

LAURENT WÆLKENS
(Katholieke Universiteit Leuven)

*The Historical Roots of Belgian Commercial Law**

Abstract

The article presents a synthetic approach to the history of Belgian commercial law. The author starts with the regulations of Roman law and leads us from the beginnings of civil law in the times of the Roman Republic, describing the role of aediles and praetors, to the times of the Roman Empire. A significant part is dedicated to the grain trade and searches – not always successfully – for a self-contained commercial law. A separate analysis of the Roman banking practices includes a discussion of cheques and accounting. The fall of the Western Roman Empire brought changes in trade in the Mediterranean region. The description of the Middle Ages includes a series of causal factors that contributed to the development of commercial law in Western Europe and that were related to the Roman tradition (for example the development of canon law and the Church itself as an institution, as well as the development of universities). It also contains the analysis of organisational elements of commercial law that mainly pertain to Italy, which at that time had a leading role. Attention is also devoted to the development of the notarial profession and the bill of exchange. In the 11th century, cities and, by consequence, autonomous and trade-oriented systems of city rights began to gain importance. This evolution which started on the Apennine Peninsula later also took place in the north of Europe, including in the German maritime cities, and eventually brought organisational changes and led to the establishment of the Hanseatic League. Legal regulations embraced, inter alia, the maritime trade. When the first annual fairs were organised, improved safety and decreased toll rates furthered the development of towns situated on trade routes. Changes in the socioeconomic structure and the fall of Constantinople influenced the progressive standardisation of commercial law in different countries. The Greeks brought to the West not only their money and wealth but also their law. In the modern era, the first companies with legal personality appeared. The origins of contemporary Belgian commercial law are without a doubt connected with French law. The French rulers' protectionist policies, which were characterised by a strong interference in laws regulating trade, were included in the ordinance of 1673, the main drafter of which was Savary, and the ordinance of 1681. Such actions resulted in traders developing their own judicial bodies. The next stage that was important for contemporary Belgian law was the issuing of the Napoleonic *Code de Commerce* of 1807. The French law was implemented in the parts of the Netherlands conquered by Napoleon. Commercial law courts after the French model were established and were staffed not by professional judges but by entrepreneurs. When the Belgians gained independence in 1830, one of

* An earlier version of this article was published in Dutch under the title *Geschiedenis van het handelsrecht* in: *Beginselen van Belgisch Privaatrecht*, XIII, *Handels- en Economisch Recht*, I, eds. B. Tilleman, E. Terry, Ondernemingsrecht, Mechelen 2011, p. 3–26.

their goals was to implement a new commercial code. In the end, however, they chose a different path – a comprehensive revision of the existing law that continued throughout the following decades. In that process Belgian commercial law was complemented with, among other things, private companies. The changes to the legal code in the 20th century resulted mainly from the developments in international law (e.g. the acceptance of conventions concerning promissory notes) as well as European law. In 1999 company law was transferred from the *Code de Commerce* to the Companies Code. The French commercial court system was adopted after the Belgian Independence, but during the last two hundred years the organisation of these courts was changed. Although some argue that there is a need for reform and for the removal of non-professional judges, the author of this paper is of the opinion that lay judges are efficient.

Key words: Belgian commercial law, civil law, Roman law, canon law, banking practices, bill of exchange, notarial practice, Hanseatic League, companies with legal personality, Napoleonic Code de Commerce of 1807

Słowa kluczowe: belgiskie prawo handlowe, prawo cywilne, prawo rzymskie, prawo kanoniczne, praktyki bankowe, weksel, notariat, Hanza, spółki z osobowością prawną, kodeks handlowy Napoleona z 1807 r.

Introduction

1. The history of commercial law is hard to demarcate

Belgium has separate commercial courts, which have their own competences and are staffed by commercial judges, but decisions on appeal are taken by the ordinary judicial institutions. There is also a separate Commercial Code, but that has been eroded to a large extent. The role of judges in commercial matters is under pressure. When the commercial courts were established, access was reserved to merchants and traders, but since then they have become courts where businesses are the most common parties, where problems concerning asset management companies are treated, and where judgments about private securities are given. The ordinary courts apply commercial law when non-traders are involved, the justice of the peace courts take action in cases between traders and there are no commercial judges in appeal proceedings. The competence of the commercial courts has been laid down by law, but what is the history of commercial law in this loose context? The history of the institutions which to this very day are exclusively within the competence of commercial law in Belgium? In some neighbouring countries, these institutions have a parallel history, but are not considered to pertain to commercial law. Is it, then, między innymi company law that has to be considered? In legal history, however, entrepreneurship is a central subject of the civil law. Is it, alternatively, law that specifically serves to advance economic exchanges that needs to be examined? In the past, the subject of commercial law was perhaps the economic exchange of goods, but this type of history of commercial law will not end in the Belgian commercial courts. Socio-economic law, European law and international law are also oriented towards those exchanges, while the commercial courts now mostly deal with the exchange of services. We have opted for an approach that is not too strict, and will remain within the tradition of the legal historians, who in the history of commercial law seek old illustrations of the separate treatment of traders and of the existence of commercial courts and specific

institutions. We will look for the separate life of commercial law in classical antiquity, the Middle Ages, the modern era and Belgium since the French Revolution.

Commercial law in classical antiquity

2. In the Roman Republic

In the Roman Republic, commercial law came partly under private law and partly under the law of the *aediles*. Private law was organised by the praetors, who were responsible for the resolution of civil conflicts. They intervened in conflicts between *cives* (brothers in arms). Originally, the *cives* were soldiers and the civil law was organised around the privileges of these warriors. When compulsory military service was abolished in the second century B.C., civil rights were acquired through descent. The praetors monitored whether these civil rights were respected. The introductory session of every suit in which civil rights were invoked was held in the military court of the praetor, who referred the parties to an ordinary judge for treatment of the substance of the case.¹ These civil rights included free access to trade (*commercium*) and the classical law of obligations. The statute of *civis* meant that one could conduct trade between *cives* throughout the entire Roman federation and that one could bring problems before the civil jurisdictions. The private law of contracts was developed within that civil law. Vending in public, meaning offering goods for sale in the street to people who had civil rights as well as to those who did not, did not come under civil law in the Republic, but under the jurisdiction of the *aediles*. These magistrates concerned themselves with the public order in towns and municipalities and were competent with regard to order and safety in the streets. This competence included both the supervision of building activities and the development of criminal law. The law relating to markets also originated from concerns with regard to orderly street trade. Complaints concerning the purchase and sale of goods on the market were treated by the *aediles*. In their jurisdictions, it was their own *aedilic* laws which applied, and not the civil rules of the praetors. Just as the praetors did, the *aediles* issued an “edict” upon the acceptance of their office in which they determined how and when they would intervene in public trade and how they could be reached in a case of a conflict concerning such trade. They decided freely whether they would adopt the rules drawn up by their predecessors without modifying them. How this procedure for the *aediles* took its course and which rules they employed is as good as unknown. A single title in the Digest is the sole document pertaining to this issue that has been preserved.² The only remnant in current law that manifestly derives from the law of the *aediles* is the short term for complaints on account of hidden defects. The pra-

¹ About the origin of the civil law and the privileges of *cives*, see: L. Waelkens, *L'origine romaine des droits et libertés fondamentaux*, “Annals de la faculté de droit, sciences économiques et gestion de Nancy” 2010, vol. 2, p. 187–210.

² On the procedure: L. Garofalo, *Il processo edilizio, Contributi all studio dei Iudicia publica*, Padua 1989.

tors applied a normal limitation period in such cases, while the *aediles* employed a short term. In the Middle Ages, this short term became the rule in the *ius commune* on the basis of a rare mention of the old law of the *aediles* in the *Corpus iuris*.³ The Roman *aediles* were also responsible for the functioning of a free grain market. In this manner, they prevented monopolisation in the grain trade and stimulated the maritime trade.⁴

3. No sources testifying to a commercial law in the imperial law

During the first century B.C., the Roman Empire was divided into imperial and republican provinces. In the imperial provinces, a new legal system, in which imperial officials administered justice, was introduced. Legal proceedings under private law, criminal law and the law of the market were dealt with by imperial *officia*, which were hierarchically placed under the praetorian prefecture. Appeals could be filed against all decisions of officials and therefore also against their judicial decisions. All of the appeals eventually ended up in the praetorian prefecture on the Palatine Hill. The administration of justice within this prefecture became a corpus of precedents that was binding for all of the officials, including the judges. In this manner, the law was steered by the prefecture. The organisation of the free market was entrusted to the grain prefecture (*annona*), which was responsible for the provisioning of the capital.⁵ This prefecture combated monopolisation in the grain trade and granted tax benefits to traders and shipmasters in certain periods. It developed its own administration of justice concerning the conferral or non-conferral of these fiscal advantages and thus developed rules about the free market and transportation. It was possible to appeal against the decisions of the grain prefecture before the praetorian prefecture. In the Senate's provinces, the republican law was placed under the imperial prefecture only gradually. Under the emperor Hadrian, the private law of the praetors was incorporated into the imperial administration of justice as the "Perpetual Edict." Gaius describes this Perpetual Edict in his Institutes. We find no commercial law in it. Because Augustus and all of his successors were also *aediles* for life in the Senate's provinces, the market law and the grain trade were also under the supervision of the imperial administration in those provinces. The prefects published compilations of case-law. Sadly, not much more has been preserved than the material that can be found in the fifth-century Codex Theodosianus and the sixth-century *Corpus iuris* of Justinian. In the Codex Theodosianus, we find quite a lot of judgments concerning economic activity, trade and storage in harbours, courier services and maritime transport, futures trading and trade that was regulated by the grain prefecture. It is, however, impossible to infer from these sources that the grain prefecture had its own distinctive case-law. There is no evidence of a separate commercial law in the judgments of

³ L. Waelkens, *Civium causa: Handboek Romiëdzy innymi recht*, Leuven, 2008, p. 350–352.

⁴ On this subject, see A.J.B. Sirks, *Food for Rome, The Legal Structure of the Transportation and Processing of Supplies for the Imperial Distributions in Rome and Constantinople*, Amsterdam 1991. This book mainly treats imperial law, but also contains explanations and a bibliography concerning republican trade.

⁵ See previous footnote.

the praetorian prefecture either. In Latin, the word for a trading firm is *familia*.⁶ This term originated from the civil law, where *familia* was the structure of liability surrounding every citizen which made clear for which other people he was answerable and which assets and liabilities he possessed. However, there are no texts in which *familiae* acting in trade are distinguished from *familiae* according to the ordinary law. During the imperial age, great trading houses and manufacturing firms were active.⁷ Oil, grain and food articles were traded over long distances and this indicates the existence of a well-developed commercial law. The Ateius firm from Arezzo was the market leader in oil lamps for one hundred and fifty years: it employed up to eight thousand people and produced its merchandise in a region ranging from Lyon to Dacia. Such productivity is not possible without an enduring company law. But how did this function? The *societas* was consensual, and therefore flexible, but could not survive the death of a member of the partnership. Whether the *universitas* in which local governments act also participated in trade is unknown. In the Codex Theodosianus, *corpora* take part in trade, but were they private firms or professional associations? Very few sources of this legal system for fifty million inhabitants have been preserved and we have found none that present a clear image of the commercial law.

4. Roman banking law⁸

Smooth financing is a part of smooth trading. The activities of banks in the imperial age have been studied, but equally in this context, it is impossible to conclude that banking law came into being in separate courts and that it was typical of traders. The banker's cheque was known in imperial law in the form of the *receptum argentarii*: a banker provided a receipt of payment (*receptum*) which was sent to the supplier, who received an *actio recepticia*: a direct claim against the banker's local agent. Bankers also issued this receipt on credit (*depositum irregulare*), something which could lead to a fictive exaggeration of their assets. This predecessor of our cheque was forbidden by the prefecture during Justinian's imperial reign (Inst. 4,6,8). Furthermore, there was the payment by means of a claim on a third party, through a *pecunia constituta*. Claims for the payment of debts were abstracted and passed on to creditors. If such a security was not paid on the due date, all of the injured parties could bring an action, the *actio de pecunia constituta*, against their legal predecessors who were mentioned on the security. These securities were discounted with bankers. *Pecunia constituta* is the predecessor of the bill of exchange between three parties. Merchant bankers were involved in trade, a common practice being the *mutuum*. This was a reciprocal agreement between a trader and a banker: the banker bought specific goods for an agreed price on the instruction of the trader, after which the banker resold the goods for future delivery to the trader in a second agree-

⁶ J.-J. Aubert, *Business Managers in Ancient Roman Law, A Social and Economic Study of Institores, 200 BC–AD 250*, Leiden–New York–Cologne 1994. Provides many examples of such *familiae* in the world of business: *familiae publicanorum, aquarum, montelaes, panni, thermensens, piscatorum*...

⁷ These can be discovered in the book by Aubert that is mentioned in the footnote above.

⁸ Bibliography in L. Waelkens, *Pecunia constituta, un mode de paiement du droit romain* "Mémoires de la Société pour l'histoire du droit et des institutions des anciens pays bourguignons, comtois et romands" 2008, vol. 65, p. 67–79.

ement. According to the current literature, one could hold an account containing money or an account containing goods with Roman bankers. Both types were very different. Putting money in an account amounted to safekeeping: after the banker's bankruptcy the money could still be reclaimed. Goods in an account, however, were the property of the banker and were released on demand and on payment. The securities were well-developed in Roman law. We find case-law about the retention of titles, the fiduciary transfer of ownership, the establishment of co-ownership through partnership, the pledge with *droit de suite*, the pledge on a business, the pledge on a variable capital, surety, joint and several liability. Bankers could hedge themselves sufficiently to allow traders to work without a capital. Merchant banking was common and traders did not need reserves.

5. Roman accounting law

In the imperial law, bookkeeping played an important part in trade.⁹ In judicial matters, the *familia* was led by a *paterfamilias*, who was liable for the acts of his *familiares*. Towards the outside world, the claims of all of his family members were in his name, and he alone was liable for the debts of his family members. The claims and debts of a *familia* were recorded in the *codex impensi et illati* (the journal) of the *paterfamilias*. In addition to this, he also kept a *codex rationum* (account book) with an account per family member. Everything he received in the financial journal (*pf credit*), he owed to a family member (*pf debet*); and everything which he had to pay according to the financial journal (*pf debet*), he had to receive from an account (*pf credit*). The limited liability in trade was organised around this “double entry bookkeeping”. Family members who had a *peculium*-account in the account book could make free use of the amount in their account. A family member's income and expenses were registered in that account and creditors could call upon the *paterfamilias* for, at most, the amount in the account. If this amount rose or fell, the liability of the *paterfamilias* increased or decreased accordingly. Creditors were allowed to inspect the account. During the imperial period, an *institutio* could be arranged with a non-family member. In the *Corpus iuris*, this legal concept was organised around the *actio institoria* (D. 14,3). The non-family member was given an *institutio*-account in a *familia*. This account functioned just as a *peculium* did. The relationship between the *paterfamilias* and the third party was a *societas* or, in the absence of proof, a *negotiorum gestio*. The income and expenses of an *institor* accrued to the *paterfamilias* with whom the *institor* held an account. The *paterfamilias* was liable for him for the amount in his account. If the *paterfamilias* did not keep accounts, or if these were slipshod, he could not invoke the limited liability. This system of the *institutio* with third parties was called *pekoulion* again in Constantinople and would be known as “factorij” (English: factory) in the Belgian region in the Middle Ages. A “factor” was, in this context, an *institor* who acted for someone else and enjoyed a limited liability when doing so. The origin of the limited liability was hardly studied, but one can find it in every region that conducted trade with Constantinople, and this long before 1494, when Luca

⁹ A further explanation and a bibliography can be found in L. Waelkens, *Gaius IV,73: Debet ou debetur?*, “Tijdschrift voor Rechtsgeschiedenis” 2000, vol. 68, p. 347–356.

Pacioli described this Roman system of bookkeeping in the last chapter of his book about the arithmetic of Constantinople.

The rise of medieval commercial law¹⁰

6. Mediterranean trade in the early Middle Ages

Since the Late Empire, the great trade centre of Europe had been Constantinople, and this remained the case until the fifteenth century. The gold bezant was the standard coin for large-scale trade until the fifteenth century, until it was replaced by the gold florin. After the fall of the Western Roman Empire in 476, Constantinople continued to conduct trade with the Western Mediterranean basin. In the early Middle Ages, Venice and Lisbon were ports of transshipment for goods from Constantinople. Almost nothing is known about the commercial law of this period.¹¹ In a recent overview of the history of Constantinople one can read a lot about ships and merchandise, as well as about the legal systemiędzy innymigeneral, but nothing about trade and commercial law.¹² The trade with Constantinople has, however, left traces in the West. From the eleventh century onwards, Pisa also proved to be a staging area for trade from the Eastern to the Western Mediterranean and to North Africa. In Pisa, in 1085, the administration of justice for traders was provided by the town's magistrates (consuls). It turns out that by 1162, the *consules mercatorum* were a separate commercial court, against which appeals could, however, be lodged with the town's magistrates.¹³ The administration of justice was based on the Roman *ius commune*, although the University of Bologna was still in an early phase of development. One can therefore assume that this common Roman law was strongly influenced by Constantinople, where the old Roman law had continued to exist. During this period, Genoa also traded with the East. In the archives of the Genovese court, a bill of exchange of 1157, for the payment of thirty-eight bezants in Alexandria, has been preserved.¹⁴ From Constantinople, trade with limited liability became known. This method was then adopted. In the thirteenth-century bankruptcy files of Genoa and Venice, there are double-entry accounts after the Eastern model.¹⁵ We do not have any older ones, but

¹⁰ An extensive bibliography can be found in H. Pohlmann, *Die Quellen des Handelsrecht* [in:] *Handbuch der Quellen und Literatur der Neueren europäischen Privatrechtsgeschichte*, I, *Mittelalter (1100–1500)*, ed. H. Coing, München 1973, p. 815–834.

¹¹ See e.g. V. Piergiovanni, *Courts and Commercial Law at the Beginning of the Modern Age* [in:] *The Courts and the Development of Commercial Law*, ed. V. Piergiovanni, [Comparative Studies in Continental and Anglo-American Legal History, 2], Berlin 1987, p. 11–21.

¹² E. Jeffreys, J. Haldon, R. Cormack, *The Oxford Handbook of Byzantine Studies*, Oxford 2008.

¹³ About this, see Ch. Wickham, *Legge, pratiche e conflitti, Tribunali e risoluzione delle dispute nella Toscana del XII secolo*, Viella 2000, p. 191–193, with further bibliography.

¹⁴ G. Cassandro, *Vicende storiche della lettera di cambio* [in:] G. Cassandro, *Saggi di storia del diritto commerciale*, Naples 1978, p. 40.

¹⁵ This was already written about by B. Penndorf, L. Pacioli, *Abhandlung über die Buchhaltung, Nach dem italienischen Original von 1494 ins Deutsche übersetzt und mit einer Einleitung über die Italienische Buchhaltung im 14. und 15. Jahrhundert und Pacilis Leben und Werk versehen*, Stuttgart 1933, *passim*.

in the earliest sources we always find this influence of Constantinople on the commercial law in the Western ports.

7. Ecclesiastical commercial law in the West in the twelfth century

In Western Europe, the fall of the Western Empire in 376 caused the division of the single Roman jurisdiction. For some centuries, prefectures, which preserved the unity of the law in relatively large areas, remained in existence in several principalities.¹⁶ In the ninth century, feudalism arose. Liege-lords delegated the sovereign administration of justice to their vassals and this practice resulted in a patchwork quilt of legal systems. Long-distance trade was hampered by uncertainty concerning the administration of justice with regard to transport and payments. In the many sovereign regions, tolls were levied on transit and these made long-distance goods expensive. Long-distance trade only revived in the twelfth century, after the establishment of ecclesiastical courts. The Investiture Controversy of the eleventh century led to the Concordat of Worms, in which the imperial feudal order allowed the Church to centralise its organisation and to create its own courts. Both the pope and the German Emperor were recognized as successors of the Roman emperor, each in their particular fields. The imperial feudal order recognised the pope as the second in succession to the Roman emperor. With regard to ecclesiastical questions, the pope became a second sovereign tax authority. In 1122, bishops started to organise itinerant courts. It was possible to file an appeal against the administration of justice of these courts with the metropolitan bishops, against whom an appeal could be lodged in Rome. In this manner, the ecclesiastical courts acquired an administration of justice which, like the administration of justice in the imperial legal system of classical antiquity, was uniform throughout Western Europe. From 1140 onwards, canon law was studied at the universities of Bologna and Paris, and judges who had studied at a university were appointed in the ecclesiastical courts. From 1170 onwards, every bishopric acquired its own permanent court. That this restructuring of the Church led to long-distance trade was paradoxical. The Roman law of classical antiquity forbade the involvement of ecclesiastical courts in commercial matters, even in trade conducted by priests (Nov. Val. 35,4 of 352). In the twelfth century, however, trade was financed with ecclesiastical tithes. Henceforth, the bishops passed a part of the ecclesiastical tithes on to Rome. The Camera Apostolica leased out the collection of these tithes to Lombard and Tuscan bankers, who established offices in the North, in London, Bruges, Cologne, Paris, Barcelona, etc. in order to collect the money there. Instead of sending the money to Italy, they put it at the disposal of traders. A Lombard banker in Bruges lent money to a local trader who used it to buy cloth. The Bruges trader then sold his cloth in Italy and put his client under the obligation to pay the Italian head office of the banker. The transportation of money over long distances was replaced by trade, which was safer and more lucrative. Thus, trade from the North, Southern France and Spain to Italy originated. Such trade suddenly became a possibility because of the ecclesiastical courts. As the goods had been sent to Italy as tithes, they came under ecclesiasti-

¹⁶ D. Claude, *Niedergang, Renaissance und Ende der Präfekturverwaltung im Westen des römischen Reichs (5.–8. Jh.)*, ZRG GA, 1997, Bd. 114, p. 352–379.

cal jurisdiction. It was in the interests of Rome that the flow of goods was not hindered. Because of the ecclesiastical jurisdiction, the cargo was exempt from tolls everywhere. For matters which were not typically ecclesiastical, these courts applied Roman law, so that bankers and traders were subjected to the Roman *ius commune* in the ecclesiastical courts. The canonists were the first to study this *ius commune* at the universities. Their law of obligations was identical in London, Reims or Milan. In Italy, this commercial law of the ecclesiastical judges dovetailed with the commercial law of Constantinople, which was also considered to be Roman law. In the ecclesiastical sphere, the bankers and traders discovered more than the benefits of a uniform law. In regions such as Lombardy, Venice and Rome the old practice of the *tabelliones*, the notarial profession with public officials who drew up authentic deeds, still existed. These provided security in the trade with Constantinople. In the North, the bishops were the first to appoint notaries and to allocate them a role in their jurisdiction. The development of the notarial profession was crucial to trade. Through the combination of the ecclesiastical jurisdiction and ecclesiastical notarial practice, traders received documents which retained their value over long distances. They developed the bill of exchange between four parties in order to send money to Italy. The Bruges agent of the Italian banker concluded a loan before a notary, with a pledge on the goods which the trader bought. The notary wrote the bill of exchange which stated the amount the recipient of the goods had to pay to the banker in Italy. The goods were then sent to the recipient, along with an authentic deed. Everything was as enforceable in Italy as it was in Flanders and *en route*. A subsequent discovery in canon law was the possibility to form an association and to take legal action as a group. In the early Middle Ages, the basis of a trading company was still the Roman *familia*: a group that was established on a voluntary basis, was characterised by joint ownership and had one liable *dominus*. In the South, traders still made use of the Roman *societas*, which could not survive the death of a member of the partnership. The abbeys, however, had been functioning as *universitates* since Roman antiquity. All of their goods belonged to the members of the abbey's *curia*. If one of these members died, his rights returned to the other members of the *curia*, who could then allocate them to a successor. In this manner, the abbeys' goods stayed outside of the law of inheritance for centuries and escaped feudalism. The ecclesiastical courts allowed bankers and traders to unite in such *universitates*.¹⁷ Thus, they could cooperate and build up economic strength without running the risk of having to wind up and divide everything whenever one of them died. At the end of the twelfth century, the ties between the traders and the ecclesiastical jurisdiction became looser, but the feudal order (the *iudices imperiales delegati*) still accepted that contracts concluded before ecclesiastical officials came under the competence of the ecclesiastical courts and that traders could always appeal to the ecclesiastical courts *ratione pacis et securitatis*.¹⁸ The *universitates* would mainly make themselves felt in England, where they would evolve into corporations.

8. The urbanisation of the commercial law

¹⁷ See the recent study by R. Mehr, *Societas und universitas, Römischrechtliche Institute im Unternehmensgesellschaftsrecht vor 1800*, Cologne–Weimar–Vienna 2008, *passim*.

¹⁸ W. Trusen, *Die gelehrte Gerichtsbarkeit der Kirche* [in:] *Handbuch...*, p. 484–487.

In the feudal system, imperial sovereignty was split up, in many regions even down to the level of manors. The burghers of these mediaeval manors enjoyed the old Roman civil rights, but were obliged to fight for their lord in return. In the twelfth century, negotiations between groups of burghers and their territorial lord resulted in the replacement of the burghers' feudal and military duties with annual payments. In return, the burghers demanded the preservation of their civil rights. The most important civil right was the right to administer justice. Many towns received a town statute which granted them the privilege of sovereign administration of justice. In these first autonomous *civitates*, trade took centre stage. Here, we see that the aldermen's courts copied the case-law of ecclesiastical courts in commercial matters. This evolution took place quickly, as can be observed in Genoa and Barcelona. In the eleventh century, there is the jurisdiction of the territorial lord, recorded for example in the *Breve de consuetudine* of margrave Albert for Genoa (1056) and the "usatges" of Barcelona (1068). These do not contain any commercial law. As early as the twelfth century, however, Genoa and Barcelona had an autonomous jurisdiction for commercial matters. At the same time, the urban notarial practice at the service of trade in Genoa, Marseilles and Venice originated. In the thirteenth century, traders took centre stage in the courts of some towns like Piacenza (1199), Milan (1213) and Venice (1240).¹⁹ The Italian commercial towns became rich city states in the late Middle Ages and remained well-disposed towards trade. The larger aldermen's courts delegated the competence to take decisions about commercial disputes to the *mercanzie* of the traders, which can be seen to originate in the twelfth century in Pisa, in the thirteenth in Siena, in the fourteenth in Florence, Rome, Piacenza, Monza, Lucca, Cremona, Mantua, Brescia, etc. Florence saw the establishment of a court for banking matters in 1299 and Pisa that of a separate division for textile trade in the fourteenth century.²⁰ Simultaneously, Siena also acquired the separate jurisdiction of the Mercanzia.²¹ At the same time as the towns in the North of Italy, many towns in the North acquired similar statutes: Bruges in 1128, Ghent in 1150, Lübeck in 1160, Hamburg in 1188, Rostock in 1218, and Bergen in 1280. In London, the Mayor's Court for commercial matters was staffed by specialised aldermen, who were joined by one trader from the North and one from the South for the treatment of matters involving foreign traders.²² In the municipal laws of the Italian towns, separate developments concerning commercial law cropped up: there was much ado about the law relating to bills of exchange and valuable papers²³ and about forms of cooperation between traders, such as the general partnership with a joint account and the limited partnership.²⁴ Both of these partnerships dissolved at the death of a partner. Partnerships with limited liability for the partners did not exist. In most of the urban legal systems, foreign alliances were privileged separately. The stat-

¹⁹ H. Pohlmann, *Die Quellen...*, p. 811–812.

²⁰ *Ibidem*, pp. 812–813.

²¹ M. Ascheri, *La decisione nelle Corti giudiziarie italiane del Tre-Quattrocento e il caso delle Mercanzia di Siena* [in:] *Judicial records, law reporting and the growth of case law* [Comparative Studies in Continental and Anglo-American Law], ed. J. Baker, Berlin 1989, p. 101–122.

²² K.W. Nörr, *Procedure in Mercantile Matters, Some Comparative Aspects* [in:] V. Piergiorganni (ed.), *The Courts and the Development of Commercial Law*, [Comparative Studies in Continental and Anglo-American Legal History, 2], Berlin 1987, p. 196.

²³ Extensively researched by G. Cassandro, *Saggi di storia del diritto commerciale*, Naples 1978.

²⁴ See among others, J. Hilaire, *Introduction historique au droit commercial*, Paris 1986, p. 167–183.

ute of the Hanseatic League in Bruges, for example, was discussed with the town government and laid down in a charter.

9. Jurisdiction over maritime trade

In this manner, the jurisdiction over trade ended up in the aldermen's courts of the towns in the twelfth century. Trade was, however, still między innymi financed by the Italian bankers who collected the Church's tithes and the ecclesiastical courts remained competent. The competition between the aldermen's courts and the ecclesiastical courts which applied Roman law stimulated the introduction of the academic *ius commune* in the towns' administration of justice. This acknowledgement of common principles in the various towns in its turn stimulated the direct trade between cities, conducted without recourse to the ecclesiastical jurisdiction. During this period, private international law was developed strongly in the academic *ius commune* and many urban courts adopted it.²⁵ The urbanisation of trade and of commercial law led to the development of maritime transport because townsmen who travelled over land were not exempt from tolls. In the Middle Ages, maritime law was developed both in the royal and in the urban courts. In 1129, there was a royal jurisdiction concerning maritime transport in Barcelona. Along the Mediterranean coast, some towns soon bought from their territorial lord the privilege to judge maritime matters according to their own sovereign right. Messina had *consules maris* in 1129, there are documents that testify to administration of justice concerning maritime law in Genoa in 1154, in Trani in the twelfth century, in Venice in the early thirteenth, etc. In the thirteenth century, Spanish urban courts, such as those of Valencia and Tortosa and Barcelona's "Consulat de mar"²⁶ also settled cases concerning maritime law. On the Atlantic coast, there was a maritime jurisdiction by the territorial ruler in circa 1150, in the Rolls of Oléron. Oléron was the island on which Eleanor of Aquitaine had her residence. The maritime law of Oléron was incorporated into the English jurisdiction in the Black Book of the Admiralty. From the thirteenth century onwards, maritime law was prevalent in northern urban jurisdictions as well. At the law faculty of Bologna, it was taught that maritime law was judged according to the local *consuetudo* and therefore in the aldermen's courts. In 1235, this rule was included in Accursius's Great Gloss.²⁷ In the fourteenth century, the law of Oléron was adopted by the aldermen's court of Damme. For the Baltic region, there was a court in Wisby. In Lübeck, in 1407 the most important rules of the maritime law of Wisby were agreed upon by the Hanseatic towns.²⁸ The maritime laws of the towns contained many common elements. *Accomenda*, for example, were accepted in most jurisdictions. In shipping, the practice of travelling tradesmen using financial backers' money to conduct trade came into being. According to the law of Constantinople, the traders were the fiduciary

²⁵ E.M. Meijers, *Etudes d'histoire du droit international privé*, Paris 1967; cf. W. Onclin, *La doctrine de Bartole sur les conflits de loi et son influence en Belgique* [in:] *Bartolo da Sassoferrato, Studi e documenti per il VI centenario*, II, Milan 1962, p. 373–398.

²⁶ About this court, see the fundamental study of Aquilino Iglesia Fereirós, *La formación de los libros de Consulat de Mar*, "Initium. Revista Catalana d'història del Dret" 1997, vol. 2, p. 1–372.

²⁷ *Gl. "Iudicetur nautica"* ad D. 14,2,10.

²⁸ K.W. Nörr, *Procedure in Mercantile Matters...* (n. 22), p. 806–810.

owners of the money with which they were entrusted. They were called to account on the basis of their agreement by means of the *actio fiduciae*. In the Middle Ages, however – initially in Genoa and Marseille – the *accomenda* was seen as a *societas* between an agent and a financial backer. This view also reached the north. If the travelling tradesman was a co-owner of the risk capital, the *societas* in which he was involved was a *societas maris*. In the Rolls of Oléron, one can find a description of the legal relationship between the co-owners of a ship. In England, this law introduced the system in which one possessed a fraction of a vessel. The Rolls of Oléron contain solutions concerning the distribution of profits, but especially concerning problems with regard to the apportionment of the costs and expenses incurred by the shipmaster.²⁹

10. The annual fairs

During the early twelfth century, the Count of Champagne attracted immigrants to this fertile region.³⁰ In order to expedite the opening up of the area and develop crafts, he granted privileges to Parisian and Flemish traders. The Count guaranteed their safety on the roads and ensured that they would enjoy fixed toll rates. Around 1150, trade gathered momentum. In some five towns, the territorial lord organised annual fairs during which the traders would receive extra benefits. For foreign traders, the ecclesiastical courts guaranteed the treatment of commercial disputes and episcopal officials functioned as notaries. The commercial law that was applied was the *ius commune*. At the end of the twelfth century, the town magistrates of Asti and Genoa (the latter in 1190) made arrangements with the Duke of Burgundy about the passage from Lyon to the market towns of Champagne. From then on, Italians on the one hand and Parisians and Flemings on the other could conduct trade with each other by land in good conditions. The decreased tolls generated transport to Italy via inland routes (via the Seine and the Marne to Champagne, and via the Saône and the Rhône to the South). In the thirteenth century, the Italian bankers began to finance trade in both directions and the annual fairs also became financial fairs. From 1274 onwards, the administration of justice would become the count's province. There would be special "gardes des foires" who had notarial competences. The privileges for traders and the special jurisdiction for transactions concluded during the annual fairs brought revenues to the region. In Germany, the most important annual fair from the twelfth century onwards was that of Frankfurt. In this town, there was imperial support for trade in the form of grants of safe-conduct and of the *ius commune* that was applied to long-distance trade.³¹ In the thirteenth century, annual fairs cropped up throughout Western Europe. Usually, they only lasted for a couple of days, but they were all characterised by the grants of safe-conduct for people and goods and by the guarantee that in the case of a commercial dispute, justice would be administered locally and according to the *ius commune*. Because the grants of safe-conduct linked to the annual fairs were valid in a larger area, the administration of justice concerning

²⁹ On this subject, see R. Mehr, *Societas und universitas...*, p. 80–94.

³⁰ See R.-H. Bautier, *Les foires de champagne* [in:] *La foire* [Recueils de la Société Jean Bodin, 5], Brussels 1953, p. 97–147.

³¹ H. Amman, *Die Deutschen und Schweizerischen Messen des Mittelalters* [in:] *La foire*, p. 149–173.

the fairs never became the towns' domiędzy innymi Privileges were granted by territorial lords. Therefore, the jurisdiction of the ecclesiastical courts or of the territorial lords' courts was preserved. When practising their profession abroad, traders preferred to come under the jurisdiction of a larger area and to be exempt from local tolls on transport by land and by inland waterways.

11. From an urban to a national commercial law

Feudalism and the autonomy of towns were based on a delegation of competences. The aldermen's court of Bruges had received its judicial authority from the count, who had, in his turn, received it from the king of France. In the thirteenth century, the *ius commune* expressed the idea that this delegation implied that one could lodge an appeal against the delegated judges with the delegating feudal lord. In the late Middle Ages this idea was slowly introduced in practice, during a long political battle which pushed feudalism back. Because of the appeals, the jurisdictions became larger again. For commercial disputes, the courts of first instance remained unchanged: they were the towns' aldermen's courts. The possibility of appeal led to respect for the precedents of the superior court, which were binding in a large jurisdiction and thus stimulated the unity of commercial law. Strong rulers organised sovereign courts. They increasingly applied the academic *ius commune* in order to drive back local particularisms. Traders supported both this evolution toward larger common economic markets and the rulers' *ius commune* with a law of obligations and a commercial law that was comparable in all countries. Some authors emphasise the mediaeval quest for a common law for traders,³² but the above developments fit in with the general advancement of the *ius commune*. The phenomenon cropped up in France in the thirteenth century, in Spain during the Reconquista and in the Netherlands under Philip the Good. England was the first Western European country that could boast an identical commercial and maritime law in all of its towns. In the thirteenth century, all of the English royal courts accepted deeds – written obligations which could be used to make payments. The theoretical development of the deed can be traced back to Jacopo Balduini (†235) in Bologna and its early introduction in England was due to the centralised administration of justice. This uniform commercial law led to a strong development of sabotage and coastal trade. In the fourteenth century, the jurisdiction of the Parliament of Paris became the largest on the continent. Foreign traders could buy “letters de bourgeoisie” there in order to receive equal treatment in all matters. They could also stipulate a reduction of tolls in them. If traders died in this jurisdiction, they were not subject to *le droit d'aubaine*, the regime in which the treasury was the only heir of a foreigner. At their death, traders' goods instead went to their heirs according to the *ius commune*.³³ An example of the influence of the academic *ius commune* can be found in the case-law of the Parliament of Paris concerning liability *in solidum* with regard to traders who cooperated. The Parliament

³² Like A. Cordes, *The Search for a Medieval Lex Mercatoria* [in:] *Oxford University Comparative Law Forum* 2003, 5 [<http://ouclf.iuscomp.org/articles/cordes.shtml>, date: 19.12.2013].

³³ B. d'Alteroche, *De l'étranger à la seigneurie à l'étranger au royaume, Xie–XVe siècle*, Paris 2002, p. 192–197.

took this idea from the legal doctrine of the law faculty of Orléans. Later, the doctrine concerning the *ius commune* limited this liability to the growth of traders' joint capital and again the Parliament followed this academic development.³⁴ Because of the possibility of lodging appeals with rulers' councils, the traders also found in the urban courts a legal system that was identical for a large area. This stimulated trade on the Continent as well. The formation of large jurisdictions announced a Europe of nations, with national legal systems.

National commercial law in the modern era

12. The wave of reception from Constantinople³⁵

In 1453, Constantinople, the greatest trading centre of the world, fell. Thousands of Greek traders emigrated to the West and this Greek invasion became the most far-reaching revolution which the West ever experienced. The entire Renaissance was based on it. The Greeks brought enormous moveable capitals with them and recapitalised banks such as the Banco San Giorgio in Genoa and the Chigi bank of Siena, which became strong players in the field of loans to governments. The greatest change, however, was caused by the commercial banks, which they established in Venice, Genoa, Barcelona, Sevilla, Lisbon... and which had enough means to set up new trade flows. Lisbon, which had always been a Greek anchorage, became a pivot on the Atlantic coast. The city was strongly influenced by Greek commercial law, but the sources for the study thereof are still patiently waiting in the national archives of Torre do Tombo. There, the archives of the great trading houses like the Doria and the mercantile house of the Greek nation which was established from Lisbon in Antwerp are also stored. The slave traders from the Levant, who were barred from anywhere else, also settled in Lisbon. It became the centre of trade in sugar, the production of which was moved from Cyprus to the Atlantic islands. Greek vessels sought new routes to India and China because the old ones had been cut off. In commercial law, the Greeks restored a great deal of Roman law during the Renaissance. In this manner, they dispersed the Roman partnership with limited liability based on the *pekoulion* and the corresponding double-entry bookkeeping. They worked with factories. "Feitors" were agents of companies: they acted autonomously and the head office's liability for their actions was limited, as has been described above. From Lisbon, the Greeks propagated the bill of exchange between three parties, which was based on *pecunia constituta*.³⁶ They developed the practice of trade without

³⁴ R. Mehr, *Societas und universitas...*, p. 118–123.

³⁵ About this second great wave of reception of Roman law, this time from Constantinople, see: L. Waelkens, *Réception ou refoulement? Pour une lecture grecque de l'histoire du droit de la Renaissance* [in:] *Modernisme, Tradition et acculturation juridique, Actes des Journées internationales de la Société d'Histoire, Louvain 29 mai–1 juin 2008*, ed. B. Coppein, F. Stevens, L. Waelkens, [Juris Scripta Historica], Brussels 2011 (in press).

³⁶ L. Waelkens, *Pecunia constituta, un mode de paiement du droit romain*, "Mémoires de la Société pour l'histoire du droit et des institutions des anciens pays bourguignons, comtois et romands" 2008, vol. 65. p.

capital, based on financing provided by the merchant banks and collateral securities. On the Atlantic coast, the Greeks spread the practice of floating charges on a variable capital, known as *hypotheca generalis* in Roman law. The Greek traders had most faith in towns where the *ius commune* in the courts dovetailed closely with the Roman law. In the fifteenth century, when the access to Bruges silted up and traders were on the lookout for a new port of transshipment, the best choice in terms of geography was Dunkirk – a naturally safe port, suitable for the largest vessels. Like Bruges, however, Dunkirk was in the jurisdiction of the Parliament of Paris. Lisbon chose the port of Antwerp instead: it was hard to reach, but it was the only town in Brabant where an ocean-going vessel could moor. Since 1430, Philip the Good had been the Duke of Brabant. He systematically replaced the local particularisms by the Roman *ius commune*, which he had imposed on his Faculty of Law in Leuven. By the middle of the century, Antwerp had judges who had studied at the University of Leuven and who knew the old Roman techniques. When the port of Antwerp was closed because of the riots during the reign of Philip II, much maritime trade moved to Holland and Zeeland, again to ports which were difficult to access, but could boast rulers and judges who were favourably disposed towards the *ius commune*, and judges from Leuven. From 1575 onwards, the jurists from Leiden, stimulated by William of Orange, furthered the *ius commune*.

13. The evolution towards a royal commercial law

In the late Middle Ages, authors like Bartolus and Paulus de Castro treated commercial law as an aspect of the European *ius commune*. In the modern era, this example was followed everywhere. Commercial law was often taught at the law faculties.³⁷ The Leuven *consilia* by Wamesius offer lawyers many pieces of advice when treating matters concerning trade.³⁸ In the first half of the sixteenth century, trade brought prosperity. In the second half of the century, however, disaster struck: religious and political wars led to low chances of survival on the European continent. In the middle of the century a financial crisis, which has left traces even in our current law, raged? In the Catholic countries, the Roman Rota forbade, through the bull *Cum onus* of 1569, *emphyteusis* in agriculture and in the rental of houses because *emphyteusis* did not involve *remissio mercedis* – a revision of the rent when the tenant's yield was insufficient. The ban on *emphyteusis* not only made leasing impossible on the continent, but also hindered *cenusus*, which was seen as an *emphyteusis* of money.³⁹ Trade without capital, financed by merchant bankers and covered by securities, became suspect on the continent. The use of factories was combated there, while Malynes would still sing its praises in England

67–79.

³⁷ On this subject, see: K.O. Scherner, *Die Wissenschaft des Handelsrechts* [in:] *Handbuch der Quellen und Literatur der Neueren Europäischen Privatrechtsgeschichte*, II, *Neuere Zeit (1500-1800)*, ed. H. Coing, München 1977, p. 799–997. For Leuven see for example the course on maritime law of Petrus Peckius, *Opera omnia*, Antwerp 1666.

³⁸ Wamesius, *Responsorum sie consiliorum ad ius forumque civile pertinentium centuriae I–VI*, Antwerp 1639–1645.

³⁹ This issue is mentioned in L. Waelkens, *Enkele grondslagen van de leasing in het ius commune* [in:] *Handboek Leasing*, Bruges 2007, p. 1–16.

decennia later.⁴⁰ Because of the dramas caused by failures to pay, sixteenth-century Germany was the first region to require companies with limited liability to raise a capital before they started conducting trade.⁴¹ During the extreme economic crisis of the end of the sixteenth century, jurists and policymakers personally experienced the major importance of trade. At the law faculties, they promoted new views in order to improve free trade and the functioning of the markets. The Spanish *ius naturalists* were the first to defend the moral character of the free market⁴² and their example was followed by jurists in many other countries.⁴³ They strongly influenced the new approach towards the law of obligations and contract law which cropped up at the law faculties. The issue of consensus took centre stage in the law of obligations and this relaxed internal and international contracting. In the legal doctrine, the commercial law was based on moral principles which were shared by Catholics and Reformed people and which transcended the local royal administration of justice. The intent was to transcend the national legal systems and to tie in again with an *ius commune*. In Leuven, Lessius promoted this new view on commercial law.⁴⁴ Important works about commercial law appeared and were read throughout Europe: the works of Stracca and Scaccia from Genoa, for example, or those of Gerard of Malynes, who had become the counsellor of the English king. In these works, the free market was emphasised.⁴⁵ The academic doctrines that were developed during these dramatic times were immediately applied by the royal courts which were staffed by academic jurists. Because of this, the traders in most Western European countries preferred having their disputes treated by the regular courts: the town's aldermen's courts for proceedings in the first instance and the sovereign councils of the monarchs for appeal proceedings. This was clearly the case in the Low Countries. In Antwerp, commercial disputes were no longer brought before the nations of the traders, but before the aldermen's court, and the divisions which dealt with commercial matters were staffed by jurists. This practice was spread to Amsterdam, Hamburg, and London.⁴⁶ In England,

⁴⁰ In his work Gerard of Malynes [Gerard van Mechelen, 1586–1641], *Lex mercatoria, The Law Merchant according to the Essential Parts of Traffick Necessary for all Statesmen, Judges, Magistrates, Temporal and Civil Lawyers, Mint-men, Merchants, Mariners and others Negotiating in all Places of the World*, London 1636.

⁴¹ On this subject, see M. Söhnchen, *Die historische Entwicklung der rechtlichen Gründungsvoraussetzungen von Handels- und Aktiengesellschaften*, [Schriften zur Rechtsgeschichte, 118], Berlin 2005, p. 23–57.

⁴² A.A. Chafuen, *Faith and Liberty, The Economic Thought of the Late Scholastics*, New York–Oxford 2003.

⁴³ R. Savelli, *Between Law and Morals, Interest in the Dispute on Exchanges during the 16th Century* [in:] *The Courts and the Development of Commercial Law*, ed. V. Piergiovanni, [Comparative Studies in Continental and Anglo-American Legal History, 2], Berlin 1987, p. 39–102.

⁴⁴ See e.g. W. Decock, *Leonardus Lessius en de koopman van Rhodos, Een schakelpunt in het denken over economie en ethiek*, “De zeventiende eeuw: cultuur in de Nederlanden in interdisciplinair perspectief” 2006, vol. 22, p. 247–261; *idem*, *Leonardus Lessius on Buying and Selling (1605). Translation and Introduction*, “Journal of Markets & Morality” 2007, vol. 10, p. 433–516; W. Decock, J. Hallebeek, *Pre-contractual Duties to Inform* *ędzy innymi Early Modern Scholasticism*, “Tijdschrift voor Rechtsgeschiedenis” 2010, vol. 78, p. 89–133.

⁴⁵ This was both the theme of the popular work by Gerard of Malynes, *The Maintenance of Free Trade*, Londen 1622 and of a work by Grotius, *Mare liberum*. For the latter book, see: *Hugo Grotius Mare liberum 1609–2009, Original latin text and English translation*, ed. R. Feenstra, Leiden 2009.

⁴⁶ D. De ruysscher, *Naer het Romiędzy innyemich recht alsmede den stiel mercantiel’. Handel en recht in de Antwerpse rechtbank (16de–17de eeuw)* [doctoraat K.U.Leuven], Courtrai 2009. For the Netherlands,

commercial law was also influenced by doctrine in the modern era. It was developed in the King's Bench, the judges of which had not trained at a university, but were nonetheless professional jurists. An important episode took place when Lord Mansfield was Chief Justice there between 1756 and 1788.⁴⁷ Stracca had a large influence on the Court of Admiralty. In Western Europe, the development of the doctrine concerning the moral character of the free market led to the generalisation of commodities exchanges and financial fairs which were acknowledged by the royal jurisdiction. They ousted the locally privileged annual fairs. In the royal administration of justice of the modern era, we also find the first companies with legal personality. In order to work in a useful way, these companies needed a sizeable jurisdiction. If the English sovereign granted corporations the status of *universitates* with legal personality by means of a privilege, all of the royal courts had to acknowledge that status and the company could operate in a large area. In the seventeenth century, commercial companies with a royal privilege turned up in the Netherlands, France, Spain, Germany... as well.⁴⁸ In the High Court of Holland and Zeeland, the VOC was the first joint-stock company with legal personality.⁴⁹ The commercial law of the modern era was thus mainly developed by the royal courts. It was based on the *ius commune* and on a European legal literature. These royal courts were also found suitable for conflicts involving foreign traders.

14. Consular courts in France⁵⁰

The development of current Belgian commercial law was strongly influenced by the evolution in France during the modern era. In the diverse French parliaments, the supreme administration of justice dovetailed less precisely with the *ius commune* than in other countries.⁵¹ As a consequence of the economic crisis at the end of the sixteenth century, the French kings took initiatives in commercial law. In order to smooth away the disastrous effects on the economy caused by the Fronde, the religious troubles and the revocation of the Edict of Nantes, the government tried to intervene in trade and industry in a protectionist manner. It did not allow commercial law to evolve at the pace dictated by the arising of commercial disputes in the parliaments, but tried to

see for example W.D.H. Asser, *Bills of Exchange and Agency in the 18th Century Law of Holland and Zeeland*, *Decisions of the Supreme Court of Holland and Zeeland* [in:] *The Courts and the Development of Commercial Law*, ed. V. Piergiovanni, [Comparative Studies in Continental and Anglo-American Legal History, 2], Berlin 1987, p. 39–102.

⁴⁷ C.P. Rodgers, *Continental Literature and the Development of three Common Law by the Kings Bench, c. 1750–1800* [in:] *The Courts...*, p. 161–194.

⁴⁸ R. Mehr, *Societas und universitas, Römischrechtliche Institute im Unternehmensgesellschaftsrecht vor 1800*, Cologne–Weimar–Vienna 2008, p. 216–365. For Castile, see J.M. Gijon, *La compañía mercantil en Castilla hasta las ordenanzas del consulado de Bilboa de 1737, Legislación y doctrina* [in:] *idem, Historia del derecho mercantil, Estudios*, Sevilla 1999, p. 345–550.

⁴⁹ On this subject, see Femme S. Gaastra, *De geschiedenis van de VOC*, fully revised edition, Zutphen 2009.

⁵⁰ This period in France is described extensively by J. Hilaire, *Introduction historique au droit commercial*, Paris 1988, p. 62–79. This book also contains an excellent bibliography for the history of French commercial law.

⁵¹ *Ibidem*, p. 66–75.

develop a watertight commercial law through ordinances. Thus, ordinances concerning the law relating to bills of exchange and commercial agents were already promulgated in the sixteenth century. In the seventeenth century, under Colbert, this separate French evolution led to the *Ordonnance du commerce* of 1673, which is usually called the Code Savary, after its main drafter. It was an ordinance containing one hundred and twenty-two articles about traders and trade. In 1681, an additional *Ordonnance sur le commerce maritime* was promulgated. With his work *Le parfait négociant* Savary influenced the interpretation of the ordinances in the sovereign administration of justice.⁵² To this, his son added a *Dictionnaire de commerce* which also strongly influenced the administration of justice until the Revolution. The situation in France differed from that in other Western European nations. In the latter, the modernisation of commercial law was steered by the market and by practice so that commercial law was gradually reformed as new situations and new problems arose. These reforms took into account the European *ius commune* and neighbouring countries' administration of justice in commercial matters. The French administration of justice, by contrast, began to elaborate on the grand ordinances. The French traders therefore strove for the establishment of their own bodies. In 1563 the *juridictions consulaires* were established,⁵³ in 1601 a *Conseil de commerce* was set up and in 1701 the Commercial Divisions were instated. The consular judges were, in line with the medieval tradition, traders, and the parties appeared before them without lawyers. The consular courts busied themselves more with mediation and arbitration than with the development of commercial law. Commercial practices, fairness and the practice in neighbouring countries took centre stage in the courts of first instance. Appeals were treated by the royal courts, which did test the disputes against the local administration of justice, but often had little sympathy for the first instance and were bound by the spirit of the ordinances. The distinction between the consular law and the royal commercial law of that period becomes clear when one compares Toubreau's *Institutes de droit consulaire ou la jurisprudence des marchands*,⁵⁴ which pleads for, among other things, the introduction of a course in commercial law at the faculties of law, to Domat's *Les lois civiles dans leur ordre naturel*.⁵⁵ In the latter work, commercial practices are not even mentioned when the author treats companies or assignments of debts. For some, the organisation of the commercial law was the province of public law, while the consular judges clearly considered it to be private law. Most of the administration of justice concerning commercial matters aimed at the classic retail and wholesale trade, after all. This was the cause of many tensions. The courts of appeal, for example, misunderstood traders' solidary obligations. Through notarial practice, businesses and the pledge on businesses were developed, but these were also interpreted in a reticent manner by the royal administration of justice. Joint-stock companies could not be linked to the Ordinance of 1673. The traders' lack of confidence in the royal courts of appeal

⁵² A new edition of Jacques Savary, *Le parfait négociant*, edited by Edouard Richard, will soon be published by the Presses Universitaires de Rennes.

⁵³ A bibliography can be found in G. Martyn, *Le débat à propos des tribunaux de commerce en Belgique depuis 1807*, "Mémoires de la Société pour l'histoire du droit et des institutions des anciens pays bourguignons, comtois et romands" 2008, vol. 65, p. 446-447.

⁵⁴ J. Toubreau, *Les institutes du droit consulaire, ou les éléments de la jurisprudence des marchands*, 2^e ed., 2 vol., Paris 1700.

⁵⁵ J. Domat, *Les lois civiles dans leur ordre naturel*, Paris 1689.

had as a baneful consequence that the consular judges strove for great discretion and that the applied commercial law was often invisible and non-transparent. In company law, the między innymi development was that of the limited partnership, but with the typical characteristic that the names of the financial backers were not disclosed. The professional judges ruled that it could be inferred from the facts that people were partners in a company, while the consular judges maintained that a written document was required and that unclear documents pertained to trade secrets.⁵⁶ The tension between consular and royal judges is also visible in the treatment of promissory notes. In the seventeenth century the Parliament of Paris forbade the promissory note that was payable *le nom en blanc*. The consular judges, however, adopted the foreign practice and systematically declared that promissory notes were payable *au porteur* or *à ordre*. Eventually, this practice was accepted by the royal courts as lawful according to customary law. In insolvency law, the consular judges defended the ranking of the ordinary creditors according to the date of the claim, while the appeal judges were proponents of the *pro rata* division. Such conflicts led to the practice of no longer validating debts and to the settling of bankruptcies in an obscure manner.⁵⁷ Because of persisting mistrust between traders and royal judges, France was lagging behind England and the Low Countries in matters such as financial law, juridical support for industrialisation⁵⁸ or the adaption of tax law to new commercial phenomena.

The Code de Commerce of 1807

15. The Codification of commercial law in 1807

In 1790, the judiciary was re-organised. The composition of the commercial courts with traders as commercial judges in the first instance was preserved. This was due to a demand of the Commercial Divisions, which saw the centralising Jacobin regime as just as paralysing to trade as the sovereign meddling of earlier times. During the civil revolution, a codification of the commercial law was set up together with the codification of the civil law. From 1801 onwards, designs circulated. The traders first and foremost wanted to codify the public law concerning trade, so that governmental interference was curbed. However, after 1804 the tendency to draw up a private-law commercial code predominated. In this context, the exceptions of the commercial law to the civil law took centre stage. After 1804, the discussion in the Council of State was held by jurists, who first and foremost thought of the modernisation of the *Ordonnance du commerce* of 1673 by adapting it to the royal administration of justice of the eighteenth century. The principle of commercial courts staffed by lay judges was no longer questioned. A disadvantage was that these judges could only be competent with regard to cases involving traders:

⁵⁶ J. Hilaire, *Introduction historique au droit commercial*, Paris 1988, p. 74.

⁵⁷ *Ibidem*, p. 317–321.

⁵⁸ On this subject, see *Studien zur Einwirkung der Industrialisierung auf das Recht* [Comparative studies in continental and Anglo-American legal history, 9], ed. H. Coing, Berlin 1991.

they could not have a general competence in specific matters such as means of payment and the suspension of payment because of an inability to pay.⁵⁹ The Code de Commerce of 1807 eventually became an attempt by the jurists to fit all of the practices and habits of commercial law into the legalism and the hierarchy of norms which the French Revolution had established in other domains. Originally, it was not permitted to dissociate the Code de Commerce from the Code civil,⁶⁰ although in nineteenth-century French law *le droit des affaires* would become a matter in which the principles of the civil code could easily be deviated from on the grounds of economic motives.⁶¹

16. The reception of French commercial law in Belgium⁶²

In 1795, the French laws entered into force in the Southern Netherlands. In 1809, an imperial decree determined the organisation of the commercial courts. They were not established in each district, but only in Brussels, Leuven, Ghent, Sint-Niklaas, Mons, Tournai, Ostend, Bruges, Courtrai, Antwerp, Liège, Verviers, Namur and Luxemburg.⁶³ In the other districts, commercial disputes were brought before the justices of the peace and the courts of first instance. In 1811, the French also introduced the Code de Commerce in the Northern Netherlands. In 1815, the French system with lay judges and a separate commercial code was perpetuated in the United Kingdom of the Netherlands. This was questioned by the northern part of the country. In 1818, for example, William I abolished the commercial courts of Bruges and Courtrai. In the law of 1827 about the organisation of the judiciary, the courts of commerce were preserved after all because of the wishes of the southern provinces of the country. After the separation of the Northern and Southern Netherlands in 1830, the Northern Netherlands returned, in 1839, to the time-honoured practice of treating commercial disputes in the ordinary courts. In Belgium, a mixed regime was established: there were commercial courts where the government deemed them necessary – thus, the commercial court of Courtrai was re-established in 1833 – while commercial disputes were treated by justices of the peace and courts of first instance in the districts which did not have a commercial court. In 1839, the Netherlands replaced the Code de Commerce by the new Commercial Code. Despite this replace-

⁵⁹ For such objections by Cambacérès, see A. Lefebvre-Teillard, *Cambacérès en het Wetboek van Koophandel* [in:] *Tweehonderd jaar Wetboek van Koophandel* [Juris Scripta Historica XXIII, 23], eds. G. Martyn, D. Heirbaut, Brussels 2009, p. 13–33.

⁶⁰ C. Delplanque, *La codification du droit commercial: une exception du Code civil?* [in:] *Tweehonderd jaar...*, p. 35–50.

⁶¹ The między innymi proposition in the article by E. Richard, *Les “incivilités” des affaires: l’évolution des exploitations minières, avatar de la commercialisation du droit et des résistances de la civilité (1810–1919)*, “Revue de la recherche juridique, Droit prospectif” 2009, vol. 2, p. 935–968.

⁶² A good overview can be found in D. Heirbaut, *Enkele hoofdlijnen uit de geschiedenis van het Wetboek van Koophandel in België* [in:] *Tweehonderd jaar...*, p. 91–103.

⁶³ On this subject see G. Martyn, *Les tribunaux de commerce en Belgique depuis 1807* [in:] *Le droit, les affaires et l’argent: célébration du bicentenaire du Code de commerce – Actes des Journées Internationales de la Société d’Histoire du Droit*, ed. A. Girollet, [Mémoires de la Société pour l’Histoire du Droit et des institutions des anciens pays bourguignons, comtois et romands, LXV], Dijon 2007, p. 450–455; A. Delvoeye, *De eerste rechtbank van Koophandel te Kortrijk*, “De Leiegouw” 1966, vol. 8, p. 177–187; A. Deceuninck, *Geschiedenis van de rechtbank van koophandel in Kortrijk*, “De Leiegouw” 2003, vol. 45, p. 79–109.

ment, commercial law never became a separate matter in the Netherlands. The lay courts were never adopted and in 1992 the commercial law was again integrated into the New Civil Code.⁶⁴

17. The Reform and disappearance of the Commercial Code

In 1831, the wish to draft a new Commercial Code was recorded in the Constitution of Belgium (art. 139, 11 Constitution of 1831). In the second half of the nineteenth century, many jurists strove for the fulfilment of that wish. Eventually, the old Commercial Code was preserved, but between 1851 and 1891, most of the provisions were replaced. Some titles kept their old, continuous numbering, like the title concerning traders, their nuptial agreements, account books, evidence of trade commitments (law of 15 December 1872) and the regulation of bankruptcies – which was thoroughly reformed by the law of 18 April 1851. Other titles were replaced by separate laws with their own numbering of articles, such as the laws on pledge and commission (law of 7 May 1872) or on the contract of carriage (law of 26 August 1891). A fundamental change concerned the introduction of the commercial company with legal personality which could be established without the government's permission. In the Berlin law faculty, the German legal scholar Friedrich Carl von Savigny (1779–1861, Minister of Justice of Prussia 1842–1848) defended the establishment without state intervention of commercial companies with legal personality, separate assets and shares which would be freely transferable. Their legal capacity would be limited to a specific goal. As the Minister of Justice of Prussia (1842–1848), Savigny furthered legislation concerning commercial companies. In 1843, the first Prussian law on the *Aktiengesellschaft*, which did not leave Europe unaffected, was promulgated.⁶⁵ England followed in 1851 with legislation concerning the Limited Company. In Belgium, the private companies were incorporated into the Belgian Commercial Code by the law of 18 May 1873. Subsequently, the insurance law in the Code was replaced (law of 11 June 1874), as well as the maritime and inland waterway law (law of 21 August 1879). After 1891, there were no more systematic replacements, but there were continual changes and new special economic legislation which undermined the unity of the Commercial Code. In the twentieth century, the code was overtaken by economic legislation inspired by international conventions. The Commercial Code's title about bills of exchange and promissory notes had to be adapted to the relevant conventions of Geneva of 1930 and was replaced by the law of 16 August 1932. Because economic legislation came to the fore in the twentieth century and because in the economy the public interest began to predominate over the particularity of the mercantile profession, the importance of the Commercial Code was severely relativized. Fifty years of European unification have also made it clear that the legisla-

⁶⁴ About this period: R.J.Q. Klomp, *Deze ijdele praal, Het handelsrecht in Nederland na de codificatie* [in:] *Tweehonderd jaar...*, p. 105–161.

⁶⁵ On this subject see W. Bayer, M. Habersack, *Aktienrecht im Wandel, I, Entwicklung des Aktienrechts, II, Grundsatzfragen des Aktienrechts*, Tübingen 2007.

tion concerning trade and the economy can no longer be based on a Belgian mould.⁶⁶ In 1999, company law was removed from the Commercial Code and incorporated into the Companies Code. The ambition of the constitutional legislator of 1831 to compose a new Commercial Code was definitively deleted during the constitutional amendment of 1971.

18. And the commercial courts?

In 1830, the commercial courts after the French model, with traders as judges, were adopted. In 1869, they were reformed. The registrars would from then on be jurists. From 1910 onwards, they held the title of senior official (*référéndaire*). This system was replaced in the Civil Procedure Code of 1967. In the new judicial organisation, a commercial court was established in each district. The chairman and the presidents of the divisions were professional judges and the “lay judges” in commercial cases became assessors. Now that the Commercial Code has been more or less closed, many Belgian jurists are pleading for the abolition of the separate commercial courts and the treatment of commercial matters after the Dutch model: before a district court, preferably in separate divisions with a separate chairman for commercial matters who coordinates activities, treats the interim proceedings and closely follows up tricky bankruptcy dossiers. The meagre advantage of this would be that the professional judges and the court registries would also be able to take action in other lawsuits. The specialisation of professional judges, however, is efficient. Experience shows that the Belgian commercial courts work at a pace that matches the speed of business life. Many lay judges are more familiar with business life on a European scale than professional judges. They still inspire the decision-making process. They are more inclined than the lawyers to treat cases in “short debates” during the introductory court session and can avoid assessments by experts. Not all professional judges are familiar with intermediary transport or the daily realities of insured risks in transport, trade and industry. Often, it is cheaper to have the settlements of complex bankruptcies, which take years, supervised by traders functioning as delegated judges than to employ professional judges. The discussions, however, are fed by jurists who dream of the Dutch system and by lawyers who see the assessors as mere ornaments from bygone days. The latter is owing to the rules of most commercial courts: the president of the division leads the debate during the hearings, while the assessors only intervene in camera. However, do we have to banish commercial judges at a time in which traders adapt more quickly to globalisation than jurists and in which any public-private cooperation is praised?

⁶⁶ E. Terryn, *Invloed van vijftig jaar Europa op het Belgische handelsrecht* [in:], *Tweehonderd jaar...*, p. 163–202.