



MODULE A: LECTURE 1: A
**A Framework for International
Insolvency
2019**

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SECTION A: GENERAL BACKGROUND



- **FRAMEWORK OF ESSENTIAL FEATURES OF AN INSOLVENCY SYSTEM** – framework in study guide



FRAMEWORK OF ESSENTIAL FEATURES OF AN INSOLVENCY SYSTEM

A.

Essence of insolvency / bankruptcy

- Collective (individual/ piecemeal) nature / procedure
- Meaning of insolvency?
- Liquidation of assets versus rescue

B.

Policy considerations

- Pro-creditor
- Pro-debtor

C.

Sources and terminology

- Historical roots: Civil or (English) Common law
- Insolvency legislation (single Act or Code or fragmented)
- General law
- Terminology

<p>Personal insolvency (individuals)</p>	<p>D. Common characteristics</p>	<p>Corporate insolvency</p>
	<p>E.</p> <p>Gateways and commencement (how insolvency proceedings are opened)</p> <ul style="list-style-type: none"> • Court? • Other? • Who can apply? (<i>locus standi</i>) <p>NB: Importance of commencement of formal state of insolvency</p>	

	<p>F.</p> <p>Effects/ consequences of commencement</p>	
	<p>F. 1</p> <p>Automatic stay</p> <p>Moratorium on piecemeal/ individual debt collecting and execution procedures</p>	
<ul style="list-style-type: none"> • Estate assets • Exempt/ excluded • Foreign assets 	<p>F. 2</p> <p>Estate / assets</p>	<ul style="list-style-type: none"> • Estate assets • Foreign assets
<p>Rights, duties, liabilities and limitations of debtor as an individual</p>	<p>F. 3</p> <p>Personal consequences and liability</p>	<p>Rights, duties, liabilities and limitations of directors and officers</p>

	<p style="text-align: center;">F. 4 Executory contracts</p> <ul style="list-style-type: none">• General powers of Insolvent Estate Representative (IER)• Exceptions, e.g. labour contracts?	
	<p style="text-align: center;">F. 5 Set-off and netting (pre- and post- commencement)</p>	
	<p style="text-align: center;">F. 6 Avoidable dispositions</p>	

**G.
Administration of estate**

- **Regulator (Structure)**
- **Court involvement (special court/ other body?)**
- **Estate representative (qualifications etc.?)**
- **Proof of claims**
- **Meetings of interested parties**
- **Creditors**
- **Tracing of assets**
- **Examinations**
- **Realisation of the assets**

	<p>H. Distribution</p> <ul style="list-style-type: none">• Classes of creditors• Types of claims• Secured• Priorities• Concurrent	
	<p>I. Cost of administration</p>	

	J. Rehabilitation	
Discharge		Corporate rescue
<ul style="list-style-type: none"> • Process • Time periods 		<ul style="list-style-type: none"> • Initiate - formal • Moratorium • Debtor in Possession / Rescue Practitioner (IER) • Post-commencement finance • Discharge • Creditors' committees



<ul style="list-style-type: none">• Formal (statutory) repayment plans• Hybrids	<p style="text-align: center;">K. Alternatives (creditor workouts: consensual)</p>	<ul style="list-style-type: none">• Formal / prescribed rescue procedures• Non-formal: work outs• Pre-packs
	<p style="text-align: center;">L. Cross-border dispensations</p> <ul style="list-style-type: none">• Sources• Terminology• Approaches• Differences in domestic laws <p style="text-align: center;">[Note: Quest is for predictability]</p>	

<ul style="list-style-type: none">• Some systems: no collective procedures for individuals, or restricted to traders	<p>M. Special rules</p>	<p>For example:</p> <ul style="list-style-type: none">• Banks, financial institutions• Groups of companies / corporations;• State Owned Enterprises• Non-profit associations• Municipalities• Sovereign debt
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SECTION B: THE SOURCES AND NATURE OF INTERNATIONAL INSOLVENCY



Facts:

- ABC Co. Incorporated in USA
- Branches, affiliates or subsidiaries in England, Germany and SA
 - (business operations)
 - Treatment of branches/ affiliates/ subsidiaries
- Order in USA?
 - England, Germany and SA?

SECTION B: THE SOURCES AND NATURE OF INTERNATIONAL INSOLVENCY



Cross border insolvency:

- Debtor A operates in 20 jurisdictions: 20 cases? Differences in approach?
- Holding-subsidary companies

Questions:

- What is international insolvency law?
- The sources and nature of international insolvency law.
- Basic principles and approaches to cross-border insolvency cases.
- Various models and instruments available and in the process of being developed in the area of cross-border insolvency law.

What is Int Ins law/CBIL?:

- In its simplest forms, a transnational insolvency involves an insolvency proceeding in one country, with creditors located in at least one additional country.”
- In the most complex cases, it involves multiple proceedings, subsidiaries, affiliated entities, assets, operations and creditors in dozens of nations”
- Cannot always be fully enforced ...

Considerations:



- **Recognition** of foreign judgments & PIL
- **Economic affairs** with foreigners
- **Interests in property** in more than one country
- **Contractual obligations** in various countries
- **Different national laws:**
 - Insolvency; and
 - Non-insolvency (**general law**)
- **Absence** of a global court, parliament, law
- **Territorial:** jurisdiction, local laws
- **Approaches:** universality v territoriality
 - Cooperate
 - Insular



Considerations...

- **Risk of multiple insolvencies:**
 - Weaker creditors may lose out
 - Risk of fraud, asset dissipation across borders
 - Thus: dealings various jurisdictions, assets different jurisdictions, companies
- **Groups**

Sources:

- **Common law approach**
- **Underlying principles: Comity (and reciprocity)**
- **Court's discretion** (inherent, common law)
- **Legislation:** (national and supra national? – EU; OHADA)
 - National law;
- Based on international instrument (Like Uncitral Model Law on Cross-Border Insolvency and see UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments)

- **Treaties:**
 - Historical examples: Verona
 - Nordic countries
 - South America
 - Europe
- **Protocols:** Maxwell; UNICTRAL etc



Terminology etc:



- **Universality** (unitary approach)
- **Territoriality** (plurality of proceedings)
- **COMI**: Place of registration/ incorporation; other than place of incorporation, either headquarters (real seat) or its operations (like business, main assets); nerve centre; ascertainable by third parties.
 - DUAL COMI: Maxwell case: headquarters England but assets in USA
 - EU recast Insolvency Regulation and UNCITRAL
- **Main proceeding**: At domicile; principal office; nerve centre (COMI) – universality
 - What law will regulate? **Lex loci concursus** ?
- **Non main proceeding**: (secondary proceeding) – modified universality (recognition order)
 - Local law will apply

Terminology:.....

- **Concurrent proceeding**
 - Different bankruptcy proceedings running concurrently
- **Recognition** (ancillary to main proceeding)
- **Foreign main**
- **Foreign non-main**
- **Concurrent jurisdiction and cooperation**
- **Foreign representative**
- **Concurrent (full blown) insolvency order v Recognition order**
- **Lex concursus**
- **Lex loci rei sitae** (property)
- **Inward and outward bound requests**
- **Public policy considerations**
 - **Exempt claims: tax claims**





Essentials in a developed system:

- **Foreign representatives** - direct access
- A clear and speedy recognition procedure
- A moratorium or stay
- Non-discrimination between creditors
- Courts and administrators to cooperate
 - Goal of maximizing value of debtor's worldwide assets
 - Protecting the rights of both debtors and creditors and
 - Furthering just administration

Some practical considerations/ differences:

- Recognition of foreign judgments v foreign insolvency(collective proceedings)
- Collective proceedings
- Technical meaning of insolvency
 - Balance sheet/ cash flow
- Priorities/ preferential claims
- Avoidance law
- Executory contracts
- Labour dispensations
- Estate representative (IP) and structure
- Prior-acquired rights: securities (floating charge...)
- Rescue v liquidation
- Funding/ contributions





... Some practical considerations:

- Fletcher poses 3 questions:
 - In which jurisdiction must procedure be opened?
 - Which system must rule elements of diversity?
 - International effects to proceedings in a particular forum?

Determinants:

- Type of assets
 - Location (lex loci rei sitae)
- The court first issuing the order (lex concursus?):
 - Jurisdiction etc
 - Adhere: universalism or territorialism?

Some current approaches:

Regional supra-national systems:

- EU Recast Insolvency Regulation
 - COMI – determines jurisdiction of main proceeding
 - Lex concursus applies – avoidance actions
 - Procedures included: liquidation as well as hybrid and pre-insolvency proceedings
 - National searchable databases in each member state
 - Groups of companies; group coordination proceedings
 - **Note:** still different insolvency and general law systems
- OHADA
 - French speaking African countries
 - Bound by treaty: same national laws and central commercial court



Some current approaches:



- Own legislation or follow UNCITRAL Model Law on Cross Border Insol
 - See also UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments

England and Wales

- Inward bound request for recognition (s 426)
- EU Insolvency Regulation
- UNCITRAL Model Law on Cross-Border Insolvency
- Common law
- Brexit?

USA

- Former s 304 of the USA BR Code
 - Universal effect, modified universality
- Since 2005, Chapter 15 adopted Model Law

Some current approaches:



RSA

- Dual system (in theory)
 - Designation and reciprocity?

Japan

- At earlier stage no assistance (insular approach)
- Now EU model law

Germany

- Statutory
- EU Insolvency Regulation

SECTION C: THE HARMONIZATION OF NATIONAL INSOLVENCY LAW AND ITS USE IN INTERNATIONAL INSOLVENCY LAW



- Harmonise local laws? (OHADA example)
- Difficult areas for harmonisation, like:
 - **Voidable dispositions;**
 - **Labour contracts;** Special cases: i.e. labour contracts?
 - **Types of claims:**
 - Secured (securities)
 - Priorities
- **Next evolutionary step in EU?** – 12 March 2014 Recommendation: New Approach to Business Failure: harmonise EU members' laws



SECTION D: PRINCIPLES RELATING TO THE QUALIFICATIONS OF ESTATE REPRESENTATIVES

- Insolvent Estate Representative (qualifications etc.?)
 - Who?
 - Licensing?
 - Regulation? (Important for recognition)
 - Note: important for cross-border insolvency

Regulation of insolvency representatives



- **EBRD Principles:**
 - P 1 – Qualifications & licensing generally
 - P 2 – Appointment in an insolvency case
 - P 3 – Review of office holder appointment
 - P 4 – Removal, resignation & death office holder
 - P 5 – Replacement of office holder
 - P 6 – Standards professional conduct
 - P 7 – Reporting and supervision
 - P 8 – Regulatory and disciplinary
 - P 9 – Remuneration and expenses
 - P 10 – Release of office holder
 - P 11 – Insurance and bonding
 - P 12 – Code of ethics
- **World Bank Principles:**
 - **UNCITRAL LGIL (2004) [Part 2, chap. III, paras. 35 -74.]**

SECTION E: INTERNATIONAL INSTRUMENTS



- **UNCITRAL:** Cross-border insolvency and other instruments
- IMF, World Bank and OECD documents.
- **Other insolvency related documents** – Summary: Wessels and Boon