Day 1 - Thursday 25 April 2024

13:00 pm – 14:00 pm: Personal Bankruptcy

Chair: Dr. Eugenio VACCARI (Royal Holloway, University of London)

- Clement MARUMOAGAE (University of Witwatersrand) and Matsietso MATASANE (University of Witwatersrand) [online]: *The Role of Judicial Discretion on the Rehabilitation of the Insolvent Persons: An Overview of the South African and Australian Approaches*
- Rosa M ROJAS-VERTIZ (ITAM Mexico): *Over-indebtedness, Discharge, and Personal Insolvency in LATAM*
- Phemelo MAGAU (University of Pretoria): *A Comparative Overview of Legislative Flaws Affecting Access to Consumer Debt Relief for Low-Income Earners in South Africa: Lessons from England*

Clement MARUMOAGAE (University of Witwatersrand) and Matsietso MATASANE (University of Witwatersrand) [online]: *The Role of Judicial Discretion on the Rehabilitation of the Insolvent Persons: An Overview of the South African and Australian Approaches*

In South Africa, judicial officers have discretion in terms of the Insolvency Act 24 of 1936 to grant rehabilitation orders in favour of insolvent persons who can demonstrate that they should be rehabilitated before the common law period for automatic rehabilitation expires. Rehabilitation is an avenue for insolvent persons to be discharged from their pre-sequestration debt obligations, facilitating their fresh financial start. In this paper, we evaluate the circumstances that may warrant a court exercising its discretion to grant a rehabilitation order before the expiry of the prescribed 10-year period. It is also interesting that notwithstanding, compliance with all the statutory requirements for rehabilitation, judicial officers can exercise their discretion to refuse to grant rehabilitation orders.
There has never been a serious academic examination of the circumstances that can influence a judicial officer to refuse to grant a rehabilitation order in South Africa. Our courts have also not adequately engaged with this question. There is a need to assess whether there is a potential for arbitrary judicial decision-making with respect to rehabilitation applications. We intend to juxtapose the South African approach to the rehabilitation of insolvent persons with the concept of discharge from bankruptcy used in Australia. In particular, we will investigate the role of the courts with respect to discharging bankrupt persons from their bankruptcy and their legal standing post-discharge in Australia. Ultimately, from the lessons learned in these two jurisdictions, we will be forwarding recommendations on how the laws regulating the discharge of insolvent persons from their bankruptcy in the respective countries could be improved.

Rosa M ROJAS-VERTIZ (ITAM Mexico): *Over-indebtedness, Discharge, and Personal Insolvency in LATAM*

This paper discusses the developments and challenging areas of insolvency proceedings for natural persons in Latin America. While the systems of Chile and Colombia are already considering if there is an abuse in the benefit of discharge, Brazil and Mexico have introduced new systems yet to be tested. With a few similarities but many more disparities, Brazil regulated a consumer renegotiation proceeding in Law 14.181/2021, published on July 1, 2021, and Mexico modernized its insolvency proceeding for natural persons -known as *concurso civil-* in the newly issued National Code for Civil and Family Law Proceedings published on June 7, 2023.

These new insolvency proceedings differ from the previous systems in the region. Chile and Colombia regulated a two-stage proceeding that started with an out-of-court renegotiation that would become a liquidation if the debtor and a qualified majority of creditors disagreed on a payment plan. Additionally, Chile regulated a liquidation proceeding with a straight discharge that became increasingly popular, allowing debtors to obtain a discharge without a payment plan.[1] As happened in the USA with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, creditors and insolvency experts in Chile were concerned that the system was leading to an abuse of discharge. This led to a reform published on May 10, 2023, which denies a discharge to debtors that conduct themselves with bad faith.

In contrast, Colombia is discussing a bill that may allow debtors to skip the renegotiation stage of the proceeding and go straight to a liquidation and obtain a discharge. Much debate and negotiations are taking place as no-asset cases have been controversial in Colombia. On the other hand, the systems introduced by Brazil and Mexico tend to facilitate access, but discharge is debatable. The new Brazilian Law 14.181/2021 regulates a renegotiation proceeding, but excludes secured and real estate debts and does not address discharge. The proceeding develops strong incentives to encourage creditors' participation. An unjustified absence may bind absent creditors to the approved plan and subordinate their debt to the payment of creditors participating in the proceeding. However, it may be construed to reward creditors who participated but rejected the plan, as in such cases, the approved plan must assure them full repayment of their outstanding principal amount. The Mexican system provides for two types of proceedings: an out-of-court proceeding with a mediator that requires unanimous consent for the plan's approval and a court proceeding that requires the approval of the debtor and a qualified majority of creditors. If the parties do not agree, the judge may impose the plan, which must not exceed three years. Although discharge is not expressly established, it may be implied from the provisions. However, it is highly improbable to be applied before 2027. Civil law judges will play a key role in implementing the systems, so the Roman principle *pacta sunt*

[1] Statistics published by the Ministry of Insolvency and Entrepreneurship (*Superintendencia de Insolvencia y Reemprendimiento*) have shown the strong preference that natural persons have for the liquidation proceeding that requires no payment plan. The last biannual Statistical Bulletin (January 1-July 31, 2023) shows that 78.11% of natural persons chose the liquidation proceeding, *https://www.superir.gob.cl/wp-content/uploads/2023/08/Boletin-Estadistico-Mensual-Julio-2023.pdf*

servanda may add a vital aspect to the discussion and development of the new proceedings.

The purpose of this study is to compare the relevant features of the systems and explore the central problems and the challenges these systems face for a better understanding and implementation.

Phemelo MAGAU (University of Pretoria): *A Comparative Overview of Legislative Flaws Affecting Access to Consumer Debt Relief for Low-Income Earners in South Africa: Lessons from England*

Debt relief measures are important for assisting over-indebted persons and insolvent debtors to repay their outstanding debts and for facilitating their integration into formal economic activities. Currently, four statutory debt relief measures are available to over-indebted persons and insolvent debtors in South Africa. These measures are, sequestration proceedings in terms of the Insolvency Act 24 of 1936 as amended, the administration order under the Magistrates Courts Act 32 of 1944 as amended, the debt review that is contained in the National Credit Act 34 of 2005 as amended, and the recently introduced debt intervention in terms of the National Credit Amendment Act 7 of 2019, which is yet to be successfully utilised. In contrast to the South African position, in England, the Insolvency Act 1986 as amended, provides customised procedures for different debtors to deal with their debts. The English insolvency system provides for bankruptcy and three different formal statutory alternative debt relief procedures, in the form of Individual Voluntary Arrangements (IVAs), Debt Relief Orders (DROs), and administration orders when one has a Country Court Judgement (CCJ) against their debt. This paper seeks to provide a comparative overview of some selected laws dealing with access to consumer debt relief for low-income earners in South Africa and England. This follows the fact that most low-income earners are over-indebted since they rely on the use of credit for survival and to attain most of their basic needs both in South Africa and England. Owing to this, debt relief measures have become increasingly important in a modern credit-driven society given the negative socio-economic effects of the COVID-19 pandemic across the globe. To this end, the paper undertakes to provide a comparative overview of selected aspects of the regulation of debt relief measures in South Africa and England. This is done to draw some lessons from England for possible adoption in South Africa to enhance and streamline the access requirements to debt relief measures to enable seamless access to debt in line with the World Bank guidelines for debt relief measures which require that insolvency laws must provide quick, open and effective debt relief for natural person debtors.

14:00 pm – 15: pm: Human Rights, ESG and Insolvency

Chair: Prof. Jill MARSHALL (Royal Holloway, University of London)

- Jen LL GANT (University of Derby): *Using Vulnerability and Relative Resilience to Optimise Fairness in Insolvency and Restructuring: A Human Perspective*

- Adi MARCOVICH GROSS (Wharton, University of Pennsylvania): *The ESG End Game: Bankruptcy's Externalization Problem*
- Christoph HENKEL (Drake University Law School) and Lidija SIMUNOVIC (University of Osijek): *Applying the ESG Double Materiality Principle and ESG Ratings to Cross-Border Insurance Recovery*

Jen LL GANT (University of Derby): *Using Vulnerability and Relative Resilience to Optimise Fairness in Insolvency and Restructuring: A Human Perspective*

Humans have an unending ability to create their own reality and then implement beliefs around that reality that can eventually become unmoveable institutions which eventually become the core of our social beings. Institutions of government, the power and enforcement of law, the legal personality of companies, even the characteristics of family and gender exist in their current state and hold power because we as humans allow them to and continue to place our faith in these human-made institutions. These institutions were created to serve humankind, but it seems that somewhere along the way the majority of humans have forgotten that, allowing these human-made institutions, such as the company, to hold power and control in many cases to the ultimate detriment of humanity as a whole.

Looking at this in the microcosm of insolvency and restructuring, if we were to place the human at the centre of the aims and purposes of insolvency and restructuring, a small step could be taken to recalibrate how we optimise fairness in the operation of our institutions. One way to approach this optimisation is to consider the vulnerability and relative resilience of the various stakeholders affected by a corporation's process of resolving financial distress. Martha Fineman introduced Vulnerability Theory primarily as a means of exploring how we deal with equality and discrimination, broadly speaking, but this theoretical approach also provides a means whereby we can assess the human element – and the human weakness – within the corporate sphere, and perhaps ensure that eventually our approach to resolving financial distress can be such that environmental claims, tortious claims due to damage inflicted by the company, and the socio-economic aspects of employment in terms of human capital can take a higher precedence due to their involuntary and non-adjusting nature as stakeholders. This paper intends to explore how we could adjust our fundamental perspectives back to a focus on the purpose of our foundational (hypothetical) social contract and recommend a redefining of the underpinning theories of insolvency and restructuring law to eventually place the human squarely at its centre, where it should be.

Adi MARCOVICH GROSS (Wharton, University of Pennsylvania): *The ESG End Game: Bankruptcy's Externalization Problem*

This Article explores the corporate shift towards Environmental, Social, and Governance (ESG) goals, investigating how bankruptcy law's strategic use allows corporations to evade liabilities, sidestep legislation, and block enforcement, thereby undermining long-term ESG investments. It uncovers bankruptcy's externalization problem and shows how

corporations use the tools of bankruptcy moratorium, discharge, priorities, and abandonment to escape liability or minimize it. This maneuver shields them from legal consequences and undermines their incentive to invest in long-term ESG goals. The Article assesses diverse applications and impacts of bankruptcy's externalization problem, in cases involving environmental liabilities, sexual misconduct, fraud, and consumer protections. The study concludes with policy suggestions, including a move towards personal and criminal liability, equitable judicial theories, and a reassessment of the U.S. Trustee's role to mitigate bankruptcy's externalization problem and enhance corporate social responsibility.

Christoph HENKEL (Drake University Law School) and Lidija SIMUNOVIC (University of Osijek): *Applying the ESG Double Materiality Principle and ESG Ratings to Cross-Border Insurance Recovery*

Since 2017, eleven property and casualty insurance companies that offered homeowners insurance in Florida failed. Five of these companies failed in 2022, and one, United Property & Casualty Insurance, even after a relatively quiet Hurricane season in Florida, was liquidated in 2023. No other U.S. state has seen more insurance companies fail within their jurisdiction in the past thirty years than Florida. Some of the biggest property and casualty insurance companies in the U.S., including State Farm or Farmers Insurance, have also either left Florida or ceased to accept new applications for property insurance in Florida.

All of these insurance failures are directly related to climate risk. Indeed, six of the ten costliest storms in U.S. history have hit the Sunshine State and 21.5 million Floridians live in areas near its two coastlines. Miami, Jacksonville, Tampa, Bradenton, Fort Myers, and Naples are six of the top fifteen biggest U.S. metropolitan areas located in Florida and also located in storm surge areas with particularly high danger for property damage. Three of the six – Bradenton, Fort Meyers, and Naples – were directly hit in 2022 when Hurricane Ian, a category 4 storm, devastated the West Coast of Florida.

While Florida had a relatively quiet year, across the globe the weather of the summer of 2023 was the most extreme yet. The deadliest U.S. wildfires in more than a century scorched Lahaina, Hawaii. In Libya, a devastating flood destroyed more than a quarter of the city of Derna. Extreme heat struck Europe, breaking temperature records. Canada has seen record wildfire emissions in 2023, which affected millions of people in Canada and the United States, and New York briefly became home to the worst air pollution in the world. In the U.S., Phoenix, Arizona recorded 31 consecutive days above 110 degrees Fahrenheit (43.3°C). And, Xinjiang, China reached 126°F (52.2°C), the hottest temperature the country has ever recorded. But not enough, ocean temperatures also broke records, NOAA estimating that more than 40 percent of the world's oceans are experiencing marine heat waves, significantly increasing the strength and number of hurricanes and cyclones across the world.

As climate change triggers these natural disasters, and as they become more frequent and severe, businesses and individual households attempt to hedge their natural disaster risk with insurance companies. But as important financial institutions, insurance companies' exposure to climate risk may threaten broader financial stability in the U.S. and across the

globe. Climate risk that can impact insurance and other financial institutions is generally categorized into physical risk and transition risk. Physical risk relates to potential damage caused by extreme weather events, such as the Maui wildfires. And transition risk arises "from policy, technology, and preference changes towards less carbon-intensive economies." Insurance companies that invest or are forced to invest heavily in fossil fuel companies may be unable to unload their holdings as economies shift towards net-zero and renewable energy sources. Both of these risk categories may therefore directly result in systemic undercapitalization in the insurance industry. We have all witnessed the impact of negative externalities from undercapitalization in the banking sector during the Great Recession and over the next few years may experience similar results in the insurance industry related to climate risks unless corrective steps are taken.

Similar to the European Union, in the United States, insurance recovery and resolution is not harmonized and regulated by the states or member states. Insurance companies are not eligible to file for bankruptcy under the U.S. Bankruptcy Code, and the EU Recast Regulation does not apply to insurance companies. Under Title IV of the Solvency II Directive, the decision to reorganize or wind up an insurance company is made by the relevant authorities of EU Member States where the insurance company is registered.

Yet, unlike the United State, in 2021, the European Commission, has introduced a "review package" of the Solvency II directive with the goal of ensuring that shareholders and creditors of insurance companies "pay their share of the cost associated with a failure [of an insurance company]." Among others, the Commission proposal focuses on "comprehensive and effective arrangements to prepare for and deal with (near) failures or (re)insurers at national level," and to require "cooperation arrangements to tackle cross-border (re)insurance failures." The Commission proposal envisions that normal insolvency proceedings may remain an alternative path, and that insurers will be required to formulate pre-emptive recovery plans to facilitate prompt remedial action and ensure that they are prepared if problems arise. And, maybe most interesting, the Commission is currently also reassessing the need to align EU-wide insurance guarantee schemes as last-resort safety nets.

Under the new EU Corporate Sustainability Reporting Directive (CSRD) insurance companies must also include sustainability reporting in their management report which must be published together with the companies' financial statements and corporate governance statement in their annual reports, and which must be based on the double materiality principle. As a result, insurers must not only report their impact on people and the environment but also outline possible effects of sustainability on their cash flows, development, and performance that may be relevant to shareholders, lenders, and other stakeholders. The reporting requirements of the CSRD thus may force insurers to consider whether any relevant sustainability factors may impact their financial statements, which directly implicate physical and transition risk factors. For example, transition risk triggered by climate change may impact asset valuation. On the other hand, physical risk factors may directly impact the valuation of insurance liabilities.

None of the described steps that are currently considered or are already implemented in the European Union are discussed in the United States as they relate to or are focused on insurance companies. This paper compares the different approaches taken in the EU and

the United States and proposes that based on the double materiality principle, ESG ratings of insurance companies should be established in order to provide better regulatory oversight, formulate more efficient pre-emptive recovery plans in domestic and cross border insurance undertakings, and inform consumers about the viability of their casualty and property insurance. In addition, ESG ratings should directly impact the level of contributions raised from the insurance industry to establish or maintain insurance guarantee schemes as last-resort protection of policyholders at the state or member state level if insurance companies fail. Yet, it is also important to note that ESG ratings need to avoid problems seen in the credit rating industry during the Great Recession and should adhere to the IOSCO definition for ESG ratings, which highlights the importance of regulatory oversight of both ESG ratings and data product providers.

15:00 pm – 15:15 pm: Coffee Break

15:15 pm – 16:15 pm: Creditors' Interests in Insolvency

Chair: Prof. Irit MEVORACH (University of Warwick)

- Adrian WALTERS (Chicago-Kent Law School) and Sarah PATERSON (London School of Economics and Political Science): *The Insolvency Silo Effect and Unexpired Leases*
- Jassmine GIRGIS (University of Calgary) and Sulette LOMBARD (University of South Australia): *Insolvent Litigation Funding and Protection of Creditors' Interests – Comparative Notes from an Australian/Canadian Perspective*
- Ana Elisa LAQUIMIA (University of São Paulo): *When Remedies Make you Sick: Side Effects from Creditors' Remedies introduced in the Brazilian Bankruptcy Law Reform*

Adrian WALTERS (Chicago-Kent Law School) and Sarah PATERSON (London School of Economics and Political Science): *The Insolvency Silo Effect and Unexpired Leases*

In her 2015 book, *The Silo Effect*, the financial journalist Gillian Tett set out to investigate how silos arise in organisations and what, if anything, 'we can do to master our silos, before these silos master us'.[2] Tett describes what she calls 'the silo effect' as the fragmentation of modern life in terms of how people organise themselves, interact with each other, and even imagine the world.[3] This silo effect is clearly visible in the way that law is developed, practised, taught, and applied in the UK and the US. Federal government in the US and government departments and executive agencies in the UK are increasingly specialist. Lawyers working in large law firms in the UK and the US are increasingly specialist. Academics increasingly teach and research in narrower and narrower fields. And the judiciary responds to this specialisation by becoming increasingly specialist itself. Nowhere is this more visible than in corporate insolvency law,[4] where a specialist bench

[2] Gillian Tett, *The Silo Effect: Why Every Organisation Needs to Disrupt Itself to Survive* (Abacus 2015) xi.
[3] Ibid., x.
[4] We have chosen to use British common law parlance. References to 'corporate insolvency law', 'formal insolvency proceedings', and 'insolvency' should be taken to include restructuring undertaken pursuant to formal proceedings

oversees corporate reorganization cases in the US; large corporate restructuring cases are channelled to judges with relevant experience in the UK; all major law firms have an identifiable corporate restructuring team; a relatively small and closely networked group of academics specialises in the field; and the Insolvency Service, an Executive Agency of the Department for Business and Trade, takes the lead on insolvency matters in the UK while the National Bankruptcy Conference advises Congress on bankruptcy legislation in the US.

There are, of course, huge benefits that come with this specialisation in increasingly complex modern markets. However, there are dangers too. These dangers are heightened in a formal insolvency context because while, as insolvency lawyers, we take for granted that we must pay some regard to the impact that formal insolvency proceedings have on the world outside insolvency, precisely how much regard we should have to the impact of insolvency law on rights and liabilities that arise under non-insolvency law is a matter of considerable debate.[5] Scholars viewing corporate insolvency law through an economic lens typically consider that insolvency rules should be developed with careful attention to the incentive effects they will have for healthy firms. What we might call 'progressive', or 'traditional', scholars are typically less concerned with incentive effects and more concerned with ameliorating the social costs of corporate failure. Our premise is that all insolvency scholars and policy makers of whatever stripe should pay at least some regard to insolvency law's incentive effects. We therefore take these effects seriously.

With incentive effects in mind, the core claim of our paper is that the treatment of unexpired leases in corporate insolvency has developed in what we call, borrowing from Tett, an insolvency silo, with scarcely any regard for the increasingly dramatic differences between the way leases are treated inside and outside of formal insolvency proceedings. We are concerned about this for several reasons. First, we are concerned that firms will be forced to resort to formal insolvency solely or largely to deal with an overrented estate, imposing both cost and risk on the business when, if appropriate changes could be made to property law instead, the leases might more easily be renegotiated outside of insolvency. Secondly, we are concerned that the treatment of unexpired leases by corporate insolvency law will have unintended consequences on the rental market outside insolvency, leading the market rather than reflecting it. And finally, we are concerned that the treatment of unexpired leases by corporate insolvency law increasingly raises foundational questions about the legal nature of a lease that are not being addressed by, or perhaps even visible to property lawyers, academics, and policy makers who are best equipped to tackle them. These are not niche concerns. How to address unprofitable leases has become the most significant problem in many sectors of the US and UK economies, from retail to casual dining to the hospitality sector, a problem further exacerbated by the COVID-19 pandemic.[6]

---

under the UK Insolvency Act 1986 or the UK Companies Act 2006 and to encompass what Americans would refer to as bankruptcy or reorganization law, and formal proceedings available under the US Bankruptcy Code.

[5] For a particularly good discussion, see Douglas G Baird, 'Bankruptcy's Uncontested Axioms' (1998) 108 Yale LJ 573, 578.

[6] As exemplified by the recent Chapter 11 filing of WeWork, the office and coworking space provider. See 'WeWork Files for Bankruptcy Amid Glut of Empty Offices', *The New York Times*, November 6, 2023.

Our paper starts by comparing the treatment of unexpired leases in UK and US corporate insolvency law with their treatment outside formal proceedings in each legal system. This enables us to draw out several crucial differences. First, we focus on the ability to create a functional non-consensual surrender inside formal insolvency proceedings and the implications for this outside insolvency. Secondly, we focus on the distribution of bargaining power between the firm and the landlord inside and outside insolvency. Thirdly, we focus on the cost of a functional surrender inside insolvency and the likely damages claim where surrender is permitted outside insolvency. Finally, we investigate the mechanisms inside and outside insolvency that promote renegotiation. This reveals some crucial differences that we map onto our concerns: firms opting for formal insolvency proceedings solely to address their unexpired leases; the potential effect of the formal insolvency process on the rental market; and the foundational questions about the legal nature of a lease that we alluded to earlier. Our analysis enables us to establish a rough agenda of the areas that property lawyers, on the one hand, and insolvency lawyers, on the other, must discuss across their domain-specific silos within national legal systems and – that lawyers in an increasingly cross-border business world must discuss inter-jurisdictionally across the more widely-configured system-specific silos occupied by lawyers trained and licensed in their own legal systems.

We conclude with an attempt to bridge the gap between silos (an exercise in what Tett calls 'silo busting').[7] Our prescription is a 'meta' law overview of the unexpired lease issue. It is not a call for property professionals to move into the corporate insolvency professionals' domain-specific silo or vice versa or, indeed, for the boundaries between system-specific silos to be collapsed, which in any event is not feasible. It is, however, a call for our silos not to be, as Tett puts it, 'excessively rigid' or 'dangerously entrenched'.[8] Instead, there must be a conversation between them to inform debate about law reform in each.

Jassmine GIRGIS (University of Calgary) and Sulette LOMBARD (University of South Australia): *Insolvent Litigation Funding and Protection of Creditors' Interests – Comparative Notes from an Australian/Canadian Perspective*

Commercial litigation funding in insolvency has proven to be a useful mechanism across many jurisdictions to enable insolvency practitioners to pursue actions that may not otherwise have been possible due to lack of funding. It has been used with much success in insolvency proceedings in Australia for decades, and its use in insolvency is gradually taking off in Canada as well after the Supreme Court of Canada officially gave the green light to insolvent litigation funding in the case of *9354-9186 Quebec inc v Callidus Capital Corp (Bluberi)*, 2020 SCC 10.

Litigation funding offers many benefits, including increased access to justice. On the other side, however, there are concerns about the extent to which the (often unregulated) use of litigation funding could negatively impact the interests of litigants. In particular, without regulation, there is concern in an insolvency context that the goals of litigation funders

[7] Tett (n 2) 304.
[8] Ibid., 306.

can overshadow and potentially harm the interests of creditors. These concerns are often highlighted in the context of funded class actions and have given rise to attempts to regulate use of litigation funding and litigation funders in some jurisdictions.

In this comparative paper, the authors will explore whether creditors are being adequately protected in the process of insolvent litigation funding in each country or whether there should be regulation of funding agreements and/or funders. The paper will assess how Canada and Australia have approached insolvent litigation funding, and whether creditors, in particular unsecured creditors, are adequately protected.

To answer this question, the authors will: (1) consider the goals of restructuring legislation in Canada and Australia; (2) explore the goals of the parties involved in the restructuring process, including the debtor, the creditors, the monitor or trustee, and the litigation funder; (3) document how litigation funding agreements have been handled under the legislation in Canada and in Australia. In Canada, these agreements have been characterized as "interim financing" during restructuring, and not a plan of arrangement. The effect of this characterization is that supervising judges have discretion to approve or deny the applications and creditors do not get to vote on the financing. In Australia, litigation funding agreements are often captured by statutory provisions that mandate either court approval or creditor approval; (4) analyse select cases from Canada and Australia to determine how courts decide whether or not to grant the request for litigation funding. The authors will assess whether this process has created a list of factors courts always consider or whether there is little predictability in what courts will consider; (4) consider the risk of exploitation for creditors when they are unable to vote on these agreements; and (5) consider the cost of regulation and whether there is harm material enough to merit its risk.

This paper therefore investigates the existing protection afforded to creditor interests under current insolvency law principles in so far as the use of insolvent litigation funding is concerned, ultimately to determine whether there is a need for additional regulation of commercial litigation funding in insolvency.

Ana Elisa LAQUIMIA (University of São Paulo): *When Remedies Make you Sick: Side Effects from Creditors' Remedies introduced in the Brazilian Bankruptcy Law Reform*

The 2021 reform of the Brazilian Bankruptcy Law no. 11/101/2005 ("BBL") aimed to introduce a number of remedies to protect creditors' interests within court-supervised voluntary restructuring proceedings (particularly in the Brazilian "Judicial Reorganization" or "RJ"). Several of those remedies were inspired by the U.S. Bankruptcy Law, and despite of the Legislators' intentions to apply those remedies in preventing acts that would be detrimental to creditors' interests, the differences between Brazil's and U.S.' regimes have the ability to change the expected outcome.

One of the main remedies introduced by the BBL reform was granting creditors the ability to propose an alternative plan in RJ proceedings. Such right was created as an opposition to the ordinary proceeding carried out in RJs, in which the reorganization plan can only be

proposed by the debtor itself, as a remedy to long lasting RJs and debtors that only presented unfair plans.

However, the application of this U.S. inspired remedy has to consider the specific characteristics of the Brazilian market.

In Brazil, most companies have concentrated ownership. This means that the RJ debtor can often be the shareholder itself, acting by means of its appointed management. Also, equity holders are not considered a class of claims required to approve a plan in any Judicial Reorganization. On the contrary: shareholders, even if also holders of unsecured, secured or any other claims against the debtor, are not entitled to vote in restructuring proceedings.

The Brazilian regime was initially created within the premise that the plan, proposed by the debtor, would be evaluated and approved in the creditors' meeting, by the relevant majorities of creditors divided by class of claims. Parties would negotiate the best possible outcome for the bankruptcy, and the decision of whether the plan was fair or reasonable would be taken by creditors, exclusively – without the interference of a judge with respect to the economic merits of the plan. This is why the Brazilian insolvency regime does not provide for absolute priority rules (or even relative priority rules), nor for the 'best interest of creditors' test' as creditor protection mechanisms in RKs.

Within this context, several challenges arise with respect to the effectiveness of this new remedy introduced by the BBL to creditors that intend to present an alternative plan.

First, because the BBL does not consider shareholders as classes of impaired claims entitled to vote a plan, the alternative creditor plan could exist in a scenario in which the creditor proposes the plan and the same creditor approves this same plan. In a voluntary proceeding centred on the ability to create the best conditions for a good faith negotiation to unravel, the application of this remedy might create a risk to the survival of the proceeding.

Second, the absence of the absolute priority rule, or the best interest of creditors test may incentive unfair payment proposals presented by creditors, leaving room for a group of creditors to direct a restructuring to benefit itself against the recovery of other similarly situated creditors.

Finally, such remedy might carry "Lender Liability" as a major side effect, even if the alternative plan if proposed in good-faith. It is well known in the U.S. experience that a creditor that is able to exert relevant influence over a debtor might become liable for damages caused to the debtor or to debtors' stakeholders. This is known as "lender liability".

Brazil is under a civil law regime, and although the "lender liability" theory is not written in any federal law, it can well be construed by several provisions of the Brazilian Civil Code, Brazilian Corporations Law and the BBL. And having the ability to propose and approve a plan, alone, that can fail and lead the company to ruin, might fit exactly in this claim, in broader ways than originally anticipated.

Against this backdrop, this essay aims to (a) draw attention to the fact that certain remedies to improve creditors' recovery can lose effectiveness if used abroad without the

proper adaptation – or worse, bring side effects so harmful to creditors (and also debtors) that its application becomes impossible; and (b) provide guidelines and interpretations parameter to allow for a safer use of imported remedies in bankruptcy proceedings.

16:15 pm – 17:30 pm: MSMEs in Financial Distress (Round Table)

Moderator: Dr. Leonardo VP de OLIVEIRA (Royal Holloway, University of London)

- Jason HARRIS (University of Sydney): *One Size Does Not Fit All: Small Business Restructuring Reforms in Australia, India and the United States*
- Princess NCUBE (University of Pretoria): *Small and Medium Enterprises (SMEs) and Insolvency: A Study on Challenges and Solutions in South Africa*
- Giuliana SCOGNAMIGLIO (University of Roma Sapienza) and Filippo VIOLA (University of Roma Sapienza): *Small and Medium-sized Firms' Restructuring Procedures: A Comparative Perspective among EU Legal Systems*
- Oriana CASASOLA (University of Leeds): *Addressing Farming Enterprises Insolvency in the UK*

Jason HARRIS (University of Sydney): *One Size Does Not Fit All: Small Business Restructuring Reforms in Australia, India and the United States*

This paper evaluates recent reforms in several common law countries that introduced specific MSME restructuring regimes. The paper compares Australia with India and the United States and provides a critique of the effectiveness of each regime and considers potential future reforms. The paper draws on empirical research and law reform reports and inquiries from each of the jurisdictions to highlight common themes as well as key differences in approaches and tools to facilitate MSME restructuring.

Princess NCUBE (University of Pretoria): *Small and Medium Enterprises (SMEs) and Insolvency: A Study on Challenges and Solutions in South Africa*

As Small and Medium Enterprises (SMEs) play a pivotal role in the economic landscape of South Africa, understanding the intricacies of their insolvency becomes imperative for sustainable economic development. This paper analyses the challenges faced by SMEs in the context of insolvency and explores potential solutions within the framework of South African laws and regulations. The current legal landscape surrounding SME insolvency in South Africa is primarily governed by the Companies Act of 2008 and the Insolvency Act of 1936. These statutes provide the foundation for the initiation and resolution of insolvency proceedings. However, the unique characteristics of SMEs, including limited resources and distinct financial structures, pose specific challenges in the application of these laws. The problem statement revolves around the inadequacies of existing legal frameworks to address the nuanced challenges encountered by SMEs facing insolvency. Factors such as delayed access to information, cumbersome legal procedures, and a lack of tailored mechanisms for SME rehabilitation contribute to the complexity of the issue. Moreover, the social and economic repercussions on the entrepreneurs, employees, and the broader community highlight the need for a nuanced approach to SME insolvency.

Drawing on international best practices, the UK serves as a notable example and comparative study with a well-established legal framework for insolvency, offering specific provisions tailored to the needs of SMEs. The Insolvency Act of 1986 in the UK provides various mechanisms for rescue and restructuring, emphasizing the importance of a nuanced approach to address the specific challenges faced by smaller enterprises. Through an exploration of a comparative study being the UK and a meticulous review of South African insolvency laws, the paper seeks to propose targeted solutions that align with the unique needs of SMEs. Potential amendments to existing legislation, the introduction of specialised insolvency frameworks, and the role of support mechanisms such as business rescue initiatives will be critically examined to formulate a comprehensive set of recommendations. The anticipated outcomes of this study include a deeper understanding of the obstacles faced by SMEs in insolvency situations and the formulation of pragmatic, context-specific solutions. Bridging the gap between legal theory and the practical challenges faced by SMEs, this research aims to contribute to the ongoing discourse on insolvency in South Africa, fostering a more resilient and supportive environment for the backbone of the nation's economy.

Giuliana SCOGNAMIGLIO (University of Roma Sapienza) and Filippo VIOLA (University of Roma Sapienza): *Small and Medium-sized Firms' Restructuring Procedures: A Comparative Perspective among EU Legal Systems*

Directive (EU) 2019/1023 (hereinafter the "directive") proved to be aware of the special features and problems of restructuring procedures that involve small and medium-sized enterprises (SMEs).

First, it acknowledged that SMEs may often have to bear restructuring costs that are disproportionately higher than those faced by larger enterprises and that, especially when facing financial difficulties, they often do not have the necessary resources to cope with them. This might lead SMEs to liquidation, even if they are viable and have a prospect of recovery.

With special regard to the objective to contribute to the proper functioning of the internal market, the directive also acknowledged that differences between member States in relation to restructuring procedures might translate into additional costs for firms with establishments, creditors or assets in more than one member State and that SMEs do not, for the most part, have the resources needed to assess risks related to cross-border activities.

The directive also seemed to be aware of the different structures that companies can present in terms of balances and relations between the various powers. In this perspective and in a minimum harmonization framework, it allowed member States to shape certain rules differently depending on, among others, the firm's size.

In particular, it sometimes allowed member States to opt out, with reference to SMEs, from a general default rule set forth for all firms; for example, member States could exempt SMEs from the obligation to treat affected parties in separate classes, on account of their relatively simple capital structure. Sometimes, instead, it set minimum rules that were mandatory for SMEs and that could be waived with reference to all other companies;

thus, for example, if a member State authorized creditors to request the opening of restructuring procedures, it would have been mandatory in SMEs to obtain the debtor's consent.

The directive then specifically recognized and emphasized the special nature of SMEs shareholders, that are often able to provide non-monetary restructuring assistance by drawing on, for example, their experience, reputation or business contacts.

In this regard, it provided a flexible concept of the principle of "prohibition of shareholder obstructive behaviors". Indeed, it allowed member States to adapt what it means to unreasonably prevent or create obstacles to the adoption of a restructuring plan to take into account, *inter alia*, whether the debtor is a SME or a large firm and the type of shareholders.

Finally, with regard to the firm's value distribution, the directive allowed for a choice between the APR and the EU RPR and, in case of choosing for the APR, it allowed to provide for specific exceptions if necessary to achieve the objectives of the plan. This option could have served, among others, to distinguish the distributional rule applicable to SMEs from that applicable to larger firms.

In light of this background, the paper first discusses the principles of economic analysis of law underlying insolvency and restructuring law, that serve to understand the dynamics prevalent in SMEs.

It then follows, also taking into account the US reform of Chapter 11 with the introduction of Subchapter V in order to facilitate the restructuring of SMEs, a comparative analysis of the choices made on this issue by some member States when implementing the directive.

In particular, the Italian legal system has embraced a "one-size-fits-all" logic, as it has laid down a single set of rules applicable, except for minor variations, to all companies, regardless of their size.

This approach, which has been criticized by several scholars, turns out to be different from that embraced by other member States. Indeed, with reference to the position of shareholders, other jurisdictions have chosen, for example, to provide a different set of rules depending on the size of the company, both on the administrative/organizational and on the distributive side.

In this regard, the tendency has emerged to strengthen the decision-making powers of shareholders of SMEs compared to larger firms (the French and Spanish legal systems, for example, have moved in this direction), as well as that of establishing more favorable distributive rules for shareholders, allowing them to remain "in the picture", in all the small firms (Spanish law) or if their participation is essential for the success of the restructuring (German, Dutch and French laws).

In light of the above, the paper aims to question what is the best model for regulating SMEs' restructuring, exploring the implications of the choice not to draw significant distinctions between SMEs and larger firms as well as of the choice to distinguish on account of the firms' size.

Oriana CASASOLA (University of Leeds): *Addressing Farming Enterprises Insolvency in the UK*

Farming is an essential economic activity at the base of the supply chain that fulfils the basic human need for food. At the same time, farming activity is exposed to specific economic, atmospheric, and biological risks that expose this pivotal sector to a substantial risk of insolvency. The relevance of the farming sector has been recognised in other countries such as the United States of America which have a particular insolvency procedure dedicated to them. In other countries, such as Italy and Poland, farmers enjoy an exclusion from major insolvency proceedings. Instead, farmers do not benefit from special treatment under the English Insolvency Act 1986.

Drawing from interviews with stakeholders in the field of farmers' insolvency, this paper explores the challenges that farmers face in accessing and succeeding within the current English insolvency regime. Additionally, learning from a comparison with the U.S.A. and Australia, this paper will suggest routes of reform to the current English approach to farmers' insolvency.

The paper is organised into three sections. First, the paper provides an overview of the farming sector in England and Wales and the options available to farmers in financial distress within the English insolvency regime. Second, the paper discusses the challenges emerging in the insolvency practice of farming enterprises. Finally, the paper critically discusses the American and Australian approaches to farmers' insolvency, and it addresses possible routes of reform.

17:30 pm – 17:45 pm: Closing remarks

- Dr. Eugenio VACCARI (Royal Holloway, University of London)

17:45 pm – 19:00 pm: Reception Drinks

- North Quadrangle, Founder's Building
- (in case of adverse weather conditions) Glass Gallery or Victorian Gallery, Founder's Building

19:00 pm – 19:30 pm: Guest lecture by Emer. Prof. Dr. Bob WESSELS (University of Leiden, CERIL and III) [online]

- *Going Broke in Rembrandt's Days*
- Introduction: Prof. Adrian WALTERS (Chicago-Kent Law School)

19:30 pm – 23:00 pm: Banquet Dinner

- Picture Gallery, Founder's Building