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The Judge, the Expert and the Arbitrator. The Strange Case of the Paris Court of Commerce (ca. 1800-ca. 1880)

“Merchants freely chosen by merchants, judging their peers without expenses or fees, and almost without formalities”¹. This 1796 description of the French Courts of Commerce gives the shortest version of countless texts discussing their advantages, from the 1563 edict establishing such a court in Paris to the 2000s arguments about their always delayed reform². The Courts nowadays fear that they could be replaced by arbitration—a procedure that, as part of a supposed “Anglo-American model” for settling disputes, is more and more praised by the largest companies³. However, there was a time when at least some of the English-speaking jurists described the French system as both peculiar and interesting. At the beginning of the 20th century, one of them praised the Courts of Commerce for their expeditious procedure (a final judgment was usually entered within two months) and their capable judges,

“versed in the procedure of these Courts, and in all commercial customs and usages”, “those best fitted to be judge of the rights of parties to purely commercial transactions [...] men who in their *business* life have shown themselves upright and just, and thoroughly familiar with all manner of business problems.”⁴

Part of the few French institutions that have remained nearly unchanged throughout the Revolution, the 184 Courts of Commerce are still made of judges elected by representatives of all firms in their jurisdiction. Those judges are merchants, bankers or manufacturers (or top executives in their firms), not “professional judges” with law degrees. They have always being suspected to use their authority in favor of their own business, and/or to know nothing about law. But one has rarely put in doubt the ideas that they are the best experts in business customs (and that this is useful) and that they judge quickly and without too much expenses (from the State, as they are not paid, as well as from the parties).

1 “*Des commerçans choisis librement par des commerçans, jugent leurs pairs sans frais, sans honoraires & presque sans formalités*”. Villers, *Rapport*, 2.

2 The Courts were called *juridictions consulaires* from the 16th century to 1790, then *tribunaux de commerce*. Their judges were (and are) called *juges du commerce*, *juges consulaires* and sometimes *consuls*.

3 Mattli, “Private justice”.

4 Fuller, *French Courts*, 146, 145.

The historian is therefore quite surprised when she reads through the Paris Court's archives, or even printed sources (from the pamphlet to the law textbook) written by judges or lawyers that really knew what happened there. The judges were supposed to be better experts than the classical judicial experts, providing technical knowledge without expenses or delays. But, except in the simplest cases, that they decided in less than one minute, they systematically used *arbitres rapporteurs* (reporting arbitrators). The typical preliminary judgment read as follows:

“Whereas the circumstances are not sufficiently clear, the court, before granting the request, orders that the parties will appear before Mr. xxx [or “the union of xxx”], who will ask for the documents of the case, that will be duly registered, hear the parties, conciliate them if possible or else write his report on stamped paper, close and seal it and send it to the court's registry”⁵.

The *arbitres rapporteurs* thus had to act at the same time as arbitrators, as accounting experts in many cases (to scrutinise the documents), but also as quasi-arbiters (as their opinion was generally followed by the Court) and as technical experts—which is clearly implied by the choice, for example, of an architect or of the building contractors union to deal with unpaid works.

From the point of view of a member of the Parliament—for example—, a judge of the Court of Commerce was a kind of technical expert. In addition to the advantages of unpaid judges, it is the main reason why such an exceptional court (elected, without professional judges) could be tolerated in the context of a “jacobine”—egalitarian, hostile to any kind of guild—revolutionary France⁶. But the Parisian merchant involved in a complicated dispute actually never discussed which such a judge: he only met the *arbitre rapporteur*, who, more and more often after 1848, was in fact not a person, but a *chambre syndicale* (a union of merchants or manufacturers of a precise trade). The definition of a complicated dispute was simple. When the case was about an unpaid promissory note or bill of exchange that was in the possession of the plaintiff, the defendant was immediately condemned, with a long term if he or she had shown before the Court, which was rarely the case. 80 to 90% of the judgments ended such simple cases. Most of the others were transmitted to an *arbitre rapporteur* and either conciliated or ended by

5 “Considérant que les circonstances [or “les faits de la cause”] ne sont pas suffisamment éclairés, le tribunal [...] avant faire droit ordonne que les parties se retireront devant le Sr. xxx [or “la Chambre de xxx”] qu'il nomme d'office arbitre rapporteur, lequel se fera représenter les titres et pièces enregistrés conformément à la loi, entendra les parties, les conciliera si faire se peut et sinon rédigera sur papier timbré son rapport, qu'il enverra clos et cacheté au greffe du tribunal.” ADP, series D2U3.

6 Lemerrier, “La France”.

a judgment based on his report.

How can we understand this peculiar practice? It may seem awkward to a common-law jurist: in the United Kingdom or in the United States, such a dispute would have been decided either by a private arbiter, without any public enforcement of his decision, or by a "normal" court that also deals with non-commercial cases (with lawyers, forms and delays, and maybe experts)⁷. The French system thus appears as a strange mix of public and private justice. It might also seem awkward to any specialist of 19th-century France. At a time when any kind of guild or trade union was officially forbidden and when no concept of artificial person existed, how could a public court let not only persons, but also unions, be at the same time experts and arbitrators—especially when it generally followed their opinion?

The quest for the perfect expert

The mythical image of a small court where merchant judges took the time to carefully investigate each case, to conciliate parties that they personally knew, using reputation as a weapon, to protect the trade customs against fraud and cheaters—and probably to win money or useful relations by the way—was probably not too far from the practice of the smallest Courts of Commerce. It was indeed only when officially asked by such courts (or by foreign courts) to choose one of them to hear witnesses or to check books that the Parisian judges personally took care of this part of the trial⁸. In most of the cases, the Court of the capital followed its own rules⁹.

Too many cases, not enough judges

They had a very simple, arithmetical reason. The number of cases was such that, while sitting ten hours a day, five days a week, the Court had to judge one case per minute. In the Civil Court of Paris, there were five times more judges and many more employees, for half the number of cases¹⁰. Three judges were needed at the Court of Commerce for the hearings, and there were only 9 (at the beginning of

7 Colfavru, *Le Droit*, esp. VI-XVII.

8 ADP, D1U3 40.

9 The Court of Toulouse used expert/arbitrators (not *chambre syndicales*), but on a much smaller scale (Capel, *Histoire*, 588-591). The Court of Lyons did not and was asked to borrow the Parisian model (Bourget, "Au Rédacteur").

10 Malo, *Pétition*; A.B., *Des réformes*.

the century) to 30 judges (at the end) in the Court, who were not retired businessmen (as a majority of today's judges are), but prominent bankers, merchants or manufacturers at the beginning or top of their careers¹¹.

They therefore needed assistance not only when facing technicalities unknown among them—with hundreds of different trades in the French economic capital¹², it was often the case—, but also when the parties' books were not well-kept—or non-existent—, or when they needed economic information as an external reference—for example the “normal” price of fir wood from December 1, 1838 to October 29, 1839, a question that got a one-page answer by the leader of the unofficial union of square wood traders, as the price depended on the quality and quantity of wood involved¹³. Some of the *arbitres rapporteurs* did not know better than the judges, but simply spent time for the enquiry. Others were, more strictly speaking, experts.

But they were rarely appointed as such, because it would have required formalities, and especially an oath before a judge: this would have taken too much time—and was not possible at all when the *arbitre rapporteur* in fact was a firm (“Baudoux brothers or one of them”, for example¹⁴) or a *chambre syndicale*. Oaths were scarce at the Court and mainly concerned veterinarians asked to investigate the causes of the death of cows¹⁵. Considering the expert as an arbitrator offered two important advantages. The procedure was simpler, as his mission as well as the contents of his reports did not have to be clearly defined. In addition, there was always the possibility of a successful conciliation, lightening the court's task. The whole process stood on the edge of what the Code of Civil Procedure allowed, with its sharp distinction between experts, arbitrators and arbiters¹⁶. Its both informal and massive character helps to explain why it left few traces in the sources: reports were massively destroyed and few of them were printed (as opposed to the many expert reports for non-commercial Courts that may be found in the Bibliothèque nationale de France as *facta*, some of them dealing with business, as industrial property, fraud and many product adulterations fell out of the competence of the Court of Commerce¹⁷). It is nevertheless possible to understand, at least partly, how the *arbitres rapporteurs* were chosen and what their existence implied.

Alternative solutions to the lack of proportion between the number of judges and the number of cases were tested from the 1800s to the 1880s, while the average

11 Lemercier, “Les carrières”.

12 Ratcliffe, “Manufacturing”.

13 ADP, D1U3 40, Tuesday, October the 29th, 1839.

14 Case 167, 9 March 1854, ADP D2U3 2236.

15 ADP, D1U3 40.

16 Le Hir & Jay, *Manuel*, 20.

17 About the competence: Fuller, *French Courts*, 147.

number of cases per year raised from 15,000 to 75,000: increasing the number of judges; letting lawyers settle the disputes; appointing “professional” experts/arbitrators; asking for the help of voluntary fellow merchants; and legitimising the *chambres syndicales* as quasi-ancillary courts. Each of these solutions was criticised, so that the court never reached any institutional equilibrium—as an economist would put it. This large range of possible, but imperfect solutions is probably typical of the general problems of expertise.

Increasing the number of judges was hardly an option for the governments, which always gave delayed and limited answers to this continuous request¹⁸. Their reasons are not obvious, as such judges costed nothing. The idea of not making an exception (or too large an exception) for Paris was probably important. But this reluctance is probably more related to the refusal to recognise any kind of organisation of private interests, especially in the capital. Courts of Commerce survived the Revolution and Chambers of Commerce were re-established in 1802, but they were supposed to embody an abstract interest of the national economy, not to be the speakers for particular trades¹⁹. They were elected as a whole, not by categories of trades.

It would have been impossible, for example, to organise parallel hearings at the Paris Court of Commerce, depending on the trade involved in the case. The only court that allowed such a representation of separate trades was not, strictly speaking, a court. The *Conseils de prud'hommes* (conciliation boards of employers and wage-earners—another “exceptional” 19th-century French institution with a strong guild flavour) were not courts, the *prud'hommes* were not judges (in the letter of the law), but they judged disputes related to work, after having tried to conciliate the parties, often with success; their judgments were enforced like any others. Four different *Conseils* were established in Paris. Each specialised in a group of trades (metal, cloth, chemical, other), and they were divided into sections, so that each judge was in fact elected by a few connected trades. Even if the judgments were entered collectively, each judge made inquiries related to his own trade—which was possible in the first decades of the *Conseils* because of the small number of cases. It is easy to understand why the *prud'hommes* refused to appoint the kind of experts used by the Court of Commerce: they actually were at the same time judges and experts. Some of them therefore considered the *Conseils de prud'hommes* as a return to the original, pure concept of the Courts of Commerce²⁰. This institution was born in Lyons, one of the towns that kept the most guild-like organisation throughout the 19th-century, because it was dominated by one trade

18 ACCIP, III-3.70(3).

19 Lemerrier, *Un si discret*.

20 Lemerrier, "Prud'hommes".

(silk) that was organised as a typical industrial district (*fabrique*)²¹. On the contrary, it was only in 1844, after hot local and national debates, that *Conseils* were created in Paris, one of the main reasons for this reluctance being the fear that quasi-guilds would be too ostensibly re-established.

Expensive salaried experts vs. non-available voluntary merchants

The second option involved the *agrés*, a small group of specialized lawyers who were permanently authorised to represent the plaintiffs and defendants at the court. Although such a representation was theoretically considered as an exception, only 0 to 15% of the parties (but the proportion was steadily increasing during the 19th century) pleaded for themselves²². It was already the case before 1790, and it was probably the return to an old custom that was criticised when, in the 1800s-1810s, it was said that lawyers usually conciliated the parties in their office, and that the Court only approved their decision²³. This practice was not mentioned anymore in the following decades, when alternative ways of dealing with the most complex cases developed, involving experts who were not lawyers.

Before 1848, the main choice for the judges seems to have been between paid and unpaid arbitrators/experts. The paid ones (who were called *arbitres salariés*, although they were not paid by the Court, but by the parties, the Court only controlling that they did not ask too much) were often criticised, even by the judges themselves²⁴. They nevertheless were quite often used, at least from the 1820s on. Some of them received a few new cases each day over more than a decade, while others were never chosen, but nevertheless fought in order to be included in the informal, then printed list of experts/arbitrators—and then to stay in it. It seems that they were more often chosen in cases about notes and bills (implying the time-consuming reading of merchants' books), and, in the 1850s and 1860s, in the increasing number of cases involving haulage or railway companies. Some of the other cases, dealing with peculiar trades and products (delivery problems, disputes about the sale of a business or the payment of works), nevertheless were also transmitted to *arbitres salariés*, even those who had declared no specialty in the printed list.

The 1859 list mentioned, along with 15 *agrés* (lawyers) and 38 trustees and liquidators (dealing with bankruptcies), 3 wood quantity surveyors (*mètres de bois à brûler*), 5 book-keepers, 6 translators, 9 veterinarians, 9 civil engineers (with

21 Cottureau, "Industrial"; Vernus, "Regulating".

22 Guibert, *Recueil*; Fuller, "French Courts".

23 ACCIP, III-3.70(3).

24 ADP, D1U3 6.

a specialty: mechanics, railways, etc.), 13 building examiners (*vérificateurs de bâtiments*), 36 architects, and 32 *arbitres*, with a specialty for 13 of them (from bank to railway, cereals, leather and gas)²⁵. It seems that only a few of the veterinarians, architects and building examiners were in fact regularly chosen as experts/arbitrators, with exactly the same appointment clause as the others, meaning that they had to try to conciliate the parties and to provide a general report on the case, not only to answer a few precise, technical questions. The judges were free to choose any *arbitre salarié*, without any obligation to consider the trade(s) involved in the case.

Where did the *arbitres salariés* come from²⁶? Most of them had some experience in business and/or law, but it was not always successful. The idea of admitting bankrupt merchants on the list was debated several times. The candidates were so many that the Court could choose its *arbitres* and refuse those who most ostensibly sought a second, less risky career. The recommendation by a judge or another authority probably influenced this choice. The active *arbitres salariés* were nevertheless criticised for their greed, that made the justice not only expensive, but also slow²⁷. In addition, the judges followed the reports of non-elected, informally appointed persons. We recognise here the classical critics against any kind of judicial expert²⁸. But they were probably even more bitter in the context of a supposedly cheap, fast and expert court, that had earned its right to exist because of these very advantages. The projects of professionalising the *arbitres salariés* (to guarantee, at least, their honesty and their knowledge of law and business) therefore had few chances to succeed²⁹. But the salaried experts survived even when the *chambres syndicales* seemed to provide a more consensual solution to the dilemmas of expertise. They were actually—like the *agrés*—experts of the Court itself, of its particular customs. This kind of expertise is rarely officially recognised, but many institutions partly rely on it³⁰.

The judges often described the appointment of *arbitres salariés* as a bad solution, but a solution that they had to use because of the reluctance of their fellow merchants to accept their appointment as unpaid experts/arbitrators³¹. This reluctance is not very surprising: Who would accept to spend time to conciliate parties and/or to gather data about the past price of a product, for example, and then to write a report, without any reward? In addition, the choice of such

25 Tribunal de commerce, *Arbitrages*.

26 ADP, D1U3 6.

27 Nougier, *Des tribunaux*, 190-193.

28 Chauvaud & Dumoulin, *Experts*.

29 E.g. Rosaz, *Projet*; Durand, *Observations*.

30 Chatriot, *La démocratie*, 143-168.

31 ADP, D1U3 6.

experts/arbitrators was not easy, especially without any guideline (such as lists, official criteria, diplomas, etc.). A retired merchant was probably less biased, but less aware of the current prices or even customs. An active merchant that really understood the case's technicalities was probably too busy to accept, and/or a friend, an enemy or at least a rival of one of the parties...³² The Court sometimes tried to solve the problem of schedules by choosing a firm as an expert/arbitrator (not as an “expert”, because it hardly could swear an oath). But it often had to appoint a new one after the first had refused, which required a new judgement—a costly solution, in terms of time and money.

Merchants actually lacked incentives to accept such a time-consuming role. The French, and especially the Parisian ones were famous for their love of *fonctions gratuites*—voluntary, semi-public positions in the Chambers or Courts of Commerce, municipal councils, organising committees of industrial exhibitions, philanthropic associations, etc.³³ But the role of expert/arbitrator lacked many of their charms: it did not offer any direct contact with the administration or with other influential businessmen (always useful in terms of information, reputation, social capital, etc.); nor was it a way to win distinctions such as the *légion d'honneur*. We can probably understand the creation of a printed list of the experts/arbitrators that, in addition to the few dozens of already mentioned salaried experts (in the last pages), gave the names of hundreds of Parisian merchants (more than 700 in the 1859 list, many of them appearing several times) not only as a practical device for the judges, who could find experts/arbitrators in more than 250 specialties, from *acières en barres* (steel bars) to wine, but also as a way for the court to create such an incentive³⁴. The voluntary experts, like the salaried ones, could hope that their unofficial, but printed status would increase their reputation, and/or that it would be the beginning of a more rewarding (in terms of information, influence and distinction) institutional career: at least 20 of the unpaid arbitrators/experts of the 1859 became *prud'hommes* in the following years and 25 entered the Court of Commerce as judges between 1859 and 1869 (for 33 new judges that were not listed as experts/arbitrators this year—and who had shorter careers in the Court than the 25). It nevertheless seems that most of the men on the list were never actually chosen as experts/arbitrators, or only in a few cases each year. It was still difficult for the Court to find a voluntary expert that was at the same time capable, unbiased and available.

32 As is shown by similar, more explicit discussions at the Chamber of Commerce: Lemerrier, *Un si discret*, 309.

33 Ibid., 74-75.

34 ADP, D1U3 6.

Unions and experts: the *chambres syndicales*

The Court faced a difficult situation. Increasing the number of judges in the necessary proportion to face the number of cases proved impossible. Using salaried experts/arbitrators was considered slightly less shocking than letting the lawyers settle the disputes, but it could not be anything else than a last resort solution, as it contradicted the very basis of the Court's own legitimacy. The judges theoretically preferred to appoint unpaid fellow merchant, but they actually did not, in many cases. In this context, it is possible to understand why the Court, especially after 1848, often chose unofficial *chambres syndicales* as collective experts/arbitrators, and thus became one of the forces that helped new trade organisations to spread and finally to be legalised.

A complex, illegal and efficient solution

What happened after, on Friday, August the 13th, 1869, the Paris Court of Commerce had appointed "*la chambre syndicale des fleurs et plumes*" (the flowermakers and feather-dyers union, which actually also included *modes*—luxury hatmaking—and “related industries”) in the case between Ernest Nuce, a merchant (*négociant*) established rue du Caire —a street that was famous for its many shops and workshops of *articles de Paris*: artificial flowers, imitation jewellery, etc.—, and Durst Wild brothers, *négociants* in the same street, involving 80 FF of unspecified merchandise^{35?}

This was a very small amount: ca. 16 days of salary for a skilled male worker, slightly more, probably, than the total expenses needed to put the case before the court (including official fees and the payment of the two *agrés*). The intervention of the *chambre* was itself not free, but it was definitely cheaper than that of a salaried expert (ranging from 15 to 500FF³⁶): the parties had to pay a *droit de chambre* of 3 FF. In other trades cases, the *chambre's* conciliation/expertise was cheaper or for its subscribers³⁷.

The *chambre syndicale des fleurs et plumes*, created in 1859, indeed had was part of a complicated structure. It included subscribers/members: a few hundreds of persons or firms of the ca. 1,000 operating in Paris in this trade. They paid 30 FF each year to join what was officially not an association, as trade associations were still forbidden (although many were tolerated by the Paris police). The *chambre*, strictly speaking, the part that acted as expert/arbitrator for the Court, was a group

35 Case 304, August the 13th, 1869, ADP, D2U3 2558.

36 Nougouier, *Des tribunaux*, 190-193; Malo, *Pétition*.

37 ADP, D1U3 54.

of 15 men elected by the subscribers (although the flowers *chambre* had many female subscribers and no rule forbade their election, they were never chosen). They met each month to settle disputes that subscribers spontaneously presented them (as private arbitrators/arbiters) and cases transmitted by courts, mainly the Paris Court of Commerce. The flowers *chambre*, in its turn, was part of a wider organisation, the National Union of Commerce and Industry (*Union nationale du commerce et de l'industrie*, UNCI), that was officially by the lawyer Pascal Bonnin created as a commercial partnership. The UNCI provided services to the subscribers of all *chambres* that were part of it (12 in 1861, more than 100 in 1884), especially legal advice and cheap technical expertise (in chemistry, engineering, etc.), but also cheap and easy credit. It was is not supposed to interfere with the role of the *chambres* as experts/arbitrators³⁸.

Other *chambres* were not part of the UNCI, such as the older *chambres* of butchers, bronzemakers, wood, coal or wine merchants—that had already been tolerated or even officially used by the administration in the 1820s-1840s—the powerful *chambre* of cloth (*la chambre des tissus*), created in 1848, the *chambres* of the building industry, that had been recreated from the 1810s on and were known as *les chambres de la Sainte-Chapelle*, as a reference to their common location, and smaller *chambres* established during the Second Empire, that joined another association, the Central Committee of *Chambres syndicales*³⁹. Some of them required no payment when they acted as experts/arbitrators, others were more expensive than the flower *chambre*, and this question was often debated⁴⁰. Some of the *chambres* conciliated hundreds of cases each year, were efficient lobbyists for their trade and succeeded in changing laws or tariffs according to their customs. Others had less subscribers and/or less influence. But they all followed the same scheme when they acted as experts/arbitrator.

It has been undermined by historians⁴¹, for many reasons: a lack of interest in law; a tendency to look in the past for the main features of contemporary unions, and especially to explain the birth of “employers unions” by the will to counter strikes and workers unions or to agree on low salaries—which was often the case, but not for all *chambres*; and a tendency to take as granted the letter of law and the prevailing political discourse of the time, that said for example that guilds were forbidden and that an expert was a person.

The role of the *chambres* as experts/arbitrators was nevertheless often mentioned: in their statuses, in their leaders' writings, in pamphlets about the Court

38 Nord, *The Republican Moment*, discusses the political role of the UNCI. On its first years and especially on the flowers *chambre*, see Lemerrier, “Articles”.

39 Lemerrier, *Un si discret*, 212-215.

40 E.g. *Union*, N°171, June 9th, 1866, 1.

41 With a few exceptions: Vernus, *Les organisations*.

of Commerce, but also in dictionaries. It was probably well-known in the business community and among the few jurists interested in commercial law. And it was a possible solution to the Court's quest for experts/arbitrators. The *chambre's* intervention was quite cheap and fast; at least, a *chambre* was cheaper than a salaried expert and it always accepted the case, unlike the voluntary arbitrators. In addition, it was a sort of court, in that it would act collectively, which would possibly produce less biased reports than a single expert/arbitrator (the Court could in principle choose three experts/arbitrators for each case, but it never did, as it was already difficult to choose one). The *chambre* collectively knew of all the technicalities and customs of the trade, or if it did not, it could call an additional subscriber to complete its information (as most of the statuses explicitly allowed⁴²). Finally, many hoped that the creation of collective organisations would gradually lead to an attenuation of disputes—or at least to a lesser proportion of disputes coming to the Court. Putting a case directly before the *chambre*, and not before the Court, without *agrées*, bailiffs, etc., would be cheaper and faster; the members of the *chambre*, all well-known in their trade, would conciliate many cases; and no one would dare to act contrary to their decision (even if it remained a private arbitration), because this would harm reputations⁴³. A few *chambres* even stated that in such a case, the subscriber would be expelled, meaning that he or she would no longer have access to other services, which, especially in the case of the UNCI, was probably a good incentive—provided that the cheater was a member of the *chambre*, which was a key problem: such a theoretical system failed to deal with cases involving infringement in New York, for example⁴⁴, but probably also many of the cases involving two different trades.

It is nevertheless easy to understand why the printed lists of experts/arbitrators first mentioned the *chambre syndicale* after each product headline—when there was one in the trade—and why a growing proportion of the experts/arbitrators actually appointed by the Court of commerce after 1848 (more than half on them on some days of 1869, for example) were in fact *chambres syndicales*. It could be a reasonable choice, from the point of view of the Court as well as the parties, although it was not exactly legal and did not fit in the “jacobine” political culture. The ministry of Justice actually issued a service instruction stating that this practice was illegal—but only in 1875, while “this custom had existed for half a century”; and the Court, in the following years, simply appointed one of the leaders of the *chambre* instead of explicitly giving the collective name⁴⁵. Shortly after, the 1884 law that legalised trade unions stated that these unions could be asked for advice

42 ADP, D1U3 54.

43 *Union.*, e.g. N°1, December 15th, 1860, 5.

44 *Union*, N°27, February 28th, 1863.

45 Block, *Dictionnaire*, 382-384.

about any dispute related to their specialty, including cases put before a Court.

The birth of a new institutional system

This customary, then official role of unions in expertise had consequences on their development. While their more visible actions of lobbying, lock-out, etc. made them vulnerable to the classical critics against particular interest groups, their role as experts, both in the loose sense of the word (giving advice to Chambers of commerce, ministers, etc.) and in its original, judicial sense, was more discreet and easier to legitimate, on the basis of the common sense idea that each trade had its peculiar techniques and customs, and therefore its peculiar expertise. All this finally led to a new—quite stable until today—institutional system giving an important, semi-official role to employers' unions in the French economic and social policy-making. Local unions of unions (such as the UNCI, or nowadays the local circles of the Medef, Mouvement of the French entrepreneurs) choose the judges at the Courts of Commerce and the members of the Chambers of Commerce (who give advice to the administration and provide various services to the local firms). They are actually elected by the firms, but there is usually only one list of candidates, and it has been so in Paris since the end of the 1860s⁴⁶. In addition, since the end of the 19th century, national advisory bodies have been created, and the unions have become more and more organised and influential, but the basic scheme remains the same.

This institutional change—from forbidden unions to unions choosing the judges of an official Court—did not happen without doubts or conflicts. The newly created *chambres* had to ask for a recognition by the Court, that was not granted for all. The Court scrutinised the list of the first members—they had to have a good reputation. In its first year, the judges also had some doubts about the UNCI: wouldn't it be a purely commercial business, with no connection to the “real trades”⁴⁷?

In addition, the birth of a *chambre syndicale* is obviously never a natural process. It requires a definition of this trade—involving matters of identity as well as of interests and technique—and a group of voluntary leaders. In some trades, there were none: they long remained unorganised and probably, therefore, institutionally disadvantaged, while the wine, bronze and flower trades, for example, had more opportunities to promote their interests. The conflicts about the definition of trades were often strongly linked to the role of the *chambres* as judicial experts. For example, the *chambre* of raw material for coachbuilding

46 Lemerrier, *Un si discret*, 236-237.

47 ADP, D1U3 54.

argued that the already existing *chambre* of coachbuilding did not include any real expert in raw material, and therefore was not the right expert in cases involving both a raw material seller and a coachbuilder, as the product involved would be raw material⁴⁸. The many conflicts of the 1860s between the *chambre* of jewel-makers and the *chambre* of jewellery (which included both makers and sellers) were related to opposite interests regarding regulations on the quality of gold, but also to such conflicts about the choice of the best expert⁴⁹. Receiving cases from official courts may sometimes have allowed some *chambres* to exercise a kind of moralizing influence on the practices in their trade, but it more probably offered them an important tool for legitimisation, that helped them to find new subscribers as well as to become credible partners for the administration. For the historian, disputes such as the jewellers' are a good reminder of the relativity of the definition of trades—and therefore of expertise⁵⁰.

For the economic historian or the economist, the strange case of the Paris Court of Commerce may in addition help to add a bit of subtlety to the debates about the "Law Merchant"⁵¹. It has often be argued—and "demonstrated", using game theory—that merchants did not need civil courts, because it was more efficient for them to use other kinds of incentives and sanctions (involving reputation, social networks, etc.) to counter cheaters, and as they needed a fast, simple justice rooted in expertise of business, not of law. The case of the French Courts of Commerce—and especially of their relationship with *chambres syndicales* in 19th-century Paris—does not easily fit in this picture, for at least two reasons.

On the one hand, the Courts of Commerce were official courts established in the context of a civil law system, having to apply Codes (of Commerce, of Civil Procedure), as their judgments could be appealed before professional judges (which was rarely the case), and entitled to use public officers to enforce these judgments. The fact that they used the *chambres syndicales* as experts/arbitrators and often followed their advice did not change this situation. Some leaders of the *chambres* indeed complained that few merchants directly came before them⁵². The use of the official Court probably gave the parties something more, in terms of un-(or less) biased and more enforceable decision.

On the other hand, the fact that the Court had to use experts, and that, even after the creation of many *chambres syndicales*, it continued to appoint individual experts (salaried ones and a few voluntary merchants), even in some of the cases involving wine or cloth, points to the complex character of "expertise". The fact of

48 Ibid., Undated letter.

49 *Union*, esp. N°58, October 31th, 1863.

50 Lemercier, "Classer".

51 For a good introduction: Aoki, *Toward*, 59-94.

52 *Recueil*, 36.

being a merchant, not a judge was not considered sufficient to be an expert in any sort of business—even if problems of schedule also explained the growing use of external experts. There never was a single “Law Merchant”, nor were there well-defined trades with their ahistorical, technical customs and their natural experts.

Defining the trade that was involved in a case, naming the know-how that was related to this trade and choosing the right person was not only a problem of information and of individual availability. Identities, interests, conflicting groups were always at stake and many different possibilities, sometimes quite far from those recommended by the Code of Civil Procedure, were tested.

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Who is the right expert? This question was probably often asked in the 19th-century Paris Court of Commerce. Although its judges would have agreed, when they confronted external criticisms against the institution, that they were (and that they were, in addition, cheaper and more efficient than any other judicial expert), they had to spend some time each year to appoint new *arbitres salariés*, to update the printed list of volutary experts and to decide which *chambres syndicales* they would support by transmitting them cases—and each day to find the right expert for a few dozens of new cases.

This points to what could be considered as a kind of expertise in its own right: the art of finding capable, unbiased and available people in a world where official guilds did not provide a ready-made, institutional (if not truly satisfactory) answer. This art was already practised at the court before the Revolution, as the pathbreaking research by Amalia D. Kessler has shown: at that time, priests were often chosen—at least when the parties came from the rural areas around Paris—as natural arbitrators, but also as experts of the human soul (and therefore of the trustworthiness of merchants)⁵³. Mayors of small towns were their 19th-century equivalent⁵⁴, but inside the capital, or when dealing with parties coming from more distant places, it was considered more important to be an expert in one trade, or, in the case of the salaried experts, in book-keeping or building. Anyway, the judges were still the experts of the world of merchants, in the sense that they were recognised able and legitimate to find experts, and even implicitly authorised to print lists of experts—lists that were used by other institutions that also were asked to “give names”, especially by the Chamber of commerce⁵⁵.

It has already been often pointed that one of the most important skills of a large-scale merchant or banker in the early modern times was the ability to gather

53 Kessler, "Enforcing".

54 ADP, D1U3 6, Report of January the 9th, 1844.

55 E.g. ACCIP, Minutes, January 18th, 1850.

information about reputations. At least up to 1848, many members of the Paris Chamber and Court of Commerce, coming from this social group, were experts in such matters. The birth of the *chambres syndicales*, along with the specialisation of firms (for example the separation of banking from long-distance trade), gave birth to a new kind of more collective, institutionalised expertise on experts, that can still be found nowadays inside the Paris Court of Commerce.

One would think that, at the beginning of the 21st century, expertise (given by a physical person appointed for a small amount of time) would often have been replaced by the use of books or other forms of stabilised knowledge, incorporated in one tool or another. For example, the registry of the Paris Court of Commerce keeps printed *usages* (customs) that are provided by the national unions (e.g. the Union of *plasturgy*) and are supposed to replace its direct advice in cases related to the peculiarities of the trade. One would also think that the birth of professions and disciplines—accountancy, chemistry...—and of professional bodies of judicial experts would have put an end to any kind of expertise by merchants on “really technical” matters. The situation is indeed very different from what it was in the 1860s. But the judges also make an important—and informal—use of knowledge possessed by their fellow judges on various—customary as well as technical—matters⁵⁶. As the number of judges finally increased—they are ca. 150 in Paris, for ca. 120,000 cases per year—, this collective, informal expertise now takes place inside the Court. Anyway, a restaurant owner still considers it useful to ask for a colleague-specialist’s advice when he or she is confronted with a complex case in the computer industry. Many judges say that they prefer to do so, because the external experts are slow and expensive. One of the most experienced judges is officially the expert of experts in the Court, the person that the others ask when they have to choose one. It happens that he also was, at two different points in time when this question was asked to all judges, one of the two judges most often asked for unofficial advice. The expertise of experts definitely seems to be an interesting source of influence, as well as a necessary tool in this kind of institution.

This is naturally more true in Paris than anywhere else—and was even more in the 19th century, when most of the statistical investigators gave up the idea of describing the Parisian economy, because of its complexity as well as its size⁵⁷. Knowing “who would know the technical answer” in the big city was a rare and valuable knowledge. On the other hand, the Paris Court influenced many changes in the Code of Commerce—about bankruptcies or company law as well as attachment. It has kept this special place and this national influence throughout the 20th century—the customs in its registry, for example, are national ones. While the size of the city mechanically multiplied the number of cases, and therefore the use

56 Lazega et al., “A Spinning top model”.

57 Lemerrier, *Un si discret*, 307-362.

of external, unofficial experts in the 19th century, this particular status of the Court of the capital gave a special weight to judgments that were often prepared inside the quasi-illegal *chambres syndicales*.

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