

COMMERCIAL JUDICIARY ON THE POLISH TERRITORIES IN THE 19TH CENTURY – A REPACKAGED FRENCH PRODUCT OR A MOCK-UP?*

JUSTIÇA COMERCIAL NOS TERRITÓRIOS POLONESES DO SÉCULO XIX – UM PRODUTO FRANCÊS REPAGINADO OU UMA SIMPLES MAQUETE?

ANNA KLIMASZEWSKA **

ABSTRACT

The focus of this article is the analysis of the actual shape of implementation of one of the most characteristic solutions of the French legal system in the Polish territories of the 19th century, that is the separate commercial judiciary. Following the 1807 establishment of the French protectorate, Duchy of Warsaw, the new state adopted the French Civil Code, Code of Civil Procedure and the Commercial Code. The judiciary was reorganized to imitate the French model, although with some significant divergences from the original. Thus, a number of foreign legal acts were cast *ad hoc* from post-revolutionary France into the Polish feudal reality. Along with them came not only new institutions, imposed with no time for their gradual development, but also a conceptual apparatus that had never before functioned in the Polish lands. The institution of commercial judiciary, which constitutes an inherent feature of the French system, has grown roots strong enough on the Polish territories to survive by a long time the obligations that resulted from the French protectorate. It is nonetheless important to analyze its evolution on the Polish territories, especially since Polish scholars have been avoiding a complex elaboration of this topic for over 200 years.

RESUMO

O foco deste artigo é a análise da real forma de implementação de uma das soluções mais características do sistema legal francês nos territórios poloneses do século XIX, qual seja a justiça comercial separada. Após o estabelecimento do protetorado francês em 1807, o Ducado de Varsóvia, o novo Estado adotou o Código Civil, o Código de Processo Civil e o Código Comercial franceses. O judiciário foi reorganizado para imitar o modelo francês, embora com algumas divergências significativas em relação ao original. Assim, diversos atos jurídicos estrangeiros foram jogados ad hoc da França pós-Revolução para a realidade feudal polonesa. Com eles vieram não apenas novas instituições, impostas sem qualquer tempo para um desenvolvimento gradual, mas também um aparato conceitual que nunca antes tinha funcionado nas terras polonesas. A instituição da justiça comercial, que constitui uma característica inerente do sistema francês, desenvolveu raízes fortes o suficiente nos territórios poloneses para sobreviver por muito mais tempo que as obrigações que resultaram do protetorado francês. Ainda assim, é importante analisar sua evolução nos territórios poloneses, especialmente considerando que os estudiosos poloneses têm evitado uma elaboração complexa desse tema por mais de 200 anos.

* This publication was prepared as part of the project “Implementation of the French Rules of Commercial Law in the Duchy of Warsaw, Constitutional Kingdom of Poland and the Republic of Krakow - *Code de Commerce* in Clash with Polish Reality” supported by funds from the National Science Centre (NCN), grant number UMO-2013/09/B/HS5/02617.

** Assistant Professor, Department of Legal History, Faculty of Law and Administration, University of Gdańsk. E-mail: anna.klimaszewska@prawo.ug.edu.pl.

KEYWORDS: Commercial tribunals. *Code de commerce*. French legal system. Polish territories. 19th century. Implementation.

PALAVRAS-CHAVE: *Tribunais comerciais*. *Code de commerce*. *Sistema jurídico francês*. *Territórios poloneses*. *Século XIX*. *Implementação*.

SUMÁRIO: I. Introduction. II. State of the Art. III. Economic background. IV. The shape of the commercial judiciary on the polish territories. IV.1. The number of commercial courts (tribunals). IV.2. The internal organization. IV.3. Electing commercial judges in practice. IV.4. Russians in the commercial judiciary of the Kingdom of Poland. IV.5 Supervision. IV.6. Jurisdiction. Summary.

I. INTRODUCTION

By virtue of the Treaty of Tilsit a new state was established in 1807 under the French protectorate. The creation of the Duchy of Warsaw meant the erection of the new state's system frameworks on certain conditions. The implementation of the 1804 *Code Civile* was indisputable and reserved by Napoleon in the Duchy's Constitutional Charter. The 1806 *Code de procédure civile*, in turn, was introduced in contravention of the appropriate legislative path, based on instructions from the Minister of Justice, who considered it indispensable for the purposes of applying the former legal act and thus managed to go around the Council of State, which disagreed. *Code the commerce* did not raise much opposition, but its reception took place in great chaos and without proper reflection on the institutions that it regulated. Also the judiciary was reorganized in line with the French model, yet with significant divergences from the original.

Despite the fact that borrowings from the French legal culture were not entirely a free choice in the political circumstances of those times, they survived on the Polish territories much longer than the rule of the Emperor. The Code of Civil Procedure had the shortest life span, as it was abrogated in 1876. *Code de commerce* was maintained until the implementation of the Polish Commercial Code of 1933, and the last provisions of the *Code civil* were also retained well into the 20th century. Not all the solutions and institutions implemented at the beginning were left without modifications; some were abandoned or amended following the shift in political forces, others yet served as the system's foundations for legal solutions that still function in contemporary Poland. The fact that they were a strong point of reference during each legislative process aiming to create national codifications, up until the interwar period, is evidence that some of them became deeply anchored in the Polish reality¹.

1 This refers not only to French legislation. Even the most ardent opponents of the systems imposed by annexing powers admitted that they had grown into the Polish legal culture. "Are there any justified concerns regarding the transplantation of a foreign spirit of law onto the substrate of Polish legal thought? The possibility that this could occur is reason enough for

Sometimes individual rules, solutions or institutions were imbued with a local character right from the beginning. It must, however, be emphasized that the shape of these rules, solutions and institutions in France had been moulded not only by elements originating from multiple legal acts (whose majority was not introduced on the Polish territories), but also by interpretations based on centuries-long legislative, doctrinal and case law traditions². Thus, they resembled a multi-sided geometric figure, where each of the listed elements constituted one side of this figure. Thus, they arrived to the Polish territories in a piecemeal state - as this is what the implementation of a few foreign acts thrown *ad hoc* from post-revolutionary France into the feudal Polish reality meant in practice.

This article analyzes the implementation, in Polish circumstances, of one of the most characteristic solutions of the French legal culture - separate commercial judiciary. This issue merits an analysis not only due to the fact that so far it has not been comprehensively covered in literature of the subject even in Poland, but primarily because it feeds into the current of research on mutual permeation of legal cultures, depicting the problems of absorption and adoption of foreign laws on a new substrate. Thus it sheds light on the process of employing a set of legal instruments (that together make up a code), created and adopted to the level of development in its country of origin, in the legal and economic life of another, different country. In the case of Polish territories, this legal and economic life was affected not only by the formation of merchant relations and the entire sector of capitalist entrepreneurship in challenging circumstances of political destabilization, resulting from warfare and post-war conditions and periods of more or less limited state sovereignty. It was also influenced by the strong anchoring of these relations, especially in the early years following the implementation of the code, in a feudal reality, to which at first sight *Code de commerce*, as a product of post-revolutionary France, was not attuned. It did not account for the level of development of economic life, of legal language³, of legal culture or for the specificity of a post-noble state with an underdeveloped economy.

concern, especially if this possibility is already showing worrisome symptoms. These symptoms include: searching for superficial similarities between old and new laws, hostility toward all things new, or better said, toward everything that the laws of the annexing powers lacked, and finally the application of new laws according to old templates and moulds. This last symptom is particularly vexing, because as a result of it, it is not the content of new law (even formal) that creates new formulas, but to the contrary— old formulas are smothering the new legal content. Even though we have a single CPL in the country [Code of Penal Law–A.K.] and a single CCL [Code of Civil Law– A.K.], the form of court writs “in circulation” in one district is so different to the form of writs in another district that even lawyers have trouble understanding them, and all the more so the general population. If a merchant, involved in court cases in different districts, receives court writs in which he will recognize the templates of the former courts of annexing powers, he will surely ask in surprise: “Where, then, is the unification?”; L. Wójcik, ‘O unifikację ducha praw polskich’ (1935) *Głos Sądownictwa*, 162.

- 2 Cf. P. Legrand, “The Impossibility of ‘Legal Transplants’”, *Maastricht Journal of European and Comparative Law*, vol. 4/2, pp. 111–124.
- 3 More: A. Klimaszewska, *Influence of French Legalese on the Development of Polish Legal*

II. STATE OF THE ART

Despite the fact that the French Commercial Code remained in force on the Polish territories for over 120 years, owing to which commercial judiciary functioned in this country as well, this issue has not yet been comprehensively covered, even though it should be of interest to scholars who deal not only with commercial law, but also with the organization of the judiciary or with the civil procedure⁴. Most authors have approached it with indifference, either omitting this area altogether, or broaching the topic superficially, including only sparse remarks about it⁵. Worse yet, these remarks were often untrue or misleading and imprecise⁶. Almost all those who took up the subject limited themselves to information copied from French authors⁷.

Language Within the Area of Commercial Law, [in:] *Multilingualism and Law*, [ed.] E. Veress, Sapientia Hungarian University of Transylvania - Forum Iuris - Robert Schumann Association, Cluj-Napoca/Kolozsvár 2016, pp. 173-184.

- 4 Owing to the Title XXV (*Proceedings before Commercial Tribunals*) of Book II, Part I of the Code of Civil Procedure, adopted in the Polish territories in 1808.
- 5 J. Szymanowski, *Wykład prawa handlowego przez J.A. Rogrona, adwokata przy Radzie Stanu i przy Sądzie Kassacyjnym Francuzkim, przełożył Jan Szymanowski, podprokurator przy Sądzie Appellacyjnym Królestwa Polskiego z dodaniem przypisów z najcenniejszych autorów czerpanych, jakoteż własnych uwag zastosowanych do prawodawstwa i jurysprudencji krajowych* [Commercial Law by J.A. Rogron, advocate of the State Council and Court of Cassation of France, translated by Jan Szymanowski, Underprosecutor of the Appellate Court of the Kingdom of Poland with Additional Remarks from Finest Authors, as Well as Own Remarks Regarding the National Legislation and Jurisprudence], Warsaw 1848, pp. 715-779; idem, *Wykład kodexu postępowania cywilnego* [Code of Civil Procedure], Warsaw 1866, vol. II, p. 147.
- 6 J. Szymanowski, *Wykład kodexu handlowego. Dzieło pośmiertne* [Commercial Code. Posthumous Work], Warsaw 1866, pp. 679-726; Idem, *Wykład kodexu postępowania cywilnego*, Warsaw 1866, vol. II, pp. 113-114 and 125; A. Boistel, *Wykład prawa handlowego, skreślił profesor prawa handlowego w wydziale prawa w Paryżu, przełożył z francuskiego Stefan Godlewski, kandydat praw* [Commercial Law, Written by Professor of Law in Paris, Translated from French by Stefan Godlewski, Graduate of Law], Warsaw 1878, vol. II, pp. 431-461, and especially 454; A. Heylman, *Historia organizacyi sądownictwa w Królestwie Polskiem*, [History of the Judiciary Organization in the Kingdom of Poland] Warsaw 1861, vol. I, pp. 74-77, 116; H. Krzyżanowski, *Zasady postępowania sądowego cywilnego* [Principles of Civil Court Procedure], Warsaw 1864, pp. 585-590; H. Chwalibóg, *Wykład kodexu postępowania cywilnego* [Code of Civil Procedure], Warsaw 1874, vol. I, p. 32.
- 7 J. Szymanowski, *Wykład prawa handlowego przez J.A. Rogrona...*; D. Dzierzoyński, *Kodex postępowania cywilnego, wyluszczony przez swoje powody – i przez przykłady; z rozwiązaniem pod każdym artykułem trudności, a oraz głównych zagadnień, następujących się w textcie; jako też z opisaniem znaczenia wszelkich wyrazów prawnych. Dzieło, przeznaczone dla uczących się prawa i dla osób trudniących się przystosowaniem przepisów procedury, i dla wszystkich innych, którzy życzą poznać takowe, a nie mogli oddawać się szczególnej ich nauce, podług drugiey edycyi przez J.A. Rogrona, Adwokata w Radzie Królewskiej i przy Sądzie Kassacyjnym z francuzkiego – przełożone na polski język z zastosowaniem do zmian zaszłych w prawodawstwie polskim, i własnem staraniem i nakładem wydane* [Code of Civil Procedure Explained Through its Motives and Examples; With a Solution of Difficulties Under Each Article and Clarification of Main Issues in the Text, as Well as With Description of the Meaning of All Legal Terms. Publication Addressed to all Students of Law and Professionals Dealing with the Adjustment of Procedural Provisions, as Well as for all Others Who Wish to Understand

In his work from 1844 (*O sądownictwie w Królestwie Polskiem. Wykład historyczny* [On the Judiciary of the Kingdom of Poland. A History], Warsaw), August Heylman omitted the topic of commercial tribunals altogether. This is all the more disappointing since after the establishment of the Kingdom of Poland, despite the widespread willingness to keep commercial tribunals, they were abolished in all cities except for Warsaw owing to lack of funds, which will be discussed at more length further on. Heylman, who was a Doctor of Canon and Civil Law, graduate of universities in Berlin and Göttingen, who after years of training served as a judge in the Kingdom of Poland and then as Vice-President of the Appellate Court in Warsaw, had easy access to all the information concerning the tribunals, as well as qualifications for the analysis and interpretation of the relevant materials. He did not take this opportunity in any of his two works concerning the organization of the judiciary. He was not alone. The same applies to Chwalibóg – a professor of the Main School of Warsaw, a prosecutor of the Warsaw Governing Senate Departments and senator; Jan Szymanowski – a member of the Council of State of the Kingdom of Poland and professor of law at the Main School of Warsaw, as well as professor of law and senator Hieronim Krzyżanowski or judge Damazy Dzierzyński. All of them certainly had access to such information. Even the contents of the only work devoted directly to this subject is inadequate⁸.

This is especially disappointing since a detailed and complete characterization of commercial judiciary and its jurisprudence in the Polish territories of the 19th century is nowadays practically impossible, owing mainly to the great destruction of Polish archives during World War II. Meanwhile, the functioning of commercial tribunals in the Polish territories was certainly not ephemeral⁹.

Them, But Could Not Study Them in Detail, According to the Second Edition of the Work by J.A. Rogron, Advocate in the Royal Council and in the French Court of Cassation, Translated into Polish with Application of the Modifications Introduced in the Polish Legislation, Own Publication and Print], Warsaw 1829, vol. I-II; H. Chwalibóg, *Wykład kodexu ...*, vol. II, pp. 5-25.

- 8 M. Krzepicki, *O sądach handlowych* [On Commercial Courts], Kraków 1844. This work offers a couple of cursory remarks on the subject of the French commercial judiciary model.
- 9 As Minister of Justice Feliks Łubieński enthusiastically underscored in his report, “Commercial tribunals established in Krakow and Lublin are already working and bringing forth most advantageous fruit. Since their recent initiation, the Commercial Tribunal in Krakow, from 24 March 1812, and the Commercial Tribunal in Lublin, from 3 December 1811 until October 1812, have examined [...] 518 cases, with only 5 left to be resolved.”; “Ostatni raport Łubieńskiego” [The Last Report by Łubieński], [ed.] S. Posner, *Gazeta Sądowa Warszawska*, no. 14/1908, year XXXVI, p. 215. As follows from data contained in reports of the Government Justice Commission, in the first two quarters of 1816 (as at 31 July), only the Warsaw Commercial Tribunal submitted a table with information about cases, of which 352 had been examined and 68 pending; Archiwum Główne Akt Dawnych [Central Archives of Historical Records] (hereinafter: AGAD), I RSKP, 104, fol. 8. On 19 September the table was amended. It follows from this amendment that “in respect of commercial tribunals” 1394 cases had been examined with 60 pending; *ibid.*, fol. 11. Data for the entire year 1816 shows

Especially the records of the Warsaw Commercial Tribunal, which functioned for the longest period of time, are sorely missed. The only records surviving to this day are the ones of the Civil Tribunal in Kalisz, which examined cases in substitution of the commercial tribunal (they also contain some cases examined by the Commercial Tribunal of the Kalisz Department before it was closed), and court records of the Free City of Krakow, as well as records of commercial cases adjudicated by the Civil Tribunal in Bydgoszcz, which had been left without examination upon the collapse of the Duchy of Warsaw, and which still had to be resolved pursuant to the provisions of *Code de commerce* when the Bydgoszcz region formed part of the Prussian state.

Unfortunately, the unwillingness to explore this issue persists also in our times. Even multi-volume works concerning the history of Polish legal system only offer fragmentary mentions of this issue¹⁰, similarly to monographs in which, owing to their subject matter, the topic of commercial judiciary should be discussed at least at a rudimentary level¹¹.

that 1215 cases were examined in Warsaw, with 75 pending; 157 cases were examined in Lublin, with 1 pending; in Kalisz all the lodged cases were examined, that is 319; *ibid.*, fol. 36. Following the closing of all other tribunals, in the subsequent years only data concerning Warsaw was collected. In 1817, the Commercial Tribunal examined 1778 commercial cases, 2 bankruptcy estate cases, and there were 54 pending commercial cases and 8 bankruptcy estate cases; *ibid.*, fol. 71. In 1818, the Tribunal adjudicated on 1719 commercial cases, with 21 pending, and 1 bankruptcy estate case, with 11 pending, *ibid.*, fol. 113. In 1819, the Tribunal issued 1691 judgements, with 28 cases pending; *ibid.*, fols. 118 and 128. In 1820, the Tribunal delivered 1440 judgements, but the information concerning pending cases, to be resolved in the following year, is missing; *ibid.*, fol. 134. In 1821, it issued 1686 judgements; in 1822–2894; in 1823–3390; in 1824–3260; in 1825–2322. In the last two years, 1824 and 1825, it resolved also 16 and 13 bankruptcy cases, respectively. *Ibid.*, fols. 141, 158, 172, 191, 203.

- 10 J. Bardach, M. Senkowska-Gluck [eds.], *Historia państwa i prawa Polski, t. III, Od rozbiorów do uwłaszczenia* [History of State and Law of Poland, vol. III, From Partitions to the End of Serfdom], Warsaw 1981, p. 124; S. Plaza, *Historia prawa w Polsce na tle porównawczym, cz. 2, Polska pod zaborami* [History of Law in Poland in a Comparative Perspective, part II, Poland Under Partitions], Krakow 2002, p. 190.
- 11 Władysław Sobociński's work contains some important information about commercial tribunals in the Duchy, but the entire passage that runs for about half a page can hardly be deemed exhaustive. W. Sobociński, *Historia ustroju i prawa Księstwa Warszawskiego* [History of the Political System and Law of the Duchy of Warsaw], Toruń 1964, pp. 246-247. Artur Korobowicz in turn lists the names of a few presidents of the Warsaw Commercial Court in the period discussed by him and covers the evacuation to Moscow in 1915. Artur Korobowicz *Sądownictwo Królestwa Polskiego 1876-1915* [The Judiciary of the Kingdom of Poland in the Years 1876-1915], Lublin 1995. The publication by Michał Makuch does not provide any new findings. M. Makuch, *Organizacja sądownictwa cywilnego w Królestwie Polskim okresu konstytucyjnego (1815-1831)* [Organization of the Civil Judiciary in the Constitutional Kingdom of Poland (1815-1831)], *Zeszyty Naukowe Instytutu Administracji AJD w Częstochowie, Gubernaculum et Administratio*, fasc. 1(13)/2016, pp. 67-78.

III. ECONOMIC BACKGROUND

In the period preceding the partitions, the Polish-Lithuanian Commonwealth was a highly agrarian country, where urban life had collapsed and large-scale manufacture industry was almost non-existent¹². Its economy was monocultural, based on agriculture alone. Nobility manors, in turn, were of a strictly feudal nature. The economic and legal position of the bourgeoisie, dominated by the rules of economic transactions that gave the upper hand to the nobility and were designed to maximize profits from manors, was particularly weak¹³.

This does not mean that the dangers of this non-diversified, exclusively agrarian profile of the Polish economy were ignored, as there emerged voices calling for industrial development¹⁴. The early transitional period, in which the forms of primitive accumulation began to combine with the first manifestations of capitalist accumulation, commenced in the '80s of the 18th century¹⁵. Transformations taking place in the social awareness were reflected in the legislative works of the Four Year Sejm (1788-1792), which contained some outlines of a cohesive and comprehensive economic policy. A certain change in attitudes emerged, evidenced not only in the rise in prestige of bankers and manufacturers, but also, most importantly, in the appointment of a "deputation with the purpose of drafting a bill concerning domestic economy".

For these reasons, the collapse of the state as a result of partitions was not only a political tragedy. It also frustrated the very first attempt to "shift from a

12 J. Jedlicki, *Jakiej cywilizacji Polacy potrzebują, Studia z dziejów polskiej idei i wyobraźni XIX wieku* [What Civilization Poles Need. Studies in History of the Polish Idea and Imagination of the 19th century], Warsaw 2002, p. 94.

13 Cf.: K. Zienkowska, *Jacek Jezierski, kasztelan łukowski, 1772-1805, z dziejów szlachty polskiej XVIII w.* [Jacek Jezierski, Castellan of Łuków, 1772-1805, from the history of the Polish nobility of the 18th century], Warsaw 1963, pp. 222-223, 237-240.

14 It was one of the tenets of the industrialists' programme. Cf: J. F. Nax, *Wykład początkowych prawideł ekonomii politycznej* [Basic Principles of Political Economics] (1790), [in:] idem, *Wybór pism* [Selected Writings], Warsaw 1956, pp. 73, 152-154, 203-204; J. Jedlicki, *Klejnot i bariery społeczne* [The Gem and the Social Barriers], Warsaw 1968, pp. 121-122.

15 It was the moment of a surge in bank transactions; the first great commercial and industrial enterprises were established. Attempts were made to organize a company for Black Sea trading, intensive searches for possible sites of salt mines were carried out, bourgeois and bourgeois-noble companies were established to lease state monopolies, a new generation of private, royal and church manufactures had started. In Warsaw, the leading centre of production, the manufacture of diverse consumption goods, typical for the first stage of industrialization, was growing; J. Jedlicki, *Jakiej cywilizacji...*, p. 94. After the Sejm resolved in 1775 that a nobleman who undertakes merchant activities would no longer lose his noble status (a law that had been in place since 1663), the interest of the gentry in merchant undertakings was on the rise. However, already in the mid-18th century trading houses (that sold wholesale and retail goods) began to emerge in the largest cities. They had no clear specialization and carried both colonial and domestic goods. There was also an increasing number of retail stores that sold assorted goods, run by merchants. It should be emphasized that in the late 18th century, only 5.5% of traders ran stores, while 90% of them were street vendors and peddlers. Cf. A. Jezierski, C. Leszczyńska, *Historia gospodarcza Polski* [Economic history of Poland], Warszawa 2003, p. 85.

non-accumulating system to an accumulating one”¹⁶. Under Prussian rule, the economic growth in Warsaw, now degraded to the status of a peripheral city, was abruptly halted¹⁷.

Following the establishment of the Duchy of Warsaw as a French protectorate in 1807, this process was still impaired. Obviously, compared to the economic collapse under the Prussian annexation, the period of the Duchy of Warsaw seemed like the onset on a new economic chapter, especially in the Posen Department and in Warsaw. However, despite the political and legal conditions that favoured the development of industry, commerce and credit thanks to the introduction of French legislation, the agrarian relations, which had not changed much, still posed a major obstacle. The feudal and manorial economy still held strong in rural areas. This unfavourable situation was further aggravated by wars and passage of armies, which resulted in destructions. Revenues of the treasury of the Duchy of Warsaw were lower than its expenses until 1811. This was a consequence of both the disadvantageous economic situation of the country (underdeveloped industry) as well as of excessive spending of the Duchy, principally attributable to the necessity of maintaining an army, which was an element of the Napoleonic system of keeping vassal states in check.

The weakness of the bourgeoisie, coupled with the unwillingness of the nobility to take up commercial and industrial activities, certainly handicapped and slowed down the process of capitalist transformation of the country and the ability to apply legal forms that served them. Moreover, in the political debate dominated by aristocrats and land owners, the issues of commercial and industrial development were constantly pushed out of sight. There were more pressing problems, especially those that directly affected the noble class. The problem of *sui generis* economic development of the country was deemed of key importance, as evidenced in many utterances from the period. Nevertheless, participants of the discussion were seldom well-versed in the matter¹⁸.

16 J. Jedlicki, *Jakiej cywilizacji...*, pp. 95-98.

17 As a result, there were very few businesses that had begun to prosper in the period of reign of king Stanisław August and weathered the storm brought on first by the great economic crash of 1793 and then the stagnation under Prussian rule. I. Ichnatowicz deems this to be the birth date of the Polish bourgeoisie; idem, *Burżuazja warszawska* [The Warsaw Bourgeoisie], Warsaw 1972, p. 46. B. Grochulska concurs; idem, „Dom” S. A. L. Fraenkel [The S.A.L. Fraenkel ‘House’], [in:] “Dzieje burżuazji w Polsce. Studia i materiały” [History of the Bourgeoisie in Poland. Studies and Materials], Wrocław 1972, vol. III, ed. R. Kołodziejczyk, p. 42. Jan Kosim, on the other hand, basing his opinion mainly on the single example of Judyta Jakubowiczowa’s career, argues that the roots of financial power of some bourgeois families of the 19th century can be traced back to the century before. J. Kosim, *Losy pewnej fortuny: z dziejów burżuazji warszawskiej w latach 1807-1830* [The Story of a Certain Fortune: the history of the Warsaw bourgeoisie in the years 1807-1830], Wrocław 1972, p. 16.

18 For example, 107 people participated in voting on the adoption of the Commercial Code in Sejm. Only I. Stawiarski offered a more lengthy, substantive contribution. Another member of the commission, T. Byszewski, confused commercial matters with tax ones. M. Handelsman, *Dyariusze Sejmów Księstwa Warszawskiego, zeszyt 1, Dziennik posiedzeń izby poselskiej*

The economic modernization of the country was at that time perceived mainly from the perspective of restoring manor estates to their old glory with the aid of the state, and of involving the state in industrialization. Emphasizing the role of private entrepreneurship and strengthening the bourgeoisie was not part of this plan. Of course, no one objected to the promotion of bourgeoisie and its undertakings, but there were no campaigns aiming for the active support of private commercial and industrial endeavours, at least not any vigorous ones. What set this period apart from the later times was the weakness and the small size of middle-level bourgeoisie¹⁹, whose financial condition was very precarious, especially in the wake of the economic crisis that hit the country in the late 18th century. With time, the situation began to change gradually, but this process did not take off for good until the '20s of the 19th century.

Despite this, in the first decades of the 19th century, all kinds of institutions of commercial law began to be used more frequently, with increasingly complex contracts made. The organizational and institutional specialization of entrepreneurs was also progressing, even though in the times of the Duchy of Warsaw capital was not accumulated by way of establishing companies. As a result, business undertakings were usually based on the financial resources of individuals, or of simple partnerships established with the purpose of carrying out a specific economic endeavour.

The unstable economic situation lingered on throughout the first years after the establishment of the Kingdom of Poland as well. Along with the gradual stabilization the developmental path of the country's economic life, as well as the functioning of the legal reality around it, began to normalize. The capital of the Polish bourgeoisie and landowners was growing and it was increasingly employed in economic undertakings. The character of the contracts made and certain elements of the organization of economic endeavours changed despite the still extant, albeit enfeebled, feudal relations that hampered the growth of the domestic market²⁰. New perspectives opened up, especially for the advancement of the textile industry²¹. The measure of development of the textile industry was both the manifold increase in the number of weavers and broadcloth manufacturers, and the dynamic growth of the urban centres they inhabited in the Zgierz and Łódź area. The production in the third decade of the century is estimated

sejmu r. 1809 [Diaries of the Sejm of the Duchy of Warsaw, fasc. 1, Diary of Sessions of the 1809 Sejm Deputy Chamber], Warsaw 1913, pp. 29-31.

19 B. Grochulska, *op.cit.*, p. 42.

20 R. Kołodziejczyk, *Kształtowanie się burżuazji w Królestwie Polskim (1815-1850)* [Shaping of the Bourgeoisie in the Kingdom of Poland (1815-1850)], Warsaw 1957, p. 100.

21 G. Missalowa, *Studia nad powstaniem łódzkiego okręgu przemysłowego 1815-1870* [Studies on the Emergence of the Łódź Industrial Area 1815-1870], Łódź 1964, p. 16 ff.

to have grown by 100%²². The powerhouse of the country's economic growth was the capital city of Warsaw, where the conditions for practical application of the principles and institutions of commercial law arose first²³. It also became the hub of the richest bourgeoisie, composed of bankers, exchange agents, army and state suppliers and merchants. It was not until the cotton and wool industry's boom after 1820 when rich merchants appeared in other industrial centres, notably in Łódź.

Up until the '40s of the 19th century, the former Duchy of Warsaw and the Kingdom of Poland were in a transitional phase, during which new methods of accumulating capital began to coexist with the earlier ones, based on feudal relations. In the forties, however, there occurred significant changes in the "general directions and proportions"²⁴, as a result of which, on the one hand, the bourgeoisie, especially of the middle level, grew in numbers and financial strength, and on the other hand, the interest in industrial activity increased among the urban dwellers, the aristocracy and the landed gentry, as did their share in trade and finance. Also at this time specialization and the process of internal stratification of the bourgeoisie picked up speed²⁵. Above all, however, processes of accumulation gained momentum in the years leading up to the outbreak of the January Uprising (1863). Paradoxically, the economic role of the bourgeoisie of the Kingdom of Poland was incomparably less significant in the constitutional period, politically more favourable, than under Ivan Paskevich (1831-1856)²⁶, whose period as *Namiestnik* is mainly associated with the harsh political repressions and economic sanctions that the Russian Empire imposed on Poland after the fall of the November Uprising²⁷. Nonetheless, in the wake of the industrial revolution which reached the Kingdom in the middle of 19th century, the textile,

22 For example: A. Rynkowska, *Działalność gospodarcza władz Królestwa Polskiego na terenie Łodzi przemysłowej w latach 1821-1831* [Economic Activity of the Authorities of the Kingdom of Poland in Industrial Łódź 1821-1831], Łódź 1951; Z. Małecki, *Metody i formy pomocy finansowej władz Królestwa Polskiego dla powstającego przemysłu łódzkiego: lata 1820-1870* [Methods and Forms of Financial Aid of the Kingdom of Poland Authorities to the Emerging Łódź Industry: the Years 1820-1870], Łódź 1960.

23 The Kingdom of Poland was established on the territories of the Duchy of Warsaw, trimmed down, among others as a result of return of land to Prussia, either attached to it directly or as the Grand Duchy of Posen, created from the western parts of the Greater Poland region and Bydgoszcz.

24 Zob. I. Ilnatowicz, *op.cit.*, p. 107.

25 B. Grochulska, *op.cit.*, pp. 42-43.

26 R. Kołodziejczyk, *Burżuazja polska w XIX i XX w.* [The Polish Bourgeoisie in the 19th and 20th Centuries], Warsaw 1979, p. 112.

27 Following the November Uprising, the tsar used prohibitive customs tariffs to keep the Kingdom's industry out of Eastern markets. There followed a temporary slowdown in the development of industry, but already in the late '30s, when the industry of the Kingdom adjusted to the new conditions, it began to grow at a fast pace. Cf: R. Kołodziejczyk, *Kształtowanie...*, pp. 11-12.

mining and smelting and agrarian and food industries developed²⁸.

Another important feature of the Polish territories, especially in the first decades of the 19th century, was the fact that the majority of investments and most profitable endeavours were linked to services for the state in a broad meaning of the word, including the organization of military supplies and other undertakings that served the state or were taken up on its behalf. The mechanisms of functioning at the meeting point of the state and private entrepreneurship had greater significance for the economic development of the country than in more advanced economies of the capitalist type. There are no sources in respect of the commercial activity that concentrated on supplies to the army, and thus it is not possible to establish based on specific examples how claims were pursued in practice²⁹, but we may surmise with a high degree of probability that in those cases the government may have reserved for itself a simplified administrative procedure that circumvented the judicial path.

The data quoted by some authors, although selective already at the beginning of the 20th century, may be of help in trying to recreate the picture of involvement in commercial activity.

28 Cf. Sale of textile articles in the Kingdom of Poland in the years 1851-1881:

Year	1851	1856	1861	1866	1871	1876	1881
Value of sales in millions of rubles	6,0	6,8	14,7	20,7	29,9	27,6	29,6

Source: A. Jezierski, *Handel zagraniczny Królestwa Polskiego 1815–1914* [Foreign Trade of the Kingdom of Poland 1815-1914], Warsaw 1967, pp. 145–146.

Industrial production of the Kingdom of Poland and export of goods to Eastern markets (in millions of rubles):

Year	Industrial production	Export to Eastern markets		
		Total	Textile goods	Iron goods
1840	8	1
1850	11	1
1860	41	12
1870	123	25
1880	171	47	20	...
1890	216	194	104	17
1900	600	395	226	27
1910	860	515	349	60

Source: A. Jezierski, *Problemy rozwoju gospodarczego ziem polskich w XIX i XX wieku* [Problems of the Economic Development of Polish Territories in the 19th and 20th Century], Warszawa 1984, pp. 136, 137, 142, 238.

29 This documentation was kept in the destroyed part of archives of the Government Commission of War.

	Warsaw	Krakow	Kalisz	Radom	Pozna	Bydgoszcz	Płock	Lublin	Total
Bankers	2	-	2	-	3	1	-	-	8
Exchange agents	78	58	3	-	16	4	1	13	173
Moneylenders	-	15	-	-	-	-	1	-	16
Wholesale merchants	830	506	490	436	1174	430	547	561	4974
Retail merchants	844	669	538	240	1163	627	429	236	4746
Street vendors	469	145	499	557	1381	153	447	830	4481
Peddlers	547	306	58	9	161	257	80	3	1421
Mercantile agents	254	204	49	12	179	23	23	69	813
Used goods sellers	115	37	13	2	93	9	17	-	286
Mercers	24	3	4	321	-	-	-	-	352
Booksellers	9	19	-	-	2	-	-	1	31
Merchant journeymen	59	238	-	16	459	17	-	18	807
Others	8	1	94	2	1	3	-	7	116
	3239	2201	1750	1595	4632	1524	1545	1738	18224

Table 1. The number of people involved in trade in the individual departments of the Duchy of Warsaw. Quoted after: H. Grossman, *Struktura społeczna i gospodarcza Księstwa Warszawskiego na podstawie spisów ludności 1808-1810* [Social and Economic Structure of the Duchy of Warsaw Based on Censuses from the Years 1808-1810], Warsaw 1925, p. 70.

These data give a certain tentative idea of the number of people engaged in trade in the years 1808-1810 in the Duchy of Warsaw. It must be approached with caution, however, as some specializations were not strictly defined, and the difference between wholesale and retail merchants was rather blurry, as the author of the list himself stressed. The activity of exchange agents was not in any way regulated in the early days, and the information quoted is at a dissonance with an 1808 regulation issued by the minister of police with a view of countering their abuses and limiting their number to 5 in Warsaw³⁰. Data from some other departments is also missing from the list³¹. As follows from general summaries, however, the overall number of people engaged in trade activities was roughly similar in all the departments, with the exceptions of the Poznań and Warsaw departments, where economic development was at a higher level, also in other spheres.

30 Quoted from S.A. Kempner, *Kierunki społeczno-gospodarcze za Księstwa Warszawskiego* [Socioeconomic Directions of the Duchy of Warsaw], *Biblioteka Warszawska*, vol. 1/1903, pp. 579-580. These discrepancies cannot be explained by the fact that the quoted data applies to the entire department, as it is hard to imagine that the majority of exchange agents moved to smaller cities from the capital city. Most likely, the aforementioned regulation was not observed.

31 In 1807 the Duchy of Warsaw was divided into 6 departments: Warsaw, Poznań, Kalisz, Bydgoszcz, Płock and Białystok, which is not accounted for here. Following the Treaty of Schönbrunn of 14 October 1809, the territory of the Duchy was expanded to include post-Galician departments: Krakow, Lublin, Radom and Siedlce, of which only the first two have been accounted for.

Many entrepreneurs, not only at that time, but up until mid-19th century, eluded classification, as a merchant was often a manufacturer, a supplier and the owner of a manor house at the same time. Many also performed the functions of exchange agents, as this type of activity secured a quicker profit than trade in goods.

A number of conditions changed in the Kingdom of Poland. The territorial area has been limited. In January 1817, the *Merchant Law* was adopted, which sanctioned corporate organization of trade, from which retail entrepreneurs such as street vendors or used goods sellers were excluded. In order to obtain the status of a merchant, one had to be registered on the official list, which depended, among others, on the capital held. The list of Warsaw merchants made in September 1817 included 68 names of merchants “probably involved in partnerships under a collective name”.³² In April of the same year, a decision was issued to regulate the operation of the stock exchange and of exchange agents (brokers) limited their number to 6, but for many years there continued to exist a problem of illegally operating “unlicensed brokers”, whose services were very popular among the merchants³³. The socioeconomic landscape of the Kingdom was also affected by the tax policies of its authorities. For example, as an effect of introduction of consumption monopoly in 1822, many small-scale Jewish traders and peddlers left Warsaw and settled in nearby towns³⁴. Thus, creation of detailed statistics, especially considering the tremendous destructions of Polish archives during World War II, is a task I cannot hope to complete³⁵. However, just to compare, it should be noted that in 1897 in the Kingdom of Poland, trade and gastronomy were the livelihood of over 620 thousand people³⁶.

32 It was made by the President of the Board of Commerce appointed in the period of the Duchy of Warsaw. It was located by A. Kraushar before the Polish archives were destroyed during World War II by A. Kraushar, *Kupiectwo warszawskie: zarys pięciowiekowych jego dziejów: monografia historyczno-obyczajowa osnuta na źródłach archiwalnych* [The Warsaw Merchantry: an Outline of Five Centuries of its History. A Historical Monograph Based on Archive Sources], Warsaw 1929, p. 44.

33 *Stulecie Gieldy Warszawskiej (1817-1917)* [One Hundred Years of the Warsaw Stock Exchange (1817-1917)], Warsaw 1917, p. 39 ff.

34 According to a list made on 26 February 1824, prior to the introduction of the monopoly, there were 627 small-scale Jewish traders residing in towns around Warsaw, while in the years 1822-1824, their number increased to 1323. Quoted after: R. Kołodziejczyk, *Kształtowanie...*, p. 242.

35 In 1851, guilds were introduced in the Kingdom of Warsaw, fashioned after the solutions of the Russian Empire. Records of the Government Commission for Internal and Religious Matters should contain “a special velvet book for recording of merchants from the 1st guild alone”, who held the license to work as bankers and to import goods from abroad in unlimited quantities and to distribute them (Arts. 11-14 of the Act); no such book has survived to our times, however.

36 A. Jezierski, C. Leszczyńska, op.cit., pp. 201-202. The employment structure was as follows: 34% of traders dealt in produce and cattle, 28% in general trade, 11% were active in the gastronomy sector, 7% were involved in trading textiles and clothes, 6% were itinerant traders

IV. THE SHAPE OF THE COMMERCIAL JUDICIARY ON THE POLISH TERRITORIES

As already mentioned, one inherent feature of the French commercial law was a separate judiciary for commercial matters, prescribed in France already in the royal ordinances, based not on paid, professional judges, but on entrepreneurs whose offices were honorary and to which they were elected by their professional communities. Upon the establishment of the Duchy of Warsaw, its judiciary system was modelled on the French one, but it did not adopt 100% of the French solutions and in some aspects diverged from them right from the very beginning³⁷. The reform, however, replaced the outdated ecclesiastical, manorial, urban and state jurisdictions with a statewide court system³⁸: courts of peace, civil and commercial tribunals, penal courts and an Appellate Court, as well as a Cassation Court, whose functions were performed, in line with the constitutional provisions, by the Council of State³⁹.

1 THE NUMBER OF COMMERCIAL COURTS (TRIBUNALS)

Some frameworks for the functioning of the commercial judiciary were outlined even before the Commercial Code was formally implemented⁴⁰, in the

and 4% dealt were intermediaries. In early 20th century, out of the 100 thousand workplaces, almost 90% were small. In Galicia, over 120 thousand people were involved in trade and ca. 40 thousand in gastronomy. Small workplaces, with 1 to 5 employees, dominated. There were almost 70 thousand of this type of “businesses”. There existed about 30 wholesale enterprises.

37 Owing to this, the adopted model was referred to as “Franco-Polish judiciary”. A. Heylman, *Historia organizacji...*, p. v.

38 As observed by Władysław Sobociński, however, “in practice, the new organization still made it possible to heed estates and defended mainly the interest of the nobility”. W. Sobociński, *op. cit.*, p. 241.

39 The Constitutional Charter of the Duchy of Warsaw; *Dziennik Praw Księstwa Warszawskiego* [Journal of Laws of the Duchy of Warsaw] (hereinafter: DPKW), vol. I, pp. XXXVI-XL; the Napoleonic Code, in effect since 1 May 1808, decrees of Frederic August dated 12 December 1807 and 27 January 1808 (DPKW, vol. I, pp. 2-3, 46-47); *Organizacja sądownictwa cywilnego w Księstwie Warszawskim* [The Organization of the Civil Judiciary in the Duchy of Warsaw], issued by the Minister of Justice on 13 May 1808, in: *Zbiór przepisów administracyjnych Królestwa Polskiego. Wydział Sprawiedliwości* [A collection of the administrative provisions of the Kingdom of Poland. Justice Department (hereinafter: ZPA WS)], Warsaw 1867, vol. VI, p. 11 ff.); *Przepisy dotyczące się Organizacji oraz attrybucji Władz sądowych i osób do składu Sądownictwa* [Provisions Concerning the Organization and Attributions of the Judiciary Authorities and Their Members], issued by the Minister of Justice on 23 May 1808, in: *S. Zawadzki, Prawo cywilne obowiązujące w Królestwie Polskim* [Civil Law of the Kingdom of Poland], Warsaw, 1863, vol. III, pp. 345-354; and the decree of Frederic August dated 26 July 1810 – *Organizacja Sądów kryminalnych, Wydziałów policji poprawczy i Sądów policyjnych* [Organization of Criminal Courts, Divisions of Correctional Police and Police Courts]; DPKW, vol. II, pp. 291-303. These courts functioned until 30 June 1876.

40 The *Code de commerce* was introduced in the Duchy of Warsaw based on a bill passed by the Sejm on the 24 March 1809: *Prawo stanowiące przyjęcie Kodexu Handlowego Francuzkiego dla Księstwa Warszawskiego* [The Law on Adoption of the French Commercial Code in the

Organization of the Civil Judiciary, issued by the Minister of Justice on 13 May 1808, whose Art. 9 stipulated that “There shall be commercial courts established in trade cities” (Title II. Courts). Nevertheless, this bill of law did not define or list “trade cities”.

We may surmise that these were the cities listed in the decree of 28 June 1809 confirming “the annual salaries and expenses for the commercial court[s] in the Duchy of Warsaw”⁴¹. In the Warsaw Department, the limits of expenditures were established for the “commercial court” in Warsaw, in the Poznań Department - for the courts in Poznań and Leszno, in the Kalisz Department for the court in Płock, and for the Bydgoszcz Department - for courts in both Bydgoszcz and Toruń. The decree also mentions the Łomża Department, but no funds were allocated to it, owing to which a commercial court was never established there⁴².

Commercial judiciary functioned also in former Galician departments pursuant to the decree of 26 July 1810 confirming the “salaries and expenses for the court magistracies in the territories recently incorporated into the Duchy of Warsaw for the year 1810/1811”⁴³. This decree is clear evidence that the Polish legislator lacked consistency in the nomenclature used to refer to these institutions. The decree provided for the establishment of two “commercial tribunals” (in opposition to the formerly employed term “commercial courts”): in Krakow for the Krakow and Radom Departments⁴⁴ and in Lublin for the Lublin and Siedlce Departments⁴⁵. Funds earmarked for this purpose were relatively modest in comparison with those allocated to other courts⁴⁶.

Duchy of Warsaw], dated 24 March 1809; DPKW, vol. I, p. 239. Despite the fact that the Commercial Code was formally adopted in 1809, already nearly a year before (10 months), by virtue of the *Provisions Concerning the Organization and Attributions of the Judiciary Authorities and Their Members* dated 23 May 1808, the application of certain provisions of the *Code de commerce* had been sanctioned, provided that the Civil Code of 1804 made a reference to them.

41 W. Bartel, J. Kosim, W. Roztocki, *Ustawodawstwo Księstwa Warszawskiego. Akty normatywne władzy najwyższej* [Legislation of the Duchy of Warsaw. Normative Acts of the Supreme Authority], Warsaw 1964, vol. II, pp. 72-73.

42 For Warsaw, where the salaries were to be higher (PLN 4000 for the scribe, PLN 2500 for the archivist, PLN 1500 for two office employees each), as well as funds for running the court secretariat (PLN 1500 PLN), the total expenditure was set at a maximum of PLN 12200. Other cities were allocated equal sums of PLN 9600 (PLN 3000 for the clerk, PLN 2000 for the archivist, PLN 1200 for two office employees each and PLN 1000 for running the secretariat). Presidents in all cities were to receive equal salaries at the amount of PLN 1200.

43 W. Bartel, J. Kosim, W. Roztocki, *op.cit.*, pp. 182-188.

44 With expenditures up PLN 13 400 (PLN 5000 for the president, PLN 3000 for the scribe, PLN 2000 for the archivist, PLN 1200 for two office employees each, and PLN 1000 for running the secretariat).

45 With expenditures of PLN 16 000 (PLN 5000 for the president, PLN 4000 for the scribe, PLN 2500 for the archivist, PLN 1500 for two office employees each, and PLN 1500 for running the secretariat).

46 A total of PLN 58 900 was allocated to penal courts in Krakow and Radom Departments, PLN 119 400 to civil tribunals in just the Krakow Department, and PLN 112 400 for civil tribunals

Following the fall of Napoleon and the establishment of the Kingdom of Poland at the Congress of Vienna, in personal union with the Russian Empire, there were no plans to abolish the commercial judiciary based on the French model. Art. 148 of the Constitutional Charter dated 15 (27) November 1815 provided for its further functioning (“There shall also be commercial courts”⁴⁷). Even after the Russian authorities quashed the November Uprising and restricted the autonomy of the Kingdom of Poland, the Organic Statute, introduced on 14 February 1832, stipulated that “The establishment of separate commercial courts shall remain as before” (Art. 64)⁴⁸. Nevertheless, as explained in clarifications to the *Collection of Administrative Provisions of the Kingdom of Poland*, “owing to the loss of the Posen and Bydgoszcz Departments, and due to planned savings of treasury funds, only the commercial tribunal in Warsaw for the Mazovian Voivodeship has been included in the budget draft for the year 1815, and it shall from now on be the only Commercial Tribunal.”⁴⁹ And thus the economic reality verified the legislative assumptions, as the budget deficit of the Kingdom made it impossible to maintain a greater number of commercial courts (tribunals), despite no legal impediments.

In the remaining voivodeships, subsequently transformed into gubernates, commercial cases were examined by civil tribunals, pursuant to Art. 640 and 641 of the Commercial Code⁵⁰ and to the *Decision that Civil Tribunals in the Province are to Handle the Tasks of Commercial Tribunals*⁵¹, issued by the Government Justice Commission dated 23 December 1816. In such events, the civil tribunals, besides their regular intitution, added the formula: “Acting in substitution of the commercial tribunal”.⁵²

The name of the only Commercial Tribunal in Warsaw was changed a number of times. In 1837 it became the “Commercial Tribunal of the Mazovian

in the Radom Department. W. Bartel, J. Kosim, W. Roztocki, op.cit., pp. 182-188.

47 Dziennik Praw Królestwa Polskiego [Journal of Laws of the Kingdom of Poland] (hereinafter: DPKP), vol. I, p. 90.

48 DPKP, vol. XIV, p. 245.

49 ZPA WS, vol. VI, p. 45.

50 Art. 640: “Dans les arrondissemens où il n’y aura pas de tribunaux de commerce, les juges du tribunal civil exerceront les fonctions et connaîtront des matières attribuées aux juges de commerce par la présente loi.” Art. 641: “L’instruction, dans ce cas, aura lieu dans la même forme que devant les tribunaux de commerce, et les jugemens produiront les mêmes effets.”; *Code de commerce, édition conforme à l’édition originale de l’Imprimerie Impériale, à laquelle on a ajouté l’exposé des motifs et une table analytique et raisonnée des matières*, Toulouse 1807, pp. 178-179.

51 This was to be a temporary situation: “[...] The Justice Commission expects the president and members of the commercial tribunal to remain on hold and to obey their duty to serve the country once the new regulations summon them to do so in the future.” Attachment no. 111 to the *Organization of the Government Justice Commission*, in: ZPA WS, vol. IV, pp. 113-115.

52 ZPA WS, vol. VI, p. 45. As follows from the surviving records, the courts did not always observe this strictly. Cf.: AGAD, Trybunał Cywilny Kaliski [Kalisz Civil Tribunal] (hereinafter: TCK) 31, 853.

Governorate”⁵³, but in 1844 the name “Commercial Tribunal in Warsaw” was brought back⁵⁴. After the judiciary reform⁵⁵ of 1876, its name was once again changed to Commercial Court.

2 THE INTERNAL ORGANIZATION

The French Commercial Code regulated the system of commercial tribunals in its Title I of Book IV (Art. 615-630). Yet as regarded some issues, it only stipulated the general frameworks, spelling out, for example that “Chaque tribunal de commerce sera composé d’un juge président, de juges et de suppléants. Le nombre des juges ne pourra pas être au-dessous de deux, ni au-dessus de huit, non compris le président. Le nombre des suppléants sera proportionné au besoin du service. Le règlement d’administration publique fixera, pour chaque tribunal, le nombre des juges et celui des suppléants.”⁵⁶ (Art. 617). At the same time, however, *Code de Commerce* explicitly stated that “Tout commerçant pourra être nommé juge ou suppléant, s’il est âgé de trente ans, s’il exerce le commerce avec honneur et distinction depuis cinq ans. Le président devra être âgé de quarante ans, et ne pourra être choisi que parmi les anciens juges, y compris ceux

53 By virtue of a rescript dated 5 (17) March 1837 (no. 2, 665) following the ukase of 23 February (7 March) 1837 (DPKP, vol. XX, pp. 413-417) changing the name of voivodeships to governorates. The territory of the Duchy of Warsaw was divided into 10 departments. After the detachment of Poznań and Bydgoszcz departments, the Kingdom of Poland, established in 1815, comprised eight voivodeships: Kraków, Sandomierz, Kalisz, Lublin, Płock, Mazovian, Podlasie and Augustów, by virtue of a decision of the Royal Namiestnik dated 16 January 1816 (DPKP, vol. I, p. 115). It should be underlined that the issuing of the aforementioned rescript is only signalled in ZPA WS, vol. VI, p. 47. Nevertheless, it was not published in any of the volumes of the Collection.

54 By virtue of a decision of the Administrative Council dated 14 (26) October 1844 (DPKP, vol. XXXV, pp. 128-131.): “[...] The Commercial Tribunal of the Mazovian Governorate, as of 20 December 1844 (1 January 1845), that is the date from which the new division of the country shall take effect, will change [...] its current name to: Commercial Tribunal in Warsaw (Art. 1)”. Also pursuant to Art. 3 of the same decision “All the courts listed in the foregoing articles shall maintain the same jurisdiction as heretofore”. Ibid, p. 131.

55 Its russifying character gave rise to serious concerns in the Polish society. Some also pointed out that it had a negative impact on the commercial relations within the Kingdom: “One of the reasons behind the sad financial condition to the detriment of the Kingdom of Poland is our judiciary reform. The society, which has no trust in the new judiciary, does not know the extent to which it can be reconciled with the Napoleonic Civil and Commercial Codes, still in force [...]. It should also be added that many officials, dispersed throughout the country, have lost their employment, as a result of which upon the implementation of the new judiciary, all mutual civil and commercial relationships became mired in anxiety and nervous anticipation, as all scramble to wind up their old businesses. worse of all, other countries with which the Kingdom of Poland has had strong commercial ties, have received the new judiciary reform with extraordinary wariness; not only did they abolish credits for Polish merchants, but maintain highest prudence also in cash-based transactions. This state of matters has had a catastrophic effect on the economic and commercial relations of the entire country.”; *Przegląd sądowy i administracyjny*, vol. I/1876, Lviv, ed. K. Stromenger, p. 325.

56 *Code de commerce...*, pp. 171-172.

qui ont exercé dans les tribunaux actuels, et même les anciens juges consuls des marchands.”⁵⁷ (Art. 620).

Thus, the French code unambiguously stipulated that judges sitting in commercial tribunals were to be elected from among people running commercial business. The same applied to the president, who not only had to reach an older age before taking on this function, but was also required to have former experience as a commercial judge⁵⁸. In this aspect, already the *Organization of Civil Judiciary* dated 13 May 1808 provided for some divergences from the code norms. Its Art. 20 read: “The commercial court shall be composed of one president, a lawyer, appointed for three years, and of court members, elected by the local Merchants’ Assembly from among themselves, accordingly to the population and trades, every two years.”⁵⁹ Thus, it did not require the president to run a commercial activity, but instead to have legal education.

Moreover, the *Organization* only stipulated, in sentence 2 of this Article, that “Each commercial court shall have one scribe appointed for life”⁶⁰, even though the code provided for a more complex administrative base in the commercial judiciary⁶¹. This state was not corrected until the decision of the Administrative Council dated 7 (19) March 1839, pursuant to which “owing to the expansion of the scope of [...] activities” of the Commercial Tribunal in Warsaw, the posts of underscribe, archivist and clerk have been added⁶².

The French code, even though it provided only general frameworks as regards the number of judges in commercial tribunals, did not explicitly stipulate that there should be a vice-president. In the Duchy of Warsaw, in turn, pursuant to the *Decision on Qualifications of the Vice-President of the Commercial Tribunal* dated 6 April 1812, such a function was provided for, with reservation of the same requirements as those that applied to the president⁶³. Based on the decision of the Duke of Warsaw dated 15 February 1810, this function could only be held by one of the appellate judges⁶⁴. Yet, following the decision of the

57 Ibid, p. 172.

58 In France, however, it did not matter whether this experience was gained in the pre- or post-revolutionary judiciary system.

59 ZPA WS, vol. VI, pp. 93-95.

60 Ibid, p. 95.

61 Art. 624. “Il y aura près de chaque tribunal un greffier et des huissiers nommés par le Gouvernement ; leur droits, vacations et devoirs seront fixés par un règlement d’administration publique.”; *Code de commerce...*, p. 173.

62 ZPA WS, vol. VI, p. 95. As regards the decision’s wording, ZPA sends readers to vol. I, p. 153, but the decision is not there.

63 ZPA WS, vol. IV, pp. 133-135.

64 The decision of Frederic August was not formulated as categorically. Cf: *Decision Allowing the President of the Commercial Tribunal to be Chosen from Among Appellate Judges* dated 15 February 1810: “At the application of the Minister of Justice dated 5th of this month, concerning the election of appellate judge Borakowski as president of the Warsaw Commercial

Administrative Council of 7 (19) March 1839, the vice-president was chosen from among judges of the Warsaw Civil Tribunal; based on this decision and against the French model, the vice-president received the salary of a tribunal judge⁶⁵. Due to the foregoing solutions concerning the president and vice-president, only the remaining candidates to the offices of judges and deputy judges had to belong to the merchant estate.

This solution must be assessed positively, however. The centuries-long tradition of commercial judiciary in France made it possible for *commerçants* to prepare for this function sufficiently well, especially since judges and deputy judges were required to have had at last five years of practice in carrying on commerce “with honour and distinction”, and the president could only be selected from among former justices (Art. 620). On the Polish territories, in turn, merchants not only had not dealt with commercial judiciary ever before but also, above all, they had never had anything to do with the new Commercial Code, transferred from a different legal system with no interim period. Therefore, professional judges as presidents and vice-presidents were necessary in commercial tribunals. The merchants did not question this arrangement for a long time. It was not until the ‘60s when Juliusz Wertheim, one of the members of the Merchant’s Assembly, pointed out at its session to the representatives “the broad privileges granted to merchants by the Commercial Code, as pursuant to Art. 620 of the Code, the president of the commercial tribunal may be one of its judges, that is a merchant. The Office of Senior Members of the Merchants’ Assembly should request that the authorities restore this privilege to the merchant estate”⁶⁶. At the same time, he stressed clearly that “above all, it is necessary for merchants to become well-versed in commercial law”⁶⁷.

The procedure of appointing judges was also regulated differently in the Polish territories from the beginning. In the French model, all the members of the commercial tribunals (including presidents) were to be chosen through direct elections, by way of voting at the assembly, whose members were the most respected merchants (Art. 618 and 621), whose electoral rights were confirmed by a list drafted by the prefect and approved by the Minister of Internal Affairs (Art. 619). There is no information which organs in the Duchy were responsible

Tribunal, we have found no impediments to his taking up this office, and therefore we allow Borakowski to step into the office of president, to which he has been elected, which he will exercise alongside his office of appellate judge.”; ZPA WS, vol. VII, p. 333. Nevertheless, its later interpretation was unambiguous: “Only one of the appellate judges may be chosen for president”; ZPA WS, vol. I, p. 153.

65 ZPA only mentions this decision, but does not publish it anywhere. For more about this rule, see, among others, vol. VI, p. 101 and vol. I, p. 153.

66 There is, however, no information whether such a request was ever made.

67 A. Kraushar, op.cit., p. 133.

for making such lists in the individual cities in which commercial judiciary was established, nor how elections of judges looked in practice outside of Warsaw. It is only known that since the implementation of the *Merchant Law* in the Kingdom of Poland in 1817⁶⁸ in Warsaw these lists, drafted by the Office of Senior Members of the Merchants' Assembly were approved by the City Hall (point 11). Later, the list of merchants issued by the City Hall was additionally approved by the Government Commission for Internal and Religious Matters [*Komisja Rządowa Spraw Wewnętrznych i Duchownych*] (hereinafter: GCIRM)⁶⁹.

At first, in line with the *Judiciary Organization* introduced in the Duchy of Warsaw, it was ordered as follows: "The president of the commercial court and the scribe shall be nominated by Us, the King, upon the presentation of their candidacy by the Minister of Justice, and the members of the commercial court, chosen from among the Merchants' Assembly, shall be subject to our confirmation" (Art. 22)⁷⁰. This provision was changed, however. After the president was chosen from among appellate judges, and the vice-president at first also from among appellate judges, and since the decision of 7 (19) March 1839 from among judges of the civil tribunal, who formally should have been nominated to office by the Administrative Council, taking the function of president and vice-president no longer required separate approval⁷¹. What is more, as follows from reference

68 DPKP, vol. IV, pp. 159-177.

69 ZPA WS, vol. I, p. 155.

70 Ibid, pp. 99-101.

71 Ibid, p. 101. Nonetheless, as underscored by Wojciech Witkowski, the right to appoint judges of the first two instances was given to the Namiestnik, based on the tsar's decree of 5 (17) May 1816 (DPKP, vol. I, pp. 405-408). This competence was later expanded to include also other court employees and officials, by virtue of authorization dated 17 (29) April 1818. In the same year the Namiestnik granted the Government Justice Commission the right to nominate lower functionaries of the judiciary system because, as noted by W. Witkowski, there was an "avalanche of personal requests"; W. Witkowski, *Komisja Rządowa Sprawiedliwości w Królestwie Polskim 1815-1876* [Government Justice Commission in The Kingdom of Poland 1815-1876], Lublin 1986, pp. 139 and 158. Owing to the fact that provisions of the *Organic Statute* of 1832 concerning the organization of the judiciary were never implemented, the aforementioned rules remained in force. Following the introduction of a classification of officials in 1836, all functionaries of the judiciary were categorized in classes from III to X. As underscored by W. Witkowski, the Administrative Council and the Namiestnik appointed and dismissed employees in classes V and VI, that is, among others, judges of the Appellate Court and possibly the president of the Commercial Tribunal, if he had not been chosen. At the same time, the Namiestnik retained his competences stemming from the tsar's decision of 5 (17) May 1816; *ibid.*, p. 139. On 6 (18) August 1847, the *Organization of Government Justice Commission* was issued. Its § 38 enumerated in detail the offices to which the Administrative Council nominated candidates at the request of the Government Justice Commission (among others, judges at the Appellate Court and at civil tribunals, and the scribe of the Commercial Tribunal in Warsaw); ZPA WS, t. I, p. 313. As emphasized by W. Witkowski, however "even though the provisions in force at the time stipulated the participation of the entire Administrative Council in the nomination procedure, the existing source materials point to the personal competences as the sole prerogative of the Namiestnik. The same follows from the fact that upon the abolishment of the Council in 1867, the personal competences were retained

to § 15, letter B of the *Organization of Government Justice Commission* of 6 (18) August 1847, both the president, as well as vice-president, judges and their deputies were chosen by the Merchants' Assembly⁷². Therefore, the original code model in respect of this issue was followed more closely in the Kingdom of Poland than in the period of the Duchy of Warsaw. Yet the election of commercial judges and their deputies was approved by the Government Justice Commission [*Komisja Rządowa Sprawiedliwości*] (hereinafter: GJC)⁷³. Whenever a judge's two-year term was about to run out, the Commercial Tribunal or the Appellate Court was to report this fact to the GJC, which then requested that the GCIRM order new elections⁷⁴. Once the elections took place in the City Hall, and election report was submitted to GCIRM, the latter notified the GJC, which in turn ordered "the Appellate Court to accept the oath from the new members, and the Commercial Tribunal to appoint the newly chosen judges to commence the exercise of their function"⁷⁵. At this point it should be mentioned that the obligation to take an oath before the Appellate Court prior to taking up their office as judges of commercial tribunals was stipulated in the Commercial Code⁷⁶.

3 ELECTING COMMERCIAL JUDGES IN PRACTICE

The Commercial Code stipulated that "A la première élection, le président et la moitié des juges et des suppléans dont le tribunal sera composé, seront nommés pour deux ans, la seconde moitié des juges et des suppléans sera nommée pour un an : aux élections postérieures, toutes les nominations seront faites pour deux ans."⁷⁷ (Art. 622). Moreover, "Le président et les juges ne pourront rester

by the Namiestnik without any doubt. Moreover, Paskiewicz pursued the practice of deciding on his own in staffing matters [...]"; *Ibid.*, pp. 139-140.

72 Reference to § 15, letter B of the *Organization of Government Justice Commission* of 6 (18) August 1847; ZPA WS, vol. I, p. 153. This is also confirmed by data from elections organized in Warsaw in the Kingdom of Poland, collected by A. Kraushar. See *supra* 80 ff.

73 *Ibid.*, vol. VI, pp. 101-103. The nomination of scribes, underscribe, archivists and clerks, depending on the class of office, rested with the Government Justice Commission (in the case of the first two) and with the president of the Commercial Tribunal (in the case of the last two). Cf: Art. 53 and 54 of *Ustawa o służbie cywilnej w Królestwie Polskiem* [Act on Civil Servants in the Kingdom of Poland] dated 10 (22) March 1859 (DPKP, vol. LIII, p. 69 ff., these articles on pp. 111-113) and decision of the Namiestnik of the Kingdom of Poland of 11 (23) July 1859 (DPKP, vol. LIII, p. 227 ff.).

74 ZPA WS, vol. I, p. 155.

75 *Ibid.*

76 Art. 629. "Ils prêtent serment avant d'entrer en fonctions, à l'audience de la cour d'appel, lorsqu'elle siège dans l'arrondissement communal où le tribunal de commerce est établi ; dans le cas contraire, la cour d'appel commet, si les juges de commerce le demandent, le tribunal civil de l'arrondissement pour recevoir leur serment ; et dans ce cas, le tribunal en dresse procès-verbal, et l'envoie à la cour d'appel, qui en ordonne l'insertion dans ses register. Ces formalités sont remplies sur les conclusions du ministère public, et sans frais.;" *Code de commerce...*, p. 174.

77 *Ibid.*, p. 173.

plus de deux ans en place, ni être réélu qu'après un an d'intervalle.”⁷⁸ (art. 623). ZPA also provides the general information that the president, vice-president, judges and their deputies were to be chosen every two years by the Merchants' Assembly at the Warsaw City Hall⁷⁹. The practice, however, diverged from the legislative guidelines.

At first, merchants selected to the office of commercial judges evaded the exercise of this function, as it collided with their business activities, which for the most part they had to take care of personally owing to the “collapse of trade and loss of revenues”⁸⁰. In the first half of the 19th century, given the frequency of these elections, they could not have been conforming to the rules stipulated in the Commercial Code. It may be concluded from Kraushar's descriptions that in later years they became more regular, and the number of judges did not exceed the limits set by the Code, although he does not provide complete data in this respect for all the periods⁸¹.

Information collected by Kraushar on the topic of elections of Warsaw commercial judges in from the second half of the '60s is quite detailed and indicates the absence of a permanent and strict procedure in this regard. Elections were held on different dates throughout the year, and they did not always result in the selection of the same number of judges and their deputies⁸². Sometimes elections of judges for a term of one year, next to judges with a term of two years, took place⁸³. It also merits a mention that the same names appeared in, for example, elections for commercial counsellors of the Bank of Poland, which indicates that a group of respected and active Warsaw merchants had emerged. From 1891 on, there are remarks that the Minister of Justice did not approve some of the merchants⁸⁴, elected by the Merchants' Assembly, whose position was becoming weaker⁸⁵. A few times, a different number of members of the Commercial Court was chosen⁸⁶. In 1896, there were some voices suggesting that the future of the Commercial Court was uncertain and that the principle of electivity of its members

78 Ibid.

79 Among others: ZPA WS, vol. VI, p. 95 and vol. I, p. 153.

80 A. Kraushar, op.cit., p. 67.

81 Ibid, pp. 111-112.

82 Ibid., p. 141.

83 Ibid, p. 151-154.

84 By-elections had to be held for this reason. Ibid, pp. 173-185.

85 It was raised, for example, that it would be recommendable to establish some rules concerning the selection of judges for the Commercial Court. There were also plans to include members of the Assembly who held guild certificates, even if they had been running their business for a period shorter than five years. These proposals remained in the sphere of discussions only, however. Ibid, p. 174.

86 Ibid, pp. 177-189.

was endangered.⁸⁷ Yet from the beginning of the 20th century, Kraushar clearly distinguishes between elections of candidates and elections of members of the Commercial Court, suggesting that the erstwhile procedure was two-tier, but he provides only fragmentary data⁸⁸.

The duties exercised by judges were certainly not illusory⁸⁹. Nevertheless, in September 1902, there appeared the option of the court being abolished. The merchants, however, stressed that its closing would be in contravention of the French Commercial Code, still in force at the time⁹⁰. Judges, nonetheless, were still elected. This tradition was only ended by the outbreak of World War I.

4 RUSSIANS IN THE COMMERCIAL JUDICIARY OF THE KINGDOM OF POLAND

Kingdom of Poland was in personal union with the Russian Empire since its establishment at the Congress of Vienna in 1815. After the November Uprising (1830-1831), the Kingdom's autonomy was considerably restricted, and after the collapse of the January Uprising (1863-1864), the Russian authorities began to abolish its institutional autonomy as well. Nevertheless, in many areas of the law, including the commercial law, the norms in place in the Kingdom differed from those applied in the Russian Empire.

The Russian legislator (who was simultaneously the Polish legislator at the time) was not only aware of the fact that *Code de commerce* was in effect on the Polish territories and of its consequences, but also creatively applied its institutions to Russians running trade activities in the Kingdom of Poland. Pursuant to the *Decision Guaranteeing Russian Merchants, Traders and Carters Protection and Care in Commercial Matters*⁹¹, issued on 27 May (8 June) 1835 by Nicholas I, Russian traders were allowed to adjudicate in commercial matters in which one of the parties was Russian⁹². As per the representations in the preamble, the de-

87 Ibid, p. 180.

88 Ibid, pp. 193-226.

89 "Sessions of 25 October 1900 and of 12 March 1900 were filled [not only with selection of candidates for the offices - AK], but also with discussions of Henryk Barylski's motion to increase the number of members of the Commercial Court, as they are overly burdened with work"; *ibid*, p. 189.

90 "Owing to the plans of abolishment of commercial courts in the Empire and of the Warsaw Commercial Court, there arose the urgent need to request that this court be maintained due to provisions of the effective Commercial Code. The Mercantile Exchange Committee has been handling this matter for a long time now. A special commission has been delegated to consider this issue in more depth."; *ibid*, p. 193.

91 No. 116, ZPA WS, vol. IV, pp. 137-143. The provisions of the Commercial Code, however, concerned not only "merchants, traders and carters", but also other categories of professions.

92 Individual transactions made with the participation of Russian merchants as part of their business conducted in the Kingdom of Poland were often documented by Polish notaries.

cision aimed to guarantee equal position to Russian merchants before courts of the Kingdom⁹³. With this view, the composition of the Commercial Tribunal of the Mazovian Voivodeship was to be expanded to include two more judges and two deputies (Art. 1), and the Appellate Court gained one more assessor and one deputy (Art. 2) chosen from among Russian merchants. Elections were to be held according to the previously binding rules “as per the existing regulations, yet the electors may only be merchants and traders based in Warsaw, included on the list approved by the Chief Director of Internal Affairs, regardless of whether they are members of the Warsaw Merchants’ Assembly.” (Art. 3). Thus, carters were left without any electoral rights, whether active or passive. Judges and assessors selected in this way could participate in sessions at which cases concerning Russian “merchants, traders and carters” were examined (Art. 4).

Moreover “a sworn translator shall be established at the Commercial Tribunal, with an annual salary of six thousand zlotys, to interpret the motions and clarifications in cases with the participation of Russians”. “Where need be, the services of the sworn translators shall also be used [...] in such cases examined by the Appellate Court” (Art. 6).

The effect of this decision, however, was not to safeguard the equal position of the listed groups of entrepreneurs. In fact, they were awarded significant privileges. Primarily, public defenders established in courts of various instances (*Pol. patroni, adwokaci, mecenasi*) were obliged to accept powers of attorney from Russian “merchants, traders and carters”. Moreover, a special fund was established, at the disposal of the Government Justice Commission, from which “immediately upon the end of each case, defenders of destitute parties shall be remunerated” (Art. 5)⁹⁴. Additionally, “cases of Russian non-resident merchants, traders and carters, in all courts, are to be examined and resolved before all other

Cf., e.g.: Archiwum Państwowe w Warszawie [State Archive in Warsaw] (hereinafter: APW), Kancelaria Walentego Skorochód-Majewskiego notariusza w Warszawie [Notary’s Office of Walenty Skorochód-Majewski, notary in Warsaw], 119, fols. 13-14.

93 “Considering that trade in Russian goods is on the rise in the Kingdom of Poland, as a consequence of which a considerable number of Russian merchants, traders and carters are moving to the Kingdom; considering that in cases brought to commercial courts, pursuant to Art. 13 (627) of Book IV of the Commercial Code and Art. 414 of the Code of Civil Procedure, parties must appear personally, and cannot be represented by defenders, or else may appear with an assistant or a special proxy; considering that when Russian merchants, traders and carters appear at the Mazovian Commercial Tribunal to defend themselves personally, their inability to speak Polish and the absence of Russian-speaking members in the commercial court, who would also be well-versed in Russian commercial matters, as well as limited options to obtain legal assistance, especially in the case of parties with insufficient funds, it is difficult for them to defend themselves and slows down the course of justice, of great significance in matters of this type.”; ZPA WS, vol. IV, pp. 137-139. The words “court” and “tribunal” were used alternately with no consistency.

94 “In order to cover the expenses resulting from the provisions of Art. 5 and 6, an annual fund at the amount of twelve thousand zlotys shall be earmarked for the Department of Government Justice Commission”. (Art. 7).

cases”. (Art. 8). Moreover, pursuant to Art. 9, “all commercial cases concerning other foreigners and non-residents” were also to be resolved before other cases.

Thus, upon their arrival in the Kingdom, Russian merchants were not to be subject solely to the commercial provisions effective in its territory. They were in a privileged situation. What is more, unlike Polish entrepreneurs, Russians were not bound by the formal restriction that required membership in the Warsaw Merchants’ Assembly, which contravened the *Code de commerce*. It was enough for them to have obtained merchant status within the Russian system, based on guild organization of trade and not threatened by freedom of economic activity. Yet the status of a Russian merchant translated into the emergence of a special group, distinguished based on subjective criterion, whose cases “in all courts”, meaning not only commercial cases, were to be examined and resolved first. For all other foreigners, whose status was however defined according to the fact of running an economic activity, thus based on objective criterion, this privilege was restricted to commercial matters only.

The foregoing decision, as already mentioned, stipulated that elections would be organized “as per the existing regulations” (Art. 3). Nevertheless, owing to the insufficient number of Russian merchants⁹⁵, the practical enforcement of Art. 623 of the Commercial Code became problematic, as it stipulated for the term of office of judges to last two years with at least one year of interval between subsequent terms. Because of this, pursuant to proclamations of the Minister Secretary of State of 21 May (2 June) 1854⁹⁶ and 16 (28) November 1856⁹⁷, which served as grounds for proclamations of the Secretary of State of the Administrative Council of 18 (30) June 1854⁹⁸ and of 17 (29) December 1856⁹⁹, it was decided to allow the Appellate Court assessor and his deputy, as well as judges of the Commercial Tribunal and their deputies, to be selected from the group of Russian merchants even if a year has not passed yet since their last term in office. Yet even this solution did not do enough to guarantee a swift pace of resolving cases. The *Internal Regulation of Matters Concerning Russian Merchants* issued on 10 (22) October 1851 evidently indicates that something had to be done to deal with the problem of assessors who regularly failed to appear at *ad hoc* sessions of the Appellate Court¹⁰⁰ The legislator did not raise a

95 ZPA WS, vol. I, p. 155.

96 ZPA WS, vol. IV, p. 147.

97 ZPA WS, vol. IV, p. 151.

98 *Proclamation of Emperor’s Supreme Will Concerning the Election of Appellate Court Assessors from Among Russian Merchants for Unlimited Time, Without the Interval of One Year*; ZPA WS, vol. IV, p. 145.

99 *Proclamation of the Emperor’s Supreme will Concerning the Election of Russian Merchants for Judges of the Commercial Tribunal*; ZPA WS, vol. IV, p. 149.

100 *Internal Regulation of Matters Concerning Russian Merchants* of 10 (22) October 1851; ZPA, vol. VIII, pp. 193-195.

similar problem in regard of the Commercial Tribunal, but there is not enough data to state that it did not exist.

5 SUPERVISION

As per the provisions of the Commercial Code “Les tribunaux de commerce sont dans les attributions et sous la surveillance du Grand-Juge Ministre de la Justice.”¹⁰¹ (Art. 630).

In the Duchy of Warsaw, in turn, pursuant to Art. 2 of the *Organization of the Civil Judiciary* dated 13 May 1808, the Minister of Justice was competent to “supervise and issue warnings” to members of the Appellate Court, of the courts of peace and tribunals of first instance (commercial tribunals were not listed). The Cassation Court, that is the Council of State, had the right to “reprimand and discipline” the Appellate Court and justices of the peace “in the presence of the Minister of Justice”. It did not have similar prerogatives regarding neither tribunals of the first instance, nor the commercial tribunals, which were supervised by the Appellate Court¹⁰². In turn, “scribes, assessors, underscribes and burgraves¹⁰³, as well as court clerks, [were] under the oversight of their respective courts.”¹⁰⁴ It follows from the contents of this provision that the Minister of Justice in the Duchy of Warsaw had no “right of supervision” over commercial tribunals, which was a sole attribute of the Appellate Court (and both the Minister and this court as regarded tribunals of the first instance). These courts could not be “reprimanded and disciplined” by the Cassation Court, either, although in theory, this court could exercise this competence in relation to presidents of the tribunals, from 1810 selected from among appellate judges, and vice-presidents, selected from among appellate judges from 1812. The Minister of Justice could not exercise his “right of warning” only in relation to the Cassation Court and commercial tribunals. The administrative staff employed at the commercial tribunals, pursuant to the last sentence of Art. 2 of the *Organization*, were subject to the supervision of their respective tribunals.

101 *Code de commerce...*, p. 174.

102 Art. 2, sentence 3: “The Appellate Court has the right of oversight over the tribunals of first instance and commercial tribunals.”

103 Pursuant to the decree of Frederic August issued on 29 August 1809, burgraves (pl. *burgrabowie*) were “Court officials appointed to serve lawsuits and to enforce Court judgements [and notary’s deeds with attached enforceability clause], called *huissiers* [...] in the French procedure” (DPKW, vol. II, p. 45). However, owing to the fact that “the dual attributions awarded to Burgraves, that is the responsibility to serve lawsuits and enforce acts and judgements, frequently multiplies costs for the parties and delays the course of their affairs”, pursuant to Frederic August’s decree of 14 October 1811 (DPKW, vol. III, pp. 407-413) “delivery and service of lawsuits and other procedural and extra-judicial writs” was entrusted to bedels, while the enforcement of acts with enforceability clause and of court judgements to court bailiffs, which thus replaced the burgraves.

104 Art. 2, sentence 5.

“The Court of Appeals may, either on the denunciation of Our prosecutor or on that of one of the presidents, ask [...] the King for the dismissal of a judge of a tribunal of first instance or of a commercial court, if it believes him guilty of prevarication in the exercise of his functions” (Art. 6, sentence 1 of the *Organization*).

As an effect, at such denunciation the Appellate Court “may suspend a judge of the tribunal of first instance or of a commercial tribunal, for reasons as prescribed by the law, and order him to stand before an indicated member of his court to be heard and to expound his actions.” (Art. 6, sentence 3).

In turn, “complaints against presidents of these courts are presented by the court and by the General Prosecutor to the Council of State which, acting in the capacity of the Court of Cassation, proceeds in the same manner as against appellate judges”¹⁰⁵ (Art. 6, sentence 5). “Investigations pursued as above are sent by the Appellate Court, via the Minister of Justice, and by the Court of Cassation directly, to Us the King to be resolved. Only in such events We the King shall pronounce in cases concerning the removal of a judge.” (Art. 6, sentences 6-7). Therefore, commercial judges answered to the Duke of Warsaw in the period of Duchy’s existence. As concerned the competences of these commercial tribunals regarding their own staff: “scribes, assessors, underscribes, burgraves and court clerks are suspended by their relevant courts and their cases examined by the Court as prescribed by the law, if not by their own court” (Art. 6, sentence 8).

Pursuant to the *Organic Statute* dated 14 February 1832¹⁰⁶, the Minister of Justice was replaced by the Chief Director of the Government Justice Commission, who up until then had the prerogative of supervision and issuing warnings¹⁰⁷. The Cassation Court, in turn, was to be abolished when the Duchy of Warsaw ceased to exist¹⁰⁸. Its responsibilities in the area of civil cases were taken

105 “The dismissal of a judge of the Appellate Court or of a justice of the peace may be requested by the Council of State acting as Court of Cassation” (Art. 6, sentence. 2). “The Court of Cassation is entitled to suspend a judge of an Appellate Court or a justice of the peace for such reasons, and order him to stand before the Minister of Justice and report on his actions.” (Art. 6 sentence 4).

106 DPKP, vol. t. XIV, p. 173 ff., Cf: Art. 23 and 35.

107 ZPA WS, vol. VI, p. 13.

108 More on this topic: A. Korobowicz, *Rys dziejów kasacji w polskim systemie sądowno-woławczym* [An Outline of History of Cassation in the Polish Appellate System], [in:] *Polska lat dziewięćdziesiątych. Przemiany państwa i prawa* [Poland of the Nineties. Transformations of the State and Law], Lublin 1998, vol. II. J.J. Litauer, “Sąd Kasacyjny Księstwa Warszawskiego” [Cassation Court of the Duchy of Warsaw], *Themis Polska*, 2nd ser., vol. V/1918; W. Sobociński, *Historia ustroju i prawa Księstwa Warszawskiego* [History of the Political System and Law in the Duchy of Warsaw], Toruń 1964; idem, “Rada Stanu Księstwa Warszawskiego jako Sąd Kasacyjny (zarys ustrojowy)” [Council of State of the Duchy of Warsaw as a Cassation Court (Outline of the System)], *Archeion*, vol. LXXVII/1984; idem, “Sądownictwo Księstwa Warszawskiego a problem kasacji. Pierwsze pomysły i zaczątki organizacji kasacyjnej” [The Judiciary of the Duchy of Warsaw and the Problem of Cassation. First Ideas and Beginnings of

over by the newly established High National Court¹⁰⁹, and criminal cases were provisionally handled by the Appellate Court¹¹⁰, until the establishment of the Warsaw Departments of the Governing Senate in 1842. Following the creation of the Governing Senate, its 9th Department tried civil cases, and 10th Department handled criminal cases, but only in the last instance.

Nevertheless, the position of the Appellate Court in relation to the Commercial Tribunal was maintained. This is because pursuant to the *Interim Provisions to Accompany the Code of Principal and Correctional Punishments* of 11 November 1847¹¹¹, in case of injurious exercise of authority and offences committed in line of work “the Appellate Court [...] is the supreme and supervisory authority in relation to civil tribunals, commercial tribunals and penal courts” (Art. 66, letter d). Disciplinary sanctions concerning scribes (Pol. *pisarz aktowy*) could be taken without any formal court proceedings by the court which had appointed them (the situation of the bedels was similar) (Art. 69). Complaints against court decisions (issued by both the Appellate Court and Commercial Tribunal) could be lodged with the Government Justice Commission (Art. 71). The Appellate Court examined in the first instance criminal cases against judges of the Commercial Tribunal (Art. 80) and its judgements could be appealed against with the 10th Department of the Governing Senate (Art. 83)¹¹².

Moreover, as stipulated in the *Organization of the Government Justice Commission* dated 6 (18) August 1847, this body was responsible for, among

Cassation Organization], *Czasopismo Prawno-Historyczne*, vol. XXXIV/2, 1982. More on the changes in the organization of the judiciary in the Kingdom of Poland: A. Korobowicz, “Zmiany ustroju sądownictwa najwyższego w Królestwie Polskim w latach 1815-1876” [Changes in the System of Supreme Judiciary in the Kingdom of Poland in the Years 1815-1876], *Czasopismo Prawno-Historyczne*, vol. XXIV/2, 1972; idem, *Polskie Sądy Najwyższe w XIX stuleciu* [Polish Supreme Courts in the 19th Century], [in:] *Sąd Najwyższy Rzeczypospolitej Polskiej. Historia i współczesność. Księga Jubileuszowa 90-lecia Sądu Najwyższego 1917-2007* [Supreme Court of the Republic of Poland. Then and Now. Jubilee Book Celebrating the 90 Years of the Supreme Court 1917-2007], [ed.] idem, Toruń 2007, pp. 75-118; J.J. Litauer, “Z dziejów sądownictwa kasacyjnego w Polsce. Sąd Najwyższej Instancji”, [From the History of Cassation Judiciary in Poland. High National Court], *Kwartalnik Prawa Cywilnego i Handlowego*, Yearbook 2, 1917.

109 Cf: *Organizacja Sądu Najwyższej Instancji* [Organization of the High National Court], introduced by a resolution of the Provisional Government of the Kingdom of Poland dated 21 September 1815 (ZPA WS, vol. VIII, p. 265 ff.), internal regulation of the HNC dated 19 October 1815 (ZPA WS, vol. VIII, p. 289 ff.) and decisions of 21 December 1815 r. (ZPA WS, vol. VIII, p. 313 ff.), 26 July 1817 (DPKP, vol. III, p. 375 ff.), 13 (25) November 1817 (DPKP, vol. IV, p. 77 ff.) and 13 January 1818 (ZPA WS, vol. VIII, p. 318 ff.).

110 Cf: Resolution of the Provisional Supreme Council dated 22 March 1814; DPKP, additional volume, p. 7.

111 DPKP, vol. XL, p. 7 ff.

112 Cf: provisions of the *Act on Civil Servants in the Kingdom of Poland* dated 10 (22) March 1859 (DPKP, vol. LIII, p. 69 ff.).

others, “maintenance of discipline and subordination among officials and officials of the Justice Department” (§ 7 letter c)¹¹³, as well as for maintaining order in the course of cases concerning commercial bankruptcy estates and, as already mentioned, in selection of members of the Commercial Tribunal (§ 15 letter b)¹¹⁴. Conducting bankruptcy proceedings fell within the scope of jurisdiction of the relevant commercial tribunals. Outside of the Warsaw Governorate, these proceedings were conducted by civil tribunals pursuant to the aforementioned rescript of the Government Justice Commission dated 23 December 1816. All the tribunals, including the Warsaw Commercial Tribunal, were obliged to submit periodic reports on its activities to the GJC, which enforced its competences within this scope¹¹⁵. In the area of “maintenance of order in the course of cases concerning commercial bankruptcy estates”, on 16 (28) January 1839, the GJC ordered the Commercial Tribunal to “report on the number of all unfinished bankruptcy estate proceedings, with indication of the years in which they were initiated and, in future reports to detail, as regards both bankruptcy estates and economic activities, how many of these have been left without resolution from the previous quarter, how many new ones have been added, and of these how many have been resolved and how many left for the next quarter.”¹¹⁶ The GJC deemed delays in proceedings concerning bankruptcy estates to be serious enough to order the vice-president of the tribunal to focus on this issue, pursuant to rescript of 29 June (11 July) 1840¹¹⁷. In turn, breaches of Commercial Code in these proceedings, which were revealed in the reports submitted by the Commercial Tribunal, caused the GJC to issue on 25 January (6 February) 1861 an instruction, which on the one hand aimed to force courts to observe the *Code de commerce*, and on the other hand to expedite bankruptcy proceedings and to lower their costs¹¹⁸. Most certainly neither the role of the Commercial Tribunal in these cases, nor the expectations of the authorities as concerned compliance with the Code’s provisions were illusory.

It is, however, necessary to underscore that as a result of the supervisory

113 ZPA WS, vol. I, p. 31.

114 Ibid, pp. 149-153.

115 On 17 (29) July 1850, the GJC ordered civil tribunals that examined commercial cases in substitution of commercial tribunals to separate commercial cases from civil ones in their reports on quarterly activities. ZPA WS, vol. IV, p. 305. Regulations of this type were simultaneously communicated to the Appellate Court, and so it too submitted similar reports to the Commission. Ibid, vol. I, pp. 195-197.

116 ZPA WS, vol. IV, pp. 115-117.

117 *Delegation of the direction of bankruptcy estate proceedings to the Vice-President of the Commercial Tribunal (On 29 June (11 July) 1840). To the Commercial Tribunal of the Mazovian Governorate. Government Justice Commission; ZPA WS, vol. IV, pp. 117-119.*

118 *Instruction for the Commercial Tribunal concerning bankruptcy estate proceedings (On 25 January (6 February) 1861). To the Commercial Tribunal in Warsaw. Government Justice Commission; ZPA WS, vol. IV, pp. 121-133.*

activities, the Government Justice Commission issued, besides personal and organizational decisions, “various general regulations aiming to clarify old and newly adopted laws, as well as to ensure that they are enforced”; it is nevertheless impossible to establish their total or even estimate number, as besides the ones printed in ZPA or in the *Rocznik Sądowy* [Court Yearbook], their number was not published anywhere¹¹⁹.

6 JURISDICTION

As regards the jurisdiction within the commercial judiciary, the provisions of the Commercial Code served as the main guideline (Art. 631-638)¹²⁰. Since its authors adopted a mixed, subjective-objective system of commercial law, the scope of jurisdiction of commercial tribunals entailed not only cases connected with the performance of commercial acts (*actes de commerce*), but also “all disputes concerning obligations and contracts between wholesalers (*négociants*), merchants and bankers” (including obligations resulting from contracts, quasi-contracts, delicts and quasi-delicts¹²¹).

The main difference in that period between France and the Polish territories consisted in that in the Code’s mother country, in order to achieve the general status of *commerçant*, whom the jurisdiction covered, it was sufficient to “carry on commerce and make it one’s habitual profession” (Art. 1), and the duty to register, against payment of an annual business tax (*patente*) was of purely administrative nature. In the Kingdom of Poland, pursuant to the aforementioned *Merchant Law* of 1817, corporate, but not autonomous, organization of trade steered by the

119 W. Witkowski, op.cit., pp. 224-225. One example is a decree of 1816 ordering that civil tribunals take over the activities of commercial tribunals, which in fact turned out to be a permanent decree.

120 It is worth mentioning, however, Art. 42 of the *Interim Provisions to Accompany the Code of Principal and Correctional Punishments* dated 11 November 1847, pursuant to which “Usury cases cannot be examined by penal courts until usury has been determined with a final or binding judgement of the civil or commercial court. In cases of this type, civil or commercial court is to decide, based on evidence allowed in civil or commercial cases, and whenever it determines by way of a final judgement that usury has taken place, or whenever it is made known to the court that its judgement to this effect has become binding, it shall be obliged to send a copy of such judgement ex officio to the relevant court of correctional police. This last court, in such cases, as well as in any other case when it is known to it that usury has been determined by a final or binding judgement of a civil or commercial court, shall hold the guilty party accountable [...]”.

121 Compare with the judgements of the French Court of Cassation, uniform in this respect, of: 4 March 1845, D. 1846, I, 208; 24 August 1863, D. 1863, I, 348; 3 January 1872, D. 1872, I, 303; 9 July 1873, D. 1875, I, 465; 20 January 1875, D. 1875, I, 355; 5 August 1875, D. 1877, I, 325; 11 July 1877, D. 1878, I, 122; 11 December 1895, D. 1896, I, 263; 28 October 1896, D. 1897, I, 583; 11 July 1900, D. 1900, I, 508; 7 November 1904, D. 1908, I, 67; 19 March 1907, D. 1907, I, 423.

state authorities was introduced. As a consequence, obtaining an entry on the list of merchants, approved by the mayor or city president following the satisfaction of criteria set out in the *Merchant Law*, was of legally validating nature. This was in clear contravention of the flagship freedom of economic activity, stipulated in Art. 1 of *Code de commerce*, which was not formally repealed, however. The way in which courts approached this situation was not uniform. In some cases, the court would find that the patent to conduct trade activities was necessary to obtain the status of a trader¹²². In others, courts delivered judgements based on a completely different argumentation, in line with which it was the character of the business activity that made one a trader, and the official register was not verified at all¹²³. Disparities were also visible in judgements concerning bills of exchange. The great majority of these cases admittedly concerned disputes between merchants, wholesalers or factors (commission agents (*commissionnaires*)), and in principle the jurisdiction of the commercial tribunal was not questioned in such instances, but even then there existed some exceptions¹²⁴. In situations where even one of the parties did not have the status of a merchant, the commercial tribunal usually adjudicated based on subject matter jurisdiction¹²⁵.

Since only traces of primary sources have survived to date, some theses cannot be 100% certain, but it is highly probable that commercial tribunals in the Polish territories did not hear cases under Art. 633, as the Duchy of Warsaw, the Kingdom of Poland and the Free City of Krakow did not have access to the

122 E.g. Archiwum Narodowe w Krakowie [National Archives in Krakow] (hereinafter: ANK), Akta Wolnego Miasta Krakowa [Archives of the Free City of Krakow] (hereinafter: AWMK), WM 238, fol. 349. In the case of Hermann Cluge, a Hamburg merchant, and Jan Fryderyk Kozłowski, a tavern owner from Kalisz, this logic went even further. The court found, in connection with a testimony of the President of Kalisz according to which Kozłowski did not conduct a trade activity, that he could not issue a bill of exchange, and thus the document issued by him must be treated as a simple IOU. As a consequence of this, the case was remanded to a civil court; Judgement of 3 February 1825, AGAD, TCK 59, fol. 486.

123 In the case between Franciszek Ziółkowski, revision officer of the Administration of Consumption Revenue of Kalisz, and Jan Fryderyk Elias, manufacturer from Kalisz, the latter argued that the commercial tribunal had no jurisdiction in the case. The judicial panel found that since Elias sells chicory grown by him, he should be deemed a trader and thus subject to the jurisdiction of the commercial tribunal; Judgement of 10 March 1825, AGAD, TCK 59, fols. 955-60.

124 As in a case which, owing to a formal defect of the bill of exchange, was remanded to a civil court despite the fact that both parties were merchants; Judgement of 23 September 1825, AGAD, TCK 61, fol. 949.

125 For example in the case between Salomon Selig Karo, wholesaler from Kalisz, and Franciszek Krauze, manufacturer of wool goods, also from Kalisz. The manufacturer raised that he was not a merchant, yet the court found that since the document issued had all the features of a bill of exchange, the case cannot be remanded to a civil court; Judgement of 23 February 1825, AGAD, TCK 59, fol. 704. See also other cases concerning bills of exchange, in which one of the parties did not have the status of a merchant: between Hipolit Przechodzki, former major of the Polish army, and Izrael Brokmann, a fishmonger; judgement of 4 February 1825, AGAD, TCK 59, fol. 500; and a case concerning bills of exchange issued by Michał Sołtyk, a cathedral dean; ANK, AWMK, WM 155, fol. 131.

sea. Yet the existing records clearly show that the commercial procedure applied, as already mentioned, to cases concerning bills of exchange¹²⁶, contracts of sale¹²⁷, companies and partnerships¹²⁸, commission services¹²⁹ and other types of obligations between merchants¹³⁰. Bankruptcy proceedings concerning merchants were also handled by commercial tribunals¹³¹. Successors of merchants' debts were also called before commercial tribunals¹³². The great majority of cases concerned bills of exchange, however.

If it was found that the tribunal did not have subject matter jurisdiction, the case was remanded to the relevant court¹³³.

The lack of a legal definition of commercial activities in the code was a considerable problem. Instead, a catalogue of these activities was contained in Book IV (Of commercial jurisdiction), title II (Of the competency of the tribunals of commerce). However, both in French judicial decisions, frequently referred to on the Polish territories in the period when the Commercial Code was in force, and in the Polish judicial decisions, the adopted interpretation in this respect was usually extensive. Among trade activities there were, for example "maintaining a horse carriage and sending it out for purposes of making money"¹³⁴, manufacture of clay bricks for sale¹³⁵ or maintenance of a public bath on one's own real

126 E.g. AGAD, TCK 31, fol. 740; TCK 31, fol. 853; TCK 59, fol. 500; TCK 59, fol. 945; TCK 59, fol. 955; TCK 61, fol. 334; TCK 61, fol. 488; TCK 61, fol. 678; TCK 61, fol. 681; TCK 61, fol. 922; TCK 63, fol. 212; TCK 63, fol. 268; TCK 63, fol. 355; TCK 63, fol. 519; TCK 63, fol. 522; TCK 63, fol. 608; TCK 63, fol. 611; TCK 63, fol. 614; TCK 63, fol. 617; TCK 63, fol. 677; TCK 63, fol. 691; TCK 63, fol. 697; TCK 63, fol. 700; TCK 63, fol. 834; TCK 63, fol. 930; TCK 63, fol. 933; TCK 77, fol. 27; TCK 77, fol. 65; TCK 77, fol. 951; TCK 77, fol. 957; ANK, AWMK, WM 155, fol. 91; WM 155, fol. 131; WM 155, fol. 199; WM 155, fol. 619; WM 155, fol. 681; WM 155, fol. 765; WM 238, fol. 225; WM 238, fol. 833.

127 E.g. AGAD, TCK 59, fol. 489; TCK 59, fol. 801; TCK 61, fol. 479; TCK 61, fol. 925; TCK 61, fol. 943; TCK 63, fol. 78; TCK 63, fol. 927; ANK, AWMK, WM 155, fol. 769.

128 For instance, AGAD, TCK 20, fol. 561; TCK 31, fol. 294; TCK 31, fol. 299; TCK 59, fol. 961; TCK 61, fol. 338; TCK 61, fol. 913; TCK 61, fol. 945; TCK 63, fol. 271; TCK 63, fol. 511; ANK, AWMK, WM 238, fol. 975; WM 155, fol. 85; WM 155, fol. 157; WM 155, fol. 193.

129 E.g. AGAD, TCK 61, fol. 663.

130 E.g. AGAD, TCK 31, fol. 737 (debt proven with an IOU); TCK 59, fol. 497; TCK 61, fol. 830 (commission to purchase wool without remuneration); TCK 63, fol. 687.

131 E.g. AGAD, TCK 59, fol. 941; TCK 61, fol. 918; TCK 77, fol. 278; TCK 77, fol. 870. Cf. also: the above-mentioned problems in the course of these proceedings and the attempts to solve them undertaken by the Government Justice Commission (see supra "Supervision and enforcement of liability").

132 E.g. AGAD, TCK 63, fol. 621.

133 E.g. AGAD, TCK 77, fol. 816; ANK, AWMK, WM 155, fol. 624;

134 Judgement of the 9th (Warsaw) Department of the Senate from 1857, 389/26, Weinkrantz vs. Feinsandt, [in:] P. Kapuściński, *Jurisprudencja Senatu z lat dwudziestu sześciu (1842-1867). Opatrzona skorowidzem wyrazowym* [Jurisprudence of the Senate from Twenty Six Years (1842-1867) with an Index of Entries], Warsaw 1869, p. 513.

135 Judgement of the 9th (Warsaw) Department of the Senate from 23 August (6 September) 1867, 16/Deskur vs. Głogowski; *Rocznik sądowy za rok 1869* [Court Yearbook for the Year 1869],

property¹³⁶. Yet the “publication of someone else’s work at one’s own cost”, with the addition of one’s own translation, explanations and introduction, treated as a type of co-authorship, was not deemed a trade activity¹³⁷. Another type of trade activity that could be subject to examination by the commercial tribunal was, for example, the rental of real property, if it was an additional condition for the transfer of an enterprise conducted at this real property¹³⁸. Obviously then, the issue of jurisdiction of commercial tribunals aroused doubts and disputes, especially since the Polish judges, unlike in the case of France, in the event of any uncertainty, could not avail themselves of the rich *jurisprudence* (Fr.), of the doctrine’s output or of the constantly growing body of laws related to the commercial law, which was not received in Poland along with the Code. In spite of this, even in difficult and complex cases, the judgements delivered were often in line with the interpretation adopted in France at the time.

Examples of this can be found in, for example, the judicial decisions of the Appellate Court of Free, Independent and Strictly Neutral City of Krakow, which examined a number of cases concerning the coal mines in the region of Dąbrowa Basin. In one of the cases, it was raised that the commercial tribunal that adjudicated in the first instance had no jurisdiction over the subject matter or the parties of the case, as partners of the company running the coalmine, as they emphasized, did not perform commercial acts, nor had they set up a commercial company. They moreover argued that the sale of coal should not be treated as a commercial act. Indeed, at the time in France the sale of coal extracted by mine owners or licence holders was not, in principle, regarded a commercial act within the meaning of the Commercial Code, as an effect of implementation of a mining law of 21 April 1810¹³⁹, which however was not in effect in the Polish territories. At first it was also deemed that a company set up for the purpose of running licensed extraction at a mine was of a civil, and not commercial nature¹⁴⁰, (limitations in the application of this rule did not begin to emerge in the

Warsaw, pp. 187-188.

136 Judgement of the 9th (Warsaw) Department of the Senate from 3 (15) September 1871, 21/ Petrov vs. Horowitz; *Rocznik sądowy za rok 1873*, Warsaw, pp. 195.

137 Judgement of the 9th (Warsaw) Department of the Senate from 1 (13) October 1871, 22/Jaffe vs. Bajkowska; *Rocznik sądowy za rok 1873*, Warsaw, pp. 195-196.

138 Judgement of the Court of Cassation dated 29 January 1883; D. 1883, I, 314.

139 *Loi du 21 avril 1810 concernant les mines, les minières et les carrières*; in: *Collection complète des lois, décrets, ordonnances, réglemens, et avis du Conseil-d’État, publiée sur les éditions officielles du Louvre ; de l’Imprimerie Nationale, par Baudouin ; et du Bulletin des lois, de 1788 à 1824 inclusivement, par ordre chronologique, avec un choix d’Instructions ministérielles, et des Notes sur chaque Loi, indiquant, 1° les Lois analogues ; 2° les Décisions et Arrêts des Tribunaux et du Conseil-d’État ; 3° les Discussions rapportées au Moniteur ; suivie d’une table analytique et raisonnée des matières*, red. J.B. Duvergier, Paris 1826, vol. XVII, pp. 90-98.

140 Cf., e.g. judgements of the French Court of Cassation of 7 February 1826, D. 1826, I, 157; 15 April 1834, D. 1834, I, 195; 10 March 1841, D. 1841, I, 175; as well as with a decision of the

judicial decisions of the Court of Cassation until the late '20s and early '30s¹⁴¹). The judicial decisions of French courts were no longer formally binding on the Polish territories following the collapse of the Duchy of Warsaw. Despite this, on 2 July 1816, a judgement was passed in the discussed case that was in line with this interpretation¹⁴².

The issue of lack of jurisdiction of the commercial tribunal in the case of a mine was also raised in the dispute between the mine administrators and Józef Zwierzyna¹⁴³. This time, the court upheld the jurisdiction of the commercial tribunal that examined the case in the first instance, owing to the fact that the administrators had hired Zwierzyna as a commission agent (*commissionnaire*) for the sale of coal. This judgement was too in line with the position of the French doctrine at that time¹⁴⁴.

Apart from that, Art. 639 of the Code stipulated that commercial tribunals would try, in the last instance, all cases in which the value in dispute did not exceed 1000 francs (about 240 silver rubles), as well as cases in which the parties submitted themselves to a final trial without right of appeal. However, as an effect of implementation of the *Act on Warsaw Departments of the Governing Senate, Ninth and Tenth*, of the *Act on Their General Assembly* and of the *Internal Regulation for the Warsaw Departments of the Governing Senate* dated 26 March 1842¹⁴⁵, judgements of the Commercial Tribunal were always issued only in the first instance and all could be appealed with the Appellate Court (Art. 4 of the *Decision concerning the manner of lodging and examination of complaints against judgements heretofore issued in the last instance*, also of 26 March 1842 r.¹⁴⁶).

Council of State dated 7 June 1836, D. 1837, III, 135.

141 Judgements of 30 April 1828, Sirey, XXVIII, I, 418; and 15 December 1835, Sirey, XXXVI, I, 333.

142 ANK, AWMK, WM 236, fols. 12-14.

143 ANK, AWMK, WM 237, fols. 137-152.

144 Cf. P. Bravard-Veyrières, *Manuel de droit commercial contenant un traité élémentaire sur chaque titre du Code du commerce, le texte des Ordonnances de 1673 et 1681, et le texte du Code, une analyse de tous les articles du Code réduits en questions, et des formules pour tous les actes, troisième édition*, Brussels 1841, p. 64; A. Rogron, *Code de commerce expliqué par ses motifs et par des exemples, avec la solution, sous chaque article, des difficultés ainsi que des principales questions que présentent le texte, et la définition de tous les termes de droit*, Brussels 1833, p. 22.

145 ZPA WS, vol. VI, p. 227 ff. and p. 327 ff.

146 ZPA WS, vol. VI, p. 299.

V. SUMMARY

The history of shaping of the Polish legal system has for centuries been one of intermingling influences of various legal cultures. Throughout different periods, the circumstances of drawing from these influences varied¹⁴⁷, but the 19th century was certainly a time marked by intensive external inspiration. In principle, unlike in the interwar period, when the Codification Commission could freely decide on the sources of inspirations in its work on individual areas of law, in the 19th century the implementation of foreign solutions was imposed from the outside, but regardless of this, many of them had a direct and lasting effect on the Polish system of law.

In the area of commercial law, the central point of reference was, of course, *Code de commerce*, which was effective on the Polish territories until the adoption of the 1933 Commercial Code. In examining its application, however, one must not forget the role of the legislator on the Polish territories, who decidedly lacked a coherent and thoroughly premeditated strategy for putting what was a ready commercial code to use with a view of transforming the Polish reality (which became obvious already at the stage of works in connection with its adoption). The legislator exhibited an ambivalent attitude toward the solutions and institutions therein contain, either adjusting to them selectively, leaving some out or modifying them. These changes, that is, the “localization” of individual solutions largely consisted in the “feudalization” of original ideas, not only by way of abolishing the flagship freedom of economic activity.

The institution of commercial judiciary, which constitutes an inherent feature of the French system, has grown roots strong enough on the Polish territories to survive by a long time the obligations that resulted from the French protectorate¹⁴⁸. This idea was implemented in the Polish conditions as illustrated in

147 In principle, we distinguish four stages of convergence and mutual permeations of various legal cultures, resulting in the emergence of a one-of-a-kind, Polish system inspired to various degrees by solutions and institutions that shaped under different legal orders. 1. The period of 1776-1792, when, at the initiative of Andrzej Zamojski and Stanisław August Poniatowski, attempts were made to draft national Polish codification, which aimed to transplant Western European ideas onto the Polish soil to the greatest extent possible; 2. The period of partitions (18th/19th century), during which legal norms were implemented directly at the will of the occupant legislators: Russia, Austria, Prussia; and legal ideas, institutions and provisions of the French law in the Duchy of Warsaw, a French protectorate established by Napoleon, which functioned as an ersatz of Polish state; 3. Second Republic of Poland – during which foreign solutions were drawn from freely and abundantly in the course of works on the Polish legislation; 4. After 1989, strengthened by Poland joining the EU. Cf. A. Klimaszewska, *La responsabilité civile des associés des sociétés commerciales dans le droit polonais – les influences de la culture juridique française et les influences des autres cultures*, in: *La responsabilité civile en France et en Pologne*, [ed.] Z. Hajn, D. Skupień, Łódź 2016, pp. 131-133.

148 Despite the wartime chaos, even the *Provisional Provisions Concerning the Judiciary Organization in the Kingdom of Poland* of 18 July 1917 (Dziennik Urzędowy Departamentu Sprawiedliwości Tymczasowej Rady Stanu Królestwa Polskiego [Official Journal of the

this text, but it must be remembered that *Code de commerce* and the institutions it regulated had been a “product” of centuries-long development of French legal culture (even so, at the moment of its promulgation, it was already considered an outdated body of laws that did not fully reflect the circumstances of the French economic reality). Thus, throwing it *ad hoc* into the Polish feudal and largely customary reality, where no commercial code had ever been in effect, had to have its repercussions. Therefore, it is easy to understand why professional judges were appointed as presidents and vice-presidents of commercial tribunals, as Polish merchants could hardly be expected to try commercial cases without any prior experience in this area.

It must be also noted that over the period when commercial judiciary functioned in Warsaw (no data exist as regards other cities), no fixed procedure of electing judges was ever established. The absence of coherent rules was manifest not only in the aspect of frequency of elections, but also as regarded the number of selected judges and their deputies. The actual practice of elections was hardly affected by the attempts to stabilize it, undertaken by the Polish authorities from time to time. From the perspective of application of the Commercial Code, it must however be stated that, besides the president and vice-president, judges and their deputies were indeed selected from among the merchantry. As regards the second instance in the appellate court, commercial cases, just like in France, were examined exclusively by professional judges. The fundamental difference, however, had to do with granting the status of a merchant according to the aforementioned *Merchant Law* of 1817 and, in consequence, with obtaining the passive and active voting right in elections for judicial offices.

What is more, some of the modifications of the original French solutions introduced on the Polish territories, such as prohibiting commercial tribunals from adjudicating in the last instance, stemmed from the general reforms of the judiciary systems. Others, such as abolishment of commercial tribunals outside of Warsaw, were not motivated by any ideology, but rather caused by the simple lack of funds earmarked in the budget for their operations. It is for certain, however, that the role of commercial tribunals together with civil and appellate judges, who

Department of Justice of the Provisional Council of State of the Kingdom of Poland], 1917, no. 1, section I, item 1) provided for the participation of jury selected by the merchantry and using the title of commercial judges in commercial cases tried by district courts, and the *Decree Concerning the Selection of Commercial Judges*, issued on 24 December 1918 (Dziennik Praw Państwa Polskiego [Journal of Laws of the Polish State], 1919, no. 3, item. 83, p. 9), regulated the course of these elections “in the cities where there are adjudicating boards for commercial cases” in relation to the frameworks set out by the Commercial Code. Thus, even though the idea of separate courts (tribunals) for commercial cases was abandoned, and instead only dedicated adjudicating boards were established in statewide judicial system, the solution was meant to expand participation of non-professional judges (merchants, entrepreneurs) in commercial cases also outside of Warsaw.

ruled in commercial cases, was not merely illusory. Thus, it must be concluded that commercial judiciary in the Polish territories was not just a mock-up – it did indeed function, but, despite the French inspiration, it functioned in its own local version. All of my previous attempts to analyze the actual shape of various institutions of the French law in the Polish territories of the 19th century bring me to the same conclusion: the adoption of a text of an act of law taken from another legal culture without other elements constituting sides of a multi-sided geometric figure which each legal rule, solution and institution resembled, is just a foothold for the further re-shaping of these rules, solutions or institutions, which is intimately tied to often adventitious local circumstances.

Recebido em: 01/10/2018.

Aprovado em: 26/10/2018.

