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Failure to Coordinate International Bankruptcies  
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Against Globalization: Sovereignty, Courts, and  
the Failure to Coordinate International Bankruptcies (1870–1940)

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## Against Globalization: Sovereignty, Courts, and the Failure to Coordinate International Bankruptcies (1870–1940)

Coordination of cross-border bankruptcies between 1870 and World War II offers a puzzling image. On the one hand, diplomats, academic lawyers, and private lobbies repeatedly tried to bring regulations closer to the ideal of unity and universality of proceedings: all parties and assets should be assembled in a single forum, governed by a single law. On the other hand, these demands were matched by repeated failures, so that territoriality, fragmentation, and thus relative economic inefficiency dominated. For example, many states adopted bankruptcy laws that were universal in design yet opposed any symmetric endeavor of their neighbors. This institutional stalemate cannot be easily traced to the resistance of shielded interest groups, such as senior creditors. I argue that the problem actually resulted from the interaction of two dimensions of sovereignty: the *domestic* dimension, whereby (under a liberal constitution) courts protect property rights and possibly reallocate them, as in a bankruptcy procedure; and the *international* dimension (i.e., the interstate political order), which determines the extent to which states will compromise their domestic prerogatives in order to commit themselves to stronger rules of cross-border cooperation. Between 1870 and 1840 it then seems that the constraints proper to the operation of coherent and trusted legal orders, at the national level, far outweigh the potential benefits more mutual opening. In contrast, the international regime that emerged after 1990 shows how greater international enfranchisement of economic agents was matched by much more fluid coordination and recognition between national jurisdictions.

# Against Globalization: Sovereignty, Courts, and the Failure to Coordinate International Bankruptcies (1870–1940)

## 1. Introduction

Even a cursory reading of the historical literature on cross-border bankruptcies reveals a striking account: coordination in this field has traditionally been limited, dysfunctional, and difficult to improve. Whether one reads the landmark essay by Giuseppe Carle (1875), the brilliant conferences by F. Piggott (1884) and Leslie Burgin (1923), the mid-twentieth-century articles of Kurt Nadelmann, or more recent academic literature, the story is the same: time and again, the same conclusions come to the fore.

On the one hand, most authors agree that the economic logic of international bankruptcies, or cross-border insolvencies,<sup>1</sup> clearly calls for the principles of *unity* and *universality* of proceedings. In other words and as clearly stated in the medieval Italian statutes, *all* creditors should be convened in a single forum where the *whole* stock of residual assets would be collected. If assets or creditors are located in different countries, then any obstacle to a smooth coordination between jurisdictions is doomed to have adverse consequences. Consider the merchant whose assets are mostly in Bruges but whose debts are mostly in Florence (or Kansas and New York, if you prefer).

In stark contrast with this doctrinal consensus and common wisdom, what actually prevailed during the whole period under review (1870–1940) was a fragmented and often chaotic international scene. Rather than universality, *territoriality* had the upper hand,<sup>2</sup> so that competition between parallel proceedings was most common—regardless of what diplomats, scholars, and practitioners argued. The

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<sup>1</sup> The second expression is more common in the contemporary legal literature; here we use both as synonyms.

<sup>2</sup> For a recent restatement of the debate between territoriality and universality, see the special issue of the *Michigan Law Review* (vol. 98, no. 7, June 2000), specifically Westbrook (2000).

proximate reasons for this result are not difficult to see. When exploring the details of how a bankruptcy works, one immediately faces a host of practical problems and decisions whose capacity to derail international coordination has been proven and documented. For example, should an opening judgment made in a given country have legal effect in another? And if such judgment impairs the professional capacity of the bankrupt merchant or allows for his imprisonment, should these rules have extraterritorial effect? May a sovereign state then allow a foreign trustee to seize, manage, and possibly auction off assets located within its own territory? Think for instance of a German judge in 1875 Strasbourg, who would adjudicate the bankruptcy of a (still French) trader just across the (new) border. And what about the rights of senior or privileged creditors? Should they be governed by the law under which the creditors initially lent money (pursuant to agreed-upon collateral) or rather under the law of the country where the bankruptcy proceedings are initiated? Also important are the cases of debt discharge and of the continuation arrangements that are typically enforced against minority dissenters: should English debt contracts be restructured by a Portuguese judge even when a clear majority of English creditors opposes the agreement?

The overall capacity of regulators and lawmakers to address these issues was neatly summarized at the 1930 Conference of the *International Law Association*: “[T]he differences between the principal commercial countries of the world in matters of bankruptcy are fundamental, and it has been found both in Conferences of Governments and diplomats on the one hand, and in endless Conferences of international lawyers and International Law Associations on the other, to be impossible to reconcile the conflicting opinion and produce any measure of combined agreement.”<sup>3</sup>

In this contribution I account for the protracted resistance to cross-border coordination, in matters of bankruptcy. Any answer to this dilemma must certainly start from the actual operations of bankruptcies and then try to identify the obstacles that proved so hard to overcome. However we shall soon be faced as well with the unique historical and political position of this institution, which is established in between the world of private contracts and property, on the one hand, and sovereign,

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<sup>3</sup> International Law Association (1930, 278). For comparable statements, see Meili (1907) or Nadelmann (1944b, 348): “Indeed, the case of an international convention acceptable to all, or most of the countries of the world can be regarded as hopeless.”

civil justice on the other. Clearly, in any liberal order it is not an anecdotic question to ask who has the right to seize the assets of a legally established firm, or to intervene into the contracts of minority creditors. An arbiter or a private agent would have neither the authority nor the jurisdiction. What about a foreign judge, then?

This quasi-constitutional dimension of the problem is very much part of the discussion. At least since John Locke and Montesquieu—and clearly under the U.S. Constitution and even the Napoleonic codes—the liberal compact was founded on a commitment to protect and guarantee individual rights in exchange for a transfer, or a recognition, of sovereign authority. Though the progress of individual rights long remained uneven and uncertain, nineteenth-century Western states certainly did not take lightly any interference with regard to property and contracts or their own sovereignty. This was a liberal and commercial age, though also an age when the interaction between nation-states was more realist than contractual, more territorial than universal. The dominant doctrine of international law was then founded on a compact, self-standing notion of sovereignty that was reflected in interactions between states that were poorly institutionalized. Still, one way or another, global markets relied on some rules supported by some tangible authority, however fragile and dysfunctional both may have been. This is the viewpoint from which the experience of international bankruptcies should be observed: it brings to light the workings of early global markets as well as the travails of their would-be regulators.

Section 2 presents the limited record in terms of actual bankruptcy treaties, including those within federations. Section 3 then examines the successive attempts by diplomats, private-sector representatives, and academic international lawyers to improve the overall international regime. In section 4 I discuss how interest groups, especially those of senior creditors, could have successfully opposed improvements. Section 5 then presents the arguments in favor of the “judicial thesis,” and section 6 makes explicit the link to the construction of sovereignty. Section 7 concludes.

## **2. The failure to coordinate: Conventions, empires, and federations**

If we take a long-term perspective, from the Napoleonic era to the 1930s, then intergovernmental agreements on bankruptcy are comparatively rare but not entirely absent. To start with, none was ever concluded between the major players of the day. For instance, Germany and Austria held negotiations in 1878–1879 on a treaty of judicial cooperation, but they failed on the issue of bankruptcy (among other things);<sup>4</sup> although they succeeded much later, in 1932, the *Anschluss* prevented the agreement from actually being tested. Neither was there any treaty on the subject between France and Germany, between Great Britain and any nation on the Continent, or between any European nation and the United States. Although the United Kingdom signed two far-reaching treaties of judicial cooperation with France and Belgium in 1934, bankruptcies were once again excluded.<sup>5</sup>

Most actual agreements in fact emerged in “post-imperial” networks. The first case occurred within the two decades following the abolition in 1804 of the German Holy Empire.<sup>6</sup> Quite rapidly, the legal and judicial order formerly regulated by the *Reichshofrat* crumbled as new independent states began not to recognize foreign judgments. Bavaria was the first, already in 1811. This led to a series of bilateral treaties among the states of Bavaria, Württemberg, Baden, and Saxony and then Prussia and Austria; some northern Swiss cantons were also part of the game.<sup>7</sup> One century later, a comparable movement was observed in the aftermath of the Treaty of Versailles and the destruction of the Austro-Hungarian Empire. Here, too, integration rapidly shifted to bilateral treaties signed between Austria and Bulgaria (1922), Czechoslovakia (1923), and Yugoslavia (1928); the latter two nations also signed a bilateral agreement in 1923, as did Czechoslovakia and Poland in 1934. In addition to these two Central European networks were several accords negotiated between France and Switzerland (1804, 1828, and 1869), Belgium (1899), and Italy (1930) as well as one between Belgium and The Netherlands (1925). Last of all is a 1933 agreement between the Scandinavian countries—the first multilateral accord on bankruptcy ever signed.<sup>8</sup>

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<sup>4</sup> Meili (1907).

<sup>5</sup> Yntema (1935).

<sup>6</sup> The first known bilateral agreement on bankruptcy was signed by Holland and Utrecht in 1679; they were followed by France and the Kingdom of Sardinia in 1760, then by France and some Swiss cantons in 1784.

<sup>7</sup> Foelix (1843); Nadelmann (1944a).

<sup>8</sup> Nadelmann (1944a).

Federal countries offer a parallel set of examples in which political integration, rather than disintegration, is the issue. Here again, the adoption of a common bankruptcy law always proved difficult. In the United States, the 1787 Constitution expressly allowed the enactment of a federal bankruptcy law in addition to state laws. Three such statutes were enacted in 1800, 1841, and 1867 but rapidly shelved. Not until 1898 was an enduring federal framework adopted that required the Supreme Court to establish a specific judicial branch for bankruptcy with its own regulations and relation to appellate courts.<sup>9</sup> The Second German Reich, founded in 1871, encountered less difficulty in establishing a federal law—possibly because of a less open and more centralized political system. Still, its 1877 bankruptcy statute was enacted only after the judiciary and the procedural law of the new Empire had been fully redesigned on an integrated basis.<sup>10</sup> Switzerland is another example: coordination first took the road of “concordats” between cantons (1804, 1810, and 1829) that belonged to their respective international law; that is, these matters were handled on a sovereign-to-sovereign basis. Discussions on a truly federal statute began only in 1868 but did not move forward until a federal constitution restructured the judiciary in 1874. Even so, a federal bankruptcy statute came into force only in 1889—after some twenty years of protracted negotiations.<sup>11</sup>

A last case is the British Commonwealth, an empire that progressively developed some forms of judicial federalism. It is significant that the first step toward the mutual recognition of judgments among England, Scotland, and Ireland did not occur until 1868 and concerned only the respective Supreme Courts; extension to the lower courts occurred in 1882. The same two steps were then taken with the Commonwealth countries in 1886 and in 1901 respectively, with a further supplementary statute being adopted in 1912. But in these later cases, bankruptcy proved again to be a stumbling block: although opening judgments and all attendant acts by a court or trustee located in Great Britain were technically enforceable in colonies or dominions, contemporary authors suggest that the actual practice was not so smooth. Moreover, the reverse, “upstream” recognition—from periphery to

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<sup>9</sup> Skeel (2001).

<sup>10</sup> See Maier (2003) and Thaller (1887); the reform of the courts and bankruptcy came into effect at the same time.

<sup>11</sup> See Roguin (1891) and pages 606–17 of the 1889 *Annuaire de Législation Etrangère*.



center—would certainly not exist, so that parallel proceedings remained a possibility;<sup>12</sup> coordination between colonial peripheries was apparently also deficient.<sup>13</sup>

These accounts highlight two main elements: (i) coming to agreements on cross-border bankruptcies is rather demanding in terms of underlying political commitment and/or integration; and (ii) the issue of jurisdiction and the hierarchy of courts seems to be part of the problem. Before exploring this line further, however, it is necessary to discard a straightforward hypothesis: that the failure of coordination was not perceived as such. Perhaps nobody cared, or perhaps private agents found their own way around the problem. In other words, in order to make sure that there was indeed a coordination problem, one should first establish that agents did actually care and also tried to solve it.

### **3. International mobilization**

During the entire period under review, cross-border bankruptcies were specifically discussed by three classes of agents: diplomats, representatives of the private sector, and international lawyers. Though their persistence attests to the presence of a real, practical problem, none of these agents was able to achieve tangible results.

#### *The Hague Conferences*

There was actually one deliberate and consistent attempt through international diplomacy to establish a more satisfactory international bankruptcy regime. It unfolded within the Conferences on International Private Law, which were held at The Hague at the initiative of the Dutch government from 1893 onward.<sup>14</sup> Although the focus was primarily on noncommercial aspects of private law (marriage, succession, etc.), negotiations also extended to such concerns as letters of exchange and the mutual recognition of corporations. Cross-border bankruptcies were also brought to the table at the first Hague Conference, and a blueprint for an international convention was discussed at the second

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<sup>12</sup> Yntema (1935); Cheshire (1938); Moore (1906).

<sup>13</sup> Australasian Commercial Congress (1889).

<sup>14</sup> Lipstein (1993).

meeting, in 1894. No vote or endorsement was obtained, and it seems the main conclusions of the debates amount to a list of the many reasons why eventual convergence would be difficult. In 1902 the topic was again discussed—but it was added at the last moment to the agenda, so that most delegates did not have a mandate to discuss it. Deliberations were thus limited to The Netherlands, the Italian head of the commission, and the Swiss rapporteur. In 1925 Great Britain finally joined The Hague Conference and promptly insisted that bankruptcy be brought back on the table. However, it withdrew from the conference altogether when confronted with insurmountable conflicts on this issue.<sup>15</sup> A draft convention for cooperation was eventually agreed upon, but it was not adopted by any sovereign government even as a working tool or blueprint.

### *The private sector*

The thinking and action of private agents, across and within countries, are of course much more difficult to apprehend than that of diplomats and governments. Moreover, one may expect that reactions will depend upon the size and openness of each economy, its level of development, or the microstructure of the enterprise and banking sector. Yet the bridge from underlying private interests to actual mobilization may be difficult to cross, and failure is difficult to observe in this case. Nevertheless, there were continuous debates on this issue in representative forums, national and international. They should be indicative of contemporary views.

Take the Congrès International de Commerce et d'Industrie, organized in Paris during the 1878 International Fair. A full section was dedicated to international commercial law, including bankruptcies. The final declaration of this congress included the “wish” (addressed to governments) that international conventions would ease and simplify the execution of bankruptcy judgments between countries, following the now classical principles of unity of jurisdiction and universality of effects. The Congrès met again in later years and evolved into a more French-centered affair, explicitly controlled and managed by the Parisian Chambre de Commerce. The result is a reliable approximation of what were the main “policy wishes” of the economic and financial establishment. Although such

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<sup>15</sup> See the respective editions of the *Actes* of the Hague Conferences.

topics as labor regulations, external tariffs, and monopolies definitely attracted the most attention, cross-border bankruptcies regularly featured in these meetings. For instance, the 1889 Congrès discussed equality of treatment among creditors and voted against the adoption of a clause of reciprocity, therefore adopting a rather liberal position in that regard. The 1890 meeting declared that the recognition of foreign judgments by the French courts (the *exequatur*) should be made easier, with limited discretion for the judge to review the substance of the judgment.

In the United Kingdom, private lobbying in favor of better bankruptcy coordination seems to have been more focused on relations within the Commonwealth. The first inter-colonial conference in Melbourne addressed the issue already in 1863 and a Committee of the House of Commons in 1871 called for a unified status, though with no success; the 1887 Imperial conference came back to the topic, as again the 1924 Congress of the Chambers of Commerce of the British Empire (both in London).

Following World War I, these private lobbies remained indeed active in the field along with a newcomer: the International Chamber of Commerce (ICC), founded in 1920. This organization was characterized by a broader reach than its national equivalent, it held large international conferences every two years, and it had direct relations with such influential bodies as the economic committees of the League of Nations. The ICC indeed emerged as an active participant in the international economic debates of the interwar period, especially during the 1930s. As usual, the topic of international bankruptcies was not as “hot” as international trade, foreign exchange, and international cartels, but it rarely dropped off the agenda. It was mentioned in the final declaration of the first ICC Congress in 1925, and it resurfaced during the 1930s: a standing commission was established<sup>16</sup> that again passed harsh judgment on the poor state of international cooperation and on the “at times inextricable, or at any rate, costly and onerous difficulties” this caused.<sup>17</sup> The commission also drafted practical recommendations that advocated, for example, equality of treatment between foreign and domestic creditors and the speedy recognition of confirmed arrangements.

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<sup>16</sup> International Chamber of Commerce (1937).

<sup>17</sup> Levêque (1939).

### *An emerging epistemic community*

Having identified the private sector's interest in a better bankruptcy regime, we may now explore one last link: the one that connects these interests to actual reform proposals—in other words, to those with the competence to formulate them. Indeed, there is no missing link here, since international lawyers repeatedly addressed bankruptcy matters and offered proposals.

After an early manifesto for an “International Bankrupt Code” was published in London in the 1820s,<sup>18</sup> the 1870s saw a renewed interest in the topic. Giuseppe Carle (1875), André Weiss (1892), Josephus Jitta (1895), and Leslie Burgin (1923) brought forward their own personal proposals. Appeals and blueprints were also adopted at international law conferences: the Association for the Reform and Codification of International Law called for such accord at its 1877 and 1880 meetings,<sup>19</sup> the Second Italian International Juridical Congress followed up in Torino in 1880,<sup>20</sup> and the Institut de Droit International addressed the issue several times.

This latter institution is the most interesting one at this point not least because it rapidly established itself as the core player in an emerging epistemic community of international lawyers. Created in 1873 in Gent, the Institut consisted of a small number of self-selected members and associates who would meet (as today) every year or two and discuss reports prepared by ad hoc, pluri-annual commissions. Draft international conventions were then voted upon, article by article, and freely submitted to national governments.<sup>21</sup> In the words of Belgian lawyer Gustave Rolin-Jaequemayns, who launched the Institut: “[B]eyond *diplomatic action* and *individual scientific action*, a new and third factor of international law should be given body and life, namely *collective scientific action*.”<sup>22</sup> If the Nobel Prize awarded to the Institut in 1904 is any indication, then this endeavor was most successful.

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<sup>18</sup> Nadelmann (1961).

<sup>19</sup> See the respective *Proceedings*; in 1895 it renamed itself *The International Law Association*, and it still exists today under this denomination.

<sup>20</sup> Nadelmann (1944a).

<sup>21</sup> See Koskenniemi (2002, chap. 1) for an account of the political and intellectual context in which the Institut was created; see Sacristie and Vauchez (2005) for an analysis of the international community of lawyers before and after World War I.

<sup>22</sup> Quoted by Brown Scott (1920, xiii); italic emphasis in the original.

The Institut repeatedly addressed cross-border bankruptcies: in 1891, 1894, 1902, and 1912. Although its universalist ideals were crushed by the First World War, it indeed managed to resume its Sessions in 1919 and in 1923 it created the Academy of International Law—where a large course on the subject was taught in 1926, reflecting (among other factors) the new round of discussions on the subject during the 1925 Session.<sup>23</sup> However, competition from inside the legal academy also became more intense. The International Law Association returned to the issue in 1921, and in 1924 it created a special commission on the subject: it flinched at first when faced with the challenge and decided to work instead on the specific issue of trusteeship. It took on the entire bankruptcy issue again in 1936—though with no result.

At the same time, a report on recent developments across countries was presented at the second congress of the International Association for Comparative Law, held at The Hague in 1935.<sup>24</sup> This was followed by a call for the creation of an “International Bankruptcy Center” in order to collect the highly diverse and increasingly complex national statutes.<sup>25</sup> This converged with a similar endeavor of the ICC that conducted its own twenty-two-country comparative survey of bankruptcy laws during 1937–1939. It noted “a very definite tendency to increase the number of privileged categories of creditors”—primarily the tax administrations and the workers. In other words, redistributive, discretionary politics by national states were entering bankruptcy laws with a new force. And as on other topics, this would drive a steady convergence at the academic level between international law and comparative law. In stark contrast with the debates of the 1870s and 1880s, the perception was now very clear that progress at the interstate level would require a much better knowledge of how states regulated their domestic economies.

#### **4. An inconclusive answer to the puzzle: Special interests**

Both the policy relevance of bankruptcy coordination and the pervasive character of resistance against it should now be beyond any reasonable doubt. The diplomats, the private sector, and the globe-

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<sup>23</sup> Rolin (1927).

<sup>24</sup> Baron (1937).

<sup>25</sup> Nadelmann (1944a). The American Society of International Law, founded in 1907, remained during the whole period much more focused on public international law and did not directly address issues of bankruptcy.

trotting academics all addressed the problem repeatedly and failed to deliver. These failures also played out during times that saw sustained levels of commercial and financial integration as well as large-scale efforts to reduce cross-border transaction costs via a number of international conventions or “unions.” So what was so distinctive about bankruptcies? And what does this tell us, retrospectively, on how global markets may be regulated?

One straightforward strategy at this point is to look for private, special interests that would have felt threatened by the prospect of an international accord and would have lobbied against it. Obvious candidates include bankruptcy professionals such as judges, lawyers, trustees, and liquidators. But they fail the test, since there are only rare indications of these groups taking a position or mobilizing on the issue. With hindsight, this should not be so surprising: in a world where genuine multinational firms were a rarity, cross-border cases were doomed to remain a marginal part of the overall markets for insolvency services; and it was far from clear that a rule-based division of judicial labor would have any tangible effect on the caseloads of the respective countries. The notion that private agents might go shopping for alternative forums was fully beyond the intellectual horizon of that time. The same account holds more generally: policy interests or “substantive” preferences almost never made it to the floor. The usual hot issues of the domestic debates on bankruptcy reform are never heard about on the international scene; think, for example, of pro-creditor versus pro-debtor rules, the trade-off between liquidation and continuation, or the rights of such stakeholders as workers and local communities.

In fact, the sole obvious private interests that might have opposed coordination can be found among the parties of actual bankruptcy proceedings—specifically, among senior creditors. This would hold regardless of whether their senior claims on the distribution of proceeds derived from statutes (as in the case of churches, tax administrations, and workers) or instead were contractual (as with mortgages and all other types of real securities). At first sight, the potential threat to coordination was indeed overwhelming. If, after the default of a transnational firm, some senior creditors were subject to a law different from the law under which they lend, then huge uncertainty would follow as regards the hierarchy of claims, the security of contracts, and the ex ante measure of investment risks. The larger

and the more internationalized the firm, the less predictable would be the outcome. Moreover, the accumulation of assets and debts located in different countries may, over the course of a firm's life, change (perhaps several times) its implied bankruptcy forum.

And the problem's magnitude only increased over time. First, with economic development and increasing capital intensity, the relative volume of debts that could be protected by real securities also increased. Second, from the 1930s onwards, statutory privileges increased as the states began large-scale manipulation of creditor hierarchies. Bankruptcy then became the instrument of redistributive policies, which are local by definition. Yet these "substantive" or political economic factors were *always* and *fully* set aside by all reform proposals. Whether in the 1820s, the 1920s, or the early twenty-first century, all proposed and actual treaties left seniority rights untouched. They would be governed by "the law of the site" and would not be compromised in an international negotiation. This undisputed principle explains the absence of private mobilization around the issue.

Thus, our original question remains unresolved of the reason why politicians and diplomats failed to improve the overall bankruptcy regime, even at the margin. In fact, having rejected the standard political economic answer, we are now in a position to take an alternate route: namely, the judicial character of bankruptcies was probably the main hindrance to progress. Because bankruptcy courts redistribute private property and rewrite contracts, they have always been strongly anchored in national judicial hierarchies that in turn operate with the delegated authority and the guarantees of the sovereign. This fact was already evident in the first medieval statutes adopted in Italy,<sup>26</sup> and the sovereignty dimension in bankruptcy became only greater in latter centuries, as nation-states became much more active in integrating their polities and economies. This is the defining historical context in which lawyers conferred at The Hague Conferences or at the Sessions of the Institut de Droit International. We now look at how they actually framed the coordination problem—that is, in formal, procedural terms rather than substantive ones.

## **5. Centrality of the judicial argument**

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<sup>26</sup> Santarelli (1964).

### *Alternate strategies for global governance*

In general terms, we can envisage three generic strategies for limiting the consequences of jurisdictional fragmentation. One strategy is to agree on a single supranational rule that would apply to all countries. This method has been adopted by today's European Union with respect to a number of issues (e.g., currency and antitrust enforcement), though not bankruptcy.<sup>27</sup> During the nineteenth century, the possibility of negotiating a universal commercial code was discussed for such cases as exchange bills and maritime law, but from the outset the approach was considered entirely impractical for the case of bankruptcy.<sup>28</sup>

The second logical strategy, then, is to negotiate interstate treaties. For instance, states may agree that jurisdiction over bankruptcies will be governed by the nationality of the debtor or by its identified "main center of activity." This route was illustrated by the aforementioned post-imperial networks, and it was the privileged option defended by the legal academy and by The Hague Conferences, though with limited outcomes.

The third strategy is simply what occurs in the absence of progress under the first two. Cross-border bankruptcies are then handled by default rules—that is, the part of national domestic laws addressing "from the inside out" those civil and commercial cases in which a foreign agent or a foreign court is involved. Lawyers refer to this as "international private law," "conflict of laws," or (in more ancient terms) as a part of the "law of the people" (*jus gentium*). This body of law typically establishes, for different types of cross-border cases, whether or not domestic courts have jurisdiction, which law (domestic or foreign) should be followed, and how foreign judgments are recognized.<sup>29</sup> For instance, international private law stipulates what the courts of country A should do with a divorce judgment rendered in country B if the right of divorce is not even recognized in country A. The point is that, by construction, rules of this sort differ from country to country and do not warrant coordination.

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<sup>27</sup> However, see Golden (2009) for a recent statement in favor of an international financial court.

<sup>28</sup> See, for instance, the *Annuaire*, VI (1882–1883) of the Institut de Droit International.

<sup>29</sup> See Foelix (1843) and Fiore (1875) for early treaties, Cheshire (1938) for a classical textbook, and Briggs (2008) for a contemporary discussion.



For example, English law—which on these questions was entirely common law—explicitly defended the principle of universality in the case of bankruptcy. In law, an English trustee could then collect assets abroad and would equally welcome all creditors under its umbrella, without differentiating among them by origin. And although foreign judgments would not be directly enforceable in England, their reception was comparably easy; the action of foreign trustees in England was well accepted, at least as regards movable assets. On the other hand, self-restriction of English courts in support of foreign proceedings was either discretionary (as regards, e.g., immovable assets) or essentially closed. For instance, debt discharge decided by a foreign court, therefore most continuation arrangements, would not affect contracts written in England. In other words, whereas the overall law was relatively liberal, it was not comprehensive as regard the issue at stake and it did not include any built-in mechanism of coordination that would have guided constructive interactions with foreign courts. It worked rather on a “take it or leave it” basis—especially outside the Commonwealth.<sup>30</sup>

French law followed comparable rules: foreign debtors and creditors had the same rights as resident ones; the French *syndic* could legally act abroad; a foreign trustee could obtain access to assets located in France; and so forth. The recognition (and hence the execution) of foreign judgments was essentially conditioned on the granting of an *exequatur* by a French judge. Though the principle is not controversial, its implementation gave to the judge the right to review the whole case and consider whether it affected “public order”—clearly a legal concept that allowed large room for interpretation. Hence, although French doctrine supported the principles of universality and unity of proceedings, implementation was cumbersome and clearly asymmetric (i.e., self-centric).<sup>31</sup> Italian law followed similar principles, and German law explicitly defended a territorial approach to international bankruptcies.<sup>32</sup> Another remarkable case was The Netherlands, which had no rule whatsoever providing for the domestic recognition of foreign judgments.

### ***What the lawyers argued***

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<sup>30</sup> See Piggot (1884), Yntema (1935), Cheshire (1938), and Blom-Cooper (1954/1955).

<sup>31</sup> Brocher (1879); Lachaud et Daguin (1889); Perroud (1929); Percerou (1935); Travers (1936).

<sup>32</sup> Hess (1934).

Shifting to how the lawyers actually tried to reform this regime, rich information can be drawn from the extensive reports of the meetings as published by the Institut du Droit International and the Hague Conferences. Though a detailed analysis of these texts would go beyond the limits of this discussion, the issues being raised, and possibly fought over, are illustrative and significant.

The first generation of Institute associates strongly defended the notion that individual civil rights should be defined by nationality and then be mutually recognized so as to allow for exchange, communication, and progress.<sup>33</sup> Although this notion made sense when applied to marriage or inheritance, it was less clear regarding commercial matters. Should a Greek national, trading with Americans from London, be subject to Greek law and courts? In other words, part of the problem was determining whether international trade should be governed by an independent body of law or by the same basic principles as the other chapters, like family law or citizenship. In the case of bankruptcy, the “nationality” option won the first 1891 round, but a new resolution adopted in 1894 endorsed the alternate principle of domicile. Hence our Greek merchant would have been required to appear in a London court.

Then came the question of unity of proceedings, a core point of the dominant doctrine on cross-border bankruptcy. In the early modern period, whose last remnants were now rapidly disappearing, merchants traded on their own credit or personal reputation rather than on hard physical capital. To a large extent, hence, “capital followed the person” so both could be brought in front of the same court. This option came under increasing pressure, first because of the growing number of firms with foreign branches and subsidiaries and second because of capital-intensive economic growth that implied more immovable assets and more senior creditors, both of which are local. Therefore, the decisions about who should have jurisdiction and how unity of proceedings should be obtained became more conflictual by the day. Still, the existing doctrine was never radically contested. Most remarkably, the alternate option of having a lead procedure to which other, secondary ones would report was

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<sup>33</sup> See the 1883 edition of the *Annuaire* of the *Institut* and the discussion of the “Oxford Rules.”

occasionally brought forward but without success.<sup>34</sup> The Hague conferences discarded it outright; and after recognizing it (under strict conditions) in 1894, the Institut restated in 1902 the “absolute unity of bankruptcy” principle.<sup>35</sup> This option would only re-emerge decades later, during the 1980s, when the European Union took on the issue from scratch.

Third was the question of “public order,” or “policy preferences” in today’s language. The concept was already present in the French rules of *exequatur*, and its relevance only increased with the emergence of regulatory states. In 1894, for example, the Spanish representative at The Hague raised the case of failed railway companies that should continue to operate during bankruptcy proceedings because of their public service duty. In 1912, the Institut agreed as well that “the interests of third parties” could be recognized when addressing the case of immovable assets. By the 1920s, the underlying conflict between policy preferences and international coordination was clearly perceived by all parties.<sup>36</sup> One result was the new interest in assembling and comparing national bankruptcy laws, as reflected in the later, parallel initiatives of the International Chamber of Commerce and the International Association for Comparative Law. In short: whereas the prerogatives of sovereignty had initially been embedded within the rights of nationality, as held by individual citizens, these prerogatives were now being increasingly invested in the state’s capacity to implement a large array of public policies. As economic growth became more capital intensive and more closely regulated by policy-making states, cross-border cooperation actually became more difficult.

## **6. Sovereignty and the regulation of private contracts**

The debates on international bankruptcies indeed offer a fine case study for analyzing how lawyers addressed these new problems and fought with their own legal concepts as well as existing political institutions. There is no doubt that most lawyers sincerely wanted to help solving a pressing, real-

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<sup>34</sup> At the 1925 Hague Conference, the English delegation defended the principle of multiple procedures but presented it as a defensive measure rather than as a potential principle of international coordination; this apparently reflected the long-run (though as yet unsystematized) evolution observed within the Commonwealth.

<sup>35</sup> See, for example, Jitta (1895).

<sup>36</sup> See, for instance, Lorenzen (1924) or the classical textbook by Westlake: “No attempt to define the limits of that reservation (public policy) has ever succeeded, even to the extent of making its nature clearer” (1922, 51; quoted by Lorenzen).

world problem, though at the same time they were obviously constrained by the existing construction of sovereignty, judicial integrity, or international private law.<sup>37</sup> The unrelenting defense of the strict unity of proceedings should be understood in those terms: rather than being interpreted merely as the reflection of a pure intellectual commitment or a conceptual fantasy, it should be traced to constraints exercised by the political and legal order of the day.<sup>38</sup>

In order to better understand this point, four features mentioned previously should be brought together: the record of post-imperial networks of bankruptcy treaties since the 1810s; the parallel experience of federal countries; the strong resistance to full judicial reciprocity (as previously described for England and France); and the clear rejection of a multilateral route to international coordination on bankruptcies (only bilateral treaties were considered). In fact, these factors all converge toward the same proposition: governments were not ready to easily compromise their domestic judicial order and procedural integrity for the sake of an international agreement. As was often remarked at The Hague, leaving one's national creditors in the hands of foreign courts presupposes not only a strong bilateral relationship but also a mutual recognition of the respective countries' constitutional and judicial orders. Signatories should have "full confidence in their respective courts," as a Belgian representative stated.<sup>39</sup> This explains why multilateralism was out of the question: such an approach presupposes the recognition of a community of states, however limited its purpose, that would warrant a transitive interaction. But this was not possible in the present case; for example, Belgium had agreements with both France (1899) and The Netherlands (1925) but the latter two had no agreement between themselves.

In other words, a key element was the political compact (i.e., the ways and rules, the procedures and legal concepts) that structured not only the interaction between sovereigns internationally but also their respective domestic interactions with citizens, their property, and their debt titles. At stake was

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<sup>37</sup> Kennedy (1996); Paul (1988); Mills (2006).

<sup>38</sup> In his discussion of the disappearance of private international law as a separate field, Paul (1988) mentions two possible reasons for this phenomenon: a purely intellectual one that would include a delayed response to Blackstone's *Commentaries*; and "the growing significance of international trade." Kennedy (1996) and Mills (2006) follow the same methodological line; for these authors, real-world (i.e., political and economic) factors are present as elements of the broader social context rather than as part of the actual history being related.

<sup>39</sup> Third Conference (1900), page 160 of the *Actes*.

the liberal government of civil societies and domestic markets as a matter of both constitutional politics and practical regulation. This may well account for the problematic yet unyielding defense of the unity of proceedings, which de facto preserves formal integrity under the rules and guarantees of a national constitutional compact. The alternate option—based on horizontal, decentralized coordination between national courts—would require that national proceedings be “opened up” to each other. And, moreover, in order to be credible, any such rule would also require that, when transacting internationally, the independence of courts from executive powers be fully established and trusted. This would have run entirely counter to the executive’s monopoly on interstate relations, which was a key feature of the realist, Westphalian regime in force at the time.

The possibility to articulate in a viable manner domestic constitutional rules and rules of international cooperation was further weakened by the latter being weakly institutionalized and often dominated by raw power politics. Interstate commitments, in other words, did not carry much weight, and international judicial regulation was of limited use for most practical purposes. In addition to the widespread reliance on interstate arbitration (i.e., a rather weak rule), the mutual recognition of civil judgments in general was cumbersome, international commercial arbitration was nonexistent, and to our knowledge no international agency developed an internal dispute settlement mechanism. In such an environment, the trade-off between cross-border coordination and the protection of national judicial prerogatives was usually unpalatable. This must have been especially true in the case of bankruptcy proceedings, which dealt with the highly sensitive institution of private property rights.

This point is strengthened when one briefly considers how the second, present-day era of globalization has been supported by a remarkable breakthrough on this score. Take the European case. After four decades of failed attempts, the European Union finally adopted a comprehensive agreement on cross-border insolvencies that became effective in 2002.<sup>40</sup> Remarkably, this agreement retained the principle of universality but dropped the principle of unity. All parties to a failure now enter the same proceeding, although it may be administered by several, coordinated national courts. A lead procedure is designated to which secondary or ancillary ones report, and courts are then duty bound to coordinate

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<sup>40</sup> See Wessels et al. (2009) and Teitz (2005) for the parallel case of civil judgements.

on a decentralized basis. Judgments are immediately enforceable across borders, information flows freely, and lead trustees may appear before all national courts. But just as in the past, policy preferences and special interests have been left to local rules. Examples include real securities and the hierarchy of claims, the rights of workers and local communities, and preferences regarding continuation versus liquidation. These matters are all left to some ninety different national laws and regulations now in force across the European Union.<sup>41</sup>

## **7. Conclusions**

From the 1870s onward, both diplomats and lawyers as well as private lobbies have constantly pushed for a better coordination of international bankruptcies. In spite of these efforts, progress was rare under all three strategies: unification, formal convergence, and better linkages. Furthermore, the puzzle of failed reform cannot be explained by a lack of reform proposals or by the opposition of private interests, such as those of senior creditors. In this paper I have argued that this situation arose from the interaction between two dimensions of sovereignty: first, the international political order between nation-states, which was very much shaped by raw power politics and allowed for limited institutionalization; and second, the domestic dimension of sovereignty, whereby states progressively developed into the ultimate guarantor and regulator of private rights and national markets. These are, indeed, two defining aspects of the evolution of capitalism during that period.

If this analysis is correct, then the present construction of global economic agents, or citizens, is likewise conditioned by two factors: the endowment of rights, over which agents negotiate with their own sovereign; and the sovereign's willingness to let regulators (specifically, the courts) coordinate on a decentralized, horizontal basis. These two factors explain why the security of private rights and contracts at the global level is arguably much stronger today than it was a century ago. Multiple jurisdictions, which once constituted a formidable problem (both political and intellectual), have now become part of the solution. However, this became possible only after the adjudication of private

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<sup>41</sup> See Slaughter (1998), Keohane et al. (2000); Alter (2008) reflects more directly on the issues discussed here.

disputes was largely freed of the strictures of a past era, one marked by realist sovereign interaction and laissez-faire domestic politics.

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