A THEMATIC AND COMPARATIVE EVALUATION OF EXECUTORY CONTRACTS AND IPSO FACTO CLAUSES

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Abstract

This introduction is designed to draw on the rich materials the national reports have produced and to reach some preliminary findings on the study. In particular, it suggests that despite the policy concerns about reorganisation, rescue and the preservation of value in the context of executory contracts, the legal rules can in themselves lead to results which may not sit well with the policy objectives.

Keywords

Executory Contracts; Corporate Insolvency Law; *Ipso Facto* clauses; Assignment of Executory Contracts; Disclaim Executory Contracts; Methodology

Background to the research project

This peer-reviewed and edited collection of chapters was initially set out to detail and analyse how the different national insolvency law systems treat the matter of executory contracts and in particular, *ipso facto* clauses. An '*ipso facto*' clause is usually a contractual device permitting automatic termination or adaptation of contractual party rights upon an 'event of default' and that event of default includes, for our purposes, an 'act of insolvency', regardless of continued performance of an executory contract by the company in question.

Insolvency law reform is often the creature of economic times. In the early phase of this research project in 2017, the UN reported that the decade of 2008-2018 was one characterized by fragile growth, high investor uncertainty and periodic spikes in global financial market volatility.[1] By 2015/16, as crisis-related fragilities and the adverse effects of other recent shocks gradually subsided, the world economy began to strengthen. Towards the end of 2016, global economic activity began to see a modest pickup, which extended into 2017. World industrial production has accelerated, in tandem with a recovery in global trade that has been predominantly driven by stronger demand in East Asia. Investment conditions have improved, amid stable financial markets, strong credit growth, and a more solid macroeconomic outlook. In 2017, global economic growth is estimated to have reached 3.0 per cent when calculated at market exchange rates, or 3.6 per cent when adjusted for purchasing power parities — the highest growth rate since 2011.[2] Thus, comparing the economic performance to the previous year, growth strengthened in almost two thirds of countries worldwide in 2017. In the midst of the then positive outlook, policy debates were underway to reform the

**all URLs accessed and checked on [date]*

[1] UN, World Economic Situation and Prospects 2018 at https://www.un.org/development/desa/dpad/publication/world-economic-situation-and-prospects-2018/

[2] Ibid, at pp 1-2

insolvency law rules on *ipso facto* clauses. Such clauses were perceived largely as anti-productivity and anti-restructuring.[3] As this survey shows, how such clauses are treated legally differs from jurisdiction to jurisdiction.

How things can change and change they did. When the COVID-19 pandemic struck economic growth was brutally halted. On top of that the geopolitical landscape added significantly to the overall economic outlook. In some jurisdictions, governmental interventions were rapidly brought in to regulate the enforceability of *ipso facto* clauses.[4] Indeed, the case for banning or limiting the effect of *ipso facto* clauses was even stronger than ever. However, as this second edition shows not all countries have responded in like manner.

As a general proposition, when a business becomes insolvent, that does not necessarily bring an end to the contracts that business had previously entered into but are pending performance. Many systems of law provide for the right of the trustee in insolvency to assume or disclaim a pre-existing contract. That right is controversial because it creates an anomaly in that the trustee appears to have been imbued with the right to speculate on the rise and fall of the relevant market and make a decision on the contract depending on which the market is heading. That, is seen by some, as flying in the face of common commercial sensibilities. After all, most legal systems do not allow a seller (for example) to speculate at the buyer's expense when they are in possession of a binding agreement.

On the other hand, policy makers are genuinely concerned that if such a right were not to exist, that would inevitably lead to much economic waste. Moreover, speculation may or may not always be a relevant factor – since the market price in question may be quite stable or that there are other factors to assume or disclaim the contract.

The matter, of course, as will be attested to by this volume, is a conceptually problematic issue because it is not simply insolvency law which is at play. Contract law and even constitutional law relating to economic rights would come into the equation. There are

[3] See for example the Australian policy debates in 2014-2016 at p. XXX; in Singapore, Parliamentary Debates, Official Report (1 October 2018), vol 94 and in New Zealand, Review of Corporate Insolvency Law – Report No. 2 of the Insolvency Working Group, on voidable transactions, Ponzi schemes and other corporate insolvency matters (May 2017).

[4] In the UK for example that new Corporate Insolvency and Governance Act 2020 was sped through Parliament in less than 6 weeks.

therefore no easy solutions. As to whether the COVID-19 pandemic has led to a more globally harmonised approach to the matter, especially on *ipso facto* clauses, remains to be seen.[5]

The philosophy behind this project is that lessons could be learnt from both developing and developed countries, and from small and large economies. The aim is to identify the key supporters, the stakeholders and the pull-push factors driving the agenda for reform. There will also be an analysis of the theoretical underpinnings of how the different insolvency law systems treat executory contracts and, where appropriate, policy recommendations are suggested.

In this preambular chapter, we shall draw some general observations from the country reports and comment on some of the main challenges faced by the laws of the many nations under study. This is not however a summary of the extensive country reports. There are elements in our approach in this chapter which might loosely be classed within the functional method[6] often adopted in comparative law analysis. We draw from the evidence provided by in the country reports to help ascertain the impact or effects of the legal rules on the treatment of executory contracts in insolvency. However, this chapter also engages in a rule based comparative analysis in an attempt to locate and identify the different rules and their construction within their domestic contexts. The purpose of this conjoined approach is to provide practitioners and policy makers both a cultural and legal perspective of the research.

[5] Noting too that inaction is not necessarily the result of a *clear policy* of inaction, but simply indifference or apathy.

[6] There is of course a great deal of literature on the method: see Ralf Michaels, 'The Functional Method of Comparative Law', *The Oxford Handbook of Comparitive Law* (OUP 2006) 339 who provided the following list. See, eg, for the United States, John C. Reitz, 'How to do Comparative Law', (1998) 46 AJCL 617; Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century', (2003) 50 AJCL 671; for France, Marc Ancel, 'Utilité et méthodes de droit compare. Eléments d'introduction générale à l'étude comparative des droits', (1971) 23 RIDC 933; idem, 'Le problème de la comparabilité et la méthode fonctionnelle en droit comparé', *Festschrift für Imre Zajtay* (J.C.B. Mohr Tubingen 1982), 1; for England, Hugh Collins, 'Methods and Aims of Comparative Contract Law', (1991) 11 OJLS 396; Peter de Cruz, *Comparative Law in a Changing World* (2nd edn, Routledge-Cavendish 1999) 230 ; for Germany, Hein Kötz, 'Comparative Law in Germany Today', (1999) 51 RIDC 753; for Scandinavia, Michael Bogdan, *Comparative Law* (Springer 1994), 59-60; for a socialist perspective, Imre Szabó, 'Theoretical Questions of Comparative Law', in Imre Szabó and Zoltán Péteri (eds), *A Socialist Approach to Comparative Law* (1977), 9, 36-38; for rise and fall in Italy, Pier Giuseppe Monateri, 'Critique et différence: Le droit comparé en Italie', (1999) 51 RIDC 989.

The functional method, of course, is not without critics[7]. However, for practitioners and policy makers, it remains a useful (albeit possibly narrow) method for looking at discrete aspects of good or poor practice. For a monograph which is intended to stimulate discussion amongst policy makers and professionals, aspects which borrow from the functional method might be justifiable on the grounds of convenience, focus and clarity. That said, it should be emphasised that in this chapter dealing with comparative analysis we are not merely concerned with functions of the rules but also on legal argument, interpretative and policy considerations.

An important facet of this Introduction is that as the stress is on legal themes, the subject of executory contracts would be explored without making the fine, technical distinctions between administration and liquidation. The issue of executory contracts in either of these contexts has been very ably discussed in our national reports.

Project Methodology

In reviewing the different jurisdictions, contributors are asked to focus on a few key themes, like in the first edition. They are asked to adopt an inquiry based on the following template:

Section 1

- Which hybrid and formal procedures are available under current legislation to a company in financial or economic distress?
- Do companies rely on out-of-court proceedings (e.g. direct negotiations with creditors)? Have these procedures been regulated by the legislators?
- Are there any other remarkable features of the domestic legal regime, which are relevant to mention in the introduction?

Section 2

- For each of the procedures mentioned in the first section, describe the treatment of executory contracts provided by the law. When *pacta sunt servanda* (contracts

[7] See generally Ralf (ibid)

shall be kept)? When does the principle of *paritas creditorum* (equal treatment of and distribution among creditors) prevail?

Do special rules apply in the insolvency context? Are executory contracts deemed to be assumed or rejected? If statutory assumption or rejection are imposed by the law, what are the consequences for the parties?

Do rules change if the debtor is either the performing or the non performing party? Do rules change depending on the nature of the procedure (either reorganization or liquidation)? Do special rules apply depending on the nature of the contract[8], the counter-party (public or private), its duration, or its importance for the survival of the distressed business? Can contracts be partially assumed or rejected? If no special rules apply, which is the general treatment provided in the law?

- For each of the procedures mentioned in the first section, describe the statutory treatment in insolvency law of contractual remedies agreed by the parties in solvent times.

  Are termination and acceleration clauses, sometimes referred as *ipso facto* clauses, enforceable in your country? To which extent (e.g. case-law and definition of *ipso facto* clause)? Is the same solution adopted with reference to all the procedures mentioned in the first section?

  Are other clauses with similar effects[9] valid and enforceable under current legislation? What's the courts' attitude towards these clauses?
- Are there any other remarkable features of the domestic legal regime, which are relevant to mention in this section?
- Provide a commentary of recent examples or cases (if any) involving the termination or continuation of executory contracts in insolvency.

Section 3

- Any major reforms since the year 2000[10]? AND for the second edition, any developments or changes brought about as a result of the national legal response

[8] Personal; Sale, hire-purchase and finance lease; Utilities; Labour; Pension; Financial.
[9] Close-out nettings; Flip clauses; Conditional rights; Penalty Provisions.
[10] Before the enactment of the Council Regulation (EC) 1346/2000 on insolvency proceedings [2000] OJ L 160 but shortly after the enactment of the UNCITRAL Model Law on Cross-Border Insolvency 1997.

to the COVID-19 pandemic challenges? Are those changes temporary or more permanent?

- What is the impact of these reform (if any) on the treatment of executory contracts? Which was the position of the government, how it changed throughout the reform debate and/or years, what contributed to those changes (e.g. economic crisis, EU regulations, etc.)?
- Are new proposals of reform of the existing insolvency framework being explored, especially in the context of the disruptions caused by the COVID-19 pandemic?

In this chapter, this editor has tried to avoid making fine distinctions between liquidators, administrators, insolvency practitioners, monitors, official receivers, office holders, etc.[11] Fine distinctions would not serve our general comparative law purposes given that different jurisdictions will have different "officers" to deal with insolvent or virtually insolvent companies. Our object is to assess in a broad brush manner the different approaches in law and policy to how executory contracts are treated in cases of "insolvency". So too the term "insolvency" would not be deeply discoursed in this monograph, recognising of course that many jurisdictions treat executory contracts and *ipso facto* clauses differently where there is an insolvency event properly so-called (as in a bankruptcy) or where restructuring schemes have been put in place.

Prefatory observations

An immediate general observation might be made that in established common law systems, there is a good deal of disputations over what some might term the *minutiae* of the principles. In the US for example case law seems to be divided between the right approach or test to identify what constitutes executory contracts in insolvency. Some courts prefer the so-called material breach test, first propounded by Professor Countryman[12] whilst others opt for the functional test. In the US prior to these two tests, commentators have tried to reason that executory contracts constitute property of the estate and therefore could simply be dealt with as the trustee sees fit – disclaim or assume. However, such an explanation is defective in that there are knock-on effects

[11] Indeed this approach is endorsed by some of the country reports, such as South Korea, where a fine distinction between liquidation and insolvency is not made.
[12] Countryman, Executory License Agreements in Bankruptcy, 57 Minn. L. Rev. 439, 460 (1973).

which could not be ignored. After all, the corporate entity in insolvency must pay for the rights it gives away or conversely, pay damages for rejecting or abandoning the contracts.

The Countryman test defines an executory contract as an agreement where "*the obligations of both the bankruptcy and the other party are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other*". On the other hand, the functional test which works "*backward from an examination of the purposes to be accomplished by rejection, and if they have already been accomplished then the contract cannot be executory*".[13]

However, although there is some fretting over the **definition of executory contracts**, the approach in England is less conceptually oriented when contrasted against the US context. The UK Insolvency Act 1986 allows the trustee to disclaim an onerous property without needing judicial sanction (albeit only in liquidation procedures).[14] The emphasis is on the liquidator's judgment as to what is onerous, and not on any discourse about the meaning of "executory".

Some civil law and Nordic law systems in Europe also tend to have specific rules relating to different types of "executory contracts" –in Italy, The Netherlands, Finland, Greece and Spain, to name a few, there are special rules for leases, employment, real property and continuous contracts etc. where a generic definition or description of what is executory would not be sufficient. There are countries, like Finland, where a distinction is also made between divisible obligations and indivisible obligations.[15] Perhaps a sharpest contrast might be seen in the Russian context, where the Insolvency Law makes no reference to executory contracts at all. There, the lack of legislative treatment of the notion of executory contracts has two possible outcomes. One is where in the very few restructuring incidents[16] there is much discretion as to how those contracts might be

[13] *In re Magness*, 972 F.2d 689, 693 (6th Cir. 1992); see too Jay Lawrence Westbrook, 'A Functional Analysis of Executory Contracts', (1989) 74 Minn. L. Rev. 227

[14] Insolvency Act 1986, s 178

[15] An example given is: "If the performance of both the debtor and the other contracting party is divisible, e.g., a contract concerning delivery of electricity or water or delivery of bulk merchandises in various part deliveries or a contract of lease, the bankruptcy estate is, however, not obliged to fulfil the contract as far as it relates to the time before the bankruptcy … These kinds of claims are normal claims in bankruptcy. If the contract is not divisible, e.g., a building contract, the bankruptcy estate is obliged to fulfil the whole contract, and even regardless of which partyof the contract is in bankruptcy." (see Ch. XXX)

[16] It is reported that in 2021 only 1.7% of all insolvency related cases concerned restructuring. See xxx.

dealt with given the government's policy of economic recovery. The other is that there is often a lack of clarity in the event of insolvency.

In contrast, countries like Slovenia actually make an explicit definition of the term "executory contract" in their insolvency law – the Slovenian Insolvency Act expressly defines a mutually unfulfilled bilateral contract (*executory contract*) as a bilateral contract which has been concluded prior to the initiation of insolvency proceedings, and whereby, prior to the initiation of insolvency proceedings: **(i)** neither the insolvent debtor nor the other party to the contract have performed their obligation on the basis of the contract, or **(ii)** neither of the parties has fully performed such obligations.[17] Swiss law also defines executory contracts but is more general – the Insolvency Law is only concerned with "*synallagmatic contracts which had not or had only partially been fulfilled at the time of the opening of the bankruptcy".*[18] By means of elimination, other forms of contractual obligations, such as a unilateral promise to provide services or money, would be excluded from the scope of "executory contracts". Other jurisdictions adopt the meaning of the term as provided for by their civil commercial law. In Greece for example the insolvency[19] law simply adopts the meaning as stated in the Greek Civil Code which defines executory contracts as those that impose future rights and obligations for both contractual parties. Although reference is usually made in these systems to general civil law, the approach is quite pragmatic and courts do not engage in a theoretical questioning of whether a particular contractual relationship was executory or not. That matter-of-fact approach is also adopted in countries such as Germany, Denmark, Turkey and Albania. Yet other jurisdictions do pay much attention to the conceptual definition of "executory contracts". In France, for instance, although there is no jurisprudence taking the sort of conceptual, philosophical definitions applied by the US courts, French case law and academic commentaries suggest that it is important to identify first the performance

[17] See chapter

[18] xxx

[19] It might be observed that in Greece the term "bankruptcy" (πτώχευση) is more common used than "insolvency" (αφερεγγυότητα); that said, the new Law 4738/2020 which came into effect on 1 June 2021, (a part of which had already come into force on 1 March 2021) is called the Insolvency Code. The new law abolished the former Law 3588/2007 (the Bankruptcy Code) and weaves into the Greek legal system 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 increase the efficiency of procedures concerning restructuring, insolvency, and discharge of debt (the EU Restructuring Directive).

or obligation which is characteristic of the contract. Then it follows that if the relevant characteristic obligation of a contract has already been performed before the insolvency procedure is opened, the contract would not be considered executory.[20] This approach appears closer to the American material breach test than the functional test but cannot be said to similar. The French approach starts with the construction of the agreement to ascertain the obligation of which the entirety contract sits.

Taking a restrictive or expansive approach to the definition of "executory contracts" might also be seen as a judicial device to limit or control the right to terminate the executory contract at the economic peril of the company in insolvency or restructuring. In Turkey, for example, the court took the view that contracts calling for prompt or immediate performance are not executory by nature thus denying the debtor's application to the court for termination of the contract.

Judicial interpretation, whether restrictive or capacious, is needful to guide the application of the law on executory contracts. In Russia for example the courts have not expressed a view as to whether partially performed contracts fall within the definition of executory contracts for the purpose of ascertaining one party's right to termination.

In Latin America and Asia, similarly there is often a pragmatic acceptance as to what the term "executory contract" means. For instance, the Panamanian legal system simply assumes that these are contracts which have not yet been performed and older legislation render them unenforceable as soon as insolvency occurs.[21] Some other legal systems have developed a jurisprudence based on civil commercial law as to the description (not necessarily a legal definition) for the term. In Argentina, there are rules for specific types of executed and executory contractual obligations in insolvency. Broadly speaking, executory contracts might be classified into three groups: (a) those where the insolvent party had fully performed its part of the contract whilst the other side had not. In such a case, the law requires that the other party must perform their part of the contract. (b) where the creditor contractor had performed its part of the contract whilst the insolvent company had not, the creditor must seek judicial recognition and enforcement of their

[20] See chapter ..
[21] See chapter … p.

claim in the insolvency proceedings. (c) where there are obligations on both sides that have not been performed, the insolvent company seek cancellation of the contract. The Argentinian example shows how important it is for "executory contract" to be defined or at least characterised legally.

A similar picture is seen in Asia. In the People's Republic of China (PRC) for example, contracts post insolvency are classified as (a) those contracts which have been performed fully by the insolvent party; such contracts are deemed therefore to be the insolvent's property for the administrator to claim; (b) those contracts which have been performed by only party, the non-insolvent company;[22] (c) those contracts with obligations yet to be fully performed by both parties. It is the contracts in (c) which are executory, strictly speaking. Their continuation is left to the administrators[23].

In some jurisdictions, even when the term "executory contract" is used in the relevant statute, the fleshing out of the meaning is left to judges and academics. Such is the case with South Korea where a pragmatic and sensible reading of term "executory" is broadly supported – so that a contract would not be routinely considered to be executory where most of its substantive obligations had already been performed. Future performance means substantial future performance. Therefore, as commented by the project contributor: "if the remaining obligations of the non-debtor party are minor, such as an obligation merely to cooperate, the contract is not" executory anymore.[24]

This pragmatic approach to definitions is shared by other common law based Asia-Pacific jurisdictions in this project such as Singapore, Bangladesh, India, New Zealand and Australia. These countries do not provide any explicit and detailed definition of "executory contract", content simply with a broad common sense notion of contracts with unperformed or incomplete obligations. There is no direct engagement with theory, like the US courts have been concerned with but neither are there detailed rules on what an executory contract is to be characterised or defined.

[22] In such cases, the contractual obligations would be treated as the insolvent's debts and the administrator shall terminate those contracts and list the other party as a creditor.
[23] Art 18, Enterprise Bankruptcy Law of the PRC 2006: "where the administrator decides that performance of the contract is to be continued, the other party shall comply; however, the other party shall have the right to request the administrator to provide a guarantee. Where the administrator refuses to do so,the contract shall be deemed to be rescinded."
[24] Xxx

This leads us to the question as to whether having a definition of "executory contract" in the context of insolvency is useful. At one level the approach should largely be about what to do with contracts calling for future performance. An overly technical characterisation of an "executory contract" would only serve to defeat the object of the law. Indeed, for example, in South Africa the term "uncompleted contract" is often used in place of "executory contract". Legalism perhaps is not the best approach when so much of whether a future obligation should or should not be disclaimed is already a matter of business judgment.

In this context it is worth reflecting on the notion of "adversarial legalism". Some scholars have argued that "adversarial legalism" has in modern legal culture and history emerged as a distinctive American legal style[25]. In the context of defining the executory contract for the purposes of dealing with the liquidator's power to disclaim onerous contracts, we might be able to suggest that given that in the US, such disclaimers may routinely be challenged judicially, a particularly legalistic style which emphasises detailed, prescriptive rules, substantial transparency in legal tests and formulated principles has developed. It is undeniable in the US and parts of the common law world, normative language (such as "you can disclaim an onerous executory contract") has to some appreciable degree been coloured now by conditionalities typified by definitions.

Limits on Assumption or Disclaiming of Executory Obligations

It is not proposed to go into depth on the subject here, given the very full explanations provided for in our country reports. The purpose here is to delineate the circumstances under which the different legal systems control the assumption or disclaiming of the executory contract following insolvency.

It might be said the legal right to assume or disclaim executory obligations is to some extent shaped by the modern tenet held in common law, civil law and Nordic law countries that an insolvency event does not bring an end to the contractual relationships of the insolvent. That said, as regards assumption of the contract, in the common law

[25] See generally Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press 2001)

tradition, it is conceivable though not commonplace that an insolvency event might be construed as an anticipatory breach which could then bring an end to the contract[26].

On the whole the right to assume or disclaim an executory contract is a matter of private law ensuring that the liquidator or office holder has the degree of control to reorganise the company. In the case of disclaiming, it is quite clear that many jurisdictions permit the office holder to decide whether to disclaim an onerous contract based on their business judgment exercised in good faith. It is especially interesting that some jurisdictions place procedural conditions on the office holder to consult. In Croatia, there is as such a legal duty on that administrator to obtain consent from the creditors' committee or assembly when deciding to disclaim or assume an executory contract which is considered to be of particular importance. The lack of consent does not however invalidate the transaction in question but failure to consult may lead to personal liability for that administrator. That outcome goes some distance to show that even where the law places conditionalities on that administrator's powers, Croatian law does not intend to over-bridle the discretionary powers of the office holder.

Cancellation or termination by the counterparty or debtor is often severely restricted in both insolvency and restructuring scenarios. Judicial interference is limited as is seen quite plainly in the US, Singapore, Australia, Canada, the UK, Denmark, Turkey, Germany, France, Chile and others. However, in certain contracts, where there are important public interests at stake, the law of the land may restrict that right to assume or disclaim the executory contract. South Africa is an excellent case in point. Its political history has been such that land transfer and ownership have been highly sensitive. Its Constitutional Law hence makes it absolute that the office holder must complete the transfer of land purchased and being paid for by instalments – failure to do so would be to cause a serious injustice on those who are poor and vulnerable. Disclaiming the contract is out of the question.

There may also be wide reasons of fairness being applied to curb the right to assume or disclaim contracts. In Japan, for example, the Supreme Court ruled that where significant

[26] See below.

unfairness was held to be a valid reason to deny the office holder from disclaiming a contract.[27] There, a company had paid a substantial corporate membership fee to a golf club under which would be refunded in ten years' time if their membership was cancelled. The company went into liquidation and the office holder purported to disclaim all contracts with the golf club and sought a refund of the fee. The court denied the company's claim because to do so would be to cause significant unfair consequences on the counterparty.

Fairness too plays a role in jurisdictions where the court has the power to adapt the executory contractual obligations in question. Judicial adaptation as a power is more extensive that judicial supervision. It is as a matter of general principle less preferred by common law jurisdictions. In contrast though judicial adaptation is not an extraordinary judicial power in civil law countries. A country which has adopted European civil legal[28] norms such as Turkey, for example, allows the debtor to ask the court to change the terms and conditions of the contract if these are found to be unpredictable or likely to create hardship for the debtor, all the while guided by imperatives of good faith and honesty.

It is also seen that legal systems are concerned too with creating the right balance between commercial certainty and practical commercial efficiencies. In Japan, we see for example a rule forcing the company officer/trustee to confirm early on whether they intend to assume or disclaim an executory contract when a company is *insolvent* (bankruptcy properly so-called) within usually the period of one month.[29] In jurisdictions as far apart from each other, like Finland, South Africa and South Korea, a similar rule applies but the time frame is more discretionary, requiring the insolvent estate or company to respond within a reasonable time. The reason is to create certainty for all concerned at discrete point in time. As to commercial efficiencies and practical considerations, Denmark, a Nordic system, for example, takes a robust pragmatic view, that the company in question could re-establish contracts which had been terminated or disclaimed up to four weeks before the opening of the *restructuring procedure*. The

[27] Judgment on the case concerning a case where the bankruptcy administrator is entitled to exercise the right of rescission based upon Article 59, para.1 of the Bankruptcy Law. 1996 (O) 2224; Minshu vol. 54, No. 2, at 553 (29 Feb 2000)
[28] Nb. The Swiss Code
[29] Failure to do so will result in automatic cancellation *by the trustee*.

difference in treatment naturally is explicable on the basis that in restructuring the practical commercial needs should be given due regard and emphasis by law.

Judicial supervision in the reorganisation efforts

Most legal systems as we see allow a good measure of discretion and business judgment for the office holder to decide whether it is in the creditors' best interest to assume or disclaim an executory contractual obligation. This editor is interested in examining and comparing the role of judicial supervision in this regard.

The subject of judicial supervision of course is controversial. On the one hand, it is arguable that the decision to assume or disclaim is a matter of good business judgment and given the exigency of time, that discretion of the office holder should not be interfered with too easily. On the other hand, in a good number of jurisdictions the policy debate has shifted away from simply about the decision to protect creditor interest but also about the justiciability of such a decision. In matters relating to fairness and justice, it is thus contended that the discretion of the liquidator should be subject to a degree of judicial supervision. There is probably no right answer here, save the platitude that the optimal position is somewhere between the two poles.

The intention here is therefore not to look for that utopian solution however construed but simply to look at how judicial supervision should be exercised and on what grounds.

First of all, judicial supervision may actually be sought by the debtor in relation to executory contracts. In the case of Argentina, for example, in both pre-packaged and voluntary reorganisation schemes, whilst the debtor is free to renegotiate the terms of the executory contract, any proposed modification must be submitted to the court for approval.[30] In the latter, (called "*Concurso Preventivo*"), differing levels of judicial supervision is applied depending on when the decision to modify/assume the contract is made. Where the decision is made by the office holder before the first 30 days since the opening of the *Concurso Preventivo*, the debtor may choose to fulfil the contract with

[30] See Insolvency Act 1995, ss 71 and 75

pending reciprocal obligations. To do this, they must seek the court's approval and authorisation. The court is required to consider properly the opinion of liquidator which should be based on technical business judgment and be impartial. The court's role is thus to assess whether the decision appears to be impartial and not tempered by bad faith or manifest error of judgment. In the case where 30 days have elapsed, the third party may terminate the contract promptly or call for performance or compliance. In the first, no judicial supervision is needed. The creditor only needs to notify the debtor and trustee. In the second situation, prior judicial authorisation is required. Failure to secure judicial approval will result in the termination of the contract.[31] Naturally the 30-day threshold is a legislative compromise. However, that shows that the law is not insensitive to the constraints of time and practical expediency. For clarity and certainty, if the creditor third party had taken a period of time to decide, the courts should necessarily be involved in ensuring that that decision is not unfair or impractical, and does not have too extensive a negative impact on other relationships. With the various time limits and procedural requirements, the Argentine system is one which implicitly takes the view that the lack of clarity can lead to poor, ineffectual judicial supervision which in turn results in poor negative restructuring or reorganisation outcomes.

It is trite to say too that a laboriously slow judicial process despite the presence of sound rules could well lead to the same negative outcomes. Indeed, our Bangladesh report highlights that proposition quite amply. Although the legal rules are actually reasonably well developed having been transplanted from other parts of the common law world, the under-resourced judicial and legal system makes the judicial supervision process quite ineffectual.

Judicial supervision might also be found not when the office holder discharges their functions, but at an earlier point – the time when they are appointed. In the PRC, for example, under the Enterprise Bankruptcy Act, the appointment of an administrator needs to be approved by the court. That appointment is not always a matter-of-course exercise. An in-depth level of evaluation of the competencies and qualifications of the administrator is made when the official list of administrators is drawn by a seven-person

[31] Civil and Commercial Code 2014, s 353

special committee of the Supreme People's Court.[32] The court will decide on whether a particular administrator is appropriate for the case in question. Hence, where the case concerns wide local concerns, the court would appoint an administrator with good local experience and reputation. On the other hand, where the case concerns a large commercial entity with extensive reach, the court would look to appointing a non-local entity (usually a firm) as the administrator. [33] The administrator then assumes virtually all control over the debtor and their appointment might thus be said to the court's approval of their power.

That matter is exacerbated by the fact that under the 2006 Enterprise Bankruptcy Law, when the debtor (as against the creditor) files for bankruptcy, unlike many legal systems where the courts would merely take judicial notice of the filing, the PRC court has wide discretion not to accept the application on the basis that there is no case of bankruptcy[34].

Indeed, scholarship on PRC bankruptcy law has argued that the extensive judicial discretion and intervention of government policies make the system less efficient than its counterparts in elsewhere, such as the US, South Korea, Japan and the UK.[35]

Hitherto the focus is on judicial involvement in the corporate reorganisation efforts. In Italy, a particularly noteworthy extrajudicial innovation was introduced in 2021 to allow for companies to enter into the negotiated crisis settlement procedure. An independent expert is appointed to help the distressed company reorganise its contractual liabilities. As part of the procedure, a court may be asked to authorise the debtor to change the terms and conditions of existing contracts, in order to take them back to equity.

In summary, it might be reasoned the role of judicial supervision whilst important as regards how executory contracts are to be treated in insolvency (or restructuring), judicial involvement is not only the option available.

[32] The SPC's Regulations on Appointment of Administrators in Enterprise Bankruptcy Cases (promulgated by the SPC, effective June 1, 2007), arts. 10 and 11
[33] Note The SPC Regulations on Appointment of Administrators et.al. (ibid), art 15; also Yujia Jiang, 'The Curious Case of Inactive Bankruptcy Practice in China: A Comparative Study of U.S. and Chinese Bankruptcy Law' (2014) 34 Nw. J. Int'l L. & Bus. 559, 573
[34] See the PRC Enterprise Bankruptcy Law arts. 2 and 7; also Lijie Qi, 'The Corporate Reorganization Regime Under China's New Enterprise Bankruptcy Law',(2008) 17 Int'l Insolvency Rev. 13, 15-17
[35] See generally Yujia Jiang, supra n. 19

***Ipso facto* stipulations**

It is widely known that *ipso facto* clauses are not treated uniformly between the different legal systems and this is properly borne out by the country reports. Some countries have had a fully aired debate about the matter of enforceability of such clauses; other jurisdictions have not tackled the matter from a policy perspective and have relied largely on established principles of law to deal with the issue.

Common law jurisdictions have long been more likely to be pro-*ipso facto* clauses given their preference for a laissez-faire approach to commercial contracting. Despite some exceptions on public policy grounds such as that provision of essential services, employment contracts etc. the freedom of contract has always played a pivotal role. The UK Supreme Court clearly made this point in a landmark decision:

> "Courts cannot rewrite or review contractual arrangements to give them an effect contrary to the substance of what the parties have agreed, even though this means that the bankrupt has less property than would otherwise be the case before and when he becomes bankrupt."[36]

Countries such as New Zealand also exercised some control over *ipso facto* clauses only in areas such as the rules on construction or interpretation of contracts.[37] In other common law countries such as India and Bangladesh, whilst it is clear that their contract law, reflecting English law, would recognise the enforceability of *ipso facto* clauses, the matter has not been subject to proper judicial airing. And there is little Parliamentary attention given to the matter, despite the recent economic turbulences.

But the COVID-19 pandemic and the pre-COVID policy debates on reform to corporate restructuring led some common law countries to changing their approach to *ipso facto* clauses.

Canada, Australia and England and Wales, for example, have recently taken the step to depart from the traditional orthodox common law view. Canadian legislation and

[36] Belmont Park Investments PTY Ltd v BNY Corporate Trustee Services Ltd & Anor [2011] UKSC 38 at para 165

[37] The matter of construction or interpretation of the *ipso facto* clause should not be understated. In New Zealand, for example, it has been rightly pointed out that such clauses would need to be applied against the background of any compromise agreement.

Australian legislation were introduced in 2009 and 17 respectively to disable *ipso facto* clauses which allow for the termination of contracts solely on the basis of an insolvency event if a business comes under the control of an administrator or receiver or if the company is utilising draft proposed safe harbour[38] arrangements[39].

The new Australian law seeks to stay the enforcement of *ipso facto* clauses by mandating an automatic 'stay' on a party's right to enforce a provision to terminate or amend a contract (such as through the operation of acceleration clauses) because the counterparty enters into voluntary administration or a scheme of arrangement. However, this stay will not prevent parties from terminating in other circumstances, such as a breach of contract arising from non-payment or non-performance.

In some civil law countries, like Austria, a similar approach is adopted. These jurisdictions link the prohibition on *ipso facto* clauses to an automatic stay or suspension of contracts. Others like Spain do not enforce the *ipso facto* clause but presume that the contracts shall continue to be performed until an express application is made by the liquidator or administrator to terminate an economically onerous relationship. The other party does not have the right to terminate the contract.

There is no appetite for the outright banning of *ipso facto* clauses, even in those jurisdictions that have all but emasculated the effect of the clause, some exceptions prevail. In England and Wales, for example, that removal of that effect of that *ipso facto* clause relates primarily to contracts for that supply of goods and services, with important carve-outs have been created for financial services. Indeed, likewise many countries provide for exceptions to a general proscription. These exceptions may lie in contractual relationships where performance is virtually uneconomic and impacts on security interests (such as close-out netting, and other financial contracts), or impinges on personal liberties (such as employment contracts, and contracts of a personal services), or is impossible (such as contracts for derivatives). There are also limits as to whether only certain insolvency related events would be caught by that ban on *ipso facto* clauses.

[38] It should be noted that unlike the US Chapter 11 scheme, the Australian Safe Harbour is not a Court-controlled process. As such, there is no scope for cramming down dissenting creditors or granting super-priority status for fresh debt.
[39] Australian Government Productivity Commission (n150), 32-33, 360-365.

Over and above these specific exceptions, some jurisdictions like Singapore and Canada accept a wide "significant [financial] hardship" exception to the ban – thus allowing the counterparty to terminate the contract in reliance on the *ipso facto* clause despite the general ban. That UK Insolvency Act 1986 was amended to allow for that supplier to ask for termination of that executory contract if that court agrees that "continuation of the contract would cause the supplier hardship"[40]. Yet others, like Australia, allow a court of law to order relief including the right to terminate under the terms of the now banned *ipso facto* clause if it is "appropriate in the interests of justice" so to do. A contrast though might be had – whilst the Australian test is objective, it is unclear if the Canadian, Singapore and English measure is objectively or subjectively tested. These tests, whether measured on objective or subjective standards, have clearly been buffeted by recent extraordinary global events.

In countries where *ipso facto* clauses are fully enforceable, the pandemic had seen the introduction of statutory rules to prevent the activation of such clauses when a company is placed in temporary protection because financial hardship caused by COVID-19 restrictions. We see this in New Zealand, one of the few jurisdictions in our survey not seeking to reform the law on *ipso facto* clauses in the near future. It introduced in May 2020 a temporary "business debt hibernation" process for businesses under financial pressure as a result of COVID-19 restrictions. Notably the new law makes it such that when a company goes into "business debt hibernation" that is not to be taken as an insolvency event or an accelerating event which would trigger the *ipso facto* clause. The new law thus limits the impact of a standard *ipso facto* clause.

In jurisdictions where there is no specific provision for ipso facto clauses, one should not conclude too quickly that there is a vacuum in the law. Such a provision or at least, the utility or use of such a device may actually be dealt with by general principles. For example, in Albania we see how as a matter of general principle, executory contracts could not be terminated where the counterparty is a public entity, except where there are real doubts the contract could be performed. However, that reliance on general principles

[40] S. 233B(5)(c)

to resolve disputes and controversies is sometimes tempered by regard to the controversial nature of *ipso facto* clauses globally. Indeed, as the Albania reforms demonstrate there is much allusion to OECD and EU norms and principles.

In the PRC, for example, *ipso facto* clauses are not specifically recognised or unrecognised in law. Article 93 para 2 of the PRC Contract Law permits parties to agree to the conditions under which either party may bring an end to the contract. It is immediately obvious that although article 93 does not explicitly refer to *ipso facto* clauses, it could be extended to cover such clauses. There are also procedural constraints to the invoking of such a right as we see in our PRC report. Proper notice of the condition being met must be given by the person seeking to terminate the contract[41]. Moreover, the respondent may challenge the legitimacy of the purported termination in court or arbitration. In short although technically speaking such clauses do not run foul of the law, in adjudicating their legitimacy the courts would be keen to ensure that workers' rights are properly protected[42] and that the general rationale of the Enterprise Bankruptcy Law to confer sufficient discretion and management control on the administrator should not be defeated[43]. It is quite clear from the various commentaries on the subject that the controversy surrounding *ipso facto* clauses has also surfaced in the PRC. Consequently, no PRC court or arbitration will ignore the potency of such clauses in restricting the administrator's powers to continue with the contractual relationships in the commercial interest of the company and the creditors.

Noting that the PRC's insolvency system was only recently reformed in 2006 and despite the fact that commentators in the PRC have clearly and early on picked up on the problem of executory contracts and *ipso facto* clauses, one might be critical that there is no specific treatment of the subject in the law reform. However, to argue that would be perhaps unfair.

It might also be suggested that despite the lack of direct legal treatment on the subject of *ipso facto* clauses in these countries, because of the lacuna regard may be had to public

[41] See Contract Law of The People's Republic of China 1999, art. 96
[42] See p.
[43] See p.

policy. In Lithuania, for example, our report tells us that *ipso facto* clauses are not banned and their enforcement might conceivably be challenged on grounds of public policy, though uncommon. In the UAE similarly although both the Dubai International Financial Centre's Insolvency Law[44] and the UAE federal laws on insolvency are silent on *ipso facto* clauses, its debtor friendly policy means that *ipso facto* clauses are unlikely to succeed. In many other jurisdictions in the common law world, the validity of the clause could ultimately be tested against the meter bar of public policy. The question is thus whether it might be argued that a case like One.tel in Australia which led to the loss of several thousand jobs and many contracts entirely demolished, the exercise of *ipso facto* rights might be ruled illegitimately under public policy considerations. From an English law standpoint, the reliance on public policy considerations in a matter which would be best legislated by Parliament would clearly not be encouraged. Indeed the Indian Supreme Court made it clear in the only reported decision on *ipso facto* clauses that the matter of the enforceability of the clause, though permitted under its Contract Act 1872, should essentially be for Parliament.

There is also, in some of those countries without an explicit framework for *ipso facto* clauses, an acknowledgement that such clauses are commonplace and would thus be permitted at least in practice, if not expressly in law. In Turkish law, for example, *ipso facto* clauses are generally acknowledged and applied in practice but the law is silent on their enforceability. Similarly, our Bangladesh survey shows that it is not uncommon for practitioners to encounter *ipso facto* type clauses but the law is unclear and there is little judicial opinion on the subject. Insolvency practitioners or liquidators will, guided by convention or practice, not law, approach creditors with a view to resolving potential disputes over the exercise of *ipso facto* clauses. That does not however mean that there is no judicial intervention. In exceptional cases where the invoking of the *ipso facto* clause would conflict with a judicially sanctioned scheme of arrangement, the court would restrict its application by setting appropriate conditions.

In closing this section, it should be observed that the law on *ipso facto* clauses is not always fully formed given that in a number of countries, the prohibition had stemmed

[44] The DFIC is a separate jurisdiction from the Emirates federal system. Under the UAE's federal insolvency law, which has been modelled after the US law, *ipso facto* clauses are unenforceable.

from recent reforms. There is thus a lack of clarity as to the general principles which would be taken to bear on any decision as to the scope and interpretation of the prohibition and its exceptions.

Assignment of executory contracts

A related matter is how and to what extent assignment of the executory contract to a third party should be factored in the law relating to executory contracts in insolvency. From our country reports, it is clear that not all countries have special rules dealing with assignment of executory contracts. Assignment of executory obligations has an important role alongside the provision for assumption of contracts in insolvency. It can assist in the further attempts at reorganising the corporate landscape. Where the contract is assigned (in some jurisdictions following the assumption of the contract by the liquidator), the corporate debtor might be able to avoid its contractual obligations since the performance would thence be taken over by the assignee whilst at the same time, prevent the original claimant from pursuing the legal claim against them. In the reorganisation process, it is not unforeseeable that an assignment will follow the sale of the debtor company's assets.

Often the matter is left to general law – after all, an assignment of a debt is not merely a matter of interest in insolvency law. We see this position in a number of common law countries. In the USA for example whilst the Bankruptcy Code provides for the circumstances an assignment of an executory contract would be permitted, it does not set out defining the meaning of assignment. That latter is largely a matter for general civil law of obligations. It is difficult to generalise about civil law and Nordic law jurisdictions – in the case of Denmark, for example, the matter of assignment of executory contracts is given extensive legislative coverage.

In the interest of the collective creditors the Danish Bankruptcy Act therefore grants the right for the debtor-in-possession to assign the continued executory contract to the buyer of the business without consent from the contracting party.[45] The right to assign can only be exercised as part of a transfer in the ownership of the business and not in a one-off asset sale. This all or nothing approach might be somewhat restrictive but one can

[45] Danish Bankruptcy Act , s 14 c (2)

understand the safeguarding and practical reasons for the constraint. After all, as the law makes it explicit that any such endeavour is to be for the collective interest of the creditors. The other practical constraint is that some contracts simply could not be transferred because of their distinctive, specific nature, i.e. if the contract can only be fully performed by the original contracting party. On the whole a transfer or assignment can be done without consent (save in those where by their legal nature, the contracts could not be performed by another party without cooperation and consent from the original contracting party).

On the other hand, Russian law clearly permits assignment but its control seems very much to be a matter of judicial discretion. It appears to this editor that much of insolvency litigation in Russia is guided by legal rules which are often imprecise allowing for practical and policy considerations to be taken into account when judicial decisions are made. That seems to be the case as regards executory contracts and the matter of assignment of contracts. There is a significant degree of expectation that any scheme should pass the good faith test.[46] That is a test in the general law, and not some insolvency law notion. On that basis, it might be suggested that in civil law jurisdictions, at least in theory, regard may be had to notions of transparency, honesty, and loyalty to the contractual relationships. The latter is often equated also with ensuring an equilibrium in the contractual relationship or discouraging opportunism.[47] Similarly, for Nordic jurisdictions, the principle of loyalty might be too be prevailed upon to admit a duty to have due regard for the other party and a duty of honest dealing.

The practical difficulty is that in urgent times when a distressed company needs to be reorganised, dealing with the question of validity of the assignment after the event is usually self-defeating. A more efficient way is for the assignment to be made subject to prior judicial approval. It is however not often clear in some legal systems whether prior approval is actually required. Where permitted, it might be useful for the office holder to seek judicial approval for the purported assignment.

[46] The Civil Code of Russian Federation, art. 1

[47] See Saul Litvinoff, 'Good faith' (1996) 71 Tulane Law Review 654, 675; Simon Whittaker and Reinhard Zimmerman, 'Good Faith', in Reinhard Zimmermann and Simon Whittaker (eds.), *European Contract Law: Surveying the Legal Landscape* (CUP 2000), pp. 7-62; Martijn W. Hesselink, 'The Concept of Good Faith', in Arthur S. Hartkamp, Martijn W. Hesselink et al. (eds.), *Towards a European Civil Code-Fourth Revised and Expanded Edition*, (Kluwer Law International 2010), pp. 619-649.

Practicalities undoubtedly play an important role in positing the role of assignment in a corporate reorganisation exercise. In the case of the PRC, where the law is not especially explicit about the treatment of executory contracts, assignment of the contracts to third parties (subject to the governance of the general principle of good faith[48] and Government policy) might justifiably be seen as a practical means to avoid having to litigate the niceties of executory contracts and attendant contractual stipulations such as *ipso facto* clauses. The advantage with assignment as a device to help with the reorganisation exercise is that assignment is usually properly provided for by general contract law and no change to any insolvency law is needed.

In common law countries, there is, as to be expected, varying degrees of prescription as to the scope of the power of assignment. What seems obvious is that there is due recognition of the role of assignment in the reorganisation of the distressed company. However most such assignments will require judicial supervision or approval. In Canada, for example, the law is expressed in these terms: the court "may make an order assigning the rights and obligations of a bankrupt under the agreement to any person who is specified by the court and agrees to the assignment."[49] Judicial approval in the Canadian context is dependent on various factors, including, whether the proposed assignment is approved by the monitor, whether the assignee would be able to perform the contractual obligations and whether it was appropriate to assign the rights and obligations to that person. There is much scope thus for judicial discretion – but that is discretion guided more general principles of creditor protection, asset protection and perhaps wider policy considerations. That said, the last is not explicitly expressed by court decisions or the legislation itself but from the tenor of the language of the law (the use of the word "appropriate") the legislative intent is clearly not to be over restrictive as to what factors would be considered in giving approval for the assignment. Judicial approval however may not be required in all common law countries however there may be grounds to challenge the assignment on equitable grounds.[50]

[48] Or principle of loyalty in that Nordic systems.
[49] Bankruptcy and Insolvency Act 1985, s 84 (1). See too Companies' Creditors Arrangement Act 1985, s.11(3) where court approval for assignments in large scale insolvencies is also required.
[50] See for example England and Wales Insolvency Act 1986, para 74, Sch. B1 in the case of a company administrator's decision which unfairly prejudice one or a group of creditors. That said, without proper judicial guidance it is difficult to say what the scope and limits of judicial control might be.

Most common law, civil law and Nordic law countries tend generally to have restrictions on what contracts could be assigned. The subject is amply discussed in our country reports. However, in the interest of completeness, the topic of anti-assignment clauses merit examination.

At one level an anti-assignment clause might conceivably be treated as a device equivalent to an *ipso facto* clause. After all, it can certainly have a significant impact on the corporate reorganisation plans. That is especially so if the clause prevents the assignment not only of rights but also debts. Distressed companies could find it near impossible to seek receivable financing under those circumstances. In a UK context, a law was enacted in 2015 to ban clauses which seek to prevent the assignment of receivables[51]. That law does not ban anti-assignment clauses generally, only those clauses impacting on receivables.[52] In gross, under the common law such clauses are valid.

In the USA, 11 United States Code § 365 provides for the power of the office holder to assign the executory contract to a third party. The legal position is also that any clauses preventing the assignment would usually not be enforced. There are exceptions to the general rule. One exception arises in contracts that are not assignable to third parties *under applicable law* and the party does not consent to such assumption or assignment. There is much literature and case law as to the meaning and scope of "applicable law".[53] It suffices to say that despite inconsistent judicial practice, there is inclination to construe "applicable law" narrowly so as not to defeat the assignment of executory contracts. The US courts also make a distinction between what is non-assignable and what is non-delegable.[54] Pulley writes, "Ostensibly, the rationale for distinguishing non-delegable, or personal service, contracts from other contracts is that these laws generally give the party

[51] Section 1, Small Business, Enterprise and Employment Act 2015

[52] For an account of the reasons for and against the legislative change, see Louise Gullifer, 'Should Clauses Prohibiting Assignment Be Overridden by Statute' (2015) 4 Penn St. JL & Int'l Aff. 47. See also Akseli Orkun, 'Contractual prohibitions on assignment of receivables : an English and UN perspective.', (2009) 7 Journal of Business Law 650.

[53] See generally the literature reviewed in Theresa R. Pulley, 'Limitations on Assumption and Assignment of Executory Contracts by Applicable Law', (2001) 31 New Mexico L. Rev. 299.

[54] "At [US] common law, many courts interpreted "applicable law" under section [365](c)(1) to apply only to non-delegable, personal service contracts. Thus, even if a law existed that prohibited assignment, that law might not be sufficient to prohibit assumption and assignment under section (c)(1)." Pulley (ibid) at p 309

receiving or rendering performance the option to refuse an alternate performer, rather than making the refusal automatic."[55]

At this juncture it might be useful to reproduce the relevant USC provision, § 365(c):

> "the trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—
>
> (1) (A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
>
> (B) such party does not consent to such assumption or assignment …"

In the US, there is also the vexed issue as to whether the "applicable law" in question means that where such a law exists, not only the assignment but also the assumption of the executory contract is made impossible. Naturally the matter is largely a question of the interpretation of the US statute in question. From a functional comparative analysis, it suffices to observe that to interpret the law as extending to both assignment and assumption, from a policy standpoint, would be place non-debtors on a stronger footing than debtors. Although that *per se* is not objectionable (in that the non-debtor had not asked to be made a party to the proceedings in the first place), favouring the non-debtor over debtors could well disturb the rationale which is intended to support the debtor in their reorganisation plans.[56] It would seem to permit a creditor, at will, to pull out of the contract which, under normal circumstances, had been properly assumed on the basis of a technical ban. Thus, in a majority of decisions from the US, the view is that unless assignment is actually contemplated, assumption of the contract would not be prevented. That said, such a constraint does not seem to have surfaced in other jurisdictions.

[55] ibid
[56] Ibid, at 314

In Nordic and Baltic states, there is an influential academic commentary[57] calling on the recognition of the right of the insolvent company to assign the executory contracts but subject to certain limitations. These limitations might be said to reflect an emerging consensus that such measures can assist in the reorganisation efforts of the company but should be practicable and be based on good faith. The *Nordic-Baltic Recommendations on Insolvency Law[58], as the commentary is titled, recommends that an assignment should be enforced when:*

(i) The insolvent has declared its intention that the contract should be continued (namely, the contract is assumed);

(ii) It is reasonably clear that the assignee will be able to perform those obligations; and,

(iii) The counterparty would not be substantially disadvantaged by the assignment.[59]

The Recommendations go on to suggest that contractual terms which seek to limit the general right of the insolvent to assume, disclaim and assign executory contracts should have no effect. Although the Recommendations do not have legally binding force, it is important to stress that in those Baltic and Nordic countries where there are no explicit provisions on the subject, these recommendations do have their origin in a good number of important commentaries and legal treatises.

It is difficult to envisage any legal system not permitting assignment of executory contracts – however, it must not be forgotten that not all legal systems define executory contracts in exactly the same way as we have discussed above.

Value extraction

Preserving value is clearly needful. However, in the cut and thrust corporate world there are "investors" who seemingly step in to rescue the financially distressed company with a less than savoury agenda. These predatory investors through setting up complex investment vehicles or arrangements may be entitled to extract in full or in part the value

[57] Produced by the Nordic-Baltic Insolvency Network
[58]The Recommendations (Wolters Kluwer 2016) are available here http://www.sccl.se/wp-content/uploads/2017/04/Nordic-Baltic-Recommendations-Final-Version-bok-rotated.pdf
[59] See paras 15-16

of their investment back and to strip the company's assets before the company eventually goes into an insolvency process. This prolonging of the company's demise and subsequently depletion of the corporate assets can undoubtedly lead to even greater damage to creditors and employees. There is little comparative law work on this important subject, a matter which is increasingly troubling governments. This work goes a little distance to demonstrate that the matter of value preservation should not be considered in a discrete manner – value preservation has to be placed in a longer-term context.[60] In the UK, in March 2018 a consultation was launched to invite comments on a proposal to claw back such financial gains from investors who have extracted value in this manner. The Consultation Paper[61] gives some examples of such value extraction arrangements: management fees; excessive interest on loans, charges over company property being granted; excessive director pay or other payments; or sale and leaseback of assets[62]. These types of transactions may unfairly benefit certain parties whilst putting creditors in a worse position than they would otherwise have been in should that company subsequently become insolvent.

Whilst it could not be said that all such rescues would fail, the UK Government had expressed concerned that if they do fail other creditors and stakeholders would be treated fairly and should not be left worse off. The challenge is thus not to ban such investments (whereby the investors assume control of the company and then assumes existing contracts) but to ensure that any law to claw back unfair gains made by those investors is sufficiently clear in its scope of application. It will also be needful to show that the initial investment had actually not added real value to the company – that will be highly problematic, though. The question of *real* value is always a difficult one in law. There is also the problem of how insolvency practitioners or office holders can unpick those complex value extraction arrangements. Although the subject falls outside the scope of our project on executory contracts, it is undeniable that executory contracts form only one cog in the larger wheel of the subject of corporate rescues.

[60] See for example country reports from Australia, the USA, Denmark, Germany, and Singapore to name a few.

[61] The proposals are unlikely to be carried forward now, having taken over by priorities (pandemic) and events (a change in political leadership) in the UK but the issues raised are by no means unimportant.

[62] Insolvency and Corporate Governance Consultation Paper 2018 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691857/Condoc_-_Insolvency_and_Corporate_Governance_FINAL_.pdf at p. 14

Conclusion

In a febrile landscape for policy makers, especially in that light of that aftermath of that COVID-19 pandemic and ongoing geopolitical tensions, this book asks an important question. Do the legal rules, proposed and pre-existing, lead to outcomes which coincide with those policy interests about reorganisation, rescue and the preservation of value in the context of executory contracts? This chapter, drawing on the rich materials served up by the national reports, demonstrates that policy objectives can sometimes be overreached by the trustees or supervising court. In common law jurisdictions, that notably arises when highly judicialised tests are devised and applied to deal with definitions and to guide the office holder's discretion and/or judicial supervision. A highly judicialised approach could inevitably lead to confusion and causes dispute and controversies. In civilian legal systems, on the other hand, the overreaching occurs because judicial discretion and government influence are left unbridled – as insolvency laws in a good many of civil law countries tend to be fairly perfunctory, much is left to the good sense of the supervisory tribunals. Although that has the advantage of an experienced court ensuring good faith and neutrality are maintained, in less developed or less resourced jurisdictions, the system may lead to unfairness or arbitrariness. Nordic countries, at least on the face of it, tend to have fairly extensive legislative provisions on the outworking of the insolvent's estate *vis-à-vis* executory contracts and from those provisions some clarity is achieved as to the definitional problem and issues on effect.

Naturally there is no one right answer to any of the challenges discussed in this Introduction. That is very much because a solution in one jurisdiction could and would not work well in another. The fact remains that whether we are referring to a civil law or a common law or a hybrid or a Nordic country, insolvency law interacts and intersects with different established laws, private and public. That means any solution, whether simple or complex, is likely to produce a knock-on effect elsewhere in the law.

It suffices thus for practitioners, policy makers and scholars of insolvency law to experiment with good practices elsewhere but always having an eye on the wider legal tapestry. The challenges we face are global but uniform global solutions are likely to be counterproductive unless other legal principles and rules are also changed.