Cross-Border Insolvency Law by Sandeep Gopalan and Michael Guihot

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Book Reviews

Cross-Border Insolvency Law by Sandeep Gopalan and Michael Guihot (LexisNexis, 2016) 423 pp, ISBN 978-0-409-34029-7.

Improved interconnectivity and shrinking of national borders as a barrier to trade and investment has increased the number or transnational insolvencies and importance of insolvency law, yet cross-border insolvency law remains an emerging field. In *Cross-Border Insolvency Law*,[1] the authors deliver an excellent and well-written resource detailing the Australian approach to cross-border insolvency, while 'providing an analysis of the legal rules and their underlying theoretical contructs from a comparative perspective'. While the primary focus is the UNCITRAL Model Law, which was adopted by Australia in 2008,[2] the seven chapters provide a wealth of information that is essential reading for practitioners and scholars in the fields of insolvency and comparative law. After the theoretical framework, there is a deeper discussion of the Model Law's application in Australia informed by the authors' years of research in the field. While the emphasis is on Australian law, building upon previous bodies of work that focus more on domestic insolvency,[3] the book also surveys important developments in other common law nations. The authors take a holistic approach addressing not only the Model Law and theoretical aspects of cross-border insolvency, but the common law approaches to transnational insolvency and problems not solved by the Model Law.

The book is divided into seven chapters, each examining a unique aspect of insolvency law. The first two chapters assess the theoretical underpinnings and jurisdictional issues related to cross-border cases. Then the authors proceed to address comity and the common law before an in depth look at the application of the Model Law. Chapters 5 and 6 cover contemporary problems unsolved by the Model Law, addressing enterprise groups and issues related to recognition and enforcement respectively. Then, the final chapter offers a richly informed comparative perspective on policy issues in the United States and European Union. The comprehensive approach makes the book an indispensable reference point for those seeking an understanding of the current state of transnational insolvency.

Significant contributions to insolvency research

The authors provide a wealth of information in each of the expertly written chapters and, in addition to new research, provide a deep comparative analysis. While the text addresses a multitude of issues, two significant and interrelated themes include approaches to insolvent enterprise groups and establishing judicial protocols for cross-border judicial cooperation. The issues of how to treat enterprise groups and how judges and administrators

1 Sandeep Gopalan and Michael Guihot, *Cross-Border Insolvency Law* (LexisNexis, 2016).
2 *Cross-Border Insolvency Act 2008* (Cth) ('*CBI Act*').
3 See, eg, Chris Symes and John Dunns, *Australian Insolvency Law* (LexisNexis, 2nd ed, 2012).

should communicate in order to coordinate simultaneous proceedings are two of the biggest problems in cross-border insolvency. The authors recognise the importance of these issues and dedicate a significant portion of the book to discussing challenges to the existing cross-border insolvency regime. The chapters provide for a rich discussion of the existing legal frameworks across multiple jurisdictions and an examination of theoretical foundations regarding potential solutions to these critical problems.

Enterprise groups

Numerous theories exist regarding the purposes and approaches to cross-border insolvency,[4] however, 'there is, as a matter of logic, a commonality in the aims of insolvency laws around the world sufficient to be able to derive a more general normative theory — that is, that insolvency law must be efficient'.[5] With an increasing number of conglomerations, dealing with the insolvency of enterprise groups poses a serious challenge that places efficiency at odds with protecting expected outcomes. As the authors point out, treating the affiliated companies as one entity decreases administration costs thereby permitting a larger distribution to creditors. However, it would effectively establish a new veil-piercing doctrine by ignoring the separate legal identity of each company, leading the authors to discuss the veil-piercing doctrine as it applies to Australia. In addition to veil-piercing, the book examines other unique foreign approaches including relying upon the doctrine of unjust enrichment.[6]

In the enterprise group analysis, the authors offered a detailed look at the current approaches in Australia, where approximately 89 per cent of the top 500 listed companies have formed corporate groups,[7] making the book not only timely but of substantial importance to the field. The current statutory regime largely protects the independent legal identity of corporations. However, the *Corporations Act 2001* (Cth) was amended to make holding companies liable for an insolvent subsidiary if the holding company was, or should have been, aware the subsidiary was insolvent while trading.[8] In addition to this statutory change, the book addresses pooling, which is also permitted under the *Corporations Act* for schemes or arrangement and voluntary winding up.[9] However, the unsecured creditors must agree to the pooling determination, making the current statutory provision unsuitable to the administration of large transnational enterprise groups where many creditors would likely object.

The authors point out that although 'some progress has been made in global efforts to resolve cross-border insolvencies of single entities, such as through

4 Gopalan and Guihot, above n 1, ch 1, entitled 'Principles Underpinning International Insolvency Law', provides an overview of cross-border insolvency theories and the associated literature.

5 Ibid 11 [1.25].

6 Ibid 140 [5.18]; *Re Nortel Networks Corporation* (2015) 27 CBR (6th) 175 (Ontario Supreme Court.

7 Ibid 145; Ian M Ramsay and Geof P Stapledon, 'Corporate Groups in Australia' (2001) 29 *Australian Business Law Review* 7.

8 Ibid 155; *Companies Act 2001* (Cth) s 588V.

9 Ibid pts 5.1, 5.5.

the Model Law, discussions about global approaches to the cross-border insolvency of corporate groups are still in their infancy'. Therefore, the detailed analysis of the workability of approaches in Australia and other jurisdictions contributed by this book provide a vital role, making the book quintessential reading for an understanding of the current state of the field.

Judicial protocols

The successful cooperation in Lehman Brothers brought attention to the Lehman Protocol. However, the system was voluntary and, as the authors note, it is important to establish clear guidelines including guidelines for addressing liquation proceedings. Restructuring works if value is created, thereby incentivising creditors to cooperate in order to reduce transaction costs. However, liquidation is a zero-sum game. The importance of establishing protocols to facilitate cooperation between courts and administrators is not new, having been recognised by academics[10] and judges.[11] However, it is commonly overlooked in books addressing cross-border insolvency. By including protocols as part of the larger enterprise discussions, the authors demonstrate their knowledge of the complex interrelationship between the issues which informed the book's discussion of the topics.

Conclusion

This text is an excellent addition to the existing literature on cross-border insolvency. Unlike other works that focus primarily on UK and US law, this book fills a much needed gap in the current academic literature by addressing the Australian approach to transnational insolvency and addressing recent major foreign cases, such as *Nextel*. However, the authors still provide a detailed discussion of the Model Law, issues related to enterprise groups, and recognition and enforcement of foreign judgments.

The book provides as a comprehensive review of the current state of cross-border insolvency. Therefore, each section provides at least the basic foundation necessarily to recognise the general issues courts face with regards to cross-border cases and their theoretical underpinnings, updating the reader on important changes, comparative differences and, at times, recommending how laws should be interpreted to best facilitate cross-border cases.[12] The comprehensive nature makes it a valuable resource for students seeking an understanding of cross-border insolvency law while the discussion of recent developments and comparative approaches is invaluable to practitioners and academics.

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10 Jay L Westbrook, 'International Judicial Negotiation' (2003) 38 *Texas International Law Review* 567.

11 Kannan Ramesh, 'The Cross-Border Project — a 'Dual-Track' Approach (Speech delivered at the INSOL International Group of 36 Meeting, Singapore (2015) <http://www.supremecourt.gov.sg/Data/Editor/Documents/Insol%2036_Speech_khb_upload%20version.pdf>.

12 See, eg, Gopalan and Guihot, above n 1, 263–5.

Cross Border Insolvency Law is a well-written and well-researched book that explores a wide range of transnational insolvency issues, only a few ofwhich could be addressed here, and should find its way to the shelf of anyone interested in cross-border insolvency.

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