Comparative Legal History

ISSN: 2049-677X (Print) 2049-6788 (Online) Journal homepage: https://www.tandfonline.com/loi/rclh20

At the end, the creditors win: pre-insolvency proceedings in France, Belgium and the Netherlands (1807–c1910)

Dave De ruysscher

To cite this article: Dave De ruysscher (2018) At the end, the creditors win: pre-insolvency proceedings in France, Belgium and the Netherlands (1807–c1910), Comparative Legal History, 6:2, 184-206, DOI: 10.1080/2049677X.2018.1534777

To link to this article: https://doi.org/10.1080/2049677X.2018.1534777

Published online: 14 Oct 2018.

Comparative Legal History, 2018
Vol. 6, No. 2, 184–206, https://doi.org/10.1080/2049677X.2018.1534777

At the end, the creditors win: pre-insolvency proceedings in France, Belgium and the Netherlands (1807–c1910)

Dave De ruysscher*

In nineteenth-century France, Belgium and the Netherlands, laws imposing pre-insolvency proceedings had different goals. In a first stage, from around 1810 until about 1860, continuity of businesses in distress was not a policy consideration. Rather, legislators purported to give the creditors early control over the insolvent's estate, which was most often liquidated. Debtor-in-possession features were mostly conceived of as a temporary reward for cooperation; lowered requirements for re-entry in the market after the winding-up of their business were another advantage for cooperating debtors. This was the same in the three aforementioned countries. In the 1870s and 1880s, the French and Belgian legislators created new pre-insolvency proceedings, which allowed debtors to keep their assets. In the Netherlands, fixed-term moratoriums prevented such an approach. Yet, also in Belgium and France, the exemption of secured creditors hampered the feasibility of compositions, and a goal of saving firms in financial peril.

Keywords: corporate insolvency; political economy; nineteenth century; commercial law

1. Introduction

Corporate bankruptcy reforms are high on the agendas of legislators around the world. Pre-insolvency is a core issue in these new laws.[1] On 21 November 2016, the European Commission published a proposed directive that aimed to harmonise pre-insolvency proceedings throughout the European Union.[2]

*Dr. Dave De ruysscher, Department of Public Law, Jurisprudence, and Legal History, Tilburg University, Netherlands, and Department of Interdisciplinary Legal Studies, Vrije Universiteit Brussels, Belgium. Email: d.deruysscher@uvt.nl

[1]Gerard McCormack and others, *Study on a New Approach to Business Failure and Insolvency. Comparative Legal Analysis of the Member States' Relevant Provisions and Practices*, https://ec.europa.eu/info/sites/info/files/insolvency_study_2016_final_en.pdf (accessed 1 March 2018).

[2]Commission, 'Proposal of European Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures', COM(2016) 723 def – 2016/0359 (COD). For a critique of this proposal, see Horst Eidenmüller, 'Contracting for a European Insolvency Regime' (2017) 18

Pre-insolvency proceedings, which have also been devised by national legislators within the EU's member states, can be defined as proceedings that allow businesses facing financial difficulties to apply for temporary protection[3] Presently, these are often considered as corporate restructuring proceedings: the management of the firm remains in place, but the company is required to undergo structural changes.[4] A common measure of protection is the temporary stay (debtors are shielded from their creditors during a moratorium; the latter cannot enforce their debts for a certain period of time). Other measures include rules on 'new/fresh money' (new lenders receive priority over previous lenders), debt-equity swaps, partial take-overs, to name but a few. The temporary stay is usually imposed by a judge; the other remedies may be part of a reorganisation plan, which has to be accepted by (a majority of) the creditors.[5]

The legislative changes, both at the national and supranational level, that were implemented following the financial crisis of 2008, have triggered questions on the goals of insolvency and pre-insolvency proceedings. Should they preserve stakeholders' rights or merely serve the interests of creditors? Are they feasible only to organise a winding-up and maximise the yields of auctioned assets of the insolvent firm?[6] Or should legislation prevent early liquidations and stimulate continuity of businesses even in the face of serious financial setbacks? It has been common to distinguish legal regimes concerning debt enforcement and insolvency along the lines of creditor- or debtor-friendliness. Recently, however, the array of possible motives underlying legislation is generally assessed as being broader. Some scholars contend that bankruptcy and pre-insolvency proceedings are valuable rituals in themselves. They can be directed towards (partial) dispensation of debts.[7] The goals of such proceedings are not only concerned with the maximisation of dividends, but also with fairness and accountability.[8] The abovementioned

European Business Organization Law Review 273. See on the earlier Recommendation: Horst Eidenmüller and Kristin van Zwieten, 'Restructuring the European Business Enterprise: The EU Commission Recommendation on a New Approach to Business Failure and Insolvency' (2015) 16(4) *European Business Organization Law Review* 625.

[3]The mentioned Directive encompasses preventive restructuring proceedings and discharge proceedings, allowing for a second chance after liquidation. See s 1 European Directive COM(2016) 723 def – 2016/0359 (COD).

[4]See for an example of the recent identification of pre-insolvency with rescue proceedings, European Law Institute, *Rescue of Business in Insolvency Law* (European Law Institute 2017) 175 (no 224).

[5]For a comparative survey of measures in corporate restructuring proceedings, see Gerard MacCormack, Andrew Keay, and Sarah Brown, *European Insolvency Law: Reform and Harmonization* (Edward Elgar 2017) 225–302.

[6]This constitutes the so-called creditors' bargain approach. See Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press 1986).

[7]Stephan Madaus, 'Schulden, Entschuldung, Jubeljahre – vom Wandel der Funktion des Insolvenzrechts' (2016) 71(11) *Juristenzeitung* 548.

[8]Vanessa Finch, 'The Measures of Insolvency Law' (1997) 17 *Oxford Journal of Legal Studies* 227.

efforts of harmonisation cannot ignore the divergence that exists among corporate insolvency laws throughout the European Union. The conceptualisation of insolvency itself provides an example. Overindebtedness can be categorised as a procedural issue (which has long been the case in Germany for example),[9] or as a theme of private law, when it is considered as a modality of debt and contract (which is a dominant view in many European countries and the United States). All this invites for thorough historical-comparative research on the topic.

Historical arguments have been quite common in debates over proposed legislative changes and their intended effects.[10] However, sometimes they are overstretched. For example, the historical precursors of pre-insolvency proceedings are commonly considered as aimed at business rescue, or as being debtor-friendly. However, there is no direct line from the Italian '*concordato*' of the later Middle Ages to restructuring proceedings of today.[11] This article demonstrates that nineteenth-century pre-insolvency proceedings could serve diverse purposes that were not incompatible with a creditor-orientated legal regime. Legislators could secure the cooperation of insolvents, but this was not per se combined with efforts of continuity of business or corporate rescue.

This article analyses pre-insolvency proceedings in France, Belgium and the Netherlands, in the nineteenth century and the first decade of the twentieth century. Analysis of the corporate insolvency regimes of these three countries is fruitful because of their shared legal history, which dates back to the early 1800s. Notwithstanding this communal background, the differences in nineteenth-century policy choices as to pre-insolvency proceedings stand out. Therefore, the historical development of the three countries' pre-insolvency regulations, resulting in divergence, demonstrates that legislators could address similar topics with different responses. Moreover, all of those could largely miss crucial points. Indeed, pre-insolvency laws of the mentioned nations did not generally preserve the going concern of firms. They mainly reinforced a creditor-orientated, liquidation-biased legal regime.

[9]German commercial law codes of the nineteenth century (ADHGB of 1861 and the HGB of 1897) typically did not contain sections on insolvency proceedings, because *Konkursrecht* was viewed as pertaining to procedure.

[10]For example, in Belgium, in the 1980s references were made to the proceeding of 'controlled administration' ('*gestion contrôlée*'), which had temporarily been in effect in 1934 and 1935. See Chamber of Representatives, Parliamentary Documents, no 775/1 (draft bill, 28 October 1983) 2–3. Also, for France, see the first issue of *International Journal of Insolvency Law*, with a section on French law containing ten papers, of which several refer to the 1930s.

[11]Already warning against such a conclusion was Alfredo Rocco, *Il concordato nel fallimento e prima del fallimento. Trattato teorico-pratico* (Bocca 1902) 36–46. See also Dave De ruysscher, 'Business Rescue, Turnaround Management and the Legal Regime of Default and Insolvency in Western History (late Middle Ages to Present Day)' in Jan I Adriaanse and Jean-Pierre van der Rest (eds), *Turnaround Management and Bankruptcy* (Routledge 2017) 22–42.

This article begins by analysing the common roots of insolvency proceedings in these countries, which are found in the Napoleonic *Code de commerce* of 1807 and will then focus on pre-insolvency proceedings in Belgium and the Netherlands in the nineteenth century. This work will then proceed to elaborate on the legislative reforms of the 1870s, 1880s and 1890s, in all three mentioned countries, which for the first time created restructuring proceedings. Finally, the proceedings of the three countries are compared and evaluated as to their effectiveness.

2. The *Code de commerce*: liquidation as default insolvency proceeding

In 1807, the French government issued the *Code de commerce*. It was imposed on the whole of the French Empire, which also included the territories of the Southern Netherlands that later, in 1830, would constitute the Kingdom of Belgium.[12] The same Code was introduced in the (Northern) Netherlands as well, but at a later time. The French *Code de commerce* had force of law in the formerly independent Kingdom of Holland (that is, the precursor of the Kingdom of the Netherlands) from January 1811 onwards. Before that time, under the Batavian regime (1796–1806), as well as under the Kingdom of Holland (1806–1810), drafts of codes of civil, commercial and procedural law had been written, containing sections on insolvency, but most of them were not promulgated.[13] Yet, these drafts of codes largely built on rules of the Old Regime and as a result they could easily be used as examples for new legislation that replaced the (foreign) *Code de commerce*. This was different from the situation in the Southern Netherlands (from 1830, Belgium) where the Napoleonic commercial code filled a gap and abolished few and often haphazard rules on insolvency. As a result, the commercial code of 1807 remained in force in Belgium for most of the nineteenth century.

A crucial difference between the legacy of the *Code de commerce* in Belgium and the Netherlands was that the Netherlands only embraced the newly introduced French codes for three years (1811–1813). In November 1813, when the Northern Netherlands threw off the yoke of French occupation, new codes were actively being prepared. In 1814, the Kingdom of the Netherlands became a United Kingdom, since it formally absorbed the – by then liberated – Southern Netherlands. Several drafts of codes were made, and deliberations were lengthy. This

[12]Ernst Holthöfer, 'Handelsrecht und Gesellschaftsrecht: Belgien' in Helmut Coing (ed), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol 3/3 (Beck 1986) 3287–91.

[13]René JQ Klomp, *Opkomst en ondergang van het handelsrecht. Over de aard en de positie van het handelsrecht – in het bijzonder in verhouding tot het burgerlijk recht – in Nederland in de negentiende en twintigste eeuw* (Ars Aequi 1998) 5–14; Boudewijn Sirks, 'De gevolgen van de inlijving van Nederland bij het Franse Keizerrijk in 1810 voor handel en nijverheid' in Louis Berkvens, Jan Hallebeek, and Boudewijn Sirks (eds), *Het Franse Nederland: de inlijving 1810–1813. De juridische en bestuurlijke gevolgen van de 'Réunion' met Frankrijk* (Verloren 2012) 148–49.

was due to the difference of opinion between Northern and Southern (Belgian) members of the drafting committees.[14] In the summer of 1830, the commercial and civil codes of the United Kingdom were ready; they were published and were purported to enter into effect in February 1831.[15] But in September 1830, the Belgian revolt of independence meant that the implementation had to be postponed. After the founding of Belgium, in the Northern Netherlands new efforts of codification resulted in the issuing of a revised commercial code in 1838.[16] In the Netherlands, Napoleon's commercial code was provisionally used until the widespread adoption of national codes. By contrast, in the new state of Belgium the 1807 French commercial code was deliberately kept.[17]

Generally speaking, the Belgian state was more receptive to the French institutions than the Netherlands. A case in point is the commercial court. The French *tribunaux de commerce* had existed in France since the middle of the sixteenth century. By contrast, in the Low Countries there was no tradition of separating civil from commercial law. All mercantile disputes were dealt with in the civil law courts. In France, mercantile issues and litigation between merchants were brought before the commercial court; in this court, only merchants were judges. The French lay commercial court was accepted with enthusiasm in the Southern Low Countries, but was acknowledged with reluctance in the North. Between January 1811 and 1838 the newly installed commercial courts in the (Northern) Netherlands struggled and they were abolished in 1838.[18] However, even

[14]The strife concerned the draft of the civil code, and not the commercial code. For the latter, a 1815 project was received favourably by Belgian delegates. However, because both codes were considered as being connected, also the promulgation of the commercial code was postponed. See John Gilissen, 'Codifications et projets de codification en Belgique au XIXe siècle' (1983) 14(1–2) *Belgisch Tijdschrift voor Nieuwste Geschiedenis* 220.

[15]Gilissen (n 14) 210.

[16]Ernst Holthöfer, 'Handelsrecht und Gesellschaftsrecht: Niederlande' in Helmut Coing (ed), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol 3/3 (Beck 1986) 3402–67.

[17]See Dirk Heirbaut, 'Enkele hoofdlijnen uit de geschiedenis van het Wetboek van Koophandel in België' in Dirk Heirbaut and Georges Martyn (eds), *200 jaar Wetboek van Koophandel* (Royal Academy of Belgium 2009) 91–103.

[18]On the French *tribunaux de commerce* (and their precursor, the *juridiction consulaire*), see Jean Hilaire, *Introduction historique au droit commercial* (Presses universitaires de France 1986) 73–75; Edouard Richard, *Droit des affaires. Questions actuelles et perspectives historiques* (Presses Université de Rennes 2005) 74–77 nos 78–83; Jean Hilaire, 'Perspectives historiques de la juridiction commerciale' in *Les tribunaux de commerce. Genèse et enjeux d'une institution* (La Documentation française 2007) 10–11; Dave De ruysscher, 'Handel in oud en nieuw recht: lobbyen voor een afzonderlijk handelsrecht doorheen de geschiedenis' (2011) *Tijdschrift voor Privaatrecht* 1623; Romuald Szramkiewicz and Olivier Descamps, *Histoire du droit des affaires* (LGDJ 2013) 191–92. On the commercial courts in Belgium and the Netherlands, see MW van Boven, 'De rechtbanken van koophandel (1811–1838). Iets over de geschiedenis, organisatie en de archieven' (1993) 97 *Nederlands Archievenblad* 5; Georges Martyn, 'De rechtbanken van koophandel in België' (2008) 10 *Pro Memorie: bijdragen tot de rechtsgeschiedenis der Nederlanden* 203;

though the 1838 Dutch commercial code was drafted in order to supersede the French code, its contents were very similar. Over the course of the first decades of the nineteenth century, in subsequent drafts and proposals of legislation Dutch traditions had been replaced for French solutions concerning matters of securities and insolvency. It is no surprise that the 1838 Dutch Commercial code bore testimony to these developments also.[19]

The French commercial code of 1807 listed rules regarding '*commerçants*', merchants, and contained a sizeable chapter on insolvency ('*faillite*'). The code provided a one-gateway-approach to bankruptcy. Upon persistent default ('*cessation de paiement*'), insolvency proceedings had to be started before a commercial court. Pre-insolvency proceedings had deliberately been abolished in the drafting process of the commercial code.[20] According to the code, negotiations of the debtors and the creditors, leading up to a composition ('*concordat*'), were possible, but only after the debtors had formally been declared insolvent. This categorisation brought about the dispossession of the effects of the insolvent debtors. In the judgment qualifying the debtors as '*faillite*', the court appointed a commissioned judge and trustees for administering the former's estate. If negotiations failed or if the majority of requirements for a composition were not met, the only outcome of the trial was liquidation of the estate. This was a very likely result: half of the creditors representing three fourths of the debts (in sums) had to accept the proposed *concordat*. In addition, not all creditors were involved: secured creditors, who held mortgages or pawns as collateral for their debts, were considered super-priority 'separatists'. They could ignore the insolvency proceedings, and even a composition, and sue to obtain their collateralised assets, thus hampering the feasibility of payment plans and reductions that were granted by non-secured creditors in a *concordat*.[21]

The sections of the French commercial code of 1807 regarding insolvency have rightly been labelled as 'strict'.[22] Insolvents were deemed to have

Georges Martyn, 'Le débat à propos des tribunaux de commerce en Belgique depuis 1807' in Anne Girolet (ed), *Le droit, les affaires et l'argent* (Université de Bourgogne 2009) 445–62.

[19]See Egbert Koops, *Vormen van subsidiariteit. Een historisch-comparatistische studie naar het subsidiariteitsbeginsel bij pand, hypotheek en borgtocht* (Boom 2013) 223–42; Vincent JM van Hoof, *Generale zekerheidsrechten in rechtshistorisch perspectief* (Kluwer 2015) 243–96.

[20]See the proposition by Legras (1799): Philippe Legras, *Projet d'un code des faillites, surséances, cessions judiciaires et banqueroutes* (Bailleul 1799) 69–73, and the acceptance of *lettres de répit* and *arrêts de surséance* in the proposal by the Miromesnil-committee. See Henri Lévy-Bruhl, *Un projet de Code de commerce à la veille de la Révolution. Le projet Miromesnil (1778–1789)* (Leroux 1932) 237–40.

[21]Hilaire, *Introduction* (n 18) 325–30; Pierre-Cyrille Hautcœur and Nadine Levratto, 'Faillite' in Alessandro Stanziani (ed), *Dictionnaire historique de l'économie droit* (LGDJ 2007) 159–67; Szramkiewicz and Descamps (n 18) 384–94.

[22]Hilaire, *Introduction* (n 18) 324–25.

committed fraud; they were arrested at the start of the bankruptcy proceedings (s 453). Criminal prosecution was probable. The commercial code distinguished between 'fraudulent bankruptcy' and 'simple bankruptcy'. The former encompassed intentional bankruptcy, but the latter was considered as insolvency because of unprofessional behaviour. 'Simple bankruptcy' was used as category for insolvency that ensued from 'excessive dispenses' and 'risky investments'. Even the irregular keeping of books by an insolvent was regarded as 'simple bankruptcy' (s 587).

Policy considerations underlying the contents of the commercial code were not in favour of insolvents, therefore. Merchants and statesmen shared reservations on leniency against merchants who could not repay their creditors and both groups had, before and during the writing of the commercial code, supported a fierce approach.[23] Notwithstanding lengthy drafting processes and deliberations on the contents of the Code, the mentioned provisions had remained virtually unchallenged. All of this was a reaction against the liberalisation of trade, which had marked the regimes of the early French Revolution and of the Directory. A financial crisis of 1805 had resulted in the corroboration, even the reinforcement of the mentioned strict ideas.[24] Additionally, under the Old Regime the fraud of debtors had become widespread because no appropriate proceeding had existed that regulated the administration of the estates of insolvents.[25] All these were reasons for the 1807 legislators to craft a legal framework that imposed dispossession at the slightest indication of insolvency. Insolvent debtors were held to bring forward their problems, even though there were no incentives for them to do so. Liquidation of business was an evident danger. Furthermore, re-entry into the market was difficult to obtain. At the end of the insolvency proceedings, when the commercial court judged on whether the effects of the insolvent debtor were to be sold publicly or whether a composition was accepted, it was also decided to what extent the debtor was 'excusable' (s 613). If in the course of the bankruptcy proceedings no traces of criminal behaviour had been found, the bankrupt was declared

[23]See the contents of projects of commercial code, written between 1801 and 1805: Fabien Valente, 'Une découverte récente: le projet de Code de commerce lyonnais (1802)' (1993) 136–37 *Vie et sciences économiques* 121; Fabien Valente, 'Contribution à l'histoire de la codification en droit commercial: le projet de la chambre de commerce de Paris (1804)' (2004) 82 *Revue historique de droit français et étranger* 90; Szramkiewicz and Descamps (n 18) 350. On the views concerning 'bankrupts' and debt, see Erika Vause, '"He Who Rushes to Riches Will Not Be Innocent": Commercial Honor and Commercial Failure in Post-Revolutionary France' (2012) 35(2) *French Historical Studies* 321; James R Munson, 'The "Interests of Commerce": Business Failure in the Commercial Code Debates, 1801–07' (2016) 30 *French History* 505.

[24]Hilaire, *Introduction* (n 18) 90; Szramkiewicz and Descamps (n 18) 349.

[25]Jean Guillaume Locré, *La législation civile, commerciale et criminelle*, vol 19 (Treuttel and Würtz 1830) 77–91. See also Sigrid Choffée, *La faillite du commerçant au XIXe siècle* (PhD thesis, Université de Paris-XII 1997) 74.

'excusable', being eligible for re-entry in the market at a later time ('*réhabilitation*') (s 614). Yet, however, *réhabilitation* could only be awarded if all debts were paid (s 605).

3. Belgium and the Netherlands: *Surséance* and *Sursis de Paiement* (c1815–c1870)

3.1. *From leniency to creditor control: Surséance in the Netherlands*

After the demise of Napoleon and the dissolution of the French Empire, the Southern Netherlands were merged with the Kingdom of the Netherlands. During the brief reign of the United Kingdom of Netherlands (1815–1830) an older idea of court-imposed moratoriums in insolvency, which had been abandoned under the French occupation, was re-introduced. In the Low Countries and elsewhere under the Old Regime, debtors' protection against enforcement had been inspired mostly by ideas of humanity; a distinction was made between 'good' and 'bad' debtors. The first ones were to be given the opportunity to postpone payments, whereas measures of strict enforcement, for example of expropriation and imprisonment, were considered fitting for the 'bad' debtors.[26]

In the (Southern and Northern) Low Countries during the seventeenth and eighteenth century, central courts had issued 'letters of grace' that provided insolvents with protection even against the will of their creditors. In 1793, the States of Holland had regulated the so-called '*surcheancie*', apparently because of abuses of the arrangement. '*Surcheancie*' was a temporary shielding of unfortunate debtors, merchants and others, against enforcement of debts, for a period of up to twelve months. The 1793 law provided that the States would grant a moratorium only following the advice of the Court of Holland. The latter had to inquire into the causes of the insolvency and to hear the opinions of the creditors. Yet, the actual decision to grant a relief was not the creditors' but pertained to the authority of the States of Holland.[27] It was fairly typical in the Old Regime that debtors' protection was deemed a privilege, granted in exceptional circumstances, and that this injunction was vested in the grace of the Prince. Similar arrangements had been common in

[26]This was a mainstream argument in the *ius commune*. See Benvenuto Stracca, *De conturbatoribus sive decoctoribus tractatus*, in *De mercatura, seu de mercatore ...* (Lyon 1556) 289 (2.2); Guiseppe Speciale, 'Fures, latrones publici, decocti fraudulenti: il confugium per if falliti da Innocenzo III a Benedetto XIII' (1996) 7 *Rivista internazionale di dirltto comune* 152. This view built on the requirement for *cessio bonorum* that the applicant had to be of good faith. On this issue: James Q Whitman, 'The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence' (1996) 105 *Yale Law Journal* 1873; Patricia Zambrana Moral, *Derecho Concursal Histórico I. Trabajos de Investigación* (Universidad de Málaga 2001) 210.

[27]Johannes van der Linden (ed), *Groot Placaatboek inhoudende de placaaten ende ordonnantien van de edele groot mog. Heeren staaten van Holland en West-Friesland ...* (Allart 1796) 564–65 (15 November 1793).

eighteenth-century France as well,[28] but during the drafting of the French commercial code of 1807 unilaterally imposed protections of debtors had been deliberately left out.

In January 1814, King William I of the Netherlands issued a decree that revived the proceeding of '*surcheancie*'. The government could grant relief (now labelled '*surséance*') to insolvent debtors, merchants and others, on the condition that they had been struck by disaster and that the relief would facilitate their recovery. When granted, a temporary automatic stay on claims applied for up to a year and insolvents were allowed to remain in possession of their effects. However, the administration of their affairs was supervised over by representatives that were chosen from among the creditors. Creditors were invited to express their opinions on the debtor's application, but they could not prevent the government's decision to impose a moratorium. In November 1814, when the assembling of the United Kingdom was being prepared, the decree was extended to the Southern Netherlands as well.[29] As had been the case in the 1793 law, the one-year moratorium was devised to block out all enforcements, and also those of secured creditors. By contrast, according to the rules of the French commercial code, secured creditors were deemed 'separatist' super-priority creditors: their pledges were not part of the bankruptcy trust (see above). Since it was unilaterally imposed from above, *surséance* was still considered a matter of princely grace, much as it had been in the Old Regime. The policy considerations underlying the decree of 1814 were still mainly based on clemency towards bona fide debtors but at the same time control over the insolvent's estate by creditors' representatives was imposed.

In the course of the 1820s and 1830s, efforts to recast the proceeding of *surséance* went together with a change of its purposes. In 1826 a new law was enacted, which altered its basic features. For example, relief was to be granted by the Supreme Court (*Hoge Raad*) and no longer by the government. This transformed *surséance* into a regular court proceeding. The decisions were taken by the Supreme Court, but the proceedings of verification of debts were administered by a court of first-instance (*arrondissementsrechtbank*). Moreover, it was provided that the debts of secured creditors were not suspended during the period of relief of twelve months.[30] This latter shift in policy came after prolonged efforts to draw up codes of Dutch law. Over the years, drafters had become more susceptible to French legislative ideas at the expense of their national tradition. As a result, the earlier Dutch approach of pooling all debts, secured and unsecured, was abandoned for a regime that was more advantageous for secured creditors.[31]

[28]Claude Dupouy, *Le droit des faillites en France avant le Code de commerce* (Pichon 1960) 139–40; Choffée (n 25) 20.
[29]Decree of 23 November 1814, *Pasinomie*, 2nd series, vol 1, 359.
[30]Law of 23 March 1826, *State Gazette* no 48.
[31]Justinus C Voorduin, *Geschiedenis en beginselen der Nederlandsche wetboeken* ... , vol 10 (Natan 1841) 883–914.

The aforementioned change in approach also concerned a new differentiation between merchants and non-merchants. The 1814 decree had not distinguished between traders and non-traders. Moreover, in the 1810s and 1820s, some (drafts of) Dutch codes had proposed the so-called *atterminatie*, for any kind of debtor. *Atterminatie* was a court-imposed moratorium of up to three years following approval by a majority of creditors.[32] But over a course of years, it was emphasised that only merchants could seek this remedy, and then, in the 1826 law, it was merged with *surséance*.[33]

In the 1838 Dutch commercial code, the sections of the 1826 law on *surséance* were for the most part copied (s 900-923), but it can be argued that the arrangement became even more creditor-orientated. A distinction was drawn between a provisional and a longer moratorium. The first one was granted by the judge (the first-instance court, not the Supreme Court), if no traces of fraudulent behaviour were found and if other conditions were met. The provisional moratorium lasted until creditors voted on the longer relief of one year; this could only be granted if a majority of creditors supported it (three fourths of creditors, representing two thirds of debts (in sums), or two thirds of creditors with at least three fourths of the debts (in sums)) (s 914). This latter change marked the end of a transformation of *surséance* from a petition for exceptional relief towards an in-court moratorium proceeding that was controlled by the creditors. In that regard, the new Dutch rules had re-aligned themselves closely to the French example of post-insolvency compositions. The conceptions of the French commercial code had prevailed over Dutch traditions.

3.2. The Belgian *sursis de paiement*

Following its independence in 1831, the Belgian government publicly proclaimed that a Belgian commercial code would be drafted, and that new bankruptcy legislation would be enacted.[34] However, in practice it took twenty years before modest changes were made to the French commercial code, which continued to be used. In France in 1838, some amendments had been inserted into the commercial code's chapter on bankruptcy. But the moratorium enshrined within the Dutch code of 1838 was not implemented. Rather, the 1838 French law aimed at softening

[32]This was part of the 1809 Civil code for the Kingdom of Holland (s 1184–1186) and of the Code of civil procedure of 1809 (s 761–764). For the reprisal of this arrangement in later drafts, see Voorduin (n 31) vol 10, 884–85.

[33]In the 1838 Civil code, or the 1838 commercial code, *atterminatie* was no longer mentioned. Moreover, the French example of the judges' authority to impose postponements of payment upon creditors (s 1244 French Civil code) was not copied either. See Carel Asser, *Het Nederlandsch Burgerlyk Wetboek vergeleken met het Wetboek Napoleon* (Van Cleef 1838) 493–94. On the progressive demise of *atterminatie*, see Willem LPA Molengraaff, *Leidraad bij de beoefening van het Nederlandsche handelsrecht* (Bohn 1912) 860.

[34]s 139, 9° and 11° Constitution of 1831.

some of the strict rules regarding insolvents, especially when they could not be held liable for their overindebtedness.[35] A Belgian law of April 1851 on *faillite* and *concordat* copied many parts of the French bankruptcy reform act of 1838, but also kept the Dutch *surséance*.[36]

In practice, the Dutch *surséance* was occasionally used after the Belgian independence of 1830. The proceedings had been adjusted to complement the new Belgian procedure: applications had to be filed with the Belgian government and the courts of appeal advised on them. But the proceeding remained exceptional. From 1831 until 1844, only 85 petitions were submitted, 58 of which were rejected.[37]

In the 1851 law, some important changes were made to the Dutch arrangement. The Belgian *surséance*, which thenceforth was labelled '*sursis de paiement*', literally 'suspension of payments', was construed as a combination of the French *concordat* and the Dutch *surséance*, as had been done in the 1838 Dutch Commercial code. Upon a brief suspension of claims following a court injunction, which was issued at the demand of an 'honest but unfortunate' debtor, a moratorium of at most one year could be granted provided that a majority of creditors, representing three fourths of the debts (in sums), voted in favour of the moratorium (s 593-610). The proceeding of *sursis de paiement* was devised as an 'insolvency light' proceeding. Bankruptcy proceedings could be started only on the condition of 'cessation of payments' ('*cessation de paiements*'), which was definitive insolvency. For *sursis*, it was provided that the debtors had to be able to recover with the moratorium, but '*cessation*' was a requirement as well, even though it must only be temporary (s 593). As a result, shifting from a pre-insolvency to a post-insolvency proceeding was very easy. If requirements for *sursis de paiement* were not met, then the debtors were generally considered *faillite*. The date of start of the *faillite* was considered the date when the debtors had filed for *sursis* (s 613). The debtors were invited to petition for *sursis* when facing difficulties of payment; early detection of financial problems was considered an advantage for the creditors. The debtors were incentivised to apply for *sursis* because re-entry was not dependent on proceedings of rehabilitation.

Next to *sursis* another composition proceeding was codified in the 1851 law. If the debtors declared themselves insolvent (that is having ceased payments definitively) and had not deceived their creditors, then an accelerated proceeding for reaching a *concordat* (ie a post-insolvency composition) could be started. Under those circumstances, the debtors were invited to propose an agreement and creditors were to vote on the proposal within a short period of time. The proceeding was implemented in order to stimulate debtors to come forward with their payment problems. But it was very difficult to achieve any successful result. First of all, the 'swift' *concordat* was a post-insolvency proceeding; the debtors had to present

[35]Hilaire, *Introduction* (n 18) 332; Richard (n 18) 576–78.
[36]Law of 18 April 1851, *State Gazette* 24 April 1851.
[37]*Compte de l'administration de la justice civile en Belgique 1832–43*, *Appendice*, xxiv.

themselves as being *faillite*, which made them vulnerable to liquidation. Secondly, this was not unlikely since the majority rules were stricter than for the regular *concordat*: three fourths of creditors, representing five sixths of the debts (in sums), were to approve the schemes that were drafted by the debtors (s 520).

The mentioned majority rules in Belgium and the Netherlands referred to French examples. Moreover, as was the case with the 1826 and 1838 Dutch regulations, the Belgian *sursis de paiement* and the 'swift' *concordat* secured creditors were not subjected to the automatic stay. This was another French view. Only under *sursis*, in the case that they had mortgages, on immovable property or appurtenances that were necessary for the debtors' business (such as factory buildings, stockrooms or warehouses), secured creditors were not allowed to seize them during the period of relief (s 606). In the preparatory statements of the 1851 law, the exception for secured creditors with mortgages was motivated as being required in order to ensure the continued possession of the debtors.[38]

This consideration was based on the older idea of indulgence towards bona fide debtors; since most businesses were conducted at home, it was felt too severe to deprive cooperating debtors of the premises which they needed for their income. The intention of the legislator was not to devise *sursis* as a corporate rescue proceeding: the mentioned rules were not written so as to ensure the continuation of business as such. In fact, the debtors could remain in possession of their effects but were closely supervised by trustees. The debtors under *sursis* were not allowed to do anything without authorisation from supervising commissioners (s 603). This was another Dutch influence. In 1814, the debtors applying for *surséance* were to remain in possession of their properties, but they were controlled by representatives of creditors. The 1826 law specified that the debtors were required to have the authority of the appointed supervisors for any action (s 10, later s 916 of the 1838 Code). This approach was due to the permeation of French ideas also. As was mentioned above, French legislation had emphasised that the bankrupt debtors would be dispossessed immediately after their declaration of insolvency.

When considering the developments in France, the Netherlands and Belgium, between 1807 and approximately 1860, it is clear that the French examples were very dominant, even to the extent that they were reinstated outside France's borders time and again. This happened in newly established states that had been taken from French control, even if they had experienced only a brief period of French occupation. In the (Northern) Netherlands, lawmakers quickly attempted to push aside the French commercial code. But its ideas lasted, and this legacy resulted in a slow disintegration of the older features of the indigenous arrangement of '*surséance*'. The same phenomenon was evident in Belgium. Since the

[38]Documents of Parliament, Chamber of Representatives, '*exposé des motifs*' 22 December 1848 (session 1848–49, no 90) 64; Documents of Parliament, Senate, report of the commission, 9 April 1850 (session 1849–50, no 66) 83.

later eighteenth century, in both Northern and Southern Low Countries, moratoriums evolved from measures of princely grace into creditor-steered proceedings.

The aforementioned examples can be considered a warning not to consider every pre-insolvency proceeding as debtor-friendly or as directed towards business rescue. The debtor-in-possession characteristics of *surséance* and *sursis de paiement* went hand in hand with strict control by trustees, even to the extent that the debtors were considered incapable to manage their estate without authorisation. Furthermore, both the Dutch *surséance* and the Belgian *sursis de paiement* proceedings were started by the debtors. These were voluntary proceedings, in contrast to the proceedings of *faillite*, which could be initiated both by creditors or the debtors. However, this did not mean that such pre-insolvency proceedings were debtor-friendly in a present-day sense. It was thought that debtors would be more willing to cooperate and bring forward their financial problems if they were not labelled as '*faillite*'. If the categorisation as '*failli*' was avoided, the cumbersome procedures of re-entry (ie the declaration of 'excusability' and the 'rehabilitation') were not to be pursued. Avoidance of rehabilitation proceedings was considered bait for struggling debtors; if they took it, creditors gained access to the estate of their debtors in an early stage of overindebtedness.

Rehabilitation proceedings could be avoided under pre-insolvency proceedings; yet, it was not a main incentive for legislators to reduce barriers of market re-entry. Their aim was to give creditors the option of liquidating, at least administering insolvent estates, as quickly as possible. As a result, the abovementioned pre-insolvency proceedings were not directed towards continuity of enterprise or restructuring. This would have required protection of the debtors, against actions of their creditors. Indeed, the risks of liquidation were very high even in such voluntary proceedings. Majority requirements were considerable, and moratoriums lasted for a short period of time only. Therefore, the juxtaposition of pre-insolvency proceedings with insolvency proceedings was mostly aimed at facilitating the creditors more than providing relief to the debtors.

Also, the mentioned legislative goals were quite naïve. It seems that, even after the creation of such pre-insolvency proceedings, debtors waited as long as possible before declaring their insolvency. In Belgium during the 1850s and 1860s, *sursis de paiement* was virtually never used.[39] It also seems that the 'swift' *concordat* remained a curiosity and in 1887 it was abolished on the understanding it was not applied in practice.[40] Between 1838 and 1877 in the Netherlands, *surséance* was only granted in 33 cases.[41]

[39] *Administration de la justice criminelle et civile de la Belgique. Justice civile. Période de 1861 à 1875. Résumé statistique* (Moniteur belge 1879) 64.
[40] Law of 29 June 1887, *State Gazette* 30 June 1887.
[41] Gustaaf W Van der Feltz, *Geschiedenis van de Wet op het Faillissement en de Surcéance van Betaling* (Bohn 1897) vol 2, 341.

4. Pre-insolvency proceedings and the continuity of business (*c*1870–*c*1910)

In the latter quarter of the nineteenth century, pre-insolvency arrangements became more orientated towards leaving the debtors in the administration of their estate. There was a clear influence from English law in this respect. In England, the bankruptcy acts of 1861 and 1869 provided that out-of-court schemes, that were negotiated with creditors and stipulating *inter alia* that the debtors remained in possession, could be registered by courts on the condition that creditors representing three fourths of debts approved the agreement.[42] Yet, English law largely envisaged a one-gateway approach: if majority requirements were not met, then the debtors were bankrupt, and liquidation was the default result of the proceedings that were thereupon started.

Beginning in the early 1870s, drafts of legislation in France and Belgium were aimed at devising a two-gateway-approach. Double-track proceedings were created. However, legislators in France and Belgium chose divergent paths as a result of their legal history. In France, policy makers did not conceal that pre-insolvency proceedings were tools of swift liquidation, even though the debtors were granted powers to administer their businesses during the course of the proceedings. In Belgium, the separation between pre-insolvency and insolvency proceedings was less superficial.

The French law of 1889 that made provision for the approach mentioned above was long in the making. In March 1848, as a response to the February Revolt against Louis-Philippe, a decree allowed the commercial courts to grant merchants a three-month protection against the actions of their creditors ('*sursis judiciaire*'). The debtor remained in possession of his effects, but was closely watched over by trustees who were appointed from among the creditors. The implied goal of the arrangement was to prepare a winding-up, not to ensure that the debtors' activities could last.[43] In August 1848, a new temporary decree was issued that allowed '*concordats amiables*'.[44] These out-of-court settlements were drawn up in order to speed up liquidations of the estate of bankrupt merchants. If a majority of

[42] Jan H Dalhuisen, *Compositions in Bankruptcy. A Comparative Study of the Laws of the EEC Countries, England and the USA* (Brill 1968) 32–35; Michael Lobban, 'Bankruptcy and Insolvency' in William Cornish and others (eds), *The Oxford History of the Laws of England. XII: 1820–1914, Private Law* (Oxford University Press 2010) 820–22; Jerôme Sgard, 'Bankruptcy Law, Majority Rule, and Private Ordering in England and France (Seventeenth-Nineteenth Century)' Working Paper 2010, http://spire.sciencespo.fr, 16–18; Pierre-Cyrille Hautcoeur and Paolo di Martino, 'The Functioning of Bankruptcy Law and Practices in European Perspective (ca. 1880–1913)' (2013) 14 *Enterprise and Society* 584.

[43] *Collection complète des lois, décrets, ordonnances, règlemens et avis du Conseil d'État*, vol 48 (Imprimerie nationale 1848) 106 (20 March 1848).

[44] *Recueil général des lois, décrets et arrêtés … Xe série: République française* (Administration du journal des notaires et des avocats 1848) 298–99 (*décret relatif aux concordats amiables*, 22 August 1848).

creditors, representing three fourths of the debts (in sums) consented, then the agreement of liquidation was acknowledged by the commercial court. Trustees were thereupon appointed for assisting in the liquidation; the debtors remained in possession of their effects until their public sale. The only incentive for the debtors to bring forward their overindebtedness was that insolvency proceedings were not started when the court homologated the abovementioned agreement; in that case the merchant could easily re-enter the market, because no '*réhabilitation*' was required. During the deliberations on measures to be taken, within the *Comité de commerce et de l'industrie* the majority of members had opted for warranting the rights of creditors, whereas only a few had pointed to the fact that there was little avail in allowing settlements with liquidation as the only possible result.[45]

The decree of August 1848 lasted until November 1849 when it was subsequently withdrawn and the decree of March 1848 on *sursis judiciaire* was no longer applied after August 1848. However, similar economic conditions to the Spring of 1848 were manifest during the Commune of 1870-71. Therefore, a temporary decree was promulgated that re-instated the '*concordats amiables*'. The phrasing of the decree was identical to the measures that had been taken in August 1848.[46] The decree was prolonged one time, but it ended to be in effect on 13 March 1872.[47]

Even though the arrangement of '*concordats amiables*' was abolished, in the years after 1872 new steps were taken to make the proceeding an integrated part of France's commercial legislation. Member of Parliament François Ducuing, who in 1871 had successfully proposed to re-allow the '*concordat amiable*' of 1848, submitted a draft bill containing the propositions of the 1848 and 1871 decrees, but with a reduced majority (half of creditors, two thirds of debts (in sums)). Even though Parliament decided to investigate it further, and send out *questionnaires* to chambers of commerce throughout the country, Ducuing revoked his draft bill in order to improve it.[48] In the later 1870s, new complaints about the rising costs of insolvency proceedings incited new plans. In April 1879, several Members of Parliament supported a new proposal that was largely based on Ducuing's ideas. For the first time, the notion of '*liquidation judiciaire*' was coined. As had been the case in Ducuing's texts, amicable arrangements were directed

[45] *Compte rendu des séances de l'assemblée nationale, III: du 8 août au 13 septembre 1848* (Assemblée nationale 1850) 108–10 (session 11 August 1848). On the tumultuous coming into being of the *décret*, see: Pierre-Claude J-B Bravard-Veyrières, *Rapport fait au nom du comité de législation sur les propositions relatives aux concordats amiables* (Assemblée nationale 1849), and also Karl Marx and Friedrich Engels, *Les luttes de classes en France (1848–1850)* ch 2.

[46] *Recueil général des lois, décrets et arrêtés ... XIIe série: République française*, vol 1 (Administration du journal des notaires et des avocats 1870) 325–27 (*loi sur les concordats amiables* 22 April 1871).

[47] *Journal officiel* of 23 December 1871.

[48] Maxime Lecomte, *Des concordats amiables ou liquidations judiciaires* (Jeunet 1880) 2, 5–6.

towards the distribution of the insolvents' properties, rather than the continuity of their businesses.[49]

Debates over insolvency reforms raged inside and outside the French Parliament. In 1879, Parisian merchants set up a committee for insolvency legislation, which was chaired by the Parisian merchant Bernard Laplacette. Following deliberations with representatives of chambers of commerce and commercial courts from all over France, the committee proposed an insolvency bill in September 1879. The plans were very innovative. The notion of '*faillite*' was suppressed and the requirements for compositions in insolvency proceedings were lowered. A majority of half of the debts (in sums) and half of the creditors could leave the debtors in possession of their effects during the proceedings. The debtors could propose a payment scheme or other measures. Unless a majority of creditors, representing two thirds of debts agreed, the estate of the insolvent was wound up.[50]

In June 1880, the Member of Parliament for Saint-Martin put forth a proposal for law reform that was an elaboration of the proposals of the Laplacette-committee. The draft contained 236 sections. Again, Ducuing's majority requirement of two thirds of the debts (in sums) was mentioned. The proposal was partly inspired by the Belgian law of 1851 also. It provided that suspension of payments ('*sursis*'), if agreed by the creditors, could last for up to one year (s 132) and that it created provision for creditors with mortgages, provided that they were on immovable property or appurtenances that the debtors needed for their work (s 128). The Saint-Martin draft bill stuck to the idea of the Laplacette committee to drop the categorisation of '*faillite*'. But nonetheless, liquidation was, as had been the case in the Laplacette bill, the default outcome. In other respects, Saint-Martin restored the creditors' powers as compared to the Laplacette bill. A *concordat* could not contain definitive cuts (s 136); it was intended for postponements that would last up to ten years (s 137). The fate of Saint-Martin's bill was sealed, however. It extended *sursis* to non-merchants (s 135), which went entirely against the French political-economic ideology.

The Belgian law of 1851 served as an example for a further draft bill. In 1880, Maxime Lecomte, a professor of commercial law, took the Belgian 'swift *concordat*' as inspiration. If debtors declared themselves insolvent, the commercial court could promptly invite all creditors; if 75 per cent of the creditors representing 75 per cent of the sums of the debts then agreed on the postponements or cuts that were proposed by the debtors, then the agreements were rubber-stamped.[51] These propositions did not gain wide support. Yet, through 1881 and 1882

[49]*Ibid*, 7–9. For an analysis of this proposal, see Edmond-Eugène Thaller, *Des faillites en droit comparé* (Rousseau 1887) 316–18.
[50]Bernard Laplacette, in *L'évènement* 29 September 1879; B Laplacette, *Projet de réforme de la loi sur les faillites* (Germer-Baillière 1880).
[51]Lecomte (n 48) 14–16.

debates continued. Magistrates subsequently joined suit, and many inaugural addresses of this period touched upon the subject of insolvency legislation.[52]

While these debates and deliberations over insolvency reform were taking place in France, attempts were also made in Belgium to change the existing pre-insolvency proceedings. In 1872, Member of Parliament Auguste Reynaert submitted a law reform proposal on '*arrangements amiables*'. The draft was clearly inspired by Ducuing's initiatives in France, but it was markedly adjusted to the Belgian context. The 'amicable arrangement' was not construed as a preparation for liquidation; instead, the debtors were left in possession in order to continue their businesses. The proposal was not accepted, most probably because it conceived of the 'arrangements' as out-of-court compositions.[53]

In 1879, two Members of Parliament, Antoine Dansaert and Adolphe Demeur, wrote a proposal that provided debtors in financial difficulties with the possibility to deliberate on a scheme of debt with their creditors, but under the supervision of the commercial court. The aim was that insolvent merchants could remain in possession of their estate, without close supervision, and that they avoided the categorisation of being bankrupt.[54] In June 1883, the law was passed. It stipulated that a request for 'preventive composition' (*concordat préventif*) made the applicant, who had not ceased payments in a permanent way and was honest and unfortunate, eligible for a suspension of enforcement of debts, which lasted a couple of weeks until all debts were listed. If the suspension was granted, the debtors kept their property. For the first time, they were granted the possibility to continue to administer their affairs. However, they were not allowed to make new contracts or alienate effects in any way (s 6). Trustees were appointed in order to make sure that the debtors did not mismanage their estate. But for the remainder, the debtors were allowed to make use of their property. A 'preventive composition', involving a definitive moratorium, was granted by the creditors. Secured creditors were not involved, and they could sue on their collateral. A majority of non-secured creditors, representing three fourths of the debts (in sums), had to approve the composition and the delegated judge, who oversaw the proceedings, could postpone voting if believing that an agreement could be made after new negotiations (s 11). This element had been a part of the 1879 proposal, and it had been copied in some of the French proposals as well.[55]

[52]Jean-Marie Thiveaud, 'L'ordre primordial de la dette. Petite histoire panoramique de la faillite, des origines à nos jours' (1993) 25 *Revue d'économie financière* 91.
[53]*Révision du Code de commerce*, *Documents of Parliament, Chamber of Representatives* (session 1871–72, no 57, www.dekamer.be/digidoc/DPS/K2289/K22891493/K22891493.PDF, 2–3 (accessed 1 March 2018).
[54]Proposition of law, Documents of Parliament, Chamber of Representatives, 9 December 1879 (session 1879–80, no 28), www.dekamer.be/digidoc/DPS/K2296/K22961228/K22961228.PDF (accessed 1 March 2018).
[55]For example, s 110 of the Laplacette-bill of 1880.

The passage of the 1883 Belgian law, which was enacted in 1887, injected new energy into the French debates and these Belgian solutions gained broad attention among French scholars and practitioners. Between 1884 and 1888, several new legislative proposals were discussed in France, but no agreement was reached. Practitioners, magistrates, chambers of commerce and politicians continued to clash over the matter.[56] In July 1882, the French government published a proposal, which was largely based on the Saint-Martin draft from two years earlier. The financial crisis of the early 1880s, including the crash of the *Union Générale* in 1884, underscored the urgency for reform but fierce debate over which solutions were best continued. Finally, in March 1888 a new proposition was submitted that received broad acceptance.[57]

This new proceeding of *liquidation judiciaire* was conceived of as a hybrid pre-insolvency proceeding. It included the possibility to reach a composition, but also took the winding-up of the debtors' business as a default result. If no majority agreement was reached on payment terms, then the debtors transferred their effects to the creditors. The debtors were to keep their assets during the proceeding, under supervision. Yet, similar to the Belgian law of 1883, this supervision was conceived as assistance. Simply put, the trustee did not interfere with the administration by the debtor (s 6-7). The latter escaped the defamatory label of '*faillite*' if the majority of creditors, representing two thirds of debts (in sums) accepted a proposed *concordat* (s 19, 2°). The new law fitted nicely with the existing legislative frameworks. The commercial court conducted the proceedings and oversaw the in-court negotiations. Furthermore, the *liquidation judiciaire* was only accessible to merchants. The temporary arrangements of 1848 and 1871 were finally given a permanent character.[58]

It is evident that both the Belgian and French legal reforms of the 1870s and 1880s took into account the concerns around the untimely dissolutions of firms. This is clear in the broad powers of the delegate judge in Belgium, who according to the 1883 law could adjourn meetings in order to seek majorities. It is equally evident in the relaxed supervision over the debtor-in-possession, which applied both in Belgium and France.

At around the same time that these changes were being debated in France and Belgium, the Netherlands were also considering proposals to recast its commercial legislation. In November 1879, a state committee was installed for preparing the reforms.[59] The resulting insolvency law of 1893, with regard to *surséance*, largely built on the earlier decree of 1826 and the Commercial code of 1838. A major change, however, was the fact that insolvency and *surséance* were

[56]Thiveaud (n 52) 92.
[57]For the details of the legislative history, and other proposals, see 'La réforme de la législation des faillites' (1889) 4th series 46(4) *Journal des économistes* 5.
[58]Law of 4 March 1889, *State Gazette.*
[59]Royal decree no 26 of 22 November 1879, *State Gazette.*

opened up for non-merchants (s 1 and s 213). Yet, *surséance* was again tightened to some extent. The provisional suspension and automatic stay, which previously had been imposed by the court only, now had to be accepted by a majority of creditors as well (consisting of two thirds in persons or three fourths of debts (in sums)) (s 217). The debtors under *surséance* could not administer their estate in any way, without authorisation (s 230). The preparatory documents of the 1893 law attest to a minimal attention of the legislative bodies and Members of Parliament for *surséance*. The arrangement was kept on the motivation that creditors could decide on the fate of the debtors. It was a deliberate choice of the legislator not to introduce majority compositions in *surséance*. Moreover, it was not deemed feasible to negotiate permanent cuts in *surséance*; the arrangement was considered a temporary protection of postponed payment only.[60]

5. Divergence in pre-insolvency approaches

The aforementioned pre-insolvency proceedings demonstrate similarities and differences to each other. Both in the Netherlands and Belgium, liquidation was not the default outcome of pre-insolvency proceedings, whereas this was the case in France. This explains why in France a debtor under *liquidation judicaire* who failed to obtain a composition was considered insolvent. Furthermore, the entry requirement for *liquidation judiciaire* was definitive cessation of payments, which was the same for *faillite*. In Belgium and the Netherlands on the other hand, pre-insolvency was concerned with temporary financial difficulties, not with cessation of payments. As a result, the purported two-track approach was more successful in Belgium and the Netherlands than it was in France.

However, this difference is linked to a more fundamental divergence as concerning the open-endedness of proceedings. In this regard, the pre-insolvency regulations in France and Belgium were clearly containing opposite solutions as compared to those that were applied in the Netherlands. In Belgium and France, the period during which the pre-insolvency composition applied was not limited in the law, but was negotiated between the creditors and the debtor. In the Netherlands, debt schemes expired after twelve (1838 code), later eighteen months (s 226, 1893 law). Cuts were much less practised in the Netherlands than in Belgium. Creditors could play a 'waiting game', because after eighteen months their claims could easily be enforced with seizure and expropriation proceedings. The Dutch *surséance* was a moratorium, whereas the French and Belgian pre-insolvency could result in the negotiated continuation of the automatic stay, and thus continuity of business. Only in 1935 would the Dutch legislator introduce a composition upon *surséance*.[61]

[60] Van der Feltz (n 41) vol 2, 346.
[61] s 252–281 Law of 1893, as introduced with the law of 7 February 1935, (1935) *State Gazette* 41.

Therefore, only the Belgian and French pre-insolvency proceedings were restructuring proceedings. This explains the relative popularity of the Belgian and French pre-insolvency proceedings, as compared to the Dutch ones. In France in 1891, 2190 *liquidations judiciaires* were filed, of which 1341 ended up in a composition. In the same year, 5713 proceedings in *faillite* were started.[62] In the period 1883–85 in Belgium 343 *concordats préventifs* were introduced in court, as compared to 1618 *faillites*. Of these 343, 201 resulted in an accepted composition.[63] In the following decades, the mentioned pre-insolvency proceedings gained more popularity. In Belgium, in the 1930s for every three *faillites* one *concordat préventif* was signed. In France, this number amounted to one *liquidation judiciaire* for two *faillites*.[64] By contrast, in the Netherlands in 1935 for example a mere 207 applications were made for *surséance*, of which only 40 were successful. Quite remarkably, the positive outcomes were nearly all for applications to which an agreement, in compliance with the majority requirements had been added. These numbers were minimal as compared to pre-insolvency applications in France and Belgium. Even though the Dutch legislator in 1935 lowered the requirements for *surséance* (composition following *surséance*, no prospect of full repayment required), the numbers of filed requests dropped in the later 1930s.[65] The 1893 law had resulted in more applications than before, but these numbers remained low.[66]

However, for all three countries mentioned, the success of pre-insolvency proceedings was restricted. Liquidation proceedings remained more numerous than pre-insolvency, restructuring proceedings. This was due to the long shadow that was cast by the French codifications. Ever since 1826, the Dutch *surséance* had not applied against secured creditors, and the 1893 law confirmed this rule (s 233, 2°). The same was true for the Belgian *concordat préventif* (s 23, 2° law 1887), and the French *liquidation judiciaire* (s 8, law 1889). As a result, in all three countries, pre-insolvency proceedings only applied for non-preferential debt. The insolvent's trust did not contain assets that had been pledged for debts. This seriously hampered the feasibility of the debtors' recovery. This was especially true in Belgium, where pre-insolvency proceedings were considered restructuring proceedings, the scope of these proceedings was heavily reduced

[62] *Compte générale de l'administration de la justice civile et commerciale* (1891) xvi.
[63] *Administration de la justice criminelle et civile* (1885) 70 and 75.
[64] *Compte générale de l'administration de la justice civile et commerciale* (1935) 56.
[65] 'Surséance van betaling in Nederland. Aantal verzoeken in de laatste jaren gedaald' *De Telegraaf* (12 September 1938); 'Surséance van betaling. Een overzicht over de jaren 1935–1937' *Het Vaderland: staat- en letterkundig nieuwsblad* (13 September 1938). Statistics can only be found in occasional news reports and references in parliamentary documents. The *Justitiële Statistiek* and *Faillissementsstatistiek* only contain data concerning insolvency, not *surséance*.
[66] In 1881–91 only seven applications were filed for the whole Netherlands. See Van der Feltz (n 41) vol 2, 341.

because of the paradigm that secured debt could not be involved in compositions. Furthermore, majority requirements – even in pre-insolvency proceedings – were high. This was a French idea as well. Courts were not to impose schemes of debt adjustment out of mildness towards the debtors. The creditors had to decide this themselves. Compelling unwilling creditors could only be done if a large number of them consented the proposals of the debtor.

In practice, as a result of all of the above, in the three countries mentioned pre-insolvency proceedings were mostly preparatory proceedings for winding-up. In the Netherlands, this was most evident. *Surséance* was a temporary protection against debt enforcements. Since 1826, creditors were invited to participate in the proceeding. The inventory of their debts could easily be used in subsequent insolvency liquidations. In France as well, many *liquidations judiciaires* ended up in either public sales of the estate, or in a *concordat* with forfeiture by the debtors of all their property,[67] despite the fact that in Belgium and France financial problems did not have to result in winding-up.[68]

A provisional explanation of the mentioned differences might be the embedding of commercial law in civil law, which was more prominent in the Netherlands since the beginning of the nineteenth century than in France and Belgium.[69] The redrafting of the 1838 Dutch commercial code, which took place after 1879, was dominated by Willem Molengraaff, who considered commercial law not as a separate branch of law but rather as a collection of exceptions to civil law.[70] The notion of *dwangakkoord* ('forced composition'), which remained prominent in Dutch bankruptcy law, refers to the compulsion of unwilling creditors to undergo the effects of majority compositions. When a reorganisation or debt scheme is categorised in terms of civil law, the consent of all those that are affected by it is most logical. Considering insolvency and pre-insolvency as standing apart from civil law, which was done in France and Belgium, helped to craft rules that were more apt to mercantile situations. Even though the Dutch Commercial code of 1838 was considered the best commercial codification of its day,[71] by the end of the nineteenth century Dutch commercial law was lagging behind the legal

[67]Pierre-Cyrille Hautcoeur and Nadine Levratto, 'Petites et grandes entreprises face à la faillite en France au XIXe siècle: du droit à la pratique' in Alessandro Stanziani and Nadine Levratto (eds) *Le capitalism au futur antérieur* (Larcier 2011) 199–266.

[68]There remain many questions on the interactions between law and economic developments. The forensic practice of commercial courts and of bankruptcy practitioners is unclear. For Belgium, Pieter de Reu (Vrije Universiteit Brussels) is currently analysing the interplay between economic variables and outcomes of insolvency and pre-insolvency proceedings in Belgium between 1850 and 1914.

[69]For the early nineteenth century, see Sirks (n 13) 148–49.

[70]Willem LPA Molengraaf, 'Is het noodzakelijk of wenschelijk tusschen handelsrecht en burgerlijk recht te onderscheiden en ze tot voorwerpen van afzonderlijke wettelijke regeling te maken?' (1883) 1 *Handelingen der Nederlandsche Juristen-Vereeniging* 251. On the take-over by civilians, see Klomp (n 13) passim.

[71]Holthöfer (n 16) 3445–59.

reforms that took place all over the world. Shifts in economic conditions were nonetheless largely similar across large regions. All over continental Western Europe, insolvency litigation rose after 1860. The liberalisation of trade, which had taken place from around mid-century, under the instigation of liberal governments, resulted in higher dynamics in entry and exit in economic markets.[72]

6. Conclusion

Over the course of the nineteenth century and throughout continental Western Europe, the rules concerning insolvency were changed, yet not fundamentally. The Napoleonic Commercial code of 1807 continued to mark the contents of new legislation. Even after the military influence of France waned, the code was kept in liberated territories, or it was a model for national codifications and laws. The commercial code of 1807 imposed the dispossession of insolvent merchants and entrepreneurs and the public sale of their effects as default proceedings. New laws on the matter were targeted at different goals. In a first stage, from around 1810 until about 1860, legislation in France, Belgium and the Netherlands was not primarily aimed at facilitating the continuity of businesses in distress. Rather, legislators purported to reduce sanctions for 'honest but unfortunate' debtors in order to ensure their cooperation, which allowed creditors to control insolvents' estates at an early stage. Another policy goal of clemency towards debtors that had not committed criminal acts leading up to their insolvency was present, but it became less important in the aforementioned period. Debt relief had to be decided on by the creditors, and was no longer considered a matter of princely grace. A comparison of developments in France, Belgium and the Netherlands demonstrates high similarities in the intended effects of proceedings. Pre-insolvency proceedings were 'quick exit' proceedings, allowing the benevolent debtors – at least in theory – to restart easily, that is after the liquidation of their insolvent estate.

During the 1870s, 1880s and 1890s in the three countries studied, new bills of legislation were drafted that addressed pre-insolvency proceedings. The philosophy underlying these laws was different from previous legislation. New motives included the prevention of the untimely dissolution of firms. In the Netherlands, *surséance* was and remained a short-term moratorium; in France and Belgium, by contrast, debtors with temporary problems had more chances to continue their activities. However, a veritable corporate rescue approach was lacking

[72]Joost Jonker and Keetie Sluyterman, *At Home on the World Markets. Dutch International Trading Companies from the 16th Century Until the Present* (sdu 2000) 175–89; Cl Lemercier, *Un modèle français de jugement des pairs. Les tribunaux de commerce, 1790–1880* (2012) Unpublished Dissertation Paris-8, 363; Dave De ruysscher, 'Praktijkgerichtheid in de rechtbank van koophandel (19de-21ste eeuw): een uitgeholde traditie opnieuw ingevuld' in Dave De ruysscher (ed), *Lekenparticipatie en rechtspreken: noodzaak of traditie?* (Maklu 2013) 157.

since secured creditors could interfere with the debtors' activities and because majority thresholds were high. But even though pre-insolvency proceedings of the 1870, 1880s and 1890s were not too different from their predecessors, in Belgium and France some novelties (adjournments and broad powers for the delegate judge, assistance instead of supervision over the debtor-in-possession) were introduced which demonstrate a stronger focus on continuity. Yet again, liquidation remained a normal phenomenon for debtors facing financial difficulties. The French, Belgian and Dutch nineteenth-century pre-insolvency proceedings demonstrate that all in all debtor-friendly elements were not contradicting a general paradigm of creditor-orientated insolvency law.

Acknowledgements

The author thanks the members of the Department of Public Law, Jurisprudence, and Legal History of Tilburg University for their suggestions.

Disclosure statement

No potential conflict of interest was reported by the author.

Funding

This article was written with the support of the European Research Council [ERC Starting grant number 714759].