

## THE REJECTION OF EXECUTORY CONTRACTS: A COMPARATIVE ECONOMIC ANALYSIS

Susana DÁVALOS\*

**ABSTRACT:** *This article describes three models used around the world for the treatment of executory contracts in bankruptcy. An economic analysis is made of the ex post incentives of the bankruptcy trustee to reject the contract under each model, based on Jesse Fried's article Executory Contracts and Performance Decisions. This article states that the approach used by Spain is likely to create the most efficient ex post incentives. The contribution of this article is to further the discussion on the treatment of executory contracts in bankruptcy, as it continues to be one of the main day-to-day issues at bankruptcy courts.*

**KEY WORDS:** *Insolvency proceedings, bankruptcy, liquidation, conciliation, insolvency, bilateral contracts, executory contracts, efficiency, economic analysis, United States, Germany, Spain.*

**RESUMEN:** *Este artículo propone tres modelos de tratamiento de los contratos bilaterales pendientes de cumplimiento en el procedimiento de insolvencia<sup>1</sup> de diferentes sistemas jurídicos, con la finalidad de realizar un análisis de los incentivos que crean las reglas de rescisión o continuación para el síndico en cada uno de los modelos propuestos. El análisis costo-beneficio de los modelos tiene como base el texto de Jesse Fried, titulado Executory Contracts and Performance Decisions. El artículo concluye que el modelo de España es el más eficiente. El objetivo de este texto es continuar con el debate sobre el tratamiento de los contratos pendientes de ejecución en los procedimientos de*

---

\* Professor of Law, Facultad de Derecho & Instituto de Investigaciones Jurídicas, National Autonomous University of Mexico (UNAM), Mexico. This article is part of the JSD dissertation submitted to UC Berkeley, Law School. I am indebted to Professor Jesse Fried for his invaluable comments and mentoring. I would also like to express my gratitude to Carla Barrerra Díaz de la Vega for her priceless help to make this article possible. I am also very grateful to Rodrigo Aguilar, Víctor Díaz, Gabriela Guzmán, Miguel Ángel Lemus, Diana Monterrubio and Daniela Sánchez for their excellent research assistance.

<sup>1</sup> Meaning “concurso mercantil.”

*insolvencia desde el punto de vista del análisis económico del Derecho, pues es un problema vigente.*

PALABRAS CLAVE: *Procedimiento de insolvencia, concurso mercantil, quiebra, liquidación, conciliación, insolvencia, contratos bilaterales, contratos pendientes de cumplimiento, eficacia, análisis económico, Estados Unidos, Alemania, España.*

#### TABLE OF CONTENTS:

I. INTRODUCTION.....	70
II. THREE MODELS.....	72
1. The American Model.....	74
2. The German Model.....	79
3. The Spanish Model.....	85
III. THE SUPERIORITY OF THE SPANISH MODEL.....	90
IV. OBJECTIONS.....	97
1. Fairness.....	97
2. Rehabilitation.....	99
V. CONCLUSIONS.....	100

#### I. INTRODUCTION

Executory contracts in bankruptcy are an issue of concern among legal scholars due to their economic importance and the complexity of their treatment. For the purposes of this article, executory contracts, as defined by Jesse Fried, are those contracts in which performance other than payment is owed by at least one party at the time of the filing of the bankruptcy petition.<sup>2</sup> These contracts are particularly relevant in any bankruptcy proceeding because they are not entirely assets, nor exclusively liabilities;<sup>3</sup> instead, they imply an interrelationship between the debtor and the non-debtor party in which each of them enjoys some benefits and bears some costs. However, depending on the value of the contract, it can indeed represent an asset or a liability to the bankruptcy estate.

Because one of the main goals of bankruptcy worldwide is the maximization of the bankruptcy estate value, it is thought that bankruptcy law should ease the powers of the bankruptcy trustee to dispose of executory contracts.

<sup>2</sup> Jesse M. Fried, *Executory Contracts and Performance Decisions* 46 in Duke L. J. 517 (1996).

<sup>3</sup> An alternative way to state it is that executory contracts “are nothing more than mixed assets and liabilities arising out of the same transaction.” See Thomas Jackson, *The Logic and Limits of Bankruptcy Law* 106 (1986).

Download English Version:

<https://daneshyari.com/en/article/7532106>

Download Persian Version:

<https://daneshyari.com/article/7532106>

[Daneshyari.com](https://daneshyari.com)