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# CHICAGO-KENT LAW REVIEW

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### COMPARATIVE AND CROSS-BORDER ISSUES IN BANKRUPTCY AND INSOLVENCY LAW

SYMPOSIUM EDITORS

ADRIAN WALTERS & CHRISTOPH HENKEL

A CANADIAN LENS ON THIRD PARTY  
LITIGATION FUNDING IN THE AMERICAN  
BANKRUPTCY CONTEXT

*Stephanie Ben-Ishai* 631  
& *Emily Uza*

This Article offers two major recommendations to expand the use of third party litigation funding (“TPLF”) into the U.S. insolvency context. As seen in the Canadian context, courts have accepted the use of litigation funding agreements fitting within certain parameters. If U.S. courts follow suit, friction against the implementation of TPLF can be mitigated. Alternatively, regulation may occur through legislative and regulatory models to govern and set out precisely what types of arrangements are permitted. Involving entities such as the SEC may expedite the acceptance of TPLF, but special attention is necessary not to intermingle notions of fiduciaries into the discussion of TPLF, as there are contentious definitional elements present. Ultimately, a framework wherein regulation coupled with judicial oversight presents the best opportunity for the United States to adopt TPLF in the insolvency context to ensure maximum delivery of benefits to vulnerable parties.

WHEN BORDERS DISSOLVE

*Laura N. Coordes* 649

Scholars have long sought to apply principles from U.S. bankruptcy law to sovereign debt restructurings. Chapter 9 of the U.S. Bankruptcy Code, used to adjust the debts of municipalities, has been a particular source of inspiration, and several proposals currently exist to adapt chapter 9 to address the challenges of sovereign debt restructuring.

The difficulties of applying chapter 9 in practice, however, have demonstrated the limitations of a one-size-fits-all solution to municipal distress. Similarly, attempts to adapt chapter 9 to apply uniformly to a broad range of sovereign states may be ineffective. A recurring problem lies in the fact that bankruptcy principles are focused primarily on debt adjustment, while the problems that sovereign states (and, indeed, municipalities) face combine both financial and political aspects.

This Article seeks to encourage scholars to look beyond the municipal bankruptcy comparison and offers a study of the challenges and results that occur when municipalities merge. Studying city-county consolidations offers unique insight into possible techniques to address the fiscal and political problems resulting from significant governmental financial distress. The distinct differences between city-

county consolidations and sovereign governments have perhaps obscured the benefits of studying these two areas together. This Article will demonstrate, however, that looking beyond the surface differences can provide valuable insight into new ways to address key fiscal and political challenges faced by government debtors.

MODULARITY IN CROSS-BORDER  
INSOLVENCY

*Andrew B. Dawson* 677

This Article proposes a framework for thinking about the design structure of the Model Law on Cross-Border Insolvency. The Model Law has been successful by many metrics; however, it has faced various implementation challenges. As leading scholar Professor Jay Westbrook has noted, thinking about these problems requires thinking about the Model Law as a system. To understand the system, it is necessary to understand its architecture, and I argue that this architecture is best understood as reflecting a modular design structure, i.e., one that divides complex systems into a hierarchical system of self-contained components. Modularity has provided insights into other areas of law, such as contract and property doctrine, and it can provide important insights to both explain the Model Law and to provide guidance on its most problematic areas.

THE AVOIDANCE OF PRE-BANKRUPTCY  
TRANSACTIONS: AN ECONOMIC AND  
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*Aurelio Gurrea-Martínez* 711

Most insolvency jurisdictions provide several mechanisms to reverse transactions entered into by a debtor prior to the commencement of the bankruptcy procedure. These mechanisms, generally known as claw-back actions or avoidance provisions, may fulfill several economic goals. First, they act as an ex post alignment of incentives between factually insolvent debtors and their creditors, since the latter become the residual claimants of an insolvent firm, but they do not have any control over the debtor's assets while the company is not yet subject to a bankruptcy procedure. Thus, avoidance powers may prevent or, at least, reverse opportunistic behaviors faced by factually insolvent debtors prior to the commencement of the bankruptcy procedure. Second, these devices may also prevent the creditors' race to collect when insolvency threatens. Therefore, the existence of avoidance actions may reduce, at an early stage, the "common pool" problem that bankruptcy law seeks to solve. Third, avoidance powers also protect the interests of both the debtor and its creditors when the former is facing financial trouble and some market participants want to take advantages of this situation. Finally, the avoidance of pre-bankruptcy transactions can also be helpful for the early detection of financially distressed debtors, so it may encourage managers to take corrective actions in a timely manner. As a result of these goals, the existence of avoidance powers can create several benefits. However, the use—and even existence—of avoidance actions is not costless. On the one hand, the use of these actions may generate litigation costs. On the other hand, the existence of these mechanisms may harm legal certainty, especially in countries in which it is relatively easy to avoid a transaction, usually because bad faith is not required, the look-back period may be too long, or no financial conditions are required to avoid a transaction. Therefore, insolvency legislators should carefully deal with these costs and benefits in order to make sure that the existence of avoidance powers does not do more harm than good. On the basis of this exercise, this paper analyzes, from a comparative and functional approach, the optimal way to design claw-back actions across jurisdictions.

INFINITE JEST: THE OTIOSE QUEST FOR  
COMPLETENESS IN VALIDATING  
INSOLVENCY JUDGMENTS

*Bruce A. Markell* 751

Universalism in cross-border bankruptcies strives to reduce waste, and harmonize restructuring and recoveries. Universalism's avatar is UNCITRAL's 1997 Model Law on Cross-Border Insolvencies (Model Law). Underlying the Model Law, however, is an implicit assumption that court orders entered in the proceeding

where the debtor's center of main interests is located will be respected in all other states in which the debtor has assets or operations. That assumption may have been incorrect, as shown by cases such as the United Kingdom's *Rubin v. Eurofinance, S.A.*

This Article looks at UNCITRAL's reaction to *Rubin*: its new Model Law on Recognition and Enforcement of Insolvency-Related Judgments (Recognition Law). It examines the Recognition Law's reciprocity provisions, and examines the likely operation of such provisions both practically (by analyzing complex debtor in possession financing orders) and theoretically (by examining theories of translation first discussed by W.V.O. Quine). The Article concludes by expressing deep pessimism that the Recognition Law will solve the perceived problems with Model Law.

LAYERING, CONVERSION, AND DRIFTING:  
A COMPARATIVE ANALYSIS OF PATH  
DEPENDENT CHANGE IN CONSUMER  
INSOLVENCY SYSTEMS

*Megan McDermott* 765

The past twenty-five years have been marked by major developments in consumer insolvency systems around the world. The threshold challenge for comparative scholars is to keep up with the changes occurring in individual countries, as a necessary—but preliminary—step toward broader comparisons of the historical, social, and institutional forces in consumer bankruptcy. In order for deeper work to take place, though, the field needs consensus on what factors are most useful to analyze. Moreover, the dynamic environment of consumer insolvency requires a framework for analysis that is flexible and adaptable enough to provide insights notwithstanding the rapid changes in the field.

Enter historical institutionalism, which Professor Iain Ramsay has proposed as a useful lens for broadly evaluating changes in consumer insolvency systems. In particular, Professor Ramsay argues that in order to take comparative consumer bankruptcy past its current descriptive stage, scholars should focus more carefully on the roles of various institutional actors in facilitating or impeding change in consumer insolvency law.

Drawing on the foundational descriptive work of consumer insolvency scholars, this Article responds to Professor Ramsay's invitation by using the tools of historical institutionalism to analyze modern trends in seven different insolvency systems. Specifically, I identify the key actors in each system and their role in contributing to legal change. I then evaluate the trends of legal change in each country, with a particular eye toward whether the trends have improved outcomes for consumers and reduced the inefficiencies caused by irrational sorting. My analysis suggests that countries whose insolvency systems have been entrusted to powerful public actors have evolved in pro-consumer ways, while countries whose systems depend on private professionals have trended in the opposite direction. These insights may be helpful for countries that are in the process of designing consumer insolvency systems, as well as for systems that find themselves stuck in suboptimal outcomes and are interested in pursuing effective reform.

MARKET ORGANISATIONS AND INSTITUTIONS  
IN AMERICA AND ENGLAND:  
VALUATION IN CORPORATE BANKRUPTCY

*Sarah Paterson* 801

Courts in England and the United States have traditionally adopted different approaches to the question of valuation in debt restructuring cases. In England, courts have tended to determine whether to approve the allocation of equity in a debt restructuring by reference to the amounts creditors would have received if no debt restructuring had been agreed. The company has typically argued that if no debt restructuring had been agreed either the business or the assets would have been sold. Typically, some evidence of exposure of the business and assets to the market will be submitted to identify the value which would have been achieved in

this “counterfactual scenario.” This contrasts with the approach in the United States, where bankruptcy courts have typically avoided reaching decisions on value based on exposure to the market and have relied on the views of the parties’ valuation experts expressed using traditional valuation methodologies.

One benefit of the U.S. approach has been that the uncertainty of the outcome of the valuation litigation has incentivised the parties to bargain, arriving at a consensual deal. However, this paper argues that changes in the organisational and institutional structure of financial and non-financial markets have fundamentally affected the utility of this “bargaining and litigation” model. It argues that changes in the informal rules, norms and beliefs held by market participants make bargaining less likely, and increase the prospects of litigation. It suggests that this insight has implications for the reform of debt restructuring procedures in the United Kingdom, Europe and the United States.

THE AMMANATI AFFAIR: SEVEN CENTURIES  
OLD, AND NOT FEELING THE AGE

*Eugenio Vaccari* 831

The enactments of the UNCITRAL Model Law on Cross-Border Insolvency and the European Regulations on insolvency proceedings have promoted an incremental approach towards substantive harmonization. This strategy has not remained unquestioned. One of the major criticisms is that such a course of actions overlooks the nature of the issues currently raised in multi-national and cross-disciplinary bankruptcy procedures.

This Article focuses on the Anglo/American bankruptcy tradition. It adopts a doctrinal methodology to question the conclusion that “collectivity” is and should be a procedural, objective, and secondary notion in light of two case studies. It suggests that in the context of cross-border, cross-disciplinary cases, equitable concepts could be employed to introduce a more nuanced understanding of the notion of “collectivity.” This should facilitate the recognition of foreign bankruptcy proceedings alongside with their inclusiveness, finality, and certainty.

FIDUCIARY DUTIES OF DIRECTORS OF  
INSOLVENT CORPORATIONS:  
A COMPARATIVE PERSPECTIVE

*Alessandra Zanardo* 867

Over the last two decades, in many jurisdictions great emphasis has been placed on directors’ fiduciary duties when a corporation is insolvent or in the amorphous “zone of insolvency”; notably, to investigate whether the directors should continue to promote the best interests of the corporation for the benefits of its shareholders, or whether their duties shift to creditors.

The resolution of this ubiquitous issue will help to answer the following questions: Do creditors have standing to pursue claims for breach of fiduciary duties in the insolvency scenario? And, if they do, is it direct or derivative standing?

This Article will address both questions. Moreover, it will discuss the issue of who has standing to assert (direct or derivative) claims against directors who have failed to act in the best interests of the corporation upon the commencement of a reorganization proceeding.

The Article compares three countries—the United States, France, and Italy—where the role of the reorganization or the (pre-)insolvency proceedings in overcoming corporate crises has been prominent for many years, or has been increasing in importance year by year. Particularly, this comparative analysis aims to highlight the differences between the United States, France, and Italy in terms of creditors’ protection vis-à-vis directors’ mismanagement and to evaluate the effectiveness of their respective regulatory and judicial responses.

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*Thomas Q. Ford* 897

Like most states, Illinois is no stranger to political gerrymandering. Since 2010, redistricting reformers have made repeated efforts to change the way Illinois's political maps are drawn, essentially by minimizing or eliminating the role lawmakers play in the process. Polls show the vast majority of Illinoisans support such a change. Reformers have chosen Illinois's citizen ballot initiative as their vehicle to amend the redistricting process, but every proposed initiative has been struck down in court before reaching voters. Most recently, the Illinois Supreme Court rejected a proposed initiative in *Hooker v. Illinois State Board of Elections*. This Note argues the court's reasoning in *Hooker* is problematic and may serve as a death blow to redistricting reform via Illinois's citizen ballot initiative. This Note also discusses the relevant players in *Hooker* as well as the relevant history of Illinois's redistricting and the citizen ballot initiative.

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