Security Interests, Insolvency and the Ranking of Debts in Early Modern Continental Europe: Transnational Trends in Legal Change

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I. Old topics, new topicality

The legal history of security interests and insolvency on the Western European continent in the Early Modern period is of prime importance. Many present-day legal arrangements that for a long time have been considered as belonging to an acquis of settled doctrine and legislation are currently less self-evident than was the case in the past. For example, every country on the European continent has insolvency legislation in place that imposes the priority of negotiated securities over unsecured debts, and in most cases in combination with an Aussonderungsrecht for the former. The Aussonderungsrecht entails that the goods pledged are taken out from the insolvency estate by the pledgee, who does not have to contribute in the costs of the administering of the estate. Secured creditors are generally not held to cuts on their debts, because their pledge is not affected by the insolvency.[1] However, a new legislative trend is to impose measures of protection, aimed at the preservation of firms, onto secured creditors as well.[2] The older underlying philosophy of mercantile and corporate insolvency legislation, which referred to creditor-steered appraisals and to liquidation as the default outcome of proceedings, is being changed for a more continuity-orientated approach.[3] Moreover, security interests have become highly abstracted. Over the course of the later nineteenth and the twentieth century, new arrangements of collateralisation (eg the enterprise charge) were created and it is often difficult to fit them into the categories that were established in the codifications of the 1800s. These codes generally did not favour non-possessory pledges and they prohibited security interests that were not listed in the law.[4] Hereafter, the focus will be on non-possessory security interests in goods.

As a result of the shifting of legal landscapes, legal historians have an important task in laying bare the assumptions that are still implicit in the persisting legal regimes relating to credit. The Early Modern period is particularly important in this regard. Between around 1500 and the end of the eighteenth century legal innovations in insolvency, pledge and commercial credit were vibrant. The main centre of legal change was North-West Europe. Building blocks were imported from the Italian peninsula, with which new arrangements and sets of rules were crafted.[5] As will be explained further, many of the legal problems and strategies of this period are not far removed from those that exist in our time.

For the Northern Netherlands, legal scholarly writings of the Early Modern era, and to a lesser extent local legislations, have been studied closely. For this region, the theme of security interests, in movable and immovable goods, is one of the most analysed themes in the country's history of private law.[6] In the nineteenth and early twentieth century, German scholars studied seizure and executory proceedings and in doing so they touched upon pledging as well.[7] Their approaches belonged more to the

1 On this notion, see J. Dalhuisen, Dalhuisen on Transnational, Comparative, Commercial, Financial and Trade Law, vol. 3, Oxford, Hart, 2016, 101, 106.

2 For an overview of the contents of contemporary laws on corporate insolvency and pre-insolvency throughout Europe, see G. McCormack, A. Keay and S. Brown, European Insolvency Law: Reform and Harmonization, Cheltenham, Edward Elgar, 2017. As regards the "carve-out" of secured debt in insolvency situations, see H. Eidenmüller, "Comparative Corporate Insolvency Law" in J.N. Gordon and W.-G. Ringe (eds.), The Oxford Handbook of Corporate Law and Governance, Oxford, Oxford University Press, 2016, online version, 16-21.

3 A critical analysis of the new paradigm is D. Burdette and P. Omar, "Why Rescue? A Critical Analysis to the Current Approach to Corporate Rescue" in J. Adriaanse and J.-P. van der Rest (eds.), Turnaround Management and Bankruptcy. A Research Companion, Abingdon, Routledge, 221-237. See also, on the general implications of this paradigm shift and the possible added value of legal history, D. De ruysscher, "Bescheiden toezichter of bemiddelaar? De rol van de rechter in reorganisatie en faillissement vanuit rechtshistorisch perspectief", Tijdschrift voor Privaatrecht 2018, 147-218.

4 On these issues, see F. Fiorentini, "Proprietary Security Rights in the Western European Countries" in M. Bussani and F. Werro (eds.), European Private Law: a Handbook, vol 1, Brussels, Bruylant, 2009, 446-452; W. Zwalve, "A labyrinth of creditors: a short introduction to the history of security interests in goods" in Kieninger, E.M. (ed.), Security rights in movable property in European private law, Cambridge, CUP, 2004, 47-48.

5 Examples include bills obligatory, indorsement of bills of exchange and companies (corporations) with limited liability and shares. See C. Petit, Historia del derecho mercantil, Madrid, Marcial Pons, 2016, 117-143, 265-312; M. Schmoeckel, Rechtsgeschichte der Wirtschaft, Tübingen, Mohr Siebeck, 158-165; R. Szramkiewicz and O. Descamps, Histoire du droit des affaires, Paris, LGDJ, 2013, 95-112, 200-236.

6 Several excellent doctoral dissertations explore the theme. See R. Feenstra, Reclame en revindicatie. Onderzoekingen omtrent de rol in de ontwikkelingsgeschiedenis van het recht van reclame gespeeld door den Romeinsrechtelijken regel omtrent eigendomsovergang en prijsbetaling bij koop (Inst. 2.1.41), Haarlem, Tjeenk Willink, 1949; E. Koops, Vormen van subsidiariteit. Een historisch-comparatistische studie naar het subsidiariteitsbeginsel bij pand, hypotheek en borgtocht, Den Haag, Boom, 2013.; A.G. Pos, Hypotheek op roerend goed (bezitloos pandrecht), enkele rechtshistorische en rechtsvergelijkende beschouwingen, Dordrecht, Kluwer, 1970; V.J.M. van Hoof, Generale zekerheidsrechten in rechtshistorisch perspectief, Dordrecht, Kluwer, 2015. See also W.J. Zwalve, "A Labyrinth of Creditors: a Short Introduction to the History of Security Interests in Goods" in E.-M. Kieninger (ed.), Security Rights in Movable Property in European Private Law, Cambridge, CUP, 2004, 38-53; W.J. Zwalve, "System des Vermögensrechts" in R. Feenstra and R. Zimmermann (red.), Das römisch-holländische recht, Fortschritte des Zivilrechts im 17. und 18. Jahrhundert, Berlin, Duncker & Humblot, 1992, 105-122.

7 H.K. Briegleb, Über executorische Urkunden und Executivprozess, Stuttgart, Liesching, 1845, 2 vols; G. Kisch, Der Deutsche Arrestprozess in seiner geschichtlichen Entwicklung. Wien und Leipzig, 1914; H. Planitz, Die Vermögensvollstreckung im deutschen mittelalterlichen Recht. Erster Band: die Pfändung, Leipzig, Engelmann, 1912; H. Planitz, "Studien zur Geschichte des deutschen Ar-

"Germanist" than to the "Romanist" strand of legal-historical scholarship. As a result, developments in local law have not always been explored in connection to the views of legal authors, which nowadays is more currently done.[8] In contrast to the Netherlands and Germany, legal-historical research on security interests during the Early Modern period in France and the Southern Low Countries (later Belgium) is scarce.[9] Comparable conclusions on the state of the art can be drawn for the theme of mercantile and corporate insolvency, with the exception of France.[10]

For all regions mentioned, the theme of security interests has not always been assessed from the angle that is best for a full understanding of legal constellations concerning debt. A broad view on security interests must take into account all rules relating to credit, thus encompassing the rules involving contracts of loan, sale, pledge, and insolvency and imprisonment for debt. Relevant rules can be found in commercial law, the law of contract, the law of procedure and even in criminal law. In-dept monographs on the insolvency laws of cities in German territories, such as for example Augsburg[11] and Frankfurt,[12] go a long way in covering the broad spectrum inherent to the topic. However, for most regions and cities with commercial scenes, a combined approach of the mentioned themes has not been pursued. Therefore, a lot remains to be done. This article aims at demonstrating the potential rewards that come along with a broad thematic appreciation of the law of security interests and insolvency. Furthermore, a case will be made for a synchronic analysis of developments in several countries of continental Western Europe. Comparison allows for detecting trends that were shared across larger areas.

II. From debt enforcement proceedings to debt pooling

1. Certified debts, indicatory seizure and imprisonment (c. 1300-c. 1450)

In the law that was applied in cities of France (pays de droit coutumier), the Low Countries and German territories in the thirteenth and fourteenth centuries, debt enforcement was subjected to strict requirements. In the fourteenth century, municipal ordinances in the Low Countries and German regions commonly stressed that in principle seizures and executory sales of property of citizens could be commisionned following a proceeding in the town's courts only.[13] Moreover, debts had to be certified by the governmental body of the locality where the contract or agreement was made in order to be considered eligible for official debt enforcement proceedings, leading up to the public sale of the debtor's properties.[14]

In the fourteenth-century French pays de droit coutumier and the Low Countries, the acknowledgment of debts in courts or by the king, as well as cooperation of the debtor marked common features of rules concerning debt proceedings. In the French pays de droit coutumier and the Low Countries, the latter aspect was evident in proceedings that entailed the "indication" of a pledge. In the Low Countries, "indicatory" seizures (thoonpand) were used mostly for when the debt had not been authenticated before the government of the constituency. A defaulting debtor could be invited, extra-judicially, to designate a movable item that served as collateral for his debt. If after a while the debtor did not pay the debt, the creditor could summon the debtor to court, in order to force him to acknowledge the debt and pledge (thus supplementing for the lack of certificate), after which the asset under pledge was seized and the executory sale could be initiated.[15] In Paris at the end of the fifteenth century, let-

restprozesses", Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung 34 (1913), 49-140, 39 (1918) 223-308 en 40 (1919) 87-198.

8 E.g. W. Forster, Konkurs als Verfahren. Francisco Salgado de Somoza in der Geschichte des Insolvenzrechts, Keulen, Böhlau, 2009.

9 See, for the pays de droit coutumier, J. Claustre, Dans les géôles du roi. L'emprisonnement pour dette à Paris à la fin du Moyen Âge, Paris, Sorbonne, 2007; O. Martin, Histoire de la coutume de la prévôté et vicomté de Paris, vol. 2, Paris, Leroux, 1930, 533-600; P.-C. Timbal, Les obligations contractuelles dans le droit français des XIIe et XIVe siècles d'après la jurisprudence du Parlement, Parijs, Centre National de Recherche Scientifique, 1977, vol. 2, 337-546. For the Southern Low Countries, there is nothing more than the generalizing assessments in Ph. Godding, Le droit privé des Pays-Bas méridionnaux du 12e au 18e siècle, Brussels, Royal Academy, 1987, 215-226, 256-257.

10 For France, legal-historical analysis has generally addressed the period after the promulgation of the Ordonnance sur le commerce of 1673: G. Antonetti, "La faillite dans la pratique notariale à Paris aux XVIIe et XVIIIe siècles", Le Gnomon 63 (1988), 4-11; G. Antonetti, "La crise économique de 1729-1731 à Paris d'après les règlements de faillites", Études et documents du Comité pour l'histoire économique et financière de la France 2 (1998), 35-181; N. Coquery and N. Praquin, "Règlement des faillites et pratiques judiciaires. De l'entre-soi à l'expertise du syndic (1673-1889)", Histoire & Mesure 23 (2008), 43-83; V. Demars-Sion, "Contribution à l'histoire de la faillite: etude sur la cession de biens à la fin de l'Ancien Régime", Revue historique de droit français et étranger 75 (1997), 33-90; F. Deshusses, "Mésurer l'insolvabilité? Usages statistiques des dossiers de faillite (1673-1807)", Histoire & Mesure 23 (2008), 19-41; Cl. Dupouy, Le droit des faillites en France avant le Code de commerce, Paris, Pichon, 1960. For the Southern Low Countries, I refer to some of my publications, which mostly tackle the situation at Antwerp, in the footnotes below. For German territories, see J. Kohler, Lehrbuch des Konkursrechts, Stuttgart, Enke, 1891; A. Meier, Die Geschichte des deutschen Konkursrechts, insbesondere die Entstehung der Reichskonkursordnung von 1877, Frankfurt am Main, Peter Lang, 2003. Other monographs on historical insolvency law in German regions will be cited below.

11 S. Birnbaum, Konkursrecht der frühen Augsburger Neuzeit mit seinen gemeinrechtlichen Einflüssen, Berlin, Hopf, 2014; P. Fischer, "Bankruptcy in early modern German territories" in Th. M. Safley (ed.), The History of bankruptcy. Economic, social and cultural implications in early modern Europe, Abingdon, Routledge, 2013,

12 Ch. O. Schmitt, Säuberlich banquerott gemachet. Konkursverfahren aus Frankfurt am Main vor dem Reichskammergericht, Cologne, Böhlau, 2016.

13 Godding, Le droit privé, 507 (nr 858); Planitz, "Studien", 1913, 55-62.

14 Some legal historians have stated that certified debts were entitled to extrajudicial debt enforcement, even to the extent of executory sales. This is particularly the case for French regions in the pays de droit coutumier (Paris, Normandie). See, for example, Claustre, Dans les geôles, 180-185, in particular 183. However, in contrast to the opinion of many, certified debts (letters obligatory under seal) did not procure the right to expropriate a debtor extra-judicially, but only to lay seizure as means to pressure the debtor. Moreover, non-certified debts were not accepted as basis for executory proceedings without an acknowledgment of the debt in court. This is evident from contractual clauses allowing for private seizure (but, not executory sale). See Timbal, Les obligations contractuelles, vol. 2, 201-228, in particular 213.

15 Godding, Le droit privé, 515 (nr 870); K. Heeringa, Rechtsbronnen

ters obligatory under royal seal allowed for a comparable method of debt enforcement. Private seizure with such a letter was called "execution parée". In contrast to the Low Countries, a letter under seal entitled the creditor to seizure of the debtor's effects, even without preliminary governmental commission or authorizing judgment.[16]

However, special stipulations in private or certified contracts of sale and loan could provide shortcuts to the mentioned proceedings and entail the "indication" of an item or of all properties of the debtor, which served as collateral. In both the French pays de droit coutumier and the Low Countries, in the fourteenth century, the clause of "obligatio" granted the creditor access to the debtor's properties by way of private seizure in case the debtor defaulted, and the clause procured preference over other creditors.[17] Both "indicatory" seizures, as well as provisions in contracts that made them possible, were highly popular because of the length of the default executory proceedings. The latter were often held at some moments during the year only,[18] and they could last for periods of one year and longer, in order to safeguard the right of pre-emption of members of the kin.[19]

Still in the fifteenth century, "voluntary" proceedings of debt enforcement existed alongside imprisonment for debt. Creditors could have their debtor arrested and incarcerated. In the later 1400s, private detention was still practised in the County of Flanders and at Antwerp.[20] This had been the usual practice in the thirteenth and fourteenth centuries.[21] Italian legal writers of the thirteenth century had hesitated over the creditors' right to keep their debtor locked up for as long as they were not given securities.[22] In the fourteenth century, in the local law of many territories of Western Europe, it was common that for imprisonment lower requirements applied than for executory proceedings. In the Low Countries and the pays de droit coutumier of France, imprisonment for debt was closely linked to the abovementioned "indication" proceeding. It served as appropriate enforcement measure for debts that had not been certified;[23] contractual provisions could stipulate that the debtor was liable "in person" as well.[24]

However, municipal legislators came to restrict private detention. In the fifteenth century, most towns of the Low Countries had a public prison, which was used for debt imprisonments. When in the Duchy of Brabant (in the Southern Low Countries) in the fourteenth and fifteenth centuries defaulting debtors were locked up in the town's prison, they had the possibility to apply for release, which could be granted by the creditors in exchange for the "abandonment" of their estate.[25] In the first decade of the sixteenth century, at Antwerp, the imprisoned debtor who had received this favour had to stand before the city's aldermen. The debtor bowed and showed the tail of his coat in humiliation. He then handed over his goods onto his creditors and was sent free from prison. However, private detention after this ceremony, at the home of one of the creditors, remained lawful.[26] At the latest in 1550, practices and proceedings of this type had disappeared, which was because of the incremental acceptance of rules and views proffered in legal scholarly writings.

2. The common pledge idea: embracing the academic tradition (c. 1450-c. 1600)

Over the course of the fifteenth century municipal authorities as well as princely courts in France and the Low Countries began to acknowledge that debt enforcement was directed primarily towards the assets of a defaulter, and less towards his person.[27] It became a well-established rule that the enforcement of debt was to be done first on the assets of the debtor, and only in case they were not present, on the debtor himself.[28] These legal changes demonstrate a progressive influence of scholarly ideas. Starting in the later thirteenth century, the idea of "goods before persons" had become increasingly accepted among Italian scholars. This referred to the idea of common pledge, which was taken from Roman law.[29] Italian legal authors came to consider all assets of a debtor as being the collateral for his debts, even if this had not been expressed in a contract or agreement. This view persisted in the writings of legal authors of subsequent generations.[30]

der stad Schiedam, The Hague, 1904, 48 (June 1497). If the parties to the agreement attested to the existence of the debt in front of the judges, the corroborating judgment serves as executory title. The proceeding of acknowledgment could be amended with an executory proceeding on the debtor's assets. See for example, Claustre, Dans les geôles, 174-175; Godding, Le droit privé, 509 (nr 862).

16 Claustre, Dans les geôles, 180-185.

17 Claustre, Dans les geôles, 246; Godding, Le droit privé, 217-219 (nrs 365-368). Again, clauses of "obligatio specialis" (designating one asset as pledge) or "obligatio generalis" (on the totality of assets of a debtor) have commonly been categorized as sufficient grounds for executory sales and as entailing a droit de suite, whereas the source materials do not state more than seizure until full payment. For the former appraisal, see for example L. Goldschmidt, Handbuch des Handelsrechts. Vol. 1/1: Universalgeschichte des Handelsrechts, Stuttgart, Enke, 1891, 300-301. See for a correct assessment, Timbal, Les obligations, vol. 2, 463-472.

18 P.J. Blok, Leidsche rechtsbronnen uit de middeleeuwen, The Hague, 1884, 323-324 (dating from the later fifteenth century); H.G. Hamaker, De middeneeuwsche keurboeken van de stad Leiden, Leiden, 1873, 24-25 (dating from 1406); J. Huizinga, Rechtsbronnen der stad Haarlem, The Hague, 1911, p. 153-154 (23 May 1463).

19 Godding, Le droit privé, 241-242. The length related to the prescriptive acquisition after "one year and one day". The executory sale proceedings were devised for immovable property, but their length seems not to have been restricted for the sale of movables. See Godding, Le droit privé, 515 (nr 870).

20 Godding, Le droit privé, 511-512 (nr 864), 519 (nr 876).

21 Godding, Le droit privé, 511 (nr 864).

22 Harry Dondorp, "Partes secanto. Aulus Gellius and the Glossators", Revue internationale des droits de l'antiquité 57 (2010) 141.

23 D. De ruysscher, "Bankruptcy, Insolvency and Debt Collection Among Merchants in Antwerp (c. 1490-c. 1540)" in Safley (ed.), The History of bankruptcy, 187.

24 Claustre, Dans les geôles, 243-266.

25 E.g. E. Strubbe, "Het Rechtsboek van Lier (ca. 1415)", Bulletin de la commission royale pour la publication des anciennes lois et ordonnances de Belgique 16 (1949-50) 150, 167

26 Willem Van der Tannerijen, Boec van der loopender practijken der Raidtcameren van Brabant, E Strubbe (ed.) vol 2, Brussels, CAD, 1952, 262.

27 Claustre, Dans les geôles, 267-271; De ruysscher, "Bankruptcy", 189-194; Godding, Le droit privé, 510-511 (nr 863).

28 Godding, Le droit privé, 510-511 (nr 863).

29 C. 8,22,1. See also G. Hanard, Droit romain, Brussels, FUSL, 1997, vol. 1, 87 (nr 87).

30 In a future publication, I will present an analysis of the concept of "gage commun" (Code civil s. 2092-2093), which was based on the

As a result of the above, the late medieval approach of allowing debt enforcement by local courts only for as much the debt had been written in an official certificate was left. Informal debts came to be sufficient to lay arrest on a debtor's assets. All over the continent, it became common that creditors were entitled to seizure, before executory proceedings and without the debtor's cooperation, when they demonstrated that the debtor had signed a private contract or agreed on a defaulted debt. The plaintiff could substantiate his claim by submitting letters, books or mercantile instruments such as bills obligatory.[31] However, private debt enforcement was discouraged. For prejudgment seizures commission from municipal administrators was often required.[32]

The common pledge idea was also crucial in another respect. In the early fifteenth century, debt enforcement proceedings were still usually individual undertakings. This meant that when one creditor sued for payment other creditors were not usually summoned to declare their debts. Moreover, if several creditors started lawsuits in order to claim payments from the same debtor, in the French pays de droit coutumier and many regions of the Low Countries and German territories priority among them was imposed according to the date of their seizures.[33] However, over the course of the 1400s and in the first decades of the sixteenth century, many municipal governments in North-West Europe imposed that the risk of a debtor's insolvency was collective. Non-secured creditors were thenceforth obliged to accept rateable reductions on their debts.[34] New laws were necessary in order to organize the pooling of the debtor's assets and the distribution of them over many creditors. The first municipal laws that imposed the summoning of all creditors to bring forward their claims had been Italian; they imposed collectivisation in case the debtor had passed away without sufficient means or had fled from the town (e.g. Amalfi 1274, Florence 1322).[35] In the course of the fifteenth century many cities in German regions and in the Low Countries imposed similar rules. In the later 1400s and early 1500s, collective proceedings were set up at Augsburg, Antwerp (1516) and Freiburg im Breisgau (1520).[36]

The mentioned changes in law were not usually the result of a "full reception" or legal transplanting. In the first decades of the sixteenth century, rules of Roman law that were drawn from academic writings were used in combination with earlier indigenous traditions. In early sixteenth-century Flanders, for example, a transitory rule implied that the first-seizing claimant was granted priority over the other non-secured creditors, the latter of who shared the remainder of the debtor's estate.[37] Furthermore, in the early 1500s, the indigenous arrangement of "abandonment" became intermingled with academic rules that were based on the Roman-law proceeding of cessio bonorum. With the reception of Roman law came a substantive change of this earlier practice. For example, the creditors were no longer allowed to refuse requests for liberation if the conveyance of all properties was offered in exchange.[38] Moreover, cessio bonorum entailed protection after the incarceration had ended as well. The imprisoned debtor swore an oath that he would repay the debts when later, after his release from prison, he would acquire sufficient income.[39] But until that time the creditors could not harass the debtor for additional payments.[40] Even though they had to give the debtor time, the latter's debts were not discharged. If the transferred assets were not sufficient to compensate all debts, then creditors were still entitled to payment of the remainder afterwards. Some cities of trade did not accept cessio bonorum, most probably because of its debtor-friendly characteristics: it was not practised in Bruges and Genoa, for example.[41]

The abovementioned changes brought about new problems. Imprisonment for debts, pledges and also insolvency regulations were closely intertwined and changes with regard to one arrangement could have an impact on others. For example, in the later decades of the fifteenth century at Antwerp the acceptance of uncertified debts as being sufficient to start seizure proceedings produced the effect that imprisonments for debt became less practised.[42] Moreover, it was a challenge to decide when a debtor could be considered insolvent. The importance of the question was linked to the collectivised proceedings. Many cities in North-West Europa still protected their citizens from apprehension and imprisonment, even seizure, for debts; an exception to these rules was when citizens were insolvent. At first, insolvency was categorized in terms of the absconding from the creditors. In the fifteenth century, below as well as above the Alps, flight of debtors was a normal phenomenon. This was closely lin-

mentioned fragment of Roman law but which had also acquired characteristics of comparable concepts such as "universitas facti", "patrimonium" and "massa".

31 De ruysscher and Kotlyar, "Local Traditions v. Academic Law: Collateral Rights over Movables in Holland (c. 1300-c. 1700)", Tijdschrift voor rechtsgeschiedenis 2018, in press; J.J. Verheul and J.P. Wade, "Prejudgment attachment of movables in French, Dutch and English law", Netherlands International Law Review 39 (1992) 378.

32 Godding, Le droit privé, 509-510 (nr. 862).

33 J. Brissaud, Le créancier "premier saississant" dans l'ancien droit français, Paris, PUF, 1972; D. De ruysscher, "Designing the limits of creditworthiness. Insolvency in Antwerp bankruptcy legislation and practice (16th-17th centuries)", Tijdschrift voor rechtsgeschiedenis 76 (2008), 310; Meier, Die Geschichte, 39-44.

34 De ruysscher, "Designing"; De ruysscher and Kotlyar, "Local Traditions"; Meier, Die Geschichte, 39-44.

35 U. Santarelli, Mercanti e società tra mercanti, Turin, Giappichelli, 1998, 93.

36 De ruysscher, "Designing", 310-313; Fischer, "Bankruptcy", 176-177; Meier, Die Geschichte, 41.

37 Ph. Wielant, Practijcke civile, Antwerp, van der Loe, 1573, 339-340 (tit. 10, ch. 7, s. 6) and 340 (tit. 10, ch. 8, s. 1).

38 Forster, Konkurs als Verfahren, 208; Juan Alfredo Obarrio Moreno, "La cessio bonorum en la tradición jurídica medieval" Glossae. European journal of legal history 13 (2016) 446; W. Pakter, "The Origins of Bankruptcy in Medieval Canon and Roman Law" in Peter Linehan (ed), Proceedings of the Seventh International Congress of Medieval Canon Law, Vatican City, 1988, 491; P. Zambrana Moral, Derecho Concursal Histórico I. Trabajos de Investigación, Barcelona, 2001, 81-84, 146-147, 181.

39 Obarrio Moreno, "La cessio bonorum", 450, 453; Zambrana Moral, Derecho concursal, 178.

40 Pakter, "The Origins", 495-496.

41 Birnbaum, Konkursrecht, 32; L. Gilliodts-Van Severen, Coutumes de la ville de Bruges, vol. 2, Brussels, Gobbaerts, 1875, 306-315.

42 De ruysscher, "Bankruptcy", 188-189.

ked to the morals surrounding debt and bankruptcy. Still in the sixteenth century, it was shameful when because of breaches of trust no credit could be found. In fact, in the later Middle Ages, many debts were "renewed"; with the approaching default date parties could negotiate on a new term of payment. But if debts accrued to the point that debtors lost their reputation of creditworthiness, the strict enforcement mechanisms triggered many to leave their town.[43] Hans Planitz demonstrated that in German regions and in the Low Countries of the later Middle Ages rules regarding fugitive citizens purported to lower bars for creditors to gain access to the (remainder of) their estates.[44]

Ideas surrounding insolvency changed tremendously when convictions grew that in all cases insolvency was not the result of fraud. The latter had been a general belief in the High Middle Ages (c.1000-c.1250), which was subsumed in the proverb "decoctor ergo fraudator". Any fugitive was held to be a fraud. Later on, city laws of Italian cities provided that those who "halted" payments were subjected to insolvency proceedings.[45] "Impending flight" or "fear of flight" came to be regarded as a sufficient starting point for insolvency proceedings.[46] However, in the sixteenth century, these views were adjusted. In Benvenuto Stracca's treatise De conturbatoribus sive decoctoribus, which was published in 1553, accidental insolvents were distinguished from those that had become insolvent due to their own actions. In continental Europe North of the Alps, starting from the later fifteenth century onwards, the infiltrating ideas regarding bonafide and treacherous bankrupts were combined with a distinction between insolvency and bankruptcy.[47] In 1564, for example, the Augsburg 1447 Gantordnung and the Nuremberg Reformation of 1479 were replaced with Faillitenordnungen, based on insolvency as criterion.[48] In a breakthrough section, the 1510 Parisian coutume provided that the "first come, first serve" rule did not apply in the case of déconfiture. Déconfiture consisted of a shortage of funds that was attested when more than one creditor sued for debt.[49]

In the periods mentioned, these legal developments were happening within the jurisdiction of fairs and towns with vibrant commercial scenes. Some economic historians have assessed bankruptcies as a new phenomenon of the fifteenth century, which became widespread in the sixteenth century, and categorized the novelty of the trend as the result of economic factors.[50] However, when legislation and institutional practices are assessed in a comparative fashion, it appears more probable that collective insolvency proceedings evolved out of incremental legal innovations and the embracing of scholarly ideas, which were taking place in more or less the same period and which were not dependent from economic factors. Before around 1450, debt enforcement proceedings above the Alps had largely been individual; from that time onwards collectivisation in proceedings and the pooling of assets and debts were pursued, developments which clearly bear the mark of academic legal scholarship and the Roman law on which they elaborated.

3. Non-possessory pledging in the new settings (c. 1450-c. 1600)

The mentioned shift from debt enforcement for certified debts to generalized enforcement proceedings had important consequences for pledging. Contracts, certified or private, often contained clauses that provided the creditor with a security. Already in the second half of the thirteenth century, in Paris and the Southern Low Countries, the non-possessory security provision "on all the goods of the debtor" was inserted into debt instruments and contracts.[51] When the scope of debt enforcements was limited to certified debts, clauses of collateral enforced the claims of creditors on their debtors' assets, which could be expropriated in executory proceedings. With generalized debt enforcement and collective proceedings in place, which were rooted in the common pledge idea, contractual clauses on securities took on another function: they served to establish priority over other creditors.[52]

Generally speaking, in French pays de droit coutumier, the Low Countries, and German territories, in the fifteenth and sixteenth centuries the reception of academic views did not result in general hypothecs and non-possessory security interests of movables being combined with a right of pursuit. It was believed that creditors had taken the risk of leaving assets with the debtor, or pledge on his belongings without taking a pawn. If the debtor transferred the assets under pledge to third parties, then the pledge was forfeited.[53] Bylaws of cities stipulated that unpaid sellers could not pursue their deliveries with third parties if they had not been paid, even though this was possible according to Roman law (Inst. 2,1,41).[54] Some cities generally imposed the rule that sale on credit was at

43 This was still common in the sixteenth century: J. Puttevils, Merchants and Trading in the Sixteenth Century: the Golden Age of Antwerp, London, Pickering & Chatto, 2015, 98, 111.

44 Planitz, "Studien".

45 Santarelli, Mercanti, 71-74.

46 M. Spann, Der Haftungszugriff auf den Schuldner zwischen Personal- und Vermögensvollstreckung. Eine exemplarische Untersuchung der geschichtlichen Rechtsquellen ausgehend vom Römischen Recht bis ins 21. Jh. unter besonderer Berücksichtigung bayerischer Quellen, Münster, Lit, 183-184.

47 De ruysscher, "Designing", 314-315.

48 Fischer, "Bankruptcy", 179.

49 L. Levinthal, "The early history of bankruptcy law", University of Pennsylvania Law Review 66 (1918), 245. See also Martin, Histoire de la coutume, vol. 2, 590. Martin treats this rule as only featuring in the 1580 coutume, but the principle of rateable distribution at déconfiture was already mentioned in the 1510 coutume (s. 197).

50 Th.M. Safley, "Introduction: a history of bankruptcy and bankruptcy in history" in Safley (ed.), The History of Bankruptcy, 3; M. Schulte-Beerbühl, "Introduction" in A. Cordes and M. Schulte-Beerbühl (eds.), Dealing with economic failures: Extrajudicial and judicial conflict regulations, Frankfurt am Main, Peter Lang, 2016, 13.

51 Claustre, Dans les geôles, 244; Godding, Le droit privé, 218 (nr 366); Martin, Histoire de la coutume, vol. 2, 530.

52 De ruysscher and Kotlyar, "Local Traditions".

53 A.S. de Blécourt and H.F.W.D. Fischer, Kort begrip van het oud-vaderlands burgerlijk recht, Groningen 1967 (7th ed.) 248 (nr 174 a); Planitz, Die Vermögensvollstreckung, 274; A.G. Pos, Hypotheek op roerend goed (bezitloos pandrecht), enkele rechtshistorische en rechtsvergelijkende beschouwingen, Dordrecht, 1970, 131, 145.

54 De ruysscher and Kotlyar, "Local Traditions".

the risk of the seller and that no claims, not even for payment of the price, could be brought in the courts.[55] By way of compensation, however, some local laws allowed for third-party seizures. In that case, the creditor laid arrest on assets that pertained to his debtor in one way or another, even though they were retrieved not with the debtor but with a third party. This proceeding served to pressure the debtor into making payments or providing sureties or pledges. The third-party seizure proceedings were aimed at seizure and not at executory sale, except for when the latter had cooperated in a scheme of fraudulent conveyances.[56] Considering all of the above, an older view that local legislation corroborated the mercantile custom that any sale on credit encompassed a right to resolve the contract if the price was not paid, and retrieve the delivered assets even with third parties, seems incorrect.[57]

III. Negotiated solutions upon insolvency

Until the end of the Middle Ages, most bankruptcies were started by creditors. As mentioned above, debtors did not have incentives to bring forward their financial difficulties. Yet from the fifteenth century onwards, in continental Europe, insolvency proceedings based on debtors' initiatives and which were not directed towards liquidation only were slowly crafted along three different routes. One path was concerned with post-bankruptcy negotiations on postponements and reductions. Above the Alps, this approach was applied incrementally from the sixteenth century onwards. Before that time, in those regions debtors could petition for government-granted temporary protection from seizures and imprisonments. It was only in the eighteenth century that in the Low Countries and German territories another strategy became widespread. Municipal authorities started imposing payment plans on creditors.

1. Post-insolvency compositions

From the late fourteenth century onwards, rulers of Italian cities started accepting debtor-creditor agreements (sometimes labelled concordato) with restraint. Such agreements could be drafted after the public alert that a debtor had gone bankrupt and the inventorying of his estate.[58] Fled debtors could be given protection, in exchange for their cooperation in listing their properties and for postponements of payment.[59] Payment plans were not negotiated reorganisation schemes. The purpose of the concordato was not to preserve the business activities, or the going concern of the debtor's firm or shop. In fact, negotiations only suspended the public sale of the insolvent's estate, and liquidation was always possible if the talks did not result in an agreement.[60] Moreover, the requirements for a concordato were generally strict. A minimum part of the creditors, in sums, had to agree in order to impose the contents of the agreement on dissenting and absent creditors. The high majority requirements (for example, seven eights of debts in sixteenth-century Genoa[61]) responded to the general principle, proffered in legal scholarship of the time, that no one could be bound under a contract that had not been present at its drafting. Because academic scholars of contract law stuck to the abovementioned principles, fifteenth- and sixteenth-century legal doctrine did not elaborate on imposed debt arrangements, in particular those encompassing reductions.[62] The concordato was a legally supported debt scheme, at least in local law, but because of the doctrinal restrictions the scope of the arrangement was limited. Further impediments included conditions as to the duration of a concordato[63] and short periods of time were imposed during which they had to be negotiated.[64] Moreover, the creditors' rights were considered fully revived even upon a minor non-compliance with the agreement.[65]

Because of the authority of legal scholarly texts, ordinances that stipulated a "cramdown" of the type mentioned, of post-bankruptcy negotiated deals on unwilling creditors, appeared relatively late outside Italy. In Nuremburg, majority compositions were mentioned in the city's legislation for the first time in 1564; Augsburg followed suit in 1574.[66] In Antwerp majority debt schemes were acknowledged only in 1608, long after the city's economic prosperity had dwindled.[67] Frankfurt accepted majority compositions in 1611.[68] Also, conditions were severe. Nuremberg's law of 1564 acknowledged five-year moratorium compositions only for as much as the dissenting creditors received pledges as collateral for their debts.[69] The 1673 French Ordonnance sur le commerce labelled concordats as lawful provided that they were supported by creditors representing three quarters of claims.[70] Fur-

55 For example at Leiden: H.G. Hamaker, De middeneeuwsche keurboeken van de stad Leiden, Leiden, 1873, 331 (book 5, part 2, s. 36, dating from 10 June 1521).

56 Hamaker, De middeneeuwsche keurboeken, 438 (book 4, s. 67, dating from 1545); C. Neostadius, Utriusque Hollandiae, Zelandiae, Frisiaeque Curiae Decisiones …, The Hague 1667, p. 116 (decision 45, dating from around 1584). On the actio Pauliana and its reception, see H. Ankum, De geschiedenis der actio Pauliana, Zwolle, 1962.

57 See for this view: A. Frémery, Études de droit commercial, Parijs, Alex-Gobelet, 1833, 396; G. Schiemann, "Über die Funktion des pactum reservati dominii während der Rezeption des römischen Rechts in Italien und Mitteleuropa", Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung 93 (1976) 195-198.

58 A. Rocco, Il concordato nel fallimento e prima del fallimento. Trattato teorico-pratico. Turin, Bocca, 1902, 36-40.

59 Rocco, Il concordato, 37.

60 Rocco, Il concordato, 46; Santarelli, Mercanti, 103, 106-107.

61 Rocco, Il concordato, 41-42, n. 21

62 J.H. Dalhuisen, Compositions in bankruptcy. A comparative study of the laws of the E.E.C. countries, England and the U.S.A., Leiden, Sijthoff, 1968, 19-24; F. Migliorino, Mysteria concursus. Itinerari premoderni del diritto commerciale, Milan, Giuffrè, 131-138, 164-194; Santarelli, Mercanti, 104.

63 Rocco, Il concordato, 43.

64 Rocco, Il concordato, 40.

65 Rocco, Il concordato, 44.

66 Birnbaum, Konkursrecht, 50-53; Dalhuisen, Compositions, 21, n. 99; M. Eisenhardt, Sanierung statt Liquidation, Frankfurt am Main, Peter Lang, 2011, 42.

67 G. De Longé (ed.), Coutumes du pays et duché de Brabant. Quartier d'Anvers. Coutumes de la ville d'Anvers, vol. 4, Brussels, Gobbaerts, 1874, 400-402 (dl. 4, tit. 16, art. 36).

68 Schmitt, Säuberlich banquerott gemachet, 332-334.

69 Eisenhardt, Sanierung statt Liquidation, 42.

70 Dupouy, Le droit des faillites, 153-154.

thermore, it was common that concordatos only restricted the rights of unsecured creditors. Creditors having pawns or non-possessory hypothecs as well as owners were excluded from the temporary protection which was common for the duration of the instalment plan: they could still seize their securitized assets irrespective of the negotiated moratorium. The 1673 French Ordonnance sur le commerce, as well, exempted creditors with hypothecs if they did not consent to a concordat.[71]

2. Government-imposed moratoriums

Next to concordatos, in the sixteenth century older remedies were still in use. Government-granted temporary relief measures allowed debtors to recover during a brief period of time. In France and the Low Countries, debtors could apply for lettres de répit and other comparable measures, which imposed a period of protection. These letters had to be brought in civil courts, which checked the veracity of the debtor's statements. In practice, however, the authority of these courts was minimal. In France, petitions for letters more or less entailed an automatic moratorium because the creditors could not easily contest their contents.[72] In the Low Countries, provincial princely courts issued lettres de répit and similar letters (e.g. lettres de saufconduite). Yet in contrast to France, and at least since the later 1520s, they were considered summons for creditors to start negotiations.[73] The Reichspolizeiordnung of 1548 centralised government-granted moratoriums in German territories, which were awarded upon a scrutiny of the trustworthiness of the applicant.[74] This approach had been practised in Italy in the later Middle Ages as well. Requests for stays served to impose a cooling down period, during which negotiations on postponements of payment were begun (salvocondotto, inducia).[75] In the sixteenth and seventeenth centuries these tactics were copied in other areas north of the Alps. The 1603 Hamburg Stadtrecht mentioned a government-imposed moratorium allowing for debtor-creditor talks;[76] comparable measures were listed in the 1659 insolvency ordinance of the city of Amsterdam.[77]

3. Imposed compliance

In some areas, petitions for princely moratoriums were transformed into voluntary collective negotiation proceedings. Such was the case in Antwerp, for example. From the later 1520s onwards, every request for relief from princely courts and councils was brought over to the municipal government. Thereupon commissioners were appointed who invited the creditors and they attempted to seek an agreement among all of them. When a deal on debt adjustment was made, which was often the case, it was confirmed by the court or council that had transferred the case.[78] In Hamburg, government-directed negotiations upon a debtor's petition emerged in the eighteenth century. In 1753, the Hamburg Faillitenordnung was directed towards compositions. Municipal commissioners supervising the negotiations actively brokered consensus among all creditors.[79] Comparable strategies were pursued in Amsterdam from 1777 onwards. A temporary stay was combined with negotiations among the creditors. The commissioners of the Insolvency Chamber actively had to convince minority creditors of accepting negotiated agreements.[80] A very modern feature was the rule that secured creditors, with the exception of owners, were forced to support payment plans. The Hamburg 1753 law stipulated tranches of repayable debt for different categories of creditors, but did not exclude secured creditors. A distinction was made between prior and recently secured creditors.[81] It is only very recently that legislators around the world are considering "carve-outs". Such arrangements impose secured creditors to contribute in one way or another to reorganisation proceedings. Usually this entails them being invited to pay a share of the costs, but sometimes cuts on their debts are anticipated.[82] Because of the mentioned legislative strategies, in the mentioned eighteenth-century cities pre-pakkaged deals were possible. Negotiations could then take place before any government intervention. Secured creditors could accept payment plans because they were sure as to what they would loose in case a scheme were imposed without their consent.[83]

IV. Structuring debt: the ranking of creditors

In the sixteenth and seventeenth centuries, many legislators above the Alps were engaged in drawing up ranks of debts. This was due to the newly introduced collective insolvency proceedings. For this theme, however, the rulers of cities could not rely too much on academic legal writings, which were notoriously confused on the issue. The Roman law on the hierarchy of debts, which in post-classical times also encompassed legal hypothecs and privilegia exigendi, was difficult to grasp.[84] Yet, there were some general principles that were common in fifteenth-century legal academic writings and to which administrators of towns abided as well. The first one was the "prior tempore" rule, which was considered a firm guiding maxim in securities. A pledgee had priority over another pledgee if the former's debt was negotiated prior to the latter's security. In the sixteenth century, however, on the basis of C. 8,13(14),2 it was sometimes conside-

71 Dupouy, Le droit des faillites, 154.

72 Dupouy, Le droit des faillites, 138-145; J. Sgard, "Bankruptcy, fresh start and debt renegotiation in England and France (17th to 18th centuries)" in Safley (ed.), The history of bankruptcy, 227.

73 D. De ruysscher, "The struggle for voluntary bankruptcy and debt adjustment in Antwerp (c. 1520-c. 1550)" in Cordes and Schulte-Beerbühl (eds.), Dealing with economic failures, 83-86.

74 Forster, Konkurs als Verfahren, 211.

75 Santarelli, Mercanti, 106.

76 Der Stadt Hamburg Gerichtsordnung und Statuta, Hamburg, Perthes, 1842, 231-232 (ch. 43, s. 6).

77 Hand-vesten, privilegien, octroyen, costumen en willekeuren der stad Amstelredam, Amsterdam, Smient, 1663, 256 (2 April 1659, s. 6).

78 De ruysscher, "The Struggle", 86-93.

79 J.N. Misler and J.G. Misler, Essai sur le droit de Hambourg touchant les faillites, Geneva, Froullé, 1781, 3, 30-31.

80 M. Roestoff, "Skuldverligtingsmaatreëls vir Individue in die Suid-Afrikaanse Insolvensiereg: 'n historiese ondersoek", Fundamina (10) 2004-05, 83.

81 Misler and Misler, Essai, 25-27.

82 Misler and Misler, Essai, 25-27.

83 Misler and Misler, Essai, 31.

84 Forster, Konkurs als Verfahren, 128; Zwalve, "A Labyrinth of Creditors", 43.

red, in France and also in the Low Countries, that the distinction between general and special pledges mattered, and that the latter could in some circumstances be given preference over the former, even if the latter had been made later than the general pledge.[85]

This amounted to yet another inconsistency within doctrine and local rulers often experienced difficulties in setting up a legislative framework with references to legal academic texts. Moreover, it was far from clear to what extent legal hypothecs and privilegia exigendi vested in the law could trump negotiated securities. In the Roman source texts, there were several examples of legal hypothecs and privilegia exigendi that took precedence over negotiated securities. The best-known example is that of the dowry, which Emperor Justinian promoted to the first tacit hypothec, having priority over every other security, including the negotiated ones (C. 8,17,12,4). Legal hypothecs that were also privilegia exigendi, of which the dowry was one example, were particularly difficult to rank. This was the case for debts out of tax claims as well.[86]

Accursius' Magna Glossa (middle 13th century) listed the dowry after tax debts, but hesitated on whether the former had priority over contracts of hypothecs (i.e. non-possessory pledges of movables or immovables).[87] Cinus of Pistoia (dec. 1336/37) prioritized the dowry over all debts, including tax debts and negotiated hypothecs. But Bartolus of Saxoferrato (dec. 1357) and even more so Baldus de Ubaldis (dec. 1400) took contracts of hypothec as being more important than the dowry.[88] The teachings on the "privilegium duplex" added to the controversies. This entailed that those creditors having both a privilegium exigendi and a legal hypothec were given priority over creditors that only had a privilegium exigendi or a hypotheca.[89] The dowry fitted within the combined privilegium, since the Justinianic texts contained categorisations of the dowry as being privilegium and hypotheca. But Negusantius at the beginning of the sixteenth century envisaged that a negotiated security had duplex privilegium even if it fell under one of the privilegia exigendi and was "prior tempore".[90]

The example of Antwerp is an illustration of how the obscurity on the matter was dealt with. A municipal bylaw of January 1516 categorized debts of salaries, debts of lease and debts of alimony as the highest preferential debts. They had to be paid after secured creditors, having pledges and hypothecs, but before the unsecured creditors.[91] The dowry was not mentioned in the bylaw. The Antwerp rulers most probably continued to rely on an older rule that stipulated that the wife, or widow in case of an insolvent inheritance, could only claim her dowry after all creditors had been paid.[92] In June 1518 a new bylaw was made, which completely shifted the ranks mentioned in the 1516 bylaw. Salaries were to be paid first, but debts of lease were now referred to an inferior rank, even after creditors with non-secured debts that had obtained a judgment before the debtor's insolvency.[93] Between 1518 and 1523, a compilation of municipal rules that were imposed in the Antwerp City Court mentioned the dowry for the first time since 1495. It stipulated that the dowry was to be paid after the debts of lease, salaries and alimony, but that it had priority over hypothecs.[94] This was a new overhaul. Debts of lease were put higher on the scale again, as compared to the 1518 bylaw. But most crucially, the dowry was now regarded upon as a preferential debt, which had not been the case before. The dowry was considered the wife's if she had agreed with her husband on investing the dowry into the marriage on the condition that it was to be used by the surviving spouse. The wife could not recover the dowry in case she accepted to have her share of the inheritance.[95]

But around 1523, shortly after the mentioned compilation was completed, the Antwerp priority rules changed again; the dowry moved up the ladder and was considered the highest preferential debt, even to the extent that it was considered more important than debts of lease, salaries and alimony.[96] Quite remarkably, the new rule was the complete opposite of what had been provided in 1495, when the dowry was the last debt that could be claimed. In a period of some thirty years the regime of recoveries of dowries had thus changed fundamentally. But however, this was not the final stage of legal development. When in 1548 a new compilation of Antwerp law was drafted, the rules were again changed. First came debts of lease, thereafter the dowry, followed by debts of salaries. Alimony was left out of the list of prioritized debts.[97]

Accursius treated the priority among privilegia exigendi mostly according to their nature instead of their date of coming into being. This brought him to put tax debts as the highest preferential debt, before the dowry, costs to refurbish or save an asset under pledge or hypothec and costs of funeral.[98] In the sixteenth century, however, it had become more common to put negotiated securities

85 Koops, Vormen van subsidiariteit, 137; W. Zwalve, "Tekst & Uitleg XII. C. 8,13(14),2", Groninger Opmerkingen en Mededelingen 27 (2010) 138-139.

86 For the tax debt as encompassing a privilegium exigendi, see D. 42,5,34, and as hypotheca, see C. 7,73,1; C. 8,14,4,4 and C. 12,62,3. For the dowry as entailing a privilegium exigendi, see D. 42,5,1-19pr., and a hypotheca, see C. 5,12,30pr.; C. 8,17,12,4 and Inst. 4,6,29.

87 Forster, Konkurs als Verfahren, 142-146; Pakter, "The Origins of Bankruptcy", 502.

88 Pakter, "The Origins of Bankruptcy", 502-504.

89 Forster, Konkurs als Verfahren, 149-157.

90 Forster, Konkurs als Verfahren, 151.

91 De ruysscher, "De ontwikkeling van het Antwerpse privaatrecht in de aanloop naar de costuymen van 1548. Uitgave van het Gulden Boeck (ca. 1510-ca. 1537), (projecten van) ordonnanties (1496-ca.1546), een rechtsboek (ca. 1541-ca. 1545) en proeven van hoofdstukken van de costuymen van 1548", Bulletin de la commission royale pour la publication des anciennes lois et ordonnances de Belgique 54 (2013) 198.

92 ACA, V, 68, fol. 5v (24 March 1495 ns).

93 De ruysscher, "De ontwikkeling", 203-204.

94 ACA, V, 2, s. 119.

95 General Archives of the Realm in Brussels (hereafter GARB), Papieren van State en Audiëntie, 1191/41, 34, s. 5/20.

96 ACA, V, 68, fol. 45v (between March 1523 and January 1526), fol. 63r (2 June 1526), and fol. 83v (22 July 1529).

97 De Longé (ed.), Coutumes du pays et duché de Brabant, vol. 1, 172 (s. 14-15).

98 Forster, Konkurs als Verfahren, 144-145.

before tacit securities, and therefore also in precedence over tax debts. More research on the issue is required, but it might have been that in the later 1500s and in the seventeenth century this was changed again, because the doctrinal rules conflicted with a more prominent role of taxation as pertaining to government imposed obligations.[99] As a result of the conflicting and perplexing rules, taxes could in one region be considered super-priority debts, and in others debts that were preferential but only after negotiated securities. Also in German regions divergence existed, in the sixteenth and seventeenth centuries. Some municipal and regional laws stipulated that tax debts were considered preferential over negotiated securities, whereas others considered these debts as entailing a general privilege that succumbed to the rights of creditors with conventional pledges and hypothecs.[100]

V. The aftermath: the codifications and the slow return of the Old Regime

The example of the ranks of debts shows how legal scholarship with regard to security interests was chequered, yet also influential. Many parts of the doctrine, and also local law, on preferential debts were copied in the age of codifications. This was more the case with regard to security interests, than with respect to insolvency. Moreover, with regard to non-possessory pledges, codifications imposed new solutions as well.

When in 1804 the French Code civil was issued, a new era started for security interests. The French revolutionaries had a general distrust of tacit legal hypothecs and non-possessory pledges. The first ones were considered as ridden with uncertainty and the latter often offered possibilities for fraud.[101] Most nineteenth-century codes stipulated that movable items that were securitized had to be handed over to the creditor.[102] These rules were a complete breach with the rules of the preceding era. In the eighteenth century, pledges could be non-possessory. They did not generally entail a right of pursuit and the rank of such debts was commonly restricted, but they brought about a priority over non-secured creditors.[103] The Civil code tore down this system, but at the same time imposed priorities on movables that often corresponded to older privileges. One example is the privilege of the seller of movables, which had been delivered and for which the price was not paid. This priority was rather weak, in that other privileges took precedence over the unpaid seller's rights. Also, the privilege was restricted to when the assets delivered were still with the debtor. If the latter had sold them, the seller could not invoke the privilege (s. 2102, 4° Code civil). Other codes could allow non-possessory pledges, such as for example the German ADHGB (1861), but in that code it was stipulated that third parties were protected against claims out of these pledges if they were unaware of their existence (s. 306). Another mark of the past was the privilege for the dowry in the French Civil Code, which was labelled a hypothèque. For fiscal duties, no privilege or legal hypothec was imposed, but in France as well as in Belgium, it was considered to apply because of older, mostly seventeenth-century legislation.[104]

Nineteenth-century French mercantile insolvency rules differed from those of the past. The French Code de commerce of 1807, which was not only in force in France but also in the Southern Netherlands (later Belgium), listed rules regarding "commerçants", merchants, and their insolvencies. Upon insolvency, which was defined as the "halting" of payments, proceedings had to be started before a commercial court. Insolvents were deemed to have committed fraud; they were arrested at the start of the proceedings (s. 453) and could regain their freedom upon a granting of "saufconduite" (s. 466). Negotiations leading up to a composition ("concordat") were possible, but only after the debtor had formally been acknowledged as "faillite". If negotiations failed, the only outcome of the insolvency trial was liquidation of the estate. The verdict of creditors also decided on the "excusability" of the debtor (s. 613). If in the course of the bankruptcy proceedings no traces criminal behaviour had been found, the insolvent was declared "excusable" which made him eligible for re-entry in the market at a later time ("rehabilitation") (s. 614). Yet, not all creditors were involved: secured creditors, who held a hypothec or pawn as collateral for their debts, were considered "separatists". They could ignore the insolvency proceedings, and even a composition, and sue to obtain their collateralized assets.[105]

Over the course of the nineteenth century, pre-insolvency compositions were re-introduced in France and Belgium. In 1883 the Belgian concordat préventif was created and in 1889 a French law on liquidation judiciaire was promulgated. Even though these arrangements were new in many respects, they were still burdened by the earlier contents of the commercial code. For example, secured creditors were exempted from the consequences of compositions. Majority requirements were high as well. In German legislation, similar rules applied. The 1855 Prussian Konkursordnung as well as the Reichskonkursordnung of 1877, on the basis of the French example, imposed a majority of three fourths of debts for post-insolvency compositions.[106] Only in 1927,

[99] A stronger position of tax debts may have been a proxy of state formation and theories on monarchal powers. Yet, also the maxim "in dubio contra fiscum" was widespread. See for example B. Clavero, "Hispanus fiscus, persona ficta. Concepción del sujeto político en el ius commune moderno", Quaderni Fiorentini 11-12 (1982-83) 113-129.

[100] Forster, Konkurs als Verfahren, 164-173; Meier, Die Geschichte, 71.

[101] Exposé des motifs de la loi relative aux privilèges et hypothèques, in "Privilèges et hypothèques", Répertoire méthodique et alphabétique de législation, de doctrine et de jurisprudence, Paris, Bureau de la Jurisprudence générale, 1858, 38 (nr. 2).

[102] Zwalve, "A labyrinth of creditors", 47.

[103] Van Hoof, Generale zekerheidsrechten.

[104] See for example, V. Vouin, Des effets de l'inscription des privilèges, Brussels, Cadoret, 1908, 8-9 (referring to the Eeuwig Edict of 1611).

[105] P.-C. Hautcœur and N. Levratto, "Faillite" in A. Stanziani (ed.), Dictionnaire historique de l'économie droit, Paris, 2007, 159-167; J. Hilaire, Introduction historique au droit commercial, Paris, PUF, 1986, 325-330; Szramkiewicz and Descamps, Histoire du droit des affaires, 384-394.

[106] Meier, Die Geschichte, 99-100, 145.

rules on pre-insolvency agreements were issued in the Vergleichsordnung.[107]

A comparable return to the Old Regime concerned pledges. The legal re-acknowledgment of non-possessory pledges took a long time. Reforms of security interests took place in France in 1863 and in Belgium in 1872. The principle, however, that the debtor was dispossessed and that the creditor had to receive and hold the pledge remained. A minor step towards non-possessory pledges was the introduction of warrants. They encompassed security interests on goods that remained with the debtor.[108] In France, in 1909 and in Belgium, only in 1919 it became possible to pledge a business estate, thus leaving it with the debtor.[109]

VI. Conclusion

All of the above demonstrates that legal changes in the theme of security interests and insolvency were intricately connected. Also, developments had transnational characteristics. This was the case in the nineteenth century, when the example of the French commercial code was followed in Belgium and also to a large extent in Germany. Yet, also in the Early Modern period rules on collective proceedings and post-insolvency compositions can be situated in the same timeframes. On the impact of legislation, court practice and the commercial attitudes a lot needs to be found out. For France, economic historians have looked closer to the practices surrounding pledging in the second half of the nineteenth century, and that research yielded as result that in practice some loopholes in the legislation were used so as to devise non-possessory pledges, which were supported in case law.[110] For Belgium, the Netherlands and Germany, legal-historical research into contractual and judicial practices on the issues of security interests and insolvency in the nineteenth century, but also for previous periods, is virtually absent. However, the importance of analysis of this type cannot be underestimated. Results would be a considerable step forward for assessing required changes in present-day law. Also, big questions relating to legal pluralism and the impact of codifications, as well as concerning the interplay between law and economy, cannot be answered properly without scrutiny of practices on the ground.

107 Meier, Die Geschichte, 204.

108 The Belgian law on warrants was passed in 1862, the French law dates from 1863. In fact this was a form of fiducia since the cédule and the warrant were given jointly to the creditor. The cédule encompassed the rights of ownership, the warrant was the security over the stock of the debtor. See Szramkiewicz and Descamps, Histoire du droit des affaires, 382-383.

109 A. Stanziani, "Fonds de commerce" in A. Stanziani (ed.), Dictionnaire historique de l'économie droit, Paris, 2007, 185-194.

110 A. Stanziani, "Le capital intangible: le fonds de commerce et son nantissement" in N. Levratto and A. Stanziani (eds.), Le capitalisme au futur antérieur. Crédit et spéculation en France, fin XVIIIe-début XXe siècles, Brussels, Bruylant, 2011, 143-161.

Zur Vorgeschichte des Schuldbetreibungs- und Konkursrechts in der Schweiz bis 1869

Lukas Gschwendt/Matthias Kradorfer

I. Einleitung

Das Insolvenzrecht war in der Schweiz bis Ende des 19. Jahrhunderts Gegenstand unterschiedlicher kantonaler Rechtstraditionen, welche zwar teilweise in wechselseitiger genetischer Abhängigkeit standen, doch unterschieden sich die kantonalen Regelungen deutlich.[1] Es fehlte in Lehre und Gesetzgebung bis zur Einführung des Schweizerischen Schuldbetreibungs- und Konkursgesetzes (SchKG) 1889 sogar eine allgemein anerkannte Trennung zwischen Insolvenz- und Zivilprozessrecht. Sodann bestand eine deutliche Diskrepanz zwischen der oft an ausländischen und historischen Vorbildern orientierten rechtswissenschaftlichen Lehre und der regionalen Praxis. Angesichts der vielerorts prekären ökonomischen Verhältnisse und der weitverbreiteten privaten Schuldenwirtschaft erstaunt der geringe Stellenwert des Rechtsgebietes in Lehre und Forschung. An der Universität Zürich las der 1850 aus Preussen geflohene Richter Jodokus Temme 1856 erstmals „Gemeiner deutscher Civilprocess mit Einschluss des summarischen Prozesses und des Concursverfahrens". Parallel dazu bot Privatdozent Aloys von Orelli eine Veranstaltung zum „Zürcherischen Civilprocess mit Einschluss des Concursverfahrens und der summarischen Prozesse" an.[2] Die Vorlesung findet sich in späteren Jahren aber nicht mehr. Offensichtlich war das Interesse der Studierenden an diesem Rechtsgebiet gering.

Im Gegensatz zum Privat- und Strafrecht, wo bis 1874 eine Bundeskompetenz ebenso fehlte, verfügte das Zwangsvollstreckungsrecht in ganz Europa über eine vergleichsweise bescheidene Wissenschaftstradition.[3] Bis

1 Vgl. Ernst Meyer, Über das Schuldrecht der deutschen Schweiz, S. 238-242.

2 Vgl. Vorlesungsverzeichnis der Universität Zürich vom Sommersemester 1856, http://www.histvv.uzh.ch/vv/1856s.html (besucht am 9. November 2018).

3 Schurter/Fritzsche, Zivilprozessrecht des Bundes I, S. 2-3.