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Were Commercial Courts Tools of "Self-Regulation" for Merchants? The Case of nineteenth-century Paris

This presentation will be based on an unpublished manuscript (prepared for my *habilitation à diriger des recherches* in 2012) **that is the product of several years of research**. I used archival material from the Paris Commercial Court for the years 1790-1880 (mostly samples of judgments and arbiter reports and minutes of organizational discussions among judges) as well as evidence on the careers of judges and other persons involved in the court (clerks, special lawyers, etc.) and (mostly printed) discursive sources, e.g. by lawyers or legal scholars, discussing the institution. More anecdotal evidence seems to allow a generalization of most of my conclusions to other French towns. My point was to describe and explain the long-term survival of a specific French model of "judgment by peers" that I consider to also have existed in other sorts of courts and to be different from alternative models of privately organized collective arbitration. Therefore, I used complementary archival and printed material on other French courts or quasi-courts dealing with economic disputes, especially the Parisian *conseils de prud'hommes* (official labor courts) and arbitration committees of *chambres syndicales* (unofficial business associations), especially that of bronze-makers. Finally, I also used archival material from the arbitration committee of the New York Chamber of Commerce and English parliamentary debates to better assess the peculiarities of the French system, both by a comparison and by the study of discourses from abroad on French courts. My study is focused on the century that followed the French revolution, but informed by Amalia Kessler's work on the 18th century and work by several sociologists (esp. Lazega, Vauchez and Willemez) on the 1980s-2000s situation.

I will only give here the outline of my presentation. Empirical material backing my conclusions can be found in my manuscript. References (chapters and page numbers) to the complete, French manuscript are given below. It can be downloaded at http://tel.archives-ouvertes.fr/tel-00685544. You can also download a French 5-page abstract or an English 6-page abstract of the manuscript.

I will begin with an assessment of the ambiguous role assigned to commercial courts in the literature, especially the neo-institutionalist economic history literature [Introduction, p. 22-25]. Milgrom, North and Weingast's paper has become a classic; it has given new strength to an old myth of legal history, that of the *lex mercatoria* or "law merchant". In their view, however, the law merchant very much departed from what is generally considered as law, and merchant courts from what is generally considered as courts: their whole point was to include them in a wider family

of institutions (in the wide sense of social norms) without institutions (in the narrower sense of abstract rules, enforcement by third-parties, involvement of something like a State, etc.), in the realm of "self-enforcing contracts" and "reputational sanctions". Accordingly, they did not pay much attention to the actual workings of such courts, the type of cases that they handled, their procedures, their clerks, etc.

More recent and more empirical studies of medieval or early modern merchant courts (e.g. by Sachs and Kessler) have shown that this view had at least to be qualified, as these courts often had quite formal procedures, were more or less included in official/general justice systems, etc. They were nothing like the natural, conflictless product of a pre-existing community of merchants, applying rules that spontaneously emerged from repeated transactions (which was the original idea of Benson – ironically intended as a criticism of neo-institutionalism).

My own study yielded the same results. It might sound unsurprising, as 19th-century France, famously criticized by Tocqueville for lacking medium bodies and celebrated by Weber for its Civil Code and bureaucratization, is rarely though of as a heaven of commercial self-regulation. However, what I also found is that the 19th century arguably was the time in the history of French commercial courts (that were created in the 16th century) when they dealt with the most cases (as compared with the population or commercial activity) and when they were most supported, by virtually every government and every lawyer. Commercial courts were a French institution in the sense that they were totally taken for granted [Chapter 2, p. 102-138]. In addition, until the last third of the century, they were also considered as a model in foreign countries, and active public campaigns led by merchants and industrialists demanded their importation in the US and mostly in England [Chapter 4]. I thus discuss **how such an institution, that was originally associated with Old Regime logics of personal status and privilege, so well survived in the post-Civil Code, post-Le Chapelier law (that forbade guilds and business associations in 1791) institutional environment. If it was due to some sort of departure from an original, communautarian model to an integration into a modern State, why is it that merchant communities were so much interested in this model?**

1. An hybrid, not a private institution...

To answer these questions, I put forward a distinction between two different models of commercial courts/arbitration committees, the idealtypes of which would be:

- **the post-1790 Paris commercial court**: an integral part of the official justice system, with e.g. a possibility to appeal above a certain sum and an official enforcement of decisions. It however had specific procedures, employees and lawyers. On the one hand, it allowed the court to deal with the vast majority of standard cases (mostly unpaid promissory notes and bills of exchange) in a cheap and predictable manner [Chapter 6, p. 449-456]. On the other hand, enquiries on more complicated cases were made in very flexible ways; they mostly involved non the expertise of judges themselves on commercial matters, but their expertise and discretion in choosing the appropriate experts/arbiters/arbitrators, who in some cases even were collective actors: the unofficial business associations [Chapter 3, p. 177-212];

- **the arbitration committee of a privately established business association**, e.g. the London Stock Exchange, the Parisian bronzemakers' *chambre syndicale* or the New York Chamber of Commerce before 1874 (although the Chamber of Commerce itself had a charter) [Chapter 3,

p. 213-240; Chapter 4, p. 290-299, 302-328]. In most of these cases, there was no appeal; the parties used no lawyers or their regular lawyers; sanctions mostly included exclusion from the association.

What I found was a consistent failure of the second type of conflict-resolution institutions to survive and to attract many cases in the 19th century, especially in France but also in other countries, apart from a handful of very exceptional cases. This was of course partly due to laws barring arbitration clauses in many countries, but what is worth discussing is that there was not much mobilization, during a long period, to change these laws. On the contrary, many merchants seemed to be interested in the semi-public, semi-private (or semi-official, semi-communautarian) features of the French system, especially in that it was able to provide relatively cheap and fast decisions and to allow prosecution of commercial partners that did not share norms with the plaintiffs (which is more or less the definition of a defendent). They used the lexicon of "public service" or "semi-governmental institution" to describe the French system. **Merchants themselves did not seem to believe in a really autonomous self-regulation of their alleged community.**

My findings in this respect are intended as part of an investigation of various possible shapes of "hybrid regulation" or "coregulation". I argue that we should begin with the idea that no court (and no regulation) is purely "public" or purely "private" (on various dimensions of the "publicness" of courts, I refer to Galanter and Lande). Beyond this misleading dichotomy, we find a collection of diverse shapes of organizations and discourses that is worth exploring and categorizing [Introduction, p. 25-27].

2. ... whose legitimacy was based on the idea of a commercial community...

This is not to say, however, that the Paris Commercial Court had no relationship with this idea of a community of commerce. On the contrary, this idea was still part of the necessary conditions of its survival. What I have shown is its the judges and other people involved in active institutional work on behalf of the commercial courts always tried to emphasize this idea of a community, including the smallest female fish retailer as well as international bankers, and distinct from the remainder of France [Chapter 6, p. 457-453; Conclusion, p. 504-506].

As Kessler has shown, commercial courts and especially judges of the Paris Court succeeded in having the institution survive the Revolution because they had shifted their discourses, earlier in the 18th century, away from defending a specific class of people and towards an eulogy of "commerce" as an abstract, civilizing force increasing the wealth of nations. This discourse was still there in the 19th century, but it was accompanied by a strong notion of the commercial community (although the precise word "community" was not used).

Thus, **judges and lawyers pleading the need of specific commercial courts emphasized the idea of a language of commerce that was only understood by those who practiced it; it was different from that of the law, but also from that of trades**, which was also very much present at that time (as shown by Sewell). The language of commerce was supposed to encompass all trades and to be best mastered by *négociant* (wholesale, large-scale merchants) that were thus able to judge for all trades.

The importance of the notion of a unified commercial community is also obvious in other, more or less explicit institutional strategies, especially in growing efforts to represent various trades among judges [Chapter 5, p. 356-361], in the very early acceptation of female vote for the election

of commercial judges, and in the low judicial fees and the well-defined pool of special lawyers that were established to allow anyone to easily sue debtors [Chapter 5, p. 372-377].

The relative success of this institutional work appears if we compare French with England, where debates on commercial courts expressed the sharply conflicting interests of City bankers and merchants, mere traders, and merchants/manufacturers from industrial towns and ports (the last group being the only one to support the French model). This success was of course based on enduring peculiarities of law and administrations regarding merchants in France, from the 1673 Ordinance to the establishment of a specific tax on businesses after the Revolution [Chapter 4, p. 276-282].

This representation of French commercial courts as the thing of merchants small or big, especially enforcing credit relationships between individual firms or partnerships, with *négociants* as the benevolent elite, arguably was also one of the reasons of the decline of the institution after 1880, as it seemed less well-suited to the modern corporation. Rising criticism by lawyers seems to have been directly related to the revocation of judgments involving large corporations; corporations seem to not so much have used commercial courts even before that date, and their governance structures did not easily fit in the model of the commercial community. This might be one of the reasons behind the demand for arbitration that seems to have risen in the late 19th century [Chapter 6, p. 491-498 ; Conclusion, p. 506-508].

3. ... but that did not judge according to collectively agreed-on commercial customs

What I therefore show is that, while the survival of French commercial courts was very much based on their ability to appear as one of the main institutions of a vibrant merchant community, and, more practically, to provide a place where any merchant small or big (including independent workers, bankers, manufacturers, etc.) could become a plaintiff, it does not imply that they performed some sort of self-regulation. First, as I have already said, they embodied a model of hybrid regulation in which the official character of the court played a crucial role. Second, the parties were not only merchants, as those who had used the language of commerce by signing a promissory note or bill of exchange could sue or be sued; 15-20% of plaintiffs (but very few defendants) were in this case in 19th-century Paris [Chapter 5, p. 352-356].

Third, **I did not find evidence of the kind of specific values behind judgments** that were prevalent in 18th-century Paris, according to Kessler (a merchant interpretation of Christian virtues) **or of the reliance on clearly defined customs (*usages du commerce*) that is generally considered by practicioners of commercial justice or arbitration and by scholars as specific for the institution**. [Chapter 6, p. 467-486, 491-500].

I therefore argue that the mere facts of (1) merchants being (part or all of the) judges, as opposed to lawyers, and of (2) having a special court dealing with commercial matters do not *per se* make commercial courts a special sort of courts, in that they would judge according to different criteria. I especially did not find that they judged according to norms emerging from transactions and widely agreed-on in the commercial community. This concurs with the few empirical studies that asked such questions about contemporary, private or semi-private special courts (Bernstein on cereal trade, Feldman on a Japanese "Tuna court"). Even in arbitration committees embodying my second idealtype, I in fact found communities constantly renegotiating the boundaries of lawful and unlawful competition, not community judges applying pre-existing "customs" [Chapter 3, p. 221-

240; Chapter 4, p. 318-328].

In the Paris Commercial Court, the word *usages* was sometimes used in arbiters reports, but generally not in judgments. **More generally, when "norms" were involved in reports**, judgements and (as far as we know) lawyers' opinions, as with other civil courts, **they referred more to statistical norms, or to the likely behavior of an autonomous, interested economic actor**, than to collectively agreed-on norms of behavior. **While French Commercial Court judgments** were extensively cited in jurisprudence publications (especially because of the scarcity of appeals) and thus **participated in the evolution of some parts of commercial law, it cannot be argued that they had it evolved according to collective norms spontaneously emerging from transactions**, or even from the norms of that part of commerce (e.g. bankers) that dominated the courts. Due to the organizational design of commercial courts, at least in the largest towns, it was very difficult for, say, mason judges to enforce some sort of masonry norms in masonry cases – more difficult than in the 18th century, although it was not totally impossible. When it happened, it was the product of the court delegating enquiries to people or associations from the trade, due to constraints in time and money, and not of the judges being themselves merchants.