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Anna J. Lund

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Book Review

INTERNATIONAL INSOLVENCY LAW: REFORMS AND CHALLENGES, by Paul Omar (ed)¹

ANNA J. LUND*

INTERNATIONAL INSOLVENCY LAW: REFORMS AND CHALLENGES, like its predecessor companion piece, *International Insolvency Law: Themes and Perspectives*² brings together contributions from a diverse group of academics and practitioners drawn from around the globe. Paul Omar, a Barrister, Senior Lecturer in Law at the University of Sussex, and the editor of the collection, should be commended for the breadth of the contributions' subject matter and geographic reach. The volume surveys both consumer and corporate insolvency law topics. The authors explore the experiences of a number of countries, predominantly the United Kingdom and Australia, but also the United States, New Zealand, South Africa, France, Germany, Singapore, the Russian Federation, South Korea, and—of particular interest considering its continuing emergence as an economic goliath—China.

Practitioners and academics alike will find plenty of useful material in the volume, but readers may have different experiences of the book, depending on how they approach it. A person researching a discrete issue may refer to the book solely for the purpose of reading the relevant chapter. Alternatively, readers wishing to broaden their understanding of comparative and international insolvency law may approach the volume as a survey of different topics within this realm. The book encourages the reader to step away from his or her own projects to see what other researchers in the field are doing, and the resulting perspective promises to enrich the reader's work. Finally, the book can be read as

* Ph.D. Candidate, University of British Columbia, Faculty of Law.

1. (Farnham, UK: Ashgate, 2013).
2. (Farnham, UK: Ashgate, 2008).

telling a larger story about the development of insolvency law globally; a number of themes emerge from the contributions when they are read as a cohesive unit. In this review, I sketch the outline of this larger story by exploring these themes.

I. COMPARATIVE AND INTERNATIONAL INSOLVENCY LAW

The editor's preface explains that the goal of the book is to present "up-to-date accounts of themes in the field of insolvency law dealing with reforms in and challenges to the subject, especially in relation to its comparative and international aspects."³ It may not be immediately clear why contributions on comparative and international insolvency law have been included in the same collection, since these initially appear to be separate fields. Bankruptcy academics have a long tradition of approaching domestic issues comparatively—looking to other countries to see how they have tackled an issue and then extracting lessons, salutary or otherwise, for application at home. By contrast, the project of international insolvency law is to determine how insolvency proceedings should be governed when they affect debtors, creditors, employees, customers, and other stakeholders located in more than one country.

The book demonstrates that comparative and international insolvency law are connected fields, and shows how comparative exercises can inform the development of principles governing international insolvency proceedings. For example, Irit Mervorach examines how a working group from the United Nations Commission on International Trade Law (UNCITRAL) attempted to distill uniform guidelines for handling related companies in insolvency proceedings from the disparate approaches adopted in countries including Germany, England and Wales, and the United States.⁴ The collection also illustrates how international insolvency law can impact comparative insolvency law. The development of international insolvency guidelines, such as UNCITRAL's Legislative Guide on Insolvency Law, has provided both an impetus for increased harmonization of domestic regimes and a framework within which comparative projects can be carried out.⁵ Susan Block Lieb, Juraj Alexander, and Evgeny Kovalenko use the UNCITRAL Legislative Guide as a starting point for considering how eight different countries have attempted to encourage participation by unsecured

3. Paul J Omar, "Editorial Preface" in *supra* note 1 at xlv.

4. "Is the Future Bright for Enterprise Groups in Insolvency? An Analysis of UNCITRAL's New Recommendations" in *supra* note 1 at 363.

5. UNCITRAL, *Legislative Guide on Insolvency Law* (2005) at Pts I & II, online: <http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf>.

creditors in restructuring proceedings. They find significant consensus on the desirability of unsecured creditor participation, but few similarities in the methods adopted for fostering it.⁶ Despite initially appearing like separate projects, the book shows that comparative research can be used as a tool for developing international law and that international law shapes domestic regimes and structures comparative exercises. This overlap justifies covering both fields in one volume.

II. CONVERGENCE AND DIFFERENCE

The overlap between international and comparative insolvency law seems to promote convergence among insolvency regimes, but this is only half the story. Twenty-two years ago, Benjamin Barber wrote a prescient piece for *The Atlantic* entitled “Jihad vs. McWorld,” in which he highlighted two countervailing forces: a push towards total global homogenization (“McWorld”), and the balkanization of communities into small, conflicting groups (“Jihad”).⁷ He observed that “the planet is falling precipitantly apart and coming reluctantly together at the very same moment.”⁸ These competing forces—towards and away from greater harmonization—have been observed in a multitude of arenas; insolvency law is no different.

Legislative reforms and judicial decisions informed by comparative analyses and international laws have fostered marked convergence between domestic insolvency regimes. David Brown traces this convergence between Australia and New Zealand.⁹ Both countries have adopted UNCITRAL’s *Model Law on Cross Border Insolvency*,¹⁰ and entered into bilateral agreements and memoranda of understanding that have harmonized their insolvency regimes. New Zealand unilaterally amended its insolvency legislation to bring it more in line with the Australian model. Brown argues that these countries could pursue even greater coordination of their insolvency regimes through a bilateral insolvency agreement.¹¹

6. “Representing the Interests of Unsecured Creditors: A Comparative Look at UNCITRAL’s Legislative Guide on Insolvency Law” in *supra* note 1 at 323.

7. (March 1992), online: <<http://www.theatlantic.com/magazine/archive/1992/03/jihad-vs-mcworld/303882/>>.

8. *Ibid* [emphasis in original].

9. “Beyond the UNCITRAL Model Law in Australasia: The Scope for Bilateral Agreements” in *supra* note 1 at 387.

10. (1997), online: <<http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>>.

11. *Ibid* at 388, 422.

Corlia van Heerden, André Boraine, and Lienne Steyn examine developments to South African law related to a creditor's ability to require the sale of a debtor's house in satisfaction of an unpaid debt.¹² South African courts have traditionally relied on the constitutional right to adequate housing to read procedural protections for the debtors into the law.¹³ The authors connect the South African experience to the longstanding (albeit state-level, and therefore patchwork) protection of homes under exemption laws in the United States and legal developments in England and Wales that provide greater protection to home owners subject to debt enforcement proceedings.¹⁴ One reading of the experiences in these three countries is that a growing international consensus supports some degree of protection from creditors for an individual debtor's residence.

Today, it is premature to declare that we are inhabiting an insolvency "McWorld." A number of the chapters in this volume highlight how differences between countries not only pose an obstacle to convergence, but provide convincing rationales for continuing variation among legal regimes.

Rebecca Parry and Haizheng Zhang provide background to and an evaluation of the new insolvency regime adopted by China in 2007.¹⁵ They note that historically, there has been a significant reluctance to liquidate State Owned Enterprises (SOEs) because, in China, employees are dependent on their corporate employers not only for wages and pension benefits, but also for services such as medical care, child care, and education.¹⁶ Liquidating SOEs can therefore be incredibly disruptive to the well-being of employees. Despite significant reforms, local governments continue to exert considerable pressure on courts and may be motivated to use their power to avoid politically unpalatable outcomes, such as the liquidation of SOEs.¹⁷ This ongoing government intervention may be warranted considering the particular vulnerability of Chinese employees.

Anil Hargovan considers how aggrieved shareholders should be handled upon a company's liquidation.¹⁸ An aggrieved shareholder may have a claim against the company for misconduct, such as misrepresentations by the company that induced the shareholder to purchase shares. The traditional rule of blanket

12. "Perspectives on Protecting the Family Home in South African Insolvency Law" in *supra* note 1 at 247.

13. *Ibid* at 248.

14. *Ibid* at 254-61.

15. "China's New Bankruptcy Law: Notable Features and Key Enforcement Issues" in *supra* note 1 at 85.

16. *Ibid* at 88.

17. *Ibid* at 110-11.

18. "Aggrieved Shareholders as Creditors: An Unmapped Coordinate in the Cartography of Australian Insolvency Law" in *supra* note 1 at 145.

subordination states that shareholders recover last, after the claims of all other creditors have been paid. The United States has adopted a blanket subordination approach to claims by aggrieved shareholders.¹⁹ In the 2007 case *Sons of Gwailia v Margaretic*, the Australian High Court set a different course.²⁰ It adopted a parity approach, holding that aggrieved shareholders should be accorded the same priority as ordinary unsecured creditors.²¹ Australia's federal government eventually passed legislation overturning the case and reinstating blanket subordination of all shareholder claims.²²

In arguing for a compromise between parity and blanket subordination, Hargovan points out that Australians have the highest recorded levels of share ownership in the world.²³ To provide for Australians in their retirement, the government has adopted a policy of mandatory superannuation, meaning that a percentage of every employee's paycheck is deposited into a fund and invested on that employee's behalf. These relatively unsophisticated investors have recourse to a system of consumer protection laws including enhanced disclosure requirements for publicly traded companies and statutory remedies for shareholders when these requirements are breached.²⁴ Blanket subordination in insolvency undermines these protections because shareholders with claims under this new statutory remedy regime are unlikely to recover anything if they are only being paid out after ordinary unsecured creditors. Hargovan argues that Australia's unique context calls for a different approach to aggrieved shareholders in insolvency law.²⁵

III. COMPETING POLICIES

Hargovan's chapter on aggrieved shareholders points to another theme that emerges from the book: the difficulty of reconciling the goals of insolvency law with the competing goals of abutting domains of legal regulation. In Hargovan's piece, the competition is between the goals of insolvency law and consumer protection law. Other chapters address competition playing out in other arenas.

19. USC tit 11§ 510(b) (1984); Canada also recently adopted blanket subordination for aggrieved shareholders. See *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 140.1.

20. [2007] HCA 1, 231 CLR 160.

21. See Hargovan, *supra* note 17 at 150-51.

22. *Ibid* at 170.

23. *Ibid* at 160.

24. *Ibid* at 146-47.

25. *Ibid* at 163.

Janis Sarra examines the competition between insolvency law and the regulatory reform of the international credit derivative market. For the uninitiated, Sarra provides a helpful overview of what credit derivatives are, how they were implicated in the financial crisis, and the post-crisis efforts to regulate the derivatives market in different jurisdictions, including the United Kingdom and the United States. Sarra is critical of the policy discussion accompanying these regulatory reforms, arguing that it has contemplated insolvency only to the extent that the insolvency of a participant in the credit derivative market might impact the functioning of that market.²⁶

Sarra argues that this policy discussion should be broadened to consider how a party's participation in the credit derivative market might impact the proper functioning of the insolvency system.²⁷ For example, a senior lender—such as a bank—will often work closely with a debtor to help the debtor restructure its affairs because the bank expects to accrue a greater financial benefit if restructuring is successful than if the debtor is liquidated. The lender's incentives may be altered, however, if it is party to a credit derivative agreement. It may be entitled to receive payment under that agreement if the debtor liquidates, and the payment may substantially exceed any profit it can expect to make if the debtor successfully restructures. This shift in lender incentives can significantly affect the functioning of a restructuring regime. Sarra urges that these types of impacts should be considered in policy discussions regarding the reform of the credit derivative market.²⁸

Roman Tomasic explores the competition between insolvency law and bank regulation.²⁹ He traces the development of the United Kingdom's *Banking Act 2009*, which creates a specialized insolvency process for banks.³⁰ The impetus for the new legislation was the near failure and public bailout of the British bank, Northern Rock plc. In addition to the usual motivations for rescuing a company, the government of the United Kingdom has been especially keen to rescue banks so as to strengthen the financial system, foster consumer confidence, and “maintain the United Kingdom's position as a pre-eminent international financial

26. “Tranched, Squared and Derived: Credit Derivative Regulatory Reform and the Restructuring of Insolvent Businesses” in *supra* note 1 at 43.

27. *Ibid* at 73-83.

28. *Ibid* at 84.

29. “Creating a Template for Banking Insolvency Law Reform After the Collapse of Northern Rock” in *supra* note 1 at 115.

30. (UK), c 1.

centre.”³¹ Tomasic sounds a note of warning that the new legislation may place so much emphasis on these other goals that it risks “over[riding] or weaken[ing] long established and widely accepted insolvency principles and practices.”³²

IV. COMPLEXITY

A fourth theme that emerges from the readings is the tension between developing insolvency legislation to address gaps in existing insolvency regimes, and avoiding excessive complexity, which can hamper the effectiveness and accessibility of a regime. This tension becomes particularly acute as industries evolve, new problems emerge, and calls for legal innovation grow louder.

Paul Todd scrutinizes the law governing goods shipped by sea.³³ He begins by examining the traditional shipping document—a bill of lading—and the legislative modifications contained in the *Carriage of Goods by Sea Act 1992*.³⁴ Todd is particularly interested in how legal practices have shifted to account for two shipping innovations: the shipment of goods in standardized containers and the shipment of bulk commodities, such as oil, to a number of different purchasers. Parties have adopted a diversity of new documents to govern these novel transactions, but these approaches may not provide parties with adequate protection when another party to the transaction becomes insolvent.³⁵ The growing complexity of the legal terrain has impeded parties from effectively safeguarding their own interests.

John Tribe considers how England and Wales’ legislative systems might be amended to better facilitate large company restructuring.³⁶ Under these current regimes, large companies are required to appoint an insolvency professional, called an administrator, if they wish to be protected by a moratorium (i.e., a stay of legal proceedings) while attempting to restructure. The Conservative Party, concerned that the cost of using an administrator might derail otherwise feasible restructurings, proposed adopting an administrator-free, judicial fast-track proceeding. Tribe criticizes this proposal on a number of fronts, including for

31. United Kingdom, Bank of England, HM Treasury & Financial Services Authority, Consultation Paper, CM7459, “Financial stability and depositor protection: special resolution regime” (July 2008) at para 1.3, cited in Tomasic, *supra* note 27 at 123.

32. Tomasic, *supra* note 28 at 123.

33. “International Trade and Insolvency” in *supra* note 1 at 23.

34. (UK), c 50.

35. Todd, *supra* note 32 at 35-38.

36. “The Extension of Small Company Voluntary Arrangements: A Response to the Conservative Party’s Corporate Restructuring Proposals” in *supra* note 1 at 207.

introducing further complexity into the English insolvency regime. Instead, Tribe suggests that the voluntary administration proceeding, which is already available to small companies and does not require the appointment of an administrator, should be extended to large companies. Tribe argues that extending an existing procedure rather than introducing a new one will avoid the needless complexity and uncertainty inherent in establishing an entirely novel regime.³⁷

David Milman reviews some of the procedures available to unsecured creditors wishing to collect a debt in England and Wales without invoking bankruptcy proceedings. He also surveys some of the safe harbours available to debtors who seek respite from aggressive collection efforts.³⁸ He considers how the *Tribunals, Courts, and Enforcement Act 2007* has altered the debt collection regime, including the introduction of a new Enforcement Restriction Order, which grants debtors a twelve-month moratorium if they have undergone a sudden, but temporary, financial shock.³⁹ This procedure complements existing proceedings but also illustrates the growing complexity of the debt collection system. Instead of continuing to add new procedures to address gaps in the current system, Milman advocates for wholesale reform to reduce the complexity and redundancy of the myriad enforcement options and safe harbour provisions.⁴⁰

Two chapters do not fall neatly into any of the identified themes; they both connect international insolvency law with theoretical perspectives. First, Armin J Kammel considers how principles from Catholic Social Thought might advance the debate over the proper theoretical aims of corporate insolvency law.⁴¹ Second, David Morrison and Colin Anderson explore how law and economics might sharpen our understanding of Australian corporate rescue provisions.⁴²

V. CONCLUDING THOUGHTS

Insolvency law is an engaging area of practice and study because it spans a diverse array of topics. This book serves as a delightful reminder of the breadth of work being carried out across the global insolvency community. Readers will find discrete essays in the volume that are of significant value for their work, but the collection provides more than a miscellany of disconnected contributions: it

37. *Ibid* at 240-42.

38. "Debt Enforcement Regimes Outside of Bankruptcy in English Law: Observations on Current Diversity and Future Complexity" in *supra* note 1 at 297.

39. (UK), c 15; *Ibid* at 317.

40. *Ibid* at 318-19.

41. "Catholic Social Thought and Corporate Insolvency Law" in *supra* note 1 at 3.

42. "The Australian Corporate Rescue Provisions: How do they Compare?" in *supra* note 1 at 171.

offers a meditation on the current state of international insolvency law. Anyone who commits to reading the whole volume will come away with a deeper understanding of the dynamic interplay between international and comparative projects, the ebb and flow of harmonization and divergence, the efforts to reconcile the goals of insolvency law with those of abutting legal fields, and the challenge of maintaining simplicity while responding to gaps in our increasingly intricate local and global legal regimes.

