

Book Review

Court-Supervised Restructuring of Large Distressed Companies in Asia: Law and Policy by Wai Yee Wan (2022) Hart Publishing 384 pp, ISBN 9781509952335

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Professor Wai Yee Wan's *Court-Supervised Restructuring of Large Distressed Companies in Asia: Law and Policy* is ambitious in its scope and aim. Through a comparative review of four Asian jurisdictions — China, India, Hong Kong and Singapore — she sets out to find the 'optimal regulatory design of a restructuring framework'.¹ An important part of the answer to this question is something that comparative law scholars have been emphasising for a while now. It is that local institutions and culture matter. Wan reminds us of prior scholarship in corporate law and corporate governance (including her own) which argues that transplants of Anglo-American laws into Asian jurisdictions often do not take into consideration local factors that are absent from the United States ('US') and the United Kingdom ('UK'). However, she rightly notes the dearth of similar academic literature in the area of corporate insolvency.² So Wan's book indeed fills an important gap.

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¹ Wai Yee Wan, *Court-Supervised Restructuring of Large Distressed Companies in Asia: Law and Policy* (Hart Publishing, 2022) vii.

² *Ibid.*

Also, her book comes in the wake of the COVID-19 pandemic which caused most countries to focus on corporate insolvency reforms because of the number of businesses pushed into insolvency as a result of the accompanying lockdowns.³ However, while the focus of post-COVID reforms has been on small and medium enterprises and out-of-court solutions, Wan's book — as the title makes abundantly clear — is concerned with large companies and court-supervised restructuring.⁴ One of the reasons Wan gives for focusing on court-supervised restructuring is that bargaining (even in out-of-court settlements) takes place in the shadow of the law.⁵

A major 'root and branch' review of Australia's corporate insolvency laws, the first in over 30 years, is currently under way.⁶ Naturally, it is a time when lawyers and policymakers in this country are not only assessing Australian corporate insolvency laws⁷ but also looking outwards at reforms in other countries. In that sense, this book is a timely publication for an Australian audience as well.

Wan's book is faithful to the traditional theoretical framework in corporate insolvency law, the creditors' bargain theory, and — more broadly — theories informed by law and economics. The book does not address the substantive arguments of progressive theories on insolvency law; it sidesteps the debate about the goals of insolvency law by simply noting that the goal of minimising transaction costs is very important irrespective of which theoretical lens one is looking through.⁸ Wan adds to the law and economics framework in corporate insolvency by identifying how the relevant agency costs differ across the jurisdictions being considered. Since controlling shareholders are dominant in large companies in Asian jurisdictions, the underlying incentives of various players will vary accordingly. Further, creditors in Asian jurisdictions are often related parties, giving rise to conflicts of interest which should be considered while applying the conceptual framework.

The book studies four Asian jurisdictions while using the US and the UK as familiar models for comparison. China, India, Hong Kong and Singapore are four important jurisdictions where insolvency laws have been reformed in recent years, and so this book is an important resource for those looking to understand corporate restructuring in these jurisdictions. Australian lawyers and policymakers will find it well worth reading since the book provides insights into two key issues: (i) incentives at play in closely held firms in the context of insolvency and restructuring; and (ii) what has worked and not worked in other countries where law reform has been inspired by US and UK law. In considering the latter, Wan reflects on legal transplants and how such transplants may fare in a new environment with its own unique local features. As she rightly remarks in the conclusion, 'lawmakers

³ Aurelio Gurrea-Martínez, 'The Future of Insolvency Law in a Post-Pandemic World' (2022) 31(3) *International Insolvency Review* 385.

⁴ *Ibid.*

⁵ Wan (n 1) 24.

⁶ On 28 September 2022, the Parliamentary Joint Committee on Corporations and Financial Services began an inquiry into corporate insolvency in Australia. The committee's final report was presented to the Senate on 12 July 2023 and tabled in the House of Representatives on 1 August 2023.

⁷ See, eg, Michael Murray and Jason Harris, 'Rebuilding the Structure of the Australian Insolvency System' (2022) 22(1–2) *Insolvency Law Bulletin* 14.

⁸ Wan (n 1) 17.

need to understand that reforms to adopt specific tools must consider the benefits and trade-offs specific to the jurisdiction'.⁹

The book's initial chapters discuss the theoretical framework employed (Chapter 1), the historical background of insolvency law in the four jurisdictions studied (Chapter 2), and agency problems in the context of corporate insolvency in each jurisdiction (Chapters 3 and 4). These chapters provide a strong lens through which insolvency and restructuring in the four Asian jurisdictions can be understood. Chapter 5 looks at the high levels of non-performing loans ('NPLs') on the balance sheets of banks in India and China and the consequent problems. The next three chapters deal with the role of insolvency practitioners (Chapter 6), the courts' role in court-supervised restructuring (Chapter 7), and the relationship between restructuring law, contract enforcement and directors' duties (Chapter 8). The final chapter considers the implications of the book's analysis and findings for future reform.

While many states have introduced restructuring processes, one of the first steps to ensuring that such processes work is to incentivise directors to initiate them. Chapter 9 looks at this issue. There is great variance in the policy choices made by the four Asian jurisdictions in this context. However, local factors play a role in how these policy choices play out. For instance, India provides neither incentives for initiation of formal restructuring nor disincentives in the form of penalties for non-initiation. Yet, the restructuring process is initiated by creditors because the insolvency legislation is being used by creditors as a debt recovery tool.¹⁰ Wan also notes that Hong Kong's proposed reforms include insolvent trading laws along the lines of what we have in Australia in s 588G of the *Corporations Act 2001* (Cth) ('*Corporations Act*').¹¹ This is interesting from an Australian perspective because recent reforms here introduced a safe harbour to soften the impact of s 588G. The safe harbour was meant to encourage directors to attempt to restructure rather than prematurely enter the company into a formal administration process.¹² Yet, another jurisdiction has found it worthwhile to adopt the more stringent position that Australia has moved away from.

Judges matter for corporate law because they can ensure that 'corporate law on the books (good or bad) is good off the books'.¹³ The same holds true for corporate insolvency law. In corporate insolvency, particularly restructuring, there is plenty of literature on the importance of the expertise and competence of judges to ensure optimal outcomes. Chapter 7 focuses on courts' exercise of discretion in the context of restructuring, rather than on the expertise and competence of judges, thereby offering new insights into the role of courts. Interestingly, Wan also notes how the goals of insolvency law in each jurisdiction factor into how much discretion judges are given rather than simply the creation of bright line rules. Despite some

⁹ Ibid 293.

¹⁰ Ibid 261.

¹¹ Ibid 272.

¹² Explanatory Memorandum, Treasury Laws Amendment (2017 Enterprise Incentives No 2) Bill 2017 (Cth) 5.

¹³ Luca Enriques, 'Do Corporate Law Judges Matter? Some Evidence from Milan' (2002) 3(4) *European Business Organization Law Review* 765.

jurisdictions not explicitly stating the goals of their insolvency laws, Wan draws inferences from the contexts of the introduction of those laws. This echoes how courts in Australia have been guided by the goals of voluntary administration explicitly stated in s 435A of the *Corporations Act*¹⁴ when dealing with voluntary administration (the prominent court-supervised restructuring process in this country).

An important player in corporate restructuring is the insolvency professional and the book devotes Chapter 6 to comparatively assessing the insolvency professional's role and regulation. This chapter, after evaluating the appointment, remuneration, accountability and independence of the insolvency professional, concludes that the key is to strike an appropriate balance between granting autonomy to the insolvency professional and increasing judicial oversight over them. Looking at the state of play in each jurisdiction, as this chapter does, helps tease out the consequences of various policy choices.

A potential danger of undertaking a comparative project that spans multiple jurisdictions is that some of the specific features of jurisdictions do not receive attention. This book manages to avoid that danger. For example, in examining the issue of NPLs plaguing India and China, Wan considers the specific problems and potential regulatory strategies despite NPLs not being a big concern in the other jurisdictions studied.

Overall, the book not only provides a ready comparative reference on court-supervised restructuring across four important Asian jurisdictions, but also offers theoretical and practical insights for policymakers, scholars and lawyers in other jurisdictions. In particular, I am sure that it offers many insights for those of us teaching and thinking about Australian insolvency law in the current times when reform is on the agenda.

¹⁴ For a discussion of some cases where s 435A of the *Corporations Act 2001* (Cth) has guided the courts, see Roman Tomasic and Jenny Fu, 'Legal Innovation and the Rescue of Corporate Groups: The Arrium Voluntary Administration' (2018) 33(3) *Australian Journal of Corporate Law* 290.