

Litigation as a designed second-order contract enforcement mechanism:
cases involving Portuguese Jews and *conversos* in the sixteenth and early
seventeenth century Brazil, Portugal and Netherlands

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At the turn of the sixteenth century, Europe and its overseas possessions experienced a high rate of growth in urban population, a great dependence on trade for the consumption of staple products, and an upsurge of marketable commodities output. Sugar was one of them. While Brazil turned into the first large-scale plantation economy and the World's main sugar producer, Amsterdam became its main distribution and refining center. Most of the Brazilian sugar trade was intermediated by merchants in Portugal. Tradesmen of Jewish origin scattered through this route played a prominent role in the sugar trade.

Such expansion, integration and complexity of markets required individuals to be assured that the parties with whom they were up to initiate exchange would not cheat, renege or neglect their commitments later. The standard historiography about the Brazilian sugar trade upholds that the legal system was unable to enforce contracts overseas, and that merchants of Jewish (and non-Jewish) origin relied on relatives and diaspora members, either or both, to tackle opportunism overseas.¹

¹ While minimizing the significance of the diaspora, Costa, Ebert, Moreira, Smith, and Stols maintained that of kinship, left undefined: Costa, *Transporte*, vol. 1, pp. 130–140, 160–61, 291–93, 413–437, 515–587; Costa, “Merchants Groups”; Stols, “Mercadores,” 30, 42; Moreira, *Mercadores*, 35, 144–45, 206–7; Ebert, “Trade,” 14, 80, 82–83, 88, 90, 97–98, 217; Smith, “Old Christian Merchants”; Smith, “Mercantile Class,” 103–4, 103, 119, 125–27, 153–54, 168–69. Smith and Swetschinski argue that clusters formed though intermarriage among a few high-rank families compensated the limits of one's kin: Smith, 137–38, 145,

Built on a prosopography of traders of Jewish origin drawn from a larger and more diverse body of sources, this paper examines the role of judicial coercion in mitigating moral hazard across wide distance and different political units. It analyzes the resort to litigation in cases involving merchants of Jewish origin plying the sugar trade route. This prosopography includes 719 powers of attorney granted by, to or against merchants of Jewish origin in Oporto and Amsterdam, mostly to charge mercantile claims, not only locally but also overseas. The prosopography also provides information about economic transactions, including, agency arrangements of different types, and about participants' ethnicity and family relations, and their geographic and social mobility.

The prosopography reveal that the legal system was not only feasible but actually used to curb opportunism and solve disputes. Judicial coercion enforced contracts among traders of various origins, even during wartime. Litigation also occurred within the diaspora that comprised merchants of Jewish origin, which allegedly constituted a cohesive group. Albeit feasible, sources suggest that judicial coercion only supplemented two different informal mechanisms based on reputation, one within the diaspora and another across different affinity groups plying this route. Still, by supplementing reputational mechanisms, litigation underpinned informal institutions that were more

154–55; Swetschinski, “Kinship”; Swetschinski, “Portuguese Jewish Merchants,” 134–291; Swetschinski, “Middle Ages,” 81. Israel, França and Siqueira extend the scope of such familial networks to encompass all members of the diaspora provided they were committed to Judaism, either openly or secretly: Israel, “Diasporas,” 3–26; Israel, “Economic Contribution,” 418, 420, 429; Israel, “Manuel,” 251–53; Siqueira and d’Oliveira, “Segunda visitação,” 151, 153–58, 160, 169–73. Mello, Koen and Vlessing emphasized the centrality of both kinship and diaspora: Mello, “Livros,” 33–34; Mello, *Gente*, 5–79; Koen, “Duarte”; Vlessing, “Thomas.” On the maladies of information and legal systems, see: Costa, “Informação e Incerteza,” pp. 103–4. See also: D.M. Swetschinski, “The Portuguese Jewish Merchants,” p. 141; De Vries and Van der Woude, *The First Modern Economy*, p. 149; Israel, *Dutch Primacy*, p. 14; Israel, “Diasporas Jewish and non-Jewish,” p. 12; D.G. Smith, “The Mercantile Class of Portugal and Brazil in the Seventeenth Century,” pp. 273–4.

inclusive than would have been otherwise. Moreover, the prosopography highlights that litigation was mostly resorted in two cases. First, when the easy verifiability of the matter reduced the transaction and opportunity costs of legal action. Second, when reputational mechanisms were unfeasible owing to the impossibility of future cooperation of a player with any other due to his death or bankruptcy.

Scholarship about governance of agency relations overseas during pre-industrial times in various contexts has focused on one mechanism – alone or supplemented by another – tackling one problem. While disputing the role of diaspora in the governance of trade, both standard² and recent scholarships stress the inability of the legal system to verify commercial claims and enforce sentences.³ My research, nevertheless, highlights that judicial enforcement was critical, as do a few studies inspired by North on other cases.⁴ Yet my study emphasizes that judicial coercion was supplementary not only to reputational mechanisms across diasporas but also to the diaspora mechanism. Finally, some scholars emphasize that multiple mechanisms – reputational and judicial, within and across diasporas – were often substitutes in tackling the same problem.⁵ My prosopography indicates that, at least in this case, judicial coercion was neither a primary mechanism nor competed with reputational mechanisms but was designed to supplement them only.

² See the references in: Curtin, *Cross-Cultural Trade*; Vanneste, *Global Trade*, 13–39; Trivellato, *Familiarity*, 10–16, 155–57, 162–63; Baghdiantz-McCabe, Harlaftis, and Pepelasē-Minoglou, *Diaspora*; Aslanian, *Indian Ocean*, 7–15, 169–74, 215–34; Chaudhuri, *Trade*, 224–27; Ribeiro, “Mechanisms,” 19–36; Rosenthal and Wong, *Divergence*, 67–98.

³ Trivellato, *Familiarity*, 208–10, 214–21, 238–43; Vanneste, *Global Trade*, 67–94; Ribeiro, “Mechanisms,” 174, 182. See also: Greif, “Théorie Des Jeux.”

⁴ North, “Institutions,” 99–102, 107; Greif, “Cultural Beliefs”; González-de-Lara, “Secret”; Fernández-Castro, “Juzgar,” 148, 236–56. Greif, “Impersonal exchange”.

⁵ They disagree, however, about whether increasingly impersonal market institutions prevailed: Grafe and Gelderblom, “Rise and Fall,” 497, 509–11; Ogilvie, *Institutions*, 310–14, 340–43. Goldberg, *Trade*, 181–84, 294–95, 353–55.

Hence, my research concurs with the economic historians who have pointed at the a “public embeddedness” of informal mechanisms⁶. However, this study indicates that despite local gradations, this was not a process that evolved in a single or in a few locales but rather spanned different areas of Western Europe (and their colonies). Recent legal historiography points to a consistent long-term trend through which by the mid-seventeenth-century, legislators, judges and lawyers made standard mercantile practices enforceable at the local or central level⁷. This study contributes to the understanding of how legal developments influenced merchants’ institutional choices.

I built the prosopography by analyzing 1,815 manuscript notarial deeds of all types referring to New Christian registered in Oporto; 3,642 printed notarial deeds referring to Portuguese recorded in Amsterdam; and 134 manuscript Inquisition trial files of New Christian merchants of Oporto and Brazil⁸, as well their relatives; together with the printed records of the Inquisition’ visits to Brazil⁹. In order to observe their routine conduct of trade, I focus on a period of reduced inquisitorial, military and political insecurity, and for which sources are abundant. It starts with Jews’ first systematic appearance in Dutch sources (1595), and the dismantlement of the New Christian mercantile group in Oporto by the Inquisition (1618)¹⁰.

⁶ Gelderblom, *Cities*, pp. 103-4.

⁷ Hespanha, *Cultura*, 148–301; Petit, *Historia*, 38–58, 121–22, 127, 146–48; Basile et al., *Lex mercatoria*, 24, 114–15, 72–74, 125–188; Wijffels, “Business Relations,” 255–90; Donahue, “Benvenuto”; Piergiovanni, “Genoese Civil Rota,” 194, 198–99; Kessler, *Revolution*, 7–14; Ruyscher, “Debt,” 7–14; Kadens, “Myth,” 1160–63, 1181–84, 1196–99.

⁸ See the end of the article for list of manuscript sources and abbreviations.

⁹ Abreu, *Confissões da Bahia; Denúncias da Bahia*; Mello, *Denúncias e confissões de Pernambuco*; Siqueira and d’Oliveira, “Segunda visitação.”

Standardization and validation of trading customs

By the early seventeenth century, both authorities and merchants enhanced the effectiveness of the legal system by establishing a growing standardization, validation and enforceability of trading customs and routines throughout Europe and its colonies.

Notarial records, private documents, and trading and arithmetic manuals show a relative standardization of the basic aspects of mercantile practices in sales, shipping, credit instruments, insurance, and agency arrangements in Portugal, Brazil, the Netherlands, and other European countries and their colonies¹¹. These growingly standardized routines of trade also produced pieces of information that facilitated principals to monitor their agents' actions and third parties to verify them.

Trading routine expected agents to register their transactions in account books and to produce various documents, which were mostly private: invoices, bills of lading, letters of advice, letters of credit, IOUs, bills-of-exchange, receipts, releases, insurance policies etc. Private documents acquired a standard formulaic wording, and were even printed in forms with blanks for the typical variables¹². Agents should attach these documents, or their excerpts and copies, in their assiduous reports on their ongoing and

¹¹ SR 314, 618, 2560, 2604; PO2 20, fos. 220v.-223v.; 25, fos.146v.-150; PO1, 133, fos.70-72v., 77-79v., 162-163v.; 137, fos.131-133, 141-143v.; Strum, "Portuguese Jews," 288-92; Strum, *Sugar Trade*, 495-97; Trivellato, *Familiarity*, 17, 158; Gelderblom, *Cities*, 133-39; Petit, *Historia*, 74-76; Basile et al., *Lex mercatoria*, 181. See also: Greif, "Commitment," 735 n. 9; Goldberg, *Trade*, 178; Bernstein, "Opting Out," 143.

¹² Trivellato, *Familiarity*, 17, 161; Gelderblom and Jonker, "Amsterdam," 11-12; Gelderblom and Jonker, "Completing," 656; Almeida, *Aritmética*, v. 2, pp. 364-6; Costa, *Transporte*, v. 1, pp. 44-7, 371; Go, "Marine Insurance," 99-100; Kessler, *Revolution*, 81-86; Strum, *Sugar Trade*, 245, 335-45, 365, 368, 398-421, 455, 494.

previous transactions, or hand them over directly to their principals. So should other trade related professionals: brokers, shipmasters, insurers etc.¹³

Such routine also required identifiable trading marks, names (or aliases), and signatures to recognize both individuals and ownership. Goods were recognizable through their owners' marks and serial numbers inscribed on their containers. Vessels were singled out by her name, master, and sometimes type or tonnage¹⁴. Finally, there was a growing standardization of commodities and trade-related services. Certified lists of prices, customs tariffs, and traders' manuals indicate standards – quality, workmanship, origin etc. – and measures for pricing goods. Brazilian sugar, within its three types, was a relatively homogenous commodity, and so were most of the goods traded along this route, such as coarse textiles, metalware, salt, grain, timber, pitch, wine, oil, dried fish, and dyes. Although other variables influenced the final price, there were easily recognizable benchmarks. The same applies to exchange, interest, freight, and insurance rates¹⁵.

During the sixteenth and early seventeenth centuries, legislators, judges, and jurists – civilians and canonists (and common lawyers) – accommodated standard mercantile contracts and technology within the plural legal systems in force¹⁶. These systems comprised civil and canon law, central legislation, local statute and custom, various

¹³ Strum, "Portuguese Jews," 207–16; Strum, *Sugar Trade*, 536; Trivellato, *Familiarity*, 161, 180; Gelderblom, *Cities*, 81–83, 86–87.

¹⁴ Strum, "Portuguese Jews," 63–67, 211; Strum, 245–46, 340–42, 406, 414, 459, 436; Gelderblom, *Cities*, 82–83; Trivellato, *Familiarity*, aliases 19, 22, 53, 215, 299 nn. 63, 327 42, 368 94.

¹⁵ PO2, 23, fos. 82v.-85v.; 25, fos. 19-20v., 64v.-65v.; 26, fos. 238-239v.; 40, fos. 195-195v.; SR 362, 379, 396; Malynes, *Consuetudo*, 19–58, 70–82, 291–324, 386–91; Mauro, *Portugal*, v. 1, 137-141, 378-380, v. 2, pp. 13–17; Silva, *Porto*, v. I, passim; Almeida, *Aritmética*, v. II, passim; Costa, *Transporte*, v. 1, pp. 88–9; Gelderblom, *Cities*, 61, 82; Strum, *Sugar Trade*, 363, 383–89; Trivellato, *Familiarity*, 169–70, 173. See also: Williamson, "Transparency," 5–6; Bernstein, "Opting Out," 118.

¹⁶ Strum, *Sugar Trade*, 495–97; Trivellato, *Familiarity*, 17, 158; Gelderblom, *Cities*, 70, 133–39; Basile et al., *Lex mercatoria*, 72–74, 125–62.

privileges (*iura propria*), Germanic customs etc.¹⁷ Validation and regulation of mercantile practices often involved restricting their legitimacy to transaction involving bona fide merchants only, foreigners and nationals¹⁸. Traders could easily learn about local variations, and agreements often mention that specific aspects of a transaction would be ruled according to a foreign custom¹⁹.

Courts accepted and requested affidavits, opinions and assessment about practices and accounts in trade and shipping²⁰. Judges validated merchants' decisions in arbitrations²¹; and in Amsterdam, the city magistrates addressed mercantile disputes to merchants for arbitration²². Dependent on state coercion, arbitration enhanced the legal system rather than replaced it²³. In Portugal, a specialized mercantile court was established; although short-lived (1598–1603), its bylaws influenced subsequent jurisprudence²⁴. In Amsterdam, no merchant tribunal was established, but a subsidiary

¹⁷ This, however, does not endorse a romanticized account of an autonomous and universal body of substantive law spontaneously produced by medieval merchants, who privately adjudicated and enforced it: Basile et al., *Lex mercatoria*, 163–88; Kessler, *Revolution*, 9–11, 96–109, 296; Greif, *Institutions*, 314–15; Ruyscher, “Debt,” 7–14; Fernández-Castro, “Juzgar,” 220–26; Donahue, “Benvenuto,” 69–120; Kadens, “Myth,” 1160–63, 1181–84, 1196–99. Although, these scholars underscore that this process neither evolved uniformly, nor responded immediately to emerging economic challenges, or overrode local particularism, they point to a consistent long-term trend.

¹⁸ Hespanha, *Cultura*, 148–301; Petit, *Historia*, 38–58, 121–22, 127, 146–48; Basile et al., *Lex mercatoria*, 24, 114–15, 181–87; Wijffels, “Business Relations,” 255–90; Donahue, “Benvenuto,” 109–12; Piergiovanni, “Genoese Civil Rota,” 194, 198–99; Roover, *L'évolution*, 122–29.

¹⁹ SR 314, 2560, 2604; PO2 20, fos. 220v.-223v.; 25, fos. 146v.-150; PO1, 133, fos. 70-72v., 77-79v., 162-163v.; 137, fos. 131-133, 141-143v.; Kadens, “Myth,” 1181, 1195–96, 1204; Malynes, *Consuetudo*.

²⁰ SR 212, 568, 601, 618, 1811, 2560; Strum, “Portuguese Jews,” 291–92; Strum, *Sugar Trade*, 495; Ortego-Gil, *Reis*, 117–19, 145; Gelderblom, *Cities*, 99, 135, 137; Basile et al., *Lex mercatoria*, 154–60; Ruyscher, “Debt,” 8–9; Fernández-Castro, “Juzgar,” 339, 357–62.

²¹ IL 728, fos. 56, 164v.; SR 792, 871, 892, 1953, 1954; Gelderblom, *Cities*, 107.

²² SR 212, 568, 601, 1811; Gelderblom, 107–8, 124; Strum, “Portuguese Jews,” 308–17.

²³ Fernández-Castro, “Juzgar,” 159–73; Ogilvie, *Institutions*, 299–300; Bernstein, “Opting Out,” 125, 129.

²⁴ Ortego-Gil, *Reis*, 117–19, 136; Strum, *Sugar Trade*, 495–97; Smith, “Mercantile Class,” 161–64; Costa, *Transporte*, v.1, pp. 228, 266–270; Mauro, *Portugal*, v. I, 305 e v. II, pp. 201–2; Silva, *Porto*, v. 1, pp.133, 220, 466, 545–550; Moreira, *Mercadores*, 126. For the intervention of civil courts, see: PO2, 36, fos. 101v.-102v. For the the *Juízo da Alfândega* and the *Juízo da Índia*, which replaced the *Consulado* tribunal: Leão, *Leis extravagantes*, fl.33v.-35v.; *Ordenações filipinas*, l.1, título LI, LII; Almeida, *Aritmética*, v. II, pp. 364–7.

Insurance Chamber was set up in 1598, and the Chamber of Insolvency and the Commissioners of Maritime Affairs would be created in 1627 and 1641²⁵.

Judicial verification did not depend on public documents. Albeit advisable, notarizing agreements or producing official certificates was not a requisite in commercial cases. Private documents, ledger books, and letters were admissible evidence, followed by sworn witnesses and affidavits. Courts also accepted foreigners' testimonies and documents produced abroad, whose certified copies, sworn translations, and authentication of signatures could be provided in case of need. Protests were a public procedure that produced sufficient evidence of failure or underperformance of a standard long-distance transaction: acceptance and payment of bill-of-exchange, loading cargo, and delivering consignment²⁶.

Rulers also adopted stricter policies to curb malicious default, bankruptcy, and absconding. Accepted bills-of-exchange and IOUs became immediately enforceable, and clauses often equaled notarized contracts to enforceable final sentences. Legislation also made straightforward contracts, preferably notarized, enforceable in a few days. Local authorities sequestered the goods of defaulters, and imprisoned absconders and insolvents, including agents, until some settlement was reached with their creditors. Provisional settlements, often through the intervention guarantors and trustees, allowed people, vessels, goods, and funds to circulate until the dispute was solved. That allowed

²⁵ Gelderblom, *Cities*, 124–26.

²⁶ IL 4481, attached document n. 5, fo. 1; PO2, 30, fos. 33-5; SR 168, 294, 319, 589, 631; Koen, "Duarte," 180, 187; Almeida, *Aritmética*, v. II, pp. 365–6; Strum, *Sugar Trade*, 245, 248, 329, 335–45, 354, 365, 368, 387, 398–421, 455, 491, 494, 537; Trivellato, *Familiarity*, 161–62, 168–69, 202; Kessler, *Revolution*, 61–62; Fernández-Castro, "Juzgar," 337–43, 356; Gelderblom, *Cities*, 79–80, 83, 87–101; Borges, *Fontes*, 35–36, 43, 45, 48–51, 56; Piergiovanni, "Genoese Civil Rota," 195; Smith, "Mercantile Class," 370–71; Malynes, *Consuetudo*, 401–4.

bona fide merchants to recover and repay, at least partially and belatedly, under the authorities' control²⁷.

Judicial enforcement

Courts could and did enforce commercial contracts. Even next of kin were brought to courthouses in trading matters. Duarte Fernandes was one of the leading members of the Jewish community of Amsterdam during its first generation. Duarte's son in Madrid ran out of funds and defaulted on payments to both his father and his father's payees in Spain. Embarrassed, Duarte Fernandes had to empower his creditors in Madrid to charge payment from both his son and his son's debtors.²⁸

Parties also filed suits against each other in faraway places, in foreign countries and even during wartime. The fact that the family of Uriel da Costa fled Porto for northern Europe at the beginning of 1614 did not mean that they ran away from all their outstanding debts in Portugal. On May 22, 1615, a New Christian merchant in Porto

²⁷ PO1, 132, fos. 64v.-66; 140, fos. 28-30v.; PO2, 8, fos. 170v.-173; 20, fos. 208-210; 27, fos. 142-143v.; 34, fos. 13-16, 133-134v.; 36, fos. 62-64v., 82v.-83; 37, fos. 122-123; SR 114, 115, 259 n. 23, 342, 359, 401, 461, 559, 548, 551, 555, 575, 576, 587, 604, 637, 702, 717, 720, 1275, 1605, 1614; IL 728, fols. 55, 131, 154-5; Strum, "Portuguese Jews," 295-306; Strum, *Sugar Trade*, 404-7, 493-94; Gelderblom, *Cities*, 50-51, 70, 97-99, 104, 117-19, 124-25, 128-30, 140, 144; Ortego-Gil, *Reis*, 107 nn. 277, 112-15; Basile et al., *Lex mercatoria*, 120-22, 156-61; Ruysscher, "Debt," 3-4, 14-15; Fernández-Castro, "Juzgar," 238-44, 304, 322; Malynes, *Consuetudo*, 101-2; Rau, *Estudos*, 116; Roover, *L'évolution*, 96-99; Greif, Milgrom, and Weingast, "Coordination." *Ordenações Filipinas*, l. III, tit. XXV.

²⁸ SR Nr. 1405, 1480.

empowered a number of Jews in Amsterdam to enforce a judgment he had obtained against Uriel da Costa's brother²⁹.

Likewise, a resident in the Portuguese inland village of Linhares secured his rights against a defaulting debtor living in Pernambuco. It is not clear what caused the debt. The creditor got the legal authorities to seize some sugar shipped by the debtor to Porto until a final judgment or agreement on the matter was reached. Meanwhile, the creditor's lawyer in Porto was instructed to further seize each and every additional shipment of sugar arriving in city that belonged to either this or any of his other debtors. This debtor was the aforementioned Ambrosio Fernandes Brandão³⁰, whereas the sugar trustees were two brothers and merchants in Porto, and later Jews in Amsterdam and Hamburg³¹.

The far-reaching extent to which legal enforcement could be secured across wide distance and different political units is demonstrated by the following case: on September 4, 1612, Garcia Gomes Vitoria, a Jewish merchant in Amsterdam, was about to leave for Emden, East Frisia, and Hamburg³². As early as October 8, Garcia's principals in

²⁹ ADP, NOT, PO2, l. 41, fls. 17-18 (1615-5-22). This power of attorney might not have taken effect because it was not signed. Yet it is not mentioned, as is usual, that it did not take effect. As far as I was able to ascertain, Israël Salvador Révah seems to have missed this document in his monumental survey of Portuguese sources on Uriel da Costa and his family and close acquaintances: I.S. Révah, *Uriel da Costa et les Marranes de Porto*.

³⁰ J.A.G. de Mello, *Gente da Nação*, pp. 26-7; R.C. Gonçalves, *Guerras e Açúcares*, pp. 219-223.

³¹ ADP, NOT, PO2, l. 27, fls. 142-143v. (1609-5-6): “*especialm.^{te} para huã caussa e demanda de Embarguo que elle const.^e fez na faz.^{da} e açuqueres de hum ambrosio frz' brandão da ci.^{de} de Lx.^a residente nas partes do brasil que Estão depositados nas mãos de ant.^o frz' esteves e de gabriel lopes desta ci.^{de} per mandado do juz dalfandegua della [...] sucedendo vir ha esta ci.^{de} ou outra quoaq.^r parte fazenda alguã do dito ambrosio frz' brandão ou de outro devedor seu fazer nella novo Embarguo.*”

³² Before leaving town, Garcia Gomes Vitoria made a last abandonment of goods to insurers for charging reimbursement and granted a general power of attorney to a Dutchman in order to take care of his affairs in town during his absence. These goods were on board the *Nossa Senhora de Nazare* of Master Miguel da Rua of Matosinhos, heading from Brazil for Porto: SR Nrs. 572. The attorney was Abraham Pelt: SR Nrs. 571. From February 1611, Garcia Gomes Vitoria was in an apparently difficult financial situation. Some of

Portugal suspected that he went bankrupt, and rushed to charge all that he owed them. Two of them lived in his hometown, Porto, and another in Torre do Moncorvo, near the Portuguese-Spanish border. All of them were New Christians.

The merchants in Porto, one of which represented that in Torre do Moncorvo, granted powers of attorneys to three Jews in Amsterdam. The latter were to collect insurance indemnities, proceedings of cargoes and an unpaid bill of exchange (re-exchanged) from the absconding agent. The principals in Portugal were aware that their agent had left Amsterdam, and their attorneys were entitled to pursue him “wherever he is” or “wherever he is to be found”³³. Goods of him, if not he in person, were found in Emden, and seized by Jeurian Jserman, substitute attorney of one of the Portuguese grantees in Amsterdam. In the meantime, this grantee also strove to seize all goods belonging to the debtor in Amsterdam. Finally, the debtor’s brother paid off at least part of the outstanding amount; and on February 5, 1613, the seizure was lifted³⁴.

Thus, we learn that a principal resident near the Portuguese-Spanish border could have his rights enforced against his agent absconding in the frontier between the Holy German Empire and the Dutch Republic, through a chain of representatives that went via Porto and Amsterdam.

Wartime

his goods had been sequestered by Portuguese merchants and as a consequence he did not pay a bill of exchange he had accepted for payment: SR 461.

³³ The merchant in Torre do Moncorvo had already one of the merchants in Porto as his attorney, and the latter substituted his powers to the merchants in Amsterdam: ADP, NOT, PO2, l. 36, fls. 62-63 (1612-10-8); fls. 63v.-64v. (1612-10-8); fls. 82v.-83 (1612-10-27). See more on the affair: SR Nrs. 461, 571, 572.

³⁴ The grantee sent a notice through the city’s messenger demanding that the debtor’s brother-in-law prove before a notary public that he indeed did not have any of Garcia’s asset: SR Nr. 587; SR Nr. 604.

A state of war encumbered but did not preclude litigation and judicial enforcement. The hostilities between the Dutch Republic and Portugal, as then part of Hispanic Monarchy, prevailing before April 1609 did not deter a leading merchant of Italian origin in Amsterdam, Jaspas Quingetti³⁵, in his efforts to obtain a refund for the money he had delivered in exchange for two bills of exchange that were never paid. The bills had been drawn in Amsterdam on May 28, 1608 by the Moura brothers on a New Christian and his son in Antwerp. The latter accepted the bills for payment but went bankrupt and were arrested by the legal authorities before October 2. Jaspas Quingetti did not get much from the Moura brothers in Amsterdam either. The re-exchanged bills were protested to the brothers a week later³⁶, when they had already fled town³⁷. On the day that Jasper learned about the drawers' flight, he empowered a "Flemish" merchant in Lisbon to institute proceedings against the Moura brothers and their properties in Portugal³⁸. For historical reasons, in Portugal, the term "Flanders" and "Flemish" referred to the Low Countries, both North and South, in particular, and to the German/Dutch speaking areas on the northwestern European coast from Calais to Gdansk, in general.

Further, Jaspas Quingetti and four other creditors of the Moura brothers had a lawsuit pending before a court in Antwerp by July 4, 1609, when they were asked by the debtors if they wished to join the agreement reached with their other creditors. The five answered that they could not abide by the agreement because the matter was still sub judice in Antwerp, but they did not oppose the States of Holland and West Frisia's

³⁵ On Jaspas Quingetti see: SR Nr. 72 n. 76; J.I. Israel, *Dutch Primacy in World Trade*, p. 71; J.I. Israel, "The Phases of the Dutch *Straatvaart*," p. 137; J. de Vries and A. van der Woude, *The First Modern Economy*, p. 368; C. Lesger, *The Rise of the Amsterdam Market*, p. 162; O. Guelderblom, *Zuid-Nederlandse kooplieden*, pp. 153-5, 158-9, 191 n. 28, 216, 231, 244, 312.

³⁶ SR Nr. 296, 470.

³⁷ SR Nr. 305.

³⁸ SR Nr. 297.

granting them a *sûreté de corps* against arrest by creditors in order to allow them to recover financially and settle their debts³⁹.

During wartime, foe's subjects filed lawsuits in intermediary countries, whose sentences were binding in the debtor's home⁴⁰. Likewise, creditors could have both goods been seized and absconders arrested in neutral cities⁴¹. Sentences pronounced in the Southern Low Countries, Catholic and loyal to the Hispanic Monarchy, were confirmed (homologated) with greater ease by Iberian courts, and were considered legitimate also in the Dutch Republic, which shared some of its judicial tradition. Resorting to these courts was facilitated by the easy mobility between both cities and the still conceivable reintegration of the northern "rebellious" provinces into the Spanish Habsburg's umbrella until 1609.

One of such judgment was given in favor of the Antwerp New Christian merchant Francisco Godines against two "Flemish" staying in Porto. The sentence was confirmed in Lisbon. The sentenced parties had their goods already seized in Porto for other reasons, and the seizure was levied by another "Flemish" merchant resident in the city, who handed over money to the substitute attorney in Porto of the creditor in Antwerp. The delivery to the substitute attorney, who was also a New Christian merchant, however, was made on the condition that such money would be returned if any subsequent judgment would order the restitution of the money to the debtor. Two additional New Christian merchants in Porto stood surety for the recipient, and a third New Christian merchant

³⁹ SR Nr. 352.

⁴⁰ ADP, NOT, PO2, l.8, fls. 134-135 (1597-7-1); l. 18, fls. 249-252 (1602-10-18).170v.-173 (1597-7-19); l. 19, fls. 173-174v. (1603-3-20); l. 20, fls. 93v.-95 (1603-7-7); PO4, l.a s., l. 8, fls.233v.-235 (02-09-1621). The same was true for the neutral Hamburg: SR Nr. 408.

⁴¹ SR Nr. 342, 3344.

guaranteed the guarantors⁴². Meanwhile, one of the debtors empowered his brother, then also in Porto, and a New Christian lawyer, to defend all his rights in Portugal and abroad and settle agreements on his behalf⁴³.

Neutral countries, such as Hamburg, further bolstered law enforcement. The insurers of an insolvent Jewish merchant in Amsterdam empowered a trader in Hamburg to seize the goods that were supposed to arrive there from Porto on a ship called *De Koning David* and release them only after the debtor paid an insurance premium or provided guarantor for it⁴⁴.

Merchants headquartered in Amsterdam often declared being residents of Antwerp, and acted through their agents in Brabant at both Antwerp's and Brussels' courtrooms⁴⁵. Likewise, Luis Mendes, a leading New Christian merchant in Porto found it more prudent to have João Mendes Henriques⁴⁶ and Henrique Garces, "residents in Antwerp or wherever they do dwell," as his primary attorneys in charging and collecting money and merchandise owed to him in Portugal, "Flanders" and elsewhere⁴⁷. Both did live in Antwerp, but Henrique Garces, grandfather of Baruch Espinosa (Spinoza), frequently stayed in Amsterdam⁴⁸.

⁴² ADP, NOT, PO2, l.8, fls. 170v.-173 (1597-7-19).

⁴³ ADP, NOT, PO2, l. 8, fls. 134-135 (1597-7-1).

⁴⁴ SR Nr. 342.

⁴⁵ ADP, NOT, PO4, l.a s., l. 8, fls. 233v.-235 (02.09.1621).

⁴⁶ SR Nrs. 106, 206 n. 59.

⁴⁷ ADP, NOT, PO2, l. 18, fls. 249-252 (1602-10-18): "*a elle lhes estavam devendo sertas dividas asi de dr.º como fazenda hem este Reino de portugall como nas partes de frandes he quallquer outras partes de quallquer outro Reino que Seia e p.ª cobrasa he arrequadasão do sobredito [...] asi dinheiro como merquadorias lletras per conhesimentos escreturas de quallquer sorte callidade caõtidade que seia he asi mais toda quall quer outra fazenda que lhe pertença por qualquer via he maneira que seia.*"

⁴⁸ SR Nr. 44, 44 n. 46, 729, 926, 1184, 1414; E.M. Koen, "Duarte Fernandes," p. 185; E.R. Samuel, "Portuguese Jews in Jacobean London" (2004), pp. 128, 157, 169; A.B. Coelho, *Inquisição de Évora*, pp. 511-522; I.S. Révah, *Uriel da Costa et les Marranes de Porto*, pp. 29, 273, 352, 464, 467, 473, 493, and appendices D and F; M. Bodian, *Hebrews of the Portuguese Nation*, p. 33.

Hamburg also played the same role. When the Moura brothers tried to recover some assets from parties living in Brazil, they first had the assistance of an Amsterdam notary public who certified that both the grantors and the notary himself lived in Hamburg, where the power of attorney was purportedly executed⁴⁹. The deed was made after the Twelve Years Truce was already in force for over a year, but the previous state of war probably left some scars⁵⁰.

Still, one could flee and abscond. Absconders, however, had to give up a salient participation in the routes and marketplaces in which they could be arrested or his goods could be seized. Hence, they had to either fly too far away or maintain a marginal role in these places. Sources mention cases of individuals absconding for several years; however, these seem to have entailed a life of privation and instability. In fact, absconding usually appears as a means meant at buying some time while renegotiating with creditors out of prison instead of a once for all strategy, as it was difficult to sustain for long when much money was involved.

The bankruptcy and absconding of the brothers Lopo and Antonio Rodrigues de Moura and Fernando Duarte de Moura had a traumatic outcome. The brothers' partnership went bankrupt in Amsterdam by October 8, 1608, and they absconded. In order to allow them to recover financially and pay off their debts, the States of Holland granted *sûreté de corps* against arrest by creditors for a period of two months, which was extended five more times, the last on March 14, 1611 for a period of six months. Fernão

⁴⁹ SR Nr. 408.

⁵⁰ During the next three years, the Moura brothers would continue to strive to save their assets in the Portuguese world: SR Nrs. 467, 482, 536, 541.

Duarte de Moura passed away on April 17, 1612, Antonio Rodrigues de Moura had moved to Italy, and only Lopo Rodrigues de Moura remained alive in Amsterdam.⁵¹

Correspondents of the Moura brothers, the father and son Gaspar Nunes and Henrique Alvares, absconded for longer: four years in Antwerp. Meanwhile, their creditors in Amsterdam proceeded against them in the Southern Netherlands, France and even in Portugal, notwithstanding the state of war between the Republic and the Iberian Crown⁵². One of the creditors was the same Jaspas Quingetti, who had taken bills drawn by the Moura brothers on Nunes and Alvares. Creditors were less lenient towards Nunes and Alvares than they were towards the Mouras. Probably because of the former's longer absconding. Along with other creditors, Quingetti empowered people in Lille and The Hague to sue and arrest them as well as seize their goods.⁵³

On top of their financial troubles, or rather as an offshoot of them, Nunes and Alvares were taken prisoner by the authorities in Antwerp for Judaizing, and banished from the country. They succeeded in obtaining a permit from the sovereign of the Low Countries to remain there for a couple of months longer, which was renewed because Nunes's advanced age allegedly did not allow him to travel. Yet even after the expiration of the permit, they refrained from leaving the Habsburg Low Countries. They preferred to live a reserved and unstable life in Antwerp, living on others' favor, and even at risk of religious persecution, rather than facing prison for their debts in the northern Netherlands⁵⁴.

⁵¹ SR Nrs. 259, 259 n. 23, 293, 305, 582.

⁵² SR Nr. 297.

⁵³ SR Nrs. 463, 464.

⁵⁴ Samuel, "Portuguese Jews," pp. 201-230.

In the meantime, they secretly traveled to The Hague in attempt to obtain a *sûreté de corps* to protect them against attempts of their creditors to arrest them while trying to reach an agreement with them. After reaching a settlement with their creditors in Antwerp, they went to the Netherlands by February 15, 1611. They asked Quingetti and his fellows creditors in Amsterdam to let them comply with the agreement made in Antwerp and settle their accounts with the Moura brothers. Jaspas Quingetti did not just refuse, but two days later empowered a resident of Rotterdam to arrest Henrique Alvares and his father and demand payment of the bills from them.⁵⁵

About a year later, the father was spotted in Dordrecht (Holland) and arrested there⁵⁶. As a result, Henrique Alvares reached an oral agreement with Quingetti and Gaspar Coymans – scion of an affluent family in Antwerp that settled in Amsterdam – on both the outstanding debt and the expenses incurred during his father’s imprisonment (probably the fees of the warden who went to arrest him, his bed and board in jail, etc.) This agreement was not to influence the creditors’ accord with the Moura brothers. Henrique Alvares gave them a rough and a cut inlaid diamond as a pledge.⁵⁷

Father and son failed to repay Quingetti and Coymans, and two years later the creditors auctioned off the diamonds in Amsterdam⁵⁸. Two months after Nunes and Alvares reached an agreement with Quingetti and Coymans, they settled with a third creditor in Amsterdam, Gaspar Rodrigues, who was the payee of two other bills of exchange that were drawn by them on the Moura brothers. According to the agreement,

⁵⁵ SR Nr. 466, 468.

⁵⁶ SR Nr. 520.

⁵⁷ SR Nrs. 517, 518, 519. On Coymans: O. Guelderblom, *Zuid-Nederlandse kooplieden*, p. 298.

⁵⁸ SR Nrs. 772, 775.

the creditor would no longer refer to the letters issued by the Chancellery of Brabant, but would keep his claims on the Moura brothers.⁵⁹

Powers to litigate

Portuguese judicial sources are not extant, and only a few Dutch appeal proceedings in commercial cases to regional and central courts remain.⁶⁰ Yet notarized powers of attorney are extant. Among the 1,130 notarial deeds from Porto mentioning New Christians between 1595 and 1618, 541 were powers of attorney (48%); and 132 of all powers of attorney (24%) had a lawyer or a solicitor as one of the grantees.

Chart 1

⁵⁹ SR Nr. 534.

⁶⁰ ADP, *Judiciais: Tribunal da Comarca do Porto, Tribunal da Relação do Porto*; ANTT, *Feitos Findos, Casa da Suplicação*; Gelderblom, *Cities*, 130–33.

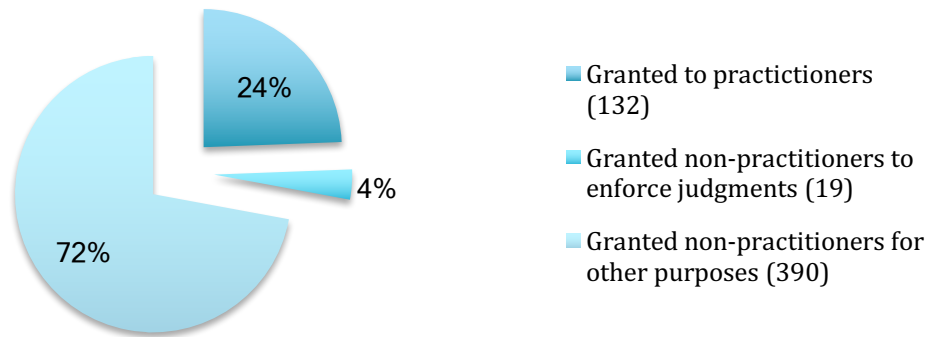
Powers of attorney among notarial records mentioning New Christians in Porto (1595 - 1618)



Source: dataset

Chart 2

Powers of attorney mentioning New Christian registered in Porto (1595 - 1618)



Source: dataset

The fact that the laconic powers of attorney were general ones had the advantages that they could be used in several different cases, and would not be interpreted restrictively. Granting powers of attorney to practitioners does not necessarily imply that a lawsuit was in progress or about to be filed; procurations might have been granted preventively. Still, one would not waste his time and money coming before a notary and granting powers of attorney to a lawyer or a solicitor unless he anticipated he might need to resort to it.

Inquisition process files support such inference. During the defense stage of the proceedings, defendants often strove to prove that all those who they suspected to have denounced them hated them deadly and, therefore, would falsely accuse them. Litigation deriving from trading disputes was often mentioned as a source of hatred, of which the defendant named witnesses.

On October 27, 1620, a judicial notary produced a certificate to confirm to the Inquisition of Lisbon the legal procedures that Alvaro de Azevedo had taken against Pedro Alvares Vitória. The former claimed to the Inquisition that owing to that dispute the latter would falsely accuse him. The notary wrote that he held in his files some proceedings containing the complaint that Alvaro de Azevedo had filed before the royal judge of Oporto over the proceeds of a travelling agency arrangement to Brazil on board of the ship of Antonio Tomé.

The claimant requested that the defendant to provide a guarantor, render accounts and pay the outstanding sum. The judge decided that the defendant should provide a guarantor for the payment of what was to be found due or else be arrested. To comply with the decision, a warden and a clerk went to the home of the defendant's mother on August 17, 1617. They asked him to provide a guarantor. Since he did not, they brought him to the city's prison.

On the next day, the defendant's brother stood surety for him, and he was released. Then, Alvaro de Azevedo filed another complaint requiring the judge to summon the defendant to render accounts. The day after, August 19, both plaintiff and defendant came before the judge, and said that they had made accounts and found that Pedro Álvares Vitoria owed 159,350 réis to Alvaro de Azevedo. The judge then condemned the guarantor to pay that sum and the legal costs.⁶¹

An addition 19 powers of attorney (19/541) were granted in Porto to non-practitioners to enforce judgments. These deeds clearly indicate a judicial response to a lawsuit. All such powers of attorney, both those authorizing practitioners to take legal

⁶¹ IL 728 , fls. 154-5

steps and those appointing non-practitioners to enforce judicial sentences, amounted to 151 deeds, a considerably large figure. Just to compare, only 60 freight contracts that mentioned New Christians were identified for the same period of time. Powers of attorney granted to non-practitioners also entitled grantees to go to court if necessary.

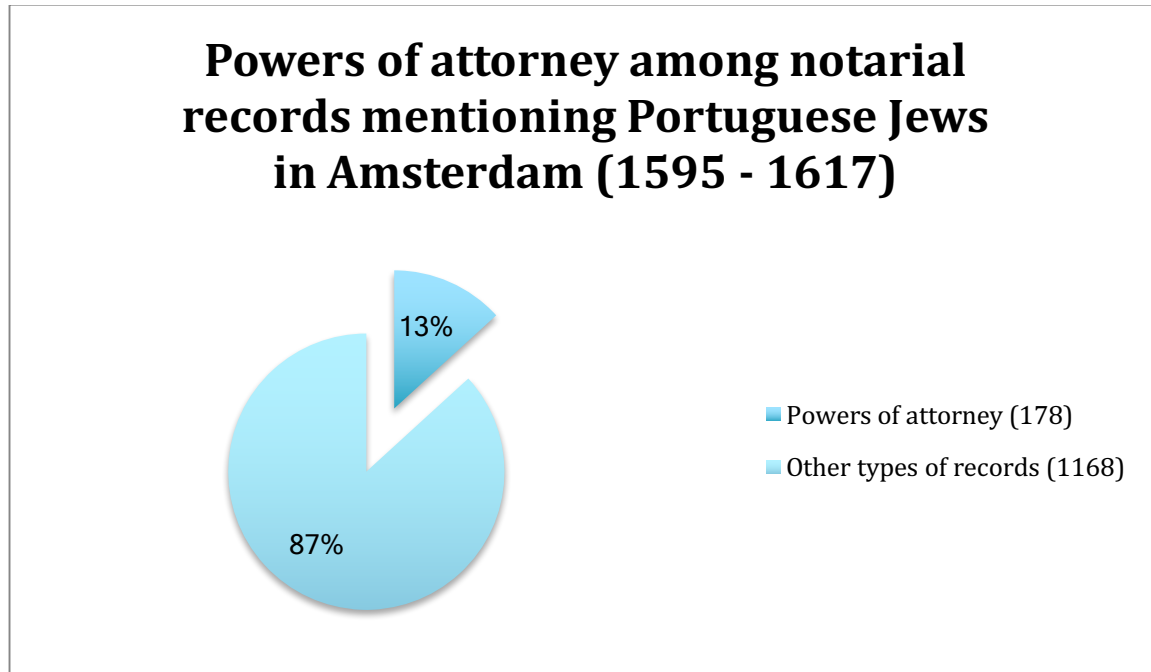
As for Amsterdam, the journal *Studia Rosenthaliana* published 1,346 notarial records of different types referring mainly to Portuguese Jews⁶² registered between 1595 and 1617 (including). Among these records, 178 are powers of attorney (13.22%) [Soon I will have around 700 powers of attorney up to 1627]. Amsterdam's notarial records present a lower proportion of powers of attorney compared to Porto's, which does not mean that they were less used in Holland. It merely reflects the fact that a large share of the deeds in Amsterdam included types of instruments that were not registered by Porto notaries, such as the abandonment of goods to insurers, protests of bills of exchange and notices.

Among those 178 powers of attorney, 30 were granted to lawyers, solicitors and officers at the municipal and provincial courts, as well as at the boards of the different admiralties and the East Indies Company, the Chamber of Assurance and the Commissioner of Small Causes. Another two powers of attorney others refer to ongoing cases. Eleven other powers of attorney empowered grantees to prosecute, arrest debtors and sequester goods. Forty-nine other powers of attorney involved actions that necessitated the intervention of formal institutions, namely release of goods seized by privateers or authorities (30), bankruptcies (11), restitution of salvaged goods (6), and

⁶² This series includes not only Portuguese Jews and New Christians living in Amsterdam, but also Portuguese Old Christians sojourning in this city, and individuals of Portuguese origin in various other places.

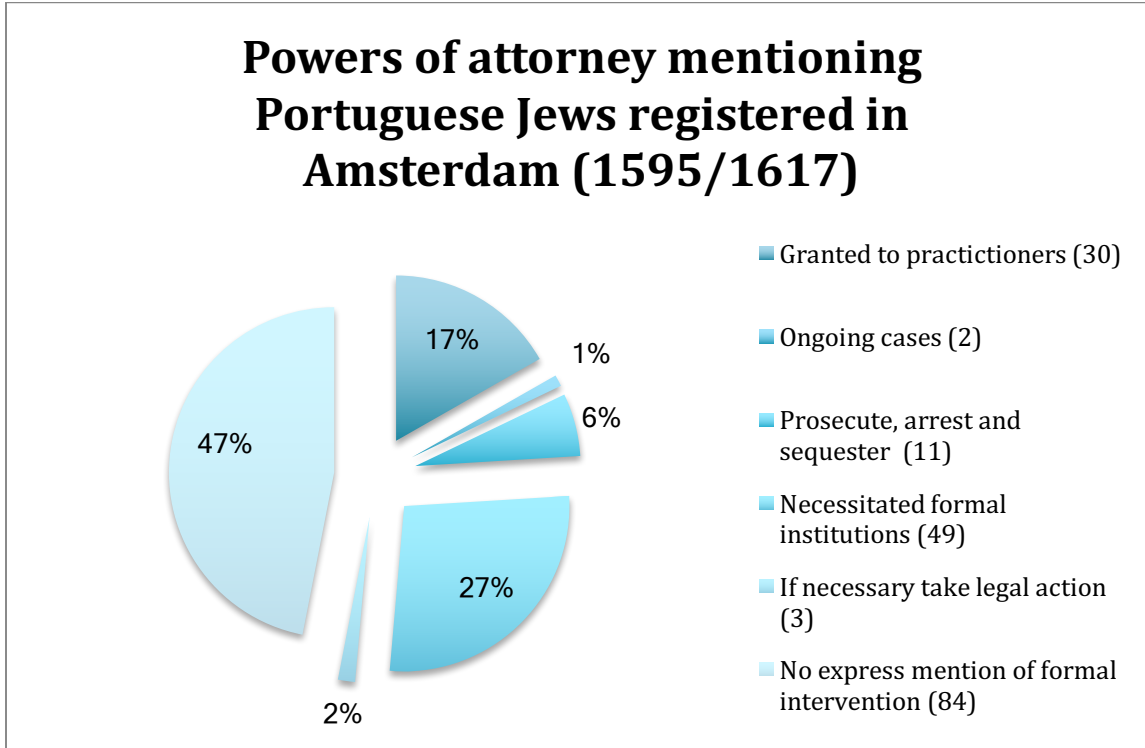
recognition of marriages (2). Thus, a total 92 powers of attorney, or over half of all powers of attorney, directly or indirectly reveal the involvement of formal institutions.

Chart 3



Source: dataset

Chart 4



Source: dataset

Powers of attorney granted to non-practitioners in Amsterdam also suggest to entitle grantees to go to court if required, and another three powers of attorney explicitly allow the grantees to take legal action if necessary.

Notarial records registered in Brazil during the studied period are not extant, However, the renowned New Christian planter, merchant, tax farmer and writer, Ambrosio Fernandes Brandão claimed to have appealed to the Court of Appeals in Salvador against several sentences that Pernambuco's local court had passed to his

detriment.⁶³ Moreover, several of the powers of attorney registered in Porto were aimed at suing or enforcing judgments in which one of the contending parties lived in Brazil⁶⁴.

Matters at stake

Not all powers granted to practitioners in Oporto referred to trading or financial disputes. A number of them dealt with inheritances, real estates, criminal cases, etc. Real estate, inheritances and dowries usually required special legal formalities, including power of attorney for representation. Yet in most powers of attorney recorded in Oporto, it is impossible to determine precisely what the attorneys were to procure, and whom they were to sue. Forty nine percent of the powers of attorney granted to practitioners (65/132) stated, in various ways, that the latter should simply defend all the grantors' rights both in and out of court, and at each and every court of justice in all current and future lawsuits. They should also charge and collect all that belonged to and was due to the grantor. Since 72% of these laconic powers were granted by merchants (47/65), it is reasonable to assume that the practitioners were to charge and collect mainly mercantile and financial assets.

In Amsterdam, powers of attorney were more specific about their aims, and Table 1 shows the distribution of matters that grantees were to procure among the 92 powers of attorney involving judicial institutions.

Table 1

⁶³ A.F. Brandão, *Diálogos das Grandezas do Brasil*, p. 37. On this court, mainly from a social and political point of view, see: S.B. Schwartz, *Sovereignty and Society in Colonial Brazil*, passim.

⁶⁴ ADP, NOT, PO2, l. 20, fls. 237v.-239 v. (1603-10-26); l. 31, fls. 20 -21v. (1610-1-13); l. 38, fls. 141v. - 142 (1614-6-11); l. 41, fls. 48-49 (1615-7-10); PO1, l. 140, fls. 146-146v. (1618-4-26); fls. 184v.-185v. (1618-5-19).

<i>Explicit formal intervention</i>	
<i>Matters</i>	<i>Number of POAs</i>
Privateers	31
Bankruptcy	18
Unknown	15
Insurance	6
Salvaged goods	6
Transportation	5
Family	3
Contraband	2
Sale	1
Enforcement	1
General POA	1
Inheritance	1
IOU	1
Minor offense	1
<i>Total</i>	92

Source: dataset

These matters can be classified into five categories. The first category are claims against authorities around goods and vessels seized by privateers or customs officials (contraband), or salvaged goods. The second group comprises easily verifiable claims over insurance, transportation, instruments of credit and sale. The third type are claims

difficult to verify, and involved parties with whom there is no expectation of future cooperation because they had either passed away (estate of deceased) or went bankrupt. Finally, there were a few non-commercial cases and powers of attorney to charge and collect what was owed by third parties for unknown reasons.

Table 2

<i>Explicit formal intervention</i>	
<i>Categories</i>	<i>Powers of attorney</i>
Claims against authorities	33
Easily verifiable claims	19
Complex matters and ineffectual reputation	19
Non-Commercial matters	4
Unknown matters	17
<i>Total</i>	92

Source: dataset

On the other hand, the 84 powers of attorney that do not explicitly mention the intervention of formal institutions can be classified into seven groups. The first group comprises formal authorizations for individuals to manage accounts at the Exchange Bank of Amsterdam, and to transfer shares of the Dutch East Indies Company and collect dividends from it. It also includes general powers of attorney – usually granted when the grantor was about to leave town – and appointment of agents overseas.

In a second group, powers of attorney authorize third parties to collect goods, instruments of credit and money. This second group also include powers to charge easily verifiable claims, such as bonds and protested bills of exchange, transportation matters, unpaid sales and money remittances. Some powers of attorney of this group were registered to help transfer assets to the grantee (*in rem suam*) rather than for representation in trading disputes, but would be useful if misgivings arose from debtors or authorities.

The third category includes commercial claims involving the estate of a deceased party (ineffectual reputation). A fourth category refers to problems with overseas agents. A fifth category concern real estate matters: leases, mortgages, sales etc. A sixth group comprises dowries and non-commercial claims over inheritances. Finally, there are claims against individuals for unknown reasons.

Table 3

<i>No express mention of formal intervention</i>	
<i>Categories</i>	<i>Powers of Attorney</i>
Authorization before authorities, general powers of attorney and appointment of agents overseas	23
Easily verifiable claims	19
Complex matters and ineffectual reputation	12
Claims against overseas agents	7
Real estate matters	6
Family matters	7

Unknown matters	10
<i>Total</i>	84

Source: dataset

Among the three powers of attorney allowing grantees to take legal action if necessary, one refers to transportation matters, another to problems with an overseas commercial agent, and the third is generic.

Discussion

Powers-of-attorney indicate that, on average, merchants filed only a handful of lawsuits in commercial disputes in a lifetime. About 430 adult male Jews lived or stayed in Amsterdam until 1618, and about twice this figure up to 1624.⁶⁵ Not all of them traded overseas, and only 65 are recorded having agents in Oporto and Brazil during that period. In Oporto, 92 New Christian merchants were mentioned having agents in Amsterdam or Brazil then. The total number of merchants in Oporto, including those of non-Jewish origin, did not reach twice that figure. If minor traders, retailers, grocers, fishmongers, inn-keepers, hucksters and peddlers are added, the number of families directly engaged in trade reached around 700.⁶⁶

Infrequent resort to courts could indicate that courts had indeed been effective in deterring opportunism, precluding enforcement.⁶⁷ True, powers-of-attorney were often

⁶⁵ Nusteling, “Jews,” 48; Kaplan, “Portuguese Community,” 26; Kaplan, “Impact,” n. 37 and 38; Israel, “Spain,” 1990, n. 16; Studnicki-Gizbert, *Nation*, 67–89.

⁶⁶ F.R. da Silva, *O Porto e o seu Termo*, v.1, pp. 115-7. David G. Smith estimated that Lisbon in the 1640s and 1650s was home to only around 200 people in the overseas wholesale trade: D.G. Smith, “The Mercantile Class of Portugal and Brazil in the Seventeenth Century,” p. 15.

⁶⁷ Greif, “The Maghribi Traders,” 463.

general and could serve in multiple cases, or just be precautionary⁶⁸. A better quantitative indication of the effectiveness of the legal system is the frequency of notarization⁶⁹. Although larger than the rate of empowerment of lawyers, the rate of notarized records per merchant in a lifetime is still within the range of a handful. Procedural law considered notarized document a superior kind of evidence, and more difficult to be contested. Merchants valued those advantages, and opted to register some agreements before a notary *ex ante* when they suspected they might face unusual misgivings with some stakeholder *ex post*. These included novice or unfamiliar counterparty, unusual conditions of the venture, third-party investors, inheritance or dowry money at stake, potential problems between different agents or between an agent and shipmaster or with another third party. Infrequent notarization suggest that merchants did not expect to file lawsuits because contracts were ordinarily enforced by informal reputational mechanisms. If trade were primarily governed by the legal system, merchants would protect themselves more often with better legal evidence. If they eventually did have to go to court, they would endure the transaction and opportunity costs of having to make a case with lower types of evidence, i.e, private documents and witnesses.

Litigation did not prevail because was it not very effective at least in terms of time and cost in complex cases.⁷⁰ Records appointing arbitrators and formalizing amicable settlements explicitly voice the parties' discontent with the court's capacity: "Since they [parties] were related and in order to avoid qualms, animosity, hatred, costs

⁶⁸ Gelderblom, *Cities*, 130–33. Gelderblom, 130–33; Strum, "Portuguese Jews," 295–97; Strum, "Forthcoming."

⁶⁹ Greif, "The Maghribi Traders," 465.

⁷⁰ PO2, 33, fos. 77-79; 116v.-118; PO1, 140, fos. 1-4v.; SR 212, 341. Those shortcomings of the legal system have been stressed by: Hespanha, *Cultura*, 348–49; Ortego-Gil, *Reis*, 99–100; Greif, "Fundamental Problem," 259; Studnicki-Gizbert, *Nation*, 119; Trivellato, *Familiarity*, 154, 159–62, 176, 179–80, 261–70; Vanneste, *Global Trade*, 31, 176; Rosenthal and Wong, *Divergence*, 67–98.

and expenditures, which usually are entailed by such lawsuits, whose outcome is doubtful and uncertain....”⁷¹ Often, both parties realized that if a magistrate or an arbiter was to find a resolution for their dispute, it “would not be reached without much dispute and cost.”⁷²

During this period, courts improved their expertise in commercial cases. In addition to the establishment of corporative mercantile courts or subsidiary specialized courts, civil (and common law), greater expertise was achieved by addressing mercantile matters to (impaneling juries of) merchants, stimulating arbitration and amicable settlements, requesting affidavits, opinions and assessment of merchants, and training judges and lawyers (civil and common) in trading skills.⁷³ Arguably, fairness and predictability of courts might have improved thanks to the rivalry between cities for greater share in trade and to the competition between jurisdictions for legal fees.⁷⁴ Finally, swift procedures were adopted in well documented straightforward cases⁷⁵.

Nevertheless, time was an unsurmountable challenge in cases involving bankruptcies, claims related to the estate of deceased merchants and dissolution of companies. These took longer and were less predictable even in arbitration by merchants, accountants and mathematicians, in and out of court.⁷⁶ These cases required careful examination of multiple accounts, sometimes over a long period of time, including creditors’ claims and claims against his debtors to the estate or company as well.

⁷¹ ADP, NOT, PO1, l. 140, fols. 1–4v. (1617-12-22). See also: PO1, l. 132, fols. 64v.–66 (1611-9-23); l. 140, fols. 28–30v. (1618-1-23); PO2, l. 20, fols. 208–210 (1603-10-6); l. 37, fols. 122–123 (1613-7-31); l. 34, fols. 13–16 (1612-1-27); fols. 133–134v. (1612-3-31).

⁷² PO1, l. 132, fols. 64v.–66 (1611-9-23).

⁷³ See notes in section I, and Fernández-Castro, “Juzgar”, pp. 127- 256.

⁷⁴ Gelderblom, *Cities*, p. 140; Ogilvie, *Institutions*, pp. 305, 309-10; Fernández-Castro, “Juzgar”, pp. 215-6; Basile et al., *Lex mercatoria*, pp. 151-162.

⁷⁵ See note 27.

⁷⁶ Fernández-Castro, “Juzgar”, pp. 168-9, 357-363. See also: Bernstein, *Opting out*, pp. 150-1, 153-4.

Sometimes, it also required determining the priorities and shares in the payments.⁷⁷ Finally, courts were not the primary mechanism in the governance of trade because they could not punish inattention that did not breach legal, customary or contractual specifications; nor could reward accomplishment.⁷⁸

By classifying the different matters for which trade-related professionals sought judicial remedy, data reveal that they turned to litigation mostly in two situations. The first were easily verifiable claims, which reduced the transaction and opportunity costs of litigation; [while litigation in such cases could reduce the frequency of costly multilateral punishment, as Greif suggests.](#)⁷⁹

The second were complex matters in which reputation mechanisms, both bilateral and multilateral, were ineffectual since one of the players could not play again, at least soon, owing to bankruptcy or death.⁸⁰ By adjudicating the latter group, courts also helped mitigate the end-game problem in the informal reputational mechanisms. According to game theorists, if players expected a repeated game to end, they would not expect punishment for misconduct in the next stage, and would cheat in the last period. Anticipating lack of cooperation in the last period, players would not cooperate in the earlier periods as well.⁸¹

⁷⁷ [note]

⁷⁸ Trivellato, *Familiarity*, p. 175; Goldberg, [xxx].

⁷⁹ Greif, [“The Maghribi Traders,”](#) 466.

⁸⁰ A similar pattern, including the termination of companies, seems to have occurred in the sentenced passed by the Grand Conseil of Malines in lawsuits involving foreign merchants between 1470 and 1550; in the lawsuits involving Flemish merchants before the Court of Holland between 1580 and 1630; the Sephardic Ergas family at the governor’s court of Livorno; at the Real Audiencia de Sevilla and at the Audiencia de la Casa de la Contratación: Gelderblom, *Cities*, pp. 128, 130; Trivellato, *Familiarity*, pp. 160-2; Fernández-Castro, “Juzgar”, pp. 214-6, 246-256. See also Greif, [“The Maghribi Traders,”](#) 464.

⁸¹ Greif, *Institutions*, pp. 434-40.

In our case, traders would have been tempted to defraud associates who they knew were seriously ill, elderly or in (non-malicious) financial distress. Likewise, the latter would be lured to defraud the former. Anticipating that they would be eventually deceived, both would refrain from entering into profitable exchange. By enforcing claims involving the estate of bankrupts and late traders, the legal system mitigated that problem, and helped reduce the disruptive effects of rumors about illness and shortfalls on the market.⁸² Associates knew that if they cheated in the last period, heirs and co-creditors could enforce at least some of their rights against them, and vice-versa. By mitigating the end-game problem, courts supplemented and underpinned the reputational mechanisms.

By highlighting that courts were able to verify complex matters, data indicate that courts could do the same about other complicated claims such as commercial agency arrangements. Yet suing over complex accounts would take long and cost much. That is probably the reason why seven out of the eight powers of attorney against agents overseas claim that the latter received goods from their principals long ago, but neither sent the proceeds back nor properly accounted them for. It was easier to check whether a good has been sold or kept at the agent's hands than it was to verify if the proceeds have been misrepresented. Grantees were empowered to demand the agent to render account of the goods and to return the capital or the proceeds. In one case, the grantee was to take legal action if necessary, and in another, one of the grantees, alongside with the son of the Azorean principal in Amsterdam, was a Portuguese lawyer.

⁸² [Safley, \[xxx\]](#); [De Ruyscher, \[xxxx\]](#), [Fernández-Castro, “Juzgar”, pp.\[xxx\]](#).

That does not mean that claimants could not produce evidence of misrepresentation or that a court could not confirm such evidence. Yet by doing the claimant would undertake higher transaction and opportunity costs. Even more so, if claims referred to misrepresentations that took place in different ventures in the course of a long period of time. If verification of complex successive operations was costly, litigation made little sense when the value of the case was smaller than the transaction and the opportunity costs of proceedings⁸³. All the more so, if the other party had few seizable assets.⁸⁴

As a result, in those cases, parties often found renegotiation to be a better, even if not optimal, solution⁸⁵. Two former travelling agents litigated with a merchant over the proceeds of an enterprise from Oporto to Brazil. An appeal decision did not appease the parties, and they decided to bring the dispute to arbitration. Both parties agreed that the outstanding debt to be assessed would be entrusted to the same agents in a new venture⁸⁶. Another merchant prosecuted his travelling agent with embezzlement for bringing unsatisfactory proceeds from Bahia and for returning to Lisbon instead of Oporto. Through another Oporto-based merchant, the agent's brother asked the principal not to sue or defame his brother but to settle and take some money that certain female street vendors owed him.⁸⁷

Merchants also preferred to defer litigation over larger sums in complex transactions and long-standing relations until losing hope in solving the dispute

⁸³ Kessler, *Revolution*, 110.

⁸⁴ Greif, "Commitment," 747.

⁸⁵ Bernstein, "Opting Out," 129, 136 nn. 46, 150; Petit, *Historia*, 54–55, 81, 131; Ortego-Gil, *Reis*, 94–96; Fernández-Castro, "Juzgar," 158, 363; Gelderblom, *Cities*, 104–5; Strum, "Portuguese Jews," 308–20.

⁸⁶ PO2, 48, fos.110v.-112v.

⁸⁷ IL 11260, fo. 88.

informally, because litigation might be detrimental to the plaintiff. Filing a lawsuit might require disclosing confidential information. It might also signal that the plaintiff was a litigious and vindictive person, which could affect his ties with mutual associates and social connections. If the other party was in financial distress, suing him would hinder his access to credit, and prompt other creditors to rush to cash in their claims. That would harm not only the plaintiff but other creditors, and deteriorate the plaintiff relations with the latter. If the expectations of compensation of both parties were not too far apart, they would usually try to renegotiate, directly or via mediators. That was particularly interesting if they still foresaw profitable exchange, even if at a lower volume of trade, and the reason of the dispute had not been outward embezzlement.⁸⁸

Even if they wanted to terminate the relation, they often sought a discreet outcome. Hence, the Oporto-based New Christian merchant Gonçalo Mendes Pinto asked his attorneys in Bahia to do their best not to shame Jeronimo de Chaves – with whom he had had a partnership for over four years – while settling their common accounts. If the former refused to turn over any account or asset, they should “neither force nor embarrass him into doing so”.⁸⁹

When reputational mechanisms failed and non-coercive means did not work, merchants turned to litigation. The fact that most powers of attorney granted against overseas agents do not expressly mention the intention of suing them or authorize grantees to take legal action, does not mean that litigation was not considered an option

⁸⁸ Gelderblom, *Cities*, pp. 104-5; Trivellato, *Familiarity*, p. 159; Fernández-Castro, “Juzgar”, pp. 153-9, 161 n. 395; Xabier [xxx], Petit [xxx], Ribeiro [xxx], Kessler [xxxx], Goldberg [xxx] Bernstein, “Opting out”, pp. 136-7.

⁸⁹ PO2, l. 33, fls. 77-79 (1611-11-8): “*nam da poder Elle Constit. e que ho obriguem nem escandalizem e assi outorgou.*”

there as well. The grantees or grantors of those powers were not legal practitioners themselves and lived or stayed in faraway places: La Rochelle, Rouen, Oporto, Brazil, the Azores, Florence, Morocco etc. When they could not settle the matter peacefully, they might choose a local practitioner.

If the grantor did not anticipate the latter possibility, he would not have bothered appearing before a public notary and registering a power of attorney against his agent. Instead, he would have written two letters of advice: one to his agent and another to his representative, asking the former to deliver assets to the latter, and the latter to collect them and give a release to the former. Private documents and other notarial records expressly confirm that the rule about transferring assets from one agent to another was through letters ⁹⁰. The lower rate of powers of attorney indirectly corroborates that.

Conclusions

The development of the legal system in enforcing contracts during the Commercial Revolution did not substitute, and was not meant to, the informal reputational mechanisms but rather to supplement and reinforced them. Judicial enforcement was mostly resorted to when reputational mechanisms were either ineffectual or had failed but the transactions and opportunity costs of litigation were low.

By addressing cases involving the estate of bankrupt or late traders, judicial coercion mitigated the end-game problem in reputational mechanism, and added stability to exchange. Furthermore, the ability of legal system to impose sanction on individuals and their goods enhanced the informal mechanisms by limiting the future income an agent expected to gain from embezzling large sums from one or many principals. If

⁹⁰ Strum, *Sugar trade*, p. 447.

agents embezzled all the smaller sums entrusted by several principals, they would have more people endeavoring to track them down, making the legal system credible. On the other hand, the reputational mechanisms underpinned the legal system by threatening those found guilty with economic marginalization (and social sanction within the diaspora).

Judicial and reputational mechanism coevolved. By accepting informal evidence of transactions, private and oral, the legal system was designed to be a second-order mechanism. Trade would take course mostly privately and informally, and so it would be supported. Only when the informal mechanisms failed or could not work, merchants would turn to the costlier legal verification and enforcement⁹¹. To better count on such remedy, a more formal recording of transactions, notarization, collaterals, guarantors, public certificates of weights, protest for non- delivery, acceptance or payment, affidavits and assessments functioned like an option. Their costs were all more sensible the more likely was the resort to the legal system to be expect even if not owing to mistrust between principal and agent⁹². Nonetheless, the effort spent in recording transactions, even if privately, in standard, widely accepted, and legally admissible formulae clearly indicates that litigation was always considered a possibility⁹³.

In fact, the reputational mechanisms that primarily supported trade in this study case depended on judicial supplementation.⁹⁴ The prosopography shows that a mechanism that conditioned economic incentives and sanctions to one's professional reputation across the different diasporas plying this route predominated in simpler,

⁹¹ Bernstein, "Opting Out," 145; Greif, "Commitment," 738, 745–47; González-de-Lara, "Secret," 268–69.

⁹² For misgivings among the parties: Costa, "Informação," 117–18.

⁹³ Gelderblom, *Cities*, 101, 139.

⁹⁴ Strum, forthcoming.

smaller, and shorter transactions (easily verifiable)⁹⁵. Since the incentives of this professional mechanism were not homogeneous across all marketplaces and diasporas, it was seldom supplemented by litigation.

In contrast, merchants preferred another reputational mechanism that relied on both social and economic constraints within the diaspora to govern more complex, larger, and longer transactions, whose details were more difficult to follow (observe) by outsiders. Diaspora members, however, were not expected to refrain from transacting with outsiders, but the professional mechanism significantly limited the alternatives for insiders who had misconducted. Furthermore, the diaspora's social incentives depended less on homogenous transactions, but rather on the maintenance of its identity and density, and multi-stranded ties within it.⁹⁶ Within the diaspora, economic punishment, instead of ostracism, involved losing preferential treatment as agents given to insiders. In a considerably competitive market, this was an important comparative advantage, particularly to less inexperienced and modest traders.

Thanks to judicial supplementation and the professional mechanism underpinning, the diaspora mechanism predominated in complex transactions despite this diaspora's structure being not as small, close and homogeneous as social scientist link to efficient constraints⁹⁷. Covering a few generations past the surveyed period, the

⁹⁵ Studying three Portuguese Jewish merchants in Amsterdam, Roitman stressed their relations with outsiders in more verifiable transactions: partnership with residents in the same center, short-term agency arrangements, debt collection, insurance, credit, forward contracts and remittance of funds: Roitman, *Same*, 145–219. My propography reveals that these three merchants had only 14.3% outsiders (2/14) in resident complex arrangements in Oporto, Pernambuco and Bahia. On relations with outsiders involving small sums or simple transactions in other contexts: Gelderblom, *Cities*, 80–81; Goldberg, *Trade*, 141–42; Lamikiz, *Trade*, 137, 152; Aslanian, *Indian Ocean*, 199, 223.

⁹⁶ Swetschinski, "Portuguese Jewish Merchants," 215–21, 273–75; Kaplan, "Portuguese Community."

⁹⁷ Gluckman, *Judicial Process*, 19–20; Cohen, "Cultural Strategies," 267–7, 274; Coleman, "Social Capital," S102–9; Burt, *Structural Holes*, 1992, 14, 18–20; Burt, "Structural Holes," 2001, 50–52; Granovetter,

prosopography comprises more than 5,000 individuals living mostly in Oporto but also as far as India, Mexico, Poland, and Turkey. About 430 adult male Jews lived or stayed in Amsterdam until 1618, and about twice this figure up to 1624; whereas more than 250 New Christians dwelled in Bahia during that, the preceding, and the following generations. Sources also and indicate a high geographic mobility.⁹⁸ Furthermore, intermarriage was not unusual in Oporto and especially in Brazil. Religious beliefs and identity sometimes varied within the same family not only among New Christians⁹⁹ but even in Amsterdam. There, several diaspora members remained in the fringes of the community, and a number presented nonconforming attitudes and beliefs. Some went back to the Catholic World at great risk, sometimes for good. A few years after the examined period, the Jewish community started using excommunication to confessionalize its members into rabbinical Judaism¹⁰⁰.

This study case raises a number of important questions. It highlights the coevolution of inclusive contract enforcement institutions such as western courts alongside particularistic ones, instead of the supersession of the former by the latter. To better evaluate the impact of the development of judicial enforcement in the governance of overseas trade in pre-industrial times, a comparative effort is required. It requires

“Impact,” 34–35, 42; Granovetter, “Problems,” 35–36, 43–45; Greif, “Commitment,” 736; Greif, *Institutions*, 445; Greif, “Contract,” 536, 539–41; Greif, “Fundamental Problem,” 273; Merry, “Rethinking,” 64–66, 69–70; Bernstein, “Opting Out,” 138–43; Studnicki-Gizbert, *Nation*, 67–121; Trivellato, *Familiarity*, 163, 221; Lamikiz, *Trade*, 116–38, 157–60; Aslanian, *Indian Ocean*, 169–74, 200–201.

⁹⁸ Novinsky, *Cristãos Novos*, 101, 165–75. Mello (over)estimated the New Christians population in the late sixteenth-century Pernambuco at 900: Mello, *Gente*, 6–7. See also: Nusteling, “Jews,” 48; Kaplan, “Portuguese Community,” 26; Kaplan, “Impact,” n. 37 and 38; Israel, “Spain,” 1990, n. 16; Studnicki-Gizbert, *Nation*, 67–89.

⁹⁹ A fairly comprehensive bibliography on this topic is found in: Saraiva, *Marrano Factory*, IX–XIV, 231–341. See also: Bodian, *Hebrews*, 18; Novinsky, *Cristãos Novos*, 60–71.

¹⁰⁰ Kaplan, “Social Functions,” 111–55; Kaplan, “Impact,” 61–62; Kaplan, “Travels”; Bodian, *Hebrews*, 32–33; Israel, “Spain,” 1990, 362–68; Israel, “Manuel”; Salomon, *Primeiros portugueses*, 21 ff.; García-Arenal and Wiegers, *Hombre*.

weighting this case against other cases of judicial enforcement across different borders and oceans, and the interrelation between litigation and informal enforcement mechanisms. Future research should also appraise to what extent the social embeddedness of judges and other judicial authorities affected adjudication in commercial matters.

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