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ARTICLE

Bankruptcy stigma and the second chance policy: the impact of bankruptcy stigma on business restructurings in China, Europe and the United States

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Abstract This paper deals with a topic of common concern to China, Europe and the United States: the negative effects of bankruptcy stigma on the second chance (fresh start) policy encouraging restructuring of businesses as an alternative to their liquidation. In most Continental European civil law systems, for example, business restructurings are still only aspirations rather than reality. This is to a great extent due to the ubiquity of intense bankruptcy stigma as a consequence of what, for example, creditors as well as the directors and officers of the bankrupt debtor avoid participating in restructuring proceedings. The resulting dominance of liquidations is perceived as a competitive disadvantage both for China and Europe compared to the United States that possesses the top model enshrined in Chapter 11 of the US Bankruptcy Code. It was for these practical reasons that the second chance policy was given clear priority by the European Union as best expressed in the Commission Recommendation of 12 March 2014 on a New Approach to Business Failure and Insolvency. Similar policy shift characterizes the 2007 Enterprise Insolvency Law of the People's Republic of China as visible from Chapter 8 on reorganisation and Chapter 9 on compositions (workouts). While bankruptcy stigma is present also in the United States, its effects are the least "*biting*" in this country and are an issue primarily in the context of consumer-bankruptcies. In light of the above, this article's main claim is that without proper understanding and acknowledging the impact of bankruptcy stigma, hardly could lawmakers' efforts aimed at forging a legal

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environment that would incentivize restructurings of financially distressed businesses yield success. Although some research on the topic is available, it tends to be focused on consumer bankruptcies only. A comprehensive, empirically based, inter-disciplinary scrutiny of the impact of stigma on business reorganisations is still lacking just like a "handbook" for combating the bankruptcy stigma. This article attempts to open the doors to this new inter-disciplinary area of law with the tools of comparative law. Besides canvassing the pertaining scholarship's hereinbefore achievements, the paper extends also to such so far neglected niches of the globe as China and the post-socialist countries of Central and Eastern Europe.

Keywords Bankruptcy stigma · Bankruptcy (insolvency) law · Insolvency proceedings · Fresh start · Second chance policy · Discharge · Reorganisation · Restructuring · Workouts · Comparative law · Transplantation

> **Reinhard Bork**
> It may be tempting to disregard this factor [i.e., the stigma] as non-serious, but any earnest attempt to construct an efficient restructuring law must take it into account until there is evidence of a wide-ranging and sustained change in popular mentality.[1]
>
> **Gerard McCormack**
> On the 'stigma' point, it is very difficult to find hard empirical evidence but within Europe as a whole, including the UK, there is certainly the opinion that stigma exists and that this works as a deterrent to entrepreneurial initiative.[2]

1 Why focus on bankruptcy stigma?

Both, theoretical and practical reasons justify paying heightened attention to, as well as researching and writing on bankruptcy stigma from a comparative perspective. These revolve around two main interlinked commonalities of all the jurisdictions within the purview of this paper. On the one hand, bankruptcy stigma is ubiquitous and thus it inevitably affects the functioning of all bankruptcy systems. On the other hand, each of these jurisdictions have posited the second chance (fresh start) policy-based business restructurings as first priorities. However, although both China and much of Europe faces major challenges with shifting to such rescue-oriented systems, the stigma's impact on the process has so far been largely neglected both by legal scholarship (especially comparative law) and by expert international bodies having been involved in assisting related law reforms. A foolproof toolbox for decreasing the intensity of stigma, or eliminating some problematic aspects of it, has not yet been forged either. The following paragraphs provide more detail on each of these points.

[1] *See* Reinhard Bork, RESCUING COMPANIES IN ENGLAND AND GERMANY (Oxford University Press, 2012), section 2.12. [Hereinafter: Bork—Rescuing Companies].

[2] *See* Gerard McCormack, *Apples and Oranges? Corporate Rescue and Functional Convergence in the US and UK*, 18 Int. Insolv. Rev. 109–134 (2009), at 114. [Hereinafter: McCormack Apples and Oranges].

Firstly, bankruptcy stigma is ubiquitous in modern societies, from China, through Europe to the United States (US). Although no exact, commonly accepted quantitative indicators exist,[3] the available sources posit that bankruptcy stigma is considerably more intense in China[4] and Europe—especially in the Continental European civil law jurisdictions—compared to the US. The intensity of stigma, understandably, varies from country to country (sometimes divergences subsist even on regional levels), due to historic reasons and the dissimilar societies, economies, as well as the non-uniform bankruptcy laws. The manifestations of stigma may also be at variance[5] along these geographic lines. Notwithstanding the disparities, however, there is a common denominator of central importance to us here: the bankruptcy stigma affects the functioning of the bankruptcy system—both consumer and business bankruptcies—with varying intensity in all the jurisdictions within the purview of this article.

What is known is that in general the intensity of bankruptcy stigma tends to be lower in those Anglo-Saxon legal systems that are at the same time also among the most advanced economies of the world. This could be concluded even based on such indirect evidences like the famous German *Schefenacker* forum shopping case,[6] where the German business moved its *centre of main interest* (COMI)—"*the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties*"[7] to England exactly because of the more favorable restructuring climate. Yet, meaningful differences exist in that respect even among the leading common law jurisdictions.[8] Figuratively speaking, while China and Europe—especially Continental European civil law system—are at the higher end of the bankruptcy stigma intensity spectrum, major Anglo-Saxon

[3] The level of bankruptcy stigma in a jurisdiction might be referred to also by a 'bankruptcy stigma index,' a non-numericized indicator, the exact features of which, however, are yet to be developed.

[4] *See, e.g.,* the interview with the 'architect of the first modern bankruptcy of China'—Cao Siyuan—in Victoria Ruan, Stigma Holds back Bankruptcy Law, in: South China Morning Post, 12 Aug 2013 issue, available electronically at http://www.scmp.com/business/china-business/article/1295985/why-stigma-holds-back-chinas-bankruptcy-law. (Last visited on 27 June 2017).

[5] As a significant portion of the Chinese economy is still in 'socialist' ownership' and notwithstanding the rapid spreading of market economy elements, old reflexes and the old way of thinking is still forcefully present. And these inevitably leave imprint even on the manifestation of bankruptcy stigma. One could say, that it is an idiosyncratic mixture of capitalist and socialist (communist) ways of perceiving the phenomenon. As Cao Siyuan, the influential expert having influenced the outlook of today's bankruptcy law of China put it: "*One is the belief that bankruptcy belongs to the world of capitalism and is against the interests of the socialist system. The other is a misunderstanding that declaring bankruptcy means putting an end to a business, and that is bad for the economy* ." [Emphasis added.] *Id.*

[6] *See, e.g.,* Bork—Rescuing Companies, section 1.07.

[7] *See* Art. 3(1) of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast). For a related commentary *see* Wolf-Georg Ringe, in: Reinhard Bork and Kristin van Zwieten (eds.), COMMENTARY ON THE EUROPEAN INSOLVENCY REGULATION (Oxford Univ. Press, 2016), page 118.

[8] *See, e.g.,* Nathalie Martin claiming that "*while in most parts of the world business failure causes less stigma than personal financial failure, both forms are viewed far more negatively in England, Australia and Canada than in the United States*." *See* Nathalie Martin, Common-Law Bankruptcy Systems: Similarities and Differences, 11 Am. Bankr. Inst. L. Rev. 367, 368 (2003).

systems are closer to the lower end.[9] Whereas Germany might be taken as the paradigm example of the former, US is clearly the system where the stigma seems to be the lowest—but still existent—among all the developed economies and common law jurisdictions.

Secondly, as stigma is ubiquitous and is therefore a common denominator for all the tackled systems herein (and beyond), research should not only discover how stigma is affecting the functioning of the bankruptcy system but also what role the variations in its intensity play from jurisdiction to jurisdiction? It is therefore not an exaggeration to claim that no comparative analysis of any aspect of bankruptcy law may afford disregarding these differences and their impact on the stigma-bankruptcy interface. This applies a fortiori if reforms are at stake which is the case today in China or much of Europe—both striving to domesticate the second chance philosophy.

Thirdly, notwithstanding the common concerns and the economic potential that may be generated by domestication of the second chance philosophy, however, no comparative piece of scholarship seems to have ventured into the analysis of specific narrow aspects of stigma-bankruptcy interface as far as business restructuring are concerned. The available publications rather tend to be limited to a single, or a few kin jurisdictions, and have so far clearly been tilted towards consumer bankruptcies. In Hungary, a country that after decades of bankruptcy-free socialism has reintroduced bankruptcy law as part of its reorientation towards market economies only recently in 1991, for example, all aspects of bankruptcy stigma have been almost completely bypassed by Hungarian legal scholarship (both Hungarian and foreign language publications).[10] This unfortunately is hardly exceptional in the region ranging from the Balkans to the Baltic States. One may suspect that this is due to the fact that Hungary has only recently introduced individual (consumer) bankruptcy laws and the push towards business restructurings has as well become a top priority only having acceded to the European Union (EU) not long ago in 2004.[11]

Fourthly, what this paper in particular would like to remedy, however, is comparative legal scholarship's bias in favor a few major western jurisdiction in this domain. This article aims to open new vistas by not only providing a synopsis of hereinbefore developments in the developed parts of the globe but by adding to the picture mosaics from such transitory countries as China or Hungary. As it will be

[9] Australia seems to come close to the United States as suggested by a 2015 study according to which "*[i]n Australia, bankruptcy debates have often reiterated concerns about bankruptcy being 'too easy' and no longer having shame or a stigma associated with it*." *See* Nicola Howell and Rosalind Mason, *Reinforcing Stigma or Delivering a Fresh Start: Bankruptcy and Future Engagement in the Workforce*, 38(4) UNSW L.J. 1529–1574 (2015), at 1530.

[10] The seminal working paper on the topic of bankruptcy stigma in Hungarian language written by the author of this paper is available for downloading from the website of the Institute for Legal Studies of the Hungarian Academy of Sciences at http://jog.tk.mta.hu/uploads/files/mtalwp/2015_06_Tajti.pdf. Accessed 27 June 2017.

[11] For example, Hungary has introduced its very first consumer (individual) bankruptcy system in its history in 2015 only (the new law stepped into force on the 1st of September 2015). *See* Act No. CV of 2015 on Debt Consolidation of Natural Persons ("2015. *évi CV. törvény a természetes személyek adósságrendezéséről*").

seen, these may likewise enrich comparative scholarship by pointing to some idiosyncratic problems and occasionally also to their unique solutions. The experiences of the so far neglected jurisdictions might also be instructive especially for such other bankruptcy systems that are still at the beginning of the reform process, are on a similar level of economic development and are thus interested in how the institutions of top model jurisdictions could be transplanted?

For example, while the leading US publications devoted to the topic have as a rule focused on the effects of the stigma in the context of individual (consumer) bankruptcies, the bigger problem in Central and Eastern Europe (CEE) is still how to incentivize creditors and the officers or owners of bankrupt businesses to participate in business reorganisations? In both consumer and business bankruptcies stigma plays a major role yet the corollary dilemmas do not fully overlap and thus the pool of questions to be answered is not identical either.

China, on the other hand, may offer other idiosyncratic stigma-linked examples, as it will be shown in this paper. Yet perhaps the most attention-deserving is the still unfolding story of sanctioning non-performing consumer debtors through a variant of stigmatization instead of introducing individual (consumer) bankruptcy proceedings. According to the underlying law passed in 2015[12] citizens may be deprived of services "*not necessary for life or business operation*." This may be a ban on checking in on flights, purchasing train tickets, or staying at hotels.[13] As technology is proved to be a very efficient aid in a country where 'naming and shaming' still works, a new type of stigma seems to be developing. This may sound problematic to Europeans yet the truth is that the 'naming and shaming tactics' have been reported to be utilized by private debt collectors in some European countries recently as well; such as Spain in the heat of the 2008 global financial crisis.[14]

Fifthly, it should be borne in mind as well that both China and the EU have on the level of policy priorities already switched to the second chance philosophy-based business restructuring bankruptcy laws, moreover, both looking at US Chapter 11 as the "*model to which … restructuring laws should aspire*."[15] This paradigm change *per se* should make the subject matter of this paper a high priority. Yet, that may be better expressed by the very title of some of the recent initiatives of the European Union

[12] *See* the act entitled as 'Several Provisions of the Supreme People's Court on Restricting High Consumption and Relevant Consumption of Persons Subject to Enforcement' (2015 Amendment), which is actually Interpretation No. 17 [2015] of the Supreme People's Court. The ban may extend not only to luxurious services and products (e.g., golf club membership or educating one's children in expensive private schools) but also to daily necessities, like prohibition to purchase a motor vehicle for private use. *See* Article 3 of the Act.

[13] *See* Yuan Yang, *Beijing Penalises 6.7 m Debtors with Travel Ban,* Financial Times, 16 Feb 2017 issue, page 3. Besides not paying debt on time, the ban may be imposed also for various crimes like hiding ones' assets or lying in court. Technology pays a key role because the system works so that personal identity card numbers are blocked centrally what then makes purchase of train tickets or checking in flights impossible. This is deemed to be the substitute for the non-existent consumer (individual) bankruptcy system.

[14] *See* Thomas Catan, *Spain's debtors feel the shame, in:* Wall Street Journal, 13 Oct 2008 issue, page 5.

[15] *See* Gerard McCormack, Andrew Keay and Sarah Brown, EUROPEAN INSOLVENCY LAW (Elgar, 2017), note 7 on page 226 for a list of references. [Hereinafter: McCormack et al., EUROPEAN INSOLVENCY LAW (2017)].

(EU), in particular, the 2007 Commission communication entitled *Overcoming the stigma of business failure—for a second chance policy,*[16] or the more recent recommendation from 2014 likewise stressing the importance of embracing "*a new approach to business failure and insolvency*."[17] These grew out of the umbrella project of the European Union named 'Restructuring, Bankruptcy and Fresh Start' "*premised on the assumption that current national bankruptcy laws and stigma associated with business failure negatively influence entrepreneurship*."[18]

As a result of this shift, while earlier bankruptcy laws were dominated by liquidation of insolvent businesses, the new generation laws give top priority to reorganisation and restructuring—or saving of businesses as going concerns. The central problem plaguing these reforms is that the materialization of this paradigm change faces major obstacles: the high intensity of the bankruptcy stigma undoubtedly being a key one. One common manifestation of the omnipresence of the stigma in China and especially Continental European civilian legal regimes is the meaningful discrepancy that survives between reorganisation laws on the books and their real-life manifestations (i.e., living laws). The available statistical data from any of the Continental European civil law systems as compared to the US on the number of launched–and especially successfully completed–reorganisations would readily show how wide this gap remains up until today[19]; notwithstanding the

[16] Commission Communication of 5 October 2007 "*Overcoming the stigma of business failure—for a second chance policy—Implementing the Lisbon Partnership for Growth and Jobs*," (COM/2007/0584 final). [Hereinafter: 2007 Communication].

[17] Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency (2014/135/EU). [Hereinafter: 2014 Recommendation].

[18] *See* Gerard McCormack, *Apples and Oranges? Corporate Rescue and Functional Convergence in the US and UK*, 18 Int. Insolv. Rev. 109–134 (2009), at 114.

[19] According to 2003 data, while in the US 70% of business bankruptcies ended with liquidation, the same number was in France 90% and in Germany 99%. In other words, compared to about 30% of successful US reorganisations, the same number in Germany was barely 1%. John Carreyrou and Matthew Karnitschnig, *Paris Looks to U.S.—on Bankruptcy*, Proposed Law Would Boost Firms' Chances of Survival: A Reward for Risk-Takers?, in: Wall Street Journal Europe, 25 Sept 2001 issue, pages 1 and A8).

German insolvency-related statistics are published by Federal Statistics Office at https://www-genesis.destatis.de/genesis/online. This, just like most European data bases, are much less detailed as the US ones available at http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables.

The Hungarian statistical data (proportionate to the comparative size of the economy) are similar to those of Germany. In 2015, for example, there were 9388 liquidations and 5463 dissolutions (of inactive, zombie businesses) initiated as opposed to mere 67 reorganisations (no data whether these were successful). *See* the bulletin of the Hungarian Statistical Bureau at https://www.ksh.hu/docs/hun/xftp/gyor/gaz/gaz1512.pdf.

In China, the Supreme Court releases (in English language as well) data on bankruptcy proceedings. According to these, in 2016 altogether 5665 bankruptcy cases were filed and out of these 1041 were supposed to be reorganisations. However, due to "*long delays in filing bankruptcy cases […] all bankruptcy cases have been liquidations*." *See* Supreme People's Court Releases 2016 Bankruptcy Data (26 Feb 2017) at https://supremepeoplescourtmonitor.com/2017/02/26/supreme-peoples-court-releases-2016-bankruptcy-data/. (Each website last visited on 21 March 2017).

fluctuations and structural changes on the market[20] and the legal reforms like the German 2011 Restructuring Act (ESUG).[21]

This is to a great extent the result of the creditors' and the debtor's—or its directors' and officers'—hesitance to actively participate, or resort to restructuring proceedings, what cannot but be the product of stigma, fear from and ignorance of what bankruptcy and bankruptcy proceedings entail. If this line of causation is plausible, then it is far from being far-fetched to claim that the efforts of both China and Europe aimed at introducing and spreading the mentioned second chance bankruptcy philosophy through domestication of local versions of reorganisation (restructuring) proceedings are doomed to produce inappropriate results without tackling the stigma besides merely formally adopting a version of reorganisation laws.

2 The roadmap to the paper and a terminology caveat

As a result of the above, this paper has only two modest goals. On the one hand, it would like to fill the gap in the scholarship by summarizing what we already know about the bankruptcy stigma and its impact on insolvency, especially restructuring laws. On the other hand, it would like to remind insolvency lawyers, lawmakers and comparative scholars of the importance of the so far largely neglected topic.

The paper, hereinafter, will focus on the following key questions. *First*, what is the bankruptcy stigma and what are its manifestations? In the part to follow, *secondly*, the geographic map of the bankruptcy stigma will be canvassed juxtaposing a number of contemporary jurisdictions. *Thirdly*, the second chance policy and its features will be focused upon, so that finally a few thoughts will be devoted to the possible tools with which one could combat the bankruptcy stigma.

In order to avoid confusion, it is a must to opt for a single nomenclature for this article. Given the centrality of US law here, the terminology of this jurisdiction will be employed. This is especially important because of the divergent meaning of the

[20] According to a recent US study "*[R]ougly two-thirds of all large bankruptcy outcomes involve a sale of the firm, rather than a traditional negotiated reorganisation in which debt is converted to equity through the reorganisation plan.*" See K. Ayotte and David Skeel, Bankruptcy or Bailouts, 35 J. Corp. L. 469–498 (2010), at 477.

[21] Germany is an excellent example of the point made: it passed a special statute (Act for the further Simplification of Company Restructuring—hereinafter: ESUG) focused exclusively at introducing a local variant of reorganisation in 2011 inspired by US Chapter 11 and the recent reforms in the UK introducing more restructuring avenues for companies (i.e., scheme of arrangements, company voluntary arrangements and administrations) notwithstanding of what the system does not function even in 2017. This was foretold by Bork in his seminal work published in 2012 when in the chapter devoted to the advantages and disadvantages of German restructuring law it concluded that *"[its] principal defect [is not only that they may be resorted to too late, only after the] likely inability to pay debts [but also that they would]* ***inevitably [be] burdened with the stigma of insolvency***." [Emphasis added]. *See* Bork—Restructuring Law, section 22.02.

As far as the success of ESUG is concerned, one renowned author has concluded in 2014: 'the 2012 reform act in effect does not function' ("*Die Reform ist praktisch wirkungslos.*"). *See* point 5 in Horst Eidenmüller, *Die Restrukturierungsempfehlung der EU-Kommission und das deutsche Restrukturierungsrecht* [The Restructuring Recommendation of the EU Commission and German Insolvency Law], paper as of 4 Nov. 2014, downloadable (in German language) from SSRN, page 19.

terms '*insolvency*' and '*bankruptcy*' in the US, on one side, and Europe as well as the other English-speaking countries mentioned, on the other. Namely, while the phrase '*bankruptcy proceedings*' under US law encompasses *all* types of insolvency-related court proceedings known by the system, for UK law this expression has a more limited reach: it is a reference only to the legal process through which private individuals can be absolved of their debt.

Besides authors from Australia, Canada, New Zealand, Singapore and some other Commonwealth member states using the English nomenclature, European sources in English tend to mimic it as well. Hence, these sources talking of the stigma in the context of 'bankruptcy proceedings' are normally references only to private individual bankruptcies. Consequently, one should be cautious with automatically extending the findings of such publications also to the business bankruptcy context, which in the UK and thus in Europe are named as '*insolvency proceedings*.'

3 What is the bankruptcy stigma? Definitions, scholarship, examples

3.1 General and bankruptcy-specific demarcation of stigma as a phenomenon

We know little about the inter-disciplinary phenomenon of bankruptcy stigma—the 'negative perception of bankrupts'[22]—though some studies, both theoretical and empirical,[23] do exist. This notwithstanding, while there is a more voluminous literature on stigmatization in sociology and social psychology,[24] a systematic analysis of the phenomenon specifically in the context of bankruptcy law, or inter-disciplinary studies involving also bankruptcy law experts, seem to be lacking.[25] The depth of the vacuum understandably differs from jurisdiction to jurisdiction. In fledgling bankruptcy systems, not unsurprisingly, it is next to impossible to locate any publication that would devote appropriate attention to the topic. As opposed to

[22] *See* Rafael Efrat, *the Evolution of Bankruptcy Stigma*, 7 Theoretical Inquiries in Law 365–394 (2006), page 366.

[23] *Id.* page 393. [After a succinct description of the history of bankruptcy stigma in the western world, the article focuses on twentieth century United States. It concludes with an observation—based on an empirical study reviewing 176 newspaper articles mentioning the word 'bankruptcy' and published in the New York Times between 1864 and 2002—that "*a noticeable shift in public attitudes [was detected] … towards individuals filing for personal bankruptcy in the United States.*"].

[24] *See, e.g.,* Erving Goffman, STIGMA—Notes on the Management of Spoiled Identity (Penguin, 1990). [Hereinafter: Goffman, Stigma (1990)]; and Stephen C. Ainlay, Lerita M. Coleman and Gaylene Becker (eds.), THE DILEMMA OF DIFFERENCE: A MULTIDISCIPLINARY VIEW OF STIGMA (Springer, 1986). [Hereinafter: Ainlay, DILEMMA OF DIFFERENCE].

[25] As a recent US study concluded "*To date, very little sociological attention has been devoted to studying the stigma associated with being heavily in debt and, in particular, with declaring bankruptcy. Despite the existence of American bankruptcy law for over one hundred eighty years and the escalating use of personal credit in America, only a handful of studies have addressed this stigma. The scholars in this small group have primarily focused on the question of whether bankruptcy stigma exists in modern society and whether it has declined over the years. They have reached sharply differing conclusions.*" *Quoted from* Michael D. Sousa, Bankruptcy Stigma: A Socio-Legal Study, 87 Am. Bankr. L.J. 435–482 (2013), at 436–437.

that, parallel with the exponential growth of the indebtedness of the citizenry, increased attention has been devoted to the bankruptcy stigma in some of the developed legal systems; though this seems to be more the characteristic of the leading common law rather than civil law jurisdictions.[26] Some of the international organizations have also dealt with the topic.[27]

Likewise, it would be hard to point to a commonly subscribed to precise definition of '*bankruptcy stigma.*' What '*stigma'*—as a broader notion—generally connotates is known[28] notwithstanding that in the view of social psychologists"*[w]hich attributes people find discrediting and the intensity of their beliefs and reactions vary so much that devising a single definition proves difficult*."[29]

Instead of exact definitions one should therefore rather be satisfied with somewhat eclectic descriptions of historic and present-time aspects and consequences of being stigmatized. Eclectic because various authors tend not to emphasize exactly the same points but rather the ones that fit their projects the most. The 2013 World Bank Personal Insolvency Report, for example, found the stigma's presence the most problematic because it deterred honest but unfortunate *consumer* debtors resort to the bankruptcy system. As they determined, "*[e]ven in well-developed insolvency regimes, significant numbers of debtors continue to avoid seeking relief, or they seek relief far later than would be optimal*, *[because] insolvency systems reveal pervasive and profound feelings of guilt, shame, and stigma.*"[30]

In the context of business bankruptcies, on the other hand, one of the main factors that stymie spreading of a restructuring culture is the hesitance, distrust or outright fear of creditors to participate in such proceedings. Yet again, more in the language of law and economics, as Sullivan, Warren and Westbrook put it, bankruptcy stigma is "a *cost associated with filing for bankruptcy based on injury to reputation or violation of moral standards*."[31]

Yet, notwithstanding all the uncertainties surrounding the definitions either of 'stigma' or 'bankruptcy stigma,' it should be helpful for bankruptcy law scholars to also depart from the following structural definition developed by social psychologists. They, in one of the leading studies, suggested that understanding of stigma presumes elucidating its **three components**, which are fear, stereotyping and social

[26] For a recent overview of quantitative and qualitative studies in the US *see* Michael D. Sousa, *Bankruptcy Stigma: A Socio-Legal Study*, 87 Am. Bankr. L.J. 435 (2013), page 456. For Australia *see* the 2015 thematic issue specifically devoted to bankruptcy stigma (consumer) of the University of New South Wales Law Journal (volume 38, No 4—Thematic: Enacting Stigma).

[27] *See* World Bank, Insolvency and Creditor/Debtor Regimes Task Force, *Report on the Treatment of the Insolvency of Natural Persons* (2013), section I.10, pages 43–44. Available electronically at http://siteresources.worldbank.org/INTGILD/Resources/WBInsolvencyOfNaturalPersonsReport_01_11_13.pdf. (Last visited on 20 March 2017). [Hereinafter: 2013 World Bank Report].

[28] Goffman speaks of stigma—generally—as "*the situation of the individual who is disqualified from full social acceptance.*" *See* Goffman, STIGMA (Penguin, 1990), Preface, page 9.

[29] *See* Anlai, DILEMMA OF DIFFERENCE, page 3.

[30] *See* 2013 World Bank Report, paras 120–121, page 43.

[31] *See* Teresa A. Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 Stanford L. Rev. 213–256 (2006), page 233.

control as the primary affective, cognitive and behavioural components respectively.[32] Out of these perhaps the last requires brief clarification: social control denotes "*reactions to stigmas [often involving] restriction or termination of social relations*."[33]

Although no academics have attempted to employ this tri-partite formula specifically for bankruptcy stigma, it may be a useful tool for systematization of bankruptcy stigma's manifestations. As each component and manifestation is distinct and thus presumes employment of different tools for elimination or reduction, such matrix would help better understand the phenomenon itself. The confines of this paper unfortunately allow only brief sketching of how the examples to follow in the next section could be classified as per the formula.[34] As it could be seen, some of the manifestations are identical in case of consumer and business bankruptcies, others are distinct. Classification is aggravated also by the fact that it is sometimes hard to draw the line among the three components.

3.2 Contemporary manifestations of bankruptcy stigma exemplified

The nature and intensity of stigmatization have differed depending on the historical context and the stigmatization we may encounter in present-time societies—as expressed by various tools of insolvency or other branches of law—is generally milder compared to earlier eras.[35] Suffice to say that a few centuries ago bankrupt individuals were not only degraded and humiliated but even jailed (if not subjected to even worse sanctions). Yet, we do not have to go back in time that much. For our purposes it is of importance rather that one could, indeed, find contemporary empirical evidences on what happens when the stigma of '*bankrupt*' is attached to a business or a private individual debtor.

Once the public becomes aware of the bankruptcy of a business or of an individual, a host of adverse consequences may ensue. Sales may decline because partners or purchasers may doubt that deliveries will be made as scheduled. Collecting receivables may become more difficult and more time consuming as *"customers [will] perceive that the bankruptcy filing enables them to avoid making payment."*[36] Likewise, consumers and clients may shift to competitors because of threats to stable spare parts supply and unenforceability of warranty claims. The looming bankruptcy normally has adverse effects also on employee morale. Employers would soon realize that it is next to impossible to employ new people

[32] *See* Anlai, DILEMMA OF DIFFERENCE, page 227.

[33] *See* Anlai, DILEMMA OF DIFFERENCE, page 87.

[34] *See* "Appendix" *infra*.

[35] One of the most well-known artistic works involving stigmatization is Giotto's panel painting *Saint Francis Receiving the Stigmata,* presumed to have been painted around 1295 and 1300, now in the *Musée du Louvre,* Paris.

[36] *See* Jonathan M. Hoff, Lawrence A. Larose and Frank J. Scatturo, PUBLIC COMPANIES (Law Journal Press, 2006, New York), pages 9–19 and 9–20.

and the best experts—blue and white collar employees as well—would leave if competitors, or other suitable jobs, exist on the market.[37]

Different kinds of examples are put forward by the 2007 Communication of the EU Commission based on empirical evidences from Europe. While 47% of the market participants surveyed said that they would never ever again order any goods or services from an enterprise that went bankrupt, 51% claimed that they would never invest in such businesses. Often, however, bankrupts are stigmatized by close family members. According to statistics referred to in this Communication, family ties break in about 15% of cases.

Stigmatization may take idiosyncratic forms as well. An interesting such example was evidenced by Professors Shuguang Li and Zuofa Wang in one of their recent articles.[38] Namely, adjudged with western eyes, in China, there is an unusually strong bond between municipalities and the listed corporations that operate on their territory. There is evidence that some municipalities went as far as to create a special fund to reward the companies that were listed (i.e., listing-license was granted to them) on their territories. Now, the prevailing presumption today is that if these corporations become bankrupt (insolvent), not only the businesses would be stigmatized but "*the negative influence that the bankruptcy of a listed corporation may impose on the image of the local government*"[39] could be even more intense. As a result, quite idiosyncratically to China, local governments are keen to help these reorganize; something that is known elsewhere as well but perhaps not with such an intensity. This, in China is much more than a 'mere' bailout and use of taxpayer's money to save the business because it involves normally also active participation of the local governments in the reorganisation process itself.[40]

Because of the intense bankruptcy stigma, Chinese businessmen try to avoid insolvency proceedings at all cost, not only liquidation but also workouts and the newly introduced reorganisations introduced by the 2007 Insolvency Act. The data mentioned in the Shuguang Li and Zuofa Wang article are quite expressive in that respect. Namely, while in year 2008 only 3139 insolvency cases were filed in China, the number of businesses that exited the market reached the astonishing number of 871,400. Obviously, the reason because of why the overwhelming majority of bankrupt businesses avoided insolvency proceedings through deregistration (*Zhuxiao*) or revocation of the licence (*Diaoxiao*) ought to be attributable to some extent to the fear from stigmatization (bankruptcy stigma) and distrust of the bankruptcy system.[41]

While these are examples of the reactions of the people who come into contact with a bankrupt, one may wonder what the reaction from the side of the bankrupts themselves is? For illustration of this aspect of stigmatization, one may point again

[37] *Id.*

[38] *See* Shuguang Li and Zuofa Wang, *China's Bankruptcy Law after Three Years: the Gaps between Legislation Expectancy and Practice and the Future Road*, Int'l Corp. Rescue, vol. 7, No. 1, 303–312 (2010). [Hereinafter: Shuguang Li and Zuofa Wang (2010)].

[39] Shuguang Li and Zuofa Wang (2010), page 311.

[40] Shuguang Li and Zuofa Wang (2010), page 311.

[41] Shuguang Li and Zuofa Wang (2010), pages 304–305.

to Chinese examples. In the Zhejiang province, one of the economically strongest provinces of China, while no more than sixty insolvency cases were filed, in a much bigger number of cases "*many company owners or top executives mysteriously disappeared, leaving their troubled business entities behind*."[42]

A look even at the scarce empirical evidences of Hungary, in the realms of insolvency still a transitory country, would reveal similar patterns of behaviour. As it was noted by Juhász, one of the leading insolvency law experts of the country, "*[i]n practice, the biggest problem is that typically the mandate of the debtor-company's CEO (chief executive officer) ceases due to resignation, death or removal by the time the liquidation proceedings begin, […] and thus there is nobody to fulfil the reporting duties to the trustee notwithstanding the explicit language of the Insolvency Act. […] When seeing the imminent financial difficulties, directors and officers, as a rule, submit their resignation, what is a unilateral legal act not requiring approval by any other body of the company*."[43] While this quotation was intended to relate to liquidations only, it should not be forgotten that it applies to reorganisations by analogy given that the main problem in that context is the very same attitude of directors and other officers.

Admittedly, such behaviour of owners and directors is not attributable solely to the bankruptcy stigma: inexperience and incomprehension of insolvency as a corollary of market economies and its superstructure, insolvency law, as well as the indeterminacy characteristic to transitory systems, and more other factors contribute. Still, the ubiquity and the determinative role of the bankruptcy stigma should not be questioned.

4 The second chance bankruptcy philosophy

Historically, going bankrupt was equal with committing a crime. The (allegedly) first insolvency law passed in England in 1542 "*treated debtors as little more than common criminals*."[44] The perception of society began to change, though with meaningfully differing speed in various parts of the world, parallel with unfolding of capitalism. Yet it took quite some time until it was realized that '*honest but unfortunate debtors (bankrupts)*'[45] also exist and not all bankrupts are crooks, fraudsters and criminals. In the US today, for example, quantitative data do not support what the logic of bankruptcy stigma might dictate because, for example, in 2007 only about 10% of insolvency cases involved fraud.[46]

[42] Shuguang Li and Zuofa Wang (2010), page 305.

[43] László Juhász, *A Magyar fizetésképtelenségi jog kézikönyve* (Novotni publisher 2014), volume I, page 448. The title of the book in English: the HUNGARIAN INSOLVENCY HANDBOOK. [Hereinafter: HUNGARIAN INSOLVENCY HANDBOOK].

[44] Charles J. Tabb and Ralph Brubaker, BANKRUPTCY LAW—Principles, Policies and Practice (Anderson Publishing, Cincinnati 2003), page 1.

[45] In the English insolvency scholarship, David Defoe is held to be the father of the phrase 'honest but unfortunate debtors.' *See, e.g.,* Robert Weisberg, *Commercial Morality, the Merchant Characters, and the History of the Voidable Preferences*, 39 Stanf. L.Rev. 3–138 (1986), page 141.

[46] *See* Stephanie Wickouski, BANKRUPTCY CRIMES (Beard Books 2007), page 1.

Nonetheless, contemporary legal systems still differ on the point of fraud significantly, partly driven by the differing intensity of bankruptcy stigma and the differing attitudes of respective societies. These are then reflected also in concrete legal solutions. For instance, German law still criminalizes—at least formally and in addition to tort law fraud—the failure to initiate bankruptcy proceedings within the time stated by the law ("*Insolvenzverschleppung*").[47] In contrast, US law does exactly the opposite and criminalizes rather only fraud in the context of insolvency. Moreover, nothing in the US Bankruptcy Code imposes the duty on directors and officers of the bankrupt debtor to file for bankruptcy.[48] Such flexibility allows negotiations with creditors in the hope to find a way out up until the very last minute. In fact, today in the US involuntary petitions are the exception in stark contrast to much of Europe.[49] German law is idiosyncratic also because it criminalizes not only bankruptcy fraud, the mentioned late filings, but also directors taking excessive risks. Although no director seems to have been incarcerated because of these crimes lately, their existence indicates what the system's approach to bankruptcy is.

Yet, introduction of the second chance bankruptcy policy is not only about what bankruptcy-related acts or omissions are criminalized. Rather it reaches broader and denotes another type of mentality and attitude that takes bankruptcy (going bankrupt) as a normal corollary of doing business in market economies; an approach that would then permeate through all branches of law. As a logical consequence of such philosophy, it is presumed that the function of insolvency law is not to penalize the bankrupt for his failure and exclude him from the market but rather to give him a second chance: opportunity for fresh start. In such a milieu, the function of bankruptcy law is to allow easy but controlled exit from the market if restructuring would not work. However, such policy would not exclude the possibility of a new try to a former director or owner of a defunct company. For a bankruptcy law resting on such pillars it is not liquidation but rather restructuring proceedings or workouts (in or out-of-court) that enjoys priority, a priority that may be worth even to rewrite some of the priority and other rules of bankruptcy law.

Needless to say, such a policy has a fair chance only in countries where the intensity of bankruptcy stigma is not prohibitively high. Namely, if in a society nobody wants to do business with a bankrupt ever again, no matter that he was '*honest but misfortunate*' earlier, and irrespective of how good *new* business ideas that person might have, he would be precluded from restarting. This simple logic leads us to Chapter 11 of the US Bankruptcy Act on reorganisations, the success story of contemporary insolvency laws. It is the number one model not only for transitory countries like China[50] but also for France, Germany, United Kingdom and

[47] *See, e.g.,* Daniel Gubitz, Tobias Nikoleyczik and Ludger Schult, MANAGER LIABILITY IN GERMANY (C.H. Beck, München 2012), page 141 et seq.

[48] *See* Christopher Mallon and Shai Y. Waisman, the LAW AND PRACTICE OF RESTRUCTURING IN THE UK AND US (Oxford University Press 2011), section 5.92, page 141.

[49] *See* Douglas Baird, the ELEMENTS OF BANKRUPTCY (Foundation Press, 5th ed. 2010), page 36.

[50] China is a telling example. While its Insolvency Act from 1986 was quite idiosyncratic and focused solely on state enterprises, the 2006 new Insolvency Act already has a much broader scope. Moreover, its drafters have tried to build on best international standards as well, including especially Chapter 11 of the US Bankruptcy Act.

the overwhelming part of Europe and beyond. Numerous reasons explain its pre-eminence, from the close linkage that exists between US bankruptcy law tolerating failures and restart versus the success of the Californian Silicon Valley, the very idea of venture capital through the realization how crucial is to restructure whenever possible because more enterprises mean more jobs, more taxes and economic growth.

A myriad of other repercussions follow from the second chance policy. For example, in a system based on fresh start, bankrupts (or the bankrupt business' owners and officers) as well think and behave differently. Importantly, in such an environment, being bankrupt is not necessarily perceived as *the end* of one's business activities and the bankruptcy proceeding is not thought of as an unnecessary legal vexation, a waste of money and time, but rather as a procedure in which it pays to participate. Instead of avoiding the initiation or participation in insolvency proceedings at all price, therefore, the debtors' owners, officers and directors as well as creditors would be willing and interested to participate in such proceedings. The larger part of business community shares such an attitude, the more a bankruptcy system shifts to a second chance-based bankruptcy systems. Moreover, if creditors actively participate in the proceedings, that is also an efficient method of monitoring the work of insolvency practitioners and of bankruptcy courts, or the debtor's officers that are left to perform the tasks of the insolvency practitioner if no external one is appointed (i.e., known as debtor-in-possession systems).

Last but not least, in a jurisdiction where such rescue culture dominates, insolvency is already something predictable allowing for the development of some basic **bankruptcy-mathematics (or bankruptcy-calculus)** and **modelling**. This, in systems where insolvency proceedings are chaotic and distrusted, is simply not possible. Two examples ought to be mentioned to show what is meant by such bankruptcy mathematics and modelling.

The first is best illustrated by the findings of the Canadian **Ziegel-Garton study** from 1988, focusing on business bankruptcies in Toronto industrial zone. As per the findings, in Canada it is possible to safely presume that being an *unsecured creditor* means that on average no more than 4–5% of claims could be recovered in bankruptcy proceedings, as opposed to approximately 45% recoveries in case of secured claims.[51] Now, if a creditor knows that he cannot recover more than 4–5% of his claims on average and if he knows that restructurings—possibly yielding much higher returns than 4 or 5%—may realistically be accomplished, he would obviously be more willing to negotiate with the bankrupt debtor and his other creditors as that may mean a much higher recovery, in addition to keeping of an important partner and other possible benefits of reorganisations.

The suitable modelling example is the **Californian *UCLA-LoPucki Bankruptcy Research Database project***, led by Professor Lynn M. LoPucki focused on "*data collection, data linking, and data dissemination.*'[52] To the external observer,

[51] *See* Jacob S. Ziegel, *the New Personal Property Security Regimes—Have we Gone too Far?,* Alberta Law Review, vol. 28(4): 739–760 (1990), page 739.

[52] The project's website address is http://lopucki.law.ucla.edu/index.htm and is hosted by the University of California, Los Angeles.

however, this project is much more than that as it is in a sense also a corroboration of the central arguments of this paper. Concretely, not only that restructuring can be a success where the intensity of the bankruptcy stigma is low, but parallel with that such systems are to that extent transparent and predictable that trends can be identified, mechanisms for controlling the costs and fees could be devised and eventually 'success modelling'—"*statistical modeling of the determinants of successful reorganisation or liquidation*"[53]—becomes possible. For the time being, much of Europe as well as China is only at the beginning of the process and is desperately looking for the "recipes" for forging their versions of second chance policy-based systems. The UCLA-LoPucki project might be invaluable in that respect save one component: neglect of the impact of bankruptcy stigma. The system departs from US law and US realities with the inherently low intensity stigma; something that does not exist elsewhere.

5 The "geography" of the bankruptcy stigma or the bankruptcy stigma spectrum

Although it is hard to measure and quantify the intensity of bankruptcy stigma, it might be validly claimed that today no modern legal system could be found where it would not be present with some level of intensity. This applies even to the US, which international scholarship places to one extreme of the bankruptcy stigma spectrum, the country with the lowest stigma index. Germany is then often used as the contrast because it is a system with a very high level of bankruptcy stigma to be placed at the opposite end of the spectrum. The European civil law systems, albeit with varying intensity, are to be placed next to German law, notwithstanding whether belonging to the Germanic, Romanic, Scandinavian or mixed legal tradition. The transitory systems of Central and Eastern Europe (hereinafter: CEE) likewise ought to be listed as resembling the most German law and the similarly intense bankruptcy stigma notwithstanding the growing influence of US reorganisation laws.

As already hinted at: all common law systems are significantly different from the US as far as the bankruptcy stigma is concerned. The available sources suggest the positioning of English, or the common law provinces of Canada, somewhere in-between the extremes represented by US and German law; though undoubtedly coming closer to the former. According to Nathalie Martin, the perception of bankruptcy in Australia, England or Canada are much more negative than in the US and thus the level of the bankruptcy stigma is palpably higher as well.[54]

The following section provides more detail to support our classification of legal systems.

[53] *Id.*

[54] *See* Nathalie Martin, *Common-Law Bankruptcy Systems: Similarities and Differences*, American Bankruptcy Institute Law Review, vol. 11 (Winter 2003), page 368.

5.1 The United States of America: the land of second opportunities

US today is the top model insolvency law as far as reorganisations and restructurings are concerned. The number of jurisdictions, many with developed economies and sophisticated legal systems, that desire to transplant a working reorganisation system looking at US law as the model is far from negligible. The list includes not only China and Germany but virtually all the Member States of the European Union—and beyond.

Yet, the second chance philosophy and the concomitant paraphernalia of the system do not end with Chapter 11 reorganisations as forms of in-court insolvency proceedings in the US. **Out-of-court workouts** have as well a venerable history in this country; something that is nothing more than wishful thinking in many others. These likewise presume active participation by debtors and creditors; features that again point back to the relatively low intensity of bankruptcy stigma. Nowadays, one could speak of an era where the combination of in-court reorganisations preceded by extensive out-of-court negotiations dominate this country. This is the story of *pre-packaged bankruptcies (pre-packs)* where the necessary consensus is reached via negotiations extra-judicially and as a consequence of what the in-court reorganisation phase is short and limited to a brief review and approval by the bankruptcy court.[55]

Bankruptcy stigma is something to be reckoned with, however, even in case of prepackaged bankruptcies because "*the mere fact of a bankruptcy filing can have deleterious effects on a company's business and reputation, [in particular], if a company's customers are individuals or unsophisticated small businesses who may bypass the company in favor of a competitor*."[56] Hence, proper preparations require targeted responses in the form of press releases and other forms of detailed communications to business partners, consumer-clients and employees with the aim of "*characterizing the filing as a technicality necessary to implement the contemplated restructuring*."[57]

American bankruptcy law is, however, far from being only a success story. This applies especially to the consumer-debtor context where the fresh start philosophy-based individual bankruptcy laws have always suffered from myriad wounds. These ranged from rampant abuses to serious socio-economic problems generated by the system. It is not without a reason, for example, that Niall Ferguson, the author of bestselling books devoted to the world of finance referred to the US as the *Bankrupt Nation,* where the right to bankruptcy and fresh start is looked upon almost as an inalienable constitutional right.[58] This designation is therefore apt not only because of the Chapter 11 success but also because of the omnipresence of bankruptcy in society; including the unprecedented indebtedness of the citizenry.

[55] *See, for example,* Mallon and Waisman, the LAW AND PRACTICE OF RESTRUCTURING IN THE UK AND US (Oxford University Press 2011), part starting with section number 7–145, page 205.

[56] Steven C. Krause (ed.), A PRACTITIONER'S GUIDE TO PREPACKAGED BANKRUPTCY (American Bankruptcy Institute 2011), at 23.

[57] Id.

[58] Niall Ferguson, the ASCENT OF MONEY (Penguin Books 2009), page 60.

In fact, the most drastic increase in bankruptcy filings in the modern history of US bankruptcy law ensued as a result of the rise of consumer credit, what went parallel with the alleged '*diminished stigma of bankruptcy*' in the 1960s[59]; something that does not seem to have been paralleled in Europe with the spreading of consumer credits. This is known in the US also as the '***reduced-stigma hypothesis,***' the validity of which more recently was questioned.[60] This hypothesis postulates nothing more than a "*belief that Americans feel less shame today than in the past*" for becoming bankrupt.[61] Perhaps the truth lies somewhere in-between and thus the right qualification was put forward recently by a Canadian author, who summarized the US consumer-bankruptcy as follows: "*Although some researchers have argued that [the] stigma has declined over time (Fay, Hurst, and White 1998, 2002; Gross and Souleles 2002), others describe a constant, but changing, stigma (White 1998; Mann 2002; Athreya 2004; Sullivan, Warren, and Westbrook 2006).*"[62]

Jurisdictions trying to borrow from the US therefore are well-advised to devise methods whereby only the good sides of the American bankruptcy system would be transplanted with the necessary adaptations. For that matter, contrary to reorganisations, the US experiences with individual bankruptcies hardly could be characterized as success stories. From the perspective of bankruptcy stigma, however, they may be instructive given that the stigma tends to "*bite*" more directly exactly in case of consumer-debtors.[63] Moreover, some manifestations of stigma are the same in both consumer and business bankruptcy contexts and could thus be applied for business restructurings by analogy.

Three points from the history of US bankruptcy law may adequately illustrate why and how US experiences could be instructive for others as well. The *first* relates to the US realization that the way bankrupt individuals are referred to in the law may matter. As a consequence, the 1978 Bankruptcy Code made a major terminology change: whereas earlier individuals in straight Chapter 7 proceedings had been called '*bankrupts*' and those having opted for rehabilitation under Chapter 13 '*debtor,*' today both are referred to as '*debtors*' in all cases.[64]

[59] *See* David A. Skeel, Jr., DEBT'S DOMINION—A HISTORY OF BANKRUTPCY LAW IN AMERICA (Princeton University Press 2001), page 131.

[60] *Id.* page 254. The empirical study conducted by the authors did not fully support the hypothesis "*that the declining stigma of bankruptcy encourage millions of debtors to file 'bankruptcies of convenience' that, in earlier times, they would not have filed. [In fact, the studies found that] there are a number of more plausible explanations available that fit the data much more closely than the decline in stigma*".

[61] *See* Teresa A. Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 Stanford L. Rev. 213 (2006), page 234.

[62] Michelle Maroto, *The Scarring Effects of Bankruptcy: Cumulative Disadvantage Across Credit and Labor Markets*, Social Forces 91(1) 99–130, September 2012, page 101.

[63] *See, e.g.,* the New York Times article (7 Dec 2011 issue) by Brian Havel, The Bankruptcy Stigma Is Gone for Airlines claiming that in the US business sector *"[s]ome think that the stigma is gone, but a number of management teams still seek to avoid bankruptcy unless absolutely necessary […].*" Available electronically at: http://www.nytimes.com/roomfordebate/2011/12/07/waging-war-on-wages/the-bankruptcy-stigma-is-gone-for-airlines; last visited on 27 June 2017.

[64] *See* David A. Skeel, Jr., DEBT'S DOMINION—A HISTORY OF BANKRUTPCY LAW IN AMERICA (Princeton University Press 2001), page 7.

The *second* reason why US law may be instructive when looking for methods to combat the bankruptcy stigma concerns the underlying presumptions and the message the existence of two avenues exploitable by financially distressed individuals offer: the Chapter 7 straight bankruptcy and the Chapter 13 rehabilitation proceedings. Namely, the presumption was that the rehabilitation approach is less stigmatizing from among the two because "*[a] debtor who tries to repay some of her debts rather than seeking an immediate discharge [as the Congress believed] would not see herself or be seen by creditors as simply abandoning her obligations*."[65] This presumption, at least in the US, is justified because individual debtors qualifying only for straight liquidation often have no assets from which to pay their creditors ('no asset' cases). This, in practical terms means that they are discharged of most of their debts immediately, or more precisely in a week or two until the discharge orders are signed by the bankruptcy judge.[66]

Thirdly, US bankruptcy law may be a very telling exception as far as the care for bankruptcy stigma is concerned because to a certain extent the contours of US bankruptcy law have always been shaped as a reaction to the stigma. While it may be an exaggeration to state that *"[l]awmakers' and public perception of stigma's effect on debtors in bankruptcy have both been major driving forces for bankruptcy legislation throughout American history,"*[67] it should not go contested that at some specific historic times this did play a major role yet it was not the only one. Having stigma in mind when drafting bankruptcy laws does not seem to have been a routine practice elsewhere so far.

5.2 The United Kingdom (UK)

An appropriate staring point is to consider the words of McCormack, who postulates that an "*Anglo-American model is a bit of a misnomer [because] [s]ubstantial differences exist between US law and UK law in [the field of insolvency law*]."[68] This remains valid up until today notwithstanding the major changes that occurred in the UK from the pro-restructuring shift that began in the 1980s. Unsurprisingly, McCormack advocates that lawmakers on the British Isles were only interested in "*[borrowing] the best features of the corporate reorganisation chapter of the US Bankruptcy Code—Chapter 11—but, at the same time, avoiding its pitfalls*."[69]

The shift, at least on the level of statutory law, occurred primarily through the Enterprise Act 2002, which "*ostensibly placed [corporate rescue] at the top of the legislative tree*."[70] Due to the shortage of time that has passed since the revamping of the system, it is too early to pass the final verdict yet, the empirical data are encouraging and McCormack might be right that now the Americans could learn

[65] *Id.* page 7.

[66] Id. page 7.

[67] *See* Yvana L.B.H. Mols, *Bankruptcy Stigma and Vulnerability: Questioning Autonomy and Structuring Resilience* 29 Emory Bankr. Dev. J. 289–331 (2012), page 303.

[68] McCormack, Apples and Oranges, page 110.

[69] McCormack, Apples and Oranges, page 110.

[70] McCormack, Apples and Oranges, page 116.

something from lawyers on this side of the Atlantic as well.[71] Convergence, even if piecemeal, is noticeable notwithstanding the notable surviving differences, in particular, the higher level of bankruptcy stigma and the significantly lower level of indebtedness of the citizenry in the UK. From the perspective of reorganisation of businesses, for example, while in the US the main rule is that the reorganisation is conducted by the debtor itself (the debtor-in-possession concept, abbreviated as DIP) and in the UK now appointment of an external insolvency practitioner is a must, in practice external trustees tend to be appointed increasingly also in the US.[72]

What matters for our purposes here, however, is that if there is another jurisdiction besides the US where bankruptcy stigma is reckoned with—then that is the UK. Still, the pertaining scholarship is limited and one could primarily find scattered brief comments on the bankruptcy-stigma interface rather than in-depth analyses in this country, too. In light of that, the following formulations of McCormack could properly express the gist of the UK position. As he noted, although "*there is no single knock-out factor that explains [the continued divergences between the US and the UK],*" the presence of bankruptcy stigma cannot be denied even in the UK. Although it is "*difficult to find hard empirical evidence […] within Europe as a whole, including the UK, there is certainly the opinion that stigma exists and that this works as a deterrent to entrepreneurial initiative*."[73] [Emphasis added.]

5.3 Germany

Germany, Europe's economic engine and one of its leading civilian legal systems, is the exact opposite of the US as far as the intensity of bankruptcy stigma is concerned. In fact, its intense presence is commonly known and reckoned with. To better understand how strong the grip of bankruptcy stigma is on the much desired business reorganisations in Germany, one should quote the words one of the leading German insolvency lawyers, Reinhard Bork, who pointed to the gist of the problem as follows:

> "*It is widely known and widely felt that in the business world at least in Germany, insolvency is still viewed as a failure and the filing of an insolvency application as an admission of one's own failure—regardless of the actual cause. No manager wants to be confronted with his or her own shortcomings. As long as this emotional inhibition remains in place, it may require some convincing to persuade managers to attempt restructuring within an insolvency procedure.*"[74]

[71] McCormack, Apples and Oranges, page 110.

[72] According to a 2005 research paper of Baird and Rasmussen, creditors routinely remove the directors and management of the debtor company to-be-reorganised whenever that suits their interests. *See* Douglas G. Baird and Robert K. Rasmussen, *Private Debt and the Missing Lever of Corporate Governance,* Vanderbilt Law and Economics Research Paper 05-08, pp. 1–48 (2005), downloadable from the SSRN database.

[73] McCormack, Apples and Oranges, page 114.

[74] Bork, RESCUING COMPANIES, section 2.12.

German businessmen are increasingly aware of the problem and often (if in the position) they react by forum shopping. The closest more reorganisation friendly system handy is the UK, as it could be concluded based on the example of the most cited recent vintage cases, in particular the already mentioned case of the Swabian automotive parts manufacturer—*Schefenacker AG*—following the suit of the earlier *Deutsche Nickel*.[75]

The cases were followed by an unprecedented interest in upgrading and making German reorganisation law competitive on the global scene and a number of statutes were enacted. These include the **2009 Debt Securities Act** ("*Schuldverschreibungsgesetz*") [31 July 2009—BGBl 2009 I, 2512], the **2010 Financial Institutions Restructuring Act** *("Kreditinstitute-Reorganisationsgesetz")* [28 Oct. 2010, BGBl 2010 I, 1900] and, in particular, the **2011 Act for the further Simplification of Company Restructuring** *("Sanierungserleichterungsgesetz")* [BGBl. 2011, Teil 1, Nr. 64, S. 2582 of 7th of December 2011].

As it might be concluded, the lawmakers' intentions are good yet the mere act of passing of a law could hardly change the mentality of businessmen and society in general overnight. Hence, now, in 2017, one could only say that time will tell whether these could generate a genuine volte face in Germany. Last but not least, the related experimentations may turn to be invaluable to other similarly situated legal systems, like the launching of bankruptcy-focused master's programs by some German law schools (Heidelberg, Kiel and Trier) recently.

5.4 Hungary

A brief gloss on Hungary, as a legal system that shares three such key features with China that the mentioned western developed legal systems do not possess, is desirable. These three features are, *first*, that Hungary used to be also a transitory country in the post-1990 period. It joined the European Union in 2004 and roughly from that point in time it is less talked of as a system in transition. *Secondly,* as far as insolvency reorganisations and restructuring is concerned, it resembles very much present time China because in this respect the system does not function as it should. In other words, in this respect, Hungary—just like China—is in process of learning.

Thirdly, Hungary used to be also a socialist (communist) system building of a *sui generis* type of planned economy; a system in which enterprises were owned by the state and in which neither credit, nor bankruptcy was looked upon as the friends of the system. For Hungarians, socialism meant largely a bankruptcy-free era in which state-owned enterprises facing financial distress were routinely bailed-out by the government. Consequently, the beginning of transition somewhere around 1990 brought with it not just an avalanche of business insolvencies but was also a rude awakening for businessmen, economists, lawyers and the politicians alike as none of them had had real life experiences with bankruptcy.

Additionally, in Hungary German law has always been the number one model law roughly since the second half of the nineteenth century essentially up until

[75] Bork, RESCUING COMPANIES, section 1-07.

today. Needless to say, due to the strong economic ties, the close geographic location of the country and many shared social values, the perception of Hungarians about insolvency is very similar to the one in Germany. The intensity of the bankruptcy stigma has also remained very strong in Hungary up until present time.

No wonder then that notwithstanding the good intentions, the incentives and push coming from the side of the European Union, hardly could one speak of a robust restructuring culture in the country. Empirical studies are essentially lacking and the bankruptcy-related publications tend to contain only brief glosses on reorganisation patterns. Yet even these few sentences reveal the devastating effects of bankruptcy stigma. One such instance, unfortunately not going beyond a single longer sentence, in the Insolvency Handbook of Juhász reveals, for example, that "*[t]he enterprises in financial difficulties did not initiate [the newly introduced] reorganisation proceedings because they did not want to risk a potential future liquidation that may have ensued if informing the creditors on opening such proceedings.* ***Rather, they try to solve their problems negotiating one by one with creditors [out-of-court and without revealing that to the outside world.]***"[76] [Emphasis added.] Unfortunately, the situation is not much different in the other post-socialist countries of the region either.

Besides China and Germany, however, Hungary has some elements that bring it closer to the US and the other leading Anglo-Saxon systems. From the perspective of bankruptcy law, two features should be mentioned. On the one hand, the Hungarian bankruptcy act now has a chapter on reorganisations that has to a certain modest extent been inspired by US law's second chance philosophy even if having reached the country primarily through the intermediation of the EU and German law. On the other hand, as opposed to German law, Hungary has a brand new, three times revamped secured transactions law that was quite closely modelled after American law, more precisely Article 9 of the Uniform Commercial Code.[77] Although the latter is of little relevance for our central theme, it is important to underline that Hungarian secured transactions and bankruptcy law is an amalgam containing elements also from Anglo-Saxon laws today.

Juxtaposition of the Hungarian and US policies as far as the nomenclature of bankruptcy law is concerned, however, should be of direct relevance from the perspective of combating the bankruptcy stigma. Namely, while the 1978 bankruptcy reforms in the US involved also cautious choice of key legal terms, that was hardly the case in Hungary. To remind ourselves: departing from the realization that the perception of an individual in financial distress would evoke different reactions from others on the market, depending on whether the reference is by '*bankrupt*' rather than '*debtor*,' since 1978 the subjects of all types of bankruptcy cases are about 'debtors' in the US. In other words, the US system took into account also what the general connotation of the term '*bankrupt*' is and what reactions that term invokes in others.

[76] Hungarian Insolvency Handbook, volume I, page 145.

[77] *See, in general,* Tibor Tajti, COMPARATIVE SECURED TRANSACTIONS LAW, Chapter on Hungary (Akadémiai könyvkiadó, Budapest 2002), as well as Tibor Tajti, Security Rights and Insolvency Law in Central and Eastern European Systems, in: McCormack G and Bork R (eds.) (2017) Security Rights and the European Insolvency Regulation, Intersentia, Cambridge-Antwerp-Portland.

Unfortunately, it is not known what logic led the drafters of the new post-socialist 1991 Hungarian Bankruptcy Act in picking the key terms. The most problematic is exactly the one chosen for reorganisation-type proceedings. Namely, instead of departing from the common, everyday meaning of these terms, as understood not only by businessmen but also by laymen, the drafters opted for a very strange, clearly unnatural solution: instead of simply naming the reorganisation proceedings—similarly to US law—as 'reorganisations' ("*átszervezés*"), they named it rather as 'bankruptcy proceedings' ("*csődeljárás*"). Here, it makes sense to add that the Hungarian language term "***csőd***" opted for as a designation for 'reorganisations' is almost identical with the connotation of the term 'bankrupt' or 'bankruptcy' in the US. This strange post-1990 terminology twist illogically changed also the meaning of terms that had been established already in the nineteenth century. It is not without a reason that Juhász, one of leading bankruptcy law authorities in Hungary, speaks of a 'conceptual conundrum' ("*fogalmi zűrzavar*").[78]

The terminology conundrum, however, has concrete negative consequences as well. Namely, the new reorganisation proceedings, the success of which heavily depends on voluntary participation of creditors and debtors was named exactly by that term which generally means the worst—the ending of the business, the hopelessness and the exact opposite from what reorganisation should be about. The terminology formula, instead of encouraging participation, actually discourages it. Apart from the fact that this causes headaches to translators from Hungarian to English (and vice versa), the bigger problem is that the wrong choice of terminology also generates mistaken reflections, which impacts upon the stigma attached.

If the choice of key terms was proved to be of importance in the US, then the situation should not be any different in Hungary either. Moreover, similar concerns may exist in other countries as well where the local language variants of key bankruptcy law terms may conflict with their everyday connotation, leading to unwanted consequences. In Hungary, interestingly, nothing suggests that rectification and alignment of the term with their everyday and historic connotation would be planned.

Lastly, a fresh arbitral award[79] issued under the ICSID Convention[80] deserves here brief mention as well because the case concerned the insolvency proceeding conducted by a bankruptcy court of the capital of Hungary, Budapest. The claimant sued Hungary based on the Bilateral Investment Treaty between Hungary and

[78] Hungarian Insolvency Handbook, volume I, page 30. One cannot but side with the critique of Juhász, who wrote: "*It is hard to understand the intent of the lawmakers and the reasons for changing the contents of more centuries of terms to something that is different from what has become domesticated in practice*." Otherwise, the etymology of the Hungarian term for 'bankruptcy'—"c*sőd*"—is not the derivative of the Italian '*banca rotta*' (broken bench). The general meaning, outside the context of bankruptcy law, is 'crowd,' or 'gathering,' because in 1840 when the first modern bankruptcy act was passed, the proceedings' began with gathering of the creditors. *Id.* However, in modern parlance, the term—just as the US term 'bankrupt'—means 'failure, collapse and complete fiasco' or 'the failure of an entrepreneur or of a company;' as defined by contemporary Hungarian Lexicons. *See Id.*

[79] ICSID case Dan Cake v. Hungary No. ARB/12/9.

[80] The Convention on the Settlement of Investment Disputes between States and Nationals of Other States was formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank) and entered into force on 14 October 1966.

Portugal and claimed that it was not accorded fair and equitable treatment by the State, or more precisely by the insolvency court. Namely, although it filed a *request for reorganisation* in due time as part of liquidation proceedings, instead of summoning the meeting of creditors to decide on the reorganisation proposal, the court asked filing of numerous additional evidences and documents within a—in the opinion of the arbitrators—too short period of time. In the opinion of the arbitral panel, the additional requirements objectively could not have been satisfied in due time. Moreover, the court ordered the liquidator to finish the sale of the debtor's within the statutory deadline without heeding the filed request for opening of reorganisation proceedings.

In a sense, the decision—deciding in favour of the Portuguese claimant—was a verdict on the way liquidation proceedings coupled with reorganisation are conducted and are perceived in the country. Although no generalizations should be made on the basis of a single case,[81] the gathered facts do suggest that a degree of uncertainty definitively surrounds reorganisations and—presumably due to the low number of reported successful reorganisation cases and the frequent abuses—courts have a degree of suspicion vis-à-vis reorganisations.

5.5 The agenda of the European Union

As it can be concluded from the above brief synopsis, restructuring and reorganisation are the common desired goals of all the mentioned systems, from China, through Western Europe to Hungary and other post-socialist systems. The picture would not be complete, however, without adding to the puzzle a few more thoughts on what the European Union is striving at in the domain of insolvency law.[82] As it is known, the EU is well-aware of the increase in the number of cross-border insolvency cases and the obstacles as well as increased transaction costs the prohibitively differing insolvency laws of the Member States generate. Yet, because of the idiosyncratic nature of the EU as expressed by the subsidiarity principle, nothing more could have been achieved than a piece of legislation that is made predominantly of conflicts of law-type provisions.[83] In other words, substantive bankruptcy laws remain in the hands of national lawmakers and EU law in essence does nothing more but helps coordination and cooperation between bankruptcy courts in cross-border insolvency cases involving more Member States.

[81] Although one may legitimately raise questions on the way insolvency proceedings are conducted in Hungary and dilemmas may arise also related to the acts of the court handling the case, similar critiques may be raised related to other legal systems as well. In the opinion of the author of this paper, however, the facts gathered by the tribunal seem to present a significantly incomplete picture. Moreover, the tribunal has not even tried to determine what the normal practice of insolvency courts are not just in Hungary but perhaps in some other countries.

[82] *See, in general,* Laura Carballo Piñeiro, *Towards the Reform of the European Insolvency Regulation: Codification rather than Modification*, 2 Nederland Internationaal Privaatrecht (NIPR), 207–215 (June 2014), at. 207.

[83] The two acts are the Council Directive 1346/2000 on insolvency proceedings and the Regulation (EU) 2015/848 of the European parliament and of the council of 20 may 2015 on insolvency proceedings (recast), which replaced the previous Directive. *See also* Reinhard Bork and Kristin van Zwieten (eds.), COMMENTARY ON THE EUROPEAN INSOLVENCY REGULATION (OUP 2016).

The story does not end, however, on the level of hard law. From the perspective of this paper it is of equal importance that Brussels has also noted and researched the various forms in which the bankruptcy stigma is present and what its impact on entrepreneurship, innovation and generally growth in Europe is. As it is stated in the Communication: *"[A]s part of the general lack of societal appreciation and understanding of entrepreneurship, business distress or even business failure is not yet sufficiently understood as a normal economic development and an opportunity for a new start. The Commission considers that a more supportive environment for businesses at risk may prevent failure."*[84]

More research projects have already been completed on the topic[85] in the meantime yet for the time being and in the light of the present constellation of political forces, these preferences of the EU could not be expressed but only in soft law instruments.[86] These clearly set to decrease the intensity of the bankruptcy stigma and domestication of the second chance policy as top priorities. Additionally, these support the points and claims raised in this article best. While Hungary is only planning to revamp its reorganisation and restructuring law in 2016, Poland, for example, has passed a distinct statute,[87] taking the provisions on reorganisations out of the former Insolvency Act (which therefore remains limited to liquidations only). They have looked at US Chapter 11 and French law (which otherwise was also inspired by US law) and introduced even four distinct types of restructuring proceedings instead of a single one. The act stepped into force on the 1st of January 2016 save the provisions on the new registry. Time will tell whether the four-restructuring proceedings-based system will bring results. Yet, as many jurisdictions know only one type of reorganisation proceedings, it may be interesting to see how this multiple-path formula will impact the stigma—equally intense in Poland as in Germany or Hungary.

[84] 2007 Commission Communication: Overcoming the stigma of business failure, for a second chance policy—Implementing the Lisbon Partnership for Growth and Jobs: Why and How to Overcome the 'European Stigma.' Brussels, 5.10.2007 COM(2007) 584 final. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0584&from=EN; last visited on 5 March 2017.

[85] *See, e.g.,* the questionnaire-based 2002 Study by Philippe and Partners and Deloitte and Touche, BANKRUPTCY AND A FRESH START: STIGMA ON FAILURE AND LEGAL CONSEQUENCES OF BANKRUPTCY; 2011 Report of an expert group commissioned by the EU Commission entitled 'A SECOND CHANCE FOR ENTREPRENEURS: PREVENTION OF BANKRUPTCY, SIMPLIFICATION OF BANKRUPTCY PROCEDURES AND SUPPORT FOR A FRESH START.

[86] Besides the already mentioned 2007 Commission **Communication**, the Commission **Recommendation** of 12 March 2014 on a new approach to business failure and insolvency (2014/135/EU) should be mentioned. [Emphasis added].

[87] The act (*Ustawa z dnia 9 kwietnia 2015 r.—Prawo Restrukturyzacyjne*) was enacted on the 9th of April 2015. *See* Tibor Tajti, Chapter on Central and Eastern Europe, in: Gerard McCormack and Reinhard Bork (eds.), SECURITY RIGHTS AND THE EUROPEAN INSOLVENCY REGULATION (Intersentia 2017).

6 Conclusions and implications

6.1 The theoretical account: facts and aspirations

Notwithstanding the dilemmas and the divergences that persist among the jurisdictions covered herein, a few conclusions lend to be formulated from the above elaboration. On a scholarly, theoretical front, these seem to be the most prominent ones.

First, it is a fact that the fresh start-based approach (or second chance philosophy) to bankruptcy law is the first ranking priority for numerous bankruptcy laws now at the outset of the twenty-first century, from the European Union, its Member States to China. As an introduction of such a new system presumes a major paradigm change going considerably beyond mere passage of new laws, the achievements cannot be but modest in the short run.

Second, as the nature of consumer and business bankruptcies differs significantly, the corollary problems that need to be addressed in the process of introducing a fresh start-based law are as well distinct. This notwithstanding that there is some overlap, too. It is of relevance as well that the interest in, and consequently the hereinbefore reform results, differ significantly with respect to the two segments of bankruptcy laws as well.

Third, it is a fact that more and more jurisdictions recognize the legitimacy of providing 'honest but unfortunate' individuals (consumer debtors) with fresh start. The new consumer bankruptcy laws, however, do not follow a single pattern, rather they tend to meaningfully diverge. Although US law is one of the models that is advisable to be consulted in this domain as well by those who would like to learn from best globally available practices, it is far from being a success story. It is rather its rich repository of experiments, with both failures and successes, because of why US consumer bankruptcy law's scrutiny is advisable. Admittedly, as operating of a consumer bankruptcy system is far from being cheap, for poorer countries its introduction is not realistic only for that particular hindrance. Yet the trend, at least in Europe, is the introduction of consumer bankruptcy law variants and with that the fresh start philosophy is also spreading.

Fourth, as opposed to consumer bankruptcies, in case of business restructurings the aspirations, both east and west, point in the same direction: positing business restructuring (reorganisations) the first priority instead of liquidations. Or, laws that materialize the second chance philosophy for businesses. Here, undoubtedly the top model is Chapter 11 of the US Bankruptcy Code together with the constantly evolving connected business practices. This notwithstanding that noticeable results have already been scored on that front in the UK after having embraced the policy of business rescue in the second half of the 1980s or that a yet-to-be-tested new German reorganisation-specific statute (ESUG) has been passed in 2011. The distinction is that while in the US a working reorganisation system is a fact, it is rather only an aspiration elsewhere.

Fifth, it should also remain uncontested that for all the systems trying to shift towards business restructuring and rescue the central question is how to make the

paradigm change when mere passage of written reorganisation laws proves to be insufficient? The magic formula, in other words, has still not been found. It is not only the meagre results of the German new act (ESUG) but the experiences of most of the EU Member States, or China that amply evidence that.

Sixth, in light of the above, this article aimed to draw the attention to the impact that bankruptcy stigma, as a ubiquitous meta-legal category, plays in these contexts. Namely, even though stigma is hardly quantifiable, subsists with differing intensity and in varying appearance forms, it obviously affects the implementation of bankruptcy laws in the systems observed in this paper—and beyond. While its intensity generally tends to be lower in leading Anglo-Saxon systems compared either to China or Continental European civil laws, it is a factor that is reckoned with even in the US notwithstanding the success of its reorganisation laws. Put simply, unless we understand the stigma, study all the manifestation forms in which it may affect the bankruptcy process, and develop methods to decrease its intensity to a tolerable level, hardly will the freshly introduced restructuring and reorganisations laws have a chance for a success. In effect, this is the central argument of this paper.

Seventh, of no less importance is that the reason why it made sense to devote this paper to the stigma-restructuring interface is that this topic has largely been so far left out of the purview of legal scholarship, both national and comparative. It is also indicative that the available publications overwhelmingly focus only on consumer bankruptcies. However, stigma may affect not only consumers but also entrepreneurs, directors and managers of companies that went bust and eventually also the businesses themselves as consumers, suppliers or creditors of such firms normally also change their stance once faced with bankruptcy. Moreover, the findings on the impact of bankruptcy stigma on consumer bankruptcies are not unreservedly applicable to business restructurings either.

Lastly, two interlinked caveates in particular to law reformers should be made. On the one hand, as bankruptcy stigma is a social phenomenon that is equally, if not primarily, within the bailiwick of social psychology, its interdisciplinary study would be needed. The better understood, the better tools for its reduction could be designed. However, it should be self-explanatory that the reduction of its intensity, or elimination of some of its undesirable manifestations, cannot be achieved solely by passage of a law. On the other hand, while presumably bankruptcy stigma could hardly be completely eliminated from social life, it should be also clear that actually one should not even strive towards getting rid of it fully. As a renowned source correctly put it, *"[t]here is certainly nothing inherently wrong with a healthy bit of stigma to deter debtors from seeking an easy way out of their legitimate obligations."*[88] In other words, stigma is a Janus-faced factor that may also deter fraud. Here, however, one should heed carefully to the few publicized quantitative data related to the otherwise comparatively largely uncharted field of bankruptcy fraud. Namely, while there may be valid empirical observations for UK and US suggesting that "*the instance of real fraud is vanishingly low*"[89] in bankruptcy proceedings, the scarce evidence does not allow for drawing of similarly encouraging conclusions elsewhere.

[88] *See* 2013 World Bank Report, para 124, page 44.

[89] *See* 2013 World Bank Report, para 118, page 42.

6.2 The practical account: tentative list of legal tools to combat stigma

In the lack of a tested toolbox with which the bankruptcy stigma could be gradually decreased, or some specific aspects of it be eliminated, in order to give room for the second chance policy, sharing the related experiences and cross-fertilization would undoubtedly be invaluable for all aspiring towards these identical goals. It should therefore be welcome to conclude by revisiting and listing the above-mentioned practical tools that may be exploited for these purposes.

First, experiences with educating consumers, or consumer-investors, on various aspects of consumer law,[90] or finance and investments, might be applied also when spreading the knowledge on the second chance policy and restructuring laws not only among consumers but also among businessmen. That should include as well references to the topic of bankruptcy stigma. The same recommendation was put forward as well by the 2013 World Bank Personal Insolvency Report suggesting that "*if debtors are unaware of the benefits of the system, or if they overestimate the downsides and dangers of seeking relief, a public campaign of education and awareness can correct misimpressions as to new options for relief.*"[91]

Second, a linked problem is that today insolvency law is treated as the step-child of legal education especially in Continental European legal systems; even if notable exceptions exist. Such an attitude must change as properly trained lawyers are a *sine qua non* for the desired paradigm shift. Better understood bankruptcy laws, for example, may ensure more efficient and more transparent conduct of bankruptcy proceedings that might change the stance of all potential participants of bankruptcy proceedings for the better as well. Introduction of Master's degree programs specifically focusing on reorganisation law recently in Germany exactly for that reason is an unprecedented invaluable experiment the outcomes of which should be heeded by other countries, too.

Third, sharing, analyzing and discussing empirical case studies—not being limited only to court cases but also to out-of-court workouts (successful and failed ones as well)—would also be beneficial. Croatia,[92] for example, has tried to impose pre-filing mandatory workouts on businessmen (i.e., out-of-court negotiations aimed

[90] Spreading information about the bankruptcy process (including also the stigma) may be a valuable tool not only in case of consumer-bankrupts but also for business people. Thus, what was concluded related to consumers and consumer law might be applied mutatis mutandis also to bankruptcy. An expert of European consumer law expressed these thoughts as follows: "*[One] of the most significant barriers to consumers gaining access to justice is a lack of knowledge about their rights. It is vitally important [therefore] to attempt to break down this barrier by educating consumers about these rights. Government departments, publicly funded community law centres or other relevant public bodies should aim to educate consumers about their rights and how to enforce them by publishing free written material. In addition, the television and the internet could be used to disseminate consumer law information. Education strategies are an important tool to encourage and empower consumers to resolve their legal problems.*" *Quoted from* Peter Spiller and Kate Tokeley, Individual Consumer Redress, *in:* Geraint Howells, Iain Ramsay, Thomas Wilhelmsson and David Kraft (eds.), HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW (Edward Elgar 2010), at 510.

[91] *See* 2013 World Bank Report, para 123, page 43.

[92] *See* the Financial Operations and Pre-Insolvency Settlement Act of 2012 ["*Zakon o financijskom poslovanju i predstečajnoj nagodbi*"]. Official Gazette, NN 108/12, and the amendments in NN 144/12, 81/13, 112/13, 71/15, and 78/15.

at reaching an agreement between the debtor and its creditors—in Croatian: "*predstečajna nagodba*") but the law has proved to be short-lived because businessmen refused to participate and simply there were no legal (or other) tools with which they could be forced to act according to the law. The unhappy outcome should partly be attributed to bankruptcy stigma that is very intense in Croatia as well (just like in the entire Balkans). This unhappy yet telling experiment unfortunately remains largely unknown outside Croatia.[93]

Fourth, another strand should be the analysis of the intended or unintended effects of various laws from the point of view whether they lessen or rather reinforce the stigma.[94]

Fifth, as it was hinted at above, it would make sense even to rethink what the connotation of the key terms used is, not only among lawyers but more importantly among businessmen and consumers. The juxtaposed examples from Hungary and US should be telling in that respect to other jurisdictions as well.

Sixth, the bifurcation of consumer bankruptcy proceedings as exemplified by US law may also be instructive as they radiate different 'messages' to the participants of the market: while Chapter 13 rehabilitation proceedings display primarily *repayment* of the overwhelming part of debts, Chapter 7 proceedings are rather branded by *immediate discharge* of most of debts.

Seventh, the above-mentioned new Polish development opting for a multiple restructuring avenues pattern—similarly to the UK—deserves analysis as an alternative to those jurisdictions that know only one type of reorganisation proceedings (e.g., Hungary).[95] Presumably the policy opting for more alternatives is a better formula for spreading the rescue culture because businessmen may choose the most-fitting one and the possibility of choice itself seems to be a panacea against the fear of bankruptcy and stigmatization.

Eight, the 2013 World Bank Report, unfortunately quite succinctly, referred also to a scrutiny of bankruptcy laws from the perspective which of the "*civil disabilities and restrictions following an insolvency case*" have stigmatizing effects? This is yet another method of reducing stigma as evidenced by experiences from some countries.[96] The Report mentioned liberalization of property exemption as such an example.[97]

[93] *See, in general,* Vladimir Mamić, Nikola Kokot, Branimir Zarković, and Nera Popović, Croatian Pre-Insolvency Settlement Saves Companies which are 'Too Big to Fail,' *in*: Rodrigo Olivares-Caminal (ed.), EXPEDITED CORPORATE DEBT RESTRUCTURING IN THE EU (Oxford University Press 2015).

[94] *See* Nicola Howell and Rosalind Mason, Reinforcing Stigma or Delivering A Fresh Start: Bankruptcy and Future Engagement in the Workforce, 38(4) UNSW L.J. 1529–1574 (2015), at 1530. [In the article focused on consumer-bankrupts, various Australian laws (regulations, professional and licensing rules) were analyzed whether they reinforce the stigma associated with bankruptcy thereby preventing or making it harder for bankrupt-individuals to reenter the job market or start a business. The article vouched for law reforms to facilitate the fresh start objective of the bankruptcy system].

[95] Hungarian law knows only one type of reorganisation (restructuring) proceedings regulated by the 1991 Act No XLIX on Reorganisation and Liquidation Proceedings ("1991. *évi XLIX. Törvény a csődeljárásról és a felszámolási eljárásról*"), Chapter II, §§7–21/C.

[96] *See* 2013 World Bank Report, para 123, page 44.

[97] *Id*.

As the listed eight tools—eclectically selected from more jurisdictions—hopefully prove, the legal laboratory trying to domesticate the second chance philosophy is already operating in many parts of the world yet largely isolated from one another. Notwithstanding the common aspirations, the common denominator among them is that very few seems to focus on studying and combating the bankruptcy stigma. While this is understandable in the case of the US where the reorganisation system works and simply it is something 'given,' it is less so in France, Germany and in other countries having set the rescue culture as first priority. The stigma, however, is present everywhere as an interfering significant factor. For this reason the inter-disciplinary topic of bankruptcy stigma and its impact on the contents and functioning of insolvency law, especially impact on restructuring laws, would deserve more attention. This applies especially to countries that aspire for an efficient, second chance philosophy-based, restructuring-oriented bankruptcy system, as is the case today with China, France, Germany and many other western European jurisdictions as well as the overwhelming part of Central and Eastern Europe.

Appendix

See Table 1.

Table 1 Socio-psychological classification of some manifestations of the bankruptcy stigma

	Consumer bankrupcies	Business bankruptcies
Fear (affective component)	1. Fear from resorting to the bankruptcy system (no-filing or delayed filing of bankruptcy petitions) 2. Fear that the seller will not be in the position to: Supply spare parts Stand for warranties	1. Fear from resorting to the bankruptcy system 2. Fear that the partner company will not be in the position to: Perform as contracted for Supply spare parts Stand for warranties
Stereotyping (cognitive component)	1. The individual (consumer) who has once already become bankrupt, is inclined to repeat the same pattern of behavior (i.e., cannot properly handle money/credit cards)	1. The officers and management of the company tend to repeat the mistakes made earlier. This applies a fortiori to single-owner firms and partnerships 2. All bankruptcies are fraudulent 3. Securities of bankrupt companies are worthless 4. China: stigmatization also of the municipality where the bankruptcy company is seated
Social control (behavioral component)	1. No lending to individual who has already been bankrupt 2. Not employing bankrupts (or former bankrupts)	1. Expert and experienced employees leave 2. Investors avoid and/or sell the securities of the bankrupt company (issuer) 3. Directors and/or owners of bankrupt business may become unavailable

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