

Designing the limits of creditworthiness Insolvency in Antwerp bankruptcy legislation and practice (16th–17th centuries)

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Summary

In 1516 and 1518, the Antwerp City Council introduced a collective system of debt recovery, which broke with the tradition of priority for the first seizing claimant. This view resulted in a legal framework, which was based on the concept of publicly known insolvency. Because of the vague legal definitions in the 1582 and 1608 customary law compilations, the position of pursuing creditors was strengthened. Although these rules weren't successful, they demonstrate an early intention to draw the line between criminal bankruptcy, persisting insolvency and temporary payment problems.

Keywords

Commercial law, bankruptcy legislation, attachment, Antwerp 16th and 17th centuries

Introduction

In the early modern period bankruptcy legislation in the Netherlands developed into a broad system, which provided solutions for general market disturbances. This development went hand in hand with a growing precision of legal definitions and with an extension of the scope of the legislation. In the sixteenth and seventeenth centuries, there was a shift from repression towards a more lenient procedure centred around insolvency. The criminal contents of the first bankruptcy legislation were slowly supplemented with new concepts making it legally possible to start collective liquidations for other than fraudulent ruins. A central issue in this process was terminology. The concern that not every financial problem should result in a liquidation of affairs needed legal clarification in order to clearly separate irreversible failures from temporary setbacks. In contemporary bankruptcy cases, a judge commonly makes this distinction. According to the 1807 *Code de commerce*, which laid the basis of bankruptcy legislation in many European countries, a debtor is bankrupt when he stops payments¹. The general contents of this provision imply that a judge must

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deduct the starting date of a failure from the concrete circumstances leading to the setback. Although the French legislator had not intended it as such, the vagueness of this text was helpful to cover unforeseen and complex situations in which a ruin may appear².

In the sixteenth and seventeenth centuries, legislators and lawyers struggled with what could be considered as signs of business failures, as they attempted to circumscribe the state of bankruptcy and insolvency in detailed rules. Early attempts to define insolvency were made in Antwerp near the end of the sixteenth century and they were closely linked to the registration and structuring of Antwerp commercial rules, which were written down several times in the sixteenth and seventeenth centuries. Although a considerable part of the commercial law in these customary law texts was drawn from learned and foreign sources, solutions from practice were also introduced into these compilations, as the Antwerp City Council wanted to provide legal protection for merchants visiting its markets. Because commercial customs had slowly trickled down into the city's legal scenes, the Antwerp legislator gave weight to them and valued their application by creating a comprehensive body of written rules on bills of exchange, insurance and companies.

This article aims at offering an insight into Antwerp bankruptcy legislation and practice in the sixteenth and seventeenth centuries³ and focuses on the creation of a

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Used abbreviations:

ACA: City Archives in Antwerp (FelixArchief)

ARA: Archives of the Realm in Antwerp

PK: Privelegekamer

RLB: Royal Library of Belgium in Brussels

V: Vierschaar

¹ Art. 437 Code de commerce.

² J.-P. Delville, G. Guiheux, M. Herail, T. Noël, L. Nurit and E. Richard, *Droit des affaires, Questions actuelles et perspectives historiques*, [Collection Didact Droit], Rennes 2005, p. 582–585.

³ The general outlines of Antwerp bankruptcy legislation can be found in: J. Beving, *Traité des faillites et banqueroutes, par A. Renouard entièrement refondu et mis en harmonie avec la loi belge du 18 avril 1851, sur les faillites, banqueroutes et sursis ...*, Brussels 1851, p. 67–73; J. Denucé, *Archives commerciales privées: le fonds des faillites à Anvers*, Annales d'histoire économique et sociale, 4 (1932), p. 372–377; J. Denucé, *De Insolvente Boedelskamer als kern voor een Antwerpsch economisch archief met inventaris*, Antwerpsch Archievenblad, 2nd series, 2 (1927), p. 204–211 and 7 (1932), p. 211–212; E. Dirix, *Historische verkenningen in het faillissementsrecht*, Rechtskundig Weekblad, 69 (2005), p. 213–215; P. Godding, *Le droit privé dans les Pays-Bas méridionaux du 12e au 18e siècle*, [Académie royale de Belgique, Mémoires de la classe des lettres, Collection in-4°, 2nd series, 14/1], Brussels 1987, p. 520–523; S. Lammel, *Gesetzgebung und Rechtsprechung, Die Gesetzgebung des Handelsrechts*, in: H. Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, [Veröffentlichungen des Max-Planck-Instituts für europäische Rechtsgeschichte], II/2, Munich 1976, p. 784–785; J. Van den Nieuwenhuizen, *Beknopte inventaris van de Insolvente Boedelskamer in het stadsarchief van Antwerpen*, [Algemeen Rijksarchief en

liquidation procedure following insolvency⁴. The first part investigates the earliest Antwerp bankruptcy legislation. The second analyses the influence of criminal law concepts in the first bankruptcy procedure. The development of a general insolvency system in the late sixteenth and early seventeenth centuries is sketched in a third part, whereas, in a fourth, the impact of the legal definitions on business strategies and practice in the courts is detailed.

1. – From individual seizure to collective liquidation. The earliest characteristics of the Antwerp bankruptcy procedure

Already in the late middle ages, the Antwerp authorities had to deal with the matter of fleeing debtors. According to the Antwerp *Keurboek*, a collection of rules dating from the fourteenth century⁵, anyone who had left his business in disarray was ordered to return and pay his creditors within three weeks. Should the fugitive not do this, he was banned for seven years and lost his citizenship⁶. Documents from fifteenth-century practice attest to the existence of public sales, whereby the returns were

Rijksarchief in de Provinciën, Archiefbestanden in niet-Rijksarchieven, 4], Brussels 1998, p. 5–7. Histories of Antwerp contain a few references to its bankruptcy legislation. See: F. Prims, *Geschiedenis van Antwerpen*, Antwerp 1927–1949, V, p. 61. Studies by economic historians have demonstrated the influence of bankruptcy legislation on mercantile practice. See: R. Baetens, *De nazomer van Antwerpens welvaart, De diaspora en het handelshuis De Grootte tijdens de eerste helft der 17de eeuw*, [Gemeentekrediet van België, Historische uitgaven Pro Civitate, Series in-8°, 45], I, Brussels 1976, p. 235–241; E. Coornaert, *Les Français et le commerce international à Anvers (fin XVe et XVIe siècle)*, I, Paris 1961, p. 42; O. De Smedt, *De Engelse natie te Antwerpen in de 16de eeuw (1496–1582)*, II, Antwerp 1954, p. 587–594; J.A. Goris, *Étude sur les colonies marchandes méridionales (Portugais, Espagnols, Italiens) à Anvers de 1488 à 1567, Contribution à l'histoire du capitalisme moderne*, Leuven 1925, p. 359–362. Some studies of legal historians have referred to Antwerp bankruptcy legislation. See: J.A. Ankum, *De geschiedenis der Actio Pauliana*, I, Zwolle 1962, p. 367; R. Feenstra, *Reclame en revindicatie, Onderzoekingen omtrent de rol in de ontwikkelingsgeschiedenis van het recht van reclame gespeeld door den Romeinsrechtelijken regel omtrent eigendomsovergang en prijsbetaling bij koop (Inst. 2, 1, 41)*, Harlem 1949, p. 125–126, p. 140–141 and p. 189–190. For general reflexions on bankruptcy legislation in the Netherlands, see: J. Kohler, *Lehrbuch des Konkursrechts*, Stuttgart 1891, p. 22–23; M. Steele, *Bankruptcy and insolvency: bank failure and its control in preindustrial Europe*, in: *Banchi pubblici, banchi privati e monti di pietà nell'Europa preindustriale, Amministrazione, tecniche operative e ruoli economici*, [Atti della Società Ligure di Storia Patria, New series, 31/1–2], I, Genoa 1991, p. 198–200.

⁴ Certain aspects of Antwerp bankruptcy and insolvency legislation, such as the important practice of settlement (*concordat*), are therefore not examined here.

⁵ The *Keurboek*, containing some 200 provisions on various issues, has been compiled from the beginning of the fourteenth century onwards. The text has been published in: *Coutumes du pays et duché de Brabant, Quartier d'Anvers*, [Recueil des anciennes coutumes de la Belgique], I, G. De Longé (ed.), Brussels 1870, p. 2–89 (hereafter *Keurboek Antwerp*). On its dating, see: F. Blockmans, *Het vroegste officiële ambachtswezen te Antwerpen*, Bijdragen voor de geschiedenis der Nederlanden, 8 (1954), p. 181; F. De Nave, *Een Antwerpse rechtsoptekening uit het begin van de 15de eeuw*, Handelingen van de Koninklijke Commissie voor de uitgave der oude wetten en verordeningen van België, 30 (1982), p. 1–5; F. Prims, *Het Keurboek van Antwerpen en het probleem der stadskeuren*, Verslagen en Mededeelingen van de Koninklijke Vlaamse Academie voor Taal- en Letterkunde, 1932, p. 445–463. On the contents of the *Keurboek*, see: M. Gozzen, *De costumiere bronnen voor de studie van het oud-Antwerpsche burgerlijk recht*, Rechtskundig Tijdschrift voor België, 39 (1949), p. 8–9; E.H. Mertens and K.L. Torfs, *Geschiedenis van Antwerpen sedert de stichting der stad tot op onze tyden*, V, Antwerp 1849, p. 510.

⁶ *Keurboek Antwerp* (*supra*, n. 5), p. 54 (art. 146).

distributed according to the date of the creditors' titles⁷. When the claimants with titles were paid, the remainder was given to the first seizing creditor⁸. If the recovered sums were not sufficient to cover all debts, the unpaid creditors were allowed to claim their investment by seizing what the ruined debtor acquired after the liquidation⁹.

Even though liquidations started by creditors mostly took on the form of a public sale, they were essentially based on individual actions of seizure. Attachment or seizure was a means to secure obligations by freezing a debtor's properties, which could be sold if the debtor refused to settle his affairs¹⁰. In this respect, there was no difference between liquidation with one creditor and expropriation involving many creditors. Although in the latter case priority rules were applied for the distribution of the proceeds from the sale, in both situations the expropriation started with seizure and ended with a public sale. In fifteenth-century Antwerp, there was no other legal remedy than seizure in situations, which concerned more than one claimant.

However, this practice changed substantially in the first decades of the sixteenth century, when two urban ordinances introduced a bankruptcy system, one of 21 January 1516 (n.s.) detailing the bankruptcy procedure and the hierarchy of debts¹¹, another of 2 June 1518 applying these and new rules to insolvent inheritances¹². This

⁷ *Oudt Register, mette berderen, 1336–1439*, Antwerpsch Archievenblad, 1st series, 29 (s.d.), p. 144–146 (26 June 1437). The Antwerp aldermen authorized the liquidation of a fugitive couple's assets. They specified that the proceeds from the public sale must be paid first to the creditors with the oldest titles ('*alst d'oudste scepenenbrieue oft renten die daerop sprekende syn*'). This rule was linked to a principle that gave older hypothecation priority over younger, as was already stated in an early-fifteenth-century legal comment by the Antwerp urban official Willem de Moelner. See: *De 'Antwerpse rechtsaantekeningen' van Willem de Moelner*, E. Strubbe and E. Spillemaeckers (eds.), *Handelingen van de Koninklijke Commissie voor de uitgave der oude wetten en verordeningen van België*, 18 (1954), p. 67.

⁸ ACA, V, nr. 68, fol. 12v. (around 1508); *Coutumes du pays et duché de Brabant, Quartier d'Anvers*, [Recueil des anciennes coutumes de la Belgique], I, G. De Longé (ed.), Brussels 1870, p. 408 (art. 92) (I, p. 378–427 is hereafter referred to as *Golden Book 1530s*).

⁹ *Het 2de Oudt Register in 't parkement gebonden, 1438–1459*, Antwerpsch Archievenblad, 1st series, 30 (s.d.), p. 316–318 (24 May 1448). In this agreement between the creditors of an insolvent debtor, which was endorsed by the City Council, it is stated that the unpaid creditors are permitted to collect their debts after the public sale of the debtor's estate. This principle was also recognized in an agreement between cities of the Duchy of Brabant in 1445. See: *Coutumes du pays et duché de Brabant, Quartier d'Anvers*, I (*supra*, n. 5), p. 714 (1 March 1445 (n.s.)).

¹⁰ There was no clear distinction between provisional seizure, as a means to freeze a debtor's properties, and attachment upon a judicial decision for its execution. In sixteenth- and seventeenth-century Antwerp, attachment had to be followed by a judgment on the seizing creditor's claim, except if the contract with the debtor permitted immediate liquidation. See: Godding, *Le droit privé* (*supra*, n. 3), p. 509–510. Hereafter, the words attachment and seizure will be used as synonyms, applying to both mentioned types of seizure.

¹¹ The Antwerp City Council issued this ordinance on 21 January 1516 (n.s.) and submitted the text to the Council of Brabant, a provincial and royal court. Endorsement of this text was obtained on 28 January 1516 (n.s.). The ordinance has been published in: *Recueil des ordonnances des Pays-Bas, Règne de Charles Quint 1506–1555*, [Recueil des anciennes ordonnances de la Belgique], I, C. Laurent (ed.), Brussels 1893 (hereafter *ROPB*, 2nd series, I), p. 464–466. The original urban ordinance of 21 January 1516 (n.s.) is found in: ACA, V, nr. 914, fol. 69. Copies of this text, which sometimes contain minor changes, are found in: ACA, V, nr. 4; nr. 5, fol. 103; nr. 14, fol. 45v.; nr. 15, fol. 40; ARA, City of Antwerp, nr. 152, fol. 82v.; RLB, Manuscripts, nr. 17087–97, fol. 33v. and fol. 71.

¹² This ordinance was not confirmed by the higher authorities. For copies of this text, see: ACA, V, nr. 4; nr. 5, fol. 107; nr. 14, fol. 43v.; nr. 15, fol. 34v.; ARA, City of Antwerp, nr. 152, fol. 83v.; RLB, Manuscripts, nr. 17087–97, fol. 35 and fol. 67.

new liquidation procedure, which was later elaborated in the city's written customs, had three important characteristics. First, it applied to all the debtor's belongings, the debts of the bankrupt being covered with all his assets, as all the bankrupt's properties were publicly sold. An urban official, the *amman*, was given the power not only to control the attachments and the public sale, but also to investigate and sequester the assets. In theory, all the bankrupt's properties should be included in the sale, even if they had not been attached. This feature of the bankruptcy procedure was probably influenced by Italian city ordinances or learned doctrine¹³ and related to the creditors' rights. The Antwerp 'Golden Book', a compilation of urban rules dating from the 1530s¹⁴, and the Antwerp customary law collection of 1548 stated that a bankrupt's assets were affected by the failure, that these resources belonged to the creditors¹⁵ and that they constituted a *massa creditorum*¹⁶. This terminology referred to a legal fiction, which implied that a bankrupt was not allowed to dispose of his properties¹⁷.

A second feature of the new bankruptcy procedure was its compulsory collective nature. After the attachment of a suspected fugitive's resources, the City Council issued an ordinance in which the debtor was ordered to resume his activities in the city and to clear his debts. Within forty days following the promulgation of the ordinance, the creditors could seize the bankrupt's goods¹⁸. After this period, all assets of the fugitive were sold and the proceeds were distributed among the creditors. The 1516 and 1518 ordinances stressed that the risks of bankruptcy should be shared collectively. They attempted to counter market disturbances of this kind by spreading their negative effects, thereby intending to overcome disadvantages of the older procedure. Under the earlier system, it was difficult for a debtor to master his payment problems, as liquidation did not necessarily wipe out all his debts because not all creditors had to be involved and because unpaid parties could still seize properties

¹³ On this rule in Italian city ordinances see: J. Hilaire, *Introduction historique au droit commercial*, [Collection droit fondamental, 1], Paris 1986, p. 310–311; U. Santarelli, *Per la storia del fallimento nelle legislazioni italiane dell'età intermedia*, [Studi di diritto privato italiano e straniero, New series, 9], Padua 1964, p. 109–113. For a brief survey of doctrinal views on this matter, consult: W. Pakter, *The origins of bankruptcy in medieval canon and Roman law*, in: P. Linehan (ed.), *Proceedings of the Seventh International congress of medieval Canon law*, [Monumenta Iuris Canonici, Series C, Subsidia, 8], Vatican City 1988, p. 494–495.

¹⁴ Mertens and Torfs, *Geschiedenis van Antwerpen* (*supra*, n. 5), V, p. 510–511.

¹⁵ *Golden Book 1530s* (*supra*, n. 8), p. 408 (art. 93); *Coutumes du pays et duché de Brabant, Quartier d'Anvers*, I, G. De Longé (ed.), Brussels 1870, p. 180 (art. 28) (I, p. 92–375 is hereafter referred to as *Antwerp customs 1548*).

¹⁶ *Golden Book 1530s* (*supra*, n. 8), p. 420 (art. 136); *Antwerp customs 1548* (*supra*, n. 15), p. 180 (art. 29); *Coutumes du pays et duché de Brabant, Quartier d'Anvers*, [Recueil des anciennes coutumes de la Belgique], I, G. De Longé (ed.), Brussels 1870, p. 530 (section 16) (I, p. 430–705 is hereafter referred to as *Antwerp customs 1570*); *Coutumes du pays et duché de Brabant, Quartier d'Anvers*, [Recueil des anciennes coutumes de la Belgique], II, G. De Longé (ed.), Brussels 1871, p. 530 (art. 5) (II, p. 2–685 is hereafter referred to as *Antwerp customs 1582*).

¹⁷ *Antwerp customs 1548* (*supra*, n. 15), p. 180 (art. 29); *Antwerp customs 1570* (*supra*, n. 16), p. 530 (section 16); *Antwerp customs 1582* (*supra*, n. 16), p. 530 (art. 5 and 6).

¹⁸ *Golden Book 1530s* (*supra*, n. 8), p. 406 (art. 86). The 1518 ordinance gave creditors from outside the Netherlands the opportunity to make their claims known within three months. See: ACA, V, nr. 4, art. 7–8. According to the 1608 customs, this rule applied to all creditors. See: *Coutumes du pays et duché de Brabant, Quartier d'Anvers*, [Recueil des anciennes coutumes de la Belgique], IV, G. De Longé (ed.), Brussels 1874, p. 388 (art. 4) and p. 414–416 (art. 69) (IV is hereafter referred to as *Antwerp customs 1608*).

after the public sale. The new bankruptcy procedure allowed the bankrupt to make a fresh start because the recovered funds were given only to claimants who had made known their demands within six weeks. Another problem before the introduction of the new liquidation procedure was that a number of creditors could not obtain payment when a debtor's properties had been sold before they heard of the liquidation. In the new procedure, the creditors' interests were protected by the public appeal: they were no longer unaware of expropriations following the bankruptcy of a contractual party. Although the new bankruptcy procedure implied the participation of all the bankrupt's creditors, unclaimed debts were considered to be extinguished and could no longer be collected¹⁹.

A third innovation of the 1516 and 1518 ordinances concerned the hierarchy between creditors. The rank of payment was no longer determined by the date but by the nature of the debt. In accordance with this principle, creditors were paid on a pro rata basis if the debtor's funds were not sufficient to compensate all contracts²⁰. This change, another possible reflection of Italian doctrinal texts or city ordinances²¹, was a consequence of the collective nature of the new procedure. It would have made no sense to invite all creditors when only a few of them could acquire a share of the proceeds from the public sale. Nevertheless, the practical relevance of the new approach was limited because the 1516 and 1518 ordinances allowed many exceptions to this rule. The earlier distinction between creditors with and those without titles was reflected by priority rules, which gave the first priority over the second. The hierarchy according to the date was still in use, as within certain categories of claims, such as those based on judgments or on public letters issued by the city's aldermen, the oldest debt was paid first²². Consequently, in practice the principle of priority for older titles prevailed. The 1516 and 1518 ordinances merely softened the rule that the order of payment for creditors without titles was determined by the date of seizure. Claimants with non-formalized debts were now paid equally and rateably.

The Antwerp bankruptcy system, as it was instituted by the 1516 and 1518 ordinances, was a combination of old and new views. Notwithstanding their new features, the 1516 and 1518 ordinances were still based on known concepts. The new bankruptcy system was mainly designed as a modified version of expropriation following seizure. Hence, attachment was still an essential part of the liquidation of a bankrupt's debts. The *amman* could gather all the bankrupt's belongings, but the creditors were only allowed a part of the returns if they had attached some of the assets. The older technique of seizure was therefore still the backbone of the bankruptcy procedure, being a customary practice that was merged with new solutions. Yet, the

¹⁹ *ROPB*, 2nd series, I (*supra*, n. 11), p. 465 (art. 3); *Antwerp customs 1570* (*supra*, n. 16), p. 532 (section 16); *Antwerp customs 1582* (*supra*, n. 16), p. 538 (art. 4).

²⁰ *ROPB*, 2nd series, I (*supra*, n. 11), p. 465 (art. 4); *Golden Book 1530s* (*supra*, n. 8), p. 420 (art. 133); *Antwerp customs 1570* (*supra*, n. 16), p. 532 (section 16); *Antwerp customs 1582* (*supra*, n. 16), p. 538 (art. 2).

²¹ Pakter, *The origins of bankruptcy* (*supra*, n. 13), p. 498–499; Santarelli, *Storia del fallimento* (*supra*, n. 13), p. 238–242. Although a direct influence of Roman law texts or of studies based on it is possible, the distribution pro rata could also have been inspired by French customary law sources or Hansa ordinances. See: Delville *et. al.*, *Droit des affaires* (*supra*, n. 2), p. 547–549; H. Planitz, *Über hansisches Handels- und Verkehrsrecht*, *Hansische Geschichtsblätter*, 31 (1926), S. 25.

²² *Antwerp customs 1570* (*supra*, n. 16), p. 534–536 (section 16); *Antwerp customs 1582* (*supra*, n. 16), p. 550–552 (art. 40–41).

1516 and 1518 ordinances were innovative in many ways. Most importantly, they hint at stronger government intervention in bankruptcy cases. Individual attachments of a bankrupt's possessions were henceforth the signal for the urban authorities to control the compensation of debts. According to the provisions of the 1516 and 1518 ordinances and of the first written customary law texts based on them, the bankruptcy procedure could be initiated if a debtor had fled from his creditors. Although it was mere theory, the bankruptcy legislation made it even possible that the liquidation started without any initiative of the creditors. The claimants had to seize some of the assets for purposes of debt evaluation, but these actions were not required for the start of liquidation upon bankruptcy. Government intervention is, moreover, clear in the ordinances in which the Antwerp City Council summoned fugitives to appear and which invited the creditors to present their claims by seizing a part of the fugitive's assets. The urban legislator attempted to provide a legal framework for situations in which liquidation and collective distribution of assets were an appropriate means to overcoming permanent cash-flow problems. If someone abandoned his business because he feared a ruin, legal remedies were provided to his creditors to act against his estate. The elaboration of these principles in practice was, however, not easy. In order to sort effect, the mentioned legal provisions were to be based on legal standards for its application. The Antwerp legislator originally used criminal concepts for this purpose and thus only foresaw the bankruptcy procedure to be started for treacherous ruins, but later softened them to include other types of setbacks.

2. – The criminal framework of the first bankruptcy ordinances

The new bankruptcy procedure instituted a collective and publicly controlled operation, which resulted in an equitable distribution of the economic risk of failure over all market players. These features are modern, in the sense that they are still decisive characteristics of contemporary bankruptcy legislation. However, this modernity must not be overestimated. The 1516 and 1518 ordinances were limited in scope and were closely linked to criminal prosecution. These legal texts applied to 'fugitives', this term being used in two different meanings. First, the word had gained the connotation of bankrupt because many merchants with liquidity problems fled their creditors. As in medieval Italian ordinances, flight was seen as criminal behaviour and was punished with the loss of property in order to allow creditors to proceed against the fugitive's assets. In its legal sense, the word 'fugitive' therefore presupposed and implied a criminal intent in order to distinguish fraudulent debtors from the merely absent, who were presumed not to have left because of their financial problems²³. Second, the criminal connotations of the word 'fugitive' led to a broader meaning. In the 1516 Antwerp ordinance, 'fugitive' encompassed other types of criminal behaviour than flight, such as the concealment of assets. According to the Antwerp 'Golden Book', 'fugitives' could also have fled into sacred places or have hidden their properties²⁴.

²³ C. Pecorella and U. Gualazzini, *Fallimento, Premessa storica*, in: C. Morati and S. Pugliatti (eds.), *Enciclopedia del diritto*, XVI, Milan 1967, p. 224–225; U. Santarelli, *Storia del fallimento* (*supra*, n. 13), p. 59–60.

²⁴ *Golden Book 1530s* (*supra*, n. 8), p. 420 (art. 134–135).

The last paragraph of the 1516 ordinance states that ‘fugitives’ who had gone bankrupt because of unfortunate events such as fire, robbery or shipwreck were excluded from criminal prosecution. Because the word ‘fugitive’ had acquired a broad meaning, it seems possible that in the other provisions of the 1516 and 1518 ordinances it was also meant as insolvent in a non-criminal sense. In other words, the 1516 and 1518 ordinances could have intended to permit the use of the bankruptcy procedure in situations in which a debtor simply offered his property to his creditors in order to settle his debts. A generalization of the word ‘fugitive’ might have ended up in a liquidation system based on insolvency. Some elements, though, indicate that the bankruptcy procedure was not meant to apply to these situations. First of all, the 1516 and 1518 ordinances do not specify how the bankruptcy procedure was used for non-criminal failures. If the ordinances were meant to be used for simple ruins, they were likely to contain specific rules on voluntary cooperation, which is not the case. A second argument relates to the existence of a separate procedure for ruined debtors of good intent. In the ‘Golden Book’, it is stated that creditors could apprehend their debtor and lock him in the public prison for six weeks. Afterwards, he could swear an oath, abandon his assets to his creditors and leave prison²⁵. This practice of ‘cession of goods’, was, as elsewhere in the Netherlands, influenced by Roman law²⁶ and applied to debtors of good faith²⁷. Furthermore, a compilation of customary rules dating from the early 1520s still mentions the priority of the first seizing claimant in seizure procedures, which would have been abandoned if the 1516 and 1518 ordinances had applied to all collective liquidations²⁸.

It is clear that the 1516 and 1518 ordinances heavily relied on criminal concepts to define the requirements for their application, as they were based on the distinction between criminal and *bona fide* debtors. The first fell under the scope of the bankruptcy legislation and could not escape criminal prosecution; the second were not subject to the collective liquidation of the bankruptcy system. The legal distinction between fraudulent bankruptcies and other insolvencies is also found in other Antwerp legal texts concerning debt recovery. For example, creditors had to obtain an authorisation from the urban authorities in order to apprehend citizens, while this was not required for the detention of fugitives or of debtors on the verge of fleeing²⁹. The differences between treacherous and other ruins were confirmed by national legislation of the

²⁵ *Golden Book 1530s* (*supra*, n. 8), p. 406–408 (art. 88–89).

²⁶ Godding, *Le droit privé* (*supra*, n. 3), p. 518–519. It has been suggested that this practice slowly spread to the North from France, where it was first mentioned in a 1256 royal statute. See: V. Demars-Sion, *La réglementation de la cession de biens dans les Pays-Bas méridionaux: copie ou modèle des solutions françaises?*, in: J.-M. Cauchies and S. Dauchy (eds.), *Commerce et droit*, [Cahiers du Centre de Recherches en histoire du droit et des institutions, 5–6], Brussels 1996, p. 132–133; P. Zambrana Moral, *Iniciación histórica al derecho concursal*, [Estudios y ensayos, 54], Málaga 2001, p. 197, 250–258.

²⁷ *Antwerp customs 1548* (*supra*, n. 15), p. 368–370 (art. 2); *Antwerp customs 1570* (*supra*, n. 16), p. 700–702 (section 39). If the imprisoned debtor had manipulated his situation, his creditors could still grant him a ‘scandalous’ release. See: Godding, *Le droit privé* (*supra*, n. 3), p. 519; Demars-Sion, *La réglementation* (*supra*, n. 26), p. 145–146.

²⁸ *Diversschen lantrechten van Brabant*, E.I. Strubbe (ed.), *Handelingen van de Koninklijke Commissie voor de uitgave der oude wetten en verordeningen van België*, 18 (1954), p. 362.

²⁹ *Antwerp customs 1548* (*supra*, n. 15), p. 282–284 (art. 19); *Antwerp customs 1570* (*supra*, n. 16), p. 520 (section 15) and p. 544–546 (section 18); *Antwerp customs 1582* (*supra*, n. 16), p. 114 (art. 4) and p. 216–218 (art. 16).

1530s and 1540s that decreed the prosecution of fraudulent bankrupts as thieves³⁰. In these statutes, the word *banqueroutier*, which was derived from the Italian *banca rotta*, was used to denote insolvent persons who had committed fraud³¹. These statutes contributed to a conception of bankruptcy in criminal terms³².

The framework sketched by the Antwerp legislator seems to reflect features of thirteenth- and fourteenth-century ordinances of Hansa towns. According to these texts, there was an exception to the general rule that the first seizing claimant had priority in case of the debtor's flight because the assets were then distributed equally among the creditors³³. It is not clear whether a similar rule was applied in Bruges at that time, although there are examples of collective liquidations with a rateable distribution of proceeds from public sales³⁴. The mentioned exception was not inspired by French, Italian or doctrinal examples. In the French *pays de droit coutumier*, the liquidation procedure of *déconfiture*, which implied a collective debt recovery against a debtor's insufficient estate, could be applied to simple insolvencies as well as to corrupted ones. If a debtor's debts outweighed his assets, the privilege of the first seizing creditor was put aside in favour of all claimants³⁵, equality between creditors being the general rule as it was in Italian city-states³⁶ and in learned law texts³⁷.

³⁰ *Recueil des ordonnances des Pays-Bas, Règne de Charles Quint 1506–1555*, [Recueil des anciennes ordonnances de la Belgique], III, J. Lameere (ed.), Brussels 1902 (hereafter *ROPB*, 2nd series, III), p. 267 (7 October 1531); *Recueil des ordonnances des Pays-Bas, Règne de Charles Quint 1506–1555*, [Recueil des anciennes ordonnances de la Belgique], IV, J. Lameere and H. Simont (eds.), Brussels 1907 (hereafter *ROPB*, 2nd series, IV), p. 233 (4 October 1540).

³¹ Statutes containing similar provisions were issued in France in 1536 and in England in 1543. See: Delville *et al.*, *Droit des affaires* (*supra*, n. 2), p. 552–554; W.J. Jones, *The foundations of English bankruptcy: Statutes and commissions in the early modern period*, Transactions of the American Philosophical Society, 63/3 (1979), p. 15–17.

³² The word 'banqueroutier' found its way to the Antwerp customs as a synonym for 'fugitive' or fraudulent debtor. See: *Antwerp customs 1548* (*supra*, n. 15), p. 184 (art. 39); *Antwerp customs 1570* (*supra*, n. 16), p. 530 (section 16).

³³ Kohler, *Lehrbuch* (*supra*, n. 3), p. 32–33; Planitz, *Über hansisches Handels- und Verkehrsrecht* (*supra*, n. 21), p. 24–25.

³⁴ R. De Roover, *Money, banking and credit in mediaeval Bruges, Italian merchant-bankers, lombards and money-changers, A study in the origins of banking*, [The Mediaeval Academy of America, 51], Cambridge (Ma.) 1948, p. 333. On the intervention of the Bruges City Council in fourteenth-century bankruptcy liquidations, see: A. Greve, *Hanseatic merchants: banking customs in 14th-century Bruges*, in: M. Boone and W. Prevenier (eds.), *Public and private finances in the Late Middle Ages*, [Studies in urban social, economic and political history of the medieval and modern Low Countries, 4], Leuven 1996, p. 7–9; J.M. Murray, *Bruges, cradle of capitalism, 1280–1390*, Cambridge 2004, p. 156–157.

³⁵ Delville *et al.*, *Droit des affaires* (*supra*, n. 2), p. 548–550; Hilaire, *Introduction* (*supra*, n. 13), p. 315–316.

³⁶ Pecorella and Gualazzini, *Fallimento* (*supra*, n. 23), p. 227–228.

³⁷ The common view was that non-privileged creditors were paid equally and rateably if their debts exceeded the proceeds from the public sale. The debtor's flight was not a requirement. This idea is found in sixteenth-century civil law literature of the (Southern) Netherlands. See: Pieter Peck (Peckius), *De iure sistendi*, in: *Opera omnia*, Antwerp 1679, p. 795 (40.7). This treatise was first published in 1564.

3. – Practice, legislative creativity and the general insolvency procedure

In the second half of the sixteenth century, legal attitudes towards insolvent persons changed remarkably. In this period, legal authors acknowledged the difference between a treacherous failure and bad luck³⁸. However, this awareness merely concerned criminal prosecution, which was thenceforth restricted to *mala fide* bankrupts. In the Netherlands, and in Antwerp in particular, these ideas gradually broke down the barriers between bankruptcy and seizure. The debt compensation and the liquidation of assets, as it was structured in the 1516 and 1518 Antwerp ordinances, slowly changed and, by the end of the sixteenth century, the distinction between fraudulent bankruptcy and insolvency in liquidation procedures was abolished.

The older techniques of debt recovery and the special procedure for bankrupts were assimilated and the criminal scope of the Antwerp bankruptcy legislation was changed, as the concept of ‘fugitive’ was supplemented with that of ‘insolvent’. The Antwerp bankruptcy legislation became more sophisticated, as features of the seizure and bankruptcy systems were refined, which was a development closely related to the evolution of the Antwerp law in general. From the first decades of the sixteenth century onwards, the law of the cities, lordships and principalities of the Netherlands was written down. Statutes of the central administration insisted on the registration of local rules³⁹. Following these orders, the Antwerp authorities finished written versions of the city’s customs in 1548, 1570, 1582 and 1608. Every new compilation of the urban customs was an extended version of the previous one and contained local customary rules as well as solutions from Roman and canon law. Learned law texts were introduced in the Antwerp compilations by lawyers, being members of the City Council or barristers at the Antwerp courts, and who had become acquainted with doctrinal solutions during their legal education at university⁴⁰. Moreover, Antwerp legislation was transformed by the introduction of new unwritten commercial customs. As a result of the commercial activities in the city, many rules on mercantile contracts were in use, even some unknown in legal doctrine at that time⁴¹. The City Council

³⁸ J. Hilaire, *Introduction* (supra, n. 13), p. 312; P.C. Reynard, *The language of failure: Bankruptcy in eighteenth-century France*, *Journal of European Economic History*, 30 (2001), p. 357–358.

³⁹ J. Gilissen, *Les phases de la codification et de l’homologation des coutumes dans les XVII provinces des Pays-Bas*, *Tijdschrift voor Rechtsgeschiedenis*, 18 (1950), p. 36–67, 239–290.

⁴⁰ On the infiltration of learned law solutions in the Southern Netherlands, see: R. Van Caenegem, *Le droit romain en Belgique*, [Ius Romanum medii aevi, V, 5 B], Milan 1966. The percentage of lawyers in the Antwerp City Council rose from the fifteenth century onwards. See: H. De Ridder-Symoens, *De universitaire vorming van de Brabantse stadsmagistraat en stadsfunktionarissen, Leuven en Antwerpen, 1430–1580*, in: *Het culturele leven in de Brabantse steden van de 15de tot de 18de eeuw*, [De Brabantse Stad, 5], ’s Hertogenbosch 1978, p. 135–144. Lawyers such as Hendrik de Moy, Philips van Mallery, Karel Gabri, Jan Shertogen and Hendrik Uwens were members of the commissions that compiled the 1582 and 1608 customs. See: Gotzen, *De costumiere bronnen* (supra, n. 5), p. 108–109, 114. On the influence of the system of the Roman law Institutes on the 1608 Antwerp customs, see: A.M.J.A. Berkvens, *Imperatoriam maiestatem non solum armis decoratam sed legibus oportet esse armatam ...*, *Notes on the influence of Justinian’s Institutes on the codification of customary law in the Southern Netherlands*, in: L. De Ligt, J. de Ruiter, et al. (eds.), *Viva vox iuris romani*, Essays in honour of Johannes Emil Spruit, [Studia Amstelodamensia ad epigraphicam, ius antiquum et papyrologicam pertinentia, 38], Amsterdam 2002, p. 1–7.

⁴¹ This is clear in the numerous references to mercantile customs in sixteenth-century *consilia* relating to Antwerp law. See: A. Wijffels, *Business relations between merchants in sixteenth-century Belgian practice-orientated civil law literature*, in: V. Piergiovanni (ed.), *From lex mercatoria to commercial law*, [Comparative Studies in Anglo-American and Continental Legal History, 24],

gradually accepted these customs and allowed their elaboration in the customary law texts⁴². This was particularly important for the chapters on bankruptcy, which were rewritten and adapted to practice. There, the distinction between the debt recovery through seizure and the bankruptcy procedure had become vague.

1. – *Insolvency in new definitions*

The 1548 and 1570 customs already contained provisions showing the beginning of a broader view on bankruptcy, as is clear, for example, in the reservation of an insolvent's property for his creditors. A ruined husband was not allowed to sign a matrimonial contract containing clauses harmful to his contractual obligations⁴³. Other sources provide proof of changing attitudes towards the old bankruptcy legislation, such as a 1556 testimonial declaration on customary law, a so-called *turbe*, which stated that the bankruptcy procedure could be used in case of insolvency. The witnesses declared that the 1516 and 1518 ordinances could be used in proceedings against the estate of '*personae alia quavis facta [sic] non solvendo*'⁴⁴. A 1572 *turbe* mentioned the use of the procedure against assets of 'insolvent or absent' debtors⁴⁵.

Legal practice may have been willing to accept that the bankruptcy procedure was applied to non-fraudulent failures, urban legislation was not adapted for such a general extension. This changed in 1582, when a new compilation was finished which included well-known ruins in the scope of the bankruptcy procedure, even if they were not the result of criminal acts. The competence of the *amman* was extended and the public appeal of creditors could now be made after a failure that was not the outcome of a malicious act. Thus, the intentions of the debtor did no longer determine which technique of debt collection should be used. The 1582 customs broke out of the dual view that had characterized older bankruptcy legislation. The criminal perspective, which had coloured earlier rules concerning collective liquidations, was softened and supplemented with the more general idea of 'insolvency'. 'Failure' in the 1582 customs referred to both insolvency of a *bona fide* debtor and bankruptcy of a criminal nature⁴⁶.

Nevertheless, the 1582 and 1608 compilations struggled with the definition of insolvency. It was difficult to distinguish the different forms of ruin, which was an urgent matter because adequate terminology determined the success of liquidation. An insolvent debtor was considered legally incapable of diminishing his assets, so that a good description of insolvency was necessary for the procedure's efficiency. If a debtor was insolvent, then every transaction made by him after the beginning of his failure was considered fraudulent. On the one hand, the legislation had thus to

Berlin 2004, p. 255–290; A. Wijffels, *Wamèse, La pratique du droit commercial dans l'œuvre d'un professeur louvaniste*, in: Liber amicorum Guy Horsmans, Brussels 2004, p. 1151–1175.

⁴² D. De ruysscher, *Law merchant in the mould, The transfer and transformation of commercial practices into Antwerp customary law (16th–17th centuries)*, in: V. Duss, N. Linder, et al. (eds.), *Rechtstransfer in der Geschichte, Legal transfer in history*, [Yearbook of young legal history, 1], Munich 2006, p. 433–445.

⁴³ *Antwerp customs 1548* (*supra*, n. 15), p. 322 (art. 55); *Antwerp customs 1570* (*supra*, n. 16), p. 646 (section 33).

⁴⁴ ACA, V, nr. 69, fol. 21v. (13 August 1556).

⁴⁵ ACA, V, nr. 69, fol. 75 (14 February 1572).

⁴⁶ *Antwerp customs 1582* (*supra*, n. 16), p. 530–532 (art. 8).

define precisely what insolvency was in order to protect the creditors' interests. On the other hand, such a provision should not be too severe because temporary financial problems could be overcome. The compilers of the Antwerp customs therefore had to find a formulation that made it possible to separate payment problems from irreversible failures. This was done in two ways. First, the Antwerp legislator listed numerous actions as signs of insolvency. For example, if assets of a debtor had been attached a few days before the failure, the date of seizure was considered to be the date of failure⁴⁷. Other provisions stated that a request for postponement or fraudulent acts, such as the preparation to withdraw assets, immediately implied insolvency⁴⁸. In these cases, an act that was not failure in itself served as the starting point of insolvency. These rules attributed a retroactive effect to the insolvency as the failure was considered to have begun earlier than the date of its appearance. Second, the 1582 customs defined failure in more general terms. If a debtor was publicly known as insolvent, the bankruptcy procedure was started⁴⁹. This notoriety implied rumours in the community of merchants, where reputation was the cornerstone of credit extending commercial transactions. In fact, every merchant had to frequent the Antwerp Exchange in order to be considered creditworthy because his presence made him reliable for agreements and promises on future contracts⁵⁰. This reference to reputation served as a general standard for situations that were not included in the detailed provisions on the beginnings of failure.

These two categories of legal articles were further elaborated in the 1608 compilation. This text introduced a general retroactivity for 'undetected failures', which covered the situations mentioned in the 1582 customs and in which insolvency was not yet publicly known. After the discovery of the failure, the insolvency was deemed to have started earlier when there had been fraudulent behaviour or other early signs of liquidity problems⁵¹. For this purpose, the 1608 text repeated the articles of the 1582 customs, but this time merely as examples of the general concept of hidden ruins. The 1608 compilation also introduced a 'suspicious period'. This Italian technique⁵² implied that every transaction conducted within two weeks before the failure was presumed to be fraudulent and was therefore null and void if no compensation for the transaction could be proven⁵³. It was suspected that the debtor had foreseen his upcoming ruin and that he had diminished his assets. Because the contracts made during this time were not valid, the creditors could seize and the *amman* could sequester the properties that had then been removed⁵⁴, this being a solution that was related to the Roman law *actio Pauliana*⁵⁵.

⁴⁷ *Antwerp customs 1582* (*supra*, n. 16), p. 528 (art. 4).

⁴⁸ *Antwerp customs 1582* (*supra*, n. 16), p. 528 (art. 3).

⁴⁹ *Antwerp customs 1582* (*supra*, n. 16), p. 528 (art. 3).

⁵⁰ On the importance of reliability at the Antwerp Exchange, see: Goris, *Étude* (*supra*, n. 3), p. 110–111.

⁵¹ *Antwerp customs 1608* (*supra*, n. 18), p. 392 (art. 12–15).

⁵² Hilaire, *Introduction* (*supra*, n. 13), p. 309; Santarelli, *Storia del fallimento* (*supra*, n. 13), p. 204–206.

⁵³ *Antwerp customs 1608* (*supra*, n. 18), p. 398 (art. 29).

⁵⁴ *Antwerp customs 1582* (*supra*, n. 16), p. 530 (art. 5).

⁵⁵ The same rule had already been part of a 1540 national statute, but was then intended to apply only to malicious transactions made by criminal bankrupts. See: Ankum, *De geschiedenis* (*supra*, n. 3), p. 368–369.

The provisions of the 1582 and 1608 customs attempted to determine what insolvency was and intended to distinguish it from mere indebtedness. These aims are clear in the rules on retroactive effect. Only really serious situations were mentioned, such as a request for postponement of payments. The Antwerp legislator tried to put into legal texts his intuition that a complete liquidation could only be started on irreversible ruins. The legislation wanted to avoid arbitrary procedures and attempted to give merchants a chance to overcome their financial flaws. Nevertheless, the effort to guarantee debtors' rights failed. The Antwerp legislator wrote down which situations could be considered as signs of failure, but did not properly define the concept of ruin itself. The legal texts did not explain the essential features of insolvency, but referred to the external element of notoriety, thereby considering the reputation of a merchant as the most important measure of his creditworthiness. The intended distinction between insolvency and mere indebtedness was not adequately translated into the literal provisions of the customary law texts, which permitted the start of the bankruptcy procedure without any objective indications of persistent financial problems. Although rumours concerning failure could have substance, they were not an efficient basis for the bankruptcy procedure. More reliable standards such as the debtor's books could have been used⁵⁶. The 1582 and 1608 customs deprived debtors of a suitable protection since accusations of payment problems were enough to mark debtors as insolvents. Because the claimants' legal actions and the rumour of insolvency went often hand in hand (a debtor sued by his creditors was not to be trusted), the sued debtor could not prove that he was still a reliable commercial party. His reputation failed him as soon as he faced these allegations.

2. – *New legislation or urban practice?*

The extension of the Antwerp bankruptcy procedure to insolvency was a remarkable transformation, which was original compared to contemporary solutions. Compilations of customary law in the sixteenth-century Netherlands were influenced by the national statutes on criminal bankrupts, so that they mostly contained rules on collective liquidation procedures for fled debtors⁵⁷. In Roman law sources, no rules could be found that separate a definite from a temporary setback. However, paragraphs of the *Corpus Iuris Civilis* regarding *cessio bonorum*, which is the transfer of estate following imprisonment, and public sales had been a starting point from which, in the late middle ages, mainly Italian authors had reflected on contemporary bankruptcy practice⁵⁸. In the middle of the sixteenth century, Benvenuto Stracca († 1578), the

⁵⁶ The 1608 customs decreed that an insolvent should transfer his books to the *amman*. This rule intended to allow the *amman* to inventory the assets of the insolvent, but was not used to determine the debtor's legal status. See: *Antwerp customs 1608* (*supra*, n. 18), p. 394 (art. 18).

⁵⁷ The customary law of Mechelen, which was written down in 1535, mentioned a collective liquidation procedure in case of flight or for insolvent inheritances. See: *Costumen van de heerlijckheid Mechelen, Costumen van de stad Mechelen*, [Recueil des anciennes coutumes de la Belgique], II, L.T. Maes (ed.), Brussels 1960, p. 88 (art. 1–2). Other customs, such as the 1570 and 1606 Brussels compilations, allowed a collective procedure against non-fraudulent debtors. They did not, however, contain a new framework for these situations, as the Antwerp customs did, and still gave priority to the first seizing claimant. See: *Coutumes du pays et duché de Brabant, Quartier de Bruxelles*, [Recueil des anciennes coutumes de la Belgique], I, A. De Cuyper (ed.), Brussels 1869, p. 26–28 (art. 63) and p. 100 (art. 114).

⁵⁸ References to these doctrinal texts, can be found in: Pakter, *The origins of bankruptcy* (*supra*,

first Italian author who systematically commented commercial law texts, argued in his treatise *De conturbatoribus sive decoctoribus* (1553)⁵⁹ that criminal prosecution was not possible if the ruin could not be reproached to the failed merchant⁶⁰. Stracca, who was influenced by Italian city ordinances, insisted on the distinction between treacherous and *bona fide* ruins for criminal purposes, and did not limit collective liquidation to the first⁶¹. Yet, he felt the need to restrict these actions against debtors who could overcome their problems and therefore advised to apply liquidations only to insolvents who were no longer involved in affairs⁶².

These ideas influenced the Antwerp legislator. Hendrik de Moy († 1610), one of the compilers of the 1582 Antwerp customs and the author of a commentary on them, mentioned Stracca when reviewing the customs' provisions on failure⁶³. The solutions regarding insolvency in the Antwerp customs of 1582 were, however, not merely copied from Stracca's views. Notwithstanding the infiltration of solutions from legal literature, considerable evidence points to an influence from practice as well. The Antwerp City Council, which included certain innovations that were going on in business practice, remedied the growing discrepancies between different debt recovery systems. After 1516, the confiscation procedure through seizure continued to be applied to debtors of good faith. A few sources inform us on the use and evolution of this technique. The records of the *amman*, which have been preserved for certain periods from the late 1520s onwards, demonstrate that attachment practice in the sixteenth century originally involved the locking of a debtor's belongings at an indicated location. The creditors detailed the assets that had to be seized and urban officials were not permitted to extend the attachment to possessions that were not listed in the petition. According to the seizure records however, the creditors often asked that unknown assets would be included⁶⁴. The records of the *amman*'s office suggest that a request for attachment could be accompanied by a demand for inventory⁶⁵, which gave the *amman* the right to make a list of all the debtor's belongings.

n. 13), p. 485–506; P. Zambrana Moral, *Derecho concursal histórico*, I: *Trabajos de Investigación*, Barcelona 2001, p. 173–242.

⁵⁹ Benvenuto Stracca, *De conturbatoribus sive decoctoribus tractatus*, in: De mercatura, cambiis, sponsionibus, fidejussoribus, debitoribus, decoctoribus, navibus, navigatione, assecurationibus, subhastationibus, aliisque mercatorum negotiis, rebusque ad mercaturam pertinentibus, decisiones et tractatus varii, Amsterdam 1669, p. 433–471. For a history and evaluation of this work, see in particular: C. Donahue, *Benvenuto Stracca's De mercatura: Was there a lex mercatoria in sixteenth-century Italy?*, in: V. Piergiorganni (ed.), *From lex mercatoria to commercial law (supra*, n. 41), p. 78–84.

⁶⁰ Stracca, *De conturbatoribus* (*supra*, n. 59), p. 442 (4.4) and p. 456 (7.3).

⁶¹ Stracca, *De conturbatoribus* (*supra*, n. 59), p. 456 (7.3, 7.4 and 7.5).

⁶² Stracca, *De conturbatoribus* (*supra*, n. 59), p. 434 (2.5.). Stracca used the expression '*foro cedere*', which can be translated as 'no longer frequenting the Exchange'.

⁶³ ACA, V, nr. 23, fol. 592.

⁶⁴ ACA, V, nr. 181, fol. 12v. (24 June 1558); nr. 182, fol. 17 (3 September 1529); fol. 43v. (15 October 1529); fol. 107v. (23 and 25 January 1530 (n.s.)); nr. 183, fol. 24 (26 February 1537 (n.s.)); fol. 73 (14 April 1537); fol. 85v. (28 April 1537). In all these cases, creditors filed a demand for the sequestration of 'all the goods' of their debtor. The formula 'on all assets, claims and credit' was used from the 1580s onwards. See: ACA, V, nr. 187, fol. 188v. (2 December 1587); fol. 191 (5 October 1587); fol. 212v. (7 November 1587); nr. 191, fol. 59v. (18 May 1609).

⁶⁵ ACA, PK, nr. 677, fol. 77 (16 October 1586); nr. 698, fol. 147 (30 March 1610); nr. 719, fol. 249v. (9 January 1624).

The extension of liquidation over all assets, which was known from the bankruptcy procedure, was thus copied into seizure practice. Although attachment was originally intended to secure and honour individual claims, the procedure had developed into a more general liquidation system during the sixteenth century. This is, moreover, attested by sources on the ranking of debts, as pro rata payments were common not only for bankruptcy expropriations but also for public sales after seizure. The Antwerp customs limited the application of this principle to the assets of fugitives, later insolvents, and inheritances lacking sufficient credit⁶⁶, but the same rules were applied in case of seizure because the customary law did not specify the hierarchy of debts for these situations⁶⁷. Creditors with titles were, as a result, the first to be paid and the remaining proceeds were divided among the creditors without formalized debts.

The bankruptcy and seizure systems were not the only methods of debt recovery. 'Cession of goods' was, as has been mentioned, a means for an imprisoned debtor to regain his freedom by handing over his belongings to his creditors. If the claimants feared that their debtor would leave his business in disarray or that he was no longer to be trusted, they could lock him up in the city's prison. The prisoner was nevertheless to be freed if he abandoned his property to them⁶⁸. 'Cession of goods' resulted in a complete liquidation of assets involving every creditor, as, prior to the 'cession', all creditors were summoned in order to acknowledge the transfer⁶⁹. As in the bankruptcy procedure, 'cession of goods' included all the debtor's assets and implied them being shared by all claimants. Although the practice of 'cession of goods' underwent important changes during the sixteenth century because it was regulated by national statutes⁷⁰, the Antwerp legislation and practice continued to determine its procedure.

The similarities between bankruptcy, seizure practice and 'cession of goods' are striking. The concern of the Antwerp legislators related to the differences between the systems, as they offered a gateway to fraud. The public appeal of creditors, for example, was not used in seizure practice and this was a problem because it allowed claimants to obtain complete liquidations with petitions for search and inventory, without having to share the proceeds from the public sale with other creditors. This forced the 1582 legislator to allow the collective procedure for bankrupts also for insolvency. In the 1582 customs, it was also stated for the first time that 'cession of goods' was considered a cause of insolvency⁷¹. The legislator clearly tried to break

⁶⁶ *Golden Book 1530s* (supra, n. 8), p. 420 (art. 133); *Antwerp customs 1548* (supra, n. 15), p. 170–172 (art. 13); *Antwerp customs 1570* (supra, n. 16), p. 532 (section 16); *Antwerp customs 1582* (supra, n. 16), p. 538 (art. 2–3).

⁶⁷ *Golden Book 1530s* (supra, n. 8), p. 406 (art. 85).

⁶⁸ *Antwerp customs 1548* (supra, n. 15), p. 368–370 (art. 2); *Antwerp customs 1570* (supra, n. 16), p. 700–702 (section 39); *Antwerp customs 1608* (supra, n. 18), p. 430–432 (art. 17).

⁶⁹ *Antwerp customs 1548* (supra, n. 15), p. 368–370 (art. 2); *Antwerp customs 1570* (supra, n. 16), p. 700–702 (section 39); *Antwerp customs 1608* (supra, n. 18), p. 432 (art. 18).

⁷⁰ *ROPB*, 2nd series, III (supra, n. 30), p. 549–550 (30 August 1536). In 1541 and 1544, new central statutes decreed the contents of the 1536 statute for the whole Netherlands. See: *ROPB*, 2nd series, IV (supra, n. 30), p. 328 (20 October 1541); *Recueil des ordonnances des Pays-Bas, Règne de Charles Quint 1506–1555*, [Recueil des anciennes ordonnances de la Belgique], V, J. Lameere and H. Simont (eds.), Brussels 1910, p. 55–56 (19 May 1544). See also: Demars-Sion, *La réglementation* (supra, n. 26), p. 133; Godding, *Le droit privé* (supra, n. 3), p. 518–520.

⁷¹ *Antwerp customs 1582* (supra, n. 16), p. 528 (art. 3); *Antwerp customs 1608* (supra, n. 18), p. 392 (art. 12).

down the barriers between the different methods of debt recovery because they had lost distinguishable characteristics. The inclusion of non-criminal insolvents in the bankruptcy procedure was therefore mainly a legal recognition of what had been known for decades, since collective liquidations were very common outside the bankruptcy procedure. Hence, the Antwerp City Council extended the scope of the bankruptcy procedure to non-fraudulent failures. This widening of the Antwerp bankruptcy legislation did not, however, result in the disappearance of the other systems. Attachment or seizure was still used for individual proceedings against assets and 'cession of goods' remained an ordinary practice when creditors had imprisoned their debtor.

4. – The influence of bankruptcy legislation on practice

The sketched legislative evolution was not without consequences for practice. The new provisions of the customary law texts determined the strategies that were applied by creditors to contractual parties who refused to honour their debts. In general, the problems in practice attest to the failure of the legislative attempts to design an efficient insolvency procedure.

1. – Bankruptcy before the Antwerp courts

As the 1516 and 1518 ordinances, later customary law texts still left important issues to be determined by judicial intervention. Trials concerning bankruptcy, insolvency or 'cession of goods' were considered to be a specific type of cases, namely so-called 'trials of preference'⁷². In them, creditors attempted to prove the priority of their debt. A second sort of lawsuit concerned bankrupts who tried to refute allegations of withdrawal of belongings. In both categories of cases, discussions related to the definition and to the starting date of the ruin in question. In a trial between creditors, the litigating parties tried to establish an earlier or later beginning of the failure in order to disadvantage their opponents, thereby using the confusing provisions of the 1582 and 1608 compilations. The creditors alleged the fraudulent nature of transactions that had been made prior to the ruin, in order to add assets to the creditors' mass. The debtor usually attempted to prove that the contract had been concluded when he still frequented the Exchange⁷³. The debtor insisted on his good name at the time of the contested operation, thereby using the articles of the 1582 and 1608 customs.

Because of the uncertainties on the definition of failure, creditors referred to acts that were mentioned in legal articles relating to the retroactive effect of ruin. It is no surprise that, once they alleged these facts as an indication of failure, they no longer provided proof of a ruin thereafter⁷⁴. Furthermore, in some cases the later failure was considered as proof of fraud at previous contracts or as an indication of the unreliable

⁷² Customary law referred to 'actions of preference' of a seizing creditor, or to 'judgments in matters of preference'. See: *Antwerp customs 1582* (*supra*, n. 16), p. 144 (art. 19).

⁷³ ACA, Processen, nr. C 2513, art. 6 Repliek (5 February 1619); V, nr. 1278, fol. 169v. (judgment of 11 March 1597); V, nr. 1267, fol. 212 (judgment of 17 June 1589).

⁷⁴ ACA, Processen, nr. C 2513, art. 3 Antwoord (8 January 1619) and art. 5 Dupliek (10 December 1619); V, nr. 1293, fol. 28v. (judgment of 22 August 1613).

nature of the later bankrupt debtor⁷⁵. An early-seventeenth-century lawsuit between the Mauriquez heirs and the widow Boots provides an example of this. The Mauriquez heirs had attached a few paintings following the bankruptcy of Hendrik de Claphouder. The widow Boots petitioned to seize the same paintings and claimed to be the owner because she had bought them from de Claphouder. According to the Mauriquez heirs, this contract was null and void because of the bankruptcy of de Claphouder a few months after the transaction. They stated that the sale was subject to a presumption of fraud simply because de Claphouder had gone bankrupt after the sale⁷⁶. This type of argument was, of course, contrary to the legal provisions which only allowed retroactivity concerning insolvency in detailed situations. A general presumption of fraud based on a later ruin was a flagrant distortion of the legislator's intentions. The absence of a clear and useable legal text on the nature of insolvency resulted in this sort of creative reasoning before the courts.

The complex legal situation in Antwerp in the seventeenth century added to the confusion. The 1608 customs were not considered to be the Antwerp customary law, presumably because they had never appeared in print. The 1582 compilation continued to be applied during the seventeenth and eighteenth centuries,⁷⁷ although its use had been prohibited after Antwerp's return to the Spanish Netherlands in August 1585. On 30 May 1586, the newly installed catholic City Council instructed barristers and judges to rely on the previous version of Antwerp customary law because the 1582 text was considered protestant and thus unsuitable for a catholic city⁷⁸. On 15 October 1592, a commission was installed to prepare a new version of the Antwerp customary law⁷⁹. This text was ready in 1608 and on 14 February 1609 permission was obtained to print its provisions regarding commercial affairs, but this did not result in their publication⁸⁰. Consequently, the new rules of the 1608 compilation, including those on the 'suspicious period' and 'undetected insolvency', had no immediate effect, although some of its provisions were decreed in a separate ordinance in 1615, which related to contracts between creditors and insolvent debtors⁸¹. The confusion relating to the applicable rules appears from lawsuits in which parties argued on what provisions were in vigour⁸².

In general, the trials on insolvency show that Antwerp bankruptcy legislation never completely liberated itself from the framework of the 1516 and 1518 ordinances.

⁷⁵ ACA, Processen, nr. R 368, art. 13 Antwoord (30 October 1612).

⁷⁶ ACA, Processen, nr. B 1941 (1622-1625).

⁷⁷ Gotzen, *De costumiere bronnen* (supra, n. 5), p. 192-198; F. Stevens, *Revolutie en notariaat, Antwerpen 1794-1814*, [Brabantse rechtshistorische reeks, 8], Leuven 1994, p. 25-30.

⁷⁸ ACA, PK, nr. 558, fol. 112v. (30 May 1586).

⁷⁹ ACA, PK, nr. 560, fol. 132v. (15 October 1592).

⁸⁰ ACA, V, nr. 64.

⁸¹ This ordinance was issued by the Council of Brabant on 29 July 1615, following a petition of Antwerp merchants. This petition, which dated from March 1615, has been published in: J. Denucé, *De Insolvente Boedelskamer* (supra, n. 3), p. 208-209. For the ordinance of the Council of Brabant, see: *Placcaeten, ordonnantien, landt-charters ... van Brabant, Vlaenderen, ende andere Provincien*, IV, Jan Baptist Christyn et al. (eds.), Brussels 1677, p. 7-8 (1.3) (29 July 1615). The ordinance was promulgated in Antwerp a week later. See: ACA, PK, nr. 919, fol. 56v. (8 August 1615).

⁸² ACA, Processen, nr. B 1941, art. 105 Tripliek (31 October 1623). Here it was stated that the suspicious period was not in use in Antwerp. See also: ACA, Processen, nr. P 223, art. 27-30 Dupliek (7 March 1648). In this trial, the defendant claimed that alleged articles of the 1608 customs were not relevant since they were not in vigour.

The intervention of the *amman* concerned the registration of the claims, the sequestration of the debtor's assets and the distribution of the proceeds from the public sale. This official had an executive task and, his competence not being changed after 1516 notwithstanding the important changes in the bankruptcy legislation, he was not involved in the determination of the actual hierarchy between the creditors. Thus, the Antwerp system was essentially dualistic in nature. An official managed the collective procedure, while the judge decided the actual contents of the case. This was also the philosophy behind the 1516 and 1518 ordinances. The gradual broadening of the bankruptcy expropriations resulted in new duties for the judge because not only the rank of the creditors had to be determined but also whether the sued debtor was insolvent or not. Under the former regime, a public summoning of the debtor led to the legal truth that he was fugitive if he did not appear within a specified delay. The lack of clarity in the legal texts relating to insolvency put the decision on this issue with the judge if allegations of insolvency were challenged. In many cases, however, no investigation into the involved debtor's financial position was made. Unlike the solution of the 1807 *Code de commerce*, there was no legally imposed declaration of the starting date of insolvencies by judgment⁸³.

A closer relation between the administration and litigation relating to cases of insolvency was later developed in Amsterdam. At the end of the sixteenth century and still in the seventeenth century, parts of the 1582 Antwerp customary compilation on commercial contracts were applied there⁸⁴. Presumably in 1617, an Amsterdam ordinance, which was influenced by the Antwerp written customs, ordered to distribute the returns from a public sale rateably if the sale was due to a debtor's flight or insolvency⁸⁵. The contribution of Antwerp legislation, which was an outcome of this city's commercial aura and of the role of Antwerp emigrants in the North after 1585, did however not halt legal innovations. On 6 November 1643, the Amsterdam City Council issued an ordinance establishing a Chamber for insolvencies⁸⁶. It contained a liquidation procedure that was applied to all types of insolvency and went further than the Antwerp solutions. Although there was still a theoretical distinction between the management of assets and the intervention of a judge, the separation between the two functions was less strict than in Antwerp, as lawsuits on the liquidation

⁸³ This resulted in discussions on proof, as insolvency could not be proven with judgments. See: ACA, Processen, nr. C 3157, art. 4–5 Replik (1668). In this lawsuit, a denial of allegations of failure was met with an invitation to swear an oath of good faith.

⁸⁴ J.W. Bosch, *Remarques sur quelques influences exercées en matière de droit, par les provinces méridionales sur les provinces septentrionales des Pays-Bas jusqu'en 1795*, Tijdschrift voor Rechts-geschiedenis, 19 (1951), p. 144–146; W.F.H. Oldewelt, *De pogingen tot 'codificatie' van het Amsterdamse recht*, Vereniging tot uitgaaf der bronnen van het oud-vaderlandsche recht, Verslagen en mededeelingen, 13 (1967), p. 71.

⁸⁵ *Handvesten, ofte privilegien, handeligen, costumen, ende willekeuren der Stadt Aemstelredam ...*, Amsterdam 1639, p. 100. The exact date of promulgation is not mentioned. In this compilation of Amsterdam legislation, the summary of this ordinance follows a 'turbe' on the rights of the unpaid vendor against a bankrupt, which dates from 15 April 1617. There is, surprisingly, no reference to this ordinance in an earlier version of the compilation dating from 1624, although this 1624 compilation does contain the text of the forementioned *turbe*. See: *Hand-vesten, privilegien, handeligen, costuymen, ende willekeuren der Stadt Aemstelredam ...*, s.l. 1624, p. 196 (= p. 96).

⁸⁶ This ordinance has been published in: Gerard Rooseboom, *Recueil van verscheyde keuren, en costumen: midts-gaders maniere van procederen binnen de stadt Amsterdam*, Amsterdam 1656, p. 304–309.

suspended the public sale and should be brought before the Chamber, which also managed the evaluation and payment of the creditors' claims⁸⁷. Furthermore, the Amsterdam legislation properly distinguished between the research into the financial situation of the suspected insolvent and the declaration of insolvency. The latter was only proclaimed if a persistent shortage of funds had been assessed⁸⁸. In Antwerp, on the contrary, the state of insolvency was determined by the claimants. It was a debtor's reputation, or the lack of confidence of his creditors, that started the insolvency procedure. Thus, in practice, insolvency was presumed to be present if collective claims were introduced. This explains why there was no legal protection for debtors who had been accused of insolvency but whose assets were found to exceed their debts.

2. – *Business attitudes towards insolvency and bankruptcy*

It is evident from the mentioned lawsuits that creditors adapted their approach towards liquidity problems of contractual parties according to the legal solutions. It would, however, be an exaggeration to consider the bankruptcy legislation as the sole basis of the creditors' actions. Instead, the merchant community in Antwerp attempted to solve business problems by means of arbitration and settlement. The ordinances issued by the City Council did not forbid negotiations and only provided rules for situations in which no agreement could be reached between the involved parties. An appeal to the urban authorities always followed a breach of trust. When creditors relied upon the declarations of their debtor that he would master his financial problems, no publicly managed liquidation was necessary. Legal remedies were only used if negotiations had failed or if creditors were not willing to extend their credit.

Some evidence hints at the application of legal procedures and terminology according to the creditor's insights. As was stated in the legal texts, the collective liquidation started after the attachment of a suspected insolvent's properties. In theory, insolvency triggered the start of the procedure⁸⁹. However, in practice, the creditors determined what was to be done. Seizure mostly served as a means to secure the cooperation of a contractual party. If a debtor refused to honour the demands upon attachment, his creditors addressed a petition for liquidation to the City Council. The automatic intervention of urban officials after the attachment of a bankrupt's assets, as it was written in the customary law, was therefore merely theoretical. In their petitions, creditors urged for a public appeal by the City Council in the form of an ordinance⁹⁰. The petitioners insisted on the fraudulent nature of the bankruptcy, even if the debtor was still present in the city and had not committed criminal acts. The assembly of creditors coloured the facts and spoke of 'ugly' bankruptcies, though without specifying

⁸⁷ G. Moll, *De Desolate Boedelkamer te Amsterdam, Bijdrage tot de kennis van Oud-Hollandsch failliten-recht*, [PhD thesis University of Amsterdam], Amsterdam 1879, p. 77–86.

⁸⁸ G. Moll, *De Desolate Boedelkamer* (*supra*, n. 87), p. 66–67.

⁸⁹ Some legal authors from the seventeenth-century Southern Netherlands mentioned this *ipso iure*-feature of Antwerp bankruptcy legislation. See: Frans Van der Zypen (Zypaeus), *Notitia iuris Belgici*, in: *Opera omnia*, Antwerp 1675, p. 104 (7.12). This treatise was first published in 1635.

⁹⁰ For an example of an ordinance asked for by creditors, see: ACA, PK, nr. 627, fol. 31v. (7 August 1560). This petition for a public appeal, made by the creditors of Jan Badueri, was honoured by the City Council. An ordinance was issued on 9 August 1560.

what could be reproached to the alleged bankrupt⁹¹. Negotiations between a debtor and his creditors were often accompanied by threats to ruin the insolvent if he did not agree with the conditions of the creditors⁹². Under the regime of the 1582 customs, the creditors therefore determined to a large extent the debtor's fate. The decision whether he would be subject to liquidation or whether he was granted facilities such as postponement was the creditors'. If they refused a settlement, they could ask the City Council for a liquidation for bankruptcy.

Conclusion

During the sixteenth century, Antwerp bankruptcy legislation evolved from a body of rules with rather primitive definitions to a system based on new but unwieldy provisions. By the beginning of the seventeenth century, Antwerp bankruptcy legislation had moved beyond the terminological framework of the older ordinances. This process resulted from a new approach to local law and was caused by the integration of originally very diverse liquidation procedures. These differences were due mainly to the partial integration by the 1516 and 1518 ordinances of collective actions in a system that was thoroughly governed by rules on individual debt recovery. However, liquidation practice had never been hindered by the limited scope of these ordinances because characteristics of the bankruptcy procedure were soon applied elsewhere. Under the influence of bankruptcy legislation, attachment or seizure, which was a means of debt collection through the locking of a debtor's belongings, could be used to freeze all the debtor's assets if it was accompanied with a petition for search and inventory.

The evident similarities between these systems and the inequalities which enabled opportunistic actions, led to a convergence of the procedures. This is evident in the extension of the bankruptcy liquidation system to insolvency. Following this innovation, which was also facilitated by changing opinions in legal literature, the old rules had to be adapted to the new concepts. Therefore, the 1582 and 1608 customs attempted strictly to distinguish between debtors, insolvents and fraudulent bankrupts. The compilers clearly felt the need to provide legal protection for situations of simple indebtedness by requiring a publicly known ruin. In real life however, these provisions resulted in problems. Both the 1582 and 1608 customs did not contain any objective standard that made it possible to determine the types of debt recovery. The difficult legal definitions and rules put the centre of the bankruptcy procedure in the courts because the judges had to define the nature of a debtor's state if he contested his creditors' claims. The Antwerp law texts contributed considerably to the power of the creditors because the concept of 'notorious insolvency' implied that the claimants themselves could decide whether the targeted debtor was financially reliable.

⁹¹ ACA, PK, nr. 675, fol. 258v. (22 December 1595); nr. 699, fol. 46v. (27 July 1610). In both requests, creditors petitioned for measures following 'eene groote ende lelycke banqueroute' ['a big and ugly bankruptcy']. In fact, nearly all ordinances issued between 1550 and 1600 that concerned collective liquidation related to a criminal bankruptcy or were at least based on allegations of such behaviour. See: *Index der gebodboeken*, Antwerpsch Archievenblad, 1st series, 1 (s.d.), p. 120–464, 2 (s.d.), p. 1–68, 2nd series, 9 (1934), p. 115–157, 186–236 and 241–315.

⁹² ACA, V, nr. 1296, fol. 230 (judgment of 25 August 1618).

In spite of all this, Antwerp customary law provides an early example of attempts to capture insolvency in legal terminology. The distinction between indebtedness and definite insolvency did not appear clearly in the Antwerp legislation, but this new view laid the basis for legal concepts surrounding the starting point of business failure, which is today, as it was in the past, an important characteristic of bankruptcy legislation.

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