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History of business law: a European history?

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Abstract

The transnational dimension of *ius mercatorum*, whose very name bears the hallmark of its juridical particularism, led some contemporary jurists to refer to *lex mercatoria* as an ‘a-national’ legal order. However, this negative definition overlooks the common cultural basis in Europe that has shaped commercial law, a cultural basis that goes beyond just its legal aspects. Indeed, if this deeply ‘*proprium*’ law sought consistency and harmonisation in Europe, accounting for this phenomenon cannot arguably merely rely on the unstoppable strength of the market. The Early-modern period offers a first-rate testing ground in order to establish whether that shared European legal culture, whatever its authority, has effectively proved a solid, deep-rooted and resilient bulwark against the abrupt changes of the time, whether as a result of the great discoveries overseas or the globalisation of trade.

Keywords

Ius mercatorum – Lex mercatoria – Early-modern period – contractual proportionality – legal culture – Europe

1. Much has been written on the special or universal character of business law. The debate, fascinating as it may be, is still open. The issue has drawn some of the most eminent experts, for example in the collection of essays edited in 2005 by V. Piergiovanni, *From Lex mercatoria to commercial law* »¹, which remains a lasting work of reference published in the series of comparative studies of legal history, sponsored at the time by the *Henkel Foundation*.

More recently, the holder of the European Chair 2016-2017 at the *Collège de France*, which also hosted the conference of which the present volume reflects the proceedings, called in his inaugural lecture for particular traditions to be taken seriously as essential features of whatever may be understood to be a European legal history².

For the historian of business law, that call presents a tough challenge, because the development of business law in Europe seems to suffer from a multiple personality disorder. On the one hand, as several scholars writing on the subject have noticed for a long time, it may be argued that there is no *ius* more *proprium* than business law³. However, as far as business law can be traced back in time, it appears to have crossed borders, displaying unparalleled homogenous and internationally porous features⁴.

¹ Piergiovanni, V. (ed.), *From Lex Mercatoria to commercial law*, Berlin, Duncker & Humblot, 2005.

² Wijffels, A., *Le droit européen a-t-il une histoire ? En a-t-il besoin ?*, Leçon inaugurale au Collège de France, Chaire Européenne 2016-2017, Paris, Fayard, 2017, p. 23 : « Ces particularismes doivent être pris au sérieux ».

³ « Le droit des marchands est indubitablement un acteur à part entière du particularisme juridique du Moyen Âge tardif » : Grossi, P., *L'Europe du droit*, Paris, Seuil, 2011, p. 77. Padoa Schioppa, A., discussing “Particular Laws”, and more specifically “Commercial and Maritime Law” in the Middle Ages, remarks that “the norms clearly show that they were the fruit of a great number of situations and cases”, in *A History of Law in Europe. From the Early Middle Ages to the Twentieth Century*, CUP, Cambridge, 2017, p. 175.

⁴ Bonacini, P./Sarti, N., (ed.), *Diritto particolare e modelli universali nella giurisdizione mercantile: secoli XIV-XVI*, Bologna, Bononia University Press, 2008 ; De ruysscher, D., « L’acculturation juridique des pratiques commerciales à Anvers. L’exemple de la lettre de change (XVIe-XVIIe siècle) », (Bart Coppein/Fred Stevens/Laurent Waelkens, ed.), Bruxelles, Koninklijke Vlaamse Academie van België voor Wetenschappen en

Fortunately, the same inaugural lecture at the *Collège de France* also draws our attention to another important characteristic of our legal history, which may be styled as the whole of *shared*, or potentially shared, features of the way law has developed in Europe⁵. Those latter features will be the focal point of my own contribution. Nevertheless, one should never lose sight of the dynamics which, in that approach, are essential for understanding the relationship of opposing forces, in some cases of mutual penetration with the particularistic traditions, which are at stake⁶.

Because of its trans-border pursuits, scholarship on business law will nowadays – in spite of the legal-particularistic character which belongs to its genetic code – prefer to style it as a non-national (or ‘a-national’) legal system⁷. The use of such a negative in labelling business law fails, however, to acknowledge the underlying cultural elements and the legal civilisation from which business law developed. Indeed, although as a profoundly particularistic law, business law developed an undeniably strong degree of uniformity on a European scale⁸, the reasons for such a development should not exclusively be surmised in the workings of irrepressible market forces. The real question is whether, beyond practical grounds, there may be deeper currents of legal culture and legal anthropology which make it possible to recognise specifically European features in the historical development of business law.

2. In order to work out an answer to that question, one has to start in ancient Greece, for “the very idea of Europe is a product of the classical edifice”⁹, as for most of our cultural history in general.

At the heart of ancient Greek thinking, Aristotle’s *Politics* (rather than the same author’s¹⁰ work on *Economics*¹¹) provide the most elaborate theory on economic exchanges between private individuals. Aristoteles, it deserves to be noted, worked that theory out in his *Politics*, as if to highlight that harmony in trade represents an interest for the whole

Kunsten, 2011, pp. 151-160 ; Basile M. E./Fair Bestor, J./Coquillette, D. R./Donahue, C., *Lex Mercatoria and legal pluralism : a late thirteenth-century treatise and its afterlife*, Cambridge, 1998 ; Hilaire, J., *Le droit, les affaires et l’histoire*, Paris, Economica, 1995.

⁵ Wijffels, *Le droit européen a-t-il une histoire ? En a-t-il besoin ?*, cit., p. 24.

⁶ It may be significant that in the argumentation proposed by Alain Wijffels in *Le droit européen a-t-il une histoire ? En a-t-il besoin ?*, cit., the two historical case-studies which the author gives as illustrations are both drawn from the history of business law : p. 37-53.

⁷ Osman, F., *Les principes généraux de la lex mercatoria : contribution à l’étude d’un ordre juridique anational*, Paris, 1992.

⁸ Galgano, F., *Lex Mercatoria*, Bologna, 2016 ; Zimmermann, R., « L’héritage de Savigny. Histoire du droit, droit comparé, et émergence d’une science juridique européenne », *Revue internationale de droit économique*, vol. (t. xxvii), no. 1, 2013, pp. 95-127 ; Cordes, A., « The search for a medieval *Lex mercatoria* », *From Lex Mercatoria to Commercial Law*, (Vito Piergiovanni, ed.), Berlin, 2005, pp. 53-68. « La fluidité même des affaires dans les réseaux marchands internationaux fait du commerce un vecteur propageant des procédures et de règles susceptibles d’être invoquées par des agents appartenant à des traditions juridiques différentes. C’est en ce sens que le droit des affaires a souvent été en Europe à l’avant-garde de la diffusion transrégionale de pratiques juridiques largement partagées », Wijffels, *Le droit européen a-t-il une histoire ? En a-t-il besoin ?*, cit., p. 51.

⁹ Wijffels, A. (dir.), *Le code civil entre ius commune et droit civil européen*, Bruylant, Bruxelles, 2005, p. XXIX.

¹⁰ The *Economics* are attributed to Aristotle, but the attribution remains controversial: Laurenti, R., *Studi sull’Economico attribuito ad Aristotele*, Milano, 1968.

¹¹ Dauzat, P.-E., « Introduction », in Aristote, *Économie*, Paris 2003, (1st ed. 1968), p. XI ; Kletitz-Drapeau, F., *Aristote, le prudent et le « manager »*, Paris, 2015, p. 21.

commonwealth, not only for the private individuals who are directly involved in the commercial transactions¹². In the first book of the *Politics*, Aristotle discusses how wealth is acquired, monetary questions and – most importantly – the relationship which may arise between the accumulation of wealth and what the Greeks called ὕbris, not in the sense of arrogance, but understood as the lack of restraint or moderation, i.e. when someone fails to appreciate the right measure of things¹³.

The difficulty to appreciate the proper measure and the constant quest to strike a right balance runs like a red thread through the history of business law, everywhere in Europe, independently from whatever particular laws may be applicable.

According to Aristotle, the occupation of men aiming at meeting human needs is the *oikonomia*, whereas the activity which only aims at accumulating money is referred to as ‘chrematistics’. The latter knows no limits, because it is inextinguishable, inordinately measureless, and has ultimately a negative effect on society¹⁴. Aristotle argued that it appeared in human communities with the introduction of money¹⁵. In his view, money is merely a convention, with no firm basis in reality, and can therefore lead to serious aberrations.

The inordinate accumulation of wealth without measure, particularly in the form of cash, was a source of worry for the ancient Greeks, who were familiar with the myth of King Midas. Midas’ story is one of the founding myths of our cultural identity, to which later authors such as Marx, Freud and Keynes would still refer¹⁶: “the Greeks sensed, because of their feeling for measure, that such excessive riches could only lead to evil results, and that is why the economy needs to be ‘regulated’”¹⁷. That is another red thread in the European history of business law, the troublesome but inevitable link with the regulation of business. For Aristotle, but also for Plato, any excess or any unruliness were a source of danger for the polity and had to be kept in check.

3. When we translate these considerations into the language of business law, we may recognise three phrases which reflect the quest for measure. These are three legal translations which I believe have attended the development of business law throughout Europe, although articulated according to distinct formats. The first is that of equity as a standard for assessing relations between merchants; the second is the need for a regulation (or self-regulation) of trade relations; and the third is the quest for contractual balance, i.e. contractual proportionality, and therefore the consideration of mutual performances.

The *æquitas mercatoria* is no doubt part of the essential heritage of European business

¹² Karl Marx had understood the point.

¹³ Kletltz-Drapeau, *op. cit.*, p. 23. White, S. A., *Sovereign Virtue. Aristotle on the Relation Between Happiness and Prosperity*, Stanford, 1992.

¹⁴ I have used the French translation: Aristote, *Politique*, Livre I, 1256a. See Brendan Nagle, D. *The household as the foundation of Aristotle's Polis*, Cambridge, 2006.

¹⁵ Karl Polanyi, addressing the distinction between economics and chrematistics, argues that “we must concede that his famous distinction of householding proper and moneymaking, in the introductory chapter of his *Politics*, was probably the most prophetic pointer ever made in the realm of the social sciences; it is certainly still the best analysis of the subject we possess”, in *The Great Transformation*, New York, Farrar&Rinehart, 1944, Chapter IV Societies and economic systems, p. 53.

¹⁶ Dostaler, G., *Les grands auteurs de la pensée économique*, Paris, 2015, p. 21.

¹⁷ Kletltz-Drapeau, *op. cit.*, p. 26.

law. Benvenuto Stracca, the founder of early-modern scholarship on commercial law¹⁸, wrote a whole part of his collected treatises *De Mercatura* (ed.pr. 1553), a collection which has sometimes been understood as a reflection of the Italian *lex mercatoria* in the sixteenth century¹⁹, on equity. When Stracca refers to equity in the context of the resolution of trade disputes²⁰, he quotes Cicero and the *corpus iuris civilis* as a matter of course, but also Budé, Alciato, Tiraqueau, Oldendorp, authors conventionally categorised as representatives of the ‘French’ legal-humanist school, even though Alciato was Italian and Oldendorp German²¹. Stracca’s work thus illustrates the fact that in his time, *aequitas mercatoria* was a concept which had circulated through time and space in Europe²². It is also a concept which has remained at the heart of arguments on business law until the present day²³.

There is no need to dwell much longer here on the *aequitas mercatoria*, which has already been thoroughly researched²⁴. Recent studies have pointed out that the concept was a useful tool in the hand of legal practitioners who felt the need to transcend the narrow boundaries of a *ius proprium*²⁵. It appears to have been a recurrent device, which is to be found not only in the works of Stracca and humanist writers, but also in the works of other authors, such as Wamesius. Whether in Ancona or Antwerp, *aequitas mercatoria* played a role in an endeavour to extract a *ratio* in business law which was effectively widely shared in the whole of Europe²⁶.

Nor is it necessary to dwell here too long on the second thread I mentioned before, the necessity of a regulation of trade relations. Such regulations could be worked out in the form of self-regulation, through the action of corporations, *ministeria*, *arti* and guilds²⁷, but also

¹⁸ Franchi, L., *Benvenuto Stracca. Giurisconsulto anconitano del secolo XVI*, Roma, 1888, p. 125.

¹⁹ Donahue, C. Jr., « Benvenuto Stracca's De Mercatura: Was There a *Lex mercatoria* in Sixteenth-Century Italy? », *From Lex Mercatoria to Commercial Law*, (Vito Piergiovanni, ed.), Berlin, 2005, pp. 69-120.

²⁰ « In curia mercatorum aequitatem praecipue spectandam, et ex bono et aequo causas dirimendas esse et de apicibus iuris disputare minime congruerit », *De Mercatura*, § « Quomodo procedendum sit in causis mercatorum », Venice, 1553, p. 244

²¹ Donahue, « Benvenuto Stracca's De Mercatura », cit., p. 85 ; Id. « Equity in the Courts of Merchants », *Tijdschrift voor Rechtsgeschiedenis*, 2004, 72, pp. 1–35.

²² Zimmermann, R., *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford, 1996, in particular p. 540; Coquillette, D. R., *Civilian Writers of Doctors' Commons, London: Three Centuries of Juristic Innovation in Comparative, Commercial and International Law [Comparative Studies in Continental and Anglo-American Legal History]*, Berlin, 1988, pp. 34-35.

²³ Or even more precisely: “*ratione personarum mercatorum*”, as the same Stracca wrote towards the end of his study on equity in disputes between merchants, *De Mercatura*, n. 8 – 1.4.

²⁴ Donahue, « Equity in the Courts of Merchants », cit.; Padoa Schioppa, A., « L'equità nel diritto merdievale e moderno », *Rivista di storia del diritto italiano*, 87, 2014, pp. 5-44, especially § « Aequitas mercatoria », pp. 23-25; Piergiovanni, V., « La giustizia mercantile », *Norme, scienza e pratica giuridica tra Genova e l'Occidente medievale e moderno*, Genova, 2012, II, p. 1176 ff. ;

²⁵ Wijffels, A., « Business Relations Between Merchants in Sixteenth-Century Belgian Practice-Orientated Civil Law Literature », *From Lex Mercatoria to Commercial Law*, (Vito Piergiovanni, ed.), Berlin, 2005, pp. 255-290, especially. pp. 276 ff.

²⁶ Padoa Schioppa reports how Paulus de Castro, in his *Commentaria ad Digestum vetus* (Dig. 1.1.1. *de iustitia et de iure*, l. iuri., n. 9, Lugduni, 1550), emphasised the arrogance of merchants who referred rather haughtily to *aequitas mercatoria*: « *qui faciunt se magistros aequitatis et contemnunt legistas discentes quod vadunt per cavillationes et ipsi per aequitatem* », « L'equità nel diritto merdievale e moderno », cit., p. 174.

²⁷ Ascheri, M., « Istituzioni politiche, mercanti e mercanzie : qualche considerazione sul caso di Siena (XIV-XV) », *Economia e Corporazioni. Il governo degli interessi nella storia d'Italia dal Medioevo all'età contemporanea*, (Cesare Mozzarelli, ed.), Milano, 1988, pp. 41-52 ; Padoa Schioppa, A., « Giurisdizione e statuti delle arti nella dottrina del diritto comune », (Id.) *Saggi di storia di diritto commerciale*, Como, 1992, pp. 12-62 ; Piergiovanni, P., « Statuti, diritto comune e processo mercantile », *El Dret Comú y Catalunya*, Barcelona, 1998, pp. 137-151 ; Astorri, A., *La Mercanzia a Firenze nella prima metà del Trecento : il potere dei grandi*

through adjudication and other interventions by commercial courts²⁸. Moreover, public authorities had an important part to play in regulating trade. Louis XIV's Ordinance on trade (1673) is a prime example of a ruler's concern with trade regulation.

Another concept, that of *utilitas publica*, was also often used as an argument in late-Medieval and early-modern trade litigation. In the context of commercial relations, it was developed as *publica commerciorum utilitas*²⁹. The need to regulate trade is the very foundation of business law, the purpose of which is precisely to restrict the much-feared lack of moderation.

The following pages will therefore focus on the third legal translation of that continuing quest for measure in economic transactions: the principle of contractual proportionality, which implies the principle imposing the justification of the merchant's performance, and hence also ultimately the justification of his profit.

4. Is it possible to view that quest for measure in trade relations also as a common feature of the European history of business law? And as an effective principle, did it withstand the test of time?

The early-modern period offers an adequate sample of conflicts of interests which may contribute to provide an answer to that question. During that period, both the practice and the theory of business law faced some major clashes. The period offers therefore a first-rate testing ground in order to establish whether that shared European legal culture, whatever its authority, has effectively proved a solid, deep-rooted and resilient bulwark against the abrupt changes of the time, whether as a result of the great discoveries overseas or the globalisation of trade.

«*La mayor cosa después de la creación del mundo*»³⁰, the greatest event since the creation of the world. That is how a chronicler, Lopez de Gomar, referred to the discovery of the Americas.

mercanti, Florence, 1998 ; Baroni, M. F., « Il consolato dei mercanti di Milano nel periodo comunale », *Nuova Rivista Storica*, 59, pp. 257-287 ; Boris, F., « Il Foro dei mercanti : l'autocoscienza di un ceto », *Atti e memorie della Deputazione di Storia Patria per le province della Romagna*, 43, 1992, pp. 319-331. Chiantini, M., *La mercanzia di Siena nel Rinascimento : la normativa dei secoli XIV-XVI*, Siena, 1996 ; Rosser, G., « Guilds and Confraternities Architects of Unnatural Community », *De bono communi. The Discourse and Practice of the Common Good in the European City (13th-16th c.)* / *Discours et pratiques du Bien Commun dans les villes d'Europe (XIII^e-XVI^e siècle)*, (Élodie Lecuppre-Desjardin/Anne-Laure Van Bruaene, ed.), Turnhout, Brepols, 2010, pp. 217-224.

²⁸ Legnani Annichini, A., *La giustizia dei mercanti*, Bologna, BUP, 2005 ; Ciano, C., *Mercanti in toga : I Tribunali di commercio nel Regno d'Italia (1861-1935)*, Bologna, Il Mulino, 2012.

²⁹ Wijffels, « Business Relations. », cit., p. 283. Piergiovanni, V., *The courts and the Development of Commercial Law*, Berlin, 1987.

³⁰ Francisco Lopez de Gomara, *Historia general de las Indias*, Sevilla, 1553 (I used the edition: Antwerp, Iuan Steelsio, 1554), in the introductory Epistle addressed to King Charles V: "Muy soberano señor: La mayor cosa después de la creación del mundo, sacando la encarnación y muerte del que lo crio, es el descubrimiento de Indias; y así, las llaman Mundo Nuevo. Y no tanto le dicen nuevo por ser nuevamente hallado, cuanto por ser grandísimo, y casi tan grande como el viejo, que contiene a Europa, África y Asia. También se puede llamar nuevo por ser todas sus cosas diferentísimas de las del nuestro. Los animales en general, aunque son pocos en especie, son de otra manera; los peces del agua, las aves del aires, los árboles, frutas, yerbas, y gnao de la tierra que no es pequeña...". The book was shortly afterwards translated into French by M. Fumeé as *Histoire generale des Indes occidentales et terres nouvelles*, Chez Michel Sonnius à Paris, 1569. The book was also translated into Italian and English, and published within years in Rome, Venice and London. These translations greatly facilitated the circulation of the work, because in Spain, its publication was prohibited *Real Cédula* in 1556.

In any respect, also from an epistemological viewpoint, the first modern age is an era of great turmoil. The entire traditional cosmography was challenged. Between 1520 and 1540, Magellan and Elcano sailed around the globe. Copernic's *De Revolutionibus* was published in 1543. The cultural context of these events was a fresh development of humanistic scholarship, of the radiant expressions of the Renaissance and of the first disquiet of the Baroque. Meanwhile, the Protestant Reformation, the Roman-Catholic Counter-Reformation and the foundation of the Society of Jesus (in 1534) had at the time a major impact on the spiritual and intellectual outlook of scholars. During that period, we can recognise a fault-line between the First and the Second Scholastics. The latter face an intellectual environment which was entirely different from that of late-Medieval thought, in particular Thomas Aquinas' system of thinking.³¹

All the intellectual forces of the age were affected by those intense shifts during the sixteenth century. They turned the philosophical and legal attention towards man as their central focal point of interest, and towards man's capacity to interact with his environment. The writers of the Second Scholastics adopted mostly a cosmopolitan and flexible approach in their productive relations with intellectuals throughout Europe, not least inspired by Erasmian humanism³². It was no coincidence that the major controversy which Molina faced dealt with the issue how to reconcile human freedom and divine grace³³. That issue was linked to a specific interest for the individual and the human will. The interest was fostered by the encounter of nominalist and voluntarist theories, in particular of the Parisian nominalist School represented by Pierre d'Ailly and Jean Gerson³⁴. Moreover, from a strictly epistemological perspective, "the second age of the Scholastic splendour takes its value and importance from the fact that it succeeded in transcending the erstwhile eristic in favour of rigorously scientific methods"³⁵. We shall see that this remark proves especially true in the area of economic law. Francisco de Vitoria and his successors – including theologians, jurists, but also economists – had to incorporate and integrate those various approaches in order to overcome the difficult task of reconciling the Thomist doctrine with the new economic order³⁶.

³¹ Ghisalberti, A., *Dalla prima alla seconda scolastica. Paradigmi e percorsi storiografici*, Bologna, ESD, 2000; Gómez Camacho, F., *Economía y filosofía moral, la formación del pensamiento económico europeo en la Escolástica Española*, Madrid, 1998 ; Haureau, J.-B., *Histoire de la philosophie scolastique*, II, t. 1, New York, Burt Franklin, 1966 ; García Sanz, A., « El contexto económico del pensamiento escolástico », *El pensamiento económico en la Escuela de Salamanca: una visión multidisciplinar*, (Francisco Gómez Camacho, ed.), Salamanca, 1998, pp. 17-42 ; Renoux-Zagamé, M.-F., v° Scolastique (Seconde), *Dictionnaire de la culture juridique*, (Denis Alland/Stéphane Rials, ed.), Paris, Puf, 2003, pp. 1398 ff.

³² Ocaña García, M., « Francisco de Vitoria y Luis de Molina: Personalismo y personalidad », *Anales del Seminario de Historia de la Filosofía*, Ediciones Universidad Complutense, Madrid, n. 7/1989. See also Sellmi, J. F., (ed.), *El intelecto agente en la escolástica renacentista*, Pamplona, Eunsu, 2006.

³³ *Concordia liberi arbitrii cum gratiae donis, divina praescientia, providentia, praedestinatione et reprobatione*, was Luis De Molina's major work. His concept of free will stirred controversies and addressed difficult issues in the whole of Europe. On several occasions, the book was almost included in the *Index librorum prohibitorum*. The first version was ready for publication in 1588, but its distribution was postponed until the following year.

³⁴ Villey, M., « Loi et droit subjectif », *La Segunda Scolastica nella formazione del diritto privato moderno*, (Paolo Grossi, ed.), Florence, Giuffrè, 1973, p. 61.

³⁵ Rommen, H. A., *Die Staatslehre des Franz Suarez*, S. J., Volksvereins-Verlag, 1926, p. 27.

³⁶ Grice-Hutchinson, M., « El concepto de la Escuela de Salamanca: sus orígenes y su desarrollo », *Ensayos sobre el pensamiento económico en España*, Madrid, 1995, p. 70; first published in *Revista de Historia Económica*, VII, 1989.

which had by then become a global system³⁷. Trade, in particular, was now run along transatlantic routes, which entailed a new scale of costs and risks, and henceforth, adjustments and new commercial models which were increasingly alien to the logics and standards which had prevailed during the Middle Ages.

Yet, faced with these challenges and confronted with a radically new epistemology and anthropology, the early-modern scholars did not break abruptly with the heritage of the previous centuries. On the contrary, they drew from the traditional authorities, which they construed truthfully in the line of the tradition, but at the same time developing an evolutive interpretation. Their approach to economic law reflected the long-term developing legal anthropology of which these scholars were the vectors. As Roman-Catholic churchmen, they attempted to justify in accordance with the Church's moral teaching – especially on matters relating to usury – the many opportunities of enrichment offered by the flourishing economy of the sixteenth century³⁸. In addition, as representatives of the scholastic method, whether philosophers or jurists, their aim was to avoid the moral disintegration and social breakdown of the *polis*³⁹, in order to ensure the balance and measure in the relations between individuals.

Aristotle's work perfectly met the expectations of the sixteenth-century scholastic writers. His distinction between "economy" and "chrematistics" made it possible to build an economic theory based on ethical principles which were compatible with the Christian tradition that remained a fundamental supporting pillar of Western culture during the first centuries of the modern era⁴⁰.

The conceptual foundations of Aristotelian-Thomist philosophy remained for a long time the theoretical stepping-stone of all legal thinking, even with regard to economic relations between individuals⁴¹. Accordingly, that approach has inevitably an ethical ring to it, which

³⁷ In this context, it is noteworthy that the conquest of Peru under the command of Francisco Pizarro started with a company contract. Diego d'Almagro, Hernando Luque and Francisco Pizarro created a private commercial company with the object of increasing the assets of the partners. Pizarro, who, like Almagro, was a soldier, wanted to engage in new ventures. Luque was a clergyman who wanted to accumulate wealth and offered to provide funding and securities required by the public authorities. It appears that he was merely a straw man acting as a front for the real financial backer, who was a wealthy resident of Panama, justice Gaspar d'Espinoza who wished to stay in the background.

³⁸ Grampp, W., « The Controversy over Usury in the Seventeenth Century », *Journal of European Economic History*, n. 10, 1981, pp. 671-695 ; Decock, W., *Theologians and contract law : the moral transformation of the Ius Commune (ca. 1500-1650)*, Leiden Boston, M. Nijhoff Publishers, 2013, especially pp. 509 ff.

³⁹ Grossi, P., « Somme penitenziali, diritto canonico, diritto comune », *Annali della Facoltà di Giurisprudenza della Università di Macerata*, I, 1966, pp. 95-134 ; Birocchi, I., *Alla ricerca dell'ordine. Fonti e cultura giuridica nell'età moderna*, Torino, Giappichelli, 2002.

⁴⁰ « Cette II Scolastique, immensément érudite, nourrie des Pères tout autant que des médiévaux, a recréé pour le temps moderne un phénomène déjà vu, qui n'est pas sans rappeler à certains égards cette espèce de confusion entre la théologie et le droit, propre à la période d'avant Gratien »: Legendre, P., in « L'inscription du droit canon dans la théologie: remarques sur la Seconde Scolastique », *Proceedings of the Fifth International Congress of Medieval Canon Law*, Città del Vaticano, 1980, pp. 443-454, p. 446.

⁴¹ « Religión es creencia, representación y orden. Es en definitiva cultura y como tal interesa nuestra historia, hipotecada ab initio por un débito cultural »: Petit, C., « 'Mercatvra' y 'ivs mercatorvm' », *Del ius mercatorvm al derecho mercantil*, *Proceedings of the Seminario de Historia del Derecho Privado*, (Carlos Petit, ed.), Madrid, 1997, p. 19. See also Grossi, P., « La proprietà nel sistema privatistico della Seconda Scolastica », *La Seconda Scolastica nella formazione del pensiero giuridico moderno*, (Paolo Grossi, ed.), *Quaderni Fiorentini per la storia del pensiero giuridico moderno*, Milano, Giuffrè, 1973 and Renoux-Zagamé, M.F., *Origines théologiques du concept moderne de propriété*, Genève-Paris, Droz, 1987 ; Savelli, R., « Modèles juridiques et culture marchande entre 16^e et 17^e siècles », *Cultures et formation négociantes dans l'Europe*

did not escape the scrutiny of sixteenth- and seventeenth-century scholars, who relied on another Aristotelian principle, which may be regarded as a specification of the principle of measure: that of commutative justice, which provides a general standard for assessing the exchange of goods between individuals⁴².

The standard of commutative justice expresses one of those principles which have deeply influenced – at times in a wayward fashion – European business law, whatever the different uses it has been subjected to.

The principle requires exchanges within society to be carried out according to the principle of equivalence between what is being given and what is being received. Moreover – and crucially –, those exchanges need to represent the individual's own activities within society⁴³.

5. In order to operate consistently, the principle needs to be reconsidered in the light of the new role played by money in early-modern commercial transactions, and of how, in the same context, capital may be rewarded. During the sixteenth century, legal scholars worked out (not without difficulty) answers to these questions, while continuing to adhere to the methodological and material foundations of the Aristotelian-Thomist European tradition. Their answers implied that the productive value of money had to be acknowledged and that a consensual theory justifying specific types of interests on loans was worked out⁴⁴. Without jettisoning the foundations of commutative justice, these new scholarly teachings fitted out the *commutatio* with subjective elements. The remuneration due to the merchant was no longer principally viewed as a material and objective *quid pro quo* for the goods he delivered, but it became a payment for his capacity to anticipate what goods would be needed in specific places, and for the risk he undertook in setting up the whole venture. In the economic context of the great discoveries overseas, such factors became decisive elements in assessing the object of what ought to be rewarded⁴⁵. From there onwards, early-modern scholars developed the theory of the just price, the theory of exchanges, and a quantitative monetary theory⁴⁶.

moderne, (Franco Angelini/Daniel Roche, eds.), Paris, Éditions de l'EHESS, 1995, p. 403. Jean Meuvret pointedly observed that “la Renaissance n’a pas libéré le commerce d’une morale issue de la théologie”: Meuvret, J., « Manuels et traités à l’usage des négociants aux premières époques de l’âge moderne », *Études d’histoire économique*, Paris, A. Colin, 1971, p. 242-243.

⁴² Brett, A. S., *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought*, Cambridge, Cambridge University Press, 2003; Descamps, O., “Prolégomènes à l’affirmation du principe général de la responsabilité pour faute personnelle chez quelques auteurs de la Seconde Scolastique”, *Études offertes à Jean-Louis Harouel*, (Damien Salles/Alexandre Deroche/Robert Carvais, eds.), Paris, Université Panthéon-Assas, 2015, pp. 761 ff.

⁴³ Barrientos-Garcia, J., *Un siglo de moral economica en Salamanca (1526-1629)*, vol. I : Francisco de Vitoria y Domingo de Soto, Salamanca, Universidad de Salamanca, 1985.

⁴⁴ Brunori, L., « Droit et justification du profit : des personnes aux capitaux au début de l’Age Moderne », *Les logiques du droit. Science de la norme et des régimes de domination*, (Soulef Ayad-Bergougnoux, ed.), Paris, Mare&Martin, 2018.

⁴⁵ Tomas de Mercado, *Suma de tratos y contratos*, Salamanca-Sevilla, 1569-1571, p.17 : “El mercader no busca ni aguarda se mude la substancia o cualidad de su ropa, el tiempo y, con el tiempo, el precio, o el lugar. V. g., mercar en Sanlúcar cien fardos de ruana y venderlos aquí, dos a dos y tres a tres o a varas en la tienda; traer también de Granada cincuenta piezas de seda y cargarlas a Indias. En ninguno de estos negocios se muda lo que se compró antes que se venda, o se mejora, si no es en el precio”.

⁴⁶ Studies on the fundamental contribution of the Second Scholastics to the price theory include: Grice-Hutchinson, M., *The School of Salamanca: readings in Spanish monetary theory, 1544-1605*, Oxford, Clarendon Press, 1952; Iizuka, I., *La Escuela de Salamanca en los primeros tiempos de la historia de la teoría monetaria*, Tokio, 1996; Gómez Camacho, F., *Economía y filosofía moral, la formación del pensamiento económico*

Francisco de Vitoria (who had been an assiduous reader of Antonino da Firenze's work) and Domingo de Soto were among the first to approve without reservations banking operations. Accordingly, allowing a banker to use an amount of money which would allow him to carry out his business was deemed a sufficient reason for justifying a fair remuneration⁴⁷. Martinus de Azpilcueta ("Doctor Navarrus") and Tomas de Mercado were critical of what they perceived to be the inertia of the Aristotelian-Thomist tradition. Azpilcueta wrote in explicit terms against Aristotle: "It is not true that the use of money with a view of making a profit through an exchange operation is against nature. Even though that may not be the main purpose of money, it is nonetheless a very important secondary purpose. Trading in shoes is not the purpose for which shoes were invented, but that does not mean that selling shoes would be against nature"⁴⁸.

6. These changes in the concept of the value of money are familiar to economic historians. They also have important legal implications, as they touch upon the assessment of the fair price in transactions between individuals. Similarly, the notion of fair price can already be found in Aristotle's work, but the different concept of what money stands for required scholars to revisit the balance of many commercial contracts. The theory of fair price first outlined by Francisco de Vitoria was further elaborated by Azpilcueta and Molina⁴⁹. In their view, the fair price was based on a meeting between supply and demand. This view comes close to the assumption of perfect competition in the absence of monopolies⁵⁰. Setting the price is therefore determined by a subjective assessment estimation based on utility⁵¹. If there is an established price, it is perfectly fair that merchants make a profit from the

europæo en la Escolastica Española, Madrid, 1998; Baeck, L., « Iberian monetarism and development theories of the sixteenth and seventeenth centuries », *The Mediterranean tradition in economic thought*, London, Routledge, 1994; Belda, F., « Ética de la creación de créditos según la doctrina de Molina, Lesio y Lugo », *Pensamiento*, XIX, 1963 ; Chafuen, A. A., *Christians for freedom: Late-Scholastic economics*, San Francisco, 1986 ; Monsalve, F., « Economics and Ethics : Juan de Lugo's Theory of the Just Price, or the Responsibility of Living in Society », in *History of Political Economy*, Duke University Press, 2010, Vol. 4, n. 3, pp. 504 ff.

⁴⁷ Domingo de Soto, *Libri decem de Iustitia et de Iure*, Salamanca, 1553, Lib. VI, q 11, art. 1.

⁴⁸ Martin de Azpilcueta, *Comentario resolutorio de usura*, Salamanca, 1556, p. 58.

⁴⁹ Hamouda, O., Price, B., « The Justice of the Just Price », *European Journal of the History of Economic Thought*, n. 4, 1997, pp. 191-206.

⁵⁰ On the determination of the just price as the market price, see Luis de Molina, *De Iustitia et Iure*, 1593, (I have used the edition: Antwerp, Ioannes Keebergius, 1615), T. II, disp. 406 n. 3 : "Pecunia quippe unius loci, commutanda pro pecunia in alio, at negotiationem, lucreque mercatorum, at caetera quae commemorata sunt, habet se instat mercis leges minimae taxatae, cuius valor modo accrescit, modo decrescit, prout illius est maior, vel minor, indigentia in uno loco, quam in alio : quare sicut abundantia aut penuria alicuius mercis, maior vel minor illius necessitas, copia maior vel minor mercatorum, eam facit in valori in aliquo loco". On the pernicious effects of monopolies for the commonwealth: see vol. II, the whole extensive *disputatio* No. 345, under the title *Monopoliis quiusque emptio et venditio illicita aut iniusta, reddatur. Et de recondendibus ac asservandibus merces in tempus caritatis*. See also Juan de Lugo, *Disputationum de Iustitia et de Iure*, Lyon, 1642, (I have used the edition: sumpt. Haered. Petri Prost, Philippi Borde & Laurentii Arnaud, Lyon, 1644), Disput. XXVI, sect. 111, 21-23: "Necessarium item Reipublicae est, quod sint aliqui, qui ex aliis locis merces in magna copia afferant, quibus hæc provincia indigeat, quas singuli non possent sibi afferre: et qui advenientibus exteris, qui eas afferant, emant illas, ut postea singuliis, quando eis indigent, vendere possint; et denique qui tempore abundantiae fructus comparent, et conservent ut postea tempore penuriae, provideant aliis cum lucro suae industriae, ac diligentiae debito: quas rationes optime prosequitur Molina ».

⁵¹ With regard to the "subjective" determination of the fair price, Luis de Molina wrote: "Illud in primis observandum est, justum pretium non ex naturis rerum secundum se, quo ad earum nobilitatem ac perfectionem esse iudicandum, sed quatenus ad humanus usus inserviunt; eatenus enim ab hominibus aestimantur atque in commerciis et commutationibus hominum inter se pretium habent", *op. cit.*, T II, disp. 348, n. 2. The same argument, but differently phrased, appears in Juan de Lugo, *op. cit.*, Disp. XXVI, sectio IV, and Leonardus Lessius, *De Iustitia et Iure ceterisque virtutibus cardinalibus libri IV*, Leuven, 1605, Liber 2, Caput XXI, dubitatio II, (I have used the edition: Paris, Typographia Rolini Theodorici, 1610).

transactions entered into according to the market rates⁵², as long as these rates result from an unimpeded operation of free market forces. On the other hand, it was assumed that neither public authorities nor monopolies would interfere in the setting of market prices.

As a result of that approach, the determination of the fair price was primarily reached through contractual operations. The setting of a fair price in synallagmatic contractual relations was therefore a task of contract law, not a prerogative of public law. The essential contribution by the authors of the Second Scholastics to the general theory of contracts and to the classification system of contracts (topics to which they contributed through many in-depth studies) has now eventually been acknowledged⁵³. In addition, it is important to emphasise an objective element, for sixteenth-century overseas trade was still largely controlled by individuals, and thus business law was mainly shaped through the law of contracts. That was also the reason why the jurists of the Second Scholastics were determined to build a more comprehensive and updated system in the law of contracts. Thomas of Aquinas' work had in, that respect left a void which made the task all the more urgent, but, at the same time, it also left more freedom with regard to topics which had already been extensively dealt with in the *Summa Theologica*. Thus, the law of contracts and business law neatly dovetailed in the scholarly theories of the Second Scholastics.

7. Justifying profit was one thing, but what about securing the measure? The notion of a moderate and just profit is a long-term ideal in the European scholastic tradition. Thomas Aquinas and Antonino da Firenze, for example, argued that the bona fide practice of the arts produced a lawful⁵⁴ *moderatum et iustum lucrum*⁵⁵. The authors of the Second Scholastics evidently pursued that tradition, but they supplemented it with a strong pinch of realism. Tomas de Mercado wrote: “‘There is no man who wants to moderate himself, so much so that when the occasion arises, he turns the helm in his favour as much as he can, and even more than he could legitimately. And since money is very much needed by merchants, its value can rise a lot, even more than wheat. Therefore, interest on money must be moderate and consistent with the quality and quantity of business, as well as with the circumstances at the time.’”⁵⁶. Such reminders to a *moderado interés* or a *justa y moderada ganancia* occur frequently in the writings of the Second Scholastics. For example when Tomas de Mercado discusses bread prices: “As far as the price of bread is concerned, two important things need to be highlighted: the first is that bread should be sold at a price that takes into account the price of wheat, milling and kneading costs, with the addition of a moderate profit. As far as the price of bread is concerned, two important things need to be highlighted: the first is that

⁵² Luis de Molina, *op. cit.*, T. II, disp. 364 «*De pretio legitimo*».

⁵³ Decock, *Theologians and contract law: the moral transformation of the Ius Commune (ca. 1500-1650)*, cit.; Gordley, J., *The Philosophical Origins of Modern Contract Doctrine*, Oxford, Clarendon Press, 1992; Birocchi, I., *Causa e categoria generale del contratto: Il Cinquecento*, Torino, Giappichelli, 1997; Duve, T., «Kanonisches Recht und die Ausbildung allgemeiner Vertragslehren in der Spanischen Spätscholastik», *Der Einfluss der Kanonistik auf die europäische Rechtskultur*. Bd. 1, Zivil- und Zivilprozessrecht, (Orazio Condorelli/Frank Roumy/Matthias Schmoeckel, eds.), Köln-Weimar-Wien, Böhlau Verlag, 2009, pp. 389-408; García García, A., Alonso Rodríguez, B., «El pensamiento económico y el mundo del derecho», *El pensamiento económico en la Escuela de Salamanca. Una visión multidisciplinar*, (Francisco Gómez Camacho, ed.), Salamanca, 1998, especially p. 84; Brunori, L., «Societas quid sit»: *La société commerciale dans l'élaboration de la Seconde Scolastique*, Paris, Mare&Martin, 2015.

⁵⁴ Grice-Hutchinson, M., «Santo Tomás de Aquino en la historia del pensamiento económico moderno», *Ensayos sobre el pensamiento económico en España*, Madrid, 1995, pp. 201 ff.; Lapidus, A., «Norm, Virtue, and Information: The Just Price and Individual Behaviour in Thomas Aquinas' Summa Theologica», *European Journal of the History of Economic Thought*, 1, 1994, pp. 435-473.

⁵⁵ Antonino da Firenze, *Summa Theologiae*, Venetia, 1581-1582, vol. III, f. 92 r.

⁵⁶ Tomas de Mercado, *op. cit.*, Capítulo VIII, *De los cambios que se hacen para las ferias de España*.

bread should be sold at a price that takes into account the price of wheat, milling and kneading costs, with the addition of a moderate profit. The second is that this moderate gain must be assessed by the judges of each district”⁵⁷. Luis de Molina also referred to a “*iustum et moderatum stipendium*” (a fair and moderate reward) owed to the baker⁵⁸.

Determining the fair price was therefore a critical issue in the quest for measure in trade relations. Luis de Molina, for instance, explained: “If, in bad faith, the seller sells at a higher price than the right price, there is a mortal sin of injustice if the difference between the requested price and the right price is high.”, and also that is not required to return anything one who has requested a price moderately higher than the right price for a capital insurance. He will have to return only when, in the opinion of the experts, the price will be considered seriously excessive”⁵⁹, or “that is not required to return anything one who has requested a price moderately higher than the right price for a capital insurance. He will have to return only when, in the opinion of the experts, the price will be considered seriously excessive”⁶⁰. Yet another illustration is the work by Juan de Lugo, where a whole sub-division deals with the topic *De pretio iusto in emptione et venditione servando* (“A fair price ought to be respected in the contract of sale and purchase”)⁶¹.

8. The price of goods may be fairly easy to determine, but how should the *iustum lucrum* be assessed in transactions where there was not, properly speaking, an exchange of goods or services, such as in the case of *cambia*, insurances, or a purely financial stake in a commercial company?

With regard to profit on exchange transactions, in particular in the course of operations carried out at fairs, a “very moderate” interest rate was allowed. That was an important breakthrough compared to the traditional doctrine on usury and its effect should not be underrated. Martino de Azpilcueta accepted the moderate use of the art of exchange: “The business of change brings benefits to the political community, so if this is exercised honestly, and the end is with moderation to maintain themselves and their families, the profit is allowed”⁶².

Tomas de Mercado considered a “very moderate” profit to be fair in exchange transactions carried out during the fairs⁶³. The exchange had to be “*justo, quiere decir sea el interés moderado*”: just, that means moderate⁶⁴.

⁵⁷ Tomas de Mercado, *op. cit.*, Capítulo II, *Do se refieren las pragmáticas reales cerca de la venta del trigo*.

⁵⁸ Luis de Molina, *op. cit.*, t. II, disp. 353, No. 24.

⁵⁹ Luis de Molina, *op. cit.*, t. II, disp. 318 No. 4.

⁶⁰ Luis de Molina, *op. cit.*, t. II, disp. 319 No. 3.

⁶¹ Juan de Lugo, *op. cit.*, disp. XXVI, sectio IV.

⁶² Martin de Azpilcueta: *Comentario resolutorio di cambios*, Salamanca, 1556, § 36.

⁶³ Tomas de Mercado, *op. cit.*, Capítulo VII, *De los cambios que se hacen para fuera del reino*.

⁶⁴ “[...] Hay algunos que, viendo menesteroso al prójimo, suben el cambio, sabiendo que no puede dejar de tomar. También, si alcanzan que el otro ha de interesar mucho en Flandes o en Venecia o en Florencia, quieren, como participando de la ganancia, cargarle en los intereses, como dicen, un quintal. Y cuán torpe e ilícito sea parece claro en las ventas y compras, do no es lícito, como dijimos, levar vendiendo más de lo que vale, aunque tenga extrema necesidad de ello el que compra o por mucho espere ganar en ello revendiéndolo. Cuánto menos convendrá hacer esto en el cambio, do solamente se tratan dineros, que de suyo ni ganan ni fructifican”: Tomas de Mercado, *op. cit.*, Capítulo VII, *De los cambios que se hacen para fuera del reino*.

Luis de Molina was also favourable towards the reward of exchange transactions which he thought were beneficial for the commonwealth (“*utile rei publicae*”)⁶⁵. In such cases, Molina accepted that the exchange agent could receive a “*moderatum stipendium*”⁶⁶. The exchange interest between different countries (in particular in the American territories) had to be, in Tomas de Mercado’s opinion, “moderate and just, i.e. pitiful and human, and not raised taking advantage of the needs of the other”⁶⁷. Luis de Molina and Juan de Lugo reached the same conclusion, although what they took into consideration was not the respective situation of the parties, but rather the performance required from the party and (for Lugo) the price for insuring the capital: “*aliquid detrahi solet pro assecuratione sortis*”⁶⁸.

9. Long-distance trade had a major impact on assessing the measure of contractual balance. Moderation appears to have been the key test for such assessments.

Mercado about “*Del fin e intención que debe tener el mercader en sus tratos*”, i.e. the aims and intentions which a merchant has to keep mind in conducting his business, warned that a merchant should not take advantage of the fact that the dominions of the Spanish Crown in America were vast and far-away, and that as a consequence they constantly lacked many goods readily available in Europe. According to Tomas de Mercado, the “good merchant” is he who supplies those territories “*llevando un moderado interés*”⁶⁹. In that context, Mercado reports that some commercial accepted that the price of goods could increase proportionally to the amount which the merchant had paid for insuring the same goods⁷⁰.

Moreover, Mercado also allowed a limited additional increase of the price, which could be justified because of the general higher risk of trade with the Americas, provided the increase remained moderate, “*y cuánto valga esto ellos lo saben muy bien, si quieren moderarse*”: the value of this increase is well known to those who want to moderate themselves⁷¹. The insurance contract also had to yield a profit that remained moderate (“*quod moderatum sit*”) and proportional to the risk.

The most vexed question, however, remained: how to measure such a profit? Luis de Molina’s answer was “*Ut limites iusti non egrediat arbitrio prudentum mercatorum erit iudicandum*”: the evaluation on overcoming the limits of justice is entrusted to the judgment of the experts⁷², which proves that he acknowledged the fundamental role of *aequitas mercatoria* (the first thread we identified above) in business practice.

Leonard Lessius followed exactly the same approach when discussing the profit owed to exchange agents. For Lessius, too, the *lucrum* has to be *moderatum*, but “*an modum excedens non est Doctorum determinare sed proborum virorum arte illa peritorum*”: it is not

⁶⁵ Luis de Molina, *op. cit.*, t. II, disp. 399, “Utrum pro cambio minuto licitum campiori sit incrementum accipere ultra pretia monetarum lege taxata”, No. 1. Lugo refers to Molina in the same vein : quaestio XXVII, sect. II, No. 14.

⁶⁶ *Ibidem*, No. 4.

⁶⁷ Tomas de Mercado, *op. cit.*, Capítulo XI.

⁶⁸ Juan de Lugo, *op. cit.*, Disp. XXVIII De cambiis, sect. X, n. 130.

⁶⁹ Tomas de Mercado, *op. cit.*, Capítulo XVI, *Pues si aquellos reinos tan grandes y tan distantes de nosotros están en continua necesidad de muchos géneros de ropa que de acá se les provee, buen celo sería ejercitar la mercancia proveyéndoselos y llevando un moderado interés.*

⁷⁰ Tenenti, A., «Note sul rapporto tra il valore delle merci e somme assicurate alla fine del Cinquecento », Studi in memoria di Federico Melis, Giannini, Naples, 1978, vol. 4, pp. 243-254.

⁷¹ Tomas de Mercado, *op. cit.*, Capítulo XVI.

⁷² Luis de Molina, *op. cit.*, t. II, disp. 57, *De contractu assecurationis*, No. 16.

for the scholars to evaluate whether the limits of moderation are exceeded, but to the judgment of *probi professionals*⁷³.

The *aequitas mercatoria* was also the reference for Juan de Lugo when he examined the value of the *lucrum cessans* in the case where a party conveys the use of money to another party. That value is “a moderate one, determined by the judgment of those who are experts in such transactions or trade” (*aliquid moderatum arbitrio peritorum in ea negotiatione vel arte*)⁷⁴. Not the scholars, but those directly involved in commercial transactions would have to determine that value.

10. In such context, the discussions about monopolies were more intricate than what one might expect. In theory, monopolies were deemed to have a negative effect on society. Sixteenth-century scholarship nevertheless admitted that under certain circumstances, public authorities could grant privileges to merchants in order to balance specific markets or to encourage merchants to start trading in new commodities. For the learned authors, it was not necessarily a bad thing if merchants obtained a *moderatum lucrum* from such privileges, in so far that did not harm the commonwealth (“*sine preiudicio boni communis*”)⁷⁵. Their reasoning thus lead them to the concept of the “common good”, highly favoured by Aristotelism and Thomism, the pillars of European legal culture⁷⁶, and to the issue of the relationship between merchant trade and business law. These issues are still particularly relevant in today’s European environment⁷⁷.

What, however, as the initiator of the present conference asked in the preface to a collection of essays on the connections between *ius commune* and European private law, “if the European moment had already passed on?” – a question addressed in a critical assessment of a European law “which implements the divorce between meta-juristic sciences and positive law”, unable to consider the law in the light of the deep-rooted transformations it is undergoing⁷⁸.

And yet. The threads we saw running over and over again in the course of European history have contributed to build a common European vocabulary shared in business law. Would they not provide the blueprint of a European business law *iustus et legitimus*?

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⁷³ Leonard Lessius, *op. cit.*, Lib. 2, chap. 23, dub. 6.

⁷⁴ Juan de Lugo, *op. cit.*, disp. XXV, sect. VI, § 1, *De lucro cessante*.

⁷⁵ Lugo, disp. XXVI, sect. XII, *De monopolis*. All the other authors in the same terms.

⁷⁶ Modde, A., « Le Bien Commun dans la philosophie de saint Thomas », *Revue Philosophique de Louvain*. Troisième série, tome 47, n°14, 1949. pp. 221-247. De Wulf, M., « L’individu et le groupe dans la scolastique du XIIIe siècle », *Revue néo-scholastique de philosophie*, year 22, n° 88, 1920, pp. 341-357 ; Sère, B., « Aristote et le bien commun au moyen âge : une histoire, une historiographie », *Revue Française d’Histoire des Idées Politiques*, vol. 32, no. 2, 2010, pp. 277-291 ; Lecuppre-Desjardin, É./Van Bruaene, A.-L., (eds.), *De bono communi. The Discourse and Practice of the Common Good in the European City (13th-16th c.) / Discours et pratiques du Bien Commun dans les villes d’Europe (XIIIe-XVIe siècle)*, Turnhout, Brepols, 2010, see in particular the contribution by Todeschini, G., « Participer au Bien Commun : la notion franciscaine d’appartenance à la civitas », p. 225-235.

⁷⁷ Tirole, J., *Économie du bien commun*, Paris, Puf, 2014 ; Flahault, F., « Pour une conception renouvelée du bien commun », *Études*, vol. tome 418, no. 6, 2013, pp. 773-783.

⁷⁸ Wijffels (dir.), *Le code civil entre ius commune et droit civil européen*, cit., p. V-X (“... si le moment européen était déjà passé ?”).

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