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The Unification of Law via the Institution of Jurisdiction in the 19th Century: Commercial Law before the High Court of Appeal of the Four Free Cities of Germany

1. Introduction

The history of private law in Germany in the first half of the 19th century is well known for exhibiting a fascinating scientific awakening. Although there was little legislation, especially not many codifications, the scholars of the historic school of law (*Historische Rechtsschule*) with their thinking back to the tradition of the records laid the foundations for the modern system and dogmatics of legal doctrine that remain until today. In a way not imaginable today, the scientific doctrine formed the contemporary private law. But this well-known role of the literature as one of the main law-producing elements hides too easily the view of a second very important contribution to the modernisation of law: the jurisdiction of the courts. The following comments will show that the jurisdiction of the courts also played a large role in unifying the law and thus in the creation of supra-regional law. Therefore, this essay will focus on the activities of the most well-known German court of the first half of the 19th century.

The *Oberappellationsgericht* (High Court of Appeal) of the four free cities that operated in Lübeck between 1820 and 1879 was the most esteemed court of its time. Founded because of German constitutional law in 1815¹, it was the third level of jurisdiction for mainly civil-law cases² from Hamburg, Frankfurt, Bremen, and Lübeck. But in 1869, 60% of the cases had to do with commercial law.³ The members of the court were often well-known German legal scholars; in particular, the court presidents Georg Arnold Heise, Carl Georg von Wächter, and Johann Friedrich Kierulff were prominent jurists.⁴ As judged by Bernhard Windscheid, the

¹ Art. 12 Abs. 3 Deutsche Bundesakte 1815: Text available in E. R. Huber (ed.). *Dokumente zur deutschen Verfassungsgeschichte*. Vol. 1: *Deutsche Verfassungsgeschichte 1803–1850*. Stuttgart, etc. 1978, p. 88.

² K. Polgar. *Das Oberappellationsgericht der vier freien Städte Deutschlands (1820–1879) und seine Richterpersönlichkeiten*. Frankfurt am Main 2007, pp. 97–134.

³ C. Bergfeld. *Handelsrechtliche Entscheidungen des Oberappellationsgerichts der vier freien Städte Deutschlands*. – K. O. Scherner (ed.). *Modernisierung des Handelsrechts im 19. Jahrhundert*. Heidelberg 1993, p. 71.

⁴ M. Braunewell. *Georg Arnold Heise. Biographie und Briefwechsel mit Savigny und anderen*. Frankfurt am Main 1999; B.-R. Kern (ed.). *Zwischen Romanistik und Germanistik. Carl Georg von Waechter (1797–1880)*. Berlin 2000; J. Eckert. *Johann Friedrich Martin Kierulff*

seat of the president of the court was as important as Savigny's professorship in Berlin.⁵ Rudolf von Jhering's nice *bon mot* of Germany's educated court confirms this positive picture.⁶ The heyday of the court lasted until 1870 but came to an end with the foundation of the *Bundesoberhandelsgericht* in Leipzig. After having lost Frankfurt from its district in 1866, the court slowly but surely lost its jurisdiction and with the implementation of the reformatory laws (*Reichsjustizgesetze*) in 1879 it was dissolved and incorporated into the still existing Hanseatic *Oberlandesgericht* in Hamburg.

Suits under commercial law are of special interest for modern scholars for many reasons. Commercial law as a whole is known to have been one of the factors in the legal modernisation of the 19th century.⁷ Here there were possibilities of making law and solving problems independent from the stiff framework of Roman law. Therefore, many legal scholars, the so-called Germanists, found interest in commercial law. One speciality of maritime commercial law, with which the court had to deal much of the time, was that there was always a relationship with foreign law. The point of origin and the destination of a ship were in two different states. Hence questions arose about the areal and personal ambit of territorial rules of law. This was also a possible catalyst for unification of law, meaning the development of supra-regional legal provisions of commercial law beyond the ambit of rules of special law.

2. Case studies to maritime commercial law trials

In the following discussion, the legal practice of the *Oberappellationsgericht* will be illustrated by examining two case studies more closely.

2.1. The argument about spoilt southern fruit for Tallinn

The first of these cases was decided on 22 December 1831. As was the situation so often, it was about the loss of a shipload of cargo through rough weather conditions in winter.⁸ In older times, it was generally not permitted to pass through the Baltic Sea between 11 November and 22 February.⁹ Passage by sea in the 19th century in December and January was no longer problematic legally, but it was still dangerous. In December 1828, skipper Peter Larsen of Lübeck signed a contract with Dietrich Gottlieb Witte to deliver some fruit from Lübeck to Tallinn.¹⁰ The ship departed on New Year's Eve from Travemünde for Estonia but returned on 15 January 1829 because the bad weather rendered it impossible to open the portholes. The crew feared that the fruit could go bad because of smoke and dust, and so they came back. The skipper asked his partner in the contract what he should do to keep the fruit fresh, but the latter just answered that he was only the forwarding agent and the bills of lading had already been transferred to Tallinn, so the skipper would have to decide what was best for keeping the fruit fresh.¹¹ When the skies grew lighter, the skipper opened the portholes and saw that the load had become wet and also that some boxes were so hot that one could not touch them with the bare hands. The steersman and the sailors made a formal statement about this, and the skipper demanded damages from his contract partner, Witte, to pay for his efforts to preserve the fruit.

In a seemingly harsh decision, the *Oberappellationsgericht* dismissed the claim completely but did refer the case back to the lower court to clarify further questions.¹² In its reasons for the judgement, the court, as in other cases, managed to direct all disputes back to questions under the general law of obligations. Thus the solution in this special case gained judicial transparency and generalisability at the same time. As a possible basis for claim, or 'action' in the terminology of Roman law, the court considered agency of necessity (*nego-*

(1806–1894). Vom Universitätsprofessor zum Präsidenten des Oberappellationsgerichts zu Lübeck. – J. Eckert, P. Letto-Vanamo, K. Å. Modéer (eds.). Juristen im Ostseeraum. Dritter Rechtshistorikertag im Ostseeraum 20.–22. Mai 2004. Frankfurt am Main 2007, pp. 31–43; of the 28 judges in total, 13 had been professors before their appointment, thereto K. Polgar (Note 2) p. 159.

⁵ B. Windscheid. Carl Georg von Waechter. Leipzig 1880, pp. 14–15; the citation can be found in B. Kusserow. Das gemeinschaftliche Oberappellationsgericht der vier freien Städte Deutschlands zu Lübeck und seine Rechtsprechung in Handelssachen. Diss. jur. Kiel, Düsseldorf 1964, p. 91.

⁶ R. von Jhering. Agathon Wunderlich. Ein Nachruf. – [Jherings] Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts 1879 (17), pp. 156.

⁷ K. O. Scherner. Die Modernisierung des Handelsrechts im 19. Jahrhundert. – K. O. Scherner (ed.) (Note 3), pp. 9–17.

⁸ Facts in Archiv der Hansestadt Lübeck (AHL) OAG L I 153, unquadr. Relation von Cropp vom 9. September 1831.

⁹ A. Cordes. Flandrischer Copiar Nr. 9. Juristischer Kommentar. – C. Jahnke, A. Graßmann (eds.). Seerecht im Hanseraum des 15. Jahrhunderts. Edition und Kommentar des Flandrischen Copiar Nr. 9. Lübeck 2003, p. 126.

¹⁰ K.-J. Lorenzen-Schmidt. – Gesamtinventar der Akten des Oberappellationsgerichts der vier Freien Städte Deutschlands. Vol. 2. Cologne, Weimar, Vienna 1994/96, p. 513: he mixes up Riga with Tallinn.

¹¹ Archiv der Hansestadt Lübeck = AHL OAG L I 153 Q 21: Entscheidungsgründe, p. 3.

¹² AHL OAG L I 153 Q 20: Urteil vom 22. Dezember 1831; in detail also in C. A. T. Bruhn (ed.). Sammlung von Entscheidungen des Oberappellationsgerichts zu Lübeck. – Lübecker Rechtssachen 1858 (1) 97, pp. 387. Imprecisely in B. Kusserow (Note 5), pp. 171–172.

tiorum gestio) and the freight contract. Remarkably, the agency as a quasi-contract stood at the beginning and was therefore supposedly superior to the contract.^{*13} In a very brief decision, the court rejected reimbursement of expenses for two reasons. Firstly, the plaintiff's contracting partner had been in Lübeck. He had had the possibility to come to Travemünde at any time and look after the fruit on his own — which he did not do. Secondly, Witte had said that the bills of lading had already been sent to Tallinn. Hence the *Oberappellationsgericht* concluded that Witte as principal obviously had no interest in saving the fruit. At this point in the reasons for the judgement comes a sentence as might be seen in a textbook: "Now no right can be gained from an agency against someone who himself has declared that he has no interest in the thing, that he does not want anything to do with it and thus abandons the thing."^{*14} Dogmatically it stands out that the court did not differentiate between the question of whether the defendant actually was the agent — and thus whether the preservation of the southern fruit was agency by Witte — and the connected question of whether this was part of his intention. Both issues could be subsumed under the interest of the agency.

Only after rejecting the claim for reimbursement of expenses from *negotiorum gestio* did the court deal with the matter of contractual claim for payment. This again shows the willingness to find generalisable solutions that break out of limitations of the special law. In general, the court acknowledged the duty of the skipper to take the best possible care of the shipload in cases of emergency at sea and in the emergency harbour. This resulted from an analogy to a statute from Lübeck about the cooling of grain and the recovery of shiploads in the event of a shipwreck.^{*15} The intention to overcome the narrowness of the special law can be seen particularly well in the fact that, although the outcome was already clear, the reasoning for the judgement adds that the same also follows from the nature of a freight contract as a kind of lease contract (*locatio conductio*) in which the recipient has to apply the same amount of care to preserve the goods as a diligent head of household (*paterfamilias*).^{*16} The reference to the 'nature of the thing' as comes up in the judgement was a topos often used by Georg Arnold Heise even before his time as president of the *Oberappellationsgericht* of Lübeck.^{*17} He often used it as an argument in his later-to-be-printed lectures on commercial law^{*18}, which shows his apparent closeness to Savigny's doctrine of sources of law.^{*19} With arguments such as these, the court left all the specialities of special law and maritime law behind and thus shifted the solution over to law of obligations only, here the discussion about rights and duties within the lease contract — the still unified type of contract known as *locatio conductio*.^{*20} Considering Roman law, the court stated that this kind of contract would normally grant reimbursement of expenses^{*21} but in this case the plaintiff had sued the wrong person.

After that, the *Oberappellationsgericht* examined whether the skipper could at least claim the agreed cartage or parts of it from the defendant if a coincidence concerning the skipper had kept him from finishing the promised tour. During this examination, the court prioritised a solution from Roman law, putting the relevant sources of special law second. Following the rules of Roman law, the court assumed that the contract had been annulled without the skipper being able to raise any claims against the defendant^{*22}, for the skipper had returned to his original port unsuccessfully. The return had been due to coincidence — namely, the bad weather conditions — and not on account of the fruit having gone bad. Had the skipper brought the spoilt fruit to Tallinn or had he berthed at a harbour on his route to Estonia, the situation might have been different. Now, however, the carrier could only be expected to adhere to the contract if the long stay in Travemünde for the necessary repairs was not to the disadvantage of the charterer. The court based this decision on Roman law^{*23}

¹³ To the *negotiorum gestio* of the common law cf. U. Floßmann. *Österreichische Privatrechtsgeschichte*. Wien, New York 2005, p. 283; R. Zimmermann. *The Law of Obligations. Roman Foundations of the Civilian Tradition*. Reprint Munich 1993 of the edition Cape Town, 1990, pp. 433–450.

¹⁴ AHL OAG L I 153 Q 21: Entscheidungsgründe, p. 4.

¹⁵ AHL OAG L I 153 Q 21: Entscheidungsgründe, p. 7, with reference to the Revidiertes Lübecker Stadtrecht 1586 6, 1, 8, and the Hansische Seerecht Tit. 3, Art. 19; Tit 9, Art. 4; also in B. Kusserow (Note 5), p. 180, with reference to C. A. T. Bruhn (Note 12), pp. 389.

¹⁶ AHL OAG L I 153 Q 21: Entscheidungsgründe, p. 8, with reference to J. A. Engelbrecht (anonymus). *Der wohlunterwiesene Schiffer*. Lübeck 1792, Abt. 2, chapt. 3, § 24, p. 58.

¹⁷ Extensive J. K.-H. Montag. *Die Lehrdarstellung des Handelsrechts von Georg Friedrich von Martens bis Meno Pöhls*. Die Wissenschaft des Handelsrechts im ersten Drittel des 19. Jahrhunderts. Frankfurt am Main 1986.

¹⁸ Heise's Handelsrecht. Nach dem Originalmanuskript hrsg. v. Agathon Wunderlich. Frankfurt 1858, pp. 2, 6, 10; methodical critique about Heise being too descriptive in P. Raisch. *Die Abgrenzung des Handelsrechts vom Bürgerlichen Recht als Kodifikationsproblem im 19. Jahrhundert*. Stuttgart 1962, p. 18; regarding differences between Heise's and Georg Friedrich von Martens' conceptions of commercial law cf. J. K.-H. Montag (Note 17), p. 68.

¹⁹ J. Rückert. *Handelsrechtsbildung und Modernisierung des Handelsrechts durch Wissenschaft zwischen ca. 1800 und 1900*. – K. O. Scherner (ed.) (Note 3), p. 44; regarding Heise's closeness to Savigny — without references to commercial law — cf. O. Lenel. *Briefe Savignys an Heise*. – *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung)* 1915 (36), pp. 96–156.

²⁰ Regarding the dispartment of the *locatio conductio* in the 19th century cf. P. Oestmann. *Mietvertrag*. – M. Schmoekel, J. Rückert, R. Zimmermann (eds.). *Historisch-kritischer Kommentar zum BGB*. Vol. 3. Forthcoming.

²¹ AHL OAG L I 153 Q 21: Entscheidungsgründe, pp. 8-9, with reference to D. 19, 2, 55, 1 and D. 43, 10, 1, 3.

²² Therefore, D. 19, 2, 15, 6 is quoted; regarding this aspect of the judgement cf. B. Kusserow (Note 5), pp. 185–189.

²³ AHL OAG L I 153 Q 21: Entscheidungsgründe, pp. 17–18: reference to D. 19, 2, 24, 4 and D. 19, 2, 27 pr.

as well as on several rules of maritime law from the French *Rôles d'Oléron*^{*24}, the Dutch *Vonnesse van Damme*^{*25}, the Scandinavian maritime law from Visby^{*26}, and the Prussian law of the 18th century.^{*27} Taking a single case as an example, the fruit transporter that had an accident, the court set up general rules for impossibility without fault in a mutual contract.^{*28} Along with this, it clarified where the boundary lay between delay without fault and complete impossibility. It was deemed impossibility when in the case of delay abiding by the contract leads to unreasonable disadvantages for the contracting party affected. By comparison, it seems a very harsh decision that the court denied the skipper even only some of the freight charges. Several maritime laws acknowledge this claim in principle^{*29}, but the court argued that the ship did not go ashore on its route but sailed back to Travemünde. At the end of the ruling, the conclusion come to is again affirmed with relative brevity by an analogy to law from Lübeck.^{*30} But the reference to special law at this point once more has no discrete relevance. This case is a distinct example of the court developing general dogmatic principles from seemingly very special problems. Therewith, the *Oberappellationsgericht* with its manner of reasoning in its judgements contributed considerably to the unification of law, because the rules of special law were adapted to achieve respectively greater coherence.^{*31} The reasoning in this case of impossibility and duties within a lease contract shows how the court administered justice beyond maritime commercial law in the main areas of the general law of obligations.^{*32}

2.2. The confiscation of the Dora in Tallinn

A second example shows a very similar method of solving legal problems. The circumstances are like many other cases the *Oberappellationsgericht* of the four free German cities had to deal with many times: the fate of the Dora. In 1817, the skipper of this ship, one Hasse, sailed from Lübeck to Tallinn. A manifesto on the import and export trade of the Russian Empire from 19/31 December 1810 ordered that all imported goods had to have a bill of lading attached that declared the quality and quantity of the goods. Furthermore, anonymous import was forbidden. This meant that every time no recipient came forward, the skipper was seen as the owner of the freight and was held responsible for the non-cleared load.^{*33} Therefore, a limitation of imports existed for Russia and thus also for the Baltic provinces in order to inhibit trading companies, shipping companies, and skippers from violating Russian customs regulations. Hasse knew of this statute, because in 1815 he had been caught in violation of the manifesto from 1810 and had just managed to flee Estonia. Two years later, he did not have as much luck. The Russian authorities confiscated the ship along with its load belonging to 13 different trading houses, with the accusation of Hasse having carried along loads that were to be brought to the Baltic provinces in secret. Hasse was taken into custody and died imprisoned in Tallinn. The skipper's widow and the shipping company took some of the merchants who had sent non-cleared goods to Tallinn to court for compensation.

The *Oberappellationsgericht* in Lübeck dealt with this case for the first time from December 1821. The parties did not agree about whether, on the one hand, the skipper had known that he had been transporting non-cleared goods and, on the other, whether the consignors had had knowledge that the import of such goods to Russia was forbidden. The City Court of Lübeck had delivered a judgement of proof, against which the consignors appealed. The parties' as well as the court's juristic argumentation shows an enormous level of

²⁴ Reference to *Rôles d'Oléron* Art. 4; regarding the *Rôles d'Oléron* cf. J. Schweitzer. *Schiffer und Schiffsmann in den Rôles d'Oléron und im Livre del Consolat de Mar. Ein Vergleich zweier mittelalterlicher Seerechtsquellen.* Frankfurt am Main 2007.

²⁵ Reference to „Leges Dammenses Vonn[esse] 4“, cited by the *Oberappellationsgericht* from J. M. Pardessus. *Collection des lois maritimes antérieures au XVIIIe siècle.* Vol. 1. Paris 1828, p. 373; regarding the *Vonnesse van Damme* cf. M. Ryckaert. *Art. Damme, Seerecht. – Lexikon des Mittelalters III.* 1986, col. 475.

²⁶ Reference to “*Wisbysches Seerecht* Art. 16, 37 (edit. v. Engelbrecht)”; regarding the source cf. G. Landwehr. *Das Seerecht im Ostseeraum vom Mittelalter bis zum Ausgang des 18. Jahrhunderts.* – J. Eckert, K. Å. Modéer (eds.). *Geschichte und Perspektiven des Rechts im Ostseeraum.* Frankfurt am Main 2002, pp. 279–280, 283–284.

²⁷ Reference to *Preußisches Seerecht von 1727* Tit. 5, Art. 31; *Allgemeines Preußisches Landrecht* Teil 2, Titel 8 § 1703; regarding the Prussian maritime law cf. G. Landwehr. *Das preußische Seerecht vom Jahre 1727 im Rahmen der europäischen Rechtsentwicklung. – Zeitschrift für Neuere Rechtsgeschichte* 1986 (8), pp. 123; *id.* *Seerecht im Ostseeraum* (Note 26), pp. 288–289, 296–298.

²⁸ Regarding the history of this problem J. Rückert. *Vom casus zur Unmöglichkeit und von der Sphäre zum Synallagma. Weichenstellungen bei der Risikoverteilung im gegenseitigen Vertrag, entwickelt am Beispiel des Dienstvertrages. – Zeitschrift für Neuere Rechtsgeschichte* 1984 (6), pp. 40–73 (with examples to maritime law on p. 51).

²⁹ AHL OAG L I 153 Q 21: *Entscheidungsgründe*, pp. 18–19, with reference to D. 19, 2, 9, 1, D. 19, 2, 33 and D. 19, 2, 36; *Rôles d'Oléron* Art. 4; *Ordonnance de la Marine* Buch 3, Titel 3, Art. 11, 22; *Code de Commerce* Art. 296; *Niederländisches Handelsgesetzbuch* Buch 2, Titel 5, Art. 28; *Hamburger Statut* Teil 2, Titel 14, Art. 3; *Preußisches Seerecht von 1727* Tit 5, Art. 31; *Allgemeines Preußisches Landrecht* part 2, Titel 8, §§ 1702, 1705; *Schwedisches Seerecht* Hauptstück 2, chapt. 12.

³⁰ AHL OAG L I 153 Q 21: *Entscheidungsgründe*, pp. 19–23.

³¹ Similarly B. Kusserow (Note 5), p. 242; for the contemporary science J. Rückert (Note 19), p. 45.

³² This judgement is documented in detail in C. A. T. Bruhn (Note 12), pp. 385–397.

³³ AHL OAG L I 22a No. 1: *Einführung und Rechtfertigung der Appellation*, p. 2; No. 19: *Urteilsgründe*, pp. 13–14.

juridical debate and demonstrates in this particular case why one could speak of this court as Germany's educated court.³⁴ Throughout all written pleadings, one can detect the aim of generalising the argument about the ship and entering into a cardinal clarification of legal questions of international maritime law. The sentences formulated contain confessions of position on legal essentials of great range. In this manner the counsel for the defendants argued: "The law that through the declared will of the head of state receives its sanction and binding force is applied to the subjects of that state, and only for these as a regulation by which the free actions of the subjects are to be adapted and judged."³⁵ Also regarded as temporal subjects are merchants who stay in the country only for a short time, as strangers. It follows in consequence that a skipper or a carter who in accordance with a freight contract travelled abroad became a temporal subject of that country, and thus had to observe the local laws and also endure the local punishments when having violated the laws.³⁶ In contrast, this should not apply to those merchants who lived in Germany rather than in the state of the prohibition act: "The merchant who makes [the import regulations] subject to his actions does not trespass against laws that are binding for him, because he is only subject to the law of his state, and there exists no absolute duty for him to let his exercise of acts that are in themselves rightful be constrained by the will of an alien sovereign [...], and if the preacher of morality demurs, the jurist calls out to him that all is allowed that has not been forbidden in the state."³⁷ This was a clear confession to a liberal view on freedom of action that could only be constrained by domestic laws. The distinction between law and moral in this almost declamatory argumentation had the purpose of claiming abidance by the laws even when it might clash with widespread moral attitudes. Some years later, Rudolf von Jhering referred to such maxims almost directly.³⁸ The practical consequence was a totally different distribution of risks between merchant and skipper. The merchant who sent his goods abroad only risked having his goods confiscated, whereas the skipper had to fear personal disadvantages, as the prohibition acts addressing foreign import and customs laws applied to him as a person.³⁹ On account of very basic considerations, without going into details of the matter, the merchants had found a general solution. That in this case the claim for compensation of the plaintiffs had to be dismissed went — according to the defendant's argumentation — without question.

Naturally, the counsel for the plaintiffs had a different opinion on this and also referred to the international law. Going into basic principles, just as the merchants did, he emphasised in his written pleading to the court: "As it belongs to the sovereign rights of every nation to determine whether and under which conditions, constrictions, and customs it wants to trade goods with other nations⁴⁰, it may also, in contradiction to this incontestable right, be naturally assumed that every citizen of a nation — when he wants to trade abroad — has to abide by the rules and laws of that country to which he trades his goods. Therefore, the merchant violates the laws of the foreign territory when he imports forbidden goods or avoids customs duty [...]. If the skipper now claims compensation of the consigner of the contraband⁴¹, the latter is obliged to pay because he has violated the principle of international law that every merchant who wants to benefit from the conditionally granted foreign freedom of action has to abide by those foreign laws."⁴² Stemming from the argument about the confiscated ship, a dispute arose as to the personal ambit of foreign rules of law. While the merchants thought the laws only to apply to those who sojourn in the national territory of the legislator, the skipper and the shipping company extended the binding force to all those who perform legal transactions with respect to that country. The conclusion was very obvious, according to the argumentation of the plaintiffs: as the merchants also violated Russian law, they were liable for the confiscation of the ship in Tallinn.

The judgement of the *Oberappellationsgericht* is a masterpiece. The tenor of the judgement of 12 December 1822 is completely rooted in the traditional legal doctrine of evidence; it contains questions of evidence and counter-evidence and focuses solely on the actual dispute.⁴³ However, the reasons given for the judgement, which were published almost in full⁴⁴, resolved the conflict concerning international law in a short introduction and then traced the entire conflict back to basic questions of the general doctrine of private legal transactions. As study of many of the court's reasons for its judgements shows, this was the true strength of the *Oberappel-*

³⁴ R. von Jhering (Note 6), p. 156.

³⁵ AHL OAG L I 22a Nr. 1: Einführung und Rechtfertigung der Appellation, p. 57.

³⁶ AHL OAG L I 22a Nr. 1: Einführung und Rechtfertigung der Appellation, p. 60.

³⁷ AHL OAG L I 22a Nr. 1: Einführung und Rechtfertigung der Appellation, p. 59.

³⁸ With the same argument Rudolf von Jhering later on defends the strict adherence to formal requirements, thereto cf. R. von Jhering. *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*. Part 2, Sect. 2. Leipzig 1858, cited after 2nd edition 1869, pp. 475–476.

³⁹ AHL OAG L I 22a Nr. 1: Einführung und Rechtfertigung der Appellation, pp. 61–62.

⁴⁰ Footnote in the written pleading, reference to G. F. von Martens. *Prima lineae iuris gentium Europaeorum practici in usum auditorium adumbratae*. Göttingen 1785, Cap 3, §§ 105, 106.

⁴¹ Definition in Brockhaus *Conversations-Lexikon*. Vol. 7. Amsterdam 1809, p. 240: „Contraband (aus dem Italienischen) heißt alles, was einem Verbot wegen Einfuhr fremder Waaren zuwider ist.“

⁴² AHL OAG L I 22a Nr. 10: Widerlegung der Einführung und Rechtfertigung der Appellation, pp. 3, 5.

⁴³ AHL OAG L I 22a Nr. 18: Urteil.

⁴⁴ C. A. T. Bruhn (Note 12), pp. 110–124; H. Thöl (ed.). *Ausgewählte Entscheidungsgründe des Oberappellationsgerichts der vier freien Städte Deutschlands*. Göttingen 1857, No. 248, pp. 334–339: one of the more detailed accounts in Thöl.

lationsgericht. The court's reasons were able to solve problems that at first glance seemed to be complicated and detailed, doing so on a fundamental level and thus establishing legal certainty beyond the individual case at hand. In the case of the *Dora*, this was achieved as follows: First, the binding force of foreign laws was dealt with. Regarding this aspect, the court differentiated between general prohibitive laws and laws that favour nationals but discriminate against foreigners. In the first case, the court judged the laws of foreign states to be considered only because of "observance of the international laws". In the second case, however, regarding the unequal treatment of nationals and foreigners, "even the international law does not demand obeying these rules, these hostile steps"⁴⁵. In deciding this way, the court referred to leading French literature.⁴⁶ The result was clear: the present European code of practice between states did not forbid establishing an enterprise that runs against foreign customs regulations or assuming the risk of such an enterprise.⁴⁷ In the beginning, this was a definite commitment to the freedom of maritime trade, independent from foreign prohibitive laws. This corresponded to the defendant merchants' legal opinion. But the *Oberappellationsgericht* aimed to make distinctions in this respect, too. Namely, the introduction regarding international law only pointed out that the skipper and the shipping company could not demand compensation simply because the principal had violated Russian customs regulations.

In contrast to this, the court considered a contractual claim — bearing in mind the uncertain hearing of evidence — to appear obvious, for "such a trade with contraband would always be a dangerous trade"⁴⁸. As it was a dangerous legal transaction, the court stated certain duties of clarification and information that would justify a contractual claim for compensation if violated. According to the *Oberappellationsgericht*, each contracting party when entering into a bilateral contract was bound to "inform the other contracting party about possible physical and legal defects and about such characteristics of those defects as might threaten their means or even the contracting party's personal safety"⁴⁹. And exactly because of this general duty to inform the other about imminent dangers, the person loading contraband had at least to inform the skipper or carter if in the event of discovery not only the goods but also the ship, coach, or horses would be in danger of confiscation. A contracting party not doing so would owe damages because, according to the freight contract, the charterer was forbidden to load illegal goods, which might cause danger to an unknowing skipper.⁵⁰ The court relied on the 'legal analogy' and the well-known treatise of the English Lord Chief Justice Charles Abbott *Tenterden*⁵¹ on the law of merchant ships.⁵² Virtually without any normative basis, the court developed a doctrine of duty of mutual clarification and information in bilateral contracts, which only had to be modified somewhat — for if the recipient knew about the dangerous aspects of the object, it was not necessary to inform him about them formally. At this point, the judgement again found a strong basis in academic law.⁵³ Out of a problem that the parties understood as a question of international law the *Oberappellationsgericht* developed important and representative rules of law for general contract law. Obviously, this judgement from 1822 established the legal practice of the *Oberappellationsgericht* in a sustainable manner. When in May 1829 it had to interpret another case involving contraband, in which the Russian authorities had again confiscated goods, the *Oberappellationsgericht* referred to this decision directly and cited the principles developed therein, extensively and almost verbatim.⁵⁴ Clearly, the representative and

⁴⁵ AHL OAG L I 22a Nr. 19: Urteilsgründe, pp. 5–6.

⁴⁶ Quoted are E. de Vattel. *Le droit des gens ou principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains*. Vol. 1. 1758, chapt. 6, § 76; Estrangin. *Additions ou supplément to: R. J. Pothier. Traité du contrat d'assurance*. Paris 1810, p. 91.

⁴⁷ AHL OAG L I 22a Nr. 19: Urteilsgründe, p. 7, with further reference to B. M. Emerigon. *Traité des assurances et des contrats à la grosse*. 2 volumes. Marseille 1783, part 1, chapt. 8, Sect. 5, pp. 210 ff.; J. A. Park. *A system of the law of marine insurances, with three chapters of bottomry, on insurances of lives, and on insurances against fire*. London 1787, p. 390; F. J. Jacobsen. *Handbuch über das practische Seerecht der Engländer und Franzosen in Hinsicht auf das von ihnen in Kriegszeiten angehaltene Eigenthum, mit Rücksicht auf die englischen Assecuranz-Grundsätze über diesen Gegenstand*. Vol. 2. Hamburg 1805, pp. 77–79; reference to this judgement also in B. Kusserow. *Oberappellationsgericht* (Note 5), pp. 182–183.

⁴⁸ AHL OAG L I 22a Nr. 19: Urteilsgründe, p. 9.

⁴⁹ AHL OAG L I 22a Nr. 19: Urteilsgründe, p. 9.

⁵⁰ AHL OAG L I 22a Nr. 19: Urteilsgründe, p. 10.

⁵¹ 1762–1832, to him M. Lobban. *Art. Abbott*. — Oxford Dictionary of National Biography 2004. Available at <http://www.oxforddnb.com/view/article/12> (14.01.2009).

⁵² C. Abbott. *A treatise of the law relative to merchant ships and seamen with an addenda relative to some laws and customs of the United States*. Philadelphia 1802, p. 280.

⁵³ AHL OAG L I 22a Nr. 19: Urteilsgründe, p. 33, with reference to D. 21, 1, 14, 10 and VI 5, 12, 31: "Eum, qui certus est, certiorari ulterius non oportet."

⁵⁴ AHL OAG L I 111 Nr. 15: Entscheidungsgründe, pp. 10–13. The judgement is also based on several books from older and newer times: E. de Vattel (Note 46), vol. 2, chapt. 6 § 76; Estrangin (Note 46); B. M. Emerigon (Note 47), part 1, chapt. 8, sect. 5, pp. 210 ff.; J. Klefeker. *Sammlung der Hamburgischen Gesetze und Verfassungen in Bürger- und Kirchlichen, auch Cammer- Handlungs- und übrigen Policey-Angelegenheiten und Geschäften samt historischen Einleitungen*. Vol. 7. Hamburg 1769, §§ 484–486; S. Marshall. *A Treatise on the Law of Insurance*. Vol. 1. London 1823, chapt. 3, sec. 1, pp. 54–57; W. Benecke. *System des Assekuranz und Bodmereiwesens [...] für Versicherer, Kaufleute und Rechtsgelehrte*. Vol. 1. Hamburg 1808, p. 34; F. J. Jacobsen. *Handbuch über das practische Seerecht der Engländer und Franzosen in Hinsicht auf das von ihnen in Kriegszeiten angehaltene Eigenthum, mit Rücksicht auf die englischen Assecuranz-Grundsätze über diesen Gegenstand*. Vol. 2. Hamburg 1805, pp. 77–79; P. S. Boulay-Paty. *Cours de droit commercial maritime d'après les principes et suivant l'ordre du Code de commerce*. Vol. 4. Rennes 1823, p. 29.

generally formulated opinion of the *Oberappellationsgericht* was highly suitable for developing prevailing case law and thus strengthening the certainty of law.

Simply for the sake of completeness, it remains to be said, as alluded to earlier, that the *Oberappellationsgericht* had to deal with the case described, concerning the Dora, several times. In 1834, the Dora case was brought to the court in Lübeck for the fifth time. But here the lawsuit was finally ended with a settlement in July 1835.^{*55} Thus, it had taken 13 years for the Dora case to be closed with the *Oberappellationsgericht*. Examples such as this show the disadvantages of a court procedure that allows unlimited appeals against interlocutory judgements. All told, four extensive decisions (*Relationen*) were worked out unavailingly by the members of the court. The respective separate proceedings before the *Oberappellationsgericht* seldom took longer than one year. Nonetheless, the case dragged on without fault on the part of the *Oberappellationsgericht* and was ended finally by an extrajudicial settlement without a final judgement being necessary. Hence, proceedings before the *Oberappellationsgericht* seemed to have had structural defects, which must not be forgotten even if the aspects of the court's legal practice described here are very fascinating. Concerning early modern jurisdiction, research into the history of law now tends to regard a high proportion of settlements also as proof for the effectiveness of the legal system.^{*56} However, regarding the *Oberappellationsgericht* of the four free cities, one should be much more careful in arguing like this. In particular, the case described of the Dora shows the enormous work that the members of the court also had to do in those cases that finally ended through settlement. While the high courts of the Holy Roman Empire could save the trouble of issuing a final judgement by initiating numerous settlement proceedings — a point that still makes settlements attractive today^{*57} — the *Oberappellationsgericht* of the four free cities had to deliver four judgements before the parties were able to settle. Thus, the transaction costs of settlements were very high, especially in those cases that were ended by settlement. Still, that the judges of the *Oberappellationsgericht* in Lübeck had a lot of work to do because of these cases, despite the settlements finally reached, did not seem to trouble contemporaries at all. At least the public perception of the court did not suffer from this, as it was the tangible judicature of the interlocutory judgements and the findings of fact that made the court famous, not the few final judgements.

3. Results

The most important result of this study appears astonishing and seems to contradict the so far self-evident modern theory. A specific maritime law is not tangible in the early judgements of the *Oberappellationsgericht* in Lübeck. This shows especially well the consequent scientific treatment of legal problems that had to be provided by the court. The judges were able to analyse the incoming cases in principal respects and to reduce them to basic general questions of law. Thus, cases of maritime law were integrated into the general law of obligations and judged according to principles of the universal doctrine of contract. But not only questions of maritime law were converted into the area of the law of obligations. A striving for representative results can also be found in the application of law. Special law was often used only to confirm results that the court had found on the basis of general principles of law anyway. Thus, even in the former cities of the Hanseatic League, maritime law was not of great importance. Often the court referred back to Roman and Canon law and compared it to sources of maritime law but also to sources of general private law from other countries, such as Portugal or Sweden.

The judgements of the early time of the *Oberappellationsgericht* in Lübeck are of especially great importance. The judgements analysed in this study were delivered at a time in which Thöl's and Goldschmidt's books — so renowned later — had not yet been written and Heise's lectures on commercial law had not been published, either.^{*58} Thus, the relationship between judicature and science as factors in the modernisation of commercial law in the 19th century seems to appear in a different light. Possibly, academically grounded practice in the 1820s did not refer to scientific law but preceded it or at least contributed considerably to it.^{*59}

⁵⁵ AHL OAG L I 202; cf. K.-J. Lorenzen-Schmidt (Note 10), vol. 2, p. 522.

⁵⁶ B. Diestelkamp. *Das Reichskammergericht im Rechtsleben des 16. Jahrhunderts.* – H.-J. Becker, G. Dilcher, G. Gudian, E. Kaufmann, W. Sellert (eds.). *Rechtsgeschichte als Kulturgeschichte. Festschrift für Adalbert Erler zum 70. Geburtstag.* Aalen 1976, pp. 435–480; also in B. Diestelkamp. *Recht und Gericht im Heiligen Römischen Recht.* Frankfurt am Main 1999, pp. 257.

⁵⁷ P. Hartmann. § 278 ZPO Rn. 6. – A. Baumbach, W. Lauterbach, J. Albers, P. Hartmann. *Zivilprozeßordnung mit Gerichtsverfassungsgesetz und anderen Nebengesetzen.* Munich 2008; W. R. Wrege. *Richten und Schlichten! Plädoyer für die Güteverhandlung im Zivilprozeß.* – *Deutsche Richterzeitung* 2003, pp. 130–132.

⁵⁸ H. Thöl. *Das Handelsrecht.* Vol. 1. Göttingen 1841; L. Goldschmidt. *Handbuch des Handelsrechts.* Vol. 1. Stuttgart 1864; Heise's *Handelsrecht* (Note 18).

⁵⁹ Concerning the influence of the jurisdiction of the *Oberappellationsgericht* of the four free cities on Heinrich Thöl cf. H. Thöl (Note 58), Preface; E. Landsberg. *Geschichte der Deutschen Rechtswissenschaft.* Vol. III/2. Reprint Aalen 1978 of the edition Munich, Berlin 1910, p. 627; E. Döhning. *Geschichte der deutschen Rechtspflege seit 1500.* Berlin 1953, p. 348; U. Falk. *Art. Thöl.* – M. Stolleis (ed.). *Juristen. Ein biographisches Lexikon von der Antike bis zum 20. Jahrhundert.* Munich 2001, p. 626.