

LIQUIDATION VS. REORGANIZATION.
A CONTRACTARIAN APPROACH TO BANKRUPTCY LAW

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This work explores the potentials of a contractarian approach to bankruptcy law and focuses on the nature of the regulation applying to the firm's distress. The purposes of the inquiry are to investigate whether the traditional view of bankruptcy law as a mandatory regulation may be reversed by proposing more efficient alternatives on the ground of contract law. In this framework, the analysis takes inspiration from recent law and economics scholarship and addresses the problem of the choice of the procedure, which is the predominant issue under a contractual model. The research first deals with the costs of a mandatory bankruptcy law and then investigates whether the system can shift from paternalism to self-protection. In other terms, are creditors able to protect more efficiently their interests, by bargaining ex ante with the firm the regime for the insolvency contingency? The work is structured in eight parts. Part I introduces the object of the research, provides a general framework on the topic and explains the relations between the underlying interests. In this context, a general background on the discussion regarding the function of bankruptcy law is provided and the implications deriving from a law and economics approach are illustrated. Part II develops the method and the goals of a contractarian bankruptcy theory, making more explicit the purposes and the boundaries of the question at the heart of the research. Part III is dedicated to a comparative analysis on the possible rules which may be designed for regulating the selection of the bankruptcy procedure. This part of the work takes inspiration from the experiences of different bankruptcy legislations and emphasizes how, in abstract, the authority to select the procedure may be alternatively assigned to the legislator, to a third party, to creditors or to the debtor. After examining all these potential regimes, the work focuses on a debtor-choice rule, which is considered the most appropriate default rule for the development of a contractarian system. Part IV, which is central in the economy of the work, deals with the transaction costs of contracting about bankruptcy. In other terms, it illustrates the actual problems to be resolved by any contractarian solutions. With this regard, the work addresses uncertainty, information asymmetry and strategic behaviors of both the debtor and creditors. Particular emphasis is also placed on the consequences of intertemporality. Part V is entirely dedicated to the analysis of Robert Rasmussen's proposal, which crafts a menu approach of bankruptcy law. Under this model, the debtor is entitled to select ex ante the procedure for the insolvency contingency among a set of procedures made available by the legislator. This solution is object of careful revision and criticism. Part VI challenges a different contractarian solution, recently elaborated by Alan Schwartz. This model engages in a more sophisticated contractual engineering analysis, suggesting a system of bankruptcy contracts able to create adequate incentives for the debtor to select the efficient procedure. Part VII discloses and discusses all the problems raised by a system of bankruptcy contracts. The firm enters into different contracts with different creditors at different times. Thus, an urgent issue of coordinating the bankruptcy bargaining has to be resolved. In addition, different classes or types of creditors may have different preferences over the procedure to be applied. The procedure maximizing the total return of the insolvent firm does not necessarily entails that the expected return to any class of creditors is also maximized. In this framework, tort creditors' protection is considered too. Part VIII provides the conclusions of the research, explaining the virtues and the limits of current contractarian theory. Finally, a proposal for a new inquiry is tentatively outlined.

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