THE REJECTION OF EXECUTORY CONTRACTS:
A COMPARATIVE ECONOMIC ANALYSIS

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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 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

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1 Meaning “concurso mercantil.”
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. These contracts are particularly relevant in any bankruptcy proceeding because they are not entirely assets, nor exclusively liabilities; 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.

3 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).
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