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Introduction: Commercial quarrels – and how (not) to handle them

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ABSTRACT. *The settlement of structural commercial conflicts of interest cannot be exclusively subsumed under the heading of dispute resolution. Even when a particular conflict opposing specific individuals or groups of interests could be settled, the broader underlying conflicts of interest would subsist and re-emerge. Both commercial and institutional or political actors would therefore rely on various techniques of conflict management, a process imposing restraint on the opposing parties while allowing sufficient leeway for business to be continued. Both conflict resolution and conflict management were devices of public and corporate governance, and therefore, following the late medieval tradition, instruments more or less based on established patterns of legal or quasi-legal models legitimised by accepted or conventional parameters of 'justice'.*

Commercial conflict resolution has been a central topic in discussions on the development of commercial relations in late medieval and early modern Europe, from the vantage point of both economic and legal historiography. The primary emphasis has been on how conflicts could be ended, or occasionally, how they should have been ended. The debates of economic historians have revolved around the role of institutions like guilds, the role of rulers and their institutions, and the role of urban governments in providing a stable environment and effective means to resolve disputes.[1] Being able to put an end to conflicts has often been seen as a prerequisite to the continuation and expansion of trade, and thus to economic growth. The efficiency of law and legal institutions has been weighed against non-judicial strategies such as mediation and arbitration. Repeatedly, it has been pointed out in historical literature that merchants preferred the non-judicial route because it was quicker and more cost-effective. A question that still needs to be asked is whether this was

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indeed an overall pattern in early modern Europe. Legal historians have looked at how law and legal procedure have been applied to commercial quarrels in the context of diversity and legal plurality.[2] In recent literature, the prevailing opinion has been that there was no uniform *lex mercatoria* in Europe, suggesting that a case had to be resolved primarily according to particular rules.[3] Such rules could share common features, but they were not identical. Moreover, in many of the localities there were overlapping jurisdictions of several courts, and different possibilities to bring a case to an appellate court if needed. Much research needs still to be done on how – or even, whether, or to what extent – merchants could make their choices in this pluralistic environment of judicial and non-judicial ways of settling their cases.

Conflicts involving merchants were anchored in the political, social and cultural context of commerce. Merchants were directly affected by political changes in their environment, they were members of various social groups and networks, and they were active actors of the urban culture. The strands of research that deal with these aspects have so far remained somewhat disconnected and would benefit from more coordinated research projects.

Perhaps even more importantly, the very concept of conflict or dispute *resolution* needs to be challenged. Presumably, in most cases merchants wanted to end their conflicts and move on with their business. Peaceful relations, whether considered at a small or large scale, are usually a better condition for commerce than the uncertainties of strife – whatever may be said about the benefits of war for business. Yet the reality was that many conflicts were never resolved. Business as usual meant constant dealing with conflicts in various forms, stages, and at various levels. Therefore the concept of conflict *management*, rather than a more restrictive view of conflict resolution, is put forward here. Next to strategies aiming to end a conflict, strategies designed to contain it also need to be put on the agenda. Diplomacy, for example, is one of the strategies and fields of study that should therefore be incorporated in research on commercial disputes.[4]

In this thematic issue, four case studies on dispute resolution and conflict management provide fresh insight into recent historiographical developments, and explore these possibilities to cast new light on handling commercial disputes in pre-modern Europe. The common thread of these contributions, beyond the general issue of conflict management, is that the case studies are all based on primary sources, some unpublished, and show developments in the late medieval and early modern history of trade and industry in various parts of Europe. Flávio Miranda considers how Portuguese merchants were confronted with conflicts and litigation in their overseas markets, comparing in particular their prospects in England, in Normandy, and in Flanders. Thomas K. Heebøll-Holm details how the English Crown and the French monarchy dealt with plundering at sea, and how extending their jurisdiction

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through admiralty administration and adjudication – a strategy that the English kings pursued more successfully at an early stage than the French Crown – was instrumental in establishing their political power and the embryonic forms of sovereignty over the sea territories they claimed. For Justyna Wubs-Mrozewicz, looking at the practice of the Hanseatic actors – both cities and individual merchants – in handling controversies provides an empirical basis for sketching the outlines of the German Hanse as an institutional network facilitating conflict management, beyond its more apparent organisational framework. Finally, Andrea Caracausi analyses litigation before the domestic tribunal of the Paduan wool guild in controversies around apprenticeship arrangements. In most cases, the disputes involved apprentices and their masters.

In the Western tradition, a peaceful and fair handling of disputes has constantly been presented and perceived to be an essential feature of good public governance. The promotion of trade and industry, and its beneficial effects for the commonwealth, has traditionally been one of the key policies of effective and fair public governance, at state and urban levels.[5] These policies therefore also implied that the social actors involved in trade and industry were offered adequate mechanisms for handling disputes that arose between them, or with the authorities, or even with third parties. The gradual emergence of an exclusive sovereign (the political 'monopolistic' government in Heebøll-Holm's typology) meant that private justice by individuals or clans was eventually outlawed, but also that jurisdictional prerogatives of other authorities within the polity were either stamped out or subordinated to the sovereign ruler's courts. That development could even be extended, as Heebøll-Holm shows, as an instrument for gaining control over sea territory. The English kings, in particular, were successful in developing the Admiralty as an effective tool of public governance over sea territory they claimed to be under their sovereignty, not least by imposing a jurisdictional authority over piracy and by hollowing out traditional jurisdictional enclaves of coastal towns. The link here between asserted sovereignty over the sea territory (which, in Heebøll-Holm's account, was at first more a theoretical assertion than a claim based on real practice) and public governance is evident: by outlawing more strictly all forms of violence and plunder at sea that were not regulated by royal authority and by providing a system of (repressive) justice that could implement the king's authority over offences committed on the high sea, the Crown could justify and legitimise the exercise of its claims over the sea territory. A similar development can be traced in fourteenth-century France, but the effectiveness of the French kings' policy appears to have been hindered during the Hundred Years' War. The Admiralties of England and France were part of what lawyers and legal historians would regard as institutions of a public authority.

The urban culture and approach to conflicts is also relevant. Wubs-Mrozewicz takes an empirical approach based on evidence in the records on

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how Hanseatic merchants and cities dealt with controversies. From her analysis, it would appear that the way the Hanseatic network facilitated the handling of controversies was a distinctive and constitutive feature of the Hanse as an institution, both for merchants and for the cities. As long as they were included in the Hanseatic network, cities and individual merchants alike would benefit from the various and flexible instruments that the network could make available (judicial and extra-judicial proceedings, mediation, arbitration, diplomatic channels…) in order to manage (and in some cases, resolve) conflicts. In the Hanse's case, there was not a single polity, nor a single political sovereign. Accordingly, governance of the Hanse depended chiefly on regular, constant multilateral consultation, through correspondence, emissaries, and, not least, periodical meetings of a Hanse Diet. The absence of a single political centre was also expressed in the lack of an overarching jurisdictional organisation for the Hanse as a whole. However, Wubs-Mrozewicz's analysis suggests that, just as merchants from different polities had to rely primarily on mutual trust and credit for conducting business with each other, trust was also extended to the acceptance (within the Hanseatic network) of each other's jurisdictions for handling litigation. As long, therefore, as Hanseatic towns retained a large degree of autonomy (an autonomy that was much dented with the growing ascendancy of territorial princes in early modern times, at least for those towns that did not enjoy the status of imperial cities, or which could not claim a privileged position *vis-à-vis* their nominal overlord, as for example Danzig towards the Polish Crown), the administration of justice linked to their own municipal public governance was not, in spite of political and possibly legal diversity, an obstacle to jurisdictional cooperation and recognition.

Both Heebøll-Holm and Wubs-Mrozewicz show that, whatever informal modalities of conflict resolution and management may have coexisted within a polity, some degree of a formal justice system was needed in order to back up or supplement the more informal modalities, and also in order to support governance by the political institutions of the polity. As already pointed out, conflict resolution, and perhaps even conflict management, do not appear in an organisational void. Miranda's research hypothesis is based on a differentiation of the systems of administration of justice in late medieval England, Normandy and Flanders. The author wonders whether for Portuguese merchants, the choice of trading markets – England, Normandy or Flanders – might have been influenced by the (judicial) conflict resolution systems in place. He thereby contrasts the comparatively centralised system of royal courts in England and the comparatively autonomous status of Flemish cities and their municipal courts (a characterisation that may need some qualification with the emergence of appellate provincial courts and a supra-provincial appellate court under the Burgundian regime). However, as his research into specific

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conflicts involving Portuguese merchants in England and Flanders makes clear, other factors than the courts' system played a role. Moreover, the types of conflicts could vary from one region to another, and the social actors who emerge from the records are sometimes also different. In the Burgundian Netherlands (Bruges, Antwerp. . .), Portuguese merchants could rely on offices and agents that acted as useful intermediaries or representatives in negotiations, mediation and litigation, an infrastructure that seems to have had no counterpart in England. The municipal councils and courts of the Netherlandish cities, often staffed in commercial towns by office-holders elected or recruited among the merchant community, offered more than the proximity to the foreign merchants' dealings, they may also have reflected a legal culture – and practical concerns about costs and delays – which was closer to a shared business culture among traders from different countries. The more normative edge of such business culture and ethics did not necessarily amount to a general law merchant in the sense of a distinct transnational legal system. Ultimately, however, it was the commitment of the rulers – kings or cities – to good public governance, implying an effective and fair system of justice, which merchants expected would protect their business and property in a foreign jurisdiction.

Public governance and trade share common interests with agriculture and industry. Caracausi's contribution on the Paduan wool guild is therefore a welcome study at the heart of the manufacturing process, upstream from the merchants' operations, but part of the economic chain that determined their calculations. The case study offers an insight into the domestic governance of a particular guild, which had to balance corporate, individual and professional interests. Yet, that balance of interests was also to reflect a degree of fairness in the practice of the guild's tribunal. Effectiveness of the corporation's governance and considerations of justice were necessary in regulating, also in the case of litigation, apprenticeship contracts. Caracausi's study shows that in the balance of those various interests, the tribunal enjoyed a certain latitude in implementing, amending or terminating apprentices' contracts with their master.

Conflict resolution and conflict management appear through these studies as social processes, which may to a greater or lesser degree present distinctively legal features, but which primarily express the need in public governance to shape efficient and just policies. Merchants were constantly facing conflicts of interests, whether private or public. Confronted with the constant risk of such a conflict of interest turning into an actual, potentially harmful and violent conflict, formal and informal means of conflict management and resolution were part of the environment that could help to reduce risks and costs in their commercial ventures. That was the area where the actors of public governance and the actors of domestic and international trade shared a common interest.

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The contributions in this Special Issue show that the shift from the traditional approach (and phrase) of 'conflict resolution' to 'conflict management' not only reflects an historical reality, it also allows an interdisciplinary historical approach, drawing from (*inter alia*) economic, social and political historiography. Such a combination of approaches will also highlight the respective importance and role played by actors, both individual and public, at various political levels and in different cultural contexts. Merchants are inevitably central actors in commercial controversies, even when, apparently, state actors take over trade issues in the course of their domestic or foreign affairs. The mechanisms and institutions that merchants will voluntarily or perforce submit to when they are involved in controversies will depend on the degree of self-governance of merchant communities and on the degree of coercion public authorities may exert. Moreover, these considerations not only played a role when merchants had to react to disputes and adverse interests hampering their business. The merchants' practice also increasingly – and inevitably with variable flexibility and success – anticipated what advantages and disadvantages mechanisms and institutions of conflict management or dispute resolution they had become familiar with could offer: in a way, the alternatives on offer were part of any prudent merchant's costs and profits analysis.

The shifting balance of power between different groups of merchants, public authorities and other actors in the field (such as privateers in maritime trade) meant, however, that a purely economic advance calculation of the costs of overcoming disputes remained speculative even at the best of times. That speculative side of any business venture means that even the most rational calculation that may be ascribed to merchants in their choice of a particular strategy in favouring a particular form of conflict resolution or management remained very relative. Historians should be wary of any generalisations tending to attribute a definite economic advantage to one strategy above another. The concurrence of alternative strategies was just as important as the concurrence of actors in the field of trade and trade disputes. Arbitration, for example, is often presented as a faster, more cost-effective and less damaging option than litigation. In practice, it was often combined with litigation, either while proceedings were in progress or when formal litigation before a court had come to a halt without a satisfactory or practical result. Nor should one assimilate too generally alternatives to legal proceedings with informal dispute resolution and, conversely, legal proceedings with (excessive) formalities. In any case, lawyers could be involved in non-legal mechanisms of dispute resolution and laymen often played a role in legal proceedings. Mediation, another form of conflict management and resolution, is now also perceived to have been an important option alongside litigation and arbitration, but in practice often intertwined with those other strategies.

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The differentiation between conflict resolution and management therefore cuts across the forums – formal or informal, private or public – which provided alternative strategies. As conflicts of interest were at stake, the strategy of conflict resolution or management sought or imposed by a party could itself be a device to pursue the conflict against a competitor or opponent, if that strategy was expected to cause greater harm to that competitor without substantially threatening one's own interests. The instrumentalisation of a strategy could even, in the case of a powerful actor or group of actors, be carried as far as opting for a mechanism that might provide a test-case on a particular conflict of interest.[6] The speculative calculation in such a case was no longer a mere issue of profits and losses, but whether the test case could backfire beyond acceptable losses. Admittedly, the historical source-material on such strategies is not always straightforward. Records of courts or notaries presenting the outcome of a controversy should not unequivocally be regarded as precedents in a narrow legal sense. The records would also sometimes be regarded as evidence of hurdles to avoid or to neutralise in the course of future business ventures – in the same way as commercial, economic or tax regulations and practices by foreign actors and authorities are considered.

Trade invariably entails conflicts of interest, even among trading partners who are not competitors, but who complement each other. In that sense, there is a continuum between peaceful commercial activities and contentious commercial relations. The contributions in this issue illustrate that commercial relations provide a specific vantage point for the much wider perspective of how, during the transition from medieval to early modern times, societies and public authorities endeavoured to control disputes that affected a broader range of interests than those of the merchants directly involved. Within the domestic sphere, commercial and economic actors may have had less leeway in seeking their own alternatives to dispute resolution models imposed by the public authorities. In international trade, the picture is more ambiguous, because, on the one hand, public authorities were less able to control the structures of trade, but on the other, many commercial actors depended increasingly on a powerful state's support for asserting their positions and claims abroad. The strategies used by both merchants and state actors nevertheless remained to a large degree dependent on a shifting balance of power, which grew increasingly complex as inter-European trade became more global.

ENDNOTES

1 For these three axes, see A. Greif, *Institutions and the path to the modern economy: lessons from medieval trade* (New York, 2006); S. Ogilvie, *Institutions and European trade: merchant guilds 1000–1800* (Cambridge, 2011); O. Gelderblom, *Cities of commerce: the institutional foundations of international trade in the Low Countries, 1250–1650* (Princeton, 2013);

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O. Gelderblom and R. Grafe, 'The rise and fall of the merchant guilds: re-thinking the comparative study of commercial institutions in premodern Europe', *Journal of Interdisciplinary History* **40**, 4 (2010), 477–511.

2 B. L. Benson, 'Justice without government: the merchant courts of medieval Europe and their modern counterparts', in D. T. Beito, P. Gordon and A. Tabarrok eds., *The voluntary city: choice, community, and civil society* (Ann Arbor, 2002), 127–50; A. Bonoldi, 'Mercanti a processo: la risoluzione delle controversie tra operatori alle fiere di Bolzano (secc. XVII–XVIII)', in A. Bonoldi, A. Leonardi and K. O. Occhi eds., *Interessi e regole: operatori e istituzioni nel commercio transalpino in età moderna (secoli XVI–XIX)* (Bologna, 2012), 29–58; D. Heirbaut, 'Rules for solving conflicts of laws in the middle ages: part of the solution, part of the problem', in A. Musson ed., *Boundaries of the law: geography, gender, and jurisdiction in medieval and early modern Europe* (Aldershot, 2005); W. Decock, *Theologians and contract law: the moral transformation of the* Ius commune *(ca. 1500–1650)* (Leiden, 2013); Charles Angelucci and Simone Meraglia, *Trade, self-governance, and the provision of law and order, with an application to medieval English chartered towns*, Toulouse School of Economics Working Paper (2013). In the context of the present preface, any attempt to outline the growing bibliography on the subject is inevitably a desultory exercise. I may *brevitatis gratia* refer to two major research projects with which I have been directly acquainted over the past ten years: first, the series of conferences (with published proceedings) organised by the *Centre d'Histoire Judiciaire* in Lille (CNRS/Lille 2 University) on dispute resolution in different areas: the last volume in the series dealt specifically with commercial conflicts: A. Cordes and S. Dauchy eds., *Eine Grenze in Bewegung: Öffentliche und private Justiz im Handels- und Seerecht/ une frontière mouvante: justice privée et justice publique en matières commerciales et maritimes* [Schriften des Historischen Kollegs 81] (Munich, 2013). Secondly, the Frankfurt project *Aussergerichtliche und gerichtliche Konfliktlösung*, which is documented on the website, http://www.konfliktloesung.eu/de.

3 See, for example, A. Cordes, 'The search for a medieval *lex mercatoria*', in V. Piergiovanni ed., *From* lex mercatoria *to commercial law* (Berlin, 2005), 53–68; D. De ruysscher, 'Law merchant in the mould: the transfer and transformation of commercial practices into Antwerp customary law (16th–17th centuries)', in V. Duss, N. Linder, K. Kastl, C. Börner, F. Hirt and F. Züsli eds., *Rechtstransfer in der Geschichte – legal transfer in history* (Munich, 2006), 433–45.

4 New Diplomatic History is starting to incorporate such perspectives; see M. Ebben and L. Sicking, 'New Diplomatic History in the premodern age: an introduction', *Tijdschrift voor Geschiedenis* **127**, 4 (2014), 541–52; J. Watkins, 'Toward a new diplomatic history of medieval and early modern Europe', *Journal of Medieval and Early Modern Studies* **38**, 1 (2008), 1–14.

5 W. Blockmans, 'Voracious states and obstructing cities: an aspect of state formation in preindustrial Europe', in C. Tilly and W. Blockmans eds., *Cities and the rise of states in Europe, AD 1000 to 1800* (Boulder, CO, 1994); D. S. Acemoglu, S. Johnson and J. Robinson, 'The rise of Europe: Atlantic trade, institutional change, and economic growth', *American Economic Review* **95**, 3 (2005), 546–79; T. Ertman, *Birth of the Leviathan: building states and regimes in medieval and early modern Europe* (Cambridge, 1997); Gelderblom, *Cities of commerce*; P. Stabel, 'Economic development, urbanisation and political organisation in the late medieval southern Low Countries', in P. Bernholz, M. E. Streit and R. Vaubel eds., *Political competition, innovation and growth: a historical analysis* (Berlin, 1998), 183–204.

6 The term 'test case' may sound anachronistic, but is warranted by arguments whereby a litigant (or his counsel) warns that other similar cases are waiting in the wings, dependent on the outcome of the case at hand. I have occasionally come across such arguments in various jurisdictions. For example, in the late medieval practice of the Great Council of Mechlin (with regard to the levying of the Zeeland toll on the Honte, the alternative estuary of the Scheldt between Brabant and the sea): A. Wijffels, 'Flanders and the Scheldt question: a mirror of the law of

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international relations and its actors', *Sartoniana* **15** (2002), 213–80; A. Wijffels, 'Toll-free navigation on the Honte ca. 1466–1468: a legal consultation by J. Boods, Pensionary of Antwerp', *Bulletin* [Commission Royale pour la publication des anciennes lois et ordonnances de Belgique] L (2009) [2012], 175–201. For an example in the early modern practice of the High Court of Admiralty in London (on the issue of the participation by English mariners in Dutch privateering ventures against Spanish and Portuguese shipping, after the Anglo-Spanish peace treaty of 1604): A. Wijffels, *Alberico Gentili and Thomas Crompton: an encounter between an academic jurist and a forensic practitioner* [*Studia Forensia Historica*, I] (Leiden, 1992).

FRENCH AND GERMAN ABSTRACTS

Introduction: Les querelles commerciales – et comment les gérer (ou pas)

Les conflits d'intérêts commerciaux de type structurel ne peuvent pas être exclusivement traités dans le simple cadre du règlement des différends. Même lorsqu'un conflit spécifique opposant des individus ou des groupes d'intérêts a pu être réglé, le conflit d'intérêts sous-jacent va subsister et resurgir. Les acteurs commerciaux et institutionnels ou politiques ont donc recours à diverses techniques de gestion des conflits, un processus qui impose une certaine retenue aux parties, tout en laissant une marge de manœuvre suffisante à la poursuite des affaires commerciales. La résolution et la gestion des conflits sont des moyens de gouvernance aussi bien pour les affaires publiques que pour les entreprises et, par conséquent, selon la tradition médiévale tardive, ce sont des instruments fondés plus ou moins sur des schémas établis de modèles judiciaires ou quasi-judiciaires, légitimés par des paramètres largement acceptés ou conventionnels de 'justice'.

Einführung: Handelsdispute – und wie man sie (nicht) führen soll

Die Beilegung struktureller kommerzieller Interessenkonflikte lässt sich nicht ausschließlich unter der Überschrift der Schlichtung subsumieren. Selbst wenn ein besonderer Konflikt, der sich gegen spezifische Einzelpersonen oder Interessengruppen richtete, beigelegt werden konnte, so blieb der diesem zugrunde liegende Interessenkonflikte bestehen und konnte wieder aufbrechen. Sowohl kommerzielle als auch institutionelle und politische Akteure verließen sich daher auf verschiedene Techniken des Konfliktmanagements, wobei sie einerseits Druck auf die Gegenparteien ausübten und andererseits genügend Spielraum ließen, um die Geschäfte weiterzuführen. Sowohl Konfliktlösung als auch Konfliktmanagement waren Methoden der öffentlichen und korporativen Steuerung und daher, spätmittelalterlicher Tradition folgend, Instrumente, die mehr oder weniger auf etablierten Mustern rechtlicher oder quasi-rechtlicher Modelle beruhten, die durch allgemein akzeptierte oder konventionelle Parameter der ‚Gerechtigkeit' legitimiert waren.

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