REVIEW OF CORPORATE INSOLVENCY LAW: PERSPECTIVES AND *PRINCIPLES*, VANESSA FINCH

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midst of transition and there are ongoing debates and discussions about how to improve the law.

The book is divided into five parts: Part I – Agendas and objectives; Part II – The context of corporate insolvency law: financial and institutional; Part 111 – The quest for turnaround; Part IV – Gathering and distributing the assets; and Part V – The impact of corporate insolvency.

Part I includes two chapters – Chapter 1, The roots of corporate insolvency law, and Chapter 2, Aims, objectives and benchmarks. Chapter 1 discusses the evolution of English insolvency law from the early bankruptcy acts in the 1500s for individual traders through the development of separate corporate insolvency statutes in the 1800s and on to the Insolvency Act 1986, which incorporates many of the recommendations of the Report of the Review Committee on Insolvency Law and Practice in the 1980s (the Cork Report).) Chapter 1 also provides an overview of the main statutory corporate insolvency procedures, the players in the corporate insolvency process and the tasks of corporate insolvency law. Chapter 2 begins with the statement of the aims of a good, modern insolvency law from the Cork Report. It then examines the leading theoretical visions for insolvency law as set out in the academic literature. Finch finds these competing visions flawed and inconsistent, but notes that they incorporate "a number of important legitimating rationales for insolvency processes.'" She sets out her own theoretical framework, which she calls the "explicit values approach", a broad-based, interdisciplinary approach that considers community and public interests in addition to the interests of creditors.' It incorporates aspects from some of the competing visions discussed earlier in the chapter and establishes four benchmarks with which she evaluates English insolvency law and proposed reforms: efficiency, expertise, accountability and fairness.

Part II discusses the overall financial and institutional context within which insolvency law operates. Chapter *3* focuses on corporate borrowing and the different types of creditors and security devices available under English law, and Chapter 4, on what constitutes corporate failure, who defines insolvency and why companies fail. Chapter 5 considers the role played by insolvency practitioners and the Insolvency Service in the administration of insolvency cases.

All too many insolvency texts focus primarily on liquidation, with a brief discussion of corporate rescue. In practice, however, the key question confronting a company in financial distress and its creditors is whether or not the

3 *Insolvency Law and Practice; Report of the Review Committee* [United Kingdom, *Cm* 8558, June 1982], under the Chairmanship of Sir Kenneth Cork, GBE.
4 *See* Finch (n *1* above), p 54.
5 Ibid., pp 55–56.

Corporate Insolvency Law: Perspectives and Principles, Vanessa Finch [Cambridge: Cambridge University Press, 2002, xxxix + 616 pp, softbound, HK$413, US$53]

In the Introduction to *Corporate Insolvency Law*, Vanessa Finch states that her book "sets out to offer a critical appraisal of modem corporate insolvency law rather than a description of existing statutory rules and case law on the subject."[1] Her aims are threefold:

> "The first is to outline the law on corporate insolvency ... and the procedures and enforcement mechanisms used in giving effect to that law. ...
>
> The second aim is to set out a theoretical framework for corporate insolvency law that will establish benchmarks for evaluating that law and any proposed reforms. ...
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> A third objective is to move beyond an appraisal of current laws and processes and to consider whether any new approaches to insolvency institutions and rules are called for: in other words, to see whether improvements have to be sought by adopting new perspectives and by challenging the assumptions that underpin present corporate insolvency regimes."[2]

These are ambitious aims, which Finch ably achieves. The book is a good resource for insolvency practitioners and company lawyers, insolvency policy makers, and teachers and students in common law jurisdictions. In the United Kingdom, *Corporate Insolvency Law* could be used as a stand alone text for teaching a corporate insolvency law course. Elsewhere it could be used as a companion volume to accompany the local insolvency materials.

Far too many insolvency law texts are hostage to the insolvency regimes that they describe. They often focus on setting out the black letter law and prove to be of assistance only when there is a "right" answer to be found in a specific statutory section or court decision. They often fail to identify which provisions are outdated or which principles need to be reconsidered. Finch has written a very different type of book. She, of course, discusses the ('law", but does so in a broad context that also considers historical developments, proposed reforms, insolvency theory, and multidisciplinary perspectives and principles. *Corporate Insolvency Law* will be of special appeal to students and practitioners in jurisdictions in which corporate insolvency laws are in the

1 Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (Cambridge: Cambridge University Press, 2002) p 1.

2 Ibid., pp 1–2.

company can be saved. Moreover, the current focus of ongoing insolvency law reform efforts worldwide is on developing effective corporate rescue regimes and a "corporate rescue culture". It is refreshing to read an insolvency text in which this is the focus of the discussion. Part 111, The quest for turnaround, is the longest part of the book. Both the length of this section and its placement before liquidation in Part IV demonstrates the primacy of corporate rescue over liquidation within insolvency law.

Chapter 6 sets out what corporate rescue is and why rescue is important. Chapter 7 discusses informal (or out-of-court) rescue and is an important part of the book. Many insolvency texts focus exclusively on the formal corporate rescue process and omit a discussion of out-of-court rescue, although the majority of corporate rescues are concluded out of court. This chapter includes a lengthy discussion of the London Approach for multi-bank workouts and will be of interest in Asia, because after the Asian financial crisis of 1997 the London Approach was adapted for use in several Asian jurisdictions – for example as the Hong Kong Approach in Hong Kong, the Bangkok Approach in Thailand and the Jakarta Initiative in Indonesia. Chapter 8 discusses receivership and considers the recommendations to cut back on the use of administrative receivership made in the *Productivity and Enterprise White Paper* of 2001.[6] *(Corporate Insolvency Law* was published before the enactment of such reforms in the Enterprise Act 2002 on 7 November 2002.)' Chapter 9 considers administration; Chapter 10, company arrangements; and Chapter 11, the rescuing process.

Part IV concerns liquidation. Chapter 12 discusses the process of gathering the assets and the role of liquidation; Chapter 13 the *pari passu* equality of treatment principle; and Chapter 14, existing policies that allow certain creditors to bypass the *pan passu* principle. In *Animal Farm* all animals are equal but some are more equal than others; the same is true of creditors in insolvency proceedings, with very little being left for unsecured creditors after the payment of claims of secured creditors, the satisfaction of "quasi-security" devices, and the payment of liquidation expenses and preferential debts (eg certain tax claims and workers' claims). In these two chapters Finch discusses some of the current proposals and reforms regarding the application of the *pari passu* principle.

The final part of the book focuses on the impact of corporate insolvency on a variety of players. Chapter 15 considers directors and Chapter 16, employees. In these chapters Finch highlights the interaction between

6 Productivity and *Enterprise: Insolvency* – A Second Chance [United Kingdom, Cm 5234, July 2001].
7 The Enterprise Act 2002 came into operation on 15 Sept 2003.

insolvency law and both company and employment law.[8] Chapter 17 ends the book with a concluding discussion of her explicit values approach.

A strength of the book is that Finch puts the legal concepts into a pragmatic business perspective. For example, when discussing borrowing in Chapter 3 she includes data on borrowing by small and medium enterprises (SMEs), setting out the percentage of SMEs that seek external financing and, of those borrowers, the percentage that seek financing from their banks, from hire purchase or leasing businesses, from factoring businesses, from working shareholders or partners, and from other routes.[9]

Another strength of Corporate Insolvency Law is that where relevant, Finch draws comparisons with other insolvency systems. For example, Chapter 6 includes a brief discussion of the Chapter 11 corporate reorganization process in the United States, and identifies many of the important aspects of the American procedures that differ from the English procedures – for example, the concept of the debtor in possession (that is, allowing existing management to continue in place post-petition rather than appointing an external administrator); the weaker position of secured creditors; the greater involvement of lawyers (rather than accountants); the division of creditors into classes; and greater court supervision.[10] Her analysis, however, overstates the role played by shareholders in the Chapter 11 process.[11] In addition, her comparison would further benefit from a more detailed discussion of the committee structure in US Chapter 11 cases and the attempt to reach consensus on a plan of reorganization through (at times heated) negotiation between the debtor company and the committees. It is this negotiation that lies at the heart of the process. The threat of a "cramdown"[12] increases the likelihood of settlement; it is in the interests of all the parties to reach agreement and thereby avoid the risks and uncertainties that would result if the cramdown were to be applied.[13]

The book's coverage is quite expansive, but there are other areas that perhaps could be included in future editions. For example, it would be helpful if the discussion of effective administrative structures and institutions in Chapter 5, which currently focuses on insolvency practitioners, could be expanded to include a discussion of the judiciary and the training and expertise of judges

8 See Finch (n 1 above), p 574.
9 Ibid., p 69.
10 Ibid., pp 195–204.
11 Ibid., pp 198, 204.
12 See United States Bankruptcy Code, s 1129(b).
13 See Charles D. Booth, "The Cramdown on Secured Creditors: An Impetus Toward Settlement" (1986) 60 American Bankruptcy Law Journal 69.

in the insolvency process. In addition, although Finch states in the Introduction that "[s]pace does not allow an appraisal of... international or cross-border issues as individual topics,"[14] it would be helpful in relevant parts of the book to alert readers to which English insolvency provisions have extraterritorial effect and the possible conflicts that may arise when other countries' laws adopt a different approach (eg in the discussion of the avoidance of preferences).

But these are but minor suggestions. Finch's provocative and comprehensive insolvency text is a welcome addition to the corporate insolvency law literature. Her explicit values approach will assist in the development of more effective corporate insolvency laws and procedures.

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[14] *See* Finch (n 1 above), pp 2–3.

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