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The Anglo-Portuguese Alliance: The Judge Conservator of the British Subjects

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Introduction

Contours of the Anglo-Portuguese relations have received ample attention from academics over the years, especially those aspects relating to military alliances, commercial networks, slave trade or disputes dealing with limits of colonial possessions. Other aspects have received less attention, as is the case with the jurisdictional privilege of a privative judge granted to British subjects. It is, however, an element that deserves to be considered if we want to understand the dynamics of the circulation of legal ideas in Europe and worldwide.

This paper seeks to contribute to a better understanding of the privilege of the forum granted to the English/British subjects from the fourteenth century until mid-nineteenth century. This paper identifies which legal sources are relevant for the study of the British/English Conservatories, clarifies the relevant context that led to the success or failure of different expectations for this forum, reviews the main developments of these Courts over the centuries, and explores the Anglo-Portuguese alliance as a source of legal interchanges not only between both parties but also between other European nations.

The paper begins with an introduction which briefly contextualizes the medieval Anglo-Portuguese friendship and privileges granted to the English in Portugal. The second part of the paper examines the formal structure of the British Conservatories in Portugal, starting with its origin in the fourteenth century and the reasons given for its existence. This paper explores the main characteristics and scope of the privilege of the forum and the legal proceedings followed in Court and also identifies the recipients of this privilege. The third part of this paper explores the competition of jurisdictions between privileged people: on the one hand, it focuses the attention in the competition of jurisdictions between Portuguese and British privileged, on the other hand, the focus is the competition of jurisdictions between English and other privileged foreigners. The final chapter is dedicated to the process of extinction of the Conservatories in the nineteenth century.

I. The Anglo-Portuguese medieval friendship

1. The Anglo-Portuguese alliance

Anglo-Portuguese relations date back to at least the twelfth century, a time when commercial and diplomatic links between Portugal and England are already evident. Also dating back to the twelfth century is a well-known episode during the Second Crusade. In 1147 a group of crusaders on their way to the Holy Land from England and Northern Europe stopped at the port in the city of Oporto and helped D. Afonso Henriques reconquer Lisbon. The traditional version of this episode reports that the aid provided was a matter of chance: when the crusaders' vessels landed for refueling in the city of Oporto, the Bishop of that city went to receive them and persuaded their leaders to help D. Afonso Henriques. A more recent version, based on a letter from Bernard of Clairvaux to D. Afonso Henri-

ques, argues that this stop in Portugal was encouraged and planned in advance by the famous prelate.¹ Afterwards, most of the crusaders proceeded to the Holy Land, but a group of Englishmen remained in Portugal, among them Gilbert de Hastings, the new Bishop of Lisbon.

Since this episode, the friendship between Portugal and England developed steadily through periods of greater and lesser proximity. This friendship can be attested by two letters, dated June 1199, in which John, King of England, refers to the King of Portugal as *karissimi fratris nostri & amici Regis Portigalen* and awards the highest honors to the ambassadors of Portugal.² Trade relations were reinforced by the 1358 Anglo-Portuguese treaty signed between King Edward III and Afonso Martins Alho, the last one that represented the merchants and sailors of Portugal.

It was in the second half of the fourteenth century that relations between both countries gained greater stability. The legal foundations of the Anglo-Portuguese alliance are found in three treaties dating from that period: the Treaty of Tagilde (10 July 1372), the Treaty of London (16 July 1376), and the Treaty of Windsor (9 May 1386).

1.1 The Treaty of Tagilde

The Treaty of Tagilde, signed by D. Ferdinand I of Portugal and the representatives of John of Gaunt, Duke of Lancaster and son of Edward III of England, on 10 July 1372, is considered the preamble of the alliance that still prevails today.³ This treaty, signed at the Church of São Salvador of Tagilde (Vizela municipality, Braga district), sealed the alliance of the two claimants to the Castilian throne.

The context of the Treaty of Tagilde was the Hundred Years' War and the disputes over the Castilian throne between two brothers. D. Pedro, who had been stripped of the Castilian crown by D. Enrique de Trastámara, his illegitimate brother, gained English support to recover it from D. Enrique, who had the support of France. At the battle of Montiel (1369), D. Pedro was killed and D. Ferdinand I of Portugal, the legitimate great-grandson of D. Sancho IV of Castile, declared war on D. Enrique.

It was under these circumstances that an embassy arrived in Portugal from John of Gaunt, Duke of Lancaster, among whose ambassadors were João Fernandes Andeiro and Roger Hoor. The Duke of Lancaster had married D. Pedro's daughter Constance in 1371 and therefore had pretensions to the Castilian throne. The ensuing Treaty of Tagilde determined that the King of Portugal and the Duke of Lancaster were true friends and that they would wage simultaneous war against Castile and Aragon on two fronts: the English in the north and the Portuguese in the west.⁴

D. Ferdinand, shortly after signing the Treaty, sent two ambassadors, Vasco Domingues and João Fernandes Andeiro, to the Duke of Lancaster in England to swear and sign the Treaty of Tagilde, which they duly did at the Savoy Palace.⁵ These ambassadors also carried powers to make complementary alliances with King Edward III of England and the Prince of Wales.⁶ These negotiations resulted in the Treaty of London of 16 June 1373.

1.2. The Treaty of London

The Treaty of Peace, Friendship and Alliance between King Ferdinand I and Queen Leonor of Portugal and King Edward III of England was agreed in perpetuity on 16 June 1373 in St. Paul's Cathedral. It is considered the main legal foundation of the Anglo-Portuguese alliance and quotes the Treaty of Tagilde as its precedent, while pre-

¹ This would explain, among other aspects, the reason why this group decided to use the sea route to reach Palestine, while the majority of the crusaders who made up the Second Crusade travelled by land. Cf. J. Phillips, *St. Bernard of Clairvaux, the Law Countries and the Lisbon letter of the second crusade*, [Journal of Ecclesiastical History, 48], Cambridge 1997, p. 485-497; H. Livermore, *The Conquest of Lisbon and its author*, [Portuguese Studies, 6], 1990, p. 1-16.

² Cf. T. Rymer, *Foedera, Conventiones, Litterae, Et Cujuscunque Generis Acta Publica, Inter Reges Angliae Et Alios Quosvis Impeatores, Reges, Pontifices, Principes, Vel Communitates: Ab Ingressu Gulielmi I. In Angliam, A.D. 1066, Ad Nostra Usque Tempora Habita Aut Tractata*, Record Commission Edition, T. I, London 1641-1713, p. 76.

³ Cf. S. Pinto, *Tratado de Tagilde de 10 de julho de 1372*, [Scientia Iuridica, Separata, Year II, 6], Braga 1952, p. 1-18.

⁴ Cf. P. E. Russell, *A intervenção Inglesa na Península Ibérica durante a guerra dos cem anos*, Lisboa 1955, pp. 221-222.

⁵ Cf. Pinto, *Tratado de Tagilde*, p. 10-11.

⁶ Santarém, *Quadro elementar das relações políticas e diplomáticas de Portugal com as diversas potencias do mundo: desde o princípio da monarchia portugueza até aos nossos*, v. XIV, Lisboa 1842, p. 55.

senting itself as an extension of those clauses.⁷ Its four clauses include the declaration of mutual and perpetual peace, friendship, union and alliance between the two parties, the commitment by both parties not to establish friendship with the enemies and persecutors of the other party, and the reciprocal obligation of assistance with military aid, or any other type of aid, for the need to defend the kingdom, provinces, dominions and places in the event of offence, oppression or invasion by land or sea. This treaty, with no revisions, has subsequently been confirmed on several occasions.⁸

1.3 The Treaty of Windsor

On 9 May 1386, the Treaty of Windsor between John I of Portugal and Richard II of England was signed in perpetuity, ratifying the 'perpetual league, friendship and confederation' between the two monarchs, with the obligation of mutual aid. This treaty has greater breadth of content than the two previous treaties, as it enshrines in its articles the freedom of trade and transit for natives of each party in the territory of the other party 'as if they were its natives'.⁹

One of the first practical consequences of this treaty was to propitiate the beginning of diplomatic negotiations for the marriage between D. John I of Portugal and Philippa of Lancaster, daughter of John of Gaunt. The marriage took place on 2 February 1387 and initiated a period of greater proximity between the two reigning houses.¹⁰ The alliance became even closer when the son of John of Gaunt, who was also the son-in-law of King John I of Portugal, became Henry IV of England.

Santarém tells us that England's alliance with Portugal was so close from the last half of the twelfth century to the end of the fifteenth century that in the sixteen treaties which English sovereigns concluded with other nations, Portugal was always included as England's ally and confederate.¹¹ The fact that John I of Portugal was the first foreign monarch to become Knight of the Garter (1400) supports the claims of those who see the Kingdom of Portugal as England's first political ally.¹²

The Wars of the Roses initiated a new period in the parties' relationship and the pact of 'true, faithful, constant, mutual, and perpetual friendships, unions, alliances, and deeds of sincere affection' described in Article I of the Treaty of London has continued for more than six centuries. It has survived the most challenging of historical contingencies, including two world wars, the rise and fall of empires, revolution and decolonisation, the multilateralization of international relations, European integration and Brexit.

2. Englishmen's privileges in the Kingdom and Dominions of Portugal

Some of the privileges granted by the Kingdom of Portugal to foreigners are extremely old. Nevertheless, with the discovery of the sea route to India, they had their most notorious phase when, through these privileges, the Portuguese monarchs attracted the most powerful European bankers and merchants to Portugal. The aim and intent were that they would assist monetarily in the Crown maritime enterprises and also have a presence in the Lisbon market.¹³

⁷ Cf. M. Caetano, *Aliança Inglesa*, [Enciclopédia Luso-Brasileira de Cultura 1], Lisboa 1963, p. 1262.

⁸ Cf. Statement by Mr Anthony Nutting in the House of Commons on 12 May 1952, [Anglo-Portuguese Treaty, 1373; 12 May 1952: House of Commons debates - TheyWorkForYou](#)

⁹ The Anglo-Portuguese treaty of 20 October 1353 already enshrined this clause of free transit for people and goods. However, this agreement was valid for only 50 years. Cf. T. Viúla de Faria and F. Miranda, *Pur Bonne Alliance et Amisté Faire: Diplomacia e Comércio entre Portugal e Inglaterra no final da Idade Média*, [Cultura, Espaço & Memória 1], Porto 2010, p. 111.

¹⁰ Cf. H. Baquero Moreno, *O Tratado de Windsor de 1386 no conspecto das relações Luso-Inglesas*, [Coloquio Comemorativo do VI Centenário do Tratado de Windsor], Porto 1988, p. 216-217.

¹¹ Cf. Santarém, *Quadro elementar das relações políticas e diplomáticas de Portugal com as diversas potencias do mundo: desde o princípio da monarchia portugueza até aos nossos*, V. XIV, 2.^a ed., Lisboa 1865, p. CXLIII.

¹² Cf. V. Shillington and A. Chapman, *The Commercial relations of England and Portugal*, London 1907, pp. 18-19.

¹³ Cf. M. Cotta do Amaral, *Privilégios de mercadores estrangeiros no reinado de D. João III*, Lisboa 1965, p. 15-20.

The foreigners who first stood out as recipients of these privileges were merchants. However, these privileges went far beyond the strictly commercial and also included civil and religious prerogatives.¹⁴ We can find these privileges scattered throughout the Ordinances of the Kingdom (*Ordenações do Reino*), the numerous collections of national legislation and manuscript codices, as well as in various treaties signed between Portugal and others nations.

With the benefit of hindsight, the privileges of the English derive their distinct character from the combination of three elements in their relationship with Portugal: its antiquity, extension and continuity over time. The early 1358 treaty, before the formal start of the Alliance, is enlightening in this respect. In fact, it was the Portuguese merchants and sailors who took the initiative to send two representatives to the English court to ask King Edward III for a commercial treaty. This treaty – celebrated for a period of 50 years – was signed by the King Edward III and Afonso Martins Alho, representing the merchants and sailors of Portugal. It was in this treaty that merchants negotiated for the first time the free movement of people and goods between the natives of Portugal and England, Gascony, Ireland, and Wales.¹⁵

After the Treaty of Windsor, trade between both countries was encouraged by King John I and his successors through the granting of several privileges that prevailed throughout the centuries. Indeed, the merchants found in the stability of the Alliance an important channel for their claims, being the main drivers and defenders of a vast set of prerogatives for their freedom of commerce, security of their properties and personal liberties. Many of these prerogatives were established in the various Anglo-Portuguese treaties to the subjects of one part in the territories of the other. These privileges frequently came with jurisdictional clauses that provided for certain categories of disputes to have specific methods of settling disputes (consular protection, mixed commissions, arbitrations, English conservatorial courts, and mixed juries, for example). It was only in nineteenth century the most of these prerogatives disappeared.

II. The Judge Conservator of the British subjects

Among the privileges granted to the British was the privilege of the forum. Formally, until the seventeenth century, this privilege was confined to Lisbon to the Judge of the Customs-House (*Ouvidor da Alfândega*). Later, in addition to the capital, there were British Conservatories in, for example, Oporto,¹⁶ Coimbra,¹⁷ Madeira,¹⁸ Rio de Janeiro,¹⁹ and the Captaincy of Pernambuco.²⁰ As will be seen in detail, the privilege of the forum is one of the oldest granted to the English. Its formal structure was shaped over time mainly by different laws (*alvarás*, decrees, charters,

¹⁴ Cf. V. Ribeiro, *Privilégios de estrangeiros em Portugal (Ingleses, Franceses, Alemães, Flamengos e Italianos)*, [História e memórias da Academia Real das Sciencias de Lisboa: Sciencias moraes e políticas, e bellas letras v. 14], Lisboa 1909-1922, p. 234.

¹⁵ There seems to be no ratification of the 1358 Treaty. Nevertheless, the Treaty was used by both monarchs. Cf. Viúla de Faria and Miranda, *Pur Bonne Alliance*, p. 111; Shillington and Chapman, *The Commercial relations*, p. 41-45; Shillington, *The beginnings*, p. 118-119.

¹⁶ Cf. *Alvará* of D. Pedro II, of 3 September 1691. This law confirms the appointment in favor of *Desembargador* Diogo Mendes Duro as Judge Conservator of the English subjects residing in that city. Cf. M. Machado, *A Comunidade Britânica do Porto: da Idade Média ao final do Século XIX*, [Douro: Vinho, História & Património 03], Porto 2017, p. 173.

¹⁷ The archives of the British Conservatory in Coimbra include cases from 1737 to 1845. Cf. A. Leitão, *Conservatória Britânica de Coimbra*, in: *Guia de Fundos do Arquivo da Universidade de Coimbra*, J. P. Paiva (Coord.), Coimbra 2015, p. 249-253.

¹⁸ By the Ordinance of 17 October 1839, the British Conservatory on the island of Madeira was declared unsustainable as result of English subjects not wanting to continue paying the expenses incurred with it. Cf. *Portaria* of 17 October 1839, Livro 1839 in *Legislação Régia - 1839 (1839-1840-1841) - Coleção Legislação (parlamento.pt)*

¹⁹ Cf. *Alvará* of 4 May 1808 in which the Judge Conservator of the British Nation is created in Rio de Janeiro to function in the same way as that of Lisbon. This law was ratified by Article X of the 1810 Anglo-Portuguese Treaty of Commerce and Navigation.

²⁰ Cf. Letter of 14 January 1814 addressed to the interim Ombudsman of the District of Sertão on the appointment of the Judge Conservator of the British Nation in Pernambuco, in B. Lima Sobrinho, *Documentos do Arquivo Publico Estadual e da Biblioteca Pública do Estado sobre a Comarca de São Francisco*, Vols. IV and V, Recife 1950, p. 149.

royal letters, resolutions, and provisions),²¹ interpretive case-law (*Assentos*) of the *Suplicação* Court (*Casa da Suplicação*),²² and Anglo-Portuguese treaties.²³

1. Origins and recognition of the privilege of the forum in the Anglo-Portuguese treaties

The *Filipinas* Ordinances established that the Judge of the Customs-House (*Ouvidor da Alfândega*) was the Judge Conservator of the English in the same way as provided in the Ancient *foral* of the Englishmen.²⁴ This Charter of Privileges, also known as Ancient Charter, to which the Ordinances make reference was compiled at the time of King John III of Portugal. It is composed of a series of laws granted by successive kings of Portugal in favour of the English and other foreigners, which the English also benefited from.²⁵

In this Charter of Privileges, we find a royal letter from D. Ferdinand of Portugal, dated 29 October 1367 (1405 era), explaining that the monarch wants to 'do grace' to the English merchants from the kingdom of England and the lordship of the Prince of Wales. He addresses Fernão Rodrigues, Judge of the Customs-House (*Ouvidor da Alfândega*) of Lisbon – 'I give you as judge in the cases that they have with some people of my lordship, about some merchandise that they buy and sell from these people or these people to them' – and clarifies that only this judge was competent to hear said causes.²⁶ From that date, English merchants were granted the privilege of the forum in cases involving goods, with the *Ouvidor da Alfândega* as their privative judge.²⁷

Since then, this privative forum was renewed by subsequent monarchs, being described in the *Assento* of 8 April 1634 as a special privilege given in the form of a contract 'by reason and respect of the said merchandise and its debts'.²⁸ The first Anglo-Portuguese treaty to make reference to the Judge Conservator was the Treaty of Peace

²¹ Following Almeida Costa, in this paper we use a very broad concept of law: being understood as any of the manifestations of the Sovereign Will intended to introduce changes in the established legal order. Cf. M. Almeida Costa, *História do Direito Português*, 5.^a ed., Coimbra 2011, p. 327.

²² The *Alvará* of 10 December 1518 determined that if doubts arose to the judges of the *Suplicação* Court about the understanding of some precept, such doubts should be taken to the Governor of the same Court. This would summon the judges that he understood and, with them, set the interpretation that was considered most appropriate. If interpretive doubts persisted, the Governor could submit the doubt to the monarch's resolution. The definitive solutions were registered in the Book of Seating (*Livro dos Assentos*) and had an imperative force for future identical cases. In this way, this *Assentos* of the *Suplicação* Court were mandatory case-law. The *Suplicação* Court was the highest court of the Kingdom. Cf. *Ibidem*, p. 333-337.

²³ In particular, in the Anglo-Portuguese Treaties of 1642, 1654, 1810 and 1843.

²⁴ 'E Conhecerá dos feitos dos Ingleses, no modo que no foral, que de nós tem, he ordenado' (Book I, tit. 52, § 9.º). The *Filipinas* Ordinances were finished in 1595 and came into force through the Law of 11 January 1603. They were only fully repealed by the Portuguese Civil Code of 1 July 1867.

²⁵ Dated March 6, 1536, it was offered in response to a petition made to the monarch and to the Judge Conservator of the English (Dr. Nicolao Dias Tinoco) on behalf of the entire English nation living in the city of Lisbon where they complained that their ancient jurisdictional privileges were constantly being disrespected. An unofficial copy of this Letter can be found, for example, in *The privileges of an Englishman in the Kingdoms and Dominions of Portugal: contain'd in the Treaty of Peace concluded by Oliver Cromwell; and various Laws, Decrees, & c. at sundry times and on divers occasions, made by the Kings of Portugal in favour of the English Nation which are things absolutely necessary to be known, by every person who is in any ways concern'd in the extensive Trade, now carry'd on between the two kingdoms. To which is added the King of Portugal's new Law concerning Diamonds found in the Brazils. Done in Portugueze and English. Printed for the Translator and sold at the Portugal coffee-house in Swithin's-Alley, at the North East Corner of the Royal Exchange*, London. 1736, pp. 50-73.

²⁶ Author's translation. In portuguese: 'Dou-vos por Juiz nos feitos que eles houverem com algumas pessoas do meu senhorio, sobre algumas mercadorias que comprarem e venderem dessas pessoas ou essas pessoas a eles' in National Archives Torre do Tombo, *Chancelaria de Dom Fernando*, Book I, Ref. PT/TT/CHR/F/001/0001; alternative form available: microfilmed copy mf. 651R; p. 20.

Within the administration of the Treasury was the customs administration which included maritime customs, dry ports and river ports where tithes were collected for the entry of goods. The Customs of Lisbon had a special organization that included, at the litigation level, a Customs Ombudsman (*Ouvidor da Alfândega*) who, besides other competences, was the Judge of the Customs. Cf. A. M. Hespanha, *As vésperas de Leviathan: Intuições e poder Político Portugal sec. XVII*, V. I., Lisboa 1986, p. 301.

²⁷ Although the Anglo-Portuguese alliance was not even formalised, the 1353 commercial treaty between Portugal and England was already in force. Russell explains that this important privilege coincided with a period of increased trade between Portugal and England as a consequence of the Hundred Years' War. Castilian merchants became unwelcome in English ports, and the Portuguese became the main suppliers of Iberian goods in England. Cf. Russell, *A intervenção Inglesa*, p. 232; and F. Miranda, *Portuguese Trade in Atlantic Europe*, [E-Journal of Portuguese History 12, 1], Porto 2014, p. 123-124.

²⁸ Translation of the author. In portuguese: 'por razão e respeito de ditas mercadorias e suas dívidas' in, *Collecção Chronologica dos Assentos das Casas da Suplicação e do Cível*, Coimbra 1791, p. 71-73.

and Commerce, signed between João IV and Charles I on 29 January 1642. In Article IX, which establishes a special regime for Englishmen who die in Portugal or in its dominions, this treaty stipulates that the goods of the deceased must be handed over to English agents and factors residing in the town where the death occurred and who had been nominated and instituted by the deceased. If he had not nominated anyone while alive, the same goods would be entrusted by authority of its Judge Conservator to one or more British merchants, who would be obliged to restore the values in question to their true owners or legitimate creditors.

The next Anglo-Portuguese treaty, the 1654 Peace and Alliance Treaty, provided details of the Judge Conservator's functions in Article VI:

Also, for judging all which shall relate to the people of this Republic, a Judge Conservator shall be deputed, from whom no appeal shall be granted, unless to a Committee of Senators, where the disputes shall be determined within the space of four months, at most, after the appeals.

This treaty also formalised a number of other important jurisdictional privileges. For instance, Article XIII stipulates that no Alcaydes or other Royal officers shall arrest or seize without being empowered in writing by the Judge Conservator, except if caught in flagrante delicto.²⁹ It also retained – albeit with some alterations in favour of the Consul – the article relating to the property of the British dead (Article VIII). Moreover, by a combined reading of Articles III, VII, XI and XIII of the same treaty, it established that the English would not only benefit from the privileges granted directly to them, but also from all those granted, presently or in the future, to any nation or republic in alliance with Portugal.

The 1954 treaty was nicknamed the *Magna Carta* of the British residents in Portugal,³⁰ due to the important privileges it recognised in terms of the security of their properties and their personal and commercial liberties. These liberties led to an increase of the community in Portugal, which organised itself into important factories that, in the following centuries, vehemently ensured the protection and continuity of these privileges, including the jurisdictional ones.

2. Justification for its existence

In Portugal, the privilege of the forum was not exclusive to foreigners. Following Pereira e Sousa, there were countless privileges of forum grouped by reason of cause or by reason of people, including tax, maritime trade, retirement, bankrupt and chapels causes. In addition to foreigners, other privileged people included the ecclesiastics, soldiers, knights of military orders, professors and students from the University of Coimbra.³¹

Thus, at a time when the legal protection afforded to foreigners was scarce and when numerous corporations and individuals were often granted a privative judge, this privilege was highly valued by the British and considered necessary for a fair competition between them and Portuguese merchants. The Judge Conservator was seen by British merchants as the principal conservator and protector of their rights and privileges and it was defended as the 'bulwark of all our immunities and rights' and 'the most important of all our privileges, as the infringement of it is the source of almost every grievance'.³²

For the Portuguese, the granting of this special jurisdiction was justified by the benefits for trade and for the Kingdom.³³ In the *Alvará* of 16 September 1665, the privilege of forum is justified to prevent the English from having

²⁹ This privilege is a confirmation of the one already established in the Ancient Charter, which included the *Alvará* of 3 October 1504 in which D. Manuel had granted this same privilege to the Germans.

³⁰ Cf. R. Lodge, *The English Factory at Lisbon: Some Chapters in Its History*, [Transactions of the Royal Historical Society 16], Cambridge 1933, p. 225.

³¹ J. Pereira e Sousa, *Primeiras linhas sobre o processo civil*, V. I, 4.^a ed., Lisboa 1834, p. 18-24.

³² Cf. *The Memorial of Francis Ibbetson, Deputy Consul General, and the Merchants of the British Factory in Lisbon to the Right Honourable The Earl of Halifax approved at the General Meeting of the Factory the 29th of November, 1764 in Memorials of the British Council and Factory at Lisbon, to his Majesty's Ambassador at that Court, and the Secretaries of State of this Kingdom*. London: Printed for J. Wilkie, at Number 71 in St. Paul's Church-yard, 1766, p. 93; 95.

³³ Cf. *Assento* of 8 de abril de 1634 in *Collecção Chronologica dos Assentos*, p. 71-73.

to attend various courts where they saw their causes dilated with declinaturs according to the privileged forums of their opposing parties.³⁴

In the nineteenth century, the Treaty of Commerce and Navigation, signed on 19 February 1810 in Rio de Janeiro, was the first and only Anglo-Portuguese treaty with a justification for the Judge Conservator figure. On the one hand, the Judge Conservator protects and facilitates the commerce between the subjects of Great Britain within the dominions of Portugal, and on the other he facilitates the relations and communications between British and Portuguese subjects (Article X *ab initio*).

However, from the origins of the English Conservator to the nineteenth century the circumstances leading to the creation of this privilege changed greatly. Following the liberal movement in many European countries, personal privileges no longer enjoyed the same grade of acceptance in nineteenth-century Portugal. Nazareth tells us that many distinguished Portuguese jurists disagreed with the numerous privileges of the forum existing in Portugal. He shared Mello Freire's opinion when considering that these privileges, especially personal ones, should be eliminated because they had too many pernicious effects:

*[...] they made the administration of justice very burdensome and uncertain; all citizens were exposed to being summoned to answer before judges very far from their place of residence, and therefore having to abandon their homes and businesses or the legitimate defence of their rights and interests.*³⁵

It was with the arrival of the first liberal system in Portugal that significant steps towards the extinction of personal privileges were taken. In fact, the 1810 Anglo-Portuguese treaty was the last one that provided for the privilege of the forum. The following treaty of 1842 provides for the extinction of the British Conservatories in Portugal, which took place in 1848, as we shall see in due course.

3. The office of Judge Conservator

Between the fourteenth century and mid-seventeenth century, the Conservator of the English was the Judge of the Customs-House of Lisbon. Coinciding with its formal recognition in Article VI of the 1654 Anglo-Portuguese treaty, King John IV appointed Gaspar de Lemos Galvão, who was not the Customs-House of Lisbon, but rather a judge *desembargador* of the *Suplicação*, to be 'Judge Conservator of the English'.³⁶

Shaw adds that Article VI of the 1653 treaty and the successive *Alvará* were a result of the pressure exerted by English merchants who complained about the slowness of their Conservators in resolving cases submitted to them. Moreover, these merchants argued that since the Judge of the Customs was not a judge of higher rank, the decisions were constantly subject to appeals to higher courts, which further dragged out the cases. The English believed that having a judge *desembargador* of the Court of Appeal (*Suplicação*) would alleviate this problem, which they considered chronic.³⁷

Until that date, the British in Portugal had no power of choice in the appointment of their Conservator, who followed the legal procedures laid down for the office of Judge of the Customs-House. After this milestone, in Lisbon, it became customary for the Judge Conservator to be chosen by the British from among the judges *desembargadores* of the *Suplicação*. This appointment fell to the English Lisbon Factory, which paid his salary, with subsequent Royal confirmation. Outside Lisbon, magistrates were recruited from the highest jurisdictions present in each location. In Oporto, they were mainly judges from the *Relação* Court (*Tribunal da Relação*). In places which did not have a *Relação*, they could be the Ombudsmen or magistrates from lower courts. In Coimbra, we can find University professors as Conservators of the English.³⁸

³⁴ Cf. J. Andrade e Silva, *Collecção Chronologica de Legislação Portuguesa compilada e anotada, 1657-1674*, 2.^a ed, Lisboa 1856, p. 101.

³⁵ Author's translation. F. J. Nazareth, *Elementos do Processo Civil*, Coimbra 1850, 99-100.

³⁶ Cf. *Alvará* of 20 October 1656, in Andrade e Silva, *Collecção*, 1648-1656, p. 1656.

³⁷ Cf. L. Shaw, *The Anglo-Portuguese Alliance and the English Merchants in Portugal 1654-1818*, London 1998, Chapter 7.

³⁸ Cf. N. Camarinha, *Juízes e Administração da Justiça no Antigo Regime: Portugal e o império colonial, séculos XVII e XVIII*, Lisboa 2010, p. 113.

The Treaty of Commerce and Navigation between Portugal and Great Britain, signed on 19 February 1810, is the only one with details of the Conservator's appointment procedure. Article X stipulates that the Prince Regent of Portugal grants to the vassals of Great Britain the privilege of nominating and having special magistrates to work in their favour as Judges Conservators in those ports and cities of their dominions where there are tribunals and courts of justice at the time of writing or established in the future. The selection process for these magistrates was as follows: a) should first of all be chosen by the plurality of British subjects residing in or trading at the port or place where the jurisdiction of the judge conservator is to be established; b) subsequently, the choice so made should be transmitted to the British Ambassador or Minister resident at the Court of Portugal to be by him laid before the Prince Regent of Portugal; c) the Regent gives its consent and confirmation; d) in case of not obtaining which, the parties interested should proceed to a new election until the Royal approbation is obtained; e) the removal of the judge conservator, in case of neglect of duty or delinquency, was also to be effected by an application to the Regent of Portugal through the channels of the British Ambassador or Minister, resident at the Royal Court.

The Judge Conservators of the British subjects were therefore true Judges. Over time, various aspects of their magistrature were specified. For instance, by the Decree of 7 April 1728, the incompatibility of the prosecutors and judges of the Crown and the Treasury to be Conservators of a foreign nation was established,³⁹ or, on the contrary, a retired Councillor had no impediment to continue as a Judge Conservator of a foreign nation.⁴⁰ In the Decree of 17 April 1838, we find the manner in which they were to be replaced in case of impediment,⁴¹ and the Decree of 5 April 1839 fixed the manner in which the jurymen, clerks and accountants of the various Courts should function in the existing foreign Conservatories.⁴²

4. Jurisdiction of the British Conservatories

In 1367, D. Ferdinand's Royal Letter, and the *Assento* of 8 April 1634, made clear that this privative forum applied to the Englishmen's causes over goods and their debts.⁴³ Furthermore, Article VII of the 1654 Treaty of Peace and Alliance, signed between King John IV and Oliver Cromwell, formally expanded the scope of this Court to cover all causes related to the people of the Republic of England. In this regard, the Decree of 5 February 1699, reiterates that this privative jurisdiction applies not only to merchant causes but to all civil or criminal causes, when a British is the plaintiff or defendant, except for cases falling within the scope of the Royal Exchequer (*Fazenda Real*).⁴⁴ Over time it was necessary to confirm or clarify several aspects related with the Conservator's jurisdiction, including the clarification that this privilege included the causes of *Força Nova*,⁴⁵ *Preferência*,⁴⁶ and Capital cases.⁴⁷

5. The legal proceedings in the British Conservatory

British subjects only had a privilege of the forum and the decision of the causes and the execution of sentences were regulated by Portuguese law. This means that legal proceedings followed what stipulated in Portuguese law for the most varied causes. Still, the remaining jurisdictional privileges enjoyed by the British subjects could affect these proceedings.

³⁹ Cf. Book 12 of the *Suplicação* f. 134, and Book 3 from the registers of the *Desembargo do Paço* f. 59 vers, in *Legislação Régia - Decretos (1701-1750-I) - Coleção Legislação (parlamento.pt)*.

⁴⁰ Cf. M. Fernandes Thomaz, *Repertório Geral ou Índice Alfabético das Leis Extravagantes do reino de Portugal publicadas depois das Ordenações, compreendendo também algumas anteriores, que se acham em observância*, 2.^a ed. V. I: A-H, Coimbra 1843, p. 149.

⁴¹ Cf. *D. Maria II (1826-1827; 1834-1853) Livro 1838*, in <https://legislacaoregia.parlamento.pt/>

⁴² Cf. *D. Maria II (1826-1827; 1834-1853) Livro 1839*, in <https://legislacaoregia.parlamento.pt/>

⁴³ Cf. *Collecção Chronologica dos Assentos*, p. 71-73.

⁴⁴ Andrade e Silva, *Collecção*, 1683-1700, p. 443.

⁴⁵ *Assento* of 6 March 1782 in A. Delgado da Silva, *Collecção da Legislação Portuguesa desde a última compilação das Ordenações. 1775-1790*. Lisboa 1828, p. 308-309. Cf. also, *Assento* of 15 February 1791 in *Ibidem*, 1791-1801, p. 5-6.

⁴⁶ Cf. *Assento* of 17 March 1792 in Andrade e Silva, *Collecção*, 1634-1640, p. 346-347.

⁴⁷ Cf. Decree of 19 April 1699 in Andrade e Silva, *Collecção*, 1683-1700, p. 447.

The British Conservatories were courts of first instance. Initially, the Judge Conservator's sentences were appealed by *apelação* or *agravo* to the *Suplicação* Court. Additionally, the process needed to be concluded within a maximum period of four months.⁴⁸ In the eighteenth century, as a consequence of the British complaints about the inconveniences of the *apelação*, the *Alvará* dated 31 March 1790 determined that the sentences of the British Conservatory could only be appealed by *agravo ordinário* to the *Suplicação*.⁴⁹

Controversies concerning proceedings were frequent and some of them had to be settled with royal intervention. A royal letter dated 3 July 1642, for instance, clarified that the English could take any oath. Specifically, this royal letter was sent to the Governor of the Oporto *Relação* Court clarifying a situation brought by the Consul of the English Nation about a case of an Englishman who was not allowed to take the supplementary oath because he was a heretic. This fact caused scandal not only to the author, but to the entire English nation. In the light of this situation, the King, after having consulted the *Desembargo do Paço* and taking into account the information gathered about the practice and style of the Kingdom and the universal law, allowed that British vassals could take any oath.⁵⁰

Finally, all proceedings required a document proving that it was in the capacity of privilege of the English nation that the claimants had recourse to that Conservatory. They also included statements and/or powers of attorney from English traders, attesting to the cases of the Portuguese who were their administrators, proxies or feitors.⁵¹

6. The beneficiaries of the privilege of the forum

As configured in the fourteenth century, this special jurisdiction was aimed at English merchants. However, this privilege seems to have been understood in a broad sense to encompass all English people from an early phase. In Article VII of the 1654 Anglo-Portuguese Treaty the scope of the Judge Conservator is formally expanded and the Conservator knows all causes relating to the English people. That is to say, it clearly ceased to be a privilege of the merchants to encompass all English subjects.

In this way, the privilege of the forum applied to cases in which plaintiff or defendant was English and later, to cases involving a subject of one of the three United Kingdoms of Great Britain. In this sense, the Royal Notice of 14 March 1814 clarified that Ireland enjoyed the same privileges as England because it was one of the three United Kingdoms of Great Britain. Therefore, the disputes against the Irish should be immediately referred to the British Conservatory.⁵²

However, those who could benefit from this privileged forum were not only British, but also their feitors, procurators, commercial agents or administrators, regardless of their nationality. In fact, the Ancient Charter already included a Letter, dated 3 October 1504, in which King Manuel extended the privileges granted to the Germans up to six servants each.⁵³ Thus, this Conservatory was a privative court intended for British residing in or trading in the country, or all those who could prove, by charter of privileges, to be administrators, feitors and commercial agents of British nationals.

As the English privilege of the forum was highly valued, the Royal legislation had to face several cases in which the privilege was fraudulently acquired. For instance, by the *Alvará* of 13 October 1752 it was determined that no Judge Conservator could issue general and vague counter-mandates, under the penalty of six months sus-

⁴⁸ Cf. Article VII of the 1654 Treaty and *Alvará* of 20 October 1656.

⁴⁹ Cf. Delgado da Silva, *Collecção*, 1775-1790, p. 600.

According to Gouvêa Pinto, *apelação* was 'a provocação legítima interposta, em tempo hábil, do juiz inferior para o superior, por motivo de remediar o gravame, que se julga feito' (p.1); *agravo* 'o recurso interposto de sentença interlocutória ou definitiva, a fim de que se reforme' and *agravo ordinário* 'o recurso interposto de sentença definitiva ou interlocutória com força de definitiva daqueles juizes de quem não se apela' (p. 23). The first difference between one and the other is that in the *apelação* it is lodged an appeal to a higher court in case one had done injustice in the lower court; in the *agravo ordinário* (also known as *suplicação*) it is lodged the appeal on the assumption that justice had been done, but rigorously (pp. 43-44) in A. Gouvêa Pinto, *Manual de Appellações e Aggravos, ou Dedução Systematica Dos Principios mais sólidos e necessários à sua Matéria, fundamentada nas Leis deste Reino*, 2ª ed. Lisboa 1820.

⁵⁰ Cf. Andrade e Silva, *Collecção*, 1640-1647, p. 149.

⁵¹ Cf. Leitão, *Conservatória Britânica*, p. 251.

⁵² Cf. *Privilegios da Nação Britannica*, p. 23.

⁵³ Cf. *The Privileges of an Englishman*, p. 60-70.

pension from his office.⁵⁴ Similarly, a Notice issued by the Secretary of State for Foreign Affairs on 25 June 1832, denounced the abuse of the privileges granted by treaties to various foreign nations. Consequently, the *Assento* of 11 July 1832 established that: a) the Judge Conservator of the British Nation is entirely subject to the examination of the Government as to the manner in which the charters of privileges of Englishmen to Portuguese vassals are passed, in conformity with the laws and treaties in which this privilege is expressly granted; b) The Government could order these charters to be revoked if they were passed surreptitiously to any Portuguese vassal to whom the Treaties do not grant such privileges; c) The Judges Conservators could only pass these charters with the content of the privileges that had been expressly granted to them by treaties, laws, permits or decrees.⁵⁵

The *Assento* of 23 November 1769 also clarified whether the foreign assignee, who enjoyed the privilege of the forum, could use this privilege against the debtor in the debts assigned by a non-privileged person. It was held that in such cases the privileged party could not use his privilege against the debtors. These privileged parties did not have more rights than those of the assignors. This prevented debtors from having harder contenders than those with whom they had agreed, being removed from their forum when their ceding creditors could not remove them.⁵⁶

Finally, it is important to note that Portuguese monarchs could also extend the privileges of the English (or any other privileges) to other individuals, regardless of their nationality.⁵⁷

7. Conflicts of jurisdiction between privileged people

In Portugal, disagreements over which jurisdiction was competent in the event of competing privileges were frequent from early on. As already mentioned, Portugal had numerous privative judges, and in addition there were several foreign Conservatories. This gave rise to conflicts of the forum between British and other privileged subjects. These controversies generated a series of laws and interpretative decisions which established the rules to be followed in resolving conflicts of jurisdiction.

7.1 Conflicts of jurisdictions between Portuguese and British privileged

With respect to conflicts between Portuguese and British privileged, the general rule was that the British forum preceded generally and indistinctly to all Portuguese privileges: whether of persons or causes, civil or criminal. Portuguese privileged were obliged to respond and litigate –whether as plaintiffs or defendants– in the British Conservatory. The only general exception, as we have seen, was for public fiscal causes. Therefore, the English privilege of the forum was not revoked by Portuguese privileges, such as those of the Tobacco, *Moedeiros*, *India and Mina* Court, and other similar privileges.⁵⁸

7.2 Competition of jurisdictions between British and others privileged foreigners

The existence of Judges Conservators for other foreign nations is already assumed in the *Filipinas* Ordinances. In fact, in addition to what was stipulated about the forum of the English, it was also stipulated that one of the *Corregedores* of the Lisbon Civil Court was in charge of the German merchants' causes 'and of the other privileged ones, staying in the said city'.⁵⁹ Nevertheless, it was specifically from the second half of the seventeenth century that the privilege granted to the English began to be claimed from the Portuguese monarchs by other foreigners.

One of the first distinctions to be made is that some of these privative jurisdictions were founded on treaties and others on unilateral concessions made by the Portuguese Crown. Consequently, the general rule was that priv-

⁵⁴ Cf. *Collecção da Legislação Antiga e Moderna do reino de Portugal*, Parte II: Da Legislação Moderna, v. III, Coimbra 1819, p. 155.

⁵⁵ Cf. Andrade e Silva, *Collecção*, 1634-1640, p. 425-428.

⁵⁶ Cf. *Collecção de Legislação antiga e moderna do reino de Portugal. Parte II da Legislação Moderna: Collecção dos assentos das Casa da Suplicação e do Cível*, 4ª ed, Coimbra 1867, p. 267.

⁵⁷ Privileges could be particular or general. They were particular when granted to an individual or individuals and generally had nothing to do with nationality. Other privileges were general when granted to a homogeneous group, such as those granted to nationals of a given country. In these cases, privileges varied according to the nationality of the bearer, but were the same for all individuals of the same nationality.

⁵⁸ Cf. *Assento* of 8 April 1634 in, *Collecção Chronologica dos Assentos*, p. 71-73; *Alvará* of 16 September 1665 in, *Collecção*, p. 101; Decree of 5 February 1699 in, *Collecção*, p. 443; *Assento* of 6 March 1782 in, *Collecção*, p. 308-309.

⁵⁹ Author's translation. *Filipinas Ordinances*. Book I, tit 49, n. 3.

ileges founded on public treaties take precedence over all others. In this sense, in cases of competition between a privilege of the forum under treaty and another voluntary privilege, the former took precedence.

7.2.1 Foreign Conservatories founded on treaties

a The French Conservatory

This Conservatory formally existed since the end of the seventeenth century and was based on Article X of the Treaty of Alliance signed between Portugal and France on 31 March 1667. A clause in this treaty recognised the French as having exactly the same privileges, liberties and prerogatives as those granted to the English and Dutch in the treaties in force at the time.⁶⁰ A few years later, the *Alvará* of 20 May 1683 confirmed the appointment made by the French subjects of a Judge *desembargador* of the *Suplicação* Court as their Conservator, just as the English had.⁶¹ By the *Alvará* of 15 September 1802, the Prince Regent decided that the sentences passed by the Judges Conservators of the Spanish and French Nations would henceforth be appealed by *agravo ordinário* under the same terms as those of the English.⁶²

Alvará of 7 April 1685 is very important regarding the competition of privileges between English and French privileged.⁶³ It established that, if an English had a claim against a French, they would litigate in the forum of the defendant.⁶⁴

However, all these privileges became ineffective as a result of the French invasions, and were not renewed by the Peace Treaty of 30 May 1814 between King John I and his allies on the one hand, and Louis XVIII of France on the other. In the Provisional Convention for the renewal of diplomatic and commercial relations between Portugal and France, in a Note from the Duke of Palmella dated 22 July 1814, it was made clear that ‘the subjects of each of the two States domiciled in the other would enjoy, as regards their persons, the same advantages and exemptions on the basis of the most perfect reciprocity’. In reply, in a Note from the Prince of Benevento to the Count of Palmella, dated 28 July 1814, the former stated that the French party could in no way conceive of renouncing a Judge Conservator for French merchants in Portugal, a faculty which they always had before the war and which the merchants of various other nations still had. To which the Count of Palmella replied in a Note of 1 August 1814, that, since all previous Treaties between the two nations had been annulled by the last Treaty of Peace, the grant of such a privilege could only be established by a new Convention for which he was not authorized to establish it.⁶⁵

In 1831, after several complaints from the French Government questioning the imprisonment of the French citizen Bonhomme – a political prisoner involved in the liberal/absolutist quarrels – a Convention was signed between Castelo Branco and the Counter-Admiral Baron Roussin on the ship *Le Suffren* on 14 July 1831. In the Convention, in addition to other petitions, we find in Article IX the petition on the French side for the ‘strict observance for the future of the privilege of the French of not being able to be arrested except by virtue of an order of the Judge Conservator of the Privileged Nations which do not have it in particular’. This petition was ‘admitted until the two Governments mutually agree on this matter’.⁶⁶ From this date on, the French had a Judge Conservator in Lisbon until the extinction of the foreign Conservatories.

b The Dutch Conservatory

⁶⁰ Cf. Anglo-Portuguese Treaties of 1642 and 1654; and Dutch-Portuguese Treaty of 1661. Later on, in the French-Portuguese Treaty of Peace of 29 September 1801, Article V para. 2 stipulated that the citizens and subjects of the two Powers would enjoy in each other’s State all the rights enjoyed by those of the most favoured Nation.

⁶¹ Cf. J. Ferreira Borges, *Collecção dos Tratados, Convenções, Contratos e actos públicos celebrados entre a Coroa de Portugal e as mais potências desde 1640 até ao presente*, v. VI, Lisboa 1857, p. 485.

⁶² Cf. D. João, Regente do Reino (1792-1816), Livro 1802-1810 in *Legislação Régia - 1802-1810 (1802-1810) - Colecção Legislação (parlamento.pt)*

⁶³ Cf. Andrade e Silva, *Collecção*, 1683-1700, p. 31.

⁶⁴ In Portuguese law, this was the general rule when there was equality of privileges, cf. Nazareth, *Elementos*, p. 98.

⁶⁵ Author’s translation. Despite of this situation, charters of privileges continued to be issued to the French subjects in the posterior years. Cf. Ferreira Borges, *Collecção*, p. 489.

⁶⁶ Cf. *Ibidem*, p. 96-97.

The Dutch were granted, in Article IX of the Treaty of The Hague of 6 August 1661, the privilege of a Judge Conservator on practically the same terms as that of the English. From this date, and even after this Treaty ceased to be in force, the Dutch continued to enjoy this privilege. By the *Alvará* of 29 August 1690, a privative Judge of the same standing and authority as the French and English Nations was granted to the Dutch. Namely, a Judge of the *Suplicação* Court to judge their civil and criminal cases, giving *apelação* and *agravo* to *Suplicação* Court in the same terms as for these two nations.⁶⁷

However, this concession did not expressly derogate from the already acquired English privilege. Therefore, the Dutch could only enjoy their privileges against vassals of other privileged nations. Because the English privilege of the forum was older than that of the Dutch, when any subject of the Dutch nation litigated with a subject of the British nation, whether plaintiff or defendant, he was required, according to the Decree of 22 April 1792, to sue or be sued in the British Conservatory.⁶⁸ In the nineteenth century, there was a Dutch Conservatory in Lisbon.

c The Spanish Conservatory

In the Peace Treaty between Spain and Portugal of 13 February 1668, Article IV stipulated that the vassals and inhabitants of both countries would reciprocally enjoy the same security, liberties and privileges granted to the subjects of Great Britain by the Anglo-Spanish Treaties of 1630 and 1667.⁶⁹ As a result of this Treaty, the *Alvará* of 22 November 1688 provided for the creation of the Judge Conservator of the Spanish Nation, and appointed João Varela, Judge of Properties (*Juíz das Propriedades*) as their Judge. In the said Conservatory, all causes pertaining to the Spanish, both civil and criminal, were processed and judged with *agravo* and *apelação* to the *Suplicação* Court, in the same conditions as the British and the French.⁷⁰ By the Decree of 13 November 1691, it was made clear that Castilians must answer before their own privative judge in both civil and criminal cases, in the same way as is practised with the English and French.⁷¹ This seems to mean that the rule of the forum of the defendant applies in conflicts between Spaniards and Britons. In the *Alvará* of 15 September 1802, the Prince Regent decided to extend the *Alvará* of 31 March 1790 so that the sentences passed by the Judges Conservators of the Spanish and French Nations would henceforth be appealed by *agravo ordinário* (and not by *apelação*).⁷²

After the French invasions, there was no Peace Treaty between Portugal and Spain nor were the old Treaties renewed. However, Spanish privileges continued to be more or less applied, including the right to have a Conservatory. This is demonstrated by a Decree of Queen Mary II, dated 1783, which imposed the annulment of one judgement of the *Suplicação* Court in a case between Spanish subjects to submit it to the judgment of the Spanish Conservatory.⁷³ In the 1830s there was one Spanish Conservatory in Lisbon.

d Danish Conservatory

The Convention of Commerce and Navigation between Denmark and Portugal, concluded on 26 September 1766, ensured in Article I that the Danes would benefit from all rights, immunities, privileges and advantages granted to vassals of other powers. That is to say, the most-favoured-nation treatment is ensured.⁷⁴ A clause that there was at least one Danish Conservatory operating in Portugal between 1800 and 1845.

e Treaties with other nations

⁶⁷ Cf. *Ibidem*, p. 486.

⁶⁸ Cf. Delgado da Silva, *Collecção*, 1791-1801, p. 67.

⁶⁹ By these treaties the Spanish granted to the English extensive privileges. Later on, Article VII of the Treaty of Utrecht of 6 February 1715 stipulated that the two nations would benefit from the most favoured nation clause in respect of all the privileges, freedoms and exemptions that had been granted until then. Moreover, the two aforementioned articles of the Treaties of 1668 and 1715 were transcribed and confirmed in the Treaty of Alliance of 11 March 1778.

⁷⁰ Cf. Andrade e Silva, *Collecção*, 1683-1700, p. 170.

⁷¹ Cf. *Ibidem*, p. 267.

⁷² Cf. Cf. D. João, Regente do Reino (1792-1816), Livro 1802-1810 in [Legislação Régia - 1802-1810 \(1802-1810\) - Colecção Legislação \(parlamento.pt\)](#)

⁷³ Cf. Decree of 2 October 1783, Livro 1775-1790 in [Legislação Régia \(parlamento.pt\)](#)

⁷⁴ This Convention was replaced by the Treaty of Commerce and Navigation of 20 December 1887.

A series of treaties signed between Portugal and other nations allowed for Judges Conservators, although there is no knowledge that Conservatories from those nations ever existed in Portugal.

In the case of Russia, the Treaty of Friendship, Navigation and Commerce between Queen Maria II and Catherine II Empress of Russia, signed on 20 September December 1787, agreed in Article VII that Russian merchants established in Portugal or to be established in the future would enjoy the prerogatives of having Judges Conservators, in the same way as it is granted to the English Nation.⁷⁵ However, there is no knowledge of a Russian Conservatory. What we do know is that in the nineteenth century there is evidence that Russians in Portugal took their cases to the Conservatory of the Confederate Nations, which was a forum for those that did not have a specific privative judge, but had the privilege of having a judge conservator.

The Swedes would also have the right to have a privative judge like the English and French, as granted by Article XXVIII of the Treaty of 28 July 1641. But they didn't request one. The same happened with Brazil, whereby the Treaty of 29 August 1825 between Portugal and Brazil stipulated that the privileges granted to the most favoured nation should be maintained.

7.2.2. Voluntary concessions of the privilege of the forum

The *Assento* of 23 March 1786, recognized the Germans' privileges as one of the oldest in the Kingdom:

*...since they began with its foundation, conferred by D. Afonso Henriques for the assistance that this and other northern nations provided to them in the siege of Lisbon, whose privileges have always been preserved by all the successor Kings.*⁷⁶

In fact, from as early as the Crusades there is knowledge of Germans who settled in Portugal under these old concessions. Additionally, a regular sea route between Danzig and Lisbon, which boosted trade with German merchants mostly linked to the Hanseatic League, existed since the fourteenth century.⁷⁷

However, it was at the beginning of the sixteenth century that, due to the Portuguese expansion, the important commercial houses of Upper Germany, mainly from Augsburg and Nuremberg, entered into negotiations with the Portuguese Crown regarding overseas trade and privileges.⁷⁸ During this time, they negotiated the 'Privilege of the Germans', contemplating the prerogatives granted to them by D. Manuel I between 1503 and 1511.⁷⁹ These are important prerogatives that show the exceptional status that German companies came to hold in Portugal.⁸⁰

At the same time, the *Alvará* of 3 October 1504, which D. Manuel granted 'to do favour' to the German companies living in the city of Lisbon, stated that none of them or German person of his house could be arrested or detained without an order of the *Corregedor do Cível*. The same guarantees were provided for their homes: no Justice could enter without an order of the *Corregedor*.⁸¹ In the Charter of Privileges granted by D. Manuel on 30 August 1509, it was also attributed to the Germans that the same *Corregedor do Cível* of Lisbon was their Judge Conservator for their causes, both civil and criminal, whether they were plaintiffs or defendants.⁸²

⁷⁵ The Treaty which was valid for 12 years was renewed with basically the same content on 16 December 1798. It was renewed again in 1812 and in 1815, for another year.

⁷⁶ Autor's translation. Cf. Livro 1775-1790 in [Legislação Régia \(parlamento.pt\)](#)

⁷⁷ Cf. J. Pohle, *Os mercadores-banqueiros alemães e a expansão portuguesa no reinado de D. Manuel I*, Lisboa 2017, p. 18.

⁷⁸ Welse-Vöhl, Herwart, Fugger, Höchstetter, Rehlinger, Gruber, Podmer-Stromer, Holzschuher, Hirschvogel, Rem ou Imhoff, were some of the companies to open branches/factories in Portugal.

⁷⁹ Cf. J. Denucé, *Privilèges commerciaux accordés par les rois de Portugal aux Flamands et aux Allemands (XV et XVI siècles)*, [Arquivo Histórico Português 7], 1909 Lisboa, p. 317; 377-380; also, Cotta do Amaral, *Privilégios dos mercadores*, p. 22 30.

⁸⁰ However, in the late 1520s, the first symptoms of stagnation in Portuguese-German relations were noted, which led, in the third decade of the 16th century, to the withdrawal of important German commercial houses from Lisbon. This loss was partly offset by the arrival of other German commercial houses in the third and fourth decades of the Five Hundreds, such as the firms of Prunner Rietwieser, Hans Paur and the Welser of Nuremberg, who mainly worked in the pearl, jewelry and gemstone market. Cf. J. Pohle, *Rivalidade e Cooperação: algumas notas sobre as casas comerciais alemãs em Lisboa no início de Quinhentos*, [Cadernos do Arquivo Municipal, 2.^a serie n. 3], Lisboa 2015, p. 34.

⁸¹ Cf. Ferreira Borges, *Collecção*, p. 484.

⁸² *Ibidem*.

In 1517, representatives from Hansa entered into negotiations with the Portuguese Crown in order to obtain the same privileges of their colleagues from Augsburg and Nuremberg. The initiative came from merchants from Lübeck who invoked the fact of being Germans and subjects of the Empire. King John III responded to the request and by the *Alvará* of 2 September 1528 granted the Lubekenses the right to use the privilege of the Germans, as Germans and subjects of the Empire that they were, as well as to the Easterlings and Anses.⁸³

Already in 1705, by the *Alvará* of July 24 after having finished the three-year term of their Conservator, Germans were granted the privilege to have as Judge Conservator a *desembargador* of the *Suplicação* Court (instead of the *Corregedor*), in imitation of the French and English.⁸⁴ In the 1830s a German Conservatory existed in Lisbon.

Apart from the Germans, the Italians also had a privilege of the forum. The Italian Conservatory was created by *Alvará* of 22 April 1800, by grace and favour of the Portuguese sovereigns.⁸⁵ In the nineteenth century there was an Italian Conservatory in Lisbon.

The subjects of friendly nations which did not have their own Judge Conservator could have access to the Conservatory of the Confederated Nations. In the nineteenth century, this Conservatory existed in Porto and Lisbon.

Finally, it is also noteworthy that the existence of foreign Conservatories in Portugal gave rise to interesting legal transplants at a European level as foreign merchants began to claim from other monarchs the same privileges they had obtained in Portugal. This was the case with the merchants of the Hanseatic League who, in 1607, obtained this privilege in the *capítulos de privilegios* granted by King Philip III to Spain for the sea port of Seville. These merchants argued that this concession would be a mere 'confirmation and extension' of the same privilege previously granted in Portugal, which had lost its independence to Spain between 1580 and 1620.⁸⁶ Later, in 1645, Philip IV granted the English a *Juez Conservador*. And so, the use of the *Juez Conservador* began to become normalised in Spain and was obtained by the Dutch and French, among others. Furthermore, the use of foreign Conservatories went beyond the Iberian borders through the Neapolitans *giudici delegati* in the middle of the eighteenth century.⁸⁷

III. The extinction of the British Conservatories

With the establishment of the Portuguese first liberal system, and in defence of the principle of equality, a progressive path for the extinction of personal privileges was initiated. Still, there was also a concern to comply with the treaties in force on. In this sense, in the Decree of 9 July 1822, the Extraordinary and Constituent General Courts of the Portuguese Nation, wishing to make effective the extinction of these privileges, decreed the extinction of all personal privileges of the forum. However, exceptions were made for privative courts expressly stipulated in subsisting Treaties, but only for the duration of such contracts and treaties.⁸⁸ The same principle applied in Article 178 of the New Judicial Reform, approved by Decree of 21 May 1841. This attributed to the judges of first instance, from the places where the defendants were domiciled, the competence to judge the causes of foreigners. However, it continued to except the case of foreigners who have Judges Conservators by treaty.⁸⁹

Finally, in Article XVII of the Treaty of Commerce and Navigation of 3 July 1842 between Great Britain and Portugal, there is a conditional waiver of the privilege of the forum by the British Party. Specifically, arguing to the advancement of the system of legislation and administration of justice in Portugal, the British Party in conformity with the wishes of the Portuguese Party, consents to give up the privilege of the Conservatory Court as soon as, and so long as, the British subjects were admitted in Portugal to the benefit of guarantees similar or equivalent to those

⁸³ Cf. Denucé, *Privilèges commerciaux*, p. 378-380.

⁸⁴ Cf. Ferreira Borges, *Collecção*, p. 486.

⁸⁵ *Ibidem*, 'Conservadores'.

⁸⁶ R. Zaugg, *La gestione dei conflitti in Antico Regime*, [*Quaderni Storici* v. 45 n. 133], Bologna 2010, p. 141. It should be noted that these *Capítulos* were not applied.

⁸⁷ Zaugg recognises, however, that this 'giudici delegati' seems to be assimilated to the pre-existing privative forum enjoyed by the Florentine, Venetian, Greek and Genevan nations, whose exact starting date seems to go back to the sixteenth century. Cf. *Ibidem*.

⁸⁸ Cf. D. Leitão Coutinho, *Collecção dos Decretos, Resoluções e Ordens das Extinctas Cortes Geraes, Extraordinarias e Constituintes que houve em Portugal nos anos de 1821 e 1822*, V. III, Coimbra 1823, p. 489-490.

⁸⁹ Cf. Decreto de 21 de maio de 1841 que contém a Novíssima Reforma Judiciária com os mapas da divisão do território e as tabelas de emolumentos. Coimbra: Imprensa da Universidade, 1857, p. 42.

enjoyed by British subjects in Great Britain with respect to: (a) to trial by jury; (b) except in cases of flagrante delicto, not to be arrested without charge and a warrant from a magistrate; (c) to be questioned within 24 hours from their arrest in flagrante delicto; (d) to be admitted to bail. In other respects, the British Party agrees that British subjects shall be put on the same conditions as Portuguese subjects in all civil or criminal cases.

In Article XVIII the Parties determine that his British Majesty, relying on the guarantees which are, or may come to be given to British subjects by the Portuguese legislation under the new constitutional system, shall not claim any privileges which are not enjoyed by the Portuguese subjects of the Portuguese in British dominions. However, in case any political commotion should impair the effect of the said guarantees, His Britannic Majesty shall have the right to claim the re-establishment and observance of the privileges ceded.

The topic was object of attention in the Notes exchanged between the Portuguese and British plenipotentiaries.⁹⁰ The Exploratory Note of Lord Howard de Walden to the Duke of Palmella clarified:

*That in respect to the declaration of Her Britannic Majesty regarding the conditional surrender of the rights connected with the Conservatorial Court, whenever the Portuguese Government shall have officially communicated to Her Majesty's Government any law or laws establishing the guarantees in question Her Majesty will recognised the right of the Portuguese Government to declare the further jurisdiction and authority of the British Conservatorial Court to have ceased by consent of Her Majesty.*⁹¹

Consequently, the Circular from Gomes da Costa, Minister and Secretary of State for Foreign Affairs of Portugal to the representatives of the Foreign Courts in Lisbon,⁹² dated 24 October 1842, abolished the privilege of the conservatories enjoyed in Portugal by the subjects of the different nations. The document states that by the Treaty of Commerce and Navigation concluded between the Portuguese and British governments on 3 July 1842, the privilege of special jurisdiction in cases involving English subjects was abolished. Since this privilege was abolished for the nation which enjoyed it by virtue of treaties or special concessions, it was not possible to preserve them for those which had enjoyed it only because the Portuguese Government considered them to be the most favoured nation. However, he adds that in the bills to be presented in the Chamber to legally establish the guarantees assumed in the Anglo-Portuguese Treaty, the Portuguese Government decided to include the subjects of all those Nations with which it is in a relationship of peace and friendship.⁹³

The discussions in the Portuguese Chamber of Deputies on the Bill concerning the extinction of the foreign Conservatories and, in particular, those to ensure the guarantees established in the 1842 Treaty, began formally on 10 December 1844.⁹⁴ One of the aspects that generated more attention was how to introduce mixed juries, non-existent in Portugal at the time. Some deputies considered it a new privilege that should not be granted. However, the majority of deputies approved its creation, justifying with requirements assumed in Article XVII of the 1842 Treaty. Subsequently, the question was whether mixed juries should be allowed for all foreigners or only for subjects of those nations that granted them to the Portuguese. The second position won the majority. It was equally discussed if foreign jurors should be foreigners from the foreign nation of the accused or not. Following the English model of mixed juries, it was decided that it should be composed of half Portuguese and half foreigners from the same nation as the accused.

The result of these discussions was established in the Law of 12 March 1845. By which, the conservatories of foreign nations in Portugal, the Adjacent Islands and overseas possessions were abolished, leaving non-Portuguese nationals subject to the jurisdiction of national courts under the same conditions as nationals (art.1). With the exception of the cases detailed in the same Law, which are summarized in the following points: foreigners residing in Portugal can be arrested only with a warrant from the competent authority, except in flagrante delicto (art.2); in any of the mentioned cases, the prisoner shall be questioned within a maximum period of twenty-four hours after

⁹⁰ Cf. Ferreira Borges, *Collecção*, p. 368-373.

⁹¹ *Ibidem*, p. 371-372.

⁹² Specifically, Austria, Belgium, Brazil, Denmark, Pontifical States, United States, France, Spain, Netherlands, Prussia, Russia, Sardinia and Sweden.

⁹³ *Ibidem*, p. 480-481

⁹⁴ These debates can be find at: [Debates Parlamentares - Câmara dos Senhores Deputados da Nação Portuguesa / Monarquia Constitucional \(parlamento.pt\)](http://Debates Parlamentares - Câmara dos Senhores Deputados da Nação Portuguesa / Monarquia Constitucional (parlamento.pt))

his arrest and bail shall be allowed according to the nature of the crime; in relation to this time limit of twenty-four hours, it is specified that it does not run on holy days and on all other days, even if they are holidays, the judicial act of questioning may be carried out on prisoners without distinction as to whether they are nationals or foreigners (Art. 3); in criminal cases in which the law establishes the intervention of a jury, the foreigner accused will have the right to have six jurors of their respective country, or as many as possible up to this number, in the jury to decide on his case, provided that he requests this to the Judge instructing the case before the day on which the opening of the General Court in which he was tried is announced (art. 4).

The Decree of 27 March 1845 adds that only British subjects resident in Portugal had the right to benefit from the mixed jury in criminal cases when jury intervention takes place, since only in England the Portuguese subjects enjoy that same right.⁹⁵

A brief turnaround emerged in 1847, when the English Government, based on Articles XVII and XVIII of the 1842 Treaty, obtained temporary recognition for the British Conservatory to operate in Portugal due to the extraordinary circumstances the country was experiencing. Accordingly, by Decree of 5 May 1847, British subjects residing in Lisbon elected João Maria Alves de Sá as Judge Conservator of the English Nation. This election was confirmed by the Portuguese Government with the express statement that the said election and its confirmation would cease to have effect as soon as the extraordinary circumstances ceased.⁹⁶ In 1848, the Decree of 18 February explains that the extraordinary circumstances which had given rise to the re-establishment of the British Conservatory in Lisbon had ceased.⁹⁷ This led to the definitive end of the English privilege of a Conservator, after almost five hundred years since its inception.

Conclusion

The exceptional nature of the privileges obtained by the English in Portugal derives from the combination of three elements: antiquity, extension and continuity over time. Since the twelfth century, the English had found in the stability of the alliance an important vehicle for maintaining privileges and claiming others. Merchants stood out as the main drivers and defenders of a vast set of prerogatives for their freedom of commerce, security of their properties and personal liberties conferred in the various Anglo-Portuguese agreements. These prerogatives went far beyond the strictly commercial, encompassing other purely civil and religious. They frequently came with jurisdictional clauses providing specific methods of dispute settlements, including consular protection, mixed commissions, arbitrations, mixed juries, and among them, the privilege of the forum, exercised through the British/English Conservatorial Courts.

Established in the fourteenth century, this privative jurisdiction was initially applied in cases involving goods and their debts. In the seventeenth century, the scope of the British Conservatories was formally expanded when Anglo-Portuguese treaties stipulated that the Judge Conservator would hear all civil and criminal cases, whether plaintiffs or defendants, with the sole exception of Royal Exchequer cases. Until the middle of the seventeenth century, the English had as their Conservator the *Ouvidor da Alfandega*. After the 1654 Anglo-Portuguese treaty, the Judge Conservator of the British Nation in Lisbon became to be a *desembargador* of the *Suplicação* Court. This special jurisdiction lasted until the middle of the nineteenth century when it ceased to exist after the Anglo-Portuguese Treaty of 1842.

In almost five hundred years of existence, this privilege gave rise to interesting legal interchanges and transplants not only between the Parties, but also between other European nations. On a bilateral level, it was with the extinction of this special jurisdiction that the most evident legal transfer took place. In fact, the clauses stipulated in the Treaty of 1842 made the extinction of this privilege conditional on British subjects benefiting in Portugal from guarantees similar or equivalent to those enjoyed by British subjects in Great Britain. This led to the creation of

⁹⁵ P. Figueiredo, *Collecção de Legislação Portuguesa relativa ao Serviço Consular*, Lisboa 1877, p.98.

⁹⁶ Between October 1846 and June 1847, Portugal went through great political, economic and social instability with subsequent riots and revolts, with the epicentre in Minho and against the governments led by Costa Cabral and successively by the Duke of Palmela. Foreign intervention through the Quadruple Alliance (1834) ended the conflict.

⁹⁷ Cf. *Diário do Governo de 23 de fevereiro* in <https://legislacao.regia.parlamento.pt>

mixed juries in Portugal and also shortened the period within which a foreign prisoner must be questioned from 48 hours to 24 hours after his arrest.

It is also noteworthy that this privilege was not confined to relations between the two powers, but was extended by Portuguese monarchs to subjects from other allied nations residing in Portugal: Spaniards, Italians, Germans, Dutch, Danes and French were some of the foreigners who had Conservatories in Portugal. This fact gave rise to interesting legal transplants at a European level as foreign merchants began to claim from other monarchs the same privileges they had obtained in Portugal.

We may conclude that in the 650 years of its existence, the Anglo-Portuguese alliance wasn't just an agent of political and cultural interchanges but also an agent of legal interchanges, between the territories of both parts but also at European level. Specifically, the Judges Conservators, with their subsequent legal transplants to other countries, were an important facilitator of foreigner's mobility and a significant tool for the recognition of their legal status.

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