

# **Comparative Consumer Bankruptcy**

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# Comparative Consumer Bankruptcy

**Jason J. Kilborn**

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*To Jay, who set me on this wonderful path of discovery  
and whose warm encouragement has sustained my journey*



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# Preface and Bibliographic Note

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This book is designed as an introduction to the variety of existing legal regimes for treating consumer financial distress. Analysis of such systems historically has been confined to English-speaking countries that share a legal tradition (the Common Law) and, at least generally, a similar viewpoint about the role of law in economic life: the United States, Great Britain, Canada, and Australia. As this book demonstrates, the scope of potential analysis has expanded greatly in recent years to include countries from a somewhat different legal tradition (the Civil Law) with a somewhat different viewpoint of the proper interplay of law and economics (particularly with respect to consumers), not to mention a very different range of languages.

Given the complexity and dynamism of this area of the law, this book does not present an exhaustive discussion of all existing formal legal responses to consumer financial distress. It focuses on the relatively new and developing laws in continental Europe, largely because that has been “where the action is” over the past decade (and because language barriers have so far inhibited my analysis of the new systems in Japan and South Korea, which I understand are quite similar to those discussed here). This project is ongoing, as more and more countries consider adopting specific legal responses to treating the ill effects of open access to consumer credit, particularly revolving credit. As legislatures in South America and Central and Eastern Europe begin to adopt similar responses, one can expect them to base their responses on models from the countries discussed here, with similar Civil Law traditions and legal systems. The countries discussed here have been chosen for this reason, as well as for their relative importance in the minds of U.S. readers (*e.g.*, Germany and France), for their similarity with former and current

U.S. law (e.g., the Netherlands), or for their representativeness within a given “family” of legal and economic systems (e.g., Sweden as representative of the Scandinavian group of systems).

The focus in this book is on the consumer debt relief regimes in Europe, primarily continental Europe, and comparing them with the past and present system in the United States. I discuss only briefly the essence of the system in England and Wales, and I omit entirely any discussion of the mature systems in Canada and Australia, largely for two reasons. First, the Anglo-American systems have been explored in some depth elsewhere, and the current operation of U.S. and English law described here is at least vaguely representative of similar developments in the other Common Law systems. Second, the notion of consumer debt relief is quite new to the Civil Law systems. The philosophy and approach to consumer “bankruptcy” on the European continent differs substantially from that in the United States and other areas with a Common Law tradition. It seemed most fruitful to dedicate this book to the similarities and differences among the less explored, newer systems.

The text that follows is drawn primarily from a series of articles that I have written over the past several years and which I have reorganized, reconsidered, updated and amplified for this book. For those interested in further or deeper exploration of this material, citations to original primary and secondary sources (most available only in the languages of the countries discussed) can be found in the following articles:

*Out with the New, In with the Old: As Sweden Aggressively Streamlines Its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?*, \_\_\_\_ AM. BANKR. L.J. \_\_\_\_ (forthcoming 2007);

*Continuity, Change, and Innovation in Emerging Consumer Bankruptcy Systems: Belgium and Luxembourg*, 14 AM. BANKR. INST. L. REV. 69 (2006);

*The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New U.S. Law From Unexpected Parallels in the Netherlands*, 39 VAND. J. TRANSNAT'L L. 77 (2006);

*La Responsabilisation de l'Economie: What the United States Can Learn From the New French Law on Consumer Overindebtedness*, 26 MICH. J. INT'L L. 619 (2005);

*The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States*, 24 NW. J. INT'L L. & BUS. 257 (2004).

The discussion of Austria is based on new research in a variety of original primary and secondary sources (all available only in German).<sup>1</sup> The brief note on the situation in England and Wales is based primarily on a fantastic paper by Adrian Walters and Donna McKenzie Skene, *Consumer Bankruptcy Law Reform in Scotland, England and Wales*, \_\_\_\_ AM. BANKR. L.J. \_\_\_\_ (forthcoming 2007),<sup>2</sup> updated with figures drawn from recent reports from the Insolvency Service in its evaluation of the Enterprise Act 2002.<sup>3</sup>

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1. See, e.g., GEORG KODEK, HANDBUCH PRIVATKONKURS: DIE SONDERBESTIMMUNGEN FÜR DAS KONKURSVERFAHREN NATÜRLICHER PERSONEN (2002); BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT, AUSWEG GESUCHT!: SCHULDEN UND PRIVATKONKURS (2004), online at <http://www.bmsg.gv.at/cms//site/attachments/2/9/3/CH0036/CMS1091089868037/privatkonkurs.pdf>.

2. Available online at <http://ssrn.com/abstract=914522>.

3. See <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/legislation/reform.htm>.