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Migrating Words, Migrating Merchants, Migrating Law

Trading Routes and the Development of Commercial Law

Edited by

Stefania Gialdroni, Albrecht Cordes, Serge Dauchy, Dave De ruysscher & Heikki Pihlajamäki

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Legal History Library

VOLUME 34

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This book collects the papers of the conference "Migrating Words, Migrating Merchants: Migrating Law", which took place in Frankfurt am Main in 2016 (19–21 September) within the framework of the project "The Making of Commercial Law. Common Practices and National Legal Rules from the Early Modern to the Modern Period", funded by the Academy of Finland and by the Finnish Cultural Foundation and directed by prof. Heikki Pihlajamäki (starting academic year: 2013–2014).

Cover illustration: "The Grand Canal with the Rialto Bridge and the Fondaco dei Tedeschi" by Canaletto. Rijksmuseum, The Netherlands. Public Domain. http://hdl.handle.net/10934/RM0001.COLLECT.8117

Library of Congress Cataloging-in-Publication Data

Names: Migrating Words, Migrating Merchants, Migrating Law (Conference) (2016 : Frankfurt am Main, Germany) | Gialdroni, Stefania, editor. | Cordes, Albrecht, editor. | Dauchy, Serge, editor. | Pihlajamäki, Heikki, 1961- editor. | Ruysscher, Dave de editor.
Title: Migrating words, migrating merchants, migrating law : trading routes and the development of commercial law / edited by Stefania Gialdroni, Albrecht Cordes, Serge Dauchy, Dave De Ruysscher, Heikki Pihlajamäki
Description: Leiden ; Boston : Brill, 2020. | Includes bibliographical references and index.
Identifiers: LCCN 2019039604 (print) | LCCN 2019039605 (ebook) | ISBN 9789004415836 (hardback) | ISBN 9789004416642 (ebook)
Subjects: LCSH: Commercial law--History--Congresses.
Classification: LCC K1006 .M54 2020 (print) | LCC K1006 (ebook) | DDC 346.07--dc23
LC record available at https://lccn.loc.gov/2019039604
LC ebook record available at https://lccn.loc.gov/2019039605

Typeface for the Latin, Greek, and Cyrillic scripts: "Brill". See and download: brill.com/brill-typeface.

ISSN 1874-1793
ISBN 978-90-04-41583-6 (hardback)
ISBN 978-90-04-41664-2 (e-book)

This book is printed on acid-free paper and produced in a sustainable manner.

Contents

Acknowledgments

The topic of this book first developed in 2015, starting from a series of conversations that I had with Albrecht Cordes on the medieval *lex mercatoria* and on the possibility to address the issue in a fresh way, in particular following the lives and travels of single merchants or merchants' families. The ideas about how to realize such a project were still vague when, some months later, Heikki Pihlajamäki asked us to take part in the international project "The Making of Commercial Law. Common Practices and National Legal Rules from the Early Modern to the Modern Period", financed by the Academy of Finland and by the Finnish Cultural Foundation. In the framework of this fruitful project, and thanks to the collaboration, support and knowledge of Albrecht Cordes and the team of his chair, the international workshop "Migrating Words, Migrating Merchants: Migrating Law" (Frankfurt am Main, 19–21 September 2016) took shape. In the process, the topic had changed into something far more comprehensive and challenging, leading to the present collection of essays.

First of all, I have therefore to thank the whole Steering Committee of the "The Making of Commercial Law" project, Heikki Pihlajamäki (director), Albrecht Cordes, Serge Dauchy and Dave De ruysscher for their steady support and valuable suggestions. I would also like to express my appreciation for Sonja Breustedt's fundamental contribution in organizing the Frankfurt workshop, and to thank the whole Brill team, and in particular Wendel Scholma and Gerda Danielsson Coe, for their competence and availability. My special gratitude goes to the language reviser, Emma Wallis, who accepted with enthusiasm the difficult task of revising papers written by authors with very different linguistic and academic backgrounds, always stimulating reflections to make the texts more readable. Finally, I feel really obliged to all the contributors of this volume, who dared to 'cross the boundaries': the temporal ones, the geographic ones and, especially, the academic ones. Our common efforts would be rewarded if this volume inspired new interdisciplinary research on trade and merchants, their language and their law, a subject of utter importance in a world which seems to lapse back into narrow-minded nationalism.

Stefania Gialdroni
Rome, 22 May 2019

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Perspectives on Seafarers, c. 1500–1800 (London-New York, 2015); and with Á. Polonia, *Maritime History as Global History* (St. John's, 2011).

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Introduction

Albrecht Cordes and Stefania Gialdroni

This book collects the papers of the international workshop "Migrating Words, Migrating Merchants: Migrating Law", which took place in Frankfurt am Main on September 19–21 2016 as part of the international project "The Making of Commercial Law. Common Practices and National Legal Rules from the Early Modern to the Modern Period" financed by the Academy of Finland and by the Finnish Cultural Foundation.[1] On the left side of the cover illustration (a view of the Venetian Rialto Bridge in the eighteenth century),[2] it is possible to see, right in the center of Venice, the *Fondaco dei Tedeschi*, which perfectly represents the scope of the Frankfurt workshop (and, as a consequence, this book), in all three regards suggested in the title.

The Italian word *fondaco* is a word borrowed from the Arabic فندق (*funduq*), which in its turn has its roots in the Greek πανδοκεῖον (*pandokeion*). These three languages generally share an important vocabulary with regards to economy and trade, and the two younger ones, Arabic and Italian, apparently deemed the word, and the concept it stood for, useful enough to import it. This concept revolves with some variations around the issues of housing, feeding, lodging, and controlling foreigners, essentially dealing with them in every sense of the word. Olivia Constable examines both word and fact in her book *Housing the Stranger in the Mediterranean World* (2004)[3] and is able to map the 2000-year long journey of the various ways in which trade-faring cities and nations hosted and controlled strangers or more precisely foreign merchants. This is one spectacular example of a wide-spread phenomenon within the realm of commercial law. In the terminology proposed by this volume the term *pandokeion-funduq-fondaco* is a migrating word. It traveled through the Eastern Mediterranean and through several languages. But the book does not content itself with this observation of migrating terminology. The ensuing question is: was the said movement of words accompanied by a parallel transfer of law?

1 Project: "The Making of commercial law. Common Practices and National Legal Rules from the Early Modern to the Modern Period": https://blogs.helsinki.fi/makingcommerciallaw/. Accessed 30 August 2018.

2 Workshop of Canaletto, *The Grand Canal with the Rialto Bridge and the Fondaco dei Tedesch*i, oil on canvas, 1707–1750, h62cm x w83cm, Rijksmuseum (Amsterdam).

3 Olivia Remie Constable, *Housing the Stranger in the Mediterranean World: Lodging, Trade, and Travel in Late Antiquity and the Middle Ages* (Cambridge: Cambridge University Press, 2004).

Did the Arabs and then in turn the Italians adopt some of the rules of their predecessors when they imported their words? Were life and trade regulated in a similar way in a Greek *pandokeion*, an Arab *funduq*, and an Italian *fondaco*?

The idea of connecting law and language though, is certainly not new. It dates back, at least, to Jacob Grimm's *Von der Poesie im Recht* (1815)[4] and *Deutsche Rechtsalterthümer* (1828).[5] In that case, though, this comparison was used to demonstrate the strict relationship between law and language as expressions of the *Volksgeist* in the framework of the search for a national identity. What we want to do here is almost the opposite: we aim at combining linguistics with social, economic and legal history in order to provide answers to questions related to the history of commercial law, which is inherently transnational.

The second part of the title, 'migrating merchants', fits into the equation just as easily. The project understands 'migration of merchants' not only in the narrow sense of permanent relocation but is also interested in merchants accompanying their merchandise or traveling for other commercial reasons, e.g. education. Did these migrating merchants transport ideas about legal institutions or other legal concepts in their luggage, e.g. about book-keeping, letters of exchange or types of commercial companies? Did they influence their hosts? Or, did they bring their ideas back home to influence local laws? Recent historical research has analyzed the encounter, over the course of history, of Muslim, Jewish and Christian 'cultural brokers', with particular focus on the Medieval Mediterranean.[6] Mechanisms of inter-religious contacts, cross-fertilization and communication have been studied extensively from sources related to people living in a cultural environment different from their own: Diplomatic envoys and scholars, artists and translators, religious experts and missionaries. Besides them, merchants were defined as 'latent brokers', i.e. agents whose impact on another culture was the by-product of an activity that had other aims.[7] The question is: is it possible to use one of those by-products, i.e. language changes, to verify the impact of merchants' migrations on commercial law?

4 Jacob Grimm, "Von der Poesie im Recht", *Zeitschrift für geschichtliche Rechtswissenschaft*, 2:1 (1815), 25–99.

5 Jacob Grimm, *Deutsche Rechtsalterthümer* (Göttingen: Dietrich, 1828).

6 Literature on the topic is very extensive. See for example the recent book edited in the framework of the EU funded research project PIMIC (Power and Institutions in Medieval Islam and Christendom): John Hudson and Ana Rodríguez (eds.), *Diverging Paths? The Shapes of Power and Institutions in the Medieval Christendom and Islam* (Leiden: Brill, 2014).

7 Marc von der Höh, Nikolas Jaspert and Jenny Rahel Oesterle (eds.), *Cultural Brokers at Mediterranean Courts in the Middle Ages* (Paderborn: Ferdinand Schöningh, 2013), 22–23.

Trading techniques are closely intertwined with the question to what degree the merchant was traveling in order to learn the trade, accompany his goods, meet his business associates, claim goods, settle accounts, or even move and change the center of his commercial activity to a new venue etc. It is a likely assumption that the migrating merchant carried his commercial and legal tools with him just like a stonemason would have carried his working tools with him on his way from one construction site to the next. But there, at the end of his journey from Nuremberg to Venice or from Dortmund to Bruges, the merchant must have encountered new ideas and techniques, and must have compared his tools with those of his foreign partners. The early modern literature on commerce and commercial law (Stracca, Malynes, Marquard, Savary) has this main purpose: to inform the merchant about all matters relevant to his success in remote regions at the other end of his trading route.

This could be a bottomless subject but we want to concentrate on the interaction between the locals and foreigners, and more precisely on the mutual learning process with regards to the daily commercial and legal routine: 'migrating law'. Osmosis, hybridization, assimilation – a number of widely discussed key words spring to mind. The two examples above were chosen on purpose. In 1508, the City council of Nuremberg adopted the Venetian tutelage laws – a fact important enough to the law lenders to boast about it by painting it in oil and hanging the scene in the *Palazzo dei Dogi*; another example is of the Hanseatic merchant Hildebrand Veckinchusen who organized his bookkeeping by copying the model he encountered in Italian and Flemish firms after moving to Bruges around the year 1400. It wouldn't be too hard to come up with additional examples but we will try to take the next step and ask: why? The merchants adopting something foreign and new must have deemed it favorable, but based on what reflections? What did they find weak and disadvantageous about the usual, traditional ways with which they were brought up? Were there regrets? We believe that to provide an answer to these questions a trans-disciplinary approach is not only useful but necessary.

In 2009 Francesca Trivellato opened her already classic *The Familiarity of Strangers* with the following statement:

> Though the expression is often invoked, an understanding of cross-cultural trade remains elusive. Rarely do historical studies offer a descriptive and analytical explanation of the ways *economic* cooperation worked across geopolitical, linguistic, and religious boundaries.[8]

8 Francesca Trivellato, *The Familiarity of Strangers. The Sephardic Diaspora, Livorno, and Cross-Cultural Trade in the Early Modern Period* (New Haven, London: Yale University Press, 2009), 1, italics added by the authors of this introduction.

If we substitute the word *economic* with the word *legal*, Trivellato's assumption perfectly describes the historiographical gap that the organizers of the Frankfurt workshop felt strongly about. The scholars invited to the conference accepted the challenge of crossing the traditional boundaries of legal-historical studies (geopolitical, ethnic, linguistic and religious) in order to provide a more comprehensive understanding of the history of commercial law from the Middle Ages to the nineteenth century. The migration of words and merchants has provided a 'fresh' point of view on the problem of the diffusion of commercial law and practices at a transnational level.

The book is divided into three parts, corresponding to three commercial networks: the Mediterranean ones, the European ones and the Atlantic ones. As is often the case when it comes to attempts at classification, this division oversimplifies the complexity of trading networks. However, we felt it useful to facilitate the reader's understanding of the contents of the book, as a variety of different socio-economic contexts are taken into account: from medieval Cairo, Pisa, Novgorod, Lübeck to nineteenth century Brazil, by way of Early Modern England, Venice, Bruges and many other trading centers.

Mark Cohen's paper, which opens the volume, immediately testifies to the limits of a strict delimitation of trading networks, as it addresses the issue of the transmission of commercial practice and law in the medieval Mediterranean and the Indian Ocean through the lens of two fascinating sources: the hundreds of unique letters, accounts, and legal documents discovered in the storeroom (geniza) of the Ben Ezra Synagogue in Fustat (or Old Cairo) on the one hand and legal texts from the Islamic Middle Ages on the other. The aim is, in fact, to analyze the relationship between merchant practice and Jewish law during the Islamic Middle Ages, on the basis of the assumption that the Talmud comes from an agrarian society and that it was only the Islamic conquest, and the creation of a huge empire, that enabled the development of long-distance trade and, as a consequence, the introduction of new commercial devices, such as a variant of agency, called *wakāla* in Arabic, or the bill of payment (*suftaja*).

In the very same period Pisa, one of the most powerful Mediterranean Maritime Republics, which flourished between the tenth and the thirteenth century, experienced the encounter between different ethnicities, languages and religions. Its prosperity led to the early development (1080s) of typical communal institutions (*consules*); as well as to the drafting of the most ancient and most exhaustive examples of written *ius proprium* that have survived until today: the *Constitutum Legis* and the *Constitutum Usus* (1160). Stefania Gialdroni's paper analyzes the classical commercial law institute of the *commenda* through the *Constitutum Usus*. The *Constitutum Usus'* own foreword states that

Pisa 'gained' many unwritten customs *propter conversationem diversarum gentium per diversas mundi partes*, i.e. thanks to the 'dialogue' with people from different parts of the world. The analysis leads to the conclusion that to strictly separate influences is almost impossible (and probably useless). However, at least in the case of Pisa, a byzantine influence, maybe via Venice, is more evident than an Islamic one.

Maria Fusaro's paper brings us into the Early Modern Period, shifting the attention to the role played by English and 'Netherlandish' shipping in the Mediterranean. Through the documentation found in several courts of law, she challenges the traditional depiction of this phenomenon as the 'Northern Invasion', as it was described, for example, by Fernard Braudel. What emerges is a less national and rather more complex trading environment, a maritime sector characterized by a considerable mix of capital investment and by multinational crews. The author not only crosses the boundaries of nationalities in the making of commercial law and practices but also devotes an extensive introduction to the analysis of both economic and legal historiography, underlying the need for a trans-disciplinary approach to really understand complex historical phenomena.

The part devoted to the Mediterranean networks ends with an essay written by one of the few linguists specialized in the history of the so-called Mediterranean Lingua Franca: Guido Cifoletti. The inclusion of a paper devoted only to language in this collection of essays aims at providing inspiration to legal and economic historians whose expertise in this field may be limited. In many works, the Mediterranean Lingua Franca was described as a currency during the Crusades and as a useful language of trade between Christians and Muslims; but that analysis now appears to be somewhat unfounded, and could even be described as a myth - a myth of inclusion and cosmopolitanism that is challenged, for example, also in Gialdroni's essay. Once more we could agree with Francesca Trivellato that "The cosmopolitan language" (of business letters) "did not automatically spawn cosmopolitan feelings of tolerance, mutual respect, curiosity, and appreciation of differences."[9] It was just the opposite, we could add. The Lingua Franca had a social importance only in the so-called Regencies during the Ottoman Empire. According to Cifoletti, at that time, Italian was the most important language of southern Europe and many people could communicate in Italian. The problem was that on the southern side of the Mediterranean Sea, it was considered a Christian language, the language of

9 Trivellato, *The Familiarity*, 17.

the Pope, and therefore many people refused to use it.[10] The reason for the creation of this pidgin language, in conclusion, may have been cultural rather than practical, and for a reason which is opposite to what the contemporary myth of the Mediterranean Lingua Franca often conveys.[11]

The second part, devoted to the European networks, begins with an essay focused on Venice. Referring to the merchants of *La Serenissima*, which founded colonies all across the Mediterranean, as 'European', may seem reductive. Nevertheless, the paper examines the links between Venice and Germany, and therefore provides a useful *trait d'union* between the Mediterranean world and Northern Europe. Uwe Israel, combining history, art, language and law, in fact, describes the role played in Venice by the *Fondaco dei Tedeschi*, the trading post where German merchants were forced to lodge and store their goods and which was modeled, as mentioned previously, after the Arabic example. This was a headquarters that was under the direct control of the municipality of Venice. In this environment, merchants were forced to confront linguistic problems. Some of the brokers known as the *messeti*, who were liable for accounting and could be defined as bilingual cultural intermediaries, were native speakers. Others learned German in Venice, where a language school had existed since the early fifteenth century. The essay clearly addresses the issue of the way in which linguistic barriers were overcome and language skills supported the development of commercial transactions on both sides of the Alps.

From the mild coasts of the Adriatic Sea, Catherine Squires, expert in the field of Germanic and Celtic philology, leads us up to Novgorod and Polotsk, in order to analyze the diplomatic and commercial relations between German merchant cities and East Slavonic lands. These relationships lasted approximately three centuries, making it a foregone conclusion that linguistic barriers would need to be somehow overcome. Squires provides an in depth linguistic analysis of medieval manuscripts that shows two different language encounters: Russian-Low German at Novgorod, the location of the Low German-speaking Hanseatic merchants, and Russian-High German (where Latin played

10 A similar refusal is described in the essay written by Catherine Squires, even if with reference to medieval Novgorod and the use of Latin: "Latin was out of the question as the language of a strange (and often hostile) confession".

11 Sabir, the name given to the Mediterranean Lingua Franca after 1830, is for example the name of the "Mediterranean Cultures Festival Sabir", which takes place every year since 2014 in a different city, representative of the phenomenon of contemporary migrations (Lampedusa, Pozzallo, Syracuse and finally, in 2018, Palermo). During the festival, seminars, meetings, workshops and performances all address topics such as the criminalization of solidarity or the key role played by supportive cities and ports in helping migrants: http://www.festivalsabir.it. Accessed 29 October 2018.

a stronger role than in Novgorod) at Polotsk where the Russians traded with the Teutonic Order and their merchants. Her aim, in fact, is explicit: "we shall not judge their content [of the texts of German-East Slavic interrelations] this is the prerogative of historians and law students, but, using linguistic evidence, we shall try to discover historical facts and legal approaches that had no explicit expression in the text."

Remaining in the framework of the Hansa network, Albrecht Cordes decides to take the written language of Lübeck law as a case study of the influence of traveling merchants and changes of language on commercial law. The Lübeck law codes were in fact first written in Latin, but after only forty years, they were quite suddenly replaced by Low German in 1270. After a long linguistically stable period the Lübeck law changed to High German in the sixteenth century, only to turn back to Latin in the seventeenth century. This peculiar process offers the opportunity to provide answers to questions such as: why did these language changes occur? and, more importantly, what consequences did these changes have on the law?

In Northern Europe, during the late medieval period, another city developed in to one of the most bustling commercial and financial markets of the Western world: Bruges. This city hosted more foreign merchants than any other place north of the Alps, including traders from the Italian city-states, the Hanseatic area, England, Scotland, France and the Iberian Peninsula. Bart Lambert analyses this lively context from the point of view of the legal traditions that those merchants carried with them along with the commodities they traded. Once more, the problem was that the different languages often reflected a difference in the visitors' conceptions of commercial law. Relying on cases brought before the Bruges aldermen, who were in charge of judging disputes involving local and foreign merchants (and who often delegated the decision to outside merchants acting as arbitrators), Lambert provides an answer to the question of whether or not only local rules were applied, or were the legal conceptions of the foreign parties also taken into account; and lastly to what extent, if at all, these last conceptions actually influenced Bruges law.

An overview of the history of commercial law cannot exclude a reference to Canon law. This task is performed here by David von Mayenburg, who examines the fight against monopoly in sixteenth century German territories. In doing so, he does not only provide a very detailed analysis of Roman and Canon Law sources as well as of the extensive literature on the topic, but addresses linguistic problems too. If merchants used their local language enriched by technical terms, City councillors used Early New High German and jurists communicated in Latin. Translations were therefore necessary. Using the classic topic of monopolies as a case study, the author addresses issues such as the

key terms that influenced the discussion and their historical origin; as well as the different interpretations of those key terms by merchants and by their opponents. Furthermore, von Mayenburg analyses the role played by the translation process in the discussion, considering for example that the term monopoly, coming from Greek, found its way into German through Latin. But if 'monopoly' became a very widespread word, even though sometimes differently interpreted, other words of ancient origins came up against native equivalents. For example, *usura* couldn't replace *Wucher*, but *Fürkauf* was relatinized into *praeemptio*. This paper testifies to the unavoidable reference to Roman and Canon law even in the framework of commercial law at the time of the triumph of the *ius commune* system.

The topic of Jewish networks of merchants comes back in Cornelia Aust's essay; this time focusing on the Jewish debate concerning the usage of different variations of bearer notes and bills of exchange (such as the one called *membrana* in Polish and *mamran* in Yiddish), in order to analyze the integration of Jewish merchants into general commerce in central and east central Europe, in particular during the eighteenth century. Also in this case, special attention is devoted to language(s) and the role they played in the transfer of terms and ideas in a commercial environment characterized by two levels of interaction: the one between Jewish and Christian merchants and the one among Jewish merchants from Eastern and Western Europe.

The third and last part of the book is devoted to the Atlantic networks. Marc Häberlein analyzes the issue of the relationship between German and English merchants at the time of the rise and triumph of English commercial expansion, both in Europe and in the North American colonies. In the sixteenth century German and English merchants came into contact in various commercial cities, especially Antwerp, and faced linguistic problems which had legal consequences. By the seventeenth century it was London which attracted a growing number of German immigrants and in the eighteenth century many German merchants settled in the North American colonies. The stories of some of those daring traders are deepened in order to examine the risks and opportunities of the 'Atlantic networks'.

Finally, Hanna Sonkajärvi closes this journey across time and space in an ideal way with her study of the consequences on commercial law and practices of the emigration to Brazil of French merchants, many of whom were of Jewish origin, after the enactment of the first Brazilian Commercial Code (1850). Starting from the introduction in Brazil of legal concepts such as the one of 'juridical person' (considered today absolutely fundamental in the framework of commercial law), the author closing this last section devoted to the Atlantic networks navigates the dangerous waters of case law. Analyzing litigation

between French and local commercial agents regarding bankruptcy and the breaking of contracts, she seizes the occasion to address issues about the importance of cross-cultural exchange, such as the role played by Frenchness (or Jewishness) in court or in the public 'arena' (especially newspapers reporting legal proceedings).

In conclusion, rather than tracing a 'history' of commercial law, we have collected 'stories' of commercial law, literally following the routes of merchants and of the languages they spoke, in order to verify if rules and practices 'migrated' with the merchants themselves as well as through (legal) texts. We were not disappointed. In different times and places, language has proved to be a useful tool to better understand the ways in which cross-cultural trade led to the introduction of new commercial devices. A widespread, constant influence carried on step by step by those 'latent brokers', the merchants, who, following their interests, led to that inextricable entanglement of traditions (cultural and legal) that built commercial law (and maybe, to a certain extent, society) as we know it today.

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PART 1

Mediterranean Networks

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CHAPTER 1

Migrating Words and Migrating Custom among the Geniza Merchants: Maimonides on Commercial Agency Law

Mark R. Cohen

This chapter addresses a problem in economic history,[1] law, and language illustrated by Jewish merchants of the Islamic world in the Middle Ages. In particular it shows how "the diffusion of certain technical words provides[s] a witness of the circulation of ideas and rules" of commercial practice, to quote from the manifesto of the conference in Frankfurt am Main in September 2016 at which this paper was presented. Further quoting from that manifesto, it "provide[s] a fresh point of view on the problem of the diffusion of commercial practices at a transnational level, with focus on the Mediterranean and Northern European seas".

My own research pertains to Jewish merchants in the medieval Mediterranean and the Indian Ocean in the eleventh, twelfth, and thirteenth centuries. My source base consists of two sorts of written documentation: the first is a unique cache of documents recovered in the nineteenth century from a room behind a wall in a medieval synagogue in Old Cairo. A Jewish custom still practiced today requires that random pages of Hebrew script that might contain the name of God be buried – the place is called a geniza and it is usually buried in a cemetery – rather than destroyed by human hands. (Islam has a similar custom, mainly for pages of Qur'an.[2]) Since the Cairo Geniza was 'buried' inside a synagogue building (though a smaller cache of manuscripts was dug up in the Jewish cemetery at the beginning of the twentieth century[3]), it was all the easier to retrieve, once its location was discovered. Moreover, since the

1 I deal in this paper with material covered in my book *Maimonides and the Merchants: Jewish Law and Society in the Medieval Islamic World* (Philadelphia: University of Pennsylvania Press, 2017), presented here in a different context in keeping with the theme of the conference, "Migrating Words, Migrating Merchants: Migrating Law."

2 See Mark R. Cohen, "Geniza for Islamicists, Islamic Geniza, and the 'New Cairo Geniza,'" *Harvard Middle Eastern and Islamic Review 7 (2006), 129–145.*

3 The Jacques Mosseri Collection, consisting of more than 7000 fragments, currently being conserved by the Taylor-Schechter Genizah Research Unit of Cambridge University Library.

Egyptian climate is very dry, the pages, though often ripped or otherwise effaced, are relatively readable.

The Cairo Geniza contains approximately 330,000 stray folio or bifolio pages. They consist of torn fragments from Torah scrolls, pages from Bible codices, leaves from prayer books, legal texts, specimens of medieval Hebrew poetry, philosophy, Jewish law, magical fragments, even pages from the Qur'an transcribed into Judeo-Arabic, a form of what linguists call Middle Arabic, but written in the Hebrew script.[4]

Among the 330,000 pages there are an estimated 20,000 castaway documents from everyday life. These include approximately 1500 fascinating letters of Jewish merchants and many hundreds of Jewish court records. The latter are largely testimonies about partnership contracts or about the dissolution of partnerships, although a small number of actual contracts is to be found.[5] The documents also include business accounts filled with precious information about prices and commercial taxes. Taken together, these 'historical' or 'documentary' Geniza fragments portray in minute and colourful detail the life and practices of Jewish – and by extension Muslim – traders during the central Islamic middle ages – that is to say, from the end of the tenth through the middle of the thirteenth centuries.

The second major primary source for my research comprises *responsa* – answers to questions of law submitted to a rabbinical jurisconsult (the equivalent of *fatwās* in Islam) – as well as collections of laws, especially the huge, all-encompassing code of Jewish law, the Mishneh Torah, completed around 1178 in Egypt by the great Jewish legist, philosopher, and physician, Moses Maimonides. This comprehensive compilation was meant to replicate in a new form the entire corpus of Biblical and post-Biblical law, from the Babylonian and Palestinian Talmuds to the legal literature of the so-called Babylonian Geonim, the rabbinic heads of the *yeshivot* or academies of legal study, in Iraq. Maimonides intended his Code to serve as a handy, comprehensive legal reference work that would render consultation of more than ten centuries of post-Biblical legal writing unnecessary.

The question that animates my work is the relationship between merchant practice and normative Jewish law during the Islamic middle ages. The Talmud,

4 See Joshua Blau, *The Emergence and Linguistic Background of Judaeo-Arabic*, 2nd ed. (Jerusalem: Ben-Zvi Institute, 1981); 3rd, rev. ed. (Jerusalem: Ben-Zvi Institute, 1999); Kees Versteegh, *The Arabic Language* (Edinburgh: Edinburgh University Press, 1997).

5 See Phillip I. Ackerman-Lieberman, "A Partnership Culture: Jewish Economic and Social Life Seen through the Legal Documents of the Cairo Geniza" (PhD diss., Princeton University, 2007) and idem, *The Business of Identity: Jews, Muslims, and Economic Life in Medieval Egypt* (Stanford, CA: Stanford University Press, 2014).

which, mutatis mutandis, can be considered the body of law of the Jewish 'polity,' received its final form, we think, in the seventh century, before the Islamic conquests. It was created in and for an agrarian society. Most Jews were farmers in the Talmudic period, which coincided with Roman followed by Byzantine rule in the Levant, Egypt, and North Africa and with Parthian followed by Sasanian rule in Persia. What trade existed was primarily local or regional. Characteristically, there is very little that we would call commercial or maritime law in the Talmud.

Things changed with the Islamic conquests. The Prophet Muḥammad's career as a merchant, coupled with religious doctrine favoring trade and profit, as well as the historical and geographical circumstances of the conquests, spurred urbanization and long-distance trade. Jews entered international trade for the first time and in large numbers.

New financial devices came into the Jewish merchant's purview. One such device was the bill of payment, roughly similar to the modern check. Called *suftaja* in Arabic, the Babylonian Geonim reluctantly approved its use, despite the prohibition of a seemingly similar device in the Talmud known as a *diyoqne,* a word betraying its Byzantine-Greek origin. The relevant *responsum* reveals Gaonic awareness of what some modern economic historians of medieval and early modern Europe refer to as the customary law of the merchants. The unnamed Gaon writes in his *responsum*:

> When we saw that people use it [the *suftaja*] in doing business with one another, we began admitting it in court, lest trade among people cease. We sanction it, no more and no less, in accordance with the "custom (or law) of the merchants" [*ḥukm al-tujjār*].[6]

This Arabic term, *ḥukm al-tujjār,* mimics the Latin phrase *lex mercatoria.* In recent years the very existence of this 'merchants' law' has been vigorously challenged by many medieval and early modern European economic historians, but it is quite clear that such a concept and institution – distinct from the official, religious laws of Judaism and Islam – was known to Jewish merchants in the Arab world. In Islamic legal parlance it is called *ʿādat al-tujjār.*

Another 'custom of the merchants' that Jews encountered in the Islamicate marketplace for the first time was a variant of agency (*wakāla* in Arabic), totally unknown to the Talmud. It differed fundamentally from Talmudic partnership and from a Talmudic version of *commenda* called *ʿisqa* in Aramaic, both of which required formal written contracts, witnesses, and ratification by a

6 Cohen, *Maimonides and the Merchants*, 26.

symbolic act known as *qinyan* ("acquisition"), similar to a handshake, and from Talmudic agency, which had no commercial application. An agent in the Talmud was delegated to perform a single, one-time task, whether it was delivering a divorce document to a wife, or acting as legal proxy appointed by a principal and charged with the task of representing him in collecting a debt or a bailment.

The Islamic merchant custom was called *ibḍāʿ* or *biḍāʿa*. Islamic legal historian Abraham Udovitch calls it "quasi-agency." As explained by an eleventh-century Islamic jurist, al-Sarakhsī (d. ca. 1096).

> And he (the *commenda* agent) may entrust it to the care of another party (*lahu an yubḍiʿahu*), because doing this is part of the custom of the merchants (*liʾan al-ibḍāʿ min ʿādat al-tujjār*), and the agent will have need for it in order to achieve profit. For trade is of two kinds: local, in one's own town, and long-distant, in another town. And the agent cannot personally supervise both of these by himself. And were he not permitted to give the capital to the care of others (*al-ibḍāʿ*), and to have the power of appointing agents (*al-tawkīl*), and the right to leave it as a deposit (*al-īdāʿ*), then he would have to miss out on one of the two types because of the preoccupation with the other type.[7]

Ibḍāʿ in its alternate form, *biḍāʿa* (lit., "goods"), occurs in the Geniza, one of several expressions representing an economic institution that resembles the assignment of agency as described by al-Sarakhsī. First designated by Shelomo Dov Goitein, the doyen of documentary Geniza research, as "formal friendship,"[8] it was likened by Udovitch to the Islamic *ibḍāʿ/biḍāʿa*,[9] taken in another

7 Al-Sarakhsī, *Al-mabsūṭ*. 30 vols. (Cairo: Maṭbaʿat al-Saʿadah, 1906–1913), 22:38. See A.L. Udovitch, "The 'Law Merchant' of the Medieval Islamic World," 122 ("quasi-agency"), in G.E. von Grunebaum (ed.), *Logic in Classical Islamic Culture* (Wiesbaden: Harrassowitz, 1970), 113–130; idem, *Partnership and Profit in Medieval Islam* (Princeton: Princeton University Press, 1970), 101–104. Imran A. K. Nyazee, *Islamic Law of Business Organization: Partnerships* (Islamabad: International Institute of Islamic Thought, 1999), 250 and note 30 there, 252, 332.

8 S.D. Goitein, *A Mediterranean Society: The Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza.* 6 vols. (Berkeley and Los Angeles: University of California Press, 1967–1993), 1:164–169. There he called it "friendship" and "informal 'cooperation.'" He introduced the term "formal friendship" in his article "Formal Friendship in the Medieval Near East," *Proceedings of the American Philosophical Society* 115 (1971), 484–489.

9 A.L. Udovitch, "Formalism and Informalism in the Social and Economic Institutions of the Medieval Islamic World," in Amin Banani and Speros Vryonis (eds.), *Individualism and Conformity in Classical Islam* (Wiesbaden: Harrassowitz, 1977), 61–81.

direction by Stanford economist Avner Greif,[10] and, most recently, treated in minute detail by Mediterranean economic historian Jessica Goldberg, who calls it "mutual service agency."[11] In this custom of the merchants one party entrusted goods or money to another on the basis of good faith, and the recipient, *acting as agent rather than partner*, traded with these on the property owner's behalf, without sharing in the profit, without bearing responsibility for unavoidable loss, and without receiving financial remuneration. In return for his services the agent could count on reciprocal services by his 'friend,' the owner of the property. Among the Jewish merchants, the institution was most commonly called *ṣuḥba,* meaning "companionship." This form of commercial agency, *ṣuḥba*-agency as I call it, was ubiquitous in the world of the Geniza merchants. It was flexible and informal and did not require the instrumentality of legal documents, witnesses, or the court. Problematically, however, as a form of agency, the institution lacked the enforceability in Jewish law that other, more formal, contractual arrangements like partnership, did.

Commercial agency as a repetitive, reciprocal service between dyadic pairs of merchants, appearing for the first time in Jewish economic life during the Islamic period, is signaled by what I call the shared Jewish/Muslim 'vocabulary of reciprocity.' This vocabulary constitutes a prime example of 'migrating words.' We find it as early as the ninth century in letters of Muslim merchants from the Fayyūm region of Upper Egypt, home of the Arabic papyri. In a letter from that time addressed to a Muslim textile merchant the sender writes: "Do not fail to write me a letter informing me of your affairs and your circumstances and all your requests (*jamīʿi ḥawāʾijika*), for in (fulfilling) them there is blessing, God willing."[12] In a letter from the tenth century a Muslim asks a friend to purchase an item, and, at the end of the letter, writes, offering reciprocity:

> Do not deprive me of your letters, including news of your affairs (*akḥbāraka*) and circumstances (*aḥwālaka*) *and any request* (*ḥāja*) *that*

10 His first article: "Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders," *Journal of Economic History* 49 (1989), 857–882. See also his book, *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade* (Cambridge: Cambridge University Press, 2006) with bibliography of his many articles on pages 466–468.

11 Jessica L. Goldberg, *Trade and Institutions in the Medieval Mediterranean: The Geniza Merchants and their Business World* (Cambridge: Cambridge University Press, 2012).

12 Yūsuf Rāġib, *Marchands d'étoffes du fayyoum au III^e/IX^e siècle d'apres leurs archives* (*actes et lettres*) *II: La correspondance administrative et privée des Banū ʿAbd al-Muʾmin* (Cairo: Institut Français d'Archéologie Orientale, 1985), 59 lines 16–17 (doc. no. 24).

> *may befall you, so that I may speedily fulfill it, with God's help, to your satisfaction.*[13]

This sentence is paraphrased nearly verbatim at the end of a Geniza letter from one Jewish merchant to another, which Goitein translates in his discussion of formal friendship: "Do not withhold from me your letters with reports about your well-being and your requirements (*hawā'ij,* plural of *ḥāja*), so that I may deal with them, as is my duty."[14] The technical term "request" (*ḥāja*) is often paired with the Arabic word for service, *khidma,* a service performed in response to a request.[15] Since *ṣuḥba*-agency, the counterpart of *biḍā'a,* was completely unknown to Jews in the Talmudic period, it is reasonable to assume that the language of mutual service agency migrated from Arab merchants to Jewish merchants in the interdenominational marketplace and in Islamic courts, and that this reflects the migration of the custom from Muslim to Jewish merchants and from Islamic to Jewish law.

If, as I have explained, *ṣuḥba*-agency lacked a place in Talmudic law, how did Jewish merchants deal with disputes arising out of agency relations? Here, too, the concept of 'migrating words' serves as a useful heuristic device. In Talmudic law, an agent cannot be held culpable for non-performance of his assigned task. He cannot be required to take a self-exculpating oath in court asserting his honest attempt to fulfill his one-time assignment. The rabbis of the Talmud were concerned lest the oath-threat deter potential agents from volunteering

13 Werner Diem, *Arabische Briefe aus dem 10.-16. Jahrhundert* (Berlin: De Gruyter, 2011), no. 9, lines 16–17: *wa-lā taqṭa'u kutubaka 'annī muḍammanatan akhbāraka wa-aḥwālaka wa-ḥāja in 'araḍat asra'tuhā bi-'awn allāh sarraka.*

14 *Med. Soc.*, 1:164, TS 13 J 25.18 verso, lines 2–3: *lā yaqṭa'u kutubahu 'annī muḍammanatan bi-akhbār salāmatihim wa-ḥawā'ijihim li-aqūma bihi ḥisbat al-wājib in shā'a allāh.* This document has been much discussed in scholarship (see the bibliography ad loc. in the Friedberg Genizah Project database [FGP]) https://fgp.genizah.org/

15 For example, Bodl. MS Heb d 76.57v, lines 17–18, *wa-in ṣalaḥtu li-*[*m*]*awlayā fī ḥāja aw khidma yusharrifunī bihā fa-yaf'al*, ed. Moshe Gil, *Be-malkhut yishmael bi-tequfat ha-ge'onim* (*In the Kingdom of Ishmael*), 4 vols. (Tel-Aviv and Jerusalem: Tel-Aviv University, Mossad Bialik, and Ministry of Defense, 1997), 3:748 (no. 523). Cf. at the end of a business letter from Aden from the merchant Khalaf b. Isaac to the merchant Abraham ibn Yijū in India: *wa-mā kāna li-mawlayā min ḥāja aw khidma sharrifnī bihā,* "If my master has a request or service (to fulfill), please honor me with it." JNUL 4^{o} 577.3/6, ed. S.D. Goitein-M.A. Friedman, *Sefer Hodu III: Avraham ben Yiju soḥer ve-yaṣran be-hodu: te'udot mi-genizat qahir* (*Abraham ben Yijū India Trader and Manufacturer: Cairo Geniza Documents*) (Jerusalem: Makhon Ben-Zvi and Rabbi David and Amalia Rosen Foundation, 2010), 157 lines 25–26; English translation in S.D. Goitein and Mordechai A. Friedman, *India Traders of the Middle Ages: Documents from the Cairo Geniza ("India Book")* (Leiden and Boston: Brill, 2008), 630.

their services. This may explain why the court records in the Geniza, which has preserved scores of court testimonies concerning partnerships,[16] contains hardly any records of adjudication of disputes between *ṣuḥba*-agents. The notable exception that proves the rule is a dossier of court records from one lawsuit against an agent from the end of the eleventh century.[17]

In the 1980s, economist Avner Greif proposed an intriguing solution to this lacuna in the Geniza records. Using game theory he posited the existence of a closed, commercial consortium, or "coalition," of Jewish merchants (following the grandmaster of documentary Geniza scholarship, S.D. Goitein, he called them "Maghribi merchants," since most of them were from North Africa). These merchants, Greif maintained, enforced contracts through "private-order" sanctions, relying on a multilateral reputation mechanism that prevented agents from cheating or otherwise controverting the principal's wishes. Members of the in-group reported instances of malfeasance to the rest of the consortium, without recourse to legal instruments and the mediation of the Jewish courts. This system, Greif argued, assured that agents would comply with the instructions of the principal, for, were they to act to the contrary, they would face being blacklisted and forfeiting access to the services of all other merchants in the coalition.

In point of fact, Jewish merchants had other enforcement options at their disposal. They could arbitrate disputes outside of the Jewish court. Or they could bring their disputes before an Islamic court, where *ibḍāʿ*- agency was recognized and where merchants – including non-Muslim merchants – could be subjected to an oath to avow their honesty. From Jewish Geniza and *responsa* sources we know that Jews frequently had recourse to Islamic courts, while Jewish and Islamic sources attest that Islamic courts usually treated non-Muslim litigants fairly.[18]

This explains, I believe, why the Jewish rabbinic elite, beginning with the Geonim and culminating with Maimonides, sought an enforcement mechanism for *ṣuḥba*-agency within normative Jewish law. A first attempt was made by Saadya Gaon (d. 942), who assimilated *ṣuḥba*-agency to the Talmudic law of bailments in his Judeo-Arabic book on that subject. A paid bailee could be subjected to a judicial oath – "the oath of bailment" (Heb. *shevuʿat hapiqqadon*). Saadya opined that the reciprocal services of *ṣuḥba*-agency constituted payment for minding a bailment.

16 See Ackerman-Lieberman, "A Partnership Culture."

17 Goitein and Friedman, *India Traders of the Middle Ages*, Section Two, Chapter One, 167ff.

18 See chapter 9 in my *Maimonides and the Merchants*.

Saadya's solution was insufficient. Product of the largely sedentary and agrarian society of the Bible (Exodus 22:6–14) and elaborated in largely agrarian Roman Palestine (especially Mishna Shevuʿot, chapter 8), the Jewish laws of bailment envisioned safekeeping of another person's money, goods, or animals. *Ṣuḥba*-agents did much more than hold property for safekeeping or receive items to deliver intact to a designated recipient. They traveled great distances, buying and selling and exchanging goods for money, starting with the owner's property, striving to make profit and to avoid loss. This far exceeded the mandate of the Talmud's bailee, who was simply asked to temporarily safeguard an item entrusted to his care.

An alternative and preferable solution was reached in stages through a process of 'migrating words' and 'migrating law.' It begins with the Arabic term, *amāna*, which may be translated as "trust" or, in modern legal language, as "fiduciary duty." *Amāna* in Islamic law, Udovitch explains in his book, *Partnership and Profit in Medieval Islam*, "is a property attaching to a number of different contractual relationships, such as partnership, *commenda*, deposit, etcetera."[19]

The obligation of *amāna*, coupled with the concept of "fear of God" (*taqwā allāh*), comes straight from the Qur'an (Sura 2:283): "If you are on a journey and cannot find a scribe, then a security deposit should be handed over. But if you trust one another, let the trustee fulfill his trust, and let him fear God, his Lord (*falyuʾaddi l-ladhī ʾtumina amānatahu walyattaqi l-lāha rabbahu*)"...And, the verse concludes, "do not conceal testimony. Whoever conceals it is a sinner at heart. God is aware of what you do."

As a juristic principle the phrase, *adāʾ al-amāna*, "fulfillment of the trust," appears in the "Book of Partnership" in the legal compendium, *Kitāb al-aṣl*, by al-Shaybānī (d. 804 or 805), who was a resident of Iraq, where the *yeshivot* were situated, and one of the 'founding fathers' of the Ḥanafī school of Islamic law. Discussing a partnership contract, Shaybānī writes: "This is a document stating the agreement upon which X the son of Y and A the son of B entered into a partnership. They entered the partnership in a God-fearing manner and with *adāʾ al-amāna*," on which Shaybānī's eleventh-century commentator, al-Sarakhsī, comments: "This contract is a contract of *amāna*, the aim of which is the attainment of profits, and this is attained by the fear of God and fulfillment of the trust (*adāʾ al-amāna*)."[20] "Fulfillment of the trust" and "fear of God" also

19 Udovitch, *Partnership and Profit,* 93 note 140. The term for violation of the trust is *taʿddī al-amāna* (ibid., 98). Cf. Nyazee, *Islamic Law of Business Organization: Partnerships*, 58–59.

20 Quoted by Udovitch from Shaybānī's "Book of Partnership" (from a manuscript).

figure as necessary qualities for forming a partnership according to al-Ṭaḥāwī (d. 933) in a sample contract in his formulary, *Al-shurūṭ al-ṣaghīr*.[21]

Jews in the tenth century were familiar with *amāna* as an aspect of business law. In the Judeo-Arabic commentary on Hosea by the Karaite Biblical exegete, Yefet b. Eli (second half of the tenth century), the author writes the following regarding the verse (Hosea 2:22) "And I will espouse you with faithfulness" (*ve-erastikh li be-emuna*), where the Hebrew word for faithfulness, *emuna,* is cognate with Arabic *amāna*. Yefet explains: "*Emuna* is one of the commandments set aside unto itself, intending thereby fulfillment of trust (*adāʾ al-amāna*) *and the employment of trust in purchase and sale and partnership* (*sharika*) *and testimony in rulings and so forth*."[22] The property of *amāna* described by Yefet is alluded to in Maimonides' Code where he rules that partners and, by analogous association, commercial agents, must carry out their duties "properly and in good faith (*be-ṣedeq ve-emuna*)." Islamic legal historian Wael Hallaq writes:

> [A]ll jurists agree that, because fiduciary duty (*amāna*) is integral to any contractual partnership, partners do not bear liability for each other's property except when they commit negligence (*taqṣīr*) or cause damage through a fault of their own (*taʿaddī*). Furthermore, the presumption of fiduciary duty does not require of partners more than *an oath* (*yamīn*) *with regard to the declaration of profits they made and the losses they incurred in conducting the business of the partnership*.[23]

According to the ancient Mishna (Shevuʿot 7:8), compiled around 200 C.E., a business partner, even on the slightest suspicion of having acted dishonestly, could be summoned to the Jewish court and required to swear an oath, called in Hebrew *shevuʿat ha-shutafin*, "the oath of partners." The person in question would swear that he had acted uprightly and had not cheated his partner(s). As in Islam, taking an oath before God was considered a grave matter. For that reason the partner's oath was considered sufficient for self-exculpation.

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21 Al-Ṭaḥāwī, *Al-shurūṭ al-ṣaghīr*, Rawḥī Ūzjān (ed.) (Baghdad: Riʾāsat Dīwān al-Awqāf, 1974), 2:736.

22 Quoted in Ackerman-Lieberman, "A Partnership Culture," 3.2, see note 11 there. I have slightly modified his translation of the Arabic *adāʾ al-amāna* (emphasis added).

23 Wael Hallaq, *Sharīʿa: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 252 (emphasis added).

Similarly, in Islamic court procedure, an oath by an accused amounted to self-exoneration.[24]

The Talmudic "oath of partners" crops up in the Geniza under the Arabic designation, *al-yamīn ʿalā adāʾ al-amāna*, "the oath on fulfillment of the trust." Unquestionably a product of the migration of words from the Islamic to the Jewish legal arena, it appears as a known and established institution in a letter and a Jewish legal document about a partnership dispute from the year 1085.[25] It then comes into view a decade later, in court records of a dispute between a principal and his commercial agent that was adjudicated before the Jewish court of Fustat.[26] This latter case is unusual. As noted, while Talmudic law allows imposing an oath on a partner, it does not with regard to an agent.

Here is where Maimonides, who lived from 1138 to 1204, steps in. Though best known as a philosopher, legist, and physician, an Arabic dictionary of learned men reports that, on his arrival in Egypt, he "made a living by trading in jewels and suchlike."[27] Maimonides represents a type of learned scholar that we find among the Geniza merchants, many of whom hailed from the Muslim West. He passed the early years of his life in the commercial milieu of Muslim Spain, then in the North African trading hub of Fez, before settling in Egypt, the pivotal point in the East-West Mediterranean and Indian Ocean trade. Around 1165, after he and his family fled the Almohad persecution of non-Muslims and impious Muslims in North Africa and Spain, and, followed by a brief stint in the inhospitable Crusader-dominated Holy Land, the Maimonides family settled in Old Cairo (Fustat).

Fustat teemed with market activity. Partnerships and agency relations were everywhere to be seen. Egypt, with its center in Cairo-Fustat, was the hub of the trade route between the Islamic West and the Levant and India. Maimonides' brother, David, traded between Egypt and India. He died as a result of a shipwreck in the Indian Ocean around 1170, losing all the goods and cash he

24 See Hallaq, *Sharīʿa: Theory, Practice, Transformations*, 352–353, and for a twentieth-century case of oath-taking in a *sharīʿa* court, see Brinkley Messick, "Commercial Litigation in a Sharīʿa Court," in Muhammad Khalid Masud, et al. (eds.), *Dispensing Justice in Islam: Qadis and their Judgements* (Leiden and Boston: Brill, 2006), 216–217.

25 Mark R. Cohen, "A Partnership Gone Bad: Business Relationships and the Evolving Law of the Cairo Geniza Period," *Journal of the Economic and Social History of the Orient*, 56 (2013), 218–263.

26 See above note 17.

27 Ibn al-Qifti, *Taʾrīkh al-ḥukamā,* translation in Bernard Lewis, *Islam: From the Prophet Muhammad to the Capture of Constantinople* (2 vols. New York: Harper and Row, 1974), 2:190; Joel Kraemer, *Maimonides: The Life and World of One of Civilization's Greatest Minds* (New York: Doubleday, 2008), 161–162, 244–258. On Ibn al-Qiftī see *Encyclopedia of Islam*[2] s.v. *Ibn al-Ḳiftī* (A. Dietrich).

was transporting on his own behalf and as agent for others, including a large sum of money belonging to his brother, Moses. The loss of his brother and, doubtless, his own investment, plunged Maimonides into a long depression.[28]

In Egypt Maimonides rapidly gained stature for his rabbinic learning and rose to become head of the community (*ra'īs al-*yahūd), appointed by the new Ayyubid ruler of Egypt, Saladin, apparently in 1171. He also served as a Jewish "mufti," the Arabic term for a jurisconsult. Maimonides wrote hundreds of *responsa*, among them answers to queries arising from disputes between merchants who disagreed over the form of their business collaboration – for instance, whether it was a partnership, a *commenda*, or a *ṣuḥba*.

Maimonides was aware that Jewish merchants frequently resorted to Islamic courts to arrange and notarize partnerships or to adjudicate disputes. Islamic court documents often ended up in the Jewish court or on his desk, as did unresolved litigations. Many Islamic legal documents were discarded in the Geniza; several dozen of them were published by Geoffrey Khan. Recourse to the Islamic judicial system concerned Maimonides as it had earlier rabbis. It posed a challenge to the communal and religious autonomy granted to the religious minorities by the Islamic state. The problem was particularly acute as regards agency, which was recognized in the Islamic law of *wakāla*, specifically in the quasi-agency institution of *ibḍāʿ*, but not in the Talmud.

Like Saadya Gaon in the tenth century, Maimonides sought a way to assimilate *ṣuḥba*-agency into the *halakha*. He did this in a section of his Code called "Laws of Agents and Partners," comprising the two principal forms of commercial collaboration that Jewish merchants engaged in. When Maimonides came to discuss the "oath of partners" in chapter 9 of "Laws of Agents and Partners" he proposed an ingenious solution to the problem of enforcing agency agreements in the Jewish court. Among those whom the ancient Mishna subjects to the "oath of partners" is someone called, enigmatically, *ben ha-bayit*, "the son of the house." The Talmud explains that this "son of the house" is "someone who hires and dismisses laborers or buys and sells produce for him," what we would call a farmer's foreman. Through analogy with the "son of the house" Maimonides applied the partner's oath to the *ṣuḥba*-agent (*halakha* 5).

> If a man consigns something to another on agency (*meshalleaḥ*, from the word *shaliaḥ*, "agent") to sell, or if he consigns him money on agency (*shalaḥ*) to buy him merchandise (*seḥora*) or produce, *even if he does not pay him for this* (*work*) *and he has no share in the profits or any benefit from this agency mission* (*sheliḥut*), *inasmuch as the latter does business with*

28 Kraemer, *Maimonides*, 243–258.

> *the money of the other person, he is like a "son of the house."* Therefore, he can require him to take an oath, based on an uncertain claim (*mi-safeq*), that he has not robbed him while bringing him the merchandise he bought or part of it,[29] or the money for which he has sold (the merchandise) on his behalf.

I submit that this *halakha* precisely describes *ṣuḥba*-agency, in which one merchant "consigns something to another on agency" and "does not pay him for this work," and (for which) the agent "has no share in the profits or any benefit from this agency mission." Maimonides certainly knew that the Arabic term for the oath of partners, *al-yamīn ʿalā adāʾ al-amāna,* had migrated from Islam to Judaism by the eleventh century. His crucial contribution – his legal reform – was to extend the oath of partners to commercial agents. His purpose was to offer reciprocal agents an alternative and equivalent method of resolving disputes in an Islamic tribunal, where there was no reluctance to impose oaths on agents, even on non-Muslims.[30]

The oath-threat that Maimonides ingeniously extended from partners to agents through analogy with the Mishna's "son of the house" added a Jewish legal deterrent to the restraining force imposed by the prospect of forfeiting future business favors by tarnishing one's reputation. In other words, we may say that Maimonides recognized and sought to solve the problem of 'contract enforcement' inherent in a system of commercial agency that relied more on informal arrangements than on formal written contracts. In this respect, agency relations among Jewish merchants contrasted with agency relations among the Genoese traders, who used legally recognized, formal, written, and notarized contracts. They could exercise considerable latitude in choosing agents because they had a ready-made structure within the law for contract enforcement.[31] Normative Jewish law before Maimonides' reform of Talmudic agency law lacked such a means of contract enforcement.

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29 The words "or part of it," *o miqṣatah,* seem to be missing from the manuscript fragment ENA NS 29.12 1r (bottom), an apparent omission by the scribe due to homoioteleuton.

30 See Gideon Libson, *Jewish and Islamic Law: A Comparative Study of Custom during the Geonic Period* (Cambridge, MA: Islamic Legal Studies Program, Harvard Law School: Distributed by Harvard University Press, 2003), 85. For Islamic judicial oaths see the "Book of Oaths (*Aymān*)" in Ibn Rushd, *Bidāyat al-mujtahid*, trans. I.A.K. Nyazee, 2 vols. (Reading: Garnet, 1994–1996),1:488–505, and on agents' oath-taking, ibid., 2:366–367, in the "Book of Agents (*Wakāla*)."

31 Proposing to explain the difference in economic growth between the Islamic world and the European West ("The Rise of the West") in the later Middle Ages, Avner Greif theorizes that the constraining, "collectivist" mentality of Middle Eastern merchants, exemplified by the Geniza Maghribī traders with their closed coalition, discouraged ventures with

I have claimed in this paper that migrating concepts and terms from Islamic commercial law and practice – the *suftaja* device, *ibḍāʿ,* or commercial agency, the 'vocabulary of reciprocity,' and the 'oath on fulfillment of the trust' marked the transformation of Jewish life from the simple Talmudic agrarian economy to the complex world of long-distance commerce. The transmission of terminology and praxis brought Jewish businessmen into the world of Muslim merchants in the Islamicate marketplace, a world of customary practice that, in turn, had a strong impact on Islamic commercial law. It is likely that the form of commercial agency called a "custom of the merchants" by al-Shaybanī derived from the custom of merchants in the pre-Islamic trade of the Arabian Peninsula and its surroundings.

To conclude: the interplay of migrating Islamic commercial terms and practices reminds us once again of the much debated *lex mercatoria*, 'law merchant,' in medieval Europe, which Udovitch long ago suggested had a counterpart in the medieval Islamicate world.[32] Leaving aside the contentious debate about the merchants' law in Europe – whether such a corpus of laws really existed; if it did, where did it first appear; whether these customs originated with merchants rather than with legislation by the 'state'; whether they represented the common, 'transnational' practice of merchants everywhere; how were these customs 'transplanted' from place to place[33] – it is clear that the Babylonian Geonim and Maimonides were aware of, and concerned about, new merchant practices Jews learned in the Islamicate marketplace that contradicted Talmudic law. Their realistic solution was to find ways of adapting Jewish law, as the Geonim put it, "lest trade among people cease." The crowning stage in this evolutionary process came when Maimonides, in his comprehensive Code of Jewish law, extended the Talmudic oath of partners to commercial agents in an attempt to forestall Jewish recourse to Islamic courts and the Islamic judicial system.

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anonymous investors or agents, limiting economic growth. By contrast, the more liberal, "individualist" way of thinking of late medieval Genoese merchants, which allowed them to use anonymous agents, facilitated pooling of resources more broadly, nurturing economic expansion.

32 A.L. Udovitch, "The 'Law Merchant' of the Medieval Islamic World," 113–130. See also Chibli Mallat, *Introduction to Middle Eastern Law* (Oxford: Oxford University Press, 2007), 313, where several terms for the custom of the merchants are given: *āʿdat al-tujjār, taʿāmul al-nās, taʿāruf bayn al-nās, wajh al-tijāra*.

33 See Albrecht Cordes, "The Search for a Medieval *Lex mercatoria*," (2003) Oxford University Comparative Law Forum 5 at ouclf.iuscomp.org and more recently, Emily Kadens, "The Myth of the Customary Law Merchant," *Texas Law Review* 90 (2012), 1153–1206, summarizing in her notes previous discussions of the controversial issue.

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CHAPTER 2

Propter Conversationem Diversarum Gentium: Migrating Words and Merchants in Medieval Pisa

Stefania Gialdroni

1 Introduction: Merchants, Travels and Laws[1]

> Qui pergit Pisas, videt illic monstra marina;
> Haec urbs paganis Turclis, Libicis quoque Parthis
> Sordida! Chaldei sua lustrant litora tertri[2]

This is how the maritime Republic of Pisa appeared to the monk Donizo of Canossa at the beginning of the 12th century: a new Babel tainted by non-Christian "sea monsters", Turks, Libyans, Parthians and "gloomy" Chaldeans.[3]

Forty years later, the famous Arab geographer Muhammad al-Idrisi, in his 1154 "Book of Roger", described Pisa as a prosperous city, full of markets, buildings and gardens:

Pisa has wonderful fortresses, fertile lands, abundant water and stunning monuments. The people of Pisa have ships and horses and are well equipped for maritime undertakings against any other country.[4]

1 I wish to thank the whole steering committee of the project "The Making of Commercial law. Common Practices and National Legal Rules from the Early Modern to the Modern Period" (https://blogs.helsinki.fi/makingcommerciallaw/), last accessed 30 September 2019 and in particular Albrecht Cordes and Heikki Pihlajamäki, for having given me the opportunity to take part in the organization of the workshop "Migrating Words, Migrating Merchants: Migrating Law" (Frankfurt, September 2016) and to edit the present volume.

2 "Who goes to Pisa will see there sea monsters; this city is tainted by pagan Turks, Libyans and Parthians! Gloomy Chaldeans cover its coasts": Donizo, *Vita di Matilde di Canossa*, ed. by Paolo Golinelli, with an introduction by Vito Fumagalli (Milan: Jaca Book, 2008), vv. 1370–1372, 120. All English translations by the author.

3 About the *fondacos* (a combination of warehouses, stables and hostels for foreign merchants) of Pisa in the area between S. Michele, S. Jacopo and Ponte Vecchio, see: Enrica Salvatori, "Ceti sociali e struttura urbana: la popolazione pisana delle cappelle di S. Michele in Borgo, S. Jacopo al Mercato, S. Cecilia e S. Lorenzo alla Rivolta nei secoli XI–XV", in *Pisa e la Toscana occidentale nel Medioevo. A Cinzio Violante nei suoi 70 anni*, vol. I (Pisa: GISEM-ETS, 1991), 231–299, at 234–236.

4 *Pisa è dotata di eccelsi fortilizi, di fertili terre, di acque abbondanti e di meravigliosi monumenti. I Pisani, che posseggono navi e cavalli, sono bene addestrati nelle imprese marittime contro tutti*

Although these two points of view appear to offer a contrast, taken together they describe perfectly Pisa in the first half of the 12th century: a wealthy, powerful, ambitious city-state, hosting merchants of different origins and faiths. And the exchange wasn't one sided. Merchants from the Republic could be found all around the Mediterranean:[5] from Sardinia to Catalonia, the Middle East and North Africa (especially Alexandria and Tunis),[6] for the whole period of Pisa's commercial expansion, i.e. between the 11th and the 13th–14th centuries.[7] Furthermore, documents from the second half of the 12th century testify

gli altri paesi. The quotation is taken from: Vv.Aa., *L'Italia ed i paesi mediterranei. Vie di comunicazione e scambi commerciali e culturali al tempo delle Repubbliche Marinare*. Atti del Convegno Internazionale di Studi Pisa, 6–7 giugno 1987 (Pisa: Nistri Lischi and Pacini, 1988), 23.

5 The *Constitutum Usus* of Pisa (see below), Chapter XV, lists many centers where merchants from Pisa used to trade. In case the contract did not foresee any precise sum but contained the country of destination of the voyage, the highest interest rate was calculated on the basis of the average profit of a voyage in that particular city, region or country *secundum morem nostre civitatis* ("according to the custom of our city"). As a consequence, the *Constitutum Usus* (CU) provides an extensive list of places in which the merchants of Pisa certainly carried out business, for example: Vada, Populonia, Falesia (Piombino) and Monte Argentario; Luni, Portovenere, Savona and Genoa; Civitavecchia and Rome; Naples, Amalfi, Salerno and Policastro; Sicily (in particular: Messina, Palermo, Mazzara, Siracusa, Lampieda – maybe Lampedusa -, Licata, Girgenti and Sciacca); Malta; in France: Narbonne, Montpellier, Saint Gilles, Marseille, Grasse; in Spain: Barcelona, Denia, Valencia, Majorca; in Africa: Tunis and Buggea, where the interest rate was the same as in Sicily. The highest rates were foreseen for the voyages to Romania, Syria, Egypt and Tripoli. All quotations of the CU in this paper, if not specified, are taken from: Paola Vignoli, *I costituti della legge e dell'uso di Pisa* (*sec. XII*). *Edizione critica integrale del testo tràdito dal "Codice Yale"* (*ms. Beinecke Library 415*) (Rome: Istituto Storico Italiano per il Medio Evo, 2003).

6 For more information about the presence of Pisan *fondacos* all over the Mediterranean see: Olivia Remie Constable, *Housing the Stranger in the Mediterranean World. Lodging, Trade, and Travel in Late Antiquity and the Middle Ages*, 2nd ed. (Cambridge and New York: Cambridge University Press, 2009). For more about the relationship between Pisa and the eastern Barbary Coast see: Marco Tangheroni, "Sui rapporti commerciali tra Pisa e la Tunisia nel Medioevo", in *L'Italia ed i paesi mediterranei*, 75–90. The intense relationships between Pisa and the Arab world (eastern Spain and the Balearic Islands, North Africa, Egypt and Syria) between the 12th and the 16th century, are witnessed (for example) by the charters edited by Michele Amari: *I diplomi arabi del R. Archivio Fiorentino* (Florence: Le Monnier, 1863).

7 According to a well established historiographical *topos*, the Battle of Meloria (1284), where the fleet of the Republic of Pisa was defeated by the fleet of Genoa, marked the beginning of the decline of Pisa (see for example: Giuseppe Rossi Sabatini, *L'espansione di Pisa nel Mediterraneo fino alla Meloria* (Florence: G.C. Sansoni, 1935)). However, it has been demonstrated that Pisa continued to compete with Genoa, especially in the East, for a certain time, as what was destroyed was the fleet, not the commercial activities: Michel Balard, "Génois et Pisans en Orient (fin du XIIIe- début du XIVe siècle)", in *Genova, Pisa e il Mediterraneo tra Due e Trecento. Per il VII centenario della battaglia della Meloria*, Genova 24–27 Ottobre 1984 (Genoa: Società Ligure di Storia Patria, 1984), 179–209, 208.

to the diffusion, among the citizens of Pisa, of Byzantine and Arab coins, as well as of those in use in the Crusader States.[8] It is in this lively, multi-cultural, as well as distrustful, framework that the famous *Constituta* of Pisa, one of the most ancient and best preserved examples of *ius proprium* in Europe,[9] were drafted, providing a privileged source to verify if, and to what extent, the interweaving of languages, cultures and ethnicities[10] really influenced the law of the *civitas pisana* and in particular its commercial law.

The survival of such ancient statutes (*Constitutum Legis*: CL and *Constitutum Usus*: CU) and the exiguity of other legal sources (in comparison, for example, to Genoa and Venice[11]) make the general problem of the relationship between rule and practice particularly evident in Pisa. It is very difficult, in fact, to state to what extent a written rule derives from a more ancient unwritten rule and it is therefore quite hard to date a law of customary origin, also considering that the statutes often focus on the controversial issues rather than on the standard mechanisms.[12]

That said, the foreword of the CU proves to be particularly useful for our purposes.[13] According to this foreword, in fact, Pisa "earned" its own customs (*suas consuetudines non scriptas habere meruit*) thanks to the "dialogue" with

8 Maria Luisa Ceccarelli Lemut, "L'uso della moneta nei documenti pisani dei secoli XI e XII", in Gabriella Garzella, Maria Luisa Ceccarelli Lemut and Bruno Casini (eds.), *Studi sugli strumenti di scambio a Pisa nel medioevo* (Pisa: Pacini, 1979), 47–83, in particular 78–83.

9 Claudia Storti, *Intorno ai costituti pisani della legge e dell'uso* (*secolo XII*) (Naples: Liguori, 1998). The *Constituta* were first edited by Francesco Bonaini in 1870: *Statuti inediti della città di Pisa dal XI al XV secolo*, vol. II (Florence: G.P. Vieusseux, 1870). Paola Vignoli has recently edited the Yale manuscript: *I costituti.* For a good overview on the very extensive historiography on the *Constituta*, see: Gernot Schmitt-Gaedke, *Die Constituta legis et usus von Pisa* (*1160*). *Gesetzbuch im Kosmos hochmittelalterlicher Rechtsgelehrtheit* (Berlin: Weißensee-Verl., 2009).

10 Lucia Battaglia Ricci and Roberta Cella (eds.), *Pisa crocevia di uomini, lingue e culture. L'età medievale*, Atti del Convegno Pisa, 25–27 ottobre 2007 (Rome: Aracne, 2009), introduction: 7.

11 Yves Renouard, *Les hommes d'affaires italiens du moyen âge* (Paris: Colin, 1968), 66. On the archive documents of medieval Pisa see: Gabriella Garzella, "Per lo studio della prima scuola di diritto a Pisa, "causidici", "iudices" e "iurisperiti" dalla fine dell'XI secolo al governo podestarile", in Gabriella Rossetti (ed.), *Legislazione e prassi istituzionale a Pisa* (*secoli XI–XIII*). *Una tradizione normativa esemplare* (Naples: Liguori, 2000), 91–103, footnote 4.

12 Lyda Favali, *Qirād islamico, commenda medievale e strategie culturali dell'Occidente* (Turin: Giappichelli, 2004), 11.

13 A Latin-Italian translation of the foreward of the CU is available in: Amerigo D'Amia, *Romanità di Pisa. Il Prologo Costituzionale* (*A. 1160*), *nucleo della sua Storia* (Pisa: Pacini, 1992), 91–92.

people from different parts of the world (*propter conversationem diversarum gentium per diversas mundi partes*), after having observed Roman law – with a touch of Lombard law – for a very long period of time[14] (*a multis retro temporibus vivendo lege romana, retentis quibusdam de lege longobarda*). On the basis of these *consuetudines*, magistrates appointed every year (*previsores*) had to judge both citizens and foreigners (*tam civibus quam advenis et peregrinis*). Our aim is to analyze which foreign words were used in the part of the CU devoted to *commenda*-like contracts, their meaning and origin, on the basis of the assumption that "words and ideas cannot move from place to place on their own. Instead, they are transferred, borrowed, and adapted by people who find them useful".[15]

2 The *Constituta Pisani* between rationalization and ideology

According to a widespread historiographical opinion, the *Constituta Pisani* entered into force on December 31st 1160.[16] Nevertheless, a prior body of Pisan laws can be dated to the 1140s,[17] while a reform of the CL took place between 1165 and 1167, after that the city had obtained, from Frederick I, a charter which stated Pisa's autonomous jurisdiction, i.e. the faculty to elect its own consuls, judges and *podestà* (chief magistrates) and the right to administer justice (6 April 1162).[18]

14 The use of Roman law in Pisa has been largely debated for a long of time. Amerigo D'Amia, for example, in 1922 wrote that it is not possible to affirm that Roman law was applied in Pisa before 1100: *Le sentenze pisane dal 1139 al 1200. Contributo allo studio della diplomatica giudiziaria e della cultura giuridica in Pisa* (Pisa: Tip. Orsolini-Prosperi, 1922), v. More recently, Chris Wickham postponed the deadline to the 1150s: *Courts and Conflicts in Twelfth-Century Tuscany* (Oxford: Oxford University Press, 2003), 119. Furthermore, already in the *Summa Qicumque vult*, Johannes Bassianus (? – 1197) said that the *pisana civitas* correctly used procedural (Roman) tools (see: Friedrich Carl von Savigny, *Geschichte des Römischen Rechts im Mittelalter*, vol. IV (Heidelberg: J.C.B. Mohr, 1850), 549–555, 553.

15 Constable, *Housing the Stranger*, 6.

16 The year 1161 according to the 'Pisan style': D'Amia, *Romanità di Pisa*, 9, footnote 1. See also: Peter Classen, *Studium und Gesellschaft im Mittelalter*, ed. by Johannes Fried (Suttgart: Hiersemann, 1983), 82–85; Gabriele Zaccagnini, "Metodi e modelli di analisi per l'edizione critica dei Costituti pisani", in Rossetti (ed.), *Legislazione e prassi istituzionale a Pisa*, 33–52, 33.

17 Enrica Salvatori, "L'espace politique e l'espace judiciaire à Pise du XIe au XIII siècle", *Rivista internazionale di diritto comune* 18 (2007), 271–282, 277. Storti, *Intorno ai Costituti*, 21.

18 Storti, *Intorno ai Costituti*, 62 ff. and 83. We know of five imperial privileges granted to Pisa. The first one is very famous: in 1081 emperor Henry IV agreed to respect the maritime customs of Pisa (*Et consuetudines, quas habent de mari sic eis observabimus, sicut illorum*

In 1156 the inhabitants of Pisa gave the task of writing two codes to a group of *sapientes* or *constitutores* ("wisemen" or "lawmakers"[19] about whom we know nothing). The first one had to collect the *leges* (i.e. Roman and Lombard laws as well as the laws enacted by the city's institutions), covering the fields of procedural law, family and inheritance law. The second one was intended to provide a written version of the local customs and in particular feudal law,[20] commercial and maritime law and also some procedural law.[21]

The legal system of medieval Pisa is famous for being heavily influenced by Roman law but this statement has to be put into perspective. On the one hand, in fact, Pisa certainly adopted Roman law very early. On the other hand, the analysis of the three most ancient surviving manuscripts of the *Constituta*[22] reveals that Pisa abandoned Lombard law, in favor of Roman law, only gradually. The first one, edited by Paola Vignoli in 2003 (the one we are examining here), dates back to the second half of the 12th century, maybe to 1186, and is now preserved in the Beinecke Library at the University of Yale. The second one, which is preserved in the Vatican Library, is dated ca. 1194, while the third

est consuetudo), see: Dietrich von Gladiss and Alfred Gawlik (eds.), *Monumenta Germaniae Historica* (MGH), *Diplomata Regum et Imperatorum Germaniae*, vol. VI.2, *Henrici IV Diplomata* (Weimar: Böhlau, 1959), n. 336, 442–443, 442; see also: Gabriella Rossetti, "Pisa e l'impero tra XI e XII secolo. Per una nuova edizione del diploma di Enrico IV ai Pisani", in Cinzio Violante (ed.), *Nobiltà e chiesa nel Medioevo e altri saggi.* Scritti in onore di G.G. Tellenbach (Rome: Jouvence, 1993), 159–182. With the second one (1162) Frederick I recognized the autonomous jurisdiction of Pisa (*Et Pisana civitas habeat plenam iurisdicionem et potestatem faciendi iusticiam*), see: Heinrich Appelt, (ed.), *MGH*, *Diplomata Regum et Imperatorum Germaniae*, vol. X.2 (Hannover: Hahn, 1979), n.356, 198–203, 199. The third one, granted by Henry VI in 1192, confirmed Frederick's privileges, see: Ludevicus Weiland (ed.), *MGH*, *Constitutiones et Acta publica Imperatorum et Regum*, vol. I (Hannover: Hahn, 1893), n. 333, 472–47. The same was done by Otto IV in 1209, see: Ludevicus Weiland (ed.), *MGH*, *Constitutiones et Acta publica Imperatorum et Regum*, vol. II (Hannover: Hahn, 1896), 37, 44–47. The last one was granted by Frederick II in 1220, see: J.-L.-A. Huillard-Bréholles, *Historia Diplomatica Friderici Secundi,* vol. II.1 (Paris: Plon, 1852, repr. Padua: Bottega d'Erasmo, 1995), 19–24.

19 The term has to be interpreted here as *constituturores legum.*

20 Peter Classen has underlined the link with the *Libri feudorum*: Classen, *Studium und Gesellschaft*, 84.

21 Pisa had three main tribunals: the *curia legis*, made of three legal experts (*iudices*); the *curia usus*, made of five judges (*provisores* or *previsores*), of whom only one had to be a *iurisperitus*; and the court of appeal, made up of five judges (*cognitores*), of whom two had to be *iurisperiti*: Peter Classen, "Kodifikation im 12. Jahrhundert: die Constituta usus et legis von Pisa", in Peter Classen (ed.), *Recht und Schrift im Mittelalter*. Vorträge und Vorschungen 23 (Sigmaringen: Thorbecke, 1977), 311–317, 311–312.

22 For an overview of the manuscripts/fragments of the *Constituta* (at least 36), see: Vignoli, *I costituti*, XXXI ff.

manuscript, the one edited by Francesco Bonaini in 1870, is dated 1233. The Yale manuscript demonstrates that, at the end of the 12th century, the most important source of the CL was still Lombard law contained in the so called *Lombarda*, with particular reference to family law.[23] Roman law became prevalent only later. In any case, the influence of Roman law on the CL is undeniable and could be explained as the result of the need for rationalization of the city's legal system, in a period of accelerated demographic and economic growth. According to Chris Wickham though, reviving a refined system of laws which would be difficult to 'absorb' was a deliberate ideological strategy of Pisa's elite: if the Bolognesi wanted only *to study* the ancient Romans, the Pisans wanted *to be* the ancient Romans.[24] At the time of its greatest expansion, in fact, the city presented itself as the 'new Rome' (or better *Roma altera*).[25] It was in Pisa that the most ancient manuscript of Justinian's Digest was preserved until 1406.[26] It was also in Pisa that jurists such as Burgundio (ca. 1110–1193)[27] and Bernardo

23 Storti, *Intorno ai Costituti*, 69 ff. The *Lombarda* (11th century) was the systematic version of the *Liber Papiensis*, which collected, in chronological order, the sources of the Lombard-Frankish law in force in the Kingdom of Italy. It was clearly a product of the so-called School of Pavia.

24 Wickham, *Courts and Conflicts*, 120.

25 This assumption is supported by different kinds of sources such as epigraphs, secular literature and hagiography. Part of the decorations of the dome, for example, i.e. pieces of marble containing ancient Roman inscriptions, had probably no other aim than that of testifying to Pisa's Roman origin, considering that marble caves of exceptional quality were certainly not too distant: Giuseppe Scalia, "'Romanitas' pisana tra XI e XII secolo. Le iscrizioni romane del duomo e la statua del console Rodolfo", *Studi Medievali* 13 (1972), 791–843. The celebration poems of the victories against the Saracens in 1087 (al-Mahdiya and Zawila) and in 1113–1115 (Balearic Islands) both compared, or better assimilated, Pisa and Rome (Giuseppe Scalia, "Il carme pisano sull'impresa contro i Saraceni del 1087", in *Studi di filologia romanza in onore di Silvio Pellegrini* (Padua: Liviana, 1971), 565–627; see also: Marc von der Höh, *Erinnerungskultur und frühe Kommune. Formen und Funktionen des Umgangs mit der Vergangenheit im hochmittelalterlichen Pisa (1050–1150)* (Berlin: Akademie Verl., 2006). Finally, the 'transfer' of the glory of Rome to Pisa, as described in the biography of Saint Bernard of Clairvaux, with reference to the visit of Pope Innocent II to Pisa in 1130 (Mauro Ronzani, "'La nuova Roma': Pisa papato e impero al tempo di San Bernardo", in Ottavio Banti and Cinzio Violante (eds.), *Momenti di storia medievale pisana. Discorsi per il giorno di S. Sisto* (Pisa: Pacini, 1991), 61–77).

26 Patrick Gilli, "Les Pandectes pisanes: fortunes et infortunes d'un texte au Moyen Âge", in Patrick Gilli (ed.), *Les élites littrées au Moyen Âge: modèles et circulation des savoirs en Méditerranée occidentale (XIIe-XVe siècles)*. Actes des séminaires du CHREMMO (Montpellier: Presses Universitaires de la Méditerranée, 2008), 233–256.

27 Peter Classen, *Burgundio von Pisa. Richter-Gesandter-Übersetzer* (Heidelberg: C. Winter, 1974).

Marangone (ca. 1110–ca. 1186)[28] lived and wrote, maybe following the framework of the almost mythical law school of Pisa, which developed, contrary to Bologna's *Alma Mater Studiorum*,[29] probably within a school of liberal arts, and not as an independent organization. The ambition of Pisa, to be considered as the 'new Rome', has been demonstrated by scholars such as Giuseppe Scalia and Mauro Ronzani[30] using a variety of sources, from architecture to literature. Chris Wickham meanwhile has focused on the ideological role of the "Romanization of Pisan law".[31]

Starting with this interpretation and shifting the attention to commercial and maritime law, could we consider the decision to write down Pisa's commercial customs the result of an ideological strategy too? If we take into account the wider context of Pisa's economic development as well as the relationship with the emperor, the idea that this decision served ideological as well as practical goals is very convincing. Pisa certainly needed to manage its demographic growth and economic wealth, as evidenced by the construction of new walls (1155) and new harbor infrastructures, not to mention the world-famous dome, baptistery and bell tower.[32] On the other hand, the relationship with Emperor Frederick I was still quite uncertain (until 1162). Therefore, it probably seemed a good idea to present to the *felicissimo atque invictissimo* ("most blissful and most invincible") emperor a list of written and clear custom-based-laws, ancient enough to be juxtaposed to the *leges*, i.e. the Lombard and Roman

28 Maria Luisa Ceccarelli Lemut, "Bernardo Marangone 'provisor' e cronista di Pisa nel XII secolo", in Rossetti (ed.), *Legislazione e prassi istituzionale a Pisa*, 181–199.

29 The only explicit reference to the teaching of law in Pisa is contained in a letter from a priest from Marseille, dated between 1124 and 1127. See for example: Garzella, "Per lo studio della prima Scuola di Diritto", 102.

30 Scalia, "'Romanitas' pisana"; Ronzani, "'La nuova Roma'"; See also: von der Höh, "Erinnerungskultur und frühe Kommune".

31 Wickham, *Courts and Conflicts*, 120.

32 Emilio Tolaini, *Le città nella storia d'Italia: Pisa* (Rome-Bari: Laterza, 1992), 51: *la nuova cinta di mura non fu dettata emotivamente* (…) *dalla calata del Barbarossa; fu invece la conseguenza della potenza raggiunta dalla città, dalle condizioni favorevoli della sua economia, dalla sua espansione demografica e edilizia; il suo tracciato fu scelto in funzione d'un piano urbanistico, e non semplicemente difensivo* ("the new city-walls were not built according to an emotional urge (…) i.e. the descent [in Italy] of Emperor Barbarossa; it was instead a consequence of the power reached by the city, of the favorable conditions of its economy, of its demographic and building expansion; its layout was chosen according to an urban plan, and not simply to defend the city". For an overview on the city's architectural development: Fabio Redi, *Pisa com'era: archeologia, urbanistica e strutture materiali* (*secoli V–XIV*) (Naples: Liguori, 1991).

laws.[33] This way, they affirmed Pisa's importance and independence from a strictly legal point of view, both by officially introducing Roman law and by providing commercial customs with an authority that only a written text could give. This interpretation has been developed by Claudia Storti, who has described the *Constituta* as the product of two forces: the "reason of the law" (*ragioni del diritto*) and the "reason of politics" (*ragioni della politica*). According to the first Pisa needed a 'book of laws', a body of fixed rules able to assure the harmony necessary to commercial development; otherwise, the "reason of politics" expressed the need to regulate the relationship with the emperor by demonstrating the dignity and legitimacy of Pisa's laws.[34] But what did the *constitutores* say precisely?

According to the foreword of the CU, the aims of the Pisans were purely practical, inspired by a sense of equity and justice. The *constitutores* claimed that Pisa's customs (*suas consuetudines non scriptas*) were influenced by contact with other populations (*propter conversationem diversarum gentium*), and that, because the judges (*previsores*) possessed different knowledge and reasoning (*ex diversitate scientiae atque intellectus*), they had been providing different solutions to equal or similar cases for a long period of time (*per diversa tempora eadem negotia atque similia aliter alii et omnino econtra quam alii iudicaverunt*). To avoid this confusion, and enable everyone to learn about Pisa's customs, they decided to write them down.[35]

If we can presume that the *consuetudines* ("customs") of the CU (or at least a large part of them) were those same maritime customs that Henry IV already promised to respect in 1081, then we have evidence of a body of customary laws eighty years before the customs were written down. Even though city-judges called *previsores* (the ones assigned to the *curia usus,* i.e. the tribunal where the

33 Marco Tangheroni, "Normativa marittima pisana. Osservazioni e confronti", in Rossetti (ed.), *Legislazione e prassi istituzionale a Pisa*, 163–180, 164.

34 Storti, *Intorno ai Costituti*, 14. See also: Gabriella Rossetti, "Le tradizioni normative in Europa: facciamo il punto", in Gabriella Rossetti (ed.), *Legislazione e prassi istituzionale nell'Europa medievale. Tradizioni normative, ordinamenti, circolazione mercantile* (*secoli XI–XV*), (Naples: Liguori, 2001), 31–63, 45.

35 *Unde Pisani qui fere pre omnibus aliis civibus iustitiam et equitatem semper observare cupierunt, consuetudines suas, quas propter conversationem quam cum diversis gentibus habuerunt et huc usque in memoriam retinuerunt, in scriptis statuerunt redigendas pro cognitione omnium eas scire volentium* ("Thus the Pisans, who, almost more than any other citizens, wished to observe justice and equality, decided to commit to the page their customs, which had evolved through contact with a diversity of peoples, and which until now had only been retained in memory, so that all those who wanted to could learn them".).

customary law was applied) are not to be found before the 1150s,[36] some scholars have supported the hypothesis that a court existed to dispense maritime/commercial justice already in the time of Henry IV's privilege.[37] In any case, the *constitutores* complained that those judges needed written laws in order to be efficient.

In synthesis, the CU already provides in its foreword an example of the influence of the encounter between merchants of different origins on the development of local customs. The *constitutores* affirmed that there was a certain degree of confusion that the CU was meant to dispel. This confusion was not due to uncertainty over the customs but rather to the ignorance of the judges. Pisan law had, in fact, already overstepped the city's boundaries both from the point of view of its development and of the subjects it addressed, creating a system which was complex and sophisticated.[38] This is evident in the long chapters devoted to partnerships, which include an institution known only too well to legal historians of the Middle Ages: the *commenda*.

3 The *Commenda* Riddle Part One: Migrating Words

Few institutions in the history of commercial law have captured the attention of so many scholars over such a long period of time as the *commenda*, also known as *collegantia, rogadia, colonna, societas, societas* or *compagnia maris*. From Levin Goldschmidt (1891) to Anja Amend-Traut (2017),[39] almost one hundred and thirty years of legal-historical research have gone by, providing such

36 Storti, *Intorno ai Costituti*, 86.

37 Roberto Celli, *Studi sui sistemi normativi delle democrazie comunali, secoli XII–XV*, vol. 1 *Pisa, Siena, Firenze* (Florence: Sansoni, 1976), 10–11.

38 *Non si trattava di usi particolari di applicazione locale perché il diritto consuetudinario pisano aveva trasceso i limiti augusti del diritto locale, perché era il prodotto di quelle "conversationes" con le genti non solo europee, ma anche di Asia e di Africa* (…) ("These were not specific uses applied at a local level because the customary law of Pisa had transcended the narrow limits of local law, because it was the product of those "dialogues" with not-only-European people, but also Asian and African (…)": Storti, *Intorno ai Costituti*, 35.

39 Levin Goldschmidt, *Universalgeschichte des Handelsrechts* (Stuttgart: Ferdinand Enke, 1891); Amend-Traut also makes reference to the 'Hanseatic version' of the *commenda*, the so-called *wedderlegginge*: Amend-Traut, "Legal Structure of Early Enterprises – from Commenda-like Arrangements to Chartered Joint-Stock Companies (Early Modern Period)", in Dave De Ruysscher, Albrecht Cordes, Serge Dauchy and Heikki Pihlajamäki (eds.), *The Company in Law and Practice: Did Size Matter?* (*Middle Ages-Nineteenth Century*) (Leiden and Boston: Brill, 2017), 63–83, 66. On the topic of company law in the Hansa area in the Middle Ages see: Albrecht Cordes, *Spätmittelalterlicher Gesellschaftshandel im Hanseraum* (Cologne-Weimar-Vienna: Böhlau, 1998), e.g. 35–36.

a variety of interpretations that retracing them gives us the opportunity to write a history of the historiography of commercial law.[40] The latest historiographical trend to have taken hold about the western European *commenda* is that it was the result of a legal transfer from the Islamic *qirad*. Some of these scholars are more prudent saying that there is not so much direct evidence but that the transfer is plausible.[41] Some of them are more assertive, claiming that the *commenda* originated in the Islamic world and was then imported to the Western world.[42] This interpretation was first developed in the framework of Islamic law scholarship[43] and was almost unthinkable for most Western scholars until the second half of the 20th century.[44] Furthermore, Lyda Favali, a comparatist who wrote an entire monograph on the relationship between Islamic *qirad* and the 'European' *commenda*, affirmed that, if *commenda*-like contracts were to be found all over the Mediterranean (and beyond, we could add[45]), it was in the statutes of Genoa, Pisa and Florence that the *commenda* had exactly the same features as the *qirad*.[46] This assumption is too intriguing not to be deepened in connection with the CU, which is, according to John

40 For an extensive overview on the historiography of the *commenda* see: Favali, *Qirād*, 2, footnote 1.

41 Favali, *Qirād*, 5.

42 Ron Harris, *The Institutional Dynamics of Early Modern Eurasian Trade* (November 3, 2008). Available at SSRN: http://ssrn.com/abstract=1294095, 7 (Accessed 20 August 2018): "Originating in Islamic law and in Middle Eastern trade practices, it was imported into 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". See also: Murat Çizakça, *A comparative evolution of business partnerships: Islamic world and Europe, with specific reference to the Ottoman Archive* (Leiden: Brill, 1996); Id., "Cross-cultural borrowing and comparative evolution of institutions between Islamic world and the West", in Simonetta Cavaciocchi (ed.), *Relazioni economiche tra Europa e mondo Islamico*, sec. XIII–XVIII (Florence: Le Monnier, 2007), vol. 2, 671–698.

43 In particular: Abraham L. Udovitch, *Partnership and Profit in Medieval Islam* (Princeton: Princeton University Press, 1970).

44 Apart from the pioneering work by Joseph Kohler (*Die Commenda im islamischen Rechte: ein Beitrag zur Geschichte des Handelsrechts* (Würzburg: Stahel, 1885), the idea of an Islamic origin of the institute was later developed and spread by Abraham L. Udovitch. See for example: "At the origin of the Western Commenda: Islam, Israel, Byzantium?", *Speculum* 37:2 (1962), 198–207.

45 "From its origins on the Arabian peninsula the *commenda* traveled both west and east. It traveled with the rapidly expanding Islam to Iraq and Syria, to Palestine and Egypt and to the Maghreb", and "The Jewish traders traveling from Cairo to the Indian Ocean ports may have served as the exporter of this institution to India". Harris, *The Institutional Dynamics,* 15–16 and 17.

46 Favali, *Qirād*, 237.

Pryor, the most ancient statutory law dealing with the *commenda* contract, as well as the text that influenced *commenda*-regulation both in the statutes of Marseilles (1253) and the *Consolat del mar* of Barcelona.[47]

As was previously said, most Western legal historians refused to acknowledge any oriental influence on the genesis of the institution for a long period of time, some considering the *commenda* a purely medieval invention, some finding its precedents in Greek and Roman law, through the *foenus nauticum* or the Byzantine χρεωκοινωνία. Certainly, it is very difficult to establish if the similarities between ancient institutions are due to interactions over the course of history or are solely the result of similar answers for similar needs. A simple resemblance is not sufficient to demonstrate that one derives from the other but we can try to analyze the issue at hand using three criteria: by verifying if and when foreign merchants came into contact with the Pisans, what were the exact characters of the *commenda*-like contracts in the CU and if a 'loan' of foreign technical words can be found in the commercial law of 12th century Pisa.

In its unilateral form, the *commenda* worked as follows: a traveling party (a merchant called *tractator, commendatarius* or *debtor*) received from an investor (called *stans, commendator* or *capitaneus*) a certain amount of money or goods in order to use them to purchase goods through trade and to cover any travel-related costs. The traveler's aim was to overcome his lack of capital, and make a profit managing the business, without any direct supervision of the capital-investor or, in some cases, according to general guidelines stated in the contract. At the end of the voyage, the capital was given back to the *stans* (who 'stayed' at home) and the profits were split between the two parties (usually not in equal parts: typically, 1/4 to the labor-investor and 3/4 to the capital-investor). The roles of the two parties were, in theory, quite clear: the *stans* provided the capital and did not take part in the voyage; the merchant invested only his labor rather than his money. All the losses were born by the *stans*. In other words, "The penniless merchant used his expertise while benefiting from the investment of the capital holder, and vice versa".[48]

In the bilateral form of this agreement that we find in Pisa, however, the *stans* contributed 2/3 and the *tractator* 1/3, with an equal share in the profits and a proportionate liability for losses.

47 "The statutes of Marseilles of 1253 on *commendae* were very largely borrowed almost verbatim from the Pisan *Constitutum usus* of 1156, and the *Consolat del mar* of Barcelona also seems to have been heavily indebted to the Pisan text": John Pryor, "Mediterranean Commerce in the Middle Ages: A Voyage under Contract of Commenda", *Viator*, 14 (1983), 133–194, 134, repr. in*: Commerce, Shipping and Naval Warfare in the Medieval Mediterranean* (London: Variorum Reprints, 1987).

48 Amend-Traut, "Legal structures of Early Enterprises", 66.

The latest historiography on the *commenda* and its origins is still dominated by the writings of two scholars: Abraham L. Udovitch and John Pryor. If the first "argued forcefully and repeatedly that the source most likely to have contributed to the peculiar characteristics of the *commenda* was the Islamic *qirad* contract",[49] the second speculated that the *commenda* may be better understood in the framework of Roman and Byzantine institutions, even though he did not reject Udovitch's conclusions and declared, at the very beginning of one of his contributions on the topic, that "the origins of the medieval *commenda* contract are unknowable simply because the contract was the product of an amalgamation of many different traditions".[50] The first author assumed that the 'real' *commenda* was only the unilateral one, the second one that unilateral and bilateral *commenda* were only two forms of the same institution. Here we will take into account the second hypothesis, because in the CU itself the term *compagnia* referred to the unilateral *commenda* while the term *societas* was used when referring to the bilateral *commenda.* When both forms were taken into account, the word *societas* was used and this means that the two forms (unilateral and bilateral *commenda*) were conceived as variations within a unique institution.[51]

We will briefly go through six possible 'ancestors' of the *commenda*, first analyzing the sources which might suggest a linguistic link (the Roman *societas* of labor and capital, the Roman *mandatum*, the Roman *foenus nauticum*, the Byzantine χρεωκοινωνία) and then deepening the analysis of institutions developed outside the Roman/Byzantine cultures (the Jewish '*isqa* and the Islamic *qirad*).

3.1 *Societas* (of Labor and Capital)

According to Pryor, the Roman *societas* of labor and capital is a likely candidate. In this partnership, one partner provided capital and the other labor. This kind of *societas* was regulated both in the *Codex*[52] and in the *Institutiones*[53] and was considered valid when the amount of labor was comparable to the amount of capital. Nevertheless, Ulpian foresaw the possibility of an unequal division of profits in case one partner gave more *pecuniae vel operae* ("money or labor") than the other.[54] Furthermore, it has been underlined that "the mere fact that in the Middle Ages the *commenda* was regarded as a form of *societas*

49 Pryor, *The Origins*, 5

50 Ibid.

51 Guido Astuti, *Origini e svolgimento storico della commenda fino al secolo XIII* (Turin: Lattes, 1933), 19 ff.; CU, XXII.

52 C. 4.37.1.

53 Inst. 3.25.2.

54 D. 17.2.5.1.

in statutory law would be enough to suggest that its origins might lie in the Roman *societas* of labor and capital even without further evidence".[55] However, there are many differences too. The first, very evident one, is that the *commenda* was a real contract (the obligation of the *tractator* began in the moment in which he took possession of the *stans'* capital) whereas the Roman *societas* was typically a consensual contract. Furthermore, in the *commenda,* the *tractator* did not become owner of the capital (while in the *societas,* as a general rule, the capital became common) and the *tractator* was independent whilst carrying out business. Finally, the sharing of the profits between the *stans* and the *tractator* was widely standardized whereas in the *societas* the profits were split in two or divided according to the agreement of the partners.

3.2 *Mandatum*

An institution that has some linguistic links, in addition to mere juridical ones, to the *commenda,* is the *mandatum* in Roman law. According to this contract, a person (*mandatarius*), promised to do something at the request of another (*mandator*), who had to indemnify him against losses. The problem is that this contract was gratuitous and differed therefore in its very economic function from the *commenda*, even though it has been speculated that the very word *commenda* derived from the union of *cum* and *mandare.*[56] Anyway, this is not the case in Pisa where, as we have seen, this institution was called *societas* or *compagnia*.

3.3 *Foenus nauticum*

The third candidate coming from the Roman world is the *foenus nauticum*, the sea loan, probably imported from Greece at the end of the Republican period.[57] It was the favorite candidate of Guido Astuti and the only one that John Pryor decisively rejected. This contract was, as the very name indicates, typical of maritime enterprises. It was contracted, like the *commenda*, for the duration of a voyage and the party supplying the capital was responsible for any losses occurred at sea. The main differences here are that the investor received a fixed percentage return (which had, in theory, no limits) on his capital (and not a share in the profit) and that he was liable only for losses occurring at sea. On

55 Pryor, *The Origins*, 22.

56 André Sayous, "Les methods commerciales de Barcelone au XIIIe siècle, d'aprés des documents inédits des archives de sa cathédrale", *Estudis Universtaris Catalans* 16 (1931), 155–198, 165.

57 Favali, *Qirād*, 131, footnote 127.

the other hand, the idea of a fixed return seems to be present in the CU too. In the chapter called *dare ad proficuum maris*[58] the *stans* delivered a sum of money (called *havere*) for a sea venture, assuming all the risks, in order to obtain a fixed payment which could be agreed on by the parties concerned[59] or established according to customary fees written down in the CU itself.[60] However, in the case of failure of the venture, the labor-investor could reach an agreement to pay less than the agreed payment, proportionally to the real profit. This contract has been interpreted as a hybrid between the *foenus nauticum* and the *commenda*, providing evidence (according for example to Guido Astuti) of the strong relationship between the first one and the second one. The linguistic link is not evident, unless we consider the presence of words of Greek origin in the CU a proof of a link with the 'Greek' *foenus nauticum*. At the dawn of the new millennium, this connection seems to be much stronger with reference to an institution used in Byzantium in the framework of maritime commerce: the χρεωκοινωνία.

3.4 *Χρεωκοινωνία*

The name χρεωκοινωνία derives from the union of the terms χρέος ("debt") and κοινωνία ("partnership"), in some ways a reminder of the terms used both in Venice and Amalfi to refer to *stans* and *tractator*, the first one called "creditor" and the second one "debtor".[61] Unfortunately, what we know about these institutions derives only from a brief text in the Rhodian Sea Law, which is dated the 7th or 8th century.[62] According to this text, the χρεωκοινωνία was a partnership in which one partner contributed capital (in this case gold and silver) and the other labor for the duration of a voyage. This partnership had a preestablished duration: if losses occurred at sea after the end of the partnership, *only* the debtor was liable. If losses occurred before the end of the partnership, then both creditor and debtor were liable proportionately to the agreed shares in the profit. Certainly, there are important differences: there are no fixed shares of the profit and the labor-investor was considered liable for losses of capital. Nevertheless, context and language can help us further. It should be underlined that the first 'European' document which refers to a *commenda*-like

58 CU, XXIV.

59 Ibid.

60 CU, XXIV and XXV.

61 Pryor, *The Origins*, 14.

62 The reference to the institution in the *Ecloga* of Leo III the Isaurian (first half of the 8th century) was not considered relevant by Pryor (*The Origins*, 25). He thought in fact that the text just referred to the *societas* of labor and capital as described in C. 4.37.1.

contract comes from Venice, where it was called *collegantia*, and is dated 976.[63] Venice was officially dominated by Byzantium until the 9th century and maintained with the empire strong commercial relationships. Furthermore, Venice is considered to be the most active commercial center in the 10th and 11th century, not only in Italy but in the whole Western world.[64] But there is something more with direct reference to the CU. In the chapters devoted to the *societates* in the CU, only two non-Latin words are constantly used: *hentica* (= ἐνθήκαι) and *tassedium* (= ταξείδιον). These words of Greek origin seem to be used in particular when referring to the sea ventures, *hentica* meaning "fund" and *tassedium* meaning "commercial voyage".[65] In chap. XXII of the CU (*De societate facta inter extraneos*, "Of society made between strangers") the word *hentica* is used sixteen times,[66] the word *tassedium* twenty-three times. The proposed translation matches Du Cange's *Glossarium ad scriptores mediae et infimae Graecitatis*,[67] where ἐνθήκαι is translated with the Latin word *merces* ("payment" or "profit") or even with *pecunia commerciis destinata* ("money destined for commerce").[68] Otherwise, the first translation of ταξείδιον according to Du Cange is *expeditio bellica* ("military expedition"), which was the meaning in classical Greek, but the related verb ταξείδεύειν could be translated as *navigare* ("to sail") and therefore it could mean "voyage by sea".[69] Furthermore, Robert Lopez and Irving Reymond, when explaining that the Byzantines used *tassedium* for "traveling", also underlined that "Venetian documents of the eleventh century adopted the word *taxedion* specifically for business

63 Julius Ficker, *Forschungen zur Reichs-und Rechtsgeschichte Italiens*, vol. 4: *Urkunden zur Reichs-und Rechtsgeschichte Italiens* (Innsbruck: Wagner, 1874), n. 29, 38–41, 40.

64 Renouard, *Les hommes d'affaires*, 28.

65 This is the translation also proposed in the English version of Max Weber's *Zur Geschichte der Handelsgesellschaften im Mittelalter: nach südeuropäischen Quellen* (Stuttgart: Enke, 1889): Max Weber and Lutz Kaelber, *The history of commercial partnership in the Middle Ages* (Lanham: Rowman & Littlefield: 2003), e.g. 129 and 132.

66 E.g. with reference to the loss of the investment: CU, XXII; or to the shares in the profits and losses in the case of the bilateral *commenda*: CU, XXII.

67 Charles du Fresne Du Cange, *Glossarium ad scriptores mediae et infimae Graecitatis* (Lugduni, 1688, repr. Graz: Akademische Druck, 1958), 386; see also: Jean Marie Pardessus, *Collection de lois maritimes antérieures au XVIIIe siècle*, vol. IV (Paris: Imprimerie Royale, 1837), 569, footnote 4.

68 The Greek glossarium refers to the word *Entheca* in the Latin one, also published by Du Cange: *Glossarium ad scriptores mediae et infimae Latinitatis* (Lutetiae Parisorum: 1678, repr. Graz: Akademische Druck, 1954 of the 1883–1887 edition). In this last one (page 271), we can find ἐνθήκη also translated as *pecunia commerciis destinata.*

69 Du Cange, *Glossarium ad scriptores mediae et infimae Graecitatis*, 1528.

ventures of the *collegantia* type".[70] Therefore, these specific words could certainly testify to a special link with the Byzantine world, maybe via Venice.

Up until now this linguistic connection had been almost ignored, with the important exception of Guido Astuti.[71] The χρεωκοινωνία matches all our criteria: the commercial relationships, a certain linguistic link and many similarities with the *commenda*, providing, according to the different interpretations, the connecting link between the *societas* of labor and capital and the *commenda*;[72] or between the *foenus nauticum* and the *commenda*. Nevertheless, the differences are important too: there is no reference to a bilateral investment because the labor-investor was always considered liable for losses (in the case of them occurring at sea, he would have to give back the entire capital, if they occurred after the end of the partnership, he would be responsible for a part of them). As in other cases, some features of the *commenda* are present, some others are missing.

4 The *Commenda* Riddle Part Two: Migrating Merchants

If we leave the area of the possible connections with Roman/Byzantine law traditions, the latest historiographical trends lead us to the Middle East and North Africa, towards the Jewish *'isqa* and the Islamic *qirad*.

4.1 *'Isqa*

The *'isqa* contract is mentioned in many sources of Jewish law from the Middle Ages: the Babylonian *Talmud*, the *Mishneh Torah*, the *responsa* of Maimonides and the documents of the Cairo Geniza.[73] In this contract (which was useful

70 Robert S. Lopez and Irving W. Raymond, *Medieval trade in the Mediterranean world*, 1st ed. 1955 (New York: Columbia University Press, 1990), 21, footnote 17.

71 Astuti, *Origini,* 130.

72 Pryor, *The Origins*, 37.

73 The Babylonian *Talmud* is a collection of authoritative interpretations and commentaries on the non-written Jewish law consolidated in The *Mishnah Torah* was completed, around 1178, by the famous scholar, jurist and physician Moses Maimonides. The Cairo Geniza is the 'storage' of an Egyptian synagogue where thousands of documents, dated between the 10th and 13th century, have been accidentally discovered in 1889–90. They were 'buried' instead of being destroyed because, according to a Jewish custom, pages of Hebrew script containing the name of God should not be destroyed by human hands. Favali, *Qirad*, 119 ff. For an overview of the most important sources of Jewish law, as well as of the precious documents of the Cairo Geniza see this volume: Mark Cohen, "Maimonides on Commercial Agency Law: Migrating Words and Migrating Custom among the Geniza Merchants".

for avoiding the prohibition of usury as were both the *commenda* and the *qirad*) one partner (*malveh*) provided capital, the other one (*loveh*) labor. Half of the capital was regarded as an interest-free loan, which had to be given back to the investor, whereas the other half was considered to be held in trust and given back to the investor with a share of the profit made on it. According to the Talmud, the two parties shared profits and losses according to two options: the investor received half of the profit and bore 2/3 of the losses, otherwise he received 1/3 of the profit and bore a half of the losses. Conversely, the *Mishneh Torah* foresaw all possible combinations but only if the labor-investor obtained more profits than losses.[74] If the capital was lost because of robbery or fortuitous events, then usually the investor assumed the risks. From the *responsa* of Maimonides and from the documents of the Geniza, it appears evident that the Jewish merchants of the 12th and 13th century distinguished between a *qirad* according to Islamic law and a *qirad* (or *'isqa*) according to Jewish law and that the first one was in much more frequent use. In the first case the labor-investor was not liable; in the second case he retained some liability for loss of capital. Udovitch argued that because in the *'isqa* the labor-investor retained some liability the *commenda* could not have evolved from it. Otherwise, most scholars today agree that the *commenda* could be unilateral or bilateral (which is certainly the case in Pisa), and in the second case the labor-investor participated in both profits and losses.

Contacts with Jewish merchants would certainly have occurred, both in the Middle East and North Africa, whilst not forgetting the presence of a Jewish community in Pisa itself, which was established as far back as the second half of the 12th century, while persons *ex genere ebrerorum* (i.e. of Jewish origin) were certainly living in neighboring cities such as Lucca as early as the 9th century.[75] The *'isqa* has been excluded from the list of possible 'ancestors' because it assigned some degree of liability to the labor-investor in the case of losses. As we have seen, however, in the bilateral *commenda* this was possible too. Furthermore, the most ancient documents of the Cairo Geniza related to the *'isqa* date back to the first decades of the 11th century,[76] i.e. even after the first mention of the Venetian *collegantia* (second half of the 10th century). Otherwise, the Islamic *qirad* certainly developed in the context of the pre-Islamic

74 Favali, *Qirad*, 121.

75 Paolo Orsucci and Chiara Giannotti, *Comunità ebraica di Pisa: millecentocinquantanni: un nuovo ritratto di famiglia: ebrei ed ebraismo nelle province di Pisa e Lucca (859–2009)* (Ospedaletto, Pisa: Pacini, 2010).

76 See for example: Harris, *The Institutional Dynamics*, 17.

Arabian caravan trade as early as the 6th century and is, according to the most recent historiography, our strongest candidate.

4.2 *Qirad*

The first traces of an Islamic institution called *qirad, mudaraba* or *muqarada* date back to the 6th century but it was with the spread of Islam that it acquired its definitive features, and was probably known to Muhammad himself.[77] This institution proves to be very similar to the *commenda*, which appeared in Europe in the 10th century, developed during the whole 11th century and reached its widest diffusion during the 12th and 13th centuries. They had both structure (in its basic features) and function in common: both *qirad* and *commenda* provided a tool for the rich representatives of the elite to invest their money and make a profit without being directly involved in the business of making that money and gave the merchants the financial means to travel and trade, whilst limiting their responsibility for the invested capital. Typically, the relationship between the *stans* and the *tractator*, who were separate most of the time, was based on mutual trust and good faith, exactly like in the *qirad.*[78]

Certainly Arab and Pisan merchants came into contact at the dawn of the new millennium. Pisa played an important role in the First Crusade (1099) and profited from the voyages towards the Holy Land even going so far as to establish commercial settlements in Syria, Lebanon and Palestine. Pisan merchants could be found around the whole Mediterranean area at the time of the drafting of the *Constituta Pisani*, and there was a constant presence of Muslims in Pisa described in numerous documents of the time throughout the 12th century.[79] Apart from the "sea monsters" described by Donizo, which could refer not only to persons but also to ships, another monk, this time Icelandic (Nikolàs Bergsson), wrote, describing his voyage in Italy around 1150, that he met some Muslims in Pisa.[80] Furthermore, art history provides useful information too. It is certain, in fact, that no other city received such a quantity of Islamic ceramics,

77 According to the tradition, Muhammad took part in caravan trade towards Syria and other countries, an activity that he continued also after having met Khadījia, his first wife, who, at the time they met, was looking for someone to send with the caravans to Syria to deal with purchasing. A kind of enterprise that has been interpreted as an example of *qirad* (Favali, *Qirād,* 20, footnote 6).

78 Pryor, "Mediterranean", 135.

79 See Marco Tangheroni, "Fonti e problemi della storia del commercio mediterraneo nei secoli XI–XIV", in Sauro Gelichi (ed.), *Ceramiche, città e commerci nell'Italia tardomedievale*, Ravello 3–4 maggio 1993 (Mantova: Società archeologica padana, 1998), 18.

80 Marco Scovazzi, "Il viaggio in Italia del Monaco islandese Nikolas", *Nuova Rivista Storica* 51 (1967), 358–362.

and for such a long period, as Pisa did; that Islamic artisans (from Andalusia and the Balearic islands) moved to Pisa importing the technical skills for the production of fine majolica;[81] that Islamic models influenced the decoration of the Piazza di Pisa.[82] These facts confirm the strong relationships, not only commercial,[83] but also artistic and cultural, between Arabs and Pisans at the time in which the *sapientes* wrote the chapters of the CU devoted to partnerships.[84] If more proof were needed, just a few decades later the famous Pisan mathematician Leonardo Fibonacci (ca. 1175–ca. 1235) introduced in Europe Arabic numerals after having come into contact with Arab scholars in Bugia (now Algeria), where he traveled for commercial purposes.[85]

But what are the similarities and differences between *qirad* and *commenda* exactly? If we refer to the archetypal unilateral form, the similarities are evident: both contracts were characterized by an exchange of performances; the capital-investor provided the funds and the merchant the work; in both cases only the capital-investor was liable (and only up to the amount of the capital invested) toward third parties and remained the sole owner of the capital even after he had given it to the labor-investor, who was in charge of conducting the business only from the moment in which he took possession of the capital. At the end of the voyage, the capital was given back to the investor and the profits were divided. The differences seem to be less trenchant: the prohibition, in the *qirad*, of any interference of the capital-investor in the activities of the labor-investor, for example, or the fact that in the *qirad* the investment consisted of money, not goods. But one difference seems to be incisive and is evident in the

81 Graziella Berti, "Pisa: uno dei primi centri del Mediterraneo non islamizzato che acquisirono la tecnica per produrre "maioliche" nei primi decenni del secolo XIII", in Battaglia Ricci and Cella (eds.), *Pisa crocevia di uomini*, 337–358.

82 Antonino Caleca, "Artisti a Pisa: un duomo, una piazza, una città", in Battaglia Ricci and Cella (eds.), *Pisa crocevia di uomini*, 307–322.

83 See also the numerous treatises: Amari, *I diplomi arabi*.

84 In the CU, companies (*societates*) were distinguished according to the relationship between the *socii* and the place in which the company was intended to operate. The first kind of distinction (personal) was between family companies (XXI: *De societate inter patrem et filium et inter fratres facta*) and companies created by strangers (XXII: *De societate inter extraneos facta*); the second distinction (geographical) was between companies destined to activities on the mainland (XXIII: *De compagnia de terra* and XXVI: *De his que dantur ad proficuum de terra in botteca vel alio loco*) and in the sea (XXIV: *De his que dantur ad proficuum maris*; XXV: *De constitutione facta de prode maris non nominato*). These are very long and detailed chapters, evidently the result of the concrete commercial activities and of the early development of a legal culture in Pisa.

85 Marco Tangheroni, "Fibonacci, Pisa e il Mediterraneo", in Marcello Morelli and Marco Tangheroni (eds.), *Leonardo Fibonacci: il tempo, le opere, l'eredità scientifica* (Pisa: Pacini, 1994), 13–34.

CU: the *qirad* could not be bilateral.[86] On the contrary, in Pisa we have both forms: the *societas maris* and the *compagnia*. If we consider the three criteria proposed to verify the different hypothesis, the *qirad* meets two of them: Arab merchants certainly came into contact with the Pisans and the *qirad* really resembles the (unilateral) *commenda* in many respects. However, no 'loan' of technical words from the Arabic is to be found in the CU, certainly not in the chapters devoted to partnerships.

5 Conclusion

Recent historical research has analyzed the encounter, over the course of history, of Muslim, Jewish and Christian "cultural" or "cross-cultural brokers", with particular focus on the Medieval Mediterranean.[87] Mechanisms of interreligious contacts, cross-fertilization and communication have been studied through the sources provided by people living in a cultural environment different from their own: diplomatic envoys and scholars, artists and translators, religious experts and missionaries. Beside them, merchants have been defined "latent brokers", i.e. agents whose impact on another culture was the by-product of an activity that had other aims. Thus, also slaves, prisoners, mercenaries and pilgrims have been defined as "unintentional brokers".[88]

Pisa was certainly a crossroads of cultures but we cannot forget that "in the Medieval Mediterranean, communication and dialogue were rarely aimed at the understanding or approval of cultural differences – no matter how desirable this might be nowadays".[89] The foreword of the CU raises a lot of expectations but, unfortunately, the analysis of the text, in particular of the chapters devoted to commercial partnerships, are quite disappointing if, that is, you are

86 Nevertheless, the bilateral *qirad* is mentioned too, for example in a document dated 1076: Abraham L. Udovitch, "Theory and practice of Islamic law: Some evidence from the Geniza", *Studia Islamica* 32 (1970), 289–303.

87 On the topic see: Francesca Trivellato, *The Familiarity of Strangers. The Sephardic Diaspora, Livorno, and Cross-Cultural Trade in the Early Modern Period* (New Haven and London: Yale University Press, 2009), in particular the introduction. This very successful book has been recenty translated in Italian: Francesca Trivellato, *Il commercio interculturale. La diaspora sefardita, Livorno e i traffici globali in età moderna* (Roma: Viella, 2016).

See also, for , the EU funded research project PIMIC (Power and Institutions in Medieval Islam and Christendom): http://pimic.eu/, accessed 30 August 2018.

88 Marc Van der Höh, Nikolas Jaspert and Jenny Rahel Oesterle (eds.), *Cultural Brokers at Mediterranean Courts in the Middle Ages* (Paderborn: Ferdinand Schöningh, 2013), 22–23.

89 Ibid. and Trivellato, *The Familiarity*, 17.

looking for explicit evidences of the "dialogue" between Pisan merchants and other people.

According to the 'migrating words' hypothesis, the *commenda* in the CU seems to be linked, as we have seen, to the Byzantine world and therefore to the χρεωκοινωνία, which seems to be, by its very structure, a more likely candidate for the role of 'ancestor' of the *commenda* than the *foenus nauticum*, which, moreover, survived as an autonomous institution for the whole of the Middle Ages. The second hypothesis is that of the 'migrating merchants' which examines whether the *commenda* could have come from the Islamic *qirad*, a transfer that could have occurred in the Middle East at the time of the first and second Crusades[90] or via Pisa's relationships with North Africa, Spain or even Sicily. This hypothesis is weakened, in Pisa, by the strong role played by the bilateral *commenda* (*societas maris*) and by the presence, in the CU, of technical words of Greek origin. To sum up, we cannot be sure of a link with the χρεωκοινωνία because of the lack of sources and we cannot be sure of a link with the *qirad* because of the importance, in Pisa, of the bilateral style *commenda*.

Nevertheless, we cannot forget how important the ideological element in the *Constituta Pisani* was. Language, certainly one of the most important vehicles of national identity, was deployed to mirror the national identity that the Pisans desired. The legal texts of the 'new Rome' were of course written in Latin, "since antiquity and all through the Middle Ages the legal language par excellence".[91] Some words were taken from Lombard law, some others from Greek (the language spoken in Constantinople, the language known and translated by Burgundio of Pisa) but not from Arabic. If we interpret the CU in this framework, the *sapientes* in charge of writing the text were learned people who had a perfect grasp of the significance of their work. The point in question is whether we consider more prevalent the practical goal of the CU (as it was described in its foreword) or the ideological meaning of this very ancient statute. If the first interpretation prevails, then the use of words of Greek origin meaningfully reveals that this was the language used by merchants in Pisa, demonstrating a privileged link with the Byzantine rather than with the Islamic world. On the other hand, taking into account the hypothesis of the CU as the result of a precise political strategy, words other than those of Latin, Lombard and Greek origin could not be admitted without compromising the power politics of the time; thus putting into perspective the value of words

90 Harris, *The Institutional Dynamics*, 16.

91 In this volume: Albrecht Cordes, "The Language of the Law. The Lübeck Law Codes (ca. 1224–1642)".

such as *hentica* and *tassedium*. According to Guido Cifoletti, the Mediterranean Lingua Franca was a pidgin language created by Maghrebi (or Turkish) people in the modern era to avoid speaking Italian, the "language of the Pope".[92] It could have been the same, in some way, for the Pisans of the 12th century: they had commercial relationships with the Arabs and were influenced by their institutions but none of the words used by the "sea monsters" would be allowed to soil the coasts of Pisa or its all important statutes.[93]

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92 See in this volume: Guido Cifoletti, "Lingua Franca and Migrations".

93 See also: Giuseppe Scalia, "Contributi Pisani alla lotta anti-islamica nel Mediterraneo centro-occidentale durante il secolo IX e nei primi del XII", *Anuario de estudios medievales* 10 (1980), 135–144.

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CHAPTER 3

'Migrating Seamen, Migrating Laws'?

An Historiographical Genealogy of Seamen's Employment and States' Jurisdiction in the Early Modern Mediterranean

Maria Fusaro

In May 1646 the English ship *Margaret Constant* arrived in Venice.[1] Like all foreign ships she did not dock in the *Bacino* of St. Mark, but instead in the small but heaving harbour of Malamocco, situated on the central of the three channels connecting the Venetian lagoon with the Adriatic Sea at the southern end of the Lido island. Her cargo was unloaded and the ship had some recaulking done in nearby Poveglia. Once this work was completed, 26 seamen demanded two months of their salaries in arrears, which Captain John Bondoch had promised them on arrival in Venice and, on his refusal, they abandoned ship. In the following days the dialogue between captain and crew broke down entirely; when the troops of the *Podestà* of Malamocco intervened to try and defuse the situation, a fight involving firearms erupted and caused the death of one of the seamen. Even by the standards of Malamocco, a notoriously rough place, this was an exceptional outburst of violence, and the Venetian authorities swiftly moved in to investigate. The seamen, at this point locked in the local keep, denounced the captain for breach of contract, claiming he had first promised and then refused to pay two months' worth of their wages in arrears.

Throughout June the two parties fought in the Venetian courts. Due to the severity of the episode, and the complex mix of civil and criminal charges

1 The original research for this essay was conducted thanks to funding from the European Research Council under the European Union's Seventh Framework Programme (FP7/2007–2013)/ERC Grant agreement No. 284340: LUPE – *Sailing into Modernity: Comparative Perspectives on the Sixteenth and Seventeenth Century European Economic Transition*. Further work was done when affiliated with another ERC project (FP7/2007–2013)/ERC Grant agreement No. 295868: ConfigMed – *Mediterranean reconfigurations. Intercultural trade, commercial litigation, and legal pluralism, XVth–XIXth centuries*.

I wish to thank Albrecht Cordes and Stefania Gialdroni for their invitation to participate in the workshop "**Migrating Words, Migrating Merchants: Migrating Law**" (Frankfurt, September 2016), and all other participants for stimulating questions and comments. I also would like to thank Guido Rossi and Francesca Trivellato for their comments and criticism to an earlier version of this essay. The usual disclaimers apply.

involved, the case was delegated to one of the highest courts of the Republic, the *Avogaria di Comun*,[2] and it is for this reason that, rather exceptionally, two complete trials – a civil and a criminal one – have survived.[3] The defence of the captain was firmly centred on justifying his actions by reiterating English usage regarding the payment of wages:

> It is the fixed and unalterable usage [in England], that on signing up sailors leave the first five or six months' pay in the Captain's hands as a guarantee of continued service, and they cannot start receiving pay beforehand.[4]

On 28 June, however, Bondoch was condemned in a civil court to pay the sailors' full wages up to that day or, if they decided to come back on the ship, the equivalent of just the two months he had promised them, so they could also pay off the debts they had been running in town in the intervening time. In the criminal trial he was absolved, the Venetian court arguing, somehow in contradiction to the position held during the civil trial proceedings, that his acts were committed with the intention of preserving peace in the harbour, although I cannot help but think that the fact that he had just been transporting – for free – biscuit (*biscotto*) to the Venetian Navy (*Armata*), at that time engaged against the Ottomans in the waters of Crete, might have had some influence on the court's decision.[5]

On the following 4 July the Venetian Senate promulgated a decree allowing foreign sailors to resort to the Republic's tribunals only to force their captains to respect the clauses of the original contract and the laws of their own country of origin. This was not carried out in practice, however, and until the end of the century Venetian courts continued to hear similar cases, notwithstanding the frequent republication of this prohibition.

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2 On the role of the *Avogaria* within the Venetian government see Cristina Setti, "La terza parte a Venezia: l'Avogaria di Comun tra politica e prassi quotidiana (secoli XVI–XVIII)", *Acta Histriae* 22 (2014), 127–144.

3 Archivio di Stato di Venezia (henceforth ASV), *Avogaria di Comun*, *Civile*, busta (b.) 276, fascicolo (fasc.) 17; ASV, *Avogaria di Comun*, *Penale*, b. 353, fasc. 21.

4 ASV, *Avogaria di Comun*, *Penale*, b. 353, fasc. 21, carte non numerate (cc.n.n.) (16 June 1646); on this rule see also Richard Blakemore, "The Legal World of English Sailors, *c.*1575–*c.*1729", in Maria Fusaro et al. (eds.), *Law, Labour and Empire: Comparative Perspectives on Seafarers, c. 1500–1800* (Basingstoke: Palgrave Macmillan, 2015), 100–120. All translations of original documents are mine.

5 ASV, *Senato Mar*, filza (f.) 385, cc.n.n. (28 June 1646).

These two trials were preserved as they contributed to the development of Venetian law, becoming the basis of substantial jurisdictional reforms regarding foreigners' ability to sue in the Republic's courts of justice. It is important to underline here how, within the idiosyncratic Venetian legal system, 'precedent' played a far more important role than in other continental systems; from this perspective therefore it is rather comparable with English 'common law'.[6] However, I would argue that the importance of this case went well beyond Venice, and it should be considered as marking an important stage in the development of European international commercial and private law.

The trials of the *Margaret Constant* provide us with a privileged view into the social, economic and political implications of maritime wage controversies. I have discussed these in detail elsewhere,[7] here I just want to start this essay by briefly focussing on one particular aspect of it: the differing points made by the English captain in his defence, and by the Venetian magistrates in their judgment. Bondoch focussed on the 'laws and customs' of England regarding seamen wages' disbursement, which he described in grossly simplified terms compared to the actual situation, a version which had the full support of other captains and merchants of the local English mercantile community in the testimonies they provided for the trials.[8] However, the Venetian magistrates did not question the nature of these English 'laws and customs', for them the crucial point did not lie in these or in their application, but on Bondoch breaking the promise to actually disburse his crew the sum equivalent of two months of wages, and on his attempts to stop his crewmen from accessing the courts of the Republic to enforce this promise. For the *Avogadori di Comun* his culpability was clear:

> You have been the cause and root of this evil, and if you had satisfied them of rightly owned wages, as you should have done, and had actually promised them; and if you had not lied about this to the *Camera*

6 More details in: Maria Fusaro, "Politics of justice/Politics of trade: foreign merchants and the administration of justice from the records of Venice's *Giudici del Forestier*", *Mélanges de l'École française de Rome*, MEFRIM 126/1 (2014), 139–160.

7 Maria Fusaro, "The Invasion of Northern litigants: English and Dutch seamen in Mediterranean Courts of Law", in Maria Fusaro et al. (eds.), *Law, Labour and Empire*, 21–42; and in my forthcoming *The Making of a Global Labour Market, 1573–1729: Maritime Law and the Political Economy of the Early Modern Mediterranean*.

8 ASV, *Avogaria di Comun, Penale*, b. 353, fasc. 21, (6 June 1646); on this date three English captains and two merchants testified that wage payment usage was that described by Bondoch in his own declaration. On the uncertainty of the English rules regarding wage disbursement see Fusaro "The Invasion of Northern litigants".

> *dell'Armamento* about the unfolding of events in the run up to their abandonment of the ship, none of these troubles would have happened [the riot in Malamocco], and therefore you are culpable…[9]

The crew of the *Margaret Constant* appeared to have been fully made up of Englishmen, something rather rare in the seventeenth century Mediterranean, so in this particular case there was no issue about the existence of clashing national usages or about the application of different agreements. The issues at the core of this controversy were two: maintaining one's promise and not hindering access to justice. The reason why the case of the *Margaret Constant* should matter deeply to us is because it highlights the existence of two rather different attitudes towards the law, that it to say, of two different conceptions of justice in Venice and England.

From the last quarter of the sixteenth century Northern – English and 'Netherlandish'[10] – shipping had entered the Mediterranean, and quickly established themselves as important economic players in this area. This phenomenon, famously described by Fernard Braudel as a veritable 'Northern Invasion',[11] was for a long time understood in simple 'national' terms, assuming that these Northern ships were simply the expression of the expansion of their national economies. However, the documentation found in Mediterranean courts of law tells a less linear and rather more complex story, as what emerges is a maritime sector characterized by a considerable mix of capital investment and usually also by multi-national crews.

In other words, the Northern Invasion was neither a linear nor a uniform process, and its complexity has been severely underplayed by the classic narrative which linked it to a swift Northern takeover of Southern European economies. Over the last twenty years my research has focussed on delving deep into this phenomenon to try and understand the precise practical modalities of this transition. The investigation of the differences in traditional local customs, and in the laws increasingly promulgated in this period to support and facilitate maritime trade, has proven to be a fruitful way of approaching this topic. From the primary evidence in Mediterranean countries' courts of law a notably high rate of litigiousness between Northern captains and their crews has

9 ASV, *Avogaria di Comun*, *Penale*, b. 353, fasc. 21, (9 June 1646).

10 In Venice 'Flemish' was the generic name used to indicate people from both the northern and the southern provinces, to avoid confusion here I shall borrow the expression 'Netherlandish', as used by Maartje van Gelder in her *Trading Places: The Netherlandish Merchants in Early Modern Venice* (Leiden and Boston: Brill, 2009), 1.

11 Fernand Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II*, 2 vols. (Berkeley: University of California Press, 1995, 1st French edition 1949), i: 606.

emerged, and this tallies with the comment of Ralph Davis who, in his classic analysis of the British shipping industry, pointed out how during the seventeenth century wage litigation in the London High Court of Admiralty was especially high amongst crews active within the Mediterranean. This was for him a rather puzzling issue, especially given that wages for crews active there appeared to be higher than those available for the same period in other areas of English shipping activities.[12]

Starting in the last quarter of the sixteenth century, in Genoa, Livorno and Marseille the Northerners were increasingly active not only on the maritime routes connecting the Mediterranean with the north of Europe, but became also important players in intra-Mediterranean trade. For Venice the situation was rather delicate, as in addition to their activities in those two maritime trade circuits just mentioned, English and Netherlandish shipping played also a fundamental support role for the *Armata* throughout the seventeenth century, when the Republic was embroiled in several naval conflicts, with the War of Candia (1645–1669) towering above them all due to its length and financial costs. This situation placed the Republic in a most difficult conundrum: English shipping was both its strongest competitor for maritime traffic and a necessary element to bolster Venetian naval strategy in the region. These two contrasting elements profoundly shaped all aspects of Anglo-Venetian interactions, and also influenced the practical administration of justice within the maritime sector, as clearly evidenced above in the case of the *Margaret Constant*.[13]

1 Socio-Economic History and the Law: An Historiographical Genealogy

The methodological peculiarity of my recently completed ERC-funded project *Sailing into Modernity*, was to make use of material produced by courts of justice to compensate for the scarcity of more traditionally 'economic' documentary evidence connected with maritime employment before the middle of the eighteenth century.

12 Ralph Davis, *The Rise of the English Shipping Industry in the Seventeenth and Eighteenth Centuries* (London: Macmillan, 1962); on this issue see also: Richard Blakemore, "'Pieces of eight, pieces of eight': seafarers' earnings and the venture economy of Early Modern seafaring", *Economic History Review* 70 (2017), 1153–1184.

13 A detailed analysis of this in Maria Fusaro, *Political Economies of Empire in the Early Modern Mediterranean: The Decline of Venice and the Rise of England 1450–1700* (Cambridge: Cambridge University Press, 2015), especially 188–195.

Over the last two decades, documentary material of this kind has been fruitfully used for the study of the Ottoman Empire to elucidate many issues related to socio-economic analysis, business organization and even economic growth; especially the records of the *Khadi* courts have allowed scholars to compensate for the scarcity of extant primary evidence directly related to the economic sphere.[14]

This kind of approach is still relatively novel in its application to Western Europe's socio-economic history, however it echoes the approach pioneered by Italian historians at the end of the nineteenth and the beginning of the twentieth century, a group which came to be known as the 'economic-juridical school' (*scuola economica giuridica*). Its main representatives were Gaetano Salvemini, Gioacchino Volpe, Romolo Caggese and Gino Luzzatto, who championed an analytical approach "at the fertile crossroads between the historiography of institutions and that of society, the latter seen especially from its economic side".[15] The peculiarities of the Italian Middle Ages, with its impressive economic growth founded on flourishing urban middle classes, predisposed it for a historiographic approach focused on social conflict as a primary engine of economic and political change.[16]

Throughout the twentieth century this type of analysis evolved, forming something of a red thread within the Italian historiographical tradition, although it did not really cross national boundaries.[17] Given the wealth of international scholarship which has investigated the Italian Middle Ages, there are three major exceptions to this neglect within Anglophone scholarship, all connected more with the 'economic' than 'juridical' element: Philip Jones' close

14 See Timur Kuran (ed.), *Social and Economic Life in Seventeenth-Century Istanbul: Glimpses from Court Records*, 10 vols (Istanbul: Türkiye İş Bankası Kültür Yayınları, 2010–2013). For a synthetic introduction on the development of *Khadi* courts see: Najwa Al-Qattan, "Inside the Ottoman Courthouse: territorial law at the intersection of state and religion", in Virginia H. Aksan and Daniel Goffman (eds.), *The Early Modern Ottomans: Remapping the Empire* (Cambridge: Cambridge University Press, 2007), 201–212, and bibliography therein quoted.

15 "[…] punto d'incrocio fecondo fra storiografia delle istituzioni e studio della società, riguardata, quest'ultima, principalmente sotto il profilo economico": Enrico Artifoni, *Salvemini e il Medioevo. Storici Italiani fra Otto e Novecento* (Naples: Liguori, 1990), 13–14.

16 For a subtle analysis of the development of these issues within Italian medieval studies see Enrico Artifoni, "Giovanni Tabacco storico della medievistica", in Giuseppe Sergi et al. (ed.), *Giovanni Tabacco e l'esegesi del passato* (Turin: Accademia delle Scienze, 2006), 47–62; Paolo Favilli, *Marxismo e storia. Saggio sull'innovazione storiografica in Italia (1945–1970)* (Milan: Angeli, 2006).

17 Mauro Moretti and Ilaria Porciani, "Italy's various Middle Ages", in Robert J. Evans and Guy P. Marchal (eds.), *The Uses of the Middle Ages in Modern European States, History, Nationhood, and the Search for Origins* (Basingstoke: Palgrave Macmillan, 2011), 177–196.

critical engagement with these authors on the vexed question of the 'transition from feudalism to capitalism'; Stephen Epstein's sharp revisionism, which engaged with both Italian and British historiographies; and Chris Wickham's active and critical engagement with the Italian debate on the connection between economic and political development.[18] In my view, this profoundly Italian approach to the interplay between economic development and politico/juridical institutions needs also to be considered as a silent intellectual ancestor to the New Institutional Economics approach, whose chronological focus from the late seventeenth century has meant it has just about ignored developments in earlier centuries.[19] There are of course exceptions, such as the work of Avner Greif, who cogently argued for the crucial role of medieval institutions and contract law in establishing the basis of Western European economic hegemony, but these studies concentrate, again, more on the 'economic' and less on the 'legal' side of the story.[20]

Another important influence to my methodological approach is Italian microhistory, not just because Giovanni Levi and Edoardo Grendi played an important role in my own intellectual development, but also because the analysis

18 Philip J. Jones, *Economia e società nell'Italia medievale* (Turin: Einaudi, 1980); and his *The Italian City-State: from Commune to Signoria* (Oxford: Clarendon Press, 1997); Stephan R. Epstein, *An Island for Itself: Economic Development and Social Change in Late Medieval Sicily* (Cambridge: Cambridge University Press, 1992) and his *Freedom and Growth*: *The Rise of States and Markets in Europe, 1300–1750* (London: Routledge, 2000). A synthesis of some of these issues and debates in: Franco Franceschi and Luca Molà, "Regional states and economic development", in Andrea Gamberini and Isabella Lazzarini (eds.), *The Italian Renaissance State* (Cambridge: Cambridge University Press, 2012), 444–466. Chris Wickham has recently published a synthesis of his views on these issues in *Sleepwalking into a New World: The Emergence of Italian City Communes in the Twelfth Century* (Princeton: Princeton University Press, 2015).

19 See especially Douglass C. North and Barry R. Weingast, "Constitutions and commitment: the evolution of institutions governing public choice in seventeenth-century England", *Journal of Economic History*, 49 (1989), 803–832; Daron Acemoglu and James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (London: Profile, 2012).

20 Paul R. Milgrom, Douglass C. North and Barry 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), 1–23; Avner Greif, *Institutions and the Path to the Modern Economy. Lessons from Medieval Trade* (Cambridge: Cambridge University Press, 2006) and bibliography therein quoted. See also the critical considerations of Quentin Van Doosselaere in his *Commercial Agreements and Social Dynamics in Medieval Genoa* (New York: Cambridge University Press, 2009), 4–10; and those of M. Alejandra Irigoin and Regina Grafe, "Bounded Leviathan: Fiscal Constraints and Financial Development in the Early Modern Hispanic World", in D'Maris Coffman et al. (eds.), *Questioning Credible Commitment. Perspectives on the Rose of Financial Capitalism* (Cambridge: Cambridge University Press, 2013), 188–227.

of the type of evidence on which this research work is based – such as judicial and notarial material – has been the privileged playing field of this particular approach, which has defined and discussed at length its limits and possibilities for analysis. These have been tested and discussed across various national historiographies and sub-disciplinary approaches – economic, social and cultural – thus providing a stimulating example of a truly trans-national and trans-cultural approach.[21]

The complex history of Italy does not lend itself easily to a comparative approach. From the economic side, the traditional interpretation of the terminal decline of the various Italian states during the early modern period has certainly contributed to its absence from the bibliography and debates on early modern economic history. However, recent revisionist analyses have turned Italian decline from an 'absolute' to a 'relative' one, thus opening up the possibility of fruitful comparisons.[22]

If things are already rather complex from the economic side, the situation is possibly even more complex from the legal history side given the substantial, and substantive, differences between legal systems within Europe. Nearly twenty years ago Antonio Padoa-Schioppa commented that "the reader should always bear in mind that the comparative history of European law – a fascinating field of research for the wealth of perspectives that it opens up on both past and present – is still for the most part unexplored country".[23] The situation has not really changed in the intervening time.

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21 A recent synthesis on these issues, especially useful for the critical analysis of microhistorical methodological approaches towards primary evidence, is in Étienne Anheim and Enrico Castelli Gattinara, "Jeux d'échelles. Une histoire internationale", *Revue de synthèse*, 130 (2009): 661–677 and bibliography therein quoted. On the possibilities of microhistory to contribute to global history see also: Maria Fusaro, "After Braudel: a Reassessment of Mediterranean History between the Northern Invasion and the Caravane Maritime", in Maria Fusaro et al. (eds.), *Trade and Cultural Exchange in Early Modern Mediterranean* (London: I.B. Tauris & Co.), 1–22, 8–10 and Francesca Trivellato, "Is There a Future for Italian Microhistory in the Age of Global History?", *California Italian Studies* 2.1 (2011) available at http://escholarship.org/uc/item/0z94n9hq (last accessed 7 June 2018).

22 For Italy at large: Paolo Malanima, "When did England overtake Italy? Medieval and early modern divergence in prices and wages", *European Review of Economic History* 17 (2013), 45–70 and his *La fine del primato. Crisi e riconversione nell'Italia del Seicento* (Milan: Mondadori, 1998); Sophus A. Reinert, *Translating Empire. Emulation and the Origins of Political Economy* (Cambridge (Mass.): Harvard University Press, 2011); for the Venetian state: Paola Lanaro (ed.), *At the Centre of the Old World: Trade and Manufacturing in Venice and the Venetian Mainland, 1400–1800* (Toronto: Centre for Reformation and Renaissance Studies, 2006).

23 Antonio Padoa-Schioppa, "Preface", in Antonio Padoa-Schioppa (ed.), *Legislation and Justice* (Oxford: Clarendon Press, 1997), ix–xiv, xiv.

The history of legal systems, embedded within what can be generally called a New Institutional Economics interpretative framework, is truly a potentially most fruitful avenue of investigation.[24] In an essay dedicated to the relationship between maritime and global history, a few years ago, I encouraged maritime historians to

> move in the same direction as the so-called 'new institutional' economic historians and commit themselves to work toward transcending national historiographies by exploring different approaches through the use of wide-ranging comparisons.[25]

Sailing into Modernity was conceived and designed with this kind of approach in mind, and these issues are also at the centre of another ERC-funded project, *Mediterranean Reconfigurations: Intercultural Trade, Commercial Litigation, and Legal Pluralism* (*15th-19th centuries*), under the direction of Wolfgang Kaiser.[26] What is particularly striking, and worth stressing, is that these projects have been conceived and designed completely independently by scholars with rather different intellectual genealogies and personal trajectories, and still they share a very similar approach based on the effort to overcome monocausal explanations through a strong comparative stance based on the active engagement with different methodologies and several national historiographies.

Mediterranean Reconfigurations utilises court practices to investigate how exchanges within actual commercial judicial cases constituted the foundations of a process of cross-fertilization among legal systems in the Mediterranean, something which does not emerge from the doctrinal and jurisprudential sides of the story. *Sailing into Modernity* employs a similar approach; seeking to understand maritime trade and labour through cross-referencing the institutional and normative sides with their actual implementation in everyday disputes and diplomatic exchanges, in order to provide an alternative perspective on

24 On this see the considerations of Douglass C. North, "Law and economics in historical perspective", in Fabrizio Cafaggi, Antonio Nicita and Ugo Pagano (eds.), *Legal Orderings and Economic Institutions* (London-New York: Routledge, 2007), 46–53.

25 Maria Fusaro, "Maritime History as Global History? The Methodological Challenges and a Future Research Agenda", in Maria Fusaro and Amélia Polónia (eds.), *Maritime History as Global History* (St John's (Newfoundland): International Maritime Economic History Association, 2010), 267–282, 279.

26 ERC Advanced Grant, based at Paris 1- Sorbonne Panthéon, see: http://configmed.hypotheses.org/ (last accessed 7 June 2018).

the actual development of different European legal systems.[27] Both these projects are positive signs of increased inter-disciplinary dialogue, especially through the involvement of young scholars with very different backgrounds. However, there is still a lot that can be done to further foster these exchanges. It is rather telling that at the 2010 *Istituto Datini* conference on the subject of "Where is Economic History Going? Methods and Prospects from the 13th to the 18th centuries", the session dedicated to "Old and New Insights: relationships with other subjects" did not include any contribution to this burgeoning relationship between legal and economic history.[28]

These efforts at analysing economic development through a primarily qualitative and not quantitative approach are also meant to overcome the well-known limits of pre-modern evidence. When dealing with maritime litigation, the practical impossibility of a quantitative approach is even more evident; the ephemeral nature of pre-modern economic documentation is paired with the even more ephemeral nature of the material produced in pursuing maritime trade, especially log books and roll musters whose survival is exceedingly rare for the period before the eighteenth century. The archival situation in Venice is also particularly dire, as port books and other documentation connected with the management of the economy were deemed surplus to requirement and pulped when the archives were relocated after the fall of the Republic; the only 'economic' material that survived in a serially consistent manner being that produced from the 1750s onwards.[29]

Even if the socio-economic and legal sides are the two main pillars of this analysis, in the course of my research it became increasingly evident that the political dimension is an essential part of this story. On the one hand, maritime litigation ended up generating a wealth of diplomatic exchanges between the countries under investigation; and, on the other, domestic political

27 Interesting considerations on the interface between the learned legal literature and court practice in David Ibbetson, "Comparative Legal History: A Methodology", in Anthony Musson and Chantal Stebbings (eds.), *Making Legal History: Approaches and Methodologies* (Cambridge: Cambridge University Press, 2012), 131–145, especially 135–143.

28 Francesco Ammannati (ed.), *Where is Economic History Going? Methods and Prospects from the 13th to the 18th centuries* (Florence: Firenze University Press, 2011).

29 It is important to mention that documentary material produced by the courts of justice was regularly eliminated, when deemed too damaged or useless, as part of the archival reorganizations of the Republic, on this see Filippo de Vivo et al. (eds.), *Fonti per la storia degli archivi degli antichi Stati italiani* (Rome: Direzione Generale Archivi, 2016), 113, 160–161,168–169, 171–173. Massive losses specifically to the archives of the Venetian *Corti di Palazzo* were suffered in the 1770s during the tenure of Antonio Antelmi as their Custodian, for a detailed analysis of these losses, and their implications for the study of all Venetian history: Fusaro, "Politics of justice/Politics of trade" (footnote 6).

developments in each state played an important role in shaping maritime employment throughout Europe and directly influenced both the production of legislation and the attitude of the courts of justice towards these issues.

Throughout the seventeenth century the role of consuls appears to be evolving from representatives of merchants to those of states, these developments were not linear and presented substantive local differences across Europe, as exemplified in a recent collection edited by Marcella Aglietti, Manuel Herrero Sánchez and Francisco Zamora Rodríguez.[30] I have discussed elsewhere how consuls played an accessory but important role within maritime wage controversies, usually by providing translation services when needed, and by liaising between local authorities and fellow countrymen.[31] However, if consuls were increasingly becoming expressions of state interests, merchants and seamen were not necessarily conducting their business along national lines. This had important consequences, especially when maritime controversies landed in the courts. Through the active engagement – or lack of – of 'national' consuls it is possible to evaluate states' involvement in the maritime activities of their own subjects.[32]

Following northern seamen's litigation within Mediterranean courts of justice allows us to trace the evolution not only of legislation itself, but also the changes in the balance of power between different states. By tracing the quantity and quality of consular involvement in these controversies, we can evaluate the development of more stringent 'national policies' about wages and employment, and the reach of soft power of various states. From a preliminary analysis it appears that throughout the seventeenth century consuls' jurisdiction within Europe was more tacit and informal then previously assumed. Whatever the status of consuls regarding the extent of their jurisdiction, the growing reality of international crews certainly acted as a practical limitation of their activities in this regard. Whatever the nationality of the ship and her master, a sailor with a differing nationality would have had absolutely no

30 Marcella Aglietti, Manuel Herrero Sánchez and Francisco Zamora Rodríguez (eds.), *Los cónsules de extranjeros en la Edad Moderna y a principios de la Edad Contemporánea* (Madrid : Ediciones Doce Calles, 2013).

31 Fusaro, "The Invasion of Northern litigants", and *The Making of a Global Labour Market*.

32 Two evocative examples of such issues, involving English and Venetian merchants and ships in Suraiya Faroqhi, "The Venetian Presence in the Ottoman Empire", *The Journal of European Economic History* 15 (1986), 345–384, 374; and Daniel Goffman, *Britons in the Ottoman Empire, 1642–1660* (Seattle – London: University of Washington Press, 1998), 127. For an analysis of the later stages of this see Leos Müller, *Consuls, Corsairs, and Commerce. The Swedish Consular Service and Long-distance Shipping, 1720–1815* (Uppsala: Uppsala universitet, 2004).

interest in appealing informally to the consul for the resolution of the controversy. A far better chance was to appeal to the local courts, especially in places where the protection of sailors' rights was stronger, as was clearly the case in Southern as opposed to Northern Europe.

Behind this type of litigation there were several important political and diplomatic issues to consider. In practical terms, one can sometime see how local authorities were actually sort of tacitly pleased when such controversies were handled by consuls, in the quiet privacy of their own homes instead of allowing these cases to clog up the courts. At the same time, there was a growing political and diplomatic debate as to how many of these controversies should legitimately be handled by consuls as all European states were concerned about not being seen to give up any of their own jurisdiction.[33]

2 Legal History: Theory and Practice

Mario Ascheri once astutely commented that economic historians focus on merchants, markets and goods rather than on the legal institutional frameworks of mercantile activities, whilst legal historians concentrate on the doctrinal side of institutions: "doctrines last (and even today can be useful in the courts), institutions die and it is pointless to court them".[34] These divergent interests regarding the subject itself are among the factors which have historically hampered the dialogue between economic and legal historians. But now a closer collaboration is emerging between scholars of the two disciplines, and this volume is clear evidence of that;[35] this should allow us to better investigate the 'law' beyond its 'normative system' reality and instead study it as a social, economic and ultimately cultural practice along the lines suggested by Christopher Hill and Lawrence Friedman.[36]

33 Andrea Addobbati has provided an excellent analysis of these issues for Livorno, see his essay "Until the Very Last Nail: English Seafaring and Wage Litigation in Seventeenth-Century Livorno", in Maria Fusaro et al. (eds.), *Law, Labour and Empire*, 43–60 (see footnote 4).

34 Mario Ascheri, *Tribunali, giuristi e istituzioni dal medioevo all'età moderna* (Bologna: Il Mulino, 1989), 28.

35 See the work of the international research network behind it: *The Making of Commercial Law: Common Practices and National Legal Rules from the Early Modern to the Modern Period*, see: http://blogs.helsinki.fi/makingcommerciallaw/presentation/ (last accessed 7 June 2018).

36 Christopher Hill, *Puritanism and Revolution. Studies in Interpretation of the English Revolution of the 17th Century* (London: Secker & Warburg, 1958), 28; Lawrence M. Friedman, *The Legal System: A Social Sciences Perspective* (New York: Russell Sage Foundation, 1975). See

However, the development of this fledging dialogue is being somewhat hindered by legal historians' lively internal debate on the exact terms of the relationship between the 'law' as an autonomous system and other social factors.[37] In a recent – and perceptively witty – analysis of the legal profession's prejudice against empirical research, Elizabeth Chambliss carefully discussed the development of this debate and the strength of those who "tend to view law as an independent discipline with its own theories and methods, and not simply a parade ground for the social sciences".[38] She also highlighted the pitfalls and dangers intrinsic to this kind of investigation, which is necessarily cross-disciplinary and therefore potentially contentious. In Chambliss' words, the dangers are many and multifaceted, as "socio-legal scholarship is plagued by infighting between law and social sciences, the social sciences and the humanities, and competing perspectives within social sciences disciplines".[39]

Let me be absolutely clear on this, I come to these issues from what I can only describe as a 'robustly historical' perspective, which has been inspired by the conviction that it is possible to shed light on the socio-economic development of a society through the analysis of the evolution of its legal structures.[40] I have absolutely no illusion that the relationship between laws and the societies which generate them is anything but extremely complex and multilinear.

As an historian, I see law as a supremely social construct, and as a 'social and economic' historian I am convinced that it is essential to investigate, and take

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also the considerations of Antonio Hespanha in his "Early Modern Law and the Anthropological Imagination of Old European Culture", in John A. Marino (ed.), *Early Modern History and the Social Sciences: Testing the Limits of Braudel's Mediterranean* (Kirksville: Truman State University Press, 2002), 191–204, especially 201–204.

37 For a good example of this debate see the considerations of Marie Theres Fögen, "Legal History – history of the evolution of a social system. A Proposal", available in English at: http://data.rg.mpg.de/rechtsgeschichte/rg01_abstracts.pdf and the critical response of Simon Roberts, "Against a Systemic Legal History", available at: http://rg.rg.mpg.de/en/article_id/3. For a more optimistic view of possible collaboration and developments, see the contributions in: Guillaume Calafat, Arnauld Fossier and Pierre Thévenin, "Droit et sciences sociales: les espaces d'un rapprochement", *Tracés. Revue de Sciences humaines* [on line], 27 (2014) URL: http://traces.revues.org/6040 and bibliography therein quoted (last accessed 7 June 2018).

38 Elizabeth Chambliss, "When do facts persuade? Some Thoughts on the Market for 'Empirical Legal Studies", *Law and Contemporary Problems* 17 (2008), 17–39, 37 and 22.

39 Chambliss, "When do facts persuade?", 21.

40 See the monographic issues of *Annales HSS* "Histoire et droit", 52 (2002); and of *Tracés. Revue de Sciences humaines*, 27 (2014), "Penser avec le droit".

into full account, all the active constituents which contributed to its evolution.[41] This requires a collective effort at carefully disentangling the reciprocal influences at the basis of the interdependence between the evolution of legal norms and the development of societies and political systems. And for this reason, even with my empirical bias, I am convinced of the paramount importance of the more theoretical – jurisprudential – side of the story. However, my own research is firmly focused on the practice of the courts, as ultimately I am not interested in legal history *per se* but in the social and economic elements which emerge from the analysis of legal documentation. Concentrating on trying to reconstruct how actual events unfolded, and on the practice of the courts in confronting them, has allowed me to investigate the gap between the normative side (in this specific case of maritime law) that expressed governments' desires and aspirations, and its practical application on the ground. The problem with fully trusting treatises and manuals concerned with the law and its administration – of which there is an abundance for Italy (and Venice) for this period – is their (perfectly logical) reliance on jurisprudence at the expense of practice.[42] Ascheri warned scholars not to treat them as pure gold ('*oro colato*'), highlighting how their authors "interrogated the sources with questions different than ours, and thus obtained different answers".[43] Jurisprudence and practice did not always coincide,[44] and this was not a problem exclusive to *ius commune* countries; there was also a gap between doctrine and case law in common law, as Simon Deakin pointed out when discussing the evolution of labour law.[45]

41 For a recent analysis of these issues see Carlo Focarelli, *International Law as Social Construct. The Struggle for Global Justice* (Oxford: Oxford University Press, 2012).

42 For Venice the principals are: Filippo Nani, *Prattica Civile delle Corti del Palazzo Veneto* (Venice: Pier Antonio Zamboni, 1694); Francesco Argelati, *Pratica del Foro Veneto. Che contiene le materie soggette a ciaschedun Magistrato, il numero de' Giudici, la loro durazione, l'ordine, che suole tenersi nel contestare le cause, e le formule degli atti più usitati* (Venice: Agostino Savioli, 1737).

43 Mario Ascheri, "Il processo civile tra diritto comune e diritto locale da questioni preliminari al caso della giustizia estense", *Quaderni storici* 34 (1999), 355–387, 370–371.

44 As elegantly argued by Guido Rossi regarding the medieval history of insurances: Guido Rossi, "Civilians and insurance: approximations of reality to the law", *Tijdschrift voor Rechtgeschiedenis* 83 (2015), 323–364.

45 Simon Deakin, "The Contract of Employment: A Study in Legal Evolution", Working Paper 203 'ESRC Centre for Business Research', University of Cambridge, available at: http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp203.pdf (last accessed 7 June 2018).

3 Hierarchy of Legal Sources and Procedure as Political Concerns

Had it been less politically charged, a wage case such as that of the *Margaret Constant* would have normally been tried with summary procedure in the court of the *Giudici del Forestier*; its criminal component would most likely have been dealt with directly by the *Podestà* of Malamocco. However, the particular circumstances of this case – such as the involvement of a foreign ship, especially one of those employed in the war effort against the Ottomans, and shedding of blood during the disturbance in Malamocco, with all the corollary concern about effective port policing – made it an especially sensitive one, causing its delegation to the *Avogaria*. This flexibility was peculiar of the Venetian pragmatic approach to the administration of justice, with both the choice of court and of procedure applied, being clear evidence of the political will behind the administration of justice.[46]

Another important element which warrants analysis is how the Venetian system of justice could be extremely flexible regarding the hierarchy of legal sources applied by the courts, and these variations provide an excellent means with which to appreciate the political economy of the Republic. Venice appears to be rather exceptional amongst early modern European states in claiming 'monopoly in law-making', which traditional legal theory attributes to 'modern states' and which implies the existence of a clear hierarchy of sources.[47] In the words of Silvia Gasparini:

> The only valid norms in Venice are those issued or sanctioned by Venetian legislators. The administration of justice is never delegated to a special class of jurists, and there is never any reference to a source of law external to the system. Both legislation and jurisdiction are the prerogative of a single political body, the patriciate.[48]

The *Giudici del Forestier* demonstrates how flexible the hierarchy of legal sources was. Within its wide jurisdictional remit, the two most important areas were civil cases involving foreigners as defendants (mostly commercial

46 Fusaro, "Politics of justice/Politics of trade" (footnote 6).

47 Jan M. Smits, "Plurality of Sources in European Private Law, or: How to Live with Legal Diversity", in Ulla Neergaard and Ruth Nielsen (eds.), *European Legal Method – in a Multi-Level EU Legal Order* (Copenhagen: Jurist- og Økonomforbundet Forlag, 2012), 71–86, 71.

48 Silvia Gasparini, "I giuristi veneziani ed il loro ruolo tra istituzioni e potere nell'età del diritto comune", in Karin Nehlsen-von Stryk and Dieter Nörr (eds.), *Diritto comune, diritto commerciale, diritto veneziano* (Venice: Centro tedesco di studi veneziani, 1985), 67–105, 71.

disputes), and all 'maritime' cases, such as those arising from the chartering of ships and controversies between ship-owners, captains and mariners. Procedure was summary in both these areas, but a fundamental difference existed in the hierarchy of legal sources. In trials involving foreigners, the first source were the pacts made with the place of origin of the foreign defendant, if such pacts existed; in their absence, the judge was to refer to Venetian statutes, usage and, always last, his own *conscientia*. Exceptionally, international pacts, not statutes, were given pre-eminence here.[49] Conversely, in all cases involving ships, the hierarchy was more traditional; the judge was expected to first consider the statutes of Venice, then usage and, lastly, his own conscience.[50]

To summarise, the application of summary procedure to maritime cases was never questioned, conversely when the issue was distributing justice to 'foreigners' the granting of summary procedure was conceptualised in terms of 'privilege' and therefore it was a matter for political debate.[51]

Under 'normal' circumstances, both parties in a commercial/maritime controversy held an interest that a resolution was reached swiftly and cheaply, however this did not necessarily mean that resorting to consular arbitration was necessarily the preferred option of both parties, as it also needs to be considered how the business priorities of merchants and their partners was not necessarily aligned with the interests of their home states. In a time of profound structural transformation of the European economy, which between the sixteenth and seventeenth centuries was undergoing an important transition, the commercial game was particularly complex and trade did not necessarily move along national lines. It is therefore a mistake to assume that a full agreement existed between the interest of states and governments and that of their own subjects when acting as 'commercial operators'. It is in this close analysis

49 "Item omnes et singulas causas, vertentes inter Venetos et Forinsecum vel forinsecum et forinsecum, audire et examinare et definire debeor et in eis procedere in formam pactorum et, si pacta non fuerit, in formam statuti, ubi statutum loquitur, et ubi statutum defecerit, secundum usum, et ubi usus mihi deffecerit [sic], secundum meam conscientiam, bona fide et sive fraude"; article five of the *Capitolare* of the *Giudici del Forestier*; for a full analysis of the implications of this see Fusaro "Politics of justice/Politics of trade".

50 "Curam, et studium habebo omnes et singulas causas, et placita quæ pertinent ad rationem Navium, […] audire et examinare, et definire pro citius potero bona fide sine fraude, et in eis procedere sub formam statutis, itu statutorum loquisi, et uti mihi statutum deffeceverit sub usum, et uti mihi deffecerit usus secundum meam conscientiam bona fide et sive fraude"; article four of the *Capitolare* of the *Giudici del Forestier*. Both in ASV, *Compilazione delle Leggi*, b. 210, cc. 619r-624r; also in Melchiorre Roberti, *Le magistrature giudiziarie veneziane e i loro capitolari fino al 1300*, 2 vols (Padua: Tipografia del Seminario, 1906–11), ii: 103–112.

51 Fusaro, "Politics of justice/Politics of trade" (footnote 6).

of everyday disputes that the jostling between different interests and the interplay of proto-globalization started to be established.

4 'Migrating Seamen, Migrating Laws'?

The Republic of Venice was most proud of the robust link between the administration of politics and the administration of justice, with the corollary legislative self-reliance which was also an essential element of the Myth of Venice.[52] This heightened awareness of the connection between laws and government was also reflected in the way the Republic's governmental bodies discussed other countries' legislation on maritime matters.

Reciprocity was the founding pillar of Venetian foreign policy, and as a result Venice would always defend its right to extend its jurisdiction over its own subjects.[53] This jealous defence of jurisdiction was one of the motives behind the many *parti* of the *Senato* that, starting with the case of the *Margaret Constant* in 1646, repeatedly stated that sailors' contracts needed to be judged – in Venice – according to the laws of the country where the original agreement had been stipulated. A watchful and proud awareness of the distinction between Venetian and foreign laws powerfully emerges from the entirety of the documentation produced by the Republic's governmental bodies.[54] Innumerable passages argue for the distinction between Venetian and English maritime laws, starting with the *Senato* decree of 1646:

> For all vessels coming from the West, agreements between captains and seamen and *the laws of those countries* are to be respected, and [these pacts] cannot be altered by any [Venetian] magistrate under any circumstance.[55]

This type of formula is constantly repeated, usually referring to "the laws of England" (*leggi d'Inghilterra*),[56] sometimes tempering the expression, as in

52 Fusaro, *Political Economies of Empire*, 2, 14 and bibliography therein quoted (footnote 13).

53 Fusaro, "Politics of justice/Politics of trade" (footnote 6).

54 For an authoritative introduction see: Gaetano Cozzi, "Autorità e giustizia a Venezia nel Rinascimento", in his *Repubblica di Venezia e Stati italiani. Politica e giustizia dal secolo XVI al secolo XVIII* (Turin: Einaudi, 1982), 81–145.

55 ASV, *Senato Mar*, reg. 104, cc.146r/v (4-7-1646); another copy in ASV, *Cinque Savi alla Mercanzia*, b. 103 n.s., cc.n.n. (4-7-1646); the *Italic* is mine.

56 ASV, *Cinque Savi alla Mercanzia*, b. 103 n.s., cc.n.n. (27-11-1694) and ASV, *Cinque Savi alla Mercanzia*, b. 81 n.s., cc.n.n. (24-5-1707); other common expressions are: "le leggi del

"the laws and customs of the English nation" (*per le Leggi, et consuetudini d'Inghilterra*),[57] other times specifying further, as in the "maritime laws of England" (*Leggi di marina d'Inghilterra*).[58] This recognition of normative differences was not limited to England. Diversity of legislation was clearly acknowledged for other states, such as the United Provinces, whose crews were almost as litigious as the English in Venice. The laws promulgated by Charles V and Philip II in the middle of the sixteenth century were well known in Venice, and a translated copy was available to the *Senato*.[59] However, the variety of foreign regional customary legislation was also acknowledged by the Venetian authorities, as in the complex case of the ship *Orso Nero*, where at the centre of the dispute were the specific customs of the city of Middleburgh, in Zeeland.[60] When the legislation of two countries was discussed jointly, the standard formula was "in conformity with the pacts, and the laws there valid".[61]

Until now only laws promulgated in Venice have been mentioned when analysing the language used in courts and, indeed, the *Consolato del Mare* is the 'elephant in the [court] room' in Venice. It was, of course, very well-known there, if nothing else as it had been printed in the city several times.[62] However its regulations were never incorporated into city statutes as had happened elsewhere in Southern Europe. Giorgio Zordan argued that some of its regulations were applied in Venice "through tacit consent" as norms pertaining to the general Mediterranean consuetudinary tradition.[63] 'Tacit' is the key word here, as amongst the extant primary evidence dealing with seamen's litigation the first direct mention by Venetian magistrates of the *Consolato* dates only from 1705 when, in response to the umpteenth petition from English merchants active in Venice, the *Cinque Savi alla Mercanzia* provided a list of all the commercial privileges which the 'English nation' enjoyed in the territories of the

proprio loro Paese": ASV, *Cinque Savi alla Mercanzia*, b. 103 n.s., cc.n.n. (28-11-1707); "li patti et le Leggi della Natione Inglese": ASV, *Cinque Savi alla Mercanzia*, b. 103 n.s., cc.n.n. (15-12-1712).

57 ASV, *Cinque Savi alla Mercanzia*, b. 103 n.s., cc.n.n. (10-5-1679).

58 ASV, *Cinque Savi alla Mercanzia*, b. 103 n.s., cc.n.n. (14-6-1679).

59 ASV, *Cinque Savi alla Mercanzia*, b. 103 n.s., cc.n.n. (29-5-1682).

60 ASV, *Cinque Savi alla Mercanzia*, b. 103 n.s., cc.n.n. (27-11-1683), this case is analysed in detail in Fusaro, *The Making of a Global Labour Market*, Chapter 4.

61 "nella conformità dei Patti, e leggi da loro accostumati", as in: ASV, *Cinque Savi alla Mercanzia*, b. 81 n.s., cc.n.n. (24-5-1707).

62 The earliest printed editions are: *Lo llibre del Consolat*, Barcelona, 1484 (2nd edition 1494); *Capitoli et Ordinationi di Mare et di Mercantie*, Rome, 1519; *Libro del Consolato del Mare*, Venice, 1549 (2nd edition 1564).

63 Giorgio Zordan, "Le leggi del mare", in *Storia di Venezia*, Alberto Tenenti and Ugo Tucci (eds.), vol. 12: *Il mare* (Rome: Istituto della Enciclopedia italiana, 1991), 621–662, 627.

Republic. After listing those concerned with the currants trade and the import of dried fish, the *Savi* continued:

> Amongst the privileges is also that contained in the [*Senato*] decrees dated 4 July 1646, 14 June 1679, 30 May 1682, 24 August 1686, by power of which controversies between English captains and seamen are to be judged with the particular laws of England, and not otherwise either with those of the *Consolato del Mare* or with those of the Most Serene Republic.[64]

Mention of the *Consolato* in this context is initially rather surprising. The two most important collections of customary legislation in Europe were the *Rôles d'Oléron*, recognised in most of northern Europe, and the *Consolato del Mare* in the Mediterranean. Before this instance neither is mentioned in the Venetian documentation, given what is discussed above about Venice's jealous defence of its own laws and jurisdiction, it would have indeed been most surprising if this had been the case. Could it be that the *Savi* ignored the existence of the *Rôles d'Oléron* and their status as accessory customary law in the North of Europe? Possible, but unlikely; what is more likely in this case, centred as it was on seamen's wages, is that both Venetian legislation and the *Consolato* granted 'wages' the status of 'privileged credit',[65] and this was definitely not the case in the 'particular laws of England' or, indeed, in *Oléron*. Therefore it was actually pertinent for the *Savi* to mention Venetian laws and the *Consolato* in juxtaposition with the 'laws of England'. Indeed, if one was to compare *Oléron* and the *Consolato* on the topic of seamen's duties and their wages, substantial differences emerge, especially concerning employment agreements and the reasons for terminating them, the duties and rights of the parties on board, the rights of crewmen to participate in decision-making and, crucially, wages and their disbursement.[66]

There might be a further reason to explain why the *Consolato* was directly mentioned at this juncture. At the beginning of the eighteenth century, a time

64 ASV, *Cinque Savi alla Mercanzia*, b. 81 n.s., cc.n.n. (28-5-1705), elaborated further in Fusaro, *The Making of a Global Labour Market*, Chapter 2.

65 This issue is discussed at length in Fusaro, *The Making of a Global Labour Market*, Chapter 5.

66 For a detailed comparison on the issue of wages see: Julia Schweitzer, *Schiffer und Schiffsmann in den Rôles d'Oléron und im* Llibre del Consolat de Mar – *Ein Vergleich zweier mittelalterlicher Seerechtsquellen* (Frankfurt am Main – Oxford: Lang, 2007), 41–59; on the status of crew's wages as privileged credit in the Consolato see Addobbati, "Until the Very Last Nail", 45 (see footnote 33).

of profound judicial reform began in Venice and much of the rest of Europe; this stimulated a profound reconsideration of the relationship between the Venetian legal system, the *ius commune* and the various legal and customary traditions which characterised the different constituent parts of the Venetian state.[67] This effort at codification was to continue until the very end of the Republic, and within the maritime sector it culminated in the 1786 publication of the *Codice per la Veneta Mercantile Marina*, considered the crowning achievement of the Venetian Enlightenment, and one of the most comprehensive examples of early codification in Europe.[68]

5 Laws, Legal Pluralism and Forum Shopping: A Conclusion

Medieval and early modern practitioners had no trouble navigating between laws and custom, or finding their way around the multiplicity of judicial venues, at home or abroad.[69] The situation is rather different for modern scholars. On the one hand, we need to engage with a traditional historiography which sees a linear progression from medieval customary rights to a supposedly novel early modern capitalist regime based on contractual relations. Recent scholarship is showing how this transition was substantially more nuanced in its actual developments, and how the issues of law and legal pluralism were central

67 Gaetano Cozzi, "Fortuna, o sfortuna, del diritto veneto nel Settecento", in his *Repubblica di Venezia e stati italiani. Politica e giustizia dal secolo XVI al secolo XVIII* (Turin: Einaudi, 1982), 319–410; Claudio Povolo, "Un sistema giuridico repubblicano: Venezia ed il suo stato territoriale (secoli XV–XVIII)", in Italo Birocchi and Antonello Mattone (eds.), *Il diritto patrio fra diritto comune e codificazione* (*secoli XVI–XIX*) (Rome: Viella 2006), 297–353, especially 302–306 and bibliography therein quoted.

68 Zordan, "Le leggi del mare", 630–632; Massimo Costantini, *Porto navi e traffici a Venezia* (Venice: Marsilio, 2004), 61–74. Many legal codes were planned in Venice, only two were actually produced: in 1780 the *Codice feudale della Serenissima Repubblica di Venezia* (on this see: Gina Fasoli, "Lineamenti di politica e legislazione feudale veneziana in Terraferma", *Rivista di Storia del Diritto Italiano*, 25 (1952): 58–94; and Giuseppe Gullino, "I patrizi veneziani di fronte alla proprietà feudale (secoli XVI–XVIII). Materiale per una ricerca", *Quaderni Storici* 15 (1980): 162–193). The second one was the *Codice per la Veneta Mercantile Marina* in 1786; for a modern critical edition see: Giorgio Zordan, *Il codice per la veneta mercantile marina*, 2 vols (Padua: CEDAM, 1981–1987).

69 Edda Frankot highlights how bringing cases to court abroad was common since the Middle Ages, something facilitated in the cases she studied by the existence of the Hanseatic League, see her *'Of Laws of Ships and Shipmen' Medieval Maritime Law in Urban Northern Europe* (Edinburgh: Edinburgh University Press, 2012).

also to the colonial project.[70] Following the work of Lauren Benton, historians have focussed on early modern empires as a privileged stage for legal pluralism.[71] With the exception of Benton, scholars have tended to concentrate their attention on the interplay between different legal systems or on the relationship between the metropolis and its colonies within individual empires, and they have rarely moved beyond this. The exceptions are those proponents of *lex mercatoria*, or indeed of a pan-European 'maritime law', both currently hotly debated issues amongst legal experts and historians.[72] However, these arguments are usually developed at the *supra*-national level, whilst I am developing my argument within a *trans*-national framework. This is an important difference.

On the other hand, the literature on modern legal pluralism is also voluminous and is primarily concerned with studying the effect of contemporary globalization on national laws.[73] Many of these contributions start with a quick sketch of historical antecedents, but legal experts have a tendency to ignore pre-modern developments (implicitly considering them to be antiquarian irrelevancies) and therefore posit their analyses on the atemporal existence of the 'nation-state' as a law-generating mechanism.[74] A consequence of this is to consider as a novelty the contemporary layering of different sources of legal authority, something quite familiar to scholars working on the pre-modern period, even more so for those engaged in transnational narratives. The field of

70 Lauren Benton and Benjamin Straumann, "Acquiring Empire by Law' From Roman Doctrine to Early Modern European Practice", *Law and History Review* 28 (2010), 1–38; Lauren Benton, *A Search for Sovereignty. Law and Geography in European Empires 1400–1900* (Cambridge: Cambridge University Press, 2010); Lauren Benton, "Historical Perspectives on Legal Pluralism", *Hague Journal on the Rule of Law* 3:1 (2011), 57–69; Alessandro Stanziani (ed.), *Labour, Coercion, and Economic Growth in Eurasia* (*17th-20th centuries*) (Leiden: Brill, 2012); Shaunnagh Dorsett and John McLaren (eds.), *Legal Histories of the British Empire: Laws, engagements and legacies* (Abingdon: Routledge, 2014).

71 Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2002); also Lauren Benton and Richard J. Ross (eds.), *Legal Pluralism and Empire, 1500–1850* (New York-London: New York University Press, 2013).

72 The literature on these issues is rather large, for a summary of these issues and bibliographical references see Fusaro, "Politics of justice/Politics of trade" (footnote 6).

73 Since 1969 there is also a journal dedicated to its study: the *Journal of Legal Pluralism and unofficial law*. See also the growing literature on 'legal transplants' between different legal systems; for a sharp analytical introduction see Michele Graziadei, "Legal Transplants and the Frontiers of Legal Knowledge", *Theoretical Inquiries in Law* 10 (2009), 693–713.

74 On this see the considerations in: J.M. Smits, "Plurality of Sources in European Private Law: or How to Live with Legal Diversity", in Roger Brownsword et al. (eds.), *The Foundations of European Private Law* (Oxford: Hart, 2011), 323–335.

labour history has been particularly receptive to blending national narratives so as to better understand their reciprocal influences. Directly tackling these issues, Silvana Sciarra provides a limpid synthesis:

> [Globalization] has forced states into transnational practices and trapped them into so many connections with supranational institutions that they have become less relevant as social actors and often less powerful as legislators. [...] This has been described as the third period of post-modern legal pluralism [...].[75]

Legal pluralism is a complex concept, and some of the confusion in its analysis derives from the fact that it can be defined in two ways:

> The simultaneous existence – within a single legal order – of different legal sources applying to identical situations. In other words, when different rules can solve one case in various ways, we speak about pluralism. We also speak about *Pluralism* when dealing with the coexistence of a plurality of different legal orders with links between them.[76]

Maritime litigation provides us with evidence in support of both these definitions, on the one hand, even within a single state it was usually possible to choose between 'different legal sources' and, on the other hand, collections of maritime customs such as *Oléron* or the *Consolato* are perfect examples of the links connecting different legal orders.

A practical consequence of the above was the widespread use of 'forum shopping': "where certain individuals attempt to move tactically between judicial venues and negotiate their way through formal legal procedures in their own interests".[77] In other words, legal pluralism – as the possibility to choose between venues – was almost always available to seamen, as they could resort to different legal systems and *fora* to resolve their disputes.

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75 Silvana Sciarra, "How 'Global' is Labour Law? The Perspective of Social Rights in the European Union", in Ton Wilthagen (ed.), *Advancing Theory in Labour Law and Industrial Relations in a Global Context* (Amsterdam: North Holland, 1998), 99–116, 100–101. See also A.-J. Arnaud, "Legal Pluralism and the Building of Europe", in Hanne Petersen and Hendrik Zahle (eds.), *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot: Dartmouth, 1995), 149–169.

76 The latter definition being "precisely what happens in the building of Europe [today]": in Arnaud, "Legal Pluralism", 150.

77 Jeroen Duindam, Jill Harries, Caroline Humfress and Nimrod Hurvitz, "Introduction", in Eidem eds, *Law and Empire: Ideas, Practices, Actors* (Leiden: Brill, 2013), 1–22, 19.

In seventeenth-century Europe, forum shopping was the absolute norm: Dutch and English seamen took great advantage of these possibilities and did indeed bring their claims to various court. Whether crowding the High Court of Admiralty in London – "busier with instance litigation from 1630 to 1660 than it had ever been before or would ever be again"[78] – or the *Forestier* in Venice and the *Conservatori del Mare* in Genoa, seamen took advantage of different legislation in different countries. They were protagonists of the civil litigation boom which swept through sixteenth- and seventeenth-century Europe, a phenomenon which has attracted scholarly attention,[79] and which had profound social and cultural impact.[80] Richard Kagan called this period a "'legal revolution' – an age in which the formal adjudication of disputes was sharply and dramatically on the rise".[81] This increase in litigation engaged all levels of society. Its roots lay in the deep transformations of European society and economy, especially those connected with the evolution of social and labour relations due to the increase in credit and contractual relations.[82] As the maritime sector underwent structural changes on its way to becoming truly

78 George F. Steckley, "Instance Cases at Admiralty in 1657: A Court 'Packed up with Sutors'", *Journal of Legal History* 7 (1986): 68–83, 68.

79 For some classic texts see: Richard Kagan, *Lawsuits and Litigants in Castile, 1500–1700* (Chapel Hill: North Carolina University Press, 1981); and his "A Golden Age of Litigation: Castile 1500–1700", in John Bossy (ed.), *Disputes and Settlements: Law and Human Relations in the West* (Cambridge: Cambridge University Press, 1983), 145–166; C.W. Brooks, *Lawyers, Litigation and English Society since 1450* (London: Hambledon, 1988); and his "Interpersonal conflict and social tension: civil litigation in England, 1640–1830", in A.L. Beier, David Cannadine and James M. Rosenheim (eds.), *The first modern society: essays in English history in honour of Lawrence Stone* (Cambridge: Cambridge University Press, 1989), 360–367; Craig Muldrew, "Credit and the courts: debt litigation in a seventeenth-century urban community", *Economic History Review*, 46 (1993): 23–38; Julie Hardwick, *Family business. Litigation and the political economies of daily life in early modern France* (Oxford: Oxford University Press, 2009).

80 For England, a good example is the amount of litigation presented on stage, such as in the plays of Shakespeare; for a sharp recent analysis see Quentin Skinner, *Forensic Shakespeare* (Oxford: Oxford University Press, 2014) and (massive) bibliography therein quoted; interesting material also in a recent exhibition at the Folger Library, see: http://www.folger.edu/press-release-age-of-lawyers-exhibition (last accessed 7 June 2018).

81 Kagan, "A Golden Age of Litigation", 145.

82 Craig Muldrew, *The economy of obligation. The culture of credit and social relations in early modern England* (Houndmills: Macmillan, 1998); Christian Wollschläger, "Civil litigation and modernization: The work of the municipal courts of Bremen, Germany, in five centuries, 1549–1984", *Law and Society Review* 24 (1990), 261–282; Kagan, "A Golden Age of Litigation".

globalised, these phenomena took on a stark importance;[83] the analysis of the implications of this for maritime employment provide us with an important perspective on the conflicting social, economic and political conceptions of labour across Europe. All these elements converged to create rather different legal frameworks for labour, well beyond the maritime world, and this complex heritage not only underpins the history of European economic development and political interplay, but influences our daily lives even today.[84]

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83 Data on the increase of litigation in the Admiralty Court in George F. Steckley, "Litigious Mariners: Wage Cases in the Seventeenth-Century Admiralty Court", *The Historical Journal* 42 (1999), 315–345, 317.

84 Fusaro, *The Making of a Global Labour Market*, and Wolfgang Streeck, "Why the Euro divides Europe", *New Left Review* 95 (Sept-Oct 2015), 5–26.

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CHAPTER 4

Lingua Franca and Migrations

Guido Cifoletti

The search for a 'Lingua Franca' has long fascinated Europeans, who have been, for centuries, in search of one language which could overcome all the divisions across this diverse continent and trading area. The real 'Lingua Franca' doesn't quite fulfill all these desires but it is nevertheless interesting in the context of this book's subject matter, looking at how language migrated through trade and the law. According to our sources, 'Lingua Franca' was an Italian-based pidgin, commonly used in the so-called Regencies, i.e. Algiers, Tunis and Tripoli, during the Ottoman era. It was in use from the 16th century until the French conquest of Algiers in 1830. The first scholar who approached the topic was a very distinguished German linguist, Hugo Schuchardt, in an article dated 1909; he collected many documents in this language, traced its history, and drew its features.[1] Nevertheless, even after the publication of his works, some legends about this language circulated, for example the story that it was used in the age of the Crusaders,[2] or that it was the common maritime language of the Mediterranean.[3] More recently, in the twenty-first century, further studies have appeared which suggest, at hand of some new texts and documents, that this was not so.[4]

Today it is difficult to imagine a situation with so important differences. But the period of Ottoman domination coincided in the Arabic world with an extreme decline, in literature, sciences, arts, in fact across a whole range of culture. Moreover, it was also a period of political and demographic decline for the Arab world: at that time, Europe was prolific, and Arab countries were depopulated. In 1492 the conquest of the Nasrid Kingdom of Granada after a long ten year war meant that Castillian Spain was at the peak of its power; having

1 Hugo Schuchardt, "Die Lingua franca", *Zeitschrift für romanische Philologie* 33 (1909), 441–461. See also: Federica Venier, *La corrente di Humboldt, Una lettura di* La lingua franca *di Hugo Schuchardt* (Rome: Carocci, 2012).

2 Robert A. Hall jr., *Pidgin and Creole Languages* (Ithaca and London: Cornell University Press, 1966), 4.

3 Henry and Renée Kahane, Andreas Tietze, *The Lingua Franca in the Levant. Turkish Nautical Terms of Italian and Greek Origin* (Urbana: University of Illinois Press, 1958).

4 Jocelyne Dakhlia, *Lingua franca. Histoire d'une langue métisse en Méditerranée* (Paris: Actes Sud, 2008), and Guido Cifoletti, *La lingua franca barbaresca,* 2nd ed. (Rome: Il Calamo, 2011).

won Granada and Andalucía the Catholic Monarchs, Ferdinand and Isabella turned their attention to the conquest of North-African countries. In 1510 a Spanish fleet occupied Oran and Tripoli; the dynasties of Tlemcen and Tunis were in some way protected as vassals of the Hispanic monarchy, but some Tunisian towns like Mahdia or the island of Djerba, changed their master several times, swapping between Christian and Muslim rulers.

It is impossible to forget the *Jihâd*: without it, all the history of the Ottoman Empire, up to the 19th century, is impossible to understand; but at that time, European identity and Christian identity were probably as strong as Muslim identity, or even stronger. The whole Muslim community was mobilized in the defense of North Africa. Some Turkish pirates came from the East, and established the state of Algiers (1516), and afterwards that of Tripoli (1551) and Tunis (1574); the Moroccan port of Salé was in the same situation (even if politically it was not part of the Ottoman Empire), but Lingua Franca was little used there, because of the widespread knowledge of Spanish. In all these towns, piracy was the main activity; they were dependent on the Turkish sultan (except Salé), but his authority carried a different weight, according to times and places. Muslim pirates (called *Barbaresques*) captured many European ships, and brought their crews to Maghreb ports; they were held there as slaves. In amongst them were some famous people such as the Spanish writer Miguel Cervantes in Algiers, or Saint Francis of Paul in Tunis. At the same time, there was also a slave trade going from African countries to the Maghreb; compared to them, Europeans slaves had more hope of returning to their homes, because it was possible to hold them for ransom. A few others escaped by ship; and many thousands of them died in detention. There is evidence to suggest that Lingua Franca was used mainly to communicate with European slaves, but also with diplomats and travelers. At this time in these countries, the use of Lingua Franca was all encompassing so that no European needed interpreters. In the Levant, at the time of the Ottoman Empire, Lingua Franca is also recorded, but it was not so widespread; it was also used in some European towns like Venice, but without the social relevance of the countries of the Maghreb.

The language acquired the title Lingua Franca because in Muslim countries (and many other Oriental languages) all western Europeans were known as Francs.[5] The use bore no relation to the country of France, because its use to denote all western peoples dates back to the Byzantines, at the 9th century (the time of Charlemagne's Empire).

5 On the origin of the expression 'Lingua Franca' see: Manlio Cortelazzo, "Che cosa s'intendesse per lingua franca", *Lingua Nostra* 26 (1965), 108–110; Henry and Renée Kahane, "Lingua Franca. The Story of a Term", *Romance Philology* 30 (1976), 25–41.

At this point we should turn to some texts in Lingua Franca: one of the first known examples was the conversation between a Turkish pirate, Dragut (Türgüt) and the Knight of Malta Parisot de la Valette (later Grand Master of The Order). Dragut, a very clever pirate, was captured in 1540 by a Genoese fleet, and was set to work as a rower in a galley; Parisot, who had previously been his prisoner, saw him and said: *Señor Dragut, usanza de guerra!* ("Mister D., this is the custom of war!"),[6] and Dragut answered: *Y mudanza de fortuna!* ("and a reversal of fortune!").[7]

Many of these types of exchanges can be found in a book by Fray Diego de Haedo, a religious scholar who collected much evidence from Christians who had been prisoners in Algiers at the end of the 16th century; he published his work, *Topographia e historia general de Argel*, in 1612 in Valladolid; for example many Muslims said, to their Christian slaves, this sentence as consolation: *non pillar* (or *pigliar*) *fantasia, Dio grande, mundo così così, si venir ventura andar a casa tuya* ("don't worry, God is great, the world is so and so, if you are lucky you will go home"); and a Marabout (a man of religion) scolded a priest who was also a slave in Algiers, saying: *Mirar Iafer, que esto estar gran pecado: como andar aqui carta por terra? Pillar y meter en aquel forato, guarda diablo, que la Papaz Christiano fazer aquesto* ("look Ja'far, this is a great sin: how did this paper fall on the ground? Take it and put it in that hole, pay attention, that the priest does that"); later the master of this slave asked this Marabout, why a paper fallen on the ground was considered such a great sin and he answered: *Como? Y ancora parlar Papaz dessa manera? Estar muy grande pecado, y grande pecado: responder que dezirme, que cerrar boca, chito chito, non parlar* ("What? Does the priest still speak like that? It is a very great sin: answer what I say, that he must remain in silence, quietly, quietly, don't speak").[8]

Some texts are amusing: for example the English Consul in Tripoli, Thomas Baker (who was in office from 1677 to 1690) passed a night drinking wine with some Muslim friends, and after that appeared before the Dey, who noticed that he was drunk, and asked: *Signor Consule perqué non restar à casa tova quando ti star sacran?* ("Sir, why don't you stay home when you are drunk?") and he answered: *Saper Sultan que gente comme mi bever vin, et bestie comme ti bever acqua* ("you Sultan must know that men like me drink wine, and animals like you drink water").[9]

6 All English translations by the author, apart from the quotation of Hugo Schuchardt (see footnote 15).

7 See: Cifoletti, *La lingua franca barbaresca*, 141.

8 Ibid., 145–147.

9 Ibid., 167. This story was not related in Baker's memoirs, but in the book of Father Quartier, *L'esclave religieux et ses aventures* (Paris: D. Hortemels, 1690), 240.

In 1830, the central documentation of this language was printed in Marseilles, the *Dictionnaire de la langue franque ou petit mauresque*, which is the only work entirely dedicated to this argument, whilst Lingua Franca was still alive. From this book, we have found many interesting sentences such as for example: *y a-t-il longtemps que vous n'avez pas vu Monsieur M.*? is translated *Molto tempo ti non mirato Signor M.?* ("Has it been a long time since you saw Mr. M.?")*; Je l'ai vu hier* is translated *mi mirato iéri* ("I saw him yesterday")*; C'est un brave homme* ("He is a good man") becomes *star bouona genti;* and *Quand vous le verrez faites lui mes compliments* ("When you see him, give him my compliments") becomes *quando ti mirar per ellou saloutar mouchou per la parté di mi*[10] (most of our sources are in French, because the interest of France in the Maghreb went on for many centuries prior to the colonization).

However, in 1830 Algiers was conquered by France, and this world of pirates, janissaries and renegades disappeared; and with it Lingua Franca gradually too. It did survive about fifty years under the new name of *Sabir.* The new name was born from the new environment of French settlers, and originated in Molière's "Le bourgeois gentilhomme": this comedy contains in fact a ballet in Lingua Franca, which begins with the words *Se ti sabir…* "If you knew…". But this new version or *Sabir* had a much more limited range of expression than the former Lingua Franca. If we compare the sentences of an article published in 1852:[11] *Ti andar mirar, mi andar semi semi*, translated *Tu vas sortir pour visiter la ville; veux-tu que je t'accompagne?* ("You are going out to visit the city; do you want me to accompany you?") with similar expressions in the *Dictionnaire* of 1830, like: *Qui est ce Monsieur qui vous parlait tantôt* ("Who is this gentleman who has been speaking to you sometimes?"), which was translated *qui star qouesto signor que poco poco ablar per ti*; or *Je serais bien aise de faire sa connaissance* ("I would be glad to meet him")*,* which became *mi ténir piacher conoschir per ellou*; or finally *Nous irons le voir ensemble* ("We will go to see him together") which became *bisognio andar mirar per ellou siémé siémé.*

The last evidence of *Sabir* appears to have been reduced still further. In a book dating from 1887: *Arbi djemel, moi fusil, besef,* which was translated as follows in French: *un Arabe a voulu tirer sur mon chameau; j'ai pris mon fusil et j'ai tire* ("an Arab wanted to shoot my camel; I took my rifle and I shot").[12]

10 Ibid., 122.

11 This article, *La langue sabir*, by Mc Carthy and Varnier, appeared on *L'Algérien, journal des intérêts d'Algérie*. See: Cifoletti, *La lingua franca barbaresca*, 223–230.

12 Valéry Mayet, *Voyage dans le Sud de la Tunisie* (Paris: Challamel, 1887). See: Cifoletti, *La lingua franca barbaresca*, 243.

But what are the origins of *Sabir* or Lingua Franca? Was it a language of trade? This was the opinion of Schuchardt, and many others; but at that time, commerce between the northern and southern sides of the Mediterranean wasn't so important (in fact the only relevant commerce was the capture and ransom of slaves), and in fact nearly all texts which have survived are unrelated to commerce. In connection with this, it must be noted that our admiration for some scholars of the past doesn't oblige us to accept all their opinions: medieval people gave us a useful saying in that regard saying about ancient philosophers "compared to them we are dwarfs, but we are dwarfs on the shoulders of giants, so we can see further".[13] More recently it has been generally accepted that when two languages meet, the creation of a pidgin (or a creole) is not the rule, but an exception.[14] I think we must thoroughly study the conditions which caused the rise of this type of language; in my opinion it depends on historical conditions, much more than linguistic conditions.

Schuchardt said that a reduction of the Italian language to a pidgin required a good knowledge of that language, so in his opinion it was European people who created this pidgin. He wrote:

> to use another image: it is not the foreigners who break away single stones from a splendid, well-appointed edifice in order to construct meager huts, but the owners themselves who put them in such ends. [...] how does it turn out that the Arab, who does not yet know Italian, selects *mangiar* as the expressent for *mangio, mangi, mangia* etc.? Only after very extensive conversance with Romance would he realize the statistical preponderance and functional generality of the Romance infinitive. Even then, if he realizes that nothing corresponding to this infinitive exists in his language, much less to the 3rd pers. sing., he still does not say *mi voler mangiar*, for example, but *mi vuole mi mangia*. It is the European who impresses the stamp of general currency on the infinitive.[15]

13 *Dicebat Bernardus Carnotensis* [Bernardo di Chartres] *nos esse quasi nanos gigantium humeris insidientes, ut possimus plura eis et remotiora videre*: John of Salisbury, *Metalogicon*, III, 4. Others, though, may have used the expression before.

14 See: Peter Bakker, Aymeric Daval-Markussen, Mikael Parkvall and Ingo Plag, "Creoles are typologically distinct from non-creoles", *Journal of Pidgin and Creole Languages* 26:1 (2011), 5–42.

15 Schuchardt, *Die Lingua franca*, 443–444. English translation by Thomas L. Markey, in: Hugo Schuchardt, *The Ethnography of Variation. Selected Writings on Pidgins and Creoles* (Ann Arbor: Karoma, 1979), 28.

His opinion is very wise and it is easy to see the logic in it, but our sources suggest the opposite: all European travelers said that Maghrebian (or Turkish) people were always the first to employ Lingua Franca, and no Christian ever (according to their memoirs) simplified his language to be understood. But there is a way to conciliate all this. In the 16th and 17th centuries, the Maghreb was a multiethnic region. In the town of Algiers, indigenous people (the so-called Baldis, a Maghrebian pronunciation for Arabic *baladî*, "from the country") were an oppressed minority; the power was with Turkish people and with renegades from all European countries. Assimilated to the ancient populations (Muslims and Jews), refugees from the Iberian Peninsula lived in all towns of the Maghreb: Jews called Sefardis, Muslims from the reign of Castile called Moriscos, and Muslims from Aragon called Tagarins. Some of their communities had retained a Spanish dialect for centuries, and some Sefardis still do so today. Knowing this it is easy to imagine that if so many people had some knowledge of Romance languages then understanding Europeans would not have been very difficult. At that time, the world-wide language was Italian: it was the most important language of Europe, because literature was held in such high standing, and Italian writers were appreciated by all cultivated people; it was also used for exchanges in the Ottoman Empire, where the secretaries of the Sultan were Greeks who studied at Italian universities. But we must remember that for Muslims, this was the language of the enemy: in fact it was the language of the Pope, the true antagonist of the Sultan (the relation between religious and political power in the Muslim world, and also in the Ottoman state, needs a special and separate treatment).

So I arrived at the conclusion that this pidgin was created by Muslims: Moriscos, Tagarins, renegades who had a good knowledge of Romance languages. None of them would have had much difficulty in understanding (and also speaking) Italian, which was, after all the main language of exchange, but they refused to speak Italian out of principle because of identity problems: they wanted to be Turks, so they refused to speak the same language as their enemies. So they created a language, which avoided the negative connotations of the other. My opinion (which must be verified) is that that same problem of identity was at the origin of the creole language too. Creoles were slaves transported to America or other countries who didn't have any common language except that of their masters, but they refused to speak it, and so created new languages instead.

In our sources, we find evidence / a trace of this hostility against the Italian language: Louis Frank, who was in Tunis at the time of Napoleon, talks about the bey Hammuda, who reigned over this town:

> Il parle, lit et écrit facilement l'arabe et le turc; la langue franque, c'est-à-dire cet italien ou provençal corrompu qu'on parle dans le Levant, lui est également familière; il avait même voulu essayer d'apprendre à lire et écrire l'italien pur-toscan; mais les chefs de la religion l'ont détourné de cette étude, qu'ils prétendaient être indigne d'un prince musulman.[16]

Some speakers of Lingua Franca had an even more thorough knowledge of Romance languages: for example we can read about the Pasha of Tripoli, Yusuf Qaramanli, who, in 1825, met the Sardinian Consul, who spoke a very literary Italian, and understood him, but answered in Lingua Franca.[17] Another example in the book of Monsieur de Fercourt, who tried to escape from slavery (in 1678); his master, a Tagarin (who presumably could speak a Romance language very well) addressed him in Lingua Franca: *perro sensa fede, gyaour, sentar abasso* ("dog without faith, misbeliever, sit down on earth") (for the Turkish

16 "He speaks, reads and writes Arabic and Turkish easily; the Frankish language, that is to say, that corrupted Italian or Provençal spoken in the Levant, is also familiar to him; he had even tried to learn to read and write pure Tuscan Italian; but the religious leaders deterred him from this study, which they claimed to be unworthy of a Muslim prince". See: Cifoletti, *La lingua franca barbaresca*, 192.

17 I can report this dialogue. At first the Pasha said: *Mi conoscer ti aver bona cabesa, pirò Re Sardinia mandar sempri Consul senza rigal* ("I recognize that you are a clever man, but the King of Sardinia always sends his Consul without presents"), and the Consul answered (in Italian): *Il Re Di Sardegna è troppo generoso e splendido per evitare di mandare il regalo, ma egli manda il regalo quando invia un nuovo Console, e ciò secondo il trattato firmato da V.A. medesimo* ("The King of Sardinia is too generous and splendid to avoid sending a gift, but he would only send a gift when he sends a new Consul, that is according to the very treaty signed by Your Highness yourself"). The Pasha went on saying: *Ti star Consul i no star? mi non entender, così aver fatto Re Sardinia per Ugo, i tratato con Sardinia no dicir questo* ("Are you a Consul or not? I don't understand, so did the King of Sardinia with Ugo, the treaty with Sardinia doesn't say this"). And the Consul replied: *Il mio Re mi ha mandato soltanto per far le funzioni del signor Parodi, che è sempre il console di S.M. presso V.A., ed anzi la mia venuta a Tripoli deve provare a V.A. quanto sta a cuore al nostro Re di mantenere la buona armonia con V.A., perché Egli mi ha fatto lasciare la mia residenza di Corfù per venire qui a fare le veci del signor Parodi durante la sua malattia* ("My King sent me only to perform the duties of Mr. Parodi, who is still the consul of His Majesty before your Royal Highness; and indeed my coming to Tripoli should demonstrate to Your Majesty how important it is to our King to maintain a spirit of harmony with Your Highness, because He made me leave my residence in Corfu to come here to take the place of Mr. Parodi during his illness"). But the Pasha answered: *Cristiane star furbi, Barodi star morto, i Re Sardinia mandar ti Tripoli birché tener bona cabesa i procura no pagar rigal* ("Christians are artful, Parodi is dead, and the King of Sardinia sends you to Tripoli because you are clever and you manage not to pay presents"). See Cifoletti, *La lingua franca barbaresca*, 206.

punishment called *falaqa*).[18] But some Maghrebian people were unaware of Romance languages, and also their knowledge of Lingua Franca was imperfect: so Emanuel d'Aranda (1640)[19] in Algiers had a master who wanted that his slaves worked *forti*, for them it would mean 'quickly', but actually he wanted them to do an accurate job. Probably he misunderstood the frequent expression of Lingua Franca *como estar, bono, forte, gramerçy* ("how are you, good, strong, thanks (to God)");[20] so he took the words *bono* and *forte* as synonyms.

We must also consider that Lingua Franca came to an end not only because of the conquest of Algiers: at that time (the beginning of the 19th century) the thoughts of Muslim people were changing, they looked at Europe not only as a home of enemies, but also as a superior civilization, worthy of being copied. In this perspective, a better knowledge of European languages (especially French) was required, and Lingua Franca had no reason to exist, because there was no reason to keep the distance, that had been maintained for centuries, any longer.

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18 Ibid., 169.

19 Ibid., 156–157.

20 Ibid., 160.

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PART 2

European Networks

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CHAPTER 5

Brokers as German-Italian Cultural Mediators in Renaissance Venice

Uwe Israel

This magnificent bird's-eye view shows Venice in 1500; the title: Venetie MD indicates the subject matter.[1]

From a cloud above, Mercury, the god of merchants and thieves looks down at the city. The banner reads: "I, Mercury, shine favorably upon this above all

FIGURE 5.1 Jacopo de' Barbari, Venetie MD. Woodcut (Anton Kolb) Nuremberg 1500, 134,5 × 282 cm., Venice, Biblioteca del Museo Correr, cl. XLI n. 57 (source: Wikimedia commons).

1 Cf. Corrado Balistreri-Trincanato, *Venezia città mirabile. Guida alla veduta prospettica di Jacopo De' Barbari* (Caselle di Sommacampagna: Cierre, 2009); Juergen Schulz, "Rivisitando la grande veduta di Venezia di Jacopo de' Barbari", in Maria Agnese Chiari Moretto Wiel and Augusto Gentili (eds.), *L'attenzione e critica. Scritti di storia dell'arte in memoria di Terisio Pignatti* (Miscellanea. Facoltà di Lettere e Filosofia dell'Università di Venezia 12) (Padua: Il poligrafo, 2008), 85–95; Friedl Brunckhorst, *Architektur im Bild. Die Darstellung der Stadt Venedig im 15. Jahrhundert* (Studien zur Kunstgeschichte; München, TU, Diss. phil., 1994/95) (Hildesheim: Georg Olms Verlag, 1997), 127–181; Juergen Schulz, "Jacopo de' Barbari's View of Venice. Map-making, City Views, and Moralized Geography before the Year 1500", *Art Bulletin* 60 (1978), 425–474.

FIGURE 5.2 The city center around the Rialto Bridge (detail from fig. 5.1)

other emporia". Gazing up at him from below is the god of the sea, Neptune, who is restraining a sea monster in St Mark's Basin in front of the Doge's Palace. A tablet reads: "I, Neptune, reside here, smoothing the waters at this port". From the sides, ancient gods of the wind blow fresh air into the lagoon and appear to ensure a healthy climate for the city. However, the Venetians must have been very worried about their fragile habitat at the end of the fifteenth century: They fought against the lagoon drying up, the siltation of canals and the resulting poor air quality.[2]

In an encomiastic Renaissance style, the view offers visual praise of the city that moves the island town into a heathen realm of gods, thus dispensing with the traditional patron saints of Mark and Mary.[3] In a slightly enlarged arsenal,[4] one can see galleys being built – although it is not the navy seen in port, but the merchant fleet, which, like both gods, represents the peaceful and smooth trade of the maritime republic. However: at the time the woodcut was made, Venice was at great risk: From the Portuguese, who opened the Cape route to the spices of eastern India in 1498, and from the advancing Turks, who in 1499

2 Elisabeth Crouzet-Pavan, *"Sopra le acque salse". Espaces, pouvoir et société à Venise à la fin du Moyen Âge* (Collection de l'École Française de Rome 156), 2 vols. (Rome: École française de Rome, 1992), vol. 1, 311–317.

3 Norbert Huse, *Venedig. Von der Kunst, eine Stadt im Wasser zu bauen* (Munich: C.H. Beck, 2008), 7–10.

4 Cf. Ennio Concina, *L'Arsenale della Repubblica di Venezia* (Milan: Electa, 2006).

burned the unchallenged villages of *Terraferma Veneta*, in close proximity to Venice, to ashes.[5]

The visual emphasis of the economic center at the heart of the city, around the Rialto Bridge, is also meant to suggest economic prosperity, with the disproportionately large traders' loggia on the right and with the specifically-named *Fondaco dei Tedeschi*,[6] the trading post of the Germans, on the left bank of the Grand Canal, indicating the pulse of the city.

The distinct accentuation of the valley of Serravalle, through which the shortest route past Cadore and Brenner leads to Augsburg, Regensburg and Nuremberg (places with which the closest economic ties had existed for centuries)[7] illustrates the fact that the transalpine routes were given particular importance for Venetians at this time.[8]

The publisher of the giant woodcut shown came from Nuremberg – the most important partner city of Venice in the North for years,[9] as well as a center of cartography and specialty printing.[10] The woodcut presents an innovative view of a complete city panorama that unexpectedly included detailed

5 Cf. Uwe Israel, "Venedigs Welt im Wandel um 1500", in Ingrid Baumgärtner and Piero Falchetta (eds.), *Venedig und die neue Oikoumene. Kartographie im 15. Jahrhundert* (Venetiana. Collana del Centro Tedesco di Studi Veneziani 17) (Rome: Viella, 2016), 175–200; Id., "Ab vom Kurs. Venedig und die atlantische Expansion des 15. und 16. Jahrhunderts", *Archiv für Kulturgeschichte* 94 (2012), 313–340; Paolo Preto, *Venezia e i Turchi* (Florence: Sansoni, 1975).

6 Cf. Henry Simonsfeld, *Der Fondaco dei Tedeschi in Venedig und die deutsch-venetianischen Handelsbeziehungen. Eine historische Skizze*, 2 vols. (Stuttgart: J.C. Cotta, 1887); Uwe Israel, "Art. Fondaco dei Tedeschi", *Historisches Lexikon Bayerns* (2015), (http://www.historisches-lexikon-bayerns.de/artikel/artikel_45368); Id., "Art. Fondaco dei Tedeschi", *Handwörterbuch zur deutschen Rechtsgeschichte* 1 (2008), 1614–1615.

7 Cf. Bernd Roeck, Klaus Bergdolt and Andrew John Martin (eds.), *Venedig und Oberdeutschland in der Renaissance. Beziehungen zwischen Kunst und Wirtschaft* (Studi. Schriftenreihe des Deutschen Studienzentrums in Venedig 9) (Sigmaringen: J. Thorbecke, 1993).

8 Cf. Uta Lindgren (ed.), *Alpenübergänge vor 1850. Landkarten – Strassen – Verkehr* (Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte. Beiheft 83) (Stuttgart: Steiner Verlag Wiesbaden, 1987).

9 Cf. Bettina Pfotenhauer, *Nürnberg und Venedig im Austausch. Menschen, Güter und Wissen an der Wende vom Mittelalter zur Neuzeit* (Studi. Schriftenreihe des Deutschen Studienzentrums in Venedig. Neue Folge 14) (Regensburg: Schnell & Steiner, 2016); Philippe Braunstein, "Wirtschaftliche Beziehungen zwischen Nürnberg und Italien im Spätmittelalter", *Beiträge zur Wirtschaftsgeschichte Nürnbergs* 1 (1967), 377–406.

10 Cf. Wojciech Iwanczak, *Die Kartenmacher. Nürnberg als Zentrum der Kartographie im Zeitalter der Renaissance* (Darmstadt: Primus-Verlag, 2011); Peter Burke, "Early Modern Venice as a Center of Information and Communication", in John Martin and Dennis Romano (eds.), *Venice reconsidered: The history and Civilization of an Italian City-state, 1297–1797* (Baltimore: John Hopkins University Press, 2002), 389–419.

FIGURE 5.3 From the lagoon through the river plains of the Po to the foothills of the Alps (detail from fig. 5.1)

protruding buildings, paths and squares developed from a German-Italian (more precisely, Venetian-Nurembergian) joint venture.[11] The view was carved into wood based on the designs of the Venetian painter and printmaker Jacopo de' Barbari for the merchant and bookseller Anton Kolb, who lived in Venice for many years.[12] Both were frequent transalpine border crossers: After the completion of the woodcut, they were both in the service of Emperor Maximilian I in the North – de' Barbari located in Nuremberg. The Italian died in Mechelen – the German in Venice. Kolb came from one of the most affluent merchant families in Nuremberg. The Kolbs, like the Augsburg Fuggers, had their own chamber in the new *Fondaco dei Tedeschi*, which had been built 1505–08.[13]

11 Cf. Andrew J. Martin, "Anton Kolb und Jacopo de' Barbari. "Venedig im Jahre 1500". Das Stadtportrait als Dokument venezianisch-oberdeutscher Beziehungen", in Bärbel Hamacher and Christl Karnhehm (eds.), *Pinxit – sculpsit – fecit. Kunsthistorische Studien. Festschrift für Bruno Bushart* (Munich: Deutcher Kunstverlag, 1994), 85–94.

12 Cf. Beate Böckem, *Jacopo de' Barbari. Künstlerschaft und Hofkultur um 1500* (Studien zur Kunst 32) (Cologne: Böhlau, 2016), 33–53; Peter Zahn, "Die Endabrechnung über den Druck der Schedelschen Weltchronik (1493) vom 22. Juni 1509. Text und Analyse", *Gutenberg-Jahrbuch* 66 (1991), 177–213, 196–197.

13 Böckem, *Jacopo de' Barbari*, 34.

The community of Venice had built the trading post at the beginning of the thirteenth century to promote, concentrate and levy the trade with the Germans in particular.[14] They did this based on the Levantine model, as the name (which derives from the Arabic word for this type of *emporium*: *funduq*) shows.[15] Although the Venetian magistrate had leased the facility in the first decades of its existence for over 1,100 ducats per year, as of 1266 it was under municipal administration.[16] The *Fondaco* soon became one of the main income sources for the city. In 1472, the Doge Paolo Morosini quoted the annual turnover at one million ducats.[17]

After being expanded, the enormous building with several courtyards, 56 rooms and numerous storage vaults, could house approximately 100 merchants. Roughly the same number of servants, who often came from German lands as well, were available to these merchants: There was a building administrator with assistants, scribes, cooks for two dining halls, a tavern keeper as well as a multitude of bale binders, carters and carriers.[18] They were a part of the German settlement of Venice[19] concentrated around the Rialto, which included several thousand people in the fifteenth century, and thus may have even exceeded the Greek settlement in number – at a time when Venice

14 Cf. Karl-Ernst Lupprian, *Il Fondaco dei Tedeschi e la sua funzione di controllo del commercio tedesco a Venezia* (Centro Tedesco di Studi Veneziani. Quaderni 6) (Venice, 1978).

15 Cf. Uwe Israel, "Das mittelalterliche Kaufhaus im europäischen Mittelmeerraum", in Franz J. Felten (ed.), *Mittelalterliche Kaufhäuser im europäischen Vergleich* (Mainzer Vorträge 18) (Stuttgart: Steiner, 2015), 127–152; Id., "Levantehandel", *Handwörterbuch zur deutschen Rechtsgeschichte* 3 (2014), 939–941; Olivia Remie Constable, *Housing the Stranger in the Mediterranean World. Lodging, Trade, and Travel in Late Antiquity and the Middle Ages* (Cambridge: Cambridge University Press, 2003); Ennio Concina, *Fondaci. Architettura, arte e mercatura tra Levante, Venezia e Alemagna* (Venice: Marsilio, 1997).

16 Michael Knapton, "La finanza pubblica", in Giorgio Cracco and Gherardo Ortalli (eds.), *Storia di Venezia. Dalle origini alla caduta della Serenissima. Vol. 2: L'età del comune* (Rome: Istituto della Enciclopedia italiana, 1995), 371–407, 391.

17 Gerhard Rösch, "Il Fondaco dei Tedeschi", in Susanna Biadene (ed.), *Venezia e la Germania. Arte, politica, commercio. Due civiltà a confronto* (Milan: Electa, 1986), 51–72, 52.

18 Cf. Uwe Israel, "Fondaci. Mikrokosmen für Fremde", in Peter Bell, Dirk Suckow and Gerhard Wolf (eds.), *Fremde in der Stadt. Ordnungen, Repräsentationen und Praktiken* (*13.-15. Jahrhundert*), (Inklusion/Exklusion. Studien zu Fremdheit und Armut von der Antike bis zur Gegenwart 16) (Frankfurt a. M.: Peter Lang, 2010), 119–141 and 474–477.

19 Cf. Philippe Braunstein, *Les Allemands à Venise* (*1380–1520*), (Bibliothèque des Écoles Françaises d'Athènes et de Rome 372) (Rome: Écoles française, 2016); Cecilie Hollberg, *Deutsche in Venedig im späten Mittelalter. Eine Untersuchung von Testamenten aus dem 15. Jahrhundert,* (Studien zur historischen Migrationsforschung 14) (Göttingen: Vandenhoeck & Ruprecht, 2005).

consisted of approximately 100,000 inhabitants.[20] The only other German settlements in Italy that were similarly large were in Florence, Rome, Trent and Treviso.[21]

Most of the people who immigrated in large numbers to Italy from German lands, particularly in the fourteenth and fifteenth centuries – usually unmarried men – went to the South as small traders: They were bakers, cobblers or weavers. The first generation of book printers came from Germany as well.[22] In addition to bringing this new technology to the South, they also introduced the organizational structure of publishing houses. As a bookseller for the Nuremberg printer Koberger, Anton Kolb had been distributing the Nuremberg Chronicle of Hartmann Schedel in Venice since 1493. In 1500, as publisher of the woodcut, he applied to the Senate for the printing privilege of the cityscape and a copyright protection.[23]

The migrants often married into Italian families, assimilated surprisingly quickly and, in many places, were able to organize themselves into special

20 Philippe Braunstein, "Appunti per la storia di una minoranza: La popolazione tedesca di Venezia nel Medioevo", in Rinaldo Comba, Gabriella Piccinni and Giuliano Pinto (eds.), *Strutture familiari, epidemie, migrazioni nell'Italia medievale* (Nuove ricerche di storia 2) (Neaples, 1984), 511–517: 513. Cf. Ermanno Orlando, *Migrazioni mediterranee. Migranti, minoranze e matrimoni a Venezia nel basso medioevo* (Ricerche e saggi dell'Istituto Veneto di Scienze, Lettere ed Arti) (Bologna: Il Mulino, 2014); Andrea Zannini, *Venezia città aperta. Gli stranieri e la Serenissima, XIV–XVIII sec.* (Metropoli 1) (Venice: Marcianum, 2009); Maria Francesca Tiepolo and Eurigio Tonetti (eds.), *I Greci a Venezia* (Venice: Istituto Veneto di Scienze, Lettere ed Arti, 2002); Brunehilde Imhaus, *Le minoranze orientali a Venezia. 1300–1510* (Rome: Il Veltro, 1997).

21 Cf. Andreas Böninger, *Die deutsche Einwanderung nach Florenz im Spätmittelalter* (The Medieval Mediterranean. Peoples, Economies and Cultures, 400–1500 60) (Leiden: Brill, 2006); Uwe Israel, *Fremde aus dem Norden. Transalpine Zuwanderer im spätmittelalterlichen Italien* (Bibliothek des Deutschen Historischen Instituts in Rom 111) (Tübingen: Niemeyer, 2005); Knut Schulz and Christiane Schuchard, *Handwerker deutscher Herkunft und ihre Bruderschaften im Rom der Renaissance. Darstellung und ausgewählte Quellen* (Römische Quartalschrift für christliche Altertumskunde und Kirchengeschichte. Supplementband 57) (Rome: Herder, 2005); Serena Luzzi, *Stranieri in città. Presenza tedesca e società urbana a Trento* (*secoli XV–XVIII*) (Istituto Storico italo-germanico Monografie 38) (Bologna: Il Mulino, 2003).

22 Cf. Ferdinand Geldner, *Die deutschen Inkunabeldrucker. Ein Handbuch der deutschen Buchdrucker des XV. Jahrhunderts nach Druckorten. Vol. 2: Die fremden Sprachgebiete* (Stuttgart: A. Hierseman, 1970), s. v. 'Venedig; Marino Zorzi, "Stampatori tedeschi a Venezia", in Biadene (ed.), *Venezia* (see above, n. 17), 115–140; Leonardas Vytautas Gerulaitis, *Printing and Publishing in fifteenth-century Venice* (Chicago: American Library Association, 1976).

23 Cf. Christopher L.C.E. Witcombe, *Copyright in the Renaissance prints and the privilegio in sixteenth-century Venice and Rome* (Studies in Medieval and Reformation Thought 100) (Leiden: Brill, 2004).

brotherhoods.[24] It was here that the newcomers in particular first found solidarity, camaraderie and perhaps a piece of home as well. The German-speaking bale binders of the *Fondaco*, for example, had their brotherhood altar in the Dominican Church Santi Giovanni e Paolo.[25] There was also a chapel dedicated to Mary in the *Fondaco* for the German merchants.[26] A few steps away, also at the foot of the Rialto Bridge, was the parish church of San Bartolomeo, where they could also hear sermons in German; those from Nuremberg set up their own altar in San Bartolomeo for their own city's patron saint, Sebaldus.[27] Conversely, they brought the worship of another plague saint, Rochus, from the lagoon to the Pegnitz River, where they dedicated an altar in St Lawrence and a cemetery chapel outside the city walls to him.[28] It was therefore not only terms and practices that travelled great distances with the migrants – but relics and cults as well.

Albrecht Dürer painted "The Feast of the Rose Garlands" during his second trip to Venice for the German merchants' Brotherhood of the Rosary in San Bartolomeo.[29] The portrait shows several long-distance traders as well as Emperor Maximilian I and the artist himself. Since Dürer was not a merchant, he could not live at the *Fondaco* during his stay in Venice. He stayed perhaps in the nearby White Lion's inn, which focused on ultramontane guests, German speakers in particular.[30] The inn was run by Piero Pender Todesco from Bern, whose actual name, Peter Schneider, could not be pronounced by the Venetians. Pender was in favor of successful integration in the foreign land. He reported important guests to the *Signoria* and was used by her as a messenger and interpreter, similar to the building administrator at the *Fondaco*: In 1500, Pender accompanied an envoy from his hometown of Bern to the Senate; in

24 Cf. Francesca Ortalli, *Per salute delle anime e delli corpi. Scuole piccole a Venezia nel tardo Medioevo* (Presente storico 19) (Venice: Marsilio, 2001).

25 1418 june 1. Simonsfeld, *Der Fondaco* (see above, n. 6), vol. 1, 163–165 n. 320.

26 Cf. 1360 sept. Ibid., 77 n. 185 a.

27 Cf. Thomas Eser, "'In onore della città e dei suoi mercanti'. Presenza e rappresentazione della città di Norimberga a San Bartolomeo nell'età di Dürer", in Natalino Bonazza et al. (eds.), *La Chiesa di San Bartolomeo e la comunità tedesca a Venezia* (Chiese di Venezia. Nuove prospettive di ricerca 1) (Venice: Marcianum, 2013), 67–86.

28 Pfotenhauer, *Nürnberg* (see above, n. 9), 405. Cf. Heinrich Dormeier, "Venedig als Zentrum des Rochuskultes", in Volker Kapp and Franz-Rutger Hausmann (eds.), *Nürnberg und Italien. Begegnungen, Einflüsse und Ideen* (Erlanger romanistische Dokumente und Arbeiten 6) (Tübingen: Stauffenburg, 1991), 105–127.

29 Cf. Olga Kotková (ed.), *Albrecht Dürer the feast of the Rose Garlands, 1506–2006* (Prague: Národní galerie v Praze, 2006).

30 Marino Sanuto, *I diarii* (*1496–1533*), 58 vols. (Venice: Visentini, 1879–1903), vol. 3, 630.

1509, he traveled in the name of the *Signoria* to the Bishop of Trent.[31] Julianus de Biundo, the building administrator of the *Fondaco*, was sent as an interpreter of the Venetian emissaries to the newly-elected King Albert II in 1438;[32] his successor Maphemus Francho, who is said to have known German very well, was sent for the same purpose on Frederick III's trip to Rome in 1452.[33]

Merchants were only allowed to stay at inns (specifically assigned to them) if the *Fondaco* was full. Otherwise they were required to stay at the trading post. The *Fondaco* was an obligatory institution in which both the goods were kept and where the transalpine long-distance traders had to reside and register themselves before they could pursue their business in the city. They themselves were not allowed to export their goods beyond Venice; instead, they had to sell them to Venetian traders only, and then only at the trading post. The revenue had to be reinvested locally and again, only with indigenous merchants – trading with other foreigners was not allowed.

1 Brokers

To ensure adherence to this and to additional rigid regulations and to guarantee payment of tax, a broker[34] was to be called in for all transactions.[35] To avoid trickery (as much as possible), each merchant was assigned a personal broker, drawn by lot, during his stay in Venice.[36] Unofficially acting as a broker was

31 Uwe Israel, "'Gastarbeiterkolonien'? Wie fremd blieben deutsche Zuwanderer in Italien?", in Reinhard Härtel (ed.), *Akkulturation im Mittelalter* (Vorträge und Forschungen 78) (Ostfildern: Jan Thorbecke Verlag, 2014), 295–338, 306.

32 1438 May 8: *Juliano del Biundo, massario fontici nostri Theotonicorum, quod possit ire pro interprete cum oratoribus nostris ituris ad serenissimum dominum regem Hungarie ac electum imperatorem, reservato ipsi Juliano officio suo*. Simonsfeld, *Der Fondaco* (see above, n. 6), vol. 1, 229–230 n. 417.

33 1452 Jan. 2: *requisierunt habere secum interpretem discretum virum Mapheum Francho, massarium fontici Teotonicorum, qui optime scit idioma Teotonicum.* Ibid., 254 n. 465. Cf. ibid. 264 n. 481; 271 n. 493.

34 Cf. Wolfgang Sellert, "Art. Makler", *Handwörterbuch zur deutschen Rechtsgeschichte* 3 (2014), 1203–1209; J.A. van Houtte, "Art. Makler", *LexMA* 6 (1993), 156; Robert S. Lopez, "Sensali nel Medioevo", *Nuova rivista storica* 17 (1938), 108–112; Eberhard Schmieder, "Unterkäufer im Mittelalter", *Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte* 30 (1937), 229–260; Jan A. van Houtte, "Les courtriers au Moyen Age", *Revue historique de droit francais et étranger* 15 (1936), 105–141; Simonsfeld, *Der Fondaco* (see above, n. 6), vol. 2, 23–28.

35 1319 feb. 15: *Henricus de Viena, mercator Teutonicus,* was fined because he had sold goods *sine suo meseta*. Ibid., vol. 1, 19 n. 56.

36 Ibid., 330 n. 607. Cf. Gino Luzzatto, *Storia economica di Venezia dall'XI al XVI secolo* (Venice: Marsilio, 1995), 52; Roberto Cessi and Annibale Alberti, *Rialto. L'isola. Il ponte. Il mercato* (Bologna: N. Zanichelli, 1934), 260–261.

subject to punishment. In 1335, the neighborhood foremen of S. Marco filed for pardon for one of their *custodiens*, Sibotus Teutonicus, as he did not understand the *lingua Latina* (meaning Italian) and therefore did not understand the ban given in *lingua nostra* to not mediate transactions; additionally, he was *antiquus et forensis*, carried no weapons and was a respectable man. He was able to convince the neighborhood foremen of his innocence, whilst they advocated for him. However, the Senate did not relent and refused him the pardon for the fixed penalty of 100 lb, a very high money fine.[37]

Brokers could be found in the Rialto area since the beginning of the thirteenth century, and in Genoa a half-century before.[38] The Venetian word *messeta* derives from the Greek *mesitis*, which indicates the traditional ties of Venice to Byzantium. As of 1300, brokers were generally called *sensal*, which likely derives from the Arabic *simsar*, meaning mediator.[39] In this case as well, terms migrated with practice. Legal-historical literature indicates that the influence of the Italian broker law in southern Germany was large, which is supported by the fact "that there have been regulations since approximately the fourteenth century in numerous southern and central German town charters that show accordance and similarities with the broker laws of Venice (*fondaco*), Pisa, Genoa, Florence and other Italian trade cities in the essential points".[40] In northern Germany, especially in the Hansa cities, a different path was taken with liberal commercial law. The brokers here did not have any role in trade policy.

The brokers in Venice were appointed by the powerful *Consoli dei mercanti*; in the *Fondaco*, they were under the supervision of the *Visdomini del Fondaco dei Tedeschi*, who were directly responsible for the trading house.[41] The number of brokers in the *Fondaco* was increased from 20 to 30 in 1314, which allowed for the growing significance of the transalpine trade.[42] Once a year (twice as of 1317), they were supposed to give account of their activities to the

37 1335 Okt. 28. Simonsfeld, *Der Fondaco* (see above, n. 6), vol. 2, 293 n. 8.

38 Cf. the situation in Genoa: Marco Veronesi, *Oberdeutsche Kaufleute in Genua 1350–1490. Institutionen, Strategien, Kollektive* (Veröffentlichungen der Kommission für geschichtliche Landeskunde in Baden-Württemberg. Reihe B, Forschungen 199) (Stuttgart: Kohlhammer, 2014).

39 Lupprian, *Il Fondaco* (see above, n. 14), 10.

40 Sellert, "Art. Makler" (see above, n. 34), 1204.

41 Georg Martin Thomas, *Capitular des Deutschen Hauses in Venedig* (Berlin, 1874), XIII, and 2 cap. 6. Cf. Mario Caravale, "Le istituzioni della Repubblica", in Girolamo Arnaldi, Giorgio Cracco and Alberto Tenenti (eds.), *Storia di Venezia. Dalle origini alla caduta della Serenissima. Vol. 3: La formazione dello stato patrizio* (Rome: Treccani, 1997), 299–364, 338.

42 1314 Jul. 31: *non sufficiant pro mercatoribus, qui continue veniunt ad fonticum*. Simonsfeld, *Der Fondaco* (see above, n. 6), vol. 1, 15 n. 41.

Council of Forty.[43] Not everyone, however, survived this test without difficulty: In 1320, for example, Bertaldo Theutonico, who had not passed this examination, only received a pardon due to the fact that he had long conducted himself loyally and legally in the past. He had lost his license after he sold horns to a neighbor illegally.[44] Brokers were absolutely not allowed to do business themselves.[45]

The broker was supposed to collect half a per cent of the good's value as a fee; from this, they were allowed to keep 30 per cent.[46] The remainder went to the municipality. In the fourteenth century, the position was lucrative: In 1356, the Council of Forty and the Great Council accepted Çaninus Nanni as a broker: He was a citizen and *fidelis noster*, expert of the German language and had a large family that he otherwise could not support.[47] However, the income had its limits: In 1392, Dominico Brunicardo was permitted to appoint a deputy, as he alone could not feed nine people from the income of his broker business – so that he himself could do extra work.[48]

After the turn of the fifteenth century, the position seems to have generally brought in less, as the notices of brokers who fell into poverty increase at this time.[49] Nevertheless, it was still a coveted post and an honor to be elevated to the position of a broker at the *Fondaco*. Particularly deserving individuals (or their sons, if they could speak German)[50] were thus frequently appointed to the position, as Johannes de Liberio de Boemia was in 1361. He was appointed on the grounds that he had accompanied several members of the nobility for a long period of time in different areas of the world and had rendered

43 Suspension for two years, if one falled the *prova*. 1307 (1317?). Thomas, *Capitular* (see above, n. 41), 34 cap. 97.

44 1320 nov. 13: *Bertaldo Sancti Marini Theutonico, qui fuit messeta per longum tempus fideliter et legaliter se habendo; qui alias cecidit ad probam inter 40 pro quodam mercato cornuum cujusdam sui propinqui, quod fecit ignoranter: quod reducatur ad statum pristinum, ita quod possit esse messeta, sicut prius erat.* Simonsfeld, *Der Fondaco* (see above, n. 6), vol. 1, 22 n. 64.

45 Cf. ibid., 68 n. 165; 120–121 n. 260.

46 Luzzatto, *Storia* (see above, n. 36), 104; Lupprian, *Il Fondaco* (see above, n. 14), 18.

47 1356 (May 18 and June 6): *civis et fidelis noster, sicut exponit, sit expertus lingua Theotonica.* Simonsfeld, *Der Fondaco* (see above, n. 6), vol. 1, 63 n. 161.

48 1392 (?) (apr. 9): *Quod Dominico Brunicardi, missete in fontico Theotonicorum, civi nostro, qui habet novem creaturas ad substentandum et de utilitate et proventu dicti officii missetarie illas creaturas nullo modo substentare potest, ex quo oportet quod per alium modum querat viam possendi eas substentare*. Ibid., 488 n. 811 (274 a). Cf. 488 n. 812 (274 b); 285–286 n. 521.

49 Ibid., 68–69 n. 166; 486 n. 807 (214a); 99–100 n. 222; 489 n. 814 (282 a); 144 n. 295; 146 n. 299.

50 Ibid., 250 n. 456; 313 n. 576; 343–344 n. 623.

outstanding service to the Doge and the consuls.[51] In 1439 the broker Franciscus Brunicari successfully asked for a post as a broker for his 22-year-old son. It is said that Franciscus had been working hard for Venice for 36 years, taking great personal risks in different regions of the world: Not long before he had traveled in Switzerland at his own expense even, taking a high personal risk because of the plague.[52] Indeed in 1433 the senate had sent Franciscus on a long journey to German cities and to Duke Frederic of Austria because of damages not further specified. His post as a *sensal* was to be reserved for him because the reason for his journey was important.[53] However, Franciscus had once, in the past, lost his post because he didn't pass the examination, but in 1420 he nevertheless was awarded the privilege to live on the *insula* of the *Fondaco* again because of the laudable deeds he had done for many venetian ambassadors, whom he had accompanied when they traveled to Bohemia, Poland, Hungary and Germany – where it is thought he worked as an interpreter.[54]

Promotions occurred upon special request of the foreign princes, as in 1424 at the request of the 'king of Dacia',[55] or 1427/28 at the request of Duke Louis III of the Palatinate who advocated for a young Venetian, who had accompanied him in the previous year on his pilgrimage to Jerusalem,[56] or 1492 at the request of Catherine Cornaro, Queen of Cyprus, for a loyal servant.[57] Around 1500 leasing out the *sansaria* ("brokership") was allowed if deserving citizens

51 1361 dec. (1362 jan. 9): *Johanni de Liberio de Boemia, qui longo fuit cum pluribus nobilibus hujus terre ad diversas partes mundi et specialiter cum inclito domino nostro domino duce et per officiales consuls* (*es? atus?*) *multum commendatur de bona fama et sufficentia.* Ibid., 80 n. 190.

52 1439 nov. 9: *prudens vir Franciscus Brunicari, civis noster, jam annis 36 et ultra exercuit personam suam eundo ad diversas partes mondi et pro diversis factis nostris cum multis laboribus et periculis persone sue, nunquam recusando, sed semper promptissime obediendo mandatis nostris, et modo noviter iverit de nostro mandato ad partes Svicerorum pro factis omnibus notis absque aliqua provisione sive salario cum maximo periculo suo tam respectu itineris quam respectu morbi pestiferi qui viget in partibus illis.* Ibid., 230–231 n. 419.

53 1433 feb. 26. Ibid., 218 n. 397. Cf. ibid., 229 n. 416; 230 n. 420.

54 1420 (jan. 3 and 7): *quod etiam privatus fuit transitu et habitacione insule fontici Theutonicorum, quod cedit ad maximum ejus damnum*. Ibid., 168–169 n. 324.

55 1424 (sept. 6 and 7): *ut providum juvenem Nicolaum de Biudi, civem nostrum originarium, doctum idioma Theuthonicorum.* Ibid., 490 n. 817 (339 a).

56 1427–(1428 jan. 20, 22 and march 30): *providus juvenis Anthonius de Corado civis noster* […] *cum sit optime doctus illud ydioma Theutonicum*. Ibid., 491 n. 819 (350 a). Cf. Reinhold Röhricht and Heinrich Meisner (eds.), *Deutsche Pilgerreisen nach dem heiligen Lande* (Berlin: Weidmannsche Buchhandlung, 1880), 471. Cf. 1426 (1427?)–1427 Jan. 16, 22 and 25: Also for *Leonem Sumariva quondam Leonis ab imprestitis, civis nostri fidelissimi.* Ibid., 490–491 n. 818 (347a).

57 1492 May 28: *Augustino Bonamico civi nostro originario et majestatis sue servitori fidelissimo*. Ibid., 320 n. 589.

could no longer carry out their work due to age or illness.[58] During this time, the position was even given to great artists, who probably didn't carry out the work themselves. This is how the brothers Bellini and Tizian were appointed to be *sensals* of the *Fondaco dei Tedeschi*.[59] It seemed by this point that it was no longer important to be of a certain age, to know the German language or the economic rules governing trade to win an appointment.[60]

In addition to the *sensals* who were responsible for the *Fondaco*, there were those who were exclusively licensed for the Rialto market or for grain or pepper transactions. In contrast to the other brokers of Venice, the *sensals* of the *Fondaco* generally had to be native speakers of German or at least know German well, which they were required to prove before they were appointed.[61] They alone could additionally work as interpreters for the transactions in the city – other Germans of the *Fondaco* were forbidden to do so, according to the regulations of the house: In the autumn of 1336, a Henrico Theotonico was sentenced with a fine of over 30 pounds for unauthorized translation services; however, he was exempted from half of this fine due to poverty.[62]

2 Language Acquisition

Not all merchants actually required an interpreter: Sons of German merchants were regularly sent to Italy, Venice in particular, to learn the local language, respected among the merchants as a 'lingua franca', as well as the current commercial practices in the city.[63] In Venice, however, such educational trips could easily come into conflict with the enforced residency rules for German

58 1488 Sept. 19: *quod prudens civis noster Antonius Dolce, sansarius in fontico Theotonicorum, qui ob quedam ejus importantissima negocia stare habet sepius per aliquid tempus extra hanc urbem nostram, locare et affictare possit sansariam suam.* Ibid., 314 n. 578. Cf. 341 n. 620; 344 n. 625; 344–345 n. 626.

59 Ibid., vol. 2, 28.

60 1482 aug 2: *chel sia sta electi sanseri in fontego, de i qual tal non ha la lengua Todescha, tal son in decrepita eta e tal non se exercita per non saver far sansaria.* Thomas, *Capitular* (see above, n. 41), 247–249 cap. 13.

61 1346 (?). Ibid., 49–50 cap. 130. Cf. Gerhard Rösch, "Le strutture commerciali", in Cracco and Ortalli (eds.), *Storia di Venezia* (see above, n. 16), 437–460, 453.

62 1336 Oct. 15 (and 1337 May 18): *Quod fiat gratia Henrico Theotonico* […] *quod fuit thollomacius de quibusdam mercatis, quod est contra eorum capitulare.* Simonsfeld, *Der Fondaco* (see above, n. 6), vol. 1, 480 n. 790 (93 d).

63 1472 Nov. 4: *aliquos adolescentes Theotonicos tenere etatis, missos per parentes eorum ad hanc urbem nostram, ut discant linguam nostram et abachum, sicut ab antiquo hic servari consuevit.* Ibid., 289–290 n. 525. Cf. Pfotenhauer, *Nürnberg* (see above, n. 9), 44–45 and 70–95.

merchants at the *Fondaco*: In 1308, even members of the Great Council had to concern themselves with obtaining the remission of a large fine for six Venetians, to the tune of 1,000 pounds each. The fine had been applied because they had housed sons of German merchants in their houses all located near the *Fondaco*. In defense, they argued that the boys had only come to learn the *grammatica* or the *abacus* – and that they would only have taken them in out of love, not for money.[64]

But where had the brokers learned their German who could not go on language trips to the North and did not come from the German-speaking realm or from a German-speaking migrant family?[65] Since the beginning of the fifteenth century in Venice, there was an easy opportunity for this near the *Fondaco* – at the language school of Master George of Nuremberg in San Bartolomeo Square.[66] We can thank him for the oldest preserved Italian-German language book of 1424.[67] This textbook was primarily aimed at Italians who wanted to learn German. It is clear that it was to be studied for commercial practice, with direct reference to the *Fondaco* and the broker business there.[68]

64 1308 Aug. 1: *teneant secum in domo pueros Theotonicos, filios bonorum hominum mercatorum de illis partibus, non aliquo pretio sed amore, quorum aliqui vadunt ad audiendam gramaticam, aliqui vero ad labacum*. Simonsfeld, *Der Fondaco* (see above, n. 6), vol. 1, 8 n. 24.

65 Cf. Lorenz Böninger, "Le comunità tedesche in Italia. Problemi linguistici e di inserimento", in Isa Lori Sanfilippo and Giuliano Pinto (eds.), *Comunicare nel medioevo. La conoscenza e l'uso delle lingue nei secoli XII–XV* (Rome: Istituto storico italiano per il Medio Evo, 2015), 149–160; Uwe Israel, "Mit fremder Zunge sprechen. Deutsche im spätmittelalterlichen Italien", *Zeitschrift für Geschichtswissenschaft* 48 (2000), 677–696.

66 Cf. Philippe Braunstein, "Imparare il tedesco a Venezia intorno al 1420", in *La trasmissione dei saperi nel Medioevo* (*secoli XII–XV*) (Pistoia: Centro italiano di studi di storia e d'arte, 2005), 321–336; Cecilie Hollberg, "Handelsalltag und Spracherwerb im Venedig des 15. Jahrhunderts: Das älteste deutsch-italienische Sprachlehrbuch", *Zeitschrift für Geschichtswissenschaft* 47 (1999), 773–791.

67 Edition: Oskar Pausch, *Das älteste italienisch-deutsche Sprachbuch eine Überlieferung aus dem Jahre 1424 nach Georg von Nürnberg* (Österreichische Akademie der Wissenschaften, Philosophisch-Historische Klasse. Denkschriften 111) (Wien: Böhlau, 1972). Printed under the title „Introito e porta" in different versions (1479, ca. 1480, 1482, 1498, 1499, 1500, 1513, in four languages 1510: Latin, Italian, French, German) by: Adam von Rottweil, *Deutsch-Italienischer Sprachführer*, Vito Reno Giustiniani (ed.) (Lingua et traditio 8) (Tübingen: Narr, 1987).

68 E.g.: *la volta – daz gebelb; el messeta – der unterchauffel, ly messeti – die unterchauffel.* Pausch, *Das älteste italienisch-deutsche Sprachbuch* (see above, n. 67), 143. Cf. Helmut Glück, "Georg von Nürnberg und der Wirtschaftsraum Mitteleuropa um 1400", in Id. and Bettina Gabriele Morcinek (eds.), *Ein Franke in Venedig. Das Sprachlehrbuch des Georg von Nürnberg (1424) und seine Folgen* (Fremdsprachen in Geschichte und Gegenwart 3) (Wiesbaden: Harrassowitz, 2006), 33–50.

Of particular note are the realistic bilingual dialogues from everyday commercial life. The book is not without wit and entertainingly pokes at national stereotypes: For example, it mentions that the Germans always wanted discounts everywhere or that they were commonly said to be drunkards.[69] One scene takes place in the cloth shop of a Venetian, where the son of the owner (who, fittingly, is called Bartolomeo) meets with a German merchant. Bartolomeo has learned German for almost a year with Master George, which the merchant acknowledges with the words: *Ez ist ein hubz dinck Deucz chunen in diser stat durch dez Deucz Hauß willen* ("It is a fine thing to know German in this city because of the German house; much nicer in Italian: *per amore del Fontego*").[70] Since he knows German, the transaction can be started without a broker. Bartolomeo, however, remembers the necessity of a broker: *Get in gocz nomen und vergesst nicht ewers unterchaufelz, anders wir schafften nichz* ("Go in God's name and do not forget to bring your broker with you, as otherwise we won't achieve anything").[71] Then, with the active participation of the broker, a purchase is completed for 25 rolls of cloth worth over 100 ducats. Before the 'Johannes-Minne' (a drink in honour of the apostle John) is drunk in parting, the German promises the Italian to bring *von deuczen landen* a *deucze tasschen* ("a little German bag from German lands"), illustrating the steady nature of German-Italian trade.[72] Bartolomeo could perhaps also have asked the Unterkäufel ('broker') for this souvenir, as the *Serenissima* regularly engaged bilingual brokers who held positions of trust for services in German lands.

3 Envoys

Office holders had to be citizens of Venice and were sworn in.[73] The swearing-in can frequently be seen in the court files: On 16 June 1301, for example, Martinus misseta, Giraldus misseta jurati confirmed the declaration of a Nicolaus

69 Pausch, *Das älteste italienisch-deutsche Sprachbuch* (see above, n. 67), 243–244 and 251. Cf. Klaus Heitmann, "Das Deutschenbild im italienischen Mittelalter", in Id., Gert Pinkernell and Oskar Roth (eds.), *Spiegelungen. Romanistische Beiträge zur Imagologie* (Studia Romanica 86) (Heidelberg: Winter, 1996), 163–201; Klaus Voigt, *Italienische Berichte aus dem spätmittelalterlichen Deutschland. Von Francesco Petrarca zu Andrea de' Franceschi (1333–1492)*, (Kieler historische Studien 17) (Stuttgart: Klett, 1973).

70 Pausch, *Das älteste italienisch-deutsche Sprachbuch* (see above, n. 67), 257.

71 Ibid., 244. Cf. *Und nach tisch so chum ich her mit meim unterchauffel*. Ibid., 243.

72 Ibid., 256.

73 Cf. a controversy about the the right to be a broker at the Fondaco between *cittadini originari* and immigrants, who were citizen only by privilege. Giuseppe Trebbi, "La società veneziana", in Gaetano Cozzi and Paolo Prodi (eds.), *Storia di Venezia. Dalle origini alla*

Polanus misseta juratus, who had perhaps immigrated from a German-speaking area of Poland.[74] The privilege registers that have been preserved from the fourteenth and fifteenth centuries confirm the citizen status of some brokers. An average of approximately 20 people per year became citizens in this way, which is quite a small number compared to the population of Venice overall. But this type of prerequisite was not required for members of established Venetian families: They were *cittadini originari* ("original citizens") by birth. Immigrants, however, had to be domiciled in the city for up to 25 years and prove regular payment of taxes and the purchase of government bonds or participation in military operations in order to become a *cittadino per privilegio* ("citizen by privilege") at the very least, a status which was frequently associated with limitations. Evidently, only a few of them were able to or wanted to achieve this. Only 14 people of the approximately 4,000 recorded in the CIVES database who received citizenship in Venice between 1300 and 1500 can be identified as brokers – and from these few, not even all of them were responsible for the merchants in the *Fondaco*.[75]

This can be assumed for Bertaldus meseta of Germany, who stated in 1306 that he had lived in Venice for 25 years and that he lived in the parish of San Giovanni Crisostomo, thus in the immediate proximity of the *Fondaco*.[76] This is indicated in the case of Marcus filius Henrici of Munich. He received grand burgher rights in 1358 after only 18 years in Venice – after the terms for the granting of this type of citizenship had become less strict in the wake of the Black Death.[77] It was explicitly forbidden for many of the privileged persons to do business on their own account in the *Fondaco*,[78] as was the case with Iohannes messeta, who had received small burgher rights after 15 years.[79] In 1383, Sander de Colonia, who had lived in the city with his family for 11 years,[80] and Conradus de Magancia, who had lived in the city with his family for 19 years,[81] requested the status *de extra*, the grand burgher rights, which basically

caduta della Serenissima. Vol. 6: Dal Rinascimento al Barocco (Rome: Treccani, 1994), 129–213: 167–168.

74 1301 June 16. Simonsfeld, *Der Fondaco* (see above, n. 6), vol. 1, 4. n. 12.

75 Cf. CIVES VENECIARUM: http://www.civesveneciarum.net; Reinhold C. Mueller, *Immigrazione e cittadinanza nella Venezia medievale* (Studi. Deputazione di Storia Patria per le Venezie 1) (Rome: Viella, 2010).

76 1306 Jan 1. CIVES (see above, n. 75), id. 702. Cf. above, n. 44.

77 1358 Jul. 14. CIVES (see above, n. 75), id. 2358.

78 Forbidden in 1.191 cases, that means one third of the total number of cases. Mueller, *Immigrazione* (see above, n. 72), 31.

79 1366 Nov. 21: From *Persenor* (Brixen?). CIVES (see above, n. 75), id. 1935.

80 1383 March 26. Ibid., id. 3244.

81 1383 Sept. 30. Ibid., id. 871.

allowed for foreign trade. Both stated very substantial reasons for this. They were poor and needed citizenship to be able to practice occupations:[82] The man from Cologne in order to become a broker at the *Fondaco*, and the man from Mainz in order to get *officii et beneficii,* and thus to be able to obtain a public post as well.

In 1308, we learn that the broker Jacobellus Balisterius, who was likely a German immigrant with the surname of Schütz,[83] was sent to Augsburg as a municipal envoy in order to have Venetian goods, that had been confiscated in Füssen, released.[84] Schütz's responsibilities assuredly went further than those of a messenger. The fact that a bilingual broker was sent and that the goods were supposed to be safely handed over to him suggests that he was supposed to be able to negotiate if needed. Additional responsibilities are also obvious in the case of Jacobus Caroldo: He was sent to Germany at the expense of Venetians in 1431 to collect aggrieved parties' money using official letters.[85] The same year, the *sensal* Antonius de Corado was sent to Salzburg to have confiscated goods released: Here, it specifically states that it was necessary to send someone who knew German for the release of the goods – it was likely believed that business could not be conducted in Salzburg with Italian or Latin.[86] The brokers of the *Fondaco* were also used as translators of written documents. In 1469, a *sensal* noted on a borrower's note written in German (which was enclosed with a letter from the Doge to the Nuremberg Council): *Ich Antonni*

82 Cf. Beatrice Del Bo, *Cittadinanza e mestieri. Radicamento urbano e integrazione nelle città bassomedievali* (*secc. XIII–XIV*), (L'Italia comunale e signorile 6) (Rome: Viella, 2014).

83 Cf. Israel, *Fremde* (see above, n. 21), 169–171.

84 1308 oct. 17: *quod securitates et promissiones illas per proprium nuncium mitteremus. Nunc autem predictum nostrum nuncium, latorem presencium, Jacobellum Balisterium missetam fontici nostri Teuthonicorum, ad vos duximus transmittendum ad recipiendum dictas ballas cum promissionibus et securitatibus supradictis, rogantes vos, quatenus illas ballas et res predictas eidem nostro nuncio liberetis et absolute illas permittatis secure per vestrum districtum conduci et inde extrahi.* Simonsfeld, *Der Fondaco* (see above, n. 6), vol. 1, 9–10, n. 26. Cf. 1337 june 18: *quod Federicus misseta fontici* […] *mittatur ad illas partes* [sc. *Alemanie*] *in favorem liberationis ballarum nostrorum cum litteris et commissione que vedebitur domino, consiliariis et capitibus de 40.* Ibid., 33 n. 95.

85 1431 apr. 29: *mitti debeat Jacobus Caroldo missseta in fontico Teothonicorum ad partes Alemanie cum literis nostris ad procurandum satisfactionem predictorum nostrorum civium et fidelium creditorum dicti Hermani* [sc. Reck from Nuremberg] *ad expensas ipsorum creditorum*. Ibid., 199–200 n. 370. Cf. ibid., 170–171 n. 327; 198–199 n. 369; 200–203 n. 372, 373 and 374.

86 1431 oct. 22: *pro quorum recuperatione est neccesse mittere aliquem, qui scit Theotonicum ad partes Salcisburgi*. Ibid., 204 n. 377.

Zenta hab dise geschrifft aufgelegt zw Welsch ("I, Antonni Zenta, have translated this letter into Italian").[87]

Brokers were also sent over the Alps on behalf of Venetian citizens in matters of trade,[88] for which an official permit was required, as officials were normally not allowed to simply leave the city.[89] In 1332, for example, Gutefredus de Collogna received the license to be able to travel to Flanders for *nobili*.[90] Leave to take care of family matters was also occasionally granted upon request: Thus, Conrado Nani, whose father had passed away in 1355, was allowed to go to Germany for three months in order to accept his inheritance.[91] Pilgrimages were also recognized as reason for leave: In 1360, Henricus de Mulbach wanted to go on a pilgrimage to Santiago di Compostella for salvation;[92] in 1445, Guilielmus Flori wanted to make a pilgrimage to Jerusalem.[93] However, the brokers frequently had to appoint a substitute for absences that were due to personal reasons.[94]

4 Summary

The study of the late medieval broker community at the trading post of the Germans has illustrated that the Venetian *sensals* should be viewed as top cultural mediators.[95] Their bilingualism was not simply used for the brokerage of

87 1469 jan. 21. Ibid., 280–281 n. 512.

88 1442 Apr. 20: *Quod pro favore quorundam civium nostrorum damnificatorum a Theotonicis mitti possit ad partes Alemanie unus ex missetis fontici Teothonicorum, qui eis videbitur, attento maxime quod bona civium nostrorum dici possunt et reputari bona nostri comunis, sicut alias in similibus casibus missi fuerunt de aliis missetis dicti fontici, eunte eo ad expensas illorum qui ipsum mittent, et reservato sibi officio cum utilitatibus*. Ibid., 240 n. 437.

89 Cf. Lupprian, *Il Fondaco* (see above, n. 14), 20.

90 1332 Jan. 14 (and Feb. 23). Simonsfeld, *Der Fondaco* (see above, n. 6), vol. 1, 476 n. 781 (90 a).

91 1355 May 10: *Quod fiat gratia Conrado Nani, missete in fontico Theotonicorum, quod possit ire ad partes Allemanie per tres menses occasione patris sui ibi mortui, qui plura bona sibi dimisit, cum consules mercatorum dicant quod ad presens modicum fieri (?) fit in fontico de mercatoribus*. Ibid., 60 n. 157. Cf. ibid., 264 n. 481; 290–291 n. 527; 299–300 n. 548; 305 n. 560.

92 1360 (1361 March 1): *in remissionem suorum peccatorum et bono anime sue corpus et ecclesiam Sancti Jacobi de Galicia disposuit visitare, possedendo ponere unum alium loco sui*. Ibid., 77 n. 186.

93 1445 (Jan. 16 and March 14). Ibid., 248–249 n. 453.

94 Ibid., 489–490 n. 816 (338 a); 24–25 n. 436; 262–263 n. 477 and n. 478; 263 n. 479; 274–275 n. 501; 277 n. 507; 284–285 n. 518; 285 n. 519; 290 n. 526; 302–303 n. 554; 303 n. 555; 303 n. 556; 199–200 n. 370.

95 Brokers as *kulturelle Grenzgänger*: Gerhard Fouquet, "Kaufleute auf Reisen. Sprachliche Verständigung im Europa des 14. und 15. Jahrhunderts", in Rainer Christoph Schwinges

transactions, but frequently for negotiations in the North as well. In the South, it was these experts' task to initiate transactions, as well as to instruct the foreign merchants in the local customs and in the legal and economic regulations of Venetian trade. They also had to ensure the foreign merchants' adherence to these rules. In the North, the Venetian brokers were used to settle interurban economic conflicts and were even allowed to conduct negotiations for Venice. It is clear that they contributed to the transalpine exchange of economic and legal terms and practices.

Incidentally, their migrant background is not addressed in any of the sources. Loyalty to Venice was obviously not called into question for the brokers who had emigrated from German lands. In the language book by Master George, the German merchant bemoans the brokers' lack of solidarity with the foreign merchants: When haggling, he becomes agitated about the fact that both the locals whom he is bargaining with, broker and seller, are conspiring with one another. The merchant said:

> Der Chawffman spricht nur also: Ir chent euch wol an einander. Ir peißt euch nicht aneinander. Aber wir armen chawffleut sein die, die den schaden haben ewrs chriegen. Ir chumpt wol uber ain mit einander ("You certainly know each other well. You don't bite each other, but we poor merchants are the ones who are harmed by your 'yelling'. You will already agree with one another").[96]

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(ed.), *Europa im späten Mittelalter. Politik - Gesellschaft - Kultur* (Historische Zeitschrift. Beiheft 40) (Munich: Oldenbourg, 2006), 465–487: 486. Cf. Michael Gassert, *Kulturtransfer durch Fernhandelskaufleute. Stadt, Region und Fernhandel in der europäischen Geschichte* (Europäische Hochschulschriften 915) (Frankfurt a. M.: Peter Lang, 2001); Bernd Roeck, "Kulturtransfer im Zeitalter des Humanismus. Venedig und das Reich", in Bodo Guthmüller (ed.), *Deutschland und Italien in ihrer wechselseitigen Beziehung während der Renaissance* (Wolfenbütteler Abhandlungen zur Renaissanceforschung 19), (Wiesbaden: Harrassowitz, 2000), 9–29.

96 Pausch, *Das älteste italienisch-deutsche Sprachbuch* (see above, n. 67), 246–247.

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CHAPTER 6

German-East Slavic (Language) Contacts in Legal Texts of the Thirteenth-Fifteenth Centuries

Catherine Squires

1 Introductory Notes

Active relations between German[1] merchant cities and East Slavic lands[2] lasted approximately three centuries; there were long periods of diplomatic and commercial success in this time, punctuated by dramatic crises and conflicts. The prolonged contact left behind a massive legacy of manuscript sources in a variety of languages. As a rule, the respective sides in the partnership did not have a common language for communicating with each other and for negotiating agreements and treaties. This means, that in addition to commercial and legal matters their relations were complicated by the necessity of dealing with linguistic matters, which included overcoming the language barrier in oral discussion and written correspondence; the final challenge was elaborating a text and language form, diplomatically, legally and culturally acceptable to both sides. Because we are dealing with two mature traditions of law and legal language, which were developed in different cultural and political circumstances, it is clear, that adjustment had to take place both in the legal content of their collaboration and the linguistic shape their communication and the resulting agreements took in the course of these centuries.

1 This study was supported by the Russian Research Foundations RGNF and RFFI (Project # 17–01-00158 and 18-012-00131a).

2 In this study we speak of German and East Slavic, the latter including Old Russia and the lands today known as Belarus. As we are dealing with a time long before the modern tripartite division of East Slavonic into Belarus, Russia and the Ukraine was established, we would like to avoid confusion due to the modern specific language classification, according to which the language of the Polotsk-Vitebsk region is now called Old Belorussian, but was quite recently placed by Slavic language historians as Old West-Russian. As we are focusing on closely related languages in just two writing centres- Novgorod and Polotsk- and do not wish to complicate the picture by specifying the features and status of their languages, we shall use the traditional terms '(Old) Russian' for Novgorod and- for Polotsk- 'Ruthenic' derived from русин, рутен, used in the Lithuanian Principality for the Slavic Orthodox population as opposed to Lithuanian and Polish Catholics. By German we mean medieval High German and – in the majority of texts – the Low German of the Hanseatic cities.

One might then expect, that these contacts between different law systems and languages were not confined to a simple transfer of legal practices, notions and terminology. Indeed, the adjustment took place in a variety of situations, depending on political, theological, mental and other factors, usually placed by linguists in a socio- or pragmalinguistic perspective. The dependence of language fact on social circumstance, well established by these linguistic approaches, presents the scholar of medieval texts with a method, which can now, after being reversed, be used to uncover social and mental approaches via language analysis. Following this line we shall, by examining the texts of German-East Slavic interrelations, analyze them from the point of view of a linguistic philologist. That is we shall not judge their content – this is the prerogative of historians and law scholars, – but, using linguistic evidence, we shall try to discover historical facts and legal approaches that had no explicit expression in the text.

2 Historical-Geographic Frames and Contact Participants

Diplomatic and commercial relations between Old Rus' and the neighboring lands of modern Belarus on the one hand, and the West in the 13–15th centuries on the other, concentrated around two clusters, one headed by Novgorod the Great in the Russian North-West and the other by Polotsk in the West. Historically both the Northern and the Western contact areas of East Slavic go back to the initial trading routes of the Varangians (Scandinavians) moving from the island Gotland across the East Baltic into the river Dvina and passing Smolensk and Kiev on their way down the river Dnepr all the way to Constantinople.

Part of this road structure, Gotland-the East Baltic-the Neva river-Novgorod, was used by the Hanseatic merchants who followed in the footsteps of the Scandinavians from the second half of the 12th century; whereas the longer southern branch via the Dvina and Smolensk led to the Polotsk lands. In fact, the earliest contacts with the German merchants from Gotland were established by Novgorod only a little earlier (the treaty of 1191) than by Smolensk (1229), the latter then acting as diplomatic leader for Polotsk and Vitebsk. Later the two western cities took over and Smolensk was excluded from direct contacts with the Germans.[3]

3 About the Hanseatic-Russian relations see: Catherine Squires, *Die Hanse in Novgorod: Sprachkontakte des Mittelniederdeutschen mit dem Russischen, mit einer Vergleichsstudie über die*

Novgorod, accompanied by Pskov, represented Old Russia in commercial relations with north-European trading centers, whereas Polotsk's contacts (together with Vitebsk) were oriented to the West. According to their different geographical orientation, the two centers, Novgorod and Polotsk, were dealing with different German partners. This is reflected both in the choice of correspondents and in the languages involved in each cluster. Novgorod was primarily exchanging letters with the Hanseatic cities Visby on Gotland, Lübeck, the Livonian cities Riga, Reval/Tallinn, Dorpat/Tartu with only a small fraction of texts from the Livonian and the Teutonic orders. Polotsk had less contact with the Hanseatic cities; instead, it was involved in close exchange with Lithuania, Poland, both chivalric orders and some episcopal chanceries (the bishops of Riga and Dorpat).

Polotsk was no less important as a political and commercial center, than Novgorod. In fact, its intermediate position between the principalities of Old Rus' in the East and Poland, the Great Principality of Lithuania and the Livonian order in the West, made Polotsk a major link between Russia and Western Europe, Greek Orthodox and Catholic dominated areas. The city itself presented an ever-changing mixture of cultures, religions and languages– and traditions of chancery writing.[4]

3 Participating Languages

These different situations in Novgorod and Polotsk account for the kind of partners each city was involved with and the varieties of languages participating in the contact.

The position of Novgorod the Great as the commercial mediator for the entire Russian crop-growing principalities and hunting regions, literally locked in by the Hansa,[5] accounts for the fact that the written texts of its German

Hanse in England (Köln, Weimar, Wien: Böhlau, 2009), a full list of text sources is given on p. 218–235 (*Russisch-hansische Quellen*).

4 Tatiana Timoshko, "Issledovaniya formulyara russko-nemetskoy diplomaticheskoy perepiski XV v. na materiale dogovornyx gramot mezhdu Polotskom i Rigoy" [Studies of the Formulaic Patterns of 15th-Century Russian-German Communication: The Polotsk-Riga Treaty Charters], *Proceedings of the 18th International Conference "Lomonosov"* (Moscow: MAKS-Press, 2011), 83–85, http://lomonosov-msu.ru/archive/Lomonosov_2011/structure_28_1305.htm (consulted on 01/09/2017).

5 The Hansa used all possible measures to keep other western partners out of direct dealing with Novgorod, including a very effective language blockade, see further below; for details see: Squires, *Die Hanse in Novgorod*, 36–50.

partners are almost exclusively Low German, with only a small inevitable section in Latin.

The language situation in Polotsk was quite different. The multicultural history of the city begins with the first episcopal (Orthodox) diocese established by 992; in the late 12th century Polotsk belonged briefly to Smolensk, but was soon after 1216 taken by the Livonian Knights of the Sword; then followed a period when the principality switched regularly between Eastern Christian (Orthodox) faith under Slavic rulers and Catholic periods under Lithuania, which it joined in 1392 under Vytautas the Great. This resulted in a broader variety of partners and languages, which included both Low and High German, Polish, Lithuanian, and a much bigger proportion of Latin than in the case of Novgorod.

The obvious next step would be to find out how– in which of these languages– the communication between the Germans and the Russians or Ruthenics took place.

4 Language of Communication: The Novgorod Model

In the case of Novgorod the contacting parties had no common language: The Latin and Low German of the Hansa is confronted here with the Old Russian (of East Slavonic origin) used in oral communication and lay official writing and the Church Slavonic (a South Slavonic literary form) used in elevated literary (religious) genres. For the legal intercourse and writing the form was predominantly Old Russian, the same language that was spoken by the people in the city.

This is where we come to the crux of the matter. Previous research on language contacts in Novgorod[6] has shown, that during most of the contact period the Russian side stuck to Old Russian and made no effort to master Low German; Latin was out of the question as the language of a strange (and often hostile) confession. Tellingly, the expression 'Latin language' is used in the Russian documents to name all western partners as if to denote the strange, the alien. The remarkable result of this cultural, mental and religious rigidity was, that overcoming the language problem was left to the German partners, who promptly made the most of this opportunity: the Hansa made a special policy

6 Squires, *Die Hanse in Novgorod*, 39–50, 52; Catherine Squires, "Rus' i Ganza: model' yazykovogo kontakta", in Alexander Gugnin and Anton Zimmerling (eds.), *Slavyano-germanskiye issledovaniya* ["Old Rus' and the Hansa: a Language Contact Model", *Slavic-Germanic Studies*], (Moscow: Indrik-Publishers, 2000), I–II, 436–540, here: 454–457, 464–472.

of keeping the communication under control by learning Russian and employing their own translators and interpreters, thus not only locking out all possible western competition but also locking in the Russian side who had no active access to western languages, or legal and commercial innovations other than those mediated by the Hanseatic partner.

This had still further implications; because only the German side dealt with both languages (writing in and translating both languages),– the contact actually took place on the Hanseatic side, in the course of the bilingual activities of the municipal chanceries, authorities and merchants of the cities. The Russian side did not actively contribute to the interrelations of languages until the middle of the 15th century, when gradually interpreters were educated in Novgorod and the necessary language competence and interest developed.

This means, that while the transit of actual commercial activity and legal practice moved in the direction from West to East, their reflection in the languages (transfer of contact phenomena in text structure and language) went in the opposite direction, from East to West, from 'business Russian' of the Middle Ages to the Low German of the official and legal writing of Lübeck and the other Hansa towns. These commercial and legal bodies and their language thus became the recipients of influences from Novgorod.

Before we investigate these contact phenomena in the language and text composition of the Low German legal texts regarding Novgorod further, we must pause to formulate the first conclusions about the reciprocal approaches of the two negotiating parties:

The motivation of the Hanseatics towards ensuring stable and lasting negotiations with Novgorod was obviously sufficient to move them to take active measures, for which the Novgorodians lacked the necessary flexibility. The concessions the Hansa had to make– and made – included: (1) coming to Novgorod to negotiate treaties and settle problems (the Russian side refused to negotiate on their partner's territory), (2) a complete switching to the partner's language. This last point was not due to a lack of language competence but more a difference in attitude (it is true that for a long time Novgorod had no interpreters and translators from German and Latin), and this problem was successfully solved after the mid-15th century, when the Russian side changed its mind. But before that for three centuries the Latin language was not only a token of the western and alien, but also marked a confessional difference and hence had a legal significance, too, as religion and legal ritual were inseparable in the Middle Ages. This meant that throughout the whole history of trade and contact their diplomatic talks were carried out in Old Russian, took place in Novgorod, and, inevitably, that all treaties and agreements reached between the end of the 12th and the beginning of the 17th century (a trade privilege

given by the Russian side to Lübeck in 1603) were originally composed in Russian. It is these original Russian charters that were confirmed and sealed by both sides, handed to the German mission and only after that translated into Low German by the Hanseatic translators. It must be stressed here, that it is exactly this act of translation that forms the initial basis for language contacts in Novgorod.

5 The 'Other' Model: Polotsk

Turning now to Polotsk, we shall see that it had periods of Catholic influence and close connections to Latin-writing administrations (of Lithuania, Poland, the Chivalric Orders). In fact, Latin was at certain periods used in the city chancery, which means that the city periodically had a common language with the German partners, and that in general legal writing and communication was open to western (Latin) influences. Moreover, a considerable part of the documents, issued by administrative and legal bodies in Polotsk, were written in German. This applies to texts issued in the name of the Great Prince of Lithuania Vytautas, but also to two late 15th-century letters from the *Vogt* (head of the legal administration) of Polotsk. Also, one letter by Vytautas and another one by the regent (*namestnik*) of Polotsk Alekna Sudimantaitis are in Latin. Even so Ruthenic seems to prevail from the beginning of the 15th century; and yet a typical example of the mixed language situation is, that drafts of treaties between Riga and Polotzk, written in Riga, were in Slavonic.[7]

This bilingual (often multilingual) competence of the legal bodies in Polotsk enabled them to translate both ways: from German into Ruthenic and vice versa. Treaties could be (and sometimes were) composed and formulated in parallel versions in two (or more) languages. Translators both in Riga and Polotsk were able to produce accurate renderings in both traditions (the local Ruthenic and the western), avoiding one-way transfer in the language and text structure.[8]

Thus, in contrast to the Novgorod contact model, where influences in terminology, formulaic patterns and text structure moved from Russian to Low German (from East to West), in Polotsk the process of accumulation of the

7 An overview of all Polotsk charters has become possible thanks to the recently published edition: Anna Choroshkevitch, Sergey Polekhov, Catherine Squires et al. (eds.), *Polotskiye gramoty XII-nachala XVI v.* [*The Polotsk Charters of the 12th-early 16th centuries*] (Moscow: Izdatel'stvo Universiteta Dmitriya Pozharskogo, 2015), I–II.

8 Timoshko, "Issledovaniya", 84–85.

partners' terms and descriptions went in both directions. To illustrate this difference, here are the words describing citizens of Polotsk and Novgorod.[9] The local vernacular expression in Polotsk is мужи полочане (literally "the men of Polotsk") and it was transferred into Middle Low German usage as *men to Ploskowe*; an alternative expression comes from the western tradition: *borgere to Ploskau* "citizens of Polotsk". In Novgorod, the typical Russian way of naming the local citizens was to use a collective description "the whole (Great) Novgorod": ко всему Великому Новугороду (here in the Dative case), which regularly appears in Low German legal texts as *de menen Nogardere* or *alle* (*gantze*) *grote Nougarden*. Both in Polotsk and in Novgorod a simple 'the Polotskers' or 'the Novgorodians' is equally possible in Low German texts, cf. *Ploskowere* and *de Nougardere*; but no European term like *borger* or burgher occurs in the original Russian or translated texts from Novgorod.

The one-way transfer in the case of Novgorod means that it is the textual sources of the German towns pertaining to their Russian affairs (not the texts of the Russian side) that accumulated influences from the contacts and contain the linguistic evidence necessary for this study.[10]

As has already been mentioned, this does not apply to the case of Polotsk. The cities Novgorod and Polotsk exemplify two contact models, which differ in a number of features of a political, cultural and religious nature. A comparison between both cities helps to bring out interesting correlations, which allows a clearer view of the interaction of language and political and legal factors.

6 Corpus of Text Sources

From the numerous text sources concerning the history of Novgorod and Polotsk available today we must exclude all documents that are not concerning

9 The quotations of the historic charters were taken from the following editions: *Polotskiye gramoty XII-nachala XVI v.* (as in footnote 7), Valk (ed.) *Gramoty Velikogo Novgoroda i Pskova* [*Charters of Novgorod the Great and Pskov*] (Moscow-Leningrad: Izdatel'stvo AN SSSR 1949); Karl Koppmann, Goswin von der Ropp, Dietrich.Schäfer (eds.), *Hanserecesse. Die Recesse und andere Akten der Hansetage 1256–1537*. I part, vol.1–8 (1256–1430), II: vol. 1–7 (1431–1476), III: vol. 1–9 (1477–1530); Friedrich Georg Bunge, Hermann Hildebrand (eds.), *Liv-, Est-, Curländisches Urkundenbuch nebst Regesten* (Reval: Estländische literarische Gesellschaft 1853–1914).

10 Apart from its methodological significance for sociolinguistic tasks, the conclusion we just arrived at proves the high value of the Hanseatic sources for the historiography both of Novgorod and the relations of the North Russian metropolis with the West.

commerce and legal commercial matters. The different genres of the surviving sources are:

– for the German side: treaties, correspondence with the partners, correspondence between Hanseatic cities, bodies of the Order and other European recipients, documents in preparation of missions, accounts and reports on the results of missions, financial reports, conclusions made at Hanseatic congresses;
– for the East Slavic side: treaties, grants of privileges, letters of protection, correspondence with the partners.

Of these, only treaties and privileges have a truly legal status. Of the surviving treaty charters some do not contain commercial agreements and regulations (political or peace treaties). The majority, though, are either commercial agreements or contain positions concerning trade.

In the following lists charters from Novgorod and Polotsk are represented by the years of their conclusion, those listed after the double slash were concluded for Novgorod under the rule of Moscow, the numbers of existing copies are given in brackets, the abbreviations stand for languages: R – Old Russian / Ruthenic, LG – Middle Low German, HG – Middle High German, L – Latin.

Novgorod: 1191 R, 1262 R, 1269 LG (2), 1301 R, 1301 LG, 1332 LG, 1338 LG, 1342 LG, 1372 LG, 1372 R, 1372 LG, 1373 R, 1373 LG, 1392 R (2), 1392 LG (4), 1421 R, 1421 HG, 1423 LG, 1434 LG, 1436 LG, 1448 LG, 1450 LG, 1466 LG, 1487 LG // 1503 LG, 1509 LG, 1514 LG, 1521 R, 1521 LG, 1531 R, 1531 LG, 1550 LG, 1603 R;

Polotsk: 1229 R, 1263 R, 1267 R, 1338 LG, 1338 R, 1338 LG, 1380 L, 1386 L, 1387 L, 1399 R, 1401 HG, 1405 R, 1405 R, 1405–6 LG, 1405–6 HG, 1405–6 LG, 1405–6 R, 1406 HG, 1406 LG, 1406 L, 1407 R, 1407 R, 1439 LG, 1447 HG, 1467 L, 1467 HG, 1478 R, 1511 R.[11]

The lists show the overall number of charters concerning international trade in both cities, the chronological density of diplomatic and commercial events and the different proportions in language representation in Novgorod and Polotsk. In the latter, High German and Latin play a distinctly greater role, than in Novgorod. As was pointed out earlier, the almost totally Low German character of the sources from Novgorod is due to its partnership with the Hansa, while a higher proportion of Latin and High German charters in Polotsk marks the broader variety of partners and local bodies involved. For example, the very important treaty of 1406 was composed in parallel Low German and

11 The data concerning the Novgorod charters were taken from: Squires, *Die Hanse in Novgorod*, 60–63, 218–235; those about Polotsk were collected in: *Polotskiye gramoty* (footnote 9).

Latin versions, while of the three draft projects that led to it, two were written in Ruthenic (by Riga and Polotsk) and the third one in Low German by the Master of the Order Conrad von Vytinghove. Later confirmations of the treaty were given in 1407 in Ruthenic, in 1439 in Low German by the Great Prince of Lithuania, and in High German in 1447 and 1467 by the King of Poland Sigismund.[12]

7 Modality of Genre- Modality of Status

A closer look at the selected texts shows further differences. In the case of Novgorod, some of the charters comply with the criteria of a treaty, others are grants of (trade) privileges, and some are letters of protection issued by the Russian authorities to secure safe passage to Novgorod for the German merchants.

It is, however, difficult to divide these documents definitively into these three categories. For example, historians and scholars of legal history, editors and publishers of the documents are not unanimous in labelling the types. Leopold Goetz classified all Novgorod charters of 1189, 1262, 1269 as treaties (*Vertrag*), but generally most of the texts receive different labels, for example, the charter of 1301 (in Low German translation) was published as a grant of trade privilege (*ein Privileg des Grossfürsten*) by Goetz and as a treaty by Michael Paul. Similarly, an agreement concluded in 1392 was entered as a treaty by Karl Koppmann in his edition of the Hanseatic documents, but classified as a 'peace treaty' by Arthur Winckler and Igor Lagunin.[13] Yet a contemporary inscription at the back of the manuscript evasively calls it "a copy [of a document] confirmed by the kissing of the [holy] cross": *Copia nyeburs crucekussinge to Nougard*. The name *crucekussinge* places the document in a class of its own (see below).

From a pragmalinguistic standpoint, there is an essential difference between a treaty and a grant of (trade) privileges. While the first is a bilateral

12 Timoshko, "Issledovaniya", 84–85.

13 Leopold Karl Goetz, *Deutsch-russische Handelsgeschichte des Mittelalters* (Lübeck: Waelde, 1922), 46, 51, 63, 72; Michael C. Paul, "Was The Prince of Novgorod a 'Third-Rate Bureaucrat after 1136?", *Jahrbücher für Geschichte Osteuropas* 56: 1 (2008), 72–113, 103; Arthur Winckler, *Die deutsche Hansa in Russland* (BoD, Bremen: Unikum 2012) (reprint of: Arthur Winckler, *Die deutsche Hansa in Rußland*. Berlin 1886), 38; Igor Lagunin, "Izborsk i Ganza. Niburov mir 1391 g." ["Izborsk and the Hansa. The Niebur Peace Treaty of 1391"], Vestnik Pskovskogo universiteta, Seriya „Socialno-politiceskie nauki 2 (2013), 33–39; Koppmann (ed.), *Hanserecesse*, I Abteilung, Bd. IV, Nr. 45 (footnote 9).

agreement reached and formulated on the basis of reciprocity and equal diplomatic representation of both sides, the latter, being also a bilateral text, shows an asymmetry in the representation of the parties: privileges are granted by one side to the other. And this is made apparent in the phrasing of the text. A confusion of these types– a reciprocal symmetrical presentation of the parties vs. a textual *mis-en-scène* depicting one party as a recipient of the other party's condescending grace– is unlikely unless there is a reason for it.

In the cases we are examining there seems to have been a mental-cultural difference that accounts for the confusion. The very first clauses of the protocol show that the Russian original charter was often meant as a granting of privileges. This is apparent in the Russian opening clauses, which were used in the concluded agreement and subsequently transferred to the protocol of the Low German translation. Two examples illustrate this transfer:

Example 1:

A typical opening clause from Novgorod scribes was: "Here arrived (have arrived) [+list of the ambassadors] to appear before [the authorities of Novgorod]". An example can be found in the Russian charter of 1301: …се приеха Иванъ Бнлыи из Любка, Адамъ съ Гочкого берега [+ names of the ambassadors]…. The same is also to be seen in the treaty of 1392: Се принха Иванъ Нибуръ из Люпка посольствомъ…. In the translated copies made for the Hanseatic cities this initial clause is transferred into the German protocol and becomes a regular feature used for Low German charters pertaining to Russian affairs, as in this Low German copy of the treaty of 1392: *Her Johan Nyebur van Lubeke unde* [+ names of the ambassadors], *boden van dessüt der see,*[…], *sint ghewesen to Nowgharden vor uns, alse deme borchgreven Thimofe Jurjevitze unde* [there follow names of the local authorities] *unde vor dem meynen heren van Nougharden,…*

The opening clause in Russian was much more than just a stylistic ornament, but was seen by the Novgorod side as an essential property of a legally valid document. This can be demonstrated by the fact that the Russian side refused to negotiate treaties anywhere else except their own city, arguing, that otherwise the final text could not begin with the correct opening "Here have come to us…" and would not be a valid document. The textual topography which shows the prince of Novgorod as the central focus of international activity had a meaningful relation to the legal validity and political and religious manifestation of the event.

That the Germans, too, were quite aware, that some expressions in the successfully concluded agreements showed them in an unfavorable light, but could not be omitted, becomes indirectly apparent from their efforts to

diminish the disadvantage. For example, the city of Reval had two different German versions of the treaty of 1392 – one accurate translation and another one, formulated in the person of the Germans and with a milder variant of the opening clause: *Hir is gekomen her Johan Neibur van Lubeke,* [+ names]. *Desse syn gewesen vor boden to Nougarden van des gemeynen copmanns wegene van der Dudeschen hense,… unde hebben gesproken myt dem borchgreven van Nougarden Tymofei Jurjevitze,* [+ names] *unde myt gantzen gemeynen Nougarden.* By cutting the clause in two sentences (the second sentence beginning with *Desse syn gewesen…*) the scribe breaks the logical connection between the success of the mission and the Novgorod-oriented topography of the traditional formula.

Later, especially under the influence of Moscow, a new opening clause became popular, it was typical of Russian petitions, e.g. …и онъ вамъ билъ челомъ и просилъ у васъ … ("and he beat his head to you and begged you…"). Literally meaning "to hit one's head [against the floor by bowing]", this expression was accurately reproduced in Low German versions as *sinen hoved slan*. Here is a Low German text fragment showing the guilty side in a conflict apologizing: *…iu heren sla wi vnse houet. wi sin schuldich. vorbarmet iu over vns* ("To you, our lords, we bow (hit our heads), we are guilty, have mercy on us…"). This opening clause was also used by Novgorod in diplomatic texts and as a result they acquired the form of a humble petition instead of depicting two equal parties.

This implication of inequality is faithfully reproduced in the translations made by the Hanseatic scribes, as shown in this treaty of 1487 with Novgorod and the Tzar of Moscow:

> …hyr synt gekomen in desz grothforsten vaderlike erve to grothe Nowgarden to des grothforsten stedeholder to Nowgarden, Jacob Zacharevitzen unnd… (+names of the rest of the authorities of Novgorod) <…> Dudesche boden: van Derpte borgermestere her Tyman Herken… (+ names of the members of the mission) unnd hebben ore hoveth geslaghen dem grothen heren keyszer van Ruszlande unnd statholder to grothe Nowgarden …

The common semantics of these two opening clauses is that the Hanseatic mission is more or less distinctly shown as the petitioner, addressing the prince of Novgorod (later – the Great Prince/Tzar of Moscow) with a request, which the opposite side then grants them. The bilateral treaties of 1487 and 1514 use language normally reserved for petitions. Both protocol variants – "Here arrive

(have arrived)" and the "hitting one's head"-formula of Russian petitions – were adopted by Low German and used for these specific Russian-Hanseatic contexts.

8 Misunderstanding or Consensus?

There obviously was a difference between the Russian and the Hanseatic traditions concerning the genres of charters used for international diplomacy. This has a direct connection to the aforementioned blurred line between treaties and grants of privileges: it seems this fuzziness of pragmatic types of text is no accident, it goes back to the Russian originals of the charters and is rooted in the cultural and mental modalities which the Russian side implied in its negotiations with its German partners. One could say in simpler words, that, what Novgorod meant to conclude with the western partners, was a grant of privileges (or another asymmetrical agreement, granting certain favors to the foreign merchants), whereas the Hanseatics preferred to see most of them as treaties, and sometimes succeeded in gently changing their modality towards a fairer equilibrium of status. On the whole it should be notedthough, that the highly pragmatic Hanseatics generally overcame or ignored these differences in favor of a successful and profitable cooperation which was in the interests of both sides.

A very important consideration, resulting from these observations, is that the ambiguity of genre perception may only at first glance appear to be an obstacle to communication. In reality this blurriness has a positive effect, as it leaves a free intermediate space, a buffer zone where differences can be smoothed out of the way without being really overcome. Thus a consensus is made possible between opinions that could otherwise prove irreconcilable and harmful to the negotiations.

Undoubtedly the Hanseatics were rewarded for the concessions they had to make to bridge the numerous cultural, mental, legal, political and religious gaps that lay in the way of their commercial profits in Novgorod.

9 Contact Phenomena

The transit of terms and legal expressions, travelling from East to West, from the Russian tradition of legal texts to the usage of the chanceries in Hanseatic cities, included a long list of lexemes (financial terms, descriptions for various

Russian goods, minutiae of Russian life and the authorities of Novgorod), phraseological units and formulae of legal language, whole text patterns, religious-legal rituals and traditions, etc.[14] This journey from East to West was made by the formulaic clauses illustrated above, and also by nouns, derived from the Russian formula "to beat (bow/lower) one's head", Russian 'челобитье', used as a name for this specific kind of charter and duly reproduced in Low German as *dat hovetslan/dat hovetslach* (meaning a petition or a document of agreement), for example:

> Wir Sendebaden van den sewentich Steden: van Dorpte Johan Bulk Borgermeister, u. Arent van Lohn Ratman…, sinth gekomen in des Groten Herren sein vederlike Erwe tho Grote Neugarden,… mith erren Hovetslage…(1514 LG).

Probably the most striking example of their flexibility is the participation of the Hanseatics in the religious ritual of kissing the Russian Orthodox cross as a form of oath confirming the agreement. The Russian corroboration clause "NN have kissed the cross upon this agreement" was an obligatory element of the legal charters, in fact it was the main textual formula testifying that the agreement was concluded. As such, it had the place in the text, which in the western (Latin-based) tradition is assigned to the mentioning of the seals (from lat. *nostra sigilla apensa sunt*). Russian charters were also sealed by both partners of a treaty, but this was not expressed by a special *corroboratio*-clause in the text. Following the Russian originals, the Hanseatic German versions of the charters also omit the mention of the seals and faithfully replace it with the 'cross-kissing' *corroboratio*.

The Russian prototype of this clause can be found in the treaty 1373 R: на томъ яковъ да иванъ из любка, да григоръй, да иванъ из гоцкого берега хрьстъ цъловалъ про тыи товаръ ("upon this Jakob and Ivan from Lubeck and Iwan from the Gothic shore have kissed the cross regarding the goods"). In Low German copies this clause occurs in the majority of charters from Novgorod. A typical example is to be found in 1371/1372 LG: *vp alle dingh so heft <…> ywane . vn(nd) <…> olycze dat cruce ghe kusset* ("upon all these points Ivan and Olisey kissed the cross").

Similar to the opening clauses, this corroboration clause also served as a basis for linguistic derivation: in Russian as well as in Low German, a treaty with the Russians as well as the parchment document containing the text, are

14 Contact phenomena of these types are analysed in German and Russian book publications: Squires, *Die Hanse in Novgorod* (footnote 3); Catherine Squires and Svetlana Ferdinand, *Ganza i Novgorod: yazykovye aspekty istoricheskix kontaktov* (Moscow: Indrik, 2002).

regularly called by a noun literally meaning "crosskissing", e.g. in Russian по съмъ перемирнымъ грамотамъ і по сему крестному целованью… ("according to these peace charters and to this crosskissing") (1521 R). In Low German we find the transferred legal term as early as the charter of 1301 LG: *uppe dat olde recht und de crucekussinge,…* ("upon the old law and the crosskissing").

These and many other loans (words, expressions, text structures) in the sphere of legal writing were transferred into the Low German legal language in Novgorod and reached as far west as the chancery and official usage in Lübeck, the Hanseatic metropolis. These innovations in language and text were adjusted and accepted in the recipient (Low German) language. For example, the term *crucekussing* was circulating in German, well known and understood among the population of Lübeck and has finally found its legitimate place in Middle Low German dictionaries.[15]

In Novgorod, these and many other legal terms and phrases were transferred from Old Russian to Low German, but no transit in the field of law was documented in the opposite direction.

10 A Comparative Remark

The language contact as observed in the relationship between the Hansa and Novgorod, is typical of this particular case and can be explained by the one-way character of translation, characteristic of Novgorod up to the middle of the 15th century: only by the Hanseatic side, not by the local bodies in the Russian partner city. In a different situation,– for instance, in a city where the administration and chanceries actively engaged in the task of translating their textual intercourse with western partners,– the picture could be different. Polotsk, which at various stages of its history became part of the Great Principality of Lithuania, and was closely connected to Poland, switched between the Orthodox and the Catholic Church, at times employed Latin scribes in the municipal chancery, hosted language contacts in both directions. The city scribes produced texts in which the usual Slavonic text patterns were combined with the western corroboration clause mentioning the sealing of the charter instead of the local 'crosskissing'-clause. A good example can be seen in the treaty of 1406 between Polotsk and Riga, mediated by Prince Vytautas of Lithuania. It contains the east Slavic 'crosskissing'-phrase *…de wegere scholen nu <…> dat cruce dar vpp kussen, dat se recht wegen schollen* ("the weighers must now kiss

15 See *krucekussinge* and *krucebref* in: Schiller Karl, August Lübben, *Mittelniederdeutsches Wörterbuch* (Bremen: Kühtmann [u. a.], 1876), II: 587–588.

the cross to swear that they will weigh correctly"), but not in the final text clause. This position in the document is taken by the western 'sealing'-*corroboratio*, cf. *hebbe wy vnser Inghesegel an dessen breff laten hanghen* ("we have attached our seal to this charter") in Vytautas' Low German and *sigillum nostrum duximis appendendum* in his Latin version (1406 LG, 1406 L). The subsequent Ruthenic versions of 1407 continue along these lines and take the western clause instead of the original Slavic 'crosskissing': со обою сторону межи нами, Полочяны и Рижяны, и печяти есмо свои привесили к сеи грамоте ("both our sides, the men of Polotsk and those of Riga, have hung their seals unto this charter").

This example shows the symmetrical orientation of language and text influences in the Polotsk's cultural ambience as opposed to the one-sided influence observed in texts concerning Novgorod. In this comparison, the specific character of linguistic development taking place in Novgorod, stands out clearly and distinctly, it is also possible to single out the correlation of these linguistic results with the contrasting extralinguistic backgrounds in both cities, which most probably have caused the deviations in language. These extralinguistic aspects, one should be reminded, are the goal and the research task of this study, which deals with discovering legal and political facts, implicitly conserved by language.

11 Novgorod: Language System vs. Legal Reliability

So far we have dealt with the formulaic and legally significant parts of the beginning and closing parts of a charter. The less formal middle section of the charter includes narrative and is therefore relatively free of stereotypical patterns. Still, it also shows the impact language contact had on the form in which legal messages were communicated in the documents.

Recent research has drawn attention to the interrelation between Old Russian and Low German in the basic aspects of language (grammar) typology. Studies in syntax show a principal difference between Low German and Russian: whereas Old Russian sentence syntax displays a very low level of subject reference (like in Latin, the subject noun when omitted is not necessarily replaced by a pronoun), in Middle Low German and generally in Germanic languages both a formal grammatical subject and an inflecting verb are strictly obligatory.[16]

16 In modern Russian, sentences without subject (even in the form of a pronoun in subject position) amount to only 44 per cent of the total number of non-past sentences (Pavlova

The referential system is among the basic grammatical properties of a language, it has bearing on the grammatical categories of person, number, gender, on the use of finite or non-finite verb forms, generally on clause-internal syntax. Let us see now what effect this grammatical peculiarity has on the abilities of a legal context to indicate the subject of legal responsibilities and rights.

In Russian treaty-texts from Novgorod one will find sentences which contain neither an explicit grammatical subject nor an inflecting verb, like for example, in this article from the treaty of 1262: А старыи миръ до КотлингъЪ (literally: The old peace [=treaty] up to Kotling; translation: "The old agreement [continues to function] within the border as far as the island of Kotlin"). This is an extreme case when a legal paragraph contains neither a verb denoting the action meant nor the persons whom it concerns. The treaty of 1269 is not available in the original language, but the Low German translation shows, how the chancery in Lübeck put it into Middle Low German: *Dhen olden vredhe to dher nuwart binnin ketlingen van gotlande vn*(*de*) *wedher uan nogarden bit tote ketlingen* ("The old peace [=treaty][concerning] the Neva route up to Kotlin from Gotland and back from Novgorod to Kotlin"). The result is a very clumsy sentence, due to the lack of a predicate.

This however is a rare early example, later translators mostly follow the syntactic rules of their language by introducing formal subjects and verbs. To illustrate this second type, we shall compare another pair of examples:

(a) a paragraph from 1262 R: А гдЪ ся тяжя родить, ту ю кончати, literally saying "And where a conflict arises, it [there] to end", really means "All conflicts should be settled where they occur";

(b) a similar paragraph in the treaty of 1269 was rendered in Low German: *So war so dhe twist ge schut dhar sal man se endegen* ("Wherever a conflict happens, there one should settle it").

In this example, the subordinate clause in the Russian charter has neither a grammatical subject, nor a matching inflecting verb. In Middle Low German, though, complying with its basic rule, the translator introduces a formal subject (the indefinite pronoun *man* 'one') and a finite verb that acts as a copula with the infinitive *endeghen*.

A third variant is presented in the next pair of quotations. A paragraph from the charter of 1262 says: Новгороцмъ гостити на Гоцкыи берегъ бес пакости, а НЪмцьмъ и Гтъмъ гостити в Новгъгородъ бес пакости [...]

2011, cited in: Andrey Kibrik, *Origins of the Russian referential system: Alternative scenarios*. Paper delivered at SLE 2012. Stockholm, 2012) and non-past sentences prevail in legal texts, - and in one third of all cases the only referential device is verbal inflection (which is similar to Latin). In Old Russian these statistics ran even higher.

на старыи миръ ("Novgoroder (=in the Dative) to visit on Gothic shore without impediments, and Germans (=in the Dative) to visit in Novgorod without impediments [...] according to the old peace [treaty]"). In this type, there is no formal subject, but the real actors (the Novgoroders / the Germans) are mentioned in the dative case. An inflecting verb is absent, too, while the action (coming and trading) is expressed by an infinitive. The following shows the strategy of the Lübeck translator in a similar case: *vnde dhe wintergast sal comen .<...> uppe dhen olden vredhe* (1269 LG; "and the winter trader should come in accordance with the old peace (treaty)"). The German scribe copes by putting the actor in the nominative case, thus producing a subject. As to the finite verb, he is forced to introduce a finite (*sal, sollen*) and this involuntary act means adding a lexeme that was not contained in the original at all.

The analysis of many similar cases showed, that in translating clauses of this third type scribes always added a finite verb, the same in almost all instances: the Middle Low German *schollen*, *sollen*, which, unlike the English cognate 'shall', often had the modal meaning 'must'. This led to a considerable semantic distortion in the formulation of some legal rules; for instance, the last example formulates the legal permission to come and trade, not a prescription or obligation as the translation could imply.

Another problem concerns the additional subjects of the Low German translations. While the third type presents no difficulties in this respect and correctly conveys the original Russian message, legal clauses of the second type shown above do not imply any subject-actors at all. It has been noticed, that this problem occurs in clauses explaining the procedure of settling conflicts, claims and complaints. The only grammatical solution available to the translator is a passive construction: with *twist* 'conflict' in the position of the formal subject, but no mention of the real actor – the body or person in Novgorod responsible for settling these conflicts. This is in contrast with clauses dealing with major 'positive' topics such as guarantees, permissions and instructions, which contain sufficient information about the necessary contacts. A possible explanation, as to why the persons or bodies in charge of solving minor conflicts find no mention in the text could be that the necessary addresses and contacts, important to the foreign merchants, were common knowledge to the locals and seemed unworthy of mentioning. If this suggestion proves correct, then we have another instance of 'Novgorod-centered' thinking on the part of the medieval Russian lawyers and diplomats. Together with other text-pragmatic peculiarities discussed above this outlines the specific profile of legal writing- and legal thinking- in the Novgorod of the 13th to the early 16th centuries.

12 Concluding Remarks

The analysis of the linguistic and textual media involved in the Hansa contacts with Novgorod and German partners with Polotsk showed that the obvious innovative potential of such contacts was realized to varying extents and sometimes even in different directions, depending on specific mental, cultural, religious, and political factors. The example of Novgorod demonstrated correlations with these extralinguistic factors, which were derived from formal (systemic) linguistic data and can be applied to other case studies, including other historical periods.

Although the language material has indirectly pointed up certain obstacles in the development of international innovation in Novgorod, on the whole, the period between the 13th and 15th centuries was a glorious time for the city., Two centuries before the founding of Saint Petersburg the metropolis of the Russian north was already opening a window to Europe. In spite of the various limitations exemplified above, by the end of the 15th century Novgorod was profiting from prolonged international contact and displaying extraordinary achievements in the fields of literature, translation, the visual arts, science, political administration, philosophy and theology. A new vision was developing that brought about such innovations as a new complete translation of the Bible, even with the use of western (Latin and German) versions.

Yet, before the century ended, in 1478 Novgorod lost its independence to Moscow, and in 1494 the Hanseatic St. Peter's Yard in Novgorod was destroyed by Ivan III of Moscow and an end was put to the presence of the Hansa in the city. In the same years– in 1498– Polotsk received the Magdeburger municipal law.

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CHAPTER 7

The Language of the Law: The Lübeck Law Codes (ca. 1224–1642)

Albrecht Cordes

1 Hanseatic History, the Migration of Words and the Making of Commercial Law

The law of Lübeck was not only the law of the imperial town located in the southwestern corner of the Baltic, one of the largest German cities in the Late Middle Ages and, indeed, the head of the Hanse. It was also the law of about 80–100 middling and small towns, from Tondern in Denmark all the way around the Baltic to Reval (today Tallinn) and Narva in Estonia. Life in the Hanseatic *Kontors* of Novgorod and Bergen was governed by Lübeck rules. The Lübeck law was, however, not the universal law of the Hanse itself. Many important Hanseatic cities (Cologne, Hamburg, Danzig, Riga and others) did not observe it. But within the Hanse the 'family' of Lübeck law towns was by far the most important. These far-flung cities were bound together doubly: by membership of the Hanse and by the common legal culture diffused through Lübeck law. Being a Lübeck law town had two advantages. First, the Lübeck law codes applied to all these towns. That is why many of them were eager (and paid good money) to obtain an official manuscript; this in turn is the reason for the considerable number of well-preserved manuscript copies of the Law of Lübeck. Second, the Lübeck city council acted as an appellate court (*Oberhof*) for these towns. As they were located in many different duchies, both inside and outside the Holy Roman Empire, the Lübeck council exercised – if the anachronistic term is permitted – a transnational jurisdiction.[1]

1 The leading scholar of Lübeck Law was Wilhelm Ebel (1908–1980). In his book *Lübisches Recht I* (Lübeck: Schmidt-Römhild, 1971) he examined the sources and the courts. Vol. II, which should have contained the substance of the law, never appeared. Recent surveys by Peter Oestmann, "Lübisches Recht", in *Hanselexikon* https://www.hansischergeschichtsverein.de/lexikon?buchstabe=l#anzeige (9 August, 2018) and Albrecht Cordes, "Lübisches Recht", in *Handwörterbuch zur deutschen Rechtsgeschichte* (*HRG*) vol. 3, 2nd ed. (Berlin: Erich Schmidt, 2016), 1072–1079.

Most of the manuscripts of the Lübeck law codes date from the second half of the 13th century.[2] A few more were produced in the following decades, but after 1350 the manuscript production ends, and the text of the law remains stable for more than 200 years. The Lübeck law covers roughly the same topics as other urban law codes of the 13th century, a period characterized by an "urge towards codification".[3] The Lübeck codes contain family and inheritance law as well as criminal law, not to mention a significant number of procedural rules. Given that, one might be inclined to wonder why they are analyzed here in the context of early trade law. There are two reasons, both cogent. On the one hand, Lübeck's city council consisted principally of merchants. They set the tone for all major political and legal decisions. Hence, all Lübeck law was commercial law in the sense that it was promulgated by merchants acting in the best interests of their city and its economy. On the other hand, commercial law, especially company and maritime law, played an important role within the codes. The examples discussed in this paper focus on these subjects.

It stands to reason that, as merchants moved about, they took their legal language with them, and by that very fact alone triggered changes in the law of the places they visited. In this sense, the law itself – in our case commercial law – 'traveled' too. From a Hanseatic perspective, it would have been enticing to focus on 'Migrating Merchants'. Hanseatic merchants moved with great facility from one Hanseatic town to another. They also traveled overseas, notably to the four major Hanseatic *Kontors* in Bruges, London, Bergen and Novgorod, as well as to the many smaller foreign trading posts. They moved back and forth, for longer or shorter periods of time. Some even settled overseas permanently. They were sent as apprentices to live with relatives in other Hanseatic towns. They married women from other parts of the Hanse, forging further links with their in-laws. They founded companies with external partners. Finally, following a well thought-out commercial strategy, they dispatched their sons to other towns ranging from the Baltic to the Rhineland and the Netherlands.[4] Frenetic real estate markets bear eloquent testimony to this impressive

2 The two central editions, both (by the standards of their times) of high quality and not superseded to this day, are Johann Friedrich Hach (ed.), *Das Alte Lübische Recht* (Lübeck: von Rohden'sche Buchhandlung, 1839), and Gustav Korlén (ed.), *Norddeutsche Stadtrechte II: Das mittelniederdeutsche Stadtrecht von Lübeck nach seinen ältesten Formen* (Lund and Copenhagen: Håkan Ohlssons Boktryckeri) 1951. A new edition is planned, this time of the Codex Bardewik from 1294, the most luxurious of all Lübeck law manuscripts. It was deemed lost after 1945 but was recently rediscovered in a small-town Russian library; see below at n. 26.

3 Sten Gagnér, *Studien zur Ideengeschichte der Gesetzgebung* (Uppsala: Almqvist & Wiksell, 1960), 288.

4 The pedagogical and biographical aspects of company law were the subject of Albrecht Cordes, *Wie verdiente der Kaufmann sein Geld? Hansische Handelsgesellschaften im Spätmittelalter* (Lübeck: Schmidt-Römhild, 2000). This thread was picked by Gert Koppe, who edited

degree of mobility.[5] City councils encouraged this mobility to the best of their ability, notably by keeping the hurdles low for fellow Hanseatic merchants who wanted to obtain their citizenship.[6] All in all, Hanseatic merchants were on the move.[7]

This mobility should not be confused with a general open-door policy on the part of Hanseatic towns. However, within the Hanseatic League it did lead to strong personal ties, a low degree of violence between the Hanse cities and a relatively uniform culture (architecture, the constitution, law and language). This last aspect, the language of merchants and commercial law, is the focus of this paper.

2 Language Changes

2.1 *Around 1225: Writing Down Oral Low German in Latin*

The impact of language on law is best studied at the point where the language changes.[8] For Lübeck law, two linguistic turns spring to mind.[9] The first was the abrupt switch from Latin to Low German in the mid-1260s. The second was

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and commented "Hans Wynekes Revaler Handlungsbuch (1490–1497). Ein Beitrag zur Ausbildung hansischer Kaufleute" in Stephan Selzer (ed.), *Menschen – Märkte – Meere. Bausteine zur spätmittelalterlichen Sozialgeschichte zwischen Hamburg, Lübeck und Reval* (Münster: MV-Wissenschaft, 2018), 123–179.

5 Entries in the earliest town books of Wismar and Rostock from the late 13th century show that 10% of all houses would change hands in a single year; Ebel, *Lübisches Recht I*, 22, n. 8; Karl Kroeschell, Albrecht Cordes and Karin Nehlsen-von Stryk, *Deutsche Rechtsgeschichte Band 2: 1250–1650,* 9th ed. (Cologne, Weimar and Vienna: Böhlau, 2008), 74.

6 Take as an example Sivert Veckinchusen, citizen of Lübeck at the beginning of the 15th century, then (in the wake of an uprising) exiled to Cologne where he obtained citizenship immediately. Once the unrest was quelled and the old order restored, Sivert renewed his citizenship in Lübeck; Franz Irsigler, "Der Alltag einer hansischen Kaufmannsfamilie im Spiegel der Veckinchusen-Briefe", *Hansische Geschichtsblätter* 103 (1985), 75–99.

7 Philippe Dollinger, *Die Hanse*, 6th ed. revised by Volker Henn and Nils Jörn (Stuttgart: Kröner, 2012), 165–170.

8 Two parallel cases of medieval translations of laws, England and Denmark, are discussed by Bruce O'Brien, "Why Laws Were Translated in Medieval England: Access, Authority, and Authenticity", and Michael H. Gelting, "Leges Iutorum: The medieval Latin Translation of the Law of Jutland", both in: Jenny Benham, Matthew McHaffie and Helle Vogt (eds.), *Law and Language in the Middle Ages* (Leiden and Boston: Brill, 2018), 11–29 and 52–82.

9 The leading philologist of Medieval Low German is Robert Peters (Münster). His writings were the main inspiration for the linguistic parts of this article. See Robert Peters, Die Kanzleisprache Lübecks, in Albrecht Greule, Jörg Meier and Arne Ziegler (eds.), *Kanzleisprachenforschung. Ein internationales Handbuch* (Berlin and Boston: De Gruyter, 2012), 347–365, his paper "Die Rolle der Kanzleien beim Schreibsprachenwechsel von Niederdeutschen zum (Früh-)Neuhochdeutschen" in the same volume, 101–118, and his various contributions to

the gradual transition from Low to High German (while the academics reverted to Latin) – in the 16th and early 17th century. But the first and most profound rupture in the history of the language of the law undoubtedly occurred when the law was first put into written form.[10] The move from an oral to a written legal culture also betokened a transition from spoken Low German to Latin, the only language up to the task of casting legal matters into written form in the early 13th century.

Low German, or "the Saxon language" as its speakers termed it, was common to areas ranging from the Low Countries – Dutch and Low German are closely related – in the west to Scandinavia and the Baltic in the east. It was as wide-spread as any major European language in the Late Middle Ages. But was it also a legal language? If so, it was callow indeed. The first attempt to cast the law into Saxon legal prose was undertaken in the 1220s, when Eike von Repgow wrote The Saxon Mirror in 'Elb-Eastphalian', the Low German dialect spoken in the region around Halle and Magdeburg.[11] This – and not the Westphalian spoken by the majority of the settlers in the new towns along the Baltic shores – became the language that shaped Lübeck law. Since The Saxon Mirror was an important source for Hamburg law and for its *Ordeelbook* (1270),[12] we encounter here an initial example of parallel migration of law and language. There is a

Werner Besch et al. (eds.) *Sprachgeschichte. Ein Handbuch zur Geschichte der deutschen Sprache und ihrer Erforschung,* vol. 2, 2nd ed. (Berlin: De Gruyter, 2000). On the topic of how the language of the municipal administration influenced the language in the merchants' private bookkeeping see Doris Tophinke*, Handelstexte. Zu Textualität und Typik kaufmännischer Rechnungsbücher im Hanseraum des 14. und 15. Jahrhunderts* (Tübingen: Gunter Narr, 1999).

10 The entry of the law into the written world is described for England by Michael Clanchy, *From Memory to Written Record. England 1066–1307*, 3rd. ed. (Hoboken: Wiley-Blackwell, 2012). For the continent and a slightly later period see Simon Teuscher, "Zur Mediengeschichte des mündlichen Rechts im späteren Mittelalter", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung* (ZRG.GA) vol. 131 (2014), 69–88.

11 For the law book and its history see Friedrich Ebel, "Sachsenspiegel", in *HRG* vol. 4, 1st ed. (1990), 1228–1237 (1229) and Heiner Lück, *Der Sachsenspiegel. Das berühmteste deutsche Rechtsbuch des Mittelalters* (Darmstadt: Lambert Schneider, 2017). For its language see Christa Bertelsmeier-Kierst, *Kommunikation und Herrschaft. Zum volkssprachlichen Verschriftlichungsprozeß des Rechts im 13. Jahrhundert* (Stuttgart: S. Hirzel, 2008) and Jörn Weinert, *Studien zur Sprache Eikes von Repgow. Ursprung – Gestalt – Wirkungen* (Frankfurt a.M. etc.: Peter Lang, 2017).

12 Latest edition, translation and commentary by Frank Eichler, *Das Hamburger Ordeelbook von 1270 samt Schiffrecht nach der Handschrift von Fredericus Varendorp von 1493* (*Kopenhagener Codex*) (Hamburg: Mauke, 2005).

possibility that The Saxon Mirror also influenced Lübeck law, either directly or via Hamburg, a question which would merit further examination.

In his foreword, Eike tells his readers that he originally drafted his text in Latin and then translated it into Low German, a very difficult undertaking, as he states. We can readily credit the second assertion. It must have been quite a task to invent (or at least be the first to record) Low German legal terminology. The result of Eike's labors was the oldest surviving secular text in the vernacular, the first Low German text which was neither clerical nor literary. But the first point is a bit mysterious. Heiner Lück, one of today's leading experts on The Saxon Mirror, has re-examined the question of whether this putative Latin original ever really existed. He tends to think not. That would explain why no traces of the Latin version exist. Lück's second argument is more relevant in our context: Eike may very well have conjured up a fictional Latin draft because Latin was universally deemed to be of greater eminence and higher authority than Low German. After all, Latin had been the legal language par excellence since Roman times. Eike was not of high birth, and his book was a private effort. It had not been commissioned by someone in authority, say a bishop or a prince. Given that, inventing a Latin precursor would have handily improved the authority of his text.[13]

Latin's cachet as *the* legal language must have been the reason why the Lübeck law makers chose it over their own Low German language. Moreover, Lübeck's most important fundamental charters were in Latin, and they already contained some of the rules which would then enter into the Lübeck law codes.[14] Lübeck's elevation to exalted status as an Imperial City in 1226 gave its council the right to make its own by-laws, and it did not hesitate to grasp this opportunity by the horns. However, the council's most ancient piece of legislation was probably just slightly older: the Lübeck fragment (c. 1224).[15]

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13 Lück, *Sachsenspiegel*, 39–41. Lück's thesis stands and falls on the assumption that the unknown author of the Latin version of the Saxon feudal law, the *autor vetus de beneficiis,* is not identical to Eike. A similar reference to an alleged Latin original occurs in the German version of the Song of Roland by an author commonly referred to as 'Pfaffe Konrad'. Jürgen Wolf drew my attention to this parallel attempt to raise the authority of a text by claiming that it is the translation of a Latin predecessor.

14 Lübeck was founded in 1142, and re-founded by Duke Henry the Lion of Saxony in 1159. The privileges mentioned date from 1188 (Frederic I Barbarossa) and 1226 (Frederic II); Dollinger, *Die Hanse*, 24–26.

15 Korlén, *Das mittelniederdeutsche Stadtrecht*, 33 and 62; Fritz Rörig, *Hansische Beiträge zur deutschen Wirtschaftsgeschichte* (Breslau: Ferdinand Hirt, 1928), 15–17 (reprint of Rörig's paper "Lübeck und der Ursprung der Ratsverfassung", *Zeitschrift des Vereins für Lübeckische Geschichte und Altertumskunde* vol. 17, 1915, 27).

The Latin the councilmen had at hand was of course not the classic language of Cicero. It was a variant of medieval Latin which did little to hide the fact that the authors' native tongue was German and that they were not familiar with classic Latin grammar – a fact which did not stand in the way of the practical success of the codes. The town councilors and their chancery clerks had little formal education. Try as it might, Lübeck found it difficult to recruit formally trained legal experts. Indeed, around 1250, it even sent its delegate Konrad Pictor on a recruiting mission to Padua and other Northern Italian centers of jurisprudence. But Pictor returned empty-handed. The graduates of these universities were well sought after back home, and possible candidates proved unable to obtain permission from the local *Signore* to work abroad.[16] So Lübeck had to settle for local talent. Its first known clerk was Hinrich of Brunswick (active between 1242 and 1259).[17]

However, it was not the lack of impeccable grammatical skills which made Latin inappropriate for expressing many of the mercantile rules of the North. The reason was rather that a substantial number of concepts central to trade law had already been developed before and were already well-established when written Latin arrived. If the accustomed Low German terms were clearer than their Latin equivalents, or if Latin simply had no expression for a specific rule or situation, the German words were simply inserted into the Latin text. These inserts[18] are valuable because they are the only witnesses from the period when all home-grown law was still completely oral. Early Low German law words like these constitute our only opportunity to peer behind the veil which separates us from the era of purely oral law.

Two examples from the last and most complete Latin code, the one produced for Danzig (Gdańsk) and dating from 1263,[19] illustrate the point nicely.

16 Karl Kroeschell, *Deutsche Rechtsgeschichte Band 1: Bis 1250*, 13th ed. (Cologne, Weimar and Vienna: Böhlau, 2008), 285/6.

17 Robert Peters, *Kanzleisprache*, 349. One might wonder if a single person could possibly have had such a massive impact. But we have to remember that we are dealing with a person who served for decades as a scribe in a still largely illiterate society. A.C. Højberg Christensen, *Studier over Lybæks kancellisprog fra c. 1300–1470* (Copenhagen: Universitetsbogtrykkeriet J.H. Schultz, 1918) adds more proof of the relevance of individual clerks and their impact on crucial linguistic changes.

18 They remind legal historians of the oldest witnesses of Germanic legal terminology, the famous Frankish law-words (*Malbergische Glossen*) inserted into the otherwise Latin Lex Salica, the Frankish law of the late 5th century; Heiner Lück, "Lex Salica", in *HRG* vol. 3, 2nd ed. (2016), 924–940.

19 Johann Friedrich Hach (ed.), *Das Alte Lübische Recht* (Lübeck: von Rohden'sche Buchhandlung, 1839), Codex I, 183–228.

According to Art. 44, the owner of a barge that has been used against his will has an action for tort against the culprit. Alternatively, he can authorize the use of his vessel *ex post facto* and enforce payment of an appropriate charter fee:

> Si dominus navis vult prosequi, ille qui accepit solvet ei hure sed si vult conqueri quattuor solidi componet.

But it was not obvious how to translate *hure* into Latin. *'Locatio conductio'* might have done, but it was simpler to stick with the eminently clear Low German term, *hure*, the equivalent of the modern Dutch word *huur*.

According to Art. 99 all parties profiting from jettison, ship- and cargo-owners alike, are obliged to contribute to compensating those whose goods were sacrificed. The individual shares are to be calculated in proportion to the value of cargo remaining to each freighter. The wording is:

> Navis ipsa et omnes indifferenter qui in ea sunt debent illa bona proiecta solvere secundum marctal.

Marctal – or in High German *Markzahl*, literally translated: 'mark-number' – is a word which contains the concept of 'proportional value', dollar for dollar, as opposed to *Manntal*, *Mannzahl*, 'per capita'. Clearly, those who drew up the code had no Latin word to express this concept with anything approaching the precision of *marctal*.[20]

2.2 *1263/67: The Sudden Change from Latin to Low German Codes*

Why did the lawmakers abandon Latin only 40 years later? The transition to Low German was a sudden and definitive break with the past. All signs point to a deliberate decision by the council. Limiting ourselves to the codified law and disregarding the fact that the overall abandonment of Latin as an administrative language was very slow and only completed in the early 15th century,[21] let's look at the details. In doing so, we should bear in mind that the transition from Latin, the traditional language of the law, to Low German, a largely unformed

20 Three more Low German legal terms in the Danzig Codex, selected at random, illustrate the relation between the two languages: Art. 26: *Immobilia id est torfachteigen* (inherited real estate); Art. 66: *Culpe que vulgo vorsate dicitur* (*vorsate* = intention); Art. 100: *Si non est ibi wapenscreinge* (weapon-shouting).

21 Peters, *Kanzleisprache*, 347, distinguishes a phase of formation of the Low German administrative language (1270–1375) from a phase of *Sprachausbau* or elaboration (1370–1530).

language, occurred in the context of rapid economic expansion,[22] in the course of which the region that would soon become the pivot of the Hanse quickly acquired self-confidence and political weight.

The most ancient Low German elements of the Lübeck law code date from 1267, when Rostock received legal advice from Lübeck. The oldest surviving manuscript was copied for Elbing in the 1270s,[23] and the copy with the greatest historical impact was the one used by the council itself, usually dated "1270/82" but with a number of entries which are difficult to date. Due to its current location this copy is usually referred to as Codex Ki (Ki for Kiel, while the Codex K lies in Copenhagen). The 1270s were precisely the years when Lübeck's Hanseatic sister town Hamburg issued its *Ordeelbook* (judgement book). The *Ordeelbook* was drawn up by a retired politician and legal expert named Master Jordan von Boizenburg.[24] He was the first to systematize Low German law by dividing the Hamburg law into 12 chapters and sorting the legal material accordingly.[25] A more tentative approach to developing a systematic code of law was undertaken in 1294 by the Lübeck councilman and chancellor Albrecht von Bardewik. The codex bearing his name was thought to have been lost in the course of the Second World War but miraculously turned up recently in the library of the little town of Jurjewez on the Volga, 450 km north-east of Moscow.[26]

In Lübeck, this half-hearted approach towards a structured arrangement of the articles remained the exception. Immediately after its completion, while Albrecht was still in office as chancellor, a delegation from Kolberg ordered and received a version of the code which reverted to the jumbled, pre-1294 order. The venerable, established sequence of articles apparently outweighed

22 Andreas Ranft, "Lübeck um 1250 – eine Stadt im 'take-off'", in Wilfried Hartmann (ed.), *Europas Städte zwischen Zwang und Freiheit. Die europäische Stadt um die Mitte des 13. Jahrhunderts* (Regensburg: Universitätsverlag Regensburg, 1995), 169–188.

23 Peters, *Kanzleisprache*, 351 f. Lübeck and Hamburg were the places where the tradition of Low German city laws began around 1270, Klaus Wriedt, "Latein und Deutsch in den Hansestädten vom 13. bis zum 16. Jahrhundert", in Bodo Guthmüller (ed.), *Latein und Nationalsprachen in der Renaissance* (Wiesbaden: Harassowitz, 1998), 287–313, namely 300/01.

24 Christa Bertelsmeier-Kierst, "Jordan von Boizenburg", in *HRG* vol. 2, 2nd ed. (2012), 1389–1391.

25 Eichler, *Ordeelbook*, 17–19.

26 Natalija Ganina and Inna Mokretsova, "Verschollener ‚Bardewikscher Codex' aufgefunden", *Zeitschrift für deutsches Altertum und deutsche Literatur* vol. 145 (2016), 49–69. A modern edition, together with a facsimile and a juridical commentary of its content, is being prepared by a group of international scholars cantered around Natalia Ganina.

the 'modern' attempt to systematize the material – a telling case of path dependency.

In general, the law is conservative, preferring continuity to change. Lübeck's legal history was no exception. Well into the 16th century, Lübeck law remained an unsorted collection to which new rules were added by simply attaching them at the end. This method facilitated rapid growth of the text, permitting the number of paragraphs to rise from 60 in the earliest Latin manuscripts of the 1230s to over 250 by the end of the century.

All in all, the last decades of the 13th century were an especially busy phase of political, legal and administrative activities in Lübeck in general, and in its core, the Lübeck town hall, more than anywhere else. Lübeck law was quickly spreading eastwards. Delegations arrived from newly-founded towns, requesting fresh copies of the code and legal advice. This was the atmosphere in which Low German was widely accepted as a *lingua franca,* and that included the legal language. The new towns founded along the shore of the Baltic, perhaps lacking learned jurists, surely would have preferred texts that they could understand without command of Latin. This also explains why the Lübeck law codes, as a group of documents the most powerful motor for spreading Lübeck law, initiated the gradual transition from Latin to Low German.[27] The change started at the top.

This development went hand in hand with an important innovation in education. Shortly after 1250 the Lübeck council abolished the Bishop of Lübeck's monopoly on education and established a new school, charging its scribe to act as headmaster and take charge of the curriculum. The lawsuits with the bishop went all the way up to the Pope, and in the end the council triumphed. The only subject the new town school was not allowed to teach was singing – a bearable compromise.[28]

The transition is best illustrated by comparing the last Latin and the first Low German codes.[29] Here again, a few examples will have to suffice. One well-known article deals with the legal capacity of ordinary women in comparison to female merchants.

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27 Peters, *Kanzleisprache*, 351.

28 Albrecht Cordes, "Who Shall Educate the Merchants' Children? Episcopal and Town Schools at Lubeck around 1300", in Helle Vogt and Mia Münster-Swendsen (eds.), *Law and Learning in the Middle Ages. Proceedings of the Second Carlsberg Academy Conference on Medieval Legal History 2005* (Copenhagen: DJØF, 2006), 181–192.

29 These are the Latin Danzig code from 1263, ed. by Johann Friedrich Hach, *Das Alte Lübische Recht*, Codex I, 183–228, and the Lübeck Council manuscript (Codex Ki), 1270/82, ed. by Gustav Korlén, *Das mittelniederdeutsche Stadtrecht*, 82–158.

Codex Danzig, 1263, Art. 21: De hereditate mulierum.
Nulla mulier potest bona sua impignorare, vendere vel dare sine procuratore. Nec aliqua mulier potest carius fideiubere quam pro duobus nummis et dimidio sine mundibordio suo id est vormunde exceptis illis que habent kopschat et solent emere et vendere. Quicquid promittit de iure solvere tenetur si de promisso concivi poterit.

Lübeck council manuscript, 1270/82, Art. 22: Van vruwen borchtucht.
Negein vruwe ne mach oc ere gut ver kopen noch versetten noch vergeven sunder vormunde.
Noch nen vruwe ne mach hoger borge werden sunder vormunde den vor driddehalven penning sunder degene de kopschat hebben unde kopen unde vorkopen. So wat se loven dat scholen se gelden.

Comparison of the two articles in both languages reveals four telling differences in content.

(1) The title was amended from 'Women's inheritance' to 'Women as sureties' but this is still too narrow. The article deals with a good deal more than just the limit to which all women can guarantee debts (a mere 2½ pennies of Lübeck currency). The most important issue – the legal capacity of commercially active women and their right to guarantee unlimited amounts of debt – does not show up in the title.

(2) The Latin text employs three words for 'guardian': *procurator, mundibordius* and *vormunde*. The first two are synonyms. If there ever was a factual difference between them, it had long since been abandoned. *Vormunde* is another example of a Low German word inserted into a Latin text. This time, however, it is accompanied by its direct Latin counterpart and introduced with the words *id est*: 'her guardian, that is *vormunde'*. In the German version, the word replaced the two Latin terms and returned to its native environment.

(3) The real door-opener for female legal capacity was possession of merchandise plus mercantile experience: Women who have *kopschat* (High German *Kaufschatz*,[30] literally 'sale treasure') are legally competent and consequently bound by their contracts. Here, yet another Low German word was inserted into the Latin text. Apparently, legal Latin had no equivalent for *Kaufschatz* in the sense of goods meant for resale (and not for consumption). The hurdle for demonstrative business experience was lowered by dropping the word *solent* when rendering the Latin text into

30 Albrecht Cordes, Art. "Kaufschatz", in *Hanselexikon* https://www.hansischergeschichtsverein.de/lexikon?buchstabe=l#anzeige (10 August, 2018).

Low German. The Latin text required that women be 'used to' buying and selling before they could serve as sureties. The Low German text views it as sufficient that a woman had in fact started buying and selling. As 'being used to' is an imprecise term, the new version not only lowered the threshold but also made things clearer: women attained independent legal standing the moment they started buying and selling.

(4) The unclear restriction at the end of the Latin text *si de promisso concivi poterit* was deleted. That made tradeswomen's liability for debts unlimited.

The next two examples are the Low German versions of the Latin articles concerning illicit use of a barge and jettison mentioned above.

> Codex Danzig, Art. 44: De promone
> Si quis promptuarium vel navim alterius acceperit et in Travenam cum ea perrexerit, si dominus navis vult prosequi, ille qui accepit solvet ei hure sed si vult conqueri quattuor solidi componet.

> Council manuscript, Art. 43: Van pramen
> So we enes anderen mannes pram nemet sunder sine witschap unde in de Travene mede varet, will he dat vorderen des de pram sin is, de andere schal eme hure geven, und will he dar klagen he schal it eme beteren mit ver Schillingen. It ne do vur not oder ander echt not.

> Codex Danzig, Art. 99: Notandum quod quandocunque aliqua bona proiciuntur propter necessitatem aure vel aliter qualitercunque. Navis ipsa et omnes indifferenter qui in ea sunt debent illa bona proiecta solvere secundum marctal.

> Council manuscript, Art. 89: De gut werpet in water not: So war lude sint an water not unde er gut werpet, dat gut mot dat schip unde de lude de dar gut hebben in deme schepe na marktale gelden. Na deme alse iowelik gut mochte gelden inder havene dar se to dachten.

Again, it strikes the eye that the Low German texts are not simply translations of the older Latin version. Instead, in both articles a sentence is added at the end. In the first case, an exception: If the barge was used in the event of fire or some other emergency (*echte not*) the unauthorized user could not be held liable. The sentence added to the other article was an explanatory specification: In cases of jettison the question of how compensation should be calculated was crucial. The added sentence specifies that the relevant prices should be the ones obtained at the end of the outward voyage (as opposed to the point of

departure). In this way, the – positive or negative – effect of the voyage entered into the equation.

One final example from the 13th century involves company law. There were a number of terms for 'trade companies', all represented by the Latin word *societas*. Among the Low German equivalents were *selscop, maatscap, kumpenye,* and *wedderlegginge*. These terms were apparently used as synonyms and seem to reflect regional language peculiarities rather than differences in substance.[31]

To sum up this section: The language shift led to (1) dropping outdated or incomprehensible elements, (2) providing explanations and clarifications, (3) reducing redundant complexity or (4) introducing new terminological distinctions, and finally (5) adding exceptions. Comparing the last Latin and the first German codes illuminates the legal thinking of the council members and their clerks, and shows how seriously and thoroughly they worked when casting the first written codes in their native language. All in all, the Medieval Latin they had at their disposal was ill-suited to comprehend the details of a fully developed body of trade law. Their native Low German was simply better. The shift back to Low German – written Low German this time – in the 1260s was a process of secularization and professionalization. Suddenly the merchants by and for whom the rules were made were able to understand and influence them directly, without the intermediation of a clerk. At the same time the transition to Low German was a precondition for the rapid dispersal of the Lübeck law to the East and the North at a time when many new towns were being founded along the shores of the Baltic. Merchants, language and law migrated.

2.3 *16th / 17th Century: The Slow Shift to High German – and Back to Latin*

The Low German codes from the 1270s mark the beginning of a period of roughly 250 years in which Low German was the predominant legal language in many regions of Northern Europe. The diffusion of Low German as the normal language of business is, obviously, linked to the Hanse itself, which flourished during the final centuries of the Middle Ages. As Hanseatic history drew to a close, Low German lost its dominant position as well. Its role as a legal language started to fade away from the beginning of the 16th century. But this was a very slow process which took some 300 years to complete.[32] Of the many

31 Albrecht Cordes, *Spätmittelalterlicher Gesellschaftshandel im Hanseraum* (Cologne, Weimar and Vienna: Böhlau 1998), 239 and 323: the earliest known example of a distinction between different types of commercial companies dates from the early 15th century.

32 In the 19th century Low German had finally become 'low' in a social sense as well. In his novel *Die Buddenbrooks* Thomas Mann sheds an insightful and ironic light on the use of spoken High and Low German in Lübeck in 1848. Consul Jean Buddenbrook, an alter ego

town registries which governed all aspects of law and administration in the daily life of Lübeck, some switched to High German, but others, depending on their function, stuck with Low German. For example, the *Oberstadtbuch* (the land register which was in use until Napoleon arrived) never abandoned Low German.[33] Real estate is a slow-moving area of law and in special need of continuity with its traditional formulae and the trust that they inspired. Also, in most cases property was transferred, it was by sale or inheritance, from one Lübeck citizen to another, that is to say within the Low German language community.

In its court rulings, the Council retained the old language, but it tellingly began to insert Latin terms into its verdicts. Wilhelm Ebel's edition records them principally in the period 1450–1550. Before 1500, we meet no Latin terms at all. Between 1500 and 1525, three verdicts employed Latin terms, but between 1525 and 1550 that number rose to 30. Indeed, prior to 1520 the court verdicts contain just one Latin term, a generic mentioning of *obligatio* in a case dealing with debts in Antwerp.[34]

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of Mann's own grandfather Johann Siegmund Mann jr. (1797–1863) and a highly respected member of one of Lübeck's leading families, extinguishes the revolutionary spark of the workers by switching from High to Low German, depicted by Mann as the language of the ordinary people. Here is the dialogue between the Consul and his worker, Cark Smolt:
„Nu red' mal, Carl Smolt! Nu is' Tied! Ji heww hier den leewen langen Namiddag bröllt […] *Smolt, wat wull Ji nu eentlich! Nu seggen Sei dat mal!"*
„Je, Herr Kunsel, ick seg man bloß: wi wull nu 'ne Republike, seg ick man bloß …"
„Öwer du Döskopp … Ji heww ja schon een!"
„Je, Herr Kunsel, denn wull wi noch een."
("Come on, Carl Smolt! It's high time! You have been rioting all afternoon. Smolt, what do you want at the end of the day! Spit it out!"
"Well, Mr. Consul, I am just saying: we now want a Republic, I am just saying…"
"But you idiot … you already have one!"
"Well then, Mr. Consul, we want another one!" [Translation: A. Cordes/ St. Jenks]).

33 Peters, *Kanzleisprache*, 361.

34 Wilhelm Ebel (ed.), *Lübecker Ratsurteile*, 4 vols. (Göttingen, Frankfurt and Berlin: Musterschmidt Verlag, 1955–1967). The three oldest Latin words are *obligatio*, *chirographum* (a technical term for an indentured charter), and the typical canon law phrase *ultra dimidum iusti pretii,* inserted in these words into the Low German text (verdict no. 87 from 1502, no. 812 from 1521, and no. 1055 from 1525). Ebel's edition has been challenged by two recent articles on a number of grounds, among others because he apparently selected only a small percentage of the available verdicts – without disclosing his criteria – and neglected older, pre-1400 Latin verdicts of the Council. See Carsten Groth, "Die Lübecker Ratsurteile. Wilhelm Ebel und eine wissenschaftliche Geschäftsführung 'ohne Auftrag'?", and Philipp Höhn and Alexander Krey, "Schwächewahrnehmungen und Stadtbucheditionen. Der Zugang zu Recht und Wirtschaft in drei Editionsansätzen des 20. Jahrhunderts", both in *Hansische Geschichtsblätter* 135 (2017), p. 31–69 and 71–125. It would be a signal achievement if future researchers would follow their lead and expand the body of

From that point onward, the court language started changing. The constitutional reforms in 1495 and the years following strengthened the centripetal forces and led to a stronger integration of the German North into the Empire. That included the language. Already before 1500 Low German book-printers in Lübeck were economically unsuccessful and went bankrupt.[35] Martin Luther's bible translation from 1534 contributed greatly to the establishment of High German as the standard language across the entire country. Thus, religion and law both contributed to forging Germany as a nation with a common language in the Humanist era. From now on, and right up to the end of the old Empire in 1806, the German legal landscape was shaped by the Imperial Chamber Court (founded in 1495), and its Vienna counterpart, the Imperial Aulic Council.[36] The Hanseatic towns accepted the new courts without any apparent hesitation, the first cases from Lübeck already arriving at the new Imperial court before 1500. Thus, legal communication across the linguistic border between northern and southern Germany became more frequent as well. This influence must have been the main transmission belt for Latin terms in Low German texts. This was, interestingly, the mirror image of the intrusion of Low German terms into the Latin text of the first codes around 1250.

A marginal note on an early Imperial Chamber Court file from 1549 illustrates how this infiltration process worked. A clerk at the Chamber court had to copy a disputed company contract from Lübeck into the court's files. But he must have found the lengthy description of the duties of the company's financial director, Hermann Karsten, cumbersome and difficult to understand. Nonetheless, he dutifully copied the precise Low German wording of the contract:

> Idt schall ock de vorgedachte Hovetstol, alse 9000 marc den. Lubecensis sampt alle deme anderen Gelde, so se disser Masscopye thom besten up Rente nehmen, in Hermen Karstens Huß In Bewaringe gelecht werden, und dar steds uthgegeven und upgeboret werden.

Tellingly, however, he added a gloss in the margin, succinctly explaining the situation with the help of a new German loan word, *Administration*:

available sources. However, these criticisms don't vitiate the argument made here that a growing number of Latin terms appear in the verdicts after 1520.

35 This is an aspect Jürgen Wolf (Marburg) pointed out to me.

36 Dietmar Willoweit, *Deutsche Verfassungsgeschichte. Vom Frankenreich bis zur Wiedervereinigung Deutschlands*, 7th ed. (Munich: Beck, 2013), § 15. Kroeschell / Cordes / Nehlsen-von Stryk, *Deutsche Rechtsgeschichte Band 2*, Ch. 21, 277–292.

Nota, dat Hermen Carstens de administration *des geldes gehadt.*

This example shows how hard it is to describe the process of administration without using the word itself. The value of precise terminology (and the superiority of a thinking clerk to a mechanical copying machine) become evident.[37]

It is surely worth mentioning that the High German which slowly gained ground in the north was no static entity either. The so-called "full reception of the Roman Law in Germany[38]" occasioned the introduction of a good number of new loan words into High German as well.

Let's return to the main subject, the language of the law. The intrusion of Latin into Lübeck's Low German court verdicts was followed (after a few decades) by the most important shift. In 1586 the 'Renewed town law' of Lübeck was, as its compilers described: "…brought from [the] old Saxon language into High German". This code was a late instance of the Humanist 'reformations' of town and territory laws (*Stadt- und Landrechtsreformationen*) in the 15th and 16th centuries, starting with the Nuremberg 'reformation' of 1475.[39] Lübeck, together with Hamburg, was a relative late-comer. In Bremen, the reform plans even failed altogether.[40]

Lübeck did not take the initiative in this development. The council was required to act by the smaller towns which had adopted Lübeck law centuries earlier.[41] The Mecklenburg towns of Rostock and Wismar urgently needed modern, updated copies of their law. Unlike Lübeck they were not imperial cities but mere *Landstädte*, subjects of their lords, the dukes of Mecklenburg. In the 12th and 13th centuries, the great foundation period of cities in Central Europe, endowment with a prominent town law like Lübeck's was an essential

37 Albrecht Cordes, "Kapital, Arbeit, Risiko, Gewinn. Aufgabenteilung in einer Lübecker Handelsgesellschaft des 16. Jahrhunderts", in *Das Gedächtnis der Hansestadt Lübeck*. Festschrift für Antjekathrin Graßmann (Lübeck: Schmidt-Römhild, 2005), 517–534, with a photograph of the gloss on p. 523.

38 Kroeschell / Cordes / Nehlsen-von Stryk, *Deutsche Rechtsgeschichte Band 2*, 251.

39 Kroeschell / Cordes / Nehlsen-von Stryk, *Deutsche Rechtsgeschichte Band 2*, Ch. 19, 247–265.

40 On the three Northern German town laws see Sonja Breustedt, "Die 'späten Stadtrechtsreformationen' im Hanseraum. Ein Forschungsbegriff auf dem Prüfstand", in Andreas Deutsch (ed.), *Stadtrechte und Stadtrechtsreformationen* (forthcoming).

41 Hans Teske, "Der Ausklang der Lübecker Rechtssprache im 16. Jahrhundert", in *Ehrengabe, dem deutschen Juristentage überreicht vom Verein für Lübeckische Geschichte und Altertumskunde* (Lübeck: Verlag des Vereins für Lübeckische Geschichte und Altertumskunde, 1931), 55–101; Wilhelm Heinsohn, *Das Eindringen der neuhochdeutschen Schriftsprache in Lübeck während des 16. und 17. Jahrhunderts* (Lübeck: Max Schmidt-Römhild, 1933).

component of the starting kit every founder of a town required, even if the newly founded town lay outside of his realm. But those days were long past. The authorities of the 15th and 16th centuries were endeavoring mightily to erect modern territorial states. Ideally, that should have had included a common law and a uniform jurisdiction covering the whole territory. That is why early modern rulers tried to sunder the bonds which held the Hanseatic towns together.

It is a typical trait of early modern German constitutional history that numberless conflicts like this one were conducted with legal arguments, often pursued as lawsuits all the way up to the new Imperial courts. The strongest argument the opponents of modernization used was their claim that their ancient privileges were *iura quaesita*, well-acquired rights.[42] And to make the case one had to be able to produce written proof – hence the urgent need of an updated law book. Unlike its 'daughter towns', the imperial city of Lübeck had no such regional lord breathing down its neck. The Council and its legal experts must also have been painfully aware how far legal practice had deviated from codes that by now were more than 300 years old and had never been updated. Unlike the ecclesiastical courts manned with jurists as judges, the technique of non-learned decision making was not based on the 'subsumption' of the facts of the case under an abstract norm. Therefore it did not require the judges to name and cite the specific articles on which they based their verdict. That ensured that the yawning gap between codified black-letter law and the workaday practice of the law did not impede the work of the court.

But in the end Lübeck gave in to the constant nagging of its 'daughter towns'.[43] The result was the code of 1586, which was issued in High German. Although no one disclosed the reason for this change, surely the prestige of the Imperial courts and the fact that the modern town and territory law reformations mentioned above were all in High German must have played a role. The shift may have been a last-minute decision because the various drafts were still written in Low German. As in the 1260s, the linguistic turn was more than a simple translation. Instead, the Council seized the opportunity to organize the legal content of the code to accord with the systematic rules of its time and to change a good number of rules significantly.

It is here that things start to get complicated. Therefore, I will limit myself to a single example, again selected from commercial law: The question was how trade companies were to divide losses. This issue, which the Latin Codes of the

42 Olechowski, "Jura Quaesita", in *HRG* vol. 2, 2nd ed. (2012), 1424–1426.

43 Wilhelm Ebel, *Lübisches Recht I*, 211–214.

13th century did not mention at all, was newly introduced on the occasion of the linguistic switch from Latin to Low German.[44]

> Wederleget iemen den anderen in cumpanie, so wanne se schichten scholen, is dar hovetgůt unde winninge, so scal he to voren up boren, dat he to voren hevet ut geleget.
> Dat andere scolen se like delen. Is dar min den hovetgůt, so scholen se dat gůt schichten, alse se it to samene geleget hebbet na marktale.

The Segeberger Codex, an undated draft from the mid-16th century, still held more or less on to the old rule:

> Wedderlegget ein dem anderen an kopenszchopp [ofte] an szelszcopp, wen sze szchichten edder delenn scolen is dar dat hoveth gudt unde de winninge szo szchall he erst upboren wes he erst hefft utgelecht.
> Wes dar denne von winninge is, dat schal men like delen. Wert ock sake, dat se allike vell hadden utgelecht, so delen se alle gudt als se likes konen.

But article 3. 9. 1 of the new code of 1586 (Chapter 3, 9, entitled "De societatibus. Von Geselschafften und Marschopeyen") put things quite differently:

> Machen etzliche Geselschafft mit einander dergestalt, das einer oder mehr Gelt legen, der oder die andern thun die Arbeit, wann sie alßdann scheiden woellen, so nimpt der jenige, welcher das Gelt geleget, den Heubtstuel zuvorn.
> Den gewin theilen sie zugleich. Ist aber kein gewin, so theilen die jenigen mit einander, die das Gelt zusamen getragen. Die andern aber haben die Arbeit umbsunst gethan.

The first paragraph was basically left unchanged. The varying terms for trade companies have no visible consequences. The partition of goods upon liquidation starts with the return of surplus capital to its owner. The differences are that the 1586 code expands the scope of the article by including the possibility that more than two partners might form a company, and that one or more of these might contribute solely labor instead of equity capital as their

44 The Danzig codex of 1263 had 120 articles, the Lübeck Council codex 257. 169 of these were entered by the first scribe around 1270. Art. 168, the next-to last of these, is the one cited here. The last 88 articles, written by 7 other hands, date from the following decades.

contribution to the company. Unavoidably, this entailed consequences for sharing losses.

The second paragraph starts with the division of profits and the simplest principle of sharing them: Equal parts. The appeal of the Low German term for this, *like deelen,* was so strong that it had been used in a host of contexts in the past, the most famous one being the nickname for the 14th century pirates reputed to have divided their bounty into equal parts. As to losses, things get more complicated. The principle from the 13th century was division in proportion to capital invested, *marktal*,[45] instead of equal partition. This surprising result – contradicting the principles observed in the division of gains and of losses – was lost during the following centuries. The Segeberg draft replaces it with the self-evident and therefore superfluous rule that if identical sums of capital were invested the whole company could be divided into identical parts.

The 1586 code demonstrates how a core principle of medieval Hanseatic company law had become obsolete. After abridging and clarifying the regulations about the division of profits, the article mentions that work might replace money as a valid contribution to a company. Up to the late 16th century everybody who wanted to become the partner of a Hanseatic trade company had to invest money himself, be it his own or borrowed capital, in order to contribute to the company's capital stock (called *Hauptstuhl*, literally: 'main chair').[46] But now, for the first time, investing work was accepted as a valid contribution. Interestingly enough, the change was not spotlighted, for instance in a dedicated article focusing on this question alone. Instead the new principle was stated in an inconspicuous, almost incidental way. Perhaps the change was less spectacular than it looks in hindsight because business practice had already introduced that possibility.

Another last minute decision was to translate the headlines of the articles into Latin. This opened the door to the high courts in Germany. All Imperial judges, noble or not, had to be learned lawyers by now. Headers phrased in Latin also might well have provided an entree to other courts elsewhere in Europe and, indeed, to the universities, in the hope of establishing Lübeck law as a subject of academic research. Lübeck Law was well prepared for entering academia, but ill prepared to maintain its position in the legal practice of the post-1648 era of modern nation states. Lübeck law became the *Ius Lubecense*:[47]

45 *Marktal* was also the word used to describe the partition of compensation in the case of jettison in the Danzig codex and the Lübeck council manuscript, see above.

46 Cordes, *Gesellschaftshandel*, 80–87.

47 This is the subject of the thorough bibliography of Wilhelm Ebel, *Jurisprudencia Lubecensis. Bibliographie des lübischen Rechts* (Lübeck: Schmidt-Römhild, 1980).

No longer the relevant law for most legal practice along the Baltic shores but merely a prominent example of 'particular' by-laws, i.e. one among a host of non-*Ius commune* legal orders. Even so, in northern German universities, heavily frequented by Scandinavian and Baltic students, the *Ius Lubecense* became a well-accepted field of study in the 17th and 18th centuries. That was not unimportant because academic treatment was essential for the acceptance of the old by-laws by the *doctores iuris* and by the courts. These were not wholly distinct entities, since the Law Faculties were important bodies of jurisdiction until well into the 19th century. So in order to survive and to retain a modicum of practical importance, Lübeck Law had to change. It had to turn back to Latin.

The entree to the universities and their libraries was provided by a Latin translation of the principles of Lübeck law. Credit for this belongs to David Mevius from Greifswald. Mevius (1609–1670), a law professor and the vice president of the Wismar Tribunal,[48] the highest court of the Swedish territories in Germany, became the most prominent author of the learned Lübeck law through his eminently successful *Commentarii in Ius Lubecense* from 1642.[49] The second author worth mentioning in this context is Johannes Marquard (1610–1668), a trained jurist and successful politician. In the year before arriving at the summit of his career as mayor of his home town Lübeck, Marquard published one of the first German treatises on commercial law, a move which definitely did not hinder his ambitions. His *Tractatus politico-iuridicus de iure mercatorum et commersiorum singulari* from 1662 and already his Jena dissertation 26 years earlier made him a pioneer of commercial law.[50]

Thus, the circle was completed, and Lübeck law was again treated in Latin, at least in the academic world. But this was a language far different from the Latin of the 13th century. Mevius used the elaborate, sometimes excessively technical language typical of baroque lawyers. Many authors followed his lead, spawning a number of the typical short dissertations of the time. They dealt with numerous details of Lübeck law. It is interesting to note how these dissertations change over the decades: The historical introductory chapters

48 While the president, at the Wismar Tribunal as well as at the Imperial Chamber Court, was of high nobility, and acted as the representative and political head of the court, it was the vice president who was the premier lawyer in the building and governed the daily business of the court.

49 Nils Jörn, "David Mevius", *HRG* vol. 3, 2nd ed. (2016), 1488–1491.

50 Heinz Mohnhaupt, "'Iura mercatorum' durch Privilegien. Zur Entwicklung des Handelsrechts bei Johann Marquard (1610–1668)", in Gerhard Köbler (ed.), *Wege europäischer Rechtsgeschichte. Karl Kroeschell zum 60. Geburtstag dargelegt von Freunden, Schülern und Kollegen* (Frankfurt, Bern, New York and Paris: Peter Lang, 1987), 308–323.

become longer, while the past tense gains the upper hand. Although Lübeck law was now a respectable scholarly subject, the loss of practical relevance started to make it look like an antiquity.[51]

In 1642, when Mevius' commentary was published, the Hanse's role was rapidly diminishing. Within the Hanse, Lübeck had already been eclipsed by Hamburg. Many towns observing Lübeck law lost the right of appeal to the Lübeck Council. Lübeck law became academically respectable at a moment when its social and economic importance had already declined almost to the vanishing point. It became completely obsolete with the promulgation of the German Civil Code on 1st January 1900.

3 The Linguistic Turns in Context

What can the description of linguistic turns contribute to our subject? Does knowing about the cycle Latin – Low German – High German – Latin help us better to understand the relation between migrating words, merchants and laws? And what of the overarching topic "The Making of Commercial Law"?

To start with the last question: Since the law consists of words, "the making of commercial law" requires a decision as to the language in which the commercial law shall be "made". The choices are the local vernacular, Latin or some third *lingua franca*, possibly a technical language spoken and controlled by experts alone. This choice defines the participants of the discourse, the group of persons who can take part in shaping the law according to their interests. Control of access to this deliberation process is an instrument of power. In turn, when this group of insiders produces fitting rules and fair judgments – in short: a convincing result –, they will increase the authority of their language as a legal language, and thus stabilize their own power. This simple reflection points to the general relevance of language choices for the law, a connection which is often not taken into account sufficiently.

More specifically, commercial law excites interest because here two professional languages collide: Latin as the language of those learned in the law, and the vernacular, in our case Low German, as the language of the mercantile elite and the council of Lübeck. Robert Peters has presented linguistic proof that the Low German of the codes was not identical to the North Albingian dialect spoken by the first settlers who arrived in Lübeck from the immediate

51 Albrecht Cordes, "Die Rechtsnatur der Hanse. Politische, juristische und historische Diskurse", *Hansische Geschichtsblätter* 119 (2001), 49–62.

surroundings.[52] Nor were they written in the Westphalian variant, the mother tongue of the majority of Lübeck's settlers. (As the newcomers adapted to the language spoken by the settlers who had arrived earlier, the Westphalian dialect subsequently played just a minor role.) Instead, the legal language was Eastphalian, spoken in the region between Halle and Magdeburg, the homeland of Eike von Repgow and the cradle of Saxon law. At the beginning of this paper we hazarded the tempting hypothesis that Hinrich of Brunswick, the first Lübeck clerk known by name, might have influenced this process, although he himself wrote Latin.[53] Be that as it may, the sheer fact that the codes of 1270 ff. used a language which diverged, be it ever so slightly, from the day-to-day language on the streets demonstrates that here we are dealing with a professional language in its own right. It was this dialect which attained linguistic supremacy in the Baltic region in the following centuries.

Our general project's subtitle 'Common practices and national legal rules',[54] suggests that the unity of common practices in the Middle Ages disintegrated into national fragments in the Early Modern Era. This view of the modern nation-state as a destroyer of a purported previous unity is a wide-spread topos among legal historians. True or false, it can shed light on the task at hand, the parallel question raised by this paper being: Did using Latin as a common language define a legal space and make it cohesive? And did the linguistic turn away from Latin to the vernacular languages destroy a functioning, coherent space where all trade law problems could be solved in a single language? In the case of academic Latin in the 17th and 18th century some of that may indeed be true. Latin was the language of jurisprudence, including trade law, from Finland to Portugal and even beyond the oceans. However, the short Latin period of the 13th century does not qualify for such eminence. Its influence was too short-lived, and too obviously shaped by men who mastered it only with difficulty.

This volume focuses on the question of how merchants on the move and language shifts influenced commercial law. Speaking generally, in the otherwise largely stationary Medieval society merchants were among the most mobile groups. Long-distance traders covered distances and crossed borders frequently and with relative ease. Therefore, they needed to master a number of languages, at least on a basic level. That included terms for traveling,

52 Peters, *Kanzleisprache*, 352 f., based on Korlén, *Das mittelniederdeutsche Stadtrecht,* 75–78.

53 Peters, *Kanzleisprache*, 349.

54 https://blogs.helsinki.fi/makingcommerciallaw/presentation/ (6 August 2018).

bargaining and describing merchandise.[55] Their vocabulary traveled with the traders: migrating terms in the sense of this volume. Within Hanseatic history, this migration could best be studied by examining the language politics in the *Kontors* in London, Bruges, Bergen and Novgorod.[56]

But that lead must be followed on another occasion. The subject of this paper forced us to stay at home in Lübeck. From there, we observed words and law migrating along the Baltic shores as new cities were founded in the 13th century. Most of them were furnished with Lübeck law, adopted the Low German legal language alongside it and subsequently remained in legal and linguistic contact with their court of appeal, the Council of Lübeck. Due to this lasting connection the language changes and the arrival of new legal terminology in the law codes of Lübeck influenced the law and its language in the whole Baltic area, as well as in the Kontors of Bergen and Novgorod.

In closing, let us compare the two main linguistic turns examined here: The change to Low German as a legal language in the 1260s, and its abandonment in the 16th century. What were the results of language choice and language change in these two cases?

Low German became a richer and fuller language when it acquired Low German legal terminology, written down in Lübeck for the first time around 1270, about 50 years after Eike's pioneer work, The Saxon Mirror. Low German gained in authority. Its long-lasting impact on the whole Baltic region has its roots here. The gap between written and spoken law narrowed, the danger of misunderstandings was reduced. A larger part of the population was now able

55 Agnete Nesse, "Trade and Language. How did Traders Communicate across Language Borders?", in Wim Blockmans, Mikhail Krom and Justyna Wubs-Mrozewicz (eds.), *The Routledge Handbook of Maritime Trade Around Europe 1300–1600* (London and New York: Routledge, 2017), 86–100, gives a concise overview of the language contacts between merchants. Nesse's main topic, the language contacts and cross-overs between Norwegian and German in Bergen contributes an interesting addition to our present topic, see among others her paper "Bilingual Texts from a Bilingual City", in Geir Atle Ersland and Marco Trebbi (eds.), *Neue Studien zum Archiv und zur Sprache der Hanseaten* (Bergen: Museum Vest. Det Hanseatiske Museum, 2008), 47–64. Hanseatic traders and Scandinavian locals used 'semicommunication': Everybody spoke his mother tongue, and due to the close relation of the languages they could at least superficially understand one another; Kurt Braunmüller and Ludger Zeevaert, *Semikommunikation, rezeptive Mehrsprachigkeit und verwandte Phänomene: eine bibliographische Bestandsaufnahme* (Hamburg: Universitätsverlag, 2001).

56 Pioneer work in this field was achieved in the commendable study of Catherine Squires, *Die Hanse in Novgorod. Sprachkontakte des Mittelniederdeutschen mit dem Russischen. Mit einer Vergleichsstudie über die Hanse in England* (Cologne, Weimar and Vienna: Böhlau, 2009).

to participate in the legal discourse. For one thing, it was now not only the clerics (and the few laymen conversant with Latin) who could understand the language of the law: the law itself was secularized. And secondly, by virtue of rising literacy among citizens, energetically supported by the Council's school policy, the sheer number of people in a position to discuss legal matters grew by leaps and bounds. It would be wrong to deem this process proto-democratization. After all, the oligarchic government of the council was not endangered but rather strengthened by this process. But the language change made Lübeck Law more viable and increased its usefulness in daily practice, including the Hanseatic merchants and their day-to-day business routines.

By way of contrast, the changes of the 16th and 17th centuries seem to contribute less to 'the making of commercial law' and more to building a nation-state. Little by little, Lübeck Law came to constitute one of the legal provinces within the 'Holy Roman Empire of the German Nation' as it was called from the end of the 15th century. In order to prevail before the Imperial courts and in the university law faculties, it had to clothe itself in High German and Latin. Both Lübeck law and the Low German language paid for this process of integration into early modern Germany with a loss of independence at home and a loss of supremacy in the Baltic region.[57] There a new nation with hegemonic ambitions arose: Sweden, the Northern powerhouse of the 17th century.

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57 By contrast, Low German speakers outside of Germany were less influenced by this centralization. The German upper class in the Baltic provinces of the Russian empire stuck to their traditional language until the end of the First World War.

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CHAPTER 8

A Legal World Market?

The Exchange of Commercial Law in Fifteenth-Century Bruges

Bart Lambert

1 Introduction

During the later Middle Ages, the city of Bruges was one of Western Europe's most bustling commercial and financial markets. It realised higher volumes of trade and attracted more merchants from a wider range of regions than any other place north of the Alps, including traders from the Italian city-states, the Hanseatic area, England, Scotland and the Iberian Peninsula. From the beginning of the twentieth century, historians have adopted a myriad of labels to characterise late medieval Bruges' economic position. Each of these implied a specific view on the relationship between the different groups of alien visitors to the city and between the foreign merchants and its local population. In 1908, Hanse historian Rudolf Häpke somewhat anachronistically christened Bruges 'a medieval world market', where international merchants exchanged goods that originated from every known corner of the Continent, sometimes even beyond.[1] In the 1950s, Jan Van Houtte claimed that the city was only a national market, where foreign merchants imported commodities for local consumption and exported Flemish products, without actually interacting with each other.[2] His views were later disputed by Wilfried Brulez, who drew attention to the many goods that were re-exported and the contacts between alien merchants, often facilitated by local hostellers and money-changers.[3] In the 1990s, Peter Stabel saw Bruges as a gateway city that connected the industries of the Low Countries, most notably the Flemish cloth industry, to international outlets.[4] James Murray argued that none of these hierarchical models did justice to the character of the Bruges market. He compared the merchant

1 Rudolf Häpke, *Brügges Entwicklung zum mittelalterlichen Weltmarkt* (Berlin: Curtius, 1908).

2 Jan A. Van Houtte, "Bruges et Anvers, marchés nationaux ou internationaux du XIVe au XVIe siècle?", *Revue du Nord* 34 (1952), 89–108.

3 Wilfred Brulez, "Bruges and Antwerp in the 15th and 16th centuries: An antithesis?", *Acta Historiae Neerlandicae*, 6 (1973), 1–26.

4 Peter Stabel, *Dwarfs among Giants: The Flemish Urban Network in the Late Middle Ages* (Leuven: Garant, 1997).

community within the city's walls to a neural system in which each trader acted as a node that gave access to new and constantly changing networks of people and goods.[5]

An issue that has received far less attention is how the legal conceptions of Bruges' visiting merchants and local tradespeople related. A high turnover of trade inevitably resulted in a high number of commercial disputes, and these needed to be sorted out. Quarrelling merchants in Bruges had several options in order to come to terms with each other.[6] Conflicts could be settled amicably, without the involvement of a court. If a merchant belonged to one of the foreign nations, the associations of foreign traders originating from the same city or region, then his disputes with fellow nation members could be judged by the consul or president of the group.[7] Conflicts with other alien merchants or local citizens had to be brought before the urban court of the aldermen.[8] The central courts of the Flemish counts and, later, the Burgundian dukes, such as the Council of Flanders and the Great Council, had authority over peculiar cases and dealt with appeals against urban sentences.[9] Yet the merchants flocking to Bruges did not only bring a wide range of goods with them, but also a variety of legal traditions. The ways of settling commercial disputes that alien traders were most familiar with in their hometown or region were fundamentally different from those of other foreign visitors and those of their local hosts. So far, no historian has established how these legal traditions were negotiated. Was late medieval Bruges a legal world market where different conceptions of law were exchanged and eventually the most efficient one prevailed?

5 James M. Murray, "Of nodes and networks: Bruges and the infrastructure of trade in fourteenth-century Europe", in Peter Stabel, B. Blondé and Anke Greve (eds.), *International Trade in the Low Countries (14th-16th Centuries): Merchants, Organisation, Infrastructure* (Leuven: Garant, 2000), 1–14.

6 For an overview of private law in the late medieval Low Countries, see Philippe Godding, *Le droit privé dans les Pays-Bas méridionaux du 12e au 18e siècle* (Brussels: Palais des Académies).

7 Bart Lambert, "Making size matter less: Italian firms and merchant guilds in late medieval Bruges", in Dave De ruysscher, Albrecht Cordes, Serge Dauchy and Heikki Pihlajamäki (eds.), *The Company in Law and Practice: Did Size Matter?* (*Middle Ages-Nineteenth Century*), (Leiden: Brill, 2017), 34–48.

8 Jan Dumolyn, Frederik Buylaert, Guy Dupont, Jelle Haemers and Andy Ramandt, "Social groups, political power and institutions II, c.1300–c.1500", in Andrew Brown and Jan Dumolyn (eds.), *Medieval Bruges, c.850–1550* (Cambridge: Cambridge University Press, 2018), 269–278, 300–304.

9 Jan Dumolyn and Bart Lambert, "Cities of commerce, cities of constraints: international trade, government institutions and the law of commerce in later medieval Bruges and the Burgundian state", *Low Countries Journal of Social and Economic History* (*TSEG*), 11 (2014), 89–102.

Or was it a place where local and national legal traditions were imposed on alien visitors?

In his 2013 book *Cities of Commerce*, Oscar Gelderblom claimed that the main strength that attracted foreign merchants to Bruges instead of other markets was its advanced institutional framework. Among those commercial institutions, Gelderblom placed most emphasis on the city's urban courts: it was because the jurisdiction of these tribunals was constantly and increasingly adapted to the needs of visiting merchants that they could resolve their commercial disputes against lower transaction costs than elsewhere, and that they remained in Bruges.[10] But was it? Did local authorities really alter legal traditions to accommodate foreign traders? If they did, to whose needs were they adapted? How did the city government balance the expectations of foreign merchants with the centuries-old rights and privileges of the local population? In this chapter, I will examine according to which legal codes commercial disputes in late medieval Bruges were judged. I will focus on litigation before the urban court of the aldermen, in Gelderblom's view the centrepiece of the institutional regime that was so successful in drawing merchants to the city. First I will discuss what urban and central legislation tells us about the way in which commercial disputes had to be resolved by the aldermen, then I will investigate the daily legal practice before the city's courts. In the final part of the paper I will assess how adaptive Bruges' legal codes were to the interests of international traders.

2 Legislation

The Bruges aldermen were certainly not entitled to judge all commercial disputes in the city. As previously mentioned, conflicts between alien merchants who came from the same town or region were resolved by the consuls of the nations representing these traders.[11] Specific cases, for instance those involving the prince's officers, were brought before the central courts.[12] When a foreign merchant died during his stay in Bruges, the settlement of his inheritance fell under the authority of his home government.[13] When traders disagreed about the terms of bills of exchange, the aldermen could only rule a final

10 Oscar Gelderblom, *Cities of Commerce: The Institutional Foundations of International Trade in the Low Countries, 1250–1650* (Princeton: Princeton University Press, 2013).

11 Lambert, "Making size matter less", 41–43.

12 Dumolyn and Lambert, "Cities of commerce, cities of constraints", 91.

13 Louis Gilliodts-Van Severen (ed.), *Coutumes de pays et comté de Flandre. Quartier de Bruges: Coutume de la ville de Bruges* (Brussels: F. Gobbaerts, 1874–5).

verdict if the initial contract had been drawn up in Bruges.[14] Still, the majority of the litigation resulting from disputes over international trade took place before the court of the aldermen.

The surviving normative texts are unanimous when it comes to which law the aldermen needed to follow in these cases. Already in 1304, when Bruges was still emerging as a centre of international trade, the city's third charter, granted by Philippe, the son of the Flemish count Guy of Dampierre, specified that "if a merchant or stranger comes before the aldermen" he could expect "to have justice within three days, or eight days at the latest, according to the law and custom of the city".[15] In a municipal ordinance in 1396, it was stipulated that if a foreign merchant had his goods seized in a case of debt, he should provide surety and "conform to the laws, customs and usages of the city of Bruges".[16]

When the Burgundian duke John the Fearless granted new commercial privileges to the merchants of Venice active in his territories in 1405, he made clear that all disputes these traders had with non-Venetians had to be judged "according to the law of our said land and the punishment according to the laws and customs of the towns and places where they are".[17] In a ducal ordinance in 1459, John's grandson Philip the Good confirmed that all international commercial conflicts in the Burgundian Low Countries should be settled "according to the local customs of the place where they occurred" and that no appeal against an intermediate judgement of a local court would be upheld.[18] The legislation concerning commercial litigation thus leaves little room for doubt: if merchants active in Bruges did not belong to the same merchant group and their deal turned sour, the case had to be settled according to Bruges customary law, regardless of the places of origin of the parties.

3 Legal Practice

The sentences of the Bruges urban court were recorded in the *Civiele Sententiën*, which have been preserved for about twenty years of the fifteenth century. Most of the verdicts do not explicitly mention a law code or a set of rules which the aldermen would have followed: they simply give the details of the cases and of the decisions made by the court. Some, however, are more elaborate.

14 Gilliodts-Van Severen, *Coutumes de la ville de Bruges*, I, 460–461.
15 Ibid., 311.
16 Ibid., 445.
17 Bruges, Stadsarchief Brugge, Cartulary Oude Wittenboek, fol. 46 r.
18 Gilliodts-Van Severen, *Coutumes de la ville de Bruges*, II, 35–39.

Covering all kinds of issues and parties, these more explicit sentences invariably refer to Bruges customary law. In 1449, for example, the Castilian Diago de Ribanertin as representative of Pierre le Riche sued Roderigo Embite, another Castilian. Embite had had thirty bales of Spanish wool belonging to le Riche seized because of unpaid debts. Ribanertin objected that the money had been paid and claimed the wool back, but the Bruges aldermen ruled that, "according to the laws, customs and usages of the said city of Bruges", Embite could keep the goods until the matter was definitively settled.[19] A similar case was pleaded only a few weeks later. Roderigo le Riche, possibly related to Pierre, and Roderigo del Nager, both Castilian merchants, argued that twenty-five bales of Spanish wool belonged to Alvaro de Villeferrado, who owed them money. Fernando de Burgos, also a Castilian, claimed the wool was his brother's property. The two Roderigos decided to have the bales confiscated, in order to litigate "according to the customs and usages of the city of Bruges". The aldermen ordered de Burgos to substantiate his claim with evidence and when he could not do so, assigned the wool to le Riche and del Nager.[20] Again referring to Bruges customary law, the court of aldermen sentenced that local citizen Jacob Metteneye had to pay £40 gr. to Edinburgh merchants John Hutton and Henry Scot in 1453. Metteneye stood surety for William Carebris, another Scotsman who owed Hutton and Scot eighteen sacks of wool.[21] In 1460, the Florentine Agnolo Tani went to court because, he argued, he had been appointed as a surety for his compatriot Luigi Strozzi without giving his consent. Following "the laws, customs and usages of the city of Bruges", the aldermen released Tani of his duties.[22]

There are three types of cases in which the urban court did not automatically follow Bruges customary law. The first of these concerns the disputes over the international shipment of goods. In some of these sentences, the aldermen took into account the specific customs of the places where the commodities were loaded onto the ship. In 1447, Jehan Pausan, patron of a Genoese carrack, sued Jehan de Imbonati. Pausan had shipped 101 barrels of oil from Seville to Sluys. As some of these had started to leak, the patron had decanted part of the oil into empty barrels and wanted de Imbonati, the owner of the goods, to cover the additional costs. However, de Imbonati argued that "according to the customs and usages maintained on the carracks of Genoa loading oil during the summer on the river of Seville", he was not supposed to do so. Pausan

19 Bruges, Stadsarchief Brugge, Civiele Sententiën Vierschaar, 1447–1453, fol. 126 v.
20 Ibid., fol. 140 v.
21 Bruges, Stadsarchief Brugge, Civiele Sententiën Vierschaar, 1453–1460, fol. 30 r.
22 Ibid., fol. 389 v.

objected that that was not what the customs said. The aldermen decided to give both parties seven extra months to come up with evidence for their allegations.[23]

In 1467, the Venetian merchants Jacopo Balbi and Leonardo de Bondunerio went to court. They had shipped twenty-five sacks of cotton from Venice to Sluys, but upon arrival one part of the cargo was missing and another part was damaged. Referring to the "customs and usages of Venice", they now expected their fellow Venetian Marco Morozini, the current patron of the ship, to compensate them for their losses. Yet Morozini claimed he had bought the carrack in Sluys six months after the shipment of the cotton. According to Bruges customs, he was not liable to pay for any damage that had occurred before his purchase. The aldermen agreed and told Balbi and de Bondunerio to seek compensation from the original owner of the ship.[24]

It is often assumed that disputes regarding international shipping during this period were resolved following international maritime law, as recorded in the Rolls of Oléron or the local Rolls of Damme.[25] Yet only in one case in the fifteenth-century *Civiele Sententiën* did the Bruges aldermen consider such rules. In a dispute between Castilian pilots and a Venetian patron in 1453, it was stated that "the custom of the sea concerning Castilian pilots is such that their services last from the ports of Spain from which they depart until they come before the sand banks of Flanders". Apparently, the aldermen were not that familiar with these laws, as they suspended the case in order to "inform themselves on the custom" and to find precedents.[26] Among the central and local legislation on commercial matters, only the privileges granted by the Flemish count Louis of Male to the Castilians in 1366 mention international maritime law. One clause specified that if merchants shipped goods on Castilian ships, they were bound to pay the freight costs, as stated in "the custom of the sea".[27]

The second type of case in which the aldermen followed other rules than local customs is that of insurance disputes. Late medieval Bruges was a major insurance market, where groups of mainly Italian underwriters provided insurance policies against competitive prices.[28] Whenever the aldermen judging

23 Bruges, Stadsarchief Brugge, Civiele Sententiën Vierschaar, 1447–1453, fol. 19 v.-20 r.

24 Bruges, Stadsarchief Brugge, Civiele Sententiën Vierschaar, 1465–1469, fol. 87 r.

25 For maritime law during this period, see Edda Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe* (Edinburgh: Edinburgh University Press, 2012).

26 Bruges, Stadsarchief Brugge, Civiele Sententiën Vierschaar, 1453–1460, fol. 116 r.

27 Bruges, Stadsarchief Brugge, Cartulary Oude Wittenboek, fol. 50 v.-52 v.

28 F. Edler De Roover, "Early examples of marine insurance", *Journal of Economic History* 5 (1945), 172–200; J.P. Van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800* (Kenwyn: Juta, 1998), 16–18.

insurance cases referred to a specific set of rules, they did so to "the custom in the matter of insurance" or, more elaborately, "the custom for the good and preservation of the common merchandise maintained at all times by all merchants involved in insurance". In 1459, for example, the Genoese Marco Gentile claimed compensation from insurers Michele Arnolfini, Carlo Lomellini and Agnolo Tani after his ship was lost. Arnolfini, Lomellini and Tani were prepared to pay the Genoese, but stated that, according to insurance customs, this entitled them to the shipwreck or any of its cargo that might be recovered. The aldermen decided that the insurers had to compensate Gentile first and that any claims to the ship or the goods would be settled later.[29] In 1469, Bruges citizen Christoffels Vlamijnc sued his Castilian insurer Francisco de la Pegna to obtain the £10 gr. he was entitled to after the loss of a quantity of chamois. De la Pegna wanted to have Vlamijnc's claim in writing, something the Brugeois said he was not supposed to do according to insurance customs. The aldermen sentenced de la Pegna to pay in attendance of a definitive verdict on the matter.[30]

Bruges customary law did not apply to the cases between members of the same foreign nation that were judged internally by the consuls either. Even though it is never specified in their privileges, these disputes were resolved according to the laws of the alien merchants' places of origin. When a nation member disagreed with his consul's sentence, he could appeal against the verdict before the court of the Bruges aldermen.[31] This raises the question which rules prevailed in these appeal cases, the foreign law upheld in the original verdict or Bruges customs as in other trials before the urban court? Only in one appeal sentence did the aldermen explicitly say which legal code was followed. In 1467, Alvaro Dyes appealed against the decision of the consul of the Portuguese nation in Bruges. The court of the aldermen considered his case, but taking into account "the custom on the unloading of goods coming from Portugal over the great sea and the delivery of these goods in the said city of Bruges", it confirmed the consular sentence.[32] In 1458 a representative of the Catalan nation sued Catalan merchant Pierre Jehan Lorde before the aldermen because he refused to pay the one groat for each pound worth of imported goods the nation collected from its members. The only reason that this was not treated by the Catalan consul is that Lorde was associated with Gheeraert Plouvier, a Bruges citizen. The aldermen considered the "ancient custom observed [by the Catalans] on this issue" and the ordinance on the matter by

29 Bruges, Stadsarchief Brugge, Civiele Sententiën Vierschaar, 1453–1460, fol. 274 v.
30 Bruges, Stadsarchief Brugge, Civiele Sententiën Vierschaar, 1469–1470, fol. 81 v.
31 Lambert, "Making size matter less", 43.
32 Bruges, Stadsarchief Brugge, Civiele Sententiën Vierschaar, 1465–1469, fol. 131 v.-132 r.

the King of Aragon and Sicily, and ordered Lorde and Plouvier to pay the levy.[33] The scarce evidence thus suggests that when judging internal affairs of the foreign nations, either in appeal or first instance, the Bruges court respected the laws of the alien merchants' places of origin.

In one type of case it is impossible to establish the rules that underpinned the sentences. Very often, the Bruges aldermen delegated their decision-making power in commercial disputes to a committee of arbitrators, chosen from the merchant community itself. They worked out a compromise, which was subsequently confirmed by the aldermen. The sentences were recorded in the *Civiele Sententiën*, either translated or in the arbitrators' original language. In none of these cases is it specified which legal code was adopted to come to a decision. It is likely that, even though their judgments were considered formal verdicts that had to be followed on pain of fines, the arbitrators' mediations were guided by equity and the desire to maintain merchant satisfaction rather than the strict letter of the law.

4 Legal Adaptation

Apart from insurance cases, internal nation issues, shipping disputes and, probably, arbitration cases, commercial disputes in late medieval Bruges were, thus, judged according to local customary law. Were these rules adapted to the needs of the visiting merchant communities? Gelderblom claims that authorities "tried to incorporate as much as possible foreign mercantile usage in the local customs".[34] Bruges' customary law during this period was recorded only fragmentarily, but there is little evidence that points in that direction. In 1410, the ducal ordinance on the new money stipulated that merchants settling bills of exchange in Bruges would have to pay half the amount in gold, half in Flemish silver currency. After the Italian nations complained that this was impossible for them to do, the aldermen arranged for the measure to be delayed.[35] In 1467, the Venetian merchants obtained an exemption from customary law. In cases that involved Venetians, debtors would no longer be allowed to swear an oath that they owed nothing to their creditors before the latter would have had the chance to produce evidence on the debt. It was stressed that this exemption,

33 Bruges, Stadsarchief Brugge, Civiele Sententiën Vierschaar, 1453–1460, fol. 222 r.-v.

34 Gelderblom, *Cities of Commerce*, 140.

35 Gilliodts-Van Severen, *Coutumes de la ville de Bruges*, I, 435–437.

which was granted by the duke and not by the city government, could be withdrawn at all times.[36]

Moreover, we should bear in mind that measures taken in the private interest of one particular merchant group could be detrimental to the interests of other foreign merchants and of the Bruges population at large. In 1396, the urban authorities set out the procedures in cases where Bruges citizens were summoned before the aldermen by foreigners. Most clauses simply clarified what was already prescribed by the city's customs. At the end of the ordinance the authorities emphasized that it was crucial that citizens could obtain justice just as quickly and easily as foreign visitors.[37] This highlights one of the most important obstacles to the large-scale and progressive adaptation of local customs to the needs of alien merchants assumed by Gelderblom. Both citizens and foreign visitors were involved in commercial disputes and they were judged according to the same set of rules. For the local Brugeois to allow systematic changes to these rules in favour of others would, thus, have undermined their own interests. Alterations to local laws in order to accommodate Bruges' foreign merchant community were, therefore, exceptions rather than the rule. They were everything but particular to the urban authorities too. The aforementioned ducal ordinance issued by Philip the Good in 1459, for example, limited the possibilities of appealing against local courts' intermediate sentences exactly to guarantee the continuity of international trade in Bruges.[38]

If there is evidence of adaptation, then it is of visiting merchants adapting to the specifics of the local judicial system, rather than the institutions being adapted to the merchants. There are many examples of cases in which a foreign trader attempts to outwit the other party, both local and alien, with a more advanced knowledge and understanding of Bruges' customary law. Representing his compatriots Loys Stoc and Anthoine Centurion, the Genoese Luciano Spinola sued English merchant Thomas Patrich in 1449. Spinola claimed that Patrich still owed Stoc and Centurion £200 gr., whereas the Englishman maintained he had already paid his debts. The aldermen gave Patrich two months to produce the necessary evidence. When he reappeared before the urban court, he argued that Spinola had prevented him from accessing his letters and he asked for more time. The Genoese reminded the aldermen that "according to the laws, customs and usages of the said city of Bruges", Patrich

36 Bruges, Stadsarchief Brugge, Cartulary Oude Wittenboek, fol. 258 v.-261 r.

37 Gilliodts-Van Severen, *Coutumes de la ville de Bruges*, I, 441–448.

38 Gilliodts-Van Severen, *Coutumes de la ville de Bruges*, II, 35–39.

should not be allowed any further delay. The magistrate agreed and sentenced Patrich to payment of the £200 gr.[39]

In 1438 Bruges citizen Philippe Metteneye and the Bruges sheriff claimed several sums of money from Catalan merchant Jehan Gregoire. Gregoire acknowledged that he had made the debts, but said he had done so as a factor in the business of Jehan de Lubera. Ever since, de Lubera had fired him and replaced him with Jehan Claris, another Catalan. "Referring to the rights, laws and customs of the city of Bruges", Gregoire argued that the successor who has taken over the factor's goods and responsibilities is also liable to pay for his debts. The aldermen considered Bruges customary law and concluded that Gregoire was right: the factor who succeeds another is expected to cover his predecessor's debts, as he is also entitled to receive his profits. Claris thus had to pay for everything that Metteneye and the sheriff demanded. The sentence was recorded in one of the city's cartularies, probably to be consulted as a precedent in future cases.[40]

In 1467 the Castilian Fernando de Salines had the Genoese patron Andrea Italiano summoned before the aldermen. Italiano had shipped bales of wax from Cadiz to Sluys for de Salines, but part of the cargo had gone missing. After the patron failed to appear repeatedly, the aldermen decided he should cover all of the losses. Yet in 1469, Italiano reappeared and brought the matter before the urban court again. He argued he had been travelling at the time of the original case and neither he, nor his surety and representative had received the summons from the court. For that reason, he believed that the original sentence should be withdrawn. De Salines disagreed and gave Italiano a masterclass in Flemish customary law. According to the laws and customs of the land of Flanders, he stated, a sentence could never be withdrawn or reviewed by the same judge, in this case the Bruges aldermen. A verdict by another, sovereign judge was only possible if Italiano appealed against the original sentence or if he asked for a reformation. But, the Castilian remarked cleverly, neither of these options were available as parties needed to appeal within ten days following the verdict in first instance and to apply for a reformation within a year and a day. Italiano had waited for sixteen months. To finish things off, de Salines quoted almost verbatim from Philip the Good's 1459 ordinance, underlining how a multiplication of trials could only damage the interests of the merchant community. The aldermen followed him on all points, dismissed all

39 Bruges, Stadsarchief Brugge, Civiele Sententiën Vierschaar, 1447–1453, fol. 92 v.-93 r.
40 Bruges, Stadsarchief Brugge, Cartulary Groenenboek A, fol. 345 r.-346 r., 377 r.-378 r.

of Italiano's claims and convicted the Genoese to the payment of the legal costs.[41]

The evidence from Bruges' *Civiele Sententiën* makes clear that international merchants were not just passive consumers of justice who either had to undergo local customs or leave for a place with better conditions. Their interaction with existing institutional regimes was of paramount importance for the transaction costs of their businesses, not, as often suggested, by having regulatory frameworks adapted to their needs, but by developing their own legal literacy and making more effective use of what was available.

5 Conclusions

Even though the city attracted merchants with very different perspectives on how commercial disputes had to be settled, commercial law in late medieval Bruges was no cosmopolitan amalgamation of different legal traditions. Practice before central courts, where the impact of learned law was more significant,[42] may have been different, but both normative sources and legal practice suggest that most disputes brought before the Bruges bench of aldermen, which constituted the majority of commercial court cases in the city, were judged following Bruges customary law. The only exceptions in this regard were insurance conflicts, which were resolved according to international rules, and cases concerning shipments and internal nation issues, which were settled according to alien merchants' home law. Evidence that Bruges' customs, which also applied to the city's own citizens, were continually adapted to the needs of visiting international traders, is few and far between. Merchants active in late medieval Bruges did not outcompete their colleagues by settling in a place that offered them a custom-made judicial regime, they made a difference by being versatile and engaging more fully with existing local legal traditions.

41 Bruges, Stadsarchief Brugge, Civiele Sententiën Vierschaar, 1469–1470, fol. 49 v.-50 r. For the reformation of sentences, see Jos Monballyu, "Van appellatiën of reformatiën: de ontwikkeling van het hoger beroep bij de audiëntie, de Camere van den Rade en de Raad van Vlaanderen (ca. 1370–ca. 1550). Bijdrage tot de ontstaansgeschiedenis van het hoger beroep in de Nederlanden", *Tijdschrift voor Rechtsgeschiedenis* 61 (1993), 251.

42 Alain Wijffels, *Qui millies allegatur: les allegations du droit savant dans les dossiers du Grand Conseil de Malines* (*causes septentrionales, ca. 1460–1580*) (Leiden: Brill, 1985).

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CHAPTER 9

Wörter für Wucher: *Ius commune* and the Sixteenth Century Debate on the Legitimacy of South German Trading Houses

David von Mayenburg

1 Introduction

In his chronicles, the Protestant writer Sebastian Franck (1499–1542/43) described the high levels of inflation in 1531.[1] After a few bad harvests, the prices of staple foods had risen that year to unprecedented levels. This inflation, according to Franck, was attributable by many

> (…) solely to the infidelity of the people and their usurious pre-emption, who bought up everything that the wretched common man had; and then, as soon as they had gotten their hands on it, had to dance to their tune and pay according to their will (…)[2]

Many rich farmers and gentlemen had granted their socmen and subjects loans and were now demanding twice or three times the amount back. And that is supposed to be, mocked Franck, the brotherly love taught by the gospel. The particular aspect of the inflation in 1531 was considered by Franck to be the fact that the harvest that year was actually good. The fields had been harvested, the vines were full of grapes, but the prices continued to rise. Franck could only interpret this situation as divine punishment, as had been announced in Lev. 26:26: "When I break your staff of bread, ten women will bake your bread in one oven, and they will bring back your bread in rationed amounts, so that you will eat and not be satisfied.[3]" And Franck goes on: "God will send the right grasshoppers for this (I mean the usurers), who will eat everything so that

1 Sebastian Franck, *Chronica, Zeytbuch vnd geschychtbibel von anbegyn biß inn diß gegenwertig MDXXXI. jar Darin beide Gottes vnd der weit lauft, hendel, art, wort, werck, thun, lassen, kriegen, wesen vnd leben ersehen vnd begriffen wirt* (…) (Straßbourg, 1531), fols. 249v-250r.

2 *allein der antrew der menschen vnd dem wuocherischen fürkauff zuo / die alles auffkauffen wz der liederlich gmein mann hat; Als dann wann es jnen in die feüst kumpt / muoß man jr lied singen / vnd nach jrem willen bezalen*: Franck, *Chronica*, fol. 249v.

3 Lev. 26:26, quoted in Franck, *Chronica*, fol. 250r.

everyone thinks that it had been harvested and brought in before the grasshoppers".[4]

The comparison of an economic anomaly with a plague and the identification of its assumed cause – the traders and merchants – with grasshoppers, will probably be familiar at least to German readers: in the spring of 2005 Franz Müntefering, the then Chairman of the German Social Democrats, had compared the actions of 'anonymous financial investors' with a plague of locusts, and thereby triggered a lively discussion about the morality of hedge funds and private equity companies.[5] However, at the same time, the problematic comparison with animals was criticized. The money-grabbing grasshopper was quickly and to a certain extent rightly contextualised as being in the anti-American and anti-Semitic tradition of National Socialism.[6] Excessive greed combined with excessive powerlessness seems to lead, not just today but 474 years ago as well, to a comparable vocabulary and comparable strategies of scapegoating.

The purpose of this volume is to find out to what extent merchants not only took goods, but also words and expressions with them on their trade routes, and then distributed them throughout the world. My contribution will, to a certain extent, deal with the contrary perspective. I will investigate the expressions with which other people encountered the merchants, with which their activities were assessed and – where applicable – were also restricted and prohibited by law. Not only does the comparison that I have just made indicate that no migration has occurred here over the centuries, but that the arguments and instruments used against the excesses of trade have been present virtually everywhere and at all times. This may well be due to the fact that the ban on usury was a product of Christian moral ethics, and is therefore anchored as stably and permanently in Europe as the Catholic Church itself.

If I am to address the question of monopoly and its containment in the following, I am aware that in doing so I am entering a large field which continues to be ploughed very intensively in the literature. When looking at legal-historical literature in the narrower sense which is written in German, the stream of literature has been flowing continuously for several decades: an

4 (…) *dartzuo wirt Gott die rechten hewschrecken* (*ich meyn die fürkaeuffer*) *schicken / die alles abetzen / das yederman wirt meynen man hab es schon vor den hewschrecken ernedt und einbracht* (…)*:* Franck, *Chronica*, fol. 250r.

5 N.N., *Die Namen der "Heuschrecken",* in Stern online, 28.5.2005, [http://www.stern.de/politik/deutschland/kapitalismusdebatte-die-namen-der--heuschrecken--5351566.html], accessed on May 24th 2018.

6 Tobias Jaecker, *Von Mücken und anderen Saugern*, in *Jüdische Allgemeine*, 19.5.2005, [http://www.jaecker.com/2005/05/von-muecken-und-anderen-saugern/], May 24th 2018.

important article by Maximiliane Kriechbaum was published only recently, addressing the statements of medieval legists with regard to the canonistic ban on interest.[7] Hans-Jürgen Becker published a very readable survey dealing with the ban on interest in 2014.[8] The two most important books of the last two decades were written by Harald Siems, about the ban of interest in the early Middle Ages, and Bernd Mertens, on the discussion of monopolies in the early modern period.[9] Looking deeper into the past and trying to trace back the legal-historical contributions regarding the canonistic ban on interest until the first fundamental study by Wilhelm Endemann,[10] or even when including the intensive research of Werner Sombart[11] and Jakob Strieder[12] with regard to aspects of social and economic history, one might easily come to the conclusion that this topic has been investigated sufficiently. But this, of course, does not preclude new findings due to changes in perspective. For example, the modern research dating back to the 19th century has been dominated by a striking sympathy for the trading houses, resulting from predominant bourgeois-liberal concepts of economic ethics. From this perspective, the contemporary criticism of the Fugger and Welser appeared as a 'censorious pessimism', which stood in a stark contradiction to the unique economic boom that Germany experienced during those times, a boom, "that essentially resulted from

7 Maximiliane Kriechbaum, "Die Stellungnahmen der mittelalterlichen Legistik zum kanonistischen Zinsverbot", in Volker Friedrich Drecktrah, Dietmar Willoweit and Götz Landwehr (eds.), *Rechtsprechung und Justizhoheit. Festschrift für Götz Landwehr zum 80. Geburtstag von Kollegen und Doktoranden* (Cologne: Böhlau Verlag, 2016), 23–52.

8 Hans-Jürgen Becker, "Das Zinsverbot im lateinischen Mittelalter" in Matthias Casper et al. (eds.), *Was vom Wucher übrigbleibt. Zinsverbote im historischen und interkulturellen Vergleich* (Tübingen: Mohr Siebeck, 2014), 15–45.

9 Harald Siems, *Handel und Wucher im Spiegel frühmittelalterlicher Rechtsquellen* (Schriften der MGH) 35 (Hannover: Hahn, 1992); Bernd Mertens, *Im Kampf gegen die Monopole. Reichstagsverhandlungen und Monopolprozesse im frühen 16. Jahrhundert* (*Tübinger rechtswissenschaftliche Abhandlungen*), 81 (Tübingen: Mohr, 1996). See also: Winfried Trusen, "Die Anfänge öffentlicher Banken und das Zinsproblem. Kontroversen im Spätmittelalter", in Marcus Lutter (ed.), *Recht und Wirtschaft in Geschichte und Gegenwart. Festschrift für Johannes Bärmann zum 70. Geburtstag* (Munich: C.H. Beck, 1975), 113–132.

10 Wilhelm Endemann, *Studien in der romanisch-kanonistischen Wirthschafts- und Rechtslehre bis gegen Ende des siebenzehnten Jahrhunderts*, 2 vols., (Berlin: Guttentag, 1874–1883).

11 Werner Sombart, *Der moderne Kapitalismus*, 3 vols. (Leipzig: Duncker & Humblot, 1902–1927).

12 Jakob Strieder, *Studien zur Geschichte kapitalistischer Organisationsformen. Monopole, Kartelle und Aktiengesellschaften im Mittelalter und zu Beginn der Neuzeit*, (first Munich: Duncker & Humblot, 1914), 2nd ed. (Munich: Duncker & Humblot, 1925, repr. Munich: Duncker & Humblot, 2014).

commercial initiative".[13] At least since the last financial crisis, however, this optimistic believe in economic progress has been followed by a more sceptical view of the free market economy. It is not surprising, therefore, that some historians tend to re-assess the medieval debate on usury from a more relaxed perspective.

New perspectives on the topic can also be expected by researching the prohibition of monopolies from a legal-historical point of view. The role of canon law in this field, for instance, has not been adequately resolved so far. The following considerations begin with a discussion of the morality of trade in the early 16th century, and specifically with the question of the concepts which lawyers from antiquity until the 16th century referred to as amounting to economic malpractice. The starting point is the observation that in the literature up to now, but also in the debates of the early Modern Age, two different threads of discourse come together, but – both legally and historically – may refer to separate traditions. By this I mean the discussion about the questionable exorbitant interest rates in the area of credit law on the one hand, and the debate about monopoly and pre-exemption (*Fürkauf*), which is to be considered from the aspect of the sale of goods and company law, on the other. While the monopoly question had always been considered to belong to the world of legisprudence since its treatment by the Emperor Zeno, while that of preemption was more a question for local laws, the increasingly stricter ban on interest since antiquity – despite its strong tradition under civil law – is traditionally associated more with canon law. The combination of these threads in the late Middle Ages, according to my hypothesis, may have been a reason – and one that has been underestimated until now – for the additional momentum which the debate on business ethics gained in the early 16th century. The question arises as to when and under what circumstances this combination came about. The process of answering this question can only be started in very broad terms here, especially as a wide compass is required in order to trace back the relationships to their ancient beginnings. For the purposes of this volume, the focus is on a historical analysis of the concepts – although I know full well that conceptual history may not be the end, but just the beginning of the research. Since the question of interest on credit has been thoroughly

13 Johann Peter Wurm, *Johannes Eck und der oberdeutsche Zinsstreit,* 1513–1515, (Reformationsgeschichtliche Studien und Texte) 137 (Münster: Aschendorff, 1997), 59. Even modern textbooks on economic history stick to the idea that the trading houses were representatives of progress, while the population and reformers were cleave to a theory of medieval and antique ideas: Michael North, "Von der atlantischen Handelsexpansion bis zu den Agrarreformen (1450–1815)", in id. *Deutsche Wirtschaftsgeschichte. Ein Jahrtausend im Überblick*, 2nd ed. (Munich: C.H. Beck, 2005), 112–196, here: 116.

covered in the literature of the last 150 years, my focus is primarily on evaluating sources regarding the neglected monopoly and pre-emption problem. In a first step, I would like to examine the monopoly, addressing a key issue in the early modern debate, but unlike the previous literature, not from a civil law, but from a canon law perspective. Specifically, the question how the church characterized a monopoly has to be clarified, and whether and if so, how the church found and defined a general terminology for usurious unconscionability. In a second step, it shall be reviewed how the legal term monopoly was used in the debates of the 16th century, and how its usage, if applicable, differed from the usage in the Middle Ages.

Without anticipating the sources and their divergent definitions, the object of the investigation has to be outlined with a definition. With the term 'Monopoly', I describe an economic activity where the supply and demand for a specific asset only depends on a single participant (or only a few market participants = 'oligopoly') and therefore, this participant gains control over the price of the products and services.[14] Economically speaking, 'Pre-Emption' (*Fürkauf*, in some sources also called *Vorkauf*[15]) is a special form of monopoly in which the participant almost completely buys up specific products before the opening of a local market, and therefore, by avoiding the market, is able to sell them at a high price due to general shortage. In practice, such market behaviour has occurred in food product markets in particular, and can result in strong price increases, particularly in times of famine. A definition of the expression 'usury' is more difficult, however, because sources use it with various connotations. Moreover, the term was modified during the historical progress from a neutral expression which described profit in general, to a pejorative

14 Because of the possibility of demand monopolies too narrow: H[ermann] Kellenbenz, "Monopol", in Adalbert Erler and Ekkehard Kaufmann (eds.), *Handwörterbuch zur Deutschen Rechtsgeschichte*, 1st ed. (abbreviated below HRG[1]), 5 vols. (Berlin: Schmidt, 1964–98), vol.3, col.633–645, here: col.633: *...die Beherrschung des Gesamtangebots wirtschaftlicher Güter nach Menge und Preis*; similar: Nikolaus Linder, "Monopol", in Albrecht Cordes et al. (eds.), *Handwörterbuch zur Deutschen Rechtsgeschichte*, 5 vols., 2nd ed. (abbreviated below HRG[2]), 1596–1602, here: 1596: *... eine Form des Marktes, bei der ein Anbieter allein das Angebot eines bestimmten Guts kontrolliert und dessen Preis daher in bestimmten Grenzen frei festsetzen kann.*

15 Albrecht Cordes, "Fürkauf", in *HRG*[2], vol. 1, col. 1878–1878; Heinrich Crebert, *Künstliche Preissteigerung durch Für- und Aufkauf. Ein Beitrag zur Geschichte des Handelsrechts*, (Deutschrechtliche Beiträge) 11/2 (Heidelberg: Carl Winter, 1916); see also: Max Neumann, *Geschichte des Wuchers in Deutschland bis zur Begründung der heutigen Zinsengesetze (1654). Aus handschriftlichen und gedruckten Quellen dargestellt*, (Halle: Verlag der Buchhandlung des Waisenhauses, 1865), 100–108.

meaning of illegal profit which is gained by market disparity and exploitation.[16] In the following, from an analytical point of view, 'usury' is understood as a legally or ethically disapproved profit.

2 Monopoly and Usury in Antiquity and the Middle Ages

2.1 *Starting Point 1: The Term Monopolium and the Ban on Monopolies of Emperor Zeno* (*C. 4.59*)

The economic operating principles of a monopolistic economy were already known in antiquity. The fact that anyone who can specify the quantity of an article also determines its price is a principle which is easy to understand and which, above all, towns and local authorities – but in some cases also private individuals – have made frequent use of, either to make money or to carry out public administrative tasks.[17] In the predominant agricultural society of the antiquity and the Middle Ages, manipulation of the food prices by controlling the supply was as widespread as it was controversial. Less frequent in the antique and medieval times were forms of vertical market organization which had been criticized since the late Middle Ages, monopolizing not only the intermediate trade, but also the production and the sale of entire sectors of activity.

The concept of monopoly, which is formed from the Greek μόνος (mónos, "alone") and πωλέω (pōléō, "I sell"), appears for the first time in the late classical Greek literature of the fourth century B.C. in the variants monopōlion (μονοπώλιον) as used by the orator Hypereides[18] and as monopōlía (μονοπωλία) by Aristotle. The latter tells an anecdote in his "Politika" about the philosopher Thales of Miletus, who, in a speculative transaction with olive oil, proved that even a poor man could become rich without any problem. Thales wanted to provide an example of his wisdom, but the principle he chose could be generalized because it constituted nothing other than the establishment of a monopoly, as some cities did if they needed money.[19] Apparently, this story was widely known in ancient times, since in his writing "De divinatione" Cicero

16 Cf. the short article of H[ans]-W[olfgang] Strätz, "Wucher", in *HRG*[1], vol. 5, col. 1538f.

17 Detailed on monopolies in ancient times: Fritz Heichelheim, "Monopole", in Pauly and Wissowa (eds.), *Paulys Realenzyklopädie der classischen Altertumswissenschaft,* new edition, 31th half binding (Stuttgart: Metzler, 1933), col. 147–199.

18 Heichelheim, "Monopole", col. 147.

19 Aristotle, *Politika* I, 1259 a 5–34, W.D. Ross (ed.), *Aristotelis Politica* (Oxford: Clarendon, 1957); on the background of this tale cf.: Christian Mueller-Goldingen, *Aristoteles, Politik: Einleitung und Kommentar* (Heidelberg: Universitätsverlag Winter, 2016), 71–72; on urban

also discussed the speculation of Thales as an example of predictive reasoning, which was not evidently a form of prophecy.[20] Pliny the Elder also mentioned this anecdote in his "Natural history".[21]

Although speculation with staple foodstuffs, including the natural price fluctuations of these products, was therefore well known in antiquity,[22] the terms for such forms of behaviour also fluctuate initially. Merchants who pushed up the prices of grain by means of pre-emption, but also by manipulating weights, were still referred to with the ancient term *dardanarii* under classical Roman law.[23] Ulpian states that this practice was fought through mandates and laws (*mandatis et constitutionibus*). He names a mandate with which officials had to ensure that no bought-up goods were kept away from the markets, or that poor people had to pay higher prices because the rich were unwilling to sell their stock at affordable prices on the market.[24] As sanctions for such behaviour, the mandate ordered the closing of their shops and exile and forced

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monopolies: Kurt Riezler, *Über Finanzen und Monopole im alten Griechenland. Zur Theorie und Geschichte der antiken Stadtwirtschaft* (Berlin: Puttkammer & Mühlbrecht, 1907).

20 Cicero, De divinatione 1, 111 f., Wilhelm Ax (ed.), *M. Tulli Ciceronis scripta quae manserunt omnia, Fasc. 46: De divinatione. De fato. Timaeus* (Stuttgart: Teubner 1938), p. 53[b]: (…) *quos prudentes possumus dicere, id est providentes, divinos nullo modo possumus, non plus quam Milesium Thalem, qui ut obiurgatores suos convinceret, ostenderetque etiam philosophum si ei commodum esset pecuniam facere posse, omnem oleam ante quam florere coepisset in agro Milesio coemisse dicitur: animadverterat fortasse quadam scientia olearum ubertatem fore* (…).

21 Pliny the Elder, *Naturalis Historia,* 18, 68, § 273, Iulius Sillig and Ludovicus Ianus (eds.), *Naturalis historiae libri XXXVII*, 8 vol. (Hamburg and Gotha 1851–1858), 3:139.

22 Detailed on particular monopolies: Heichelheim, "Monopole" (see above, n. 17), col. 149–191.

23 Ulp. D.47.11.6 and Paul. D.48.19.37 (here only with reference to the forgery of measurements and weights). The sources of the Corpus Iuris Civilis are as quoted after: *Corpus Iuris Civilis*, Theodor Mommsen, Paul Krüger, Rudolf Schoell (eds.), 3 vols., (repr. Hildesheim: Weidmann, 2000–2009). There is no consensus regarding the origin of the expression 'dardanarii'. According to Evelyn Höbenreich, *Annona: Juristische Aspekte der stadtrömischen Lebensmittelversorgung im Prinzipat* (Grazer rechts- und staatswissenschaftliche Studien), 55 (Graz: Leykam, 1997), 209 there is no "reliable derivation of the expression". Höbenreich, 206–227 also gives some details on the regulation's background.

24 Ulp. D.47.11.6 pr.: *Annonam adtemptare et vexare vel maxime dardanarii solent: quorum avaritiae obviam itum est tam mandatis quam constitutionibus. mandatis denique ita cavetur: "Praeterea debebis custodire, ne dardanarii ullius mercis sint, ne aut ab his, qui coemptas merces supprimunt, aut a locupletioribus, qui fructus suos aequis pretiis vendere nollent, dum minus uberes proventus exspectant, annona oneretur". Poena autem in hos varie statuitur: nam plerumque, si negotiantes sunt, negotiatione eis tantum interdicitur, interdum et relegari solent, humiliores ad opus publicum dari.*

labour for members of the poorer class.[25] An edict of the late 1st century from Antioch, due to a famine, prescribed the sale of all cereal reserves for fixed prices which were stated by the government. Those who ignored this and continued to hold back their cereals were punished with confiscation, of which the denunciator received 1/8th.[26]

In contrast, the Latin term 'monopolia' is only used later and would have sounded unusual to Roman ears. This is proven by the fact that according to Suetonius (A.D. 70–130), Emperor Tiberius used only to speak Latin in the Senate, and would apologise if he occasionally used Greek loan words like 'monopoly'.[27] This implies that the word was not used as a common expression in the commercial or legal language until the 2nd century A.D., an assumption which is supported by the results of a word search I conducted in the Digest and the Institutes of Justinian, and which did not lead to any matches.[28] The quoted excerpt from Suetonius also points to the fact that the problem of monopolies was part of a broader discussion within the senate, however. Accordingly, Pliny the Elder reports in his natural history that the senate and the emperor were continuously occupied with petitions from the provinces regarding fraudulent monopolies in the trading of cloth brushes made from hedgehog spines.[29] Therefore, the topic was widely known, although the Greek loan word *monopolium*, which was used in a pejorative sense due to its connection with fraud (*fraus*), remained exotic. The only exception – which was also decisive for the late mediaeval and early modern age – remained two fragments included in Justinian's Code (C. 4.59). However, the rather cryptic decree of the Eastern Roman emperor Leo I (a.473), which has only survived in fragments and was published in the Greek language, played virtually no role in the

25 Ulp. D.47.11.6 pr.: (…) *Poena autem in hos varie statuitur: nam plerumque, si negotiantes sunt, negotiatione eis tantum interdicitur, interdum et relegari solent, humiliores ad opus publicum dari.*

26 Edict of Lucius Antistius Rusticus, inscription approx. a.92/93 B.C., here as qtd. in Hans-Ulrich Wiemer, "Das Edikt des L. Antistius Rusticus: Eine Preisregulierung als Antwort auf eine überregionale Versorgungskrise?", in *Anatolian Studies* 47 (1997), 195–215, here: 200.

27 Suetonius, *De Vita Caesarum libri VIII*, 3, 71, Maximilian Ihm (ed.), *C. Suetonii Tranquilli opera*, De vita Caesarum libri VIII, (Leipzig: Teubner, 1907), 158: (…) *sermone Graeco quamquam alioqui promptus et facilis, non tamen usque quaque usus est abstinuitque maxime in senatu; adeo quidem, ut monopolium nominaturus ueniam prius postularet, quod sibi uerbo peregrino utendum esset.*

28 For identifying relevant fragments, the online edition of the Corpus Iuris Civilis from the "Roman Law Library" was consulted: [http://droitromain.upmf-grenoble.fr/], accessed on May 24th 2018.

29 Pliny the elder, *Naturalis Historia* (see above, n. 21), 8, 56, § 135, 2:67: (…) *hac cute expoliuntur vestes. magnum fraus et ibi* [*lucrum*] *monopolium invenit, de nulla re crebrioribus senatus consultis nulloque non principe adito querimoniis provincialibus.*

humanist jurisprudence of those versed in Greek[30] and is usually completely ignored in today's specialist literature.[31] It was only the anti-monopoly-law of Zeno (C. 4.59.2, a. 483), which was established ten years later, that became effective.

This law can be briefly summarised as follows:[32] according to the introduction, it was not only forbidden to exercise a monopoly (*monopolium exercere*) in the business sectors which were listed in part individually, but also generally (*cuiuslibet materiae*). Additionally, this ban was designed not only to cover those monopolies which were set up from a private position of power (*pro sua auctoritate*), but also by associations which had been established by imperial acts of all kinds. Furthermore, no one should be allowed to reach agreements in unauthorised gatherings not to sell items more cheaply than agreed in the gathering. Chapter 1 issued a special regulation for builders and cuppers, who were not allowed to reach any agreements to carry out certain services without competition. Chapter 2 imposed the confiscation of assets and lifelong exile as the punishment for anyone exercising prohibited monopolies. Finally, Zeno ordered that if prohibited agreements were concluded, those presiding over the other professional groups (*ceterarum praeterea professionum primates*)

30 C. 4.59.1 (Leo 1, a.473). The fragment is passed over in many editions of Codex Iustinianus and instead Zeno's law of 483 is quoted as C. 4.59.1.

31 For example in Mertens, *Kampf* (see above, n. 9), 23–26, who quotes Zeno's law as "C. 4.59".

32 C. 4.59.2 (Zeno, a.483), quoted from the Editio Stereotypa (see above, n. 30), p. 186: *Iubemus, ne quis cuiuscumque vestis aut piscis vel pectinum forte aut echini vel cuiuslibet alterius ad uictum vel ad quemcumque usum pertinentis speciei vel cuiuslibet materiae pro sua auctoritate, vel sacro iam elicito aut in posterum eliciendo rescripto aut pragmatica sanctione vel sacra nostrae pietatis adnotatione, monopolium audeat exercere, neve quis illicitis habitis conventionibus coniuraret aut pacisceretur, ut species diversorum corporum negotiationis non minoris, quam inter se statuerint, venumdentur.*

1. Aedificiorum quoque artifices vel ergolabi aliorumque diversorum operum professores et balneatores penitus arceantur pacta inter se componere, ut ne quis quod alteri commissum sit opus impleat aut iniunctam alteri sollicitudinem alter intercapiat: data licentia unicuique ab altero inchoatum et derelictum opus per alterum sine aliquo timore dispendii implere omnique huiusmodi facinora denuntiandi sine ulla formidine et sine iudiciariis sumptibus.

2. Si quis autem monopolium ausus fuerit exercere, bonis propriis spoliatus perpetuitate damnetur exilii.

3. Ceterarum praeterea professionum primates si in posterum aut super taxandis rerum pretiis aut super quibuslibet illicitis placitis ausi fuerint convenientes huiusmodi sese pactis constringere, quinquaginta librarum auri solutione percelli decernimus: officio tuae sedis quadraginta librarum auri condemnatione multando, si in prohibitis monopoliis et interdictis corporum pactionibus commissas forte, si hoc evenerit, saluberrimae nostrae dispositionis condemnationes venalitate interdum aut dissimulatione vel quolibet vitio minus fuerit exsecutum.

should pay a fine of 50 gold pieces. Secondly, 40 gold pieces should be paid by administration officials who foiled attempts to punish convicted monopolists out of corruption or for other reasons.

The legislative motivation is not completely clear from the text and has therefore been open to divergent methods of interpretation until today.[33] However, there is a strong suggestion that the aim was to curb the colleges of trade and commerce which had increasingly liberated themselves from state control and contributed to inflation by means of price-fixing.[34] Like its predecessor, the law of emperor Leo I, Zeno intended to curb the corruption among the administration of the monopolies, which was evidently flourishing.

Two aspects appear to be important for the further discussion:

> Firstly, the legislative text does not contain any moral-ethical or Christian-motivated condemnation of monopoly as a violation of the common good or reprehensible profit (*turpe lucrum*). This does not mean, however, that such monopolies were not considered at the time from their ethical aspects. The contemporary patristic literature, which is yet to be addressed, speaks a clear language in this respect. However, the law itself is kept rather technically abstract and is therefore of little use as the starting point for a discussion of moral theology.
> Secondly, even if it is possible that this motivation does not have to be explicitly highlighted in the context of the intensive contemporary discussions, Zeno's law contains an obvious rigour which cannot be ignored. This is proven by both the draconian sanction of lifetime exile, which is an extraordinary response to an economic crime, and the threatened sanctions for corrupt officials. Moreover, despite its mentioning of examples, the definition of the crime left hardly any loopholes: price cartels were banned without exception. Ultimately, the detailed description – and therefore unmistakable highlighting – of the self-commitment of the legislator is striking. Principally, he did not have any possibility to permit monopolies through individual acts of legislation.

Therefore, Zeno's law indeed indicates experiences with the efficiency of anti-monopoly legislation. He intended to close loopholes and responded to grievances with great severity. The extent to which this inflexible approach worked within the context of economic practice is to be examined later.

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33 Mertens, *Kampf* (see above, n. 9), 23–26.

34 Alexander Demandt, *Geschichte der Spätantike: das Römische Reich von Diocletian bis Justinian*, 2nd ed. (Munich: C.H. Beck, 2008), 338f.

2.2 *Starting Point II: Usury and Grain Speculation in Canon Law until Gratian*

2.2.1 Trade, Usury, and Monopoly

Any search for a discussion aligned to the concept of the *monopolium* in early canon law will be in vain. By contrast, trade and its excesses are widely discussed, above all else in the patristic literature and later in the Middle Ages in theological literature – with the most prominent individual here being Thomas Aquinas. The question of food speculation is also dealt with, which was discussed using the expression *Fürkauf* in German.

It is well-known that the underlying tone of the canonical treatment of economic topics is typically extremely critical of commerce. This fundamental attitude, reminiscent in the motif of the cleansing of the temple in the Bible,[35] was already omnipresent in patristic literature, although – as Jörg Oberste rightly emphasises – it was in no way undisputed and repeatedly tempered by pragmatic arguments.[36]

The important aspect for the legal side of the problem and for the further discussions up to the early Modern Age is that Gratian included several fragments which were highly critical of commerce in his decree (around 1140), and therefore in the core of classical canon law. This tendency was also exacerbated by the appendices (*paleae*) that were added later. Therefore, the author of the decree used source material of a much-stretched period. There are two historical periods when the problems of trade were discussed intensively, namely the era of the church fathers (approximately from the 4th until the 7th century) and the Carolingian period in the 8th / 9th century.

Gratian adopted opinions of the patristic literature, which defamed the professions of salesmen or merchants as unchristian altogether: for instance, *distinctio* 88 of the decree contains a passage with a letter from Jerome, where he abominated trading on the part of clerics and called for merchants to be avoided like the plague.[37] Most impressive is *palea* D.88 c.11, the Latin translation of a fragment, originated in the 5th century A.D., which was falsely referred to in

35 Mt 21:12–13; Mk 11:15–17; Lk 19:45–48; Jn 2:13–16.

36 Jörg Oberste, *Zwischen Heiligkeit und Häresie. Religiosität und sozialer Aufstieg in der Stadt des Mittelalters.* Vol. 1: *Städtische Eliten in der Kirche des hohen Mittelalters* (Cologne/Weimar/Vienna: Böhlau, 2003), 73–75.

37 Hieronymus to Nepotianus, ep.52, Migne (ed.), Patrologia Latina (abbreviated below MPL), vol. 22, col. 531 = D.88 c.9: *Negotiatorem clericum, ex inope diuitem et ex ignobili gloriosum, quasi quasdam pestes fuge*. In the following, the fragments of Corpus Iuris Canonici are cited from: *Corpus iuris canonici*, Aemilius Friedberg (ed.), 2 vols. (Leipzig: Bernhard Tauchnitz, 1879–1881).

the Chrysostom's *opus imperfectum ad Matthaeum.*[38] With the cleansing of the Temple, according to the text, Christ wanted to indicate that no tradesman could please God. In addition, no one should become a merchant if they did not want to be thrown out of the temple. More than 500 years later, a canon of an autumn synod held in Rome, which was convened by Pope Gregory VII in 1078, and which was also adopted in the decree, contained the warning that the profession of a salesman could not be practiced without sin. True penance could only be demonstrated by those who gave up trading.[39]

However, a large share of the Church's legal experts approached the problem more pragmatically and made a distinction – in the 9th century at the latest – between permitted and sinful trading profits. A formulation of the Pseudo-Isidorean Decretals attributed to Pope Leo I gets to the heart of this distinction as follows: the quality of his profit either accuses the merchant or absolves him because it is either honourable or shameful.[40]

The entire question of the admissibility of economic activity thereby shifts to the judgemental level. The category of *turpe lucrum* (Greek αἰσχρος κέρδος or also αἰσχροκέρδος, aischros kérdos / aischrokérdos), the shameful profit, was far older, however. It was well established long before the times of the Council of Nicaea in A.D. 325, which in its famous canon 17 stated that clerics were not only prohibited from charging interest but also from inventing every other action aiming at a disgraceful profit (… *vel aliquid tale prorsus excogitans turpis lucri gratia*[41]).

38 Opus Imperfectum ad Matthaeum, Hom. 38 zu c.31, the original text ed. Migne, Patrologia Graeca, vol. 56, col. 839: *Eiciens Dominus uendentes et ementes de templo, significauit, quia homo mercator uix aut numquam potest Deo placere. Et ideo nullus Christianus debet esse mercator, aut, si uoluerit esse, proiciatur de ecclesia Dei…*; for this see also: Oberste, *Heiligkeit* (see above, n. 36), 74.

39 Council of Rome, a.1078, c. 6, Georg Gresser (ed.), *Die Synoden und Konzilien in der Zeit des Reformpapsttums in Deutschland und Italien von Leo IX. bis Calixt II. 1049–1123*, (Paderborn et al.: Ferdinand Schöningh, 2006), 179–180, n.393 = De pen. D.5 c.6: (…) *Ideoque miles, uel negotiator, uel alicui offitio deditus, quod sine peccato exerceri non possit si culpis grauioribus irretitus ad penitenciam uenerit, uel qui bona alterius iniuste detinet, uel qui odium in corde gerit, recognoscat, se ueram penitenciam non posse peragere, per quam ad eternam uitam ualeat peruenire, nisi negotium relinquat, uel offitium deserat, et odium ex corde dimittat, bona quidem que iniuste abstulit, restituat, arma deponat, ulteriusque non ferat, nisi consilio religiosorum episcoporum pro defendenda iusticia* (…).

40 (Supposedly) Leo I. to bishop Rusticus, c.8, ed. [http://www.pseudoisidor.mgh.de/html/244.htm] = De poen. D.5 c.2: *Qualitas lucri negotiantem aut accusat, aut arguit, quia et est honestus questus, et turpis.*

41 First Council of Nicaea, a.325, c.17, ed. Josef Wohlmuth, *Conciliorum Oecomenicorum Decreta*, 3 vol., 3rd ed., (Paderborn et alt., 2002), c.17, 1:14 = D. 47 c.2 = C.14 q.4 c.7: (…) *iuste censuit sancta et magna sinodus, ut, si quis inuentus fuerit post hanc diffinitionem usuras*

The Greek form of *turpe lucrum* (αἰσχροκέρδος), however, was already used in the epistles, especially in the letters of Paulus to Titus and Timothy, as well as Petrus.[42] Striving for a disgraceful profit is one of those attributes, which according to Paulus characterize a person as inappropriate for the profession of a deacon or bishop.[43] Paul warns, for example, that among the Jews there are many unruly talkers and deceivers who spread false doctrines for the purposes of a shameful profit.[44] The Greek expression αἰσχροκέρδος is also found occasionally outside of Christian literature. Flavius Josephus (approximately A.D. 37 -after A.D. 100) used it for the description of John of Giscala, who, out of alleged piety, had been selling oil for excessive prices to Jews who were enclosed in Caesarea Philippi.[45] As long ago as the 2nd century B.C., the historian Polybios (around 200 B.C. – around 120 B.C.) used the expression to describe the greed of the Cretans, who were the only people not to have a swearword for greed. Since the purchase of land had been permitted unlimitedly, they had developed such acquisitiveness that their private and public life had been heavily influenced by constant riots, murder and civil war.[46] In the *Decretum Gratiani*, *turpe lucrum* not only appears in the aforementioned *canon* 17 of the first Council of Nicaea. In addition, in further ecumenical councils, namely the council of Chalcedon (A.D. 451) and the second council of Nicaea (A.D. 787), clerics were prohibited from attaining disgraceful profit through secular business.[47] Pope Gelasius addressed a similar reminder to the bishops of Lucania

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accipiens, aut aliquam adinuentionem uel quolibet modo negotia transigens, aut emiolia, id est sescupla exigens uel aliquid tale prorsus excogitans turpis lucri gratia, deiciatur a clero et alienus existat a regula.

42 See: 1 Tm 3:8; Tit 1.7 and Tt 1:11, 1 P 5:2. For details see: Aída Besançon Spencer, *2 Timothy and Titus. A New Covenant Commentary* (Eugene (Or.), 2014), 18.

43 1 Tm 3:8 (deacon), Tt 1:7 (bishop).

44 Tt 1:11.

45 Flavius Iosephus, Life, v.75, Folker Siegert, Heinz Schreckenberg and Manuel Vogel (eds.), *Flavius Josephus, Aus meinem Leben* (*vita*). *Kritische Ausgabe, Übersetzung, Kommentar,* 2nd ed. (Tübingen: Mohr Siebeck, 2011), 50.

46 Polybios, Histories, 6.46, F.W. Walbank and Christian Habicht (eds.), *Polybius. The Histories*, vol. 3: Books 5–8. transl. W.R. Paton, (Loeb Classical Library) 138 (Cambridge, MA: Harvard University Press, 2011), 412, 414: τήν τε γὰρ χώραν κατὰ δύναμιν αὐτοῖς ἐφιᾶσιν οἱ νόμοι, τὸ δὴ λεγόμενον, εἰς ἄπειρον κτᾶσθαι, τό τε διάφορον ἐκτετίμηται παρ᾽ αὐτοῖς ἐπὶ τοσοῦτον ὥστε μὴ μόνον ἀναγκαίαν, ἀλλὰ καὶ καλλίστην εἶναι δοκεῖν τὴν τούτου κτῆσιν. καθόλου θ᾽ ὁ περὶ τὴν αἰσχροκέρδειαν καὶ πλεονεξίαν τρόπος οὕτως ἐπιχωριάζει παρ᾽ αὐτοῖς ὥστε παρὰ μόνοις Κρηταιεῦσι τῶν ἁπάντων ἀνθρώπων μηδὲν αἰσχρὸν νομίζεσθαι κέρδος…Κρηταιεῖς διὰ τὴν ἔμφυτον σφίσι πλεονεξίαν ἐν πλείσταις ἰδίᾳ <καὶ> κατὰ κοινὸν στάσεσι καὶ φόνοις καὶ πολέμοις ἐμφυλίοις ἀναστρεφομένους (…).

47 Council von Chalcedon, a.451, c.3, Wohlmuth (ed.), *Decreta* (see above, n. 41), 1:88 = D.86 c.26 = C.21 q.3 c.1 (*palea*); Second Council of Nicaea, a.787, c.4, ibid., 141 = C.16 q.1 c.64.

in A.D. 494.[48] At the synods of the Frankish empire, the expression *turpe lucrum* was used repeatedly in the same tenor.[49] It wasn't only the Eastern Church fathers who used the term *turpe lucrum,* the Western Church fathers did so too: Gratian included a passage of Isidore of Seville, in which clerics were exhorted to keep away from secular life, especially not to charge usurious interest rates, and not to practice any profession with the aim to gain disgraceful profit or to participate in fraud. The love of money, as the primary substance of all crimes, should be renounced, and any participation in secular offices and businesses rejected.[50] Jerome is quoted with a passage in which he refers to the admonition of the apostle Petrus not to seek for disgraceful profit.[51] In A.D. 444, pope Leo I used the expression in his famous Decretals, where he extended the ban of interest, which was originally only applicable for clerics, to laymen.[52] In the East, Origen reminded the religious of the cleansing of the temple.[53]

Furthermore, *turpe lucrum* is frequently mentioned in the context of simony.[54] Gratian himself uses the expression: no bishop was allowed to crave disgraceful profits and to make his living from dishonourable businesses.[55]

Here, the ban of employing clerics in two churches because this "(…) smelled of *turpe lucrum*" is found in c.15, ibid., 150 = C.21 q.1 c.1.

48 Pope Gelasius to the Lucan bishops, a.494, c.15, Andreas Thiel (ed.), *Epistolae Romanorum pontificum genuinae et quae ad eos scriptae sunt a S. Hilarii usque ad Pelagium II* (Brunsberg: Peter, 1868), 371 = D.88 c.2.

49 Council of Chalon-sur-Saône, a. 813, c.7, ed. Monumenta Germaniae Historica, Concilia (below MGH Conc.) 2,1, 275 = C.16 q.7 c.42 = C.20 q.3 c.5.

50 Isidore of Seville, *De ecclesiasticis officiis*, ed. MPL 83, col.778 = D.23 c.2: (…) *usuris nequaquam incumbant, neque turpium occupationibus lucrorum, non fraudibus cuiusquam studium appetant; amorem pecuniae quasi materiam cunctorum criminum fugiant, secularia offitia negotiaque abnuant* (…) The fragment is also found as canon of the council of Mayence, a.813, c.10, ed. MGH Conc. 1.2, p. 263.

51 Jerome to Nepotianus, a.392, ep.52 c.7, ed. MPL 22, col. 533–534 = D.95 c.7 in paraphrase of 1 Petr. 5.2.

52 Leo I. a.444, ed. MPL 54, col. 613 = C.14 q.4 c.8: (…) *Nec hoc quoque pretereundum duximus, esse quosdam turpis lucri cupiditate captos qui usurariam exercent pecuniam, et fenore uolunt ditescere* (…).

53 Origenes, Homily 15 to Matth c.21, Migne (ed.), Patrologia Graeca (see above, n. 38), vol. 13, col. 1441–1446 = C.16 q.7 c.9.

54 The Council of Chalcedon (see above, n. 47) condemns the granting of consecration in return for money as most disgraceful profit (*turpissimi lucri commodo*): ibid., c.2 = C.1 q.1 c.8. Similar: Gregory VII to the bishop of Rouen and all Frenchmen, a.1073/1085, JL 5276 = C.1 q.3 c.2; Leo IV. to the British bishops a.849, JE 2599 = C.1 q.7 c.5; Council of Rouen, a.650, c.7, ed. Mansi 10, col. 1201 = C.7 q.1 c.33.

55 DG post D.86 c.25: *Prohibetur etiam episcopis turpis lucri esse cupidus, ne aliquo inhonesto negotio uictum uel cetera necessaria sibi querat;* see also: DG ante D.91 c.1: *Qui autem turpi*

There can therefore be no doubt that even in the old church a collective term – *turpe lucrum* – was found for despicable business practices. However, this did not solve the problem, because although the term is clear as far as its moral-ethical statement is concerned, it needs to be specified more closely in terms of its content in order not to dissipate into legal arbitrariness. Referring to the character of the delinquent, the expression *turpe* could influence the further discussion in a problematic way: this association with shrewdness, slyness, hypocrisy etc. made it easy to project the expression and its associated criminal energy to certain groups of persons – whether traders, the Jews, the Cretans or others. The expression shares this feature with its functional equivalent, the use of the German word *Wucher*.

2.2.2 Price Monopolies

The task of canon law was therefore to define the term *turpe lucrum* more closely and determine the incriminated practices. Even at first sight, the dominance of usury (*usura*) is striking, and has had a very strong influence on the entire canonical discussion up to the Modern Age. Even today's consideration of the economic law of the Church is predominated by the question of the prohibition of interest. An automatic search in the vocabulary of the Decree of Gratian for the word 'usur*' brings up 116 hits, whereas in the *Liber Extra* the term and its derivations are used 125 times.[56]

By contrast, the question that is of interest here, i.e. the monopoly – the control of prices or supplies by a single individual or just a few market participants – only becomes apparent upon closer inspection. The word 'monopoly' does not appear either in the vocabulary of the *Decretum Gratiani* nor the *Liber Extra*. Therefore, the search must be redirected and should look for alternative paraphrases of the issue. For example, in agricultural communities it was frequently the case that either producers or distributors would build up reserves so as to resell such products at high prices in times of famines. Starting from late antiquity, this practice was widely discussed.

In his poem *De Laudibus Dei*, the Carthaginian poet Blossius Aemilius Dracontius (A.D. 455–505), a contemporary of Emperor Zeno, complained about the greedy food speculators (*captatores … annonae*), who bought up the yield of the earth that was meant for everyone and even grieved over rich harvests.[57]

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lucro uel inhonesto negocio uictum sibi querere prohibetur, de oblationibus ecclesiae stipendia consequatur.

56 The search was automated using the scanned Friedberg-edition. Some technical errors cannot be excluded completely, yet they are not expected to skew the results too much.

57 Blossius Aemilius Dracontius, *De Laudibus Dei*, 3, v.26–45, ed. MGH, Auctores antiquissimi 14, 92f.

Dracontius adopted an opinion which Saint Ambrose (A.D. 339–397) had already discussed thoroughly in the 4th century. In the third book of his treatise on the duties of the sacristan (*De officiis*) Ambrose dealt with the relationship between utility and morality and comes to speak of the practice of food speculation.[58] Starting from the Bible verse (Pr 11:26: "He who withholds grain, the people will curse him"), he castigates this practice in the strongest terms. Ambrose first reflected on some possible arguments for the opposite side: cultivating the soil led to high costs, so one might help the poor by selling the grain during famines. Moreover, the grain was in the possession of the seller. Furthermore, business activity should not be condemned, since everyone had the same opportunity to purchase the grain. Ambrose replies to these arguments, and argues that a diligent farmer should be rewarded for his effort. Nevertheless, the yield of nature should not be converted into fraud.[59] In consequence, the poor as well as the speculators would have to wish for bad harvests. Therefore, the behaviour of the tradesman was not to be regarded as efficient but as a devious fraud.[60] Ambrose, the experienced lawyer, judges the events very much from the legal perspective and declares that food speculation is robbery, because the speculator appropriates the natural resources for himself with an inhuman degree of hardness.[61] At the same time, Ambrose equates this practice of driving up prices by keeping back the item being sold until an emergency arises with usury (*faenus*, *usura*). And furthermore, the speculator was acting contrary to the common good, not only causing private, but also public harm (*damnum publicum*).

Even if Ambrose does not explicitly speak of *turpe lucrum*, his reference to it within the context of usury shows that the two problems were considered to be parallel phenomena. Like *usura,* the usury of food also upsets the natural order by privatising common property and making it the object of egotistical forms of behaviour. The cunning and stealth of the usurer of food is equal to that of the impostor. Overall, these forms of behaviour harm not only the

58 Ambrose, *De officiis Ministrorum*, 3, 6, 37–44, ed. [http://monumenta.ch/latein/text.php?tabelle=Ambrosius&rumpfid=Ambrosius,%20De%20Officiis%20Ministrorum,%203,%20%20%20%206&nf=1], accessed on May 24th 2018.

59 Ambrose, *De officiis*, 3, 6, 41: (…) *Cur ad fraudem convertis naturae industriam?* (…).

60 Ambrose, *De officiis*, 3, 6, 41: (…) *et hanc tu industriam vocas, hanc diligentiam nominas, quae calliditatis versutia, quae astutia fraudis est* (…).

61 Ambrose, *De officiis*, 3, 6, 41: (…) *Latrocinium hoc, an fenus appellem? Captantur tamquam latrocinii tempora, quibus in viscera hominum durus insidiator obrepas. Augetur pretium tamquam sorte cumulatum fenoris, quo periculum capitis acervatur. Tibi conditae frugis multiplicatur usura: tu frumentum quasi fenerator occultas, quasi venditor auctionaris. Quid imprecaris male omnibus, quia maior futura sit fames, quasi nihil frugum supersit, quasi infecundior annus sequatur? Lucrum tuum damnum publicum est.*

interests of the victims of usury, but also the foundations of solidarity within the human community.

The legal escalation of the speculation problem, which was initially a theological consideration, may well substantiate the expectation that this passage of Ambrose must also have found its way into the collections of canon law in Late Antiquity and the early Middle Ages. Indeed, it can be found in the *Decretum* of Ivo of Chartres (ca. 1040–1115), which in addition to robbery, theft and usury, also lists several other offences.[62] However, this incorporation into canon law remained an isolated case; above all, it was not taken over by the *Decretum Gratiani* – and not, therefore, by the core of classical canon law.

On the whole, this deals with monopolistic forms of behaviour only in a few places. In the 12th century, they were probably not as socially relevant as in the late antiquity or Franconian times. Not incidentally, the few tracks that can be found in the decree originated in the 9th century.

The first evidence, an alleged canon of the so-called *Capitula Martini*, may have originated from the Pseudoisidorian Decretals from the second quarter of the 9th century.[63] Clerics, it is stated here, who, after the resolution of the Council of Nicaea, practiced usury or sought disgraceful profit from any business or benefited from selling assets like wine, fruits or other assets, should be demoted. The fragment significantly summarises the behaviour that was considered problematic from the perspective of the church: firstly, usury (*fenus, centesima*), then the few differentiated groups of the *turpia lucra,* and lastly the practice called *superabundantia* (literally: over-abundance), i.e. the violation of the contractual parity by drawing profit out of the difference between the purchased price and the selling price. Even if *turpe lucrum* is not used as a hypernym here, one might recognise how the author identified speculative profits with usury and other dishonourable activities.

The problem appears particularly clearly in the *capitulare missorum*, which was adopted in 806 in Nijmegen:[64] if at the time of the harvest or grape

62 Ivo of Chartres, *Decretum*, 13, 26, ed. MPL 161, col. 806 D. The 13th title is headlined *De raptoribus, de furibus, de usurariis et feneratoribus; de venatoribus, de maledicis et contentiosis, de comessationibus et ebrietatibus, de furiosis, de Iudaeis, et eorum correctione.*

63 Capitula Martini, c.62. ed. [http://www.pseudoisidor.mgh.de/html/121.htm] = C. 14 q.4 c.4: *Si quis oblitus timorem Domini, et sacrarum scripturarum, que dicunt: 'Pecuniam suam non dedit ad usuram', post hanc cognicionem magni concilii feneraverit uel centesimam exegerit, aut ex quolibet negocio turpis lucri quesierit, aut per diuersas species uini, uel frugis, uel cuiuslibet rei, emendo uel uendendo aliqua incrementa susceperit, de gradu suo deiectus alienus habeatur a clero.*

64 Capitula Missorum Niumagae Datum, a. 806, c.17, ed. MGH Capit. 1, p. 132 = C. 14 q.4 c.9: *Quicumque tempore messis uel uindemiae non necessitate, sed propter cupiditatem conparat annonam uel uinum, uerbi gratia de duobus denariis conparat modium unum,*

gathering somebody buys grain or wine not out of necessity, but out of greed, i.e. buys a *modium* for two denarii and then stores it before reselling it for four, six or more denarii, then this should be called a shameful profit. This instruction indicates a renewed increase in the amount of attention devoted to the problem of grain speculation during the Carolingian period. The *capitulare* came about within the context of one of the three large famines of the Carolingian era and was therefore part of a programme to overcome the crisis and quite evidently not only a case of symbolic politics.[65] Three years later, an Aachen Capitulary exacerbated this regulation by prohibiting the buying up of entire harvests for speculative purposes.[66] The issue was present during the entire Middle Ages until the early modern period.[67] In 1227, a provincial synod held at Trier replicated the prohibition of speculation regarding maize and wine.[68]

It should be noted that up to the *Decretum Gratiani* and beyond, canon law dealt primarily with usury. This was systematically considered to be the most important sub-case of those transactions which were aimed at making a shameful profit (*turpe lucrum*).[69] Monopolistic price speculation, above all with food, was a further sub-case of *turpe lucrum*, albeit less important in terms of its significance.

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et seruat, usque dum uendatur denariis quatuor aut sex, aut amplius, hoc turpe lucrum dicimus.

65 More details can be found in: Hubert Mordek, "Karls des Großen zweites Kapitular von Herstal und die Hungersnot der Jahre 778/779", in *Deutsches Archiv für die Erforschung des Mittelalters 21* (2005), 1–52; Adri E. Verhulst, "Karolingische Agrarpolitik: Das Capitulare de Villis und die Hungersnöte von 792/93 und 805/06", in *Zeitschrift für Agrargeschichte und Agrarsoziologie* 13 (1965), 175–189.

66 Capitulary of Aachen, a.809, c.12, ed. MGH Capit. 1, 149: *Ut nemo propter cupiditatem pecuniae et propter avaritiam suam prius detur pretio et futura questione sibi praeparet, ut duplum vel triplum tunc recipiat, sed tunc tantum quando fructum praesens est illos conparet.*

67 Neumann, *Geschichte* (see above, n. 15), 100–107.

68 Konzil von Trier, a. 1227, c.10, Johann Friedrich Schannat and Joseph Hartzheim (eds.), *Concilia Germaniae*, 11 vols. (1759–90), 3:532: (…) *item praecipimus, ne ea intentione mutuent pecuniam suam ante messem vel vindemias, recepturi in messe vel vindemiis bladum vel vinum pro multo minori pretio, quam valeat in tempore bladum vel vinum emant illicite paciscendo ante messem vel vindemias ad exponendum sive expendendum in domibus tantum et non advendendum; item inhibemus Sacerdotibus et Clericis beneficiatis, ne tempore messis vel vindemiarum emant vilius bladum vel vinum a pauperibus ut postea carius vendant* (…).

69 Moreover: Franz Schaub, *Der Kampf gegen den Zinswucher, ungerechten Preis und unlautern Handel im Mittelalter. Von Karl dem Großen bis Papst Alexander III. Eine moralhistorische Untersuchung* (Freiburg /Br.: Herder, 1905), 77 with numerous references in n. 1.

As a reason for this ban and at the same time as a measure for restricting the incriminated behaviour, a selection of motives was provided: even the profession of a tradesman was suspicious. The necessary character attributes for practicing this job, especially the omnipresent greed of the merchant and his generous handling with the truth, were, according to the church lawyers, unsuitable for a cleric, but also problematic for a non-professional. Moreover, food speculation contained further despicable features: it questioned the natural order, while natural resources, provided by God for everyone, were made subject to the private realisation of profits. This was seen as especially reprehensible if the rules of Christian mercy were violated because buyers were forced to pay exorbitant prices.

If one compares this canonical assessment of the monopoly question with that of Roman law, it is initially noticeable that this problem is discussed far less intensively – due to its lesser significance – than the omnipresent usury. Its sphere of influence also extended to a certain degree to the monopoly problem, which is considered less from the technical and economic aspect, and more from the moral and ethical perspectives. The starting point of canon law is almost no less strict than that of Roman law: draconian penalties for clerics and laymen were supposed to help enforce the radical threat of punishment.

2.3 *Further Development up to the Late Middle Ages*

2.3.1 New Perspectives: Thomas Aquinas and Monopolies

To understand the further discussion on monopolies in the High and Late Middle Ages it is paramount to look at the view of Thomas Aquinas (about 1225–1274), whose contribution can only be presented in brief.[70] First, it should be highlighted that Thomas, in the tradition of the Church Fathers, distanced himself from trade. In his writing *de regno* he recommended building cities in fertile areas, in order to enable them to grow their food self-sufficiently without depending on trade. Trade was not only seen as harmful because it invited foreigners into the cities who disturbed their peace. Even if the citizens of the city traded between themselves, it would have been undesirable, because a variety of vices were spread: since traders were striving for profit, greed would be planted in the hearts of the citizens, everything would be purchasable, and fraud would run rampant as well as contempt for the common good. Moreover, traders who habitually laid down lazily in the shadows were not suitable for

70 Cf. Joseph Höffner, *Wirtschaftsethik und Monopole im 15. und 16. Jahrhundert*, 1st ed. Jena 1941, reprinted and here as quoted as Joseph Höffner, *Wirtschaftsordnung und Wirtschaftsethik*, Ursula Nothelle-Wildfeuer and Jörg Althammer (eds.) (Ausgewählte Schriften) 3 (Paderborn et al.: Ferdinand Schöningh, 2014), 33–188, here: 99–106.

the military service.[71] Thomas concedes, however, that traders were necessary to a limited extent in order to ensure the supply of the city with goods that could not be produced locally, and in order to sell surpluses.[72]

Of greater importance for the monopoly discussion were the fundamental statements Thomas made in his *Summa Theologica* (1265/73) with respect to transactional justice. He first highlighted that as a general rule, exchange was allowed and not forbidden as long as no one defrauded anyone else.[73] Since exchange was allowed for the mutual satisfaction of needs, performance and consideration had to be equal; therefore, a fair price had to be requested, which Thomas defines with the 'paid price', thus the market price.[74] Consequently, anyone, who wanted to sell a good more expensively than he bought it violated the principle of justice of exchange.[75] Exceptions to this fundamental principle of moral theology, which – according to Thomas' own statement – was stricter than the regulations of civil law which allowed every contract beyond the limit of *laesio enormis*,[76] were only permitted to a limited degree. One

71 Thomas Aquinas, de regno ad regem Cypri, 2, 3, ed. [http://www.corpusthomisticum.org/orp.html#69956]: (…) *Rursus: si cives ipsi mercationibus fuerint dediti, pandetur pluribus vitiis aditus. Nam cum negotiatorum studium maxime ad lucrum tendat, per negotiationis usum cupiditas in cordibus civium traducitur, ex quo convenit, ut in civitate omnia fiant venalia, et fide subtracta, locus fraudibus aperitur, publicoque bono contempto, proprio commodo quisque deserviet, deficietque virtutis studium, dum honor virtutis praemium omnibus deferetur: unde necesse erit in tali civitate civilem conversationem corrumpi. Est autem negotiationis usus contrarius quam plurimum exercitio militari. Negotiatores enim dum umbram colunt, a laboribus vacant, et dum fruuntur deliciis, mollescunt animo, et corpora redduntur debilia et ad labores militares inepta: unde secundum iura civilia negotiatio est militibus interdicta* (…).

72 Thomas Aquinas, de regno ad regem Cypri, 2, 3: (…) *Nec tamen negotiatores omnino a civitate oportet excludi, quia non de facili potest inveniri locus qui sic omnibus vitae necessariis abundet quod non indigeat aliquibus aliunde allatis; eorumque quae in eodem loco superabundant eodem modo redderetur multis damnosa copia, si per mercatorum officium ad alia loca transferri non possent. Unde oportet quod perfecta civitas moderate mercatoribus utatur* (…).

73 Thomas Aquinas, II[a]-IIae q. 77 a. 1 co. (…) *Respondeo dicendum quod fraudem adhibere ad hoc quod aliquid plus iusto pretio vendatur, omnino peccatum est, inquantum aliquis decipit proximum in damnum ipsius* (…).

74 Thomas Aquinas, II[a]-IIae q. 77 a. 1 co. (…) *Quod autem pro communi utilitate est inductum, non debet esse magis in gravamen unius quam alterius. Et ideo debet secundum aequalitatem rei inter eos contractus institui. Quantitas autem rerum quae in usum hominis veniunt mensuratur secundum pretium datum, ad quod est inventum numisma, ut dicitur in V Ethic.* (…).

75 Thomas Aquinas, *II[a]-IIae* q. 77 a. 1 co. (…) *Et ideo si vel pretium excedat quantitatem valoris rei, vel e converso res excedat pretium, tolletur iustitiae aequalitas. Et ideo carius vendere aut vilius emere rem quam valeat est secundum se iniustum et illicitum* (…).

76 Thomas Aquinas, *II[a]-IIae* q. 77 a. 1 ad 1.

exception was the possible risk for the seller (*damnum emergens*[77]). Furthermore, as an exact price was never to be determined, certain fluctuations were tolerable.[78] Thomas Aquinas recognized the fact that the synchronisation of purchase and sales prices was not achievable and provided for further exceptions in this area.[79] Explicitly, he turned against some canons of the *Decretum Gratiani*, according to which all merchants generally lived in sin since they sold at higher prices than they purchased. In his answer, Thomas differentiates between the types of barters: they could, for example, target the purchasing of the necessities of everyday life. This kind of barter was seen as necessary and tolerable. In this case, it was not the merchants, but the state which was responsible for making sure that everyone received the essential. More problematic were barters which were made not for the purpose of livelihood, but for the realisation of profit. Here, according to Thomas, the merchant had to act with discernment: although the greed for profit was reprehensible, the profit itself should be evaluated as ethically neutral. Equally, it could target a laudable aim or vice. As long as a merchant used his moderate profit for the maintenance or the support of the poor, this would not cause any problems. A profit was not to be blamed if the substance of the trading good improved between purchase and resale, if transport costs occurred, or if price fluctuations due to changes in time and place arose.

Considering this argumentation, one can retrieve an ambivalent impression: on the one hand, common stereotypes about trade and its negative consequences for the human character are carried further and reinforced. On the other hand, the strictness of the canonical ban of usury is broken up and opened in favour of a more flexible argumentation. Thomas at least touches on the problem of 'pre-emption'. However, he does not carry out a precise analysis of the monopoly issue altogether. With its legal and economic details, it would also be beyond his mainly theological field of interest.[80]

2.3.2 Zeno's Monopoly Law in Mediaeval Legisprudence

I only intend to go briefly here into the legalistic discussion of the monopoly problem. It is striking that Zeno's monopoly law was given scant attention by civilians. This is certainly true of the glossators.

77 Thomas Aquinas, *II^a-IIae* q. 77 a. 1 co.

78 Thomas Aquinas, *II^a-IIae* q. 77 a. 1 ad 1.

79 Thomas Aquinas, *II^a-IIae* q. 77 a. 4 arg. 1.

80 Höffner, *Wirtschaftsethik*, (see above, n.70), 103.

Thus, any comment is missing in the *Summa Trecensis* (approx. 1135[81]). Placentinus (†1192) deduced the expression of monopoly, probably inaccurately, from μόνος (alone) and πόλις (city) and contented himself widely with a paraphrase of the legal text.[82]

The *Summa Codicis* of Azo (before 1190–1220) devotes five marginal numbers to it:[83] Zeno's law initially forbade all illicit contracts (*illicitas pactiones*) of the listed branches of trade. Furthermore, according to Azo, monopolies of craftsmen were banned which consisted of individuals who agreed on not educating certain people in their craft, unless they were sons or nephews or were seeking to gain exclusive benefits in any craft or craft sector in other ways.[84]

Azo's interest here is less in the control of prices than in the problem of the monopolisation of the guilds of individual branches of business. However, he then provides a reason for the ban on monopolies: it is part of the self-determination rights (*libera facultas*) of every individual to specify the price and wage when buying and selling and in the *locatio conductio* (i.e. working, renting or working relationships). Each person was to be assigned his own, including the Jews.[85] Azo therefore substantiates the ban on monopolies by saying that such agreements infringe contractual freedom and – as Placentinus before him[86] – are a violation of the general principle of distributive justice (*suum cuique*).[87]

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81 The search was conducted using the edition of Hermann Fitting (ed.), *Summa Codicis des Irnerius* (Berlin: J. Guttentag Verlagsbuchhandlung, 1894). Fitting falsly identitied this work with the Summa of Irnerius: Hermann Lange, *Römisches Recht im Mittelalter. Die Glossatoren* (Munich: C.H. Beck, 1997), 403.

82 Placentinus, *Summa Codicis*, on C. 4.59.2, ed. [*Placentinus*]*: In Codicis Dn. Ivstiniani Sacratissimi Principis Ex Repetita Praelectione Libros IX. Summa a Placentino Legvm Interprete Excellentissimo etc.*, (Mayence, 1536), 186f.

83 Azo, *Summa Codicis*, on C.4.59.2, ed. *Azonis Ivrisconsvltissimi in Ivs Civile Summa, etc.*, (Lyon, 1564), fol. 122re, right col.

84 Azo, *Summa* on C.4.59.2 (see above, n. 83), n.1: (…) *singularem negotiationem: quod tunc accidit, cùm inter se paciscuntur, ne aliquem instruant in arte sua: nisi filios, vel nepotes, vel cum aliquo modo per pactum id facere nituntur, vt soli commodum alicuius artis, vel negotiationis sentiant*.

85 Azo, *Summa* on C.4.59.2 (see above, n. 83), n.4: (…) *Debet igitur esse cuilibet libera facultas in emendo, & vendendo, vel locando, & conducendo, & circa precium, & circa mercedem. Iustum est enim vnicuique sua committi: Etiam si Judæus sit* (…).

86 Placentinus, *Summa Codicis*, on C.4.59.2 (see above, n. 82), p. 186: (…) *nempe officium alteri, id est publicæ personæ iniunctum, nemo priuatus debet arripere, quia iustum est sua cuique committere* (…).

87 Cf. Cicero, *De legibus* 1, 6, 19, ed. Jonathan G.F. Powell, *M. Tulli Ciceronis De Re Publica, De Legibus, Cato Maior de Senectute, Laelius de Amicitia* (Oxford: Oxford University Press,

The commentators also only dealt with the antimonopoly law to a very limited extent. It is mentioned neither by Cynus de Pistoia (ca.1270–1336/37), nor by Guilelmus de Cuneo (ca.1270–1335) in his *Lectura super Codice*,[88] nor by Paulus de Castro (1360–1438),[89] and Jason de Maino (1435–1519);[90] Bartolus de Sassoferrato contented himself in his *Lectura Codicis* with two irrelevant lines.[91]

Baldus de Ubaldis (1327–1400) devoted no more than a narrow column to it in his *Commentaria.*[92] He highlighted that neither unjust laws nor unjust contracts were valid.[93] In addition, even his general legislative power does not lead to a prince's right to issue unjust laws, a fact that his readers should memorize well (*Tene menti*[94]). Baldus underlines the fact that artisans were not allowed to agree contractually not to be permitted to continue the work of another. The same applies to corresponding ordinances. However, a community in its entity should be allowed to make such regulations. Baldus does not give a reason for this restriction. If the formation of monopolies occurred on a conspiratorial basis, the authorities had to take action on their own initiative.[95] This remark is helpful for the analysis of the concept of monopoly in that it emphasises an aspect which is already present in the text of Zeno and remains so in the Middle Ages and the early Modern Age. The term *monopolia* was not only used to refer to agreements intending to manipulate business transactions, but conspiracies in general which were aimed at destabilising public order.[96] This connotation of rebellion should also be borne in mind in the analysis of the discussion of the term monopoly in the early Modern Age. Baldus further asked whether it would be called a monopoly if the Guelphs passed a resolution against the Ghibbelines. He responded that this would be the case if any

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2006), 166: (…) *Eamque rem illi Graeco putant nomine < a > suum cuique tribuendo appellatam* (…).

88 Cynus de Pistoia, *Lectura super Codice*, (Venice, 1493); Guilelmus de Cuneo, *Lectura super Codice*, (Lyon, 1513).

89 Paulus de Castro, *Lectura Super Codice*, (Venice, 1495).

90 Jason de Mayno, *Commentaria in primam partem Codicis*, (Lyon, 1581).

91 Bartolus de Sassoferrato, *Lectura super prima et secunda parte Codicis*, on C. 4.59.2 (Venice, 1499), 157 right col.

92 Baldus de Ubaldis, *Commentaria* on C.4.59.2, ed. *Baldi Vbaldi Pervsini Ivrisconsvlti etc. in Quartum & Quintum Codicis libros Commentaria etc.*, (Venice, 1627), fol.133r, right col.

93 Baldus, *Commentaria*, on C.4.59.2 (see above, n. 92), n.2: *Not. iniqua statuta, vel pacta non valere*.

94 Baldus, *Commentaria*, on C.4.59.2 (see above, n. 92), n.3.

95 Baldus, *Commentaria*, on C.4.59.2 (see above, n. 92), n.5: *No. quod quando delictum per modum conspirationis committitur, per inquisitionem proceditur*.

96 Cf. the examples in: "Monopol" in *Deutsches Rechtswörterbuch* (Weimar et al.: Hermann Böhlaus Nachfolger, 1914-), vol. 9 (Weimar: Hermann Böhlaus Nachfolger 1996), col. 850.

private right was usurped. Yet, as long as the resolution was in the public interest, it would be valid.[97]

Bartholomew Salicetus (1330/40–1412) says little with respect to the monopoly-law in his very detailed comment on the *Codex Justinianus*. Nevertheless, he underlines the fact that the cobblers and traders of Bologna frequently conflicted with this law.[98]

If one asks about the reasons for the neglectful treatment of monopoly law, in my opinion, these can be found not least in the economic landscape of the Italian High and Late Middle Ages, which had completely changed compared to the situation in late antiquity. A system that was increasingly based on privileges secured exclusive rights for individual groups in certain areas of economic life. Some examples are mentioned in the comments referred to above, in particular the guild system with its restrictions on accessing and exercising professions, which best suited the colleges addressed by the law. Mention of the cobblers and traders by Bartholomew Salicetus also shows the attempt to apply the law to contemporary conditions. One might therefore assume that it did indeed find practical application in economic life. Whether this was the case to any significant extent is doubtful. Odofredus († 1265) introduced his lecture on Zeno's law in a slightly mocking tone:[99] people might be bad today, but they had not been saints in the past either, which is why the law on monopolies had been created. However, Odofredus then refrained from making any detailed comments and recommended that his listeners should rework the law at home. It was a nice law if it was complied with. But it was not complied with in this town or elsewhere, because the might of kings and their subjects meant that it only existed in words and not in deeds.

The fact that this was true is confirmed by an analysis of the relevant *concilia* literature: for example, the seven-volume edition of the surveys of Alexander de Tartagnis indeed contains some surveys regarding the interest-related issue, but none with respect to monopoly-regulation.[100] None of the concilia

97 Baldus, *Commentaria*, on C.4.59.2 (see above, n. 92), n.7: *Sed quod si Guelphi faciunt ordinamenta contra Gibbelinos, an dicatur monopolium? Respondeo aut faciunt vsurpationem alicuius priuati commodi, & est monopolium, vt hic, aut propter bonnum publicum, & tunc secus.*

98 Bartholomaeus Salicetus, on C.4.59.2, ed. *Bartholomaei a Saliceto Bononiensis etc. Pars Secunda. In Tertium & Quartum Codicis Libros* (Frankfurt am Main, 1615), col. 1075: *quod not. quia in hac l. incidunt frequenter sartores & mercatores in ciuitate Bonn.*

99 Odofredus, *Lectura* in C.4.59.2, ed. *Odofredi etc. In Primam Partem Codicis etc. Praelectiones, etc.* (Lyon, 1550), 255ve.

100 I searched the register of the complete work*: Consiliorvm sev Responsorvm Alexandri Tartagni etc.*, vol. 1 (Venice, 1610). With regard to *consilia* of Alexander on the question of

collections from the late Middle Ages evaluated by me contains any indication that Zeno's monopoly law was invoked before a court. Only towards the end of the 16th century, i.e. within the context of the extensive discussion on monopolies, does this appear to have changed. An example of this is the Ingolstadt lawyer Andrea Fachinaeus, a native of Italy, who submitted an opinion in a dispute involving a salt monopoly.[101] Although this type of source has to be evaluated more closely, an initial perusal suggests very strongly that the monopoly legislation of the *Codex Justinianus* did not play any significant role in late mediaeval practice.

2.3.3 The Monopoly in Canonical Sources

In the other books of the *Corpus Iuris Canonici* the search for the word 'monopolium' and its derivations is equally as futile as in the decretistic literature.[102] In contrast to the usury issue, which is thoroughly dealt with in the canonical sources and the corresponding literature of the Middle Ages, an intensive analysis of market dominance is missing. It is mentioned only incidentally. Thus, Henricus de Segusio, called Hostiensis (before 1200–1271), in his *Summa Aurea* paraphrases Zeno's law in the context of prohibited *societates*, without contextualizing the problem from a canonist point of view.[103]

However, reference should be made here to a source which is not only important for the canonistic view of the monopoly problem, but which was also not without implication for interpretation under civil law within the context of the amalgamation of church and secular law in the *ius commune*. This refers to a decretal which Pope Gregory IX addressed in 1227 and 1234 to the Archbishop, the Archdeacon and a Canon in Tours in France.[104] The subject of the dispute was the exclusivity right of the sale of meat: the clergy in the community of Mehun-sur-Yèvre maintained that the butchers in the village were only allowed to sell their meat at the sales outlets of the clergy. This right had evidently been contravened by none other than the Bishop of Orleans, who had set up his own butchers' stalls and had sold meat there. First of all, the decretal casts a revealing light on the practice of trading in meat in France and makes it

interest cf. Hermann Lange, "Das kanonische Zinsverbot in den Consilien des Alexander Tartagnus", in Lutter (ed.), *Recht und Wirtschaft* (see above, n. 9), 99–112.

101 Andrea Fachinei, *Consiliorvm etc. Liber Primus* (Frankfurt am Main, 1610), Cons.1, 6, 47–51.

102 I analysed: The *summa* of Paucapalea, the *summa* of Rolandus, the *summa* of Rufinus, the *summa* of Stephen of Tournai and the *Summa Simonis*, as well as the *Glossa Ordinaria*.

103 Henricus de Segusio (Hostiensis), Summa Aurea, on X. 1.39, ed. *Henrici de Segusio Cardinalis Hostiensis Svmma Avrea, etc.*, vol.1 (Venice, 1574), col.397, n.4.

104 X 2.28.69 (Gregory IX., a.1227/1234 = P.9621 = Mansi 23, col.134).

clear how intensively the French Church was involved in the 13th century in the sale of staple foods – so intensively that their representatives competed with each other at the local markets.[105] In view of the high moral yardstick which was applied to the behaviour of clerics in terms of usury, the Pope should actually have intervened at this point. Indeed, at the Council of Vienne in 1311/12, a canon was adopted which imposed penalties on clerics who continued to work as meat traders or public house landlords after receiving three warnings.[106]

The fact that the monopolisation of meat sales might be problematic against the background of civil monopoly legislation was initially of no relevance in the canonical discussion of the case. The reason for this was not so much the separation of the two legal spheres, but primarily due to the fact that when selecting these decretals for the *Liber Extra*, Raymond of Penyafort was not concerned about their solution under substantive law. The case presentation is more of a vehicle for clarifying a problem of legal procedure. The decretal, which has only survived in fragments, therefore does not contain any decision on the matter or its substantiation. The key issue was the question of the extent to which the bishop was allowed to continue his sale activities during the pendency of the legal claim.[107] Accordingly, the Pope's letter that was sent to Tours was also classified in the second book of the decretal collection under the title "de appellationibus". Many decretalists do not therefore deal with the economic aspect of the case, or if they do then they only do so marginally. Thus, the *Glossa Ordinaria* on the *Liber Extra* (1263) comments only on procedural aspects.[108] Even so, Hostiensis reported in his comments on this point that such exclusivity rights were commonplace today, not only in terms of the

105 Regarding the intervention of communes in selling meat cf. Ramón Agustín Banegas López, "Competencia, mercado e intervencionismo en el comercio de carne en la Europa bajomedieval. Los ejemplos de Barcelona y Ruán", in *Anuario de Estudios Medievales 42* (2012), 479–499.

106 Council of Vienne, a.1311/12, c.8, ed. Wohlmuth, *Decreta* (see above, n. 41) 2:364–365 = Clem. 3.1.1: *Dioecesanis locorum districte praecipimus ut clericos carnificum seu macellariorum aut tabernariorum officium publice et personaliter exercentes nominatim et tertio moneant ut sic ab huiusmodi officiis infra convenientem terminum monentium ipsorum arbitrio moderandum desistant et quod ipsa nullo unquam tempore reassumant. Qui si taliter moniti ab his non destiterint aut ipsa ut praemissum est exercendo resumpserint quandocunque coniugati omnino non coniugati vero in rebus et si omnino incedant ut laici in personis privilegium clericale quamdiu praemissis institerint eo ipso amittant.*

107 Concerning aspects of procedure cf. Knut Wolfgang Nörr, *Romanisch-kanonisches Prozessrecht. Erkenntnisverfahren erster Instanz in civilibus* (Berlin and Heidelberg: Springer, 2012), 45.

108 I used: *Decretales D. Gregorii IX Papae, Svae Integritati un cvm Glossis Restitvtae* (Rome, 1582), X 2.28.69, col. 975–977.

sale of meat, but also the furnaces and mills.[109] Bernardus de Montemirato (called Abbas Antiquus, approx. 1225–1296) interpreted the exclusive right regarding the selling of meat, as well as the selling of furnaces, as customary law (*consuetudo*).[110]

It was Innocent IV (1195–1254) who recognised a possible contradiction with the monopoly prohibition of the Emperor Zeno most clearly.[111] The demands of the local clergy appeared to violate this law. However, this law only forbade fraudulent associations. This was not a fraudulent association, however, but the exercising of a customary right or privilege. This was not a restriction on individuals or objects, but only on a specific location, and was admissible.

The interpretation of Innocent IV would appear to be plausible and practical at first glance, although upon closer examination it scarcely stands up with a view to the law: this clearly excludes any form of exceptional permission for monopolistic associations. Nor does the law speak of a restriction to fraudulent monopolies. Rather, it is based on the general incrimination of monopolistic behaviour without any consideration of the motives for the association.

It is clear that Innocent had no real interest in a strict interpretation of the monopoly law, which as a norm under civil law hardly seemed worthy of canonical consideration anyway. From the canonical perspective, such an infringement would have become relevant at best if the objective element of price collusion had been accompanied by a reprehensible attitude, a *turpe lucrum*. As this was not the case, Innocent did not see any reason – in line with the rest of canonical literature – to disapprove of the business affairs of the French clerics. They were indeed prohibited from now on by the Council of Vienne from working independently as butchers or public house landlords.

109 Hostiensis, Lectura on X. 2.28.69, ed. *Apparatus sive commentum famosissimi Hostiensis super secundo* [*et tertio*] *libro decretalium*, (s.l., ca. 1512), fol. 436ve.: (…) *sicut et de furnis et molendinis occurrit quotidie* (…).

110 Bernardus de Montemirato, *Lectura Aurea,* on X 2.28.69, ed. Bernardus de Montemiro (Abbas Antiquus), *Lectura Aurea super Quinque Libris Decretalium*, (Straßburg 1510, repr. Frankfurt am Main 2008), fol. 137v: (…) *videtur innuere, quod haberent hoc de consuetudine* (…).

111 Innocent IV., *Commentaria* on X. 2.28.69, ed. *Commentaria Innocentii Quarti Pont. Maximi super libros Qvinque Decretalivm, etc.* (Frankfurt am Main, 1570), fol. 339 v: *Haec petitio videtur esse contra ius C. de monopo. per totum. Sol. illud loquitur, quando homines fraudulenter faciunt pacta, quod aliis non liceat vendere, vel quod alios non instituant in aliqua arte, quod non licet. Isti autem non fraudulenter faciunt, sed ex privilegio, vel consuetudine, vel illud non est licitum de personis, vel rebus, sed de loco, ubi sit venditio, bene licet pascisci, ut hic.*

But the fact that they were permitted to have corresponding exclusive rights was explicitly confirmed, for example by Panormitanus (1386–1445).[112]

Only incidentally does Innocent IV note that the monopoly prohibition could be limited by customary rights or privileges, as a result of which the business lost its character of deception. This limitation was to prove highly significant for the future fate of the law on monopolies. It was not only taken up by canonists such as Johannes Andreae (around 1270–1348) or Panormitanus,[113] who confirmed it and attempted to underpin it with further references to civil law, but also became part of legalistic tradition through Baldus' Margarita.[114] As Johann Sichard (1499–1552) rightly remarked later,[115] this interpretation *contra legem* removed the necessary stringency from Zeno's law for it to have any sweeping effect. However, it was consistent with the practice of privileging monopolistic economic forms, which was widespread not only in the ecclesiastical, but also in the secular realm.

Overall, canon law maintained a close relationship between monopolies and the crimes of robbery or *usura*. The important canonist Bernardus Papiensis (before 1150–1213) in his *Summa Decretalium* attempted a systematic of *usura.*[116] This crime, he held, differed little from robbery and could be defined as a profit from interest.[117] Bernardus also defines the expression *turpe lucrum*: as follows: shameful profit should be called any dishonest action, even if it were not usurious.[118] Thus, Bernardus uses *turpe lucrum* as a general term in order to denote business practices, which were not identical with usury though, but shared its reprehensibility. This disgraceful profit could result from various

112 Panormitanus, *Commentaria*, on X 2.28.69, n.2., ed. *Abbatis Panormitani Commentaria Tertiae Partis in Secundum Decretalium Librum etc.* (Venice, 1582), fol. 16or.: *Not. quod etiam in clericis & ecclesiis potest hoc ius competere, licet ipsi non possint per se exercere officium carnificum vel tabernariorum* (…).

113 Panormitanus, *Commentaria*, on X 2.28.69, n.2 f., fol.16or.

114 Baldus de Ubaldis, Margarita, (Milan 1491), s.v. "Monopolium": *De materia monopolii vide Inno.* [*X 2.28.69*] *et ibi habes quod illi tit. per privilegium aut consuetudinem potest derogari.*

115 Johann Sichard, on C.4.59.2, ed. *Sichardus rediuiuus etc.* (Frankfurt am Main, 1598), vol. 1, p. 478, n.11.

116 Bernardus Papiensis, *Summa Decretorum* 5, tit. 15 "de usuris", E[rnst] A[dolph] Th[eodor] Laspeyres (eds.), *Bernardi Papiensis Faventini Episcopi Summa Decretalium* (Regensburg, 1860, repr. Graz 1956), 233–240.

117 Bernardus Papiensis, *Summa* 5, 15 § 1, 233: *Usura est ex mutuo lucrum pacto debitum vel exactum*. Because of the similarity to robbery Bernhard refers to C.14 q.10 c.10.

118 Bernardus Papiensis, *Summa* 5, 15 § 4, 234: *Turpe vero lucrum dicitur, quod quidem non est usura, sed fit cum quadam improbitate.*

businesses, such as loans (*commodatum*), rent (*locatio*), craft (*artificum*), exchange (*mutuum*) or trade (*negotiatura*).[119] With regard to the latter commercial activities, Bernardus recorded, that they could be either honourable or disgraceful. For example, a business would be justifiable, if certain goods were purchased at a low price in Alexandria, in order to ship and sell them at a higher price in Bologna. Bernardus does not give an example for *turpe lucrum,* but only referenced upwards in his text, where he described an exchange as disgraceful, which was stipulated only for the purpose of exploitation, yet without mutual consent.[120] Bernardus defined a profit which resulted from a prohibited business transaction not only as disgraceful, but also as criminal, and in this respect, he cites the monopoly law of Zeno among others.[121]

It should be noted, therefore, that canon law only dealt to a small extent with the topic of monopoly in its central source materials. Following Joseph Höffner, however, it can be assumed that the discussion of the monopoly question and therefore its tradition in the early Modern Age was based less on the writings of the law scholars than the genre of confessional jurisprudence.[122] Raymond of Penafort (1175–1275), the compiler of the *Liber Extra*, discussed pre-emption in detail in his Summa, based on the ban of *Capitulare Missorum* in C.14 q.4. c.9.[123] He castigated pre-emption and only allowed the hoarding of food if it was not sold again for a higher price during times of famine, in accordance with the example of Joseph in Gn 41:47–57. Such persons who sold gold coins, money, other objects and above all food in order to bring about inflation should be abhorred like nefarious beasts.[124] Raymond is primarily concerned here with the moral condemnation of a form of behaviour which – like *usura* – he considered to be one of the mortal sins.

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119 Bernardus Papiensis, Summa 5, 15 § 4, 234: *Ut autem haec omnia plenius intelligantur, sciendum, quod lucrum aliud ex commodato, aliud ex locato, aliud ex artificio, aliud ex mutuo, aliud ex negotiatura.*

120 Bernardus Papiensis, *Summa 5*, 15 § 4, 235. *Ex mutuo fit lucrum aliud paciscendo vel extorquendo, et tunc in usurae nomen et vitium cadit.*

121 Bernardus Papiensis, *Summa 5*, 15 § 4, 235: *praeterea non tantum turpe, sed etiam puniendum lucrum invenitur, quod fit ex prohibita negotiatione, ut Cod. de monopol. L. 1 et de commerciis et mercator. per totum titulum* [*C. 4.63*].

122 Höffner, *Wirtschaftsethik*, (see above, n. 70), 161.

123 Raymond of Penyafort, *Summa* II, de usuris, § 9, pp. 235f; on the *Capitulare Missorum* see above, 15.

124 Raymond, *Summa*, 236: *illos econtra credo tanquam nefandas belluas detestandos, qui ea intentione emunt aureos, vel alias monetas, vel res venales, & praecipue victualia, vt de talibus caristiam inducant.*

3 The Monopoly upon the Transition to the Modern Age

In the literature, it is repeatedly emphasised that the concept of the monopoly was used upon the transition to the Modern Age to a similarly inflated extent as that of capitalism since the 19th century.[125] This finding must seem surprising against the background of the minor importance attached to the monopoly problem in the Middle Ages, as explained above. It should therefore be examined whether when the Middle Ages were coming to an end, certain legal or extra-legal circumstances led to a renaissance of the monopoly concept. Such an examination should in particular go into the language used. One typical aspect of the transition to the Modern Age is the – at least partial – changeover to the German language. If one assumes that the public discussion of the monopoly in particular also occurred in German, the question arises as to whether this had any repercussions on the legal language. The German and Latin literature should therefore be evaluated in the same way as legal and extra-legal contributions. At this point, the analysis cannot be carried out completely. Some hints and references to the appropriate survey of Joseph Höffner must be sufficient.[126]

3.1 *Latin Texts*

3.1.1 Economic and Theological Treatises

At the end of the Middle Ages there was patently a growing interest in problems of the economy. This initially becomes clear in texts written in Latin which continued the learned discourse of the Middle Ages, but which also became more acute within the context of their changed environment. The growing interest in the problems of monopoly, pre-emption and usury must be seen before the background of the unprecedented rise of modern trading companies and their rapidly growing prosperity which had resulted from trade, financial transactions and their professional organisation, especially in Upper Germany, since the beginning of the 15th century. Considering the fact that the simultaneous crisis in agriculture proved impossible to overcome, it seems obvious that the contemporaries saw an interdependence between the starving of the population on the one hand and the enormous accumulation of capital of a few trading companies on the other hand.

125 Similar: Wurm, *Johannes Eck* (see above, n. 13), 61.
126 Höffner, *Wirtschaftsethik* (see above, n. 70), 33–188.

Initial indications of a growing interest in the concept of the monopoly are found as long ago as the 14th century. Initially, the topic was predominantly debated by theologians and economists, while only a few jurists took part in it.

Conrad of Megenberg (1309–1374) can serve as an example for the economic point of view. In his large-scale Ykonomia, he reports of a shortage of spices, which resulted from shipwrecks of some Venetian and Genoese merchant ships.[127] In this situation, everyone who purchased and stored spices beforehand would have gained huge profits. This was, according to Conrad, a monopoly, which he defined as *vendicio unius et ab uno*, as a sale of and by a single person. Apparently, Conrad does not refer to the corresponding regulation in the *Codex Justinianus*, but to the passage in Aristotle's *Politika* cited above.[128] Conrad of Megenberg rejected such practices. He urged town authorities not to permit any monopolies, as the common good should always be given priority over private benefit. Therefore, anyone who withheld from the community the bounties which nature had provided in order to become rich should be rebuked. It was indeed blasphemy to deprive other people of God's generosity.

Of greater importance is the debate by the contemporary theologians who dealt with the ethics of trade in their manuals for confessors (*summae confessorum*) and later in special tracts.

The focus of the debate, which cannot be portrayed here in great detail, shifted from Paris, to Vienna and to Leipzig: the first tracts originated from a group of Parisian theologians, namely Jean Gerson (1363–1429), Henry of Langenstein (1325–1397), Henry of Oyta (ca. 1330–1397), and Nicole Oresme (before 1330–1382).[129] Their work was characterised by a strict rejection not only of usury, but also of monopolistic economic systems: for instance, Nicolaus von Oresme explicitly turned against monopolies run by the authorities. He even condemned the establishment of governmental coin and salt monopolies as harmful and tyrannical, since it resembled the buyout of all grains and its more expensive resale by the prince.[130] Oresme, like Conrad of Megenberg, argues without any reference to the sources of the *ius commune*. Langenstein and

127 Conrad of Megenberg, *Ykonomia*, 1 ,4, c.16, ed. MGH Staatsschriften 3, 1, 345.

128 See above, n. 19.

129 Concerning this in detail: Johann August Roderich von Stintzing, *Geschichte der populären Literatur des römisch-kanonischen Rechts in Deutschland am Ende des fünfzehnten und im Anfang des sechszehnten Jahrhunderts* (Leipzig: Hirzel, 1867), 539–542.

130 Nicolaus Oresme, *Tractatus de Origine, Natura Jure, et Mutacionibus Monetarum* (1st ed. Cologne, 1484), here quoted from: Charles Johnson (ed.), *The De Moneta of Nicholas Oresme and English mint documents* (London et al.: Nelson, 1956), p. 16. I would like to thank Bart Lambert for directing my attention to this treatise.

Oyta carried forward the discussion in Vienna after 1383, where they and their colleagues in the faculty wrote further tracts on the ethics of merchants.[131] The notorious preacher and anti-Semite Johannes de Capistrano (1386–1456), who himself wrote a tract regarding greed, carried the issue to Leipzig.[132] While these Latin treaties of the late Middle Ages almost completely concentrated on theological and ethical aspects of the issue, any search for a legal analysis, which is based on legal sources, comes to nothing.[133]

A more innovative approach to the monopoly question was taken by the Tübingen theologian Konrad Summenhart (ca. 1450–1502) in his extensive treatise *De contractibus licitis atque illicitis,*[134] which essentially concluded the depicted discussion.

Summenhart approaches the problem from various directions and attempts to clarify a theological question about the legality of monopolistic business practices with the help of both legal and economic arguments. His starting point is Zeno's monopoly law, which he initially explains along the common-law doctrine, starting from its etymology: someone is acting monopolistically if he operates a certain business alone on the basis of official power in a *civitas* and excludes others from it. Other forms of monopoly were price agreements with the goal of generating a higher or even excessive profit. Even if the merchant did not aim to generate excessive profits with this agreement, but instead safeguard himself against losses, this was a monopoly, as the agreement resulted in the goods not being sold for a fair price if the hedged risks did not come about. A monopoly also existed where it was specified in an agreement that only the relatives of the contractual partners should be trained in a specific trade – or also when the keepers of the bath decided only to allow others to bathe for a specified price. It was also a monopoly if employees, e.g. writers or builders, decided that the work that they had started must not be continued by anyone else. The same applied to those who hired out items such as horses, houses or stations, as well as to pharmacists and the traders at the weekly markets.

If one compares Summenhart's remarks with the text of Zeno's law, it becomes clear how doctrine and legal reality have changed within the last thousand years. For his interpretation, Summenhart borrows from theories about

131 Stintzing, *Geschichte der populären Literatur* (see above, n. 129), 542f.; Winfried Trusen, *Spätmittelalterliche Jurisprudenz und Wirtschaftsethik. Dargestellt an Wiener Gutachten des 14. Jahrhunderts* (Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte, Beiheft), 43 (Wiesbaden: Steiner, 1961).

132 Stintzing, *Geschichte der populären Literatur*, 544f.

133 Stintzing, *Geschichte der populären Literatur* (see above, n. 129), 543f.

134 Konrad Summenhart, *De contractibus licitis atque illicitis*, Tract. III c.51, (Venice, 1580), 241.

usury which were widespread from the time of Thomas Aquinas and developed above all to define the *usura*. Above all, this applies to the postulate of a just price serving as a standard for the moral admissibility of a business.[135] Furthermore, Summenhart expands the catalogue of incriminating branches of commerce to include a number of trades which were relevant to his everyday life. This applies in particular to the exclusive rights of the guilds, but also to other areas of economic life which tended to enter into price agreements in the late Middle Ages.

Summenhart then names two reasons why he considers the monopoly prohibition to be fully appropriate: on the one hand it was required by natural reason (*naturali ratione*). This is because everything that only served the purposes of private benefit was harmful to the interests of the community and was even inadmissible if it prevented someone from performing a beneficial act for his fellow man. If, for example, a part of the body attempted to act only for its own benefit and did not let the other parts of the body or the body as a whole benefit from this, it would be prevented from doing so by the other parts of the body. Just as such a part of the body would be eliminated, the situation was the same with the mystical body, or the community as a whole. The monopolist was displaying just such behaviour: he was manipulating the prices to his own benefit and not serving the community as a whole. He was imposing a price on the others, coercing them and blackmailing them against just principles, forcing them into a type of compulsory contract (*servilem obligationem*). By contrast, it was appropriate for a free society to have a free choice when buying, selling, renting and letting.[136] But even if such pressure did not exist, the monopoly was unfair because it prevented the merchant from doing good. On the other hand, the monopoly was also prohibited by positive laws. Since Zeno's monopoly law forbade it in all of its above variations and the extremely strict penalties showed that the legislator considered this to be behaviour which was particularly punishable.[137]

Summenhart's remarks do not exist in a vacuum. However, they appear to me to be particularly noteworthy in terms of the manner in which they combine theological, economic, legal and scientific thinking. This combination is not only of relevance at the level of the sources, but also at the level of reasoning: pre-emption was a sin, since it not only contradicted the moral order, but was also contrary to economic and social reason. Yet, this image may deceive,

135 See above.

136 Konrad Summenhart, *De contractibus* (see above, n. 134), 241: *Cum tamen deceat in libera ciuitate liberam esse facultatem in emendo, vendendo, locando, & conducendo*.

137 Summenhart, *De contractibus*, 241.

since Summenhart did not intend a quasi-interdisciplinary analysis issue of usury and monopolies. Rather, he conflicted with the canonists of his times and was intending to win sovereignty for the theologians with regard to the interpretation of contemporary social and economic questions. As Heiko Oberman showed, Summenhart can be considered to be an important forerunner for a process of differentiation between law, canon law and theology.[138]

3.1.2 Legal Texts

Only very few lawyers took part in the debate about morals in business life of the 14th and 15th century. A rare exception is Viennese canonist Johannes Reutter († after 1404), whose treatise *Super quaestiones de contractibus* came down to us in manuscript.[139] The issue of monopolies seems to have been even less interesting to contemporary jurists. A reason for this might be that in contrast to the frequently discussed question of price speculations, the achievement of monopolistic market power by the large trading houses did not take place until the second half of the 15th century, and was not therefore perceived as being a problem by the public – at least not yet.[140]

A striking exception is an expert opinion written by Christoph Kuppener († after 1404), a lawyer from Leipzig, regarding the question of "what usury and usurious trading was". This expertise was published simultaneously in Latin and German.[141] Kuppener thoroughly debated the legal aspects of usury, illustrated by many examples from legal practice.

In this context, pre-emption is mentioned: someone who is buying food and later sells it at a higher price is not a usurer if he purchased the goods for his personal needs. However, it is *turpe lucrum*, if he only purchases the food with the intention to sell it at a higher price later on.[142] Kuppener deals in detail with *montes pietatis*, which was already common in Italy but remained

138 Heiko Augustinus Oberman, *Werden und Wertung der Reformation. Vom Wegestreit zum Glaubenskampf* (Tübingen: Mohr, 1977), 148, on the example of tithe.

139 Stintzing, *Geschichte der populären Literatur* (see above, n. 129), 543. see also: Joseph von Aschbach, *Geschichte der Wiener Universität im ersten Jahrhunderte ihres Bestehens. Festschrift zu ihrer fünfhundertjährigen Gründungsfeier* (1865), 412f.

140 Aloys Schulte, *Geschichte der Grossen Ravensburger Handelsgesellschaft, 1380–1530*, 2 vols., (Stuttgart: Deutsche Verlags-Anstalt, 1923), 2:236.

141 Christoph Kuppener: *Consilia elegantissima in materia usurarum et contractuum usurariorum* (Leipzig, 1508); id.: *Ein schons buchlein czu deutsch, doraus ein itzlicher mensche, was standes er sey, lernen mag, was wucher und wucherische hendel sein* (Leipzig, 1508). On Kuppener and his œvre: Theodor Muther, "D. Christoph Kuppener", in: id., *Aus dem Universitäts- und Gelehrtenleben im Zeitalter der Reformation. Vorträge* (Erlangen, 1866), 129–177.

142 Kuppener, *consilia* (see above, n. 141), fol. B. iii re.

unknown in Germany. Although (or actually due to) the fact that Kuppener was taking part in miscellaneous trading businesses,[143] he strongly criticised the business behaviour of trading companies.[144]

Many merchants disregarded the common good and therefore could not be tolerated by regents, such as, for instance, those merchants and shareholders who had accumulated vast quantities of goods and money and maintained commercial agencies in Venice, Russia and Prussia. When it came to their attention that goods like saffron, pepper and corn were rising in price, they bought up all stocks in order to arbitrarily regulate the price. Such behaviour could be tolerated neither in the countryside nor in the cities, because it was wrong, violated the common good and by its nature was a monopoly. Therefore, these monopolists had to be punished by expropriation and rightfully be ruined. There can be no doubt that Kuppener was referring to Zeno's monopoly law, here, although he did not cite it either in the German or in the Latin version of his tract. The question of why Kuppener omitted Zeno's law will never be resolved: perhaps he had no access to the text or only knew about it at second-hand? Perhaps it was not used in contemporary practice or Kuppener did not want to cite it for political reasons? What can be stated here for certain is that Kuppener joined in with the contemporary criticism of the large trading houses, but without precisely founding this criticism within the Roman law.

For the field of jurisprudence it was much more difficult for the theologians to deal fundamentally with the problem of monopolies. A random sample shows the difficulties which German legal experts had in harmonising Zeno's law with the everyday legal reality. Johann Sichard introduced his comments with the remark that this was an unpopular matter (*materia odiosa*),[145] as Italy and Germany were both full of monopolies (*quia in tota Germania et Italia omnia plena sunt monopoliorum*). He therefore wanted to speak clearly (*cum*

143 Concerning this: Muther, *Kuppener* (see above, n. 141), 152–153.

144 Kuppener, *buchlein* (see above, n. 141), E i.: (…) *furter saltu vormerken, das ettliche kaufleute in landen vnn steten sein, dy do durch regenten eins gemeinen nutzes nicht sollen in solchen landen vnn steten geliden werden, nachdem sie mergklichen schaden brengen dem gemeinen nutze. Exemplum als do sein die reichen kaufleute ader reiche geselschaffter eines handels, die do haben gros gelt vnn gut, vnn haben die diner czu Venedig, in reuszen vnn in preuszen; vnn wen sie erfarn, das ein ware aufsteiget ader tewerbar wirt, es sey an saffran, pfeffer, getreide, ader an* anderer ware, so kauffen sie *vber haupt solche ware czu yn auf, das sie furder solche ware den andern verkauften mögen nach alle irem gefalle; dan solch ir furnemen sal man in landen vnn steten nicht leiden, vnn ist vnrecht, vnn beswert sere einen gemeinen nutz, vnn hat auff sich die nature monopolii, vnn auch ire pene wy oben gesatzt ist, das man yn ire guter nehmen magk mit rechte vnn sie in das elende treiben* (…).

145 Johann Sichard, on C.4.59.2, (see above, n. 115), 477.

protestatione) to call his readers as witnesses for his standpoint. In his definition, Sichard attempts to clarify the Latin terms by using German equivalents. For example, for the description of pre-emption, the Latin word *coemere* is translated with *auffkauffen* ("buy up").[146] According to Sichard's somewhat circular definition, monopolies were initially identified with *societates* ("societies"). Such societies were allowed in principle, however, provided that they did not degenerate into monopolies.[147] In Sichard's view, Zeno's law was indeed pretty (*pulcra*), but should be considered almost obsolete due to the current social wrongs (*tamen propter vitium temporum nostrorum fere obliterata*).[148] Sichard distinguished – in the same manner as Innocent IV – between three forms of monopolies: those relating to objects and goods, those relating to individuals, and those relating to specific locations.[149] Zeno's law only spoke about the first of these. There were personal monopolies, for example, where certain trades were only made accessible to the sons or nephews of the individuals who carried them on or where – contrary to the older canon law – specific benefices were reserved for the offspring of the aristocracy.[150] As an example of a monopoly relating to a location, Sichard refers to the situation in which the subjects of a Lord are obliged to grind their grain in his mill.[151] However, the subjects could also set up monopolies if they decided not to protect the fields of others against cattle breaking in. The same applies to the sale of meat, citing Innozenz IV.[152] Statutes with binding effects were forbidden too, if they exercised external effects. If they were binding only the members of the society, they were effective, as long as they did not force their members to do something inadmissible or impossible.[153] Sichard then asks how the comments of Innocent IV on the extent of the monopoly ban are to be understood, since he had not objected to the claim of the clergy to have an exclusive right of sale. If Zeno's law did indeed not include monopolies covering a specific

146 Sichard, on C.4.59, 477, n.2.

147 Sichard, on C.4.59, 477, n.2: *Quæ monopolia nos sane parum significanti verbo vulgo appellamus* GESELLSCHAFFTEN */ id est, societates nisi in monopolia degenerent, non sunt iure prohibitæ* (…).

148 Sichard, on C.4.59.2, 477, n.1.

149 Sichard, on C.4.59.2, 478, n.2.

150 Sichard, on C.4.59.2, 478, n.3f.

151 Sichard, on C.4.59.2, 478, n.7.

152 Sichard, on C.4.59.2, 478, n.7: *Sic etiam monopolium est, si quidam coguntur certo loco carnes emere. Quae sane monopolia licet improprie sint talia, tamen omnia sunt prohibita,* vt pulcre Innocen. [X 2.28.69].

153 Sichard, on C.4.59.2, 478, n.8–10.

location, its scope was very reduced. Innocent was therefore wrong.[154] This can be demonstrated by the fact that Innocent wrote that the three mentioned types of monopolies were forbidden, unless privilege or customary law tolerated them. Sichard considered this a disastrous development: if this restriction were not eliminated, it would make the struggle of many imperial states against the rich commercial companies more difficult, which found it easy to obtain privileges and circumvent the law.[155]

Sichard's comment points out various problems of the legal experts when dealing with the monopoly law: it reveals a certain degree of unfamiliarity with a law which was scarcely discussed over centuries and now, within the context of the social debate about the large trading houses and their profits, suddenly appeared to be relevant. Not only did the terms have to be translated into German, the threat of huge punishments also appeared not to fit into the legal and political context of the times. Even so, Sichard defended – for thinly veiled political reasons – the severity of the monopoly law against the apparently overpowering normative force of the facts as they stood.

3.2 *German Texts*

Of major importance for the terminology of the discussion on usury are the first attempts at a transformation of ancient and mediaeval scientific knowledge into the current discussion – and that in the German language.

These first started in the 15th century with the *Klagspiegel*, a law book that was later edited by Sebastian Brandt, but whose author was, according to recent research by Andreas Deutsch, the writer-in-residence of Schwäbisch Hall, Conrad Heyden (around 1385 – 1444).[156] When studying this important book, which was written to make the most important legal matters of the Roman law understandable for forensic use, one cannot find any hint to the monopoly issue, however. The same is true of later law books, which based on the *Klagspiegel*: Ulrich Tengler's *Laienspiegel* (1509) only contain one chapter *vom wuocher gut* ("on usury"), in which 'usury' is used as an equivalent for the Latin *usura* or

154 Sichard, on C.4.59.2, 478, n.11: *Quæ responsio, si esset vera, plurimum limitaret hunc tit. Sed venia magni viri, falsa est.*

155 Sichard, on C.4.59.2, 479, n.11: *Per quæ excusantur hodie multa monopolia, vt etiam in comitiis Imperialibus non possit recte fieri provisio contra monopolia, nisi illa restrictio, de qua iam diximus, tollatur* (…) *alias facile erit diuitibus mercatoribus impetrare privilegia, & fraudem facere legi.*

156 Andreas Deutsch, *Der Klagspiegel und sein Autor Conrad Heyden. Ein Rechtsbuch des 15. Jahrhunderts als Wegbereiter der Rezeption* (Forschungen zur deutschen Rechtsgeschichte) 23 (Cologne/ Weimar/ Vienna: Böhlau, 2004).

faenus.[157] Tengler inculcates on his readers the profligacy of usury, yet mentions a series of exceptions that could permit usury. In the *Laienspiegel*, the question of pre-emption or monopolies is not dealt with. Only later in the 16th century, Justin Göbler inserted a chapter *Vom fürkauff des Getreyds und Frücht* ("on the pre-emption of grain and fruit") in his *Rechtenspiegel* (1550).[158] The most important criminal codes of the time, the *Constitutio Criminalis Bambergensis* (Procedure for the judgment of capital crimes, 1507[159]) as well as the Empirial *Constitutio Criminalis Carolina* (1530)[160] lack any reference to the prohibition of monopolies.

As has already been made clear in Sichard's example, this disinterest can be understood as a translation problem. In the light of a significant discrepancy between written law and legal practice, especially in the field of trade, the learnt lawyers could only hold their ground if they reproduced the corresponding legal matters in German language. The theologians paved the way: it is reported that the itinerant preacher Johannes de Capistrano used to preach in Latin for hours while the content of his speech was translated into German by a doctor who was traveling with him.[161]

It is not a coincidence that Christoph Kuppener's expert opinion with respect to usury was the first treatise of the Roman law provided in 1508, which was published in the German language. It must be emphasised that this book does not refer directly to a contemporary legal discourse, but is rather grounded in the tradition of the treatises on penance. Kuppener mentions in his introduction that the suggestion for his book originated from the confessors of the Dominican Order and his friend, Leipzig canonist Stephan Gerdt (about 1474–1518/19), who needed it as a guideline for the practice of confession. When

157 Ulrich Tengler, *Laienspiege*l, 1st ed. Augsburg 1509, here quoted from the edition: *Layenspiegel: Von rechtmässigen ordnungen in Burgerlichenn vnd Peinlichen Regimenten* (Straßburg, 1510), fol. 31v–33r, here fol. 31v: "Wuocher hat manigerley außlegungen / vnn würdet im latein genent vsura (…)".

158 Justin Göbler, *Rechtenspiegel*, ed. *Der Rechten Spiegel / Auß den beschribenen Geystlichen / Weltlichen / Natürlichem / vnd andern gebreuchlichen rechten etc.* (Frankfurt am Main, 1550), fol. 184r.

159 Bamberger Halsgerichtsordnung von 1507, Josef Kohler and Willy Scheel (eds.), *Die Bambergische Halsgerichtsordnung unter Heranziehung der revidierten Fassung von 1580 und der Brandenburgischen Halsgerichtsordnung zusammen mit dem sogenannten Correctorium, einer romanistischen Glosse und einer Probe der niederdeutschen Übersetz*ung. (Die Carolina und ihre Vorgängerinnen, Text, Erläuterung, Geschichte) 2 (Halle an der Saale: Verlag der Buchhandlung des Waisenhauses, 1902), 1–117.

160 Constitutio Criminalis Carolina, Friedrich-Christian Schroeder (ed.), *Die Peinliche Gerichtsordnung Kaiser Karls v. und des Heiligen Römischen Reichs von 1532* (*Carolina*), (Stuttgart: Reclam, 2000).

161 Muther, *Aus dem Gelehrtenleben* (see above, n. 141), 155.

merchants confessed, considering the growing differentiation between complex forms of business, it had to be decided as to whether their contracts were to be considered sinful or not. Kuppener justified his German translation with the fact that non-professionals were unable to understand the written law in Latin, and therefore had to instruct academics to explain it to them.[162] Representatives of legal humanism like Thomas Murner (1475–1537) made similar attempts.[163] Murner complained that many city officials did not know the legal basis of their administrative work because they lacked knowledge of the Latin language. Furthermore, his goal was to support the poor people who were in need of justice with germanising the law (*den armen des rechten begirigen zuhilff zuokumen / mit vertütschten rechten*).[164]

It was of great importance, therefore, to translate the key terms from the Latin discussion, i.e. above all *usura*, *turpe lucrum* and *monopolium,* into German. But the German words used – *Wucher*, *Fürkauf* and *Monopol* – each had their own – also legal – history, so that a process of amalgamation came about, not only linguistically, but possibly also in terms of legal content. This translation process could help to clarify the introduced expressions, but could also obscure them – in German as well as in Latin.

3.2.1 *Wucher* and *Usura*

The word most affected by this was *Wucher* (Old High German: "wuocher"), which in its original meaning initially meant 'fruit', 'yield' or 'offspring' and was therefore by no means pejorative.[165] In the meaning of *wuchern* = "grow luxuriantly" this meaning is still found today. In the Middle Ages, the word Wucher was used not only to mean the crop yield, but also the yield from interest.[166] Only with the increasing establishment of the ban on interest did the meaning of *wuchern* become pejorative. In 1411, the *Blume der Tugend* ("Flower of Virtue"), a poem by Hans Vindler, included the following lines: *Eyn weyser man also gicht* [*spricht*] */ Es sol keyn man nymmer nicht / Seyn gut meren*

162 Kuppener, *buchlein* (see above, n. 141), fol. A ii re.: *Und ab die leyhen, die eingefurten rechte czu latein gesatzt, nicht vornemen, do leidt yn nicht macht an, Sollen solchs den gelerten befelhen, solche recht in iren rechts buchern aus zufuehen*.

163 An article of the author regarding the issue of translating parts of the ius commune into German is in preparation.

164 Thomas Murner, *Der keiserlichen stat rechten ein inga*[*n*]*g und wares fundame*[*n*]*t. Vorrede* (Straßburg, 1521). The work is something in between of a translation of Justinian institutions and an independent textbook.

165 Strätz, "Wucher", (see above, n. 16), col. 1538.

166 Walther Mitzka (ed.), *Trübners Deutsches Wörterbuch*, 8th ed. (Berlin: de Gruyter, 1957), 265f.

mit vsuran / wann wuocher pringt schad vnn schant:[167] "A wise man said, that no one should increase his wealth by the means of *usura*, since usury brought harm and disgrace".

At more or less the same time there is also a change in meaning in the legal literature. One example is the so-called Rechtssumme of Brother Berthold of Freiburg, a lexical collection which was probably created at the end of the 14th century and above all else adapts sources of canon law, but also relies heavily on Thomas Aquinas.[168] Here, the problem of usury is dealt with in great detail in two places, under the headlines "usury" and "buying and selling".

Berthold defined usury as an evil profit which a man squeezed out of his neighbour by lending or borrowing something in return for money, use, labour or service, but that he, according to God's commandment, should actually lend or borrow out of love and free of charge.[169]

Usury is 'evil profit', with which Berthold no doubt takes up the Latin concept of the *turpe lucrum*. Berthold adds a detailed delimitation of sinful loans and interest as well as the rightful profit follows, followed by a long list of all forms of usurious behaviour, which Berthold gathered from the comments of Hostiensis on title *de usuris* in *Liber Extra*, as well as from the *Summary Concerning the Cases of Penance* by Raymond of Penyafort.[170] Berthold starts talking about speculation here: if someone kept goods away from the market in order to achieve a higher price later on, this action was to be considered neither as fraud, nor as usury nor as a sin. Only if he sold the good at a much higher price, was it usury.[171] Berthold discussed the problem of speculative

167 Friedrich Zarncke, Hans Vindlers Blume der Tugend, *Zeitschrift für deutsches Alterthum* 9 (1853), 68–119, here: 99.

168 *Die 'Rechtssumme' Bruder Bertholds. Eine deutsche abecedarische Bearbeitung der 'Summa Confessorum' des Johannes von Freiburg. Synoptische Edition der Fassungen B, A und C*, Georg Steer, Wolfgang Klimanek, et al. (eds.), 4 vol., (Tübingen: , 1987), 1: 13*.

169 Berthold, *Rechtssumme*, letter "W", c.36, 2:2276: *Vnd wuocher ist ain pöses gewinnen, das ain mensch tut von seinem naechsten, dem er etwas leyhet oder von im entleihet vmb gelt, vmb nucz, vmb arbait, vmb dienst, das er im von lieb wegen, die er im schuldig ist von gots gepot wegen, leihen oder entleihen vmb sust*.

170 Berthold, *Rechtssumme*, letter "W", c.39, 2:2292–2318. Berthold gives reference for his sources ibid., 2318.

171 Berthold, *Rechtssumme*, letter "W", c.39, 2:2306 (emphasis in original): A*uch hiet ain mensch ain ding das er nit wolt verchauffen auf ain zeit, sunder behalten durch gewinung auf ain ander zeit, vnd wolt ein andrer das gut haben, er möcht im das geben, nit als es auf die zeit güilt, sunder als es wurd gelten auf die ander zeit nach guter achtung, also das der ander mensch nit betrogen würd grosleich,* vnd jm uil türer wurd *gegeben dann das guot möcht gegolten haben, vnd war nit wucher noch sund. Aber gab er das gut vil tewrer, so war es wucher*.

profit under the headline of *laesio enormis* here, which, in his times of Canon law, used to be the common *sedes materiae*.

It was also allowed, according to Berthold, to establish a society in which every shareholder could demand an equal share of profit; however, he regarded a distribution of profits that discriminated against one of the shareholders as usurious.[172]

Berthold dealt more precisely with the ethics of merchants under the headline "buying and selling",[173] drawing not upon Canon Law, but upon Thomas of Aquinas. Buying and selling, as well as 'trading in valuable objects', according to Berthold, were permitted in principle if they were carried out for the purposes of commerce. This included standard commerce aimed at satisfying the everyday needs of people (necessities, *Notdurft*), because a man needed the goods of others and the aim was mutual benefit. In addition, trade was necessary to provide for those who were not artisans and therefore not able to produce such goods. Third, trade was necessary in order to import essential goods from other countries and areas which were not available locally.[174]

In contrast, commercial practices were forbidden if they were guided by greed (*geitikeit*). Here, Berthold brings a further motive into the discussion for rejecting usury involving cereals – the ethics of domestic needs previously discussed under the heading of food.[175]

Those who bought grains and wine cheaply out of greed, only to sell them more expensively when prices were rising, committed a moral sin. The crime was even more contemptible if the consumers had to suffer because they were forced to buy the goods for inflated prices. On the other hand, it should not be seen as a sin if someone bought a good inexpensively for personal needs or to nourish his family, yet did not need it later on and sold it for a fair price on the market.[176] The same applied if goods were purchased inexpensively in order to help the people in need later on.[177] Christoph Kuppener also discussed

172 Berthold, *Rechtssumme*, letter "W", c.39, 2:2316.

173 Berthold, *Rechtssumme*, letter "C", c.1, 1:1338ff.

174 Berthold, *Rechtssumme*, letter "C", c.1, 1:1338–1340; cf. Thomas Aquinas, *II^{a}-IIae*, q. 77 a. 4 s. c.

175 Berthold, *Rechtssumme*, letter "C", c.3, 1:1342: *Vnd also ist es vmb die lawt, die da choren vnd wein chauffent in der wolfail vmb wenig geltz, vnd behaltent das als lang das es tewr wirt. Tünt si das von geitikait wegen, fo tund si ain todsünd, vnd besunder wann si des als vil chauffen, das ander läut davon gepresten leiden, vnd müssen in das ab chauffen nach irem willen*.

176 Berthold, *Rechtssumme*, letter "C", c.3, 1:1342–1344.

177 Berthold, *Rechtssumme*, letter "C", c.3, 1:1344 with references to Thomas Aquinas.

pre-emption as part of the usury issue. In his interpretation of the corresponding order of the *Capitulare Missorum* (C.14 q.4 c.9[178]) he translated *turpe lucrum* with 'disdainful profit' (*schnoder gewin*), which made a resale of food hawkish, while the *Hausnotdurft* ("necessities of the house") allowed it.[179] A comparison to the Latin text shows, that Kuppener could not find a Latin equivalent to the expression "necessities of the house" (or *Hausnotdurft*).[180] It must be stressed here that *Hausnotdurft* was a widespread term used in the context of economic ethics north of the Alps, a term which in legal historical literature was not appreciated adequately so far therefore requires further research.[181]

It should also be noted that although the expression *turpe lucrum* became a collective term for indecent business behaviour in Latin, there was nevertheless no generally used equivalent in German: Berthold translates it with "evil profiting", Kuppener with "disdainful profits" and in Konrad Heyden's Klagspiegel (about 1436) it appears as *schendlichs genieß.*[182]

Finally, the negative connotation of the term usury significantly grew during the 16th century. Certainly, the fierce theological debates, especially between the reformers, which cannot be discussed further here, had an important impact. Martin Luther attacked interest on loan in his scripture *Von Kaufshandlung und Wucher* ("On trading and usury"), but also harshly criticised the excessive speculation gains of the Upper German trade houses.[183]

178 See above, n. 64.

179 Kuppener, *buchlein* (see above, n. 141), C iiii.

180 Kuppener, *consilia* (see above, n. 141), B iii. On this topic: Renate Blickle, "Hausnotdurft. Ein Fundamentalrecht in der altständischen Ordnung Bayerns", in Günter Birtsch (ed.), *Grund- und Freiheitsrechte von der ständischen zur spätbürgerlichen Gesellschaft* (Göttingen: Vandenhoeck & Ruprecht, 1987), 42–64.

181 Significantly an entry for the expression *Hausnotdurft* is missing in the standard handbook on German legal history, the HRS. A hasty identification with the concept of aliment (*Nahrung*), which is outdated by now in economic history research, appears as inappropriate: Robert Brandt, "Nahrung", in HRG[2], vol. 3 (Berlin: Erich Schmitt 2016), col. 1756–1758.

182 Sebastian Brandt (ed.), *Der Richterlich Clagspiegel etc.*, (Straßburg, 1553), 104. However, Heyden does not refer to the issue of usury here; instead he refers to the problem of filing an action motivated by disgraceful pursuit of profit (*turpe quaestum*), which was prohibited according to Marc. D 48.2.8 and integrated as C.2 q.1 c.14 in the *Decretum Gratiani.*

183 Martin Luther, *Von Kaufshandlung und Wucher* (1st ed. Wittenberg, 1524), ed. WA 15, 293–322. More detailed: Hermann Barge, *Luther und der Frühkapitalismus* (Schriften des Vereins für Reformationsgeschichte) 168 (Gütersloh: Bertelsmann, 1951), 23–28.

However, little was gained as a result in legal terms: the increasing equating of *Wucher* with the term *usura*, the meaning of which was equally controversial, did not contribute towards any clarification of the concept. As a result, the uncertainty surrounding how to deal with usury remained in the 16th century: the Protestant lawyer Justin Göbler (1504–1567), who published a handbook of the Roman Empire for practitioners in German in 1564,[184] distinguishes *Wucher* and its equivalent usury, which according to the Protestant interpretation is permitted rather extensively,[185] from 'unfair usury' (*vnbillichen wuocher*), which in his opinion is also prohibited.[186]

3.2.2 Pre-emption (*Fürkauf*)

For usury involving goods which did not have any specific designation in Latin (except for the hardly ever used term *dardanarii*), the German language had a number of words.[187] The first of these which is worthy of mention is *Aufkauf* ("buy up"), which refers to the purchasing of huge quantities in order to increase the price. In the municipal law of Steenwijk (before 1372) this term had already been associated in an economically correct manner with the concept of the *Monopoliaten* ("monopolists").[188] A more common term on the other hand is that of *Vorkauf* or *Fürkauf*. This means the purchase of goods before they were offered at the market for sale in order to control prices afterwards. The word *Fürkauf* appears for the first time in Middle High German sources, but is then translated back into the Latin language with paraphrases such as *praeemptio, anticipatio, promercator.*

Although the term *Fürkauf* was initially used for the phenomena of local price fluctuations, at the end of the 15th century it became caught up in the wake of the anti-monopoly campaigns which were increasingly directed against the large trading houses.

Still in the traditional context, but already in the meaning of its politically pejorative usage, the word *Fürkauf* is found in the *Reformatio Sigismundi*, an anonymous reform document that appeared anonymously at the beginning of the 15th century. The expression 'monopoly' is not used here; nevertheless, usury and pre-emption are mentioned in the same breath: for collecting the tithe, according to the proposal, one might appoint a reeve or commissioner

184 Justin Göbler, *Handbuch / Und außzug kayserlicher vnd Burgerlicher Rechten / In sechß vnterschiedliche Buecher etc.* (1st ed. Frankfurt am Main, 1564), here I used the 2nd ed., (Frankfurt am Main, 1566).

185 Göbler, *Handbuch*, 3, 7, 196–200 with the headline: *"Von der Vsur / wuocher vnd gewinn".*

186 Göbler, *Handbuch*, 3, 7, 199.

187 Evidence can be found in Crebert, *Künstliche Preissteigerung* (see above, n. 15), 14–23.

188 Crebert, *Künstliche Preissteigerung*, 15.

with a good reputation, especially without vices like adultery, pre-emption, usury, etc..[189] The same should apply for the selection of judges.[190]

At another point, the author classified usury, pre-emption and embezzlement as varieties of the sin of simony.[191] Some people speculated with the food prices and therefore committed sins not only involving the poor, but the whole world. Natural disasters and crop failures were God's punishment for such practices.[192] Whatever anyone ate from such a transaction could not be consumed naturally; it would have to make you ill. An order should therefore be issued to the effect that all *Fürkäufer* (pre-emptive usurers) who travelled throughout the land and towns buying and selling should stay at home. Anyone who cultivated grain or wine should take this to the towns without having to pay any duties.

A similar use of 'pre-emption' can be found in the so called *Oberrheinischen Revolutionär*, a reform paper finalised in 1510: The author compared *wuocherer, kremer, fur kouffer* ("usurers, hucksters, pre-emptors") with thieves:[193] a merchant who took more than the earned wage was a thief and equated a pre-emptor. That were those who did not want to sell in return for cash and lent the item for the doubled amount. This was usury and theft.[194] Strikingly, the author of the *Oberrheinische Revolutionär* does not mention the monopoly expression either.

However, the term is used differently only a few years later in the imperial recess of 1512. Now it is associated directly with the concept of wholesale monopoly and declares that the large companies dared to control all kinds of goods and commercial goods to pre-empt and to determine the prices for their own advantage and thereby harmed the Holy Empire and its territories.[195] For

189 *Reformatio Siegismundi*, Heinrich Koller (ed.), *Reformation Kaiser Siegmunds* (MGH Staatsschriften) 6 (Stuttgart 1964), 167; similar combinations can be found in further passages of the text, e.g. ibid., 354.

190 *Reformatio Siegismundi*, 294.

191 *Reformatio Siegismundi*, 67.

192 *Reformatio Siegismundi*, 314.

193 *Der Oberrheinische Revolutionär. Das Buchli der hundert Capiteln mit xxxx Statuten*, Klaus H. Lauterbach (ed.) (MGH Staatsschriften) 7 (Hannover: Hahnsche Buchhandlung, 2009), c.30, 202; also cf. ib., 484: *Die kleinen dieb, die henkt man, die grossen, als wuocherer, fur kouffer, kirchenrouber <nit>.*

194 *Oberrheinischer Revolutionär*, 485: *Ein kouffman, der mer dan verdienten lon nimpt, ist ein dieb vnd wirt gezelt glich eim fur kouffer. Das sindt die, die do nit weind vmb bar gelt kouffen vnd gebens dings vmb zwey gelt etc. Das ist wůcher vnd diebstal.*

195 Recess of the Imperial diet of Trier and Cologne, a.1512, § 16, in *Neue und vollständigere Sammlung der Reichs-Abschiede etc.*, 2nd part (Frankfurt, 1747), 144: (...) *allerley Waar und Kauffmanns-Güter* (...) *in ihre Händ und Gewalt allein zu bringen unterstehen, Fürkauff damit zu treiben, setzen und machen ihnen zum Vortheil solcher Güter den Wehrt ihres*

this reason, it had been decided to forbid "such harmful activities" in the future. The latter term is then paraphrased in the margin with the term "monopolies". The term *Fürkauf* here evidently takes up the practices of price manipulation referred to in Zeno's law and gives them a German name. However, this extends the concept of *Fürkauf* beyond its original meaning so that it loses its legal distinctiveness. Not for nothing is it found as a political rallying cry almost ubiquitously in the environment of the monopoly debates.

3.2.3 Monopoly

Unlike the case of usury and pre-emption, the Greek/Roman loanword 'monopoly' prevailed in the German language over other neologisms (such as the word *Einzigkauf* subsequently found in Pufendorf).[196] The German Law Dictionary (*Deutsches Rechtswörterbuch*) records the first entry for Flanders in 1476.[197] In the discussions on the commercial companies, it became the key concept of political debate. It is however questionable as to what this meant for its legal use.

For a key figure of the monopoly debate, the Augsburg lawyer Konrad Peutinger (1465–1547), Uta Goerlitz has recently analysed these relationships in detail.[198] She was able to convincingly show how much Peutinger's use of the key term *monopolium* was dependent on the recipient within the context of the extensive political monopoly debates of the 1520s: in his Latin expertise, which was aimed at a scholarly audience, he devoted himself above all else to economic and legal-ethical questions and emphasised how important the profession of merchant was. When he drew up a report in the German language on behalf of the Augsburg Council in 1522 for the Council of Regency, in which he

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Gefallens, fügen damit dem H. Reich und allen Ständen desselbigen mercklichen Schaden zu (…).

196 Samuel von Pufendorff, *Acht Buecher / Vom Natur- und Voelcker-Rechte etc.*, (Frankfurt/Main, 1711) vol. 2, v, 5, 7, 101.

197 *Marie de Bourgogne, Privillegen gheconsenteert den lande van Vlaenderen*, a.1476, ed. Octave Delepierre, 45–71, here: 58. Further references in: "Monopol", in DRW (see above, n. 96), vol. 9, col. 849f.

198 Uta Goerlitz, "Philologie und Jurisprudenz. Sprachendifferenzierung und Argumentationsstrategie bei dem Augsburger Humanisten Konrad Peutinger (1465–1547)" in Enno Bünz (ed.) *Medizin, Jurisprudenz und Humanismus in Nürnberg um 1500. Akten der gemeinsam mit dem Verein für Geschichte der Stadt Nürnberg, dem Stadtarchiv Nürnberg und dem Bildungszentrum der Stadt Nürnberg am 10./11. November 2006 und 7./8. November 2008 in Nürnberg veranstalteten Symposien.* (Pirckheimer Jahrbuch zur Renaissance- und Humanismusforschung) 24 (Wiesbaden: Harrassowitz, 2010), 369–398.

went into the planned anti-monopoly legislation,[199] he consciously attempted to avoid a legal definition of the term monopoly. He even admitted that this was a word which the scholars must understand; it is not in our understanding.[200] This ban should be renewed and even extended to include further unfair practices – but this ban had nothing to do with the Augsburg commercial activities.

It is understandable that the smokescreen tactics behind this argumentation aroused suspicion amongst his readers, above all on the Augsburg City Council. Peutinger was therefore explicitly asked to explain the legal situation in greater detail in German. The result was a further expert report, the so-called "Legal information on the monopoly concept" (*Rechtsauskunft über den Monopolbegriff*) of 1522/23.[201] Here too, Peutinger very cleverly conceals the explosive power of the monopoly law: with the help of a philologically underpinned analysis of the Greek terms used in the legal text he attempts to show that Zeno's law only referred to the trade in essential goods, but not to high-quality 'spices', as traded by the great merchants of the 16th century. As Bernd Mertens has convincingly shown, this interpretation can barely be reconciled with the wording of the law, which forbade monopolies of all kinds.[202]

If one reads the official comments of contemporary lawyers such as Sichard or even specialists such as Peutinger on the concept of the monopoly, it is conspicuous that they only resort in a very loose manner to the traditional sources. As explained, the comments on the concept of the monopoly were rather few and far between, even in the Middle Ages. For Peutinger and his colleagues this gave rise to the paradoxical situation that it was difficult for them to find a legally precise definition of a legal term (if they wanted to), even though this was a political battle cry that was on everyone's lips. It is striking that the practical legal literature of the early Modern Age also treated the monopoly problem with similar neglect to the mediaeval legisprudence. There is no identifiable uniform language or even classification, and the interest of the lawyers in this

199 "Antwort des Augsburger Rates an das Regiment zu Nürnberg auf die ihm zur Beratung übersandten drei Fragen die Monopolien betreffend", (November, 1522) in *Deutsche Reichstagsakten unter Kaiser Karl v. Dritter Band*, Adolf Wrede (ed.), (Gotha 1901), no.103, 561–571.

200 Antwort des Augsburger Rates, 570: [*ein Wort,*] *das die gelerten versteen mußten; ist in unserm verstand nit.*

201 The text is edited in: Bauer, Clemens, "Conrad Peutingers Gutachten zur Monopolfrage. Eine Untersuchung zur Wandlung der Wirtschaftsanschauungen im Zeitalter der Reformation. 1. Teil", *Archiv für Reformationsgeschichte* 45 (1954), 1–43, here: 7–14.

202 Mertens, *Kampf* (see above, n. 9), 60–63.

topic did not grow, at least in the short or medium term, as a result of their everyday activities. Such a prominent representative of jurisprudence as Ulrich Zasius made no reference whatsoever to the monopoly in his quite remarkable work.[203]

4 Outlook and Conclusion

Overall, in the field of jurisprudence, the monopoly was also treated with a similar amount of neglect in the second half of the 16th century as it was in the Middle Ages. In the *Tractatus Universi Iuris*, the monumental collection of canonical tracts compiled under Pope Gregory XIII in 1584–86, there are only four entries under the heading of *monopolium.*[204]

Virginio de Boccacci de Cingulo, an Italian lawyer who died in 1596, briefly mentions the criminal liability of the monopolist: those who conspired or distributed money in such ways that a money monopoly was created had to be punished under Roman monopoly law, since this crime did not only generate private harm, but also turned against public liberty and therefore was not to be tolerated.[205] Also, all the statutes of *collegia,* which stated that only citizens of a specific city or a specific territory could be members of the collegium, were prohibited as monopolies.[206]

Franciscus Lucanus, a lawyer from Parma in the second half of the 15th century, mentions another example of a forbidden monopoly: in his treatise *de privilegio fisci* he condemned the despicable custum (*consuetudines pessima*) of some doctors, who denied treating certain patients for the reason that another doctor had already cared for them.[207]

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203 I searched the register of Zasius' complete edition (which indeed is not complete): Ulrich Zasius, *Opera*, 6 vols. (Lyon 1550, repr. Aalen 1966).

204 Included are: Baldus de Ubaldis, "De statutis", in *Tractatus Universi Iuris* (*i.F.: TUI*), Francisco Ziletti (ed.), 25 vols. (1st ed. Venice, 1584–1586), vol. 2, fols. 86r-154v, here: fol. 148v, n.24, as well as the below mentioned three writings of Konrad Braun, Virginio de Boccacci de Cingulo and Franciscus Lucanus.

205 Virginio de Boccacci, "De interdicto vti poßidetis, Siue de manutentione in posseßione", n.183, in *TUI*, vol. 3/2, fol. 317r: *est enim monopolium, non solum priuatorum damnum, sed communis liberatatis offensium, & ideo non est tolerandum*.

206 De Boccacci, "De interdicto", n.185. The author cites as a reference the expert opinion of Baldus and some special literature on criminal law.

207 Franciscus Lucanus, "De priuilegio Fisci", n.5, in: *TUI*, vol. 12, fol. 10r: *…quod summe notandum est contra medicos, quorum consuetudines pessimae sunt, vt recuset medicus illi mederi, quem alter in manibus habuerit ad sanandum*.

Finally, Konrad Braun (ca. 1495–1563), a German controversial theologian, established a connection between 'usury' and 'sedition' in his treatise *de haereticis:*[208] Illegal agreements of certain market participants could raise the suspicion of conspiracy and therefore their initiators were standing close to the heretics and schismatics.[209]

In the teaching of natural law in the 17th century, there is no fundamental rejection of the monopoly. Even though modern economic history raises reasonable doubt regarding a too general alleged dominance of mercantile economic systems,[210] at least contemporary jurists showed no fundamental anti-monopolistic opposition based on the rules of Roman or Canon Law. If Zeno's law explicitly forbade imperial exceptions of the ban on price agreements, this was *de facto* ignored. Jacques Cujas (1522–1590) saw this and tried to handle the problem with a redefinition of monopoly: first, in his comment on C. 4.59.2 he defined the monopoly, with reference to Strabo's description of ancient Alexandrian state monopolies,[211] as the right of a single or certain people to sell specific goods with the approval of the prince and by paying taxes.[212] This definition may have corresponded to 16th century French practice; nevertheless, it was diametrically opposed to the monopoly ban of emperor Zeno – the law Cujas was commenting on at this point. Cujas seemed to have accepted this contradiction, as he did not try any further to resolve it.[213]

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208 Conradus Brunus, "De haereticis et schismaticis", in *TUI*, vol. 11/2, fols. 271r-333r, here: fol. 328r, n.7.

209 With regard to Konrad Braun, who dealt intensively with the legal aspects of riots, see: David von Mayenburg, "'Ubi est incolumitas obedientiae, ibi est sana forma doctrinae' – Aufruhr und Revolte im kanonischen Recht", in Orazio Condorelli, Franck Roumy and Mathias Schmoeckel (eds.), *Der Einfluss der Kanonistik auf die europäische Rechtskultur*, Öffentliches Recht, (Norm und Struktur) 37:2 (Cologne/Weimar/Vienna: Böhlau, 2009), 217–266; for further sources see: "Monopol", in DRW (see above, n.96), vol. 9, col. 859, under Section III.

210 This highly controversial problem can not be taken up in all its facets here. Details can be found in: Moritz Isenmann (ed.), *Merkantilismus. Wiederaufnahme einer Debatte* (Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte. Beihefte) 228 (Stuttgart: Franz Steiner Verlag, 2014).

211 Cujas refers to: Strabo, *Geographika* 17, 1, 799 c, here quoted from the German translation: *Strabons Geographika*, Stephan Radt (ed.), 10 vols., (Göttingen: Vandenhoeck & Ruprecht, 2002–2011), 4:441: *... und für auswärtige Waren ist auch der Zoll hoch* (*die Stadt besitzt ja außerdem auch noch Monopole; denn Alexandrien ist im großen Ganzen der einzige Ort, der solcherlei Waren sowohl aufnimmt als nach außerhalb liefert*).

212 Jacques Cujas, on C. 4.59, ed.: *Iacobi Cuiacii Opera in Tomis XI Distributa, Auctiora Atque Emendatiora, Pars Prior, Tomus Secundus* (Venice, 1758), col. 262: *Et est monopolium vendendæ certæ mercis jus quod unus certive homines sibi vindicant permissu principis sub onere vectigalis*.

213 Cujas, on C. 4.59, col. 262: *Id vero omnimodo improbat Constitutio hujus Tituli* (...).

Hugo Grotius (1583–1645) in *de jure belli ac pacis* (1625) evaluated the monopoly issue under the aspects of natural law and highlighted that natural law did not prohibit all monopolies. They could be justified as the means of the authorities to stabilise prices and indeed for this reason had been allowed again and again since antiquity. Even between private parties, natural law did not generally prohibit to establish monopolies. Grotius regarded pre-emption as allowed, as long as the resale price was reasonable. Apart from that, although speculative behaviour violated the Christian law of love, it did not impinge upon someone's individual rights.[214]

The German legal literature adopted this opinion and developed it further: Heinrich Hahn (1605–1668) analysed four types of monopolies, namely (1) state privileged monopolies, which, along with the prevailing opinion, he considered as permissible as long as they were established due to a reasonable cause and in order to stabilise the prices, (2) conspiracies of private buyers or sellers with the aim to manipulate prices, which he refused based on C. 4.59.2, (3) pre-emption with grains at times of a market, which also was prohibited according to the monopoly law, and (4) the case that someone, in order to sell his goods expensively, is preventing someone else from bringing his goods to the same place. This behaviour was regarded as a violation of justice and mercy, especially if it was accompanied by deception or violence.[215]

It almost seems ironic that the church truly discovered and incriminated the issue of monopolies only at a time when its influence on economic policy was already very much in decline: a provincial synod held in in Salzburg 1569 repeated the ban on food speculation, but then raised the question of why Zeno's law, which addressed everybody, should not *a fortiori* be obeyed by clerics. As an expression of greed, the establishment of monopolies was declared a form of usury and the synod commanded to excommunicate such churchmen.[216] A synod in Besançon in 1571 demanded from merchants was allowed to buy

214 Hugo Grotius, *De Ivre Belli Ac Pacis Libri Tres*, Paris 1525, 2, 12, 16, 285: *Monopolia non omnia cum iure natura pugnant. nam possunt interdum à summa potestate permitti iusta de causa & pretio constituto. Possunt et a privatis institui, æquo duntaxat compendio… At qui, vt in Velabro olearij, de compacto id agunt, vt res supra pretium id quod summum nunc est in communi pretio, vendantur, aut vi, aut fraude impendiunt, ne maior copia importetur, aut ideo merces coemunt vt vendant pretio quod tempore venditionis iniquum sit, iniuriam faciunt, atque eam reparare tenentur. Quod si alio modo impediunt inuectionem mercium, aut ideo coemunt vt pluris vendant, pretio tamen pro temporis ratione non iniquo, faciunt quidem aduersus caritatis normam, quod multis euincit Ambrosius librum officiorum tertio, sed propriè ius alterius non violant.*

215 See: Heinrich Hahn, *observata theoretico-practica ad Matthæi Wesenbecii in L. libros Digestorum Commentaria*, tit.7, (Cologne, 1675), 1:415–416.

216 Synod of Salzburg, a. 1569, const. 27 c.7, Johann Friedrich Schannat and Joseph Hartzheim (eds.), *Concilia Germaniae*, 11 vols. (1759–90), 7:301; cf. ibid., c.8: *Cum enim Lege Imperiali,*

goods more cheaply than they sold them, but only if this practice served their personal needs or the support of the poor and if they avoided monopolies.[217] A provincial synod held in Brixen in 1603 declared all monopolies which were harmful to common welfare as rejected and condemned.[218]

In the 17th and 18th centuries the interest in the monopoly problem increased overall. Numerous dissertations and treatises dealt not only with Roman law, but with the increasing numbers of laws passed by sovereigns to control economic life. However, an analysis of these documents goes beyond the scope of this paper.[219]

The following conclusions can be drawn from the above:

1. Even during antiquity there was no useful general term for describing economic malpractice. While under Roman law there were measures to combat usury involving goods, and these had been familiar under the term 'monopolium' since late antiquity, usury involving interest was the domain of canon law, which it combated under the term 'usura'.
2. Monopoly law as a ban by the Church on interest provided for Draconian penalties in the case of infringements, but fought until the early Modern Age against their circumvention and non-compliance. While the anti-monopoly law tended to describe its facts more objectively, the interest policy of the Church remained close to the concept of characterological and individual culpability.

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etiam inter Laicos Monopolia, privatione bonorum, & perpetui exilii pœna sint damnata; quis ea feret inter Ecclesiasticas personas? (…).

217 Synod of Besançon, a. 1571, Schannat and Hartzheim (eds.), *Concilia Germaniae* (see above, n. 216), 8:103: *Potest tamen mercator propter utilitatem communem, & ad finem honestum* (*puta ad sustentationem domus suæ, vel pauperum*) *suam artem exercere, & tanquam pro stipendio laboris, vilius emere, & carius vendere; dummodo vitet monopolia* (…).

218 Synod of Brixen, a. 1603, tit. de usuris, c. 9, Schannat and Hartzheim (eds.), *Concilia Germaniae* (see above, n. 216), 8:579: *Omnia monopolia, quæ authoritate privata fiunt, aut in manifestum damnum Reipublicae conceduntur, rejicimus & damnamus*. Similar: Synod of Konstanz, a. 1609, tit. 18, c.9, ibid. 906.

219 A selection of 17th century dissertations (in chronological order): Johannes Thomae, *Disputatio Iuridica De Monopoliis* (Jena, 1650); Ahasver Fritsch, *Commentatio Synoptica ad Nobilissimam Legem Unicam Cod. De Monopoliis* (Jena, 1659); Georg Werner, *Dissertatio Iuridica De Monopoliis* (Helmstedt, 1664); Friedrich Gerdes, *Disputatio Inauguralis De Monopoliis* (Greifswald, 1671); Gottfried Stösser, *Dissertatio Iuridica Ad L. unic. C. De Monopoliis, Oder Von dem eintzig Kauff und Verkauff* (Straßburg, 1672); Michael Friedrich Lederer, *De Monopoliis & Occasione hac ad L. Unic. Cod. eod. Tit.* (Wittenberg, 1672); Wilhelm Peter Devens, *Disputatio Iuridica Inauguralis, Theorico-Practica De Monopoliis* (Duisburg, 1683); Nikolaus Thilenius, *issertatio Iuridica. In Pragmaticam Imp. Rom. German. Sanctionem, De Monopoliis* (Gießen, 1686); Jakob Burkhard, *Disputatio Iuridica De Monopoliis* (Basel, 1700); Johann Friedemann Schneider, *Princeps Monopola, h.e. De Praecipuis Regum Europaeorum Et Electorum Secularium Monopoliis*, (Halle) p. 1700.

3. With the *turpe lucrum,* the Church created a general term that was useful to a certain extent and which also helped to categorise phenomena, such as usury involving goods in addition to that involving interest. However, the possibilities created here were not consolidated legally because the term usura was expanded to other forms of economic misconduct.
4. Zeno's monopoly law eked out a shadowy existence in the Middle Ages and the early Modern Age. This was partly due to the fact that it could scarcely be enforced in a world of privileges and monopolies. By restricting its application in the decretalists to such cases in which no customs or privileges existed, the Church specifically took away the impact of this law, making it even more ineffective.
5. In the politically heated atmosphere of the early 16th century, the terms usury, monopoly and pre-emption became political battle cries. However, this did not result in the case of monopoly law in particular in lawyers taking any greater interest in them. On the contrary, even specialists display a lack of interest and information. Linguistic transfer processes also contributed not least to the disintegration of the terms, for example by equating *Wucher* and *usura*.

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CHAPTER 10

Transfer of Credit, Mercantile Mobility, and Language among Jewish Merchants in Seventeenth and Eighteenth Century Central and East Central Europe

Cornelia Aust

Jewish merchants – Sephardim and Ashkenazim –were closely integrated into the commercial world of seventeenth- and eighteenth-century Europe and beyond. Even though studies of Jewish commercial networks in early modern Europe have shown that Jews indeed operated in more (Ashkenazim) or less (Sephardim) close-knit networks,[1] they were an integral part of the general world of early modern commerce and used the same financial instruments as their non-Jewish counterparts. Among those financial instruments, bills of exchange belonged to the most important means of facilitating early modern trade across geographic, political and cultural boundaries.

This article demonstrates how closely Jewish merchants were integrated into the financial system of eighteenth-century central and east central Europe; through their usage of bills of exchange. This article traces the usage and the related internal Jewish regulations regarding bills of exchange, including the very similar financial instrument of the *membrana* in Polish or *mamran* in Hebrew, which had developed in late medieval and early modern east central Europe. I seek to answer the question of how Jewish merchants used this financial instrument as a particularly mobile group and how Jews integrated it into their own legal and social framework. Moreover, I would like to argue that different commercial frameworks – commerce among Jewish merchants, between Jews and non-Jews and between eastern and western Europe – intersected on multiple levels, with special regard to law and language. Following some general considerations regarding the development of bills of exchange and the

1 See for example: Jessica V. Roitman, *The Same but Different? Inter-Cultural Trade and the Sephardim 1595–1640* (Leiden: Brill, 2011); Francesca Trivellato, *The Familiarity of Strangers: The Sephardic Diaspora, Livorno, and Cross-Cultural Trade in the Early Modern Period* (New Haven, CT: Yale University Press, 2009); Cornelia Aust, "Between Amsterdam and Warsaw. Commercial Networks of the Ashkenazic Mercantile Elite in Central Europe," *Jewish History* 27:1 (2013), 41–71.

Jewish legal discussion about them, the article turns to the regulations put down in Jewish communities in central and east central Europe. It discusses the Jewish usage of this financial instrument as well as more generally the usage of non-Jewish commercial institutions, like courts, by Jewish merchants. Eventually, it turns to the question of language and examines how and when Jewish merchants used Hebrew or Yiddish in their business.

1 Forms of Debt Bills

Bills of exchange had existed since the Middle Ages, they sometimes had developed out of notarized exchange contracts especially in Italian cities and in southern France. They were used to transfer funds across short or long distances. By the end of the thirteenth century, they could already be circulated without a notary's seal.[2] Those classic bills of exchange always involved four individuals, two merchants in one place and two agents in another location. They were able to safely transfer payments without shipping coins and to provide short-term credit. The merchant, "who wished to transfer funds abroad to one of his agents […] would lend money to another principle in his city and receive a bill of exchange in a foreign currency in return." This bill would be addressed to an agent of the latter merchant in the foreign city and advise him to pay a specific sum to the person to whom the first merchant wished to transfer funds.[3] With the introduction and eventually general acceptance of the endorsement, bills of exchange became more suitable for long-distance trade and the provision of credit in the early modern period. Now, one merchant could issue a bill of exchange to the payee and name the payer, usually in a different place. Instead of having to redeem the bill of exchange via a specific agent at the second place, the payee could transfer the bill of exchange to another merchant and, thus, endorse it. This new instrument of the endorsement replaced the need for the second agent.

Endorsing the back of a bill of exchange allowed for its transfer from one merchant to the next before the bill was due. After considerable resistance, the endorsement was slowly accepted in central Europe from the mid-seventeenth century onward. Leipzig allowed its usage in 1682; Danzig (Gdańsk), one of the most important commercial cities on the Baltic Sea, ratified its practice only in

2 Raymond de Roover, L'evolution de la lettre de change XIV^{e}–XVIII^{e} siècles (Paris: Librairie Armand Colin, 1953), 25–40.

3 Francesca Trivellato, "Credit, Honor, and the Early Modern French Legend of the Jewish Invention of Bills of Exchange," *Journal of Modern History* 84 (2012), 289–334, here 294.

1701, even if tacitly merchants in central Europe had already been using it for many decades. The endorsement allowed a bill of exchange to circulate beyond its initial signatories, providing greater flexibility in commerce and the provision of credit. As there were no international courts that could enforce debts against foreign agents, bills of exchange proved the most effective means of transferring funds or loans abroad. Moreover, the flow of bills of exchange contributed to the establishment of international currency exchange rates, as they determined the demand for national or territorial currencies.[4]

From the mid-seventeenth century onward, the endorsement came into usage in central and east central Europe, thus later than in western Europe. There it emerged in the late fourteenth century, but was common in the early seventeenth century. Similarly, specific exchange regulations and the quotation of exchange rates were introduced in central and east central Europe likewise about a century later than in western Europe. Depending on the geographic location, codifying regulations regarding exchange law became an urgent necessity. Often these regulations had already been part of city or fair regulations. By the seventeenth century, however, commercial centers in central Europe had begun to introduce particular municipal exchange regulations. As in the case of the endorsement, there was a clear time lag between cities in the west and cities further east. Thus, Frankfurt am Main introduced an exchange regulation in 1578, Hamburg in 1601, and Nuremberg in 1621, whereas cities further east followed more than half a century later: Riga in 1671, Breslau in 1672, and Leipzig in 1682. Only in the eighteenth century were exchange regulations introduced into general state laws: in Prussia, this happened in 1724 and in Russia in 1729.[5] Other innovations in commercial law followed.

The joint liability rule, another financial instrument that was fully developed by the eighteenth century, was of even greater importance. With long

4 Jürgen Schneider, "Messen, Banken und Börsen (15.-18. Jahrhundert)," *Banchi pubblici, banchi privati e monti di pietà nell'Europa preindustriale* 31:1 (1990), 135–169, esp. 150–151; Isabel Schnabel and Hyun Song Shin, "Liquidity and Contagion: The Crisis of 1763," *Journal of the European Economic Association* 2:6 (2004), 929–968, here 934. Still the most concise history of bills of exchange: de Roover, *L'evolution de la lettre de change*, 82–84, 119–122, 140. See also: Kurt von Pannwitz, *Die Entstehung der Allgemeinen Deutschen Wechselordnung. Ein Beitrag zur Geschichte der Vereinheitlichung des deutschen Zivilrechts im 19. Jahrhundert* (Frankfurt am Main: Peter Lang, 1999), 31–32, 263–275. For Leipzig: Robert Beachy, *The Soul of Commerce: Credit, Property, and Politics in Leipzig, 1750–1840* (Leiden/ Boston: Brill, 2005), 36.

5 Schneider, "Messen, Banken und Börsen," 146, 168. See also Carl Günther Ludovici, *Grundriß eines vollständigen Kaufmanns-Systems, nebst den Anfangsgründen der Handlungswissenschaft, und angehängter kurzen Geschichte der Handlung zu Wasser und zu Lande. Zweyte vermehrte und verbesserte Auflage* (Leipzig: Bernhard Christoph Breitkopf und Sohn, 1768), column 1790.

chains of transmission and long distances between the issuer and the payer of a bill, the former had to be sure that the latter would honor his bills of exchange. The joint liability rule added an additional incentive to discipline the payer. It ensured that in a case of default, all endorsers as well as the issuer and payer "could be held liable for the full amount of the bill."[6] Once a payer refused to honor a bill of exchange and a notary's office recorded a protest, the holder of the bill of exchange could demand payment from any endorser or from the issuer by drawing a re-exchange bill or by suing. Whoever received a demand of payment could turn to another endorser with the same claim. Moreover, when a protest was issued, copies of it had to be distributed to all endorsers and to the issuer, thereby endangering the reputation of a defaulted payer. Veronica Aoki Santarosa has shown that the joint liability rule "put in place a formal mechanism that linked otherwise distinct personal networks" in eighteenth-century France.[7]

Bills of exchange, called *lettre de change* in French, *Wechsel* or *Wechselbrief* in German, and *wissel* or *wisselbrief* in Dutch spread across Europe (and beyond) over time and by the eighteenth century were the most important means of payment and of raising credit in long-distance trade. Nevertheless, the institutional conditions to facilitate commerce varied greatly throughout Europe, between commercial cities in the Mediterranean or Amsterdam and London in the west, central European cities in the Holy Roman Empire, and commercial centers in east central and eastern Europe.[8] Looking eastwards, the limitations of formal commercial and legal institutions within Europe remained enormous. Until the mid-eighteenth century, for example, bills of exchange issued in St. Petersburg could only be drawn in Amsterdam. Institutionally, Amsterdam housed more than one hundred notarial offices by the mid-eighteenth century, which among other things registered protests of bills of exchange. In comparison, the first eight notarial offices in Warsaw opened only in 1808 after Napoleon had established the Duchy of Warsaw. The rulers of the Polish-Lithuanian Commonwealth had not introduced any specific exchange

6 Veronica Aoki Santarosa, "Financing Long-Distance Trade: The Joint Liability Rule and Bills of Exchange in Eighteenth-Century France," *The Journal of Economic History* 75:3 (2015), 690–719, 693. On the introduction of the joint liability rule, see Herman van der Wee, "Monetary, Credit, and Banking Systems," in M.M. Postan and H.J. Habakkuk (eds.), *The Cambridge Economic History of Europe* (Cambridge: Cambridge University Press, 1977), 291–392, esp. 325–327. See also Schnabel and Shin, "Liquidity and Contagion," 338–339.

7 Santarosa, "Financing Long-Distance Trade," 716.

8 On the importance of institutions and the distinction between informal and formal institutions, see Douglass Cecil North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990), 4, 46–47.

regulations in the country or in its larger commercial cities. This lag in trade regulations is probably the key reason why most payments by east European (Jewish) merchants in Frankfurt an der Oder or Leipzig were made in cash. Bills of exchange issued in eastern Europe usually were directly drawn on west European banking houses in Amsterdam or Hamburg, and in a few cases, in Breslau.[9] A lack of suitable legal institutions prevented the enforcement of payments of bills of exchange in eighteenth-century eastern Europe. It was paired with a deep mistrust that many merchants had of Polish legal institutions in the second half of the eighteenth century.[10]

Nevertheless, parallel to the bill of exchange a similar financial instrument had developed out of traditional bearer notes in east central Europe during the late Middle Ages. Already in fourteenth-century Poland, the term *membrane*– derived from the Latin word for parchment– was used to denote some document associated with blank writing or a general bill of indebtedness.[11] From there, a specific debt bill developed, which Jews and non-Jews alike employed to raise credit and facilitate commerce; this new financial instrument, which was often issued in Latin or Polish but sometimes also in Hebrew "displayed distinct commercial and legal advances over [medieval] bearer notes."[12] Compared to a promissory note (*shetar ḥov* in Hebrew) it provided the same security, but was much easier to transfer. The document could be circulated by leaving the name of the creditor on the back of the bill blank and could also be discounted for fast cash. Though somewhat comparable to an endorsement, the much less developed framework of legal institutions and the lack of a legal

9 Markus A. Denzel (ed.), *Geld- und Wechselkurse der deutschen Messeplätze Leipzig und Braunschweig (18. Jahrhundert bis 1823)* (Stuttgart: Steiner, 1994), 5, 13–16; Markus A. Denzel, "Zahlungsverkehr auf den Leipziger Messen vom 17. bis zum 19. Jahrhundert," in Hartmut Zwahr, Thomas Topfstedt, and Günter Bentele (eds.), *Leipzigs Messen 1497–1997. Gestaltwandel – Umbrüche – Neubeginn. Teilband 1: 1497–1914* (Cologne: Böhlau Verlag, 1999), 149–165, esp. 152, 156–162.

10 Cornelia Aust, *The Jewish Economic Elite. Making Modern Europe* (Bloomington: Indiana University Press, 2018), 9–10.

11 Józef von Lekszycki, *Die ältesten großpolnischen Grodbücher, vol. 1: Posen 1386–1399* (Osnabrück: Zeller 1965 [reprint of Leipzig 1887]), 263. See also: "Membrana," in *Słownik Staropolski vol. 4*, (Krakow: Polska Akademia Nauk, 1963–1965), 181.

12 Edward Fram, *Ideals Face Reality: Jewish Law and Life in Poland, 1550–1655* (Cincinnati: Hebrew Union College Press, 1997), 132. For the classic article on the *mamran* see: Philipp Bloch, "Der Mamran (ממרן), der jüdisch-polnische Wechselbrief," in A. Freimann and M. Hildesheimer (eds.), *Festschrift zum siebzigsten Geburtstage A. Berliner's* (Frankfurt am Main: J. Kauffmann, 1903), 50–63.

instrument comparable to the joint liability rule confined the geographic reach of the *membrana*, which ceased to exist by the early nineteenth century.[13]

Called *mamran* (pl.: *mamranoth*) in Hebrew, it assumed the following form, which Rabbi Mordecai Jaffe described during the late sixteenth century as follows:

> The debtor signs on one side of the paper and on the reverse side directly opposite the signature he writes, in the presence of the debtor, the sum of money and the due date. The side with the signature is left blank to permit the creditor to insert the Trust Clause (preventing the debtor from challenging the validity of the document) and the type of currency to be used as well as other details which benefit the creditor. The terms are incontestable on the theory that if the debtor trusted the creditor with the blank paper the court will not question what is thereafter written. There is one exception, however, that is where on the reverse side one sum of indebtedness is stated and then an additional sum is added after the date of repayment. This is presumptively added by the creditor without the debtor's knowledge.[14]

From the descriptions, we have from the sixteenth century, as well as later; we can see that the *mamran* must have been clearly distinguishable from a bill of exchange. On the latter we find the debtor, the payee and the payer as well as all other relevant information such as due date, place of issue, and the outstanding debt on the front of the bill of exchange, while the back was reserved for the endorsement (from Italian *in dorso*, "on the back") once it had been introduced.[15] It seems that the *mamran* could be circulated by leaving the name of the creditor on the back of the bill blank, but without an endorsement, it could not be circulated as widely as bills of exchange. Before coming back to the usage of bills of exchange and *mamranoth* by Jewish merchants in eighteenth-century central and east central Europe, I will briefly discuss the usage of this financial instrument and the related halakhic discussions in early modern Europe.

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13 Bloch, "Der Mamran," 61–62.

14 Quoted from: Abraham M. Fuss, "The Eastern European Shetar Mamran Re-examined," in *Dine Israel* 4 (1973), 51–67, esp. 55–56.

15 Bloch provides copies of three *mamranoth* from the second half of the eighteenth century from Posen (Poznań) which show that the debtor's name appears on one side of the *mamran*, all other information but not the name of the creditor on the opposite side. Bloch, "Der Mamran," 62–63.

2 Credit, Debt, and Charging Interest

As merchants, moneylenders, and pawnbrokers, though these were only some of the economic fields Jews were active in,[16] Jews from the Middle Ages onward were regularly confronted with questions of charging interest or of debtor creditor relationships. Though they were active in commerce and finance, they did not invent bills of exchange as – in particular French – early modern authors of commercial handbooks (*ars mercatoria*) have claimed.[17] Jews' economic activities, however, spurred continuous halakhic discussions surrounding the permissibility of debt bills and the ways in which debtors could and should satisfy their creditors. Since Jewish business was not endogamous, the rabbinical authorities of the Middle Ages were already having to deal with those questions and recognized "that commercial relationships between Jew and Gentile would have to be pragmatically treated."[18]

During the Late Middle Ages, when at least in some European regions Jews moved increasingly into pawnbroking, the transference of debts via pledges was one of the main issues of halakhic debate. With the development of bills of exchange, this financial instrument and its transferability became a major issue of debate for early modern rabbinical authorities. "The easy transfer of such bearer notes, that is, promissory notes payable to the bearer rather than an individual specifically named on the note" spread in the Netherlands in the second half of the sixteenth century, and first in France and then in the German speaking lands in the seventeenth century. In Poland, bearer notes were in use since the fourteenth century, but their owners still needed proof of having purchased the note or possessing a power of attorney.[19]

16 For a thorough revision of assumptions about Jewish economic activities in the Middle Ages see: Michael Toch, *The Economic History of European Jews: Late Antiquity and Early Middle Ages* (Leiden/ Boston: Brill, 2013).

17 Trivellato, "Credit, Honor, and the Early Modern French Legend of the Jewish Invention of Bills of Exchange," 293. The legend evolved by the mid-seventeenth century in a compilation of commercial laws annotated by the Bordeaux lawyer Étienne Cleirac and claimed that Jews, when expelled from France in the Middle Ages, invented bills of exchange and insurance policies to salvage their goods. The legend was canonized in Jacques Savary's *Le parfait négociant*, though for example German authors of *ars mercatoria* often doubted or right away rejected the legend. See for example: Paul Jacob Marperger, *Beschreibung der Banqven* (Halle/ Leipzig: Felix du Serre, 1717), 4; Ludovici, *Grundriß eines vollständigen Kaufmanns-Systems*, 384.

18 Haym Soloveitchik, "Pawnbroking: A Study in Ribbit and of the Halakhah in Exile," *Proceedings of the American Academy for Jewish Research 38/39* (1970–1971), 203–268, esp. 215.

19 Fram, *Ideals Face Reality*, 131.

No matter which instrument of credit Jews used, theoretically, the usage of debt bills was problematic on many accounts including the prohibition of charging interest to other Jews. However, in western Europe rabbinic authorities had somewhat relaxed their ban on lending interest between Jews by the seventeenth century as Jewish merchants frequently used bills of exchange when trading with each other. A Venetian rabbi, Simone Luzzatto, best known for his 1638 "Discourse on the Jews of Venice," a defense of Jewish commerce and the importance of trade in general, fully approved the handling of bills of exchange in all of their forms.[20] Similarly, in the Polish-Lithuanian Commonwealth the *membrana* or *mamran* was used so widely, that the rabbinic establishment did not possess much power against it. Though eastern European rabbis were less inclined to relax the ban, they developed a legally acceptable way to circumvent the prohibition.[21]

The rabbis' concern was, however, less with the provision of credit than with the rule that borrower, lender, and transferee had to be present for transferring debts or that they had to use a power of attorney, conditions not fulfilled when handling *mamranoth* or bills of exchange. Moreover, the possibility of leaving the second side of a *mamran* blank and filling in the payable amount later in order to add additional costs was halakhicly problematic.[22] Rabbinic authorities in eastern Europe thus were unsure whether to treat the *mamran* as an "ordinary bill of indebtedness" or as a "totally new type of bill of indebtedness requiring different rules."[23] Eventually, however, it seems that Jews used those bills of indebtedness without any doubt of their permissibility. Rabbis were not asked for Responsa (religious rulings) concerning the acceptability of *mamranoth*, but rather specific questions concerning their use were put to them. Although they were eager to determine whether a *mamran* actually constituted a halakhicly valid document, this had only limited relevance for day-to-day business dealings.[24] Although Jews were bound by Jewish law in all

20 Benjamin Arbel, "Jews, the Rise of Capitalism and Cambio: Commercial Credit and Maritime Insurance in the Early Modern Mediterranean World [Hebrew]," *Zion* 69:2 (2004), 157–202, here 190–191. On the *Discourse* see: Jonathan Karp, *The Politics of Jewish Commerce: Economic Thought and Emancipation in Europe, 1638 -1848* (Cambridge/ New York: Cambridge University Press, 2008), 21–27.

21 Fram, *Ideals Face Reality*, 133–134; Trivellato, "Credit, Honor, and the Early Modern French Legend of the Jewish Invention of Bills of Exchange," 301.

22 Fram, *Ideals Face Reality*, 133–134, 137.

23 Fuss, "The Eastern European Shetar Mamran Re-Examined," 61.

24 For details on the halakhic discussions, see: Fram, *Ideals Face Reality*, 135–137.

areas of life, they "at times neglected a strict observance of commercial law" during the seventeenth and eighteenth centuries.[25]

Not only were both financial instruments, the bill of exchange and the *membrana*/*mamran* common and widely established by the late sixteenth and early seventeenth centuries, rabbis also began to lose part of their authority to the lay leadership of the Jewish community, which mostly consisted of members of a small strata of wealthy and successful merchants. This development was based in the emergence and growth of relatively powerful Jewish communal organizations across Europe, though they proved to be stronger and much more complex in the Polish-Lithuanian Commonwealth than in the German speaking lands.[26] Rabbis were sometimes bound to the communal leadership by contract and often acted in agreement with the communal leadership. Over time, it seems that communal ordinances (*takkanot*) – here especially concerning questions of trade and finance – gained increasing weight and established rules in addition to the legal decisions of rabbis.

3 Communal Regulations (*takkanot*) Concerning Bills of Exchange

With the strengthening of communal authority in early modern Jewish communities, their written regulations, *takkanot* (sg. *takkanah*) in Hebrew, assumed increasing importance in communal life. Though rabbis had some say in early communal *takkanot*, most of them were laid down by the communal lay leadership, mostly consisting of wealthy merchants and, increasingly in Poland-Lithuania, wealthy leaseholders.[27] Individual *takkanot* already existed in medieval Ashkenaz, especially those of the three Rhinish communities Speyer, Worms and Mainz, but they became much more common in early modern Europe. Moreover, rabbis drew up the aforementioned medieval *takkanot Shum* in the Rhineland and, thus, they were halakhicly binding. Many early modern regulations were penned by communal lay leaders and did not have the same religiously binding status. Moreover, they generally were

25 Edward Fram, "Jewish Law from the Shulḥan Arukh to the Enlightenment," in N.S. Hecht, B.S. Jackson et al. (eds.), *An Introduction to the History and Sources of Jewish Law* (Oxford: Oxford University Press, 1996), 359–377, esp. 360.

26 On communal cohesion as a crucial marker of early modern Jewish history, see: David B. Ruderman, *Early Modern Jewry. A New Cultural History* (Princeton, Oxford: Princeton University Press, 2010), 57–98.

27 On the relationship between communities and wealthy merchants and leaseholders, see: Gershon David Hundert, *Jews in Poland-Lithuania in the Eighteenth Century: A Genealogy of Modernity* (Berkeley: University of California Press, 2004), 79–87.

not binding for non-residents of the communities, where they were stipulated. Nevertheless, these *takkanot* constituted the legal framework, in addition to laws laid down by Christian rulers concerning Jews, on which early modern Jewish communities functioned.[28] Those communal regulations usually covered a wide range of issues, from synagogue attendance and conduct over questions of daily life, sometimes including sumptuary laws, to issues of communal taxation, economic activities in general and commerce and finance in particular. Sometimes bound separately, most often, those *takkanot* were inscribed into the record books (*pinkas*, pl. *pinkasim*) of the Jewish communities or the communities even kept specific *pinkasim* that only contained *takkanot*.[29]

These regulations, thus, are one of the important sources for tracing the usage of financial instruments or at least the way the communal leadership pictured their usage. One of the earliest early modern *takkanot* from the area of central and east central Europe – those from the Jewish community of Krakow – still maintain relative silence on the issue. This silence seems surprising as bearer notes handed on by the creditor were already in use as early as the fourteenth century and Jews in Krakow were generally very active in commerce, including various credit transactions with non-Jewish clients.[30]

Nevertheless, the community's extensive ordinances of 1595, containing over 100 paragraphs, mention *mamranoth* only in passing. One short paragraph states that *mamranoth* come with the same stringencies as any kind of contract as if the bearer of the document receives the power of attorney from the borrower.[31] Thus, we see a reflection of the early halakhic concerns over *mamranoth*, which violated the requirement "that debts be transferred in the presence of the borrower, the lender, and the transferee […], or through a power of attorney."[32] The regulation, however, leaves no doubt that *mamranoth* were widely used.

Only a few years later, at the beginning of the seventeenth century, regulations became more detailed: in 1607 the Council of the Four Lands (Hebrew: *va'ad arba' aratsot*) laid down a long list of so-called laws of usury. They are an

28 On *pinkasim* and *takkanot* see: Stefan Litt (ed.), *Jüdische Gemeindestatuten aus dem aschkenasischen Kulturraum 1650–1850* (Göttingen: Vandenhoeck & Ruprecht, 2014), 7–19; Fram, "Jewish Law from the Shulḥan Arukh to the Enlightenment," 365–366.

29 Litt, *Jüdische Gemeindestatuten*, 20.

30 Jürgen Heyde, *Transkulturelle Kommunikation und Verflechtung: Die jüdischen Wirtschaftseliten in Polen vom 14. bis zum 16. Jahrhundert* (Wiesbaden: Harrassowitz, 2014), 104–105.

31 Majer Bałaban, "Die Krakauer Judengemeinde-Ordnung von 1595 und ihre Nachträge," *Jahrbuch der Jüdisch-Literarischen Gesellschaft* 10, 11 (1912, 1916), 296–360, 88–114, here 335.

32 Fram, *Ideals Face Reality*, 134.

example of close cooperation between lay and rabbinic leadership, the rabbis penned them and the lay leadership endorsed them. The council was established in the second half of the sixteenth century, originally as an instrument of taxation and was made up mostly of lay officials. Though rabbis sometimes participated in the council's meetings or met on the occasion of fairs in Lublin or Jaroslav, the Council of the Four Lands was not a rabbinic council. It represented the four lands Great Poland, Little Poland, Ruthenia and Volhynia and intervened in a wide range of matters, including educational policies, banning heretics, rules for Shabbat and other holidays, and last but not least a whole variety of economic matters.[33]

The laws of usury, laid down in the *takkanot*, also sanctioned the handling of *mamranoth* and promissory notes (Hebrew: *shetar ḥov*). Unlike the Krakow *takkanot*, Rabbi Joshua Falk (1555–1607), who attended the council meeting, actually wrote down these regulations and the council and its lay leaders approved them. These 1607 *takkanot* were among other things an attempt to develop "a legally acceptable method of charging interest on loans between two Jewish parties."[34] This went along with Rabbi Falk's general efforts to address new issues in the field of commercial law in his earlier commentary *Sefer Me'irat Eynayim* on Josef Caro's *Shulḥan Arukh*. Though *mamranoth* were widely used by the seventeenth century, the *takkanot* display some wariness. After a long list of conditions for a loan or investment, the regulations insist that in the case of a *mamran* all these conditions laid down for a loan or investment had to be written explicitly on the back of the document. This information included equal share of profits and losses, that the debtor was to be paid for his effort, and that his oath was deemed reliable.[35] These regulations seem to remind the bearer of the bill of the binding legal force the document held.

In 1624, the council added another important point that we find repeatedly in communal ordinances. This paragraph concerned the general legal competence of young Jewish men, an issue that usually was also part of general exchange regulations in central Europe.[36] According to the Council of the Four

33 On the council see: Adam Teller, "Rabbis without a Function? The Polish Rabbinate and the Council of Four Lands in the 16th–18th Centuries," in Jack Wertheimer (ed.), *Jewish Religious Leadership: Image and Reality*, vol. 1 (New York: The Jewish Theological Seminary Press, 2004), 354–384.

34 Fram, "Jewish Law from the Shulḥan Arukh to the Enlightenment," 366.

35 Shmuel A. Arthur Cygielman, *Jewish Autonomy in Poland and Lithuania until 1648* (*5408*) (Jerusalem: Shazar Center, 1997), 279–291. For the Hebrew text see: Israel Halperin and Israel Bartal (eds.), *The Records of the Council of the Four Lands* (Jerusalem: The Bialik Institute, 1990).

36 Anja Amend-Traut, *Wechselverbindlichkeiten vor dem Reichskammergericht. Praktiziertes Zivilrecht in der Frühen Neuzeit* (Cologne: Böhlau Verlag, 2009), 248–250.

Lands, any *mamran* signed by a man married for less than two years was void. To the same end, the *takkanah* notes that "should a person lend money to a person aged less than 25 years, or to a person married less than two years […] the loan is null and void."[37] The Lithuanian Council (Hebrew: *va'ad medinat lite*), a parallel institution to the Council of the Four Lands representing the Jewish communities of the Lithuanian part of the Commonwealth, seems to have been somewhat more lenient. The regulations of the council state that a *mamran* written by a young unmarried man was invalid if written without the knowledge of his father, his relatives, or the president of the local rabbinical court, but apparently could be legal under the set conditions.[38]

In German speaking lands, *takkanot* of Jewish communities put down similar regulations. In the three communities of Altona, Hamburg, and Wandsbek, the communal *takkanot* cover the years from 1685 to 1780. It is not surprising that the communal elders regularly penned regulations concerning bills of exchange or immovable promissory notes as Hamburg constituted one of the most important financial hubs between Amsterdam as provider of credit for central Europe and Prussia.[39] Here, bills of exchange and promissory notes of unmarried men under the age of 20 were invalid, except when the rabbi of the community had confirmed the document and when the father or some other close relative of the young man was aware of it.[40]

In Frankfurt am Main, another important commercial center for Jews and non-Jews, such stipulations appear unsurprisingly in the general exchange regulations, and likewise in the *takkanot* of the Jewish community. Generally, boys under the age of fourteen were excluded from any handling of bills of exchange as they were generally not contractually capable. For older men (and women though with certain restrictions) different exchange regulations required different rules. In Leipzig minors could be penalized with the full force of the law regarding bills of exchange whereas in eighteenth-century Braunschweig all bills of exchange were invalid when issued by a person under the age of 20. The 1739 exchange regulations of Frankfurt am Main stated that minors under the age of 25 were not allowed to conclude contracts, except with the consent of their parents or a guardian. Young men who already ran their own business were excluded from this regulation. Jews apparently could also receive an exception when they were under 25 but already married and held

37 Cygielman, *Jewish* Autonomy, 279–282, 299.

38 Ibid., 312–313. For Hebrew see: Simon Dubnov, *Pinkas medinah o pinkas va'ad ha-kehilot ha-rashiyot bi-medinat Lita* (Berlin: Hebräischer Verlag, 1928).

39 See: Schnabel and Shin, "Liquidity and Contagion," 929–968.

40 Heinz Mosche Graupe, *Die Statuten der drei Gemeinden Altona, Hamburg und Wandsbek: Quellen zur jüdischen Gemeindeorganisation im 17. und 18. Jahrhundert,* 2 vols. (Hamburg: Christians, 1973), vol. 1: 234, § 112; vol. 2 (Hebrew): 182.

the privilege of residency (*Judenstättigkeit*) in Frankfurt am Main.[41] The earlier communal *takkanot* of 1674/75 do not explicitly mention this stipulation, but lay down in great detail at which age and under which conditions young unmarried men were allowed to trade in textiles or retail.[42]

An entry in the communal record book (*pinkas*) of the Poznań Jewish community sheds an interesting light on this issue. In 1641, the elders of the community state that according to a decision by a Jewish regional council in Bełżyce, only men married for at least three years were allowed to issue *mamranoth*. The communal elders complain about the ensuing limitations for businesses in their community and interpret the regulation. According to their opinion, this regulation only applies to those men, who have no business experience. Thus, they allow all men, who ran their own business and had accumulated the necessary experience, to issue *mamranoth* at any time under the condition that the drawer of the *mamran* would inform the leading communal elder of the month (*parnas ha-ḥodesh*).[43] Thus, the Jewish communal leaders, most of them active in commerce themselves, were very aware of the necessity of stipulating the handling of bills of exchange to avoid poor business decisions by banning young and inexperienced men from handling such a complex financial instrument as a bill of exchange or *mamran*. Likewise, they apparently were very well aware of local or regional exchange regulations and acted along similar lines.

Another issue that communal *takkanot* discussed regularly is the limitation of bills of exchange. The maturity of a bill of exchange, i.e. the time when the payer had to satisfy the creditor or the last endorsee of the bill of exchange was usually noted on the bill itself. The maturity depended on the place of issue and followed the local exchange regulations. The communal ordinances, in contrast, discussed the limitation of a bill of exchange or *mamran*, meaning the time when any claims based on a bill of exchange expire. This limitation usually began from the day of the maturity of the bill of exchange and was interrupted by action on a bill of exchange. There was no common limitation for bills of exchange; it likewise depended on local or regional exchange regulations.[44] The Leipzig exchange regulations of 1682, for example, set two years as the limitation if no claims were made in court within this time. This regulation was confirmed again in 1768.[45]

41 Amend-Traut, *Wechselverbindlichkeiten*, 249–250.

42 Litt, *Jüdische Gemeindestatuten*, 71–72, 488–489.

43 Bloch, „Der Mamran," 58–59.

44 "Wechselverjährung," in J.G. Krünitz (ed.), Oekonomische Encyklopädie, vol. 235 (Berlin: Pauli, 1856), 340–341.

45 Josias Ludwig and Ernst Püttmann (eds.), *Die Leipziger Wechselordnung mit Anmerkungen und Beilagen versehen* (Leipzig: J.S. Heinsius, 1787), 71, 209.

The ordinances of the Jewish community in Poznań from the first half of the seventeenth century state that community members had to notify the communal beadle (*shamash*) if a *mamran* was about to expire after three years. When the debtor was notified, the validity of the document was extended by another three years.[46] Likewise, the 1687 *takkanot* of the Jewish communities in Hamburg and Wandsbek stipulated that bills of exchange and other promissory notes expired after three years and thus all claims would be void, if the holder of the document did not register it with the communal leadership. In this case, the validity of the document was extended. Just a few decades later, the Hamburg regulations, however, stated that bills of exchange remained valid for ten years. If the owner of the bill of exchange registered it with a Jewish or non-Jewish court within this time period, its limitation was extended for another ten years.[47] The regular occurrence and repetition of such regulations also points to the crucial importance of Hamburg as a financial node in seventeenth- and eighteenth-century central Europe.

For this reason, the various *takkanot* from the Altona, Hamburg, and Wansbek communities that the communal elders stipulated, dating from between roughly the last quarter of the seventeenth and the last quarter of the eighteenth century are particularly instructive in regard to the relationship between Jews and Christians in commerce and the internal Jewish and the general legal system. In the first *takkanot* of 1685, we find the very clear instruction that all three the communal elders, the rabbi, and the local judges would always find the best possible regulations to avoid halakhicly forbidden deeds concerning bills of exchange and the prohibition of charging interest.[48] Thus, they were very aware of the legal implications of early modern commerce and the traditional limitations of Jewish law. However, they likewise understood that Jews took part in general commerce and thus, they were eager to reconcile Jewish law and daily economic necessity.

Thus, these communal lay leaders and rabbis were aware of the existence of general exchange regulations and knew that Jewish rabbinical courts, if two Jews turned to them, had to abide by these regulations. A 1710 *takkanah* notes that the rabbi had to decide according to the strict laws of the bourse concerning bills of exchange. Although the rabbi of the community could pronounce a ban if one of the tax paying members of the community did not pay a bill of exchange ten days after its due date, but he also had to make sure that all

46 Dov Avron, *Pinkas hakesharim shel kehilat Pozna (5381–5595)* (Jerusalem: Hoza'at Mekitzei Nardemim, 1967), 47.

47 Graupe, *Die Statuten*, vol. 1: 150, § 148/155; 233–234, § 111; 278, § 58; 297, § 45; vol. 2: 91, 182, 320–231, 250.

48 Graupe, *Die Statuten*, vol. 1: 122, § 86/ 89, vol. 2: 58–59.

payments were made according to general law (*dina de-malchuta-dina*). This famous Talmudic dictum held that the law of the land is binding, though this certainly applied only to particular fields of Jewish law, commercial law and exchange regulations in this particular case.

Although this article deals particularly with communal *takkanot*, rabbinical decisions did not fall out of use and rabbis certainly were able to deal with economic issues. This can be seen, for example, in the responsa literature, written decisions of Jewish law (*she'elot u-tshuvot*), of the eighteenth-century Talmudic scholar and chief rabbi of Prague, Yeḥezkel Landau. In his volume of collected responsa, *Noda' bi-Yehudah* (1776), he deals with a case of a dissolved partnership, sold shares, and debt obligations.[49] Another example of rabbis' involvement in commercial issues is the collection of sample documents by Samuel b. David Moses Halevi (ca. 1625–1681). Coming from Poland, he was elected rabbi by the Jews of the Prince-Bishopric of Bamberg in 1661. Following an earlier example from Krakow (*Sefer Tikkun ha-Shetarot*), he published a volume of sample documents called *Sefer Naḥalat Shiv'ah*, first printed in Amsterdam 1667/68. It collects documents from different areas of life including a number of commercial contracts, especially obligations.[50] Thus, communal *takkanot* laid down general rules for dealing with financial and commercial issues, while rabbis continued to answer questions in concrete cases.

4 Going to Court

A parallel issue to the handling of bills of exchange was the usage of courts. In some Jewish communities, rabbinic courts dealt with matters of personal status, while lay courts, often run by Jewish businessmen, judged monetary matters (among many other subjects), based on local commercial custom and a 'common sense' approach.[51] The examples of Metz and Frankfurt am Main, however, demonstrate that rabbis were well aware of general commercial laws and customs. The rabbinic court in Metz still judged a wide variety of financial and commercial cases between Jews in the last quarter of the eighteenth

49 Yeḥezkel Landau, *Noda' bi-Yehudah*, *Ḥoshen mishpat*, pt.1, no. 10. I thank Edward Fram for pointing me to this responsum. On similar earlier rabbinical decisions see: Fram, *Ideals Face Reality*, 138–143.

50 Carsten Schliwski, Anmerkungen zum *Sefer Naḥalat Shiv'ah* des Zeckendorfer Rabbiners Samuel ben David Moses Halevi – Versuch einer Einordnung, in: Michaela Schmölz-Häberlein (ed.), *Jüdisches Leben in der Region. Herrschaft, Wirtschaft und Gesellschaft im Süden des Alten Reiches* (Baden-Baden: Egon, 2018), 349–359.

51 Fram, "Jewish Law from the Shulḥan Arukh to the Enlightenment," 367.

century as did the rabbinic court in Frankfurt am Main.[52] The authority of rabbinic and Jewish lay courts also depended on the degree of communal autonomy a Jewish community enjoyed. According to Jewish law, taking a fellow Jew to a non-Jewish court or threatening him or her with arrest by non-Jewish authorities was strictly forbidden and regarded as a sin. However, already in the Middle Ages rabbis were fearful that Jews would take their cases concerning commercial and financial matters to non-Jewish courts instead of having their cases adjudicated by Jewish law.[53] In the reality of early modern Europe, the appeal to non-Jewish courts, even if only Jews were involved in a given dispute, was rather common, as Moshe Rosman and others have shown.[54] The most common reason for an individual merchant to turn to a non-Jewish court was probably the assumed ability of the court to judge to his satisfaction and against his opponent, and even more importantly, to enforce whatever decision was made. Nevertheless, the leadership of the Hamburg community tried at least to keep to the letter of the law. The relevant *takkanah* kept the prohibition of taking a fellow Jew to a non-Jewish court. However, it allowed endorsing the bill of exchange with regards to a non-Jew, who then could take the Jewish debtor to a general court and, thus, an inner-Jewish case out of the Jewish legal system.[55]

It is unsurprising that many Jewish businessmen ended up in court with non-Jewish disputants as was the case with disputes about bills of exchange that the Imperial Court (*Reichskammergericht*) received during the eighteenth century, in which many Jewish merchants were involved.[56] The same can be seen from the entries of protested bills of exchange in the record books of various notarial offices in Amsterdam. Not only were those protested bills of exchange endorsed widely between Jews and non-Jews, both must have met regularly when dealing with these protests. But even the few bills of exchange issued and endorsed exclusively among Jews were taken to a general notarial office in case of a protest.[57]

52 Jay R. Berkovitz, *Protocols of Justice. The Pinkas of the Metz Rabbinic Court 1771–1789*, 2 vols. (Leiden: Brill, 2014), vol. 1, 97–100; Edward Fram, *A Window on Their World. The Court Diaries of Rabbi Ḥayyim Gundersheim Frankfurt am Main, 1773–1794* (Cincinnati: Hebrew Union College Press, 2012), 34–50.

53 Soloveitschik, *Pawnbroking*, 215.

54 Moshe Rosman, "The Role of Non-Jewish Authorities in Resolving Conflicts within Jewish Communities in the Early Modern Period," *Jewish Political Studies Review* 12:3–4 (2000), 53–65. See also: Fram, *A Window on Their World*, 50–62.

55 Graupe, *Die Statuten*, vol. 1: 239, § 122c; vol. 2: 188.

56 Amend-Traut, *Wechselverbindlichkeiten*, 244–245. According to Amend-Traut's study, there was at least one Jewish party involved in nearly a third of all cases examined.

57 For more details see: Aust, "Between Amsterdam and Warsaw," 48–55.

The following example from Berlin shows poignantly that Jewish business partners had no remorse taking fellow Jews and even family members to non-Jewish courts. Moreover, the case points to the complexity of court cases involving bills of exchange. In this case, it was Berent Symons, a wealthy Jewish merchant from Amsterdam, who together with his brothers Benjamin and Samuel Symons took his son Isaak to court. Isaak Symons had moved to Berlin around 1753, where he traded in jewels and other goods with the financial backing of his father. Soon, however, he made close contact with Abraham Hirschel, a Saxon court Jew who lived in Berlin and also traded in jewels. His new acquaintance and future brother-in-law, however, did not have the best reputation in Berlin after an infamous court case against Voltaire that had been widely publicized in the contemporary press. Isaak Symons' father and uncles not only rejected his marriage with Hirschel's sister Friederica, but already in 1754, Berent Symons filed an action against his son accusing him of the embezzlement of his money at the instigation of the Hirschel family. Eventually, Abraham Hirschel and his brother-in-law Isaak Symons were involved in at least three extensive lawsuits that occupied the commercial court in Leipzig, of which we unfortunately have no surviving records, as well as the Supreme Court of Prussia (*Kammergericht*) in Berlin, involving among other things falsified bills of exchange.[58]

Without going into the details of the trials, there are a number of probable reasons why these cases were taken to the Prussian Supreme Court in Berlin and not to the communal *beit din*. The court documents do not provide any indication that the cases were first taken to a rabbinic court. First, the case involved members of more than one Jewish community, and it seems that Berent Symons, the Amsterdam merchant, took his son to the non-Jewish court directly. He may not have trusted the *beit din* in Berlin to find a satisfying resolution or have the means of enforcing the ruling regarding the assets his son and his son's brother-in-law allegedly embezzled. How complicated a case it was becomes visible from Berent Symons letter to the Prussian Supreme Court in 1755. In this letter, he pleads that the court quickly proceed with his case and to consult "an experienced banker and an unbiased *Calculatoris*," because his claims "consist of many drawn bills of exchange and debt bills; with these matters jurists are less familiar than bankers and merchants."[59]

58 For a detailed description of the case see: Cornelia Aust, "Daily Business or an Affair of Consequence? Credit, Reputation, and Bankruptcy among Jewish Merchants in Eighteenth-Century Central Europe," in Rebecca Kobrin and Adam Teller (eds.), *Purchasing Power: The Economics of Jewish History*, (Philadelphia: University of Pennsylvania Press, 2015), 71–90.

59 Barent Symons & sein Sohn Isaac Symons, Januar-Mai 1755, Geheimes Preußisches Staatsarchiv (GStA) Berlin, I. HA, Rep 9, Y2, Fasz. 123.

When gentile courts got involved, they faced an additional challenge when it came to evidence brought in by the parties. While most bills of exchange negotiated in court were written in German, Dutch, or French, this was rarely the case for account books of or letters between Jewish merchants. At least in central Europe, many Jewish merchants kept their account books in Hebrew characters throughout the eighteenth century. In our case, the Amsterdam merchant Berent Symons not only employed a non-Jewish advocate to represent him in his lawsuit against his son, but also a translator. The latter was responsible for the correspondence between Isaak Symons and his father's advocate who did not speak Hebrew or Yiddish. Moreover, he argued "my son made the whole matter very confusing due to his denial that he was incited by the Hirschel family. Much of the important evidence," he continued, "needs to be taken from the Hebrew correspondence and made accessible to the advocate."[60] Moreover, Isaak Symons also kept his account books – apparently very neatly – in Hebrew script, though presumably in some form of Yiddish. During the later trial, the complainants argued that the books were forged. In this case, the court turned to a theologian at the nearby university in Frankfurt an der Oder, who was familiar with Hebrew and the "Jewish-German" language and writing. This example shows the complexity of such trials, which was only aggravated by language issues.

On the other hand, it illustrates the great familiarity of these merchants and brokers with the commercial world of their day. Not only, did Berent Symons not turn to the *beit din* or a rabbi, via a rabbinical responsa, but used a typical institution of eighteenth century commerce, a *Parere*, an opinion given by one or more merchants on a particular question. The genre emerged at the end of the seventeenth century in Leipzig and Hamburg and spread across German-speaking lands during the eighteenth century. Merchants used it in particular to answer questions regarding exchange law, and, thus, it was aimed at avoiding or shortening legal disputes by receiving an evaluation of the legal situation from a group of experts; this was of particular importance in the light of a lack of expertise in non-specialized courts that Berent Symons also lamented.[61]

In the above-mentioned case, Berent Symons indeed turned to four Berlin merchants with a specific question. Using typical substitute names, he asks

60 Ibid.

61 I thank Sonja Breustedt for drawing my attention to this particular institution of early modern commerce. Sonja Breustedt, "Kaufmännische Pareres – Gutachten als Konsens und Beweismittel im 17. und 18. Jahrhundert," in Albrecht Cordes (ed.), *Mit Freundschaft oder mit Recht? Inner- und außergerichtliche Alternativen zur kontroversen Streitentscheidung im 15.-19. Jahrhundert* (Cologne: Böhlau, 2015), 261–268. See also: Amend-Traut, *Wechselverbindlichkeiten*, 46–47.

whether it is correct that *Cajus* demands from *Titius* to the presentation of the endorsed bills of exchange, which the first had drawn on the latter, but also the *secunda* bills and an additional receipt for each bill of exchange. This, according to Berent Symons, was the strategy of his son and Abraham Hirschel against him. As long as he did not provide the additional material, Isaak Symons and Abraham Hirschel refused to settle their accounts with Berent Symons regarding the bills of exchange he had already paid. Berent Symons, thus, asked whether this was legitimate according to commercial law and custom. On January 23, 1755, the four Berlin merchants, Georg Wilhelm Schweiger, the Gebrüder Jordan, Peter Sautier, and Girard Muhelet endorsed the opinion of the inquirer. They stated that the *prima* bill of exchange is always fully valid and an additional receipt over the payment is not necessary at all as the bill of exchange itself counts as receipt. Thus, they decided that *Cajus* was bound to settle his account with *Titius*.[62] The file, unfortunately, remains silent about how successful the submission of this *Parere* to the court actually was.

It is curious that in this particular case just the fact that the document is included in the court file allows us to recognize that the negotiated case was between two Jewish merchants. This constellation also illustrates the close familiarity of at least the wealthier strata of Jewish merchants (as well as rabbis as seen earlier) with exchange regulations, the intricacies of handling bills of exchange and such measures as the mercantile *Parere*, which allowed commercial expertise into the courtroom.

5 The Usage of Hebrew and Yiddish in Bills of Exchange/ *Mamranoth*

There is no doubt that many of the Jewish and non-Jewish merchants, who were active in eighteenth-century central and east central Europe, operated their businesses in a multilingual environment and were versed in more than one language at least in the field of commerce. As we have seen in the example above, the usage of Hebrew, Yiddish or German written in Hebrew characters could constitute a problem in court when Jewish merchants were involved. This was the case, for example, when Jewish merchants kept their books in Hebrew characters or when they wrote parts of their commercial correspondence in Hebrew or Yiddish.[63]

62 Barent Symons & sein Sohn Isaac Symons, Januar-Mai 1755, GStA Berlin, I. HA, Rep 9, Y2, Fasz. 123.

63 See for example the letters of the Prager family in London and Amsterdam: Gedalia Yogev, *Diamonds and Coral: Anglo-Dutch Jews and Eighteenth-Century Trade* (New York: Holmes & Meier Publishers, 1978), 183–186.

In contrast, it remains doubtful that Jewish merchants, at least in the eighteenth century, issued bills of exchange in Hebrew letters, be it Hebrew, Yiddish or German. Nevertheless, a concrete anxiety about commerce and especially the trade with bills of exchange in relation to Jewish merchants seems to have been prevalent in the early modern period. The aforementioned legend about Jews as the inventers of bills of exchange is only one way in which images of Jews as usurers and worries about the expansion of credit were expressed. In general, it was the stigmatization of Jews that made them "vehicles for expressing widely felt anxieties about commerce" in the early modern period as Jonathan Karp has argued.[64]

A concrete example based in commercial practice might be a 1792 manual for learning Yiddish (*Lehrbuch zur gründlichen Erlernung der jüdischdeutschen Sprache*). The manual addresses merchants in particular and argues that it is tremendously important to understand and be able to read Yiddish to conduct successful business with Jewish merchants. The Christian author Gottfried Selig, a convert from Judaism, claims that Jewish merchants issue bills of exchange in Yiddish and provides the text of an exemplary bill of exchange with a German translation.[65] Thus, the author suggests that Jews issued bills of exchange, written in Yiddish, not only among themselves but even to non-Jewish merchants or at least that such a bill of exchange would eventually circulate among non-Jews via the endorsement. Selig published this work, after having eventually secured a position as lector at the university in Leipzig. While we can assume that Selig indeed was familiar with bills of exchange issued in Yiddish, his publication like many other texts he penned had a clear anti-Jewish bias and aimed at proving the alleged Jewish propensity to deceit in commercial matters.[66] Though the text published by Selig is typical of an eighteenth-century bill of exchange and Jews may well have issued Yiddish bills of exchange between themselves, it seems rather unlikely that such bills were often issued in Yiddish, especially when they were intended to be circulated. Johann Gottlieb Heineccius (1681–1741), for example, noted in his Dutch work on exchange law (*Grondbeginselen van het wisselrecht*) that Jews were very active in the exchange trade and emphasized that they did not write their bills of

64 Karp, *The Politics of Jewish Commerce*, 2.

65 Gottfried Selig, *Lehrbuch zur gründlichen Erlernung der jüdischdeutschen Sprache für Beamte, Gerichtsverwandte, Advocaten und insbesondere für Kaufleute; mit einem vollständigen ebräisch- und jüdischdeutschen Wörterbuche* (Leipzig: Voß und Leo, 1792), engraving following p. 38, 44.

66 On Gottfried Selig and his autobiographical conversion narrative see: Johannes Graf (ed.), *Judaeus conversus. Christlich-jüdische Konvertitenautobiographien des 18. Jahrhunderts* (Frankfurt am Main: Peter Lang, 1997), 34, 84, 117–259.

exchange in old rabbinic letters, meaning Hebrew characters, which Christians obviously would not understand.[67]

When the Prussian Jewish community in Frankfurt an der Oder raised credit for communal expenses from the Hamburg Jewish merchant Jacob Moses Schlesinger, the brother of two local merchants and communal leaders, he issued the respective bills of exchange in German. These bills of exchange from the 1760s were not supposed to circulate, and all parties involved knew how to write and read Hebrew and Yiddish, still their choice of language was German. Their torn, i.e. paid, versions can be found in the files of the Frankfurt Jewish community and are strong evidence for the preference of using one of the languages in which bills of exchange in central Europe were commonly issued: Dutch, German or French.[68]

The situation seems to be slightly different when looking at the *mamran*, which indeed seem to have been issued also in Hebrew or Yiddish at least until the end of the eighteenth century. Phillip Bloch published three Hebrew *mamranoth* from the second half of the eighteenth century, found in the state archives in Poznań. They show, as far as the copy can tell, the typical features of *mamranoth*, referring to the issuer on the opposite side of the document, though the document is titled *shetar ḥov* (promissory note). Then it provides the sum to be paid and the Hebrew due date, and emphasizes that the document has the validity of a bill of exchange (*katav ḥiluf*), which is recognized by state courts. All three *mamranoth* could be paid anywhere, but especially in Frankfurt an der Oder and Breslau, the two most important commercial centers of eastern Prussia and Silesia.[69] This specification also points to the limited geographical reach of *mamranoth*. Even though we know that Jewish merchants in Frankfurt an der Oder and Breslau apparently recognized these *mamranoth*, most Jewish merchants from Poland who arrived at the fairs in Frankfurt an der Oder and Leipzig paid for their purchased goods in cash. *Mamranoth*, it seems, did not cross this geographical line.

Many places in east central and eastern Europe were extremely limited in where bills of exchange could be drawn. In the Polish-Lithuanian Commonwealth and its larger commercial cities, no specific regulations regarding the trade in bills of exchange were introduced. One of the reasons for the lack of legal development was undoubtedly Poland's precarious economic situation in

67 Herbert Ivan Bloom, *The Economic Activities of the Jews in Amsterdam in the Seventeenth and Eighteenth Centuries* (Williamsport, PA: The Bayard Press, 1937), 195.

68 Pinkas Kehilat Frankfurt, MS 19, Maimonides Library Tel Aviv, 15v, 20, 48v.

69 Bloch, "Der Mamran," 62–63. For financially related terms used in the *pinkas* of the Rabbinic court in Metz see: Berkovitz, *Protocols of Justice*, vol. 1, 89–90.

the eighteenth century. This economic situation and the respective lag in trade regulations is probably the key reason why east European (Jewish) merchants in Frankfurt an der Oder or Leipzig made most of their payments in cash. When bills of exchange were issued in eastern Europe during the eighteenth century, they were usually directly drawn on west European banking houses in Amsterdam or Hamburg, and in fewer cases in Breslau.[70]

It seems, however, that precisely these borderlands between east and west recognized both financial instruments – the much more geographically limited *mamranoth* and the widely circulating bills of exchange. The East Prussian provincial law (*Ostpreussisches Provinzialrecht*) of 1801 mentions this particular form of borrower's note.[71] Calling them *Mamre-Storchows*, the first paragraph explains their form, with the name of the borrower on the opposite side and the lack of the creditor's name. It then states that the document is valid in court when the formula "payable anywhere" is added or when it is noted that the note is payable in Prussia in particular.

The communal *takkanot* examined earlier provide a similar picture. Drawing on a number of examples, *takkanot* from the realm of the Polish-Lithuanian Commonwealth usually mention the immobile promissory note (*shetar ḥov*) and the *mamran.* Both terms appear continuously in the relevant regulations on credit and other financial matters. The Hamburg *takkanot* are clearly different in terms of language. The ordinances recognize simple promissory notes (*shtarot*) and proper bills of exchange, *katav ḥiluf*, a direct translation of the German term *Wechselbrief*. A *takkanah* from 1744 uses *katav ḥiluf* and *vekhsel*, both spelled in Hebrew characters, interchangeably. The usage of the term *vekhsel* points to their increasing linguistic acculturation to the German environment.[72] To the communal elders in Hamburg, thus, only regular bills of exchange, which they called *katav ḥiluf* or *vekhsel* in German, were relevant, while in Poland the communal elders saw it as sufficient to refer to the *mamran* as the form of debt bill used locally.

The omission of the *mamran* in Hamburg does not mean, however, that German Jewish merchants were not aware of it. Glikl bas Judah Leib, the famous female Jewish merchant of Hamburg, apparently understood both forms of obligation. In her description of problems with one of her son's financial situation in Berlin, she mentions both the *ḥiluf katav* (alternatively she uses

70 Denzel, *Geld- und Wechselkurse der deutschen Messeplätze Leipzig und Braunschweig*, 5, 13–16; Denzel, "Zahlungsverkehr auf den Leipziger Messen vom 17. bis zum 19. Jahrhundert," 149–165, 152, 156–62.

71 *Ostpreußisches Provinzialrecht* (Berlin 1801), 104 (addition 145 for § 1260).

72 Graupe, *Die Statuten*, vol. 1: 247, § 132; vol. 2: 199.

the acronym for *ḥiluf brif*) and the *mamranoth*, which she denotes explicitly as Polish *mamranoth*, though she unfortunately does not provide any further information about their appearance, their language or their handling.[73] Thus, individual Jewish merchants used *mamranoth* in their business with Polish Jewish merchants, even though they are not mentioned explicitly in the Hamburg *takkanot*, maybe because such *mamranoth* occurred very infrequently, were not issued but only accepted by local Jewish merchants, and might have been handled similarly to western bills of exchange.

In geographic border areas such as the eastern parts of Prussia or Moravia in the Habsburg Empire we find a different situation; it seems the local merchants used both bills of exchange and *mamranoth.* In Nikolsburg, in southern Moravia, the *takkanot* from the first half of the eighteenth century, in particular those ordinances dealing with commercial loans always name both the *vekhsel brif* (also *ḥiluf katav*) and the *mamran*. Both were valid and to be treated according to general law, though in the case of two Jewish parties, one had to register the failure to pay with the communal beadle (*shamash*) to receive a deferral of payment.[74]

Though Polish Jewish merchants apparently still used the *mamran* up to around 1800, it soon disappeared in the first decades of the nineteenth century. Abraham Fuss probably errs when he argues against Bloch that the *mamran* continued to exist and to be discussed in rabbinic literature throughout the nineteenth century, just under different names, such as *veksil* or *tratta*.[75] Rather, the introduction of new commercial institutions spread the usage of endorsable bills of exchange. A late nineteenth-century Hebrew article on commercial issues explains the handling of bills of exchange in every detail without mentioning the term *mamran* even once. Published in the first volume of the Hebrew annual *Keneset Yisra'el* in 1886, the article's very practical advice turns to readers of Hebrew, presumably more traditional and at least in many cases less wealthy Jewish merchants in the Congress Kingdom of Poland. In Hebrew, the author, Dov Ariyeh Fridman, uses the word *veksil*, derived from German, *exclusively* and even the corresponding Hebrew word *katav ḥiluf* does not appear. Equally he provides all other technical terms in German, partly in Hebrew, partly in Latin characters. The basic terms for a bill of exchange, such as drawer and drawee, payer and payee, are also given in Russian. Even in a

73 Chava Turniansky (ed.), *Glikl: Zikhronot, 1691–1719* (Jerusalem: Merkaz Zalman Shazar le-toldot Yisra'el, 2006), 402.

74 Abraham Naftali Zvi (Ernst) Roth, *Sefer Takkanot Nikolsburg* (Jerusalem/ Tel Aviv: Hotsa'at ha-makhon le-meḥkar ve-letotsa'at sefarim "Sura,"1961), 120–122, 132–133.

75 Bloch, "Der Mamran," 61; Fuss, "The Eastern European Shetar Mamran Re-examined," 67.

short footnote that discusses the origin of the bill of exchange, Fridman does not mention the *mamran* or any possible origin of the bill of exchange in medieval and early modern Poland.[76]

6 Conclusion

This survey of the usage of bills of exchange and its east central European version the *mamran* has shown how closely Jewish merchants were integrated into the early modern world of commerce in central and east central Europe. Following economic necessity, rabbis sought to adapt Jewish law to the reality of economic institutions in early modern Europe, though they did insist on the all-encompassing validity of the Halakhah. On a day-to-day level, however, the use of bills of exchange and *mamranoth* was so common that rabbis and communal lay leaders were left to stipulate the details of their usage. The same holds true for the usage of non-Jewish courts. Often Jewish merchants had no remorse taking their fellow Jews to Christian courts in business matters, because they believed their case was served better there or that these courts had more means to enforce their decisions. Sometimes cases were also taken to non-Jewish courts as courts of appeal. The rabbinic and lay leadership of the Jewish communities, however, sought to retain some influence in these commercial matters, mostly via their communal regulations (*takkanot*). These were also to safeguard the Jewish communities and its members by avoiding risky or unreliable business behavior, for example from young men, yet inexperienced in business. For the most part, however, these *takkanot* confirmed general exchange regulations, thus, playing a part in the general institutional developments in the field of commerce.

There were, however, considerable differences between the German lands and the Polish-Lithuanian Commonwealth. There is no evidence that, at least by the eighteenth century, Jewish merchants in the German lands issued bills of exchange in Hebrew or Yiddish, though most kept their books and their business correspondence with fellow Jews in Hebrew, Yiddish or, toward the end of the century, in German in Hebrew characters. Widely circulating bills of exchange, however, practically prohibited issuing bills of exchange in a script closed to non-Jewish merchants. In the Polish-Lithuanian Commonwealth, however, we do find ample evidence of the usage of the Polish (or Latin) *membrany* in their Hebrew form, the *mamranoth. Takkanot* of Jewish communities

76 Dov Ariyeh Fridman, "Over Le-Sokhar," *Keneset Yisra'el* 1 (1886), 189–214, esp. 189–190.

in the central European borderlands show that in these areas Jewish merchants knew and used both forms of bills. Even further west, Jewish merchants were apparently familiar with the *mamran* and occasionally might have used it – mostly in Prussia – when doing business with Polish Jewish merchants. Nevertheless, by the early nineteenth century, the *mamran* disappeared when the Polish-Lithuanian Commonwealth disappeared from the map of Europe in 1795 and its partition territories were increasingly incorporated into the legal systems of the partitioning powers, and east central and eastern European economy became more closely integrated in the European economy.

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PART 3

Atlantic Networks

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CHAPTER 11

Coming to Terms with the Atlantic World: German Merchants, Language, and English Legal Culture in the Early Modern Period

Mark Häberlein

1 Introduction

As Philip D. Curtin pointed out more than three decades ago, long-distance commerce constituted one of the major areas of cross-cultural exchange in world history. Merchants and traders frequently crossed political, legal, cultural, religious and linguistic boundaries, and the ability to form far-flung trans-imperial networks became a hallmark of merchant groups and diasporas.[1] The emerging British Empire of the early modern period was no exception in this regard. Recent research has confirmed that the commercial rise of England and its colonial empire was accompanied by a growing participation of foreigners in Anglo-Atlantic commerce. Apart from Huguenot and Jewish merchants,[2] Germans played an important role in English commercial

1 Philip D. Curtin, *Cross-Cultural Trade in World History* (Cambridge: Cambridge University Press, 1984). There is now a vast amount of literature on merchant communities and diasporas. See, e.g., Frédéric Mauro, "Merchant Communities," in James D. Tracy (ed.), *The Rise of Merchant Empires: Long-Distance Trade in the Early Modern Period* (Cambridge: Cambridge University Press, 1990), 255–286; Ina Baghdiantz McCabe, Gelina Harlaftis, and Ioanna Pepelasis Minoglou (eds.), *Diaspora Entrepreneurial Networks: Four Centuries of History* (Oxford: Berg, 2005); Francesca Trivellato, *The Familiarity of Strangers*: *The Sephardic Diaspora, Livorno, and Cross-Cultural Trade in the Early Modern Period* (New Haven and London: Yale University Press, 2009); Francesca Trivellato, Leor Halevi, and Cátia Antunes (eds.), *Religion and Trade: Cross-Cultural Exchanges in World History, 1000–1900* (Oxford: Oxford University Press, 2014); Dagmar Freist and Susanne Lachenicht (eds.), *Connecting Worlds and People: Early Modern Diasporas* (London and New York: Routledge, 2017).

2 For Huguenots, see J.B. Bosher, "Huguenot Merchants and the Protestant International in the Seventeenth Century," *William and Mary Quarterly*, Third Series 52:1 (1995), 77–102; R.C. Nash, "Huguenot Merchants and the Development of South Carolina's Slave-Plantation and Atlantic Trading Economy, 1680–1775," in Bertrand Van Ruymbeke and Randy J. Sparks (eds.), *Memory and Identity: The Huguenots in France and the Atlantic Diaspora* (Columbia: University of South Carolina Press, 2003), 208–240; Sally M. Schultz and Joan Hollister, "Jean Cottin, Eighteenth-Century Huguenot Merchant," *New York History* 86:2 (2005), 133–167; Susanne Lachenicht, "The Huguenots' Maritime Networks, Sixteenth – Eighteenth Centuries," in

expansion. While a significant number took up residence in London and engaged in various branches of colonial trade there, others ventured directly to the colonies in pursuit of economic and social opportunities.[3]

This essay surveys the involvement of several German merchants in the expanding British Atlantic world with particular regard to the legal and linguistic issues raised by their activities. As few Germans were familiar with either English law or the English language before the mid-eighteenth century, the establishment of Anglo-German commercial relations was inevitably accompanied by learning processes. While the main focus of this chapter will be on the late seventeenth and eighteenth centuries, my exploration of this topic is preceded by brief remarks on Anglo-German commercial exchange at the beginning of the early modern era and on the learning of English in early modern Germany.

2 Early Commercial and Linguistic Exchanges

In the sixteenth century, commercial interactions between German and English merchants took various forms. Merchants from the Hanse League had been present in London since the Middle Ages and formed a close-knit community in the *Stalhof* ("steelyard"). While the steelyard constituted a privileged space with separate jurisdictional rights in the Late Middle Ages, most of the Hanse privileges were rescinded in the course of the sixteenth century.[4] Nonetheless, merchants from cities like Cologne conducted a thriving London trade during the reign of Elizabeth I (1558–1603), exporting books, wine, wood to make longbows, steel and weapons and importing woolen cloth, England's major commodity at the time.[5] Several merchant companies from south

Freist and Lachenicht (eds.), *Connecting Worlds and People*. For Jews, see Holly Snyder, "Rules, Rights, and Redemption: The Negotiation of Jewish Status in British Atlantic Port Towns, 1740–1831," *Jewish History* 20:2 (2006), 147–170; Natalie A. Zacek, "'A People So Subtle': Sephardic Jewish Pioneers of the English West Indies," in Caroline A. Williams (ed.), *Bridging the Early Modern Atlantic World: People, Products, and Practices on the Move* (Farnham and Burlington, Vt.: Ashgate, 2009), 97–112; idem., "The Freest Country: Jews of the British Atlantic, ca. 1600–1800," in D'Maris Coffman, Adrian Leonard, and William O'Reilly (eds.), *The Atlantic World* (London and New York: Routledge, 2015), 364–375.

3 John R. Davis, Stefan Manz, and Margrit Schulte Beerbühl (eds.), *Transnational Networks: German Migrants in the British Empire, 1670–1914* (Leiden and Boston: Brill, 2012).

4 Cf. Nils Jörn, *"With money and bloode:" Der Londoner Stalhof im Spannungsfeld der englisch-hansischen Beziehungen im 15. und 16. Jahrhundert* (Cologne et al.: Böhlau, 2000).

5 Claudia Schnurmann, *Kommerz und Klüngel. Der Englandhandel Kölner Kaufleute im 16. Jahrhundert* (Göttingen: Vandenhoeck & Ruprecht, 1991).

German cities also included England in their commercial orbit. Thus the Haug-Langnauer firm of Augsburg participated in the 'Company of Mines Royal', which was incorporated in 1568 for the exploitation of the copper mines of Keswick in the county of Cumberland. The Haug-Langnauer sent Daniel Hoechstetter, a native of Augsburg who had acquired considerable expertise in Alpine mining operations, to Keswick as their manager. Hoechstetter remained in charge of the mining company after his employers' bankruptcy in 1574, and his English partners later sold their shares to him and Thomas Smith. After Daniel Hoechstetter's death, his son-in-law Marx Steinberger and his sons Emanuel and Daniel the Younger continued the mining operations until the late 1630s. The younger Daniel Hoechstetter had come to England as a young man and may have belonged to a group of technical experts who were recruited to explore mineral resources in Sir Walter Raleigh's fledgling North American colony on Roanoke Island in the mid-1580s. He was highly respected and frequently consulted as a mining expert and seems to have been perfectly bilingual. According to historian George Hammersley:

> Daniel wrote a clear and fluent English, but still appears to have used it like a second language: his spelling is more regular, his manner of expression more deliberate, than normal among his contemporaries.[6]

More commonly, south German and English merchants met in commercial cities on the European continent, especially in Antwerp, which served as the major distribution center for English woolen cloth on the continent. Germans marketed central European silver and copper, fustians and metal goods in the city on the Scheldt River and engaged in credit and exchange operations with merchants from various nations, including Englishmen.[7] When the English Merchant Adventurers decided to move their headquarters from Antwerp to

6 George Hammersley (ed.), *Daniel Hechstetter the Younger: Memorabilia and Letters, 1600–1639* (Stuttgart: Steiner, 1998), 23–50 (quote on 43). On Hoechstetter's possible involvement in the Roanoke Island venture, see Gary Carl Grassl, *The Search for the First English Settlement in America: America's First Science Center* (Bloomington, Ind.: Authorhouse, 2006), 113–115, 145, 214–219; James Horn, *A Kingdom Strange: The Brief and Tragic History of the Lost Colony of Roanoke* (New York: Basic Books, 2011), 67, 78.

7 A number of exchanges between German and English merchants are recorded in Jakob Strieder, *Aus Antwerpener Notariatsarchiven. Quellen zur deutschen Wirtschaftsgeschichte des 16. Jahrhunderts* (repr. Wiesbaden: Steiner, 1962). Cf. also Schnurmann, *Kommerz und Klüngel*, 161–162, 166–168, 175, 217, 246 and *passim*; Donald J. Harreld, *High Germans in the Low Countries: German Merchants and Commerce in Golden Age Antwerp* (Leiden and Boston: Brill, 2004), 20–30, 34–35 and *passim*.

Emden, Hamburg and Stade in 1569,[8] the city council of Nuremberg sought to entice them to set up a branch in the Franconian imperial city as well. While this initiative did not produce immediate results, a small community of English merchants was established in Nuremberg in the early seventeenth century.[9]

English and German merchants also engaged in business transactions in Spanish port cities. Thus Robert Thorne, a merchant from Bristol, and his Italian partner Leonardo Cattaneo sold their rights in a soap manufactory in Seville to Ulrich Gessler, who represented Bartholomäus Welser and his associates in Augsburg, in 1531. The contract was drawn up in Spanish, a language with which all the participants in the transaction were obviously familiar. At the time of the sale, thirteen slaves from North and West Africa were working in the manufactory; Robert Thorne manumitted two of them on the condition that they continued to work for the Welsers for another five years.[10]

In the late sixteenth and early seventeenth century, a number of economic and political developments disrupted these well-established commercial ties. The Dutch revolt against Spain affected transit trade through the Netherlands; Queen Elizabeth I ordered the closing of the *Stalhof* in 1598; the Thirty Years' War in Germany devastated the economy of south and west Germany (although the North Sea ports of Hamburg and Bremen benefitted); and the English Civil War created additional uncertainty in the mid-seventeenth century. These political and military conflicts were exacerbated by recurrent economic and financial crises.[11] Therefore the number of German merchants in London – mostly from Hamburg, Emden, Wesel and the region around Cologne and Aix-la-Chappelle – remained small in the first half of the seventeenth century.[12] The Augsburg merchant-banker Marx Conrad von Rehlingen,

8 Cf. Wolf-Rüdiger Baumann, *The Merchants Adventurers and the Continental Cloth Trade (1560s–1620s)* (Berlin: De Gruyter, 1990).

9 Lambert F. Peters, *Der Handel Nürnbergs am Anfang des Dreißigjährigen Krieges. Strukturkomponenten, Unternehmen und Unternehmer. Eine quantitative Analyse* (Stuttgart: Steiner, 1994), 105–107, 111, 254, 300–301 and *passim*.

10 Gustav Ungerer, *The Mediterranean Apprenticeship of British Slavery* (Madrid: Editorial Verbum, 2008), 24–25, 113–118; Heather Dalton, "Negotiating Fortune: English Merchants in Early Sixteenth-Century Seville," in Williams (ed.), *Bridging the Early Modern Atlantic World*, 57–73, esp. 65; idem., *Merchants and Explorers: Roger Barlow, Sebastian Cabot, and Networks of Atlantic Exchange, 1500–1560* (Oxford: Oxford University Press, 2016), 120–121.

11 Cf. Charles P. Kindleberger, "The Economic Crisis of 1619 to 1623," *Journal of Economic History* 51:1 (1991), 149–175; Sheilagh C. Ogilvie, "Germany and the Seventeenth-Century Crisis," *Historical Journal* 35:2 (1992), 417–441.

12 Margrit Schulte Beerbühl, *Deutsche Kaufleute in London. Welthandel und Einbürgerung (1660–1818)* (Munich: Oldenbourg, 2007), 81–88.

who had invested £1,000 into the Guinea trade in London in 1637, was certainly an exceptional case of German investment in English overseas commerce at this date.[13] It was only after the Restoration of the English monarchy in 1660 that Anglo-German trade recovered; this recovery coincided with the takeoff phase of English commercial expansion in the Atlantic world.[14]

The examples given above have already hinted at some linguistic aspects of Anglo-German exchange. In general, German merchants learned foreign languages when abroad. As a rule, aspiring merchants were sent abroad at a young age (often between thirteen and sixteen) in order to acquire the language by immersion in a native household for two to three years. Merchants' sons from Augsburg and Nuremberg, whose experiences have been the focus of a recent study, were most commonly sent to Italian and French commercial cities, above all to Venice and Lyons, but also to Antwerp (where schoolmasters opened a number of private schools for foreign learners in the sixteenth century) and Spanish cities. To support their learning efforts, a number of grammars, dictionaries and learning materials were published in central and western Europe.[15]

While few south German merchants sent their sons to England before the Thirty Years' War, the *Stalhof* in London was the primary place for learning English in the case of young Hanse merchants.[16] Responding to complaints about young traders who possessed neither linguistic skills nor commercial experience, the Hanse League decided in 1530 to admit only those to the *Stalhof* who had been learning the language for at least half a year (*die voer erst ein half jar up der sprake gewesen*). In 1554 this requirement was raised to two years, and candidates for admission had to pass an examination before the

13 Reinhard Hildebrandt (ed.), *Quellen und Regesten zu den Augsburger Handelshäusern Paler und Rehlinger 1539–1642. Wirtschaft und Politik im 16./17. Jahrhundert. Teil 2: 1624–1642* (Stuttgart: Steiner, 2004), 206, 213.

14 Cf. Kenneth Morgan, *Slavery, Atlantic Trade, and the British Economy, 1660–1800* (Cambridge: Cambridge University Press, 2000); Nuala Zahedieh, "Making Mercantilism Work: London Merchants and Atlantic Trade in the Late Seventeenth Century," *Transactions of the Royal Historical Society*, 6th series 9 (1999), 143–184; idem., *The Capital and the Colonies: London and the Atlantic Economy, 1660–1700* (Cambridge: Cambridge University Press, 2010).

15 Cf. Helmut Glück, Mark Häberlein and Konrad Schröder, *Mehrsprachigkeit in der Frühen Neuzeit. Die Reichsstädte Augsburg und Nürnberg vom 15. bis ins frühe 19. Jahrhundert* (Wiesbaden: Harrassowitz, 2013), 55–91.

16 Cf. Wilhelm Stieda, "Zur Sprachenkenntnis der Hanseaten," *Hansesche Geschichtsblätter* (1884), 157–164, esp. 157; Jennifer Willenberg, *Distribution und Übersetzung englischen Schrifttums in Deutschland des 18. Jahrhunderts* (Munich: K.G. Saur, 2008), 73.

alderman and the merchants' council.[17] Although the evidence is scant, it can be assumed that English and German merchants who engaged in business transactions in cities like Antwerp or Seville either conversed in the local language or employed interpreters.

Two things are important to note in this context. First, instruction in modern languages was largely a private affair: Although a few schools and universities began to teach English on an irregular basis in the late seventeenth century, those who wished to acquire the necessary linguistic skills usually had to hire a private language teacher (*Sprachmeister*)[18] or obtain them through immersion abroad. Second, apart from diplomats, merchants were almost the only professional group in Germany who saw the need to learn English before the end of the seventeenth century; scholars, for example, would usually read English texts in Latin translations.[19] It was only in the course of the eighteenth century, with the spread of Enlightenment ideas and the growing reputation of English literature and culture, that demand for instruction in the language among educated members of the bourgeoisie increased. The first printed manual for German learners of English, a Latin-based *Grammatica Anglica,* was published in Strasbourg only in 1665, and twenty-seven English grammars and handbooks appeared between 1700 and 1770 – a mere fraction of the materials published for learners of French or Italian.[20]

3 German Merchants in London

For the period from the Restoration to the end of the Napoleonic Wars, Margrit Schulte Beerbühl's study of the German merchant community in London

17 Jörn, *Stalhof*, 293.

18 On private language teachers, see the essays in Mark Häberlein (ed.), *Sprachmeister. Sozial- und Kulturgeschichte eines prekären Berufsstands* (Bamberg: University of Bamberg Press, 2015).

19 Bernhard Fabian, "Englisch-deutsche Kulturbeziehungen im achtzehnten Jahrhundert," in Barbara Schmidt-Haberkamp, Uwe Steiner, and Brunhilde Wehinger (eds.), *Europäischer Kulturtransfer im 18. Jahrhundert. Literaturen in Europa – Europäische Literatur?* (Berlin: De Gruyter, 2003), 13–30, esp. 16–17.

20 Konrad Schröder, *Lehrwerke für den Englischunterricht im deutschsprachigen Raum, 1665–1900. Einführung und Versuch einer Bibliographie* (Darmstadt: Wissenschaftliche Buchgesellschaft); Friederike Klippel, *Englischlernen im 18. und 19. Jahrhundert. Die Geschichte der Lehrbücher und Unterrichtsmethoden* (Münster: Nodus, 1994), 39–65. Cf. Fabian, "Englisch-deutsche Kulturbeziehungen," 23–24; idem., "Englisch als neue Fremdsprache des 18. Jahrhunderts," in Dieter Kimpel (ed.), *Mehrsprachigkeit in der deutschen Aufklärung* (Hamburg: Meiner, 1988), 178–196; Willenberg, *Distribution und Übersetzung*, 72–74.

provides us with a detailed picture of their involvement in many branches of English commerce, including trans-Atlantic trade, and points out some of the legal issues which they faced. In the late seventeenth and early eighteenth centuries, hundreds of Germans obtained rights of naturalization or denization in the English capital, and no fewer than 475 Germans became citizens there between 1715 and 1800. Two-thirds of the Germans naturalized in London during the eighteenth century were merchants, bankers and entrepreneurs. Hamburg and Bremen were the most important cities of origin of these migrants, but a substantial group also came from centers of proto-industrial production in northwest Germany like Elberfeld, Herford and Osnabrück. These origins are indicative of the goods with which German merchants in London dealt: The export of central European textiles, especially linen, to England and its colonies was the mainstay of their trade, but in the course of the eighteenth century they also branched out into the tobacco, sugar and fur trades. Chain migrations, which sometimes spanned several generations, kinship ties and business cooperation linked German textile-producing regions, Hanseatic port towns and the British commercial world. Thus members of the de Smeth family, which hailed from Hamburg, were established in Amsterdam, London and Livorno in the early eighteenth century, and the family's commercial operations extended to the Levant, Russia, the Iberian Peninsula and the British colonies in America. Around 1740 the firm of Abraham Korten, a native of Elberfeld who had become naturalized in London in 1718, traded with Russia, British North America and the Caribbean. In his extensive business operations Korten cooperated with his relatives in Elberfeld as well as with naturalized Germans and Dutchmen in London. The Hamburg merchant John Anthony Rücker, who obtained British citizenship in 1745, was the first of nine members of his family to move to London during the eighteenth century. His nephew John Peter settled in New York three decades later, and when John Anthony Rücker died in 1804, he left several plantations in the Caribbean to another nephew, Daniel Henry.[21]

As Schulte Beerbühl shows, a crucial aspect of the commercial success of these migrants was their naturalization. By acquiring British citizenship, German merchants were able to overcome the mercantilist restrictions placed on trade within the British Empire by the Navigation Acts and directly participate in overseas trade. In order to bolster English colonial trade and bar foreign

21 Schulte Beerbühl, *Deutsche Kaufleute in London*, *passim* (for the de Smeth family, see 193–195, 331; for the Rücker family, see 176–178, 198–199; for Korten, see 338–345). For a concise survey, see Margrit Schulte Beerbühl, "German Merchants and the British Empire during the Eighteenth Century," in Davis, Manz, and Schulte Beerbühl (eds.), *Transnational Networks*, 39–57.

competition, the Navigation Acts, a series of laws passed by Parliament between 1651 and 1673, stipulated that goods had to be carried between England and her colonies in English ships manned by a majority of English seamen. All goods shipped from a continental European port to an English colony had to clear customs at an English port before crossing the Atlantic; the same applied to most colonial goods being transported from American or Caribbean ports to continental Europe.[22]

Moreover, German merchants who resided in London were able to benefit from the advantageous commercial treaties which Great Britain had concluded with Portugal, Spain and Russia. They also invested in regulated companies like the Hudson Bay, Eastland and Levant Companies, bought stock in the Bank of England as well as shares in the East India and South Sea Companies, and played an especially prominent role in the British Russia trade. Their variegated commercial activities and investment strategies indicate that naturalized German merchants were familiar with English commercial and corporate law.[23]

Yet Schulte Beerbühl's study also shows that rapid commercial expansion, intense competition, recurrent financial crises and frequent warfare entailed considerable risks of business failure, especially in the late eighteenth century. On the whole, British bankruptcy law rewarded cooperative behavior. While sixteenth- and seventeenth-century statutes had provided for the imprisonment of insolvent debtors, who were generally seen as fraudulent and irresponsible, the 1706 bankruptcy statute stipulated that insolvent merchants could be recognized as "honest" debtors and could seek a deal with their creditors in order to avoid debtor's prison.[24] Bankrupts who cooperated with their creditors, handed over their business documents to them, and helped to collect outstanding debts were now able to obtain so-called certificates of conformity, in which at least four-fifths of the creditors testified that the bankrupt had settled as many of his obligations as he possibly could. These certificates provided merchants with an opportunity for a fresh start. According to Schulte

22 John J. McCusker and Russell R. Menard, *The Economy of British North America, 1607–1789* (Chapel Hill: University of North Carolina Press, 1985), 46–50; Hermann Wellenreuther, *Niedergang und Aufstieg. Geschichte Nordamerikas vom Beginn der Besiedlung bis zum Ausgang des 17. Jahrhunderts* (Münster: LIT, 2000), 245–246, 485–487.

23 Schulte Beerbühl, *Deutsche Kaufleute in London*, *passim*; idem., "German Merchants," 51–55.

24 W.J. Jones, "The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period," *Transactions of the American Philosophical Society* 69:3 (1979), 1–63; Julian Hoppit, *Risk and Failure in English Business, 1700–1800* (Cambridge: Cambridge University Press, 1987), 18–41.

Beerbühl, a substantial number of insolvent German merchants managed to secure such a certificate.[25]

The career of Peter Hasenclever (1716–1793), a native of Remscheid in Westphalia, illustrates the opportunities as well as the risks confronted by German merchants and entrepreneurs who ventured into overseas trade. Hasenclever initially worked for his cousin, a cloth and needle manufacturer in the Rhenish town of Burtscheid, and gradually forged a Europe-wide network of contacts in the course of extensive business trips to France, England, Russia, Poland, Silesia and the Iberian Peninsula. During his commercial apprenticeship, he seems to have acquired extensive linguistic skills as well. In 1750, Hasenclever joined a mercantile company in Cádiz which was reorganized five years later and exported large consignments of central European linen to South America during the Seven Years' War. In 1763, the Westphalian merchant, who had married the daughter of an English captain, settled near London. Shortly afterwards, he won two English investors for his plan of an American Company, which was endowed with a capital stock of £21,000 and sought to produce iron, potash, flax and hemp in the colonies. The ambitious Hasenclever hired about 500 German and English miners, ironworkers, colliers and laborers along with their families to build a complex of iron furnaces and forges in the hills of northern New Jersey. He also acquired extensive tracts of land in various other colonies. Due to poor planning, technical problems, conflicts within the company and the bankruptcy of one partner, however, the venture quickly failed. In order to escape imprisonment as an insolvent debtor, Hasenclever sought to take advantage of British bankruptcy law and handed his assets, including his shares in the American Company, over to his creditors in 1770. But the trustees of the company refused to sign an agreement that would have granted the Rhenish merchant a certificate of conformity, and the Court of Chancery sentenced him to pay an additional £4,000. In response to this sentence, he published the book titled "The Remarkable Case of Peter Hasenclever, Merchant" in which he claimed that he had been wronged. Hasenclever eventually migrated to Silesia in 1773, where he became engaged in various industrial enterprises, promoted the modernization of textile production, and worked for closer commercial and diplomatic relations between Prussia and Spain. He also fought to regain his reputation in Britain and finally obtained a ruling by a London court in 1787 which cleared him of all debts and allowed him to engage in business within the British Empire once again.[26]

25 Schulte Beerbühl, *Deutsche Kaufleute in London*, 347–389.

26 Adolf Hasenclever, *Peter Hasenclever aus Remscheid-Ehringhausen, ein deutscher Kaufmann des 18. Jahrhunderts* (Gotha: F.A. Perthes, 1922); Klaus Weber, *Deutsche Kaufleute im Atlantikhandel 1680–1830. Unternehmen und Familien in Cádiz, Hamburg und*

Apart from highlighting the importance of British bankruptcy law for some German merchants, Peter Hasenclever is a good example of an entrepreneur whose business activities in the Atlantic world extended to several colonial empires. As Margrit Schulte Beerbühl has pointed out:

> the economic activities of the immigrant merchant elite in London did not stop at the borders of the British Empire. Their impact can only be fully understood if their trading activities and family relations outside imperial borders are noted; that is in terms of their kinship and family connections to the major European port cities, which were often gateways to the non-European world.[27]

Historians of the early modern Atlantic world are increasingly taking note of its interconnected, entangled nature,[28] and the activities of German-born merchants, which often transcended imperial, linguistic, and legal boundaries, underlines this interconnectedness.[29]

In addition, some German businessmen were able to forge transatlantic ties in the context of religious and philanthropic endeavors. This was the case with the Augsburg silver merchant and banker Christian von Münch the elder (1690–1757), who became involved in the transfer of money and goods to Protestant refugees from Salzburg in the North American colony of Georgia in the 1730s and 1740s. In his recent study of the Salzburger settlement of Ebenezer, Alexander Pyrges has pointed out its remarkable transnational and transconfessional character: The migration of several hundred religious refugees and their settlement on the Savannah River was organized and sustained by a network that included the senior of the Evangelical Lutheran Church in the imperial city of Augsburg, Samuel Urlsperger; the Glaucha orphanage founded outside the gates of Halle by the Lutheran pietist August Hermann Francke; the Anglican *Society for Promoting Christian Knowledge*, a voluntary religious association that supported various pious and charitable activities; the German

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Bordeaux (Munich: C.H. Beck, 2004), 73, 128, 130–131, 279–280; Schulte Beerbühl, *Deutsche Kaufleute*, 146, 166, 182, 382, 385; Marc Levinson, "Peter Hasenclever (1716–1793)," *Immigrant Entrepreneurship* <http://www.immigrantentrepreneurship.org/entry.php?rec=224> (accessed Jan. 31, 2017).

27 Schulte Beerbühl, "German Merchants," 56.

28 Eliga H. Gould, "Entangled Histories, Entangled Worlds: The English-Speaking Atlantic as a Spanish Periphery," *American Historical Review* 112:3 (2007), 764–786.

29 Cf. Mark Häberlein, "Migration and Business Ventures: German-Speaking Migrants and Commercial Networks in the Eighteenth-Century British Atlantic World," in Davis, Manz, and Schulte Beerbühl (eds.), *Transnational Networks,* 19–38, esp. 34–38.

Lutheran court chapel in London; and the Board of Trustees which governed the colony of Georgia from London during the first two decades of its existence (from 1732 to 1752).[30] The eminent banker Christian von Münch,[31] who was alerted to the Salzburgers' plight by Samuel Urlsperger, originally seems to have supported the Ebenezer settlement for charitable reasons, using his connections to bankers in his native Frankfurt and in London to transfer bills of exchange from Urlsperger to his correspondents and render other financial services. Three 'transports' of Salzburgers to Georgia between 1733 and 1736 were largely financed through these exchange transactions.[32] Christian von Münch also shipped goods destined for refugees from Salzburg and collected inheritances on their behalf. In the late 1740s, the Augsburg merchant-banker began to send trade goods to Georgia for his own account and took part in the recruitment of more than two hundred transatlantic migrants from the vicinity of Ulm. At mid-century, he also obtained 1,000 acres of land in the colony and sent a surveyor to America in order to oversee the establishment of a plantation there. The surgeon Johann Ludwig Mayer acted as Münch's agent in Ebenezer, extending credit to the community and shipping some silk produced there to Augsburg. The merchant-banker may even have envisioned "developing a hereditary estate in Georgia, which was to be directly under the English Crown and as independent of all other jurisdiction as any imperial territory in Germany." While these ambitions came to nothing, it appears that Münch took advantage of Georgia's peculiar status as a philanthropic enterprise and consciously blurred the lines between the charitable support of religious refugees

30 Alexander Pyrges, *Das Kolonialprojekt EbenEzer. Formen und Mechanismen protestantischer Expansion in der atlantischen Welt des 18. Jahrhunderts* (Stuttgart: Steiner, 2015).

31 A native of Frankfurt, Münch had begun to work for the Augsburg banking house of Rauner in 1708. He married one of his employer's daughters in 1713 and subsequently formed a company with his brother-in-law Johann Thomas Rauner the younger. In 1718, the imperial treasury (*Hofkammer*) ordered silverware valued at 50,000 from Rauner & Münch, who had established a branch in Vienna by that time. The company also became involved in the Bavarian salt trade and advanced 400,000 florins to the Bavarian Elector in 1725. Münch became the sole owner of the company in 1728 and was elevated to the nobility three years later. He advanced further loans to the Elector of Bavaria and held a monopoly contract for the delivery of copper from the Banat (in present-day Romania) to Vienna from 1733 to 1737. Moreover, he experimented with the cultivation of mulberry trees for silk production on his landed estate near Augsburg. For his career, see Wolfgang Zorn, *Handels- und Industriegeschichte Bayerisch-Schwabens 1648–1870. Wirtschafts-, Sozial- und Kulturgeschichte des schwäbischen Unternehmertums* (Augsburg: Verlag der Schwäbischen Forschungsgemeinschaft, 1961), 30–34, 37–38. Cf. also Günther Grünsteudel et al. (eds.), *Augsburger Stadtlexikon,* 2d ed. (Augsburg: Wissner, 1998), 667; Pyrges, *Das Kolonialprojekt EbenEzer*, 229–230.

32 Pyrges, *Das Kolonialprojekt EbenEzer*, 178, 230–231, 240–241, 244–246, 250.

and the pursuit of his own business interests. He also benefited from the fact that the Georgia Trustees elected him as a corresponding member – a status which may have enabled him to evade some of the restrictions of the Navigation Acts.[33]

4 German Merchants in the American Colonies

In the course of the eighteenth century, a number of German immigrants established themselves as merchants in the Atlantic seaports of the British Empire. One of the most successful colonial businessmen of German origin was Caspar Wistar, the son of a forester from the vicinity of Heidelberg. Wistar had migrated to Philadelphia as a young man in 1717 and began his career as a button maker and shopkeeper; he also joined the Society of Friends (or Quakers), then the dominant religious group in Pennsylvania. During the 1720s, he entered the field of transatlantic commerce, and by 1730 he began to import a variety of goods directly from Germany. As the Navigation Acts allowed only subjects of the British crown to engage in commerce within the empire, Wistar pursued three complementary strategies. First, he became naturalized as a British subject in 1724. His naturalization act specified his commercial privileges, declaring him "free and fully able and capable to trade, traffic, load, freight and transport all […] manner of goods, wares and merchandises not by law prohibited to be imported or exported" like "the natural liege people and subjects of the King of Great Britain born in this province of Pennsylvania." Secondly, Wistar cultivated a transatlantic network of partners and agents that sustained his German-American trading activities. German goods destined for the Pennsylvania market were purchased by a childhood friend in the town of Neckargemünd, who entrusted their shipment to transatlantic business travelers or emigrants, including members of Wistar's own family who followed him to colonial America. Wistar's business network also comprised river boatmen, ship captains, Mennonites in the Palatinate, Krefeld and Amsterdam, and colonial Quaker merchants.

Thirdly, the Philadelphia merchant focused on the importation of German goods that were not produced in comparable quality in Great Britain and were

33 Zorn, *Handels- und Industriegeschichte*, 38, 301; George Fenwick Jones, *The Georgia Dutch: From the Rhine and Danube to the Savannah, 1733–1783* (Athens, Ga.: University of Georgia Press, 1992), 139, 146–147 (quote on 147); A.G. Roeber, *Palatines, Liberty, and Property: German Lutherans in Colonial British America* (Baltimore and London: Johns Hopkins University Press, 1993), 114; Pyrges, *Das Kolonialprojekt EbenEzer*, 190, 241–242.

in high demand among German migrants. These included custom-made rifles, metal objects, silk, fustian and linen textiles, German-language books, looking glasses and mirrors. As Rosalind Beiler has shown, Caspar Wistar's commercial strategy, which was finely attuned to the exigencies of transatlantic trade and the needs of overseas migrants, was remarkably successful. His commercial profits enabled him to buy extensive tracts of land in Pennsylvania, much of which he later resold to German settlers. By finding jobs for recently arrived immigrants, selling land and goods to them, extending credit and providing information, Wistar became a patron of the Pennsylvania German community. At the time of his death in 1752, he owned an estate worth £26,000 (Pennsylvania currency), making him one of the richest men in Philadelphia.[34]

Beiler has also pointed out that Wistar conducted his transatlantic trade on the margins between the legal shipment of emigrants' personal household goods and the illegal smuggling of non-British commercial items. In September 1736, for example, a customs collector in Philadelphia confiscated the ship *Princess Augusta*, which carried a large number of new iron and copper items allegedly belonging to German immigrants but actually shipped for the account of traders like Wistar. While the ship was restored, the admiralty judge hearing the case upheld the official's decision to confiscate the goods as illegal imports.[35]

Moreover, the enterprising Philadelphia merchant became involved in manufacturing and technological transfer. In 1739, a few months after the immigration of four German glassmakers to Philadelphia, Wistar set up a glassworks in southern New Jersey, which he turned into the first successful enterprise of its kind in British North America. Beiler has demonstrated that Wistar strongly relied on experience acquired in his native Germany when he formed the United Glass Company and founded the company town of Wistarburg. As the son of a Palatine forester, he was familiar with the Peterstal glassworks, which had been set up near Heidelberg in 1710. He was well aware that abundant supplies of wood were essential for a successful glassmaking enterprise, and he relied

34 See Rosalind J. Beiler, "From the Rhine to the Delaware Valley: The Eighteenth-Century Trading Channels of Caspar Wistar," In Hartmut Lehmann, Hermann Wellenreuther and Renate Wilson (eds.), *In Search of Peace and Prosperity: New German Settlements in Eighteenth-Century Europe and America* (University Park, Pa.: Penn State University Press, 2000), 172–188; idem., *Immigrant and Entrepreneur: The Atlantic World of Caspar Wistar* (University Park, Pa.: Penn State University Press, 2009), 89–153.

35 Rosalind J. Beiler, "'Smuggling Goods or Moving Households?' The Legal Status of German-Speaking Immigrants in the First British Empire," in Walter G. Rödel and Helmut Schmahl (eds.), *Menschen zwischen zwei Welten. Auswanderung, Ansiedlung, Akkulturation* (Trier: Wissenschaftlicher Verlag Trier, 2002), 9–23.

on the expertise of skilled German craftsmen, who transferred central European technology to the New World. The organization of Wistar's United Glass Company, which comprised several partnership contracts between the entrepreneur and individual glassmakers, was obviously modeled after similar legal arrangements in Germany. In contrast to his native Palatinate, however, Wistar could draw on indentured laborers in New Jersey, and the United Glass Company was largely free of government restrictions placed on manufacturing in eighteenth-century Germany. Additional glassmakers were subsequently recruited with the help of business associates in Germany. After Caspar Wistar's death in 1752, his son Richard continued the enterprise until the Revolutionary War, when his fortunes rapidly declined.[36]

Yet it has also to be noted that relatively few German merchants in the American colonies were able to replicate the success of Caspar Wistar. With the exception of Johann Heinrich Keppele (1716–1797), a Philadelphia merchant who was involved in twelve transatlantic passenger transports between 1752 and 1775 and established direct business contacts with Hamburg,[37] Germans were marginal participants in the business of transporting continental European migrants overseas, which was firmly in the hands of English firms based in Rotterdam, London and Philadelphia. Several other German businessmen who entered the passenger transport business at mid-century quickly failed.[38] Although more research on the activities of German merchants in the British colonies is needed, it appears that this failure was not due to the lack of linguistic skills or unfamiliarity with the legal system, but rather to insufficient capital and the superior connections and business organization of their English competitors.[39]

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36 Arlene Palmer, "Glass Production in Eighteenth-Century America: The Wistarburgh Enterprise," *Winterthur Portfolio*, 11 (1976), 75–101; Rosalind J. Beiler, "Peterstal and Wistarburg: The Transfer and Adaptation of Business Strategies in Eighteenth-Century American Glassmaking," *Business and Economic History*, 26 (1997), 343–353; idem., *Immigrant and Entrepreneur*, 154–171.

37 Cf. Birte Pfleger, "John Henry Keppele (1716–1797)," *Immigrant Entrepreneurship* <http://immigrantentrepreneurship.org/entry.php?rec=7> (accessed Jan. 31, 2017).

38 Andreas Brinck, *Die deutsche Auswanderungswelle in die britischen Kolonien Nordamerikas um die Mitte des 18. Jahrhunderts* (Stuttgart: Steiner, 1993), 85–88; Marianne S. Wokeck, *Trade in Strangers: The Beginnings of Mass Migration to North America* (University Park, Pa.: Penn State University Press, 1999), 70–71, 240–254.

39 Important studies of English merchants in Atlantic commerce include Jacob M. Price, *Perry of London: A Family and a Firm on the Seaborne Frontier, 1615–1753* (Cambridge, Mass., and London: Harvard University Press, 1992); David Hancock, *Citizens of the World: London Merchants and the Integration of the British Atlantic Community, 1735–1785* (Cambridge: Cambridge University Press, 1995); and Sheryllynne Haggerty, *The British Atlantic*

5 German-Jewish Merchants in Eighteenth-Century North America

Among the German-speaking merchants and traders who established themselves in Great Britain's North American colonies were some Ashkenazic Jews who, despite their small number, provided important commercial links between Atlantic port cities and the expanding colonial backcountry.[40] An exemplary case is that of Joseph Simon, who hailed from a Frankfurt family[41] and migrated via England to colonial America, where he established himself in Lancaster, Pennsylvania, in the mid-1740s. Lancaster, a mostly German-speaking town of about three thousand inhabitants at the time of American independence, was a major supply center for settlers in the Pennsylvania backcountry and a gateway between the port city of Philadelphia and the colonial frontier.[42] As a trader, Joseph Simon took full advantage of the town's strategic location and commercial opportunities: He imported a variety of goods from England and the Caribbean, became involved in the fur trade and land speculation, entered supply contracts for frontier troops during the French and Indian War, and invested in the manufacture of guns, other iron goods, potash, and liquor. Simon formed partnerships with merchants from several ethnic and religious backgrounds: Ashkenazic Jews in Philadelphia like David Franks and the brothers Barnard and Michael Gratz, English-speakers like the Lancaster gunsmith William Henry and the Irish-born Indian trader George Croghan. But he also engaged in frequent business dealings with German-speaking inhabitants of Lancaster. In 1763, Joseph Simon and the tavern keeper Matthias Slough, the son of an immigrant from the Kraichgau region of southwestern Germany, formed a partnership that organized wagons and teams for the provisioning of military units on the Pennsylvania frontier.[43] As a member

Trading Community, 1760–1810: Men, Women, and the Distribution of Goods (Leiden and Boston: Brill, 2006).

40 On Jews in early America, see Eli Faber, *A Time for Planting: The First Migration, 1654–1820* (Baltimore and London: Johns Hopkins University Press, 1992); Oscar Reiss, *The Jews in Colonial America* (Jefferson, N.C., and London: McFarland, 2004).

41 On his origins in Frankfurt on the Main, see Elisheva Carlebach, *Palaces of Time: Jewish Calendar and Culture in Early Modern Europe* (Cambridge, Mass., and London, 2011), 69–71.

42 See Jerome H. Wood, Jr., *Conestoga Crossroads: Lancaster, Pennsylvania, 1730–1790* (Harrisburg: Pennsylvania Historical and Museum Commission, 1979); Mark Häberlein, *The Practice of Pluralism: Congregational Life and Religious Diversity in Lancaster, Pennsylvania, 1730–1820* (University Park: Penn State University Press, 2009).

43 Wood, *Conestoga Crossroads*, 115, 140–141; Sidney M. Fish, *Barnard and Michael Gratz: Their Lives and Times* (Lanham, Md.: Rowman & Littlefield, 1994), 20, 25, 30–31, 38–40, 43, 45, 49–51, 56–57, 61–63, 71, 84–86, 90–92, 94–98, 100, 113, 116–120, 124, 126, 129; Mark

of Lancaster's small Jewish community, on the other hand, Joseph Simon steadfastly held on to religious tradition, privately employing a slaughterer for kosher meat, keeping Torah scrolls and a Torah ark for worship services in his home, and commissioning manuscript Hebrew calendars.[44] His manifold activities suggest that Simon was fluent in Hebrew, English and German and was perfectly familiar with the requirements for drawing up valid business contracts and organizing business ventures that linked the colonial backcountry to the Atlantic world.

While the American War for Independence (1775–1783) impeded transatlantic communication for German (including German-Jewish) merchants, it also created new opportunities for those who either sold arms and other goods to the American rebels[45] or supplied the German mercenary regiments that fought on the British side. A good example for the latter case is provided by the brothers Philip and Jacob Mark, sons of a Jewish *Hoffaktor* in the small principality of Waldeck. A typical eighteenth-century mercenary state, Waldeck regularly hired out regiments to major European powers in wartime in return for subsidies. In 1776, the principality concluded a subsidy contract with Great Britain that obliged it to send a regiment of 670 men to North America in return for annual subsidies of 25,000 Talers. Waldeck also promised to replace deceased, wounded or deserted soldiers.[46] Philip and Jacob Mark were put in charge of outfitting the regiment, shipping the necessary supplies to North America, and transferring the subsidies from London to Arolsen, the capital of Waldeck. While Philip Mark accompanied the regiment to New York and Florida and acted as its quartermaster and cashier, his brother Jacob was in charge of the European side of the supply operation. Whereas their business

Häberlein and Michaela Schmölz-Häberlein, "Competition and Cooperation: The Ambivalent Relationship between Jews and Christians in Early Modern Germany and Pennsylvania," *Pennsylvania Magazine of History and Biography,* 126:3 (2002), 409–436, esp. 431–433; Häberlein, *Practice of Pluralism*, 167–171.

44 Häberlein and Michaela Schmölz-Häberlein, "Competition and Cooperation," 430–431; Häberlein, *Practice of Pluralism,* 166–167; Carlebach, *Palaces of Time*, 69–71.

45 Claudia Schnurmann, "A Scotsman in Hamburg: John Parish and his Commercial Contribution to the American War of Independence," in Markus A. Denzel, Jan de Vries, and Philipp R. Rössner (eds.), *Small is Beautiful? Interlopers and Smaller Trading Nations in the Pre-Industrial Period*. Proceedings of the xvth World Economic History Congress in Utrecht (Netherlands) 2009 (Stuttgart: Steiner, 2011), 157–176.

46 Benno Freiherr von Canstein, *Der Waldeckisch-Englische Subsidienvertrag von 1776. Zustandekommen, Ausgestaltung und Erfüllung* (Arolsen: Waldeckischer Geschichtsverein, 1989).

operations have been exhaustively described elsewhere, they will be briefly summarized here with regard to the linguistic and legal issues involved.[47]

From 1777 to 1781 Jacob Mark assembled several supply shipments for the regiment in Germany. While he purchased cloth and uniform parts from local suppliers (including his Jewish relatives), wine was supplied by a merchant in Bremen. Mark also purchased insurance for the sea voyage from Bremerlehe to England and America, handled complex credit operations with London bankers, and forwarded mail between Arolsen, London and New York. This job entailed considerable geographic mobility: Thus Jacob Mark accompanied a shipment of supplies to New York in 1777 and traveled to London four years later in order to take care of various business and legal matters. Although the Waldeck authorities issued written instructions to him, Jacob Mark's correspondences show that he enjoyed considerable freedom to carry out his operations as he saw fit. The Waldeck officials obviously trusted his skills and business acumen, and Jacob Mark turned this fact to his advantage: In 1780 the Mark brothers obtained the privilege to settle their account directly with the regiment – in other words, between themselves! During his sojourn in London in the winter of 1781–82, Jacob Mark reported a number of conversations with British officers, bankers and politicians, which indicate that he was fluent in the English language. According to his letters from the British capital, he patiently negotiated with the treasury office for the payment of subsidies, convinced reluctant bankers to issue letters of exchange in advance, purchased various luxury objects for the prince of Waldeck and his court, and collected information on the regiment, which had been taken prisoner in Florida. As he informed the principality's secret secretary (*Geheimsekretär*) Frensdorf in 1781, his lengthy negotiations in the British capital involved considerable expenditure in time and money.

When the war ended in 1783, the Mark brothers decided to remain in America and establish themselves as independent merchants in New York. Their subsequent career reveals some parallels with those of colonial merchants of German origin like Caspar Wistar. They were keen to obtain American citizenship, which Philip Mark held by 1789; they concentrated on importing continental European goods, including German-manufactured mirror-glass and a variety of textiles and accessories; and they cultivated ties with German entrepreneurs, especially the Weimar-based publisher and businessman Friedrich

47 For this and the following paragraphs, see Mark Häberlein and Michaela Schmölz-Häberlein, "Revolutionäre Aussichten. Die transatlantischen Geschäfte der Brüder Mark im Zeitalter der amerikanischen Unabhängigkeit," *Jahrbuch für Europäische Überseegeschichte*, 15 (2015), 27–89.

Justin Bertuch,[48] as well as with the German-speaking elite in New York City, becoming founding members of the German Society of New York. When Philip Mark decided to return to Germany in 1794 on account of his failing health, he secured an appointment as U.S. Consul in Franconia and made his home in Bamberg, where two of his brothers were living. Although the Mark brothers had dissolved their business partnership before Philip's repatriation, they continued to collaborate in various projects, including land speculation in upstate New York, until Jacob Mark's bankruptcy in 1800.

This bankruptcy case reveals that Jacob Mark and his partner, his nephew John Speyer, had accumulated huge debts in the course of their business operations. Taking advantage of the first, short-lived bankruptcy act passed by Congress in the same year,[49] Mark and Speyer assigned their real estate in New York City and Oneida County to the New York firm of Townsend & Jones and the merchant John Murray. They also requested Townsend & Jones to settle their debts with James I. Roosevelt. Jacob Mark and John Speyer were officially declared bankrupt in July 1800, and two New York merchants were assigned the task of collecting outstanding assets and settling further debts. As the funds proved insufficient to pay the creditors, however, the bankruptcy proceedings in New York courts dragged on until the early 1820s.[50]

6 Conclusion

As the cases discussed in this essay indicate, German involvement in Anglo-American trade in the later seventeenth and eighteenth centuries entailed a number of risks and impediments, including the trade restrictions associated with the English Navigation Acts, heavy competition from British merchants, and the vagaries of the ocean voyage, particularly in wartime. To overcome these risks, German merchants adopted a variety of strategies: They obtained British (or later American) citizenship, specialized in the importation of goods from continental Europe which were in high demand in the colonies, devised ways to circumvent the Navigation Acts by blurring the lines between philanthropy and business or between household goods and commercial items, and

48 Cf. Thomas C. Starnes, "Bertuch, Philip Mark und der große Nordamerika-Plan," in Gerhard R. Kasier and Siegfried Seifert (eds.), *Friedrich Justin Bertuch (1747–1822). Verleger, Schriftsteller und Unternehmer im klassischen Weimar* (Tübingen: Niemeyer, 2000), 229–244.

49 Cf. Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* (Cambridge, Mass., and London: Harvard University Press, 2002).

50 Häberlein and Schmölz-Häberlein, "Revolutionäre Aussichten," 80–84.

cultivated extensive business networks that frequently crossed ethnic and linguistic boundaries.

As English was not taught in German public schools on a regular basis before the end of the early modern era, merchants venturing into the Anglophone world usually learned the language in situ – either during their commercial apprenticeship or as immigrants in an English-speaking environment. While a few merchants of German origin like the Rücker family and Caspar Wistar were remarkably successful, the cases of Peter Hasenclever and Jacob Mark illustrate the hazards involved in transatlantic commerce within the boundaries of the British Empire. Some of those who failed took advantage of British bankruptcy law, which offered "honest" debtors the opportunity of a fresh start.

Finally, on the subject of how far did words travel with merchants? To be sure, the Anglo-German and Atlantic trades familiarized merchants and their customers with a variety of commodities. In the Anglo-American world of the eighteenth century, *Osnabrigs* (or *Osnabrughs*) and *Tecklenburghs* were standard terms for linen cloth from northwest Germany,[51] while English imports like calicoes, kerseys and Manchester cloth could be purchased at shops and fairs in Germany.[52] The merchant Peter Hasenclever, who wrote several articles on political economy after his return to Europe, published a statistical overview of North America's trade on the eve of the War for Independence in the Hamburg magazine *Politisches Journal* in 1781, which was based on customs records and Hasenclever's own observations during his stay in the colonies. While most products, weights and measures are rendered in German, the author also uses English terms like "cotton" and "Paper Currency," Occasionally he gives both English and German terms, as in *Bounty oder Prämie* and *Bushel, oder Scheffel*, and he explains that "coasting traders" are ships *welche von einem amerikanischen Hafen zum andern, an der Küste hinfuhren*.[53]

When it comes to more complex issues of corporate, contract and bankruptcy law, it appears that the German merchants residing in Britain or the American colonies became familiar with the practical aspects of Anglo-American commercial law in the course of their business operations and used

51 See, e.g., Eulanda A. Sanders, "The Politics of Textiles Used in African American Slave Clothing," *Textile Society of America Symposium Proceedings*, Paper 740 (2012); Schulte Beerbühl, "German Merchants," 42.

52 In the late eighteenth century, these items regularly appear in advertisements in German newspapers like the "Hochfürstlich-Bambergisches Intelligenzblatt."

53 [Peter Hasenclever], "Generalrechnung der Exportation der Nord-Amerikanischen Produkte; von Kanada bis Florida," *Politisches Journal, nebst Anzeigen von gelehrten und anderen Sachen,* 1:1 (1781), 122–135.

them to their advantage. But that knowledge was largely restricted to the merchants who actually needed it. It was only after 1780 that works appeared in Germany which familiarized readers with facets of English commercial law in a more systematic way.

In 1782, Johann Andreas Engelbrecht published a two-volume work titled *Theorie und Praxis der Assecuranzen*, a translation of John Weskett's "A Complete Digest of the Theory, Laws, and Practice of insurance" (London, 1781). As Engelbrecht confessed in his preface, he found his task quite difficult, for Weskett's work was very important in an English context but of limited use for Germany. Therefore he had decided to add a number of notes and explanations. Additional problems were created by the work's legal style and the huge difference (*himmelweiten Unterschied*) between English and German forms of legal process. Moreover, as English expressions like "company," "partnership" and "society" were virtually synonymous in German, Engelbrecht chose to include the English originals in his chapter headings.[54] From 1785 to 1797, Johann Georg Büsch and Christoph Daniel Ebeling published three volumes of their *Handlungsbibliothek*, which contained articles and book reviews on English and American trade as well as essays on commercial law and practice. Yet when the Göttingen jurist Georg Friedrich von Martens wrote a brief introduction to the English law governing bills of exchange along with relevant documents in 1797, he emphasized that they were little known in Germany.[55] Thus it appears that systematic coverage of English commercial law in Germany was still in its infancy at the end of the early modern era. In the final analysis, German merchants who ventured into the British Atlantic world had to learn what they needed to know on the spot and from experience.

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CHAPTER 12

Laws – Customs – Conventions: French Merchants and French Legal Doctrines in the Brazilian Law Courts in the Second Half of the Nineteenth Century

Hanna Sonkajärvi

The second half of the nineteenth century coincided, in Brazil, with the introduction of the first *Código Comercial* (1850) which was inspired by French legal doctrine and a substantial immigration of French merchants, many of them of Jewish origin. A number of these immigrants actively relied on their relatives in France to conduct their businesses in Brazil.[1] Also, numerous foreign firms operated in imperial Brazil through local business partners or agents tasked with carrying out business on behalf of their paymasters. In this context, legal conflicts would arise that needed to be settled in the Brazilian law courts, which were starting to apply the new Commercial Code.

This paper will offer a micro-historical analysis of the initial phases of insolvency litigation (conciliation and arbitration) and, within these proceedings, the expertise of arbiters in the verification of merchants' account books. It will focus on commercial litigation between French and local commercial actors and on the reception of French legal doctrines by various legal actors (judges, lawyers and litigants) in 1850s and 1860s Brazil. Based on a research in progress, I will argue that even though social practises linked to the merchants' belonging to a French (and Jewish) communities, legal instruments such as French notarial records, and French legal doctrines, are visible in the sources provided by court records, the weight of this French influence upon legal practice should not be overestimated. Instead, what seems to have mattered more than ethnic or religious belonging, or the use of a certain set of legal instruments, was the

1 Fania Fridman, "Une autre 'France Antarctique': le Rio de Janeiro des juifs français au XIXe siècle", in Laurent Vidal and Tania Regina de Luca (eds.), *Les Français au Brésil, XIXe–XXe siècles* (Paris: Les Indes Savantes, 2011), 193–211; Frieda Wolff, "Firmas francesas de israelitas no Brasil no século XIX", *Revista do Instituto Histórico e Geográfico Brasileiro* 147:351 (1986), 456–464.

embeddedness of the respective merchants, their creditors and the merchant-arbitrators in a given local setting of social- and business networks.

In recent years, the study of migrations has developed largely along the lines of network analysis[2] – and when it comes to the economic activities of migrants – New Institutional Economics.[3] This has been the case especially for migration movements or 'trading diaspora' such as the Basque or the Sephardic Jewish trading networks across the Atlantic. In this context, various scholars have researched the role of religion, ethnicity and kinship by studying families, religious brotherhoods and associations, and the role of trust in the construction and maintenance of networks.[4] However, trust in these studies is, in the main understood as personal-trust established through face-to-face relationships or the action of intermediaries and agents. A few authors, such as Avner Greif, Stefan Gorißen or Sheryllynne Haggerty have in their respective analysis of merchants' networks taken into account that trust is not only established interpersonally, but that there can exist a trust-based relationship created by

2 Simone Derix, "Vom Leben in Netzen. Neue geschichts- und sozialwissenschaftliche Perspektiven auf soziale Beziehungen", *Neue Politische Literatur* 56 (2011), 185–206; John Scott, *Social Network Analysis: A Handbook* (London: Sage Publications, 1991); Barry Wellman and Stephen D. Berkowitz (eds.), *Social Structures: A Network Approach* (New York: Cambridge University Press, 1988); Harrison C. White, *Identity and Control. How Social Formations Merge* (Princeton: Princeton University Press, 2008).

3 Douglass C. North, *Theorie des institutionellen Wandels* (Tübingen: Mohr Siebeck, 1988); idem, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990); Oliver E. Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (New York: The Free Press, 1985).

4 Xavier Lamikiz, *Trade and Trust in the Eighteenth-century Atlantic World: Spanish Merchants and Their Overseas Networks* (Woodbridge: Boydell & Brewer, 2010); Juan Javier Pescador, *The New World Inside a Basque Village. The Oiartzun Valley and its Atlantic Emigrants, 1550–1800* (Reno: University of Nevada Press, 2004); Fernando Férnandez González, *Comerciantes vascos en Sevilla* (Vitoria-Gasteiz: Gobierno Vasco, 2000); Lutgardo García Fuentes, *Sevilla, los vascos y América: Las exportaciones de hierro y manufacturas metálicas en los siglos XVI, XVII y XVIII* (Bilbao: Fundación BBV, 1991); Óscar Álvarez Gila and Alberto Angulo Morales (eds.), *Las Migraciones vascas en perspectiva histórica* (*siglos XVI–XX*), (Bilbao: Universidad del País Vasco, 2002); Francesca Trivellato, *The Familiarity of Strangers: The Sephardic Diaspora, Livorno, and Cross-Cultural Trade in the Early Modern Period* (*New Haven: Yale University Press, 2009*); Jorun Poettering, *Handel, Nation und Religion. Kaufleute zwischen Hamburg und Portugal im 17. Jahrhundert* (Göttingen: Vandenhoeck & Ruprecht, 2013). On other merchants' diaspora, see Philipp D. Curtin, *Cross-Cultural Trade in World History* (Cambridge: Cambridge University Press, 1984); *Christopher H.* Johnson, David W., Sabean et al. (eds.), *Trans-regional and Transnational Families in Europe and Beyond: Experiences since the Middle Ages* (New York: Berghahn, 2011); *Klaus* Weber, *Deutsche Kaufleute im Atlantikhandel 1680–1830. Unternehmen und Familien in Hamburg, Cádiz und Bordeaux* (Munich: C.H. Beck, 2004).

norms, institutions and organizations.[5] In arguing this, they draw on authors like Niklas Luhmann, Susan P. Shapiro and Anthony Giddens.[6] Recently, Francesca Trivellato has pointed to the need to study not only "the generic importance of family, religious, ethnic, and communitarian ties", but to pay closer attention to legal arrangements and institutions. Concretely, she suggests studying the legal organization of Jewish merchant communities to understand "to what extent legal instruments were the sole facilitators of cross-cultural exchanges".[7] It is certainly not by chance that the study of early modern merchants' justice has regained its popularity recently.[8] Enquiring into

5 Avner Greif, *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade* (Cambridge: Cambridge University Press, 2006); Stefan Gorißen, "Der Preis des Vertrauens. Unsicherheit, Institutionen und Rationalität im vorindustriellen Fernhandel", in Ute Frevert (ed.), *Vertrauen. Historische Annäherungen*, (Göttingen: Vandenhoeck & Ruprecht, 2003), 90–118; Sheryllynne Haggerty, *'Merely for Money'? Business Culture in the British Atlantic, 1750–1815* (Liverpool: Liverpool University Press, 2012); Regina Grafe, "On the Spatial Nature of Institutions and the Institutional Nature of Personal Networks in the Spanish Atlantic", *Culture & History Digital Journal* 3:1 (2014), 1–11; Regina Grafe and Oscar Gelderblom, "The Rise and Fall of Merchant Guilds: Re-thinking the Comparative Study of Commercial Institutions in Premodern Europe", *The Journal of Interdisciplinary History* 40:4 (2010), 477–511. In relation to the Basque migrations, Tamar Herzog, Guillermo Pérez Sarrión and Alberto Angulo Morales have pointed to the importance of associations and religious confraternities in the formation and maintenance of networks and linkages between the home provinces and the 'diasporas', Alberto Angulo Morales, "L'associonisme basque dans les villes espagnoles (Madrid, Valladolid, Séville, Cadix, Lima, Mexico) des deux côtés de l'Atlantique à l'époque moderne", in Martine Acerra, Guy Martinière, Guy Saupin et al. (eds.), *Les Villes et le monde. Du Moyên Âge au XX^e siècle* (Rennes: Presses Universitaires de Rennes, 2012), 253–270; Alberto Angulo Morales, "La Real Congregación de San Ignacio de Loyola de los Naturales y Originarios de las tres provincias vascas en la Corte de Madrid, 1713–1896", in Amaya Garritz (ed.), *Los Vascos en las regions de México, siglos XVI a XX*, vol. 5 (México: UNAM/Ministerio de Cultura del Gobierno Vasco/Instituto Vasco-Maxicano de Desarollo, 1996), 15–34; Tamar Herzog, "Private Organizations and Global Networks in Early Modern Spain and Spanish America", in Luis Roniger and Tamar Herzog (eds.), *The Collective and the Public in Latin America: Cultural Identities and Political Order* (Brighton: Sussex Academic Press, 2000), 117–133; Guillermo Pérez Sarrión, "Las redes sociales en Madrid y la Congregación de San Fermín de los Navarros, siglos XVII y XVIII", *Hispania* 225 (2007), 209–254.

6 Niklas Luhmann, *Vertrauen. Ein Mechanismus der Reduktion sozialer Komplexität*, 4. ed. (Stuttgart: UTB, 2000); Susan P. Shapiro, "The Social Control of Impersonal Trust", *American Journal of Sociology* 93:3 (1987), 623–658; Anthony Giddens, *The Consequences of Modernity* (Stanford: Stanford University Press, 1990), 79–111.

7 Francesca Trivellato, "Sephardic Merchants in the Early Modern Atlantic and Beyond. Toward a Comparative Historical Approach to Business Cooperation", in Richard L. Kagan and Philip D. Morgan (eds.) *Atlantic Diasporas. Jews, Conversos, and Crypto-Jews in the Age of Mercantilism, 1500–1800* (Baltimore: Johns Hopkins University Press, 2009), 112.

8 For Legal Historians' reassesment of merchants' justice, Albrecht Cordes, "The Future of the History of Medieval Trade Law", *American Journal of Legal History* 56 (2016), 12–20; Dave De

merchants' actions via this institution permits a study of the interactions between different merchants' groups and the society in which they operate.[9]

In this paper, I propose to focus on one particular immigrant group, Alsatian Jewish merchants, in order to reflect upon and formulate hypothesis, hinting at some preliminary results in relation to the way that migrants encountered and used the law and how legal notions and concepts migrated across time and space. Even before the big immigration waves to Brazil, which set in during the second half of the nineteenth century, there was a substantial French migration to Brazil which was encouraged by the utterly Francophile Brazilian royal court. Although little research has been done until today on this particular migration,[10] it seems that the large number of these French migrants were

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ruysscher, "La lex mercatoria contextualisée: tracer son parcours intellectuel", *Revue Historique de Droit Français & Étranger* 4 (2012), 499–515; Carlos Petit, *Historia del Derecho mercantil* (Madrid: Marcial Pons, 2016). Overall, the latest studies in History of Law represent a new way to study the commercial courts – not as a separate organization, but as an actor that is part of a plurality of jurisdictions. Moreover, they underline the importance of customary law; refer to, for example, Ezequiel Abásolo, "El código de comercio español de 1829 en los debates y las prácticas jurídicas del extremo sur de América", *Anuario de Historia del Derecho Español*, vol. 78–79, 2009, 447–460; Dave De ruysscher, *Naer het Romeinsch recht alsmede den stiel mercantiel. Handel en recht in de Antwerpse rechtbank (16de-17de eeuw)* (Kortrijk: UGA, 2009); Carlos Petit, "Mercatvra y Ivs mercatuvrum. Materiales para una antropologia del comerciante premoderno", in Carlos Petit (ed.), *Del ius mercatorium al derecho mercantile*. III Seminario de Historia del Derecho Privado, Sitges, 28–30 de mayo de 1992 (Madrid: Marcial Pons, 1997), 15–70.

9 Guillaume Calafat, *Une mer jalousée. Contribution à l'histoire de la souveraineté (Méditerranée, XVII siècle)*, (Paris: Seuil, 2019); Christophe Denis-Delacour, "Consolato del mare, Consoli et Capitani à Civitavecchia (1742–1797)", *Rives méditerranéennes* [on-line article], http://rives.revues.org/4127 [last consulted May 7, 2018]; Marcella Aglietti, Manuel Herrero Sánchez and Francisco Zamora Rodríguez (eds.), *Los cónsules de extranjeros en la Edad Moderna y a principios de la Edad Contemporánea* (Aranjuez: Doce Calles, 2013); Roberto Zaugg, *Stranieri di antico regime. Mercanti, giudici e console nella Napoli del Settecento* (Roma: Viella, 2011); Bernd Hausberger and Antonio Ibarra (eds.), *Comercio y poder en América colonial: los consulados de comerciantes, siglos XVII–XIX* (Madrid: Iberoamericana-Vervuert, 2003); Colin F. Wilder, "The Rigor of the Law of Exchange. How People Changed Commercial Law and Commercial Law Changed People (Hesse-Cassel, 1654–1776)", *Zeitschrift für Historische Forschung* 42 (2015), 629–659.

10 Fridman, "Une autre 'France Antarctique'". Valuable data on various individuals were collected by Frieda and Egon Wolff in the 1970's and 1980's, see for instance Egon Wolff and Frieda Wolff, *Os Judeus nos Primórdios do Brasil República, visto especialmente pela documentação do Rio de Janeiro* (Rio de Janeiro: Biblioteca Israelita H.N. Bialik, Centro de Documentação, 1979); Wolff, "Firmas francesas de israelitas". They reveal a significant increase in the number of Alsatian Jewish migrants after 1870. There does not exist, however, a systematic study of the French or Alsatian Jewish Migration in the 19th century.

actually Alsatian Jews.[11] Being French, Jewish and German speaking, they could play with different kinds of categories of belonging whilst conducting their businesses and daily life in nineteenth century Brazil.[12] Their Frenchness was at times reflected in legal processes concerning insolvency and contract breaking; or when they relied upon family members back home or networks of compatriots to back up their honour via testimonies in the law courts; and lastly when they employed French notarial documents as legal instruments to back up their cases.

Apart from these legal instruments, French commercial law was prominently present in Brazilian legal discourse of the time: The 1850 Commercial Code was influenced by the Portuguese (1833), Spanish (1829) and, especially, French (1807) commercial codes,[13] but even more so by the diffusion of the writings of Jean-Marie Pardessus,[14] who is considered the founder of Commercial Law as an academic discipline in France, following the promulgation of the Napoleonic

11 Studying litigation in different Brazilian law courts permits a more thorough exploration of the Alsatian Jewish networks in the country and a study of the Jewish merchants' interactions with non-Jewish individuals. It equally adds to our rather rudimentary knowledge of the legal practice related to commercial litigations in Brazil. So far, legal historians of Brazil have mostly studied the norm and hardly considered the practise. Some indications of the way that mercantile litigation was conducted can be found in Hanna Sonkajärvi, "The application of the Brazilian Commercial Code between 1850 and 1860: an analysis of the evidence of a case of negligent bankruptcy", *Tempo* 21 (2015), 1–17. The best introduction to the normative and institutional framework of Brazilian mercantile justice is provided by José Reinaldo Lima Lopes, "A formação do Direito Comercial brasileiro. A criação dos tribunais de Comércio do Império", *Cadernos Direito GV* 4: 6 (2007), 5–70. José Reinaldo de Lima Lopes (ed.), *O Supremo Tribunal de Justiça do Império: 1828–1889* (São Paulo: Saraiva, 2010), deals with the Supreme Court's decisions, but not with the trial process. Edson Alvisi Neves, *Magistrados e negociantes na Corte do Império do Brasil: o Tribunal do Comércio* (Rio de Janeiro: Jurídica do Rio de Janeiro/FAPERJ, 2008), does not discuss legal practice nor does he give a clear picture of the competences of the Merchant Court.

12 Brazilian law courts' records reveal various cases of insolvency and economic litigation involving Alsatian Jews in the mid-nineteenth century, from the 1830's onwards. Some of them were members of the same family and were engaged across the country in commercial activities such as peddling, banking and the selling of luxury articles and jewellery. Many of them made use of networks that were created around their common origins as Alsatians and Ashkenazim as well as their use of the German language; still others adhered to French associations in Brazil and especially in Rio de Janeiro.

13 Lima Lopes, "A formação do Direito Comercial", 16–17; Icyar de Aguilera Vieira and Gustavo Vieira da Costa Cerquieira, "L'influence du Code de commerce français au Brésil – (Quelques remarques sur la commémoration du bicentenaire du Code français de 1807)", *Revue internationale de droit comparé* 59:1 (2007), 27–77.

14 On Pardessus, see Hilaire, Jean, "Pratique et doctrine au début du XIXe siècle. L'oeuvre de Jean-Marie Pardessus (1772–1853)", in Annie Deperchin, Nicolas Derasse and Bruno

Code de Commerce. In addition, the widely-used manuals by the Portuguese commercial law expert José Ferreira Borges (1839), provide an illustration of the French influence by drawing heavily on French authors and French language concepts for the keywords that they contain.[15] Books, however, do not prove, if and to what extent French concepts and legal instruments were used by the migrants – and by merchants in general – in their day-to-day business activities. Did the legal actors notice that there was a dialogue between French commercial law and Brazilian commercial law, and if they did, did this help them in finding their way through the legal proceedings?

Although the *lex mercatoria* – or idea of a universal merchants' justice – was shared by the merchants of Brazil and those abroad and although there was a significant influence of French law and legal thinkers in the Brazilian juridical scene, cases of bankruptcy indicate that local actors and customs could counterbalance this influence. This, I will argue, has in large part to do with the oral nature of the initial phases of the juridical proceedings, the social and economic embeddedness of the legal actors and, more specifically, with concepts of honour and reputation. These concepts were linked to the foreignness,[16] as strangers to a city (or village) and to the merchant community, of the French

Dubois (eds.), *Figures de Justice. Études en l'honneur de Jean-Pierre Royer, Centre d'Histoire Judiciare* (Lille: Centre d'Histoire Judiciare, 2004), 287–294.

15 José Ferreira Borges, *Das fontes, especialidade, e exellencia da administração commercial segundo o Código Commercial Portuguez* (Porto: Typographia Commercial Portuense, 1835); José Ferreira Borges, *Diccionario juridico-commercial* (Porto: Typographia de Sebastião José Pereira, 1856), [1. ed. 1839].

16 Simona Cerutti has recently argued that being a foreigner in the Early Modern period was not a matter of status, but, instead, a condition. Therefore, mercantile jurisdiction could consider poor people, orphans or merchants as foreigners, Simona Cerutti, *Giustizia sommaria: pratiche e ideali di giustizia in una società di Ancien Régime* (*Torino, XVIII secolo*), (Milan: Feltrinelli, 2003); eadem, *Étrangers: étude d'une condition d'incertitude dans une société d'Ancien Régime* (Montrouge: Bayard, 2012). In a slightly more radical approach, I have adhered to the definition of the German sociologist Alois Hahn, that "foreignness is not a quality, nor even an objective relationship between two persons or groups, but rather the definition of a relationship ("Fremdheit ist keine Eigenschaft, auch kein objektives Verhältnis zweier Personen oder Gruppen, sondern die Definition einer Beziegung".)", Alois Hahn, "Die Soziale Kosntruktion des Fremden", in Walter M. Sprondel (ed.), *Die Objektivität der Ordnungen und ihre kommunikative Konstruktion*, (Frankfurt am Main: Suhrkamp, 1994), 140. The foreigner appears as a situational category that can be constantly redefined in processes of inclusion and exclusion. An individual being a foreigner to a certain community, city or corporation encountered problems in finding people to testify for his good reputation. Thus the importance of networks such as networks based on kin, same geographical origin, religious community, guilds or trading partners, Hanna Sonkajärvi, *Qu'est-ce qu'un étranger? Frontières et identifications à Strasbourg* (*1681–1789*), (Strasbourg: Presses Universitaires de Strasbourg, 2008).

merchants. Therefore, even if legal instruments could be the facilitators of cross-cultural exchanges and were perceived by the legal actors as such, their concrete influence upon the legal practice, however, remains an issue that demands further investigation.

1 Insolvency in the Law Courts

In 1859, the District Appeals Court of Rio de Janeiro (*Tribunal de Relação do Rio de Janeiro*) was treating the case of a man called A.S. Levy, in both its criminal and commercial chambers. A.S. Levy was a pedlar, a jewellery trader and Alsatian Jew, who had fled the city of Pelotas, in the province of *São Pedro do Rio Grande do Sul*,[17] in 1858, after having committed what was a suspected negligent bankruptcy there. The municipal court of Pelotas and the second instance District Appeals Court in Rio de Janeiro were therefore treating his case in absentia.

Witnesses to the bankruptcy said that Levy had claimed to own a jewellery store in Paris, at the *Rue de Rivoli*, together with his brother, Samuel Levy.[18] The brother was, at the time of the trials, established as a jewellery trader in Rio de Janeiro. His company *Naurá, Levy & Companhia* was located at the *Rua de Rosário*, which was one of the main streets for Alsatian and French origin Jewish migrants in Rio de Janeiro's city centre. Nephews of the two brothers worked as agents for the company of Samuel Levy in Rio de Janeiro as well as pedlars in various regions of Brazil.

In 1858, when A.S. Levy fell into insolvency, his brother, Samuel Levy, of the *Naurá, Levy & Companhia* and other creditors decided to send a member of the Levy family to the distant city of Pelotas, near the border of Brazil with Uruguay. The mission of the cousin, also named Samuel Levy and based in Pernambuco as a pedlar, was to verify, if A.S. Levy had sufficient funds left for negotiating an agreement with his creditors. Arriving in Pelotas, the nephew discovered that A.S. Levy had fled the city and had left some of the jewellery and bills of exchange in the hands of various individuals. When Levy had turned up in search of these belongings they had refused to return them. In

17 Today's Rio Grande do Sul in the extreme south of Brazil. Municipal or civil judges were able to try commercial cases in the first instance. The District Courts of Appeal (*Tribunais da Relação*), located in Bahia, Rio de Janeiro, Maranhão, and Pernambuco served as second instances. The province of São Pedro do Rio Grande do Sul was part of the geographically immense Rio de Janeiro legal district.

18 On the Parisian jewellery shops, Jacqueline Viruega, "Les entreprises de bijouterie à Paris de 1860 à 1914", *Histoire, économie et societé* 25 (2006), 79–103.

addition, one of these individuals, the owner of *Hotel Alliança*, in the city of Pelotas, known as Santiago Prate[19] tried to collect money from other merchants and pedlars who owed money to A.S. Levy. Another person that A.S. Levy had trusted was the merchant Manuel Josef Schlossmann,[20] who was a citizen of the United States. Levy allegedly pointed a gun at Schlossmann when he refused to return Levy his property.

On the 23th of May, 1859, A.S. Levy, was judged – in absentia – and found guilty of intentional bankruptcy[21] by the Rio de Janeiro Judge of Commercial Affairs.[22] The Chamber of Commerce established that Levy had conducted his business in the name of a simulated firm called *A.S. Levy & Companhia* and that Santiago Prate and Manuel Josef Schlossmann had been involved in the crime. The court records permit the reconstruction of some of his social and commercial ties. Levy had business relationships with various individuals of Alsatian origin, including various family members. In Rio Grande do Sul and in Pelotas he traded with two nephews: Júlio Isaac, who was aged 19 in 1859 and Jacob Schwob, also aged 19. In Pelotas, A.S. Levy also traded with Mauricio (or Moyse) Lemann, with José (or Joseph) Brunschwig and Isidoro Lambert, all Jews of Alsatian origin. In Rio de Janeiro, he conducted business with his brother Samuel and Samuel's Alsatian associate Mauricio Naurá as well as with his nephew Olivier Cerf Levy[23] and with Manuel Hirsch Weil, who also seems to have been of Alsatian origin. In fact, the legal records reveal that Levy's business networks were not exclusively French, Alsatian or Jewish; that said, the Levy family did draw heavily both on their French nationality and on their fluency in the German language to do business. This becomes evident when the court records speak of business correspondence written "in German and with Hebrew characters" between the Levy brothers and the Pelotas based

19 Actually, Giacomo di Prati, of Italian origin.

20 The court records show that Schlossmann swore an oath on the Bible when giving his testimony. However, he was reported to have written a letter to Samuel Levy "in German with Hebrew characters", which would point to a Jewish origin.

21 The Brazilian Commercial Code of 1850 made the distinction between a normal insolvency (*falência ordinária*), caused by bad conjunctures and other external factors, and an intentional bankruptcy (*falência culposa*). Ferreira Borges, *Diccionario juridico-commercial*, 161, speaks, in line with the French legislation, of an "insolvency in good faith" ("quebra de boa fé") and bankruptcy in bad faith ("quebra de má fé").

22 *O Juiz de Direito do Comercio da Primeira Vara do Rio de Janeiro*

23 The name of Cerf Levy Olivier appears in a manifesto, signed by Alsatian Jews in 1871, when Alsace was annexed by Prussia. Reacting to the annexation, some of the Alsatian Jews in Brazil publicly declared their intention to remain French citizens on the pages of the business newspaper *Jornal do Comércio*, Fridman, "Une autre 'France Antarctique'", 204.

merchant and partner-in-crime of Levy, M.J. Schlossmann, and when they mention the French Consul in Pelotas, Jean Baptiste Roux, along with French and French-speaking-Swiss merchants based in Rio de Janeiro as being clients of Levy.[24] Along with these names, the court records cite creditors and trading partners that are identified as being of Spanish, Portuguese, Danish, French, Italian and Brazilian origin. These individuals appear to have been non-Jewish since they swore the oath for their respective testimony on the Bible.

It is interesting to note, that taking oaths in the law courts was possible for the Jews and other non-Catholic individuals without a problem. In such cases, the court protocols would state, that the person swore "in conformity with his religion".[25] This practice remarkably contrasted with the fact that, officially a catholic state, Brazil discriminated members of other religious groups in such matters as marriage, heritage rights and burials because it was the Roman Catholic Church that took care of registering such civil acts and, therefore, marriages of non-Catholics were often simply not registered until the second half of the nineteenth century.[26] There is no evidence in the sources that the fact of Levy being Jewish would have influenced the court decisions or the argumentation of his debtors. Whether this really was so, or whether such arguments were not registered or whether his status as French prevailed in the eyes of his opponents, must remain the object of speculation.

2 The Legal Process between Oral Testimony and Written Documentation

The difficulties that arose during the trials related to the Levy bankruptcy were quite like complications that appeared in relation to other bankruptcy-cases of

24 Arquivo Nacional, Rio de Janeiro [hereafter: AN], Tribunal da Relação do Rio de Janeiro, n°837, Maço 163: Juiz de Distrito da 1ª Vara Crime do Corte do Rio de Janeiro: Carlos Constant Chatenay e Randolpho Fischer, administradores da massa falida de A.S. Levy, apelantes/Santiago de Prate, e M.I. Schlosmann, apelados, 1859, f. 116r.; 127r.

25 i.a., NA, Tribunal da Relação do Rio de Janeiro, n°837, Maço 163: Juiz de Distrito da 1ª Vara Crime do Corte do Rio de Janeiro: Carlos Constant Chatenay e Randolpho Fischer, administradores da massa falida de A.S. Levy, apelantes/Santiago de Prate, e M.I. Schlosmann, apelados, 1859, f. 130v., "Julio Isaac, natural de Paris, com dezenove anos de idade, solteiro, negociante, morador no Hotel Ravôt testemunha jurada segundo a forma de sua Religião Hebraica […]".

26 In 1861 and 1863 laws were passed, which gave non-Catholics the right to have their marriages registered. The first Civil Register exclusively administered by the Brazilian State was only created in 1874.

the time. The Commercial Code,[27] introduced in 1850, determined that bankruptcy cases should be first examined locally, in what can be characterised as an informal conciliation[28] and arbitration procedure, and then, if there was no agreement, by the local, first instance, law court.[29] Therefore, when insolvency was detected the process would begin with an attempt at conciliation. At this stage, the parties tried to reach an agreement in an oral proceeding before the local justice of the peace (*juiz de paz*).[30] If this proceeding could not be concluded, the case was treated as a case of voluntary arbitration by an Arbitration Court linked to the Municipality.[31] The arbitration judges were chosen by the

27 The Brazilian Commercial Code entered in force in 1850 and was supplemented by Regulamento Nr. 737, 1850, which regulated the organization of courts and established new rules for the legal procedure. Since Brazil did not have a Civil Code until 1916, the Commercial Code, the code of procedure called Regulamento Nr.737, and the General Law of Mortgages (1864) served as the sources of Private Law. However, when it came to the ordinary procedure, the Regulation followed, in large part, the Philippine Ordinances, which also continued to be invoked in matters not regulated by the new legislation, whose introduction had begun with the Criminal Code (1830) and the Criminal Procedure Code (1832), José Reinaldo Lima Lopes, *O direito na história. Lições introdutórias*, 4. ed. (São Paulo: Atlas, 2008), 271–287.

28 The importance of conciliation and arbitration becomes clear in the light of the evidence offered by Adriana Pereira and Alexandre Bazilio de Souza. They show, based on data from several parishes from Rio de Janeiro and São Paulo between 1830 and 1890 that most civil law cases were resolved informally. A failure of the conciliation occurred mostly as a result of the defendant not appearing in person for the hearing, Adriana Pereira Campos and Alexandre de Oliveira Bazilio de Souza, "A Conciliação e os Meios Alternativos de Solução de Conflitos no Império Brasileiro", *Dados – Revista de Ciências Sociais* 59:1 (2016), 288.

29 Special Commercial Courts were established by the Commercial Code, but only for the biggest cities: Rio de Janeiro, Bahia, São Luís und Recife. In other places the local municipal courts would treat commercial litigations in the first instance. In the second instance, the district appeals courts (*Tribunais da Relação do distrito*) in Bahia, Rio de Janeiro, and Pernambuco had a separate chamber specialized in commercial issues. The Supreme Court (*Supremo Tribunal*) in Rio de Janeiro only decided about the correctness of the sentence pronounced by an appeals court. If the Supreme Court annulled the decision, then the process would return to an appeals court different from the one that had already tried the case earlier, Lima Lopes, "A formação do Direito Comercial", 34–35.

30 The Constitution of 1824 determined that no legal process should be initiated without a tentative of "reconciliation (reconciliação)". This was to be conducted by the local justices of the peace (*juiz de paz*) or, in absence of this functionary, by other legal authorities, Pereira Campos and de Oliveira Bazilio de Souza, "A Conciliação e os Meios Alternativos", 273, 278.

31 *Decreto N° 737 de 25 de novembro de 1850*, art. 411, http://www.planalto.gov.br/CCIVIL_03/decreto/Historicos/DIM/DIM737.htm [last consulted May 7, 2018]. According to Amalia D. Kessler, *A revolution in commerce. The Parisian Merchant Court and the rise of commercial society in eighteenth-century France* (New Haven: Yale University Press, 2007), 70–72,

disputing parties and were merchants, thus constituting a case of trial by peers.[32] These first two stages were conducted orally. It was this informality that caused problems in both local courts of first instance and in the District Appeals Court of Rio de Janeiro, which were to discover that they did not know what had been established in the previous conciliation and arbitration processes. Typically, new creditors turned up during the bankruptcy procedure claiming that they had not been paid or claiming that the sums due to them were higher than had been established in the initial phase.[33] This was possible because there were no written records of the conciliation and arbitration procedure transmitted to the law courts. They, therefore, had to heavily rely on testimonies.

Merchants' account books and all types of written evidence on commercial transactions occupied a prominent place in the Commercial Code and the codes of procedure (*Regulamentos* 737 and 738). Every merchant was obliged to conduct his book keeping in a clear and consistent manner (Art. 10–20, *Código Comercial*). A diary and copybook of correspondence were to be kept by all merchants. The book keeping was to be done "in a mercantile manner", in chronological order and without omissions, cancellations, marginal notes or words inserted in retrospect.[34] All registers should be bound together and their pages numbered and every page was to be countersigned and stamped by a

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the advantage of arbitration, compared to a regular legal process, resided in the fact that the arbitration did not introduce a rupture in the interpersonal relations which constituted the basis of commercial relations. The main quality of this form of conflict resolution lay, therefore, not so much in that it would save time and money, but that it permitted the restoration of friendship and confidence. Also, according to Kessler, the arbitration process created a situation where social pressure among the merchants and their creditors facilitated the resolution of conflicts. These observations also seem valid for Brazil in the second half of the nineteenth century because we are talking about a society which was still characterized by a precarious banking system which would not serve the needs of all types of merchants in all regions of the country. Although bank notes would circulate in the provinces in this period, many merchants short of cash still recurred to informal credit and family banking systems. Many of them needed short-term credit to buy goods and materials which they then would sell on. Therefore, numerous transactions were made through promissory notes, which could be passed to third parties, and through oral agreements. This oral practice permitted more flexibility on the volatile markets of a society still very much based on inter-personal relations.

32 Alvisi Neves, *Magistrados e negociantes*, 164–165.

33 Typical of cases of bankruptcy was the fact that court cases initiated by different creditors were conducted simultaneously in separate processes, and at times, by several courts. The parallel proceedings could thus influence the procedure.

34 *Lei n° 556, de 25 de junho de 1850*, art. 14, http://www.planalto.gov.br/ccivil_03/decreto/Historicos/DIM/DIM738.htm [last consulted May 7, 2018].

legal authority as soon as the insolvency procedure was initiated.[35] Deficient book keeping could not serve as proof in favour of the merchant.[36] A merchant who refused to hand over his books for inspection could be handed a prison sentence.[37] The Code foresaw the summoning of witnesses in cases of insolvency. According to Art. 818, testimonies could be heard at the beginning of the juridical process to determine the reasons for the insolvency.[38]

There were hierarchies between different types of proof that stemmed from the ordinances from Philipp II, King of Spain (*Ordenações Filipinas*, 1603), dating from the period of the Iberian Union. The new code of procedure (*Regulamento* 737, arts. 140 and 141) made a difference between absolute (*provas plenas absolutas*) and relative proof (*provas plenas relativas*). Within this hierarchy, the merchant's account books and other commercial scriptures counted as relative proof, which could be over-ruled by oral testimonies. António Manuel Hespanha characterises the relative proofs as evidence which did not suffice alone, but needed to be bolstered by other evidence.[39] What is noteworthy in relation to this hierarchy is that facts, which were considered to be "of common knowledge or inevitably uncertain", could be accepted as evidence.[40] This opened up possibilities for the acceptance of rumours and hearsay, which could convert themselves into valid evidence, when a large enough number of individuals repeated them as testimony.

In the case of Levy, the Appeals Court of Rio de Janeiro (*Tribunal da Relação do Rio de Janeiro*) had great difficulty in determining whether Levy had really been in a commercial partnership or if he had acted alone.[41] The implicated merchants, being modest ones, were not registered at the commercial district of Rio de Janeiro and the courts had to rely on the testimony of witnesses to try to resolve the cases. In the wake of the insolvency and Levy's fleeing the city new creditors turned up and others alleged that Levy owed them bigger sums than they had declared previously. Since no obligation to register business contracts and bills of exchange at a notary's office existed, the courts often were

35 *Lei n° 556, de 25 de junho de 1850*, art. 13.

36 *Lei n° 556, de 25 de junho de 1850*, art. 15.

37 *Lei n° 556, de 25 de junho de 1850, art.* 20.

38 *Lei n° 556, de 25 de junho de 1850*, art. 818.

39 António Manuel Hespanha, *Como os juristas viam o mundo, 1550–1750. Direitos, estados, pessoas, coisas, contratos, ações e crimes* (Lisbon, s.n., 2015), 586–587.

40 „*o que fosse notório ou o que fosse inevitavelmente incerto*", ibid., 586–587.

41 AN, Tribunal da Relação do Rio de Janeiro, Juiz de Distrito da 1ª Vara Crime da Corte do Rio de Janeiro, nr. 837, maço 163: Carlos Constant Chatenay e Randolpho Fischer, administradores da massa falida de A.S. Levy, apelantes/Santiago de Prate, e M.I. Schlosmann, apelados, 1859.

left in a situation where one merchant's word stood against the word of another merchant.

Given this confusion, which was inherent in the juridical system, the municipal courts and the Rio de Janeiro Appeals Court tried to conclude the cases by resorting to calling a large number of witnesses, most of whom were not first-hand witnesses but rather relied on hearsay and rumours which had been circulating.[42] In theory, and according to a tradition of *Ius Commune*, such testimonies were meant to be considered less significant than testimonies made by eyewitnesses or where written evidence existed.[43]

In practice, however, testimonies tended to base their arguments on 'facts', which they considered to be of common knowledge and painted a picture of the adversarial parties through the lens of a code of 'mercantile honour'. This honour consisted of individual merchants' appearance and reputation. A merchant worthy of confidence and credit would enjoy a good reputation that was based on the reputation of his family and on his own moral integrity, of which the merchant would give evidence by means of his day-to-day actions in conducting his business.[44] As a consequence, categories constructed in social interaction, such as honour,[45] reputation[46] and trust,[47] were of fundamental importance to the economic activities of individuals – and simultaneously – for all judgements made by law courts with regard to these activities. It is

42 These whitnesses employed formulations such as *"saber por ter ouvido dizer a diferentes pessoas* (*to know for having heard various people say*)*"*, or "*ter ouvido dizer geralmente* (*having heard people state in general*)*"*. For instance, i.a., AN, Tribunal da Relação do Rio de Janeiro, nr. 2408, caixa 1605, f. 569v, 596r.

43 Hespanha, *Como os juristas viam o mundo*, 588. The *Ordenações Filippinas* determined that two testimonies constituted full proof in cases for which the law did not require a greater number of testimonies, ibid. 590. The Brazilian Commercial Code, and the codes of process (*Regulamentos*) nr. 737 and 739, do not explicitly state the number of testimonies required, Lima Lopes, "A formação do Direito Comercial", 35, states that normally 15–20 witnesses were heard in Brazil, but the number could be as high as 56.

44 Laurence Fontaine, *L'économie morale. Pauvreté, crédit et confiance dans l'Europe préindustrielle* (Paris: Gallimard, 2008), 284–294; eadem, "Antonio and Shylock: Credit and Trust in France, c. 1680-c. 1780", *Economic History Review* 54:1 (2001), 39–57.

45 See Sibylle Backmann et al. (eds.), *Ehrkonzepte in der Frühen Neuzeit. Identitäten und Abgrenzungen* (Berlin: Akademie Verlag, 1998); Martin Dinges, *Der Maurermeister und der Finanzrichter. Ehre, Geld und soziale Kontrolle im Paris des 18. Jahrhunderts* (Göttingen: Vandenhock & Ruprecht, 1994).

46 See Daniel Roche, *La Culture des apparences. Une histoire du vêtement* (*XVII^e–XVIII^e siècle*), (Paris: Fayard, 1990); Graig Muldrew. *The economy of obligation: the culture of credit and social relations in early modern England* (Basingstoke, New York: Palgrave, 1998), 148–172.

47 See Pierre Bourdieu, "The Forms of Capital", in John G. Richardson (ed.), *Handbook of Theory and Research for the Sociology of Education* (New York: Greenwood, 1986), 241–258.

therefore no surprise that commercial litigations were often fought not only in the courts, but in the pages of newspapers.

In conformity with this logic the witnesses stressed that Levy did not have mercantile knowledge, nor did he behave in a way a merchant should. Some witnesses stated that he lived beyond his means and sold certain products for a price that was far too low.[48] The witnesses also referred to his personal life as a proof of his low credibility. Various individuals talked, or were asked about the fact that Levy had a mistress in Pelotas, with whom he shared a household, even if he was already married in France.[49] Yet other people testified that his nephews, Julio Isaac and Jacob Schwob, who were equally involved in the bankruptcy process, were not trustworthy because they "would not trade with good faith"[50] or "do not merit any attention at all since different deeds committed by them are of public knowledge".[51] Of course, these witnesses did not consider it necessary to explain what they actually meant by this information which they insinuated was publicly known.

All that said, the focus on honour, reputation and trust which increased the importance of oral testimonies – and of social ties or networks; be they based on religion, friendship, business interests, language or geographical origin – stood in a rather paradoxical relation to another feature of the legal system: A high degree of formalization and bureaucratization of the legal proceedings, if we exclude the first two 'informal' phases of the bankruptcy process. In fact, as soon as the litigation reached the courts, the legal proceedings were mainly conducted in written form and dominated by clerks. They required cash for the

48 AN, Tribunal da Relação do Rio de Janeiro, Tribunal da Relação do Rio de Janeiro, n° 837, maço 163, Juiz de Distrito da 1ª Vara Crime do Corte do Rio de Janeiro: Carlos Constant Chatenay e Randolpho Fischer, administradores da massa falida de A.S. Levy, apelantes/Santiago de Prate, e M.I. Schlosmann, apelados, 1859, 120v–121r., testimony given by Eugenio Emilio Raffard.

49 AN, Relação do Rio de Janeiro, Tribunal da Relação do Rio de Janeiro, n° 837, maço 163, Juiz de Distrito da 1ª Vara Crime do Corte do Rio de Janeiro: Carlos Constant Chatenay e Randolpho Fischer, administradores da massa falida de A.S. Levy, apelantes/Santiago de Prate, e M.I. Schlosmann, apelados, 1859, f. 119r., testimony given by Joaquim Marques Lameiras; f. 121r., testimony given by Eugenio Emilio Raffard; f. 176v., protocol of interrogation of the accused M.J. Schlosmann; f. 180v., testimony given by Innocencio Correia Durão; f.198r., testimony given by Cerf Levy Olivier; f. 204r., testimony given by Rodolpho Fischer.

50 "*não negociarão de bôa fé*", AN, Tribunal da Relação do Rio de Janeiro, n° 837, maço 163, Juiz de Distrito da 1ª Vara Crime do Corte do Rio de Janeiro: Carlos Constant Chatenay e Randolpho Fischer, administradores da massa falida de A.S. Levy, apelantes/Santiago de Prate, e M.I. Schlosmann, apelados, 1859, f. 181r., testimony given by Gabriel José Portella.

51 "*não merecem conceito algum, segundo é voz publica fundada em vários factos praticados por esses indivíduos*", Ibid., f. 180r., testimony given by Innocencio Correia Durão.

documents that they drafted or copies which they passed from one law court to another. The parties also gathered testimonies in hearings that were conducted by the municipal Judge of Civil Law and Commerce in the presence of lawyers or legal representatives from both sides.[52] These witness statements were then sent to the District Appeals Court in Rio de Janeiro. This type of procedure resulted in very extensive documentation, with frequent repetitions. The trials were expensive and slow. In contrast, the decisions from the Court of Appeals often did not exceed more than half a page of each sheet in the file.

Although the legal proceedings were based on written communication, at the same time, credibility given to written documents by the law courts seems to have been extremely low. The distrust becomes particularly evident, if we consider the tribunals' way of dealing with merchants' account books and other types of mercantile documents. Even though the Brazilian Commercial code had established a set of rules concerning the verification of the account books by fellow merchants as arbiters, and even though omissions and errors in merchant books could be interpreted as constituting proof against the bankrupt merchant, in practise, they appear almost never to have been used as allowable evidence. Instead, the courts preferred oral testimonies which were usually submitted to the courts in writing.

The fragility of merchants' account books as legal evidence becomes clear, if we consider the bankruptcy case of the merchants Manuel Fernandes d'Oliveira and Antônio Caetano Pereira Maciel before the Rio de Janeiro *Tribunal da Relação* in 1861–1862. They appealed against the decision of the Rio de Janeiro Commercial Court, which in the first instance, had condemned them to a four-and-a-half-year prison sentence for having committed an intentional bankruptcy. Their advocate put forward the argument that account books alone could not constitute evidence that would allow for the establishment of the crime of intentional bankruptcy.[53] To justify his argumentation, the advocate recurred to French authors and doctrines: Jean-Marie Pardessus,[54] 'the

52 People who did not posses a law degree could also call themselves, and be called, advocates.

53 AN, Tribunal da Relação do Rio de Janeiro, vol. 808, caixa 146, f 142v-143r, Antônio Caetano Pereira Maciel e Manuel Fernandes d'Oliveira, apelantes/A Justiça, apelado, 1861–1862.

54 Pardessus published, among other works, Jean-Marie Pardessus, *Élémens de jurisprudence commerciale* (Paris: Durand, 1811); idem, *Cours de droit commercial,* 4. vols. (Paris: Garnery, 1814–1816), idem., *Collection de lois maritimes antérieures au XVIIIe siècle,* 6 vols. (Paris: Imprimerie royale, 1828–1845); idem, *Us et coutumes de la mer, ou Collection des usages maritimes des peuples de l'antiquité et du moyen âge,* 2 vols. (Paris: Imprimerie royale, 1847).

authority' for issues of mercantile justice in Brazil, the criminologist Faustin Hélie[55] and the specialist in procedure Adolphe Chauveau.[56] The Rio de Janeiro District Appeals Court conceded the appeal stating that all the witnesses had spoken in favour of the two merchants and that their trade volume was too insignificant to justify a prison sentence of up to eight years as laid out in the article 821 of the Commercial Code.[57]

3 Merchant Culture and the Social Construction of Legal Proofs

How should we explain, then, this discrepancy between the treatment of the words written by the merchants (in their commercial records, correspondence and bills of exchange) and the merchants' words (i.e. oral testimonies) written down by the clerks? Based on the case studies that I have conducted so far, it is possible to formulate some sort of hypothesis that underlines the importance of the social embeddedness (or lack thereof) of the legal actors:

One aspect that could explain this discrepancy is linked to the acts of arbiters (*arbitros*) employed by the justice system to verify the merchants' account books. These arbiters were merchants chosen by the conflicting parties and they acted as specialists in the juridical proceedings with the task of offering a technical assessment of the given merchant's account books, diaries, bills of exchange and all types of receipts that were relevant to the business in question. In fact, these experts acted as a 'brokers' between the litigants, having to negotiate the different interests of the creditors and the bankrupt merchant.[58] Their role as actors of mercantile justice did not have anything to do with the separation of the public and private roles of juridical actors – something that, according to Niklas Luhmann, permits modern legal proceedings to gain

55 Author, notably of: Faustin Hélie, *Traité de l'instruction criminelle ou Théorie du Code d'instruction criminelle*, 9 vols, (Paris: C. Ingray, 1845–1860).

56 i.a. Adolphe Chauveau, *Manuel de la contrainte par corps en matière civile et commerciale* (Paris: Veuve C. Béchet, 1829); idem, *Formulaire général et complet, ou Traité pratique de procédure civile et commerciale*, revu par M. Glandaz. 2 vols. (Paris: Imprimérie de Cosse, 1852).

57 AN, Tribunal da Relação do Rio de Janeiro, vol. 808, caixa 146, f 142v–143r, Antônio Caetano Pereira Maciel e Manuel Fernandes d'Oliveira, apelantes/A Justiça, apelado, 1861–1862.

58 Guillaume Calafat, "Expertise et compétences. Procedures, contextes et situations de légitimation. Introduction à l'atelier doctoral 'Expertise et compétences'", *Hypothèses* 14:1 (2010), 103.

legitimacy through the "relative autonomy" of the legal system.[59] On the contrary, these arbiters were completely embedded in the local microeconomic landscape, in which they were to assess and judge[60] the acts of individuals whom they might perceive as former or future business partners or as rivals. The initial phase of the arbitration was conditioned by the fact that the arbiters were, in many cases not only merchants, but that they – or their relatives – could hold governmental and local responsibilities as deputies of the city (*vereadores da Câmara Municipal*), justices of the peace (*juízes de paz*) and as provincial deputies. Along with the positive enhancement to one's reputation that a nomination as arbiter could bring to a person, the merchants acting as experts might therefore have economic motivations for wanting to act as arbiters.[61] The verification of the accounts of a bankrupt merchant not only gave them insights into the specific situation of that one merchant, but it also laid open his entire network of credit and business relations. This knowledge, of course, could bring the arbiters a comparative advantage in the future, especially in smaller cities and localities with a limited number of merchants and with scarce possibilities of accessing capital.

There is a second reason which might explain the complete rejection of merchant account books as evidence in these processes, and that can be found in the specificity of 'merchant culture'.[62] That is to say that it is quite likely that the merchants themselves, but also the municipal judges (who were not necessarily educated in law) who were often part of the same local political and economic elites, considered the parameters fixed by the legislation for the use of mercantile documentation to be just too demanding. Contemporary economic actors tolerated a certain negligence in relation to documents that were supposed to register transactions. After all, records of transactions with family

59 Niklas Luhmann, *Legitimation durch Verfahren*, 3. ed. (Frankfurt am Main: Suhrkamp, 1983), [1. ed. 1969], 69–74. Cerutti, *Giustizia sommaria,* 12, defends the idea that the procedure was the central element of the legal process in the Early Modern Period. The aim of justice was not to create equality before the law, or to reach a fair trial, but instead to create a consensus between the parties.

60 Calafat, "Expertise et compétences", 100–101, notes, based on the sociology of François Ewald, that the porous frontier between explication and judgement is something that is inherent to proceedings conducted by specialists, see, François Ewald, "L'expertise, une illusion necessaire", in Jacques Theys and Bernard Kalaora (eds.), *La Terre outragée. Les experts sont formels!,* (Paris: Autrement, 1992), 203–210.

61 Guillaume Calafat, "Expertises et tribunaux de commerce. Procédures et réputation à Livourne au XVIIe siècle", *Hypothèses* 14:1 (2010), 145–146

62 I define merchant culture (in parallel to legal culture) widely, as the fabric of values and positions that regulates the commercial (or legal) actions. This definition includes all kinds of economic (or legal) actors.

and friends were rarely written down. Although errors, omissions and even fraud are documented in the law court records, they were almost never considered neither in the commentaries nor in the decisions of the courts. The economist Jens Beckert makes this point when he writes: "market action [is] a form of social interaction that [...] [can] only [be explained] by the institutional structures, social networks, and horizons of meaning within which market actors meet".[63] It would seem fair then to acknowledge the existence of a specific merchant culture, based on conventions, or hypotheses inherent to the mercantile world, which actors refer to in order to assess a given situation and initiate action.[64] If the expertise is a context and a situation, or as Michel Callon and Arie Rip point out, a space of debate that is open to a multiplicity of heterogeneous actors,[65] then the juridical proceedings, and within them the arbitration process, can be understood as a space of negotiation in which the world of merchants encounters that of justice.[66]

A third aspect that seems to explain the reticence of tribunals to acknowledge merchants' account books as evidence has to do with the way that the experts would proceed with the examination of these books and any receipts of transactions. For the legal actors, arbiters, judges and witnesses alike, it appears to have been clear that merchant books were likely to have been exposed to manipulation. The merchants' account books, like any other mercantile

63 Jens Beckert, "The social order of markets", *Theory and Society* 38:3 (2009), 247.

64 It is not by chance that Guillaume Calafat, "Expertise et compétences", 103–104, recurs to the 'Economy of Conventions' in his article on experts. The analytical proposition of Économie de Conventions is that conventions are cultural resources that co-ordinate economic action and emerge as responses to economic uncertainty. Conventions cannot be defined as institutions, but as initial hypotheses which actors refer to so that they can assess a given situation and pass into action. Conventions serve as frames of reference that are collectively identified. However, they are, at the same time, constantly evaluated and re-evaluated by individuals, who decide whether to act in conformity with a certain convention or not. Institutions need to be 'enacted' by competent, convention-guided actors in real situations. They are therefore "permanently built and rebuilt through interaction and interpretation", Rainer Diaz-Bone and Robert Salais, "Economics of Convention and the History of Economies. Towards a trans-disciplinary approach in Economic History", *Historical Social Research* 36:4 (2011), 1. For an overview, see Luc Boltanski and Laurent Thévenot, *De la justification. Les économies de la grandeur* (Paris: Gallimard, 1991); François Eymard-Duvernay (ed.), *L'Économie des conventions, méthodes et resultants*, 2 vols. (Paris: La Decouverte, 2006).

65 I own the reference to Callon and Rip to Calafat, "Expertise et compétences", 103. See Michel Callon and Arie Rip, "Humans, non-humans: morale d'une coexistence", in Jacques Theys and Bernard Kalaora (eds.), *Terre outragée: les experts sont formels!,* (Paris: Autrement, 1992), 140–156.

66 Calafat, "Expertises et tribunaux", 153.

records, had to be sealed at the beginning of a bankruptcy process. In practice, this body of evidence was often taken into the custody of business partners, friends or family members in the initial phases of conciliation and arbitration. The records could also be manipulated by the bankrupt merchants themselves during the transition from voluntary conciliation to arbitration. For instance, the brother of A.S. Levy, Rio de Janeiro jewellery merchant Salomon Levy, declared, during the process that was made against the alleged partners in crime of the intentional bankruptcy committed by A.S. Levy:

> that he, the witness, had heard cousins Samuel Levy and Julio Isaac and Jacob Schwab say that the records which were taken with the goods of A.S. Levy & Companhia were faulty and written by [the alleged business partner, Manoel José] Schlosmann, because the real records had been burned.[67]

Furthermore, some merchants simply could not write and relied on other individuals for their book making. Consequently, some account books contained more than one person's handwriting.

A fourth aspect that influenced the legal process was that the initial phases of conciliation and arbitration were always conducted as oral proceedings. The information gathered in these phases often did not get through to the judges of first and second instance, or if they did, it would be in the form of written testimonies that would refer to supposed commercial balances, agreements and facts established during these initial phases. No direct communication was foreseen to take place between the different juridical levels, but rather, information circulated through the records, and copies of records and testimonies sent to the respective law court by the litigant parties.

Legal formalism could result, however, at least in some cases, in an astonishing degree of predictability (or stability) regarding the courts' requirements. This is illustrated by a case, in which the aforementioned Manoel Josef Schlossmann was involved. He was sued in 1856, by the Alsatian banker and merchant Nestor Dreyfus the older for not paying his debts. The local municipal court in Pelotas, the second instance in Rio de Janeiro, and finally the Rio de Janeiro

67 "que ele testemunha ouvio diser a seu primo Samuel Levy, a Julio Isaac, e Jacob Schwab que os livros que forão arrecadados com os bens de A.S. Levy & companhia erão faltos e escripturados por Schlosmann, porque os verdadeiros tinhão sido quemados", AN, Tribunal da Relação do Rio de Janeiro, nr. 837, maço 163, f 134v, Juiz de Distrito da 1ª Vara Crime do Corte do Rio de Janeiro: Carlos Constant Chatenay e Randolpho Fischer, administradores da massa falida de A.S. Levy, apelantes/Santiago de Prate, e M.I. Schlosmann, apelados, 1859.

Supreme Court[68] had no problem whatsoever in accepting legal documentation drafted in France by the brothers Nathan and Nestor Dreyfus[69] and registered in Brazil as the basis of their decision-making. Therefore, the company, *N. Dreyfus ainé & Companhia,*[70] could present full powers which they had granted to various agents as pieces of evidence. The documents were translated by a public translator and helped to prove that the commissioner of the enterprise *N. Dreyfus ainé & Companhia,* Roman Cohé, had overstepped his competences, since he had not been commissioned by the enterprise, but by the commissioner originally contracted by the company, Alfonso Milliot, a resident of São Paulo. This sub-contractor, or commissioner contracted by the primary commissioner, so the company, had no right to conclude a compromise regarding the debts that Schlossmann was to pay to the company. Therefore, Schlossmann was condemned at all three levels to pay his remaining debts to the Company *N. Dreyfus ainé & Companhia.*

4 Conclusion

Did, then, the Frenchness of the economic actors or French legal instruments and doctrines carry weight in the Brazilian law courts in the second half of the nineteenth century? Based on the cases analysed here, it is possible to conclude that they could, but that they did not necessarily need to, matter. Then, unlike in the case of Manuel Fernandes d'Oliveira and Antônio Caetano Pereira Maciel, there are no court recordings in the cases of the French merchants Levy and Dreyfus which referred to French laws or French manuals. The search for evidence by the courts remained, in the Levy case, dominated by socially defined concepts such as honour, reputation and friendship. The litigants consequently referred to common universal conventions of the merchant community to justify their actions. However, in the case of Dreyfus, we see *Dreyfus ainé & Companhia* consciously use French notarial records as legal tools. The

68 AN, Supremo Tribunal da Justiça, nr. 7075, maço 2, Processo de revista civel entre partes recorente M.J. Schlossmann, recorridos N. Dreyfus ainé & Companhia para o recorrente em 15 de Julho de 1857.

69 In the letter, which grants powers to present the firm in Brazil, drafted in 1851, the brothers are said to be merchants living at Rue de Provençe in Paris, the first one recurring to justice on his own behalf, and the second one in the name of the abolished company LeRoy & Fils Dreyfus.

70 The company that was established at the Rua de Alfândega in Rio de Janeiro city centre exported coffee and imported textiles, wine, cognac, jewellery and haberdashery from France, Fridman, "Une autre 'France Antarctique'", 202.

case therefore shows that the migrants' links to their home community could matter and that there were legal instruments that held sway even on the other side of the Atlantic. The *Dreyfus ainé & Companhia* counted on French notarial records to secure their business interests in Brazil. Many of the Alsatian-Jewish companies in Brazil had a 'mother-' or 'sister-company' in France, most of the time in Paris and it is therefore worth investigating how these links were used and if, indeed, they were used systematically to build up businesses in Brazil. Overall, these cases seem to indicate that universal ideas about how merchants should behave translated into a discourse that can also be identified as such by historians. However, the success of such a discourse was very much dependent on the local and social embeddedness of the merchant(s) in question. French juridical concepts were very present in the learned legal discourse of the time, but they were not necessarily attached to (or in dialogue with) legal practice. Since written evidence was considered less valuable than oral testimony, merchants needed both the collaboration of peer arbiters and the support of local fellow merchants and residents who would testify in their favour. Therefore, the question was not so much of what origin the given merchant was – or which legal doctrines his lawyer might refer to – but to what extent he was embedded in the respective merchant community in which he operated.

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