

BOOK

The global meets, and sometimes clashes with, the local: the development of new global norms in insolvency law and the implementation, or not, by nation states

Bankrupt: Global Lawmaking and Systemic Financial Crisis

Terence C Halliday and Bruce G Carruthers
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Over the last decade, if not longer, there has been sweeping insolvency law reform around the globe as many nations have adopted new or updated insolvency statutes and corporate bankruptcy systems. New global norms both for cross-border insolvency and domestic insolvency laws have been established by leading international organisations. The efforts to develop such global norms culminated in the now well-known instruments of the Model Law on Cross-Border Insolvency and the *Legislative Guide on Insolvency Law*, each of which was produced by the United Nations Commission on International Trade Law (UNCITRAL), and the World Bank's *Principles for Effective Creditor Rights and Insolvency Systems*.

How and why did these sweeping international and national reforms come about? And why did the new global norms and new national laws turn out the way they did? Moreover, has there been convergence or divergence between these global norms and national laws and practice? These issues are the focus of a comprehensive, important and incisive empirical study by two sociologists who specialise in the study of law and markets, Terence C Halliday and Bruce G Carruthers, in their new book *Bankrupt: Global Lawmaking and Systemic Financial Crisis*. This book is extremely timely: it provides an extensive examination of global law-making responses to the Asian financial crisis, and now a decade after that crisis policy makers around the world continue to grapple with ways to address the fallout from yet the latest crisis, namely the global financial crisis that engulfed the world economy in late 2008.

To their credit, the authors do not shy away from tackling enormously important subjects. They address the relationship between law, markets and globalisation and, in particular, how the development of law has been racing to catch up with the development of global markets in an era of globalisation. They explore how new global norms are developed and established in an area as complex and fraught with competing interests and agendas as insolvency law. But they also consider the limits of globalisation as it confronts the sometimes harsh realities of implementation at the domestic level. They show why enactment and then implementation of a new insolvency statute at the national level may diverge (and, in some cases, diverge very significantly) from the new global norms despite pressures and persuasion from international institutions to seek greater convergence and so-called 'harmonisation'.

A particular value of the authors' research is that it is based on extensive empirical research. In addition to wide-ranging secondary sources, the book draws heavily on fieldwork. One of the authors was a regular observer at the UNCITRAL insolvency working group sessions and participated extensively in programmes organised by the international organisations that were involved in creating global insolvency norms. Furthermore, the authors indicate that as part of their research they conducted literally hundreds of interviews with key players at both the national and international levels. These interviews yield some very valuable first hand, behind-the-scenes insights into how the process was perceived by those who were intimately involved as participants.

The results of this empirical study offer something for a diverse range of readers. For academics and others focused on globalisation, particularly its prospects and limits, this book provides a framework for evaluating when and how globalisation will produce convergence in commercial law and practice. For policy makers, the book reveals the actual processes of global law making, it shows why global norms developed by UNCITRAL, the World Bank and other international bodies take the form they do, and it demonstrates the limits of powers exercised by international financial institutions. For national policy makers and insolvency practitioners, whether foreign or domestic, who work in local markets around the world, the chapters on Indonesia, Korea and China make for compelling reading on how global norms are translated into national laws and then are implemented, or not, in practice.

The narrative in the book follows a natural progression from the global to the local, and it contains a crucial discussion and analysis of how the global interfaces with the local. It begins with the ways that financial crises such as the Asian Financial

Crisis (or, before that, other global historical events such as the fall of the Berlin Wall and the collapse of communist regimes) spawn global law making efforts, and then proceeds through the efforts of individual countries to implement the newly developed global norms.

As the authors point out with great persuasiveness, it is one thing for international organisations such as UNCITRAL and the World Bank to develop new global norms in response to regional and global developments, or for the International Monetary Fund to try to force the adoption of these norms by countries as part of its financial assistance to countries in financial crisis. Yet it can be quite another thing in practice and reality for countries such as Indonesia, Korea and China to implement – or in many cases actually modify or even frustrate – such global norms. What is decided and agreed upon as global norms and key reform initiatives in Washington (home of the IMF and World Bank) and Vienna (home of UNCITRAL) may end up as something very different when implemented in Jakarta, Seoul or Beijing, not to mention in areas outside of these capital cities.

The authors present a most thoughtful and insightful analysis of how different institutions – both public and non-governmental organisations such as professional organisations – each leave their individual imprint on the global law making process, and how their individual impact depends, among other things, on their comparative expertise, their ability to enforce their conclusions on local players, and the perception of their legitimacy. For instance, they compare the relative strengths and weaknesses of institutions such as the World Bank, the IMF and UNCITRAL as agents of change in global reform efforts, as well as the role of regional institutions including the European Bank for Reconstruction and Development (EBRD) and the Asian Development Bank (ADB) and other international institutions such as the Organization for Economic Cooperation and Development (OECD).

Moreover, the authors also reveal and examine a competitive tension at work in the process of global norm-setting, with different international institutions vying to be the first institution to establish the new global norms for insolvency law and with different leading nations globally or regionally (eg, the US, UK, France, Germany, Australia, etc) as well as various professional associations (eg, INSOL, the IBA, ABA, etc) seeking to promote their own individual vision of what constitutes the proper type of reform. For instance, they discuss the IBA's contribution to the development of the Model Law on Cross-Border Insolvency, particularly through significant earlier IBA initiatives in this area, as well

as the IBA's involvement in the deliberations of UNCITRAL on the Legislative Guide.

Yet the authors also show how some type of consensus on global norms can be achieved out of this mass of different and even sharply divergent viewpoints and approaches. For example, one technique employed by UNCITRAL in drafting the Legislative Guide was to vary the level of specificity of individual recommendations depending on how firm the level of consensus was with respect to a given issue. Therefore, more strongly and widely supported positions were spelt out in greater detail, whereas issues on which there was less of a broad consensus were pitched at a level of more broad-based general principles.

The authors devote a major part of the book to a central puzzle for international organisations and global law makers: Why do national laws and practice often fail to mirror global norms? And, to use the authors' terminology, why does the 'law in action' in countries often not correspond with 'law on the books'? The authors offer a number of sophisticated, subtle, and some would say ground-breaking theories and concepts to answer these questions. In the authors' lexicon, three processes stand out: intermediation, foiling, and recursivity. Each of these influences how wide is what the authors call the 'implementation gap', that is, the gap between global norms and national reforms as well as between national reforms and national practice.

By 'intermediation', the authors focus on intermediaries, whether institutions or individuals, who span both global institutions and individual nation-states, and the ways these intermediaries influence the convergence of national law and practice with global norms. The authors point to the critical role often played by certain insolvency experts who are players at both the national and global levels. These individuals have the credibility and legitimacy to move between the levels and are thus indispensable in translating new global norms into national law and practice. Yet the authors do point out that in practice there is a fairly limited pool of individuals who actually end up performing this vital role.

By 'foiling', the authors refer to the process by which national players can resist the imposition of global norms. Halliday and Carruthers provide a catalogue of methods by which ostensibly weak nations can end up thwarting the goals of supposedly much stronger global players. As the authors explain it, states in extreme financial distress can use 'weapons of the weak' to level the playing field vis-à-vis global players, especially at the point of implementation. *Bankrupt* argues this was the case most dramatically in Indonesia. Despite its urgent need for massive IMF financial assistance in the wake of the Asian Financial Crisis, Indonesia

was, for instance, in practice able to turn a seemingly sound and constructive IMF-supported reform, the establishment of a specialised Commercial Court, into a fairly meaningless institution.

At the heart of the authors' unique analytical contribution is their theory of 'recursivity'. In colloquial terms, the idea is that legal change recurs through cycles from law on the books to law in action and back to law on the books. Law in action frequently does not accord with the intent of lawmakers because there are weaknesses, gaps, or contradictions in the formal law, which may give rise to another corrective round of law making and reform, thereby resulting in new 'law on the books'. These cycles can continue until the law 'settles' at the point at which there is some type of equilibrium between 'law on the books' and 'law in action'. *Bankrupt* shows that whereas international organisations often have the power to encourage changes in a nation's formal law, it is domestic players, including local insolvency practitioners, who determine whether such formal law becomes law in practice.

The authors deploy this theory to explain the trajectory of insolvency reforms in Indonesia, South Korea and China. They explain that in Indonesia the reform trajectory began with a comprehensive package of reforms in substantive law and restructuring institutions, but these reforms required repeated corrective measures to fill gaps, clarify ambiguities, and correct prescriptions based on faulty diagnoses. They note that in Korea the trajectory followed a different course of successive less ambitious reforms, but culminated in a massive Bankruptcy Act, years after the Asian Financial Crisis had already passed.

The authors maintain that in China the years-long, on-and-off again process of insolvency reform presents a more complicated case. As they point out, China was less directly affected by the Asian Financial Crisis than a number of other Asian countries, but it eventually enacted a comprehensive law almost a decade after the crisis, amid fears of social unrest that could result from widespread corporate bankruptcies. In their discussion of China's new insolvency law, Halliday and Carruthers raise serious doubts about both how effectively the new law will be implemented and how free Chinese courts will be from political interference.

The final conceptual piece in the puzzle is a familiar problem for international organisations, namely, the implementation gap between the aspirations of global norm-makers and actual changes in bankruptcy practice. In the authors' view, the size of the gap is a measure of the relative power of global institutions and local interests. They state that 'implementation becomes a particularly acute issue because it is the ground of political struggle that most favours "locals".'

Not only is everyday legal practice invisible to official eyes but local businesses, creditors and debtors, lawyers and judges are adept at exploiting their local knowledge to frustrate powerful international agents of change.' Driving this point home, the authors argue that 'much of the ground won by international organisations at the point of enactment is subsequently lost in rear-guard battles over implementation.'

This book covers such important territory and is so thought-provoking that it suggests some follow-up topics for further study and analysis. First, the analysis and conclusions in this book cry out for comprehensive and broad-ranging empirical research on whether, overall, the global insolvency law reform project has achieved its objectives across the world, ie, whether, for instance, these reforms in practice have led to better functioning insolvency systems, including more effective reorganisation processes.

Second, it would be very useful to find out whether the players implicated in the 'foiling' of new laws as discussed in *Bankrupt* are roughly co-extensive with the controlling shareholders of debtor companies in the emerging markets and developing countries, particularly in the case of family-owned and controlled companies, and whether techniques similar to 'foiling' are used in such restructurings and reorganisations.

Third, in an indication of how incredibly timely this publication is with the onset in late 2008 of the global financial crisis and given the book's emphasis on the catalytic role of financial crises in spurring law reform efforts, what does the analysis in this book predict about the type of law-making and global norm-setting that the current crisis will spawn?

Bankrupt concludes with some fairly sobering and cautionary observations and conclusions about the entire project of global law reform. The authors cast doubt on some of the fundamental premises of past global law reform efforts, such as whether 'good law' is a necessary prerequisite for greater foreign investment as well as greater economic growth and development in developing countries. In addition, the authors stress the crucial necessity of balancing and adapting global reform ambitions with local, on-the-ground conditions and contingencies in individual countries, as well as the need for global actors, particularly international financial institutions, to 'negotiate' and not 'impose' global reforms on national players. They point out how this has not always characterised past reform efforts and yet that it should be a critical element in any future reform efforts. Moreover, the authors also underline the importance of the robustness of local institutions as a key determinant of whether global law reform efforts will be successful in the national context and note that this has not always received sufficient emphasis in global reform efforts.

To sum up, this is not a study that should be left to gather dust on the bookshelves of policymakers, insolvency professionals and others who continue to be deeply involved in the project of global insolvency law reform or other global commercial law reform efforts more generally. The authors' concluding observations merit very serious consideration by, and indeed might even be considered required reading, for all of those parties – from international organisations to leading nations to professional associations and individuals brought in by international organisations as expert consultants – who engage in future rounds of global lawmaking and reform efforts. This book will also be a very useful handbook for national policymakers and other domestic actors who find themselves addressing new global norms. In short, *Bankrupt* offers potentially critical and powerful lessons for any future reform

efforts, particularly if such efforts are to be successful as measured not only by the enactment of new laws but more importantly in the effective implementation of such laws in everyday insolvency practice.

Steven T Kargman¹

Note

- 1 Steven T Kargman, formerly Lead Attorney of the Export-Import Bank of the United States and General Counsel of the New York State Financial Control Board, is President of Kargman Associates, a New York-based international restructuring advisory firm. He has served as a member of the United States and American Bar Association delegations to the UNCITRAL Working Group on Insolvency Law, and he currently serves as Co-Chair of the International Bankruptcy Subcommittee of the American Bar Association's Business Bankruptcy Committee and as a member of the Board of Directors of the International Insolvency Institute. The views expressed in this article are solely the views of the author and do not necessarily represent the views of any organisation or institution with which he is or has been associated or affiliated.



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Client Services Professional Development Department

The College of Law
Braboeuf Manor
Portsmouth Road, Guildford,
Surrey GU3 1HA, United Kingdom
DX: 2400 Guildford
Tel: +44 (0)1483 460200
Fax: +44 (0)1483 460306
E-mail: ibapracticediploma@lawcol.co.uk

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