

# ***Corporate Reorganization Law and Forces of Change (OUP 2020)***

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## Motivation

- ABI Commission vs LSTA debate framed in similar terms to 1980s economic vs progressive debate
- But 1980s debate was a product of ‘firms, capital structures and players’ that existed at the time (Jackson 2018)
- Forces of change from proximate fields have dramatically changed the landscape and multiple types of reorganization case for **large** corporates have emerged as a result
- Different approach to these different types of case in the US and England

## Controlling argument

- Using conceptual framework developed in a different context to analyse these adaptations leads to wrong turns

## Comparative approach

- US Chapter 11 rooted in full financial and operational reorganizations and difficulties arise in applying existing conceptual framework to reorganizations limited to financial creditors
- English corporate reorganization rooted in financial reorganizations and has a well-adapted conceptual framework for this type of case
- But adaption needed in England for full financial and operational reorganizations
- And new adaptations of corporate reorganization law require flexibility in both jurisdictions

# The concepts

Concept	US		England
	Economic	Progressive	
Unsecured creditor protection	Market-based approach	Protect weakly adjusting creditors	London Approach and reorganizations limited to financial creditors
Collective action problem	Broad agreement on role of corporate reorganization law in preventing the 'grab race'		London Approach and principles of cooperation
Secured creditor control	Respect secured creditor control rights	Shift bargaining power towards debtor	Long history of 'blanket lien'
Debtor control	Sceptical of debtor control rights	Endorse debtor control rights to promote reorg.	Out-of-court nature of London Approach. Different experience of deregulation, mass tort, and class action litigation
Bargaining and litigation	Concern with complex valuation	Support higher valuations for unsecured creditors	Role of Bank of England and fear of exclusion from primary syndication market
Transparency and disclosure	Broad agreement on t&d		Confidential London Approach negotiations

# The forces of changes

Force of change	Concept	New or reformulated concept
Rise of leverage	Informed, strongly adjusting, unsecured financial creditor: reduced importance of unsecured creditor protection	Reduction of transaction costs
Rise of trading	Rise of market for distressed debt and reduced importance of collective action problems	Holdout problem
Rise of secured credit	Incentives of secured creditors to promote corporate reorganization and reduced significance of secured creditor liquidation bias	Secured creditor control rights to promote corporate reorganization objective
Fall of lifetime manager	Disincentives for managers to file early	DIP to signal 'business as usual'
Fall of gentleman banker	New attitudes to risk of litigation and implications of complex mechanisms (Hart and Moore 2008)	Reducing opportunities for litigation
Fall of honest broker	Risks of transparency and disclosure	Insider trading safe harbours

# Practice: US

## Exchange offer

- Reduce transaction costs
- Contain holdout threat
- Avoid litigation over valuation

## Connected party s 363

- Reduce transaction costs
- Contain holdout threat
- Avoid litigation over valuation: current market price in prevailing market conditions

## Prepackaged plans

- Reduce transaction costs
- Signal 'business as usual'

## Contractual control rights

- Reduce transaction costs
- Contain holdout threat
- Importance of control rights in reducing liquidation bias

# Practice: England

Scheme Scheme  
+ prepack

- DIP to signal business as usual
- Reduce holdout problem and litigation risk: majority rule and counterfactual

Part 26A  
restructuring plan

- DIP to signal business as usual
- Reduce holdout problem: cross-class cram down power
- Reduce litigation risk: role of relevant alternative

Contractual  
control rights

- LMA intercreditor agreement
- Scope of intercreditor agreement and court
- Lock-up agreements and rights vs interests



## Theory and practice

### Economic lens

- Solve bargaining failure
- ‘Mimic’ results market would have produced if bargaining had been possible
- Reduce transaction costs

### Progressive lens

- Prevent distress spreading to operations and to weakly adjusting trade creditors, employees, and community

# New forces of change

- COVID-19
- Covenant-lite and covenant loose lending
  - Becomes more difficult to contain restructuring in financial debt
  - Cases compromising both financial and operational creditors
- Theory and practice
  - Greater distance between economically-minded and progressively-minded scholars
- Comparative analysis
  - US (still) has better tools to stabilize operations and create liquidity

## **New forces of change**

- Modern strategic reorganization cases
  - Landlords
  - Pensions
- Theory and practice
  - New questions of equitable pain sharing
- Comparative analysis
  - Counterfactual/relevant alternative and non-financial creditors

## **New forces of change**

- **Fragmented capital structure reorganizations (Ayotte 2019)**
  - Disagreement about the appropriate transaction in distress
  - Living will? (Jackson and Skeel 2013)

## Future forces of change?

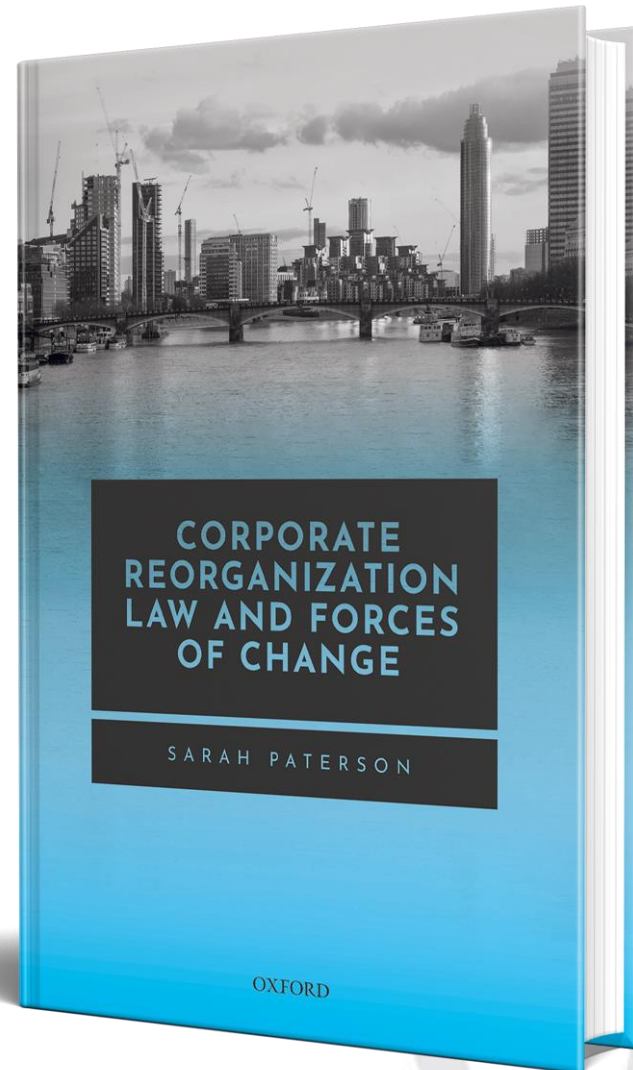
- Actors move from being iconoclasts to becoming part of establishment
  - Public reputation?
  - Attitudes of investors
- Willingness of market to discipline itself
  - Net short lender disenfranchisement provisions
  - Permitted transfer lists

## Conclusion

- Identify type of corporate reorganization case
- How does dominant theoretical concern manifest itself in that type of case:
  - Allocation of assets to highest and best use
  - Preserve company for weakly adjusting trade creditors, employees, and community in which debtor is embedded
- Implications for reform agenda

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