Hübner, Klara

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Studia historica Brunensia. 2024, vol. 71, iss. 2, pp. 247-251

ISSN 1803-7429 (print); ISSN 2336-4513 (online)

Stable URL (DOI): https://doi.org/10.5817/SHB2024-2-14
Stable URL (handle): https://hdl.handle.net/11222.digilib/digilib.80896

Studia historica Brunensia 71 / 2024 / **2**
https://doi.org/10.5817/SHB2024-2-14

Conclusion: Some Thoughts on *Arbiter, arbitrator, or compositor amicabilis*

Klara Hübner / huebnerk@mail.muni.cz

Department of Auxiliary Historical Sciences and Archive Studies, Faculty of Arts, Masaryk University, Brno, Czech Republic

The volume's in-depth examination of various issues not only focuses on the tools, procedures and social positioning of arbitration in pre-modern societies, but also covers an impressively wide chronological range. It begins with the somewhat hazardous task of the arbitrator in the Roman Republic and ends in the late Middle Ages with Uwe Tresp's contribution on King Sigismund's ability to use arbitration procedures to demonstrate his political virtuosity.

Given such a wide range of contributions, it is not easy to reduce them all to a common denominator. That would also mean pushing the terms, phenomena and written testimonies towards some kind of definition, which would not be in the spirit of Lenka Šmídová Malarová and Přemysl Bar, nor would it correspond to the overriding claim of the workshop, which is "the more I learn, the more I know". So it may be better to start from a different angle: When I think of *arbiter, arbitrator or compositor amicabilis*, what comes to mind is the referee, who since the 19th century has been the impartial and legitimate third party in European sporting contests, commited to settle all conflicts between players on the pitch.

Strange as it may sound, the referee metaphor is apt for several reasons: Firstly, as in pre-modern arbitration, on the pitch the referee operates at an intermediate procedural level, somewhere between the internationally recognised rules of sports federations and the often unwritten customs of local rule-breaking. When applied to medieval practice, this is somewhere between the Roman or canonical norm and local conflict resolution practices, which – depending on the local human resources and institutional structures – are dynamically interpreted, but without falling outside the framework of the overarching set of rules. Secondly, the referee's decision is generally recognised by both parties to the conflict, which also usually applies in the case where he does not have a judicial background. The related English term *umpire* refers to this fact, which derives from the Old

This study was supported by grant no. 19-28415X "From Performativity to Institutionalization: Handling Conflict in the Late Middle Ages (Strategies, Agents, Communication)" from the Czech Science Foundation (GA ČR); it relies on the Czech Medieval Sources online database provided by the LINDAT/CLARIAH-CZ research infrastructure (https://lindat.cz) supported by the Ministry of Education and Science of the Czech Republic (project no. LM2018101).

French *nonper* – *"non"* meaning "not" and *"per"* meaning "equal" or "belonging to" a party in a dispute. It is first mentioned around 1350 in connection with sporting contests.[1] According to the Middle English Compendium, his role is that of an arbitrator, or "*one who is called upon to act as an arbiter in a dispute between two people*".[2] And it is precisely this fact that highlights a third similarity, which is that in both sport and in civil arbitration, he is the actor to whom the responsibility for peaceful conflict resolution has been transferred. The principal reason was that he could rely on a universally recognised legal framework, enjoyed general recognition and was sometimes legitimised by transcendent ideas.

But now to the crux of the matter; the wide range of contributions here confirms that medieval arbitration in all periods and regions of Europe was above all a tangible process with fixed rules, and only then was it sanctioned by a transcendental superstructure. We encounter the diversity of its actors and learn about the legal foundations of the procedures, the possible applications, and the manifestations in which the *arbitri* operated. And let us not forget the breadth of the written form, which helps us to see arbitration as a principle with a wide range of possible applications, most of which were based on local traditions, traditional legal norms and flexible procedures.

Moreover, we are able to see how popular arbitration was, precisely because it had an openness that made the already highly personalised legal thinking of the Middle Ages even more personal. But the principal reason for its popularity was pragmatic, insofar as arbitration was seen as a quicker alternative to the often lengthy procedures of the secular and ecclesiastical courts. It dealt with everyday matters such as property claims and real estate issues quickly, and it was also cheaper.

Arbitration was therefore a low-threshold procedure that was used by all in medieval society: Equals, but also, as Lenka Blechová points out, those who were legally more divided than united, such as Christians and Jews, secular actors and clerics, and merchants and traders. These were people who often operated in different regions and legal spheres. The only thing that united them was their interest in pragmatic conflict resolution, while respecting the rules of the higher law. In this regard, the situation could be likened to lower division players playing on the same pitch as the national team with the same rules.

To return to the contributions that constitute this mosaic of perceptions, let us begin with the basic principles of arbitration at the time of the Roman Republic, which the article by Petr Dostalík introduced. It was here that first emerged the idea of the arbiter as a link between the state and the dispute cultures of its smallest social nucleus, the patriarchal *familia*. This function was semi-institutional and was performed by praetors with police and judicial powers. Nevertheless, it was also practised by laymen, who could

1 The term "umpire" deriving from the Middle English *oumpere* – *noumpere* – the Anglo-Norman *nounpier*, means "unequal" in the sense of "impartial". Since its first appearance around 1350, it has been used in certain sports to designate the referee. Umpires were not equal to the other players, they were above them, which is a principle that goes back to antique gladiator contests that were overseen by a *summa rudis* and his assistant, the *secunda rudis;* see: Köhne –Jackson (eds.) (2000), p. 67.

2 Middle English Compendium: An arbitrator, *arbiter*, *umpire*, a *mediator*; (b) one who decides a matter when arbitrators cannot agree (Middle English Compendium, Dictionary, noumper (e n., quod.lib.umich.edu/m/middle-english-dictionary/dictionary/MED29953).

incur the wrath of the disputants if they did not fulfil their arbitration mandate within a given time, which many a modern referee might relate to. Another aspect is procedural issues, which Patrick Macowiak addressed in demonstrating how Roman law and individual interpretations of the notion of public reputation and *fama* clashed in the presentation of evidence.

A number of contributions are also devoted to the central question of how and when the principle of arbitration was appropriated by secular and ecclesiastical rulers. Felix Timmer shows how arbitration increasingly became an instrument of princely participation in royal power in the Roman Empire in the early 12th century, while Lukáš Führer points to a similar phenomenon in connection with the written procedural rules of leading ecclesiastical actors in 13th-century Bohemia. In the study by Enes Dedic we are introduced to the *Djed*, an ecclesiastical actor who was also often called upon for arbitration purposes. His precarious position as head of the Bosnian Church is also a reference to the local validity of most arbitration judgements.

This precariousness of the position of certain actors also applies to special areas of law, such as that of the Jews in late medieval Prague, who, according to Lenka Blechová, had access to a sophisticated system of arbitration under Jewish law, into which Christians had little insight. As in the case of Catholic dignitaries, the rabbi was seen as the guarantor of the preservation of the two central transcendental goals of arbitration, namely reconciliation and peace.

Lenka Šmídová Malarová's contribution takes a close look at the municipal circles of medieval Brno and its relationship with the neighbouring town of Uherské Hradište, which in the late Middle Ages sought to free itself from its institutional dependence on Brno, even though the political hierarchy between the two towns remained untouched. Veronika Ondrášková examines ecclesiastical criminal jurisdiction and its legal framework, in which the subtle differences between arbiter and arbitrator are outlined, while Jakub Razim presents a surprising case study on the Prague *Parvus ordinarius*, an arbitration manual that shows that a significant number of procedures were standardised in late medieval Europe.

Daniel Luger claims that despite their similar functionality, arbitration charters were based on specific formulae, the different effects of which have been little studied. He demonstrates this with the formula *de alto et basso*, which was an integral part of many arbitration documents in the late Middle Ages, although it has been overlooked until now. Moreover, this example shows how the slow infiltration of structural specifics into arbitration charters was achieved through the use of quantitative methods.

Unresolved arbitration cases can also be used for political purposes, as shown by the case study by Ondřej Schmidt, who unravelled the long-running unresolved arbitration case of the Viennese merchant family Haiden, which lasted over 60 years in the 15th century and involved several preeminent European actors. A similar longevity of conflict resolution is invoked by Heinrich Speich, who devoted himself to the dense network of alliances of the Swiss Confederation. In this case, the procedures and instruments of arbitration were appreciated as a faster and more precise alternative to the more cumbersome policy of alliances. Finally, Uwe Tresp describes how

Sigismund used his dual role as judge and arbitrator to strengthen his political position in Wittelsbach Bavaria.

This outline illustrates that some of the themes in the volume need to be explored in greater depth, as many of the contributions point in a similar direction. The following questions and accompanying discussion give an indication of just two of them:

1. What is meant by the term "arbiter"? This is place where *Arbiter, arbitrator* or *compositor amicabilis* comes into play. However, Lenka Blechová and Lenka Šmídová Malárová also refer to the *uberman*. There is also the mediator or, according to Heinrich Speich, the *umpire*. Moreover, Felix Timmer mentions the *proto-arbiter*, a functional variety that can be described as "*arbiter avant la lettre*", since – as so often in the Middle Ages – the function appears before the designation.

What these terms have in common, however, is that they have been used in different research contexts to designate the central actors in an arbitration whose primary task was to hear the two parties to a dispute, analyse the evidence presented and then, in the role of a neutral authority, make a decision in favour of one or the other. They reflect a norm that was obviously more dynamic in practice.

The various terms also makes it clear that, despite their common roots in Roman law, the notions of what the arbiter's duties should include were often based on local ideas, which were ultimately reflected in the limited scope of this instrument. This cultural-spatial practice of interpretation is sometimes reflected in the argumentative patterns of the proceedings. For example, notoriety had a different procedural significance in the urban north of Italy than in the centres of power in Bohemia. The same applies to the role and perception of the arbitrator: Might gifts to the arbitrator – as in the case of the Bosnian *Djed* – have been perceived as bribery in the Central European context? And what about arbitration cases in which the disputants or the arbiter knowingly or subtly prioritised their own agenda? If the character of the arbiter is thus questioned, the next step would be to trace the changes in this office not only through the ages, but, above all, in specific areas of law in medieval Europe.

2. What is the nature of arbitration? Is it an institution, a procedure, a (Christian) principle – or all of the above? Throughout the contributions, we repeatedly encounter arbitration in all these aggregate states, but without more in-depth examination. The question of arbitration as an institution was of particular interest in earlier research that distinguished between "ad hoc" and institutional arbitration. While the former was said to have been convened spontaneously by two parties without any legal status, the institutional form was considered to have fixed procedures, written down, for example, in treaties. Supposedly, it was organised on the basis of the power hierarchy, from top to bottom; i.e., from the emperor or king to princes and townsmen, and similarly from the pope to the bishops.

In view of the many findings in the present volume, it seems more useful to analyse arbitration not only on the base of its institutional structures, but also through the dynamics between its elements. The first aspect is the variety of actors that used it:

Rulers and cities, clerics and seculars, allies with different legal backgrounds, city lords and Jews, cities against local nobles, but also clerics against clerics. A second aspect is the application of specific Roman or canonical sentences, which is also reflected in the above-mentioned conceptual cluster of arbitration. And it is important to bear in mind its close interdependence with litigation proceedings, as illustrated by Jakub Razim in the idealised triangle between judge, active plaintiff and passive defendant.

A third aspect is the fact that it covered a great range of disputes from feudal conflicts to adultery and inheritance disputes. All underline the open, typically medieval character of this popular procedure. Another aspect relates to the rationality of the procedures, as Lukáš Führer shows in his example of the *compromissum* from the Bohemian Church, which always followed the same steps, beginning with the identification of the parties, followed by the choice of the arbiter, up to the determination of the penalty for failure to comply with the judgement by a certain date. A final aspect is the transcendent principle of arbitration, legitimised by the deeply Christian and Jewish understanding of social peacekeeping, which was considered the first duty of a community. According to Razim, a failed reconciliation was not only a legal problem, but above all a moral one, since it transformed the person who had broken the trust into an irredeemable sinner.

The richness of the case studies presented would, of course, require a more differentiated look at actors, procedures and practical implementation, but in view of the abundance of follow-up questions, this must be formulated as a research desideratum. Finally, I would like to return briefly to an aspect that has been mentioned several times. It is also one of those research desiderata that illustrate how different the methodological perceptions of historians and legal historians can be. It concerns the arbiter/arbitrix problem. Both Petr Dostalík and Veronika Ondrášková pose the question of whether women were able to act as arbiters in classical Roman legal terms. Only the *pater familias* was allowed to take on arbitration cases. Female family members were not legal subjects and therefore had to be represented by a male relative. Veronika Ondrášková could only point to a Frankish queen who acted as arbitrix, but she could not identify her.

Contrary to the legal findings, however, there is a historical example in the person of Agnes of Hungary, daughter of the Habsburg king Albert I, who was murdered near Rheinfelden in 1308. She was widowed at an early age, in 1308. From then on, she worked in Königsfelden Monastery and dedicated herself to the memory of her father, without ever taking vows. During this time, particularly in the period between 1330 and the 1350s, Königsfelden became a centre for mediation, including arbitration.[3] She acted as mediator and arbitrator on a number of occasions, such as the arbitration attempt in a dispute between Rapperswil, Zurich and Waldstätten in 1351, which was not successful.[4] It is also documented that even opponents of the House of Austria turned to the Hungarian widow queen in their disputes with the Habsburgs, although, of course, Agnes also acted in the interests of her house. In this respect, her intense activity as an arbitrator is perhaps unique in the Middle Ages.

3 This fact is known from research, but was not investigated in detail since the 19th century. More recent studies have been carried out, for example, by: Widder (2005), pp. 91–134; Boner (1965), pp. 3–17.

4 StaZH, C I Stadt und Land, Nr. 1489, October 1, 1351.

The spiritual dimension of peacekeeping will have played as much a role as her networks and personal assertiveness, which, as a member of the high European aristocracy, predestined her to become an arbitrix. Moreover, she is living proof that the opportunities offered by her high aristocratic background sometimes took precedence over Roman legal gender norms. Her example also shows us that our image of the arbitrator must not be too narrowly defined, either terminologically or in terms of her role in the proceedings, but must be reconsidered across social, religious, and, as in this case, gender boundaries.

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