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Partnership Governance Through Private Ordering in Early Modern Amsterdam

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This article examines the contractual practice of business partners in early modern Amsterdam on the basis of 847 notarized partnership contracts that were registered between 1601 and 1791, which were subsequently cross-read with legal scholarship and decisions of the High Court of Holland, Zeeland, and West-Friesland. Through the application of Eugen Ehrlich's socio-legal framework, it demonstrates how early modern business partners governed their partnerships through private ordering and developed a 'living law' to address practical commercial needs. In particular, partners devised contractual mechanisms to preserve business continuity despite withdrawal or death, including penalty clauses, share transfers, pre-emption rights, and provisions locking capital into the partnership. Moreover, in the absence of a clear and practical legal framework, business partners developed a living law in order to manage who appeared publicly as part of the business, who remained in the background, and how far their liability should extend towards external creditors of the partnership. Where formal courts did not recognize these arrangements, partners relied on reputational pressure, arbitration, notarial intervention, and strategic recourse to public courts for enforcement. The article therefore reveals a flexible, bottom-up normative order and argues that private partnerships served as important sites of legal innovation, introducing features such as capital lock-in, transferable ownership, and limited liability before these were formally recognized in company law.

Keywords: Amsterdam, continuity, contract enforcement, early modern period, (limited) liability, living law, norms for decision, notary, private partnership, Roman-Dutch law

1 Introduction

Even though private partnerships were a widely used means of business cooperation across early modern Europe, we still know remarkably little about the norms that governed their everyday operation. In (legal) historiography, private partnerships have long been in the shadow of the corporate form of business organization and, if partnerships received any attention at all, they were generally approached by focussing exclusively on what was written in the books of learned jurists and judges.[1] The relevance of these works for early modern commercial practice, however, was already questioned at the start of the eighteenth century by legal practitioners, who remarked upon the fact that 'amongst merchants, the subtleties of the law are dismissed and trade is conducted in accordance with the principles of reasonableness and fairness'.[2]

Consequently, by focussing on early modern private partnerships, this contribution aims to identify the rules of conduct through which Amsterdam business partners organized and governed their contractual relationship and examine the extent to which these rules departed from the (Roman-Dutch) legal framework that was applied in the Dutch Republic during the seventeenth and eighteenth centuries. In order to do so, the contribution will rely upon an in-depth analysis of 847 notarized partnership contracts registered between 1601 and 1791, which were subsequently cross-read against the writings of Roman-Dutch scholars on private partnerships and judicial decisions from the High Court of Holland, Zeeland, and West-Friesland.[3]

Notes

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1 *See* e.g., Willem D. H. Asser, *In solidum of pro parte. Een onderzoek naar de ontwikkelingsgeschiedenis van de hoofdelijke en gedeelde aansprakelijkheid van vennoten tegenover derden* (Brill 1983); Ralf Mehr, *Societas und Universitas: Römischrechtliche Institute im Unternehmensgesellschaftsrecht vor 1800* (Vandenhoeck & Ruprecht 2008); Martijn Punt, *Het vennootschapsrecht van Holland, Zeeland en West-Friesland in de rechtspraak van de Hoge Raad van Holland, Zeeland en West-Friesland* (Wolters Kluwer Nederland 2010); Wouter Druwé, *Loans and Credit in Consilia and Decisions in the Low Countries* (Brill 2020).

2 'In *foro mercatorio* (onder de kooplieden) *ubi rejiciuntur apices juris et ex bono et æquo agitur* (alwaer de spitsvindigheden van rechten verworpen worden, en na reden en billykheid gehandeld word': Jeronimo Mattheus Barels, *Advysen over den koophandel en zeevaert mitsgaders verscheidene turbes, memorien, resolution, missives, enz. daertoe behoorende,* vol. II, 251 (Hendrik Gartman 1781).

3 These sources were collected and analysed by the author as part of her doctoral research on private partnerships in early modern Amsterdam: Manon Moerman, *Normative Hybridity in Private Partnerships: An Exploration into the Rules of Conduct for Business partners in Early Modern Amsterdam* (Unpublished Dissertation 2026), doi: 10.26481/dis.20260701mm.

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To determine the nature (i.e., legal or not) of the rules of conduct between business partners, this study will build on the conceptual framework that was developed by the Austrian legal sociologist Eugen Ehrlich, separating the 'norms for decision' – the law as defined by judges, jurists, and legislators – from the 'living law' on private partnerships – containing extra-legal norms that would not be upheld in court.[4] Ultimately, this article expects to reveal that early modern partnership contracts reflected a private ordering in which the business partners actively shaped a normative framework within which they conducted business rather than being merely passive subjects of top-down regulation.

In section 2 the contribution will start by introducing the business partners and their commercial activities before examining the question of why private partnerships were established during the seventeenth and eighteenth centuries. Afterwards, it will consider how private ordering operated in three important areas: continuity, liability, and enforceability. Section three will examine whether and to what extent business partners departed from the Roman-Dutch legal framework of dissolution-on-exit and -death. This will then be followed by contrasting the norms for decision and the living law on the question of external liability of business partners in section 4, before analysing what (if any) mechanisms were available to partners to enforce a living law that the public courts did not recognize in section 5.

2 Who used partnerships, and why?

The answer to the question of who became a business partner in early modern Amsterdam is more diverse than might be expected. Throughout the seventeenth and eighteenth centuries, partnerships brought together merchants and artisans, widows and young entrepreneurs, relatives and co-religionists, experienced businessmen and aspiring newcomers. What connected these people, however, was not necessarily a shared social or professional profile, but the wide range of business opportunities that partnerships offered by pooling individual resources, dividing the workload, and sharing (financial) risks.

Despite Amsterdam's rapid demographical growth during the seventeenth century and the city's international and multicultural character, it rarely happened that strangers went into business together. Instead, partners were often relatives, friends, or members of the same religious or professional community.[5] Yet, despite the particular importance of kinship and religion in commerce, these did not constitute closed networks.[6] So, while Jewish entrepreneurs frequently partnered with relatives and co-religionists, they would occasionally enter into a partnership with someone from outside their family circle or religious community.[7] Women and younger entrepreneurs were similarly visible in partnership contracts throughout the seventeenth and eighteenth centuries.[8] While private partnerships enabled widows to continue the business of their deceased husband, aspiring partners under the age of majority (i.e., twenty-five) received access to the capital, experience, skills, and commercial networks of a more established entrepreneur by entering into a partnership agreement.

Amsterdam's central position in European and global commerce is clearly reflected in the contracts, as 42% of the partnerships were devoted to the trade in a wide variety of goods. While some of these trading partnerships would be operating locally, the geographical scope of many others reached far beyond Amsterdam. Moreover, 11% of the partnerships in our sample were active in the export industries (often referred to as *trafiek-* or *verdelingsindustrieën*) by processing imported raw materials in one of the city's many sugar refineries, cotton factories, ropewalks, and other industries. Interestingly, Amsterdam's busy harbour generated a distinctive form of partnership, referred to as the vemen or cooperatives, whose members worked together to weigh, pack, transport, or store the goods that arrived by sea. Finally, one-fourth of the partnerships concerned one of the many crafts and trades that were governed by the Amsterdam guilds, such as bakeries, butcheries, grocery stores, smithies, printing houses, or carpentry businesses.

But what made the partnership worth choosing? Although the obvious answer to this question would be the accumulation of profit, profitmaking alone does not seem to fully explain its appeal. Instead, the partnership's particular strength is found in its capacity to combine resources, such as money, goods, labour, knowledge, or skills, that were otherwise difficult to bring together. Partnerships therefore played a pivotal role in facilitating the creation of entirely new enterprises and enabling existing ones to expand, while also reducing the workload otherwise carried by one individual. Moreover, on top of purely economic purposes, early modern partnerships were also instrumental in achieving certain social or personal

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[4] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Routledge 2017).

[5] Naomi R. Lamoreaux, *The Partnership form of Organization: Its Popularity in Early-Nineteenth-Century Boston,* in *Entrepreneurs: The Boston Business Community, 1700–1850* 258 (Conrad E. Wright & Katheryn P. Viens eds, Massachusetts Historical Society 1997); Moerman, *supra* n. 3, at 53–57.

[6] 190 partnership contracts (25%) were registered between family members, and seventy-five partnerships (10%) were identified in which at least one Jewish partner was involved.

[7] Six private partnerships established a cross-cultural business relationship between Jewish and non-Jewish entrepreneurs.

[8] 163 contracts (21.5%) were identified in which at least one of the partners was a woman, while sixty-eight partnerships (9%) were registered at the notary's office with a minor business partner.

goals. Hence, by allowing a partner who became ill to continue to receive their share of the profits and by financially supporting elderly members, partnerships operated not only as a means for business organization but also as a modest form of social security. Moreover, in early modern Amsterdam, partnerships could help to arrange an advantageous marriage by giving a prospective son-in-law a place in an established business and, with it, the means to establish himself as a respectable businessman.[9] In other cases, sons, daughters and other heirs would enter into a partnership to fulfil the explicit wish of a deceased relative to keep their business alive.[10]

3 Safeguarding the partnership's continuity

Early modern private partnerships did not have a separate legal personality. Their continued existence therefore depended entirely on the consensus amongst the constituting members to (continue to) form a partnership. Consequently, if one partner decided to leave, or died, the partnership would in principle come to an end. This was more than just a technical legal problem, since liquidation meant that the capital tied up in the business had to be recovered, assets might have to be sold, and established commercial relationships could be disrupted. Hence, the possibility of an early dissolution posed a serious threat to the value, stability, and reputation of the business. Unfortunately, Roman-Dutch legal doctrine offered little assistance in this respect. The norms for decision understood the partnership to represent a personal relationship of trust in which the partners had chosen one another because of their particular skills, knowledge, integrity or reputation (intuitu personae). These personal qualities of the partners, jurists argued, were generally not found in anybody else, not even in the partners' relatives, meaning that the partnership inevitably came to an end following the death or premature departure of a partner.[11] Hence, following the need for more durable and stable business partnerships, Amsterdam entrepreneurs gradually developed their own solutions to the problem of continuity by creating what can be described as a living law of partnership continuity which consisted of contractual arrangements that reflected what early modern business partners themselves considered necessary in order to safeguard their partnership's continuity.

3.1 *Discouraging Early Exits*

The first solution was simply to make leaving more difficult. Seventy-six percent of the private partnerships in our sample were established for a fixed period with an average initial duration that increased from six years in the seventeenth century to 7.5 years in the eighteenth century. However, since a fixed term did not, in itself, prevent a partner from leaving early, contractual penalties became an important deterrence mechanism. Although the prevailing *norms for decision* permitted early withdrawals and considered clauses which prohibited business partners to leave early to be null and void, fifty-four contracts in our sample (or seven percent) would nevertheless try to discourage the partners from doing so by imposing a financial penalty – ranging from 100 to as much as 20,000 guilders on top of any damages caused to the partnership – in case of an unjustified premature withdrawal.[12] One partnership established in 1701, for example, imposed a fine of 3,000 guilders on a partner who withdrew before the expiry of its ten-year term, although an exception was made for withdrawal caused by the outbreak of a war or other unforeseen circumstances.[13]

Although penalty clauses did not abolish the right of withdrawal, they changed its cost by making premature exits financially unattractive, while still leaving room for circumstances in which departure could reasonably be justified. In doing so, these provisions managed to reconcile the individual freedom of business partners with the collective interest in keeping the business alive.

3.2 *Facilitating Share Transfers*

A second, more radical solution was to make it possible for a partner to leave without dissolving the partnership. More specifically, Amsterdam entrepreneurs developed contractual mechanisms that separated a partner's exit from the dissolution of the business. From the second half of the seventeenth-century onwards, some contracts therefore started to facilitate semi-transfers, allowing partners to transfer part of their share in the profits to a so-called sub-partner or croupier.[14] Although semi-transfers did not result in the *croupier* becoming a fully-fledged business partner, they nevertheless illustrate how entrepreneurs were increasingly developing ways to

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[9] *See* e.g., City Archive Amsterdam (hereinafter: CAA), Notarial Archive (hereinafter: NA) (5075), notary Salomon Dorper, 10744/787 (27 Oct. 1751); CAA, NA (5075), notary Wessel van Kleef, 14483/154 (22 Apr. 1751); CAA, NA (5075), notary Dirk Oortmond, 14939/496 (19 Dec. 1771).

[10] *See* e.g., CAA, NA (5075), notary Dirk van der Groe, 4221 (6 May 1711); CAA, NA (5075), notary Philippus Roos, 8443/48 (11 Mar. 1751); CAA, NA (5075), notary Geert Bouman, 12628/24 (4 Feb. 1771).

[11] Fransiscus Kersteman, *Hollandsch Rechtsgeleerd Woordenboek*, 519 (De Weduwe van Esveldt en Holtrop 1777); Hugo de Groot, *Inleidinge tot de Hollandsche Rechtsgeleertheid*, III–XXI (De Weduwe van Hillebrant Jacobsz. van Wou 1631); Johannes Voet, *Commentarius ad Pandectas Translated into English by J.R. Rose Innes*, vol. XVII, 55 (J.C. Juta 1879).

[12] Unfortunately, business partners rarely specified what they would consider to be a valid reason to withdraw from the partnership.

[13] CAA, NA (5075), notary Daniël van Liebergen, 6283/113 (15 Dec. 1701).

[14] Henry Lévy-Bruhl, *Histoire juridique des sociétés de commerce en France aux XVII^e et XVIII^e siècles* 28, 136–138 (F. Loviton 1938). In total, sixteen contracts allowed for (one of) the partners to transfer part of their share to a third party: Moerman, *supra* n. 3, at 145–149.

make the economic value of their partnership's share more transferable.[15]

Other contracts went a step further and permitted the full transfer of a partner's share. This was particularly important in partnerships between three or more partners, where the departure of one member did not necessarily have to bring the whole enterprise to an end. Twenty-two contracts in our sample – established primarily during the eighteenth century for the purpose of industrial activities, such as ropewalks, breweries and malt houses – contained a pre-emption clause which gave the remaining partners the first opportunity to acquire a departing partner's share and allowed them to continue the business as before. In 1791, for example, seven entrepreneurs who were engaged in a partnership to print and sell books stipulated that partners who wished to leave could never withdraw their capital. Instead, they had to offer their share to their fellow partners, who had the opportunity to purchase it at the latest agreed valuation. Only if the remaining partners collectively declined the offer could the share be transferred to someone outside the partnership who had been approved by (a majority of) the existing members.[16] Likewise, partnership contracts that did not include a pre-emption clause generally required the consent of the remaining partners before a transfer could take place, to ensure that the business would remain in the hands of 'close and reliable friends' *(familiaire en elkander alles toevertrouwende vrinden).*[17]

Contractual practice equally allowed for both the members of a *veem* to leave and for new partners to arrive without this resulting in the partnership's dissolution. Take, for example, the cooperative of *De Brabandse Pakkers*, which continued its activities uninterruptedly between 1761 and 1791 despite several changes in its composition during that period.[18] However, members who decided to leave the *veem* prematurely were not allowed to withdraw their capital from the common fund. Instead, an individual arrangement was made between the leaving and arriving partner by means of which the latter promised to pay his predecessor – 'out of his own pocket' *(uyt zyn eygen beurs)* – a recurring sum of money until his death.

By allowing individual partners to exit while protecting the remaining members from an unwanted change in the partnership's composition, the *living law* facilitated changes in ownership without abandoning the personal character of partnerships. By making such changes conditional upon the consent of those who remained, Amsterdam business partners combined transferability with control which ultimately allowed for tradable ownership and capital lock-in – features that are generally associated with the corporate form – to be gradually introduced in larger (industrial) partnerships without entirely abandoning the personal trust on which they were founded.

3.3 *Surviving Death*

Because the death of one partner equally dissolved the partnership according to the *norms for decision*, business partners were faced with similar challenges if one of them passed away prematurely. In practice, most contracts therefore anticipated this event by either allowing the surviving partners to continue the business or giving the widow or heirs of the deceased a choice to enter the partnership themselves, sell the deceased's share to the surviving partners, or, in some circumstances, transfer it to a third party. In doing so, early modern business partners developed a wide range of contractual arrangements. Several contracts required both the surviving partner(s) and the deceased partner's widow or heirs to first agree to continue the partnership. Others granted the surviving partner(s) the decisive say, obliging the widow or heirs to leave the capital in the business if the survivor(s) wished to continue, while some would give the widow or heirs the right to decide whether they wanted to continue, thereby forcing the surviving partner(s) to either continue or dissolve the partnership.

Interestingly, however, although Roman-Dutch jurists continued to reject contractual provisions that appointed an heir to continue the partnership, the High Court of Holland gradually introduced two main exceptions to the strict rule of dissolution-on-death through its voluntary jurisdiction.[19] First, clauses which named a specific successor were accepted by the Court, as they allowed the existing partners to consent to continue the partnership with that particular person from the outset. Second, arrangements by means of which an heir could formally enter the partnership but without having any say over the business were permitted. Here, the Court argued that, since the management was left entirely in the hands of the surviving partners, they had not been forced to

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[15] Philippe Antoine Merlin, *Recueil alphabétique des questions de droit. Quatrième édition, revue, corrigée, et considérablement augmentée,* vol. IV, 410–412 (Garnery 1828).

[16] CAA, NA (5075), notary Jan Harmsen, 16402/633 (19 Sep. 1791).

[17] CAA, NA (5075), notary Pieter van der Meulen, 6845/175 (31 Mar. 1721).

[18] *See* e.g., CAA, NA (5075), notary Wessel van Kleef, 14429/203 (14 Feb. 1761); CAA, NA (5075), notary Wessel van Kleef, 14433/656 (24 Dec. 1761); CAA, NA (5075), notary Pierre Fraissinet Jr. 16500B/295 (7 Jun. 1781).

[19] *See* e.g., The Hague, National Archive, High Court of Holland, Zeeland, and West-Friesland (3 Mar. 2002), 1524, f° 005 (3 Apr. 1731), f° 034 (17 Nov. 1741), and f° 033 (24 Oct. 1741); Jozeph Johannes Henning et al., *Perspectives on and a Selection from Felicius-Boxelius 'Tractatus de Societate': A Treatise on the Law of Partnership* 208–209, 212 (University of the Free State 2006); De Groot, *supra* n. 11; Voet, *supra* n. 11.

continue the partnership with a potentially obstinate or wayward person.[20]

Despite these exceptions, the gap between the *norms for decision* and the *living law* remained. Business partners continued to make contractual arrangements that went beyond what the High Court considered acceptable by, for example, effectively locking the deceased partner's capital into the business without allowing the heirs to withdraw. In 1761, for example, a contract between two business partners stipulated that the deceased partner's capital had to remain invested for six years after his death, in return for which his widow would receive an annual interest of 4%.[21] Between 1741 and 1791, similar arrangements appeared in six Jewish partnership contracts in order to protect the partnership from being liquidated by the heirs of a deceased partner.[22] By prioritizing the survival of the enterprise over the individual freedom of its members, these arrangements came remarkably close to corporate permanence.

So, while the norms for decision persisted in presenting private partnerships as temporary and personal arrangements whose continued existence depended entirely on the will of its individual members, notarized partnership contracts tell a different story. They show how entrepreneurs actively designed arrangements to safeguard the stability and continuity of their business, thereby gradually transforming the partnership from a strictly personal relationship that ended with the disappearance of one of its members into an organization capable of surviving changes in ownership. By the eighteenth century, some partnerships were even beginning to move from a contract intuitu personae towards a contract intuitu pecuniae, not because the personal qualities of a business partner ceased to matter, but because the continuity of the partnership itself was considered a value worth protecting.

4 External liability of business partners

Throughout the early modern period, Roman-Dutch jurists and judges were primarily occupied with the question of whether business partners could bind each other towards third parties and if they should therefore be held proportionately (pro rata) or jointly and severally (in solidum) liable for their partnership's debts. Influenced by Roman law, prominent jurists, such as Johannes Voet, maintained proportionate liability, which the High Court continued to uphold well into the eighteenth century.[23] Unfortunately, liability was rarely the explicit subject of partnership contracts. Notarial deeds were primarily concerned with defining the internal rights and obligations of the partners, while very few contracts explicitly referred to their external liability towards creditors. Moreover, and contrary to their French counterparts, notaries in the Low Countries generally did not distinguish between general, limited, or anonymous partnerships.[24] Instead, the terms compagnie, compagnieschap, societeit, associatie and maatschappij were used interchangeably, while the word commandite appeared in only three eighteenth-century contracts.[25] Consequently, to reconstruct the liability regime of early modern partnerships, one has to examine the way in which a partnership presented itself to the outside world by analysing whose name appeared in the firma, who was permitted to use it, and who participated in the management of the business.

By the seventeenth century, merchants in Amsterdam had come to regard partners whose names appeared in the partnership's *firma* as jointly and severally liable (in solidum) for debts incurred in the name of the partnership (in nomine societatis). A creditor whose contract had been signed by one partner in nomine societatis could therefore pursue any of the partners whose names appeared in the firma for the entire debt. This commercial practice was confirmed in 1707 by means of a so-called turba mercatorum, in which twelve Amsterdam merchants explicitly recognized this custom by stating that partners who were named in the firma were understood to have the authority to act as their partners' mandatary *(mandatarius socii).*[26] Likewise, the creditors of partnerships that went under the private name of one partner only held a claim against that person rather than the undisclosed partner(s) behind the partnership.[27] Hence, these covert partnerships

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[20] Punt, *supra* n. 1, at 144–145.

[21] CAA, NA (5075), notary Jan Ardinois, 9270/81 (17 Sep. 1761). *See* e.g., CAA, NA (5075), notary Hermanus Morre, 11663/132 (11 Dec. 1741); CAA, NA (5075), notary Benjamin Phaff, 10221/664 (19 Dec. 1741).

[22] CAA, NA (5075), notary Isaac Costerus, 9810/4223 (13 Mar. 1741); CAA, NA (5075), notary Salomon Dorper, 10741/39 (20 Jan. 1751); CAA, NA (5075), notary Godefridus Schaak, 11517B (6 Dec. 1751); CAA, NA (5075), notary Dirk Oortmond, 14937/103 (12 Mar. 1771); CAA, NA (5075), notary Mr Jacob Klinkhamer, 14553/32 (19 Mar. 1781); CAA, NA (5075), notary Fernand Samuel Korff, 17704/508 (14 Nov. 1791).

[23] Asser, *supra* n. 1, at 119–129; Punt, *supra* n. 1, at 79–85.

[24] Bram van Hofstraeten, *The Organization of Mercantile Capitalism in the Low Countries*, 13(2) Low Countries J. Soc. & Econ. Hist. 1, 10–11 (2016), doi: 10.18352/tseg.19.

[25] CAA, NA (5075), notary Hermanus de Wolff, 8954/255 (8 Mar. 1741); CAA, NA (5075), notary Cornelis van Homrigh, 12399/1039 (31 Dec. 1771); CAA, NA (5075), notary Pierre Fraissinet Jr., 16502/1176 (26 Oct. 1781).

[26] Barels, *supra* n. 2, at 238–239. When the parties in court disagreed about the content of an alleged custom, the judges could turn to several experts to either confirm or deny the existence of a customary rule. The result of this inquiry was subsequently written down in a *turba mercatorum.*

[27] *Handvesten; ofte privilegien ende octroyen; mitsgaders willekeuren, costuimen, ordonnantien en handelingen der stadt Amstelredam,* vol. II, 507–508 (Hendrik van Waesberge, Salomon en Petrus Schouten 1748).

(representing 8% of the contracts in our sample) sharply distinguished between the partners' internal and external liability and enabled entrepreneurs to remain invisible – and consequently not directly liable, – to the partnership's creditors, while still being proportionately liable for the partnerships debts towards their business partner.

The significance of the firma in determining the external liability of business partners also becomes clear when discussing the position of silent partners in early modern Amsterdam. In 1661, Jean Decquer, Hendrick Decquer and Philips Bailly established a private partnership under the name of 'Jean & Hendrick Decquer', who were also the only partners who could contract *in nomine societatis.* In their contract, the partners explicitly linked the absence of Bailly's name in the *firma* to his position as a silent partner whose liability would not exceed the sum of his investment in the partnership.[28] Contrary to early modern France, the *société en commandite* was not recognized as a separate legal category by the *norms for decision* until the start of the nineteenth century.[29] Consequently, even though only a small batch of fifteen partnership contracts in our sample explicitly limited the liability of (one of) the business partner(s), they nonetheless provide evidence that Amsterdam business partners used limited partnerships through their *living law* long before it was formally recognized in Dutch law.

Within this landscape of contractual liability arrangements, an especially interesting position was occupied by the *vemen.* Although their members described them as associaties, compagnieschappen or societeiten, Amsterdam cooperatives differed substantially from the partnerships usually associated with these terms. Their firma often referred not to the names of individual members but to the colour of the hats they wore (e.g., *Roodhoedenveem*), or the origin or type of product in which they specialized (e.g., *Schotse veem, Venetiaanse pakkers, Zijdeveem*). This made it very hard for third parties to pursue individual partners, who were often not allowed to use their private name when corresponding with third parties, and forced creditors to address the *veem* as an entity rather than its individual members.

5 Multi-layered enforcement

Some contractual arrangements to safeguard the continuity of the partnership or limit the liability of business partners were not recognized as law by the public courts, subsequently falling outside the scope of formal adjudication. Consequently, Amsterdam business partners had to search for alternative enforcement mechanisms within a complex and multilayered landscape of parajudicial, infrajudicial, and judicial institutions.[30]

First and foremost, business partners were expected to act 'in such a way that can be expected from a decent and honourable man' in order to uphold each other's good reputation and credibility as well as the standing of the firm as a whole. Outside the partnership, however, entrepreneurs would also actively participate in multiple interlocking institutions, such as guilds, confraternities, or parish churches, which would exchange information about their members' reputation. Consequently, by developing a bad reputation in one community, business partners would also earn the disfavour of all other communities.[31] Hence, through social pressure – also referred to as the 'reputation mechanism' – premodern business partners were discouraged from breaching a contract out of fear of being branded untrustworthy. Contracts reinforced this pressure by including devices such as the sworn oath, through which partners who were accused of wrongdoing could only be absolved by declaring their innocence before God on penalty of eternal damnation.[32] As 'men of honour', business partners were expected to be able to maintain stable and peaceful relationships.[33] In order to uphold a reputation for being diplomatic and harmonious, business partners were required to remain discrete and settle their disagreements privately and behind closed doors. Similarly, in partnerships between a larger group of associates, an internal procedure in the form of a majority-vote clause was often put in place to facilitate the private and internal settlement of future business disputes.

When private enforcement failed, business partners could turn to so-called infrajudicial enforcement mechanisms by bringing a third party – other than a judge – into the conflict.[34] Evidence of this second layer of enforcement emerged primarily from the growing number of arbitration clauses in our sample of contracts, which bind the contracting parties to submit unresolved disputes to arbitrators or 'good men'.[35] These arbitrators were appointed by the partners to render a 'reasonable and fair' judgment that was based on practical knowledge and expertise, rather than a strict application of the

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[28] CAA, NA (5075), notary Cornelis van der Hoop, 2551A (22 May 1661).

[29] Punt, *supra* n. 1, at 91.

[30] Benoît Garnot, *Justice, Infrajustice, parajustice et extra justice dans la France d'Ancien Régime,* 4(1) Crime, Histoire & Sociétés 103–120 (2000), doi: 10.4000/chs.855.

[31] Amalia D. Kessler, *Enforcing Virtue: Social Norms and Self Interest in an Eighteenth-Century Merchant Court,* 22(1) Am. Soc'y Legal Hist., 71, 109 (2004), doi: 10.2307/4141666.

[32] Kessler, *supra* n. 31, at 93.

[33] Amalia D. Kessler, *A Revolution in Commerce: The Parisian Merchant Court and the Rise of Commercial Society in Eighteenth-Century France* 151–161 (Yale University Press 2007).

[34] *See* e.g., CAA, NA (5075), notary Jan de Braij, 2433A (30 Jun. 1651); CAA, NA (5075), notary Jan Harmsen, 16402/633 (19 Sep. 1791).

[35] The number of contracts that contained an arbitration clause increased from twenty-one (14%) during the seventeenth century to 158 (26%) during the eighteenth century.

law.[36] In addition, business partners who hoped to settle their dispute without resorting to court could also appeal to the notary to serve as a scribe, messenger, or mediator. A particularly popular notarial instrument in this respect was the so-called insinuatie; a formal default notice issued to a non-performing partner and documenting their response, which transformed private pressure into an official public record that could be used as strategic leverage.

Very few business partners ultimately pursued the 'sad, long, and expensive' judicial route in early modern Amsterdam.[37] Nevertheless, rather than being mutually exclusive, infrajudicial and judicial mechanisms of enforcement were found to complement each other in two ways. First, through its voluntary jurisdiction the High Court of Holland could provide infrajudicial settlements, such as notarial contracts, compromises, or arbitral verdicts with the executive force they would otherwise be lacking.[38] Second, through the partners' strategic use of public courts as leverage in order to pressure a recalcitrant partner into a private or infrajudicial settlement, after which the case could be withdrawn again from litigation.[39]

6 Concluding remarks

This contribution set out to uncover the norms that governed the everyday operation of early modern private partnerships in Amsterdam, and to assess the extent to which these norms diverged from the Roman-Dutch legal framework applied by jurists and the High Court of Holland. Drawing on Eugen Ehrlich's distinction between the norms for decision and the living law, the analysis of 847 notarized partnership contracts registered between 1601 and 1791 showed that Amsterdam business partners were far from passive recipients of a top-down legal order. Instead, they actively constructed a private ordering from the bottom-up that frequently ran ahead of – and at times directly against – legal doctrine as it was taught at law faculties and applied in the courtroom.

First, in matters of continuity, business partners responded to the doctrine of dissolution-on-exit and -death with a set of contractual mechanisms – penalty clauses, semi-transfers, pre-emption rights, and occasionally even clauses that locked a deceased partner's capital into the firm – which pushed the partnership away from a purely personal relationship *(intuitu personae)* and towards something closer to an enduring enterprise *(intuitu pecuniae).* Second, in the absence of a clear and practical legal framework regarding the external liability of business partners, Amsterdam merchants experimented with different ways of allocating risk. In doing so, the partnership's name or firma served as an important means to signal a partner's responsibility towards creditors, to conceal capital investors from public view, and to distinguish external from internal liability. Third, especially in those areas where the living law departed from the norms for decisions, business partners relied on a layered system of reputational, infrajudicial, and judicial mechanisms to enforce their private arrangements.

Taken together, these findings suggest that early modern private partnerships were flexible instruments that the partners could adapt through private ordering in order to meet commercial needs that legal doctrine was slow, or unwilling, to accommodate. This gap between the norms for decision and the living law consequently revealed a functioning normative order that operated largely outside – and despite – formal law.

For legal historians and academics in the field of company law, this contribution therefore offers a corrective to the historical studies that have so far either privileged the corporate form or applied a top-down rather than a bottom-up perspective to the study of premodern partnerships. It furthermore shows that several features now primarily associated with corporations, such as capital lock-in, transferable ownership, or limited liability, were being introduced in partnership contracts well before they were implemented in the law, while also demonstrating the value of a multidisciplinary analysis that brings together concepts, methods, and sources from the fields of (legal) history, law, and (legal) sociology.

For practitioners and policymakers in company law today, the study is a reminder that private ordering has always been, and remains, a primary site of legal innovation. Moreover, contemporary shareholder agreements, buy-sell clauses, and arbitration provisions continue to perform the functions for which they were already devised by Amsterdam business partners in the seventeenth century. Understanding how such bottom-up arrangements historically filled gaps that were left by formal law – and how courts gradually tried to accommodate them – offers a long-term perspective on the relationship between contractual freedom and statutory company law.

Notes

[36] *See* e.g., CAA, NA (5075), notary Gerardus Wijthoff, 13408/161 (7 and 10 Mar. 1791); CAA, NA (5075), notary Nicolaas Toll, 18046/39 (12 May 1791).

[37] CAA, NA (5075), notary Hermanus van Heel, 12847/903 (8 Dec. 1761).

[38] Kersteman, *supra* n. 11, at 22; Punt, *supra* n. 1, at 294; Pieter Vromans, *Tractaet de foro competenti* 303 (J. A. Langerak 1722).

[39] Aries van Meeteren & G. Vermeesch, *In hope of Agreement: Norm and Practice in the Use of Institutes for Dispute Settlement in Late Seventeenth-Century Leiden,* in *The Uses of Justice in Global Perspective, 1600–1900* 144–145 (Griet Vermeesch et al. eds, Routledge 2019).