Preface

Britain and the United States are sometimes spoken of as two countries divided by a common language. One may find some truth to this paradox in the sphere of insolvency and corporate restructuring. Americans talk of corporate bankruptcy whereas in Britain the talk is of corporate insolvency with the language of bankruptcy in the main confined to the insolvency of individuals. Moreover, Americans speak of corporations and in the UK the talk is of companies. But certainly in the corporate rescue sphere the differences are more deep-rooted than mere matters of terminology. The differences are often presented in the form of a generalisation that US law is pro-debtor and UK law is pro-creditor. US law is based on a debtor-in-possession norm whereas in the UK the norm is that of management displacement. In addition there is superficially greater secured creditor control of the restructuring process in the UK. But part of my thesis is that the traditional generalisation is, at best, a potentially misleading over-simplification. Debtor-in-possession does not necessarily mean that the management team that was responsible for the company’s financial misfortunes remain in control of the business. Creditors in the US can exercise decisive influence over the restructuring process through debtor-in-possession financing agreements.

The book also offers the conclusion that there is a degree of functional convergence in practice but, at the same time, acknowledges that corporate rescue, as distinct from business rescue, still plays a larger role in the US. The functional convergence has partly come through the UK Enterprise Act 2002 but the book suggests that the main move has been that of US law and practice in a UK direction with greater emphasis on business disposals and speedier cases than on corporate reorganisations, as traditionally understood. This mirrors practice in the UK where the emphasis has always been on the rescue of businesses through disposals of profitable or potentially profitable parts of a company’s operations rather than carrying on business through the vehicle of the existing corporate entity. This outlook has not changed with the Insolvency Service Evaluation Report (January 2008) on the Enterprise Act revealing that the corporate rescue outcome is achieved in very few cases. The emphasis continues to be on maximising recoveries for creditors by means of business and asset sales. US law contains certain features such as a special funding mechanism for companies in financial difficulties that might usefully be transplanted across the Atlantic if corporate rescue is
going to play a larger role in the UK and the hopes of the architects of the Enterprise Act realised.

The focus throughout the book has been on providing a critical comparative evaluation of US and UK law, incorporating relevant empirical evidence where appropriate. Developments in other jurisdictions and on the international level have not been neglected however. Part of the interest in this book may lie in providing a possible way forward for other jurisdictions or at least in illuminating the path not to follow.

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