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XXIX

COMPANIES AND COMPANY LAW IN LATE MEDIEVAL
AND EARLY MODERN EUROPE

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PEETERS

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A BUSINESS TRUST FOR PARTNERSHIPS? EARLY CONCEPTIONS OF COMPANY-RELATED ASSETS IN LEGAL LITERATURE AND ANTWERP FORENSIC AND COMMERCIAL PRACTICE (LATE SIXTEENTH- EARLY SEVENTEENTH CENTURY)¹

Dave DE RUYSSCHER

1. Introduction

In 2006, Henry Hansmann, Reinier Kraakman and Richard Squire argued in a seminal article in *Harvard Law Review* that throughout history practices and rules in support of ‘entity shielding’ have been as important for the development of autonomous business ventures as those that promoted the limited liability of investors. Entity shielding, or asset partitioning, entails the protection of company-related assets from claims of personal creditors of partners/owners, whereas limited liability prevents creditors of the company from bringing a suit against investors/owners. The mentioned authors underscored that the costs involved in entity shielding were for a long time too high to allow efficiency of the legal technique. These costs foremost concerned the fact that investors had to loosen their grip on the invested sums or assets, when separating them from their own properties, and that they had to rely on those working with their money. Because opportunistic or egotistic behaviour of the latter proved difficult to remedy, the benefits of asset partitioning were considered lower than its disadvantages. It was, according to Hansmann, Kraakman and Squire, only from the nineteenth century onwards that professional accountancy and an improved judicial approach in court cases in which companies were involved made it possible to overcome these deficiencies.² These arguments have been criticized as being too much focused on the American corporation. Some have pointed to the fact that late-medieval and early modern continental forms of

¹ This text is a summary of first results from ongoing research regarding the relationship between academic doctrine and local law, as to partnerships, in the seventeenth and eighteenth centuries (Fund of Scientific Research – Flanders, postdoctoral project 2010–2013).

² H. HANSMANN, R. KRAAKMAN and R. SQUIRE, “Law and the rise of the firm”, *Harvard Law Review* 2006, 1333-1403.

business organisation, such as the *commenda*, enabled a combination of investments with guarantees for both creditors and investors.³

Even though the abovementioned article of Hansmann, Kraakman and Squire has rightly emphasized the importance of entity shielding, its historical arguments, and also those that were brought up in critiques on the article, must be nuanced. Their descriptions of commercial law between approximately 1200 to 1800 do not always correspond with how legal historians tend to look at the complexity of commercial law in that period.⁴ Moreover, the abovementioned publication takes as its central theme the efficiency of foremost legislative actions and of the commercial practice that responded to them. Most attention is being paid to corporations and chartered companies and not to contractual and private firms and partnerships. In this regard, the *commenda* is usually, and among historians and legal historians alike, considered to have been the predecessor of the chartered, state-organized companies that were set up at the beginning of the seventeenth century. The *commenda* is usually regarded as an innovation that was crafted in mercantile practice and as having supplemented or replaced features of the late-medieval academic law regarding *societates* that were unwieldy for business (e.g. personal and unlimited liability of (working) partners; no ‘veil’ between personal and company-related properties). However, during recent years, more attention has been paid to late-medieval and early modern scholarly legal rules on *societas* that allowed for a modest distinction between what was of or for the company and those properties that the partners owned personally and which were deemed not to be involved in the partnership.⁵

In this paper, a case will be made for a profound influence of doctrine, of legal literature, on local legal practice with regard to the legal abstraction that was required in order to construe ‘the company asset’ for partnerships. Indeed, in the early seventeenth century, legal doctrine started rephrasing earlier scholarly views on the ‘*capitale*’, or ‘*corpus societatis*’, which were concepts that had been applied to relations between partners. This was done in order to give partnerships more weight, in terms of real rights and also with regard to contracts with third parties.

³ E.g. N.R. LAMOREAUX and J.-L. ROSENTHAL, “Entity shielding and the development of business forms: a comparative perspective”, *Harvard Law Review Forum* 2006, 240.

⁴ Emphasizing that commercial law was a blend of commercial usages, customs, ordinances and – to a limited extent – doctrine is J. HILAIRE, “Réflexions sur l’héritage romain dans le droit du commerce au Moyen Âge”, *The Legal History Review* 2002, 213-228.

⁵ R. MEHR, *Societas und universitas: Römischrechtliche Institute im Unternehmensgesellschaftsrecht vor 1800*, (*Forschungen zur neueren Privatrechtsgeschichte*, XXXII), Cologne, 2008, 100-101 (hereinafter referred to as: MEHR, *Societas und universitas*). Exploring the consequences of partnerships with regard to real rights is S. BLATH, *Societas sive communio. Zum Begriff des Personengesellschaftsvertrags vom Humanismus bis zum 19. Jahrhundert*, (*Schriften zur Rechtsgeschichte*, CXLVIII), Berlin, 2010 (hereinafter referred to as: BLATH, *Societas sive communio*). See also, for comparable research regarding partnerships in common law, J. GETZLER and M. MACNAIR, “The firm as an entity before the companies act”, in P. BRAND, K. COSTELLO and W.N. OSBOROUGH (eds.), *Adventures of the Law. Proceedings of the Sixteenth British Legal History Conference*, Dublin, 2005, 267-288; J.S. ROGERS, “Sobre los orígenes del moderno derecho inglés de sociedades”, in C. PETIT (ed.), *Del ius mercatorum al derecho mercantil*, Madrid, 1997, 325-326.

In the first decades of the 1600s, what had been acquired for a partnership came to be considered as being distinct from personal assets of partners. These changes in legal literature were reflected in the legal practice of the city of Antwerp. Its urban law was permeated with civil law also with respect to partnerships. Many rules went back to the *ius commune*, and also in court practice advocates frequently cited writings of civil law in order to answer questions that had been left open by the texts of Antwerp law. The views of legal practitioners evolved, as did the ideas in legal literature. In this paper, the coming into being of a concept of ‘company assets’, of a ‘company fund’, in legal doctrine, and in the Antwerp legal and mercantile practice of the early seventeenth century is examined.

2. Partnerships in Antwerp law, legal and mercantile practice (sixteenth century)

In the first years of the 1600s, Antwerp’s earlier status of *emporium*, of a hub for international business, was seriously damaged. Since 1585, tolls on in- and outgoing traffic over the river Scheldt had hindered its firms from doing and developing business. The emigrations following the religious and political unrest in the Low Countries at around that time, too, resulted in a gradual reorientation of Antwerp-based trade towards other ports in continental Europe.⁶ This economic and political background explains to some extent the changes in the Antwerp urban law of this period. In 1608, a new collection of rules of law that were applied by the Antwerp City Court was written. It was fundamentally different from previous compilations of Antwerp law, in the sense that it stipulated more formal requirements for mercantile contracts and it provided many more substantial articles of law on commercial agreements. The 1608 collection listed thirty-nine sections regarding partnerships, among them mandatory prescriptions (chapter 9, volume 4).⁷ The 1582 compilation had only eleven sections on this theme (chapter 52), most of which served as non-mandatory default rules in case the partnership contract lacked detailed provisions.⁸ Quite remarkably, not even the more extant 1608 collection

⁶ M. LIMBERGER, “‘No town in the world provides more advantages’: economies of agglomeration and the golden age of Antwerp”, in D. KEENE and P. O’BRIEN (eds.), *Urban achievement in early modern Europe. Golden ages in Antwerp, Amsterdam and London*, Cambridge, 2001, 39-62; A.K.L. THUIS, “The river Scheldt closed for two centuries”, in F. SUYKENS et.al. (eds.), *Antwerp. A port for all seasons*, Antwerp, 1986, 165-273; H. VAN DER WEE and J. MATERNÉ, “Antwerpen als internationaler Markt im 16. und 17. Jahrhundert”, in W. FELDENKIRCHEN and H. POHL (eds.), *Wirtschaft, Gesellschaft, Unternehmen. Festschrift für Hans Pohl zum 60. Geburtstag*, Stuttgart, 1995, 470-499.

⁷ *Coutumes de la ville d’Anvers dites compilatae*, G. DE LONGÉ (ed.), (*Coutumes du pays et duché de Brabant. Quartier d’Anvers. Coutumes de la ville d’Anvers*, III-IV), Brussels, 1872-1874, 172-188 (vol. 4 is hereinafter referred to as: *Antwerp 1608 Costuymen*).

⁸ *Coutumes de la ville d’Anvers dites impressae*, G. DE LONGÉ (ed.), (*Coutumes du pays et duché de Brabant. Quartier d’Anvers. Coutumes de la ville d’Anvers*, II), Brussels, 1870, 392-396 (hereinafter referred to as: *Antwerp 1582 Costuymen*).

explains a lot about the liquidation of commercial partnerships. The 1608 law book only detailed that, before distribution of profits among partners, company-related debts had to be paid. This rule excluded partners from any payment out of insolvent partnerships.⁹ Other rules envisaged another situation in which a lawsuit was brought involving assets that related to a company. In that case, the assets should not be used for personal debts.¹⁰ However, it was not provided whether those assets could be taken out of the estate of the partner who was sued by the company's creditors (see further). Again, even when the whole of the Antwerp law of the sixteenth century is held up to the light, not a lot can be found on the dismantling of partnerships.

This absence of written rules of Antwerp law regarding the liquidation of partnerships, in the sixteenth century, resulted from several facts and practices. First, relatively few disputes regarding partnerships came to the attention of the Antwerp government, and they have therefore left modest traces in the documents of its City Court and City Council. This phenomenon also resulted in a relative late awareness, among Antwerp jurists, as to many legal questions involving commercial partnerships. Indeed, merchants were generally not in favour of ending a partnership or recovering debts from an associate by means of a trial. Petitions of merchants regarding such matters, which were sometimes addressed to the Antwerp City Council of aldermen, clearly demonstrate that the applicants were – as they put it – due to the circumstances ‘forced’ to seek help from the urban government.¹¹ If after many attempts partners had not been given compensation or had not received a report of the financial state of the partnership, they usually asked the Antwerp aldermen that one or two commissioners would be appointed in order to read the accounts and draw up the definitive balance.¹² Many settlements of partnership accounts, and even of disputes arising from them, were reached without the intervention of urban officials.¹³

Secondly, at the level of the judicial practice of the Antwerp City Court, claims or cases regarding partnerships were not considered as such. The dissolution of a partnership, when it led to attachments (*arrest*, i.e. seizure) and a public sale

⁹ *Antwerp 1608 Costuymen*, 180 (ch. 9, s. 15).

¹⁰ *Antwerp 1608 Costuymen*, 182 (ch. 9, s. 25).

¹¹ E.g. Antwerp City Archives (ACA), *Privilegiekamer*, No. 679, fo. 18r-v (*apostille* 4 November 1597).

¹² Applicants always asked for a commissioner ‘*uyt de Weth*’, i.e. from the bench of aldermen. See: ACA, *Privilegiekamer*, No. 679, fo. 2 (*apostille*, 14 October 1597). Sometimes, ‘good men’, which were merchants having expertise on the matter under question, would assist the commissioners. Commissioners then prepared the case file, and the final verdict was imposed by the City Court.

¹³ In some petitions to the Antwerp aldermen, it is said that attempts to reach an agreement by means of ‘good men’ had failed. E.g. ACA, *Privilegiekamer*, No. 637, fo. 72v. (*apostille*, 23 March 1566 (n.s.)). In this particular case, an appointment for negotiations had been made, but the defendant had not brought ‘good men’ with him. It was common that both parties proposed one or two merchants and that the group of ‘good men’, consisting of merchants proposed by both plaintiff and defendant, would attempt to settle the dispute. The ‘good men’ had to negotiate and to mediate between the parties, but they could not impose a verdict on them.

of assets, was never labelled in those terms. It was merely regarded as involving the concurrence and fulfilment of claims of creditors.¹⁴ Also, there was no specific type of proceeding for disputes among associates. When a partner had taken the initiative of dismantling a partnership and started a lawsuit for it, the latter had the form of a settlement ‘of accounts’. This proceeding resulted in the distribution of profits, the payment of debts, the return of invested assets, and the payment of salary to ‘factors’ (i.e. working partners being employed by the partners).¹⁵ A trial ‘in matter of accounts’ was also very common when the administration of an inheritance estate or guardianship for minors was concerned.¹⁶ Of course, this identification of partnership issues with the reading and settling of accounts followed from the bookkeeping that was in use in firms. But, also, even when no formal agreement regarding a partnership existed, for example in the case of commission trade, accounts were made between the principal and his agent. As a result, business ventures of that kind were also occasionally brought before the courts under the form of ‘a matter of account’.¹⁷

This second phenomenon also ensued from the fact that, in the urban forensic practice of Antwerp and as well among merchants residing there, a partnership was generally identified with its administrator and, as a result, the partnership itself did not really matter. Commercial partnerships were dissolved at the end of the partnership contract or following insolvency. In both cases, creditors who had not been paid filed suit for their debts against the one with whom they had signed a contract, i.e. the administrator of the company. In the sixteenth and seventeenth centuries, bankruptcy or insolvency of a partnership as such was unknown, also in Antwerp since legal personality did not exist.¹⁸ It was, in practice, the failure of the

¹⁴ E.g. ACA, *Processen*, No. E6530 (1595–96); ACA, *Processen Supplement*, No. 6056 (1577).

¹⁵ E.g. ACA, *Privilegiekamer*, No. 666, fo. 129r-v (*apostille*, 3 December 1586).

¹⁶ E.g. ACA, *Processen Supplement*, No. 4298 (1602–03).

¹⁷ ACA, *Privilegiekamer*, No. 694, fo. 148 (9 May 1608).

¹⁸ There is ample literature suggesting the contrary, with respect to chartered companies in general, and in particular concerning the *Verenigde Oost-Indische Compagnie* (VOC). However, if one reads the 1602 VOC charter closely, it is clear that the *bewindhebbers* (i.e. directors) of each chamber were held liable for the debts of that chamber, and they were even held personally liable if the sums which they had invested and which served as guarantee for their actions did not suffice. See E. GEPKEN-JAGER, G. VAN SOLINGE and L. TIMMERMAN, *VOC 1602-2002. 400 Years of Company Law*, Deventer, 2005, 23; M. DE JONGH, *Tussen societas en universitas. De beursvennootschap en haar aandeelhouders in historisch perspectief*, Deventer, 2014, 68-71; O.C. GELDERBLOM, A. DE JONG en J.P.B. JONKER, “The Formative Years of the Modern Corporation: The Dutch East India Company VOC, 1602–1623”, *Journal of Economic History* 2013, 1053. In practice, lawsuits regarding debts of the chambers of the VOC were brought against their *bewindhebbers*, *nomine officii*. They were considered to be ‘officers’. See also: H.M. PUNT, *Het vennootschapsrecht van Holland. Het vennootschapsrecht van Holland, Zeeland en West-Friesland in de rechtspraak van de Hoge Raad van Holland, Zeeland en West-Friesland (Uitgave vanwege het Instituut voor Ondernemingsrecht, LXXVIII)*, Deventer, 2010, 101. In fact, the concept of ‘legal personality’, in the sense of a corporate structure that could itself be sued for debts, has – in the civil law tradition – not been linked to commercial company types before the beginning of the nineteenth century. See M. DIESELHORST, “Zur Theorie der juristischen Person bei Friedrich Carl von Savigny” and J. SCHRÖDER, “Zur älteren Genossenschaftstheorie. Die Begründung des modernen

director of the partnership, i.e. of the books of the company which he kept, that brought about the insolvency of the firm. As a result of a common blending of personal with company-related funds and assets, insolvency of this kind prompted the liquidation of those assets that were found with the administrator, which were often for the most part but not always of the company. The claims of his associates with regard to the partnership were considered to be claims against the administrator personally, and they concurred with those of other creditors.¹⁹

It will be demonstrated that these sixteenth-century characteristics of mercantile and legal practices surrounding partnerships were for a large part congruent with the academic law of the 1500s but also that in the early decades of the seventeenth century new interpretations regarding the enforcement of debts in Antwerp made it possible to tackle problems of insolvent partnerships more efficiently than had been the case in older forensic practice and that this mimicked some new thoughts brought forward in legal literature.

In order to fully appreciate these preliminary conclusions and how things changed after ca. 1600, first it must be explained that, in sixteenth- and seventeenth-century Antwerp, the local law with regard to commercial contracts closely interacted with civil law and that this was reflected in the judicial practice of the Antwerp City Court. Jurists working in and for the Antwerp aldermen elaborated on usages of merchants, concerning agreements of commerce (bills of exchange, bills obligatory, partnership, agency, maritime insurance) and situations (insolvency, bankruptcy). The usages, practices and opinions of merchants provided the raw materials that jurists used in order to craft concrete, workable and theoretically sound norms of law. The latter were imposed by the Antwerp City Court, where the aldermen sat as judges.²⁰ In the first half of the sixteenth century, the Antwerp aldermen had only occasionally established default rules for mercantile contracts. This was done in different sources of urban law. Before the middle of the sixteenth century, the most important one was the *enquête par turbe* (*turbe* in Dutch). *Turben* were organized at the demand of litigants wanting to evidence their claim as to the existence and application of an unwritten rule, and they were held under the supervision of the Antwerp City Council. Ten or more witnesses, usually legal practitioners and many of them having a law degree, declared whether the adduced norm was urban law. Declarations made at *turben* and concerning mercantile contracts were added into the urban *turbeboeken*, which were ledgers into which testimonials

Körperschaftsbegriffs durch Georg Beseler", *Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno* 1982/83, 319-337 and 399-459.

¹⁹ E.g. ACA, *Privilegiekamer*, No. 637, fo. 5v. (28 Feb. 1566 (n.s.)).

²⁰ The Antwerp aldermen formed both the City Council and the City Court. There were minor differences between the two institutions as to their composition. In civil cases, the City Court was presided over by only one of the two royal officers residing in Antwerp, i.e. the amman, whereas the other one, the *écoutète* (*schout* in Dutch), was also a member of the City Council. Generally speaking, Antwerp norms of private law were imposed in judgments of the City Court rather than with ordinances that were issued by the City Council.

thought to be relevant were inserted. They contained the rules that the aldermen considered important to keep a record of.²¹

In these *turbeboeken*, statements of law by the Antwerp aldermen were also recorded. Such statements were drawn up only after 1550, and some of them served to establish default rules of contract that had not yet been mentioned in older texts of Antwerp law. Also urban ordinances sometimes regarded commercial situations (for example, the 1516 and 1518 ordinances on bankruptcy proceedings),²² and a few princely laws, which had been issued following requests of merchants for detailed rules, concerned the recovery of debts stemming from bills obligatory, bills of exchange and maritime insurance contracts.²³ Only starting in 1570, compilations of Antwerp urban law provided extensive and detailed precepts on most mercantile contracts.²⁴

From the *turbeboeken*, it is evident that, in the sixteenth century, partnership issues were not debated and not even in the decades in which the Antwerp economy boomed, around the middle of the sixteenth century. Only one registered statement of Antwerp law relates to partnership, and it demonstrates how much the law of the city was based on legal literature. Around 1554, the Antwerp aldermen solemnly declared (in Latin) that payment of a letter obligatory that had been made out to bearer and which had been signed ‘*nomine societatis*’ for a general partnership (‘*societas generalis*’) could be collected from any partner of that partnership, if the signing partner had had an express mandate from his associates. The certificate that was issued by the Antwerp aldermen confirmed in legal phrasing the contents of what had been stated by six legal practitioners, five merchants, among them three Genoese, and two Genoese brokers.²⁵ Other sources of Antwerp law, until about 1570, are silent on partnerships. The 1516 and 1518 urban ordinances instituting a

²¹ D. DE RUYSSCHER, “From usages of merchants to default rules: practices of trade, *ius commune* and urban law in early modern Antwerp”, *The Journal of Legal History* 2012, 3-29.

²² D. DE RUYSSCHER, “Designing the limits of creditworthiness. insolvency in Antwerp bankruptcy legislation and practice (16th-17th centuries)”, *The Legal History Review* 2008, 310-313.

²³ In the 1530s and 1540s, Emperor Charles V had issued some ordinances imposing rules on contracts of partnership, letters obligatory to bearer and bills of exchange. These laws, which mostly involved the recovery of debts, had for a large part been asked for by the community of merchants in Antwerp, and they had been confirmed by or petitioned with the support of the Antwerp aldermen. See: O. DE SMEDT, “De keizerlijke verordeningen van 1537 en 1539 op de obligaties en wisselbrieven. Eenige kanttekeningen”, *Nederlandsche Historiebladen* 1940, 16-21. After 1550, only maritime insurance remained the object of new royal legislation, which was negotiated for between the royal institutions, the Antwerp aldermen and the community of merchants of Antwerp. See: D. DE RUYSSCHER and J. PUTTEVILS, “In search for the political in political economy. Legislative talks for marine insurance institutions in Antwerp (c. 1550-c. 1570)”, *BMGN – Low Countries Historical Review* 2015/3, 25-49.

²⁴ Four compilations of Antwerp law were drafted following royal orders. The first one, of 1548, did not detail any sections on commercial agreements. The 1570 compilation was succinct in these respects, except for two chapters on maritime insurance and bills of exchange.

²⁵ ACA, *Vierschaar*, No. 69, fo. 159 (ca. 1554). The original statements to which the certificate refers have not been preserved. Because of this, but also because of ubiquitous legal terminology within the certificate, one must be cautious to deduce mercantile views from it. I thank Bram Van Hofstraeten for fine tuning my earlier estimation of the date of this certificate.

collective bankruptcy system do not refer to the rights of partners or to what should happen in case a bankrupt had both personal and company-related debts.²⁶ Other sources of law, too, reveal but few legal rules on this issue. The princely ordinance of 4 October 1540 banned earnings on blind investments in trading partnerships conducted by merchants if the investor was not formally made a partner. Speculations on profits coming from business firms had to have the form of a partnership: investors should be partners (*socii*). Whether this ordinance intended to exclude limitedly liable partners or attempted to restrict forms of deposit banking is, given the concise formulation of its sections, unclear.²⁷

Even though few rules were written down that addressed partnerships, some other norms can be found that concerned agency. A 1542 Antwerp *turbe* addressed the liability of ‘factors’, which were salaried directors of partnerships, with regard to the contracts that they signed when they had a so-called general mandate. In that case, the principle of liability of the principal was established for agreements that were concluded in his name, except for when the factor had acted maliciously or negligently.²⁸ This principle was similar to the mentioned norm regarding the liability of partners. In this period of the sixteenth century, the organising of business ventures with directors, commission trade and partnership were closely intertwined, and concepts such as ‘factor’, ‘commissioner’ and ‘compagnon/compañero’ were to a large extent used interchangeably.²⁹

The Antwerp rules of the second half of the 1500s provide a further argument as to the close relations between these notions. The 1582 Antwerp law compilation lists some articles regarding partnerships in a separate chapter that groups rules concerning partnership (*compagnie*) and (matrimonial) community. Many of them paraphrase what the contemporary civil law said on the theme. Partners could resign (s. 11) and profits had in principle to be divided equally, except if another arrangement had been made (s. 8). However, other sections of the 1582 law book clearly derogated from civil law. Section 1, for example, provided that partners were – as a general rule – held liable, *in solidum* and *pro toto*, with regard to company debts. This was not acknowledged in writings of civil law.³⁰ Section 2 stipulated that every

²⁶ Cf. *supra*, n. 22.

²⁷ *Recueil des ordonnances des Pays-Bas*, 2nd series, J. LAMEERE and H. SIMON (eds.), IV, Brussels, 1907, 235.

²⁸ ACA, *Vierschaar*, No. 68, fo. 156 (9 Nov. 1542).

²⁹ J.M. GIJÓN, “La práctica del comercio por intermediario en el tráfico con las Indias durante el siglo XVI”, *Anuario de Historia del Derecho Español* 1976 [reprinted in *Historia del Derecho Mercantil. Estudios*, Sevilla, 1999 – I refer to the latter reprint], 213, 215 and 232-234. Gijón examined contracts from the first half of the 1500s, relating to the Spanish trade in the New World, and noticed that similar organisational rules were interchangeably labelled with *factoria*, *encomienda* or *comisión*. This probably followed from the fact that the administering partner was identified with the partnership itself, as mentioned above.

³⁰ Civil law did not acknowledge a general rule of liability *in solidum* of partners for ‘company debts’. Exceptions include when the latter could be subsumed under the *actio exercitoria* or *actio institoria* or when debts had been made on the basis of a mandate and while mentioning the *nomen societatis*. In those cases, the liability of each partner was sometimes *pro parte* (when they were considered to *simul contrahere*)

partner could pursue a debt of the company, and for this rule no support could be found in the *ius commune* either.³¹

These rules elaborated on the 1554 statement of the Antwerp aldermen, but they were somewhat more vague, in the sense that they did not refer to the use of the name of company. It seems that the sections in the 1582 law book pointing to ‘debts of the company’, and not to ‘debts made when mentioning the name of the company’, were a blend of rules on partnership with others applying to factors. They were *inter alia* related to a provision in the 1582 collection confirming an older rule of Antwerp law, which was an exception to real rights and rules regarding mandate, which applied to factors. If a factor or a merchant trading on commission on behalf of a principal sold assets belonging to the latter, and in the act he transgressed his mandate (by accepting too low a price, for example), then the principal could not recover the assets from the buyer or from another party possessing them.³² A *droit de suite* was excluded. The idea underlying this norm was that when a mandate was given for the purposes of business the principal entrusted his agent with powers of appreciation, and the principal could afterwards not oppose the contracts that ensued from the agent’s judgment. This conviction was copied into the Antwerp rules of partnership as well. Every partner should respect the agreements that were made for the benefit of the partnership. According to the Antwerp law as it had been set forth in the 1554 statement, any partner in a *societas generalis* was deemed to be an agent of the others. The 1582 rules built on that premise, without mentioning it, and extended it to all types of partnership.³³

The 1608 collection of Antwerp law was much more extensive on partnerships than the 1582 compilation. In many respects, the former was stricter than the latter. The 1608 compilation provided for the first time that partnership contracts should be registered with a notary, for example, and that any claim out of a privately written partnership agreement was considered null and void.³⁴ Also, the 1608 collection clearly distinguished between a partnership contract and cooperation in busi-

but usually *pro toto* (if a reciprocal, even silent, mandate had been given to the one that had made the contract). See: W.D.H. ASSER, *In solidum of pro parte. Een onderzoek naar de ontwikkelingsgeschiedenis van de hoofdelijke en gedeelde aansprakelijkheid van vennoten tegenover derden*, Leiden, 1983; MEHR, *Societas und universitas*, 95-167, and the fragment of Van der Tanerijen’s treatise that is cited in Van Hofstraeten’s contribution on Antwerp company law (footnote 15). Secretary Henry de Moy, who was the main compiler of the 1582 Antwerp law book, knew this and explicitly mentioned that ‘the [Antwerp] rule was contrary to the written law’. See ACA, *Vierschaar*, No. 22, fo. 428. His motivation for the precept is interesting for it mentions that the Antwerp City Court had judged according to this ‘custom’ (*consuetudo*), which de Moy thought logical in matters of commerce. Please note that I consider civil law to have been stricter for the mentioned topic than Van Hofstraeten and that, accordingly, de Moy’s statement points to the *ius commune* and not merely to Justinianic law.

³¹ ACA, *Vierschaar*, No. 22, fo. 428v.

³² *Antwerp 1582 Costuymen*, 444-446 (ch. 58, s. 5).

³³ The 1582 provisions were intended for partnerships ‘regarding merchandise’ (s. 1). Other sections do not restrict the scope to partnerships between merchants or for the purposes of trade, but the comments of Henry de Moy clearly corroborate this interpretation. See n. 30 and 31.

³⁴ *Antwerp 1608 Costuymen*, 174 (ch. 9, s. 2-3).

ness that did not have this form. Only if a partnership agreement had been made, the partners were held liable for the debts made when mentioning the name of the company. If such an agreement had not been made, or if debts had been made by a partner without references being made to the company, this was not the case.³⁵ An exception to the principle that partners were held liable *in solidum* for partnership debts was made for ‘participants’ (*participanten*) who had invested but did not engage in trade. The exception was restricted to those financiers that were not mentioned in the firm’s name and who had not been defined as a partner in the partnership agreement. With the exception of this last part,³⁶ the Antwerp arrangement was clearly copied from rules in the 1588/89 Genoese urban statutes regarding *participatio*.³⁷

The 1608 law book did not have much influence, and the 1582 collection remained the most important in Antwerp. As a result, the sections that were part of the 1608 collection never gained wider recognition in Antwerp. Even though the Antwerp aldermen had ordered the use of the 1608 chapters on mercantile agreements in the Antwerp City Court, they had not been printed and their voluminous size (it contained 3643 sections) prevented that many manuscripts were made, which hindered their dispersal. Also, the cumbersome and unwieldy sections regarding formalities in trade were not welcomed. In the first decades of the seventeenth century, older rules regarding the liquidation of estates, in bankruptcies and in other situations, and the 1582 precepts on partnership continued to be applied. Newly proposed rules as to companies, which were found in new civil law literature on the subject, were combined with those sixteenth-century Antwerp rules. With this combination it was intended to address problems that arose in mercantile practice. A certain vagueness

³⁵ *Antwerp 1608 Costuymen*, 174-176 (ch. 9, s. 4 and s. 10).

³⁶ The main difference between the Genoese and Antwerp rules was that according to Genoese law a *particeps* was a special sort of *socius*, whereas according to the 1608 Antwerp rules a *particeps* was not to be considered as a *socius* and thus cannot be mentioned in the partnership contract. See also Van Hofstraeten’s text in this volume. Please note that I do not agree with his interpretation of the 1588/89 Genoese law according to which a *particeps*, who was never mentioned in the name of the business venture in which he invested, could nonetheless be working for it. According to Genoese law, and in full concordance with contemporary legal thinking, active participation brought about full liability, also on the basis of the last paragraph ‘*Qui periculo suo*’ of chapter 12, book 4 of the Genoese statutes of 1588/89. See *Statutorum civilium reipublicae Genuensis* ..., Genoa, Hieronymus Bartolom, 1589, 139-142. Moreover, I understand the 1608 Antwerp rules in the sense that a partner that was mentioned in the partnership contract as having limited liability could not be active in the partnership without incurring full (joint and several) liability. If this was nonetheless agreed on among the partners, it was *contra legem*.

³⁷ This was mentioned in the *Memorieboeken*, which served to support the contents of the 1608 law book. See ACA, *Vierschaar*, No. 28bis, ad part 4, ch. 9, s. 8. ‘... *ita expresse habent etiam statuta Genuensium lib. 4 cap. 12 art. incipit Socii...*’. The rule in the 1608 Antwerp collection has often been interpreted as reflecting a reception of ‘the’ *commenda* in Antwerp law. This can only be upheld if *commenda* is considered to be a genus type of partnership contract entailing limited liability of some partners. In historical terms, the Antwerp rule and the notes in the *Memorieboeken* referred to *participatio* and not to the Genoese *societas per viam accomenditae*. See, for literature as to the differentiation between *commenda* and *participatio*, J. HILAIRE, “L’œuf de Christophe Colomb. La commandite, du Code de commerce au Code marchand”, in A. VIANDIER et al. (eds.), *La société en commandite entre son passé et son avenir*, Paris, 1984, 167, footnote 98; MEHR, *Societas und universitas*, 175, footnote 1003.

of the mentioned 1582 articles, and the virtual absence in the Antwerp law of solutions as to the liquidation of partnerships, allowed civil law to have a great influence at this point. This is clear in the judicial practice of the Antwerp City Court and in commentaries on Antwerp law dating from the first decades of the 1600s. These source materials demonstrate how, in early seventeenth-century Antwerp, commercial partnerships were explained mainly starting from the learned law.

3. Acquisition of assets for a *societas* and its purpose: sixteenth- and early seventeenth-century civil law

In the sixteenth century, the civil law regarding *societas* still largely focused on the classical questions that had been raised in late-medieval legal scholarship. Not much attention was being paid to the consequences as to ownership, with regard to contracts that were made for partnerships, and if the issue of *dominium* was mentioned, it mostly concerned assets that were invested in the partnership. The few and succinct late-medieval rules on property acquisition by partners were also cumbersome for trade. In his commentary on the chapter in the Digest regarding partnerships (D.17,2, *Pro socio*) (1534), the Louvain law professor Gabriel Van der Muiden (Mudaeus) paid more attention to this subject and he stated that what a *socius* obtained for the partnership firm (in a *societas* for purposes of profit making) had to be shared (*communicare*) with his partners. However, the act of sharing was considered as being distinct from the acquisition (through *traditio*) itself. It was only after the ‘communication’ that an acquired asset could be regarded as *communis* to the partners, i.e. as their joint property. Mudaeus explained this by underscoring that the *actio pro socio* was *in personam*, and not *in rem*, and that the fact of being a partner did not as such yield rights to the assets bought by and delivered to partners. As a result of this, what a *socius* received by means of *traditio* after a sale was his own, even when he had paid for the bought assets with money of the partnership, and this remained so until he formally ‘communicated’ the ownership to his partners.³⁸ These views translated, with respect to real rights, the rule regarding personal rights deriving from the external relations of the partners. It was a commonly held opinion in late-medieval doctrine that *socii* were not assumed to act on behalf of one another, even though many exceptions to this principle were acknowledged. Mudaeus summarized the late-medieval literature on this issue when he underscored that *socii* were bound by a *socius* if, and only if, the latter had acted on a mandate (as *institor*) and when he had mentioned the *nomen communis (societatis)*.³⁹

³⁸ G. VAN DER MUIDEN (MUDAEUS), *De contractibus, I. Pro socio* ..., Frankfurt-am-Main, 1586, 53 (I. *si quis societatem*, Nos. 6-7) (hereinafter referred to as: MUDAEUS, *De contractibus*). Van der Muiden’s ideas were very common in his time. See, for comparable views of humanist authors, BLATH, *Societas sive communio*, 47 and 52.

³⁹ MUDAEUS, *De contractibus*, 52 (I. *si quis societatem*, No. 1).

It was foremost the *Rota* of Genoa, and the Genoese law in general, that had a great impact on the profound changes which the learned rules regarding partnerships underwent after approximately 1600. Many decisions of the Genoese *Rota*, which were published as a collection for the first time in 1582, promoted a more flexible legal attitude towards partnerships.⁴⁰ The Genoese law had absorbed many practices of merchants, by rephrasing the practices in academic legal terminology. This approach made it possible that many usages and views of merchants, on the basis of the Genoese academic reformulations, could also be adopted in other European cities of commerce, where the *ius commune* was applied, and among them was Antwerp. The innovations of the Genoese law consisted of a presumption *iuris et de iure* between partners that they were held liable, jointly and severally, for debts out of contracts that had been signed when the firm's name had been mentioned.⁴¹ It is not unlikely that Genoese law had an influence on the abovementioned sections of the 1582 Antwerp law compilation regarding partnership.⁴² As referred to above, sections in the 1608 Antwerp law book were supported with references to the 1588/89 Genoese statutes.

Equally important was the doctrine that built on the Genoese rules. In the first decade of the seventeenth century, some monographs on partnership answered questions on the status of acquired assets. In 1601, Pedro Sanz de Morquecho published a treatise regarding the division of assets from partnerships, communities and heritages, and, in 1606, Ettore Felici (Felicus) finished a book on *societas* and *communio*.⁴³ These works were known in the Low Countries,⁴⁴ and the innovative considerations and opinions mentioned in them gained influence in those regions. Morquecho and Felicius, for example, stated that the one who administered the partnership (*administrator*) had to inform the partners about the business and had to show them the accounting books of the firm, even if he could not be considered an *institor* or *procurator*.⁴⁵ Mercantile practice had indeed produced a new terminology

⁴⁰ MEHR, *Societas und universitas*, 73-76 and 154-157.

⁴¹ MEHR, *Societas und universitas*, 154-157.

⁴² The 1582 law book was printed in December 1582 and, at around that time, the edition by Marcus Antonius Bellonius of *Decisiones* of the Genoese *Rota* could have been available in Antwerp. To what extent other sources reflecting Genoese law or earlier versions of Genoese statutes were used is as yet uncertain.

⁴³ P. SANZ DE MORQUECHO, *Practica Quotidiana ... De divisione bonorum: tum societatis conventionalis & coniugalis, tum meliorationum, & hereditatum, aliarumque rerum eo spectantium ...* The first edition was published in Madrid in 1601. The best-known edition is the 1607 Frankfurt-am-Main one, which is cited hereinafter (as: MORQUECHO, *Practica quotidiana*); E. FELICI (FELICIUS), *Tractatus de communione seu societate, deque lucro item ac quaestu*, Frankfurt-am-Main, 1606 (hereinafter referred to as: FELICIUS, *Tractatus*).

⁴⁴ Both were mentioned in the catalogues of libraries of royal courts, in Holland and Frisia. See: *Catalogus librorum qui extant in Suprema Frisiorum Curia*, <http://home.wanadoo.nl/mpaginae/Cat34Hof/cathof34.htm>, and J.TH. DE SMIDT, *Catalogus oude drukken in de bibliotheek van de Hoge Raad*, Zwolle, 1988, 64.

⁴⁵ FELICIUS, *Tractatus*, 440 (XXXVIII.27); MORQUECHO, *Practica quotidiana*, 176 (IX.3). This concept of '*administrator*', in the sense of a working partner or director of a partnership, was used

(*administrator*), which was more factual than the learned concepts that had been based on fragments of Roman law (*institor, procurator*), and the former slowly replaced the latter. The references in both mentioned works to the decisions of the *Rota* of Genoa were abundant, and they served to push the older doctrine on *societas* steps further.

Especially Felicius tried to build a new framework around the Genoese insights.⁴⁶ As a result, he chose the concept of purpose of the partnership as a legal criterion. Whereas authors of the later Middle Ages and of the sixteenth century had insisted on external and factual elements such as the use of the name of the firm, the consent of the partners or a mandate to the one acting on behalf of the partners, when determining whether a debt should be considered as the partners',⁴⁷ Felicius expressly stated that assets that were bought by a partner with his private money, but which were comprised under the objects of the *societas*, belonged to the *socii*.⁴⁸

Felicius also insisted on the fact that, in general, goods acquired by partnerships were the shared property of the partners as soon as they had been received by one partner, even without or before an express act of sharing. This responded to problems in mercantile practice and to legal distinctions that had proved too complex to handle. Whereas the starting capital of a partnership could easily be described, because it was mentioned in the partnership contract, this was usually not the case for assets that were bought and sold thereafter, during the life of the partnership. Civil law authors before Felicius did not greatly value the flexibility that was required with respect to assets of this kind. Invested goods were deemed common property of the partners (*communio*) from the moment that the partnership agreement had effect.⁴⁹ By contrast, rules were more stubborn when it came to acquired merchandise and property. With regard to the transfer of property constituting acquired movables and immovable property onto partners, the late-medieval jurists had distinguished between the – in mercantile environments rather rare – *societas omnium bonorum*, on the one hand, involving immediate joint ownership of acquired properties and, on the other hand, other ventures. Against those opinions

already at the end of the fifteenth century in combination with the obligation of '*reddere rationum*' (communicating accounts) to partners, in a *consilium* by Mariano and Bartolomeo Socini. See MEHR, *Societas und universitas, Quellenanhang*, 148.

⁴⁶ Morquecho's book was not as new as Felicius' book. Yet, Morquecho attempted to bend the late-medieval insights to the maximum, which had also been done by Mudaeus for example. Morquecho sometimes used concepts that were not currently used in learned writings. See, for example, his view on the fact that partners were bound *in solidum* for debts that were linked to what had been versed '*in bursam communem*', in the common fund. This referred to D.17,2,82, which however only mentioned the word '*arca*'. See: MORQUECHO, *Practica quotidiana*, 157 (IV.20). The word '*bursa*', which was a typical notion used in mercantile practice, had been mentioned in judgments of the Genoese *Rota*, and sometimes in civil law writings of Commentators. The first use – to my knowledge – was by Cino da Pistoia. See MEHR, *Societas und universitas, Quellenanhang*, 90.

⁴⁷ For example, MUDAEUS, *De contractibus*, 59 (l. *iure societatis*, No. 1).

⁴⁸ FELICIUS, *Tractatus*, 157 (XIV. 81).

⁴⁹ Some authors even said that there was no partnership without *communio*. See: FELICIUS, *Tractatus*, 101 (IX.42) and 143 (XIV.1).

Felicius argued that it was the nature of the *societas lucri et damni*, i.e. the partnership that was started in order to make a profit, that future assets were involved. According to Felicius, any partnership contract entailed the fiction that it comprised ‘a *constitutum*’ on assets that would be received by a partner. Upon *traditio* to one partner, all partners acquired *dominium*. Felicius combined this view with his insight that the goal of actions of partners, and the objects of the partnership, were the most important benchmarks. If a partner had bought assets with the intention of introducing them into the partnership, those assets were the common property of the partners after delivery, even if the partner that bought the assets had only used his own name when signing the contract.⁵⁰

It is evident from the writings of Felicius and also from Morquecho’s treatise that these authors intended to provide answers to problems that arose in practice and which had never before substantially been addressed in legal literature. In that respect, also the use of legal presumptions was important. For the first time, it was described in great detail how, in case of doubt, it could be determined whether an asset was private or belonging to the company. Felicius, for example, mentioned that assets bought by an *institor* were presumed to be of the company.⁵¹ The general principle remained that ownership in the quality of *socius* was not presumed and that what a partner has obtained through sale or by means of another contract was presumed to be his personal property. However, exceptions to this rule became so many that the previously generalising rule became an empty shell.

The mentioned newly proposed rules of doctrine resulted in the fact that assets that were accumulated during the lifetime of a partnership were to some extent shielded from personal creditors of the partners. If ownership was more easily shared among the partners, creditors wanting to challenge their real right had to bring a suit against every partner. It was a firmly established rule that creditors of one joint owner could not have rights on assets in joint ownership but, in principle, only on the *pars* belonging to their debtor.⁵² Therefore, when assets relating to a firm were seized or expropriated, this could only be done when all the associates were involved in the proceedings. The detailed distinctions of the late-medieval *ius commune* could no longer be used to the advantage of creditors of the company: if the purpose of a sale was that the assets accrued to the partnership, then they could no longer be seized by the acquiring partner as compensation for that partner’s personal debts. Before Felicius, this had been a possibility when the partner had not yet communicated the assets to his associates. Most of these insights were related to tangible movables and immovable property and not to claims, debts or sums of cash. In the decades after the publication of Felicius’ treatise, the Antwerp jurists nonetheless applied the doctrinal ideas in that sense as well.

⁵⁰ FELICIUS, *Tractatus*, 144-146 (XIV.9-19).

⁵¹ FELICIUS, *Tractatus*, 157 (XIV.86).

⁵² MUDAEUS, *De contractibus*, 292 (l. *de pignorum fructu*, No. 42).

4. Civil law and asset partitioning in Antwerp law and legal practice after 1600

The ideas of Felicius were quickly picked up in Antwerp⁵³ where they were blended with the sections of the 1582 law book. For example, in an annotated version of that book, of which the remarks date from the beginning of the seventeenth century, it was explicitly said that contracts regarding the company were not only those that had been made when referring to the name of the company but also those that generally regarded benefits for the partnership.⁵⁴

In some respects the incompatibility of Felicius' ideas with older *ius commune*, with the *communis opinio doctorum*, was felt. Anthony Anselmo, an Antwerp advocate and legal author, for example, wrote between approximately 1620 to 1640 that partners could not bring a *reivindicatio* against assets acquired by one partner for the partnership but which thereafter he had sold on his own behalf and before *communicatio* of the ownership. If the selling partner had left with the sum received from the buyer, this was an evident problem. According to Anselmo, the property rights on those assets were not acquired before their sharing. However, if the insights of Felicius had been followed, this would have been a false problem. According to Felicius, assets acquired for the company were jointly owned by all partners, irrespective of a formal *communicatio*. As a result, if that view would have been endorsed, the partners had had the *reivindicatio*. Anselmo, who was inspired by the late-medieval legal literature in this respect, nonetheless counterbalanced his abovementioned strict position by stating that it was under the mentioned circumstances possible to seize the sums of money that had come from the sale of such a company asset.⁵⁵

It is amazing that Antwerp jurists like Anselmo were attached to an interpretation based on *iura in personam* rather than to *iura in rem*, even though the contemporary civil law, and in particular the views of Felicius, were inclined to give more weight to the latter. This was also true with regard to the interpretation of another rule of Antwerp law. The 1582 law book provided that an owner was not supposed to be involved in a collective expropriation proceeding. If someone had *dominium* over an asset that was found in the estate of his debtor, then he could simply take it, and it was not considered to be part of the *massa creditorum*, i.e. the

⁵³ References to Felicius' treatise were common, both in briefs of advocates that were brought into the Antwerp City Court and in commentaries on the 1582 law book that were written by Antwerp jurists. See: *Annotata ad consuetudines Antverpienses*, Royal Library Brussels, Manuscripts, 13568 (hereinafter referred to as: *Annotata ad consuetudines Antverpienses*), fo. 193v. See also, for an example of it being cited in an advocate's brief, ACA, *Processen Supplement*, No. 4173, *dupliek*, s. 14.

⁵⁴ City Library of Antwerp, E10040, No. 149, ch. 52, ad art. 1: '*Oft als goedt of gelt in saken vande compagnie bekeert is*' ('... or if the assets or money have been used for the purpose of the company ...').

⁵⁵ A. ANSELMO, *Rechten ende Costuijmen der Stadt van Antwerpen met de Annotatien ende Commentarien van Heer ende Mr Antonio Ancelmo*, University of Antwerp (City Campus), Library, Manuscripts, MAG-P 63.3, 613 (hereinafter referred to as: ANSELMO, *Rechten ende Costuijmen*).

estate that was sold publicly and of which the proceeds were rateably distributed among the creditors. The 1582 law book provided that this applied for an owner retrieving ‘his own goods’.⁵⁶ This rule had some negative consequences for trade. Even though it is not clear whether the compilers of the 1582 law book had intended to exclude joint owners – among them partners – from the scope of this section, in any case in the first half of the seventeenth century, this was felt to have been the case. This meant that creditors seeking payment of a personal debt could in principle expropriate company assets and that the latter could not be taken from the *massa* by the other partners on the basis of the argument that the seized assets were jointly owned. This was a problem, because this interpretation meant that any seizure of a company-related asset had to be contested by all partners, who could only file suit and bring their claim on the assets in concurrence with the claims of the seizing creditor. The partners were thus held to join in on any expropriation proceeding started against assets of the partnership, even if it had been launched by a creditor of a personal debt of the administrator. This also resulted from the mentioned interpretation, which considered the rights of partners with respect to jointly owned property as personal rather than as real.⁵⁷ However, there was also a positive side to the mentioned norm. Because assets could not be pursued and retrieved if they had been the joint property of the partners, it was understood that the personal action of the partners on their part in the profits of the company, or in the alienated assets, could be linked interchangeably to assets or to sums that had come in their place. Therefore, any partner could sell company assets, and the partners that later heard of this could direct a personal action against the partner that had acquired the price for the sale. This compensation for being excluded from a *droit de suite* proved important in later interpretations of Antwerp law.

All this was not very surprising in light of the late-medieval civil law. In many respects, the Antwerp urban law of the sixteenth and even of the seventeenth centuries still built upon doctrine of the fourteenth and fifteenth centuries, and it often neglected contemporary insights.⁵⁸ Innovation came from practice rather than from those doctrinal influences, and it was only when these novelties gained ground that an interpretation on the basis of Felicius’ new concept of the ‘purpose of the company’ became possible.

The mentioned understanding of rights of partners on assets of the company, as involving ‘tracing’,⁵⁹ was stimulated by certain features of Antwerp rules

⁵⁶ *Antwerp 1582 Costuymen*, 540 (ch. 66, s. 9).

⁵⁷ If their rights had been construed as *in rem*, an assimilation with the 1582 rule that allowed owners to take their properties out of the *massa* would have been easier.

⁵⁸ D. DE RUYSSCHER, “Antwerp Commercial Law in the Sixteenth Century: a Product of the Renaissance? The Legal Facilitating, Appropriating and Transforming of Mercantile Practices”, in B. BLONDÉ, G. MARNEF, B. DE MUNCK en M.F. VAN DIJCK (eds.), *Provincializing the Renaissance? Tradition, Innovation, Translation and Appropriation in Antwerp, c. 1400-1600*. Turnhout, 2016, in the press.

⁵⁹ ‘Tracing’, or ‘real subrogation’ (in French: *subrogation réelle*) entails a juridical fiction as to the identity between movables that are being substituted by other movables.

regarding seizures. Third-party attachments had been common in Antwerp since the early sixteenth century. Such a seizure involved the attachment of assets with a party not having a contractual relationship with the claimant.⁶⁰ Seizures were not required to be based on a real right and therefore personal claims could also be substantiated with seizure.⁶¹ After 1620, a trust-like and fictitious assimilation of company-related goods with their monetary proceeds was sometimes extended to third parties, and this was done under the form of a third-party attachment. Commentaries on the Antwerp law dating from the middle of the seventeenth century mentioned that the '*penningen*', i.e. the coins, replacing company assets that had unjustly or illegitimately been alienated, could be seized and recovered with third parties.⁶²

This also ensued from the possessory protection of buyers, which came to be applied in Antwerp in the same early seventeenth century. It was deemed not possible to recover assets with third parties that were of good faith, i.e. when, at the time of the sale, they had not known that the seller could not alienate the property.⁶³ The 'tracing'-rule remedied this rule of protection, which was not in the interest of the owners, including the partners. Further research is needed with respect to the scope of this 'tracing'-rule and also whether it managed to persist in later periods.⁶⁴ In any case, what was original in the Antwerp interpretation was that the claim of partners in response to fraudulent behaviour of one partner was not purely personal (as the *actio pro socio* of the late-medieval academic law) but that also some 'real-like' rights were acknowledged on the return, on the proceeds, that were received in exchange for those assets. If a partner secretly sold a company asset for his own benefit, then the 'coins' that had come from the sale should be considered as belonging to the company. The 'purpose' of the business venture, which had been read in Felicius' work, served as a criterion to distinguish such 'company money' from other sums and to accept the priority of partners in relation to such 'coins' over other creditors.⁶⁵

⁶⁰ The earliest (clear) example dates from 25 September 1535. See: ACA, *Vierschaar*, No. 182, fo. 28v.

⁶¹ Near the end of the sixteenth century, it was customary that the applicant of attachment showed a document containing the debt for which the attachment was laid to the *amman*, who was responsible for the actual seizure of assets. Evidence of a real right was not required. E.g. ACA, *Vierschaar*, No. 188, fo. 31v. (4 March 1596).

⁶² ANSELMO, *Rechten ende Costuijmen*, 613; *Annotata ad consuetudines Antverpienses*, fo. 167v.

⁶³ See: *Antwerp 1608 Costuymen*, 396 (ch. 16, s. 24). Even though the 1582 law book did not contain these rules, it was the law as reflected in the 1608 law book that was imposed in the Antwerp court practice.

⁶⁴ The lacking of any publicity as to the affectation for the company was problematic.

⁶⁵ Personal creditors of a director could therefore not seek payment before these sums had been paid out to company creditors. This was an exception to the Antwerp and civil-law rule that money was presumed to be the property of the possessor. See FELICIUS, *Tractatus*, 41 (III.76), with references to a *consilium* of Baldo degli Ubaldo.

5. Conclusion

In the early seventeenth century, Antwerp jurists combined the urban law of their city with contemporary legal doctrine. In some respects, they used writings of civil law of the later Middle Ages and of the sixteenth century, and many urban rules remained close to the latter. Most provisions in the 1582 Antwerp law book did not give much consideration to real rights of partners on company assets, and they explained problems surrounding illegitimate transfers of company goods by a partner in terms of the *actio pro socio*. By contrast, Felicius detailed how *dominium* was established for company assets and, for the mentioned hypothesis, he promoted the retrieval of the alienated goods with third parties, on the basis of real rights. Partners could thus, according to early-seventeenth-century legal doctrine, retrieve *bona societatis* when they had falsely been brought outside the reach of the partners. The Antwerp law rules that were created in response to these new insights combined the best of the earlier tradition of urban law with academic literature. The third-party attachments used earlier were stretched so as to comprise attachments of money, and the latter were conceived as being possible because of a fictitious assimilation of sums of money for assets that had been affected by the goal of the company. The latter was an adoption of Felicius' insights as to the overall criterion of purpose of the firm. Also because of restrictions that were imposed as possessory protection for third parties, the idea arose that money that had been accepted following a transferal of partnership property could be considered as 'company money'. Therefore, a modest trust-like approach towards company property also entailed a kind of 'tracing'.

As a result of all this, it may be said that the Antwerp example demonstrates that, in the early modern period, entity shielding existed in some form by law and – if the Antwerp example is representative for continental Europe – rather in doctrine and the practice of the courts than in legislation. The affectation for the company allowed personal goods to be separated from partnership-related goods, and the latter could not, or could but with difficulty, be expropriated by personal creditors of a partner. This innovation was important in a mercantile context in which more partnerships with administering partners or directors engaged in diverse business activities, having open goals. The renewal in the law regarding company assets clearly responded to needs of commerce. The risk, following a mandate in matters of trade, was more firmly allocated to the principal or principals, also within a partnership. The principle was that a decision of the 'agent', in this case the *administrator*, could not be reversed with regard to third parties and not with respect to alienated assets. The Antwerp 'tracing' softened some of the harsh consequences of that principle. In general, the example of the Antwerp law and of its interpretation through legal literature in the first half of the seventeenth century provides evidence of how civil law had a concrete impact on legal solutions for business, even when they were imposed only by means of judgments and following interpretations by jurists working for local governments. This conclusion corresponds with the now

spreading idea that civil law accommodated mercantile practice in the early modern period, even though that has, as yet, mainly been deduced from legal literature and not from the legal practice in European-continental cities of commerce.⁶⁶

⁶⁶ CH. DONAHUE, “Benvenuto Stracca’s *De Mercatura*: Was There a *Lex Mercatoria* in Sixteenth-Century Italy?”, and A. WIJFFELS, “Business Relations Between Merchants in Sixteenth-Century Belgian Practice-Orientated Civil Law Literature”, in V. PIERGIOVANNI (ed.), *From Lex Mercatoria to Commercial Law*, Berlin, 2004, 109-110 and 255-290.