9-2-2015

Dikai Emporikai: A Response to Alberto Maffi

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Prof. Maffi has taken up a topic that unfolds like complex origami to reveal a multitude of questions. The topic of *dikai emporikai* is a very narrow issue, but is a topic that contains mysteries of procedure and substance, as well as raising public policy issues that are critical to the economic power of Athens.

So what value can I add to this discussion? I will attempt to provide an interdisciplinary perspective that springs from my training as a lawyer and my work in other ancient legal systems, such as Islamic law. I will certainly not neglect the Greek text, but my comments will largely come from my work in comparative law and the modern practicalities of commercial practice (the underlying principles of which do not differ much from the ancient practicalities). Of course, I will do so fully aware of the dangers of projecting modern practice and perceptions onto ancient society. My time is limited and so my comments must be as well. I will address four issues. While the first part of my response is a direct reaction to Prof. Maffi's paper, the remaining parts will slowly turn toward my own particular interests regarding *dikai emporikai*. Here are the issues I will address:

1. *Why did Athens create a special commercial court?*
2. *Why was a written contract a requirement of the commercial court's jurisdiction?*
3. *What should we make of the Athenian impulse for the lender to share in the borrower's risk?*

I will first take up the general concept of commercial courts. Prof. Maffi opens his paper with the question of why a commercial action was created in Athens. My starting point here will be to answer the question from a modern perspective. Commercial courts are not unique to ancient Athens. They exist today in many, if not all, of the fifty United States. The rationale for creating a special court for commercial matters is generally described as two-pronged. First, the speed of the proceedings benefits parties who need to continue with their business. Second, the expertise of judges who hear commercial cases repeatedly results in a more consistent and fair application of the law. These reasons for creating *dikai emporikai* have been raised by commentators repeatedly and evidence in support of these reasons can be found in the ancient texts. However, an additional motive for creating this special case existed in Athens: the need to open the courts to foreign traders. This is not an issue in U.S. or European courts where foreign parties can sue (provided certain minimal jurisdictional requirements are met).

Prof. Maffi makes the daring suggestion that speed was not a goal of *dikai emporikai*. He supports this conclusion by pointing, among other things, to the lack of any requirement to use an arbitrator to settle the dispute and the length of the investigations that would be undertaken by the Thesmothetai. If we accept this conclusion, why then was the commercial court created?

At this point, I would like to briefly take up a point that Prof. Maffi promises not to address, but still makes his opinion clear. The question is the meaning of *dikai emmenoi*, which can be translated either as "suits brought on a monthly basis" or "suits that must be decided within a month." Most famously, Edward Cohen argues for the first definition (that *lexeis*, or "complaints", can only be lodged one day every month and that these charges

would be accepted during the winter). Prof. Maffi disagrees. He sees that the pressing need of merchants was to have their business disputes resolved immediately so that they can be made whole again and as soon as possible to continue their business in full force. I agree with this interpretation since it is the only interpretation that makes any sense from a practical perspective. We are not talking about multi-national corporations with resources that allow them to wait for redress. Small businesses can be ruined by a single dispute and need redress quickly in order to survive (and hopefully continue to trade while the summer weather is still conducive to sailing). I have meditated for some time on the following question: *How would it benefit merchants to have their complaints received one day a month during the winter long after the need for redress arises?* I cannot think of any benefit, but I welcome any light that my fellow participants can shed on this. On the other hand, if we accept that *dikai emmenoi* means that the case will be resolved within a month - just as the menstrual cycle (*menses emmenoi*) is finished within a month - then we can argue that speed was a motivation for creating the special court.

Let's turn now to another potential motivation for creating a commercial court. Was a special commercial court created in order to provide expertise regarding commercial matters? If we accept Prof. Maffi's point that jurors were unlikely to have been drawn from a special class of merchants, then such expertise in the court was unlikely.

If neither speed nor expertise motivated the creation of commercial courts, we are left with the need to create a special court to allow complaints from foreigners. While *metics* appeared to have the right to pursue private actions in Athenian courts (Todd: 194), non-metic foreigners did not. However, *dikai emporikai* could be initiated by non-metic foreigners. In fact, both parties could be foreigners. But why would Athens want to give

foreigners the right to use their courts (and to sue Athenian citizens)? For the same reason that modern states provide investor-friendly laws, low taxes, lax regulations, and other enticements to businesses. In order to attract traders and businesses to their economy. Merely the right to sue (whether or not it was speedy or decided with expertise) would have been a reason to do business in Athens. Cohen argues (or argued some 42 years ago) that most merchants resided in Athens and that no special court was needed to resolve disputes involving a foreigner. With all due respect (Dr. Cohen's books are among my favorites), this I find hard to believe.

Written contracts are one of the jurisdictional requirements of the commercial courts. Why is this so? Cohen argues that a written contract alleviates the concern about choice of law. If the contract states the agreement clearly, the jury need not be concerned with whether Athenian practice and law or that of another state governs the transaction. This makes perfect sense and I believe that written agreements would make the jury's decision easier. But are there any other reasons for requiring written contracts? Might there be other benefits of requiring written agreements? I can think of at least two. First, like the common law Statute of Frauds (which exists still in the U.S. for the sale of goods, but has been qualified virtually out of existence in Great Britain and, as I understand, only exists for the sale of real property), the requirement for a written agreement protects against fraud. That is, requiring the showing of a written agreement prevents one party from wrongfully accusing another party of having entered into a contract. This requirement has fallen so far from common use in the modern world that I wonder whether it was a factor in ancient Athens. However, I do believe that written agreements assist with resolving disputes. If the parties agreed on certain provisions in writing, it is

much easier for a court to reach a decision. The Athenian law granting supremacy to written contracts over law only adds to the benefits of entering into a written agreement.

The requirement of written agreements would have the additional benefit of increasing the practice of using written agreements in the Mediterranean. If a trader wanted swift justice in Athens, a written agreement was necessary. Written agreements were likely helpful in other parts of the Mediterranean world where traders did business.

Now I will take some liberties by pursuing an issue that is suggested by Prof. Maffi's paper, but only in the most subtle way. That is, this most peculiar rule that all lenders will suffer total financial devastation if a shipwreck occurs. This is peculiar from a Western modern perspective because lenders excuse payment from borrowers only under the most extreme and uncontrollable circumstances. And they don't always do that. To wit, here is a *force majeure* clause from a modern sales agreement:

> *Seller shall not be liable in damages for any delay or default in performing hereunder if such de-lay or default is caused by conditions beyond its reasonable control including, but not limited to, Acts of God, natural disasters, government restrictions (including, but not limited to, the denial or cancellation of any kimport or export licenses), wars, insurrections, piracy, and terrorism. This clause shall in no way excuse the buyer from any payment obligations.*

Notice that it is only the seller that will not be liable if conditions for performance become impossible. The buyer still has to pay under any circumstances. But this was not the case in Athens. The lender would share this risk and sacrifice all profit (as well as the return of the capital investment) in the event of a shipwreck.

Why is this the case? Why would a creditor want to share in the risk of the borrower? And the situation grows more drastic. Not only does the creditor share in the risk of the borrower not paying at all in the case of shipwreck. The creditor also accepts the risk that the borrower pays late. The lender would share the risk of late payment (i.e. the credit risk) because *tokos* was not based on time, but was a set percentage of the loan (or "yield") regardless of how long it would take the borrower to repay.

So we have the creditor sharing the risk in multiple ways. This is very different from modern western practices, but it is very similar to medieval and modern Islamic financial practices**.** Islamic law despises interest and financial devices for funding businesses require the lender to share the risk of the transaction by, for example, taking equity in the company that is being financed. Why do we see this sharing of risk in Islam and ancient Greece? Is it a moral imperative to not place the risk entirely on the borrower? Or does it serve some other greater purpose? Perhaps to force the lenders to be more prudent in selecting their investments? An Athenian banker would never invest in a trading expedition that involved a rotting boat asail in the storming season. Money would only be spent where the risk of shipwreck or late payment was low. This would encourage wise investments and the most efficient placement of capital.