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Comparative and International Insolvency Law Central Themes and Thoughts

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11. *On the Origins and Challenges of Court-to-Court Communication in International
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On the history of cooperation

Before analyzing the specifics of communication and cooperation, it is important to understand some of the history of cooperation between courts and the philosophy behind it. Insolvency is an old subject of law. It has a long history, being known in the Middle Eastern and Roman worlds as long as there has been a recorded history of commerce and trade.¹ We know that the Romans had a bankruptcy law, as did the Greeks. The word insolvency derives from the Latin 'in' (against) and 'solvere' (dissolve or release), and the insolvent would normally be someone who was not freed from debt.² For the Romans as well as for the Greeks, a bankruptcy law was imperative because of their extensive trading links. They had to deal with problems such as: what happens if a ship capsizes when it carries a cargo from A to B, or what happens if we arrive and the goods have perished, and they are no longer worth what we have paid for them?

During the entire period of the Dark Ages however, from 480 all the way to the 12th or 13th centuries, there is very little in the way of what we call formal insolvency law. In the 12th or 13th century, there is a new resurgence of ideas. At this time, an early renaissance takes place, as trading resumes across Europe and nations are once again interested in the exchange of goods, reusing the old Roman roads. This process begins with the fairs of Champagne, where traders from all over Europe come to exchange their goods every Saturday. To facilitate this, there is a peculiar local law that applies only to the fair. The first fairs of Champagne occur around 1104, 1105.³ In the same period, the first universities are developed. Here, people start to think about law again and develop a renewed interest in Roman law in general terms and how it can be made to fit the modern age. A number of people from Lombardy in Northern Italy travel all over Europe to trade and set up offices where they can exchange goods and sell their commodities. Those institutions of insolvency that have been transmitted to the modern European commercial and legal worlds are said to derive from the medium of legal and business practice in Lombardy.⁴ The word 'Lombard' was long used in England and France as a synonym for moneylender, and Lombard Street in London is still the official address of a number of leading financial institutions.⁵ The Lombards went to fairs, created commercial links and entered into commercial negotiations, and they also resolved commercial disputes. They created, among other things, the idea of cheques and promissory notes.

All this commerce is generating a huge amount of disputes and litigation. At this time, a resurgence occurs of the idea of the *concursum creditorum*. This Roman law concept, where creditors gather together and decide what to do with the debtor, even today underpins many European insolvency laws. This resurging of the idea of the *concursum creditorum* occurred out of need: in the absence of formal insolvency law, informal procedures developed where creditors came together to decide upon the debtor's fate.

¹ P. Omar, *European Insolvency Law*, 2004, p. 3.

² P. Omar, *European Insolvency Law*, 2004, p. 3.

³ See E. Chapin, *The Towns of Champagne From Their Origins Until the Beginning of the Fourteenth Century*, 1934, p. 19.

⁴ P. Omar, *European Insolvency Law*, 2004, p. 3.

⁵ P. Omar, *European Insolvency Law*, 2004, p. 3.

Early bankruptcy laws were developed to deal with a purely domestic problem with an embryonic international dimension: the problem of absconding debtors. Some of the first insolvency statutes, the Statute of Bankrupts of Henry the 8th in 1542 in England⁶ and the French insolvency ordinances of the 1560s, deal with what happens if the debtor goes abroad. A process develops where domestic regimes are created to deal with a particular problem that is brought to life by international commerce. We see attempts to deal with this problem as a domestic problem alone and as a problem with a potential international dimension. At this time, commerce is taking place across boundaries but there is very little of the type of global commerce that we see today. It's still an embryonic world order, but commerce generates litigation, liability and debt, and these international consequences of globalization must be dealt with. The insolvency statutes of Henry the 8th dealt with preventing debtors from leaving the country and, in order to warrant this, making sure that they were physically under the control of the court. The French Ordinance took a slightly different route. It concentrated on finding the absconded debtor and bringing him back. Even today, many modern insolvency systems incorporate elements of these two approaches to dealing with the debtor.

This is still quite far removed from the idea of communication and cooperation, because these are penal regimes in which the main purpose is to apprehend the debtor and prevent him from escaping so that he remains under the control of his creditors and is more likely to surrender his assets for the benefit of these creditors. It isn't until modern times that insolvency sheds off some of the penal elements and becomes more 'neutral'. The Roman Law of the Twelve Tables⁷ provided that a debtor who failed to make proper payments to his creditors could be 'in parti secanto' (cut into pieces) or sold into slavery.⁸ In modern times, insolvency has been stripped of many of these penal elements, although some of them are still contained in a number of the insolvency regimes of today. In France, for example, the phenomenon of 'civic death' exists, which is the idea that if you are a debtor and you are convicted of fraud in relation to insolvency, you can be prevented from standing for election, or even from voting in an election, because you have lost your civic rights as a result of becoming insolvent.

In the Middle Ages, when dealing with the problem of absconding debtors, we encounter a very strong feature of international relations: the idea of sovereignty. Every nation is responsible for its own laws and can seek to enforce its own laws, mostly on its citizens and indeed on anyone who lives within the ambit of the ruler. Territorialistic, sovereign-based views on dealing with international insolvency prevail at this time. Territorialism may be defined as dealing with local assets for the general satisfaction of the claims of local creditors.⁹ Territorialism is still the norm in many jurisdictions, although very few territorial regimes in modern times explicitly rule out participation by foreign creditors, in spite of this having often been the case in earlier times.¹⁰

In the Middle Ages, there are very few examples of international treaties dealing with cooperation. There are commercial courts, and these courts sometimes use their own unique law, like the fairs in Champagne that had their own unique laws to deal with the problems of litigation and debt. Commentators report that arrangements for the treatment of insolvency appear to be known from the 18th century onwards, although instances of

⁶ P. Omar, Developments in Cross-Border Insolvency Practice in the United Kingdom, 2002, 14 Bond Law Review, p. 347-371.

⁷ Lex XII Tabularum, traditionally dated 450 BC, were the first known codification of Roman law. P. Omar, European Insolvency Law, 2004, p. 4.

⁸ P. Omar, European Insolvency Law, 2004, p. 4.

⁹ Paul J. Omar, The Landscape of International Insolvency Law, 11 Int'l. Insolv. Rev. 173, 177. (2002).

¹⁰ Paul J. Omar, The Landscape of International Insolvency Law, 11 Int'l. Insolv. Rev. 173, 177. (2002).

international insolvency made an appearance in history long before this time.¹¹ Some of the earliest examples date back to the medieval period.¹² Amongst the examples of the early drive towards organisation of international proceedings also are a compact between two Dutch states in 1697 and a French ordinance of the early 18th century.¹³ A later treatment of insolvency occurs in the treaty between France and the Catholic Swiss cantons and Valais, concluded in 1715, which, although not referring specifically to insolvency, referred jurisdiction to the ‘natural judges’ of the defendants, unless both parties were fortuitously present at the same location or had agreed on the jurisdiction of a particular court.¹⁴ However, there was no real mechanism to deal with these problems at an international level.

Developing a more expansionist way

How do we move from very isolated, very territorialistic sovereign-based views of dealing with insolvency to a more expansionist, more open way of dealing with international insolvency and therefore one that brings in philosophies of communication and cooperation? One theory on this has to do with imperial expansion. In the 17th century, the British empire expanded explosively. There was an enormous increase in international commercial trade within its boundaries. This created a need for more uniformity in commercial custom. And incidentally, because bankruptcy is very much a part of commerce, the need to then deal with problems arising from litigation and problems arising from risk and liability, which would include ways of dealing with insolvent debtors. A debate arose on a possible solution for this problem. Jabez Henry, a member of the English Bar and later judge, published a pamphlet in 1825 titled ‘Outline of Plan of an International Bankruptcy Code for the Different Commercial States of Europe’ and recommended that there should be some form of mutual recognition system, considering that we could make this work as we were amongst civilized nations.¹⁵ Here, actually for the first time, the word ‘cooperation’ was mentioned.

This notion of cooperation is put forward in the middle of a debate on whether or not there should be a framework for international law. This is quite a revolutionary concept in a situation where we have no, or only very limited, methods for dealing with insolvencies even in a domestic context. The concept of the equal treatment of creditors was very much fixed in Henry’s statements. An international framework was not really an alien concept either: it is something that was inherent in the commercial judgements in the 13th and 14th centuries, where there were examples of commercial men and women coming from other countries to bring claims against debtors situated in our jurisdiction.

In 1820, we see the first transition from emptiness, or really limited attempts of dealing with international insolvency law, to something tangible. This is where the framework of international law of bankruptcy begins. A very rapid transition occurs, in particular within the British Commonwealth.

In 1849, for the very first time in the bankruptcy statute of that year, reference is made to the equal status of overseas courts. So, a court in London or a court in Scotland would

¹¹ P. Omar, *The Landscape of International Insolvency Law*, 2002, 11 Int’l. Insolv. Rev. 173, 177. See also: P. Didier, *La problématique du droit de la faillite internationale*: RDAI 1989, p. 203, citing the failure of the Bardi Bank in Florence and its overseas branches in 1345.

¹² Treaty of 1204 (Verona and Trent) and Treaty of 1306 (Verona and Venice), cited in P. Wood, *Principles of International Insolvency*, 1995, p. 291.

¹³ P. Omar, *The Landscape of International Insolvency Law*, 11 Int’l. Insolv. Rev. 173, 177. (2002). Compact of 1697 (Holland and Utrecht) and Ordinance of Louis XV of 9 April 1747, cited in K. Nadelmann, *An International Bankruptcy Code: new Thoughts on an Old Idea*, 1961, 10 ICLQ 70 at 75.

¹⁴ P. Omar, *Criteria and Paradigms in International Insolvency Texts*, 2004, 12 *Insolvency Law Journal* 7-27, p. 4.

¹⁵ P. Omar, *The Landscape of International Insolvency Law*, 2002, 11 Int’l. Insolv. Rev. 173, 177.

grant the other court equal status. Scotland was, and still is, an independent jurisdiction, so it is a foreign court as far as the English courts are concerned. However, there is also mention of courts in Calcutta or Bombay. The fact that at this point in time these courts were regarded as co-ordinate and competent for the same matters is not really surprising because these courts were all British courts, as they were a product of colonization. They could gather information about the debtor, they could impose an order requiring the distribution of assets to the creditors, and then this order would be respected by all the other British courts.

British law travelled the globe, leaving solutions in each of the countries and territories in which it was established. Of course, bankruptcy law travelled with this wave. The Bankruptcy Acts of 1849, 1861, 1883, 1904 and 1914 travelled the world and became incorporated in the laws of each and every one of the British colonies and territories. The 1849 Act also includes a section that says that all courts are mutually bound to come to the aid and assistance of all other courts.

All of these developments responded to what was happening at the end of the 18th century and the beginning of the 19th century in philosophical terms. This was a critical moment where there was a huge overseas expansion in trade, an enormous increase in commercial dealings, and therefore a continuing rise in the amount of litigation, and the risk and liability. Although the 1849 Act did not make it imperative, it encouraged the circulation of judgements and mutual assistance in preventing a debtor from absconding. This was made easier because a single law applied throughout the empire and every court could have jurisdiction over the same debtor and the assets of that debtor.

Judges

The challenges of court-to-court communication today and in the future are influenced by the fact that there are two types of judges in this world, depending on what type of jurisdiction they come from. The world is divided into legal families or legal traditions. We have a very strong civilian legal tradition, which is represented by countries such as The Netherlands, France, Spain and most of the countries in South America. In addition, we have a very strong common law tradition that is antithetical, meaning 'against the spirit of the thesis'. Common law, the English inspired model, is predominant in the judicial shaping of the law. Statute is important in the English legal context. However, judges have the ability to fill the gaps in the law and to create interpretations for statutes to fit new circumstances and new conditions. It is said that in the common law system, the judges do not create law, they merely discover it, albeit sometimes very creatively. The common law has traditionally seen itself as an evolutionary process that is very much directed by the judges. We can compare this to the civilian system and the predominance of the written law, which is very much a Roman law fundamental. Jurisprudence or case law has importance in the civilian system. However, it does not have the same significance as it does in the common law. What characterises the civilian law is that it relies most heavily on the written law and the exclusivity of the written law.

This means that in the civilian law tradition, we need to enshrine communication and cooperation in something tangible that a civilian judge can rely on, whereas in the common law we merely need to have a facility. We can tell the judge what would be ideal and it is up to the judge to find the methodology to achieve that purpose. There can be directive provisions, but these are never as conclusive as in the civilian system, and if any things were excluded from a list because we did not consider them at the time, we have not had time to change the statutes, or certain practices change and the article does not incorporate them, we may read these things into the existing article.

Article 31 Insolvency Regulation

Today we have to contend with these two legal families and the ways in which they look at communication and cooperation. When it comes to the European Regulation, the structure of communication and cooperation of Article 31 EC Insolvency Regulation responds very clearly to the civilian requirement for a written law as authorization for doing so. It is not very ‘common law oriented’ in its approach. It enshrines communication and cooperation in something tangible that a civilian judge can rely on, such as required in the civilian system. In the common law system, court-to-court communication can take place in the presence of a positive duty and be further inspired by soft law, such as the European Communication & Cooperation Guidelines for Cross-border Insolvency 2007, referred to as the CoCo Guidelines.

When looking at the UNCITRAL Model Law, Articles 25 to 27 in Chapter 4 appear to be hybrid. Article 25 and 26 take the common law approach, stating that the ideal is to achieve mutual aid and assistance, to achieve cooperation between the practitioners and the courts. Article 27 then leads the civilian lawyers by enumerating, in 27a to 27f, particular methodologies with respect to cooperation. However, Article 27f is a provision that basically says “and any other method possible that you would like to use” (literally: “the enacting State may wish to list additional forms or examples of cooperation”), which is actually a very common law type of approach. Judges can creatively use Article 27f to actually push the boundaries, to push the cooperation.

The problem is that, despite the presence of Article 31 of the Insolvency Regulation’s mandatory duty (‘you must cooperate’) and despite the presence of the CoCo Guidelines that tell you how you should do it, some judges in the civilian system who are particularly shy about cooperation may find that this mandatory duty isn’t enough without the provision being fleshed out in terms of changes of civil procedural rules or changes of the rules of court to accommodate types of cooperation that haven’t been institutionalized in that system.

There are many examples from the UK with regard to communication and cooperation. So we can actually predict what the judges are likely to do. What type of cooperation they are going to create, what avenues of cooperation they choose, if they are open to informal or formalized links between courts, whether or not they are even open to the idea of cooperation between courts through the creation of a protocol. Judges are very creative. In particular the American and Canadian judges have discovered how to advance cooperation. They have had experience with a protocol enshrining the court-to-court communication in the sense of an informal statute that allows the judges to adapt cooperation to the circumstances of each particular case.

In the common law, particularly when looking at the UNCITRAL Model Law, there is no need to establish that list in Articles 27 a to f, although sub f is quite a creative way of getting around the problem. Articles 25 and 26 would have been enough to authorize the judges to do whatever they want to do to achieve cooperation. Arguably, Article 27 was inserted in the UNCITRAL Model Law because it responds to the need of the civilian lawyer for a constitutional basis for cooperation.

In Canada, and in the US in particular, many different aspects of cooperation that other common law courts haven’t even established, are based on Article 27f. A civilian judge would not be easily inclined to do so. This is a contrasting attitude when taking into account Article 31 of the Insolvency Regulation and the mandatory duty that it imposes.

The common law lawyer would safely base methods of court-to-court communication on the mandatory duty of Article 31 in combination with the CoCo Guidelines, which are a

soft law instrument. But as the CoCo Guidelines are not mandatory, they may not inspire a civilian judge to use a method of court-to-court communication that is covered by the CoCo Guidelines if this method does not fit in with existing judicial practice, even in the presence of the mandatory duty of Article 31. Article 31 then remains without issue: its effectiveness is entirely dependent on whether or not a judge has practice.

Signs of a more flexible approach

Now, one of the interesting things here is that some courts, even in classically very civil-oriented jurisdictions, France being one of them, have been moving away from the very directive and mandatory interpretation of law, towards a more flexible, more accommodating approach. More recently there is evidence, particularly in the *Daisytek* case, that even the French Supreme Court is abandoning long held views of what are mandatory rules of public order. The issue in the *Daisytek* case was that the French local court not only opened proceedings but also stated that the UK court that had done so as well had no authority. One of the reasons why the UK court was said to have no authority was because it had failed to consult the employees at the moment required. However, the French Supreme Court¹⁶ eventually stated that this mandatory rule was no longer of great importance for the opening of insolvency proceedings, and therefore this was not really an obstacle. This is quite a revolutionary conclusion.

Furthermore, the French Supreme Court sometimes has the ‘grands arrêts’, big cases which establish real principles that are no less legitimate in the French constitutional order than the law itself. In fact, when you look at the French constitutional court it has a very peculiar role in their system. Through its case law it creates what they call the constitutional values, which have equal rank with the French constitution. In this regard, French judges actually engage in the same process as English judges do on a more day-to-day basis with every single case.

The way in which the ECJ decides on matters and the way in which it is composed is very much a tribute to its civilian law inspiration. The ECJ’s six original founders were all countries with civilian law traditions. However, the way in which it now creates lines of jurisprudence and follows its own thinking, even on precedent law, is very much common law inspired.

We have identified a couple of comparable processes that are happening here. We see that civilian courts are starting to take on broad ideas of judicial practice and judicial case management.

The struggle in the future will be to encourage the civilian lawyer to start thinking of things like, for example, Article 27f as an opportunity to open up new fields of practice and new experiences for the judges without a need for the legal rule, or a change of legal procedural rules, or a change of the rules of the court.

¹⁶ Re *Daisytek ISA*, Cour de Cassation, June 27, 2006.