



The Common Law Perspective

Enforcing the creditors' bargain:
how common law rights helped to
make and unmake the world of
cross-border credit markets

James Grand, Athens 8 November 2013

Legal Certainty of contract: the creditors' bargain

The basis: “If you get the money, I get the agreement.”

- the intention of the parties as disclosed from the language of the contract
- the “Parol evidence rule” – the entire agreement clause
- form over substance: “recharacterisation” is a weak agreement
- implied terms: the test of “necessary for business efficacy”
- exceptions: unfair contract terms, reasonableness, “remoteness of damage”, consumer protection, ambiguity/alternative meanings (*Persimmon Homes* case).

The Key Developments:

- Recognition of governing law/jurisdiction: Convention to Regulation
- Enforcement of judgements

Security rights

The basics:

- 4 types: mortgage, charge, lien, pledge
- Registration requirements – void against a liquidation
- Fixed or floating – priority claims
- Assignment of contractual rights “by way of security”
- Key exceptions: distinction from true sale

The Key Developments:

- CIWUD – recognition of “rights in re”
- Insolvency Regulations – recognition of foreign “security interests”
- Financial Collateral Directive – avoiding registration formalities
- Test of control (*Spectrum Plus*)
- Work in progress: trusts, floating charges, assignment of contractual rights



The market value of credit

The basics:

- Transferability – negotiable instruments, bonds
- Close-out netting and set off as contractual tools
 - single agreement
 - valuation of future cashflows (swaps)
 - insolvency – exclusion of “market value” from anti-deprivation rules in insolvency

The Key Developments:

- Recognition of judgements in EEA
- Recognition of governing law in EEA
- Recognition of set-off and close-out netting in insolvency (CIWUD, Insolvency Regulation, Crisis Management Directive and Financial Collateral Directive)



The future – the wrong remedies for mis-identified problems?

Fairness is not contractual certainty

- The end of caveat emptor
- Principles and outcomes based regulation
- Purposive construction of EU law
- Moral hazard of borrowers

Financial Collateral

- The confusion of credit analysis with market value
- The worst credit risk is when you think you aren't taking it
- Central Counterparties – a Maginot line?

The future – the wrong remedies for mis-identified problems? contd.

Business model of financial businesses

- Compliance is expensive and is not very entrepreneurial
- Focus on bank capital tools
- Splitting market risk business from credit risk business
 - Subsidiarisation
 - RRP planning for failure
 - Unbundling of financial functions concentrated in banks



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