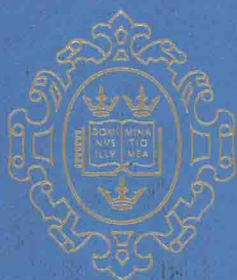


OXFORD
INTERNATIONAL AND COMPARATIVE
INSOLVENCY LAW SERIES

TREATMENT OF
CONTRACTS IN
INSOLVENCY

EDITED BY
DENNIS FABER,
NIELS VERMUNT, JASON KILBORN,
KATHLEEN VAN DER LINDE



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PREFACE

The second volume of this series on international and comparative insolvency law deals with the treatment of executory contracts in the insolvency of business debtors. This substantive topic is of great practical relevance for those who deal with business debtors—not only as counterparties in particular executory contracts, but also as third party creditors competing for the debtor's limited resources. A business debtor has a significant interest in executory contracts, especially in its reorganization where its survival and recovery may depend on continuing contractual relationships.

Straddling the fields of insolvency law and contract law, the response to executory contracts provides an opportunity to reflect on the interaction between the core principles and values of each of these fields. When must the idea of *pacta sunt servanda*, or 'bargains must be kept', yield to the principle of *paritas creditorum*, or equal treatment of creditors? Which contract parties deserve additional protection? To what extent does party autonomy or freedom of contract allow contracting out of the insolvency system? The solutions adopted in various jurisdictions provide fascinating material for policy analysis.

But the treatment of executory contracts also illustrates important assumptions about the administration process and the expected outcomes of insolvency proceedings. The ability of an insolvency administrator to assume executory contracts with recurring obligations presupposes either continued trading or the right to assign that contract, perhaps as part of a going-concern sale. Expected outcomes should account for the measure of correspondence and divergence in the treatment of executory contracts in, respectively, liquidation and reorganization proceedings. One might question whether rules originally developed with liquidation in mind, have been sufficiently responsive to the dictates of reorganization. The opportunities and challenges of unitary as opposed to independent proceedings could be analysed from this perspective.

Important issues related to security and ranking of claims may also have a bearing on the treatment of executory contracts. However, these topics will form the subject matter of future volumes in this series. Comparison of different jurisdictions also reveals the relevance of social security and guarantee schemes in the approach to executory contracts. Basic features of the property system also cannot be completely ignored, for example the separation between agreement and transfer of ownership in an abstract system, where the delay in transfer of ownership

increases the chance that a pre-insolvency contract may still be unexecuted when proceedings commence.

This volume follows the example of the first in the level of detail provided in stating the subject matter. Reports aim at providing a comprehensive account of the topic comparable to leading domestic texts. The general outline is followed in each national report. Apart from facilitating comparison, it also forces authors to address questions that would not necessarily occur to them while following their own methodology writing for domestic readers. As in the first volume, terminology has not been standardized so as to retain the jurisdiction-specific conventions.

The jurisdictions covered mirror most of those in the first volume. They represent developed and emerging markets from different continents and different legal families. We trust that the usefulness of this series will be enhanced by consistency in the inclusion of jurisdictions.

The general outline falls into four distinct parts: an introduction; a discussion of the approach to executory contracts in general and the consequences of their assumption or rejection; a consideration of specific contracts that may be subject to different rules; and an analysis of the enforceability of clauses stipulated by contract parties to alter the normal effects of insolvency. Where different rules apply to liquidation and reorganization, authors were invited to use indicative sub-headings.

The introduction of each national report allows an insight into important trends and developments in the domestic system, and in addition tests the meaning of the concept 'executory contract' and verifies the assumption that the insolvent estate either vests in, or is subject to the control of, an insolvency administrator.

In the second section the general principles governing executory contracts enjoy attention. The basic effect of the commencement of proceedings on existing unexecuted contracts is considered in the introductory part of this section, including the question whether an election needs to be made and, if so, what rules apply as regards timing and approval of the election. The specific consequences of, respectively, the assumption and rejection of executory contracts are then considered in the second main section. In relation to assumption, important issues are whether the insolvency administrator needs to cure prior default and whether the debtor's performance needs to be guaranteed or secured. The rejection of executory contracts is considered, with emphasis on the source, status, and ranking of any claim for damages that may be asserted by the counterparty.

In the third section, attention is devoted to specific contracts that are subject to special rules. The development of these exceptions and the policy considerations supporting them are briefly sketched. Comparison is facilitated by reference to specific contracts or categories of contracts that are subject to special rules in at least some jurisdictions. The absence of a special arrangement in particular jurisdictions

could be equally informative of its approach. In some instances special arrangements are contained in non-insolvency statutes, and the general outline ensures that national reports also include a consideration of these statutes that might not traditionally be analysed in domestic insolvency law texts. The specific contracts or categories of contracts are: sale, hire-purchase, and finance lease contracts; operational lease and rental contracts; construction contracts; utility contracts; labour contracts, agency contracts, commission contracts, and other contractual collaborations; pension contracts; financial and financial collateral contracts; insurance contracts; escrow and trust arrangements; and intellectual property (IP), domain name, and licensing contracts.

Each national report concludes with a discussion of the enforceability of pre-insolvency clauses stipulated by either the debtor or a counterparty. At issue is the extent to which it is possible to contract out of the insolvency system. This topic cuts to the core of public policy issues, by juxtaposing the notion of party autonomy or freedom of contract and the basic principles or assumptions of insolvency law. Differences of approach can be illustrated through a jurisdiction's response to *ipso facto* clauses—contractual stipulations that provide for the termination or modification of a contractual obligation on the ground of the commencement of insolvency proceedings. Does the mere fact that a stipulation is triggered by the commencement of insolvency proceedings render it unenforceable, or will enforceability depend on what effect the clause will have on specific insolvency rules? Is the motive of the parties relevant? The typical stipulations identified in the general outline are: termination and acceleration clauses; close-out netting provisions; flip clauses and contractual step-in clauses; flawed asset or conditional rights clauses and penalty provisions.

Again, the approach to pre-insolvency agreed stipulations cannot be viewed in isolation. The range of specific exceptions in a jurisdiction, such as those in relation to close-out netting in specific types of contracts, may provide some explanation as to the enforceability of similar stipulations in general contracts. Also relevant, particularly to the notion of non-deprivation, is the supplementary role of avoidance provisions, which are to be considered in a separate volume in this series.

A list of sources for further reading is provided at the end of the book.

Dennis Faber
Niels Vermunt
Jason Kilborn
Kathleen van der Linde

GENERAL OUTLINE OF NATIONAL REPORTS

A. Introduction

Introduction

- General introduction to the topic (eg general trends over time in legislative treatment and in case law, new developments in practice, and main discussions in legal literature).
- The following definition of an executory contract is used in the book: 'Contracts that at the commencement of the proceedings have not been fully performed by both the insolvent debtor and the counterparty.' Is this definition accurate from the perspective of domestic law?
- Are general rules provided for the situation where only one party has not fully performed its obligations? Are the assumptions correct that: (i) if it is the debtor that has not fully performed, the other party will have a claim for performance or damages, which can be submitted in insolvency; and (ii) if it is the counterparty that has not fully performed its obligations, the insolvency administrator can demand performance or damages from that party?
- Are there any other remarkable features of the domestic legal regime which are relevant to mention as an introduction?

B. General Treatment of Executory Contracts

General remarks

- Are executory contracts deemed to be assumed or rejected? Or does the insolvency administrator need to make an explicit choice? Do special rules apply to the timing of the decision on assumption or rejection? For example, can the insolvency administrator delay the decision until confirmation of a plan of reorganization or some other time? Or can the creditor—or the court (upon request or *ex officio*)—set a certain time limit? Are contracts automatically deemed assumed or rejected after the lapse of this time period? Is a decision to assume or reject an executory contract subject to court approval or creditor review (eg by the creditors' committee)? If so, which test is applied?
- Can contracts be partially assumed and rejected? And can executory contracts be assumed in amended form by the insolvency administrator (eg in respect of non-assignment clauses and certain onerous provisions)?

- Does a distinction need to be made between contracts pursuant to which the debtor's obligation entails the performance of a certain act ('active obligation') and contracts under which the debtor is obliged to tolerate certain acts of the counterparty ('passive obligation')?
- Do special provisions apply to a long-term contract or a contract for an indefinite time period?
- Which rules apply to contracts involving (irreplaceable) personal services to be performed by the insolvent debtor? For example, is the counterparty's express approval required if the insolvency administrator assumes a personal service contract and subsequently designates another party to perform the relevant services?
- Do special rules apply to assumption and rejection of government/state contracts?
- Is the insolvency administrator entitled to transfer executory contracts (eg as part of a going-concern sale)?

Assumption of executory contracts

- Which general rules apply and which legal consequences are triggered by the assumption of executory contracts? For example, does the insolvency administrator need to cure default and/or provide security or other assurances for performance of post-commencement (and perhaps even pre-commencement) obligations? If so, must the debtor's non-monetary obligations also be secured? Is a distinction made regarding the special treatment of post-commencement claims which have arisen prior to and after assumption of the contract by the insolvency administrator?
- Is the insolvency administrator personally liable for the performance of obligations arising out of assumed executory contracts? If so, can the insolvency administrator be discharged of such liability?

Rejection of executory contracts

- Which general rules apply and which legal consequences are triggered by the rejection of executory contracts?
- Does rejection of an executory contract give rise to a claim of the counterparty? Does a claim arise pursuant to a special provision under insolvency law, or under the general law of obligations? Which status is awarded to such a claim (eg regarding priority/subordination, (non-)enforceability and admission as an insolvency claim)? In which circumstances can contractual damage claims be reduced by operation of law or by court order?
- What are the consequences of rejection of a long-term contract or a contract for an indefinite time period? If the insolvency administrator has rejected such a contract, are claims for the restitution of advance payments made by the debtor prior to the commencement of insolvency proceedings deemed to come

into existence prior to insolvency (eg upon making the advance payment) or during insolvency (eg upon termination)? To which extent is this relevant if, for example, all present and future claims of the debtor have been encumbered with security interests prior to insolvency? Does the extended scope of security to after-acquired assets catch such claims? And is set off permitted by the counterparty?

C. Specific Contracts

General remarks

- Why do certain contracts receive special treatment by the legislator or in case law (eg special protection is deemed necessary to protect certain weaker parties, or the legislator seems to be receptive to pressure from lobby groups)?
- Has the special treatment of certain contracts evolved over time, or is it a more recent phenomenon?

Sale, hire-purchase, and finance lease contracts

- Do special insolvency provisions apply to the assumption and rejection of sale, hire-purchase, and finance lease contracts?

Operational lease and rental contracts

- Do special insolvency provisions apply to operational lease and rental contracts?
- Does a distinction need to be made between the termination of operational lease/rental contracts relating to (certain) movable property and those relating to immovable property? And do special provisions apply to commercial/consumer and residential/non-residential leases?
- What is the status of claims arising out of operational lease and rental contracts which become due and payable during insolvency? Are such claims deemed to be present (conditional) claims or future claims upon the conclusion of the contract or else upon the commencement of insolvency proceedings?

Construction contracts

- Do special insolvency provisions apply to construction contracts?

Utility contracts

- Do special insolvency provisions apply to utility contracts?
- Is the supplier of utilities (eg water, electricity, gas, and heating) obliged to continue supply once requested by the insolvency administrator after the commencement of the proceedings? If so, which conditions apply?

Labour contracts, agency contracts, commission contracts, and other contractual collaborations

- Do special insolvency provisions apply to labour contracts, agency contracts, commission contracts, and other contractual collaborations?
- In which circumstances can employment contracts be terminated by either the insolvency administrator or employees of the insolvent company? Which notice periods apply?
- What status is awarded to salaries and related employee claims which become due and payable during the course of insolvency proceedings? Do employees have access to a publicly funded redundancy scheme?
- Is the insolvency administrator entitled to terminate employment contracts, commission contracts, and/or corporate resolutions pursuant to which directors and members of the supervisory board of a company have been appointed? Does termination automatically suspend any powers granted under general company law? Do special rules apply to listed companies?
- Is the insolvency administrator entitled to reject or modify collective bargaining agreements?

Pension contracts

- Do special insolvency provisions apply to pension contracts and the debtor's obligations pertaining to retiree health care?
- Can pension distributions be limited by a pension fund if it becomes financially distressed?
- What is the status of pension premiums and related obligations (eg backservice payment obligations)? Is preferential status accorded to such claims? And can special treatment be invoked in respect of pension claims arising during the course of insolvency proceedings?
- Are contractual obligations under pension contracts automatically transferred upon a going-concern sale of the business?
- Do (former) employees have access to a state fund if the employer and/or pension fund is declared insolvent?

Financial contracts

- Do special insolvency provisions apply to financial contracts, such as financial collateral arrangements (ie agreements pursuant to which certain financial assets (eg cash, bank deposits, credit claims, and securities) serve as collateral to secure current and/or future obligations)?
- Are certain financial contracts automatically terminated by operation of law (eg certain derivative contracts)?
- Do certain financial contracts benefit from the exclusion of other protective provisions that apply under general insolvency law?

Insurance contracts

- Do special insolvency provisions apply to insurance contracts?

Escrow and trust arrangements

- Do special insolvency provisions apply to escrow and trust arrangements?

IP, domain name, and licensing contracts

- Do special insolvency provisions apply to IP, domain name, and licensing contracts?

D. Pre-Insolvency Agreed Contractual Remedies

Contractual remedies stipulated by the debtor

- Are contractual provisions used in practice which purport to avert the commencement of insolvency proceedings (eg automatic debt for equity swaps and non-petition clauses)? In which circumstances are such clauses binding and enforceable?

Contractual remedies stipulated by the counterparty

Termination and acceleration clauses (in certain countries also referred to as 'ipso facto' clauses)

- Are termination and acceleration clauses valid and enforceable?
- If such clauses are overridden under general insolvency law, are exceptions provided in respect of particular contracts?
- If such clauses are permitted under general insolvency law, are exceptions provided in respect of particular insolvent debtors (eg as part of bank resolution measures recently adopted in the wake of the global financial crisis)? And is an exception provided if advance payments are made or the performance of payment obligations is sufficiently assured (eg by providing collateral or a guarantee of a third party)?
- Where domestic insolvency law provides that termination clauses can be overridden, creditors may be tempted to take pre-emptive action to avoid that outcome by terminating the contract on some other ground before the application for insolvency proceedings is made (assuming a default by the debtor other than one triggered by commencement of the proceedings). For example, parties can rely on default triggered if certain financial or other covenants are not met. Is such a technical default/automatic termination mitigated by providing that the insolvency administrator has the power to reinstate those contracts (eg provided both pre- and post-commencement obligations are fulfilled)?

Close-out netting provisions

- Are close-out netting provisions valid and enforceable?

Flip clauses

- Are priority flip clauses valid and enforceable?
- Does national law provide for specific treatment of other types of flip clauses or contractual step-in rights (eg a third party can step into the debtor's contractual position by contract termination/novation techniques upon the occurrence of default or the commencement of insolvency proceedings)?

Flawed/conditional rights

- Are flawed/conditional rights valid and enforceable?

Penalty provisions

- Are penalty provisions valid and enforceable?

Other contractual remedies stipulated by the counterparty

- Are other types of contractual remedies commonly stipulated by a counterparty?

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