

Joint Michigan Legal History Workshop/Law & Economics Workshop
9 September 2015

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**How do businesspeople like their courts?
Evidence from mid-19th century
France, England, and New York City**

Abstract: The World Bank's *Doing Business* reports include specialized commercial courts in their list of items in the legal environment that are supposed to help businesses, especially SMEs, to develop. Commercial courts are official, special courts dealing with business disputes and which generally use simpler procedures than other official courts; historically, all or most of their judges have often been businessmen or -women rather than lawyers. This inclusion has certainly helped France gain a few ranks in *Doing Business* reports, as, contrary to statist stereotypes on this country, commercial courts with elected judges have existed there continuously since the 16th century. Elsewhere, however, they were abolished in the end of the 19th century. The US and UK are a special case: they never had commercial courts; however, there were heated debates on this institution in England and in the State of New York in the 1850s-1870s. Those debates ended up with reforms of official courts and the development of privately organized arbitration, rather than with the importation of the continental European commercial courts. Studying these debates as well as 19th-century practices of commercial dispute resolution in France, England and New York City sheds light on the preferences of businesspeople as regards dispute resolution. Many scholars believe that businesspeople prefer, and have always preferred, very formal, official procedures, for the sake of predictability; others point at preferences for flexibility and/or expertise, leading firms away from official courts. The few contemporary empirical studies on this topic offer mixed evidence. Taking into account 19th-century debates and practices points at three necessary clarifications. First, which businesses are we thinking of? (banks or merchant houses, small or big, etc.) Second, how do national legal traditions interfere with their preferences? (not only common law vs. civil law, but also other products of national historical trajectories) Third and most importantly, the menu of available options was never reduced to something purely private, informal and expert vs. something public, predictable and legal: we must consider the finer preferences that led most businesspeople to advocate either for hybrid (official, special, lay) courts or for a system of several complementary forums for dispute resolution.

Note: This draft paper is based on a French manuscript that is to become a book, and that is available at <https://tel.archives-ouvertes.fr/tel-00685544/>

Introduction

The *Doing Business* reports published by the World Bank since 2003 are inspired by the “legal origins” school of thought.¹ Especially in their first issues, the idea that national institutions, especially commercial law, are key to the success of businesses went along with a trust placed in features of the common law rather than civil law tradition—especially its alleged procedural simplicity and protection of creditors. However, one distinctly French institution has always been part of the list of good practices in *Doing Business* reports: specialized commercial courts, with simpler procedures than standard civil courts. Since 2005, such courts have therefore been created, or re-established, in many countries, especially in (English- as well as French-speaking) Africa.²

Given the prevalent beliefs about French statism and about the cult of uniformity in the civil law tradition, characterizing commercial courts as distinctly French might seem surprising. Perhaps even more surprising is the fact that all the French commercial judges, since the creation of the institution in the mid-16th century, have been elected laypersons (heads of businesses, along with senior managers since the 20th century), rather than lawyers appointed by a public authority. This lay character of commercial courts is not explicitly endorsed by the World Bank and has generally not been adopted in the recent creations. It however confers on the French commercial courts an additional aura of adaptability and pragmatism: something more commonly associated with the common law tradition and/or commercial arbitration. How can we make sense of the fact that such commercial courts not only survived the French Revolution, but thrived in the 19th-century, after the Napoleonic codification of law and administrative centralization?

The contrasted fate of commercial courts in 19th-century France, England and United States

Specialized commercial courts were a common feature in continental Europe at that time, partly because they had been exported by Napoleon's armies and subsequently kept by, e.g.,

1 La Porta, Rafael, Florencio Lopez de Silanes, Andrei Shleifer, & Robert W. Vishny. “Law and Finance.” *Journal of Political Economy* 106, no. 6 (1998): 1113-55; for the topic addressed here, Djankov, Simeon, Rafael La Porta, Florencio Lopez-De-Silanes, & Andrei Shleifer. “Courts.” *Quarterly Journal of Economics* 118, no. 2 (2003): 453-517.

2 See e.g. Cofie, Sandra. “Ghana-Establishment of the Commercial Court”» *SmartLessons in Advisory Services*, décembre 2007, 1-4; Hertveldt, Sabine. “Case Study: Rwanda. Pragmatism leads the way in setting up specialized commercial courts.” In *Celebrating Reforms 2008*, 84-91. Washington D.C.: World Bank Group, 2007.

Belgian and Rhineland.³ Yet in many of these countries, reforms of the late 19th century exhibited a preference for non-specialized courts: special commercial courts were abolished in the Netherlands in 1838, 1868 in Spain, 1877 in Germany and 1888 in Italy.⁴ Conversely, the jurisdiction of the 220 French commercial courts regularly expanded (including bankruptcies and maritime conflicts in 1790, promissory notes involving merchants and non-merchants in 1847, conflicts between commercial partners in 1856), and their legitimacy was unquestioned. A representative quote from parliamentary debates on the topic presented commercial courts as “a thing nobody criticizes.”⁵ While in previous centuries, and since 1889, many lawyers have (unsuccessfully) criticized them and asked for their abolition, there were no such attempts in 1789-1889. Conversely, a new institution, labor courts, was modeled on commercial courts; French jurisprudence collections mentioned commercial decisions as sources of law, especially on new questions such as railroad transportation or futures markets; and governments of all political stances regularly asked commercial judges for advice on the evolution of the law.⁶ Commercial courts were completely taken for granted (they were an institution in the strong sense of the word), and they never dealt with as many cases, in proportion of the population, as in the 19th century: 165,000 new cases in 1840 (among which 42,000 were filed in Paris alone, i.e. one for two registered businesses), 225,000 in 1883 (64,000 in Paris).⁷

While we of course lack any direct evidence on the general preferences of French business persons as regards dispute resolution, most of them silently used commercial courts, and those who have left writings generally endorsed them (or advocated for a more democratic election system, otherwise praising the institution). Perhaps more surprisingly, this was also

3 The widespread character of the institution can be checked e.g. in de Saint-Joseph, Anthoine. *Concordance entre les Codes de Commerce étrangers et le code de Commerce français*. Paris: Videcoq père et fils, 1844 (or in English in Levi, Leone. *Universal code of commerce*. Edimbourg: s.n., 1851, heavily inspired by the former).

4 Ciancio, Cristina. « Mercanti e Giudici. Problemi e modelli di giurisdizione commerciale nell'Ottocento europeo. » *Archivio Storico del Sannio*, no. 1-2 (2009): 59-92.

5 « Une chose que personne ne conteste. » *Journal des débats*, 20 January 1840. This was said by Jacques Lefebvre, who had himself briefly been a commercial judge, but the idea was shared by less directly interested politicians.

6 I found 30 such requests for opinions, from ministers of Justice or of Commerce, in the internal minutes of the Paris Commercial Court, still archived there, books 1 to 6, for 1790-1878. On jurisprudence, see e.g. Dalloz, Édouard, & Charles Vergé. *Code de commerce annoté*. Paris: Au bureau de la Jurisprudence générale, 1877: 7% of all cited decisions are from (first degree) commercial courts, as opposed to non specialized other first degree, appeals or supreme courts; more than 10% of decisions on artistic property, the stock exchange, bankruptcy procedures, railroads and maritime questions are from commercial courts. For a general presentation of French labor courts and their similarities with commercial courts, see Kessler, Amalia D. “Marginalization and Myth: The Corporatist Roots of France’s Forgotten Elective Judiciary.” *American Journal of Comparative Law* 58 (2010): 679-720.

7 Those numbers exclude the less numerous but more lengthy bankruptcy procedures, only including lawsuits between two or more parties. By registered businesses, I mean the number of *patente* (commercial tax) payers: see below. Numbers from the official yearly series *Compte général de l'administration de la justice civile et commerciale* (Paris, Imprimerie royale/nationale/impériale, 1833-).

true of governments and political commentators on all sides, including e.g. Victor Hugo, who cited those elected courts as an example for to the socialist experiment of the Paris *Commune*,⁸ in spite of their creation during the Old Regime and their very bourgeois character. How had an apparently so corporatist institution become compatible with a political culture that forbade trade unions and business associations, and theoretically deemed judges to be a mere “mouth of the law?”⁹

It would be tempting to resort to a materialist or functionalist explanation. Commercial courts were extremely cheap, both for the parties and the state, because the judges were voluntary laypersons; in fact, in spite of their extremely low fees, they more than paid for themselves. In addition, their decisions were quick, rarely appealed and generally confirmed when they were.¹⁰ On 30 April 1862, a petition criticizing the specialized lawyers of the Bordeaux commercial court was quickly tabled by the Senate after a senator had remarked that the Paris commercial court was able to produce one (non-default) judgment every 4 mn 38 s, and that only one in 55 such judgments were subsequently overturned. These reasons certainly have weighed, especially when the abolition of commercial courts was actually discussed (which has been regularly the case during the Old Regime, then since the 1980s¹¹), but they cannot explain why France kept specialized courts at the time when they were abolished, in spite of the costs, in other European countries.

Solving the puzzle therefore requires a revision of the commonly received wisdom on French statism, as well as a refinement of lazy assumptions on the preferences of businesspeople as regards dispute resolution. This can only be done by placing the French case in international perspective. Like that of France, the economies of England and the United States in the 19th century are famous for their growth and mutations; yet the latter countries had no specialized commercial courts—and little commercial arbitration. In fact, in the 1850s-1870s, commercial courts based on the French model and/or organized commercial arbitration were widely campaigned for in England, while in New York City, a more focused

8 Victor Hugo, letter to MM. Meurice & Vacquerie, 28 April 1871, published in *Œuvres complètes de Victor Hugo*, Paris, Hetzel/ Quantin/ Société d'éditions littéraires et artistiques, 1880-1926, *Actes et paroles* 3, p. 168-169.

9 On the French post-revolutionary political culture, and on this famous quote from Montesquieu, see Rosanvallon, Pierre. *The demands of liberty: Civil society in France since the Revolution*. Cambridge, Mass.: Harvard University Press, 2007.

10 The rates were meticulously observed by the ministry of Justice (*Compte général...*, *op. cit.*), and similar or better than those of non-specialized courts—of course partly because appeal was only possible beyond a certain sum, and was very costly.

11 See Kessler, Amalia. *A Revolution in Commerce. The Parisian Merchant Court and the Rise of Commercial Society in eighteenth-century France*. New Haven: Yale University Press, 2007 and Vauchez, Antoine, & Laurent Willemez. *La justice face à ses réformateurs (1980-2006). Entreprises de modernisation et logiques de résistances*. Paris: PUF, 2007.

advocacy by the Chamber of Commerce led to actual experimentation. In both countries, these campaigns proved to be important for the eventual institutionalization of arbitration, but in the 1870s to 1890s, businesspeople still could only rely on official, non-specialized courts—or had to do without any court-like institution—to solve their disputes.¹²

What did businesspeople want?

Comparing those three cases not only leads to qualify the simplest narratives on differences between the common law and the civil law, or on “varieties of capitalism.”¹³ It sheds an important light on what we often too readily assume to be the preferences of businesspeople as regards dispute resolution. Two completely contradictory assumptions in this respect indeed run through the literature in several disciplines, without, to my knowledge, many attempts to jointly discuss them.

On the one hand, scholars claim that modern capitalism requires predictability. This is of course a tradition born with Max Weber in his sociology of law, and generally aimed, as he did himself, at discussing modernization (bureaucratization and/or the advent of the “rule of law”) and criticizing those mechanisms of dispute resolution that are not deemed modern. Weber himself used *kadi* (Muslim judges, esp. in the Ottoman Empire) as a counter-model, that of a substantive, hence arbitrary, and non-formalized justice.¹⁴ Interestingly, novelist Balzac, writing a few decades before Weber, also used this stereotype on the conciliatory but unpredictable *kadi* and likened commercial judges to them.¹⁵

On the other hand, promoters of “alternative dispute resolution” since the last decades of the 20th century have abundantly criticized bureaucratic, official courts and promoted a more substantive adjudication rooted in norms shared in specific communities. They have

12 The English discussion did not extend to Scotland or Ireland, which still had very different laws and courts; part of it happened in India, Canada, and Australia, but to my knowledge, those were just echoes of the English debate. Similarly, discussions in New York were not much commented on outside of the State. This paper is extracted from a study of French commercial courts from 1790 to 1880, in comparison with discussions and practices found in England and in the State of New York. It is based on extensive research in digitized printed material (newspapers, journals, parliamentary reports and debates, especially for England), as well as various secondary sources, and primary sources on the workings of the Parisian commercial courts (mostly thousands of sampled decisions from Archives de Paris, series D2U3, and minutes of discussions between judges on the organization of the court, from Greffe du Tribunal de Commerce, Paris; they have been complemented by a smaller sample of decisions from the commercial court in Beauvais, a middle-size town 75 km North of Paris) and on arbitration at the New York Chamber of Commerce (New York Chamber of Commerce and Industry records, 1768-1984; Rare Book and Manuscript Library, Columbia University Library – denoted here as NYCC).

13 Hall, Peter A., & David Soskice. *Varieties of capitalism. The institutional foundations of comparative advantage*. Oxford-New York: Oxford University Press, 2001, re-phrasing the classical opposition between Latin statism and Anglo-Saxon liberalism.

14 On Weber's views and recent re-appraisals of qadi, see e.g. Rubin, Avi. *Ottoman Nizamiye Courts: Law and Modernity*. New York: Palgrave Macmillan, 2011.

15 Balzac, Honoré de. *Histoire de la grandeur et de la décadence de César Birotteau*. Paris: Boulé, 1838, p. 84-85.

sometimes listing, among their examples, historical European or US merchant communities along with Puritan villages or Chinese migrants.¹⁶ This inclusion of merchant communities relies on the works of the law professors, versed in anthropology, who have created the myth of the “law merchant” as an autonomous, non-state-based institution.¹⁷ The same source of seemingly serious historical evidence was recruited by libertarian economists advocating stateless regulation,¹⁸ as well as neo-institutionalists contrasting “self-enforcing” contracts with reliance on the state for enforcement.¹⁹ Among those, we find the academic inspirers of *Doing Business*. The first issue of the report thus used many historical justifications, especially as regards “which courts are socially desirable:” according to this text, quick, simple and expert adjudication definitely answered the question.²⁰ The most radical statement on this question is probably to be found in a scholarly paper by the most famous World Bank experts in economic institutions: “In a theoretical model of an ideal court, a dispute between two neighbors can be resolved by a third on fairness grounds, with little knowledge or use of law, no lawyers, no written submissions, no procedural constraints on how evidence, witnesses, and arguments are presented, and no appeal.”²¹

Contemporary evidence on such preferences is, to my knowledge, mixed; more importantly, it does not add up to a cumulative body of knowledge on preferences on businesspeople and what shapes them. In a pathbreaking, but little-replicated study, Stewart Macaulay explored the reasons that could explain the lack of legal formalism and little use of courts he found among US manufacturers in the early 1960s.²² His paper is very important as he contrasts businesses (e.g. depending on the respective weight of their legal and commercial

16 See especially Auerbach, Jerold. *Justice Without Law? Resolving Disputes Without Lawyers*. Oxford: Oxford University Press, 1984.

17 On the scholarly genealogy of the “law merchant,” see e.g. Hatzimihail, Nikitas E. “The Many Lives - And Faces - Of Lex Mercatoria: History as Genealogy in International Business Law.” *Law and Contemporary Problems* 71, no. 3 (2008): 169-90.

18 Including a specialist of arbitration in the USA: Benson, Bruce L. “The Spontaneous Evolution of Commercial Law.” *Southern Economic Journal* 55, no. 3 (1989): 644-61. He concludes (660): “Thus, the invisible hand guiding the development of the market's spontaneous order had to be supported by another invisible hand which guided the evolution of commercial law. [...] Both were “produced” by the same people – the merchant community. They had to be, and they continue to be cooperating evolutionary processes – two invisible hands, fingers intertwined to produce commercial order.”

19 Greif, Avner, Paul Milgrom, & Barry R. Weingast. “Coordination, Commitment, and Enforcement: The Case of the Merchant Guild.” *The Journal of Political Economy* 102, no. 4 (août 1994): 745-76.

20 *Doing Business 2004*, Washington, D.C., The World Bank Group, 2004, 46. “History supports these findings.” (46) “One needs only to look at history.” (52, mentioning the lower number of “state-employed” judges in 16th-century England, as compared to France, as evidence of more work left to voluntary local judges, hence simpler procedures) The paper by Greif, Milgrom and Weingast is also cited (53).

21 Djankov et al., “Courts”, art. cit., 455. This paper is also full of historical narratives, arguing, for example, that England has generally been more pacific than France from the Middle Ages, or that French governments imposed formalism on an unwilling judiciary.

22 Macaulay, Stewart. “Non-Contractual Relations and Business: A Preliminary Study.” *American Sociological Review* 28 (1963): 55-69.

departments) and transactions (depending on their magnitude and unusual character) as regards preferences for legal formalism; yet he does not address what could be specific for the US, the State he studies or the period as regards e.g. access to courts or (lack of) knowledge of law among businessmen, which are taken as a given.²³ On the contrary, the recent “turn against law” (in fact, against the use of official courts) analyzed by Marc Galanter depends both on expenses and perceived biases in decisions; yet this more macro study lacks direct evidence on businesses or contrast between them. In contemporary Russia, Katherine Hendley found, like Macaulay, few lawsuits between long-term partners in large contracts; but an heavy use of special, official courts with a simple procedure for the recovery of small debts was explained both by easy access to them and by the fact that such litigation made debts official for the creditor, allowing to pay lower taxes. In her important work on several business associations in the contemporary USA, Lisa Bernstein describes merchants demanding to be judged according to the exact wording of the law or of their contracts, rather than to an alleged custom; but she also found actual communities relying on reputational sanctions.²⁴ No systematic view can yet be extracted from these scattered works, but they have begun to show that we need to go beyond the simple alternative between a general preference for predictability and a general lack of trust in official courts.

What do our three 19th-century cases tell us about preferences of businesspeople at that time, and at a quite macro (regional or national) scale? Not much, similarly, if we only consider the predictability-flexibility dichotomy. England is a famously problematic case for Weber's commentators: the duality of equity and common law, as well as the small number and high fees of courts, did not offer much predictability, at least until reforms in the second half of the century.²⁵ Conversely, it is difficult to reconcile the *kadi*-like image of commercial courts both with Weber's own account of French bureaucracy and with the trust capitalists and

23 Other authors have shown that the choice of arbitration forums depends on the type of transaction at stake and the underlying relationship: Casella, Alessandra. “On market integration and the development of institutions: The case of international commercial arbitration.” *European Economic Review* 40, no. 1 (1996): Mattli, Walter. “Private Justice in a Global Economy: From Litigation to Arbitration.” *International Organization* 55, no. 4 (2001): 919-47. I here concur with Feldman, Eric A. “The Tuna Court: Law and Norms in the World’s Premier Fish Market.” *California Law Review* 94, no. 2 (2006): 313-69, 320 stating that the perceptions among parties about their interest to litigate should be treated as “highly contextual, depending upon individual and social values, the availability of particular dispute-resolution mechanisms, and the existence and power of financial incentives, among other factors.”

24 Galanter, Marc. “The Turn against Law: The Recoil against Expanding Accountability.” *Texas Law Review* 81 (2003 2002): 285-304. Hendley, Kathryn. “Business Litigation in the Transition: A Portrait of Debt Collection in Russia.” *Law & Society Review* 38, no. 2 (2004): 305-48. Bernstein, Lisa. “Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms.” *University of Pennsylvania Law Review* 144, no.5 (1996): 1765-1821; Bernstein, Lisa. “Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry.” *The Journal of Legal Studies* 21, no. 1 (1992): 115-57.

25 Ewing, Sally. “Formal Justice and the Spirit of Capitalism: Max Weber’s Sociology of Law.” *Law & Society Review* 21, no. 3 (1987): 487-512.

governments seem to have put in them. As regards the “law merchant” view, its empirical basis has already been devastated by many historical studies, emphasizing the quite formal procedures and/or official status of medieval merchant courts and the mythical character of supposedly consensual merchant customs emerging from transactions.²⁶ What about the ideal-typical value of the concept? It does not seem to add much to our understanding of French commercial courts, as their official status was very clear, and had been reinforced by Napoleonic Codes. For enforcement, they relied on official bailiffs and prisons when necessary, not reputational or exclusion threats. The vast majority of French 19th-century commercial contracts were certainly not self-enforcing in the way Avner Greif defined this term; neither were their English or US counterparts.

We therefore need better suited concepts to understand the preferences of businesspeople as regards dispute resolution—be it in the 19th century or today. This most importantly requires a qualification of the public/private dichotomy that underlies the most common assumptions. Not only are some official courts rather quick and cheap, expert and/or informal—three qualities often used to praise French commercial courts—while arbitration proceedings, for example, are often slow and expensive, because lawyers arbitrate with all the formality they deem necessary. Even more fundamentally, it is often difficult to place a dispute resolution mechanism on a public-private scale, because such a scale has several dimensions, as Marc Galanter and John Lande have pointed out more than twenty years ago: e.g. does a law compel the parties to use this mechanism? who pays the judge(s) or arbitrator(s)? are the decisions made public?²⁷ The most “private” forums always decide “in the shadow of the law,”²⁸ be it because the law does not forbid or even compels the parties to use them (a key point for the development of private arbitration) or because the threat of an official lawsuit drives them to accept an unofficial settlement. If, accordingly, we take as our point of departure the fact that all dispute resolution mechanisms are public-private hybrids, what we need is a way to

26 See e.g. Kadens, Emily. “The Myth of the Customary Law Merchant.” *Texas Law Review* 90, n° 5 (s. d.): 1153-1206; Sachs, Stephen E. “From St. Ives to Cyberspace: The Modern Distortion of the Medieval “Law Merchant”.” *American University International Law Review* 21, no. 5 (2006): 685-812; Donahue, Charles Jr. “Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica.” *Chicago Journal of International Law* 5 (2004): 21-37.

27 Galanter, Marc, & John Lande. “Private Courts and Public Authority.” *Studies in Law, Politics, and Society*, n° 12 (1992): 393-415.

28 Mnookin, Robert H., & Lewis Kornhauser. “Bargaining in the Shadow of the Law: The Case of Divorce.” *The Yale Law Journal* 88, no. 5 (1979): 950-97. The point has also been made as regards the use of various conciliatory procedures in French judicial history (as regards civil, rather than commercial litigation, and early modern, rather than modern history). Conciliation was generally pursued alongside with lawsuits, each procedure being thought of as an additional pressure put on the adverse party: conciliation was not chosen because it was thought of as better than courts, or because courts were not accessible, but it was a complement to lawsuits. See e.g. Garnot, Benoît, éd. *L'infrajudiciaire du Moyen Âge à l'époque contemporaine*. Dijon: éditions universitaires de Dijon, 1996.

distinguish between diverse types of hybrids, and then to assess which are better for business—or, as historians would rather have it, why some of these types have been preferred by some businesspeople, in specific times and places. In this attempt, I follow the pathbreaking work of Eric Feldman in his field study of the Tuna Court in Tokyo: likewise, French commercial courts could be said to be a product of “formal state law” that yet “outperform[ed] informal group norms by satisfying the business needs of close-knit merchants while simultaneously contributing to the[ir] shared values.”²⁹ I would not, however, deem it a victory of predictability, but rather an interesting possible hybrid among others to be observed: the official, specialized, lay court.

Structure of the paper

In order to better define such hybrids and understand the underlying preferences and what shaped them, I will start, in the first part of this paper, by emphasizing the fact that what I have called businesspeople in this introduction is not necessarily an homogeneous, self-conscious, let alone consensual community. Depending on the type of business, of dispute, and the position in the dispute, we will of course find different preferences as regards dispute resolution—as shown by Macaulay and others. Here, I will insist on a somewhat different point: the fact that the persistence of French commercial courts was rooted in a strong sense of the existence of an encompassing commercial community, which did not exist in England or New York. The way businesspeople define themselves (as businesspeople, merchants, or in some other way) matters for their preferences, as well as for the practical possibility of establishing commercial courts, or other mechanisms of dispute resolution. This self-consciousness of course is not easily changed, which leads us to the second part of this paper. It addresses path dependency, or the reasons why preferences (and possibilities) as regards dispute resolution could be shaped by national “cultures” or “traditions”: what do we mean by such phrases? In the case of commercial courts, was it a question of civil vs. common law? Finally, the third part of the paper more directly discusses hybrid public/private dispute resolution mechanisms. The explicit demands of 19th-century businessmen clearly exhibited the hope to conciliate the advantages of the public and the private; yet this conciliation eventually took two different shapes: that of an official, specialized, lay court in France, and that of a complementarity between more and more formal official courts and newly organized private arbitration in England and in the USA.

²⁹ Feldman, Eric A. “The Tuna Court.” art. cit.

1. Looking for a commercial community

The fact that the legitimacy of French commercial courts relied on the widespread, even taken for granted idea of an encompassing commercial community—including not only wholesale merchants, but also bankers, manufacturers, shopkeepers, and even the smallest independent subcontractors, akin to workers—appears at the clearest when we contrast this situation to the English case. This contrast was not identified as such by the contemporaries, because the presence of “commerce”, as the community was called in France, was as obvious there as its absence was in England; yet in retrospect, this absence seems to have played an important role in the failure of promoters of “tribunals of commerce” in England. This contrast certainly had ancient roots, but this sense of a community was not a given for French commercial judges: many of their actions can be understood as deliberate maintenance of this foundation of their legitimacy.³⁰ What about New York, then? What we find there is some success in maintaining a community, hence a legitimate forum for dispute resolution, but at the much smaller scale of one type of business in one city.

England: “Commercial men” vs. shopkeepers

The campaign for “tribunals of commerce”—a literal translation from the French, whereas their promoters also stressed the examples of Hamburg and Malta—began in 1849, and led to the publication of three distinct parliamentary reports, in 1858, 1871, and 1874.³¹ These reports recorded extensive investigations into foreign law and practices, as well as the wishes of English merchants, manufacturers, bankers, underwriters, lawyers, chambers of commerce, municipal corporations, and business associations. Yet they had no direct effect, especially on the laws of 1873 and 1875 that deeply reformed English courts.³² The campaign and debates

30 This part very much draws on French scholarship about group identity: how legal identification differs from public representation and from self-consciousness, and how each of the three shapes the others. See the pioneering work by Boltanski, Luc. *Les cadres*. Paris: Editions de Minuit, 1982, and a synthesis by Avanza, Martina, Gilles Laferté. « Dépasser la “construction des identités” ? Identification, image sociale, appartenance ». *Genèses*, no. 61 (2005): 134-52. Their conclusions are somewhat akin to those of Brubaker, Rogers, & Frederick Cooper. “Beyond “identity”.” *Theory and Society*, no. 29 (2000): 1-47. On the daily maintenance work of legitimacy, I have been inspired by Lawrence, Thomas, Roy Suddaby, & Bernard Leca, éd. *Institutional work: Actors and agency in institutional studies of organizations*. Cambridge: Cambridge University Press, 2009.

31 Along with newspaper and journal articles and pamphlets, many of which have luckily been digitized especially in various Gale databases, those are my main sources as regards England. Judicature Commission. *Report from the Select Committee on Tribunals of Commerce, &c.* London: s.n., 1858; *Report from the Select Committee on Tribunals of Commerce, together with the proceedings of the Committee, minutes of evidence, appendix, and index*. London: s.n., 1871; *Appendix to Third report containing the answers to the questions issued by the commissioners and the minutes of evidence taken before the commissioners relating to Tribunals of commerce*. London: Printed by G.E. Eyre and W. Spottiswoode for H.M. Stationery off., 1874.

32 Lobban, Michael. ““Old wine in new bottles”: the concept and practice of law reform, c. 1780-1830.” In *Rethinking*

were strongly rooted in the whig/liberal side of English politics: the conservatives mostly remained indifferent. They began when merchants and manufacturers from Liverpool, then other cities forged an alliance with law reformers who had been active since the 1820s.³³ The main topic, for merchants as well as reformers, was access to justice: the English high courts were as prestigious as they were expensive, and mostly located in London (with additional circuit judges actually circulating between towns). Merchants and manufacturers in other ports and in industrial cities claimed that they wanted less technicalities, decision based on “the true merits of the case” (which suited the Benthamian law reformers) and/or customs, and a generally more accessible way to solve their conflicts; in their view, this could be achieved by importing the continental commercial courts. They published or influenced hundreds of articles in newspapers, gained some support in London, including that of the lord mayor; an association was created, with several hundred members in the 1850s and enough support in the Parliament to present bills and launch investigations.³⁴ They eventually failed partly because after 1867, they worked in parallel with the prestigious Judicature Commission, in charge of general judicial reform: their concerns were not taken into account there, or were considered as attacks against the legal profession; this, in turn, was partly due to the very strange, obsessive rhetorics of the president of the association, Francis Lyne.³⁵

However, such obstacles might have been overcome if the aims of the association had been clearer, more practical, and more consensual. In fact, beyond the general, appealing phrase “tribunals of commerce”, members did not agree on what they actually wanted, and most did not want to import the French model as such; even those who seriously considered such a legal transplant eventually deemed it impossible.³⁶ This all has to do with the very

the Age of Reform. Britain 1780-1850, ed. by Arthur Burns, 114-35. Cambridge/New York: Cambridge University Press, 2003.

33 The first publication, centered on criticisms against the *nisi prius* procedure, is Levi, Leone. *Chambers and tribunals of commerce, and proposed general Chamber of Commerce in Liverpool*. London: Simpkin Marshall, 1849. According to its title page, it was also published in Liverpool, Dublin, Glasgow, and Birmingham. Leone Levi (1821-1888) was a young Italian merchant recently installed in England, whose original letter to a local journal earned him a position as secretary of the newly created Liverpool Chamber of Commerce, then the author of the first English comparison between foreign commercial laws (Levi, *Universal Code, op. cit.*) and ultimately the holder of the first chair in commercial law in England, at King's College, a barrister and doctor in political and economic science. Searle, Geoffrey Russel. *Entrepreneurial politics in mid-Victorian Britain*. New York: Oxford University Press, 1993, 169, 184.

34 See e.g. “Tribunals of Commerce.” *The Morning Chronicle*, August 8, 1851 and the endorsement by Charles Dickens in “Tribunals of Commerce.” *Household Words*, November 8, 1851; on the support by most Chambers of Commerce, Society for Promoting the Amendment of the Law. *The authorised report of the Mercantile Law Conference*. London: Longman, Brown, Green, Longmans and Roberts, 1857, 44; on the pinnacle of the movement, with a petition signed by 1,500, including the lord mayor of London, *The fourth report of the Tribunal[s] of Commerce Association*. London: E. Wilson, 1856.

35 See e.g. Lyne, Francis. “The Tribunal of Commerce Association, and where is the fool?” *The Morning Chronicle*, December 17, 1856.

36 For example, “I made some inquiries about it, and I find that most people are quite ignorant of what a tribunal of

encompassing jurisdiction of French commercial courts. This jurisdiction—what should be defined as commercial disputes, hence transferred to commercial courts if they were created in England—was originally never discussed. Implicitly, merchants and manufacturers seem to have had two different types of disputes in mind: on the one hand, the recovery of debts, including rather small ones, which was long and expensive in the traditional judiciary system;³⁷ on the other hand, disputes involving specific questions that lawyers were deemed unable to solve properly, e.g. regarding merchant shipping.³⁸ When the creation of commercial courts became a credible prospect, however, most participants in the debate agreed on the fact that no merchant judge would want to spend time on small claims, especially as regards debts. The most favorable parliamentary report envisioned commercial courts dealing with cases involving at least £20: the equivalent of ca. 100 days of wages for a well-paid worker, and above the median of cases actually dealt with in the Parisian commercial court. Other proposals included even higher thresholds. Besides, in the meantime, county courts had been created to adjudicate small claims generally, especially small debts, be they commercial or not; these courts proved very accessible, predictable, and auspicious for merchants acting as creditors.³⁹ Similarly, specific provisions had been made for bankruptcies, merchant shipping disputes, and the almost automatic recovery of unpaid bills of exchange.⁴⁰ A separate procedure had been created for each of these types of disputes, that were all dealt with in commercial courts in France. This diminished support for “tribunals of commerce,” as shopkeepers, for example, concentrated on the workings of the county courts,⁴¹ while bankers from the City, on the contrary, considered that the debate “does not concern us; it is more for the small capitalist.”⁴²

commerce means. All they clamour for is, “Let us have commercial matters settled by commercial men, and not by lawyers.” *Report...*, *op. cit.*, 1871, 1263 (Birmingham merchant Charles Henry Wagner); “it was perhaps a mistake on our part to adopt the foreign and ambitious name of tribunals of commerce”. *Ibid.*, 567 (Jacob Behrens, one of the leaders of the campaign, a wool manufacturer from Bradford with Hamburgian origins).

37 For example, “At this moment I have brought two actions for small balances of wrong accounts before two tribunals of commerce abroad with full confidence in their quick and satisfactory conclusion, which in England I should without hesitation write off as bad debts at once.” *Ibid.*, 563 (Behrens).

38 In the 1860, a revival of the campaign was led by Newcastle, merchant shipping disputes being presented as a first step; see George Denman, *Merchant shipping disputes. A Bill to Improve and facilitate the Trial of Disputes relating to Merchant shipping*, March 24, 1865 (Hansard).

39 Rubin, Gerry R. “Debtors, creditors and the county courts, 1846–1914: Some source material.”» *The Journal of Legal History* 17, no. 1 (1996): 74-82; Polden, Patrick. *A history of the county court, 1846-1971*. Cambridge: Cambridge University Press, 1999; Johnson, Paul. “Creditors, debtors, and the law in Victorian and Edwardian England.” In *Private law and social inequality in the industrial age: comparing legal cultures in Britain, France, Germany and the United States*, ed. par Willibald Steinmetz, 485-504. Oxford: Oxford University Press, 2000.

40 Bauman, John A. “The Evolution of the Summary Judgment Procedure--An Essay Commemorating the Centennial Anniversary of Keating’s Act.” *Indiana Law Journal* 31, no. 3 (1956): 329-56.

41 See e.g. “Association of Trade Protection Societies.” *The Times*, April 27, 1871.

42 *The fourth report of the Tribunal[s] of Commerce Association*, Londres, E. Wilson, 1856, 25 (anonymous answer).

Some merchants, however, still advocated the addition of merchant assessors to county courts, or even to the higher courts; others envisioned purely merchant or mixed tribunals confined to specific types of disputes. Among the reasons for their failure, we find further proof that the groups who were considered as “commerce” in France were not one self-conscious community in England. Answers to the last parliamentary enquiry, launched by the Justicature Commission, show that municipal corporations and chambers of commerce, as well as individual merchants and manufacturers, while generally in favor of some sort of involvement of merchants in official justice, were divided between precise options; on the contrary, business associations were opposed to commercial courts and/or advocated arbitration (that they would organize), while lawyers, bankers, and underwriters refused or strongly limited the powers of merchant assessors, not to mention purely merchant courts. Not only was there no consensus, but one of the most important dividing line opposed Londonian finance to merchants and manufacturers located outside the capital.⁴³ The more precocious differentiation of financial operations from wholesale commerce in England might account for this divide: the City appeared as a separate community, rather than a commercial elite that could support merchant justice, even less spend time to make it work.

More generally, most commentators agreed on the fact that it would be extremely difficult, if not impossible, to find voluntary merchant judges with a sufficient reputation, even outside the City—especially if they had to adjudicate disputes between businesspeople with a lower status, which was anyway rarely envisioned. The contemporary French economist and commercial judge Horace Say would have interpreted this reluctance as part of a tendency, among English merchants, not to be interested in official charges.⁴⁴ This hypothesis would require empirical support, though: we can at least state that English merchants or manufacturers were not reluctant to sit in the Chamber of Commons. Their reluctance to act as voluntary judges more probably has to do with the English tradition of rare, extremely respected and well-compensated judges (part of the “national culture” I will discuss in the second part of this paper), and with the fact that they did not view themselves as the better part of the same group as shopkeepers: they therefore did not consider judging their disputes as a time-consuming, but honorable and necessary charge. “A small shopkeeper is not ordinarily spoken of in England as a commercial man,” according to metallurgist Charles Seely; “Do you think that merchants of first-class character would undertake, without

43 This is based on counting the 101 opinions in the report, which shows statistically significant differences. *Appendix to Third report, op. cit.*

44 Say, Horace. « Tribunaux de Commerce. » In *Dictionnaire de L'économie Politique*, edited by Charles Coquelin and Gilbert-Urbain Guillaumin, 772–75. Paris: Guillaumin, 1852.

remuneration, to give such time as would be necessary, [...] particularly if that business was of such a nature as would allow tradesmen's disputes to be brought before them?" asked MP and banker Thomson Hankey, while *The Times*, which regularly expressed the views of the City on the matter, doubted that a proper London Commercial Court would agree "to settle squabbles between charwomen and costermongers."⁴⁵

France: Maintaining the common language of commerce

From the contrast that I have begun to draw with England, it should not be inferred that there was no division of labor or inequality inside "commerce," in France or that commercial courts played no part in reproducing these inequalities. On the contrary, during most of the century, they were only elected by the few hundreds bankers, merchants and manufacturers considered as the most worthy by the administration in each city; in fact, the incumbents were chosen by the former judges, as there were not many candidates who were ready to spend several days each month judging hundreds of cases per day. In addition, as in most courts, the presence of repeat players, mostly creditors, as well as the higher proportion of bankers, of men, and of partnerships and corporations among plaintiffs, while wine merchants, women, and individuals were more numerous among defendants indicates that commercial courts often enforced the pre-existing balance of power.⁴⁶

However, men in their forties and fifties, among the most prominent French bankers, merchants and manufacturers, actually sat for long hours to hear extremely small cases involving many shopkeepers and subcontractors. The most prestigious among them only spent one or two years in the court; this was considered as a sort of internship, to be rewarded by access to more prestigious and powerful, and less demanding, seats in the (official) Chambers of Commerce, the municipal councils, the (private) Bank of France councils for the Parisians, and sometimes ultimately in the Parliament.⁴⁷ Such incentives were necessary to overcome a reluctance to lose valuable time that was probably as strong as in England.

45 *Report...*, *op. cit.*, 1871, 359. *Report...*, *op. cit.*, 1858, 1232. *The Times*, October 28, 1872, 9.

46 On repeat players, Galanter, Marc. "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." *Law & Society Review* 9, no. 1 (1974): 95–160. Numbers based on sampled judgments from 1806, 1808, 1813, 1824, 1839, 1846, 1854, 1860, 1862, 1869, 1875 in Paris and 1839, 1862 in Beauvais.

47 Assertions on judges are based on a prosopographic database (from various sources) including the 439 judges who sat in Paris from 1800 to 1871, and, as regards the time-consuming character of the task and reluctance to accept it, minutes of discussions among judges (see also *Journal des débats*, October 15, 1831, commenting on a law granting access to the French equivalent of the Chamber of the Lords to four-times presidents of commercial courts). The comparison with an "internship" or "supplementary commercial education" was used by contemporaries about Paris (Archives nationales, F12 1225, James Odier, letter by Charles Legentil, December 22, 1849) and Bordeaux (lawyer Alaret in *Appendix...*, *op. cit.*).

Judges were therefore present in sufficient numbers; even more importantly, they deliberately acted to maintain the image of a justice open to the whole commercial community, from the female fish retailer to railway companies. As Amalia Kessler has shown, commercial judges had succeeded in having the institution survive the Revolution (although guilds, any sort of association based on trade, and any sort of privilege were theoretically forbidden) because they had shifted their discourses, earlier in the 18th century, away from defending a specific class of people and toward an eulogy of "commerce" as an abstract, civilizing force increasing the wealth of nations.⁴⁸ This discourse was still there in the 19th century, accompanied by more practical actions aimed at maintaining the identification with "commerce" among the parties (so that the courts remained legitimate) and among those who considered themselves as the commercial elite (so that voluntary judges could be found).

As for the latter, this involved the co-optation of new types of merchants and manufacturers among judges when (unofficial) business associations emerged in some trades and began to criticize the dominance of bankers and non-specialized wholesale merchants in the courts.⁴⁹ Judges were still far from a random sample of parties, but discourses as to what exactly they should represent or embody had shifted early enough to avoid endangering the whole institution—even if it had involved a few heated meetings and competitive elections. They were still supposed to be legitimate as judges because they mastered "the language of commerce," that of credit and account books. This made them more expert than lawyers, and akin enough to shopkeepers to represent them. A mere retailer or craftsman in turn was not deemed fluent enough in that language to become a judge: he would speak the tongue of his trade, not that of commerce generally. This somewhat precarious distinction between the languages of the law, of the trades and of commerce generally was essential for the maintenance of the legitimacy of the institution. It was so prevalent that ordinary judge Eugène Costard, however critical on other aspects of commercial courts, presented it with perhaps the most clarity, when writing that "a banker will understand book-keeping as well as a cloth-maker; but what he won't understand, it is the technical language that characterizes each operation in cloth-making."⁵⁰ While lawyers tended to defend the law as the only bridging language and new business associations feared that elite judges would know nothing about

48 Kessler, *Revolution*, *op. cit.*

49 Nord, Philip G. *The Republican Moment. Struggles for Democracy in Nineteenth-Century France*. Cambridge: Harvard University Press, 1995, 48-63, 250-254.

50 Costard, Eugène Auguste. "Projet de Réforme Dans La Juridiction Commerciale." *Revue Pratique de Droit Français* 13 (June 1862): 433-45, 436. On the contemporary strength of the language of the trades, see Sewell, William H. *Work and Revolution in France. The Language of Labor from the Old Regime to 1848*. Cambridge; New York: Cambridge University Press, 1980.

their specific trades, rhetoric, as well as a moderate diversification of the judges' origins, succeeding in defending the language of commerce as the common tongue. In practice, most of the cases that were not simple unpaid debts were judged with the help of external experts, *arbitres rapporteurs*, who tried to conciliate the parties and, when this failed, wrote reports that the judges often followed. While many such experts had been priests in the 18th century, the Parisian court more and more often appointed business associations to play this role collectively after 1840, thus deferring to their expertise in the language of their specific trade. It could thus be argued that many of the decisions of the official commercial court were actually made by unofficial, private trade associations. However, what is important is that these associations never succeeded in replacing this indirect role with direct arbitration.⁵¹ The commercial courts remained the legitimate institution, specialized because commerce was deemed special, but universal as regarded commerce.

As regards the parties, their consent to commercial courts as an institution, when it seemed to become more dubious, could be fostered by enlarging its constituency: the judges thus accepted, with some reluctance, an almost universal male franchise in 1871, and were among the very first to extend it to women in 1898. Perhaps more importantly, even the Parisian court, which had by far the heaviest caseload, always maintained that it would judge even the smallest commercial claims (against attempts at giving justices of the peace jurisdiction on them), and judged them during the same hearings as almost all the others (only the few most complicated cases were heard separately). Until the early 1870s, this symbolic equality between cases was pushed so far that printed forms were not used, even for the completely standardized decisions stating that a bill of exchange or promissory note should be paid: they deserved the same handwriting as the others.⁵² Finally, equality was not purely symbolic, as in all the commercial courts that had an important enough caseload, a small pool of lawyers (15 in Paris, called *agrés*) was appointed by the judges; in exchange for a simpler access to the court (which in effect gave them a quasi-monopoly in the representation of the parties, except for the most important cases), they had to apply uniform low rates for small cases. Commercial courts were therefore very accessible (hence their caseload of small cases), and

51 Lemercier, Claire. "The Judge, the Expert and the Arbitrator. The Strange Case of the Paris Court of Commerce (ca. 1800-Ca. 1880)." In *Fields of Expertise. A Comparative History of Expert Procedures in Paris and London, 1600 to Present*, edited by Christelle Rabier, 115–45. Newcastle: Cambridge Scholars Publishing, 2007.

52 The introduction of printed forms, found in the sample decisions, was never explicitly discussed in the minutes. The same minutes extensively discuss changes in the schedule of the hearings, which never include specific hearings for the most standard cases. Likewise, the very first discussion about not publicly hearing unpaid debt cases (which only happened in 1937) or handing them over to justices of the peace is found in Jardin, Georges. *Aux Congressistes de La Confédération Des Groupes Commerciaux et Industriels de France, 6, 7 et 8 Mars 1911. Le Projet de Loi Coutant. Nous N'en Voulons Pas*. Bernay: impr. de H. Miaulle, 1911.

the fact that the *agréés* were repeat players *par excellence* somewhat balanced the odds in each case: the parties did not have to be experts in the very peculiar, partly customary procedure of each commercial court, that could seem so unpredictable or even arbitrary to outsiders, because their lawyers necessarily were.

New York: Negotiating customs in a local trade community

The case of New York confirms that, in the words of William C. Jones, “the primary function of arbitration appears to have been to aid various commercial groups, whether formally organized or not, to retain or obtain a separate identity from the community as a whole”.⁵³ However, this process of joint maintenance of an identity and an institution happened at a much smaller scale than in France—not just because it was local, but also because the New York Chamber of Commerce was an elitist institution, with membership based on co-optation and restricted to “merchants” (i.e., non-specialized shipping merchants). It was central for the identity of this merchant aristocracy, which, until the Civil War, remained very distinct from that of local manufacturers.⁵⁴ The Chamber of Commerce was not a mere private club, however: from 1770 onwards, successive charters conferred upon it a quasi-public status and functions in the operations of the port; and whereas frequent arbitrators were members of the wealthiest local families, the arbitration services were meant to be open to non-members.⁵⁵ This actual provision of arbitration (effective from the 1820s to the 1870s), with a quasi-public status, by the wealthiest merchants, for the benefit of users of the port generally (one of the parties was even a woman in 1847), with very cheap fees, is akin to the role French commercial judges considered that they played for commerce generally—but within the narrower limits of one city and one type of commerce.⁵⁶

53 Jones, William Catron. “Three Centuries of Commercial Arbitration in New York: A Brief Survey.” *Washington University Law Quarterly*, 1956, 193–223, 212. Feldman, “The Tuna Court.”, art. cit., elaborates on the same idea. My account of the New York Chamber of Commerce in this respect contradict Morton Horwitz’s, as he considered that New York merchants turned to official courts in the 19th century due to a growing division of labor, hence a lessened sense of community. Horwitz, Morton. *The Transformation of American Law, 1780-1860*. Cambridge: Harvard University Press, 1977, 158.

54 Beckert, Sven. *The Monied Metropolis. New York City and the Consolidation of the American Bourgeoisie, 1850-1896*. Cambridge-New York: Cambridge University Press, 2001. The Chamber had 20 members when it was created in 1768, 40 in 1817, 200 in 1849 and 1,000 in 1891—the date when it admitted manufacturers. Wheatley, Richard. “The New York Chamber of Commerce.” *Harper’s New Monthly Magazine* 83, no. 496 (September 1891): 502–17. On the previous restriction to “merchants,” established in 1769, see NYCC, box 394 (November 17).

55 Assertion based on counting members of the arbitration committee in NYCC, boxes 394-400 and looking for their biographies mostly in *Internationaler Biographischer Index*. Munich-New Providence: K.G. Saur Verlag, 1997. Arbitration remained open to non-members until 1860.

56 In the 18th century, there had been arbitrations, but the Chamber mostly acted as an auxiliary of official courts—including English courts during the Independence War. In the 1800s and 1810s, the Chamber barely existed. On the 1847 case, NYCC, box 1, folder 1, September 9, 1847.

However, even if we take this different scale into account, the New York Chamber of Commerce arbitrated much less cases than a French commercial court decided on. It was not used as a general forum to solve conflicts: the few cases per year that were brought before it were rather used to settle disputed questions on the customs of the shipping trade, involving charter-parties, bills of lading or demurrage.⁵⁷ What the Chamber offered was less a way to split differences between the parties than what was called in France *parères*, or opinions on customs (a role which some French Chambers of Commerce also played, as well as the most successful business associations in the second half of the century).⁵⁸ Those did not as much certify observed customs as they deliberately decided on what custom should be. The arbitration committee for example decided that “A general usage of this kind presents so many obstacles to a free market, and the power of the owner to use all reasonable means to dispose of his property, that it has no claim for adoption as a rule of trade and commerce.” “The committee not recognizing the existence of any custom applicable to this case [we]re of opinion that an allowance of 1 1/4% is an equitable compensation.”⁵⁹ The Chamber ensured the publication of such decisions, in the hope that they would influence practices as well as official courts.⁶⁰

When confronted with questions on which the law was silent, the merchant elite therefore decided on what should be considered as the custom of the port—no more, no less. The ability of the Chamber to do this—which was true, to the best of our knowledge, only of very few among its English counterparts⁶¹—was rooted in its success in establishing the idea of a merchant community centered on the port, and its legitimacy in representing it. Arbitration services, in turn, reinforced this idea and this legitimacy. This kind of virtuous circle did not exist at the level of “commerce” as a whole in England or in the United States, while it did in France—although it required careful maintenance, by practices as well as discourses.

57 I found information on a total of 121 cases for 1818-1874 in NYCC, boxes 1, 2, 3, 22, 24, 25, 58, 60, 325, 371, 375, 462, 463, and this survey is likely to be exhaustive. 62% were shipping disputes.

58 On *parères*, see Hirsch, Jean-Pierre. *Les deux rêves du commerce. Entreprise et institution dans la région lilloise, 1780-1860*. Paris: éditions de l'EHESS, 1991.

59 NYCC, box 462, December 17, 1863; box 1, folder 2, November 12, 1834.

60 NYCC, box 395, report of April 15, 1817, box 396, minutes of March 17, 1840.

61 Little is known about English Chambers of Commerce, especially their legal roles, and it is even truer of their US counterparts. See however Bennett, Robert J. *Local Business Voice: The History of Chambers of Commerce in Britain, Ireland and Revolutionary America 1760-2011*. Oxford: Oxford University Press, 2011, and Hadden, Sally E. “The Business of Justice: Merchants in the Charleston Chamber of Commerce and Arbitration in the 1780s and 1790s.” In *The Southern Middle Class in the Nineteenth Century*, edited by Jonathan Wells and Jennifer R. Green, 16–39. Baton Rouge: Louisiana State University Press, 2011.

2. National traditions: beyond common vs. civil law

Different relationships to the idea of a distinct and unitary commercial community thus go some way toward explain the weakness of demands for French-inspired commercial courts in England and in the State of New York, as well as the weakness of criticisms against the institution in France. Of course, those differences in explicitly stated preferences could also be explained by the very taken-for-grantedness of institutions: businesspeople in each country simply did not imagine that their disputes could be solved in a different way; their preferences were shaped by legal traditions. There certainly is an important element of path dependency, in the sense of the past shaping the future, in this narrative, but the exact mechanism should be specified. The endless reproduction of judicial procedures is not a given; in fact, in the US and in England, there were important changes in procedures, or even in law and the whole system of courts, in the 19th century, following debates that took continental European experiences into account. Discussions on commercial courts were started by practitioners of international merchant shipping who had a first-hand knowledge of the institution. Ironically, for all the revolutions and regime changes, the French judicial system on the contrary changed very little, and foreign practices were not much discussed.⁶²

If change is possible, we must account for reproduction. It is what I have begun to do when addressing the notion of “commerce.” As English lawyers were quick to point out, establishing commercial courts would require a definition of commercial matters, which was the topic of many dissertations and a reason for procedural disputes in France. Borders were indeed endlessly discussed, be it about non-merchants signing bills of exchange, peasants selling grain, or the new conflicts involving directors and the management of corporations.⁶³ Yet this never translated into negating the dichotomy between commercial and civil law and procedure, which had been firmly established by royal Ordinances in 1670-3 and re-asserted by the Napoleonic Codes. The age of these laws, however, does not in itself explain their survival. In addition to the discursive efforts that I already mentioned, a web of laws and daily practices mutually supported each other in defining “commerce” as a separate group. They did so in such a way that even the disappearance of guilds and of any legal requisit to become a

62 Lobban, art. cit; Kessler, Amalia D. *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800-1877*. New Haven: Yale University Press, 2016; Chauvaud, Frédéric, Jacques-Guy Petit, and Jean-Jacques Yvarel. *Histoire de La Justice de La Révolution à Nos Jours*. Rennes: Presses universitaires de Rennes, 2007.

63 See e.g. Dalloz & Vergé, *Code de commerce, op. cit.*

merchant did not destroy this definition. Since the Ordinances, even the smallest shopkeepers were supposed to hold reasonably standardized account books, which was important for the specifically commercial bankruptcy procedure.⁶⁴ Although the daily practices of accounting were less standard than commercial judges expected, this was a contribution to the definition of the commercial community. So was the creation, during the Revolution, of a specific tax, *patente*, that had to be paid by all entrepreneurs large or small, except farmers: paying this tax was the only requisit to create a business, and it was used by courts as one of the most important pieces of evidence about being a member of “commerce.” Compulsory commercial book-keeping, specific procedures in case of heavy debts (bankruptcy), the commercial tax, and commercial courts: each of these separate institutions could have been abolished at some point, but their simultaneous existence made this less likely, as they supported each other's workings as well as legitimacy. Conversely, the fact that none of this existed in England in 1850 made the sole creation of commercial courts, without complementary institutions supporting both the legal definition of commerce and individual identification to it, unlikely.⁶⁵

At least two other sets of legal as well as practical habits can be identified which similarly contrasted France and England as regards the question that I discuss here: they have to do with procedure and with the more or less distant relationship between merchants and the law. In each case, this influenced the likelihood of legal reform, in that no simple transplant of a part of the system was possible without further changes; but even upstream, preferences themselves were arguably shaped. It was difficult simply to think about something like French commercial courts in England: they would not easily come to mind, they would not seem very legitimate, and precisely devising them would seem complicated. The case of New York serves as an important counterpart here, as it establishes that the England-France contrast was not mostly based on differences between the common law and the civil law. In many respects, the relationship with law of the New York merchant elite seemed closer to that of the Parisians than the Liverpoolians: “with”, rather than “before the law.”⁶⁶

Procedure: from the Statute of Frauds to the adversarial “tradition”

Looking closely at the objections made by lawyers to the importation of commercial courts on

64 Kessler, *A Revolution, op. cit.*; Coquery, Natacha. *Tenir Boutique à Paris Au XVIIIe Siècle : Luxe et Demi-Luxe*. Paris: CTHS, 2011.

65 My use of the notion of mutually supportive institutions owes much to François, Pierre, ed. *Vie et Mort Des Institutions Marchandes*. Paris: Presses de Sciences Po, 2011.

66 Following the distinction made by Ewick, Patricia, and Susan Silbey. *The Common Place of Law. Stories from Everyday Life*. Chicago-Londres: University of Chicago Press, 1998.

a continental (French or Hamburgian) model, we observe procedural arguments that are more than concerns on impracticality. Commercial courts were illegitimate or even unthinkable, because they threatened two fundamental principles of English law. The first was the separation between fact-finding – left to juries in some procedures – and adjudication. “Special juries” existed in English as well as US law, and could in some cases consist of merchants.⁶⁷ What campaigners for commercial courts asked for, however, was more: merchants should be among the judges, perhaps the only judges; as least, they would be assessors, somewhat lesser judges, but still on the adjudication side. This divide did not exist as such in continental law: where there were juries, the division of labor between them and the judges was not exactly thought of as involving fact vs. law.⁶⁸ The fact vs. law rhetorical divide was present in the very wording of French decisions, but the ways in which the judge could ascertain fact were more diverse than in England; it could include sub-contracting the task to an “expert”, or “arbitre rapporteur” in commercial courts (working on the side of the judge, not that of one of the parties), but also go and check for himself. On the contrary, the lawyer and liberal MP Acton Smee Ayrton, although he had been one of the strongest allies of the commercial courts campaign, considered letting “the judges' knowledge of facts assist them to their judgment” as a foreign aberration; the Newcastle Legal Association presented the establishment of merchant judges as “a scheme for transferring experts from the witness box to the bench,” a phrasing delectably reproduced by judge Quain, from Queen's Bench, when examining witnesses on commercial courts. He had been particularly shocked when reading that in Hamburg, a merchant judge who was not sure about a custom could simply walk to the stock exchange and enquire about it.⁶⁹

The fact that a confusion between the fact-finding jury and the adjudicating judge was anathema was closely related with rules on admissible evidence. Those had been established in the 1677 Statute of frauds, enforced until 1954. While explicitly insisting on the requirement of written contracts in some cases (whereas French civil law, especially commercial law, quite often enforced unwritten contracts if there was supporting evidence), the Statute effectively led to solemn authentications by testimonies not only of customs, but also of written material. The account books of merchants, however well-kept, were not admitted as proof. The fact that commercial writings would not help to enforce contracts

67 Oldham, James. *Trial by Jury: The Seventh Amendment and Anglo-American Special Juries*. New York: NYU Press, 2006. Those were criticized for their cost and merchant juries were suspected to include more professional jurors than actual merchants.

68 See e.g. Donovan, James M. *Juries and the Transformation of Criminal Justice in France in the Nineteenth & Twentieth Centuries*. Chapel Hill: The University of North Carolina Press, 2010.

69 *Report...*, *op. cit.*, 1958, 760, 1565; *Appendix...*, *op. cit.*, 32, 118, 141, 142, 147.

seems to have led to little use of paper at least in some cities and trades.⁷⁰ On the contrary, the attractiveness of French commercial justice for the parties, especially in terms of delays, relied on the fact that judges used a wide array of evidence, especially accounts and correspondences, and rarely required the parties, let alone other witnesses, to be examined. As a consequence, French merchants knew that committing their contracts to writing, or even having them authenticated by paying a light tax, could be beneficial for enforcement. Ancient procedural laws thus had produced practical effects in the long run that made change unlikely. The most entrenched explicit defenders of those laws in England, describing commercial courts as barbarian threats on a refined English tradition, admittedly were lawyers fighting for their jurisdiction.⁷¹ As a consequence of those laws and ensuing more practical habits, however, merchants themselves, even when presented with claims on the cheap and expert character of commercial courts, would not easily adopt this new idea; not that they expressed an explicit preference for the judge vs. jury divide or the Statute of frauds,⁷² but they deferred to the lawyers' expertise on such matters, effectively narrowing the range of thinkable reforms.

The US case provides an interesting contrast here, in that important changes occurred during the 19th century in the very procedural culture as defined here, i.e. especially as regards norms and practices of fact-finding. What Amalia Kessler has defined as the birth of the adversarial tradition can be observed in my New York case. In the late 18th and early 19th centuries, New York and the US generally were more open to continental practices of fact-finding than England; the Statute of frauds was often replaced by diverse local practices. In New York, Dutch precedents had left a legacy in the admittance of diverse types of evidence and the use of arbitrators/experts appointed by judges both to try to conciliate the parties and to investigate the case, akin to French *arbitres rapporteurs*.⁷³ In the US more generally, the will

70 Oral contracts were apparently more prevalent in Manchester than in Liverpool, which might help to explain why the latter city was prominent among promoters of commercial courts and the former had one of the only Chambers of Commerce that opposed them. *Report, op. cit.*, 1858, 1027, 1182.

71 As written by the conservative solicitor general and specialist of commercial law Hugh McCalmont Cairns, “ But did he mean to say that a document springing from the proceedings in a commercial transaction was to be adjudicated upon in a manner different from documents arising out of other matters, he ventured to say, that any innovation of that kind in our system of jurisprudence would be eminently unsatisfactory to the country—it would be so abnormal in itself, and so serious in its consequences, that he believed the House would never give its assent to such a proposition.” House of Commons debate, April 15, 1858. In 1870, one of the bills inspired by the idea of commercial courts included the admission of account books as evidence. *A Bill for the Establishment of Tribunals of Commerce*, 1872.

72 When explicitly questioned about the Statute of frauds, banker Thomas Baring said that it was essential to secure transactions, while representatives of traders opposed it, as did some promoters of commercial courts. Yet it was taken for granted in most of the sources I have read. *Appendix...*, *op. cit.*, 139; Leppoc, Henry Julius. “Tribunals of Commerce, or Courts of Arbitration.” *Journal of Social Science*, November 1865, 49–60.

73 Aiken, John R. “New Netherlands Arbitration in the 17th Century.” *Arbitration Journal* 29, no. 3 (1974): 145–60;

to break with the English tradition had strengthened interest in civil law at the beginning of the 19th century. This helps to understand how the New York Chamber of Commerce began to offer arbitration, first to official courts, then to parties directly. During the first half of the 19th century, the parties and members of the Chamber accepted decisions made by a small group of merchant-arbitrators, on the basis of written evidence (a statement of facts by the parties, complemented only in some cases with correspondence, sometimes authenticated by notaries or port authorities) and of their personal ideas on legitimate customs. This procedure is in no way natural: it is likely to have evolved from continental European legacies, but it was not to remain endlessly legitimate. After an appealed and hotly discussed case in 1844,⁷⁴ and more generally from the 1860s onwards, we find decisions taking more than a few days, and parties requiring a more formal procedure. They knew about the new “Field Code” of procedure adopted in 1848 (and discussed in the previous years)⁷⁵ and asked for the new procedural guarantees even in Chamber of Commerce arbitrations. They required more precise justifications in decisions, communication of all the pieces, hearings allowing them to actually meet the arbitrators and to have their say on the written evidence of their opponents. In the last case dealt with by merchant arbitrators, a Bostonian party deemed the Chamber's regulations “entirely unjust” because of the lack of the now customary adversarial procedure.⁷⁶ The Chamber of Commerce had to authorize internal appeals in 1840, and the examination of witnesses in 1849.⁷⁷ It refused to answer direct questions on custom, that were deemed too abstract, in 1864.⁷⁸

This culminated in the actual experimentation of an official commercial court attempted by the Chamber of Commerce in the 1870s. Ironically, whereas it had ostensibly been inspired by continental European “tribunals of commerce,” the only judge in this court was a lawyer, Enoch L. Fancher, who heavily used witnesses and cross-examination. When the parties added “arbitrators” from the commercial world to this judge, as the regulations allowed them to, those were in fact mere expert witnesses. The delays that ensued certainly played an

Moglen, Eben. “Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law.” *The Yale Law Journal* 93, no. 1 (November 1983): 135–52; Jones, “Three centuries.” art. cit.

74 NYCC, box 1, folder 1, box 227, folder 4, box 396.

75 Kessler, *Inventing*, *op. cit.*

76 Box 1, folder 16, letter from Albert A. Cobb & co., May 6, 1874. “we are entirely unable to appreciate the justice of the Arbitration committee ignoring the custom in all courts, of first considering the plaintiffs claim, then the defendants response to same, and then allowing the plaintiff to correct errors or misstatements made by the defendant.” The evolution in the parties' demands does not seem to be linked to a more common use of lawyers (who already represented some parties in the 18th century).

77 NYCC, box 396, March 17, 1840; box 396, January 2nd, February 6, 1849. On the previous opposition to the use of witnesses, box 227, folders 4 and 5, box 396, September 3rd, December 18, 1844.

78 NYCC, box 1, folder 15, and box 23, folder 8.

important role in the failure of the experiment. Fancher deal with ten cases per year, as compared e.g. with 2,600 in the official court dealing with maritime matters; “he looked at these questions as would a lawyer.”⁷⁹ The court was never formally abolished, but practically ceased to exist in the early 1880. Yet this choice of a lawyer and an oral, adversarial procedure had been the logical continuation of an evolution prompted by the parties themselves: they had expressed a general, cultural change that had happened at a national scale and equated adversarial procedure both with modernity and a US national character (as opposed to feudal, despotic continental Europe). Nobody had campaigned for official commercial courts going beyond merchand shipping matters in New York before the 1850s: there was no community to back this idea, while there was one behind arbitrations at the Chamber of Commerce. On the contrary, while “tribunals of commerce” were asked for by some after the mid-century, as we will see below, the actual transplant of something like continental European courts had become unlikely: new procedural preferences had made them more and more illegitimate.

Legal consciousness: should law be as accessible as groceries?

Be it before or after 1850, however, there is a common pattern on the discourses I found in New York about the resolution of commercial disputes: before the beginning of the 20th century, no praises for commercial courts or arbitration were based on a lack of access to official justice, be it in terms of physical access, cost, delays, or legal technicalities. Arbitration by the Chamber of Commerce, then attempts at making it more official, were justified by expertise (and the lack of efficiency of merchant juries in this respect⁸⁰); when the language of the law was criticized, it was as alien to commercial custom, not because of its intrinsic obscurity. US and especially New York merchants indeed seem to have entertain the same familiar relationship with the law and courts as their French or Parisian couterparts, even without specialized commercial courts. Circuit courts had been replaced by local courts in the State of New York in 1821, common law had been merged with equity in 1846, and the Field Code had made the initiation of a lawsuit easier; the number of judges, especially in the State Supreme Court, was raised each time the caseload increased, and the threshold to access

79 According to Julius Henry Cohen, a lawyer and famous promoter of arbitration, NYCC, box 325, folder 6, Report of February 2nd, 1911. Comparative numbers in *The World*, March 3, 1877. I have examined the ca. 50 cases dealt with by Fancher until 1880 (NYCC, boxes 2, 3, 22, 24, 25, 58, 60, 463).

80 It had been the prominent concern of the first, and very isolated, author who advocated “cours of commerce” in the US, James Wilson, in Pennsylvania: “Lectures on law, delivered in the College of Philadelphia, in the years 1790 and 1791.” part II, chapter III, *The works of the honourable James Wilson, LLD*, edited by Bird Wilson. Philadelphia: Lorenzo Press, 1804. The proposal seem to have been inspired by English Staple Courts rather than French commercial courts.

county courts, that had existed before their English counterparts, was higher.⁸¹ Moreover, as demonstrated by Morton Horwitz, the rhetorics of merits vs. technicalities had been early endorsed by judges in higher courts and used to favor the largest businesses. In 1808, the first US jurisprudence publication, *The American Law Journal*, was presented as a tool for merchants, among others. “The most consistent legal theorist of market economy according to Horwitz, Gulian Crommelin Verplanck, was born in a merchant family; his uncle by the same name had arbitrated for the Chamber of Commerce in 1785-99. John Duer, a judge and author of treaties favoring insurance, and a member of the New York codification commission recommended by the Chamber, had a nephew, William Denning Duer, a banker and director of insurance and railway companies, who similarly was part of the arbitration committee in 1858-60.⁸² This adds up to more than anecdotes: New York merchants were able to work “with the law” and make the best use of official courts; they developed arbitration as a complementary tool, not out of a preference oriented against litigation.

The English discourses I found were completely different: many merchants deferred to the expertise of lawyers to the point of priding themselves never to use lawcourts—while some of their colleagues complained that they in fact *could* not use courts and therefore recover debts. In the late 1850s, slightly more than 2,000 cases, for the whole of England, entered a trial phase in London; in 1846, it was estimated that no more than three commercial cases each year, involving more than £10,000, were tried by the high courts; county courts had not existed before that year, and afterwards could not deal with cases involving more than £50.⁸³ Henry Steinhal, a merchant of manufactured goods in Manchester, testified about a case tried before the Court of Chancery, which has lasted nine month and cost £1,400, while it would have been decided in two weeks and for less than £50 in Hamburg.⁸⁴ The underlying justification was that lawsuits were a necessary evil to be confined to really important cases, that had to be tried with the required slowness and expenses (mostly induced by the examination of witnesses), by knowledgeable and well-compensated judges.⁸⁵ While the

81 See e.g. Browne, Irving. “The Judiciary.” In *The Public Service of the State of New York*, edited by Paul A. Chadbourne and Walter Burritt Moore, Vol. 3. Boston: James R. Osgood and Co, 1882.

82 Horwitz, *Transformation*, *op. cit.*, 180, 234.

83 House of Commons, April 15, 1858; Arthurs, Harry. “Without the Law”. *Administrative Justice and Legal Pluralism in Nineteenth-Century England*. Toronto: University of Toronto Press, 1985, 56. It was said that some merchants reduced their claims in order to use county courts: Leppoc, “Tribunals of Commerce.” *art. cit.*, 54.

84 *Report*, *op. cit.*, 1871, 564. Similar examples abound in publications about commercial courts.

85 On the contrary, the wages of French judges were extremely low, which was supposed to filter out those who lacked personal wealth. Brougham, Henry. “Des Différences Qui Existent Entre Le Système Judiciaire de l’Angleterre et Celui de La France.” *Revue de Droit Français et étranger*, 1845, 81–90; Bernaudeau, Vincent. “Entre Distinction Sociale et Légitimité Professionnelle : L’argent et La Magistrature Des Notables Dans La France Du XIXe Siècle.” In *Les Juristes et L’argent. Le Coût de La Justice et L’argent Des Juges Du XIVe Au XIXe Siècle*, edited by Benoît Garnot, 157–67. Dijon: Université de Dijon, 2005.

original promoters of commercial courts, as well as law reformers generally, strongly objected to that, many merchants had incorporated this justification. Liverpool underwriters for example still stated in 1873 that they would rather had a just than a quick decision, implying that only the high courts would be able to provide it. A member of the Manchester Chamber of Commerce went as far as to write that “The English people like the administration of law to be dignified and well ordered, and would reluctantly see it brought to every man's door like green groceries on a flat cart with a donkey.”⁸⁶

This was ideology, which is important in the building of legal cultures, but also more than ideology: merchants effectively had little access to courts, and to law generally. Their legal consciousness developed “before the law,” or, to put it in the more terms of lord chief justice Cockburn, “The law is a sealed book for the trader in Great Britain, and he cannot stir a step without a lawyer at his elbow.”⁸⁷ The financial elite actually had lawyers, and deferred to their expertise, including their opposition to commercial courts; others often lacked connexions in the legal world. It was, as we have seen, difficult to imagine English merchants acting as voluntary judges: partly because judges, in the view of many, should be well-paid, “scientific lawyers;”⁸⁸ and partly because the equivalent of a Parisian commercial judge with a law degree, earned along with one of the specialized lawyers of the court, and a cousin writing treaties on industrial property⁸⁹ was not to be found. Merchants who had always known this situation did not necessarily conceive of it as a problem, or even a peculiarity; it anyway shaped their preferences as regards dispute resolution generally, and even more as regards possible practical arrangements.

These contrasting types of legal consciousness should certainly be investigated in more detail, for example by comparing merchant correspondences from the three countries. With the empirical evidence already available, we can already state that they were relatively independent from the legal tradition (in terms of common vs. civil law) and even procedural habits (as we see no major change in New York in this respect when the adversarial procedure

86 *Appendix, op. cit.* J.F.T. “Tribunals of Commerce. To the Editor of The Times.” *The Times*, November 1, 1872. Even those who wanted a more accessible justice had to use the rhetoric of “all litigation” as “an evil,” as the solicitor general put it in the House of Commons on April 15, 1858. It was made possible by the conciliatory qualities conferred on commercial courts. “The great object is to stop men from going to law,” as stated by former barrister Henry Clarke in *Report, op. cit.*, 1871, 378.

87 This sentence is present in many articles and pamphlets of the 1850s. I have not been able to trace its origin.

88 Prominent banker Lloyed answered many questions by stating that they should rather be asked to a “scientific lawyer.” (*Report, op. cit.*, 1871). Many other businessmen similarly seemed uncomfortable with legal questions. *Appendix, op. cit.*, p. 150-1.

89 This refers to Guillaume Denière, who had an unusual trajectory in the court, but such close relationships with the legal world were common. On Denière's student years, minutes of the Paris commercial court, June 30, 1860, and on his family, Plessis, Alain. *Régents et Gouverneurs de La Banque de France Sous Le Second Empire*. Genève: Droz, 1985, 58.

becomes the taken-for-granted norm). They depended much more on the availability of courts, and on the ideology justifying it (or its absence). Investigations on preferences for conciliation vs. adjudication would certainly benefit not only from historical depth – showing how national cultures sometimes change – but also from more sensitivity to practical constraints (from admissible evidence to the location of courts). They should of course also take into account the fact that many dispute resolution mechanisms do not anyway provide purely “private” conciliation or purely “public” adjudication, but hybrid solutions.

3. The two dreams of businesspeople: autonomous but official dispute resolution

“A semi-judicial authority with a high-sounding and impressive name.”⁹⁰ The phrase was coined by a newspaper mocking the Court of arbitration recently established by the State of New York and run by the Chamber of Commerce; yet it is an accurate summary of what its founders intended it to be: something that would offer all the advantages of private arbitration *and* official justice. Such chimerae, regularly found in debates on commercial courts, deserve to be taken seriously if we pretend to discuss preferences as regards dispute resolution.

Similarly, French historian Jean-Pierre Hirsch wrote about “the two dreams of commerce,” enterprise and institution: not only did businesspeople rarely speak with one voice (producers of machines for example advocating less taxes on foreign iron while iron producers disagreed), but each businessperson, in one given moment, was (and is) generally teared between asking for more freedom and more protection from the state.⁹¹ As obvious as the idea might seem, it is often forgotten in discussions on the preferences of businesses generally—for example in the creation of indicators in the *Doing Business* reports, even if recent issues have taken care to specify which exact type of business was the target. Translated into the realm of dispute resolution, Hirsch's idea fits the empirical evidence—and calls for a joint use of the Weberian and “law merchant” literatures—by implying that businesspeople want the cheapness, short delays, and expertise generally associated with private and/or conciliatory dispute resolution, while they also praise the predictability, enforceability and independence from the interests of each trade generally associated with public adjudication. Research would benefit from taking into account this intrinsic ambiguity of preferences, rather than considering as obvious the fact that businesses require either predictability or flexibility.

⁹⁰ *The Daily Graphic*, March 14, 1876.

⁹¹ Hirsch, *Les deux rêves*, *op. cit.* He often used the quote “let us do as we please [i.e. *laissez-faire*] and protect us a lot,” found in a late 18th-century letter by a manufacturer to a commerce inspector.

However, as we have seen in the first two parts of this paper, this intrinsic ambiguity translates into very diverse expressions of preferences for specific institutions, be they explicit expressions, e.g. in public campaigns, or implicit, in use made or not made of the available forums. This diversity is partly organized along contrasts between nations that have been reproduced by path dependency, in that the existence of a system of other institutions influences the legitimacy of, or even the possibility to think about, each possible mechanism of dispute resolution. What we observe as a consequence is not a clear preference for public or adjudicative solutions in some countries, private or conciliatory institutions in others: this rather translates into different hybrids between those two extremes. Two appear in my research on commercial courts: they are not necessarily the only ones, but defining them as different and understanding the reasons why one or the other was eventually chosen is a first step toward better understanding hybrid dispute resolution forums, or hybrid regulation, more generally.

Inviting private expertise in the public realm: official, specialized, lay courts

The first hybrid is embodied by French commercial courts, but was arguably prevalent in 19th-century French social and economic regulation more generally. It has until now been under-discussed in the literature on dispute resolution, because it does not fit in common dichotomies. It has most of the features generally deemed desirable in private or alternative dispute resolution, with simple procedure as compared to civil justice generally, judges deemed extracted from, and even elected by, the community of the parties, apparently quick, cheap, and expert decisions, and conciliation as often as possible⁹². However, it is also essential for supporters of this model that the courts are official, an integral part of the state; their decisions are therefore enforced (or appealed) like any other, and it is compulsory to use the court to litigate many types of disputes. This compulsory character is of course the main cause of the widespread use of commercial courts in France; but their official status is also one of the

92 This summary is concerned with the public image of these courts, and the aggregate advantages parties saw in them, rather than with their inner workings. Considering all the decisions in a commercial court to be quick, cheap, expert and conciliatory is a mere praising discourse, however prevalent in the scholarly literature, that I do not endorse. In practice, some of the decisions of the 19th-century Parisian court were cheap, quick, and predictable, e.g. those on unpaid promissory notes or bills of exchange; those were also very formal and made little use of the judges' personal expertise. Other decisions used their expertise, sometimes in commercial practices generally, when they directly read accounts or correspondances, often in terms of knowledge of the local trade elites, when they appointed *arbitres rapporteurs*. Those decisions tended to be more time-consuming and expensive, closer in this respect to civil justice generally. As for conciliation, it happened regularly, if not in a majority of cases, but is likely to be explained by reasonable anticipations by the parties as to the likely decision and balance of power rather than by the personal talents of judges.

keys to their discursive success, and to the failure of attempted alternatives, such as direct arbitration by business associations in Paris in the second half of the 19th century. Official status implies enforceability (I have found little evidence of trust in reputational sanctions among French or English 19th-century businesspeople⁹³) and dignity: an official court had something more in the eyes of the parties and, perhaps more importantly, of the voluntary judges. Commercial judges actually defended their status as official judges on par with the others (even if most of those were paid) on several occasions in the 19th century: this implied wearing a (distinct, but still solemn) uniform, being exempted from national guard duty, etc.⁹⁴ Such symbolic rewards certainly helped to find benevolent elite members willing to help recovering small commercial debts.

This association between what is generally thought of as the advantages of private dispute resolution, on the one hand, and an official character, on the other hand, is often found in descriptions of what English-speaking campaigners for commercial courts had in mind. As *The Times* aptly summarized in 1882, “Something much simpler and shorter than a jury trial or an arbitration conducted with all the pomp and circumstance and delay of an ordinary reference, something more authoritative than the unrecognised tribunals of our great trades, seems needed.”⁹⁵ How can we make sense of the fact that it did not translate into official, specialized, lay courts? Even without directly French-inspired commercial courts, whose adoption seemed unlikely for the reasons stated before, some sort of similarly hybrid institution could have been thought of in England. In a way, arbitration by the New York Chamber of Commerce fit this bill, in that the Chamber was chartered by the state; its member prided themselves with this official character.⁹⁶ The provision of arbitration was not, however, considered as a public service in the strong sense, and its use was certainly not compulsory, even for merchant shipping disputes.

When the continental model of “tribunals of commerce” was summoned, it was to claim a more official status. It actually had been briefly mentioned in 1839 minutes, but the topic had been tabled; in 1847 and 1851, the same thing happened, this time after more serious

93 See e.g. *Union nationale du commerce et de l'industrie*, a journal recording minutes of various business associations that tried but generally failed to organize private arbitration from 1859 onwards. Among a lot of others, banker Sampson Lloyd stated that in Birmingham, “There seems to be a great indisposition to go before any tribunal which has not some authority.” *Report, op. cit.*, 1871, 806.

94 They however escaped any disciplinary control by the Appeal Courts. See the parliamentary debate at *Chambre des pairs*, February 26, 1838.

95 “A few days ago”, *The Times*, February 3, 1882, 9.

96 On the significance of charters creating “body politicks,” see Novak, William J. “The Legal Transformation of Citizenship in Nineteenth-Century America.” In *The Democratic Experiment: New Directions in American Political History*, edited by Meg Jacobs, William J. Novak, and Julian E. Zelizer, 85–119. Princeton: Princeton University Press, 2003.

investigations and a close vote.⁹⁷ The triggers for an actual experiment were apparently the growing demand of the parties for a formal procedure and nascent competition between the Chamber and new business associations.⁹⁸ In 1864, the Chamber printed a new arbitration form that explained its more and more adversarial procedure and advertised from its new 1861 charter: the State Congress had then opened the possibility for the awards to be certified by a court of record, hence become official precedents. In 1865, arbitrators had to swear an oath before a judge of the State Supreme Court; in exchange, they could swear in the parties.⁹⁹ Those more and more used the word “court” in their correspondence to talk about the arbitration committee.

This road toward officialization took a decisive turn in 1874, with the creation of a “Court of Arbitration”: a court of record, with a seal, its judge appointed by the governor and paid by the State, along with his clerk.¹⁰⁰ The new institution and that was praised by most newspapers for its public character: “public court,” “public forum,” “public benefits,” “public utility.” As we have seen, the experiment ended because of a lack of demand of the parties for a court that was official, specialized, but lacked a simpler procedure and, apart from the sponsorship of the Chamber of Commerce, had little direct relationships with the merchant community. It had also proved problematic to begin with in terms of hybridization between the private and the public. The court had only been created after heated debates related to conflicts between New York City and the non-commercial remainder of the State of New York. In this context, opponents argued not only that taxes on the country would be used to offer a new institution that would solely benefit the wealthiest merchants,¹⁰¹ but also that this type of public-private hybrid was unconstitutional. Little contradiction was voiced on the last issue and, over time,

97 The 1829 discussion possibly happened because a commercial court had just been created in New Orleans. This little-known bilingual institution was very different from the New York experiments; the judge was a lawyer, but the procedure was very simple. It only worked until 1846. Kilbourne, Richard. *Louisiana Commercial Law: The Antebellum Period*. Baton Rouge: Publications of the Institute Paul M. Hebert - Law Center - Louisiana State University, 1980, 84-107. On New York debates in 1839, NYCC, box 396, March 5 and April 2. On 1847 and 1851 debates, probably related to the birth of the English campaign in Liverpool, and to contemporary debates in New York about importing continental European justices of the peace, NYCC, box 296, April-September 1847, February 1851-December 1852; box 227, folder 6.

98 On this competition, e.g. NYCC, box 400, June 3 and November 4, 1875.

99 NYCC, box 398, March 1860 to April 1861 on the new charter; *Powers of the Arbitration Committee of the Chamber of Commerce of the State of New York and the Forms of Submission, Awards, Etc.* New York: Craighead, 1864; NYCC, box 1, folder 5 on oaths.

100 On preliminary debates at the Chamber from the end of 1873, drawing on the proposal of 1851, box 399, October 1873-January 1874. At the same time, similar projects were discussed, apparently without consequences, in Canada: “Dominion Board of Trade. Important Session Yesterday. The Fisheries, the Establishment of Tribunals of Commerce, and Other Matters Discussed.” *New York Times*, February 28, 1874.

101 “for the benefit and convenience of a class,” representative McGowan *New York Times*, May 21, 1875; “in the interest of a wealthy private corporation,” senator Jacobs, *Journal of Commerce*, March 8, 1876. “What is obviously wanted is not a Court of Arbitration supported by the State for the benefit of rich merchants and bankers and brokers, but cheap justice for the people.” *The Daily Graphic*, March 14, 1876.

members of the Chamber of Commerce themselves considered that the court had failed because its procedure was too formal and because any official commercial court was doomed to fail, without disentangling the two reasons: according to arbitration propagandist Charles Bernheimer, “it was impossible to make a semi-governmental institution.”¹⁰² It was apparently difficult to think of the type of hybrid that was taken for granted in France: both official and run directly by merchants. The same was even truer in England.

What we find here is the same mutual support among a set of laws and practices that I described in the second part of this paper. French commercial courts could rely on the existence of many similar organizations that were considered as part of the state (i.e. listed in official publications like *Almanachs* as such, not requiring authorizations for meetings, unlike private associations, etc.), but whose members were voluntary experts extracted from the business community (or other private occupations) for the sake of this very expertise on matters civil servants were not supposed to master.¹⁰³ Chambers of commerce, that had been created in the late 16th century, a few decades after commercial courts, were an important part of this mutually supportive system; they had been re-created in 1802 with an advisory role and even more official status than before the Revolution (e.g. prefects, the local heads of public administration, were their nominal presidents).¹⁰⁴ Many new, similarly hybrid institutions were created during the 19th century, such as labor courts or local committees inspecting and advising schools or charities. Commercial courts lent their legitimacy to the nascent labor courts, but their own unquestioned status also benefitted from this expansion of the model. It allowed the French government to tap into the time and knowledge of the elite, while fostering its consent by associating it to decisions, and without violating the revolutionary principles that asserted that there were to be no medium bodies between the state and the individuals. The key was that members of voluntary courts and advisory bodies were appointed or even elected as individuals, then became part of the state: the administration did not have to recognize any sort of separate self-government.

102NYCC, box 115, folder 13, Charles Bernheimer to Truman C. Huff, May 17, 1915.

103The spatial metaphor (invitation into the state) is meant to contrast with a remark by William Baldwin, noticing that “so much of” the US state is arranged “outside the state.” Conversely, much of French collective interests are organized inside the state. The contrast should not be over-stated: hybrids similar to the model of each country can be found in the other. It however offers a good description of invitation (of commercial judges) vs. delegation (of dispute resolution to privately organized arbitration). See Baldwin, Peter. “Beyond Weak and Strong: Rethinking the State in Comparative Policy History.” *Journal of Policy History* 17, no. 1 (2005): 12–33, 15 and Barreyre, Nicolas, and Claire Lemerrier, ““In stark contrast to ... France”: The state in nineteenth-century United States and France, beyond exceptionalism.”, 2015, working paper available upon request.

104Lemerrier, Claire. *Un si discret pouvoir : aux origines de la Chambre de commerce de Paris, 1803-1853*. Collection “L’espace de l’histoire.” Paris: La Découverte, 2003.

Choosing complementarity: privately organized arbitration in the shadow of the law

As we have seen, attempts at creating French-inspired commercial courts eventually failed both in England and in New York. They however triggered discussions and experiments that were part of the invention of a different hybrid answering demands for an official, yet flexible commercial dispute resolution. This phenomenon has been aptly described by Gunther Teubner with the metaphor of the “legal irritant.”¹⁰⁵ Importing something from a different legal system is never as simple as changing a discrete part in a machine, or even as transplanting an organ (which either works or fails). Whatever the level of success of the transplant as assessed by the contemporaries, the attempt itself changes parts of the workings of the social and legal systems, and of their interactions. In the case of commercial courts, it probably played a role in the choice of complementarity between privately organized arbitration and the official courts. At the beginning of the 20th century, this complementarity, however in fact recently established, had become known as a peculiar feature of the English legal system, and for some business associations, it was taken for granted as the only thinkable way to solve commercial disputes. It was established much later in the US. In order to thrive, it requires a law making compromissory clauses valid, i.e. enforcing agreements to arbitrate written before any dispute has arisen, which was voted in 1889 in England and only in 1925 at the federal level in the USA (1920 in New York, 1925 in France, where arbitration, however, had much less success than in the USA). Most arbitration afterwards follows from standard printed contracts including such clauses. This practice is often seen as timeless and natural, like the law merchant, by those who believe in “self-enforcing contracts” backed solely by reputational or exclusion sanctions. It is all the more important to notice that in fact, successful arbitration by associations was rarely found before laws on the compromissory clause, and that such laws were not very much asked for by any commercial community before debates (on commercial courts or other matters) put commercial dispute resolution on the agenda.¹⁰⁶

In England, attempts at establishing arbitration by Chambers of Commerce (for all trades or

¹⁰⁵Teubner, Gunther. “Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences.” *Modern Law Review* 61 (1998): 11–32.

¹⁰⁶In France, the Supreme Court had forbidden compromissory clauses in 1843, almost without any comments by merchants or lawyers, and debates on the topic only began in the 1900s, based in the English experience (Archives de Paris, 2ETP/3/3/70 6). In the US, contrary to what is often stated, merchants were not the prime or the most important movers on arbitration matters: campaigning for arbitration supported by the law was the hybrid solution New York Chamber of Commerce members eventually settled for, but they were just one group in a much wider progressive—and paternalistic—campaign. See Kessler, Amalia D. “Arbitration and Americanization: The Paternalism of Progressive Procedural Reform.” *The Yale Law Journal*, no. 124 (2015): 2940–93.

the most prevalent locally, e.g. wool in Bradford) in fact went along with campaigns for an official status for the Chambers and for the creation of commercial courts: any hybrid would do for those merchants who claimed access to justice. Banker Sampson Lloyd and president of the Halifax Chamber of Commerce William Morris even strongly advocated officially appointed arbitrators, chosen by merchants: “I should give it [the collective arbitration that existed at the Stock Exchange] all the force of an established recognised body selected for their fitness,” and would even name it “tribunal of commerce,” as it “has a greater dignity in it than calling it a mere committee.”¹⁰⁷

The options that were directly inspired from France eventually failed, and Chambers of Commerce remained mere private associations. Most of their attempts at providing arbitration also proved unsuccessful, especially before the Act of 1889.¹⁰⁸ Even afterwards, arbitration seems to have been organized with more success at the scale of the trade rather than of the place, and specifically for commodities, with corn trade perhaps the most striking case. Standard forms spread quickly, in England and even in the rest of Europe (all merchants therefore had to arbitrate in London), and hundreds of arbitrations took place, but they were confined to very specific types of disputes, mostly on quality.¹⁰⁹ The London Chamber of Commerce, that had itself only been created in the 1881, established its own “Court of arbitration” in 1892; during a few months, this “infant English tribunal of commerce,” or “British species of tribunal of commerce,” revived hopes of an official status and decisions on thousands of cases (in the English-speaking world generally). The Court however remained a private forum, attempting at solving more diverse and legally complex disputes than the trade associations, but failing in that role after 1950, with almost no decisions and no interest from the Chamber of Commerce.¹¹⁰ Meanwhile, more complicated matters were dealt with by the reformed Queen's Bench, in which a specialized—but still very legal and prestigious—group of judges had been assigned to commercial matters and had devised an explicit division of labor

¹⁰⁷*Report, op. cit.*, 1871, 33-39.

¹⁰⁸In addition to Bennett, *Local Business Voice, op. cit.*, 550-1 (ca. 20% of Chambers of Commerce claimed that they offered arbitration in 1860, 40% in 1900) and parliamentary reports, see “Courts of Arbitration.” *The Times*, September 15, 1881 and Rosenbaum, Samuel. *A Report on Commercial Arbitration in England*. Chicago: American Judicature Society, 1916.

¹⁰⁹London Metropolitan Archives, minutes of the London Corn Trade Association, 1884-. The Liverpool Cotton Brokers and the London Stock Exchange seem to have provided the only thriving arbitration services before 1889, according to parliamentary investigations on commercial courts.

¹¹⁰It has had a new life since the 1980s. Before 1950, the Court dealt with ca. 20 cases per year. Quotes from Pickstone, C. H. “Compromise and Arbitration. A Paper Read before the Incorporated Law Society at the Annual Provincial Meeting.” *The Albany Law Journal* 54, no. 18 (October 31, 1896): 281–85, and “The London Court of Arbitration.” *American Judicature Society* 12 (1916): 40–46. On the subsequent failure institution, minutes of the court (London Metropolitan Archives), and Lemercier, Claire, and Jérôme Sgard. “Arbitrage Privé International et Globalisation(s).” Report to the Ministry of Justice, 2015, available online, 148-163.

with the trade associations.¹¹¹ In the USA, the New York Chamber of Commerce campaigned from the 1910s onwards for legalizing the compromissory clause and spreading arbitration (in commercial and labor disputes and generally), then offered lists of arbitrators to the American Arbitration Association; other associations or “boards of trade” provided quality arbitration on commodities, like in England.

In the two countries, in which the official judiciary system were still quite different, commercial arbitration on a large scale had been made possible by the legalization of the compromissory clause, and subsequent decisions on the enforcement of awards: it could only thrive in the shadow of the law, while non-specialized official courts (or out of court, out of arbitration conflict resolution) still provided the bulk of commercial decisions. In order to properly assess the workings of arbitration, it is important to realize that it is almost never a genuinely “private” form of “self-regulation.” The development of arbitration in the US and, earlier and at a probably larger scale, in England, rather points at a public-private hybrid that is different from that embodied by commercial courts. In the three countries, decisions are more or less formal, legal, cheap, etc. depending on the matter. In France, however, they are all made by the same organization, an official, specialized, lay court. In England and in the US, there is a division of labor between non specialized official courts and several private arbitration organizations—which is likely to produce different balances of power between parties.

Conclusion

This paper was mostly concerned with debunking common, lazy equivalences: between Anglo-Saxon countries, common law, and institutions favoring business (vs. France, civil law, and less favorable institutions); between conciliation and private dispute resolution, litigation/adjudication and public courts; between specialization, informality, expertise, and concern with “customs.” By doing so, it has hopefully not only added to our sense of complexity, but offered different ways to clarify past debates and practices. I have tried to do so by opening a list of distinct possible hybrid, offering diverse shapes of public-private dispute resolution (and regulation generally). In my narrative, it happens that one of these

¹¹¹Dezalay, Yves, and Bryant G. Garth. *Dealing in virtue: International commercial arbitration and the construction of a transnational legal order*. Chicago: University of Chicago Press, 1996, 131-134 aptly describe the contemporary situation inherited from this reform as hybrid: “The relative intrusiveness of the courts should therefore not be seen as a public-court hostility to private arbitration. Indeed, the labels are misleading on both counts : the public courts watched out for the interests of the shipowners who dependend on the standard form contracts ; and the private system was in turn assimilated into the public one. An extraordinary bond ran from the shipping industry through Essex Court and others to the trial and appellate courts acorss the street and in the House of Lords.”

hybrids (official, specialized, lay courts), is rather found in France, the other (privately organized arbitration in the shadow of the law) in the UK and the US—although at different times and scales. This should not be construed, however, as a return to common dichotomies under a different guise. Additional case studies situated in other countries and periods hopefully will offer a more interesting pattern of associations between hybrids and national cultures—and possibly add other hybrids to the list.

Discussing preferences (which, in the strong sense of the word, are necessarily unobservable) and reasons for decisions that we perfectly know were eventually made is perhaps also presuming, with a high risk of ad hoc explanations and teleology—especially when the decisions to be explained are mostly decisions to go on with the existing institutions. I however believe that, as historians, we bear a strong responsibility to explain which exact mechanisms underlie reproduction, or path dependency: continuity as well as change deserves our understanding. Lazy explanations, here, have to do with essentialized versions of tradition, culture, or identity. I have tried to envision these notions in a more dynamic way, showing how the sense of an encompassing commercial community, or its absence, can be found in sources, how they could be reproduced by discourses, but also by daily practices, and how they might shape preferences as regards dispute resolution. Similarly, my understanding of legal traditions insists on legal consciousness, however difficult to assess it might be for past actors, and on systems of mutually supportive institutions, rather than on the general distinction between common and civil law. Whereas my French sources are undoubtedly more detailed and encompassing, the comparison that I have drawn between some English and US merchants as regards their familiarity with the law and courts opens the way for additional important research: it qualifies claims on the Anglo-Saxon character, as well as on the allegedly recent encounter between law and business.