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, 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 history.

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 law. However, as far as business law can be traced back in time, it appears to have crossed borders, displaying unparalleled homogenous and internationally porous features.

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 Middles Ages to the Twentieth Century, CUP, Cambridge, 2017, p. 175.
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’s work on Economics¹⁰) 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

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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.


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.

commonwealth, not only for the private individuals who are directly involved in the commercial transactions\textsuperscript{12}. In the first book of the \textit{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 ὑϐρις, 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 things\textsuperscript{13}.

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 society\textsuperscript{14}. Aristotle argued that it appeared in human communities with the introduction of money\textsuperscript{15}. 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 refer\textsuperscript{16}: “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’"\textsuperscript{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 \textit{aequitas mercatoria} is no doubt part of the essential heritage of European business

\textsuperscript{12} Karl Marx had understood the point.
\textsuperscript{14} I have used the French translation: Aristote, \textit{Politique}, Livre I, 1256a. See Brendan Nagle, D. \textit{The household as the foundation of Aristotle’s Polis}, Cambridge, 2006.
\textsuperscript{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 \textit{The Great Transformation}, New York, Farrar&Rinehart, 1944, Chapter IV Society and economic systems, p. 53.
\textsuperscript{17} Kletltz-Drapeau, \textit{op. cit.}, p. 26.
law. Benvenuto Stracca, the founder of early-modern scholarship on commercial law, 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 *les mercatoria* in the sixteenth century, on equity. When Stracca refers to equity in the context of the resolution of trade disputes, 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 German. Stracca’s work thus illustrates the fact that in his time, *aequitas mercatoria* was a concept which had circulated through time and space in Europe. It is also a concept which has remained at the heart of arguments on business law until the present day.

There is no need to dwell much longer here on the *aequitas mercatoria*, which has already been thoroughly researched. 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*. 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 Europe.

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 guilds, but also...
through adjudication and other interventions by commercial courts. 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*. 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*» , the greatest event since the creation of the world. That is how a chronicler, Lopez de Gomar, referred to the discovery of the Americas.
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.
which had by then become a global system. 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 century. 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, 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 era.

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 individuals. Accordingly, that approach has inevitably an ethical ring to it, which

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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.


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.

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 individuals\textsuperscript{42}.

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 society\textsuperscript{43}.

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 out\textsuperscript{44}. Without jettisoning the foundations of commutative justice, these new scholarly teachings fitted out the \textit{commutatio} with subjective elements. The remuneration due to the merchant was no longer principally viewed as a material and objective \textit{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 rewarded\textsuperscript{45}. From there onwards, early-modern scholars developed the theory of the just price, the theory of exchanges, and a quantitative monetary theory\textsuperscript{46}.


\textsuperscript{45} Tomas de Mercado, \textit{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”.

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 remuneration. 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”.

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 Molina in History of Political Economy, in History of Political Economy, these changes in the concept of the value of money are familiar to economic historians.

With regard to the “subjective” determination of the fair price, Luis de Molina wrote: “Illum 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 et in commodis et commutationibus 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 cardinales libri IV, Leuven, 1605, Liber 2, Caput XXI, dubitatio II, (I have used the edition: Paris, Typographia Rolini Theodorici, 1610).

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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.
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, lucraque mercatorum, at caetera quae commemoratur sunt, habet se instat mercis leges minime 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 aliorum 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 also Juan de Lugo, Disputationum de Iustitia et de Iure, Lyon, 1642, (I have used the edition: sumpt. Haered. Petri Prost, Philippi Borde & Laurentii Audon, Lyon, 1644), Disput. XXVI, sect. 111, 21-23: “Necessarium item Reipublicae est, quod sint aliqui, qui ex aliis locis merces in tempus caritatis 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 Audon, 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 hic provincia indigeat, quas singuli non possent sibi afferte: et qui advenientibus exteris, qui eas afferant, emant illas, ut postea singulis, quando eis indigent, vendere possint; et denique qui tempore abundantiae frustus comparant, et conservent ut postea tempore penuriae, provideant alii cum lucro suae industriae, ac diligentiae debito: quas rationes optime prosequitor Molina ».
51 With regard to the “subjective” determination of the fair price, Luis de Molina wrote: “Illum 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 cardinales 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 rates, 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 acknowledged. 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 lawful *moderatum et iustum lucrum*. 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.’" 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

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52 Luis de Molina, *op. cit.*, T. II, disp. 364 « De pretio legitimo ».
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. Luis de Molina also referred to a “iustum et moderatum stipendium” (a fair and moderate reward) owed to the baker.

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 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, 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. 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”).

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.”

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

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57 Tomas de Mercado, op. cit., Capítulo II, Do se refieren las pragmáticas reales cerca de la venta del trigo.
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")\textsuperscript{65}. In such cases, Molina accepted that the exchange agent could receive a "moderatum stipendium"\textsuperscript{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”\textsuperscript{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”\textsuperscript{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”\textsuperscript{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 goods\textsuperscript{70}.

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 themselves\textsuperscript{71}. 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 egrediatur arbitrio prudentium mercatorum erit iudicandum”: the evaluation on overcoming the limits of justice is entrusted to the judgment of the experts\textsuperscript{72}, which proves that he acknowledged the fundamental role of \textit{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 \textit{lucrum} has to be \textit{moderatum}, but “an modum excedens non est Doctorum determinare sed proborum virorum arte illa peritorum”: it is not

\textsuperscript{66} Ibidem, No. 4.
\textsuperscript{67} Tomas de Mercado, \textit{op. cit.}, Capítulo XI.
\textsuperscript{68} Juan de Lugo, \textit{op. cit.}, Disp. XXVIII De cambiis, sect. X, n. 130.
\textsuperscript{69} Tomas de Mercado, \textit{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 mercancía proveyéndolesos y llevando un moderado interés.
\textsuperscript{71} Tomas de Mercado, \textit{op. cit.}, Capítulo XVI.
\textsuperscript{72} Luis de Molina, \textit{op. cit.}, t. II, disp. 57, \textit{De contractu assecurationis}, No. 16.
for the scholars to evaluate whether the limits of moderation are exceeded, but to the judgment of probi professionals.\textsuperscript{73}

The \textit{aequitas mercatoria} was also the reference for Juan de Lugo when he examined the value of the \textit{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” (\textit{aliquest moderatum arbitrio peritorum in ea negotiatione vel arte})\textsuperscript{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 \textit{moderatum lucrum} from such privileges, in so far that did not harm the commonwealth (“\textit{sine preiudicio boni communis}”).\textsuperscript{75} Their reasoning thus lead them to the concept of the “common good”, highly favoured by Aristotelism and Thomism, the pillars of European legal culture\textsuperscript{76}, and to the issue of the relationship between merchant trade and business law. These issues are still particularly relevant in today’s European environment.\textsuperscript{77}

What, however, as the initiator of the present conference asked in the preface to a collection of essays on the connections between \textit{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 undergoing.\textsuperscript{78}

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 \textit{iustus et legitimus}?

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