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From Atlantic to All-American New York Experiments in Judicial Transplant

Abstract: One of the key areas where the United States is generally contrasted to France is law. Yet pitting the common law tradition against Napoleon's civil code obscures the diversity of the French justice system, as well as the differences between English and US experiences. This paper tells how, when preoccupied with reforming judicial procedure, both before and after the Civil War, New Yorkers were inspired by some lesser known corners of French justice, such as the conciliatory “justices of the peace” and the lay, elected, but official “commercial courts”. It draws on research by Amalia Kessler on the birth of the US “adversarial tradition” and complements it with a focus on merchants and their disputes. It shows that the relationships of New York merchants with the legal system were, in the first half of the century, remarkably similar to those of their French counterparts, and in many respects shaped by shared trans-Atlantic experiences. Ironically, though, explicit attempts at importing elements from the French judicial system happened, in the late 1840s to mid-1870s, were instrumental in strengthening the idea of a distinctly US national character with, among other, procedural implications. They ultimately led to the invention of what was deemed a specifically American way to deal with (commercial) disputes.

One of the key areas where the United States is generally contrasted to France is law, and this contrast is possibly thought to have been strongest in the early 19th century. In the 1800s, **Napoleonic codification had organized substantive law and the judicial system along supposedly clear, hierarchical lines.** One of its aims had been to end the legal pluralism of the Old Regime, whose overlapping jurisdictions gave rise to very long lawsuits. Courts were now organized like a French garden. Moreover, their judges were supposed to act as a mere “mouth of the law,”¹ not to interpret it. **On the contrary, each American state had its own judicial**

¹On the French post-revolutionary political culture, and on this famous quote from Montesquieu, see ROSANVALLON Pierre, *The demands of liberty: Civil society in France since the Revolution*, Cambridge, Mass., Harvard University Press, 2007.

organization and, while debates were heated between advocates of jurisprudence and legislation, it was clear that **judicial precedent was to play an important role in the evolution of the common law**. Moreover, the period I study is known as that when judges very often exhibited substantive discretion when choosing to interpret precedents in a way that would promote economic growth (or the interests of merchants and manufacturers), as opposed to late 19th-century legal formalism.²

This general contrast shaped many political debates: its discursive importance is undeniable. It however **fails to capture daily experiences with the judicial system in both countries – especially those of merchants**,³ a very important part of the political and social elite in the 19th century, and prominent users of the legal system, because of their credit disputes, quarrels stemming from the risks of shipping goods through the Atlantic, etc.

Along with a clear hierarchy of professional judges, the Napoleonic Codes had established or confirmed hundreds of lay courts with cheap, simple procedures that dealt with hundreds of thousands of cases per year, including almost all credit disputes, commercial or otherwise. Appeals from such courts were only authorized above a certain amount in dispute, so that the lay judges enjoyed a wide degree of discretion. **Among those courts were 220 commercial courts (*tribunaux de commerce*)**.⁴ In all cities and commercial towns, they were the official first-degree courts for commercial disputes. They were widely used, and generally deemed satisfactory by the diverse French governments (they cost little, judged quickly, and could easily be praised as either very traditional or very modern) as well as by merchants themselves. One telling proof of their success is the failure of almost all attempts at establishing parallel, private arbitration schemes. **Most merchants seemed happy with the peculiar mix of the official and the informal offered by commercial courts**. Their official character promised efficient action against debtors, while the fact that judges were elected merchants and enjoyed a lot of procedural and substantive discretion offered opportunities to adapt the law to dominant economic practices (or the practices of the economically dominant).

No such thing existed in the US. However, as we will see, contrary to their English counterparts, **New York merchants seem to have enjoyed the same proficiency in the use of law and courts as the French**. Moreover, they regularly discussed possible improvements in mechanisms for the resolution of commercial disputes, and experimented with such alternative mechanisms. **Those debates and experiments, in the first half of the century, exhibit similarities with continental European practices that point to a relatively common Atlantic experience. From the 1840s onward, on the contrary, more frequent direct references to European, including French, institutions went hand in hand with the differentiation of what was considered as a distinctly American way to adjudicate disputes**. My claims in this respect are mostly based on a thorough investigation of debates on and practices of commercial arbitration in the New York Chamber of Commerce.⁵ This case study led me to conclusions extremely close to those of Amalia Kessler, which I will also briefly present. She has studied the birth of the US

²HORWITZ Morton, *The transformation of American law, 1780-1860*, Cambridge, Harvard University Press, 1977.

³Unless otherwise specified, I use the word “merchant,” as was done at the time, both to refer specifically to wholesale, large-scale merchants who also had financial activities, and more generally to denote all traders, manufacturers, insurers, bankers, etc.

⁴LEMERCIER Claire, *Un modèle français de jugement des pairs. Les tribunaux de commerce, 1790-1880*, manuscript for habilitation, University of Paris 8, 2012, available online.

⁵Rare Book and Manuscripts Library, Columbia University Library: New York Chamber of Commerce and Industry records, 1768-1984 – cited as NYCC in the remainder of this paper.

“adversarial tradition” in the same period, focusing more on the New York experience of the Chancery Court and on debates on the transplant of “courts of conciliation” from France.⁶ I very much follow her in arguing for the interest of a history of procedure (debates on, and practices of procedure) as a symptom of many social and cultural evolutions, and particularly of changing definitions of national characters. In this paper, I emphasize two aspects that are present but more understated in her book: first, the fact that evolutions in the early decades of the 19th century, especially in New York, are to be understood in a transatlantic, rather than strictly American or Anglo-American context; second, the idea of **“legal irritants,”** borrowed from legal sociologist Gunther Teubner, which has relevance beyond the context of legal studies. Teubner highlights the **irrelevance of the mechanical or organic metaphor of the transplant to study international circulations:** nothing has ever been imported after having been surgically isolated from its original system, and it's not even enough to envision reception as adaptation. **We should rather think of deliberate attempts at transplantation as “irritants” that often trigger unintended responses** – as when, in the 19th century, a growing interest in foreign systems went hand in hand with sharper definitions of national characters.

An Atlantic model (1760s-1840s): A “body politic” negotiating local trade customs

The arbitration practices of the New York Chamber of Commerce, from its birth in the late colonial period to the 1840s, exhibited many similarities with the continental European, and especially the French experience. While there was no commercial court in New York, the familiarity of merchants with law and courts was akin to that of their counterparts in e.g. Bordeaux or Nantes – **shaped by European ways to deal with maritime and commercial disputes that had come to span the Atlantic. There were shared practices, but almost no explicit references to France in those decades.**

The Chamber of Commerce: a chartered corporation inheriting continental European practices

The New York Chamber of Commerce was created in 1768.⁷ As such, it is **one of the oldest “Chambers of Commerce” in the English-speaking world. Such organizations, that had older Mediterranean origins, had been systematically established in the commercial cities of France,** from the mid-17th to the mid-18th century. This, as well as the creation of new commercial courts, was part of an economic policy that had begun with Colbert, the minister of Louis XIV, and continued beyond the Revolution, esp. with Chaptal, a minister under Napoleon. Colbert's name is generally associated with statism, yet he was also interested in getting better information, and even collecting advice, from merchants⁸. **French Chambers of Commerce were not mere merchant guilds: they enjoyed an official status and ran important harbor facilities. On the contrary, the “Chambers of Commerce” that were created in Great Britain, Ireland and Scotland have always remained**

⁶KESSLER Amalia D., “Deciding against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication”, *Theoretical Inquiries in Law*, 2009, vol. 10, pp. 423-483; KESSLER Amalia D., *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800-1877*, New Haven, Yale University Press, 2016.

⁷FRIEDMAN Lee M., “The First Chamber of Commerce in the United States”, *Bulletin of the Business Historical Society*, 1947, vol. 21, n° 5, p. 137-143.

⁸MINARD Philippe, *La fortune du colbertisme : État et industrie dans la France des Lumières*, Paris, Fayard, 1998.

purely private associations (even if many tried to become official at some point).⁹

In the late 18th and early 19th centuries, the New York Chamber stood somewhere in between those two models. Like many other corporations of the early Republic, it had been chartered by King George III in 1770, then by the State of New York in 1784.¹⁰ This implied an official recognition that went beyond that of a mere club – and, as a counterpart, specific duties. Until the late 19th century, it was nothing like a place to socialize (it didn't even have a fixed location). Its main activities were lobbying for commerce (e.g. canals, bankruptcies, and the codification of commercial laws were topics for petitions to the State and the US legislators), improving the harbor (e.g. by the establishment of a nautical school),¹¹ and, as we will see, trying to standardize trade practices. **As a regulator of the harbor, the Chamber was similar to its counterparts in Bordeaux or Nantes:** its executives were elected by members who had themselves been co-opted; yet their influence was also backed by State recognition. As such, **the New York Chamber of Commerce should be considered as part of a system that, on both sides of the Atlantic, ensured that merchants as a group had a voice in the negotiation and implementation of official commercial norms.** The exact ways in which they played this role certainly varied between New York and Bordeaux – but not much more than between Bordeaux and Le Havre, New York and New Orleans, or between the mid-18th and mid-19th centuries. On both coasts, the State and civil society were much more intertwined than is generally thought; moreover, the legal distinction between the private and the public, and especially private vs. public corporations, appeared much later in New York than in other parts of the Northeast.¹²

The early arbitration practices of the New York Chamber were also similar to continental European procedures. In its early years, the Chamber was used by local colonial courts as a referee: the courts referred the parties to arbitration by the Chamber.¹³ Yet this “reference” had little to do with the English practice bearing the same name. On the contrary, it appears very similar to what was found in Paris at the same time when the (official) commercial court referred parties to guild official who tried to settle the disputes and, when it was not possible, wrote a report on the case.¹⁴ This role, called *arbitre rapporteur*, was neither that of an English judge nor that of an English jury (or even that of an English equity examiner). It might have been inherited from the New York courts of the Dutch West India Company, that had very much used this procedure in commercial cases.¹⁵ In the late colonial period, when it only had a few dozen members, the young Chamber of Commerce tried to gain in legitimacy by playing this role of *arbitre rapporteur* for official courts.

It was, however, a double-edged sword, as this role was expanded, in 1779-1784, on behalf of the English occupants. At a time when courts, except the Court Martial, did not work, the Chamber

⁹The other first Chamber in the English-speaking world, also created in 1768, was established in Jersey. BENNETT Robert J., *Local Business Voice: The History of Chambers of Commerce in Britain, Ireland and Revolutionary America 1760-2011*, Oxford, Oxford University Press, 2011.

¹⁰For the NYCC charter, see Stevens John Austin, *Colonial records of the New York Chamber of commerce, 1768-1784*, New York, J.F. Trow & co., 1867, p. 89-97.

¹¹HEFFER Jean, *Le port de New York et le commerce extérieur américain, 1860-1900*, Paris, Université de Paris I Panthéon-Sorbonne, 1986.

¹²See e.g. WILLIAMS Joan, “The Development of the Public/Private Distinction in American Law”, *Texas Law Review*, vol. 64, n° 225, pp. 225-250; HARTOG Hendrik, *Public property and private power: The corporation of the city of New York in American law, 1730-1870*, Chapel Hill, University of North Carolina Press, 1983.

¹³*Earliest arbitration records of the Chamber of commerce of the state of New York*, New York, Press of the Chamber, 1913; NYCC, box 326, folder 5.

¹⁴KESSLER Amalia, *A Revolution in Commerce. The Parisian Merchant Court and the Rise of Commercial Society in eighteenth-century France*, New Haven, Yale University Press, 2007.

¹⁵AIKEN John R., “New Netherlands Arbitration in the 17th century”, *Arbitration Journal*, 1974, vol. 29, n° 3, p. 145-160.

replaced them to officially adjudicate 200 commercial cases. This involvement with the former colonists did not damage the institution, however: after a mere change in membership, its charter was renewed in the Spring of 1784. It was mostly inactive in the 1790s-1810s, but the first decades had left their mark. **The Chamber was not a mere private club, one of its goals was to arbitrate disputes, and the accepted way to do so was quick and informal, as opposed to following the English rules of evidence** (the “statute of frauds,” which was theoretically valid in New York common law courts). **It is important to know about this background so as not to systematically look for the origins of arbitration in an American exceptionalism.** The puritans, the Quakers, then the Mormons promoted community arbitration and quoted Saint Matthew on the perils of going to court.¹⁶ Yet this religious impetus probably needed imported templates (the inherited Dutch procedure of *arbitre rapporteur*, the fashionable French organization of Chambers of Commerce – both in fact widespread all over continental Europe) in order to be able to influence judicial practices. The fact that Federalist lawyers prided themselves with reading civil law treatises and experimenting with procedures inspired by the Roman-canon law might have made these templates even more attractive.¹⁷

Merchants who spoke the language of the law

New York merchants in the first half of the 19th century also resembled their French counterparts, rather than their colleagues in Manchester or Liverpool, in that they lived and acted “with the law”, rather than “before the law,” i.e. they did not hesitate to use lawyers and courts and were fluent enough in their language.¹⁸

Although this point should certainly be backed by an analysis of the archives of firms, it is already clear from the records of the NYCC, especially when contrasted with the mottos of English campaigns for the creation of commercial courts in the 1850s.¹⁹ Those primarily advocated access to justice. Merchants in the most important English ports and industrial cities claimed that they had nowhere to go to recover large debts or litigate important commercial disputes: the high courts in London were extremely slow and expensive and dealt with few cases. Other merchants, however, opposed the creation of special courts, especially with merchant judges, because they accepted the received wisdom that law was something too important to be left to them – it was “a closed book” for merchants and was to remain so. Debates on commercial arbitration and litigation in New York never became as heated as in England, and they never mentioned access to justice before the 20th century. **There were little debates because, as we will see, the arbitration provided by the Chamber of Commerce was seen as a complement to litigation, not a substitute. Access to justice, moreover, was apparently not a problem for the shipping merchants who dominated the Chamber until the 1870s.**

US and especially New York merchants indeed seem to have enjoyed the same familiar

¹⁶Horwitz, *Transformation*, 140-159; AUERBACH Jerold, *Justice Without Law? Resolving Disputes Without Lawyers*, Oxford, Oxford University Press, 1984; STEINBERG Allen, ““The Spirit of Litigation”: Private Prosecution and Criminal Justice in Nineteenth Century Philadelphia”, *Journal of Social History*, 1986, vol. 20, n° 2, p. 231-249.

¹⁷It was especially the case of James Kent; see e.g. Chapter 1 in Kessler, *Inventing*.

¹⁸I follow the distinction made by EWICK Patricia et SILBEY Susan, *The Common Place of Law. Stories from Everyday Life*, Chicago-Londres, University of Chicago Press, 1998.

¹⁹On these campaigns, see LEMERCIER Claire, “How do businesspeople like their courts? Evidence from mid-19th century France, England, and New York City”, University of Michigan Legal History Workshop/Law & Economics Workshop, 2015, available online.

relationship with the law and courts as their French or Parisian counterparts, even if there was no commercial court in New York. The number of judges, especially in the State Supreme Court, was generally raised when the caseload increased, contrary to what happened in England, and merchants seem to have had no difficulty to use the Court of Chancery, in Albany (which had borrowed some continental European procedures).²⁰ In 1808, the first US jurisprudence publication, *The American Law Journal*, was presented as a tool for merchants, among others. “The most consistent legal theorist of market economy” according to Morton Horwitz, Gulian Crommelin Verplanck, was born in a merchant family; his uncle by the same name had arbitrated for the Chamber of Commerce in 1785-99. John Duer, a judge and author of treaties favoring insurance, had a nephew, William Denning Duer, a banker and director of insurance and railway companies, who similarly was part of the arbitration committee in 1858-60.²¹ The biographies of the dozen most active arbitrators at the NYCC more generally show that they were prominent members of the Chamber more generally; they were at the peak of their merchant career, in their forties or fifties; they shipped goods to and from the Caribbean, China or Europe; some were also insurers, bankers or real estate brokers. They came from various US States (few were born in England or Scotland) and religious denominations. They appear very diverse, but they clearly built a merchant elite that was not afraid of lawyers²² and knew about commercial and legal practices out of the US.²³

Why, then, would they want to arbitrate – which was somewhat daring, as the contemporary jurisprudence leaned against this option²⁴ – **if they had no reason to be afraid or weary of courts?** The archives are not very explicit on the reasons why the Chamber, when it was revived in the late 1810s, promoted its own, more autonomous arbitration system. In the late 19th and early 20th century, promoters of arbitration criticized juries (supposed to be unpredictable and not versed enough in the trade), as had, in the late 18th century, the “founding father” James Wilson²⁵. However, I found no explicit criticism against juries in the archives of the Chamber (otherwise prolix as regards law) before 1870. In one of the other Chambers of Commerce that provided arbitration in the late 18th century, this happened at a same time when juries had been reformed to include more merchants, suggesting, once again, complementarity rather than competition between arbitration and courts.²⁶ My hypothesis is that, in the first half of the 19th century, New York merchants **arbitrated in order to negotiate customs, rather than to adjudicate disputes.**

²⁰See Kessler, *Inventing*, Chapter 2 and e.g. BROWNE Irving, “The Judiciary”, in Paul A. CHADBOURNE & Walter BURRITT MOORE (dirs.), *The Public Service of the State of New York*, Boston, James R. Osgood and Co, 1882, vol.3.

²¹Horwitz, *Transformation*, 180, 234.

²²The Chamber regularly asked counsels before petitioning on legal matters, and especially when it drafted bill proposals – it happened for the first time in 1819, about bills of exchange (NYCC, box 395, 27 March 1819).

²³In 1860, one of the rare honorary memberships was awarded to the former president of the Bordeaux commercial court. NYCC, box 398, minutes, 1 March 1860.

²⁴The “Vynior’s Case” allowed the parties to have a court void any arbitration award, and it was especially influent in New York. BENSON Bruce L., “An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States”, *Journal of Law, Economics, & Organization*, 1995, vol. 11, n° 2, p. 485-487.

²⁵See e.g. COHEN Julius Henry, “The Law of Commercial Arbitration and the New York Statute”, *The Yale Law Journal*, 1921, vol. 31, n° 2, p. 150, and “Lectures on law, delivered in the College of Philadelphia, in the years 1790 and 1791”, part II, chapter III, in WILSON Bird (ed.), *The works of the honourable James Wilson, LLD*, Philadelphia, Lorenzo Press, 1804.

²⁶HADDEN Sally E., “The Business of Justice: Merchants in the Charleston Chamber of Commerce and Arbitration in the 1780s and 1790s”, in Jonathan WELLS & Jennifer R. GREEN (eds.), *The Southern Middle Class in the Nineteenth Century*, Baton Rouge, Louisiana State University Press, 2011.

Informal arbitration as a way to negotiate trade customs

From the late 1810s to the late 1840s, the Chamber of Commerce grew from 40 to 200 members – along with New York commerce and population – and began its intensive petitioning and monitoring of the harbor. The latter included, as it already had in the late 18th century, the drafting and publication in newspapers of “mercantile regulations,” i.e. prescriptions as to the proper use of bills of exchange, units of measurement, and the proper rates for brokerage and storage commissions.²⁷ The Chamber could not make them compulsory, but used its official status to promote them as references. Producing such references was all the more important at a time when “customs” were more and more used by courts as default rules when the intent of the parties was not clear.²⁸ **“Mercantile regulations” were one way in which the Chamber could hope to influence both merchant practices and judicial decisions. Arbitration awards arguably was another,** although they do not seem to have been widely disseminated before the 1870s. It is likely that they circulated among Chamber members, and merchants more generally (the Chamber met in cafés and exchanges).

Under the guise of arbitration, the Chamber was regularly asked questions that had been abstracted from specific cases, and it answered in a way that aimed at setting a custom. For example, it was asked “when a bill of lading specifies a freight to be paid here, in “pounds sterling », at what rate should it be calculated? ».²⁹ The party who received an answer to such a question could then use it in court, or as a threat of going to court and winning. The New York Chamber even appended its seal (one of the attributes of its official character) on a couple of certificates intended for foreign courts.³⁰ This attestation – in fact, the creation – of a custom by an officially recognized group was known in 18th and 19th-century France as a *parère*, and performed in the same way, especially by Chambers of Commerce.³¹ This is not to say that the New Yorkers had a direct French inspiration here (although it is likely that they knew certificates of customs to be one of the things French Chambers produced), but merely to assess that **here, too, the same practices occurred on both sides of the Atlantic – and faded after the mid-century.**

What about the arbitrations that more specifically decided on one case? Contrary to most courts, the members of the arbitration committee only operated when the parties had agreed on the facts. They were to send a jointly written “statement of facts,”³² and the whole investigation was then based on the exchange of a few letters and on an oral discussion between arbitrators: there were no oral testimonies, cross-examinations, etc., and in most cases, the arbitrators never met the parties. Some of the documents sent to the Chamber had been authenticated by notaries or port authorities, but most had not. **This simple procedure is likely to have evolved from continental European legacies, which was not uncommon in the US at that time** (it looked like a simple version of the procedure at the Albany Court of Chancery). It accommodated the

²⁷NYCC, minutes, box 394, 3 April 1770, 2 August and 1 November 1785; box 395, 2 March 1819; box 397, 2 October 1856. For examples of circulation of such rules, see “Commercial Epitome”, *The Economist*, 3 août 1850, p. 18-20; BUTTS Isaac Ridler, *The business man's law library*, Boston, I.R. Butts, 1857, p. 105.

²⁸Horwitz, *Transformation*, 190-201.

²⁹ NYCC, minutes, box 395, 19 November, 14 Decembre 1819 – a lot of similar questions are in box 1.

³⁰NYCC, minutes, box 395, 7 January 1823 (“in courts of law abroad”); box 1, folder 3, file “1822” (Swiss court).

³¹Hirsch, Jean-Pierre. *Les deux rêves du commerce. Entreprise et institution dans la région lilloise, 1780-1860*. Paris: éditions de l'EHESS, 1991.

³²NYCC, box 279, folder 1, rules of the arbitration committee, 24 May 1822.

busy schedule of merchant parties (sometimes in foreign countries, as arbitration was open to non-members until 1860) and arbitrators, and allowed cheap decisions, but not on a large caseload: the Chamber only dealt with one to four cases per year.³³ This has nothing to do with the caseload of a French commercial court (thousands of cases per year in the largest cities). It is likely that most parties, when already in dispute, could not be brought to agree enough on the facts to accept such a procedure.

Arbitration was not therefore meant to enforce e.g. the recovery of debts, but **to settle disputes on principles between parties who agreed to accept the authority of the Chamber about the proper customs of the trade**. For example, “The committee not recognizing the existence of any custom applicable to this case [we]re of opinion that an allowance of 1 1/4% is an equitable compensation”.³⁴ In an early report, the committee clearly admitted that it was prepared to base an award solely on fairness reasons.³⁵ It even sometimes openly decided against custom, based on “free market” principles.³⁶

Arbitration at the NYCC until the 1850s illustrates practices of trade regulation that were similar on both sides of the Atlantic, which is not necessarily surprising, as they regulated transatlantic trade. I have emphasized its continental European, and especially French origins, not to say that commercial disputes in New York were solved in the same way as in Paris, but to question two more common assessments of US arbitration, and US law more generally. First, **the roots of arbitration in the NYCC were not specifically American**; second, **the legal experience of New York merchants had little in common with that of their English partners**: its peculiarities were not due to “the common law tradition” generally. **However, it is striking that NYCC members almost never explicitly mentioned European courts or procedures at that time. Ironically, their growing interest for “commercial courts” after 1850 ended up with changes that eventually transformed arbitration practices into something specifically American**, much more different from the French model than before. Explicit discussions on Continental European models were key to the birth of a distinctly American procedural tradition.

Legal irritant (1840s-1910s): From attempts at creating a “commercial court” to the birth of “US amicable arbitration”

While the Chamber of Commerce, being chartered, had been endorsed by the State of New York, its awards, during the first half of the 19th century, had no legal authority. **The Chamber drew on its official status and on the authority of its arbitrators in the merchant community** and hoped that it would be sufficient in order to have the awards play the role of guidelines for commercial practice. **For some of the members, however, it was not enough: they advocated**

³³I found information on a total of 121 cases for 1818-1874 in NYCC, boxes 1, 2, 3, 22, 24, 25, 58, 60, 325, 371, 375, 462, 463; this survey is likely to be exhaustive. 62% were shipping disputes (on charter parties, bills of lading, demurrage, etc.).

³⁴NYCC, box 1, folder 2, 12 November 1834.

³⁵NYCC, minutes, box 395, 4 May 1819. “The Committee determined that the charge of \$15 for re-exchange not being sanctioned by usage, cannot be maintained, but they unanimously decide that it is fair and equitable, and would have allowed it as a precedent, had not a law (lately passed respecting damages on returned inland bills) rendered it unnecessary.” The Chamber had petitioned the State Legislature for this law on February 3rd.

³⁶NYCC, box 462, 17 December 1863 : “A general usage of this kind presents so many obstacles to a free market, and the power of the owner to use all reasonable means to dispose of his property, that it has no claim for adoption as a rule of trade and commerce.”

the creation of a genuine commercial court. This demand of an official status was part of a wider interest, in New York, for Continental-European lay courts: courts that would have an official status, but simple procedures and judges with little legal training, and that would hopefully foster conciliation. **However, such attempts at legal transplant failed. This failure reveals that the parties themselves, as well as political actors, had already begun to take for granted, and more specifically for American, a specific type of procedure** (that is today called “adversarial” and requires much formality) **and a sharp divide between public and private institutions.**

Foreign inspirations used in attempts at officialization

The idea of a commercial court appeared three times in the minutes of the New York Chamber of Commerce between 1839 and 1851; the topic was tabled, but after more and more serious investigations.³⁷ In each case, **the aim clearly seemed to have been officialization:** a commercial court would be a court, i.e. more than mere arbitration. Two decades later, when the NYCC was briefly authorized to run such a court, it was mocked by a newspaper as “a semi-judicial authority with a high-sounding and impressive name.”³⁸ This certainly captures much of what New Yorkers – as well as English campaigners – sought in the French model: acquiring more prestige without losing the control of the Chamber on the institution; adding the charms of an official status to those of self-regulation.³⁹ However, it was not easy to plan exactly which type of court to establish.

In 1839, John J. Boyd mentioned a “Tribunal or Court of Commerce » that would have a merchant jury without a judge, deciding both on facts and law.⁴⁰ This project was tabled without much comments, and arbitration went on as usual. It might have been triggered by growing discussions in New York, and the US generally, about European courts of conciliations: after the financial panics of 1837 and 1839, looking into French models could be seen as a way to better police the market society.⁴¹ It was also a moment when the Chamber tried to expand its activities generally; and the members might have been aware of the contemporary creation of a short-lived commercial court in New Orleans, a harbor that was then as important as New York (the judge of this court actually came from New York).⁴²

The 1847 proposal for a “court of conciliation for the adjudication of commercial causes”

³⁷NYCC, minutes, box 396, 5 March and 2 April 1839; box 296, April-September 1847, February 1851-December 1852; box 227, folder 6.

³⁸*The Daily Graphic*, 14 March 1876.

³⁹This is close to what Hirsch, *Les deux rêves*, defined as “the two dreams of commerce”: adventure and institution, self-regulation and protection.

⁴⁰NYCC, minutes, box 396, 5 March and 2 April 1839.

⁴¹Kessler, “Deciding.”

⁴²This little-known bilingual institution, active until 1846 (it produced 8,000 decisions), was however very different from the New York experiments in arbitration and from Boyd's proposal. The judge was a lawyer, unlike his French counterparts, and the jurisdiction was wider than in France, but the simple procedure and heavy caseload very much resembled the French model. Kilbourne, Richard. *Louisiana Commercial Law: The Antebellum Period*. Baton Rouge: Publications of the Institute Paul M. Hebert - Law Center - Louisiana State University, 1980, 84-107; “Commercial Court (Orleans Parish)”, <<http://nutrias.org/inv/commct.htm>>; BULLARD Henry Adams et CURRY Thomas, *A new digest of the statute laws of the State of Louisiana*, La Nouvelle-Orléans, E. Johns, 1842, 234-237, 831; KER Robert J., *Proceedings and debates of the Convention of Louisiana*, La Nouvelle-Orléans, Besancon, Ferguson & Co., printers to the Convention, 1845, 676-690.

looked more promising, as its author was the president of the Chamber, James Gore King.⁴³ King, who had been banker in Liverpool, was the brother of a Governor of New York and became a member of the US Congress in 1849-51; he had studied law in Harvard, and one of his sons joined the New York Supreme Court in 1850: **he exemplified the close relationships with the legal and political worlds of frequent NYCC arbitrators.** He was also a Whig, like most of those who campaigned for lay courts inspired from France in England as well as in the US. He was probably driven to the idea of a specialized commercial court by English debates: it was English reformers who had begun to advertise for French (and Danish) “courts of conciliation » (*juges de paix* and *conseils de prud'hommes*), and one of them, lord Henry Brougham, was very much read in the US; in 1849, both Brougham and Liverpool merchants were to begin a campaign for “tribunals of commerce » in the same spirit.⁴⁴ The phrasing of King's proposal is that of debates inspired by Brougham at the New York Constitutional Convention in 1846: this Convention, after heated debates, had not directly endorsed courts of conciliation, but had allowed the state legislators to create such courts. **The reformers considered the idea of “domestic tribunals” as modern in that they promoted a simple procedure, stripped of technicalities. References to France offered a way to jointly promote two Benthamian ideas that had been favored by the Chamber of Commerce: the codification of law and this simplification of procedures.**

The King proposal of 1847 was studied, but not very much pushed forward by the Chamber.⁴⁵ In 1851, Boyed rephrased his previous version, including an explicit reference to continental Europe: **as New York had become as important in commerce as European cities, it deserved the same kind of courts.** He now planned to have judges, elected by the Chamber of Commerce, along with a jury, randomly drawn from its members. What he had in mind was a “court of record,” at the level of the highest courts of the State; decisions were to be officially enforced and the court, if it did not cover its costs, should be funded by the city or county. After a lively discussion and a vote of 12 v. 10, the Chamber however decided that the proposal should not be sent to the State legislators. Opponents do not seem to have disagreed on the general aim of the proposal, but they feared that the State would oppose it anyway because it differed too much from custom as to the role of the jury, or because it could be considered unconstitutional, in terms of separation of powers, to have the Chamber control such a court.⁴⁶

In the 1860s, the Chamber of Commerce pursued a less radical officialization strategy. The phrase “tribunal of commerce” briefly resurfaced in discussions on the renewal of its charter, but was quickly abandoned. However, the State Congress, in the new charter of 1861, opened the possibility for the awards of the Chamber to be certified by a court of record, in order to become official precedents. **The Chamber did not have its own court, but its awards had gained some legal authority and prestige,** which was all the more important because of a nascent competition from business associations.⁴⁷ **Yet it was not enough for some members,** and the

⁴³NYCC, minutes box 396, 6 April, 4 May and September 1847. On King, “Obituaries”, *New York Times*, 5 October 1853. The NYCC maintained a correspondence with the Liverpool Chamber of Commerce during the English campaign, but did not react when sent material on commercial courts. Minutes, box 298, 2 March 1865.

⁴⁴Kessler, “Deciding,” Lemercier, “How do businesspeople.”

⁴⁵It was however mentioned in the press, e.g. *The New York Observer and Chronicle*, 10 April 1847, p. 59.

⁴⁶NYCC, minutes, box 396, 4 February, 1 April, 2 December 1851, 6 January, 3 February, 7 December 1852; box 227, folder 6, Report of April 1851.

⁴⁷On this competition, e.g. NYCC, box 400, June 3 and November 4, 1875. On some new associations, e.g. the New York Commercial Exchange in 1861, providing arbitration (and having obtained a similar provision by the State), JONES William Catron, “Three Centuries of Commercial Arbitration in New York: A Brief Survey”, *Washington University Law Quarterly*, 1956, p. 462-463.

idea of a genuine “tribunal of commerce for the speedy, judicial and economical settlement of disputes among merchants and others” resurfaced at the end of 1873.⁴⁸ This time, thanks to an active lobbying of the State Congress by members of the Chamber, the proposal became a law: a **“Court of Arbitration” was launched in April 1874**. It is likely that this new attempt was triggered by the renewal of English debates on commercial courts, which were covered by the press in the whole English-speaking world.⁴⁹ The author of the proposal was again a banker, Elliott F. Shepard (1833-1893) – an active Republican, and a lawyer, who created the New York Bar Association in 1876⁵⁰. He mobilized other lawyers by criticizing delays and the incompetence of the jury in ordinary courts – questions that the Chamber had never much commented on before.⁵¹ David Dudley Field, the famous author of the New York Code of procedure, who had supported courts of conciliation in 1846 and campaigned in the 1860s, with the support of the NYCC, for codification, backed his proposal.⁵²

Campaigns for legal transplants: from looking into Europe to defining America

However, the Court of Arbitration was short lived, in spite of, or possibly *because of* this endorsement by lawyers. **Similarly, what happened in the US at a wider scale was a codification of procedural law that put emphasis on the formal adversarial procedure, rather than on the example of the lay, conciliatory French courts. The constitutional debates of the late 1840s, while they had increased interest for European models, had also given birth to an articulate discourse opposing the transplant of “courts of conciliation” by presenting them as the product of feudal (traditional and unequal) European political systems – paternalist institutions perhaps suited for agrarian societies, but not for the modern United States. Conversely, features of the adversarial procedure, such as the public, oral cross-examination of witnesses, were heralded as necessary in an advanced democratic society, one that relied on individual freedom and free market, even if they reduced access to justice by increasing costs and delays.**⁵³ An official report in 1862 stated that “in consequence of the forms of government, habits, and institutions in Europe differing so essentially from those of our own [...] all the features and peculiarities of those tribunals could not be adopted here”.⁵⁴ What had been heralded by law reformers as modern (courts of conciliation dismissing mere legal technicalities) was now dismissed as too traditional for the US. Enquiries into European models that were aimed at allowing a legal transplant rather crystallized the definition of a distinctly American model, forbidding such a transplant, **and endangering the kind of previously unnoticed hybridization of legal traditions that was at play in New York commercial arbitration.**

The joint study of practices of arbitration and discourses on the proper way to solve disputes and

⁴⁸NYCC, minutes, box 399, 2 October, 6 November, 4 December 1873, 8 and 10 January 1874.

⁴⁹See for example discussions in Canada as reported in New York: “Dominion Board of Trade. Important session yesterday. The fisheries, the establishment of Tribunals of Commerce, and other matters discussed.”, *New York Times*, 28 février 1874.

⁵⁰“Elliott F. Shepard dead”, *New York Times*, 25 mars 1893.

⁵¹His campaign seems to have led to similar attempts in Charleston in 1876 and Detroit in 1877. NYCC, box 60, folder 2.

⁵²NYCC, box 465; minutes, box 397, 6 February 1847.

⁵³Kessler, “Deciding.”

⁵⁴*Documents of the Assembly of the State of New York, 85th session, 1862*, Albany, Charles Van Benthuyzen, 1862, 4:1, cited by Kessler, “Deciding,” 469. This report dealt with a proposed court that was established in Delaware County in 1862-5, for small claims, with little success.

on foreign models allows us to better understand the chronology of the process, and therefore its logics. The New York Chamber archives are an interesting complement to Kessler's study in that they exhibit **a growing demand for procedural formalism expressed by the parties themselves**: some before the constitutional discussions of 1846 (when a trend toward adversarialism was also found by Kessler at the Court of Chancery), many afterwards, and especially in the 1860s. Of course, it is likely that some merchants had such preferences before they were publicly articulated as part of a distinctly American character. However, **public debates certainly were key in the making of a genuine tradition: something that began to be taken for granted.**

In 1844, the Chamber still opposed the examination of witnesses, because of costs and delays; in 1849, it had to surrender and authorize it.⁵⁵ Parties required more precise justifications in the awards, the communication of all the pieces, hearings that would allow them to actually meet the arbitrators, and wanted to have their say on the written evidence of their opponents.⁵⁶ The new charter that, in 1861, allowed some awards to be certified by courts of records added a separate impetus for formalization, as this required oaths from the arbitrators and from the parties.⁵⁷ The Chamber also had to pledge itself to follow the laws of the State, and it bought a few legal treatises.⁵⁸ In 1864, arbitrators refused to answer direct questions on custom, that were deemed too abstract.⁵⁹ The arbitrators more and more used the vocabulary of courts in their correspondence to talk about the arbitration committee, and so did the parties.⁶⁰ **This evolution in the demands of the parties does not seem to have been caused by a more common use of lawyers** (who already represented some parties in the 18th century): **it rather appears as a symptom of the quick institutionalization of the new procedural tradition.** All these changes did not support arbitration at the Chamber: the number of cases it dealt with – with increased delays – dwindled in the 1860s-1870s (whereas commerce boomed after the Civil War). In the last case the committee dealt with, just before the opening of the “Court of Arbitration,” a Bostonian party deemed the Chamber's rules “entirely unjust” because of the lack of the now customary adversarial procedure.⁶¹ **What the parties now wanted from the Chamber (and from its new competitors in the provision of arbitration) was not an authorized opinion on custom, but the resolution of a dispute, with all due guarantees. Incremental changes thus had slowly wiped out the arbitration tradition of the Chamber, without any explicit notice of this fact by its members.**

When re-opening the debate on “tribunals of commerce” in 1873, **the lawyer Shepard apparently wanted to thwart this tendency toward becoming a court with an adversarial**

⁵⁵NYCC, box 227, folders 4 and 5, box 396, 3 September, 18 December 1844, 2 January, 6 February 1849. Oral testimonies were more and more frequent in the 1850s: box 1, folder 9. This evolution is very similar to that found by Kessler in the practices of the Court of Chancery (*Inventing*, Chapter 2), similarly based on an evolution of the demands of lawyers, not a new use of lawyers.

⁵⁶NYCC, box 1, folder 1, letter by B. Warburton, January 1835; folder 2, 13 April 1835.

⁵⁷NYCC, box 398, March 1860 to April 1861; *Powers of the Arbitration Committee of the Chamber of Commerce of the State of New York and the Forms of Submission, Awards, Etc.* New York: Craighead, 1864; NYCC, box 1, folder 5 on oaths.

⁵⁸NYCC, box 462, 2 June, 17 August 1864.

⁵⁹NYCC, box 1, folder 15, Letter by L. Marx & Co, 18 May 1864; box 23, folder 8, letter by William Whitlock, 10 June 1864; box 462, 21 January, 2 June 1864.

⁶⁰NYCC, box 23, folder 1, Report of the 13 December 1860; box 1, folder 11, Schuchardt and Gebbard to Van Beuren, 15 March 1848, “we have agreed to change the tribunal.”

⁶¹Box 1, folder 16, letter from Albert A. Cobb & co., May 6, 1874. “we are entirely unable to appreciate the justice of the Arbitration committee ignoring the custom in all courts, of first considering the plaintiffs claim, then the defendants response to same, and then allowing the plaintiff to correct errors or misstatements made by the defendant.”

procedure. He explicitly stated that the judge should be free to call expert witnesses rather than passively take stock of the evidence offered by the parties – like in the European “inquisitorial” tradition, rather than the US “adversarial” one. He made positive references to the paternal justice of “patriarchal times,” reversing the rhetoric that had won against courts of conciliation 25 years before.⁶² He quoted statistics from Paris, hoping that it would be possible to deal with as many cases (i.e. almost 70,000 in 1869) as in a French commercial court. **Such a position, however, could not be heard any more in 1873,** be it by merchants in the Chamber of Commerce who faced the new demands of the parties or by the State legislators.

The new “Court of Arbitration” was, first and foremost, a court: it inherited very little from previous experiments of arbitration at the NYCC. The only judge, appointed by the Governor, confirmed by the Senate and paid by the State, was a Doctor of Laws, Enoch L. Fancher, who just came out of the State Supreme Court.⁶³ In spite of his inaugural speech opposing the “true principles of justice” to “forensic contests,”⁶⁴ and of ostensibly flexible rules of evidence, he heavily used the public, oral, stenographed examination and cross-examination of witnesses, sometimes lasting more than ten days for one case.⁶⁵ When confronted with doubts on a custom, he cited legal treatises rather than authoritative merchants.⁶⁶ His trajectory was that of a typical US legal reformer, from insisting on substance over form to putting emphasis on the modernization of judicial organization and embracing the adversarial procedure. When the parties added adjunct “arbitrators” from the commercial world to Fancher, as the rules allowed them to, those were in fact treated as mere expert witnesses. **Whereas the new institution had been praised by most newspapers as an entirely new thing inspired by foreign models** (e.g. “*the first regular court of arbitration ever established in the US*”)⁶⁷, its delays – months rather than days –, caused by Fancher's very American procedural choices, were soon criticized. In December 1874, a newspaper had already concluded that the Court of Arbitration was “**nothing more than an new Supreme Court**”.⁶⁸Fancher only dealt with ten cases per year. The court was never formally abolished, but ceased to exist in the early 1880s.⁶⁹

Going private: from official to amicable arbitration

The Court of Arbitration articulated the public and the private in a way that was very different from that of the previous Committee of Arbitration – and deemed problematic by many contemporaries. **Instead of a chartered association offering informal conciliation and advice to members, it was a typical official court hosted by a chartered association. What had been lost in this evolution** – in fact already in the dwindling practice of arbitration in the 1860s – **were European-inspired procedures** (written statements of facts, certificates of

⁶²“to carry the administration of justice back to its pristine glory in the patriarchal times, when the head of the tribe sat in the gate of the city and dispensed justice, himself protecting the weak and defending the ignorant”. *The Court of arbitration [...] An Address on the subject, delivered by Elliott F Shepard, [...]*, New York, Press of the Chamber, 1875.

⁶³A detailed portrait is given by the *Daily Graphic*, 11 November 1874.

⁶⁴*The Court of arbitration*.

⁶⁵NYCC, box 227, folder 6, “Questions propounded by the honourable George H. Forster to the secretary of the Chamber of commerce in regard to the operations of the Court of arbitration, and the answers of the secretary thereto”, 26 January 1876.

⁶⁶See e.g. NYCC, box 3, folder 6, note of 19 December 1875; box 58, folder 7, opinion of 4 December 1876.

⁶⁷NYCC, box 465, Scrapbook of arbitration, 1874-1882. Quotation from the *New York Daily Bulletin*, 15 October 1874.

⁶⁸*The Graphic*, 18 December 1874.

⁶⁹I have examined the ca. 50 cases dealt with by Fancher until 1880 (NYCC, boxes 2, 3, 22, 24, 25, 58, 60, 463).

customs, etc.). **What was still present, but less and less consensual, was the idea that the State could give the Chamber authority on commerce generally** – at a time when a new industrial elite fought for precedence in New York with merchants.⁷⁰

The debates of the 1870s were partly debates on the possibility, and suitability, of articulating the public and the private in the organization of justice. More importantly, they were read as such by campaigners for arbitration in the 1910s – at a time when the NYCC enthusiastically joined the progressive mobilization on this topic.⁷¹ They knew that the Court of Arbitration had failed, and **they explained this failure by a lack of separation between the public and the private. In this way, they created a new American tradition of purely amicable, unofficial arbitration** – a phrasing which they used in Europe in the 1920s to contrast it both with the English and the continental European tradition. What they promoted at that time was in fact as different from what the Chamber had done in the early 19th century as it was from the failed attempt at officialization in the 1870s.

The Court of Arbitration had caused heated debates among State legislators in the 1870s, before and mostly after its creation (there were multiple amendments, a veto of the Governor, etc.). Most were related to disagreements about its funding between New York City and the non-commercial remainder of the State of New York. Opponents to the Court argued that taxes on the country should not be used to create an institution that would solely benefit the wealthiest merchants.⁷² The jurisdiction of the Court was indeed limited to disputes situated in the City or Harbor of New York; but the city and county did not want to pay either, partly because they were governed by Democrats, whereas Fancher and most of the Chamber executives were Republicans. The fact that the funding was never completely secured (Fancher was only paid twice) partly accounts for the failure of the institution. **However, in the retrospective view of the 1910s, something that had in fact very little been discussed in the 1870s was put forward**, rather than those political or geographical divides: the fact that the Court of Arbitration, as a public-private hybrid infringing the separation of powers, was unconstitutional. **According to arbitration propagandist Charles Bernheimer,**⁷³ answering in 1915 to a student at the Harvard Business School, **“The European Systems could not be used because of fundamental differences in conceptions of law, and of customs, and because it was impossible to make a semi-governmental institution [...]. A Commercial Court according to our American conception of equality of all, would eventually develop into 'class legislation', which is contrary to the spirit of our American institutions”.**⁷⁴ In addition to the idea that US democracy was incompatible with European-inspired courts, an idea

⁷⁰BECKERT Sven, *The monied metropolis. New York City and the consolidation of the American bourgeoisie, 1850-1896*, Cambridge-New York, Cambridge University Press, 2001.

⁷¹In the US, contrary to what is often stated, merchants were not the prime or the most important movers on arbitration matters: the New York Chamber of Commerce was just one group in a much wider progressive–and paternalistic–campaign. See KESSLER Amalia D., “Arbitration and Americanization: The Paternalism of Progressive Procedural Reform”, *The Yale Law Journal*, 2015, n° 124, pp. 2940-2993.

⁷²“for the benefit and convenience of a class,” according to representative McGowan (*New York Times*, 21 May 1875); “in the interest of a wealthy private corporation,” according to senator Jacobs (*Journal of Commerce*, 8 March 1876). “What is obviously wanted is not a Court of Arbitration supported by the State for the benefit of rich merchants and bankers and brokers, but cheap justice for the people.” *The Daily Graphic*, 14 March 1876.

⁷³Charles L. Bernheimer (1864-1944), president of the NYCC Arbitration Committee from 1912 to 1944, was a Republican manufacturer who was particularly interested in labor arbitration. Following his impulse, the Chamber created a fund to popularize arbitration (the *Arbitration Education Fund*), created model rules, lobbied Secretary of Commerce Hoover, etc.

⁷⁴NYCC, box 115, folder 13, Charles Bernheimer to Truman C. Huff, May 17, 1915.

that, as we have seen, was born during the mid-19th century debates, Bernheimer describes the public-private divide as sharper in the US. **Whereas the Chamber of Commerce, when campaigning for arbitration under his impetus, studied French commercial courts more thoroughly than at any time before, and constantly praised them,⁷⁵ this praise could not be envisioned anymore as leading to an attempt at legal transplant.**

As we have seen, arbitration in the 19th-century New York Chamber of Commerce in fact had constantly hybridized public and private elements, in various arrangements. Yet its practices was not perceived as such by the promoters of “organized but extra-legal arbitration, tribunals”⁷⁶ who now wanted arbitration to be legally permitted, but otherwise free from official interference. Rather than looking for officialization, as their predecessors had, they emphasized a male ethics of commerce that would, in and of itself, support the purely private organization of arbitration practices.⁷⁷ When involved in discussions about the creation of the Court of Arbitration in the new International Chamber of Commerce in the early 1920s, **Bernheimer and his successors had already transformed this discourse into the alleged description of an intrinsically American branch of arbitration, less legal than the English or continental European one – purely private and amicable, only relying on moral sanctions for enforcement.⁷⁸**

⁷⁵See e.g. Julius Henry Cohen's report (he was the counsel of the Chamber and another important propagandist of arbitration) of 2 February 1911 (NYCC, box 325, folder 6).

⁷⁶SMITH Reginald H., *Justice and the poor*, Boston, The Marymount Press, 1919, 69.

⁷⁷E.g. “an honorable and manly policy to pursue in commercial controversies was to endeavor to adjust them without resort to the courts”. Report of 1917, NYCC, box 115, folder 16.

⁷⁸This view was e.g. endorsed by Édouard Dolléans, the secretary of the ICC Court of Arbitration, in the minutes of the Court, 24 May 1921 (archives of the International Chamber of Commerce, Paris): “*the American point of view, which attaches great importance to reconciliation, and also the European point of view more particularly concerned with organising arbitration on a legal basis*”; “*in Europe the mentality was different, a little more legal*”. This opposition was more generally taken for granted in the 1920s.