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Nr. 332 (Aufsatz / *Essay*, 2015)

Transaction Costs in Athenian Law

Law and Transaction Costs in the Ancient Economy, hg. v. Dennis Kehoe, David M. Ratzan, Uri Yiftach (Ann Arbor 2015), 36–50

Schlagwörter: Gerichtsgebühren — Vertragskosten und -gebühren — Dem. 32 — Hypereides, gg. Timandros — soziale Mechanismen

Key Words: court fees — contract costs and fees —Dem. or. *32 —Hyperides* ag. Timandrus *— social mechanisms*

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Law and Transaction Costs in the Ancient Economy

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UNIVERSITY OF MICHIGAN PRESS

ANN ARBOR

Published in the United States of America by the
University of Michigan Press
Manufactured in the United States of America
♾ Printed on acid-free paper

2018 2017 2016 2015 4 3 2 1

A CIP catalog record for this book is available from the British Library.

Legal Documents in Ancient Societies (Conference) (2nd : 2009 : Washington, D.C.)
Law and transaction costs in the ancient economy / Dennis P. Kehoe, David Ratzan, and Uri Yiftach, editors.
pages cm—(Law and society in the ancient world)
"The papers in this collection are the product of a conference titled 'Transaction Costs in the Ancient World' organized by David Ratzan and Uri Yiftach. The conference was held on 27–29 July 2009 at the Center for Hellenic Studies of Harvard University in Washington, DC, with the financial support of the Institute for the Study of the Ancient World (ISAW) of New York University. This conference was one in a series of colloquia held since 2008 by the research group Legal Documents in Ancient Societies (LDAS)."—Acknowledgments.
Includes bibliographical references and index.
ISBN 978-0-472-11960-8 (hardcover : alk. paper)
1. Law and economics—History—To 1500—Congresses. 2. Transaction costs—History—To 1500—Congresses. 3. Roman law—Economic aspects—Congresses. 4. Law, Greek—Economic aspects—Congresses. 5. Law, Egyptian—Economic aspects—Congresses. I. Kehoe, Dennis P., editor. II. Ratzan, David M., editor. III. Yiftach, Uri., editor. IV. Center for Hellenic Studies (Washington, D.C.), sponsoring body. V. New York University. Institute for the Study of the Ancient World, sponsoring body. VI. Title.

KL8022.5.L44 2015
340.5'3—dc23

2015017644

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CHAPTER 1

Transaction Costs in Athenian Law

Gerhard Thür

One of the major issues in an analysis of the role that transaction costs played in the ancient economy is to examine the extent to which a legal system might control the costs of the most important legal acts that individuals could undertake. Doing so would have helped to make the legal system more authoritative in protecting property rights, since parties to transactions would have had a greater incentive to protect their interests through the legal system rather than through extralegal means. The costs of using legal protections are the specific topic of three other essays in this collection, those of Uri Yiftach (chapter 6), François Lerouxel (chapter 7), and Rudolf Haensch (chapter 10). The legal system of classical Athens provides an appropriate place to begin such a study, since the costs of court procedures there, in contrast to other places in the ancient world, are well documented. In this essay, I will focus on three topics important for understanding the role of transaction costs in a legal system: first, court fees, second, fees on and the costs associated with contracts, and, finally, the social mechanisms within a legal system that are designed to balance the interests of parties to lawsuits or contracts.

Court Fees

In Athens, there was a complex system of fees for public and private lawsuits.[1] In this essay, in the interests of space, I will concentrate on trials con-

1. No comprehensive work exists on the fees in public and private lawsuits. For Athens, see the sources and literature quoted in nn. 4 and 9–11 below.

cerning private transactions. These trials took place before different tribunals. Suits between citizens usually came before the Forty. The parties had to submit their cases to a so-called official arbitrator chosen by lot, or a διαιτητής. This man held a preliminary hearing exactly as a magistrate vested with jurisdiction might. The task of the διαιτητής was to prepare the case for the main hearing before the court, or δικαστήριον, or—when possible—to reconcile the litigants. The parties were always free to agree with the settlement proposed by the διαιτητής, in which case no trial took place.[2] This was an extremely efficient procedure, saving costs for both the state and the parties. The δικαστήριον was called to hear the case only if one of the litigants was unsatisfied with the mediation of the διαιτητής; then the matter was decided expeditiously in one session, with no possibility of appeal. For his work, the διαιτητής received one drachma from each litigant, and he could exact an additional drachma for each day that the hearing was prolonged (in all likelihood from the party that had requested a delay).[3]

Court fees, or πρυτανεῖα, were to be paid when a member of the Forty brought the case before the δικαστήριον.[4] In commercial cases, noncitizens were permitted to bring their claims before one of the six θεσμοθέται drawn from the board of the nine supreme magistrates, the ἄρχοντες. Citizens and foreigners had to pay the same court fees: for an amount in dispute under one hundred drachmas, there were no fees; when the amount was between one hundred and one thousand drachmas, each of the litigants had to pay three drachmas; for disputes worth more than one thousand drachmas, the fee was set at thirty drachmas for each litigant. The state thus collected six or sixty drachmas for every major trial. The litigant who lost had to reimburse the winner for his πρυτανεῖα charges.

The treaty between Stymphalos and Demetrias ca. 303–300 B.C.E. envisioned an even more economically efficient process: each party had to deposit a fee equal to one-tenth of the amount in dispute. The court kept safe the double amount, and the winner could withdraw his advance immediately.[5] The reason for this regulation was the international character of the treaty. Since the litigants came from different poleis, such cash advances to

2. Thür 2009: 411.
3. Harpocrat., s.v. παράστασις; Poll. 8.39, 127; Harrison 1968–71: 2:67.
4. For the following paragraph, see Poll. 8.38; Harrison 1968–71: 2:93; Scafuro 2011: 172 n. 115.
5. Thür and Taeuber 1994 (hereinafter *IPArk*): no. 17.57–58. and pp. 230–32 (see discussion there also about other poleis).

the court were the safest way for the winner to get his fee reimbursed. In Athens, no judicial magistrate was allowed to accept court fees on deposit. Instead, he charged and exacted only the amount due to the polis and immediately forwarded this amount to the treasury. It therefore fell to the winner to recover his money, even against a foreigner. To offset the risk for the losing party's not paying, however, foreigners had to secure Athenian guarantors. Athens thus saved on administrative costs and took the burden off the magistrates, while leaving the risk and trouble of collection and reimbursement to the victorious party in a suit.

In Athens, private trials were surprisingly inexpensive. For disputes up to one thousand drachmas (categories 1 and 2), the state took either nothing or only six drachmas. In those cases, a δικαστήριον of 201 judges was impaneled. They were chosen by lot from the entire pool of citizens who had sworn the dikastic oath and were present the morning of the court date. At the end of the day, each juror received three obols (half a drachma);[6] the total cost of adjudication was therefore 100.5 drachmas. If one δικαστήριον could hear and decide four trials a day—this is a conservative estimate: in my own opinion, it was likely to have been closer to eight[7]—the state had revenues of at most forty-eight drachmas and expenses of 100.5 drachmas. In other words, although the fees the state collected obviously depended on the number of trials and their respective valuations (i.e., under or over one hundred drachmas), we may surmise that it had net expenses of at least 52.5 drachmas a day. One can estimate more precisely the costs of trials of the third category, those disputes for amounts over one thousand drachmas. For these cases, a court of 401 judges was impaneled. Since such cases required longer arguments, these courts probably conducted only two or three trials in one sitting. The state thus took in 120 or 180 drachmas, against a cost of 200.5 drachmas for the judges. The cost to the state for the sitting of the larger δικαστήριον was therefore either 20.5 or 80.5 drachmas, depending solely on the number of trials it was able to conduct. Given the preceding calculations, it would seem that the court fees never covered the whole expenses for the δικαστήρια. Mogens Herman Hansen has recently calculated the overall annual cost to the state for all δικαστήρια, private and public, as between twenty-two and thirty-seven talents.[8] Since he did not take into account the fees paid by the parties in private cases and the

6. *Ath. Pol.* 62.2.
7. Thür 2000: 43 with n. 12.
8. Hansen 1995: 195.

fines in public ones, the actual cost was substantially lower; there are too many unknowns to estimate it more exactly.

The state tried, by various means, to prevent citizens and foreigners from abusing the legal system. I will not deal extensively here with the most well-known methods. These include the fine of one thousand drachmas on a citizen who brought a public charge and then dropped the prosecution (before a δικαστήριον of five hundred judges) or failed to secure one-fifth of the votes,[9] as well as the παρακαταβολή, the required deposit for claimants in probate cases equal to one-tenth of the value of the estate and likely forfeited to the estate if the claim was rejected.[10]

In connection with the costs of litigation, the ἐπωβελία is of interest. This was a penalty of one-sixth of the value of the claim at issue—that is, one obol for every drachma—and was assessed in various types of cases when the plaintiff lost or when he failed to secure one-fifth of the votes. It was applied, for example, in guardianship cases. Important for commercial matters was the ἐπωβελία in παραγραφή trials. When a plaintiff filed suit in a δίκη ἐμπορική, the defendant was allowed to enter a special plea—written "beside" the plaintiff's claim, hence *para-graphein*—that the action was barred on certain technical grounds. The magistrate had to bring this plea before a court, and the defendant, now a de facto plaintiff, spoke first. Whichever party lost the παραγραφή trial had to pay the penalty for frivolous suit. The payment was probably made to the opposing litigant.[11] In this case, then, the economic interests of the state were protected only indirectly, but the deterrent effect was the same as in the other penalties previously mentioned.

Today, advocacy costs are an essential part of legal costs. In Athens, every litigant had to speak his case in propria persona. Only one's closest relatives or friends were allowed to act as supporters (συνήγοροι), and they were not allowed to accept money.[12] So we do not find advocates in Athens. Theoretically, the idea of easy and equal access to the law seems to have been achieved: both citizens and foreign merchants could take advantage of the low costs of litigation and the prohibition of paid advocacy. In practice, however, matters were not so simple: litigants often spent on "speechwriters" (λογογράφοι) what they saved on advocacy costs.

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9. Dem. 58.6; Harrison 1968–71: 2:83.
10. Harrison 1968–71: 2:181–83; Scafuro 2011: 23–25.
11. Isocr. 18.35, 37; Harrison 1968–71: 2:185. Whitehead (2002: 86–88) understands the payment as made to the treasury.
12. Dem. 46.26; Wolff 1968: 12 (= 2007: 101); Harrison 1968–71: 2:159; Rubinstein 2000: 52f–53.

At various points in their careers, most of the ten well-known Attic orators plied this trade. Pointedly, Wolff speaks of a "trade" (*Gewerbe*) in order to separate unlicensed speechwriters whose competence lay in rhetoric from the standards and controls associated with the modern profession of a lawyer.[13] The lawyer is bound to the ethical standards of the juristic profession—at least in Europe (and at least in theory). The speechwriter, unlike a lawyer, did not appear in public. Like a tailor, the speechwriter wrote a made-to-measure speech for his client and, if necessary, the συνήγορος. Like actors, the litigants then had to memorize their speeches and rehearse their appearances at court. We do not know how much the speechwriters were paid for their efforts[14] or how frequently Athenians made use of their services.

Sometimes the speechwriters had good knowledge of the law and used this to guide their clients' tactical steps. They formulated the witness depositions and formal questions and challenges (προκλήσεις), which the parties would ask or direct to each other during the preliminary hearing. All documents and statutes on the basis of which a case was to be argued had to be disclosed beforehand to the opponent, in the sessions before the διαιτήτης or the magistrate.[15] With this information, the speechwriter used his rhetorical powers to create a court speech with emotional appeal that would engage and persuade the lay judges. Since the λογογράφος—like a ghostwriter—was working out of the public eye, the winner could not prevail on the loser to reimburse him for the costs. Each party therefore bore this financial risk personally, which represented a considerable obstacle to access to the law. Only litigants well versed in the specialized art of performing court speeches had a realistic chance of winning over the enormous numbers of laymen governed by mass psychology when sitting in the δικαστήρια.

The lay judges, δικασταί, were not the only persons ruled by emotions, since the litigants themselves often pursued other interests besides rationally calculated financial ones when bringing cases. Every lawsuit was a merciless struggle, an ἀγών, for social position, reputation, and honor.[16] In ancient litigation, slandering the opponent was normal. Disputes involving simple economic matters were commonly settled before friends or in the preliminary

13. Wolff 1968: 10 (= 2007: 100).
14. Dem. 35.42 mentions one thousand drachmas in a case for three thousand; I thank Uri Yiftach for this reference.
15. Thür 2007: 142 (= 2008a: 64).
16. Cohen 1995.

hearings. Only totally irreconcilable litigants went to the court, and in doing so, they would insult each other openly in public. In fact, a topos of the court speech was to reproach an opponent with his irreconcilability: he had rejected all means of compromise out of court.[17] The social expectations not to go to court certainly reduced the costs of resolving disputes. But once the trial started, there was no more reasoning on economic considerations. With the speechwriter at his side, the party often invested more than the issue was worth financially. Nonmaterial values, which could certainly also turn into material ones, were now at stake.

Adriaan Lanni holds that trials involving overseas commerce were characterized by more rationality and less emotion.[18] If so, the costs of litigation should have been lower in such disputes. Certainly, as Lanni points out, speeches involving such cases lack the passages in which opponents personally insult one another. The reason—in her eyes—was that foreign merchants were only admitted to file suit in Athens if they had written contracts, or συγγραφαί, with the defendants. Supposedly, the use of συγγραφαί had the consequence that trials could be conducted on a more objective and fair basis when disputes arose. However, the document was only a formal prerequisite to bring a trial in Athens; its existence had nothing to do with whether or not the litigants engaged in ad hominem attacks. Rather, the explanation for the absence of such challenges lies in the fact that it made little sense to attack the reputation of a foreigner in Athens. Therefore, litigants in these cases insulted their opponents indirectly and wove their insults elaborately into the narrative part of the speech.

A good example is the speech of Demosthenes against Zenothemis (Dem. 32).[19] In Syracuse, Protos from Massalia (Marseille) had bought grain with the money belonging to the Athenian Demon, who was, incidentally, Demosthenes's uncle. The grain was loaded onto the ship of Hegestratos, also from Massalia. After being repaired in Kephallenia, the ship arrived in Athens. The grain was unloaded and stored, but Hegestratos, captain and shipowner, had lost his life on the voyage from Syracuse to Kephallenia. Before this unfortunate event, however, he had pledged the grain to his compatriot Zenothemis, who was sailing with him. In Athens, Zenothemis had to use a legal ritual to gain possession of the pledge: he formally invaded the storehouse to take

17. Scafuro 1997: 121–23, 393–96.
18. Lanni 2006: 149–74.
19. For full discussion, see Thür 2003: 60–76.

possession of the grain, for the sole reason of being—again formally—expelled by Demon and Protos, who were, it seems, the actual possessors. Thereafter, Zenothemis filed a δίκη ἐξούλης, a cause of action against expulsion, for the double value of the grain. He first filed against Protos, who escaped from Athens and was condemned in absentia. Then Zenothemis filed the same charge against Demon, who countered with a παραγραφή, arguing that he, Demon, had no commercial συγγραφή with the foreigner Zenothemis and therefore that Zenothemis's commercial claim (δίκη ἐμπορική) against him, the Athenian citizen, was inadmissible (§ 2). If the court had agreed with Demon's argument, Zenothemis would have lost his case completely: as a foreigner, he would not have the standing to file a citizen charge against Demon, and Protos was now beyond his reach. Additionally, Zenothemis would have been punished with the ἐπωβελία, the fine of one-sixth of the value of the grain in dispute.

To achieve his aim of barring Zenothemis's δίκη ἐξούλης against Demon, Demosthenes, as speechwriter, did his best to distort the facts and insult his opponent. First, he obscured the fact that a συγγραφή existed between Demon and Protos, who undoubtedly had contracted, in turn, with Zenothemis. Most likely, it was a bottomry loan, much like the one preserved in the speech against Lakritos.[20] Then Demon accused his opponent Zenothemis of conspiring, with Hegestratos, to commit "insurance fraud": in order to keep the money from all the bottomry loans they had made in Syracuse, Hegestratos had allegedly tried to sink his own ship. Caught in the act, he leaped into the sea and was drowned. Reading between the lines, one comes up with the following, much more likely scenario: Hegestratos went overboard when sailing the vessel, heavily damaged by storm, to Kephallenia, sometime after Zenothemis had loaned him money, probably drafted in a συγγραφή, to repair the ship, as collateral for which Hegestratos pledged the grain cargo. This explains the (sound) basis of Zenothemis's claim and why he pursued Demon in court. All this, however, was cleverly covered up by Demosthenes's fantastic and exciting story about the alleged "insurance fraud."

In addition to distorting the facts, Demon is also made to hurl the gravest of insults in the course of his narrative (§§ 4–13), a way of proceeding that takes us far from any standard of fairness in commercial trials. He even discredits his own agent Aristophon, who had managed to repair the ship in

20. Dem. 35.10–13: the debt is only due when the ship safely arrives in the harbor.

Kephallenia and now, in a fully correct way, was testifying as a witness on behalf of the plaintiff. In Demon's speech, Aristophon is cast as a well-known member of the "Piraeus mafia" (§ 10). Even Protos, Demon's erstwhile business partner, comes in for rough treatment (§§ 24–30). In a pointed contrast, the speech also includes a chapter in which Demon praises his own contributions to the Athenian grain imports (§§ 21–23). To sum up, we have here a commercial case with all the characteristics of an average court speech, only structured in a different way. In practice, by manipulating the facts to his own advantage, an Athenian litigant was able to bar a foreign merchant from due access to the law. For the foreigner, it was impossible to calculate this risk.

For these reasons, studying litigation costs resulting from the law of Athens cannot be confined to court fees and speechwriters' salaries. In theory, Athens had designed an efficient system to enforce commercial claims quickly and inexpensively. However, because of the mentality of the parties and the lay judges sitting in the huge courts, the carefully designed measures often did not work in practice. A further difficulty was the primitive structure of the Athenian law of contract. A debtor who did not perform his duties was not condemned simply to pay compensation. Instead, according to the principle of the δίκη βλάβης (an action for tort), he could be forced to pay double the amount. If the creditor had several codebtors defaulting on their common obligations, the punishment could also be cumulative. An example of redoubling and cumulating penalties is the case of Pantainetos (Dem. 37).

Instructed by Nikoboulos and Euergos, Antigenes, slave of the first, had privately seized from Pantainetos thirty minas of silver (half a talent). Pantainetos was going to use this to pay the state rent for a silver mine in Laurion (§ 22). Because of the delay in payment, Paintainetos was registered as a state debtor for double the amount, or one talent (§§ 22 and 24). He therefore sued Nikoboulos for two talents, double the amount again (§ 50), even though he had already received two talents from Nikoboulos's partner Euergos. Thus an unjustified securing of half a talent turned into a fine of one talent and private penalties of four talents.[21] This system is far from economic compensation. Nevertheless, like the high risks of lawsuits, the archaic rigor of contract enforcement indirectly brought it about that the parties performed their duties as far as possible voluntarily.

21. Thür 2006: 163.

Fees on and Costs of Contracts

On this topic, one can be very brief: as far as is known, there are no sources. From Athens, not a single private contract is preserved as an original document. The ὅροι (stone monuments recording mortgages) sometimes mention sale or encumbrance contracts on real property but never provide the full texts.[22] From a bottomry loan deed transmitted by Demosthenes (35.10–13), we see that Athenians did use extended contract forms—in this case, one that was widespread over the Mediterranean world down to the Roman period.[23] Yet we know nothing about professional scribes or their salaries. This technical knowledge doubtless belonged to the business of tradesmen and bankers.

Athens had fees for the services it provided in official auctions. The responsible officers for this matter were the "sellers" (πωληταί), assisted by a herald (κῆρυξ). The objects of these auctions were confiscated goods[24] and leases (Athens let out its silver mines, temple lands, building projects, and tax collection). *Athenaion Politeia* 47.2–3 deals with the duties of the πωληταί, but without mentioning any fees.[25] Only from the πωληταί records preserved in inscriptions do we know about a sales tax (ἐπώνιον) and herald's fees (κηρύκεια),[26] probably assessed at 2 percent of the price. The whole system of public finance, including an import tax exacted at the harbor, cannot be dealt with in this study.

Indirectly, the prices of goods were influenced by whether the seller had to guarantee title for the buyer. Buying from the state at an auction was safe.[27] A private seller had to offer guarantees against eviction, and he probably added a certain premium to the price to cover this risk. Not from Athens but from Stymphalos, we discover that buying in the marketplace, the agora, was privileged with just this sort of protection: even if one bought stolen goods at the agora, one was not compelled to return them to the owner.[28] This statute concerned first and foremost durable goods like slaves or livestock, not consumer items such as wine and grain. For real property, there was always one person who acted as a guarantor, a βεβαιωτής or πρατήρ.

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22. Finley 1951: 21.
23. Thür 1987.
24. Hallof 1990.
25. See the 1981 commentary by Rhodes.
26. Longdon 1991: P 2, 3, 5, 53.
27. Pringsheim 1961: 305.
28. *IPArk* no. 17.121–24 with commentary.

Social Mechanisms

The free market, regulated by supply and demand, is a social mechanism that—in a global perspective—regulates the costs of goods. I cannot say whether and to what degree this economic mechanism was actually operative in classical Athens. In this section, I will concentrate on three legal institutions that optimized the economic balance between the parties of a contract or legal dispute: public auction, the estimation of the penalty in the law courts, and the leasing of an orphan's estate. In all these cases, law and psychology went hand in hand to create institutions significant for Athenian economic life.

A transparent and fair auction was a means for the seller to realize the best price, rent, or wage. From Athens, we know about only official auctions, not private ones.[29] Looking to the πωληταί records for the silver mines, the figures for the rents leave some reason to doubt whether an auction took place with every lease. On the one hand, the leases for some mines were sold for high, oddly specific prices (e.g., 17,750 drachmas).[30] Such examples seem to indicate productive mines let to the highest bidding entrepreneur. On the other hand, we have many smaller, stereotyped figures of 20 or 150 drachmas, which cannot be the result of auctions. The mines leased for these amounts seem to be unproductive. How did the πωληταί lease them? *Athenaion Politeia* 47.2 tells us that the πωληταί let the mines in conjunction with the βουλή, or Council. We should suppose that the five hundred members of the Council, presided over by the πωληταί when deciding such cases, were asked to decide which one among several applicants was the most suitable. The procedure was a social or political interaction between the competing applicants and the controlling organ of the state, rather than a purely economic one.

Much easier to explain is the social mechanism governing the relationship between litigants and the δικαστήριον when it came to assessing penalties. When the defendant in a commercial trial was found guilty, there remained the problem of how to assess the penalty. Normally, it was set at double the amount of the βλάβη, the "harm" or financial loss the plaintiff had suffered. Yet the smaller δικαστήριον of 201 citizens technically did not

29. Pringsheim 1961.
30. Langdon 1991: P 19.26–30; see Faraguna 2006: 146–47 with discussion of earlier literature.

have the legal capacity to assess any amount: a δικαστήριον of that size could only vote "yes" or "no." Here the Athenians followed the simple principle of giving both litigants the chance to suggest a penalty amount for an up-or-down vote. The plaintiff would submit his estimate, or τίμημα, in the written statement of his claim. If condemned, the defendant then also had the opportunity to submit his τίμημα. Both litigants had a short time to present orally the justifications for their estimates.[31] Then the judges decided for one of the two petitions. The litigants were thus confronted with a psychological dilemma: if the plaintiff gave too high of an estimate, he risked having the δικαστήριον agree with the defendant's lower estimate, and vice versa for the defendant. Of course, this mechanism did not always succeed in bringing about the legally correct result; but the court did thereby avoid making difficult calculations as to the real damage, while encouraging the parties, who were in a much better position to know the truth of the matter and the true value of the dispute, to submit reasonable estimates. Complicated lawsuits thus could be brought to an end within a single court day with the greatest probability of a just and economically fair outcome.

In the recently published fragment of the speech of Hyperides against Timandros, we find the mechanisms of auction and τίμησις (estimation) combined.[32] The trial concerned a guardianship dispute, or an action on a δίκη ἐπιτροπῆς. After coming of age, Akademos charged his former guardian Timandros with financial malfeasance. As in the case of young Demosthenes against Aphobos (*Dem.* 27), the argument revolved around the guardian's having to give an account of his administration of a business he held in trust. A guardian had two options when it came to managing a business in his ward's estate: either run it himself or lease it out. If he went the first route, the guardian was required, at the end of his duty, to give a full account of his administration, and all profit and loss fell to the ward. In such cases, guardianship trials followed a predictable script. By taking the second route, leasing the business (μίσθωσις οἴκου), the guardian secured a leaseholder who paid a rent to maintain the ward and promised to return the fortune when the ward reached his majority, with the same value as it had had when the leaseholder had received it.[33] On the one hand, the second option was safer for the

31. Harrison 1968–71: 2:80.
32. For the text, see Tchernetska et al. 2007; Horváth 2008. For discussion, see Thür 2008b and 2010.
33. Dem. 27.58.

ward, because the leaseholder took on all the risk; on the other hand, all profit exceeding the fixed rent fell to the leaseholder. Under the second option, the costs of resolving disputes were low, because a lawsuit on guardianship was forestalled by leasing the business.

Another problem involving transaction costs concerned how a ward's business, the οἶκος ὀρφανικός, was leased. Here the Hyperides fragment sheds some valuable new light. Up until now, we have known that the guardian had to register his guardianship with the ἄρχων and, at the time of registration, could also apply to lease out the οἶκος.[34] The ἄρχων then arranged to have the business auctioned before a δικαστήριον. But how was the highest bid determined? One conjecture is that the contract was awarded to the bidder who offered the highest rate of interest. According to another theory, the winner was the person who offered the best security,[35] but if so, this was not properly an auction at all. Auctions based on competing offers of rates of interest depend on bidders being able to assess the value of the capital with reasonable confidence, yet this was precisely the difficulty, as Athenian "businesses" were made up of a combination of slaves, stocks of raw materials and finished products, and credits and debts. In other words, an auction on the basis of rates of interest amounts to holding an auction on two independent variables simultaneously, the value of the capital and the potential business opportunity. While this could have been the case, I think it much more likely that the winning bid represented the highest assessment of the capital.

One finds some support for this conjecture in the beginning of the new Hyperides fragment. The fragment starts in the middle of the sentence: τοῦ μὲν εὑρίσκοντος ἐν τῷ δικαστηρίῳ μὴ ἔλαττον ἢ τοῖς παισίν ("so that [. . .] might not be less than that realized in court for the children"). From the context, it is clear that the issue concerned the leasing of an estate. But what was "realized" (or "fetched," εὑρίσκοντος) before the δικαστήριον? The first editors suggest that we should understand the phrase to refer to "profit" (λῆμμα),[36] that is, the interest (or, more correctly, the rate of interest). But in a guardianship case, the capital, not the interest, was at stake. It therefore stands to reason that it was the capital that was meant to be safeguarded by allowing the guardian to lease a business instead of administering it himself; moreover, in no source is a rate of interest ever mentioned. (We might reason-

34. Isai. 6.36.
35. Both are discussed in Harrison 1968–71: 1:196.
36. Tchernetska et al. 2007: 3f.

ably speculate that the interest rate was fixed by custom or statute.) Therefore, I suggest that we see the phrase as referring to a bid on the capital and that the word κεφάλαιον and not λῆμμα stood somewhere in the text that preceded: the translation that would result is "so that the capital in trust [when the guardianship ends] might not be less than that realized for the children in court."[37]

With this case, we thus have a comprehensible auction with a simple social mechanism. In leasing and securing a ward's business, the problem was to assess the capital, the present value of the business itself. The Athenians left this task to the competing applicants. The person who won committed himself to repaying the highest value of the capital. Competition not only avoided underassessment but also guaranteed that the ward, until coming of age, would obtain the highest amount of interest, since, to win the bid, every applicant would naturally bundle into his assessment a premium based on his expected profits. Additionally, sufficient real security was demanded as a part of the bid. Finally, in lines 8–9, we read that not merely the ἄρχων but also the δικαστήριον had to accept the bid. After listening to the speeches of the applicants (ἀκούσαντας), the judges decided by vote (δικάζειν).

Combining the principles of τίμησις and auction, this balanced social mechanism seems well designed to protect the financial interests of the ward, put his business into knowledgeable and capable hands, release the guardian from the onerous and dangerous duty of having to render an account, and save the parties the costs of a guardianship lawsuit. We know that the young Demosthenes could win such a trial only with the help of his teacher, the speechwriter Isaeus. What we do not know is how much Demosthenes had to pay to his teacher out of the fortune recovered in court—in any case, the fee paid to Isaeus must have been a considerable transaction cost.

Conclusions

In the preceding discussion, we have seen that the legal framework of classical Athens affected transaction costs in some unexpected ways. Three topics that shed light on transaction costs have been studied here. First, represent-

37. In Thür 2010: 8 n. 4, I suggested the following restoration: [ἐξὴν δὲ τοῖς ἐπιτρόποις μισθῶσαι τὸν οἶκον κατὰ τοὺς νόμους, ὥστε τὸ κεφάλαιον τὸ διαχειρισθὲν] τοῦ μὲν εὑρίσκοντος . . . (cf. Dem. 27.58).

ing a substantial cost in judicial proceedings were not the court fees but, rather, the fees for advocacy. However, since the (ghost)writers of the court speeches did not act openly, their wages remain in the dark. Even in simple business disputes, the parties had to resort to skillful oratory. Double penalties for breaching a contract and a harsh rigor of enforcement deterred merchants from bringing one another to trial. Second, it is difficult to calculate the costs in drawing up private contracts. Private deeds were drafted by the personnel of merchants or bankers. Sales taxes were only imposed in public auctions. Third, we must not overlook the importance of social mechanisms, where law and psychology went hand in hand. Public auctions did not always comply with the best bid, and self-assessing by legal opponents or competitors avoided complex jurisdictional measures.

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IPArk, see Thür and Taeuber 1994.

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