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Sarah Paterson, Corporate Reorganisation Law and Forces of Change (Oxford: Oxford University Press, 2020) 320 pp., £80 (hardback) ISBN 978-0-19-886036-5

Review by Stephen Gwaza

Notable socio-economic developments, technological advances, the financial crisis and the Covid 19 pandemic, which have characterised the dawn of the twenty-first century, have profoundly transformed the landscape within which corporations and finance interplay. The impact of these developments on corporate reorganisation law, which has become high profile in recent years,[1] cannot be understated. The need for a serious evaluation of how this "new world" (p 2) affects corporate reorganisation of corporations has therefore been rarely more important and Sarah Paterson's *Corporate Reorganization Law and Forces of Change* constitutes an invaluable contribution to that enterprise. Paterson's book is aimed at examining and understanding the new ways in which corporate reorganisation law is mobilised and adapted by market participants in the US and England in finance and non-financial corporates and the "implications for corporate reorganisation law theory" (p 33). She is concerned about the significance of these adaptations for scholars, practitioners, judges and the legislature "when they analyse the content of corporate reorganisation law and the case for reform" (p 2).

Paterson introduces her book by examining the ongoing contest between scholars who adopt an economic, market contractarian approach and those who take a progressive, pro-legal view to corporate reorganisation which has continued to shape the reform debate in the US since the introduction of Chapter 11. She highlights how a "bundle of concepts" (p 7) have become the "weapons" in the

[1] Rebecca Parry and Stephen Gwaza, 'Is the Balance of Power in UK Insolvencies Shifting?' (2019) 7 NIBLeJ 2, 1.

tussle between these two schools of thought in the US. The contentious concepts in the ongoing debate are identified as; "unsecured or junior creditor; collective action; secured creditor control rights; debtor control rights; and bargaining and litigation" (p 7). Paterson argues that the English corporate reorganisation law, which is more adept to facilitating modern mobilisation and adaptation of corporate reorganisation law in complex financial capital structures, is a result of a different historical conceptual framework to that of the US. Importantly, this comparative discussion exposes the imprudence of holding on to redundant concepts in the face of a "new world", Paterson urges US scholars to learn from the English experience but also warns English scholars against complacency because there is always a danger that certain laws are simply reproduced due to long held legal-ideological conceptions without regard to profound changes in context. Sadly, this often results in the ineffectiveness of such laws in an economic sense.

Chapter two of Paterson's book, which is a careful evaluation of the history of finance and corporate reorganisation in the US and England, will assist the reader to appreciate the resultant differences in corporate reorganisation law in these jurisdictions. This history also explains the emergence of the disparate conceptual frameworks in the two countries. In the US the significant role of the courts, investment bankers and lifetime debtor management steered the development while in England it was the predominantly privately-driven scheme of arrangement which propelled progress. This chapter undergirds the comparative analysis that follows in the subsequent chapters of the book.

The following chapters open with an examination of the conceptual arguments which always emerge in the US corporate reorganisation law discourse. Sarah Paterson ingeniously uses the borrowed meta-theory of the significantly shifting 'logics', 'practices', and 'identities'[2] in finance or non-finance corporates to show how this affects the mobilisation and adaptation of corporate reorganisation law in context. In Chapter three the author identifies how the rise of

[2] Patricia Thornton, William Ocasio and Michael Lounsbury, *The Institutional Logics Perspective: A New Approach to Culture, Structure and Process,* (OUP 2012) 128-47.

leveraged capital structures has radically altered the theoretical conceptualisation of the unsecured, weakly adjusting creditor in regard to high value corporate restructuring, particularly in the US. She contends that sophisticated, well informed participants who hold most of the unsecured debt in some of these high value capital structures can hardly be described as weak and poorly adjusting creditors. Inevitably, both economic and progressive scholars would have to re-evaluate their ideological perspectives in context. Paterson argues that the English scheme of arrangements[3], plus the vast jurisprudence developed by English courts, the establishment of the London Approach and the amendments to the LMA inter-creditor agreement have proven to be useful tools for corporate reorganisation of capital cases. However, the author argues that the conceptual frameworks adopted by English scholars, practitioners, judges and the legislature may prove inadequate for the development of new valuation concepts in future.

Subsequent chapters examine how the changes in 'logics', 'practices' and 'identities' have also altered the traditional understanding of the concept of collective action, the secured creditor, the concept of bargaining and litigation and the concept of the honest broker in turn. Chapter six, which deals with the lifetime manager, is an interesting chapter that highlights the marked conceptual differences between the US and England theorisations of corporate restructuring.

As a result of the US's historical lifetime management, progressive scholars successfully argued for a debtor in possession Chapter 11 in the hope that this would motivate management to proactively file for reorganisation before corporate distress had worsened. It had been envisaged that the attraction of staying in charge and preservation of employment with all its benefits would be sufficient motivation to ensure the timely engagement of remedial action by the management. However, the "new world" which has brought about organisational and institutional changes that have given rise to private equity firms has seen the demise of the lifetime manager in the US. Therefore, the traditional conceptual arguments between progressive and economic

[3] Companies Act 2006, Part 26.

scholars around a debtor in possession model of corporate reorganisation must of necessity also change. The English regime did not have a similar conceptual approach to debtor in control in corporate reorganisation. However, the English scheme of arrangement, which has historically been an out of court procedure, is a debtor in possession affair where existing management steer the restructuring, except for instances where litigation is initiated by financial creditors who are unhappy with the management.

Chapter nine of the book is an interesting foretaste of the future. Paterson interrogates the assertions by economically minded scholars that the need for "full financial and operational reorganisation" may be diminishing as US corporates move towards a "bundle-of-contracts business model" (p 216). She foresees fresh battle lines being drawn between the old adversaries over the implications of bundle-of-contracts business model for corporate reorganisation law. The rise of covenant-lite loans and fragmented capital structure reorganisations are also explored in this chapter. Insofar as England is concerned, once again Paterson points to why the corporate restructuring law is suited to achieve positive results although she is concerned about its sufficiency to facilitate reorganisation in cases where diverse participants and societal costs are implicated. The author also sounds a warning about the possibility of a deluge of cases implicating general unsecured creditors, employees and customers, as opposed to sophisticated financial institutions, as a result of the Covid-19 pandemic which has seen most companies in both the US and England continue to accumulate liabilities during lockdown while relying on temporary government assistance.

In chapter ten Sarah Paterson examines both the ABI report and the LSTA response and proposes a way to finding common ground between the traditional US protagonists. While admitting that the two schools of thought in the US may never agree purely for ideological reasons, the author argues that because of the undeniable shift in "logics", "practices", and "identities" in the financial markets a "context-sensitive" (p 252) approach to the corporate reorganisation law ought to be adopted. In the English section of the chapter, Paterson evaluates the new tools that the recently introduced Corporate

Insolvency and Governance Act 2020 offer. Perhaps unavoidably, the discussions of the relevant features of the Act[4] are slightly sketchy. The new bill was introduced just before the book was due for publication. Despite the minimal appraisal, the author commends the English approach but opines that some tools may have to be borrowed from Chapter 11 if necessary, to deal with cases with wider reorganisation implications.

Paterson's plea is for judges to be afforded sufficient protection for creativity and pragmatism on the way participants mobilise reorganisation law and she also warns scholars, practitioners, judges and the legislature to avoid path dependence in the face of incontrovertible changes in "logics", "practices", and "identities" in the financial markets.

Sarah Paterson's book is well researched and extensively referenced. The clarity with which she discusses complex interdisciplinary subjects makes this book a resource material with a wide appeal. Undoubtedly, Paterson has greatly enhanced the understanding of corporate reorganisation law involving financial and non-financial corporates in the twenty first century and the importance of innovation.

[4] The Corporate Insolvency and Governance Act 2020.