1. Corporate rescue through the ages

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1. RESCUE IN ANCIENT TIMES

In early societies, a common accounting for exchanges is important.¹ This involves establishing a system for determining the value of objects or goods by reference to prevailing precious commodities. In this system, the inability to fulfil exchanges can lead to penalties, ranging from restitution, the payment of damages, all the way to the loss of liberty. Debtors would rarely be given multiple opportunities to default on their obligations, as single defaults would be enough to trigger action, although no formal system similar to bankruptcy or insolvency exists as we understand it.

Particular occasion was given to consideration of the role of debt and default in international trade, in which the rarity of commodities played a part in the reasons for the beginning of long-distance trade. The higher the profits, the greater the incentive would be for undertaking such trade, though, the greater the distance, the higher too the risk from bandits, despoliation by tax gatherers and sovereigns and, most especially, bad luck. Yet, creditors were willing to invest in expeditions (given possible higher profits), while the willing participation of debtors could be assured with some repartition of risk. Thus, agreements would often provide for profit- and risk-sharing to 'equalise' burdens, examples being known from Sumer and Babylon in the late Bronze Age. At about the same time, trading contracts became common in the Eastern Mediterranean, often including insurance against risk with the lender by payment of a premium. Groups of merchant debtors could combine to insure against risks for common shipped goods, while calculation of the risks would depend on the length of voyages, the time of year, ports of departure or arrival, etc. The custom of 'general averages' ensured compensation for loss of goods overboard and there is perhaps here the emergence of an idea of equality of debtors with risks being borne by all in proportion to their contribution.

For traders and non-traders alike, though, the harshness of penalties for defaults gives rise to social stigma, a factor that remains with us still today, such that, even when penalties are attenuated, stigma can remain. This could explain religious injunctions for debt-forgiveness to ensure avoidance of stigma and enable creditors to show charity. The idea of the jubilee (periodic debt-forgiveness) became accepted in Judeo-Christian thought at an early stage, so too the prohibition on usury and the idea of limiting profits to the acceptable, which also have their counterparts in Islamic religious thought. However, mitigation of debt default is not common to all cultures and early Roman Law reputedly had very harsh penalties for defaulters: slavery, debt-bondage or death, as Table III of the XII Tables reputedly permits: the debtor to be '*in parti secanto*' (cut to pieces). Various prohibitions on ability to carry out trade tended to reinforce stigmas for default.

¹ See D Graeber, *Debt: The First 5,000 Years* (Melville House 2014) Chapters 1–3, on which this section is partly based.

2. RESCUE FROM THE MIDDLE AGES TO THE DAWN OF THE LIMITED LIABILITY COMPANY²

In the Middle Ages, when bankruptcy was in its infancy, options for debtors were limited. Once creditors had worked out in a multi-dimensional zero-sum game analysis, perhaps based on perceived information asymmetry, that more was to be gained by cooperation than competition and piecemeal dismemberment of the debtor's property, the embryo of what was to be an insolvency procedure for traders was formed, called the *fallimento* or *faillite*. Yet, it is also possible here that, in the way a common approach is taken towards a mutual defaulting debtor, the idea of equality of creditors emerges, often referred to as the 'pari passu' (in equal steps) principle. The *fallimento* process might in part have been inspired by the *cessio bonorum* (transfer of goods) procedure in Roman law, which was reputed to have been introduced by the Emperor Augustus (27 BCE–14 CE), in stark contrast to the penal procedures of earlier Roman law. This and other procedures were 'rediscovered' as the by-product of the establishment of centres for learning in Northern Italy, i.e., the earliest universities, such as Bologna, where the study of Roman Law was revived, with substantive and procedural rules adapted for use in the periods following this early renaissance of education.

Such cession-type procedures, which came to be used mostly for non-traders, still exist in a number of Civilian law systems, buried in the detail of the Civil Codes of these jurisdictions, where they serve as a mechanism for the transfer of property from an indebted party to creditors in satisfaction of their claims. However, they are not always a process that regulates issues such as discharge, the effect of stays or whether rehabilitation ensues at a procedure's end, although these tended to be used in the application of the procedure to non-traders. For example, in Jersey, a mixed jurisdiction, where the mediaeval French law still applies in the domestic procedure also called *cession de biens*, a discharge was only introduced by Article 10 of the Law of 1832 (*loi sur les décrets*), but remains unavailable in the case of an uncooperative debtor (*Birbeck v Midland Bank* 1981 JJ 121).³ An alternative view of where the mediaeval procedure *fallimento* originated, though there is scant evidence for this, may be in the commercial customs of the trade fairs (such as the Foires de Champagne), where rules that later coalesced into the *lex mercatoria* evolved as need arose, dealing with matters as diverse as short weight in sales, degradation of goods, loss of property, and warranties, among other things, and perhaps also the consequences of the insolvency of trading debtors.

In any event, irrespective of the origins of the *fallimento* procedures, the result was that, where initiated, such procedures commonly saw debtors put their goods in creditors' hands to be dealt with as the latter saw fit. The process would normally see creditors agreeing a mutual suspension of pursuit of claims (the modern 'standstill' or 'stay'), the placing of a trusted party (perhaps fellow trader or other notable of the marketplace) in charge of gathering in and turning assets into value notionally available for the settlement of claims and the costs of the process, also paying dividends on the basis of proven claims and administering the estate with

² Much of the debate in these central sections has previously been explored in D Burdette and P Omar, *Why Rescue? A Critical Analysis of the Current Approach to Corporate Rescue*, Chapter 12 in J Adriaanse and J-P van der Rest (eds), *The Routledge Companion to Turnaround Management and Bankruptcy* (Routledge 2017) 221–37.

³ See P Omar, 'UK Cross-Border Cooperation: Extending Rescue to the Jersey Debtor on a "Passporting" Basis' (2013) 22(2) *International Insolvency Review* 119, 128.

the assistance or under the supervision of a creditors' committee. Eventually, courts would get involved in the creation of principles and rules developing these creditor-led procedures further, dealing also with the fallout from such procedures, particularly whether there were bars to the debtor resuming trade or whether any discharge was available from any debts left unpaid. In many systems, there was no discharge and trading debtors remained liable to settle all outstanding debts following the essentially liquidative process.

Once legislatures became interested in formalising rules, this early structure would inform the way in which later insolvency procedures developed, from bankruptcy for individuals to liquidation for incorporated bodies. Early formulations of rules in the mediaeval period are known, perhaps one of the more famous being Henry VIII's Statute of Bankrupts of 1542. Even modern informal workout regimes owe some of their framework to the principles developed in this early environment, notably the idea of a neutral administrator and a predictable process for gathering and distributing assets. However, legislatures tended also to emphasise their views on the phenomenon, importing notions of fault (hence the name of the procedures; *fallimento* or *faillite*, which derives from the same root as in the English 'failure') in holding debtors liable for the consequences of their indebtedness and instituting penalties for default that ranged from civil to criminal in nature. Arguably, insolvency law has only shed this stigma very recently and fears of fraud and criminal activity still permeate the discourse.

The term 'bankruptcy' itself is said to derive from the practice of breaking the trader's bench in the marketplace (*banca rotta* = broken bench) to prevent further risk of the debtor continuing in trade and further defaulting (once a bankrupt, always a bankrupt). Interestingly though in the United States, bankruptcy as a term now embraces individual and corporate insolvency and is the universal expression for insolvency-related processes, an echo of this mediaeval mind-set exists in the definition of *banqueroute* in French law, where, as a result of legislation in the 16th century embodying prevailing views as to penal policy, it carries overtones of criminal behaviour and fraud.⁴ Also of note in this regard is that some of the earliest expressions of international insolvency law, the Treaties of 1204 (Verona and Trent) and 1306 (Verona and Venice) deal with issues such as the return of absconding debtors and the recovery of assets they may have concealed or taken with them, reinforcing the penal elements of the process.⁵ It is possible that the writ *ne exeat regno* (do not leave the kingdom), a Plantagenet creation in England, might have evolved to deal with this phenomenon (as well as political opponents), which still remains an issue today.

It must be remembered, however, that the principal orientation of the mediaeval paradigm was towards the liquidation of assets and satisfaction of creditors. Rescue was not an option unless creditors concurred in viewing the debtor's problems as temporary in nature. They could then choose to alleviate these by a waiver or postponement of debt recovery in which all creditors would collectively participate, subject to mutually negotiated terms. It might be said that, no matter how sophisticated the terms of such deals or plans may be in modern law, all such 'rescues' amount, in the case of financial restructurings, to no more than alleviation/waiver of claims (the 'haircut') or postponement of debt-recovery to aid the debtor's rehabilitation with a little gloss to deal with, inter alia, issues such as security, guarantors and subordination. The advantage in mediaeval times, just as in the modern day, would be seen in the satisfaction of

⁴ See J Sgard, 'Bankruptcy, Fresh Start and Debt Renegotiation in England and France (17th to 18th Century)' in T Safley (ed), *The History of Bankruptcy* (Routledge 2013) 223–5, 227.

⁵ See P Wood, *Principles of International Insolvency* (Sweet & Maxwell 1995) 291.

more debt than could be achieved in the short term through a liquidation-oriented procedure and avoidance of the ‘fire sale’, but instances of creditors agreeing this are thought to be rare.

The institution of the *concordato* was known to have developed, nonetheless, as a vehicle through which creditors could allow the debtor to recover some assets for the purpose of continuing trading and could even vote to ‘cram down’ dissenting creditors, with a view to the eventual settlement of a good proportion of debt. Needless to say, such ‘rescues’ could only exist with a high level of trust or the presence of a guarantor as to future conduct and/or liabilities. Furthermore, while the decision lay mostly in the hands of the creditors, sanction or support by judicial authority seemed to be required to support such a *concordato*.⁶ This model of the settlement agreement allowing for some trading to continue is known in a number of jurisdictions that adopted the Italian model directly or indirectly and its descendants still exist today, e.g., the Italian *concordato preventivo*, the French *concordat* (now *conciliation*) or the English composition in bankruptcy. Arguably, the scheme of arrangements adopted in the United Kingdom in 1870 also forms part of this family of procedures, inasmuch as it enables compositions or arrangements in the case of financial and/or capital restructurings, as does its insolvency analogy, the company voluntary arrangement. Such is the popularity of the scheme that it is used for reconstruction in many countries that have not transitioned to the adoption of formal rescue regimes.⁷

In the case of traders, the civil law also developed a system of *Lettres de Répit* (letters of respite), which went further than the *concordato*, by which fortunate individuals obtained the protection of the sovereign (and, later, of the courts) to postpone for a period the claims of creditors, allowing for a suspensory procedure that might improve the debtor’s prospects of recovery and creditor repayment. An example can be seen in the French Ordinance of 1673, which put under judicial control the former sovereign practice of granting *Lettres de Répit*.⁸ In Jersey, where the procedure still survives, called *remise de biens* (surrender of assets), echoes of its focus on debtors are found in the fact that it can only be initiated by the debtor, subject to a precondition of having immoveable property and only such property as is necessary need be realised by the court-appointed Jurats for the discharge of the secured creditors (plus a dividend for the unsecured) within the currency of the procedure (six–12 months).⁹ One feature of this procedure, the idea of the stay on creditor claims for a period to enable their discharge through a court-supervised process, is arguably the more proximate ancestor of the moratorium or stay known in most modern insolvency laws.

The insolvency regimes that emerged from the Middle Ages did not largely change in emphasis, stigmatising failure and penalising debtors with imprisonment for their inability to pay. Nevertheless, insolvency has since undergone a number of revolutions, many of which have depended on the impetus and drive from novelties arising from the growth in the diversity of company forms and the rise in the volume of trade. Chief among these changes is said to be the quantum leap in Western capitalist societies seen in the creation of the company and the

⁶ Sgard (n 4) 224.

⁷ See I Kawaley, ‘Cross-Border Insolvency in the British Atlantic and Caribbean World: Challenges and Opportunities’ in B Wessels and P Omar (eds), *Insolvency and Groups of Companies* (INSOL Europe 2011) 169–216, 209–10.

⁸ See C Saint-Alary-Houin, *Droit des Entreprises en Difficulté* (5th edn, Montchrestien 2006) para. 11.

⁹ Omar (n 3) 128–9.

subsequent introduction of limited liability.¹⁰ The first institution though had its counterparts in antiquity (the *societas* or *commenda*) was a revolution in enabling the conjunction of capital and labour to produce results that the use of one or the other could not have achieved alone. This enabled the separation of enterprise from investment and from labour. A person who had the means to invest but not the skill to see this investment into profit could confide the management of the investment to an entrepreneur. Similarly, an employee whose labour was limited by physical constraints to a certain daily rate could combine his energies with the energies of others to the production of goods from raw materials, paid for by investors, thus avoiding the limitations of a lack of capital that prevented individual advancement.

In essence, the company combined the interests of three very different groups in a constructive manner, thus fulfilling the concept of the civil society, being that society in which the needs of individuals and those of groups could only be satisfied through cooperation with others. This has led directly to the creation of a managerial class, whose success is not dependent on having capital or contributing labour, but the skills to manage both. Limited liability for companies was a consequence of the divorce of investment and entrepreneurship and the transfer of the risks of management to the entrepreneur. Capital investors felt sufficiently rewarded by the payment of an adequate rate of return on their investment, in essence equating their investment to a loan, although made through the subscription of shares and a participation in the deliberative institutions of the company. Limited liability offered protection for the investor against the risks of bad management and the failure of the company to prosper. It also offered a limit to the maximum investment that could theoretically be wagered and thus put a price to the investment, enabling individuals to assess the risks for their personal economies and their investment strategies.

As a result, however, the development of limited liability has shifted the burden to creditors, only partially palliated by their ability to use their bargaining power to obtain further information through diligence processes or to dictate the terms of the contract. Information asymmetry remains a problem in this relationship that is only partly alleviated by duties such as that in section 214 of the Insolvency Act 1986 (United Kingdom) obliging directors to have regard to the interests of creditors and to prevent further harm to them by notably avoiding wrongful (or insolvent) trading. A by-product of concern for the creditor's position has been the orientation in many jurisdictions towards involving creditors in the conduct of the insolvency process, from committee structures supervising the office-holder (further echoes of mediaeval developments) to rights to initiate procedures (e.g., the out-of-court appointment of an administrator in the United Kingdom). It could be said that the framework for asset-security and the availability of enforcement rights in the insolvency context, including whether or not creditors are entitled to 'separation' of secured assets from the general insolvency pool, as well as priorities, privileges and preferential status all arise from this general concern.

The beginnings of the process of depenalisation/decriminalisation of insolvency may also have resulted from the gradual acceptance of limited liability as the standard and the realisation that insolvency was an unavoidable risk of trade. The fact that insolvency became an inevitable corollary to commercial life may have done much to lessen the stigma attached to it, as witness early attempts to mitigate some of the penalties in the Bankruptcy Acts 1883 and 1914 (United Kingdom). It remains the case, however, that even today, insolvency law has

¹⁰ See P Davies, *Gower's Principles of Company Law* (6th edn, Sweet & Maxwell 1997) 36–46, this edition being the last that contains a comprehensive history of company law in Chapter 2.

not fully shaken off the associations of stigma and fault, as revealed in the September 2003 report of the Best Project on Restructuring, Bankruptcy and a Fresh Start: Final Report of the Experts' Group, commissioned by the European Community (now Union).¹¹

It may also be possible that early attempts at cooperation between insolvency courts, known as early as 1849, stem from the need to deal with the consequences of the expansion of commercial activity as imperial ambitions grew. Nonetheless, one feature of note here is the influence of the bankruptcy legislation and frameworks when it came to design a procedure for the termination of corporate activity. In fact, in the United Kingdom, the earliest examples of corporate liquidation simply applied the bankruptcy framework *mutatis mutandis*, leaving the courts to administer the process by interpreting bankruptcy law in light of the specific nature of the company.¹² Only when changes to bankruptcy law itself came into effect in 1883, instituting a novel method of dealing with the estate did there arise a need to craft specific legislation for companies, which again simply took the principles of bankruptcy law and tailored provisions based on them to companies.¹³ An echo of this 'one size fits all' process can be seen in the way the Jersey law of *désastre*, which coincidentally was a curial creation to deal with the then 'novel' phenomenon of trading insolvencies in the late 18th century, is also predicated on its application to all types of debtor, though the law (the Bankruptcy (Désastre) (Jersey) Law 1990) does contain a Part 10 dealing with the specifics of artificially created debtors (companies and certain partnerships).¹⁴

Thus, the insolvency regimes for corporate entities that emerged in the mid-19th century concentrated proceedings on the liquidation of companies and realisation and distribution of assets, thus retaining the aspect of a penalty by depriving the failed entrepreneurs of their commercial vehicle, in itself an effective sanction for that particular failed venture. Legislation that disenfranchised bankrupts and those involved in wrongful or fraudulent trading from being involved in the management of companies was designed to act so as to weed out the managerial class of those judged unfit, leading usually to their disqualification or other measures preventing access to the market (e.g., the Company Directors' Disqualification Act 1986 (United Kingdom)). In some jurisdictions, such as France, debtors faced civil death, an infamous procedure reducing the emancipated adult to the status of a non-person by deprivation of civic entitlements to stand for office, cast votes, and dispose of property. This was in addition to the penalties the 'market' would impose in terms of creditworthiness, access to new finance and perceived risks for counterparties, even if fault were not established.

The essential liquidation focus of developments in the 19th century can be said to have led to a culture of enabling exits from the market in the least painful way. Nevertheless, this culture, and the procedures based on the essential philosophy of an orderly quietus for companies, was not designed to take into account the effects on the economy from cyclical decline in manufacturing capacity and large-scale insolvencies across the board, largely a result of the increasing dependence of all economies on international trade and the rise of global tides of economic depression. The effect of mass waves of insolvency may thus have quickly led

¹¹ European Commission, Enterprise Directorate-General, 'Best Project on Restructuring, Bankruptcy, and a Fresh Start: Final Report of the Expert Group' (2003) <https://www.iiiglobal.org/sites/default/files/EuropeanUnionProjectonRestructuringReportofExperts.pdf> accessed 30 September 2020.

¹² See V Markham Lester, *Victorian Insolvency* (Clarendon Press 1995) 222–3.

¹³ *Ibid.*, 227–8.

¹⁴ Omar (n 3) 130.

to the reappraisal of the role of insolvency legislation and two very important developments. Firstly, there began the search for alternatives to the pure liquidation of companies, as it was realised liquidation could no longer be seen as the only desirable result for a company, despite the high likelihood that this might be the result of the process. Secondly, there began a search for solutions to the problem of insolvencies with an international effect and the beginnings of cooperation between jurisdictions over the affairs of insolvent companies with an international dimension.

3. THE ‘INVENTION’ OF RESCUE IN THE MODERN AGE

In the economic environment, there gradually occurred a realisation that what mattered was the preservation of the economic benefits of a continued existence for the company. Why this should have captured the imagination of corporate lawyers and academics has long been a subject of debate. In part, this might be because of the pointers offered by procedures, such as the *concordato*, scheme or composition, which suggested that liquidation was not the only option, although it is still likely today to constitute the majority of procedures initiated in any jurisdiction, the only concern of legislators being how to achieve a balance between rescue and liquidation as well as how to promote rescue as a desirable option for those best placed to take advantage of it. Fletcher also offers the suggestion that recognition of the loss of confidence likely in a system that delayed creditors’ recovery till formal insolvency had an ‘enlightened’ effect in generating the need for timely intervention in failing businesses.

The goals and likely effect of this timely intervention were felt to be the restoration of the equilibrium of the company and prudence in its governance, measures that ultimately would avoid the disaster of real insolvency.¹⁵ Ultimately, whatever the truth, it is notable that it is only in the 20th century that the notion of rescue becomes a reality, perhaps in light of the many waves of corporate insolvency that accompanied fluctuations in economic cycles in that period and since. There is a debate about when rescue first appeared, contenders put forward including, variously, a 1906 Qin Dynasty law in China, the South African judicial management procedure in the Companies Act 46 of 1926 and French *règlement judiciaire* (judicial settlement), which first appeared in the Decree of 20 May 1955. All of these are championed as possible first attempts at a rescue law, although it might be said that rescue as a concept did not achieve great prominence until the advent of Chapter 11 of the United States Bankruptcy Code in 1978. That Chapter 11 seized the imagination as the ‘forerunner’ of rescue is still with us today, even as the Americans debate whether it needs to be reformed or replaced.¹⁶

This and other rescue focused texts were the result of the development, which began in earnest in the 1960s, of preservation measures and external controls on the liquidation process, to try and halt an irreversible decline. The introduction of a ‘rescue culture’ was seen as expressing the need for more control by economic entities of their destiny. The legislative expression of this culture would also allow Governments to create effective and efficient legal systems for the management of insolvency, an economically sensitive subject for many states, while not compromising essential philosophical views on the nature of entrepreneurship and

¹⁵ See I Fletcher, *Insolvency in Private International Law* (1st edn, Clarendon Press 1999) 4.

¹⁶ See the American Bankruptcy Institute, ‘Report of the Commission to Study the Reform of Chapter 11’ (2014) <https://abiworld.app.box.com/s/vvircv5xv83aavl4dp4h> accessed 30 September 2020.

employment. Part of the search for the ideal rescue procedure has also led to the introduction of early interventionist measures before the formal moment of insolvency, to attempt to resolve the problem by the use of such ‘insolvency-avoidance’ techniques before the problem presents itself in a further unfavourable aspect.

This twin-track approach has virtually shaped the economic thinking of today, albeit the duality reflected in this approach can also be used to describe the contrast, not just between insolvency and pre-insolvency procedures, but also between formal and informal procedures. Insolvency proceedings are no longer thought of as a final measure but, in their rescue form, can occur throughout the life of the company, often as a type of reconsolidation. The use of informal as well as formal measures is regarded as being part of the range of tools for use by business for its betterment. In relation to companies, the term that has arisen to preservation measures applied to these entities is of course ‘corporate rescue’, which is also said to have first seen light in developments taking place with regard to businesses in general in the United States, where the major distinction in types of rescue regimes rested on whether the bankrupt entity was consumer or commercial. As the term ‘corporate rescue’ suggests, the rescue of companies is at the heart of the institution and is firmly rooted in its ethos, although there gradually arose a distinction reflected in later texts between ‘entity rescues’ (or corporate rescue pure and simple) and ‘business rescues’ (the saving of the business in the ownership of that entity).

Seized upon as the inspiration for many other laws then and since (e.g., administration in the United Kingdom and *sauvegarde* in France), Chapter 11 also introduced a novelty into insolvency law, the idea being that the debtor-in-possession could initiate and direct the path of proceedings, albeit with a view to producing a plan that had to meet with the creditors’ approval. Much of the world since has been divided between debtor- and practitioner-in-possession models with mixed models only recently appearing (such as in the French procedure of *sauvegarde*, where the presumption since reforms in 2008 is that, for businesses below a certain threshold, the directors remain in charge).

Interestingly, in common with many rescue precursors, such as the scheme, Chapter 11 embraced the concept of entity rescue, since it (and many of the other procedures it inspired) was aimed at attracting the debtor entity to preserve its future prospects by undergoing a process of financial reconstruction and economic rehabilitation. Much at the same time, an alternative conception of business rescue, the business rescue, usually interpreted as the saving of the business as a ‘going concern’, also began to appear in a number of systems, with some including both entity and business rescue as options (e.g., France, where *redressement judiciaire* (judicial restructuring) allows for the option of continuation plans, sales plans as well as ‘hybrid’ plans), while practice developments in others tended to opt for one variety over the other, such as in the United Kingdom, where the rescue purpose in the old section 8 of the Insolvency Act 1986 (administration) was usually achieved by a hive down and sale of the business as a going concern, even though administration could be used as an entity rescue procedure.

Rescue procedures are known in many developed jurisdictions. Initial adopters included major trading jurisdictions, such as Australia (introduced by the Corporate Law Reform Act 1992, now in the Corporations Act 2001), Canada (Companies Creditors Arrangement Act 1985; Bankruptcy and Insolvency Act 1992), France (Book VI of the Commercial Code, replacing two Laws of 1984 and 1985) and, of course, the United Kingdom, where two procedures, both rescue-focused (company voluntary arrangements and administration)

were introduced by the Insolvency Act 1986 following recommendations made in the Cork Report on Insolvency Law and Practice (1982). Depending on the date of introduction of the various procedures, there can be seen a gradual change in emphasis from the requirement that the undertaking pay all debts in full for the benefit of creditors to a more holistic approach requiring the debtor and creditors to cooperate in the recovery of the business concerned, necessitating sacrifices on the part of both sets of stakeholders.

There remain differences over the precise nature of rescue, apart from any conceptual differences between entity and business rescue, and definitions abound. For Brown, it is said to connote the ‘removal of danger, perhaps an imminent one’,¹⁷ while for Belcher, ‘[...] if rescue is defined simply as the avoidance of distress and failure, all management activity can be thought of as constant and repeated rescue attempts’.¹⁸ Nevertheless, rescue in its legal and now accepted sense as the availability of procedural recourse for businesses in financial difficulties has been rapidly transplanted to the rest of the world, Singapore¹⁹ and South Africa²⁰ being but two examples. Many jurisdictions now feature as part of the arsenal of tools to deal with insolvency one or more specifically rescue-oriented measures, although coverage is not universal and, in too many places still, rescue is a relatively unknown term.

By way of encouraging rescue-focused reforms, UNCITRAL have taken the concept on-board by placing it at the heart of their 2004 Legislative Guide, which contains a ready-made template for those embarking on insolvency law reform, whether in the developed, developing or emerging worlds. UNCITRAL has also produced guidance for procedures involving corporate groups and is in the process of finalising a Model Law for micro- and small-enterprises (MSEs). Many benchmarks and guidelines produced by international bodies active in the insolvency law field reflect rescue, not just as a useful tool, but as a desirable goal in the quest to develop mature insolvency regimes. Even the Doing Business Report, published annually by the World Bank, uses, as one of its eight indicia, the presence of a workable insolvency regime, including rescue and liquidation options, in jurisdictions worldwide. Such is the pressure to have workable rescue regimes that practitioners in those jurisdictions that have not embarked on reforms (or are not likely to) have been known to press alternative procedures into use, such as the scheme, which has undergone a renaissance in the Caribbean,²¹ or the just and equitable winding up in Jersey as a pre-pack substitute.²² Even in jurisdictions with long-established rescue regimes, there is a quest for innovation that sees the periodic introduction of new processes, such as the ‘moratorium’ and ‘Part 26A’ procedures newly provided in the UK by the Corporate Insolvency and Governance Act 2020.

In its present incarnation, corporate rescue is now associated with what is termed the revival of companies on the brink of economic collapse and the salvage of economically viable units to restore production capacity, employment and the continued rewarding of capital and

¹⁷ See D Brown, *Corporate Insolvency Law in Practice* (Wiley 1996) 1.

¹⁸ See A Belcher, *Corporate Rescue* (Sweet & Maxwell 1997) 12.

¹⁹ Companies Act 1967, amended in 1987 to introduce UK-style administration. Its insolvency provisions have now been subsumed into the Insolvency, Restructuring and Dissolution Act 2018 (in force July 2020). Neighbouring countries sharing a similar common-law system, such as Brunei and Malaysia, adopted rescue using UK-inspired procedures in 2016.

²⁰ Business Rescue Act 2008.

²¹ Kawaley (n 7) 209–10.

²² See P Omar, ‘Rescue by Any Other Name’ (2014) 18(3) *Jersey and Guernsey Law Review* 200 (in extenso).

investment. What has become clear is that preservation of a company has acquired a status as a desirable end for the insolvency process, either as a re-consolidation of the company's economic health and well-being or as a restructuring, with the excision of unviable elements. Nevertheless, one of the key topics of debate in corporate rescue remains the ultimate benefit of rescuing a company. There are many interests competing in the arena of corporate rescue, which must all be considered in the approach to the salvaging of companies. There are the very diverse interests of the investors, the entrepreneurs, the employees, creditors and debtors and society at large, normally represented by the state, which may itself have an interest through its representative organs. Certain of these 'stakeholder' interests are more palpable than others. Employees and their dependants benefit from continued employment being offered, which may also have indirect benefits in terms of skill acquisition and social mobility. Investors have an expectation of continued reward and in these days of continued democratisation of share ownership, the definition of investors may encompass both employees and a wider section of the public.

Creditors and debtors are encouraged by business and have most to gain from the continuation of trading. There are differences in the status of creditors and their importance to the continued activity of the business, a fact reflected in their organisation into discrete categories dependent on their enjoyment of security and privileges recognised by law. Entrepreneurs, of course, owe their *raison d'être* to the continued existence of these vehicles of commerce. These interests may be reflected in the design of the insolvency systems in question, such as in France, where the priorities in Article 3 of the Law of 1985 were set as being the consolidation of the business, preservation of employment and satisfaction of creditors. Preservation of the business, but not necessarily of its corporate structure, was also an aim mentioned in the Cork Report, while the orientation of administration, as first introduced in the United Kingdom in 1986, took an outcomes-based approach in the old section 8 of the Insolvency Act 1986.

These interests are, however, not the only ones at stake. Beyond them lie the intangible elements of benefit. It is true to say that insolvency law has traditionally had a strong interest for the state. This has often been described as flowing naturally from the close interest the state has in the creation of companies, which encompasses their dissolution. There is still a strong element of national interest that has its expression in periodic revisions of legislation in this field. The interests of the state may be said to be both active and passive. The active elements come from the obligations individuals may have towards the state to pay necessary taxes, customs duties and other revenues, whether this is as a result of direct business activity or through the payment of taxes on income and spending, derived indirectly from the company and its constituent elements. The passive element is the interest the state has in maintaining general conditions of access to the market, from which all companies have the capacity to benefit or not, as the case may be. It is the sum of all these benefits, its aggregate, which has shaped the reappraisal of insolvency and its transformation into corporate rescue. It is also perhaps true that because of the intimate interest of the state in insolvency that it has been one of the areas in which international cooperation has been slowest in developing.

The establishment of corporate rescue as the prevailing ethos of business brings in its wake considerations of ethics, particularly where there is conflict between the interests alluded to above. In this situation, there is the added ambiguity of the role of the state, given its active role, as beneficiary of business, and its passive situation, as guarantor of economic freedom, not to mention the ambiguity of state institutions participating in the insolvency process as

creditors. It is arguable that corporate rescue cannot exist as a separate concept and an end in itself.

As a result, it must reflect contemporary and prevailing views of what constitutes corporate rescue, which definition must, of necessity, differ from country to country. However, 'corporate rescue' is increasingly viewed as being that gradual tendency towards the saving of more businesses than was the case in systems traditionally preferring liquidation as the ultimate outcome for business failure. It is in considering what interests are to be protected and which are to be preferred, that the state, in its role as legislator, intervenes the most. For this reason, insolvency and corporate rescue are continually evolving subjects. From the standpoint of the legal commentator, a law cannot be isolated from its context. It is precisely this view of the flux in which corporate rescue finds itself, the shifts in procedures between the various competing interests, the intervention of the state, whether administrative or judicial, the views of participants in the process, that makes this subject one worthy of close examination.

Pausing a moment, one might conclude, from the above that, while a definition may be difficult to pin down and though there has not been universal adoption of rescue as an option in all jurisdictions, that, nonetheless, rescue is alive and well and set to stay, not least because of the support of the international institutions active in the field of insolvency law reform. That would be partially correct, insofar as the concept of rescue is concerned. In this context, two things have changed: where in time rescue is to be attempted and, concomitantly, what type of rescue is now associated with the more formal procedures. These are the subject of the next section.

4. THE STRESSES ON RESCUE: THE TIMES ARE A-CHANGING

4.1 Moving Back in Time: Upstreaming Insolvency

More recently, rescue has taken on new overtones in a number of jurisdictions, signifying that the concept of rescue there has been evolving. Pre-insolvency and 'secret' procedures appear to be the way forward. The concept of upstream rescue entered the vocabulary of the insolvency practitioner sometime in the 1980s. The simple idea is that rescue of the entity or its business should occur at a point much earlier than the moment in time it becomes susceptible to the formal procedures of insolvency, for which it would normally qualify by entering into a state of insolvency. This would tend to occur when the debtor ceased to be able to make payments to its creditors and meet those liabilities, which, once contingent and possibly unquantified, were now certain and had fallen due.

This is true in France, where the concept of *cessation de paiements* (cessation of payments) governs access to the procedures of *redressement judiciaire* (judicial rescue) and *liquidation judiciaire* (judicial liquidation), but not in the United Kingdom, where only entry to winding up is associated with formal insolvency being demonstrated. Rather, it is possible to utilise both the company voluntary arrangement and administration as pre-insolvency procedures based on the absence of a strict requirement to demonstrate actual insolvency. The former approach is more usually found in European insolvency laws, where both '(actual) insolvency' and 'imminent insolvency' tests are present.

In the period since the Millennium, however, pre-insolvency procedures have become more common. In some respects, their use may be described as having become ‘institutionalised’ in the laws of many of the European Union’s member states, just as formal rescue was from the 1980s onwards. In a similar way, debtor-in-possession type procedures, of which Chapter 11 is a prime example, have become more popular and, though not widespread in practice, have even been adopted in some national laws, e.g., the French *sauvegarde* procedure. A further change in some countries has seen the introduction of the practice of the ‘pre-pack’, the idea being to enable the combination of business or asset sales with the desirable effects of upstream rescue by confining formal processes to the end point of negotiations taking place *sub rosa*, principally to avoid reputational damage and potential loss of value and trading partners. Though not yet universally available, the pre-pack was adopted in France in 2010 as the *sauvegarde financière accélérée* (accelerated financial preservation) procedure, while, in the United Kingdom, its use, as a variant of the administration procedure, is sanctioned by Statement of Insolvency Practice No. 16. Jurisdictions are known to be thinking of adopting analogous procedures, an example being the Netherlands, where the *Wet Homologatie Onderhands Akkoord* is due to enter into force at the beginning of 2021.

The cumulative impact of the presence of these procedures on the insolvency map, including also recourse to out-of-court workouts and other turnaround techniques, is to expand the definition of what constitutes rescue to encompass not just formal, but informal, pre-insolvency and, in some cases, non-insolvency procedures. An example of the latter being the use in the United Kingdom of the scheme, despite the presence of formal insolvency procedures, for the financial restructurings of European companies, because of the non-application of the centre of main interests test usually found to allocate jurisdiction in insolvency.²³ An unintended by-product of this expansion of what rescue covers is the rather tortuous definition in Article 1(1) of the Recast European Insolvency Regulation (Regulation No. 2015/848), which treads a cautious line by providing three separate definitions of proceedings to be included within the scope of the text so as to demarcate carefully between the ‘sheep’ and the ‘goats’, the avowed intention being to exclude ‘secret’ and non-insolvency procedures from those procedures eligible to benefit from the framework, including the automatic recognition facility and cooperation provisions it contains. This also avoids the need to draw the boundary by using a formal insolvency test, thus drawing both upstream and downstream procedures together within an overall definition of rescue for the purposes of the text.

That said, the wider definition of rescue and concentration on its upstream variants may in the end be more propitious for certain types of rescue, including entity and business rescue, as early intervention undoubtedly allows for more to be undertaken, including both financial and operational restructurings, with greater possibility of successful outcomes. In fact, the European Union issued a 2014 Recommendation on a New European Approach to Business Failure and Insolvency encouraging the adoption by member states of what is termed a ‘preventive restructuring framework’. The result has been the adoption of the Preventive Restructuring Directive 2019²⁴ now undergoing the process of transposition into the laws of the various member states. Though part of the same continuum of thought, preventive

²³ See J Seelinger and A Daehnert, ‘International Jurisdiction for Schemes of Arrangement’ (2012) 9(4) *International Corporate Rescue* 243 (in extenso).

²⁴ Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to

restructuring is not quite the same as pre-insolvency processes. A similarity is that a preventive procedure is designed to work further ‘upstream’ from formal insolvency, but, unlike many pre-insolvency procedures, it relies on a standstill or moratorium being invoked to allow for restructuring to occur through a plan approved by creditors. Moreover, preventive procedures may differ in length from pre-insolvencies and their framework may be more complex.

While preventive restructuring has been hailed as offering greater choice for debtors in financial and economic distress at an earlier stage, with tools appropriate for the formation of a restructuring plan with added chances of success for occurring prior to the onset of formal insolvency, nonetheless, an unintended result, perhaps, of this change in emphasis, has been also to shift the focus of the more formal procedures, where it is felt that fewer options remain because of the comparative lateness of the point at which these procedures can be engaged. The reliance until recently on formal insolvency procedures may now be waning as a result of measures designed to avoid them.

4.2 The Evolution of Rescue in Formal Insolvency

Perhaps as a result of the way in which upstream and other procedures have occupied the ‘rescue space’, formal procedures have seen their role change to enable rescue in the form of asset sales. The example may be given of the way in which Chapter 11 is increasingly used to effect what is called a ‘[section] 363 sale’ as the preferred option for disposal of the business or of substantial assets with a ‘stalking horse’ used to benchmark the value to be achieved through the auction process. In the United Kingdom, the ‘enhanced liquidation’ function of administration, present from the very beginning in the law (old section 8(d) of the Insolvency Act 1986), has been seen more and more in use, just as in Canada, there is the modern phenomenon of the ‘liquidating CCAAs’, which use a statute designed for reorganisation (and not liquidation!) to carry out a sales plan (of the business or of a group of assets) that has the same effect as a liquidation.²⁵

One area, however, in which formalism still seems to allow a wider range of options is in the financial insolvency arena, where bank resolution regimes, allowing for rescue and liquidation options require entry through formally instituted structures, perhaps because of concern over systemic integrity. Paradoxically, the London Approach, which is the paradigm for consensual workouts, was also created to deal with the problems of insolvent banks. However, today’s preference seems to be more for predictable structures and frameworks providing certainty.²⁶ The architecture of modern finance seems to be pursuing a trajectory at odds with developments in the main business sectors, perhaps necessary because of the systemic risk banking failure poses, a feature that is certainly familiar to the modern world, in the wake of the Global Financial Crisis of 2008 and problems currently being experienced as a result of the pandemic, which risk a return to recession for many major economies across the world.

increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 OJ L172/18.

²⁵ See J Girgis, ‘Corporate Reorganisation and the Economic Theory of the Firm’ in B Wessels and P Omar (eds), *Insolvency and Groups of Companies* (INSOL Europe 2011) 89–110, 108–9.

²⁶ See P Moffatt, ‘The European Union Special Resolution Mechanism: A Necessary Fix?’ (2015) 3(2) *Nottingham Insolvency and Business Law e-Journal* 493, 493–84.

5. RESCUE: THE BRAVE NEW WORLD?

Whither rescue then in this brave new world? As entity rescue gives way to business rescue, which in turn is superseded by sales and enhanced liquidation options, is there cause to revisit what is meant by rescue? Belcher's observation (quoted earlier) may have had echoes in the past, given its emphasis on the rescue of the firm and the assets it was using. While this may be the basis on which entity rescue is predicated, what then is the rationale for business rescue or enhanced liquidation? Although entity rescue is firmly associated with the preservation of employment, continued benefit to society and other desirable by-products of rescue, the modern literature has begun to question whether value is best achieved by retaining assets within the firm or, rather, whether assets should be returned to economic productivity by allowing creditors to 'recycle' them or others, better placed to maximise the use-value of those assets, to acquire them through an asset or business sale.²⁷

It is appropriate at this point to acknowledge that such introspective questions have been, for a time, superseded by the fallout from the pandemic, necessitating out of the ordinary economic and legal responses to deal with an extraordinary viral threat to the world's health and economic well-being. The first response of many legislatures was to institute emergency measures targeting health concerns, notably by way of containment, thus affecting travel internationally and movement internally. There were also requirements for lockdown and sheltering with limited and a complexity of permissible derogations. That this would have a profound impact on the economy went without saying, as businesses deemed non-essential closed overnight and restrictions were placed on access to essential business premises. Employers closed workplaces and workers were sent home to fret about their futures and how they would meet upcoming bills. The second response was to introduce measures largely aimed at controlling the outflow of working capital from firms and reducing the impact on the solvency of all businesses, including furlough schemes, suspension of the rights of commercial landlords (and rent liability), temporary moratoria, financial support plans, state guarantees for loans, solidarity funds as well as various sector-specific initiatives in many countries, many targeted at small- and medium-enterprises.

The next phase acted by way of anticipation of what might emerge as the crisis draws to an end (or indeed, is prolonged). This can be seen in the introduction of specifically targeted legislation, such as the UK Corporate Insolvency and Governance Act 2020, which might simply be the acknowledgment that the interim measures aimed at eking out the life-span of businesses only serve to delay the accounting that must inevitably follow the postponements of debts that will still have to be paid, while work will have to be found, if there is work, for those employees, for whom furlough comes to an end or is withdrawn. The first signs of the hecatomb that many say must come have already been seen as early as July 2020, as businesses started to notify employees of expected redundancies. The simple reason is that the Government's expectation that, after stasis/hibernation, business will simply rebound as restrictive measures are eased is based on nothing more than hope. It is thus vulnerable to sudden and acute reversal caused by a resurgence of the virus, whose return for further bites at an already enfeebled and demoralised populace cannot be ruled out. The same is true in other jurisdictions, where legislation has taken similar shape with similar purposes and outcomes.

²⁷ Girgis (n 25) footnotes 1 and 24.

In that light, the challenges for after the pandemic will be determining what the shape of rescue will be in years to come. The previous speed at which domestic laws were amended and replaced across the world will not come to an end, as the fallout from the pandemic, together with worsening economic conditions, will require a fresh consideration of how to ensure resilience in the framework and how to make procedures more responsive to the needs of stakeholders. As every change that will be made will have an impact on the perceived desirable canons of rescue, the question may be fairly asked whether rescue has reached or will reach the point where, given its protean form and that it is capable of very different meanings, it ceases to have a single purpose and instead may be 'all things to all men'. This raises difficult issues for proponents of rescue, particularly those engaged in law reform and capacity building in the emerging and developing world, having to justify recommendations for the adoption of rescue in particular forms, when rescue itself has mutated into many forms elsewhere. In the last analysis, what rescue is may ultimately depend on the imagination of the rescuer and in the outcomes that are desired (and which may be achievable).