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The Mutual Influence of French and English Commercial Laws in Insolvency

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Introduction[1]

The French and English systems of insolvency[2] have both a certain antiquity, with common roots traceable to the extension of banks and commercial practice in Western Europe and the consequent need to deal with the economic fallout of financial crises. This was particularly true when, as in the 14th century, there was a general crisis in banking involving most of the leading houses in Florence suffering from an overextension of credit.[3] Because of the establishment of these banks in France and England, the failure of the Bardi Bank in 1345 was said to have had repercussions on the financial stability of both the French and English Crowns.[4] One of France's most eminent writers, Maurice Druon, has also chronicled, albeit in fictional form, the very real impact of the withdrawal of the Tolomei Bank to Siena on the finances of the French Crown in the mid-14th century.[5] It is certainly true that one of the first comprehensive ordinances anywhere in bankruptcy was that promulgated in 1673 in the reign of Louis XIV (1638-1715), although this was preceded by ordinances in 1536 and 1560 in the reigns of François I (1515-1547) and Charles IX (1560-1574) respectively.[6] The corresponding enactment in England, the Statute of Bankrupts 1542, appeared during the reign of Henry VIII (1509-1547).

These mediaeval enactments are said to be derived from prevailing elements of bankruptcy practice in Italy, themselves derived form Roman law origins, and show a number of procedural similarities, particularly in the penal elements of the laws. In fact, the etymology of bankruptcy is said to be from the Italian '*banca rotta*' (broken bench), the punishment meted out to the insolvent trader, whose bench on the market place was ceremonially broken to deny the trader the ability to continue exercising his craft. The common origins of the two insolvency systems have been largely lost in the separate and divergent paths the two nations have taken, although there are elements that indicate that the legislators in both systems have considered developments in the other country when proceeding to reforms in their own. It

[1]The author wishes to thank the organisers for their kind invitation to contribute this paper to the collected proceedings of the colloquium.
[2]In English law, the term 'bankruptcy' is used to describe procedures applicable to natural persons, sole traders and partnerships, while '(corporate) insolvency' is applied to the equivalent procedures for corporate entities. In the United States, the term 'bankruptcy' is indifferently used for procedures applicable to natural and legal persons.
[3]See N. Davies, Europe: A History (1997, Pimlico Press, London), p.401.
[4]See P. Le Cannu et al., Entreprises en Difficulté (1994, Joly Editions, Paris), para. 2027.
[5]See M. Druon, Le Lis et le Lion (1970, Livre de Poche, Paris), p.203 et seq.
[6]See B. Soinne, Traité des Procedures Collectives (1995, Litec, Paris), p.4.

is the purpose of this paper to consider these mutual influences in the field of insolvency and the common influences to which both systems are subject in the present day.

I - The Influence of the French on the English

At the outset of the 19th century, the great idea was that of codification. The appearance of the Commercial Code, whose bicentenary is celebrated at this colloquium, followed the promulgation of the Civil and Civil Procedural Codes in 1804 and 1806 respectively, while it preceded the Code of Criminal Instruction of 1807 and the Penal Code of 1810. In the United Kingdom, the genius of Jeremy Bentham (*floruit* 1748-1832) presided over the efforts of men of influence attempting to secure the rationalisation and accessibility of laws. Bentham's seminal opus in the field, his *Traités de legislation civile et pénale*,[7] is in fact cited approvingly in the debates preceding the adoption of the Civil Code and in the work accompanying the Code of Criminal Instruction, demonstrating the extent of interest of legislators in France in corresponding developments elsewhere.[8] Bentham's influence nearer home consists in the fact that the architect of bankruptcy law in the 1830s, Henry (later Lord) Brougham (*floruit* 1778-1868), was influenced by Bentham's principles. An earlier consolidation had been attempted in bankruptcy law in 1824-1825 along rational lines, the inspiration for this attempt coming from Lord Eldon (*floruit* 1751-1838), the then Lord Chancellor,[9] and his sanctioning of the preparation of a bill. The drafters of the law are said to have consulted the 'codes of Ireland, Scotland, France and the United States' in order to achieve a complete consolidation of all the existing bankruptcy laws.[10]

The extent of this work cannot be underestimated, given the difficulties later faced by Sir Mackenzie Chalmers (*floruit* 1847-1927) when codifying a relatively small area of law dealing with the sale of goods and being confronted with a considerable number of statutes and, literally, thousands of cases that he was required to sift through to emerge with a succinct text, later enacted as the Sale of Goods Act 1893 (now 1979). Nonetheless, the bankruptcy reforms had not altered the underlying law, a process often referred to consolidation and the way the *droit constant* principle is used in French codification, leading to calls for further reforms growing.[11] Lord Brougham's attempt at reforms, successfully enacted, was 'historic' because it contained what became known as 'officialism', where officials, permanent appointments made by the Lord Chancellor, replaced creditors in the administration of the debtor's estate.[12] It is possible, although Lester does not canvass this idea, that officialism was inspired by the operations of the *Tribunal de Commerce*, where, apart from a brief hiatus, the conduct of

[7]Translated by M. Dumont, in 3 volumes, Paris, 1802.
[8]See P. Schofield and J. Harris (eds), The Collected Works of Jeremy Bentham: 'Legislator of the World': Writings on Codification, Law and Education (1998, Clarendon Press, Oxford), pp.12-14.
[9]The British 'constitutional anomaly' as, until recent reforms, the post-holder was at one and the same time a judge, the speaker of the House of Lords and member of the Government.
[10]See V. Markham Lester, Victorian Insolvency (1995, Clarendon Press, Oxford), p.34.
[11]Ibid., p.44.
[12]Ibid., p.45.

insolvency matters under the supervision of the court has been a feature since 1715. Nevertheless, the subsequent enactment of a Consolidation Act in 1849 saw a further Benthamite development through the use of the then modern technique of a short rationale preceding clauses in the law explaining the purpose and justification of the provisions.[13] Although the technique was abandoned in the face of hostility in the House of Commons in order to ensure the law's passage, reference was clearly made to the 'clear-sighted[ness]' of the French legislators in pioneering the technique. Today, of course, the explanatory memoranda (*exposé des motifs*), which accompany and often exceed the legislation in volume, are considered an indispensable adjunct to interpretation. It is interesting that, at about the same time, the production of a major work on comparative commercial laws by Professor Leone Levi, studying the mercantile law of Great Britain and that of a number of other countries, including France, stimulated a parallel debate about the desirability of codification of the entirety of commercial law and the complete harmonisation of the commercial laws of England and Scotland, including of course insolvency law.[14]

Later developments exclusively within the province of bankruptcy law saw the introduction of two new elements inspired directly by French law. The Bankruptcy Act 1883 introduced the Official Receiver, whose status was as an employee of the Board of Trade, which was then, and now as the Department of Trade and Industry, the Government department that supervises, *inter alia*, the administration of company and insolvency law. This was said to be clearly modelled on the French institution of the *juge-commissaire* and resembles its French counterpart in providing supervision of the debtor's estate pending the appointment of a trustee. Its difference is of course in the source of authority, given the *juge-commissaire*'s membership of the *Tribunal de Commerce*, while the Official Receiver is clearly a public servant, although he may have a public investigatory and prosecution roles as part of the remit of his task, which is to protect the interests of creditors.[15] In fact, the Insolvency Service, part of the Department of Trade and Industry, retains the overall role with respect to the organisation of the Official Receivers, but, when appointed, these officials are attached to the High Court and those County Courts which have jurisdiction in bankruptcy. They are often the first appointees in both cases of individual insolvency (as trustees) and corporate insolvency (as liquidators), although when subsequent appointments are made of insolvency practitioners to act in these cases, the Official Receivers continue to have a supervisory role in the conduct of proceedings.[16] The second element was the requirement that the interests of the creditors be further protected by investing the estate, pending distributions to those entitled, with the Bank of England, a move that is clearly acknowledged as being modelled on the functions of the *Caisse des dépôts et consignations*.[17]

[13]Ibid., p.69.
[14]See (Lord) A. Rodger, Codification of Commercial Law in Victorian Britain (1992) 108 LQR 570, p.572.
[15]Lester, op. cit., p.195.
[16]See A. Keay and P. Walton, Insolvency Law: Corporate and Personal (2003, Pearson, Harlow), pp.32-33.
[17]Lester, op. cit., p.197.

A number of indirect influences of French law may also exist. One of these is the view that the move in Europe towards abolishing the use of debtor's prisons, formerly a powerful tool in the hands of the creditors or the State, was inspired by reforms in France in 1867, subsequently adopted in a number of other Western European jurisdictions, including England through the Act for the Abolition of Imprisonment for Debt enacted in 1869.[18] A further influence consists in the fact that, when equivalent procedures for the dissolution of the estate of corporate entities were introduced, the prevailing bankruptcy model, was extended and applied to the situation of corporate debtors. In fact, the Joint Stock Companies Act 1856, which also saw the introduction of limited liability, introduced the concept of winding up (liquidation) and permitted referrals to the bankruptcy court to hear petitions for winding up.[19] The success of the 1883 bankruptcy reforms also led to similar reforms to corporate insolvency, with the Official Receiver taking on the role of the provisional liquidator of the company.[20] Another indirect effect consisted in the fact that the Bankruptcy Act 1883 and its successor consolidation legislation, the Bankruptcy Act 1914, were exported to a number of Commonwealth countries, including Australia, Canada, Malaysia, Singapore and India.[21] This occurred as a result of two processes, the first being the extension of legislation to colonial possessions during the Victorian era, either expressly or as 'statutes of general application'.[22] The second comes from the fact that inspiration is still occasionally sought from developments in the United Kingdom for legislation in the Commonwealth.[23] In fact, the influence may go further, with Lester being of the view that, although explicit acknowledgement of the connection does not exist,[24] the similarities between the Bankruptcy Act 1883 and the United States Bankruptcy Act 1898 as indicating the unlikelihood that the latter was drafted without some reference to the former.[25]

The influence of the French system is not limited to the dawn of insolvency law in England. In more modern times, the Cork Report on Insolvency Law and Practice,[26] appointed to review insolvency law generally, recommended the introduction of 'corporate voluntary arrangements' and 'administration' as

[18]See K. Gratzer, Insolvent, thus a swindler? The Insolvency Law and Imprisonment for Debt in Sweden, paper presented at the XIV International Economic History Congress (Helsinki 2006), available through the University of Helsinki website at: <www.helsinki.fr/iehc2006/papers2/Gratzer.pdf>, p.15 (last viewed 30 April 2007).

[19]Lester, op. cit., p.224. It should be noted that corporate insolvency measures are applicable to all of the internal jurisdictions within the United Kingdom: (i) England and Wales, (ii) Scotland and (iii) Northern Ireland. Scottish bankruptcy law is, however, very different to that applicable in the other jurisdictions.

[20]Ibid., p.227.

[21]Ibid., pp.295-296 for a list of colonies and territories to which the Acts were extended.

[22]See K. Roberts-Wray, Commonwealth and Colonial Law (1966, Stevens and Sons, London), pp.554-555.

[23]An example is Part VIIIA of the Singapore Companies Act (Chapter 50), introducing judicial management, a procedure based directly on that of administration in the United Kingdom.

[24]Lester, op. cit., p.298 in fact reports a statement by Congressman Doliver, speaking in 1898, to the effect that the use of the English 'machinery of Government' would be 'wholly impractical' in the United States.

[25]Ibid., p.299.

[26]Report of the Review Committee into Insolvency Law and Practice 1982 (Cmnd. 8558).

forms of rescue procedures for corporate entities.[27] There is a debate as to whence 'rescue' as a concept originates, with a number of different definitions existing.[28] Nonetheless, it has been noticeably part of insolvency vocabulary since at least the 1960s, with preservation measures and external controls on the liquidation process being used to try and halt the irreversible decline of companies. The introduction of a 'rescue culture' was seen as expressing the need for more control by economic entities of their destiny and the legislative expression of this culture, through modernising laws imbued with the concept of rescue, would also allow Governments to create effective and efficient legal systems for the management of insolvency. Part of the search for ideal rescue procedures has also led to the introduction of early interventionist measures before the formal moment of insolvency, to attempt to resolve the problem before it presents itself in an unfavourable aspect, with the resulting twin-track approach virtually shaping the economic thinking of today. It is entirely possible that rescue was shaped by developments in Western Europe, with the French law of 1955[29] in fact containing embryonic elements of what eventually became a fully-fledged rescue regime developed through the Laws of 1967, 1984 and 1985.[30] This is despite the fact that the Bankruptcy Act 1978, which saw the adoption of what is now Chapter 11 of the US Bankruptcy Code,[31] often being cited by commentators as the first legislative expression of this concept. Nonetheless, the Cork Report was aware of developments elsewhere, with a comparative view of laws in other jurisdictions, including the United States, France and South Africa, showing that rescue was a viable proposition for quite a few companies.

In more recent times, the reforms introduced by the Enterprise Act 2002 have certainly been preceded by an awareness of comparable developments in Europe. A 2000 Consultation Document, titled 'Bankruptcy – A Fresh Start' referred to analogous procedures from a number of jurisdictions, including France.[32] A further Report by the Insolvency Service, issued in May 2000, titled 'A Review of Company Rescue and Business Reconstruction Mechanisms' uses extensive evidence from a number of jurisdictions internationally, again including France. Issues that were canvassed as part of this process included comparing the apparent complexity of the procedures in the United Kingdom to the 'single-entry point' (*guichet unique*) position in France and Germany, the former a reflection of the position in 1985 and the

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[27] Now contained in Parts I and II of the Insolvency Act 1986.

[28] See A. Belcher, Corporate Rescue (1997, Sweet and Maxwell, London), p.12: 'the avoidance of distress and failure' and D. Brown, Corporate Insolvency Law in Practice (1996, Wiley, Chichester), p.1: '[the] removal of danger, perhaps an imminent one'.

[29] Decree-Law of 20 May 1955.

[30] Law no. 67-563 of 13 July 1967, Law no. 84-148 of 1 March 1984 ('Law of 1984') and Law no. 85-98 of 25 January 1985 ('Law of 1985') respectively.

[31] For an overview of what is usually referred to as 'Chapter 11', see the information on the United States Courts website at: <www.uscourts.gov/bankruptcycourts/bankruptcybasics/chapter11.html> (last viewed 30 April 2007).

[32] In Section 4 – International Comparisons, copy available through Insolvency Service website at: <www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/con_doc_archive/consultation/freshstart/sec4.htm> (last viewed 30 April 2007).

prominence given to *redressement judiciaire*.[33] Other issues included the entry qualification for the process, the running of the process, the availability of post-commencement financing and the final determination of the outcome, the observation being made at a number of points of the strong role given to the courts within the French system.[34] A subsequent White Paper,[35] issued in July 2001, used the justification of the importance of collective insolvency procedures in Europe generally, as opposed to private recovery methods like administrative receivership, to promote administration and restrict receivership in the face of great opposition from financial institutions. The May 2000 Insolvency Service Report also alluded to this when reporting the views of contributors to the consultation process who stated that the need for international recognition of insolvency proceedings, given the increased tendency for cross-border elements, could make a strong case for restricting the role administrative receivership would play in the future.[36]

It is significant that the influence of French law on developments in the United Kingdom continues to be felt through the comparisons that are made as a feature of modern reform initiatives. However, the traffic is not all one-way and there have been major developments in France revealing a consciousness of reforms and progress on the other side of the Channel.

II - The Influence of the English on the French

In the field of insolvency reforms, there appears to be awareness on the part of commentators and legislators of developments occurring elsewhere. This is particularly acute in the period leading up to the adoption of the Laws of 1984 and 1985 when, for example, the Senate reflects the fact of reforms in other jurisdictions in anticipating the shape of French reforms.[37] The convergence of reforms at the time, with a number of Western European jurisdictions adopting rescue-type laws, including France and the United Kingdom, has led some commentators to speak of a 'first-wave' of insolvency reforms against which subsequent waves have been measured.[38] Unfortunately, it is difficult to ascertain whether there is an active consideration of the content of the English insolvency regime at this period, although articles in the business press reporting the insolvency statistics did occasionally invoke England, Germany and the United States as comparators when looking at the balance between creditors' and debtors' interests as well as the desirability of further reforms.[39] Similarly, in the context of the ill-fated reforms to the *Tribunaux de Commerce*, reference is made to the practice of Commercial Courts in a number of jurisdictions, including England,[40] particularly in relation to the hearing of insolvency matters and the role of the courts in supervising the

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[33]Ibid., paras. 148-150.
[34]Ibid., paras. 152, 155 and 164.
[35]'Productivity and Enterprise – Insolvency: A Second Chance (Cm. 5234).
[36]At para. 51.
[37]JO rapp. Sénat, 2e sess. 1983-1984, no. 332, p.26.
[38]See R. Parry, Introduction to K. Broc and R. Parry (eds.), Corporate Rescue in Europe: Recent Developments (2004, Kluwer, Deventer), pp.2-5.
[39]See R. Maëder, La défaillance d'entreprise en France: quatre points clefs, Les Echos (22-23 May 1998); Y. Gallois, Près de 45000 défaillances en France, Le Monde (1 October 2002)
[40]Others included Belgium, Germany, Italy and Spain.

conduct of insolvency proceedings.[41] Much later, there is also a Ministry of Justice report, issued on 1 March 2003, titled *Insolvabilité des enterprises*, which investigates the corporate insolvency rules applicable in, *inter alia*, the United Kingdom and the United States,[42] under three broad headings dealing with the qualification for entry to insolvency procedures, the balance of rights between debtor and creditors and insolvency outcomes, including the prospects for a rescue plan. The report concludes noting the widespread acceptance of the debtor-in-possession concept, low thresholds for entry qualifications and the prevalence in use of pre-insolvency arrangements, although it does not cite any particular preference with respect to possible reforms within the French context.[43]

Nevertheless, it is not until the most recent reforms, which have concluded in the adoption of the Law of 2005,[44] that there is a consensus on the direct influence of Anglo-American procedures on the French. Commenting on the drafts, two eminent commentators describe Chapter 11 of the United States Bankruptcy Code, referred to earlier, as serving as the inspiration behind the adoption of the *sauvegarde* (preservation) procedure.[45] The conception of *sauvegarde* as a type of debtor-in-possession procedure permitting the management to stay at the helm and steer the business through the financial difficulties being experienced is directly patterned on the American model, although there are limitations on its use, given that the option is only available to businesses under a threshold to be defined by decree, provided that the business has not triggered formal insolvency by ceasing to pay due debts. Over the threshold, *sauvegarde* clearly resembles more its formal counterpart of *redressement judiciaire*, as an administrator is usually appointed to supervise the debtor-in-possession or to assist the latter in the performance of all or some tasks.[46] The internal workings of *sauvegarde* owe much to its relationship to *redressement judiciaire*. Thus, it may be more proper to speak of *sauvegarde* as a hybrid procedure showing some similarities with the American system with a selective 'borrowing of rules'.[47] Nonetheless, it is noticeable that there is a consciousness more generally of the adoption elsewhere of rescue-type procedures, with the use in Belgium, Germany, Italy and the United Kingdom of such procedures providing ample support and justification for the adoption in France of *sauvegarde*, particularly given the risk of forum-shopping being used by cross-border groups of companies seeking to benefit from the provisions of the European Insolvency

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[41] 'Les Juridictions Commerciales', a Senate Study produced in October 1998, a copy of which is available through the Senate website at: <http://www.senat.fr/lc/lc44/lc44_mono.html> (last viewed 30 April 2007).

[42] Other countries surveyed include Canada, Italy, Germany and the Netherlands.

[43] A copy of this report may be viewed under the rubric '*Etudes de droit comparé*' through the Ministry of Justice website at: <www.justice.gouv.fr> (last viewed 30 April 2007).

[44] Law no. 2005-845 of 26 July 2005 ('Law of 2005').

[45] See comments on preliminary drafts by M. Frison-Roche, L'inéluctable convergence des droits de la faillite, Les Echos (30 September 2002) and P-M. Le Corre, Présentation générale du projet de réforme des entreprises en difficulté: de l'avant-projet au projet de loi de sauvegarde des entreprises, Gazette du Palais 2004, nos. 56-57, p.4 at p.7.

[46] Article 23, Law of 2005, amending Article L. 622-1, Commercial Code.

[47] Le Corre, op. cit., p.7.

Regulation.[48] The recent use of *sauvegarde* in the Eurotunnel debt restructuring, which saw the adoption of a reorganisation plan after a six-month process, appears to vindicate these views.[49]

Another innovation of the Law of 2005 consists in the introduction, for businesses exceeding a threshold to be defined, of the creditors' committees, which will have a role to play in the approval of any rescue plan. In fact, two committees will be constituted within thirty days of the opening of proceedings, representing financial institutions and principal suppliers respectively. Creditors with at least five percent of the total debt owed them will be represented as of right, others being invited by the administrator to attend, although their interests will be considered when any agreed plan is presented to the court for validation. The purpose of the committees is to pronounce on the viability of the plan presented by the debtor-in-possession, assisted, it being the case, by an administrator. A strict time limit is set requiring the committees to be given this draft within two months of their being first constituted, the objective being that subsequent exchanges of opinion and observations contributing to the final draft submitted to court. Voting on the committees will take place within a further period of thirty days and will be by a special majority, calculated according to the amount of debt certified by the company auditors, a positive vote by both committees (amounting to at least two-thirds of the value of the total debt) being required for the plan to be presented to court for validation. Once the creditors signify their approval, the role of the court is limited to ensuring that all interests are duly taken into account, dissenting and non-participating creditors will become bound.[50]

The source of this innovation is also stated by some commentators as being inspired by the creditors' committees in Chapter 11 proceedings.[51] However, the operations of the committees are quite different. The American model is reliant on appointment by the Office of the United States Trustee in cases where the formation of a committee is deemed useful, which may not be every case, and whose membership ordinarily consists of unsecured creditors who hold the seven largest unsecured claims against the debtor.[52] Informal practice, however, suggests that membership may be drawn from a broad section of the creditors (bondholders, trade suppliers, financial lenders). Only exceptionally will more than one committee be formed, while for small business debtors, just as in France, no committee need be appointed.[53] Nonetheless, the creditors' committee model is also used in the United

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[48]Council Regulation (EC) No. 1346/2000 of 29 May 2000 ('European Insolvency Regulation'). See A. Outin-Adam and S. Bienvenu, Sauvegarde des entreprises: le point de vue de la Chambre de commerce et d'industrie de Paris, JCP La semaine juridique, éd. Entreprise et affaires 2005, iss. no. 42, art. no. 1516, p.1781 at p.1782.

[49]TC Paris judgments of 2 August 2006 and 15 January 2007, noted in the White & Case Insolvency Notes (March/April 2007), pp.7-8.

[50]Article 83, Law of 2005, introducing new Articles L. 626-29 to -35, Commercial Code.

[51]See P. Pétel, Le nouveau droit des entreprises en difficulté, JCP La semaine juridique, éd. Entreprise et affaires 2005, iss. no. 42, art. no. 1509, p.1730 at p.1732.

[52]Section 1102 of Chapter 11.

[53]Ibid., Section 101(51D). Article L. 626-29, Commercial Code authorises the supervising judge to form a committee at the request of the debtor or administrator for a business under the threshold.

Kingdom in the context of a number of procedures, including corporate voluntary arrangements, administration and liquidation, where creditors are required to meet to approve the proposed arrangement, administrator's plans or, in certain circumstances, compromises or action by the liquidator.[54] Only in administration can the meeting of creditors go on to constitute a committee with any supervisory role over the implementation of the plan.[55] Both English and American systems include this discretionary element, which appears to be a noteworthy difference from the French rule. Furthermore, the French system presents a significant departure from any of the Anglo-American models available, particularly the fact that it remains ultimately subject to the supervision of the court during its currency, a feature that is not necessarily the case in either the English or American models. As a result, one may justly speculate whether the *sauvegarde* model should be regarded as based directly on any one of the Anglo-American procedures or whether it should be viewed as a hybrid between its domestic roots in the *redressement judiciaire* model and an attempt at introducing the contractual model implicit in the Anglo-American systems.

III - Common Influences and a Common Future

It is testament to the mutual influences between both systems that initiatives in insolvency law continue to contain an element of comparison between the French and English systems. In fact, within the European Union, to which both nations belong as member states, such comparisons are continually being made as member states progressively renovate their legal systems. Increasingly, however, it is at the international level that developments in insolvency are appearing and their influences on domestic law felt.

In Europe, for example, a 2003 European Commission Report focused on a number of issues, particularly the availability of early warning systems and options for restructuring in domestic laws, how legal systems may contain rules impeding fresh starts as well as the stigma of insolvency as a deterrent to entrepreneurship.[56] Its extensive report was accompanied by country reports on the law in the member states as well as an outline of the applicable law in the United States. In relation to structural matters, issues surrounding early warning systems focused on the opportunities for early recognition and the availability of support to assist access to expert advice with view to taking remedial action. As for restructuring proper, problems identified within the document included access to information about restructuring options, the negative impact of publicity as well as procedural issues surrounding entry qualifications for procedures, the degree of protection for particular creditors and whether courts are equipped to handle the demands of insolvency

[54]Sections 3, 24 and 141, Insolvency Act 1986 respectively. See also paragraph 53 of Schedule B1 to the Act for the equivalent rule in 'new-style' administrations. In the case of corporate voluntary arrangements, a meeting of shareholders is also required and section 4A deals with the resolution by the court of any conflict between the shareholders and creditors.
[55]Ibid., section 26. See also paragraph 57 of Schedule B1 to the Act.
[56]Best Project on Restructuring, Bankruptcy and a Fresh Start, Final Report of the Experts' Group (September 2003). The discussion that follows is excerpted from the Executive Summary, pp.7-9.

proceedings and have access to available expertise. The issue of fresh starts, increasingly of contemporary relevance in Western Europe,[57] is made great play of, particularly in the report's analysis of the obstacles posed by domestic legal systems, especially where restrictions imposed on bankrupts and the disqualifications regime generally applying to insolvent debtors is considered to serve as a barrier to the resumption of economic activity. It notes that the legislation in force in the member states is of varying levels of efficacy and contains widely differing measures.[58]

The impact of these as well as widely differing methods for the discharge of debts can create a stigma impeding fresh starts reflected in social attitudes towards debt and bankruptcy. In particular, the report mentions the lack of a clear distinction between what it terms 'honest' and 'dishonest' debtors, with social attitudes accounting for very different views of the acceptability of conduct, leading to difficulties for those who were simply unfortunate rather than culpable.[59] From a survey of the laws applicable in various member states of the European Union, there can be discerned a wide range of penalties, from civil to criminal, that may underline national views of conduct as expressed in normative legislation. The report does state the difficulties it has in establishing whether there is a pattern to underlying social views about the acceptability of insolvency. Nonetheless, it goes on to balance the difficulties experienced in distinguishing between the unfortunate and the culpable against the need to distinguish between good and bad faith situations. Accordingly, it seeks to make a clearer distinction between measures applicable to fraudulent and non-fraudulent debtors, perhaps leading to a reduction in the stigma. This would occur through the removal of 'outdated and unnecessary' restrictions and prohibitions in national legislation. In particular, care would need to be taken that any legislative action as a result of either of these initiatives takes into account both the need to encourage fresh starts and to provide clear rules by which company management is able to discern when the optimum point has been reached in order to resort to insolvency proceedings. Nonetheless, the structural recommendations in the report do much to assist the development in the European Union of early warning and rescue procedures thus ensuring optimal survival conditions for businesses within the Single Market. The issues dealt with in this report may well serve to prompt member states, including those that have recently presented reforms, to revisit their insolvency regimes with view to enhancing their rescue aspect and serve as an opportunity for re-assessment of their compliance with the ideals of corporate rescue.

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[57]An example is the introduction in the United Kingdom of the concept of the 'fresh start' by the Enterprise Act 2002. There is some literature on the viability and extent of this concept in a number of different jurisdictions, for which see D. McKenzie-Skene, Forgiving our Debtors: a Scottish Perspective on a Fresh Start for Debtors (2005) 14 IIR 1; M. Roestoff and S. Renke, A Fresh Start for Individual Debtors: the Role of South African Insolvency and Consumer Protection Legislation (2005) 14 IIR 93.
[58]For examples of this diversity, see by this author: Wrongful Trading: Prospects for a Harmonizing Text in the European Union (2004) 1 ICR 294.
[59]Executive Summary (note 56 above), pp.7-8.

In fact, the fresh start initiative may have been prompted as a result of a perceived convergence between domestic insolvency laws with the predominance of corporate rescue ideals. In fact, it is noticeable that there are a number of similar elements to the reforms that have occurred in Western Europe, in which France and the United Kingdom have both recently taken part. There is firstly the context of increasing numbers of insolvencies prompting reforms, especially in the consumer law area, but increasingly in relation to corporate entities and debtors. This is a common element to most reform initiatives and is often prompted by the observation of the difficulties in achieving rescue. It is also a reflection of the economic role of insolvency measures as a method of macro-economic regulation. There is also the concept of rescue itself as being a desirable outcome to the reform initiative, although 'corporate rescue' may mean very different things in each jurisdiction. This is perhaps tribute to the fact that corporate rescue is now firmly part of the landscape of insolvency and the design of procedures in insolvency is often prompted so as achieve, to the maximum extent possible, the rescue of debtors. Related to this is the concept of upstream rescue, where debtors at a stage where insolvency is imminent or anticipated may file for rescue, with encouragement being given for this process. This is certainly the way in which in the United Kingdom corporate voluntary arrangements now better perform after the amendments introduced in the Insolvency Act 2000 and it is also the way in which the new French procedure of *sauvegarde* introduced in 2005 seems intended to work.

There also appears to be in Europe a fascination with the American 'Chapter 11' procedure and the extent to which the debtor is in control of that procedure by acquiring the status of 'debtor-in-possession'. It seems that this fascination dates to the beginnings of the series of reforms initiated from the 1980s onwards, with the reforms in Germany in 1994 said by some to be the first to explicitly express this connection by being inspired directly by the American legislation.[60] However, this must be viewed against a background, in which many European insolvency regimes are deemed to be pro-debtor, including, as seen from the English perspective, the French. This may be an incorrect view given the pro-social stance of legislation such as the French, to which even otherwise pro-debtor elements are subordinate. In this light, the moves towards a system analogous to the American and to which *sauvegarde* is compared are, in fact, radical moves along the spectrum of the conflict between creditor and debtor. The move for the United Kingdom, usually termed a pro-creditor jurisdiction, is also seemingly towards a pro-debtor strategy with the curtailment of administrative receivership, the emphasis on the collective interests of creditors and the enhanced corporate voluntary arrangements regime introduced by the Insolvency Act 2000, but may be less radical than suspected as the creditor retains the same bargaining role within voluntary arrangements and enjoys the power of appointment in administration. Nonetheless, a feature of recent reforms, especially the French, appears to promote the concept of the debtor-in-possession and explicitly relates this to the need to encourage resort to insolvency without the

[60]See E. Ehlers, German Statutory Corporate Rescue Proceedings: The *Insolvenzplan* Procedure, Chapter 4 in K. Broc and R. Parry (eds.), op. cit., pp.79-80.

fear of dispossession or loss of control. Nevertheless, this apparent espousal of the debtor-in-possession concept may require a change in the culture of participants in insolvency. A final similarity in recent reforms is the fact that most procedures now provide for fast-track options and, in certain circumstances, impose time limits for procedural stages. This approach appears to acknowledge the universal axiom that 'time is money' and the proliferation and extension of proceedings serve only to dissipate assets that would otherwise be available for creditors.

However, there are dissimilarities in the reform processes in Western Europe. The positions in the United Kingdom and France have moved towards the multi-procedural (or 'plethora') approach so as to provide a number of procedures with different emphases and which may be useful at different stages of the approach towards insolvency. This may be contrasted with that prevailing in a number of other countries, including Germany and Spain,[61] where the positions are reliant on the maintenance of a uniform insolvency procedure covering all debtors, which in both countries might also have been necessary in order to harmonise the previously disparate systems and procedures applicable in those jurisdictions. For France, the plethora approach represents quite a dramatic step, given that as recently as in the Law of 1985, the single-entry point (*guichet unique*) system continued to find favour. It is difficult to appreciate which of these two approaches will be more successful in the long run and whether debtors appreciate in reality the choice that is in theory open to them. In practice, however, the choice may be less open, this certainly being the position in France, because of the qualification that the debtor's being in technical insolvency will close off certain options, notably s*auvegarde* and, after 45 days, *conciliation*. The position in the United Kingdom seems to be more open in allowing for greater choice in respect of when corporate voluntary arrangements or administration may be appropriate. A further dissimilarity may be, even allowing for the complexities of insolvency proceedings generally, the emphasis on procedure, in which the French approach, which seems very rule-driven, may be contrasted with the greater flexibility and built-in discretion that are features of the English system. Aspects of the different procedures that may illustrate this include the emphasis on judicial supervision in France and the subordination of the judicial administrator to the *juge-commissaire* for many tasks. This may be contrasted with the greater freedom enjoyed by the administrator in the United Kingdom and the inclination of the courts to leave matters largely in the hands of the insolvency practitioners.

A further dissimilarity exists at the level of treatment of creditors, with the United Kingdom abolishing the preference given to debts owed the state (the Crown preference), while France only goes as far as allowing state organs the possibility of conceding waivers or remission of debt. In addition, the constitution of a fund for unsecured creditors in the United Kingdom will potentially serve to 'redistribute' some of the privilege that has been given up, a feature that is not present in the French model.[62] Given the usual

[61]Insolvenzordnung 1994 and Law no. 22/2003 of 9 July 2003 respectively.
[62]New section 176A, Insolvency Act 1986 (this provision is not yet in force).

predominance of debts owed to state bodies as a feature of insolvency cases, the differences between national regimes may well have an impact on the chances of success in the jurisdictions concerned. A final dissimilarity relates to the legal cultures and underlying ethos of insolvency law in these jurisdictions, particularly in the articulation between rescue and liquidation. In France, the 1967 and 1985 regimes both placed the emphasis on rescue and may still be true in the emphasis placed on *sauvegarde* as an anticipatory rescue procedure and the continued importance of *redressement judiciaire* in formal insolvency. This contrasts sharply with the absence of a presumption in the United Kingdom for or against any particular procedure, the courts being more concerned with the use of the most appropriate mechanism for resolving business difficulties. The presence or absence of a presumption may not in the end be determinative of the outcome, as the statistics show that liquidation is the likely outcome in the majority of cases in all jurisdictions. However, the way that courts and the professionals under their supervision administer proceedings may be predicated on the culture instituted by these presumptions.

Developments in the insolvency environment in Europe predating the fresh start initiative may also have a part to play in the common future of insolvency law in Europe. Prior to the initiative, the insolvency environment contained a small number of texts, chiefly resulting from an overall jurisdiction, recognition and enforcement allocation initiative that also brought into being the Brussels Convention 1968.[63] Although the overall project has resulted in a number of important texts allocating jurisdiction for particular types of debtors,[64] its insolvency component has been nearly four decades long in the making. It has also come at a price, notably the abandonment of early desires to include some aspects of substantive harmonisation. This is despite the many arguments that have been made about the impact of insolvency in its economic aspect on society and the consequent need for action to tackle its negative manifestations, including through the harmonisation of rules. However, the extent of the harmonisation has always been problematic. In fact, the working party drafting the text from which the European Insolvency Regulation was ultimately derived acknowledged that systematic unification of insolvency would take a long time and hence ruled out the creation of a 'European insolvency' and substantive modification of domestic laws.[65] This long lead time was viewed as necessarily arising from the fact that insolvency contained 'numerous, interconnected issues of legal and social policy' and its relationship to public order (*ordre public*) issues in many member states that made full harmonisation unrealistic.[66] Nevertheless, harmonisation has never gone away as the utopian ideal of law-making and related measures in the

[63]Now superseded by Council Regulation (EC) No. 44/2001 of 22 December 2000 ('Brussels I Regulation').
[64]Such as the European Insolvency Regulation (individual and corporate debtors), Directive 2001/17/EC of 19 March 2001 (insurance bodies) and Directive 2001/24/EC of 4 April 2001 (credit institutions).
[65]See Report on the Draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings (Lemontey Report) (1981) (OJ 1982 Bull. Supp. 2/82), p.50.
[66]See I. Fletcher, Conflict of Laws and European Community Law (1982, North-Holland Publishing Co., Amsterdam), pp.190-191.

field of company law have shown that, where harmonisation has been the aim, it has worked reasonably well, provided it is targeted at discrete areas and not systematically across the field as a whole.

The question, however, is whether in more modern times insolvency law even approaches the point at which company law harmonisation was first initiated as an ideal. Given that there seems to be a convergence between domestic insolvency laws with the predominance of corporate rescue ideals, the question will be whether there are elements within insolvency law that are possible subjects of harmonisation. One possibility may be to take the elements of the model law that accompanied the first drafts of the text that ultimately became the European Insolvency Regulation, where it may be seen that reservation of title, set-off, spousal property claims, transactional avoidance (*actio Pauliana*) and the opening or extension of proceedings to directors were all considered potential subjects of harmonisation. Many of these remain as exceptions from the default rule of the law of the proceedings (*lex concursus*) applying for the determination of issues arising out of proceedings. and may well be, for that reason, appropriate subjects if there is a determination to harmonise.[67] However, it is difficult to see member states agreeing to substantive rapprochement of their internal laws unless there were overwhelming economic benefits for them to do so, which would necessarily be a precondition to persuading the European Commission to undertake the process. Given the length of time it took to reach the final stages of the European Insolvency Regulation, it seems very doubtful that solutions will be forthcoming in the short to medium terms. That is not to say, however, that there have been no indications of a possible move towards some embryonic harmonisation.

One indication has come from the work of the European Union's Group of High Level Company Law Experts, formed in September 2001 in order to advise on a modern regulatory framework for company law and to restart the company law harmonisation programme, which had stalled in the late 1990s. With the observable growth in corporate failures worldwide, the need to revitalise the project and to initiate a discussion on the need for the modernisation of company law in Europe assumed a particular urgency. A considerable number of issues were canvassed as part of the consultation process with a consultative document being released in June 2002.[68] Chapter 3 of the Consultative Document, under an overall Corporate Governance rubric, contained a Title IV dealing with the strengthening of the duties of the board and increasing the accountability of directors in situations where the company they govern became insolvent. Although it was not intended that there be a comprehensive codification or harmonisation of the rules on directors' liability, given that the rules were undergoing extensive modification in many member states, the document made reference to the fact that there were specific rules in a number of member states for holding directors accountable if the company became insolvent and made express mention of a

[67] Articles 5-15, European Insolvency Regulation.

[68] A Modern Regulatory Framework for Company Law in Europe: A Consultative Document of the High Level Group of Company Law Experts (June 2000).

number of different formulations of this rule in various member states. [69] The document considered that the introduction of a framework rule at European level could be a considerable improvement for the operations of companies for the reason that the protection of creditors could be enhanced without compromising the ability of directors to make choices about the functioning of the enterprises they managed, including the choice about the fate of the company itself where insolvency was a real prospect. The existence of a Europe-wide rule would do much to enhance the confidence of creditors and their willingness to deal with companies as trading partners, particularly as it would serve potentially to minimise the inherent risk in doing business across borders where information may be more difficult to obtain. This prompts the desire, without harmonising all of the rules on directors' liability, to introduce a similar level of protection for creditors of companies across the European Union by specifically targeting the issue of insolvent trading liability. The group's Final Report makes the recommendation that action should be carried out as a medium-term priority as part of the project, perhaps resulting in the production of a text in the not too distant future.[70] What this development may point to is the possibility that similar initiatives could take place where there is sufficient consensus for them, whether or not on the basis of related developments in the corporate law field.

As far as more profound attempts at engaging in the harmonisation process are concerned, it seems that there may be a preference more for the convergence approach, where the identification of principles or guidelines is carried out and against which domestic legal systems are measured. This has certainly been the philosophy behind developments such as the project on drafting common Principles of European Insolvency Law, which reported in 2003,[71] the UNCITRAL Legislative Guide on Insolvency Law and the Core Principles for an Insolvency Law Regime formulated by the European Bank for Reconstruction and Development, both emerging in 2004, while, more recently, the World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems were produced in 2005. All of these 'soft-law' texts may in the long-term, by promoting convergence, have an effect on future reform initiatives in both countries.

Summary

The history of the developments in both jurisdictions that have been chronicled here renders tribute to the fact that the two legal systems have had a mutual appreciation of the strengths and weaknesses of each other's laws. However, in more recent times, an underlying tension between both legal systems has emerged. This arises from the perceived differences in the philosophies that motivate the different legal systems. Speaking to a colloquium organised as part of the bicentenary celebrations for the Civil

[69] Ibid., para. 12.
[70] Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe (November 2002), p.126.
[71] The Principles themselves as well as National Reports detailing the position in member states can be seen in W. McBryde, A. Flessner and S. Kortmann (eds.), Principles of European Insolvency Law (2003, Kluwer, Deventer).

Code, President Jacques Chirac addressed an audience composed of representatives from jurisdictions within the French legal family, in which he lauded the codification of 1804 as a 'political act of real historical import.'[72] The President stresses the cohesion produced by a codification that replaced a diversity of laws with a single clear and accessible text that incidentally served to spread Revolutionary values throughout society and acknowledges the role these 'institutions' continue to play in the development of modern society. Although the President places these developments in the context of technological progress and the rise of globalisation, he underlines the importance of ensuring that these tools remain up to date, particularly in the face of competition between differing legal orders at European and global levels. This is seemingly a reference to the competition caused by the apparent predominance of 'Anglo-Saxon'[73] law in international commercial transactions and which may have directly prompted the later formation of the *Fondation pour le droit continental,*[74] announced on 1 March 2006, as a means of countering the influence of 'Anglo-Saxon' law. This is particularly given that 'Anglo-Saxon' law is noted for the increasing analysis of law through economic eyes, a feature the President deplores for its apparent lack of concern for 'a moral dimension to law and [French] preoccupations in relation to social justice.' In any event, although one cannot underestimate the differences that do exist and that may result in an aversion to or impede any process of convergence or harmonisation, the continued regard each country has for the legal system of the other may still result in mutual influences that could have an impact on reform considerations to come. This may yet be the case despite the agenda for reform potentially moving to the international level and to the work of the European Union and other international bodies in the insolvency field.

26 February 2007 (revised 30 April 2007)

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[72]Speech at a Colloquium at the Sorbonne on 11 March 2004, available through the Elysée website at: <www.elysee.fr/elysee/root/bank/print/2597.htm> (last viewed 30 April 2007).

[73]The term 'Anglo-American' is preferred by those commentators that look to the common origins of the legal systems of England and the United States.

[74]See website at: <www.fondation-droitcontinental.org> (last viewed 30 April 2007).