, Timur, 2005. The Absence of the Corporation in Islamic Law: Origins and Persistence American Journal of Comparative Law, 53(July), 785-834.

institutions. He says that there was no demand for the corporate form in later Islam. He provides two main explanations. The first is the introduction of the *waqf*. This is a path dependency explanation: because the *waqf* was introduced first, it was adopted and demands for the corporation never emerged. The *waqf* responded to the demand for semi-public functions, but what about demands from merchants? Demand for an institution that would serve large-scale business enterprises did not develop because inheritance and partnership law splintered business entities in the Islamic Middle East into small economic and social fragments. These small fragments were unable to act collectively in order to press the political and legal elites for the introduction of corporate forms of organization.

The explanation by Greif mentioned above that related family structure to the appearance of the corporation in Europe complements Kuran's explanation.⁵⁵ The extended family of the Middle East was an institution that provided wealth, security and permanence. The corporation developed in Europe as substitute for the extended family of the East not because of the advantages of the west and the corporation but rather as a substitute for what was missing in the west – the extended family.

Why didn't Islamic civilization import and transplant the corporate form from Europe at a later stage? As long as the *waqf* served the provision of utilities and public services well, and the *commenda* served the needs of maritime trade well, there was no reason to turn to the corporation. The relevancy of the corporation for Eurasian trade was demonstrated by the VOC and the EIC only in the 17th century. Even then, there was a slow appreciation of the contribution of institutional factors to northwestern European success.

⁵⁵ Greif, Avner, 2006a. Family Structure, Institutions and Growth: The Origins and Implications of Western Corporations. *American Economic Review*.

Why did the Commenda migrate?

The first explanation to be suggested is that the *commenda* was a less complex institution than the corporation. It may also be suggested that its connection to the State was looser. I elaborated on the complexity of the *commenda* and on its embeddness in the legal system for two reasons. The first is to demonstrate that its place along the continuum is just a short distance before the corporation. The second is to augment the puzzle regarding the movement of the *commenda* across civilizations. The migration of such an institution from one civilization to another requires an explanation.

The *commenda* was a voluntary contractual institution, but it could not function outside the realm of a legal system or even a learned juristic community. A legal system, including third party (state, city or merchant community) enforcement was needed. A *commenda* could not solve the basic problem of cooperation on the international level. It was unlikely to be formed between two parties from different civilizations. It was likely to be performed between two residents of the same city or two members of the same merchant community. Dispute resolution required more than only enforcement or fact-finding. *Commenda* contracts could not be made complete due to the complexity of the arrangements and the unpredictability of all the circumstances. A legal system was needed for ascertaining norms, developing more detailed norms and for the application of general standards and norms to specific cases. A good example for such a need is the requirement that the traveling party follow common merchant practices.⁵⁶ Not following such practices would amount to a

⁵⁶ Udovitch, Abraham L., 1970, Partnership and Profit in Medieval Islam. Princeton University Press, New Jersey., pp. 203-4.

violation of his mandate and a breach of the *commenda* contract. But the support of a legal system was needed in order to turn this general standard into operative rules of conduct and enforcement. The *commenda* could thus be expected to be reflected in codes, particularly merchant and maritime codes, in scholarly legal books, in dispute resolution records and in practical manuals. To conclude, I do not find the explanation that the *commenda* traveled without difficulty because it was a simple contract and not as complex and State-dependant an institution as the corporation a sufficient explanation. There is something to it, but more reflective explanations should be considered.

Assuming that we accept the view that the *commenda* originated in pre-Islamic Arabia, this means that its origin was in trade practices. It had no religious origins. We should not be confused by the fact that historians trace the first references to it to early Muslim law books. These are the first references probably because its earlier history was mostly oral and left no traces in written documents. The context of the discussion of the rules governing the *commenda* is in the more secular parts of Islamic law. The corporation, on the other hand has, according to widespread views, significant ties to the core of Christianity. It was the institutional-constitutional building block of the most dominant force in Christianity, the Roman Catholic Church, built around the theocratic status of the Pope. Alternately, it emerged from the uniqueness of Christian theology of marriage and canon family law.

Timing depicts much. According to most accounts, the *commenda* had earlier historical routes than the corporation. It was used in a relatively advanced form by the 8th century, if not before, while the corporation only appeared, ruling out dubious Roman existence, no earlier than the 12th century. The *commenda* had an early start. It had four more centuries in which to migrate. At the other end of the timeline, the

corporation proved to be an advantageous institution for the organization of Eurasian trade very late. Only decades after the establishment of the EIC in 1600 and of the VOC in 1602, did the long-term economic performance of the corporate form, in its joint stock variation, become evident. Earlier applications of the corporate form, which were domestic in nature, did not interact with Asian civilizations and did not present themselves as relevant for Indian Ocean merchants. By the 17th century, Asian civilizations had less time and more obstacles to adopting the corporate form.

Spatial explanations are also worth mentioning. The travel distance of ideas that were developed in a civilization closer to the center of the Eurasian land mass was shorter than that of ideas developed on its western edge. The place of origin of *commenda* was closer to the Indian Ocean than that of the corporation. It was more central to the main business routes going east. It happened to emerge in a perfect place and with the right timing to be carried eastward with Muslim religion, conquest and trade. It migrated to south and east Asia with the general flow of Islamic ideas, technologies and institutions.

Interaction between civilizations does not take place only on frontiers and through conquests.⁵⁷ The Indian Ocean is a prime example of interaction and diffusion in multiple sites and forms. Arab merchants visited Indonesia long before the arrival of Islam and visited China by the 8th century.⁵⁸ Chinese merchants arrived in Indonesia and India in Song times, if not before, and in the early 15th century, with

⁵⁷ For the methodological and theoretical approaches see: Trivellato, Francesca, 2002, *Jews of Leghorn, Italians of Lisbon, and Hindus of Goa: Merchant Networks and Cross-Cultural Trade in the Early Modern Period*. EUI

⁵⁸ Richards, D.S. (Ed.), 1970. *Islam and the Trade of Asia: A Colloquium*. Brunu Cassirer, Oxford & University of Pennsylvania Press.

Zheng, also in Arabia.⁵⁹ Networks of merchants, with overseas branches and agents, spread over the major entrepots of the Indian Ocean.⁶⁰ The geography of the Indian Ocean and the streams and monsoon regime made the straits of Malacca an essential passage between South China Sea and the Bay of Bengal and beyond. Malacca became a meeting place of Chinese, Indian and Arabian merchants, and, from the 16th century, also of European merchants. Ships often harbored in Malacca for several months awaiting the shift in the monsoon regime.⁶¹ Malacca was the ultimate Indian Ocean cosmopolitan entrepot. The dominant legal view around the Indian Ocean, unlike in Europe and the Atlantic Ocean, was that of free ocean and freedom of access to ports.⁶² These cosmopolitan encounters were one of the triggers for the passage of individuals from one civilization to another as interpreters, navigators, agents and the like. Ships with crews from a mixture of civilizations were not uncommon in the Indian Ocean. Europeans were outsiders, or very late arrivals, to these sites of commercial, cultural, technological and institutional exchanges. While the conception of the *commenda* floated around the Indian Ocean since the 8th or 10th centuries, the conception of the corporation did not. To reach Indonesia or China, it had to be taken along overland routes through other civilizations.

⁵⁹ Deng, Gang, 1999, *Maritime Sector, Institutions, and Sea Power of Premodern China*. Greenwood Press, Connecticut, Jung-Pang, Lo, 1955. *The Emergence of China as a Sea Power During the Late Sung and Early Yuan Periods*. *The Far Eastern Quarterly*, 14, No. 4, 489-503, Levathes, Louise, 1994, *When China Ruled the Seas: The Treasure Fleet of the Dragon Throne*. Oxford University Press. Fitzgerald, C.P, 1972, *The Southern Expansion of the Chinese People: Southern Fields and Southern Ocean*. ANU Press, Canberra.

⁶⁰ Abu-Lughod, Janet L., 1989, *Before European Hegemony: The World System A.D. 1250-1350*. Oxford University Press, Chaudhuri, K.N., 1985, *Trade and civilisation in the Indian ocean - An Economic History from the Rise of Islam to 1750*. Cambridge University Press.

⁶¹ Meilink-Roelofsz, M.A.P, 1962, *Asian trade and european influence in the indonesian archipelago between 1500 and about 1630*. The Hague: Martinus Nijhoff, Pires, Tome, 1990, *The suma oriental of Tome Pires : an account of the East, from the Red Sea to Japan, written in Malacca and India in 1512-1515*. Asian Educational Services, New Delhi, [India], van-leur, J.C., 1955, *Indonesian trade and society : essays in Asian social and economic history*, vol. 1. The Hague : W. van Hoeve.

⁶² Alexandrowicz, C. H., 1967, *An Introduction to the History of the Law of Nations in the East Indies* Clarendon Press, Oxford.

Conclusion

This project focused on historical research in several stages. It began with legal-economic institutions perceived to have significant effects on economic performance: institutions for the organization of long-distance trade. It recognized that such institutions evolved in different forms in different environments. Thus, it was shaped as a comparative project that examined the institutions of four major civilizations: Western European, Arab-Muslim, Indian and Chinese. Such a comparison across civilizations is likely to generate interesting insights because of the radically different religious, social and political environments. On the other hand, the project focused on the performance of similar functions, namely the organization of long-distance maritime Eurasian trade, mostly conducted in the Indian Ocean. It related to a period when all four civilizations were involved in that trade, roughly the early modern era. This focus turns the project from one that compares institutions in the abstract to one that compares them in a very specific context. Of the various institutions involved in Eurasian trade, ranging from the State to the peddler, the project pinpointed two institutions, the corporation and the *commenda*. The two were selected because they are located around the center of the continuum that I suggested for the prediction of the likelihood of institutions to migrate. This enabled the paper to focus on a conjuncture in which both migration of institutions and the indigenous evolution of institutions is likely and should be examined.

This paper calls attention to the fact that the *commenda* migrated from Arabia all the way to northwestern Europe and to China. In sharp contrast, only the western Europeans used the corporation in maritime trade. The distinct migration patterns of the two institutions direct us to some factors that are likely to affect institutional migration. The patterns in this case were clearly affected by the timing of the

development of the institution. It was the older institution, the *commenda*, that migrated. Migration patterns were also affected by when the efficient functioning of the institution in the relevant activity became evident. The corporation, which was only later applied to maritime trade and whose success only then became clear, did not migrate. Migration patterns were affected by the place of origin of the institution. The more centrally located institution, the *commenda*, migrated both east and west. It seems that cross-civilization migration, from port to port and civilization to civilization, was faster in the Indian Ocean than in the Atlantic or Mediterranean. The expansion of Islam was a factor in the migration of the *commenda*, but not a sole factor. Interaction between civilizations in Eurasia did not take place only along frontiers. In the Indian Ocean, the *commenda* diffused through visiting merchants, merchant networks, mix-crew ships entrepots, and strategic meeting places such as Malacca. Europeans, and their institutions, were outsiders to these interactions until relatively late.

Indigenously developed institutions did not fully substitute for the corporation in Asian civilizations. As we have seen, each civilization developed its own environmentally shaped and path dependent institutions. They emerged from either family or religion-based institutions, or both. They were involved in the provision of infrastructure and other public goods. Both the Muslim *waqf* and the Chinese lineage corporation went through constant adaptations. They were not obsolete institutions when the Europeans arrived in Asia. There is no reason to assume that they could not have been further adapted for business purposes or even for maritime trade. In a way, their fortunes were comparable to that of the English trust. In principle, the trust could, have been adapted from land and family uses to business uses. It was in the process of doing exactly that. Due to a unique historical conjuncture, the corporation

was eventually adapted more rapidly for the same use.⁶³ But unlike the English trust, that was defeated by the corporation within the same State and legal system, the *waqf* and the lineage corporation lost ground to outsiders and their further adaptation was constrained to uses in the family and religion realms.

The *commenda* was widely used in Eurasian maritime trade prior to the arrival of the English and Dutch East India Companies around 1600. Thereafter, the corporation rose to dominance, first in Cape-route trade with Europe and gradually also in intra-Asian trade. Eventually, the corporation-based economies became global leaders. One of the key differences between the two institutions is that while the *commenda* was basically a single-venture contract, the corporation was a lasting institution that allowed the accumulation of capital over time and even intergenerational transfer of locked-in capital. The correlation between the diffusion patterns of these institutions and the economic performance of the civilizations that used them is intriguing.

This paper presented only an initial example of the value of cross-civilization comparative institutional research. It did not aim to offer an authoritative account of the history of the corporation and the *commenda*. It did not aim at advancing a theory of the migration of institutions. It aimed at asserting the claim that institutional analysis errs when it ignores migrations. It aimed at pointing to potential topics and methods of research.

⁶³ Harris, Ron, 2000, *Industrializing English law : entrepreneurship and business organization, 1720-1844*. Cambridge University Press, Cambridge.

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