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**The First Doctrinal Consideration
on “Transatlantic” Commercial
Law: Tomás de Mercado’s *Summa
de tratos y contratos*, 1569-1571**

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“*Todo es diferentísimo*”

Tomás de Mercado, *Suma de tratos y contratos*
Chap. XVIII « De los tratos de Indias y tratantes en ellos ».

Abstract

The "Suma de tratos y contratos" (1569-1571) by Tomás de Mercado is the first legal treatise on trade that explicitly takes into account the specificities of Spanish trade with the Indias. Tomás de Mercado was faced with very profound changes in trade: long distances, large convoy sizes, the need for large amounts of funding, high risk, variations in prices and the value of money...

From a theological-legal point of view, these upheavals posed new and complex questions.

Mercado, advisor to the merchants of Seville and an excellent knowledge of New Spain, analyses the sudden transformation of economic and juridical practice with finesse and realism. The 'Suma' is thus an extraordinary real-time testimony to the profound transformations taking place in 16th century commerce.

Moreover, faced with fundamental questions of moral order and juridical legitimacy, Mercado proposes legal solutions of high equilibrium in which theological imperatives are masterfully reconciled with the needs of transatlantic commercial practice.

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1 Text and context

Conventionally scholarship looks upon Tomás de Mercado as a member of the School of Salamanca and places him in the general intellectual tradition often referred to as Late Scholasticism¹.

He was born in Seville in 1525 and moved at a young age to what is now Mexico, where he had his first formal education. When he returned to Spain, he studied theology and law at the University Salamanca². He then moved to Seville where he became the moral advisor of the city's merchants. The merchants of Seville commissioned him to write his *Suma de tratos y contratos* - published in 1569 -, in which they expected to find the necessary moral guidelines for their commercial activities.

These circumstances are important for understanding Mercado's thinking, because he combined at the same time a philosophical, juridical and technical-economic approach³. Moreover, although he may appear as a perfect representative of the Aristotelian-Thomistic tradition, his work was revolutionary in his day⁴. Mercado's life straddled Spain and Mexico and placed him therefore at the heart of the nascent world market. New Spain (today roughly Mexico) was a Spanish territory in the North of the Isthmus of Panama. It was established in the wake of the Spanish conquest of the Aztec Empire in 1521 and, after additional conquests, it became a viceroyalty in 1535 (until 1821).

New Spain was the centre of the new global trade network based on early "colonialism"⁵. After the conquest of Mexico and the Philippines during the

¹ Thomas Duve, « The School of Salamanca. A Case of Global Knowledge Production » (May 31, 2020), Thomas Duve, Christiane Birr, José Luis Egío García (eds.), *The School of Salamanca: A Case of Global Knowledge Production* (Max Planck Studies in Global Legal History of the Iberian Worlds, Vol. 2), Leiden, Max Planck Institute for European Legal History Research Paper Series No. 2020-12; Thomas Duve, "La Escuela de Salamanca y la historia del derecho. Balcance y perspectivas", *Boletín Digital*, 30, 5-13, 2019; Andreas Wagner, Anselm Spindler, "School of Salamanca", *Encyclopedia of Renaissance Philosophy*, Marco Sgarbi (ed.), 2018; Roberto Hofmeister Pich, "An Index of 'Second Scholastic' Authors", *Right and Nature in the first and second Scholasticism*, Alfredo Santiago Culleton, Roberto Hofmeister Pich (eds.), Turnhout: Brepols, IX-XVII, 2014; Martin Schlag, "Socio-Economic-Political Concepts in Late Iberian Scholasticism", *Salamanca Working Papers Series*, 3, 2018, p. 1-24; André Azevedo Alves, José Moreira, *The Salamanca School*, Londres-New York, 2010; Marie-France Renoux-Zagamé, "Scolastique (Seconde)", *Dictionnaire de la culture juridique*, Denis Alland, Sthéphane Rials (eds.), Paris, 2003; Alejandro A. Chafuen, *Christians for Freedom : Late-Scholastic Economics*, San Francisco, 1986; Marjorie Grice-Hutchinson, *The School of Salamanca: Readings in Spanish Monetary Theory, 1544-1605*, Oxford, 1952.

² Maria Paz Alonso Romero, *Salamanca, escuela de juristas*, Madrid, 2012.

³ Mauricio Beuchot, Jorge Iñiguez, *El pensamiento filosófico de Tomas de Mercado. Lógica y economía*, Mexico D.F., UNAM, 1990, p. 9.

⁴ M. Beuchot, *op. cit.*, p. 14.

⁵ Antonio Garcia Baquero Gonzalez, *La carrera de Indias - Histoire du commerce hispano-américain, XVIIe-XVIIIe siècles*, Paris 1997; Antonio-Miguel Bernal, Isabel Martínez Ruiz, *La financiación de la carrera de Indias (1492-1824): dinero y crédito en el comercio colonial*

sixteenth century, Spain established a maritime route from China to the port of Manila in the Philippines, and from there to the port of Acapulco on the Western coast of Mexico. In that system, New Spain had a strategic role in global trade. Through the *Nao de China*⁶, commodities were shipped from the Far-East to America, and from there to Seville⁷. Moreover, Mexico was the most important economic area of Spain's overseas territories. Mexican mines played a fundamental role in the American system established by the Spaniards⁸.

Tomás de Mercado was first trained in Mexico, which was therefore not some far-flung peripheral territory, but the most significant overseas territory of the Spanish Empire. He then settled in Seville, where he stayed for a long part of his life. Seville played a key-role in commercial activities between Europe and the American territories⁹. Mercado witnessed the birth of the world market and that was the focus of his work¹⁰. His approach was not merely that of an observer, for he tried to reconcile theory and practice, philosophy and economic order¹¹.

2 The first treatise on “transatlantic” commercial law

español con América, Seville 1992; Hilario Casado Alonso, “La formación del espacio económico (siglos XV y XVI). Las transferencias de mercancía y símbolos en la “Primera Edad Global””, *La apertura de Europa al Mundo Atlántico: espacios de poder, economía marítima y circulación cultural*, José Ramón Díaz de Durana Ortiz de Urbina, José Antonio Munita Loinaz (eds.), Universidad del País Vasco, 2011.

⁶ Salvador Bernabéu Albert, *La nao de China, 1565-1815. Navegación, comercio e intercambios culturales*, Seville, 2013 ; Luis Alonso Álvarez, *El costo del imperio asiático. La formación colonial de las islas Filipinas bajo dominio español, 1565-1800*, México, 2009.

⁷ Antonio García Baquero Gonzalez, *op. cit.*; Antonio-Miguel Bernal, Isabel Martínez Ruiz, *op. cit.*; Luis Alonso Álvarez, *El costo del imperio asiático. La formación colonial de las islas Filipinas bajo dominio español, 1565-1800*, México, 2009.

⁸ Angel Palerm, “Sobre la formación del sistema colonial”, *Ensayos sobre el desarrollo de Mexico y America Latina. 1500-1975*, Mexico, 1979.

⁹ Luis Navarro García, “El Puerto de Sevilla a fines del siglo XVI”, *Archivo Hispalense*, 1966, p. 141-178; Eduardo Trueba, *Sevilla marítima. Siglo XVI*, Seville, 1990; Bennassar, Bartolomé (ed.), *Vivir el siglo de oro. Poder, cultura e historia en la época moderna*, Universidad de Salamanca, 2003; Gregorio Salinero, *Une ville entre deux mondes: Trujillo d'Espagne et les Indes au XVIe siècle : pour une histoire de la mobilité à l'époque moderne*, Casa Velasquez, 2006; Eberhard Crailsheim, *The Spanish Connection: French and Flemish Merchant Networks in Seville*, Böhlau Verlag Köln Weimar, 2016.

¹⁰ José Luis Ruiz-Peinado, Ricardo Piqueras, Javier Laviña, “Presentación”, *Suma de tratos y contratos de mercaderes y tratantes discidados y determinados*, Universidad de Barcelona, 2010, p. 15 : “Tomas de Mercado intenta aclarar los términos del comercio, no sólo con las Indias, sino global”; Francisco Gómez Camacho (ed.), *Three essays on the times and work of Tomás de Mercado*, Madrid, 2018.

¹¹ Marcel Bataillon, *Erasmé et l'Espagne, recherches sur l'histoire spirituelle du XVIe siècle*, Genève, Droz, 1937 ; Wim Decock, “Collaborative Legal Pluralism. Confessors as Law Enforcers in Mercado's Advice on Economic Governance (1571) ”, *Rechtsgeschichte-Legal History*, Rg 25, 2017, p. 103-114 ; Luna Bernal, Alejandro César Antonio, “Valoración moral del comercio en Suma de tratos y contratos (1571) de Tomás de Mercado”, *Pensamiento Novohispano*, 15, 2014, p. 79-92.

The *Suma de tratos y contratos* became a famous work and it had a significant influence on commercial thinking and practice at the time. It was first printed in Salamanca in 1569¹², and reprinted with two other books in Seville in 1571. An abridged version was quickly printed and translated into Italian¹³. The treatise's main contribution was to shed light on the new transatlantic economic developments¹⁴, but perhaps the could be argued the other way round, since the birth of a transatlantic market challenged the intellectuals and forced them to consider the new economic and social system from an original perspective. Tomas de Mercado was inevitably affected by this economic revolution. His Aristotelian education would prompt him to shape a form of knowledge and to build a theoretical analysis closely oriented towards his formal object's reality. It was a type of knowledge based and focused on experience.

The “*nuncupatoria*” epistle is addressed to trade professionals, the distinguished and eminent consulate of the merchants of Seville, which had enjoined Tomas de Mercado to provide them with advice on commercial issues¹⁵. It is significant that the treatise is written in Spanish, and not in Latin as were many similar works at the time (such as the genre of *De Iustitia et de Iure* treatises).

The “*nuncupatoria*” epistle makes clear that the merchants of Seville commissioned the book because Mercado had lived both in the Spanish overseas territories and in Seville, and was therefore very well acquainted with the ways commercial practices had developed in the new American environment¹⁶: “This book is a brief illustration, in an accessible style, of the contracts which parties in these kingdoms and in the Indies most frequently enter into, viz. purchases, sales and exchanges¹⁷.”

¹² This text was digitally edited as one of the sources of the project *The School of Salamanca: A Digital Collection of Sources and a Dictionary of its Juridical and Political Language*: <https://id.salamanca.school/texts/W0007>

¹³ The title of the Italian translation by Piero Maria Marchetti was : *De' negotii et contratti de' mercanti e de' negotianti. Tratto utilissimo non solamente a chi esercita la mercatura, ma ancora à confessori, predicatori et lettori, nel quale con risoluzione molto chiara, e compendiosa si tratta di Vendite, Compre, Cambi, usure e restitutione*, Brescia, 1591. This work is nowadays republished with critical presentations : Restituto Sierra Bravo, *Suma de tratos y contratos*, Editora Nacional, Madrid, 1975 ; N. Sánchez-Albornoz, *Suma de tratos y contratos*, Instituto de Estudios Fiscales, Madrid, 1977.

¹⁴ Mauricio Beuchot, Jorge Iñiguez, *op. cit.*, p. 23.

¹⁵ Pedro Collado Villalta, “El Consulado de Sevilla por un mayor protagonismo en la Carrera de Indias”, in *Andalucía y America en el siglo XVI: actas de las II Jornadas de Andalucía y América*, Bibiano Torres Ramírez, José J. Hernández Palomo (eds.), Vol. 1, 1983, p. 275-306.

¹⁶ “The master Tomas de Mercado wishes health and prosperity to the famous and honourable consulate of the merchants of Seville. The merchant Angelo Brunengo, a great expert in exchange transactions, has persuaded me to write in clear and simple terms what I have advised over the years to the merchants on so many different subjects, with regard to their activities in this country and in Nueva España”, Tomas de Mercado, *Suma de tratos y contratos*, consulted edition: Seville, Fernando Diaz, 1587 (corresponding to the augmented edition of 1571), epistola nuncupatoria (my own translation). See Elvira Vilches, *New World Gold: Cultural Anxiety and Monetary Disorder in Early Modern Spain*, Chicago, 2010, p. 193.

¹⁷ Tomás de Mercado, *op. cit.*, epistola nuncupatoria (my own translation).

According to Aristotelian methodology, Mercado's starting point consists in observing overseas trade as it was: "We see that in the West Indies, now that Spaniards enjoy the peaceful possession of territories and jurisdiction over the natives, they are commonly involved in one of two types of activities: mining or trade. They either extract gold and silver, or they bring and sell the commodities coming from Spain"¹⁸. Moreover: "Over the past sixty years, since the West Indies were discovered, a substantial convenience and an excellent opportunity for acquiring great wealth have incited princes to become merchants, seeing in this trade a great opportunity for profit"¹⁹. Mercado observed that the number of merchants in the city of Seville increased enormously and those merchants made so much money and they did it so quickly, that sometimes a noble title was conferred upon them²⁰.

The harbour of Seville was the gateway to the maritime trade-routes to the Indies. It was therefore the seat of the *Casa de la Contratación*²¹, where all the commercial transactions with regard to the overseas territories had to be handled, from the stipulation of the contracts to the collection of the *quinto real*, the tax on imported commodities. "The *Casa de la Contratación* in Seville concentrates the richest and most important global commercial traffic. This is well known all over the world. Seville is the centre of all world trade, as Andalusia and Lusitania touch the extreme end of the land. When the Indies were discovered, they were already half way there. Accordingly, all the commodities produced in the old continent, even in Turkey, come here to be exported to the new countries where they are sold at the highest prices. From here, the city flourishes through all kinds of trade. Here in Seville, the great and important exchange operations take place which go to the fairs, in and outside the kingdom, sales and purchases are agreed, on credit or for cash, at incredible prices. Shipments of such enormous value are arranged, on a scale which in their times were never reached in Tyro or Alexandria"²².

Considering the trade from a public economic law perspective, Mercado observes that the building of the vast Spanish overseas empire triggered strong protectionist measures. Right from the start of his treatise, Mercado insists on the fact that the laws of the kingdom did not allow foreigners to participate in the commercial activities with the Indies. Infringements were severely punished: "... as regards the commerce with the Indies, it is forbidden in these words: 'We command that no foreigner can trade with the Indies; no

¹⁸ Tomás de Mercado, *op. cit.*, p. 15v (my own translation).

¹⁹ Tomás de Mercado, *op. cit.*, p. 16r (my own translation).

²⁰ Tomás de Mercado, *op. cit.* p. 16r (my own translation), See Jorge Valverde Frankin, *Titulos nobiliarios andaluces: genealogía y toponomía, descripción histórica*, Granada, 1991; the chapter "Nobleza y comercio en la Sevilla del siglo XVI" in Guillermo Céspedes del Castillo, *Ensayos sobre los reinos castellanos de Indias*, Madrid, 1998, p. 166 ss.

²¹ Carlos Petit, *Historia del derecho mercantil*, Madrid, 2016, p. 132-142; Ana Belén Fernández Castro, "A Transnational Empire Built on Law: The Case of the Commercial Jurisprudence of the House of Trade of Seville (1583–1598)", *Entanglements in Legal History: Conceptual Approaches*, Thomas Duve (ed.), Berlin, 2004, p. 187-202; Antonio Acosta Rodríguez, Adolfo Luis González Rodríguez, Enriqueta Vila Vilar, *La Casa de la Contratación y la navegación entre España y las Indias*, Seville, 2003.

²² Tomás de Mercado *op. cit.*, p. 16r (my own translation).

foreigner, neither any *morisco* or mulatto is allowed to exchange gold and silver, whether processed or unprocessed, under punishment of forfeiture and perpetual exile. For if foreigners enter in such transactions, there will be no durable wealth for our kingdom, nor any increase in the custom duties. Spain, Seville and the Indies bear witness of such harm and prejudice”²³.

The real situation was more complex. In 1523, the king had ordered that “no foreigner of our kingdom [may] trade with the Indies”²⁴. Foreigners were facing, at least formally, tight restrictions with regard to the most profitable economic activities at the time. Yet, Tomás de Mercado mentions the presence of many foreigners trading in Seville²⁵, because when a foreigner was domiciled in Spain (not an easy requirement to meet, but not unfeasible), he could enjoy a similar status to the native Spaniards according to various local rules²⁶. Gradually the commercial policy changed and Charles V, for obvious reasons, adopted a more open policy than his predecessors. He first authorised the German Welser, and subsequently all foreigners, to the trade with the Americas. Later, in 1552, legislation reintroduced the exclusion of foreigners from trade with the Indies²⁷. Many foreign merchants were able to by-pass the prohibition by using the contractual device of a commission. On the other hand, the *Recopilación de las leyes de Indias* offered foreign merchants the possibility to obtain a public license for trading with the Indies. In practice, foreign merchants were in great numbers active on the trade routes between Spain and the Indies. A common practice consisted in using front men for their commercial ventures²⁸.

In terms of economic policies, Mercado supported the monetary policy of the Spanish monarchy based on the massive import of gold in Spain. Accordingly,

²³ Tomás de Mercado, *op. cit.*, chapter VI “De la autoridad que tiene la Republica de tassar los precios y qual dellos es justo”, p. 31r (my own translation)

²⁴ Novísima Recopilación, Libro III, Título V, Ley XV.

²⁵ “ The Germans, the Flemings, the Italians, the inhabitants of Burgos, those of Medina, the Portuguese, the Catalans, and other diverse nations handle their wealth and money, including operations of exchange and loans, they buy and sell, according to the instructions they have received from the owners or from their partners ” (my own translation of Tomas de Mercado, *op. cit.*, p. 276v).

²⁶ Rafael Gilbert, “La condición de los extranjeros en el antiguo Derecho español”, dans *L'Étranger. Recueils de la Société Jean Bodin*, II, Bruxelles, 1958, p. 151-199.

²⁷ In fact Mercado partially quotes the *Leyes de Indias*, Libro IX, Título XXVII, Ley primera, version 1552, who considers a licence for foreigners traders: “*Por evitar la saca de moneda que los extrangeros sacan de nouestros reynos mandamos que ningun extrangero pueda tratar en Indias, si no estuviere habilitado con naturaleza, y licencia nuestra; así como en compañía publica, ni secreta, en mucha, ni en poca cantidad, por si, ni por interpositas personas, pena de perdimiento de las mercaderias, que contraren, y de todos los demás bienes que tuviere*” .

²⁸ Albert Girard, Antonio García-Baquero González, *El comercio francés en Sevilla y Cádiz en tiempo de los Habsburgo: contribución al estudio del comercio extranjero en la España de los siglos XVI al XVIII*, Seville, 2006; Antonio García-Baquero González, *La carrera de Indias: suma de la contratación y océano de negocios*, Algaida, 1992; Raffaele Belvederi, *Genova, la Liguria e l'oltremare tra Medioevo ed età moderna: studi e ricerche d'archivio*, Vol. 7, Genova, 1989, p. 213; Federigo Melis, “Gli italiani e l'apertura delle vie atlantiche”, *Mercaderes italianos en España. Siglos XIV-XVI. Investigaciones sobre su correspondencia y su contabilidad*, Sevilla 1976, Serie: Ciencias Económicas y Empresariales, 1, p. 167-175.

the authorities had to determine the value of gold and the coined money had to retain its metal value²⁹.

Mercado observed how much the overseas expansion influenced prices and inflation, which was amplified by the enormous masses of gold and silver extracted in the Spanish American territories. Mercado was intrigued by the value variations of the precious metals in different places. He was surprised to note that the value of precious metals was much lower in the Indies. He therefore attempted to outline a quasi-quantitative theory of the value of these commodities: "In Florida, which is as extensive as the whole of Europe, they hold gold and silver in such contempt that they are unwilling to take those materials in their hand, as we are reluctant to take up the soil. Copper and iron are for them the supreme wealth, and they prefer a pound of copper to four pounds of gold"³⁰. Consistent with his Thomistic approach, Mercado was interested in the price revolution which spread across Europe as a result of the Spanish conquests in the New World³¹. His interest was particularly caught by the speculative operations which had flourished to unprecedented levels in his time, in stark contrast to the Aristotelian-Thomistic theory which asserted the sterility of money and gold³².

Not only prices, trade also was changing. Mercado is one of the most remarkable witnesses of that momentous transformation.

²⁹ José Luis Ruiz-Peinado, Ricardo Piqueras, Javier Laviña, *op. cit.*, p. 16; Oreste Popescu, "Contribuciones indianas para el desarrollo de la teoría cuantitativa del dinero", *Economía y economistas españoles*, Enrique Fuentes Quintana (ed.), Vol. 2, 1999 (De los orígenes al mercantilismo), p. 209-241.

³⁰ Tomás de Mercado, *op. cit.*, p. 33v (my own translation). Tomás de Mercado, together with Martín de Azpilcueta, is considered one of the proponents of the economic tradition of "Iberian monetarism": see: Marjorie Grice-Hutchinson, *op. cit.*; Ikiro Iizuka, *La Escuela de Salamanca en los primeros tiempos de la historia de la teoría monetaria*, Tokyo, 1996; Louis Baeck, chapter "Iberian monetarism and development theories of the sixteenth and seventeenth centuries", Louis Baeck, *The Mediterranean Tradition in Economic Thought*, Londres, 1994; Francisco Gómez Camacho, "Pensamiento monetario de la escolástica española de los siglos XVI y XVII", *Modernidad de España: apertura europea e integración atlántica*, Antonio-Miguel Bernal (ed.), Bilbao-Madrid, 2017, p. 303-320; Francisco Gómez Camacho, *Economía y filosofía moral, la formación del pensamiento económico europeo en la Escolástica Española*, Síntesis, Madrid, 1998; Oreste Popescu, "El Pensamiento Económico en la Escolástica Hispanoamericana", *Cuadernos de Ciencias Económicas y Empresariales*, n. 22, 1992, p. 11-36.; Elvira Vilches, *op. cit.*, especially Chapter 4 "The New World of Money", p. 145-208.

³¹ Fernando Hernández Fradejas, "La Escuela de Salamanca y la teoría subjetiva del valor", *Anuario Jurídico y Económico Escurialense*, XLV, 531-556; Alfredo Santiago Culleton, "The moral dimension of Economics: The Scholastic Doctrine of Value in Tomás de Mercado and Juan de Lugo", *Scholastica Colonialis: Reception and Development of Baroque Scholasticism In Latin America 16th-18th Centuries*, Roberto Hofmeister Pich, Alfredo Santiago Culleton (eds.), Roma-Barcelona, Fédération Internationale des Instituts d'Études Médiévales, 2016, p. 53-73.

³² Elvira Vilches, *op. cit.*, especially Chapter 6 "The Indies, Values and Wealth", p. 271-319; Smith Michael A., *Human dignity and the common good in the Aristotelian-Thomistic tradition*, New York, Mellen University Press, 1995.

3 The particularities of trade with America

Mercado dedicated an entire chapter - Chapter XVIII « *De los tratos de Indias y tratantes en ellos* » - « on the trades with the Indies and the traders involved », explaining the particularities of trade with the American territories, as well as differences compared to European trade: “*todo es diferentísimo*”, “everything is very different”, he noted³³.

The first particularity mentioned by Mercado was that merchants started to favour the purchase of commodities with the aim of reselling the same by settling for a long-term payment. As a result, they had to pay a higher price in order to have this advantage, with in turn important consequences on the price of the commodities. “The first [specific feature] is that the merchants which load here the commodities they intend to resell in America, almost always negotiate a deal which includes a long-term credit. For that reason, the commodities become very expensive”³⁴. Market prices in New Spain were therefore much higher than in Europe since merchants had to ensure they took into account a margin on the price which they had to pay to the seller in Europe. Another consequence of the long-term payment was that prices in Europe unduly increased because of the vastly increased demand for commodities to be sold in America.

Mercado was aware of the fact that in many respects these economic operations raised delicate issues. He warned that it was necessary to verify the contractual equilibrium in this type of sales, because the passage of time between the delivery and the payment did not as such alter the value of the commodities³⁵. The risks presented by the sale on credit were therefore of two kinds. On the one hand, there was the risk that the postponed payment and the agreement to pay a higher price might conceal a practice tainted by usury. On the other hand, the operation entailed the risk of an unjustified enrichment in favour of the seller, if, under the pretext of the deferred payment, he would raise the price to a level against equity³⁶.

The second unusual development of the new markets was that in the Spanish overseas countries, sales were usually agreed on credit: commodities were not paid for in cash. Mercado denounces a collateral effect of this practice was that the use of trade on credit also spread throughout Europe (where, on the contrary, this practice was very rare), producing many side-effects, as whenever the transaction was a cover for usury³⁷.

³³ Tomás de Mercado, *op. cit.*, chap. XVIII “De los tratos de Indias y tratantes en ellos”.

³⁴ Tomás de Mercado, *op. cit.*, p. 91r (my own translation) ; see Luisa Brunori, “Ventes à crédit et spéculation au Siglo de Oro à travers le regard d’un des premiers juristes du marché globalisé : Tomás de Mercado et sa Suma de tratos y contratos (1569-1571)”, *Revue des Contrats*, n. 3, 2016, p. 521-526.

³⁵ Tomás de Mercado, *op. cit.*, p. 69v, (my own translation).

³⁶ Tomás de Mercado, *op. cit.*, see the whole Chapter XIII “*Del vender y comprar al fiado* » (“On credit sales and purchases”) and chapter XV “*Do se tocan y reprueban muchos modos ilícitos de vender al fiado*” (“In which many illicit ways of selling on credit are dealt with and reproved”).

³⁷ Tomás de Mercado, *op. cit.*, p. 91v, (my own translation).

Moreover, once the commodities had reached the overseas territories, the determination of their price also faced considerable difficulties. Difficulties arose, as Mercado pointed out, because one had to take into account the impact of the risks associated with the transport and the shortage of some goods in the Indies³⁸. Mercado also noted a crucial difference when he compared the trade with the Indies with that in Europe. In the former, in contrast to maritime trade practices in Europe, the different commodities were not separated, but the entire ship's cargo was sold as a whole: "The way to sell in those countries is certainly very different from the way that is practiced in Spain, in Seville, in Flanders or in Italy. The difference is that the whole undivided load is sold, great or small. They do not separate the different commodities, or single out specific goods from the whole cargo"³⁹. In contrast, in Europe, one sells for retail, and wholesale trade commodities are therefore divided into different blocks. This affects the price of commodities, because usually the price corresponds to the sum of the price of the separate blocks". Such a practice was not possible in the case of block sales of maritime cargoes. In the overseas harbours, the cargoes of the fleet's ships were upon arrival immediately attributed "*de un solo concierto*", each time at a price fixed for the whole load of a ship. This had unusual effects on the price of the single goods: "In the Indies, Mercado notes, the practice is to negotiate all at once the sale of all the commodities on board, comprising any kind of merchandise, for eight thousand or ten thousand ducats. This is usually agreed at the time the fleet arrives, and the price is set for the whole cargo on a ship"⁴⁰. This practice was encouraged by the fact that the arrival of convoys in the ports of the Indies coincided with the organisation of the fair⁴¹. The *feria de Acapulco*, for example, was considered the largest fair in the world. Merchants, not only from Mexico but also from neighbouring regions, travelled to participate in the fair when the ships of the Nao de China arrived on the Pacific coast of Nueva España⁴².

Another feature of the trade with the Indies was that the sold commodities did not belong to the merchant, but to a commercial company in which the merchant was a partner, or to a third party on whose behalf the merchant was acting as an agent or broker: "The commodities which the merchants sell always belong to someone else, or to their company of the *encomienda* of whom they are part, and since the goods which they manage are owned by others, they must act as most reliable agents"⁴³. The organisation of the overseas trade was therefore no longer founded on the activities of single merchants operating individually. The new developments of overseas trade required new forms of collective commercial organisation.

³⁸ Tomás de Mercado, *op. cit.*, p. 92r-95v, (my own translation).

³⁹ Tomás de Mercado, *op. cit.*, p. 93r, (my own translation).

⁴⁰ Tomás de Mercado, *op. cit.*, p. 93v-94r, (my own translation).

⁴¹ Tomás de Mercado, *op. cit.*, p. 94r-94v, see Luisa Brunori "Les ferias dans la Suma de tratos y contratos de Tomas de Mercado (1571)", *Historia & Ius*, 17/2020 - paper 8.

⁴² Enrique Quiroz, "Los mercados en la Colonia", *Arqueología mexicana*, n. 122, 2013, p. 68-73.

⁴³ Tomás de Mercado, *op. cit.*, p. 95v-96r (my own translation).

4 Large-scale partnerships

On the strength of his shrewd observations, Mercado concluded that the very extension of the Spanish colonial empire was bound to have a profound influence on the organisation of trade. The era of the single merchant, or of the small family partnership, had gone. Commercial organisations based on large capitalist partnerships was no longer an option, but had become a necessity: “It is necessary to keep some person of trust there. Moreover, it is a way to increase the assets and the capital, because big business will yield more income. However, to make more profit it is useful and convenient to bring together the inflow of two or three financial investments, so that, as the trade grows, so likewise the returns. Those two considerations, viz. practicality and convenience, are of particular importance in this city [Seville] from where the trade with the Indies is organised, as they are very distant and remote territories. Therefore, merchants usually set up companies and send partners to the Indies”⁴⁴. Mercado was the first to observe the reality of a development which is by now generally accepted by historians: “The horizontal capitalistic organizations preside over all the changes among the dominant powers in the Western economy”⁴⁵. As scholarship now recognises, the geographical discoveries generated a favourable climate for the development and improvements of commercial partnership agreements. It became obvious that no individual entrepreneur could muster by himself the capacity to venture into the transatlantic business. At the same time, everyone was attracted by its promises of apparently unlimited wealth and whole segments of society wanted to acquire a share in the exploitation of the overseas territories. None was willing to risk all his assets, but many were tempted to invest some of them in the new transatlantic business. Partnership contracts fully met those concerns. They allowed to share the capital obtained through contributions of several individuals, to spread the risks, to choose between a participation as a financing or as a managing partner, and to limit one’s liability. All that offered investors a wide range of options with the relative safety of reducing their risks. Individuals from the most diverse backgrounds, who often were completely unfamiliar with trade, became members of trade partnerships involved in commercial operations related to the *Nueva España* territories.

According to Mercado, partnerships whereby some partners lived in America and the others in Spain, were frequent in practice. For the first time, partnership contracts were used to set up working arrangements between merchants and non-merchants, the former in order to carry out their commercial projects in the overseas territories, the latter because they wished to invest their financial resources in such ventures. Mercado pointed out that the new trade with America had completely changed the structure of commercial partnerships. The need for heavy investments in order to finance

⁴⁴ Tomás de Mercado, *op. cit.*, Chapter IX, *De las compañías de los mercaderes y de las condiciones que se han de poner para que sean justas*, (“On commercial partnerships and conditions they need to comply with in order to be fair”), p. 49v, (my own translation).

⁴⁵ José Gentil Da Silva, “Les sociétés commerciales, la fructification du capital et la dynamique sociale, XVIème-XVIIème siècle”, *Anuario de Historia Económica y Social*, V 2º, 1969, p. 123, (my own translation).

the American ventures and to share the risks brought to the foreground a clear-cut division between two types of partners: the *socius stans* whose participation consisted only in his financial contribution, and the *socius tractans*, who managed the logistics of the journey to New Spain and the commercial enterprise. In Mercado's view, this new configuration of the associative structure appeared very clearly, even though it represented a radical departure from the uniform model of the Medieval *societas mercatorum*⁴⁶.

Mercado also emphasised that the contribution of the partners who travelled overseas had to be adequately assessed in consideration of the hazards linked to the journey to the American territories: "Is there anything more barbarian or cruel than sending a merchant, who may be a skilled and intelligent person, perhaps a young man who just got married, and to award him merely a fourth part of the profit?"⁴⁷. That was the reason, Mercado explained, why partners who undertook in person the journey to America, usually did not contribute a large share of money, because their labour was a sufficient justification for their share in the gains. Their predicament was very different from the position of the other partners, who remained at home in Europe with wife and children: "This way the partners who travel to the Indies, do normally not invest money in the company, or only very little, but they nonetheless earn a great deal. That is because we have to consider what is fair. It is a great contribution to take a so long and dangerous trip for sea, to abandon one's own home-country, to live and to reside in places where life is difficult, as in Nombre de Dios, Saint Domingo, Honduras, or Veracruz. For all those reasons, one very rightly tries to offer compensation for their inconvenience. Therefore, one very rightly seeks to provide them with compensation for the adverse conditions in which they have to carry out their work. They are catered for at the company's expense, they are refunded for all their costs, all which is not practised on behalf of partners who stay at home with wife and children"⁴⁸.

The distances and the dangers of overseas trade also raised new considerations on the risks involved. Mercado believed that partnerships which conducted business overseas were exposed to higher risks than those who kept their commercial activities within Europe. This was not only because the odds they faced entailed higher probability of losses, but also because those losses could mean that the whole venture was lost. "Today, a risk of ten thousand ducats in one of these companies used for the trade with the Indies, amounts to the same amount of ten thousand ducats"⁴⁹. That consideration was critically relevant, because it was precisely the risk of losing everything which justified the profit of the capitalist partner, who was therefore not a fraudulent usurer but a valuable financier⁵⁰.

⁴⁶ Tomás de Mercado, *op. cit.*, p. 51r, (my own translation).

⁴⁷ Tomás de Mercado, *op. cit.*, p. 51r, (my own translation).

⁴⁸ Tomás de Mercado, *op. cit.*, p. 50v, (my own translation).

⁴⁹ Tomás de Mercado, *op. cit.* p. 51r-51v, (my own translation).

⁵⁰ See Luisa Brunori, *Societas quid sit. La société commerciale dans la réflexion de la Seconde Scolastique*, Paris, 2015.

5 Speculations

Mercado furthermore explained how the trade with overseas countries triggered new forms of speculation linked to the long-distance routes, the timing of payments and the increased risks for commercial enterprises. For example one of the chapters of his treatise deals with: “*Del mercar adelantado y vender en España a pagar en Indias*” (“On anticipated purchase, to sell in Spain and to pay in the Indies”). This was a way of speculating on the variation of the prices in time and in space. The operation consisted in buying merchandise in Europe and re-sell it in Indies for double or triple the price compared to the original price. The commodity was delivered in Spain but the payment was made to an intermediary of the seller in the Indies. The purpose was that the buyer could resell the commodity for an even higher price, due to the shortage of those goods in New Spain. Mercado gives the examples gives the example of things whom expatriates felt an immense lack of and that they absolutely could not get in Indies: olive oil and wine, without which, Tomas de Mercado says, “it is impossible to live well”⁵¹.

Mercado was very critical towards this form of speculation, which increased prices unreasonably and was a cause of unjustified enrichment in favour of the merchants who practised such methods. Mercado strongly condemns the widespread practice of raising the prices of scarce goods in the Indies, which can cost more than three times as much as in Spain⁵². Mercado admitted that a modest increase of the commodities’ price in America was justified because of the journey and the risks involved. In that sense, his opinion was consistent with the doctrine of deferred payment (in particular with regard to payments made at exchange fairs), according to which the price-reference for commodities is the price practised at the place of delivery, not at the place where the payment is made.

On that point, Mercado reported that some commercial courts admitted that the price of the commodity could be augmented in proportion to the price which the merchant had paid for the insurance of the same commodity: “In the case when the price is paid in the Indies, it is right to increase the price to a level equivalent to the price for which the commodities are insured”; however, if the thing sold is paid in Spain but delivered in the Indies, this increase in price is not justified since the seller no longer runs any risk⁵³. In addition, Mercado also admitted a limited augmentation of the price which could be justified by the general risk in trading with America, provided that the price increase remained moderate: “Moreover, the price can be increased to some

⁵¹ “Ni vino, ni aceite, sin lo cual no se pasa ni puede pasar bien la gente », *op. cit.*, Chap. I « Del intento del autor”.

⁵² Tomás de Mercado, *op. cit.*, p. 84r.

⁵³ Tomás de Mercado, *op. cit.*, p. 82v-86r, (my own translation); on this topic see A. et B. Tenenti, “Note sul rapporto tra il valore delle merci e somme assicurate alla fine del Cinquecento”, in *Studi in memoria di Federigo Melis*, Florence, Giannini, 1978, vol. 4, p. 243-254.

extent, taking into account the value of the insurance of the journey. This is because the commercial operation is submitted to a risk. Merchants know very well how much that risk is worth, and need to exercise restraint”⁵⁴. In these pages, Mercado very often mentions the elements of 'risk' and 'uncertainty' that accompany trade with the Indies, pointing out that this is a peculiar aspect of this type of trade that have a major impact on speculative phenomena relating to commodity prices⁵⁵.

Many other aspects documenting the influence of the birth of a transatlantic market on commercial legal practice are discussed in Mercado’s treatise. For example, the specific exchange operations practised in Nueva España, which in the American markets worked according to different logics compared to the mechanisms of exchange transactions in Europe⁵⁶. Tomas de Mercado also dealt with the sale of slaves from Cabo Verde, which is the topic of the entire Chapter XX of his treatise. Mercado justified the traffic in the following terms: “On the issue, whether the capture and selling of black people and people of other types, is permissible according *ius gentium*, I say what the theologians say. In fact, there are reasons for which a person may be justly captured and sold”⁵⁷. In accordance with the current doctrine of the time, Mercado says that those reasons could be a just war or a conviction for committing a public crime. However, he strongly insists that these reasons had to be strictly interpreted. Beyond those specific cases, the trade in slaves was unjustified and illegitimate⁵⁸.

All aspects of the new 'proto-global' trade are therefore closely observed by Tomas de Mercado who enjoys a privileged position between the two sides of the ocean. Mercado was an observer ‘in real time’ and immediately understood the essential difference between trade in New Spain and trade in Europe: “*everything is very different*”, he noted. His treatise went also further than that fundamental finding. Mercado was able to anticipate accurately the effects of the new practices. He discerned the increasing involvement and interest of Europeans in the new trade and realised that the characteristic features of international trade were undergoing a radical transformation.

⁵⁴ Tomás de Mercado, *op. cit.*, p. 84v, (my own translation).

⁵⁵ In this regard it has been said that Mercado's work can be considered as “*una prehistoria del probabilismo*”, José Luis Egío García, “Tomás de mercado y la transfretación global de bienes y normas”, *Cauriensa*, vol. 15, 2020, p. 169-200, p. 173. The author underlines the Mercado's effort to avoid or at least try to minimise the growing disconnection between the early modern world of facts and the world of moral and religious values and precepts, (p. 188).

⁵⁶ Libro III, Capítulo XIII “*De los cambios que se usan de aquí a Indias*” (“On exchange operations which are practised from here to the Indies”).

⁵⁷ Tomás de Mercado, *op. cit.*, p. 102v.

⁵⁸ Tomás de Mercado, *op. cit.*, the whole Chapter XX “*Del trato de los negros de Cabo Verde*”, p. 102r ss.; Elvira Vilches, *op. cit.*, p. 193.

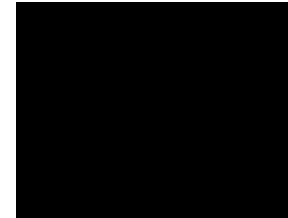
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