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"Extrajudicial and Judicial Conflict Resolution"****Arbeitspapier/Working Paper****Nr. 4 (2013)****Litigating abroad****Merchant's expectations
regarding procedure before
foreign courts
according to the hanseatic privileges
(12th - 16th C.)**

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1. Introduction¹

Although the debate about Alternative Dispute Resolution (ADR) was sparked by specific deficits of the US-American civil law procedure, the whole world is now involved. My long-term objective is to offer an analysis inspired by this debate that views medieval trading law from the perspective of the user of the judicial system. Most previous studies in this field (as with most studies in legal history overall) have tried to guarantee objectivity by choosing to analyze from a bird's-eye view. By contrast, I will deliberately take a subjective approach and ask why one of the belligerent parties would choose either public or private justice. One may call this an approach of cultural history.² A history of medieval proceedings in market rights and trade law can then be written, based on the parties' behavior in case of conflict.

The present paper addresses a preliminary question – but one which is crucial for setting the trend of the whole analysis. The solution of mercantile conflicts in court should not be looked upon in isolation, but should be seen in the context of the alternative options to which the parties had access. The widespread medieval dichotomy of '*Minne oder Recht*' (love or law) – or, in northern Germany, usually '*Freundschaft oder Recht*' (friendship or law) – gets to the heart of the two possibilities: either consensual arbitrated agreement, or a disputable verdict before a court. This choice is not that of '*Gericht oder nicht?*' (court or not?), because a judicial proceeding that seems to head to a disputable verdict can reach another ending – for instance a composition, a settlement declaration, abandonment of action, or simply not carrying on with the proceeding and allowing it to fizzle out.

If one is interested in how merchants solved their conflicts, and seeks to determine the role that court proceedings played in this context, it is necessary to start with the question of when and why merchants would choose to go to court rather than opting for an alternative. We presume that whether the court procedure corresponded with the merchants' needs and expectations was of key importance. Hence, the question posed by the present paper is: which procedural rules and which other features made judicial action attractive to merchants and, from their point of view, supported their interests?

An answer to this question may be sought in the Hanseatic privileges of the 12th to the 15th century. In oligarchic republics such as medieval Lübeck the merchants, ruling over almost all aspects of urban power (especially including the legislature and the judiciary), could exercise direct influence on the constitution of the courts as they saw fit. This they could do without having to reveal their motives or objectives in writing. In this context they can therefore only be measured against their own actions – that is to say, their statutes and verdicts.

¹ This is the rearranged and slightly abbreviated version of a German article which has appeared in the volume Albrecht Cordes & Serge Dauchy (ed.), *Eine Grenze in Bewegung. Private und öffentliche Konfliktlösung im Handels- und Seerecht* (Schriften des Historischen Kollegs, Kolloquien 81), München 2013, 39-64. Christoph Cordes translated the text, and Mark Godfrey and Kate Gilbert revised it. My sincere gratitude goes to all of them. The printed version of this paper will appear in 2013 in the volume "Law and Disputing in the Middle Ages. Proceedings of the Ninth Carlsberg Academy Conference on Medieval Legal History 2012. Edited by Per Andersen, Kirsi Salonen, Helle Møller Sigh, and Helle Vogt, København 2013".

² Michael Maurer, *Kulturgeschichte. Eine Einführung*, Stuttgart 2008; Achim Landwehr, *Kulturgeschichte*, Stuttgart 2009.

When they were abroad, however, the merchants depended on other ways of designing court procedures to work in their favor, appealing to the foreign ruler's interest in trade, credit and alien goods to promote their own interests through privileges. While from the outside these appeared to be sovereign grants, simply one-sided evidence of favor being conferred, substantively they were much closer to contracts. In addition, whereas the traders' notions of which procedural rules would work to their advantage are rarely expressed directly, the privileges granted to them offer precisely this information. The Hanseatic merchants and cities acquired these privileges in tough negotiation backed up with great material and moral resources, namely, goodwill and money. They obtained them from the rulers of their partner cities in commerce along the northern and western shores of Europe and fought tooth and nail for them even in the 16th century, when this form of trade politics had lost a good part of its former importance. It is not my aim to answer the question whether the Hanseatic League's clinging to the politics of privilege-syndicates accelerated or delayed its demise during the dawning epoch of territorial states. Solely important here is that the privileges were of great meaning for the rise and flourishing of the Hanseatic League between the 12th and 14th centuries. Thus, this paper sets out to make use of the Hanseatic privileges in the matter of distinguishing public and private justice.

Initially, two case studies of early privileges in Flanders will be presented, both of which allow deep insight into procedural law. The second part of the paper will serve to analyze the procedural regulations of the nineteen privileges which Rolf Sprandel chose for his edition of central Hanseatic sources in the Freiherr vom Stein-memorial series.³ I will try to reconstruct the interests of the Hanseatic merchants as regards their legal position in courts abroad through the privileges of England, Flanders, Norway, Denmark, Russia, and France. This analysis is sorted topically rather than territorially or chronologically. Such an approach is feasible because of the great continuity in merchants' expectations about how trade procedural law should be constituted in foreign courts. Even as the willingness of the ruler to accept the Hanseatic demands differed from country to country, the demands themselves did not. In other words, while the outcome of each negotiation might be different, we may assume that the catalogue of demands that the Hanseatic legates started them with was quite similar.

2. Two privileges in Flanders for German merchants from 1252

In the early 13th century, German merchants from Cologne, Lübeck, Hamburg, and Dortmund began to appear in Flanders, those from Cologne having already gained ground in London in the preceding century. In Flanders, Bruges served as the most important point of contact. After the landlocked city was granted access to the sea unexpectedly by a storm surge in 1134⁴ the presence of a harbor made an economic upswing possible. Bruges lost its status in the 15th century, however, when access to the sea silted up despite great financial and

³ Rolf Sprandel (ed.), *Quellen zur Hanse-Geschichte. Mit Beiträgen von Jürgen Bohmbach und Jochen Götze. Ausgewählte Quellen zur deutschen Geschichte des Mittelalters. Freiherr vom Stein-Gedächtnisausgabe XXXVI* (henceforth: Sprandel, *Quellen*) Darmstadt 1982, part B I, 165-247.

⁴ Description of the events and geographic relations: James M. Murray, *Bruges, Cradle of Capitalism, 1280-1390*, Cambridge 2005, 30-33.

technical efforts to keep it open. In the 1600s the Hanseatic trading branch office was moved to Antwerp.⁵

The cloth production of Flanders centered around Bruges. At the same time, the city was the key sales market for German wine from the Rhine region which was traded through Cologne. In the second quarter of the 13th century the number of German merchants in Bruges increased considerably. The first evidence of German commercial importance in Bruges is the group of privileges granted by Countess Margarethe II of Flanders and Hennegau in the spring of 1252. These might well be connected to a plan to found a colony for the 'Osterlinge' (Eastlings) – as German merchants were called in Flanders – which would have been a closed trading branch office of the kind which the Hanseatic League installed in all of their other important bases. The potential location for this settlement was downstream of central Bruges, in the suburb of Damme or close to it. Since Bruges remained the only Hanseatic trading branch office wherein merchants did not live separately but mixed with the locals, this plan evidently was never fulfilled. Nevertheless, several regulations hint that the privileges were negotiated and granted with the plan in mind, including infrastructural stipulations such as a court and a public scale in Damme. The countess and her son Guido may have been especially generous with their concessions in anticipation of this project.

Although the settlement project apparently never came to fruition, these privileges nevertheless sealed an important alliance between two emerging economic powers. At the same time they are of special interest for legal historians, in part because the German merchants were represented by the councilman Hermann Hoyer from Lübeck and the *magister iuris* Jordan von Boizenburg – who, after he resigned from political office a few years later, created Hamburg's municipal law, the famous Ordeelbook (Judgment Book) from 1270.⁶ Thus, the *Mercatores Romani Imperii* were legally well advised. Indeed, the mere fact that in contrast to other privileges these identify the merchants' representatives by name underlines the great importance of these two prominent envoys. Formally all German merchants from the empire were recipients of the privileges. However, the origin of the representatives shows the importance of Hamburg and Lübeck in this context.

The first and longer of the two⁷ privileges was granted by the Countess of Flanders and Hennegau together with her son Guido, Count of Flanders, on March 24, 1252. The second⁸ was granted three weeks later by the countess alone. According to its wording, the first privilege seems to apply to all of Flanders, while the second regards the trade to Damme especially. Furthermore, the second was awarded only to the '*universitas*' of the merchants from Cologne, Dortmund, Soest, and Münster and is valid only for merchants in Damme rather than for those in all of Flanders. These restrictions are not mentioned in the first privilege but can also be found in a third one from May 23, 1252,⁹ which Sprandel did not

⁵ Ernst Schubert, Novgorod, Brügge, Bergen und London: Die Kontore der Hanse, in: *Concilium medii aevi* 5 (2002), 19 – <http://cma.gbv.de/z/cma/2002> (accessed on April 8, 2012). Still valuable: Jozef Hubert Aloysius Beuken, *De Hanze en Vlaanderen*, Maastricht 1950, therein chapter 4 regarding the Hanseatic League's organization in Flanders. A helpful overview in English: Peter Stabel, *Bruges and the German Hanse. Brokering European Commerce*, in: Luc Francois & Ann Katherine Isaacs (ed.), *The Sea in European History*, Pisa 2001, 35-55. Still useful: Walther Stein, *Über die ältesten Privilegien der deutschen Hanse in Flandern und die ältere Handelspolitik Lübecks*, in: *Hansische Geschichtsblätter* 30 (1902), 51-133.

⁶ Christa Bertelsmeier-Kierst, Art. Jordan von Boizenburg, in: *Handwörterbuch zur deutschen Rechtsgeschichte* (henceforth: HRG) 2, Berlin 2012 – 2nd edn., col. 1389.

⁷ Sprandel, *Quellen*, 182 (no. B I 6).

⁸ Sprandel, *Quellen*, 186 (no. B I 7).

⁹ *Hansisches Urkundenbuch I*, ed. Konstantin Höhlbaum et al., Halle 1876, 142-44 (no. 431); see Beuken, *De Hanze en Vlaanderen*, 32 (no. 3) and Stein, *Über die ältesten Privilegien*, 56-57 (no. 3).

include in his case book. In this third privilege, Margarethe renews her earlier grant of toll abatement for the '*universitas*' of the said four cities as well as for that of Aachen.

The first privilege

(1.1) Procedural law appears in a prominent position in the text immediately after the introductory protocol of the privilege. Merchants of Flanders in the empire and those from Germany in Flanders are exempted from judicial duel, a regulation also encountered in municipal privileges from the 11th century on which now was also introduced here in the privileges. The Fourth Lateran Council (1215) had forbidden the participation of clergy in ordeals only decades before.¹⁰

(1.2) '*Nullus possit forfacere bona alterius*' – 'No [merchant] can forfeit another's goods'. This is probably the most important and most frequent demand in early mercantile privilege regulations. It dismisses the notion that a foreign merchant should bear responsibility for any compatriot's debts outside their home country – a widespread regulation in early commercial law which made traders liable for the debts of each and every one of their fellow-countrymen when trading abroad. The notion that liability should be based upon national origin rather than on individual conduct was one of the two first and most intensively fought trade restrictions, the right of shipwreck being the other. The merchants opposed it and advocated the sole individual responsibility of the trader instead, in both civil and criminal law. Here, the latter is addressed first, as it is stated that the 'malefactor' (and no one else) shall atone for his actions and be punished accordingly.

The regulation by civil law follows. No merchant is to be made liable for another's debts unless he is his bailsman or the principal debtor. The train of thought continues with the subsequent question of how a domestic creditor can pursue his rights if he cannot hold his debtors' countrymen responsible. The privilege assumes that a creditor from Flanders will have to pursue his debtors in their native country, and stipulates that verdicts from courts in Flanders be acknowledged and enforced in the empire. Such measures were certainly not within the Hanseatic representatives' power to decide, however. Neither were they appropriate for the content of a privilege intended to manage the trade of German merchants in Flanders. Like the prohibition of duels, this seems to be based on the presumption of active trade between Flanders and the empire, including visits to the empire by traders from Flanders as well as the reverse. In fact, however, the economic upswing of Bruges had meant that traders from Flanders could stay within their own borders and simply wait for merchants from all over the world to come to them. Hence, the practical relevance of a regulation to acknowledge and enforce verdicts from Flanders in the empire was certainly very small. The underlying idea surely was self-evidently of value and was elaborated with judicial expertise. However, it was ahead of its time.

(1.3) Regulations regarding the jurisdiction and the procedure of the scabini (jury) court follow. This court, staffed with local legal experts, clearly enjoyed the merchants' confidence. The regulations empower the court to rule in matters of new bylaws and orders ('*cora et bannus*') that the merchants deem disadvantageous for themselves, as well as in matters of criminal law in which the merchants are involved. Furthermore, the privilege touches the court's code of practice: the defendant may be convicted only by the court's own verdict ('*veritas*') or by the verdict of another scabini court which it has acknowledged. If convicted

¹⁰ Karl Kroeschell, *Deutsche Rechtsgeschichte 1: Bis 1250*, Köln, Weimar & Wien 2008 – 13th edn, 288-90; Wolfgang Schildt, *Art. Gottesurteil*, in: HRG 2, cols 481-91.

the defendant is to pay according to the law of the scabini and that of the country ('*secundum legem scabinorum et terre*').

(1.4) Next comes the directive deciding whether the defendant must be bound in order to keep him from continuing his journey and ensure his pre-sence before the jury, or whether he is to be spared such treatment. The distinction plays an important role in many other privileges as well. It seems as if the question was debated intensely, as suggested by the details concerning exceptions and counter-exceptions. The defendant may escape the constraint on his freedom if he has bailsmen or *in rem* securities, the value of which must be proven through the attestation of two neighbors of good repute. Nevertheless, there is no such resort in cases involving '*Hals und Hand*' ('neck and hand', i.e. serious crime).

The locals in Bruges served as companions, partners and supervisors at the same time. This is indicated by their attestation being required as validation for the *in rem* securities of the defendant.

(1.5) Possibly the most typical demand of merchants concerning trials is that they be brief. Even though this requirement is unique to neither the Hanseatic context nor to the Middle Ages in general, it is expressed peculiarly in this context: judicial matters regarding trade shall be decided within three (at most, eight) days. Only if the jury swears that this deadline is impossible can there be an exception, and in that case they should decide as fast as they can. However, the merchants are not obliged to wait for that day if they can provide a bailsmen or substitute. Again we find expressed the concern of losing valuable time on sales travels through lengthy judicial proceedings. Still, why three or eight days exactly? This remains unknown. In any case, given such short time limits the court must have been in permanent session rather than meeting only intermittently. Or is this not about natural days but days in court? Anyway, it is striking that Damme and Bruges are named as places of trial in this specific order. Whereas in other respects this privilege seems to apply to all of Flanders, here its priority is revealed to be Damme and Bruges.

(1.6) A regulation on the *lus naufragii* follows: In case of shipwreck, merchants shall not lose ownership of the goods which they can save from the sea. In the Middle Ages and up until early modern times shipwreck law was a much-discussed and complex matter.¹¹ The fact that the Hanseatic merchants had fought for such regulations in other countries as well as in Flanders indicates that this was not a matter of importance for the Flanders region alone, but was of more widespread significance. This is the only article which does not deal with procedural law regulations. Every other directive of the privilege concerns court proceedings.

(1.7) Next, the departure of a loaded ship from the sea of Flanders is dealt with. The departure of a merchant's ship may be forcibly stopped only by a valid verdict against this ship or a new case brought against it that allows its sequestration according to the custom of Flanders ('*terre consuetudinem*'). Although the reasoning here might seem tautological ('the ship may leave if it is not rightfully forbidden to do so'), this provision is remarkable because it reveals that free passageway and hence free trade is the rule and inter-ferece with it only the strictly limited exception. Incidentally, the reference to the '*consuetudo*' of Flanders illustrates the general principle that in all cases the privileges are part of the domestic laws and are subordinated to them. The clause at the end indicates the same thing, when it states the obvious: In all cases that are not dealt with in this document the customs and laws of Flanders ('*consuetudini vel legi terre Flandrie*') shall find usage.

¹¹ Albrecht Cordes, Art. Strandrecht, in: Lexikon des Mittelalters 8, München 1997, cols 212-13; Hans Peter Glöckner, Art. Strandrecht, Strandregal, in: HRG 5, Berlin 1998, cols 19-26.

(1.8) Next follows the regulation treating the cases in which a merchant is confronted with a claim that has not yet been judged by the court. The merchant can choose to take an oath of purgation, or to pay and purge according to the local laws (*'secundum legem loci'*). By the 11th century at the latest the one-handed oath of purgation had come to be the form of proof that the merchants preferred,¹² because that way they could avoid the danger of ordeals and the difficulties of finding compurgators when they were abroad. In the 13th century the oath of purgation was increasingly replaced by the evidence of witnesses, and in the privilege of 1252 we find the oath to be an option only in cases where the court has not yet ruled.

(1.9) The last regulation stipulates that people who get off a ship which may rightfully depart, in order to help in an emergency, do not thereby fall back under the jurisdiction of the shore. The lack of connection to the content of the other provisions makes this rule look somewhat out of place. It is quite possible that although it is couched in general terms, it was in fact drafted to solve a specific case at hand.

The second privilege

(2.1) The second, shorter privilege, which applied only to trade with Bruges and Damme, begins by regulating the acceptability of trade in cases where neither participant is a local. This is a particularity of Flanders, as many other places required that either the buyer or the seller be from the place where the trade took place.

(2.2) The next directive deals with a special variation of the ban of guilt by association (see above 1.2) for Damme. Here, only the offender and his goods may be taken to court lawfully. The decision in such matters is reserved to the counts.

(2.3) To prevent conflicts of interest, customs officers may not simultaneously hold another office as judge, jury member or reeve¹³. One may see an antagonism between customs officers and merchants here. Potentially, the latter tried to escape their 'natural' enemies, at least in juridical procedures.

(2.4) The next article deals with flaws of the judicature as well. Members of a jury who knowingly participate in an unjust verdict may not carry out their duty as jurors in subsequent trials until the injured party has received satisfaction.

(2.5) By giving the scale and the set of calibrated weights to the merchants in Damme the countess gives away one of the state's most important rights of trade control.

Both of these two privileges clearly signal the special interest of both the counts and the merchants in promoting Damme's infrastructure. There is a court; the local scale is in the hands of the Hanseatic merchants; there is a customs facility and a reeve. The first privilege, which at first sight seems to apply generally to all of Flanders, turns out to be – at least in part – especially intended for Damme as well. All of these references fit perfectly with the idea that there was an intention, later abandoned, of creating a separate Hanseatic colony outside Bruges. However, this cannot be analyzed in more detail as it is not the focus of this paper.

¹² Albrecht Cordes, *Spätmittelalterlicher Gesellschaftshandel im Hanseraum (Quellen und Darstellungen zur hansischen Geschichte ; N.F., 45)*, Köln, Weimar, Wien 1998, 64-70.

¹³ The translation of *advocatus* – German: *Vogt* – into English poses a problem. It is not question of an advocate but of an agent who represents a church, a monastery or a prince in all kind of military, administrative and other worldly matters inside and outside of the courts. The best fitting term seems to be 'reeve'.

Of the 14 articles that I have divided the privileges into, 11 concern procedural law. In the more general and therefore probably more important first privilege, 8 out of 9 articles regard procedure. This proves the merchants' keen interest regarding their standing in procedural law abroad in Flanders in the mid-13th century.

3. The Hanseatic merchant's expectation of court proceedings as shown in the trade privileges

The primary sources for this paper are the 19 privileges which Rolf Sprandel chose for his edition of the *Quellen zur Hanse-Geschichte* of the Freiherr vom-Stein memorial edition.¹⁴ His choice is persuasive, including as it does the most important and most famous privileges from the 12th through the 14th century. Starting with Henry II of England's 1157 privilege for the traders from Cologne in the Hanseatic League's early days,¹⁵ the collection of privileges continues down to the privilege of the Danish Imperial Council associated with the Peace of Stralsund (1370), which marked the League's defeat of Denmark and the height of its power.¹⁶ The final source in the collection, which is remote both geographically and chronologically from the rest, is the privilege of Louis XI of France from 1483.¹⁷

The majority of the privileges, many of them from Flanders and England, date to the decades between 1250 and 1310. The former¹⁸ have been evaluated above. Also of particular note is the privilege of Edward I of England from 1303, generally known as *Carta mercatoria*.¹⁹ In this privilege, the crown endowed not only the Hanseatic League but all foreign merchants equally – thus including the important Italian trade colony in London as well – with favorable legal status in exchange for a substantial increase in tolls. In so doing, it created a consistent law relating to all aliens in England.

The report from the Lübeck perspective on the Danish privileges for the Scania Market in Skanör and Falsterbo dates to the period between 1203 and 1209.²⁰ In this report the merchants of Lübeck put their favorable legal status in Scania in writing, this being of great importance because of the herring fishing there. Henry the Lion's privilege of Artlenburg from 1161 is also included among the sources collected by Sprandel,²¹ even though it concerns the trade of the Gotland merchants in Germany rather than the active German trade in Scandinavia. The sovereigns of Novgorod endowed the Hanseatic merchants with two closely corresponding privileges from 1199 and 1269.²² Just a few years later came the privileges of the Norwegian kings for the German bridge in Bergen.²³ Up until 1302 all

¹⁴ Sprandel, Quellen.

¹⁵ Sprandel, Quellen, 170 (no. B I 1).

¹⁶ Sprandel, Quellen, 228 (no. B I 18). The Danish privilege from the preceding year: Sprandel, Quellen, 226 (no. B I 17).

¹⁷ Sprandel, Quellen, 234 (no. B I 19).

¹⁸ Sprandel, Quellen, 182, 186 (nos B I 6 and 7). The two privileges from 1309 which were granted by the city of Bruges because of the trade embargo's conclusion concern Flanders as well: Sprandel, Quellen, 220, 225 (nos B I 15 and 16).

¹⁹ Sprandel, Quellen, 208 (no. B I 14). This privilege tied in with other, more specific privileges granted by Edward's father Henry III in 1237, 1266 and 1267: Sprandel, Quellen, 180, 188, 190 (nos B I 5, 8 and 9).

²⁰ Sprandel, Quellen, 178 (no. B I 4). The later privilege of 1268 mainly relates to Skanör and Falsterbo as well: Sprandel, 192 (nr. B I 10).

²¹ Sprandel, Quellen, 172 (no. B I 2).

²² Sprandel, Quellen, 175, 193 (nos B I 3 and 11).

²³ Sprandel, Quellen, 196, 202 (nos B I 12 and 13).

privileges were penned in Latin except for the 1269 privilege of Jaroslaw Jaroslawitsch, the sovereign of Novgorod, which was in Low-German.²⁴ Low-German then predominated in the 14th century; it seems to have come out on top as the lingua franca in the Baltic. The late French privilege was in Latin once again.

Opening of recourse to the courts; Remedy for aliens

First and foremost, many privileges guarantee merchants a remedy in general (nos 1 and 2). It can be assumed that the frequent promise in the earliest privileges (*'fare justitiam'*) is a concrete invitation to use the legal process in case of injustice rather than being merely an unspecific promise of fairness. This can be seen from the addressees of the English document, for example, who are not the merchants themselves but the public officers of the realm who are entrusted with the administration of justice. The Norwegian justices (no. 12) are instructed not only to provide the people of Lübeck with unobstructed justice but even to treat their disputes with loving priority (*'quadam amoris prerogative'*).

In Bruges, courts are documented in both the city itself and the harbor community of Damme, a few kilometers downstream. We are acquainted with courts held in proximity to commercial events such as fairs and markets; for the foreign traders this corresponds to a court close to the harbor. The most famous visual display of such a court by the harbor is found in the illustrated manuscript of the municipal law of Hamburg from 1497.²⁵ It has been used so often, and in such different contexts, that it has become a cipher for medieval Hanseatic seafaring in itself. In this picture, which can be found at the beginning of the last section (*'Van schiprechte'*), one can see through an open archway three judges at a table with green cloth. There is a crowd of people in front of the entrance; they seem to be queuing in order to be awarded their justice. Like the court, the loading crane in the lower left corner is a communal accommodation. It is a structural measure to promote trade and – in the words of the New Institutional Economics – is designed to abate transaction costs. Because the court close to the market or the harbor was a natural institution in the Hanseatic hometowns, the merchants expected to find the same in foreign countries as well. The location of the courts close to the harbor thus had a practical as well as a symbolic function as tangible evidence that the merchants could obtain justice while abroad.

Preliminary remedy, securities

While the subject of 'preliminary remedy' is of relatively little importance for modern codes of procedure, it played a key role in the Middle Ages. In an environment in which it is uncertain when the court can take the next step in its procedure – be it because the parties rule the procedure or because unwilling parties can easily escape the court's grasp – and in which it is even less definite whether there will be a final verdict at all, the result of the preliminary remedy procedure can prove to be the de facto resolution of the entire legal dispute. In cross-border medieval trade this problem was of special significance, as goods were often enough accompanied by the merchant. If the foreign merchant was in search of justice – because of debts owing to him or his having suffered some injustice – it was his decision

²⁴ Sprandel, Quellen, 193 (no. B I 11).

²⁵ Heinrich Reincke, Die Bilderhandschrift des Hamburgischen Stadtrechts von 1497, neu herausgegeben von John Bolland, Hamburg 1968; Beate Binder, Illustriertes Recht. Die Miniaturen des Hamburger Stadtrechts von 1497, Hamburg 1988; lastly Frank Eichler (ed.), Die Langenbeck'sche Glosse zum Hamburger Stadtrecht von 1497, Hamburg 2008.

whether he would prosecute his rights locally or whether he would let the matter rest and continue his trading trip. However, in cases where a foreigner was the defendant, the clash of interests is obvious: on the one hand, the suitor who is fighting for the enforcement of his title, and on the other, the defendant who is interested in a swift resumption of his trip.

In each of the privileges the section which regulates whether the merchant may be fettered or even imprisoned is important, and is explicitly set out. In Flanders (no. 6, 1.4 above) the defendant can avoid this if he has bailsmen or *in rem* securities, so long as he is not charged with a serious crime. The Norwegian clause from a quarter-century later (no. 12) is so similar that it seems as if the result of the negotiations in Bruges might have been the inspiration for those in the north. A detailed regulation regarding when and how an accused merchant may be fettered can be found in the early Danish privilege (no. 4) as well. Both texts from Novgorod (nos 3 and 11) say that neither a German in Russia nor vice versa may be imprisoned. Hence, there was a prison or at least a bullpen in Novgorod's Hanseatic trading branch office (the *Peterhof*), where, in lieu of a Russian prison, an accused German might be held.

Like its Flemish counterpart (no. 6, 1.7 above), the Norwegian privilege (no. 12) broaches the issue of whether a ship which is ready for departure may be confiscated by the creditor of its merchant. The Norwegian term for that measure ('*taksetning*') is slipped into the Latin text. The regulation is more sophisticated than the one from Flanders and not easy to understand. Here, the creditor – it seems (the references are not clear) – can confiscate the ship of whichever fellow countryman of the debtor is the least ready for departure. Thus, the taking of securities is limited to the object which damages the Hanseatic League the least, but the old, disputed custom of holding merchants responsible for the debts of their compatriots seems still to be in effect.

The abundance of detail in the privileges regarding this point indicates how important the preliminary solution of the conflict was for the merchants, and how thoroughly those who gave privileges weighted the conditions under which they were willing to let the foreigners escape their territory. It seems as if there was inverse proportionality of the relevance of the preliminary remedy and the length and efficiency of the main proceeding.

Competence; specific trade jurisdiction; autonomous internal courts

In the oldest Hanseatic privilege, the one granted by the English crown in 1157 to the merchants of Cologne (no. 1), the king guarantees to treat the men of Cologne, their friends and goods as he would his own people. In case of infringement, satisfaction shall be assured: '*Plenariam iusticiam faciatis*'. At least in criminal law, the guests are treated legally in the same way as Englishmen. Henry the Lion's privilege from four years later (no. 2) specifies that in the event of a merchant's being sentenced to death and executed on his way to a trading destination or on his way home '*in die non legitimo*' (hence, not a regular court session), a fine is to be paid to his heirs and relatives.

The model of the general courts' competence for the disputes of Hanseatic merchants was implemented in Flanders as well as elsewhere. The Hansa traders asserted the jury court's competence (no. 6) in various contexts. Another strategy was the establishment of special trade law jurisdiction. This was the case in England (no. 14, art. 5) and France (no. 19, art. 9). In the French example the merchants' disputes were uncoupled from the competence of the general courts. Public officers who were already acquainted with seafaring, such as the admiral and vice-admiral of France, along with the bailiffs, seneschals and governors of the

most important harbors, were appointed to establish this jurisdiction by the French crown. Moreover, they were made permanent conservators for the trading courts at the same time. Similarly, bailiffs and public officers (*ministri*) were chosen for the implementation of equivalent court procedure in England.

Like the privileges, the *Sachsenspiegel* (between 1220 and 1235) has an eye for specific market jurisdiction. Its author, Eike von Repgow, clearly outlines the differences in competence of the market jurisdiction and the ordinary one. He speaks from the point of view of the common land law and thus from an external perspective rather than that of a merchant: in many cases the defendant may turn a cold shoulder to the judge of the market court. Only in four cases he is obliged to answer: If he is living in the judge's area of jurisdiction; if he has property therein; if he has committed a crime; or if he has given a pawn for his debt. The market court is mentioned in the same breath with foreign courts,²⁶ indicating that both types of courts are perceived as similarly menacing – or at least alien – for a rural population which is not acquainted with trading.

One must distinguish between specific trade jurisdiction within the host country's legal system and the equally demanded and granted internal courts of the foreign merchants. This finds expression in Denmark (nos 4 and 10), where the merchants of Lübeck are allowed free election of a reeve (*advocatus*) to administer justice in the case of minor debts and quarrels. Again, the dividing point is serious crime; quite naturally, the king reserves to himself the right to decide in such cases. After the merchants from Cologne, first those from Hamburg (no. 8) and then those from Lübeck (no. 9) were granted their Hansa in England, paving the way for installation of corporate structures which probably included internal jurisdiction.

The last-mentioned source includes a stipulation which we do not usually come across, in that 'those citizens (*burgenses*) by whom Lübeck is governed' – the councilmen of Lübeck must be meant – are entirely exempted from English jurisdiction. One reckons this has a parallel with the consulate jurisdiction of later centuries, maybe even diplomatic immunity. However, this question remains unanswered.

Applying law

The privileges also cover the question which substantive legal system is to be used in court. Again, the sources from England and Flanders are the most informative.

The English privilege from 1157 (no. 1) states that merchants shall have permanent peace to create their just custom: '*firmam pacem habeant faciendo rectas consuetudines suas*'. Moreover, judges are directed not to demand new customs or charges ('*novas consuetudines vel rectitudines*') from the merchants. This binomial pair closely relates rights and dues. Moreover, this is one of only two instances in the privileges wherein the merchants' rules and the right to live by them are acknowledged. The other evidence for that is the Danish privilege which correlates with the Peace of Stralsund (1370). Therein, the Hanseatic merchants take advantage of their defeated opponents' weakness by forcing them to assure the merchants' independence from Danish law. Specifically, they may only be sued

²⁶ Sachsenspiegel, Landrecht III 25 § 2; impressively illustrated in *Codices picturati*, e.g. the bottom drawing on fol. 45v. of the illustrated manuscript (Bilderhandschrift) from Wolfenbüttel (c. 1350-1375), where the defendant turns his back on the judge who is pointing at him. In this way the court's lack of jurisdiction is illustrated. A beautiful facsimile of this manuscript was published at Graz 2006.

before their German reeve and according to the law of their hometown ('*vor syme Dudeschen voghede na siner stad rechte*', no. 18, art. 5 and 6).

These two examples (the oldest privilege and the exploitation of the special situation in 1370) are the only ones which sanction the applicability of foreign law. In all other cases the law with respect to foreign merchants – including the specific rules of the merchants and markets – is part of the domestic law (of England, Flanders, or Norway respectively). In other words, the Hanse normally did not attempt to impose its own legal order but rather tried to influence the law of its hosts. Hence, there is no indication of transregional, let alone transnational mercantile law of any kind and, thus, none either for the much-touted but untraceable medieval *Lex Mercatoria*.²⁷

This is also true for the only textual reference to a '*lex mercatoria*' in the privileges. In 1303 King Edward declared that conflicts about contracts with merchants should be decided according to the customs of that market where the contract was agreed upon: '*secundum usus et consuetudines feriarum et villarum, ubi dictum contractum fieri contigerit*' (*Carta mercatoria*, no. 14, art. 3). Additionally, the bailiffs of the respective market are to decide the matters overnight ('*iusticiam faciant de die in diem sine dilatione*')²⁸ and '*secundum legem mercatoriam*' (art. 5). Furthermore, a reliable man living in London is to be installed as *iustitarius*, a kind of national judge for the conflicts between the international merchants ('*inter mercatores et mercatores*'), before whom merchants can negotiate and settle their debts in cases where the market courts are not able to meet the tight deadline (art. 8). Subsequently, it is promised that – independently from the work of the *iustitarius* – decisions shall be made '*secundum legem mercatoriam*'. The correlation with short deadlines shows that the order to decide trading issues by '*lex mercatoria*' is a regulation of procedural law: The term refers to a set of rules of procedure.

In turn, the privileges of Flanders (1252, nos 6 and 7) are especially rich. After abolishing the hated custom of holding merchants responsible for their compatriots' debts, the countess declares that whoever is responsible shall atone for his own deeds alone and be punished according to the jury's verdict and the law of the land (i.e., Flanders). When the text later says '*secundum legem scabinorum et terre*' (1.3 above), the same thing is meant, despite the slight difference in phrasing. However, there are other expressions that could comprise different meanings. According to the custom of the land ('*secundum terre consuetudinem*'), a ship which is ready for departure may still be stopped if there are new developments in the state of affairs (1.7 above), and '*secundum legem loci*' one must pay and atone in cases of being called on one's debt in a matter which the jury has not yet decided on, if one refuses to take the oath of purgation (1.8 above). In the event of a merchant from Flanders pursuing his debt in his debtor's home country, the merchant must do so '*secundum legem et consuetudinem dictorum locorum*' – according to the law and custom of the aforementioned

²⁷ Karl Otto Scherner, *Lex mercatoria - Realität, Geschichtsbild oder Vision?*, in: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung* 118 (2001), 148-67, at 148; Albrecht Cordes, *Auf der Suche nach der Rechtswirklichkeit der mittelalterlichen Lex mercatoria*, in: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung* 118 (2001), 168-84, at 168.

²⁸ The literal translation of *de dies in diem* is 'from day to day', and the interpretation above assumes that this refers to the continuance of legal proceedings from one calendar day to the one immediately following. An alternative reading, suggested to me by my editor, Kate Gilbert, assumes that *dies* here refers to a 'day in court.' In that case the phrase would mean that the proceedings must be ongoing without interruption – in contrast to '*sine die*', meaning that no date is set for the resumption of the proceedings. This latter view is supported by the article from the older English privilege in which the prosecution '*in die non legitimo*' is forbidden. There, without any doubt, it is a question of 'a day in court': see above in the section on 'Competence; specific trade jurisdiction; autonomous internal courts'.

hometown. In Norway (1294, no. 13), as in the first two articles in Flanders, it is said that the authorities may punish '*secundum leges patrie vel loci consuetudinem, in quo delictum conprobatur esse commisum*'. Hence, the idea of a national jurisdiction which took account of local particularities existed in both Flanders and Norway. It remains unclear whether '*lex*' and '*consuetudo*' were used synonymously or whether they denoted different bodies of law.

Thus, it is possible to identify trade law as a special right for specific places and a specific group of people in England as well as in Flanders and Norway. It is important to note, however, that this is always a part of the law of the land or – to use a possibly anachronistic term – of national law.

Law of evidence: witnesses and compurgators

The Belgian Jean Bodin Society, which has continued to analyze institutions of legal history comparatively since the 1950s, engaged in the topic of 'L'assistance dans la résolution des conflits' in 1992. Therein, it compared several types and kinds of legal assistance from local sources (compurgators, *Fürsprecher*) with assistance from those having a background in learned law (advocates, procurators).²⁹ Even though the picture is variegated and has numerous regional differences, one does find an increase in professionalism in the Late Middle Ages, when formerly the parties had to find assistance from within the local court circuit. Foreign parties were in an unfavorable position in both the new and the old system; one may see this as an away game in which not only the spectators but the referees as well favor the home team.

The Hanseatic merchants tried to evade this threat through the privileges they negotiated. There, they insisted on the forums being made up in equal measure of locals and of foreigners, namely their own Hanseatic companions. This could apply to the compurgators and witnesses as much as to the assembly of the jury and the courts themselves. A particularly inventive agreement to this effect can be found in the Russian privileges (no. 11). Here both the foreign and the local party are to name one 'witness' each. If they choose the same witness, he must be believed. If they do not agree on the person to be chosen, a lot is thrown, and whoever has the luck of the draw has the right to present his witness ('*is recht an sinem tuge*').³⁰

According to the 1303 *Carta mercatoria* of King Edward I (no. 14, art. 6), in cases of conflict between a merchant and another party, investigative commissions, *inquisiciones*, are to be composed of Englishmen and countrymen of the merchant in the same measure, irrespective of the other party's nationality. In circumstances in which there are not enough foreigners, the foreign party should be allowed to fill up the open spots with locals whom it deems suitable. The legal nature of panels with equal representation is not clearly perceptible in either England or Russia. The two appointed 'witnesses' in the Russian example seem almost like referees; in the English example, the '*inquisicio*' seems more like an entity for conflict-solving of its own kind rather than a court.

The abolishment of judicial duels (no. 6, 1.1 above) is part of the law of evidence as well.

The primacy of jury verdicts over individual oaths was clearly established in Flanders. Oaths of purgation were admitted only before a jury had spoken. Once guilt was established by a

²⁹ The articles were published in four volumes of conference transcripts: *L'assistance dans la résolution des conflits* (Bruges 1996-1998).

³⁰ Cf. no. 3, where the rule is limited to conflicts without bloodshed.

jury's verdict or its approval of the verdict of another jury court, there was no longer room for an oath of purgation.

The law of evidence is an especially fruitful topic. Evidently a strong need for action and regulation was felt in this field. The two most important issues were the combat against irrational evidence and the struggle to man the deciding juries with as many representatives of the Hanseatic community as possible. Equal representation in juries and other joint panels played a key role in the merchants' demands of their trading partners.

Procedure, duration of proceedings

In Flanders, a '*causa mercatorum*' was to be decided within three days, or eight at most (no. 6, 1.5 above). In England it was even question of a deadline from one day to the next ('*de die in diem*', no. 14, art. 5 and 8)³¹. Both regulations have been presented above. The issuers of both privileges also prepared for the case in which those deadlines were not achievable. In Flanders, the jury had to swear that the time limit was impossible to meet. Then, they were to decide on the matter as quickly as possible. In England, there was an entirely different authority that one could appeal to: the *iusticiarius*. In Great Britain, the promise to deal with matters of trade as quickly as possible was not limited to foreign merchants. The English Piepowder³² courts as well as the Scottish Dustifoot courts in markets and fairs took on mercantile conflicts so quickly that – according to the etymology – the parties had no time to clean the dust off their feet.

The speed of decision-making also played an important role in places which neither promised nor met such ambitious deadlines. In France, the aforementioned conservators (no. 19, art. 9) in ports were responsible for bringing justice quickly and '*absque strepitu et figura iudicii*'. The procedure was supposed to be quick; noise and judicial persnickiness were to be avoided.

According to the privilege of Flanders (no. 6, 1.5 above), those merchants who deemed even these high-speed proceedings too slow were allowed to sail off and send a representative to the hearings, if they had provided bail.

4. Conclusion: Procedure in commercial litigation as a future research topic

Ideally, there are two kinds of jurisdiction which are favorable for a merchant's issue: either ordinary courts in favor of the traders or a special jurisdiction for merchants, fairs and markets with its own procedural regulations. The latter model is that of England, the former model is represented by Flanders, which took care of the merchants' issues through the ordinary jury courts. Both here and in England the courts evidently had the confidence of the merchants. Neither the privileges of Flanders nor those of England reveal a preference of the Hanseatic merchants for either system.

The Hanseatic representatives could identify and enforce their interests in both systems. There was a constant and precise catalogue of wishes which was given to its diplomatic delegation by the Hanseatic League. This delegation would then come to negotiate the

³¹ For an alternative interpretation of '*de die in diem*', see note 28.

³² The word stems from the French expression '*pieds poudrés*', whereas the Scots settled with the Germanic equivalent.

privileges. As long as the Hanseatic League had a powerful position, most of their wishes could be realized in all systems. These included fast proceedings, populating the deciding panels in equal measures, rational law of evidence, no obstruction of the journey's continuation, and prevention of loss of property through the dangers of the voyage. As the perspective of the *Sachsenspiegel* shows, these purposes seemed strange and possibly dangerous to the non-mercantile population; the market courts were just as incomprehensible as foreign courts and therefore were put on the same level with them. Several of the merchants' new demands must have overstressed the traditional legal opinions of the non-mercantile parts of the population. Only in explicit merchant republics like Lübeck was it possible and reasonable to use principles of mercantile law as a base for the general municipal law.

Even if the general population would not have been impressed by the innovations of mercantile court procedure, the efforts to secure an equal legal position in the countries of all trading partners undoubtedly decreased the transaction costs of Hanseatic trade. There was a definite competitive advantage in the abolition of *lus naufragii* or the freedom from being brought fettered to court if one could provide bailsmen and securities, to cite two examples which stood high on the Hanseatic agenda.

Not all privileges contained as many procedural regulations as the two privileges of Flanders from 1252 analyzed at the beginning of this paper. One may ascribe that level of detail to the delegation member from Hamburg, the learned *magister iuris* Jordan von Boizenburg, who was personally named in the privilege. Nevertheless, procedural law played an important role in the privileges of other countries, even if it was not as vital there as in Flanders; this aspect of the privileges merits more attention than scholars have paid it hitherto. All in all the amount of regulatory material is both small and constant over space and time. In the first century, the increase in length of the privileges is due to more topics being added. After that, however, what changes is not the numbers of topics but the differentiation of the rules. Other factors increasing the length of the privileges are preliminary notes and justifications which towards the end seem almost baroque (no. 19). This was not typical of the swift and often laconic style of the Hanseatic privileges, but after all it was not the merchants themselves but the great crowns of Europe who chose the exact wording of the texts.

Is there a correlation between the quality of procedural law and the attractiveness of proceeding by using alternative means of solving the conflict instead? Answering this question is especially hard because of the unevenness of the sources. The non-judicial strategies of solving conflicts produce far fewer written sources than the juridical ones. For example, one hears only coincidentally at best, if a merchant simply aborts his business relation to a former partner even though that is the single most lethal weapon of an individual merchant if his partner depends on this relation. Only if the Hanseatic community as a whole threw down the gauntlet and imposed an embargo, are we informed of boycotts, relocation of the staple or trade wars.³³

The most important point remains, that the sheer extent of procedural law regulations in the privileges proves the paramount importance of the matter. For hundreds of years the Hanseatic League continued its efforts to secure good procedural standing of its merchants before foreign courts. This effort would never have been undertaken if the favorable design

³³ An indication of this can be found only in the privileges of Bruges. In 1309, the city granted especially generous privileges because the Hanseatic merchants lifted their blockade and returned their staple from Aardenburg to Bruges (nos. 15 and 16).

of court proceedings in other countries had not been of key importance for the Hanseatic external trade.