

# 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

#### Α.

#### **Essence of insolvency / bankruptcy**

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

#### В.

#### **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



Personal insolvency (individuals)	D.  Common characteristics	Corporate insolvenc
	E.  Gateways and commencement (how insolvency proceedings are opened)  Court? Other? Who can apply? (locus standi)  NB: Importance of commencement of formal state of insolvency	

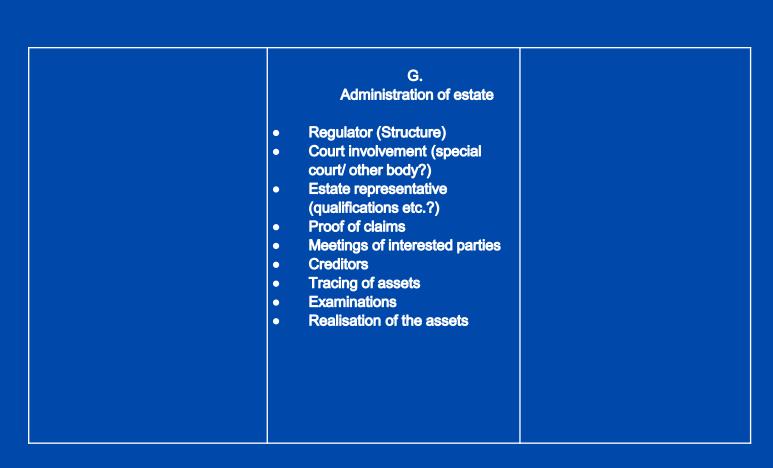


	F. Effects/ consequences of commencement	
	F. 1  Automatic stay  Moratorium on piecemeal/ individual debt collecting and execution procedures	
<ul><li>Estate assets</li><li>Exempt/ excluded</li><li>Foreign assets</li></ul>	F. 2 Estate / assets	<ul><li>Estate assets</li><li>Foreign assets</li></ul>
Rights, duties, liabilities and limitations of debtor as an individual	F. 3 Personal consequences and liability	Rights, duties, liabilities and limitations of directors and officers



F. 4 Executory contracts  General powers of Insolvent Estate Representative (IER) Exceptions, e.g. labour contracts?	
F. 5 Set-off and netting (pre- and post- commencement)	
F. 6 Avoidable dispositions	







H. Distribution  Classes of creditors Types of claims Secured Priorities Concurrent	
I. Cost of administration	

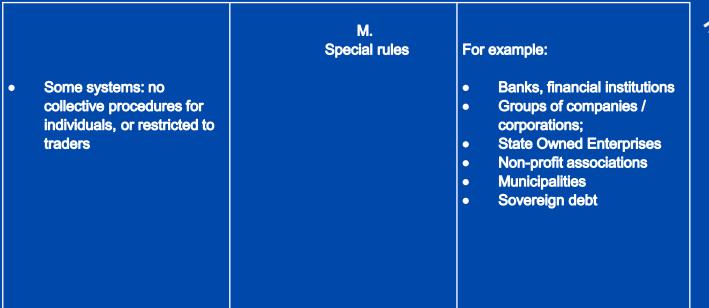


	J. Rehabilitation	
Discharge		Corporate rescue
<ul><li>Process</li><li>Time periods</li></ul>		<ul> <li>Initiate - formal</li> <li>Moratorium</li> <li>Debtor in Possession / Rescue Practitioner (IER)</li> <li>Post-commencement finance</li> <li>Discharge</li> <li>Creditors' committees</li> </ul>



<ul> <li>Formal (statutory)         repayment plans</li> <li>Hybrids</li> </ul>	K. Alternatives (creditor workouts: consensual)	<ul> <li>Formal / prescribed rescue procedures</li> <li>Non-formal: work outs</li> <li>Pre-packs</li> </ul>
	L. Cross-border dispensations	







## SECTION B: THE SOURCES AND NATURE OF INTERNATIONAL INSOLVENCY 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-subsidiary 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:

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- 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





- 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