



Les tribunaux de commerce. Genèse et enjeux d'une institution

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Abstracts

Introduction: The Commercial Jurisdiction from a Historical Viewpoint,

by Jean Hilaire, Professor Emeritus at the University of Paris II Pantheon-Assas

The very long story of the commercial courts may help clarify the present problems. This story started in Italy around the 12th and 13th centuries. All of these courts had jurisdiction to make decisions on trade dispute applying the merchants own customs, and thus to deal with this type of dispute within the framework of the guild, applying summary and inexpensive proceedings in order not to impede business. A genuine French model of commercial jurisdiction emerged in the 16th century when the monarchy expended a lot of legislative effort to develop trading structures. The author begins with the presentation of the foundations of French tradition and then carries on with the constant challenges that appear in the comparative study of the Italian medieval jurisdiction and the French model established in the 16th century; these challenges partially explain the precariousness in which the consular courts were kept until the end of the Ancien regime.

At the cusp of the 18th and 19th centuries, the development of the economy certainly needed to be adjusted. Therefore, the 1807 Commercial Code brought mere adjustments to the Ancien Regime's tradition. However, during the 19th century the economic evolution through the development of manufacturing and industrial activities, and later the banking system, called for the constant need to adjust.

Finally, the author deals with the jurisprudential contribution of the consular courts. Nowadays, the "French model" has changed so much that it is now very remote from the institution created in the mid-16th century.

The Archives of the Commercial Courts, an Inheritance to Protect: the Example of Gironde,
by Louis Bergès, Head of the Archives Department of Gironde

The collection of archives of the Commercial Courts represents a broad and impressive variety of documentation, which is difficult to identify and sometimes is impenetrable; the future of this permanent source of information for historical research remains uncertain.

The situation of the jurisdictions in Gironde is not different from what has been noted elsewhere. Over the last two centuries, the collections of documentation that were preserved by the Clerk's Office have been subjected to tribulations that most of the time were the consequence of the indifference towards a large number of collections of public archives until the 1979 Archives Act came into effect.

The archives of the Commercial Courts are as old as the consular jurisdiction itself (1563). The case of the consular jurisdiction is significant: like all the Charges of the Ancien Regime, the charges of the judges and consuls were virtually axed by Title 12 of the August 12, 1790 Act; in fact, the judges and consuls carried on their missions in accordance with the August 13, 1791 Act until the first Commercial Courts were established from December 1792.

The author traces the presence of the prestigious collections of historical archives in Gironde over the last two centuries.

**The Archives of the Commercial Courts and Trade in the West of France:
some examples until 1814**

By Philippe Hrodej, Anne Moreau, Karine Audran

In the 16th century, the consular court was established in the west of the kingdom mostly owing to the big harbour cities, which were more commercial than those inland. Influenced by the success achieved by the establishment of the first tribunals, the trading and merchant communities of the secondary harbours very early on called for more consular seats. However, it would take more than a century and a half before the majority of these requests succeeded, continuously facing the active opposition of the ordinary and special courts' representatives who jealously preserved all of their prerogatives. The revolutionary years hastened the dismantling of the former judicial and administrative structures. The removal of the admiralty, while greatly called for from the 1780s, became effective in 1791. Its jurisdiction was distributed between the justices of the peace and the commercial courts, which had been created during the previous year on the basis of the consular structures, whose prerogatives were retained.

The crossing of research carried out on the admiralty records and that resulting from the former consular courts clerks' offices, established in the harbour cities, is of a great interest for research on the shipping trade before 1789. That is what P. Hrodej shows first through his reflection on the trading society involved in West Indian commerce under the Colberts in La Rochelle, and then A. Moreau through the example of sea traffic in Brittany in the 18th century, both constituting the first two parts of the present article. Finally, as K. Audran emphasizes in the third part which is dedicated to the presentation of the sources used in the study carried out regarding the equipping of ships in Saint-Malo under the French Revolution, the Consulate and the Empire, the records of the commercial courts are significant: they help in understanding the organization of shipping activities developed by the coastal communities after 1789 and to assess the involvement of their main actors.

The Courts of Bordeaux Competent on Matters of Merchandise before the Creation of the Consular Court (from the mid-15th to mid-16th Century),

by Michel Bochaca, Professor of Medieval History at the University of La Rochelle

In December 1563 King Charles IX enacted the creation of the Consular Court of Bordeaux, granting it the powers of older ordinary courts that until that year had jurisdiction for disputes between merchants in matters of trade deals. As common in such cases, the transfer of jurisdiction generated suspicion.

Beyond the examining procedure prior to the registration of the royal edict, the Parliament, the Seneschalship of Guyenne, the Admiralty and the Township of Bordeaux were the four jurisdictions directly concerned with the creation of this new court. The author of this essay addresses the history of these four jurisdictions through a period from the French Conquest (1453) to the end of the reign of King François I (1547).

The Recruitment of the Judges and Consuls of the Commodity Market of Bordeaux, from its origins to the Richelieu Government (1564-1625),

by Laurent Coste, Assistant Professor at the University of Bordeaux III

An understanding of the first years of the Commodity Market of Bordeaux is based upon a small amount of documentation. First of all, the December 1563 Decree set forth the electoral and functioning rules as well as the powers of its jurisdiction. The list of the judges and consuls, partially incomplete for the 1560s, has been published in a book in the 18th century. It was primarily a summary of the Jurade deliberations registers. The Book of the Market's Treasure, a beautiful 170-parchment paged volume with a black and gilded leather binding, traced the consular elections from 1619. Finally, the book of the frairie Notre-Dame des Anges mentioned the names of fellow members since the foundation of this religious group by Archbishop François de Sourdis in 1620. Most of the information is official and the registers drawn up by a notary are necessary to comprehend the background where the first consular magistrates were recruited.

After having presented the mechanisms and the results of the first elections, the author tries to place the judges and the consuls in the merchant hierarchy of Bordeaux and to reconstruct the networks that have allowed this merchant patriarchy to last.

The Jurisdictional Disputes Between the Consular Court and the Ordinary Courts in Bankruptcies Matters: The Role of the Commercial Chamber of Guyenne,

by Antonio Dos Santos, PhD in Law.

The 1673 Decree set the basis of the legislation on bankruptcy, even though it was embryonic. Theoretically, this regulation was not only for the benefit of the merchants. Until 1715, there was a duality between the Consular Court and the Parliament, depending on the nature of the cases. Indeed, from 1714, many bankruptcies occurred that the Parliament qualified as criminal offences. In that situation, the merchants turned to the Commercial Chamber of Guyenne.

The author traces the history of the Guyenne institution with respect to the liberal spirit of the Colbert Decree until the Royal Declaration of June 10, 1715 and the end of the Ancien Regime, referring to examples taken from the archives.

The Struggle for and the Issue of the Control of the Admiralty in Brittany,

by Samuel Le Goff, PhD Student at the University of Rennes II

The Admiralty was an old institution of the Ancien Regime that dealt with maritime affairs. Its jurisdiction, which was essentially based on the 1681 Navy Decree, covered the sea and the seashores. After defining precisely what the Admiralty was in Brittany, the author details all the issues of power regarding the following criteria: geographical rivalries, social rivalries especially between the Breton families. This study sheds light on the role of the institution and the major role of the judges during the last three centuries of the Ancien Regime.

The Common Commodity Market of Montpellier,

by Sophie Molinier-Potencier, Assistant Professeur at the University of Orleans

The Consular Court of Montpellier was created by Decree on June 1, 1691; it was modelled on the Commodity Market of Toulouse which was granted by the King to the merchants in 1549 and considered as the oldest consular court, because it was the first commercial jurisdiction that worked permanently. However, both courts were “Commodity Markets”, that followed the tradition of the old trade fairs and constituted special places of meeting for the merchants to exchange, trade, negotiate, set the prices, in the presence of commissionaires and brokers. The 1691 Decree creating the Market of Montpellier never referred to a place of exchange; only the use of the word “Market” and the repeated referrals the Decree made to the Commodity Market of Toulouse in essence established its place in Montpellier. What was obviously intended in Montpellier was the creation of a Consular Court; there are no clear sources about the existence and the functioning of a place of exchange. However, that did not prevent the Consular Court to go beyond the framework of a simple court, because of its strong links with the merchants ‘guild of Montpellier.

The Sea Consulate of Nice, 1613-1855,

by Michel Bottin, Professor at the University of Nice

The creation of commercial jurisdiction in Nice came a result of the incorporation of the city and its region under the sovereignty of the House of Savoy in 1388.

A commercial court was created in 1448 modelled on the Italian court system because of concerns of merchants. On January 1st 1613, a new court was established titled “Sea Consulate” which had dual commercial and shipping jurisdiction and lasted for more than two centuries. The institution was complex on a functional level. With the incorporation of Savoy into France in 1860, the commercial court was reinstated into its Napoleonic framework, as defined by book IV of the 1807 Commercial Code.

This brief presentation reveals the institution’s special characteristics in relation to comparable French institutions. The Sea Consulate’s jurisdiction dealt with both consular and admiralty matters; it made decisions, at least during the 18th and 19th centuries, without the right to an appeal; the judges were legal professionals, except for a short period of ten years, and the merchants functioned as lay judges in a very limited capacity. Another difference that should be noted is that the Nice jurisdiction functioned within this framework until 1855!

The institution has not yet been thoroughly studied. Only some aspects have been examined, either directly or indirectly. This presentation both reviews this research and tends to draw new lines: regarding the legal framework, the proceedings and the legal remedies, the status of judges, the influence of French Law and finally the relationship between law and trade.

The Consular Courts in the Napoleonic Commercial Code,

by Fabien Valente, Assistant Professor at the University of Montpellier I

Book IV of the Commercial Code dedicated to the “Commercial Court”, which is the briefest, deals with the Consular Courts in sections 615 to 648. These 33 sections essentially repeat the provisions of the Ancient Law and more specifically the Decree of March 1673 dealing with trade.

After defining the influence the Ancient law had on the Commercial Code provisions, the author of this essay shows the necessity of the institution that lasted through the Ancien Regime and the French Revolution. The 1807 lawmaker thus established the commercial courts as the means to enforce commercial law.

Those courts, which are part of the judicial system, are ruled by the following principles: “1) the judges must be competent on trade matters; 2) the proceedings between the litigants must be simple; 3) the proceedings must be summary; 4) the decisions must be enforced quickly.”

Through the study of the jurisdiction, the organization and the functioning of the consular courts, the author enlightens us on the relevance of the 1807 Code’s provisions regarding these four principles.

The Functioning and the Issues of the Commercial Courts during the 19th and 20th Centuries,

by Maître Michel Armand-Prevost, Attorney-at-law at the Bar of Paris, Honorary Vice-President of the Commercial Court of Paris and Former Senior Member of the Court of Cassation

The author traces the long history of the consular justice that goes back over 4 centuries ago, if one considers its starting point the Royal Decree of 1563 initiated by Chancellor Michel de l’Hospital. What was originally commercial justice gradually became the justice of economic life. After describing the four criteria that the French Revolution sought to apply to the courts, the author focuses on the three permanent features of the commercial courts history: first, the consular jurisdiction was practically always exposed to the more or less open hostility of part of the judiciary, despite its somewhat acknowledged necessity; second, business activity required some specificities (quickness, flexibility, exemption from procedural formalism); finally the commercial courts never had full jurisdiction on collective proceedings.

Can these observations be confirmed by the study of the commercial courts history of the last two centuries? That is what the author tries to do through the examination of the functioning and the issues of the consular jurisdiction.

Were there Honest Judges and Faithful Merchants in Lille in the 18th and 19th Centuries like « César Birotteau »?

by Sylvie Humbert, Assistant Professor at the Free Faculty of Law of the Catholic University of Lille

In the 18th and 19 centuries, France embarked on the track of industrial revolution in the name of great principles: freedom, individual freedom, freedom of enterprise, freedom of trade, but also to establish order in the organization of the consular institutions and to ensure strict application of the legislation and the codes.

How then did the Lille Region reconcile the principles of freedom and order? In the 18th century, Lille was already a major setting for trade and manufacturing; from the period of the Consulate and throughout the 19th century, its industrial activity expanded dramatically.

Balzac described this period of industrial and commercial revolution in his famous novel “César Birotteau” which presented the prestige and the misfortune of a merchant who also exercised the position of a consular judge.

From the beginning the notions of trade and justice, of merchant and judge, seemed to conflict with one another. The author examines this antagonism as well as the history of the consular judges of Lille who formed a kind of “plutocracy”.

The Notion of Merchant in Bankruptcy Proceedings before the Commercial Courts of Brittany in the 19th Century,

by Tangi Noël, PhD Student at the University of Rennes I

In order to define what the characteristics of commerce are, the question is first whether to define above all what a merchant or a trade deal is, and then whether to adopt a subjective or objective reading of the Commercial Code. This complex theory is elaborated by the doctrine.

The difficulty of defining the status of a craftsman adds to the complexity of defining what a merchant is. Whether someone is called a merchant or a “non-merchant” is a theoretical question, which still forms one of the Commercial Law pillars.

The author gives a concrete case study of precedents: the study of bankruptcy proceedings before the Appeal Court of Rennes in the 19th century allows a concrete approach of the notion of merchant; indeed the opening of these proceedings against a professional proves de facto his capacity as a merchant. The practice then draws the picture of a complex and equivocal notion that makes it difficult to know both the nature and the activity of the company. Therefore, as the definition of merchant was not satisfactory, in practice the courts allowed and favoured a broad conception of this notion in order to control a big portion of economic life.

Justice and Business: a History Revealing Economic and Political Changes (19th-20th Centuries),

by Hubert Bonin, Professor at the Political Studies Institute of Bordeaux

This book about the commercial courts provides a look at the role justice plays in business life, all the more so considering recent controversies raised about this issue in political and civic debates. These controversies can be better understood through a historical lens focusing on the long

movement of capitalism building, which has tended to be as “clean” as possible, or in any case less “unrestrained”, but without hope of achieving the dream of a “socially aware business”. Indeed, this business “guilt” can be seen as a common characteristic in our country. The author traces the history of this situation from the time of the French Revolution.

However, a question remains: how can justice measure up to capitalism? The place of justice in the conventional system, which makes up the (public or private) framework of capitalism, has to be assessed by taking into account legislation that contains too many loopholes to be reasonably enforced in daily business life.

Thus, a fear could be raised that legislative power would step aside in favour of judicial power, and that the “power of the judges” would outweigh the powers of the citizens or their representatives in Parliament. Consequently, any thought about the relations between justice and business leads one to reflect on how political power is organized in an overall sense; according to the conceptions of a nation’s citizens as well as the type of economy they want, with the understanding that a liberalization of capitalism cannot operate without some constraints, which will lead lawmakers and judges to agree on their mutual responsibilities.

Can (and must) the French model of commercial courts be reformed?

By Jean-Paul Jean, Deputy Public Prosecutor at the Appeal Court of Paris, Fellow Professor at the University of Poitiers

The commercial courts are certainly the French courts that are the most deeply rooted because of their long historical characteristics. The commercial jurisdiction escaped major reforms, among which the reform of the judicial map that Michel Debre ordered in 1958; this map was actually drawn up at an exceptional moment when the Executive took the lead over the Legislative and started a program of structural reforms in the judicial area that the Ministry of Justice appointed by General de Gaulle briskly enforced through the mean of 13 orders and 31 decrees.

The commercial justice was historically established in the townships and villages, which held trade fairs; the system was slightly adjusted for the last time in 1809 and is now confronted with the economic and geographical reality of the employment situation.

The archaic geographical distribution of the commercial courts on the judicial map is striking when compared with the zones of activity and demographic development listed on the map of the State organization of regional development (DATAR).

Indeed, there were nine commercial courts in 1998 in the county of Seine Maritime, six in Charente-Maritime, but only 2 in the Rhone and one in the Hauts-de-Seine.

The clerks’ offices of the commercial courts were also the only ones, in 1965, to avoid the State takeover of the clerks who were public members of the legal profession appointed by order of the Ministry of Justice; they fulfilled a liberal regulated profession and were paid in proportion to the number of deeds they made.

The author deals successively with: the modernization of collective proceedings law, the series of scandals and exposures; the failure of a program to reform commercial jurisdiction, radical antagonism on the issue of the hearings presidency, the specific issue of reforming the consular jurisdictions map, and finally some future prospects for economic justice, particularly the role of judicial regulation in economic life.

Conclusion : The Commercial Courts, Local History and the European Prospects,
by Yves Chaput, Professor at the University of Paris I Pantheon-Sorbonne

The institutional stability of the consular jurisdiction and the old arguments for and against the commercial courts are not revealing of the development of context and litigation.

The question that remains is whether some changes of prospects, when surpassing their anachronism, would not paradoxically establish the French commercial courts as an “avant-garde” solution, a pattern for an economic jurisdiction in Europe. It could be so as far as the representativeness and the competence of the elected members are ensured.

In order to answer this “provocative” question, the author develops 3 guiding principles that can be asserted, taken from the jurisprudence, the economy and their interpreters.