The University of Liverpool Interdisciplinary Conference on Bankruptcy & Insolvency Theory The Gallery, Foresight Centre, University of Liverpool, UK 1st, 2nd and 3rd April 2020	
Programme	
DAY ONE **Wednesday 1st April**	
8.30-9.00	Registration and Coffee
9.00-9.15	Welcome, housekeeping and thank you to our sponsors and attendees Welcome from the Dean: • **Professor Debra Morris**, (Dean, School of Law and Social Justice, University of Liverpool) Welcome from the Head of Law/Research at Liverpool: • **Professor Warren Barr** (Head of the Department of Law, School of Law and Social Justice, University of Liverpool).
9.15-10.15	**HARMONISATION, CROSS-BORDER THEMES & INTERNATIONAL APPROACHES** 1. **Dr. Emilie Ghio and Dr. John Galvin** (Birmingham City University) *Applying social psychology theories to the harmonisation challenges in EU insolvency law* 2. **Dr. Neeti Shikha** (Ministry of Corporate Affairs, Govt. of India) *India's Tryst with Cross Border Insolvency*

	Chair: **Dr. Paul Omar** (INSOL)
10.15-12.00	**OFFICE HOLDER ACCOUNTABILITY THEMES** 1. **Dr. Anne-Marie Weber-Elżanowska** (University of Warsaw) *Should a debtor's shadow directors be obliged to file for insolvency and bear the consequences for failure to do so? A Polish- German comparative analysis on the need for a functional interpretation of the law* 2. **Dr. Stephen Baister** (Manolete Partners plc and Moon Beever LLP) *Financing Insolvency Litigation: Some Legal and Practical Considerations* 3. **Tiffany Ehimiaghe** (Lancaster University) *Wrongful Trading and the Issue of Funding in the UK* Chair: **Mr. Stephen Hunt** (Griffins LLP)
12.00-12.30	Lunch
12.30-14.15	**RESCUE THEMES** **1. Professor Jason Harris** (University of Sydney) *The theoretical framework supporting Australia's corporate rescue law* **2. Kudzai Mpofu** (University of the Free State) *Behind the veil of ignorance: Assessing the feasibility of business rescue scheme for unincorporated business entities in South Africa.* **3. Pride Chanakira** (University of Wolverhampton) *Theory of Corporate Rescue in England and Wales - A Case of Trying to Find a Needle in a Haystack?* Chair: **Professor Andrew Keay (University of Leeds**)

14.15-14.30	Coffee
14.30-16.15	**STRUCTURE THEMES** 1. **Professor. S. Sivakumar** (Indian Law Institute) *Insolvency and Bankruptcy Code & Supreme Court of India* 2. **Ana Filipa Conceição, Catarina Frade, Paula Fernando** (Escola Superior de Tecnologia e Gestao de Leiria) *The end of "super judges" in the insolvency proceedings: new challenges for training and working modes* 3. **Andrew James Perkins** (Truman Boden Law School) *The Two Tiers of Bank Insolvency* 4. **Dennis Cardinaels** (University of Leeds) *Differentiation between factions of unsecured creditors: a solution to reduce vulnerability?* Chair: **Mr. Giogio Corno** (Studio Corno, Milan, Italy)
16.15-16.30	Comfort Break
16.30-18.00	KEYNOTE LECTURE (Day One): **Professor Karen Gross** (formerly New York Law School; former President, Southern Vermont College (a 4 yr. institution) and former Senior Policy Advisor to the US Department of Education. Current position: Senior Counsel, Finn Partners) ***Almost 25 Years After the Publication of Failure and Forgiveness: How Has (and Hasn't) Insolvency Law Evolved (Devolved)?*** *This presentation will start with a focus on the early support of and criticisms with respect to my book, Failure and Forgiveness, published in 1996. I will then turn to our focus globally on a more community-centered awareness of the impact of insolvency. Then, I will suggest a current example from the US of where we have gone awry, namely the inability in perpetuity of educational institutions to seek insolvency relief as doing so deprives them of all federal student aid -- a*

	death knell. Finally, I will raise the issue of trauma and the need for trauma-responsive lawyers and insolvency courtrooms for those individuals who and entities which are financially distressed. This builds on my new book, Trauma Doesn't Stop at the School Door (Columbia Teachers College Press June 2020) and circles back to the themes in Failure and Forgiveness, albeit through a different lens, namely the lens of trauma. Keynote Chair: **Professor David Milman** (Lancaster University)
18.00	Close
18.00-19.00	Conference Drinks – Kindly Sponsored by: **<u>Exchange Chambers</u>** ***Exchange Chambers is an award-winning set of Barristers' Chambers with a proven track record in all major areas of law.*** ***With 173 members, including 17 silks, many of the set's barristers are recognised as leaders in their field. Consistently ranked as a leading national set, Exchange Chambers develop strong relationships with their clients to ensure that they understand their requirements and deliver outstanding service.*** ***For more information visit: https://www.exchangechambers.co.uk/***

DAY TWO Thursday 2nd April 2020	
8.30-8.50	Coffee & Registration
8.50-9.00	Welcome, housekeeping and thank you to our sponsors and attendees Day Two Welcome: • **Professor Michael Gordon** (Director of Research and Professor of Public Law, Liverpool Law School, School of Law and Social Justice, University of Liverpool)
9.00-10.00	**RESTRUCTURING THEMES** 1. **Assoc. Prof. Sarah Paterson** (London School of Economics and Political Science) *The strange absence of general contracts in corporate bankruptcy theory* 2. **Susan Morgan** (University of Nottingham) *Company Voluntary Arrangements and Path Dependency* Chair: **Mr. Mark Cawson QC** (Exchange Chambers)
10.00-10.15	Comfort Break and Refreshments
10.15-12.00	**STAKEHOLDER AND SOCIAL POLICY THEMES** 1. **Dr. Jenny Gant** (University College Cork) and **Dr. Paul Omar** (INSOL International) *Social Policy and Insolvency: Unfinished Business?* 2. **Professor Christopher Symes** (University of Adelaide)

	"Fair go Mate!": A fairness 'movement' in Australian Insolvency law and practice 3. **Dr. Catherine Robinson** (University of Technology Sydney) Good in Theory: Regulatory Theory vs. Practice in the Context of Australian Insolvency Practitioners 4. **Dr. John Wood** (University of Central Lancashire) *Uncharted Waters in Uncertain Times: How the Modern Market Economy is Challenging the Economic and Social Value of the Company* Chair: **Dr. Stephen Baister** (Manolete Partners plc and Moon Beever LLP)
12.00-12.30	Lunch
12.30-14.15	**CRITICAL APPROACHES TO BANKRUPTCY** 1. **Dr. Dr Lézelle Jacobs** (University of Wolverhampton) *A woman's touch? – A Legal Feminist perspective on Insolvency Theory* *2.* **Dr. Catherine Brown** (Queensland University of Technology) *Revisiting the Priority of Taxation in Corporate Insolvency: An Application of Dworkin's Rights Thesis and Equality Theories* 3. **Dr. Hamiisi Junior Nsubuga** (Middlesex University) *The Role of the Court in Balancing Stakeholder interests in Bankruptcy in light of the Traditionalist and Proceduralist Theoretical Perspectives: Judicial Politics, Activism and Rationality* Chair: **Professor Jason Harris** (University of Sydney)
14.15-14.30	Coffee
14.30-16.15	**PERSONAL INSOLVENCY THEMES**

	1. **Mr. Kudzai Mpofu and Ms. Yola Jiba** (University of the Free State) *Assessing the efficiency of the 'debt relief scheme' in discharging medical bills in South Africa.* 2. **Imke Lammers, Professor Rosalind Mason, Dr. Uwe Dulleck and Dr. Nicola Howell** (Queensland University of Technology) *A multi-disciplinary perspective on personal bankruptcy: Results from a systematic literature survey* 3. **Dr. Orhan Emre Konuralp** (Institut Suisse De Droit Compare and Bilkent University) *To Bankrupt or not to Bankrupt: The Turkish Answer(!)* Chair: **Mr. David Mohyuddin QC** (Exchange Chambers)
16.15-16.30	Comfort Break
16.30-18.00	**Professor Melissa B. Jackoby** (Graham Kenan Professor of Law, University of North Carolina at Chapel Hill) ***Restructuring Values*** *Conceptualizing American bankruptcy system as a public-private partnership, this talk will discuss how unduly loose conceptions of economic value maximization have been used to transform an integrated system balancing a variety of policy goals into one that falls short on all, and reinforces structural inequality in the process. I will illustrate these points using a case study of The Weinstein Company, Harvey and Robert Weinstein's film and entertainment company that filed for bankruptcy in the aftermath of allegations of sexual harassment. I talk also will touch on structural inequality implications of American municipal bankruptcy law. The talk will conclude with commentary on larger changes necessary to realign the system with a variety of constitutional and democratic values.* **Chair: Professor Andrew Keay (University of Leeds)**
18.00	Conference Close
18.00- onwards	Conference Dinner - **with pre-drinks sponsored by:** **Griffins: Insolvency-Litigation-Forensics**

	Griffins are one of the largest independent insolvency practices in the UK who have been providing insolvency, litigation and forensic services for the past 30 years. We have grown steadily during that time, expanding in London and adding offices in the UAE. Griffins have built a long history of establishing legal insolvency precedents. We are highly proactive in the pursuit of asset recovery, maximising returns to creditors. We pride ourselves equally on the trust we have garnered, as much as the many successes achieved for a broad spectrum of clients. *Our clients include private individuals, corporations, law enforcement agencies, foreign governments, other professional clients and the legal profession. We work closely with a number of the industry's regulators in cases where office holders licenses have been revoked, and regularly act for government and commercial clients where our specialist knowledge and skills are effectively deployed.* **For more information see: https://www.griffins.net**

UNIVERSITY OF LIVERPOOL

DAY THREE Friday 3rd April 2020	
International Insolvency Reflections - A Round Table School of Law and Social Justice, Meeting Room G, 13.00 until 17.00	
Open to all, with conference participants : • Dr. Catherine Brown (Queensland University of Technology) • Professor Karen Gross • Professor Jason Harris (University of Sydney) – **CHAIR and CONVENOR** • Dr. Dr Lézelle Jacobs (University of Wolverhampton) • Professor Melissa B. Jocoby (University of North Carolina) • Professor David Milman (University of Lancaster) • Dr. Paul Omar (INSOL) • Professor Chris Symes (University of Adelaide) • Dr. John Tribe (University of Liverpool) • Dr. John Wood (UCLAN) and more… If you would like to participate in this event please email: j.tribe@liverpool.ac.uk	
13.00 – 15.00	Reflections on Bankruptcy and Insolvency Teaching • What do we teach in insolvency courses and what should we teach in insolvency courses? • The relationship between content and practice, • The use of theory, • International and comparative perspectives, • Assessment design • Combined and singular courses
15.00 – 17.00	Reflections on Bankruptcy and Insolvency Research • Theoretical Approaches • Legal History • Critical Legal Studies • Empirical Work

	• International Approaches • Comparative Work

ABSTRACTS

B

Dr. Stephen Baister

Manolete Partners plc and Moon Beever LLP

Financing Insolvency Litigation: Some Legal and Practical Considerations

This paper considers some of the legal and practical matters which an office-holder should take into account when contemplating embarking on litigation and how to finance it. Whilst it necessarily focuses primarily on contentious work, some of the matters addressed are relevant to instructing solicitors and others in relation to non-contentious work as well.

Dr. Catherine Brown

Queensland University of Technology

Revisiting the Priority of Taxation in Corporate Insolvency: An Application of Dworkin's Rights Thesis and Equality Theories

When it comes to distribution of scarce assets in corporate insolvency, it has historically been the view of Australian law reform bodies that the collection of taxation revenue should not be at the expense of other unsecured creditors. Nevertheless, in the event of corporate insolvency, there are competing and inconsistent provisions in Australian corporate and taxation laws that can result in the Commissioner of Taxation obtaining priority in insolvency.

This paper revisits the 1988 Australian General Insolvency Inquiry (Harmer Report) which recommended that the statutory priority for taxation should be abolished, and the principle of pari passu should prevail. This paper contends that a framework based on Ronald Dworkin's rights thesis and equality theories supports the recommendations of the Harmer Report in relation to the priority of taxation in Australian corporate insolvency. This paper also examines the efficacy of Dworkin's theories as a theoretical basis on which legislative policy that directly, or indirectly, impacts the priority of taxation in insolvency should be justified as a departure from the principle of pari passu.

C

Pride Chanakira

University of Wolverhampton

Theory of Corporate Rescue in England and Wales - A Case of Trying to Find a Needle in a Haystack?

This paper explores the corporate insolvency regulatory landscape in England and Wales to demonstrate how the theory of corporate rescue is fatally obscured by secured interests and stakeholders with various priority rights. The result is that the aspirations and commendations of the Cork Committee of promoting a corporate rescue culture inspired by a communitarian approach are clearly undermined. Drawing on that premise and the inconsistent approach adopted by the courts in the winding up of Carillion plc and Re British Steel [2019] EWHC 1304 (Ch) and the petition hearing in Cambridge Analytica (UK) Ltd [2019] EWHC 954 (Ch), it is argued that the theoretical basis of corporate rescue espoused by the Cork Committee cannot be reconciled with the principles and purposes of distribution and dissolution under Schedule B1 provisions. Hence, it is submitted that the contemporary corporate insolvency policy promotes the interests of secured creditors, along with a vague public interest, at the expense of corporate rescue.

The theory which supports English insolvency law has hardly ever been made clear, let alone the theory which underlies company rescue (notwithstanding the statement of the Cork Committee at para 198). The paper, therefore, initially seeks to set the background by unpacking the underlying principles and purposes of administration and thus clearly identifying the theoretical basis of corporate rescue in England and Wales. Ultimately, the paper contemplates the compatibility of the corporate rescue framework, bearing in mind the Government reform proposals, with the new trend of preventive restructuring (EU Directive 2019/1023) and the indicators of resolving insolvency as rated by the World Bank Doing Business Report.

Dennis Cardinaels

University of Leeds

Differentiation between factions of unsecured creditors: a solution to reduce vulnerability?

Despite several recent regulatory changes within the insolvency framework, the paper aims to examine the existing problems unsecured creditors still face due to a lack of differentiation between different factions of unsecureds.

First, based on both legislation and case-law the paper will briefly analyse which insolvency theory predominantly underpins the current regulatory framework and which impact this has got on the position of unsecureds during insolvency procedures. Despite some exceptions, the current insolvency framework appears to be largely a product of the 'creditors' bargain theory' for it predominantly focusses on the whole group of unsecured creditors without taking into consideration the different existing factions within the group of unsecured creditors. As a result, there appears to be a considerable failure to (sufficiently) differentiate among different unsecureds which risks putting many unsecured creditors in jeopardy.

Secondly, the paper will critically set out why it might thus be better to recognise the existence of different groups of unsecured creditors instead of continuing to view all the unsecureds as being part of one homogenous group. Furthermore, it will then examine whether such a differentiation could reduce their vulnerability. Related to this are the flaws that exist in relation to insolvency governance and more in particular in respect of the controlling or non-controlling position some factions of unsecured creditors might have prior to and/or during the insolvency procedure.

Finally, after having made the case to remodel our current insolvency framework (and to depart from our current reliance on the 'creditors' bargain theory) some suggestions aiming to enhance fairness and, thus, to improve the position of vulnerable factions of unsecured creditors will be provided.

To conclude, while there is still a long way to go to ameliorate the position of unsecureds, by adopting a new insolvency theory, this presentation intends to contribute to this debate.

Ana Filipa Conceição, Catarina Frade, Paula Fernando

XXXXXXX

The end of "super judges" in the insolvency proceedings: new challenges for training and working modes

Insolvency procedures have become more and more complex, especially since the preferred legal solution, according to the international best practices, shifted from liquidation to debt restructuring and debtor recovery. This purpose adds more pressure to the judicial system and creates bigger challenges for judges' skills, knowledge and training.

Recent developments in European legislation, with an emphasis on the European Insolvency Regulation (EIR) and, particularly, on the Directive (EU) 1023/2019, have highlighted, on the EIR's case, the possibility of the national courts having to deal with more cross-border restructuring procedures, due to the reinforcement of the rules on groups of companies; regarding the Directive, it states the need of creation or reinforcement of the restructuring procedures at a national level and, concerning the courts, the probable densification of tasks. The courts will eventually face new challenges regarding the analysis of the restructuring plan before its judicial approval and also regarding the confirmation of creditors' classes in order to enforce the cross-class cram down – all of these tasks exceeding the traditional legal training of judges. In this new or renovated restructuring procedures, the court, usually a single judge, will be called to appreciate the contents of the restructuring plan from a legal and financial point of view, including the debtor's accounts, before issuing the ruling about admission or confirmation of the plan, based not only on legal grounds, but also on the opportunity and feasibility of the plan.

Empirical analysis in Portugal indicates, however, that the curricula of the Law degrees, the only degree that capacitates the judiciary, are lacking the foundations of Insolvency Law, and also in Management, Accounting or Economics. Furthermore, the basic training of the judges, regardless the fact that since 2016 includes courses in the aforementioned areas, does not enable the most part of the judges to fully understand

restructuring plans. Adding to these insufficiencies, Portuguese courts do not have a structured and functional support panel of experts, leaving the judges without proper technical support. The technical and scientific transversality of Insolvency law therefore has no match with the traditional conception of an omniscient judge, able to produce informed and just decisions about every topic. Their "superhuman" decision capacity is currently challenged by the new cooperative justice models that without eliminating the final function of judging, integrates judges in a bigger picture of collaboration with other judicial agents.

E

Tiffany Ehimiaghe
Lancaster University

Wrongful Trading and the Issue of Funding in the UK

The law on wrongful trading is arguably for the protection of creditors. However, the complexities involved in a wrongful trading suit suggests otherwise. This paper focuses explicitly on the issue of funding. The extent as to how s.214 is effective as a statutory tool is largely linked to the issue of funding. Following the decision in the Re Ralls Builders,1 it is now riskier to bring the expensive wrongful trading suit. This because the liquidators will have to show a causal link between the net deficiency of the company and the acts of the company. However, in practice, where there has been misbehaviour by the directors in the run-up to insolvency, it is much more likely, that directors will be brought under s.10 of the Company Directors Disqualification Act. This further suggests how ineffective the statutory provision of wrongful trading is.

This paper concludes that while the law on wrongful trading is good law for the protection of creditors, the issue of funding must be tackled for the statutory provision to achieve its purpose of increasing competence.

G

Dr. Jenny Gant and Dr. Paul Omar
University College Cork and INSOL

Social Policy and Insolvency: Unfinished Business?

The Papal encyclical, Rerum Novarum (of these novelties), issued in 1891, dealt with capital and labour issues. Though difficult fully to establish causation, it has undoubtedly had an influence on the development, not just of a strand of Catholic doctrine known as Catholic Social Thought, but also of the prevailing model of social capitalism, in which the role of employees in a firm (and ancillary issues, such as collective bargaining, pensions, the proper balance of capital and labour rewards) finds a focus. It is entirely possible that the contemporary development of "hard" employment principles (acquired rights, preservation of employment) in some jurisdictions owes much to the way in which this (and subsequent) papal pronouncements have seeped into liberal and socialist consciousnesses.

In insolvency, the tension between employees and rescue has long been evident. Often seen in some jurisdictions as the first casualty of any cost-cutting exercise, this approach can be contrasted with the strong feeling for preservation of employment in other jurisdictions (sometimes at all costs). Neither is optimal and can lead to the wastage of resources that could be better used for restructurings. Central to current perceived difficulties with rescues is the impact of the Acquired Rights Directive, which has been litigated extensively in some jurisdictions (UK, NL etc), and which reflects an attempt (arguably unsuccessful) at creating a compromise between extreme views on the place of employees and their skills as a component of any successful restructuring process.

This paper asks how relevant is Rerum Novarum to understanding the rise and possible resolution to this tension. In an age which tends to polarisation and extremes, capitalist and socialist models find it difficult to compromise; vague notions of social capitalism, reliant on finding a happy medium between two schools of thought, appear unsatisfactory. Is it possible to predict how the role of employees in rescues will change? Is it possible to anticipate whether they will be less or more valued? These are the essential questions this paper seeks to explore.

Emilie Ghio and John Galvin
Birmingham City University

Applying social psychology theories to the harmonisation challenges in EU insolvency law

The harmonisation of insolvency law has been at the top of the EU institutions' agenda in the last decade. This resulted in several significant initiatives, such as the Recommendation on a New Approach to Business Failure 2014; the European Insolvency Regulation Recast 2015; and the Preventive Restructuring Directive 2019. However, existing political and economic tensions amongst Member States mean that a European-wide insolvency regime is unlikely to be achievable.

The challenges of harmonising insolvency laws are well known and have received much attention in the law and economics literature. Findings from the field of social psychology, with its focus on psychological processes and group behaviours, provide a new perspective on how and why these challenges are difficult to overcome.

This paper explores ways in which social psychology may inform debates about harmonisation, using insolvency law as a case study. Such insights help to understand how actors' social and cultural biases affect harmonisation efforts.

The paper proceeds as follows. The first section introduces the challenges facing the harmonisation process in insolvency law. Second, selected theories from social psychology are identified and explained. Specifically, select theories and models of attitude formation, status quo bias, endowment effect, and attributions, including attribution errors. These insights are then applied to: (i) the challenges in harmonising insolvency law; (ii) the harmonisation process and the form of harmonisation measures achieved.

We argue that theoretical discussions around the harmonisation of insolvency laws in the EU need to be aware of the impact that psychological biases have on legal decision-making processes. Understanding these factors can help to explain why challenges to harmonisation exist and why EU harmonisation measures are in their current form. Not discounting the economic and political tensions, this research provides a basis to overcoming psychological biases which is argued to hinder progress in this area.

H

Professor Jason Harris
The University of Sydney

The theoretical framework supporting Australia's corporate rescue law

This paper examines the nature of Part 5.3A of the Corporations Act 2001 (Cth), which provides the main corporate rescue law in Australia ('voluntary administration'). The paper considers how voluntary administration works as a corporate rescue law and whether the procedure is justifiable as a legal policy goal by identifying and critiquing the theoretical underpinnings of the law. The paper considers the historical, social and political context in which voluntary administration arose and discusses the potential future operation of Australia's corporate rescue laws.

J

Dr Lézelle Jacobs
University of Wolverhampton

A woman's touch? – A Legal Feminist perspective on Insolvency Theory

With Warren for President and the first ever all women spacewalk it seems like the ideal time to consider Insolvency Theory through the special tinted lens of the Legal Feminist movement.

In considering the impact that women and feminism might have on the law, some questions arose. Have the Legal Feminist movement and ideologies that have been expressed by the movement through its development, in any way influenced that revered area of the law that many call Insolvency Law? More specifically, have women influenced the development of the law relating to insolvency? This seems too broad to consider. The area of Insolvency Theory is, therefore, chosen for this investigation as the ideologies of the theories and those of Feminism could more readily be contrasted and compared.

Insolvency theory asks the question about in whose interests insolvency law should be formulated. Stated more plainly, it considers who and what should be protected and recognised by insolvency law. The aim of this paper is to evaluate whether there is any evidence of feminist ideology to be found in insolvency/bankruptcy theory. To ask whether insolvency theories may also be categorised in relation to ideologies expressed in the legal feminist movement. It aims to adopt a feminist enquiry, to consider a gendered perspective to legal and social arrangements.

K

Dr. Orhan Emre Konuralp
Institut Suisse De Droit Compare and Bilkent University

To Bankrupt or not to Bankrupt: The Turkish Answer(!)

After 2001 economic crisis in Turkey, most of the legislation, which is related with economics, has been amended. One of them was Code of Enforcement and Bankruptcy (CoEB). Since the no redemption of the depts is a major result of the crisis, debtors faced with the danger of bankruptcy. However, bankruptcy was an efficient solution neither for creditor nor for debtor. This is because, after liquidation of bankrupt debtor's assets, usually most of the creditors could not be satisfied in economic means. Besides the bankrupt debtor would lose all of the property which would prevent the debtor to re-establish an economic undertaking. As a result of that, with the amendment in CoEB in 2004, a chance was given to stock companies and cooperatives to provide liquidity before bankruptcy. If they had chance in economic recovery, they would not face with bankruptcy. Unfortunately, it is accepted that, this system, deferment of bankruptcy, was abused by debtors, thus was not able to give expected economic outcomes. Consequently, deferment of bankruptcy procedure was abrogated and composition in bankruptcy was re-legislated. As a result of this re-legislation, the existing composition agreement procedure was slightly amended, and it became the only way for debtors as a pre-insolvency instrument. It should be added that, composition agreement, unlike deferment of bankruptcy procedure, is available both for stock companies and natural persons, thus it has a wider scope of application. However, since many more debtors are able to avoid from bankruptcy, this might result in inefficiency. This is because right to claim of the creditors is suspended during this composition procedure. The aim of this paper is to analyse the current and former pre-insolvency procedures of Turkish law and find an answer to the question: Is it appropriate and efficient to postpone bankruptcy?

L

Imke Lammers, Rosalind Mason, Uwe Dulleck, Nicola Howell

Queensland University of Technology

A multi-disciplinary perspective on personal bankruptcy: Results from a systematic literature survey

This study provides a systematic survey of the complex literature on personal bankruptcy from a multi-disciplinary perspective. We argue that personal bankruptcy is an inherently interdisciplinary concept. Thus, a meaningful discussion of personal bankruptcy requires consideration of its historical origins as well as attention to its location within a broad constellation of interrelated frameworks. While a relatively large interdisciplinary literature exists, research tends to naturally gravitate towards two sub-disciplines that seem difficult to unify: Law & Sociology and Law & Economics. More recent studies suggest that behavioural insights may be able to bridge this gap. To provide a more wholistic view on personal bankruptcy, we survey more than 162 pieces of literature that examine personal bankruptcy historically as well as from the perspectives of Law, Sociology, Economics and Behavioural Research. We develop assessment criteria (e.g, timeframe, jurisdiction, focus of analysis, etc.) which we use as a basis to outline the current state of affairs in each sub-discipline, comment on how these parallel streams of research can inform each other and highlight avenues for future research.

M

Kudzai Mpofu and Yola Jiba
University of the Free State

Assessing the efficiency of the 'debt relief scheme' in discharging medical bills in South Africa

The number of South Africans who can afford healthcare services is inversely proportional to the increase of healthcare expenses. South Africa Statistics reveal that out of 54 million people, only 17 percent can afford medical aid schemes and the rest of the populace depends on their monthly or weekly earnings to meet their medical bills. It follows that the increase of healthcare costs in the past decade has led to a large number of consumer debtors filing for bankruptcy. In order to address this problem, the parliament promulgated the National Credit Amendment Act of 2019, which provides a debt relief scheme. In terms of section 88A of the Act, a consumer debtor on the verge of insolvency may apply for debt intervention. A debt counsellor is appointed to administer the debtor's estate until he or she is declared solvent. However, critics maintain that the new debt relief regime will have a negative impact on the financial sector, causing banks to drastically increase loan rates in order to recoup losses. The purpose of this paper is to examine the efficacy of the debt relief scheme in discharging debts arising from medical bills. Will it work?

Kudzai Mpofu
University of the Free State

Behind the veil of ignorance: Assessing the feasibility of business rescue scheme for unincorporated business entities in South Africa

In a developing economy, enterprises such as sole traders and partnerships occupy a large part of the informal sector as small and medium enterprises as small and medium enterprises SMEs. Their economic impact is most noticeable in areas such as employment creation, income distribution and poverty alleviation. SMEs contributed 57 percent of South Africa's gross domestic product in the first quarter of 2019. Although SMEs are crucial to the economy of South Africa, there are no special procedures that facilitate their rehabilitation when they experience financial distress. The Chapter 6 business rescue is only available to companies incorporated in terms of the Companies Act of 2008. On the other hand, the National Credit Act of 2015 which provides debt relief for natural persons excludes partnerships and does not recognize sole proprietorship. Therefore, the purpose of this paper is to suggest a business rescue mechanism for unincorporated business enterprises. It is my view that this business rescue mechanism must be informed by John Rawls' theory of justice and its application in the law of insolvency. Rawls' idea of the 'original position' is to set up a fair procedure so that principles agreed to will be just and this exercise should be considered behind the 'veil of ignorance.'

N

Dr. Hamiisi Junior Nsubuga
Middlesex University

The Role of the Court in Balancing Stakeholder interests in Bankruptcy in light of the Traditionalist and Proceduralist Theoretical Perspectives: Judicial Politics, Activism and Rationality

In most jurisdictions, the court plays a central role in providing stakeholder protection in bankruptcy and debt restructuring regimes. Although there are many advantages to debt restructuring through contractual means, court intervention is usually needed to regulate and deal with difficulties that can arise such as the imposition of restructuring plans on dissenting creditors and wealth transfers between creditors. However, the role of the court in mitigating these concerns has sometimes been overlooked or misunderstood. While there exists specialist bankruptcy courts in some jurisdictions such as the US that govern bankruptcy proceedings, other jurisdictions such as the UK rely on general non-insolvency specialist judges to preside over and coordinate bankruptcy proceedings.

According to prof. Baird, theoretical discourse on the subject of bankruptcy and its role in a legal system is mainly contested by the traditionalists and proceduralist theoretical schools. One point of contention between these two theoretical schools is the role of the court in bankruptcy proceedings. While proceduralists view the role of the court in bankruptcy proceedings as that of a disinterested arbiter, and that the role should be limited to directing and controlling competing stakeholders' collection processes, traditionalists hold a completely different view. Traditionalists believe that to ensure justice and fairness in bankruptcy, the court should implement bankruptcy's equity goals on a case by case basis and that judges should exhibit broader discretionary powers in discharging the court's roles.

In this article, I analyse the role of the court in bankruptcy proceedings as contested by the proceduralist and traditionalist theoretical schools. The article analyses contentious aspects such as judicial discretion, judicial politics, activism and rationality and how these have impacted the court's role in the bankruptcy field, especially, at a time when the role of insolvency law in a legal system is the subject of varied debates.

O

Dr. Abiodun Adeniyi Ojetunde
University of Ibadan

Insolvency Risk: Characterisation and Prediction

This paper sets out to analyse the concept of insolvency risk in a firm and how it can be objectively measured. Our main objective is to predict whether a firm will face an insolvency situation, based on its most recent historical data stored in its accounts. In order to achieve this, the prediction of insolvency risk is studied reviewing some of the most relevant literature and explaining the accounting and financial implications which lie behind it, understanding the concept of insolvency from this perspective. In mathematical terms, this is an example of the so-called Problem of Classification (or Discriminant Analysis), which is usually approached using Statistics. More specifically, the chosen way to mathematically measure insolvency risk is through some of the most popular statistical prediction methods which deal with this problem. Some of these methods consist of the classical Altman's Z Score, essentially equivalent to the Linear Discriminant, or more contemporary methods like Classification and Regression Trees or Neural Networks.

These methods are applied on two samples. The first one is a sample of 40 Nigerian firms selected under some certain criteria, gathering its data from Federal Office of Statistics (FOS) database. The second one is the actual sample of 40 Nigerian firms drawn and interviewed directly conducted by us. A balanced approach between financial theory and statistical theory is used in order to effectively convey the message that we cannot totally rely on the statistical methods without taking into account the non-mathematical implications, for this is a complex issue involving many other areas such as finance, accounting or economics.

P

Assoc.Prof. Sarah Paterson
London School of Economics and Political Science

The strange absence of general contracts in corporate bankruptcy theory

Two of the most powerful tools which Chapter 11 offers are (i) the ban on the exercise of so-called ipso facto termination rights; and (ii) the right of the debtor to decide whether to assume, assign or reject contracts. Together these tools (i) help the debtor to stop a spiral of contract terminations, as suppliers and customers become nervous about the debtor's financial condition; (ii) create liquidity for the case (because the debtor can keep the contract on foot without paying for pre-filing supply); and (iii) enable the debtor to reshape its operations. At present, English corporate reorganization law does not offer easy equivalents to these tools, and the UK government is currently proposing to introduce a ban on ipso facto clauses. However, the proposal contains very little analysis of the case for reform.

We might, therefore, expect to be able to turn to US corporate bankruptcy theory to understand the case for and against the ipso facto ban and debtor rights of assumption, assignment and rejection. However, we find that these powerful tools are curiously under-theorized. Economically minded scholars have tended to focus on the role of the automatic stay in preventing enforcement against assets, rather than its role in preventing contract termination. Moreover, they have spent very little time analysing: the relationship between the debtor's post-filing rights and the counterparty's non-bankruptcy rights; the ex ante effects of an ipso facto ban; and the risk that the ipso facto ban and related rights may result in bankruptcy forum shopping by certain constituencies. At the same time, progressively minded scholars have spent remarkably little time considering the distributional consequences of these tools. This paper will attempt to close this gap, and will consider the implications of the analysis for the current reform agenda in the UK.

Andrew James Perkins
Truman Boden Law School

The Two Tiers of Bank Insolvency

Prior to the Global Financial Crisis (GFC) the leading financial jurisdictions of the world did not have a special resolution regime to deal with a failing bank. If a bank became insolvent normal rules of corporate insolvency would take over in order to provide orderly resolution of banks affairs.

However, in the aftermath of the GFC there was a renewed interest in regimes for the orderly resolution of failing banks. Many jurisdictions in addition to their insolvency regime adopted a "special resolution regime" specifically applicable to a failing banking institution whereby a bank which provides critical functions to the economy and whose failure presents a threat to financial stability can be lifted out of liquidation under a state's insolvency regime.

For regulators there appears to be a choice. Resolution covered by a special regime or liquidation covered by national insolvency law. Definitions of a banking institutions 'critical functions' and 'public interest' play a key role in deciding whether a banking institution gets to benefit from a special regime or be left to be liquidated.

My theory is that there is now uncertainty within global financial markets because of the current diversity in liquidation procedures for participants in the banking sector. I will test this by examining how the definitions of 'critical function' and 'public interest' effect a state's decision to place a failing bank into insolvency or a special regime through UK and EU law.

The structure of this paper will explore the emergence of special resolution regimes, the role that 'public interest' and 'critical function' play in states decision to place institutions into either a special regime or insolvency. I will then evaluate the tensions this has caused for the sector.

My preliminary finding is that based upon a two tier framework, global institutions can face different insolvency outcomes in different jurisdictions. I will argue that for the financial system to operate effectively banks and creditors deserve certainty about the rules which will govern liquidation in the event of failure.

R

Dr. Catherine Robinson
University of Technology Sydney

Good in Theory: Regulatory Theory vs. Practice in the Context of Australian Insolvency Practitioners

In 2019, the UK Insolvency Service is undertaking a review of the regulation of insolvency practitioners. The review of whether the 2015 legislative objectives have been achieved, will inform any changes to the current regulatory framework. Relevantly, a term of reference of the review is consideration of different regulatory models. In Australia, the findings of the 2019 Banking Royal Commission magnified, inter alia, the corporate regulator, the Australian Securities and Investment Commission (ASIC), slow approach to litigation. The wake of the Banking Royal Commission has seen a shift of ASIC's enforcement posture to, 'Why not litigate?' representative of the "old-model" of enforcement; hard, adversarial and punitive. Given the importance of modern regulation and heightened public interest in regulation, it is timely to reflect upon the Australian regulatory model of insolvency practitioners under the Insolvency Law Reform Act 2016 (Cth). This paper will first discuss regulatory theories as they apply to the personal insolvency regulator, the Australian Financial Services Authority, and ASIC (as the corporate insolvency regulator). Next it will review enforcement action against insolvency practitioners since commencement of the law reform. Based on the publicly available information to date, the paper identifies disconnect between the objectives of the regulatory framework, and performance of the regime itself. Further, given the divergent regulatory styles of AFSA and ASIC, a key legislative objective 'harmonization of the disciplinary processes of insolvency practitioners' may also only ever be "good in theory".

S

Dr. Neeti Shikha
Head Centre for Insolvency & Bankruptcy, Indian Institute of Corporate Affairs, Ministry of Corporate Affairs, Govt. of India

India's Tryst with Cross Border Insolvency

International Insolvency regime has stayed resistant to reforms until recent times. It has been 32 years since the issue of UNCITRAL Model Law on Cross Border Insolvency (herein after mentioned as 'Model Law') but there are only 44 countries have adopted the Model Laws. There has been growing discourse on reforming the international insolvency regime through adoption of Model laws and several common law countries such as UK, Singapore etc have adopted the same with some modifications. India has proposed to adopt the Model Law and if adopted, it will be the latest addition to the group of countries that aim towards achieving universal insolvency regime and harmonising the cross border insolvency. Though the cross border insolvency regime is at a stage of conception, there are several concerns that must be flagged at this stage in order to ensure that the cross border insolvency regime harmonises the existing challenge that exsists in Model Law framework. . An important question that the paper addresses is whether the model adopted by India has paid sufficient attention to the choice of law rules related to various substantial question of law that arises in cross border insolvency, such as avoidance of antecedent transactions, treatment of guarantee etc.

This paper aims to discuss the proposed cross border framework in India and discusses the issue that the proposed framework may pose in achieving a "market friendly' resolution as the new insolvency law of the country. It critically evaluate the model adopted by India for the cross border insolvency and assess how the new rights and discretions are applied in practice given the significant role to be played by the company courts in India. In the end, the paper suggests that while cross-border insolvency reform might have aided easier recognition of a foreign insolvency proceeding and enhanced cross-border assistance, debt restructuring law reform may not have been very useful for the company from a practical perspective.

Prof. (Dr.) S. Sivakumar
Indian Law Institute

Insolvency and Bankruptcy Code & Supreme Court of India

India enacted the Insolvency and Bankruptcy Code 2016 (IBC) to consolidate and amend the laws and set of rules relating to restructuring and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner. It aims for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India. Under this Code, in case of default in payment of credit, the debtor's assets are put in the control of creditors. The debtor is given a period of 180 days to decide on the liquidation of assets. In case no decision is taken, the asses are automatically liquidated under the Act. It seeks to infuse efficiency, smoothens in the restructuring of the corporate personality, realize the debt and possibility of reviving the company itself. Section 5(14) defines 'insolvency resolution process period' as a 'period of one hundred and eighty days beginning from the insolvency commencement date'.

The Code creates various institutions to facilitate the insolvency proceedings. It creates Insolvency and Bankruptcy Board constituted under section 188(1) of the Act to regulate the conduct of insolvency agencies and professionals. Section 207 provides for registration of a specialized cadre of Insolvency Professionals with the Board. Such professionals would be qualified in the field of experience in the field of finance, law, management, insolvency or such other field as specified by the Board. The Insolvency Professional Agencies would be responsible for certifying such professionals. The National Companies Law Tribunal (NCLT) has been made the adjudicating authority for companies; and the Debt Recovery Tribunal (DRT), for individuals. The final appeal lies before the Supreme Court.

Thus in India, IBC is the comprehensive legislation governing resolution, insolvency and bankruptcy of individuals, partnership and proprietorship firms, limited liability partnerships, companies and corporations. However, the last three years have seen a number of litigation before the apex court of India, where court has sought to clarify the ambiguity, strengthened the mechanism under the Act/Code and had played a constructive as well as role of facilitation. This paper analyses the efficacy of IBC and the Indian Judicial attitude towards this and on the progress made, issues faced and the future agenda including suggestions to improve the system.

Professor Christopher Symes
University of Adelaide

"Fair go Mate!": A fairness 'movement' in Australian Insolvency law and practice

There is a uniqueness about Australian insolvency. It doesn't quite follow its common law cousins although it does reflect some well understood and almost universal fundamental aims and values. Diacritically, as Australian law and practice has unyoked from the UK, new values have appeared.

This paper suggests that the history, objectives, philosophy and even the theoretical underpinnings in Australian insolvency legislation and jurisprudence serve as the catalyst for a 'fairness movement of insolvency.' Drawing from recent legislative changes and 21st century cases decided in Australia, the paper describes the current position and goes on to suggests even more radical change could be made using fairness to what have been considered staples such as preferences, set off, protected monies, disclaimers and even the treatment of insolvency boomerangs.

T

Dr. John Tribe
University of Liverpool

Kahn-Freund Vindicated: Evidence from corporate insolvency of the "calamitous" (mis)use of the corporate form during the final stage of Capitalism

This article provides a Marxist critique of how directors have used and abused the corporate form and its attendant statutory privilege of limited liability.

This director behaviour is symptomatic of the crisis of capitalism. Case law examples of preferences, transactions in fraud of creditors, transactions at an undervalue, wrongful trading, fraudulent trading and behaviour leading to directors disqualification due to "unfitness" demonstrate overwhelming misuse and resulting undermining of the corporate form. This damaging behaviour impacts on multiple stakeholders (employees, creditors, the environment, suppliers, society more broadly, etc) and reveals behaviour that is contributing towards the decay of capitalism.

Far from limited liability companies being used as a vehicle to foster economic growth we are seeing the form being used to benefit directors' individual selfish behaviour. This diversion from the accumulation objectives of capitalism contributes to the undermining of capitalism in its final stage.

W

Dr Anne-Marie Weber-Elżanowska
University of Warsaw

Should a debtor's shadow directors be obliged to file for insolvency and bear the consequences for failure to do so? A Polish-German comparative analysis on the need for functional interpretation of the law.

The empirical observation of companies' strategies in pre-insolvency situations reveals a repetitive pattern of executive directors' resignations, followed by a period of no formal appointment of new executive directors, often accompanied by the empowerment of special proxies to enable legal representation of the company. At the same time, factual company governance is performed either by the "old" executive directors or by the shareholder(s). According to the letter of the Polish Insolvency Law, the duty to file an insolvency motion rests upon a company's executive directors. Consequently, sanction for failing to comply with such obligation may only be imposed upon these executive directors. The author argues that the existing approach of courts and scholars, which does not allow for application of the relevant provisions to shadow directors, creates a dangerous hole in the safety net of creditor protection mechanisms. Comparative analysis of the approach taken by German courts and scholarship reveals that despite narrow scopes of application derived from the literal interpretation of the law, functional interpretation may and should serve as an instrument to overcome evident deficiencies of the legal framework.

Dr. John Wood
University of Central Lancashire (UCLAN)

Uncharted Waters in Uncertain Times: How the Modern Market Economy is Challenging the Economic and Social Value of the Company

Gale of destruction or 'creative destruction' refers to the incessant product and process innovation mechanism by which new production units replace outdated inefficient ones. It was coined by Joseph Schumpeter (1942), who considered it 'the essential fact about capitalism'. The process of Schumpeterian creative destruction (restructuring) permeates major aspects of macroeconomic performance, not only long-run growth but also economic fluctuations, structural adjustment and the functioning of factor markets.

The model can be aptly applied to insolvency law, specifically the application of corporate rescue since it provides the preamble as to why companies fail, why they should be allowed to fail, and how the market can still extract value from failed companies. To establish the optimum value of an insolvency company remains one of the most contentious issues in insolvency law. The valuation process that determines whether saving the company as a going concern or the sale of its assets constitutes the ideal rescue strategy is open to interpretation. Often, the default position of rescue as a going concern is taken at the expense of sale of assets but it remains questionable whether this default position always presents the best result for interested parties in the long term. Furthermore, the reduced life-span of companies due to the insatiable appetite for technology in the workplace has ensured that corporate rescue could offer better value if the assets were sold. This article argues that creative destruction can help to adjust corporate rescue to reflect the modern market economy.