

What's in a Name?

Challenging Early Modern Ideal-Types of Private Partnerships in the Low Countries (17th-18th Centuries).

Introduction

In 1802, Johannes van der Linden translated Robert Joseph Pothier's *Du contrat de société* (1765) into Dutch for his fellow-compatriots because of 'the large usefulness it would have with regard to contemporaneous socio-economic life' (Van der Linden 1802). Likewise, van der Linden introduced several ideal-type categories of private partnerships, like the general partnership (*société générale, vennootschap onder firma*) and the limited partnership (*société en commandite, commanditaire vennootschap*), into Dutch jurisprudence. Originally, however, these partnership types had been devised by seventeenth-century French jurists, like Jacques Savary, while preparing the French *Code de Commerce* (1673). Ultimately, the reception of French corporate structures was formalized through the official introduction of the Napoleonic *Code de Commerce* in Belgium (1807) and the Netherlands (1811).

Subsequently, legal historians continuously addressed the nature and development of private partnerships, created in the early modern Low Countries, by means of such, originally French, ideal-type categories (Punt 2010, Asser 1983, Duynstee 1940, Van Brakel 1916). By making use of analytical instruments provided for by legislation and jurisprudence, they brought about a theoretical understanding of private partnerships that most likely didn't correspond to the actual early modern corporate practices, which were in turn primarily customary by origin.

This project hypothesizes that an alternative methodology, principally based on the exploration of sources produced directly by the entrepreneurial community, will reveal an entirely new, much more diverse and dynamic image of corporate structures frequently used in the early modern Low Countries. Likewise, the proposed research not only aspires to debunk the traditional ideal-type narrative, it also aims at evidencing the supposed obliviousness of entrepreneurs with regard to early modern commercial legislation and ditto jurisprudence.

Scientific Relevance

The chief hypothesis of the project is rooted in the PI's distrust in the traditional ideal-type approach. Four deficiencies exemplify the latter's problematic nature.

1. The ideal-type approach has French origins. Whereas its model categories have proven to be quite popular among early modern French entrepreneurs (Kessler 2007 & 2003, Lévy-Bruhl 1938), this does not necessarily imply a comparable acquaintance in the Low Countries. For example, recent explorations of sixteenth-century notarial registers in Antwerp suggested an almost ignorable degree of familiarity among local entrepreneurs with limited partnerships like the French *société en commandite* (Van Hofstraeten 2016).
2. The ideal-type categories suffer from typological rigidness. Limiting one's analytical instruments to the straightjacket of model categories forces the observer to capture historical reality into simplified and often merely theoretical concepts, without allowing

for the observance of other organisational structures. Glances at the archival material, however, suggest that early modern entrepreneurs did not think in such legal categories, but that they disposed of a significant degree of contractual freedom that enabled them to create such structures that served their case-specific needs at best (Van Hofstraeten, 2016a).

3. The ideal-type approach presupposes geographical universality. Consequently, scholars overlooked the possibility of organisational and legal differences within the Low Countries. Still, such regional diversity is most likely, not only because of the geographical differences that existed within early modern commercial practices (Lichtenauer 1956), but also, and most underestimated so far, because of the existing specialization of economic centres in the Low Countries. A primarily industrial city like Liège may have called for different strategies and organizational instruments than chiefly commercial centres like Amsterdam and Antwerp.

4. The ideal-type approach implies uniformity over time. If one limits his analytical instruments to theoretical model categories, one excludes a priori the identification of potential developments in a set of partnership types that existed in a specific place. Still, such changes would most likely have occurred, as altering political circumstances, professional contacts with foreign merchants and new economic opportunities may have encouraged entrepreneurs to modify their existing corporate instruments into more suitable ones.

Likewise, the ideal-type approach presented us with a distorted image of early modern private partnerships in the Low Countries, and therefore, providing a more accurate alternative is urgent, also because it continuously constrained legal historians from drawing the right conclusions.

Scholarly Background

At first, small-scale private partnerships were largely neglected by legal historians. The political and economic significance of the bulky chartered companies, like the Dutch East India Company and the Dutch West India Company, incited those pioneering legal historians, who were to deal with the history of Dutch company law first, to search for the roots of the full-fledged joint-stock enterprise in those colonial companies (Van Brakel 1908, Van der Heyden 1908). Afterwards, the latter continued to inspire legal historians. As a result, the available literature is vast (De Jongh 2014, Gepken-Jager, van Solinge & Timmerman 2005, Den Heijer 2005).

Simultaneously, however, the success of such large enterprises caused a profound ignorance among Dutch and Belgian scholars with regard to the legal structure and development process of the more modestly-organized private partnerships existing within the early modern Low Countries. If such corporate structures, and by extension the corresponding usages generally accepted among entrepreneurs in the Low Countries, did receive scholarly attention at all (Asser 1983, Duynstee 1940), such examinations were primarily based on jurisprudential and legislative sources instead of documents produced by commercial practice itself. Only Simon Van Brakel showed, at the outset of the twentieth century, some interest in notarized partnership agreements by means of which private companies had been established in sixteenth- and seventeenth-century Amsterdam and Rotterdam (Van Brakel 1914 & 1916). Yet, his contributions remained utterly descriptive and above all very concise.

Since a few years, one may speak of a revived interest in early modern private partnerships among legal historians (Decock 2015, De ruyscher 2015, Punt 2010).

Nonetheless, these recent attempts too focussed on legislative and jurisprudential sources or were still framed alongside the traditional patterns provided for by the ideal-type approach. Finally, the PI himself examined systematically the use and legal nature of private partnerships in sixteenth-century Antwerp (Van Hofstraeten 2016b & 2016c). In addition, he carried out sample-based explorations of the Maastricht and Liège notarial archives in search for seventeenth-century partnership agreements (Van Hofstraeten 2015 & 2017). Again, these efforts and the eventual observations were still troubled by the ideal-type narrative.

So, there is still a major historiographical lacuna which concerns the legal features of private partnerships as well as their exact role in the overall development process of early modern company law. This project is designed to fill these gaps.

Overall Aim

The overall aim of this project is to provide a new, more accurate, understanding of early modern corporate structures and usages in the Low Countries. Therefore, the project will explore and open up the *terra incognita* of an unused set of sources, most importantly notarized partnership agreements. These contracts constitute, as immediate products excogitated by the entrepreneurs themselves, true reflections of what Eugen Ehrlich conceptualized as *Rechtsleben* or 'living law', i.e. the generally accepted and binding norms of conduct existing outside the framework of official state legislation (Hertogh 2004; Ehrlich 1911).

The project hypothesizes to demonstrate a significant discrepancy between this 'living law' of corporate usages, on the one hand, and early modern company law as it existed in the minds of contemporary legislators and jurists, on the other hand. In opposition to the limited number of well-defined and termed partnership types provided for by early modern jurisprudence and legislation, the actual 'living law' is expected to manifest itself, not only as insensible as far as terminology - What's in a name? - is concerned, but also as a much more diverse and dynamic entity as a result of the contractual freedom of which early modern entrepreneurs could dispose of.

In order to put flesh on the overall hypothesis of the project, the project calls for a resolute return to the most appropriate archival sources, produced by the entrepreneurs themselves, instead of limiting one's research to the often more easily accessible jurisprudential and legislative texts.

Thus, examining notarized partnership agreements will not only reveal the true nature and development of private partnerships in the early modern Low Countries, it will also make a ground-breaking contribution to our current understanding of the contemporaneous relationship between the entrepreneur and the law. In light of this relationship, the project aims to demonstrate that, despite an ever-increasing number of legislative efforts on commercial issues from the 1500s onwards (Lammel 1976), such top-down regulations not necessarily found their way to the bottom of the market. Likewise, the project may call for a considerable reconsideration of the commonly accepted portrayal of the early modern period as the pivotal breakthrough period regarding legislation as the prime source of law (Heirbaut 2013, De ruyscher 2011, Lesaffer 2004).

Displaying the true diversity and dynamics of early modern private partnerships requires a systematic analysis of partnership agreements concluded in at least three economic centres of the Low Countries. These centres are Liège, Amsterdam and Antwerp and have been chosen because of their appropriateness in light of tackling all deficiencies of the ideal-type approach. Each one of them constitutes a separate subproject within the overall project and addresses a similar set of more specific research questions: What kind of corporate structures can be identified, and which rights and duties were being contracted in

the agreements? What is the true importance of limitedly liable partners in these cities? How do the observations relate to the content of contemporaneous jurisprudence and legislation on private partnerships, and is it possible to identify specific developments (or the reception of legal novelties) as regards their structure and internal organisation? If so, which determinants can be identified as responsible for such developments? Did contracting parties show signs of categorization, and if so, according to which distinctive criterion? To what extent can one speak of regional diversity within the Low Countries, but also from a broader European perspective?

Subproject 1: Early Modern Private Partnerships in Liège (1581-1795)

Already in a very early stage the city of Liège developed both a significant metallurgical industry as well as a uniquely organised exploitation of its coal mines (Dumoulin & Kupper 2002, Leboutte 1997, Hansotte 1980). Due to their capital-intensiveness, suchlike industries engendered, already in the fourteenth century, the creation of private partnerships as a means of cost reduction (Kranz 2000). During the sixteenth- and seventeenth centuries, new industries like glassmaking and the extraction of alum, sulphur and lead called for similar action (Lejeune 1939). From the 1720s onwards, the need for capital grew even stronger with the appearance of the Newcomen steam engines (Leboutte 1997). Not only the significance, but also the specific industrial nature and capital-intensiveness of the early modern Liège economy, renders the city into a most appropriate means to challenge the ideal-type narrative on private partnerships, more specifically its presumed geographical uniformity.

Whereas the city's mining activities and metallurgical industries have been the object of numerous appraisable studies (Leboutte 1995, 1997; Gaier 1977, 1988; Hansotte 1972a, 1972b, 1980; Yernaux 1939; Harsin 1928), the organisational and legal features of their enterprises hardly received scholarly attention. This lacuna in the history of company law in the Low Countries is most deplorable since preliminary, sample-based explorations of the Liège archives revealed considerable idiosyncrasies regarding the organisational and legal features of mining companies in early modern Liège (Van Hofstraeten 2017).

In order to discover such idiosyncrasies as well as the overall legal and organisational features of Liège corporate structures, the researcher at hand will primarily make use of notarized partnership agreements which can be found in the city's notarial archives, currently preserved at the Liège *Archives de l'Etat*. Since contracting parties were not obliged to register their agreements officially, the set of industrial and mining companies can be expanded by means of an exploration of the exploitation concessions that were granted by Liège land owners to private partnerships. In light of corporate structures and usages, these concessions proved to be most instructive as well (Kranz 2000). Here, the archives of local ecclesiastical institutions in particular as well as those of the Liège *Chambre des Finances* are to be consulted in the first place (Kranz 2000, Polain 1937).

Subproject 2: Early Modern Private Partnerships in Amsterdam (1585-1811)

Opting for a city like Amsterdam as the centre of a second subproject is obvious for various reasons. In addition to the availability of the necessary source material, the choice is motivated by the attested acquaintance of the city's entrepreneurs with the idea of private partnerships (Gelderblom 2010). Secondly, there is the prosperity of the Amsterdam economy during the seventeenth century which attracted numerous foreign entrepreneurs from abroad. Such an influx presumably coincided with the transfer of innovative legal ideas,

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which renders the city into a suitable case to challenge the assumed chronological uniformity of the ideal-type narrative. Finally, there is the nearby presence of chartered companies, closely resembling modern joint stock companies. To what extent did their organisational and legal structure influence the modestly organized private partnerships, or vice versa?

So far, the early modern economy of Amsterdam has received a great deal of scholarly attention, mainly because of the Golden Age it experienced during the seventeenth century. However, historiography - possibly blinded by the success of the bulky chartered companies for colonial trade - failed to address the modestly organized private partnerships in a proper and exhaustive way. Whereas economic historians do acknowledge their significance within (specific sectors of) the overall economic system and showed a manifest interest in the *partenrederij* as the presumed origin of limited liability in the city (Gelderblom 2010, de Vries & van der Woude 1997, Riemersma 1952), nor they nor legal historians ever deferred private partnerships to a systematic and in-depth analysis on the basis of notarized partnership agreements.

The researcher at hand will therefore examine the organisational structure and legal characteristics of those private partnerships established in the city of Amsterdam during the seventeenth and eighteenth centuries. In order to do so, he will make use of those partnership agreements that have been registered by notaries who were active in the city of Amsterdam, and whose protocol books are currently being preserved in the *Amsterdam Stadsarchief*.

Subproject 3: Early Modern Private Partnerships in Antwerp (1608-1807)

Whereas Amsterdam constitutes an excellent example of a growing economy, seventeenth- and eighteenth-century Antwerp provides a case of opposite economic circumstances. After experiencing an unseen economic prosperity during the long sixteenth century, the Antwerp market turned into decline. Likewise, the city embodies an appropriate subject to assess the impact of degenerating economic circumstances on the further development of private partnerships.

There is, however, a more important ground to incorporate a city like Antwerp as into the overall project. No other city or region in the early modern Low Countries recorded its commercial practices as often and extensive as the city of Antwerp did (Van Hofstraeten 2008). The customary compilations of 1582 (*Consuetudines impressae*) and 1608 (*Consuetudines compilatae*) each comprised hundreds of articles on commercial practices. Whereas the 1582 compilation did not distinguish between various types of private partnerships yet, its 1608 successor demonstrates some initial attempts of categorization. Therefore, Antwerp serves as an ideal case study in order to examine the relationship between the merchant community, on the one hand, and the municipal authorities and their statutory legislation, on the other hand. To what extent is it possible to observe an influence of the city's commercial statutes on actual corporate practices acknowledged by local entrepreneurs?

The frequent use of private partnerships in Antwerp during the early modern period has been attested sufficiently so far, while simultaneously their sixteenth-century organisational and legal features have already been the object of a systematic analysis (Cf. *Scholarly Background*). Unfortunately, these observations were still troubled by the shortcomings of the ideal-type approach. Therefore, the researcher will re-analyse the sixteenth-century data along the lines of a concept-free approach and, more importantly, expand his analysis to partnership agreements notarized in the seventeenth and eighteenth centuries and currently preserved in the *Antwerp City Archives*. Such expansion is crucial for a proper examination of the real significance of the 1608 *Consuetudines compilatae*.

Methodology

The methodology applied in the project represents one of its most innovative elements. In order to discover the actual corporate structures and the true 'living law' on early modern companies, the project starts with a rejection of all existing, top-down analytical instruments provided for by the ideal-type approach. In turn, the researchers will apply a bottom-up approach, free from any anachronistic concepts, and will draw conclusions on early modern private partnerships as presented to them in notarized partnership agreements. Especially regarding the identification of organisational structures and the reconstruction of early modern corporate practices these contracts prove to be uttermost instructive. In order to limit the risk of a researcher bias, all observations will be deferred to the **four eyes principle** whereby observations require the approval of at least two researchers.

A similar bottom-up approach that starts with sources produced by early modern entrepreneurs instead of legislators and jurists requires the opening up of **a new set of sources**. Here lies one of the most prominent challenges of the project. In addition to significant **palaeographical and linguistic challenges**, the archival research is extremely time-consuming, for it requires an exhaustive analysis of all, often non-indexed, notarial protocol books produced during the period under examination. Nevertheless, only a systematic analysis of these documents allows for a truthful understanding of the nature and development of private partnerships in the early modern Low Countries.

The development of such a new narrative is based on a quantitative and qualitative analysis of the various clauses that can be found in the extant partnership agreements. As the latter's number may run up to 200 per city, the project introduces **a new way of contract analysis**, for the project will develop an **electronic database** that allows the researchers to pose queries. Likewise, the identification of possible trends over time as well as dependencies between various clauses of the partnership agreements and/or specific characteristics of the contracting parties will be facilitated significantly.

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