Chapter 25

The role of social policy in corporate rescue and restructuring: a messy business

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1 Introduction: the theoretical dogma of insolvency law

Insolvency law has long been predicated on a theory drawn from the Law and Economics movement: wealth maximisation (as it concerns returns to creditors owed to them by the debtor). This has been described as a 'Frankenstein monster' by the father of Law and Economics, Richard Posner, albeit from a perspective of defending its existence.[1] A 'pragmatic economic libertarian', Posner believes in minimum government embracing *laissez-faire*,[2] intervening in the economy only to correct market failures, and is pragmatic insofar as his philosophy is not predicated on morality.[3] Posner's approach uses a hypothetical contractarian model to justify wealth maximising rules,[4] which was adapted by Thomas Jackson and built upon by Douglas Baird and others to create the creditors' bargain model[5] to *uncover* the 'normative foundations of bankruptcy law'.[6]

Given the inherent regulatory intervention that typifies insolvency and restructuring laws and procedures, interfering with contractual entitlements as a part of its collective nature, it is curious that insolvency law theorists would adopt an underlying concept drawn from a (pragmatic philosophical?) movement that aims to minimise intervention in law and society wherever possible while maximising efficiency. Regardless of this curious enigma in the reliance on a key Law and Economics paradigm to justify and explain the normative foundations insolvency laws that act to create a framework of collective action (contrary to the contractual obligations duly owed by a debtor prior to its financial distress), insolvency law and theory today continues in many if not most quarters to maintain a dogmatic attachment to the creditor wealth maximisation principle. This is despite Law and Economics traditionally adopting a positive approach to assessing law in order to find an 'aggregate win' between the participants in the circumstances. Insolvency law is in contrast a case of minimising the 'aggregate loss' of the collective of creditors.[7]

As noted by Hardman in Chapter 27 of this Handbook, little space has been devoted by Law and Economics scholars to its applicability to insolvency or restructuring law, whereas the Law and Economics paradigm has become a keystone for insolvency law theory. It is curious, therefore, that there have been only limited successful explorations of alternative theories of insolvency law that take in the many social, involuntary and non-financial stakeholder interests that are inextricably associated with business and corporate failure. This is particularly true given that the creditors' bargain model is fraught with problems, not the least of which being that it was created to explain a process that has existed in some form for 2 millennia and longer in some ancient civilisations (for example, the Hammurabi dynasty in Babylon, 2250 BC)[8] and was developed as a reaction to pre-existing conditions

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[1] Richard A Posner, 'Law and Economics *Is* Moral' (1990) 24 Val U L rev 163, 163.

[2] *idem*, 165.

[3] *idem*, 166.

[4] Donald R Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1993) 71 Tex L Rev 541, 541.

[5] See for example Thomas Jackson, *The Logic and Limits of Bankruptcy Law* (Beard Books 1986); Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91(5) The Yale Law Journal 857; 'Of Liquidation, Continuation, and Delay: An Analysis of Bankruptcy Policy and Nonbankruptcy Rules' (1986) 60 Am Bankr L J 399; 'On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain' (1989) 75(2) Symposium on the Law and Economics of Bargaining 155; with Robert E Scott, 'On the Nature of Bankruptcy: An Essay of Bankruptcy Sharing and the Creditor's Bargain' (1989) 74(2) Virginia L Rev 155; Douglas G Baird, 'The Uneasy Case for Corporate Reorganisations' 15 J Legal Stud 127; David Gray Carlson, 'Bankruptcy Theory and the Creditors' Bargain' (1992) 61 U Cin L Rev 453; and more recently, Barry E Adler, 'The Creditors' Bargain Revisited' (2018) 166 U Pa L Rev 1853.

[6] Korobkin (n 4) 543.

[7] Jonathan Hardman, 'Law and Economics of Corporate Financial Difficulty' Chapter 27 in Jennifer LL Gant and Paul J Omar (eds), *Research Handbook on Corporate Restructuring* (Elgar forthcoming) 2.

[8] See L Levinthal, 'The Early History of Bankruptcy Law' [1918] University of Pennsylvania Law Review 223; for a detailed history of bankruptcy law over the last two millennia, see Paul Omar, *European Insolvency Law* (Ashgate 2004).

relating to debt. Rather, bankruptcy is not 'the logical outcome of ethical principles consciously adopted and consistently applied by perfectly rational legislators; it is instead the product of social exigency, moral conflict, and political compromise.'[9] In short, the result of over indebtedness and financial failure is messy and it is the messiness that collective procedural frameworks have been created to control and improve for the benefit of all creditors and, more recently, stakeholders in the future of the company.[10] Add to that the pull of social policy initiatives, and the regulatory entanglement becomes tortuous.

The purpose of this chapter is to examine some of the competing insolvency theories or policies that contradict the creditors' bargain and allow for a consideration of social policy matters (section 2); explore the interplay between social policy and insolvency and restructuring, focusing on the introduction of the new EU Preventive Restructuring Directive (section 3);[11] consider and compare the approach to social policy as it intersects with insolvency and restructuring in the EU as well as two key restructuring destinations of both the UK and the USA (section 4); and finally to consider what the position may be given the crises of health and economies encountered in 2020 that affect both social and financial/economic issues globally (section 5).

2 The evolving position of insolvency theory

2.1 Where can social justice be found?

Insolvency and restructuring procedures are usually engaged when a debtor is no longer able to pay its debts, leading to a potential race by creditors to enforce their contractual rights against the debtor's assets, subsequently resulting in the dissipation of those assets and an unequal result among the collective of creditors. Insolvency law seeks to resolve the inefficient result of these self-interested reactions by creating a procedural framework in which creditors are unable to pursue their individual claims, but must instead participate in a collective process that will eventually result in equitable distributions mostly on a pro-rata basis connected to the amounts owed to each creditor (*pari passu*). Thus, *prima facie,* the goal of insolvency is to provide the greatest possible returns to creditors. However, corporate failure affects more than banks, trade creditors, and shareholders who all have a contractual claim against the assets or value of the company. Clearly, the employees of a company may find themselves jobless and perhaps even pension-less if the company is dissolved. As an employee's purely contractual claim is unsecured, it will have little hope of claiming back lost wages, entitlements, and other benefits unless additional protections are provided under the law.

Most jurisdictions have recognized the social problem associated with this situation and provided some level of priority or preference to ensure that employees will get a commensurately larger bite of the apple, at the expense of both secured and unsecured creditors and depending on the jurisdiction. These privileges are supported by international organisations such as the World Bank,[12]

[9] David Gray Carlson, 'Philosophy in Bankruptcy' (1987) 85(5/6) Michigan Law Review 1341, 1389 as summarised by Korobkin (n 4) 543.
[10] See for example Gert-Jan Boon, 'Harmonising European insolvency Law: The Emerging Role of Stakeholders' (2018) 27 International Insolvency Review 150.
[11] Directive (EU) 2019/1023 of the European Parliament and of the Council of June 20 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and the amending of Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172/18 (the 'Preventive Restructuring Directive' or the 'PRD').
[12] The World Bank, 'Principles for Effective Insolvency and Creditor /Debtor Regimes' (World Bank Group 2016) <http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf > accessed 28 August 2020. Principle C.12.4 calls for special recognition and treatment of labour claims on the basis that 'workers are a vital part of an enterprise and careful consideration should be given to balancing the rights of employees with those of other creditors.'

UNCITRAL,[13] the International Labour Organisation,[14] and European Union institutions[15] and extend well beyond the protection of direct financial costs in respect of wages. In particular, the EU institutions have laid down Directives that require the approximation of minimum standards for protecting job security and continuity of employment,[16] as well as ensuring fairness for collective economic dismissals.[17]

Employees are afforded greater consideration for a number of reasons. They are often considered 'involuntary creditors' as they have little choice but to provide their labour in exchange for their livelihood. However, it could also be argued that an employee can choose whether or not to take a job, but the reality is far more complicated. The capitalist societies of the Western World require as a matter of fundamental importance to society and even the individual identity that people work to support themselves financially. Their labour investment is undiversified so if the firm fails, an employee will likely lose their job with the unavoidable effect on local economies supported by their wages. This can also impact future support through the adverse impact an insolvency may have on employee pensions.[18] It is therefore difficult to accept that there really is a choice in whether a person undertakes work to earn their livelihood, or even a particular job depending on the circumstances of the individual and market conditions at the time.

Employees contribute more than just their labour for livelihood, particularly in today's service economies requiring a high level of skill and intellect. They contribute to 'productivity, innovation and firm synergies' which frequently enhance firm value and may have done so over an extended period, exhibiting difficult to quantify values such as loyalty. These confer 'value on the corporation on the basis of implicit or explicit promises of job security.'[19] Sarra observes further that:

> The promise gives rise to contributions to the firm in the form of time, energy and creativity over and above the current wage/labour exchange. On insolvency, the employees' investments in this respect are not adequately protected by employment contracts or statutory minimum protections as these provisions are aimed solely at fixed capital claims.[20]

Whereas wealth maximization can be justified if humanity is removed from the equation entirely, along with the costs of involuntariness and information asymmetry, when looking at the circumstances of insolvency as a reality and all of its associated impacts on society and global economies, people (and other non-financial stakeholders) must be considered in order to perform a full execution of the social contract to which we are all a party. This includes the corporation, which benefits from legal systems 'perpetuated by the government and the public' and should therefore bear some responsibility and accountability to the human beings upon which the corporation is built.[21] The need to consider employees as integral parts of the business has been supported by discussions around firm-specific

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[13] UNCITRAL Legislative Guide on Insolvency Law (United Nations 2005) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf> accessed 28 August 2020. See paras 72 & 73 on pages 287-288 in which the priority for workers claims provided by a majority of States is discussed as well as the guarantee funds that some States provide to cover claims not met by the insolvent estate.

[14] See the International Labour Organisation, C095 Protection of Wages Convention (1949) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C095> accessed 28 August 2020. See Article 11(1):

> In the event of the bankruptcy or judicial liquidation of an undertaking, the workers employed therein shall be treated as privileged creditors either as regards wages due to them for service rendered during such a period prior to the bankruptcy or judicial liquidation as may be prescribed by national laws or regulations, or as regards wages up to a prescribed amount as may be determined by national laws or regulations.

See also International Labour Organisation, C158 Termination of Employment Convention (1982) Article 11 and C173 Protection of Workers Claims (Employer's Insolvency) Convention 1992, Articles 6 and 12.

[15] Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer [2008] OJ L 283/36.

[16] Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L 82/16.

[17] Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L 225/6.

[18] Janis Sarra, 'Widening the Insolvency Lens: The Treatment of Employee Claims' Chapter 12 in Paul J Omar (ed), *International Insolvency Law: Themes and Perspectives* (Taylor & Francis 2008) 295-334, 297.

[19] *idem* 297.

[20] Janis Sarra, *Creditor Rights and the Public Interest, Restructuring Insolvent Corporations* (University of Toronto Press 2003) 70 as cited in Janis Sarra, 'Widening the Insolvency Lens: The Treatment of Employee Claims' Chapter 12 in Paul J Omar (ed), *International Insolvency Law: Themes and Perspectives* (Taylor & Francis 2008) 295-334, 297 cited in footnote 5 and 6.

[21] E Merrick Dodd Jr, 'For Whom Are the Corporate Manager's Trustees' (1932) 45 Harv L Rev 1145, 1148 as cited in Nathalie D Martin, 'Noneconomic Interests in Bankruptcy: Standing on the Outside Looking In' (1998) 59 Ohio State L J 429, 439.

human capital and the integral part that humans play as a defining feature of a firm itself.[22] A key takeaway of labour theory in this area is that:

> …employee investments in firm-specific human capital cannot be well protected by explicit and complete contracts. Other institutional arrangements are needed, and those arrangement often have the effect of tying the fortunes of the employee together with those of the firm.[23]

The relationship between employee and employer (debtor/company) is therefore far more interrelated and connected than a supplier/debtor relationship as suppliers can choose the terms of the contract and adjust interest rates, for example, to account for insolvency risk. A secured creditor will have an even greater separation as their risk is protected by the ability to exercise their security. Employees have no such choice or flexibility in the role that they play in a firm.

As noted by John Rawls:

> Fairness to persons may be achieved by a well-ordered society even though all (admissible) conceptions of the good do not flourish equally and some hardly at all. This is because it is fairness to persons that is primary and not fairness to conceptions of the good as such.[24]

Applying Rawls' theory of justice to the circumstances of insolvency stakeholders would likely lead to an insolvency and restructuring framework design that considers the needs of those who are the most disadvantaged by a company's bankruptcy in order to create a perfectly fair and just system that goes beyond the mechanism of contracts.[25] That said, there are arguments that insist that social policy issues should not be a consideration for insolvency or restructuring as they do not have a legal connection to what is technically a situation created by legal relationships.

2.2 Insolvency vs restructuring: justifying a different approach to social policy

There is a clear difference between insolvency (read liquidation) and restructuring or rehabilitation procedures. The latter processes tend to see the company or businesses of the company continue to trade during the procedure and sometimes beyond its completion when a rescue is truly successful. This will automatically benefit stakeholder groups such as employees who may be able to retain their employment and job security, although this will also depend on what protections are available in a jurisdiction in terms of protecting continuity of employment and entitlements during an insolvency or restructuring.[26] In addition, restructuring cannot be solely a different mechanism of debt collection as its outcome will inevitably require creditors to either wait or accept alternative means of repayment. If it were pure debt collection, every restructuring would be more likely to end in liquidation. A key justification for the alternative rationale behind restructuring over liquidation can be found in the new Preventive Restructuring Directive:

> Restructuring should enable debtors in financial difficulties to *continue business*, in whole or in part, by changing the composition, conditions or structure of their assets and their liabilities or any other part of their capital structure – including by sales of assets or parts of the busines, or,

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[22] On this discussion, see for example Gary S Becker, 'Human Capital: A Theoretical and Empirical Analysis with Special Reference to Education' (1964) National Bureau of Economic Research; Peter B Doeringer and Michael J Piore, *Internal Labour Markets and Manpower Analysis* (DC Heath 1971); Sanford M Jacoby, 'The New Institutionalism: What can it Learn from the Old?' 29(Spring) Industrial Relations 316; Masanori Hashimoto, 'Firm-Specific Human Capital as a Shared Investment' (1981) 71(June) American Economic Review 475; and Robert C Topel, 'Specific Capital and Unemployment: Measuring the Costs and Consequences of Job Loss' in Alan H Meltzer and Charles I Ploser (eds), *Studies in Labour Economics in Honor of Walter Y Oi* (North Holland 1990) 181-124.

[23] Margaret M Blair, 'Firm-Specific Human Capital and Theories of the Firm' (2003) Georgetown University Law Centre, Business, Economic and Regulatory Policy Working Paper No 167848, 58, 61.

[24] John Rawls, 'Fairness to Goodness' (1975) 84(4) The Philosophical Review 536, 554. 'Conceptions of the good' may include concepts such as economic liberty, wealth maximisation, and other conceptions of fairness that are common to economic and insolvency discourse. For an argument that argues that a just and fair bankruptcy or insolvency framework that satisfies Rawls' theory of justice, see Robert K Rasmussen, 'An Essay on Optimal Bankruptcy Rules and Social Justice' (1994) 1 U Ill L Rev 1.

[25] See John Rawls, 'Justice as Fairness' (1958) 67(2) The Philosophical Review 164; *A Theory of Justice* (Belknap Press 1971); 'Fairness to Goodness' (1975) 84(4) The Philosophical Review 536; 'The Domain of the Political and Overlapping Consensus' (1989) 62(2) New York University Law Review 233.

[26] See Robert K Rasmussen, 'An Essay on Optimal Bankruptcy Rules and Social Justice' (1994) 1 U Ill L Rev 1, 27-31.

> where so provided under national law, the business as a whole – as well as carrying out operational changes (emphasis added).[27]

Restructuring is therefore far from an alternative debt collection mechanism – rather it fulfils an entirely different function, which should indicate a variance in the traditional theory underpinning insolvency law frameworks, extending instead to consider social policy issues. An example of this difference can be found in the decisions made around the application of the Acquired Rights Directive,[28] which were discussed in detail in Chapter 9 of this Research Handbook. Despite a variety of procedures under which pre-pack sales have been devised in several different jurisdictions, the key outcome has been that if the business is continuing during the procedure, then any sale of that business will implicate the operation of the Acquired Rights Directive and require the transfer of employment contracts to the purchaser of that business. It does not matter what a procedure is called, but what it actually intends to do.[29] Whereas in a pure liquidation all business activities will cease, in a restructuring the aim is to preserve that business and all of the benefits associated with it, including the continuation of employment and also implicating other social policy matters.

2.3 Observations from American bankruptcy policy (Chapter 11)

Bankruptcy in the United States has come to be synonymous with the Chapter 11 reorganisation procedure, so when one comes to read scholars in this area, it is necessary to realise that the differentiation between liquidation and reorganisation or restructuring is not generally made as the default discussion revolves around the flagship that is the American Chapter 11. Elizabeth Warren and Douglas Baird undertook a debate around the purpose of bankruptcy law less than a decade after the US Bankruptcy Code was passed. Baird embraces the creditor's bargain for all aspects of bankruptcy law, which extends to reorganisation under Chapter 11. He sees a reorganisation as a hypothetical sale of ownership interests that are 'transferred to the old owners in return for the cancellation of their pre-bankruptcy entitlements' with a liquidation differing only insofar as it is an actual sale on the market.[30] Warren acknowledges the complex 'messiness' of bankruptcy whereas Baird ties it up neatly within the creditors' bargain normative framework for all bankruptcy situations.[31] If social policy matters are to be considered and accommodated within a bankruptcy or insolvency framework, then it is submitted herein that Warren's less streamlined, but more accommodating approach is the better starting point. Warren explains:

> I see bankruptcy as an attempt to reckon with a debtors' multiple defaults and to distribute the consequences among a number of different actors. Bankruptcy encompasses a number of competing – and sometimes conflicting – values in this distribution. As I see it, no one value dominates, so that bankruptcy policy becomes a composite of factors that bear on a better answer to the question, 'How shall the losses be distributed?'[32]

As noted, reorganisation differs from liquidation, despite Baird's approach. Warren notes further that 'the revival of an otherwise failing business also serves the distributional interests of many who are not technically "creditors."'[33] This includes employees, customers, suppliers, nearby property owners, states and municipalities that have an interest in a business's continued existence for a variety of reasons. Employees may not have been able to retrain for other jobs (or indeed find them).

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[27] Preventive Restructuring Directive, Recital 2.
[28] Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses OJ L 82/16 (the 'Acquired Rights Directive').
[29] See the following cases that concern the application of the Acquired Rights Directive in various jurisdictions and procedural circumstances: Case C-135/83 *HBM Abels v The Administrative Board of the Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* [1985] ECR 469; Case C-362/89 [1991] *D'Urso and ors v. Ercole Marelli Eletromeccanica Generale SpA and ors* [1991] ECR I4105; Case C-472/93 *Spano and Others v Fiat Geotech and Fiat Hitachi* [1995] ECR I-4321; Case C-319/94 *Jules Déthier Equipement SA v Jules Dassy* [1998] ECR I-1061; Case C-399/96 *Eurpiéces SA, in liquidation, v Wilfried Sanders and Automotive Industries Holding Company SA* [1998] ECR I-6965; in the UK, see *Oakland v Wellswood (Yorkshire) Ltd* [2009] EWCA Civ 1094; [2010] B.C.C. 263 (CA (Civ Div); *OTG Limited v Burke & Others* [2011] UKEAT 0320/09; *Key2Law (Surrey) LLP vs Gaynor De'Antiquis and Secretary of State for Business Innovation and Skills* [2011] EWCA Civ 1567; referred to the CJEU by the Netherlands, Case C 80/14 *USDAW & Others v WW Realisation 1 Limited (In Liquidation) & Another* ECLI:EU:C:2015:291.
[30] Douglas G Baird, 'The Uneasy Case for Corporate Reorganisations' 15 J Legal Stud 127, 127.
[31] See Douglas Baird, 'Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren' (1987) 54 U Chi L Rev 815 – Warren acknowledges Baird's neat approach on page 797 of 'Bankruptcy Policy'.
[32] Elizabeth Warren, 'Bankruptcy Policy' 54(3) Uni Chi L Rev 775, 777.
[33] *idem* 787.

Customers and suppliers would not have to resort to less attractive alternatives. Property values would not decline as a result of the failure and the tax base would remain steady due to the preservation of employment and business taxes for states and municipalities.[34] Reorganization 'acknowledges the losses of those who have depended on the business and redistributes some of the risk of loss from the default.'[35] Further, in the American context, policy makers clearly recognised the broader concerns that bankruptcy reorganisations address, noting the protection of the investing public, the protection of jobs, and helping troubled businesses being equal aims of a good system that allows reorganisation and rehabilitation, extending well beyond the interests of the parties in dispute (creditors and debtor).[36] 'Rather than merely distributing assets, the central purpose of Chapter 11 is to reduce the economic effect of financial disaster' which is an entirely different aim than simply maximising asset value for creditor returns.[37]

The creditors' bargain and its premise of creditor wealth maximisation is at odds with the bankruptcy policy that informed the passing of Chapter 11 considering as it does in the discussions and commentary within Congress the broader impact of insolvency and the benefits that business reorganisation can provide to non-contractual stakeholders. The EU recognised this during the drafting of the Preventive Restructuring Directive, including in its recitals many of the issues considered important by American policy makers. However, Member States take different approaches to the aims of insolvency and restructuring with a variety of nuances and perspectives that make a cross-jurisdictional conversation on the matter extremely difficult at times.[38] While that has led to incredibly interesting academic debates, it has not, perhaps, helped identify the best approach to implementation that could be adopted on an EU-wide basis, leading to what will likely be an broad spectrum of preventive restructuring frameworks.

3 Conflicting nature with a common goal: The Preventive Restructuring Directive

One of the underlying rationales for restructuring, whether preventive or otherwise, is the preservation employment by saving the business that provides it. However, there remains a tension between the creditor wealth maximisation aims of insolvency and restructuring and the re-distributional aims that protecting employee financial entitlements and rights in an insolvency or restructuring will often have. It was, however, recognised in the new Preventive Restructuring Directive that employees should occupy a special place in the considerations of a rescue plan. This became clear during the period between the passing of the Proposal for a Directive in 2016[39] and the eventual passage of the PRD in 2019.

During the consultation process during which several EU institutional bodies provided feedback on the Proposal, the European Economic and Social Committee[40] and the European Parliament Committee on Employment and Social Affairs[41] wanted to introduce amendments that would increase

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[34] *idem* 787-788.
[35] *idem* 788.
[36] *ibid*; see also Elizabeth Warren, 'Bankruptcy Policymaking in an Imperfect World' (1993) 92 Mich L Rev 336 for a more in-depth discussion of this matter as it pertains to Chapter 11 and the United States.
[37] Nathalie D Martin, 'Noneconomic Interests in Bankruptcy: Standing on the Outside Looking In' (1998) 59 Ohio State L J 429, 436 paraphrasing Elizabeth Warren in 'Bankruptcy Policy' 54(3) Uni Chi L Rev 775, 788. See also James W Bowers, 'Groping and Coping in the Shadow of Murphey's Law: Bankruptcy Theory and the Elementary Economics of Failure' (1990) 88 Mich L Rev 2097, 2143.
[38] Consider for example the debate surrounding the Absolute Priority Rule versus the Relative Priority Rule, both contained in Article 11 of the PRD: Douglas G Baird, 'Priority Matters: Absolute Priority, Relative Priority, and the Costs of Bankruptcy' (2017) 165(4) U Penn L Rev 785; Stephen J Lubben, 'The Overstated Absolute Priority Rule' (2016) 21(4) Fordham Journal of Corporate & Financial Law 581; R J de Weijs, A L Jonkers, and M Malakotipour, 'The Imminent Distortion of European Insolvency Law: How the European Union Erodes the Basic Fabric of Private Law by Allowing 'Relative Priority' (RPR)' (2019) Centre for the Study of European Contract Law Working Paper Series No. 2019-05; Anne Mennens, 'Puzzling Priorities: Harmonisation of European Preventive Restructuring Frameworks' (Oxford Business Law Blog March 25th, 2019) <https://www.law.ox.ac.uk/business-law-blog/blog/2019/03/puzzling-priorities-harmonisation-european-preventive-restructuring> accessed 15 July 2020; Ignacio Tirado and Riz Mokal, 'Has Newton Had His Day? Relativity and Realism in European Restructuring' (2018/19) Winter Eurofenix 20; and Stephan Madaus, 'Leaving the Shadows of US Insolvency Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law' (2018) 19 Eur Bus L Rev 615.
[39] Proposal for a Directive of the European Parliament and of the Council COM(2016) 723 final of 22 November 2016 on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU [2016] 2016/0359 (COD) (the 'Proposal').
[40] European Economic and Social Committee, 'Opinion: Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU' (Business Insolvency) INT/810.
[41] European Parliament Committee on Employment and Social Affairs, Opinion of 5 December 2017 on the proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of

the degree to which workers were referred to in the final version of the PRD.[42] This led to the introduction of a new Article 13 in the final text of the PRD, which emphasised worker protection. However, workers' rights and protections were peppered throughout the recitals of the PRD following the input from the committees feeding back on the Proposal, starting with Recital 1, which emphasises that frameworks under the Directive should not affect workers' fundamental rights and freedoms. Phrases like 'including workers' were added throughout the Directive, though the additions really had little effect on what protections would actually be available to workers, except perhaps the suggestion that workers should not be affected by the stay at all. This was adopted into Article 6(5), which stated that Paragraph 2 (the scope of the stay) 'shall not apply to workers' claims'; however, this was with a derogation caveat that permitted the stay to apply as long as 'payment of such claims is guaranteed in preventive restructuring frameworks at a similar level of protection.'

Recital 60 specifies that 'workers should enjoy full labour law protection' throughout preventive restructuring procedures, which is a foregone conclusion in reality as Member State labour law will always take primacy. These are highly influenced by the social policy Directives[43] that aim to protect employees whose employers find themselves in financial difficulty. Essentially, the protections of workers under the PRD relies on pre-existing EU law as implemented in the Member States, which is further specified in Article 13 of the PRD naming 5 specific Directives, described in section 4.1 of this Chapter. Article 13 adds nothing additional to the protections already provided by the EU and under Member State law, which follows the normal pattern of employment law being firmly resolved by reference to national regulations, although these regulations have minimum standards derived from EU law. Thus, current law is intended to continue to protect employees in what may be a very different legal framework once the PRD has been implemented. Given the widely held perspective that an overly protective regulatory framework aimed to benefit employees may inhibit the level of success in rescue and restructuring (with a potential adverse impact on employees should the restructuring fail), it would not be surprising if frameworks are devised that aim to circumvent some of the employment protection that currently exists for employees whose employers are insolvent or otherwise in financial difficulty.

While there are no specific provisions that extend beyond those directly affected by a restructuring, such as those noted by Warren as customers, suppliers, nearby property owners, states and municipalities that have an interest in a business's continued existence, a number of recitals do acknowledge the broader impact a business' financial distress may have on an 'economy.' Although this may not provide direct protection for non-financial interests, it does provide a clue into some of the policy discussions that were had during the drafting of the final version of the Directive. This concern is also apparent in the 2014 Recommendation, which in its first Recital specifically includes the 'economy as a whole' as also benefitting from the maximisation of total value of a firm during a restructuring.[44] Recital 12 goes on to note that:

> …removing the barriers to effective restructuring of viable companies in financial difficulties contributes to saving jobs and also benefits the wider economy.
>
> Moreover, efficient insolvency frameworks would provide a better assessment of the risks involved in lending and borrowing decisions and smooth the adjustment for over-indebted firms, minimizing the economic and social costs involved in their deleveraging process.

The content of these recitals indicate a recognition within the EU institutions of the broader impact of corporate restructuring and the benefits it can have across a range of stakeholders, contractual and otherwise. However, while lip service has been paid to some of the broader social and public aspects of corporate restructuring in the run up to the passage of the PRD, there remains a tension between the aims of restructuring and insolvency and social policy in the EU, as such it has been difficult to

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restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU COM(2016)0723 – C8-0475/2016 – 2016/0359(COD).

[42] JCOERE Consortium, 'Exposition of the Preventive Restructuring Directive', Chapter 5 in *Judicial Cooperation Supporting Economic Recovery in Europe, Report 1 – Identifying Substantive Rules in Preventive Restructuring Frameworks Including the Preventive Restructuring Directive which May Be Incompatible with Judicial Cooperation Obligations* (UCC 2020) 71 <https://www.ucc.ie/en/jcoere/research/report1/report1chapter/report1chapter5/> accessed 28 August 2020.

[43] See section 4.1 below.

[44] Commission Recommendation C(2014) 1500 final of 12.3.2014 on a new approach to business failure and insolvency OJ L 74/65 (the 'Recommendation').

rationalize its economic and social roles. This conflict is echoed in both the American and United Kingdom experience. A brief discussion of the development of the social aspect of the EU (as it relates to restructuring and insolvency) will be given in the following section, followed by a comparative look at the social policy as it has developed connected to insolvency and restructuring frameworks in the UK and USA.

4 Comparing approaches to social policy and restructuring in the EU, UK and USA

4.1 Development of the social face of the European Union

From the beginning of the European integration project in the 1950s and until the beginning of the second millennium, social policy has been viewed as a poor relation in the process of European integration as compared to establishing and maintaining economic goals such as the Common Market. The Treaty of Rome merely exhorted Member States to improve working conditions and standard of living for workers without actually conferring any rights on the workers themselves. The initial view was that economic integration itself would ensure an optimum social system through the removal of obstacles to free movement. The Spaak report drawn up prior to the Treaty of Rome rejected the idea of trying to harmonize social policy within the Community because it was thought that as higher costs tended to accompany higher productivity, the differences between countries were not as great as they appeared.[45] In the early days of the European Economic Community, the absence of a clearly identifiable Community social policy can be explained by the fact that social policy and labour law lay at the heart of the sovereignty of Member States and were viewed as a means of preserving their integrity and political stability.[46] The UK has been a key obstacle, wavering only slightly away from a staunch unwillingness to relinquish any real sovereignty depending on the political party in power at the time. Although the social chapter was adopted when the Labour Party came to power in 1997 with the promise of social justice and inclusion, conceptually ending the 'two track social Europe' circumstance, [47] the social policy aspects of the EU have continued to be an annoyance to many UK policy makers, which is evident in the Brexit debacle in the latter half of the 2010s.

Once the EURO was adopted, integrating Member State economies in a way that until the turn of the millennium was unheard of, the social policy aspect of the EU could remain in the shadows. However, the increased interdependencies created by the creation of the Common Market united by a single currency meant that EU economic policy and national social policies could no longer exist in parallel. Employment policy moved to the forefront of the agenda in the European Union[48] because social policy in one country had become relevant to other states as it can affect the integrity of the currency and the competitiveness of the larger trans-national market.[49] Social policy was further enhanced in 2003 with the introduction of the Community Charter of Fundamental Rights in the Treaty of Nice, which provided an additional counterweight to the neo-liberal orientation of the Treaty by providing the European Court of Justice with the jurisdiction to reconcile social and economic rights, at least to the extent that the scope of EU law would allow. It was hoped that this would also prevent States from removing certain social rights as a means of improving competitiveness within the Common Market in a 'race to the bottom'.[50]

It cannot be said that the efforts of the EU to create a level playing field in terms of social and employment policies have been entirely successful. While the EU has certainly introduced many social policy Directives insisting on certain minimum standards, the range of protections still vary significantly between the Member States. The same is the case for those Directives that aim to provide a safety net or buffer for employees affected by their employer's financial distress or insolvency.

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[45] C Brewster and P Teague, *European Community Social Policy and its Impact on the UK* (Institute of Personnel Management 1989) 52.
[46] W Streeck, 'Neo-Voluntarism: A New European Social Policy Regime?' (1995) 1 European Law Journal 31.
[47] J Fairhurst, *Law of the European Union* (Pearson Education Limited, 2010) 16.
[48] J T Addison, 'In the Beginning, There Was Social Policy: Developments in Social Policy in the European Union from 1972 through 2008' (2009) The Rimini Centre For Economic Analysis PR 01-098-10.
[49] D Trubek and L Trubek, 'Hard and soft law in the construction of social Europe: the role of the Open Method of Coordination'(2005) 11(3) European Law Journal 345.
[50] Catherine Barnard, *EU Employment Law* (4th edn, OUP 2012) 28-32.

4.2 EU regulatory protections for employees in restructuring

As noted in section 3 of this Chapter, the PRD relies on the pre-existing employment protections provided under 5 different EU Directives and their varied implementation among the Member States. Article 13 of the PRD specifically refers to two collective labour oriented Directives on consultation[51] and works councils.[52] It also refers to the Acquired Rights Directive,[53] the Collective Redundancies Directive,[54] and the Employers in Insolvency Directive.[55] It is in Article 13 and these 5 Directives that social policy issues arise directly within the PRD, although as aforementioned, its treatment is really merely exhortative and a reminder of what Member States should already be doing. It is, however, questionable as to whether these Directives go far enough to ensure that the social policy of the EU in relation to employees is adequately achieved insofar as they relate to restructuring (preventive or otherwise), rather than insolvent liquidation as these Directives have not changed substantially in line with the development of the rescue culture toward prevention in the last decade or so.

In order to lend some context to what the PRD refers to in terms of socially protective Directives aimed to provide a buffer for employees, a brief description will be given of each of them. The Consultation Directive aims to improve the provisions among the Member States that 'ensure that employees are involved in the affairs of the undertaking employing them and in decisions which affect them'.[56] Further, the Consultation Directive has for its objectives to strengthen dialogue, promote mutual trust within undertakings to improve risk anticipation, increase flexibility of work organisation, facilitate employee access to training, and overall to provide a greater level of integration to employees to increase their employability and involvement in an undertaking's future.[57] The Directive sets out provisions that will enhance timely information and consultation activities with employees and is in addition to the requirements of the Collective Redundancies Directive, focusing instead on offsetting any 'negative developments or their consequences and increasing the employability and adaptability of the employees likely to be affected.'[58] Interestingly, the Consultation Directive also specifically refers to the need for timely information and consultation in the context of a successful restructuring as may be required to adapt to new conditions affecting a company.[59]

The Works Councils Directive (recast) of 2009 updated EU provisions geared toward modernising legislation developing European Works Councils throughout the Member States.[60] These Works Councils are intended to promote dialogue between management and labour generally,[61] building on the Consultation Directive to focus on the impact on workers associated with transnational entities, which 'may lead to the unequal treatment of employees affected by decisions within one and the same undertaking or group of undertakings.'[62] The solution presented in this Directive is the creation of European Works Councils that could manage the equitable information and consultation activities for employees of transnational employers.[63] Thus, the Works Councils Directive builds on the Consultation Directive in order to provide similar rights but to ensure equality of treatment for groups of companies.

The Acquired Rights Directive, discussed briefly above, applies to business transfers, whether insolvent or otherwise, and was developed because '[i]t is necessary to provide for the protection of

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[51] Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L 80/29 ('Consultation Directive').
[52] Directive 2009/38/EC of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) [2009] OJ L 122/28 ('Works Councils Directive').
[53] Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L 82/16 ('Acquired Rights Directive').
[54] Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L 225/6 ('Collective Redundancies Directive').
[55] Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer [2008] OJ L 283/36 ('Employers in Insolvency Directive').
[56] Consultation Directive, Recital 6.
[57] Consultation Directive, Recital 7.
[58] Consultation Directive, Recital 8.
[59] Consultation Directive, Recital 9.
[60] Works Councils Directive, Recital 7.
[61] Works Councils Directive, Recital 8.
[62] Works Councils Directive, Recital 11.
[63] Works Councils Directive, Recital 13.

employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded.'[64] This Directive applies to any transfer of undertaking or part thereof[65] and operates to transfer an employer's obligations under a contract of employment to the purchaser of a business.[66] The Acquired Rights Directive also allows for an exemption for those transfers occurring when the 'transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets.'[67] As discussed in detail in Chapter 9 of this Handbook, this exemption does not extend to those procedures instituted when a company may be insolvent, but is continuing to operate during the procedure. Given the aim of restructuring under the PRD to continue business, it is likely that any business transfer that occurs within a new framework will also attract the application of the Acquired Rights Directive.

The Collective Redundancies Directive will apply to employers contemplating collective redundancies, depending on the size of the business, affecting at least 10, 10% or 30 employees or in the alternative 20 employees over a period of 90 days.[68] Both of these rules depend on the meaning of 'establishment', which has caused confusion and led to fairly different implementations and interpretations of the Collective Redundancies Directive. Not surprisingly, this has also led to references to the CJEU to clarify certain ambiguities.[69] The fundamental aim of the Collective Redundancies Directive is to afford greater protection to workers in the event of collective redundancies[70] by ensuring adequate information and consultation opportunities are given to employees so affected.[71] This Directive will likely be an important consideration for debtors engaging in a restructuring given the operational changes that may occur in parallel with such activities.

Finally, the Employers in Insolvency Directive requires that all Member States create a state fund guaranteeing some level of payment of outstanding employment claims[72] while allowing Member States to set some limitations on the responsibility of those guarantee institutions, as long as they are 'compatible with the social objective of the Directive and may take into account the different levels of claims.'[73] The Employers in Insolvency Directive sets a lower limit on the time that should be covered by the guarantee institution at the last three months remuneration.[74] The Directive also gives Member States the scope to set a ceiling on the payments available from the guarantee institutions, with the only limitation being that they (again)'must not fall below a level which is socially compatible with the social objective of this Directive.'[75] It should be noted that the provisions of the Employers in Insolvency Directive will only apply to employers who are insolvent, which is defined as being where 'a request has been made for the opening of collective proceedings based on insolvency of the employer.'[76] Thus, for the purpose of the PRD, the availability of a guarantee fund to cover unpaid employee claims will likely only be available if such a procedure qualifies as an insolvency procedure, which in the context of an EU definition may be by reference to the presence of such a procedure in Annex A of the EIR Recast.[77] Given Member States have a choice of whether to include new preventive restructuring procedures in the Annex, guarantee funds may not be available in this context. Contrastingly, by including pre-insolvency procedures in the Annex, the guarantee funds may provide a buffer for debtors trying to shed the debt of their employee wage claims which, with the limitations set by Member States on the payments available from guarantee funds, may result in unfair treatment of employees in the context of restructuring.

The presence of minimum standards of social protection does not necessarily provide the optimum protection needed to ensure employees are treated equitably as it relates to the real contribution they make to a firm. Clearly, the policy of the European Union today remains focussed on social

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[64] Acquired Rights Directive, Recital 3.
[65] Acquired Rights Directive, art 1(1)(a).
[66] Acquired Rights Directive, art 3(1).
[67] Acquired Rights Directive, art 5(1).
[68] Collective Redundancies Directive, art 1(1)(a)(i) & (ii).
[69] See for example Case C-80/14 *USDAW and B. Wilson v VW Realisation 1 Ltd (in liquidation), Ethel Austin Ltd, and the Secretary of state for Business, Innovation and Skills.*
[70] Collective Redundancies Directive, Recital 2.
[71] Collective Redundancies Directive, Recital 17.
[72] Employers in Insolvency Directive, Recital 3.
[73] Employers in Insolvency Directive, Recital 7.
[74] Employers in Insolvency Directive, art 3(2).
[75] Employers in Insolvency Directive, art 3(3)
[76] Employers in Insolvency Directive, art 2,
[77] Council Regulation (EU) 848/2015 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (Recast) [2015] OJ L 141/19 ('EIR Recast').

protections, even if they are not as significant as they were prior to the financial and sovereign debt crises of the last decades. This contrasts significantly with the approach of the United States, which remains an important destination for restructuring with its Chapter 11 reorganisation process influencing the design of the PRD. In addition, the success of the UK scheme of arrangement[78] provided some inspiration for the PRD, although in terms of design the PRD provisions remain closer to the procedural framework of Chapter 11 in many ways. Both of the restructuring destinations that at least anecdotally have influenced the design of the PRD tend to provide a lower level of social protection than the social policy goals of the EU would intend.

4.3 Restructuring destinations and the influence of social policy

The United States and United Kingdom have been preferred destinations for restructuring by foreign corporations for several decades. This preference is laid at the feet of each jurisdiction's expertise in the area, extending from specialised courts in the USA to specialised judges in the UK and a well-developed profession of insolvency practitioners in both jurisdictions. Both jurisdictions also have rules that make it easy to establish jurisdiction, each using a 'sufficient connection' in relation to their more popular procedures, which can amount to a bank account or a 'peppercorn' in some cases. Both jurisdictions also have a lower level of social protections than the Member States of the EU, which perhaps allows more focus to be had upon creditor wealth maximisation goals and the interests of the business and company, rather than employees and communities, although the United States does take this to a different (lower) level than does the UK, bound as it is (for now) by minimum social policy standards derived from EU Law. Each jurisdictions' approach to restructuring in terms of the influence of social policy may be interesting examples of how the two competing policy areas work in two successful restructuring jurisdictions.

4.3.1 <u>The United Kingdom</u>

There is a fundamental difference between the developmental roots of socially protective legislation for employees and workers in the UK as opposed to most EU Member States. The British style employment contract remains tied in many respects to the 'master and servant' model relying on a command relation with an open ended duty of obedience imposed on the worker, reserving far-reaching disciplinary powers to the employer.[79] The advent of the welfare state and the extension of collective bargaining caused employment law to change direction, but the traditional hierarchy of employer and employee remained difficult to dislodge from the British legal psyche.[80] The development of the employment contract in the 1960s imposed certain civil obligations, however, the hierarchical characteristic of the traditional master and servant model has been carried over into the modern contractual employment relationship to some extent.[81] While the terminology of 'master and servant' has thankfully disappeared from legislation, it remains evident in Britain's regulatory approach to employment law.[82] This has been displaced to some extent by the application of EU law through the social policy Directives. Member States have, however, taken varied approaches to the implementation of the social policy directives as derogations are available that have been implemented differently among the Member States owing to the endogenous factors of culture, legal tradition and domestic social policy. This is particularly true for the UK, which has implemented these Directives, but often without a clear connection with pre-existing legal frameworks, which has caused confusion and at times ineffectiveness of the implementing legislation.

In the UK prior to 1963, labour law and employment protection were largely dealt with through the common law and collective bargaining. Legislation was present only inasmuch as it concerned the regulation of trade unions, wage protection, health and safety, or the protection of women or children workers.[83] The passage of the Contract of Employment Act 1963, which required reasonable notice be given before a dismissal an the provision of written particulars of a contract of employment, saw the

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[78] See the Companies Act 2006, Part 26.
[79] S Deakin and W Njoya, 'The Legal Framework of Employment Relations' (2007) Centre for Business Research, University of Cambridge, Working Paper no. 349, 7.
[80] *ibid*.
[81] Lord Wedderburn of Charlton, 'The Social Charter in Britain: Labour Law and Labour Courts?' (1991) 54(1) Modern Law Review 1, 6.
[82] *ibid* 6.
[83] The Trade Unions Act 1871 (34 & 35 Vict c 31), the Truck Acts 1831 (1 & 2 Will 4 c 37), the Factory and Workshop Act 1901 (1 Edw 7 c 22), the Coal Mines Act 1911 (1 & 2 Geo 5 c 50, and the Employment of Children Act 1903 (3 Edw 7 c 45).

first diversion from the voluntarist style of protecting employment rights.[84] Since 1963, labour regulation has grown significantly, and since 1973 this legislative growth has been largely influenced by developments emanating from the EU.[85] As aforementioned, the UK was slow to adopt EU social policy and it has remained a topic of debate between Labour and Conservative policymakers. Whereas Labour governments have tended to temper the neo-liberal tendency of Britain, for example, by accepting the EU Social Chapter, Conservative governments have persistently tried to reduce labour regulation in favour of market flexibility.[86]

The provisions introduced over the time of the UK's EU membership do not always fit easily within the UK legal system. Apart from what are often fundamentally different socio-economic imperatives in legal regulation, as EU law is generally modelled in the style of Continental legal practice, it is not always easily implemented into the UK's common law.[87] The UK position has not been assisted by the fact that there are significant differences between the UK labour system and those on the continent. There is no institutionalised system of worker representation and no requirement for employers to recognise or to bargain with labour unions.[88] Essentially, the UK system was and perhaps still is so different from the labour and employment regimes in continental Europe that the way in which Directives were drafted did not fit with the mechanisms of UK law.[89]

However inadequate the implementation legislation may be, the UK has implemented the three main EU Directives that aim to protect employees in the event of their employer's insolvency.[90] The Collective Redundancies Directive is implemented in the Trade Union and Labour Relations (Consolidation) Act 1992.[91] The UK adopted the lesser used of the options under the Directive, creating rules on collective redundancies that impose consultation obligations on employers who are making 20 or more employees redundant at a single establishment over a period of 90 days,[92] which was viewed as being more flexible for employers. This implementation has not been without controversy with challenges to the perceived flexibility due to the ambiguity of the definition of establishment,[93] but it can be said that it generally functions as expected. The main issue is the lack of representational infrastructure in the UK that is present among most other EU Member States.[94]

The Employers in Insolvency Directive was implemented via Part XII of the Employment Rights Act 1996 and guarantees payment to an employee of an insolvent employer out of the National Insurance Fund.[95] However, recovery from the fund is restricted to £489 per week[96] for up to a maximum of eight weeks for arrears of pay.[97] Holiday entitlement and compensation for unfair dismissal can also be reclaimed from the National Insurance Fund, but the aggregate of all debts will be similarly limited to that amount.[98] While limited in scope, this particular implementation has been relatively uncontroversial. Finally, the ARD was implemented in the TUPE Regulations[99] and is an

[84] M O'Sullivan, et al., 'Is Individual Employment Law Displacing the Role of Trade Unions' (2015) 44 ILJ 222.
[85] G S Morris, 'The Development of Statutory Employment Rights in Britain and Enforcement Mechanisms' in L Dickens (ed), *Making Employment Rights Effective* (Hart Publishing 2012) 8-10.
[86] Jennifer L L Gant, *Balancing the Protection of Business and Employment in Insolvency: An Anglo-French Perspective* (Eleven International Publishing 2017) 174-175.
[87] *idem* 151.
[88] B Hepple, 'Social Rights in the European Economic Community: a British Perspective' (1989) 11 Comp Lab LJ 425, 435-437.
[89] J Bell, 'Path Dependence and Legal Development' (2012) 87 Tulane Law Review 787.
[90] The PRD, art 13 refers to two additional Directives that govern aspects of consultation and participation, but these are not particularly controversial in the context of restructuring here: Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation OJ L 80/29 and Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) OJ L 122/28.
[91] Part IV, Chapter 2.
[92] Collective Redundancies Directive, art 1(a)(ii). Most Member States opted to implement the test under art 1(a)(i).
[93] See Case C 80/14 *USDAW & Others v WW Realisation 1 Limited (In Liquidation) & Another* ECLI:EU:C:2015:291.
[94] See Jennifer L. L. Gant and Jenny Buchan, 'Moral Hazard, Path Dependency, and Failing Franchisors: Mitigating Franchisee Risk through Participation' (2019) 47(2) Federal Law Review 27.
[95] Employment Rights Act 1996, s 182.
[96] Employment Rights Act 1996, s 186(1)(a).
[97] Employment Rights Act 1996, s 184.
[98] Employment Rights Act 1996, s 186(1).
[99] Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) as amended by The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (SI 2014/16).

excellent example of an EU social policy related law that has found an awkward place in UK law as its implementation has been difficult, messy, and controversial.[100]

The UK also provides protection for employees generally in dismissals by their employer, whether in the context of restructuring or otherwise. Unfair dismissal legislation[101] protects employees from dismissals that have not been justified if an employee has worked at an establishment for at least two years. Redundancy[102] is also regulated, which is the most likely method of dismissal to occur in times of an employer's financial distress. Like unfair dismissal, an employee must also have two years of continuous employment. If eligible, then employees may also be due a statutory redundancy payment[103] calculated according to the length of time an employee has worked for the employer. In the event of collective redundancies, the Collective Redundancies Directive[104] may of course apply. This contrasts significantly from the protections available to employees affected by the insolvency of their employer available under the US system.

Even within the Brexit discussion, social policy matters have retained a focus within Parliament. Negotiations around the Great Repeal Bill suggested the inclusion of additional schedules that would ensure that the law derived from the EU that conferred rights on workers, such as the three social policy Directives relevant to restructuring and insolvency situations, were retained upon the ultimate exit from the EU. The suggested amendments were not included in the final EU (Withdrawal Agreement) Act 2020[105] but an intention was indicated to introduce an Employment Bill[106] that would provide the same protection of those rights acquired by workers during Britain's EU membership. Although an Employment Bill was discussed during the Queen's Speech at the end of 2019,[107] there has been little movement in this area since then, nor does the bill appear likely to contain a guarantee for EU derived rights to be retained by workers post-Brexit.

The likely result will be that the more controversial rules, such as the Acquired Rights Directive, may well be repealed eventually in favour of a more flexible labour market that would cater to broader choices in restructuring decision making. This may well eventually have an adverse impact on the certainty of job security for workers in the United Kingdom as well as an eventual reduction of social policy protections overall depending on the allies the UK eventually makes in terms of trade. It remains to be seen what the impact of Brexit will be on the UK's popularity as a restructuring destination and in connection with this, whether it will try to create a more flexible environment for foreign investment in terms of business incorporation and running by reducing the social protections that may increase the costs of such investment, particularly if it aims to attract investors from countries such as the US who will often seek lower costs at the expense of social protection.

4.3.2 The United States

The United States has long been a destination for companies wishing to restructure using the Chapter 11 procedure. However, the US takes a very different approach to the value of social policy when it comes to providing buffers for employees in particular. These positions are derived in part from the different way in which the 'social contract' is viewed and implemented.

The US Constitution is a classic example of a social contract, although its inviolability tends to support the status quo, rendering change difficult and rules inflexible. It can also be used as a stabilising device, but equally it can be wielded to justify unequal power distribution, whether social, financial or political.[108] By contrast, European countries, including the UK, generally perceive that the

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[100] Gant (n 86) 50-153. See also Chapter 9 of this Research Handbook for a detailed discussion of the Acquired Rights Directive and the controversy surrounding it.
[101] Employment Rights Act 1996 c 18, s 98.
[102] Employment Rights Act 1996, s 139.
[103] Employment Rights Act 1996, s 162.
[104] Trade Union and Labour Relations (Consolidation) Act 1992 c 52, s 188.
[105] European Union (Withdrawal Agreement) Act 2020 c 1.
[106] 'The Employment Bill 2019-20 was announced during the queens speech on 19 December 2019. No date is yet available for second reading.' (House of Commons Library 13 January 2020) < https://commonslibrary.parliament.uk/research-briefings/cbp-8790/> accessed 1st September 2020.
[107] 'Queen's Speech' (UK Government 19 December 2019) <https://www.gov.uk/government/speeches/queens-speech-december-2019> accessed 1st September 2020.
[108] MA Fineman, 'The Social Foundations of Law' (2005) 54 Emory LJ 201, 205-206.

social welfare of individual citizens is more of a public responsibility than does the United States.[109] This could be attributable to the near sacred place that independence occupies in the American social contract. By imposing paternalistic social protections, it could be said that independence is undermined due to the possibility that individuals may have to forgo responsibility in order to rely on state benefits.

The perception of 'social rights' in Europe and the US is thus quite different, with the UK falling somewhere between them in terms of policy tendency. The provision of full social rights under the social contract would imply that a state has responsibility for some minimal form of substantive equality that marks a right of humanity no less important and worthy of governmental protection than the guaranteed political and civil rights and equalities. In the US, while political and civil rights are for the most part accepted, the concept of social rights is missing almost entirely from considerations about what a state should count as its responsibilities. The concept of rights is also frozen in nineteenth century models and change only with great difficulty and political risk.[110] While the American justice model embodies antidiscrimination focussing on guarantees of equality of opportunities and access to justice,[111] the idea of redistribution is anathema to a majority of the politically active populace. This American cultural norm is exemplified in the reluctance of America to accept international norms based on the fact that some of these institutions embody an alternative to the formal vision of equal opportunity entrenched in American jurisprudence.[112]

The late Justice Scalia, for example, was suspicious of the discussion or consideration of 'foreign views', stating that the Court 'should not impose foreign moods, fads, or fashions on Americans,'[113] encapsulating the largely isolationist tendencies that continue to characterise US domestic and foreign policy. Such norms would often require government intervention to ensure that the rights are guaranteed, positive action that is distressing to the American cultural psyche, preferring instead to protect rights through negative prescriptions in the law. While there is some support for exploring and advocating ideas of human dignity, equality, freedom, and justice, particularly in the rise of the social and economic left in the political climate of the 2020 election period, these go well beyond the purely economic justifications of the market that have often been used to limit contemporary American social policy and are therefore difficult to promote successfully.[114]

From its peak following the New Deal era, much of the welfare state programmes have been retrenched in the US with policy changes that either cut social expenditure, restructure welfare state programs to conform more closely to the residual welfare state model, or alter the political environment in ways that enhance the probability of such outcomes in the future.[115] In addition, social policy retrenchment is highly path dependent, thus social policy choices tend to create strong vested interests and expectations, which are difficult to dislodge. As the risks have risen due to increased income inequality, growing instability of income over time, increased employment in less structured services and part time roles, and increased structural unemployment, social protections have been eroded rather than enhanced.[116] The US has an uneasy partnership with welfare state ideals. The purpose of welfare considerations undermines that central theme of independence and the individual responsibility that is connected to it. This approach to matching reforms to social changes is also evident in the American approach to employment issues arising out of corporate rescue.

The American employment system is characterised by the concept of "at-will" employment in which employers possessed the legal authority to determine unilaterally the terms and conditions of an employment relationship.[117] Essentially the doctrine means that both the employer and employee are engaged in a relationship that is at the will of either of them, thus the employee can leave at any time and the employer can dismiss him, unless there is a contractual provision in place to the contrary,

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[109] *idem* 206.
[110] *idem* 208-209.
[111] *idem* 209.
[112] *idem* 217.
[113] *Lawrence v Texas* 539 US 558 (2003).
[114] Fineman (n 108) 222.
[115] P Pierson, *Dismantling the Welfare State* (CUP 1995) 17.
[116] JS Hacker, 'Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States' (2004) 98(2) The American Political Science Review 243, 245-249.
[117] SF Befort, 'Labour and Employment Law at the Millennium: a Historical Review and Critical Assessment' (2001) 43 B C L Rev 460, 355-375; This rule gained the ultimate authority in 1908 when the Supreme Court provided a constitutional basis for the doctrine in *Adair v United States*, 208 US 161 (1908).

though most employees do not have an employment contract with such provisions in place.[118] The 'at will' doctrine is almost universally accepted in the US, having been described as the 'very foundation of the free enterprise system.'[119] Some states have enacted legislation placing limitations on the at-will doctrine; however, broadly speaking it is still in place, with some limited exceptions based in tort or contract law.[120] There is no specific employment law regime providing protections outside of what is provided by an employment contract, collective bargaining and agreements governed by labour law, or tort law.

There have been some justifications given for the introduction of legislation limiting the 'at-will' doctrine. These have been attributed to the changing nature of the workplace in which the doctrine is at odds with the realities of contemporary employment relationships. A need to implement some labour protection due to the significant decline in union membership and power has also been recognised. Contemporary employment relationships are characterised by increasingly large corporate employers as well as specialised job functions that have made mobility within the labour market less realistic. Advances in trade and technology have further tipped the balance of power toward employers, particularly in view of the need for employers to compete in the global market, leading to a 'race to the bottom' of employment rights. The lack of any regime for protecting employees from unfair dismissals further exacerbates this problem as workers are not protected from whimsical dismissal unless it is based on the protected characteristics of discrimination legislation or if it occurs within one of those jurisdictions where the courts have limited the application of the 'at will' doctrine.[121] The lack of employment protection for American workers is not helped by the lack of federal power to control social policy in this area in any fundamental way due to the fact that contract law, of which employment law is a subset, is governed by individual state legal systems.

In terms of employment while a firm continues to operate during a Chapter 11 procedure, following the petition for bankruptcy under Chapter 11, employees that have been assumed by the debtor are assured of being paid for services rendered during the reorganisation. These rank as an administrative expense and are given first priority, though it is rare that such a claim will arise as a debtor will be sure to continue to pay such administrative debts as they fall due or risk not completing reorganisation.[122] In any event, while priority exists, it falls short of the priority given to employees in similar situations in EU countries. Employee claims occurring prior to the petition for Chapter 11 rank fourth in priority under the US Bankruptcy Code. However, these are limited to claims of direct compensation in wages, salaries and commissions that have been earned at the time of the petition but not yet paid in the 180 days prior to the filing for bankruptcy and are limited in the amount claimable. This also applies to pension and welfare benefit claims arising under a pre-established plan.[123] These rank equally to and combine under the limitations applied to wages and salaries. While true that these claims carry priority, this is only after administrative expenses and secured claims have been paid. Certain damages claims might also rank with priority, although this is only if the relevant employment contracts have been assumed, in the absence of which the debtor will have no obligation to pay damages immediately upon breach.[124]

Although there are also certain employee rights available in connection with actions taken under Chapter 11 that places job security at risk, these do not always adequately protect employees who might be subject to drastic reductions in the workforce, pensions and other employee benefits. In the absence of any protection by collective agreements, employees may get notification of redundancies but will essentially just have to suffer the loss of their jobs and associated benefits. The Worker

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[118] CA Scott, 'Money Talks: The Influence of Economic Power on the Employment Laws and Policies in the United States and France' (2006) 7 San Diego Int'l LJ 341, 351.

[119] DB Shine, 'An Analysis of the Terms and Level of Implementation of the European Union's Collective Dismissal Directive and the United States WARN ACT. Another Example for the European Union on the Relative Merits of Political Federation over Confederation' (1998) 12 Fla J Int's L 183, 185.

[120] SF Befort, 'Labour and Employment Law at the Millennium: A Historical Review and Critical Assessment' (2001) 43 B C L Rev 460 378-383.

[121] SF Befort, 'Labour and Employment Law at the Millennium: A Historical Review and Critical Assessment' (2001) 43 B C L Rev 460, 385-393.

[122] D R Korobkin, 'Employee Interests in Bankruptcy' (1996) 4 Am Bankr Inst L Rev 5, 14-15.

[123] Pensions refers only to retirement income while welfare benefits refer to medical, health, accident, disability or death benefits, severance pay, training, apprenticeship programmes, day care and prepaid legal services.

[124] PM Secunda, 'An Analysis of the Treatment of Employee Pension and Wage Claims in Insolvency and Under Guarantee Schemes in OECD Countries: Comparative Law Lessons for Detroit and the US' (2014) XLI Fordham Urban Law Journal 867, 898 and DR Korobkin (n70) 8-9.

Adjustment and Retraining Notification Act,[125] a statute requiring advance notice if collective redundancies were envisaged, mitigates some of the issues surrounding large scale bankruptcies.[126] If the WARN Act is engaged, the employer must provide written notice to representatives and employees affected by the action. There is no statutory redundancy payable unless provided for in a contract. The WARN Act applies to business enterprises of a certain size and composition in the event of a mass layoff,[127] however, the threshold for a mass layoff is relatively high compared to the Collective Redundancies Directive.

These drastic reductions often occur at the beginning of a reorganisation process, which is then sometimes followed by the payment of massive retention bonuses to upper management in order to keep them on the job.'[128] Thus, there is often a great divide between the treatment of managers as opposed to workers and employees in the context of Chapter 11 restructurings.[129] In addition, collective agreements and employment contracts can be summarily terminated under the Bankruptcy Code.[130] The persistence of the 'at will' doctrine means that employees in these situations will have recourse to legal protection in only limited circumstances.

The WARN Act does not require consultation, merely 60 days advance notice in employers having over 100 employees, though it excludes several categories of workers, including those engaging in collective action at the time of the notice.[131] There is also no provision for transferring employment contracts upon a business transfer. Employees will only transfer if the transferee formally offers them employment and continuity of employment is not guaranteed.[132]

Compared with the protections available to employees affected by the insolvency of their employer in the UK and other EU countries, the WARN Act merely recognises that employees are affected, but offers very little in terms of real security or protection. In addition, the priority treatment of employees does little but ensure they continue to be paid while they are working, with any unpaid wages upon termination left unsecured with the rest of the collective. This is where the regulatory protections provided to American employee job security and wage and wage-related entitlements in the event of an insolvency ends.

5 What happens next: the many crises of 2020 and their potential impact on social policy and restructuring in the future

The year 2020 may be a turning point for how financial distress is treated in the future, presenting policy makers first with an immediate crisis for businesses locked down at fairly short notice by the COVID-19 health crisis throughout the world, then lingering with continued restrictions that have reduced income and profits due to limitations on the numbers of people who can utilise a space at the same time. The interrelationship between insolvency and social policy is particularly clear in the context of the COVID crisis, shining a spotlight on both the efficacy of current systems to deal with the sudden shocks precipitated by economic lockdowns and the safety nets available to the employees affected by the reactions to the financial distress created thereby.

Reactions by governments across the globe have been diverse in terms of providing buffers for businesses and people who have been significantly impacted by the lockdown rules. Even in Europe,

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[125] An Act to require advance notification of plant closings and mass layoffs, and for other purposes (the 'WARN' Act) enacted by the 100th United States Congress, Pub. L. 100-379 102 Stat 890.
[126] PA Susser, AM Wever and SJ Friedman, 'Employment and Employee Benefits in the US: Overview' (2014) Practical Law Multi-Jurisdictional Guide on Employment and Employee Benefits <http://global.practicallaw.com/1-503-3486> first accessed 28 October 2014.
[127] Scott (n 118) 373-374.
[128] See for example Re Eastman Kodak Co. Et al, Voluntary Petition for Chapter 11 Bankruptcy, Case No 12-10202, So, Dist. NY (2012) available from http://bankrupt.com/misc/Kodak_StipSpectra073013.pdf first accessed 30 October 2014.
[129] J Berry, 'Different Playing Fields: What Affect Does Chapter 11 Bankruptcy Have on Employees of the Debtor and Why do, These Affects Drive Companies to Bankruptcy?' (2012) Social Sciences Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2139062> first accessed 30 October 2014.
[130] Susser (n 126).
[131] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.
[132] Scott (n 118) 377.

the difference in approach has been stark in some areas.[133] Many jurisdictions have created a 'safe harbour' for companies facing financial distress as a result of lockdown rules by relying on the toolkits already available to local companies,[134] with some engaging in temporary adjustments to make solutions more flexible under the circumstances,[135] or by utilising current procedures in innovative ways.[136] Others have introduced brand new mechanisms, often rushing them through the legislative process to make them available to ailing businesses.[137]

Most jurisdictions have also introduced social policy measures to create a buffer for employees and small businesses, ranging from 'suspension of tax payments, state guarantees/loans, subsidies for businesses and freelancers, and measures halting redundancies dictated by economic reasons.'[138] The UK has covered employer obligations relating to the Coronavirus Job Retention Scheme and the Coronavirus Statutory Sick Pay Rebate Scheme to reclaim employees' coronavirus related statutory sick pay, which has helped both employers and employees. The latter scheme has extended sick pay to employees who have been advised to stay at home even if they are not sick.[139] In addition, the UK created a furlough process under the Job Retention Scheme, which has arguably had the greatest beneficial impact for both employers and employees during the crisis. This scheme has seen employees paid 80% of their wages up to a monthly cap of £2500 by employers who apply on behalf of employees under the scheme.[140]

The US has taken a somewhat different social policy approach to buffering employees from dismissals associated with COVID19 lockdowns. They have enacted the Families First Coronavirus Response Act (FFCRA) that requires certain employers to provide employees with paid sick leave for specified reasons related to COVID 19 and is effective from 1st April to 31st December 2020. The provisions of this Act apply only to a limited section of the labour market.[141] For the most part, however, an essentially voluntarist duty has fallen upon employers to ensure health and safety for their workers while employers' obligations toward employee rights remain uncertain. In relation to the social safety net available to workers, the crisis has revealed major weaknesses in unemployment insurance as well as employee rights and autonomy for those workers considered 'essential' during the crisis.[142] In Europe, however, and also in the UK, there was a quick reaction to put supports in place for workers while in the United States there are at the time of writing over 40 million workers who have applied for unemployment. Of course, the current US government also sent $1,200 to all taxpayers qualifying under a certain income threshold, which is a mere drop in the ocean of the effects the crisis has already had on those 40 million unemployed workers.

The crisis has further shown a real disconnect between social policy reactions and the provisions implemented to protect businesses or create a fertile environment for restructuring. While business protection and rehabilitation has a positive effect on employment generally, there is little consideration of anything protective within insolvency and restructuring frameworks, leaving it entirely within the scope of employment and labour law to extend buffers for affected employees. As these provisions fall away in the UK, it is more likely than not that there will be a return to the pre-EU status quo.

The PRD pays lip service to protecting employees, but the social policy Directives were not created with preventive restructuring in mind. It presents a new paradigm that, as it is not dealt with in

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[133] See Emilie Ghio, Gert-Jan Boon, David C Ehmke, Jennifer L L Gant, and Eugenio Vaccari, 'The Limits and Logic of the EU Harmonisation Process in the Wake of the Covid-19 Pandemic' (2020) (Summer) Eurofenix 22.
[134] For example, France and Italy has continued to use its existing rules while also introducing some emergency measures – see Ghio et al (n 133) 22.
[135] Germany, for example, has suspended filing obligations to encourage directors to continue trading – see Ghio et al (n 133) 22.
[136] The UK has seen an increased utilisation of administration, but using it in a 'light touch' way by relying on an little used provision in the Insolvency Act 1986 allowing consent to be given to the board to continue to exercise board powers, transferring it in some ways to a debtor in possession style of procedure – see Ghio et al (n 133) 22.
[137] The Dutch WHOA (*Wet homologatie onderhands akkoord)* has been pushed; Italy has introduced a new Insolvency Code; and the UK rushed a new restructuring plan through parliament – see Ghio et al (n 133) 23.
[138] Ghio et al (n 133) 23.
[139] 'Coronavirus Statutory Sick Pay Rebate Scheme set to launch' (Gov.UK 19 May 2020) <https://www.gov.uk/government/news/coronavirus-statutory-sick-pay-rebate-scheme-set-to-launch?utm_source=0128333f-ceb9-45ee-a773-0051e0111053&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate> accessed 1st September 2020.
[140] 'Coronavirus Job Retention Scheme' (Gov.UK 26 June 2020) <https://www.gov.uk/government/collections/coronavirus-job-retention-scheme> accessed 1st September 2020.
[141] 'Families First Coronavirus Response Act: Employee Paid Leave Rights' (US Department of Labor) <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave> accessed 1st September 2020.
[142] L Mineo, 'How COVID Turned a Spotlight on Weak Worker Rights' (The Harvard Gazette, 23 June 2020) <https://news.harvard.edu/gazette/story/2020/06/labor-law-experts-discuss-workers-rights-in-covid-19/> accessed 30 November 2020.

the preventive restructuring context, should be considered in any reformative efforts of social policy Directives and other rules regulating the safety nets for a corporation's most valuable asset: its workforce. The current situation is messy, to borrow from the beginning of this Chapter. Bringing social policy in line with the needs of employees affected by the *restructuring* of their employer is likely to also be messy, particularly in an EU perspective considering the numerous countervailing interests that will inevitably be involved in any reform activities.