The regulatory power of international trade contracts over 19th century Dutch commercial sales law

by Janwillem Oosterhuis

INTRODUCTION

How do national courts accommodate changing commercial practices out of which disputes arise? And how strong is the regulatory power of the contracts underlying these changing commercial usages? If various national courts develop similar rules to accommodate changing commercial practices, is that mainly because similar changes require similar solutions? Or are similar rules developed because these rules are for a regional, European market? This article will address these questions from a historical perspective: how responsive have national jurisdictions – and particularly the Dutch one – been to changing commercial practices in the 19th century? And have similar rules been developed because of similar problems or a shared, European market? In the latter case: how strong was then the regulatory power of international trade contracts?

The judicial response to certain changes in commercial sales practice in 19th century Europe will be analysed as a case study, ie a growing reliance on immediate default once a seller had failed to deliver in time and subsequently the market price rule to calculate the damages due. Immediate default and the market price rule can be related to the introduction of faster and more reliable means of transport, such as railways, but importantly also to the introduction of industrial production processes. First these changes will be highlighted in commercial sales law for the English, German and Dutch jurisdictions. It will appear that immediate default and the market price rule became entrenched in the English jurisdiction roughly between 1820 and 1840, in the German ones between 1840 and 1850, and in the Dutch jurisdiction between 1860 and 1870.

Following this enquiry, the adoption of immediate default and the market price rule within the Dutch jurisdiction will be analysed for its responsiveness to changes in commercial sales practice and whether this response had been developed independently and/or for a regional, European market. Using 19th century statistics about external trade and judicial statistics on commercial disputes, the entrenchment of immediate default and the market price rule will be related to the overall increase in trade and the ensuing commercial cases in the Dutch jurisdiction; the final question will be whether this increase in commercial cases was concentrated in courts of commercial cities with a regional or international interest. If, for instance, the adoption of immediate default and the market price rule took place simultaneously or shortly after a strong increase of commercial cases, concentrated in regional or international commercial centres, this would indicate that such a jurisdiction might be highly responsive to changes in commercial (sales) practice within a regional, European market. Investigation of the Judicial Statistics for the Kingdom of the Netherlands seems indeed to indicate a strong responsiveness of Dutch courts in the context of a European market.

CHANGES IN 19TH CENTURY COMMERCIAL SALES LAW: IMMEDIATE DEFAULT AND THE MARKET PRICE RULE

Damages as a remedy for breach or non-performance of commercial sales have certain characteristics under the common law, among which the absence of the requirement of a notice of default and a preference for a so-called abstract assessment of damages, commonly referred to as the market price rule (G H Treitel, *Remedies for breach of contract: a comparative account,* (Oxford, 1988) 114, 130, 136-38). Damages as a remedy in – inter alia – German and Dutch commercial legal practice developed similar features during the nineteenth century. In cases where the contract of sale fixed a date of delivery, no notice of default was necessary if a seller failed to deliver in time. The buyer could then immediately claim damages, generally by taking the difference between the original purchase price and the market price of the goods on the contractual date of delivery (J Oosterhuis, *Specific Performance in German, French and Dutch law in the nineteenth century: remedies in an age of fundamental rights and industrialisation,* (Leiden 2011) 237-309, 323-77).

In the English, German, and Dutch jurisdictions, the

immediate default and market price rule became characteristics of damages in commercial sales laws in the course of the eighteenth and nineteenth centuries. These similar characteristics of damages in common law and German and Dutch nineteenth century commercial legal practice can be related to similar, economic origins (see in detail J Oosterhuis, "Damages and the Industrial Revolution in England, Germany and the Netherlands – Damages as Remedy in 18th and 19th century European Commercial Sales Law", 22/4 ZEuP (2014) 793-823).

In England, the market price rule was already developed in the late 1760s but became firmly entrenched in the law of damages between 1820 and 1840. This development probably ran parallel to a further acceptance of immediate default as a characteristic of damages as a remedy. It is submitted that the growing use of the market price rule for the assessment of damages for England, particularly since the 1820s, is related to a vast increase in international and domestic trade, better means of transport, and thus the emergence of (inter) national markets. These markets enabled litigants and courts to assess an award for damages on the basis of the difference between the purchase price and the market price at the date of the debtor's default. However, England had known earlier periods of abundant foreign trade, for example from 1650 to 1750. The distinctive feature of the period between 1760 and 1840 seems to be the gradual industrialisation of English society, more specifically production processes (see in detail Oosterhuis, 22/4 ZEuP (2014) 795-804).

The relationship between the emergence of (inter)national markets and particularly industrialisation of production on the one hand, and the market price rule and immediate default as characteristics of damages on the other hand, is even more prominent in the German and Dutch jurisdictions. During the nineteenth century, due to, inter alia, liberalisation of trade and better means of transport, interregional and international markets for generic goods with daily fluctuating prices emerged in these civil law jurisdictions. The development of the market price rule in the German Confederation in the 1840s and 1850s and in the Netherlands in the 1860s and 1870s, ran parallel to a subsequent exponential increase in domestic and international trade: in the German Confederation since the 1840s, and in the Netherlands since the 1860s. However, not only did trade increase in the German Confederation and the Netherlands, but it also changed in nature. Due to the industrialisation of society, goods were starting to be used on a different scale and in different production processes. For the German territories, this industrialisation of production is most prominent for the iron industry in the 1840s and 1850s, whereas for the Netherlands, the industrialisation of the cotton industry since the 1860s is exemplary. These vast social and economic changes made it important not only that delivery took place, but also when delivery took place. The remedy of *Specific Performance* was no longer adequate for a buyer who needed to have the goods on time, either for the purposes of re-delivery or for their use in an industrial production process. Instead, the buyer would make a covering purchase and/or recover his damages from the seller at a later time. It is submitted that immediate default upon the lapse of a delivery date as a characteristic of damages in commercial sales law is thus related to the emergence of a modern economy in Germany since the 1840s, and in the Netherlands since the 1860s. For the German territories immediate default and the market price rule were eventually laid down in Article 357 of the *Allgemeines Deutsches Handelsgesetzbuch*, whereas for the Netherlands these changes were reflected in judicial decisions during the 19th century (see in detail Oosterhuis, 22/4 ZEuP (2014) 804-813 (Germany), 813-821 (the Netherlands)).

It is thus submitted that immediate default and the market price rule as characteristic features of damages in English, German, and Dutch commercial legal practice are indeed related to similar economic changes, most prominently to the industrialisation of production processes, but also to a vast increase in interregional trade of generic goods, and a general availability of fast and reliable means of transport.

CHANGING PRODUCTION PROCESSES OR INCREASING INTERNATIONAL TRADE?

These changing characteristics of damages in commercial sales law, ie immediate default and the market price rule, can thus importantly be attributed to pressure from two sides: a more internal pressure, ie adapting the rules to changing production processes, and a more external one, ie adapting the rules to changing international commercial practice. These two developments are obviously linked – international commercial parties also react on changing production processes in the first place. But they can nevertheless be distinguished to a certain extent as well by looking at the parties to a commercial sales contract: importantly, whether both parties are traders or that at the least the buyer is a merchant and not for instance an end-user, such as a factory owner. In the context of this contribution, the author is mainly interested in the pressure of international trade in changing certain rules, or put it differently, in the regulatory power of international commercial contracts.

CHANGES TO DAMAGES AS A REMEDY IN 19TH CENTURY DUTCH COMMERCIAL SALES LAW

To illustrate the influence – or regulatory power – of international sales contracts on a certain jurisdiction, the Netherlands will be taken as an example, because the Dutch had been the last to incorporate immediate default and the market price rule in its commercial sales law. To distinguish the respective pressures of changing production processes and increasing international trade, the incorporations of immediate default and the market price rule as characteristics of Dutch commercial sales law – briefly sketched in the first section – will be elaborated in more detail. Particular attention will be paid to the parties to a contract.

Specific date of delivery

Trade sales which took place at a commodity exchange obviously regarded timely delivery as being of the utmost importance (Arrondissements-Rechtbank (hereafter A-Rb) Dordrecht, 30 June 1845, confirmed Provinciaal Gerechtshof (hereafter Prov Gh) Zuid-Holland, 6 May 1846, *Weekblad van het Regt* (hereafter *W*) 764 (500 barrels of turnip oil); A-Rb Amsterdam, 3 February 1854, *W* 1550 (colza oil)). Yet, since the late 1840s, the same appeared to be true in respect of other trade sales of generic goods with fluctuating market prices: courts increasingly held a seller to be in default as soon as he failed to deliver in time, for example in cases concerning deliveries of rice (A-Rb Amsterdam, 10 December 1847, *W* 944), wood (A-Rb Amsterdam, 29 November 1848, *W* 989) and rubber (A-Rb Assen, 27 February 1854, *W* 1634, confirmed Prov Gh Drenthe, 16 December 1854, *W* 1663). In order to take optimal advantage of seasonal and market conditions in the sale of fungible goods, sellers often included fatal delivery dates. For example, the District Court Rotterdam ordered in 1854 a seller to pay his buyer's damages and loss of profit after he had failed to comply with his buyer's request for delivery of 20,000 hectolitre of coal from Mariemont, Belgium, before 1 December (A-Rb Rotterdam, 10 May 1854, confirmed Prov Gh Zuid-Holland, 24 December 1855, *W* 1715). In this case, most likely involving a Dutch merchant as buyer, a timely delivery was of the essence given that the market price of coal would probably increase during the winter, and thus any late delivery would prevent the yielding of any profit from that increase.

Although a certain date of delivery was not in itself a term due to which mere lapse a debtor would fall into default, increasingly from 1860 onwards (albeit gradually), parties to commercial sales of generic goods – such as cotton (A-Rb Almelo, 29 October 1862, *W* 2543) or raisins (A-Rb Amsterdam, 18 October 1865, *W* 2758) – did in fact claim rescission with damages as soon as their sellers failed to deliver on time. The latter dispute was between two merchants, but the first one was between an English trading company and a Dutch cotton mill.

Trade sales v "ordinary" sales

This practice resulted in the emergence of a distinction between commercial trade sales – in which cases a specific date of delivery had to be included as a resolutive condition within the terms of the contract – and "ordinary" (trade) sales – in which cases the courts would generally presuppose the existence of a resolutive condition under Article 1274 of the *Burgerlijk Wetboek*. The distinction between the two came about in conjunction with a growing interest in commercial law after the introduction of the *Allgemeines Deutsches Handelsgesetzbuch* in 1861 (see Oosterhuis, *Specific Performance*, 355-56). In 1866, the District Court Amsterdam delivered two decisions in close succession which seemed to expound two slightly different interpretations of the exact meaning of the specific date of delivery in the context of a trade sale. The first case was very similar to those interpretations of Article 357 of the *Allgemeines Deutsches Handelsgesetzbuch* that the German courts had given around the same time, since damages were considered the primary remedy. The Amsterdam court stated in it that if parties, at least in trading matters, had stipulated a delivery date within the contract and delivery had not taken place before its expiry, then the explicit resolutive condition operated in such a way that the contract had to be treated as expired. Here the obligation to deliver thus ceased to exist as delivery had not taken place in due time. This was contrary to ordinary sales in which a resolutive condition was only presupposed by the *Burgerlijk Wetboek*, and under which the seller's obligation continued until rescission was claimed. In both types of sale, a buyer could claim rescission with damages but, importantly, a court could not grant an additional time to perform in respect of a trade sales with a specific or fixed delivery date, and the buyer was not obliged to claim rescission in court (again, contrary to ordinary sales) (A-Rb Amsterdam, 3 January 1866, *W* 2783).

However, it seems that the notion of a contract expiring upon default due to the expiry of a fixed date gave rise to far-reaching consequences that were deemed intolerable in practice. The Amsterdam court refined its prior interpretation a few months later: it stated that if a seller was in default (*mora*) to deliver before a specific date of delivery, this did not mean that the entire sale had expired, but only that the buyer was no longer obliged to accept the belated delivery. The seller's obligations were still valid if he fell in default, but the buyer could then choose between actual performance and rescission with damages. Otherwise, the choice of whether to perform in time or not, and thus in turn whether his obligation would be binding or not, would rest entirely with the seller. However, if in trade matters a date of delivery was inserted into the contract, the condition to deliver within a certain time had to be classed as a resolutive condition, even though such a contract did not expire *ipso jure.* Here, the court declared that a sale of 300,000 coconuts, to be delivered before the end of October 1864, was rescinded and ordered the seller to pay damages to his buyer in Le Havre, France (A-Rb Amsterdam, 21 March 1866, *W* 2809. The court had to apply the *Code civil* in this case; Article 1139 *Code civil* is equivalent to Article 1274 *Burgerlijk Wetboek*). Contrary to the previous case from 1866, this dispute most likely concerned two merchants.

Immediate default and rescission ipso jure

According to Isaac Abraham Levy (1836-1920), an Amsterdam commercial lawyer, the principle *dies interpellat pro homine* was embodied in Article 1274 of the *Burgerlijk Wetboek*, and a notice of default was thus unnecessary in a sale with a specific date of delivery, just as it was under Article 357 of the *Allgemeines Deutsches Handelsgesetzbuch* (J.A. Levy, *Het algemeene Duitsche handels-wetboek, vergeleken met het Nederlandsche wetboek van koophandel*, Amsterdam 1869, Art 357, n 1, 311-12). Indeed, after it became customary for traders to include a specific date of delivery in trade sales of generic goods and to claim damages upon its lapse, most courts held that the consequence of the lapse of such a date would be immediate default. In 1871, the District Court Rotterdam stated that

even if one did not assume that the mere lapse of time brought about a seller's default in trade sales of generic goods with a specific or fixed date of delivery or shipment, at the very least a buyer would not be obliged to accept what was delivered after that date (A-Rb Rotterdam, 11 December 1872, *W* 3538). If a party was in default on the basis of the contract itself, a separate notice was then unnecessary to establish his default. Thus a claim for rescission under Article 1303 of the *Burgerlijk Wetboek* did not necessarily have to be preceded by a notice of default. In 1880, the District Court Den Haag stated that this would particularly be the case in respect of the sale of fungible goods – in this case flour – whereby the insertion of a specific period for delivery would usually have the effect of holding the debtor in default upon mere lapse of the period (A-Rb 's-Gravenhage, 7 May 1880, *W* 4521): here the parties were a flourmill and a baker respectively.

Around 1880, it thus may be said that the majority of courts started to treat a resolutive condition, including a fixed date of delivery, as a fatal term, ie one that would bring about an end to the agreement and justify rescission *ipso jure* (see Oosterhuis, *Specific Performance*, 359-61). Not only was a seller immediately in default as soon as he failed to deliver on time, but the contract was also considered rescinded from the moment of default. Consequently, it seems that Dutch legal practice had adopted a similar approach towards a contract of delivery (*Kauf auf Lieferung*) or trade sale with a fixed date of delivery (Fixgeschäft) as had been taken in the context of Article 357 of the *Allgemeines Deutsches Handelsgesetzbuch* some 20 years earlier. Damages (in the form of the price difference) had assumed for such trade sales the position of the creditor's primary remedy.

Market price rule

The underlying concept of the market price rule lay in the difference between a buyer's purchase price and the market price at the date of his seller's default. Thus it became essential to establish when the seller was actually in default. As has been discussed above, prior to 1860 courts generally did not consider a contractual date of delivery in itself to be a fatal or fixed term, the failure of which would result in the creditor being declared in default immediately. There are examples of judicial decisions that, *per contra*, considered the inclusion of a certain date of delivery as being fixed and held a seller to be in default as soon as he failed to deliver in time. Such decisions also held the contract to be rescinded *ex tunc* and calculated damages on the basis of the difference between the purchase price and the market price on that contractual, fixed date of delivery (A-Rb Amsterdam, 10 December 1847, *W* 944).

Nevertheless, prior to 1860, non-defaulting parties regularly contended that they could choose a date other than that on which the seller's default took place in the assessment of damages by way of price difference. They argued that the defaulting party should have to pay the difference between the purchase price and the price on a date following the seller's default that suited them more favourable, including: the highest market price before the summons; the highest market price after the summons; the highest price prior to the date of resale; or the date of resale itself; the date of the verdict in which rescission was established (see, for instance, judicial decisions from 1850, 1851, 1854 and 1858 before the Amsterdam District Court and Court of Appeal respectively, *Magazijn van Handelsregt* 2 (1860), 46-57). Thus, as was the practice of litigants in the German territories, buyers often sought to choose the date at which the goods were at their highest market price (see also Levy, *Handels-wetboek*, Art 357, n 1, p 312).

However, from around 1860, the courts explicitly rejected this kind of arbitrary calculation of the price difference. In 1863, in a dispute between two merchants, the District Court Amsterdam stated that if a buyer claimed actual performance and a seller still failed to deliver, the latter had to pay the difference between the purchase price and the market price at the contractual date of delivery (A-Rb Amsterdam, 11 July 1863, *W* 2513). Yet it was perhaps only after 1870 that the payment of the price difference between the purchase price and market price at the fixed date of delivery became *the* standard means of assessing damages (A-Rb Rotterdam, 18 April 1866, *W* 2821 (merchants); A-Rb Rotterdam, 28 May 1866, *W* 2826 and A-Rb Rotterdam, 20 November 1867, *W* 3001 (merchants); Prov Gh Noord-Holland, 18 February 1869, *W* 3150). From 1870 onwards, Dutch courts regularly used the price difference as the standard means of establishing a buyer's damages if his seller failed to deliver on time. Moreover, this appeared to correspond with the growing judicial trend of viewing the contractual date of delivery as being a fixed date of delivery. Such cases concerned trade sales of all kind of goods with a market price, including: meat (A-Rb Maastricht, 28 May 1874, Prov Gh Limburg, 8 February 1876, *W* 3999), Union Pacific railway stocks (A-Rb Amsterdam, 15 June 1876, *W* 4024), and "good fair Dhollerah" cotton (A-Rb Almelo, 2 April 1879, Gh Arnhem, 25 February 1880, *W* 4522) – although the last dispute knew a cotton mill as buyer. The underlying rationale was simply that a seller who failed to deliver should not be able to profit from an increase in the market price.

Since around 1875 therefore, when trade sales concerned generic goods with a fluctuating market price and a specific date of delivery was included within the terms of the agreement, the seller was held to be immediately in default upon lapse of the due date – in that case the contract was rescinded *ipso jure* and the buyer could essentially only obtain the price difference.

Primary influence of international trade sales

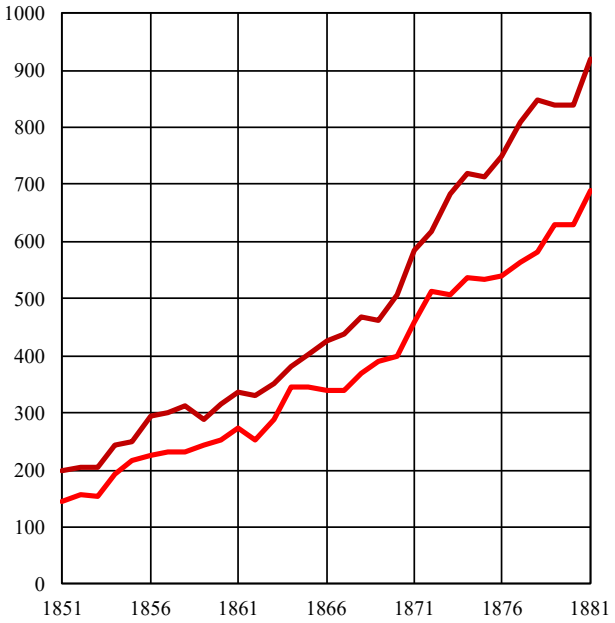
From the above overview, it can be observed that in most disputes with known parties, those indeed concerned merchants. This suggests that for the Netherlands, international trade has indeed decisively pushed towards the incorporation of immediate default and the market price rule as characteristics of damages in Dutch commercial sales law – more than the changing production processes, visible where cotton mills act as buying parties. Moreover, most of the disputes were parties relied on immediate default and/or the market price rule to establish their damages, were adjudicated before

the Amsterdam and Rotterdam District Court respectively: Amsterdam and Rotterdam being important international trading centres.

LOCATING THE INFLUENCE OF INTERNATIONAL TRADE ON 19TH CENTURY DUTCH COMMERCIAL SALES LAW

But how strong has this influence of international trade on Dutch commercial sales law been? Or, put differently, what has been the regulatory power of the underlying commercial sales contracts? The above overview indicates that this power has been exercised most decisively between around 1865 and 1875. It appears that the period 1865-75 coincides with a period of (strongly) increasing external trade of the Netherlands (on the fundamental problem of statistical identification in modern empirical economics, see E Helland & J Klick, "Legal Origins and Empirical Credibility" in M Faure & J Smits (eds), *Does Law Matter? On Law and Economic Growth,* (Antwerp, 2011) 99-113, here 108-9). The external trade of the Netherlands increased steadily during the 1860s but particularly in the course of the 1870s (graph 1).

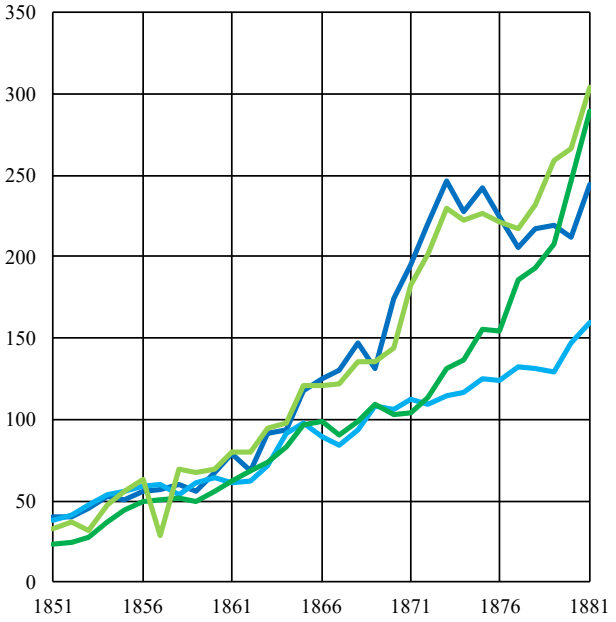
Graph 1: *Dutch external trade 1851-1881 in million guilders*



External Trade Aggregate Current Value: Import (dark red) / Export (light red)
Source: derived from B R Mitchell, *European Historical Statistics 1750-1970*, London 1975, 490, 540-41.

Moreover, closer inspection of the external trade with the UK and Germany confirms this picture: a steady increase in trade during the 1860s and a growth spurt in the 1870s (graph 2). Importantly, there is a trade surplus with Germany: exporting Dutch sellers might have wanted to accommodate their importing German purchasers. That would mean additional exposure to German-styled sales contracts, including immediate default and the market price rule.

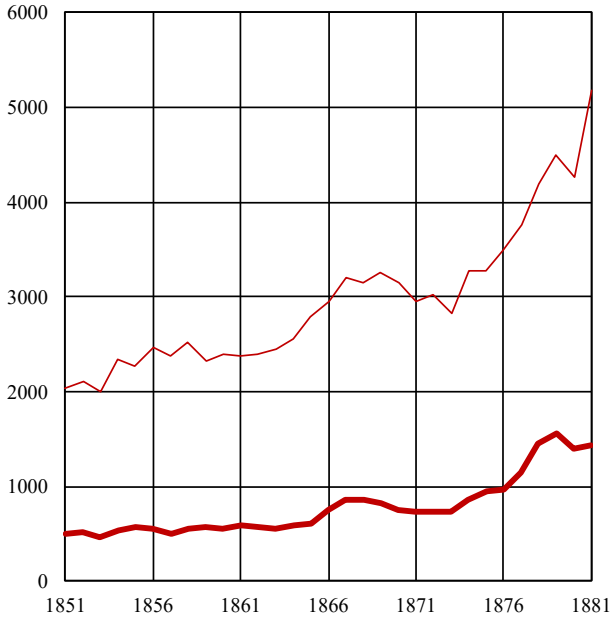
Graph 2: *Dutch external trade with the UK and Germany 1851-1881 in million guilders*



External Trade (value) UK: Import (dark blue) / Export (light blue)
External Trade (value) Germany: Import (dark green) / Export (light green)
Source: derived from B R Mitchell, *European Historical Statistics 1750-1970*, London 1975, 540-41.

Unfortunately, no separate statistics on the number of disputes about international commercial sales before Dutch district courts are available. The statistics that are available, nevertheless suggest that the higher amount of external trade was indeed translated in a higher number of (commercial) disputes. In the first place, there is an increase in the overall number of disputes including the number of commercial disputes (graph 3). Although these commercial disputes include a large variety of commercial disputes, for instance about agency contracts, accounting books, company rules, etc. and not only commercial sales, they can still serve as a proxy for commercial sales disputes, because the underlying commercial activities are often related to trade.

Graph 3: *Final decisions by Dutch district courts 1851-1881*

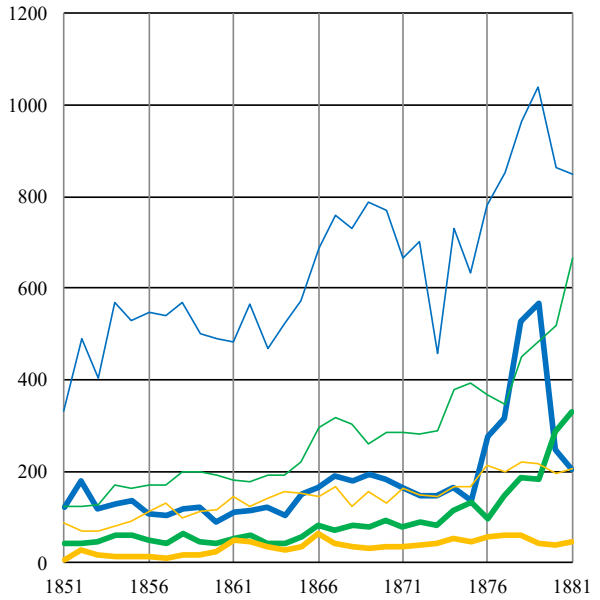


Overall Total Amount (thin red line)
Commercial Cases (thick ref line)
Source: derived from *Geregtelijke Statistiek van het Koningrijk der Nederlanden 1851-81*.

The number of commercial disputes depends importantly on the amount of commercial activity, and as a derivative of commercial activity the ensuing increase in commercial disputes is less prominent. Moreover, the effect of increasing trade only has a delayed effect on the number of commercial disputes. This can also be observed for the increase in final decisions in commercial disputes before certain Dutch district courts. As from the mid-1860s a slight increase in the overall number of commercial disputes can be observed; from the mid-1870s a stronger increase in commercial disputes can be observed.

An increase in commercial disputes as such does, however, not mean a similar or proportionally larger increase of international commercial disputes. Therefore the author has looked at whether the amount of commercial disputes increased stronger in international commercial centres, notably Amsterdam and Rotterdam, compared to the overall increase in commercial disputes, but also to a more local district court, Maastricht (graph 4).

Graph 4: *Final decisions by the Amsterdam, Rotterdam and Maastricht district courts 1851-1881*



Amsterdam: total (thin blue) / commercial (thick blue)
Rotterdam: total (thin green) / commercial (thick green)
Maastricht: total (thin yellow) / commercial (thick yellow)
Source: derived from *Geregtelijke Statistiek van het Koningrijk der Nederlanden 1851-81*.

The increasing exposure to international commercial contracts seems indeed to correspond with more international commercial disputes, as district courts in the international market centres (Amsterdam, Rotterdam) gain importance at the cost of local ones (Maastricht).

Roughly between the mid-1860s and the mid-1870s, Dutch courts – notably the Amsterdam and Rotterdam District Courts – incorporated immediate default and the market price rule as characteristics of damages within Dutch commercial sales. This period of judicial incorporation coincides with a strong increase in international trade with the UK and Germany, particularly as from the 1870s. Rather, the increase in trade on its turn also coincides with a considerable increase in commercial disputes, notably before the Amsterdam and Rotterdam district courts: it can safely be assumed that there was thus also an increase in international commercial disputes. Taken together, these observations suggest that Dutch commercial sales law responded quite strongly to the regulatory power of the international commercial sales contracts, here exemplified by immediate default and the market price rule, because this response coincided with the strong increase of international trade and ensuing commercial disputes between the mid-1860s and mid-1870s.

CONCLUSIONS

The incorporation of immediate default and the market price rule as characteristics of damages in the commercial sales laws of England, the German territories and the Netherlands, seems to be prompted importantly by a growing use of industrial production processes and increasing (inter) national trade during the 19th century. This supports the idea that changes in commercial practice importantly depend on exogenous economic changes and expanding markets. The incorporation of immediate default and the market price rule as characteristics of damages in Dutch commercial sales law might be attributed to a significant exposure to disputes about international trade sales between the mid-1860s and the mid-1870s because of the growing trade with the UK and Germany. The responsiveness of a jurisdiction to the regulatory power of international commercial contracts therefore seems to depend importantly on the exposure to international trade and the ensuing disputes about the underlying commercial contracts.

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