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# Alternative Dispute Resolution from the Perspective of Legal Instructions of Brno Swornmen for Uherské Hradiště

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## Abstract

This paper deals with the question of to what extent alternative dispute resolution was reflected in the legal instructions issued by Brno City Council at the request of the towns that constituted the Brno legal circuit. For this purpose, the author selected the town of Uherské Hradiště as one such recipient of such legal instructions, since it has the most well-preserved agenda of these documents from the period of the first half of the 14th century up until the pre-White Mountain era. On the basis of these sources, it is possible to determine the extent to which the issue of alternative dispute resolution penetrated Brno's instructional practice.

## Keywords

legal instructions – Middle Ages – Brno – alternative dispute resolution – Brno legal circuit – arbitration – Uherské Hradiště – municipal law – towns – Moravia – Czech lands – early modern period

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Soon after its recognition as a city, Brno became the supreme court seat of a number of towns and villages in the area of what is now south and south-eastern Moravia.<sup>1</sup> These localities, which became subject to the municipal law of Brno by virtue of a granted landowner's privilege or at their own request, formed an informal territorial unit, which is known as the Brno legal circuit. Belonging to this legal circuit guaranteed these municipalities the right to request legal instructions from Brno. Although the boundaries of the Brno legal circuit were subject to continuous change during the late Middle Ages and the early modern period, sources document that several dozen localities maintained relatively frequent legal contact with Brno during the period in question.<sup>2</sup> There are several reasons why these localities often voluntarily turned to Brno for guidance on a particular issue, one of which was undoubtedly the high level of Brno's municipal law, whose importance was continually growing.<sup>3</sup>

The source base of Brno municipal law initially consisted of mainly sovereign privileges, statutes of the Brno City Council, judgments and legal instructions. In the first half of the 14th century these were supplemented by Brno's oldest law book (known as *Jindřich's Law Book*), which was later expanded by the notary Jan and subsequently superseded by his work *Notary Jan's Law Book* and later revisions of it.<sup>4</sup> Among these and other sources, the *ius commune* played an important role in Brno, which, especially thanks to notary Jan, was granted a subsidiary character.<sup>5</sup> These sources, including case law, which gradually

- 1 Research based mainly on the study of the historical urban plan has shown that Brno had the characteristics of a city in the legal sense by the 1230s at the latest. This thesis, which is now generally accepted, was put forward by the archaeologist Rudolf Procházka, see PROCHÁZKA (1985) and (1993). The completion of the city-building process is associated with the granting of the privilege of Wenceslaus I in 1243, which codified the key issues of Brno's municipal law, administration and judiciary. The text of the privilege, or rather both parts of it, is available in CDB IV/1, pp. 79–87, no. 17.
- 2 The Brno legal circuit originally belonged to the wider South German legal circuit, whose centre of appeal was the city of Nuremberg. In the middle of the 14th century, this jurisdiction within the Brno legal circuit was transferred to Brno. This was due to a privilege granted by Margrave Jan Jindřich on 21 December 1350. The aim of this decree was to prevent localities that were subject to Brno municipal law from circumventing this fact and appealing abroad. The privilege is available in the CDM VIII edition, pp. 29–30, no. 60. From the literature on this subject, see FIEDLEROVÁ – ŠMÍDOVÁ MALÁROVÁ (2017), pp. 272–273. On the territorial changes of the Brno legal circuit in the Middle Ages and early modern period, see FLODR (2001), pp. 78–110; ŠTARHA (1966), pp. 172–178. In a broader context, cf. especially HOFFMANN (1975), pp. 27–67.
- 3 It is worthy of note that among the localities that voluntarily sought instruction from Brno there are also a number of peasant or bishop's villages and serf towns. Typical examples are the village of Ořechov and the town of Moravské Budějovice. For more on this, see FLODR (2001), p. 414.
- 4 On the sources of Brno's municipal law in the various phases of its development, see, in particular, FLODR (2001), pp. 27–110; FLODR (2006), pp. 27–110; FLODR (2008), pp. 38–148. Cf. HOFFMANN (1983), pp. 166–180.
- 5 *The Ius commune*, consisting of the original Roman law regulations and principles, supplemented by the commentaries of medieval legists and canonists, was seen as generally applicable law, which usually had a supportive function and was used mainly when there were gaps in the national legislation. On the interpretative levels of the concept of *ius commune* from the literature, see, e.g., BEZEMER (2010); ČERNÝ (2014). This concept is also reflected in *Notary Jan's Law Book*. Here, Article 609 states that a case that cannot be reliably resolved on the basis of Brno municipal law may be decided by means of the general laws (*leges communes*). Cf. Article 609 of *Notary Jan's Law Book*: “*Salvo ergo isto iure si evenerit casus, qui nec secundum ipsum nec secundum privilegia civitatis diffiniri potest, recurrendum est ad leges communes [...]*.” FLODR (ed.)

grew in volume, were projected in varying degrees into the legal instructions issued by Brno swornmen (*iurati*) at the request of the towns and villages that were part of its legal circuit. These legal instructions could take two forms. The first was qualified legal advice, which was a binding opinion on a specific substantive or procedural legal issue (*informatio, instructio*). The other was a direct judgment, i.e., a decision on the merits (*sententia diffinitiva*).<sup>6</sup>

The town of Uherské Hradiště in south-eastern Moravia was one of the most important applicants for Brno legal instructions. Uherské Hradiště had received Brno municipal law by the privilege of Přemysl Otakar II on 23 May 1258.<sup>7</sup> This was granted only a few months after the monarch had founded the town at the instigation of Abbot Hartlib and the convent of the Velehrad monastery (1257). With the granting of this charter (1258), Uherské Hradiště was definitively removed from the jurisdiction of Velehrad and granted autonomy in terms of self-government. This act can be seen as the formal completion of the town-building process and at the same time confirmation of the town's status in the legal sense.<sup>8</sup>

In comparison with other localities that were also part of the Brno legal circuit in the medieval and early modern period, the volume of legal instructions that Uherské Hradiště requested from Brno is many times higher.<sup>9</sup> The explanation for this is quite

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(1990), p. 357. The fact that the *ius commune* played a certain role in the legal life of Brno's burghers and did not only perform an academic function is evidenced by the *Book of Legal Acts*, which was established in the second half of the 16th century. Practically verbatim, the quoted Article 609 of the *Law Book* is referred to in the correspondence of Brno City Council addressed to the Court of Appeal in Prague. See Archiv města Brna (=AMB), fond A 1/3 Archiv města Brna – Sběrka rukopisů a úředních knih (=A 1/3), ms. no. 74, fol. 67r. In another place of this agenda, it is mentioned in this context that if the parties to a certain disputed referred to the *ius commune*, they meant primarily Justinian's Institutions, or legistic literature. Cf. „...*Oni pak ne podle tohoto Municipálu, ale podle Práva Justinianového slyšání a rozeznání bejtí mohli, A to by se přisežnými lidmi, kteřížto z oust jejich v uši své slyšeli na ně provisti mohli.*“ [Cf. English translation: “*They could be heard and judged not on the basis of this Municipal, but according to the law of Justinian. And that could be arranged by swornmen who heard it with their own ears.*”] See *Ibidem*, fol. 28r. The literature dealing with the influence of Roman and canon law in Brno legal manuscripts and practice is most recently summarized by ŠMÍDOVÁ MALÁROVÁ (2023a), pp. 54–61.

- 6 On the constant terminology in contemporary sources and in contemporary literature, see ŠMÍDOVÁ MALÁROVÁ (2023a), pp. 158–162.
- 7 “[...] *Item volumus et mandamus, ut civitas ipsa eo fundaretur iure et gauderet perpetuo, quo civitatis Brunnensis fundata videtur vel gaudere [...].*” The full text of the privilege is available in the edition: CDB V/1, pp. 245–248, no. 156. From the literature on the subject: ČOUPEK–ČOUPEK (2007), pp. 81–84.
- 8 Literature in this context points to the fact that the locality had not been settled randomly but continuously since 1254, when Přemysl Otakar II concluded a reconciliation agreement with the hostile Hungarians. See ČOUPEK et al. (1981), p. 92. On the genesis of the town and the interpretation of the two documents (1257 and 1258), see, most recently, MITÁČEK–PROCHÁZKA (2007), pp. 61–65. Cf. PROCHÁZKA–SULITKOVÁ (1984), pp. 7–9.
- 9 Legal instructions for the town of Ivančice and the town of Uherský Brod are relatively frequently represented in the preserved agenda. In contrast to the legal instructions for Uherské Hradiště, which cover practically the entire period during which the town referred to Brno (from the second half of the 13th century to the second half of the 16th century), for Ivančice and Uherský Brod we have evidence of this practice mainly for the pre-White Mountain era. These are legal instructions, the concepts of which have been preserved in Brno City Archives (= Archiv města Brna) in the *Collection of Deeds, Mandates and Letters* (= *Sběrka listin, mandátů a listů*). In addition, there are copies of other cases recorded in the *Brno Book of*

simple. Uherské Hradiště soon created its own legal circuit consisting of villages and towns in south-eastern Moravia, which originally referred to Brno. The practice was that the dispute was decided directly by the Uherské Hradiště town council, which would only turn to Brno if it was unable to issue a judgment, either because of gaps in the legislation or because of the complexity of the case. Although it can be assumed that this sub-district gradually took shape in the second half of the 13th century, i.e., in the years immediately after Uherské Hradiště received Brno municipal law, this fact can only be reliably documented for the 14th century.<sup>10</sup>

Uherské Hradiště requested legal instructions from Brno from 1258 until the pre-White Mountain era, apart from a short period after the accession of Vladislav II Jagellonian to the Bohemian throne. In 1472, the king granted the town a privilege that relieved Uherské Hradiště of the obligation to appeal to Brno.<sup>11</sup> However, it is known that there was a revival of this practice of instruction as early as the 1480s. The question therefore arises of at what point the ties between the two cities were definitively severed. It is clear that this did not happen immediately after the Court of Appeal was established in Prague in 1548.<sup>12</sup> The last surviving direct evidence of the practice of instruction between the two towns dates to 11 October 1557.<sup>13</sup> However, it is evident that at this time the town council of Uherské Hradiště was gradually reducing its legal contacts with Brno.<sup>14</sup>

Despite the decline in the practice of instruction in the second half of the 16th century, it can be said that Uherské Hradiště is the only town from the Brno legal circuit that has a comprehensive series of accepted legal instructions, which it requested intermittently for over three hundred years. These have been recorded in two preserved town books, which are currently stored in the State District Archive of Uherské Hradiště. The earlier book, known as *Liber negotiorum civitatis Hradisch*, contains legal instructions from

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*Legal Instructions* (AMB, fond A 1/3, ms. no. 71–73). From the literature on this subject, see, e.g., ŠTARHA (1970). The agenda of legal instructions and appeals to Brno is also preserved in the *Uherský Brod's Books of Appeals to Brno Municipal Law*. The cases they contain cover the period 1550–1665. For more details see: ŠMÍDOVÁ MALÁŘOVÁ (2023a), p. 176.

- 10 The oldest legal instructions for Uherské Hradiště from the middle of the 14th century are partly preserved in *Notary Jan's Law Book*, and partly in *Liber negotiorum civitatis Hradisch*. This is discussed in more detail later in the text.
- 11 The original of the privilege dated 20 April 1472 is stored in Moravský zemský archiv – Státní okresní archiv Uherské Hradiště, fond Archiv města Uherské Hradiště I, inv. no. 57.
- 12 The Prague Court of Appeal was established on the basis of an instruction of Ferdinand I of 20 January 1548 as an appeal court against the decisions of the town courts. However, the Moravian towns retained their existing position and continued to accept appeals and requests for legal instruction from the subsidiary towns. A typical example of this practice is Brno and its legal circuit. For more details, see JORDÁNKOVÁ-SULITKOVÁ (1994), pp. 247–248.
- 13 AMB, fond A 1/1, inv. no. 1657. However, only a request for a legal instruction has survived in relation to the case, the essence of which was a dispute over jurisdiction in the Uherské Hradiště legal circuit. The reply of the Brno swornmen is not known and has probably not been preserved.
- 14 This is evidenced by a lawsuit from 1571, which was filed against the members of the town council of Uherské Hradiště by a burgher from Uherský Brod, because Uherské Hradiště had prevented him from appealing to Brno. For more details, see ŠTARHA (1966), p. 179.

the second half of the 14th century.<sup>15</sup> The later one, *Liber informationum et sententiarum*, contains the Brno legal instructions sent to Uherské Hradiště between 1447 and 1540.<sup>16</sup> The later revisions of *Liber informationum et sententiarum*, which is less known to the scholarly community, both apparently dating from the early 1640s, are the last known set of legal instructions for Uherské Hradiště.<sup>17</sup>

Moreover, some of the legal instructions for Uherské Hradiště have also been preserved in Brno City Archives. The oldest of them, which the town received at the end of the first half of the 14th century, were directly reflected in the individual provisions of *Notary Jan's Law Book* and thus form an integral part of its material.<sup>18</sup> From a heuristic point of view, the set of legal instructions recorded in later revisions of the *Law Book* from the second half of the 15th century is also valuable.<sup>19</sup> It contains several legal instructions for Uherské Hradiště which are found in the *Liber negotiorum* and thus makes it possible to compare any textual modifications in this agenda. For the later period, a very small fraction of the documents on the instructional practice between the Brno and Uherské Hradiště is preserved in the *Collection of Deeds, Mandates and Letters*, which is also stored in the fonds of the Brno City Archives. It should be noted that Uherské Hradiště was mentioned in only one case and that most of the legal instructions were addressed to other localities in the Brno legal circuit.<sup>20</sup>

Beyond this agenda, however, it is documented that even at the end of the pre-White Mountain era Uherské Hradiště tolerated localities in its own legal circuit seeking legal instruction in Brno. A case in point from 1611 is the town of Veselí nad Moravou,

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- 15 *Liber negotiorum civitatis Hradisch* is an artificial convolute, the content of which consists of copies of privileges, statutes of the municipal councils of Brno and Uherské Hradiště, Brno legal instructions and records of a commemorative nature. The collection of more than a hundred legal instructions was edited with brief commentaries by Miroslav Flodr, see FLODR (ed.) (2007), pp. 13–76 (edition), pp. 90–123 (commentary). On the nature of the manuscript, see especially KRŠKA (1962), pp. 200–209; more recently, cf. the introductory study on the edition of the memorial part of the manuscript: ČOUPOKOVÁ (ed.) (2001), pp. 7–28.
- 16 *Liber informationum et sententiarum* was edited as a whole by the grammar school professor Ignác Tkač, see TKAČ (ed.) (1882). Given the obsolescence of this edition and the existence of the later revisions of this book (see note below), there is a potential need for a new critical edition that would take into account the variations in these versions.
- 17 It is ms. no. 7932, also stored in the Brno City Archives (AMB, fond A 1/3, ms. no. 7932). The relation of the manuscript to Uherské Hradiště was pointed out earlier by JORDÁNKOVÁ–SULITKOVÁ (1995), p. 295. The second revision of the book was done for the internal needs of the town of Havlíčkův Brod. Today, this manuscript is deposited in the Moravský zemský archiv – Státní okresní archiv Havlíčkův Brod, inv. no. 215. The manuscript was described and compared with *Liber informationum et sententiarum* by Václav Vojtíšek, see VOJTÍŠEK (1917), pp. 20–22. On the interrelations of *Liber informationum* with both revisions of the book (i.e. Moravský zemský archiv – Státní okresní archiv Havlíčkův Brod, inv. no. 215 and AMB, fond A 1/3, ms. no. 7932), see, most recently, ŠMÍDOVÁ MALÁROVÁ (2023a), pp. 183–191, pp. 349–405.
- 18 The legal instructions, which are specifically addressed to Uherské Hradiště, are included in a total of thirty articles of *Notary Jan's Law Book*. For an overview, see FLODR (ed.) (1990), p. 77.
- 19 The legal instructions were written at the very end of the codex and thus form a kind of informal appendix to one of the later revisions of *Notary Jan's Law Book* (see AMB, fond V3 Knihovna Mitrovského, ms. A 155, fols. 232v–248r). The legal instructions were identified by FLODR (2008), p. 84.
- 20 This is the request for legal instruction of 11 October 1557, which I have discussed in another context above.

which fell under the wider jurisdiction of Uherské Hradiště. In practice, this meant that the town was required to appeal directly to Uherské Hradiště for legal instruction, not Brno.<sup>21</sup>

The essence of the case, which is recorded in the *Brno Book of Legal Instructions* founded in 1471, is as follows.<sup>22</sup> The unspecified dispute was originally heard by the town council of Uherské Hradiště. Although it was competent to deal with the case, it seems it was not able to resolve it. Uherské Hradiště therefore sent a letter to Brno and asked Brno City Council for assistance. Although the request has not survived, the reply of the Brno swornmen, which is recorded in the aforementioned collection of legal instructions, indicates that Uherské Hradiště requested that Brno assume responsibility for the dispute and issue a decision on the matter. The Brno swornmen, who were well aware that the case was outside their jurisdiction, proposed a compromise. If Uherské Hradiště agreed, the case would be judged according to Brno municipal law, but the result of the dispute would not be a judgment, but a legal instruction, which would then become the basis for issuing an arbitral award.<sup>23</sup>

However, the Brno swornmen attached the condition that the disputing parties first had to pledge to respect the arbitral award. This pledge (*cautio*) was to be secured by third-party guarantors, who would be required pay the the fine imposed in the event of non-compliance.<sup>24</sup> The Brno swornmen justified the measure, which was based on *Notary Jan's Law Book*, on the grounds that the surety bond gave a higher degree of legal certainty to the respective councils that the content of the arbitral award would not be circumvented by the parties.<sup>25</sup>

21 On the legal circuits in the region of south-east Moravia, see ŠTARHA (1966–1967), pp. 125–132.

22 This is a series of several legal instructions issued on the same subject: AMB, fond A 1/3, ms. no. 71, fols. 102r–103v. On the nature of manuscript no. 71 (a full citation is provided in the note above) and its relation to other Brno city books, see especially ŠTARHA (1970), p. 170; JORDÁNKOVÁ–SULITKOVÁ (1995), p. 301.

23 This fact was then reflected directly in the rubric for the legal instruction in question and thus essentially fulfilled the function of a “new” legal rule. Cf.: „Právo vyšší města tohoto i od těch, kteříž své obzvláštní právo vyšší mají, rozepře k soudu přijímají, však rozuměj způsobem ubrmanským.“ [Cf. English translation: “The higher law of this city and those who have their own special higher law accept disputes in court, but understand in the manner of Ubrman.”] See AMB, fond A 1/3, ms. no. 71, fol. 102r.

24 For this, cf. the relevant passage of the legal instruction: „[...] však poněvadž z psaní vašeho, jestliže svrchu jmenované strany, podle odvolání jejich, při právě vašem, dle pořádku právního obyčejnou a dostatečnou cautii vám od sebe učinily, že na tom na všem, což od nás, ku kterejmž jsou se k soudu zavolali a odvolali, přestati, a podle uznání i všemu dosti učiniti chtějí, se nevyrozumívá: Kterážto cautii podle práva našeho v tejto příčině převedším se vykonati, ano i jistou pokutu pro nadostiučinění v sobě obsahovati má, povinni jste a budete nás napřed o všem a jak samo v sobě jest spraviti a připsi hodnověrný takové cautii nám přislati.“ [Cf. English translation: “[...] but since from your writing, if the sovereign parties, according to their appeal, have, according to the order of the law, made a common and sufficient pledge to you from themselves, that all that they have called and appealed to us, to which they have appealed to the court, to cease, and according to their acknowledgement to do all things, is not understood: Which pledge, according to our law, is to be executed in the first place in this cause, and which also contains a certain penalty for the excess of the penalty, you are bound to and shall first of all and as it is in itself to make us right, and to give us a credible record of such pledge.”] Ibidem, fols. 102r–102v.

25 The justification was written in the margin of the folio: „A to pro lepší bezpečnost vyššího i domácího práva.“ [Cf. English translation: “And this for the better security of the higher and domestic law.”] See Ibid, f. 102v. On this in *Notary Jan's Law Book*, cf. in particular Article 81(e) and Article 82 (*cautio fideiussoria*): FLODR (ed.) (1990), pp. 176–177. From the literature on the subject, cf. FLODR (2001), pp. 501, 503–504.

It was necessary for Brno City Council to be informed about the agreement of the guarantee obligation by the swornmen from the town of Veselí nad Moravou. This clearly happened, since the following legal instruction, again addressed to that town, informs us that the guarantors chosen by the parties had not been properly selected. This was because they were persons from a foreign legal circuit, specifically from the town of Skalice.<sup>26</sup> The caution of the Brno swornmen is not surprising, as they were obviously aware of the risk of enforcing the surety obligation on persons who were subject to a foreign municipal law.<sup>27</sup> After the issue of the guarantors had been resolved, the Brno swornmen sent the final (preserved) legal instruction to Veselí nad Moravou. In it, the disputing parties were instructed to appoint arbitrators who would then issue an arbitral award in accordance with Brno municipal law.<sup>28</sup>

This case is interesting not only because it closes an era during which the town of Uherské Hradiště requested legal instructions from Brno for itself or for subordinate localities of its own legal circuit, but, above all, because of its thematic focus. Considering that the extant agenda of legal instructions for Uherské Hradiště consists of several hundred inquiries concerning various substantive and procedural legal issues, only a fraction of them relate to the issue of alternative dispute resolution. In addition to this most recent case, a further legal instruction has been preserved in *Notary Jan's Law Book*, and two others are recorded in the Uherské Hradiště town book, *Liber informationum et sententiarum*.

The first legal instruction, which is preserved in *Notary Jan's Law Book*, is part of the casuistic provision of the thematic section *De arbitris*. This section regulates arbitration and conciliation proceedings under Brno municipal law. In total, there are 13 provisions (articles), the basis of which in most cases are the legal instructions of Brno swornmen for one of the localities of the Brno legal circuit. This casuistic part is then usually supplemented by a theoretical interpretation, which notary Jan compiled on the basis of the legistic and canonistic literature available at the time, or with the aid of other sources.<sup>29</sup> In general terms, the *De arbitris* section thus consists of rules governing the conditions of alternative dispute resolution, which were roughly equivalent to traditional court proceedings. These rules did not only concern the requirements for the person of the

26 AMB, fond A 1/3, ms. no. 71, fols. 102v–103r.

27 This rule is then summarized by the rubric to the quoted legal instruction: „*Přespolních lidí, ku právu zavedené rukojemství, nejní-li přitom také domácích rukojmí, právu domácímu velmi nebezpečné.*“ [Cf. English translation: “*Hostage-taking of foreigners, introduced to the law, unless there are also domestic hostages, is very dangerous to the domestic law.*”] See *Idem*, fol. 102v. It is interesting that this fact was pointed out to Uherské Hradiště earlier, in a dispute over stolen wine. In this case, which dates back to the second half of the 15th century, the Brno swornmen refused to give a verdict at that time, due to lack of local jurisdiction. For more details, see ŠMÍDOVÁ MALÁROVÁ (2023a), p. 279. The full text of this legal instruction is available in the edition: TKAČ (ed.) (1882), p. 308.

28 AMB, fond A 1/3, ms. no. 71, fols. 103r–103v.

29 See FLODR (ed.) (1990), pp. 176–180. For more on this, see BOHÁČEK (1924), p. 32; SCHUBART-FIKENTSCHER (1947), pp. 168–169. On the legal sources of the individual articles, cf., most recently, FLODR (ed.) (1992), pp. 44–46.



arbitrator (*arbiter*) or conciliator (*conciliator*), but also determined the actual course of arbitration and conciliation in Brno municipal law.<sup>30</sup>

The case this paper will focus on in the above context is part of Article 86 of *Notary Jan's Law Book* from the middle of the 14th century. It is one of the oldest known legal instructions for Uherské Hradiště and has been preserved in its entirety (i.e., we know both the substance of the question and the actual statement of the Brno swornmen).<sup>31</sup> Article 86, which notary Jan has provided with the rubric "*Utrum arbitrorum testimonium preferatur testimonio iuratorum*", should thus convey an actual case from the practice of both Uherské Hradiště and Brno.<sup>32</sup> The request for the legal instruction, which forms the core of Article 86 of *the Law Book*, shows that this was a dispute over a monetary debt to be settled before two arbitrators in the presence of six swornmen. An arbitral award was made, which included a penalty clause for if either party failed to fulfil its obligation. Half a year after the arbitral award was made, the plaintiff petitioned the town council of Uherské Hradiště, claiming that the defendant had not settled the debt within the time limit set by the arbitrator. The defendant countered this by claiming that the deadline for settlement of the debt had not yet expired, which was supported by the testimony of the six witnesses who had been present at the arbitration.<sup>33</sup> The question therefore arose as to whether the testimony of those affidavits was of greater probative value than that of the two arbitrators who had made the award in the dispute and to whom the plaintiff referred.<sup>34</sup>

It should be noted that the arbitrator's decision was in oral form (*pronuntiatio*) – albeit in front of witnesses – and was not announced in writing. This fact therefore made it more difficult to prove and reduced the degree of legal certainty for the parties.<sup>35</sup> In resolving this dispute the Brno swornmen could either side with the plaintiff, who referred to the arbitrators' allegations or rely on the testimony of the six swornmen witnesses who supported the defendant's claim.

The outcome was that the swornmen of Brno sided with the defendant in the legal instruction. They asserted that the said affiants were fully competent as witnesses and their testimony could be considered credible. As such, it prevailed over the contention of the arbitrators.<sup>36</sup> However, they also added that a different situation would have arisen if the arbitral award had not been announced by the six swornmen but by other persons whose

30 For details, see FLODR (2001), pp. 499–504. More recently, cf. MALANÍKOVÁ (2008), pp. 217–224. From the broader perspective cf. also MALANÍKOVÁ–BOROVSKÝ (2011), pp. 113–126.

31 On the pitfalls of studying legal instructions, see ŠMÍDOVÁ MALÁROVÁ (2023b), pp. 98–102.

32 FLODR (ed.) (1990), p. 178.

33 "*Reus vero respondit, quia testaretur in sex iuratos, quos arbitrii in pronunciacione supra se pr testibus statuerunt, quod terminus solucionis dictarum decem marcarum nondum aduenerit [...]*" Ibidem, p. 178.

34 "*Quesiuit ergo, si iurati de hoc testarentur, utrum eorum testimonium non sit arbitrorum testimonio preferendum [...]*" Ibidem, p. 178.

35 "*Postquam duo arbitri, in quos partes compromiserant, simpliciter coram sex iuratis pro testibus per eos ad hoc rogatis arbitrium pronunciasent [...]*" Ibidem, p. 178.

36 "*[...] tamen, quia in casu presenti arbitri in arbitrando et in pronunciando coram testibus et maxime iuratis officio suo plenie functi sunt, testimonium iuratorum, quos arbitri, quantum ad hoc, sibi quodammodo substituerunt, immo prefererunt, et deinceps audiendum [...]*" Ibidem, p. 178.

credibility carried less weight. In that case, the claims of the arbitrators who issued the award should take precedence over those of the other witnesses.<sup>37</sup>

Two other legal instructions relating to the issue of alternative dispute resolution have been preserved in the more recent municipal book of Uherské Hradiště (*Liber informationum et sententiarum*). The first case dates to the early 1480s. A request for legal instruction reveals that a lawsuit was brought before Uherské Hradiště town council pertaining to the theft of a woman's dress. Although the dispute was not unusual in its nature, it nevertheless had to be referred to the swornmen of Brno, so that they would issue the relevant legal instruction on how to proceed. This was not due to the inability of Uherské Hradiště to correctly classify the case or a lack of evidence, which had been the impetus for the request for a legal instruction in other cases, but the fact that the case had already been put before arbitrators. The question therefore arose as to, firstly, whether Uherské Hradiště town council was competent to hear and resolve the dispute and, secondly, whether the application should be upheld.<sup>38</sup>

The Brno swornmen ruled that the Uherské Hradiště town council was not entitled to decide on this matter, the case had already been put before arbitrators.<sup>39</sup> Although this fact is not expressly stated in the legal instruction, the procedural barrier of *lis pendens* (*litis pendentio*) arose at the time the arbitration proceedings were initiated. Its existence effectively prevented the town council from resolving the same case at the same time. This is a manifestation of the principle of “*ne bis in idem re*”, which prevented two decisions being made for the same case. This principle has its ideological roots in classical Roman law and it was one of the core rules of the later medieval romano-canonical procedure.<sup>40</sup>

The final legal instruction to be examined in this paper was also written in the *Liber informationum et sententiarum* but is undated. While the nature of the query is not known, since only the legal instruction was recorded in the book, it can be surmised that it was probably a dispute arising from libel.<sup>41</sup> Indeed, the legal instruction suggests that there should first have been an attempt to resolve the matter by conciliation, and only after

37 “*Sed secus esset fortassis, si pro testimonio pronunciacionis arbitrii vocaretur testes non iurati vel tales, quibus non esset tanta fides, sicut arbitris, adhibenda. Sic sententiatum est in Redisch.*” Ibidem, p. 179.

38 This is case 9, see TKÁČ (ed.) (1882), pp. 10–11. This legal instruction is also recorded in both later versions of *Liber informationum et sententiarum*: AMB, fond A 1/3, ms. no. 7932, fols. 26v–27r; SOKA HB, fond Archiv města Havlíčkův Brod, inv. no. 215, fols. 29r–29v.

39 TKÁČ (ed.) (1882), p. 11.

40 Gai Inst. 4,107, in: DE ZULUETA (ed.) (1967): „*Si vero legitimo iudicio in personam actum sit ea formula, quae iuris civilis habet intentionem, postea ipso iure de eadem re agi non potest, et ob id exceptio supervacua est: si vero vel in rem vel in factum fuerit, ipso iure nihilo minus postea agi potest, et ob id exceptio necessaria est rei iudicatae vel in iudicium deductae.*“ Cf. Dig. 50,17,57, in: MOMMSEN–KRÜGER (eds.) (1951). I notice, however, that in the Brno application practice, the Old testament stylization of this principle took over, in the wording: „*Non iudicat Deus bis in idipsum.*“ Argumentation by this principle, which was subsequently reflected in Gratian's Decree [C. 12, q. 2, c. 30, 1, in: RICHTER–FRIEDBERG (eds.) (1959)], is documented in another legal instruction for Uherské Hradiště from the second half of the 14th century. For more see ŠMÍDOVÁ MALÁROVÁ (2023a), pp. 287–289.

41 It has been documented that less serious cases of libel were resolved amicably in the Brno legal circuit. For more details, see ŠMÍDOVÁ MALÁROVÁ (2023c), pp. 115–117.

an amicable agreement could not be reached should the dispute have been referred to an arbitrator.<sup>42</sup>

The cases highlighted in this paper are unique evidence of alternative dispute resolution through the lens of Brno legal instruction for the town of Uherské Hradiště. This town was not selected randomly, as the agenda of legal instructions for Uherské Hradiště includes several hundred records of diverse focus. It should be noted that out of a total of four legal instructions touching on various issues related to proceedings before arbitrators, only one has survived for the period of the mid-14th century (*Notary Jan's Law Book*). Uherské Hradiště did not receive the other two until the end of the Middle Ages (*Liber informationum civitatis Hradisch*). The final case is from the pre-White Mountain era (*Brno Book of Legal Instructions*, ms. no. 71). Although, of course, these may not be all the actual cases in which Uherské Hradiště was instructed, it is true that the issue of alternative dispute resolution has a relatively low quantitative representation in the extant agenda.<sup>43</sup>

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fond A 1/3 Archiv města Brna – Sběrka rukopisů a úředních knih.

fond V3 Knihovna Mitrovského.

Moravský zemský archiv – Státní okresní archiv Uherské Hradiště, fond Archiv města Uherského Hradiště I.

Moravský zemský archiv – Státní okresní archiv Havlíčkův Brod, Archiv města Havlíčkův Brod.

42 This is case no. 48, recorded among the additions, see TKAČ (ed.) (1882), p. 333.

43 With regard to this agenda, in the case of questions directed to the procedural level, the most frequently preserved legal instructions concern oaths, evidence, adjournments and the temporal priority of filed actions. From a substantive law perspective, queries on disputes in the area of contract law (disputes over debts and their due and timely settlement, security and extinction of obligations) predominate. At the same time, disputes of a substantive nature are minimally represented, but this is generally due to the fact that even if the dispute concerned one of the institutes in this category (typically emphyteusis, pledge, etc.), the query was almost always directed to the obligatory effects of the contract, not substantive law. Disputes concerning inheritance (incapacity of inheritance, validity of wills and intestate succession, disputes concerning disinheritance) and cases concerning family law (representation of children, disposal of the property of the master of the house, disputes concerning dowries) are considerably more frequent in the agenda of legal instructions for Uherské Hradiště. As far as torts are concerned, it is evident from the requests for legal instructions that the range of offences with which the Uherské Hradiště councillors dealt in practice was quite varied – from property offences (theft, embezzlement, robbery), through offences against life and health (battery, manslaughter, murder), to offences of a sexual nature (rape). See ŠMÍDOVÁ MALÁROVÁ (2023a), pp. 194–299.

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## Alternativní řešení sporů z perspektivy právních naučení brněnských přísežných pro Uherské Hradiště

Příspěvek se zabývá otázkou, do jaké míry se problematika alternativního řešení sporů, ať už prostřednictvím smírce, nebo rozhodce, promítla do brněnské nalézací praxe z doby středověku a raného novověku. Pro tyto účely byla zvolena bohatá agenda právních naučení pro Uherské Hradiště, která čítá několik stovek případů různého zaměření a představuje tak relevantní výzkumný vzorek.

Město Uherské Hradiště bralo v Brně právní naučení od druhé poloviny 13. století do poslední třetiny 16. století, přičemž ještě v roce 1611 prokazatelně intervenovalo v kauze městečka Veselí (dnes Veselí nad Moravou) a podnítilo tamní přísežné, aby o rozhodnutí sporu požádali zkušenější brněnskou městskou radu. Jednalo se o poněkud kuriózní situaci, protože Uherské Hradiště se v té době do Brna již neodvolávalo, ani zde nehledalo poučení. Navíc Veselí podléhalo širší uherskohradištské jurisdikci a správně mělo žádat o vydání právního naučení pouze v Hradišti. Tento případ, který se dochoval v brněnské *Knize právních naučení* (rkp. č. 71 AMB), tak podává odpověď na otázku, zda a jakých podmínek se lokality z cizích právních okruhů mohou obracet do Brna s žádostmi o právní naučení a v podstatě tak obcházet jurisdikci svého mateřského města. Dle rozhodnutí brněnských přísežných totiž výsledkem neměl být rozsudek (nález), ale závazné stanovisko (poučení), které se následně stane podkladem pro vydání rozhodčího nálezu.

Další tři případy, které se ve sledované rovině týkají přímo Uherského Hradiště, se uchovaly z části v *Právní knize notáře Jana* z pol. 14. století, z části pak v mladší uherskohradištské městské knize *Liber informationum et sententiarum* a jejich redakcích. Také tyto dotazy směřují téměř výhradně do procesní oblasti. První, nejstarší právní naučení, se dotklo hodnověrnosti svědecké výpovědi přísežných v rozhodčím řízení. Zbývající dvě poukázala jednak na existenci překážky litispendence v řízení zahájeném před rozhodcem, za další pak na preferenci smírného vyřešení sporu.

Z analýzy právních naučení pro Uherské Hradiště tak vyplynulo, že problematika alternativního řešení sporů má v dochované agendě poměrně nízké kvantitativní zastoupení a ve srovnání s jinými kauzami představuje pouze nepatrný, byť obsahově velmi důležitý zlomek dokladů z brněnské poučovací praxe.



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