Journal of Interdisciplinary History, L:2 (Autumn, 2019), 237–264.

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Debt Litigation and the Performance of Law Courts in Eighteenth-Century Portugal

Ever since the publication of North's seminal work, scholars have recognized the fundamental role played by institutions—both formal and informal—in relation to economic growth, arguing that their primary goal is to reduce uncertainty and therefore transaction costs. Recent years have witnessed a flurry of research using financial data to study the relationship between institutions and economic development. Economists and economic historians have viewed formal institutions, in general, and the law courts, in particular, as useful observatories for assessing the impact of institutions on the economic performance of different countries. Despite the evident difficulties in measuring the quality of the judiciary, economic theory argues that efficient law courts may indeed promote investment and lead to economic growth.[1]

Although European historiography has recently begun to explore the link between law courts and economic performance, the information available about the uses made of justice in early modern Portugal is still limited. Hitherto, research on formal legal institutions has dwelt mainly upon three main topics—the organization of the judiciary and the magistracy and the functioning of specific courts, such as the high courts (*Casa da Suplicação* and *Desembargo do Paço*) and those dealing with crimes against faith (*Tribunal da Inquisição*) or matters of conscience (*Mesa da Consciência e Ordens*). Except for Reis' work, which focuses largely on the credit market and the judiciary in the second half of the nineteenth

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1 Douglass North, *Institutions, Institutional Change and Economic Performance* (New York, 1990). For the relationship between the judiciary and economic growth, see Rafael La Porta et al., "Legal Determinants of External Finance," *Journal of Finance*, LII (1997), 1131–1150; *idem*, "Law and Finance," *Journal of Political Economy*, CVI (1998), 1113–1155; Edward Glaeser et al., "Do Institutions Cause Growth?" *Journal of Economic Growth*, IX (2004), 271–303.

century, Portuguese historiography has fallen far short in its study of the relationship between formal legal institutions and the functioning of financial markets.[2]

This article represents a first step toward filling this gap. It addresses the question of how well Portuguese law courts enforced loan contracts in the eighteenth century. It starts from Reis' assumption that nineteenth-century Portugal offers an example of markets with high levels of risk, due to the inefficiency of the law courts. According to Reis, lenders charged a premium in contracts with or without adequate collateral, signaling "a collective perception that the judicial system was not adequately protecting the contractual rights of creditors." In his view, the problems of the Portuguese judicial system were rooted more in the judges, who were "captive and venal," rather than in the rules or institutions themselves. Admitting that his conjecture applies to the eighteenth century, this article explores a different method for measuring the "quality" of law courts. So far, historical research on this topic has used the interest rates of contracts to assess the performance of formal legal institutions. However, the analysis herein relies mainly on lawsuits, placing greater emphasis on two variables that are also considered to be good indicators of the quality of law courts: (1) the length of time that judicial proceedings normally took (quantitative variable) and (2) the execution of the collateral that secured the loans (qualitative variable). Such an emphasis makes it possible to assess not only the efficiency of the courts—their authority to execute contracts correctly with a minimal expenditure of effort, time, and other resources—but also

2 See, among others, António Hespanha, *As vésperas do Leviathan: instituições e poder político. Portugal, século XVII* (Coimbra, 1994); José Subtil, *O Desembargo do Paço (1750–1833)* (Lisbon, 1996); *idem*, *Dicionário dos desembargadores: 1640–1834* (Lisbon, 2010); Nuno Camarinhas, *Juízes e administração da justiça no Antigo Regime: Portugal e o império colonial, século XVII e XVIII* (Lisbon, 2010); Stuart Schwartz, *Burocracia e sociedade no Brasil colonial: O Tribunal Superior da Bahia e seus desembargadores, 1609–1751* (São Paulo, 2011); Nuno Camarinhas, "Justice Administration in Early Modern Portugal: Kingdom and Empire in a Bureaucratic Continuum," *Portuguese Journal of Social Science*, XII (2013), 179–193. For the credit market and the judiciary in Portugal, see Jaime Reis, "The Portuguese Judicial System in the Nineteenth Century: Rules, Risks, and Judges," in Debin Ma and Jan Luiten van Zanden (eds.), *Law and Long-Term Economic Change: A Eurasian Perspective* (Stanford, 2011), 277–299; *idem*, "Institutions and Economic Growth in the Atlantic Periphery: The Efficiency of the Portuguese Machinery of Justice, 1870–1910," in Hadi Salehi Esfahani, Giovanni Facchini, and Geoffrey J. D. Hewings (eds.), *Economic Development in Latin America: Essay in Honor of Werner Baer* (London, 2010), 73–101.

their efficacy, particularly their ability to produce the expected outcome (executing the collateral given in the contracts).[3]

This article looks closely at the credit activities of the Lisbon Misericórdia, a lay brotherhood founded in the late fifteenth century. The crucial advantage of studying this institution is that it was far from being an irrelevant creditor in Lisbon during the eighteenth century. A recent study has shown that the volume of credit granted by the Misericórdia represented, on average, 24 percent of the total amount of credit formally awarded by one of the eighteen public notaries operating in the city. The second advantage is that the Misericórdia's credit activity involved little asymmetrical information. Whereas previous studies about the enforcement of contracts have examined impersonal credit relationships, the current case involves parties who knew each other beforehand, since the Misericórdia (creditor) preferably loaned money to its members (debtors). That is to say, both parties played the game according to the same rules; creditors and debtors knew each other in advance, participated in an associational life, shared the same socioeconomic background (grandees), had equal access to the law courts, and enjoyed similar means of directly obtaining royal grace and favor.[4]

3 Reis, "Portuguese Judicial"; van Zanden, Jaco Zuijderduijn, and Tine De Moor, "Small Is Beautiful: The Efficiency of Credit Markets in the Late Medieval Holland," *European Review of Economic History*, XXVI (2012), 3–22; Zuijderduijn, "On the Home Court Advantage: Participation of Locals and Non-Residents in a Village Law Court in Sixteenth-Century Holland," *Continuity and Change*, XXIX (2014), 19–48; Timur Kuran and Jared Rubin, "The Financial Power of the Powerless: Socio-Economic Status and Interest Rates under Partial Rule of Law," *Economic Journal*, CXXVIII (2018), 758–796.

4 For the Portuguese credit market in the eighteenth century, see Maria Manuela Rocha, "Crédito privado num contexto urbano (Lisboa, 1770–1830)," *Análise Social*, XXXIII, 145 (1998), 91–115; Nuno Luís Madureira, "Crédito e mercados financeiros em Lisboa," *Ler História*, XXVI (1994), 21–44; Rocha and Rita Martins de Sousa, "Moeda e crédito," in Pedro Lains and Álvaro Silva (eds.), *História Económica de Portugal (1700–2000)*, I (Lisbon, 2005), 209–236. For the analysis of Barbuda Lobo's notary bureau, one of the eighteen public notaries operating in Lisbon, see Leonor Freire Costa, Rocha, and Paulo Brito, "Notarial Activity and Credit Demand in Lisbon during the Eighteenth Century," *GHES Working Papers Series*, LI (2015), 1–28, available at https://ideas.repec.org/p/ise/gheswp/wp512014.html; *idem*, "Money Supply and the Credit Market in Early Modern Economies: The Case of Eighteenth-Century Lisbon," *ibid.*, L (2014), available at https://ideas.repec.org/p/ise/gheswp/wp522014.html; *idem*, "The Alchemy of Gold: Interest Rates, Money Stock, and Credit in Eighteenth-Century Lisbon," *Economic History Review* (2017), 1–26. For the significance of the Lisbon Misericórdia as a creditor, see Rodrigues, "O incumprimento do crédito no século XVIII: o caso da Misericórdia de Lisboa," in Bruno Lopes and Roger Lee de Jesus (eds.), *Finanças, Instituições, Crédito e Moeda em Portugal e no Império (Séculos XVI–XVIII)* (Coimbra, 2019), 231–262.

Following the work of Bourdieu, scholars have argued that given certain norms, information, and attitudes, social relationships generate intangible "resources," granting individual and collective returns. The maintenance of social ties, or "social capital," via reiterated transactions with the same parties can foster mutual trust and cooperation. The economic literature has imported the concept of *social capital* as a suitable label for markets and organizations in which the risk of moral hazard is limited. The idea is that social capital matters for the working of the markets in at least two ways: (1) It facilitates the exchange of information between parties to a contract and (2) it permits the resolution of conflict without the intervention of a third party (law courts).[5]

Bearing these features in mind, the aims of this article are twofold—first, to assess how eighteenth-century Portuguese civil law courts dealt with economic transactions and, second, to evaluate the quality of formal legal institutions in settling disputes about loan contracts. Accordingly, this article is driven by three hypotheses: (1) Given that information was not a critical issue in relation to the Misericórdia's credit activity, we expect to find that minimal use was made of the law courts. Since parties not only shared the same socioeconomic background but were also members of the same confraternity, the number of disputes resolved via legal means must have been low. (2) If the law courts had intervened, their efficiency would have been guaranteed through their non-observed conditions for making partial decisions. (3) If the law courts were competent, judicial proceedings would not have taken a long time; the collateral would have been executed; and creditors would have been refunded. Lengthy judicial proceedings and the non-execution of collateralized assets would indicate that the law courts performed poorly in the protection of creditors' property rights and the fulfilment of contracts. With the exception of Zuijderduijn's recent chapter, scholars have tended to overlook the question of the execution of collateral in credit agreements.

5 The literature about social capital is extensive. See, for example, Pierre Bourdieu, "The Forms of Capital," in John Richardson (ed.), *Handbook of Theory and Research for the Sociology of Education* (New York, 1986), 241–258; James Coleman, "Social Capital in the Creation of Human Capital," *American Journal of Sociology*, XCIV (1988), s95–s120; Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York, 2000). This journal published a two-part special issue entitled "Patterns of Social Capital," *Journal of Interdisciplinary History*, XXIX (1999), 339–782.

Therefore, this article seeks to discover how easy it was to execute collateralized assets and to assess the extent to which foreclosure meant the protection of creditors' property rights and the reimbursement of loans.[6]

The findings in this article are based on a newly assembled data set that includes both the loan contracts established by the Lisbon Misericórdia and 990 lawsuits from the Misericórdia's private court of law (exclusive jurisdiction). This data set contains information about the duration of individual judicial proceedings, the subject-matter of the litigations, the profile of the litigants, and the amounts of money at stake. The article further analyzes the deliberations of the Misericórdia's advisory board in order to appraise informal mechanisms of contract enforcement.

A detailed scrutiny of the Lisbon Misericórdia's credit activity and the "quality" of its private law court discovers that, notwithstanding the reasonably short time for the court's proceedings and its routine execution of collateral, the Misericórdia was never able to solve its loan-default problem nor to protect its property rights. As a result, the Misericórdia's credit activity was subjected to rationing in 1768 and, shortly afterward, in 1775, the Portuguese Crown prohibited the Misericórdia from participating in the private credit market.

THE LISBON MISERICÓRDIA AND ITS CREDIT ACTIVITY The Portuguese Misericórdias were lay associations that, acting under royal protection, performed the fourteen Christian charitable practices known as the works of mercy. Following the founding of the first Misericórdia (August 1498), in Lisbon, by Queen Leonor (1458–1525), many others were established in the kingdom and its territories. By the end of the sixteenth century, at least 101 Misericórdias had emerged in Portugal, creating a uniform model for poor relief. The specific nature of these confraternities helps to explain such a rapid expansion. First, they enjoyed autonomy from both municipal and ecclesiastical administration, as well as autonomy from one another. Second, unlike other European confraternities, the Misericórdias did not restrict their support

6 Zuijderduijn, "The Other Fundamental Problem of Exchange: Mortgages, Defaults and Debtors Protection in Sixteenth-Century Holland," in Chris Briggs and *idem* (eds.), *Land and Credit: Mortgages in the Medieval and Early Modern Countryside* (Cham, 2018), 281–307.

to members only. Instead, their primary goal was to assist the poor strata of society (children, the infirm poor, orphan girls, poor prisoners, needy travelers, and the "ashamed poor"). These confraternities were designed to provide a complete charitable program, not to undertake just one work of mercy, as was the case with their European counterparts.[7]

Although different in nature and purpose, the Misericórdias, in general, and Lisbon's, in particular, had two features in common with the guilds, relating to their tendency to foster social capital—"closure" and "multiplex relationships." As exclusive networks, the Misericórdias enacted statutes (*Compromisso*) that imposed a *numerus clausus* on membership (*irmãos* or brothers), which varied from Misericórdia to Misericórdia. Once the *numerus maximus* had been reached, no one could join the confraternity until a member either passed away or was dismissed. According to the statutes, half of the brothers were required to be nobles (referred to as "brothers of a higher condition") and the other half were to be non-nobles, mainly craftsmen. Additionally, members had to be older than twenty-five years, able to read and write, and untainted by Jewish or Moorish blood linked to their names or those of their ancestors. That women were barred from membership, at least from 1577 onward, conveys that the Misericórdias were confraternities "of and for men." All these prerequisites, which screened potential members for social status, wealth, human capital, religious background, and gender, gave the Misericórdias the appearance of important statutory groups and turned them into closed social networks.[8]

7 For examples of the extensive literature about the Misericórdias, see Isabel dos Guimarães Sá, *Quando o rico se faz pobre: Misericórdias, caridade e poder no império português, 1500–1800* (Lisbon, 1997); *idem, As Misericórdias portuguesas de D. Manuel a Pombal* (Lisbon, 2001); Laurinda Abreu, *The Political and Social Dynamics of Poverty, Poor Relief and Health Care in Early-Modern Portugal* (New York, 2016); *idem, A Santa Casa da Misericórdia de Setúbal de 1500 a 1755: aspectos de sociabilidade e poder* (Setúbal, 1990); Maria Antónia Lopes, *Pobreza, assistência e controlo social em Coimbra, 1750–1850* (Viseu, 2000), 2 v.; Maria Marta Lobo de Araújo, *Dar aos pobres e emprestar a Deus: As Misericórdias de Vila Viçosa e Ponte de Lima (Séculos XVI–XVIII)* (Vila Viçosa, 2000); José Pedro Paiva (ed.), *Portugaliae Monumenta Misericordiarum* (Lisbon, 2002–2010), 9 v.; Joaquim Veríssimo Serrão, *A Misericórdia de Lisboa: Quinhentos anos de História* (Lisbon, 1998); Victor Ribeiro, *A Santa Casa da Misericórdia de Lisboa* (Lisbon, 1998); for the number of foundations, Paiva (ed.), *Portugaliae Monumenta Misericordiarum. I. Fazer a História das Misericórdias* (Lisbon, 2002), 19. By 1640, there were at least 300 Misericórdias in Portugal.

8 For social capital and early modern guilds, see Sheilagh Ogilvie, "Guilds, Efficiency and Social Capital: Evidence from German Proto-Industry," *Economic History Review*, LVII (2004a), 286–333; *idem*, "The Use and Abuse of Trust: Social Capital and Its Deployment

Accordingly, as Ogilvie noted for early modern guilds, the Lisbon Misericórdia generated the four forms of value associated with social capital: (1) a code of shared norms (*Compromisso*), (2) spaces of deliberation for the flow of information, (3) regulations regarding expulsion (*risco de irmãos*), and (4) collective efforts to obtain privileges from the Portuguese monarchy, one of which was the ability to have a private judge.[9]

The Misericórdia was run by an administrative board (*Mesa*) consisting of thirteen members—six noblemen, six non-noblemen, and a chairman, known as the purveyor, also a nobleman—who were selected each year by indirect election; the main board was assisted by an advisory body (*Junta* or *Definitório*), also elected annually. Like the Mesa, the Definitório had a hybrid membership of ten noblemen and ten non-noblemen, who were generally older members with experience in the administration of the brotherhood. The Definitório dealt with matters relating to membership, money lending, religious ornaments, inheritances, and bequests, as well as matters linked to the deliberations of previous Mesas. In the eighteenth century, Portuguese grandees occupied all the administrative positions in the Lisbon Misericórdia, and they also comprised the noble membership of the advisory boards. These individuals belonged to the king's circle and were among his closest advisors. As discussed below, their presence may well explain much of the benign treatment that was afforded to the Misericórdia as a creditor.[10]

By the eighteenth century, the Lisbon Misericórdia was the main charitable institution in Portugal, having taken over responsibility for several of the duties performed by other organizations, such as the management of hospitals, visits to poor people in

by Early Modern Guilds," *Economic History Yearbook*, XLVI (2005), 15–52; *idem*, *Institutions and European Trade: Merchant Guilds, 1000–1800* (Cambridge, 2011). From its founding until 1577, the Lisbon Misericórdia had 100 members; after that date, it had 600 members. In 1787, eighteen years after a royal decree that ordered the incorporation of the members of the extinguished Jesuit confraternities into the Misericórdia, the Lisbon Misericórdia numbered 1,662 brothers (262 nobles and 1,400 non-nobles). For the idea that the Portuguese Misericórdias were confraternities "of and for men," see Sá, *Quando o rico*, 94–95.

9 Ogilvie, "The Use and Abuse of Trust."

10 "Compromisso da Misericórdia de Lisboa," in Abreu and Paiva (eds.), *Portugaliae Monumenta Misericordiarium. V. Reforço da interferência régia e elitização: O governo dos Filipes* (Lisbon, 2006), 293. For the relationship between the Portuguese high nobility and these brotherhoods, see Sá, *Quando o rico*; *idem*, *As Misericórdias Portuguesas*; Abreu, "Purgatório, Misericórdias e Caridade: condições estruturantes da assistência em Portugal," *Dynamis*, XX (2000), 395–415; Serrão, *A Misericórdia de Lisboa*.

prison, and the upbringing of abandoned children. Besides pursuing its charitable purposes, the brotherhood also administered a vast estate, continuously swelled by the legacies that it received. The Lisbon Misericórdia's social functions, as well as its management of a large estate, led to its involvement in the credit, land, and property markets.

Portuguese historiography widely acknowledges the preference of these confraternities for the credit market. Although many Misericórdias faced serious financial problems in the eighteenth century due to non-performing loans, the interest received from capital loans was one of the primary sources of their annual income, at least from the mid-seventeenth century onward. For example, in 1757, 85 percent of the Lisbon Misericórdia's revenue came from its credit activity in both the private and public market [as stated above, the money loaned by the Misericórdia represented, on average, 24 percent of the total amount of credit formally registered at any one of Lisbon's eighteen public notaries during the first half of the eighteenth century]. Yet even though the Misericórdia was one of the major creditors in the city, it was neither a craft/religious guild nor a *Monti di Pietà* that loaned money to the poor at low interest rates. On the contrary, the Lisbon Misericórdia, as well as the other Misericórdias of the realm, specialized in lending money to their board members, creating an "endogenous" (inner-circle) activity.[11]

From 1690 to 1799, the Lisbon Misericórdia granted at least 102 loans, of which 94 went to grandees of the realm (amounting to roughly 548 *contos de réis*, 94 percent of the total amount of credit), most of them in the first half of the century. The debtors were primarily members of the brotherhood who occupied essential

11 Several studies recognize the preference of the Misericórdias for the credit market: Sá, "Património e economia da salvação," in *idem* and Inês Amorim (eds.), *Sob o Manto da Misericórdia: Contributos para a História da Santa Casa da Misericórdia do Porto* (Porto, 2018), I, 155–214; Abreu, *A Santa Casa,* 55; António Magalhães da Silva Ribeiro, *As práticas de caridade na Misericórdia de Viana da Foz do Lima (séculos XVI–XVIII)* (Braga, 2009), 421–422; Inês Amorim, "Património e crédito: Misericórdia e Carmelitas de Aveiro (séculos XVII e XVIII)," *Análise Social*, XII (2006), 693–729; Rute Pardal, "O sistema creditício na Misericórdia de Évora em finais do Antigo Regime," *Callipole*, XVIII (2010), 27–36; Américo Fernando da Silva Costa, *A Santa Casa da Misericórdia de Guimarães (1650–1800): caridade e assistência no meio vimaranense dos séculos XVII e XVIII* (Guimarães, 1999), 106–128, 142–143. For the importance of credit activity within the Lisbon Misericórdia's total sources of income, see Rodrigues, "O incumprimento." The Misericórdia's interest rates were similar to those charged in the city's notarial credit market, varying from 5 to 6.25% yearly. Lower interest rates were usually applied when the debtor belonged to a charitable or religious institution. Costa et al., *Alchemy of Gold*.

positions within the Misericórdia, either as chairmen or as members of the administrative or advisory boards. Although the credit activity of the Misericórdia frequently followed social ties, borrowers were not exempt from securing their loans by enlisting personal guarantees (third-party co-signers) or by using their property and other assets as collateral. As in any loan contract, such guarantees were essential; they not only mitigated the problem of adverse selection and moral hazard but also provided the Misericórdia with an estimate of the amount of money that could be recouped in the event of a default.

Table 1 shows the type of collateral offered in return for a loan by the Misericórdia's borrowers. Rights over income, financial assets, inheritances, or debts backed 69 percent of such loans, and real property backed only 14.7 percent. These numbers may indicate that the Misericórdia preferred assets that could be easily executed, or at least did not depend on the property market. A significant proportion of these assets were subject to specific laws of inheritance through entailment ("*bens vinculados*" and "*bens de morgado*") and thus were indivisible and inalienable. In fact, most of these estates and their income were the result of royal grants; in order for them to be mortgaged, the debtor required a royal licence.

Table 1 Type of Collateral Offered for a Loan by the Lisbon Misericórdia's Borrowers (1690–1799)

COLLATERAL		%
Rights over	Income	51.0
	Financial assets	13.3
	Inheritances	1.4
	Debts	2.8
Real estate	Urban	6.3
	Rural	8.4
Movable goods	Jewels	0.7
Not specified	"Bens livres"[a]	1.4
	"Bens de morgado"[b]	12.6
Annual amortization		2.1

[a]"Bens livres" is non-entailed property.

[b]"Bens de morgado" is entailed property.

SOURCES Cartório, Escrituras; Registo de Escrituras; Juros Particulares (1745–1797) (SCML/GF/RC/04/02/Lv001); Instrução precisa para o governo e administração da fazenda da Santa Casa da Misericórdia (1757) (SCML/GF/AC/01/Lv002); Contas correntes dos devedores da Casa (1756–1832) (SCML/GF/EJ/03/Lv001); Portarias e outros diplomas (1767–1797) (SCML/CR/05/cx001), doc. 43; Cofre da Mesa (1750–1751) (SCML/GF/CO/01/Lv001), Arquivo Histórico da Santa Casa da Misericórdia de Lisboa (hereinafter AHSCMLSB).

The king could allow a debtor to pledge the assets either for a limited number of years or "until the total satisfaction of the debt." The frequency with which such licences were extended suggests that many of these loans were of a long-term nature. In any case, because the pledged assets related to specific laws of inheritance, the debts were transferable, passing from one generation to another. However, as will be demonstrated below, despite the inheritable character of most collateralized assets, debtors defaulted on loans, resulting in inconvenience to the brotherhood.[12]

THE MISERICÓRDIA'S LAW COURT As a result of the re-organization of Portugal's poor-relief system in 1564, the Lisbon Misericórdia took over the management of the hospital of Todos-os-Santos, the largest hospital in the kingdom. The administration of hospitals by a local Misericórdia was not confined to Lisbon's; others were to follow its example after the mid-sixteenth century. Nevertheless, as a consequence of this incorporation, in December 1565, Cardinal Dom Henrique (1512–1580) granted the Lisbon Misericórdia the right to its own exclusive legal jurisdiction (*Juízo Privativo das Causas da Misericórdia e do Hospital*, or, in other words, a "private court of law"). This prerogative meant that thenceforth, all lawsuits in which the Misericórdia and the hospital were entangled, whether as plaintiffs or defendants, would come before a private judge, specially appointed to the post. Under the Portuguese system of justice, the right of exclusive jurisdiction was not uncommon and, by the end of the Ancient Regime, almost all aristocratic and ecclesiastical houses enjoyed it. Although these "private courts of law" depended on a royal concession, the advantages that they brought were widely recognized. Among other things, such courts had jurisdiction at first instance, which means that a single judge could take charge of any proceedings involving those institutions.[13]

According to the Portuguese law (*Ordenações Filipinas*), the Misericórdia's private judge was one of the judges (*desembargadores*)

12 For the Portuguese nobilities and the institution of entailment, see Nuno Gonçalo Monteiro, "17th and 18th-century Portuguese Nobilities in the European Context: A Historiographical Overview," *e-Journal of Portuguese History*, I (2003), 1–15; *Ordenações Filipinas*, book 4, title 100; Manuel de Almeida e Sousa de Lobão, *Tratado prático de morgados* (Lisbon, 1841).

13 Cardinal Dom Henrique was regent during the minority of the future King Sebastião (1512–1578). *Collecção da legislação antiga e moderna do Reino de Portugal: Leis extravagantes collegidas e relatadas pelo lic. Duarte Nunez do Lião per mandado do Rei Sebastião* (henceforth referred

of the *Casa da Suplicação*, the High Court of Appeal. Twice a week, on Thursdays and Saturdays, in one of the rooms of the Supreme Court, the judge tried all the cases brought by or against the Misericórdia or the Hospital of Todos-os-Santos. In the case of interlocutory decisions, the judge dispatched the lawsuits with the help of two other magistrates chosen by the governor of the Casa da Suplicação. Once the case records were completed and the case was ready for judgment, the private judge wrote his opinion in Latin, followed by the opinion of the other two magistrates. When the three judges agreed, a sentence was passed and ordered to be executed, without any leave for appeal, because "those cases of the said Misericórdia and hospital that are pious are to be dispatched with no delay, in order to mitigate expenses."[14]

Besides this private judge, two members of the brotherhood (*mordomos das demandas*) dealt with disputes that involved the institution directly. Every Friday, these men met with the Misericórdia's administrative board in order to acquaint themselves with the litigation in progress and to ascertain which stage the respective lawsuits had reached. Although the statutes (1618) recommended that these two members not cause the lawsuits to be lost due to negligence or a lack of attention, it also warned them "not to show too much eagerness, because it is more important for the Misericórdia to maintain its reputation of fairness, justice, and truth than to acquire new resources with signs of violence and artifices."[15]

Unlike other European countries, where docket rolls contain summaries of the claims brought before the law courts, Portugal has no such sources; data had to be gathered directly from the lawsuits. Between 1700 and 1799, 990 lawsuits directly involved the Lisbon Misericórdia or the institutions that it ran. In 834 cases (84 percent), the Misericórdia appeared as the plaintiff, and in 156 cases (16 percent), it appeared as the defendant.

to as *Collecção da legislação*) (Coimbra, 1786), I, 127; *Ordenações Filipinas*, book 1, title 16. For the "private courts of law," see Monteiro, "Poder senhorial, estatuto nobiliárquico e aristocracia," in José Mattoso (dir.) and António Manuel Hespanha (coord.), *História de Portugal* (Lisbon, 1993), IV, 352–353; Monteiro, *O crepúsculo dos Grandes: a casa e o património da aristocracia em Portugal* (Lisbon, 2003), 414–418.

14 *Ordenações Filipinas*, book 1, title 16; Joaquim José Caetano Pereira e Sousa, *Primeiras Linhas Sobre o Processo Civil* (Lisbon, 1825), I; *Collecção da legislação*, 128.

15 "Compromisso da Misericórdia de Lisboa," 297.

Table 2 Type and Value of Claims at the Lisbon Misericórdia's Law Court (1700–1799)

	N	%	LITIGATED VALUE (THOUSANDS OF *RÉIS*)	%
Guardianship[a]	54	6.5	2,013	0.3
Inheritances	78	9.4	14,809	2.4
Internal issues[b]	17	2.0	26,727	4.3
Loans[c]	145	17.4	484,626	78.5
Others[d]	23	2.8	19,270	0.3
Property rights	44	5.3	1,046	0.2
Rent arrears	473	56.7	86,186	14.0
Total	834	100	617,334	100

[a]Lawsuits initiated by the Misericórdia on behalf of foundlings, claiming unpaid salaries.

[b]Lawsuits relating to administrative issues, such as money owed to the confraternity when the officials settled their annual accounts.

[c]Principal and interest due.

[d]Judicial costs and claims of preference.

SOURCES Feitos Findos, Juízo Privativo das Causas da Misericórdia de Lisboa (1700–1799), Arquivo Nacional da Torre do Tombo; Cartório, AHSCMLSB.

Table 2 shows that 90.7 percent of the lawsuits initiated by the Misericórdia were debt-related (rent arrears, loans, unpaid legacies, legal fees, and unpaid wages); 8.2 percent were not related to debts (disputes over property rights, requests for the restoration of buildings, notifications prohibiting renovation work on urban and rural properties, eviction notices, petitions for the cancellation of wills, and so forth); and a further 1.1 percent involved both debts and property rights. These numbers demonstrate that the Misericórdia used the law to solve problems associated with financial constraints caused by another party's failure to pay an outstanding installment, which naturally affected the organization's cash flow. These results are in line with European historiography, which points out that early modern law courts dealt mainly with debt cases.[16]

16 Richard Kagan, *Lawsuits and Litigants in Castile, 1500–1700* (Chapel Hill, 1981), 79–127; Christopher Brooks, "Interpersonal Conflict and Social Tension: Civil Litigation in England 1640–1830," in Augustus L. Beier, David Cannadine, and James Rosenheim (eds.), *The First Modern Society: Essays in Honour of Lawrence Stone* (New York, 1989), 357–399; Craig Muldrew, *The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England* (London, 1998); Elise Dermineur, "Trust, Norms of Cooperation, and the Rural Credit Market in Eighteenth-Century France," *Journal of Interdisciplinary History*, XLV (2015), 485–506; Griet Vermeesch, "The Social Composition of Plaintiffs and Defendants in the Peacemaker Court, Leiden, 1750–54," *Social History*, XL (2015), 208–229.

Particularly interesting, however, is the financial representativeness of these lawsuits. Rent arrears, which represented a significant proportion of the cases brought by the Misericórdia, covered only 14 percent of the total value litigated in court. Yet, lawsuits brought for unpaid loans comprised 79 percent of all the financial costs that the Misericórdia incurred due to defaulters. In any event, the data point to a significant financial burden deriving from unpaid loans and interest, thus suggesting that informal means of solving payment defaults seem to have been ineffective.

The great noble families (grandees) were predominantly implicated in lawsuits relating to defaults in the repayment of loans (61 percent, or forty-seven of the seventy-seven cases). This situation is particularly significant if we consider the amount of money at stake. Of the total amount of money claimed by the Misericórdia in court, 69 percent had the high nobility as defendants, and 85 percent of all the money in lawsuits relating to loan repayments pertained to that elite. As mentioned above, the heavy presence of the grandees in the Misericórdia's credit relations was well known among Portuguese historians, although the value that these cases represented as a proportion of the costs incurred by the Misericórdia in the enforcement of contracts has so far been ignored. The Portuguese literature shows the eighteenth-century Misericórdias to have been the main creditors of the aristocracy. Seldom emphasized, however, is the fact that, despite forming part of the administrative boards, these members of the upper social strata were also defendants at the law court. Evidently, their profile as insiders did not bring them any advantage that can be linked to the effectiveness of informal institutions and social capital in closed networks.[17]

Although, in theory, the composition of the Misericórdia's administrative board—thirteen men, seven of whom were nobles—changed each year, the turnover of members does not appear to have prevented these individuals from redistributing the brotherhood's common resources among themselves. The data reveal that the defaulting debtors were the same people who sat on the administrative boards. The Mesa frequently made advantageous loans to these individuals (also grandees), whose high risk of moral hazard was already known from previous transactions. To put it simply,

17 Monteiro, "O endividamento aristocrático (1750–1832): alguns aspectos," *Análise Social*, XXVII (1992), 263–283.

once they had left their position, they acted no differently in the brotherhood: Having gained access to the Misericórdia's loans (from which they had also benefited in previous years), these noble debtors obtained favorable treatment from the Mesa, which either did not request the payment of interest for long periods of time or simply forgot to collect the debts.

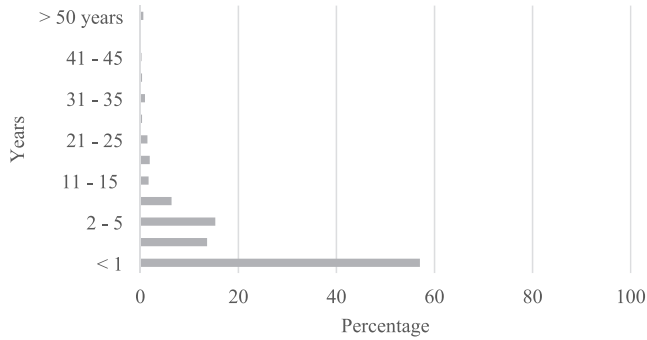
Collusive behavior is typical in professional corporations; the closed nature of such groups favors the development of monopolistic situations. Although the analysis herein is not applied ostensibly to a specifically monopolistic setting, the composition of the administrative boards provided aristocrats prone to malfeasance with access to a pool of financial resources; they were able to extract for themselves a sort of rent that derived from their social ties with the Mesa. Hence, as far as this case study is concerned, the shared norms, information flows, punishments, and collective action that are characteristic features of institutions capable of generating social capital seem to have been inefficient devices in reducing opportunism. If such collusive behavior explains many of the issues, it does not answer the question of why the courts were summoned to resolve the problems of defaults in the payment of loans. It does permit, however, the conjecture that the norms of the brotherhoods and the status of the defendants served to reduce the duration of these defendants' court proceedings, meaning that recourse to the courts was a last resort.

What remains is to assess the efficiency of the court in settling disputes over breaches of loan contracts through an analysis of both the length of time of court proceedings and the execution of collateral. How did the Misericórdia recover its resources and how did the collateral guarantee the payment of a debt in the event of default? Did membership or social status have any effect on the manner in which conflicts were resolved?

THE DURATION OF LAWSUITS As a first step toward analyzing the results, Figure 1 displays the length of time of court proceedings, from the moment the lawsuits entered the court until the execution of the respective sentences.

According to Figure 1, the law court was quick to pass sentence and enforce its decision. Roughly 57 percent of the 834 lawsuits brought before the court were settled in less than one year; 70 percent took less than one year; and just 15 percent lasted more

Fig. 1 Length of Time of Proceedings at the Misericórdia's Law Court (1700–1799)



SOURCES Feitos Findos, Juízo Privativo das Causas da Misericórdia de Lisboa (1700–1799), Arquivo Nacional da Torre do Tombo; Cartório, AHSCMLSB.

than five years. Similar rapid results were also prevalent in other European law courts. As Hardwick, for instance, pointed out, cases brought before the Nantais provost's court and the Lyonnais *Sénéchaussée* lasted fewer than three months from the plaintiff's petition to the court's judgment. Hayhoe concluded that seventeenth- and eighteenth-century French intermediate and lower courts were just as efficient. In the 1750s, those cases reached a settlement within an average of sixty-four days; those settled in fewer than three months lasted only an average of 10.5 days in court. The statutes of the Misericórdia's law court actually called for cases to be resolved quickly, because the length of time spent in court directly affected the poor echelons of society who depended on the institution for their welfare.[18]

To explore these results further, Table 3 unpacks the different types of claim at court. The most striking feature is that, despite being handled expeditiously, the lawsuits concerning defaults on loans took longer at court than did other types of claims.

The speed with which the court dispatched its cases can be explained, at least in part, by the kind of sentence that the judge

18 Julie Hardwick, *Family Business: Litigation and the Political Economies of Daily Life in Early Modern France* (New York, 2009), 64; Jeremy Hayhoe, *Enlightened Feudalism: Seigneurial Justice and Village Society in Eighteenth-Century Northern Burgundy* (Rochester, 2008), 158; Fabrice Mauclair, *La justice au village: Justice seigneuriale en société rurale dans le duché-pairie de La Vallière (1667–1790)* (Rennes, 2008), 559.

Table 3 Length of Time of Court Proceedings per Type of Claim at the Misericórdia's Law Court (1700–1799) (Number of Cases)

		TYPE OF CLAIM						
		LOANS	GUARDIANSHIP	OTHERS	PROPERTY RIGHTS	RENT ARREARS	INTERNAL ISSUES	INHERITANCES
Years	<1	63	36	17	28	271	10	49
	>1–2	18	6	1	3	75	1	9
	2–5	25	9	3	6	75	2	7
	6–10	16	3		2	28	1	3
	11–15	3				10	2	1
	16–20	3			2	7		4
	21–25	8			1	3		
	26–30	2		1				
	31–35	4		1	1		1	1
	36–40	1			1	1		1
	41–45	1				1		
	46–50							1
	>50	1			2			2

SOURCES Feitos Findos, Juízo Privativo das Causas da Misericórdia de Lisboa (1700–1799), Arquivo Nacional da Torre do Tombo; Cartório AHSCMLSB.

decreed. According to Portuguese law, debts originating from contracts drawn up by a public notary had to obtain a rapid (and inexpensive) judicial ruling (summary justice), since the notarial record itself contained the proof of the obligation. On those grounds, the importance of written contracts should not be underestimated. The destruction of the Misericórdia's notary office by the earthquake of 1755 brought financial struggles to the brotherhood because it no longer held the records that certified its investments and, above all, the property rights owned before 1755. In 1757, when reporting the weak financial situation of the Lisbon Misericórdia, Lourenço Filipe de Mendonça e Moura (1705–1788), the count of Vale de Reis and, at the time, the purveyor of the Misericórdia, emphasized the challenges facing the institution due to the lack of public deeds and other written evidence.

Mendonça e Moura specified that tenants either refused to acknowledge the Misericórdia as the landowner or, on different occasions, tried to convince the court that the contracts signed with the brotherhood had been celebrated in perpetuity (*aforamentos*) rather than for a number of lives (*emprazamentos*). This predicament was also threatening to credit arrangements; along with the public deeds, the accounts ledgers had also vanished. Whenever possible, the Misericórdia proved the obligations through notary certificates. However, when written evidence was missing, disputes persisted, often to the benefit of debtors, who either denied any financial obligation or asked for a significant proportion of the debt to be waived.[19]

19 Gestão Financeira, Administração da Casa, Instrução precisa para o governo e administração da fazenda da Santa Casa da Misericórdia (1757) (SCML/GF/AC/01/Lv002), fl. 1, Arquivo Histórico da Santa Casa da Misericórdia de Lisboa (hereinafter AHSCMLSB). *Aforamento* and *emprazamento* were two emphyteutic contracts, by which the landlord conceded the "useful domain" to a tenant (*foreiro*, taker) and, in consequence, received an annual ground rent (*foro*). Despite their long-term character, aforamento was in perpetuity, that is, with no fixed term, and emprazamento was in lives, generally three lives. For contracts of this type, see Rui Santos, "Direitos de propriedade fundiária e estratificação social rural: um contributo sociológico," in Álvaro Garrido, Leonor Freire Costa, and Luís Miguel Duarte (eds.), *Estudos em Homenagem a Joaquim Romero Magalhães: economia, instituições e império* (Coimbra, 2012), 277–293; *idem* and José Vicente Serrão, "Property Rights, Social Appropriations and Economic Outcomes: Agrarian Contracts in Southern Portugal in the Late Eighteenth Century," in Gérard Béaur et al. (eds.), *Property Rights, Land Markets and Economic Growth in the European Countryside (13th–20th Centuries)* (Turnhout, 2013), 475–494. According to Portuguese law, if the notarial obligation were to vanish, the obligation still remained; the interested parties could testify to the existence of the contract via other means (a copy from the notary records or through certified witnesses) (*Ordenações Filipinas,* book 1, title 78, §19; book 3, title 60, §6).

In any event, the law stated that lawsuits "founded on public deeds, should be concluded briefly." One of the most common clauses of these written contracts was the "confession of judgment," by which debtors (whether tenants, borrowers, or other parties) recognized and confessed a debt from its inception: "and for the greater assurance of this loan he [the debtor] desires this public record to be judged by sentence (. . .) and due to this all his goods and property that are enough to pay everything shall be seized, for he wishes to be sentenced by precept and for that purpose he confesses this debt in his name and submits the said goods and property to the said seizure, and wishes this confession and nomination to be used as a judicial term." A defendant's confession was considered definitive proof, exempting a plaintiff from the need to present further evidence. In such cases, the judge sentenced the defendant according to precept and under the terms of his confession.[20]

After a plaintiff presented the notarial record before the law court, the liability of the defendant was incontestable, and the plaintiff could request that the court seize the mortgage offered in the contract (a general mortgage consisted of all a debtor's assets, both present and future; a particular mortgage might be, say, a specific piece of land). Creditors had neither the authority to take possession of the debtors' assets nor the power to seize them; such seizure required a court order vouchsafed by a judicial officer. In other words, it was a judicial mechanism that removed the goods from the defendant to protect them from being hidden, consumed, or alienated.[21]

Once a creditor had requested the seizure of assets, a judge fixed a period of ten days (*assinação de dez dias*) for the defendant to pay the debt, to provide proof that it had already been paid, or to raise objections against the sentence. If the defendant did not meet the debt or provide satisfactory reasons for its default (or when the court dismissed these reasons), the judge usually mandated the seizure of goods as attachment for the debt, allowing the debtor twenty-four hours to pay or to assign movable or real property for seizure. Should the defendant not specify the property

20 *Ordenações Filipinas,* book 3, title 25; title 66, § 9; title 30. Cartório, Registo de escrituras (1772–1779) (SCML/CT/09/01/Lv003), fl. 196v, AHSCMLSB.

21 *Ordenações Filipinas,* book 2, title 52, §7; book 3, title 86, §1.

for seizure, the plaintiff could ask the judge to select those assets. Seizures followed a particular order: The authorities first took a debtor's movable goods, taking real property only if the sale of those goods did not provide sufficient funds to cover the debt. This regimen shows that debtors were protected to some extent from losing their properties. This observation finds further support from the fact that certain goods were barred altogether from seizure, including clothes, agricultural implements, work animals, legal and educational books, the tools of a debtor's trade, etc.[22]

The process of confiscation normally completed within three months. If the seized goods or assets proved insufficient, the plaintiff could ask the court to initiate new seizure proceedings. After seizure, goods were subject to a valuation, which was published in edicts stating their quality and price—movable property posted for nine days and real property for twenty days. The highest bidder at the public auction normally took the assets, but when no one bid, two solutions were possible: (1) The court would either ask the defendant to pay the debt or present a bidder or (2) would award the assets to the lender "for a fair price in payment of the debt."[23]

In the study at hand, it is difficult to determine which debts were reimbursed after a judicial sentence. Disputes about small claims were probably paid, or at least settled, via unofficial means. In cases involving small amounts of money, such as rent arrears, the typical seizure of things like domestic utensils and furniture suggests that debtors had few assets of their own. Hence, they may well have chosen to acknowledge their debts rather than object to them. The acknowledgment of debts may also indicate that the recourse to formal institutions was a means of resolving disputes through an out-of-court settlement; few debtors appealed the judicial ruling or appeared in court more than once. Altogether, given the short

22 *Ibid.*, book 3, title 25: "Because all the disputes based on a public record should end briefly, we order that if a person brings a case against another for some reason, or for some sum of money, that he should receive or deliver, and the plaintiff shows the public record of obligation, or the written charter, signed by the defendant (. . .), the judge will adjudicate that the case shall immediately designate ten peremptory days for the defendant to pay the plaintiff everything declared in the public record or charter, or to prove within ten days the reasons for not paying or complying with the public record or charter. Once the ten days have elapsed, if the defendant does not confirm that he has paid or does not declare the reasons why he has not paid the sum or complied with the order, the defendant will be obliged to pay." *Ibid.*, book 3, title 86, §7–8, §14, §23; book 4, title 57.

23 *Ibid.*, book 3, title 86, §14, 18; title 87, §1; book 4, title 6.

duration of the proceedings, the Misericórdia's law court seems to have performed reasonably well.

The end of court proceedings—usually indicating the enforcement of a ruling—did not necessarily mean creditors' reimbursement, particularly with regard to lawsuits about loans, which involved significant amounts of money unlikely to be paid in a single installment. In this regard, what actually happened after the enforcement of a judicial sentence? The economic literature stresses that the assignment of collateral was intended to constitute encouragement for contract compliance, with the assumption that a default on loans would lead to the forfeit of the property pledged. However, as Zuijderduijn noted in the case of sixteenth-century Holland, debtors' loss of collateral was not inevitable; in fact, expropriation occurred only in exceptional circumstances. In some cases, the type of collateral that was provided constituted a severe obstacle to the effective execution of contracts.[24]

THE EXECUTION OF COLLATERAL Although Table 3 reveals that lawsuits relating to the payment of loans were resolved quickly, it shows nothing about the enforcement of court decisions. Our information about the protection of creditors' property rights is limited; we do not know the extent to which the law court favored and protected creditors' interests. The usual assumption is that the judicial decision to seize debtors' assets resulted in their movable or real property being sold at public auction to provide compensation for plaintiffs through the sale of collateral. But even though most cases, especially those involving only small amounts of money, followed that course, not all obligations evolved in this way. As will be seen, both the quality and the nature of collateral were essential in determining how legal proceedings developed and how creditors fared.

The execution of collateral enables us to assess the quality of the law court, since, in theory, a court's performance depended on how swiftly and efficiently it performed an execution of collateral. We mentioned above that the loans granted by the Misericórdia were secured mostly by the rights over the income deriving from entailed property (*bens de morgadio*) and the Crown's assets. Estates of this kind were subject to a precise system of inheritance, which,

24 Zuijderduijn, "Other Fundamental Problems."

together with other conditions, prohibited the sale or division of the property to ensure its transmittal intact to the heirs. As Monteiro pointed out, in eighteenth-century Portugal, more than half of the income of aristocratic families derived from royal endowments. Since this kind of estate formed the central core of aristocratic revenues, it is not surprising that entailed property served as the main form of collateral for the loans granted by the Lisbon Misericórdia.[25]

If an entailed estate could not be sold, however, the Misericórdia had no right to sell the collateral at public auction. In this case, however, Portuguese law allowed for the seizure of the income from these assets to refund creditors. Hence, the judicial sentence required the payment of the debt in installments, through the consignment of rents. At first sight, this form of amortizing the debts appears to have been favorable for both the Misericórdia, which avoided the transaction costs associated with public auctions, and its debtors, who obtained a gentler way to make payments. However, most of the time, the situation was more complicated. Even after a judge had decreed the execution of collateral and the consequent consignment of rents to meet the debt, debtors continued to default on their payments. Debts often remained unpaid for several decades and, in some cases, for more than a century.[26]

An examination of the execution of movable and immovable property pledged as collateral requires scrutiny of all the circumstances surrounding the loans granted by the Misericórdia. At the beginning of the nineteenth century, the debts owed to the brotherhood amounted to 1,333,787,611 *réis*, which reveals the limited effectiveness of the law court in resolving the problem of defaults in loan repayments. In 1823, thirty-seven of the fifty-one debtors (73 percent) still owed more than 50 percent of the principal borrowed; twenty-four had amortized nothing at all; seven owed less than 10 percent of the principal; and only three had fully paid the principal. Moreover, most of these debts were contested by the Misericórdia at court, receiving a judicial sentence that consisted of the consignment of rents for the payment of the debt in installments.

Given the difficulty of providing a systematic rendering of the data available for this matter, the selection of a few case studies will suffice to illustrate how the intervention of a third party did not

25 For the Portuguese grandees' sources of income, see Monteiro, *O crepúsculo*, 262–263.
26 *Ordenações Filipinas*, book 3, title 93.

always solve the problem of unpaid loans. In 1745, the Misericórdia loaned 24 *contos de réis* to Dom Henrique Francisco da Costa e Sousa, the fourth count of Soure, at 5 percent interest. The written contract stated that the debtor had requested the money to repay other debts (estimated at 12.6 *contos de réis*) with a higher interest rate (6.25 percent). To secure the loan, he pledged "all his goods and incomes, with the special mortgage of the revenues from his *morgados*" [entailed property]; according to the royal licence, he could pledge the income from the said morgados to the amount of 6,000 *cruzados* (2.4 *contos de réis*) to pay both the principal and the annual interest. The notarial record stated that half of the value of the mortgage would be used to satisfy the current interest payments and the other half to "kill the principal," that is, to amortize the loan, so that the Misericórdia would be entirely refunded within twenty years.[27]

Twenty years later, however, in 1765, when the royal licence expired, the count had only amortized 1.5 *contos de réis*, or 6 percent of the principal. In 1768, the Misericórdia's administrative board sent him a letter asking for the payment of the accrued interest: "Whenever Your Excellency has any doubts in this matter, you shall permit the Misericórdia to use the right granted by Law (. . .) May God keep Your Excellency for many years." Yet, the threats of litigation and the menacing tone of the document seem to have had little result. In 1769, the Misericórdia went before the law court to seek redress, executing the pledged incomes offered by the debtor in the contract.[28]

According to Table 4, despite the attachment of the collateral, the brotherhood received little more than half of the annual interest. In 1778, the debtor had paid only 2.9 *contos de réis*, and the interest rose to 8.8 *contos de réis*. The fact that the judicial ruling did not take into account either the reduction of the principal or the accrued interest explains why the amortization of the debt was so small. In this case, as in many others, the court decision did not resolve the problem of the debtor's default in repaying the

27 Gestão Financeira, Administração da Casa, Instrução precisa para o governo e administração da fazenda da Santa Casa da Misericórdia (1757) (SCML/GF/AC/01/Lv002), fl. 64v; Gestão Financeira, Empréstimos a juros e outras dívidas, Contas correntes dos devedores da Casa (1756–1832) (SCML/GF/EJ/03/Lv001), fl. 94, AHSCMLSB.

28 Cartório, Certidões, maço 1, processo 21; Cartório, Execuções, maço 2, processo 3, AHSCMLSB.

Table 4 The Execution of Collateral: The Debt of the Count of Soure (Thousands of *Réis*)

		PRINCIPAL DUE	ACCRUED INTEREST	PAID INTEREST
Years	1778	21,081	8,826	120
	1780		2,108	1,336
	1782		2,108	1,484
	1784		2,108	1,440
	1786		2,108	689
	1788		2,108	1,120
	1790		2,108	1,430
	1792		2,108	1,440
	1794		2,108	1,940
	1796		2,108	400
	1798		2,108	0
	Total	21,081	29,907	11,400

SOURCE Gestão Financeira, Receita, Juros Particulares (1745–1797) (SCML/GF/RC/04/02/Lv001), fls. 16, 208, AHSCMLSB.

loan. Moreover, it created a new chain of debtors, the tenants of the seized assets. In fact, a significant proportion of the rent-arrear cases brought by the Misericórdia did not stem from its own estates but from the property pledged by its noble debtors. When the tenants of the seized properties failed to fulfil their payment of the rent, the Misericórdia brought new lawsuits against these tenant/debtors. In the case of the debt of the count of Soure, between 1772 and 1799, the brotherhood brought twelve lawsuits against defaulting tenants, demanding 11 *contos de réis* of rent arrears. The collection of these rents, however, proved to be problematical, since the tenants had no assets or property that could be seized.

The lawsuit brought against João Gonçalves Serra, the tenant of a farm at Grizos belonging to the count of Soure, is highly symptomatic. Various goods belonging to the tenant were seized and sold at public auction. But because the sale yielded the paltry sum of 5,540 *réis*, the judge ordered that the execution be terminated, due to "the lack of property, as stated in the records." Unfortunately for the creditors, this sort of outcome was not uncommon. As Table 4 shows, at the end of the eighteenth century (1798), the count had not even repaid the principal and had satisfied only 38 percent of the accrued interest. This situation continued into the first decades of the nineteenth century. In

1834, the count owed the Misericórdia 89 *contos de réis*, 79 percent of which corresponded to accrued interest.[29]

The books of Tomás de Távora, third count of São Miguel, are also indicative of both the good performance of the court and the limited ability of the judicial sentence to protect a creditor's rights. According to Monteiro, in the eighteenth century, the Lisbon Misericórdia was by far the largest creditor of this aristocratic household (in 1795, the Misericórdia and the Hospital of Todos-os-Santos granted 76 percent of all its existing debts; merchants granted 15 percent; and other religious confraternities granted about 6 percent). Between 1716 and 1721, the Misericórdia loaned 12.8 *contos de réis* to the count of São Miguel. To secure the loan, he pledged several rents designed to amortize both the principal and the interest. Due to the count's heavy indebtedness, the Supreme Court (*Desembargo do Paço*) appointed a judicial committee (a private judge) to supervise the payment of his debts. Seven years later, in 1782, the Misericórdia's law court undertook twenty-eight seizures of small rents that he owned, some of which other creditors had already seized. Despite these seizures, the value of the consigned rents corresponded to only 36 percent of the amount of the current interest. In this case, too, the pledged income gave rise to a new chain of debtors, as between 1786 and 1799, the Misericórdia brought seven lawsuits against defaulting tenants.[30]

As shown in Table 5, by the end of the eighteenth century, the count of São Miguel had satisfied only 24 percent of his previous interest in arrears (25 *contos de réis*). Again, although the law court had correctly judged the case, its intervention neither resolved the failure to pay the loan nor safeguarded the creditor's property rights.

The two cases described above exemplify a common occurrence among the loan disputes at the Misericórdia's law court. A small proportion of lawsuits relating to the non-payment of loans did, however, have a different outcome. For instance, in 1744, Fernando Teles da Silva, the fourth marquis of Alegrete, borrowed 8 *contos de réis* from the Misericórdia at a 5 percent interest rate. In 1759, the principal remained unamortized, resulting in a sum of 429,996 *réis* of accrued

29 Gestão Financeira, Receita, Juros particulares (1745–1797) (SCML/GF/RC/04/02/Lv001), fls. 16, 208, AHSCMLSB.

30 In the eighteenth century, the king often appointed a private judge for these aristocratic households. As Monteiro pointed out, one-third of the revenues of the high nobility were allocated to paying massive debts (Monteiro, *O crepúsculo*, 407–418).

Table 5 The Execution of Collateral: The Debt of the Count of São Miguel (Thousands of *Réis*)

		PRINCIPAL DUE	ACCRUED INTEREST	PAID INTEREST
Years	1778	9,791	16,237	
	1780		979	90
	1782		979	556
	1784		979	757
	1786		979	85
	1788		979	522
	1790		979	1,000
	1792		979	1,012
	1794		979	191
	1796		979	481
	1797		490	413
	Total	9,791	25,538	6,106

SOURCES Gestão Financeira, Receita, Juros Particulares (1745–1797) (SCML/GF/RC/04/02/Lv001), fls. 8, 180, 184–185, 205, 217, 219, 246, 256, 264, 273, 282, AHSCMLSB.

interest. In view of the absence of any notarial record of this loan agreement, the debtor's son, the count of Vilar Maior, "voluntarily and spontaneously" drew up a new contract with the Misericórdia, specifying new mortgages and determining that half of their value was to repay the past interest and the other half to repay the current interest. In 1760, the Misericórdia used the law court to pursue this obligation and to seize the collateral. Yet, despite the seizure, the Misericórdia remained unpaid, and, in December 1772, the accrued interest amounted to more than 2 *contos de réis*.

Three years later, in 1775, after the king had allowed the Misericórdia to "make adjustments, reductions, transactions and agreements with its debtors," Fernando Teles da Silva, the third marquis of Penalva, grandson of the original debtor, signed a new contract with the brotherhood, in which he presented new collateral and guaranteed an annual amortization of about 900,000 *réis*. This new contract even stated that the whole debt would be satisfied within twelve years. Although the debtor started to comply with the contractual terms immediately, in 1786 he received a royal favor granting a licence to keep pledging his assets "until such time as the Misericórdia was fully reimbursed." Almost fifty years after the loan was awarded, in February 1791, he finally satisfied the debt, having paid almost the same amount of money in terms of interest

(7,135,210 *réis*) as the principal of the loan he had initially asked for (8,000,000 *réis*).[31]

Note that while these cases were still in court, the defendants approached the Misericórdia with various proposals to change the terms of their debts. The implication is that the law courts worked to prevent the debtors from defaulting. As Greif and others have pointed out, when the judiciary fails to deliver an adequate solution, extrajudicial means may emerge as a way of resolving disputes. The few sources that offer information about the informal mechanisms of conflict resolution reveal that debtors frequently approached the advisory and administrative boards of the Misericórdia to renegotiate their debts. Most of these individuals had inherited the original debt. Although they sometimes attempted to deny the financial obligation, they usually sought special prerogatives to offer additional collateral. The Misericórdia occasionally released them from the payment of interest in return for the complete repayment of the loan. Nonetheless, the new credit conditions proposed by the heirs of the original debtors did not solve the problem of default in the repayment of the loan.[32]

The cases described above illustrate the limited capacity of both formal and informal mechanisms to reduce the risk of defaulted debt. In fact, the findings suggest that the issue lay less in the effectiveness of formal legal institutions than in the nature of the collateral. The fact that the mortgaged assets were subject to specific laws of inheritance—namely, the ban on the division and sale of the property—created severe obstacles for the lenders/plaintiffs. Bear in mind that the Portuguese credit market suffered from a severe deficiency: the lack of a general mortgage register. In practice, a debtor could pledge the same property against several loans, without the creditors being aware of any prior transactions relating to the same property.

31 Cartório, Registo de escrituras (1766–1772) (SCML/CT/09/01/Lv001), fls. 87v–89v; Gestão Financeira, Receita, Juros particulares (1745–1797) (SCML/GF/RC/04/02/Lv001), fls. 17, 121, 162, 170–171, 247, AHSCMLSB. In September 1771, the king authorized the Misericórdia to "make adjustments, reductions, transactions and agreements with its debtors." See "Provisão régia dispensando a Misericórdia de Lisboa do cumprimento do capítulo treze do seu Compromisso, autorizando-a a fazer ajustes, reduções, transacções e convenções com os seus devedores," in Lopes and Paiva (eds.), *Portugaliae Monumenta Misericordiarium. VII. Sob o signo da mudança: de D. José I a 1834* (Lisbon, 2008), 184–185.

32 Avner Greif, "Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition," *American Economic Review*, LXXXIII (1993), 525–548. Órgãos da Administração, Junta Pequena, Actas da Junta Pequena (1756–1801) (SCML/AO/JP/01/Lv001), fl. 85v–87, AHSCMLSB.

The combination of all these factors might have induced the Lisbon Misericórdia to ration its credit activity. In 1768, the king even determined that the Misericórdia could lend money at interest only under the proviso that the mortgages offered by the potential debtors be published conspicuously. The purpose of this expedient was to overcome the absence of mortgage registration and to prevent the Misericórdia from acquiring assets that were already mortgaged to other creditors. Moreover, in the same royal decree, the king restricted the application of the Misericórdia's loans to specific activities. Evidently, these measures did not improve the efficiency of the Misericórdia's credit activity; in 1775, the king completely prohibited the Misericórdia from participating in the private credit market on the grounds of seeking to protect property rights.[33]

The Misericórdia case study shows that the problem of default was not so much due to the court's incompetence as to the nature of collateral and to the "chronic indebtedness" of certain debtors. The inability of the law court to protect the Misericórdia's possessory interests may well have served to undermine the efficiency of the Misericórdia's credit activity.

The economic literature broadly looks at the role of institutions—what has been called, since North's seminal work, "the rules of the game"—regarding the likelihood of a party not complying with a contract (risk of moral hazard). Neo-institutionalist scholars have claimed that when institutions—either formal (laws and constitutions) or informal (norms and codes of conduct)—are well defined and efficiently enforced, the risk of moral hazard is low, thus promoting the kind of trust that reduces friction between creditors and debtors and often leads to economic growth. When institutions fail, however, opportunistic behavior, as well as litigation, is likely to ensue, signaling high levels of non-cooperation.

This article's examination of the Lisbon Misericórdia's ability to resolve the problem of defaults in loan repayments partially

33 "Alvará régio prescrevendo as normas a observar pela Misericórdia de Lisboa, quando esta emprestar dinheiro a juro," in Lopes and Paiva (eds.), *Sob o signo da mudança*, 75–77; "Alvará régio concedendo aos testadores sem parentes até ao 4° grau o poder de dispor de todos os seus bens a favor da Misericórdia de Lisboa, após consulta régia, e proibindo a mesma Misericórdia de emprestar a particulares dinheiro a juro," *ibid*., 77–79. For the effects of the royal regulation on the Misericórdia's credit activity, see Rodrigues, "Os padrões de juro da Misericórdia de Lisboa, 1767–1797," *Ler História*, LXXIV (2019), 137–160.

confirms the hypotheses presented at the outset, in the process contributing to three strands of the literature: (1) the role of the justice system, (2) the early modern confraternities, and (3) the relationship between formal institutions and credit markets. The results of this study agree with those of the European historiography that most of the cases brought to court related to financial issues—above all, debt cases. Although rent-arrear cases outnumbered all other types of claims, lawsuits relating to the non-repayment of loans were of major importance so far as the legal activity of the Misericórdia was concerned.

The article also shows that, although creditors and debtors shared the same sociological background and engaged in a confraternal life, litigants did not tend to reach settlements out of court. On the contrary, despite the low risk of adverse selection and moral hazard that characterized the Misericórdia's credit activity, the brotherhood resorted largely to the law courts to resolve their conflicts in relation to defaults in credit arrangements. These results challenge the assumption that cohesive groups hold high levels of social capital. The Misericórdia, albeit closed and engaged in multiple ventures, manifested low levels of social capital, whether assessed through the efficacy of informal rules or through the law courts. Although the brotherhood was a close-knit social network, it frequently resorted to the law courts to resolve disputes about credit contracts, not always with much success. At this point we do not have evidence that such behavior exploiting the liquidity of the brotherhood had any impact on the wealth of the brotherhood in the long run.

Furthermore, the Misericórdia case study contributes to the literature about formal legal institutions and credit markets by drawing attention to matters besides the "quality" of the law courts. The findings show that the apparent competence of the tribunal, as indicated by its rapid proceedings and the execution of collateral, was powerless to solve the problem of default or to safeguard a lender's property rights. A key implication is that the quality of formal legal institutions only partly explains the economic performance of the agents involved. Therefore, further studies need to be undertaken in this area, particularly about the nature and the characteristics of collateral, to discover more about the way in which the early modern credit markets functioned.