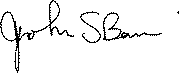
Author Statement

JOHN SAMUEL BAIN

DECLARATION OF HONOR:

I declare that the paper titled "A comparative analysis of the balance between liquidation and restructuring goals and proceedings in the USA and the UK" is my own work, that it has been prepared independently, and that all references to, or quotations from, the work of others are fully and correctly cited.

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(Signed) ……………07/01/2023……………………. Date:

Place: NASSAU, THE BAHAMAS

A comparative analysis of the balance between liquidation and restructuring goals,

and proceedings in the USA and the UK

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## **Introduction**

* 1. When companies are in financial distress or experience corporate insolvency, the methods used to resolve the situation are important to all stakeholders (Keay & Walton, 2008). The jurisdiction where the proceeding occurs is also significant because different jurisdictions have different relief systems (Lee, 2011). The post-COVID-19 Pandemic[[1]](#footnote-1) appears to be a busy time for insolvency law and proposed reforms in many jurisdictions (Landry, 2020; Wang, Yang, Iverson, & Kluender, 2020). Many of the proposed reforms are influenced by the United Kingdom's (UK) scheme of arrangements and the United States (USA) Bankruptcy Code [or the Code] (Boraine, 2023; Bracewell & Giuliani, 2012; Carruthers & Halliday, 2000; Dunne & Uzzi, 2023;). Carruthers and Halliday (2000) refer to both the USA and the UK as "advanced market economies" (p. 36) that are less influenced by politics and more by bankruptcy professionals. When disputing parties of distressed companies are unable or unwilling to reach consensual negotiated restructurings, most US businesses seek relief under Chapter 11 reorganizations or Chapter 7 liquidations (Dunne & Uzzi, 2023).
  2. Some jurisdictions have already implemented significant reforms to their restructuring regimes, while destinations, such as The Bahamas, continue to evaluate global occurrences (Landry, 2020; Kokorin, Madaus, & Mevorach, 2021). The UK and the USA (two of the primary jurisdictions for insolvency) are reviewing their existing restructuring procedures (Landry, 2020; Kokorin, Madaus, & Mevorach, 2021). Boraine (2023) indicated that internationally, most insolvency law has a basis in English law or civil law[[2]](#footnote-2).
  3. The emphasis in this paper is on those entities involved in cross-border insolvencies. By examining the different legal frameworks, practices, and objectives of liquidation and restructuring, the author aims to enlighten readers on the strengths and weaknesses of both systems. Recommended areas of improvement are discussed. The discussion and conclusion include key findings with recommendations to countries with weak insolvency regimes and those contemplating revising the reconstructing processes for distressed companies.

## **Liquidations and Restructuring – Understanding the Concepts**

* 1. The comparative analysis between liquidations and restructuring in the UK and the USA begins with understanding of the fundamental concepts behind liquidation and restructuring. In general terms, liquidation refers to the cessation of a business and selling its assets to satisfy creditors' debts (Dalakoura, 2017; Declercq, 2022). Keay and Walton (2008) argued that there are various reasons for liquidation, but in most cases, liquidation results from company insolvency.[[3]](#footnote-3) Boraine (2023) defines liquidation as "proceedings to sell and dispose of assets for distribution to creditors in accordance with the insolvency laws" (p. 20). Liquidations fall into two major categories. They are usually voluntary (where the management sells the assets of a solvent entity) or compulsory liquidation – also known as compulsory winding up (Keay & Walton, 2008).
  2. Restructuring intends to rehabilitate a financially distressed entity to allow the business to continue (Baker & McKenzie, 2022; Lee, 2011). The modification can be in the form of adjusting the capital structure, operations, or changing the management (Adriaanse & Kuijl, 2006; Garrido, 2012; Vidović, 2017). The objective is to restructure the assets and liabilities without judicial intervention (Garrido, 2012; Vidović, 2017). According to Garrido (2012):

Restructuring activities can include measures that restructure the debtor's business (operational restructuring), and measures that restructure the debtor's finances (financial restructuring) (p. 1).

* 1. There are no global rules for insolvency, and all countries with a developed insolvency system or collective debt-collecting procedure have different rules. (Baker & McKenzie, 2022; Boraine, 2023). However, various attempts continue to harmonize the different insolvency systems. Academics, international courts, and international bodies such as the United Nations Commission on International Trade Law [UNCITRAL] and the World Bank are continuous in their efforts to deal with transnational insolvency issues (Boraine, 2023; Declercq, 2022).

## **Liquidations in The UK**

* 1. Liquidation refers to selling a company's assets to pay off its debts (Dalakoura, 2017; Declercq, 2022; Keay & Walton, 2008). In the UK, liquidation of Companies falls under the Companies Act 2006, the Insolvency Act 1986 (as amended), the Insolvency Rules 1986 (as amended), the Insolvency Act 2000, the Enterprise Act 2002, the Insolvency (England and Wales) Rules 2016, the Corporate Insolvency and Governance Act 2020, and the Insolvency (England and Wales) (No. 2) (Amendment) Rules 2021, (Gov.UK, 2023). This paper will emphasize the Insolvency Act 2000, Enterprise Act 2002, and the Corporate and Insolvency Governance Act 2020. As a result of Covid 19,[[4]](#footnote-4) the Corporate and Insolvency Governance Act 2020 introduced various reforms, including a new restructuring and moratorium plans (Boraine, 2023). The Insolvency (England and Wales) Rule 2016 summarizes the rules that apply to moratoria, voluntary company arrangements (CVA), administration, receivers, and voluntary and compulsory liquidations (Gov.UK 2023; Payne, 2018).
  2. While liquidation is a legal option, the creditors may find that their recovery is less than optimal and may seek to use a restructuring or reorganizing option (Adriaanse & Kuijl, 2006; Bracewell & Giuliani, 2012). In Bluebrook Ltd.; re IMO (UK) Ltd [2009] EWHC 2114 (Ch)[[5]](#footnote-5), the UK High Court considered whether to sanction a scheme. This case concerned a consolidated company that was judged to be economically viable. The directors decided that a rescue and rehabilitation of the group, rather than liquidation, was planned. However, the group's assets were considered insufficient to pay the senior lender's debts, and the subordinate claims of the junior creditors would receive nothing on liquidation. Therefore, a restructuring was more appropriate for the stakeholders (Payne, 2018).

## **Restructuring in the UK**

* 1. There is increased recognition that well-developed economies, especially those participating in global business, should maintain an effective mechanism enabling the rescue of distressed but viable businesses (Adriaanse & Kuijl, 2006; Dick, 2021; Garrido, 2012; Payne, 2018; Vidović, 2017). For such businesses, a sale to a new owner in a liquidation process will not always be desirable, particularly when the capital markets are illiquid (Dick, 2021; Payne, 2018). In such circumstances, rescuing and rehabilitating a company is preferable to immediately liquidating. It has been argued that modern businesses typically have more value as going concerns[[6]](#footnote-6).
  2. In the UK, the current statutory provisions regarding English schemes form a part of Part 26 Companies Act 2006[[7]](#footnote-7) (Gov.UK, 2023; Payne, 2013). The scheme of arrangement is defined in Section 895 as a compromise or arrangement between a company and its creditors, any class of them, its members, or any class of them (Payne, 2013). The subject matter of the scheme is not prescribed in the Companies Act 2006. Therefore, a company can use a scheme to affect almost any internal equity or debt capital reorganization.
  3. Traditionally, four stand-alone options were available in the UK to distressed companies seeking to restructure debt (Payne, 2018). These include a contractual workout, a Company Voluntary Arrangement (CVA), a scheme of the arrangement, and administration (Gov.UK, 2023; Payne, 2018). There are advantages and disadvantages to each of these options. Additionally, combining these options is common to maximize several advantages (Payne, 2013; Payne, 2018).
  4. There have been some recent movements for further reform of these mechanisms. These reforms suggest a new restructuring plan, changes to the rules for a moratorium, the suspension of liquidation petitions, and the moderation of the rules surrounding wrongful trading liability (Boraine, 2023). Contractual workouts and CVAs, for example, do not provide for a moratorium against creditor actions, while the CVA allows for a limited cramdown.[[8]](#footnote-8)
  5. This paper will focus on schemes of arrangement and administration, two of the most used and successful tools utilized in the UK to facilitate corporate rescues and reorganizations (Boraine, 2023). Case studies provide practical insights into the UK restructuring process.
  6. For a significant period, the use of corporate schemes of arrangement has been around (Bracewell & Giuliani, 2012; Fletcher, 1997; Payne, 2018). However, these schemes were not always considered debt restructuring devices (Payne, 2018). Following several fluctuations in the global financial markets, schemes have been used increasingly to restructure financially distressed companies (Lee, 2011; Payne, 2018). The provisions for schemes are included in The Companies Act 2006.[[9]](#footnote-9) In the UK, schemes can be used in solvent or insolvent companies, similar to the provisions of workouts and CVAs, even early on in the restructuring process.
  7. The disadvantages of the scheme have been an onerous procedural requirement, a complex and potentially difficult issue of class meetings, the detailed and extensive explanatory statements required, and the lack of a statutory moratorium (Payne, 2018). This allows schemes to be disruptive, and during the application process, the distressed company is unprotected from creditor actions.
  8. The second alternative discussed in this paper is corporate administration (administration). Administration is a procedure by which an external insolvency practitioner, the administrator, is appointed to manage the company[[10]](#footnote-10). One particular form of administration that has arisen recently is *pre-pack administration*. This is where a company in financial difficulty reaches an agreement to sell its business or all of its assets before going into administration (Payne, 20185; Weil, Gotshal & Manges, 2014). This involves the insolvency practitioner and the agreement of the creditors. The agreement is placed in escrow pending the administration, and the sale takes effect immediately on administration. The business may be sold to a third party but is often sold back to the existing management or existing senior lenders. (Payne, 2018; Weil, Gotshal & Manges, 2014). Pre-packs' key attraction is that they enable a very quick sale, more likely to preserve value, goodwill, and confidence than a slower and more protracted administration process. However, pre-packs have also attracted criticism largely because they are regarded as insufficiently transparent. (Payne, 2018).
  9. One significant advantage of administration over the other restructuring devices is the existence of a statutory stay. This statutory stay is broad in its effect. For example, during the moratorium, no administrative receiver may be appointed, no resolution can be passed for the winding up of the company, no winding-up order may be made, and no steps can be taken to enforce security over the company's property or to repossess goods in the company's possession under any hire-purchase (Payne, 2018; Weil, Gotshal & Manges, 2014).
  10. To facilitate cross-border insolvencies (when insolvency proceedings begin in one jurisdiction, but the company has assets in at least one other jurisdiction [Declercq, 2022]), the UK has adopted UNCITRAL's Model Law in the Cross Border Insolvency Regulations 2006 (CBIR). According to Warner (2023), the UK adopted this law to provide an effective mechanism for cross-border insolvencies and proceedings in other jurisdictions. The CBIR sets out rules for recognizing foreign insolvency proceedings in the UK. CBIR also allows cooperation between UK and foreign courts in cross-border insolvency cases. However, the UK still allows provisions for local needs and issues (Keay & Walton, 2008).

## **Liquidations in The USA**

* 1. The USA bankruptcy code is Federally imposed and recognized as *debtor-friendly* (Boraine, 2023; Bracewell & Giuliani, 2012). This means that the laws are drafted to protect the debtor. This differs from the laws in other countries that are considered *creditor friendly*. However, it is possible to file for liquidation in the USA under Chapter 7 proceedings (Dunne & Uzzi, 2023; Taylor & Sheffner, 2016). The liquidation proceedings under Chapter 7 are initiated by filing a voluntary or involuntary petition (Bracewell & Giuliani, 2012; Dunne & Uzzi, 2023). Both solvent and insolvent entities can seek Chapter 7 relief.
  2. Once a debtor files a Chapter 7 bankruptcy, the company's assets (excluding secured loans exempted under applicable state or federal laws) become the bankruptcy estate's property (Bracewell & Giuliani, 2012; Elias & Laurence, 2010). The Bankruptcy Court supervises Chapter 7, and the liquidation is administered by an appointed trustee of the estate (Dunne & Uzzi, 2023; Elias & Laurence, 2010; IRS.GOV, 2023). The trustee's job is to collect and liquidate the debtor's assets and distribute the proceeds to the creditors (Dunne & Uzzi, 2023; Surbhi, 2018; Taylor & Sheffner, 2016). After the proceeds are fully distributed, the debtor's pre-petition debts are discharged, and his case is completed (IRS.GOV, 2023; Taylor & Sheffner, 2016).
  3. The liquidation proceeding under Chapter 7 results in the closing down of the business (Dunne & Uzzi, 2023; Keay & Walton, 2003). There are also attorney, court, and trustee fees (Elias & Laurence, 2010). The business must also give up its assets (Dunne & Uzzi, 2023; Keay & Walton, 2003). Therefore, for businesses interested in continuing, Chapter 7 is not the optimal strategy, but the option is available.

## **Restructuring in the USA**

* 1. Various authors have described the insolvency laws in the US as *debtor-friendly* (Bracewell & Giuliani, 2012; Lee, 2011). Through Chapter 11 of the Bankruptcy Code, distressed businesses can reorganize and have a *breathing space*, notwithstanding the efforts of secured creditors to foreclose on their collateral or force a liquidation (Bracewell & Giuliani, 2012; Lee, 2011). Bracewell and Giuliani (2012) argue that Chapter 11 protects and preserves distressed businesses by allowing for and encouraging financial restructuring binding to all stakeholders.
  2. The Code began in 1979, and since then, reorganization under Chapter 11 has become a viable option for major corporations in financial distress, both in the USA and globally. This includes some well-known global companies who have turned to the US Code for protection under the debtor-friendly environment. Some easily recognized companies include Texaco, Lehman Brothers, American Airlines, Delta Airlines, and Polaroid (Bracewell & Giuliani, 2012).
  3. Chapter 11 has a dual purpose. Firstly, the automatic stay (*11 USC §362(a)*) provides a debtor with breathing space so that the financially distressed entity can preserve the business as a going concern (Bracewell & Giuliani, 2012; Dunne & Uzzi, 2023). This prevents creditors from initiating judicial action or enforcing the collateral from the distressed company's assets [the *estate*] (Lee, 2011). The stay also allows the management of the debtor company time to develop a reorganization plan (Bracewell & Giuliani, 2012; Dunne & Uzzi, 2023; Lee, 2011). Secondly, Chapter 11 is intended to maximize the assets recovered for the debtor's various creditors (Bracewell & Giuliani, 2012).
  4. According to Dunne and Uzzi (2023), under Chapter 11, the debtor is allowed to 1) preserve its business as a going concern and judicially restructure its debt by reducing the amount owed (haircut) or extending repayment terms; 2) implement an operational restructuring by rejecting unprofitable contracts or selling money-losing lines of business; 3) Chapter 11 allows for the selling of corporate entities in whole or in part, or the liquidation of the company. Although under the Code, Chapter 7 also provides a means for business liquidations. However, in a Chapter 11 liquidation, the company's management is allowed to retain control of the business, whereas, in a Chapter 7 liquidation, a trustee is appointed by the Bankruptcy Court. Solvent and insolvent companies can also seek assistance under Chapter 11 (Bracewell & Giuliani, 2012; Dunne & Uzzi, 2023; Lee, 2011).
  5. Some reasons for seeking Chapter 11 protection include cash flow challenges, lack of access to credit, tort liabilities for defective products, unexpected financial challenges, and technological changes (Bracewell & Giuliani, 2012). However, some authors warn that, despite the perceived friendliness of Chapter 11, it is not a cure for all corporate woes and should only be sought as a last resort (Lee, 2011).
  6. The remedies and safeguards granted to creditors differ greatly from those given to debtors under Chapter 11. With the two sides having different expectations, Chapter 11 has become a significant international forum for addressing the financial health of major US companies and their global counterparts (Bracewell & Giuliani, 2012; Lee, 2011).
  7. The Code does not apply to bank and insurance entities, entities not resident or domiciled in the USA, without a place of business or property in the USA, and governmental entities not municipalities under 11 USC § 109 (Bracewell & Giuliani, 2012). Other entities in financial distress governed by other state or federal laws are also restricted from seeking Chapter 11 protection (Bracewell & Giuliani, 2012). Tajti (2018) noted that the stigma of bankruptcy does not seem as effective in the USA as in other jurisdictions. This cements the argument concerning the friendliness of the insolvency proceedings in the USA.
  8. Many countries have adopted the UNCITRAL model laws to facilitate cross-border insolvencies. According to Thomson Reuters (2023), the US has not fully adopted the UNCITRAL Model Laws, except for California and Texas. Additionally, the (North Atlantic Free Trade Agreement (NAFTA) agreements reflect some aspects of UNCITRAL's principles.[[11]](#footnote-11)
  9. Notwithstanding, the enactment of Chapter 15 of the Bankruptcy Code Chapter 15, titled *Ancillary and Other Cross-Border Cases,* provides a mechanism for recognizing and assisting foreign insolvency proceedings. Chapter 15 allows foreign representatives to seek recognition of their authority in US courts and provides cooperation and coordination between US courts and foreign courts or foreign representatives in cross-border insolvency cases (US Bankruptcy Code, Chapter 15).
  10. Chapter 15 of the Bankruptcy Code, incorporating the provisions of the UNCITRAL Model Law, helps to address the challenges and complexities arising in cross-border insolvency cases.[[12]](#footnote-12) It promotes the coordination of proceedings involving assets or creditors in multiple jurisdictions, facilitates communication and cooperation between courts and representatives from different countries, and aims to promote the fair and efficient administration of cross-border insolvencies.
  11. The adoption of the UNCITRAL Model Law through Chapter 15 demonstrates the recognition of the importance of international cooperation in insolvency matters and reflects the United States' commitment to harmonizing its insolvency laws with international standards. Center of Main Interest (COMI) is relevant under Chapter 15 (Baker & McKenzie, 2022; Declercq, 2022).[[13]](#footnote-13)
  12. There is some criticism of the US restructuring rules. Lee (2011) argues that Chapter 11 allows a strong presumption for large corporations of allowing the system to become corrupt due to forum shopping, lack of a clear path to reorganization, and judicial irresponsibility, letting the debtor stay in control. Indeed, not all reorganizations are viable (Dalakour, 2017; Lee, 2011; Payne, 2013). It is argued that some companies granted reorganization under Chapter 11, including *Blockbuster*, should have been allowed to liquidate[[14]](#footnote-14). Instead, the management chose the Chapter 11 proceedings, allowing them to maintain control, which is seen as a possible corruption of the intended purposes of the Chapter 11 proceedings (Dalakour, 2017; Lee, 2011; Payne, 2013)

## **Discussion**

* 1. This section presents a comparative analysis of liquidation and restructuring proceedings in the USA and the UK. Both the USA and the UK present insolvency infrastructure that facilitates cross-border insolvencies. Indeed, both jurisdictions have had numerous international cases that allow global companies with worldwide assets to litigate. When seeking an appropriate jurisdiction for cross-border insolvencies, insolvency practitioners should be aware of the laws and options available in the insolvency jurisdiction and how they may serve the various stakeholders. This paper focuses on the US and the UK's insolvency rules and processes. The USA and the UK bankruptcy proceedings have developed over time below the political horizon (Lee, 2011). In both jurisdictions, professional practitioners have been allowed to contribute to developing insolvency proceedings. Practitioners in countries currently reviewing their insolvency proceedings should follow and choose the jurisdiction that offers the type of relief sought and the benefits of litigating in either country.
  2. The UK and the USA continually revive their respective bankruptcy proceedings (Carruthers & Halliday, 2000; Landry, 2020). The UK recently proposed a stand-alone restructuring mechanism that includes a cross-class cram down and a statutory moratorium (Payne, 2018). Some authors regard these futures as positive and are strikingly similar to the US Chapter 11 provisions (Landry, 2020). The flexibility in the new UK laws is more than what is currently available using Chapter 11 because the UK rules allow for the absolute priority rule (APR)[[15]](#footnote-15) that adds certain flexibility in some circumstances.
  3. The flexibility addresses some of the previous criticism of a rigid application of the APR in Chapter 11 that can impede company reorganization (Dalakoura, 2017; Landry, 2020). Payne (2018) argues that the USA should pay attention to the UK's proposal when reviewing improvements to the APR in the USA. There has been criticism of the rigidity of Chapter 11 APR, as was highlighted in *Czyzewski v. Jevic Holding Corp.[[16]](#footnote-16)* A rigid adherence to the APR as codified in Chapter 11 in 1978 may require reform. The UK has proposed a flexible APR compatible with a modern restructuring jurisdiction (Landry, 2020; Payne, 2018). Allowing similar flexibility in the USA under Chapter 11 would maintain the USA as a major jurisdiction in cross-border insolvencies.
  4. With the adjustments to its insolvency processes, the UK will continue to be a relevant, modern jurisdiction attractive to companies seeking a modern adaptive restructuring mechanism for cross-border insolvencies. While the US was the first liberal jurisdiction recognized globally as debtor-friendly, the UK, with its long history of case law and tradition, may be catching up. As noted, however, the UK's procedure traditionally had its weaknesses that the jurisdiction is addressing.

## **Significant Cases**

* 1. Some insolvency cases were mentioned in the paragraphs above. However, some additional significant cases in the USA that are relevant to this discussion include the following:
     1. Lehman Brothers Holding Inc. (2008).[[17]](#footnote-17) This case is one of the most prominent examples of large-scale liquidation in the USA. Lehman Brothers, a global financial services firm, filed for Chapter 11 bankruptcy protection. The case highlighted the challenges of managing the liquidation of a complex financial institution and showcased the impact of such liquidation on various stakeholders, including creditors, employees, and the wider financial system.
     2. General Motors Corp. (2009).[[18]](#footnote-18) This case involved restructuring General Motors (GM) through Chapter 11 bankruptcy. The court-approved plan allowed GM to reorganize its operations, shed liabilities, and emerge as a viable company. The case demonstrated the use of restructuring to preserve jobs, revive troubled industries, and protect the interests of creditors and shareholders.
     3. United Airlines, Inc. (2002)[[19]](#footnote-19) This case involved the bankruptcy filing of United Airlines under Chapter 11. It highlighted the challenges faced by the airline industry and showcased the use of restructuring proceedings to reorganize operations, renegotiate contracts, and reduce costs. During the restructuring process, the case emphasized the importance of balancing stakeholders' interests, including employees, shareholders, and creditors.
     4. WorldCom Inc. (2003).[[20]](#footnote-20) WorldCom, a telecommunications company, filed for Chapter 11 bankruptcy protection following an accounting scandal. The case demonstrated the extensive use of restructuring efforts to rehabilitate the company, including renegotiating contracts, selling assets, and addressing financial irregularities. It showcased the potential for successful corporate turnaround through effective restructuring.
  2. Some of the significant cases in the UK that are relevant to this discussion include the following:
     1. Polly Peck International Plc (1996).[[21]](#footnote-21) Polly Peck was a multinational conglomerate that collapsed due to accounting irregularities. The case involved a complex liquidation process, during which the court-appointed liquidators realized the company's assets and distributed the proceeds to creditors. It highlighted the court's role in overseeing liquidation proceedings and ensuring fair treatment of stakeholders.
     2. MG Rover Group Ltd (2005)[[22]](#footnote-22). MG Rover Group, a British car manufacturing company, faced financial difficulties and ultimately went into administration. The case highlighted the challenges of managing a large-scale administration process, including the sale of assets and the treatment of creditors. It demonstrated the impact of the administration on employees, suppliers, and the wider automotive industry.
     3. Woolworths Group plc (2009).[[23]](#footnote-23) Woolworths Group, a well-known retail company, entered administration due to financial pressures. The case involved the closure of numerous stores and the subsequent sale of assets. It showcased the challenges of balancing the interests of various stakeholders, including employees, suppliers, and property owners, while maximizing the value of the company's assets.

## **Conclusions and recommendations**

* 1. The Insolvency and Restructuring Act 2006 is one of the significant pieces of legislation governing the UK's insolvency proceedings. The USA insolvency proceedings fall under Chapter 7, Chapter 11, and Chapter 15 of the Bankruptcy Code.[[24]](#footnote-24) The practice of insolvency continues to evolve in both jurisdictions. This section summarizes the key findings and highlights the strengths and weaknesses of liquidation and restructuring proceedings in the USA and the UK. This section also summarizes the discussion and provides recommendations for policymakers, practitioners, and researchers involved in corporate insolvency. The recommendations aim to enhance the effectiveness and efficiency of liquidation and restructuring proceedings in countries contemplating reviewing insolvency regimes.
  2. The UK was traditionally noted as a creditor-friendly insolvency jurisdiction, while the USA appeared to be debtor-friendly, using the facilities under Chapter 11. Multinational companies seeking cross-border insolvency jurisdictions can choose between the two. The UK and the USA have adopted various aspects of UNCITRAL that allow recognition in bankruptcy proceedings in other jurisdictions. Both the UK and the USA have strengths and weaknesses. The USA is debtor friendly and tends to welcome distressed companies seeking relief. Traditionally seen as more creditor friendly, the UK is reviewing the legislation to provide some aspects of insolvency in the US Chapter 11 Bankruptcy Code, but with more APD flexibility.
  3. The APD flexibility in the new UK proceedings is seen as positive. The APD rigidity in the US Chapter 11 should be reviewed and updated to reflect the modern era of globalization. A move to a flexible version similar to the UK would address one of the criticisms of the restructuring process that has been argued to discourage companies from seeking relief in the USA.
  4. The Bahamas still maintains a weak and less well-developed insolvency regime. However, like other countries, The Bahamas is currently reviewing the insolvency process to become a place where cross-border insolvencies can be addressed. Countries with a less developed insolvency regime can look at the developments in the UK and the USA as templates. Adopting the UNCITRAL Model Laws is also an option for improvement, and the model laws allow variations to comply with local laws and customs.

## **Bibliography & References**

Adriaanse, J.A.A., & Kuijl, J.G. (2006). Resolving Financial Distress: Informal Reorganization in The Netherlands as a Beacon for Policy Makers in the CIS and CEE/SEE Regions? *Review of Central and East European Law*, 31(2), 135-154.

Anyfantaki-Dalakoura, M. (2017). Corporate Insolvencies: A Comparative Analysis of the European and the USA Model with a Focus on the Liquidation vs. Reorganization Dilemma and the Effects of Both in the Economy. Retrieved on June 23, 2023, from <https://repository.ihu.edu.gr/xmlui/bitstream/handle/11544/15911/Dissertation.pdf?sequence=1>

Association of International Credit and Trade Finance Professionals (2013). Insolvency laws in Germany, UK, and USA. Retrieved on June 23, 2023, from <https://www.shumaker.com/Templates/media/images/Practices/SLK_CHA--2.pdf>

Baker & McKenzie (2022). Global restructuring & insolvency guide. Retrieved on June 23, 2023, from <https://www.bakermckenzie.com/-/media/files/insight/guides/2022/globalriguide-edition-8.pdf>

Boraine, A. (2023). Fundamental concepts of insolvency and restructuring. INSOL Global insolvency practice course.

Bracewell & Giuliani (2012). Chapter 11 of the United States Bankruptcy Code: Background and summary.

Bris, A., Welch, I., & Zhu, N. (2006). The costs of bankruptcy: Chapter 7 liquidation versus Chapter 11 reorganization. *The Journal of Finance*, *61*(3), 1253-1303. Retrieved on June 25, 2023, from <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=e1f16e66d71d24ff75027f2fa0b640175d7191e6>

Carruthers, B. G., & Halliday, T. C. (2000). Professionals in systemic reform of bankruptcy law: The 1978 U.S. Bankruptcy Code and the English Insolvency Act 1986. The American Bankruptcy Law Journal, 74(1), 35-75. <https://go.openathens.net/redirector/ncu.edu?url=https://www.proquest.com/scholarly-journals/professionals-systemic-reform-bankruptcy-law-1978/docview/202783199/se-2>

Crowe Horwath Bahamas (2023). Insolvency, Liquidations and Restructuring. Retrieved on June 23, 2023, from <https://www.crowe.com/bs/services/insolvency-and-liquidations>

Declercq, P. J. (2022). UNCITRAL Model Laws Relating to Insolvency. INSOL Foundation Certificate in International Insolvency Law.

Dunne, D. & Uzzi, G. (2023). Milbank LLP. Restructuring and insolvency in the United States: Overview. Retrieved on June 23, 2023, from <https://uk.practicallaw.thomsonreuters.com/7-501-6870?contextData=(sc.Default)&transitionType=Default&firstPage=true>

Elias, S., & Laurence, B. K. (2010). *Bankruptcy for small business owners: how to file for chapter 7*. Nolo.

Fletcher, I. F. (1997). The European Union Convention on Insolvency Proceedings: An Overview and Comment, with US Interest in Mind. Brook. J. Int'l L., 23, 25. Retrieved on June 18. 2023 from <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1668&context=bjil>

Fracassi, F. (2001). Confidentiality and NAFTA Chapter 11 Arbitrations. *Chi. J. Int'l L.*, *2*, 213. Retrieved on June 26, 2023, from <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1128&context=cjil>

Garrido, J. M. (2012). Out-of-court debt restructuring. World Bank. Retrieved on June 23, 2023, from <https://openknowledge.worldbank.org/server/api/core/bitstreams/c5fc8592-d4c0-5fc9-a7a3-3f7270493d21/content>

GOV.UK (2023). Guidance Liquidation and Insolvency. Retrieved on June 25, 2023, from <https://www.gov.uk/government/publications/liquidation-and-insolvency/liquidation-and-insolvency>

Gurrea-Martínez, A. (2020). The Future of Reorganization Procedures in the Era of Pre-insolvency Law. European Business Organization Law Review, 21(4), 829–854. <https://doi.org/10.1007/s40804-020-00191-y>

Insolvency Law Review Committee. (2013). Report of the insolvency law review committee.

IRS.GOV (2023). Chapter 7 Bankruptcy – Liquidation Under the Bankruptcy Code. Retrieved on June 25, 2023, from <https://www.irs.gov/businesses/small-businesses-self-employed/chapter-7-bankruptcy-liquidation-under-the-bankruptcy-code>

Keay, A., & Walton, P. (2003). Insolvency law: Corporate and personal. Pearson.

Knight, C & Slim, D. (2021). Episode #2: A Comparative Analysis: U.S. Chapter 11 v IL Restructuring Plans and Schemes of Arrangements. Retrieved on June 22, 2023, from [https://www.pillsburylaw.com/en/news-and-insights/inflight-audio-podcast-2-chapter-11-uk-restructuring.html#](https://www.pillsburylaw.com/en/news-and-insights/inflight-audio-podcast-2-chapter-11-uk-restructuring.html)

Kokorin, I., Madaus, S., & Mevorach, I. (2021). Global Competition In Cross-Border Restructuring and Recognition of Centralized Group Solutions. Texas International Law Journal, 56(2), 109–154.

Landry, R. J. (2020). Enhancing Rescue in Chapter 11: Lessons from Reform Efforts in the United Kingdom. American Business Law Journal, 57(2), 227–279. <https://doi.org/10.1111/ablj.12158>

Lee, R. S. (2011). Corporate Reorganization as Corporate Reinvention: Borders and Blockbuster in Chapter 11. *Harvard Business Law Review Online*, Vol. 1, No. 53, 2011, Available at SSRN: <https://ssrn.com/abstract=1942126>

Mulevičienė, S. (2020). Evaluation of the effectiveness of insolvency frameworks: does the small business perspective matter? Retrieved on June 18, 2023, from <https://repository.mruni.eu/bitstream/handle/007/17032/Muleviciene_Evaluation_of_the_effectiveness_of_insolvency_frameworks.pdf?sequence=1&isAllowed=y>

Nwafor, A. O. (2017). The Goal (S) Of Corporate Rescue In Company Law: A Comparative Analysis. Retrieved on June 22, 2023, from <https://pdfs.semanticscholar.org/ec1c/f369bbae21dde6be1200b9b1aa76ad6953f8.pdf>

Payne, J. (2013). Cross-border Schemes of Arrangement and Forum Shopping*. European Business Organization Law Review*, 14(4), 563-589. https://doi.org/10.1017/S1566752912001309

Payne, J. (2014). Debt restructuring in English law: lessons from the United States and the need for reform. LQR, 130, 282. Retrieved on June 18, 2023, from <https://heinonline.org/HOL/LandingPage?handle=hein.journals/lqr130&div=15&id=&page=>

Payne, J. (2018). Debt restructuring in the UK. European Company and Financial Law Review, 15(3), 449-471. Retrieved on June 22, 2023, from <https://ora.ox.ac.uk/objects/uuid:a14466df-9291-480d-af11-822a562910a3/download_file?file_format=application%2Fpdf&safe_filename=Debt%2Brestructuring%2Bin%2Bthe%2BUK%2BSeptember%2B2018.pdf&type_of_work=Journal+article>

Surbhi, S. (2018). Difference between bankruptcy and liquidations. Key Differences. Retrieved on June 24, 2023, from <https://keydifferences.com/difference-between-bankruptcy-and-liquidation.html>

Tajti, T. (2018). Bankruptcy stigma and the second chance policy: the impact of bankruptcy stigma on business restructurings in China, Europe, and the United States. *China-EU Law Journal 6*(1-2), 1-31. https://doi.org/10.1007/s12689-017-0077-z

Taylor, A. N., & Sheffner, D. J. (2016). Oh, what a relief it (sometimes) is: An analysis of Chapter 7 bankruptcy petitions to discharge student loans. *Stan. L. & Pol'y Rev.*, *27*, 295. Retrieved on June 25, 2023, from <https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1334&context=faculty>

Vidović, I. (2017). Out-Of-Court Debt Restructuring Versus Pre-Insolvency Proceedings: Two Sides Of The Same Coin? Retrieved on June 23, 2023, from <https://scholar.google.com/scholar?hl=en&as_sdt=0%2C10&q=Vidovi%C4%87%2C+I.+%282017%29.+Out-Of-Court+Debt+Restructuring+Versus+Pre-Insolvency+Proceedings%3A+Two+Sides+Of+The+Same+Coin%3F&btnG=>

Wang, J., Yang, J., Iverson, B. C., & Kluender, R. (2020). Bankruptcy and the COVID-19 Crisis. Available at SSRN 3690398. Retrieved on June 25, 2023, from <http://www.beniverson.org/papers/WYIJ_Bankruptcy_COVID.pdf>

Warner, R. (2023). UNCITRAL Model Law: an introduction. INSOL

Weil, Gotshal & Manges (2014). Comparative Guide to Restructuring Procedures. Retrieved on June 18, 2023, from <https://repository.mruni.eu/bitstream/handle/007/17032/Muleviciene_Evaluation_of_the_effectiveness_of_insolvency_frameworks.pdf?sequence=1&isAllowed=y>

1. # COVID-19 continues to present challenges for insolvency regulators, practitioners, and lawmakers. In March 2020, closed borders and widespread uncertainty underscored the crisis, prompting authorities around the world to devise and rapidly implement measures to protect businesses, financial services institutions, and individuals against the economic effects and prevent widespread economic collapse. The Bahamas was one of those countries that suffered through the pandemic. See 2021 World Bank & INSOL International’s Legislative & Regulatory Group: COVID-19 response and the challenges ahead www. <https://blogs.worldbank.org/psd/2021-world-bank-insol-internationals-legislative-regulatory-group-covid-19-response-and>

   [↑](#footnote-ref-1)
2. See also, Keay, A., & Walton, P. (2003). Insolvency law: Corporate and personal. Pearson. [↑](#footnote-ref-2)
3. Solvency is defined by two methods, balance sheet basis, and the cash flow basis. While cash flow is used for insolvency, voluntary bankruptcy can occur in the USA even with insolvent companies. Insolvency can be formal or informal. Formal insolvency can include both liquidations and reorganizations. [↑](#footnote-ref-3)
4. *Supra*, note 1. [↑](#footnote-ref-4)
5. The decision in this case is not considered authority for the proposition that the rights of junior creditors can be ignored. See <https://www.ilauk.com/docs/bull220.pdf> [↑](#footnote-ref-5)
6. Adriaanse, J.A.A., & Kuijl, J.G. (2006). Resolving Financial Distress: Informal Reorganization in The Netherlands as a Beacon for Policy Makers in the CIS and CEE/SEE Regions? Review of Central and East European Law, 31(2), 135-154. [↑](#footnote-ref-6)
7. Companies Act 2006, s. 895(1). [↑](#footnote-ref-7)
8. A cramdown is the imposition by the courts of a bankruptcy reorganization plan above the objection of certain creditor classes. See <https://www.investopedia.com/terms/c/cramdown.asp> [↑](#footnote-ref-8)
9. Companies Act 2006, Part 236 [↑](#footnote-ref-9)
10. Rising business insolvencies and high energy prices - Office for National Statistics. See <https://www.ons.gov.uk/businessindustryandtrade/changestobusiness/bankruptcyinsolvency/articles/risingbusinessinsolvenciesandhighenergyprices/2022-10-07> [↑](#footnote-ref-10)
11. According to UNCITRAL website ([www.ucitral.un.org](http://www.ucitral.un.org)), the USA was a signatory country to UNCITRAL until 2022. [↑](#footnote-ref-11)
12. US Bankruptcy Code, Chapter 15. [↑](#footnote-ref-12)
13. If COMI exist elsewhere the secured creditors typically requests the court to dismiss the case in favor of commencing proceedings in another jurisdiction. This effort by creditors have not always been successful. [↑](#footnote-ref-13)
14. Lee (2011) argued that Blockbuster, put itself up for sale when its reorganization plan collapsed, can hardly be mentioned without an obligatory nod to Netflix and Redbox. Both of Blockbusters competitors are often credited with putting Blockbuster out of business, and both often cited as reasons why Blockbuster should have just liquidated instead of putting up a fight. Netflix and Redbox were simply more digital age savvy competitors, famous for cheaper by-mail and vending-kiosk movie rentals than was Blockbusters. But now, Blockbuster has closed old-fashioned stores, installed new kiosks, and experimented with digital delivery. In other words, Blockbuster tried to copy the success of its competitors by becoming a secondary Netflix. [↑](#footnote-ref-14)
15. The absolute priority rule is used in corporate [bankruptcies](https://www.investopedia.com/terms/b/bankruptcy.asp) to decide the portion of payment that will be made to each participant. Debts to creditors will be paid off first, then shareholders divide the remaining assets. Secured claims always take precedence over unsecured claims. See <https://www.investopedia.com/>. [↑](#footnote-ref-15)
16. 137 S. Ct. 973 (2017) [↑](#footnote-ref-16)
17. *In re Lehman Bros. Holdings, Inc.*, 415 B.R. 77 (S.D.N.Y. 2009). [↑](#footnote-ref-17)
18. *In re General Motors Corp.*, 407 B.R. 463 (Bankr. S.D.N.Y. 2009). [↑](#footnote-ref-18)
19. *United Airlines, Inc. v. HSBC BANK USA, NA*, 416 F.3d 609 (7th Cir. 2005). [↑](#footnote-ref-19)
20. *In re WorldCom, Inc. Securities Litigation*, 294 F. Supp. 2d 392 (S.D.N.Y. 2003). *In re WorldCom, Inc. Securities Litigation*, 294 F. Supp. 2d 392 (S.D.N.Y. 2003). [↑](#footnote-ref-20)
21. *In re PPI Enterprises (US), Inc.*, 324 F.3d 197 (3d Cir. 2003). [↑](#footnote-ref-21)
22. *Kaur v. MG Rover Group Ltd*, 2005 I.R.L.R. 40 (2005). [↑](#footnote-ref-22)
23. https://en.wikipedia.org/wiki/Woolworths\_Group\_(United\_Kingdom) [↑](#footnote-ref-23)
24. Essentials in Bankruptcy - The Credit Research Foundation. https://www.crfonline.org/education/essentials-in-bankruptcy/ [↑](#footnote-ref-24)