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"quod non possit iudiciarie terminari": Arbitration Landscape in the Late Medieval Swiss Confederation

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Abstract

The paper deals with federations and alliances in the late medieval Swiss Confederation, where cohesion was established by leagues and common interests. From the 13th to the end of the 15th century, the alliance landscape became so dense, that new treaties had to be carefully fitted into the existing hierarchy of alliances. Within the alliances, clauses on arbitration and its procedures took up more and more space. Thus, a dense network of a contractually defined "arbitration landscape" developed. The task of the arbitration courts was, on the one hand, to ensure the long-term validity of the alliances and, on the other hand, to be flexible enough to deal with changing power positions and to keep pace with the development of the legal framework. Older legal historical research even went so far as to see the arbitration system as the core of Swiss federal law. The focus is on a series of alliances between the two cities of Bern and Fribourg, which is used to illustrate the development of arbitration courts. The bilateral contracts of 1243, 1271, 1341, 1403 and 1454 show as an example how arbitration develops. Examples from the surrounding Alpine and pre-Alpine regions involving one of the two cities demonstrate the widespread use, procedural differentiation and regional importance of arbitration courts.

Keywords

Swiss Confederation – Bern – Fribourg – combourgeoisie – alliance – Burgrecht – federation – pact – agreement – arbitration – arbitration court – conflict mitigation – conflict resolution

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Introduction

The medieval Swiss Confederation is often presented as a special case because of its small-scale organization and political landscape which does not fit the broad outlines of nationally oriented historiographies of European nations.[1] However, examples from Swiss history in particular allow us to understand the general developments in a more differentiated way, as it is the case here with arbitration. Arbitration courts played a decisive role in the development of the Swiss Confederation in the late Middle Ages.[2]

The article is not primarily focusing on the arbitral tribunals, their procedures and awards.[3] It will focalize on the overarching level on which the arbitration system was based: on the alliances and confederations in which arbitration had to resolve the unresolvable conflicts of the actual allies. The question is therefore more focused on the embedding and orientation of the arbitration courts than on their procedures and personal. The examples are mainly selected from the area around the city of Bern in the western Swiss Plateau. Central- and eastern Switzerland have an equally high number of arbitrated conflicts over the Alps and common property and also a high density of sources in this regard; the sources on arbitration clauses in alliances start though later than in the Western parts.[4]

The key questions focus on the political history and the formation of a dense landscape of arbitration courts in the late medieval Swiss Confederation: What is the connection between alliances and arbitration? How do alliances with arbitration clauses affect the political landscape? How do arbitration courts affect the political landscape? Can the political weight of alliances be measured by the arbitration system?

A dense landscape of alliances as in the Swiss Confederation should have led to a harmonized legal system and a dense judicial landscape, as stated by older research opinions.[5] This is obviously not the case. There were hundreds of alliances, but no common order. The alliances had hardly any influence on the internal relations of the alliance partners. On the contrary: the mutual guarantees of jurisdiction and legal venue have increasingly entrenched anachronistic mechanisms of law-making and jurisprudence on all levels.[6]

The beforementioned questions therefore focus more on the effect of arbitration in its duration and its widespread application, which in turn had repercussions on the alliance treaties and alliance practice.

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1 Basic introductions in English to the late medieval Swiss Confederation: Schmid (2016 a); Sablonier (1998).

2 The impact of arbitration tribunals on Swiss history has been emphasised since the beginning of federal historiography: Stettler (2001), pp. 28–30, 36–43 on behalf of Tschudi; Bluntschli (1849), Usteri (1925) pp. 282–316, Brand (1952); Aubin (1976); Hardy (2018), pp. 47–49, 130–139.

3 Basic terminology in Fowler (1976); recent perspectives on medieval arbitration in Baumbach–Garnier (eds.) 2019; Kintzinger (2023); Dirks (2020); Dirks (2021); Rad (2020).

4 To economical conflict lines in Central- and Eastern Switzerland: Riggenbach (1966); Brändli (1986), pp. 47–54; Rogger (1989); Sablonier (1991); Speich (2008). To early arbitrations see Waser (1961).

5 Bader (1929); Usteri (1925); Waser (1934); Bader (1984a); Bader (1984b).

6 Vgl. Baumbach–Garnier (2019), pp. 245–249; Bühler (2021), compare with Weyeneth (1919).

Alliances

An arbitration clause is a contractual agreement between two parties to settle a dispute peacefully if no ordinary court should or can be called upon. In order to visualise the links between the contracted (mostly bilateral) alliance system and arbitration, the first step is to explain late medieval alliances and their general mechanisms.[7] Where necessary, the single statements are specified for the region under investigation in order to establish comparability across regions and time.

Alliances normally are contracted treaties. They name the holders of political power as the contracting parties. They are always the result of negotiations and compromises that took place not only between the contracting parties but also within their political environment. The conclusion of a treaty creates the reality of an alliance. However, this is always influenced by developments outside the treaty. To grasp the social impact of alliances means first of all to focus attention on all persons and groups who acted with and in the alliance. Secondly, it means isolating changes in the social structure that can be essentially attributed to the fact of contractual political ties between institutions - i.e. alliances.[8] The Swiss Confederation was not founded, but consists of older and younger elements, tied together basically by a common historiography. The texts of the alliances therefore not only contain the intentions of contemporaries, but also the burden of all historiographical layers and interpretations. With regard to the arbitration tribunals it would therefore be wrong to judge them solely on the basis of the agreements in the convenants.

Alliances are contracts between two or more partners. They come about on the basis of shared legal principles and procedures. They are the result of negotiations; their content and semantics refer to the traditions and current concerns of all parties involved. In this way, deeds of alliance build a bridge between local traditions.[9] The basis of legal principals and procedures is crucial in the case of the Swiss Confederation. The fact that legal principles as well as legal customs and procedures can differ so widely in such a relatively small area is due to the geographical location of the Confederation, which streches along the Alpine arc and has different legal, cultural and economic orientations. The bridging function of the alliances should not be underestimated in the manorial sphere either. The partners of the alliances are urban and rural communities, princes, minor nobles and monasteries. The alliances create a common level of understanding, without which politically effective organisation of space seems impossible.[10]

Alliances are the result of an exchange and influence local situations for the period of their validity - and possibly beyond - just as much as they are able to shape the nature and content of the exchange. But this also means being able to grasp the potential of the contractual political bond for the formation of personal, familial, group-related or institutional strategies. Successful alliances

7 Attributions according to Schmid (2019), pp. 3–18.

8 Schmid (2019), p. 17.

9 Schmid (2019), p. 17; Carl (2000) p. 12, where the alliance (Schwäbischer Bund) is described as a political system *sui generis*.

10 Speich (2016), pp. 247–253. For comparison to Italian cities: Burroughs (2000).

are an expression of converging, but not necessarily „common" interests - even if the commonality of concerns can be inscribed in the alliance document in a legitimising form. Written down, cast in legal formulas and equipped with normative (and thus generalising) principles, alliances define their own, overarching frameworks for action.[11] Alliances in the Swiss Confederation normally were contracted for a minimal term-time of five or ten years up to durations of 51 years.[12] They were therefore intended to last a relatively long time. A special case to mention are the eternal alliances and their evolving political interpretations.[13] The framework is therefore fundamentally broad and designed to be long-lasting and effective. Of course, not every alliance was equally effective and changes in the framework conditions also had to be taken into account in alliance-terminology and practice.

Covenants are contracts and thus follow legal principles and are subject to negotiations referring to legal ideas. Their conclusion therefore requires legal and diplomatic know-how. They require specific knowledge and competences. The content of the alliance provides for specific, alliance-bound roles, especially with regard to arbitration, but also promotes the expansion of existing roles – accounting, writing, military coordination. The successful performance of such roles expands the knowledge and know-how of those acting. Alliance-building is part of the arcanum of urban politics; the transfer of knowledge and know-how as well as the necessary relationships happens partly within the council, but also within the family. Thus, alliances become catalysts of social dynamics within the elites.[14] The diplomatic personnel in the Swiss Confederation was recruited from the members of the urban (and partly rural) functional elites. They were rarely completely uninvolved in legal issues through their widespread familial interrelationships. The negotiation of alliances, the daily practice in the city/rural councils and the activity in arbitrations courts was thus reserved for the same narrow class that was economically, militarily and politically dominant in the Confederation.[15]

Alliances are made by members of the leadership groups, but in implementation they are supported by broader groups of the population. If the „common man" is included in the alliance by oath, he is able to identify with it and derive his own political role from it. Alliances thus always carry the potential for social upheaval.[16] The alliances were known not only by the contracting elites. Normally they represented interests of a broader part of the urban and rural population. The contents were read to the population and invoked by the adult men on the occasion of the annual swearing day (*Schwörtag*).[17] This is particularly to be taken into account when the implementation of arbitration judgements became problematic. Enforcement always depended on the political desirability for the elites involved and their clientele.

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11 Schmid (2019), p. 17.

12 Oechsli (1888); Oechsli (1916/1917).

13 Stettler (2004), pp. 19–21, 175–183.

14 Schmid (2019), p. 17.

15 Teuscher (1998), pp. 181–200; Braun (1996), pp. 237–238.

16 Schmid (2019), p. 18; for urban communities: Studer Immenhauser (2006), pp. 16–57; Schmid (1996); for rural communities: Blickle (1990, 1992), pp. 569–572.

17 Ebel (1958), pp. 11–46; Dilcher (2002); Speich (2019a), pp. 136–139.

Bridging gaps

The important role of the Swiss Confederation within Upper Germany consists in bringing older alliance systems closer together. In the west of what is now the Swiss Plateau, a diverse urban landscape has existed since the mid-13th century, increasingly grouped around the cities of Fribourg and Bern. In the east, starting from the Lake Constance region, a distinct urban landscape developed in the eastern Swiss Plateau and southern Swabia, centered around the cities of Zurich, Constance, Ulm and Augsburg, loosely connected with the other core-regions of urban alliances in Alsace, Swabia and on the Upper Rhine.[18]

The Swiss Confederation as a political entity has not been founded on the Rütli meadow in 1291. This belongs in the realm of myths for the 13th/14th century and later in the realm of successful early national narratives of the 15th and the 19th centuries.[19] The importance of the central Swiss rural communities and their allied city Lucerne lies in the fact that this connection enabled the western alliance system with Bern as its center to connect with the eastern area around Zurich. The two alliance systems were linked in particular by a complicated system of commitments for providing assistance (*Mahnung*).[20] Above all, these mutual commitments made it possible for the towns to assist each other in military and judicial cases. Direct alliances between Zurich and Bern, or Lucerne and Bern, only came about after armed conflicts and proxy-wars in the 1420s.

It is a constant characteristic of the Swiss Confederation: Alliances were concluded both before and during, but especially after wars. And these alliances were generally closer and more far-reaching than their predecessors. This is evident not only in the ever-expanding content of the alliance, but also in diplomatic practice: the alliance documents became ever larger, the texts longer and the mutual address of the alliance partners even more friendly. This is how the cities of Bern and Fribourg addressed each other around the middle of the 15th century: *ihr besonders lieben guoten fründe und mitburgere*.[21] At the end of the late Middle Ages, the area south of Lake Constance and the Rhine was thus a dense network of alliances, held together by numerous pacts under different names, terms and conditions.

This brings us back to the early contracts and their meanings. In the western part of the Swiss Plateau, lies the alliance network of the Aar-region, around the cities of Bern, Freiburg and Solothurn. This is nowadays the language boundary between the German and the French speaking parts of Switzerland. In the medieval legal field, the transitions between the Germanic-Alemannic and Savoy-Burgundian legal traditions are to be found here.[22]

18 Scott (2014); Scott (2017). The outreaching actions of Lombard cities or the networks of long distance trade in central and western Europe are not part of this paper.

19 Marchal (2007, 2011), explains best the uses and abuses of historiography of the early alliances.

20 Schmid (2016b), pp. 175–195.

21 Speich(2019b), pp. 77–78; Speich (2019a), p. 281.

22 Poudret (1997), pp. 305–308, Rennefahrt (1958), pp. 51–55; Hübner (2011), pp. 259–274.

Early records on arbitration

In this border region between the Germanic legal tradition and the Savoy-influenced notarial tradition, numerous formulations first became established in the confederate alliances.[23] This also includes the arbitration clauses and formulas in the urban alliances. Arbitration practice had already been established in this region before the first confederations of towns, as evidenced by several arbitration judgements from the first half of the 13th century. As in other regions, there are hardly any written arbitration awards outside of ecclesiastical law issues; at least one of the parties was subject to ecclesiastical law, as in the early case of the arbitration between the knight of Stadönz and the Johannites chapter Thunstetten from 1220.[24]

The towns in this region became more closely allied in the fragile period of the 1240s to 1260s.[25] The town alliances, some of which were older, were supplemented with arbitration clauses from 1245 onwards. These still took up comparatively little space. In the alliance between the cities of Bern and Murten of 1 July 1245, which was similar in content to the alliances between Murten and the city of Fribourg as well as between Fribourg and Biel at the same time, the later common formula for institutional arbitration courts appears here for the first time in an urban alliance.[26]

The arbitration clauses in the alliance agreements in question are proceedings under public law. The primary provisions of these instruments were the clear assignment of legal cases to an existing court. Arbitration courts were only provided for in matters where such a court could not have jurisdiction, in particular for manorial and political issues. It is clear how the wording is to be understood: an arbitration tribunal is only appointed in cases in which the courts normally seised do not have jurisdiction: *quod non possit judiciarie terminari*. The two basic formulae of the arbitration system, namely the choice of arbitrator and the paired formula of judgement according to 'friendly settlement and law', (*nach minne und recht)* are already included.[27] After this early phase of alliances, the formula appears almost universally.[28]

23 Usteri (1925), pp. 30–35; Frey (1928); Rennefahrt (1958); Speich (2019a).

24 StABE C1a, Fach Aarwangen, 1220, ed. in: FRB 2, p. 29, N°. 20. Generally: Bader (1929), pp. 16–18.

25 Nabholz (1927); Joho (1955); Zahnd (2003), pp. 472–477.

26 FRB 2, p. 258, N° 244, Alliance between Fribourg and Murten 124, June 24: (...) *Si quis vero litis occasionem seu querele super hereditarie possessis et feodis de nostris adversus aliquem ex ipsis habuerit vel converso, quod non possit judiciarie terminari, nos eligemus duos viros providos ex eorum consulibus et conversim ipsi duos e nostris, ubi vie medium inter nos et ipsos protenditur, statuendos nec inde reversuros, nisi amicabiliter vel secundum jus inter discordantes prout decreverint terminarint.* (...).=StadtA Murten II,2.

27 To the paired formula *minne und recht* see Hattenhauer (1963); Cordes (2015); Rad (2020).

28 Further alliances with similar clauses: Alliance of Bern with bishop Henry of Sion (Sitten) in 1252 in: SSRQ BE I/3/III, p. 30 N° 8: (...) *quod si* (...) *aliqua discordia oriretur, nos et ipsi* (...) *tenemur ipsam causam sive discordiam* (...) *concordia vel judicio terminare.* Alliance of Bern and Biel (Bienne) in 1279, SSRQ BE I/3/III, p. 42, N° 18: (...) *Ibidem quelibet pars debet accipere et eligere duos de consulibus suis, et dicta discordia debet per ipsos quatuor jure, amore vel concordia terminari.* Alliance of Fribourg and Murten in 1294, SSRQ FR I/1/1: (...) *in medio vie convenire tenentur et hoc secundum jus et honestam compositionem ad eorum arbitrium decidere debent, et quidquit super hoc ordinaverint, debet a partibus inviolabiliter observari.* Alliance of Bern and Laupen 1301, in SSRQ BE I/3/III, p. 53, N° 26: (...) *et si hoc ibi non fuerit emendatum, consules civitatum in*

A special form of alliances were the bilateral contracts on naturalisation in towns (*Burgrecht*, *combourgeoisie, burgensia*).[29] In a series of *Burgrechte* between the counts of Savoy in the cities of Bern and Fribourg, the development of the contracted clauses on arbitration becomes obvious. The first contract to be mentioned is the *Burgrecht* of Rudolf (II.), count of Neuchâtel-Nidau in Fribourg from 1294.[30] The formulae came from the urban alliances of the cities Fribourg and Bern and were used as well for the forementioned naturalisation contracts. Fribourg remained mainly with the traditional latin formulae until the middle of the 14th century, whereas Bern issued the first german charters soon after 1300. The first alliance with a nobleman in Bern, having inserted arbitration-clauses, date from 1308. It was probably the same count Rudolf II. of Neuchâtel-Nidau who renewed his *Burgrecht* shortly before his death.[31] The first charter in German with an arbitration clause was the *Burgrecht* of Elisabeth, Hartmann II. and Eberhard II., counts of (New-) Kyburg in the city of Bern in 1311.[32] In 1330, in the *Burgrecht* of Jean de Langres, Bishop of Basel, arbitration is mentioned already as the normal way of problem solving (*ut in terra solitum est et consuetum*).[33]

loco consueto convenire tenentur, et hoc secundum jus vel honestam compositionem ad recognitionem arbitrorum hinc inde electorum deci(n)dere et quicquid super hoc a dictis arbitris ordinatum vel a superiore fuerit, a partibus debet inviolabiliter observari.

29 The written contracts normally have further clauses and conditions (*Geding*) for the contracting parties. To *Burgrecht* see Speich (2019a) or Cuendet (1978).

30 RD 1, pp. 164–165, N° 58: *Item volumus et ordinamus quod si discordia inter nos* (...) *moveretur, quelibet pars duos de ipsorum Consilio potest et debet accipere, quorum judicio dicta discordia amore aut justitia debet terminari, et qui rebellis extiterit, aut resilierit a judicio et ordinatione dictorum quatuor arbitrorum, aut majori parte ipsorum, ipsam ordinationem servanti promitunt contra rebellem objuvare.*

31 To Rudolf II. / Rudolf III. of Neuchâtel-Nidau see Aeschbacher (1924). FRB 4, p. 318, N° 285: *Sed si inter dictos Bernenses, vel gentes suas et nos, vel gentes nostras aliqua moveretur imposterum discordia seu questio, ad diem* (...), *ubi nobis melius placuerit, hinc et inde veniere tenemur, et procurare, quod ad arbitrium quatuor honestorum, quorum ab utraque parte duo sunt eligendi, alter alteri nostrum faciat amoris vel justicie complementum.*

32 To Elisabeth, Hartmann and Eberhard of Kyburg: Hälg-Steffen (2024), Niederhäuser (2015). SSRQ BE I/3, Nr. 36, p. 62: (...) *Wir sin och ubereinkomen mit dien bürgern von Berne, daz swaz schaden wir, old unser diener, old die ze unser herschaft hörent, teten old getan hetten dien bürgern von Berne, old dien, die ze Berne hörent, old ir gütes nemen, wenne si uns dez mandin, so sullen wir widertuon, waz man wider tun mag; und waz man nit widertuon mag, dar umbe sullen wir ze tage kömen ane vürzog zwischent uns, unsern dienern, dien von Burtorf und zwischent dien von Berne ze Bollingen;zwischent Berner und dien von Thune ze Münsingen, und zwischent Berner und dien von Oltingen ze Nider Tetingen; und sullen uf dien tagen gehorsam sin ze tuonne und ze nemenne minne old recht, als sich vier erber man, der jeweder teil zwene ze schidlüten nemen, uf ir trüwe an eidez stat old uf ir eit erkennent. Und wez die vier old de vierer driie einhelle werdent, daz sol stete sin von beiden teilen. Gestiessen aber die viere gelich, so sullen gemein lüte sin her Ülrich, herre von Torberg, ritter, und der schultheisse von Berne, und sullen die gewaltig sin minnen und rechtez umbe alle Sache; und swenne ein jelich Sache an si kunt mit klagde, so sullen si sich binden, daz uszerichtenne dar nach in dem nechsten manode. Gestiessen aber die zwene, so sol gemein man sin uf recht her Ülrich der Riehe von Solotern, ritter; und waz der dar umb erteilt, daz sol stete sin. Were aber daz, das der Riehe nit wolte gemein man sin, so sullen sich die gemein ma beid un di vier schidlüte ze Solotern antwurten bi trüwe an eidez stat inrunt acht tagen, so si gestiessen, und da sin untz an die stunt, daz si überein koment einez gemeinen mannez über die Sache, dar umbe si gesprochen und gestossen hetten.* (...).

33 FRB 5; pp. 734–735, N° 695: *Est etiam conventum, quod si – quod absit – aliqua discordia seu litis propagatio oriri continget inter homines seu gentes dicti nostri Basiliensis episcopatus et dictos consules, unanimitatem, seu homines aut gentes eis pertinentes, talis discordia seu litis propagatio est decidenda et bono fine terminanda ad arbitrium arbitrorum seu personarum communium super hoc eligencium, ut in terra solitum est et consuetum.*

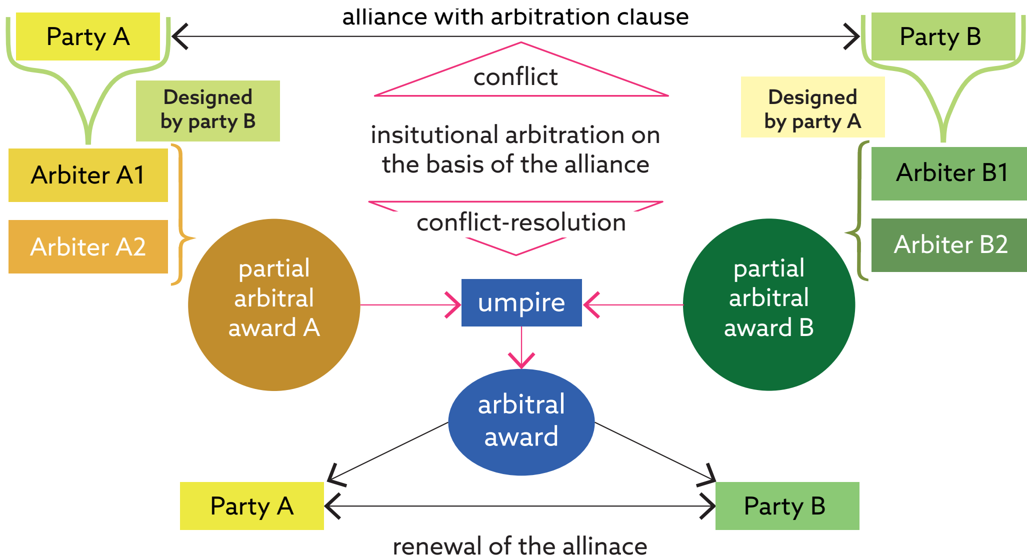

Fig. 1: Arbitration process illustrated schematically

In one of the early german *Burgrecht* in Bern of 1336, the procedure is abbreviated by the sole mention of the umpire.[34] The procedures of alliance-based arbitration courts are compatible to other regions where institutional arbitration can be found.[35]

A series of alliances: Bern and Fribourg

The first alliance between the two most important cities in the region, Bern and Fribourg, in 1243 did not yet contain an arbitration clause.[36] In the 1271 renewal, a simplified form of arbitration was agreed, similar to the one from 1252 between bishop Henry of Sion and Bern. It served as an example for further alliances later on.[37] With regard to arbitration, the treaty of alliance of 1271 stipulates that in disputes, first and foremost revenge, and in later treaties also attachment of creditors, may not be used. It then stipulates that legal recourse must be taken, i.e. the action must be brought before the

34 *Burgrecht* of Rudolf, Herr zu Weissenburg in Bern 1336, FRB 5, pp. 320–321, N° 326: *Uns sol her Johans, herre ze Ringkemberg, zwischent inen und uns gemein man sin, umbe alle frevenlichi us ze richtenne, so zwischent mir und dien minen und inen wirt uflouffent. Möchten wir dez nit han, so süllen wir einez andern gemeinen mannes über ein komen.*

35 Cuendet (1978), pp. 129–156; Buchwitz (2020), pp. 104–133; Baumbach-Garnier (2019), pp. 239–244.

36 Kern (1952); Joho (1955); Speich (2019 a). Edited in SSRQ BE I/3/III, pp. 27–28, N° 5.

37 SSRQ BE I/3/III, pp. 35–39, N° 14. (p. 36): *Si qua dictarum civitatum alteram quacumque leserit occasione, quod absit, lesa hoc vindicare non debet, set apud alteram suam deponere questionem. Et si hoc ibi non fuerit emendatum, consiliarii civitatum in medio vie convenire tenentur, et hoc secundum jus vel honestam compositionem ibidem ad eorum arbitrium decidere; et quiequid super hoc ordinaverint, a partibus debet inviolabiliter observari.* Similar clauses in the alliances with Sion (1252) and Laupen (1301): see note 28.

competent court of the other city. Only if the courts do not declare themselves competent, should representatives of the city council meet halfway to a court of arbitration and decide the case either by law or by settlement, *secundum jus vel honestam compositionem*. This decision should be binding for both parties. The formula became more complex again from 1341 in the renewals of the alliances in German.[38] The basic *formulae* and procedures are not mentioned, only the diverging formulations were named. However, the election of arbitrators does have one special feature in the case of inter-urban alliances. The arbitrators are usually elected from the ranks of the opposing side and the role of umpire is filled by a person from the narrow federal ruling class. This ensures that the arbitration award is followed and does not contradict the interests of the other allies in the alliance system.[39] After arbitration proceedings, the older alliances are usually confirmed and thus strengthened.[40] It seems, that in comparison to other regions with urban rule, the provenance of arbitrators did not cause further disputes.[41]

In these alliances, not only the parts on arbitration grew. Above all, the passages on the history of the alliance, the advantages of the economy and the political reservations grew. The texts became more and more elaborate and longer until the arbitration clause comprised almost a third of the treaty text in the renewal of the alliance in 1403. The alliance became ever closer in terms of content. In 1403, it was no longer formally an alliance, but the two cities granted each other collective municipal citizenship and referred to each other as fellow citizens. The alliance was now explicitly referred to as *Burgrecht*.[42]

38 SSRQ BE I/3/III, pp. 130–136, N° 62: (...) *den stoz ze versehenne alsus: Wa deheiner von einer stat an jeman von der andern stat dehein vorder het oder haben wirdet, dar umbe die rete unser stetten ze samen werdent sitzen ze erkennen, nach der forme der vorgenanten alten briefen, und als an disem brief geschriben ist, daz êmales, ê die rête dar sitzent werdent, die denne von dien stetten dar gesetzet werdent, der die ansprach het, sol in dem rate der anderon stat einen gemein man nemen, wen er wil; und welen er nimet, ist er ze gegini, so sol er uf der stat swerren mit ufferhabener hant ze Gotte, daz er umbe die sache, so er ze gemeinem man genomen ist, ein recht spreche inrunt viertzehen nechten dien nechsten, dar nach so die rête gestiessin. Wa er ez nit richten möchte mit der minne mit beider teilen wissent, als inn recht duncht bi dem eide, nach dem rechte, da der frevel oder dü gedinge geschehen weren, oder dü gůter legen, dar umb dü ansprach denne beschehen were, und sol der gemein man daz nit lassen durt deheiner slachte ding noch deheiner stat ordenunga noch Satzung. Were aber der gemein man, so er genomen wurde, da nit ze gegne, oder er den eit nit tun wolte, so sol sin schultheitz und dü stat, dere rät er ist, inn twingen, daz er daz tü, und sich dez verbinde inrunt drin tagen dien nechsten, so er umb die sache ze gemeinem man genomen wurde, als hie vor geschriben stat. Were aber der nit denne inrunt landes, so sol sin schultheitz und dü stat, da er rät ist, wenne er in daz lant kumet, inn twingen, daz er daz tů inrunt drin tagen dien nechsten. Genge aber den selben gemein man êhaftige not an, von tode, von gevengenissi, oder von siechtag, so mag der, der die ansprach het, einen andern gemeinen man nemen in dem selben rate, da der erre genomen waz ze gemeinem manne, und sol sich der verbinden dez selben, als hie vor bescheiden ist. Wa aber der gemein man die sache inrunt viertzehen tagen dien nechsten, so dü Sache an inn kumet, nit usrichte, alz hie vor stat, so sol er sich mornedez bi dem êgenanten sinem eide in die andren stat antwurten in sinem eigen koste, und dannant nit körnen, untz er die sache beige usgericht als er gesworn bet, und sol och sin urteil jewedern teile geben verschriben und besigelt, wenne er die urteil usgibt.*

39 Speich (2008), pp. 80–82.

40 Rappard (1944); Stettler (2004), p. 131; Speich (2019a), pp. 197–198, 233–234.

41 Domsta (1973), p. 138.

42 To the special alliance form between Bern und Fribourg see Speich (2019b). SSRQ BE I/3/III, pp. 355–364, N° 123: *So dene umb das wir ze beiden teilen in allen sachen fridlich leben und wonen, so ist zwüschent uns beredt, das niemand der unseren den anderen unervolget des rechten, des sinen entweren sol, wond was wir die vorgenant beide Stet gemeinlich oder iemand der unseren besunder von dishin an enanderen ze sprechen haben oder gewinnen, oder ob dehein angriff an dewederen teil von dem anderen bescheuh, das sol enkeins wegs von entwederen*

Diplomatics of arbitration procedures

On the face of it, the evolvement of the alliance-landscape did little to change the practice of the arbitration courts. The procedure, the choice of party-arbitrators and the umpire remained the same. However, what changed in the course of the 14th century, i.e. during the term of the treaties in question, was the value of the corresponding arbitration judgement-documents in diplomatic terms. While the arbitration award from Bern in 1220 still managed with eleven lines of text, the more recent, more extensive judgements sometimes filled maximum parchment pages measuring 80 by 60 cm. It would be easy to describe the multiplication of the texts as a usual contemporary practice.[43] That would not be entirely wrong, but it would ignore decisive factors, which will be explained below using a few examples along the lines of the above-mentioned contracts. In the early arbitrations of the 13th centrury we should not expect comprehensive accompanying documentation. In the late 15th century we may expect this, namely cause-letters (*anlassbrief, frydbrief, compromissum*), witness testimonies (*kuntschaften*), expert reports, party-awards or umpires awards (*urteil, spruch, obmanspruch*).

The first example to mention is a manorial dispute between Bern and Fribourg, concerning the county of Nidau (Inselgau) dating back to 1375.[44] We do not have the complete records of the procedure but the three decisive documents: the cause-letter (1395) in which the course of the process was specified in detail, the umpires award

teil gerochen werden, besunder wir und die unseren söllent ze beiden teilen gegen enanderen, wenne deweder teil von dem anderen darum gemant wirt fürderlich ze tagen komen gen Wünnenwil, und wenne beide teile dar koment und die sachen und der gebrest oder ansprach fürgeleit oder geoffenbart werdent, mögent si den, da in früntschaft und mit liebi nit bericht und übertragen werden, so sol der ansprechende teil ob die ansprach iemand der unseren besunder gegen einen anderen der unseren och besunder angat einen gemeinen man nemen in dem Rat da der angesprochene den gesessen ist der es vor date dies briefs nit vorsworen hab, und sol och die Stat des Rates der gemein den ist, denselben gemeinen fürderlich wisen, das er sich der sach annemen und underwind, gewunen aber wir die vorgenant beide Stette, deweder die anderen von gemeiner Stat wegen oder iemand der unseren besunder an dewedere gemeine Stat dehein ansprach darumb sol der ansprechende teil einen gemeinen man nemen, nemlich uff dem lande der in entweder Stat burger sie, und sol ietweder teil denselben gemeinen bitten, sich der sach also an ze nemen, und wen man also eins gemeinen über ein kunt, so sol ietweder teil zwen erbar man zu dem gemeinen setzen, und sullent den der gemein und die schidlüt sweren liplich ze Gott und den heiligen sich der sachen fürderlich an ze nemen, und die mit dem rechten, als verre si sich dene dez verstand oder in der minne ob si die an beiden teilen winden mögent fürderlich indrunt einem monat darnach so si sich ze der sach verbindent als vor stat uss ze sprechen und beiden teilen ir urteil in schrift besigelt ze geben, und was och dene von inen es sie von des schidlüten ob die einhell werdent, oder von dem obman und schidlüten, oder dem merteil under inen nach dem rechten, oder in der minne ussgesprochen wirt, das söllent och den beide teil stet han, und dem unverzogenlich gnug tue, wölti aber iemand dene dem spruch nit gnug tue, der sol aber dene von dem anderen teil dem er zugehöret gewiset werden wie er dem spruch fürderlich gnug tu, und den stät helt, und sol der obman und die schidlüt beiden teilen tag geben und verkünden an die vorgenante stat, nemlich gen Wunewil, si mögent si den mit der sacheren willen furer gelegen, und sol ietweder teil sie schidlüt, und beide teile den obman verkosten und von schaden ziehen, in den sie den hivon kemin, und den si bi irem eid behaben mügen, were aber das under dem obman oder schidlüten deheiner unuz wurd, oder dewedere teil die sinen nüt haben möcht, so sol und mag man andere, es sien oblüt oder schidlüt, an der abgangnen statt setzen, die sich glich verbinden als die erren getan hatten.

43 Blattmann (1994); Hildbrand (2003), pp. 386–388.

44 To the manorial development and the conflict lines of the Guglerkrieg 1375 (a side conflict of the Hundred Years War) see Zahnd (2003) or Gloor (2012).

(1396) and the confirmation of the award (1398) after further witness statements, which were requested in the first award.[45]

It is no exception but the rule that the importance of the main alliances are manifested by formulae, content and more prestigious copies of arbitration sentences.[46] The issuing of the charter of the arbitrators awards emphasised the importance of the underlying alliance, or to use Foucault's ideas: common order was re-established and materially confirmed by the existence of the documents.[47] The charters tell us more about the political landscape and the existing power-relations than they do tell about the case itself.

In 1448, the two cities Bern and Friburg were at war with each other.[48] In the so-called Savoy War, Bern was ultimately victorious over its rival. Instead of taking revenge, an arbitration tribunal was set up to resolve the problems, which retroactively declared the alliance and Burgrecht of 1403 to still be valid and in force. This allowed the two cities to continue and further strengthen their close relations. The document describes the relationship between the two "as if we were living together within the same city-walls".[49]

The arbitration court between the city of Bern and the rural community of Saanen serves as verification of the thesis. In 1445, the people of Saanen wanted to revoke their perpetual Burgrecht with the city of Bern from 1403.[50] They argued that they could not be held responsible for the actions of their ancestors. This was followed by the full procedure of a Confederate arbitration court, which lasted six years. The entire process is documented by charters: the arbiters sentences from 1451 which come to opposite results and the umpires award of 1453. The importance of the case is given by the careful selection of the high-ranking arbiters out of the Confederates elites. Bern chose arbiters from confederate cities, Saanen chose leaders of rural communities. The final award was spoken by umpires from three rural forest cantons.[51] At the end of the process, which of course confirmed the validity of the alliances, the eternal Burgrecht was solemnly

45 Cause letter: StABE C1a, Fach Nidau (1395.02.10): (...) *die vorgenanten stösse und misshellung hin gestellet haben zů dem rechten nach wisung der vorgenanten fridbriefen und die gesetzet uff den bescheidnen man Hansen von Můlron burger ze Berne als uff unseren gemeinen obman und richter in dirre sache. Und haben zů dem obman gesetztet nemlich iedweder teil zwen schidman. Wir die von Berne Peterman Buholm und Peterman Rieder unser burger. Und wir die von Friburg Hans von Perroman und Jakob Bargin unser burger. Die selben vier schiedlüt und auch den obman gesworn habend liplich eide ze Gotte und den heiligen mit ufgebortenen vingern und mit gelerten worten umb die sache ein blos recht ze sprechenne, nach dem als si denne an rat vindent, und sich selber verstant ungevarlich* (...). Umpires' award StABE C1a, Fach Nidau (1396.09.07); confirmation of the award C1a, Fach Nidau (1398.02.08).

46 Hardy (2018), p. 138.

47 Applying ideas of Michel Foucault, that jurisdiction and punishment primarily had the function of confirming and reestablishing (any sort of) order in Foucault (1975) and that order always needed comparison and similarity; Foucault (1966).

48 Fribourg became involved in a war with Bern in a secondary conflict of the Old Zurich War (1436–1450), the so called Fribourg or Savoy War (1448). This war led to Fribourg seceding from Habsburg after its defeat in 1452 and submitting to Savoy. Castella (1957), pp. 170–177.

49 Speich (2019b), pp. 80–81.

50 Speich (2019a), pp. 199–219; Bierbrauer (1991), pp. 110–124.

51 First umpires' award from Peter Seriant, chancellor of Biel: StABE C 1 a Fach Saanen (1447.11.27); Second award from representatives of Uri, Schwyz and Obwalden issued by Hans Schriber, chancellor of Obwalden, StABE C 1 a Fach Saanen (1451.03.16).

renewed by both parties and remained unquestioned until the Napoleonic conquest in 1798.

In 1560, a politically rather insignificant arbitration tribunal took place over grazing rights on the Valtermine alp in Ticino, in which the local alpine community of Quinto and the monastery of Disentis faced off against each other.[52] The widely known politician and historian Aegidius Tschudi from Glarus acted as umpire. The arbitration and its outcome are not relevant. What is interesting about this case is that Tschudi meticulously recorded the proceedings in his own hand and wrote a veritable summa of the late medieval practice of arbitration in the Swiss Confederation. Tschudi described the entire process: the problem definition, the contract of arbitration, the selection of the arbitrators, the claim, the counterclaim, the questioning of witnesses, the examination of archive documents, the arbitrators' deliberations, the parties' judgements and his own considerations as umpire.

From the historical perspective, it is the apogee of arbitration practice. At that time though, the climax was passed already. The confederate alliance network had reached its peak at the time of the Burgundian Wars in the 1470s. The ensuing dispute over the numerous allies led to a core confederation of eight, later thirteen members in 1481/1513 with other rulers loosely organised around it. Although this did not abolish the arbitration clauses of the alliances, it did reduce their effectiveness at a political level. From the middle of the 15th century, the Federal Diet had established itself as an arbitration body. Political issues were increasingly dealt with via this platform and only subordinate legal issues were resolved through the costly arbitration proceedings. During the confessional period, arbitration proceedings remained possible, but were resolved as far as possible within the confessional blocs in order to avoid further escalation.[53]

In Switzerland, arbitration remained possible up to now: A short confessional war in 1712 led to the plundering of the wealthy abbey of St. Gall. Mainly ancient books were stolen by the troops of Zurich and Bern. Most of them were returned after the conflict in 1718. Around one-hundred books and items remained in Zurich and were stored at the Central Library and the Swiss National Museum. The canton of St. Gall repeatedly demanded the return of the objects. In 2002, the cantons of St. Gall and Zurich agreed to an arbitrage by the Swiss federal council – made possible by the Swiss constitution. The salomonic verdict was that the books remain in protestant Zurich, but as a "long term loan" from the catholic church of St. Gall. The most valuable celestial globe, stolen as well in St. Gall remained in Zurich and a reproduction was donated from the canton of Zurich to the canton of St. Gall and the copy is exhibited nowadays in the library of the abbey of St. Gall.[54]

52 Deplazes (1986). To Tschudi as politician and historian see Stettler (2001).

53 Bütikofer (1991).

54 Federal media release and contract text: https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-4853.html (27.04.2006), cited on 26th September 2024.

Conclusion

Alliances and the convenants texts are fundamental to understanding end embedding the arbitration system in the Old Swiss Confederacy. In almost every (bilateral) alliance between the late 13th and the late 15th century, arbitration clauses are inserted. They serve to maintain peace and stability in legal cases that are not to be resolved by existing law-courts. Due to the many arbitration clauses in the alliances, the alliance landscape inevitably becomes an arbitration landscape in which arbitration is firmly anchored in political and alliance practice.

Arbitration courts deeply affect the political landscape. They are there to maintain a balance and to end or prevent disputes if other courts do not have jurisdiction or if no politically viable solution is forthcoming. The outcome of the arbitration tribunals is influenced by the targeted selection of arbitrators or the restriction of the eligibility of certain groups fixed in the alliance agreements. The election of party arbitrators allows the alliance partners to activate their networks and thus prepare for or counteract an escalation. Confederate Elites are connected by interaction at the confederate diet, as arbiters or leaders of military contingents. Arbitration is therefore a central element of elite communication and an area of activity for the patricians.

The political weight of alliances can actually be measured by the arbitration system. The main indicators are: (1.) the repeatedly inserted arbitration clauses in the alliances, their (2.) evolvement alongside major cases (p.e. between the cities of Bern and Fribourg) and (3.) by the highly specialised personal and proceedings within the alliance system, (4.) by historiography, starting with the Chronicon Helveticum by Aegidius Tschudi, the narrative of national historiography in the 19th century up to the reappraisal of arbitration within the framework of the League of Nations in the early 20th century. Since then, it seems that little historical relevance has been attached to the topic in research on the Swiss Confederation.

The older legal-historical research has seen the arbitration courts of the medieval Swiss Confederation as the core of a common law. That goes to far. It was a common statement that, first and foremost, they wanted to stick to their own law and the traditional jurisdictional circumscription. Furthermore, it is true that the institutional preliminary decision to appeal to an arbitration tribunal in cases of doubt had, in retrospect, certainly strengthened the Confederation's alliance system.

Fig. 2: Cause-letter. StABE, C1a F. Nidau (1395.02.10)

Fig. 3: Umpires award. StABE, C1a F. Nidau (1396.09.07)

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„quod non possit iudiciarie terminari". Prostředí arbitráže v pozdně středověké švýcarské konfederaci

Pro pochopení arbitrážního systému v pozdně středověké švýcarské konfederaci mají zásadní význam aliance a alianční dohody. Téměř každá (bilaterální) dohoda mezi aliancemi z období od konce 13. do konce 15. století totiž měla rozhodčí doložku. Ta sloužila k udržení míru a stability v kauzách, které nemohly rozhodnout řádné soudy. Z důvodu existence velkého množství arbitrážních doložek se alianční prostředí nevyhnutelně stalo prostředím arbitrážním, ve kterém byla arbitráž pevně ukotvena v politické a alianční praxi.

Arbitrážní soudy měly hluboký dopad na politickou scénu a její utváření. Přispěly k rovnováze a k ukončení nebo prevenci sporů v případech, kdy řádné soudy neměly potřebnou jurisdikci nebo se nenabízelo jiné, politicky schůdné řešení. Jak vyplývá z aliančních dohod, samotný výsledek arbitrážních řízení byl ovlivněn cíleným výběrem arbitrů nebo omezením pravomocí určitých skupin.

Volba arbitrů jednotlivých stran umožnila aliančním partnerům aktivovat své sítě a připravit se tak na potenciální eskalaci nebo jí čelit. Elity spříseženstva byly aktivní prostřednictvím politické interakce na konfederačním sněmu, jako arbitři nebo jako vůdci vojenských kontingentů. Arbitráž proto byla ústředním nástrojem komunikace elit a důležitým polem působnosti patriciјů.

Prostřednictvím arbitrážního systému pak lze meřit i politický význam aliancí a aliančních dohod. Nejdůležitějšími ukazateli jsou: (1.) rozhodčí doložky, které jsou součástí aliančních dohod; (2.) vývoj důležitých případů (např. spory mezi městy Bern a Freiburg); (3.) vysoce specializovaný personál a postupy v rámci aliančního systému; (4.) konečně přehodnocení v národní historiografii.

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