

The application of the Brazilian Commercial Code between 1850 and 1860: an analysis of the evidence of a case of negligent bankruptcy¹

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Abstract

This article offers, based on the example of a bankruptcy case (1853–1860) of a tradesman in Porto Alegre, Francisco Ferreira de Almeida, an analysis of the Brazilian Commercial Code's application in the first decade of its introduction. The purpose of this analysis is to indicate the variety of possibilities that legal agents had at their disposal in the judicial process and the restrictions created on these by legal proceedings. From the case of Ferreira de Almeida, we conclude that the legal system in the years 1850–1860 was characterized by a great complexity of courts, working sometimes in parallel and interacting or communicating in an indirect way. Even the procedure of the Court of Appeal (Tribunal da Relação) was heavily conditioned by local agents and by the actions taken early in the bankruptcy proceedings (conciliation and arbitration). Also, the public and private roles of the agents involved in the judicial process blended up and influenced the process, which still contained elements of the Philippine Ordinances. Consequently, to understand what the legal culture of the Empire was or how courts worked, it is necessary to study the judicial institutions from the point of view of the administrative and communicative practices of the social agents that composed them.

Keywords: Commercial Code; application; legal culture.

A aplicação do Código Comercial brasileiro entre 1850 e 1860: análise das evidências de um caso de falência culposa

Resumo

O artigo oferece, com base no exemplo de um caso de falência (1853–1860) de um comerciante de Porto Alegre, Francisco Ferreira de Almeida, uma análise da aplicação do Código Comercial brasileiro na primeira década de sua introdução. O objetivo é indicar a variedade de possibilidades que tinham à sua disposição os atores jurídicos no curso do processo e as restrições criadas sobre estes pelo procedimento judicial. A partir do caso de Ferreira de Almeida, chegamos à conclusão de que o sistema jurídico dos anos 1850–1860 foi caracterizado por uma grande complexidade de tribunais, que trabalhavam às vezes em paralelo e interagiam ou se comunicavam de uma maneira indireta. O próprio procedimento do Tribunal da Relação foi intensamente condicionado pelos atores locais e pelas ações na fase inicial do processo de falência (conciliação e arbitragem). Resulta, também, que os papéis públicos e privados dos atores envolvidos no processo judicial mesclaram-se e influíram no processo que ainda continha elementos da legislação filipina. Em consequência, para entender o que foi a cultura jurídica do Império ou como funcionaram os tribunais, faz-se necessário estudar as instituições judiciais a partir das práticas administrativas e comunicativas dos atores sociais que as compõem.

Palavras-chave: Código Comercial; aplicação; cultura jurídica.

La aplicación del Código Comercial Brasileño entre los años del 1850 y 1860: un análisis de las evidencias de un caso de quiebra culposa

Resumen

El artículo ofrece, con base en un ejemplo de caso de quiebra (1853–1860) de un comerciante de Porto Alegre, Brasil, llamado Francisco Ferreira de Almeida, un análisis de la aplicación del Código Comercial brasileño en la primera década de su introducción. El objetivo es indicar las varias posibilidades que los actores jurídicos tenían con ellos en el curso del proceso y las restricciones creadas a ellos por el proceso judicial. A partir del caso de Ferreira de Almeida, se llegó a la conclusión que el sistema jurídico de los años 1850–1860 fue caracterizado por una grande complejidad de tribunales, los cuales trabajaban a veces en paralelo e interaccionaban o se comunicaban indirectamente. El propio proceso del Tribunal del Relaciónamiento fue intensamente condicionado por actores locales y por acciones en la fase inicial del proceso de quiebra (conciliación y arbitraje). El resultado es también que los papeles públicos y particulares de los actores envueltos en el proceso judicial se misturaron e influyeron en el proceso que aun tenía elementos de la legislación filipina. Consecuentemente, para comprender lo que fue la cultura jurídica del Imperio o como los tribunales trabajaban, es necesario estudiar las instituciones judiciales desde las prácticas administrativas y comunicativas de los actores sociales que las componen.

Palabras clave: Código Comercial; aplicación; cultura jurídica.

L'application du Code de commerce brésilien entre 1850 et 1860: analyse de quelques évidences basées sur un cas de défaillance coupable

Résumé

Cet article propose une analyse de l'application du Code de Commerce brésilien dans la première décennie de son introduction en se basant sur l'exemple de la faillite (1853-1860) d'un marchand de Porto Alegre, Francisco Ferreira de Almeida. Le but est de montrer la variété des possibilités dont disposaient les acteurs juridiques au cours du procès juridique et les restrictions qui leur étaient imposées par la procédure judiciaire. A partir du cas de Ferreira de Almeida, nous constatons que le système juridique des années 1850-1860 était caractérisé par une grande complexité, les tribunaux travaillant parfois parallèlement les uns aux autres et interagissant ou communiquant d'une manière indirecte entre eux. Même la procédure de la Cour d'Appel (Tribunal da Relação) était fortement influencée par les acteurs locaux et les actions prises dans la phase initiale de la procédure de faillite (de conciliation et d'arbitrage). Il résulte aussi de notre analyse que les rôles publics et privés des acteurs impliqués dans le processus judiciaire se confondaient et influençaient la procédure, qui contenait encore des éléments de la législation datant de l'époque de Philippe II. Par conséquent, afin de comprendre quelle était la culture juridique de l'Empire ou comment les tribunaux fonctionnaient-ils à cette époque-là, il faut étudier les institutions judiciaires à partir des pratiques administratives et de communication des acteurs sociaux qui les composent.

Mots-clés: Code de Commerce; application; culture juridique.

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In recent years, trade laws and judicial practices involving commercial activity have received increasing attention, not only from those working in the field of classical legal history, but also from economists discussing the importance of institutions in the New Institutional Economics. Thus, several studies have emphasized the theme of commercial courts and the strategies of tradesmen in light of them.² However, given the specialization of historians, these studies tend to be legal and administrative or economic and social. On the one hand, these analyses revolve around the legal context and the administrative and political functions of the courts, focusing on structures, not on agents. On the other hand, there are studies on tradesmen based on legal documents, and the focus here is on how they make use of legal organizations. Many of these studies center their analysis on individual agents or their networks, as opposed to the organizational framework. Rare are those that try to combine the organizational perspective with the agent-centered perspective and analyze legal organizations through legal practices associated with commercial activities.³

In the History of Law, commercial laws and legal practices constitute a classic research field. In this context, legal historians address issues of codification and unification of trade laws, as well as the transfer of legal models.⁴ More recently, Amalia D. Kessler has demonstrated, in a study of the Parisian Merchant Court in the eighteenth century, how moral values and arbitration played a central role in the decisions of that court.⁵

²Refer to Lisa Bernstein, "Merchant Law in a merchant court: rethinking the Code's search for immanent business norms", *University of Pennsylvania Law Review*, vol. 144, n. 5, 1996, p. 1796-1802; Paul R. Milgrom; Douglass C. North; Barry Weingast, "The role of institutions in the revival of the trade: the Law Merchant, private judges, and the Champagne Fairs", *Economics and Politics*, vol. 2, n. 1, 1990, p. 1-23. Regarding the New Institutional Economics applied to the study of medieval trade, refer to the works of Avner Greif, especially *Institutions and the path to the modern Economy: lessons from medieval trade*, New York, Cambridge University Press, 2006.

³Simona Cerutti, *Giustizia sommaria: pratiche e ideali di giustizia in una società di Ancien Régime* (Torino, XVIII secolo), Turim, Feltrinelli, 2003; Amalia D. Kessler, *A revolution in commerce: The Parisian merchant court and the rise of commercial society in eighteenth-century France*, New Haven; London, Yale University Press, 2007.

⁴Mary Elizabeth Basile *et al.* (orgs.), *Lex mercatoria and legal pluralism: a late thirteenth-century treatise and its afterlife*, Cambridge, Ames Foundation, 1998; Albrecht Cordes, "À la recherche d'une *lex mercatoria* au Moyen Âge", *In: Pierre Monnet; Otto G. Oexle* (orgs.), *Stadt und Recht im Mittelalter*, Göttingen, Vandenhoeck & Ruprecht, 2003, p. 117-132; Emily Kadens, "Order within law, variety within custom: the character of the medieval Merchant Law", *Chicago Journal of International Law*, vol. 5, n. 1, 2004, p. 39-65; Carlos Petit, *Compañías mercantiles en Bilbao: 1737-1829*, Sevilla, Servicio de publicaciones de la Universidad de Sevilla, 1979; Vito Piergiovanni (org.), *From lex mercatoria to Commercial Law*, Berlin, Duncker & Humblot, 2005; Leon E. Trakman, *The Law Merchant: the evolution of Commercial Law*, Littleton, Fred B. Rothman, 1983.

⁵Amalia D. Kessler, *op cit.*. Overall, the latest studies on History of Law represent a new way to study the commercial courts – not as a separate organization, but as an agent that is part of a plurality of jurisdictions. Moreover, they underline the importance of customary law; *Cf.*, for example, Ezequiel Abásolo, "El código de comercio español de 1829 en los debates y las prácticas jurídicas del extremo sur de América", *Anuario de Historia del Derecho Español*, vol. 78-79, 2009, p. 447-460; Dave de Ruysscher, *Naer het Romeinsch recht alsmede den stiel mercantiel*. Handel en recht in de Antwerpse rechtbank (16de-17de eeuw), Kortrijk, UGA, 2009; Carlos Petit, "Mercatvra y lvs mercatuvrum. Materiales para una antropología del comerciante premoderno", *In: _____*, (org.), *Del ius mercatorium al derecho mercantile*. III Seminario de Historia del Derecho Privado, Sitges, 28-30 de mayo de 1992, Madrid, Marcial Pons, 1997, p. 15-70; *Idem*, "Del Vsvs Mercatorvm al uso de comercio. Notas y textos sobre la costumbre mercantil", *Revista da Faculdade de Direito - UFPR*, vol. 48, 2008, p. 7-38.

Researchers of Social and Economic History, in turn, have examined records of commercial courts as a means of studying different elites and business networks.⁶ However, some researches have ventured into the legal and cultural history of the courts. This applies to the research of Simona Cerutti. After investigating about foreign tradesmen, she began to question the importance of legal procedure in the eighteenth-century city of Turin.⁷ Cerutti analyzes numerous commercial disputes, in which several courts of the city acted (among them, the commercial court) and observes how these, in turn, responded to these legal demands.⁸ The analysis sheds light on the interactions between courts of different levels and individual agents, as a process that leads to continuous redefinition and reclassification of the cases and their protagonists, through judicial proceedings.

Although there are a large number of studies on commercial laws and judicial practices involving the commercial activity, both historians and law historians have not been much interested by the procedure as an element of the legal process.⁹ This is surprising, particularly in the case of Social History, because Sociology — and Legal Sociology — has important studies on the subject.¹⁰ For Niklas Luhmann and Bruno Latour, it is the procedure that

⁶For example, on the Hispanic world, Antonio-Miguel Bernal, *La financiación de la Carrera de Indias: 1492-1824. Dinero y crédito en el comercio colonial español con América*, Sevilla, Fundación Cajasol, 1992; Huguette Chaunu; Pierre Chaunu, *Séville et l'Atlantique (1504-1650)*, Paris, Armand Colin, 1955-1960, 9v; Manuel Basas Fernández, *El consulado de Burgos en el siglo XVI*, Madrid, CSIC, 1963; Lutgardo García Fuentes, *El comercio español con América*, Sevilla, CSIC, 1980; Bernd Hausberger; Antonio Ibarra (orgs.), *Comercio y poder en América colonial: los consulados de comerciantes, siglos XVII-XIX*, Frankfurt am Main, Vervuert; México, Iberoamericana, 2003; Teófilo Guiard y Larrauri, *Historia del consulado y casa de contratación de Bilbao y del comercio de la villa*, Bilbao, José de Astuy, 1972, 3v; Ana Crespo Solana, *La casa de contratación y la intendencia general de la Marina en Cádiz (1717-1730)*, Cádiz, Servicio de Publicaciones de la Universidad de Cádiz, 1996; Enriqueta Vila Vilar; Allan J. Kuethe (orgs.), *Relaciones de poder y comercio colonial: nuevas perspectivas*, Sevilla, Escuela de Estudios Hispano-Americanos, 1999.

⁷Simona Cerutti, *Giustizia sommaria: pratiche e ideali di giustizia in una società di Ancien Régime* (Torino, XVIII secolo), Turin, Feltrinelli, 2003.

⁸*Ibidem*, p. 12. In a similar attempt to combine Social and Legal History, Guillaume Calafat has been studying maritime and commercial disputes in the Mediterranean. In his doctoral thesis, he studied the *Governatore* and the *Auditore de Livorno*, the *Consoli* of the *Mar del Mare de Pisa* and the *Ruota Civile* of Florence. The goal was to analyze the complexity of legal concepts in the Mediterranean, and to investigate the legal culture of tradesmen and sailors during the seventeenth and eighteenth centuries. Cf. Guillaume Calafat, *Une mer jalousie. Juridictions maritimes, ports francs et regulation du commerce en Méditerranée (1590-1740)*, Doctoral thesis, Université Paris 1 Pantheon-Sorbonne ; Università degli Studi di Pisa, 2013; *Idem*, "L'institution de la coexistence. Les communautés et leurs droits à Livourne (1570-1630)", In: David do Paço; Mathilde Monge; Laurent Tatarenko (orgs.), *Des religions dans la ville. Ressorts et stratégies de coexistence dans l'Europe des XVI^e-XVIII^e siècles*, Rennes, Presses Universitaires de Rennes, 2010, p. 83-102.

⁹Simona Cerutti, *op cit.*, defends the idea that the procedure was the central element of the legal process in the Early Modern Period. The aim of Justice was not to create equality before the law, or to reach a fair trial, but instead to create a consensus between the parties. More recently, German historian André Krischer has referred directly to Luhmann's theory; see André Krischer, "Das Verfahren als Rollenspiel? Englische Hochverratsprozesse im 17. und 18. Jahrhundert", In: Barbara Stollberg-Rilinger; André Krischer (orgs.), *Herstellung und Darstellung von Entscheidungen. Verfahren, Verwalten und Verhandeln in der Vormoderne*, Berlin, Ducker & Humblot, 2010, p. 211-251; *Idem*, "Sociological and cultural approaches to pre-modern decision-making", In: Marie-Joséphine Werlings; Fabian Schulz (orgs.), *Débats antiques*, Paris, De Boccard, 2011, p. 129-140.

¹⁰Bruno Latour, *La fabrique du droit. Une ethnologie du Conseil d'État*, Paris, La Découverte, 2002; Niklas Luhmann, *Legitimation durch Verfahren*, 3. ed., Frankfurt am Main, Suhrkamp, 1983 [1969]; Dominique Schnapper, *Une sociologue au Conseil constitutionnel*, Paris, Gallimard, 2010. For a recent criticism of Latour and Schnapper, cf. Liora Israël, "Conseils de sociologues. Bruno Latour et Dominique Schnapper face au droit", *Genèses*, vol. 87, n. 2, 2012, p. 136-152.

modulates the question of the legal proceedings, engaging the participants in a common communication system and thus allowing the reduction of complexity.¹¹ Thus, Luhmann characterizes the modern legal process as a social system that gains legitimacy through the “relative autonomy” of the legal system.¹² This autonomy is generated by symbolic communication, by the separation between public and private roles of the agents involved in the legal process and the “open” or uncertain result of the legal process that enables the communicative involvement of the parties. This type of professionalization and isolation of the legal process of the social context would become a characteristic of contemporary society. In this regard, a recent study by Reuben Zahler shows how the courts in Venezuela did, a few years after independence (1821), separate the legal process from social relations, thus overcoming the confusion — typical of the Early Modern Period¹³ — that exists between people’s public and private roles.¹⁴ However, in relation to the introduction of the 1829 Spanish Commerce Code in five federal states of Argentina, Ezequiel Abasolo finds that legal professionals had integrated the provisions of the Code to a system of legal thought, which still retained many features of the legal culture of *ius commune*.¹⁵ With regard to Brazil, our research of bankruptcy cases around 1850 clearly shows that Brazilian courts of the mid-nineteenth century cannot be considered part of an autonomous or autopoietic partial system of function in society, according to Luhmann.¹⁶ Thus the legal field continued to be strongly influenced by events in the social, economic, and political fields. We therefore need to ask, how to characterize the forensic practice of the courts involved in bankruptcy cases?

This study aims to analyze the hierarchy between the courts and the procedure at the time of introduction of the Brazilian Commercial Code in 1850. We intend, through the example of a bankruptcy case (1853–1860) of a tradesman in Porto Alegre, Francisco Ferreira Almeida, to reflect on the difference between the standard and the application of law. This path is justified by the fact that, to date,

¹¹Niklas Luhmann, *Legitimation durch Verfahren*, 3. ed., Frankfurt am Main, Suhrkamp, 1983 [1969], p. 44-46; Bruno Latour, *La fabrique du droit. Une ethnologie du Conseil d’État*, Paris, La Découverte, 2002, p. 83-118 (especially chapter 2 — “Savoir faire mûrir un dossier”). However, note that the authors do not agree on the definition and meaning of Law. For Latour, the Law is omnipresent and dissociable from society, while for Luhmann, it is a partial system of society.

¹²Niklas Luhmann, *op cit.*, p. 69-74.

¹³Recent studies argue that the courts of the Early Modern Period were not autonomous, especially because of the lack of distinction between the public and private roles of the agents. There was a constant demand for the procedures to legitimize and maintain social and political order in force. The legitimacy was created through a learning process, involving legal agents and the wider public. André Krischer, “Das Problem des Entscheidens in systematischer und historischer Perspektive”, *In: Barbara Stollberg-Rilinger; André Krischer (orgs.), Herstellung und Darstellung von Entscheidungen. Verfahren, Verwalten und Verhandeln in der Vormoderne*, Berlin, Ducker & Humblot, 2010, p. 56.

¹⁴Ruben Zahler, *Ambitious rebels: remaking honor, law, and liberalism in Venezuela, 1780-1850*, Tucson, University of Arizona Press, 2013. Note, however, that Zahler not only deals with economic lawsuits, but Justice in general.

¹⁵Ezequiel Abasolo, “El código de comercio español de 1829 en los debates y las prácticas jurídicas del extremo sur de América”, *Anuario de Historia del Derecho Español*, vol. 78-79, 2009, p. 447-460.

¹⁶*Cf.* Hugh Baxter, “Niklas Luhmann’s theory of autopoietic legal systems”, *Annual Review of Law and Social Science*, vol. 9, 2013, p. 167-184.

there are few historical studies in Brazil on the judicial practice of the courts.¹⁷ We do not intend to establish an overview of the application of the Commercial Code at that time, but to indicate the range of possibilities legal agents had at their disposal in the course of legal proceedings and the restrictions created on the agents by the procedure. However, this type of micro-history allows a wider reflection on the need to study Legal History, not only from the viewpoint of laws and ideological foundations of the legal system, but also from communication processes and social practices.

*Brazilian courts of the mid-nineteenth century
cannot be considered part of an autonomous or
autopoietic partial system of function in society*

We begin with a chronological description of the bankruptcy case of Francisco de Almeida Ferreira, followed by a brief description of the provisions of the Commercial Code relating to bankruptcy. From this preliminary information, we will analyze the application of legislation in the communication processes in the courts and between courts. Discourses outside from the legal context, printed in newspapers, will also be analyzed, followed by the question of the role of social networks and the autonomy of the courts. We conclude with some general reflections on the study of legal culture¹⁸ and the functioning of the courts based on the study of the bankruptcy case of Francisco Ferreira de Almeida.

Cases relating to the bankruptcy of Francisco Ferreira de Almeida

Between 1853 and 1855, Porto Alegre newspapers *Correio do Sul*, *O Mercantil*, and *Rio Grandense*¹⁹ published several articles related to this bankruptcy case that, at first sight, may seem trivial. However, the case of the nonregistered

¹⁷One exception is the study by Keila Grinberg, *Liberata - a lei da ambiguidade: as ações de liberdade da Corte de Apelação do Rio de Janeiro no século XIX*, 2. ed., Rio de Janeiro, Relume Dumará, 1994. José Reinaldo de Lima Lopes (org.), *O Supremo Tribunal de Justiça do Império: 1828-1889*, São Paulo, Saraiva, 2010, also deals with the Court's decisions, but not with the trial process. Regarding the book by Edson Alvisi Neves, *Magistrados e negociantes na Corte do Império do Brasil: o Tribunal do Comércio*, Rio de Janeiro, Jurídica; FAPERJ, 2008, the author does not discuss legal practice, but emphasizes the legal and administrative organization of the court. The same also applies for the studies by Arno Wehling; Maria José Wehling, *Direito e justiça no Brasil Colonial: o Tribunal da Relação do Rio de Janeiro (1751-1808)*, Rio de Janeiro, Renovar, 2004; Stuart B. Schwarz, *Sovereignty and society in Colonial Brazil: the High Court of Bahia and its judges, 1699-1751*, Berkeley, University of California Press, 1973; Walter de Mattos Lopes, *A Real Junta do Commercio, Agricultura, Fabricas e Navegação deste Estado do Brazil e seus Domínios Ultramarinos: um Tribunal de Antigo Regime na Corte de Dom João (1808-1821)*, Master's thesis, Universidade Federal Fluminense, Niterói, 2009. Available from: <<http://www.historia.uff.br/stricto/td/1339.pdf>>. Accessed on: February 10, 2014; Paulo Paranhos, *A Casa da Suplicação do Brasil. A Modernidade na Justiça Brasileira*, Rio de Janeiro, Erregê, 1993.

¹⁸We define legal culture broadly as "the generator of values and positions that regulates legal action". Note that this definition includes any legal agent, in and out of court.

¹⁹The *Rio Grandense* newspaper was explicitly created in 1845 to serve the interests of tradesmen. Cláudia Simone de Freitas Munhoz, *A Associação Comercial do Rio Grande de 1844 a 1852: interesses e atuação representativa do setor mercantil*, Dissertação de mestrado, Universidade do Vale do Rio dos Sinos, São Leopoldo, 2003, p. 118.

tradesman²⁰ Francisco Ferreira de Almeida²¹ allows us to do an in-depth research of legal practice, as it was treated and judged by various courts in Porto Alegre and Rio de Janeiro during the 1850s.²² The process began with an attempt at conciliation.²³ At this stage, the parties tried to reach an agreement in an oral proceeding before the magistrate of the first district of Porto Alegre.²⁴ As this proceeding could not be concluded, the case was treated later, from March 1853, as a case of voluntary arbitration by the “Arbitration Court of the Municipality of Porto Alegre”.²⁵ The arbitration judges were chosen by the disputing parties and were tradesmen, thus constituting a case of trial by peers.²⁶ They examined the account books of Ferreira de Almeida and gathered testimonies. In the middle of the arbitration process, Francisco Ferreira de Almeida was arrested on suspicion of introducing counterfeit currency into circulation. The process took very long, and finally, the “arbitration”, not being able to make an assessment of the defendant’s business in the time provided for in Regulation 737, closed the case on June 5, 1854, without passing any sentence, leaving to the parties the possibility to appeal to the “Court of Civil Law of Commerce”.²⁷ Thus began a series of processes conducted in various first and second instance civil and

²⁰Being registered with the Chamber of Commerce of Rio de Janeiro was mandatory from 1809 on for wholesale merchants (*negociantes de grosso trato*).

²¹Francisco Ferreira de Almeida was an agricultural tradesman (dealing especially with animals, leather, dried meat, and beans), but also sold textiles, kitchenware, hardware, and books. He had a share in a ship (“Patacho Lívia”) and owned some houses and lands in Porto Alegre. Arquivo Nacional (AN), Relação do Rio de Janeiro, “José Francisco de Azevedo Quintão e Francisco Lopes da Costa Moreira, agravantes/Francisco Ferreira de Almeida, agravado, 1854”, n. 2.408, cx. 1.605, fl. 652v; 659v-670v.

²²Decreto nº 737, de 25 novembro de 1850, Art. 16: “Na arrecadação, administração e distribuição dos bens dos negociantes que não forem matriculados, nos casos de fallencia, se guardará no Juizo Commercial quanto se acha determinado pelo Código para as quebras dos commerciantes, na parte que fôr applicavel (art. 909 Código).” Lei nº 556, de 25 de junho de 1850, Art. 909: “Todavia na arrecadação, administração e distribuição dos bens dos negociantes que não forem matriculados, nos casos de fallencia, se guardará no Juizo ordinario quanto se acha determinado pelo presente Código para as quebras dos commerciantes matriculados, na parte que for applicavel.” Available from: <http://www.planalto.gov.br/CCIVIL_03/decreto/Historicos/DIM/DIM737.htm>. Accessed on: February 10, 2014.

²³Edson Alvisi Neves, *Magistrados e negociantes na Corte do Império do Brasil: o Tribunal do Comércio*, Rio de Janeiro, Jurídica; FAPERJ, 2008, p. 235, states that the conciliation was authorized for registered tradesmen, only – a situation, he states, “confirmed by the Notice of July 8, 1851”. But the case of Ferreira de Almeida shows that the notice was not observed or that it took too long for it to be applied in Porto Alegre. According to Eugene Ridings, *Business interest groups in nineteenth-century Brazil*, Cambridge, Cambridge University Press, 1994, p. 295: “Despite the law, the benefits of the Commercial Code apparently were increasingly given to nonregistered businessmen as well, for the requirement was more and more ignored”.

²⁴Decreto nº 737, de 25 novembro de 1850, Art. 24: “Póde intentar-se a conciliação perante qualquer Juiz de Paz, onde o réo fôr encontrado, ainda que não seja a frequenzia do seu domicilio”.

²⁵In accordance with Article 411 § 1 of Regulation nº 737, of November 25, 1850, which states that the arbitration “[is] voluntary when instituted by a compromise from the parties”.

²⁶Edson Alvisi Neves, *op cit.*, p. 164-165.

²⁷The decision was published by Ferreira de Almeida’s former partner and legal opponent, Francisco Antonio Borges, in the newspaper *Correio do Sul* on July 02, 1854, p. 4, and is filed with the documents of AN, *op cit.*, fl. 932: “Não tendo sido possível aos árbitros proferirem sentença definitiva nestes autos, dentro do prazo, em que as partes combinarão, porque devendo-se com atenção e cuidado, que e matéria exigia, examinar as contas, imensos documentos, e as alegações que constão dos autos [...], e ao juiz arbitral, não é permitido segundo o código do comercio e seu respectivo regulamento, ir além do mesmo prazo, sem ficar invalidada toda e qualquer decisão, que definitivamente proferisse sobre as questões, que lhe forão submetidas, os árbitros entregão os presentes autos sem sentença alguma, pelos motivos acima expedidos, devendo o escrivão intimar este despacho às partes, para seu conhecimento, e poderem requerer o seu direito no juízo, e pelos meios que foram competentes. Porto Alegre 5 de junho de 1854. — José Domingos dos Santos, Joaquim Lopes de Barros, João Correia de Oliveira, Joaquim José de Oliveira Castro, José Antônio Coelho Junior, Antônio José Pedroso”.

criminal courts. In addition, legal proceedings were accompanied by a press campaign initiated by the participants, including the “arbitration judge”, which aimed to discredit the opposing party.

As the “arbitration” did not pass on any sentence, several tradesmen appealed to the “Court of Civil Law of Commerce” of Porto Alegre,²⁸ requesting the bankruptcy of Ferreira de Almeida. The bankruptcy was opened with the sentence by the “municipal judge of commerce” on September 21, 1854.²⁹ However, a complaint filed by Ferreira de Almeida was received, and judged valid, and the judge declared his bankruptcy null and void. Consequently, his goods were returned to him in December, 1854. But, some of his creditors appealed to the District Court of Appeal (second instance),³⁰ which gave a decision on the recourse (*acordão*), on February 16, 1855, which maintained the opening of bankruptcy case and the order to confiscate Ferreira de Almeida’s goods again.³¹ The case was returned to the first instance, and Ferreira de Almeida was declared in “casual qualified bankruptcy”. However, the “public prosecutor of the second criminal court” appealed against the decision, and the District Court of Appeal, in the second instance, declared, on March 20, 1857, that Ferreira de Almeida had engaged in “negligent bankruptcy” and therefore should be sentenced to prison.³² The bankrupt, however, presented a concordat project to the justice of the peace. Thus, in meetings with creditors, from May 1857, an arrangement was made,³³ which consisted of granting him a deadline without the reduction of debts, and Ferreira de Almeida was acquitted of bankruptcy. However, not all creditors signed the document, which, on September 1, 1857, was approved by the “substitute municipal and commerce judge” of Porto Alegre.³⁴ Some of his creditors appealed to the same instance, and another “substitute municipal and commerce judge”, on April 7, 1859, considered the bankruptcy invalid and recognized as valid the claims of several of these creditors, whose

²⁸Decreto nº 737, de 25 novembro de 1850, Art. 6: “As atribuições conferidas pelo Código aos Juizes de Direito do Commercio e o conhecimento das causas commerciaes em primeira instancia, competem aos Juizes Municipaes, ou do Civel, onde os houver”.

²⁹AN, Relação do Rio de Janeiro, “Sentença do juiz do comercio José Pereira da Costa Motta, de 21 de setembro 1854”, nº 2.408, cx. 1.605, fl. 535v-536r.

³⁰The Court of Appeal responsible for Rio Grande do Sul was the Court of Appeal of Rio de Janeiro, also known as the Court’s Court of Appeal. The Court of Appeal of Rio Grande do Sul and Santa Catarina was only created in 1873, based in Porto Alegre.

³¹AN, Juízo Especial do Comercio da 1ª Vara, “Decisão do juiz municipal, substituto do comercio de Porto Alegre, José de Araújo Brusque, de 7 de Abril 1859”, nº 6.868, cx. 361, fl. 1358v.

³²Decreto nº 707, de 09 de outubro de 1850, Art. 18: “No crime de banca-rotta, ou quebra com culpa e quebra fraudulenta, formarão a culpa até ao primeiro de Janeiro de mil oitocentos cincoenta e hum os Juizes Municipaes. Desta data em diante será a mesma attribuição exercida pelos referidos Juizes tão somente nas Provincias onde não houver Tribunal do Commercio, ou Relação”; Art. 19: “Formada a culpa pelos ditos Juizes, se proseguirá no processo pela fôrma estabelecida nos Artigos antecedentes. Quando porém tiverem procedido a formação da culpa os Tribunaes do Commercio, ou Relações, remetido o traslado do processo, na conformidade do Artigo oitocentos e vinte do Código do Commercio, o Juiz de Direito, procederá a julgamento pela fôrma estabelecida a respeito dos crimes de que trata este Regulamento”; Art. 20: “Não haverá recurso do despacho de pronuncia ou não pronuncia, quando for proferido pelos Tribunaes de Commercio ou Relações”.

³³Foreseen in the Regulation nº 738, de 25 de novembro de 1850, Art. 132. Available from: <http://www.planalto.gov.br/CCIVIL_03/decreto/Historicos/DIM/DIM738.htm>. Accessed on: February 10, 2014.

³⁴AN, Juízo Especial do Comercio da 1ª Vara, “Homologação da concordata pelo juiz municipal suplente, e substituto do comercio, Luiz Alfonso de Azambuja, 1 de setembro 1857”, nº 6.868, cx. 361, fl. 1224r-v.

initial claims had been ignored by the commission that examined Ferreira de Almeida's account books for the concordat in 1857.³⁵ Ferreira de Almeida appealed against the decision in the District Commercial Court, but the "Special Court of Commerce of the first Court of Rio de Janeiro" confirmed, on June 16, 1860, the invalidity of the concordat, estimating that it could not have been approved, in view of the provision of Article 848 of the Commercial Code³⁶ and because Ferreira de Almeida had already been tried for negligent failure by the District Court of Appeal.³⁷ The judge of the Commercial Court, João Lopes da Silva Coito, considered that

the denial of a concordat is one of the civil effects pronounced in the case [ruling by the Court of Appeal, which qualified it as negligent bankruptcy in 1857], in which the bankrupt is judged guilty, and this effect remains, no matter what the final judgment of the crime is for infringing Art. 82 of the Code, for despite the bankrupt having been acquitted in the criminal judgment, the effect of that declaration remains in force; even more so since the acquittal is still dependent on the appeal of the decision filed by the Public Prosecutor.³⁸

*Social interactions and the embeddedness of the
disputing parties and judges in the social, economic,
and political environment (or networks)
influenced the way courts worked*

The bankruptcy process was accompanied by others, in civil and criminal courts. Francisco Ferreira de Almeida denounced, for example (unsuccessfully), his former partner, Francisco Antonio Borges,³⁹ who sold him slaves and, during Ferreira de Almeida's bankruptcy process, incited them to flee.⁴⁰

³⁵AN, Juízo Especial do Comercio da 1ª Vara, "Decisão do juiz municipal, substituto do comercio de Porto Alegre, José de Araújo Brusque, de 7 de Abril 1859", n. 6.868, cx. 361, fl. 1358r-v.

³⁶Lei nº 556, de 25 de junho de 1850, Art. 848 : "[...] Não póde dar-se concordata no caso em que o fallido for julgado com culpa ou fraudulento, e quando anteriormente tenha sido concedida, será revogada." Available from: <<http://www2.camara.leg.br/legin/fed/lei/1824-1899/lei-556-25-junho-1850-501245-publicacaooriginal-1-pl.html>>. Accessed on: February 10, 2014.

³⁷Decreto nº 737, de 25 novembro de 1850, Art. 2º: "Constituem legislação commercial o Código do Comércio, e subsidiariamente os usos commerciaes (art. 291 Código) e as leis civis (arts. 121, 291 e 428 Código). Os usos commerciaes preferem ás leis civis sómente nas questões sociaes (art.291) e casos expressos no Código".

³⁸AN, Juízo Especial do Comercio da 1ª Vara, "Relatório do desembargador do Tribunal do Comercio, João Lopes da Silva Coito de 4 de junho de 1860", n. 6.868, cx. 361, fl. 140r. The report is directly followed by the decision of the Commercial Court, confirming the decision of the municipal judge of Porto Alegre (fl. 1404).

³⁹Francisco Antonio Borges underwent bankruptcy in 1852, but unlike Francisco Ferreira de Almeida, was able to secure a concordat with his creditors. At the time of bankruptcy, Borges was in possession of hundreds of animals, various lands, 53 slaves, among others, Arquivo Público do Estado do Rio Grande do Sul (APERS), "Processo judicial em juízo de distrito civil de Porto Alegre: Francisco Antônio Borges, falido/Francisco Ferreira de Almeida, requerente, 1852", n. 949.

⁴⁰AN, Relação do Rio de Janeiro, "Apelação criminal: Francisco Ferreira de Almeida, apelante/Francisco Antônio Borges apelado, 1856-1857", n. 386, cx. 129.

The provisions of the Commercial Code

The Brazilian Commercial Code entered into force in 1850 and was supplemented by Regulation No. 737, 1850, which regulated the organization of courts and established a new rules for the legal procedure. As Brazil did not have a Civil Code until 1916, the Commercial Code, Regulation 737, and the General Law of Mortgages (1864) primarily served, in part, as the sources of Private Law. However, when it came to the ordinary procedure, the Regulation followed, in large part, the Philippine Ordinances, which also continued to be invoked in matters not regulated by the new legislation, whose introduction had begun with the Criminal Code (1830) and the Criminal Procedure Code (1832).⁴¹

Thus, Jose Reinaldo de Lima Lopes notes that

the 1850 Regulation created a culture and kept much of the old culture. It kept, for example, oaths as means of admissible evidence in some cases and witnesses in large numbers [...]. They were interviewed by inquiry letters, and questions were notarized in advance. The parties themselves composed the “audience”, the term was issued by the Registrar and the judges scarcely attended. A system of legal evidence (absolute and relative) was kept. Of utmost importance to the legal culture was to determine that each action corresponded to a different title [...] (chartering, insurance, salary), resulting in procedural formalities, already inherited from the old culture.⁴²

The Regulation determined that the commercial jurisdiction was applied in all causes standardized by the Commercial Code and in which one of the parties was a tradesman, but the debt also had to be related to commerce.⁴³ Article 2 of the same Regulation provides that “commercial law is constituted by the Commercial Code, and, as an alternative, commercial uses (art. 291) and civil law (arts. 121, 291 and 428 of the Code). Commercial uses will only be regulated by civil law in social issues (art. 291) and in cases specified in the Code”⁴⁴

According to the Regulation, “Municipal or Civil Judges” were competent to hear commercial cases in the first instance.⁴⁵ The District Courts of Appeal

⁴¹José Reinaldo Lima Lopes, *O direito na história*. Lições introdutórias, 4. ed., São Paulo, Atlas, 2008, p. 271-287. In the process of Ferreira de Almeida, in addition to using the codes, his lawyer bases his claim on the manual by Portuguese lawyer José Ferreira Borges, *Diccionario juridico-commercial*, Porto, Typographia de Sebastião José Pereira, 1856 [1839] and on French author Jean-Marie Pardessus, who published, among other works, *Éléments de jurisprudence commerciale*, Paris, Durand, 1811; *Cours de droit commercial*, Paris, Gamery, 1814-1816, 4v; *Collection de lois maritimes*, Paris, Imprimerie Royale, 1828-1845, 6v; and *Les us et coutumes de la mer*, Paris, Imprimerie Royale, 1847, 2v. AN, Juízo Especial do Comercio da 1ª Vara, “Apelação de Francisco Ferreira de Almeida contra a decisão do juiz municipal, substituto do comercio de Porto Alegre, José de Araújo Brusque de 7 de Abril 1859, anulando a homologação do concordata”, nº 6.868, cx. 361, fl. 1382r; 1384r.

⁴²José Reinaldo Lima Lopes, *op cit.*, p. 287.

⁴³Decreto nº 737, de 25 de novembro de 1850, Art. 10: “Competem á jurisdicção comercial todas as causas que derivarem de direitos e obrigações sujeitas as disposições do Codico Commercial, contanto que uma das partes seja comerciante (art. 18. Tit. Único Código)”; Art 11: “Não basta que para determinar a competência da Jurisdicção comercial que ambas as partes ou alguma delas seja commerciate, mas é essencial que a divida seja também comercial: outrossim não basta que a divida seja comercial, mas é essencial que ambas ou uma das partes seja comerciante, salvos os casos e excepções do art. 20”.

⁴⁴Decreto nº 737, de 25 de novembro de 1850, Art. 2º.

⁴⁵*Ibidem*, Art. 6º: “As attribuições conferidas pelo Código aos Juizes de Direito do Commercio e o conhecimento das causas commerciaes em primeira instancia, competem aos Juizes Municipaes, ou do Cível, onde os houver (art. 17 Tit. unico Código)”.

(Bahia, Rio de Janeiro, Maranhão, and Pernambuco) served as second and last instances.⁴⁶ In Porto Alegre, traders organized themselves into a “commercial association (*praça do comercio*)”, forming the “Commercial Association of Porto Alegre” in 1858.⁴⁷ However, even before this date, the early stages of proceedings of conciliation and arbitration were conducted by merchants who acted as lay judges. It is noteworthy that even in the initial phase of conciliation and arbitration, there was the participation of lawyers.

Enforcement of the legislation

Law enforcement represents a process conditioned by several factors. Thus, the procedure in courts was influenced by a process of interpretation of rules and legal facts, by the way that work was conducted and by the way the court communicated internally and with other courts, as well as by communication in the public sphere. Moreover, social interactions and the embeddedness of the disputing parties and judges in the social, economic, and political environment (or networks) influenced the way courts worked.

Communication in court: the role of legal evidence and honor

The processing of Francisco Ferreira de Almeida’s bankruptcy case with the Commercial Court proved difficult from the point of view of the judges. This is because, since the first phase, which Edson Alvisi Neves calls “pre-judicial”, arbitration judges could not even establish a definitive assessment of the bankrupt’s business, or define who his creditors were.⁴⁸ From this initial imbroglio, the Municipal Court and the Court of Appeal sought to reach a

⁴⁶Decreto nº 737, de 25 de novembro de 1850, Art. 7º: “As relações do districto são Tribunaes de segunda e ultima instancia nas causas commerciaes, e lhes competem: § 1º O conhecimento por appellação das causas commerciaes cujo valor exceder de 200 mil reis (art. 26 Tit. Unico Codico). § 2º O conhecimento da appellação interposta das sentenças do Tribunal do Commercio nos casos dos arts. 851, 860 e 906 Código”.

⁴⁷Cláudia Simone de Freitas Munhoz, *A Associação Comercial do Rio Grande de 1844 a 1852: interesses e atuação representativa do setor mercantil*, Dissertação de mestrado, Universidade do Vale do Rio dos Sinos, São Leopoldo, 2003, p. 83. The author states that the “Rio Grande city Commercial Association” was established in 1844, whose regulation, approved by the President of the Province, Conde de Caxias, in 1845, did not change their statute after the introduction of the Commercial Code of 1850. Sources prove, according to the author, that in June 1889 the statute was still the same as in 1845. This demonstrates the continuity of practices already established in commercial associations. Munhoz states that “the Commercial Code only regulated what was already in force from usages and customs in commercial associations” (p. 87). Eugene Ridings, *Business interest groups in nineteenth-century Brazil*, Cambridge, Cambridge University Press, 1994, p. 287, goes beyond that and stresses the role of local authorities in the formulation – through the legal practice – of the law: “The Commercial Code of 1850 provided that usages and customs be determined by the local commercial association, whereupon they became law, duly registered by the commercial courts.”

⁴⁸Edson Alvisi Neves, *Magistrados e negociantes na Corte do Império do Brasil: o Tribunal do Comércio*, Rio de Janeiro, Jurídica; FAPERJ, 2008, p. 164. The author only deals with the hierarchy between the different legal instances in the Portuguese system. He does not provide any information on the post-1850 Brazilian system. However, the phases of conciliation and arbitration also existed in the Portuguese Commercial Court and were provided for in the Philippine Ordinances. It can be questioned why (based on what criteria) name these two components of the process “pre-judicial”, meaning components outside the actual judicial process, as they were prescribed by law as integral stages of the whole bankruptcy process and that, in case of disagreement, the process would be transferred to the municipal court. Cf. Benoît Garnot, “Justice, injustice, parajustice et extrajustice dans la France d’Ancien Régime”, *Crime, Histoire & Sociétés/Crime, History and Societies*, vol. 4, n. 1, 2000, p. 103-120.

decision by multiplying the number of witnesses, most of whom argued that they “knew from having heard from different people” or “from general hearsay”.⁴⁹ Thus, the question of what constitutes legal evidence, from a court’s point of view, was raised.

According to the Regulation No. 737, in its Article 138, the following evidence was admitted to the Commercial Court:

§ 1 Public deeds and instruments, which are considered as such by the Commercial Code and civil laws. § 2 Private deeds. § 3 The judicial confession. § 4 The extrajudicial confession. § 5 The supplementary oath. § 6 The oath *in litem*. § 7 The witnesses. § 8 The presumptions. § 9 The arbitration. § 10 The testimony by the party. § 11 The surveys.⁵⁰

In the bankruptcy case of Francisco Ferreira de Almeida, we found that one of the main problems of the process was created by the fact that his account books revealed errors, either because they were manipulated by Ferreira himself or because they were manipulated by his former partner Borges. Thus, it was not possible to determine whether certain people were his creditors or not. It was also unclear whether the funds, object of conflict between Ferreira de Almeida and Borges, were those with which the latter had entered the commercial partnership set by both, or if they were what Ferreira de Almeida owed Borges. Therefore, to establish how the company’s property was administered, the witnesses were asked if the parties had had “intimate friendship between themselves and unlimited confidence”.⁵¹ A similar problem arose in another case, the bankruptcy case of A.S. Levy, a jewelry trader and Alsatian Jew, who, in 1858, for having committed a negligent bankruptcy in Pelotas, fled the city. In this case, the Court of Appeal had great difficulty in determining whether Levy had been actually in a commercial partnership or if he had acted alone.⁵² In both situations, the tradesmen involved were nonregistered, and the courts had to rely on the testimony of witnesses to try to resolve the cases.⁵³

Communication between courts

The testimonials that were presented before the Court of Appeal in favor of Francisco Ferreira de Almeida repeated, in a concerted manner, the statement, according to which, one of the arbitration judges, Joaquim José de Oliveira Castro, had written a note — according to some witnesses, in pencil — on the values of debt, the object of the contradiction between Ferreira de Almeida and

⁴⁹Among others, AN, Relação do Rio de Janeiro, n. 2.408, cx. 1.605, fl. 569v; 596r.

⁵⁰Regulamento nº 737, Art. 138.

⁵¹AN, *op cit.*, fl. 588v; 594v-595r; 598r; 566r.

⁵²*Idem*, “Juiz de Distrito da 1ª Vara Crime da Corte do Rio de Janeiro: Carlos Constant Chateay e Randolpho Fischer, administradores da massa falida de A. S. Levy, apelantes/Santiago de Prate, e M. I. Schlosmann, apelados, 1859”, n. 837, maço 163.

⁵³It is noteworthy that legal documents provide an important tool for the study of all types of tradesmen, but above all, they enable the study of small, nonregistered tradesmen, whose actions are difficult to capture otherwise.

Borges.⁵⁴ This type of argument was made possible because the documents in the Court of Appeal contain no official information given by the respective court or judge. The conciliation and arbitration processes were conducted orally, and there was no communication between these legal instances and the Court of Appeal. Consequently, judges eventually asked the witnesses if such a note existed, and what it consisted of. There is no evidence that the arbitration judge would have been contacted by the Court to give information on the subject. The same witnesses also argued that Borges had confessed to the police chief of having authorized Ferreira de Almeida to make use of the amount that was delivered to him.⁵⁵ However, the procedural documents do not contain any trace of communication between the police chief and the Municipal Court or the Court of Appeal.

Typical of cases of bankruptcy was the fact that court cases initiated by different creditors were conducted simultaneously by several courts

In fact, the legal process was mainly dominated by clerks. The parties gathered the evidence and testimonies were issued. Clerks required cash against documents from courts to handle written declarations on processes and decisions taken in other instances. The parties also gathered testimony in hearings that were conducted by the Judge of Civil Law and Commerce in the presence of lawyers from both sides. This type of procedure resulted in very extensive documentation, with several repetitions. The processes were expensive and slow. On the other hand, the decisions from the Court of Appeals often did not exceed half a page of the entire file.

Typical of cases of failure was the fact that court cases initiated by different creditors were conducted simultaneously by several courts. The parallel proceedings could thus influence the procedure. In the case of Ferreira de Almeida, there were doubts about the nature of the bankruptcy (negligent or common) and about the recognition of the creditors as such. The courts had to decide whether the trial could be completed or not before other processes had been closed. The multiplicity of processes could also serve as an attempt to stop a new process or to introduce new evidence in the procedure, referring to cases that had been decided in relation to other creditors in the bankruptcy in question.

⁵⁴AN, Relação do Rio de Janeiro, n. 2.408, cx. 1.605, fl. 569v; 573r-576r; 578v; 579v-580r; 584v; 593v; 594r; 597v.

⁵⁵*Ibidem*, fl. 569v; 578v; 584v.

Discourses outside of court: the role of newspapers

In 1855, the newspaper *Correio do Sul* of Porto Alegre published a letter to the editor about Francisco Ferreira de Almeida's bankruptcy case. The letter, written by one of the arbitration judges, paints a grim picture of the bankrupt:

Reading the correspondence signed by Mr. Francisco Ferreira de Almeida [...] in which this gentleman vomited on me all of his bile for passing on him a sentence, as a Judge of Commerce, that was against his wishes and calculations, I have to thank you for the officiousness with which you came for my defense [...] for such a man, thoroughly discredited by public opinion, and accused by it of passing counterfeit bills, of being a forger of signatures, and of having taken possession of the fortune of many unsuspecting people through gambling, should certainly not be the object of the sympathy of anyone who values honor and honesty and who, in their whole public and private life, always deserved the esteem and consideration of good men.⁵⁶

We observe, therefore, that even the arbitral judge participated in discourse about the process in a public forum. In fact, there were several publications on the case of Ferreira de Almeida in the newspapers *Correio do Sul*, *O Mercantil*, and *Rio Grande*.⁵⁷ The articles were written by Ferreira de Almeida himself, by his former partner and legal opponent Francisco Antonio Borges, by the lawyers of both parties, and by anonymous authors. Borges used the newspapers to systematically discredit Ferreira de Almeida in public, publishing excerpts of the proceedings and complaints about the defendant's conduct.⁵⁸

These newspaper articles were eventually attached to the case file by the Court of Appeal. The act of publicly discrediting opponents could also be considered an attempt to influence indirectly, through public pressure, arbitration and municipal judges, and, through the introduction of new arguments, the process itself.⁵⁹

⁵⁶Joaquim Lopes de Barros in the *Correio do Sul*, n. 269, 1855, p. 3. He is pointed as one of the major meat exporters (1831-1842) in statistics collected by Gabriel Santos Berute, *Atividades mercantis do Rio Grande de São Pedro: negócios, mercadorias e agentes mercantis (1808-1850)*, Doctoral thesis, Universidade Federal do Rio Grande do Sul, Porto Alegre, 2011, p. 82. The author also notes that "captain Joaquim Lopes de Barros was one of the main procurators [...] and was active in the cabotage trade with Rio de Janeiro. His merchant vessel, 'Cruzeiro do Sul' returned, in at least two occasions, carrying various goods and slaves. To the 'carioca' port, he sent meat and hides, as well as 'two slaves to be delivered', as stated in three pilotage records of Barra do Rio Grande", p. 253. Thus, the arbitration judge Lopes de Barros was active in the same type of trade as the bankrupt.

⁵⁷Not all articles have been included in the records. In the articles preserved in the National Archives of Rio de Janeiro for the case of Ferreira de Almeida, there are quotations from the following newspapers: *O Mercantil*, 20 de outubro de 1853; 24 de dezembro de 1853; 04 e 05 de janeiro de 1854; 1º de abril de 1854; 30 de maio de 1854; 20 de janeiro de 1855. *Correio do Sul*: 17 de março de 1853; 30 de dezembro de 1853; 27 de maio de 1854; 02 de julho de 1854; 15 de março de 1855. *Rio Grandense*, 08 de março de 1855.

⁵⁸In particular, *Correio do Sul*, n. 206, 02 de julho de 1854, p. 1-4; *Idem*, 17 de março de 1853.

⁵⁹We did not find such articles in other court documents. It would be interesting in the future to try to systematize the study of newspapers as a forum for fighting legal conflicts. It is likely that publications on bankruptcy proceedings in local newspapers were frequent, but were they taken into account by the courts and, if that was the case, it is possible to assess their impact on the procedure?

Social networks and the autonomy of the courts

The former partner of Ferreira de Almeida, Francisco Antonio Borges protested publicly, in newspaper *Correio do Sul*, against the delays in the initial arbitration process. His protest reveals some of the problems related to the fact that the arbitration judges were tradesmen and lay. So when Ferreira de Almeida, during the arbitration, was arrested for distribution of counterfeit currency and was still managing his property from prison, his lawyer (Antonio Joaquim da Silva Maia), according to Borges, took advantage of the situation:

took full advantage of that circumstance to procrastinate our proceedings; and finally, at the first opportunity he had, to buy himself more time, as I denounced in *O Mercantil* in April 1, presented an unjustifiable and unpleasant suspicion against three of the judges, with the notable circumstance of two of them having been chosen by his employee and under his advice, in addition to the fact that all of them had a reputation and public worth that should have protected them of suspicion by the *honorable* Mr. Almeida and his *worthy* lawyer, Mr. Maia. *This clever piece of dubious advocacy* gave the result that lawyer Mr. Maia had hoped for and that suited the interests of his worthy client, occupying much of the time with frivolous demands, 40 days with second statements when he should only have had 8, further 20 and more days for the probationary term, and 17 days that were ultimately lost in dealing with the witnesses, listening to their answers, and by the absence of Mr. Commerce Judge [...] (emphasis in the original).⁶⁰

During the arbitration, the brother of Francisco Ferreira de Almeida, Rio de Janeiro tradesman João Augusto Ferreira de Almeida, tried to act as an intermediary and, according to Borges, intentionally delayed the process. So when João Augusto returned from visiting his brother in prison without the necessary signature of the latter, which the parties had agreed upon, Borges reported this to the judges, who stated the following:

were unable to finalize the work due to the short time that they had available, as there had been more than twelve days since one of them, the respectable Mr. Antonio Jose Pedrosó, had been and was still sick, so everything had stopped: also counting with the extension that Mr. João Augusto had guaranteed.⁶¹

In this situation, João Augusto Ferreira de Almeida pressured judges to make a decision, saying that he needed to return on the next boat to Rio de Janeiro. The arbitrators decided finally, after 16 months, to close the case without a decision, indicating that the civil court could be appealed to.

Borges continues his article in *Correio do Sul*, praising the arbitration judges for being men of honor, but also accusing one of them of being an ally of Ferreira de Almeida:

⁶⁰*Correio do Sul*, 02 de julho de 1854; it can be found in the documents of the Court of Appeal. AN, Relação do Rio de Janeiro, n. 2.408, cx. 1.605, fl. 932.

⁶¹*Correio do Sul*, *op cit*.

Unfortunately, to get to this shameful result, Mr. Almeida only found the *good person* of lawyer Mr. Maia, because he also had by his side Mr. João Caetano Ferraz, a tradesman with much class spirit, zeal for the morality of commerce, righteousness and independence of character, and who, accepting the appointment as an arbitrator, much by his will, then became a hindrance to his honored colleagues, with continuing diseases in which nobody believed, and behaving in ways as to rise strong suspicions of being cooperating with Mr. Maia to buy time, as he bought nearly a month, when the other arbitrators, not daring to embarrass him, could have decided the issue, and not just to add to my new disturbances and suffering, but also in that he could have been convicted by article 240 of Regulation No. 737 of 25 November 1850, which *reads* as follows: Once the set deadline for resolution of the dispute (art. 437 § 3) has expired, the judge may punish with a fine, of one to five percent the amount of the claim, and imprisonment from eight to twenty days, any judges who are believed to be in cahoots with one of the parties to delay the decision or frustrate the agreement (emphasis in the original).⁶²

The protest shows, even when written by Ferreira de Almeida's opponent, how complicated was the process of arbitration and what were the tools used by the disputing parties. It also illustrates the role of social networks, which had the power to influence the process. The arbitration judges were tradesmen and had often government positions as councilors of the City Council, justices of the peace, and deputies at local and provincial levels.⁶³ In a small town like Porto Alegre, which had about 12,000 inhabitants in 1846 and 16,000 inhabitants in 1858,⁶⁴ tradesmen, of course, knew each other.⁶⁵

⁶²*Correio do Sul*, 02 de julho de 1854. Borges had, the day before the release of the article, protested directly with the judges. In his request, he notes the following impediments: "First, the absence of the clerk when they are about their work, keeping the case files locked in the Registry; second, repeatedly, the absence of the full number of judges, either by diseases, either because their occupations did not allow the attendance of some agents of the process; and third, the suspension put, by this petitioner's opponent, to some of the first judges. In addition, there was also a long break for Christmas holidays, which delayed the proceedings in almost a month and a half, and the event of Almeida's imprisonment, in which, according to the same Rules of Procedure, it was necessary to double the delay and give sight to the Trustee, which, at the time of the last delay, was unexpected, and as it is well known, the process became immediately complicated, I mean, became repeatedly complicated and voluminous". AN, Relação do Rio de Janeiro, "Requerimento de Francisco Antônio Borges, de 1. junho de 1854", n. 2.408, cx. 1.605, fl. 682v.

⁶³Cláudia Simone de Freitas Munhoz, *A Associação Comercial do Rio Grande de 1844 a 1852: interesses e atuação representativa do setor mercantil*, Dissertação de mestrado, Universidade do Vale do Rio dos Sinos, São Leopoldo, 2003, p. 124-133.

⁶⁴The figures only include the free population. Gabriel Santos Berute, *Atividades mercantis do Rio Grande de São Pedro: negócios, mercadorias e agentes mercantis (1808-1850)*, Tese de doutorado, Universidade Federal do Rio Grande do Sul, Porto Alegre, 2011, p. 44.

⁶⁵The thesis by Berute analyzes the networks of tradesmen and, in particular, of general businessmen registered with the Chamber of Commerce. According to the author, in the book of registration of wholesale merchants (*negociantes de grosso trato*) of the Royal Chamber of Commerce, in Rio de Janeiro (1809-1850), were listed 52 dealers in Porto Alegre, and, in the *Almanack da Vila de Porto Alegre* (1808), 57. Gabriel Santos Berute, *op cit.*, p. 141-142. This is the business elite and not of all the tradesmen, but it was this elite who joined other economic agents by business and credit bonds and held the positions of arbitration judges and justices of the peace, among other legal, administrative and political offices.

Unclear physical boundaries between the public space of courts and the private space also reflect the lack of autonomy of the courts.⁶⁶ While the examination of account books in the arbitration of Ferreira de Almeida took place in the City Council of Porto Alegre,⁶⁷ the appointment of the trustee for administration of the bankrupt estate and witness testimony took place in the house of the Commerce Judge José Pereira da Costa Motta.⁶⁸ Considering that processes unfolded essentially using the written form, the handling of documents in the course of the process deserves to be examined in a more profound way.⁶⁹ How was the information transmitted in court, and between the court and its environment? How was the information processed? After all, every kind of administration interprets or translates the rules and instructions it receives. This application process, thus, creates its own administrative logic.

Discrediting opponents could also be considered an attempt to influence indirectly, through public pressure, arbitration and municipal judges

Conclusion

From the bankruptcy case studied here, we can come to some conclusions about the study of the legal organization of imperial Brazil. Thus, it was demonstrated, from the analysis of the bankruptcy case of Francisco Ferreira de Almeida, that the legal system of the years 1850–1860 was characterized by a great complexity of courts, working sometimes in parallel and which interacted or communicated indirectly, that is, above all, upon the written declarations brought to trial and issued by the disputing parties. It is clear from the case studied that the procedure of the Court of Appeal was heavily conditioned by local agents and by actions

⁶⁶On the interference of political and economic elites in the works of Justice, cf. Edson Alvisi Neves, *Magistrados e negociantes na Corte do Império do Brasil: o Tribunal do Comércio*, Rio de Janeiro, Jurídica: FAPERJ, 2008, p. 306-314.

⁶⁷*Correio do Sul*, n. 206, 02 de julho de 1854, p. 1-4.

⁶⁸AN, Relação do Rio de Janeiro, n. 2.408, cx. 1.605, "Sentença do juiz do comercio José Pereira da Costa Motta, de 21 de setembro de 1854", fl. 535v-536r; "Depoimentos das testemunhas, 23 e 24 de novembro de 1853", fl. 568v-585v.

⁶⁹In comparison, for the Early Modern Period, Arndt Brendecke, *Imperium und Empirie. Funktionen des Wissens in der Spanischen Kolonialherrschaft*, Köln; Weimar; Wien, Böhlau, 2009, p. 166; 331-333 [Spanish edition: *Imperio e información. Funciones del saber en el dominio colonial español*, Madrid, Iberoamericana; Frankfurt am Main, Vervuert, 2012], shows how the *consejeros* of *Consejo de Indias* constantly interacted with the petitioners, agents and opposing parties in their houses or on their way to work. The limit between the official and private functions of the *consejeros* was already really fuzzy in the sixteenth century due to the fact they did not have adequate working conditions. Tamar Herzog, *Upholding justice. Society, State, and the Penal System in Quito (1650-1750)*, Ann Arbor, University of Michigan Press, 2004, p. 127-160, gives an in-depth illustration of the social, economic and family bonds between the judges of Quito and the local elites in the seventeenth and eighteenth centuries.

in the early stages of bankruptcy proceedings (conciliation and arbitration). It is also clear that the public and private roles of the agents involved in the judicial process blended up and influenced the process, which still contained elements of the Philippine Ordinances.

However, the issue being addressed in relation to the Code of Commerce and the Imperial courts is not whether they have to be characterized as modern or as old/archaic. It is, instead, to know how the legislation was applied, how the courts worked, and how did the social players of the time define these institutions and dealt with them.

Our analysis of the case shows that, to understand what the legal culture of the Empire was or how the courts worked, one should not rely solely on the legislation, or infer, through the institutional organization, the practical administration of justice. The complexity of judicial organizations becomes more visible when they are studied from the standpoint of administrative and communicative practices of the social players which constitutes them. Each action expressed a variety of behavioral possibilities within the legal system. However, it is worth noting that this kind of a study cannot be carried out only based on the files of proceedings. One needs to examine the legislation and the social context of the players, as well as the very dynamics of the judicial procedure.⁷⁰ Thus, a study that aims to investigate how the mercantile justice was articulated in everyday actions of the disputing parties and the courts —how commercial justice was understood and interpreted by private and institutional agents of the time — needs to be truly interdisciplinary, taking into account the works of both the general historians and legal historians.

⁷⁰These reflections were inspired by the works of Simona Cerutti, *Giustizia sommaria: pratiche e ideali di giustizia in una società di Ancien Régime* (Torino, XVIII secolo), Turim, Feltrinelli, 2003; Hans Joas, *Die Kreativität des Handelns*, Frankfurt am Main, Suhrkamp, 1992; Niklas Luhmann, *Legitimation durch Verfahren*, 3. ed., Frankfurt am Main, Suhrkamp, 1983 [1969]; Birgit Näther, "Produktion von Normativität in der Praxis: das landesherrliche Visitationsverfahren im frühneuzeitlichen Bayern", In: Stefan Brakensiek; Corinna von Bredow; Birgit Näther (orgs.), *Herrschaft und Verwaltung in der Frühen Neuzeit*, Berlin, Duncker & Humblot, 2014, p. 121-135.