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# Legal Aspects of the Financing of Trade

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An investigation of how trade was financed during the Byzantine period must involve a survey of all the legal institutions relevant to the accumulation or acquisition of money for commercial or productive purposes. The reasons for this are the following: first, the absence of any rules by which certain transactions could be described as commercial, by which persons engaging by profession in such transactions could be classed as merchants, and by which consequences were established for engaging in trade. In other words, there was no commercial law to govern all trading activities. Second, there were no properly organized credit or financial agencies that provided systematic, rather than circumstantial, financing for commercial or productive activities. The only relevant guild mentioned in the *Book of the Eparch* is the guild of bankers, probably money changers, as can be deduced from the provisions concerning them, which principally refer to the genuineness of the coinage and the organization of the profession. References to money changers (*argyropratai*) are, unfortunately, rare and occur only on the occasion of some special arrangements for them within the context of the more general regulation of some institution. They allow us to conclude, tentatively, that the members of this class may have been at an initial stage in the development of banking in the sense that they systematically financed entrepreneurial activities.<sup>1</sup>

Finally, there is a scarcity of source material in the form of documents connected with transactions and contracts for financing commercial or productive activities. This is not surprising: many such contracts are never put in written form, and even when a document has been drawn up for the purpose of concluding or evidencing a transaction, it is only natural that it should be destroyed after the transaction has been completed, whether successfully or not. Nor was it common for an everyday transaction to be considered important enough for inclusion in a chronicle, far less in a more ambitious work of historiography.

In the late Byzantine period (from the 13th century to the demise of the empire),

This chapter was translated by John Solman.

<sup>1</sup> See also G. Dagron, "The Urban Economy: Seventh–Twelfth Centuries," K.-P. Matschke, "The Late Byzantine Urban Economy: Thirteenth–Fifteenth Centuries," and C. Morrisson, "Byzantine Money: Its Production and Circulation," *EHB*.

trade grew under the influence of the merchants of Genoa and Venice. At this time, documents began to make their appearance; most of them are promissory notes, but the archives of the notaries of Crete have also preserved some notarial instruments.

In view of this, one clearly needs to turn to the rules of civil law and, through certain institutions, to identify, classify, and construe those rules so as to produce as full a picture as possible of the framework within which entrepreneurial activity must have developed and been financed and the rules to which it was subject. This framework, within which the parties operated and engaged in legal acts, was broad and flexible since Byzantine law observed the principle of consensual contracts, permitting the parties to be bound by a mere formless agreement in accordance with the requirements of the transaction, though of course always within the framework of the law: “the agreements of those lawfully engaging in transactions, in all ways, shall be valid.”<sup>2</sup> However, since we have no written source material relevant to transactions, we lack a vivid picture of entrepreneurial life.

This chapter deals only with the financing of trade as an entrepreneurial activity in the contemporary sense and not with the other forms of trade—usually circumstantial in nature—in which public officials engaged, supplying it with commodities that had come into their hands precisely as a result of their office.<sup>3</sup>

The basic legal institutions under civil law relevant to the financing of entrepreneurial activities are loans and partnerships/companies. In the special case of maritime trade, maritime loans and shared debt partnerships (*χρεωκοινωνία*) are relevant. The basic source for investigating these institutions is the *Basilics*, in parallel to which certain earlier and later collections of laws (the *Ecloge*, the *Procheiros Nomos*, the *Synopsis Maior*, the *Hexabiblos*, and the *Rhodian Sea Law*) have also been used here. Compendia of court practices such as the *Peira* of Eustathios Rhomaios and, for the last centuries of Byzantium, the proceedings of the synodal court are also useful as source material.

No change in philosophy or the basic regulations can be observed in the later legislative instruments or the compendia, but the collections of court practices, in particular, are of interest because the immediacy with which they are worded gives a vivid picture of the social and economic conditions of the period, as well as of the need for law to adjust to those developments.

### *Loans*

The principal financing institution involving credit was the loan. Loans served a variety of purposes, just as they do today: personal needs that have nothing to do with the debtor’s entrepreneurial activities, as well as the borrower’s business requirements. In the Byzantine period, the provisions of law drew no distinction between these two categories of loan, and the same regulations were applied to both. The sources only very occasionally refer to entrepreneurial loans—just as, indeed, there are very few

<sup>2</sup> Αἱ γὰρ βουλῆσεις τῶν νομίμως συναλλασσόντων παντὶ τρόπῳ δεκταὶ εἰσι.” *Bas.* 12.1.88.

<sup>3</sup> See A. E. Laiou, “Economic and Noneconomic Exchange,” *EHB*.

mentions of entrepreneurs in the legal sources. However, such references as there are, when taken in conjunction with the provisions regulating more specific matters, allow one to hypothesize that the loan was an institution in business activity, and especially in trade, though certainly not the only one. Where the development of entrepreneurial activity was concerned, a loan was thus the simplest manner of shifting money on a temporary basis from those who had saved or accumulated it to those who were developing entrepreneurial activities.

Because of its importance for transactions, for the circulation of money (given that loans principally involve money), and thus for the economy, the loan fell within the scope of the law, which regulated it. Loans were one of the fundamental legal institutions of Roman and later of Byzantine law, the philosophy and basic principles of which remain unchanged to the present day.

The *Basilics* is the basic source for research into the institution of the loan. Book 23 is central, but provisions applicable to loans are also to be found in books 12, 9, and 24. The *Procheiros Nomos* includes provisions regulating loans (title 11), as do the later legal compilations based on the *Basilics*: the *Synopsis Maior* (section 10, title 6) and the *Hexabiblos* of Harmenopoulos (book 3, title 5, and book 2, title 2).

Judicial practices connected with loans are dealt with in title 26 of the *Peira* of Eustathios Rhomaios, and information about the same subject in the last centuries of Byzantium is also to be found in the compendium of decisions of the synodal court.<sup>4</sup>

The legislator's central concerns in regulating the institution of the loan were, on the one hand, to protect the creditor so as not to discourage the lending of money and thus the channeling of money into the process of production and commerce (protection, however, that could not and did not extend to removal of the risk of his losing his money, which was inherent in the contract of loan) and, on the other, to protect the debtor against excessive commitment to the creditor. Unless checks and balances were imposed, this might lead to the loss even of the debtor's personal freedom or that of his family, which was prohibited ("if the creditor takes as security the children of the debtors and employs them in his service, he shall lose his rights to the loan and pay as much again to the child who has been held or to his parents,"<sup>5</sup> and "destitute debtors shall not be compelled to serve those to whom they owe money").<sup>6</sup> The purpose of this prohibition was that debtors should not be discouraged from concluding the loans they required to obtain the funds for their industrial activities.

Loans were concluded by contract, that is, by agreement between the two parties

<sup>4</sup> *Synopsis Maior*, Zepos, *Jus*, vol. 5; *Peira*, Zepos, *Jus*, vol. 4. For decisions of the synodal court: MM, vols. 1 and 2.

<sup>5</sup> Ὁ δανειστής ἐὰν ἐνέχυρα λάβῃ καὶ ἐπάρῃ τὰ τέκνα τῶν ἰδίων χρεωστῶν ἢ εἰς δουλικὴν ὑπηρεσίαν αὐτὰ μισθώσῃται, ἐκπιπέτω τοῦ χρέους καὶ ἄλλην τισαύτην ποσότητα τῷ κρατηθέντι ἢ καὶ τοῖς τοῦτου γονεῦσι καταβαλλέτω: *Ecloga* 10.2 (L. Burgmann, ed., *Ecloga: Das Gesetzbuch Leons III. und Konstantios V* (Frankfurt am Main, 1983), *Hexabiblos* 3.5.66 (K. Pitsakis, Κωνσταντίνου Ἀρμενοπούλου Πρόχειρον Νόμων ἢ Ἐξάβιβλος (Athens, 1971).

<sup>6</sup> Οὐκ ἀναγκάζονται οἱ ἄποροι χρεῶσαι δουλεύειν τοῖς ἰδίους δανεισταῖς: *Bas.* 24.3.16; *Hexabiblos* 3.5.65; *Syn. Maior* X.2.29.

that by the loan the ownership (“a loan transfers the ownership”)<sup>7</sup> of money or other replaceable things was delivered from one of the contracting parties to the other (“a loan consists of things that can be measured, numbered, and counted,”<sup>8</sup> and “pieces of money or any other thing to be found on the earth or in the sea may be lent”).<sup>9</sup> The debtor was obliged to return to the creditor things of the same quantity and quality (“A person does not lend with the intention of receiving exactly the same thing,” and “that which has been given must be replaced by things of the same kind and quality”).<sup>10</sup>

To use the legal terminology still applied today, the loan contract is concluded *in re* (i.e., with the delivery of ownership of the thing to the debtor) and is formless (i.e., it is not subject to any particular formalities and need not be put in writing). Many loans were contracted entirely circumstantially, for example, during the course of fairs, so as to allow the merchant to buy the goods he needed, with repayment taking place at the end of the fair. Such is the case dealt with by Eustathios Rhomaïos, who gives a graphic description of the merchant’s attempts to obtain, by borrowing, the money he needed to trade at the fair.<sup>11</sup> However, if the contracting parties did draw up a written contract, then we need to distinguish between instances in which an undertaking was made to contract a loan in the future and those in which the instrument was drawn up to facilitate the proof of the loan. Here it should be noted that when the loan was for a large sum (in excess of 50 litrai of gold), any contract drawn up had to be signed in the presence of three witnesses; otherwise, the contract did not constitute proof and could not be invoked by the creditor.<sup>12</sup>

### *Operation of the Loan*

The operation of the loan consisted of its use by the debtor for the entire period agreed upon and its repayment to the creditor.<sup>13</sup> If no date of repayment was agreed on, the creditor was entitled to demand repayment at any time.<sup>14</sup> If the debtor failed to repay the loan, the creditor had a clear case for bringing an action of *condictio certae creditae pecuniae* (which in the Greek-language legal texts of the period was rendered in Hellenized form as *kerton kondiktion* rather than being translated), demanding that the loan be repaid.

When the hearing began, the burden of proof was on the creditor to show “the counting out of the money,” that is, that possession of the money had been made over to the debtor and the loan concluded, while the debtor, in his defense, might contend

<sup>7</sup> Τὸ δάνειον μετατίθησι τὴν δεσποτείαν: *Bas.* 23.1.2.

<sup>8</sup> Τὸ δάνειον ἐν τοῖς σταθμομένοις, ἀριθμομένοις, μετρουμένοις συνίσταται: *Bas.* 23.1.2 and 1.

<sup>9</sup> Ἐάν τις λογάριον ἢ ἀργύριον ἢ καὶ ἕτερον τι εἶδος τὸ οἰονοῦν ἐν τῇ γῆ ἢ καὶ ἐν τῇ θαλάσσει, δανείσῃται: *Ecloga* 10.1.1.

<sup>10</sup> Δανείζει τις οὐκ ἐπὶ τῷ λαβεῖν τὸ αὐτό: *Bas.* 23.1.2, and τὸ δοθὲν ἀποδοθῆναι τοῦ αὐτοῦ γένους καὶ τῆς αὐτῆς καλλονῆς, *Bas.* 23.1.3.

<sup>11</sup> *Peira* 26.1.

<sup>12</sup> *Bas.* 23.1.63 (Ὁ χειρογραφῆσας ὡς ἐπὶ μέλλοντι δανείω), and 23.1.61.

<sup>13</sup> *Bas.* 23.1.2.

<sup>14</sup> *Bas.* 26.5.94.

that the money had never been paid (“counted out”) to him, that a smaller sum had been paid and that this was the sum due (“Not only he who has received none of the things attested to shall be able to plead failure to make the loan, but also he who has agreed to more than he received,” and “the person receiving less and having agreed to more”), or that he had already repaid the loan.<sup>15</sup>

If a debtor made such objections, he could prove them by witnesses even if a written instrument had been drawn up. The written instrument became full proof after two years had elapsed from the conclusion of the loan, and in this case the debtor was no longer entitled to lodge any objections.<sup>16</sup> However, certain exceptions were established so as to prevent the implementation of this provision from causing injustice. If the debtor had repaid the loan but the creditor, invoking an instrument drawn up more than two years previously, demanded that it be repaid again, it was possible (so as to protect debtors from those who lent money in bad faith) for the debtor to lodge an objection and prove that he had repaid the loan (although five witnesses were required for this) even though the two years had elapsed and the instrument was now full proof.<sup>17</sup> The legislation itself explains why this regulation was necessary: “there is a great difference between the person who says ‘I prove that I paid’ and the person who says ‘prove that you counted it out.’”<sup>18</sup> If the debtor contended falsely that the instrument was not genuine and it later proved to be authentic, then this borrower in bad faith would be sentenced to repay a sum double that of the loan.<sup>19</sup> In both cases, the legislator’s clear intention is to protect the contracting parties against bad faith.

However, misbehavior in a debtor was not simply a matter of failure to repay a loan. The debtor could also be in arrears, if he failed to repay the loan on the date agreed. In cases of arrears, the debtor would be obliged to pay arrears interest, that is, an increment in addition to the rate agreed if the loan bore interest. This interest would vary according to the practice of the specific location, but it could not amount to a sum greater than double the loan (“when the principal of the loan has been doubled by interest, the interest shall cease to be charged”).<sup>20</sup>

### *Satisfaction of the Creditor and Performance by the Debtor*

Satisfaction of the creditor occurred, first and foremost, with the repayment to him, in accordance with his terms, of the sum of the loan by the debtor. If the debtor was

<sup>15</sup> *Bas.* 23.1.62 (Ἀρίθμησιν τῶν χρημάτων); *Bas.* 23.1.64 and *Hexabiblos* 2.2.2 (Οὐ μόνον ὁ μηδὲν λαβὼν ἐξ ὧν ἐχειρογράφησεν ἀντιτήθησιν ἀναγκυρίαν ἀλλὰ καὶ ὁ πλείονα ὧν ἔλαβε χειρογραφήσας); *Bas.* 23.1.71 (Ὁ ἐλάττονα λαβὼν καὶ εἰς πλείονα χειρογραφήσας).

<sup>16</sup> *Bas.* 23.1.72 and *Hexabiblos* 2.2.4.

<sup>17</sup> *Hexabiblos* 3.5.82 and *Peira* 26.6.

<sup>18</sup> Πολλὴ γὰρ ἡ διαφορὰ τοῦ λέγοντος ἀποδείκνυμι ὅτι κατέβαλον καὶ τοῦ λέγοντας ἀπόδειξον ὅτι ἠρίθμησας; *Bas.* 23.1.72.

<sup>19</sup> *Bas.* 23.1.62.

<sup>20</sup> Τῶν τόκων τὸ κεφάλαιον διπλασιαζόντων ὁ τόκος παύεται; *Hexabiblos* 3.7.5, *Bas.* 23.1.42, 23.3.9, and 23.3.78. For interest in general, see D. Gofas, “The Byzantine Law of Interest,” and A. E. Laiou, “Economic Thought and Ideology,” *EHB*.

recalcitrant and failed to repay the loan, then the creditor, having had recourse to the courts and having had the sum awarded to him, could, in execution of the award, distrain upon the assets of the debtor to obtain satisfaction. He would distrain first upon the movable assets of the debtor and, if these were insufficient, upon his immovable property. If the creditor succeeded in obtaining the repayment of his loan, he took precedence even over those who had prior claims, since “the law is for the vigilant, not for those who are deeply asleep,” and “better is he who comes first.”<sup>21</sup>

Some of the more particular provisions regulating instances concerning the more highly organized and systematic financing of entrepreneurial activities are of interest for this investigation of the financing of trade. Such provisions include those that regulate the privileges of creditors (when the loans concern commercial transactions) or creditors who present themselves as financiers by profession.

A provision in the *Peira* (26.1), repeated in the *Hexabiblos* (3.5.37), concerns a loan granted to a person to enable him to trade at a fair (Ἐπὶ τῷ ἐξελθεῖν καὶ πραγματεύεσθαι εἰς τήνδε τὴν πανήγυριν). If this debtor dies and other creditors make their appearance, then the creditor who lent the late debtor money to trade would enjoy a lien on the things bought at the fair (εἰς τὸν ἀγορασθέντα ἀπὸ τῆς πανηγύρεως φόρτον) as having lent the money for that purpose (ὡς ἐπὶ τούτῳ δανείσας).

Another provision to be found in the *Peira* (19.6) concerns a preference on a loan granted, against security provided by the debtor, to a quarrying enterprise: “I lent money to a marble merchant (?) against a mortgage on the stone. . . . This same debtor having leased imperial warehouses and fallen into debt, I have a lien” (Ἐδάνεισα μαρμαρίῳ ἐπὶ ὑποθήκη τῶν λίθων . . . ὁ δὲ αὐτὸς χρεώστης μισθωσάμενος ὠρεῖα βασιλικὰ ἐχρεώστησεν, ἐγὼ προτιμῶμαι).

Evidence of the existence of persons who, by profession, financed entrepreneurial or commercial activities is to be found in the provision of Justinian’s Novel 136 (included in the *Basilics*)<sup>22</sup> under which only moneylenders (*argyropratai*) could validly grant guarantees as first debtors. This meant that, by way of exception, when the loan granted had been guaranteed by a moneylender, the creditor was not obliged to address himself first to the debtor, but might address himself directly to the moneylender and demand satisfaction from him. The exception introduced by this provision deprived moneylenders of the protection generally afforded to guarantors, preventing them from rebuffing the creditor and directing him to address himself first to the debtor and only to approach them, as guarantors, if he failed to gain satisfaction. It can be deduced from this exception that moneylenders were individuals who engaged in transactions and their financing on a professional basis and would thus be aware of the risks involved in guarantees; since their purpose in undertaking such risks was to make a profit, they had no need of the protection of the law.

However, the most important provisions that lead us to the belief that throughout

<sup>21</sup> *Peira* 6.14; *Hexabiblos* 3.5.40: Οἱ γὰρ νόμοι τῶν ἀγρυπνούντων εἰσὶν, ἀλλ’ οὐχὶ τῶν βαρέως κοιμωμένων; *Bas.* 9.3.19, *Syn. Maior* X.2.3: Καλλίων ἔσται ὁ προλαβών.

<sup>22</sup> *Bas.* 23.4.1.

the Byzantine period there was systematic financing of persons engaged in commercial or entrepreneurial activities are those concerning *ekstasis hyparchonton* and the provisions of the *Peira* that deal with fraudulent bankruptcy. Under these provisions, if a debtor's assets were insufficient to satisfy all his creditors, then he could concede all his assets to them, making a composition or *cessio bonorum* under which they would receive satisfaction from the sale (*diaprosis*) of the assets. In this way, the debtor would be discharged even if his assets had not been sufficient to satisfy all the creditors, who would receive satisfaction proportionally. After the sale of his assets and the partial satisfaction of the creditors, the debtor was free to acquire limited assets once more ("to obtain moderate property").<sup>23</sup> However, "If the debtor has not been subject to *ekstasis*, he shall be liable and answerable to claims until he has repaid everything." If once more he acquired large assets, "in his renewed prosperity, he shall be liable to his creditors once more."<sup>24</sup> This is an institution similar to modern-day bankruptcy under commercial law; under Byzantine law, however, there were no provisions specially applicable to merchants, commercial law did not exist, and the provisions were applied indiscriminately. However, by their very nature these provisions imply the existence of a number of creditors, successive sums in loans, and activity even after the composition which could produce new assets, and thus these are entrepreneurial loans, not loans to meet urgent but temporary personal needs on the part of the borrower.

### *Maritime Loans*

The financing of maritime trade was based on the institution of the maritime or bottomry loan, which predominated throughout the Byzantine period. To begin with, as a *foenus nauticum* or *pecunia traiectitia*, it was regulated by the legislation of Justinian; later, it was governed by the *Rhodian Sea Law*, in which it is referred to as "money lent on the sea."<sup>25</sup>

These regulations for maritime loans were continued almost unaltered by the *Basilics*, the *Synopsis Maior*, and Harmenopoulos, who refers expressly to the *Rhodian Sea Law*: "all maritime affairs and matters of the sea shall be subject to the law of the Rhodians."<sup>26</sup> However, the provisions do not amount to an overall arrangement, and of necessity the general provisions regulating loans would have had to be implemented as a complement.

The principal characteristic of the maritime loan was that the lender undertook the maritime risk; in other words, if the voyage for which the loan was concluded did not turn out well and the vessel with the merchandise failed to return, he was not entitled to address himself to the debtor and demand the discharge of his obligations from the

<sup>23</sup> *Bas.* 9.5.6: Μέτρια κτησάμενος; *Syn. Maior* X.2.5.

<sup>24</sup> Ὁ μὴ ὑποστᾶς ἐκστάσιον χρεώστης, ἕως τὸ πᾶν ἀποδῶ, ἐνέχεται καὶ ἀπαιτεῖται; "Καὶ πάλιν εὐπορὸν ἐνέχεται τοῖς δανεισταῖς": *Peira* 26.13.

<sup>25</sup> Ἐπιπόντια χρήματα ἐκδανεισθέντα: *Rhodian Sea Law* 3.1.

<sup>26</sup> Τὰ ναυτικὰ πάντα καὶ ὅσα κατὰ θάλασσαν κρίνεται Ροδίῳ τέμνεται νόμῳ: *Hexabiblos* 2.11.1; cf. *Bas.* 5.3, appendix, and *Syn. Maior* N.1.1–34.

rest of his assets. “Maritime money is that which goes beyond the sea, not that spent on the spot and the things bought with it, if the sailing is at the risk of the creditor.”<sup>27</sup> Unlike ordinary loans, the money lent in these cases was not “safely on land” but, under the *Rhodian Sea Law*, “it should not be treated as a land loan,” explaining why the rate of interest on maritime loans was always higher than that on ordinary loans.<sup>28</sup>

### *Partnerships*

The financing of trade and, in particular, of entrepreneurial activities was achieved with the accumulation of capital in the form of partnerships. Partnerships were regulated and, like loans, constituted an institution in Roman and then Byzantine law. However, although like the loan it was an institution under civil law, the partnership was throughout the Byzantine period the predominant and most appropriate means for financing and developing commercial and entrepreneurial activities in instances where it was necessary for two or more persons to join forces in collaboration and for capital to be assembled. It was put into effect with contributions of money and also of personal labor. The partnership was not a relationship among persons with opposing interests, but a relationship of collaboration intended to optimize the achievement of a common purpose. The provisions governing and regulating partnerships are to be found in the sources along with the provisions that govern ownership. Indeed, the term *koinonia* is used indiscriminately in the sources to define co-ownership and also partnership.

The partnership or company of Byzantine law differed little from the partnership of modern times. The philosophy remains the same: the partnership was a contractual bond of a personal nature par excellence, one in which there were coinciding rather than opposing interests in the achievement of a shared entrepreneurial objective and, of course, the purpose was to benefit the members, usually in the form of profit. The legislator’s main concerns were, on the one hand, to regulate the relationships (rights and obligations) of the partners so as to ensure that the partnership functioned smoothly and without impediment in achieving its economic objectives and, on the other, to determine the responsibilities of the partners or company members toward others in order to protect those who transacted with it.

### *Formation*

The partnership (*koinonia* in the Byzantine texts) was set up by a formless contract, that is, with the mere consent of the contracting parties and with their will to form a partnership (*affectio societatis*). Indeed, it was this will that distinguished the partnership from mere common ownership (*koinopraxia* in the Byzantine texts). It was laid down by the legislative instruments that “A partnership is set up in deed and in word and by

<sup>27</sup> Διαπόντια χρήματα εἰσὶ τὰ πέραν τῆς θαλάσσης ἀπιόντα, οὐ μὴν τὰ ἐπὶ τόπου δαπανώμενα καὶ τὰ ἐξ αὐτῶν ἀγοραζόμενα, ἐάν κινδύνῳ τοῦ δανειστοῦ πλέωσιν: *Syn. Maior* X.2.73.

<sup>28</sup> Ἐγγαία καὶ ἀκίνδυνα; Ἐγγαία μὴ χρηέσθωσαν; *Rhodian Sea Law* 2.16; cf. Gofas, “The Byzantine Law of Interest,” *EHB*.

notification,”<sup>29</sup> and that “A partnership may be set up in writing or otherwise.”<sup>30</sup> The need for the existence of consent and a common will to form the partnership emerges from the following express provision: “When a *koinonia* is set up by consent, then an action concerning a partnership can be brought, whereas when (an association) is formed without consent it is a *koinopraxia*”).<sup>31</sup>

Throughout the period in which Byzantine law was in force, and, indeed, for much longer, the partnership was a form of contract that generated rights and obligations on the part of the contracting parties (the partners) toward third parties but did not itself acquire a legal personality. In other words, the partnership never became a vehicle for rights and obligations, and as a result the personal liability of the partners toward third parties on behalf of the partnership was unrestricted. This should not strike us as in any way strange, since it was not until the nineteenth century, under the pressure of the vast expansion in trade at that time and in order to meet the new commercial needs, that companies acquired distinct legal personalities.

### *Duration of the Partnership*

The duration of the partnership differed according to circumstances, in accordance with the will of the partners, with the purpose of the partnership, with the activities in which it was to engage, and with certain other conditions. It might be agreed that the duration of the partnership was to be “indefinite, that is, as long as they [the partners] shall live,” of a specific period, as of a certain time, or when certain conditions were fulfilled.<sup>32</sup>

Since, as we have seen, the formation of the partnership was formless, it might be set up purely circumstantially in the market or at a fair by merchants trading there so as to allow them to assemble the money they needed for their commercial activities. Naturally enough, such partnerships would have a very limited duration, usually no longer than that of the fair or market.

However, the duration of the partnership did not depend only on the agreement reached by the partners. It could also be terminated when other events supervened, regardless of the will of the partners. “The partnership shall be dissolved on the demise of the persons or the thing”; the text itself clarifies demise (*phthora*) as the death or legal incapacitation of the partner.<sup>33</sup> Later legislative instruments and legal compilations give the same reasons for the dissolution of the partnership (“The partnership shall be dissolved on the demise of the persons or the thing”) but also “it shall be dis-

<sup>29</sup> Συνίσταται κοινωνία πράγματι καὶ ῥήματι καὶ δι’ ἀγγελίου: *Bas.* 12.1.4, *Procheiros Nomos* 19.5, *Syn. Maior* K.21.4, *Hexabiblos* 3.10.8.

<sup>30</sup> Συνίσταται κοινωνία ἐγγράφως ἢ ἀγράφως: *Ecloga* 10.4.

<sup>31</sup> Ὅτε μὲν ἀπὸ συναινέσεως γένηται κοινωνία, χώρα τῆ περὶ κοινωνίας ἀγωγῆ, ὅτε δὲ χωρὶς συναινέσεως, κοινοπραξία ἐστίν: *Bas.* 12.1.32, *Syn. Maior* K.21.11, *Hexabiblos* 3.10.3.

<sup>32</sup> Ἡ διηνεκῶς, τουτέστιν ἕως οὗ ζῶσιν ἢ πρὸς καιρὸν ἢ ἀπὸ καιροῦ ἢ ὑπὸ αἵρεσιν: *Bas.* 12.1.1, *Procheiros Nomos* 19.1, *Syn. Maior* K.21.1, *Hexabiblos* 3.10.1.

<sup>33</sup> Λύεται ἡ κοινωνία φθειρομένων τῶν προσώπων ἢ τοῦ πράγματος: *Bas.* 12.1.4 and 61.

solved by cancellation, death, alteration of circumstances, and destitution.”<sup>34</sup> Throughout the duration of Byzantine law, the principal characteristic of the partnership continued to be its personal nature. As a result, it was dissolved on the death of one of the partners, upon cancellation by one of the partners, or if there was a change in his personal circumstances.

Under the provisions cited above, the partnership could also be dissolved as a result of losses (“destitution,” “on the demise of the thing”), corresponding in modern parlance to the disappearance of its capital after successive losses.

Precisely because the partnership was a personal institution, it would be dissolved when one of the partners issued a cancellation (*apagoreusis* in the relevant texts) of the contract by which it had been set up. In this event, the partnership was dissolved even if the cancellation was not “timely,” although in such circumstances the partner who made the cancellation would be obliged to indemnify the others for the losses they suffered as a result of his untimely cancellation.<sup>35</sup>

### *Purpose of the Partnership*

Naturally enough, the purpose of the partnership had to be both permissible and legal. However, over and above this general requirement, which did not apply only to the partnership, the purpose of the company, as can be seen in all the relevant provisions, was the benefit and profit of the partners, even if this was not expressly stated in the contract. “Those who merely form a partnership do so in the expectation of gain.”<sup>36</sup> Furthermore, “even if a partnership is merely formed and it is not stipulated to what end, the purpose of its formation is assumed to be the making of gains from sales and purchases and rents and contracts.”<sup>37</sup> When the partners made an agreement in each separate case, the partnership could have as its purpose to trade “both in kind and in money” or to carry out a single transaction and make a profit from that.<sup>38</sup> In the latter case, we have a kind of circumstantial partnership, a *societas unius rei*, and not the more long-standing and stable bond that was more common.

### *Contributions of the Partners and Sharing Profits and Losses*

In order to achieve the purposes of the partnership, each partner was obliged to contribute to it, but the contribution could differ both from one partner to another and in terms of the type of partnership. The most common cases were those in which the

<sup>34</sup> . . . διαλύεται ἀπαγορεύσει, θανάτω, καταστάσεως ἐναλλαγῆ καὶ ἀπορία: *Bas.* 12.1.4, *Procheiros Nomos* 19.5, *Syn. Maior* K.21.4, *Hexabiblos* 3.11.1.

<sup>35</sup> *Bas.* 12.1.4, *Syn. Maior* K.21.7, *Procheiros Nomos* 19.9, *Hexabiblos* 3.11.

<sup>36</sup> Οἱ ἀπλῶς κοινωνήσαντες, ἐπὶ τῷ πόρῳ δοκοῦσι κοινωνεῖν: *Bas.* 12.1.7.

<sup>37</sup> Ἐάν ἀπλῶς γένηται κοινωνία καὶ μὴ λεχθῆ ἐπὶ τίνι, δοκεῖ συνίστασθαι ἐπὶ τῷ περιγενομένῳ πόρῳ καὶ κέρδει ἀπὸ πράσεως καὶ ἀγορασίας, μισθώσεως καὶ ἐκλήψεως: *Bas.* 12.1.7, *Procheiros Nomos* 19.7, *Syn. Maior* K.21.6, *Hexabiblos* 3.10.9.

<sup>38</sup> Καὶ ἐφ’ ἐνὶ πράγματι: *Bas.* 12.1.5, *Procheiros Nomos* 19.6, *Syn. Maior* K.21.5, *Hexabiblos* 3.10.8.

contributions were equal—“unless otherwise stated, the partners are equal”<sup>39</sup>—but there were also other possibilities: “It may be agreed that one partner shall hold one share and the other two or three.”<sup>40</sup> The agreement might be for the deficit to be made up by personal labor, or indeed for one party’s share to consist only of personal labor: “if, however, he adds something to the partnership, either in terms of money or service or anything else,”<sup>41</sup> “and if they [the partners] have unequal shares of the property,” and “the poorest of the partners shall make up in labor what he lacks in money.”<sup>42</sup> “It shall be possible to form a partnership in which one person contributes money while the other contributes labor.”<sup>43</sup> “Some of them [contribute] their capital, others their labor.”<sup>44</sup> Provision was also made for the contribution of all the assets of the partners, in which case we are talking about a “partnership in all goods” involving an undertaking by the partners to contribute any donations or bequests they might acquire in the future: “They must make a special declaration that they are setting up a *totorum bonorum* partnership,”<sup>45</sup> and “If a partnership is formed *totorum bonorum*.”<sup>46</sup>

Each partner had the right to a share in the profits produced, after the deduction from the capital formed from the partners’ contributions of the expenses incurred for the purposes of the partnership, and an obligation to participate in the losses when the company’s liabilities outweighed its capital. As a rule, shares were proportional to contributions, though it was permissible for different agreements to be made. However, it was not possible for one of the partners to be completely excluded from the profits: “It shall not be possible to make an agreement by which one party sustains only the losses while the other appropriates the profit.” Such a partnership would be declared invalid by the law, would be regarded as the result of fraud, and was called a Leonine partnership. However, it was not contrary to the purposes of the partnership for a partner to be relieved of a share in the losses if he was exposed to risks at sea or elsewhere or if he contributed personal labor of a value equal to the loss: “A person shall not suffer loss, but he shall share in the profits if his service is equal to the loss when he alone sails or takes risks or travels in foreign parts.”<sup>47</sup> The expenses of the partnership were those that took place for its purposes: “A person traveling abroad for

<sup>39</sup> Ἐάν μὴ λεχθῆ, τὰ μέρη ἴσα εἰσίν: *Bas.* 12.1.29, *Syn. Maior* K.21.10.

<sup>40</sup> Δυνατὸν δὲ συμφωνεῖν, τὸν μὲν ἔχειν ἓν μέρος, τὸν δὲ δύο ἢ τρία: *Bas.* 12.1.29, *Syn. Maior* K.21.10.

<sup>41</sup> . . . ἐὰν μέντοι τι πλέον εἰσάγη τῇ κοινωνίᾳ, ἢ ἐν χρήμασι ἢ ὑπουργίᾳ ἢ ἑτέρῳ τινί: *Bas.* 12.1.29, *Syn. Maior* K.21.10.

<sup>42</sup> Ὁ γὰρ πενέστατος ὡς ἐπίπαν τὸ λείπον ἐν χρήμασι διὰ τῆς σπουδῆς ἀντεισάγει: *Hexabiblos* 3.10.8, *Syn. Maior* K.21.5; cf. *Bas.* 12.1.5.

<sup>43</sup> Δύναται συστήναι κοινωνία τοῦ μὲν ἐνὸς χρήματα συνεισφέροντος, τοῦ δὲ ἑτέρου σπουδῆν: *Bas.* 12.1.83.

<sup>44</sup> . . . ἢ τινῶν μὲν ἐνθήκην, ἑτέρου δὲ ἢ ἑτέρων τοὺς οἰκείους μόχθους: *Ecloga* 10.4.

<sup>45</sup> Δεῖ γὰρ αὐτοὺς εἰδικῶς ἐκφωνεῖν ὅτι τοτόρουμ βονόρουμ συνιστῶσι κοινωνίαν: *Bas.* 12.1.13.

<sup>46</sup> *Bas.* 12.1.3, *Procheiros Nomos* 19.3, *Syn. Maior* K.21.3, *Hexabiblos* 3.10.6.

<sup>47</sup> Οὐ δυνατὸν συμφωνεῖν, ὥστε τὸν μὲν μόνον τὴν ζημίαν, τὸν δὲ τὸ κέρδος οἰκειοῦσθαι; and Καὶ ἵνα τὶς μὴ ζημιῶται μὲν, τοῦ δὲ κέρδους ἐστὶ κοινωνός, ἐὰν τοσαύτη ἐστὶν ἡ ὑπουργία, ὅσον ἡ ζημία, ἐὰν μόνος πλῆ ἢ κινδυνεύῃ ἢ ξενιτεύῃ: *Bas.* 12.1.29, *Syn. Maior* K.21.10.

joint commercial purposes may charge to the partnership only such expenses as are incurred for its purposes.”<sup>48</sup> Similarly, debts contracted for the purposes of the partnership “are to be paid jointly.”<sup>49</sup>

### *Operation of the Partnership*

Given that the principal characteristics of the partnership were its personal nature, the relationship of trust among the members, and (secondarily) the assembly of capital, its smooth operation was safeguarded through a system of provisions that regulated the degree of liability of the partners, in each case, toward each other and toward third parties transacting, via them, with the partnership, since throughout the period of Byzantine law the partnership did not acquire a legal personality of its own and did not become a vehicle for obligations and rights. In view of this, and also of the fact that neither Roman nor Byzantine law recognized the institution of agency, the partnership’s transactions were conducted by the partners, who entered into personal contracts and undertook personal and unrestricted liability toward the third parties with whom they transacted. The extent of their liability would depend on the type of contract concluded on each occasion.

However, a partner entering into transactions with third parties was obliged to inform the other partners of the gains he had made from transactions conducted in his own name and on behalf of the partnership. He had a similar right to claim from the other partners a proportional share of the gains they had made from transactions both in their own names and on behalf of the partnership. This is to be deduced from the wording of the purpose of the partnership, “the income and profit generated,” and, indirectly, from the provision connected with the cancellation of the partnership: “whatever I acquire until the partner is acquainted (with my cancellation) is common property.”<sup>50</sup> Each partner was entitled to claim what he had spent on behalf of the partnership, once more in proportion to his share: “The debts contracted in the duration of the partnership shall be paid jointly.”<sup>51</sup>

The partners were liable to one another for simple negligence and, more specifically, were to be as assiduous in pursuing the company’s affairs as they were in looking after their own assets: “The partner may be held liable on account of negligence and idleness but he shall not be bound to take greater care than he would in his own affairs.”<sup>52</sup> Indeed, the partner was still held liable “even if his actions were beneficial in many

<sup>48</sup> Ὁ ἀποδημήσας διὰ κοινὴν ἐμπορίαν μόνως τὰς εἰς αὐτὴν γινομένης δαπάνας λογίζεται τῇ κοινότητι: *Bas.* 12.1.50, *Procheiros Nomos* 19.19, *Hexabiblos* 3.10.28.

<sup>49</sup> . . . ἐκ τοῦ κοινού δίδεται: *Bas.* 12.1.27, *Procheiros Nomos* 19.11, *Hexabiblos* 3.10.20.

<sup>50</sup> Ἐπὶ τῷ περιγενομένῳ πόρῳ καὶ κέρδει; and ὅσα μὲν κτήσομαι ἕως οὗ μάθη, κοινά: *Procheiros Nomos* 19.7 and 9, *Syn. Maior* K.21.6 and 7, *Hexabiblos* 3.10.9 and 8.

<sup>51</sup> Τὰ συστάντα χρέα τῷ καιρῷ τῆς κοινωνίας ἐκ τοῦ κοινού δίδεται: *Bas.* 12.1.27, *Hexabiblos* 3.10.20, *Procheiros Nomos* 19.11.

<sup>52</sup> Ὁ κοινωνὸς ἀπὸ ἀμελείας καὶ ῥαθυμίας ἐνέχεται, οὐ χρεωστῆ δὲ μεγάλῃν ἀσφάλειαν, ἀλλ’ οἶαν ἐν τοῖς ἰδίοις πράγμασιν: *Bas.* 12.1.70, *Syn. Maior* K.21.22, *Hexabiblos* 3.10.11.

other ways.”<sup>53</sup> The partners were not liable for misfortunes, that is, for losses caused by events “occurring *absit omen*,” as the *Basilics* defines the concept,<sup>54</sup> which would be shared out among the partners in accordance with their ratio of participation in the losses: “The partner is not held liable for matters of a fortuitous event.”<sup>55</sup> Vivid descriptions are given in the relevant texts of indicative cases of losses caused by misfortunes, with a distinction being drawn between theft and brigandage: the latter was regarded as a misfortune and the loss was sustained by all the partners, while losses resulting from the former were sustained only by the partner who had failed to take the necessary precautions.<sup>56</sup>

During the last centuries of Byzantium, the term *koinonia* was no longer used, being replaced by the term *syntrophia*, applied both to ordinary commercial companies and to shipping associations. Among the most important sources for the activities of these partnerships is the collection of decisions of the synodal court of Constantinople. The decisions it handed down in various disputes among partners reveal a wide range of the entrepreneurial activities engaged in by *syntrophiai*, whose operations were still governed by the provisions concerning partnerships. As we have seen, these provisions were flexible, allowing entrepreneurs to unite their forces in the manner most appropriate to the achievement of the company’s objectives, contributing in kind, in cash, or in labor and receiving their profits (or sustaining losses) proportionally. This system encouraged entrepreneurial activities. *Syntrophiai* were set up to run shops of all kinds or to trade in other cities. Disputes connected with these *syntrophiai* were subject to the jurisdiction of the synodal court of Constantinople, whose decisions give us a vivid picture of the transactions and companies of the time, using graphic detail in the narrative of events to describe the dispute before the court.<sup>57</sup>

### *Maritime Partnerships*

Special mention should be made of the financing of maritime trade via the formation of partnerships whose sole purpose was entrepreneurial activity at sea. The beginnings of the maritime partnership are regarded as being the profit-sharing system (*kerdokoinonia*) referred to in the index to the *Rhodian Sea Law* or the system of debt-sharing (*chreokoinonia*) defined in the relevant provision of the same collection,<sup>58</sup> perhaps because this was the first time that the undertaking of the maritime risk by the partner contributing the capital was combined, in the same provision, with the corresponding

<sup>53</sup> . . . κἂν ἐν πολλοῖς ἑτέροις ὠφέλησεν: *Hexabiblos* 3.10.19 (= *Procheiros Nomos* 19.10).

<sup>54</sup> Παρ’ ἐλπίδα συμβαίνοντα: *Bas.* 12.1.50.

<sup>55</sup> Τὰ τυχηρὰ ὁ κοινωνὸς οὐκ ἐπιγινώσκει: *Bas.* 12.1.50, *Procheiros Nomos* 19.14, *Syn. Maior* K.21.13, *Hexabiblos* 3.10.23.

<sup>56</sup> *Bas.* 12.1.50, *Procheiros Nomos* 19.14 and 15, *Syn. Maior* K.21.13, *Hexabiblos* 3.10.23 and 24.

<sup>57</sup> *MM* 2: no. 536, pp. 326–28; no. 564, pp. 374–75; no. 631, pp. 473–74; no. 632, pp. 474–75. Cf. E. Paragianni, Ἡ νομολογία τῶν ἐκκλησιαστικῶν δικαστηρίων τῆς βυζαντινῆς καὶ μεταβυζαντινῆς περιόδου σέ θέματα περιουσιακοῦ δικαίου (Athens, 1992), 1:112ff.

<sup>58</sup> *Rhodian Sea Law* 2.17. On this text, see D. Letsios, Νόμος Ῥοδίων Ναυτικῶς: *Das Seegesetz der Rhodier* (Rhodes, 1996).

release from liability for losses of the partner who contributed his personal labor and carried out the voyage.

However, this arrangement was not alien to Justinianic law. In practical terms, the provisions regulating the partners' membership of the partnership, which permitted the contribution of labor, when taken in conjunction with those regulating the distribution of profits and losses, which permitted one partner to be released from liability for losses, enabled the partners—in accordance with the principle of free will and depending on conditions and on their entrepreneurial requirements—to set up a partnership with all the characteristics of a maritime partnership as defined by the relevant provision of the *Rhodian Sea Law*.

Under the provisions of the *Rhodian Sea Law* from which we draw such knowledge as we have of this form of company, the *chreokoinonia* was a form of partnership in which the contribution of one partner always took the form of the payment of money (“if one partner gives gold or silver for the needs of the company”) while that of the other consisted of labor. This payment was a contribution to the partnership, which, as can be seen from the text of the provision, had maritime trade as its purpose and consequently, in accordance with the same provision, “if there should be losses resulting from risks at sea, then the partners will share the losses in accordance with their agreement, in the same proportion as they would have shared the profits if the voyage had ended well.”<sup>59</sup>

Apart, of course, from the obvious legal differences between a contract to set up a partnership and a loan contract, the practical difference between the *chreokoinonia* and the maritime loan, which lies outside the scope of this discussion of the subject, was that the financier was a partner and, if the voyage turned out well, would collect profits in an agreed proportion of what had resulted rather than a predetermined rate of interest.

The entire legal tradition of Byzantium, down to Harmenopoulos, referred back to the *Rhodian Sea Law*, laying down that “judgment of all maritime affairs and matters of the sea shall be subject to the law of the Rhodians,” on condition, however, “that there is no other law opposed to the laws of the Rhodians.”<sup>60</sup>

Given the elementary regulation of the *chreokoinonia* by the *Rhodian Sea Law* and the statement of Harmenopoulos, it can be seen that the provisions of Byzantine law governing company affairs acted as a supplement to the original provisions on the *chreokoinonia*. Thanks to the principle of the consensual contract that Byzantine law admitted, they allowed the contracting parties to agree on any supplementary terms (on condition, of course, that these were permitted by legislation) they might deem advantageous for the optimal achievement of the objectives of the partnership, which, in trade, was always the greatest possible profit. Such terms would be selected in accordance with the economic conditions in force at any time and in the given circum-

<sup>59</sup> Ἐὰν δὲ . . . συμβῆ ἐκ τῶν κατὰ θάλασσαν κινδύνων ἀπώλειαν γενέσθαι, καθάπερ τοῦ κέρδους ἔδοξε καὶ τὰς ζημίας πρὸς τὰ μέρη κατὰ τὰς συνθήκας ἀναδέχεσθαι: *Rhodian Sea Law* 2.17.

<sup>60</sup> Ὅταν μὴ ἄλλος νόμος ἐναντιούμενος τοῖς τῶν Ῥοδίων νόμοις εὑρίσκηται: *Hexabiblos* 2.11.1.

stances, thus helping the *chreokoinonia* to develop into a useful vehicle for maritime activities.

Under these provisions, which were usually of a dispositive nature, and thanks to their flexibility, the partners could determine their contributions and the distribution of the profits so that a partner who was contributing labor need not have a share of the losses or might also contribute money, in which case he would increase the capital of the partnership and his share of the profits, though he would also have a share in the losses (only in proportion to the capital he had contributed).

This more highly evolved form of the maritime partnership was used as a vehicle for their maritime enterprises by the Byzantine merchants of the last centuries of the empire, and it was in connection with companies of this kind that the synodal court was called upon to hand down the decisions from which we draw information.<sup>61</sup> It was also the framework within which the associations formed by foreigners who had settled in Constantinople, most of them Genoese and Venetians, were set up and operated, together with the partnerships founded jointly by Byzantine and foreign partners, especially in Venetian-ruled areas. These associations were the *commenda* (unilateral or bilateral) and the *collegantia*, an examination of which is relevant in this discussion of the institutions by which maritime trade was financed since, in the Byzantine period, they were used to promote commercial activities related to the sea.<sup>62</sup>

The unilateral *commenda* was an association formed by agreement between two partners, of whom one (the *socius stans*) put up the capital and the other (the *socius tractator*) undertook to make the voyage and to trade using the capital. The duration of the partnership might be fixed at a specific period, or it might cover only a single voyage. After the agreed period had elapsed and the *socius tractator* had returned, the profits realized—if there were any—were divided according to the original agreement. If the voyage produced a loss, it would be borne by the *socius stans*. The unilateral *commenda* may have developed in the West as a substitute for the maritime loan in view of the ban on the charging of interest by the western church. The bilateral *commenda* and the Venetian *collegantia* differed from the unilateral *commenda* in that the *socius tractator*, too, could invest money in the partnership, thus acquiring a share of the profits (though also in the losses) proportional to the money he had put up.

The operation, organization, regulation, and potential under Italian law of these associations, which in the last centuries of Byzantium were also used by Byzantine entrepreneurs, did not differ from the corresponding parameters for maritime partnerships governed by Byzantine law. The similarities between these types of partnership (the *commenda* and the *collegantia*, on the one hand, and the maritime partnership under Byzantine law, on the other) can be explained by the fact that both stemmed

<sup>61</sup> MM 2: no. 656, p. 511; no. 676, p. 550–51; no. 680, p. 560, and cf. Papagianni, Νομολογία, 1:103–4.

<sup>62</sup> See also D. Gofas, “Εμπορικές επιχειρήσεις Ἑλλήνων τῆς Κρήτης γύρω στό 1300,” Ἐπιθεώρηση Ἐμπορικοῦ Δικαίου 41 (1990): 1–34; A. E. Laiou-Thomadakis, “The Byzantine Economy in the Mediterranean Trade System, Thirteenth–Fifteenth Centuries,” *DOP* 34/35 (1980–81): 177–222; N. Oikonomides, *Hommes d'affaires grecs et latins à Constantinople (XIIIe–XVe siècles)* (Montreal, 1979), *passim*.

from the same family of law: Roman law, which acknowledged the *societas* of capital and labor. However, there was another substantive factor in the similarity between them: it is only natural that the rules of law that regulate similar entrepreneurial activities in similar conditions, in the same period, in the same part of the world, should themselves be similar, resulting in similar legal forms to meet the needs of the period and the conditions.

The attribution to each company of a description as a *commenda*, a *collegantia*, or a Byzantine maritime partnership is in every case a matter of fact. What can be discerned in the various instances of such partnerships is the existence of capitalists who systematically invested in entrepreneurial activities, on land and at sea.