

The Social and Legal Process of Bankruptcy in Germany, 1815-1870



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A thesis submitted for the degree of
Doctor of Philosophy
Hilary Term 2017

For Konrad

Acknowledgements

First and foremost I owe thanks to my two supervisors. They have become veritable teachers and mentors and have both exceeded what University regulations expect of supervisors. I am grateful to Professor Joshua Getzler, who taught me that small keys open big doors and that the intricate complexities of the law contain meanings, the discovery of which changes the way we look at the social world. I am grateful to Professor Avner Offer who taught me that clarity in writing comes from clarity in thinking. I will need a whole lifetime to fully implement his advice. This thesis is still far off the standard he sets in his own works.

I owe thanks to the generous financial support by the Economic and Social Research Council and the Scatcherd Scholarship at Oxford University. The German National Scholarship foundation (Studienstiftung), which had accompanied me throughout my student life, contributed additional funding. St. John's College Oxford provided a place to live and study within Oxford that became home. Its diverse and thriving community became a source of friendships and inspiration.

I spent the final year of my doctorate at the Max-Planck Institute for Legal History in Frankfurt thanks to Professor Stefan Vogenauer, who offered me this opportunity to draw on the institute's library and resources. I also thank Professor Dr. Reinhard Zimmermann for his generous hospitality at the Max-Planck-Institute for International Private Law during a research stay in April 2015.

My intellectual experience in Oxford was shaped by the Economic and Social History Group in Oxford, a community of highly motivated, sincere and virtuous scholars, who care and support for each other. To single out a few I should thank Jane Humphries, who is responsible for me staying on for the D.Phil in Oxford, and my friends Sebastian Huempfer, Arthi Vellore, Alexis Wegerich, and Diana Greenwald.

A broad range of material and a number of different archives were consulted for this research. I would like to thank the archivists at the Hamburg chamber of commerce and the Saxon State Archive in Leipzig for their enthusiastic help. I also owe thanks to Baron Moritz von Bethmann and the Haniel Company, who both opened their private archives for me.

Last but not least, there are a number of people, whose friendship and support has accompanied me through the past years, and without whom my work would not have been possible. I thank my Oxford friends Annette and Frank von Delft with little Clara and Charlotte, Jonas Propst, Myrto Aspioti, Sally Le Page, Katharina Natter, and the whole Oxford University Orchestra. I also thank Marie-Theres von Schickfus, Susi Fejer, and Linda Heß for commenting and proofreading earlier drafts of this thesis. I was blessed with my parents and my little brother, who always stood behind me with their trusting love.

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List of Abbreviations

Archiv der Hansestadt Lübeck	AHL
Allgemeine Deutsche Wechselordnung	ADWO
Allgemeine Gerichtsordnung	AGO
Allgemeines Deutsches Handelsgesetzbuch	ADHGB
Allgemeines Landrecht	ALR
Firmenarchiv Franz Haniel & Cie	HA
Bethmannarchiv Familienakten	Bethmannarchiv FA
Bethmannarchiv Geschäftsakten	Bethmannarchiv GA
Bundesarchiv	BuA
Bürgerliches Gesetzbuch	BGB
Einführungsgesetz	EG
Grundgesetz für die Bundesrepublik Deutschland	GG
Hessisches Staatsarchiv Darmstadt	HStADA
Insolvenzordnung	InsO
Institut für Stadtgeschichte Frankfurt	ISG Ffm
Konkursordnung	KO
Neue Falliten Ordnung	NFO
Säsisches Staatsarchiv Dresden	SStADD
Säsisches Staatsarchiv Leipzig	SStALe
Staatsarchiv Bremen	StAHB
Staatsarchiv Hamburg	StAHH
Stiftung Hanseatisches Wirtschaftsarchiv bei der Handelskammer Hamburg: Safebestand der Commerzbibliothek	Commerzbibliothek

Abstract (Short)

The regulation of bankruptcy poses a dilemma to societies. It needs to address two problems at once: the first concerns the balance between debtor and creditor interests; the second pertains to the question between deterrence and continuity. Up to the present day there is much disagreement about the appropriate design of bankruptcy procedures. German states in the nineteenth-century found it impossible to agree on a common insolvency regime until the 1870s. This thesis investigates the legal as well as the social process of bankruptcy in a sample of towns and states in Germany between 1815 and 1870. It focused on non-Prussian legal systems in order to shed light on those alternative solutions to bankruptcy that were not ultimately adopted in the national bankruptcy code.

Bankruptcy was a social process that could take place in court as well as out of court. Creditors and debtors had strong incentives to turn to extrajudicial settlement mechanisms. Where strong local corporate organisations for merchants existed, they facilitated settlements and rule-enforcement among its members out of the official court system. Those local clubs often played the role of an arbitrator. For long, bankruptcy regulation had been part of the mercantile self-administration. Legal harmonization and processes of state formation put an end to these practices. Simultaneously, an industrializing economy devised new organisational forms that were alien to the old legal framework. Toward the second half of the century, legal harmonization gained momentum; creditor protection became the focus of lawmakers while local communities and their interests no longer played a role. As German legislators built a national and universally shared legal framework, bankruptcy regulation ceased to be local and communal. This was to the liking of businessmen, who had long complained about legal fragmentation when trying to conduct business across different German regions.

Abstract (Long)

This thesis is divided into three parts. Part I sets out the theoretical and methodological premises for combining legal history and economic history. Chapter 2 explores the nature of bankruptcy and how historians can approach the issue. Bankruptcy is best understood as a social process, in the course of which the law demands that a number of parties with conflicting interests come together and engage with each other. There are legal boundaries as to who is allowed to partake and concerning the range of permissible actions. The law sets the framework – and to some extent also the infrastructure – within which parties operate during this social process. The framework’s design varies between inclusion and exclusion. Chapter 2 argues that theories of public goods and club goods provide one entry point for economic historians to discern the working of local bankruptcy regimes. It goes on to show that, whatever the exact legal framework, there is an ‘entrepreneurial moment’ in bankruptcy: actors, whether debtor or creditor, face a scarcity of resources which are not optimally used. They may have conflicting visions as to what a more productive use of these resources would be and try to influence the bankruptcy procedure in order to exploit that they may see as an opportunity to reduce or avoid losses. It is important to bear in mind this element of human agency in a process that seems so formalized and structured by the law.

Chapter 3 endeavours to help the reader navigate between the different legal systems, which will be revisited in the ensuing analysis and case studies. To this end, chapter 3 compares different legal regimes and their solutions to bankruptcy. It highlights three legal ‘strands’ or ‘families’ within the German states that had different approaches to bankruptcy: the imported French law, the bankruptcy procedure of the *ius commune*, which had been codified in some states, and municipal statutes, particularly in the free Hanse towns. The chapter first compares different stages of the bankruptcy procedure in the respective legal strands. It then proposes two indices for debtor protection and creditor protection and assigns scores on each index to a range of German states. It also gives an overview of the different priorities assigned to creditor groups in various German bankruptcy laws.

Part two of the thesis focuses on the municipal bankruptcy regimes in the Northern Hanse towns, Hamburg, Bremen, and Lübeck. They were sovereign city-states as well as important trading hubs. They were also seen as models for the development of commercial law in Germany. Chapter 4 shows that the bankruptcy regime in those towns was designed to serve the interests of the merchant citizens. The main objective was to filter viable from unviable firms. Therefore the emphasis lay on reducing monitoring costs, facilitating information flows, confining the veto power of actors and enabling out-of-court settlements. This system was only tenable on a local, exclusive level, designed for a relatively homogenous group. It excluded large parts of the population, particularly city-dwellers without citizenship, craftsmen, and labourers.

As the towns' populations increased and the German economy became more integrated, such a local regime reached its limits. Chapter 5 describes an event, during which these limits became exposed. In 1857, a financial crisis hit the market for bills of exchange on both sides of the Atlantic. In Germany, the Hanse towns were the first to suffer from contagion. Influential merchant guilds in those towns lobbied to amend the bankruptcy laws so as to prevent a liquidity crisis from turning into an insolvency crisis. These attempts were criticized by neighbouring states, particularly by Prussia, as they showed a disregard for multilateral agreements with other German states concerning commercial law. Hamburg and Lübeck indeed introduced a special, temporary insolvency regulation to shield trading houses from collapse. The prize was the loss of political credit among other German states.

The last part of the thesis turns to two distinct groups of actors: creditors and women. Chapter 6 explores the ways in which creditors sought to influence the bankruptcy procedure. Relying on a combination of quantitative evidence and sources from business archives, it shows different attitudes of secured and unsecured creditors and the difficulties of lenders to keep track of their debtors. A frequent cause for such difficulties was the distance between lenders and borrowers. Particularly industrial facilities were often established outside of traditional merchant towns and had to raise capital from outside their local jurisdiction. A second cause was conflict of laws and legal uncertainty arising when actors from different legal systems engaged

with each other. The chapter discerns some common strategies among creditors to overcome these obstacles.

Chapter 7 turns to the multiple roles women played in bankruptcy. This role depended on the legal status of these women, i.e. whether they were wives, widows, or unmarried. Local laws often protected certain 'female' assets such as the dowry and the wives' inheritance. Under certain circumstances, wives could retain these assets before creditors could lay claim to the bankrupt's estate. They then became important actors in settlement negotiations, as they could use their assets to leverage a deal with creditors. This legal privilege should not hide the fact that many a woman was defrauded by her indebted husband, who used his wife's dowry to pay off creditors long before a formal procedure was set in motion. Some 10 percent of the cases collected for this thesis have women as main debtors and chapter 7 attempts to delineate the ways in which women were treated differently in bankruptcy and to which extent women acted independently, either as borrowers or lenders. In fact, women might have been much more involved in their husband's business activities or acted as independent actors than historians have so far given them credit for.

CHAPTER 1: INTRODUCTION

Principal and interest,
My debts great and small
Must one day be reckoned up!
All that I still owe
Is written in God's book
(...) See the guarantor
Who acquits you of all debts
What you, o Man, still owed on account
The Lamb's Blood – o great love!
Has discharged your debt
And settled you with God
Take care and do not forget
To use Mammon wisely.

Solomon Franck/ Johann Sebastian Bach,
Cantata BWV 168 (Leipzig, 1725)¹

I. Designing Rules for Failure

There are situations in life and in business in which strict adherence to rules causes more harm than good. Discretion is needed to mitigate the harshness of rules.² A debtor's bankruptcy is such a situation. Bankruptcy is the exception to a rule, shared among legal systems, prescribing that promises must be kept – *pacta sunt servanda*. A debtor's insolvency renders that principle void; he does not pay because he refuses to, but because he lacks the means to honour his multiple obligations.³ There is not enough for everyone.

The first problem bankruptcy laws address is the balance between creditors and debtors. If each creditor resorted to suing the debtor individually, attempting to seize the remaining assets,

¹ English translation by RICHARD JONES in DÜRR, ALFRED AND JONES, RICHARD DOUGLASS, *The Cantatas of J.S. Bach: With their Librettos in German-English Parallel Text* (Oxford, 2005), pp. 474-475, German original: Kapital und Interessen/ Meine Schulden groß und klein/ Müssen einst verrechnet sein./ Alles, was ich schuldig blieben,/ Ist in Gottes Buch geschrieben/(...) So schau den Bürgen an,/ Der alle Schulden abgetan!/ Was du, o Mensch, in Rechnung schuldig blieben;/ Des Lammes Blut, o großes Lieben!/ Hat deine Schuld durchstrichen/ Und dich mit Gott verglichen. (...)/ So sei bemüht und unvergessen,/ Den Mammon klüglich anzuwenden.

² As Cicero noted in his *De officiis: Summum ius summa iniuria*. The literal translation reads 'the highest law becomes highest injustice', meaning that a strict and obstinate application of written rules without considering their purpose and wider effects may lead to injustice.

³ SCHWEPPE, A., *Das System des Concurses der Gläubiger nach dem gemeinen in Deutschland geltenden Rechte* (Göttingen, 1829).

the result would be piecemeal liquidation on a first-come-first-served basis.⁴ Bankruptcy laws attempt to settle these cases in an orderly manner. Instead of first-come-first-served, the distribution of value among creditors is accomplished *pro rata*, i.e. in proportion to each creditor's legitimate claim.⁵ Bankruptcy therefore forces a degree of solidarity among creditors; they are expected to share the loss from their debtor's default to the extent that they are equal in rights.⁶ The declaration of bankruptcy transforms them into collective proprietors of the bankrupt's estate⁷; the debtor no longer has power over his assets.⁸

At the same time, bankruptcy laws offer a remedy for debtors. They draw a line beyond which a debtor cannot be forced to fulfil promises for which he lacks the means.⁹ If he undergoes a formal liquidation or reaches an amicable settlement with creditors, he will be acquitted of all remaining debt. Like no other legal institution, bankruptcy balances liability and forgiveness. A normative compromise is negotiated each time that a debtor and his creditors bargain for a debt-settlement.

The second problem that bankruptcy laws confront also concerns a normative compromise: the need to balance deterrence and continuity. Granting everyone a second chance irrespective of the circumstances of their failure would promote moral hazard. Yet a harsh bankruptcy regime threatens to liquidate viable firms prematurely and discourage businessmen from ventures that involve risk. Again, bankruptcy rules need to strike a balance between the strict enforcement and the relinquishing of rules.

⁴ GOODE, ROY, *Principles of Corporate Insolvency Law*, 2 ed. (London, 2008), pp. 62 and 74.

⁵ Cf. FINCH, VANESSA, *Corporate Insolvency Law : Perspectives and Principles*, 2 ed. (Cambridge, 2009), Chapter 2.

⁶ RADIN, MAX, 'The Nature of Bankruptcy,' *University of Pennsylvania Law Review and American Law Register* 89/1 (1940), pp. 1-9.

⁷ This is the approach in most civil law countries that might differ to the tradition of common law systems.

⁸ WENGLER, FRIEDRICH ALBERT, *Der Conkurs der Gläubiger nach Königlich Sächsischem Rechte unter vergleichender Berücksichtigung gemeinrechtlicher Grundsätze* (Leipzig, 1870), pp. 60-67, 91; FOERSTE, ULRICH, *Insolvenzrecht*, 2 ed. (Munich, 2004), pp. 72-79.

⁹ It has become widespread practice to use the feminine or the plural form in order to avoid an overly masculine and sexist language. I fully agree with the need to use a nuanced and balanced language in order to avoid perpetuating prejudices. However, since the majority of actors in my source material were male, since in fact the laws of the 19th century presumed that creditors and debtors were naturally men rather than women, I am going to keep the male form with the exception of sections that deal explicitly with women as debtors or creditors.

The epigraph partly deals with this predicament. It was a piece of literature that was not intended as scholarly discourse but for ordinary churchgoers. Yet it was no sermon either. Composers and librettists had artistic freedom in choosing their words and music. The text is related to a biblical passage: Matthew 18, 23-35, explaining the concept of generosity with a parable of debtor and creditor.¹⁰ Solomon Franck, Bach's librettist in this cantata, draws on financial terms to translate a complex theological concept – forgiveness – in vernacular language to which his audience could relate. He knew what he was writing about. Franck was a trained lawyer and a government official in Weimar, where he also managed the princely mint.¹¹

As a scholar the epigraph strikes me as noteworthy because of its equivocal use of financial terms. What is the debt the text is referring to? In the religious context one might assume that debt is synonymous with sin. And in the rhetoric of the church sin was universal; all the audience were sinners, and they knew it. Yet such a reading would be at odds with the rest of the cantata-text. In the preceding recitativo, the tenor describes human life in general, material and spiritual success, as a loan advanced by God, which must be repaid one day with interest. So it seems that it is not solely about sins, about moral transgressions; the text claims that everyone constantly deals with assets that do not ultimately belong to them.

The reliance on financial terms and civil law vocabulary makes one think about the analogies between the Christian doctrine of forgiveness and bankruptcy law. Words such as 'guarantor', 'discharge', or 'principal' are technical terms. Set in the religious and liturgical context, they become dubious because the central word, 'debt', has itself a double meaning in German; *Schuld* means both 'debt' and 'guilt'.¹² The question remains whether the text talks about interest to be paid on a contractual debt with God or punishment to be expected for our trespasses? Is this about making the most of those assets we are entrusted with, 'use mammon wisely' and become

¹⁰ ASKANI, HANS-CHRISTOPH, "Vergebung der Sünden IV. Systematisch-theologisch," in *Theologische Realenzyklopädie* 34, ed. GERHARD MÜLLER (Berlin, New York, 2002), pp. 678-686; GUTH, DELLOYD J., "The Age of Debt, the Reformation and English Law," in *Tudor Rule and Revolution: Essays for G.R. Elton from his American Friends*, ed. DELLOYD J. GUTH AND JOHN W. MCKENNA (Cambridge, 1982), pp. 70-82.

¹¹ CARL, BERTHEAU, 'Franck, Salomo,' *Allgemeine Deutsche Biographie* 7 (1878), pp. 213-214; HOFFMANN-ERBRECHT, LOTHAR, 'Franck, Solomo,' *Neue Deutsche Biographie* 5 (1961), pp. 320.

¹² SITZLER-OSING, DOROTHEA, "Schuld," in *Theologische Realenzyklopädie*, ed. GERHARD MÜLLER, 30 (1999), pp. 572-577 ; BOSSY, JOHN, *Christianity and the West* (Oxford, 1985), pp. 92-94.

successful? Or should it be translated into ‘use mammon virtuously’, i.e. ‘don’t cheat’? The liturgical context suggests the latter reading, yet both interpretations are possible.

To push the analogy even further: the cantata could be read as a warning to potential free riders that forgiveness is conditional. Repentance, the usual behaviour by which a sinner may ask for acquittal from their sins, is not mentioned in the text. It conveys an image in which the individual feels the burden of proof that their behaviour was diligent and considerate; the discharge, the settlement requires a third party, a guarantor. Similarly to the stance taken in the cantata-text, insolvency regulation sets boundaries for when and how a debtor may petition for bankruptcy. A debtor should ‘deserve’ the legal remedy. When drafting bankruptcy rules, lawmakers attempt to distinguish fraudulent bankrupts from ‘the honest but poor’ and they come up with different screening mechanisms.

I am investigating the conditions for creditors and debtors to settle a bankruptcy case under different German bankruptcy regimes during the nineteenth century. This period saw Germany’s legal framework fragmented; most of its laws originated from the early modern period, the time when the cantata was written. The economy that underwent substantial change through market integration and industrialisation challenged this legal framework. Actors in Germany had to deal with economic failure in an environment that was characterized by legal insecurity and the advent of new business forms.

I also explore a number of other issues. Firstly, bankruptcy was a product of urban specialisation. A number of legal historians have traced the origins of these laws back to city-states in Northern Italy during the 15th century. Urban markets and urban jurisdictions developed jointly. Cities were able to develop a sophisticated infrastructure with specialized courts, and assemble experienced jurists who worked together with merchants and merchant organizations. In nineteenth-century Germany, bankruptcy laws often remained communal statutes; in some cities such as Leipzig, Hamburg, Bremen, or Augsburg, they were seen as part of the fundamental laws holding together the civic community.

This leads to an issue that Craig Muldrew called the ‘sociability of credit’: ‘society [was] not just the positive expression of social unity through Christian love (...) but the cumulative unity of

the millions of interpersonal obligations which were continually being exchanged and renegotiated.¹³ With the extension of credit networks throughout the early modern period, many more people were drawn into the web of commercial obligations. Port and trading towns were connecting points in those webs, which largely consisted of informal sales credit. Lawmakers showed an awareness of the mutual interdependence of agents in commerce and trade, which was expressed in commercial legislation during the 18th and 19th century. Josef Kohler, an eminent law professor of the Berlin law faculty, wrote in 1891 in his historical account of German bankruptcy laws, that bankruptcy was distinguished from other laws by ‘its social character’. He used ‘social’ in the sense of communal and collective rather than ‘pertaining to society’ (as we understand it today).

In order to determine what a bankruptcy regime actually did, it needs to be studied within the wider set of economic institutions and organisations. Did lawmakers put the emphasis on punishment and deterrence, or did they offer arbitration and a second chance? Did merchants view it as a ‘civic death’ or was it a market-clearance mechanism? Bankruptcy was first and foremost a product of local structures and actors. This is different from how other economic historians have viewed it. Rather they concurred with economists who viewed bankruptcy as a ‘satisfactory barometer of business prosperity and depression.’¹⁴ The business literature took bankruptcy rates as a measure of success or failure and economists relied on bankruptcy statistics in part for constructing business-cycle indices.¹⁵ Only recently did economic historians develop a sense for the variety that bankruptcy rules took in different settings.¹⁶ The historical and cultural context mattered. The following chapters do not retain the assumption, that bankruptcy laws served the same purpose everywhere and at all times. Rather they ask, how the historical bankruptcy laws in Germany addressed the typical bankruptcy problems as outlined above and which other functions this kind of regulations might also have contained. To the extent that particular normative

¹³ MULDREW, CRAIG, *The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England* (Basingstoke, 1998), p. 123.

¹⁴ SILBERLING, NORMAN, 'British Prices and Business Cycles, 1779-1850,' *The Review of Economics and Statistics* 5/Supplement 2 (1923), pp. 223-247., quoted in: DUFFY, IAN PAUL HARRY, *Bankruptcy and Insolvency in London in the late 18th and early 19th century* (DPhil-Thesis Oxford, 1973), p. 164.

¹⁵ CARTER, RICHARD AND VAN AUKEN, HOWARD, 'Small Firm Bankruptcy,' *Journal of Small Business Management* 44/4 (2006), pp. 493-512.

¹⁶ KÖHLER, INGO, ed., *Pleitiers und Bankrotteure : Geschichte des ökonomischen Scheiterns vom 18. bis 20. Jahrhundert*, (Frankfurt am Main, 2012), p. 164.

and social settings shape a regulation, the mere frequency of bankruptcies should be anything but a clear proxy for economic success or failure.

Any study in social and economic history will rely – implicitly or explicitly – on models and theory in order to discover and interpret the empirical data. Some scholars emphasize the elegance of abstract models; others uphold that only empirical case studies yield meaningful insights. My reading of the sources is informed by economic and legal theories of bankruptcy. This theoretical understanding is laid out in Chapter 2. The actual investigation was a process of going back and forth between theory and source material, whereby the sources also started to speak to and adapt the theory. I hope that lawyers, economists, and historians alike can relate to this process.

II. Other Writers

a.) Legal History

Insolvency regulation has received less attention compared to the vast body of literature that exists for other aspects of private and commercial law in German history. An older generation of historians viewed bankruptcy legislation as part of the communal and municipal regulation and referred the topic to local and regional history.¹⁷ The legal historian Franz Wieacker described the 1877 national bankruptcy code, in German *Konkursordnung*, as one of the ‘best pieces of legislation’ of the newly founded German Empire.¹⁸ What exactly made it such a good piece of legislation he did not say. A short appraisal of the code’s history was first published at the event of its

¹⁷ RACHEL, HUGO, 'Die Handelsverfassung der norddeutschen Städte im 15. bis 18. Jahrhundert,' *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich* 34 (1910), pp. 983-1045; SCHORR, WALTER, *Zwangsvollstreckung und Konkurs im Recht der freien Reichsstadt Nürnberg* (Nürnberg, 1961); HELLMANN, FRIEDRICH, *Das Konkursrecht der Reichsstadt Augsburg*, ed. OTTO VON GIERKE (Breslau [Wrocław], 1905); PETERKA, OTTO, 'Hellmann, Friedrich, Zur Geschichte des Konkursrechts der Reichsstadt Ulm,' *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung* 31 (1910), pp. 465.

¹⁸ WIEACKER, FRANZ, *A History of Private Law in Europe with Particular Reference to Germany* (Oxford, 1995), p. 369; 1st edition in German WIEACKER, FRANZ, *Privatrechtsgeschichte der Neuzeit: unter besonderer Berücksichtigung der deutschen Entwicklung* (Göttingen, 1967)

centenary in 1977.¹⁹ By and large, the topic occupied only a niche existence in the works of legal historians and featured in encyclopedia entries and source collections.²⁰

The bankruptcy code from 1877 lasted until Germany's reunification. It was then replaced by the new 'insolvency order', *Involvenzordnung*. As the *Konkursordnung* from 1877 had become history, legal historians developed a new interest in its sources and development. At first, scholarship focused on bankruptcy as an issue of German state formation under Prussian hegemony and the judicature of the Leipzig based *Reichsgericht in Zivilsachen*.²¹ Subsequently the perspective was extended to earlier legislation aiming to provide an overview of the different bankruptcy legislation in force in Germany before unification.²² Wolfgang Forster investigated the reception of insolvency doctrine from Spanish law schools in the early modern period. He examined the ideas of the Spanish scholar Francisco Salgado de Momoza and his influence on German legal thinking.²³ More importantly, Forster's book contextualizes this development in the political and socio-economic climate after the thirty years' war in Germany. Forster shows that the bankruptcy procedure was an important instrument for impoverished noble families to keep their estates as one entity while placing them under the administration of their creditors.²⁴ Taking those accounts as important and helpful starting points, my own investigation moves away from a focus on doctrinal legal history and attempts to apply an economic history perspective to the topic. It is an attempt to account for the 'living law' and combine analysis of legislation with empirical data derived from historical sources.

¹⁹ UHLENBRUCK, WILHELM, "Ein hundred Jahre Konkursordnung," in *Ein hundred Jahre Konkursordnung 1877-1977*, ed. WILHELM UHLENBRUCK, BERN KLASMEYER, AND BRUNO KÜBLER (Cologne, 1977), pp. 3-34.

²⁰ OGRIS, WERNER, "Konkurs," in *Handwörterbuch zur deutschen Rechtsgeschichte*, ed. ADALBERT ERLER AND EKKEHARD KAUFMANN (Berlin, 1978), pp. 1038-1040.; DÖLEMAYER, BARBARA, "Kodifikation Deutschland," in *Handbuch der Quellen und Literatur der Neueren Europäischen Privatrechtsgeschichte III/2*, ed. HELMUT COING (Munich, 1982), pp. 1440-1625. grants the revision of German procedural law (*Zivilprozessordnung*) and the enactment of the German bankruptcy code half a page together.

²¹ MEIER, ANKE, *Die Geschichte des deutschen Konkursrechts, insbesondere die Entstehung der Reichskonkursordnung von 1877* (Frankfurt am Main et al., 2003); MÖLLER, KRISTINA, *Die Rechtsprechung des Reichsgerichts in Zivilsachen: Eine Untersuchung der Zuständigkeit und Organisation des Reichsgerichts sowie seiner Rechtsprechung im 19. Jahrhundert unter besonderer Berücksichtigung der Konkursanfechtung* (Paderborn, München et. al., 2001)

²² VOLLMERSHAUSEN, CHRISTIANE, *Vom Konkursprozess zum Marktberichtigungsverfahren. Das deutsche Konkursverfahren vom Jahr 1700 bis heute* (Münster, 2007)

²³ FORSTER, WOLFGANG, *Konkurs als Verfahren. Francisco Salgado de Momoza in der Geschichte des Insolvenzrechts* (Cologne 2009)

²⁴ *Ibid*, pp. 256-275.

Outside of Germany, the interest in the history of bankruptcy laws has been more pronounced. Bankruptcy and debtor's prison were prominent research topics for several generations of British historians.²⁵ Jeremy Bentham once described bankruptcy legislation as a crucial element of a 'nation of shopkeepers', of a specifically British culture in commerce and trade.²⁶ Ever since, this dictum has inspired inquiries into bankruptcy legislation by legal and cultural historians. Scholars in the U.S. had another incentive to study the historical development of their bankruptcy regime. The fact that Article 1 Section 8 Clause 4 of the United States Constitution authorizes the federal government to enact 'uniform Laws on the subject of Bankruptcies throughout the United States' elevated the issue of bankruptcy to the level of 'constitutional history'.²⁷

b.) Economic History

The interest of economic historians had been restrained by the nature of sources. Economic and social historians have a liking for quantifiable sources. But except for the past hundred years, bankruptcy statistics or even comprehensive contemporary collections of cases are rare. The economic historian was confronted with a mass of individual cases. Linking them together or deriving aggregate statistics proved difficult.²⁸ This changed with new computing techniques and digitalization, which made it easier to collect, access, and share large amounts of data.²⁹

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- ²⁵ HOPBIT, JULIAN, "The Use and Abuse of Credit in Eighteenth-Century England," in *Business Life and Public Policy*, ed. NEIL MCKENDRICK AND R. B. OUTHWAIT (Cambridge, 1986), pp. 64-78; KELLY, DAVID, "Insolvency in Eighteenth-Century Dublin," in *The Gorgeous Mask : Dublin 1700-1850*, ed. DAVID DICKSON (Dublin, 1987), pp; HANNAH, LESLIE, "The moral economy of business. A historical perspective on ethics and efficiency," in *Civil histories. Essays presented to Sir Keith Thomas*, ed. PETER BURKE, BRIAN HARRISON, AND PAUL SLACK (Oxford, 2000), pp. 285-299; LESTER, MARKHAM, *Insolvency and reform of English bankruptcy law 1831-1914* (Oxford, 1991); LESTER, MARKHAM, *Victorian Insolvency. Bankruptcy, Imprisonment for Debt, and Company Winding-Up in Nineteenth-Century England* (Oxford, 1995)
- ²⁶ ATKINSON, CHARLES, *Jeremy Bentham, his Life and Work* (London, 1905), pp. 184, 230; RUBIN, G. R., 'Debtors, Creditors, and the County Courts 1846-1914 : Some Source Material,' *Legal History* 17/1 (1996), pp. 73-81; QUILTER, MICHAEL, 'Daniel Defoe: Bankrupt and Bankruptcy Reformer,' *The Journal of Legal History* 25/1 (2004), pp. 53-73.
- ²⁷ SKEEL, DAVID, *Debt's dominion. A history of bankruptcy law in America* (Princeton, Oxford, 2001); COLEMAN, PETER, *Debtors and Creditors in America : Insolvency, Imprisonment for Debt, and Bankruptcy, 1607 - 1900* (Madison, 1974); BALLEISEN, EDWARD, 'Bankruptcy and the Entrepreneurial Ethos in Antebellum American Law,' *Australian Journal of Legal History* 8 (2004), pp. 61-82.
- ²⁸ GEHRMANN, MANFRED, "Konkurse im Industrialisierungsprozess Deutschlands" (Universität Münster, 1978).
- ²⁹ HANSEN, MARY ESCHELBACH, "Differences in Sources of Credit by Sector: A View from Bankruptcy Records, Mississippi 1926-1936," in *Enterprising America: Business, Banks, and Credit Market in Historical Perspective*, ed. WILLIAM COLLINS AND ROBERT MARGO (Chicago, 2015), pp. 179-212.

The new institutional economics further provided a stimulus to study bankruptcy laws. Arguing that institutions matter for the economy often relies on historical cases and examples.³⁰ As creditor and debtor rights are at the core of the institutional economics argument, historical regimes of lending and debt-enforcement have come into the focus.³¹ Over the past two decades a rich body of literature emerged, dissecting all sorts of different institutions and their role for the economy. A particularly useful aspect in consulting these authors lies in its comparative approach.³²

Patrick Fridenson called on business historians to study bankruptcies in an article from 2004. He suggested studying business failures with a Schumpertian view, to refine historians' understanding of failure as integral part of any entrepreneurial venture.³³ Two subsequent publications staked out the research field. Paolo Di Martino adopted the comparative approach to the study of bankruptcies in his study of Italy and England.³⁴ Jérôme Sgard used bankruptcy legislation as an example to contribute to the debate about legal origins.³⁵ These two publications mark the beginning of a series of new studies conducted by economic and business historians about bankruptcy laws in Europe and the US. My own investigation, too, owes to their approach and methodology.

³⁰ NORTH, DOUGLASS CECIL, *Institutions, Institutional Change and Economic Performance*, 27 ed. (Cambridge, 2009); WEINGAST, BARRY R. AND NORTH, DOUGLASS C., 'Constitutions and Commitment. The Evolution of Institutional Governing Public Choice in Seventeenth-Century England,' *The Journal of Economic History* 49/4 (1989), pp. 803 - 832.

³¹ Muldrew, *The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England*, 1998, ; CLAY, KAREN, 'Trade, Institutions and Credit,' *Explorations in Economic History* 34/4 (1997), pp. 495 - 521.

³² It should be noted, however, that in those comparisons, Germany is often depicted as an odd outlier, whether it was its peculiar system of cartels and universal banks, or Prussian public education programs: GUINNANE, TIMOTHY, 'Delegated Monitors, Large and Small: Germany's Banking System 1800-1914,' *Journal of Economic Literature* 40/1 (2002), pp. 73-124; ROE, MARK, 'German "Populism" and the Large Public Corporation,' *International Review of Law and Economics* 14 (1994), pp. 187-202.; LUCA, GIUSEPPE DE AND LORENZINI, MARCELLA, 'A Taxonomy of Infrastructure Financing in Europe in the Long Run 12th-18th Century,' *Entreprises et histoire* 70 (2013), pp. 10-36.

³³ FRIDENSON, PATRICK, 'Business Failure and the Agenda of Business History,' *Enterprise & Society* 5/4 (2004), pp. 562 - 582.

³⁴ DI MARTINO, PAOLO, 'Approaching Disaster: Personal Bankruptcy Legislation in Italy and England 1880 - 1939,' *Business History* 47/1 (2005), pp. 23 - 43.

³⁵ SGARD, JÉRÔME, 'Do Legal Origins Matter? The Case of Bankruptcy Laws in Europe 1808 - 1914,' *European Review of Economic History* 10 (2006), pp. 389 - 419.

The study of bankruptcy and debt-enforcement gathered further momentum in the wake of the financial crisis 2008.³⁶ With David Graeber's influential and popular book on debt, the topic reached a wider public and its scholarly discourse received new impulses.³⁷ Max Safley recently published a compendium about the history of bankruptcy in Europe that brings together various perspectives from different countries.³⁸ Important case studies on early modern trading towns and networks have bridged the disciplinary boundaries between economic history and cultural history.³⁹ Social historians have started to look at categories such as class and status and how these categories shaped the experience of debtors and creditors.⁴⁰

German bankruptcy laws in the 19th century still lack this attention. While the origins of the 1877 *Konkursordnung* are well documented, we know too little about the pre-unification bankruptcy laws and their effect on the industrializing German economy. Historians who wish to include Germany in their comparative accounts often focus on Prussia and take it as a *pars pro toto*, thereby discarding the complex patchwork character of the German legal system. My study intends to supply new insights concerning precisely those German states not previously studied.

c.) Law and Economics, Economic Analysis of the Law

For economists and lawyers, bankruptcy continues to be subject to both academic research and policy reform. The Law and Economics strand, which aims to connect the two disciplines, is

³⁶ GRABAS, MARGRIT, 'Die Gründerkrise von 1873/79 - Fiktion oder Realität? Einige Überlegungen im Kontext der Weltfinanz- und Wirtschaftskrise von 2008/2009,' *Jahrbuch für Wirtschaftsgeschichte/Economic History Yearbook* 52/1 (2011), pp. 69-96; CASSIS, YOUSSEF, *Crises and Opportunities: The Shaping of Modern Finance* (Oxford, 2010)

³⁷ GRAEBER, DAVID, *Debt. The First 5,000 Years* (New York, 2011)

³⁸ SAFLEY, THOMAS MAX, ed., *The History of Bankruptcy: Economic, Social and Cultural Implications in Early Modern Europe*, (London, 2013)

³⁹ HÄBERLEIN, MARK, "Merchant's bankruptcies, economic development and social relations in German cities during the long 16th century," in *The History of Bankruptcy: Economic, Social and Cultural Implications in Early Modern Europe*, ed. THOMAS MAX SAFLEY (London, 2013), pp. 19-33; SCHULTE-BEERBÜHL, MARGRIT, "The Risk of Bankruptcy among German Merchants in Eighteenth-Century England," in *History of Insolvency and Bankruptcy from an International Perspective*, ed. KARL GRATZER AND DIETER STIEFEL (Huddinge, 2008), pp. 61-82.

⁴⁰ VAUSE, ERIKA, "'The Business of Reputations': Secrecy, Shame, and Social Standing in Nineteenth-Century French Debtors' and Creditors' Newspapers," *Journal of Social History* 48 (2014), pp. 47-71; COQUERY, NATACHA, 'Les faillites boutiquières sous l'Ancien Régime: Une gestion de l'échec mi-juridique mi-pragmatique (fin XVIIIe - fin XVIIIe siècle),' *Revue Française de gestion* 8-9 (2008), pp. 341-358.

particularly relevant in this respect.⁴¹ Bankruptcy is an issue where experts from both disciplines find common ground.

The academic community of Law and Economics yielded influence on bankruptcy reforms in both the U.S. and the U.K. A famous debate took place in the *University of Chicago Law Review* in the late 1980s between two eminent insolvency scholars, Douglas Baird and Elizabeth Warren. Baird maintained that maximizing returns for creditors should be the ultimate goal of any bankruptcy regulation. He argued in favour of setting incentives for debtors to file for bankruptcy as soon as they experience financial difficulties while simultaneously giving creditors more control over how to realize value from the debtor's estates. Court intervention should be kept at a minimum; if in doubt, creditors 'know best'.⁴²

Warren criticized this view and emphasized the social dimension of bankruptcy, particularly for large firms with many employees. She identified a group of creditors that would not benefit from more creditor control and less court-intervention: 'involuntary creditors'. This group comprises employees and third parties that have been hurt by the firm's actions and want to claim damages. The costs of a firm's bankruptcy are also often felt by the wider community, most immediately through unpaid taxes but also through the dislocation and destruction of the whole enterprise and a loss of economic welfare.⁴³

Baird's summary of the debate, written ten years later in the *Yale Law Journal*, is a witty and concise description of the issues.⁴⁴ The Warren camp, which Baird labelled as 'traditionalists', included many practitioners arguing that bankruptcy law plays a special role in any legal system and advances distinctive goals. Baird and his acolytes, almost entirely academics, maintained that the bankruptcy system, like the rest of the legal system, must serve the ideal of free and perfect markets.

Law and Economics scholars have maintained the assumption that the system of the common law is the equivalent of efficient markets. Some authors created a quantitative measure for

⁴¹ ROE, MARK, 'Chaos and Evolution in Law and Economics,' *Harvard Law Review* 109/3 (1996), pp. 641-668.

⁴² BAIRD, DOUGLAS, 'Loss Distribution, Forum Shopping, and Bankruptcy,' *University of Chicago Law Review* 54/3 (1987), pp. 815-834.

⁴³ WARREN, ELIZABETH, 'Bankruptcy Policy,' *ibid.*, pp. 775-814.

⁴⁴ BAIRD, DOUGLAS, 'Bankruptcy's Uncontested Axioms,' *Yale Law Journal* 108 (1998), pp. 573-599.

creditor-protection in different capital-markets that should prove that the common law system had the best creditor protection. However, what exactly is understood as an efficient market those accounts frequently fail to define. As other scholars have pointed out elsewhere, some of the premises on which law is being analysed in those accounts are irrelevant for civil law countries.⁴⁵

A number of subsequent studies refined the comparative method of Law and Economics.⁴⁶ Work conducted by John Armour et al. created an extensive database on regulation of workers rights, debtor protection and investor relations as well as a sensitive and rigorous approach to numerical coding.⁴⁷

Sefa Franken draws on game theory and numerical coding to determine the efficiency of debtor vs. creditor-oriented bankruptcy regimes. She argues that a hard bankruptcy regime is creditor-friendly as it reinforces the monitoring and bonding functions of relational bank lending by making the bank's threatening power outside of bankruptcy a credible one.⁴⁸ The argument conceives of bankruptcy law as an incentive structure that also affects action outside of the courtroom and before lawsuits have been filed.

Beck et al. draw on a similar method to show why legal arrangements, in particular with regard to bankruptcy, matter for firms' access to capital. Beck et al. focuses on the independence of the judiciary and the adaptability of the legal system, trying to create a measure that applies to

⁴⁵ LAMOREAUX, NAOMI AND ROSENTHAL, JEAN-LAURENT, 'Legal Regime and Contractual Flexibility. A Comparison of Business's Organizational Choices in France and the United States During the Era of Industrialization,' *American Law and Economics Review* 7 (2005), pp. 28-61; REIMANN, MATHIAS, "Comparative Law and Economic Analysis of Law," in *The Oxford Handbook of Comparative Law*, ed. REINHARD ZIMMERMANN AND MATHIAS REIMANN (Oxford, 2006), pp. 839-866. ; LA PORTA, RAFAEL, SCHLEIFER, ANDREI, AND LOPEZ-DE-SILANES, FLORENICO, 'The Economic Consequences of Legal Origins,' *Journal of Economic Literature* 46/2 (2008), pp. 285 - 332.

⁴⁶ ARMOUR, JOHN, "The Law and Economics of Corporate Insolvency: A Review," in *Comparative and International Perspectives on Bankruptcy Law Reform in the Netherlands*, ed. REINHOUD VRIESENDROP, JOSEPH MCCAHERY, AND FRANK VERSTIJLEN (Den Haag, 2001), pp. 99-138.

⁴⁷ ARMOUR, JOHN et al., 'How Do Legal Rules Evolve? Evidence From a Cross-Country Comparison of Shareholder, Creditor and Worker Protection,' *European Corporate Governance Institute Law Working Paper* 129 (2009), pp. 1-55; ARMOUR, JOHN, DEAKIN, S. F., AND SIEMS, MATHIAS, 'Law and Financial Development: What are We Learning From Time Series Evidence?,' *Brigham Young University Law Review* 2009/6 (2009), pp. 1435-1500; ARMOUR, JOHN, HSU, AUDREY, AND WALTERS, ADRIAN, 'The Costs and Benefits of Secured Creditor Control in Bankruptcy: Evidence from the UK,' *Review of Law and Economics* 8/1 (2012), pp. 101 - 135.

⁴⁸ FRANKEN, SEFA, 'Creditor- and Debtor-Oriented Corporate Bankruptcy Regimes Revisited,' *European Business Organization Law Review* 5/4 (2004), pp. 645-675.

both common law and civil law countries.⁴⁹ Djankov et al. used the comparative Law and Economics approach for a survey of various debt-enforcement regimes across the world, in which insolvency regulation features as one remedy among many.⁵⁰

Despite all those attempts of formal modelling and quantitative measuring, Joseph Stiglitz's comments remain an important reminder of the intricate difficulty of quantifications. Stiglitz appreciates that inadequacies in bankruptcy laws are an important part of institutional weaknesses in financially developing countries. He points out that there cannot be a single, universal bankruptcy code: 'Any bankruptcy regime balances several objectives. (...) Bankruptcy laws have evolved over time. (...) Bankruptcy provisions, therefore, need to be tailored to the individual country and the circumstances.'⁵¹

III. Germany in the Nineteenth Century

'In the beginning was Napoleon.'⁵² The victory of the French armies shaped Germany for a long time. When Napoleon's armies seized territory after territory the Holy Roman Empire ceased to exist in 1806. In 1815, the congress of Vienna created something new: a German Confederation of independent states, whose constitutions ranged from free city-states to small principedoms and large territorial states. It also included Prussia and Austria, two major European powers, whose territories in the East extended beyond the borders of the Confederation. There was no universal legal system, neither within the Confederation, nor sometimes within individual states.

The fragmented German legal landscape had developed into this patchwork over centuries. Some historians regard those individual legal systems as subcategories of a common German legal culture with a shared legal history; other historians emphasize the differences and point to the variegated overlapping and interlocking of legal institutions and jurisdictions. This debate also intersects with a philosophical debate about the nature of the law. Jurists and historians in Ger-

⁴⁹ BECK, THORSTEN, DEMIRGUC-KUNT, ASLI, AND LEVINE, ROSS, 'Law and Firms' Access to Capital,' *American Law and Economics Review* 7 (2005), pp. 211-252.

⁵⁰ DJANKOV, SIMEON et al., 'Debt Enforcement Around the World,' *Journal of Political Economy* 116/6 (2008), pp. 1105-1149.

⁵¹ STIGLITZ, JOSEPH, "Bankruptcy Laws. Basic Economic Principles," in *Resolution of Financial Distress. An International Perspective on the Design of Bankruptcy Laws*, ed. STIJN CLAESSENS (Washington, 2001), pp. 1 - 24.

⁵² NIPPERDEY, THOMAS, *Deutsche Geschichte 1800-1866. Bürgerwelt und starker Staat* (Munich, 1984), p. 1.

many went to great length about this abstract issue since 1814, the days when the two jurists Savigny and Thibaut first discussed it.⁵³ Does the law develop from below, building on local customs and practices? Or does the law in all places follow a shared ideal that makes it distinctively German?

In more recent times, historians have come to view Germany as an indefinite region in the middle of Europe rather than a Nation-State in the proper sense.⁵⁴ The old debate, interesting and important as it may be, has been cast aside and legal historians now emphasize four developments. Not every part of the German region was equally exposed to each of them, but in some way or another, they all left their mark. The four developments were: (1) the reception of Roman law throughout the middle-ages, (2) the local community and corporative laws, particularly in autonomous market-towns, (3) large codification-projects of the so-called enlightened absolutism in the 18th century, and finally (4) French codes that had been introduced by Napoleon.

Ancient Roman law remained the basis of the legal order in Germany until the end of the 19th century. Roman law was learned law, i.e. the law of scholars, and it was attractive for a number of reasons. First of all, it was written, and therefore '*ius certium at finitum*'. More importantly, this written law became the '*ius commune*' in the scattered legal landscape of the old Empire. Whenever there was no local custom or written law at hand to settle a case, Roman law provided the 'default' rule. It was presumed to be universal, the law of the Emperor, the law of all parties.⁵⁵ The term *ius commune* referred to that body of law in any litigation whose applicability did not need to be proven. If a litigant alleged but could not prove that he or she had some right by local custom, and the court applied Roman law, this was *ius commune*. Accordingly, the content of the *ius commune* remained fluid from case to case and from region to region.

Local customs were the counterpart to the *ius commune* and simultaneously its complementary. Throughout the early modern period they retained their flavour of personal privileges. Local

⁵³ STERN, JACQUES, ed., *Thibaut und Savigny: zum 100jährigen Gedächtnis des Kampfes um einheitliches bürgerliches Recht für Deutschland, 1814-1914, die Originalschriften in ursprünglicher Fassung mit Nachträgen*, (Berlin, 1914).

⁵⁴ GREEN, ABIGAIL, "Political Institutions and Nationhood in Germany," in *Power and the Nation in European History*, ed. LEN SCALES AND OLIVER ZIMMER (2005), pp. 315-332; BREUILLY, JOHN, *Austria, Prussia and the Making of Germany 1806 - 1871*, 2 ed. (London, 2011); WEHLER, HANS-ULRICH, *Deutsche Gesellschaftsgeschichte*, vol. 1: Vom Feudalismus des Alten Reichs bis zur defensiven Modernisierung der Reformära 1700 - 1815 (München, 1987)

⁵⁵ WHITMAN, JAMES Q, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change* (Princeton, 1990)

customs derived from and were attached to a person's personal qualities (e.g. as a nobleman or a burgher of a town). They set out the right or liberty of a person to act or not to act. Law in this respect was personal property in the sense of inheritable, defeasible or assignable claims, which could be acquired through membership in a specific corporatist entity such as a guild, a town, a confessional branch, or a princely jurisdiction.⁵⁶

The old sources of law came under pressure from a new development: the so-called enlightened absolutism, which postulated that laws should be written down in clear and universal premises. German historiography sees this movement as an attempt of aspirational princes to gain the prerogative of legal interpretation, to curtail judicial powers, and create the new category of 'subjects'.⁵⁷ The resulting codification projects were also closely linked to the agenda of the enlightenment. Codification should make the law accessible to the public and create a consistent and logical system. Many highly skilled lawyers and theoreticians of natural law worked for absolutist rulers.⁵⁸ Merchants were often sympathetic to these codification projects as they promised legal certainty and were influenced by a mercantilist spirit – although not always a mercantile one.⁵⁹

The Napoleonic codes were to some degree a development of this codification movement. Yet the codes were also something genuinely new. Firstly, they broke with the society of the Ancien Régime and adopted the values of the French Revolution. Equal treatment by the law, separation of church and state, emancipation of Jews, freedom of trade – these were radical reforms.⁶⁰ The so-called *Cinq-Codes* were introduced in Germany where French troops occupied territories and in states that became allies of Napoleon. Particularly important was the *Code de Commerce*, which remained in force for most of the century in the Rhineland. Even though the

⁵⁶ MERTENS, BERND, 'Das Verhältnis von Handelsgewohnheitsrecht zu Gesetz und Verkehrssitte (Usance) im 19./20. Jahrhundert,' *Zeitschrift für Neuere Rechtsgeschichte* 37/1 (2015), pp. 68-79.; COING, HELMUT, *Epochen der Rechtsgeschichte in Deutschland*, 4 ed. (Munich, 1981), pp. 29-33; Wieacker, A History of Private Law in Europe with Particular Reference to Germany, 1995, pp. 143-147.

⁵⁷ DEMEL, WALTER, *Vom aufgeklärten Reformstaat zum bürokratischen Staats-Absolutismus* (München, 1993); BIRTSCH, GÜNTER, WILLOWEIT, DIETMAR, *Reformabsolutismus und ständische Gesellschaft*, vol. 3 (Berlin, 1998)

⁵⁸ KARST, THOMAS, 'Der Einfluss von Carl Gottlieb Svarez auf die preußische Gesetzgebung,' *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung* Bd. 120 (2003), pp. 180-199.

⁵⁹ BUCHNER, THOMAS, 'Arbeit, Ordnung - Produktivität? Ein Vergleich von niederländischem Merkantilismus und deutschsprachigem Kameralismus im 17. Jh.," in *Konzepte von Produktivität im Wandel vom Mittelalter in die Frühe Neuzeit*, ed. CORINNA LAUDE AND GILBERT HEB (Berlin, 2008), pp. 315 - 344.

⁶⁰ ACEMOGLU, DARON et al., 'The Consequences of Radical Reform: The French Revolution,' *American Economic Review* 101/7 (2011), pp. 3286-3307.

Rhineland became part of Prussia after 1815, Prussian law did not replace French law. The new Prussian bankruptcy law in 1855 for example did not affect the *Code de Commerce* in the Rhineland. A similar situation arose in the former Electoral Palatinate, a region between Landau and Speyer, which had become part of the Bavarian Kingdom after 1815, yet retained French law for most of the 19th Century.⁶¹ The laws of the Grand Duchy of Baden were in large parts a literal translation from the French.

IV. Sources and Methods

An interdisciplinary approach to historical bankruptcy laws seeks to combine economic history and legal history. It takes the analysis of law-texts and scholarly literature and an understanding of the evolution of legal doctrine from legal history. It also follows the convention of distinguishing between private and public law as far as it makes sense for the respective time and place. Finally, legal history in Germany is always simultaneously a form of intellectual history. The development of law has always been a joint venture of professors at German law faculties, judges, and government officials. Some actors even united those three roles in one person. Textbooks written by law professors therefore provide important explanations of the original legislation.

Economic history, on the other hand, offers a different toolbox: it employs quantitative methods and has the empirical analysis guided by economic theory. Theories of semi-public goods and entrepreneurship are particularly relevant for studying bankruptcy regulation. Quantitative data could be extracted from court records and the resulting descriptive statistics serve as an entry point for the analysis.

Chapter three resorts to a statistical measurement taken from Law and Economics in order to compare different German bankruptcy laws. Each law was assigned scores for debtor protection and creditor protection, in order to make these laws comparable despite their differences in form and detail. Such index scores serve descriptive purposes and need to be used in conjunction with other techniques of approaching and understanding legal texts. Most of the other chapters

⁶¹ SPAULDING, ROBERT MARK, 'Revolutionary France and the Transformation of the Rhine,' *Central European History* 44 (2011), pp. 203 - 226; CONRAD, HERMANN, "Preußen und das französische Recht in den Rheinlanden," in *Recht und Rechtspflege in den Rheinlanden*, ed. J. WOLFFRAM AND A. KLEIN (Cologne, 1969), pp. 78-113.

work with a combination of quantitative and qualitative evidence, where the descriptive statistics help tracing trends and developments or make the working of the bankruptcy regime visible. Evidence from individual cases, in which actors' voices are more lively and rich in detail, complete the picture. Some of these documents were private accounts, others were written for formal occasions such as a court hearing.

The sources come from a range of different German states and cover the time period from 1815 to 1871. On the Congress of Vienna in 1815 the German Confederation was founded as a group of 39 sovereign states, coordinating their policies at the *Bundestag* in Frankfurt. The endpoint of this time-period, 1871, is the foundation of the new *Kaiserreich* following the Franco-Prussian war 1870/1871. The *Kaiserreich* replaced the old Confederations, unified the various independent German states and aimed to absorb them into a centrally run Nation State and a national Monarchy.⁶² Legal harmonization was part of these state building efforts.

Rather than a complete taxonomy of bankruptcy laws across the whole of the 39 German states, I chose some representative jurisdictions. The sample covered in this thesis includes the Kingdom of Saxony, the four free Cities, the Grand Duchy Hessen-Darmstadt, and the Rhineland. One motivation for selecting these jurisdictions was to supply a non-Prussian view on the German bankruptcy regimes. The geographer Wilhelm Heinrich Riehl became famous for distinguishing Germany into three parts: North, South, and the Middle. The North and the South, represented by Prussia and Austria respectively, he called 'centralized country'. He called Middle Germany, with its smaller and middle-sized polities, autonomous towns, and scattered jurisdictions, the 'individualized country'.⁶³ In picking the above jurisdictions, I focus on those smaller- and middle-sized but nonetheless economically important parts of Germany. The four free cities were important trading hubs. Hessen, Saxony, and the Rhineland included important urban centres such as Cologne, Leipzig, and Mainz/Darmstadt. Each of these states was also among the first to industrialize in Germany. I confide that the availability of sources also determined the selection of jurisdictions.

⁶² Nipperdey, *Deutsche Geschichte*, 1984, pp. 768-790; STOLLEIS, MICHAEL, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 2 (Munich, 1992), pp. 438-442.

⁶³ RIEHL, WILHELM HEINRICH, *Land und Leute*, 2 ed. (Stuttgart, 1855), quoted in MINTZKER, YAIR, *The Defortification of the German City 1689-1866* (Cambridge, 2012), p. 18.

a.) Court Records as an Historical Source

Court records provide rich data and a good entry point for studying bankruptcy.⁶⁴ For one, they often contain the files of original bankruptcy cases, which reveal the law's application and thus also indicate where it differed from the law on the books. Furthermore, courts collected all sorts of information, even if it was not related to a formal lawsuit. Courts were often asked to give approval of debt settlements that had been negotiated privately. Commercial courts also collected information pertaining to the founding or dissolution of firms. Because courts sought to formalize and standardize procedures, the records are often suited to both quantitative and qualitative analysis.

There are, however, a number of caveats. Insofar as they contain actual lawsuits, they include only those cases where parties could not agree on a solution by themselves. The tone of those files is adversarial. What is more, the sample remains self-selected. Going to court has always been costly and time intensive. Parties who brought a matter before a judge were usually able to afford these costs.⁶⁵

Court cases rarely contain any personal notes or autobiographical evidence. Law texts and legal literature (commentaries and treatises) use a form of technical language that seems bloodless and hermetically sealed. Similarly, court files and records follow repetitive and formulaic language patterns. These language patterns in law are to some extent designed to reduce ambiguities, which is why they leave out everything that goes beyond the technical legal terms.⁶⁶ The personal story behind a court case is often only indicated between the lines.

A more practical problem emerges with respect to the availability of court records. Archivists seeking to maintain control over the size of their collections regularly disposed of legal records in their holdings before anyone came up with the idea of compiling judicial statistics.⁶⁷ Court statistics as well were few and far between in Germany of the nineteenth century. Not

⁶⁴ Though a number of German legal historians have studied jurisdictions in the Holy Roman Empire, the working of courts in the nineteenth-century has received little attention.

⁶⁵ FEINSTEIN, C. H. AND THOMAS, MARK, *Making history count : a primer in quantitative methods for historians* (Cambridge, 2002), pp. 117-119.

⁶⁶ cf. GEPHART, WERNER, *Recht als Kultur. Zur kultursoziologischen Analyse des Rechts* (Frankfurt am Main, 2006), p. 289-299.

⁶⁷ SPERBER, JONATHAN, *Property and Civil Society in South-Western Germany 1820-1914* (Oxford, 2005), Appendix.

even the Prussian administration, so often praised for its organizational skills, compiled judicial statistics on a regular basis before the 1860s.⁶⁸

Where the real court files were preserved, other practical problems arise. In most cases, we cannot be sure that the collection is complete, while the material simultaneously exceeds the limit of what can be handled by one researcher in a given time. Having said this, court records remain the most detailed source for studying bankruptcy. In addition, the use of courts and their functioning is similarly important in assessing the working of a bankruptcy regime. Cases brought before the court by those who could afford to make use of the courts on a regular basis reveal something about these particular people as well as about those, who are absent. Moreover, the application of the law in courts was the backdrop against which out-of-court bargaining occurred.

Fortunately, archival records for the Hanse towns are particularly rich as far as bankruptcy is concerned. There, merchant corporations and specialized commercial courts kept lists of all firms and persons who filed for bankruptcy and whether or not they reached an out-of-court agreement. In Bremen, these lists included the periods from 1849-1879 for the higher court (*Obergericht*), and 1814-1867 for the lower court (*Untergerecht*).⁶⁹ In Hamburg, the merchant guild (*Commerzdeputation*) kept lists for the years 1804-1835 and 1849-1870 for both the commercial court and the lower city court. The actual court files from the commercial court were stored at the Hamburg state archive until the 1920s. When the archivists started to make space in the shelves, they fortunately compiled a card-index, referencing each file and some benchmark information about the case before destroying the files. I have transcribed all cards between 1850 and 1869. For both cities, Bremen and Hamburg, datasets have been compiled that extract the quantifiable data from those records. Table 1 gives an overview of the size and the variables of those datasets.

Table 1 Dataset Derived from Archival Material in Hamburg and Bremen

Hamburg Merchant Guild	Hamburg Commercial Court	Bremen
------------------------	--------------------------	--------

⁶⁸ VON KAMPTZ, KARL ALBERT, ed., *Jahrbücher für die preußische Gesetzgebung, Rechtswissenschaft und Rechtsverwaltung*, vol. 1-66, (Berlin, 1820-1846) are in this respect a complete exception and even in Prussia, court statistics were compiled only sporadically.

⁶⁹ StAHB Ratsarchiv D.11.b.1.d Vol. 1-2.

Time Period	1804-1835; 1850-1870	1850-1869	1819-1823; 1849-1879
Observations	8,881	1,016	1,113
Variables	Date of insolvency Name of debtor Name of debtor's Firm Gender Religion Classification Rate of debt recovered Whether or not acquitted Jurisdiction (commercial court or lower court)	Date of insolvency Name of debtor Name of debtor's Firm Gender Religion Classification Rate of debt recovered Whether or not acquitted Size of debt Number of creditors Reasons for bankruptcy Outcome of procedure Date of end of procedure	Date of insolvency Name of debtor Name of debtor's firm Gender Religion Form of procedure Jurisdiction Date of end of procedure

The descriptive statistics derived from the dataset provide an entry point for the further analysis. Whenever possible, the study also takes recourse to correspondence found in those court files in order to complement the quantitative evidence.

Similar sources for other parts and towns of Germany are missing or at least very hard to locate. In order to widen the perspective beyond the borders of the Northern Hanse towns, I drew on different source materials. The Saxon state archives in Leipzig and Dresden keep many original bankruptcy cases in their holdings. This is bulky material as some of these files contain literally everything, from the stamps used for sending the bankruptcy petition to lengthy correspondences between judges and trustees. I used this material to extract quantifiable data comparable to the abovementioned dataset as well as to trace back the interaction between creditors and debtors that remains concealed in statistical sources.

Another source that reported on bankruptcy cases was law journals. If a case came before a court of appeal or touched on a particularly contentious issue, the judgment that settled this case was regularly published in law journals, giving the judges' reasoning and revealing some of the cases' characteristics. Among the German law journals the *Archiv für Zivil- und Kriminalrecht für die Königlich Preussischen Rheinprovinzen* is the most consistent in reporting the outcome of appeal cases

on the issue of bankruptcy. Note though that the journal only reported for the jurisdiction of the Rheinland. In addition to the Rheinland and Saxon cases, I also consulted the files on record for the court of appeal in Frankfurt. Frankfurt was another free city in Germany and the city-states maintained a joint court of appeal in Lübeck. The history of the court is well-documented and complete inventories for its decisions and the underlying cases exist. Cases from all three jurisdictions – Frankfurt, Rheinland, and Saxony – were entered into another database. The real value of these cases lies in their rich and elaborate personal correspondences in which parties argue with each other, often at a normative level. Figure 1 below shows the structure and the variables of this database. Table 2 on the next page gives an overview of the number of observations and the variables entered into the database. The database is a relational SQL database that makes it possible to search for certain combinations of characteristics.

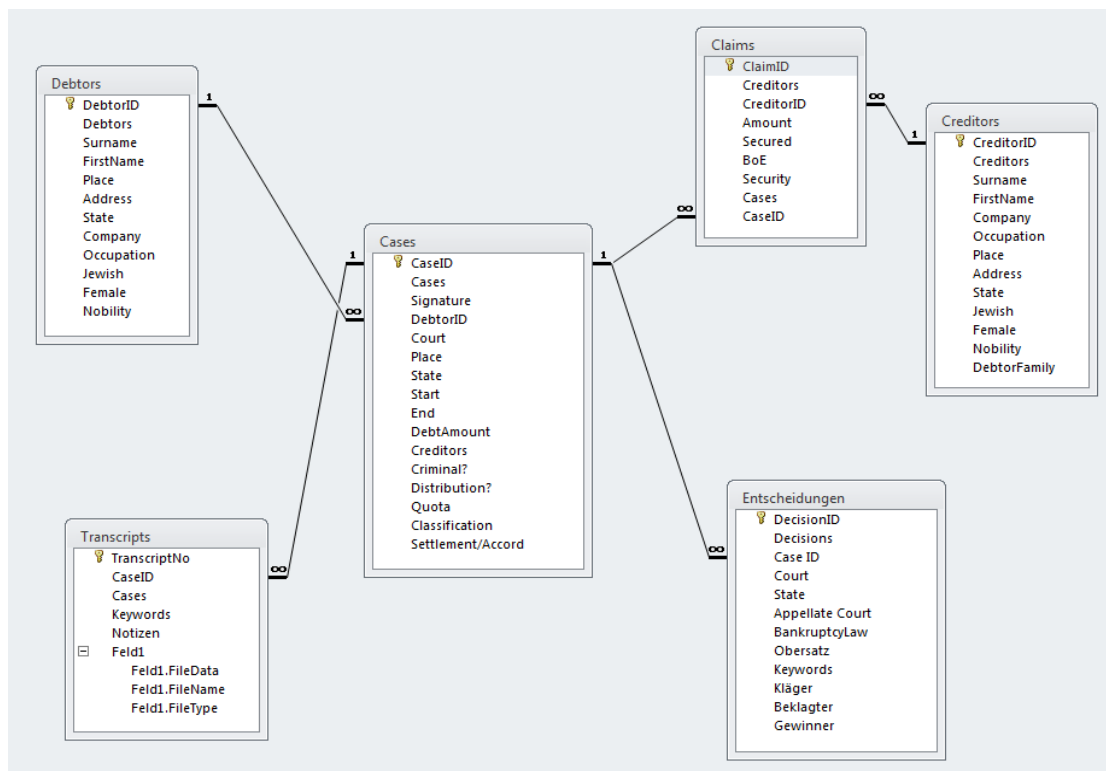


Figure 1 Structure of Relational Database
Composed with an SQL Database

Table 2 Observations and Variables in Case-Database for Germany 1815-1870

Jurisdiction	Debtors	Creditors	Debtor Variables	Creditor Variables	Case Variables
Rhineland	224	224	Name	Name	Date of beginning
Frankfurt	36	41	Place & State	Place & State	Date of closure
Haniel	15	1	Occupation	Occupation	Debt amount
Saxony	7	6	Company	Company	Number of creditors
Württemberg	2	-			Whether or not value was distributed
Prussia	6	13	Sex	Sex	% of debt recovered
Hesse	7	-	Religion	Religion	Whether or not a settlement was reached
Other	10	13	Nobility	Nobility	
			Filed together with wife	Size of the Claim	
				Claim was secured, if yes type of security	
				Claim was based on a bill of exchange?	

b.) Business Archives

Even if a firm never goes bankrupt, its business archives may reveal the perspective of a creditor. In the course of a firm's lifetime, its owners experience the failure of business partners and the default of other debtors. I was granted access to three business archives, including two banks and an industrial conglomerate. All three companies were founded in the eighteenth century. Bethmann Bank advanced to become one of Europe's prime financier for railways; Franz Haniel became one of Germany's first 'Ruhr Barons'; and the Frege Bank gradually declined and was eventually absorbed by a competitor.

aa.) Gebrüder Bethmann, Frankfurt

The Bethmann family is closely linked to German history. The brothers Simon Moritz and Johann Philipp founded the bank in 1748. It still exists today. At the beginning of the nineteenth century Simon Moritz junior led the house to become one of Frankfurt's most eminent banking institutions. For his services in placing Austrian government bonds on the Frankfurt market, he

was later raised into Austrian aristocracy. Under his son Moritz von Bethmann's leadership the bank began to invest in new manufacturing technologies and financed railway construction both within Germany as well as abroad.⁷⁰ Moritz von Bethmann was also involved in the foundation of the *Darmstädter Bank*, the *Frankfurter Bank*, and the *Bank für Handel und Industrie* Berlin. The Bethmann Bank continued as a family business until 1976, when it merged with the Bavarian Bankhaus Maffai. Today the Bethmann Bank AG is part of the Dutch ABN AMRO Group.⁷¹ The records of the *Gebrüder Bethmann* Bank are stored in the Frankfurt city archives.⁷²

bb.) Franz Haniel & Cie. GmbH, Duisburg

The Franz Haniel & Cie. GmbH dates back to the year 1756 and started as a haulage firm. Franz Haniel senior moved the business into coal mining and ironworks around 1805.⁷³ Franz subsequently turned into what is known in Germany as a 'Ruhr Baron': a merchant commanding large industrial conglomerates, commanding shares in multiple firms and combining an entire supply chain from mining to smelting furnaces to ironworks and finally machine building. Franz Haniel senior died in 1868 and was succeeded by his son Hugo Haniel, who paved the company's way into its current form: a large holding that owns multiple firms, run by a professional management separately from the Haniel family, which still owns all of the company's shares.⁷⁴ The Franz Haniel & Cie. GmbH today ranks as the fourth biggest family owned company in Germany more than 12.000 employees and 3.8 billion Euros in revenues in 2015.⁷⁵ The records of the company under Franz' and Hugo's leadership are preserved in a private family archive at the company's headquarters in Duisburg.

⁷⁰ HELBING, CLAUS, *Die Bethmanns. Aus der Geschichte eines alten Handelshauses zu Frankfurt am Main* (Wiesbaden, 1948).

⁷¹ <https://www.bethmannbank.de/de/bethmann-bank/geschichte-der-bethmann-bank/index.html> (retrieved 18.11.2016).

⁷² A different branch of the family must not be confused with the Frankfurt based bankers. Susanne von Bethmann, Simon Moritz junior's sister, married the Frankfurt merchant Johann Jakob Hollweg. Their children later carried the name Bethmann-Hollweg and became high-ranking politicians, law professors, and civil servants. Susanne's great-grandson, Theobald von Bethmann-Hollweg, was German Chancellor from 1909 to 1917.

⁷³ FEIDEN, MAX KARL AND FRANZ HANIEL UND CIE., eds., *Haniel*, (Duisburg, 1956).

⁷⁴ HAROLD, JAMES, *Familienunternehmen in Europa - Haniel, Wendel und Falck* (Munich, 2005).

⁷⁵ <https://www.haniel.de/unternehmen/profil/kennzahlen/> (retrieved 18.11.2016).

cc.) Bank- und Handelshaus Frege & Co., Leipzig

In 1739, Christian Gottlob Frege founded the trading house Frege & Co in Leipzig. Christian Gottlob was a merchant banker: he traded with commodities, mostly fish from the Baltics and fruit from eastern Europe, while simultaneously advancing credit and loans to clients. His firm eventually turned into a discount house for foreign bills of exchange and his banking activities made him a central figure in the Leipzig mercantile community.⁷⁶ The elector-prince of Saxony later solicited his advice in fiscal matters and relied on his services when issuing bonds for the Saxon state. The *Bank- und Handelshaus Frege & Co* continued operations under the leadership of Frege's sons but its importance declined toward the second half of the nineteenth century as other bankers proved more adept financiers of industrial ventures in Saxony.⁷⁷ The preserved records of the bank are on record in the Saxon State Archives in Leipzig.

c.) Other Primary Sources

The respective bankruptcy laws in force at a jurisdiction at a given time are texts that employ a particularly formalized language that is rooted in its time and circumstances. Their analysis needs to be complemented by consulting scholarly literature written by contemporary lawyers and merchants. In a number of textbooks and law commentaries, jurists described how laws were best applied and gave their suggestions for legal reform. Less frequent but nonetheless useful were printed merchant handbooks, giving advice to merchants on a wide range of topics, starting from accounting matters on to insurance issues and finally to bankruptcy law.

Bankruptcy reform came repeatedly on the political agenda, although it failed until after the foundation of the Nation State in 1871. Ministers charged committees to file reports on the current state of bankruptcy within their jurisdiction and gather expert opinions on reform proposals. Some of those ministerial reports were conserved. They include the Prussian reform attempts in the 1830s, the law-reform debates in the Frankfurt national assembly of 1848/1849, the Prussian bankruptcy reform in 1854, the Lübeck bankruptcy reform of 1862 and the drafts for the nation-

⁷⁶ FRANKE, ANNELORE, 'Frege, Christian Gottlob,' *Neue Deutsche Biographie* 5 (1960), pp. 390.

⁷⁷ WEBER, DANNY, *Das Handels- und Bankhaus Frege & Comp. in Leipzig* (Stuttgart, 2008).

al bankruptcy code in 1874. Table 3 summarizes the various source materials and their use in this thesis.

Time and again, reports and statistics will state debt amounts in local currencies. Germany lacked a uniform currency until 1870. Whenever quoting original sources, I left the amounts in the original currencies. Only in the case where statistics included cases from various jurisdictions and multiple currencies, the sums were converted into *Reichstaler Preußisch Corent*, which was simultaneously the reference currency in the German Confederation, the *Vereinstaler*. A table with exchange rates is included in Appendix A. It lists the three most frequently quoted currencies: South-German Guilders, the Prussian Taler and the Hamburg Mark Banco. Exchange rates are taken from Denzel's Handbook of Historical Exchange Rates (2010).⁷⁸

⁷⁸ DENZEL, MARKUS, *Handbook of World Exchange Rates, 1590-1914* (Farnham, 2010).

Table 3 Overview of Source Material			
Category	Qualitative Use	Quantitative Use	Chapters
Laws	Close Reading of Law Texts	Numerical coding to assign index scores	3 to 7
Legal Scholarship	Textbook, Assessment of laws		
Court Rulings Published in Law Journals	Content of Decisions, Judge's Reasoning	Case Database	6, 7
Court Records from Hanse Towns		Case Database	4, 5
Case Files from Archives	Correspondence, Trustee's reports etc.	Case Database	4 to 7
Business Archives	Correspondence, Trustee's reports etc.	Case Database	6, 7
Ministerial and Parliamentary Minutes	General assessment of legal reform		3 to 6

CHAPTER 2: THE PROBLEM OF BANKRUPTCY

L'opposition entre le système latin et le système germanique s'explique par l'idée de justice individuelle en France et l'idée de la prédominance de l'intérêt public en Allemagne.⁷⁹
Tibor Nicolas Léh, *La faillite dans le droit européen continental* (Paris 1932)

I. Introduction - Public or Private Interests?

Tibor Nicolas Léh wrote his doctoral dissertation at the Faculty of Law at the University of Lyon in 1932 on the newly enacted bankruptcy code in Yugoslavia.⁸⁰ The first part of his book is a comparative survey of different European bankruptcy laws and their underpinning principles. He distinguished between two families of laws: countries in the Latin tradition and countries in the Germanic tradition. According to Léh, the separating characteristic was that in the Latin tradition, bankruptcy was part of substantive commercial law, confined to a specific occupational group and subject to the institutions that governed commercial law. Countries of the Germanic tradition, on the other hand, framed bankruptcy as part of their procedural law, i.e. the rules regulating how disputes could be brought before and discussed in court. Moreover, the German legal family had gradually enlarged the scope of these laws:

Dans le pays appartenant au groupe latin, la faillite est considérée comme une institution spéciale au droit commercial. (...) Les lois appartenant au groupe germanique nous montrent l'évolution de l'extension de la faillite et les diverses phases par lesquelles elle a passé. Dans ces pays, la réglementation différait suivant que le débiteur appartenait à l'une ou à l'autre catégorie.⁸¹

⁷⁹ Léh, 1932, p. 29: The opposition between the Latin [legal] system and the Germanic system rests on the idea of individual justice in France and the idea of a predominance of the public interest in Germany.

⁸⁰ Full title : LÉH, NICOLAS, *La faillite dans le droit européen continental. Comparaison des principales lois des groupes latin et germanique présentée dans le cadre de la plus récente loi européenne d'ensemble (Loi yougo-slave de 1929)* (Paris, 1932).

⁸¹ Léh, 1932, p. 27: In those countries belonging to the Latin group, bankruptcy is considered a special institution of commercial law. The laws of those countries belonging to the Germanic group present us with an evolution of an extended bankruptcy law and the different phases through which it went. In these countries, the regulation differed depending on whether the debtor belonged to one or another category.

He concluded that French law and all legislations in its tradition were predominantly concerned with supplying legal remedies to individuals who faced severe losses from the insolvency of their debtor – in short: creditor protection. In contrast, he described the German bankruptcy code as governed by an overarching idea of the ‘public good’ or the ‘public interest’ (see the quotation above).

Léh’s observation is noteworthy because it ties the rather technical subject of bankruptcy laws back to its underpinning normative axioms. His assessment further calls attention to both the problem of bankruptcy and the problem of studying bankruptcy. This chapter endeavours to deal with both.

Whenever societies allow individuals to use the concept of debt for their promises, they face a dilemma between discretion and control. It concerns the extent to which a lender can hold a borrower responsible for unfulfilled promises. Promises should be fulfilled; lenders should be able to reasonably weigh the risks of lending. Yet, the (modern) law does not enforce *any* promises; it would not go as far as allowing creditors to extract a pound of flesh from a defaulting borrower. Bankruptcy legislation tries to solve this problem. It needs to balance partially contradicting goals that arise in the event of financial failure: creditors want repayment; debtors want relief from the debt burden; both parties prefer not to embark on a costly court procedure; authorities want parties to settle their disputes under the wings of their jurisdiction instead of relying on private enforcement (which could include extracting a pound of flesh); and people related to the debtor, e.g. family and employees, want their interests acknowledged when the bankrupt’s estate is liquidated. Each of these goals can often only be implemented at the expense of one of the other goals. If a debtor had only one single creditor, ordinary debt collection laws apply. The typical dilemmas that bankruptcy legislation attempts to solve arise from the plurality of creditors. According to Max Radin’s seminal article from 1940, this plurality of creditors is the defining characteristic of bankruptcy.⁸²

The coming together of different stakeholders, whose claims may vary in enforceability and nature, requires coordination. Although even a plurality of creditors might find an amicable solu-

⁸² Radin, ‘The Nature of Bankruptcy,’ 1940, p. 5.

tion on their own, this task is much harder to accomplish without an organization providing guidance, rules, and promises to enforce whatever deal is reached. The exact design of a bankruptcy regime can take myriad forms. It can be done entirely out of court, as long as the contracting members agree in advance on the rules that govern in bankruptcy or subject themselves to the same code of conduct. Or it can rely entirely on authorities' intervening and sorting out things.

This leads to the problem of studying historical bankruptcy laws. Legal scholars nowadays often have firms in mind, and they are interested in achieving an 'optimal' balance of interests between debtors and creditors.⁸³ They seldom inquire about the social and cultural embeddedness of a given bankruptcy regime. Historians, on the other side, often are immersed in their micro-analysis of case studies that prevents them from deriving more general interpretations or falsifiable hypotheses.⁸⁴ This chapter ventures to combine the legal perspective on bankruptcy, economic analysis, and historical understanding to analyse historical bankruptcy regimes.

Léhs quotation provides the vantage point: the distinction between 'the private' and 'the public' interests. It denotes the two poles of a spectrum that contains many mutations in between. Mutations and gradual *évolution* is what one has to deal with in the case of nineteenth-century German history. The 39 different German polities had a certain degree of cultural and linguistic homogeneity and a large degree of economic and legal diversity. As such, they are a laboratory to study the embeddedness of bankruptcy regimes in their respective community.⁸⁵ They simultaneously challenge the tendency to generalize about legal families or portray legal systems in national stereotypes.

⁸³ GORDON, GREY: Optimal Bankruptcy Code: A Fresh Start for Some, working paper presented at Indiana University, September 8 2014, available:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2494888 ; Armour, The Law and Economics of Corporate Insolvency: A Review, 2001, pp. 107-110.

⁸⁴ For a good discussion of this methodological problem for historians see: WICKHAM, CHRIS, "Problems in Doing Comparative History," in *Challenging the Boundaries of Medieval History: the Legacy of Timothy Reuter*, ed. PATRICIA SKINNER (Turnhout, 2009), pp. 5-28.; this is not to discredit the value of insightful case studies such as collected in GRATZER, KARL AND STIEFEL, DIETER, eds., *History of Insolvency and Bankruptcy*, (Huddinge, 2008).

⁸⁵ On the notion of embeddedness see: GRANOVETTER, MARK, 'Economic Action, Social Structure and Embeddedness,' *American Journal of Sociology* 91/3 (1985), pp. 481 - 510.

II. Bankruptcy is Best Described as a Social Process

There is a difference between simply being strapped for cash, mere debt-enforcement and bankruptcy. Anyone can encounter periods of illiquidity, which does not necessarily lead to legal action. Simple debt collection can be done privately, which sometimes may take the form of bullying and intimidating the debtor. Or it can be done by relying on public authorities and the courts. Bankruptcy regimes on the other hand affect the relationship between the debtor and the entirety of his creditors as well as the relationship between each individual creditor and all other creditors.⁸⁶ And this is why it furnishes a collective setting and takes recourse to the mediating role of an authority or organization. Bankruptcy is first and foremost a procedure with many parties involved, and as such is a social process.⁸⁷

Once the procedure is triggered, the rights of claimants are stayed and the debtor's financial situation is sorted out in an orderly manner.⁸⁸ That is the essence of the procedure. It admits actors into a special legal sphere, where they are being assigned roles with a predefined menu of permissible actions. They can be stuck in this sphere for many years.⁸⁹ Figure 2 below represents a simplified version of a nineteenth-century bankruptcy procedure. It identifies four stages, which can – in one way or another – be detected in almost any (European) bankruptcy law.⁹⁰ In reality, the stages blend into each other. The figure provides a rather schematic overview for the 'messy world of bankruptcy'.⁹¹

⁸⁶ Finch, *Corporate Insolvency Law : Perspectives and Principles*, 2009, , pp. 70 & 91 KORI, AUGUST SIEGMUND, *System des Concurs-Processes nebst der Lehre von den Classen der Gläubiger nach gemeinen und königlichen Sächsischen Rechten* (Leipzig, 1828), p. 35.--

⁸⁷ KOHLER, JOSEPH, *Lehrbuch des Konkursrechts* (Stuttgart, 1891), p. 1

⁸⁸ Baird, 'Loss Distribution, Forum Shopping, and Bankruptcy,' 1987, p. 824.

⁸⁹ Charles Dicken's Jarndyce and Jarndyce is an example from English Literature, the Generallandesarchiv Karlsruhe owns records of a number of aristocratic estates that were put under bankruptcy administration for decades, e.g. the bankruptcy of duke William of Salm-Reifferscheid-Krautheim 1803-1827, GeLAKa 72 No. 3369-3391.

⁹⁰ Attempting a detailed comparison between civil law traditions and commercial and private bankruptcy in common law would exceed the limits of this thesis. Moreover, commercial bankruptcy in common law systems has evolved into a range of different procedural forms while private bankruptcy has remained subject to statutory legislation. This path was not taken in most continental European legislations at the end of the nineteenth century. A useful comparison of the procedures available in commercial bankruptcy in the UK, France, Germany, and Italy in the nineteenth century can be found in Di Martino, 'Approaching Disaster,' 2005, 23 – 43.

⁹¹ WESTBROOK, JAY LAWRENCE AND WARREN, ELIZABETH, 'Searching for Reorganization Realities,' *Washington University Law Quarterly* 72/3 (1994), pp. 1257-1290.

The first stage of a bankruptcy procedure established boundary rules that decided the procedure's accessibility. Boundary rules filter admissible members by defining the circumstances and personal characteristics that must be fulfilled by petitioners. But it is not necessarily limited to a gatekeeper function.⁹² Again, a fragile balance is needed between making entry too easy and too difficult. If petitioning for bankruptcy becomes too easy for debtors, it undermines the 'bonding role of debt'⁹³ and could weaken incentives to settle debts. If, however, there were too many barriers between a debtor in financial distress and a bankruptcy procedure, it would set incentives for delay and fraud. Hence, in this stage, the law addresses issues such as: when does illiquidity become insolvency? Who is allowed to trigger the procedure or to oppose this act, e.g. creditors, debtors, or judges?

Once the second stage commenced, the debtor lost control over his assets. Judges, court-commissioners, a committee of creditors or a professional insolvency practitioner assessed the debtor's financial state, examined the books, halted and possibly undid recent transactions and ensured that the assets were safe.⁹⁴ Simultaneously, creditors were informed about the new situation. This stage is important for gathering and sharing information about the case. In the past, the debtor's situation was made public in newspapers in order to mark the defaulter and inform distant creditors.⁹⁵ Furthermore, once creditors presented themselves to the bankruptcy administrators, they were asked to provide sufficient proof of their claims in the form of official documents. Aggregating and validating all the necessary information often took several months.

⁹² BLAZY, RÉGIS, CHOPARD, BERTRAND, AND NIGAM, NIRJHAR, 'Building Legal Indexes to Explain Recovery Rates. An Analysis of the French and English Bankruptcy Codes,' *Journal of Banking and Finance* 37/6 (2013), pp. 1936-1959.

⁹³ *ibid.*, p. 1939.

⁹⁴ Any action that transfers assets out of the reach of creditors in the imminent danger of bankruptcy is deemed a fraudulent conveyance and can be nullified by the court by way of a proceeding under the *Actio Pauliana*, an institute derived from Roman law, or equivalent institutes, cf. OGRIS, WERNER, "Gläubigerbenachteiligung," in *Handwörterbuch zur Deutschen Rechtsgeschichte I*, ed. EKKEHARD KAUFMANN AND ADALBERT ERLER (Berlin, 1971), pp. 1694-1695; SCHULZ, FRITZ, *Principles of Roman Law* (Oxford, 1936).

⁹⁵ Vause, 'The Business of Reputations,' 2014, ; Schulte-Beerbühl, *The Risk of Bankruptcy*, 2008, pp. 61-82.

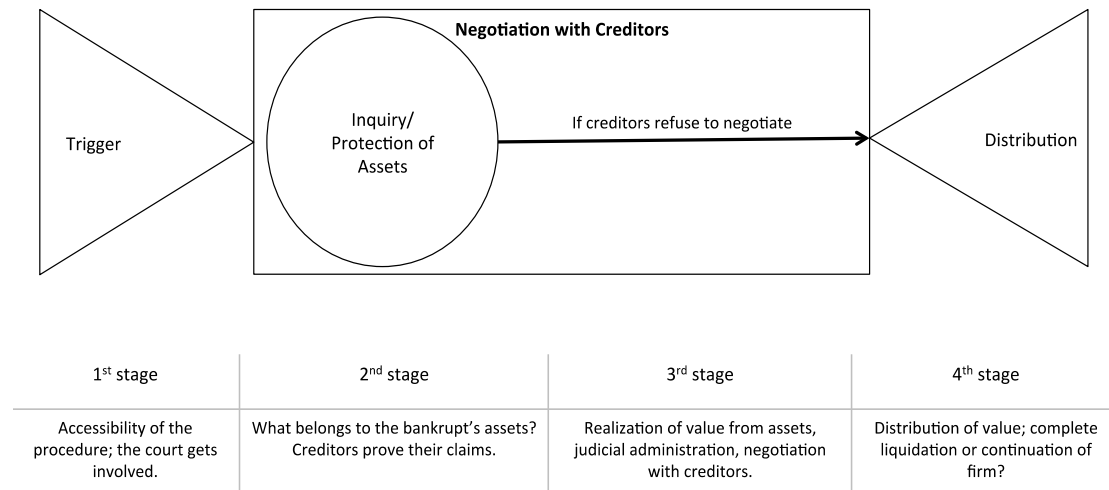


Figure 2 Stylized Stage Model of a Bankruptcy Procedure

The second and third stage (negotiating with creditors) often overlapped.⁹⁶ If a firm with a large number of fixed assets had declared bankruptcy, its administrators often found themselves in the role of provisional managers. To realise as much value as possible, they had to complete ongoing transactions and liquidate smaller assets. Simultaneously, bargaining with unsecured creditors could begin at this stage. The administrator and the creditors negotiated whether they would discharge the debtors of some of his debts. Out-of-court settlements were not universally known in every bankruptcy regime. On the contrary, this element often distinguished a mercantile bankruptcy jurisdiction from more comprehensive regimes in larger territorial states.⁹⁷ This third stage of the bankruptcy procedure could as well take several months to resolve.

Eventually, stage four was concerned with an equitable distribution of the realized value among the creditors. The distribution usually followed some established principle, a precise and formalised key given by the respective bankruptcy code. These rules ultimately decided to which extent secured creditors enjoyed priority over unsecured creditors, whether or not the seniority of the loan played a role, and whether or not the law allowed for any other interests.⁹⁸ If no settlement was achieved in stage three, the debtor's assets were auctioned off at this stage. Addi-

⁹⁶ Foerste, *Insolvenzrecht*, 2004, p. 202.

⁹⁷ MARIAGE, HENRI, *Évolution historique de la législation commerciale, de l'Ordonnance de Colbert à nos jours 1673-1949* (Paris, 1951).

⁹⁸ The latter are often called „involuntary“ creditors, since they are affected by a debtor's default but have never entered a formal contract with him nor had a chance to decide whether they would demand securities or not. The extent to which rights of involuntary creditors are acknowledged in a bankruptcy code often serves as an indicator for whether the law aims at maintaining social peace or is overly concerned with creditor protection: cf. Goode, *Principles of Corporate Insolvency Law*, 2008, , p. 44 & 50.

tionally, authorities decided whether pre-bankruptcy behaviour was punishable or not. The menu of penalties ranged from prison and expulsion to simply remaining liable to debts even after completion of the bankruptcy.⁹⁹ Creditors and the debtor were often better off if they reached a settlement beforehand. It spared them the court fees and a time-consuming procedure with the subsequent formalities of public auctions. Creditors often favoured being paid 20% of the outstanding debt instantly rather than waiting for a long procedure that could ‘eat up’ all the returns from the estate’s liquidation. *Lieber der Spatz in der Hand als die Taube auf dem Dach* – A bird in the hand is worth two in the bush.

III. Bankruptcy Dilemmas

a.) Multiple Goals

Legislators face a dilemma: how far can a debtor be forced to repay their debt? Is recovery from financial collapse possible? Different solutions exist for this sort of dilemma. Ideally, laws should ensure that the bankruptcy situation is dealt with in an orderly manner and, where possible, prevented.¹⁰⁰

The bankruptcy procedure is an economic institution that decides over survival and death in the economy. It gives creditors and debtors a guide how to behave in financial distress and provides individuals, who are about to contract a loan with one another, legal certainty about what will happen if things go wrong. It is an economic institution that intervenes in a specified situation and creates a special legal sphere with its distinct rules. This special ‘legal sphere’ is the social process, described above, that itself is nested in a wider system of rules and rights.

The interplay of political and juridical power produces regulation, as described in the model of economic institutions by Acemoglu et al.¹⁰¹ Rules govern behaviour; they rule in and rule out certain actions in the social process or try to incentivise certain actions. As such they likely reveal

⁹⁹ KADENS, EMILY, "The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law," *Duke Law Journal* 59/7 (2010), pp. 1229-1319; UHLENBRUCK, WILHELM, "Insolvency," in *The Oxford International Encyclopedia of Legal History* 3, ed. STANLEY KATZ (Oxford, 2009), pp. 248-250.

¹⁰⁰ Warren, "Bankruptcy Policy," 1987, p. 785

¹⁰¹ ACEMOGLU, DARON, JOHNSON, SIMON, AND ROBINSON, JAMES, "Institutions as a Fundamental Cause of Long-Run Growth," in *Handbook of Economic Growth* 1, ed. PHILIPPE AGHION AND STEVEN DURLAUF (Amsterdam, London, 2005), pp. 386-472.

something about the distribution of political power in a society.¹⁰² But it is more than just a power struggle. Laws also express a normative decision about what a society regards as 'good' and 'bad'. With regard to bankruptcy, regulation expresses how a society views debt-default.

Historically, the first written bankruptcy laws in Europe started off as a sub-category of criminal law.¹⁰³ Indeed there is some similarity in the normative dilemmas that come together in the decision whether or not someone be punished and the decision whether or not someone be held liable for his debts.¹⁰⁴ In criminal law there is always an aspect of retaliation.¹⁰⁵ With regard to bankruptcy, compensation might be a better word than retaliation: creditors want repayment, and where they cannot receive full repayment they demand some sort of compensation for it, and if it is only that the debtor be punished for not paying back his creditors. *Pacta sunt servanda*. The second dimension is the 'general community interest'. Viewed from the stance of community interests, (criminal) law should maintain social order and social peace. Bankruptcies should best be avoided in the interest of the community. A fairly typical strategy in this regard is deterrence. Ex ante, the threat of punishment for defaulting debtors seems to serve this interest, too. Yet, once the failure took place, this perspective differs in so far as it wishes to absorb negative externalities, i.e. containing unemployment and contagion that could derive from a bankruptcy case.¹⁰⁶ Finally, there is the stance that focuses on re-socialisation in criminal law, asserting that convicts deserve a second chance, that society cannot afford imprisoning nor incriminating too many of its members. The analogy works for bankruptcy, too. Instead of re-socialisation one might call it a 'concern for productivity'. Bankruptcy laws should help transfer assets that are no longer productive back to their most productive use.¹⁰⁷ This also affects the person of the debtor. Preventing him from making a fresh start, for example by imprisoning him, would run counter to

¹⁰² CRAWFORD, S. AND OSTROM, ELINOR, 'A Grammar of Institutions,' *American Political Review* 89/3 (1995), pp. 582 - 600.

¹⁰³ Kadens, 'The Last Bankrupt Hanged,' 2010, pp. 1233 and 1304.

¹⁰⁴ ROXIN, CLAUS, *Strafrecht*, vol. I (München, 2006), pp. 69-87, distinguishes the three functions of penal law in vengeance, individual prevention, general prevention.

¹⁰⁵ Ibid., p. 71, Kant, Emanuel, *Metaphysik der Sitten* (Königsberg, 1797, reprint Berlin, 1922).

¹⁰⁶ AGHION, PHILIPPE "Bankruptcy and its Reform," in *The Palgrave Dictionary of Economics and The Law* 1, ed. PETER NEWMAN (London, New York, 1998), pp. 145-149.

¹⁰⁷ HAHN, DAVID, 'Concentrated Ownership and Control of Corporate Reorganisations,' *Journal of Corporate Law Studies* 4/1 (2004), pp. 117-154; ARMOUR, JOHN, 'Corporate Insolvency in the United Kingdom: the Impact of the Enterprise Act 2002,' *European Company and Financial Law Review* 5 (2008), pp. 135.

the productivity perspective.¹⁰⁸ Figure 3 gives a stylized depiction of the three normative dimensions that tie into bankruptcy laws.

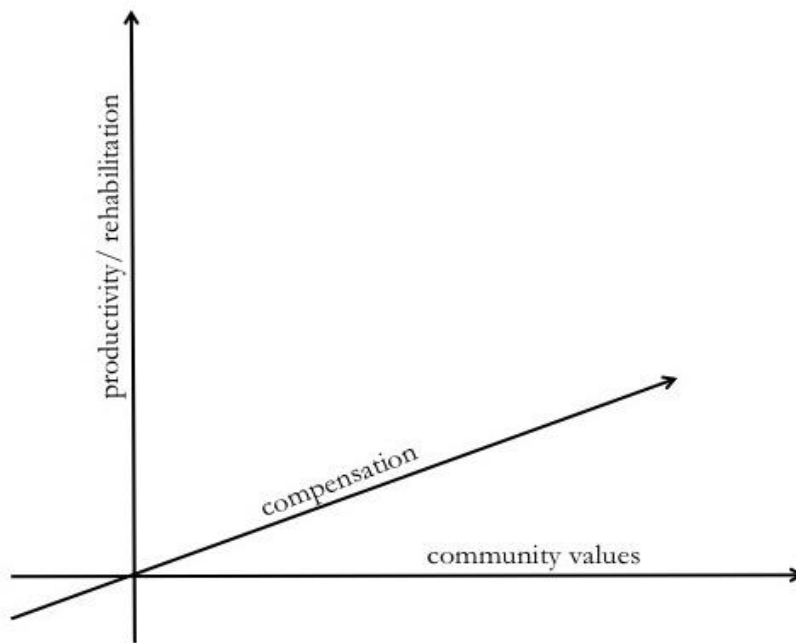


Figure 3 Three Normative Dimensions in Bankruptcy

Many a legal scholar and economist tried to determine how these dimensions should be optimally balanced in order to find the ideal or ‘best’ bankruptcy law. What is ‘good’ and what is ‘bad’ in the context of bankruptcy? This debate revolves around different normative ideas and principles, which are often more implicit than outspoken.¹⁰⁹ Léh’s comparison between the French and the German bankruptcy regime, quoted at the beginning, highlights this particular aspect. Though bankruptcy law incrementally moved away from its origins in criminal law and though its former punitive aspects were loosened over time, the following chapters will time and again touch on the implicit normative ideals that underpinned different legal interpretations and calls for bankruptcy reform.¹¹⁰

¹⁰⁸ Lester, *Victorian Insolvency*, 1995, .pp. 88-123.

¹⁰⁹ See above section 2.1, b)

¹¹⁰ Saxony abolished debtor’s prison in 1831: *Mandat, die Aufhebung des Schuldturm-Prozesses betr.*; 15. Juni 1831 in: *Gesetzsammlung für das Königreich Sachsen* (Dresden, 1831), pp. 121-122.

b.) Ex ante vs ex post incentives for creditors

An important insight from law and economics scholarship is that rules affect behaviour before and after bankruptcy through anticipation and setting incentives.¹¹¹ Even small adjustments in one component of a bankruptcy procedure could thus have an effect on the credit market. The line of thought perceives of the bankruptcy procedure as an incentive structure that guides individual behaviours. In this view, policy makers only need to fine-tune these incentives in such a way that the desired outcome will manifest itself.

The law's impact is assessed based on its *ex ante* and its *ex post* effects, i.e. the way actors anticipate the effects of the procedure prior to the debtor's insolvency and the outcomes and effects in the aftermath of bankruptcy. It has become a focal point in the economic analysis of bankruptcy laws against which many reforms are being measured. A brief passage from Johan Armour's widely cited article is illustrative:

If the legislature subjects particular types of voluntary transaction to statutory 'taxation' (as through the prospect of redistribution in insolvency), then sophisticated parties may be expected to structure their affairs differently so as to avoid the ambit of the legislation. In the case of insolvency [in the UK], such 'avoidance action' has resulted in relatively little funds reaching the intended beneficiaries of the statutory redistribution.¹¹²

Armour is concerned with *ex post* inefficiency: strong redistributive elements in bankruptcy could result in unsecured creditors being sent away empty-handed. He also mentions the *ex ante* impact when he states that lenders will adjust their contracts beforehand in such a way as to avoid the laws intervention, that is they are more likely to attach securities to loans in order to have priority in the case that the debtor goes bankrupt. The higher the costs of a bankruptcy, the higher the overall costs of financing debt. Creditors are expected to account for the possible costs of bankruptcy by adjusting the interest rates at which they are willing to lend.¹¹³

A positive *ex ante* effect is achieved, for example, if a particular bankruptcy regime does not discourage lending in an economy but rather supports credit markets. Since bankruptcy laws

¹¹¹ They refer to themselves as '*proceduralists*', Baird, 'Bankruptcy's Uncontested Axioms,' 1998, 576.

¹¹² ARMOUR, JOHN, "Should We Redistribute in Insolvency?," in *Company Charges: Spectrum and Beyond*, ed. JOSHUA GETZLER AND JENNIFER PAYNE (Oxford, 2006), pp. 189-225.

¹¹³ SCHWARTZ, ALAN, 'Contracting About Bankruptcy,' *The Journal of Law, Economics, and Organization* 13/1 (1997), pp. 127-146.

often prescribe a specific hierarchy of different types of claims, this will affect the investment patterns of private actors.¹¹⁴ A distributional rule is considered 'fair' if it prescribes a scheme for which all creditors lacking prior knowledge to how they would fare with respect to other creditors could have been expected to bargain *ex ante*.¹¹⁵

With regard to *ex post* efficiency, scholars are concerned with the question of how to decide about reallocating assets to their most productive use – which in some cases entails liquidation, and in others reorganisation.¹¹⁶ An *ex post* efficient bankruptcy regime will make as little mistakes in this decision as possible. It effectively functions as a filtering device to strain out viable from unviable firms.¹¹⁷

Scholars do not share a unanimous definition of 'efficiency', neither in bankruptcy nor in general. With regard to bankruptcy, some focus on creditor rights in bankruptcy and advocate strict adherence to pre-bankruptcy entitlements, otherwise the bankruptcy procedure would result in a redistribution of value among creditors that was not initially agreed on.¹¹⁸ Yet strict adherence to pre-bankruptcy entitlements might make it difficult to keep a firm as going concern, because secured creditors can retrieve compensation from their collateral right away.¹¹⁹ Comparative studies focused on incentive structures to classify different bankruptcy systems as more debtor- or more creditor-friendly.¹²⁰

Critics point out that by making the maximisation of value for creditors the only objective against which a bankruptcy law is being judged, one simply confuses bankruptcy with mere debt

¹¹⁴ Armour, Hsu, and Walters, 'The Costs and Benefits of Secured Creditor Control,' 2012, pp. 103-105.

¹¹⁵ JACKSON, THOMAS, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditor's Bargain,' *The Yale Law Journal* 91/5 (1982), pp. 857-907.

¹¹⁶ BAIRD, DOUGLAS AND JACKSON, THOMAS, "Corporate Reorganization and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy," in *The Economic Analysis of the Law: Selected Readings*, ed. DONALD WITTMAN (Oxford, 2003), pp. 212-221.

¹¹⁷ FROUTÉ, PHILIPPE, 'Theoretical foundation for a debtor friendly bankruptcy law in favour of creditors,' *European Journal of Law and Economics* 24/3 (2007), pp. 201 - 214.

¹¹⁸ BEBCHUK, LUCIAN ARYE AND FRIED, JESSE, 'The Uneasy Case for the Priority of Secured Claims in Bankruptcy,' *Yale Law Journal* 105 (1996), pp. 857.

¹¹⁹ GETZLER, JOSHUA, "The Role of Security over Future and Circulating Capital: Evidence from the British Economy circa 1850-1920," in *Company Charges : Spectrum and Beyond*, ed. JOSHUA GETZLER AND JENNIFER PAYNE (Oxford, 2006), pp. 224-245; BAIRD, DOUGLAS, *Cases, Problems, and Materials on Bankruptcy*, 4 ed. (New York, 2007)

¹²⁰ GLAESER, EDWARD AND SCHLEIFER, ANDREI, 'Legal Origin,' *Quarterly Journal of Economics* 117/4 (2002), pp. 1193 - 1230.

collection.¹²¹ Others have remarked that the literature might exaggerate the actual impact of those ex ante effects on debt finance.¹²² The dividing line in this debate interestingly follows the distinction between public and private interests in bankruptcy: those who object to the emphasis on ex ante effects as a quality criterion argue that this view merely sidesteps the actual, normative debate (what should be the goal of a bankruptcy law?) and ignores public interests in bankruptcy such as keeping jobs, infrastructure, etc.

These objections aside, this approach makes a valuable contribution in linking the bankruptcy framework to credit markets. Once the bankruptcy procedure is opened, the debtor has his ownership of his estate revoked and creditors collectively take over. Their rights are stayed, too, until a decision is reached about whether or not the estate will be liquidated. Then the law prescribes an order in which creditors are being paid and the exact place in line may decide whether or not a creditor can recover any debt at all. Max Radin poignantly expressed this link between the bankruptcy procedure and creditor's incentives in the phrase: 'Whatever purposes bankruptcy attempts to carry out, it does by working on the creditors primarily (...).'¹²³

IV. Studying Historical Bankruptcy Laws

An investigation of historical bankruptcy regimes requires an understanding of its components, their function, and the reception and application by debtors and creditors, its 'users'. Any framework employed for such an investigation must allow for a past that differed substantially from our modern notions of law and state. There was no overarching German Nation state with a functional bureaucracy; instead there was piecemeal legislation by numerous small states. Towns enjoyed varying degrees of autonomy, ranging from sovereign city-states to independent entities within princedoms. The German people remained segregated into different status groups, *Stände*, each with their corporate identity, privileges, and rights.

This situation offers a point of contact with an approach to law taken by many Law and Economics scholars. It regards law as a product that can be purchased and consumed by individ-

¹²¹ Warren, 'Bankruptcy Policy,' 1987, p. 808.

¹²² MOKAL, RIZWAAN JAMEEL, 'Priority as Pathology : The Pari Passu Myth,' *The Cambridge Law Journal* 60/3 (2001), pp. 581-621.

¹²³ Radin, 'The Nature of Bankruptcy,' 1940, p. 9.

uals as ‘users’ or ‘consumers’; according to this view, laws are ‘produced’ in line with certain demands.¹²⁴ Historians of the early modern period and the early 19th century are well familiar with a past that understood law as personal rights and privileges people owned because they had (a) acquired them by birth, royal deed, corporate membership, or buying and (b) had the means to assert them in the absence of a strong state either by their own resources or by contributing to organizations that ensured enforcement.¹²⁵

The following sections outline how this thesis approaches historical bankruptcy regimes in line with the aforementioned theory.

a.) Individuals’ Actions

Popular opinion often equates bankruptcy with an individual’s failure. Responsibility for financial collapse is ascribed to the behaviour of a single entity, the individual debtor or a firm’s board of managers.¹²⁶ Upon closer look, the assumption about the sole-responsibility of the debtor for financial collapse is difficult to maintain. A debtor might have good reasons to believe that his venture can become profitable again after overcoming a period of low liquidity. But an adversarial creditor can use the legal definition of insolvency to force his debtor into the bankruptcy procedure. Or the other way round: a debtor may seek the protective shield of the bankruptcy procedure to evade individual law-suits and negotiate a debt moratorium with his creditors.

On the one hand, such actions depend on the exact bankruptcy regulation set by particular laws; they depended partly on the respective level of creditor or debtor protection and the resulting ‘attractiveness’ of the law for certain parties. The bankruptcy procedure was a social process; once it is triggered it required the parties involved to act, which actions were in turn shaped by rules and institutions external to these actors.

¹²⁴ EIDENMÜLLER, HORST, 'Recht als Produkt,' *Juristenzeitung* 64/13 (2009), pp. 641-653.

¹²⁵ CAENEGEM, RAOUL C. VAN, *Judges, Legislators and Professors. Chapters in European Legal History* (Cambridge, 1987); GETZLER, JOSHUA, "Transplantation and Mutation in Anglo-American Trust Law," *Theoretical Inquiries in Law* 10/2 (2009), pp. 354-387; SWAIN, WARREN, "Lawyers, Merchants, and the Law of Contract in the Long Eighteenth Century," in *Law and Legal Process : Substantive Law and Procedure in English Legal History*, ed. MATTHEW DYSON AND DAVID IBBETSON (Cambridge, 2013), pp. 186-216.

¹²⁶ Prior to widespread application of limited liability, the firm and its owners were identical in nineteenth-century Germany.

On the other hand, the scarcity of resources also constrained actors in their decisions. A bankrupt debtor has, by definition, not enough (liquid) assets to pay his multiple creditors. That further limits what is possible in bankruptcy. To settle the case without conflict would require all parties to cooperate and coordinate. But since parties often have conflicting interests, laws provide a form of standardized way to go about such a situation. The question arises, how much room there is for individuals to shape the outcome of a case by engaging in bargaining and successful reallocation of assets.

Mark Casson's theory of the entrepreneur supplies a framework for studying this human residual. He defines the entrepreneurs as 'someone, who specializes in taking judgmental decisions about the coordination of scarce resources.'¹²⁷ An entrepreneur has a piece of information that he believes to be unique and allows him to identify and exploit an opportunity for business. In order to exploit this opportunity, he engages in market-making, that is he tries to produce trade at minimum cost. That includes reducing transaction costs and overcoming obstacles that are involved in creating a market for the good he wants to offer.¹²⁸ Casson views entrepreneurs as a sort of middlemen. They seek information about economic opportunities, i.e. resources that are currently being misallocated. Entrepreneurs then venture to get control of those resources and funnel them to a better use. Casson also integrates Harvey Leibenstein's dictum that the entrepreneur is someone who upsets a pre-existing equilibrium.¹²⁹ Entrepreneurial activity cannot be explained assuming that all actors are constantly optimizing and, under the condition that all information is readily available in prizes, will naturally converge to the optimal level of resource-distribution.¹³⁰ Rather, the entrepreneur has access to a piece of information that is not already reflected in market prizes, which puts him in a position to exploit that information. In order to pursue this, he engages in a number of coordination activities to alter the existing state.

This description of entrepreneurship resembles in many aspects what debtors, creditors, and trustees are doing in bankruptcy. Coordination and decision-making is required lest parties resort

¹²⁷ CASSON, MARK, *The Entrepreneur: An Economic Theory*, 2 ed. (Oxford, 2003), p. 20.

¹²⁸ Ibid., p. 13.

¹²⁹ Leibenstein further remarks that this is the reason why classical economic theory is so ill-equipped for dealing with the entrepreneurs as an economic actor, cf. LEIBENSTEIN, HARVEY, 'Entrepreneurship, Entrepreneurial Training, and X-Efficiency Theory,' *Journal of Economic Behavior & Organization* 8/2 (1987), pp. 191-205.

¹³⁰ Ibid., p. 197

to vigilant piecemeal liquidation that only benefits the quickest and strongest creditor. The pool of stakeholders ranges from financiers, to suppliers, to employees, to family members, and eventually to the local tax collector. Bankruptcy brings all stakeholders together and requires simultaneous negotiations. As soon as the debtor's insolvency becomes apparent, creditors are in competition for shares of the remaining assets. As soon as debtor and creditor take up talks, the outcome simultaneously affect all parties because special side-agreements between individual parties are illegal and would be seen as attempts of fraud. Creditors and debtor are bound together in a collective procedure, while each of them may secretly wish to maximize their individual return from the case at the expense of the others.

Economists view simultaneous negotiations as prohibitively costly.¹³¹ Yet a debtor's bankruptcy often triggers a sort of simultaneous negotiation. The bankruptcy procedure internalizes some of the bargaining steps in order to reduce costs. Laws differ in their approach. They can either incentivise parties to enter into negotiations with each other or limit bargaining to an absolute minimum. But either way, the bankruptcy law never fully removes all potential for bargaining. There remains a space that will be filled by individuals' actions. Some individuals may be better equipped than others to take advantage of this bargaining. This is what I call the 'entrepreneurial moment' in bankruptcy.

The first decision individuals must take in bankruptcy is whether they wish to become active or not. In the latter case, the procedure will unfold according to a predefined pathway, ultimately leading to the liquidation of the remaining assets and distributing the returns among creditors according to a predefined key. This is the path likely taken if a bankrupt's assets are negligible or if the debtor is fugitive.

If, on the other hands, parties decide to intervene in the procedure, there are at least six actions to pursue 'judgmental decisions about the allocation of resources':

- (1) Contact making, finding out who is involved.
- (2) Negotiation with debtor.
- (3) Negotiation with fellow creditors.

¹³¹ CASSON, MARK, 'Der Unternehmer. Versuch einer historisch-theoretischen Deutung,' *Geschichte und Gesellschaft* 27 (2001), pp. 524-544.

- (4) Administration of assets.
- (5) Monitoring of debtor and fellow creditors.
- (6) Enforcement of deal.

Depending on the speed and consensus with which negotiations were pursued, they could significantly shorten or even stop the formal procedure. Debtors usually had a strong incentive to find an amicable settlement with their creditors to avoid the liquidation of their assets and the stigma that was often attached to a formal court sentence. For creditors, the incentives to bargain could vary. Creditors with a lien can seize the assets that were given to them as collateral rather than forgoing part of their claim in order to reach a settlement. In this case, unsecured creditors could still proceed with negotiations, but the aggregate pool of assets would be diminished. On the other hand, if the law establishes a number of statutory liens, even a secured creditor might have an incentive to negotiate, because he has no certainty over the extent to which his security interest is enforceable vis-à-vis other secured claims.

If parties embark upon negotiations, for whatever reasons, they will engage in the above-mentioned activities. The costs attached to each of them will then influence success or failure of these negotiations.

b.) Structures and Organizations

Individuals' action is both limited by and relies on organizations and rules. No individual acts alone in an empty space. Bankruptcy in particular, as pointed out above, is shaped by its embeddedness in a wider normative framework as much as by the form of the organizations that enforce its rules. These underpinning organizations do not necessarily have to be a state in the modern sense. The organization should be able to make a credible threat, lest it foregoes the ability to act against actors who break rules. Institutional economics have shown that commitment and credible threats are core-components of any functioning institution. Organisations also perform functions beyond mere rule-enforcement, such as synthesizing, assessing, and distributing information in a way that could not be achieved by individuals alone.

Information is a crucial element in the course of a bankruptcy procedure. Access to it, its reliability, and distribution can decide the likelihood of a settlement. Bankruptcy laws aim to mitigate asymmetries between different parties by ensuring an equal distribution of information about assets, rights, and titles. To this end, the trustee often takes on the role of a general accountant, corresponding with all parties. The above sections showed that a lot of what actors in bankruptcy do consists in accessing and exchanging information. This process ultimately rests on the organisation that governs the bankruptcy regime, which can act both as a facilitator or a decelerator of this social process.

This leads back to L  h's distinction between predominantly private and predominantly public bankruptcy regimes, with which this chapter began. It opens a spectrum of possible solutions to bankruptcy that runs from purely private to purely public goods, with many shades in between. Economic theory ascribes different characteristics to private goods and public goods respectively. Assume that bankruptcy was a purely private good. In this case parties would negotiate individually what had to happen in bankruptcy, either by drafting individual contracts beforehand or by bargaining afterwards.¹³² Some creditors might get compensation on a first come first serve basis, unless the debtor has an agreement with a more powerful creditor who can protect him from the bullying of the others.¹³³

On the other end of the spectrum is the purely public good: it is non-excludable and non-rivalrous. The current German insolvency law, the *Insolvenzordnung*, applies to all insolvencies under the jurisdiction of the German law.¹³⁴ Every debtor is allowed to petition for an insolvency procedure, though the law might prescribe different procedures for companies as opposed to individuals. Modern German law is non-excludable. At least in theory, there is equal treatment before the law.¹³⁵ And it is non-rivalrous, that is it is not rendered less effective or diminished as it is applied to an increasing share of people.

¹³² Jackson, 'Creditor's Bargain,' 1982, p. 868.

¹³³ The aim of some roman law provisions probably was to provide a remedy for exactly this kind of situation, Meier, *Geschichte des deutschen Konkursrechts*, 2003, pp. 13-15.

¹³⁴ EGInsO, Art. 2, Art. 102, § 1; InsO §§ 2, 3.

¹³⁵ GG Art. 3, I ; Art. 3, III.

There are goods that are neither purely private nor purely public. These impure goods are known as common pool resources (the commons) and club goods. Common-pool resources are non-excludable but suffer from rivalrous consumption.¹³⁶ Everyone can exploit the fishing reservoirs of the north-sea, but the resource is finite and as one party exploits the resource, it diminishes the pool of fish available to others. Club goods, on the other hand, are defined by the possibility to exclude non-members from consumption.

I propose to consider municipal insolvency statutes in local communities and small jurisdictions as a club good. Societies did not leave the problem of bankruptcy to be solved privately.¹³⁷ But few societies had the capacity to provide a bankruptcy regime that merited the term 'public good'. State-driven regulation that shaped interpersonal relations between private individuals is typical for the sort of nation state that is itself a product of the outgoing nineteenth-century.¹³⁸ To coordinate actions in bankruptcy and keep conflict at a minimum, early-modern communities relied on powerful corporatist organisations. By corporatist organisations I mean local clubs that performed semi-public duties. Despite a lot of criticism, they continued to structure relationships between individuals while simultaneously relying on their member's contribution throughout the nineteenth-century.¹³⁹ Members were selected based on their qualities, ranging from religious affiliation to occupational groups. Townspeople in Germany experienced bankruptcy as a legal regime structured and governed by clubs. These regimes provided the local statutes and sources for later bankruptcy codes.

Léh wrote that French law distinguished between merchants and non-merchants in bankruptcy. This distinction applied for most German jurisdictions, too. Merchants formed powerful

¹³⁶ MCGUIRE, MARTIN, "Public Goods," in *The Oxford Encyclopedia of Economic History*, ed. JOEL MOKYR, 4 (2003), pp. 295-298 distinguishes between four types of goods: private, public, the commons and toll goods.

¹³⁷ CONZE, WERNE AND HAVERKATE, GEORG, "Staat und Souveränität," in *Geschichtliche Grundbegriffe 6*, ed. REINHART KOSELECK AND WERNER CONZE (Stuttgart, 1990), pp. 1 - 155., quantitative approach: DINCECCO, MARK, 'Fragmented Authority from Ancien Regime to Modernity. A Quantitative Analysis,' *Journal of Institutional Economics* 6/3 (2010), pp. 305 - 328.

¹³⁸ OSTERHAMMEL, JÜRGEN, *Die Verwandlung der Welt. Eine Geschichte des 19. Jahrhunderts*, 2 ed. (München, 2013), pp. 572, 585-586, 617.

¹³⁹ COLLIN, PETER, 'Privatisierung und Etatisierung als komplementäre Gestaltungsprozesse. Ein historischer Rückblick auf regulierte Selbstregulierung,' *Juristenzeitung* (2011), pp. 274 - 282.; HENNING, FRIEDRICH-WILHELM, "Die Mitwirkung der Kaufmannschaft an der Gesetzgebung vom Mittelalter bis zum Deutschen Handelstag 1861/1914," in *Zur Politik und Wirksamkeit des Deutschen Industrie- und Handelstages und der Industrie- und Handelskammern 1861 bis 1949*, ed. HANS POHL AND WILHELM TREUE (Stuttgart, 1987), pp. 35-49.

groups and gained wide-ranging competencies for self-administration. These groups collectively negotiated special privileges vis-à-vis the authorities, enforced codes of conduct, and sought to maintain a functioning local market place. This is a common theme for centuries of European history. The success of the Champagne fairs has been explained by the fact that merchants created their own mercantile court to solve disputes according to their *lex mercatoria*. The first known bankruptcy statutes come from early modern cities in Northern Italy. In Germany, these groups were often called *Kaufmannschaften*, or *Handelskammern*, and they were directly involved in adjudicating commercial law.¹⁴⁰ The development of commercial law was auxiliary, sometimes even necessary for the expansion of commerce and trade.

In what respect is it important for the bankruptcy regime whether it is organised as a public or a club good? Clubs are exclusive. If they admit too many members, they suffer from a so-called congestion point. Beyond this point, the provision of the good cannot keep pace with the number of consumers. The benefit of joining a club is that it can avoid this congestion point while simultaneously spreading the costs of the good's provision across a large enough membership so that it becomes affordable to more individuals. Clubs can also govern collective resources. Depending on the set-up costs, a sufficient membership – not too small, but not too large either – also helps reinforcing compliance with rules.

In Germany, the bankruptcy regime incrementally moved from a club good to a public good. By the 1877 national bankruptcy code, it had become a public good.¹⁴¹ To trace the development from various clubs to a unified public system, it is necessary to understand when clubs lose their benefits. The congestion point is determined by the size or amount of the good on the one hand and by the number of members or consumers on the other hand. The number of members and the size of the good determine each other. A change in one consequently leads to a

¹⁴⁰ ROTH, RALF, "Verflechtungen von Vereins- und Verwaltungstätigkeit als Form kommunaler Selbstregulierung," in *Selbstregulierung im 19. Jahrhundert*, ed. PETER COLLIN, et al. (Frankfurt, 2011), pp. 293-309.

¹⁴¹ *Entwurf einer Konkurs-Ordnung, nebst Motive zu dem Entwurf einer Konkurs-Ordnung, und Entwurf des Einführungsgesetzes, sowie Anlage-Band zu den Motiven des Entwurfs einer Konkurs-Ordnung*, vol. 1 (Berlin, 1875), [henceforth Motive] pp. 5-14.

change in the other.¹⁴² This mechanism is explained in Figures 4 to 5, which are based on James Buchanan's article from 1965.

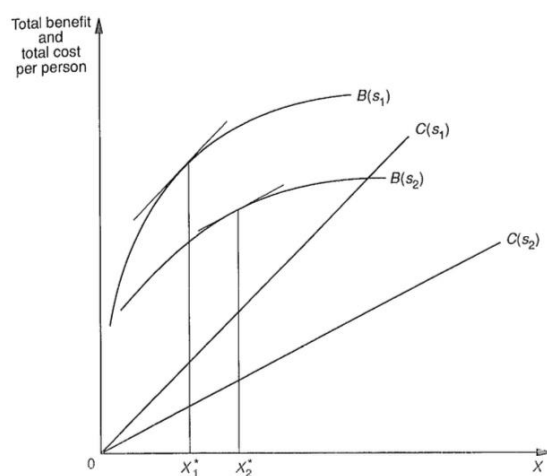


Figure 4 Benefits and Costs Related to the Size/Amount of a Club Good

Figure 4 concerns the question of an optimal quantity or size of the club good. The size or quantity is measured on the abscissa or x -axis. The ordinate or y -axis depicts total benefits and total costs per person. A given number of club-members is assumed, to which the figure refers as S_1 . For each individual member in a group of a given size one can draw a benefit function $B_{(S_1)}$ and a cost function $C_{(S_1)}$. An important characteristic of the benefit function is that its upward-slope is concave, which suggests that adding new units of club good is subject to diminishing marginal returns.¹⁴³ The function of total costs per unit of club good is linear since it is assumed that costs are shared equally among members.¹⁴⁴ Every unit of club good that is added will increase the costs for every individual by the same fraction. The optimal quantity of the club good is defined as the point where the derivatives of the total cost and total benefit functions are equal, written as $X_{(S_1)}$. Beyond this point it is impossible to further increase the quantity of club-good without the costs for every individual member increasing by a larger margin than the benefits they enjoy from another unit of club good. In Figure 4, S_2 represents costs and benefits for a different (increased) number of club members. The benefit curve $B_{(S_2)}$ flattens as membership is increased (and as the club moves from S_1 to S_2 respectively) because the benefits from any added unit of

¹⁴² CORNES, RICHARD AND SANDLER, TODD, *The Theory of Externalities, Public Goods, and Club Goods*, 2 ed. (Cambridge, 1996).

¹⁴³ SANDLER, TODD AND TSCHIRHART, JOHN, 'The Economic Theory of Clubs : An Evaluative Survey,' *Journal of Economic Literature* 18/4 (1980), pp. 1481-1521.

¹⁴⁴ Buchanan, 1965, p. 8.

club good for each member is now shared with a greater number of people, which in turn also flattens the cost-function $C_{(s_2)}$.

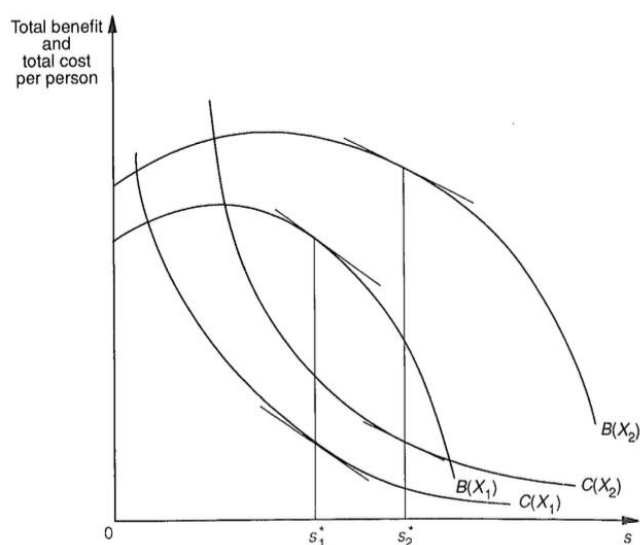


Figure 5 Benefits and Costs Related to Number of Club-Members

In Figure 5 the quantity of the club good is held constant, denoted as X_1 . Membership size is measured on the x -axis and costs and benefits on the y -axis. The cost-function $C_{(X_1)}$ and the benefit-function $B_{(X_1)}$ depict the changing costs and benefits for every individual club members as membership is increased. The benefits for each individual member initially rise as people are added to the club because every clubs needs a certain number of members to begin with. Soon, the increasing number of club members creates a crowding effect and the benefit curve starts to slope downward.¹⁴⁵ Under the equal cost-sharing assumption, costs for any given quantity of club good that each member has to bear will fall quicker at the beginning and then loses steepness and approximates a constant. Again, the optimal point (S_1) for club membership is located where the derivatives of the two curves are equal. Beyond that point, no new member can be added without benefits for each individual deceasing faster than its associated costs. Assuming a larger quantity of club good X_2 , the respective costs and benefits curves will shift upwards and flatten to the right, which brings the optimal point of membership-size S_2 to the right as well.

Quantity of the club good and size of the club's membership determine each other. The highest attainable level for the individual is the combination of optimal good quantity with the optimal size of membership. Put in simpler words, a club will overstretch and probably alienate

¹⁴⁵ Buchanan 1975, p. 7.

its members if it tries to provide a good that goes beyond the capacities of its members either in quality or quantity. A limited group of people is hardly inclined to provide a public good while bearing the costs as a club. On the other hand, even if the good remains the same, a change in membership can equally alienate individual members. Sharing a good with too many people or conflicts within the club due to increased heterogeneity in membership are possible scenarios.

In the following chapters, I regard bankruptcy regulation as the good that is being provided. That includes both the written rules as well as the institutions for rule-enforcement. The regulation can address the entire community that lives in a given jurisdiction. In this case, bankruptcy is a public good. Alternatively, rules may address only subparts of the population that live in the jurisdiction. In the latter case, the boundaries of the legislation are different from a jurisdiction's political or administrative boundaries and the regulation is effectively a club-good.¹⁴⁶

It is difficult to give an exact measure of the costs and benefits of bankruptcy legislation. One important benefit of a fully-functioning bankruptcy law is a decrease in monitoring costs for creditors: though there is still monitoring required by the creditor, the attention shifts away from watching over every single debtor to observing and learning how the legal system works.¹⁴⁷ For people who conduct a considerable amount of their daily businesses on credit and find themselves in the role of debtors, bankruptcy often means protection against thronging creditors.¹⁴⁸ Another benefit is legal certainty. A number of legal provisions, bankruptcy law among them, is designed to facilitate contracting about the future by restricting or enabling certain actions in the future.

Regarding the costs of a bankruptcy regime, we should distinguish between setting-up costs and maintenance costs. Initially someone (an individual or a committee) is charged with specifying and designing the rules, which is a one-off cost. Subsequently, the system must be employed and enforced. Compliance must be monitored and disputes should be settled without recurrence

¹⁴⁶ Cornes and Sandler, *The Theory of Externalities, Public Goods, and Club Goods*, 1996, , pp. 51 seqq.; see Mintzker, *The Defortification of the German City 1689-1866*, 2012, , pp. 70-73 for a description of the German concept of *Weichbild*, i.e. the concept that surrounding villages of a city applied the city's law without having full access to the city's legal system and technically being still subject to a different authority as part of a principedom or bishopric.

¹⁴⁷ It needs to be said that bankruptcy laws can in fact incur other monitoring costs on creditors depending on incentives and priorities given to certain classes of creditors. The next section will deal with this issue in more detail.

¹⁴⁸ Coleman, *Debtors and creditors*, 1974, p. 269.

to an authority outside the club. The system furthermore needs to adapt to changing conditions so that it continues to offer benefits to its members.¹⁴⁹ These are maintenance costs. Congestion sets in when the system loses its ability to exclude non-members from accessing the jurisdiction. Either the existing institutions are then incapable of handling the increased caseload – or the membership changes such that its preferences do not align any longer with the established rules and mechanisms.

c.) Research Questions

Club-good theory and theories of entrepreneurship inform and guide the analysis of source material in the following chapters. Drawing on the preceding sections, I derive four research-questions (or hypotheses), that will be addressed in the course of this book.

- (i.) Under which circumstances did parties engage in settlement negotiations?
- (ii.) What were the costs and benefits of these negotiations that influenced their success or failure?
- (iii.) What was the main difference between a club-good-style bankruptcy regime compared to a public-good bankruptcy regime?
- (iv.) How does an extension of the club in terms of membership (i.e. turning it into a public-good) affect the good (i.e. the regulatory content) itself?

¹⁴⁹ GREIF, AVNER, *Institutions and the Path to the Modern Economy. Lessons From Medieval Trade* (Cambridge, 2006), p. 124.

V. Post-Scriptum: Women in Bankruptcy

The chapter on women in bankruptcy somewhat represents a digression from the framework elaborated here. It is neither concerned with identifying clubs that governed bankruptcy regulation, nor with the strategies with which creditors ventured to influence the procedure. But time and again women appear in the sources both as debtors and creditors. They ran businesses, filed lawsuits, and bailed relatives. For sure, they are less prominently depicted in the sources and the share of women who actually engaged in business and credit relations was much smaller; their majority was often reduced to a passive role in their husband's household. Yet their fates should be acknowledged and chapter 7 attempts to make them visible.

Women in bankruptcy may constitute a special case, which can nonetheless be accommodated into the aforementioned framework. For one, women were rarely members of the club. Women in the nineteenth-century were neither considered full citizens in any German state or city-state, nor were they admitted to special corporate groups and business organizations. A first conjecture would expect them to be treated differently in bankruptcy, because they did not enjoy the benefits of club membership, or could not avail themselves of the help of the underpinning organization and networks.

Yet women were also expected to partake in their husband's occupational identity. Whatever special privileges and rights their husband enjoyed, had an influence on their legal status as well. A miller's wife was subject to different codes of conduct compared to a merchant's wife. That was the case not least because the marriage market for different status groups was different and accordingly brides were endowed differently. The wife's dowry was itself an asset in a bankruptcy, subject of many conflicts and special regulation. Husbands regularly plundered their wife's dowries in order to pay off creditors. Though wives legally retained the ownership over their assets, they had to actively intervene in order to assert it. After all, one of the dowry's several functions also was to insure the bride against her husband's financial collapse, his death, or his elopement.

The role of wives should not be reduced to that of an additional pool of assets available to creditors. It is hard to assess, whether wives really did not participate in their husband's decision-

making and the management of a firm. Creditors who demanded a wife to co-sign a loan-contract at least could have had more in mind than simply seizing her dowry in case of default. They often seemed to treat the wife as their husband's business partner.

The conjecture is supported by modern development economics. It emphasizes women's role as coordinators and moderators in family networks, which they take in many traditional societies.¹⁵⁰ Development programs try to integrate this role in their aid-strategies. They often hand out loans and commodities to women exclusively, because empirical studies showed that this resulted in a fairer distribution of resources.¹⁵¹ Women who command goods and funds also have a better intra-household bargaining position.¹⁵² For many decades now micro-credit programmes rely on increasing the share of women among their borrowers – who are jointly liable – in order to boost the average repayment rate.¹⁵³

This brief regress into development economics suggests that husbands and wives could sometimes perform a sort of intra-family cooperative. Credit co-ops have been studied but their concept has not been extended to families. However, their role for the early industrialisation in rural Germany was acknowledged in a number of works. Economic historians ascribe the success of credit co-ops, which can be measured in high repayment rates, to three conditions: the special sociology of co-ops that revolves around a community core that encouraged cooperative behaviour; the fact that members were constantly in contact with each other; and the joint liability of

¹⁵⁰ DUFLO, ESTHER, 'Women Empowerment and Economic Development,' *Journal of Economic Literature* 50/4 (2012), pp. 1051-1079; MCCANTS, ANNE, "Petty Debts and Family Networks: The Credit Markets of Widows and Wives in Eighteenth-Century Amsterdam," in *Women and Credit: Researching the Past, Refiguring the Future*, ed. BEVERLY LEMIRE (Oxford, 2001), pp. 33-50.

¹⁵¹ JORDAN, WILLIAM CHESTER, *Women and Credit in Pre-Industrial and Developing Societies* (Philadelphia, 1993); WOOLLEY, FRANCES, "Control over Money in Marriage," in *Marriage and the Economy: Theory and Evidence from Advanced Industrial Societies*, ed. SHOSHANA GROSSBARD-SHECHTMAN (Cambridge, 2003), pp. 105-128.

¹⁵² SEN, AMARTYA, "Gender and Cooperative Conflicts," in *Persistent Inequalities: Women and World Development*, ed. IRENE TINKER (New York, Oxford, 1990), pp. 123-149.

¹⁵³ ARDENER, SHIRLEY AND BURMAN, SANDRA, eds., *Money-Go-Rounds: The Importance of Rotating Savings and Credit Associations for Women*, (Oxford, 1995); HOLLIS, AIDAN, "Women and Micro-Credit in History: Gender in the Irish Loan Funds," in *Women and Credit: Researching the Past, Refiguring the Future*, ed. BEVERLY LEMIRE (Oxford, 2001), pp. 73-90.

co-op members, which resulted in an efficient monitoring of debtors. A neighbour often knew more about a borrower's financial situation than a bank clerk.¹⁵⁴

The combination of development economics and theory of financial co-ops suggests that wives fulfilled multiple roles in their husband's bankruptcies: monitoring, guarantor, and lender of last resort. Similar to a credit co-op the role of a non-borrowing (family) members was to control the debtor's actions and to ensure, that his ventures did not endanger the welfare of the rest of the community (or family). That is what merchant wives often did. They were lenders to their husbands because husbands could dispose of their wives dowry. If the wife maintained control over her dowry and ensured that it was not pledged for bad debt, she enjoyed priority in bankruptcy. In this case, she often exercised significant leverage during negotiations with her husband's creditors. Sometimes she could avoid the bankruptcy altogether by taking over her husband's firm and she entered into the role of an entrepreneur herself.¹⁵⁵

¹⁵⁴ BANERJEE, ABHIJIT, BESLEY, TIMOTHY, AND GUINNANE, TIMOTHY, 'The Neighbor's Keeper: The Design of a Credit Cooperative with Theory and a Test,' *The Quarterly Journal of Economics* 109/2 (1994), pp. 491-515.

¹⁵⁵ HÄBERLEIN, MARK, "Zwischen Vormundschaft und Risiko: Ökonomische Handlungsspielräume und Investitionen Augsburger Patrizier- und Kaufmannsfrauen des 16. und frühen 17. Jahrhunderts," in *Prekäre Ökonomien: Schulden in Spätmittelalter und Früher Neuzeit*, ed. GABRIELA SIGNORI (Konstanz, 2014), pp. 139-158.

CHAPTER 3: GERMANY'S LEGAL LANDSCAPE

(...) now of all times, one has nothing better to do than to hastily restore a crude melange (...) and to organise each state as if there was no thread connecting it to the world. (Anton Friedrich Justus Thibaut: *Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts*, 1814)

(...) one must not discredit the particular laws of individual provinces and towns. Rather their private law deserves praise insofar as it connects to the sentiment and consciousness of the people. (Friedrich Carl von Savigny: *Vom Beruf unserer Zeit*, 1814)¹⁵⁶

I. Introduction

There are many famous academic debates. Few have resonated as strongly as the debate between Thibaut and Savigny over the question, whether Germany needed a unified private law. With slight exaggeration, it can be seen as the constituent dispute from which all camps and schools in German legal scholarship ultimately derive. Having experienced German defeat by Napoleon and the rule of French law, Thibaut called for a German equivalent to the French *Code Civil*. He regarded it as a prerequisite for Germany's political, economic, and most importantly its moral development. Savigny, on the other side, dismissed Thibaut's codification project as utopian. The century-old tradition of individual German regions adapting and combining Roman law with their local custom could hardly be undone in a couple of years. Savigny called for learned jurists to fathom the common grounds of German legal understanding and to preserve the old customs and traditions as an 'organic whole'.¹⁵⁷

Thibaut and Savigny were both law professors teaching at the eminent law faculties in Heidelberg and Marburg respectively. But their dispute was more than just a sophisticated argument in the ivory tower. It had a bearing on the daily affairs of most Germans, and on the 'national question', which was as politically charged as a matter could be at the time. The source of this

¹⁵⁶ Stern, ed., Thibaut und Savigny, 1914, p. 41; *ibid.* p. 96, *own translation, German original:* (...) gerade in diesem Augenblick hat man an vielen Orten nichts eiliger zu thun gehabt, als das karuse Gemisch (...)wiederherzustellen, jeden kleinen Staat zu organisieren, als ob er mit der ganzen Welt durch keinen Faden zusammen hänge (...); (...) so darf nicht geradezu das besondere Recht einzelner Provinzen und Städte für nachtheilig gehalten werden. Lob in dieser Beziehung verdient das bürgerliche Recht, insofern es das Gefühl und Bewusstseyn des Volkes berührt oder zu berühren fähig ist. (...)

¹⁵⁷ RÜCKERT, JOACHIM, *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny* (Ebelsbach, 1984), pp. 95-97.

debate, Germany's fragmented legal landscape, similarly provides the motivation for this chapter. Wives enjoyed different degrees of protection from their husband's creditors in the Duchies of Baden or Hesse. While the privileges of noblemen and military might have been acknowledged in Prussian law, they were discarded elsewhere.

This chapter examines and compares the laws of a few selected states that stand as exemplars for different 'legal families' within Germany. I combine insights from the existing legal history literature and my own close reading of the primary material. It cannot be a definite or encyclopaedic account of all German states.

The chapter is split into two parts: the following section describes three important approaches to bankruptcy that influenced German legislation. I quote examples from individual cases in order to illustrate how the respective bankruptcy procedures worked in practise. In contrast, section III.) turns to a bird's eye perspective and compares different bankruptcy laws by way of calculating two indices for creditor protection and debtor friendliness. The index design borrows from earlier works in law and economics. It is nevertheless unique and newly created for this purpose. I do not wish to quantify how 'good' or 'bad' a particular bankruptcy law was. The index merely tries to measure the balance between creditor friendly and debtor friendly rules in each bankruptcy system. This chapter provides useful background information for the ensuing chapters.

II. The Process of Bankruptcy

The bankruptcy procedure varied in length depending not only on jurisdiction but also the nature of the business and parties involved. It often took quite a lot of time to be brought to an end. The first step to analyse and understand historical bankruptcy laws is to emphasize this procedural character. Bankruptcy was a process rather than an event. The law prescribed a sequence of actions in the hope that the underlying collective action problem can be solved in its course.¹⁵⁸ The jurisdiction, where this process took place, was usually the place, where the debtor currently lived. In theory, that even applied if he was merely visiting that place for a short time, e.g. if he

¹⁵⁸ For the dilemmas of bankruptcy see Chapter 2.

was a merchant visiting a fair. The court, were the bankruptcy was filed, the bankruptcy court assumed control in all obligational questions relating to the debtor's estate, sometimes even over his assets abroad.¹⁵⁹ It will be shown later, to which extent this concept gave rise to conflict of laws and jurisdictions.

Most German laws conceptualized bankruptcy this way. Insolvency regulation often formed part of the procedural codes rather than the codes on substantive law. In Bavaria, for example, bankruptcy was regulated in the *Codex Bavarici iudiciarii*, the codification of procedural¹⁶⁰ questions and instructions to judges on how to administer law suits.¹⁶¹ French law, in contrast, regulated insolvencies in the third book of the *code de commerce*. It was by its own right a matter of substantive commercial law and subject to the jurisdiction of specialized commercial courts.¹⁶²

The limitation to procedural questions in the German approach entailed a disadvantage. Bankruptcy touched on important questions of substantive law, on questions about the relationship between debtor and creditor, between different types of creditors, and questions about the nature of obligations in a particular society. Hence, German bankruptcy codes either contained rules that affected substantive law but stood separate from the legislation on contracts or tort law; or these codes referred questions of substantive law to the respective legislation in private law.¹⁶³ Where no coherent codification of private law was available, Roman law in the version of the German *ius commune* was employed, though permeated by customs of local towns and munic-

¹⁵⁹ Meier, *Geschichte des deutschen Konkursrechts*, 2003, pp. 74-77.

¹⁶⁰ The distinction between procedural law and substantive law is a core principle in German legal scholarship. Procedural law is adjectival law concerning the actions and operations permissible in the course of a lawsuit. In the juxtaposition to substantive law, procedural law is often vilified as 'formality'. Yet most lawyers would agree that any court ruling (or in fact any legal decision) derives its legitimacy as much from its reasoning as from the following of a clear and fair procedure by which this decision is reached.

¹⁶¹ KLEBER, JOSEPH MARTIN/ METTENLEITER, JOHANN MICHAEL/ BRÉARD-NEUVILLE, PIERRE ANTOINE SUPPLICE DE: *Codex iuris bavarici iudiciarii de anno MDCCLIII. oder baierische Gerichtsordnung* (München, 1810) [henceforth *Codey iuris bavarici*]; *Allgemeine Gerichtsordnung für die Preussischen Staaten* (Berlin, 1795) [henceforth *AGO*], PIELSTICKER, CARL: *Process-Ordnung in bürgerlichen Rechtsstreitigkeiten für das Großherzogthum Baden Officielle Ausgabe* (Karlsruhe, 1832) [henceforth *Baden Process-Ordnung*].

¹⁶² Private insolvencies have been introduced into French law as late as the 20th century, cf. BELL, JOHN, BOYRON, SOPHIE, AND WHITTAKER, SIMON, *Principles of French Law*, 2nd ed. (Oxford, 2008), p. 461.

¹⁶³ An example for the former: Erläuterung und Verbesserung der Prozeß- und Gerichtsordnung, in: *Codex Augusteus*, Vol. I, p. 2381 ss.; an example for the latter approach: *Prioritäts-Ordnung für das Königreich Baiern*, in: *Gesetzblatt für das Königreich Baiern* (1822), cols. 101-140.; *Erbe- und Handfestenordnung*, in: *Sammlung der Verordnungen und Proclame des Senats der Freien Hansestadt Bremen* (1833/1834), pp. 31-113.

ipal statutes.¹⁶⁴ As a result some states had a bankruptcy code prescribing a procedure, but substantive law questions were left to the particularities of local custom and statutes of the place where the case was filed.¹⁶⁵

Thus, while many German laws shared a core of *ius commune*, there were aspects in which they differed substantially. The introduction of French law under Napoleonic reign further complicated matters.¹⁶⁶ Figure 6 shows a map that indicates the different German jurisdictions. The various shades of brown stand for laws in the tradition of the German *ius commune*. Even though the kingdoms of Saxony and Prussia also applied adaptations of the *ius commune*, they are emphasized in green and blue respectively. The two states had important political leverage when it came to legal reform. Also, most of the example cases and other material on the *ius commune* approach quoted in this chapter come from these states. Purple stands for French law, pink is its adaptation in Baden laws. Because it included large parts of the Ruhr Area and Germany's most densely populated area along the river Rhine, French law became the other important source of law for Germany. The free cities Frankfurt, Hamburg, Bremen, and Lubeck are coloured in bright red. The differences between these legal families will be examined in the following sections. But first, I shall like to look at the stages that immediately preceded bankruptcy.

¹⁶⁴ See introduction and Wieacker, *Privatrechtsgeschichte der Neuzeit: unter besonderer Berücksichtigung der deutschen Entwicklung*, 1967, , pp. 440 ff.; Whitman, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change*, 1990, pp. 8-17.

¹⁶⁵ *Codex iuris bavarici*, Tit. 19 with Banco-Ordnung der Stadt Nürnberg and Handelsgerichtsordnung der Stadt Nürnberg, in: MEIBNER, JOHANN KARL, *Codex der europäischen Wechsel-Rechte*, vol. 1 (Nürnberg, 1836), pp. 178-266; Hellmann, *Augsburg*, 1905, pp. 17-23.

¹⁶⁶ DE SAINT-JOSEPH, ANTHOINE, *Concordance entre les codes de commerce étrangers et le code de commerce français* (Paris, 1851), pp. 97-125 [henceforth Code de Commerce]

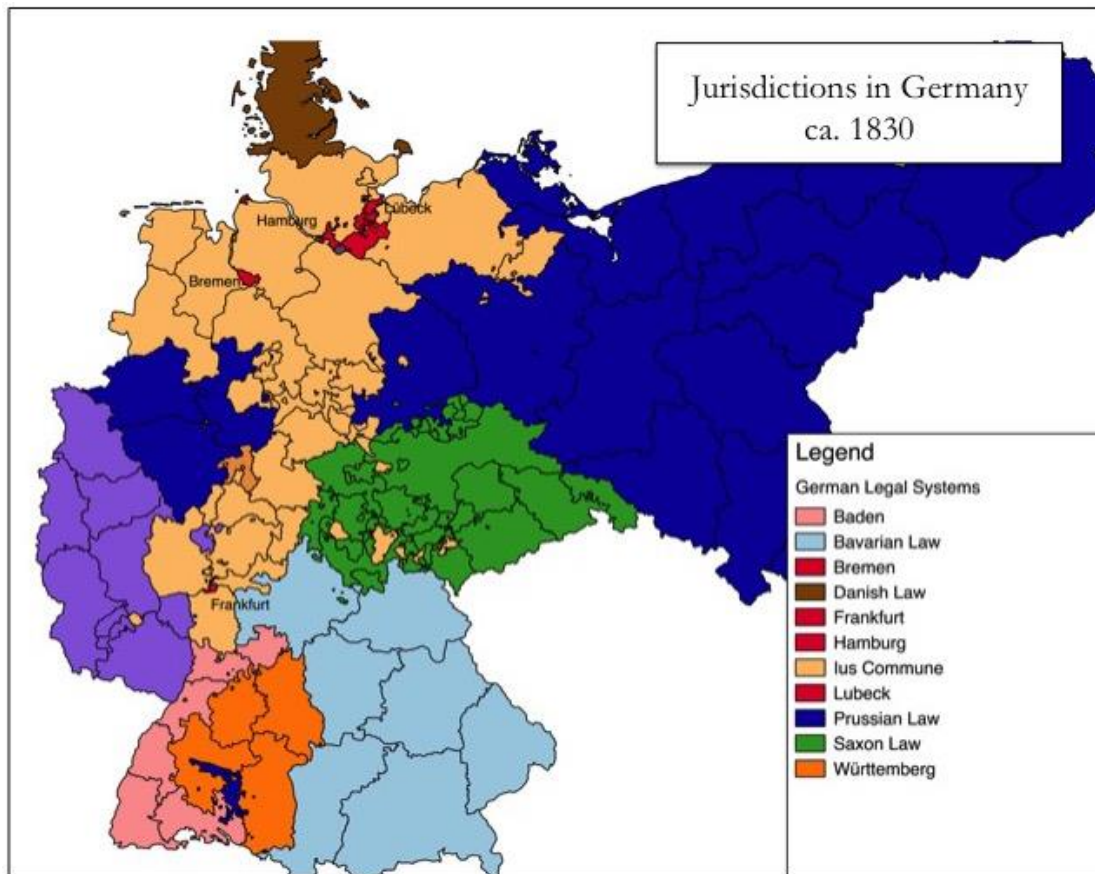


Figure 6 Map of different jurisdictions within Germany ca. 1830,
 map created with QGIS, information on German district borders in 1830 from Harvard Geospatial Library <http://calvert.hul.harvard.edu:8080/opengeoportol/> (02.02.2016); colouring of jurisdictions based on *Deutsche Rechts- und Gerichtskarte* (Kassel 1895), HERMANN KINDER (ed.): *div-Atlas Weltgeschichte*, (Frankfurt 2014).

a.) Dusk

Bankruptcy rarely comes out of nowhere. The legal beginning of a bankruptcy can be very different from its actual beginning. When exactly bankruptcy legally begins depends on the definition of illiquidity and insolvency.¹⁶⁷ However, a bankruptcy often casts long shadows in advance of these circumstances. Before a debtor is legally bankrupt, he has usually experienced problems, financial trouble and arguments with creditors. This pre-bankruptcy stage is often outside the domain of a concrete insolvency regulation. Nevertheless, it should be seen as part of the ‘process’ of bankruptcy and formed a commonly shared starting point for most cases.

¹⁶⁷ A contemporary example is how the German legislator considered changing the definition of insolvency during the financial crisis of 2008, see: PIEKENBROCK, ANDREAS, 'Empfiehl sich angesichts der Wirtschaftskrise die Einführung eines gesonderten Restrukturierungsverfahrens?,' *Zeitschrift für Vergleichende Rechtswissenschaft* 108 (2009), pp. 242-272.

aa.) Pre-bankruptcy debt collection efforts

During the months preceding the formal declaration of insolvency the debtors' activities were strongly influenced by the looming financial collapse. This was, so to speak, the 'dusk' before the night of bankruptcy fell over the debtor's assets, a twilight-period. It included growing pressure on the debtor by informal efforts of debt collection and formal enforcement into the debtor's property. Informal measures could include a barrage of letters and visits demanding immediate repayment, warnings of a ruined reputation, threats of legal action or sometimes even violence. Some collectors resorted to contacting the debtor's friends, relatives and business partners. The law imposed restrictions on how far creditors could go in order to make a debtor pay. Nonetheless, a debtor's life in the months before bankruptcy likely was tense and filled with a flood of demands to repay.

If the debtor had pledged a collateral as security in the original loan contract, creditors could pay themselves from selling this collateral. After a certain grace period had elapsed without the debtor effecting payments, creditors with a lien could proceed to foreclose or repossess the collateral. Unsecured creditors could only sue the debtor. If successful, they obtained a judgment against the debtor, a judicial ruling that the debt was owed and may be collected with the help of formal legal means, i.e. a police officer or court official.¹⁶⁸

Seizure of personal property was employed if the debtor still owned assets or when it was at least assumed that he was hiding assets somewhere or that he was likely to own assets either through future income or inheritance. The court ruling that had established the validity of a creditor's claim also gave this creditor a security interest in a specific good or right. But even this remedy was of limited use for creditors if the debtor had already pledged most of his assets to secured creditors in advance. Any collateral that secured creditors had obtained had to be deducted from the debtor's assets before unsecured creditors could enforce against his property. The secured creditor, who could repossess and foreclose the collateral, had a huge advantage over the unsecured creditors. Yet it was not always the case that the security's value covered the whole of a creditor's claim. If there was a remainder, the secured creditor competed with the

¹⁶⁸ cf. Baden Process-Ordnung (1832), Art. 675 ss. and Art. 1016 ss.; AGO (1795), Tit. 24 and Tit. 51.

unsecured creditors in court for a share in the value that was realized from selling the unpledged assets.

For cases in which the debt could not be collected, many German states in the 19th century still knew the ‘debtor’s tower’, *Schuldturm*, or debtor’s prison. The debtor was imprisoned, put under ‘personal arrest’, until the debt was settled, often by the help of relatives. Debtor’s prison became increasingly unpopular during the 19th century as a means of debt-collection. Creditors were often obliged to pay for the debtor’s meals and care in prison.¹⁶⁹ If the debtor’s family was without considerable wealth, this procedure only added to the creditor’s expenses. Imprisonment made sense if the debtor was likely to flee to another state or hide from his creditors. Moreover, as industrialisation and wage labour spread across Germany, debtor’s prison also lost its appeal because it prevented the debtor from using his labour to earn wages, which could then be garnished by creditors.¹⁷⁰

bb.) Hair-cuts, moratoria and other attempts to settle

Legal action against the debtor in the months preceding bankruptcy was only one side of the coin. The other side were the debtor’s attempts to keep his creditors at arm’s length, his efforts to buy time.

In old medieval and early modern German law, debtors could appeal to the benevolence of their ruler. Granting respites for repayment was seen as integral part of the Emperor’s authority to pardon and punish and was subsequently assumed by the ever more powerful princes of the individual territories.¹⁷¹ Such a respite brought all enforcement actions to a halt and required creditors to give the debtor yet another grace period. As the Latin name of these debt-moratoria – *Quinquennell* – suggests, the grace period could last up to five years.¹⁷² However, this special rem-

¹⁶⁹ Kadens, 'The Last Bankrupt Hanged,' 2010, ; Coleman, Debtors and creditors, 1974, pp. 250-253; Goode, Principles of Corporate Insolvency Law, 2008, , pp. 6-9.

¹⁷⁰ WEHLER, HANS-ULRICH, *Deutsche Gesellschaftsgeschichte*, vol. 3 Von der "Deutschen Doppelrevolution" bis zum Beginn des Ersten Weltkrieges 1849-1914 (Munich, 1995), pp. 55 and 135; Coleman, Debtors and creditors, 1974, pp. 249-269; VAUSE, ERIKA, 'Disciplining the Market: Debt Imprisonment, Public Credit, and the Construction of Commercial Personhood in Revolutionary France,' *Law and History Review* 32/03 (2014), pp. 647-682.

¹⁷¹ DABELOW, CHRISTOPH CHRISTIAN, *Ausführliche Entwicklung der Lehre vom Concourse der Gläubiger* (Halle, 1801), p. 152 .

¹⁷² PUCHTA, WOLFGANG HEINRICH, *Ueber den Concursoprozess : besonders mit Rücksicht auf die Mittel seiner Abwendung und Abkürzung* (Erlangen, 1827), p. 223.

edy for debtors had largely disappeared by the 18th century. Had it been an important instrument to help many an indebted country estate following the devastating thirty-years war in 1648, the ascending territorial state prioritised maximising fiscal returns into their coffers and financing wars over the pardoning of debt.¹⁷³

The other means for debtors was to bargain with their creditors for an out-of-court settlement, a *Nachlassvertrag* or *Accord*. Parties were free to conclude any private contract that regulated the amount, means, and time frame of repayment.¹⁷⁴ As long as all parties agreed voluntarily, these agreement were protected by the law just like any other contract.¹⁷⁵ Getting all creditors to agree voluntarily to a moratorium or a ‘hair-cut’ was difficult, though. Remember the different types of creditors that existed, e.g. secured and unsecured ones. Their interests were often diametrically opposed.

Most German bankruptcy laws regarded these voluntary agreements as a stage that preceded and was separate from the formal bankruptcy procedure.¹⁷⁶ An important exception was the French legislation in the western parts of Germany. Here, the friendly agreement, *Accord* or *Concordat*, was a possible outcome of the bankruptcy procedure itself and took place under the wings of the commercial court.¹⁷⁷ Other exceptions could be found in the free cities and some municipal statutes.¹⁷⁸

Whether the decision of the majority of creditors to accept such an agreement should be binding on the dissenting minority was a point of debate between German jurists. Many bankruptcy regulations, notably Prussian and French law, exempted secured creditors from settlements.¹⁷⁹ No secured creditor was supposed to receive less through a settlement than if he had pursued his claims in formal bankruptcy. This regularly meant that secured creditors could not be

¹⁷³ Puchta points to the 30years war in Germany as a crucial driver of this development, cf. *Ibid*, p. 39; similarly Kori, *System* 1828, p. 20.

¹⁷⁴ SPANGENBERG, 'Practische Bemerkungen processualischen Inhalts,' *Gießener Zeitschrift für Civilrecht und Proceß* 6 (1833), pp. 266-257.

¹⁷⁵ ENDEMANN, WILHELM, *Das deutsche Konkursverfahren. Systematisch dargestellt* (Leipzig, 1889), § 288; Schweppe, *Das System*, 1829, p. 157.

¹⁷⁶ VON ADLERFLYCHT, JUSTINIAN, *das Privatrecht der freien Stadt Frankfurt*, vol. 5. Teil Der Civilproceß der freien Stadt Frankfurt (Frankfurt, 1832), p. 1326.

¹⁷⁷ Code de commerce (1838), Art. 507 and 513; Baden Proceßordnung (1832), §§791-792 and § 820.

¹⁷⁸ See section 2.d) and Chapter 4 on Hamburg, Bremen, and Lübeck.

¹⁷⁹ Puchta, *Ueber den Concursprozeß*, 1827, p. 452.

forced to write off debts.¹⁸⁰ Justinian von Adlersflycht, senator and president of the city court in Frankfurt, wrote in his account of the city's procedural law that majority decisions were 'generally not permissible'. He made an exception only in the case that the dissenting minority was not worse off than in a formal bankruptcy and if there was not the slightest doubt about the parties' candour.¹⁸¹ To this end, all parties should swear an oath confirming that everything had happened in accordance with and strict observance of the law. A creditor simply had to refuse swearing that oath if he wanted to stop the others from reaching an agreement. Puchta, himself a judge in Bavaria, remarked that courts should act as arbitrators in the absence of other possible mediating agents; their role became particularly important, in his words, when the parties came from lower ranks of society: '(...) if creditors and debtor belong to the lower estates (...) inexperience with these matters and lack of trust and mutual will causes that nobody takes a suitable initiative.'¹⁸² Otherwise the law would procure an unfair advantage to those, who knew the legal system best.

cc.) In the beginning there was paperwork

To file a bankruptcy either party – debtor or creditors – needed to petition for it in court. In some jurisdictions, courts could start the procedure *ex officio*. But even then there was usually a creditor in the background whose complaints triggered court action. The beginning of the procedure was the end of the abovementioned twilight-period. For creditors it meant the end of time-consuming efforts to make a debtor repay and the end of a race with other creditors. For debtors it was often the end of their business, the definite end of their plans and hopes for a prosperous future. Withal, the bankruptcy petition was conceived of as a remedy for the debtor. Debtors who petitioned themselves for bankruptcy did so because the storm of requests for repayment, law suits and threats had already *de facto* deprived them of control over their property and business. Haunted by their creditors, they sought refuge in the bankruptcy court, for the bankruptcy

¹⁸⁰ Schweppe, *Das System*, p. 43, GÜNTHER, KARL FRIEDRICH, *Der Conkurs der Gläubiger nach gemeinem deutschen Rechte mit Angabe der wichtigen besonderen Bestimmungen des im Königreiche Sachsen geltenden Rechts* (Leipzig, 1852). Bills of exchange were a different matter, see: BENDER BENDER, JOHANN HEINRICH, *Handbuch des Frankfurter Civilprocesses* (Frankfurt, 1854), p. 459.

¹⁸¹ Adlersflycht, *Der Civilprozeß*, p. 1328.

¹⁸² Puchta, *Ueber den Conkursprozeß*, p. 243, own translation, German original: (...) wenn Gläubiger und Schuldner zu den niedern Ständen gehören (...) Unerfahrenheit in der Behandlung solcher Geschäfte, Mangel an Vertrauen und Vereinigung des Willens verursachen, daß es schon an der zweckmäßigen Einleitung fehlt (...).

procedure promised that no creditor could pursue their claims individually against the debtor or put him into debtor's prison.¹⁸³ That was why some laws and contemporary commentators spoke of the *Wobltat* – blessing or good deed – in relation to bankruptcy.¹⁸⁴

In some cases, access to this remedy was rather restrictive. For example, the debtor could be required to provide proof that he was actually insolvent and not just temporarily strapped for cash.¹⁸⁵ Other jurisdictions, in contrast, already admitted cash-flow insolvent debtors into the bankruptcy procedure, i.e. when a debtor had stopped making regular and ongoing payments. French law limited the bankruptcy procedure to merchants only.¹⁸⁶ And the city-states had rules that required the debtor to either own full citizenship or have amassed an immense amount of debt.¹⁸⁷

Whatever the specific requirements for admission into bankruptcy were, the debtor needed to provide proof that he met either of them. Ideally, he supplied the bankruptcy judge, or, more likely, a court secretary, with copious information about his affairs. The judge at the local court-house of the debtor's town then decided whether the petition for bankruptcy was granted or declined. The latter happened, if the debtor did not fulfil either of the requirements or was in fact not bankrupt at all. If the judge opened the procedure, he or his secretary proceeded to drafting the necessary forms. The debtor was then sworn in to certify the accuracy of the information on penalty of perjury.¹⁸⁸

From then on, the debtor no longer owned his property. A trustee or administrator now managed the bankruptcy estate on behalf of the creditors, who legally owned the estate.¹⁸⁹ More paperwork followed. In most jurisdictions, courts were required to put up public notices that a

¹⁸³ SULLIVAN, TERESA, WARREN, ELIZABETH, AND WESTBROOK, JAY LAWRENCE, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* (New York, Oxford, 1989), p. 24.

¹⁸⁴ Dabelow, *Ausführliche Entwicklung*, 1801, p. 501.

¹⁸⁵ SCHÜTZ, CARL, *Der württembergische Civil-Proceß mit Einschluss des Concurs- und Wechsel-Processes* (Bonn, 1831), p. 460-471; *Codex iuris bavarici* (1810), Ch. 19, § 1; Kori, *System* 1828, p. 25.

¹⁸⁶ *Code de Commerce* (1838), Art. 437; Bell, Boyron, and Whittaker, *Principles of French Law*, 2008, p. 461; COQUERY, NATACHA AND PRAQUIN, NICOLAS, 'Règlement des faillites et pratiques judiciaires,' *Histoire & Mesure* 23/1 (2008), pp. 43 - 83.

¹⁸⁷ *Der Stadt Hamburg neue Fallitenordnung, auf Befehl E. Hochbedl. Raths publicirt den 31. August 1753 nebst den Additional-Artikeln und den das Fallitwesen betreffenden neueren Conclusis und Verordnungen* (Hamburg 1832), [henceforth NFO] Art. 109 No. 1.

¹⁸⁸ MARTIN, ADOLPH, *Vollständige nach Grundsätzen separirte Concurs-Acten zur Erläuterung und Versinnlichung der Theorie des Concurs-Verfahrens* (Jena, 1827).

¹⁸⁹ Kori, *System* 1828, pp. 134 and 147; Puchta, *Ueber den Concursprozeß*, 1827, p. 366.

bankruptcy petition had been submitted. In some instances a placard outside the courthouse might have been sufficient to let everyone involved in the case know. More often, the opening of the procedure was published in newspapers, together with a call that all creditors may contact the court and register their claims until a specified date (see figure 7).¹⁹⁰

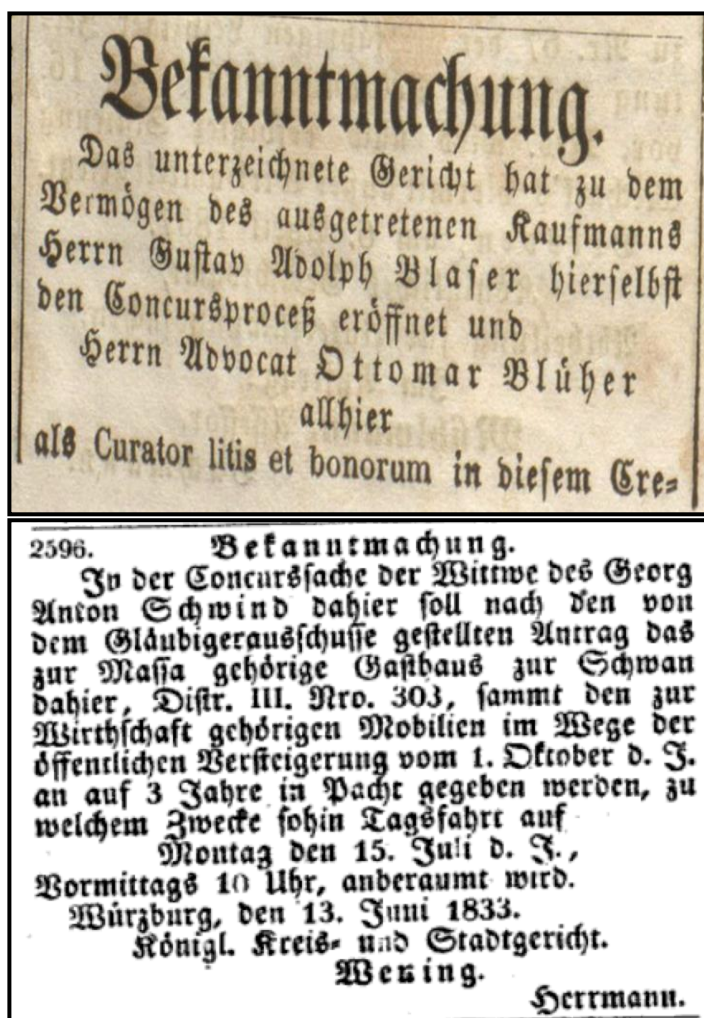


Figure 7 Public notice of a bankruptcy.

Left: in Leipzig, *Leipziger Nachrichten* 1856, p. 1764, in *Konkurs Lesky in SäStALe*, Nr. 20094 Right: in Würzburg, *Frankfurter Journal* 1833, Vol. 2, Nr. 177.

The opening of the procedure stopped all collection efforts. At the court's behest, the administrator or trustee that had been provisionally appointed started immediately with collecting as much information about the bankruptcy estate as possible. Had the debtor been running a business, the trustee examined his accounting books and checked their accuracy. If no such books were available, the trustee was commissioned to catalogue all assets and make sure that nothing mysteriously disappeared. Depending on the case and the size of the bankruptcy estate,

¹⁹⁰ Unfortunately, German historical newspaper that are still available are not the most reliable repository for bankruptcy notices.

this task could last for many days and required multiple people and professional accountants. And while all this counting, listing, and reporting was going on, the first creditors were coming in to register their claims. The procedure had started rolling.

b.) Bankruptcy in the *Ius Commune*

Maria Sophia Bötticher's case, a *Kaufmannsfrau* in Rochlitz, a village between Leipzig and Dresden, illustrates some characteristics of the procedure that followed the *ius commune* approach.¹⁹¹ She was already stripped of most valuables when she turned to the court. There was little in the bankruptcy estate that could help her repay her creditors in full. In this respect, her case was probably 'typical'. Yet she was also 'atypical' because she was a woman. Her petition, written on March 27th 1835, highlights the particular vulnerability from which women suffered:

As I had to give so many guarantees to my deceased husband's debts, I am so deeply troubled now, that I do not know how to help me and know no other mean as to assign what little is left in my possession to my creditors.¹⁹²

A characteristic of the procedure that followed was that it introduced two new actors in addition to debtor, creditor, and judge: the *Curator* and the *Contradictor*. They were predecessors of the modern administrator (*Konkursverwalter*). Their roles were not easily distinguishable. In Maria Bötticher's case, the court appointed only one person who was simultaneously *Curator* and *Contradictor*. Whether it was because the court deemed a women's case less important or because her estates were in fact so small that one person sufficed or because the village lacked any suitable personnel to fill both posts, we do not know. However, it was nothing uncommon. A lot of sources argue that the two should better be combined in one person in order to avoid further delay in the administration of cases.¹⁹³

The *Curator* represented the creditors collectively in relation to third parties. He also administered the bankruptcy estate and tried to maximise the value of the remaining assets.¹⁹⁴ In this

¹⁹¹ SaStALe, Amt Rochlitz, Nr. 4018 *Maria Bötticher*.

¹⁹² Own translation, German original: *Durch die vielen Verbürgungen für meines Ehemannes Schulden bin ich dergestalt in Decrement gekommen, daß ich mir gar nicht mehr zu helfen weiß, und kein anderes Mittel mir übrig bleibt als mein noch besitzendes bisschen Vermögen diesen Gläubigern vollends abzutreten.*

¹⁹³ Wengler, *Der Conkurs*, 1870, , p. 52, with references to older sources. Different opinion expressed in Kori, *System* 1828, p. 148.

¹⁹⁴ BAYER, HIERONYMUS VON, *Theorie des Concurs-Processes nach gemeinem Rechte*, 4 ed. (Munich, 1868), pp. 111 and 120.

respect he worked in the interest of both, debtor and creditors. With the opening of the bankruptcy procedure, the court appointed a provisional *Curator*. Creditors could later confirm that decision or suggest a new person. On the other side was the *Contradictor*. His title was meant literally. He carefully examined each claim and, where necessary, contested them. As he needed to be able to appear in court, the law explicitly asked for a lawyer to perform this role.¹⁹⁵ It was not clear, whose interests he represented: the debtor and the bankruptcy estate with regard to creditors' claims, or the creditors with regard to individual claims?¹⁹⁶ With this uncertain role, it is not surprising, that towards the 19th century it was generally agreed, that the role of the *Contradictor* was an impediment to a swift and pragmatic procedure.¹⁹⁷

The *ius commune* also assigned extensive powers to the bankruptcy judge. In the Prussian *Allgemeine Gerichtsordnung*, the two trustees were downgraded to mere assistants of the judge. The judge had almost absolute power to decide. He could even overrule collective decisions of the creditors assembly. Contemporary jurists criticised that it overextended the judge's capacities and probably resulted in bad and uninformed decisions as he often simply lacked sufficient knowledge about commercial matters.¹⁹⁸ Moreover, this situation meant that the *Curator* lacked sufficient incentive to bring a case to an end quickly and act for the benefit of creditors.¹⁹⁹

After Maria Bötticher had sent her petition to the court and after the judge had opened the formal procedure, the following stage was stretched across three so-called *Ediktstage* or *Liquidationstermine*. These were hearings in court where creditors could register their claims. In Maria Bötticher's case, two hearings sufficed. After the last hearing the court drafted a ruling that legally established the registered claims and excluded those who had missed deadlines or had been unable to provide sufficient proof. This was on September 2nd 1835, more than five months after the original filing.

The *Liquidationsterin* was followed by the *Prioritätsverfahren*, designated to establish the relationship between different types of creditors. The court gave the *Curator* time until October 19th

¹⁹⁵ Schweppe, *Das System*, 1829, p. 200.

¹⁹⁶ Bayer, *Theorie*, 1868, p. 137.

¹⁹⁷ Gesetz-Revision. Pensum V. Vom Revisor vorgelegter Entwurf zur Concurs-Ordnung (Berlin 1831), in: SCHUBERT, WERNER, ed., *Gesetzrevision (1825-1848): Abt. 2 Öffentliches Recht, Zivilrecht und Zivilprozessrecht*, vol. II/10, (Vaduz, 1990), p. 212.

¹⁹⁸ Puchta, *Ueber den Concursprozeß*, 1827, p. 301.

¹⁹⁹ Gesetz-Revision, 1831, pp. 255-257.

to agree on a proposal. It also encouraged him for the last time to seek an amicable settlement. The deadline passed without any reaction. On November 27th 1835, the court filed another ruling that decreed a fixed rank order between creditors.²⁰⁰

The *ius commune* contained ample exemptions, privileges and a sophisticated rank order for creditors. The system had evolved incrementally since the 16th century, first in form of five classes of creditors: (1) creditors with a special property right, (2) so-called tacit hypothecs, (3) secured creditors, (4) creditors with a personal privilege, (5) unsecured creditors.²⁰¹ Creditors in one class had to be fully compensated before distribution could proceed to members of the next class. By the 19th century, so many subcategories had been introduced that commentators feared it might have turned the original function upside down.²⁰²

The distribution of Maria Bötticher's assets went as follows: first came the costs and fees for the bankruptcy procedure, ca. 67 *Mark*. Second came outstanding taxes and fees to local authorities, ca. 102 *Mark*. The money obtained through the sale of her house, ca. 900 *Mark*, went to three different secured creditors. First ranked a creditor who held a mortgage on the house. The second secured creditor had obtained an undefined security interest in her assets. Third ranked a creditor that had obtained a court ruling granting him a security interest in her property. The unsecured creditors ranked last in the list. At the bottom of the list, the judge noted in simple words, that all creditors from class two downwards had not been repaid in full, not even secured creditors. In other words: court costs, fees and the privilege given to fiscal claims had received prerogative at the expense of ordinary creditors.

c.) The French Style in Bankruptcy

Friedrich von Rappard in Aachen and Philipp Compertz in Cologne were frequent business partners. Maybe they were even friends. They also went bankrupt nearly simultaneously. Compertz declared his insolvency on January 2nd 1826, followed by von Rappard on January 6th.²⁰³

²⁰⁰ Vollmershausen, *Marktberäinigungsverfahren*, 2007, p. 39.

²⁰¹ Forster, *Konkurs als Verfahren*. Francisco Salgado de Momoza in der *Geschichte des Insolvenzrechts*, 2009, pp. 176-179.

²⁰² *Gesetzrevision*, 1831, p. 252.

²⁰³ Published in: *Archiv für das Zivil- und Kriminalrecht der Königlich-Preussischen Rheinprovinzen* Vol. 10/1 (1827), pp. 278 and 283.

Cologne and Aachen were located within the Rheinland province and part of the Prussian Kingdom. The province had vigorously defended their French codes against attempts from the Prussian side to incorporate the Rheinland into the jurisdiction of its *Allgemeines Landrecht*.²⁰⁴

Compertz' and von Rappard's bankruptcy was dealt with according to the rules of the third book of the *Code de Commerce* and fell into the jurisdiction of special commercial courts. These courts, too, had been introduced by the French. They consisted of professional jurists and a number of lay judges, merchants selected from the local chambers of commerce.²⁰⁵ A special characteristic of French insolvency regulation was the distinction between two different states of insolvency. The bankruptcy procedure began with the date that the commercial court officially and publicly declared its opening. From this date forward, creditors were given forty days to register their claims with the court, otherwise they were excluded from further proceedings. In his declaration the court also set the date for the beginning of the so-called 'state of insolvency',²⁰⁶ which could be dated back several months. From this date onwards the debtor was assumed to have been unable to honor his obligations and to have been legally in a state of bankruptcy. Transactions and contracts made between this date and the formal opening of the procedure could be declared null and void.

One of Compertz' creditors had to learn about this possibility the hard way. The published court sentences identify Philipp Compertz as a *Banquier*, a banker. The number of creditors and their geographical dispersion was quite large. A number of foreign merchants had accounts with him in order to settle transactions and cash bills in Cologne. Everyone who had deposited money with him was now a creditor in the bankruptcy case. At the creditor assembly in May 1826, the court secretary counted 140 men, whose claims amounted to 382,796 *Reichstaler*. The court decided the date for the de-facto insolvency to be the 15th of October 1825.

²⁰⁴ Conrad, *Das französische Recht*, 1969, ; RECKENDREES, ALFRED, "Institutioneller Wandel und wirtschaftliche Entwicklung - Das westliche Rheinland in der ersten Hälfte des 19. Jahrhunderts," in *Deutschland als Modell? Rheinischer Kapitalismus und Globalisierung seit dem 19. Jahrhundert*, ed. D. GILGEN, C. KOPPER, AND A. LEUTZSCH (Bonn, 2011), pp. 45-88.

²⁰⁵ LEMERCIER, CLAIRE, *Un si discret pouvoir. Aux origines de la chambre de commerce de Paris 1803 - 1853* (Paris, 2003), pp. 114-121, 182; HANDELSKAMMER HAMBURG, *Dokumente zur Geschichte der Handelskammer Hamburg* (Hamburg, 1965).

²⁰⁶ Code de Commerce 1807, Art. 441 and 442; Code de Commerce 1838, Art. 441 and 443.

Jakob Marx, a merchant from Karlsruhe, claimed the sum of 4,160 *Taler*. Karlsruhe is ca. 300 km further up the river Rhein. Marx was too late. The document he produced to proof his claim dated the transaction to the 12th of November. On that day Marx had sold Compertz a quantity of copper which Marx did not want to ship up to Karlsruhe. As the 12th of November was after the declared date of the de-facto insolvency, the court rejected Marx' claim. His claim was precluded for a second reason: Marx had missed the deadline of forty days to register the claim.²⁰⁷ French law paid much more attention to the *timing* of things; precise deadlines and time-periods were defined for each state of the procedure. It helped to speed up the procedures, and promised legal certainty. For many Germans, French law represented a 'modern' and cutting-edge approach to law, favorable to their old customary laws.

Another characteristic of the *Code de Commerce* was its emphasis on friendly settlements. The law provided a couple of incentives to facilitate agreements between debtor and creditors on 'hair-cuts' or debt moratoria. In contrast to the *ius commune*, negotiations for an *Accord* formed part of the official bankruptcy procedure. Compertz reached such an *Accord* with his creditors, promising to pay them forty percent of his debts over a period of three years. The Accord was approved by the commercial court shortly thereafter.²⁰⁸

Now, there was still von Rappard's bankruptcy in the background. Von Rappard had drawn bills of exchange amounting to 120,000 *Taler* on Compertz, who had accepted. Von Rappard used these bills to pay for goods and services he received from Spies & Comp. This company actually triggered both bankruptcies when it presented the bill to Compertz who was unable to pay. Both merchants now bargained for an Accord with their creditors separately. Yet as Compertz seems to have acted as von Rappard's bank, they were entangled with each other through creditors like Spies & Company who registered their claims in both procedures. Compertz and von Rappard thus faced a coordination problem, which was expressed in the following letter from von Rappard to Compertz in March 1826:

Those, who received 45 % from me for their bills, will approach you with 55% of the mentioned 120,000 with 66,000 Tl, which you must be able to promise

²⁰⁷ Published in: *Archiv für das Zivil- und Kriminalrecht der Königlich-Preussischen Rheinprovinzen* Vol. 9/1 (1827), p. 290.

²⁰⁸ Ibid.

them, otherwise we won't come to a conclusion here (...) I report this so that you can adopt measures and put the 55% aside, then we will both be well again (...) I had enough time to check on my people here, and if you are trying to plot a cheap settlement with them, you won't succeed; letting you know this I deem my duty as your friend.²⁰⁹

Compertz in fact reached an Accord of 40 percent, fifteen percent less than von Rappard demanded in his letter. Spies & Comp. had opposed the arrangement but was outvoted by other creditors. A majority of creditors that combined at least two thirds of all claims could make decisions that became binding for the dissenting minority. After Spies & Comp. had received only 45 percent from von Rappard, their hopes must have been on Compertz. But he now challenged their claim in court, arguing that they had entered into an agreement with von Rappard, albeit de facto involuntarily, to discount 55 percent of the outstanding debt. The sum to which they were creditors of Compertz should be reduced by the same amount. And from this 120,000 Taler minus 55 percent, Compertz was willing to pay forty percent. Put in other words: he wanted to pay only 18 percent on the original debt. The case went up to the higher appellate court, and Compertz was successful. The appellate court declared that an *Accord*, once accepted and approved, was binding, and that it affected joint-debtors, too.

d.) The Alternatives of the City States

The wealth of the four free cities, Frankfurt, Hamburg, Bremen and Lubeck, rested predominantly on trade and commerce. While Frankfurt employed a variation of the *ius commune* procedure, bankruptcy legislation in the three northern cities differed substantially from the rest of Germany.²¹⁰

In Hamburg, Bremen, and Lubeck legislators were naturally concerned to provide remedies to their mercantile community. Insolvencies of merchants accounted for roughly 71 percent of all

²⁰⁹ Own translation. German original: Diejenigen also, die dadurch bei mir für ihre Accepten nur 45% erhalten haben, kommen mit 55% von obigen 120,000 auf sie zurück mit 66,000 Tl., die Sie Ihnen auch definitiv zusichern müssen, da wir sonst nicht fertig werden können; (...) Ich melde Ihnen dieses, damit Sie Ihrerseits Ihre Maßregeln nehmen und hier 55% für sich kollektiven, dann wird es uns beiden wieder gut gehen (...). Ich habe hinlänglich Zeit gehabt, meine Leute hier zu prüfen, und wenn Sie einen wohlfeilen Versuch mit ihnen machen, so werden Sie nicht durchkommen; dieses halte ich mich verpflichtet, Ihnen als Freund zu melden.

²¹⁰ BENDER, JOHANN HEINRICH, *Handbuch des Frankfurter Privatrechts* (Frankfurt, 1848), p. 15-19; Motive, 1875, p. 50-55.

cases in the Hamburg commercial court.²¹¹ ‘Merchants’ was a broad category that comprised of a range of different species: from small shop-keepers to large and eminent trading houses. I quote the example of a medium sized house in Hamburg with two partners under the name ‘Merck & Fink’.²¹² The gentlemen Heinrich Merck and Wilhelm Fink experienced financial turbulences in the early 1850s. The preceding decade had been tough on businesses in Hamburg: the big fire of 1842 first destroyed multiple warehouses in the port, and the following years of political unrest and revolution leading up to 1848 had created an environment of uncertainty. Some of the losses the house had suffered had not yet been recuperated and creditors started to press for their money.

On the morning of January 11th 1850 Mr. Fink made his way to the town hall and requested to see the secretary on duty, to whom he handed his petition for a *Senatskommission* and a provisional summary of his balance sheets, showing a deficit of some 80,000 *Mark Banco*. As the two partners were personally liable for the firm’s obligations, Mr. Merck had to file a separate bankruptcy for himself. Fink’s request was granted the evening of the same day during the sitting of the city council. Two senators were commissioned to supervise the insolvency proceedings in both cases. Their first official act was to take the two debtors under oath not to leave the city, not to alienate any of their property, and to cooperate and assist the senators. Simultaneously they publicly announced the insolvency on the board of the local Bourse in order to summon all creditors to a gathering in the next three days.

Creditors came together around noon the following Saturday in Senator Bary’s *Kontor*, as he himself was a distinguished merchant. One by one they presented documents legitimizing themselves and proving the amount of their claims. Some merchants showed up with the authority to act on behalf of foreign creditors in Bremen or Lubeck. Fink’s young wife was accompanied by her father. A handful of foreign claimants were sent away directly as they did not own citizenship and failed to produce a residency permit. Once the two senators had drawn a provisional list of 45 potential creditors, this group elected an administrator or trustee, Mr. Buchholz.²¹³ He was a

²¹¹ Data from the commercial court in Hamburg, see Chapter 4.

²¹² StAHH 375-2, C2 *Verträge der Vertrauenskommission Merck und Berseburg-Gößler*, 1850.

²¹³ StAHH. Handelsgericht 222-3, B1 No. 3357.

creditor, too. As trustee his task was to verify the accuracy of claims, to draw an inventory and to maximize the value of the bankruptcy estate. Fink's house, his furniture, his share of the partnership with Merck, his share in the belongings of the firm, his entire estate now was property of the collectivity of creditors, and Mr. Buchholz was their representative. Simultaneously he started to act as an intermediary between Mr. Fink and his creditors. As Buchholz became acquainted with the state of Fink's finances, he started making proposals for an out-of-court settlement between Fink and his creditors.

Merck & Fink had been dealing in manufactured good *en gros*. Most of their income had come from buying and selling goods in public auctions. After significant losses in the 1840s, they had resorted to a practice of taking advances on goods in order to keep up ongoing payments. Those advances were usually only two thirds of the nominal value of the goods they imported, but it gave them access to short term funds and allowed them continuing payments for a little while. Most of these advances came from the owners of the auction halls. They charged 7 percent interest on the advances plus another 0.5 percent for storage of the goods and 1 percent for every successful auction. This model turned out to be a vicious cycle. Whenever Merck & Fink bought goods from one of their suppliers with money borrowed from one merchant, they almost simultaneously handed them over to another merchant, who had given advances previously. The two gentlemen had no chance to rebuild their own capital stock. They were essentially shifting borrowed money in circles from one creditor to another for the sake of not publicly declaring their insolvency.²¹⁴

Now, as the administrator was going through their books and verified claims, it turned out that most creditors claimed to have a security interest in goods, on the basis of which they had lent money. Some of the claims were contradicting. In accordance with Art. 48 and 49 of the Hamburg Bankruptcy Code he listed all creditors in descending order of the dates they contracted with Fink. He then drew a line between the secured and unsecured creditors and another at half of the sum of all secured debt to distinguish between senior secured and junior secured creditors.

²¹⁴ StAHH, Handelsgericht 222-3. B1 No. 3437.

It went right through the claim of Mr. Eduard Thöle: he now became a one quarter senior and a three quarters junior creditor.

Buchholz eventually managed to accelerate debt negotiations by threatening to consign the case to a formal insolvency procedure. That would have meant that the commercial court would have taken over the case to liquidate all assets and establish a distribution among creditors, which could then be challenged by each individual creditor and fought out in court. On December 16th in 1850, creditors finally settled with Fink for the following contract:

§ 1 The assembly of creditors under the heading of the commission of the commercial court, grants Mess. Merck & Fink a debt moratorium of 2 years, under the condition that, if the majority of creditors come to the conclusion that insolvency becomes unavoidable, the moratorium can be unilaterally stopped. Over the course of the moratorium, no interest is being charged on outstanding debt.

§ 6 After expiration of the moratorium, Mess Merck & Fink promise to repay part of their debt, namely: 25 percent to the senior secured creditors, 18 ³/₄ percent to the junior secured creditors and 12 ¹/₂ percent to the unsecured creditors. Payment can be done in installments over a period of three years.

§ 7 Creditors retain all rights as regards the outstanding sums beyond completion of this contract. However, until Mess Merck & Fink have not yet completed repayment or until it has become obvious that they never will be able to provide the repayment specified in this contract, no creditor can pursue action in court against the firm or its partners.²¹⁵

III. Comparing Bankruptcy Laws in Germany

a.) Method

A word of caution is necessary when approaching laws with the methods of indexing and numerical coding. After a first ‘wave’ of law and economics studies relying on numerical indices as analytical tool, this approach was fiercely criticised. Concepts like ‘investor protection’, critics

²¹⁵ Own Translation. German Original: ‘§ 1 Die Versammlung der Gläubiger unter der Anleitung des Handelsgerichts verständigt sich darauf, den Herren Merck & Finck ein Moratorium auf zwei Jahr zu gewähren, unter der Bedingung, daß, wenn die Mehrheit der Gläubiger zum dem Schluss kommen sollte, daß ein Conkurs unvermeidlich würde, das Moratorium jederzeit einseitig gestoppt werden kann. Für die Zeit des Moratoriums fallen auf die Ausstände keine Zinsen an.

§ 6 Nach Ablauf des Moratoriums versprechen die Herren merck & Fink ihre Schulden zurückzuzahlen, namentlich: 25 Prozent an die älteren gesicherten Gläubiger, 18 ³/₄ Prozent an die jüngeren gesicherten Gläubiger und 12 ¹/₂ Prozent an die ungesicherten Gläubiger. Die Zahlung kann in Raten über einen Zeitraum von drei Jahren erfolgen.

§ 7 Die Gläubiger behalten sich das Nachmahnungsrecht über die Dauer dieses Zeitraums hinaus vor. Solange jedoch die Herren Merck & Fink ihre Zahlungen novh nicht vervollständigt haben oder es noch nicht offensichtlich geworden, daß sie den Bedingungen dieses Vertrags nie werden entsprechen können, soll kein Gläubiger gegen sie oder die Firma bei Gericht auftreten., StAHH 375-2, C2 Verträge.

argued, were oversimplified and yielded trivial results.²¹⁶ What was more, these results were shown to hold little explanatory value when challenged in subsequent studies.²¹⁷ The criticism was valuable and helped the methodology to evolve. New approaches widened the scope of these indices as well as the underlying data in order to ameliorate some of the earlier limitations.

For an index to yield any meaningful results, the coding has to be consistent and accurate. Whatever values are ascribed to individual regulations should represent the actual function and importance of that rule in the interplay with other rules and laws. Work conducted by John Armour et al. created an extensive database on regulation of workers rights, debtor protection and investor relations as well as a sensitive and rigorous approach to numerical coding.²¹⁸ In their attempt to achieve consistency and accuracy, they increased the number of variables and allowed for decimal values in some cases rather than relying on binary coding. The following index borrows from this approach. The variables, analysis and coding are my own.

An index does not necessarily render the results less 'subjective'. Developing an index and assigning different values to variables is an activity determined by the researcher's mode of analysis. He or she assigns values based on questions they are asking to understand the function of certain rules. The activity in itself is a form of analysis. It is worth pointing out the nature of these questions. They bring the comparison to a different level; they presume some 'universal' functions of a bankruptcy law and this predefined functionality becomes the glass through which the researcher looks at the law. This must not be confused with a judgment about the law's quality or respective deficiency. The value of this method lies in its capacity to visualize variances between different legal systems.

Two different indices with 34 variables each have been constructed for the current purpose. Their focus lies on creditor protection and debtor protection respectively. Appendix A reports all

²¹⁶ SIEMS, MATHIAS, 'Statistische Rechtsvergleichung,' *RebelsZ* 72 (2008), pp. 354-390; La Porta, Schleifer, and Lopez-De-Silanes, 'The Economic Consequences of Legal Origins,' 2008, pp. 285-332.

²¹⁷ Lamoreaux and Rosenthal, 'Contractual Flexibility,' 2005, Rosenthal GUINNANE, TIMOTHY W. AND ROSENTHAL, JEAN-LAURENT, 'Making do with imperfect law: small firms in France and Germany, 1890-1935,' *Entreprises et histoire* 57/4 (2009), pp. 79; Sgard, 'Legal Origins,' 2006, ; RAMSAY, IAIN, 'A Tale of Two Debtors: Responding to the Shock of Over-Indebtedness in France and Englan - a Story from the *Trente Piteuses*,' *The Modern Law Review* 75/2 (2012), pp. 212-248.

²¹⁸ Armour et al., 'How do Legal Rules Evolve?,' 2009, ; Armour, Deakin, and Siems, 'What are We Learning From Time Series Evidence?,' 2009, ; Armour, Hsu, and Walters, 'The Costs and Benefits of Secured Creditor Control,' 2012, pp. 112-120.

variables and the respective values assigned to each variable in each of the examined laws. Creditor protection here is understood to affect bankruptcy laws in two different ways: one side of it concerns the relationship between creditor's protection *from* arbitrary and potentially harmful actions by the debtor. It includes questions relating to the amount of control the debtor has over assets before and in bankruptcy, whether the debtor's family and wife are granted special privileges, and under which circumstances the debtor can file bankruptcy. The other side of creditor protection concerns the relationship between different types of creditors, i.e. the protection of creditors from other creditors. This includes a set of questions relating to the bankruptcy procedure itself, the way the law ranks different types of creditors and the mode of decision making among creditors.

Debtor friendliness can equally take different forms, depending on the stage of the process. The three broad building blocks here relate to the phase preceding the bankruptcy, the phase of the procedure, and the outcome of the procedure. Before the procedure ensues, it might be relevant whether there is a preparatory stage, and what kind of formalities the debtor has to observe. During the procedure the focus shifts to questions of whether the debtor can participate at all, maybe even influence the course of the procedure. Finally, with regards to the outcome, it is interesting to which extent the law allows for and facilitates a friendly settlement between debtor and creditors and how the distribution of value is enforced.

The two aspects, creditor protection and debtor friendliness, are often seen as the two ends of a spectrum on which any bankruptcy regime may be located. Therefore, some variables can be found in both indices, so to speak as chromatic inflections. An example is the question whether a debtor could unilaterally file for bankruptcy and whether he had to prove balance-sheet insolvency. The easier it was for a debtor to file bankruptcy, the better, because he could possibly use it as a means to escape prosecution by creditors. For creditors, on the other hand, easy access to the bankruptcy system meant, that alternative forms of debt-collection became less efficient and that, from the moment the bankruptcy procedure was opened, they had to stop their individual collection actions.

Other variables that are part of both indices can exert a similarly positive or negative effect on both sides. Sometimes, having a written rule for a certain situation already leaves all parties better off than had the issue been left to the individual (and possibly uncertain) discretion. And lastly, there are variables that are particular to either side. That was the case regarding a precise definition of what constitutes a fraudulent bankruptcy, which affected the debtor only. If none such definition was stipulated by the law, the debtor was essentially left to the arbitrary judgment of his contemporaries and the discretion of judges. If, on the other hand, the law established a set of criteria against which the debtor's pre-bankruptcy behaviour could be measured, this increased the law's predictability and gave the debtor better opportunity to defend himself against allegations of fraud. The rank order of privileges and claims, on the other hand, is a variable that has a bearing on the creditor's side and the likelihood of being repaid from the bankruptcy estate.

There were many more facets of the respective regimes that the indices cannot fully account for. They will either be discussed in the following case studies or have to be left to in-depth analysis of these particular laws.²¹⁹ The indices are also not a very good indicator of the efficacy and fairness with which the respective systems were administered. Again, this is a question that will be further explored in the following case-study chapters.

b.) Sample of Bankruptcy laws

It would be much desirable to build longitudinal time series to assess convergence or divergence of legal systems over time. Yet this is not feasible with the kind of sources that are available. Some parts of Germany had no codified bankruptcy law at all. Any information about those regions comes from contemporary textbooks and other second-hand descriptions. Countries that did have a written bankruptcy law differed greatly in their timing; legal codes that were produced in the 19th century applied a substantially different language and structure than their older predecessors from the 18th century. Finally, we know that some countries amended parts of the existing laws later on. As far as possible those decrees have been taken into account in the following indices. However, the source material remains fragmentary. An important secondary source giv-

²¹⁹ See the literature review in the introduction.

ing a profound overview of legal sources in German states is the 1875 collection of materials for the new German bankruptcy code.²²⁰

The 18th century had been a century of important codification projects and similarly a century of commercial expansion. Many German states and most free cities decreed new bankruptcy codes in this period, which became the basis for reforms and new legislation in the 19th century. Bankruptcy legislation seems to have accelerated in the latter century. Figures 8a and 8b illustrate the frequency with which new insolvency regulation was decreed. The corresponding laws are listed in Appendix B.

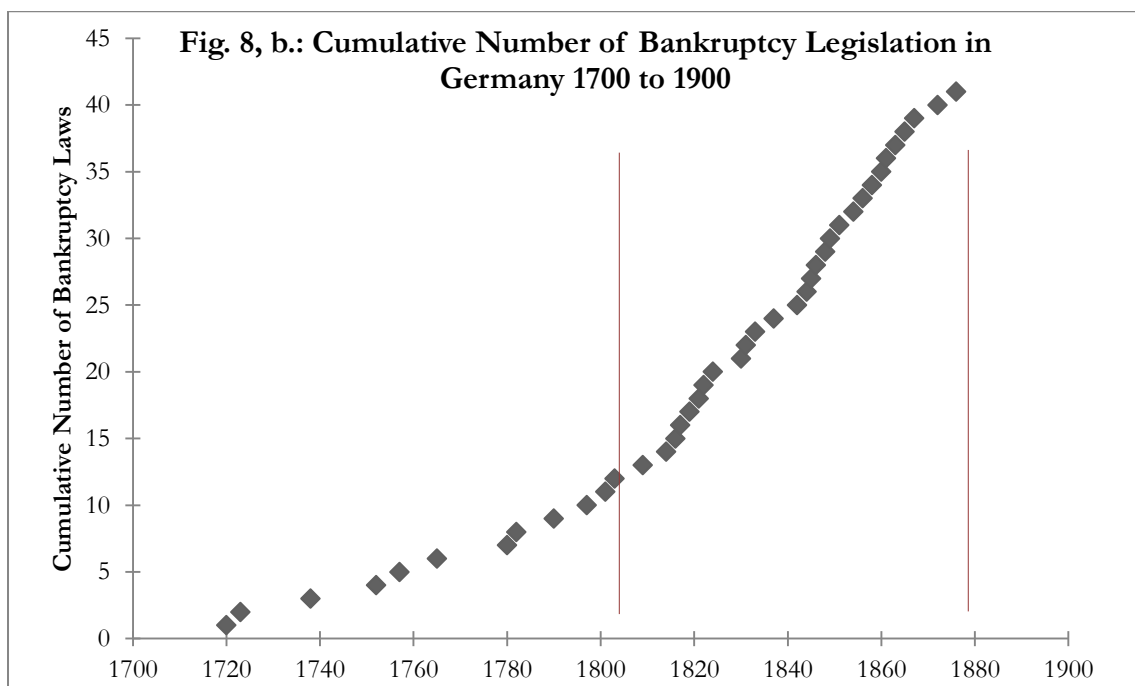
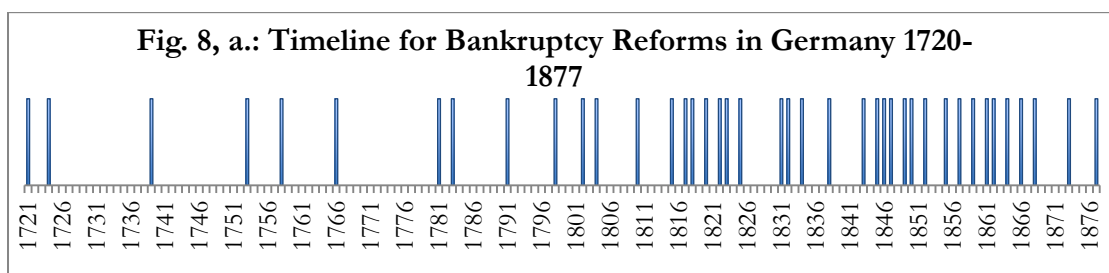


Figure 8: Enactments of new bankruptcy laws in Germany 1700-1877; see Appendix B for a list of all decrees included in these figures. Information about legislation from Deutscher Reichstag, Entwurf einer Konkurs-Ordnung, nebst Motive zu dem Entwurf einer Konkurs-Ordnung, und Entwurf des Einführungsgesetzes, sowie Anlage-Band zu den Motiven des Entwurfs einer Konkurs-Ordnung. Vol. 1 (Berlin, 1875) and Coing, Helmut ed., Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte (München, 1973-1989).

²²⁰ Motive, 1875, Appendix I.

It includes Prussia, the Rhineland, Hesse-Darmstadt, Hesse-Nassau, Hannover, the four free Cities, Austria, Baden, Bavaria, and Saxony, ending with the national German bankruptcy code of 1877. To be sure, there were few comprehensive bankruptcy codes and many more decrees, designed to regulate specific details of the bankruptcy procedure. But even then, the 19th century proves to be an extraordinary prolific time with regard to bankruptcy regulation, as can be seen in the figures.

Some of the movement seems evident. The cluster of new laws following 1815 should be seen in the context of the end of Napoleonic occupation and the restoration of former German states. The cluster of the 1840s and 1850s points to a different force. Those decades were marked by economic and political turmoil. There were calls for reform, culminating in the first national parliament of 1848 in Frankfurt. After the German Revolution had been crushed in 1849, German authoritarian governments focused on reforms of private law in order to silence calls for democratic rights. Main products of this time is the 'Universal German Law on Bills of Exchange', a legacy of the Frankfurt Parliament in 1849, and the 'Universal German Commercial Code', a product of interstate negotiations that came into force in 1862.²²¹ It has been argued, that these reforms offered economic liberties to the German bourgeoisie, which in exchange refrained from calls for a democratic participation.²²² In many cases, bankruptcy reforms were a side product of this new legislation. But a unified bankruptcy code was still far off and needed political unification first.

For the indices, twelve laws were selected from this sample: The Prussian *Allgemeine Gerichtsordnung* of 1795 and the Prussian *Konkursordnung* of 1855; the laws of the Kingdom of Saxony as they stood after 1815 and then again in 1834, after a couple of new decrees; the bankruptcy procedure according to the Bavarian *codex iuris bavarici iudicarii* and the Bavarian law on hypothecs from 1822 and the new Bavarian bankruptcy procedure from 1869; the laws of the free Hanseatic cities of Hamburg, Bremen and Lübeck; and the bankruptcy procedure according to

²²¹ SCHNELLE, ALBERT, *Bremen und Die Entstehung des Allgemeinen Deutschen Handelsgesetzbuches 1856-1864*, ed. WILHELM LÜHRS (Bremen, 1992); *Allgemeines deutsches Handelsgesetzbuch. Amtliche Ausgabe* (Munich, 1862); HEINISCH, GEORG FRIEDRICH, *Die allgemeine deutsche Wechselordnung mit Beifügung der gesetzlichen Abänderungen in den einzelnen Staaten und der Vorschläge der Nürnberger Handels-Conferenz* (Bamberg, 1861).

²²² Nipperdey, *Deutsche Geschichte*, 1984, , p. 682-683; Wehler, *Deutsche Gesellschaftsgeschichte*, 1995, pp. 120-125, 213.

book three of the French commercial code and its reform in 1838, which were in force in the Rheinland.

c.) Findings

Figure 9 (next page) illustrates the scores for the two indices assigned to twelve different German bankruptcy laws. The values for debtor friendliness are located on the ordinate, values for creditor protection on the abscissa. Every point in the scatter plot represents a particular bankruptcy law and the values it reaches on both indices. Though it is possible that a law scored values on either index between zero and forty, most of the laws analysed in this chapter received values between fourteen and thirty on both indices. Within that particular range, noteworthy differences remained.

This exercise shows that debtor friendliness and creditor protection are not necessarily mutually excluding. Most laws seem to aim at an equitable balance between the two goals. Take the question of a so-called ‘twilight’ period for transactions before the bankruptcy opening. If a transfer of assets shortly before the bankruptcy can be undone and contracts from this period are seen as null and void, this might benefit both debtor and creditor. It is good for creditors as this ‘twilight’ period helps increase the overall value of the bankruptcy estate from which they can be compensated. It benefits the debtor because it excludes the most recent claimants. It builds him a bridge to escape the consequences of some of those actions he had committed under pressure shortly before bankruptcy.

Excluding laws from the second half of the century for a moment, it is possible to identify the three different approaches to bankruptcy as described above: legislations in the tradition of the *ius commune* score lower values for debtor friendliness compared to the free cities, with Hamburg at the upper end of the spectrum and a seemingly debtor-friendly bankruptcy law as early as 1753. The French *loi des faillites* as part of the commercial code of 1808 occupies a middle position and seems to offer better creditor protection. This result exhibits different approaches to the dilemma of bankruptcy, i.e. the need to balance contract-enforcement and debt relief. It also indicates different political economies in those jurisdictions and their perception of relevant

deadweight losses. The approach taken in the free cities was apparently interested in giving debtors a second chance and limit the extent of debt-service. Other jurisdictions, notably territorial states, seemingly feared negative effects from a too lenient bankruptcy law and opted for stronger creditor protection.

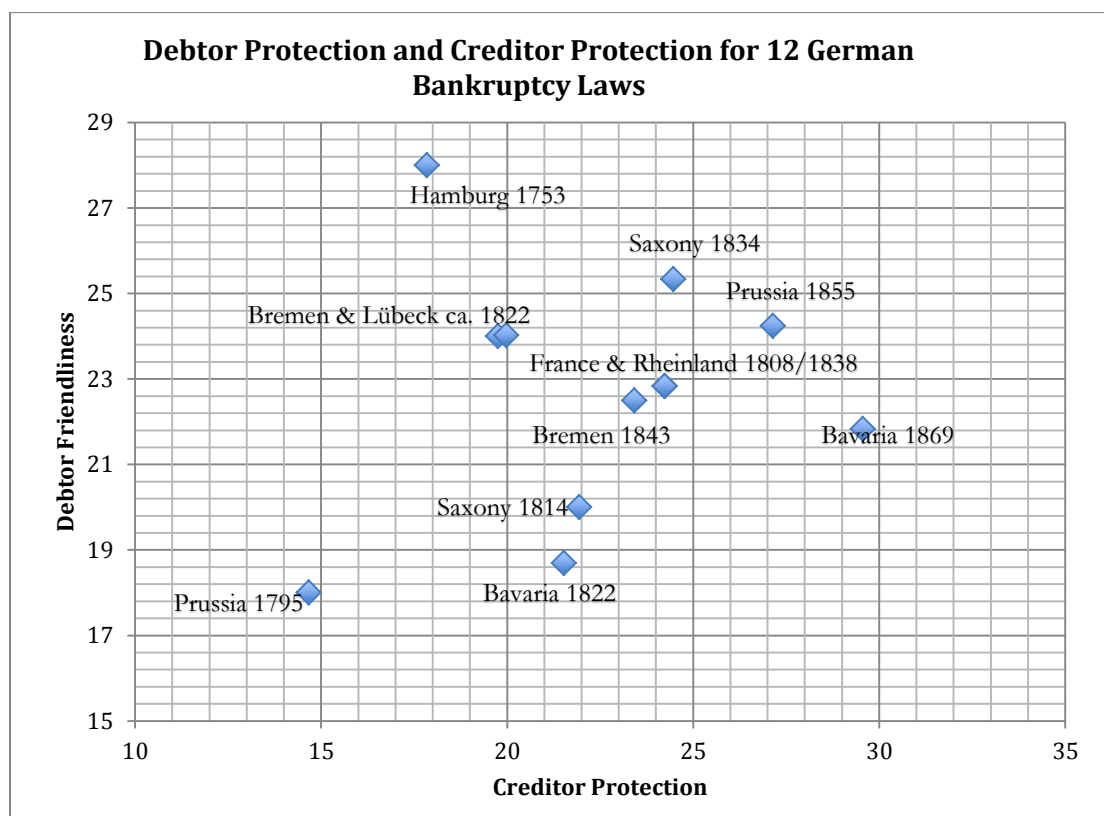


Figure 9 Scores for Debtor and Creditor Protection in German Bankruptcy Laws based on the indices as shown in Appendix A.

States that introduced new legislation often moved to a different point on that spectrum. In general, it appears that each bankruptcy reform improved the situation for both debtors and creditors. This was likely a function of the legislation becoming more and more sophisticated over time. Older laws often prescribed some general rules but failed to take into account for specific case groups. They were also often out-dated as far as questions about the administration and liquidation of industrial undertakings or company-like business entities arose. New bankruptcy laws in the 19th century often abolished this ‘one fits all’ approach and offered variations of the bankruptcy procedure for different case constellations, to the benefit of both debtors and creditors.

What made the free cities so particularly debtor friendly has partly been discussed above. It was a mix of flexibility, emphasis on out-of-court settlements that included secured creditors and allowing the debtor to participate in the bargaining. A settlement was seen as the default or desired outcome by the law; liquidation was only the second best alternative. Debtors could file for bankruptcy at any point without having to establish balance-sheet insolvency. This came at a price. Foreign creditors could easily be excluded from participating in the procedure if they failed to appoint a local representative. Secured creditors had to forgo some of their priority in bankruptcy. A group of creditors that was in the minority lacked protection against any sort of ‘tyranny of the majority’.

Bremen’s new bankruptcy code from 1843, the *Verordnung über das Debitverfahren*, partially breaks with that tradition. It improved creditor protection, apparently at the expense of some of the earlier debtor friendliness. A new level of creditor protection was achieved by introducing preparatory stage, during which the accounts and financial situation of the debtor was thoroughly investigated before he was admitted to the procedure. Only merchants retained the right to file bankruptcy without proofing actual insolvency. The law also introduced stricter regulation of the bargaining process between creditors and debtors in order to protect minority creditors and establish some standards against which a settlement had to hold.²²³

Quite interesting is the steep increase in debtor friendliness in Saxony between the end of the Napoleonic period and 1834. Insolvency regulation in the Kingdom of Saxony could be found in the older Procedural Code from 1724, the so-called *Erläuterte Proceßordnung*. It was a legislation in the spirit of the *ius commune*.²²⁴ But within Saxony remained islands of particular jurisdictions, most notably that of the commercial town and centre for international fairs since the middle ages, Leipzig. The city had decreed its own regulation for bills of exchange in 1682 (much in accordance with the custom in other trading cities), together with a specialized commercial court and arbitration court for foreign merchants visiting the fairs. Part of this regulation

²²³ HANDELSKAMMER BREMEN, *Das Bremische Moratorial- und Akkord-Verfahren verglichen mit dem Accordverfahren der preussischen Concursordnung. Eine Denkschrift mit Rücksicht auf die bevorstehende Fallitgesetzgebung des deutschen Reichs verfasst im Auftrage der Handelskammer in Bremen* (Bremen, 1871). Pp. 8-12.

²²⁴ LÜNIG, JOHANN CHRISTIAN, ed., *Codex Augusteus, oder neuvermehrtes Corpus iuris Saxonici*, vol. 2, (Leipzig, 1724), pp. 2463-2502; Vollmershausen, *Marktbereinungsverfahren*, 2007, pp. 127-132.

was, again similar to other trading cities like Hamburg or Bremen, to facilitate bargaining between creditors and debtors and to set incentives for out-of-court settlements.²²⁵ What happened after 1814 was that the royal administration in Saxony incorporated this type of regulation into the body of state law and extended its applicability to the whole of the Kingdom.²²⁶ Furthermore, in 1834, King Anton Friedrich August abolished debtor's prison in Saxony per royal decree.²²⁷ This decision was later taken back by his successor after the failure of the Frankfurt Parliament in 1849.

Prussia's *Allgemeine Gerichtsordnung* scores astonishingly low for both debtor friendliness and creditor protection. With regard to the debtor's side, the result derives from a number of rules that deprived him of any meaningful ways to influence the course of the procedure. If a debtor wanted to petition for bankruptcy, he had to prove balance-sheet insolvency. If courts decided to open the procedure *ex officio* they were not subject to the same requirement; in the course of the ensuing process, the debtor was never asked for help, nor was his cooperation acknowledged or rewarded; there were no incentives for reaching an amicable settlement with creditors; and the lack of a clear definition of what constituted a fraud in bankruptcy made the debtor vulnerable to criminal prosecution if any of his creditors wanted to.

For the creditors' side, the result is largely due to the complicated rank order and large number of exemptions that applied in bankruptcy. Prussian law divided the group of creditors into seven different 'classes'. Adding the various subdivisions within classes, the law prescribed a total of 67 different priority rights in bankruptcy.²²⁸ If a creditor wanted to challenge the rank he had been put in by the court, he needed to sue all creditors with whom he wanted to be treated as equal.²²⁹ This made the situation of secured creditors increasingly unpredictable and impeded their efforts to enforce their security interests. A number of statutory priorities ranked over secured creditors and ensured that fiscal authorities and landlords received their share. Unsecured creditors, at the bottom of the hierarchy, had little hope to receive any dividend.

²²⁵ Meißner, Codex, 1836, pp. 301-319.

²²⁶ FREIESLEBEN, FRIEDRICH, *Handbuch der vom Jahre 1572 bis auf die neueste Zeit erschienenen noch jetzt gültigen Civil-Proceß-Gesetze des Königreichs Sachsen* (Leipzig, 1834-1842), Vol. 1, p. 266.

²²⁷ Mandat, die Aufhebung des Schuldthum-Processes betr., *ibid.*, Vol. 2, p. 297.

²²⁸ Vollmershausen, *Marktbereinigungsverfahren*, 2007, p. 89.

²²⁹ AGO Tit. 50 §§ 148, 268 and 482.

The priority of claims, the rank order of creditors and secured creditors relationship with other statutory priorities was a source of much diversity across German bankruptcy laws. Table 4 (pp. 84-85) gives an overview of the different rank orders. It remains schematic, but it should convey an idea of the range and variety of different solutions in the German states.

The costs of administrating the bankruptcy estate and any court fees that accrued during the procedure had absolute priority everywhere. Another common trait was the degree to which 'involuntary' or 'reluctant' creditors were acknowledged and even privileged. To reiterate: 'involuntary' creditors never had formally contracted a loan with the debtor, but held claims from tort law, arrears in taxes or not having received payment for delivered goods.

Now, most bankruptcy laws acknowledged these claims and sometimes even gave them priority over secured creditors. But within this category of claims, differences remained. Take for example the question whether a wife's dowry should be part of the bankruptcy estate or whether the wife has the right to retain her property before any of the creditors is being paid. Over the course of the 19th century, this privilege was then pushed downwards in the hierarchy. Sometimes special clauses were introduced that prevented merchants' wives from retaining their goods but allowed everyone else the privilege. Some of the older laws also had clauses that gave special privilege to feudal landlords and military authorities.²³⁰ The degree to which *pia corporae* – charitable trusts run by the church to fund hospitals and orphanages – could claim priority over other types of creditors was, again, subject to the influence of a particular church in a particular region. From the 18th century onwards and long into the 19th century, credit cooperatives such as the *ritterliche Kreditverein* or the *landschaftliche Bodenkreditverein* also successfully lobbied for special privileges in the bankruptcy of their members.²³¹

Which claim should have priority in bankruptcy was ultimately a normative decision. In some legal systems the rank order mirrored the relationship between different entitlements out-

²³⁰ SStADD, 11321 Generalkriegsgericht, Nr. 11583, *Tabelle über die beim Generalkriegsgericht anhängig gewordenen Kreditwesen* 1831.

²³¹ STOLLEIS, MICHAEL, "Das Bayerische Hypothekengesetz von 1822," in *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert* 3, ed. HELMUT COING AND WALTER WILHELM (Frankfurt, 1976), pp. 240-272.

side of bankruptcy. Others, particularly the free cities and French law, modelled bankruptcy as a special 'zone' that had nothing to do with the entitlements outside of bankruptcy.

Frankfurt had been quite pronounced in its aim to even out the differences between creditors in bankruptcy. In 1838 and 1839 it issued a law that abolished most of the old customary privileges for guilds, craftsmen, patricians, clergy and other social groups in the city.²³² Secured creditors received priority over fiscal, tort, and marital claims (limited to merchants' wives), followed by unsecured creditors. Hamburg had a set of seven statutory priorities, followed by secured creditors and unsecured creditors. The former were ranked according to the age of their claim.²³³ French law only granted wives and children priority in bankruptcy if they had previously obtained a court ruling that established their claim. Other privileges and tacit hypothecs had been abolished. Secured creditors were compensated by the sale of the object in which they had a security interest, unsecured creditors by the leftovers.²³⁴

French law exerted a huge influence on German legislation. The *Code de Commerce* was appealing to German lawyers because it avoided lengthy fights between parties over the rank of their claims. It also facilitated out-of-court settlements, while simultaneously providing standards to which those settlements had to abide furnishing the court with extensive monitoring powers. Though the bankruptcy procedure was part of the commercial code and thus limited to merchants, the latter was defined by the *nature* of the transactions and not by the actor's membership of a certain corporate body. This widened the scope of eligibility and arguably made the bankruptcy system under French law more accessible than its counterparts in other German states. Last but not least, French law had a precise definition of fraud or fraudulent conveyance actions in bankruptcy which protected the debtor from arbitrary accusations; it also regulated how the debtor could petition for rehabilitation after bankruptcy and thus end this chapter once and for all.

²³² Gesetz die Rangordnung der Gläubiger im Conkurs, und Abschaffung der Generalhypotheken betreffend, in: *Gesetz- und Statutensammlung der Freien Stadt Frankfurt*, vol. 5 (Frankfurt, 1837), p. 248.

²³³ Neue Falliten Ordnung 1753, Art. 49 No. 1.

²³⁴ DESHUSSES, FRÉDÉRIC, 'Mesurer l'insolvabilité?', *Histoire & Mesure* XXIII/1 (2008), pp. 19-41.

Table 4 Rank Order of Creditors in Selected German Bankruptcy Laws

	Saxony	Prussia 1795	Prussia 1855	Bavaria	Baden
1st	Court Costs, Grain Loans, Funderal Costs, Salaries, Land Tax	Court Costs, Taxes, Credit-Corporations, Deposits, Firm-Partners	Third party property, goods bought on commission	Goods bought on commission, Wife's dowry, Third party property	Court costs, Funderal costs, salary, allimentation for family, outstanding taxes
2nd	Wifes and state if obtained a priority right by court sentence, building loans and loans for land acquisition	1st Class: 15 rights, e.g. borrowed goods, goods bought on commission, wife's dowry, Fideicommiss, loans for textile manufacturers, loans for bred and grain	Immovables and deposits, loans to military, rent, transportation (railway and post)	feudal fees	Privileges on movables: rent, deposits, transport costs
3rd	Secured Creditors, Mortgagees, Deposit Holders	2nd class: 14 rights, e.g. fire insurance, Onera publica et communia, funeral costs, employees, school fees, transport costs, rent, alimentation for family	costs of bankruptcy administration and court	1st class: salary and outstanding taxes	Mortgagees
4th	"Chirographarii" = Unsecured Creditors	3rd class: mortgagees	land tax, salaries, mortgagees	2nd class: mortgagees	Tacit mortgagees
5th		4th class: 11 rights, e.g. arrears of oneribus communibus, Peculium of children, Equipagegelder, building costs	Arrear taxes, church taxes, funderal costs, children and wives (except for merchants)	3rd class: deposits, rent, accommodation	Unsecured creditors
6th		5th class: 12 rights, e.g. heirs of wife, Lucra nuptialia, overlords in bankruptcy of their servants, estates in bonis curatorum, Pia corpora etc., privileged factories	Everyone else	4th class: children and minors, wife, bills of exchange, trusts	
7th		6th class: 14 rights, e.g. mortgagees that haven't been compensated in 3rd class, loans without interest, study and school fees, court fees, bills of exchange, loans to manufacturers		5th class: unsecured creditors	
8th		7th class: unsecured creditors, everyone else			

Table 4 (continued)

	Hesse-Darmstadt	Rheinland	Frankfurt	Hamburg	Bremen	Lübeck
1st	Court costs, outstanding taxes	Court costs, funderal costs, salary, subsistence, rente	third party property, salary, rent	funderal costs, public duties, rent, salary, accountant, workers, accommodation, children, pirates-insurance	Third party proptery, insolvency costs	Rent, funeral costs, health service, accommodation
2nd	mortgagees	wife and children if they have a security obtained by court ruling	Hypotheken auf liegende Güter	goods bought on commission, wife's dowry children	mortgagees	City Debt
3rd	funeral costs, health costs, salary, taxes	mortgagees	Wifes of merchants	1st class: senior secured creditors	rent, funeral costs, salary, health, public duties	Children
4th	children, wife's dowry	Chirographaires, unsecured creditors	Outstanding taxes	2nd class: junior secured creditors	general and specific securities	Wife's dowry if she has no children
5th	Unsecured creditors, everyone else		tacit mortgages	3rd class: unsecured creditors	everyone else	Mortgagees
6th			Everyone else			Everyone else
7th						
8th						

IV. Interpretation and Conclusions

The findings of the preceding section show that Germany's political fragmentation trickled through into the legal sphere. The German legal landscape was a hodgepodge, a *Flickenteppich*. The two indices that have been designed for this chapter bring some of the differences to light. To reiterate: this is merely a measure of differences between different laws with respect to two specific issues. The index values are no judgment about the quality or progressiveness of an individual legislation. Plotting twelve laws with their respective scores for creditor protection and debtor treatment in a scatter plot exhibits the extent to which these laws varied from each other. Differences were driven by particular decisions about the order in which creditors were repaid, but equally by different roles assigned to the courts, different powers awarded to the creditor assembly, and finally by different attitudes towards the debtor.

Focusing on this latter dimension only, the index for debtor treatment reveals some sort of trichotomy regarding the earlier laws. The free cities mark the upper end of the spectrum, with Hamburg's bankruptcy law from 1753 scoring particularly 'debtor friendly' in the index. The lower end is populated by states that applied some variance of German *ius commune*, whether or not relying on written statutes. Rhineland and Baden applied French law and marked a middle ground of the spectrum. This is also the area to which subsequent legislation would gravitate. It raises the question whether the variance was an expression of divergent attitudes to the very concept of debt and credit or merely a reflection of the state of knowledge and infrastructure in each respective state.

There was a sort of general agreement among jurists of the early 19th century that the complicated rank orders of creditors in German *ius commune* did more harm than good. To many commentators it appeared simply out-dated.²³⁵ The French model, on the other side, attracted jurists as well as practitioners and merchants.

²³⁵ MITTERMAIER, CARL JOSEPH ANTON, 'Ueber die Fortschritte der Gesetzgebung über Hypotheken und über die Forderungen, welche an die Gesetzgebung in dieser Beziehung gestellt werden können,' *Archiv für die civilistische Praxis* 19/1 (1836), pp. 126-176.; Schubert, ed., *Gesetzrevision*, 1990 p. 262.

After 1815 the Rhineland successfully resisted the introduction of Prussian law and kept the *Code de Commerce*. This resistance was a challenge to the Prussian judiciary; her western provinces, almost twenty per cent of her population, applied French law. Some openly asked whether the French model was the better one.²³⁶

The French model was competitive because it prescribed a special procedure to commercial bankruptcies while at the same time not restricting access to the procedure by way of guild-memberships or the like. As already mentioned, everyone who conducted transactions that could be subsumed under commercial law – from an innkeeper to a merchant-banker – could apply to the commercial courts and their procedures. Merchants, manufacturers (the new industrialists) and the beneficiaries of the new freedom of trade therefore rallied behind the French model. They appreciated the opportunities offered by the French codes as well as the anonymous bureaucracy that came with them: The particular modernity of the French model consisted in the universality of its rules that could be applied to transactions of ‘all sorts of people’ (as Georg Büsch would have called them a century earlier), regardless of their status. Put in other words: the logic of calculating and balancing interests, which forms the basis of the commercial contract, could be enforced unimpeded; personal and local aspects did not play a role in this new model – everyone could be treated like everyone else. The urge for mercantile bankruptcy laws in French style was, in the end, the urge to extend this logic to all fields of commerce, trade, and exchange in Germany.

An anecdote from the year 1843 might illustrate this demand for a new conceptualisation of bankruptcy and commercial law. Friedrich Carl von Savigny, whom I quoted in the epigraph, was the then minister for juridical and legal reform in the Prussian Kingdom. Together with his colleague, the minister of justice Heinrich Gottlob von Mühler, he had to deliberate on a matter brought forward by the merchant guilds in Stettin, Tilsit, and Magdeburg.²³⁷ Their petition described the current legal situation as ‘not [being] conducive’ for out-of-court settlements and they strongly demanded enhanced autonomy for their respective institutions to govern bankruptcy

²³⁶ Conrad, *Das französische Recht*, 1969, p. 111.

²³⁷ SCHUBERT, WERNER, 'Mühler, Heinrich Gottlob' *Neue Deutsche Biographie* 18 (1997), pp. 286-287.

cases at their discretion.²³⁸ For the moment, this request was met with some reservations on the part of the ministry of justice. But it resonated with earlier proposals that had been drafted in an earlier report on bankruptcy reform in the 1830s.²³⁹ The distinction of commercial bankruptcies from other forms of bankruptcies and incentives for out-of-court settlements eventually became part of the Prussian bankruptcy reform of 1855.

This reform was important in two respects. First and foremost, Prussia was the biggest state within the borders of the German confederation and the strongest member in the *Zollverein*, both in terms of volume of trade as well as population. In the language of political scientists, Prussia was an autonomous veto player. A bankruptcy reform in this state did not go unnoticed elsewhere in Germany. Secondly, it was the beginning of a new era of sustained law reform projects. The reform happened amidst works for a unified German commercial code, which had been under way since 1849. It set the stage for further reform projects and ultimately provided the model for the unified bankruptcy code in the new Empire.²⁴⁰ The bankruptcy reform of 1855 served Prussia to set the agenda in this new law reform era and the beginning of the end of the old legal regime.

²³⁸ RATHGEBER, CHRISTINA ed., *Die Protokolle des preussischen Staatsministerium 1817-1938. Acta Borussica Neue Folge*, (Hildesheim, 1999-2004), [henceforth *Acta Borussica*], Vol. III, No. 196 (18.10.1843).

²³⁹ Schubert, ed., *Gesetzrevision*, 1990, p. 272.

²⁴⁰ THIEME, JÜRGEN, "Zur Entstehung der Konkursordnung," in *Einhundert Jahre Konkursordnung*, ed. WILHELM UHLENBRUCK, BERND KLASMEYER, AND BRUNO KÜBLER (Cologne, 1977), pp. 35-69.

CHAPTER 4: BANKRUPTCY IN A MERCHANT TOWN

(...) Yet in lieu of the good old plebeian-cosy bankruptcies and depletions, which they carried out among themselves, there are now noble agreements with stately foreign creditors, appropriately considered twists of fortune, which vaguely suggest legality, further some re-erectments, and only seldom someone has to depart from the scene.²⁴¹
Gottfried Keller, *Die Leute von Seldwyla* (Brunswick, 1856)

I. Introduction

Bankruptcy regulation in Germany originated on the municipal level.²⁴² Towns with their physical market places, fairs, and ports developed a regulatory setting for commercial activities in their jurisdiction, and bankruptcy legislation was embedded therein. This chapter and the following consider the bankruptcy regimes of three north German city-states: Hamburg, Bremen, and Lübeck. Their regulatory framework aimed to lower bankruptcy costs and to support local credit markets. Their respective bankruptcy regimes were part of an infrastructure which was maintained by guilds and corporatist institutions. Members of these ‘clubs’ were given easier access to a settlement procedure. Non-members were often subject to a different procedure or even discriminated against.

Hamburg, Bremen, and Lübeck enjoyed the status of sovereign states until unification in 1872. My argument extends beyond the boundaries of these three cities. Even though, by the 19th century, most German towns had lost their autonomy to state governments, there is ample evidence that local statutes in many towns were similar to the ones I describe in this chapter.²⁴³

²⁴¹ Own translation. German original: Aber statt der früheren plebejisch-gemütlichen Konkurse und Ver-lumpungen, die sie untereinander abspielten, gibt es jetzt vornehme Akkommodements mit stattlichen auswärtigen Gläubigern, anständig besprochene Schicksalswendungen, welche annäherungsweise wie etwas Rechts aussehen, sodann Wiederaufrichtungen, und nur selten muß noch einer vom Schauplatze abtreten. Gottfried Keller, *Die Leute von Seldwyla* (Brunswick, 1856).

²⁴² An earlier version of this chapter has been published under the title: ‚Bankruptcy Laws as *Standortpolitik*‘, in CORDES, ALBRECHT AND SCHULTE-BEERBÜHL, MARGRIT, eds., *Dealing with Economic Failure. Between Norm and Practice 15th to 21st Century*, (Frankfurt, 2016), pp. 193-214. It has since been rewritten and altered substantially. I am grateful for comments from the audience at the 2016 Economic History Society annual conference in Cambridge.

²⁴³ Compare with list of bankruptcy legislation in Appendix C.

What the free cities still practiced had previously been employed in other towns as well. Urban places had been the cradle of bankruptcy regulation across Germany.

II. Bankruptcy as a Privilege

Mattheus Rodde (1754-1825) was the *Burgmestre* of Lübeck at the start of the 19th century. Almost everything about him was extravagant: his wife, Dorothea Schlözer, the first woman in Germany who was awarded a doctorate in Philosophy, their alleged *ménage à trois* with the French writer Charles de Villers, and his office. Lübeck had traditionally only four mayors at a time, but the city's Senate appointed him a fifth mayor in 1806.²⁴⁴

On September 13th 1810, Mattheus Rodde convened his creditors in order to propose an out-of-court settlement and give them the opportunity to appoint an administrator of his estates.²⁴⁵ Such a settlement required approval by the authorities. Rodde petitioned for an *außergerichtliches Konkursverfahren*, an out-of-court bankruptcy procedure. He requested the city council, the Senate, to install a commission of senators, 'to seek an amicable agreement with creditors and with the powers to administer oaths'.²⁴⁶ The petition reached the Senate on September 23rd 1810. Rodde's books showed assets valued at 2,155,693 *Mark Courant* while his obligations summed up to 2,686,684 *Mark Courant*, hence a deficit of half a million *Mark*.²⁴⁷ That was an extraordinarily high sum at the time.

A burgher who defaulted lost citizenship rights for the duration of the bankruptcy. It was unthinkable for Rodde to continue as member of the highest legislative and judicial council. He stepped down immediately. The city's legal counselor, *Syndicus* Dr. Curtius – simultaneously president of the higher city court – and senators Köhler and Kindler were appointed to the senatorial commission overseeing Rodde's case. The three men appointed trustees from the ranks of local

²⁴⁴ FLEISCHER, DIRK: Art. "Schlözer, August Ludwig von", in: *Neue Deutsche Biographie*, Vol. 23 (2007), p. 98; FEHLING, E. F., *Lübeckische Ratslinie von den Anfängen der Stadt bis auf die Gegenwart* (Lübeck, 1925; reprint, 1978), pp. 151-152.

²⁴⁵ Mattheus Rodde, Letter from September 27th 1813, in: AHL 1.1-1 No. 3822, *Roddes'sche Debitmasse*.

²⁴⁶ German original: 'Zum Versuch der Güte mit den Gläubigern und der Macht Eide abzunehmen', AHL 1.1-1 No. 26595, *Sammlung von Dekreten und Gesetzen zum Konkursrecht*.

²⁴⁷ Balance Sheet attached to letter from September 27th 1810 in AHL 1.1-1 No. 3822; see introduction for a table with historical exchange rates.

creditors and sent letters to all foreign creditors. Rodde's business relations stretched from Lüneburg, Frankfurt, and Hamburg to St. Petersburg, Porto, Naples, and Paris.²⁴⁸

The appointment of trustees was controversial. One creditor, Nicolaus Heinrich Johansson, complained in harsh words. He threatened to veto a settlement if he himself was not appointed a trustee. Johansson wrote a stinging letter to the Senate:

He [Johansson] does not hope that personal issues could have an influence on the rendering of justice. Though he was without important family connections and though he lived quietly, he worked diligently and always fulfilled his obligations to everyone. (...) The commission treated him disgracefully and for his reputation's sake he could not give in. What do people have against him? Why can he not become administrator? Could it be that the distinguished administrators had knowledge that he did not?²⁴⁹

They did. The case was delicate. As a senator, Mattheus Rodde had been in charge of the city's finances. Napoleon's continental blockade had disrupted trade and the French army had made Lübeck pay for the occupation costs.²⁵⁰ Rodde, with the help of the Hamburg merchant-banker Heckscher, managed to establish trusting relationships with bankers in Paris. He used this network for both private and official matters. Now, these bankers presented claims running up to a million *Livres*. They argued that they would never have granted credit to Rodde had they not assumed that he acted on behalf of the city.²⁵¹ They expected Lübeck to step in and cover what could not be repaid from the sale of Rodde's estate. Even the French vice consul for northern Germany intervened.

The local, arbitrary rules assist fraudulent bankrupts. Quite egregiously, the bankrupt's children can debauch while foreign creditors are deprived of their just entitlements. The senate is judge and party in the same case; its partiality becomes evident in the lenient procedure against the bankrupt. (...) The bankers will complain to the Emperor himself, who will not enjoy seeing his efforts of

²⁴⁸ AHL 1.1-1 No. 3822

²⁴⁹ Own translation. German original: 'Er hoffe nicht, daß persönliche Rücksichten auf Recht und Unrecht Einfluss haben könnten. Sey er ein Mann ohne große Familien-Connexionen und lebe er still, so nähre er sich redlich und werde jeden gerecht Zeit seines Lebens werden. (...) Er halte es seiner Ehre nicht zuwider grade zu zu erklären, daß es ihm auch lieb und wünschenswerth sey, durch Theilnahme an der Provision der Administratoren den ihm drohenden Verlust sich zu erleichtern. (...) Er sei an der Commission öffentlich schimpflich behandelt und seine Ehre leide es nicht, in dieser Sache nachzugehen. Was man gegen ihn habe? Warum er nicht Administrator werden solle? Hätten die ernannten Herren Administratoren in einigen Sachen vielleicht mehr Kenntnisse als ehr?' report of Johanssen's petition to the Senate by Praetor Müller, October 3rd 1810, *ibid*.

²⁵⁰ WENIGER, AXEL, *Die Finanzverwaltung Lübecks im 19. Jahrhundert* (Lübeck, 1982), pp. 17-19.

²⁵¹ Report to the Senate 'Pariser Banquiers', probably October 6th 1810, in AHL 1.1-1 No. 3822.

re-establishing mercantile morale in the commercial code being ignored in your town.²⁵²

It was unheard of in Paris that the bankrupt's family, particularly his children from first and second marriages, enjoyed a priority claim. But Lübeck managed to fight off attempts to enforce French law within its city walls. In fact, the children's claims, being privileged under Lübeck customary law, turned out to be leverage in the negotiations with Paris. Rodde's sons proposed to use their priority in order to pay 50 percent of the claims within eighteen months. As the French chief-negotiator insisted on a 75 percent refund, the Senate eventually offered to cover the difference.²⁵³

French occupation ended in 1813. We do not know whether the 75 percent were ever fully paid. Rodde himself left the city. But his lawsuit continued. It had stranded in a *mélange* of corporatist bodies, which was typical for German towns. Many different parties had stakes in the issue. There were private creditors, from whose ranks had been appointed the trustees. Then there was the city itself as a creditor. But the city was represented by the Senate and eleven *bürgerliche Kollegien*, corporatist bodies.²⁵⁴ They did not necessarily hold harmonious interests.²⁵⁵ It was, again, the family that orchestrated a solution: Rodde's children proposed to use the assets normally exempted from seizure to pay in installments. Eighty percent to the most senior secured creditors, 66 percent for secured creditors whose claims dated from 1807 to 1810, 33 percent to 'younger' creditors whose claims dated from 1810 and 10 percent to unsecured creditors. The city should content herself with 50 percent. The senate eventually signed the deal on January 27th 1816, five years and three months after the case had commenced.

²⁵² Own translation. German original: 'Die hiesigen ungerechten Gesetze begünstigten den Betrug durch Fallissement. Es sei unerhört (...) die Kinder des Falliten (...) schwelgen zu lassen. (...) Der Senat sei Richter und Parthei in dieser Sache, die Partheilichkeit ergebe sich aus dem mildern Verfahren gegen den Bösen Bruch. (...) Die Banquiers würden beim Kaiser Klage führen, dieser habe nicht umsonst die kaufmännische Moral in dem Handelsgesetzbuche hergestellt.' Ibid, and AHL 1.1-1 No. 3824, Syndicus Curtius' oral report to the Senate, relating his meeting with the vice consul, November 2nd 1810.

²⁵³ Copy of a contract draft between Rodde's sons Joachim Mattheus von Rodde and Mattheus von Rodde with Louis Auguste Doumère, the advocate of the Paris bankers from October 13th 1810, approved by the Senate on November 7th 1810, AHL 1.1-1 No. 3824.

²⁵⁴ Including the 'Kaufleutekompanie, Schonenfahrerkompanie, Novgorodfahrerkompanie, Bergenfahrerkompanie, Rigafahrerkompanie, Stockholmfahrerkompanie, Gewandschneiderkompanie, Krämerkompanie, Vier große Ämter, Schiffergesellschaft, Brauer Zunft', cf. AHL 5.1-1 *Bürgerschaftliche Kollegien und deren Einrichtungen*.

²⁵⁵ AHL 5.1-1 Nr. 303 *Schiffergesellschaft, Rodde 1810-1816*, fol. 14, Letters from November 20th 1810 and January 27th 1816.

Rodde's case is exceptional. Because it irritated the local community and strained established customs it exposes something about the nature of bankruptcy in those towns at the time. It also highlights the entanglements between the law(s), various corporatist bodies and the community as a whole – a structure that seemed arbitrary to Parisian bankers. Rodde's case encapsulates the approach to bankruptcy described in this chapter. The description will focus on four characteristics in particular:

- (i) Bankruptcy was seen as an issue that concerned the whole community, particularly the mercantile community.
- (ii) Towns were organized as a shareholder community with different gradations of status and privilege, depending on membership in corporate bodies.
- (iii) The shareholder community provided a club-like infrastructure to handle bankruptcies. Access to it remained restricted.
- (iv) 'Club members', whether debtor or creditor, could rely on this infrastructure to reach out-of-court agreements. Outsiders could not.

III. Why Merchants Cared About Bankruptcy

a.) The Shareholder-Community

The notion of a shareholder-society is not just a metaphor. The city-states were run like joint enterprises, and merchants were shareholders – sometimes in conjunction with other status groups, sometimes exclusively. The model went back to a long tradition of autonomous towns in Germany, the *Reichsstädte* and *Hansestädte*. Citizenship was the most important club. It was a form of property that could be inherited or purchased; it entailed a number of privileges such as access to the jurisdiction of the higher city courts, access to the marriage market with other citizen-families, and the right to vote in the civic assembly. In Hamburg, this assembly was called *erbgesessene Bürgerschaft*, 'burghers by inheritance'. Ordinary city dwellers could only participate in city politics if they were members of one of the corporatist bodies, another important club. In

Hamburg and Bremen, the merchant guild admitted Jewish merchants and foreigners into its ranks, although they were never granted the status of citizens.²⁵⁶ In Lübeck, the civic assembly consisted of eleven different corporate bodies. Their exclusiveness varied. Some were organized strictly according to occupational lines like guilds, others simply charged an entry fee.²⁵⁷

Corporate bodies were most frequently established along occupational lines and regulated the urban job-market for their particular trade. They monitored entry into the market, solved conflicts between members, and supported established businesses. The documents issued by the local merchant guilds (later turned chambers of commerce) regularly opened with a standard phrase: *Dem Flor der hiesigen Handlung*, 'to the flourishing of local commerce'. Everything that helped increase the volume of trade and commerce was seen as an objective of the merchant guild – the *Handelskammer*, *Kaufmannschaft*, or *Commerzdeputation*.²⁵⁸ These organisations are important for the history of bankruptcy regimes because they accumulated expertise in five important areas: (i) separating trusted and reliable traders from fraudsters, (ii) managing debt accounts where the organization could help negotiate repayment schedules with debtors, (iii) arbitration in case of conflict between members, (iv) influencing Senate and the Civic Assembly to act in their interest, (v) managing and maintaining an infrastructure that facilitated trade such as the local bourse, the port authority, and the commercial court.²⁵⁹

In Hamburg, the *Commerzdeputation* traditionally commanded seven votes out of 144 in the civic assembly, which otherwise consisted of representatives of the respective parishes; there was also a significant overlap between the personnel of the corporation and senators in the city council. The *Schütting*, in Bremen the seat of the *Kaufmannschaft*, in Lübeck the residence of the *Schonensfabrikerkompanie*, was the place where insolvency cases were announced and assets were pub-

²⁵⁶ BRÄMER, ANDREAS et al., *Das Jüdische Hamburg: Ein historisches Nachschlagewerk* (Göttingen, 2006); SCHLEIER, BETTINA, "Der Bremer Rat und das Stadtrecht um 1800," in *700 Jahre Bremer Recht*, ed. KONRAD ELMSHÄUSER AND ADOLF HOFMEISTER (Bremen, 2003), pp. 235-249.

²⁵⁷ GRABMANN, ANTIJEKATHRIN, 'Die Statuten der Kaufleutekompanie von 1500,' *Zeitschrift des Vereins für Lübeckische Geschichte und Altertumskunde* 61 (1981), pp. 19-36; KÜHL, UWE, *Von der kaufmännischen Korporation zur kommerziellen Interessenvertretung: Kaufmannschaft und Handelskammer zu Lübeck im 19. Jahrhundert bis zur Reichgründung* (Lübeck, 1993).

²⁵⁸ These organisations had many different names and were ultimately transformed into chambers of commerce. For simplicity I call them 'merchant guild' in this chapter.

²⁵⁹ BENNETT, ROBERT 'Supporting Trust: Credit Assessment and Debt Recovery through Trade Protection Societies in Britain and Ireland, 1776-1992,' *Journal of Historical Geography* 38 (2012), pp. 123-142.

licly auctioned by registered brokers.²⁶⁰ In all three cities, these bodies appointed members as lay judges at the commercial court or higher court.²⁶¹ They were directly involved in adjudicating bankruptcy cases.

To briefly reiterate what chapter II stated about the organization of clubs: clubs provide semi-public goods. They are suited to provide those goods and services that require monitoring of and information sharing with members. There are economies of scale involved. A certain good might only materialize if the costs of its production can be spread across a large enough membership. Yet, one characteristic of club goods is that they cannot be extended infinitely. Every 'user' added to the club increases the costs of providing and managing the good. Every 'user' added also increases the heterogeneity of the club's members. Heterogeneity bears the potential for diverging interests among members. It can undermine the club-good's infrastructure.²⁶² Certain goods may then be provided by the state as public goods, therewith losing their ability to exclude and discriminate users.

Merchants and businessmen had organized in clubs to support each other and control markets. They wanted these clubs to remain exclusive. Within their community they collaborated, formed partnerships and trading associations. Merchants were often creditor and debtor at the same time; the bonds of credit and debt connected almost all community members with one another. Thus, a bankruptcy case immediately affected many people within that mercantile community. The preface to the Hamburg bankruptcy code of 1753 stated that bankruptcy 'not only weakens the general credit, but also draws other merchants involuntarily into disaster.'²⁶³ Johann Friedrich Hach (1769-1851), a member of the Lübeck city court, in a lecture in 1822 compared

²⁶⁰ Rachel, 'Die Handelsverfassung,' 1910,

²⁶¹ Staatsarchiv Hamburg [henceforth StAHH], 222-3 B Handelsgericht, the commercial court followed the French model: KESSLER, AMALIA, *A Revolution in Commerce. The Parisian Merchant Court and the Rise of Commercial Society in Eighteenth-Century France* (New Haven, 2007).

²⁶² See Ch. 2 and Sandler and Tschirhart, 'Theory of Clubs,' 1980,

²⁶³ (...) Viele Bürger und Einwohner, sich dem Verfall ihrer Nahrung zuziehen, und dadurch zu banqueroutieren genötigt werden (...) wodurch nicht nur (...) der allgemeine Credit geschwächt, sondern auch öfters andere Kaufleute (...) mit ins Verderben (...) gestürzt werden. Publikations-Mandat der Falliren-Ordnung, in HASCHE, THEODOR, *Erläuterung der Hamburgischen Falliten-Ordnung* (Hamburg, 1797-1806), 1797, Vol. I, p. 27.

bankruptcies to little stones, which, when thrown into water, create eccentrically expanding rings.²⁶⁴

Bankruptcy entailed the removal from the ranks of the governing elite; a bankrupt was not allowed to hold public office. Office-holders in those autonomous towns and city states were recruited disproportionately from the ranks of merchants; they formed some sort of oligarchy.²⁶⁵ A merchant's bankruptcy or the fall of an eminent trading house could thus affect the city's political balance. If one bankruptcy indeed drew other merchants into disaster, such a contagion could become a threat for this oligarchic city politics. Within those towns, there was always a tension between deputies and representatives of craftsmen and lower ranks to the civic assembly, the legislature, on the one hand and the patrician and mercantile members of the city council, the executive, on the other hand.²⁶⁶ Removing too many merchants from status and privilege at the same time could disrupt a political equilibrium; contagious bankruptcy could substantially weaken the merchant guild's influence on offices and city politics. The aim to secure political influence partly explains the motivation for many merchant organizations to control bankruptcy legislation and contain the effects of individual defaults.

b.) The Direct Costs of Bankruptcy

City councils in the three northern port towns repeatedly discussed the issue of bankruptcy. The two most frequently raised concerns were the costs of the procedure (in form of fees, wasted time, and salary to trustees) and the city's reputation with foreign creditors. From time to time, the city councils voted to form a sub-committee and request them to draft new bankruptcy legislation. These sub-committees then existed for decades and often never completed their task. Only Hamburg managed to codify its bankruptcy law before the 1800s. In Bremen and Lübeck, the bankruptcy procedure relied on piecemeal legislation, local custom, and the internal dispute

²⁶⁴ Johann Friedrich Hach, *Gedanken über das Fallitenwesen in Lübeck*, in AHL 5.4 *Gemeinnützige Gesellschaft* 05.02 Einzelne Vorträge.

²⁶⁵ BÖHME, HELMUT, *Frankfurt und Hamburg: des deutschen Reiches Silber- und Goldloch und die allerenglichste Stadt des Kontinents* (Frankfurt a. M., 1968); AHRENS, GERHARD, "Von der Franzosenzeit bis zur Verabschiedung der neuen Verfassung 1806-1860," in *Hamburg: Geschichte der Stadt und ihrer Bewohner 1*, ed. WERNER JOCHMANN AND HANS-DIETER LOOSE (Hamburg, 1982), pp. 415-490.

²⁶⁶ ISENMANN, EBERHARD, "Obrigkeit und Stadtgemeinde in der frühen Neuzeit," in *Einwohner und Bürger auf dem Weg zur Demokratie*, ed. H. E. SPECKER (Stuttgart, 1998), pp. 59-111; Rachel, 'Die Handelsverfassung,' 1910, p. 95-104.

resolution mechanisms by their mercantile corporations. Eventually, Bremen came forward with a comprehensive bankruptcy code in 1841 and Lübeck as late as 1863.

Whether or not the bankruptcy law was codified, all three Hanse towns had a shared understanding of the issue of bankruptcy. Their merchants and shipping agents maintained close relationships with each other and simultaneously provided the personnel that governed these cities.²⁶⁷ In 1620 the Hanseatic league produced a common declaration on bankruptcies. The document expressed concern about the harm to commerce and trade if bankruptcies occurred too frequently. The members of the league promised each other mutual assistance in handling bankruptcy cases. The document included a common arrest warrant to search and apprehend fugitive debtors in any of the league's cities. It also contained an information-disclosure obligations: if a debtor was sued at a court outside his home-town or petitioned for bankruptcy himself with such a court, his home town was obliged to supply any requested information regarding the debtor's wealth, business, and whereabouts of assets back home.²⁶⁸ This concern with bankruptcy persisted in the Hanse towns. In 1785 the Lübeck *Bergenfahrer*, one of the eleven corporatist bodies that were part of the city's self-administration, pressed for a new bankruptcy law:

As it is the case that prosperity and reputation of this good city [*Der Flor der hiesigen Handlung*] rests primarily in trade and commerce, that it is most importantly based on trust and credibility, which will necessarily be lost, and thus commerce must suffer, if one does not repay honestly what one has borrowed (...) the honorable assembly of burghers deems it exigent that those bankrupts be (...) punished with imprisonment, *declaration infamiae*, (...) and other means, so that our local Bourse does not fall into disregard with foreigners and the diligent and industrious (...) shall not lose access to their credit.²⁶⁹

²⁶⁷ WURTHMANN, NICOLA, *Senatoren, Freunde und Familie. Herrschaftsstrukturen und Selbstverständnis der Bremer Elite zwischen Tradition und Moderne 1813-1848* (Bremen, 2009), pp. 98-107

²⁶⁸ Staatsarchiv Bremen [henceforth StAHB], *Mandat der vereinigten deutschen Hånse-Städte wider die mutbwillige Falliten und Bancquerottiere* (printed in Lübeck 1620).

²⁶⁹ 'Wie nun der Flor und das Ansehen dieser guten Stadt principaliter in der Handlung bestehet, diese aber sich auf Träu und Glauben vornemlich gründet, welcher sich notwendig verlieren, mithin das commercium großen Schaden leiden muß, wenn man dasjenige nicht redlich bezahlet, was man geliehen oder Sonaten dem anderen schuldig ist: so glaubet die Ehrliebende Bürgerschaft nicht untrüglich zu sein, wenn solche Banqueroutierer uns Tüchtige mit mehreren Ernst angesehen, nur andere zum Abscheu ohne Ansehen der Person Standes und Wirken auch derjenigen welchen publique Gelder anvertrauet in gefänglicher Haft, declaration infamiae, publicatione Baunorm und andern nachdrücklichen Strafen be-
leget würden, damit dies hiesige Börse nicht bey auswärtigen in üble Nachrede gebracht und andere rechtschaffenen commercirenden, die mit Ehren durch die Welt wollen, der Credit entzogen werden möge.' Brief der Bürgerschaft an den Rat, 1785 (without date) AHL 5.1-1 *Bergenfahrer Fallitenordnung* 1796.

The petition was successful. The *Senate* established a committee for compiling a new bankruptcy code. Senators might have turned to Hamburg's law from 1753 in search for a model. In the meantime, the Senate reminded Lübeck's mercantile society:

(...) that these unfortunate events [bankruptcies] disturb our commerce; the soul of which – general credit, honor and credibility with guests and domestics alike – is weakened and destroyed (...) ²⁷⁰

These sentences merely reiterate what had already been expressed in the 1620 common Hanseatic declaration: a fear on behalf of domestic businessmen that foreign merchants would shun away from trading with their city if they had reason to believe that repayment in bankruptcy was unlikely. These (printed) petitions and city-council resolutions probably addressed a wider audience beyond the town's walls. The threat of imprisonment and the harsh wording served a declamatory function; similar texts have been issued with remarkable regularity throughout the early modern period. Councilmen signaled commitment to rule enforcement in compliance with Christian doctrine. Anyone borrowing money should be held responsible if they defaulted. The practice of money lending and borrowing should be closely monitored and held to account by the city council; those who fell into distress for reasons beyond their control could appeal to an act of mercy in line with Christian values.

The threat of imprisonment alone could not stop bankruptcies from happening. Contemporaries knew that failure was a practical contingency for merchants. In 1797 the city council of Bremen called bankruptcies a 'natural concomitant' of a trading port.²⁷¹ Johann Georg Büsch (1728-1800), rector of the *Handelsschule* in Hamburg, acknowledged that the business activity in trading towns necessarily led to more bankruptcy cases than elsewhere.²⁷² They were no indicator of an economic crisis but merely proved, that more business was conducted at that place.²⁷³ Going bankrupt was never described as something desirable, but it could happen. And if it hap-

²⁷⁰ '(...) wie durch diese unselige Eräugnisse das Commercium gestöhret; die Seele desselben, der allgemeine Credit, Ehre und Glauben bey Auswärtigen und Einheimischen geschwächte und eingestürzt (...)' Decree of the City Council, Lübeck March 16th 1785 in AHL 1.1-1 No. 26595 *Fallitenordnung Lübisches Recht*

²⁷¹ StAHB D.11.a.5 *Berichtserstattung wegen heimlicher Accorde*, probably March 31st 1797.

²⁷² BÜSCH, JOHANN GEORG, *Versuch einer Geschichte der Hamburgischen Handlung nebst zwei kleineren Schriften eines verwandten Inhalts* (Hamburg, 1797).

²⁷³ Büsch opined that bankruptcies were a means of adjusting a city's trade balance, *ibid*, part. II, 246-253.

pened, if losing money became inevitable, than the loss should at least be as small as possible. To minimize the loss from default, one had to contain the costs of the procedure.

The procedural costs took the form of fees, wasted time, and salary to trustees and lawyers. Time and money needed for lawsuits could be substantial. But another cost included reputation. As pointed out above, the reputational loss entailed the loss of office and maybe even citizenship. Members of wealthy merchant families might not have had to worry about the economic support for making a living after they went bankrupt since they could turn to their relatives. But they were stripped of status and privilege for the time they were deemed insolvent. Had they not reached an amicable settlement with their creditors, they were even denied access to the local bourse for whatever period the commercial court deemed appropriate, and thus stigmatized for years.

A single bankruptcy not only affected the balance sheets of creditors and debtors' reputation, it also imposed costs on the community. In the lecture, in which Johann Friedrich Hach describes bankruptcy contagion, he also explains those communal costs:

Every bankruptcy diminishes the general and public wealth, the Burgher who could bequeath wealth to his heirs descends into the ranks of a resident who merely consumes, and quite often he loses both his capacity and desire to contribute directly to public life (...)²⁷⁴

Loss of credibility, loss of reputation – both as an individual as well as a community – and the costs imposed by the formal procedure were the direct costs merchants worried about. Reliability and accountability was what one 'owed' to business partners, particularly if they came from the neighboring town.

c.) The Indirect Costs of Bankruptcy

Councilmen were acutely aware that there was a difference between short-term liquidity problems and insolvency. The question of how to distinguish between a viable and unviable firm, between illiquidity and insolvency, arose every day. Any businessman, either as lender or borrow-

²⁷⁴ 'Jeder Conkurs vermindert die Summe des allgemeinen Vermögens, aus dem vererbenden Bürger wird ein verzehrender, und wie oft geht nicht die meiste Kraft und der lebhafteste Wille für die unmittelbare Theilnahme an dem öffentlichen Leben verloren' Hach, Gedanken, 1822.

er, needed a capacity to judge a venture that relied on debt and whether or not it would eventually have the means to repay.

Businessmen then came to view the law, particularly insolvency regulation, as a filtering device. It could help the judgment insofar as it described criteria against which a borrower's behaviour was to be measured. Other auxiliary legal instruments included information disclosure requirements and the threat of punishment as a deterrent directed against fraudulent debtors. They reinvoke the dilemma of bankruptcy, as addressed in Chapter 2. If the law was too lenient on debtors, creditors had to do all the monitoring and information gathering by themselves. Monitoring debtors often required detailed knowledge of their business, in short: time and attention. If the law was too lenient and creditors were reluctant to bear the costs of monitoring, they could instead resort to taking liens; they could be expected to ask for collateral being pledged in exchange for a loan or charge a higher interest rate to cover the increased risk and costs of monitoring. Whether collateral or higher interest rates – in either case borrowing became more expensive for debtors.²⁷⁵

In such an environment, debtors could lower their costs of borrowing by sending a strong signal of creditworthiness. Reputation, longevity of a trading house, family connection, personal relations, the record of past behaviour, even holding a public office – they became business-credentials. Even the successful insolvency settlement with creditors and a successful discharge of a debtor could become a signal of creditworthiness. Büsch, whom I quoted above, suggested that the Hamburg merchant guild should not only publish the beginning of a merchant's bankruptcy in the public papers but also its outcome:

It would be conducive to the credit of merchants if it would be published in public papers after an important insolvency case, what dividend the bankrupt was able to pay to his creditors. (...) But it is a peculiar thing about the credit. With regard to a rich man, people seldom think beyond the fact that he is rich right now, and a merchant, about whom it is known that he married much [sic], is deemed creditworthy as long as one deems his business as profitable (...)²⁷⁶

²⁷⁵ Stiglitz, *Bankruptcy Laws*, 2001,

²⁷⁶ „Es wäre gewiß dem Credit der Kaufleute überhaupt zuträglich, wenn von allen wichtigen Concurſen in ſolchen Blättern (...) am Ende jedes Concurſe Nachricht eingerückt würde, wie viele Procente der Fallit gegeben habe. (...) Aber es iſt ein wunderliches Ding um den Credit. Nur ſelten wird bei einem reichen Manne weiter hinaus gedacht, als daß er jetzt reich ſei, und ein Kaufmann, von welchem man weiß, daß er viel geheiratet habe, gilt in der gemeinen Meinung für gleich glaubenfeſt (...) ſo lange man ſeine Ge-

Too much power for creditors, however, could discourage businessmen from borrowing money and taking risks in the first place. The legal scholar Anton Mittermaier reminded his readers, that merchants performed an important social function as middlemen; he described them as connecting points, where ‘networks and knowledge come together.’²⁷⁷ This social function involved taking risks. In Mittermaier’s account, merchants should be judged according to slightly more lenient criteria compared to other occupations because the activity of merchants was simultaneously a driving force behind credit markets. Theodor Hasche (1769-1854), a jurist and judge who wrote an authoritative three-volume commentary of the Hamburg bankruptcy law, reports that lawmakers in 1753 had been concerned with the costs of borrowing and lending and how a new bankruptcy law would possibly affect them:

(...) that it is precisely the frequent bankruptcy and the deficient liquidation of the bankruptcy-estates that weaken the general credit and disturb commerce.
(...) Strengthening the general credit (...) is the source of wealth and welfare of every citizen in a trading state.²⁷⁸

The dilemma for lawmakers consisted in the wish to lower the costs of borrowing on the one side, which would enable merchants to raise capital more easily and stimulate commerce and trade. On the other side was a fear that a too lenient bankruptcy system carried the danger of moral hazard, that free riders would abuse the system and spend other peoples’ money without feeling obliged to repay. Creditors were inclined to lend if they received sufficient surety that repayment would be enforced. Otherwise they withheld funds. Debtors, on the other side, would turn to ‘risk-free’ activities with a lower profit trajectory, if borrowing-costs became too high. Borrowing-costs included interest rates, pledging collateral, and disclosure of information, which could often threaten business-models relying on the uniqueness of an entrepreneur’s access to information.

schäfte überhaupt für gewinnvoll hält (...)’ BÜSCH, JOHANN GEORG, *Theoretisch-Praktische Darstellung der Handlung in deren mannigfaltigen Geschäften* (Hamburg, 1792), Vol. 2, pp. 163 – 169.

²⁷⁷ MITTERMAIER, CARL JOSEPH ANTON, *Der gemeine deutsche bürgerliche Prozeß in Vergleichung mit dem preußischen und französischen Civilverfahren und mit den neuesten Fortschritten der Prozeßgesetzgebung* (Bonn, 1820-1826), p. 217.

²⁷⁸ (...) daß nämlich die häufigen Fallissement und die schlechte Berichtigung der Conkurs-Massen, den Credit schwächen und dadurch die Handlung stören. (...) Die Befestigung des Credits (...) ist die Quelle des Reichthums und des Wohlseyns der Bürger in einem Handlungsstaate.’ Hasche, Erläuterung, 1797-1806, Vol. 1, p. 35.

Hermann Baumeister (1806-1877), another legal scholar and member of the Senate from Hamburg, was writing in the 1850s but he makes a similar link between the bankruptcy regime and the credit market as his predecessors. In his words, the premise that should govern lawyers when interpreting bankruptcy laws was to expand credit markets and creditors' propensity to lend – *Dem Creditums zum Nutzen*.²⁷⁹ That required a carefully calibrated balance between creditor protection and debtor protection.

These quotes engage with a theoretical discourse that still continues today. The indirect effects of bankruptcy concerned transaction costs, including the costs of information gathering, monitoring, or bargaining for and enforcing a contractual arrangement. Contemporaries did not have a word for it, but they knew nevertheless about the importance of bringing down bankruptcy costs and containing its effects on other fields of commercial activity. Scholars of law and economics are discussing the same questions today, though with new techniques and new vocabulary. Lawyers and economists picture the modern company as entirely decoupled from any local context (whether or not this proposition is accurate).²⁸⁰

Behind this debate is the same quest for a balanced bankruptcy regime. Law and economics calls it an 'optimal' bankruptcy regime, supporting 'efficient' credit markets. The response to these questions in modern 20th century legislation has been to differentiate the insolvency procedure. In US and UK legislation, there is no single bankruptcy rule that fits all cases. A number of European legislators have followed suit. Most recent bankruptcy reforms furnished a procedural menu from which actors can choose. The choice is often left to creditors, who in turn base it on what they deem 'optimal' in their case (usually in the sense of minimizing costs and maximizing returns for creditors).²⁸¹ As can be inferred from the debates in eighteenth- and nineteenth-century Hamburg, these debates are no new or 'modern' phenomenon.

²⁷⁹ BAUMEISTER, HERMANN, *Blicke auf einzelne Gegenstände des Hamburgischen Rechts* (Hamburg, 1852), p. 325.

²⁸⁰ Warren, 'Bankruptcy Policy,' 1987,

²⁸¹ DRUKARCZYK, JOCHEN AND SCHÜLER, A., "Die Eröffnungsgründe der InsO," in *Kölner Schrift zur Insolvenzordnung*, ed. HILDEGARD WROBEL-SACHS (Münster, 2009), pp. 28-85.; RINGE, WOLF-GEORG, 'Forum Shopping under the EU Insolvency Regime,' *European Business Organization Law Review* 9 (2008), pp. 579-620.

IV. Institutional Framework in the Hanse Towns

Bankruptcy entailed more than just winding up firms and liquidating a debtor's assets – at least from the perspective of Hanseatic merchants. Bankruptcy was an issue that concerned the whole merchant community and affect the autonomy of city-administrations. For their business, merchants relied on their community's organization, which formed part of the city's self-administration. Merchants relied on this special autonomous status as well as on the 'infrastructure' provided by city and merchant guild to conduct their business. Above all, they relied on the homogeneity and shared interests of the mercantile community itself. Success in business often depended on cooperation and merchants sought mechanisms to settle disputes, to share information and foster mutual trust.

Because of the aforementioned concerns, merchants constructed a peculiar system. Their approach to the issue of bankruptcy resembled modern regulators' approach in some respects. The real concern was with the community's local credit market, in which nearly every merchant was creditor or debtor and exposed to the risk of insolvency. The fraudulent bankrupt was a problem that could be dealt with by criminal law. To this end the insolvency regulation made use of a particularly harsh vocabulary to single out the *Unrechtsgehalt* of such a behaviour. But this vocabulary should not conceal the fact that the actual institutional framework of insolvency regulation in the free cities was much more complex. Corporate bodies such as the merchant guild played a pivotal role. In contrast to modern legislators these towns could not resort to a powerful state. In fact there was hardly any state power in the modern sense available to them.

a.) Club Membership

Merchants in Königsberg exposed this link between membership in a circumscribed community and the expected treatment in bankruptcy. Königsberg had long been a member of the Hanseatic league, but had later come under Prussian rule. In the 1850s they suggested to establish a type of 'bankruptcy insurance'. A charter was drafted that carried the title: 'Society for merchant interests

and insolvencies.²⁸² The Prussian Ministry of Justice ultimately prevented the society's establishment. Prussian civil servants and jurists favoured legal harmonization within the kingdom rather than further fragmentation. But the fact that merchants in the 1850s considered creating such an organization and wrote to their kingdom's highest authority to seek permission shows that there was nothing uncommon about such an approach. Mercantile practices and a sense of autonomy were deeply ingrained in the city's political culture. They could rely on legal opinions such as proposed by Hasche's commentary on the Hamburg bankruptcy code. He expressed an understanding, that insolvency regulation was put in place by and for the club of merchants, not the general population.

It is very clear that the bankruptcy law was made for commerce and merchants, while it is inappropriate for people of a different occupation, particularly for peasants. Even within the city walls, if the debtor is not a merchant, we become aware of many inconveniences.²⁸³

He and others argued that merchant transactions were often a bet on the future. Success and failure was not always within the control of the actors; failure was an occasional concomitant of these activities. The 'honest but unfortunate' merchant should not be cut off from his business and made to suffer, but instead given a second chance.²⁸⁴ These authors further argued that non-merchants, who were not exposed to risk and luck to the same extent, should not be granted the same leniency. Moreover, non-merchants were considered as being less committed to the established and shared standards of merchant custom, particularly common accountancy rules and the intricacies of the bills market. Therefore, they could not be trusted in financial affairs. Access to the bankruptcy system would extend their credit and set incentives to borrow and live above their means.²⁸⁵

Bankruptcy laws in the Hanseatic towns distinguished three 'classes' of bankrupts: (i) fraudulent, (ii) negligent, and (iii) unfortunate. Debtors in the first category faced a criminal trial. Con-

²⁸² BUCHARDI, 'Der Königsberger Verein der Kaufleute für Behandlung von zahlungsunfähigen, oder in Concurs verfallenen Schuldnern,' *Beiträger zur Erläuterung des preußischen Rechts durch Theorie und Praxis* 4 (1860), pp. 391-401.

²⁸³ Own Translation. German original: Allein es ist sehr klar, daß die Falliten-Ordnung bloß für den Handel und die Kaufmannschaft eingerichtet ist, hingegen für Leute eines anderen Gewerbes, und besonders für Bauren [sic] nicht passend ist. Selbst in der Stadt, wenn die Falliten nicht Kaufleute sind, zeigt sich in manchen Stücken schon einige Unbequemlichkeit.' Hasche, *Erläuterung*, 1797-1806, Vol I., p. 25.

²⁸⁴ Büsch, *Darstellung*, 1792, p. 157.

²⁸⁵ *Ibid.*, p. 165, similarly Schubert, ed., *Gesetzrevision*, 1990, p. 256.

viction as a fraudulent debtor precluded out-of-court agreements with creditors. If, over the course of negotiations with creditors, it became apparent that the debtor had concealed assets, the process was immediately halted and the case referred to a police-investigation.²⁸⁶ Debtors in the last category – ‘unfortunate debtors’ – could count on the law’s protection against their creditor. A debtor was considered ‘unfortunate’ if his insolvency was the outcome of forces outside of his control. Judges at the commercial court assessed whether or not a bankruptcy was self-inflicted. So-called unfortunate debtors could still negotiate an out-of-court settlement with their creditors. Whether creditors received partial repayment through liquidation or through a settlement, they could not hold the debtor accountable for past debts after completion of the procedure. In these cases, bankruptcy was ‘final’ in the sense that the debtor was discharged of all old claims and granted a second chance.²⁸⁷

‘Negligent debtors’, on the other hand, could not count on such a discharge. This category of bankrupts comprised debtors who had borrowed in excess of their assets and had invested in risky enterprises without taking adequate precautions.²⁸⁸ A debtor classified as negligent could bargain for an out-of-court agreement. There was no police investigation or criminal trial. Negligent debtors had fewer assets exempted from seizure by their creditors.²⁸⁹ Completion of the procedure did not discharge them of the remaining debt. They also lost public offices and all privileges associated to their status in the city’s community until they had repaid their senior secured creditors at least 80% of the original debt.

The laws gave a clear definition of what constituted a fraudulent bankrupt; they enlisted a number of forbidden actions and named characteristics – such as poorly kept accounts, concealing assets, secret side-contracts with individual creditors etc. – that indicated an attempt of fraud.²⁹⁰ Both debtors and creditors could infer from reading the law under which circumstances their actions would cross the boundary into a criminal offense. In contrast, the categories ‘negligent’ and ‘unfortunate’ had not been specified in the same manner. They were vague categories;

²⁸⁶ Lübecker Entwurf 1828; NFO Hamburg; Lübecker Verordnung.

²⁸⁷ Lübecker Entwurf 1828. Hamburg NFO, Bremen 1841.

²⁸⁸ *Der Stadt Hamburg neue Falliten-Ordnung Auf Befehl E. Hochedl. Raths publicirt den 31. Aug. 1753 Nebst den Additional-Artikeln und den das Fallitwesen betreffenden neueren Conclusis und Verordnungen* (Hamburg, 1823), [henceforth NFO] Art. 104 u. 105

²⁸⁹ NFO Art 105 Nr. 3.

²⁹⁰ NFO Art. 102.

judges, creditors, and debtors could rely on its room for discretion when arguing whether or not someone deserved debt-relief or was merely ‘playing’ the system.

There was a number of technical restrictions, ensuring that certain bankruptcy cases never ended up in front of the commercial court. Bremen law referred petty cases that concerned value below 200 Guilders to the lower court and cases that exceeded this value to the higher city court.²⁹¹ This distinction continued under the new insolvency regulation from 1841. The new law stipulated that the higher city court would supervise ‘debt-commissions’ but that it would refer ‘negligible’ cases to the lower court.²⁹² Since ‘debt-commissions’ meant the bargaining procedure for debtors and creditors to reach a settlement, this prescription essentially barred petty debtors from this procedure. The higher city court in Lübeck, where members of the city council served as judges, was also the main arbitration tribunal for merchants. The lower court had jurisdiction over disputes between ordinary city-dwellers while disputes between a city dweller and a citizen came under the competence of the higher court.²⁹³ The 1828 draft for a new bankruptcy law in Lübeck attempted to create a common bankruptcy jurisdiction, but the draft never became binding law.²⁹⁴

In Hamburg, cases that fell below the threshold of 4,000 Mark Banco were defined as petty cases and referred to a special procedure. The customary name for this procedure, *Dielenverfahren*, signifies the segregated character. It literally meant that petty cases had to remain outside. A mayor or court official would hear these cases on a Saturday morning at their home’s or the *Kontor’s* vestibule (the so-called *Diele*). Petitioning debtors in these cases were not even invited inside, into the *Stube* (either the office or reception room).²⁹⁵

These restriction had the appearance of ‘practical’ or ‘objective’ measures, but in fact privileged a specific social group, namely merchants. Citizenship itself was another important barrier, as city dwellers without formal citizenship were often excluded from certain jurisdictions. Trus-

²⁹¹ MÜLLER, HARTMUT, 'Bremen und die Kaiserdiplome von 1541,' *Bremisches Jahrbuch* 79 (2000), pp. 13-29.

²⁹² SENAT DER FREIEN HANSESTADT BREMEN, 'Verordnung für Debit- und Nachlaßsachen vom 24. Mail, publicirt 5. Juni 1843,' *Sammlung der Verordnungen und Proclame des Senats* (1846), pp. 31-180. § 3.

²⁹³ *Revidirte Ober Gerichts Ordnung eines Erbarm Raths der Kayserl. Freyen und des heiligen Reichs Stadt Lübeck* (Lübeck, 1631), pp. 1 and 11.

²⁹⁴ 'Entwurf einer Fallitenordnung für die Freie und Hansestadt Lübeck', in: BA DB 55/15 Reichsministerium der Justiz 1848-1849, *Entwurf eines gemeinsamen Handelsgesetzbuches*.

²⁹⁵ NFO, Art. 109; LEONING, OTTO, 'Die Gerichtstermine im Magdeburger Stadtrecht,' *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung* 30 (1909), pp. 37-50.

tees and administrators of bankruptcy cases could only be ‘domiciled’ merchants, registered with the local merchant guild.²⁹⁶ Foreign creditors needed a local representative who owned full citizenship in order to be registered and admitted to the proceedings.²⁹⁷ Experienced merchants could rely on their trading partners in other cities – a benefit non-merchants did not share.²⁹⁸

b.) Procedural Choices

Hamburg, Bremen, and Lübeck discarded the ‘one-fits-all’ approach and provided more than one procedure to settle bankruptcies. In 1753, Hamburg’s new law prescribed that debt-commissions, consisting of two senators, would administer bankruptcy cases. The senate combined legislative, executive and judicial authority in one body. After 1815, the commissions were transferred from the senate to the commercial court. They now comprised of two judges from this court and a representative of the city administration. Debt commissions similarly existed in Bremen and Lübeck. In Lübeck, the Senate merely ‘appointed’ the commission; the actual supervision was left to a court official of the lower court.²⁹⁹

Individuals unable to pay their debts could apply to the court to set up a commission for their case. Its primary task was to act as an arbitrator, to oversee the appointment of a trustee and to help debtors conciliate a plan with their creditors to repay their debts. The commissioners did not intervene much in the bargaining process. If creditors and debtor could agree on an amicable settlement, an *accord*, their job was done. If parties failed to agree, the case went into formal insolvency procedure at the court. Court action was in most cases synonymous with liquidation.

A comparable system can be found in modern bankruptcy law, which may serve as an illustration. The formal court procedure resembles a Chapter 7 procedure under current US bankruptcy law. Debtors give up all their assets and receive a discharge in exchange. The assets are auctioned and the proceeds are distributed among the creditors ‘pro rata’.³⁰⁰ The debt commissions resemble a Chapter 13 procedure in current US bankruptcy law. Debtors promise to make

²⁹⁶ Lübeck Entwurf 1828

²⁹⁷ NFO, Art. 4 in conjunction with NFO Art. 8.

²⁹⁸ GORIBEN, STEFAN, "Der Preis des Vertrauens. Unsicherheit, Institutionen und Rationalität im vorindustriellen Fernhandel," in *Vertrauen. Historische Annäherungen*, ed. UTE FREVERT (Göttingen, 2003), pp. 90 - 118.

²⁹⁹ AHL 3.2-1 Vol. 4 *Debitkommissionen 1733-1863*.

³⁰⁰ About the special key for distribution among creditors see the section below ‘partial priority’.

some repayment over the next couple of years in exchange for a temporary respite. In Hamburg, if creditors and debtors reached agreement in the commission, debtors kept their assets but promised repayment from their future income. Creditors could not take action against the debtor within five years following the settlement.³⁰¹

Debt commissions provided a last resort before formal liquidation for debtors seeking debt relief. The settlements could range from debt moratoria and rescheduling to the possibility of a discharge of debts. Only debtors could apply to the Commission. The application brought individual actions against the debtor to a halt.³⁰²

The commissions drew their personnel from both the Senate and the merchant guild. While the commercial court was formally in charge of establishing the commissions, the president of the court was a professional jurist, who was always also a member of the senate. The other judges were lay judges appointed by the merchant guild.³⁰³

After a debt commission had been established, the decision between liquidation and reorganization was in the hands of creditors. Together with the debtor, the trustee would compile an inventory of all assets and propose a reorganization and repayment plan. If creditors refused this plan, the case was sent to court. Sometimes it took multiple attempts until a repayment plan was finally accepted.

³⁰¹ Additionalartikel 5, Hasche Vol III, p. 119.

³⁰² Debitverordnung Bremen 1841, § 4; Handelskammer Bremen, Das Bremische Moratorial- und Akkord-Verfahren, 1871, p. 13.

³⁰³ Handelskammer Hamburg, Dokumente zur Geschichte der Handelskammer Hamburg, 1965,

Procedural Paths in Hamburg's Bankruptcy Law

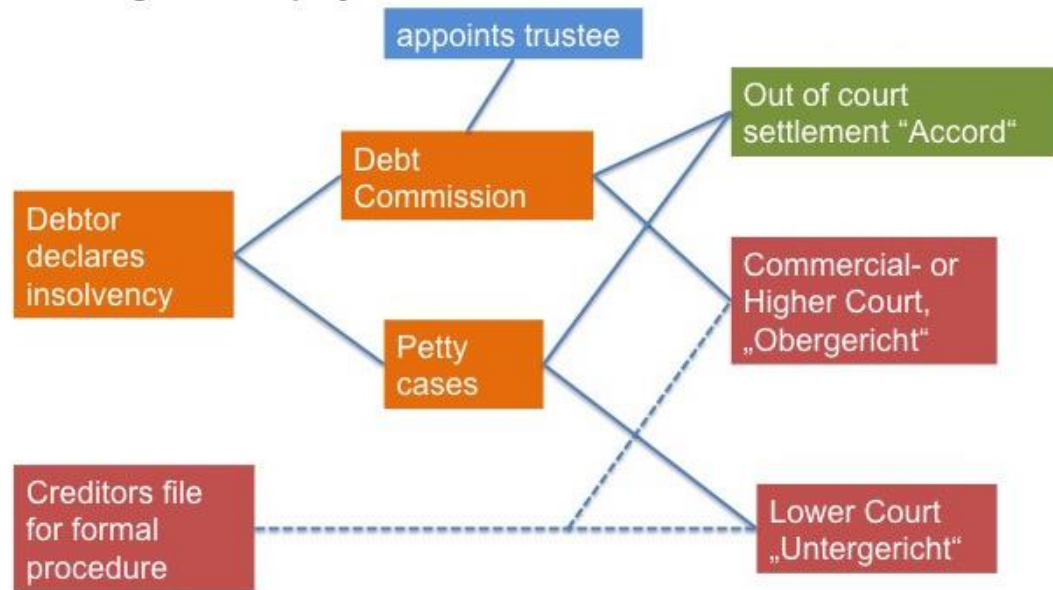


Figure 10 Procedural Paths in Hamburg's Bankruptcy Law
own design, based on *Neue Fallitenordnung 1753*.

c.) Partial Priority

Not all forms of credit were the same. The most important distinction was between commercial credit and mortgage- or security-backed credit.³⁰⁴ Distinct forms of credit together with distinct securities called for a distinction between different types of creditors. A fundamental principle of bankruptcy law, distribution *pro rata* or *par conditio creditorum*, promised to put like-creditors at an equal footing. Who was equal and who was not, however, was often difficult to determine. In Prussia, law-makers had attempted to provide a conclusive codification of all possible constellations that could arise. The result were 166 different statutory privileges and particular remedies for creditors in bankruptcy.³⁰⁵ Instead of clarifying the relationship between different creditors, it was largely seen as further protracting bankruptcy procedures.

Creditors faced difficulties to gauge their own status with certainty in advance, even and particularly under the Prussian system. Creditors about to sign a lending contract could not ascertain

³⁰⁴ HOFFMAN, PHILIP, POSTEL-VINAY, GILLES, AND ROSENTHAL, JEAN-LAURENT, 'Entry, Information, and Financial Development: A Century of Competition between French Banks and Notaries,' *Explorations in Economic History* 55/1 (2015), pp. 39-57.

³⁰⁵ FALK, ULRICH, 'Die Konkursübel. Forschungsfragen zur Geschichte des Konkursverfahrens in Deutschland,' *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung* 131 (2014), pp. 266-324.

the amount that might be realized in bankruptcy if their borrower defaulted. A rational creditor would price this uncertainty into their contracts in the form of higher interest rates. Secondly, particular remedies could lead to piecemeal dismantling of a debtor's business. Such piecemeal liquidation, by the untimely removal of important operating assets, could in turn reduce the overall value of the bankruptcy estate.³⁰⁶

A bankruptcy regime that introduced greater uniformity among all claimants could avoid those pitfalls. Reducing the number of particular remedies and privileges also reduced the amount of complexity and uncertainty for creditors. Such systems in turn required a collective procedure, that is to say, a coming together of all creditors and making each one's compensation partly dependent on their cooperation with others. A collectivistic process likely increased the aggregate pool of assets available for distribution among creditors (as will be demonstrated in the following sections and paragraphs). The system's advantage – cooperation among different types of creditors – was simultaneously its disadvantage, for coordinating decisions was difficult to achieve under the conditions of a dispersed group of creditors.

It appears that municipal bankruptcy statutes realized such an approach on the assumption that local creditors could easily coordinate their decisions and actions. All of the Hanse towns enacted statutes that curtailed privileges in bankruptcy for secured creditors. Theodor Hasche suggested that law-makers had originally intended to abolish all immunities in bankruptcy. They eventually had refrained from such a radical measure because 'society was not supposed to be ready' for this step yet.³⁰⁷

Three classes of creditors remained in the Hanseatic bankruptcy law: senior secured creditors, junior secured creditors, and unsecured creditors. The distinction between the former two categories was made by way of listing all secured creditors chronologically, summing up their claims and drawing a line of separation at precisely fifty percent. Even if that meant that half of the secured assets claimed by one creditor were classified as senior and the other half junior.³⁰⁸ These secured creditors were only given partial priority. Within the group of secured creditors,

³⁰⁶ Ramsay, 'Two Debtors,' 2012,

³⁰⁷ Hasche, *Erläuterung*, 1797-1806, , Vol 1, p. 39.

³⁰⁸ *Neue Falliten Ordnung* Art. 49 No. 1.

claims were sorted by their age. When it came to the distribution of value, secured creditors were simply entitled to be paid *more* than unsecured creditors, but not necessarily being *fully* repaid *before* unsecured creditors. This approach smoothed the asymmetry between creditors and was different from the legislation undertaken in Saxony, France, and Prussia.³⁰⁹

d.) Majority Rule

The stance on security rights was auxiliary to the law's emphasis on amicable out-of-court agreements, *accords*. A law that stipulates an elaborate rank order of creditors makes agreements much more difficult; secured creditors, who are protected by absolute priority, could always resort to foreclose their secured claim. Introducing partial priority changed that dynamic fundamentally. Creditors could still disagree over the question how to proceed with the debtor's assets. Vetos by a small minority or even single creditor could be avoided by allowing the majority to control the procedural choice. This ensured that *most* creditors would benefit from a particular choice, as they would not consent to an *accord* if they did not expect it to put them into a better position than they would be in formal insolvency.³¹⁰

Laws in the tradition of the German *ius commune* required unanimity of creditors and exempted secured creditors.³¹¹ In contrast, City statutes included secured creditors in the agreement and allowed for majority decisions. The majority was defined as the biggest share of debt rather than the majority of creditors; it gave the largest creditor relatively more weight than other creditors. The city-laws prescribed a key that determined how votes were distributed among creditors (see table 5).³¹²

³⁰⁹ BEBCHUK, LUCIAN ARYE AND FRIED, JESSE, 'The uneasy case for the Priority of Secured Claims in Bankruptcy: further thoughts and reply to critics,' *Cornell Law Review* 82 (1998), pp. 101-162; De Saint-Joseph, *Concordance*, 1851, ; Vollmershausen, *Marktbereinungsverfahren*, 2007, pp. 95-97, 155.

³¹⁰ Schwartz, 'Contracting About Bankruptcy,' 1997,

³¹¹ This point was not uncontested among German jurists, cf. Kori, *System* 1828, , p. 162, in contrast to Von Adlerflycht, *Das Privatrecht*, 1832, , p. 1328 and Bayer, *Theorie*, 1868, , pp. 104-105.

³¹² NFO, Art. 4, similarly *Inspektionsverfahren*, Lübeck 1857, AHL 1.1-1 No 17762.

Table 5 Distribution of Votes in Creditor Assembly

according to Art. 4 of the Hamburg bankruptcy code 1753 and the Lübeck draft for a bankruptcy code 1841

Siez of Claim in Lübeck	Size of Claim in Hamburg	Number of Votes
	< 100 Mark Banco	0
< 1,000 Mark Courant	100 – 3,000 Mark Banco	1
1,001 – 5,000 Mark Courant	3,001 – 9,000 Mark Banco	2
> 5,000 Mark Courant	9,001 – 15,000 Mark Banco	3
	15,001 – 21,000 Mark Banco	4
	> 21,001 Mark Banco	5

A particularly strong instrument was the *Zwangvergleich* – forced accord. Hamburg decreed in 1753 that a debtor, who could credibly promise repayment of more than 40 percent to his senior secured creditors, 30 percent to the junior secured creditors and 20 percent to the unsecured creditors, reached a settlement. Courts would approve of such a settlement as legally binding and valid, even against the will of creditors.

If the estate is such that the older *Hypothecarii* in the first class receive forty, the more junior in the second class thirty, and the book-creditors in the third class receive twenty percent, either in cash or in installments over one year (...) so shall such an *accord* become binding, and creditors shall content themselves with it.³¹³

If, after reaching an agreement, the debtor managed to repay eighty percent of the outstanding debt over the course of a couple of years to his senior secured creditors, he would even be considered fully rehabilitated. In other words: repaying all of the sums owed was never a requirement. And as long as the majority of creditors agreed, the law gave permission to negotiate any settlement below the stipulated threshold.

³¹³ NFO, Art. 50 (1), own translation, German original: 'Ist die Massa so beschaffen, daß die älteren Hypothecarii in der ersten Classe 40, die jüngeren in der zweyten 30, und die Buch-Schulden in der dritten 20 pro Cent, entweder baar, oder wenigstens binnen Jahres Frist, (...) erhalten können; so soll der Accord allemal angenommen werden müßen, und solche Annehmung von den Creditoribus nicht können abgelehnt werden.'

This regulation set incentives for parties to resolve the case outside of courts. For creditors, the gradation of repayment according to the temporal seniority of their security interest (rather than other privileges) provided an acceptable standard to distribute value among secured creditors. And because secured creditors only enjoyed partial priority, unsecured creditors had better chances of receiving some repayment. Finally, debtors could reduce their debt burden substantially if they complied with the regulation and managed to convince creditors. As long as the majority of creditors agreed, the law permitted any settlement below the stipulated ceiling.

V. Empirical Evidence

Court records in the three northern Hanse towns support the analysis of the institutional framework set out above. The following passages rely on a sample of court cases compiled from the records of the Hamburg *Commerzdeputation* and the Bremen *Kaufmannschaft* from 1801 until 1869.³¹⁴ For Hamburg, I can draw on a sample of some 8,000 court cases, in Bremen the sample contains some 2,500 cases.³¹⁵ These sources even recorded the outcome of the respective procedure – liquidation or *accord* – and whether a case was referred to the commercial court or the lower court. Not all court files have been preserved in a complete state and record keeping practices changed over time. The most reliable and complete information is for the time between 1849 and 1870. Where possible, additional records in the state archives of Hamburg and Bremen have been included in the analysis.³¹⁶

a.) Procedural Choices

The frequency with which either debtors or creditors filed for bankruptcy in those towns was much higher than elsewhere. In the 1820s, there was almost one case per thousand inhabitants in Bremen, and more than half a case in Hamburg, compared to only 0.09 in the Prussian heartland and 0.01 in the Rheinland, where French law was applied. The relative frequency of Saxony, Hes-

³¹⁴ Stiftung Hanseatisches Wirtschaftsarchiv, Safebestand der Commerzbibliothek, S/599 No. 122 b-e; StAHB D.11.b.1.c *Konkurse Obergericht 1849-1877*; D.11.b.1.d *Konkurse Untegericht 1814-1877*; AHL 1.1-1 Nos. 17751, 26575, 26590.

³¹⁵ A description of the dataset is available in the online appendix.

³¹⁶ StAHH, 222-3, B1, Vol. 1-7.

se-Darmstadt and Baden are closer to the Prussian case than to the free cities. The difference between Bremen and Hamburg on the one side and the other German states on the other side became even more pronounced in the second half of the century. For both, Bremen and Hamburg, we may ask whether this was simply the effect of merchants in those towns commanding a larger share of the population or whether bankruptcy there served a different function than in Prussia or Saxony.

Figure 11 gives an impression of the diverse outcomes with respect to the frequency of bankruptcies of different German jurisdictions. It weighs the frequency of bankruptcies by the population size. It should be noted, however, that the settlement procedure in Hamburg and Bremen was part of the official insolvency procedure and that figures for those towns were derived from the records of local chambers of commerce. Figures for the other states are derived from official court statistics. The latter did not account for any out-of-court settlements. Table 6 lists detailed values in a five-year interval.

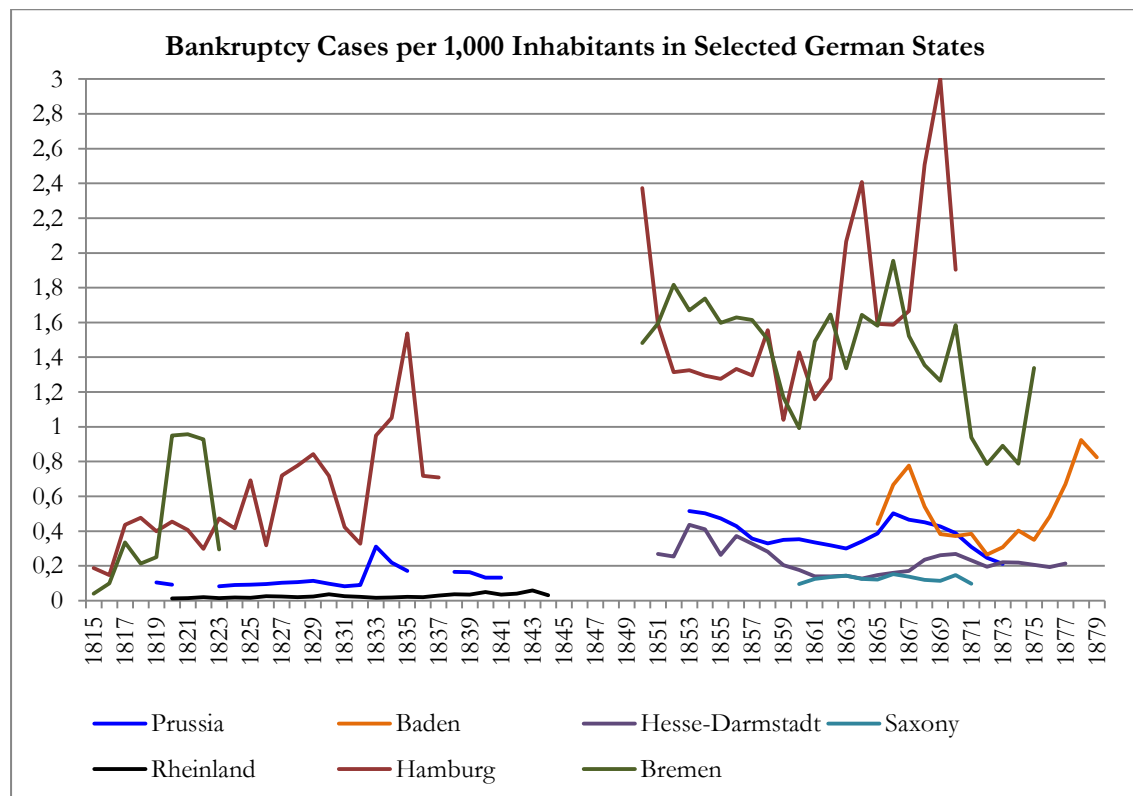


Figure 11 Bankruptcy Cases per 1,000 Inhabitants in Selected German States (own illustration, for the data sources see Table 6)

Table 6 Bankruptcy Cases per 1,000 Inhabitants in Selected German States

Absolute figures in parentheses.

	Prussia	Rheinland	Baden	Hessen	Saxony	Bremen	Hamburg
1815	0.12 (851)						0.18 (20)
1820	0.09 (790)	0.01 (25)				0.95 (50)	0.45 (52)
1825	0.09 (791)	0.01 (32)				0.92 (51)	0.69 (84)
1830	0.09 (994)	0.03 (76)					0.71 (91)
1835	0.17 (1910)	0.02 (50)					1.53 (203)
1840	0.13 (1585)	0.04 (128)					
1845		0.03 (83)					
1850				0.26 (229)		1.48 (119)	2.37 (371)
1855	0.47 (6383)			0.26 (221)		1.59 (142)	1.27 (212)
1860	0.35 (5157)			0.17 (151)	0.09 (202)	0.99 (95)	1.42 (252)
1865	0.38 (5626)		0.44 (631)	0.16 (137)	0.12 (285)	1.58 (166)	1.59 (306)
1870	0.38 (6274)		0.38 (549)	0.26 (228)	0.14 (346)	1.58 (187)	1.9 (450)

Sources: *Kamptz' Jahrbuch zur Gesetzgebung* (Berlin, 1812-1841); *Zeitschrift für Zivil- und Kriminalrecht in den Königlich Preussischen Rheinprovinzen* (Cologne, 1820-1845); *Justizministerialblatt* (Berlin, 1852-1872); *Übersicht über die Rechtspflege im Königreich Sachsen* (Dresden, 1863-1868); *Beiträge zur Statistik des Großherzogthums Hessen*, Bd. 11-15 (Darmstadt, 1870); *Übersicht über die Rechtspflege im Großherzogthum Hessen* (Darmstadt, 1851-1877); *Übersicht über die Rechtspflege im Großherzogthum Baden* (Karlsruhe, 1865-1879), Staatsarchiv Bremen D.11.b.1.1.c-d, Stiftung Hanseatisches Wirtschaftsarchiv, Safebestand der Commerzbibliothek, S/599 No. 122 b-e; HOHORST, G. *Wirtschaftswachstum und Bevölkerungsentwicklung in Preussen 1816-1914* (Bielefeld 1978), 372-381; KRAUS, ANTIJE. *Quellen zur Bevölkerungsstatistik Deutschlands 1815-1875* (Boppard am Rhein, 1980), 262-263.

The following figures provide a closer look at the sample of cases in Bremen. They compare the frequency of debt commissions to formal liquidations and petty cases. Figure 12 depicts the caseload at the higher court, figure 13 shows the lower court. Debt commissions and settlements are blue, formal liquidations are red. The relationship between debt commissions and liquidations is inverted from one jurisdiction to the other. Debt commissions dominated the caseload at the higher court, liquidations dominated at the lower court. It resembles a division of tasks: cases that were 'valuable' enough to have access to the higher-court jurisdiction were more frequently

settled in a debt commission while small and petty cases were more frequently subject to a formal liquidation in court. Records from Hamburg produce a similar picture for most of the 19th century.

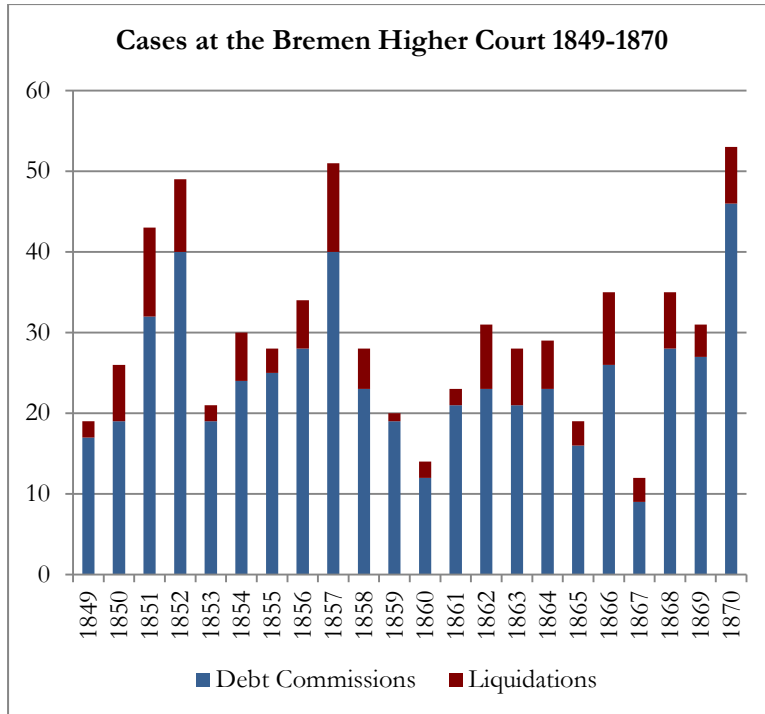


Figure 12 Bankruptcy Cases at the Bremen High Court 1849-1870
 Source: StAHB D.11.b1.1c *Konkurse Obergericht 1849-1877*, own figure

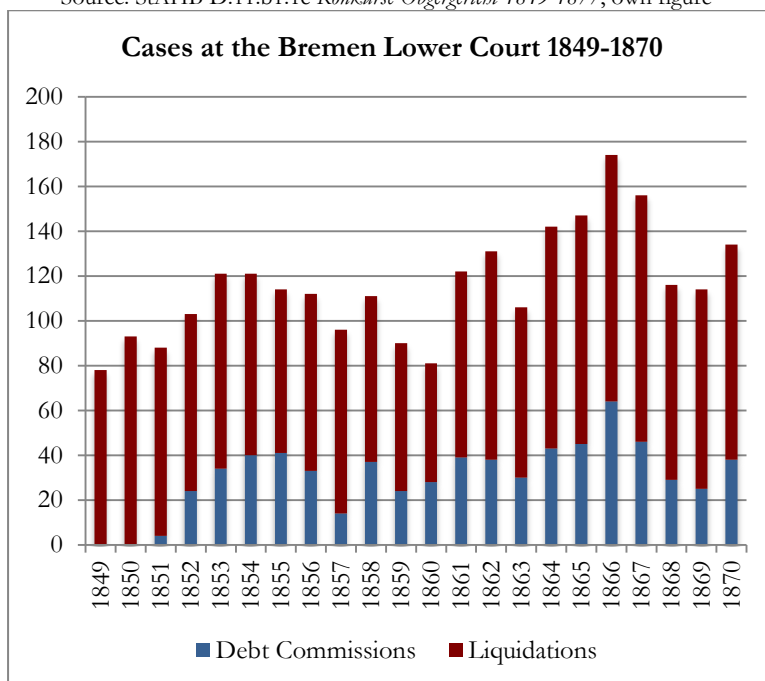


Figure 13 Bankruptcy Cases at the Bremen Lower Court 1849-1870
 Source: StAHB D.11.b1.d *Konkurse Untergericht 1814-1877*, own figure

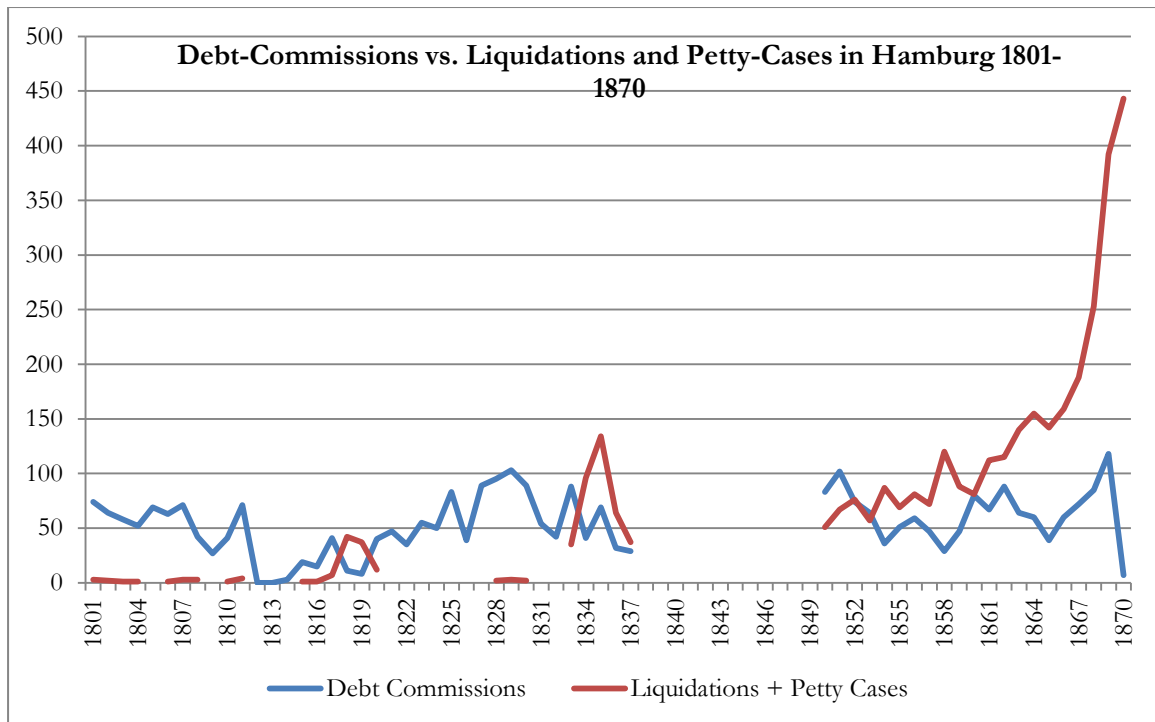


Figure 14 Debt-Commissions vs. Liquidations and Petty-Cases in Hamburg 1801-1870,
 Source: Commerzbibliothek S/599 No. 122 b-e.

For Hamburg, the available data covers a longer time period. Figure 3 exhibits an interesting turn in the second half of the century. The figure shows absolute frequencies for out-of-court settlements and formal bankruptcy procedures for both courts, commercial court and lower court combined. Debt commissions dominated in the earlier period. Formal liquidations combined with petty cases (the *Dieienverfahren*) surpassed out-of-court procedures by the 1850s. Subsequently, this form of bankruptcy procedures rose steeply while the number of settlements stagnated. The senate scrapped the old out-of-court procedure by 1869 (which accounts for the last surge in numbers of liquidations). The question arises of what was driving the demand for debt-commissions and why it receded toward the end of the period. I will come back to this in the next chapter.

b) Creditor's Bargain

One key to answering the question lies in the nature of these debt-commissions and the grounds on which actors choose between one procedure or another. The law itself prescribed conditions under which one or the other path should be followed. But creditors could easily change the course if they decided that they wanted to take a debtor to court or if they were determined to

stay out of it. It was a matter of goodwill on behalf of creditors and arguably also of belonging to the circle of insiders.

The hypothesis that the bankruptcy regime was designed as a filtering device seems to suggest an easy answer: actors may have chosen the path that promised to maximize their returns. They pressed ahead for formal liquidation in cases where there was little hope that the debtor would recover. Conversely, they agreed to an *accord* if the prospect of future returns was reasonably high. The evidence from court records supports this view. In the Hamburg sample of bankruptcy cases only 15.74 percent of liquidations distributed value to creditors, compared to 19.03 percent of out-of-court settlements. In the rest of cases, both liquidations and debt-commissions, creditors went home empty-handed. Deducting court fees, taxes, and exempted assets had left nothing to be distributed.

The histogram in Figure 15 depicts the frequency with which certain dividends were paid out to creditors in debt settlements. On average, such an out-of-court agreement repaid creditors 17.12 percent of the outstanding debt. Liquidations conducted by courts in Hamburg repaid creditors only 13.4 percent of the outstanding debt.

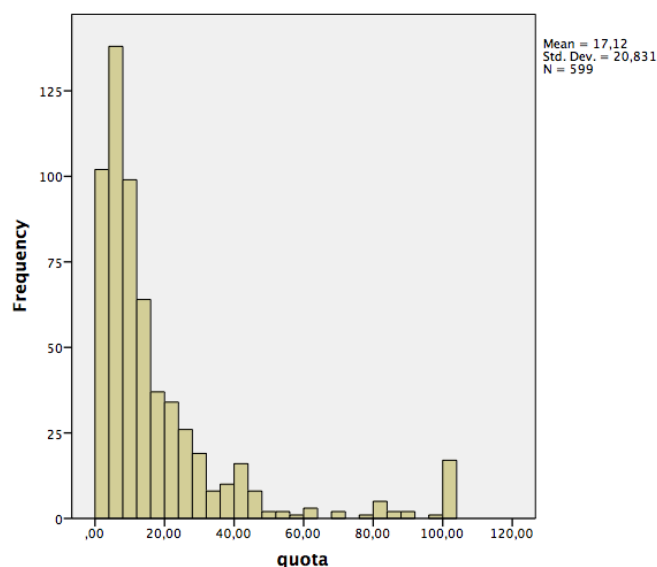


Figure 15 Histogramm of Repayment Dividends in Debt Settlements

Source: Commerzbibliothek, S/599 No. 122 b-e

In the majority of cases repayment was not even close to the threshold of forty percent that was stipulated in the law as a condition of a forced *accord*. These out-of-court settlements were voluntary. One might even question why the law contained such a threshold if it was hardly ever

met. Even more surprising is the frequency with which some family names occur in the records. In the subsample of merchant-cases at the commercial court, many debtors petitioned for bankruptcy several times. The merchant guild's record book lists 4,145 cases, but only 2,298 different names. Not a single one of these 'reoffenders' qualified as a petty case.³¹⁷ Sometimes a debtor showed up three or four times in the records, sometimes entire families, one after another, including wives and in-laws. Table 7 below lists some of the most frequent 'reoffenders'. The table deliberately excludes family names like Müller, Schmidt, Meyer, which are common German surnames.

Table 7 Frequent Family Names and Firms in Record Books of Hamburg and Bremen Insolvency Courts

City	Family-/Company-Name	Insolvencies (1820-1869)	No of Accords*	Several accords for one petitioner
Hamburg	Schlesinger	9	4	
Hamburg	Rothschild	8	4	Yes
Hamburg	De Lemos	7	1	
Bremen	Bolte + Bolte junior	7	5	Yes
Bremen	Friedrich Wilhelm (Georg's brother, see below)	7	6	Yes
Bremen	Theater Unternehmungsverein	7	5	
Hamburg	von Halle	6	3	Yes
Hamburg	Reimer	6	2	Yes
Bremen	Georg Wilhelm (Friedrich's brother, see above)	6	5	Yes
Hamburg	von Döhren	5	2	Yes
Hamburg	Moses	5	1	
Bremen	Frese & Söhne	5	3	Yes
Hamburg	Oppenheim	4	3	Yes
Bremen	Wittwe Waetke & Co	4	2	
Bremen	Bethmann	3	3	Yes

* records are not entirely reliable on this outcome. In Bremen both *Debitverfahren* and *Administrationsverfahren* have been counted as *Accord*, as it was the prescribed default outcome for these procedures; in Hamburg, cases that were handled under the jurisdiction of the Commercial Court were assumed to have reached an *Accord* if they did not subsequently file an official declaration of insolvency.

c.) Merchants vs. Ordinary Debtors

The stories behind individual court cases underline the fact that merchant cases were handled differently from other debtors. There is the case of the stonemason and bricklayer Albrecht Krienke in Hamburg. His story started in 1853, the year when he bought his first house and then

³¹⁷ A debtor was counted as recurrent debtor if his surname as well as the combination of his forenames was the same as in a previous entry. We have no means to inquire whether some people might have carried both the same family name and the same forename.

made a large profit from selling it afterwards.³¹⁸ Around 1861 a merchant talked him into a deal where he would invest all his savings in this merchant's business and become a partner. This ended in huge losses for Krienke. Unperturbed by his misfortune and 'avidly looking for new sources of revenues' – as the court files express it – he entered business with a real estate agent in 1866. Krienke bought two parcels of land from this agent and received a loan from the latter in order to finance the construction of two houses.

There was a time period specified in the contract within which Krienke had to finish construction. As it became clear that he would fail this deadline, he sought help from his family. His son in law gave him another loan, in exchange for which he mortgaged the unfinished houses.³¹⁹ Krienke could hire more workers with the money. When one of his suppliers, who had delivered goods on credit, got notice of that particular loan, he sued Krienke in court for fraudulent bankruptcy.³²⁰ Krienke was eventually acquitted of the accusations, but his entire business and all his assets went into liquidation in order to cover the costs of the procedure.

The case is quoted here because it points to a different attitude to family help with non-merchants. Krienke was sued for a practice that was standard practice among merchants. The majority of debt-commissions only reached a friendly settlement because the debtor could draw on funds from his family and friends.³²¹ Krienke's experience was not uncommon. Craftsmen and ordinary employees found it more difficult to raise additional funds if they came into financial difficulties, unless they turned to merchant-bankers and other professional moneylenders for help.

Merchants can be identified as a group stood apart from 'the rest'. Table 8 lists information derived from the sample of court cases in the Hamburg state archives that contained information on the debtor's occupation. This sort of information was not collected consistently until the 1850s, which is why the sample is again limited to the period from 1850 to 1869.

³¹⁸ StAHH, Ka 570 (Mikrofiche), 4643, No. 17 "Bericht der Curatores".

³¹⁹ Ibid., No. 40 "Schlussbericht".

³²⁰ Ibid., No. 1 "Antrag auf Universalarrest".

³²¹ AHL 1.1-1 o. 3822 *Roddes'sche Debitmasse*; StAHH Ka 538 (Mikrofiche) 3118 *Heckscher, Simon*.

Table 8 Occupations in the Sample of 1,016 Insolvency Cases at Hamburg's Commercial Court 1850-1869

	N	No. of creditors	Average Debt	Mean of repayment	median of repayment	duration in months
<i>labourers</i>	8	29	6,177	11.5	11	21.34
<i>inn-keepers</i>	52	44	7,983	37.38	30.5	31.12
<i>craftsmen</i>	177	30	15,969	18.63	9	31.46
<i>shop-keepers</i>	186	42	18,562	14.59	9.5	30.83
<i>merchants</i>	425	51	43,103	18.82	9	34.52
<i>manufacturers</i>	60	35	21,498	21.57	16.5	34.09
<i>learned profs</i>	21	58	16,910	40.85	14.66	32.75
<i>rentiers</i>	13	30	6,707	30	30	16.21
<hr/>						
<i>Merchants</i>						
<i>Shop-keepers</i>	616	48	35,432	17.52	9.5	33.37
<i>The Rest</i>	400	34	15,401	22.78	13.75	31.79

Source: Staatsarchiv Hamburg, 222-3 B Handelsgericht

The 'learned professions' in the sample consist of doctors, lawyers, and teachers or academics. 'Office-holders and rentiers' include members of the city administration, military, and aristocrats. 'Merchants' and 'shop-keepers' are the broadest and least defined categories. Many court-files simply listed *Kaufmann* as the debtor's occupation, without giving any further details. *Krämer* and *Händler* have been grouped into a separate category, 'shop-keepers/dealer', in an attempt to distinguish merchants selling groceries or haberdashery in their shops and merchants that commanded large warehouses and ships in different parts of the world. But even then, the boundary between the two categories was often hybrid in reality. Therefore the two are condensed into a single group when comparing merchants with non-merchants.

Despite this caveat, the evidence shows that merchants formed a distinct group. The average amount of debt in merchant cases was more than double that of non-merchants. The liquidation of their assets recovered less of the outstanding debt compared to non-merchant cases (with the exception of craftsmen). In essence, merchants and shop-keepers stood out as a distinct group because they had – on average – more creditors, higher levels of debt, of which they were able to repay less than debtors from other occupational groups.

d.) Negligent Debtors

In the distinction of ‘unfortunate’, ‘fraudulent’, and ‘negligent’ debtors, the latter ‘negligent’ debtors benefitted most from the system.³²² The majority of merchants who declared their insolvency had not come into this state by accident and misfortune. Records of the merchant guild in Hamburg list 5,709 ‘negligent’ debtors, compared to 84 cases of fraud and only 18 unfortunate debtors. Among those cases that went into a formal court procedure, there were 728 cases of negligence, 72 cases of fraud and only 2 ‘unfortunate’ debtors. Court files also record 96 cases in which the debtor died during or shortly before the procedure. How many of the latter were suicides is impossible to assess.

It is easy to argue that the distinction between unfortunate and negligent was arbitrary. That merchants frequently worked with other people’s money is a truism. Why was the distinction upheld? To answer that question, a closer look into the legislation is necessary.

If authorities classified a debtor as ‘unfortunate’, that was akin to a pardoning. The German *entschuldigen* entails both meanings, discharge of guilt and discharge of debt. An unfortunate debtor was released from the debt he owed to creditors, as well as the guilt and shame that was associated with bankruptcy. A negligent debtor, on the other hand, remained liable for the amount of debt for which his creditors had not discharged him in a settlement. As a person and member of the community he was not rehabilitated until his repayment had covered 80 percent of the most secured creditors’ claims or until his creditors ‘forgave’ him voluntarily.

The main objective of these three categories was to prevent fraud on creditors. Legislators found it harder to describe the circumstances, under which a debtor ‘deserved’ the remedy of a discharge in positive terms. But they had a clear vision of what behaviour should not be tolerated. The bankruptcy codes resort to listing a number of defining elements for fraudulent and negligent debtors. Whose behaviour was not mentioned in this catalogue was eligible for a discharge.

³²² Cf. above p. 104.

According to the Hamburg bankruptcy code of 1753, a debtor attempted fraud if he (1) was hiding assets from his creditors,³²³ (2) forged documents and his balance sheets, (3) deliberately squandered funds, (4) borrowed large sums shortly before his insolvency declaration in order to force creditors into a settlement, (5) had not kept accurate balance sheets, (7) or if he was fugitive.³²⁴

Negligent behaviour, in contrast, included (1) failure to file for insolvency in due time, (2) inaccurate books and balance sheets, (3) having sent goods abroad without taking sufficient precautions (and insurance), (4) whoever offered his creditors 40, 30, and 20 % in a settlement,³²⁵ and (5) merchants who had engaged in substantial short-selling.³²⁶

In Lübeck, a municipal ordinance provided a spectrum of actions that should preclude a debtor's discharge as 'unfortunate'. The law ordered them in increasing degrees of wrongdoing: (1) bold ventures that exceeded a merchant's own funds, (2) lack of mercantile experience and know-how, (3) choosing of disparate means and obscure insurance policies, (4) short-selling, (5) lack of accurate books and balance sheets, (6) borrowing even though the insolvency is already foreseeable, (7) committing suicide or fleeing the city. The last three categories constituted 'fraudulent and disgraceful' bankruptcy.³²⁷

These definitions were conclusive and the grounds on which debtors in nineteenth century bankruptcy cases were judged. Both Bremen and Lübeck revised their bankruptcy regimes in the late 1830s, though only Bremen managed to pass a comprehensive law reform in 1841. The two drafts were very similar in their attempt to incorporate elements of French insolvency law. However, the definitions of fraud and negligence changed little.³²⁸

The legal definitions of fraud and negligence can be compared with the reasons for insolvencies given in court records. Establishing the causes of insolvency, was never straightforward. The version given by trustees and judges could differ from the version given by a debtor in his initial filing. The very first pages of each court record at the Hamburg commercial court often

³²³ Buying stocks from foreign companies was treated alike; legislators regarded such behaviour as if the debtor attempted to bring money out of the country and make it impossible for creditors to chase it.

³²⁴ Art. 102 NFO.

³²⁵ See above section 4d).

³²⁶ Art. 104; the latter (5) described as „Windhandel“, „Leerverkäufe“ and „Wechselreiterei“.

³²⁷ Ordinance 1785.

³²⁸ Entwurf Lübeck 1841, Bremen Law 1843.

contain a letter (seldom more than half a page) in which the debtor indicated what had led to him filing for bankruptcy. At the end of the procedure, the court either confirmed this assessment or established another cause for the bankruptcy in its final report. Thirteen reasons can be identified that were given frequently by debtors when filing for insolvency. For simplicity, I have further condensed them into eight categories: (1) financial, (2) business, (3) exogenous shocks, (4) creditors pressing for repayment, (5) misbehaviour of a business partner, (6) chain-effects from other bankruptcies, (7) family problems, illness, and/or death, (8) incompetence or unsustainable lifestyle.

Figure 16 displays the relative frequencies of these categories as given by debtors in the court files 1849 to 1870. The sample is divided into the aforementioned occupational categories. This information is not unproblematic. On the one hand, we might expect debtors to come up with excuses for their bankruptcy. On the other hand, even if these are merely excuses, this information still informs us about what debtors thought was a credible justification. Interestingly, there are relatively few cases in which debtors invoked great misfortunes to have visited their families or businesses. In contrast, financial reasons such as lack of capital, the burden of interest payments, and speculation are more frequently mentioned as one would expect it from the point of view of a debtor. Neither was a valid reason to be considered for a discharge. Perhaps no surprise is the fact that most debtors blamed the pressing of their creditors as major cause for their insolvency.

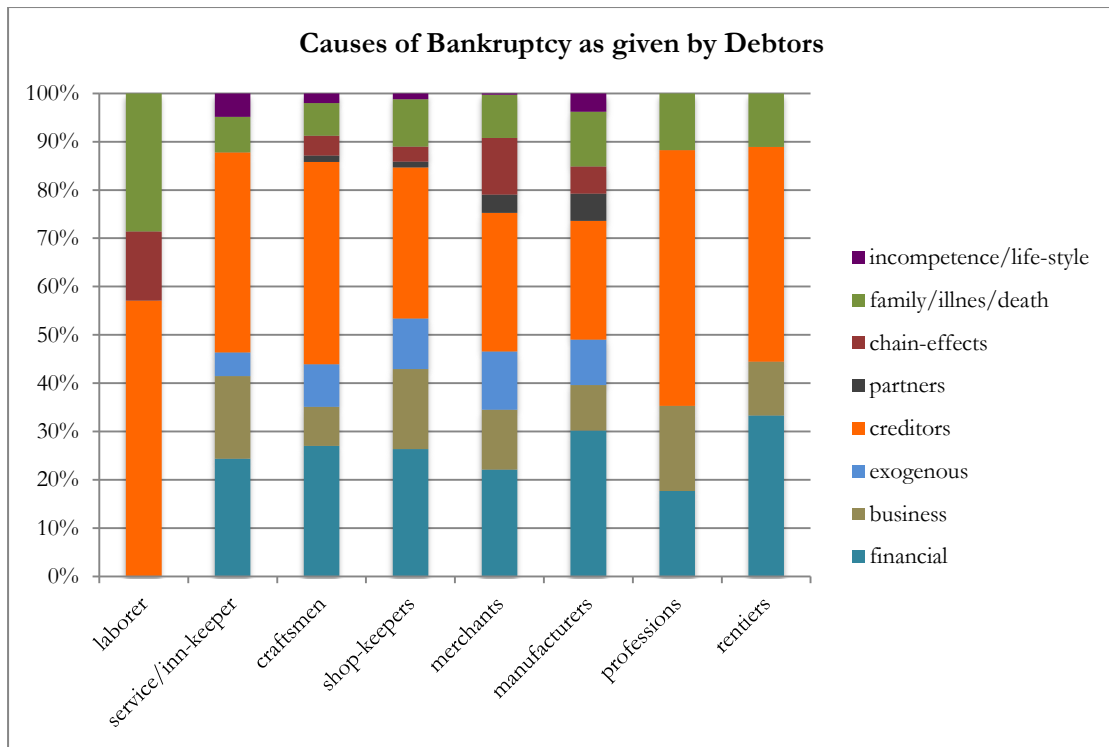


Figure 16 Causes of Bankruptcy stated by Debtors

Source: StAHH, 222-3 B *Handelsgericht*

The information from debtors should be juxtaposed with the version of trustees and authorities. Figure 17 therefore displays the causes of bankruptcy most frequently given in the final court reports. These reports are not fully objective either. Trustees, creditors, and their lawyers deliberately looked for any mistakes and flaws in a debtor’s behaviour, even minor ones, that could be used against the debtor. Having said this, these reports are far from arbitrary as they were often the product of a long process during which all parties had spent time on examining the debtor’s situation.

The blaming of creditors almost disappears in these reports. Servants and workers appear to be the social group that was most vulnerable to family tragedies and misfortunes. Officials recognized those causes even more frequently than debtors used them in their defence. The illness of a child or the death of a partner threatened the economic survival of workers and servants far more than any other social group. Reports also sometimes hint alcoholism, depression, and other causes that kept a debtor from earning a regular income.

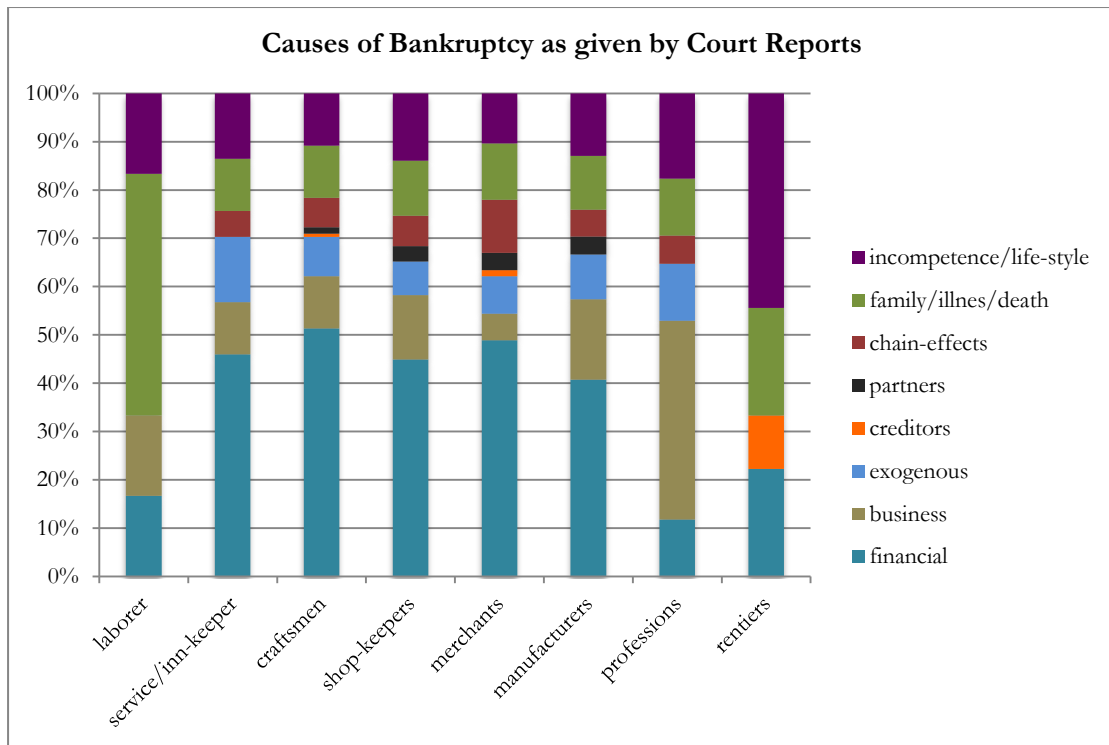


Figure 17 Causes of Bankruptcy Stated by Court Reports

Source: StAHH, 222-3 B *Handelsgericht*

The causes for the insolvency of servants and workers were almost never financial, i.e. bills of exchange, interest payments and the like. In contrast, financial issues as a cause of bankruptcy was most frequent for those debtors who ran their own business. That included both, merchants and non-merchants. ‘Lack of capital’ is the term that is mentioned with a striking regularity. Speculation is another commonly used term. That included trading bills of exchange. Many deals were concluded without that actual coinage changed hands. There are also a number of historical accounts suggesting that the German economy before 1870 suffered from a constant shortage of money.³²⁹ There was not enough coinage in circulation to meet the demands of an expanding economy. Without discarding the influence of silver shortage, merchants probably relied on rolling trade credit and bills of exchange for transactions of a certain size.³³⁰ Everyone was simultaneously debtor and creditor in these lending networks.

The high frequency of financial causes in figure 7 and the high frequency of creditors as cause of bankruptcy in figure 6 could be two sides of the same coin. If so many businessmen

³²⁹ NORTH, MICHAEL, *Kommunikation, Handel, Geld und Banken in der frühen Neuzeit* (München, 2000); Weniger, *Die Finanzverwaltung Lübecks im 19. Jahrhundert*, 1982, pp. 149-151; TILLY, RICHARD, *Geld und Kredit in der Wirtschaftsgeschichte* (Stuttgart, 2003), pp. 85-111.

³³⁰ See Chapter 5 for a detailed discussion of these practices.

relied on trade credit and endorsement of bills, it only took one or two creditors who were unwilling to extend a credit line and the business came to a halt. From the perspective of debtors, creditors were to blame because they pressed for repayment and were unwilling to extend another grace period to a troubled merchant or innkeeper. From the perspective of creditors, it was the attempt to run a business without substantive own capital that was the real cause of the bankruptcy. Both sides were right. If someone called in a loan prematurely or if another person did not deliver in time, the whole circle could be disrupted and a merchant quickly found himself drained of liquidity with creditors pressing for repayment.

The majority of these cases would be subsumed under the category of negligent debtors. The definition of negligence included a number of business practices, which were standard and not regarded as negligent as long as things worked smoothly. In the case of failure, however, the municipal laws were not inclined to release merchants from accountability. That was an important aspect of the law in two respects. It was a safeguard against merchants who would try to take advantage of the local system; it sent the message that, although the infrastructure including the merchant guild and the commercial court provided efficient measures for businessmen to file for insolvency and settle the case with their creditors, their behaviour and decisions would still be reviewed in the process. Secondly, by not offering these merchants an easy discharge but keeping them liable for the amount of debt not covered in the settlement, the law made it easier for creditors to give their consent to a proposed settlement.

VI. Conclusion

Hamburg, Bremen, and Lübeck were free port towns in the German Confederation. Their societies included many merchants with international links as well as craftsmen, manufacturers, small businesses, and a service sector. Transactions in this marketplace were often conducted on credit. Many a merchant was simultaneously debtor and creditor. Liquidity problems could arise at any time. Overcoming these problems while simultaneously avoiding shutting down a debtor's firm was often also in the interest of creditors.

All the evidence and text-passages quoted in this chapter served to argue that the bankruptcy regime in the merchant towns was designed to help a special social group, traders and merchants, in their daily activities and handling of credit. This was done in two ways. Corporatist bodies monitored their members or at least made them subject to stronger social control, which in turn increased the readiness with which members trusted each other. And the bankruptcy procedure itself prioritised debt-moratoria and other forms of out-of-court settlements. A debtor who was well networked and had the backing of a wealthy family had little difficulties in forging such an out-of-court settlement with his creditors. The system excluded a considerable number of ordinary city dwellers.

The Hanse towns supplied a mechanism for debtors to summon their creditors and negotiate an appropriate solution for their particular situation. The real demand for the bankruptcy system was not the 'honest but poor' – even though the official law texts offered him a generous discharge – but rather those actors in the market who relied on credit for their business. Merchants worked with other people's money, and they needed a facility to handle financial difficulties and contain chain reactions.

The bill market played an important role in all of this. The biggest sources for credit-relations were bills of exchange and unsecured trade-credit. The bill of exchange had the advantage of being easily alienable. The next chapter examines the relationship between bills, credit market, and bankruptcy regime.

CHAPTER 5: THE BILL OF EXCHANGE & BANKRUPTCY

Mephistopheles

Such paper's convenient, for rather than a lot (...)
Since the paper, in this way, pays for itself,
It shames the doubters, and their acid wit,
People want nothing else, they're used to it.
So now in all of your Imperial land
You've gems, gold, paper enough to hand.
(...)

The Treasurer

No dispute will divide us in the future:
I'm happy to have a wizard for a partner.

*(Johann Wolfgang Goethe 1832,
Faust II, Scene IV, transl. by A. S. Kline)³³¹*

I. Introduction

The previous chapter showed that these towns employed a merchant friendly bankruptcy regime, which formed part of an infrastructure to support local commerce and trade. This chapter now turns to the market for bills of exchange (or simply 'bills'). Merchants have long relied on these instruments to conduct business without the need for cash. The German economy furthermore suffered from a constant scarcity of coinage until the 1870s. Bills of exchange became a surrogate for money and simultaneously an instrument of commercial lending. Regulation of the bill market coevolved with insolvency regulation. Economic growth and market integration in the 19th century further expanded the use of bills of exchange. Unified rules were established across Germany by 1849, but they left the issue of bankruptcy untouched. The new regulation decoupled the bill market from local bankruptcy rules and debt-collection, which remained fragmented.

This decoupling was flawed. It eventually rendered the traditional approach to bankruptcy in towns and cities ineffective. The financial crisis of 1857 highlighted the close relationship between the bill of exchange and bankruptcy regulation. It will serve as an example here of how

³³¹ German original: *Mephisto*: Ein solch Papier, an Gold und Perlen Statt,/ Ist so bequem, man weiß doch, was man hat;/ (...)Und das Papier, sogleich amortisiert,/ Beschämt den Zweifler, der uns frech verhöhnt./ Man will nichts anders, ist daran gewöhnt./ So bleibt von nun an allen Kaiserlanden/ An Kleinod, Gold, Papier genug vorhanden. (...) *Schatzmeister*: Soll zwischen uns kein fernster Zwist sich regen/ Ich liebe mir den Zaubrer zum Kollegen.

bankruptcy law and commercial paper were mutually dependent. Hamburg and Lübeck were among the places that are reported to have suffered most from the 1857 crisis. It was eventually resolved by introducing a special short-term credit facility and an exceptional, temporary bankruptcy law.

II. The Bill of Exchange

Bills of exchange served as a means of payment because they could be endorsed multiple times. The bill was a paper due to which the issuing party promised to pay the beneficiary of the bill on behalf of a third party. Unlike a cheque, which has a fixed relationship between the issuer, the beneficiary, and the issuer's bank, the practice of endorsement meant that the bill could be transferred to a new beneficiary. Those bills often simply stated that the promising party should pay at due date a certain amount 'a visto', that is payable to whoever presented the bill.

The bill had evolved over centuries and appealed to merchants because it proved to be a versatile instrument. It came to serve four functions: a) to send money abroad, b) to trade different currencies, c) to advance credit, and d) as a means of payment. Legally, it was difficult to grasp. Nineteenth century jurists differed over a coherent legal theory explaining the bill of exchange.³³² A brief survey of the aforementioned functions and its corresponding legal theories will help explain the role of bills in bankruptcy proceedings.

a.) The bill as means of currency exchange

Before domestic bills were allowed, the bill of exchange in its 'classic' form involved four parties residing in two different jurisdictions with different currencies. Consider the following case: a merchant in Amsterdam sent goods to a merchant in Hamburg. Hamburg used the Mark, Amsterdam the Guilder as their respective currencies. In principle, the Hamburg importer could pay by exchanging Mark into Guilders and sending them to Amsterdam. This procedure was time consuming and costly. Instead the Dutch Merchant could 'draw' a bill of exchange on the Ham-

³³² WÄCHTER, LEONHARD, 'Die letzten Verhandlungen der Nürnberger Handelsconferenz über die deutsche Wechselordnung,' *Archiv für deutsches Wechselrecht und Handelsrecht* 10 (1861), pp. 368-378; BLEIBTREU, F. C., *Die Lehre von den Wechseln mit Hinweisung auf bestehende Gesetze* (Erlangen, 1860).

burg merchant. The technical terminology calls the Hamburg merchant, the debtor, a 'drawee' and the Amsterdam merchant, the beneficiary, the 'drawer'. The bill was a letter in which the importer acknowledged his debt to the exporter and promised to pay him or the bearer of the bill a certain sum either upon his presentation of the letter – *a visto* – or at a specified due date – the *usance*. The debt was denoted in the currency of the debtor, in our case Hamburg Mark. Having drawn the bill, the Amsterdam Merchant could then sell the bill to a third party, the 'remitter'. The remitter would pay for the bill in the creditor's local currency, Dutch Guilders. This way the drawer could turn the bill into money in his local currency. The remitter then forwarded the bill to his partner or agent in Hamburg, who presented the bill to the debtor. If the debtor accepted the bill (that is, he confirmed the validity of the claim), he would pay the amount specified in the bill in his local currency, Hamburg Mark. The seller and buyer could conduct the transaction with their respective currencies and did not have to actually exchange coins.

The remitter and his agent in Hamburg could have been merchant bankers, whose business consisted in sending bills back and forth to make a profit by exploiting the differences in the exchange rates of currencies. The profit derived from differences between the amount for which the bill was bought from the drawer and sold to the agent. The remitter, who had bought and sent the bill from Amsterdam to Hamburg, now had money in Hamburg currency lying around at his agent's office. In order to have the money with him in Amsterdam (and in Guilders), the whole transaction had to start again, this time with Hamburg as the starting point. The remitter's agent would purchase a bill that was drawn on a merchant in Amsterdam, send it to his partner there, who would present it to the drawee and receive money in Guilders. This way, the two accounts in Hamburg and Amsterdam could be balanced. If the exchange rate was favourable, the remitter in Amsterdam had made a profit.

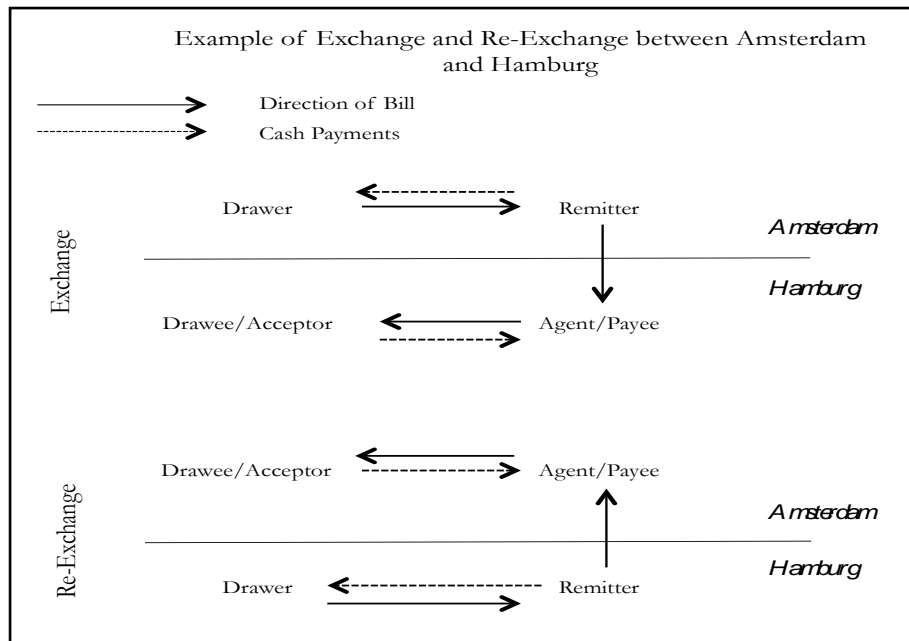


Figure 18 Hypothetical Example of Exchange and Re-Exchange,
 based on DE ROOVER, RAYMOND: 'What is a Dry Exchange?' *Journal of Political Economy* 52/3 (1944), pp. 250-266.

That baseline model of currency exchange already included elements of credit because it shifted actors' time-horizons. The importer (the drawee) did not have to pay for the goods right away, whereas the exporter (the drawer) received payment immediately. The payment to the drawer by the remitter was itself a loan to the drawer, as the remitter paid the value of the bill trusting that the drawee was solvent and would pay at due date.

b.) Local bill markets as a source of credit

Over the centuries, merchants developed new variances of the bill of exchange in order to make loans without coming into conflict with the ban on usury. One of these variances was the so-called dry exchange, or *Sola Wechsel* in German. The dry exchange severed the issuing of the bill from a specific transaction that should be paid for. Unlike the previous example, there was no actual exchange of goods involved. To use the above example: a merchant could turn to a Hamburg bank and ask for a sum, say 100 Mark. The merchant would draw a bill on the bankers correspondents in Amsterdam, which was payable 'to yourselves', i.e. to the same merchant bankers. The merchant would hand that bill to his bank in Hamburg and receive 100 Mark in exchange. The correspondent in Amsterdam would then reverse the line by drawing a bill on the merchant in Hamburg to the benefit of the Hamburg bank, payable at a specified date. This was 'a loan

disguised as an exchange'.³³³ By the 16th century, merchant bankers even abandoned the practice of sending the actual paper to their foreign correspondents. They merely balanced accounts in their books.³³⁴

Dry exchanges subsequently developed into acceptance credit. A merchant drew a bill of exchange on his bank (i.e. the private banker with whom he held an account); the beneficiary was the merchant's creditor. The bank accepted the bill and simultaneously bought it from the merchant at a discount, i.e. the bank gave the merchant the money minus the discount rate. The merchant could use the money to pay off his creditor, but he was obliged to pay back the bank the full amount at due date (that is the bill's nominal value and not the discounted prize). The bank's profit increased with the discount rate.

Accepting and discounting bills of exchange became an important source of credit. Private merchant bankers dominated the German banking system at the beginning of the nineteenth century. Large scale incorporated banks and state-run reserve banks were not yet established. Merchant bankers developed out of the traditional shipping business; the Hanse towns and cities that were located on important trade routes such as Augsburg, Breslau, Frankfurt, and Cologne consequently became Germany's first banking centres.³³⁵ Because importing and exporting involved doing business in different currencies, relying on bills of exchange as prime payment method and using them for trade credit, importers and exporters gained expertise in finance. Some decided to specialise in banking activities, casting aside the shipping business.³³⁶

Some German towns founded municipal banks modelled after the Amsterdam *Wisselbank* to support their local bill-market.³³⁷ Hamburg was the first with its old *Hamburger Giro-Bank* from 1619. Bills exceeding a certain value could only be cashed in at the Giro Bank. The bank functioned like a clearance house and helped settling international payments by introducing a book currency, the *Mark Banco*. Hamburg merchants, merchant bankers, and bill brokers, who held accounts with the Giro-Bank, paid in their money in whatever currency it was, but all transac-

³³³ DE ROOVER, RAYMOND, 'What is a Dry Exchange? A Contribution to the Study of English Mercantilism,' *Journal of Political Economy* 52/3 (1944), pp. 250-266.

³³⁴ *Ibid.*, p. 262.

³³⁵ POHL, HANS AND POHL, MANFRED, *Deutsche Bankengeschichte*, vol. 2 (Frankfurt, 1982), pp. 20-21.

³³⁶ Bethmann/Rege are examples.

³³⁷ *Wissel* was Dutch for *Wechsel*. LESGER, CLÉ, "Amsterdam," in *The Oxford Encyclopedia of Economic History*, ed. JOEL MOKYR, 1 (2003), pp. 121-123

tions on the books were conducted in *Mark Banco*. Bill brokers occasionally used the bank to re-discount their bills if their 'money at call' was being retrieved. Bremen had a similar institution since 1817 and Lübeck since 1819.³³⁸

It must be stressed that neither of these banks were central banks. In fact, Germany lacked a developed banking system before the 1850s as well as a common currency. Prussia had created a chartered bank, the *Königliche Bank*, in 1765, which was an attempt to combine the clearance house function of the Hamburg bank with the issuing of notes as done by the Bank of England.³³⁹ But even then, the *Königliche Bank* was not a central bank in the sense that it acted like a 'bank of banks', a lender of last resort.³⁴⁰

The co-existence of multiple currencies in Germany was not resolved until 1870. The South-German states used Guilders, the North-German territories and Prussia used Taler; Bremen issued its own silver currency, Hamburg and Lübeck relied on the so-called *Mark Lübisches Courant*. There also existed book-currencies which were used for accounting only, such as the *Kölner Mark*, the Saxon *Rixdollars*, and the Hamburg *Mark banco*. The German confederation concluded a series of multilateral currency treaties in 1837 and 1838, fixing the value of Guilders and Taler in Cologne *Mark* (1 *Kölner Mark* = 233,85 g fine silver = 14 Taler = 24,5 Guilders).³⁴¹ It was the tentative step in the direction of a common currency area.

For all these currencies, bank notes existed and were convertible into silver. The right to issue notes was strictly regulated and limited in most German states. Only banks with a special charter were allowed to issue notes. During the 1830s and 1840s an increasing number of German states established such banks. As of 1851 nine banks in the Confederation had that right, which still makes for a relatively small number and possibly a relative scarcity of paper money compared to countries like England and Scotland.³⁴² It has been argued that Germany's underde-

³³⁸ Pohl and Pohl, *Deutsche Bankengeschichte*, 1982, p. 72.

³³⁹ LOTZ, WALTHER, *Geschichte und Kritik des deutschen Bankgesetzes vom 14. März 1875* (Leipzig, 1888), p. 11.

³⁴⁰ Both 'bank of banks' and 'lender of last resort' are expressions that have been coined specifically for the Bank of England.

³⁴¹ Tilly, *Geld und Kredit in der Wirtschaftsgeschichte*, 2003, p. 88.

³⁴² Guinnane, 'Delegated Monitors, Large and Small: Germany's Banking System 1800-1914,' 2002, pp. 76-79.

veloped banking system and a scarcity of cash held Germany back in its economic development and made merchants rely on bills of exchange.³⁴³

c.) Endorsement and the bill's liquidity

The technique of endorsement was an important innovation that made the bill attractive to merchants. It transformed the bill into a liquid asset that was 'payable to bearer' and that could be traded. Endorsement means that ownership of the bill could be transferred or 'assigned' to any third party. The assignee (the one to whom the bill was transferred) obtained the title specified in the bill, the title itself was depersonalised. Because ownership of bills became transferable, merchants used it among themselves in lieu of payment. But that did not mean that the bill itself became depersonalised. If the debtor defaulted upon presentation of the bill, he could hold the assigner, i.e. the original owner, or a previous endorser liable for the outstanding sum.³⁴⁴ Endorsers wrote their name on the back of the bill.

The local Bourses were central places in trading towns, where bills were being sold and bought. A bill with a long chain of endorsers or the names of a highly reputable trading house among the endorsers was regarded as secure. Such a bill that was backed by a merchant banker's acceptance was more easily 'discountable'. That means that if the owner of the bill wanted cash before the bill fell due, he could sell it at a discount at the local Exchange or Bourse.

A lot of merchant bankers used the discounting of bills of exchange to provide credit for goods in transit. A lot of trading houses as well as merchant bankers relied on the bill market as a liquidity reserve. Merchant bankers frequently bought large amounts of bills with money that had been deposited with them. Rather than keeping large amounts of cash, trading houses and merchant bankers gave their cash to bill brokers, who bought bills of exchange at a discount on their

³⁴³ TILLY, RICHARD, *Kapital, Staat und sozialer Protest in der deutschen Industrialisierung* (Göttingen, 1980), 44-54; on the importance of monetary policy for economic development see MURPHY, ANNE, "The Financial Revolution and its Consequences," in *The Cambridge Economic History of Modern Britain 1*, ed. RODERICK FLOUDD, JANE HUMPHRIES, AND PAUL JOHNSON (Cambridge, 2014), pp. 321-343., in particular pp. 334-338.

³⁴⁴ KOHN, MEIR, "Bills of Exchange," in *The Oxford Encyclopedia of Economic History 1*, ed. JOEL MOKYR (Oxford, 2003), pp. 257-258.

behalf.³⁴⁵ This was ‘money at call’; bill brokers had to reckon with their clients calling in their money on short notice if they needed cash. Unlike capital that had gone into a long-term investment, bills of exchange were easy to liquidate, as long as the bill market worked. Buying and selling bills of exchange on the one hand while also investing in long-term projects on the other hand formed the cornerstones of most of the proto-banking activities.³⁴⁶

We must not picture these exchanges between traders and merchant-bankers as one-off transactions. In reality, they often had so-called ‘rolling’ credit relations. A trader issued dry exchanges repeatedly, which were unrelated to a specific venture or contract, but which he would either sell himself at the local Exchange or sell it back to his ‘house-bank’, which would place it at the Exchange. This way – like a loan – they provided him with the necessary cash to keep his firm running, his working capital. As long as the merchant paid interest regularly, the bank in turn accepted more bills.

III. The Bill of Exchange and Bankruptcy

a.) Complementaries

The bankruptcy regulation formed part of the necessary infrastructure for a functioning bill-market. The bill market relied on trust, but this trust had to be supported by an effective enforcement system. The transferability of bills also entailed that the whole chain of endorsements could be held liable for payment. Bill regulation needed to provide effective enforcement while simultaneously containing the possible negative externalities like chain effects due to the chain of endorsers.

Economic historians have shown that the bill of exchange had its ‘golden Age’ in Northern Europe mainly as an urban occurrence.³⁴⁷ Communal authorities rather than states provided the infrastructure needed to keep up the discounting of bills. Figure 19 shows a stylized genealogy of

³⁴⁵ ZIEGLER, DIETER, 'Zentralbankpolitische "Steinzeit"? Preußische Bank und Bank of England im Vergleich,' *Geschichte und Gesellschaft* 19/4 (1993), pp. 475-505., p. 484, fn 29.

³⁴⁶ TEMIN, PETER AND VOTH, HANS-JOACHIM, 'Banking as an Emerging Technology,' *Financial History Review* 13/2 (2006), pp. 149-178.; WEBER, KLAUS, *Deutsche Kaufleute im Atlantikhandel 1680-1830* (Munich, 2004)

³⁴⁷ Kohn, Bills of Exchange, 2003, p. 257.

laws on bills of exchange in Germany. It lists the first date that a place received a written regulation for bills of exchange. Straight lines indicate that a new law either copied large parts of an existing law directly or at least explicitly acknowledged the other law as the source. The dotted lines indicate a loose connection between two laws, i.e. individual articles are similar. Regulation started in the Northern port towns, and other cities soon followed suit.³⁴⁸ The first written regulation on bills of exchange was enacted 1603 in Hamburg. Lübeck followed in 1620. From there, the regulation spread quickly to other Hanse towns.

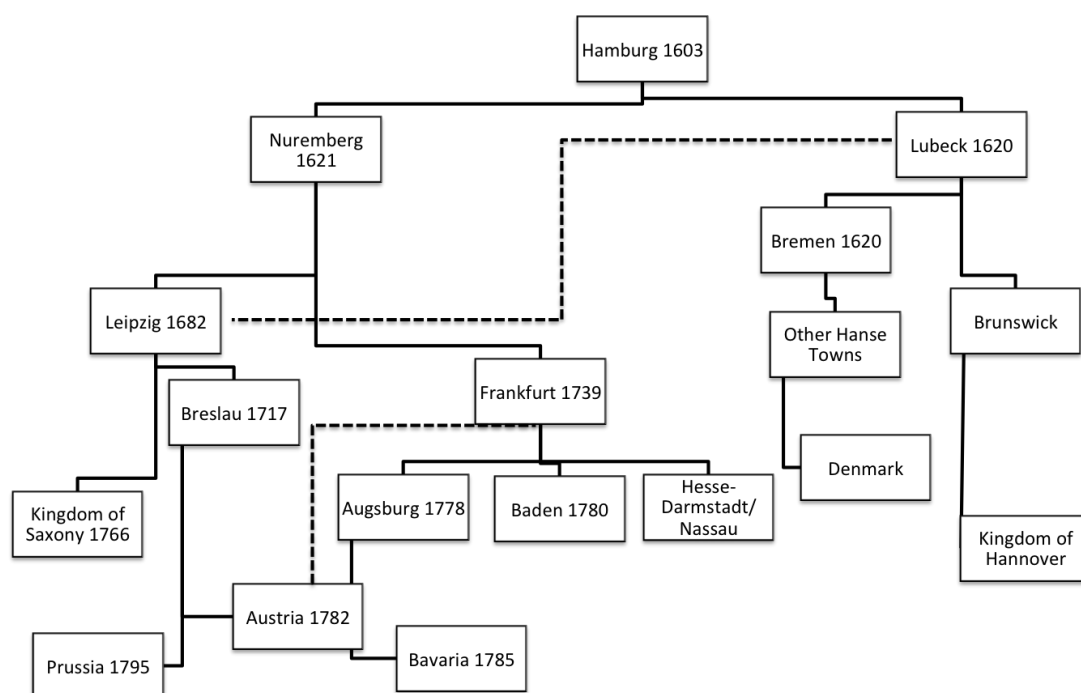


Figure 19 Regulatory Genealogy for Bills of Exchange in Germany,
Stylized Representation, own figure

At the end of the 18th and early 19th century, state governments turned to these municipal statutes when attempting to codify the law of bills of exchange in their respective territory. In 1682, Leipzig enacted a law on bills of exchange and its regulation for the commercial court. This law became influential as a blueprint for Breslau, which in turn ended up as model for Prussia

³⁴⁸ Arguably, there are gaps of several decades between some legislative activities. There are numerous records that show how city councils installed committee after committee to draft these laws. In some towns, these committees never completed their task. Figure two comprises of the most eminent trading towns in Germany, where some sort of law making for bill brokers could have been expected sooner or later.

and Austria.³⁴⁹ Frankfurt's legislation from 1739 became the default rule for bills in Baden, the Palatinate, and the three Hessian states. It also influenced the Habsburg legislation.³⁵⁰ These state laws in turn became the base for the unified German law on bills of exchange, the *Allgemeine Deutsche Wechsel-Ordnung* (henceforth ADWO).

These statutes were not state-driven legislation, but mercantile regulation that occurred in a 'bottom-up' style. For centuries, the bill of exchange would travel between different cities but rarely reach the countryside of a state. They were a function of inter-urban trade just like fairs and permanent Bourses were an urban invention.³⁵¹

But even within towns and cities, not everyone was allowed to draw bills of exchange. Towns and cities curtailed this right to draw and underwrite bills, the *Wechselfähigkeit*, by limiting it to members of the local merchant guild and guests of the tightly monitored markets and fairs. Special courts were established to handle conflicts and defaults. This had to happen within a specified time period because travelling merchants could not wait for a lengthy procedure.³⁵² Laws often decreed that the procedure should be held within three days of either party protesting. Speed was also pivotal to uphold the bill's function as means of payment. Thus, a special procedure was invented: the *Wechselprozess*. The procedure was swift, relied on oral testimony, thereby avoided paperwork, and was a remedy for creditors to get hold of a defaulting debtor. He could be apprehended on request of the bill-holder and kept in prison until he paid or disclosed his insolvency.³⁵³ The regulatory framework became known as rigour of bills, *Wechselstrenge* or *rigor cambialis*.³⁵⁴

³⁴⁹ REYSCHER, ... 'Der Entwurf einer allgemeinen deutschen Wechselordnung,' *Zeitschrift für deutsches Recht und deutsche Rechtswissenschaft* 12 (1848), pp. 295-302.; Rachel, 'Die Handelsverfassung,' 1910, pp. 88, 132.

³⁵⁰ PLATNER, VICTOR, 'Vergleichung der gemeinen Deutschen Wechselordnung mit dem Kurhessischen Wechselrecht,' *Archiv für deutsches Wechselrecht* 4 (1855), pp. 60-79.

³⁵¹ DENZEL, MARKUS, "The European Bill of Exchange. Its Development from the Middle Ages to 1914," in *Cashless Payments and Transactions from the Antiquity to 1914*, ed. MARKUS DENZEL AND SUSHIL CHAUDHURY (Stuttgart, 2008), pp. 153-194.

³⁵² SGARD, JÉRÔME, 'Global economic governance during the middle ages: The jurisdiction of the champagne fairs,' *International Review of Law and Economics* 42 (2015), pp. 174-184., p. 177; PANNWITZ, KURT VON, *Die Entstehung der Allgemeinen Deutschen Wechselordnung: ein Beitrag zur Geschichte der Vereinheitlichung des deutschen Zivilrechts im 19. Jahrhundert* (Frankfurt, 1999), p. 27.

³⁵³ Platner, 'Vergleichung,' 1855, p. 67; Kori, System 1828, p. 51.

³⁵⁴ LAUBENBERGER, L. AND DE ROOVER, R., "Wechsel, Wechselrecht," in *Handwörterbuch zur deutschen Rechtsgeschichte*, ed. ADALBERT ERLER, et al., 5 (1998), pp. 1179-1184

Throughout the early modern period, the development of the law of bills is almost synchronous with municipal bankruptcy statutes. A law on bills of exchange either contained provisions for insolvent debtors or it was quickly followed by another piece of legislation that established a commercial court and regulated its procedure, including the bankruptcy procedure.³⁵⁵ The bankruptcy procedure was both consequence of and complement to the *Wechselstrenge*. Arresting defaulting debtors was a remedy that was pertinent if dealing with travelling merchants. But imprisoning debtors was not seen as an appropriate way to handle affairs internally. The community of a free imperial city like Lübeck or Frankfurt did not want to see citizens sending each other to prison: ‘No Burgher can be apprehended by another Burgher or Dweller on the pretext of indebtedness’, reads one of the articles of Lübeck’s *Stadtrecht*.³⁵⁶ Moreover, imprisonment often failed to deliver anything. Some debtors could not pay but they were not insolvent either. On the books, they still had enough assets to meet their obligations. But some of these assets were simply not liquid at the time one or several bills matured. The financial literature defines such a situation as a maturity mismatch.³⁵⁷ It calls for a distinction between illiquidity and insolvency. The manifold communal bankruptcy procedures acknowledged this distinction. The thread that connected them all is that they were more sophisticated than the idea of putting a debtor to prison.

Leipzig is a good example for this two-pronged approach that tried to regulate the bill market and the issue of bankruptcy conjointly. In 1682, its city council issued two documents: the law on bills of exchange and an ordinance establishing a commercial court. The court became the authority in all ‘matters of exchange letters, (...) cessions of goods (...) and settlements between merchants’.³⁵⁸ § 19 of the law on bills of exchange stipulated that the owner of the bill could hold the entire chain of endorsers liable if the drawee could not pay. But he had to follow the names on the bill in strict reverse order. § 20 also allowed the owner of a bill to take recourse simultaneously on both, the debtor and the last endorser(s), until he was fully compensated. At the same time, Art. 25 in the Leipzig commercial court statute offered a potential relief for debtors and an

³⁵⁵ Meißner, Codex, 1836, pp. 244-248, 301-319.

³⁵⁶ Stadtrecht Lübeck, Lib. 5, Tit. 12, Art. 10, in: *Der Kayserlich freyen Reichs-Stadt Lübeck Statuta, oder: Das / so wol in denen Städten Holsteins / als in der Reichs-Stadt Lübeck gebräuchliche Stadt-Recht/ etc.* (Leipzig, 1798), p. 115.

³⁵⁷ BOLTON, PATRICK, SCHEINKMAN, JOSE, AND SANTOS, TANO, ‘Outside and Inside Liquidity,’ *Working Paper Series (National Bureau of Economic Research)* 14867 (2009), pp. 1-59.

³⁵⁸ Leipziger Handelsgerichtsordnung, Art. II, in: Meißner, Codex, 1836, p. 303.

opportunity to reach settlements. If a majority of creditors agreed to a settlement, those creditors opposed to the agreement were forced to accept it. If the debtor could credibly promise fifty per cent repayment over the course of three years, creditors were not even consulted.

Further south, both Frankfurt and Augsburg combined bankruptcy provisions and bill regulation.³⁵⁹ In both towns the law on bills of exchange simultaneously prescribed a court procedure for insolvent debtor. Good faith, *bona fides*, was widely regarded as important element of commerce and trade. Yet its propagation came with organisations that enforced payments and handled bankruptcies. To quote Georg Büsch once again:

The usual cause of the bankruptcy of a proper merchant derives from the laws on bills of exchange in those states, which have introduced it formally, but (...) without granting moratoria, and where ensuing lawsuits are not met with the principle, that one shall not depress a Burgher.³⁶⁰

The owner of a bill, the presenter, had to take action against a defaulting debtor lest he lost his title against the other endorsers. But if the *Wechselstrenge* was enforced unmitigated, the network of credit and debit of an entire place could collapse. The bankruptcy of a large trading house or a merchant banker could entail chain-effects if creditors took recourse to previous endorsers. It posed a dilemma between rule-enforcement and protecting the local bill-market. Lawmakers resorted to a differentiated procedure as it has been described in the previous chapter. Imprisonment for drawees who had defaulted on a bill, the *Wechselarrest*, was hardly ever enforced in any of the eminent trading towns.³⁶¹ In Leipzig and later in Saxony, a creditor could request the debtor's apprehension even after the bankruptcy procedure had already commenced. The creditor lost this right as soon as he joined other creditors in the negotiations for a settlement. Debtor's prison for a debtor who was already in bankruptcy seems paradoxical as it neutralized the personal productivity of the debtor. August Kori, a professor at the prestigious law faculty in Leipzig, gave a simple explanation in his textbook on Saxon bankruptcy laws: imprisonment could pressure the debtor's (extended) family and partners to bail him out.³⁶² Because

³⁵⁹ COING, HELMUT, *Die Frankfurter Reformation von 1578 und das Gemeine Recht ihrer Zeit* (Weimar, 1936).

³⁶⁰ 'Die gewöhnliche Veranlassung zum Bankerott eines eigentlichen Kaufmannes entsteht aus dem Wechselrechte in Staaten, wo dasselbe förmlich eingeführt ist, aber (...) keine moratoria erteilt werden, und nicht etwa auf Wechselklagen der Bescheid erteilt wird, man könne die Bürger nicht drücken.' Büsch, *Darstellung*, 1792, p. 157.

³⁶¹ Wächter, 'Verhandlungen,' 1861, p. 369.

³⁶² Kori, *System* 1828, pp. 51-52.

imprisonment was not available as an enforcement instrument during settlement negotiations, creditors could use this instrument to exact a promise from relatives or partners that they would co-sign and stand surety for a settlement.³⁶³

Communal bankruptcy statutes gave creditors enough discretion to decide about moratoria, settlements or liquidation on a case-to-case basis and by majority rule. Negotiations could last days, weeks, and even months. As they had to observe only few formalities, this was still faster than a formal court procedure. Over the course of a year, hundreds of these negotiations took place in merchant towns. On average, each day somewhere in Hamburg and Leipzig a debtor and his creditors gathered to reschedule debt. It kept the bill market running.

b.) The Separation

The bill market was the field where German states experimented with legal harmonization for the first time. Three reasons made it an easy candidate for law reform. First, there was the creation of the German customs union. Since the 1830s, more and more German states joined this intergovernmental organisation, removed custom barriers with their partners and thus contributed to market integration in Germany. The growing volume of transregional trade and exchange was financed mostly through bills of exchange. There was no common currency, let alone a central bank system for Germany. Bills of exchange became the first universal means of payment for Germany.

Second, legal harmonization in this field had strong advocates. Business organisations and the legal profession alike voiced demands and arguments in favour of a unified bill regulation.³⁶⁴ This was to some extent a corollary of the market integration through the customs union. It was also intermingled with patriotic sentiments. Authoritarian governments had suppressed a German nation state. German unification was subsequently sought in the least contested fields, which were simultaneously technical enough so as not to receive too much public attention.³⁶⁵ The bill market was one of those fields.

³⁶³ See p. 189 and Wengler, *Der Conkurs*, 1870, p. 199, this clause was abolished 1860.

³⁶⁴ THÖL, HEINRICH, *Protocolle der Leipziger Wechsel-Conferenz* (Göttingen, 1866).

³⁶⁵ WILLOWEIT, DIETMAR, *Deutsche Verfassungsgeschichte. Von Frankreich bis zur Wiedervereinigung Deutschlands - ein Studienbuch*, 4 ed. (München, 2001), p. 270-273, 282-285.

Thirdly, there was regulatory competition. The bill of exchange was a remedy against the shortage of coinage and states started to expand its use by way of integrating formerly communal statutes into their stately framework. In an area, where states were as interdependent as was the case in the German Confederation, every attempt of a state like Bavaria, Prussia, or Hesse-Darmstadt to rewrite their bill regulations had effects on the other members. Prussia, which was divided internally between French law in its Rheinland territories and Prussian law elsewhere, was particularly aware of this problem. In the early 1840s, some states devised new draft-legislations: Saxony in 1841, Nassau and Bremen in 1842, Austria and Brunswick in 1843.³⁶⁶ They prompted Prussia to respond with another draft in 1845, and ultimately led to the *Wechselrecht* conference of all German states in Leipzig 1847. The German law on bills of exchange, *Allgemeine Deutsche Wechselordnung* [henceforth ADWO], that was crafted by delegates at this conference – mostly legal scholars and civil servants – was ultimately adopted and put into effect in all German states, including Austria, by 1849. Times had seen political unrest in the meantime. The institution that eventually voted on the new law was the German constitutional parliament of 1848 in Frankfurt. The parliament was soon dissolved and the law became its longest lasting legislative legacy.³⁶⁷

A precondition for the reform action was an intellectual change that took place in legal scholarship. Karl Einert, a member of the Leipzig law faculty, published a book in 1839, arguing that bills of exchange were a surrogate for money among merchants. It became known as the ‘paper money theory’ and was the first time that someone spelled out a monetary theory of the bill of exchange.³⁶⁸ Einert’s views were developed in subsequent academic books by colleagues and students, which in turn formed the basis for the Leipzig conference of 1847.³⁶⁹ There was a direct link between academic debate and legislative activity. It gave the bill an abstract nature. Einert wrote: ‘A commercial paper designed for the use that is intended with the bill of ex-

³⁶⁶ Pannwitz, *Entstehung*, 1999, p. 104-105.

³⁶⁷ *Ibid.*, pp. 190-191.

³⁶⁸ EINERT, CARL, *Das Wechselrecht nach dem Bedürfniß des Wechselgeschäfts im neunzehnten Jahrhundert* (Leipzig, 1839).

³⁶⁹ THÖL, HEINRICH, *Das Handelsrecht, Zweiter Band: Das Wechselrecht* (Göttingen, 1847); THÖL, HEINRICH, *Entwurf einer Wechsel-Ordnung für Mecklenburg nebst Motiven* (Rostock, 1847); LIEBE, FRIEDRICH AUGUST GOTTLÖB, *entwurf einer Wechselordnung für das Herzogthum Braunschweig* (Braunschweig, 1843).

change is the more accomplished the more it is abstract.³⁷⁰ A few years later, when a certain Reyscher, whose first name is unknown, reviewed the ADWO, the abstractness of bills had become a given: 'We must call it an achievement that it [the draft] navigates smoothly (...) between the different theoretical views about the nature of the bill.'³⁷¹

This development severed its ties with local custom. The Leipzig conference in 1847 reinforced this divorce. Delegates of the conference aimed for a unified means of payment in the German area, but harmonizing in other fields of law was unthinkable. Therefore the bill was decoupled from its ties with local procedural law. That included the long-grown connection between the bill of exchange and bankruptcy law. The two were separated, lest concerns about the sovereignty of states would obstruct the process of harmonization.³⁷²

Art. 29 of the ADWO still included the liability of the chain of endorsers. If a drawee entered into a bankruptcy procedure, regardless of its jurisdiction, the presenter could demand 'security' from all preceding endorsers.³⁷³ At the same time, the new law substantially expanded the ability to draw and endorse bills, the *Wechselfähigkeit*. Art. 1 of the ADWO: '*Wechselfähig* is every one who can oblige himself through contracts.' This set credit free. A judge at the Berlin city court counted less than twenty lawsuits on bills of exchange with value below fifty *Thaler* for the time before 1848 and showed that this figure increased to 400 in 1849 and almost 900 in 1850. The frequency of lawsuits on bills that exceeded fifty *Thaler* in value also increased but not as dramatically.³⁷⁴ Smaller bills of value up to 50 *Thaler* circulated in much higher frequency now in Prussia. The picture was probably similar elsewhere in Germany. The bill of exchange had become available to smaller debtors and creditors outside the merchant sphere.

³⁷⁰ Einert, Wechselrecht, 1839, p. 110.

³⁷¹ Reyscher, 'Der Entwurf einer allgemeinen deutschen Wechselordnung,' 1848, p. 302.

³⁷² Pannwitz, Entstehung, 1999, p. 107.

³⁷³ Art. 29, ADWO.

³⁷⁴ BORCHARDT, ... 'Betrachtungen über die Erfolge der deutschen Wechselordnung,' *Archiv für deutsches Wechselrecht* 2 (1852), pp. 25-31.

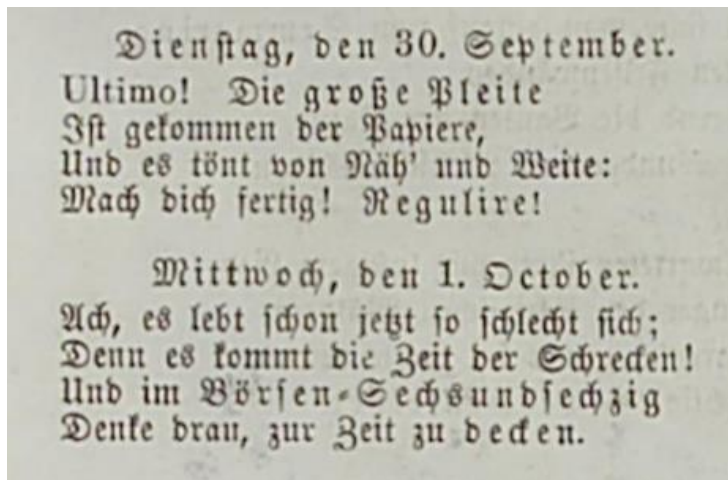


Figure 20 Poem from Kladderadatsch No. 44 (Berlin, 1856), Front-Page.

The discrepancy between expanding the use of bills of exchange on the one hand while severing its connection with local insolvency regulations had consequences. The 1850s became economically turbulent. The bill market was often at the heart of events.³⁷⁵ After a slump of the Paris Bourse had affected German markets in 1856, the satirical newspaper *Kladderadatsch* in Berlin complained that too little regulation had led to the creation and bust of a bubble. The little poem in figure 20 above reads: ‘Ultimo! The grand failure / has arrived of the paper / and it sounds from far and proximate / get ready: regulate! / Alas, life is miserable enough / Daunting times will soon be with us / and when in the Exchange lottery / never forget to give security.’³⁷⁶

IV. The Crisis of 1857

The chain of endorsers was a crucial element of a bill and helped turn it into a means of payment. If the bill market was hit by an external shock that dried up credit in some place, such a shock could be exacerbated through this chain of endorsers. The crisis of 1857 is a case in point. Historians date its beginning to August 24th 1857, when the Ohio Life and Trust Insurance Company in the U.S. filed for bankruptcy. It brought an abrupt end to a decade of growth and prosperity in the U.S. economy.

³⁷⁵ HAUTCOEUR, PIERRE-CYRILLE AND RIVA, ANGELO, ‘The Paris Financial Market in the 19th Century. An Efficient Multi-Polar Organization?’, *Economic History Review* 65 (2012), pp. 1326-1353; PLUMPE, WERNER, *Wirtschaftskrisen : Geschichte und Gegenwart* (Munich, 2010).

³⁷⁶ Own translation, *Kladderadatsch* No. 44 (Berlin, 1856), Front-Page.

Where historians differ is the question of what caused the crisis to break out. One strand suggests that falling prices in speculative railroad securities triggered a panic. Railroads had played an important role in the boom of the previous years and had added a whole range of new unregulated security instruments to the financial markets, which were issued by private companies instead of state or federal governments.³⁷⁷ It seems that the railroad boom slowed down in July 1857, which caused the value of railroad securities and the value of land to fall. A different strand asserts a link between the end of the Crimean war in Europe and the crisis of 1857. Because the war between Russia and a coalition of European powers had interrupted the flow of grain from Russia to Europe, the U.S. and Scandinavian countries provided surrogates. After signing the peace treaty of 1856, Russia resumed exporting grain to Europe while U.S. producers did not cut back their exports. By summer 1857, grain prices were in free fall and merchants were left with warehouses full of grain and sluggish demand.³⁷⁸

Whatever the exact causes may have been, the Ohio Life bankruptcy triggered a panic in the U.S. that soon reached Europe: via Liverpool and Glasgow the contagion arrived in London, the financial heart of Europe. On November 12th 1857, British Parliament suspended the charter of the Bank of England temporarily, therewith stopping convertibility of bank notes into bullion.³⁷⁹ In Germany, the crisis was felt strongly in Hamburg and Lübeck. Bills lost their ability to function as means of payment as their discounting became more difficult. The circulation of paper credit came to a halt. In the absence of other sources of short-term liquidity and without an easy means to liquidate operating assets, even economically viable firms started to default on their debts. What had started as a liquidity shortage turned into a wave of insolvencies.

Figure 21 shows the discount rates according to the records of the Hamburg chamber of commerce.³⁸⁰ The discount rate determined the price of bills in the bill market and reflected the ease with which they could be passed on. It was simultaneously the interest rate charged on ac-

³⁷⁷ CALOMIRIS, CHARLES AND SCHWEIKHART, LARRY, 'The Panic of 1857: Origins, Transmission, and Containment,' *The Journal of Economic History* 51/4 (1991), pp. 807-834.

³⁷⁸ HUSTON, JAMES, 'Western Grains and the Panic of 1857,' *Agricultural History* 57/1 (1983), pp. 14-32; TEMIN, PETER, 'Review of The Panic of 1857 and the Coming of the Civil War by James L Huston,' *The Business History Review* 62/4 (1989), pp. 704-705.

³⁷⁹ EVANS, D. MORIER, *The History of the Commercial Crisis 1857-1858 and the Stock Exchange Panic of 1859* (London, 1859; reprint, New York 1969), p. 35.

³⁸⁰ Stiftung Hanseatisches Wirtschaftsarchiv, Safebestand der Commerzbibliothek [henceforth Commerzbibliothek], S/599 No. 55 rot; Staatsarchiv Hamburg [StAHH], 222-1 B1.

ceptances. An interest rate far above 5% was traditionally associated with usury. The turn of the year 1855/1856 already witnessed a stark increase of interest rates up to 7%, possibly linked to the crisis at the Paris Bourse in 1856. Over the summer 1857, the average discount rate went up again. It reached 8% in October 1857, and eventually reached 10% in December the same year. The interest rate indicates that it became increasingly difficult to sell bills and that banks had become wary in their acceptances. The sharp decrease in interest rates at the beginning of 1858 was accomplished by Hamburg's crisis management, which effectively suspended the free trading of bills temporarily.

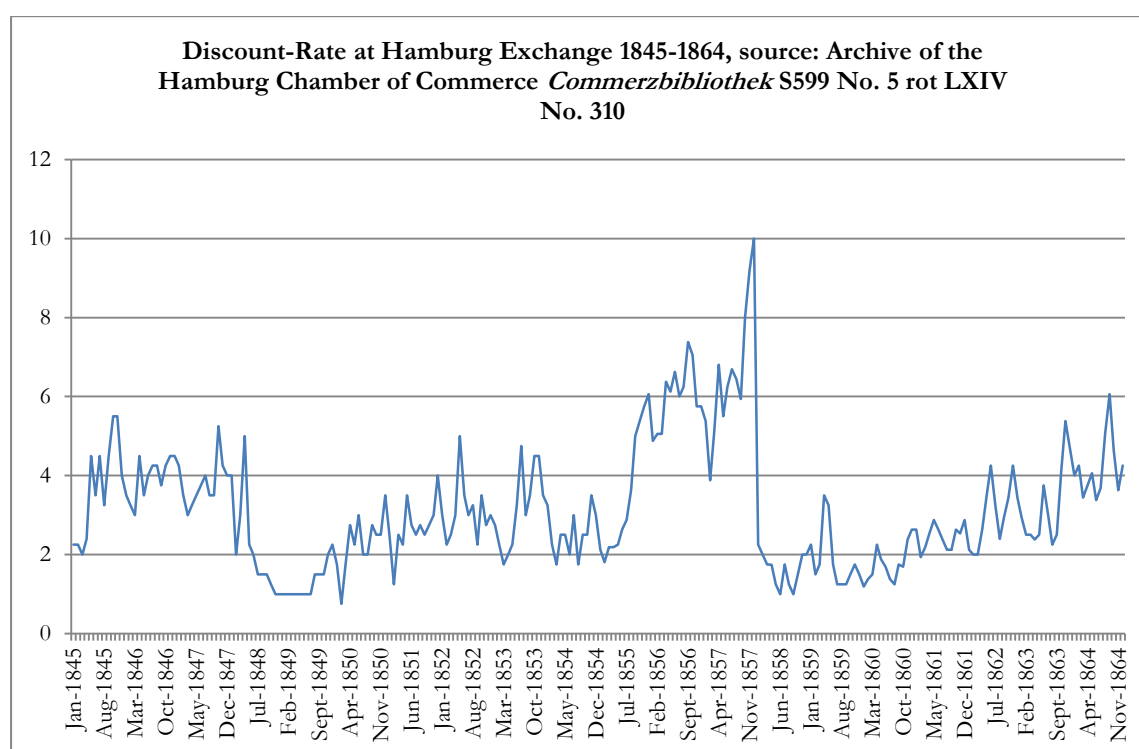


Figure 21 Discount-Rate at Hamburg Exchange 1854-1864; Source: Commerzbibliothek S599 No. 5 rot LXIV No. 310

a.) Hamburg

First signs of a crisis in Hamburg can be traced to early November 1857. The *Commerzdeputation*, the executive committee of the *Kaufmannschaft*, met to discuss a growing shortage of money and increased outflow of silver from the Hamburg *Vereinsbank*. Some newspapers reported financial distress and even revealed the names of troubled firms. Members of the merchant guild condemned this 'libellous journalism' and hastened to add that it was a product of 'mere imagina-

tion'.³⁸¹ The *Commerzdeputation* affirmed in its minutes, published the next day at the Bourse, that there was nothing to worry about. Two days later, they called for an emergency meeting with a delegation of bill brokers. The brokers reported problems with discounting bills and requested special measures of support. On November 17th, the *Commerzdeputation* officially turned to the Senate asking for the establishment of a state-run discount house.³⁸² From then on, Senate and *Commerzdeputation* were in permanent emergency mode. It took only a week from the affirmation that 'there is nothing to worry about' to launching crisis management.

Reading through the minutes of the *Commerzdeputation* reveals two recurring issues in the deliberations. First, access to and verification of information was difficult. Deputies would bring information from different sources into the discussions, which were often contradictory or at best ambiguous. When uncertainty dominated, the conclusion was often not to act at all. Second, the merchant guild proposed to follow the example of the Bank of England and suspend silver convertibility in Hamburg. It was met with opposition from the Bank of Hamburg and the Hamburg Senate, which led to a stalemate that lasted for days.³⁸³ The Senate blocked the *Commerzdeputation* because it was concerned about Hamburg's reputation within the German Federation. The Senate also feared to place social peace in jeopardy by enacting far reaching decrees that would change the city's constitution on behalf of a section of the population at the expense of the others.

On November 22nd in 1857, a private initiative around the merchant banker Solomon Heine pressed forward with the plan for a discount house.³⁸⁴ The city-senate was asked to contribute with a loan from the Hamburg *Giro-Bank*, but refused to do so.³⁸⁵ The initiative was nevertheless able to raise 10 Million Mark. More than 300 Hamburg merchants joined the initiative and provided capital.³⁸⁶ Operation of the initiative started on November 23rd. The organizers had under-

³⁸¹ Commerzbibliothek S/599 No. 55 rot, see *Protokolle der Commerzdeputation*.

³⁸² *Ibid.*, minutes from 17.11.1857.

³⁸³ AHRENS, GERHARD, *Krisenmanagement 1857. Staat und Kaufmannschaft in Hamburg während der ersten Weltwirtschaftskrise* (Hamburg, 1996), p. 96.

³⁸⁴ Solomon Heine was the uncle of author Heinrich Heine, see article on Solomon Heine in the *Neue Deutsche Biographie*, online: <http://www.deutsche-biographie.de/sfz28918.html> (24.10.14).

³⁸⁵ The Giro-Bank was no issuing bank or central bank; it was primarily a clearing house for bills of exchange, see above section II, b).

³⁸⁶ The *Garantie-Diskonto-Verein* did not pay out loans in cash. Its function was to endorse bills of exchange and back their credibility by a consortium of merchant bankers and their joint capital reserves, see. § 5

estimated the demand for a discount house to buy up bad bills and the *Diskonto-Verein* had to be shut down only five days after resuming operations.³⁸⁷ Pressure and discontent were subsequently channelled to the City Council in what is known as the *Sturmpetition* of the 26th November: a delegation was sent to the town hall and insisted it would not leave before the twenty senators agreed to summon the Hamburg civic assembly for the next day. Furthermore, the senators were asked to endorse a plan for a commission issuing short-term loans on goods to any troubled merchant in the city.

Hamburg's merchants were essentially trying to create a central bank substitute. Hamburg lacked an issuing bank, a 'bank of banks'. Merchant bankers felt particularly vulnerable in the face of a bank-run. Their petitions were successful. The following morning the Hamburg civic assembly decided that a committee should be established under the guidance of Senator Haller. The total amount of loans that could be issued was limited to 10 Million Mark with the option of extending it to 15 Million Mark. Since neither the city's bursary nor the Hamburg bank commanded enough reserves to give out these loans in cash, they should be issued in special bank notes, the *Kammermandate*.³⁸⁸ These bank notes themselves would expire on 31st July of the following year 1858.

In the meantime the bankruptcy of the merchant-bankers *Ullmer & Cramér*, one of the biggest trading houses in Hamburg, on November 29th accelerated events. Karl Marx, probably the most famous chronicler of this crash, described the event to his American audience as a 'flood of defaulting bills breaking loose. (...) Everything except for gold and silver had lost its value'.³⁸⁹ Senate and *Commerzdeputation* responded with a measure that had been tried in 1799 and 1763: ³⁹⁰ a temporary suspension of the bankruptcy code and a special reorganizing procedure to help

in the *Plan des Garantie-Diskonto-Vereins von 1857*, in *Commerzbibliothek Hamburg*, S599 Nr. 55rot., fol. XCI No. 6.

³⁸⁷ WIRTH, MAX, *Geschichte der Handelskrisen* (Frankfurt, 1858), p. 436, 440-442.

³⁸⁸ Art. 6 of the official decree for the *Belebungscommission* described these provisional bank-notes as bearer-shares. All bank-notes had a expiry date, which was approximately one month after the date at which the original loan was due. Because the borrower had to deposit goods with the *Belebungscommission*, these bank-notes could in turn be exchanged for goods, as long as they were presented prior to the 31st of July, 1858, see "Amtliche Bekanntmachung", in: *Der Correspondent 28.11.1857*, *Commerzbibliothek S599*, Nr. 55 rot.

³⁸⁹ Marx in his account of the crisis in the *New York Daily Tribune*, January 5th 1858, in: Marx-Engels, *Werke*, Vol. XII, p. 220.

³⁹⁰ *Commerzbibliothek S 599 Nr. 55 rot, Protokolle der Commerzdeputation*, 30.11.1857, fol. 10.

those firms who found themselves ‘unable to pay (...) although they stock huge piles of bills in their kontors, which had become worthless not because they had bad credentials but because they could not be discounted (...).’³⁹¹ In effect, they redefined the distinction between illiquidity and insolvency.

On December 6th the civic assembly of Hamburg finally established a state-run discount house. The original proposal of the merchant committee had stipulated that it should discount bills of exchange by an adjusted interest rate and pay in bank notes. The value of these bank notes should be fixed so that they could become legal tender.³⁹² The eventual proposal that was brought to the civic assembly lacked such a fixed discount rate. A fixed rate would have worked only if Hamburg had simultaneously suspended silver convertibility. Yet the majority of the civic assembly opposed such a measure. A decision was reached only after a marathon debate, for which even all Sunday church services in the city were cancelled.³⁹³ The final decision backed the discount house with 5 Million Mark, relying on a capital mix of stocks and bonds as well as silver.

The city senate also resolved to negotiate with other German states over loan of another 20 Million Mark in silver bars to back the issued bank-notes.³⁹⁴ First inquiries were made immediately in Berlin and Vienna. The Prussian Prime Minister rejected supplications from Hamburg.³⁹⁵ The imperial government in Vienna eventually advanced 10 Million Mark in silver bars, which were posted to Hamburg in a special train.³⁹⁶ While this was still in the making, pressure on the Senate increased: agents had written to the council on behalf of four of the ‘most eminent’ trading houses, inquiring about a special loan and threatening to suspend payments if they would not be supported. It was a ‘too big to fail’ argument. The names of these houses were not disclosed in the letters, but the hints sufficed to convince the Senate to instate a so-called ‘trust-

³⁹¹ Marx, New York Daily Tribune, January 5th 1858 (Marx-Engels, Werke, Vol. XII, 345.)

³⁹² See above, fn 55.

³⁹³ Ahrens, Krisenmanagement, 1996, p. 61.

³⁹⁴ An account of this session of the civic assembly can be found in the New Year’s speech by the president of the *Commerzdeputation*, issued to the members of the Hamburg merchant guild on their ordinary quarterly meeting on December 31st 1857, printed in *Hamburger Börsenhalle 01.01.1858*, *Commerzdeputation* S599 Nr. 55rot, “Protokolle der Commerzdeputation 1857”.

³⁹⁵ The decision was made public in the Berlin newspaper “Die Zeit” and sparked fierce reactions in Hamburg and other Hanseatic towns, cf. the pamphlet *Ein Wort zur Zeit and die berliner “Zeit”, oder: deutsche Hilfe in deutscher Not*, printed and bound in Hamburg January 1858, in: *Commerzdeputation* S599 Nr. 55rot, a reprint of the original “Zeit” article in *Hamburger Börsenhalle* 24.12.1857, *ibid.*

³⁹⁶ Ahrens reports that the city council even lacked the means to insure the silver in transit against potential accidents and losses, cf. Ahrens, 1996, p. 91.

commission', *Vertrauenskommission*, in addition to the measures already mentioned. The sole task of this trust-commission was to keep contact with those large houses while keeping communications confidential and advance support 'at all costs'.³⁹⁷

b.) Lübeck

Hamburg and Lübeck were geographically closer to each other than either of them to Bremen. Socio-economic ties between the two cities were also strong due to numerous business partnerships and intermarriage.³⁹⁸ The city of Lübeck could not avoid the crisis once it had hit Hamburg. On December 2nd, Senator Curtius in Lübeck telegraphed to well-disposed Senators in Bremen and Hamburg to inquire about measures taken in those places. Bremen's response was swift and short: there were none. The city council left it to the chamber of commerce to deal with the situation. They assessed the crisis in Bremen as less severe than elsewhere. Silver convertibility in Bremen would be maintained even if that meant a loss of reserves.³⁹⁹ Hamburg did not even bother to respond; the measures adopted there by December 3rd and the various gatherings of the civic assembly had been covered in most newspapers throughout Northern Germany.

On December 3rd, the Senate of Lübeck instated a mixed commission, *gemeinsame Kommission*, comprising of members of the city council, the elders of the civic assembly, delegates of the chamber of commerce and directors of the Lübeck banks. Shortage of cash was an acute problem for the banks. In a letter to the Senate, the two directors of the *Lübecker Privatbank* professed that they had done everything in their power to supply the bank with fresh capital. But their reserves had reached a critical low and they would have to close soon. One of the signing directors was Johann Siegmund Mann, the grandfather of author Thomas Mann.⁴⁰⁰ A first step taken by the Lübeck government was to order all public organisations, including the churches and the synagogue, to accept notes issued by the *Privatbank* as means of payment for fees, taxes, and lev-

³⁹⁷ Commerzbibliothek S/599 No. 55 rot, Letter by Schön, Königswarter, and Reimer 09.12.1857.

³⁹⁸ Thomas Mann lets one of the protagonists in his *Buddenbrooks* marry a merchant from Hamburg, not from Bremen.

³⁹⁹ Archiv der Hansestadt Lübeck [AHL], 1.1-1 17760 *Suspension des Art. 29*, telegram from Senator Lampe (Bremen) to Senator Curtius (Lübeck) 03.12.1857.

⁴⁰⁰ AHL 1.1-1 17761 *Erlaß einer Verordnung wegen Annahme der NOten der Lübecker Privatbank in öffentlichen Kassen*, fol. 2.

ies. Later in the month, Lubeck would also adopt a special bankruptcy procedure, the *Inspektionsverfahren*, which was modelled after the Hamburg example.⁴⁰¹

Suspension of Article 29 ADWO was fiercely debated in Lubeck. In contrast to Hamburg, both civic assembly and senate eventually adopted the proposal and the critical section was suspended ‘until further notice’.⁴⁰² Simultaneously, special envoys were sent to German capitals, in order to negotiate a loan to provide fresh capital for the two Lübeck banks. Curtius was one of these envoys, sent to Berlin with letters addressed to the Prussian King and the Prussian Prime-Minister von Manteuffel. Curtius had originally opposed the suspension of Article 29. In his letters from Berlin, he never missed an opportunity to reiterate his criticism.⁴⁰³

The environment he encountered in Berlin reinforced this view. The Prussian government was exasperated over Lübeck’s unilateral move to discard a long negotiated universal law in Germany and feared that this could set a precedent. Prime Minister von Manteuffel refused to advance loans to either Hamburg or Lübeck. His objections were later published as a stringent letter in the Prussian newspaper *Zeit*, in which he claimed that the crisis was ‘home-made’ by Hamburgers and Lübeckers and ultimately ‘well-deserved’.⁴⁰⁴ Just like Hamburg, Lübeck now turned to the Habsburg government in Vienna. This and the fact that Hamburg was already receiving money from Austria prompted the Prussian government to reconsider its refusal. Curtius was called in to the prime minister and offered a loan by the Prussian *Königliche Bank* – under the condition that Lübeck would resume compliance with the ADWO ‘immediately’.⁴⁰⁵ But in the meantime, the other envoy to Hamburg had secured a loan of 400,000 Mark Silver from a consortium of Hamburg merchants, Salomon Heine among them.⁴⁰⁶ Part of the money also came from the Austrian silver loan. Although Curtius was enthusiastic about the Prussian proposal and urged his colleagues back home to accept, the Lübeck Senate ultimately sent a withdrawal letter to the Prussian prime minister.

⁴⁰¹ AHL 1.1-1 17762 *Inspektionsverfahren*, see Appendix.

⁴⁰² AHL 1.1-1 17760 *Suspension*, Decree of the Lübeck City Council from 04.12.1857.

⁴⁰³ AHL 1.1-1 17759 Letters from Senator Curtius to the Lübeck City Council between 05.12.-14.12.1857.

⁴⁰⁴ Commerzbibliothek S/599 No. 55 rot, Excerpt from the Berlin Newspaper “Zeit” 24.12.1857 and 21.12.1857

⁴⁰⁵ AHL 1.1-1 17759 Letter to the Emperor 14.12.1857.

⁴⁰⁶ AHL 1.1-1 17759 Letter from Hamburg 19.12.1857 and report of the Lübeck *Privatbank* from 24.04.1858 about repayment made to Salomon Heine.

V. Crisis Management

In the previous chapter, we met the case of Lübeck's mayor as an illustration of how local peculiarities could colour the process of credit and bankruptcy. The 1857 crisis serves a similar function. The reaction of the local community reveals much about the bankruptcy regime in those merchant towns. Crisis management in both towns relied on a twofold strategy. It raised new funds in order to support banks and establish a discount schemes. And it temporarily introduced a special bankruptcy law. The crisis demonstrates how closely the bankruptcy regime and bill market were tied together.

Table 9 gives a summary of the various rescue mechanisms that were put in place in 1857. It lists the title and date of legislation and its entry into force, whether a measure targeted the bill market or the bankruptcy regime, and the city where it was adopted. It is difficult to assess success or failure of these measures. One indicator of success might be the fact that both cities were able to repay the contracted rescue-loans including interest before the due date.

Table 9 Rescue Measures Adopted by Hamburg Government in 185

Title	Date of decree	Start of operations	Target	City
Loan Commission	26.11.1857	01.12.1857	Bankruptcy	Hamburg
Special Bankruptcy Law	30.11.1857	05.12.1857	Bankruptcy	Hamburg/Lübeck
Grace Period for troubled bills	01.12.1857	03.12.1857	Bill market; small & medium sized firms	Hamburg
Discount House	06.12.1857	07.12.1857	Bill Market	Hamburg/Lübeck
Trust Commission	12.12.1857	08.12.1857	Five largest merchant-bankers in the city.	Hamburg
Suspension of Art. 29 ADWO	04.12.1857	10.12.1857	Bill Market	Lübeck

a.) The bill market

Part of the measures aimed to increase or at least sustain the negotiability of bills. The loss of confidence in the bill market was pervasive. Without negotiability, bills became derelict. As so many of them cluttered the balance sheets of merchant-bankers, these bills threatened bankers with insolvency. The deputies of the *Commerzdeputation* estimated that there were outstanding bills

to the amount of 30 Million Mark for which remittance was due in December and January. In an attempt to collect more reliable information, they asked merchants to enter the maturity dates of bills in their possession into a public record book at the local Bourse.⁴⁰⁷ Nobody complied. Disclosing this sort of information would have exposed one's own vulnerability.

The measures adopted in Hamburg and Lübeck had been used in earlier crises like the one in 1763, 1799, and most recently in 1847/1848. Back in 1763, the bankruptcy of a single house, the Huguenot merchant bankers De Neufville, was sufficient to render a large amount of bills in circulation worthless. A bank run followed. The senate stepped in by authorising a commission to buy and discount bills until the market calmed down. In 1857 senators in Lübeck sent for their predecessors in office and in the administrative board of the local bank, who were brought back from retirement to give oral accounts of how they had managed the crisis of 1848.⁴⁰⁸

What had changed in the meantime was the bill market itself. It had become subject to national regulation as opposed to municipal laws governing the issue of bankruptcy. The ADWO from 1849 deprived city councils of their discretion. Merchants in Hamburg and Bremen criticized Article 29 of the law for its lack of limits and specifications of how the chain of endorsers should be held liable if a drawee defaulted. They argued that it exacerbated the crisis.⁴⁰⁹ Both towns subsequently saw a power struggle between those arguing for temporary suspension, and those opposed to such a move. In Lübeck, the former succeeded and the law was suspended temporarily. The decision was criticised from abroad and from within.⁴¹⁰ It might have given local merchant bankers a respite, but it came at a high political cost. Senator Curtius relentlessly warned his colleagues:

Because I deem the suspension of Art. 29 (...) a mistake that will threaten Lübeck now and in the future, and because I am convinced that the peril of political complications and recriminations will grow the longer this suspension lasts (...).⁴¹¹

⁴⁰⁷ Commerzbibliothek S/599 No. 55 rot, Protokolle, 26.11.1857

⁴⁰⁸ AHL 1.1-1 17759, Letter of City Council to the retired members of the bank supervisory board 23.12.1857; Commerzbibliothek S/599 No 55 rot, Protokolle 13.11.1857, Letter to the *Bankbürger*.

⁴⁰⁹ AHL 1.1-1 17760, Minutes of the standing committee of citizens 03.12.1857; Commerzbibliothek S/599 No. 55 rot, Protokolle 01.12.1857.

⁴¹⁰ AHL 1.1-1 17760 Protest note by the Deputies of the Duchy of Baden to the Federal Diet in Frankfurt 18.01.1858; Letter from the federal committee on commercial law in Nuremberg, 04.02.1858.

⁴¹¹ '(...) Weil ich die Suspendierung des Art. 29 der allg. Dt. W. O. für eine Lübeck jetzt und mehr noch künftig mit den schädlichsten Folgen bedrohenden Fehler halte, und weil ich überzeugt bin, dass, je

In Hamburg, similar attempts to opt out of the national law had been resisted. Merchants initially asked the senate to introduce a formal fourteen-day grace period for endorsers to honour the debt before they were regarded as insolvent. The proposition had the backing of large parts of the civic assembly, but was ultimately vetoed by the Senate.⁴¹² The merchant guild then resorted to public campaigning. Its president published a ‘speech to the Hamburg merchant class on the use of the German law on bills of exchange’, printed December 1st. It evoked old Hamburg custom and urged merchants to apply the new law in the ‘most gentle’ way:

The local banks have realized the situation and thus agreed, appropriately and thankfully, to seek recourses in repayment issues in the most gentle way. It is imperative that the entirety of our Bourse follows this example unanimously without delay (...) If everyone complies, we can together avoid great calamity (...)⁴¹³

In a ‘devil take the hindmost’ atmosphere, the appeal fell on deaf ears. There was no alternative to a large scale state-run discount scheme. It was eventually made possible for Hamburg through a silver loan of fifteen Million Mark from the Austrian government.⁴¹⁴ In Lübeck’s case, it was again the merchant banker Salomon Heine from Hamburg who advanced a loan of 400,000 Mark to the neighbouring city.⁴¹⁵ A look at the origin of bills that had been discounted in December 1857 through this scheme shows that the Austrian decision was well calculated. The majority of bills drawn on Hamburg merchants and handed in to the discount house had their origins in places in the Austrian Empire.⁴¹⁶ An insolvency wave at the Hamburg market would have affected Austrian creditors. The picture also reveals important trade links with Great Britain and the Scandinavian countries. Bills from Prussian territory only amounted to some six per cent. Interestingly, Hamburg and Lübeck governments had turned to Prussia first with their requests.

länger die Suspension dauert, desto mehr die Gefahr politischer Complicationen und bedenklicher Reclamationen an uns herantreten wird.’ AHL 1.1-1 17760 Letter from Senator Curtius 30.12.1857, published 02.01.1858.

⁴¹² Commerzbibliothek S/599 No 55 rot *Ansprache an die Kaufmannschaft*, published 01.12.1857.

⁴¹³ ‘Die hiesigen Banken haben dies richtig erkannt und deshalb den dankeswerthen zeitgemäßen Beschluß gefaßt, während der jetzigen Krisis bei ihren Regressnahmen in der schondesten Weise zu verfahren. Es kommt nun darauf an, daß die Gesammtheit unserer Börse diesem Beispiele ohne Verzug einmüthig sich anschließe (...) Wenn alle Betheiligten dieser Regel nachkommen, kann gewiß keinem Einzelnen daraus ein Vorwurf gemacht werden.’ See Ibid.

⁴¹⁴ Staatsarchiv Bremen (StAHB), 2-W.2.a(4) *Anzeige über den Erfolg der durch die Handelskrisis hervorgerufenen außerordentlichen Maßregeln*, printed July 1858; Commerzbibliothek S/599 No. 55 rot, Protokolle 03.12.1857.

⁴¹⁵ See above fn. 70.

⁴¹⁶ Figures from StAHH 357-2 A2 Vol. 2 *Disconto Casse von 1857*.

Leaving geographical proximity aside, it demonstrates how powerful Prussia had become through the customs union within Germany.

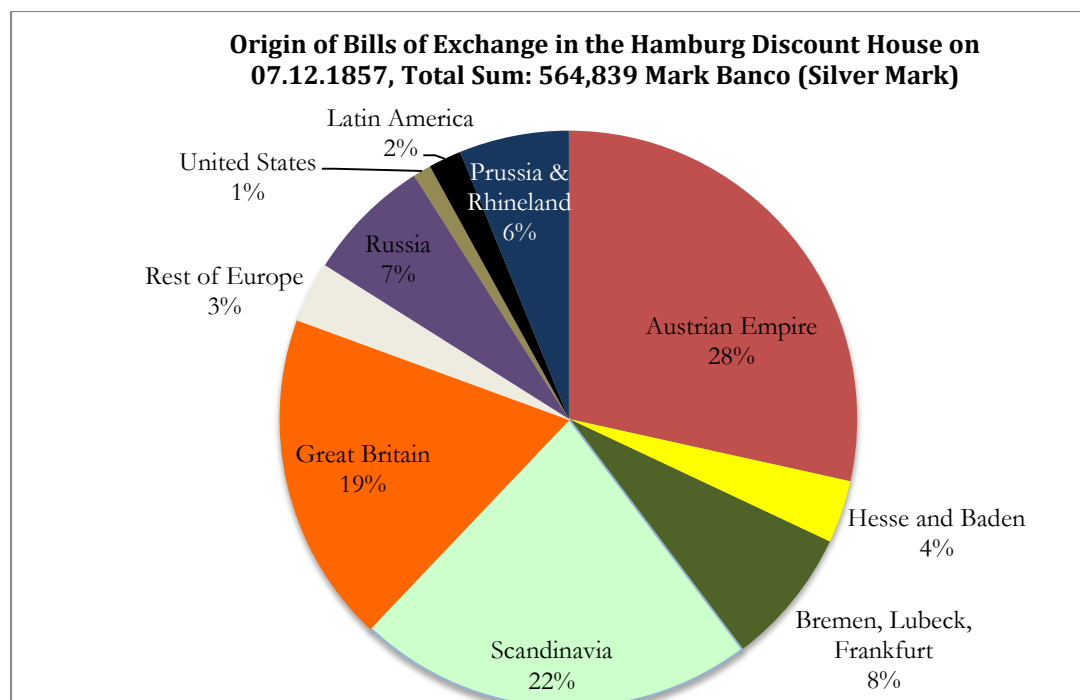


Figure 22 Origin of bills discounted at the Hamburg discount house; Source: StAHH 357-2 A2 Vol. 2 Disconto Casse von 1857

It is reported that the discount scheme in Hamburg took in a total of 928 bills, the total value of which amounted to 3,029,548 Mark Banco. It even made a profit of some 40,681 Mark in the end.⁴¹⁷ This seems to confirm the argument of deputies of the merchant guild that not all bills had lost their value. They repeatedly called the system a ‘clockwork’ of credit, that was unfortunately not running smoothly at the moment. Like a clockmaker, who cleans the cogwheels and springs in order to find any obstructive parts, one thought it best to remove all those ‘troubled assets’ from the money market.

Calling the money market some sort of machine is a trope that runs through history. Today’s actors evoke that image when discussing policy choices in financial matters.⁴¹⁸ But apart from political rhetoric, that image also illustrates what I have described in these two chapters: that the mercantile communities relied on a specific, local infrastructure. It was designed to facilitate their

⁴¹⁷ StAHH, 2-W.2.a(4) *Anzeige über den Erfolg der durch die Handelskrisis hervorgerufenen außerordentlichen Maßregeln*, p. 10.

⁴¹⁸ KRUGMAN, PAUL, *The Return of Depression Economics and the Crisis of 2008* (London, 2008); FLANDREAU, MARC AND UGOLINI, STEFANO, "The Crisis of 1866," in *British Financial Crises since 1825*, ed. NICOLAS DIMSDALE AND ANTHONY HOTSON (Oxford, 2014), pp. 76-93.

business; it was entrenched in local politics; and it relied on physical elements like the local Bourse as well as on intangible elements in the form of the bankruptcy law or the law on bills of exchange. This is why contemporaries thought that changing one or two cogs in the machine was a sufficient reaction to a financial crisis.

It was a different question though whether the machine itself was still state of the art. Signs that it had become outdated can be found in the deliberations of the Hamburg merchant guild in the crisis in November 1857. Although the organisation lobbied for a state-run discount scheme early on, there was no consensus internally whether such a measure was helpful. Actors appear to have been at odds over the question of who would (and should) be the beneficiaries. The minutes from November 13th read:

As has become apparent from various confidential inquiries (...) that the need for a discount house in the form of its predecessor of 1848, in the interest of small and medium houses, which conducted solid business (...) is currently not given, because the issue is with bills of an entirely different nature, namely those, which circulate in significantly large amounts on a small number of houses (...) ⁴¹⁹

The passage can be read as an indicator that membership in the Hamburg merchant guild had become more heterogeneous. For sure, there had always been differences between merchants. Yet by 1857 the big trading houses seem to have acquired not only a different scale but also a different quality. The expansion of the circle of people who could draw bills of exchange (and have them drawn on them), which was an effect of the ADWO, had further increased the shadow-banking system.⁴²⁰ In order to buy and speculate with large amounts of bills some houses had issued bills themselves. This was leveraged finance. Some members of the merchant guild did not believe that the discount-scheme would give much relief. They again wrote to the Senate:

The undersigned have been commissioned by the four most eminent trading houses within our Bourse (...) to declare, that aforesaid houses face a situation such that they might have to stop payments in the imminent days unless they

⁴¹⁹ 'Nachdem auf Grund inzwischen von mehreren Seiten eingezogenen näheren und confidentielleren Erkundungen sich herauszustellen scheint, dass das in der Conferenz am 11. D Mts. Geltend gemachte Bedürfniss einer Diskonto Casse in der Art, wie die im Frühjahr 1848 bestandene, im Interesse der Kleinen und mittleren Häuser, welche solide Geschäfte betrieben, den Diskontenten aber weniger bekannt sind, gegenwärtig nicht vorliege, sondern es sich der Hauptsache nach hierbei um Wechsel ganz anderer Art handele, nämlich solche, welche in auffalend großer Menge auf einzelne Häuser umlaufen und deren Ver-Diskontirung schwieriger zu werden anfängt', Commerzbibliothek S/599 No 55 rot, Protokolle 13.11.1857.

⁴²⁰ Borchardt, 'Betrachtungen,' 1852, pp. 26-28.

and other affected houses receive a temporary aid of up to twelve million Mark Banco (...) How many other houses will thereupon be carried off by the fall of these houses is impossible to determine, - an immense and incalculable catastrophe, which can destroy the commercial importance of our place for ever.⁴²¹

It was a 'too big to fail' argument. They threatened the government that state default would become inevitable if those houses went bust. This was enough finally to convince those in charge that individual houses would be bailed out. The 10 Million Mark Silver, which had arrived from Vienna, were assigned as capital to the 'Trust Commission', consisting of five Senators, who entered in direct and confidential negotiations with the troubled houses.⁴²² It was like one of the debt-commissions that regularly happened in out-of-court bankruptcy proceedings: Creditors were invited to negotiations, moratoria and debt respites were proposed to mitigate the financial burden, shareholders were asked to guarantee with family property, and the commission distributed the 10 Million Mark Silver as loans to bridge maturity mismatches.⁴²³ All houses survived. The commission made a profit from interest payments of 206,585 Mark.⁴²⁴ Considering the overall size of the loan this makes a meagre interest rate.

b.) Bankruptcy and Liquidity

The loan commission was the first measure that was adopted in Hamburg. It targeted small and medium sized firms, carriers, warehouse owners rather than merchant bankers.⁴²⁵ It was no new invention but rather followed experiences from earlier crises, notably 1763 and 1848. Loans were given to merchants who could produce security either in form of non-perishable goods in local warehouses or in the form of safe and valuable stocks and bonds. Registered brokers of the Hamburg Exchange valued the offered securities. The minimum sum of a loan was 3,000 Mark

⁴²¹ 'Die Unterzeichneten sind von Vier der ersten Handlungshäuser unserer Börse beauftragt worden (...) die bestimmte Erklärung abzugeben, dass dieselben in der Lage sind, schon in den allernächsten Tagen ihre Zahlungen einstellen zu müssen, wofern ihnen und anderen betroffenen Häusern nicht sofort eine temporärer Aushilfe bis zum Belauf von zwölf Millionen Mark Banco (...) gewährt wird. (...) Wie viele andere Häuser alsdann noch weiter in den Sturz mit werden hinab gezogen werden, läßt sich gar nicht ermessen, - eine unerhörte und unübersehbare Katastrophe, welche die Handelsgröße (...) unseres Platzes (...) vielleicht für immer vernichten (...) wird.' Commerzbibliothek S/599 No. 55 rot, Letter by Schön, Königswarter, and Reimer 09.12.1857.

⁴²² StAHH, 375-2 C2 *Kommission zur Behebung der Handelskrise, Verträge der Vertrauenskommission.*

⁴²³ StAHB, 2-W.2.a(4) *Anzeige über den Erfolg der durch die Handelskrisis hervorgerufenen außerordentlichen Maßregeln*, p. 6.

⁴²⁴ *Ibid.* p. 16.

⁴²⁵ The complete text of the law can be found in appendix A.

Banco, the maximum was stipulated as 66 $\frac{2}{3}$ percent of the good's value.⁴²⁶ Loans could be given out in cash or as *Kammermandate*. The latter was a paper issued by the city's finance department, the *Kämmerei*, an instrument payable to bearer. *Kammermandate* were accepted as means of payment for taxes, levies etc. They could also be used to repay the loan at due date.⁴²⁷

The loans were thought to be a firewall between the market for goods and services and the bill market. Under normal circumstances, owners of warehouses, carriers and other merchants engaged in wholesale deals would have relied on bills of exchange as a source for liquidity. Now, this source had dried up and in the climate of a crisis it became even harder to quickly liquidate tangible assets. *Kammermandate* were intended to be a surrogate for bills. Yet acceptance and circulation of the new paper money was sluggish in the beginning. The Senate's final report from July 1858 recounts that the loan commission initially gave out loans as a mix of *Kammermandate* and cash in order to attract users. Salomon Heine mediated a loan of 2.5 Million Franc Silver from Brussels in order to allow the loan commission to buy back their own paper money. Eventually, the discount house was also authorized to discount *Kammermandate*. Overall the loan commission gave out loans to 193 firms to the total value of 8,153,500 Mark Banco, of which 6,932,000 Mark were secured by goods and 1,221,500 Mark were secured by stocks and bonds. Unlike the 'trust commission' and the 'discount house', the 'loan commission' recorded a substantial loss in its balance sheets, roughly 467,000 Mark Banco.⁴²⁸

The law granted the loan commission the right to liquidate the stored goods and valuables that had been given as security if their value fell by twenty percentage points or if the debtor officially declared his insolvency.⁴²⁹ The latter rarely happened. Debtors had another last resort before declaring their insolvency. In both cities they could petition for a temporary administration of their estates. Lübeck called it 'inspection' because administration was already the standard term for out-of-court bankruptcy procedures.⁴³⁰ Both cities had issued a new but temporary

⁴²⁶ See Commerzbibliothek S/599 No 55 rot: 'Amtliche Bekanntmachung behufs Belehungskommission etc.', published in *Hamburger Correspondent* 28.11.1857, § 2.

⁴²⁷ Ibid. §§ 5, 6, 11.

⁴²⁸ StAHB, 2-W.2.a(4) *Anzeige über den Erfolg der durch die Handelskrisis hervorgerufenen außerordentlichen Maßregeln*, p. 8

⁴²⁹ Commerzbibliothek S/599 No 55 rot: 'Amtliche Bekanntmachung (...) see fn. 92, § 13.

⁴³⁰ Ahrens, *Krisenmanagement*, 1996, p. 45.

bankruptcy law in response to the crisis. By way of filing a case according to this special law, debtors could avoid an official insolvency declaration, while their assets and estate were handled as if it had entered one of the out-of-court procedures mentioned in the previous chapter. Creditors bargained for a settlement, the administrator together with the debtor managed assets and estates. And if a debtor repaid the quorum of 80 per cent to secured creditors, he was rehabilitated.⁴³¹

A comparison of the two laws shows that Lübeck, which followed Hamburg with a few days' delay, copied large parts of the text.⁴³² All the more interesting are the differences that persisted between the two versions. Lübeck's version is longer. This is due to the fact that Lübeck lacked a written bankruptcy code. While Hamburg could easily point to rules and provisions in its code for procedural details, Lübeck could not. § 6 of the Hamburg law stated: 'As far as the administration of the debtor's estate is concerned, administrators (...) are bound to follow the rules stipulated in the bankruptcy code (...)'. Art. 6 in the Lübeck law read: '(...) to apply the principles that are in place for the out-of-court resolution of bankrupt estates.' Under the assumption that Lübeck's senators did not invent these principles from scratch, their slightly longer version might contain some of the rules, which had hitherto been unwritten custom.

The law from Lübeck followed the custom of old Hanseatic laws in granting far reaching decision making powers to the creditor assembly, which could vote by simple majority. The law also supplied a key for the distribution of votes, which resembles Art. 4 of the Hamburg bankruptcy code. Creditors below 500 Mark Courant were granted one vote, creditors whose claims were between 500 and 2,000 Mark obtained two votes, creditors between 2,000 and 5,000 Mark three votes, and creditors with claims worth more than 5,000 Mark four votes.⁴³³ The Lübeck law did not incorporate a special quorum for repayment. Hamburg qualified the term 'full repayment' as equalling 80 percent repayment to senior secured creditors, 60 percent to junior secured creditors, and 40 percent to unsecured creditors. In Lübeck, 'full repayment' meant full repayment.

⁴³¹ Verordnung wegen zeitweiliger Einführung eines Administrationsverfahrens im Falle von Zahlungssuspensionen. Beliebt durch Rath- und Bürgerschluß vom 2ten December 1857.

⁴³² Both texts in full length in appendix B.

⁴³³ Verordnung, die einstweilige Einführung eines Inspectionsverfahrens bei Zahlungs-Einstellungen betreffend (Publicirt am 15.December 1857), Art. 4.

And while Hamburg promised debtors that the whole affair could be handled privately and without giving public notice (except to creditors), Lubeck made both the beginning and the outcome of the procedure public in the local Bourse.

Table 10 Descriptive Statistics of Administrations under the 1857 Law in Hamburg

	N	Minimum	Maximum	Mean	Std Dev.
duration (months)	118	2,86	86,74	18,84	16,76
settlement	38	2	96	44,24	18,53
liquidation	15	3,8	86	33,30	20,80
Fully repaid	82				
Total	139				

The only surviving written records of this procedure are from the Hamburg chamber of commerce and the Hamburg state archives.⁴³⁴ Table 10 gives some descriptive statistics that have been extracted from these records. The sample of court files consisted of 139 cases (although the Senate's final report counts 145 firms that applied for an administration under the 1857 law.) The majority, 82 cases, recorded 'fully repaid' (in the Hamburg sense of the term, i.e. 80 percent) as the outcome of the procedure. Fifteen cases were conferred to the commercial court for a formal liquidation. In 38 cases creditors agreed to discharge the debtor partially. On average, an administration lasted for 19 months, which explains why the final report in July 1858 was unable to report concrete results.⁴³⁵ Compared to the non-crisis figures, the average recovery rates for both out-of-court settlements and formal liquidations were much higher.⁴³⁶ This is evidence in support of the arguments advanced by members of the local merchant guilds at the time: that the crisis of the bill market had come to affect houses which would have been regarded as sound and solvent under 'normal' circumstances. In his public rebuke, the Prussian prime minister had denounced Hamburg's merchants as feckless 'overborrowers' and greedy speculators, for whom the current market turmoil was the punishment they deserved. He might have had a point in regard to the practices of leveraged finance. But he confounded things and overlooked the fact that, in the absence of other established universal means of payments, the bill market was the connecting

⁴³⁴ In Commerzbibliothek S/599 No 55 rot.

⁴³⁵ StAHB, 2-W.2.a(4) *Anzeige über den Erfolg der durch die Handelskrisis hervorgerufenen außerordentlichen Maßregeln*, p. 4.

⁴³⁶ Compare Figure 15 in Chapter 4.

thread within the mercantile community. What may be a sober extension of credit in one economic moment may seem to be speculative leveraging when conditions change.

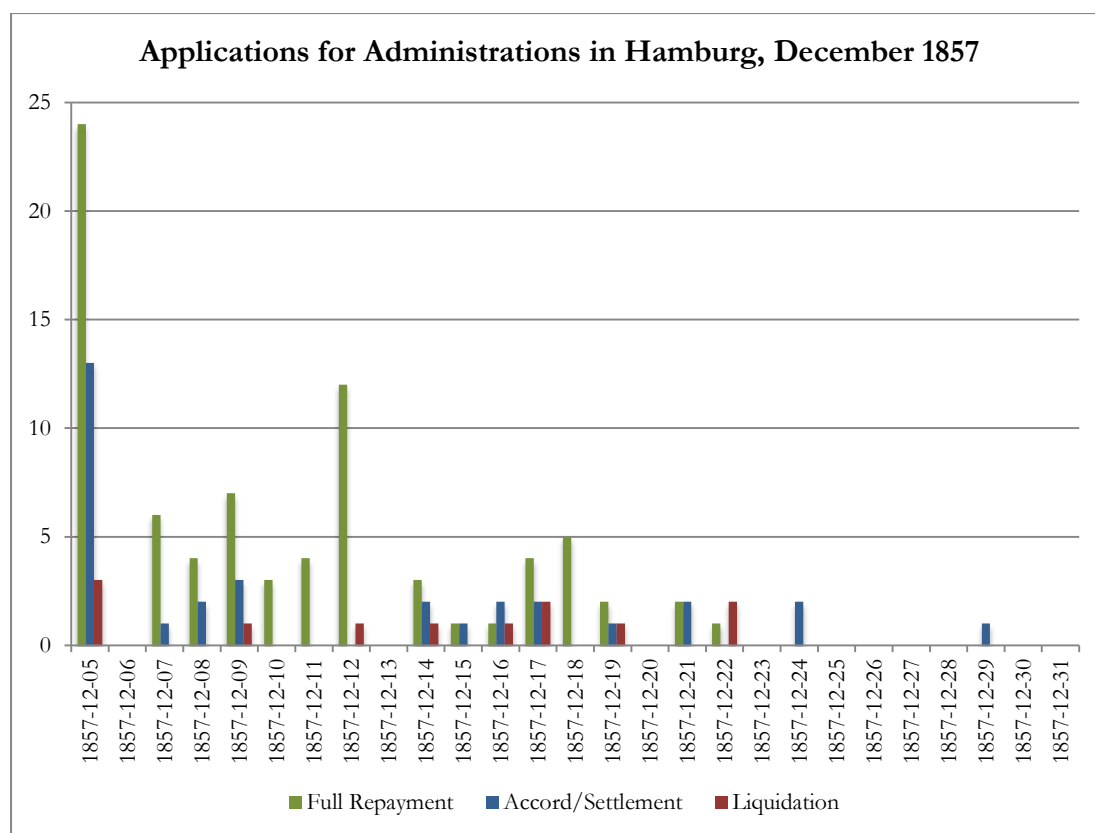


Figure 23 Timing of applications for administrations under the 1857 law;
 Source: Commerzbibliothek S/599 No 55 rot, own figure.

A closer look at the time that debtors applied for an administration illustrates the dynamic of the crisis. When the scheme started operations on December 5th, demand was high. Forty cases were filed that day. It was a Saturday, the end of a week that had been chequered by emergency meetings and public discussions about the crisis. When courts and merchant guild resumed work on Monday, the number of applicants was down to seven. Sixty per cent of all applications were filed during the first seven days after the passing of the law. Of these cases that had been filed in the first phase, more than two thirds of debtors repaid creditors in full or received a discharge as ‘unfortunate’. 22 percent of these early cases reached an amicable settlement and only 5.9 percent were sent into formal liquidation. For the rest of cases filed in December, the number of discharges and full repayments decreased, accords reached a third of all cases and the share of liquidations went up to 17.9 percent. These latter were potentially free riders whose financial difficul-

ty was not regarded by creditors as a short term liquidity shortage but rather as a crisis of solvency.

VI. After the Crash

The special bankruptcy law in Hamburg further lowered the barriers for merchants to enter proceedings and bargain with their creditors without this process even being called 'bankruptcy' or 'insolvency'. The survival rate of firms during December 1857 and January 1858 was higher than under the ordinary bankruptcy law in Hamburg. It is further evidence that the bankruptcy regime in the Hanse towns was more agile and debtor friendly than the regimes of other parts of Germany. In spite of its apparent usefulness, the Hanse towns sacrificed their bankruptcy regimes shortly after this crisis. There was no resistance on their part when political and legal unification after 1870 under the wings of Prussia imposed a more formalistic approach that removed control from creditors and conferred it on professional courts. Why did that happen?

Part of the explanation can be derived from the fact that credit had been set free when earlier legislation, particularly the law from 1849, had decoupled the bill of exchange from its complementary, the bankruptcy law. In previous times, the use of bills was restricted to merchants. The bankruptcy regime had been part of this arrangement and was similarly biased towards merchants. The change of legislation in 1849 lifted these restrictions. Arguably, the 1849 law merely officiated a development that had started decades ago and had made the barriers around the mercantile community increasingly porous.⁴³⁷

Speaking in terms of club good theory: cases that were eligible for an out-of-court bankruptcy procedure under the Hanseatic regime now came from outside the ranks of traditional merchant circles. The membership of the mercantile community became bigger and more heterogeneous. This in turn undermined the capacity of the system to lower transaction costs for its members. Monitoring and rule enforcement became increasingly difficult in the heterogeneous group. A bigger caseload strained the limited resources of the commercial court. The bargaining

⁴³⁷ See the debate on the introduction of freedom of trade in Germany (*Gewerbefreiheit*): STEINDL, HARALD, "Die Einführung der Gewerbefreiheit," in *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte III/3*, ed. HELMUT COING (Munich, 1986), pp. 3527-3629.

process between debtors and creditors, which was central to the procedure, relied on a shared understanding of values and norms among merchants. The more likely it was that parties were strangers to each other, the less likely it became that a successful settlement was forged between them.

This rift comes to light during the crisis of 1857. Members of the merchant guild had been at odds as to which measure would be best suited to counter the crisis. The group had become too diversified to find a straightforward solution. This process of diversification had started well before 1849. Hamburg's mercantile community could not be regarded as a homogenous group any more. What the members of the 'trust commission' experienced coincided with a trend that has been noted with regard to urban communities in the 19th century. The traditional legal and social bonds of the old urban civil society became porous.⁴³⁸ Over the course of the century, a new *Wirtschaftsbürgertum*, the economically successful upper and middle class emerged. This class remained remarkably small. The rest – small and medium sized merchants, shopkeepers, craftsmen – were situated between the new upper class and the newly emerging working class.⁴³⁹

What historians have denoted as 'the breakdown of the old urban community'⁴⁴⁰ can be linked to the organisation of debt-commissions and the bankruptcy regime in those towns. Chapter 4 stated that only 19 percent of all debt commissions repaid creditors a share of the outstanding debt. This figure reported the average for the entire sample of cases. There is more diversity across time, as displayed in Figure 24 below. The share of successful debt-commissions was higher in the first half of the century. Between 1803 and 1804 it reached thirty percent, in 1808 even 35 percent. From then on, it shrank continuously. In the 1850s and 1860s it even fell below five percent. Settlements, it seems, had gone out of 'fashion'.

⁴³⁸ BREUILLY, JOHN, "Urbanization and the Social Transformation 1800-1914," in *Germany, A New Social and Economic History 3*, ed. SHEILAGH OGILVIE AND RICHARD OVERY (London, 2003), pp. 192-225.

⁴³⁹ Wehler, *Deutsche Gesellschaftsgeschichte*, 1995, pp. 130-137.

⁴⁴⁰ *Ibid.*, p. 134.; Nipperdey, *Deutsche Geschichte*, 1984, pp. 210, 255.

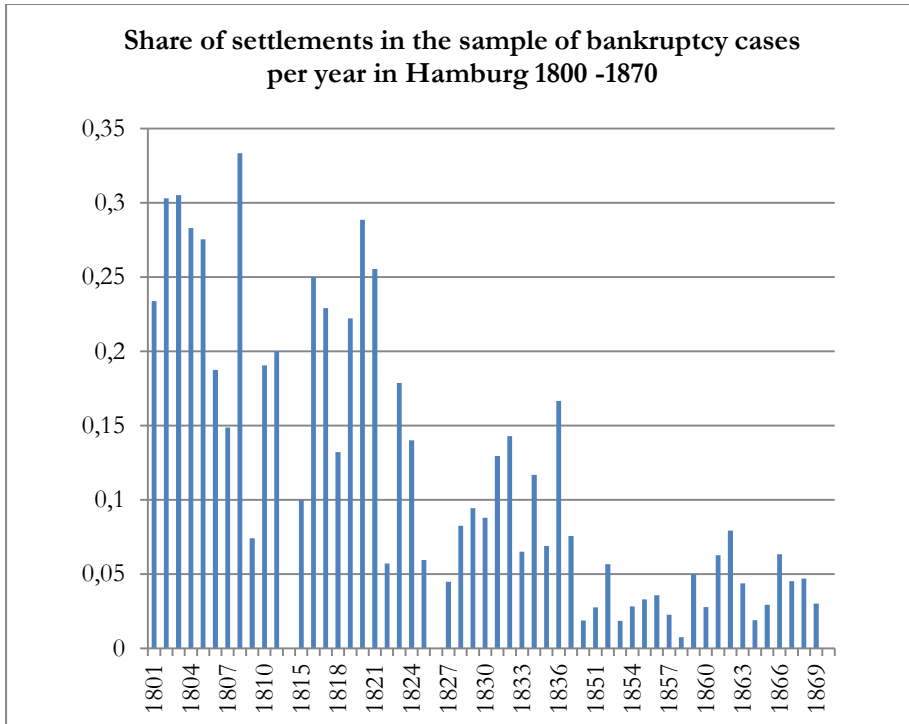


Figure 24 Yearly share of successful debt commissions and settlements in Hamburg
 Source: Commerzbibliothek, S/599 No. 122 b-e

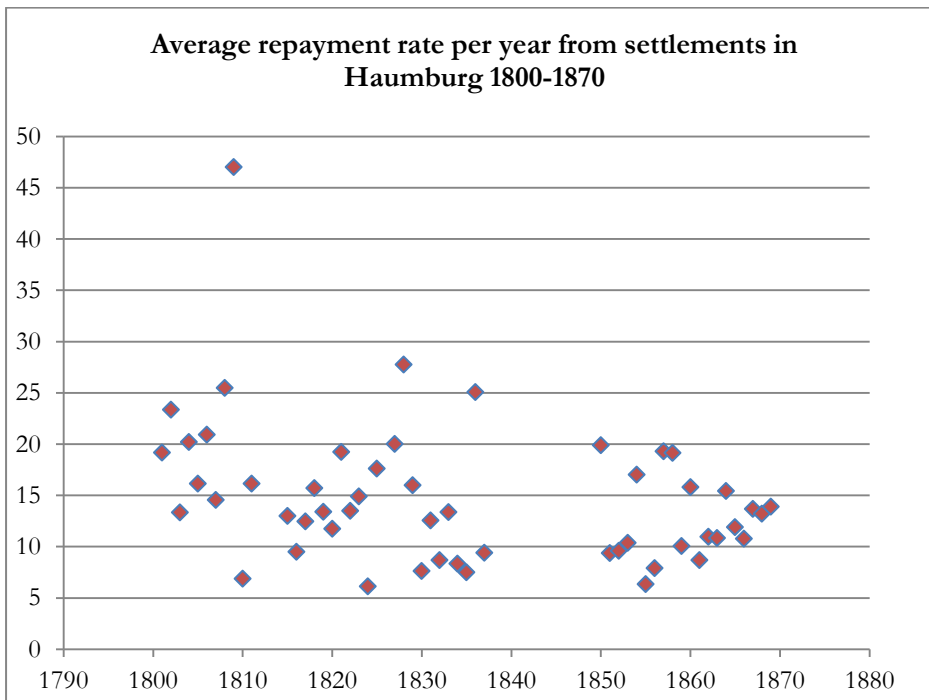


Figure 25 Average repayment rate from settlements,
 Source: Commerzbibliothek, S/599 No. 122 b-e

A similar trend affected the share of debt that was actually repaid. Figure 25 uses the yearly average instead of the overall average. The dispersion was bigger in the first half of the century, while it appears to converge towards 15 percent in the second half. Bear in mind that this is only the quota that was being paid to senior secured creditors. The other two creditor-classes received only two thirds or half of this share. The first half of the century had more years in which the repayment rate was significantly higher. Even if discarding the year 1810 as an outlier, values between 20 and 25 percent were not rare in the period until 1837.

There was a decreasing share of successful debt-commissions, and this decreasing share repaid decreasing amounts. Simultaneously, the frequency of bankruptcy cases increased. The Hamburg system was unable to absorb and handle this caseload. It lost its advantage of saving actors the costs of a formal procedure. And it probably also lost its impact on the credit market as a whole.

This is where I return to the question of why the insolvency and resolution system ceased to work in Hamburg while it continued in Bremen. As shown in the previous chapter, Bremen reformed its (unwritten) Bankruptcy system in the 1840s, incorporating some of the solutions from French law. Bremen did not have to bear the burden of an old, written code it inherited from the previous century. When it decided to draft new legislation it could pick freely from customs that had been proven practical over time while adapting to a new economy. Hamburg was reluctant to develop and adapt. There was a comprehensive code and an established infrastructure that proved resilient to change even though it undermined itself.

VII. Conclusions

This chapter together with the previous one looked at the bankruptcy regime in three North German Hanse towns. Legal texts, court files, records books of the respective merchant guilds, newspaper articles and scholarly treatises were used to analyse the understanding of and approach to the issue of bankruptcy in those towns. I argue that the bankruptcy regime was an integral part of the local infrastructure for commerce and trade that had long been organised like a club.

The bankruptcy system offered different paths for different cases. Creditors could opt for a formal liquidation of the debtor's assets, which would involve going through a court procedure and discharging the debtor of whatever debt was left after completion of the liquidation. Alternatively, creditors could opt for a settlement, voluntarily granting the debtor a debt-moratorium or waiving parts of the debt while still retaining the entitlement to enforce the remaining debt in the future. Settlements were most frequent among merchants. They could rely on an organisation, the local merchant guild, which helped with negotiations, monitoring, and private enforcement of deals among its members. Non-merchants were more frequently subject to formal liquidations. They were often excluded from the jurisdiction to which merchants had access, either because they lacked full citizenship or because the 'size' of their cases was too small to be considered relevant for the commercial court.

The rate of repayment in settlements was very low. This indicates that a large amount of unsecured debt was involved, which in turn points to the importance of bills of exchange, which had the status of an unsecured loan in bankruptcy in all three towns. Bills served as a means of payment, a source for trade credit, and cornerstone of the activity of merchant-bankers at the local bourse. For an effective running of the bill market, the mercantile community also resorted to bankruptcy legislation. The regime in Hamburg, Bremen, or Lübeck functioned like a filtering device to distinguish between viable and unviable firms, to allow merchants occasionally to dispatch bad bills and write off parts of their debt, without exciting a contagion of counter-party claims and subrogations. This worked as long as everyone complied with the regulations of the local merchant guild and was subject to their monitoring. Until the nationalisation of the bill market, bankruptcy laws and the regulation of bills of exchange had long been twins.

The crisis of 1857 illustrates this close relationship. As Hamburg and Lübeck were both hit by the crisis, they temporarily introduced a special bankruptcy law. But their room for manoeuvre had limits. Bill regulation had been nationalized in Germany with a law from 1849 to account for the increasingly mobile and widespread use of this means of payment. Opting out of this national framework in order to resort to local custom as part of the crisis-management proved difficult and politically harmful.

But it was not the crisis of 1857 that brought these local systems down. It was a change of business activity and probably also of the composition of the local communities. The growth of the German economy, market integration, and the new industrial activities made the old mercantile community much more heterogeneous. The national law on bills of exchange finally removed the privileged access of merchants to the bill market. Everyone could draw, buy, and trade bills now. The old bankruptcy regime, with its organisation and exclusiveness, was undermined by this heterogeneity and diffusion of debtors. It lost its ability to bring down monitoring and enforcement costs through personalized regulation brokered by communal institutions. When, in the 1870s, the Prussian government started its campaign to export their bankruptcy laws to the other German states, there was no resistance from merchants and businessmen from any of those city-states.

CHAPTER 6: CREDITORS

What you, my lad, call an art, is only a knowledge of law, and the wisdom to turn it to one's own profit. He who is up to this can not fail to be a great man (...)
Could you have witnessed the gloomy lull before the storm broke, the fearful despair of the husband, the high spirit of his wife, who insisted upon throwing in her own fortune to the last dollar to save his honour, you would not say that our calling is poor in passion or emotion.
Gustav Freytag, *Credit and Debit*, (1855, English translation New York 1858)⁴⁴¹

I. Introduction

This chapter asks how creditors viewed and managed their relationship with debtors. Unfortunately, creditors are not as visible in the sources as bankrupt debtors; comprehensive lists of lenders and their claims were rarely preserved. Investigating creditors' perspective on bankruptcy must therefore turn to another range of sources than the previous chapters, combining evidence from appeal cases published in law journals with individual case-files that were preserved in the Saxon state archives and in private company archives.⁴⁴²

Creditors face their own dilemma in bankruptcy; their intent in a bankruptcy procedure is not necessarily congruent with the law's objective. They want to maximise their returns to minimise their losses. The law furnishes a procedure that aims to give equal treatment to each creditor in line with their respective entitlements. To this end, it takes a collective approach: as soon as a court formally pronounces the opening of the procedure, it also halts all individual actions against the debtor. All creditors are required to enter the collective procedure that ensues. Once the procedure commenced, the law assigns the bankruptcy estate to the collective proprietorship of creditors. German law even gives them a collective name, as if it was a communitarian entity: *Gläubigerschaft*. The law's intention is to avoid a 'first come first served' liquidation. The loss that

⁴⁴¹ German original: Was du Kunst nennst mein Sohn, ist weiter nichts als Gesetzkenntnis und die Weisheit, das Gesetz zum eignen Vorteil zu benutzen. Wer das versteht, der wird auf Erden ein großer Mann (...). Wenn Sie die Gewitterschwüle empfunden hätten, welche auf dem Geschäft lag, bevor es fiel, die furchtbare Verzweiflung des Mannes, den Schmerz der Familie, die Hochherzigkeit seiner Frau, welche ihr eigenes Vermögen bis zum letzten Taler in die Masse warf, um die Ehre ihres Mannes zu retten, Sie würden nicht sagen, daß unser Geschäft arm an Leidenschaften und großen Gefühlen ist (...). Gustav Freytag, *Soll und Haben* (Leipzig 1855), pp. 110 & 240.

⁴⁴² See Chapter I for a discussion of the source material.

stems from a borrower's default should ideally be shared among lenders.⁴⁴³ The law makes them collaborators in the creditor community, where they appoint trustees and decide over the deployment of assets. There is no amicable settlement without consensus among creditors.

An implicit contract to abide by general insolvency rules can be incorporated into every voluntary contract by operation of law. Whether such a social contracting for the insolvency regime is real or putative is not a necessary debate for the law; all are taken to bargain in the shadow of the law, whether they perceive the shadow or not.

A more piercing problem is that creditors neither form a unitary group nor passively observe events beyond their control. The types of creditors vary, sometimes with irreconcilable differences between each other.⁴⁴⁴ Secured creditors pay attention to different issues than unsecured creditors. Ex post, that is once the debtor defaulted, most creditors attempt to maximize their individual share. They can only do so at the expense of other creditors, undermining the collective approach to bankruptcy provided in legal statutes.

This chapter aims to shed light on the variety of creditor interests. The following sections examine how creditors exercised power in the course of a procedure and influenced the outcome of a bankruptcy case.

II. Evidence from Appeal Cases

What were the issues that concerned creditors most when one of their debtors defaulted? Appeal cases may serve as a vantage point for identifying these issues. These were cases in which creditors sued a debtor, a trustee, or other creditors because they objected to certain aspects of the bankruptcy procedure. The decisions in appeal cases were frequently published in law journals and served as legal interpretation-guidelines for lower jurisdictions. These published court rulings reveal creditors' occupations, the size of their claims, and whether or not they had obtained collateral.

⁴⁴³ GROSS, KAREN, *Failure and Forgiveness. Rebalancing the Bankruptcy System* (New Haven, 1997), p. 137.

⁴⁴⁴ Sullivan, Warren, and Westbrook, *As We Forgive*, 1989, pp. 273-274.

For this thesis I assembled a set of some 292 bankruptcy cases that were decided by the high court of appeal in Cologne, and 102 bankruptcy cases from Frankfurt, which were decided at the high court of appeal for the free cities in Lübeck.⁴⁴⁵ The court in Cologne was the most authoritative institution in the Rhineland and western German provinces that applied French law. The court in Lübeck had been established as the court of appeal for the free cities. If a creditor appealed a bankruptcy decision by Frankfurt courts, the case was transferred to Lübeck.

The sample shows the issues over which creditors disagreed and the timing with which these issues challenged the established interpretations of written law. It should be noted, however, that this sample is not representative of the whole of Germany. It is limited to two jurisdictions and merely reveals frequent concerns and disputes under French law and Frankfurt's municipal statutes.

a.) Who Lent Money?

Craftsmen, shopkeepers, or manufacturers, who ran their own business, accrued both business and consumer debt. Nineteenth-century German law did not yet provide the standardized company forms with limited liability that are available to entrepreneurs today. This did not entail that someone, who was knowledgeable in the law, had no means of partitioning assets into different pools and reducing the risk of bankruptcy. However, the majority of people lacked the necessary resources to do this and remained personally liable for their actions without distinguishing whether they were taken for business or personal use. Accordingly, creditors extended both consumer and commercial credit and the two were often conflated.

Table 11 shows descriptive statistics derived from appeal cases. The first row gives the relative share of different occupational groups in the overall sample. The second row reports personal information, i.e. whether the creditor was a woman or whether the ruling labelled the creditor as Jewish. The third row shows mean debts and recovery rates, whether or not value was distributed among creditors, the share of amicable settlements and the average duration of cases.

⁴⁴⁵ KALTWASSER, INGE, ed., *Gesamtinventar der Akten des Oberappellationsgerichts der vier Freien Städte Deutschlands*, vol. Vierter Band: Frankfurter Bestände, Teil I, (Cologne, 1994); *Archiv für das Zivil- und Kriminalrecht in den Königlich Preussischen Rheinprovinzen*, vol. 1-63 (Cologne, 1818-1871).

A majority of published decisions labelled the creditor as merchant. Together with manufacturers they make up more than two thirds of the sample. Interestingly, *rentiers* made up the second biggest group within the sample of creditors. This cohort comprised of members of the nobility, landowners, high-ranking government officials, who lived off annual pensions or extracted rents from their property. Conversely, very few debtors in the dataset were rentiers.

The share of female creditors is also higher than the share of female debtors. As will be described below in Chapter 7, there was a significant overlap between the group of female creditors and those creditors who belonged to the debtor's family. 15% of creditors were explicitly labelled as Jewish, often with a disparaging connotation as 'Jewish Moneylender'. Roughly a third of all creditors were partners in a registered company and acted on behalf of this company.

In slightly over half of all cases value was distributed to creditors. Conversely, the other half of cases ended without a distribution and sent creditors home empty handed. This seems a rather successful rate. In contrast, records for the Hanse towns show that between 60% and 75% of all cases ended with nothing distributed to creditors.

Table 11 Descriptive Statistics of Creditors in Appeal Cases
(in percentages unless stated otherwise)

	laborer	craftsmen	shop-keeper	merchants	manufac-turer	free pro-fessions	rentier
occupation	2.2	3.2	3.2	57.8	14.1	3.2	15.7
	female	belongs to debtor's family		labelled as jewish		partner in a registered firm	
personal	18.5	18.2		15.1		33.2	
	Distribu-tion	Settlements	recovery in settle-ment	Average Loan*	Average Loan below 45,000*	Average Duration**	
claims	51	13.7	25.41	8122.47	4972.55	19	

* in *Reichstaler* or *Preussisch Courant* (the appendix contains a table with exchange rates for German currencies)

** in months

In 13% of these appeal cases the parties had formed a settlement contract beforehand. This share is significantly smaller compared to the frequency of settlements in Hamburg. Two reasons

for this phenomenon suggest themselves: first, settlements are by definition an agreement between creditors and debtors. The present dataset only shows those agreements that failed. It is unlikely that this figure represents the actual frequency of settlements. It is, secondly, likely that fewer settlements took place under French law, as it was more formalistic in its approach and made settlements subject to court approval.

On average, 25% of the outstanding debt was recovered for creditors in those appeal cases. This rate is higher than recovery rates in the Hanse towns. This can be related to the fact that there were more liquidations under French law and fewer attempts to reorganize a debtor's business. The average loan was 8,177 *Taler*. The figure drops to 5,000 *Taler* if loans above 45,000 *Taler* are excluded as outliers.⁴⁴⁶

The average duration of cases under French law was shorter than the bankruptcy procedure under both the law of the Hanse towns and the German *ius commune*. It indicates that the approach in French law succeeded in accelerating the procedure, which had for long been demanded by merchants and businessmen.⁴⁴⁷

Table 12 aims to show who lent to whom. It displays the different creditor groups by debtors' occupations. The sample is limited to cases that reveal both the debtor's and the creditor's occupation. For each debtor group, the respective creditor occupations are listed, along with the average amount of money owed and an indication of whether or not the loan was secured and on what this security was based. The data remains fragmentary because the publicized court rulings did not report this information consistently.

For most debtor-occupations, merchants account for the largest share of their respective creditors. At the same time, it should be noted that 'merchant' is the least clearly defined category, which likely conceals the heterogeneity of this group of creditors. The findings for rentier-creditors are noteworthy: they appear to have lent more frequently to shopkeepers, merchants, and craftsmen, while they steered clear of manufacturers. There are six cases in which a rentier lending to a merchant has family relation to this merchant. In those incidents where rentier-creditors created a lien to secure their loan, they took it on debtors' immovable property. These

⁴⁴⁶ For a rough estimation of the respective values see exchange rates in Chapter I.

⁴⁴⁷ Puchta, Ueber den Concursprozeß, 1827, , p. 282; Schubert, ed., Gesetzrevision, 1990 , pp.xlvi, 64-79.

findings indicate conservative lending decisions; they lent funds to craftsmen and shopkeepers, while lending to merchants often occurred together with family links.⁴⁴⁸

Merchants, on the other hand, lent predominantly to their kind, manufacturers and shopkeepers. They often had their debts secured by movable goods. This was likely commercial credit to pay for goods in transit, which in turn were pledged as collateral. Yet merchants also have the lowest recovery rates that are recorded in the sample. In the bankruptcy of a manufacturer, merchants only recovered an average of 10% of the outstanding debt; in the bankruptcy of a fellow merchant this rate rose to 18%, but still stayed below the overall average of 25%.

Although the data is fragmentary, Table 12 conveys an idea of the differential exposure to non-payment. Taking a lien could reduce a creditor's risk of non-payment. The security interest meant that a creditor could seize the pledged item to satisfy the loan if the borrower defaulted. Taking collateral set aside certain property for a specific creditor and shielded it from seizure by other creditors. The data reported here indicates that merchants and rentiers more frequently used liens, while other creditor groups relied less frequently on secured debt. Especially for shopkeepers and craftsmen it is likely that a good portion of their claims was daily trade-credit or arrears they allowed their frequent and personally known customers.

⁴⁴⁸ COLEMEN, D.C., 'Gentlemen and Players,' *The Economic History Review* 26/1 (1973), pp. 92 - 116.; HUMPHRIES, JANE AND BEST, MICHAEL, "The City and the Decline of the British Economy," in *The Decline of the British Economy*, ed. BERNARD ELBAUM AND WILLIAM LAZONICK (Oxford, 1986), pp. 223-239.

Table 12 Creditors and their Claims per Debtor Category

	Share	Size of Claim (in Taler)	Secured Debt (Absolute Frequency)	Bill of Exchange (Absolute Fre- quency)	Average unse- cured debt (in Taler)	Average secured debt (in Taler)	Rate of Recovery (in %)	Security (Absolute Frequencies)				Creditor is Debtors Family
								Immovable	Movable	Personal	General	
Inn-Keepers, N=5												
Inn-Keeper	0,2	.			.	.	.					1
Craftsmen	0,4	3008	2		.	3,008	.		1	1		
Merchants	0,4	3514,5	2		.	3,514.5	25	1			1	
Craftsmen, N=17												
Craftsmen	0.05	5370			5,370	.	.					
Merchant	0.65	15831,57	3	2	22,366.25	7,118.67	.		2		1	
Manufacturer	0.12	490,5		1	490.5	.	.					
Free Profession	0.06	.			.	.	.
Rentier	0.12	.	1		.	.	.			1		
Shop-Keepers, N=23												
Servants	0.04	500	1		.	500	.			1		
Craftsmen	0.04	76			76	.	.					
Shopkeeper	0.13	3223			3,223	.	.					
Merchants	0.43	5051,86	1	3	5,193.83	4,200	.		1			
Manufacturer	0.13	900	1	1	730	1,240	25		1			
Rentier	0.22	.	2		.	.	.		1	1		4
Merchants, N=77												
Servant	0.04	1966,67	3		.	1,966.67	.		1	1		
Craftsmen	0.03	394	1		.	394	.		1			
Shopkeeper	0.01	.			.	.	.
Merchants	0.66	11401,82	13	8	10,430.17	14,532,67	18	2	9			7
Manufacturer	0.10	7529,75	1		8,520	598	25					
Free Profession	0.01	2000			2,000	.	.					
Rentier	0.14	5010,22	3	1	5,842.29	2,098	15	2		1		6
Manufacturers, N=29												
Shopkeeper	0.03	6700	1		.	6,700	.		1			
Merchant	0.55	32613,4	7	1	37,002.57	22,372	10	2	4		1	1
Manufacturer	0.38	1015,14	3	2	945.33	1,434	31		3			
Rentier	0.03	.	1		.	.	.					
Free Professions, N=5												
Merchant	0.2	11600		1	11,600	.	.					
Free Profession	0.6	10680	1		.	10,680	.			1		
Rentier	0.2	540			540	.	.					
Rentiers, N=1												
Merchants	0.5	1015			1,015	.	.					
Rentier	0.5	5140			5,140	.	.					1

b.) Litigation Issues

Historians argue that state building is a process by which human interaction became increasingly subjected to rules and norms that standardize and rationalize daily processes.⁴⁴⁹ Following that notion, the frequency, with which certain issues are brought before court, should indicate which issues were already standardized in a legal system and which were still contended. Problems, for which written rules and a widely shared interpretation of these written rules existed, should result in fewer lawsuits compared to problems, the outcome of which was difficult to predict.⁴⁵⁰ The appeal cases studied here took place in the period between 1818 and 1870. This era witnessed the industrialisation of Germany's economy. The regulatory framework often lagged behind this process; new organisational and productive forms faced uncertainties with regard to legal protection. The frequency with which certain issues were disputed in court indicates those uncertainties in the regulatory framework.

Figure 26 lists different categories of issues that were subject of bankruptcy-related appeal case. Together they account for more than 80% of all cases brought before court. The categories are listed in order of their relative share in the aggregate sample. It is striking that the actual liquidation and distributional decisions account for the smallest share among these categories. More often, parties disagreed over the right of family members to renounce participation in the bankruptcy or over procedural issues. Three particularly frequent issues had to do with secured claims and settlements. A common thread connecting those issues was often related to so-called asset partitioning, that is whether certain goods and titles benefited creditors collectively, or whether these goods were set apart by securities, liability clauses, company law, and other contractual arrangements.⁴⁵¹

⁴⁴⁹ Osterhammel, *Die Verwandlung*, 2013, p. 868, quotes the notion of the 'disenchantment of the World' from WEBER, MAX, 'Wissenschaft als Beruf', in: *Ges. Aufsätze zur Wissenschaftslehre*, by IDEM, ed. by MARIANNE WEBER (Tübingen, 1924), pp. 524-555.

⁴⁵⁰ KAGAN, ROBERT, 'The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts,' *Law & Society Review* 18/3 (1984), pp. 232-372.

⁴⁵¹ For the notion of 'asset partitioning' see the seminal article by HANSMANN, HENRY AND KRAAKMAN, REINIER, 'Organizational law as asset partitioning,' *European Economic Review* 44/4 (2000), pp. 807-817.

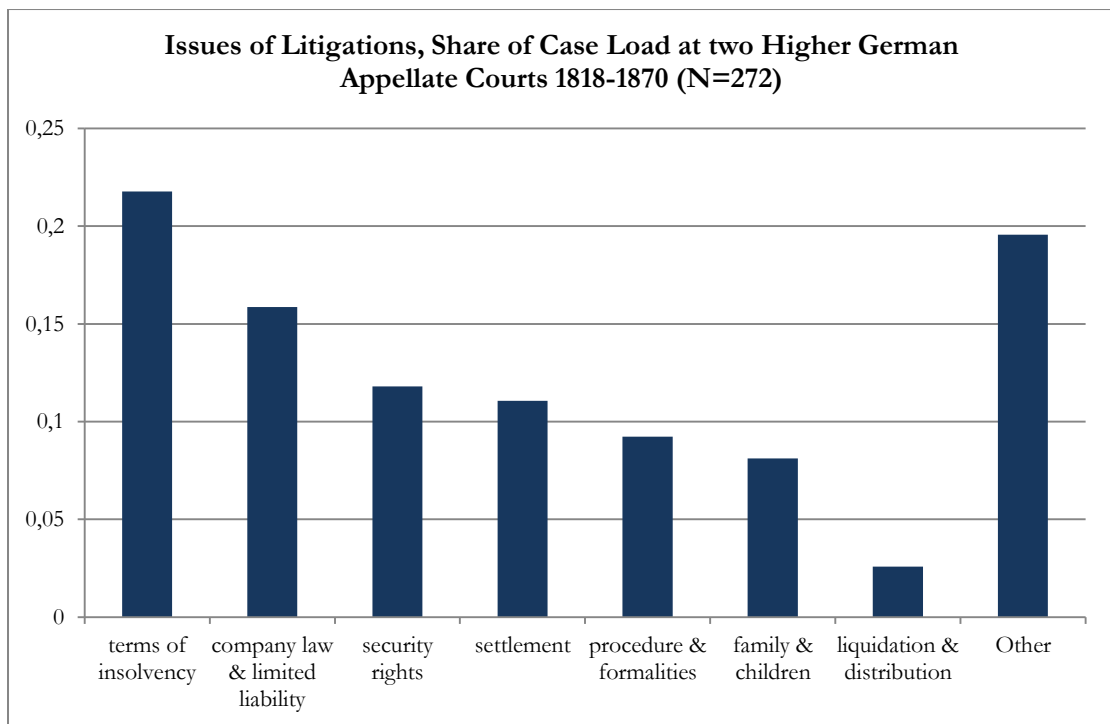


Figure 26 Issues of Litigation at Two German Courts of Appeal 1818-1870

Asset partitioning underlay conflicts related to company law, which was the second biggest category. These issues arose out of the bankruptcy of a firm with multiple partners, who were simultaneously directors. Their frequency indicates the extent to which the nineteenth-century invented new organizational forms that challenged existing legal axioms. Such cases often concerned the extent to which a director's private creditors could lay claim to the company's assets. Or vice versa, to what extent were the company's creditors permitted to seize a director's private assets. Similar problems arose in the liquidation of a joint-stock company, which was a new company form. The correct treatment of shareholders (should they be treated as unsecured creditors or as owners?) posed problems for jurists in the early years of this company form. Yet an important caveat must be stressed: whenever firms with multiple owners and joint-stock-companies were involved, the dispute's value was often significant and merited expensive legal action. Cases with lower stakes might not show up in the present sample.

A representative case concerning asset partitioning took place in the 1830s. The merchant Hoelte was simultaneously partner in the firm *Overbeck & Hoelte* and owner of the firm *Hoelte & Sons*. The former, *Overbeck & Hoelte*, filed bankruptcy in 1830. Hoelte himself filed a separate bankruptcy for his second firm. Creditors of Hoelte's second firm feared that they would rank

behind creditors of the *Overbeck & Hoelte* Company and demanded the surrender of property of *Hoelte & Sons*. They were initially successful in obtaining a favourable ruling at the Cologne city court. Yet the trustees of the other firm appealed and the court annulled the first ruling, deciding that:

(...) neither law, nor mercantile custom acknowledges that an arbitrarily established firm in different name or a company without real partners be a moral person and a different entity from the person of the owner; and no one can assume that the rights and obligations of this company be a different whole separated from his [the owner's] rights and obligations.⁴⁵²

This decision still assumed an unequivocal personal liability that extended into the private property of a firm's partner. A debtor could not simply swap assets into a different legal entity in order to shield it from claimants. 30 years later, judges at the same court revised their predecessor's opinion. The wife of a bankrupt merchant demanded compensation for her losses and seizure of assets that belonged to a company to which her husband had been partner. The *code de commerce* entitled wives to retrieve property that they had brought into the marriage. However, the judges at the court of appeal declined the wife's request, arguing that she was her husband's private creditor, not the company's creditor. The court warned that granting partners' wives the right to seize company assets would open the gate to moral hazard and fraud; partners could use their wives to shield property from company creditors. The judges not only established a distinction between company assets and private assets, they simultaneously insinuated that the husband was the real beneficiary of wives' legal rights.⁴⁵³

The most frequent issues brought before the courts of appeal concerned the definition of bankruptcy itself. These were largely cases from French law and were related to a particularity of the French codes. The *code de commerce* distinguished between the beginning of the *state* of the insolvency and of the insolvency *procedure*. The latter began with the court publicly decreeing a debtor insolvent and appointing a provisional trustee. In this writ, judges specified a date in the

⁴⁵² weder ein Gesetz, noch eine Handelsgewohnheit der willkürlichen Annahme einer von dem Namen verschiedenen Firma oder einer Gesellschafts-firma ohne wirkliche Gesellschafter, die Wirkung beilege, dass nun eine solche Handlung als eine von der Person des Eigenthümers der Handlung getrennte moralische Person, und die unter der angenommenen Firma erworbenen Rechte und eingegangenen Verbindlichkeiten als ein von seinen übrigen Rechte und Verbindlichkeiten abgesondertes Ganze betrachtet werden könne. *Archiv für das Zivil- und Kriminalrecht* Vol. 16, Part I (1832), p. 88.

⁴⁵³ See Chapter VII for more case studies and details about wives' rights and treatment in bankruptcy.

past, from which onward the debtor was assumed de facto insolvent. Any transactions that had been effected after this date were subject to approval by the bankruptcy court. Trustees often applied to courts to nullify those transactions in order to increase the overall pool of assets in the bankruptcy estate. The law did not specify how courts should determine the exact date of de facto insolvency. Because the precise date had wide implications, this provision caused bitter disputes.

Some of the disputes that came before the appellate court in Cologne challenged the prevalent understanding of insolvency and led to discussions about the purpose of bankruptcy laws. Take the sentencing of merchant Heinrich Koch in 1843. Koch had filed for bankruptcy in 1840. His assets were so insignificant that they did not even cover the court fees so that the responsible judge decided to cancel the procedure. Three years later, the company *Dalis & Sons* applied for foreclosure against Koch. The latter responded that he had filed for bankruptcy and thus could not be sued by individual creditors. But the higher appellate court decided:

(...) that the insolvency procedure *was not established for the benefit* of debtors, but to equitably compensate creditors; was the procedure not completed due to the insufficiency of assets, the debtor cannot oppose the individual attempts of creditors to assert their rights by pointing out he was still in a state of insolvency.⁴⁵⁴

The court had to decide a similar case seven years later. On this occasion it specified the notion of insolvency in the following way:

If someone stops ongoing payments and does not honour his obligations as they become due, that itself is sufficient for filing bankruptcy, *even though the state of assets is apparently enough* to cover all debts (...) The opposition against a bankruptcy declaration is not justified merely by pointing out that the assets exceed liabilities.⁴⁵⁵

According to this latter interpretation, a debtor was de facto insolvent if his assets, though still enough to cover his debts on the books, were not liquid and available to pay off creditors.

⁴⁵⁴ 'daß das Fallimentsverfahren keine Rechtswohlthat für den Falliten ist, sondern lediglich die gleichmäßige Befriedigung seiner Gläubiger zum Zwecke hat, ist dasselbe wegen Mangels einer solchen nicht fortgesetzt worden, so kann der Fallit der individuellen Rechtsverfolgung nicht bezahlter Gläubiger seinen fortdauernden Fallitzustand nicht entgegensetzen.' *Archiv für das Zivil- und Kriminalrecht* Vol. 36, Part I (1843), p. 145, own emphasis.

⁴⁵⁵ Die Einstellung der Zahlung von Handelsverbindlichkeiten genügt für sich allein zur Falliterklärung, sollte auch der Vermögensbestand anscheinend zur Deckung der Schulden hinreichen. (...) Der Einspruch gegen eine Falliterklärung ist da durch nicht zu begründen, daß der Werth der Activa die Passiva übersteigen solle. *Archiv für das Zivil- und Kriminalrecht*, Vol. 45, Part. I (1850), p. 45, own emphasis.

Judges worried that even a small debt moratorium could disturb the commercial circulation.⁴⁵⁶ Having a right that was enforceable at the time was (and is) different from having a right that would become enforceable at a later stage.⁴⁵⁷ This decision is noteworthy because it assumes that illiquidity triggers insolvency; the old distinction between the two collapsed. This distinction had underpinned municipal bankruptcy regimes favouring out-of-court settlements. In Prussia and the rest of Germany that applied the *ius commune* procedure the debtor petitioning for bankruptcy had to show in his account books that his liabilities exceeded his assets. French law now based the decision about whether or not someone was bankrupt on his actions rather than his pecuniary state. The new understanding made it easier for creditors to sue their debtors and trigger a bankruptcy procedure – provided they deemed this procedure advantageous.

III. Problems and Costs

Businessmen often carried out transactions beyond the boundaries of their municipality or their polity. In the legally fragmented German Confederation, this posed additional challenges to creditors if they wanted to monitor borrowers and keep track of their funds. The following case exemplifies some of these problems. On April 12th 1849, Dennis Oechsner wrote to Franz Haniel, a manufacturer and merchant from Ruhrort. Ruhrort and Mainz were some 250km apart along the river Rhine. Haniel used Oechsner as an agent and informant for transactions with business partners in the Rhine-Main area that included Mainz, Darmstadt, Frankfurt, and Aschaffenburg. Oechsner's letter carried an unpleasant message for Haniel:

Because Mr. Carl Schmidt did not respond to any of my letters, and because I did not trust his fatuous verbiage, I went to his place, and found my worries justified as he went on a trip last Friday and eloped, and left his wife and child in a dreary situation. (...) I beg you to send his invoice and the contracted notarial deed as soon as possible, so that I may assert our rights.⁴⁵⁸

⁴⁵⁶ Ibid.

⁴⁵⁷ Jackson, 'Creditor's Bargain,' 1982, p. 879.

⁴⁵⁸ Dadurch daß ein Herr Carl Schmidt hier auf keinen meiner Briefe geantwortet, und ich überhaupt wenig Vertrauen auf dessen einfältiges Schwätzen hatte, machte ich mich heuer, fand leider meine gerechte Besorgnisse bestätigt, indem er den letzten Feiertage einen Ausflug machender (...) durchgegangen sit und Frau und Kind in einer trostlosen Lage zurückgelassen hat. (...) Ich bitte Sie eilend mir so schnell wie möglich die Schmidt'sche Verkauf-Rechnung und den vollführten Notarial-Akt zu senden, damit ich unsere Rechte wahre. Haniel Archive No. 82, *Konkurs Schmidt* fol. 5.

Schmidt, a vintner, had purchased coal from Haniel and according to the accounts owed him the sum of 3,299 Guilders. He had already been in touch with Haniel a few months earlier regarding his liquidity problems. The existence of the notarial deed, to which Oechsner referred, suggests there was some sort of debt discharge between Haniel and Schmidt before. According to the deed, Schmidt acknowledged a debt to Haniel of 1,500 Guilders, while Haniel conceded that there were no other claims from his side against the debtor. Schmidt pledged several barrels and wine cases as security for the debt. Haniel's son Hugo, who had represented his father's firm in the negotiations with Schmidt, had personally signed the deed. Franz Haniel senior thus deemed himself insured against the loss from Schmidt's bankruptcy. Seizing the collateral, however, proved more difficult than expected. Oechsner confided to Haniel in another letter:

He [Schmidt] took everything of value, silver & gold. His uncle, seventy years of age, and his wife are poor as dirt and indebted to Charon Sarasin for 12,000 (...) What is more, there are no books; no one has a clue what is going on (...) the wine cases might be confiscated and it could be that they [the authorities] renounce our priority.⁴⁵⁹

The trustee whom the Frankfurt city court appointed to administer the liquidation of Schmidt's remaining assets objected to Haniel having a secured claim. He interpreted the notarial deed as a sales contract, by which Schmidt sold Haniel the wine cases and barrels in exchange for the coal. As trustee, he had the power to revoke transactions, which had taken place shortly before the insolvency. He preferred to have the barrels auctioned in Frankfurt and to treat Haniel as an unsecured creditor, who might or might not receive payment after court fees and administrative costs were deduced from the auction's return. He further pointed out a formal error in the deed that meant – in his interpretation – that it could not be interpreted as assignment of collateral. The correspondence between the trustee, the city court, Oechsner in Mainz and Haniel in Ruhrort dragged on into the year 1850. At some point Haniel writes to Oechsner in a resigned tone:

I read the trustee's (...) response. It is composed in a style intelligible only to a Frankfurt lawyer (...) Without delving into the legal intricacies, I confine myself

⁴⁵⁹ Er hat alles von Werth mitgenommen Silber & Gold (...) Sein alter 70 Jähriger Onkel & dessen Frau sind bettelarm denn sie haben bei Charon Sarasin für 12,000 gutgeschrieben (...) Übriges sind keine Bücher da & Niemand weiß wie sich die Sache gestaltet. (...) Die Weine sollen Consignationsgut sein weißhalb es möglich wäre, daß sie uns vonerheimig gezogen würden. (...), *Ibid.*, fol. 10.

to recounting – once more – the circumstances, as you know them and as I have already done in my letter [to the city court] (...) ⁴⁶⁰

Haniel lost the case in the end. In a last letter to Oechsner, he orders him to take the necessary steps to appeal against the city court's decision to revoke his security claim. Further files concerning this case are not on record. The case encapsulates three issues that creditors faced when an outward debtor defaulted: (1) communication with local authorities and actors, over distance and usually by proxy, (2) the need to cope with a different jurisdiction, and (3) being able to assert and enforce security titles.

a.) Distances

Monitoring a debtor caused a significant part of the transaction costs involved in lending money. Before a creditor lent money he needed to vet the borrower. But the requirement for monitoring did not stop there. A debtor's solvency could change any time. In order to weigh the probability of default, the creditor needed to stay informed about the debtors business and his transactions. If a liquidity problem became apparent or default became likely, the creditor needed to secure his claim, either by obtaining a writ of execution from a court or by taking a lien. The individual lender also had to monitor all other creditors. If one of his fellow lenders foreclosed, that was an alarming signal to other creditors. The bankruptcy procedure prevented a run on the debtor's assets, which is why each creditor also had to weigh the consequences of his decision to foreclose, as his foreclosure could trigger the bankruptcy procedure. Creditors needed to determine whether or not they would benefit from such a procedure or whether it would be worthwhile attempting an out-of-court deal with the borrower.

Gathering information was already a challenge in a town as big as Hamburg or Bremen. The example of the Hanse towns shows how many of the legal provisions were motivated by the aim to generate and distribute information.⁴⁶¹ With increasing distance between debtor and creditor,

⁴⁶⁰ Die Erwiderung des Curators (...) habe ich durchgesehen. Dieselbe ist in einem Style abgefasst, daß nur ein Frankfurter Jurist sie verstehen kann; (...) Ohne mich auf alle diese juristischen Spitzfindigkeiten einzulassen, beschränke ich mich darauf, noch einmal (...) das Sachverhältniß vorzutragen, wie es Ihnen bekannt ist, und wie ich dasselbe auch bereits in meinem Briefe angeführt habe (...), *Ibid.*, fol. 26

⁴⁶¹ See Chapter IV.

the flow of information was difficult to maintain. The fragmented German legal landscape added further hurdles.

Court procedures were bound to specified time periods. Deadlines as well as the requirement to name local representatives often served to exclude foreign creditors from a procedure right away. Creditors that did not file their claim within specified time frames were not admitted to the procedure. Deadlines continued to play a role within the procedure. For example, if someone did not submit his written opposition to a decision taken by other creditors or trustees within a specified period, he was assumed to have consented to the measure. In all these transactions, distance between a creditor and a debtor complicated and protracted communication.

Table 13 compares the average linear distance of a debtor from his creditors, drawing on those cases in the database that contained lists of lenders or account books.⁴⁶² Borrowers from the Ruhr area and the Hanse towns (Bremen and Hamburg, excluding Lübeck) are treated in separate categories. A third category describes rural places in general. I count a place as rural if it had fewer than 10,000 inhabitants or if it was outside one of the German conurbations. The left column reports simple averages. In the right column, the distance between a debtor and his creditor was weighted by the size of the respective claim in relation to the overall sum of the debtor's obligation. The larger a creditor's claim, the more his distance-value mattered in calculating the average distance.

Table 13 Average Distance Between Creditors and Debtor in Km

Debtor's place	Unweighted mean	Mean weighted by size of claims
Ruhrgebiet	79.28	131.34
Hanse Cities	74.97	82.76
Rural Places	209.43	158.64

It is noteworthy, that borrowers from Hamburg and Bremen only exhibit an average radius of 75km (46 miles), which increases to a mere 82km in the weighted measurement. Places from

⁴⁶² Linear distances obtained from Harvard Geospatial Library (opensource), <http://calvert.hul.harvard.edu:8080/opengeoportal/>, retrieved 09-2016.

the Ruhrgebiet initially have a similarly short distance. Once the size of claims is taken into account, it increases to over 130km. The farthest distances separated debtor and creditor in rural places. The simple average here is 209km, the weighted average still 158km (98 Miles). A possible explanation could be found in the fact that capital was more readily available in urban places. Debtors did not have to look beyond their municipality in order to raise funds. Moreover, many of the new industrial facilities were built outside of urban agglomerations. Factories were erected near rivers, frequently on aristocrat's rural estates, or near mining sites.⁴⁶³ Those industrial facilities were more capital intensive than traditional merchant ventures and warehouses in cities. Their owners and managers borrowed from a wide array of investors beyond the borders of their respective polity.

b.) Conflict of Laws

A few kilometres were sometimes enough for a creditor to belong to a different jurisdiction and a different legal system. There was no legal guarantee that creditors, who were foreign to a debtor's jurisdiction, would be readily admitted to the bankruptcy procedure. A standard policy was to request foreign creditors to appoint local proxies, who were subject to the debtor's jurisdiction. They could only file claims that were acknowledged and enforceable in the debtor's local legal system. In Hamburg, for instance, a creditor's local representative had to possess citizenship in the town, which diminished the pool of admissible representatives.⁴⁶⁴ As a complimentary provision for foreigners, Hamburg and Bremen law demanded that the courts should send notices to foreign creditors informing them about the insolvency. Hasche, in his commentary of the Hamburg bankruptcy code, found this measure embarrassing for his home-city. He asked: 'Why should it be the administrator's task to take money after foreigners?'⁴⁶⁵ He further objected to incidents of foreigners attempting to arrest a debtor under foreign law, even though he had filed insolvency in Hamburg and enjoyed safe conduct. He deemed it the city's responsibility to shield domestic debtors against such encroachments.

⁴⁶³ Frequent examples of these Junker-Ventures are quoted in Gustav Freytag's *Soll und Haben*, quoted above.

⁴⁶⁴ For the notion of citizenship as a property see Chapter IV again.

⁴⁶⁵ Denn was haben es die Curatoren nötig, den Auswärtigen Geld nachzutragen? Hasche, Vol. II, p. 375.

Who has claims here in Hamburg, needs to accept our insolvency law and inquire about its principles, without expecting any legal advice by trustees; - secondly, he must assert these rights personally.⁴⁶⁶

Defensive attitudes like this existed across Germany and prompted Schwegge to include an extensive complaint about the state of the German legal system in his 1829 textbook on bankruptcy law:

(...) today the relationship to another German state cannot legally be understood other than any relationship to any other foreign state; only that among German states old custom, convenience (...) incline more to mutual assistance compared to genuinely foreign states.⁴⁶⁷

Schwegge wrote these lines in 1829 in a relatively young German Confederation. A few years later, the German Customs Union and attempts of harmonizing commercial policies among German speaking states contributed to cooperation on juridical matters. In 1855, the newly enacted Prussian bankruptcy law could simply note that 'there is no distinction between foreign and domestic creditors.'⁴⁶⁸ Theodor Goldammer, in his commentary for the Prussian bankruptcy code in 1858, lists twenty bilateral treaties between Prussia and other German states, in which both sides promised mutual administrative assistance in bankruptcy cases.⁴⁶⁹ Although the situation for foreign creditors became more tenable over time, swift and efficient administrative assistance was still a matter of whether or not their home state had a bilateral agreement with the debtor's state. Moreover, no agreement freed creditors from the burden of knowing which rights and claims were enforceable under the law of the debtor's state. Entitlements could derive from domestic statutory privileges or corporate rights, such as privileged claims for members of the same guild, rules concerning whether or not the bankrupt's wife enjoyed an immunity for her assets, and so forth. These entitlements could not be asserted in a different jurisdiction, at least if

⁴⁶⁶ Wer hier in Hamburg Forderungen hat, muß sich einmal das Falliten Recht gefallen lassen und sich darum bekümmern, ohne daß er von den Verwaltern der Masse eine Rechtsbelehrung erwarten darf; - zweytens aber muß er, (...) seine Rechte selbst gelten machen., in: Hasche Vol. II, p. 375

⁴⁶⁷ (...) und jetzt ist das Verhältniß zu einem anderen Deutschen Lande sogar rechtlich nicht anders zu beurtheilen, als das zu jedem anderen ganz ausländischen Staate; nur daß unter Deutschen Ländern alte Angewohnheit, Convenienz (...) zur Gewährung der Rechtshülfe geneigter machen, als unter ganz fremden Ländern. In: Schwegge, Das System, 1829, , p. 285.

⁴⁶⁸ Konkursordnung 1855, § 3.

⁴⁶⁹ GOLDAMMER, THEODOR, *Kommentar und vollständige Materialien zur Konkurs-Ordnung vom 8. Mai 1855* (Berlin, 1858), p. 75-76.

they 'did not stem already from Roman law and were commonly acknowledged.'⁴⁷⁰ The enforcement of foreign statutory and corporate rights would otherwise amount to a foreign state infringing on the territorial sovereignty of another state, which was not permissible under the principles of the German Confederation.⁴⁷¹

Mutual legal assistance between states was crucial when a debtor owned property in different states. Based on the principle that the insolvency was 'universal' and affected the debtor's entire assets, the jurisdiction of his residence should also have had the competence to administer and liquidate assets abroad. The matter became complicated if foreign creditors laid claim to foreign assets and filed a suit in a different jurisdiction. Some scholars argued that because the opening of a bankruptcy procedure halted all other pending lawsuits in the *domestic* jurisdiction, pending lawsuits in *foreign* jurisdictions should also be referred to the debtor's domestic forum. Indeed, the Prussian bankruptcy law from 1795 decreed that only the court where the bankruptcy was filed could decide and settle any pending lawsuit, regardless of the jurisdiction.⁴⁷² This provision was in the spirit of the Prussian *Allgemeines Landrecht* that endeavoured to centralize Prussia's legal system and cut back the competencies of individual jurisdictions.⁴⁷³ Others argued that pending lawsuits in different jurisdictions should continue in the forum that had originally been filed but be requested to inform the bankruptcy court about every step.⁴⁷⁴

Whatever the exact specification, the reliance on inter-state legal assistance could further delay the settling of a bankruptcy case. After all, creditors in different places need not have had mutually consistent interests. Assume a debtor in jurisdiction A owned, among other assets, a factory in jurisdiction B, the acquisition of which had been financed partly with money from creditors in A. After the debtor has been declared insolvent, creditors in A want swift liquidation and repayment, while claimants to the factory in B might have an incentive to delay the proce-

⁴⁷⁰ Schweppe, *Das System*, 1829, p. 286

⁴⁷¹ *Ibid.*, p. 286.

⁴⁷² AGO, Vol I., Tit. 50, § 27.

⁴⁷³ HATTENHAUER, HAND, "Einführung in die Geschichte des Preußischen Allgemeinen Landrechts," in *Allgemeines Landrecht für die Preussischen Staaten von 1794*, ed. HANS HATTENHAUER (Neuwied, 1994), pp.###; HELLMUTH, ECKHART, "Der Staat des 18. Jh. England und Preußen im Vergleich," in *Reformabsolutismus im Vergleich. Staatswirklichkeit - Modernisierungsaspekte - Verfassungsstaatliche Positionen*, ed. GÜNTER BIRTSCH (Hamburg, 1996), pp. 5 - 24.

⁴⁷⁴ Puchta, *Ueber den Concursprozeß*, 1827, pp. 301-309; Draft of the *Civilprozessordnung für Bayern* from 1825.

ture and keep the factory as going concern. The observations from those cases quoted here provide two hypotheses in response to the first research question, formulated in Chapter II (page 53): Under which circumstances do parties engage in settlement negotiations?

(1) If parties have mutually consistent interests they will engage in settlement negotiations unless one party is better off due to a security interest or would benefit from a different procedure.

(2) Success or failure of a settlement depend on the relative costs attached to the activities necessary to pursue the settlement.

The relative distance between debtor and creditor, the conflict of different legal systems, particularly with regard to enforceable security interests and the possibility to file suits against a debtor at a different jurisdiction obstructed a swift settlement of bankruptcy cases. The more widely separated parties to a bankruptcy case were, the less likely was a settlement.

A case from the Bethmann Bank is an illustration of hypothesis (1). Simon Moritz von Bethmann had accepted a bill of exchange in which Count Kesselstedt from Trier promised to pay the bank 2,000 Guilders.⁴⁷⁵ Bethmann got involved personally after the due date passed in January 1855 without money being transferred and after several letters by Bethmann's clerks to Count Kesselstedt remained unanswered. Bethmann, whose family had only recently been ennobled, addressed Count Kesselstedt, a member of the Prussian military and of old imperial aristocracy, in utmost politeness. The letter's style suggests that Count Kesselstedt enjoyed a lenient treatment by the bank due to his status. Under normal circumstances, the bank would have taken recourse to the *Wechselstrenge* in order to enforce the bill, which entailed the debtor's detention. Bethmann informed Count Kesselstedt that he had his partners extend the due date to May 1855 but that he could not override his partners' decisions infinitely and that 'it would be a shame and do me great harm if I had to file a lawsuit against the Count'. May came and no money was transferred. On May 16th Count Kesselstedt wrote to Bethmann from Paris and asked for another respite until the end of June. He confided:

⁴⁷⁵ Bethmannarchiv *Geschäftsakten* W1-9/ 5 No. 810.

(...) that I am here involved in marriage negotiations, (I indeed hope to be married rather soon); if your partners would attempt taking legal measures against me, they could harm my endeavours, even destroy it.⁴⁷⁶

It appears that Count Kesselstedt hoped that marrying into a wealthy family would appease his creditors.⁴⁷⁷ The Count did indeed marry, but his plan failed. The Bethmann Bank had made inquiries about Kesselstedt's financial affairs in the meantime. A court official from Trier wrote to Frankfurt, that the Count had tried negotiating a settlement with creditors. The Prussian king had become involved and had appointed a special aristocratic arbitrator. However, Kesselstedt's new parents-in-law were reluctant to bail him out. On July 17th, Count Kesselstedt travelled to Frankfurt in order to speak to Bethmann personally. Bethmann was unavailable when Kesselstedt arrived, so that the latter left him a note. Bethmann sent a vague response to the Count's hotel the same evening, in which he did not decline another respite explicitly, but indicated that his and his partners' goodwill was stretched to the limit. Bethmann simultaneously advised his *Kontor*:

Count Kesselstedt is in town, with regard to the payment of his bills, he will be unable to pay today. His plan is to give us another bill with shorter maturity, backed by the army's revenue office in Trier. (...) An officer of the revenue office will probably show up at the office in order to make an arrangement. See to it that you get rid of him (...)⁴⁷⁸

A court in Trier declared Count Kesselstedt bankrupt and Bethmann became part of the collectivity of creditors, the *Gläubigerschaft*. The case was difficult because Trier was part of the area where French law was employed while the Count had served as officer in the Prussian army. From Bethmann's records it appears that a military court dealt with the case, but the procedure followed the steps laid out in the French *code de commerce*. The military administration sent an arbitrator, who was successful in reaching an *Accord* with creditors: Count Kesselstedt would repay

⁴⁷⁶ (...) daß ich hier in Heiratsumständen bin, (ich hoffe sogar in kürzester Zeit verheiratet zu seyn), wenn daher Ihre Associés gegen mich einen solchen Schritt unternehmen würden, so könnten Sie meinem Vorhaben sehr schaden, oder gar ganz vernichten. Bethmannarchiv *Geschäftsakten* W 1-9/ 5 No. 810; Letter 16.05.1855

⁴⁷⁷ Richard Strauss mocks similar arrangements between nobility and bourgeoisie in his Operas *Arabella* and *Rosenkavalier*.

⁴⁷⁸ Graf Kesselstedt ist hier, wegen Zahlung seiner Wechsel. Er kann ihn auch beim besten Willen heute nich Zahlen. Seine Absicht ist uns einen Wechsel auf nahen Termin auszustellen, den sein Rentamt in Trier acceptirt (...) Der Rentamtmann Herr von Gabain würde sich heute Mittag zu ihnen begeben um sich mit ihnen zu verständigen. Sehen Sie wie Sie ihn abwimmeln können.(...). Bethmannarchiv *Geschäftsakten* W 1-9/ 5 No. 810.

28% of his debt over the course of 15 years. Bethmann opposed the agreement, which was unfavourable for him. Indeed, similarly stretched settlements must have been so frequent, that the older German bankruptcy textbooks report a saying that circulated among lawyers: *Der Konkurs frisst die Schulden auf* – bankruptcy eats up the debts.⁴⁷⁹

Bethmann looked for help and resorted to the law on bills of exchange. This had been harmonized across Germany with the *Allgemeine Deutsche Wechselordnung* in 1849 (see Chapter 5). Bills of exchange enjoyed an especially rigorous enforcement, the *Wechselstrenge* or *rigor cambialis*. The law upheld this rigour even if the debtor defaulted and creditors, whose claims derived from bills, only counted as unsecured creditors. This meant that bill-creditors could not demand a place in line before secured creditors, but they could still demand that the debtor's person be detained, the *Wechselarrest*.⁴⁸⁰ Bethmann apparently threatened to petition for prison in Kesselstedt's case. His records contain letters, in which the trustee in Trier begged Bethmann 'not to take action against the Count's person'. The trustee pointed to a different dilemma: if Bethmann would indeed force Count Kesselstedt to pay his bills in order to be released from debtor's prison, the Count would only be able to pay with someone else's assets, as the ownership of his entire estate was consigned to his creditors:

As far as the Count's person is concerned, I do not think it would serve your interests if you made his position untenable; he is a benevolent albeit impoverished debtor of yours. Making recourse to your personal contacts with his comrades to this or another purpose is unlikely to yield any benefit, it would probably even disadvantage your hopes for swift repayment.⁴⁸¹

⁴⁷⁹ Kohler, *Lehrbuch des Konkursrechts*, 1891, p. 510; also Falk, 'Die Konkursübel,' 2014, and WILMOWSKY, PETER VON, "Insolvency Law - Its Roles and Principles," in *Dealing with Economic Failure in Historical Perspective*, ed. MARGRIT SCHULTE-BEERBÜHL AND ALBRECHT CORDES (Frankfurt, 2016), pp. 243-260.

⁴⁸⁰ Cf. page 141 and Dabelow, *Ausführliche Entwicklung*, 1801, pp. 529 & 536; Schweppe, *Das System*, 1829, pp. 95-96; TREITSCHKE, GEORG CARL, *Alphabetische Encyclopädie der Wechselrechte und Wechselgesetze* (Leipzig, 1831), Vol. 1, pp.284-289; 'Kann der Wechselgläubiger, wenn er sich in den Konkurs des Wechselschuldners eingelassen hat, den Schuldner auch noch mit Wechselstrenge verfolgen?,' *Blätter für Rechtsanwendung* 2 (1837), pp. 333-335.

⁴⁸¹ Was aber die Person des Grafen angeht, so glaube ich nicht, dass es Ihrem Interesse entsprechen würde, wenn Sie ihm, der jetzt ein gutwilliger, aber Nichts vermögender Schuldner von Ihnen ist, seine gegenwärtige Stellung unmöglich machen würden. Die Benutzung Ihrer persönlichen Beziehungen zu seinen Kameraden zu diesem oder einem ähnlichen Zwecke würde Ihnen daher nicht vortheilhaft, wahrscheinlich aber in Ihren Hoffnungen auf eine baldige Regulierung sehr nachtheilig sein. Bethmannarchiv *Geschäftsakten* W 1-9/ 5 No. 810.

Bethmann's threat proved successful. He was repaid the outstanding 2,000 Guilders in full. The written records remain silent about the exact sources of the money. The case is an example for a creditor who feels wronged by the bankruptcy settlement in a different jurisdiction and takes recourse to a different procedure that promises to be a remedy. Because the law on bills of exchange was harmonized across all German states as of 1849, some creditors and particularly banks might have used it to exert leverage in debt negotiations or even prevent a settlement that did not offer the desired terms. The case shows how security interests (or the lack thereof) as well as the availability of different procedures with different distributional consequences thwarted the likelihood of a settlements.

Under the condition of an ever-increasing scope of economic activity within Germany, this phenomenon undermined local bankruptcy statutes. It also shifted the focus of bankruptcy legislation: while local and municipal bankruptcy regimes had focused on balancing conflicting interests, an increasing number of technically 'foreign' creditors chasing their debtors demanded legislation that made debt-collection swift and efficient.

IV. Strategies of Influencing the Bankruptcy Procedure

a.) Local Agents

Dealing with outward debtors caused transaction costs, starting with the necessity to communicate over wide distances via letter and engaging with a court procedure by proxy. Appointing local agents in turn caused other problems and insecurities, as shown in a case from Haniel's records. Haniel had lent money to Mr. Mahlinger's mining business in Weilburg. Weilburg and Ruhrort, the hometown of the Haniel company, are more than 200km apart. Mahlinger defaulted on a bill of exchange that was due in October 1858. Haniel drew on the help of an agent in Weilburg, Ehrhardt, to inquire about Mahlinger's situation. Ehrhardt wrote to Haniel, that Mahlinger had liquidity problems because he had not yet recovered all that was owed to him. Ehrhardt was confident that Mahlinger would be able to pay if Haniel gave him more time and suggested May 1859 as new deadline. Haniel followed this advice.

On December 14th, Haniel received an unsolicited letter written by a lawyer from Weilburg, informing Haniel that Mahlinger had been sued for fraudulent bankruptcy. The lawyer feared that Mahlinger would attempt to deceive his creditors into a disadvantageous debt-settlement. The lawyer used the letter to offer his services and enclosed a warrant that Haniel only needed to fill in if he wanted the lawyer to represent him in court. Shortly afterwards a second letter arrived from Weilburg, this time from Mahlinger's lawyer:

The current circumstances here are of a curious nature, and I can only emphasize at this time that continuing the customary formal bankruptcy procedure would certainly fail to serve the creditors interests in the present case, given its tedious, circuitous, and sumptuous form.⁴⁸²

This comment alluded to the bankruptcy procedure according to the *ius commune*, that was the default rule for the duchy of Nassau and would thus be applied in Weilburg. There was a kernel of substance in his remarks, for the *ius commune* procedure was regarded as protracted and expensive. Whether or not Haniel believed him is unknown. The lawyer also named a few local lawyers, suited to represent Haniel's interest in court. The author of the first letter was not among them. Haniel was confronted with contradictory information from Weilburg. On the one hand the warning of a fraudulent bankruptcy and the urgent advice not to agree to any settlement proposal; on the other hand the reminder of the cost and duration of a formal procedure, which would further diminish the value of the expected return. Haniel sent an angry letter to his agent Ehrhardt: if not for Ehrhardt's confident letter and suggestion to grant Mahlinger more time, Haniel would have insisted on immediate payment and possibly have applied for foreclosure. 'How can I get my money back? I cannot adequately judge [the situation] (...) I know neither of these two lawyers.'⁴⁸³ He demanded further inquiries by Ehrhardt and firmly requested 'urgent diligence'.⁴⁸⁴

The correspondence highlights those problems that came with long distances: the trust, that a merchant put into his local agent was itself a risky investment; it was hard to see through the

⁴⁸² Die hier obwaltenden Verhältnisse sind ganz eigenthümlicher Art, und es läßt sich vorläufig nur so viel sagen, daß im vorliegenden Falle die Fortführung des dahier im Lande geltenden gewöhnlichen gerichtlichen Concursverfahrens bei der Weitläufigkeit, Langwierigkeit und Kostspieligkeit desselben an und für sich nicht im Interesse der Gläubiger liegen würde (...). HAA No. 66 *Zeche Mahlinger*.

⁴⁸³ Wie kann ich mein Guthaben retten? Mir fehlt das Urteil darüber. (...) Ich kenne keinen der beiden Anwälte. HAA No. 66 *Zeche Mahlinger*, fol. 5.

⁴⁸⁴ 'nachdrückliche Gewissenhaftigkeit' Ibid.

intricacies of a foreign legal system; and it was difficult to verify the information received from the other place – particularly if it was unclear or contradictory. The creditor’s position was thus weakened and he could find himself in a situation in which he was at the mercy of local agents.⁴⁸⁵

In the present case, Haniel subsequently resumed control by casting Ehrhardt aside and taking over the correspondence with local authorities himself. There was a fraction of creditors in Weilburg that proposed keeping the mine as a running business. Haniel acknowledged in a letter, that this might be beneficial to local creditors, but that he was not interested. Yet he also wanted to avoid a lengthy court procedure. He eventually agreed to a settlement, which paid him 40% of his outstanding debt. In April 1859 he wrote a letter to the trustee of Mahlinger’s estate, expressing his consternation:

According to your account, the situation is so destitute, and trusting that you have investigated the state of things thoroughly, and because you allege that another hesitation could entail further disadvantages, I finally agree to the contract, by which Mahlinger pledges to pay me 40%.⁴⁸⁶

The bundle of qualities that businessmen sought in a local agent is summarized in a file from Bethmann’s records. The Bethmann bank had lent money to a factory near Mannheim. After the manufacturer went bankrupt, Bethmann bailed out the factory and became its owner. The intention was to reorganize the business and then sell the facility at a profit. In February 1829, one of Bethmann’s associates remarked in an internal memo to Simon Moritz senior:

Our experience has shown over the course of one year, that it is impossible to manage the business in Käferthal from Frankfurt; rather all dispositions should be left to the discretion of a local manager (...) To this end, we must find a man, who is known to the *Gebrüder Bethmann* and has proven reliability, someone who has the necessary know-how to conduct all calculations and accounting by himself and who can assert his superiority in these matters; someone who is furthermore well educated and intelligent in order to keep the subordinated within the bounds of respect and obedience.⁴⁸⁷

⁴⁸⁵ This is an almost proto-typical principal agent problem and a similar situation is described in VARIAN, HAL, 'Monitoring Agents with Other Agents,' *Journal of Institutional and Theoretical Economics* 146/1 (1990), pp. 153 - 174.

⁴⁸⁶ Nach ihrer Aufstellung steht die Sache so mißlich, und im Vertrauen, daß Sie den Stand der Dinge allseitig geprüft und indem Sie behaupten, daß ein Zögern nachtheilige Folgen bedeuten habe ich mich entschlossen, den Vertrag, demwelchen sich Mahlinger mir gegenüber zur Zahlung von 40% verpflichtet, zu vollziehen. HAA No. 66 *Zeche Mahlinger*, fol. 19.

⁴⁸⁷ Die Erfahrung hat in dem Laufe eines Jahres gezeigt, dass für die Direction des Kaerferthalers Geschäftes von Frankfurt aus nichts geleistet werden kann, sondern sämtliche Dispositionen dem Director der Fabrik überlassen bleiben müssen (...) Es ist daher um diese Stelle ganz auszufüllen ein Mann erforderlich, den die Herren Gebrüder Bethmann von erprobter Verlässlichkeit kennen, der im Stand ist durch

Ideally, the envisaged manager should already have a history with the bank. It was impossible to award the same degree of trust to a complete stranger. Trust had to be built incrementally over long time periods.⁴⁸⁸ It is also noteworthy that the bank was looking for someone who had superior know-how in commercial and accounting matters. They were looking for someone who could not be deluded, particularly with regard to the relatively new industrial technology. Whether or not the Bethmanns found a suitable candidate is unknown; but they sold the factory eventually and it was not their last industrial acquisition.

Finding trustworthy local agents to handle one's affairs in a foreign jurisdiction was a difficult matter. It added to the costs that creditors faced in bankruptcy. Creditors had to monitor their debtor *ex ante*, so as to be prepared for the event of their debtor's insolvency, as well as *ex post*, that is once the debtor had filed for bankruptcy. Yet they also had to monitor their local agents and assess the reports they received from the court procedure.

b.) Increase Aggregate Pool of Assets

Being in control of the communication and the decision-making in the procedure was not the only concern of creditors. Their decisions also depended on the available pool of assets. In bankruptcy, the debtor by definition did not have enough assets to pay all his creditors in full. If it appeared right from the beginning that the pool of assets was insufficient to cover even the costs of the procedure, the case could be dispatched as a petty case and the bad debts could be written off without there being a cause for major conflicts among creditors. Cases in which the security rights of creditors were clear or where the estate's liquidation was relatively easy were similarly not prone to conflict. In many cases, creditors also demanded that bankrupts' wives should surrender their property (i.e. their dowries) in order to increase the overall pool of assets and incline creditors to agree on an amicable settlement. Chapter 7 deals with this phenomenon in more detail.

Geschäftskennntnis alle Berechnungen und Scriptura selbst gut machen und hierin seine Superiorität über jeden in seiner Umgebung zu behaupten versteht; der überdies durch Bildung und Verstand gehoben ist um das untergebene Personal in die Schranken des Respects und des Gehorsams zu halten (...). Bethmannarchiv *Geschäftsakten* W 1-9/ 5 No. 1045, Letter from 24.02.1829.

⁴⁸⁸ LUHMANN, NIKLAS, *Vertrauen. Ein Mechanismus der Reduktion sozialer Komplexität*, 3 ed. (Stuttgart, 1989), pp. 72-85.

It was a different issue with cases where a debtor had considerable – albeit insufficient – assets and where the estate's liquidation posed problems, i.e. if the intact estate was worth more than the sum of its parts. That was the case in the majority of bankruptcies that ended up in court. It was particularly frequent with regard to industrial and mining facilities. For this reason, Saxon and Prussian law enacted special legislation for debt-collection in the mining industry, similar to the special regulation for ship-owners in the Hanse towns.⁴⁸⁹

The conflict arose between those lenders who had an interest in keeping the debtor's business as going concern, and those lenders, who insisted on a swift liquidation by which they possibly diminished the returns of those who preferred reorganization. The exact motives could vary. Lenders with an interest in continuing the debtor's business often regarded it as valuable to the local economy. They were often also unsecured creditors who had not obtained a lien beforehand. Conversely, lenders with a lien often insisted on liquidation to realize their security and opposed the additional effort of administering a remote business.

Starting in the middle of the nineteenth-century, a strategy that was frequently employed with regard to industrial facilities was to turn a debtor's firm into a joint stock company, with the unsecured creditors as shareholders. Shareholders then often had to supply additional capital in order to pay out the secured creditors. This is known today as a debt-equity conversion. The *Labnhütte*, a steel factory in Gießen, to which Franz Haniel's son Hugo had lent money, may serve as an illustrative case.

The *Labnhütte* informed Hugo Haniel in January 1876 that it had stopped honouring its ongoing obligations.⁴⁹⁰ The insolvency occurred after the foundation of the German Empire, but before the bankruptcy law was harmonized in 1877. The relevant jurisdiction was the Grand-Duchy of Hesse-Darmstadt. Hugo Haniel ordered a local lawyer to safeguard his rights in the ensuing procedure.

⁴⁸⁹ Hamburg Neue Falliten Ordnung 1753, Art. 22, *Verordnung wegen einer mehreren Begünstigung der Frachtgelder*, 1766, *ibid.* p. 116; *Königlich-Preußisches See-Recht*, Cap. VI.; cf. overview in: LAMMEL, SIEGBERT, "Die Gesetzgebung des Handelsrechts," in *Handbuch der Quellen und Literatur der Neueren Europäischen Privatrechtsgeschichte II/2*, ed. HELMUT COING (Munich, 1976), pp. 571-744.

⁴⁹⁰ Haniel Archive No. 637 *Konkurs Labnhütte*.

With the votes of the unsecured creditors, the first creditor assembly in February 1876 decided to turn the firm into a joint-stock company. This majority consisted of 18 unsecured creditors, each of whom could claim several thousand *Taler* and together accounted for more than 80% of the firm's debt.⁴⁹¹ Haniel's claim was 'merely' 800 *Taler*. He had no means to influence the decision. The biggest secured creditor was a Prussian credit-cooperative, the *Kur- und Neumärkische ritterliche Darlehenskasse zu Berlin*, with a hypothec worth of 450,000 *Taler*. The founders of the new joint-stock company thus decided to increase the firm's capital stock in order to pay off the cooperative's claim. The report from the creditor assembly closes with the remark that the current liquidity problems were entirely due to the current recession (which would later be called *Gründerkrach*). The managers were confident that the demand for crude iron would resume as soon as the overall business activity was back to normal.⁴⁹² It is noteworthy that the creditor assembly took place in the rooms of the Gießen town hall, which suggests that local authorities, too, had an interest in continuing the facility.

The efforts proved to be futile. Already in August 1876, the joint-stock company went into liquidation. This step became inevitable because legislation for joint-stock companies in Hesse-Darmstadt as well as the newly enacted German Commercial Code prescribed tougher capital requirements. In other words, the threshold for insolvency was lower for joint-stock companies than for other firms.⁴⁹³ Hugo Haniel was back to his original place in the line as an unsecured creditor. A trustee took over the administration of the facility and the secured creditors were repaid as soon as possible.

A year later, Hugo Haniel received another letter from Gießen. The trustee presented a prospective buyer of the facility, who was willing to bid for the claims. He offered 35% of the nominal value of the outstanding debt for Haniel's claim. Haniel agreed.⁴⁹⁴ In this case, a local creditor had waited for the firm to go into liquidation in order to buy up one claim after another at a re-

⁴⁹¹ *Ibid.*, Minutes of the creditor assembly 28th February 1876, p. 2.

⁴⁹² *Ibid.*, Minutes, p. 5.

⁴⁹³ It is arguable whether founding a joint-stock company was an instrument to avoid conflicts between creditors and still effect the firm's liquidation.

⁴⁹⁴ Haniel Archive No. 637, Letter from Hugo Haniel to the estate's trustee 10th October 1877.

duced price and thus take ownership of the factory. The *Labnhütte* indeed survived and continued operations into the 20th century.⁴⁹⁵

Firms with multiple partners faced the challenge of keeping their assets intact if one of their partners left the firm, while the others continued to be in business.⁴⁹⁶ The clear distinction between firm and private assets of partners as drawn by limited liability rules was not available for most of the nineteenth century. Insecurity about which assets belonged to the firm and which to a former partner could diminish the market value and the creditworthiness of a firm. The Bethmann Bank itself is an example. The bank never went bankrupt, however from the early 19th century on it always had multiple partners on an equal footing with the founding family. The bank was in fact re-founded in regular intervals. The firm contracts between partners usually lasted for six to ten years. After this period, the firm was dissolved and immediately re-constituted with new personnel.

The following case took place in 1866. The old partnership *Gebrüder Bethmann*, which had existed between 1824-1832, had suffered losses from the bankruptcy of a Prussian Juncker named Heinrich von Benecke. The bankruptcy procedure paid only 10% of the outstanding debt. The rest was written off in the accounts as lost debt, entered into the *Verlorene Schulden Konto*. In 1832 Bethmann and his associates dissolved the partnership. The ‘dissolving contract’ contained the following provision with regard to outstanding claims:

The new owner takes over all liquid assets without costs or deductions; he endeavours to realize all remaining illiquid claims (...) to this end a special liquidation account is opened, for those items, which are indivisible, which are illiquid, or the value of which cannot be estimated, or which the new partnership refuses to take over because they appear dubious.⁴⁹⁷

Meanwhile in Berlin, other creditors filed a suit against Benecke, which was settled in 1859 (34 years later!) with an agreement between creditors and Benecke’s heirs that paid an additional

⁴⁹⁵ Hessisches Wirtschaftsarchiv, *Industriekultur und Industriegeschichte an Labn und Dill*, Beiträge zur hessischen Wirtschaftsgeschichte Vol. 1 (Darmstadt 2007), pp. 20-24.

⁴⁹⁶ Whether the partnership needed to be reconstituted if one of the partners left the firm was handled differently by local legislations.

⁴⁹⁷ Own translation. German original: ‘Der neue Inhaber wird ferner alle liquiden Gegenstände ohne Kosten oder Abzug übernehmen; er wird für Rechnung der jetzigen Societät die eventuelle Einbringung der illiquiden Ansprüche besorgen (...) Zu diesem Ende wird ein Liquidations-Conto eröffnet, für alle Gegenstände, welche nicht teilbar, nicht liquid sind, deren Wert nicht ausgesetzt werden kann, oder so die neue Societät, als ihr zweifelhaft erscheinend, nicht übernehmen will. (...)’ ISG Ffm Bethmannarchiv GA W 1-9/5 No. 148

6% of the former debt to all creditors, including the Bethmann Bank. Benecke's heirs volunteered to pay another 5% in 1863 and 20% in 1866 in exchange for being acquitted of all further claims. These funds went to the Bethmann Bank in Frankfurt, which was legally a new partnership and different from the former creditor of Benecke. The question arose, whether or not the heirs of those partners, who had quit the Bank in 1832, could demand payment of these additional and unexpected returns from the Benecke case, in which their ancestors had been involved. The bank commissioned Dr. Euler, the bank's lawyer and public notary, to draft an expert opinion. But Euler had no definite answer to the question either. On the one hand stood the 'dissolving contract', stipulating that the newly founded bank should bring in any outstanding debt for the benefit of the old partners. On the other hand was the fact that Benecke's debt had already been written off before the dissolution of the old partnership. A debt that had been written off was different from an illiquid debt. Dr. Euler closed his opinion with a simple advice to the bankers:

A vague contract frequently obfuscates the law and if it is to do with the interpretation of a spurious expression it becomes impossible to predict how a court might judge the case. This offers an opportunity for an out-of-court settlement.

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Following that advice, Moritz Bethmann wrote an internal memo reminding his associates that future partnership contracts should best avoid any ambiguities and include a special provision for the event that a similar case recurred. He warned that the impression should be avoided that the bank operated with ambiguous partnership rules and could be held liable for outstanding debt either by former partners or their heirs. Such an impression could harm the bank's position at the Frankfurt market place. The bank itself often borrowed money to leverage transactions and had the need to assure creditors of its sound finances. The bigger the pool of own assets standing surety for a loan, the 'cheaper money is for us.'⁴⁹⁹

⁴⁹⁸ Own translation. German original: 'Durch eine nicht klare Vertrags-Abfassung wird das Recht nicht selten verdunkelt und wenn es sich einmal um die Interpretation zweifelhafter Ausdrücke handelt, kann man nicht vorhersagen, wie eine gerichtliche Entscheidung ausfallen wird. Hier beginnt der eigentliche Boden des Vergleichs.' Ibid.

⁴⁹⁹ Ibid., letter by Bethmann from 19th March 1869.

c.) Administrative Efficiency

If creditors actively intervened in the bankruptcy procedure and the administration of the bankrupt's estate, they usually faced a couple of management issues. The appointed trustee was either a local creditor, who could potentially connive with the debtor, or it was a lawyer who was appointed by the court and who often lacked the commercial know-how. To the extent that the bankruptcy procedure was a filtering device to distinguish viable from unviable firms, this distinction depended as much on the quality of the accounts as on the efficiency with which the assets were managed and reallocated after the procedure had been triggered. The procedure itself, its costs, duration, and administrative constraints could sometimes push the decision into one or the other direction. Some estates remained under administration for decades, pending lawsuits and conflicts between different creditors could postpone the distribution of value for years and further declined the estate's value. If creditors thought it worthwhile to keep a firm alive or to reallocate some of its assets for a better use, they had to get actively involved and could not rely on the courts.

The Leipzig merchant-banker Christian Gottlob Frege junior adopted a wholesale strategy in this regard in a case that took place in 1810. The weaving mill Rochser & Augustin in Leipzig was bankrupt. Frege was its biggest creditor. The account books showed 19,200 Taler secured debt (of which Frege claimed the biggest share), and 120,000 Taler unsecured debt while the firm's assets were valued at 95,800 Taler.⁵⁰⁰ Frege must have had an interest in obtaining ownership over the mill. He wrote to the appointed trustee, a lawyer named Prentzel, and offered to buy the entire estate and hire Prentzel's services privately for its liquidation:

I shall pay 38,730 immediately (...) You will be liable that the estate brings at least 40,000. (...) I will pay you for your services (a) if it returns 18% you will get 1% of the value of unsecured creditors (...) (b) if the return is higher, you will get half of the surplus (c) if you return less than 18%, you will get 1% of the estate's value as payment (...) ⁵⁰¹

⁵⁰⁰ Sächsisches Staatsarchiv Leipzig (henceforth SStAL) *Bestand Bankhaus Frege* 21021 No. 151.

⁵⁰¹ Ibid. letter by Frege to Prentzel, 26th September 1810: (...) 38,730 zahle ich sofort aus (...) Sie haften dafür, dass die Masse wenigstens 40,000 gibt. (...) Für Ihre Bemühungen gestehe ich Ihnen zu (a) wenn 18% herauskommen, 1% auf die Summa der chirographarischen Gläubiger (...) (b) wenn mehr herauskommt, so erhalten Sie von dem was mehr ist die Hälfte. (c) wenn weniger als 18% herauskommt, so erhalten Sie von mir von der Summe der Masse ein Procent.

The deal was sealed and the Leipzig commercial court approved a settlement contract with the other creditors, who also wanted a quick solution rather than a protracted and costly court procedure. Frege could pay the secured creditors in full, which cost him only 5,000 Taler as he owned a hypothec of most of the firm's immovable property. The unsecured creditors received 14% of their claims, in total 16,800 Taler, for which Frege partly used the firm's liquid assets and remaining cash. An account from after the liquidation shows that Frege in total spent 22,000 Taler but eventually received 38,000 Taler from the firm's liquidation.

Frege exerted a considerable influence on the procedure. He stopped the court procedure and bought the estate in order to dispose of the assets at will. The factory, for which the Bethmann Bank sought a new manager in 1829 (quoted above), was probably a comparable case. The bank had obtained ownership of the firm, restructured the business but left the facility intact and sold it at a later stage, making a profit.⁵⁰² Such a wholesale strategy required financial power on the creditor's side. Forty years later, industrial organisations existed in Germany, the financial affairs of which were so extensive, that a single creditor alone could not exert a meaningful impact.

A Karlsruhe based factory in 1848 exemplifies this problem. Similar to the *Labnhütte* in Gießen, dozens of creditors had to join together in order to restructure the insolvent firm. Both the Bethmann bank and the Franz Haniel Company took part in this process. The factory's financial difficulties were related to the insolvency of a trading house, *Haber & Söhne*, which was based in Karlsruhe and had served as the factory's main financier. *Haber & Söhne* declared their insolvency in 1847. At the beginning of 1848 the owner of the factory, Emil Kessler, wrote to Bethmann, 'that such a facility [i.e. his factory] must not suffer from the insolvency of the mentioned house.'⁵⁰³ He reported to be in negotiations with notables in Baden and the government of the Grand Duchy, which had announced an interest in keeping the firm alive. Bethmann served as a middleman for Kessler's other Frankfurt based creditors. At the creditor assembly,

⁵⁰² Ibid. Fol. 2, notarial contract.

⁵⁰³ Bethmannarchiv Geschäftsakten, W1-9 No. 812, letter by Emil Kessler to Simon Moritz Bethmann, December 1847: [dass] 'ein solches Etablissement [die Fabrik] durch die Verlegenheit des gedachten Hauses in keiner Weise Not leid[e].'

which gathered in Karlsruhe on March 1st 1848, it was disclosed that the firm lacked some 1 Million Guilders in order to continue operations:

On the one hand the factory's continuation cannot be guaranteed without a debt discharge, on the other hand it is certain that creditors will suffer losses if they insist on a formal liquidation in court.⁵⁰⁴

With the support of Baden's government, a new joint stock company was founded. The issue had even been subject of parliamentary debate in the Baden delegates' assembly, where the Minister of the Interior is reported to have said:

What is more, if one grants creditors a few securities, one should also mention the danger they risk if they refuse any arrangements and leave it to the last resort [i.e. the court]. It is well known how protracted such bankruptcy procedures become (...) and the present case is particular because we have to do with three factories that are all connected to each other, but each is located in a different jurisdiction; (...) the banking house, that financed all three factories and thus connects them, and which would have to be dissolved too if those factories were to fall, has another fourth jurisdiction. (...) Creditors will furthermore consider, that the returns from a sale might be disappointing given the present destitute state of our economy. (...) ⁵⁰⁵

One of the conditions under which creditors agreed to found a joint stock company was that the Baden government bought 50% of all shares. For a short period, the survival of Kessler's facility seemed certain. Kessler lost the sole ownership, but was left in a managing position because creditors valued continuity in the running of the company. Time however showed that Kessler himself was part of the problem. At the beginning of 1850, creditors and shareholders convened again and discussed mismanagement of the factory. The Bethmann Bank sent a representative, Mr. Koch, to the general meeting in October 1850 and it appears that the associates had been in touch with other creditors beforehand. Koch wrote back to Frankfurt that every-

⁵⁰⁴Ibid.: Minutes from Creditor Assembly, 17th March 1848, p. 7: Kann einerseits der Fortbestand der Fabrik nicht erhalten werden, wenn sie nicht zu einer allmählichen Schuldentilgung zugelassen wird, so ist andererseits ein großer Verlust auf Seite der Gläubiger als sicher vorauszusehen, wenn dieselben eine gerichtliche Liquidation herbeiführen wollten

⁵⁰⁵Badischer Landtag, *Verhandlungen der Ersten Kammer* (1847/1849) Protokolle Vol. 1, pp. 25-56, online: <http://digital.blb-karlsruhe.de/blbihdl/periodical/pageview/680510> (retrieved 06.10.2016): Im Übrigen wird man den Gläubigern, wenn ihnen einige Sicherheit gewährt wird, wohl auch die Gefahr vorstellen können, welche sie laufen, wenn sie sich zu keinem Arrangement verstehen, sondern es aufs Äußerste ankommen lassen. Es ist bekannt, wie lange oft solche Ganten sich verzögern (...) und hier kommt noch das ganz besondere Verhältniß hinzu, daß diese drei Fabriken in einem sehr wesentlichen Zusammenhange stehen, jedoch in drei verschiedenen Gerichtsbezirken liegen; (...) Das Bankhaus, durch dessen Vermittlung sie die Gelder erhalten haben, das also mit ihnen zusammenhängt, und den Zusammenhang unter ihnen selbst begründet, und dessen Verhältnisse, wenn die Fabriken zum Falle kämen, gleichzeitig erledigt werden müssten, hätte dann noch einen vierten Gerichtsstand (...) Die Gläubiger werden ferner in Erwägung bringen, dass, zumal in der jetzigen so geldarmen Zeit, der Erlös eben auch schlecht ausfallen würde (...).

thing passed amicably and ‘according to plan’, that ‘even Kessler came to accept the inevitable’ and that the general meeting had voted to liquidate the company. The committee charged with organizing its liquidation consisted of a Baden government official, the Bethmann Bank, the Haniel company, and four other creditors. Operations continued under a provisional management. The Baden Government bought the factory for 250,000 Guilders, and promised to reconstitute it as a joint stock company, committing itself to buying shares worth 50,000 Guilders.⁵⁰⁶ This time, the venture met with success. The records in Frankfurt show that the Bethmann Bank remained a shareholder. There are regular reports from shareholder meetings up until the late 1860s. The supervisory board later contained distinguished bankers like Abraham Oppenheim from Cologne and Carl von Rothschild from Frankfurt.⁵⁰⁷

V. Summary and Conclusions

If a borrower defaulted on his debt, minimizing the loss became the primary aim of creditors. Simultaneously, a debtor’s bankruptcy could open new opportunities. If the bankrupt’s estate contained significant assets, reallocating them to a productive use and not impairing their profitability became another concern of creditors. Both minimizing losses and reallocating assets at times could seem irreconcilable. Each creditor could try to minimize his losses individually, while reallocating assets and their profitable liquidation depended on the cooperation between creditors.

Frictions arouse in negotiations if creditors’ interests diverged. Different security and priority rights attributed to respective creditor groups promoted those differences. The more a legal system acknowledged priority rights in bankruptcy, the more difficult the task of finding consensus among creditors became; a secured creditor had little incentive to negotiate in the first place. He could insist on a court procedure and have his security right enforced – provided that the court procedure itself was not so costly that it would render his security interest worthless.

⁵⁰⁶ Bethmannarchiv Geschäftsakten, W1-9 No. 812: Letter by the Baden Interior Ministry to the Bethmann Bank 20th June 1852.

⁵⁰⁷ Ibid.: cf. Letter by Salomon Oppenheim to Baron Carl von Rothschild November 21st 1858; Minutes from the supervisory board of the *Karlsruher Maschinengesellschaft*, October 17th 1859.

Quantitative evidence from appeal cases in the Rhineland and Frankfurt jurisdictions shows that merchants and rentiers provided most of the loans. Rentiers were significantly more often lenders than debtors. Both groups sought to minimize their risk of non-payment by taking liens, therewith setting apart certain assets, which could not be claimed by other creditors. Merchants most frequently lent money to merchants and secured debt by taking movable goods rather than landed property as collateral. Among the issues that were brought before courts, the definition of insolvency and associated issues of partnership and company law together accounted for the largest share of appeal cases investigated for this thesis. The former concerned the distinction between illiquidity and insolvency and the interpretation of legal provisions in French law that distinguished between the 'state' of insolvency and the insolvency procedure. Courts adopted an approach that linked the 'state' of insolvency to a debtor's visible actions rather than the value of his assets on the books. The fact that a borrower could not pay at due date was sufficient to trigger the bankruptcy procedure.

Courts in the *Rheinland* also adopted a more creditor-friendly approach to bankruptcy. Where the old German customary law had spoken of bankruptcy as a legal remedy for debtors, a *Rechtswohltat*, judges applying the French *code de commerce* now conceptualised it as a means of debt collection at the service of creditors. Similarly courts curtailed practices of asset partitioning in different partnership and company forms, and also restricted customs that had given wives the right to retrieve assets from their bankrupt husband's estate. The latter theme will be followed up in the next chapter.

The attitude of these appellate courts chimed with a general demand for better creditor protection. Lenders across Germany were annoyed by legal uncertainty, bankruptcy laws that did not keep pace with industrial development, and by the persistence of some priority rights founded on personal privilege. The situation was an obstacle to lending across polity-boundaries. Yet the industrial development did not necessarily take place in large and established cities with their developed urban markets. The areas of Lahn and Ruhr, or the Saxon hinterland are examples of rural places that were quickly transformed during industrialisation thanks to their endowment of natural resources. Mining, steel-production, and other industrial facilities had to raise capital from

urban areas. If a long distance, a political boundary, or both divided a debtor from his creditor, the latter feared legal uncertainty and protracted negotiation in the event of a default. Evidence from the private records of successful merchants like Bethmann, Frege, and Haniel show that communication with a debtor abroad was complicated and often relied on local informants, whose trustworthiness was never perfectly established.

In some instances, creditors resorted to collectively taking over the entire bankruptcy estate and administered the realization of value themselves instead of leaving the task to a court procedure. As most bankruptcies comprised a plurality of creditors, such a strategy required substantial negotiating with fellow lenders. A cleavage existed between unsecured and secured creditors. But even if this could be bridged, creditors had to be in general agreement with regard to how the bankruptcy estate should be administered under their collective proprietorship and whether or not the business should be kept as a going concern. Frege and Bethmann, two merchant bankers, employed a particular strategy: they bought entire bankruptcy estates from other creditors at a discounted price in order to have full control over the entire pool of assets and effect the liquidation themselves. As the century progressed and as the size of entities in which lenders invested increased, it became increasingly difficult for one single creditor to influence a bankruptcy procedure without joining coalitions. Thus in a few instances, the Bethmann Bank and the Haniel company witnessed the formation of a joint stock company out of a bankrupt firm, comprising all unsecured creditors as shareholders. It is not clear from those few examples whether or not the strategy was on the whole successful. Because joint stock companies were subject to closer scrutiny by authorities in terms of the capital-debt-ratio and because their threshold for insolvency was lower than for other business forms, it is unlikely that the new company form would transform a financially distressed firm into a more sustainable venture.

CHAPTER 7: WOMEN IN BANKRUPTCY

In that minute all that was involved in the word 'bankrupt' rose clearly before her: (...) 'Bankrupt' – that was more dreadful than death (...) 'He is bankrupt,' she repeated. She was so cast down and shaken by the fatal word that the idea of escape, of assistance from her father, never occurred to her.

Thomas Mann, *Buddenbrooks*,
transl. H. T. Lowe-Porter (London 1957), p. 169⁵⁰⁸

I. Introduction

Perhaps the most famous bankruptcy case in German literature, Grünlich's insolvency in Thomas Mann's *Buddenbrooks*, is narrated through the eyes of the bankrupt's wife. Antonie, the daughter of Konsul Buddenbrook from Lübeck, married Bendix Grünlich, a merchant from Hamburg, because he was seemingly of the same social standing as her. Prior to the wedding, Buddenbrook senior made inquiries about his potential son-in-law. Grünlich's business partners were quick to assure Buddenbrook that he was a diligent, industrious young man of solid finances. As it soon revealed, however, he was already in debt when he married Antonie, and had hoped that marrying into a wealthy merchant family from Lübeck would help appease his creditors. His creditors knew about the scheme and joined the farce in front of Buddenbrook senior. But the marriage to Antonie was not enough to recapitalize Bendix Grünlich. The quote above is taken from the scene in which father Buddenbrook travels to Hamburg, cuts his support of his son-in-law after reading the real account-books and takes his daughter back with him to Lübeck.

Not all was lost for Antonie. Parts of her dowry was successfully recovered in the bankruptcy procedure, and she was still able to re-marry later in the book. There are many similar real-life cases to be found in court records all over Germany. They lack the flourish and dramatic details that Thomas Mann added to the case, but they share a concern with the wife's dowry and her

⁵⁰⁸ German original: Erst in diesem Augenblick ging alles vor ihr auf, was in dem Worte »Bankerott« verschlossen lag, (...) »Bankerott« ... das war etwas Gräßlicheres als der Tod, (...) »Er macht Bankerott!« wiederholte sie. Sie war dermaßen geschlagen und niedergeschmettert von diesem Schicksalswort, daß sie an keine Hilfe dachte, auch nicht an eine, die von ihrem Vater kommen könnte.

ambivalent role as her husband's creditor and co-debtor.⁵⁰⁹ A very similar example taken from an actual court case is that of Samuel Gotthelf Wächter, a merchant based in Gorbitz, near Dresden. He filed his bankruptcy on October 24th 1832. According to Saxon law, his wife Anne Rosine could protect her property, notably her dowry, from being seized by her husband's creditors. That confronted Samuel Wächter with a dilemma: if he wanted to make his creditors a credible settlement offer, he would have to do so at the expense of his wife's rights. But if his wife then sued him for her due title, the court could annul the settlement with his creditors. The settlement eventually produced a compromise: Anne reclaimed parts of her dowry under the *ius separationis*, while her other property and the gifts she received during the marriage were ranked in the fourth category of creditors, where she competed with unsecured creditors. The silver cutlery that her stepmother had given her was auctioned and the proceeds were used to compensate secured creditors.⁵¹⁰

Both cases illustrate the issues women faced in bankruptcy. Married women were in an ambivalent position, acting as their husband's guarantors and creditors at the same time. They owned property which could help their partners reach a settlement with their creditors, but as the law gave their husbands fiduciary power over their dowry, the wives also became their spouses' conditional creditors in their own right. Wives faced the dilemma that seizing control of their assets often pushed their husbands into insolvency, while failure to do so likely entailed the loss of their property to the benefit of their husband's creditors.

Husbands faced a conflict of interest between their marital obligations (i.e. administering and taking care of their wives property) and their commercial obligations toward their creditors. Creditors in turn feared that debtors used their wives to shield assets from seizure.

Non-married women were also set apart from male actors by a variety of laws concerning the status of widows, single, and divorced women. Female debtors and creditors experienced bankruptcy cases differently from male debtors and creditors because of their gender. Many con-

⁵⁰⁹ Thomas Mann relied himself on a real-life case from his family. Bendix Grünlich's real name was Anton Elfeld and the files of his bankruptcy are on record in the Hamburg State Archive: StAHH 222-3 *Handelsgericht* B1 Nr. 3357.

⁵¹⁰ StADD 10248 Gorbitz Nr. 33 Samuel Gotthelf Wächter, Folder 3.

flicts were fought over female rights to property in court. In court files concerning such cases, women play an active role, whether as lenders, borrowers, plaintiffs, or defendants.

This chapter aims to describe and shed light on this often overlooked role of women in the bankruptcy regime. It examines specific cases in which women faced the bankruptcy regime. All cases are taken from the evidence of court-records and court rulings assembled for this thesis.⁵¹¹

II. The Special Legal Status of Bankrupts' Wives

A number of different laws curtailed female proprietorship in nineteenth century Germany. Once a woman married, her husband became the legal administrator of her assets. Laws concerning women's property thus focused on the relationship between her and her husband, between her ownership and his administrative rights. Many of the laws and statutes that were in force during the first half of the nineteenth-century dated back to the early modern period.

The legal status of the wife's dowry was a recurring issue for lawmakers. What would happen to these assets if her husband became insolvent? How should the law balance the wife's legal ownership and her husbands de facto power to alienate her property? Should her interests be protected at the expense of creditor rights? These questions came up repeatedly when jurists discussed bankruptcy reform. Just as in other regulatory fields, different jurisdictions designed different solutions to these problems, as can be inferred from Table 14.⁵¹² Most legal regimes treated the bankrupt's wife as a creditor to his estate for a specific bundle of assets.

The first elaborate rank order of creditors in the German *ius commune* was established in Saxon law in the seventeenth century.⁵¹³ Wives ranked second for their dowry in jurisdictions that followed this pattern. In some jurisdictions, like in Bavaria, wives' dowries even ranked first. There were also jurisdictions that made a wife's right to retain her dowry dependent on her hus-

⁵¹¹ See Introduction for a detailed description of sources.

⁵¹² Table 14 is a reproduction of Table 4 in Chapter 3.

⁵¹³ Forster, *Konkurs als Verfahren*. Francisco Salgado de Momoza in *der Geschichte des Insolvenzrechts*, 2009, p. 177-180.

band's occupation (i.e. whether or not he was a merchant) and to whether or not she had offspring.⁵¹⁴

Women's priority for their dowry was called *ius separationis* or *Separationsrecht* and literally meant 'the right to separate'. The wife could sort out what belonged to her and what belonged to her husband before it was the creditors' turn to seize assets. The *Separationsrecht* goes back to a remedy that Roman law made available to wives whose husbands were verging on insolvency (*vir vergens ad inopiam*). The revival of Roman law in medieval Italian cities rejuvenated that institution. It has been argued that, by its propagation, jurists met a demand in developing urban societies of the early modern period for asset shielding legal devices: gradually, these societies stratified according to patrimony and class. Families feared downward social mobility. Constructing a legal priority for the daughter's dowry was a way of hindering the dissemination of the patrimony.⁵¹⁵

Roman law permitted the wife to either reclaim her dowry or to lay claim to an equivalent amount of her husband's assets. This helped women to protect their dowry and gave them the necessary legal means to defend their claim against her husband's creditors.⁵¹⁶ Renaissance jurists, who had revived the Roman jurisprudence, maintained that a wife should be able to provide for herself by taking physical control of her husband's goods if he fell into insolvency during marriage.⁵¹⁷ Jurists called this priority a tacit hypothec, *stillschweigende Hypothec*.⁵¹⁸ It was called 'tacit' because they were established by law rather than by a notarial deed or by contract.

By the beginning of the nineteenth century, jurists and practitioners regarded tacit hypothecs as an impediment to trade and commerce because, contrary to normal hypothecs, information about tacit hypothecs was not publicly available unless the creditor knew a debtor's circumstances in detail. Thus in a regime with tacit hypothecs, lenders faced uncertainty as to the extent to

⁵¹⁴ WOLFF, 'Das Konkursverfahren in Frankfurt am Main,' *Zeitschrift für Gesetzgebung und Rechtspflege in Preußen* 1 (1867), pp. 166-189., p. 181; Lübeck Stadt-Recht, 1798, Lib. I, Tit. 5, Art. V; Neue Falliten-Ordnung, 1823, Art. 30.

⁵¹⁵ KUEHN, THOMAS, *Law, Family, and Women: Toward a Legal Anthropology of Renaissance Italy* (Chicago, 1991), Chapter 8.

⁵¹⁶ KIRSHNER, JULIUS, "Wives' Claims against Insolvent Husbands in Late Medieval Italy," in *Women of the Medieval World: Essays in Honour of John H Mundy*, ed. JULIUS KIRSHNER AND SUZANNE WEMPLE (Oxford, 1985), pp. 256-303.257.

⁵¹⁷ *Codex Iustinianus* Liber 5 Tit. 12 No. 29 in: MOMMSEN, THEODOR et al., eds., *Corpus Iuris Civilis*, 3 vols., (Hildesheim, Berlin, 1889-1902)

⁵¹⁸ Dabelow, *Ausführliche Entwicklung*, 1801, p. 243-244.

which they could lay claim to a debtor's property without being surpassed in bankruptcy by the wife's tacit hypothec.⁵¹⁹

In 1724, Saxony made an attempt to abolish tacit hypothecs altogether. Wives who wanted to have priority to their assets in their husband's bankruptcy could only demand separate compensation if they had obtained a hypothec through a court ruling.⁵²⁰ If a woman wanted to have security for the assets she had brought into the marital community, she needed to sue her own husband in court in order to receive a ruling that granted her collateral worth the value of her dowry. She had to do this before her husband had filed for bankruptcy, which was problematic.⁵²¹ Before filing for bankruptcy a husband may have, to all intents and purposes, been doing well, in which case there was no objective reason for her to seek security.

Alternatively, if a husband had liquidity problems for some time before filing for bankruptcy, his wife's lawsuit would be viewed as an act of betrayal, and risk triggering official investigations into his financial situation.⁵²²

The Prussian *Allgemeine Gerichtsordnung* set further boundaries for the old *Separationsrecht*. The law specified that the wife could only lay claim to the assets that she had brought into the marriage and that were still existent *in natura*, i.e. movables that were still physically present.⁵²³ The wife could only lay claim to land if her title stemmed from the time before the marriage and was recorded in the local land registry.⁵²⁴ She became creditor in the 4th rank of creditors, below secured creditors, for the value of any original property that was not physically present any more. Loans advanced to her husband were located in the 5th rank, as long as she had not charged interest.⁵²⁵

⁵¹⁹ On the question of publicity for hypothecs in general see: Stolleis, *Das Bayerische Hypothekengesetz von 1822*, 1976, p. 251.

⁵²⁰ Saxon Law cf. Lünig, ed., *Codex Augusteus*, 1724, Add. Tit. 43, Column 2483: 'daß weder einem Ehe-Weibe noch dem Fiscus noch auch demjenigen, so zur Erbauung und Erhaltung eines Hauses oder Gutes etwas dargeliehen, hin für ein ius praelationis oder auch nu rein ius reale zustehen solle, wenn sie nicht deßwegen eine gerichtliche Hypothek constituieren lassen.'

⁵²¹ Once the bankruptcy procedure was triggered, no individual law suits could be filed against the debtor, cf. Chapter 3.

⁵²² Insolvency Proceedings *ex officio*, see Chapter 3. This particular case refers to a law, printed in Lünig, ed., *Codex Augusteus*, 1724, Add. Tit. 51.

⁵²³ AGO Tit. 50, §§ 312, 313.

⁵²⁴ AGO Tit. 50, § 320.

⁵²⁵ AGO Tit. 50, §§ 406 and 433; once she had charged interest, she was treated as an unsecured creditor.

The French *Code civil*, which was in force in the western areas of Germany, provided three different arrangements for matrimonial property rights. Couples could decide whether they wanted to live in separation of goods, conjugal community of goods or in the *régime dotal*.⁵²⁶ In her husband's bankruptcy, the wife's property was treated according to the rules laid down in the bankruptcy code. The 1838 law stipulated that a bankrupt's wife could retain immovable property if it had belonged to her already before the marriage. Property that was bequeathed to her during the marriage was treated analogously as having always been in her ownership.⁵²⁷ For acquisitions made during the marriage the deed of sale had to state explicitly that they had been purchased with the wife's own money. Otherwise the legal presumption was that her husband financed new purchases.⁵²⁸ Any immovable property the wife had brought into the marriage she could retain in bankruptcy if it was still physically present and if she could prove her ownership by deeds and other accepted documents.⁵²⁹ The wife could not claim money that she had expended in order to pay for her husband's debts.⁵³⁰ Though Article 2135 of the French civil code gave women a (tacit) hypothec on their husband's estate equivalent to the value of their property, in the case of bankruptcy it applied only to the wife's movables that had been part of the dowry. If her husband was a merchant, the hypothec was restricted to the property he had owned before the marriage, thus excluding all new acquisitions.⁵³¹

While a women's entitlement to recovering her dowry in her husband's bankruptcy was enforceable in most German jurisdictions, the extent to which a husband could dispose of his wife's assets during the marriage and whether or not she could hold him liable for his actions remained open to debate. It was generally accepted that the wife lacked any legal capacity to alienate or transform any of her property without her husband's consent.⁵³²

⁵²⁶ *Code Napoléon: Édition seule officielle pour le grand-duché de Berg* (Dusseldorf, 1810) [henceforth Code Civil], Art 1540 et seqq.

⁵²⁷ *Loi des Faillites de 1838*, Art. 557, 558 in: De Saint-Joseph, *Concordance*, 1851, [henceforth *Loi des Faillites de 1838*]

⁵²⁸ *Loi des Faillites de 1838*, Art. 559.

⁵²⁹ *Loi des Faillites de 1838*, Art. 560.

⁵³⁰ *Loi des Faillites de 1838*, Art. 562.

⁵³¹ He had to be a merchant either at the day of marriage or must have become one in the year following the marriage: *Loi des Faillites de 1838* Art. 563; Code Civil Art. 2135.

⁵³² HOLTHÖFER, ERNST, "Geschlechtsvormundschaft. Ein Überblick von der Antike bis ins 19. Jahrhundert," in *Frauen in der Geschichte des Rechts: Von der Frühen Neuzeit bis zur Gegenwart*, ed. UTE GERHARD (Munich, 1997), pp. 390-451.

Table 14 Rank Order of Creditors

	Saxony	Prussia 1795	Prussia 1855	Bavaria	Baden
1st	Court Costs, Grain Loans, Funeral Costs, Salaries, Land Tax	Court Costs, Taxes, Credit-Corporations, Deposits, Firm-Partners	Third party property, goods bought on commission	Goods bought on commission, Wife's dowry, Third party property	Court costs, Funeral costs, salary, alimentation for family, outstanding taxes
2nd	Wives and state if obtained a priority right by court sentence, building loans and loans for land acquisition	15 rights, e.g. Borrowed goods, goods bought on commission, wife's dowry, Fideicommisses, loans for textile manufacturers, loans for bread and grain	Immovables and deposits, loans to military, rent, transportation (railway and post)	feudal fees	Privileges on movables: rent, deposits, transport costs
3rd	Secured Creditors, Mortgagees, Deposit Holders	14 rights, e.g. Fire insurance, Onera publica et communia, funeral costs, employees, school fees, transport costs, rent, alimentation for family	Costs of bankruptcy administration and court	1st class: Salary and outstanding taxes	Mortgagees
4th	"Chirographarii" = Unsecured Creditors	mortgagees	land tax, salaries, mortgagees	2nd class: Mortgagees	Tacit mortgagees
5th		11 rights, e.g. Arrears of oneribus communibus, Peculium of children, Equipagegeld, building costs	Arrear taxes, church taxes, funeral costs, children and wives (except for merchants)	3rd class: deposits, rent, accommodation	Unsecured creditors
6th		12 rights, e.g. Heirs of wife, Lucra nuptialia, overlords in bankruptcy of their servants, estates in bonis curatorum, Pia corpora etc., privileged factories	Everyone else	4th class: Children and minors, wife, bills of exchange, trusts	
7th		14 rights, e.g. Mortgagees that haven't been compensated in 3rd class, loans without interest, study and school fees, court fees, bills of exchange, loans to manufacturers		5th class: Unsecured creditors	
8th		Unsecured creditors, everyone else			

Table 14 (continued)

	Hesse-Darmstadt	Rheinland	Frankfurt	Hamburg	Bremen	Lübeck
1st	Court costs, outstanding taxes	Court costs, funderal costs, salary, subsistence, rente	Third party property, salary, rent	Funeral costs, public duties, rent, salary, accountant, workers, accommodation, children, pirates-insurance	Third party property, insolvency costs	Rent, funeral costs, health service, accommodation
2nd	Mortgagees	Wife and children if they have a security obtained by court ruling	Mortgagees	Goods bought on commission, wife's dowry children	Mortgagees	City Debt
3rd	Funeral costs, health costs, salary, taxes	Mortgagees	Wifes of merchants	1st class: Senior secured creditors	Rent, funeral costs, salary, health, public duties	Children
4th	Children, wife's dowry	Chirographaires, unsecured creditors	Outstanding taxes	2nd class: Junior secured creditors	General and specific securities	Wife's dowry if she has no children
5th	Unsecured creditors, everyone else		Tacit mortgages	3rd class: Unsecured creditors	Everyone else	Mortgagees
6th			Everyone else			Everyone else
7th						
8th						

Within German jurisdictions that employed French law, women could not claim compensation if their husband had used assets that had originally been part of the wife's dowry in order to pay for his own debts. That was the understanding of the higher appellate court in Cologne, which offered the authoritative interpretation of French law within the German territories.

In December 1858 the court of appeal in Cologne ruled in the case of Carl Gustav and Caroline Bahns. When the two had married in 1836, their prenuptial agreement had limited the conjugal community of property to goods attained during the marriage. Property that dated from the time before marriage remained exclusively in the hands of its original owner. Carl Gustav went bankrupt in 1855. During the procedure, Caroline claimed 1,496 *Reichstaler* that her husband owed her because he had allegedly sold and pledged assets of her property. The appointed trustee fought the claim in court, arguing that Caroline could not make these claims unless the conjugal community of goods were terminated:

As long as the conjugal community of property lasts, the husband retains the right to administer his wife's property and may enjoy the usufruct thereof; if *in casu* the wife retrieves her goods from her husband with one hand, she would have to return them to him with the other, and we would be stuck in circular reasoning (...) ⁵³³

Caroline's lawyer responded that the fact that the husband had declared bankruptcy 'fundamentally changed the situation' because:

(...) the claim now is not directed against the husband but against the bankruptcy estate which is under the collective administration of her husband's creditors; she [the wife] is not currently demanding to be paid out of the estate but merely to be admitted to the list of creditors; the measure would in any case be necessary in order to prevent that the estate be distributed and exhausted without the wife's interests having been protected in the slightest (...) ⁵³⁴

The court sided with the trustee and declined Caroline's request. Similar views can be found in a number of other decisions in appeal cases. Though the wives of bankrupts had the

⁵³³ (...) Der Ehemann behalte nämlich, so lange die Gütergemeinschaft bestehe, das Recht der Verwaltung des Sondergutes seiner Frau und des Genusses der Revenüen davon; wenn daher in casu die Frau mit der einen Hand ihre Reprisen vom Manne bezahlt erhalte, so müsse sie solche mit der anderen demselben wiedergeben, so daß also ein ganz frustratorischer Cirkel gemacht werde (...) Aus: *Archiv für das Zivil- und Kriminalrecht der Königlich-Preussischen Rheinprovinzen* Vol. 54/1 = N.F. Vol. 47/1 (1858), p. 149.

⁵³⁴ (...) ändere sich die Sachlage gänzlich durch das Falliment des Ehemannes; jetzt werde nicht gegen ihn, sondern gegen die Masse der Gläubiger die Forderung der Frau festgestellt; sie verlange zur Zeit keine Auszahlung, sondern Admission zum Passiv-Status des Falliments; diese Maßnahme sei in allen Fällen auch schon als konservatorischer notwendig und gestattet, da sonst die ganze Masse erschöpft werde, ohne daß die Frau für ihre Rechte den mindesten Schutz erhielt. (...) Ibid.

enforceable right to reclaim the remaining dowry from the estate before secured creditors were paid, there was little they could do to protect other pieces of property, especially from being used by their husbands to pay for debts. Husbands were fully entitled to administer their wives' property. Even if they misspent or lost any of this property, courts would not acknowledge any claim brought forward by wives in their husband's bankruptcy.

The wives' *Separationsrecht* was limited even further toward the second half of the nineteenth-century, as in the Prussian *Konkursordnung* from 1855. In the original draft § 62 had given wives the same priority as children and other persons in the bankrupt husband's custody. The proposal met resistance in the committee that drafted the final version. According to Theodor Goldammer, who assembled the legislative documents in his commentary on the 1855 law, the merchants in this committee threatened to veto the entire draft if § 62 were not dropped.⁵³⁵ They argued that the 'nature' of marriage demanded that wives shared their husbands' destinies:

If she enjoys the benefits [of marriage], she must also bear the disadvantages. The marital relationship actually called for a complete communion of goods among spouses; the law already privileges the wife if it acknowledges her separate property and counts her as creditor. The immunity for wives offends the natural sense of justice (...)⁵³⁶

In the law as it came into force, the reformulated § 88 reads:

The bankrupt's wife may keep from other creditors only: (1) the movable and immovable assets in her property, including pending claims and shares payable to bearer, which she owned already before entering the marriage (...) (3) bedding, underwear, and garments that were given to her by her husband and were meant for her personal use.⁵³⁷

The dowry was not mentioned any more. The following article, § 89, even explicitly stated, that the wife was not allowed to lay claim to any land owned by her husband. Property that she

⁵³⁵ Goldammer, *Kommentar und vollständige Materialien zur Konkurs-Ordnung vom 8. Mai 1855*, 1858, p. 203.

⁵³⁶ *Ibid.*, own translation, German original: Genieße sie die Vortheile desselben [des Ehestandes], so müsse sie auch die Nachteile mit tragen. Das eheliche Verhältniß erfordere eigentlich eine vollständige Gütergemeinschaft unter den Eheleuten; es enthalte danach schon eine Begünstigung der Frau, wenn sie in die Kategorie der Gläubiger des Mannes gestellt wird. Die Vorrechte der Frau verletzten das natürliche Rechtsgefühl (...).

⁵³⁷ *Konkursordnung für die preussischen Staaten vom 8. Mai 1855 nebst den darauf bezüglichen Gesetzen und Verordnungen: Amtliche Ausgabe* (Berlin, 1855) [henceforth *Konkursordnung 1855*] p. 231-232: Die Ehefrau des Gemeinschuldners kann, der Gläubigerschaft gegenüber, als ihr Eigenthum nur in Anspruch nehmen: (1) die beweglichen und unbeweglichen Sachen, einschließlich der ausstehenden Forderungen und der auf den Inhaber lautenden Papiere, welche die Ehefrau schon vor Eingehung der Ehe eigenthümlich besaß (...) (3) die der Ehefrau von dem Gemeinschuldner während der Ehe zugewendeten, zu ihrem persönlichen Gebrauch bestimmten Betten, Kleidungsstücke und Leibwäsche.

had brought into the marriage, whether as a dowry or as a loan, was not to be shielded from creditors by special laws. Contemporary jurists were convinced that it sufficed to admit women into the status of an ordinary creditor for the above assets. They argued that a women who did not trust her husband with the administration of her property could always turn to the court and petition to be given collateral for the value of her belongings. All she had to do was to sue her husband. 'It is solely her duty to take the necessary precautions to secure her goods, and taking collateral will be enough security to this end.'⁵³⁸

III. (Married) Female Debtors

a.) Descriptive Statistics

Women lacked full legal rights everywhere in nineteenth century Germany; they were not considered full citizens. Though women had ownership, men could freely dispose of their wives' property. Only widows and spinsters had more freedom in this regard, if they had not been given a legal guardian. Women did, however, have the capacity to appear in court.⁵³⁹ Cases in which women appear as debtors make a share of 10% of the sample of bankruptcy cases from the appeal courts in Lübeck and Cologne as well as the collected archival material from Dresden and Leipzig.⁵⁴⁰ In the records from Hamburg and Bremen, there were female debtors in between 5% and 12% of bankruptcy cases. The following sections summarize the quantifiable data that can be extracted from these cases.

⁵³⁸ Goldammer, Kommentar, p. 201, quoted passages from *Motive zu den von dem Revisor vorgelegten Entwürfen des materiellen Pfand- und Hypothekenrechts (...) und der Prioritäts-Ordnung*, Vol. 2 (Berlin, 1829), reprinted in: Schubert, ed., *Gesetzrevision*, 1990

⁵³⁹ This capacity was not unanimously accepted. Local customary laws often demanded that the husband or a legal guardian represented the wife in court. Nevertheless, historians have shown that – by and large – women actively used courts and legal procedures to assert their property rights; cf.: WESTPHAL, SIEGRID, "Frauen vor den höchsten Gerichten des Alten Reiches: Eine Einführung," in *In eigener Sache. Frauen vor den höchsten Gerichten des Alten Reiches*, ed. SIEGRID WESTPHAL (Cologne, Vienna, Weimar, 2005), pp. 1-17; CARIUS, HENDRIKJE, *Recht durch Eigentum. Frauen vor dem Jenaer Hofgericht 1648-1806* (Munich, 2012), p. 12.

⁵⁴⁰ For a detailed description of the samples see Introduction and Appendix A.

Table 15 Women in Database of Appeal Cases

(Rheinland, Frankfurt, and Saxony 1818-1870)

	Entire Database (N=292)		Women (N=28)		Single Women (N=14)	
	Mean	Median	Mean	Median	Mean	Median
Debt*	15386,73	3353	8958	4563	12808,5	4825
Duration in months	28,83	15,64	27,02	17,53	44,28	26,81

Litigant was female: 18

Litigant belonged to family: 12

Claims based on Bill of Exchange 2

Amicable Settlements: 4 (all of which were single women)

* The average amount of debt is given in *Taler Preußisch Courant* from 1843, from Denzel, *Handbook of World Exchange Rates, 1590-1914* (Farnham, 2010), pp. 197, 242, cf. Exchange Rate Table in Appendix A.

Table 15 gives the mean and the median for the amount of debt the duration of cases in Saxony, Frankfurt, and Rheinland. It further distinguishes between the overall sample of female debtors and a special group of single filing women.⁵⁴¹ In these latter cases, there is no indication of a husband; some of these women are explicitly labelled ‘divorced’ or ‘widowed’. Half of all female debtors were single filing women. Section 5 of this chapter will deal in greater detail with single women in bankruptcy.

The bottom of Table 15 gives some further information that could be retrieved from court files. In 18 out of 28 cases, the litigant that brought the case to court was female as well, and the majority of these female litigants belonged to the extended family. There were only two claims made on the basis of a bill of exchange. There were four amicable settlements between a female debtor and her creditors, all of which were reached by single filing women.

⁵⁴¹ The term ‘single filing’ is taken from Sullivan, Warren, and Westbrook, *As We Forgive*, 1989, (cf. footnote 184), p. 149.

Table 16 Female Debtors in the Hamburg Records

	Commercial Court* (1850-1870) N=29	Hamburg Merchant Guild* (1818-1837,1850-1870) N=428
	Mean	Mean
Duration	35,79	
Debt**	15974,78	
Creditors	40	
Recovery	40,43	23,3
company	4	61
	Occupations	Status
	Service 4	widows 214
	Shop-Keeper 11	divorced 18
	Merchant 7	single 145
	Rentier 1	missing 51
		discharge 100
		higher court 72
		lower court 189
		bankruptcy 167

* The left-hand column reports information from the fonds of the Hamburg Commercial Court in the Hamburg State Archive StAHH 222-3 B2; the right-hand column reports information taken from the records of the Hamburg merchant guild or *Commerzdeputation*, in *Commerzbibliothek* S599 122 a-d blau.

** The average amount of debt is given in *Mark Courant*, the local Hamburg currency, cf. Denzel, Handbook, 2010, p. 191 and Appendix A.

In the Hanse towns, the share of female debtors in formal bankruptcy proceedings was lower. Among the formal court proceedings that were conducted at the Hamburg commercial court, there was only 2.9 % of the sample that involved a female bankrupt. The records for the out-of-court settlements at the merchant guild show a slightly stronger presence of women, with 4.9 % of the sample for the same time period. The highest share of female debtors was recorded at the Bremen courts, where 12.5 % of the sample were filed between 1847 and 1879.

Table 16 summarizes the quantifiable information from the Hamburg records. The left-hand-side of this table presents quantifiable data from formal court proceedings.⁵⁴² With regard to duration, female debtors did not deviate from the average of the overall sample. A case would usually last for 35 months, roughly three years. The average amount of debt was 15,900 *Mark Courant*, which was similar to the sum owed by male non-merchants, while male merchants had an average amount of debt of 35,400 *Mark Courant* (Hamburg's Currency). As far as their occupations are given, female debtors were predominantly part of the mercantile community. There is a significant difference between women and men as far as the repayment rate is concerned. For female debtors, the average repayment rate was 40.43% of their debt, which concurs with the legally prescribed threshold for mandatory settlements.⁵⁴³ Male merchants had an average repayment rate of 9.5%, while non-merchants repaid 13.75%. This data suggests that female debtors were either capable of realizing more value in the liquidation of their business, or they had a lower debt-to-assets ratio in the first place.

This phenomenon is also present in the sample of out-of-court settlements, but is less marked here. Data for this sample of cases is on the right-hand side of Table 16. The average repayment rate for female debtors was 23.3%, again over the average value of male debtors, who repaid ca. 15%.

Records of the merchant guild also give information about the status of these women. Record keepers distinguished between widowed, divorced, and single women. Half of all female debtors were widows. Single women account for a third of the sample. Only about 4% of the women are recorded as 'divorced'. No information is given in 12% of the cases.⁵⁴⁴

After reaching an out-of-court settlement, creditors in Hamburg often reserved the so-called *Nachmahnungsrecht*. That meant that they discharged the debtor of parts of their debt for a certain period of time, but retained the right to lay claim to their future income.⁵⁴⁵ There is hard-

⁵⁴² For the difference between formal court proceedings (*Insolvenzverfahren*) and the out-of-court settlements (*Senatskommission* and *Dienverfahren* respectively), see Chapter 4.

⁵⁴³ Neue Falliten Ordnung, Article 50 (1).

⁵⁴⁴ This could suggest that these were married women. Unfortunately we have no means to test this conjecture.

⁵⁴⁵ Neue Falliten-Ordnung, Article 105 (2) and (6); see Art. 'Nachmahnung', in *Deutsches Rechtswörterbuch*, Vol. IX, column 1216.

ly a difference between female and male debtors in this respect. Creditors discharged only about 3 % of cases, whether they involved men or women.

Women did not have the same access to the legal system as men. Only 16% of the female debtors had their case handled by a *Senatskommission*, overseen by the commercial court. The majority of women (44%) were referred to the procedure known as *Dieleverfahren* for cases deemed as ‘petty’, or to the formal court proceedings (39%).

Table 17 Women in the Bremen Court Records

N=620

	Untergegericht N=555 (89.5)*	Obergericht N=65 (10.5)*
Widows	368 (66.3)**	24 (36.9)**
Company	16 (2.9)	10 (15.4)
Procedure:		
<i>Bequest</i>	320 (57.7)	22 (33.8)
<i>Bankruptcy</i>	114 (20.4)	4 (6.2)
<i>Debit</i>	55 (9.9)	27 (41.5)
<i>Administration</i>	20 (3.6)	-

* percentage relates to the sample size of female debtors N = 620

** percentages in the rest of the column relate to the sample size of female debtors at this particular jurisdiction as given above.

Bremen had introduced a new bankruptcy law in 1841, which offered debtors and creditors four procedural options. The frequency with which female debtors in Bremen went through any of these procedural options is given in Table 17 in absolute numbers, with percentages in parentheses. Similarly to the cases in Hamburg, the majority of female debtors in Bremen filed their bankruptcy at the lower city court. Widows accounted for more than half of these cases. Only 10.5% of the 620 female debtors were admitted to the jurisdiction of the *Obergericht*.⁵⁴⁶ This sub-sample had a smaller share of widows (37%) and a bigger share of women who owned a company (15%), while only 3% of the female debtors at the lower court owned a company.

The majority of female debtors at the lower city court filed for a so-called *Nachlasskonkurs*. These were cases of women whose deceased husbands had been so indebted, that their widows declined their bequests. Most of them asked to be acquitted from any claims their husbands' creditors could lay on their property. They freely surrendered all their inheritance to their hus-

⁵⁴⁶ For differences between the two jurisdictions see Chapter 4.

bands' creditors in exchange for a discharge. About a fifth of the female debtors at the lower court went through formal bankruptcy proceedings themselves. In almost 4% of the cases, women were put to an *administration*, that is to say they were assigned a legal guardian by the court because a judge regarded them unable to handle money on their own.⁵⁴⁷ Only 10% of the cases were admitted to a *Debitverfahren*, which usually ended in an out-of-court settlement. This picture changes if we look at the jurisdiction of the higher court. There, only a third of the filing women asked for an acquittal from their deceased husband's debts. The biggest group (41.5%) was admitted to a *Debitverfahren* and only 6% of the cases entered formal bankruptcy proceedings. The rest were referred to the lower court due to the insignificance of their assets.

We can infer from this sample of appeal cases that women more frequently turned to family members if they wanted to borrow money. Litigants in the cases of female debtors often belonged to the debtor's extended family. Records from the Hanse towns reveal two important differences between male and female debtors: firstly, female debtors show higher repayment rates than male debtors, and secondly, female debtors were less likely to be admitted to a procedure at the commercial court and reach an out-of-court settlement. As 'petty cases', they were disproportionately referred to the jurisdiction of the lower court. The sample of female debtors from those two cities furthermore consists of a large share of widows. This latter finding points to the economic vulnerability of widows at the time.

b.) An Intra-Family Co-op?

The statistics above relate to cases in which women autonomously filed for bankruptcy. Far bigger was the number of women who engaged with the bankruptcy regime because they were married to a bankrupt borrower. Roughly 45% of all cases in the assembled datasets have an additional entry after the debtor's name: '...and wife.' Whether the other 55% were all unmarried is unknown.⁵⁴⁸

⁵⁴⁷ Senat Der Freien Hansestadt Bremen, 'Verordnung,' 1846, §§59-60, 258.

⁵⁴⁸ Data from KRAUS, ANTIJE, ed., *Quellen zur Bevölkerungsstatistik Deutschlands 1815-1875*, (Boppard a. R. , 1980) suggests a higher proportion of married men for various German states, which was furthermore increasing over the course of the century.

For most women, their property consisted in the dowry they had brought with them. As described above, this was subject to special regulation and the attention of legal scholars. Regardless of whether or not an individual state's bankruptcy regime granted the wife immunity in her husband's bankruptcy for the amount of her original dowry, her property played a role with regard to four issues: (i) her wealth could affect her husband's creditworthiness in the eyes of lenders. If the husband then went bankrupt (with or without his wife's prior attempt to bail him out), the issue arose of (ii) whether or not the wife was able to use her property as leverage in settlement negotiations, e.g. by offering to pay a certain share of the debt. Within settlement negotiations, an important issue was (iii) her legal position vis-à-vis other creditors: was she as wife conjointly liable for her husband's business debts? Or did the law regard her as ordinary creditor to her husband's estate as far as her property was concerned? If the latter was the case, creditors feared that (iv) her husband could have transferred and assigned assets to her prior to bankruptcy in order to shield them from creditors.

The formal doctrines of the law protected a wife's dowry. Nonetheless, retrieving dower property was practically very difficult for women. It is likely that this happened only in a minority of cases. Husbands could use such property prior to bankruptcy in order to pay off debt. Despite the special protection for dowries in the case of bankruptcy, husbands were free to dispose of it (almost) at their will outside of bankruptcy. Similarly, the wife could relinquish her legal priority, the *Separationsrecht*, by co-signing debt-contracts with her husband. Sometimes creditors explicitly demanded that a wife signed a guarantee for her husband and that she offered her dowry to cover his debts.⁵⁴⁹ The marital relation was always also an economic relation.⁵⁵⁰ Throughout the nineteenth century the decision to marry was also partly a business decision, with husband and wife becoming a property sharing duality; a businessman could boost his creditworthiness simply by signalling that his wife was wealthy. By the same token, this turned wives into business partners.

⁵⁴⁹ That is what is contained in the section, that regularly appears in bankruptcy laws, that a woman who volunteers to pay for her husband's debt is assumed to have done this with her husband's funds and cannot lay claim to his bankruptcy estate afterwards for the amount she paid, see above section 2 on French and Prussian law.

⁵⁵⁰ Some have argued that it has always been primarily an economic relation, cf. BRONFENBRENNER, MARTIN, 'A Note on the Economics of the Marriage Market,' *Journal of Political Economy* 79/6 (1971), pp. 1424-1425.

If a wife had successfully shielded her dowry free of pledges and obligations, she often found herself in a position to decide whether or not her husband could reach a settlement with creditors in bankruptcy. Chapter 4 already recounted a case in which the wife's decision to retain her property pushed her husband into insolvency. This was not particular to the Hanseatic bankruptcy regime. The industrial company *Ambronn & Schreiber* based near Dresden experienced financial difficulties in the late 1850s. Their liquidity problems had to do with the 1857 crisis that affected bill markets everywhere in Germany. Many bills in circulation could not be cashed in or discounted. In February 1858, two months after the climax of the crisis in Hamburg, David Schreiber wrote to the Saxon Ministry of the Interior:

Our insolvency is largely the result of derelict bills on Hamburg, while we are also relieved about the well-advised and timely measures in Hamburg, which supported all those houses, with which we had credit-relations, and enabled them to compensate their creditors almost to the full amount.⁵⁵¹

Schreiber nevertheless asked the ministry for a loan of 25,000 Taler. Merely keeping the textile factory running cost the company 5,000 Taler per week. It was necessary to keep the factory in operation if the owners were to regain the ability to honour the company's obligations. Schreiber had already submitted a settlement proposal to creditors, in which he asked for a debt moratorium in exchange for a down payment of 12,000 Taler.

The ministry advanced the loan, but settlement negotiations dragged on for months. In the first draft for a settlement contract, dated the 11th January 1858, there is no word about the partner's wives. In the final settlement deed, dated the 11th May 1861, § 6 decrees with regard to Ms Schreiber and Ms Ambronn:

§ 6 The matrimonial property of Ms. Johanna Julianen Schreiber, born Fischer, of 5,195.20 Taler and Ms. Louisen Ambronn, born Kaufmann, of 9,198.19 Talern, is to be reduced to the amount of 3,000 and 4,000 respectively for the gentlemen creditors' benefit, and the remainder will be listed among the ordinary creditors (...)
b) the creditors and Ms. Ambronn further agree and declare by virtue of a formal transfer of rights that she [Ms. Ambronn] may claim all debts owed to the company Ambronn & Schreiber by foreign and overseas debtors in so far as

⁵⁵¹ Unsere Zahlungseinstellung ist hauptsächlich durch nothleidende Wechsel auf Hamburg herbeigeführt worden, indessen verdanken wir es dem schonenden, umsichtigen und gerechtmütigen gerichtlichen Einschreiten in Hamburg, dass alle Häuser, bei welchen wir kredirt sind, aufrecht erhalten und in den Stand gesetzt worden sind ihre Gläubiger ziemlich vollständig zu befriedigen. HStADD 10736 *Ambronn & Schreiber Handelskrisis*, fol. (1)

these have, on the May 11th 1861, not yet paid, amounting to some 1,000 Talern, a sum which she agrees shall count against her remaining matrimonial claim.⁵⁵²

Johanna Schreiber and Louise Ambronn gave up parts of their dowry and agreed to be ranked with the other creditors for the remainder. Louise further agreed to an exchange: she was assigned the outstanding debt of her husband's company, in exchange for which she accepted to have her dowry-claim reduced by the sum of these outstanding debts. She probably hoped that these unpaid amounts were still possible to recover.

This example shows that some women endeavoured to exercise leverage in debt-negotiations and help continue their husband's business. By renouncing their legal priority both wives facilitated the settlement with their husband's creditors. In this cooperation between husband and wife, the latter acted as a guarantor for the bankrupt.

The bankruptcy reform committee in Bremen, set up in 1834 to draft a new bankruptcy law, observed similar practices when investigating old Bremen custom. The committee compiled a dossier in which judges of the Bremen *Obergericht* summarized their experiences. These judges often belonged simultaneously to the merchant guild and to the senate, since a strict division of power had not yet been implemented. Thus, these judges were familiar with both the formal court proceedings and the out-of-court negotiations. With regard to the latter, they remarked that wives were often in a leading position. The type of barter described above was rather common in Bremen:

It is often the [debtor's] wife who proposes to a bankrupt's creditors to consign to her the estate with all assets and debts, promising in exchange to indemnify creditors, and renouncing her or her children's priority (...) until this compensation has been paid.⁵⁵³

⁵⁵² § 6 Das von Frau Johanna Julianen verhehel. Schreiber, geb. Fischer, mit 5194,20 Talern und von Frau Louisen Ambronn geb. Kaufmann mit 9198,19 Talern (...) angemeldete eheweibliche Einbringen wird von den beiden Liquidantinnen zu Gunsten der übrigen Herren Gläubiger und zwar von Frau Johanna Julianen Schreiber auf 3000 und von Frau Louisen Ambronn auf 4000 herabgesetzt und in dieser Höhe gerichtlich locirt. (...).

b) sind sämtliche Gläubiger mit Frau Ambronn noch dahin übereingekommen und erklären kraft förmlicher Cession (...) daß dieselbe alle zur Concursmasse der Firma Ambronn & Schreiber gehörigen überseeischen Außenstände (...) insoweit sie bis zum 11. Mai 1861 weder in Baarem noch in Wechsel eingegangen für das Bauschquantum von 1000 Talern annehmen und diese Summe auf das ihr verwilgigte eheweibliche Einbringen sich anrechnen lassen soll. HStADD 10736 *Ambronn & Schreiber Handelskrisis*, fol. 4, *Vergleichsurkunde* 11.05.1861.

⁵⁵³ Oft ist es die Ehefrau welche den Gläubigern vorschlägt, ihr die ganze Masse, mit Aktivis und Passivis zu übertragen, wogegen sie dann den Gläubigern eine gewisse Abfindung zusagt und garantiert und

The authors of the dossier even alleged that it was the wife rather than the debtor himself who took the initiative to bargain with creditors. Third parties, who volunteered to stand surety for the debtor, were likely recruited from the wife's family, and often it was the father in law himself.⁵⁵⁴

Many state and municipal laws established strict conditions for these out-of-court settlements. These specifications usually concerned procedural questions.⁵⁵⁵ But they were silent with regard to the question of who could be the negotiating party on behalf of the debtor. Jurists actually shared the expectation that a debtor's family would step up, show solidarity with their family member and compensate creditors in order to save the family reputation.⁵⁵⁶ This view still resonated in the legal opinions drafted in preparation of the national bankruptcy code of 1877: 'The hope to rescue an existing business shall prevail upon relatives and friends to bring certain sacrifices for the debtor's benefit.'⁵⁵⁷

c.) Family Obligation and Contractual Obligation

That wives should contribute to the settlement by offering parts of their property or relinquishing their entitlements was a widely shared expectation among jurists. This expectation, which the legislators of 1877 formulated as a normative prescription, indicates jurists' suspicion that the wife could shield assets from creditors. The cooperation between husband and wife could go both ways: the wife could act as guarantor, yet her husband could also use her immunities to shield assets from seizure.

In cases where women explicitly contributed to the husband's business, e.g. when they ran a shop together, most German state laws removed women's legal privileges. They either became

bis dahin mit ihrer eigenen Forderung, oder der ihrer Kinder (zum Beispiel aus Brautbriefen, erster Ehe oder dergleichen) zurücktritt. StAHB D.11.a.1.a.3.b *Notizen über das bestehende Moratorium Accords- und Conkurs Verfahren* 19.03.1834, Art. 34.

⁵⁵⁴ As indicated in Thomas Mann's *Buddenbrooks*.

⁵⁵⁵ See Chapter 3.

⁵⁵⁶ Puchta, *Ueber den Conkursprozeß, 1827*, , pp. 240 and 253.

⁵⁵⁷ Falk, 'Die Konkursübel,' 2014, , p. 307, quotes: HAHN, CARL AND MUGDAN, BENNO, eds., *Die gesammten Materialien zur Konkursordnung und dem Einführungsgesetz zu derselben vom 1. Februar 1877 sowie zu dem Gesetze, betreffend die Anfechtung von Rechtshandlungen eines Schuldners außerhalb des Konkursverfahrens vom 21. Juli 1879*, vol. 4, (Berlin, 1881), p. 353

personally liable partners on equal footing as their husband or, if they co-signed debts, had to renounce their priority rights.

It should be noted, that many of these businesswomen actively joined their husband's business in times of dire need, or after having been abandoned by their husbands. In Frankfurt 1848, Butcher Jacob May sued Louise Bertha Prenck for the amount of 445 Guilders for meat deliveries. They had agreed to payment in instalments, but Louise had missed two payments. The court files exhibit Louise's precarious situation: she kept the inn '*König von Preußen*', which had originally belonged to her parents and had subsequently been transferred to their son-in-law. At the time of the lawsuit her father had fled Frankfurt and her husband had already been declared insolvent. It is likely that Louise Prenck had become innkeeper due to an exchange similar to the one described in section 3b):

After her father escaped and after her husband's bankruptcy, Louise Prenck acquired the inn and managed it together with Rhein [her husband] under the company name 'Prenck & Rhein'.⁵⁵⁸

Given that her father had fled the city, he is most likely to blame for the indebtedness. Her husband had taken the bankruptcy procedure upon himself while she had taken over running the inn. If that was the case, then Louise had probably already exhausted the capacity of rescuing her parents' inn when Jacob May sued her for the unpaid meat. She was initially successful in fending off May's complaint, and obtained a debt respite from the lower city court. But May took the case to the appeal court in Lübeck and won. We do not know what happened to Louise and whether she was able to save the family business.⁵⁵⁹ The higher appellate court had dismissed Louise's case because it assumed her to have always been jointly in business with her husband. Even though her husband had reached a settlement and she had taken over the inn, the court assumed that she was jointly liable for his debts and that claims like Jacob May's, which dated back to her husband's insolvency, added to her debts.

⁵⁵⁸ Nach der Flucht des Vaters und dem Falliment des Ehemannes erstand Louise Prenck die Gastwirtschaft und führte sie nun gemeinschaftlich mit Rhein unter dem Firmennamen Prenck & Rhein (...) ISG Frankfurt, 1.14.11 OAGL Z 1111.

⁵⁵⁹ In contrast to so many other cases of female creditors, the court records do not add the entry: 'admitted to poor relief', cf. Kaltwasser, ed., *Gesamtinventar der Akten des Oberappellationsgerichts der vier Freien Städte Deutschlands*, 1994, p. 29.

When exactly a wife should be treated as her husband's business partner and when she should merely be regarded as his wife (and could thus become his creditor) became the subject of a parliamentary debate during the revolutionary period of 1848. Just across the street from Frankfurt's St. Paul's church, where Germany's first parliament convened, the notables of the free city assembled in the town hall to work out a constitution that would implement the principles that had been proclaimed in the 1848 'declaration of universal rights of the German people'. One of those principles was equal treatment under the law. This must not be understood in our modern sense to include gender equality. Hardly any politician seriously proposed that women should be given full citizen rights. The question of equal treatment under the law rather concerned the extent to which the law should be allowed to distinguish between individuals of different status groups, referred to as *Stände*.

In January 1849 in the Frankfurt constitutional assembly, the deputy Carl Benkard proposed that married women of all social standing be treated equally in the bankruptcy of their husband.⁵⁶⁰ He made reference to the new declaration of universal rights⁵⁶¹:

(...) The present law according to which some wives may, to the detriment of creditors, retain what they have brought into the marriage out of their insolvent husband's estates, is of the same spirit as other laws of this sort, which lose all legitimacy in view of the universal rights of the German people, because they contradict §7 of the declaration: 'there is no distinction of estate before the law; all corporate privileges are abolished; all Germans are equal before the law.'⁵⁶²

It had hitherto been a privilege of merchant wives in Frankfurt to take their private goods and dowry out of the bankruptcy estate if their husband had declared insolvency. This ran counter to the limitations of merchant wives' *ius separationis* in French law. Carl Benkard's suggestion received the support of notables representing craftsmen, whose wives did not enjoy the same

⁵⁶⁰ Antrag auf Aufhebung der sogenannten weiblichen Rechtswohltat und die Gleichstellung der Ehefrauen rücksichtlich des Schuldenwesens betreffend 25.01.1849; in: ISG Verfassungsgebende Versammlung 87, fol 2.

⁵⁶¹ Grundrechte des deutschen Volkes, MOMMSEN, THEODOR, ed., *Die Grundrechte des deutschen Volkes mit Belehrungen und Erläuterungen*, (Leipzig, 1849; reprint, Frankfurt 1969).

⁵⁶² Zu den in unserem Geist und nach bestehenden Gesetzen dieser Art, welche durch die Grundrechte des deutschen Volkes notwendiger Weise alle gesetzliche Kraft verlieren müssten, weil sie mit dem §7 derselben: "vor dem Gesetz gilt kein Unterschied der Stände; alle Standesvorrechte sind abgeschafft; die Deutschen sind vor dem Gesetz gleich" im Widerspruch sind, gehört das zur Zeit noch bestehende Gesetz, wonach manche Ehefrauen berechtigt sind, bei Überschuldung ihrer Ehemänner ihr in die Ehe eingebrachtes Vermögen, in der Regel zum größten Nachteil der Gläubiger, aus der Masse heraus zu ziehen (...) ISG Frankfurt, Verfassungsgebende Versammlung, No. 87, *Gleichstellung der Ehefrauen aller Stände hinsichtlich ihrer Illatenforderung im Concours ihrer Ehemänner*, 25.01.1849-09.07.1849.

privilege. The law assumed craftsmen's wives to be part of their business, whereas merchant wives were merely regarded as housewives.⁵⁶³ The motion sparked a debate on whether women should be granted the right to have private property at all. The justice committee of the Frankfurt Senate wrote a dossier, tracing the privilege of merchant women back to the sixteenth-century city law. Women could rely on this privilege provided they did not contribute in any sort to their husband's business and as long as their dowry still existed *in natura*, that is, as long as the specific items (linens, silverware, monies, immovable goods) that had constituted the original dowry were still in the husband's estate. According to the Frankfurt *Reformation*, the wives of craftsmen and servants were excluded from this privilege by default because it was simply assumed that in their households, both wife and husband generated income and sometimes even ran a business together.⁵⁶⁴ The craftsmen in the assembly protested that the nature of their trade had changed substantially since the sixteenth century, but in vain: the debate ended with the rejection of the original proposal and a confirmation of the status quo.⁵⁶⁵ Carl Benkard's disappointment about this decision is expressed in his final remarks. At the same time, these remarks reveal that his intentions had little to do with emancipatory or liberal ideals, and that women at the time were, by twenty-first century standards, still far away from emancipation:

(...) The woman who surrenders her person into the hands of her husband should also entrust him with her property, and if she does not want this, she had better not marry in the first place. That a creditor who [with his loan] already contributed to the utility and welfare of the married couple [by his loan], should be left with nothing, while the wife has priority with her reclamation, for this I cannot find a legal foundation (...)⁵⁶⁶

That the notables decided in favour of the status quo, despite Benkhards vocal attempts to remove the old privileges, indicates that many merchants regarded it as advantageous. The decision was probably also linked to a prevailing sense that (patrician) merchant families should be distinct within the urban community. The segregation of the old society of estates did not fade away easily. The decision to preserve the status quo was also due to the difficulties one encoun-

⁵⁶³ Ibid.

⁵⁶⁴ *Reformation* was the name of the old Frankfurt city-law.

⁵⁶⁵ Ibid., Conclusive remarks from July 9th 1849.

⁵⁶⁶ Die Frau, welche ihren Mann ihre Person anvertraut, muss ihm auch ihr Vermögen anvertrauen können, und wenn sie das nicht will, ihn lieber gar nicht heyrathen. Das aber der Gläubiger, der doch in der Regel für das Wohl und den Nutzen beider Eheleute Arbeiten oder Leistungen gemacht hat, das Nachsehen haben und sein Geld verlieren soll, während die Ehefrau mit ihrem Vermögensreclamationen ihm vorgezogen wird, dazu kann ich keinen Rechtsgrund finden (...) Ibid., Fol. 22.

tered when embarking upon changing parts of legal system. Frankfurt's private law comprised of many highly specialised rules for certain small subparts of the population.⁵⁶⁷ Eliminating these differences in the bankruptcy rules would have had reverberations at other ends of the system. Writing a coherent civil code, however, was a task beyond the ability and time-horizon of notables. Above all, the decision meant that merchant wives continued to enjoy legal privileges, which their husbands probably used to protect assets.

IV. Merchant Wives

a.) Mercantile and Municipal Statutes

Merchant wives and their privileges constituted a special case that merits a separate analysis. Wherever local laws distinguished between different corporate groups, that distinction then also applied to women married to a member of the respective corporate group. As bankruptcy regimes often linked specific legal consequences to merchants, their wives were assumed to partake in their 'occupational identity'.⁵⁶⁸

In the Hamburg bankruptcy code from 1753, Article 30 determined the extent to which women could be held liable for their husbands. Law makers in Hamburg based the liability of women on the timing and duration of their marriage: if the couple had been married for five years and longer, the wife lost her privilege to retain her dowry and property from the bankruptcy estate. Not only did she lose her priority over secured creditors, but it was also forbidden for her to make any claim against the estate.⁵⁶⁹ If, on the other hand, the couple had been married for less than five years and if the husband had already accrued debt before entering the marriage, the wife could claim her dowry and all her property before any other creditor, secured or unsecured.⁵⁷⁰

The five-year-rule was problematic, for it ran counter to a widely shared principle of Roman law according to which most other German jurisdictions distinguished a husband's pre-

⁵⁶⁷ Von Adlerflycht, *Das Privatrecht*, 1832, Vol. I, pp. 6-16.

⁵⁶⁸ See Chapters 3 and 4.

⁵⁶⁹ *Neue Falliten-Ordnung*, Art. 30, No. 1.

⁵⁷⁰ *Neue Falliten-Ordnung*, Art. 30, No. 2.

matrimonial from his matrimonial debts.⁵⁷¹ This distinction freed a woman from paying for her husband's debts if these debts dated from a time before their marriage, but made her liable for debts accrued during the time of their marriage. The Hamburg bankruptcy code exchanged this principle for the case of the insolvency of the husband with the five-year-rule.

Even though not stated explicitly, article 30 targeted merchants' wives. Theodor Hasche, who wrote the extensive commentary to the Hamburg bankruptcy code, mentioned that the criterion according to which the husband had to have pre-matrimonial debts was rarely scrutinized. 'One always finds something (...),' he writes, because 'as a merchant he will have had debts even before marrying.'⁵⁷² The reasons for this sort of legal arrangements had, again, to do with access to credit and funds. Contemporary authors write that access to credit for a merchant often depended on a wealthy marriage, a *gute Partie*. Theodor Hasche even contends that the state in Hamburg actively promoted 'wealthy marriages' between merchant families, referring to the law granting citizenship to foreigners if they married into a citizen family.⁵⁷³ Another contemporary author, Georg Büsch, describes the conjugal community of goods as a form of security for creditors. A debtor's standing with his creditors could substantially improve if they knew his wife was well endowed.⁵⁷⁴ Because the transfer of wealth through marriage played such a big role in the Hanse towns, contemporaries saw it as the state's duty to provide some form of protection for the wife's property.

Unlike Hamburg, Lübeck had no coherent and codified bankruptcy law. Here, rules and norms concerning bankruptcy were scattered across the *Stadtrecht*, the latest version of which dated from 1798.⁵⁷⁵ This code had an extensive section on matrimonial law and dowries. In the case of the husband's bankruptcy, Lübeck's law distinguished between women who had offspring and women who did not. On the one hand, if a debtor died or fled the city without having paid his creditors, and if this marriage had produced children, then the debtor's wife was obliged to pay creditors out of her dowry. If, on the other hand, the couple was childless, the

⁵⁷¹ Carius, *Recht durch Eigentum. Frauen vor dem Jenaer Hofgericht 1648-1806*, 2012, pp. 92-105.

⁵⁷² HASCHÉ, THEODOR, *Erläuterung der hamburgischen Falliten-Ordnung*, vol. 2 (Hamburg, 1802)p. 290.

⁵⁷³ *Ibid.*, p. 284. although it is not clear from his wording whether he refers to poor young men marrying wealthy daughters, or the other way round.

⁵⁷⁴ Büsch, *Darstellung*, 1792, , p. 168-169.

⁵⁷⁵ HAMMEL-KIESOW, ROLF, "Lübeck," in *Handwörterbuch der Deutschen Rechtsgeschichte III*, ed. ALBRECHT CORDES, et al. (Berlin, 2016), pp. 1070-1072.

wife could retain her dowry in full before any of the creditors could claim payment out of the estate.⁵⁷⁶ Incidentally, the *Stadtrecht* lists this rule under the section-heading: *de dote ejusque privilegiis* – of dowries and their exemption.

That women with children should pay for their husband's debts, while childless women did not have that obligation, seems odd at first sight. Jurists at the beginning of the nineteenth-century questioned that principle. Was not the mother weaker than a childless woman and thus in need of protection, especially if the children were still underage and could not provide for themselves? – they asked. A doctoral dissertation (whose author's name is not recorded) at the University of Göttingen from 1811 raises the issue and was reprinted and circulated in Lübeck. The author argues that the rule concerning women with children should be limited to the special case that the indebted husband had either fled the town or was dead.⁵⁷⁷

Different explanations were put forward for this rule. Johann Hach, a judge at the higher appellate court in Lübeck, writing in 1822, contended that it served to protect the debtor's children from infamy and lifelong indebtedness. The mother was to pay off the debt that would otherwise be transferred onto her children. She should sacrifice her property in order to spare her children the disgrace and secure them a second chance.⁵⁷⁸ The anonymous dissertation put forth a different explanation: the rule allegedly solved a monitoring problem. The fact that it had been so easy in the medieval and early modern times for an indebted merchant to disappear from a city state had been a source of insecurity for lenders in Lübeck. Threatening bankruptcy with punishment and prison was no remedy; it only amplified the incentive to leave the town when in financial distress. Legislators thus resorted to taking wife and children as hostages. If a debtor fled the town, his beloved ones would suffer. After all, the dependent and attentive mother, in her concern for her children, was deemed 'the best supervisor for her husband's business.'⁵⁷⁹

⁵⁷⁶ Lübeck Stadtrecht 1798, Lib. I, Tit. 5, Art. 7.

⁵⁷⁷ *Untersuchung der Frage: ist, nach den Rechten der vormaligen freien Hansestadt Lübeck, die Ehefrau eines Falliten überhaupt und in jedem Fall verbunden, die Schulden ihres Mannes zu bezahlen?* (Hamburg, 1811)

⁵⁷⁸ AHL 05.4 *Gemeinnützige Gesellschaft*, 05.02 Einzelne Vorträge, 0330: Johann Friedrich Hach, *Gedanken über das Fallitenwesen in Lübeck*, 05.11.1822

⁵⁷⁹ *Ist die Ehefrau eines Falliten*, 1811, p. 11.

Both authors made similar suggestions for a reform of the matrimonial property regime in bankruptcy, concurring with their Hamburg colleagues.⁵⁸⁰ Jurists at the beginning of the nineteenth century wanted to see a bankrupt's wife admitted to the bankruptcy procedure as ordinary creditor of his estate for the amount of her dowry. These authors defined the dowry as a loan to the husband. Büsch and Hach acknowledged that the wife had a weaker position than most of her husband's creditors, in particular because her dowry was a loan without interest. For this reason, they found it appropriate if the wife was counted among the secured creditors.⁵⁸¹ Hasche went further still to claim that a wife's dowry was an ordinary commercial investment. She invested into her husband's business because she wanted more than mere interest. Therefore the law should regard her as a type of shareholder in the debtor's business and count her dowry as unsecured debt.⁵⁸²

Jurists had become wary of the possibility for debtors to hide assets by transferring them into their wife's property. This suspicion is marked by a new rhetoric that viewed women as their husbands' business partners; a number of treatises on how a bankrupt's wife should be treated in bankruptcy are full of analogies to business models; matrimonial property rights are rarely justified in terms of protection of the weaker party of by reference to solidarity.⁵⁸³ It was a line of thinking that curtailed the old privileges, particularly the *Separationsrecht*, and eventually made women even more dependent on their husbands or the goodwill of mostly male creditors.

In the *Code de commerce* of 1837, Articles 544 to 557 determined the rights of a bankrupt's wife in bankruptcy under French law.⁵⁸⁴ Those articles formed a subsection of the chapter entitled: *des différentes espèces de créanciers et de leurs droit en cas de la faillite*; 'of different sorts of creditors and of their rights in the case of insolvency.' French law thus assigned wives the role of a credi-

⁵⁸⁰ Johann Friedrich Hach probably knew the dissertation from 1811. Both texts, the dissertation and Hach's essay on the bankruptcy law from 1822, allege that the conjugal community of property historically never existed in Lübeck's law. The authors suggest that the assumed community of property in Lübeck was an outflow of practitioners misinterpreting the law; and they both seem aware that their suggestion is very provocative for some conservative minds. The dissertation was defended at the University of Göttingen, to which Hach maintained strong links: Fehling, *Lübeckische Ratslinie von den Anfängen der Stadt bis auf die Gegenwart*, 1925, , Nr. 14.

⁵⁸¹ Büsch, *Darstellung*, 1792, p. 169; Hach in AHL 05.04 *Gemeinnützige Gesellschaft* 0330

⁵⁸² Hasche, *Erläuterung der hamburgischen Falliten-Ordnung*, 1802, p. 285

⁵⁸³ principles promoted in modern family law, cf. introduction in: SCHWAB, DIETER, *Familienrecht*, 23 ed. (Munich, 2015).

⁵⁸⁴ *Loi des faillites de 1838*, articles 557-564.

tor, though a special kind of creditor, positioned between secured and unsecured creditors. Under whatever matrimonial regime these women were filing claims in bankruptcy, the burden of proof fell upon them to show that assets and items had been purchased with money that originally belonged to them and not to their husband.

The burden of proof systematically put women at a disadvantage. To begin with, women had to be sufficiently vested in these issues to take care of the necessary documentation upon entering and during marriage. Sometimes this failed because of their illiteracy, which was more frequent at the time among women than among men.⁵⁸⁵ But the task also called for an understanding of the law and some 'financial literacy' on the woman's part for her to be able to assess her husband's financial situation and take the necessary steps to secure her property. It required that the wife took on the role of an internal auditor, a role that was incompatible with the image of women as docile housewives predominant at the time. Women without a knowledgeable adviser were likely overwhelmed by the task of securing their property and monitoring their own husband.

By curtailing the rights and privileges of merchants' wives, French law sent an important message to lawmakers. The Prussian *Konkursordnung* of 1855 followed the French model in many respects, but also took it a step further.

§ 80 VIII. The entitlements of children and persons in the custody of the debtor: (...) The debtor's wife, with the exception of the wives of merchants, ship-owners and manufacturers, enjoys a similar priority with regard to her property that has come into the administration and usufruct of her husband.⁵⁸⁶

The Prussian law acknowledged that the debtor had a fiduciary obligation with regard to the assets of those individuals, for whom he acted as legal ward; and it drew an analogy between those obligations and the wife's assets. The law simultaneously exempted merchants from this obligation with regard to their wife's assets and thus renounced merchant wives' immunity. In

⁵⁸⁵ SCHOFIELD, ROGER, 'Dimensions of Illiteracy 1750 - 1850,' *Explorations in Economic History* 10/4 (1973), pp. 437 - 454; BECKER, SASCHA AND WOESSMANN, LUDGER, 'Was Weber Wrong? A Human Capital Theory of Protestant Economic History,' *The Quarterly Journal of Economics* 124/2 (2009), pp. 531-596.

⁵⁸⁶ Die Ansprüche der Kinder und der Pflegebefohlenen des Gemeinschuldners (...) Die Ehefrau des Gemeinschuldners, mit Ausnahme der Ehefrauen von Handelsleuten, Schiffsredern und Fabrikbesitzern, gebührt wegen ihres gesetzlich in die Verwaltung und Nutznießung des Ehemannes gekommenen Vermögens (...) ein gleiches Vorrecht, in: Goldammer, Kommentar und vollständige Materialien zur Konkurs-Ordnung vom 8. Mai 1855, 1858, p. 190.

previous drafts and committee hearings for the new law, the proposal had been made to leave the old *Separationsrecht* as defined in the *Allgemeine Gerichtsordnung* untouched and demand that merchants' wives should sign a declaration waiving their privileges. Expert opinions from merchants described it as impractical and the proposal failed to rally much support. The committee's report reveals that its members agonized for several weeks over the distinction between merchants and non-merchants until they reached the conclusion:

Until now, every attempt to draw a definite line between a merchant (...) and another persons, has failed, and one may convincingly argue that all further attempts in that direction will fail, too. (...) The strict distinction between commercial activities and other occupations, as it may have existed in previous times, has recently disappeared. Commercial and industrial endeavours and ventures, in this extraordinarily increased economic activity, (...) are no longer limited to the mercantile community (...).⁵⁸⁷

Article 80 in its final form attempted a compromise between protecting the property rights of wives and protecting the interests of creditors. Lawmakers also realized that the changed economic circumstances together with the abolition of guilds all over Germany had blurred the boundaries between hitherto static occupational borders, i.e. between merchants and non-merchants. To fully account for the new socio-economic reality, a systematic reform of marital and family law would have been necessary. This task was beyond the scope of lawmakers who were concerned with bankruptcy. In those areas of commercial law which advanced first on the level of legal harmonization in Germany, lawmakers contended themselves with compromises, until further legislation eventually brought a systematic civil code. Whenever mercantile interests came into conflict with women- and family-rights, the latter had to give way.

b.) Prenuptial Agreements and Asset Shielding

On the one hand businessmen were keen to see personalized privileges in bankruptcy taken down everywhere in Germany, which would give them greater legal certainty in their lending decisions. On the other hand, they worried about shielding their family members, and particular-

⁵⁸⁷ Ibid., p. 207: Nun ist aber jeder bisher gemachte Versuch, eine bestimmte Grenze zwischen einem Kaufmann (...) und zwischen anderen Personen zu ziehen, immer mißglückt, und man mit Gewißheit (...) sagen, daß auch alle ferneren dain gerichteten Versuche (...) mißglücken werden. P. 204: Die strenge Scheidung des Handelsgewerbes von den übrigen Berufsarten, wie dieselbe wohl in früherer Zeit vorhanden war, ist gegenwärtig verschwunden. Kommerzielle und industrielle Bestrebungen und Unternehmungen sind jetzt, bei dem so außerordentlich gesteigerten Verkehre (...) nicht mehr auf den Handelsstand beschränkt (...).

ly their daughters, from the risks of their business. Inversely, if their business had grown to a certain size, they also had to shield the company from the potential damages inflicted by family members. Private creditors of a company's partner, for example creditors of sons and son-in-laws, should not be able to seize company assets.⁵⁸⁸ This was particularly important at a time that lacked sophisticated company forms and the limited liability of the 20th century. Prenuptial agreements provided a means of partitioning assets between the company and the family.

The marriage contracts that survive in the archives of the Bethmann family exemplify such agreements. The first of these is from the year 1842. Philipp Heinrich Alexander Moritz von Bethmann married Dame Marie Anna Wilhelmine von Bose.⁵⁸⁹ Bethmann's father, Simon Moritz, had been married to a Dutch middle-class woman. He was subsequently elevated into Austrian aristocracy.⁵⁹⁰ His son's marriage to the daughter of a royal marshal of Nassau confirmed the social ascension of the Bethmann family. Moritz junior had begun his career in banking in 1833 and was now leading the '*Geb Brüder Bethmann*', one of Frankfurt's most eminent banks. The marriage contract introduced two important elements of asset partitioning with regard to Moritz' function as partner of the bank: Article 3 of the contract established the division of goods as the marital property regime. The wife kept the ownership over assets she brought into the marriage, but her husband administered them. Article 4 explicitly broke with traditional Frankfurt marital law, according to which a merchant's wife had priority for her dowry over all other creditors in the case of her husband's insolvency:

Because the particular formalities and pecuniary circumstances laid out by his forefathers that bind the groom do not permit that his future wife enjoys the statutory rights and privileges regarding heritage and property, to which she would be entitled according to this city's law, she herewith renounces – in exchange for the benefits stipulated in § 5 [of this contract], (...) all her [statutory] rights and privileges against her future husband (...), in particular all claims against her husband's future acquisitions (...)⁵⁹¹

⁵⁸⁸ Hansmann and Kraakman, 'Organizational law as asset partitioning,' 2000, p. 813.

⁵⁸⁹ The exact order of Bethmann's first names is different in different documents. I use it as it was written in the notarial act that verified the prenuptial agreement.

⁵⁹⁰ Helbing, *Die Bethmanns*. Aus der Geschichte eines alten Handelshauses zu Frankfurt am Main, 1948, .

⁵⁹¹ Da die besonderen Formalien und Vermögens-Verhältnisse des Herrn Bräutigams wie dieselben durch leztwillige Anordnungen seiner Vorfahren reguliert worden sind, nicht gestatten, daß seiner zukünftigen Gemahlin diejenigen Erb- und Vermögensrechte an seinem Vermögen zu Gute kommen, welche den Eheleuten (...) kraft den Vorschriften hiesiger Stadtreformation zustehen, so verzichtet die Fräulein Braut gegen die ihr unter § 5 eingeräumten Vortheile (...) auf alle ihr an dem Vermögen ihres zu-

Moritz effectively bought off his bride's legal rights by offering her a dowry. The bride received an endowment of 150,000 Guilders, which would have remained in her property after her husband's death. Furthermore, she was granted an annuity in case she survived her husband. The annuity's precise value would depend on the number of offspring.⁵⁹²

Moritz and Marie had two sons and three daughters. The marriage contracts of two of these daughters are on record. They too show the Bethmanns' attempt to shield family and company from each other while binding the future sons-in-laws to the company. Both daughters married merchant-bankers whose names later appear in the list of the firm's partners. In 1863, Maria Henriette von Bethmann married the Swiss banker Carl Gabriel Rudolph von Frisching; in 1867 her sister Louise Frederike married Rudolph Baron de Hottinguer from Paris. Frisching later became partner of the Bethmann bank; the Bethmann and Hottinguer families closely cooperated in placing government and railway bonds at the respective marketplaces in Frankfurt and Paris.⁵⁹³ It was clear that these marriages were more than just the union of two people. They were also a form of merger of different enterprises with implications for the bank's partners and shareholders. This is why all partners of the bank signed and sealed Maria Henriette Bethmann's marriage contract to Frisching as witnesses (see figure 27 below).

künftigen Ehegemahls zustehenden (...) Rechte, also auf einen Anspruch an die eheliche Errungenschaft (...) ISG *Bethmannarchiv Familienakten* III 2a.

⁵⁹² Ibid. § 5.

⁵⁹³ ISG Ffm Bethmannarchiv GA W 1-9/5 806 contains parts of the correspondence between Hottinguer and Bethmann concerning the railway business during the 1870s.

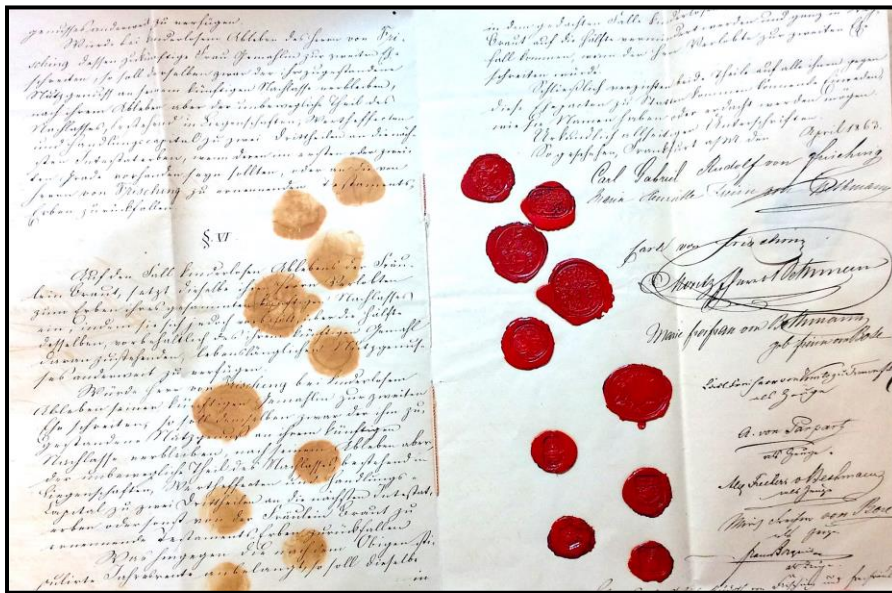


Figure 27 Marriage Contract between Marie Bethmann and Rudolf Frisching, ISG Ffm, Bethmannarchiv FA, VIII 18.

In Louise Bethmann’s case, the contract was drafted and signed at a Paris notary office, even though the wedding itself took place in Frankfurt. The contract thus followed the marital institutions offered by the French *Code civil*. Article 1497 of the *Code civil* allowed parties to replace the conjugal community of goods with any other valid contract. Louise’s and Rudolph’s contract established the *régime de non-communauté des biens*: the husband had the power to administer all property but each party retained ownership over their property, even during marriage.⁵⁹⁴

The contract explicitly exempted both partners from paying for each others’ debts:

- (1) Each party retains ownership of all their property, movable or immovable, regardless of whether it has been brought into the marriage or whether they are acquired during the marriage, either by consignment, gift, or inheritance.
 - (2) The husband enjoys the usufruct of and has the right of administering all assets, current and future, movable and immovable, of his future wife.
- As a consequence of this non-community of goods, the future partners will not be liable for each other’s debts, whether these have been accrued before or after the wedding.⁵⁹⁵

In addition to the fiancé, the parents also became contracting parties. Bethmann senior committed himself to paying his daughter’s part of her inheritance in advance to the amount of

⁵⁹⁴ Code civil, Art. 1530

⁵⁹⁵ 1° Chacun d’eux conservera la propriété de tous ses biens mobiliers et immobiliers, tant même qu’il procédera au moment de la célébration du mariage que ceux qu’il recueillera ultérieurement par soumission, donation, ou leg. 2° Le mari aura la jouissance et l’administration de tous les biens actuels et futurs, mobiliers et immobiliers de la femme. Par suite de cette non communauté les futures époux ne seront pas tenues des dettes l’un de l’autre antérieure ou postérieure au mariage.’ ISG *Bethmannarchiv Familienakten*, VIII 18

200,000 *Francs*. He also promised his daughter an annual pension of 4,000 *Francs*, which would increase if she had offspring. Article 8 of the contract gave the Bethmann family the right to redeem that dowry at any time. If the family formally declared its intention to take the dowry back, it would turn into a loan, payable at 5% interest per annum from the moment the request had been filed. The future wife renounced her statutory hypothec on her husband's landed property, to which she was legally entitled according to the *Code civil*.⁵⁹⁶ The contract limited the hypothec to one of the Baron's summer residencies and an additional 186 hectares of forest. The Baron could dispose freely of his other property without any contradicting claims by his future wife.

V. Single Women and Moneylending

a.) Spinsterhood and Widows in Early Nineteenth-Century Europe

The role of women as wives in bankruptcy received much attention by lawmakers. In contrast, unmarried or widowed women were ignored despite having been a considerable proportion of the female population. The historical demographer Hajnal and his students estimated that in the early modern period and the beginning of the industrial age roughly a third of the female population had not yet married by the age of 30.⁵⁹⁷ As the average marriage age in the eighteenth and nineteenth centuries was 24 years, Hajnal assumes that it became less likely for women above the age of 30 to marry at all. He describes this phenomenon as part of the 'European Marriage Pattern' that kept population size in balance with Malthusian laws.⁵⁹⁸

Lifelong spinsterhood was no rarity in nineteenth-century Europe. For one, the revolutionary and Napoleonic wars at the beginning of the century had taken their toll on the male popula-

⁵⁹⁶ Code civil, Art. 2140.

⁵⁹⁷ HAJNAL, JOHN, 'Age at Marriage and Proportions of Marriage,' *Population Studies* 7/2 (1953), pp. 111-136., p. 112

⁵⁹⁸ HAJNAL, JOHN, "European Marriage Patterns in Perspective," in *Population in History: Essays in Historical Demography*, ed. DAVID VICTOR GLASS AND DAVID EDWARD CHARLES EVERSLEY (London, 1965), pp. 101-143.

tion. In the following decades, immigrants from Europe to the US were mostly men.⁵⁹⁹ This deprived the European marriage market of a good proportion of potential husbands. Furthermore, marriage at the time was dissimilar from the 'romantic' marriage of the late twentieth century. It was a decision influenced by economic considerations and the goal of many families was to match their daughters with a suitable candidate from at least the same social rank, if not higher. Marrying downward the social ladder was to be avoided.⁶⁰⁰ Finding a suitable candidate was no easy feat. Many families could not afford to keep non-working daughters. A large proportion of businesswomen in the USA and UK were spinsters, whether they were small-shopkeepers, innkeepers, or engaged in banking activities.⁶⁰¹ Van der Woude and De Vries showed that in the Netherlands the proportion of unmarried women above 30 years of age even increased between 1830 and 1859 from 39% to 45%.⁶⁰²

Good population statistics for Germany before 1850 are rare. Table 18 gives the proportions of single households and extended households for Frankfurt and Hamburg. The free cities had more single households compared to rural states. Most single women either led their own households or lived in households where the family lived together with extended family members and servants. Frankfurt had a higher proportion of single households than Hamburg, while Hamburg had a higher proportion of extended family households. The table also shows the proportion of single households as recorded in Baden in 1864 and in the first Germany-wide census in 1871. The 1880 census was the first to also acknowledge widows and widowers. In absolute numbers there were almost twice as many widows as there were widowers. Widowers were also more likely to remarry than widows.

⁵⁹⁹ GUINNANE, TIMOTHY, "Population and the Economy in Germany 1800-1990," in *Germany, A New Social and Economic History* 3, ed. SHEILAGH OGILVIE AND RICHARD OVERY (London, 2003), pp. 35-69.

⁶⁰⁰ VICKERY, AMANDA, 'Golden Age to Separate Spheres? A Review of the Categories and Chronology of English Women's History,' *The Historical Journal* 36/2 (1993), pp. 383-414.

⁶⁰¹ GOLDIN, CLAUDIA, "The Economic Status of Women in the Early Republic: Quantitative Evidence," *The Journal of Interdisciplinary History* 16/3 (1986), pp. 375-404; NENADIC, STANA, "The Social Shaping of Business Behaviour in the Nineteenth-Century Women's Garment Trades," *Journal of Social History* 31/3 (1998), pp. 625-645.

⁶⁰² DE VRIES, JAN, "The Population and Economy of the Preindustrial Netherlands," *Journal of Interdisciplinary History* 15/4 (1985), pp. 661-682..

Table 18 Single Households in Germany and Proportion of Widowers and Widows

City/State	Year	Single Households	Family-Households housing non-family members (i.e. servants, distant family, workers, etc.)			
Frankfurt	1871	37.96 %	41.79 %			
Hamburg	1867	11.21 %	51.47 %			
Baden	1864	8.7 %				
German Empire	1871	6.13 %				
			Widowers	Widows	Remarried Widowers	Remarried Widows
German Empire	1880	362,625	701,643	9.3 %	5.4 %	

Source: FRANZ ROTHENBACHER, *Historische Haushalts- und Familienstatistik von Deutschland 1815-1990*, (Frankfurt, New York, 1997), pp. 52; 25-34, 243-281

Widows often found it difficult to re-marry.⁶⁰³ They were probably the largest group among the single women. Some of these widows could fall back on assets inherited from their husband, while others were taken in by their children. Some used the money they inherited to lend at interest. It has been suggested that authorities in early modern Europe turned a blind eye on orphans, widows, and charitable institutions when it came to the ban of usury.⁶⁰⁴ Larger towns and the free cities in Germany issued their own bonds and widows are considered to have played an important role as investors in these municipal bond markets.⁶⁰⁵

Other widows, however, struggled to maintain themselves after their husband's death and did not receive any family help. Sometimes they tried to continue their husband's business; sometimes they worked as servants in other families as long as their age and health permitted.⁶⁰⁶ They often became indebted. Without the means to repay creditors, widows often became an economic liability for their communities. Various municipal institutions had been set up during the early modern period to deal with destitute widows.⁶⁰⁷ Statutes in Freiburg prescribed that

⁶⁰³ Jordan, *Women and Credit*, 1993, , pp. 70-76.

⁶⁰⁴ SPICKSLEY, JUDITH, 'Women, 'Usury' and Credit in Early Modern England: The Case of the Maiden Investor,' *Gender and History* 27/2 (2015), pp. 263-292.

⁶⁰⁵ GILOMEN, HANS-JÖRG, "Frauen als Schuldnerinnen und Gläubigerinnen in der Stadt Basel in den 1420er Jahren," in *Prekäre Ökonomien: Schulden in Spätmittelalter und Früher Neuzeit*, ed. GABRIELA SIGNORI (Konstanz, 2014), pp. 103-138.

⁶⁰⁶ FONTAINE, LAURENCE, "Women's Economic Spheres and Credit in Pre-Industrial Europe," in *Women and Credit: Researching the Past, Refiguring the Future*, ed. BEVERLY LEMIRE (Oxford, 2001), pp. 15-32.

⁶⁰⁷ JOCHMANN, WERNER AND LOOSE, HANS-DIETER, eds., *Hamburg. Geschichte der Stadt und ihre Bewohner*, vol. I, (Hamburg, 1982).

widows must not be denied credit for the purchase of foodstuffs.⁶⁰⁸ The longevity of these institutions indicates the size of the problem.

b.) Empirical Evidence

The dataset of court cases from the Rheinland, Saxony, and Frankfurt contains 54 female creditors and 28 female debtors. Out of the latter group of female debtors, 14 filed for bankruptcy as single women.⁶⁰⁹ The other eleven cases were 'joint-filers', i.e. records list them as joint debtors to their husbands. There are only four cases in the dataset in which female debtors were able to secure an amicable settlement with their creditors. They all involved single women.

As far as it is possible to infer anything from such a small sample, these single women spent longer in bankruptcy than the joint-filers. The average length of the bankruptcy procedure for these single women was 44 months, compared to 27 months for joint-filers. Single filers were also more heavily indebted than joint filers. Those 14 single women had an average amount of debt of some 12,800 Taler, compared to 8,900 Taler for joint-filers. For both single women and joint filers the majority of creditors were also female. It is impossible to gauge from the records the latter's exact marital status, whether these women were widows, spinsters, or wives.

It appears that women as creditors often invested more time in court procedures than their male counterparts. On average a female creditor was occupied for up to three years with the bankruptcy of her debtor. They also lent smaller amounts than their male counterparts. Whether this was the case because they commanded fewer funds or because they were generally more cautious in their lending decisions is unknown.

Female creditors (see Table 19) were more frequently related to the bankrupt than male creditors. More than 70 % of the women in our dataset were related to their debtor. This confirms the conjectures formed above about the intra-family reciprocity. Female creditors, the majority of whom were spinsters or widows, often advanced loans to male borrowers from their immediate environment. There are cases where mothers gave money to their son's businesses, or an unmarried daughter lent money to her sister's husband.

⁶⁰⁸ Gilomen, *Frauen als Schuldnerinnen und Gläubigerinnen in der Stadt Basel in den 1420er Jahren*, 2014, p. 110.

⁶⁰⁹ For these single debtors see Table 2 at the beginning of this chapter.

Table 19 Female Creditors

N =54

Case Characteristics		Security (absolute frequencies)	Occupation (absolute frequencies)
Average Duration	33.3 months	secured 18	servant 3
Average Amount of Debt	6,548 Taler	<i>of which...</i>	innkeeper 1
		hypothec 6	merchant 9
Involved in Settlement	12.5%	dowry 5	manufacturer 1
Family Relation to Bankrupt	72.22%	statutory 4	rentier 19
Owned Company	11.11%	goods 1	

Family was often a lender of last resort for debtors at the verge of bankruptcy. That women were more frequently drawn into such arrangements had to do with their limited ability to engage in other forms of business. Though free enterprise or *Gewerbefreiheit* was introduced in most parts of Germany over the course of the century, it often excluded women.⁶¹⁰ They could continue their deceased or bankrupt husband's enterprise. But setting up their own business was often restricted by membership requirements of local business organizations, which excluded women.

The level of secured loans given by female creditors was as high as those by male creditors. Roughly a third of all loans were lent on collateral. Among the various types of collateral, liens on immovable goods constituted the biggest category. Next in line were dowries that were either secured by a notarial act or enjoyed priority in bankruptcy according to local statutes. Female creditors were no less aware than men of the need for security in financial transactions.

As described in chapter 5, the bill markets in Germany had long been subject to municipal regulation. They often did not include women. A majority of statutes explicitly excluded women. In places like Augsburg, Brunswick, and Vienna a women's ability to draw bills of exchange, her *Wechselfähigkeit*, was restricted by special conditions.⁶¹¹ According to the Frankfurt law on bills of exchange from 1739, women could only draw bills if they paid taxes on a property worth at least

⁶¹⁰ Steindl, *Gewerbefreiheit*, 1986, pp. 3545-3553, pp. 3558-3569.

⁶¹¹ AMEND-TRAUT, ANJA, *Wechselverbindlichkeiten vor dem Reichskammergericht : Praktiziertes Zivilrecht in der Frühen Neuzeit* (Cologne, 2009), p. 235.

2,000 Guilders in value.⁶¹² Moreover, bills drawn on women in Frankfurt were legally regarded only as debenture or IOU, which was subject to less rigorous regulation but also made these papers more difficult to endorse.⁶¹³ The *Wechselarrest* did not apply to women, and accordingly court procedures did not treat women as endorsers, drawers, or drawees but simply as ordinary debtors or unsecured creditors.⁶¹⁴ This is why there was not a single case in the database where a female creditor based her claim on ownership of a bill of exchange.

c.) Cases

Statistical evidence cannot convey the peculiarity and precariousness that often characterized the business of those single women. Individual cases, though not representing the average, provide a better insight into what was at stake for single women.

Catharina Hörle worked as housekeeper starting in 1862 for the merchant Adam Ruhland in Frankfurt. It was not her first position and she was already middle-aged at the time she took it up. From previous employments she had managed to accumulate some savings. As she was unmarried, these savings were probably meant to provide for her in old age. Of these savings she gave 1,200 Guilders to her new employer, who experienced financial difficulties over the course of 1862. In 1863 he was taken to prison on a protested bill of exchange. While in prison, he issued an IOU to Catharina Hörle and pledged his entire furniture to her. Shortly afterwards, Catharina sued her employer for the outstanding wages and demanded repayment of her loan. On that occasion the Frankfurt city court opened ex officio bankruptcy proceedings. Catharina demanded admission to the rank of secured creditors so that the IOU and that the furniture could be auctioned. The trustee and other creditors objected to her claim and the Frankfurt city court originally ruled that ‘servants have no right of garnishment with regards to their masters’ movable property.⁶¹⁵ Catharina took her case to appeal at the appellate court for the free cities

⁶¹² Ibid.

⁶¹³ (...) die von Frauenzimmern ausgestellten Wechsel nur als Schuldscheine (...), in Platner, 'Vergleichung,' 1855, pp. 62, 63.

⁶¹⁴ Reyscher, 'Der Entwurf einer allgemeinen deutschen Wechselordnung,' 1848, , p. 301; Dölemeyer, 'Privatrechtliche Handlungsspielräume von Frauen, in: Engel/Kern/Wunder "Frauen in der Stadt, Königstein 2002, pp. 87-102, p. 99.

⁶¹⁵ (...) dass Dienstboten in Bezug auf das Mobiliar ihrer Herren keine Detention [haben]. ISG OAGL Z Nr. 646.

in Lübeck, which eventually ruled in her favour in 1865. The previous ruling was annulled, official ‘criers’ auctioned the furniture and Catharina was admitted as a secured creditor for the amount of 1,200 Guilders including 5% interest per annum since 1862.⁶¹⁶ The appellate court’s ruling is consistent with all that has been said here about Germany’s bankruptcy regime. The privilege for outstanding wages was commonly shared; so was the priority for secured creditors. The pseudo-feudal argument made previously by the Frankfurt city court, according to which servants could not seize their masters’ movables, was already out-dated in the 1860s. That such arguments were still employed illustrates the inertia and resistance that female creditors had to overcome to have their claims recognized and enforced.

Widows constituted the largest group of single female creditors in the dataset. They often appeared as creditors because they had invested money in the hope of increasing their savings and their inheritance. They were not necessarily poor nor did they live at subsistence level. They could afford to lend money.

For example, the widow Johanna Wilhelmine Eydtmann at least had twenty oil paintings in her possession, which she wanted to sell in 1839. She commissioned the Frankfurt art dealer Sieger to arrange the sale and placed the paintings in his custody. Shortly afterwards, in early 1840, Sieger went bankrupt. His warehouse was seized and its contents were publicly auctioned. The merchant Ludwig Christian Becker bought the paintings. Johanna now sued Ludwig Becker and claimed that he had bought the paintings below their actual value. She too had to fight her way up to the appellate court, but unlike Catharina Hörle, she ultimately lost the case.⁶¹⁷

A different case involved a dyer from Frankfurt. Johann Heinrich Benack had more than seventy creditors when he filed for bankruptcy in 1825. He almost reached a settlement with his creditors that would have spared him the formal liquidation of his working assets. Yet Catharina Magdalena Cladbach, a widow from Mainz, refused to accept the proposed settlement.⁶¹⁸ At first, Benack and the other creditors ignored her complaint and proceeded with the accord. But Catharina invoked Frankfurt customary law in bankruptcy, according to which an out-of-court

⁶¹⁶ Ibid.

⁶¹⁷ ISG OAGL Z Nr. 70.

⁶¹⁸ ISG OAGL Z Nr. 80.

settlement needed the unanimity of the creditors or the explicit acknowledgement that the qualified majority of creditors had not infringed minority's rights.⁶¹⁹ She claimed that she had been left out of the negotiations and had been treated in a way that would make it impossible for any court to validate the settlement. The higher appellate court in Lübeck decided in her favour and annulled the settlement.

Not all women were sufficiently well endowed to assert their entitlements in court. Single women, who ran their own business, were often defenceless. Maria Blumenröder in Meissen, Saxony, was divorced and widowed and owned her parent's farm, which she ran by herself. In the late 1820s she came to the attention of local authorities when neighbours denounced her. A letter to the county court in Meissen from February 1827 reads:

The local farm-keeper and land-owner Maria Dorothea, divorced Linke, widowed Blumenröder, is apparently in huge debt. Recently she sold various things (...) instead of the usual twelve cows only six now graze on her field. (...) Although I personally have nothing against such maladministration, I deemed it my duty to let your highborn Excellency know about this incident (...)⁶²⁰

The court remained inactive at first, but complaints about Maria's behaviour kept coming in. Only a few days after the first complaint, the local *Amtsmann* accused Maria of 'still continuing to ruin her farm.'⁶²¹ And the local gardener Carl Gottlob Schreyer compiled a detailed protocol of Maria's wrongdoings and sent it to the county court. He stated that 'there is no doubt that Maria wants to defraud her creditors, as her estate hardly deserves to be called a farm any longer (...).'⁶²²

On 9th March 1827, Maria, who was likely illiterate, filed an application for bankruptcy through her legal guardian, the so-called *curator sexus* or *Geschlechtsbeistand*, Joachim August Binthe. He worked together with the appointed trustee to realize the value of her estate and represent Maria in court.⁶²³ Her bankruptcy application is a testament of misfortune. She had

⁶¹⁹ VON ADLERFLYCHT, JUSTINIAN, *Der Civilprozeß der freien Stadt Frankfurt* (Frankfurt, 1832), pp. 1329-1330.

⁶²⁰ StADD 10057 Nr. 8862.

⁶²¹ Die hiesige Gutsbesitzerin Maria Dorothea Blumenröder (...) fährt immer noch fort, ihre Gutswirtschaft zu ruinieren. StADD 10057 Nr. 8862.

⁶²² (...) daß es ganz keinem Zweifel unterworfen, wie sie beabsichtigt, ihre Gläubiger zu betrügen, denn ihre Besetzung ist gar nicht mehr als Wirtschaft zu betrachten (...), StADD 10057 Nr. 8862.

⁶²³ Cf. THIER, ANDREAS, "Geschäftsfähigkeit," in *Handwörterbuch der Deutschen Rechtsgeschichte* 2, ed. ALBRECHT CORDES, et al. (Berlin, 2012), pp. 270-273. and Art. 'Kurator', in KÖNIGLICH PREUBISCHE AKADEMIE DER WISSENSCHAFTEN AND HEIDELBERGER AKADEMIE DER WISSENSCHAFTEN, eds.,

been orphaned at a very young age with nothing and no one left but the farm. She married Johann Blumenröder in order to have someone who could help her with the farm. She described herself as unknowledgeable in ‘economic matters’ and her first marriage as ‘happy’. But Johann Blumenröder died and her second marriage with Christian Linke proved disastrous. He was abusive towards her, neglected the farm and squandered their savings. He even forced her to stand surety for him to the amount of 700 Taler. Shortly after their divorce, a fire destroyed large parts of the farm and she became deeply indebted in order to rebuild the farm.⁶²⁴ As in the case of other female debtors, her biggest secured creditor was a woman as well: Christiane Gönel, the wife of the local *Kommissionsrat* in Meissen. Her loan of 4,000 Taler was secured with a lien on the farmhouse. Christiane had called in the loan, which was likely what pushed Maria to file her petition for bankruptcy.

What is striking about this case is that there are so many bitter complaints on a rather petty case. The accounts show that Marias property was estimated at 5,500 Taler. She owed 4,160 to Christiane Göler, and another 2,264 Taler to unsecured creditors, among which her ex-husband claimed the largest sum.⁶²⁵ This left a non-trivial difference of some 924 Taler, which however still did not render her ‘over-indebted’; the discrepancy between assets and debts was much bigger in many other cases. It was either that Maria was inept in managing the farm so that creditors and neighbours intervened, or that she had attracted animosity in the community for some other reason. Her male creditors released a barrage of complaints to the authorities. Her largest (and female) creditor did not join the complainants. The ensuing procedure was swift and ended with a public auction in July 1827, some four months after the filing. This auction realized a value of 8,164 Taler, which was above the initially estimated value of Maria’s property and enough to pay off all her creditors in full.⁶²⁶ It turned out that she was not ‘over-indebted’ at all. It might be regarded as a good outcome for her, but her farm and family inheritance were gone and her reputation destroyed in a bankruptcy procedure that could have been avoided.

Deutsches Rechtswörterbuch: Wörterbuch der älteren deutschen Rechtssprache, 9 vols., (Weimar, 1914/1996), Vol. 8, p. 141.

⁶²⁴ StADD 10057 Nr. 8862, fol. 5 09.03.1827

⁶²⁵ StADD 10057 Nr. 8862, fol. 6

⁶²⁶ StADD 10057 Nr. 8862, fol. 12-15.

Other cases remind us that sometimes widows forced family members to sacrifice their wealth and labour in order to support them. Melchior Moll's wife provides an example that took place during the 1820s in the Sauerland. After Melchior died, his wife continued his textile trade under the company name 'Melchior Moll Witwe'. Her unmarried daughter worked in the business from the beginning. After the firm made losses for several consecutive years, her son Friedrich entered the business in 1825. The firm continued to operate until 1829, when Friedrich eventually filed for bankruptcy. Upon opening the procedure the firm had 33,589 Taler in assets and owed 57,576 Taler, of which 18,000 were secured debt. The local authorities initiated criminal investigations into the son's conduct. The regional chamber of commerce was asked for an expert opinion. Three local merchants compiled an exonerating report:

It seems that Friedrich Moll not only did his utmost in every respect (...) as it should be expected of every capable merchant; the existing evidence in form of balance books strongly suggests that the son sacrificed himself for the family (...) and it is indisputable that his entering into the firm would have mostly benefitted his mother and sister if no further misfortunes had arisen.⁶²⁷

The Molls managed to reach an out-of-court settlement with their creditors in which they paid off 40% of their debt. Whether or not their family business survived is unknown.

VI. Conclusion

This chapter endeavoured to delineate the ambivalent position of women in bankruptcy – whether as wives involved in their husband's bankruptcy or as single, widowed, or independent women. The single most regulated female property right in the early modern times and the beginning nineteenth-century was a wife's dowry. In bankruptcy, women could resort to the Roman institution of the *ius separationis* or *Separationsrecht* to demand their dowry back before any secured creditors were compensated. This institution posed a dilemma, particularly for the mercantile community. On the one hand families were keen to prevent the dissemination of their

⁶²⁷ Alles deutet darauf hin, dass der Geschäftsführer Fried. Moll nicht allein sein Möglichstes in aller Hinsicht getan (...) wie es von geschickten Kaufleuten kann gefordert werden; die Beweise liegen in den befundenen Balancen und es ist handgreiflich, dass sich der Sohn der Familie aufgeopfert (...) dass also der damalige Eintritt in die Handlung mehr zum Vorteil der Mutter und Schwester, wenn die Unglücksfälle in der Folge auch nicht anhaltend eingetreten wären, gewesen, ist unstreitig, transcribed in JUNG, MICHAEL, *Insolvenzen im beginnenden Industrialisierungsprozess. Untersuchungen zu den Existenzbedingungen frühindustrieller Unternehmen im Bergischen Industriegebiet* (PhD University of Wuppertal, 1990), p. 171.

own patrimony when they were debtors, and the *Separationsrecht* was a means to this end. Wives could also use it as leverage in their husband's bankruptcy to negotiate with creditors. Yet when merchants and businessmen were creditors, they resented the legal uncertainty that stemmed from the varying use of this institution in different polities. City states and merchant towns had previously formed compromises, as in the case of Hamburg, where the wife could take all her property out of the state if she had been married less than five years, but otherwise had to give everything that she owned to her husband's creditors.

As the scale and regional scope of economic activity in Germany increased, businessmen lobbied for the abolition of the *Separationsrecht*. They wanted legal security with regard to their priority rights in their debtor's bankruptcies and regarded the customary immunity as an instrument to shield assets from creditors. Subsequent legislations indeed curtailed the former privilege and women's property rights worsened rather than improved over the course of the century. This was simultaneously a function of the sequence of legal harmonization in Germany: the fields of commercial law and bankruptcy law were among the first to be harmonized while family law was among the last. Lawmakers focused on commercial priorities and business organizations were the prime beneficiaries of this new legislation.⁶²⁸ They often ignored issues of intra-family property rights that stemmed from the new legislation.

The empirical evidence suggests that single-filing women were predominantly widows. As debtors, these single women often spent longer in bankruptcy and had higher rates of indebtedness compared to married women. Women often became entrepreneurs when they had to make ends meet or tried to rescue a family business. They repeatedly fought for their rights in court and contested otherwise widely accepted priorities; they asserted the privileging of outstanding wages or the right of each creditor to be heard in settlement negotiations. As creditors they were frequently related to the borrower, lent smaller amounts but were otherwise just as careful in taking security measures as their male colleagues. Single women were vulnerable and often even defenceless against their male counterparts. Accusations of fraud in handling debt could quickly destroy their doings.

⁶²⁸ Cf. JOHN, MICHAEL, *Politics and the Law in late Nineteenth Century Germany: The Origins of the Civil Code* (Oxford, 1989).

CHAPTER 8: CONCLUSIONS

The signatory, the Royal Minister of Justice, would consider it highly desirable, if a unity in bankruptcy regulation could be reached among German states. (...) However, the minister believes on the other hand, (...) that accomplishing said unity is nowhere more difficult to attain than for this issue [of bankruptcy].
Letter from the Bavarian Ministry of Justice to the Saxon Representative to the Frankfurt *Bundestag*, April 5th 1866.⁶²⁹

I. Findings

Bankruptcy regulation furnishes a legal process to handle a debtor's default. That there can be much disagreement about the appropriate design of this process can be seen in Germany, where no shared bankruptcy regime existed for most of the nineteenth century. German states found it impossible to agree on a common insolvency regime. Only after national unification by a political hegemon, Prussia, did Germany receive her first unified bankruptcy code. I have studied the legal as well as the social process of bankruptcy in a sample of towns and places in nineteenth-century Germany. A focus was directed on non-Prussian legal systems in order to shed light on alternative solutions to bankruptcy that were not ultimately adopted when it came to national unification. Identifying and describing the distinct bankruptcy regimes was only one part of this study. Another task was to determine how individuals made use of the respective legal system and whether there were discernible trends over time. The following sections attempt to condense the gist of this study into ten findings.

a.) Findings

(i) Creditors and Debtors often preferred not to go to court to settle a case. They disliked the court procedure for its formal prolixity as well as for the expenses levied by legal representatives, trustees, and court-fees; the latter were payable out of the bankrupt's estate and thus di-

⁶²⁹ Own translation, German original: Der unterzeichnende königliche Staatsminister würde es für höchst Wünschenswert erachten, dass eine Gemeinsamkeit der Gesetzgebung der deutschen Staaten über die Konkursordnung erzielt werde, (...) Allein der Minister glaubt auf der anderen Seite (...), dass die dem Zustandekommen einer gemeinsamen Gesetzgebung entgegenstehenden Schwierigkeiten nirgends größer seien als gerade auf diesem Gebiet [der Konkursordnung]. From BayHStAM MJU 12787, *Justizministerium*.

minished the funds to be distributed among creditors. This finding holds across all legal systems studied.

(ii) Both creditors and debtors had incentives to turn to extrajudicial dispute settlement instead. Debtors hoped that avoiding a formal court procedure would save them from liquidating their business and would simultaneously incline creditors to grant debt respites. They also feared the social opprobrium attached to a public insolvency declaration. Such a declaration often deprived them of civic rights such as attending burgher assemblies or the local bourse. Creditors, on the other hand, hoped that an extrajudicial settlement would save them time and, as it often left more assets to be distributed, money. They also wished to circumvent the legally prescribed priorities and immunities that affected the distribution of value among multiple creditors. Some legal systems had sophisticated orders of priority and made it hard for creditors to anticipate what they could receive in a formal procedure.

(iii) Extrajudicial bankruptcy settlements could be accomplished either by stipulating the mechanism in the original loan contract or by bargaining after the debtor defaulted. In either case, parties felt compelled to negotiate in the shadow of the law; formal bankruptcy law provided the backdrop against which parties weighed whether or not they were likely to profit from an out-of-court deal. The inclination to settle a bankruptcy outside of the courts declined if either party felt significantly disadvantaged vis-à-vis other parties, such as creditors who suspected their debtor of fraudulent behaviour, multiple creditors with conflicting interests, or a debtor who felt overwhelmed by mighty creditors.

(iv) The German landscape was a hodgepodge, a *Flickenteppich*. Chapter 3 constructed two indices to measure debtor and creditor protection. These indices have revealed a tripartition: (1) In states that shaped their bankruptcy laws according to the German *ius commune*, the insolvency regulation was characterized by a focus on procedural elements and on liquidation. Its sophisticated rank order of creditors attempted to lay down priority rules for any type of claim. Con-

temporary jurists criticised it as slow and expensive. (2) Municipal statutes of free cities were markedly different. During the early modern period there had been a large number of autonomous towns in Germany enacting their own bankruptcy laws. The free cities reflected this tradition into the nineteenth century. Authorities in those towns relied on strong corporate organisations for rule-enforcement. (3) States that had experienced French occupation often kept the French *Code de Commerce* or modelled their laws after it. The model was attractive to businessmen because it targeted commercial bankruptcies, offering a settlement option while also removing old access barriers like guild membership. Contemporary jurists admired it because it created strong courts that could intervene at any point in the procedure.

(v) When forming a settlement, creditors and debtors often relied on local corporate organisations. This was most pronounced in the free cities, where these organisations officially played an adjudicating role; but they also yielded influence in other towns, albeit not as unequivocal. Corporate organisations elucidate the role of local clubs: members of the merchant guild or the chamber of commerce could more easily access and share information. The guild also administered the commercial court, appointed its judiciary, and enforced its rulings or deals reached between parties. A special procedure for petty cases ensured that the infrastructure was not cluttered. The law offered a formal liquidation procedure as well as an alternative procedure, in the course of which creditors and debtor would negotiate under the supervision of a judge or court-official. The different procedural choices ensured that a liquidity problem did not immediately trigger an insolvency procedure that could lead to the untimely dissolution of a firm.

(vi) The bigger the influence of these local clubs on the bankruptcy regime, the more insolvency cases were handled through the official system. Different jurisdictions calibrated the role of these local clubs differently. States that relied on the German *ius commune* for their bankruptcy regime, such as Saxony and Prussia, did not acknowledge these organisations officially. This did not entail their absence. Leipzig's merchant guild, for example, seems to have played a similar role compared to Hamburg in facilitating settlements and being a source for commercial regula-

tion, although it was a Saxon city. The commercial courts of the French legal family attempted to incorporate mercantile know-how; their members were partly appointed by the local chambers of commerce, which in turn had been established in a uniform fashion to replace the old guilds. The free cities, in turn, relied on corporate organisations for rule enforcement. Mercantile self-administration and autonomous municipal government were not separated clearly in those places.

(vii) The overlap of mercantile self-administration and municipal authority with regard to bankruptcy implies that bankruptcy regulation had long been a function of urban specialisation. This was similar to the regulation of bills of exchange. In terms of legislation the bill of exchange and bankruptcy law coevolved. For centuries, bills of exchange travelled between different cities but rarely reached the countryside. Towns and cities curtailed the right to draw and underwrite bills by limiting it to members of the local merchant guild and guests of the tightly monitored markets and fairs. Special courts were established to handle conflicts and defaults. A law on bills of exchange either contained provisions for insolvent debtors or it was quickly followed by another piece of legislation that established a commercial court and regulated its procedure, including the bankruptcy procedure. The two regulations often complemented each other.

(viii) Legal harmonization was under way even before the political union – in the Prussian customs union and later in the national law on bills of exchange in 1849 and the drafting of a unified commercial law in 1862. This process hardly considered regional customs and local clubs; legal reformers ignored them. It is remarkable that the treatment of bankruptcy was not unified until 1877. But even as individual polities continued with their distinct bankruptcy regimes, harmonizing an increasing number of commercial issues across German states diminished the efficacy of those bankruptcy laws. The regulation of bills of exchange was decoupled from its former counterpart. Local clubs were unable to deal with an increasingly heterogeneous group of businessmen in which the traditional merchant-banker was no longer dominant. Large trading houses made investments everywhere in Germany, while industrial facilities sought to raise

capital from beyond their region. Creditors found it tedious to deal with external legal systems. The traditional mechanisms in place to handle defaults lost their utility.

(ix) The French model proved influential in this process. It was first adopted by the Prussian bankruptcy reform of 1855, which in turn became a blueprint for the national bankruptcy law of 1877. The French legal spirit promoted equality before the law; it was hostile to the society of estates that had hitherto dominated Germany. As a consequence, a number of privileges and immunities for different persons and claims were eliminated. While the law of 1877 was under consideration here, it does mark the endpoint of a process delineated in the previous pages. As the old settlement mechanisms ceased to work, the bankruptcy law became an instrument of debt-collection. Toward the second half of the century, creditor protection seems to have played a bigger role than issues of debtor protection and reorganization. Arguably, the national bankruptcy code differed from the *Code de Commerce* in allowing non-merchants to petition for bankruptcy and by introducing the so-called *Zwangsvergleich*, a forced settlement. The *Zwangsvergleich* was a remnant of the older settlement mechanisms in the Hanse towns. But it was deprived from the support of local organisations and their enforcement mechanisms.

(x) To the extent that the bankruptcy law became general and universal it ceased to be local and communal. Contrary to older statutes, local communities and their interests were no longer acknowledged. This was to the liking of businessmen, who had been complaining about the legal fragmentation when trying to conduct business across different German regions. Women probably suffered from this development. They had long enjoyed special priority rights in bankruptcy and had in fact been part of the bankruptcy regime – as guarantor, as monitor, and as protective shield. They lost this role and were degraded to dependants of their husbands.

b.) Outlook

The legal development in Germany was by no means a linear development. There is a danger that we interpret nineteenth-century law making solely as a foreshadowing of what was to come

because the end of the century witnessed a strong Bismarckian state. Such an attitude can overlook the many side-stories, undercurrents, and conflicting developments that happened simultaneously. At different times and in different places, the dilemma of bankruptcy was interpreted and solved differently.

This raises the question how important bankruptcy law really was. The German economy industrialised and built railways long before the national bankruptcy code was in place. It also seems to have been a subject that was not high on the agenda of contemporary politicians. Contrary to other legal fields, its development remained 'Bismarck-free'; neither the mighty Prussian statesman nor any other German frontbench politician intervened in its design. It was an issue left to legal experts. Yet in this capacity it did occupy lawmakers across Germany a great deal. There was numerous new legislation, reform attempts, and debates across the German states on the issue of bankruptcy, mostly held among jurists and business representatives. There was a sense that the bankruptcy regime had to change to take account of the economic change that the country was undergoing.

Prussia was not the focus of this thesis, but further research should place Prussia's bankruptcy reform from 1855 in a comparative context with law reform in other German states. Prussia's reform abandoned the old roots of its bankruptcy regime and gravitated towards the French model. The timing was not accidental; there was a sustained effort under way to draft a German commercial code. The final result in 1862 still did not incorporate a unified bankruptcy regulation. Was it because the views and concepts in other German states were too different to be aligned outside of a political union?

German legal history has for long focused on the history of ideas and dogmas. A focus on social practices and empirical evidence was missing. Economic history, on the other hand, has often focused too much on statistics, ignoring the normative debates and how they shaped and influenced behaviour; even ignoring the big impact that some seemingly minor regulation might entail. Further research should explore the exchange between the commercial world and jurists. To which extent did law makers rely on mercantile know-how? How did the law in turn shape businessmen's normative understanding of the world they were acting in? To which extent did

both spheres, jurists and businessmen, pursue different normative assumptions and where did they mingle?

Finally, this thesis has a bearing on contemporary issues. The history of bankruptcy law in Germany is also a history of autonomous communities and their self-administration, the difficulty to harmonize those normative frameworks, and the power of federal structures. While most issues of commercial law were harmonized long before a political union, reformers failed to provide a national bankruptcy code. The issue was so embedded with local communities that it touched deep normative beliefs. Unifying bankruptcy laws required a technocratic bureaucracy and the Prussian hegemony to bring about legal harmonization – a reminder that few legal codifications are free from the impact of political competition. European policy makers attempting to build an EU-wide insolvency framework, should take a closer look at this aspect of history.

II. Interpretation

a.) The Dilemmas of Bankruptcy

Bankruptcy regulation has to make two normative decisions: one concerns the relationship of creditor rights and debtor rights. The other relates to the balance between deterrence and continuity. The need to address these dilemmas occurs whenever societies allow for the concept of debt. In this respect, an insolvency regime is almost by definition a central element of market economies.⁶³⁰ A number of historical lawmakers had viewed creditor protection as their prime objection. It had to do with a belief, that any lenient treatment would be letting debtors ‘off the hook’. The same belief underpinned the argument that imprisonment was a perfectly just consequence for defaulting debtors. By the nineteenth century, this was no longer the paramount approach to bankruptcy. But it had not faded either – nor has it until recent days.

⁶³⁰ CLAESSENS, STIJN AND DJANKOV, SIMEON, eds., *Resolution of financial distress: an international perspective on the design of bankruptcy laws*, (Washington, 2001), Introduction p. xvii.

	<i>Creditor friendly</i>	<i>Debtor friendly</i>
<i>Individual level</i>	Protection of creditor rights and interests	Protection of debtor rights and interests
<i>Community level</i>	Deterrence of fraudulent or gambling behaviour/ enforcement of due diligence	Obviating premature liquidation of viable enterprises/ ensuring continuity

Figure 28 Bankruptcy Dilemmas (own table)

By penalizing default and emphasizing creditor protection, lawmakers often created other incentive problems. Debtors had an incentive to shift assets out of the reach of the bankruptcy regulation, in which they were disenfranchised. Debtors could also attempt to protract the triggering of bankruptcy, which sometimes lead to a long suffering of both the firm and its creditors. Creditors on the other hand could use a creditor friendly bankruptcy regime to prey on their debtor's weaknesses and seize assets at the first opportunity. Solutions for a swift and smooth resolution of financial distress therefore often included provisions that left something for the debtor and kept them partially in charge of the firm. However, this was not the solution to all problems either. In a debtor friendly bankruptcy regime, borrowers might 'gamble on resurrection'. The expectation that firms can be rescued could lead to moral hazard. A debtor friendly bankruptcy regime also shifts the burden of monitoring on creditors. They might in turn charge higher interest rates to compensate for the increased risk of default, which reduces the availability of credit in the economy.

b.) There is no Optimal Solution

Legal scholars repeatedly attempt to justify the fact that so many bankruptcy provisions are exemptions from ordinary (out-of-bankruptcy) private law. Yet bankruptcy law is a product of its time and the economy it serves. There is no 'universal' and 'optimal' bankruptcy code that is good for everyone. Some individuals may do better under one code than under another. Having said this, it does not follow that bankruptcy law is simply the product of pressure group politics.

'Badly written codes can make everyone worse off'.⁶³¹ Winding up firms, businesses, and personal wealth often entail externalities that affect innocent bystanders. Particularly in small civic communities such as the free cities, lawmakers were sensitive to such externalities. The actual bankruptcy code was always a compromise of different objectives and it did not focus solely on the relationship between debtor and creditors. Its overarching goal was often rather different and focused on containing the negative effects of bankruptcy on the community.

Advancing money and goods on credit in exchange for a promised share in future prosperity is the continuous activity in a commercial society. It involves an element of trust and goodwill, which is vulnerable to the debtor's default. By defaulting, a debtor loses his creditworthiness, their families lose their breadwinner, lenders lose their future profits, and workers lose their employment. What is more, the assets that a debtor pledged as security might not always fully compensate creditors for their lost future profits. The firm as a going concern is often worth more than the sum of its parts. The issue then is how to equitably distribute the loss from a debtor's default.

This becomes particularly apparent in times of crisis, when bankruptcy is widespread. A crisis often threatens dangerous chain-effects. Some therefore argue, that a financial crisis represents the 'moment of truth for the insolvency regime'.⁶³² In a recession the danger is that financial distress may be self-reinforcing. Debtors become unable to repay debts, which threatens creditors, which in turn restricts their lending that may be required to revive the economy. A whole cycle of commercial lending and repaying may come to a halt. Government action is then needed in two ways: it might have to assist directly, although with caution in order to avoid new moral hazard problems; and it should write rules that lead to efficient private restructuring efforts. Some of the alternative bankruptcy models in this study were actually the result of such crisis management by governments.

⁶³¹ Stiglitz, *Bankruptcy Laws*, 2001, p. 4.

⁶³² BERGES, AUGUST MARIA, "Vergleich und Konkurs in der Evolution der Marktwirtschaft," in *Ein hundred Jahre Konkursordnung* ed. WILHELM UHLENBRUCK, BERND KLASMEYER, AND BRUNO KÜBLER (Cologne, 1977), pp. 363-399.

c.) Consumer Credit vs Trade Credit

It should be added to the aforementioned that there exists an important difference between private loans and commercial loans. A private individual repays their debt by restraining consumption and saving money. These are gains from austerity. A firm repays its debt from future income generated through production and sales. These are gains from prosperity. Modern insolvency regulations acknowledge this distinction; during the nineteenth-century, it was inchoate. Limited liability was yet in its earliest stage, new business forms such as stock companies were experimented with, and the vast majority of businessmen were personally liable partners or owners of their firm.

This is why it is sometimes difficult for a modern observer to interpret historical bankruptcy laws. Because this distinction was not yet fully implemented, bankruptcy laws addressed both the default of a private individual and that of a business. Some of those provisions that seem overly ‘moralistic’ to the modern beholder derived from the need to urge debtors to austerity in advance, the need to distinguish between a ‘deserving’ debtor – the poor but honest – and those who squandered their wealth. Other provisions that strike a modern reader as particularly lenient were designed for businesses, to offer a path to settlement and reorganization; they were probably not intended to be applied to private individuals. However, the distinction between the two was difficult to make.

The first legal system that put it into writing was the French *Code de Commerce* from 1807/1838. It included a settlement mechanism and offered debtors the option for a fresh start, yet limited the code’s applicability to merchants. One could also say that the code could offer a settlement mechanism *because* it was restricted to merchants. Private individuals were referred to the ordinary debt-collection mechanisms. It is maybe telling for the changing of time and sentiment that the national German bankruptcy code in 1877 allowed private individuals to avail themselves to the remedy of bankruptcy. And it is probably symptomatic for our current time, that we come to define the human being in terms of an entrepreneur, and as a consequence more and more European insolvency laws have devised ‘reorganization’ procedures for private individuals.

d.) The Club Good Model

Municipal bankruptcy statutes that originated in the German free cities and towns during the early modern period show a somewhat similar, yet different solution to the bankruptcy dilemmas: the club good solution. These statutes furnished a mechanism for structural bargaining between creditors and debtors and for concluding amicable settlement that avoided liquidations. It was in the interest of town authorities to keep disruptions to the cycle of lending and borrowing at a minimum. But it should not be interpreted as particularly lenient on debtors either. The burden of monitoring and screening that was felt by creditors in such an arrangement was somewhat outsourced to corporate organizations. Membership in a guild-like organisation such as the *Kaufmannschaft* was important if one wanted to make use of this system.

These organisations provided an infrastructure in that they were often running the local bourse and delegated members to sit as judges at the commercial court. They facilitated the circulation of information about individual members among the community, established certain entry requirements, and asserted their own jurisdiction over commercial matters. Members subscribed to a certain code of conduct and in exchange received access to a business-friendly insolvency regime. The system also offered multiple procedural choices and left the decision over liquidation or settlement to creditors; they could choose the resolution that promised the highest return (i.e. the smallest loss from the debtor's default). Viable firms should get a second chance, while creditors should feel reassured by this system and not compelled to restrict lending or charge higher interest rates.

The downside of this system was its exclusivity. It dispatched of petty cases and ordinary city dwellers in a fast-track liquidation procedure. Over the course of the century, the exclusive club met its limits when business activity became more widespread and bigger in scale and scope. The old membership structure changed, new forms of business organisations emerged, and an interest in autonomous, local jurisdictions ceased. The model ultimately vanished. But it represents an interesting historical example for a system that attempted to grant debtors the possibility of reorganization while still ensuring a working capital market.

e.) The Ambiguity of the Law and Creditor's Responsibility

Bankruptcy rules become necessary in the event that a debtor has multiple creditors. There is seldom unanimity about the best solution to financial distress. Hence control matters. Security rights are an element that bestows the power to seize pledged assets on creditors. It is a form of control. Creditors can exercise it at will and upend a bargaining process. Recognizing absolute priority rights is usually seen as a way to reward creditors in bankruptcy and reassure them that their interests will be protected. Upon closer look, however, it is not clear that it actually achieves this goal. My findings contribute to a long debate about whether or not absolute priority in bankruptcy is a good idea. They suggest that it is not.

Security rights can be conflicting themselves. A large number of the disputes that came to courts had to do with determining the right rank order of creditors and their priority rights. More security rights sometimes only produce more confusion. If the rules are not clear and predictable, creditors will still charge higher interest rates. What is more, creditors have themselves different abilities to screen and monitor their debtors. A creditor who specializes in this activity, for example a bank, will usually make sure it accumulates sufficient priority rights to outweigh all other creditors. Absolute priority for secured claims is also not suited to discourage creditors from imprudent loans.

Bankruptcy laws usually remain incomplete and ambiguous. This may seem paradox at first if one assumes that these regulations are put in place to resolve the problem of incomplete contracts. But just as it would be prohibitively costly to foresee any potential default in contractual stipulations, it is impossible for the law to cover every possible case that could occur. Even more so as bankruptcy laws serve multiple objectives as has been pointed out above. Their ambiguity leaving room for interpretation and judicial discretion must be seen as a way to reconcile those conflicting goals. If creditors and debtors come together to negotiate possible solutions to financial distress, what really is being negotiated is a normative question: should the solution maximize the value for creditors right now, or should it keep the firm as a going concern to maximize value in a longer time-horizon? Many will disagree about what measures and which time horizon will be appropriate. It is a dispute about valuation, the question whether or not a

business has a fundamental value that is different from today's market value, that is different from the value of the sum of its parts. The solution in some German towns was to leave this normative question to the private negotiation between parties (albeit under the wings of a judge or a commission ensuring the legality of their solution). The decision to liquidate, reorganize, or sell a business should be based on whichever option generates value for all parties, including creditors, debtors, other shareholders, and innocent bystanders such as workers. In order to make parties consider all relevant interests the question must be raised, whether more responsibility could (and should) be shifted to creditors by removing their absolute priority rights.

There is the practical argument, that removing these priority rights makes creditors more inclined to engage in settlement negotiations and smooths the asymmetries between different types of creditors. There is the accounting argument, that the whole business entity is often worth more than the sum of its parts, so piecemeal liquidation ought to be avoided. In fact, most laws acknowledged this latter argument by distinguishing the realization of value (which is usually in the hands of a trustee) and its distribution among creditors into two different stages. There is also a normative argument: creditors advanced loans to the debtor in the hope of reaping a share of his future profits. Should they not equivalently partake in his future losses? It can be asked why their risk should stop with the debtor's default. Rather this risk continues into the process of bankruptcy, however spread out this may be; creditors form a sort of solidary community that needs to find an equitable (not necessarily equal) distribution of losses. The opponents of such a view argue, that creditors will charge higher interests in order to compensate for the increased burden of monitoring, and that this would be bad for the economy as a whole. This argument seems to assume, that creditors do not or cannot adequately monitor their debtors and will resort to charging a fee in advance. But it is not made clear, why the lawmaker should feel compelled to remove this burden from creditors. Maybe making creditors bear some of the risk and keep something for debtors would lead to fewer law suits, encourage creditors to lend prudently, monitor debtor's activity, and thus benefit society as a whole.

APPENDICES

A. Historical Exchange Rates

Historical Exchange Rates for 3 German Reference Currencies

	Frankfurt and South German Guilders Current				Prussian Current/ Vereinstaler				Mark Banco (Hamburg)				
	100 Francs	100 Marc banco	100 Prussian current	100 Rixdollars Leipzig	100 Francs	100 Frankfurt Guilders	100 Marc banco	100 Rix-dollar	100 Mark Courant	100 Francs	100 Frankfurt Guilders	100 Prussian Courant	100 Rixdollars
1820	39.72	73.53	144.82	150.16	27.3	68.39	51.06	103.98	123.74	53.46	135.31	254.97	202.72
1825	39.32	72.44	144.31	149.39	27.15	68.79	50.39	103.4	123.25	53.69	136.63	259.22	204.92
1830	39.48	72.84	145.13	149.26	26.99	68.32	50.34	102.65	125.64	53.41	135.88	197.16	202.04
1835	39.33	73.28	145.06	1849.36	27.01	68.63	50.77	102.89	125.28	53.32	135.58	195.46	201.42
1840	39.12	73.18	146.44		26.43	67.66	50	102.07	123.28	52.92	135.25	197.93	202.21
1845	46.88	87.84	174.99	174.89	26.64	56.66	50.26	99.87	124.16	53.03	112.43	196.72	196.85
1850	47.29	88.12	175.37	175.26	26.82	56.7	50.26	99.67	125.94	53.31	112.52	196.66	196.43
1855	46.68	88.04	176.43	176.2	26.26	56.17	49.86	99.82	124.36	52.75	112.3	197.91	197.49
1860	46.44	88.09	175.39	175.28	26.31	56.7	50.13	99.82	125.11	52.47	112.6	197.1	196.67
1865	47.32	88.83	174.9	174.92	26.92	56.83	50.83	99.8	126.37	52.96	110.81	193.78	193.45

Variable	Coding	BAY 1722	BAY 1753	BAY 1819	BAY 1822	BAY 1856	BAY 1862	BAY 1869	FR 1808	FR 1838	HH1 1753	HH1 1756	HH1 1768	HH1 1772	HH1 1775	HH1 1782	HH1 1815	BR 1834	BR 1843	Li 1822	PRUS AGO	PRUS HYP	PRUS KO	SAX 1815	SAX 1834	
(23) Personal assets of a shareholder debtor can be shielded from debts of a company/partnership?	Yes = 1, No = 0, Mixed = 0,5	0,5	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	0	0
2.3. Outcome																										
(24) Any form of substantive control and legal provisions for public auctions?	Yes = 1, No = 0	0	1	1	1	1	1	1	0	0	1	1	1	1	1	1	1	0	1	1	1	1	1	1	1	1
(25) Third party can bail out the debtor during the procedure?	Yes = 1, No = 0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
(26) Debtor can propose settlement?	Yes = 1, No = 0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	0	0	0	1	1	1
(27) The law stipulates thresholds for distribution in settlement below 50%?	Yes = 1, No = 0	0	0	0	0	0	0	0	0	0	1	1	1	1	1	1	1	0	1	0	0	0	0	0	0	1
(28) Does the law set incentives to facilitate a settlement?	Yes = 1, No = 0	0	0	0	0	0	0	0	1	1	1	1	1	1	1	1	1	1	1	0	0	0	1	0	1	1
(29) Does the settlement/accord include secured creditors?	Yes = 1, No = 0	1	1	1	1	1	1	1	0	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
(30) Who votes on a proposed settlement?																										
a. Secured creditors	Yes = 1, No = 0	1	1	1	1	1	1	1	0	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
b. Unsecured creditors	Yes = 1, No = 0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
(31) Creditors and debtor can negotiate settlement without interference of courts?	Yes = 1, No = 0	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	0	0	0	0	0	0
(32) Full discharge after completion of settlement plan?	Yes = 1, No = 0, Mixed = 0,5	0	0	0	0	0	0	0	1	1	0	0	0	0	0	0	0	0	0	0,5	0	0	0	1	0	0
(33) Full discharge after completion of liquidation?	Yes = 1, No = 0, Mixed = 0,5	0,5	0	0	0	0	0	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
(34) No criminal action against 'negligent' debtors?	Yes = 1, No = 0, Mixed = 0,5	0,5	1	1	1	1	1	1	1	1	0	0	1	1	1	1	1	1	1	0	1	0	0	0	1	0
(35) Precise definition of what constitutes a fraudulent bankruptcy?	Yes = 1, No = 0	0	0	0	0	0	0	0	1	1	1	1	1	1	1	1	1	0	1	0	0	0	1	0	1	0
(36) Debtor does not lose civil rights during procedure?	Yes = 1, No = 0	0	0	1	1	1	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	1	0	0
(37) Debtor is rehabilitated automatically after completion of procedure?	Yes = 1, No = 0	1	0	1	1	1	1	0	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	1
(38) Creditors cannot object to rehabilitation?	Yes = 1, No = 0	1	1	0	0	0	0	1	1	1	1	1	1	1	1	1	1	1	1	1	0	0	0	0	0	1
Max. Value: 40		19,69047619	17,19047619	18,19047619	18,69047619	18,69047619	19,83333333	21,83333333	22,83333333	22,83333333	28	27,5	28,5	28,5	28,5	28,5	28,5	24	22,5	24,02380952	18	17,5	24,23809524	20	25,33333333	

C. Bankruptcy Codes, Statutes and Decrees in Germany

1700-1877 (continued next page)

Year	State	Law
1721	Nuremberg	Banco-Ordnung der Stadt Nürnberg
1724	Hesse-Darmstadt	Civil-Proceßordnung
1724	Saxony	Erläuterung und Verbesserung der Proceß- und Gerichtsordnung (sog. Erläuterte Proceßordnung)
1739	Frankfurt	Wechselordnung
1753	Bavaria	Codex juris Bavarici judicarii oder baierische Gerichtsordnung, Kap. 19 & 20
1753	Hamburg	Neue Fallitenordnung
1758	Austria	Handlungs- und Fallitenordnung
1766	Sachsen	Geschärftes Mandat gegen die Banqueroutiers in dem Marggrafthum Oberlausitz
1781	Austria	Allgemeine Konkursordnung
1783	Sachsen	Geschärftes Mandat gegen die Banqueroutiers in dem Marggrafthum Oberlausitz
1791	Prussia	Allgemeine Gerichtsordnung für die Preußischen Staaten
1798	Lubeck	Erneuertes Stadtrecht
1802	Hamburg	Wechselgesetze
1804	Bavaria	Handelsgerichtsordnung der Stadt Bavaria
1808	Rhineland	Loi des Faillites (Livre III, Code de Commerce)
1810	Baden	Landrecht für das Großherzogthum Baden nebst Handelsgesetzen
1815	Hamburg	Handels-Gerichts-Ordnung. Auf Befehl Eines Hochedlen Rathes (...) 15.12.1815.
1817	Sachsen	Anordnungen über das veränderte Versteigerungsverfahren und die Beschleunigung der Konkursprozesse, Grundherrschaft Wendischbora
1818	Hesse-Darmstadt	Verordnung vom 6. April 1818 über die Zulässigkeit von Moratorien und deren Voraussetzungen
1818	Sachsen	Firmen- und Procura-Ordnung für die Stadt Leipzig 10.06.1818
1818	Sachsen	Leipziger Mäklerordnung, bestätigt am 7.3.1818
1820	Lubeck	Der freien Städte Lübeck und Hamburg revidierte Concurrs-Ordnung für das Amt Bergedorf
1822	Bavaria	Hypothekenordnung
1822	Rhineland	Loi des Faillites
1822	Lubeck	Mäkler-Ordnung der freien und Hansestadt Lübeck
1823	Sachsen	Mandat, die Beschränkung der den Gläubigern Königlicher Diener an deren Diensteinkommen einzuräumenden Rechte betreffend; vom 18. Juni 1823
1825	Frankfurt	Von Handlungsgesellschaften, ihrer Auseinandersetzung, Gesellschafts- und der Gesellschafter Particular-Gläubigern. Wechsel-Ordnung
1831	Lubeck	Erneuerte Verordnung für den Auctionarius
1832	Baden	Proceß-Ordnung, darin: Gantverfahren
1834	Sachsen	Gesetz, die Rechte persönlicher, directer und indirecter Staatsabgaben in Concursen betr.; vom 20. October 1834
1834	Hamburg	Entwurf einer Hamburgischen Wechsel-Ordnung

1838	Prussia	Gesetz über die Eisenbahn-Unternehmungen, §§ 1-3, 6
1838	Austria	Bestimmungen über das bey Eisenbahnen zu beobachtenden Concessions-System
1838	Frankfurt	<i>Rangordnung der Gläubiger im Konkurs</i>
1843	Prussia	Gesetz über Aktiengesellschaften
1843	Bremen	Verordnung für Debit- und Nachlaßsachen vom 24. Mai, publiziert 5. Juni 1843
1845	Frankfurt	Wechsel- und Merkantil-Ordnung der Freien Stadt Frankfurt, Offizielle Ausgabe
1846	Sachsen	Allgemeine Firmen- und Procura Ordnung vom 28.7.1846
1847	Prussia	Gesetz über die Errichtung von Handelsgerichten vom 03.04.1847
1849	Sachsen	Gesetz über Schuldarrest und Wechselprozeß vom 17.6.1849
1849	Austria	Entwurf einer allgemeinen Concursordnung für die Provinzen des österreichischen Kaiserstaates
1849	Austria	Entwurf eines österreichischen Handelsrechts nach den Beschlüssen der im Jahre 1842 deßfalls niedergesetzten Hofcommission
1850	Hannover	Allgemeine bürgerliche Proceßordnung für das Königreich Hanover
1852	Austria	Kaiserliches Patent vom 26.11.1852, wodurch neue gesetzliche Bestimmungen über Vereine angeordnet werden
1855	Prussia	Konkursordnung
1857	Prussia	Entwurf eines Handelsgesetzbuches für die preußischen Staaten
1857	Lubeck	Einstweilige Einführung eines Inspektionsverfahrens
1859	Rhineland	Gesetz wegen Änderung einiger Bestimmungen des Rheinischen Handelsgesetzbuches, vom 9. Mai 1859
1861	Hannover	Gemeines Konkursrecht
1862	Austria	Gesetz vom 17.12.1862 zu Einführung eines Handelsgesetzbuches
1862	Lubeck	Concurs-Ordnung für die freie und Hansestadt Lübeck
1866	Sachsen	Entwurf einer Concursordnung
1868	Austria	Gesetz vom 25.12. zur Einführung einer Concursordnung mit anschließendem Abdruck der Concursordnung
1873	Austria	Kaiserliche Verordnung vom 21.6.1873 wodurch besondere Bestimmungen über die Auflösung von Actiengesellschaften erlassen werden
1877	German Empire	Konkursordnung

D. The Law Establishing the Loan Commission for Hamburg 1857 (in German)

Amtliche Bekanntmachung im Correspondent
28.11.1857

Die in Gemäßheit des Rath- und Bürgerschlusses vom 27. November d J behufs Bewilligung von Vorschüssen auf Waaren und Werthpapiere niedergesetzte Commission macht hiedurch, im Einverständnis mit Löblicher Kämmerei und nach eingehalter und erfolgter Genehmigung Eins hochedlen Raths, die Bedingungen bekannt, unter denen die Vorschüsse zu leisten sind.

Regulativ

Über die in Gemäßheit Rath- und Bürgerschlusses vom 27.11.1857 zu leistenden Vorschüsse auf Waaren und Werthpapiere.

§ 1 Nur auf courante, hieselbst lagernde, nicht leicht verderbliche Waaren und auf solide Werthpapiere kann Vorschuß gegeben werden. Die Entscheidung ob eine Waare als courant oder ein Werthpapier als solide für die fraglichen Zwecke anzusehen sey, steht allein der Commission zu.

§ 2 Der Belauf der vorzuschießenden Summe beträgt, je nach dem Ermessen der Commission, von 50 bis 66 $\frac{2}{3}$ % des Werthes – der Werth der Waaren wird nach der Tagesreihe geschätzt, zu welchem dieselben an der hiesigen Börse zu fassen sind, wie solcher Börsenpreis durch die dazu von der Commission adhirten beeidigten Mäkler festgestellt werden wird; der Werth der Werthpapiere nach dem dafür an der hiesigen Börse notirten Geldwerthe des Tages, oder, je nach dem Ermessen der Commission, nach Taxe der von ihr zu adhirtenen Makler oder Sachverständigen.

§ 3 Die Anmeldungen der Vorschußgesuche geschehen auf dem Bureau der Commission im Rathhause, durch Ausfüllung und Unterzeichnung der dafür bestimmten Formulare.

§4 Unter Bco 3000, und auf längere Zeit als bis höchstens Ende Juni 1858, wird kein Vorschuß bewilligt.

§ 5 Die Leistung des von der Commission bewilligten Vorschusses geschieht durch löbliche Kämmerei, und zwar, nach deren Wahl, in Kammer-Mandaten oder, sofern es ihr stattnehmig erscheinen sollte, baar; in diesem letzteren Falle, unter Verständigung über die in Abzug zu bringenden Zinsen.

§ 6 Die Kammer-Mandate lauten auf Inhaber. Sie sind mit einem bestimmten Verfalltag versehen und haben bei Waarenvorschüssen mindestens 1 Monat, bei Vorschüssen auf Werthpapiere mindestens 14 Tage länger zu laufen, als der Vorschuß rückzahlbar ist. Kein Mandat kann einen späteren Verfalltag haben als den 31. Juli 1858. Die Mandate sind von zwei Kammerbürgern zu unterzeichnen und einem nicht zur Kammer gehörigen Mitglieder der Commission zu contrasigniren.

§ 7 Über die Lagerung der verpfändeten Gegenstände steht löblicher Kämmerei die Entscheidung zu. Die Werthpapiere wird sie in ihren Gewahrsam nehmen und entweder in ihrem eigenen Locale asserviren, oder, sofern es ihr zweckmäßig und ausführbar erscheint, im Bankgebäude unter Obhut der Bancobürger niederlegen. Die Waaren wird sie in die von ihr dazu bestimmten Lagerräume bringen lassen, oder in anderweitiger Art und ihren Verschluß nehmen, in beiden Fällen aber Niemandem, ohne Unterschied der Person, den Zugang zu den Lagern anders als im Beiseyn der von ihr angestellten Person verstaten.

§ 8 Die Feuerversicherung der verpfändeten Waaren wird löbliche Kämmerei für Rechnung und Gefahr des Anleihers beschaffen lassen, es sey denn, daß eine frühere ihr genügende Asscuranz bereits darauf Statt hätte und solche mit ausdrücklicher Genehmigung des Assecurateurs auf sie übertragen würde. Rücksichtlich der Werthpapiere bleibt die Versicherung gegen Feuersgefahr, wenn nicht der Anleiher eine solche ausdrücklich wünscht, dem Gutdünken löblicher Kämmerei überlassen.

§9 Die verpfändeten Gegenstände lagern übrigens selbstverständlich in jeder Beziehung für Rechnung und Gefahr des Anleihers, und ist l. Kämmereri weder für UNtergang, noch für Manco, Gewichtsverlust oder Beschädigung verantwortlich, sofern solche nicht erweislich durch die Schuld der von ihr rechtlich zu vertretenden Personen herbeigeführt wurden. Dagegen haftet der Anleiher der l. Kämmereri für allen Schaden, den sie auf irgend eine Art durch die Beschaffenheit der von ihm verpfändeten Waaren oder deren Fußlagen erleiden möchte.

§ 10 Die Anleiher trägt die Transportkosten, die ALgermiethe, die Feuer-Assecuranzprämie, die Kosten der von der Commission nöthig erachteten Taxationen und alle und jede sonstigen, auf dem verpfändeten Gegenstände haftenden particulären Unkosten, welche auf Anfordern sofort von ihm bezahlt werden müssen. Für die allgemeinen Bureau- und Administrationskosten wird ihm bei Rückzahlung des Vorschusses eine Spese von $\frac{1}{4}$ % auf das vorgeschossene Capital berechnet.

§ 11 Der Anleiher hat den Vorschuss an dem vorgeschriebenen Tage entweder in Kammermandaten, welche nicht später fällig sind als die ihm zZ als Vorschuß gegebenen Mandate, oder auch baar, zurückzuzahlen. In letzterem Falle wird ihm für die Zeit vom Zahlungstage bis zu dem Verfalltage der z Z als Vorschuß empfangenen Mandate der laufenden Disconto vergütet.

§ 12 Falls die Rückzahlung des Vorschusses an dem dazu bestimmten Tage nicht erfolgt, ist Kämmereri befugt, sobald es ihr beliebt, und ohne weitere gerichtliche oder außerordentliche Procedur oder Anzeige, zum bestmöglichen, wo und wie sie wolle, öffentlich oder unter der Hand, ganz oder theilweise, vorzunehmende Verkaufe des Unterpandes für Rechnung und Gefahr des Anleihers zu schreiten, um sich daraus, so weit es reicht, für Kapital, Verzugs-

zinsen, Kosten und Schäden bezahlt zu machen; und hat der Anleiher das nach vorzulegender Abrechnung der Kämmereri sich etwa ergebende Deficit als liquide Schuld ohne alle Einrede zu bezahlen, worüber, wie über die Unterwerfung unter alle übrigen Bestimmungen dieses Regulativs, bei Empfang des Vorschusses von jedem Anleiher ein Revers zu zeichnen ist.

§ 13 Außer dem vorerwähnten Falle, da die Rückzahlung in dem dafür gesetzten Termin nicht erfolge, hat die Kämmereri auch noch in folgenden beiden Fällen die Befugniß, zu dem sofortigen Verkaufe ds Pfandes, unter gleicher Berechtigung wie vorstehend, ihrem Ermessen nach zu schreiten, nämlich:

(1) im Fall einer gerichtlichen Insolvenz-Erklärung des Anleihers, sofern nicht Curatores bonorum auf deshalb an sie ergangene Aufforderung zur sofortigen Einlösung des Pfandes bereit sind;

(2) falls, zufolge einer durch Mäkler oder Sachverständige vorgenommenen Taxation, der verpfändete Gegenstand über 20 % der ursprünglichen Taxsumme an Werth verloren haben sollte, und der Anleiher auf deshalb an ihn ergangene Aufforderung nicht eine sofortige, von der Commission für genügend erachtete, additionelle Sicherheit leistete, oder von dem Vorschusse so viel zurückzahlte, daß das ursprüngliche Verhältniß des Vorschusses zum Werthe des Pfandes wieder hergestellt würde.

§ 14 Abändernde und zusätzliche Bestimmungen zu diesem Regulativ können mit Einverständniß der Kämmereri, unter Genehmigung eines Rathes getroffen werden, unbeschadet, wie sich von selbst versteht, aller für die bereits erfolgten Anleihen erworbenen Rechte.

Hamburg, den 28. Novemebr 1857m gez.
Haller, Hahn, Albers, Flor, Großmann, Grase-
mann, Söhle.

E. Synopsis of Special Insolvency Regulation in Hamburg and Lübeck 1857

Explanation: The Lubeck statute followed Hamburg's legislation with a few days. Extensive passages are simply copy pasted from the Hamburg model. Words and passages that have been coloured in red here indicate differences between the two documents.

HAMBURG

Verordnung wegen zeitweiliger Einführung eines **Administrationsverfahrens** im Falle von Zahlungssuspensionen. Beliebt durch Rath- und Bürgerschluß vom 2ten December 1857

Auf Befehl E. H. Raths der freien und Hansestadt Hamburg publicirt den 2ten December 1857

§ 1 Wenn ein Schuldner, welcher sich augenblicklich nicht im Stande befindet, seine mercantilischen Verbindlichkeiten zu erfüllen, dennoch sein Vermögen für hinreichend hält, um je nach den Umständen seine Gläubiger daraus schließlich zum Vollen befriedigen zu können, so ist ihm innerhalb der drei ersten Werktage nach dem Tage der Zahlungseinstellung gestattet, unter Einreichung seiner Designatio Creditorum und unter dem Erbieten zur Abstattung des dieser Verordnung angehängten Eides, beim **Handelsgericht** auf **Convocation** seiner Gläubiger, behufs herbeizuführender Administration oder Mitadministration seines Vermö-

§ 2 Das **Handelsgericht** wird sodann den Eid durch **einen** Commissarius abnehmen, und die Gläubiger-Versammlung convociren lassen, damit sie über die Frage, ob entweder Administration oder Mitadministration eintreten solle, beschließe, und die Wahl der Administratoren oder Mitadministratoren vornehme. **Für das Verfahren bei dieser Versammlung gelten die im Art. 4 der Neuen Falliten Ordnung enthaltenen Vorschriften.**

LUBECK

Verordnung, die einstweilige Einführung eines **Inspektionsverfahrens** bei Zahlungs-Einstellungen betreffend (Publicirt am 15. December 1857)

Es hat der Senat im Einvernehmen mit der Bürgerschaft beschlossen, und verordnet hiedurch:

Art. 1

Schuldner, welche sich augenblicklich nicht im Stande befinden, ihre merkantilische Verbindlichkeiten zu erfüllen, jedoch Ihr Vermögen zu vollen Befriedigung ihrer Gläubiger für ausreichend erachten, können innerhalb der drei ersten Werktage nach den Tage Zahlungseinstellung, unter Einreichung **ihrer Bilanz** und eines möglichst genauen Gläubigerverzeichnisses, sowie unter dem Erbieten zur Ableistung des in der Anlage zu dieser Verordnung festgestellten Eides, bei dem **Senate** auf zusammen Berufung ihrer Gläubiger zum Zwecke der vorläufigen Beiordnung von Inspektoren eintragen.

Art. 2.

Zwei vom Senat ernannte Kommissare nehmen demnächst dem Bittsteller den von ihm angebotenen Eid ab und berufen die Gläubigerversammlung zur Wahl der Inspektoren **nach einfacher Stimmen Mehrheit der erschienenen Hypothek und Buch Gläubiger.**

HAMBURG

§ 3 Die erwählten Administratoren oder Mitadministratoren haben, sobald sie sich zur Übernahme des Amtes bereit erklärt haben, und vom Handelsgericht bestätigt und auf die getreue Erfüllung der ihnen nach gegenwärtiger Verordnung obliegenden Pflichten behüfig vereidigt worden sind, sofort und ungesäumt eine genaue Erforschung des Zustandes der Masse sich angelegen sein zu lassen, und über deren Ergebnis längstens in vier Wochen einen ausführlichen Bericht an die Gläubiger abzustatten.

§ 4 Sobald sie bei der Untersuchung des Status die gewisse Überzeugung gewonnen haben, dass die Masse nicht zureiche, um sämtliche Creditoren zum Vollen befriedigen zu können, so haben sie ohne alle Zögerung – und also auch wenn solches im Laufe der ersten 4 Wochen der Fall sein sollte, sofort, und ohne den Ablauf der vierwöchentlichen Frist abzuwarten, - den Gläubigern davon Anzeige zu machen.

LUBECK

Art. 3

Die gewählten Inspektoren haben, nach erfolgter Annahme der Wahl und nachdem sie von den Kommissaren auf die getreue Erfüllung der nach gegenwärtiger Verordnung ihnen obliegenden Pflichten durch Hand-Gelöbnis verpflichtet sein werden, den Zustand der Masse ungesäumt und mit möglichster Genauigkeit zu erforschen und über das Ergebnis ihrer Bemühungen binnen vier Wochen in einer durch die Senatcommissare einzuberufenden zweiten Gläubigerversammlung ausführlichen Bericht zu erstatten.

Gewinnen die Inspektoren bei Untersuchung des Massezustandes schon vor Ablauf dieser Frist die Überzeugung, das die Masse nicht ausreiche, sämtliche Gläubiger zum Vollen zu befriedigen, so haben sie davon unverzüglich die Kommissare in Kenntnis zu setzen und, ohne Rücksicht auf die noch laufende Frist, die sofortige Einberufung der zweiten Gläubigerversammlung bei denselben beantragen.⁶³³

Art. 4

In der zweiten Versammlung haben, Nach Anhörung des Berichts der Inspektoren, die Gläubiger darüber zu beschließen, ob die Inspektion auch ferner noch und eventuell bis zu welcher Zeit dieser beibehalten, oder ob eine außergerichtliche Administration oder eine gerichtliche Behandlung der Masse eintreten soll.

Die Entscheidung hierüber erfolgt zwar auch noch einfacher Stimmenmehrheit der erschienenen Hypothek Grundbuch Blogger; Es einfach dabei den Betrag der einzelnen Gläubigern zuständigen Kapitalforderungen in der Maaße Berücksichtigung finden, dass jeder Inhaber solcher Forderungen zum Gesamtbetrage von weniger als 500 Mark nur eine, von 500 bis 2000 Mark zwei, von 2000 bis 5000 Mark drei, von 5000 und darüber vier Stimmen abzugeben hat, und im Zweifelsfalle die Angabe des Gläubigers über den Betrag seiner Forderungen entscheidend ist.

⁶³³ This is a literal copy of Art. 4 of the Hamburg Bankruptcy Law from 1753.

HAMBURG

§ 5 Die Gläubiger haben nach ihnen vorgedachtermaßen von den Administratoren oder Mitadministratoren abgestattetem Bericht oder gemachter Anzeige, per majore, nach Inhalt des Art. 4 der Neuen Falliten Ordnung darüber zu beschließen, ob die Masse seinerseits im Wege der Administration oder Mitadministration liquidirt und beendigt werden solle, oder ob ein förmliches Fallitverfahren einzuleiten und zur Wahl von Curatoribus bonorum zu schreiten sei.

§6 Im Bezug auf die Verwaltung der Masse haben die Administratoren oder Mitadministratoren sämtliche in der neuen Falliten-Ordnung für die Curatores bonorum gegebenen Vorschriften zu befolgen, mit der Ausnahme jedoch, daß sie

(1) rücksichtliche der Constituierung der Masse von den Vorschriften der Art. 9 und 11 der Neuen Falliten Ordnung über die Inventur und Sicherstellung der Activa **insoweit abweichen dürfen, als es, ihre gewissenhaften Überzeugung nach, ohne Gefahr für das Interesse der Gläubigerschaft geschehen kann, und**

(2) **nicht an die Vorschrift der neuen Falliten Ordnung rücksichtlich des öffentlichen Verkaufes der beweglichen Güter gebunden sind, wenn sie es für zweckmäßig halten, einen Privat-Verkauf vorzuziehen.**

§ 7 Überhaupt gelten alle Bestimmungen, welche die bestehenden Gesetze in Betreff der Fallitmassen und der bei denselben in Betracht kommenden privatrechtlichen Verhältnisse enthalten, soweit sie nicht in der gegenwärtigen Verordnung ausdrücklich aufgehoben sind, auch für die in Gemäßheit dieser Verordnung herbeigeführten Administrationsmassen, **und hat namentlich der nach Maßgabe des § 1 derselben beim Handelsgericht eingereichte Antrag sowohl rücksichtlich der Dispositionsfähigkeit des Schuldners, als rücksichtlich des Aufhörens von Executionen, Arresten, und sonstigen Sonderdeckungen, völlig dieselbe Wirkung wie eine gerichtliche Insolvenzerklärung.**

LUBECK

Art. 5

Der etwa beschlossenen Beibehaltung der Institution ungeachtet bleibt es den Inspektoren unbenommen, zu jeder Zeit auf einberufen einen neuen Gläubigerversammlung, Zum Zweck erneut Schluss damit die Fortdauer der Inspektion, bei den Senatskommissaren anzutragen.

Art. 6

Falls eine außergerichtliche Administration beliebt wird, haben die Senatskommissarien, deren Commissorium auch auf diesen eventuellen Fall sich erstrecken wird, **ohne Weiteres die für die Behandlung außergerichtlicher Debitmassen geltenden Grundsätze zur Anwendung bringen zu lassen.**

Wird die gerichtliche Behandlung der Masse beschlossen, so ist davon unverzüglich dem beikommenden Gerichte zur Wahrnehmung des Weiteren Kenntnis zu geben.

Art. 7

Durch die Anordnung des Inspection wird dem Schuldner die Disposition und Verwaltung seines Vermögens nicht entzogen; zwar ist er in beiden Rücksichten an die Zustimmung der Inspektoren gebunden, jedoch sind alle von ihm vorgenommenen Handlungen für die Masse rechtsverbindlich, unbeschadet der Bestimmung am Schlusse des Art. 8.

Für die Sicherstellung der Aktivmasse haben die Inspektoren im Allgemeinen in derselben Weise zu sorgen, wie dies bei außergerichtlichen Debitmassen den Administratoren obliegt; ein Proclama dagegen haben sie vor Erstattung ihres ersten Berichtes niemals zu extrahieren, und die Inventur der Masse dürfen sie nach Umständen bis zu demselben Zeitpunkte unterlassen. Falls auf den ebengedachten Bericht eine Fortdauer der Inspektion beliebt wird, ist zugleich über das Proclama und die Inventur von den Gläubigern nach Maaßgabe der hinsichtlich des Stimmenverhältnisses im Art. 4 gegebenen Vorschrift Beschluss zu fassen.

HAMBURG

§ 8 dagegen aber sollen die Rechtsfolgen, welche ein Fallissement für die Person des Falliten und dessen bürgerliche Ehre nach sich zieht, durch eine Gemäßheit dieser Verordnung eingesetzte Administration oder Mitadministration in keiner Weise herbeigeführt werden; es soll vielmehr der Schuldner, so lange die Administration oder Mitadministration dauert, bei aller bürgerlichen Ehre verbleiben, **vorbekühlich jedoch, daß er sich einstweilen, und bis zur völligen Entfreiung von seinen Schulden, der Ausübung öffentlicher Ämter und Officien zu enthalten hat, und auch seiner etwa erforderlich erachteten, zu seiner Ersetzung vorzunehmenden Neuwahl nicht widersprechen kann.**

§ 9 Wenn die Masse auf dem Wege der Administration oder Mitadministration liquidirt und beendigt wird, findet keine Classification noch Börsenanschlag wegen der Entschlagung statt; hingegen verbleibt den Creditoren für den Fall, daß die Liquidation keine 80, 60 und 40 % auf ihre Capitalforderungen sammt Zinsen ergeben sollte, das Nachmahnungsrecht bis zu solchem Betrage, nach Maßgabe dessen, was die Neue Falliten Ordnung und die Additionalartikel vom 24.04.1772 in dieser Hinsicht für leichtsinnige Falliten vorschreiben.

§ 10 Wenn der Schuldner dem von ihm geleisteten Eide zuwider gehandelt hat, oder wenn eine sonstige ihm zur Last fallende unrechtfertige Handlungsweise gegen seine Gläubiger, oder einzelne derselben, sich während der Administration herausstellt, ist er sofort aller Wohlthaten der gegenwärtigen Verordnung verlustig zu erklären **und das Administrations Verfahren auch ohne und selbst wider den Beschluß der Creditoren, ex officio**, in ein förmliches Fallit-Verfahren zu verwandeln und als solches zu beendigen.

§ 11 Die den Administratoren oder Mitadministratoren für ihre Bemühung ausgesetzende Remuneration **wird vom Handelsgericht** nach Ermessen der Umstände bestimmt.

§ 12 Nach dem 31ten März 1858 werden keine, nach Maßgabe des § 1 dieser Verordnung an das Handelsgericht zu stellende Anträge ferner mehr zugelassen.

LUBECK

Art. 8

Die Bestimmungen der bestehenden Gesetzgebung in Betreff der bei Debitmassen in Betracht kommenden privatrechtlichen Verhältnisse finden auch auf die unter Inspektion gestellten Massen in so weit Anwendung, als ihnen nicht die Vorschriften dieser Verordnung entgegenstehen. Insbesondere hat die Einreichung des im Art. 1 gedachten Antrages in Bezug auf die Sistirung von Executionen, Arresten und Sonderdeckungen ganz dieselbe Wirkung, wie eine gerichtliche Insolvenzerklärung.

Art. 9

Dagegen hat die Einreichung eines solchen Antrages diejenigen Rechtsfolgen nicht, welche eine gerichtliche oder außergerichtliche Insolvenzerklärung für die Person eines Falliten und dessen bürgerliche Stellung herbeiführt; es behält vielmehr der Schuldner während der Dauer der Inspektion seine vollen bürgerlichen Ehrenrechte und bleibt zu deren Ausübung befähigt, so lange nicht seine Insolvenz sich herausgestellt hat.

Art. 10

Handelt der Schuldner dem von ihm geleisteten Eide zuwider oder stellt es während der Dauer der Inspektion sich heraus, daß er schon vor deren Eintritt in irgend einer Weise gegen seine Gläubiger insgesamt oder Einzelne derselben unrechtfertig gehandelt habe, so ist er sofort aller Vortheile, welche die gegenwärtige Verordnung ihm gewährt, für verlustig zu erklären und seine Masse der gerichtlichen Behandlung zu überweisen.

Art. 11

Die Inspektion hört auf, und es tritt der Schuldner in die freie Disposition über seine Güter wieder ein, sobald eine auf Antrag der Inspektoren berufene Gläubigerversammlung durch Stimmenmehrheit nach Maaßgabe des Art. 4 sich darüber entschieden hat.

Art. 12

Sowohl von dem Eintritt eines Inspektionsverfahrens, als von dessen Beendigung, wird der Kaufmannschaft mittelst Börsenanschlages Kenntnis gegeben.

HAMBURG

EID: Ich NN schwöre zu Gott dem Allmächtigen, daß ich bei meinem gegenwärtigen **Creditwesen**, oder einem nicht zu verhoffenden ferneren Fallissement, den von meinen Gläubigern erwählten Deputierten, oder den künftigen Curatoribus bonorum, und dem etwa von ihnen anzunehmenden Buchhalter, von meinem ganzen Vermögen, liegender und fahrender Habe, hier oder auswärts befindlichen Gütern, Effecten, Waaren, Preciosen, Geldern und Schulden, getreulich Nachricht geben, davon nichts, es sei hier oder anderswo befindlich, verschweigen oder verhehlen, meine Bücher, Correspondance, Handlungs-Papiere und Documente, ihnen unweigerlich einhändigen und von allem, was sie zu wissen begehren, aufrichtige Nachricht erteilen, auch ihnen sonst nach Möglichkeit an die Hand gehen, und übrigens mich allemal, wenn ich gesondert werde, sistiren, und bis zur gänzlichen, entweder gütlichen oder gerichtlichen, Endschaft meiner Sache, mich, ohne Einwilligung meiner Gläubiger, aus dieser Stadt und deren Jurisdiction nicht begeben wolle.

LUBECK

Art. 13

Die den Inspektoren für ihre Bemühung zuzubilligende Vergütung **wird in der zweiten Gläubigerversammlung nach den jedesmaligen Umständen festgestellt**. Die Stimmzählung erfolgt auch hierbei nach den Bestimmungen des Art. 4.

Art. 14

Nach dem 31. März 1858 werden Anträge der im Art. 1 bezeichneten Art nicht mehr zugelassen.

Anlage: Eid

Ich N. N. gelobe zu Gott dem Allmächtigen, daß ich bei meinem gegenwärtigen **Schuldenwesen** den von meinen Gläubigern zu erwählenden Inspektoren, oder **den etwa demnächst zur Regulierung desselben zu bestellenden Administratoren** von meinem ganzen Vermögen, hiesigem sowohl als auswärtigem, möge es nun in liegenden Gütern oder fahrender Habe, in baarem Gelde, Aktien oder sonstigen Werthpapieren, Pretiosen, Waaren oder ausstehenden Forderungen bestehen, getreulich Nachricht geben, denselben nichts davon verschweigen, verhehlen, oder gar entfremden, ihnen meine Bücher, Correspondenzen, Handlungspapiere und sonstigen Documente unweigerlich einhändigen und jede ihrerseits begehrte Auskunft aufrichtig erteilen, sie bei ihren Bemühungen nach Kräften unterstützen, ohne ihre Zustimmung oder gegen ihre Anordnung keine Veräußerung von Gegenständen, welche zu meinem Vermögen gehören, vornehmen, **und mich bis zur gänzlichen Regelung meines Schuldenwesens** ohne Einwilligung der obgedachten Vertreter meiner Gläubiger nicht von hier entfernen wolle.

So wahr mir Gott helfe!

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I. Archival Material

Archive	Signature	Sub-Signature	Time Period	Title
AHL	1.1-1	17751	1750(?)-1811	Konkursfälle bis 1811
AHL	1.1-2	1706	1815	Schuldenwesen Brauereizunft
AHL	1.1-3	3822-3826	1810-1817	Roddes'sche Debitmasse
AHL	1.1-4	15066	1722	Zuständigkeit Niedergericht Konkurse
AHL	1.1-5	16778	1832	Vergleichsvorschlag Wittwe Brand
AHL	1.1-6	26568	1852	Zulässigkeit außergerichtlicher Debitkommissionen
AHL	1.1-7	26575	1810-1820	Behandlung kaufmännischer Konkurse
AHL	1.1-8	26589	1831	Fallitenordnung Grundlinien
Bundesarchiv	DB 55/15		1848-1849	Reichsjustizministerium der Justiz; Entwurf eines gemeinsamen Handelsgesetzbuches
Commerzbibliothek	S 599 Nr. 55 rot		1857-1859	Handelskrise
Commerzbibliothek	S 122 a-e		1801-1870	Fallitenbuch
Commerzbibliothek	905 Bde 2-3		1850-1860	Gläubigerdesignationen
Haniel Archiv	HAA:190		1820-1837	Konkurs von Gerh. Lohbeck in Mühlheim/Ruhr
Haniel Archiv	HAA:82		1844-1850	Schmidt'sche Konkurs-Sache
Haniel Archiv	HAA:85		1850-1854	Scholl'sche Konkurs-sache
Haniel Archiv	HAA:66		1858-1854	Zeche Mahlinger
Haniel Archiv	HAA:603		1859-1863	Konkurs des Heinrich Schmitz in Meiderich
Haniel Archiv	HAA:378		1862	Konkurs der Zuckerfabrik Einbeck
Haniel Archiv	HAA:196		1862-1863	Konkurs von G.P. Bundschu in Mannheim
Haniel Archiv	HAA:75		1864-1865	Reinhardt'sche Konkurs-sache Lauenburg
Haniel Archiv	HAA:564		1868	Forderungen F.H. Staub & Söhne, Baumwollspinnerei
Haniel Archiv	HAA:637		1876-1877	Konkurs der Aktien-Gesellschaft "Lahnhütte"
Haniel Archiv	HAA:617		1876-1878	H.H. Elshorst, Konkurs-Akten
Haniel Archiv	HAA:643		1876-1883	Konkurs der Preussischen Bergwerks- und Hütten-Aktien-Gesellschaft auf Zeche Hansa bei Huckarde
Haniel Archiv	HAA:622		1877	Konkurs von Joh. Backhaus
Haniel Archiv	HAA:735		1878	Konkurs von Carl Schneider
ISG Ffm	Bethmann-archiv FA	III/50	1840-1860	Gelegenheits-Darlehen
ISG Ffm	Bethmann-archiv FA	III/2a	1842	Ehevertrag
ISG Ffm	Bethmann-archiv GA	W 1/9-5, 148	1866	Korrespondenz mit ausgetretenen Teilhabern der Firma die gegenseitigen Verbindlichkeiten betreffend
ISG Ffm	Bethmann-	W 1/9-5,	1810-1812	Darlehen an Strasburger Kaufmann

Archive	Signature	Sub-Signature	Time Period	Title
	archiv GA	25		
ISG Ffm	Bethmann-archiv GA	W 1/9-5, 1045	1853	Fabrik in Käfertal?
ISG Ffm	Bethmann-archiv GA	W 1/9-5, 1044	1821	Ehrbacher Anleihe
ISG Ffm	Bethmann-archiv GA	W 1/9-5, 852	1876	Vorschuß an Rau (Hotelbesitzer Strasburg)
ISG Ffm	Bethmann-archiv GA	VIII/18	1869-1898	Societäts Verträge mit Partner
ISG Ffm	Bethmann-archiv GA	III/49	1835-1862	Gesuche um Darlehen
ISG Ffm	OAGL	Z3-1707	1823-1855	Zivil-Fälle am Oberappellationsgericht Lübeck
StADD	10157 Grundherrschaft Borthen		1830-1852	Tabellen über die beim Gericht Borthen verhandelten Zivil, Konkurs- und Vormundschaftsangelegenheiten
StADD	10548 Grundherrschaft Schleinitz		1820-1832	Gerichtskostenrechnungen Konkurse
StADD	11321 Generalkriegsgericht		1831	Tabelle über die beiM Generalkriegsgericht anhängig gewordenen Kreditwesen
StAHB	D.11.a.1.a.3.b		1834	Notizen über das bestehende Moratorial- Accords- und Concurs-Verfahren und Andeutung über die Verbesserung derselben. Als Material zur Berathung für die am 24ten Janr. 1834 ernannte Deputation zur Berathung einer neuen Falliten-Ordnung.
StAHB	D.11.a.1.c		1827-1828	Verhütung Nachteiliger Kompensationen durch Wechsel an Auswärtige
StAHB	D.11.a.1.e		1823	Konkurse Obergericht 1823
StAHB	D.11.a.5		1733-1810	Accorde
StAHB	D.11.a.8		1842	Übertragung Eigentum
StAHB	D.11.b.1.b		1818	Konkurse 1818
StAHB	D.11.b.1.c		1849-1879	Konkurse Obgericht 1849-1879
StALe	20014 - Amt Nossen		1847 - 1856	Statistische Übersichten über Zivil-, Konkurs- und Kriminalprozesse sowie über Vormundschaften
StALe	20086 - Gerichtsamt Burgstädt		1856	Repertorium über Konkursverfahren, Sequestrationen, Zwangsversteigerungen u. a. 1742-1856 im Bezirk des Schönburgischen Justizamtes Wechselburg
StALe	20578 - Rittergut Wolkenburg mit Kaufungen		1855 (1872)	Repertorium von Zivil- und Konkursprozessen, Nachlass- und Vormundschaftsangelegenheiten der Gerichte Wolkenburg und Limbach über Wolkenburg und dazugehörige Dörfer
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