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## **Courts and the Funding of Business in Nineteenth-Century France**

This paper is intended as a contribution to discussions in this workshop, as initiated by Oscar Gelderblom and Francesca Trivellato's text "The Business History of the Preindustrial World" – and, previously, "The Funding of Small-Scale Business in Pre-Industrial Europe"<sup>1</sup>. (however, if you see potential for an independent paper here, I'm interested in suggestions!) It aims, quite simply, at inserting courts, their archives, and conflict resolution more generally in our debates. Courts could matter in two ways, which will be presented in parts I and II of this paper (a brief introduction to French commercial courts is provided at the beginning of part I).

First, the archives of organizations that (often among other functions) took part in the resolution of commercial disputes could be added to the list of "high-quality primary source material, whether letters, account books, probate inventories, or tax registers" which could be used to write a comparative business history of the preindustrial world. Many business and economic historians are aware of that, but it might be useful, taking nineteenth-century France as a case study, to take stock of what we have already learned from such sources. This might help in setting a program for the study of similar sources elsewhere: there were commercial courts in many cities in the past, be they based on a continental European model or not; and sometimes, similar sources were created by different organizations.

In addition, part I sums up findings in French judicial sources from the literature. They have contributed to the revision of European economic history in a direction that is perhaps still worth emphasizing, because it does not seem to have made its way to mainstream textbooks. Those sources depict an economy where corporations, the stock exchange, and banks played a marginal role; where many goods were produced by sub-sub-contractors ultimately working for wholesale merchants;<sup>2</sup> where supplier credit and commercial paper, along with family loans, were the main sources of credit; and yet an economy that was in many ways modern and growing, even if it was based on institutions deemed more or less archaic after the 1870s.

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<sup>1</sup>A working paper presented in 2016 at the Caltech Early Modern Group.

<sup>2</sup>In the way described by Charles Sabel and Jonathan Zeitlin, 'Historical Alternatives to Mass Production', *Past & Present*, (1985), pp. 133–176; Charles Sabel and Jonathan Zeitlin (eds.), *World of possibilities*, (Cambridge University Press: Cambridge, 2002).

Courts, of course, were part of these institutions. The second thing that I would like to discuss (in part II) is whether and how they mattered for the funding of business. Gerlenderblom and Trivellato urge non-economic historians to consider neo-institutionalist hypotheses, e.g. Avner Greif's discussion of private-order contract enforcement, and discussions of law, finance, and growth. To a modest extent, I have tried to do so in my research on the Paris commercial court, and on attempts in England (and in the State of New York) to establish "tribunals of commerce" in the nineteenth century.<sup>3</sup> My interest in this literature was prompted by the direct contradiction between two lineages of well-cited papers and books which have addressed the preferences of businesspeople as regards dispute resolution. To put it shortly, the Weberian hypothesis, i.e. the idea that capitalism requires predictability, hence formal rationalization, hence a more bureaucratic justice, is still alive and well in many circles.<sup>4</sup> However, many authors in economics, especially in the "law and growth" school, take the opposite for granted, namely the idea that businesspeople favor flexible legal solutions constantly adapting to new needs, and prefer the most informal and less costly resolution mechanism that can be thought of.<sup>5</sup> French commercial courts are an interesting case here because they do not seem to fit clearly in this public/private divide. By offering comments on the role they played in the funding of business in nineteenth-century France, my intention is to move the debate away from (non-existent, at least in my period) general contrasts between common law and civil law, or public formal courts and private informal arbitration. If we are to take courts into account when studying the funding of early modern business, it is more important to address questions of access to justice, legal auxiliaries, and institutional complementarity – questions that are not adequately captured by such divides.

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<sup>3</sup>Part II draws on Claire Lemerrier, 'Un modèle français de jugement des pairs. Les tribunaux de commerce, 1790-1880', manuscript for *habilitation à diriger des recherches*, Paris 8, 2012, and Claire Lemerrier, 'How do businesspeople like their courts? Evidence from mid-19th century France, England, and New York City', working paper for the University of Michigan Legal History Workshop/Law & Economics Workshop, 2015. Both texts are available online.

<sup>4</sup>For a discussion of Weber's view, along with a reappraisal of Ottoman qadis (the epitome of unpredictability for Weber, and a simile for French commercial judges among some contemporaries), see Avi Rubin, *Ottoman Nizamiye courts*, (Palgrave Macmillan: New York, 2011).

<sup>5</sup>Simeon Djankov, Rafael La Porta, Florencio Lopez-De-Silanes, and Andrei Shleifer, 'Courts', *Quarterly Journal of Economics*, 118 (2003), pp. 453–517.

## **I. What do we learn about the funding of business from the archives of French commercial courts? Partnerships, bankruptcies, and commercial paper**

### *French commercial courts*

Official commercial courts (sanctioned by the king) have existed in many commercial cities in France from the mid-sixteenth-century onward. Their organization and jurisdiction has little changed since. All the judges are laypeople, elected by merchants (today, by firms). They deal with most of the disputes between (non-agricultural) businesses that are considered civil, not penal, e.g. on the quality of goods, unlawful competition, and unpaid debts. The effect of the French Revolution on the institution (in a law of 1790) was mostly to create more commercial courts, and to increase and strengthen their jurisdiction. While bankruptcies had often been the sole province of general courts (i.e. non-commercial, with professional judges) during the Old Regime, commercial courts were now in charge. As all other special courts had been abolished, they also gained jurisdiction on maritime cases, which had formerly been treated by admiralties. Finally, in the new judicial order that replaced legal pluralism, the parties *had* to bring their commercial disputes to commercial courts, if they wanted official litigation: those were the first resort court for commercial matters; appeals would go to the same Appeals courts than for other civil disputes.

Hence commercial courts were completely official (as they had been before the Revolution), taking part in the public monopoly on legitimate violence, i.e. using bailiffs and the police whenever necessary (prison for commercial debt was only abolished in 1867). Yet they were a specialized court, with judges elected among a social group that was supposed to be that of the parties, and commercial procedure was simpler than civil procedure (e.g. requiring less testimonies, admitting merchant correspondence and accounts as proof). These features had already been quite common in cities of continental Europe before the French Revolution; what it mostly did was systematize them (in France and beyond, thanks to Napoleonic armies and Codes) – however counterintuitive it might seem, as it is the same revolutionary Parliament that forbade guilds and any type of business interest association.

The nineteenth century was arguably the time when most disputes were dealt with by French commercial courts (certainly if we take into account the general population or number of businesses). 165,000 new cases were filed in 1840 (42,000 in Paris alone), 225,000 in 1883 (64,000 in Paris).<sup>6</sup> My own research has been centered on those cases,

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<sup>6</sup>*Compte général de l'administration de la justice civile et commerciale* (Paris, Imprimerie royale/nationale/impériale, 1833-).

i.e. litigation strictly speaking. Yet courts had several other functions which left important archives for research of the funding of business.<sup>7</sup>

### *Partnerships*

Since 1673, a copy of all types of deeds creating, extending or dissolving a partnership or another type of firm (e.g. a corporation), be they drawn up privately or by a notary, had to be left at the clerk's office of the relevant commercial court. Today, local archives hold gigantic series of such deeds, which have not been used that much by historians.<sup>8</sup> They are often poorly indexed, which makes them unsuitable for firm monographs; the fact that deeds are often arranged in purely chronological order, mixing creations, slight changes, extensions, and dissolutions, also complicates quantitative enquiries. However, the reason why they are so seldom used has probably more to do with a lack of interest in patterns of governance: the deeds demonstrate flexibility in the drawing of various types of partnerships;<sup>9</sup> they also allow us to understand who brought what to the firm and how they were to be compensated.

For example, in 1845, René Josse, a flower- and feather-maker (an important industry in Paris at the time) and Pierre Lecher, a dyer, created a general partnership. Josse already had a business: his contribution was its material and merchandise, for 3,300.25 FF. Lecher only brought “his industry,” and was supposed to be in charge of accounts, and “internal affairs” (perhaps supervising production), while Josse would deal with “external affairs” (perhaps sales and credit). They and their wives were to give all their time to the firm, and Josse had to find a female apprentice. The two associates were to share benefits and losses equally, but those should be calculated *after* the payment of a 6% interest to Josse on his capital. In addition, the share of the benefits which could be used by each associate for his personal needs was specified.<sup>10</sup> Of course, this is just a contract, in the sense that it tells us little about what actually happened afterwards (we could look for the dissolution or prolongation of this partnership in the source, but this is where it gets complicated). However, it is a great source to understand the drawing of contracts per se,

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<sup>7</sup>For Parisian archives, see Brigitte Lainé, *Juridiction consulaire 1563-1792. Tribunal de commerce 1792-1997*, (Archives de Paris: Paris, 2009). For archives of French courts generally, including commercial courts: Jean-Claude Farcy, *Guide des archives judiciaires et pénitentiaires*, (CNRS éditions: Paris, 1992 – available online).

<sup>8</sup>Hervé Joly, ‘L’exploitation des actes de sociétés pour l’histoire des entreprises : intérêts et difficultés’, *Entreprises et histoire*, 33 (2003), pp. 120–126.

<sup>9</sup>Naomi Lamoreaux and Jean-Laurent Rosenthal, ‘Legal Regime and Business’s Organizational Choice: A Comparison of France and the United States During the Era of Industrialization’, *American Law and Economics Review*, 7 (2005), pp. 28–61.

<sup>10</sup>Archives départementales de Paris (ADP), D31U3 121, n°69. I thank Stéphane Buzzi for sharing this source. 3,300 FF represent two to three years of wages of a skilled worker, or one year for a low-level employee.

the types of capital the actors thought that they could rely on, and acceptable ways to allocate and reward tasks.

Jean-Laurent Rosenthal has compiled a series of such deeds for Paris, which hopefully will be analyzed in the near future. His team has already made some calculations based on published lists of new companies: in the nineteenth century, many newspapers (some of which have been digitized) began to publish extracts from the information available at the clerk's office, increasing its circulation.<sup>11</sup> Studies on the North of France have shown the potential of research in the detailed contents of deeds of partnership. Jean-Pierre Hirsch drew on them to open the path for a serious study of family firms, observing that if family, as a set of private resources, had been sufficient to run a business, its members would not have needed to complement it with legal formalization. Jean-Luc Mastin followed his path, studying how elite families transitioned to the heavy industries in the second half of the nineteenth century. They went on using the same “recipes” that had worked one century before, i.e. limited partnerships complemented by tailored “family pacts” which ensured a reciprocal circulation of credit (law was necessary to enforce family solidarity). They also experimented with new legal forms, e.g. civil joint-stock companies (*sociétés civiles par actions*) for mines. More studies of this sort are certainly needed, even for France, as differences between regions and sectors are likely to have been large, precisely because the French legal regime offered a lot of flexibility.<sup>12</sup>

Finally, it is worth noticing that disputes between associates were singled out in French law from 1673 to 1856: supposedly to avoid costs and delays, and certainly to avoid publicity (because those were “intimate relationships” likely to involve pride [*amour-propre*]), they were to be dealt with by arbiters.<sup>13</sup> In the nineteenth century, commercial courts had to choose these arbiters. In Paris, there were ca. 250 such “forced arbitrations”, as they were called (*arbitrages forcés*), each year. They were assigned to a small pool of young lawyers (more famous ones were occasionally chosen for cases that were deemed important). To my knowledge, such arbitrations have never been studied. Statistics of the ministry of Justice count them separately, and at least some of the decisions are preserved among the series of deeds (some documents from famous cases also appear in printed form at the *Bibliothèque nationale de France*). Taking them into

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<sup>11</sup>Lamoreaux and Rosenthal, ‘Legal Regime.’

<sup>12</sup>Jean-Pierre Hirsch, *Les deux rêves du commerce*, (éditions de l’EHESS: Paris, 1991); Jean-Luc Mastin, ‘Concentration dans l’industrie minière et construction de l’espace régional’, *Revue du Nord*, 387 (2010), p. 793; Jean-Luc Mastin, ‘La mutualité du crédit des “grandes familles” du Nord, au cœur du système financier régional (région lilloise, XIXe siècle)’, *Entreprises et histoire*, 77 (2014), pp. 74–84. Systematic studies might be found in unpublished master's and PhD dissertations (monographs of sectors or regions), which are often badly indexed in France. It is however unlikely that much attention has been paid to the exact terms of contracts in older works.

<sup>13</sup>Quotations from minutes of discussions among Parisian commercial judges (preserved at the clerk's office), 23 February 1850. See also Chambre de commerce de Boulogne-sur-Mer, *De l’arbitrage forcé*, (impr. de Charles Aigre: Boulogne-sur-Mer, 1850).

account could add to the study of governance. In addition, the fact that, from 1856 onward, these conflicts fell in the jurisdiction of commercial courts is interesting. In Paris, the court referred them to a new category of auxiliaries: liquidators (those in charge of winding up), who quickly earned the same bad reputation as trustees in bankruptcies. It is very likely that those were essentially the same persons, performing the same duties as before. Yet commercial courts and chambers of commerce had asked for this change because forced arbitration was slow and costly, and it seems that no merchant objected. This is one of many indications that advantages often associated with arbitration in the literature (without consideration of how it actually works) were thought of by contemporaries as advantages of commercial courts *over* arbitration.

### *Bankruptcies*

Bankruptcy files have long been used to study the funding of French firms, as it is the only source that is available in public archives.<sup>14</sup> Bankrupt firms are of course not a random sample of all firms. However, there were many bankruptcies, which were not always caused by the bankrupt's lack of skills: such files give us a reasonable idea of the range of common business practices (perhaps biased in the direction of riskier ones). Due to changes in procedure, many account books and correspondences produced *before* insolvency have been preserved for the eighteenth, but not the nineteenth century<sup>15</sup>. Later files mostly give access to successive, synthetic balance sheets drawn *after* the beginning of the procedure, inventories of all assets drawn by the trustee, lists of creditors, and a short narrative of the firm's and the entrepreneur's trajectory.<sup>16</sup> We have therefore learned much more about Old Regime practices than about later ways of funding businesses from

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<sup>14</sup>The classical study is that by Jean-Clément Martin, 'Le commerçant, la faillite et l'historien', *Annales ESC*, 35 (1980), pp. 1251–1268; it includes many (rather anecdotal) examples for the nineteenth century. There were however more studies of *numbers* of bankruptcies than systematic investigations of files since.

<sup>15</sup>For excellent studies of such eighteenth-century account books, see Natacha Coquery, *Tenir boutique à Paris au XVIIIe siècle : luxe et demi-luxe* (CTHS: Paris, 2011) and Clare Haru Crowston, *Credit, fashion, sex. Economies of regard in Old Regime France*, (Duke University Press: Durham, 2013).

<sup>16</sup>These narratives sometimes give interesting details about credit and about how tasks were organized in the firm generally (i.e. how the firm used current accounts and commercial paper; who managed accounts; how to deal with associates who also claimed to be creditors). They are of course the product of a normative interpretation by bankruptcy trustees (i.e., theoretically at least, creditors before 1838, and auxiliaries of the court afterwards) e.g. when they questioned the rationality of this or that investment. As such, they would deserve a systematic study that would use them as sources on some practices as well as on social norms. For interesting examples, see Nicolas Praquin, 'Les faillites au XIXe siècle. Le droit, le chiffre et les pratiques comptables', *Revue française de sciences de gestion*, (2008), pp. 359–382, esp. pp. 369–71 on governance conflicts. For a study of the types of account books listed in inventories, Pierre Labardin, 'Accounting prescription and practice in nineteenth-century France. An analysis of bankruptcy cases', *Accounting History Review*, 21 (2011), pp. 263–283.

this source – and we could still expand the size and diversity of samples for the eighteenth century.

Recent investigations in the files of small shopkeepers, of milliners (more or less prosperous), of an horologer who was part of the wider milieu of wholesale merchants, all of them in Paris, and of sugar refineries in various places all offer a remarkably similar description of credit in the nineteenth century – a description that is completely compatible with the one drawn from the account books of transatlantic merchant-bankers.<sup>17</sup> Account books were mostly used to manage complex, often long-term credit relationships (rather than to optimize profit on specific ventures). Credit was extremely important in comparison to capital, and took many shapes that seldom included an explicit mention of interest (although, of course, it had a price). As cash payment was almost never used, the survival of firms was based on a delicate balance between supplier credit and credit to clients. Some of those clients were known to seldom pay, but were still sought for because they offered political contacts or publicity; more generally, provisions were always made for doubtful or lost claims. Most of the volume of credit was managed through current accounts, thus blurring borders between trade and banking (and making retrospective calculations of maturity or interest almost impossible and possibly irrelevant). The second main source of credit was commercial paper, i.e. promissory notes and bills of exchange (the latter being more used by firms with a higher social and economic status). Even promissory notes were not always associated with actual commercial exchange, which added to the financial role of wholesale merchants.

Nineteenth-century files are more easy to use for a study of bankruptcy procedures than for that of funding per se. Yet recent research by Viera Rebolledo-Dhuin based on 141 files of Parisian booksellers/publishers paints a picture that is very close from that of the Old Regime.<sup>18</sup> Creditors (those who were listed during the proceedings) were often

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<sup>17</sup>Note that 20 to 30% of all French bankruptcies were recorded in Paris. Natacha Coquery, 'Credit, trust and risk. Shopkeepers bankruptcies in the eighteenth century Paris', in Thomas Max Safley, ed., *The history of bankruptcy: economic, social and cultural implications in early modern Europe* (Routledge: London, 2013) pp. 52–71; Clare Haru Crowston, *Credit, fashion, sex. Economies of regard in Old Regime France*, (Duke University Press: Durham, 2013); Marie-Agnès Dequidt, 'Le négociant et le crédit : le cas de Noël Héroy, horloger négociant à Paris, fin du XVIIIe siècle', *Entreprises et histoire*, 77 (2014), pp. 22–32; Maud Villeret, 'Entre opportunité et risque : l'usage du crédit dans les raffineries de sucre françaises au XVIIIe siècle', *Entreprises et histoire*, 77 (2014), pp. 33–42; Pierre Gervais, Yannick Lemarchand, and Dominique Margairaz (eds.), *Merchants and Profit in the Age of Commerce, 1680-1830*, (Pickering & Chatto Publishers: London, 2014).

<sup>18</sup>Viera Rebolledo-Dhuin, 'L'espace parisien des libraires sous la monarchie de Juillet', *Revue d'histoire du XIXe siècle*, (2009), pp. 37–57; Viera Rebolledo-Dhuin, 'De la circulation du papier dans la librairie à Paris au XIXe siècle ou les dynamiques du crédit inter-entreprises dans le secteur du livre', *Entreprises et histoire*, 77 (2014), pp. 59–73. She complemented her study of bankruptcy files with private archives from a librarian turned discount-broker and sources from the Bank of France. Her results are consonant with those of researchers who studied industrial businesses, out of Paris, on the basis of account books,

drawn from the overlapping circles of family, neighbors, fellow booksellers/publishers, and suppliers (with family, i.e. loans by parents or the wife's dowry, playing a central role at the initial stage of buying a relatively expensive business). These circles had to be supplemented with the circulation of commercial paper, managed by financiers. Booksellers were considered bad debts by the Bank of France (because of the risk associated with owning large supplies of books), so that their financiers were mostly fellow booksellers whose discount brokering activity had become more and more important. Those connected the world of books with wider merchant circles (and asked a tall price for this service). It is through such intermediaries that the London banking crisis of 1825 hit Parisian booksellers. Merchandise played the role of collateral for part of the commercial paper (*warrants*, pledged assets).

This precise description by Rebolledo-Dhuin confirms contemporary accounts and some macro quantitative data on the key role of the discounting of commercial paper in the French economy as a whole (although corroborating fine-grained evidence on different sectors and place would of course be useful). As the Bank of France, during most of the century, chose not to disseminate too much paper money of its own, and to very restrictively discount commercial paper, its circulation was organized in pyramids which left an important place to intermediaries with a direct knowledge of small and medium businesses: practitioners of a trade who also played a financial role, wholesale merchants generally, and local banks (the latter, then large deposit banks, tending to replace the former after the middle of the century). The circulation of commercial paper supplemented notarized loans, providing credit that was not necessarily short-term, due to frequent renewals.<sup>19</sup>

In a very original research, economic historian Pierre-Cyrille Hautcœur and business scientist Nadine Levratto, studying Paris in the second half of the nineteenth century, contrast the fate of bankrupt firms depending on the size of their capital and on their status (sole proprietorships, partnerships, limited partnerships and corporations).<sup>20</sup> They find more and more differentiation in the initial situation of these firms, which could prompt further research on their funding as well as their use of bankruptcy proceedings. They also notice that, all other things being equal, sole proprietorships were relatively

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e.g. Jean-Claude Daumas, 'Contraintes et logiques du crédit inter-entreprises dans une firme textile familiale. Blin et Blin, 1827-1975', *Entreprises et histoire*, 77 (2014), pp. 85–93.

<sup>19</sup>Pierre-Cyrille Hautcœur, 'Les transformations du crédit en France au XIXe siècle', *Romantisme*, (2011), pp. 23–38; Viera Rebolledo-Dhuin and Patrice Baubeau, 'Escompte. L'évolution d'une pratique d'origine marchande (XIXe s.-XXe s.)', in Didier Bensadon, Nicolas Praquin, and Béatrice Touchelay, eds., *Dictionnaire historique de comptabilité des entreprises* (Presses Universitaires du Septentrion: Villeneuve d'Ascq, 2016) pp. 379–383.

<sup>20</sup>Pierre-Cyrille Hautcœur and Nadine Levratto, 'Petites et grandes entreprises face à la faillite au XIXe siècle en France : du droit à la pratique', in Nadine Levratto and Alessandro Stanziani, eds., *Le capitalisme au futur antérieur. Crédit et spéculation en France fin XVIIIe - début XXe siècles* (Bruylant: Bruxelles, 2011) pp. 199–265.

avored by creditors (and/or trustees and/or judges) in the sense that they were more often authorized to pursue their businesses, perhaps because they were deemed more involved in it, hence less likely to fail again. Larger businesses were otherwise treated with more leniency in the proceedings. This is an interesting pattern that would deserve confirmation on wider samples of bankruptcy files: it would point in the direction of a court favoring firms with higher economic status, but also those that were more traditionally organized. This seems consonant with other behaviors of commercial courts, esp. as regards general litigation.

### *Credit in commercial litigation*

Most monographs of commercial courts have been solely concerned with the trajectories of their judges and their jurisdictional fights, and have avoided the use of judicial archives in the strict sense. Amalia Kessler is an important exception, with her study of hundreds of eighteenth-century Parisian arbiter reports.<sup>21</sup> Even though she made little use of quantification, reading many reports helped her to select significant cases, which confirm the uses of credit and accounts sketched above. Arbiter reports are lacking in Paris for most of the nineteenth century, and it seems that they have not been preserved in other places. The systematic study of Parisian reports for the beginning and end of the century would still be extremely useful: few sources give that much detail on actual commercial practices. Even if questions of quality of goods are over-represented in the cases referred to arbiters, we get, for example, details on various schemes of payment, mixing cash and commercial paper with assorted maturities.<sup>22</sup> Moreover, arbiters were regularly used because the parties simply disagreed on who owed something to whom: in such cases, their sole role was to sit with the parties and compare their accounts. Even if such reports do not include a copy of the account books, they are an interesting testimony to uses of current accounts.<sup>23</sup>

What mostly remains from the daily workings of commercial courts in the nineteenth century is series of judgments. Those are purely chronological, generally not indexed in any way, and preserved in overwhelming quantities. In Paris, the court judged five days per week, and on two of these days, it typically issued 600 to 1,000 judgments. Those are almost impossible to read for an untrained scholar, due to the heavy use of abbreviations (each courts had its own and they were never made explicit) – it takes more than one day to read one day's worth of judgments for the capital. Finally, such efforts might seem

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<sup>21</sup>Amalia D. Kessler, *A revolution in commerce. The Parisian Merchant Court and the Rise of Commercial Society in eighteenth-century France*, (Yale University Press: New Haven, 2007).

<sup>22</sup>See e.g. a case involving piano-maker Pleyel, 25 December 1810, ADP D6U3 36.

<sup>23</sup>Similarly, judges themselves had to check accounts and write a report when they were asked to do so by another court (commercial or otherwise): this created documents which cannot yield systematic data but are interesting as case studies. ADP D6U3 40-41

pointless because judgments generally tell very little about cases. As regards our topic, for example, they generally don't state when a debt relation had begun.<sup>24</sup> I have however studied (non-ideal) samples of judgments, so as to understand the daily workings of the court (for Paris and, in a more exploratory way, for the middle-size town of Beauvais).<sup>25</sup> This data provides an additional view of credit practices, and of course mostly documents uses of the judicial system.

Litigated cases offer a small, non-representative sample of commercial transactions. Each Parisian entrepreneur would, on average, be a party in one case per year (of course, many would in fact never litigate while others, esp. financiers, would do so very often), which seems to be a high rate in comparison with other historical settings.<sup>26</sup> However, the vast majority of transactions would never be litigated. It is plausible that litigation would be more frequent for transactions that were likely to offer cheap, quick, and predictable outcomes. The prevalence of commercial paper before the court is certainly related to such factors. Yet it also reminds us of its importance for commerce generally; the relatively easy recovery of debt based on promissory notes and bills of exchange was certainly part of their appeal. In Paris, the recovery of a promissory note was the main issue in 40 to 60% of cases on the days devoted to the simplest judgments, and still 30 to 40% on days devoted to semi-complex cases (seemingly without change over time). Unpaid bills of exchange, with typically higher amounts (500 to 2,000 FF for the typical bill of exchange, 200 to 400 FF for the typical promissory note) made up 10 to 20% of the daily caseload in the 1800s-20s, and 5% afterwards. Similarly, in Beauvais, in 1862, I found 46% of unpaid promissory notes and 14% of unpaid money orders (*mandats*, a slightly less secure version of the bill of exchange, for amounts not much higher than those of promissory notes). In the remainder of the litigation, some conflicts had to do with the funding of business, e.g. unpaid merchandise (hinting at supplier credit) or demands to pay an account balance; but the plaintiff's claims were generally less easy to interpret from terse judgments.

Commercial courts appear as an accessible last resort solution to recover debts based on commercial paper. Since the eighteenth century, it was clear that all endorsers of a bill of exchange could be held responsible for its payment;<sup>27</sup> moreover, they fell in the

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<sup>24</sup>There are, however, exceptions, i.e. cases in which judgments themselves offer narratives of practices. And exceptions, in such a source, number in the thousands. A systematic investigation of judgments looking for specific information (on, say, uses of commercial paper, supplier credit, or problems of governance in partnerships) would be possible.

<sup>25</sup>Lemerrier, 'Un modèle français.' I mostly used samples of 50 to 200 judgments clustered in the same day (trying to vary days and seasons while covering several decades, with a total of ca. 1,700 judgments).

<sup>26</sup>See e.g. Oscar Gelderblom, *Cities of commerce*, (Princeton University Press: Princeton, 2015), chapter 5. There were ca. 40,000 merchants (*patentés*) in Paris and 80,000 judgments; most judgments involved at least two parties (many involved more, but many cases included more than one judgment).

<sup>27</sup>Veronica Aoki Santarosa, 'Financing Long-Distance Trade: The Joint Liability Rule and Bills of Exchange in Eighteenth-Century France', *The Journal of Economic History*, 75 (2015), pp. 690–719.

jurisdiction of commercial courts even if they owned no business, because the bill of exchange was deemed a commercial instrument by nature (even if it was also used for non-commercial loans). The same was true for promissory notes. Provided that the paper had been registered with the administration (which required a light tax), and, for bills of exchange, that they had been protested (a procedure that was carried on by bailiffs or notaries, depending on the cities, and had also long been routine), a commercial court would always order payment of commercial paper, without further enquiry.<sup>28</sup> Finally, in large cities, commercial courts used a small pool of lawyers called *agrées* (they had no monopoly, but represented most of the parties) who had to apply a rigid scale of fees for simple cases – and this was the paradigmatic simple case. Most parties never appeared in court, especially in cases based on commercial paper: in Paris, the fifteen *agrées* represented most of them.

Litigation was therefore a relatively cheap tactic: fees payed to the administration, the court and *agrées* represented at most 10-15% of the sum at stake for typical cases (and of course, these expenses were theoretically reimbursed by the losing party). It could be used for comparatively small debts, i.e. from 100 FF upward (roughly half of cases in the Paris court would have fallen in the jurisdiction of county courts, dealing with “small debts,” in England; the median amount at stake represented 100 days of wages for a skilled male worker). Accordingly, the little information we have on parties exhibits social diversity, not only among defendants but also among plaintiffs – although, predictably, bankers and partnerships were more frequent among plaintiffs, while women, sole proprietors, and non-merchants were among defendants. There were 5 to 8% of women and 60 to 90% of sole proprietors among plaintiffs on a given day in Paris and in Beauvais (but the share of sole proprietors decreased in Paris after 1850, and women rarely appeared as creditors for commercial paper); they were respectively 5-20% and 80-95% among defendants (partnerships appeared even less as defendants in cases involving commercial paper). Large banks did use the court to recover some debts; but it also offered chances of recovery to smaller, less specialized creditors. The role of *agrées* was particularly important in that it leveled the field of knowledge of the law and the specific procedures of the court: all parties had to draw from the same, narrow pool.<sup>29</sup>

All this does not imply, however, that going to court (or, in fact, sending an *agrée*) was really a *last* resort solution, and even less that it worked. Judgments would send a bailiff

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<sup>28</sup>Such a routine use of courts has often been dismissed by historians, but some have commented on its significance. On our topic, see Claire Priest, ‘Colonial Courts and Secured Credit: Early American Commercial Litigation and Shay’s Rebellion’, *Yale L.J.*, 108 (1999 1998), pp. 2413–2450; Claire Priest, ‘The Nature of Litigation in Early New England’, *Yale L.J.*, 111 (2002 2001), pp. 1881–1887; Kathryn Hendley, ‘Business Litigation in the Transition: A Portrait of Debt Collection in Russia’, *Law & Society Review*, 38 (2004), pp. 305–348.

<sup>29</sup>This is a remarkable exception to the classical situation of a “repeat player” vs. a “one-shotter,” which generally favors creditors. Marc Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’, *Law & Society Review*, 9 (1974), pp. 95–160.

at the debtor's house, with, if this person was a merchant and the amount due was high enough, the threat of prison; the debtor would have to pay the sum owed, plus a legal 6% interest and judicial expenses. He or she, of course, was not always able or willing to pay, and we know very little on this issue – except that, like in other times and places, prison for debt was seldom actually used (a few hundred people were imprisoned each year, while tens of thousands had been condemned to pay), and was known to mostly make matters worse: it only acted as a threat.<sup>30</sup> What we know, however, is that in 10 to 15% of judgments each day, the Parisian judges offered an extension of time to the debtor – even if, most of the time, the creditor had undeniable evidence, i.e. a registered commercial paper. This was a customary invention of the court in the early nineteenth century, long criticized by professional judges but firmly maintained, and standardized to a 25-day extension. It was granted whenever the defendant bothered to attend court or send an *agrée*, instead of just defaulting. It was in fact a way to avoid the debtor's playing on procedure for the same duration, hence saving money and time to the parties and the court. Creditors were at risk to wait one more month, but this risk was completely predictable.

## II. How did courts matter to the funding of business?

*“Preindustrial France”?* Questions on when, where, and who

Part I generally depicts nineteenth-century French businesses that appear similar to their eighteenth-century counterparts: partnerships working with family loans, supplier credit and commercial paper, in a system dominated by merchant-bankers, making good use of laws and procedures established in 1673. We are still in the “age of commerce” as described by Pierre Gervais,<sup>31</sup> which would then have lasted a bit longer in France than in the US: until the 1870s-80s rather than 1820s. This chronology is compatible with what we know about uses of the corporate form: Jean Rochat's dissertation, confirming the pioneering work by Jean-Laurent Rosenthal et al., found patterns similar to those depicted by Naomi Lamoreaux and others for the United States in the early nineteenth century.<sup>32</sup> Until the 1860s, not only were there few corporations, but they were confined to specific sectors (utilities, insurance, railroads), had few, illiquid shares and were more or less considered as public entities. This all concurs with Alessandro Stanziani's claim (based on different sources) that French growth essentially occurred in the context of Old

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<sup>30</sup>Pierre-Cyrille Hautcœur, ‘La statistique et la lutte contre la contrainte par corps’, *Histoire & Mesure*, XXIII (2008), pp. 167–189.

<sup>31</sup>Gervais et al., *Merchants and Profit*.

<sup>32</sup>Jean Rochat, ‘Change for Continuity. The Making of the société anonyme in 19th Century France’, in Harwell Wells, ed., *Handbook on the History of Corporate and Company Law* (E. Elgar Press, 2017).

Regime laws and, hence, types of business organization.<sup>33</sup> Of course, this growth also involved agriculture, railways, and two successive booms in joint-stock limited partnerships; but France's exports very much relied on luxury and fashion goods.<sup>34</sup> Those were produced on a wider scale, with more division of labor than in the eighteenth century, but in fundamentally similar firms.

This emphasis on continuity between the late seventeenth and late nineteenth centuries is quite important, as scholarship (especially in history departments) still tends to separate the two, hence to overestimate modernity in the nineteenth century (among specialists of the Old Regime) or to study the nineteenth solely by reading it backwards, in search for embryos of future developments (as has long been the case in modern financial history)<sup>35</sup>. Considering this period as an “age of commerce” leads to question the “preindustrial” category used in this workshop. Does it apply to nineteenth-century Paris as I just described it? Gelderblom and Trivellato do not seem to point at the period before industrial growth, before documentation by reliable large datasets, or before Chandlerian firms. They mention two key change that define the “industrial” period, because of their influence on the organization of firms: the appearance of higher-quality public information, and freedom of contractual choice for adult (and probably white) men. The first process was arguably incremental in Europe, with many commercial newspapers already active in the eighteenth century. On the contrary, the French Revolution abruptly forbade guilds and erased almost all barriers to entry in business. Nineteenth-century France would anyway be “industrial,” following this definition. Commercial courts add to this picture, as they appear accessible and predictable (even more so than in the eighteenth century). It is however interesting that in this context, older ways to organize and fund businesses not only survived, but thrived. They perhaps relied on laws and information circuits that were already quite “industrial” in the eighteenth century. Yet those seem to have gradually evolved since the late Middle Age, while businesses expanded in numbers and range, rather than radically changed their organization.<sup>36</sup> I would therefore plead for the inclusion of the age of commerce, even in cases when it continued into the nineteenth century, in our comparisons.

Coming back to the topic of courts, it is clear from Part I that what we know of their archives is heavily biased toward Paris. This would have to be corrected in future

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<sup>33</sup>Alessandro Stanziani, *Rules of exchange: French capitalism in comparative perspective, eighteenth to the early twentieth centuries*, (Cambridge University Press: Cambridge; New York, 2012).

<sup>34</sup>On the funding of agriculture, see Gilles Postel-Vinay, *La terre et l'argent : l'agriculture et le crédit en France du XVIIIe au début du XXe siècle*, (Albin Michel: Paris, 1997).

<sup>35</sup>See for example criticisms by Mary A O'Sullivan, *Dividends of development: Securities markets in the history of U.S. capitalism, 1865-1922*, (Oxford University Press: Oxford, 2016).

<sup>36</sup>On the lack of change in circular letters, business correspondence generally, and proxy forms from the eighteenth to the first half of the nineteenth century, see Arnaud Bartolomei, Fabien Éloire, Claire Lemercier, Matthieu de Oliveira, and Nadège Sougy, ‘L’encastrement des relations entre marchands en France (1750-1850). Une révolution dans le monde du commerce ?’, *Annales HSS*, (2017, forthcoming).

research. However, the little I know about other courts (from statistics of the ministry of Justice, forays in the Beauvais archives, and anecdotal evidence e.g. in English parliamentary reports) confirms what I present here on Paris, be it on court procedures or what court archives tell us on credit. Two potentially important differences should, however, be taken into account in future research. First, Parisian artisans or shopkeepers mostly rented their premises: they didn't have to buy real estate, and could not use it as collateral either. This probably impacted the funding of businesses.<sup>37</sup>

Second, the commercial court was physically more accessible in the capital than in a department with just one such court: in the latter case, it would be located close to most merchant houses, which would create a more important inequality with, say, manufacturers in a distant town. As we have seen, the parties rarely attended audiences in person; they could have learned the proper use of *agréés* by reading manuals or asking fellow merchants, and managed litigation without ever visiting the building. Commercial courts however offered useful commercial information in many ways. Even if newspapers began to print it in the nineteenth century, there was still more to learn in the premises (which were often located close to the local exchange): deeds (and trade marks) could be perused at the clerk's office; bankruptcies were announced and assemblies of creditors took place; and there was an audience public for judgments, perhaps taking notes on who appeared too often as an insolvent debtor. In a context where credit rating was forbidden (the Bank of France had a system, partly based on the contribution of commercial judges or former judges in its discount councils, but kept it private)<sup>38</sup>, this was valuable information. For all their financial and cognitive accessibility, commercial courts in this way probably contributed to define a circle of insiders: not so much those who knew how they worked, but those who visited often. Such a circle would perhaps be more closed, and have more control on business practices, in regions where courts were less physically accessible.

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<sup>37</sup>Robert Cull, Lance E. Davis, Naomi R. Lamoreaux, and Jean-Laurent Rosenthal, 'Historical financing of small- and medium-size enterprises', *Journal of Banking & Finance*, 30 (November 2006), pp. 3017–3042 pointed this out. An early study of ca. 230 bankruptcy files in the region of Roanne indeed notes that textile manufactures were heavily mortgaged. The structures of trade and credit otherwise appear remarkably similar to what I sketched before – including the role of cotton merchant/discount brokers. The exception was a local banker who invested in coal mines. Robert Estier, 'Les faillites, instrument d'histoire économique : l'exemple de la région roannaise dans le deuxième quart du XIXe siècle (1827-1851)', *Bulletin du centre d'histoire économique et sociale de la région lyonnaise*, (1973), pp. 17–59.

<sup>38</sup>Emmanuel Prunaux, 'Les comptoirs d'escompte de la Banque de France, 1re partie', *Napoleonica. La Revue*, (2010), pp. 14–146; Emmanuel Prunaux, 'Les comptoirs d'escompte de la Banque de France, 2e partie', *Napoleonica. La Revue*, (2010), pp. 49–98.

## *Evolving laws and economic ideas*

With these caveats in mind, let us come back to the question of how commercial courts could matter to the funding of business. Perhaps the most obvious channel of influence is through debates and jurisprudence leading to an evolution of the law. Commercial judges were lay judges: their peculiar position in the judicial system was predicated on the fact that they had skills that other judges had not, hence they understood economic evolutions and their legal consequences better. Accordingly, commercial courts generally, and especially the president of the Parisian court, were regularly asked for advice by the ministers in charge of Commerce and Justice in the nineteenth century (ca. 30 times between 1800 and 1877, more often from 1848 onward than before). In addition, even if they only issued first resort judgments, some of those made their way into the jurisprudence. In one source of the late 1870s, 10 to 40% of the judgments cited on some topics were issued by commercial courts.<sup>39</sup> Along with questions of industrial property (Paris) or conflicts with ship captains (Marseille), the Parisian court was particularly cited as regards the stock exchange (unofficial transactions led by non-privileged agents, the *coulisse*) and bankruptcy procedures; courts out of Paris were also often cited on partnerships. Some jurisprudence journals specialized in commercial courts; a few have been digitized, but never systematically studied, although they offered detailed analysis of some cases.

Commercial courts certainly played a role in many evolutions that are considered today as part of modernization and that have to do with the funding of business. The more and more open access to joint-stock companies, then corporations in the 1850s-60s, the introduction of the cheque (1865) and the abolition of prison for debt (1867) had been advocated for some time. Other changes appeared in jurisprudence, hence arguably influenced practices, before being translated into law, e.g. the enforcement of illegal (according to the letter of the law) futures transactions in the Parisian stock exchange (although for quite a long time, the appeals court overturned such judgments whenever it could). Similarly, the Parisian court introduced (and seemingly encouraged other courts to introduce) successive evolutions in the management of bankruptcies that generally bureaucratized it, encouraged the insolvent to enter the procedure earlier and the creditors to find an agreement (so as to avoid chain bankruptcies), but also aimed at curtailing procedures for very small businesses (so as to avoid their overwhelming the court). In this last case, it is obvious that the motivation of the judges was not to adapt law to the modern economy (although some of them were members of the circle of French liberal

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<sup>39</sup>Édouard Dalloz and Charles Vergé, *Code de commerce annoté*, (Au bureau de la Jurisprudence générale: Paris, 1877).

economists), but to manage increasing numbers of bankruptcies with scarce resources in terms of personnel.<sup>40</sup>

More generally, that commercial judges were far from unanimous on all these questions. Their Old Regime counterparts had long hesitated before changing their definition of good faith to accommodate the “challenges of anonymity,” be it in the context of companies or blank bills of exchange.<sup>41</sup> Yet in the end, they had played a role in circulating new ideas on credit and commerce generally, and new rules on companies and bills of exchange specifically. As Amalia Kessler has shown, their discursive work was key to the very survival of commercial courts, as they succeeded in presenting the institution not as a privilege of merchant guilds, but as the expression of “commerce” generally: a wholesome social function, not a specific class of persons.

Similarly, records of discussions among judges (and sometimes publications that they signed) show that the Parisian commercial court was far from unanimous in promoting innovations that seemingly lessened the rights of creditors, stimulated speculation, or harmed the “morals of the market” generally. Criticisms of “blind capitalism” (by a banker-insurer) flourished in public discourses of newly elected presidents – as much as pleas against “outmoded laws.” One president, in 1853 (a jeweler), only praised the bill of exchange, “the wet nurse of true credit,” to disparage the risky stock of new companies which tended to replace it in the portfolio of bankers.<sup>42</sup> Whereas judges and arbiters had completely abandoned, after the Revolution, the Christian references that were everywhere in Kessler's sources, some among them still played the role of defenders of old-style commercial virtue (or what they deemed so). It is perhaps not surprising, as judges at the commercial court tended not to be drawn from the ranks of the high bank and the most prestigious merchants anymore after the 1840s (those still were sometimes elected, but they spent few years in this extremely time-consuming position), but rather from the elite of each trade or industry; in the 1860s, they seem to have rarely been personally involved in joint-stock companies.

In aggregate, the Parisian court, and most other commercial courts, did plead for new legislation – and created jurisprudence – which eventually contributed to the birth of a new type of business organization and funding. Their internal debates, along with those of chambers of commerce, can be read as the expression of perennial doubts and alternatives among the elite of the business community. The new meanings of good faith and credit that were finally adopted, after these decades-long debates, in the 1860s

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<sup>40</sup>Paul Lagneau-Ymonet and Angelo Riva, ‘Les opérations à terme à la Bourse de Paris au XIXe siècle’, in Nadine Levratto and Alessandro Stanziani, eds., *Le capitalisme au futur antérieur. Crédit et spéculation en France fin XVIIIe - début XXe siècles* (Bruylant: Bruxelles, 2011) pp. 107–142; Jérôme Sgard, ‘Do legal origins matter?’, *European Review of Economic History*, 10 (2006), pp. 389–419.

<sup>41</sup>Kessler, *A Revolution in Commerce*.

<sup>42</sup>Quotations from minutes of discussions among judges (which also reproduce public discourses). Jean Chrysostome Michel, 25 August 1838; Antoine Jean Pépin-Le Halleur, 20 August 1846; Guillaume Denière, 30 June 1860; Nicolas François Ledagre, 16 July 1853.

ultimately contributed to the demise of a business organization, that of the age of commerce (whereas the adoption of new meanings in the eighteenth century, as traced by Kessler, had on the contrary contributed to its long-term survival).

In this respect, it is noticeable that the legitimacy of commercial courts in political and legal circles, otherwise arguably at its zenith in the nineteenth century, was somewhat shaken, in the 1870s, by a series of nullifications of Parisian court judgments by the Supreme court (*Cour de cassation*). There had been 2 to 7 nullifications in the previous decades, but 26 took place in the 1870s, 18 of which involved large corporations (railroads, insurance companies and banks). In the late 1860s and 1870s, decisions of the Parisian courts in financial scandals (*Crédit mobilier*, *Union générale*, the Panama Canal) had been heavily publicized (also in the foreign press). New, large-scale governance conflicts involving the division of labor and liabilities between associates and directors were an opportunity for some lawyers to question the jurisdiction of commercial courts (or even their very existence, for the first time since the French Revolution). The fact that such judgments were brought to the supreme court in the first place also shows that some of the new large corporations were well-equipped to go beyond first-resort courts, and did not hesitate to thereby question their legitimacy. French commercial courts survived this crisis and adapted to the world of Chandlerian firms, seemingly without much harm (although they have certainly been more criticized, especially from the 1980s onward, than in the period studied here). Yet this episode again suggests that the institution was especially well-suited to the business organizations of the age of commerce – not so much to the new corporations.

*Maintaining merchant capitalism? Beyond the common vs. civil law divide: a study in institutional complementarity*

Although commercial courts accompanied, and even encouraged, the transition to new models of business funding, my thesis would rather be that they were an integral part of a system, which maintained merchant capitalism in France until the end of the nineteenth century. I use the word “maintenance” in reference to the notion of “institutional work” – the work required so that institutions survive.<sup>43</sup> My research on commercial courts indeed started with the enigma of their very long-term survival in France. Of course, it has to do with path dependency, but this is a lazy answer if we don't specify how it works. As taken-for-grantedness defines institutions (those that survive), sources are not often explicit about those adaptation and reproduction mechanisms their survival. My understanding of the French case has therefore benefited from a study of the failed importation of “tribunals of commerce” in England, in the 1850s-70s. This failure was not ineluctable (the English judicial organization was thoroughly reformed in the 1870s),

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<sup>43</sup>Thomas Lawrence, Roy Suddaby, and Bernard Leca (eds.), *Institutional work*, (Cambridge University Press: Cambridge, 2009).

nor can it be directly or solely attributed to differences between common law and civil law. The main reason is, of course, that it is always difficult to transplant one element of a legal (and social system) without all the others that more or less support it, or depend on it.<sup>44</sup> Studies on legal transplants make this systemic quality apparent. Mine led me to define elements of the French system that were absent in England, and supported commercial courts.

Going one step further, I surmise that such systemic differences reinforced the divergent economic trajectories of the two countries. This is not to say that institutions exogenously *caused* economic practices; I am rather thinking of mutual reinforcement. I find this hypothesis all the more interesting because of its connection with the often unquestioned premises about the judicial preferences of businesspeople that I presented in the introduction. England is famously a problem for Weberian theory, as its cumbersome courts were anything but predictable at the time of the industrial revolution.<sup>45</sup> Yet Djankov et al. tell a tale of smooth, informal justice/arbitration in England (from the Middle Age) as opposed to rigid, statist French courts.

What I find in the many parliamentary reports, pamphlets and newspaper articles published in England in the 1850s-70s is a group of initially well-connected, liberal reformers, drawing on writings by lord Brougham and Bentham (opposing technicalities), who essentially stated that English merchants and manufacturers outside the City had no access to courts whatsoever. Court sessions were so scarce and access to justice was so expensive that even large debts always could not be recovered through litigation. International merchants knew continental commercial courts (Hamburg, Malta, Paris, and Bordeaux were the most cited examples) and asked for something similar. The proposal was seriously considered, hundreds of pages of testimonies were printed, dozens of bills were drawn, but always tabled. The story ended with a slightly more open access to courts, and with the authorization of the promissory clause in 1889: England became the first country to provide effective, collectively organized arbitration, especially in the commodities markets, at the end of the century. This type of arbitration was to be praised by some economists as natural justice; yet it was not the first choice of English merchants and manufacturers at the time. They had rather explored diverse ways to mix the advantages of public and private, formal and informal dispute resolution (as continental commercial courts did, in their view).<sup>46</sup>

Which features supporting commercial courts were absent in England, making their importation more difficult? Some aspects of the English common law were a problem,

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<sup>44</sup>Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences', *Modern Law Review*, 61 (1998), pp. 11–32.

<sup>45</sup>Sally Ewing, 'Formal Justice and the Spirit of Capitalism', *Law & Society Review*, 21 (1987), pp. 487–512.

<sup>46</sup>On demand for, and the success of, similarly hybrid courts, see e.g. Gelderblom, *Cities of commerce*, and Eric A. Feldman, 'The Tuna Court: Law and Norms in the World's Premier Fish Market', *California Law Review*, 94 (2006), pp. 313–369.

mostly the rigid separation between judge and jury, law and fact-finding (making it more difficult to envision merchant judges, and the French use of arbiters), and the rigid Statute of Frauds, which defined extremely high standards of evidence, e.g. requiring many testimonies (the United States had done away with it). The problem, however, was not only that the Statute of Frauds existed (it could have been reformed), or that lawyers stood by it. Its long existence had also modeled merchant practices; conversely, the fact that French (and continental) commercial courts admitted merchant accounts and correspondence as evidence, and that continental merchants were used to notaries and the official registration of some deeds, was essential for the survival and legitimacy of commercial courts. In Manchester, some manufacturers had apparently adapted by not putting some types of contracts in writing; hence, they were less interested in commercial courts (their chamber of commerce was the only one to oppose the proposal) than international merchants in Liverpool, who used the same type of writings as their continental counterparts. Commercial courts were intimately tied, through the type of proof that they admitted, to the whole system of commercial writing and certification. In addition, they also relied on chambers of commerce. Granted, some chambers had been created in England since the eighteenth century – they were among the leading organizations campaigning for commercial courts. But those were private associations, whereas chambers of commerce on the continent had been sanctioned or even created by political authorities. Those provided a well-accepted model of a semi-public, semi-private association. Nineteenth-century England did not seem to have such a model (referring to guilds would have been anathema): it was difficult to think of an official court rooted in a purely private association; but who could list potential voters, and provide potential judges, if not a chamber of commerce?

This vexing question hints at a final, very important difference between France and England: in France, “commerce” had been clearly defined, legally and socially (in daily practices) at least from 1673 onward, and the Revolution had only confirmed this definition. Although the jurisdiction of commercial courts was ostensibly based on the matter at stake, not on personal status, their judges were only elected by (a varying subset of) merchants, and, except in the case of commercial paper, the parties were indeed merchants. After the Revolution, merchants were defined by the payment of a special tax (*patente*); but since 1673, they had also been characterized by specific obligations, however enforced: having account books, registering the deeds of their companies at the commercial court. They had access to specific bankruptcy procedure.

Moreover, commercial courts actively worked to maintain the idea of a community of “commerce.” Kessler showed how it helped them escape the abolition of the guilds, but maintenance operations did not stop there. In the nineteenth century, whenever judges were criticized for being insufficiently representative of the parties, the courts eventually accepted an extension of franchise (women could even vote in 1898 – it was the first French institution to grant them this right) and co-opted some leaders of the opposition as

judges. Commercial courts – even the Parisian court, which had to constantly adapt to the flow of cases – always refused to relinquish small commercial debts. It is only in the late 1930s that a specific procedure was created for unpaid commercial paper, avoiding the daily public hearing of hundreds of essentially undisputed cases. Until the 1870s, the Parisian court even maintained handwritten judgments for these completely standard cases. Along with the long refusal to set up specific chambers for specific types of cases, this testifies to the costly maintenance of an image: that of a unique community of “commerce,” from female retailers to the high bank, in which hierarchies clearly existed, but did not erase the similarity of practices.<sup>47</sup> Equality was not entirely symbolic: as we have seen, *agrées* (somewhat paradoxically, as they were a clearly privileged group) partly leveled the litigation field. Authors of commercial and judicial handbooks – a well-established industry – also contributed by making the law and procedures more accessible.

On the contrary, in England, one of the main eroding factors of the campaign for “tribunals of commerce” was the total lack of such a community. There was no long-standing definition of “commerce,” and none of the associated rights or obligations. The merchants and manufacturers who had led the campaign did not envision a court that would deal with small debts or be open to shopkeepers (as judges or even parties). Partial solutions were found for access to justice in specific cases: a summary procedure for bills of exchange, a specific one for merchant shipping dispute, more satisfying bankruptcy proceedings, county courts that allowed shopkeepers to recover their clients' debts. Nobody wanted a court for all commerce, in the French definition. In addition, the long lack of access to courts, and the monopolization of judicial language by lawyers and solicitors, had persistent effects. Not only lawyers, but even some merchants, wrote that the dignity of the law relied on its aristocratic character: “The English people [...] would reluctantly see it [the administration of the law] brought to every man's door like green groceries on a flat cart with a donkey.”<sup>48</sup> It is not as much common law as a specific type of “legal consciousness” that differentiated English from continental merchants in the middle of the nineteenth century.<sup>49</sup> This intuition would of course deserve further scrutiny, especially based on the comparative study of merchant correspondences.

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<sup>47</sup>Such a pattern seems to have been absent in Italy, where commercial courts were rarely elected and often dispensed with small cases (Cristina Ciancio, ‘Abolire o riformare ? Procedura e giurisdizione commerciale nell’Italia postunitaria’, *Rivista di Storia del Diritto Italiano*, LXXXIII (2010), pp. 139–198). I surmise that this might have been key to their abolition in 1888, but more comparative research between continental European countries is certainly needed to understand why France was the only country where commercial court ultimately survived.

<sup>48</sup>J.F.T. [a member of the Manchester Chamber of Commerce], “Tribunals of Commerce. To the Editor of The Times.” *The Times*, November 1, 1872.

<sup>49</sup>Patricia Ewick and Susan Silbey, *The Common Place of Law. Stories from Everyday Life*, (University of Chicago Press: Chicago-Londres, 1998).

The French system as I just described it – based on the admittance of accounts and commercial letters as proof, and the collective maintenance of the idea of a commercial community – had elective affinities (in the Weberian sense) with business organization at the age of commerce, i.e. a world of partnerships, merchant-bankers, and commercial paper. The case of Parisian booksellers clearly shows that access to credit was difficult and expensive in many trades: the age of commerce was no egalitarian paradise. However, shopkeepers and bankers indeed shared basic practices and ways to organize. The fact that debt recovery, and litigation generally, did not require to create an internal legal department or hire an expensive lawyer was one thing among many others that kept this system going. On the contrary, the earlier specialization of the City and birth of integrated firms in England probably made it easier, at least for some firms, to do without easy access to justice. The survival of French commercial courts, along with that of their institutional environment (notaries, chambers of commerce, etc.) was probably supported by the fact that specific business organizations thrived; it also contributed to their survival.