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INTRODUCTION

The history of commercial law is one of the most interesting and fastest-growing sub disciplines of legal history. The history of commercial law is also an interdisciplinary field *par excellence*, as it attracts not only legal historians, but also general historians and economic historians. Since commerce has always crossed national boundaries, its legal history also lends itself more than naturally to a comparative approach.

This volume is an attempt to present the history of early modern commercial law in Western Europe as an interdisciplinary and comparative enterprise, capable of being approached from various different angles and with many methodologies. The early modern period, for our purposes, is a long one, stretching from the fifteenth to the end of the nineteenth centuries. This is arguably the period which has received the least amount of attention so far in the study of commercial law in England, Italy and Germany. The medieval period, not least because of the discussions on *lex mercatoria*, has attracted more attention in these countries, and the same can be said for the past two centuries, which has seen much research focused on the formation of modern law, although even in these two periods, scholarly work has mainly concentrated on national histories of commercial law. In France, however, the medieval history of commercial law has been less studied, but its history in the early modern period has received much more attention.

There is also a difference between legal and economic history. For England, Italy and Germany, a great deal of legal historical research has been carried out on commercial law, but this is less the case for the Low Countries and France. Commercial-economic themes concerning nineteenth-century France (apart from for the codification era) have been mostly the territory of economic historians, not legal historians. The same is true for the Low Countries and in all periods. There, and especially on the Northern Netherlands, economic historians have covered the seventeenth and eighteenth centuries well. Much the same applies to Scandinavian research on the history of commercial law. As for the United States and the United Kingdom, the distinction between legal and economic history is less rigid.

The book is based on papers presented at the workshop “Historiography and Sources of Early Modern Commercial Law,” which was organized in September 2014 in Helsinki. This was the first

in a series of five workshops with different themes: “Small, Medium-Sized and Large Companies in Law and Economic Practice (Middle Ages – Nineteenth Century)” (Brussels, May 2015); “The Influence of Colonies on Commercial Legal Practice” (Fiskars, Finland, January 2016); “Migrating Words, Migrating Merchants, Migrating Law” (Frankfurt am Main, September 2016); and “The Historiography of Commercial Law: Past, Present, and Future” (Helsinki, September 2017).[1]

This first workshop invited the speakers to choose subjects that dealt with either the sources of commercial law, or historiographical themes. All but one contributor chose the former, and accordingly we decided to limit this volume to the sources of commercial law and to devote the final conference to the historiography. One of the red threads that runs through this present volume is the extent to which historical sources reflect sources of law.

In this study the aim is to demonstrate the wide variety of sources that are necessary to grasp fully the numerous facets of early modern commercial law. It is not appropriate to limit the understanding of “sources” to normative sources, although their central role is self-evident in legal history. The most important of these are codifications, both comprehensive ones such as the French *Ordonnance de Commerce* and the more selective ones; and court records, which become more extensive during the late Middle Ages and the Early Modern periods. However, in order to approach the reality of commercial life and commercial law, these normative sources need to be seen in the context of the day-to-day business routine: official and private registers and account books, contract charters, letters and wills. Educational literature, manuals on law and bookkeeping, arithmetic books and similar sources which are not strictly normative complete the picture.

If we take law in commercial matters to mean something more than simply legislation and state-derived norms, the problem of normativity enters the picture and we unavoidably touch upon legal-theoretical debates. For example, if one defines law as “living law,” in the spirit of the legal sociologist Eugen Ehrlich, then cultural practices and shared mentalities can be identified as belonging to “merchant law”. Established practices and customs are, however, difficult to distinguish in conceptual terms. This then triggers the question of to what extent merchants were legally literate and articulate, with regard not only to official law, but also vis-à-vis their own “ways of doing things”. Did they, for example, consider accounting practices that were shared among

[1] The conferences are organized by the Project “The Making of Commercial Law: Common Practices and National Legal Rules from the Early Modern to the Modern Period.” The Project Leader is Heikki Pihlajamäki, and the Steering Group consists of Albrecht Cordes, Serge Dauchy and Dave De ruysscher.

merchants as “law”? Were sanctions more than a (temporary) loss of reputation? Analysis of different historical sources can yield answers to such questions. However, it is only by focusing on the detailed scrutiny of historical sources and on what they can tell us that we will arrive at conclusive views. Therefore, this book contains contributions in which diverse historical sources stemming from within mercantile milieus, such as letters, merchant manuals, newspapers, and others, are held up to the light.

The concept of commercial law is notoriously elusive, and especially so in the early modern period. The Dutch law for example, as Boudewijn Sirks shows, had no commercial law separate from private law before the early nineteenth century. Thus, there existed no special body of rules applicable to merchants and/or special courts. Nevertheless, there were specific commercial regulations, contract forms of special importance for commerce and even courts, which in practice dealt mostly with commercial problems. Hence, when dealing with the early modern period we must allow ourselves a certain degree of pragmatism in deciding what we recognize as “commercial law,” if we wish to be able to compare the law on commercial activities in different parts of Europe and the world. Our concept of commercial law is a practical one, as it refers to all forms of legal regulation that had to do with merchants and their business. Commercial law thus encompasses commercial contracts, bankruptcy, commercial courts and procedure, and company law.

As Justina Wubs-Mrozewicz shows, international commercial conflicts were not solved based on legal sources and legal practice only. Economic and political interests were deeply intertwined in the resolution of commercial conflicts, which is why diplomatic sources are indispensable when trying to understand premodern commercial conflict solving at the international level. Alain Wijffels emphasizes the links between commercial law and public policy. Using the practice of the Grand Council of Mechelen as an example, he demonstrates how important it is to see commercial law not only as private law between merchants, but also in connection to public governance. High courts, such as the Grand Council of Mechelen, are important here because of their nature as “institutions where the interface between public governance on trade and the private interests of merchants was put to the test.”

Ricardo Court’s chapter on the sixteenth-century merchant customs uses the commercial letters of a Genoese merchant as a primary source. The letters of Gio Francesco di Negro contain important information, not easily found in the traditional legal sources, on the “written and unwritten rules governing long-distance trade in the Western Mediterranean.” Guido Rossi explains, in his

contribution on sixteenth-century insurance practice, how different sources (written rules, insurance manuals, and documents such as policies, mercantile correspondence and judicial or arbitral decisions) must often be used to complement each other in order to form a coherent picture of insurance law. Comparing Dutch, English, French and Italian practices regarding the institution of abandonment, Rossi shows how different sources can be understood in context.

Notaries were, at least in some parts of Europe, at times involved in the drafting of partnership agreements. Bram van Hofstraeten's contribution demonstrates how notarial practice evolved in the sixteenth-century Low Countries. He demonstrates that notarized partnership agreements were primarily concerned with the internal organization of the partnerships, and only little with external liability issues. Notarial guidebooks or *formularii* formed a branch of practical legal literature, as did merchant guidebooks, which Dave De ruysscher discusses in his article. During the period ranging from 1490 to 1600, over a hundred *ars mercatoria* manuals were published in Antwerp alone. De ruysscher, however, cautions against reading merchants' manuals as descriptions of valid mercantile law, but rather as expressions of individual thought. He is doubtful regarding to what extent early modern commercial practices can be described as normative at all, given, for instance, the scarcity with which customary law is mentioned in sources. Customs as binding legal norms are not frequent in the early modern *consilia* either, as Eberhard Isenmann writes in his article on the fourteenth- and fifteenth-century German legal, moral-theological and economic expert opinions on commercial matters. Instead of usages, customs or moral arguments, legal professionals preferred Roman law and legal literature. Nevertheless, a wide range of commercial legal issues were discussed in the opinions, such as bookkeeping, trademarks, contracts and just prices.

Anja Amend-Traut's article shows the wealth of normative material also contained in the commercial case files of the Imperial Chamber Court and the Aulic Court, the two highest courts of the Holy Roman Empire of the German Nation. Although the decisions themselves were lacking *rationes decidendi*, expert opinions and law faculties' opinions included in the case files contain interesting legal argumentation. In addition to this, the Aulic Council granted privileges and formulated trade policy decisions with a general normative character.

Unfortunately, the wealth of sources we encounter in continental Europe is largely absent in some of the European fringe areas such as Scandinavia. As Heikki Pihlajamäki shows, the Swedish early modern commercial law can nevertheless be researched at least through case files of the lower courts and high courts. However, since these were not specialized commercial courts, commercial

cases are far from frequent. Legal literature on commercial law is also scarce, and there are no notarial deeds or *consilia* to be found in the archives. Swedish law was, from early on and compared to other parts of Europe, to a great extent statute-based and thus centralized. The statutory development of the seventeenth century offers, therefore, one important insight into commercial law in early modern Sweden. Mia Korpiola's contribution then offers a view into the practice of Sweden's first royal appellate court, the Svea Court of Appeal, in its very first years. Starting its functions in 1614, the Court received few commercial cases in its first year. Their number then gradually increased, the main part consisting of simple credit notices (*manebrev*) and – in accordance with Alain Wijffels's observations concerning the Grand Council of Mechlin – controlling the observance of public trade regulations.

Margrit Schulte Beerbühl, writing on the speculation bubble of 1799, adds another significant source to those mentioned above, which gains significance from the seventeenth century onwards: newspapers. She approaches her topic, however, not only by way of newspaper publicity, but also through court records and other sources.

Modern commercial law emerged in the nineteenth century. It is often presented as the period of rising legal positivism, and France is often given as the prime example. However, Edouard Richard demonstrates with various examples the French paradox in which, despite the prevailing post-revolutionary *légicentrisme*, commercial customs and usages could still thrive, and sometimes even clearly *contra legem*. One of the reasons behind this phenomenon was the poorly drafted Commercial Code of 1807, the preparation of which Olivier Descamps analyses in his contribution.

For most of the nineteenth century, Germany was in stark contrast to France politically. Steps towards legal unification were nevertheless taken before the unification in 1871. Peter Oestmann presents in his essay the founding history of the *Oberappellationsgericht Lübeck*, the most significant of the German nineteenth-century courts dealing with commercial affairs. The Lübeck court was founded in 1820 as the superior court for the free cities of Bremen, Frankfurt am Main, Hamburg and Lübeck, and the court functioned until 1879. Although the Lübeck court did not specialize in commercial law, a large proportion of the cases dealt *de facto* with commerce. Most of the case files and printed decisions of the court still exist and are easily accessible.

The most important message of this volume is the following. We hope that the contributions here show something of the wealth of sources on which historians of commercial law can, and indeed often should, use to approach their subject. Depending on the subject, historical research on mercantile law must be ready to open up to different approaches and sources in a truly imaginative and interdisciplinary way. This is the case, of course, in all legal historical research. It is, however, even more the case in a field such as commercial law. This, more than many other branches of law, has always been largely non-state law. This remains so even despite of the fact that it is vital to take public concerns into consideration if one wishes to grasp the workings of and changes in commercial law. Mercantile law rising out of situations and the practices of commercial life, often gradually and piece-meal, may sometimes call for its historian to employ a different set of sources than, say, were one to write a history of procedural or criminal law. Merchants themselves, usually without legal training, have always been instrumental in shaping the rules governing their activity. Normative, "official" sources are important in commercial law as well, but other sources are often needed to complement them. Though it may not be a complete study, the articles here hopefully present a good assemblage of those sources.

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