

COLLANA RAVENNA CAPITALE

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RAVENNA CAPITALE

FROM INTERNATIONAL TREATIES
TO THE BINDING NATURE OF CONTRACT.
A HISTORICAL AND COMPARATIVE STUDY

COLLANA RAVENNA CAPITALE



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Indice

Introduction	»	vii
Regulatory Autonomy in Eastern Roman Provinces: the Babatha Archive		
<i>Simona Tarozzi</i>	»	1
Earth and water in the formularies of the <i>Albertini Tablets</i>		
<i>Paola Biavaschi</i>	»	13
International Treaties and Commercial Practices in Late Antiquity: Romans and Persians in <i>CJ. 4.63.4</i>		
<i>Silvia Schiavo</i>	»	23
Il n’y a que le provisoire qui dure: early eighteenth-century preliminary articles and conventions in doctrine and practice		
<i>Frederik Dhondt</i>	»	35
Esigenze solidaristiche e vincolo contrattuale nella giurisprudenza italiana dall’età giolittiana all’avvento della Costituzione repubblicana		
<i>Alan Sandonà</i>	»	51
<i>Pacta sunt servanda</i> – Basic Principles of a Modern Contract Law		
<i>Christoph Schärfl</i>	»	69
Self-enforcing Tools in International Contracts: A Comparative Perspective		
<i>Laura Maria Franciosi</i>	»	93
Post-Contractual non-competition clauses in German Labour Law – an example for today’s law formed in practice		
<i>Julia Maria Gokel</i>	»	109
Party autonomy and its effects on the International Maritime Law: the role of the Paramount Clause		
<i>Anna Montesano</i>	»	119

International Treaties and Commercial Practices in Late Antiquity: Romans and Persians in CJ. 4.63.4

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1. The interconnection of Roman private law, international treaties and commercial practices between Romans and foreigners is constantly subjected to a strong interest by scholars.

Among many possible declinations of the topic, it is worth remembering, for example, the one that led to investigate links and connections of clauses of international treaties with the rules of internal law.

Think, for instance, about the ancient *foedus Cassianum* and the impact it probably had on decemviral legislation: the provisions of international law provided for in the *foedus* would have in fact influenced the formulation of Tab. 2.2 and Tab. 6.4.

In Tab.2.2, alongside the disease (*morbus*), also the *status dies cum hoste* is stated as a cause of *excusatio* for the *iudex* or *arbiter* and for the *reus* (presumably in the *legis actio per iudicis aribitrive postulationem*). It would therefore become a priority and would allow the trial to be updated (*dies diffusus*).

Tab. 6.4, on the other hand, contains the famous rule relating to the *auctoritas aeterna* towards the foreigner. Also the regulation here outlined could be linked to the contents of the *foedus Cassianum*. In fact, the treaty allows the Latin *hostis* to have access to *mancipatio*. Consequently, it requires to take into consideration the situation in which the thing (in relation to which there is the guarantee) is not on Roman territory. The *decemviri* would therefore have established, with reference to this case, that the Roman *mancipio dans* had to give the foreign *mancipio accipiens* unlimited assistance over time (in the event that the *res* leaves the Roman territory before a year).

In both situations, the decemviral legislation would therefore conform to the principles of international law accepted in the treaty.¹

¹ On the clause of private law of *foedus Cassianum* (493 b.C.) see, among others, L. CAPOGROSSI COLOGNESI, *Cittadini e territorio*, Rome, 2000, 73 ss; 123 ff. On Tab. 2.2: D. KREMER, *Trattato internazionale e legge delle Dodici Tavole*, in *Le dodici Tavole dai Decemviri agli Umanisti* (M. HUMBERT a cura di), Pavia, 2005, 197 ff., which is focused on different problems

Furthermore, various works dedicated to the ancient treaties concluded between Rome and Carthage² stressed the existence of common diplomatic practices, based, among other things, on the determination of specific spaces where commercial exchanges could take place, and on the identification of surveillance systems and of the legal protection of the foreigner. Therefore practices that appear to mix elements of freedom but also of control: over places, people, and goods.³ Not only that: some of these studies highlighted the utility of deepening

connected with the decemviral rule. Kremer emphasizes, in particular, that the *decemviri* accepted this approach influenced by the rule of the *foedus Cassianum* according to which the trial with the *hostis* had to be terminated within ten days, in the place where the deal was concluded. The XII Tables would therefore have been adapted, and this implies the primacy of the rules of the treaty over the *ius civile*. For these aspects see also G. GILIBERTI, *L'ius gentium romano come ordinamento transnazionale*, in *Cultura giuridica e diritto vivente*, 2, 2015, 8 ff. Different approach in V. MAROTTA, *Tutela dello scambio e commerci mediterranei in età arcaica e repubblicana*, in *Ostraka. Rivista di antichità*, 5, 1996, 90 ff. Marotta (as before B. ALBANESE, *Sulle cause di diffissio diei*, in *Brevi studi di diritto romano (II)*, in *Annali del Seminario Giuridico dell'Università di Palermo*, XLIII, 1995, 176 ff.; 189 ff.), believes that the rule of the XII Tables does not refer exclusively to the summons for a trial with a foreigner, but to every type of "business" with the foreigner. Overview on the content of Tab. 2.2, with discussion on the problem of *dies diffusus* in HUMBERT, *La loi des XII Tables-Édition et commentaire*, Rome, 2018, 118 f.; R. FIORI, *Il processo privato*, in *XII Tavole. Testo e commento* (M.F. CURSI a cura di), I, Naples, 2018, 81 ff.

On Tab. 6,4, see again KREMER, *Trattato internazionale ...*, 203 ff., who, regarding *auctoritas*, accepts the stance of HUMBERT, *La codificazione decemvirale: tentativo di interpretazione*, in *Le Dodici Tavole ...*, 1 ff. For a general overview see ID., *La loi des XII Tables, ...*, 273 ff.; CURSI, *La mancipatio e la mancipatio familiae*, in *XII Tavole ...*, 351 ff.

² On these treaties: B. SCARDIGLI, *I trattati romano-cartaginesi*, Pisa, 1991; L. LORETO, *Sui trattati romano-cartaginesi*, in *BIDR*, 98-99, 1995-1996; 779 ff.; CAPOGROSSI COLOGNESI, *In margine al primo trattato con Cartagine*, in *Studi in onore di E. Volterra*, Milan, 1971, 171 ff.; MAROTTA, *Tutela dello scambio ...*, 76 ff.; A. BRESSON, *Les accords romano-chartaginois*, in *La mobilité des personnes en Méditerranée de l'antiquité à l'époque moderne. Procédures de contrôle et documents d'identification* (sous la direction de MOATTI), Rome, 2004, 649 ff.; D. NÖRR, *Osservazioni in tema di terminologia giuridica predecemvirale e di ius mercatorum mediterraneo: il primo trattato cartaginese-romano*, in *Le dodici Tavole ...* 147 ff.

³ For a general overview on these problems see C. MOATTI, *La mobilità négociée dans l'Empire romain tardif: le cas des marchands étrangers*, in *Le relazioni internazionali nell'alto medioevo. Spoleto, 8-12 aprile 2010*, Spoleto, 2011, 159 ff. In the first treaty concluded between Rome and Carthage (dating back to 509 b.C.; see Polyb. 3.22.1-2) territorial limitations were decided for the commercial exchanges. In particular, according to the reconstruction offered by Polybius, the Romans were required (except in situations of state of necessity) not to cross Fair Promontory with their ships; on the other hand, the Carthaginians are not precluded from any geographical area (while they are forbidden to carry out hostile acts against some cities and the Latins subject to Rome, as well as to establish their own settlements in *Latium*). The significance of the limitations imposed by the Carthaginians on the Romans is debated: CAPOGROSSI COLOGNESI, *In margine al primo trattato con Cartagine ...*, 176; ID., *Cittadini e territorio*

the content of international treaties in order to bring out the possible connection of the negotiable operations they presuppose with the idea of a contract of sale, consensual and with obligatory effects, characterized by more ancient origins than what was claimed traditionally by scholars.⁴

In the paper some of these aspects will be reconsidered, with reference, however, to the Late Antiquity. We will study a constitution by Theodosius II, a text which shows a small, significant example of reception in Roman law of clauses coming from international treaties.⁵

The constitution is also of some interest because it allows us to reconstruct, albeit to a limited extent, commercial practices in use between Romans and Persians, and the political and security problems connected to them.

2. The constitution we refer to is *CJ. 4.63.4* (408 or 409 a.D.), accepted in the title *De commerciis et mercatoribus* of the *Codex Iustinianus*.⁶ It deals with the

..., 111; SCARDIGLI, *I trattati ...*, 73; A. CORBINO, *La risalenza dell'emptio venditio consensuale e i suoi rapporti con la mancipatio*, in *Iura*, 64, 2016, 64 ff. On the question of lack of rules regarding the position of citizens of Chartage in Rome see also M. TALAMANCA, *La tipicità dei contratti romani fra 'conventio' e 'stipulatio' fino a Labeone*, in *Contractus e pactum. Tipicità e libertà negoziale nell'esperienza tardo-repubblicana. Atti del convegno di diritto romano e della presentazione della nuova riproduzione della littera Florentina (Copanello 1-4 giugno 1988)* (F. MILAZZO a cura di), Naples, 1990, 45, fn. 35.

⁴ For this stance see CORBINO, *La risalenza dell'emptio venditio consensuale ...*, 9 ff. The scholar criticizes the traditional approach, according to which the consensual *emptio venditio*, with obligatory effects, was introduced in Rome not before than the first half of III century b.C. (as a consequence of international trade, after conquests). For Corbino, this type of sale could be more ancient, and results to be compatible with the commercial practices of these treaties (and not in contrast with the structure of an act as the *mancipatio*). For a different position: TALAMANCA, *La tipicità dei contratti romani fra 'conventio' e 'stipulatio' ...*, 45, fn. 35. On these problems see also NÖRR, *Osservazioni in tema di terminologia giuridica predecemvirale ...*, 147 ff.

⁵ NÖRR, *Osservazioni in tema di terminologia giuridica predecemvirale ...*, 158, footnote 58, recalls this constitution as “esempio (tardo) di trasformazione di clausole contrattuali inter-statali in norme statali”.

⁶ On this title of *Codex Iustinianus* see observations in M. BIANCHINI, v. *Diritto commerciale nel diritto romano*, in *Digesto delle discipline Privatistiche- Sezione di diritto commerciale*, 4, Turin, 1989, 331 ff.; according to Bianchini the title suggests that Justinian's compilers were aware of the necessity of a precise normative frame dedicated to trade and its limitations. The constitution is not accepted in the Theodosian Code. On this exclusion see G. TRAINA, *Mercanti e frontiera. Una lettura di C. 4.63.4*, in *Confini, circolazione, identità ed ecumenismo nel mondo antico. Atti del VII Incontro di Studi tra storici e giuristi dell'Antichità, Vercelli, 24-25 maggio 2018* (P. GARBARINO, P. GIUNTI, G. VANOTTI a cura di), Firenze, 2020, 60 f.

question of trades between Roman and Persian merchants, trades that could take place only in well-defined territorial areas.⁷

It is a law revealing some details of what has been defined as ‘mobilité négociée’, that is the mobility of people dictated by various types of needs, including commercial ones, subjected to different forms of control and limitation, often through the definition of international agreements of various kinds.⁸

Let’s start by reading the text:

CJ. 4.63.4. Impp. Honorius et Theodosius AA. Anthemio pp. Mercatores tam imperio nostro quam Persarum regi subiectos ultra ea loca, in quibus foederis tempore cum memorata natione nobis convenit, nundinas exercere minime oportet, ne alieni regni, quod non convenit, scrutentur arcana. 1. Nullus igitur posthac imperio nostro subiectus ultra Nisibin Callinicum et Artaxata emendi sive vendendi species causa proficisci audeat nec praeter memoratas civitates cum Persa merces existimet commutandas: sciente utroque qui contrahit et species, quae praeter haec loca fuerint venumdatae vel comparatae, sacro aerario nostro vindicandas et praeter earum ac pretii amissionem, quod fuerit numeratum vel commutatum, exilii se poenae sempiternae subdendum. 2. Non defutura contra iudices eorumque apparitiones per singulos contractus, qui extra memorata loca fuerint agitati, triginta librarum auri condemnatione, per quorum limitem ad inhibita loca mercandi gratia Romanus vel Persa commeaverit. 3. Exceptis videlicet his, qui legatorum Persarum quolibet tempore ad nostram clementiam mittendorum iter comitati merces duxerint commutandas, quibus humanitatis et legationis intuitu extra praefinita etiam loca mercandi copiam non negamus, nisi sub specie legationis diutius in qualibet provincia residentes nec legati reditum ad propria comitentur. hos enim mercaturae insistentes non immerito una cum his, cum quibus contraxerint, cum resederint, poena huius sanctionis persequetur.

⁷ For MOATTI, *La mobilité négociée* ... 159 ff., there are many differences in circulation of merchants between classical age and late antiquity; nevertheless, late Roman Empire is still a space remaining ‘open’ (and relations with Persian seem to confirm this situation).

⁸ MOATTI, *Introduction*, in *La mobilité des personnes en Méditerranée de l’antiquité à l’époque moderne* ..., 15; EAD., *Translation, Migration and Communication in the Roman Empire: Three Aspects of Movement in History*, in *Classical Antiquity*, 25, 2006, 123 ff. She underlines that international treaties had always considered human mobility and commercial exchanges, as treaties of Rome and Chartage testify. Furthermore, in MOATTI, *La mobilité négociée* ..., 160 ff., the scholar notes that diplomatic tools used to this finality had different juridical structures and characteristics. See also *idem* 166 ff., for an overview on the treaties.

The constitution states that both Roman and Persian merchants cannot carry out markets (*nundinae*) outside the places agreed in a treaty (*foedus*) previously concluded by the two nations.⁹ This is required to prevent spying.

Theodosius II acknowledges this prohibition in his constitution, by stating that no Roman subject must dare to go beyond the cities of Nisibis, Callinicum and Artaxata in order to conclude sale contracts, and that it is not possible to exchange goods with the Persians beyond these places. The contract parties have to be aware that things bought or sold beyond these places will be claimed by the sacred treasury, and in addition to this, that there will be the loss of the price (*numeratum* or *commutatum*). Furthermore, they will suffer the penalty of exile.

In the second paragraph, the emperor establishes that a penalty of thirty pounds of gold would not be lacking for the *iudices* (and their *apparitores*) who are competent for the territories whose borders had been crossed by a Roman or a Persian merchant to trade, for each individual contract concluded.

In the further paragraph of the constitution, however, an exception is provided for those who accompany the ambassadors sent by the Persians to the Roman Empire. They will in fact be able to conclude sales and in any case contracts even beyond the places indicated, as long as they do not stay too long.

3. In the constitution there are several points of interest to be developed briefly.

First of all, as we said, *CJ.* 4.63.4 is a law that incorporates the content of an international treaty. It therefore makes international rules binding from the point of view of the internal order. The reception of the rules of the *foedus* leads to significant consequences on the level of private law (but not only), which we will try to highlight.

There is no certainty about the date of the *foedus* recalled here by the emperor. According to some scholars there may be a reference here to the one concluded by Diocletian and the Persians in 298, but it cannot be excluded that it is a later treatise, dating back to the times when the Persian king Yazdgard protected Theodosius II.¹⁰

⁹ V.M. MINALE, *Sulla regolamentazione giuridica dell'importazione, del commercio e della produzione della seta tra tardoantico ed età bizantina*, in *Koinonia*, 44/II, 2020, 1131, underlines reciprocity of rules reported in the *principium*. On reciprocity in the treaty see also observations in C. BALDUS, *Regelhafte Vertragsauslegung nach Parteirollen im klassischen römischen Recht und in der modernen Völkerrechtswissenschaft*, Teil 1, Frankfurt, 1998, 318 ff., and in MOATTI, *La mobilità négociée* ..., 172.

¹⁰ On the question see *The Codex of Justinian. A New Annotated Translation, with Parallel Latin and Greek Text. Based on a Translation by Justice Fred H. Blume* (B. W. FRIER ed.), I, Cambridge, 2016, 1056; G. MARAGNO, 'Punire e sorvegliare'. *Sanzioni in oro imperatori burocrazia*, Naples, 2020, 442; MOATTI, *La mobilità négociée* ..., 174.

The treaty of the time of Diocletian would in fact indicate that the only commercial space for trade of Romans and Persians was Nisibis, on the Tigris river.¹¹ The function of this limitation would involve security reasons as well as fiscal ones;¹² at the same time, it is certain that further treaties between the two nations contained similar rules.¹³

Following the Roman defeat linked to the expedition led by Julian in 363, with the peace made by Giovianus and Shapur II, Nisibis was ceded to the Persians, losing its function as a gateway for oriental goods into the Roman world. The treaty cited by Theodosius II instead takes into consideration on the Roman side *Callinicum* as a place where exchanges were allowed, and Nisibis and Artaxata on the Persian side. The constitution would therefore refer to a further *foedus* and not to that of 298.¹⁴

The cities mentioned here would become the only places allowed for commercial exchanges of Romans and Persians, territories where contracts can be concluded.¹⁵

¹¹ On the treaty of 298 see R. ANDREOTTI, *Su alcuni problemi del rapporto fra politica di sicurezza e controllo del commercio nell'impero romano*, in *RIDA*, 16, 1969, 215 ff. Different stance in TRAINA, *Mercanti e frontiera...*, 57.

¹² ANDREOTTI, *Su alcuni problemi...*, 238, fn. 34; MOATTI, *La mobilità négociée...*, 172.

¹³ MOATTI, *La mobilità négociée...*, 174, recalls also the *Expositio totius mundi et gentium*, which remembers that also another city, Edessa, was opened to commercial exchanges. G. TRAINA, *Le frontiere armene dell'Impero romano. I due punti di vista*, in *La mobilità des personnes en Méditerranée de l'antiquité à l'époque moderne...*, 217, underlines wealth and prosperity of the cities involved starting from III century.

¹⁴ On the question and, in general, on the several treaties involving Roman and Persians, see TRAINA, *La frontiera armena dell'impero romano...*, 216, according to whom *CJ.* 4.63.4 recalls previous treaties; F. MILLAR, *De la frontière au centre. La monarchie centralisée de Théodose II (408-450 AP. J.-C.)*, in *La mobilità des personnes en Méditerranée de l'antiquité à l'époque moderne...*, 571 ff; D. NAPPO, *I porti romani nel Mar Rosso da Augusto al Tardoantico*, Naples, 2018, 158. The scholar underlines that the treaty seems to refer to consolidate practices; probably, the substitution of *Nisibin* with *Callinicum* was made very early, by the end of IV century (*Amm. Marc.* XXII,3,7 describes the intensity of commercial exchanges in *Callinicum*). This situation, among other things, remained unchanged over time, and the terms of the agreement referred to in the constitution were also confirmed in subsequent treaties concluded with the Persians. Some changes are recorded later: with the treaty concluded by Justinian with the Persians in 562 the city of Dara was also opened. Different approach in TRAINA, *Mercanti e frontiera...*, 57 ff. Regarding the historical events involving the territories mentioned in the constitution a brief reconstruction is offered also in MINALE, *Sulla regolamentazione giuridica dell'importazione, del commercio e della produzione della seta...*, 1131 ff., with bibliographical reference. The scholar accepts the idea that the treaty was concluded at the times of Theodosius II and stresses the fact that *Anthemius (praefectus praetorio Orientis* to whom the constitution is addressed) had a certain role in it.

¹⁵ See *Petrus Patricius*, frag. 14 (MÜLLER, *Fragmenta Historicorum Graecorum*, IV, 189). Here Nisibis is described as a place of contracts: MOATTI, *La mobilità négociée...*, 180, where

The further aspect to highlight is that relating to the negative consequences envisaged for the violation of the rules regarding the conclusion of contracts.

First of all, reference to *emptio-venditio* has to be noticed, but perhaps also to *permutatio*. In the constitution words as *commuto/commutatio* are used: *Nullus igitur posthac imperio nostra subiectus ultra Nisibin Callinicum et Artaxata emendi sive vendendi species causa proficisci audeat nec praeter memoratas civitates cum Persa merces existimet commutandas...*

In late sources similar expressions are sometimes certainly used in place of the terminology *permuto / permutatio*¹⁶ (for example, *CJ. 1.2.14.3* of 470,¹⁷ or *Lex Rom. Burg. 35.5*¹⁸).

Therefore, sales and exchange appear to be the contracts here mentioned,¹⁹ whose conclusion is possible only in the places identified in the treaty and reported in the constitution: this is a small overview on the commercial practices that intervened between Romans and Persians in these areas.

In the case of contracts concluded *praeter haec loca* various consequences are foreseen in the constitution. First of all, the goods that have been sold and bought will be claimed by the *sacrum aerarium*. At the same time, the parties will also lose the price (*numeratum* or *commutatum*²⁰): it will be forfeited by the *sacrum aerarium*.

the scholar remembers that limitations of specific zones where commercial exchanges were authorized or prohibited is already foreseen in the treaties of Rome and Carthage; on the text of *Petrus Patricius* observations also in NAPPO, *I porti romani ...*, 158.

¹⁶ On *commutatio* instead of *permutatio* in late sources see C.A. CANNATA, *Labeone, Aristone e il sinallagma*, in *Scritti scelti di diritto romano* (L. VACCA a cura di), III, Turin, 2014, 72, footnote 36. Cannata recalls also Fest. 234 L. *Permutatur id proprie dici videtur, quod ex alio loco in alium transfertur: at commutatur, cum aliud pro alio substituitur. Sed ea iam confuse in usu sunt.*

¹⁷ *CJ. 1.2.14.3. Imp. Leo et Anthemius AA. Armasio pp. Sane, si haec nostrae perennitatis statuta audaci spiritu et mente sacrilega quisquam oeconomorum vel hominum temeranda crediderit, ipse quidem, qui protervo ausu ecclesiastica praedia donationis vel emptionis seu commutationis aut cuiuscumque contractus alterius nomine nisi eo quo nunc statuimus acquirere vel habere temptaverit, omnem huiusmodi fructum propriae temeritatis amittat: et pretia quidem et munera, quae eius rei gratia data fuerint oeconomio seu aliis quibuscumque personis, ecclesiae lucris et commodis acquirantur...*

¹⁸ *Lex Rom. Burg. 35.5. Sciendum etiam est, quod facta quaterlibet commutatio vicem obtinet emptionis, secundum legem Theodosiani de cognitoribus et procuratoribus...*

¹⁹ On the general idea of *contractus* as *alienatio* in the constitution see E. LEVY, *Weströmisches Vulgarrecht. Das Obligationenrecht*, Weimar, 1956, 22 and fn. 33.

²⁰ It is interesting to think about the meaning of *commutatum* referred to *pretium* in this point of the constitution (*pretium numeratum* or *commutatum*). This could be a further reference to exchanges that took place through *permutatio* (see the translation of this part of the text in G. GRAETREX, S.N.C. LIEU, *The Roman Eastern Frontier and the Persian Wars*, II, London, 2002: "...the price that was paid in cash or in kind..."). J. CUJACIUS, *In Lib. IV Codicis Recita-*

Furthermore, also the penalty of exile is provided in *CJ.* 4.63.4. Therefore, very hard consequences are foreseen by the emperor towards the merchants: they affect not only the commercial business itself,²¹ but also the people involved, for whom the *aeterna exilii poena* is imposed.²²

As already mentioned above, in the third paragraph of the constitution there are also sanctions against *iudices* and *apparitiones*. The emperor in fact establishes the payment of thirty pounds of gold for provincial governors (and *apparitiones*) whose territories were crossed by the Romans or the Persians to go to forbidden places, for each of the contracts concluded in violation of the rules.²³

The provision of a sanction against *iudices* and *apparitores* makes us think of places of trade as places of “control”, where members of *administratio* were involved, with tasks of supervising and intervening so that to avoid the violation of the rules (in this case of the treaty).²⁴

tiones Solemnes. Ad Tit. LXIII De Commerciis et Mercatoribus, in *Opera*, IX, Prati, 1839, col. 602. seems to refer only to contracts of sale. On the other hand, it should be noted that, in the same title of the *Codex Iustinianus*, a constitution is preserved, dating back to 375, *CJ.* 4.63.2 where there is a prohibition of paying gold to the barbarians (for reasons related to the need for its conservation: see BIANCHINI, s.v. *Diritto commerciale* ..., 330). According to R. DELMAIRE, *Les largesses sacrées et res privata. L'aerarium impérial et son administration du IV au VI siècle*, Rome, 1989, 284 this could mean “un commerce par troc ou paiement en argent...”. Referring to this further constitution, CUJACIUS, *In Lib. IV Codicis Recitationes Solemnes. Ad Tit. LXIII De Commerciis* ..., col. 601 underlines that the price has to be paid “in argento, vel in aere, non in auro...”. On the constitution, see also the recent research of F. CARLÀ, *L'oro nella tarda antichità: aspetti economici e sociali*, Turin, 2009, 273 ff. He emphasizes that the *ratio* of the prohibitions in the constitution is that increasing wealth must be guaranteed to the State, while foreign populations must be deprived of products that could be strategic, such as gold.

²¹ CUJACIUS, *In Lib. IV Codicis Recitationes Solemnes. Ad Tit. LXIII De Commerciis*..., col. 602 underlines that similar rules can be found in *CJ.* 4.61.11, on sales of salt.

²² *Poena exilii* can be found also in other constitutions on trade. See *infra*, footnote 30.

²³ On the sanction for *iudices* and *apparitiones* see now MARAGNO, “*Punire e sorvegliare*’ ..., 441 ff. The constitution is examined by the scholar, together with others concerning monopolies and markets. In a broader context, *CJ.* 4.63.4 is part of a group of texts in which sanction of payment of gold is provided for acts committed by members of the *militia* in their relations with citizens. The *iudices* are therefore here recalled not in relation to acts committed in the exercise of the jurisdiction. In fact, from the constitution of Theodosius II the idea seems to emerge that they have surveillance functions, and that they are called to intervene to prevent the movement of merchants outside the territories strictly indicated in the *foedus*.

²⁴ MOATTI, *La mobilità negoziata* ..., 177. Moatti (180 ff.) specifies the need for the presence, in the places authorized for trade, of judicial institutions that could guarantee exchanges and punish violations of the rules. On the control in these places see also CARLÀ, *L'oro nella tarda antichità* ..., 272, fn. 360. On this problem, but with reference to more ancient treaties: MAROTTA, *Tutela dello scambio* ..., 86. The scholar underlines that *emporìa* were places with many experts, such as interpreters, experts of equivalence etc., who could give support in the

In other contemporary sources, in fact, there are traces of various tools used precisely for the surveillance of the spaces of commercial activities and sometimes also of the goods that were the subject of trade.

Think, for example, of the meticulous regulation of the traffic that took place through ports. A constitution of 420, again by Theodosius II, *CTh.* 7.16.3, deals with the complex documentation that had to be produced in this regard. The emperor, in addition to prohibiting illegal goods from being exported to the barbarian populations,²⁵ requires declarations and travel documents (to tell the truth, probably also in order to control the ‘controllers’).²⁶

In this framework, also the role played by the *comes commerciorum*²⁷ is noteworthy. Employed by the *comes sacrarum largitionum*, he was in charge of controlling the commercial traffic of the Empire with the neighbour countries, as well as of supervising the places where commercial activities took place²⁸ (*commercia*²⁹). The *comes commerciorum* was also responsible for the registration of for-

conclusion of the various affairs and to settle discussions that arose between the parties. Observations also in NÖRR, *Osservazioni in tema di terminologia giuridica predecemvirale ...*, 160 ff.

²⁵ On *merces illicitae* see, among others, G. VISMARA, *Limitazioni al commercio internazionale nell'Impero romano e nella comunità cristiana medievale*, in *Scritti in onore di Contardo Ferrini pubblicati in onore della sua beatificazione*, I, Milan, 1947, 445 ff.; ANDREOTTI, *Su alcuni problemi ...*, 245 ff. MINALE, *Commercio e produzione della seta ...*, 1127 ff. focuses on the trade of silk and its limitations.

²⁶ *CTh.* 7.16.3. Impp. Honorius et Theodosius AA. Eustathio praefecto praetorio. *Saluberrima sanctione decrevimus, ne merces illicitae ad nationes barbaras deferantur, et quaecumque naves ex quolibet portu seu litore dimittuntur, nullam concussionem vel damna sustineant, gestis apud defensorem locorum praesente protectore seu duciano, qui dispositus est, sub hac observatione confectis, ut et ad quas partes navigaturi sunt et quod nullam concussionem pertulerunt, apud acta deponant: quorum authenticum nauclerus sive mercator habebit, scheda apud defensorem manente.* The constitution is accepted, with some modifications, also in *CJ.* 12.44.1. On its content: MILLAR, *La monarchie centralisée de Théodose II ...*, 572; M. CALCAGNO, *Un sistema nuovo di controllo sulle navi in partenza: la costituzione di Teodosio II del 18 settembre 420 (accolta in CTh. VII.16.3)*, in *Civiltà classica e cristiana*, III, 1982, 373 ff.; P. CUNEO, *Sequestro di persona, riduzione in schiavitù e traffico di esseri umani. Studi sul “crimen plagii” dall’età diocleziana al V secolo d.C.*, Milan, 2018, 103 ff. Cuneo highlights that, after the establishment of a complex system of control and an articulated administrative apparatus, the emperor here feels the need to prevent acts of abuse by the officials involved.

²⁷ On *comites commerciorum*: DELMAIRE, *Les largesses sacrées et res privata*, ..., 284.

²⁸ On the “excluding” function of these officials (they are called to check that trade does not take place with unauthorized subjects) see the recent work of F. LUCREZI, L. MINIERI, *Comes e commercium nella burocrazia del tardo antico: i comites commerciorum*, in *Atti dell’Accademia Romanistica Costantiniana*, XXIV, *Militia inermis e militia armata. Apparati civili e militari nella tarda antichità. In onore di Maria Campolunghi*, Perugia, 2021, 585 ff.

²⁹ On different meanings of the word: DELMAIRE, *Les largesses sacrées et res privata* ..., 283 ff., and MOATTI, *La mobilità négociée ...*, 179 ff. (with more bibliographical references).

eign merchants: he had to give them an authorization without which they could not remain in the Roman territories.³⁰

In conclusion, it was a complex surveillance system, which also included the rules laid down by the *foedus* taken up in *CJ.* 4.63.4.

4. A further clarification on these aspects can be made.

As it has already been said, the constitutione of Theodosius II clearly states that the reason for the territorial limitations imposed by the *foedus* is to prevent espionage (...*ne alieni regni, quod non convenit, scrutentur arcana*).³¹

The places of commerce were characterized by an intense circulation, not only of people and goods, but also of news and valuable information; the markets were places of passage, located on the borders, and for this reason strategic also from a political and military point of view.

The sources often describe merchants as important instruments for spreading news. Those who travelled for commercial reasons played a very important role in the dissemination of information:³² they used to frequent different peoples, whose language and customs they knew. They often created contacts in view of the opening of new commercial routes and consequently traced paths then followed also on a military and political level. All this could lead to real acts of espionage that jeopardized the security of the Empire.³³

³⁰ *CJ.* 4.63.6. Imppp. Theodosius et Honorius Maximino comiti sacrarum largitionum. *Si qui inditas nominatim vetustis legibus civitatis trasgredientes ipsi vel peregrinos negotiatores sine comite commerciorum suscipientes fuerint deprehensi, nec proscriptionem bonorum nec poenam perennii exilii ulterius evadent. I. Ergo omnes pariter, sive privati seu cuiuspiam dignitatis sive in militia constituti, sciant sibi aut ab huiusmodi temeritate penitus abstinendum aut supra dicta supplicia subeunda.* On the constitution: MOATTI, *Translation, Migration and Communication in the Roman Empire ...*, 124; EAD., *La mobilità négociée ...*, 178; LUCREZI, MINIERI, *Comes e commercium, ...*, 593 ff., who underline that the penalties envisaged for merchants are the same provided for Romans and Persians in *CJ.* 4.63.4: this could be a sign of the same type of repressive approach.

³¹ According to D. LEE, *Information and Frontiers: Roman Foreign Relations in Late Antiquity*, Cambridge, 1993, 63, perhaps other reasons could also be hidden behind these limitations, such as, for example, the need to prevent the export of prohibited goods from the Roman Empire (this concern is also linked to the creation of the *comes commerciorum*).

³² An interesting example can be found in Amm. Marc. XVIII, 1-3. Ammianus refers here of Antoninus, a merchant operating on the borders who then became a persian spy (LEE, *Information and Frontiers, ...*, 63 ff.; TRAINA, *La frontiera armena dell'Impero romano, ...*, 218). For Justinian's age see Procop. *H. A.*, 30. 12-14.

³³ On the strategic role of merchants (and others) in the circulation of information see ANDREOTTI, *Su alcuni problemi ...*, 245; C.R. WHITTAKER, *Frontiers of the Roman Empire. A Social and Economic Study*, Baltimore, 1994, 228 ff. More recently, observations on the question in M.F. PETRACCIA, *In rebus agere. Il mestiere di spia nell'antica Roma*, Bologna, 2012, 94 ff. M. TRAVERSO, *Il segreto come carattere esclusivo del potere nella Roma antica*, in *Za Pruder*,

Given this context, the need was evidently felt to intervene, through the identification of limits which, in the case relating to the *foedus* referred to in *CJ.* 4.63.4, consist in precisely circumscribing the spaces to be used for commercial purposes.³⁴

However, the regulation envisaged in the treaty and implemented in the constitution has one significant exception.

As already mentioned, in the third paragraph of the constitution the emperor states that the limits dictated do not apply to those who accompany the ambassadors of the Persians, ambassadors sent *ad nostram clementiam: Exceptis videlicet his, qui legatorum Persarum quolibet tempore ad nostram clementiam mittendorum iter comitati merces duxerint commutandas, quibus humanitatis et legationis intuitu extra praefinita etiam loca mercandi copiam non negamus, nisi sub specie legationis diutius in qualibet provincia residentes nec legati reditum ad propria comitentur. hos enim mercaturae insistentes non immerito una cum his, cum quibus contraxerint, cum resederint, poena huius sanctionis persequetur.*

Humanitatis et legationis intuitu they are granted with the possibility of trade (*mercandi copia*); so they are authorized to conclude contracts beyond the places recalled in the *foedus*.³⁵

This exception, however, is tempered by the need for those who accompany the *legati* to remain as little time as possible. If they stay too long or even do not return to their country of origin, they will not be granted the right to persevere with commercial exchanges. For those who will continue to practice commercial activities despite the prohibition, but also for those with whom they have concluded contracts, the application of the negative consequences already provided for in the constitution is envisaged.

Even in the last part of the constitution, we can see the intent to limit the stay of these subjects as much as possible, obviously for security reasons.³⁶

VII, maggio-agosto 2005, 14 ff., for a reconstruction of the organization foreseen for the use of the information in a system of *intelligence*. See also MINALE, *Sulla regolamentazione giuridica dell'importazione, del commercio e della produzione della seta, ...*, 1132.

³⁴ As mentioned (see above, fn. 15), already in the first treaty concluded between Rome and Carthage precise territorial limits are foreseen in relation to commercial exchanges.

³⁵ Also in this point of the constitution we can see a small reference to the *permutatio*, given the words *merces commutandae*.

³⁶ On this exception see MILLAR, *La monarchie centralisée de Théodose II ...*, 572. According to MOATTI, *La mobilità négociée ...*, 182, the principles behind this clause are similar to the ones on the ground of constitutions as *CJ.* 4.61.8, dating back to 381. According to the scholar, the sources show that together with *legati* persons like spies or defectors tried to enter roman territories (for example, see *CJ.* 4.41.2, issued by Marcian in 457). On this question F. GORIA, *Romani, cittadinanza e estensione della legislazione imperiale nelle costituzioni di Giustiniano*, in *La nozione di Romano tra cittadinanza e universalità (Da Roma alla terza Roma. Documenti e Studi II)*, Naples, 1984, 317 ff.

Another aspect connected to the constitution of Theodosius II is worthy to be mentioned. In 562 Justinian signed a further treaty with the Persian king Chosroes I. It contained a commercial clause similar to that foreseen by the *foedus* of CJ. 4.63.4. According to the Byzantine historian Menander the Protector³⁷, Roman and Persian merchants, regardless of the type of goods they traded, had to do business by passing through specific customs.³⁸ For ambassadors and other categories there would have been exceptions and in particular the possibility of exchanging goods without territorial limitations (even though the rule was maintained that those places had to be abandoned quickly).³⁹

The scheme of the *foedus*, recalled in CJ. 4.63.4, is therefore a scheme with ancient roots, but which continues to find application in the history of international relations between Romans and Persians.

³⁷ Fr. 6,1-3.

³⁸ According to Menander, it happened on the ground of ancient customs. MINALE, *Sulla regolamentazione giuridica dell'importazione, del commercio e della produzione della seta ...*, 1133, says that this approach seems to be in contrast with the presence in the *Codex Iustinianus* of CJ. 4.63.4 that, as we have seen, incorporates a previous treaty between Romans and Persians. This is a very interesting aspect we cannot investigate here, but which could say something about the relationship of clauses contained in international treaties with imperial legislation. Perhaps, in the writer's perception, despite Theodosius II taking up the clause of *foedus*, the origin of those rules limiting trade should not be linked to the imperial provision but to the practices that were established between the Romans and the Persians.

³⁹ On this treaty see, among others, MOATTI, *La mobilità négoce* ..., 175, and S. PULIATTI, *Incontri e scontri. Sulla disciplina giuridica dei rapporti internazionali in età tardoantica*, in *Le relazioni internazionali nell'alto medioevo...*, 115 ff.; the scholar points out the strong connection between the treaty and the *foedus* recalled in CJ. 4.63.4.