Showing the Truth to the Judge: The Role of Proofs in the Consulate of Seville during the Late 16th Century

ABSTRACT

This paper examines the role played by the proofs in the jurisdiction of the consulate of Seville during the last years of the 16th century. Its purpose is to challenge the historiographical assumption that mercantile justice was summary, based on the principle of good faith among merchants that presupposed a simplified procedure free from long proving periods. Through the study of litigation in the consulate I am going to show how mercantile good faith coexisted with the judicial model of the ius commune, in which proofs were at the core of the judicial decision making. Even if this jurisdictional model affected trial's shortness and simplicity, sources show that in some cases litigants preferred it instead of a summary jurisdiction since it offered them enough legal certainty to invest and negotiate in long distance trade.

KEY WORDS

Trade, Consulate, Litigation, Proofs, Ius Commune.

In early modern Spain, consulates were commerce institutions created and administered by merchants in order to give unity to the regulation of commercial transactions, as well as for resolving conflicts between merchants via their own rules and customs. The principle Spanish commercial cities were host to these institutions. In contrast with the Aragonese crown, which had maintained consulates in cities like Barcelona, Valencia and Mallorca since the 13th and 14th

centuries [1], consular institutions appeared later in the Kingdom of Castile. It was not until 1494 that a consulate was founded in Burgos, using as a model the institutions existing in the Kingdom of Aragon; some years later, in 1511, a consulate was also founded in Bilbao [2].

The city of Seville, at the heart of the commerce with the New World, was no exception. In a report presented in April of 1543 to the Council of the Indies by the merchant Cebrián de Caritate, the merchants of Seville requested the creation of a consulate after the fashion of those existing in Valencia, Barcelona, Bilbao and Burgos. They gave one reason for this: The Sevillian merchants needed a summary jurisdiction that could quickly resolve their lawsuits and help them avoid greater harm to their assets:

«Because we have no consulate for dealing with things by way of a corporation of prior [3] and consuls, we have suffered and continue to suffer serious problems, losses and disorder in carrying out our business, and many lawsuits have caused major delays that have harmed our merchandise in detriment to its worth, all of which would cease if our businesses were ruled and governed by a consulate» [4].

After months of negotiations, the then-Prince Philip dictated a Royal Provision on August 23rd, 1543, ordering that a consulate be founded in Seville [5].

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[1] R. Smith, *Historia de los Consulados de Mar (1250-1700)*, Barcelona 1978, pp. 20-24; T. Montagut Estragués, *El Llibre del Consolat de Mar y el ordenamiento jurídico del mar*, in «Anuario de Historia del Derecho Español», 67 (1997), pp. 201-217; J. Cabestany Fort, *Consols de mar y consols d' ultramar en Cataluña (siglos XIII-XV)*, in R. Ragosta (ed.), *Le genti del mare mediterraneo*, Napoli 1981, Vol. I, pp. 397-425.

[2] F. Ballesteros Caballero, H. Casado Alonso, A. C. Ibáñez Pérez, S. Escolar Díez (eds.), *Simposio Internacional «El consulado de Burgos»*, Actas del V Centenario del Consulado de Burgos: 1494-1994, (Burgos 28-30 de septiembre de 1994), Burgos 1994, pp. 527; J. P. Priotti, *Bilbao y sus mercaderes en el siglo XVI. Génesis de un crecimiento*, Bilbao 2005, pp. 35-69.

[3] The prior was a merchant in charge of the direction of the consulate. He had the same faculties and obligations of the consuls but exercised a casting vote in all the institutional decisions according to the Law 7 of the 1556 ordinances of the consulate of Seville. Transcribed in A. Heredia Herrera, *Las Ordenanzas del Consulado de Sevilla*, in «Archivo Hispalense», 171 (1973), p. 157.

[4] «A causa de no tener consulado para tratar sus cosas por vía de la Vniuersidad de Prior y Consules se avian seguido e siguian grandes ynconuenientes e diminuçion e desorden en el dicho trato y comerçio y se mouian muchos pleitos y con ellos dilaçiones grandes en daño de las dichas mercaderías y en detrimento de sus créditos, lo cual todo çesaria si se rrigiesen y gouernasen por consulado». J. J. Real Díaz, *El Consulado de cargadores a Indias: su documento fundacional*, in «Archivo Hispalense», 147 (1968), p. 286.

[5] There was a long delay between the founding of the consulates of Burgos and of Bilbao— which were created shortly after Columbus's discoveries—and that of Seville. The presence of the *Casa de la Contratación* (House of Trade), which acted as a consulate up until the foundation of the consulate of Seville, may go some way to explaining this delay. A. Heredia Herrera, *Apuntes para la Historia del Consulado de la Universidad de Cargadores a Indias en Sevilla y en Cádiz*, in «Anuario de Estudios Americanos», 27 (1970), p. 219; R. L. Woodward, *Merchant Guilds (Consulados de Comercio) in the Spanish World*, in «History Compass», 5 (2007), pp. 1576-1584; M. Souto Mantecón, *Los consulados de comercio en Castilla e Indias: su establecimiento y renovación (1494-1795)*, in «Anuario Mexicano de Historia del Derecho», 2 (1990), pp. 227-250.

With this concession, the Crown of Castile conceded to Sevillian merchants the right to a special, privileged jurisdiction in which merchants could resolve their legal disputes by means of a procedural style that obviated the excessively lengthy lawsuits typical to ordinary jurisdiction [6]. The prior and the consuls of Seville had the crucial task of rendering their judgement as quickly as possible, by omitting procedural formalities and the intervention of lawyers who could delay the process. To be precise, the consulate's founding text established that: «Lawsuits had to be resolved by following the procedures in use among merchants, without petitions or documents drawn up by lawyers, but by relying on the known truth and fair dealing that exist between merchants, without giving rise to malicious delays... or postponements caused by lawyers» [7].

These principles are repeated over and over in all the ordinances of Hispanic and Indian consulates, without exception. They constitute the foundation on which some mercantile legal historiography has based its dogmatic assertion that the mercantile justice administered in the consulates was summary justice [8]. I seek to rebut this assumption via an analysis of the litigation brought to the consulate's tribunal, which will show that the reality of mercantile justice was totally different from what has been described by the historiography up to now. The summary justice that the consulates sought to administer was, in many cases, a mere goal, or rather, was an ideal model of justice for mercantile activity, at least during the last years of the 16th century.

In order to explain the paradoxical relationship between legislation and the practice of the consulate's court we must define a highly important concept: that of mercantile jurisdiction. Castilian law in the medieval and modern epochs developed in the context of the legal tradition of *ius commune*, which had important implications for how that age understood the notions of jurisdiction, the judge and the lawsuit. Thus, jurisdiction was understood in its most literal sense, as *iuris dicere*, «saying the law» [9]. This was the backbone that sustained Castilian and European legal culture, the same that considered judges as the structural axis of the normative production. The judge was the public figure recognized as an authority for specifying equity in the resolution of a conflict or

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[6] Rapidity of judgment was not an overriding issue in ordinary jurisdiction, since the guarantee of the correct administration of justice took precedence. M. P. Alonso Romero, *El solemne orden de los juicios. La lentitud como problema en la historia del proceso en Castilla*, in «Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid», 5 (2001), p. 23.

[7] Consuls had to settle mercantile disputes: «Por estilo de entre mercaderes, sin libelos ni escritos de abogados, saluo solamente la verdad sabida e la buena fe guardada como entre mercaderes, sin dar lugar a luengas de maliçia, ni a plaços ni dilaçiones de abogados». Real Díaz, *El Consulado de cargadores a Indias* cit., p. 288.

[8] F. Galgano, *Lex mercatoria: Storia del diritto commerciale*, Bologna 1993, p. 38; S. Coronas González, *La jurisdicción mercantil de los consulados del mar en el Antiguo Régimen (1494-1808)*, in *Simposio Internacional «el Consulado de Burgos»* cit., pp. 251-279; M. M. Del Vas Mingo, *La Justicia Mercantil en la Casa de la Contratación de Sevilla en el siglo XVI*, in «Estudios de Historia Novohispana», 31 (2004), p. 76.

[9] P. Costa, *Iurisdictio. Semantica del potere político nella pubblicistica medievale (1100-1433)*, Milano 1969; M. Meccarelli, *Arbitrium, Un aspetto sistematico degli ordinamenti giuridici in età di diritto comune*, Milano 1998.

lawsuit between persons that derived from the use of things through the subjective weighing of several sources of law [10]. It was the judges that «said» the law, a practice that was fundamentally carried out via the resolution of lawsuits.

In the mercantile domain, this capacity to «say» the law corresponded to the consuls, who, according to consular legislation, were the judges that resolved lawsuits between merchants arising from mercantile practice, but with the characteristic of judging in strict conformity with the known truth and fair dealing. These were the directives that the consuls had to respect when resolving lawsuits, but their implementation posed certain problems in practice, where the terms turned out to be highly ambiguous.

To understand the meaning of judging in conformity with the known truth and fair dealing, I turn to the mercantile legal doctrine. In his famous mercantile treatise *Curia Philipica,* the Spanish jurist Juan de Hevia Bolaños defined «known truth» as the truth of fact discovered and proven in the trial, while «fair dealing» was seen to be the equity that tempered the harshness of legal subtleties [11]. It is striking that this definition appears to refer to the jurisdictional principles of *ius commune,* where the proofs were crucial to the resolution of the lawsuit and the judges were considered to be ministers of equity, bound to judge *secundum allegata et probata* and *secundum iura legesque* [12].

The association that I am suggesting, of the jurisdictional principles of the *ius commune* with the principles of mercantile jurisdiction is based on the literalness of the legal doctrine I have just cited, but above all on the experience of the jurisdiction of the consulate's tribunal. That is, on how the consuls administered justice to the Sevillian merchants through resolving their lawsuits, i.e. through the practice of «saying» the law. The lawsuits resolved by the consuls show evidence of jurisdictional practices similar to those of the civil courts that were involved in the *ius commune* tradition. This tendency of the consulate's jurisdictional practice consisted in the implementation of a model of administration of justice where judges' decisions were derived from the truth as demonstrated by the proofs, as well as from the laws, uses and practices of mercantile profession.

I claim that the implementation of the jurisdictional model of civil law in the consulate, and as a result, the importance acquired by proofs in order to resolve mercantile lawsuits, arose as an institutional response to the principal problem of exchange: The uncertainty caused by the risks inherent to

[10] P. Grossi, *L'Europa del diritto*, Roma-Bari 2007, pp. 281; A. D'Ors, *Derecho es lo que aprueban los jueces*, in «Atlántida», 45 (1970), pp. 233-243.

[11] *Curia Philipica*, bk. II, ch. XV, num. 37, ff. 445-446.

[12] C. Garriga, *Justicia Animada. Dispositivos de la justicia en la monarquía católica*, in «Cuadernos de Derecho Judicial», 6 (2006), pp. 59-106; J. Vallejo, *Ruda Equidad, Ley Consumada. Concepción de la Potestad Normativa (1250-1350)*, Madrid, 1992, pp. 550; J. Vallejo, *Acerca del fruto del árbol de los jueces. Escenarios de la justicia en la cultura del ius commune*, in «Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid», 2 (1998), pp. 19-46; B. Bravo Lira, *Iudex minister aequitatis. La integración del derecho antes y después de la codificación*, in «Anuario de Historia del Derecho Español», 60 (1991), pp. 111-163; M. Galán, *La progresiva búsqueda de las garantías de justicia para con el juez*, in J. Cruz Cruz (ed.), *La justicia y los juicios en el pensamiento del Siglo de Oro*, Pamplona, 2011, pp. 95-120.

long-distance trade. Success in the Atlantic trade was uncertain and led to a need for an efficient jurisdiction, able to make commerce viable through the generation *ex ante* of the certainty that merchants needed regarding the profitability of their businesses and the economic capacity of their partners. Merchants wanted to be sure that their economic partners would comply with their contractual obligations *ex post*, despite the long distances, the mobility and uprootedness that in many cases implied the profession, as well as the dangers that go hand in hand with navigation [13].

The arduous context in which commerce with the Indies developed made difficult the operation of a summary jurisdiction based solely on good faith among merchants. The last 20 years of the 16th century were especially sensitive to these problems. During this period the war with England was at its height, which spurred the attacks of English pirates on Spanish vessels in the Atlantic. There were numerous pirate attacks, both along the coasts of Spain as well as in America, which caused enormous economic losses. It is enough to recall the capture of the city of Cadiz by part of the English fleet in July of 1596, which caused the devastation of the city and the nearly complete destruction of the fleet that was preparing to set off for New Spain [14]. In addition, the climatological conditions were unfavourable. According to Chaunu's calculations, between 1583 and 1598 around 120 ships were lost during the crossing of the Atlantic due to storms [15]. In addition, we must include the confiscations made by the Castilian crown itself which, albeit it rarely, when occurred caused severe harm to the merchants economy.

The repercussions of these conditions were often catastrophic for the merchants. Between the years of 1580 and 1610, I have counted 125 declarations of bankruptcy preserved in the archives of the most important tribunals of Seville (the Royal Audience, the House of Trade and the Consulate), all corresponding to individuals connected directly to the Indies trade, primarily merchants and sailors. More than ever the Sevillian merchants needed institutions that would be able to assure compliance with contractual obligations in an efficient way. In this context, an effective administration of justice meant that the consuls would judge the lawsuits by adhering to the truth of the facts demonstrated by proofs, not necessarily in a summary way. This was the only possible way to safeguard the property rights of the litigants.

The consulate provided various solutions for resolving conflicts. First of all, the consuls sought to convince the litigants to come to an agreement outside

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[13] A. Greif, *The fundamental problem of exchange: A research agenda in Historical Institutional Analysis*, in «European Review of Economic History», 4 (2000), pp. 251-284; S. Ogilvie, *Institutions and European Trade. Merchant Guilds (1000-1800)*, Cambridge, 2011, pp. 250-314; P. R. Milgrom, D. C. North, B. R. Weingast, «The role of institutions in the revival of trade: the law merchant, private judges, and the Champagne fairs», in *Economics and Politics*, 2 (1990), pp. 1-23.

[14] M. Bustos Rodríguez, *Historia de Cádiz: los siglos decisivos*, Madrid, 2005, pp. 405-413.

[15] P. Chaunu, H. Chaunu, *Séville et l´Atlantique (1504-1650). Partie Statistique*, Paris, 1955, Vols. III-IV.

of court in order to avoid a lawsuit. If the extrajudicial agreement was unfruitful, then the consuls would suggest to the parties that they submit to arbitration, in which the dispute would be resolved by one or more trusted arbitrators, outside of the framework of a lawsuit in a court, thereby speeding the process and the attainment of a judgment. If the litigants refused to submit to arbitration, or else, if once it was started the litigants refused to continue with it, then the parties could begin a lawsuit directly at the consulate.

At the consulate the trial began with a demand that the plaintiff presented to a court's notary. The demand would then be presented to the defendant so that he could respond within the deadline set by the consuls. Once the consuls were in possession of the demand and its reply, if there was insufficient evidence to come to a decision, the procedure continued with an evidence phase that aimed to guarantee a solution based on the truth of the matter [16]. The frequently dishonest behaviour of the litigants in trials often forced the consuls to test the truth of their allegations, and as a result traditional forms of proof, such as the deposition made by the plaintiff under oath—that is, founded solely on the good faith of the plaintiff—or simple verbal agreements did not have full evidentiary value in the consulate of Seville.

An example of this can be found in the 1598 lawsuit between Antonio de Castro and Francisco Suárez de Medina over a debt, in which the declarations under oath the two parties made had to be proven by witnesses and documents. The litigants made contradictory declarations, since the first held that he had not received the two silver fountains that the second, Francisco Suárez, claimed to have delivered as payment for a debt of 18,700 *maravedies*. The contradictions in the declarations of the two parties meant that the litigants had to present further proofs that would confirm those declarations. The consuls ordered the parties to present witnesses as well as to present a supposed payment receipt held by Antonio de Castro, which he refused to provide [17].

It seems that—for the Indies trade—neither good faith between merchants nor verbal agreements had enough binding force. Merchants required court intervention to have contracts enforced, despite the reluctance to get involved in lawsuits that supposedly characterized merchants [18]. This produced a notable increase in lawsuits in the Sevillian tribunals, a phenomenon that affected all Castilian courts in general [19] and which also meant that the litigants would have

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[16] E. Gacto Fernández, *Historia de la jurisdicción mercantil en España*, Sevilla 1971, pp. 128-153; S. Coronas González, *Derecho Mercantil Castellano. Dos estudios históricos*, León 1979, pp. 108-124.

[17] The contradictory declarations of the litigants were taken on March 15 and 18, 1598. The judicial act that requested the parties to present further proofs is also from this last date. Archivo General de la Cámara Oficial de Comercio, Industria y Navegación de Sevilla (AGCOCINS), *Consulados* 434, num. 5.

[18] C. Petit, «Mercatura y Ius Mercatorum, Materiales para una antropología del comerciante premoderno», in *Del ius mercantorum al derecho mercantil: III seminario de Historia del Derecho Privado* (Sitges 28-30 de mayo de 1992), Madrid 1997, pp. 61-66; C. Petit, «Del usus mercatorum al uso de comercio. Notas y textos sobre la costumbre mercantil», in *Revista da Facultade de Direito* –UFPR, Curitiba», 48 (2008), pp. 7-38.

[19] R. L. Kagan, *Pleitos y pleiteantes en Castilla (1500-1700),* Salamanca 1991, pp. 131-138.

to have proofs that would support the truth of their claims, since any action by the court relied on the evidence brought forward by the litigants. For the consuls a declaration under oath by the plaintiff had as much evidentiary weight as that of the defendant; as a result, deciding which party had the most legitimate argument demanded other proofs that could validate each litigant's account. Thus, the consuls' jurisdictional procedure gave more weight to the evidentiary phase, as this facilitated the demonstration of the facts and made the administration of justice feasible —even if this meant lengthening the trial and, as a result, making the lawsuit more costly.

The consuls usually granted nine days to the parties for the evidentiary phase, although it could be extended when the litigants needed more time to gather their proofs. Indeed, some lawsuits took as long as they might have under ordinary jurisdiction. The parties frequently requested that the evidentiary phase be extended, in anticipation of any difficulties they might run into preparing their evidence. The most common reason given for an extension was to allow time to obtain depositions from witnesses that were in other parts of Castile, Europe or the Indies. The parties sometimes even requested the very lengthy *término ultramarino*, an overseas delay granted under ordinary jurisdiction [20].

Thus, the *término ultramarino* was repeatedly requested by Francisco Rodríguez, on behalf of the merchant Juan Gutiérrez de Luque, in the lawsuit he pursued against Cristóbal de Carrión and others in order to obtain an insurance reimbursement for some lost ginger: «I request that the process move to the evidentiary phase, with the ordinary term for this part of the world, in addition, of course, to the overseas time period of a year and a half in order to seek evidence in the city of San Juan of Puerto Rico, where the event occurred» [21].

Nevertheless, the fact that litigants could request the overseas delay did not mean that the consuls allowed it—it was not granted, for example, in any of the cases I studied. The consuls sought to maintain the shortened procedural model, making the trial as speedy as possible and only granting limited extensions for the evidentiary phase, typically in renewable periods of six days. However, their efforts were in vain when the repeated deadline extensions caused the lawsuit to draw out across several months.

This occurred in the lawsuit over the payment on an insurance policy that was presented by the Flemish merchant Bautista Maer against the also Flemish insurers Lorenzo Bermullen and Francisco Ustarte, who had insured certain

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[20] *Recopilación de las Leyes de Indias*, bk. IX, title III, law XII. This law stipulated a period of one and a half years for seeking evidence in New Spain, two years in Peru, and three years for the Philippines.

[21] «Pido ser reçeuido a prueua con el termino ordinario para estas partes, y desde luego termino y plazo vltramarino de año y medio para hazer my prouanza en la ciudad de San Juan de Puerto Rico donde passo el hecho». Petition presented by Francisco Rodríguez on the 24th of February of 1600, in the presence of the consuls in Seville. AGCOCINS, *Consulados* 434, num. 9, f. 29. Lawsuit of Jerónimo Vargas, in the name of Juan Díaz of Zurita, against the insurers of a certain ginger that came from Puerto Rico in the ship San Buenaventura, which was lost due to an attack by corsairs.

goods that had been loaded in Santo Domingo onto the vessel La Fortuna, whose whereabouts had been unknown for several months. On May 8, 1595 the insurers asked the consuls for an extension of the deadline to present proofs, which would justify their refusing payment on the insurance policy. Bautista Maer argued against this extension, claiming that: «The other party, in order to delay this lawsuit, has requested an extended evidentiary period. And in conformity with the ordinances of this consulate the time period that has been conceded does not have to be provided to lawsuits concerning the awarding of insurance reimbursements and other similar issues. In conformity with the stated ordinances the court must make its decision based on known truth and fair dealing» [22].

The consuls granted the insurers the extension of the deadline for proofs that they had requested, despite the express opposition of Bautista Maer, who insisted that it was the obligation of the consuls to judge on the basis of known truth and fair dealing, without allowing time-consuming delays. It has to be emphasized that by conceding this extension of time the consuls did not commit a grave error, despite violating the ordinances referred to by Maer. On the contrary, with this concession the consuls were following, precisely, their commitment to judge in conformity with the known truth. One of the connotations of *iurisdictio* in the culture of *ius commune* was the wide margin for making decisions that the judges had qua ministers of equity and declarers of the law in the cases which were submitted to their authority. This leeway even gave them the faculty to alter the order of the proceedings when the necessities of justice of the case required it. The consuls, through their prudential decision, had to be able to restore the damaged equality between the plaintiff and the defendant in a lawsuit, even when this involved changing the order of the process or the contravening of a norm [23]. Even if the allowance of extended time to present proofs was contrary to the procedural norms of the consulate and its spirit of providing summary justice, the consuls could change that procedure in order to provide justice that accords with the truth demonstrated by the proofs.

I am not aware of any restrictions regarding the evidence that could be presented in the consulate of Seville. Evidence like the testimonial, expressly limited in the summary process of ordinary jurisdiction, the *juicio ejecutivo* [24], was welcomed without any apparent objection by the consulate. The reason for lim-

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[22] «La parte contraria, por dilatar esta caussa, a pedido termino. Y conforme a las ordenancas deste consulado el termino que se a concedido no se auia de dar en los negocios de premios de siguros y otras cossas semejantes. Conforme a las dichas ordenancas se a de jusgar a verdad sabida y buena fe guardada». Petition presented by Bautista Maer on 22th of May of 1595 before the consulate's notary. AGCOCINS, *Consulados* 432, num. 13. Lawsuit of Bautista de Maer against Lorenzo Bermullen and Francisco de Ustarte, regarding insurance.

[23] Meccarelli, *Arbitrium* cit., pp. 3-22; J. Vallejo, «El cáliz de plata. Articulación de órdenes jurídicos en la jurisprudencia del ius commune», in *Revista de Historia del Derecho*, 38 (2009), p. 12.

[24] J. Montero Aroca, *La herencia procesal española*, México 1994, pp. 81-102; P. Lumbreras Valiente, «Aportación a la historia del juicio ejecutivo en el derecho patrio», in «Revista de Derecho Procesal», 2 (1960), pp. 385-394; V. Estepa Moriana, «El juicio ejecutivo como proceso de ejecución en el derecho histórico español», in *Revista de Derecho Procesal Iberoamericana,* 1 (1977), pp. 87-101.

iting the testimonial evidence in ordinary jurisdiction was the delays that this form of proof caused for the process. Allowing witnesses could prolong the case unnecessarily, since the original legal debate could be diverted towards undermining the testimonies given. This situation also occurred in some cases in the consulate, even though they were infrequent and the accusations were unfruitful. For example, in 1600, in the lawsuit between the merchant Juan Gutiérrez de Luque and the insurers of a certain ginger for the payment of his insurance award, the insurers undermined the witnesses presented by Gutiérrez de Luque arguing on the basis of the family relationship and friendship that the latter had with the witnesses, seeking to invalidate the proof: «The witnesses presented by the other party are Diego de Villafranca, brother of the opposing party, and other friends of his, to whom no credence ought to be given» [25]. The rejection of the testimonies presented by the insurers ended with Gutiérrez Luque's justification of the validity of his witnesses, a justification that was accepted by the consuls, who thus kept the legal debate on track.

Documentary proof was the crowning piece of evidence in the consulate's jurisdictional procedure, just as it was in courts of ordinary justice. Not even good faith among merchants could compete with the proving value of documents, even if, of course, not all documents enjoyed the same proving power. In contrast with public documents [26], private documents—such as letters, delivery notes, and in general any document prepared outside of the public trust (i.e. not before a notary or a royal authority)—were suspect and required a demonstration of proof. This was a suspicion that, it should be noted, was raised by the litigants themselves, who were apt to contradict the validity of these documents during the trial.

The ordinances of the consulate itself promoted the use of public and commercial notaries, so that there could be no room for doubt regarding the authenticity of mercantile documents, and thereby speed up trials. This is observable in the case of insurance, where Law 30 of the 1556 consulate ordinances established that insurance policies signed before a commercial notary did not need the signature of the insurer for recognition in order to pay the insured party. This law recognizes documentation prepared before a notary as having full value as evidence and meant that, for the consulate, regardless of the good faith of the parties, the proof of private agreements had to be demonstrated in order for them to have evidentiary value in a trial [27].

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[25] «Los testigos que presentó son a Diego de Villafranca, hermano de la parte contraria, y a otros amigos suyos a los quales no se a de dar credito alguno». Petition presented on July 19, 1600 by Pedro de Miranda Campo, in the name of the insurers of the ginger that travelled in the ship San Buenaventura. AGCOCINS, *Consulados* 434, num. 9, f. 61.

[26] In the mid-16th century Castilian legislation recognized as public documents—i.e. whose contents were considered to be true and which therefore enjoyed irrefutable probative value—royal legislation and documents, sentences handed down by courts, the decisions of arbitrators, confessions before an appropriate judge, documents recognized by either party before a judge, and any written document prepared before a notary public. Montero Aroca, *La herencia procesal española* cit., México 1994, p. 90.

[27] Heredia Herrera, *Las ordenanzas del Consulado de Sevilla* cit., pp. 165-166.

The consolidation of documentary proofs as the instrument par excellence for accrediting the truth of a fact also affected the form in which lawsuits progressed. Lawsuits handled by the consulate show a clear tendency towards a written form [28] even if the institutional ordinances expressed a preference for oral trials due to the simplicity and flexibility that they provided [29]. A documented procedure presented a number of advantages for the litigants. First, it served to advertise both the existence of a dispute as well as the form in which the parties arrived at a solution. The tribunal had a certifying role [30], which implied keeping a true record of the behaviour and attitude of the parties towards a problem in their professional area, a record that gave the community of merchants clues as to the reputation of the litigants. Second, maintaining a written culture facilitated the process of collective contracting, a procedure that was taking form in mercantile companies, and which would progressively replace the contracting of individuals. Documents played a crucial role in the process of exchange, since they clarified the rights and duties of the partners in highly complex mercantile operations, and facilitated their accreditation and public defence at trial [31].

Merchants preferred the clarity provided by a documented trial, a clarity that was difficult to obtain with oral procedures—when, for example, the parties had to deal with the accounting ledgers of a company, or when multiple creditors from different nations sought compensation following a bankruptcy. The written document acted as a guarantee of the truthfulness of trade contracts, whose content was socially recognized as legitimate. Written proof of a contract was for merchants a form of protection when dealing with trading partners from Spain and abroad because it guaranteed the existence of the obligation specified on paper, especially when they were made before a notary.

This phenomenon was highly favourable for commerce with the Indies, an intercultural commerce par excellence, due to the diversity of foreign merchants involved in it and despite the legal prohibitions in force in Castile that reserved this commerce to natives of the kingdoms of Castile. Foreign involvement in Indies trade was so important that the most reputable historiography on the issue has accepted that it was, in reality, a European business manipulated by merchants of several nations, especially those from Genoa, Flanders, Portugal, France and England [32]. Naturally, the foreign presence is notable in the lawsuits, which reflect an international commerce for which documentary proof was a strategic element.

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[28] This is testified by the numerous trials at the consulate documented in written form due to their complexity. For the 16th century see AGCOCINS, *Consulados* 431-434.

[29] Law 13 of the 1556 ordinances of the consulate of Seville. Heredia Herrera, *Las Ordenanzas del Consulado de Sevilla* cit., p. 158.

[30] R. Ago, *Economia Barocca. Mercato e istituzioni nella Roma del Seicento*, Roma 1998, pp. 155-158.

[31] J. Hoock, *Règle et loi dans le discours commercial de la première modernité*, in F. Piat, L. Braguier-Gouverneur (dirs.), *Normes et Transgressions dans l'Europe de la Première Modernité*, Rennes 2013, pp. 61-74; T. Herzog, *Mediación, archivos y ejercicio. Los escribanos de Quito (siglo xvii)*, Frankfurt am Main 1996, pp. 15-16; K. Burns, *Into the Archive: Writing and Power in Colonial Peru*, Durham & London 2010, pp. 20-45.

[32] A. García-Baquero González, *Andalucía y la Carrera de Indias*, Sevilla 1986, p. 42; E. Vila Vilar, «Sevilla, capital de Europa», in *Minervae Baeticae. Boletín de la Real Academia*

To show the reality of this situation, it suffices to look at any court record about bankruptcy trials in any of Seville's tribunals. I will use as an example the bankruptcy of the Portuguese merchant, Simón Freile de Lima, which is preserved in the archive of the Royal Audience of Seville. The lawsuit is incomplete, and thus we don't know the exact date of Freile's bankruptcy. What we do know is that his creditors appeared before the Royal Audience between 1595 and 1604, in order to try to recover the money he owed from the property remaining to the bankrupted merchant. In addition to Spanish merchants, many foreign merchants were among Freile's creditors, especially Portuguese, Flemish and Italians. They were all prepared to demand payment of what was owed them, backed up by the letters of payment which they or their representatives had issued in Seville before the notaries of the city [33].

Foreign merchants, independently of their national origin or the type of business in question, tended to back up their mercantile contracts by means of documents prepared before Sevillian notaries. Both Spaniards and foreigners were conscious of the legal security that notarial documentation gave to long-distance trade, thanks to the full evidentiary value that this documentation enjoyed, which also aided in the defence and proof of the existence of the obligations that the litigants took on in the contracts they signed.

Proving the existence of an obligation and the failure to comply with it by one of the litigants became the central aspect of the mercantile lawsuits in the consulate, and the indispensable ground upon which the consuls founded their judgments. This fact meant that many merchants went to lawyers because they believed that their experience and knowledge of the law would result in a better defence of their interests and in an improvement of their possibilities of winning the lawsuit. In this manner, the consulate's summary process—which had originally followed the style of the merchants, avoiding formalisms and the intervention of lawyers—began to be substituted by a procedural order that was coordinated by specialists in law.

The presence of lawyers in the jurisdiction of the consulate played a crucial role. Not only did they advise the consuls regarding complex legal issues [34], they even resolved lawsuits without the supervision of the consuls [35]. This is illustrated also by the 1595 lawsuit initiated by the merchant Bautista Maer against Lorenzo Bermulen and Francisco Ustarte for the payment of an insurance claim,

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Sevillana de Buenas Letras, 37 (2009), p. 74; P. Molas Ribalta, *La burguesía mercantil en la España del Antiguo Régimen*, Madrid 1985, p. 39.

[33] Archivo de Protocolos de Sevilla (APS), *Real Audiencia* 29077. The creditors of Simón Freile of Lima, a Portuguese merchant, against his widow.

[34] Law 16 of the 1556 ordinances states that the consuls could make use of the advice of a lawyer who could counsel them on any issues they considered relevant. Nevertheless, this consultation was limited to counsel by a specialist; in no way did it authorize the lawyers to resolve the lawsuits in the consulate by themselves. Heredia Herrera, *Las ordenanzas del Consulado de Sevilla* cit., p. 159.

[35] AGCOCINS, *Consulados* 432, num. 13. Lawsuit by Bautista de Maer with Lorenzo Bermullen and Francisco de Ustarte.

for which judgement was pronounced solely by the attorney Juárez de Castilla, and where the presence of the prior or the consuls could not be confirmed.

Litigants began to turn systematically to lawyers to handle their legal cases —something that was permitted by the consulate's ordinances provided they did not initiate legalistic debates that would prolong the lawsuit. The rule was apparently respected, as I have not found any lawsuits that were characterized by a great deal of technical complexity, beyond the mere citation of the consulate's legislation as applicable to the case at hand [36]. Nevertheless, the presence of lawyers at the consulate undoubtedly fostered a tendency to make the process increasingly technically complex. Even if their influence did not have an impact on the basic principle of simplified decisions and procedural documentation, their presence can be felt in the form that trials took: Seeking to respect certain procedural stages found in ordinary jurisdiction where the evidence phase was crucial for the development and resolution of the lawsuit.

The phenomenon is clear in the lawsuit initiated in August of 1596 by Bernardo de Paz, captain of the ship *Nuestra Señora de la Esperanza*. The captain sought to have the consuls require the merchants that had loaded merchandise in his ship to pay the damages caused by a storm while he sought refuge in the port of Sanlúcar de Barrameda in the face of the threat of the English fleet that was preparing to take the city of Cadiz. The petition was prepared by Jerónimo de Santacruz, one of the most popular lawyers among the litigants of Seville. The lawyer was highly insistent that the consuls should start the evidentiary phase. That same day the consuls ordered that the defendants should be notified of the petition, and they began the evidentiary phase of the lawsuit. The party of Bernardo de Paz presented a list of witnesses in October of 1596, while the defendants did not even respond to the petition. The defendants maintained an absolute silence, corroborated by the multiple accusations of default presented by the plaintiff, following the advice of his lawyer, over the course of more than six months. From the beginning of the lawsuit until the end of April of 1597, the consuls sought unsuccessfully to obtain a response from the defendants, so that the evidentiary phase could continue, as the plaintiff's lawyer had requested. But the disobedience of the defendants blocked the process and just caused expenses for the plaintiff. Therefore the consuls decided to bring in Bernardo de Paz in order to convince him to accept a reasonable agreement for both parties, with which he could pay the damages sustained by his ship and finish a lawsuit that had only caused him expenses and interfered with his business [37].

Over the course of the evidentiary phase, when litigants could provide no documents, witnesses were the alternative most valued by the judges. Any per-

[36] Allusions to consular legislation, particularly regarding insurance policies, appear in certain lawsuits, sometimes with transcriptions of the ordinances that the parties sought to emphasize in their own favour, but without any additional technical complexities. See AGCOCINS, *Consulados* 432, num. 22. Lawsuit of Arnaldo Crabe against Francisco Hutarte and Lorenzo Bermuele, concerning insurance; AGCOCINS, *Consulados* 432, num. 11. Lawsuit of Juan Enríquez, resident of Seville, against certain insurers.

[37] AGCOCINS, *Consulados* 433, num. 3. Declarations of Captain Bernardo de Paz Espina regarding the serious breakdown of his ship.

son that had knowledge of the facts leading up to the dispute, whether seen or heard, and who believed in their truthfulness or knew of them by their publicity, could be called forward to testify by the litigants in order to clarify the issue. The testimony thus depended entirely upon the subjectivity of the witnesses, and as a result its evidentiary value could potentially put at risk the objectivity needed by the magistrates to come to a decision. Knowing this, the magistrates sought from a very early period to reduce these risks by assigning various degrees of credibility to the declarations on the basis of the identity of the witnesses [38]. Ever since the Middle Ages, Castilian legal texts, such as the *Siete Partidas*, established a list of persons whose testimony should be ignored because of their scant credibility; for example, infamous persons, murderers, rapists, thieves, vile men, or Jews and Moors in a lawsuit between Christians [39]. Nor was the testimony of women given full evidentiary weight. Even if the *Siete Partidas*, as opposed to other prior legal texts, allowed the testimony of women as proof in any kind of lawsuit other than inheritance cases, if their declaration was contradicted by a male witness, it was the latter's testimony that the judges would accept as valid [40].

In none of the mercantile lawsuits that I have studied (whether at the consulate or the House of Trade or the Royal Court of Seville) I have come across women or Moors or Jews whose testimony was rejected by the judges due to their sex or religion. What is commonly encountered in mercantile litigation are attacks on the credibility of male witnesses, alleging that their style of life is blameworthy or that the witness is an enemy of the affected litigant. A rich example of this kind of attack is found in a lawsuit that took place in 1586 in the House of Trade between the merchants Juan Marroquín and Gaspar Jorge. The first party accused the other of having intentionally sunk his ship, and with the following declaration sought to undermine the credibility of the witnesses that Jorge had presented in his own defence:

> «One witness is Alonso Barrajo, Portuguese, who is a drunkard who gets drunk every day and doesn't leave the taverns, and is a nasty, low man who for four maravedies given to him for wine would say whatever he is told to say, and he fled from this city because of certain business that he had in the House of Trade, so that they wouldn't catch him and punish him. And the other witness is Hernando Cortes Barbosa, Portuguese, a man who is a great enemy of mine, who threatened me in the San Francisco square before certain persons, and hates me mortally. The so-called Hernando Cortes, Portuguese, in addition to being a terrible enemy as I just said, has been and is a great friend to the other party, and they eat and drink together and are very friendly. And Luis Hernandes who says he is a fisherman, is also a witness for the opposing party, is a Morisco from the kingdom of Granada and according to the laws and ordinances of these kingdoms cannot be a witness. And generally speaking he is such a lowlife that for any amount of money he will say what he is told to say,

[38] M. Madero, *La verdades de los hechos. Proceso, juez y testimonios en la Castilla del siglo xiii*, Salamanca 2004, pp. 43-76.

[39] *Siete Partidas* 3, 16, 8.

[40] Madero, *La verdades de los hechos,* cit., pp. 76-83.

and, as I have said, he cannot be a witness, and I intend to prove and demonstrate all of what I have said against these men» [41].

The witnesses are viciously attacked because, above all, the trustworthiness and impartiality of the witnesses had to be confirmed by the consuls in order to accept them as proof. The first thing the witnesses had to declare was their personal information. This consisted of a set of data that would identified them, and which guaranteed both their legal fitness to testify as well as their trustworthiness. This information included their age, place of birth, profession, and relationship with other members of the community, as well as with the litigants. It was of capital importance that the witnesses justify in their depositions the *causa scientiae* of their statements, explaining how and why they were informed of the events and facts, putting special emphasis on their good memory and on their lack of interest in the outcome of the trial [42].

Generally, under the supervision of an attorney, the witnesses responded to the questions that the plaintiff had chosen to have answered during the deposition [43]. The notaries of the consulate were tasked with receiving and carrying out documentary tests [44]. In this way, witnesses did not make their declarations in the presence of the consuls, but rather in the presence of the notary assigned to the trial [45].

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[41] «Uno es alonso barrajo, portugues, el qual es borracho y se enborracha cada dia y no sale de las tavernas y es honbre vil y bajo que por quatro maravedies que le diesen para vino diria quanto le dijesen que dijese, y se fue huyendo desta çiudad por çierto negozio que tuvo en esta casa de la contratasion porque no lo prendiesen e castigasen. Y hernando cortes Barbosa, portugues, enemigo capital mio y vino conmigo en la plasa de san françisco delante de çiertas personas y me tenia odio mortal. El qual dicho hernando cortes, portugues, demas de ser mi enemigo capital como dicho tengo, a sido y es muy gran amigo de la parte contraria y comen y beben juntos y tienen muncha familiaridad. Y luys hernandes que dize tener ofisio de pescador, testigo asimismo de la parte contraria, es morisco del reyno de granada y conforme a las leyes y prematicas destos reynos no pueden ser testigos. Y mayormente siendo honbre tan bajo que por qualquier dinero diria lo que le dijesen el qual como dicho tengo no puede ser testigo todas las quales dichas tachas se las pretendo probar y averiguar». Petition presented by Matías de Rivera in the name of Juan Marroquín, on September 30, 1586. Archivo General de Indias (AGI), *Contratación* 727, num. 8. Declaration of Gaspar Jorge, resident of Seville, against Juan Marroqui, merchant, also a resident of Seville, about his having been the cause of the loss of the vessel Santa Lucía.

[42] Ago, *Economia Barocca* cit., p. 162.

[43] The attorney Luis de Coronado, a lawyer at the various tribunals in Seville, composed in 1600 the questions presented by the party of Cristóbal Carrión and the co-defendants insuring the ship *San Buenaventura* in the trial that Gonzalo Hernández de Luque initiated against them. Hernández de Luque sought to force the payment of 600 ducats of the insured amount of a load of ginger that was lost during the return trip to Seville from Puerto Rico. AGCOCINS, *Consulados* 434, num. 9, f. 55.

[44] In the Castilian courts and chancelleries, the heavy workload meant that the judges delegated to notaries of the tribunal the job of receiving evidence, except in exceptional cases of great gravity or importance. R. Roldán Verdejo, *Los jueces de la monarquía absoluta: su estatuto y actividad judicial. Corona de Castilla (Siglos xiv-xviii)*, Santa Cruz de Tenerife 1989, pp. 278-283.

[45] In the lawsuit initiated by Capt. Alonso de Chávez Galindo, seeking payment of the insured amount for the ships Nuestra Señora de la Concepción and La Misericordia, which were lost on the return trip from Puerto Rico to Spain, the court accepted as probative the testimony presen-

A certain formulaic structure can be seen in the responses given by the witnesses, restricted to using legal terms that seem distant from the slang of the sailors and merchants. The more the testimonies appeared to be similar, the more the argument acquired strength, which may indicate that the notary made alterations or «adjustments» to the procedure of taking declarations [46]. Despite these similarities, some testimonies were unique and contributed key information to defining the contents of the case. Everything indicates that notaries preserved, if not the textual content of the depositions, then at least the data that distinguished them from each other.

In the consulate, a judgement that put an end to the dispute was the product of the analysis of evidence presented by the litigants. This jurisdictional behaviour is in keeping with the principle of *ius commune*: Judge in conformity with what has been alleged and proven by the litigants. Furthermore, the value accorded by the consuls to different kinds of evidence provided by the litigants also hews to the criteria established by *ius commune*. In this sense, thanks to the influence of the Roman-canonical procedure, the value of evidence was determined by law and not by the free choice of the magistrates [47]. The consuls limited themselves to deciding whether a piece of evidence was sufficient to demonstrate the truth of a fact or affirmation. As Paz Alonso indicates, it was the law in Castile that fixed the coefficient of truth that should be assigned to each piece of proof [48].

The consuls made brief and austere judgements, always composed according to the criteria of the evidence at hand, and indicating which of the litigants had most effectively made their case, thereby meriting a favourable judgment. The narrative style of the sentences of the consulate was practically identical to that of Castilian judges of ordinary jurisdiction, who had no obligation to explicitly express what motivated their decisions [49].

Despite their simplicity, it is clear from the consuls' judgments that the legal criteria used in the evaluation of the evidence were the same as that used in *ius commune*. These criteria are of particular interest when the proofs pre-

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ted by the gentleman *veintiquatro* (alderman) Lorenzo de Vallejo, in order to demonstrate the loss of the cargo transported by these vessels. It was the notary Alonso de Segura who took and transcribed the declarations of the witnesses. AGCOCINS, *Consulados* 433, num. 7. Evidence presented on May 30, 1595.

[46] The same phenomenon is also found in other courts. T. Kuehn, *Reading Microhistory. The Example of Giovanni and Lussana*, in «Journal of Modern History», 61 (1989), pp. 512-534.

[47] J. Martínez Gijón, *La prueba judicial en el derecho territorial de Navarra y Aragón durante la Baja Edad Media*, in «Anuario de Historia del Derecho Español», 31 (1961), p. 53.

[48] M. P. Alonso Romero, *El proceso penal en Castilla. Siglo xiii-xviii*, Salamanca 1982, p. 223.

[49] This was not the case, for example, in Aragonese law, where the magistrates were obligated to explicitly state the reasoning and legal basis for their decisions. F. Ranieri, *El estilo judicial español y su influencia en la Europa del Antiguo Régimen*, in España y Europa. Un pasado jurídico común. Actas del I Simposio Internacional del Instituto de Derecho Común (Murcia, 26-28 de marzo de 1985), Murcia 1986, pp. 101-118; E. Martiré, *La Audiencia y la administración de justicia en Indias*, Madrid 2005, pp. 178-184; C. Garriga, M. Lorente, *El juez y la ley: la motivación de las sentencias (Castilla, 1489, España, 1855)*, in «Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid», 1 (1997), pp. 97-114.

sented by the plaintiff and the defendant had the same probative value but were contradictory. This occurred, for example, when both parties presented the same types of documents, or testimonies that were apparently difficult to fault. Castilian procedural doctrine, in addition to being generous [50], sought to resolve these problems by providing a series of rules for evaluating evidence, taking into account the possibility of contradiction. In such cases, the legal procedure focused on the way in which the truth was demonstrated in the documents, and as a result other proofs were necessary to demonstrate their validity. This evidence could require the declaration of witnesses to confirm, for example, that a foreign notary that had presumably produced a document put into question effectively elaborated it.

When it was the witnesses who contradicted each other in their declarations, the consuls tended to decide in favour of the party that had presented more and better witnesses; that is, of proven reputation and without demonstrable flaws in their deposition [51]. The two elements that the consuls took into consideration for evaluating contradictory evidence were the number of witnesses and their quality. These elements are the same as those recommended by the doctrine of *ius commune*, which permeated the legislation of the *Partidas* [52]. In this context, the reliability of the witnesses—derived from the authority they enjoyed thanks to their social prestige and the way in which they had come to know the facts—was of special importance to the litigants, since the result of the trial could depend on their declarations.

CONCLUSION: LEGAL CERTAINTY VS. SUMMARY JUSTICE?

Justice was meted out by the consuls in strict keeping with the evidence provided by the litigants. In contrast with other kinds of proof, documents had more evidentiary power, particularly documents that enjoyed public trust because they were made before a notary or produced by royal officers or institutions. Following these, in terms of evidentiary value, came private documents, provided that their value was accepted and recognized by the contracting parties in the presence of a judge. Then came witness testimonies, which enjoyed greater credibility in court the more reliability they had. Finally, when the legitimacy of claims in a dispute were called into question, that which was just was defined as that

[50] A list of the works and the medieval doctrines of the *ius commune* pertaining to evidence can be found in A. Pérez Martín, *El derecho procesal del ius commune en España*, Murcia 1999, pp. 36-39.

[51] The value of the testimony depended on the identity of the witness. In Castile those potential witnesses who were excluded were friends or enemies of either of the litigants, or anyone in a relationship of subordination with either of the parties. Nor could declarations be taken from those who were of ill repute or who, due to their actions, had fallen into error or sin. Madero, *La verdades de los hechos* cit., pp. 86-89.

[52] S. Martín-Retortillo y Baquer, «Notas para un estudio de la prueba en la tercera partida», in *Argensola: Revista de Ciencias Sociales del Instituto de Estudios Altoaragoneses*, 22 (1955), pp. 109-117.

which was best proved; that is, decisions went in favour of arguments supported by more and better evidence. Here, «best» is understood as being that of greatest quality, measurable, for example, by the witnesses' experience and knowledge of the facts, or by the public nature of the events that gave rise to the controversy.

In this context, the principle of justice in the consulate of Seville —«render judgment without causing lawsuits or delays»— needs to be reconsidered. This principle sought to avoid the cost and length of trials. However, the length of procedures in the consulate increased in a bid to provide a correct judicial response, supported by the evidence —even at the risk of the trial process adopting the formalities proper to ordinary jurisdiction. The consulate used this jurisdictional model despite the fact that it implied an increasing distance from its origins as a summary jurisdiction. Just like in ordinary justice, the consuls had to interpret the law in each case, defining justice for the parties in accordance with the evidence they presented to the court.

Litigants had to demonstrate the inherent truth of their claims, and he who could best prove his position would see his interests satisfied by the tribunal. Indeed, the consul's sentence was based on evaluation of the evidence presented by the litigants, and their judicial actions were generally cautious, dependent on the evidence that the parties could prove. Any doubt was resolved by the least harmful path, by seeking to minimize any damage to the interests of both parties, while gathering sufficient evidence to allow the consuls to hand down a judgment. In lawsuits regarding insurance, for example, when there was a doubt concerning the truthfulness of an allegation of accident or loss, the consuls ordered the insurers to make a preventive payment on the policy. For this purpose, the insured had to present a bond to the tribunal that would guarantee a potential refund of the insured amount, in case it could be successfully demonstrated that damages had been intentional [53].

But the fact that the consulate adopted or practiced the jurisdictional principles of *ius commune* should not be interpreted as a development harmful to commercial activity. This jurisdictional path sought to offer better solutions of justice, irrefutable and trustworthy, even if this affected the simplicity, celerity and economy of its procedures. The Sevillian merchants sought judicial certainty, and they were willing to take on the costs involved in trials that were based on the truthfulness of the facts demonstrated by evidence, similar to the practice of ordinary jurisdiction.

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[53] This is what occurred in the 1595 case between Luis Bernal Ascanio, resident and councillor of the island of Tenerife, and the insurers of the ship Nuestra Señora del Rosario. AGCOCINS, *Consulados* 431, num. 7.