

Feeling Sorry for Some Creditors

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Abstract : The interaction of contract and property has always been a concern in corporate and commercial law, where there are internal structures created that may not match the externally perceived image generated by the labels attached to those structures. We will focus, in particular, on the priority structures created by affirmative asset partitioning, which have increasingly come under challenge by those attempting to negotiate around them. The most prominent has been the AT1 bonds issued by Credit Suisse which were wiped out before its equity when the troubled bank was acquired by UBS. However, this should not have come as a surprise to those whose “bonds” had similarly been “redeemed” upon the occurrence of certain reference events in countries like Singapore, Hong Kong and Taiwan during their Minibond crisis linked to US sub-prime defaults. These were derivatives classified as debentures and sold as such. At the same time, we are again witnessing “liabilities” seemingly ranking higher up the balance sheet ladder, finding themselves lowered in events of default. We will examine the mechanisms holders of perpetual securities or preference shares have tried to use to protect themselves. This is happening against a backdrop that sees a rise in the strength of private credit and inter-creditor conflicts. The restructuring regime of the hybrid scheme in Singapore now, while adopting the absolute priority rule in Chapter 11 as the quid pro quo for creditor cramdown, does not apply to shareholders and so exempts them from cramdown. Complicating the picture further, shareholders are not exempted from cramdown in the Dutch scheme, but it adopts a relative priority rule. At the same time, the important UK Supreme Court decision in BTI 2014 LLC v Sequana [2022] UKSC 25 has held that directors’ duties to take account of creditor interests are activated only when a company is almost insolvent. All this has been complicated by digital assets created by businesses. Investors are quite happy to have them classified as property (like a thing) when it comes to their transferability, but then when the issuer defaults to have them seen as a claim on the business (as a choice in action), that puts them at the level of a creditor. But these hidden interests will not show themselves on an issuer’s balance sheet until it is too late to be considered and yet if accepted, may also prevent any meaningful restructuring.

Keywords : asset partitioning, creditor priority, restructuring, BTI v Sequana, digital assets

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