Corporate Rescue Law — An Anglo-American Perspective

Gerard McCormack
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Recent years have seen something of an explosion of scholarly interest in United Kingdom insolvency law generally. More specifically, coverage of matters of international and comparative insolvency law, on the one hand, and the corporate rescue ideology on the other, has expanded commensurately to legislative and judicial developments in this area. Professor McCormack's latest major work draws together these two exceptionally stimulating themes and amounts to a highly readable and informative text and an excellent addition to insolvency scholarship.

The subject matter of this work is particularly timely as far as developments in the United Kingdom are concerned. The Insolvency Service, an Executive Agency of the Department for Business, Innovation and Skills, has very recently published a consultation document, *Encouraging Company Rescue — A Consultation*, which seeks comments on possible amendments to the company voluntary arrangement and administration procedures, currently contained in Part I and Schedule A1 and Part II and Schedule B1 of the *Insolvency Act 1986*. The consultation notes that:

> . . . the Government wants to provide companies which have a viable future but are facing difficulties, with an opportunity to establish a more stable footing and prosper, helping to preserve jobs and livelihoods. An important part of this is ensuring that the insolvency legislative framework continues to live up to its international reputation for fairness, striking the right balance between the interests of debtors and creditors, both in these current difficult economic times and in the future.[1]

For present purposes, what is particularly interesting about the detail of the proposals upon which comment is invited is the extent to which, if ever implemented, they mark a shift towards the U.S. Chapter 11 regime. In essence, the proposals fall under two heads: the first considers an extension of the "CVA [company voluntary arrangement] with moratorium" procedure to companies of all sizes (it is

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1 The Insolvency Service, "Encouraging Company Rescue — A Consultation", (June 2009) online: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/compresc/compresc09.pdf> ¶ 22.

at present available only to "small" companies), and the second proposes various means for the creation of priority finance to be used to facilitate the operation of a rescue plan. Both might be considered as rather more debtor-empowering than the current U.K. approach, hence the enquiry as to whether they represent an ideological swing from the perceived creditor orientated U.K. system to the debtor-friendly Chapter 11 of the U.S. This leads inexorably to the question of whether such a move will assist in achieving the Government's objectives as noted above.

This is a daunting enquiry, but one which Professor McCormack's book is likely to prove an invaluable tool in addressing. In essence, he embarks upon an exhaustive investigation of U.K. and U.S. reorganization procedures and scrutinizes the orthodox wisdom that the two systems are fundamentally "different", both in terms of philosophy and procedurally. Indeed, Professor McCormack's opening gambit encapsulates his overall theme, that the traditional understanding of the U.S. regime as "pro-debtor" and the U.K. approach as "pro-creditor" is "at best, a potentially misleading over-simplification." This thesis is of much more than purely academic interest, as it has the potential to impact upon legislative policy and insolvency practice both in the short and long term, and in this regard alone it is suggested that this work is likely to prove an extremely important one.

It is probably fair to say that there are only a few individuals who can claim to have a comprehensive understanding of the law and practice of both systems, as a thorough study of either is a weighty task in itself. But Professor McCormack goes much further then a description of the legal reorganization regimes of each jurisdiction: rather than approaching his task through a purely legalistic lens, he incorporates both theoretical and empirical perspectives. Given that the work is substantially more sophisticated then a straightforward comparison of two legal structures, this is entirely appropriate. In order to fully understand and evaluate the strengths and weaknesses of each, it is important to be able to gauge how, *in practice*, each operates, and one of the consistent strengths of this book is the way in which Professor McCormack is able to demonstrate that the underlying perspective of a debtor-friendly/creditor-friendly polemic between the two systems is often more imagined than real.

The introductory chapters of *Corporate Rescue Law — An Anglo-American Perspective* set the scene by explaining, in chapter 1, one of the academic theories underpinning the rescue ideology, that of "going concern value", and in chapters 2 and 3 the basic features of U.K. and U.S. corporate restructuring law respectively are explored. The first Chapter, in particular, makes fascinating reading and is immaculately researched and referenced. It outlines the basic proposition that corporate rescue is an appropriate response to corporate distress because it preserves the going concern value of the distressed company and then goes on to examine this orthodoxy in detail. Rather than simply trot out a series of theoretical perspectives, Professor McCormack takes the further step of examining who, or what, is the main beneficiary of any going concern surplus that a successful rescue may yield. In this regard, he reaches the highly credible conclusion that the U.K. and U.S. regimes have an inherently common goal, which is not, as one might perhaps imagine in the case of the U.S. system, "rescue for rescue's sake", but rather the maximization of creditor recoveries.

The following Chapters take the same illuminating approach. Having outlined the fundamental features of U.K. and U.S. corporate restructuring law, Professor

McCormack treats each in turn and again considers whether what at first sight appear to be ideological or structural schisms are, in fact, less broad than the appearance suggest. Chapter 4 examines the issues of the entry route into a rehabilitation procedure and the conferral of control rights once the procedure is in operation. This is highly pertinent to the first of the Insolvency Service's consultation questions referred to earlier, *viz*, whether the CVA with moratorium procedure should be made available to *all* companies rather than just small ones. Once again, the emphasis of the discourse is less concerned with the technical details of the legal regime and more with what might be described as "law in action".

This is most illuminating, particularly with regard to the issue of control. Consonant with the idea that Chapter 11 is debtor friendly is the view that one aspect of this tendency is reflected by the maintenance of debtor control, a tendency that Professor McCormack very lucidly suggests should not be taken at face value. Equally, chapter 5 of this work compares and contrasts the essential features of the statutory moratorium (or automatic stay) within the U.K. and U.S. regimes and examines the approach of the courts in each jurisdiction to the question of whether the stay should be lifted. His conclusion that in this regard the U.S. approach is arguably more *creditor friendly* than that of the U.K. (at least as far as *secured* creditors are concerned) is a further illustration of his overall approach to exploding some of the myths regarding the supposed bias of each system.

Chapters 6 and 7 go on to consider the question of funding within a rescue scheme and the role of and implications for employees of the troubled company, and together represent, in the reviewer's opinion, the highlight of the book. Both chapters tackle, on a comparative basis, areas which are probably the most opaque and difficult dimensions of the insolvency arena and both chapters are outstandingly researched, written and argued. The issue of financing a rescue operation is, of course, one feature of the current consultation in the U.K., and Professor McCormack draws upon the Canadian courts' approach to the *Company Creditors' Arrangement Act* to suggest that it is not entirely beyond the bounds of possibility that super-priority finance could already be obtainable in the U.K. through the concept of administration expenses. As regards the position of employees, this is often a sadly neglected area of comparison when it comes to international insolvency works. The author addresses this routine omission thoroughly and perceptively, and this chapter alone therefore represents a very tangible addition to knowledge and scholarship in the insolvency arena.

The final two chapters of the work consider the mechanics of the restructuring plan within the U.K. and U.S. systems, including the "cramdown" option in the U.S., and the overall conclusions to be drawn in the light of this very searching and thorough investigation. The concluding chapter revisits the initial theme of *de facto* similarities between U.K. and U.S. restructuring law and also examines calls for reform of each before noting that in practice as well as in law "there is evidence of convergence between the U.K. and U.S. systems. . . .".

In their entirety, the chapters of *Corporate Rescue Law — An Anglo-American Perspective* represent one of the most incisive and relevant treatments of comparative insolvency regimes to date. It is sometimes all to easy to dismiss comparisons as rather interesting but of academic relevance only: Professor McCormack's work cogently demonstrates that a *thematic* approach to the comparative exercise can

lead to an expansion of knowledge and understanding that will be hugely important when evaluating policy developments and initiatives in any given area of law.

As thoughts in the U.K. turn towards more ambitious corporate rescue ideals, this book is an absolute boon: it provides the reader with a mass of legal and practical insights into the workings of two ostensibly divergent systems and challenges received wisdom in a fluent and persuasive manner. Not only are legal differences examined through the lens of practice, but also commercial, philosophical and social responses to failure are considered and highlighted as possible drivers of those real distinctions that do exist. Professor McCormack has produced an exceptional work that should be required reading for academics, practitioners and policy makers alike, and is to be warmly congratulated.