

INSOL World – Book Review

Financial Regulation of Banking, Derivatives, Securitisations and Trusts in China

by Mark Hsiao

Carswell, a division of Thomas Reuters Canada Limited, 2009, 257pp

Review by Jeffrey H. Chen, Mayer Brown LLP, Hong Kong, China, PRC

Each of the six chapters in this book is really about a different topic and could have been written as six independent articles. However, all of these chapters would be of interest to those involved in structured finance transactions in China.

Chapters 1 and 2 provide an introduction to regulation of banks in China. Chapter 3 is a description of Basel II. Chapter 4 covers derivatives generally, but contains a helpful summary of the derivatives regulations promulgated by the CBRC in 2004. Chapter 5 is a survey of credit derivatives, credit-linked notes, synthetic CDOs and similar structured credit products. Chapter 6 summarizes the pilot securitization regulations promulgated by the CBRC in 2005 utilizing the trust structure, and then goes on to provide an account of the development of the rules and law on trusts in China.

The main theme of the book is to demonstrate that banks can get regulatory capital relief via various forms of structured finance, including securitization and

derivatives. This is true in many jurisdictions, but of course is more of a wish than reality for China. Still, for those involved in PRC regulatory lobbying, some useful arguments along these lines may be found.

Throughout the book, the author compares various Chinese legal concepts against the background of their English legal counterparts or origins. This was most successfully and insightfully done in Chapter 6 in relation to trusts. The law of trusts evolved in England over hundreds of years, whereas in China the concept is very new. Thus, when comparing trust concepts between England and China, a number of insights can be gained as to the meaning of some rather obscure provisions in the PRC law on trusts, e.g., the trustee's duty of care and fiduciary duties.

The author does not address (or only vaguely alludes to) the effect of the global credit crisis on the PRC financial regulatory environment. This topic would be of great interest to many people. For example, it is generally known that public securitizations are currently on hold at this time, pending further consideration by the PRC State Council as to the effect of the global credit crisis on the Chinese economy. Perhaps the author will publish more on this topic in the near future. 🌐

Bankrupt: Global Lawmaking and Systemic Financial Crisis

By Terence C. Halliday and Bruce G. Carruthers

Stanford University Press, 2009, 505pp

Review by Steven T. Kargman, Kargman Associates, New York, USA

New international instruments embodying new global norms in insolvency are now fairly familiar to those working in the international insolvency field. UNCITRAL's Model Law on Cross-Border Insolvency and Legislative Guide on Insolvency Law, and the World Bank Principles for Effective Creditor Rights and Insolvency Systems, have established new standards for cross-border and domestic insolvency law. The past decade has seen insolvency law reform sweep the globe as many nations have adopted new or updated insolvency statutes and corporate bankruptcy systems.

Until now, there has been no comprehensive explanation of how this burst of global lawmaking came to pass or how this lawmaking developed in the way that it did internationally and across the world in a diverse range of nations. That gap has now been filled with this compelling, important and incisive new empirical study, *Bankrupt: Global Lawmaking and Systemic Financial Crisis*, by two sociologists, Terence C. Halliday and Bruce G. Carruthers.

Bankrupt presents a very thoughtful and insightful analysis of how different international institutions such as the World Bank, UNCITRAL, and IMF each leave their individual imprints on the global lawmaking process, and how their individual impact depends, among other things, on their

comparative expertise, their ability to enforce their conclusions on local actors, and the perception of their legitimacy. They also analyze the important role played by leading nations and professional organizations such as INSOL, the IBA and the ABA.

Based on their research in Indonesia, China and Korea following the Asian Financial Crisis, the authors suggest new and cogent theories as to why national laws and practice often fail to mirror global norms. In so doing, they develop a new conceptual framework for understanding why "law in action" in countries often does not correspond with "law on the books" in these countries—i.e., why there is an "implementation gap." The book argues that it is practitioners who substantially determine whether the global norms will be realized in everyday practice and whether local practice will converge with global aspirations.

Bankrupt will be an indispensable resource for those wanting to understand the fundamental dynamics and processes of global lawmaking in a critically important commercial field such as insolvency law. This new volume, with its valuable lessons from the global lawmaking experience in the wake of the Asian Financial Crisis, has arrived at a very timely moment as countries around the world continue to grapple with the fallout from the current financial crisis.

All INSOL members are eligible to 30% discount on this book when ordering online at <http://www.sup.org/book.cgi?id=9183> using the promotion code: BANK09. The offer is valid until March 15, 2010.