The History of Market Discipline: Bankruptcy, Renegotiation, and Debt Discharge in England and France (Sixteenth–Nineteenth Century)

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ABSTRACT

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Between the 1620's and the 1880's, English bankruptcy law forbid the confirmation of majority votes by creditors on continuation arrangements. By making collective action more difficult, this rule affected in a major way how the economic agents interacted with the institution, both before and after defaults. It also set English law apart from mainstream European traditions, namely the Italian, and later French legacies. In accounting for the initial divergence, this article gives a decisive role to early-modern conflicts between courts over the jurisdiction on trade issues; in the background commercial expansion and unsettled relations between the executive, legislative and judicial powers did also weigh heavily. Ulterior stability then responded, first, to the comprehensive constitutional commitments that had to be taken in order to protect market discipline against rent-seeking interests; second, to the internal microeconomic coherence attained by the respective bankruptcy regimes. Lastly, the slow return of English law to confirmed arrangements, over the course of the 19th century, reflected changing economic conditions and a more stable environment, where the overall commitment to market discipline was better institutionalised. The strictures built into the initial regime could thus be relaxed. This comparative historical paper is thus a contribution to the debate on the fragile transition from "limited access" to "open access" economies, in the terms recently used by North, Wallis and Weingast (2009).

Keywords: bankruptcy, trade law, commercial courts, constitutions.

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"*What is tragic is when the difficulties encountered by enterprises systematically become synonymous to bankruptcy (…). The law should give the manager the capacity to recover; it should help him restore his confidence when he is in trouble; it should convince him that failure is not irreversible*"
Nicolas Sarkozy, September 2, 2007.
Bicentenary of the Commercial Code, Tribunal de Commerce de Paris.

« *the authorities cannot and should not be expected to intervene with a support package every time a bank – even a large one – gets into difficulties. Such interventionist approach (…) would in all likelihood compromise the efficient provision of financial services and inhibit the exit of weak firms from the industry*".
Ian Bond, Head of Financial Crisis Management, Bank of England, October 26, 2006. London.

1. Introduction

Bankruptcy is the ultimate market sanction. When markets have failed to impose a change of course and when implicit insolvency ends up in open illiquidity, market exit becomes a systemic necessity. And where markets have failed, a public institution should do the job exogenously. At least in modern market economies, the intricate mechanism whereby contractual exchanges are suspended, assets reallocated, and losses shared, is designed by lawmakers. Bankruptcy is an institution that must be voted upon, financed, and staffed.

As a consequence, not all bankruptcy laws are identical. Each is part of a unique and complex legal, jurisdictional, political, and market environment. A law that performs reasonably well in one environment should not be expected to deliver the same performance elsewhere. Another one, that functioned well in a given time period, may later be thoroughly reformed. On the other hand, there is a set of defining problems—of a mostly microeconomic nature—that should be addressed by all bankruptcy laws. Most clearly, for instance, lawmakers must always identify a criteria or a signal for starting the procedure although they will inevitably make this decision under conditions of asymmetric information. No lawmaker, trader, or judge knows for sure whether or not a given market participant is solvent. It may then happen that solvent firms are declared bankrupt or that failed ones continue to operate. In other words, the institution of bankruptcy is inherently fallible, although some versions are less so than others.

Another critical policy issue to be addressed when reforming bankruptcy law is to decide which public it should primarily target: should the law's threats and opportunities aim those who are inside or outside market exchanges? If the whole population of market participants (say, the solvent ones) is considered the most important, then bankruptcy should probably work, first of all, as a force of dissuasion. The harsher the treatment of bankrupts the better, just because all market agents should do everything to fulfil their contractual undertakings. Renege at your peril! Market discipline would arguably be stronger, microeconomic decision closer to optimal, and welfare higher; or so the argument runs. For prolonged periods of time, both English and French law indeed threatened the most offending bankrupts with capital punishment and allowed creditors to imprison debtors. The problem is: execution of bankrupts remained exceedingly rare and the sovereigns eventually decided that fellow traders should not have the right to infringe into each others' civic status.

In other words, all bankruptcy reformers are confronted with the question of what should be for the agents to decide and what rather corresponds to a public good, or a public concern. Should the institution be exclusively an instrument offered to aggrieved creditors? Or should it care for interests that go beyond that of failed businesses, such as a notion of public morality, or economic discipline? Critically, if those whose wealth is directly at threat have the upper hand, then they should be allowed to bargain ex post and to resolve the default to the best of their interests. Provided they have all available information, they should be in the best position to compare the private benefits of continuation versus liquidation. But easy renegotiation of debts may also cause widespread moral hazard: if debtors know ex ante that they may find their way out of default ex post, with not much cost, then failure may become more common and the credit market may shrink. In this case, lawmakers may consider that regulation is warranted.

This paper compares how, from the 1620s until the 1880s, bankruptcy laws in England and France stabilized on two opposite equilibria between market discipline and renegotiation. That is, the two countries each opted for a specific trade-off regarding the ex ante versus ex post dilemma, or, again, the risks of undue liquidations as opposed to moral hazard. Specifically, the French tradition has always accepted the judicial confirmation of majority votes among creditors: this helps to control holdout investors and reduces transaction costs when bargaining ex post. Statutes, in other words, actively supported continuation arrangements and assumed that they were positive in both private and social terms. In England judicial confirmation of majority votes was closed for two centuries and a half, so that restructuring agreements were exclusively a private, out-of-court, voluntary affair, while bankruptcy *per se* remained a single-entry, single-exit institution. That is, it worked exclusively as a debt collection instrument—often a harsh one—and would not differentiate between insolvent businesses and those that had only suffer a liquidity shock.

The account of two leading emerging economies making such contrasting and enduring choices, regarding a core market institution, is intriguing. In a standard Law and Economics framework, market forces would have probably identified much more rapidly a superior solution and then force convergence. Conversely, if the emphasis were on path-dependent patterns, such as "legal origins" (or traditions) then accounting for the initial divergence and the ulterior convergence becomes the challenge. This article attempts to articulate both approaches. On the one hand, bankruptcy is envisaged in microeconomic terms, that is through the complex set of incentives and constraints to which it confronts agents. On the other hand, their trade-offs also include the reliability of the forum where the bankruptcy process takes place; it may protect more or less efficiently their private rights, and they as well opt-out or minimize reliance upon its services. This is where microeconomics are anchored onto the evolving institutional and political economic environment that characterises each country.

An open question is to which extent these alternate choices affected the long term economic development of England and France. Given the superior performance of the former country, especially in the financial sphere, one may expect that it had a better legal infrastructure. However, although this paper is on the whole agnostic, it rather follows Lamoureaux and Rosenthal (2005) in underlying the relative modernity of commercial law in France during the Ancien Regime and the early nineteenth century.

Section 2 summarizes the economic literature on ex ante market discipline and the ex post renegotiation of debt contract. Section 3 presents the historical and political environment in which modern bankruptcy law emerged in England and France, from the mid-sixteenth century onwards. The next section then compares the rather stable, self-consistent, though contrasted regimes that emerged from landmark reforms adopted respectively in 1705 and 1673. Section 5 discusses possible explanations for these divergent choices and for their longevity. On the first count, a decisive role is given to conflicts between jurisdictions, at times of commercial expansion and unsettled relations between the executive, legislative and judicial powers. At least in part, the ensuing stability of bankruptcy regimes is then accounted for by the constitutional solutions, or commitments, that were designed in order to protect market agents, and hence competition, against pervasive rent-seeking interests. In other words, this comparative history of bankruptcy laws is also about the differentiated strategies adopted to support the gradual and fragile transition to fully-fledged market economies (North, Wallis, Weingast 2009). Open access, in other words, is also about fluid exit.

2. Market Discipline and Debt Renegotiation

The expectation that ex post renegotiation may have adverse ex ante effects on implementing contracts is widely held in the economic literature. Probably the most general or systematic argument along this line derives from the economics of socialist and transition economies and, more specifically, from the works of János Kornai (1980). His core concept of soft versus hard budget constraints is based on widespread accounts of central planners' inability to commit themselves not to complete (or refinance) investment projects that appear to be bad ones.[1] Whereas a credible threat of liquidation or bankruptcy might have induced management to better screen projects or to increase implementation efforts, the lack of ex post sanctions instead induced a loose pattern of ex ante resource mobilization. Other things equal, the result was low growth, limited technological progress, and large-scale waste of resources. This paradigm has enjoyed remarkable success and is now the standard analytical language within which transition and developing capitalist economies are analysed (in the case for instance of recapitalized banks or public services). In a definition of market economies based on forward-looking notions of commitments, expectations, and sanctions, any contingent clause that could affect the binding power of rules and contracts is presumed to have adverse effects.

This paradigm then converges with the "legal origin" literature, as initiated by La Porta et al (1998) and Gleaser and Shleifer (2002). As they defend that legal traditions differently protect contracts, over time and across countries, these authors actually suggest that the enforcement of budget constraints is the causal "transmission channel", from law to development. Critically, the superior, pro-market character of the English Common law, as opposed to Civil or French law, would reflect the superior binding power of contractual commitments in the former case.

Of course, both the "legal origins" and the "budget constraints" approaches directly affect how the historical account of bankruptcy law is interpreted. In their review of the literature on soft budget constraints, Kornai et al. (2003) indeed argue, without any supportive evidence, that the long-term trend of market economies has historically been from harder to softer constraints. Although there are arguments for a rather tough, pro-creditor approach to bankruptcies in weak legal environments (Ayotte and Yun 2008), an alternate hypothesis could be defended as well. That is, the institutional conditions that marked the early development of market economies could have warranted that substantial discretion be left to the parties as they entered the creditors' bargain, which modern theory often puts at the core of the bankruptcy debate (Jackson 1986 and 1989, Baird 1987). First, underdeveloped monetary systems, with no central bank and no lender of last resort, would rather expose agents to more exogenous liquidity shocks. Other things equal, a bankruptcy law biased towards ex ante discipline may then disproportionately increase the number of solvent businesses that would unduly fail[2]. Second, if the return on fire-sale liquidation is low because secondary markets for physical assets are illiquid, then closing the door to renegotiation may be even more costly. In other words, underdeveloped money *and* capital markets would rather increase the side costs of a hard bankruptcy regime. Where private commitment mechanisms have failed to avert default (Bolton and Scharfstein 1996, Diamond 2004), creditor passivity and moral hazard may become dominant patterns (Mitchell 1993, Roland 2000). Many seventeenth- and eighteenth-century traders' books actually make the point that an arrangement with an insolvent merchant is a viable option if it allows the debtor to liquidate progressively and on better terms. This would explain the remark of Jacques Savary

[1] See Kornai (1980). The more recent, standard model has been formulated by Dewatripont and Maskin (1995).

(1675), in the introduction to *Le Parfait Négociant*, that he witnessed failures happening more than twenty years after the decisive losses had been incurred.

However, the same traders' books also regularly underscore that relying on the courts was always a last-resort option in case of defaults. English and French experiences with bankruptcy laws actually unfolded in an environment where agents could easily opt out of the courts and coordinate in private fora at lesser costs. If relational hazards or exceptional transaction costs were not at stake then the parties involved should have been be able to anticipate the outcome of the procedure and agree privately on an equivalent distribution of losses while saving part of the costs (Schwartz 1993). Still, the reliability and effectiveness of private deeds, as of accords by notaries, were very much dependant upon the overall economic and political constitution. Because bankruptcy is about broken contracts, and wealth being up for grab, it is critically dependant upon sustainable guarantees that opportunistic moves by powerful agents – public or private – will be controlled.

3. The Medieval and Early-Modern Background: A Historical Sketch

Modern bankruptcy laws emerged in the trading cities of Northern Italy (Florence, Pisa, Genoa, Venice) during the thirteenth and fourteenth centuries (Kohler 1892, Santarelli 1964). Already at that time, the opening of a bankruptcy procedure imposed on agents a clearly defined brake on normal contractual interactions: the capacity of creditors to arbitrate between alternate investment strategies was curtailed, and the debtor's status was severely impinged. He could not trade anymore; his assets, accounting books, and correspondence, were seized; he was usually imprisoned and torture is often countenanced. The primary aim was to control the usual endgame problems in strategic interaction: creditors may run on the assets and the debtor may fly away, or adopt high-risk strategies of "gambling for resurrection". Typically, the debtor's property was seized and sold, and the proceeds were shared among creditors on a pro-rata basis. From a long-term, comparative perspective, each of these actions raised serious problems of doctrine for lawmakers. Even the shift from a "first come, first served" principle to one of equal treatment among creditors was legally problematic, as it de facto imposed an external rule on contractual rights.

The Italian tradition was however for collective action to extend one step further: the process could end either in straightforward liquidation or in a *concordato*, which is a private continuation agreement that typically allows the bankrupt to recover his assets and restart trading with reduced or rescheduled

[2] All the critics of reorganizations who point to their excessive reliance on fragile nonmarket valuations assume, implicitly or otherwise, that liquidity constraints do not bind agents; see for instance Roe (1983) and Baird (1986).

debts. The critical point—where again the collective good weighs heavily on individual rights—is that a majority of creditors (generally a qualified majority) could bind dissenters; if needed, judicial confirmation would guarantee enforcement on any holdout investors. In other words, after the debtor was expropriated, the contractual rights of creditors may be intervened.

These core Italian principles were exported to the rest of Europe and absorbed into the statutes of the larger trading cities (like Barcelona, Lyons, Antwerp, Bruges or Lübeck). As in Italy, the procedures were generally conducted by mostly self-regulated, commercial courts or *consulates*, manned by judges elected among the traders themselves, sometimes associated with learned lawyers. During the sixteenth century, emerging modern states began to introduce repressive penal statutes against failed debtors.[3] More comprehensive and far-reaching evolution occurred during the seventeenth century. This emerged first of all in England and France, where commercial customs (known as the Law Merchant) were progressively confirmed, absorbed, and thoroughly restructured by the legal and judicial institutions of emerging national states.[4] Regulations that had worked at particular times and places became the founding stones of emerging national legislations that were enforced by the new, territorial, mercantilist States. As such, these regulations would apply to all traders, and in all places, within a given kingdom.

Lyons and its renowned traders' court, *la Conservation de Lyon*, is generally considered the principal French city where the medieval traditions were aggregated and rewritten. As France's major and possibly largest financial hub during the sixteenth and seventeenth centuries, Lyons indeed attracted many Italians traders and bankers, who brought with them both private and public economic institutions—or so the common tale runs (Mareschal 1625). What is certain is that local rules and practices were de facto confirmed by the King[5] before becoming the main basis for the *Ordonnance du commerce* of 1673. This summary version of core trading customs was in fact the first modern commercial code, though a light one. Its long-standing influence in Continental Europe would be compounded by a series of piecemeal royal decisions and by a large body of case law and learned

[3] These first such statutes were enacted respectively in 1543 and 1571 in the case of England, and in 1490, 1536 and 1560 in France.

[4] The exact legal status of the Law Merchant and the history of its absorption into state-sanctioned legal orders are two topics concerning which knowledge and consensus both remain limited. This is especially true for France, where a large part of available research still dates from the turn of the 20th century.

[5] The official title of the 1678 rulebook governing trade in exchange letters in Lyons makes the point, in its own intricate way: "Rules of the exchange market of the City of Lyons, proposed by the main merchants of the said City, and consented upon by the *Messieurs les Prévost des Marchands et Echevins* [heads of the municipality], Keepers of the privileges of its fairs: confirmed by His Majesty in his Trade Council, checked by the Court of the *Parlement de Paris*, and registered at the Court of the *Conservation des Privilèges Royaux des Foires*, at the said City". (Reglemens, 1678).

comments.[6] After the Revolution, the mark of the *Ordonnance* remained strong on the 1807 *Code de commerce,* which in turn would shape the legal field for at least another century[7]. In this long-run history, bankruptcy—which was addressed comprehensively in the 1673 text—is probably the item whose evolution since the Italian, medieval experiences presents the clearest elements of continuity (Renouard 1857, Thaller 1887, Percerou 1935, Hilaire 1986).

The early modern history of commercial law in England also witnessed its gradual absorption within state-sanctioned law, although this process took very different forms[8]. First, the local version of the old Law Merchant was apparently more tightly linked to the Common law than was the case of mercantile law and civil law, on the Continent (Basile and al. 1998, Padoa-Schioppa 1992). Second, the jurisdiction of medieval traders' courts (*Pie powders* and *Stapple* courts) seems to have been contested by, or shared with the Common law courts at an early hour (Gross 1908, Hall 1932, Donahue 2004, Rogers 1995); by the sixteenth century, they were clearly on their way out, at a time when their counterparts were blossoming on the Continent.[9] Lastly, remodelling the Law Merchant along the lines of the common law of property and contract did not take the road of an *Ordonnance,* an edict adopted and enforced by the Monarch. In England this process was advanced primarily by the Common law courts so that, from the late sixteenth century onward, conflicts between jurisdictions over commercial affairs would develop along very different lines in the two countries. Unlike the long-running French feud between elected traders' courts and civil jurisdictions, in England the defining conflict opposed Common law to Equity courts and more generally to monarchic institutions. Yet, Common law courts did not attempt to take over bankruptcy proceedings as such, if only because of their utter resistance to all forms of collective action. Starting in 1543, cases were thus administrated by so-called "Bankruptcy Commissions", created on a case-by-case basis by the Chancery, after one or more creditors had observed an "Act of Bankruptcy" and petitioned the Lord Chancellor. Each Commission was thus a short-lived public authority, initially regulated by a loose procedure,[10] whose members were chosen among local notables and fellow traders: "such wise and honest discreet persons as to him shall seem good". They received control over the debtor's assets;

[6] Savary's *Parfait négociant* (1675) is by far the most famous commentary; it was re-edited and translated until the end of the eighteenth century. Among many others, see also Toubeau (1682), Bornier (1749) and Rogue (1773).

[7] Boileau (1806), published immediately before the new *Code* was adopted, elegantly summarizes the practice of bankruptcy in France as it had evolved since 1673; see Laurens (1806) for a more detailed treatise, and the unsigned *Instructions sur les affaires contentieuses* (1786) for a more procedural, court-oriented discussion. Renouard (1857) is a representative nineteenth-century view of the pre-1807 legislation, and a classic comment of the *Code* and its first reforms.

[8] The literature is not unanimous in assessing the influence and the legal character of the medieval Lex Mercatoria in England: Hall (1932), Holdsworth (1925), Burdick (1909) or Treiman (1938a) endow it with much influence, whereas Jones (1979), Rogers (1995), Basile et al (1998) or Donahue (2004) are much more critical of the earlier literature.

[9] See Goldschmidt (1875), Holdsworth (1914), and Sutherland (1934).

[10] During the seventeenth century, "Procedures were crudely outlined, clerical requirements were ignored, and all the statutes were amorphous on the subject of ultimate administrative and legal responsibility" (Jones 1979).

they had the power to put him in prison or free him, audition him, control debt titles, collect and sell the assets, and share the dividend. In fact they were "the highest execution in law against the body, estate and effects of the bankrupt" (Davies 1744).

It is not clear however to which extent the Italian *concordato* was imported in England in those early times. The main authority supporting this proposition is Malynes's 1624 *Lex Mercatoria*, but not many other authors concur[11]. What is reasonably sure is that bankruptcy proceedings were rare: not more than ten per year until the 1620s', after Jones (1979). Critically, trends towards establishing a standardized confirmation procedure for majority vote emerged in the later sixteenth century, before failing. Here is the immediate historical context out of which the "long English exception" as regard bankruptcy law emerged. First, the Admiralty court—which had close links with both continental civil law and overseas commerce—was nonetheless unable to compete for jurisdiction over bankruptcy; extending its jurisdiction over inland trade was impossible and, as a rule, maritime law does not include a mechanism for collective action on debtors. Then, the Privy Council started to develop a procedure of confirmation based on a mix of arbitration and case-by-case administrative directions. Finally, after 1590 the trend was taken over and extended by the Chancery court: it enforced majority votes and relieved debtors by issuing so-called *Bills of Conformity* (Holdsworth 1907, Dawson 1950, Jones 1979, Smith 2006). But weak procedural guidance caused increasing criticism as those bills started to be presented as an expression of royal arbitrariness. A reformed, streamlined framework was introduced in 1620 by Francis Bacon, then Lord Chancellor, hence an ally of the King, and no minor historical figure. But this was apparently too late. Resistance by the Common law courts, and more directly by the Parliament, proved unrelenting. Abolishment was obtained the year after by Edward Cooke, then the ultimate defender of Common law and Common law courts. A major leader as well at the House of Commons, he declared *Bills of Conformity* "detestable". The ultimate attack, on March 14, 1621, was however just an opening shot, or an instrument, in the final scene of Cooke's long political and personal fight against Bacon. Immediately afterwards, the same morning, in front of the same parliamentary committee, charges of corruption would be levelled against Bacon that he would later confess, before being impeached by Parliament on May 3 (Zaller 1971, White 1979, Powell 1996). The long term history of economic institutions had just intersected with *l'histoire événementielle* of the Great men, waging Great battles.

Instrumentalization however did not imply that the 1621 turn was exclusively contingent or opportunistic. By 1624 the very attempt to reach an arrangement with adverse effects for creditors was added to the list of "Acts of bankruptcy" that now inevitably lead to liquidation. A second lock was thus added to the closed door leading to judicially confirmed arrangements. The next main stage in this long history would be the introduction of debt discharge in 1705, followed more than a century latter, in 1825, by early steps towards (re-)introducing court-sanctioned arrangements. But it was only after 1883 that they became common practice, so that creditors and debtors were now offered the same basic menu as in France. We now proceed with analysing and comparing the economics of the "classical regimes" that emerged after, respectively, the 1673 *Ordonnance* and the 1705 Act.

4. Two Legal Architectures

4.1. French Outcomes

Under the Ancien Régime, French law offered no less than four different options to address financial distress or default. In today's terms, these options derived from Commercial, Constitutional, Civil, and Penal law, respectively. The four entry gates then led to at least eight possible exits (see Table 1)

i. The *faillite* was the standard commercial procedure directly inherited from the medieval Italian *fallimento*, a continuity that extends beyond the 1807 codification until the present day. As in Italy, the *faillite* could end up first in liquidation (or *contrat d'union*): the proceeds of the auction were then distributed on a pro-rata basis among nonsenior creditors and with senior rights (by definition) protected.[12] The residual post-liquidation debts remained binding after the procedure had ended, so that individual creditors could again go after the debtor and his possible new assets—whether acquired by inheritance, marriage, or work. Finally, the debtor would not regain his civic and professional rights unless he reimbursed all his debts. Thus, liquidation was *not* a route to debt discharge and a fresh start.

Alternatively, the *faillite* could lead to a continuation arrangement, also called a *Concordat* after 1807. As in medieval Italy, a qualified majority of creditors and judicial confirmation would give back to the debtor all his rights, assets, and capacity to manage—but certainly not all his reputation. This was the normal and least dishonorable road to debt restructuring, *hence* debt discharge, that is longer maturities or debt reduction. Alternatively, the debtor might for instance receive a mandate to sell his commercial assets over a certain a period of time; or, he could agree to transfer a percentage of his total sales (say, 2%) to his debtors until his restructured debt was fully repaid.[13] The *concordat* being a contract, its actual content was fully in the hands of the parties, while the courts and procedure addressed transactions costs.

[11] See page 161 of the 1996 reprint by the Metheglin Press.
[12] Under the *Ordonnance,* a three-quarters majority (in sums) was needed in order to receive confirmation.
[13] I thank Anne Wegener Sleeswijk for pointing out this model of contract.

ii. After the *faillite*, the *Lettre de répit* was the second entry to financial restructuring. It was granted by the King upon the demand of the debtor and allowed temporary relief in order to negotiate with the creditors.[14] Although the ulterior negotiation followed very much the same steps as under the *faillite*, the initial decision came from the sovereign and was discretionary. Clearly, this instrument was perceived as twisting the arms of reluctant creditors and at substantial further cost to the debtor's reputation. Although, in the Middle Ages, the *Lettres* were very much an unconstrained royal privilege (like grace in the case of conviction), they became increasingly regulated after 1673. However, much evidence suggests that the *Lettres* encountered considerable and apparently increasing resistance[15]: the 1789 *Cahiers de doléances* often called for their elimination, and the 1807 *Code* enacted it; they would be remembered, all over the nineteenth century, as the mark of a past, despotic government.

iii. The third option, the *cession,* was a direct legacy of an archaic form of collective action against debtors that originated in ancient Rome and then re-emerged in the Middle Ages within the Civil (not Commercial) law.[16] The *cession* was specifically the most common instrument of debt relief for nontraders, who did not have access to *la faillite*; it would even be closed to traders after 1838. The logic was that the debtor surrendered all his goods and assets to his creditors, who then proceeded to sell them and to share the receipts on a pro-rata basis. The debtor was then freed both from prison and from the threat of future imprisonment, so that he actually would benefit from a "fresh start".[17]

iv. Finally, *la banqueroute* was the penal procedure associated with commercial failure in case of fraud by the debtor. Its origins were in the early exclusively repressive statutes adopted during the sixteenth century. The 1673 *Ordonnance* then distinguished *la faillite* (which was a purely commercial procedure) from *la banqueroute;* the 1807 *Code* then further distinguished, as a matter of degree, between *banqueroute simple* and *frauduleuse,* although both brought the debtor to a penal court.

4.2. The Long English Exception

When compared with the baroque French landscape, the English case was much simpler. As already stated, from the 1620s until the 1880s, confirmation of arrangements was prohibited so that the whole institution was exclusively construed as an instrument to seize the debtor's estate for the joint benefit of creditors.

[14] The *Lettres de répits* were issued by the Chancellerie, or Ministry of Justice; the *Lettres de défense générale* and the *Arrêt de surséance* were comparable, discretionary orders but they did not affect traders.
[15] See for example *Le nouveau commentaire des loix du commerce* (1787), Bornier (1749), and Denisart (1771).
[16] The *cession* would then find its way into the 1804 *Code civil*, rather than the 1807 *Code de commerce*, whose third book was entirely devoted to *faillites et banqueroutes.*

During the seventeenth century, the fate of bankrupt debtors then proved quite dire, as Daniel Defoe (among many others) argued.[18] If any unpaid debt remained after the procedure was closed, then any new resources (for instance an inheritance) acquired or earned by the debtor could be seized. He could also be returned to prison by any creditor and would stay there as long as the later was willing to pay for his incarceration. Business risks were further compounded by the resistance to partnership's limited liability of the *commenda* type, by the English Common law.[19] The proposal to once allow the confirmation of majority arrangements experienced a revival during the last two decades of the seventeenth century: attempts at re-introducing it were made in 1679, in 1693, and in 1696–97 along with other measures aimed at helping debtors (in 1670–71, 1678, 1690, and 1694);[20] occasional pamphlets against the current bankruptcy law can also be found.[21] Though these attempts did not succeed, they attest to some dissatisfaction with existing rules. The 1705 *Act of Anne*[22] brought more balance into the institution, possibly under the pressure of an increasing number of bankruptcy cases:[23] if the debtor transferred all his assets and if a qualified majority (four fifths in sum) of creditors agreed, then the debtor would be discharged of his residual liabilities; his old debtors could no longer throw him in prison or seize his assets. The main beneficiary of this reform was, of course, the proverbial "honest but unlucky trader", as opposed to the criminal one. But the notion also came to the fore that this fresh start approach had major social benefits. In the much-quoted commentary of Blackstone: "Thus the bankrupt becomes a clear man again; and […] may become a useful member of the commonwealth" (1811, p. 488).

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[17] This actually describes the voluntary version of the *cession* that took the form of a contract between debtor and creditors. A judicial version, mandated by a court and imposed upon creditors, was considered highly infamous and implied permanent losses of civic and professional rights (unless the whole debt was latter reimbursed).

[18] Bankruptcy "has something in it of Barbarity; […] It contrives all the ways possible to drive the Debtor to despair, and encourages no new Industry, for it makes him perfectly incapable of anything but starving. This Law, especially as it is now frequently executed, tend[s] wholly to the Destruction of the Debtor, and yet very little to the Advantage of the Creditor" (Defoe 1697).

[19] Harris (2000), Rogers (1995).

[20] See Hoppit (1980) and Treiman (1938a). The 1697 act, which abolished the 1696 act on arrangement, mentions primarily the opportunities for fraud and deception that were occasioned by the previous act. However, Cooper (1801) also states that only a single arrangement was actually confirmed during the whole year when the law was in application.

[21] Anonymous (1679), Price (1694).

[22] In 1732 a comprehensive Bankruptcy Act was adopted that reiterated and added formal clarity to the existing regulations, which remained the touchstone of legislation until 1825.

[23] Jones (1979) considers that, during the first decades of the seventeenth century, there were merely a few dozen bankruptcy cases each year for the whole country. At the end of the same century, in possibly the first English language treatise on bankruptcy, Goodinge (1695, p. ii) notes that "the concerns of Bankrupts, which were heretofore almost wholly managed within the Precincts of our Capital City and famous Marts, are now descended into Country-towns and villages, so that it is become a matter of Publick Consideration". Green (1776), p. v), writing another major treatise some eighty years later, quotes the very same sentence of Goodinge's (in its 1707 edition) and continues as follows: "If these were the sentiment of a lawyer in the beginning of the century, [then] what should they have been, had he lived to this time". See also Marriner (1980).

Yet, contrary to common wisdom, the uniqueness of modern English bankruptcy law does *not* stem for the early eighteenth century introduction of debt discharge and fresh start. Continental lawmakers had long noted that keeping debtors in jail indefinitely and pre-empting all future income flows was not a promising incentive scheme.[24] Again, the key difference is that, under Italian and French statutes, discharge would be decided solely by the creditors, generally as part of a broader continuation settlement negotiated with their debtor; for this reason, the capacity for judges to discharge debt unilaterally, as introduced in England after 1849, is completely alien to the Civil law tradition. The key English feature, is that for two and a half centuries continuation could only be agreed under private deeds, hence voluntarily and without majority vote, a practice that was actually supported by the courts.[25] In other words, the distinct character of English law was not a possibly pro-market preference for ex post accommodation, but rather a clear structural orientation toward ex ante discipline, though under terms that became much less harsh after 1705. Finally, this long separate course distinguished the English experience not only from the Italian and French traditions but from virtually all of Continental Europe for the entire period under review. As far as we know, during the early modern and modern periods, all Continental statutes and codes included the possibility of confirming majority arrangements (Table 1). In his encyclopaedic 1892 treatise, Kohler even defines the *Concordato* as "*the soul of bankruptcy law*"; the French lawyers who drafted the 1807 Code preferred calling it its "crowning".[26]

Over the course of the nineteenth century, England's gradual adoption of a formula for confirming majority vote under bankruptcy proved to be incredibly difficult. Although the details of this history fall beyond the scope of this paper, the first step was an 1825 act that introduced a highly restrictive confirmation mechanism, that remained virtually unused.[27] In 1849, arrangements introduced by the debtor could be confirmed if a three-fifths majority agreed. But again the courts seem to have strongly resisted, so that continuation agreements did not take hold in practice (Forsyth 1841, Holland 1864).

[24] In *Les coutumes du Beauvaisis* (1283), one of the best-known medieval legal treatises, Philippe de Beaumanoir had already made the point quite clearly: « Ce serait contraire cose à l'humanité qu'on laissât toujours corps d'homme en prison pour dette, puisqu'on voit que le créancier ne peut être payé par la prison » (quoted by Troplong 1847, p. 19).

[25] Because these accords were private, the archives are apparently rare and fragmented. See, however, Hoppit (1987) and Luckett (1992). Montagu (1823) remains however the main source: in what is possibly the first treatise on private compositions, the author (a former bankruptcy commissioner) comments on tens of cases brought to the courts, mostly during the four preceding decades. Forsyth (1841) later mentions that these agreements were "common practice" and that they benefited from "the constant anxiety by the English Courts of law and equity to uphold and give effect to such arrangements"(pp. 1–3). He then distinguishes between *assignments*, which transferred the debtor's property to one or more creditors who acted as trustees and liquidated the estate; and *deeds of inspectorship*, which allowed the debtor still to manage the firm although now under the control of his creditors' agent. "Composition" was the term exclusively employed during the nineteenth century for private, voluntary accords; "arrangement" often implies judicial oversight and confirmation, but usage is not uniform.

[26] "*die Seele des Konkurswesens*", Kohler (1892, page 451) ; Locré (1829, book 4, page 150).

After two other failures, in 1861 and 1869, the 1883 Act marked the eventual convergence of this long trial-and-error process with a two-way approach (Robson 1888): agents could choose between either a judicial procedure working on a standard, qualified majority basis, and private compositions but with minimal rules of publicity and registration (added in 1887). This reform was actually successful in that arrangements became frequent—in parallel with private deeds, which apparently remained the norm for the largest businesses.[28] A 1914 reform further regulated deeds and imposed majority rule, so that they were brought much closer to standard procedures**.** Settlements reached out-of-courts, or with only a limited, final confirmation procedure remain however common till these days, with rather similar features. Private mechanisms that apparently solved part of the collective action problem, until the late nineteenth century, have apparently left a powerful and effective legacy. The so-called "London approach" is actually strongly defended both by the authorities and the media, most clearly against the influence of the more heavy-handed U.S. Chapter 11 approach to bankruptcy (Armour and Deakin 2000, Brierley and Vlieghe 1999, Willman 2008).

4.3. Support and Legitimacy

Support to the post-1705 regime was thus very strong: since then, the Act of Anne has been constantly hailed as the true birthdate of an original, pro-market bankruptcy tradition in England that would uniquely conjoin "principles of humanity and the benefit of trade".[29] Prison for debt would certainly be a major focus of criticism, especially from the late eighteenth century onwards, but even this conflict does not seem to have affected the legitimacy of the overall regime. Not only was the old conflict over the *Bills of Conformity* forgotten, but the very principle of confirmation did not surface again before at best the 1820s'.[30] Even during the later decades, on the long and winding road back to the *Concordato*, the recognition of rediscovering a past or foreign model is seldom evident.

[27] In its comment on bankruptcy law published immediately afterwards, Holt (1827, p. liv) does not give much consideration to this innovation and seems to consider it as a variant of the *cession.* More generally, on bankruptcy law and practice during this century see Duffy (1985) and Lester (1995).

[28] "[T]he great commercial world, alienated and scared by the divergence of the English bankruptcy law from their own habits and notions of right and wrong, avoided the court of bankruptcy as they would the plague. The important insolvencies which had been brought about by pure mercantile misfortune were administered to a large extent under private deeds and voluntary compositions, which, since they might be disturbed by the caprice or malice of a single outstanding creditor, were always liable to be made the instruments of extortion" (Bowen 1907).

[29] These terms are used in almost similar manner by Cooke (1799), Cullen (1800) and Beawes (1813). See also in the modern literature McCoid (1996) and Tabb (1991).

[30] In his treatise on commercial law, Wyndham Beawes (1813) allocates more than a hundred pages to bankruptcy issues, including a rather detailed comment on the 1673 French *Ordonnance*; but he does not mention once the *Concordat.* In the case of the Netherlands, he suggests that traders "may find some method to settle with the creditors". Cooper (1801) defines the French *Concordat* as "a mode of composition which not unfrequently takes place".

In France, confirmed arrangements were certainly not a completely remorseless principle. Many commentators took note that debtors remained morally obligated to their creditors after benefiting from a debt cut. The true custom of merchants, it was suggested, probably condemned majority votes although judges did not endorsed this principle – rightly so, it was eventually concluded.[31] Despite these misgivings, abolishing judicial confirmation of majority votes in fact never became a serious policy issue.[32] If ever, the preparation of the 1807 Code de Commerce would have offered a unique occasion to revisit the whole economic logic of the law –government lawyers and Parisian technocrats in those days were not much shy in this respect. A detailed account of the debate was published shortly afterwards by the Baron Locré, who had been Secretary-General of the commission at the *Conseil d'Etat* that discussed the last draft of the Code. L'*Esprit du Code de Commerce* (1814) is then, altogether, the first legal comment of the new text and a remarkable historical document on its preparation. On judicial confirmation, Locré is both casual and straightforward: "the wish of the majority [should] bind the minority, and nothing is more just [than this rule]: how not to presume that the greatest number has made the arrangements that are the most convenient to the common interest?"[33] In fact, the discussion at the *Conseil d'Etat* had centred mostly on the parallel guarantees that minority creditors should receive from the law: "Because any man suis juris has the capacity to manage his business, the law owes him special protection only when he may be bind against his will. If the law were to extend its reach where it is not necessary, it would only impair or paralyse the exercise of his property rights." (ibid, p. 450)

Both in England and France therefore policy-makers and commentators explicitly adhered to the specific trade-off between ex ante and ex post concerns on which the respective countries had stabilised. Even mentioning that bankruptcies worked differently on the other side of the Channel has been exceedingly rare in both countries, today as in the past.

5. Accounting for Divergence

How can we account for these diverging choices and for their stability over time? Do their emergence and ensuing resilience respond to the same factors? Answering these questions may follow three main directions. A first "genetic" hypothesis would draw from the "legal origin" argument: the enduring

[31] This ambiguity is most clearly visible in Savary (1675), Denisart (1771), and Frémery (1833). Or Des Bruslons (1741, I): la « faillite diminue à la vérité le crédit & la réputation du Marchand, mais elle ne le note pas d'infâmie, comme fait la banqueroute frauduleuse, pourvu qu'il paye exactement à ses Créanciers, aux termes des contrats d'attermoyement qu'il a passé avec eux ».

[32] In 1770, the higher Civil court in Paris tried to gain jurisdiction over confirmation from the local *Juridictions consulaire*. An open conflict followed during the course of which the latter issued a detailed, 70-pages legal memorandum in defence of its case: at no point in this document or any other related archive is the intrinsic legitimacy or economic relevance of majority vote and confirmation questioned. See *Mémoire…* (1770).

English exception would reflect primarily a set of highly specific, legal principles written at an early hour into the structure of Common law. A second, “structural” approach emphasises the logical and institutional consistency of the respective bankruptcy regimes after they had stabilised, in 1673 and 1705. Path dependency would reflect stability in the way coordination mechanisms, beliefs, and institutions offer predictable and reasonably efficient strategies for solving collective action problems. As we agree with this later option, and reject the former, the question of the initial divergence between England and France remains however unanswered. A third, “constitutional’ argument may then defend that the key variable here was the institution within which the procedure operated, in the two countries. That is, the judicial guarantees offered to traders, as they addressed debt default, would explain the more or less open-ended character of the bankruptcy regime they adopted or supported.

5.1. Silent Origins

The obvious argument in favour of the first, “legal origin” thesis derives from the founding conflict over the *Bills of Conformity* that pitted Cooke and Bacon one against the other. Because the Common law courts strongly defended a highly individualistic approach to property and contractual rights, they structured the decisive battle against collective action among creditors; and despite the fact that bankruptcies have always been governed by statutes, this opposition by the courts would have initiated a long-run pattern that prioritized ex ante market discipline and the integrity of contracts over accommodation and executive interference. The problem with such argument is not to identify one or many occasions when Common law principles and Common law courts did bear heavily on legal and institutional evolutions. There are plenty of them, of course. The difficulty is to demonstrate that they shaped those legal and institutional outcomes in a way that allowed them to predictably and consistently orient economic behaviours in a manner favourable to market forces, or development. At least in the present case, this interpretation faces serious difficulties.

First, when *Bills of Conformity* were abolished, in 1621, the Common law courts and the Parliament did not propose any consistent alternate bankruptcy framework that could be considered anything like pro-market or pro-enterprise. What they created was even less satisfactory from an economic standpoint than the Roman *cessio*, which at least offered a way out of debt and prison.[34] Second, when discharge was eventually adopted, some eighty years later, the Parliament actually introduced majority vote in the procedure. The contractual rights of minority creditors could now be intervened. Lastly, over the course of the nineteenth century lawmakers would again fight for decades in order to further

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[33] Locré (1829 edition, book 3, page 502).

[34] The proximate role of traders in this conflict, as in the broader fight by Common law court for supremacy, is not that clear. For instance, in his *Lex Mercatoria or the Ancient Law Merchant*, published in 1622 in London, Malynes laments the limited concern of the Parliament for traders’ interest. See also Steckley (1978) and Cromartie (1999).

extend this rule and ease the way for the negotiation of arrangements. In other words, successive generations of lawmakers did not have the same outlook on how commercial failures should be regulated nor, more generally, on the proper way to govern a market economy. They would first classify any attempt to negotiate an arrangement as a quasi-penal Act of Bankruptcy; but they would later develop one of the most open-ended, free-wheeling bankruptcy regime ever seen. Or they would hail either the modernity of offering a "fresh start" or the virtue of "hard budget constraints". The integrity of contracts would then be considered by some as the ultimate foundation of civil society and public order[35], while others argued for decades against the huge arbitrary costs imposed by society to so many, simply by chance.[36] In other words, although the fight between common lawyers and civilists was at the core of abolishment of *Bills*, there is no trace here of a "meta-norm" that would have guided ulterior generations of lawmakers as they addressed the practical problems encountered by their constituents on the market-place.

5.2. Microeconomic Patterns

Beyond the defining dilemma that opposes market discipline to private renegotiation, the different roads taken by English and French law were prolonged by a series of more secondary patterns. These traits have generally been studied as self-standing issues, though the present perspective accounts for them in a more consistent way. They were indeed tightly knitted into statutes and case law, so that they summed up altogether into a fairly coherent "rule of the game". Only a comprehensive view of the overall institution can account for its capacity to actually shape expectations and behaviours – both inside and outside bankruptcy. This structural coherence, and the complex procedural and professional apparatus that enforced the law, clearly made large-scale, across the board reforms difficult if ever possible. Pragmatic lawmakers would have to content themselves with incremental reforms when pressures for change came to bear. These structural patterns regard successively initiative, signal, discovery, and repression.

First, as already mentioned, the initiation of a bankruptcy was associated in England with the observation of an Act of Bankruptcy, originally a reprehensible one that allowed one or more creditors

[35] "[F]idelity in performance of Covenants and Promises is one main foundation of a well ordered Commonwealth. […] If Bankrupts the Arch-builders of fraud, utterly subvert and take this away, as indeed they do, who doubteth but that the Commonwealth, unlesse prevention be in time used, will shortly be ruinated? […] If the Bankrupts weaken and violate performance of fidelity […] the Commonwealth cannot florish, but become a body without a Soule" (Sauterius 1640, p. 22).

[36] Edmund Burke made the point in a speech to the electors of Bristol: "It is a fault in our law that the inflicting of that punishment [prison for debt] is not on the opinion of an equal and public judge, but is referred to the arbitrary discretion of a private, nay, interested individual. He who formally is, and substantially ought to be, the judge, is in reality no more than ministerial: a mere executive instrument of a private man, who is at once judge and party" (quoted by Montagu, 1809). On prison for debt, see in a vast literature Innes (1980), Lester (1995), Finn (2003).

to petition for a Commission (Treiman, 1838b). As a consequence, entry into bankruptcy was only "involuntary", or initiated by creditors. Before 1705, the threat of lifelong prison rendered moot the alternate, "voluntary" road (initiated by the debtor); later, the possibility of discharge added new reasons for leaving control over entry firmly in the hands of creditors. Alternatively, if the procedure were framed as a platform for negotiation, as in France, then there would be no reason to restrict entry: mutual control would take place inside, provided the internal architecture of the institution was adequate and the incentives to initiate the procedure were adequate (Baird 1991). And indeed, historically, there is no debate on the voluntary vs. involuntary issue, which is an important one in the Anglo-American historical literature.[37] By the same token, the opposition between pro-debtor and pro-creditor statutes is also very much an Anglo-American concern. Open-ended negotiation tends to place the focus on intercreditor relationships and hence on the balance between pro-liquidation and pro-continuation interests, or between senior and junior interests.

Instead of an observable Act of Bankruptcy, French law envisaged the opening of a procedure as a response to an underlying economic "state" where a firm was (or was not) and where it might fall. « *Un commerçant est en faillite, ou tombe en faillite* », as the contemporary language still has it. Of course, insolvency was the underlying issue at stake, whatever its definition at the time, and major difficulties were encountered when attempting to recognize this unenviable state. Judges were certainly looking for directly observable (though often elusive) signs or even for acts.

However, the notion of an *état de faillite* also invites a methodical inquiry into the reason of the failure and the prospect of recovery. Its sheer ambiguity makes explicit the need to address an in-built informational problem. And if private transactions should be supported, then all available information should indeed be collected, centralized, and shared among all parties. Accounting books and correspondence should be open, the debtor should be interrogated, the cause of his failure queried, and experts consulted—as the 1673 *Ordonnance* made clear. In the English framework, there was certainly a need to identify all assets and to check, for instance, that false creditors did not join in the distribution of dividends; successive statutes included increasing regulation on this score. But because the going concern was practically over once a Commission had been created, exploring the reasons for failure and the prospects for recovery was much more a secondary issue. An institution that was based entirely on ex ante market incentives faced far fewer requirements in terms of ex post discovery and internal governance, simply because there was so little room for deliberation and choice.

[37] "One of the most fascinating tales in the development of bankruptcy jurisprudence concerns the monumental transformation by which the inthinkable—voluntary bankruptcy—became commonplace" (Baird 1991, p. 142). See also McCoid (1987 and 1988).

A corollary is that disentangling the penal and civil dimensions built into the procedure proved to be much more difficult in England. First, the concept of an initially penal Act of Bankruptcy was in accord with the huge protection offered by Common law to private property. Still during the sixteenth century, defining the bankrupt as a criminal was actually the only way to take control of his assets so as to distribute the proceeds.[38] Second, because there was no way for the debtor to negotiate an arrangement and regain the management of his assets, no internal logic urged a distinction between those who may trade again and those who should not. In the French case, the very possibility of continuation made it necessary to differentiate between the intrinsic state of the firm, commercial and financial, and the personal behavior of the businessman, who might have acted in a reprehensible manner. Indeed, this modern principle was already stated in a 1629 reform proposal[39] and became a defining principle of the 1673 *Ordonnance.* As mentioned previously, *la faillite* was explicitly designed as a framework for renegotiation with no intrinsic penal dimension, whereas *la banqueroute* involved crime and prosecution.[40]

5.3. Courts vs. Administration

These structural or synchronic considerations can account at least in part for stability or path-dependency; standard political economic issues relating to the organization of professions and other special interests may then easily be added. The open political fights of the early sixteenth century did also bear when English bankruptcy started to diverge, before stabilising, much later, around alternate rules of collective action. At this point, a further element also comes into the picture that asks to shift the lens from the bankruptcy procedure as such (signal, discovery, decision and so one) to the institution that hosted it. That is: one should also look at the framework within which agents interacted, the type of guarantees they received, and the confidence they would have in the officials they encountered. Here, the difference between the English and French environments is again very strong. And, remarkably, it emerged more than half a century *before* the procedures diverged.

The early modern and modern experience with bankruptcy in France is indeed closely linked to the fortunes of self-regulated commercial jurisdictions. Beyond the unique *Conservation de Lyon*, the French King established from 1549 onward an increasing number of more generic *Juridictions consulaires*, which were then reformed and streamlined (1668–71) just before the *Ordonnance* was adopted, in 1673. Although such courts were created by the Prince there is little doubt that local traders' communities were invested in these institutions, which allowed them to settle their contractual disputes without being threatened by political or rent-seeking interferences. Rules of discovery and

[38] Treiman (1938b). This problem is linked to the large role given under Common law to personal arrest, which was an alternative (not a complement) to seizure of assets. See Cohen (1982) and Levy (1968).
[39] The *Code Michaud*, written in 1629 but never enacted, introduced this difference.

proof were light, the parties would directly argue in front of the court, attorneys were called in only for the larger cases, and appeal did not usually suspend execution. The courts also fully recognized the specificity of commercial customs and trade law, the latter being much more unified across the country than civil law, especially after 1673. Last but not least, justice was free of charge if only because the locally elected judges did not own their position.[41]

In fact, the main threat on the *Juridictions Consulaires* came not from Paris and the King's unchecked powers but instead from the other, traditional jurisdictions with their many and expensive office-holders, intricate procedures, and never-ending trials—that is, the overstaffed local Civil courts and the regional supreme courts (*les Parlements*). They never accepted the *Cours*, their utterly alien rules and their recruitment. Literally dozens of precedents opposing civil and commercial courts are registered in the lawbooks, which binding power seems to have been partial[42]. They reflect a continuous guerrilla war, where the royal administration in Paris remained, at least until the mid-eighteenth century, the ultimate though vigilant defender of commercial jurisdictions.

What this suggests is that the structure, operation, and selection of the *Juridictions consulaires* gave them, to a non-negligeable degree, the character of a commitment device, one entered into by a wayward monarchy that actually tied its own hands, as those of its agents. The sovereign, or competing legal professions, would just not expropriate creditors when contracts were thrown open, even when an official with the extraordinary capacity to confirm majority rule might be called in. Clearly, this was not a one-sided, unconditional delegation, and bankruptcy procedures were very much fought over by the civil courts and the traders[43]. Still, even when and where the former had control over those cases, the *Ordonnance* did rule and offered a second line of defence. Tellingly, it made sure that cash would *never* pass through the hands of bailiffs, notaries, police officers and "*autres personnes publiques*" (title 11, article 9). More generally, both the 1673 and the 1807 codes put officials in charge of the procedure, but left the substance of the decisions exclusively in the hands of the parties. The overall success and legitimacy of the *Juridictions consulaires* leave little doubt: in 1790, they were transformed overnight into *Tribunaux de commerce* and under this very same name and basic constitution, they remain today one the oldest active public institutions in the country.

Seen from this view angle, the initial divergence of English bankruptcy law should actually be brought backward from the conflict of the early 1620s', till 1543, when Bankruptcy Commissions were introduced. As stated, their defining characteristic is that they were created by, and remained anchored

[40] Under the *Ordonnance*, as under the *Code*, prosecution would immediately close the door to composition.
[41] Guillon (1904), Hilaire (1986), Dupouy (1960), Kessler (2007).
[42] Over the course of seventeenth century, and within the sole jurisdiction of the *Parlement de Paris*, 24 cases have been found, where the rights of defending *Juridictions consulaires* have been upheld against Civil courts.
[43] Dupouy (1960), Kessler (2007),

in the executive/bureaucratic arm of the government, namely the Chancery. Although the discussion is still rife as whether they were or not a jurisdiction, their weaknesses regarding procedural guarantees are clear. At least until the eighteenth century, guidelines for decision making were not made explicit, Commission member recruitment was not strong, corruption is often mentioned, and pressures by the executive bureaucracy were clearly a problem.[44] Critically, there are unambiguous indications that, prior to 1620, both the Privy Council and the Chancery were willing to pressure recalcitrant minority creditors and even threaten them with imprisonment. Treiman (1938a) mentions for instance that in 1591 the Privy Council instructed the Bankruptcy Commissions to let recalcitrant minority creditors *"plainlie to understande that yf anye informacion shalbe broughte at anye tyme againste them upon any matter by stricktness of law, they are to looke for noe favor but all extreamitie that maie be used, in respecte of the contempte they shewe to her Majestie's authoritie and harde disposicion to theis poor men oppressed by their rigorous dealing"*.

Some thirty years later Malynes (1622), who supported Continental-style arrangements, shared retrospectively this « despotic » view with regard the Chancery : *"the Bills of conformitie were of late yeares used in the Chauncerie, which by the Parlement Anno 1621 are made void, because of divers great abuses committed in the defence of Bankrupts, who to shelter themselves from the rigor of the Common-lawes, did preferre their Bills of complaint in Chauncerie, which was in the statute of protection, and the parties broken, became to be releeved for easie composition with their Creditors, albeit at charges another way extraordinarie"*

What this suggests is that the attacks of the Common law courts and the Parliament on the *Bills of Conformity* should not be interpreted solely as reflecting an inherent bias against collective action, or a side argument within an ongoing fight for political supremacy. Indeed, the resistance to the *Bills* very much resembles the sharp criticism which would be voiced latter in France against the *Lettres de Répit*. In both countries, eventual abolishment would remain as a signalled victory against despotic abuse. By the same token, there were apparently good reasons to limit the discretion of Bankruptcy Commissions. Hence the proposition that, as long as their purview consisted exclusively of seizing and liquidating assets, limited judicial safeguards were probably not a serious problem because the finality of the process was foretold. Allowing more discretion and shifting to an open-ended procedure would then raise more concerns. Having one's contracts broken is not a pleasant experience; but what could be more threatening than being placed thereafter in the hands of an absolutist body or a dictatorial majority? More discretion for one or another required more judicial safeguards for the minority, as the *Conseil d'Etat* suggested. And indeed, the introduction of discharge in 1705 was followed by a

[44] Holdsworth (1914), Dawson (1950), Jones (1979); Smith (2006) for a rare and interesting recent contribution. See also Price (1694) for a powerful pamphlet against the corruption of commissioners; Welbourne (1932) for a colourful description of bankruptcy proceedings in early nineteenth-century London.

reinforcement of decision rules and by more guarantees for dissenting creditors. And when England, in 1825, began its slow movement towards majority arrangements, bankruptcy courts were soon introduced, in 1831, in parallel with Commissions.

6. Conclusion

The comparison of the development of bankruptcy laws in England and France between the sixteenth and nineteenth centuries first highlights their joint origin in the early mercantilist period. Both were part of initial attempts to build national trade legislation as of the fight between courts for jurisdiction over commerce. These common origins are reflected in the centuries-long conflict between the French Civil and Commercial courts, as in the long struggle for supremacy by the English Common law courts. The rule to be established was not indeed a benign one. One way or another, the formalization and credible enforcement of bankruptcy had to be founded on a most solid commitment: both the wealth at stake and the inevitable resistance by powerful agents against market exit would inevitably exercise considerable resistance against any procedure.

In France, an unruly monarchy entered into an ad hoc side commitment with traders that allowed them to settle their contractual disputes on their own. In order for commerce to prosper, the courts, the procedures, and the law would be drawn primarily from self-regulated customs, and they would then be carefully insulated from an overtly patrimonialist, pre-capitalist society. The common practice of the *Lettre de Répits* and the unrelenting attacks by the Civil courts attest to the level of pressure on traders' institutions. In this sense, the remarkably modern features of early bankruptcy law in France may indeed reflect the despotic character of the Ancien Regime. "Constitutional insulation", as a response to these threats, allowed formal rationalization in the Weberian sense; and this pattern was then reflected in the universal, abstract character of the light 1673 code.

On the other hand, the English divergence can be traced to specific pattern of the Common law tradition, although it is difficult to envisage it a factor that would have actually shaped the ulterior emergence of a modern, open-market institution. Moreover, the English divergence that emerged in the 1620s' also reflects, in a probably stronger way, the earlier development of judicial institutions. Specifically, two elements have been identified: the early marginalization of medieval traders' courts, and the resistance by the Common law courts to collective action. Their joint consequence is that when the state started to regulate bankruptcies, during the sixteenth century, no jurisdiction was in a position to confirm and enforce majority votes in a legitimate, acceptable way. Critically, the Privy Council and the Chancery court did not offer enough guarantees of judicial independence. If this analysis is correct, the implication is that the Common law courts' success in gaining jurisdiction over trade actually reflected the superior guarantees they offered across society, and over the long run. Ad hoc constitutional insulation would not be needed in order to protect traders and markets. Of course, the absorption of trade issues in the Common law proved to be a complex, convoluted, century-long process; one of its side effects, especially during the seventeenth century, may have been an utterly archaic bankruptcy law.

Indeed, once the divergence from a two-exits to a one-exit institution had occurred, problems of individual and collective action within bankruptcy took wholly different directions than in France–whether one considers issues of signal, initiation, discovery and information, decision, or penalization. The need for logical coherence between these elements was then gradually written into the formal or synchronic structure of the procedure. Critically the 1705 Act of Anne, that introduced debt discharge, brought considerable support and stability. This suggests that a working regime, or a better institutional equilibrium, had been reached. Most stakeholders seemed indeed to agree that private compositions, a liquidation-only procedure, and debt discharge now established a satisfactory balance between ex ante threats and ex post accommodation.

Still, the resilience today of the out-of-court, lightly-regulated, “London Approach” to renegotiations echoes the capacity of the post-1705 regime to support the development of enduring private institutions, that helped solving problems of collective action left un-addressed by the statutes. Similarly, the *Tribunaux de commerce* remain remarkably close to their Ancien Régime forbears, including with respect to their fraught relationship with civil jurisdictions. Whatever the enormous evolutions observed over time, these inherited institutional patterns may actually reflect the comparable conditions that presided over the early history of the respective jurisdictions and procedures. In order to be relied upon, both had to protect traders against rent-seeking. The suggestion is the commitment devices that were designed at the time have left a mark that is still visible today, although they do not respond anymore to their initial rationale.

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TABLE 1

Italy	Bologna (1509), Florence (1322, 1415, 1585), Siena (1619), Venice (1395), Genoa (1589)
Flanders (Antwerp)	Statute (1615)
Republic of Geneva	*Statuts de la République de Genève* (1713)
Hamburg	Statute on bankruptcy (1753)
Nuremberg	Statutes (1517, 1634)
Prussia	Code Prussien (?)
Austria	Statute 1734, 1781
Spain	*Ordenanzas* of Bilbao (1737)
Low Countries	Amsterdam 1659 statute (*Kamer van der Desolate Boedels*).
France	Bounyn (1586), Mareschal (1625), *Le stile de la jurisdiction royale établie dans la ville de Lyon* (1657), *Ordonnance sur le commerce* (1673).

TABLE 2

English and French early modern bankruptcy law: A summary comparison

	England, 1625–1880s	**France**
Signal/criteria	Acts of bankruptcy	*État de faillite*
Initiation	Involuntary only	Involuntary and voluntary
Role for discovery	Limited	Important
Contractual dimension	Absent	Strong
Qualified majority vote	Impossible, then limited	Normal
Outcomes	Liquidation only	Liquidation or renegotiation
Institutional structure	Administrative	Judicial
Place for contingent rules in the absorption of exogenous shocks	Limited	Important
Main market effects	Ex ante	Ex post
Main downside	Undue liquidations	Moral hazard