Asian Principles of Business Restructuring

Questionnaire

ASIAN BUSINESS LAW INSTITUTE

A joint project by the International Insolvency Institute and the Asian Business Law Institute

About the International Insolvency Institute
The International Insolvency Institute ("III") is a non-profit, limited-membership organization dedicated to advancing and promoting insolvency as a respected discipline in the international field. Its primary objectives include improving international co-operation in the insolvency area and achieving greater co-ordination among nations in multinational business reorganizations and restructurings.

About the Asian Business Law Institute
The Asian Business Law Institute ("ABLI") is an Institute based in Singapore that initiates, conducts and facilitates research and produces authoritative texts with a view to providing practical guidance in the field of Asian legal development and promoting the convergence of Asian business laws.

Published by the Asian Business Law Institute.

All enquiries should be addressed to:
The Secretariat
Asian Business Law Institute
1 Supreme Court Lane
Level 6
Singapore 178879
info@abli.asia

Questionnaire

31 January 2019

Index

1 Preliminary Outline

The purpose of this part is to establish where insolvency law sits in your domestic legal system, whether it is functionally part of the civil or corporate law, whether it deals with the entities that are commonly used for the conduct of business, and whether it is part of the ordinary commercial or State law or has primacy in the form of a federal or national law. This section also enquires about the main forms of business organisation and asset security in your jurisdiction.

1.1.1 Give a brief description of your domestic legal system, its legal origins and whether it is a member of any particular legal family. Describe how the laws changed after the Asian and/or Global Financial Crises.

1.1.2 Give a brief description of the place of insolvency law in your domestic legal system (e.g. part of civil or corporate law) and whether there is a distinction between personal and corporate insolvency law (as well as any variants for specific entities/persons). Indicate whether insolvency law is a general law at the same level as other laws or a special law that overrides other laws. Indicate whether insolvency law is a continuous law or whether any insolvency laws are enacted on an as-needed basis for limited periods of time. Is the corporate insolvency law of your jurisdiction restricted to specified corporate entities? (e.g. is there a separate insolvency framework for financial institutions?)

1.1.3 Give a brief account of the legislation governing insolvency in your jurisdiction:

(a) title and chapter number, origin, legislative history, relevant dates as well as when most recently amended;

(b) influences on the legislation (e.g. other legal systems), what international benchmarks, if any, have been used in creating this legislation, and whether any international advice was sought or received on the creation of this legislation; and

(c) the role of soft law principles and binding precedents on the interpretation of the law, such as court decisions, regulations, rules or directions (e.g. High/Supreme Court rules or decisions).

1.1.4 Give a brief account of any treaties or other enactments that govern or touch upon insolvency law to which your jurisdiction is a party (or has otherwise indicated an intention to adopt).

1.1.5 Does the public have access to court filings or other information concerning an in-court or out-of-court restructuring (e.g. a public docket system)? Is such information freely available? Is the public permitted to attend insolvency court hearings?

1.1.6 What are the common forms of business organisation in your jurisdiction (e.g. corporation, partnership, sole proprietorship, etc.)?

1.1.7 Asset security and recording:

(a) What are the common forms of asset security used in your jurisdiction, widely defined to include all transactions that have a function of securing obligations (e.g. mortgage, charge, pledge, enterprise pledge, charge, retention of title, finance lease, etc.)?

(b) Are any other types of security (possessory liens, workers' liens, maritime liens, tax liens, etc.) recognised and afforded priority in "pre-/insolvency" (i.e. both pre-insolvency[1] and formal insolvency[2]) proceedings in your jurisdiction?

(c) Is set-off and/or netting used in your jurisdiction?

(d) Briefly describe the types of registry and recording systems used for asset-based security and indicate whether such systems provide for electronic filing.

(e) Are registry and recording systems or databases searchable by the public? If so, is access free?

1.1.8 What grounds are used to determine which jurisdiction and venue are appropriate to commence insolvency proceedings by or against a debtor (e.g. place of registration, headquarters, presence of assets or business activities, etc.)?

2 Rescues: Out-of-Court and In-Court (Governance and Supervision)

Part 2 of this Questionnaire seeks to discover the procedure(s) that can be described as rescue, rehabilitation or reorganisation, as opposed to liquidation, irrespective of whether the procedure envisages the rescue of an entity, its business or its major assets. Procedures may be of the out-of-court or in-court variety. In the first instance, the major part of the procedure may consist of an informal gathering of creditors with the debtor for the formulation of a rescue plan acceptable to the creditors, whether or not the plan, which may be in the form of a contract between the parties, is subsequently approved of by the court. In the case of an in-court rescue, this type of procedure envisages the conduct of the procedure under the supervision of the court and/or an insolvency office-holder, even if the procedure itself is "light-touch", i.e. a procedure that is dependent on a simple framework contained in laws or court rules. More formally, in-court procedures can consist of quite complex procedures governed by legislation and (often) detailed rules. The idea behind this part of the Questionnaire is to try and understand the range of possibilities for rescue, rehabilitation or reorganisation offered by your legal system.

In the case of the procedures below, please also state the position of secured creditors, whether they are required to participate in these procedures and what happens to the

[1] See the explanation of pre-insolvency at Section 2.2 on page 4.

[2] See the explanation of formal insolvency at Section 2.3 on page 6.

assets subject to any security they may have. Please also note any difference in treatment between creditors holding asset security and creditors who have the right of set-off and netting, where the latter exists and is used in your domestic system.

2.1 Out-of-Court Workouts

Generally, out-of-court workouts do not take place under the supervision of the court, although supervision (by the court or some other public body) could be an option in some systems. Out-of-court workouts may consist of agreements entered into by assenting parties that take the form of a contract. The agreement may be made subject to approval by the court in order to give it enforceability or to sanction one or more steps contemplated therein for which court approval may be required if, for example, some prejudice may occur to one or more of the parties involved or the parties seek to bind dissenting creditors to the agreement or to maintain a neutral position pending the implementation of the agreement. Out-of-court workouts may involve mediation by an insolvency office-holder or other professionals trusted by the parties. Generally, the rules governing out-of-court frameworks may derive from ordinary contract law, a special law and/or insolvency law, but are light-touch in that the rules may expressly avoid complexity and leave much to be determined by the parties.

2.1.1 Are there any established practices for facilitating out-of-court workouts (i.e. workouts conducted without recourse to any formal restructuring or insolvency proceedings) in your jurisdiction? Are there any examples of market practices/rules that have been developed for such workouts? Alternatively, are there any formal legal structures that encourage such workouts as precursors/alternatives to formal insolvency proceedings?

---

*For instance: some jurisdictions have developed (e.g. through their Central Bank or Banking Association) a framework for enabling restructuring negotiations to be conducted for debtors with exposure to multiple banks. State if there are conditions to the use of any such procedures as well as if there are rules or banking regulations for non-performing loans (**NPLs**). Similarly, are asset management companies established to address NPL problems? If so, on an ad hoc or continuous basis?*

2.1.2 Are there any particular types of debtors excluded from out-of-court workouts? Are there any restrictions on participation by creditors that are affiliated or connected to insiders or the beneficial or ultimate beneficial owners of the debtor? Are there any differences in treatment between foreign and domestic debtors? If the answers to the foregoing questions are affirmative, briefly describe how workouts involving these categories of debtors are managed.

2.1.3 Does the law include specific rules to enable or facilitate out-of-court workouts?

For instance: are there rules of taxation law that facilitate/impede restructuring or the sale of the business on a going concern basis either by providing/avoiding incentives or disincentives to restructure? Are there differences in the approaches taken by public or private entities to participation in such workouts?

2.1.4 Does the law/practice require or encourage mediation or other forms of alternative dispute resolution (**ADR**) in cases of financial difficulty?

For instance: does the law provide for a State agency, judge, court or tribunal to offer assistance in the resolution of disputes and negotiation of an out-of-court workout? Are parties permitted to have recourse to mediation and are professional representatives (e.g. lawyers) involved?

2.2 Pre-Insolvency Proceedings

Pre-insolvency proceedings can be characterised as quasi-collective proceedings under the supervision of a court or an administrative authority which give a debtor in financial difficulties the opportunity to restructure at a pre-insolvency stage and to avoid the commencement of insolvency proceedings in the traditional sense.[3] Some jurisdictions may require that a debtor be in a state of an actual or imminent inability to pay its debts as they fall due. Pre-insolvency proceedings represent an intermediate step between out-of-court processes and more formal in-court processes. They may be made available to debtors at a stage prior to the onset of formal insolvency and for reasons other than merely financial ones (economic issues, employment-related questions, corporate problems, etc.). Generally, such proceedings attempt to be "soft-touch" and use simplified rules. However, this is not always the case. Pre-insolvency proceedings can permit many of the same outcomes as more formal insolvency proceedings and are viewed as being more beneficial to debtors in financial difficulty because such proceedings are generally available to be invoked at an early stage of distress. Such proceedings may be made available through corporate, insolvency and/or special legislation.

If the term "pre-insolvency" is not used in your jurisdiction, please use the term(s) used in your jurisdiction that effectively explains the same concept when responding to the questions within this section.

2.2.1 Does the law distinguish between pre-insolvency and formal insolvency in relation to the availability of proceedings to deal with debtors experiencing difficulties? What are the typical pre-insolvency options and proceedings available for resolving difficulties and which ones are the most commonly used?

[3] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) NO 1346/2000 of 29 May 2000 on insolvency proceedings, COM (2012) 743 final.

2.2.2 If the answer to 2.2.1 is affirmative, does the law provide for any formal pre-insolvency proceedings in addition to any main formal insolvency proceedings that can be used to achieve a business rescue for a debtor in difficulties or in anticipation of difficulties?

For instance: are there corporate and/or insolvency proceedings, e.g. schemes of arrangement, compositions or preventive restructurings, etc.?

2.2.3 Are there any particular types of debtors excluded from the benefit of pre-insolvency proceedings (e.g. micro-, small- and medium-sized enterprises (**MSMEs**), State-owned enterprises (**SOEs**) or municipality-owned enterprises, businesses of strategic importance, etc.)? Do such proceedings allow for collective or joint administration of connected debtors or corporate groups? Are there any differences in treatment between foreign and domestic debtors?

2.2.4 What are the general conditions for the opening/commencement of pre-insolvency proceedings? Can such proceedings be limited to a certain group of affected creditors whose debts are to be restructured to restore viability or must such proceedings include all creditors?

For instance: may the opening/commencement of pre-insolvency proceedings be requested only by the debtor or also by creditors (and if the latter, is there a particular type or minimum number of creditors, or a minimum value of creditor claims required)? If the opening of pre-insolvency proceedings is requested by the debtor, is notice required to be given to creditors? Are other parties, such as a government regulatory agency or the public prosecutor/attorney-general, allowed to request the opening of pre-insolvency proceedings? Are there any differences in procedural requirements (e.g. proof of financial distress or insolvency) depending on who is requesting the pre-insolvency proceedings? Is there evidence of any practice of "abusive filing" (i.e. filings designed to extort payment from debtors)? In instances of possible fraud/abuse of process, can the debtor or (certain) creditors be banned from requesting pre-insolvency proceedings (e.g. on the basis of an abuse of right principle) and can such proceedings be terminated, or can an approved plan or concluded agreement be nullified for fraud/abuse of process?

2.2.5 Where the debtor is a corporate entity, which organs of the corporate entity are entitled to decide whether the corporate entity should request the opening of pre-insolvency proceedings? Is there any particular procedure that those organs must use? Are there any opportunities for interested parties to object?

For instance: is prior approval of a general meeting of the entity's shareholders required before pre-insolvency proceedings can commence? What are the requirements for such a meeting (e.g. quorum, etc.)? Are the interests of the entity's minority shareholders protected where such proceedings have been requested by the entity's major shareholders?

Is prior consultation or approval of a body of employee representatives (such as a works council), or any other form of employee consultation, required?

2.2.6 What publicity rules apply to filing for, and the opening of, pre-insolvency proceedings (excluding any requirements imposed by securities law on listed entities)?

For instance: is a request for the opening of pre-insolvency proceedings published? Are creditors actively informed of such a filing? If so, are they alerted by an individual notice or by a message containing general information to all creditors? What are the forms of publicity: Official Gazette, newspapers, court register, trade register and/or online? Are there any special rules for foreign domiciled creditors? (e.g. do foreign creditors get extra days for lodging their claims? If the commencement of pre-insolvency proceedings require filing by several creditors, how do foreign creditors find out relevant information?)

2.2.7 Who controls the pre-insolvency process? Is it driven by the debtor or creditor(s)?

2.2.8 Does the pre-insolvency process in your jurisdiction involve the appointment of someone to manage or oversee the debtor's business? If the answer to the foregoing question is affirmative: who can make such appointments? How is the role of such an appointee defined? Does such an appointee need any particular qualification?

2.2.9 What are the general criteria for the approval of a pre-insolvency rescue plan (e.g. full consensus or approval by a requisite majority of creditors)? Are there any requirements to refer plan approval to mediation or arbitration in cases of less than full consensus or requisite majority approval?

2.3 Formal Insolvency Proceedings in General

Formal insolvency proceedings generally refer to proceedings undertaken where a debtor is in an advanced stage of financial distress. Typically, a prerequisite to such proceedings is the satisfaction of a formal test of insolvency. Outcomes here may resemble those available at earlier stages through informal/out-of-court or pre-insolvency proceedings, but generally take place under the supervision of the court and with the participation of an insolvency office-holder. The legal frameworks governing such proceedings tend to be detailed and complex.

While we observe the importance of an efficient and well-functioning liquidation regime to a legal system, this section is concerned with the availability of rescue-type proceedings.

2.3.1 What formal insolvency proceedings are available to business debtors in your jurisdiction, and what, if any, are their stated purposes?

2.3.2 Are there any particular types of debtors excluded from formal insolvency proceedings? Are there any differences in treatment between foreign and domestic debtors? Briefly describe how insolvencies involving these different types of debtors are dealt with.

2.3.3 Does the law prescribe any hierarchy or order of priority regarding the purpose and/or outcome of formal insolvency proceedings? More specifically, is there a priority given to any of the following proceedings: reorganisation, liquidation, other types of settlement/plan; and, where there may be a choice between outcomes, how does the law prescribe how the choice is to be made?

For instance: does the law require a business rescue to be pursued before a piecemeal sale of the debtor's assets? If so, does the law require a reorganisation to be pursued before a sale of the business on a going concern basis?

2.3.4 Which of the formal insolvency proceedings identified in 2.3.3 can be used to achieve a business rescue?

2.3.5 What are the general conditions for the making of a request to commence formal insolvency proceedings?

For instance: may the opening/commencement of formal insolvency proceedings be requested only by the debtor or also by creditors (and if the latter, is there a minimum number of creditors or a minimum value of creditor claims required?) Is there evidence of any practice of "abusive filing" (i.e. filings designed to extort payment from debtors)? In instances of possible fraud/abuse of process, can the debtor or (certain) creditors be banned from requesting such proceedings (e.g. on the basis of an abuse of right principle)? Can requests be filed online?

2.3.6 Is a public interest application procedure available in your jurisdiction?

For instance: are parties such as a government regulatory agency or the public prosecutor/attorney-general allowed to request the opening/commencement of formal insolvency proceedings? What conditions apply to such applications? Are they dealt with any differently to applications made by debtors/creditors?

2.3.7 Are there variations of any standard formal insolvency proceedings used in the case of particular entities, e.g. "too big to fail", financial institutions, related entities, SOEs, etc.?

2.3.8 With regard to an application for the opening/commencement of formal insolvency proceedings generally:

(a) is there a requirement to prove the cessation of payments (i.e. a failure by the debtor to pay a debt when due);
(b) are the concepts of actual and/or imminent insolvency used in your jurisdiction;
(c) is contingent liability and/or balance sheet insolvency relevant; and
(d) is there a particular burden of proof laid on any of the parties in relation to such an application?

2.3.9 Where the debtor is a corporate entity that is entitled to request the opening of formal insolvency proceedings, which organs of the entity are entitled to decide whether the entity should make the request?

For instance: is prior approval of a general meeting of the shareholders of the corporate entity required? Are the interests of minority shareholders of the corporate entity protected where such proceedings are requested by the entity's major shareholders? Is prior consultation with or approval by a body representing employees (such as a works council), or any other form of employee consultation, required?

2.3.10 If there is a period of time between the filing and the opening/commencement of formal insolvency proceedings and/or the appointment of an insolvency office-holder:

(a) are protective and/or interim measures regarding the debtor's assets available and what are they?

(b) are these protective and/or interim measures automatically applicable or does a court have the power to order them? If a court has the power to order these measures, can the court do so of its own motion or only upon the application by an interested party?

(c) where there are such "gaps" in time, how are they dealt with in practice?

For instance: does the law provide for or can a court order a preliminary stay or designate a preliminary administrator in order to protect the debtor's assets while investigating the conditions for the opening/commencement of such proceedings? Are there any limits on the types and duration of relief that can be granted?

2.3.11 What are the general conditions for the opening/commencement of formal insolvency proceedings?

For instance: what are the relevant conditions/triggers that must be satisfied to open such proceedings? Are they always relevant or can they be overturned in order to promote a business rescue (e.g. by court order or creditors' vote)? May the court investigate all relevant facts ex officio? If not, what information and documents must the applicant submit with its request (e.g. inventories, list of creditors/claims, financial ratios, plan proposal, expert testimony about the feasibility of a proposed business rescue, prior consent of creditors, etc.)? Does the law provide for adversarial procedures including a hearing and the full body of evidence? What is the evidentiary standard and who bears the burden of proof? Which stakeholders are entitled/required to be heard? Is the decision to open formal insolvency proceedings made by a court or administrative body that is independent and impartial with respect to the parties? Does the law provide any stakeholder with a right to appeal? If so, does any appeal delay the commencement of formal insolvency proceedings?

2.3.12 Does the law preclude *ex ante* (i.e. prior to actual insolvency) the use of formal insolvency proceedings by debtors whose businesses are unviable (i.e. economically—rather than merely financially distressed debtors), and, if so, how?

2.3.13 What publicity rules apply to filing for, and the opening of, formal insolvency proceedings (excluding any requirements imposed by securities law on listed entities)?

For instance: is a request for the opening of formal insolvency proceedings published? Are creditors actively informed of such a filing? If so, are they alerted by individual notice or by a message containing general information to all creditors? Are there specific publicity requirements for opening formal insolvency proceedings? If so, are they designed to make such proceedings visible in another jurisdiction? What are the forms of publicity: Official Gazette, newspaper, court register, trade register and/or online? Are foreign domiciled creditors notified and how? (e.g. do foreign creditors get extra days for lodging their claims? If the commencement of pre-insolvency proceedings require filing by several creditors, how do foreign creditors find out relevant information?)

2.3.14 Does the law of your jurisdiction prescribe any provisioning requirements on banks once a borrower enters into formal insolvency proceedings?

2.4 Support Structures (Courts and State Agencies)

This section seeks information about the judicial and other public organisations involved in the insolvency process, both at pre-insolvency and formal insolvency stages, in your jurisdiction. The primary interest here is in the functioning of the courts, although other participants may exist in the system, including bodies representing State interests, those representing the interests of employees, relevant ministries and supervisory bodies, etc.

2.4.1 Who supervises pre-/insolvency proceedings in your jurisdiction?

For instance: if supervision is not within the primary control of a court, is there another form of supervision available, and, if yes, by whom (creditors' committee, an agency, an insolvency office-holder, and/or supervision of those insolvency office-holders by a body that authorises/licenses them)? In such a case, is there any role for a court?

2.4.2 Where a court has a supervisory function in relation to pre-/insolvency proceedings, what is the nature and scope of the court's role?

For instance: is a court involved in certain (substantial) decisions made by the debtor or the insolvency office-holder, and, if so, which ones? Can the court give binding instructions to the debtor or the insolvency office-holder on request by particular parties or of its own motion?

Is the supervisory role carried out by a specialist insolvency court, or by a specialist insolvency division within a court, or by a specialist insolvency judge? Are the actions of the court reviewable, and, if so, by whom and on what basis?

2.4.3 Who is responsible for devising the rules of practice and procedure which apply to pre-/insolvency proceedings that involve a court (e.g. the judiciary, the legislature, etc.)? Are professional bodies (such as those for lawyers, insolvency professionals, etc.) consulted as part of the development of such rules?

2.4.4 Which, if any, government regulatory agencies are involved in a business rescue, and for what purpose?

For instance: are certain government regulatory agencies empowered to promulgate (binding) regulations or set (non-binding) guidelines in insolvency matters, such as Insolvency Councils or an Insolvency Service? What are the exact tasks assigned to them? Are the persons appointed by such government regulatory agencies required to act independently? How are any such persons funded? If public (i.e. State) funding is a source, do you consider there to be a risk to the impartiality of these persons? Are some agencies tasked with intervention on behalf of the government in the rescue of strategically important companies? Are there any exemptions provided by government regulatory authorities (such as the securities regulator, the tax authority, the Central Bank, etc.) to facilitate the restructuring or insolvency process of a corporate debtor?

2.4.5 Where debtors are listed companies, do the stock exchanges in your jurisdiction on which they are listed have any role in their insolvency?

2.4.6 Where courts are involved in the administration of insolvency, is court-to-court communication (whether at the domestic or international level) permissible and recognised in your jurisdiction, and is it used in practice?

2.5 Insolvency Office-Holders

Insolvency office-holder is a term that refers to professionals involved in the insolvency process at one or more stages. They may belong to a recognised profession or professional body accorded status within the domestic legal system. They may have a code of ethics and be supervised by a combination of participants, including the courts, creditors, supervisory bodies and State organisms. Generally, entitlement to act as an insolvency office-holder is subject to educational qualifications and/or practice experience, irrespective of the procedure by which the professional is appointed, and may be subject to licensing, certification and/or registration requirements.

2.5.1 Do pre-/insolvency proceedings in your jurisdiction involve insolvency office-holders? If not, who is involved (e.g. independent experts, accountants or other professionals)?

2.5.2 In pre-/insolvency proceedings where insolvency office-holders are involved, who may be appointed to act as an insolvency office-holder?

For instance: is the insolvency office-holder required to have a licence or to be registered in an official list or otherwise hold a formal authorisation? Do specific qualification requirements apply to insolvency office-holders (e.g. general experience in business and/or insolvency law, mandatory (postgraduate) professional training and any continuing training requirements, mandatory membership of a professional association, evidence of a clean criminal record, etc.)? Are insolvency office-holders required to be individuals, or can a body/association of insolvency office-holders be appointed to act for an entity involved in the insolvency process?

2.5.3 How are insolvency office-holders appointed in pre-/insolvency proceedings? Which parties have a role in such appointments: debtors, creditors, the court, the State or other bodies?

For instance: what is the appointment procedure? Is such procedure creditor- or petitioner-driven or is it subject to approval by a court? Alternatively, is it subject to an automated selection process, such as by random computer selection? Can it be influenced or determined by creditors? Can an appointment be challenged, and, if so, by whom and on what basis? Are insolvency office-holders usually lawyers, accountants or turnaround professionals?

2.5.4 What powers do insolvency office-holders have in each pre-/insolvency procedure listed above that is available to a debtor/creditor?

For instance: does the insolvency office-holder have the power to manage the debtor's business, enter into new contracts on its behalf, and sell its assets? Does the insolvency office-holder have the power to compel the production of documents by the debtor or its management or other third parties? Does the insolvency office-holder have the power to examine the debtor, officers or employees of the debtor or third parties who might have assets of, or information about, the debtor? Does the insolvency office-holder need prior authorisation (e.g. court or creditors' committee approval) for the exercise of his/her powers, and, if so, in what circumstances? What sanctions, if any, apply if the insolvency office-holder acts wrongly? Can the exercise of the insolvency office-holder's power be challenged or appealed? If so, on what grounds can a challenge be made (e.g. the insolvency office-holder acted ultra vires, negligently, unreasonably or fraudulently?) Who may make such a challenge? Who determines (e.g. the court) whether the insolvency office-holder has acted wrongly? If the debtor's assets include shares in a company, can the insolvency office-holder invoke all the company law rights of a shareholder? Does the insolvency office-holder have the right to pursue actions on behalf of creditors, including to attempt to "pierce the corporate veil" of other legal entities in an effort to recover estate assets?

2.5.5 What duties do insolvency office-holders owe, and to whom (e.g. creditors, shareholders, the court, etc.)?

2.5.6 What sanctions apply if an insolvency office-holder breaches his/her duty, and do they include any risk of personal liability? Is it customary for insolvency office-holders to obtain professional indemnity/liability insurance, and, if so, who bears the cost for such insurance?

For instance: is there any potential liability for insolvent trading or wrongful trading in pre-insolvency proceedings or with respect to non-insolvency debtors (and are there any protections available against this)? Are pre-insolvency appointment holders personally liable for ongoing executory contracts,[4] orders for goods and services and other expenses?

2.5.7 To what reporting obligations are insolvency office-holders subject in your jurisdiction?

For instance: what information needs to be given to creditors or shareholders? What information must be made publicly available (e.g. inventories, public reports, etc.)? How is such information published (e.g. online, at a court, etc.) and how often?

2.5.8 How are insolvency office-holders remunerated in your jurisdiction?

For instance: is there a difference between remuneration depending on the type of procedure? Is the remuneration based on an hourly rate, a fixed rate, a percentage of realisations from the debtor's estate or a combination of the foregoing? Is the remuneration set at a general rate or can it be adjusted based on, for example, the experience of the insolvency office-holder and the complexity of the case? Is remuneration affected by the outcome of the procedure (for example, through payment of a "bonus" for maximisation of recoveries or rescue of the debtor's business)? Does a tariff system exist to limit the maximum amount of remuneration that can be charged by an insolvency office-holder? Is there an obligation on insolvency office-holders to take up certain mandates pro bono?

2.6 Directors/Managers of Distressed Entities

This section seeks to explore whether the directors and/or managers of distressed entities continue to have a role in the management of a debtor during the insolvency process, what their ongoing duties and liabilities may be for acting in this role and what their relationship may be with any insolvency office-holder appointed, for example where a procedure is under the control of an insolvency office-holder but the directors may have particular duties under the law to fulfil.

[4] An executory contract is a contract that has not been fully performed.

2.6.1 Does the law in your jurisdiction impose any special obligations on the directors/managers of distressed entities? If so, what are the consequences for breach of such obligations?

For instance: is there any legal obligation for directors to file a request for the opening of pre-/insolvency proceedings, or are there other important incentives for them to do so (e.g. the application of protective measures, or to prevent personal liability of directors for insolvent trading, etc.)? What are the consequences (civil and/or criminal liability) of delayed or premature filings by directors/managers of distressed companies? During pre-/insolvency proceedings, is there any legal obligation on directors/managers with regard to their conduct, e.g. by refraining from certain actions or positively performing certain duties such as information reporting?

2.6.2 Identify any requirements under other laws (e.g. corporate, labour, tax, etc.) of your jurisdiction related to pre-/insolvency proceedings for which directors/managers of distressed entities or insolvency office-holders may be liable for failure to comply and indicate whether such failures carry civil and/or criminal liability and whether such laws are, in practice, enforced.

2.6.3 Where the debtor is a corporate entity, once pre-/insolvency proceedings are commenced:

(a) does the law permit the debtor (its owners, directors and managers) to remain in possession?

(b) if so, in what circumstances and under which pre-/insolvency procedure? What exactly is the legal position of the debtor-in-possession (**DIP**)[5]?

For instance: is the DIP liable like an insolvency officer-holder? Is the DIP to be seen as representing the interests of creditors, the estate or all stakeholders, etc.?

(c) are there any limitations to the management powers of the debtor that remains in possession?

2.6.4 Are there special sources of liability in your jurisdiction for directors who act for a DIP?

2.6.5 Does the law of your jurisdiction allow individual directors of a DIP to be replaced by creditors, special advisors and/or the insolvency office-holder and, if so, in what circumstances?

---

[5] A debtor-in-possession or DIP, as defined by the UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions", refers to a debtor in reorganisation proceedings that are so structured that the debtor him- or herself, or itself (especially the board of a company), retains full control over the business, with the consequence that the court does not appoint an insolvency representative.

2.6.6 Where a debtor does not remain in possession:

(a) What, if any, residual powers are enjoyed by directors/managers in each pre-/insolvency procedure listed above as available to a debtor/creditor;

(b) Is the exercise of such residual powers subject to any special approval requirements?

(c) If the exercise of such residual powers is subject to special approval requirements, what are the approval procedures and from whom should the approval be obtained?

(d) What is the role and what are the duties of the directors/managers where an insolvency officer-holder is appointed to serve in a limited capacity?

(e) What is the relationship between the directors/managers and the insolvency office-holder?

(f) What duties do the directors/managers owe to the insolvency office-holder and vice versa?

For instance: do directors/managers need the consent of an insolvency office-holder, creditors, shareholders or a court to exercise any residual powers?

2.6.7 What are the respective responsibilities that directors/managers of a distressed entity owe to regulatory bodies other than the court?

For instance: if the debtor is a listed corporate entity, is the responsibility for continuous reporting owed to the stock exchange discharged by the debtor's directors/managers or its insolvency office-holder?

2.7 Conversion of Proceedings

This section seeks to discover whether the initial choice of an appropriate procedure for a distressed debtor/entity can be changed once the debtor is under a supervised process and its true financial position is known, leading to a review of its viability. In such cases, the law may allow for options to switch between procedures in order to achieve more optimal outcomes or to recognise the reality of the debtor's distressed (and terminal) position.

2.7.1 Is there a compulsory order of process which requires that a restructuring be attempted before a liquidation, and are there any requirements that proofs be shown that a restructuring has been attempted before liquidation?

For instance: if multiple applications are filed for liquidation and reorganisation, does the law require that the application for reorganisation be considered first, even if there is a prior-in-time application for liquidation? In cases of competing applications, is there a burden of proof on the debtor's viability?

2.7.2 How are unsuccessful rescue attempts in pre-/insolvency proceedings terminated or converted into other procedures? In cases of conversion, is a conversion automatic and, if not, what conversion procedures should be followed?

2.7.3 Does the law of your jurisdiction limit the time for which pre-/insolvency proceedings can be used to effect a business rescue, e.g. the time for the preparation and presentation of a rescue plan?

2.7.4 More generally, in what circumstances would pre-/insolvency proceedings:

(a) be terminated; or

(b) be converted into another form of procedure, such as (in the case of a corporate debtor) liquidation?

2.7.5 Where any form of pre-/insolvency proceeding results in the liquidation and dissolution of a debtor (as in the case where the debtor's business is sold on a going concern basis, and the residual entity is wound up), what rules of your jurisdiction apply where additional assets of the debtor are subsequently discovered?

For instance: can an application be made to restore the debtor entity to the register of companies so that the additional assets can be recovered and distributed to creditors?

2.8 Rescue Financing

This section seeks to discover the mechanisms available in your jurisdiction to meet the costs of pre-/insolvency proceedings and any rescues, whether from existing funds available to the debtor entity, new funds brought in by creditors/shareholders or from the proceeds of asset sales and disposals. This section also enquires about the priority afforded to any new financing (which may include an extension of existing financing and/or associated asset security).

2.8.1 What direct costs can be incurred during pre-/insolvency proceedings in your jurisdiction?

For instance: costs of operating the business; fees for any insolvency office-holder or court, or legal/ financial advisor involved in the proceedings, etc.

2.8.2 How are the direct costs identified in 2.8.1 met?

For instance: are direct costs discharged from the debtor's assets (encumbered and unencumbered), and, if so, in what order of priority? How are direct costs discharged where the debtor's assets are insufficient to meet them?

2.8.3 Does the law of your jurisdiction contain special provisions on the extension of finance to a debtor:

(a) within a fixed period of time *prior to* the collapse of the business or commencement of a restructuring, and is there a distinction between financing provided in an out-of-court restructuring and formal insolvency proceeding?

(b) *after* the petition for or the commencement of pre-/insolvency proceedings?

For instance: can a petitioning party be ordered to make a down-payment on the costs of the proceedings (e.g. the insolvency office-holder's salary or compensation)? Which requirements apply to "post-commencement" finance arrangements, e.g. approval by the insolvency office-holder or the court of such arrangements or limitations as to the amount and/or scope of such finance? Does the law allow a priority or special security (e.g. super-priority) to the provider of post-petition or post-commencement finance? Are lenders who offer new finance in support of a rescue plan that has been confirmed by a court exempted from any civil and criminal liability that may be associated with the continuation of the debtor's business or clawback risks in any subsequent insolvency?

2.8.4 Can assets be sold to generate funds to finance the ongoing operations of the business of the debtor during restructuring and what special protections does the law provide to creditors having a security interest in the assets to be sold?

For instance: can encumbered and unencumbered assets be sold to raise funding? Must assets sold be non-core or non-essential to the restructuring of the business? Must the claims of secured creditors be paid first from the proceeds of the sale of assets or can the proceeds of sale be used to first reimburse the costs associated with the sale?

2.8.5 Where the debtor is a corporate entity:

(a) does the company law or insolvency law of your jurisdiction contain specific rules that require shareholders and/or related companies to financially assist (directly or indirectly) a distressed debtor?

(b) are shareholder/related-party/insider loans, new loans or pre-existing loans, subordinated in any subsequent liquidation and distribution of the debtor's assets in pre-/insolvency proceedings?

2.8.6 Where litigation is contemplated in the course of pre-/insolvency proceedings, is third-party funding permissible in your jurisdiction for the purpose of investigating and pursuing claims?

2.9 Effect of the Stay/Moratorium

A stay/moratorium is one of the most effective tools available in insolvency. It serves to prevent the dissipation of the estate while preserving claims awaiting decisions in the future but permitting, in the interim, the estate and the assets it contains to be determined. It provides the debtor with breathing space, during which time the debtor can better focus on trying to determine the best path forward. This permits the viability of the business to be better ascertained at an early stage through forming a true picture of the assets subject to insolvency proceedings.

The stay/moratorium may have a number of effects, including to freeze claims, to prevent enforcement of claims already adjudicated upon or to prevent litigation from proceeding which may be adverse to the interests of the estate. Because a stay/moratorium may be inimical to creditors' interests, its availability may be subject to pre-conditions, such as the opening of formal insolvency proceedings. In out-of-court or pre-insolvency situations, stays/moratoriums may be available by agreement between the parties (referred to as standstill agreements), or by statute on a narrower basis.

2.9.1 Where pre-/insolvency proceedings are used to effect a business rescue, what stay/moratorium, if any, is provided for by the law of your jurisdiction to protect the debtor's assets, and when and how does it arise?

For instance: does the law contain rules for sealing of the insolvent estate or guarding/security of certain assets? Does the stay arise automatically or only by court order? At what point does it arise? Is there any provisional or interim stay that arises on the filing of (as opposed to the formal commencement of) pre-/insolvency proceedings?

2.9.2 What is the impact of any such stay/moratorium on:

(a) secured creditors (including their exercise of out-of-court enforcement rights, if any);

For instance: is the insolvency office-holder entitled to use, consume or dispose of secured assets during the stay/moratorium? If so, is a prejudiced creditor entitled to reimbursement for damages and/or can it demand a substitute security? Can a secured creditor submit an application to the court for leave to enforce its rights as if the stay does not apply to it or to seek adequate or other protection of its interests?

(b) retention of title holders and finance leases;

(c) pending lawsuits and unexecuted judgments; and

(d) in the case of corporate debtors, petitions for other insolvency processes, including the liquidation of such debtors?

2.9.3 Does a stay operate only within your jurisdiction or does it have a worldwide effect? Where a stay is territorial, can it nonetheless extend to or affect conduct occurring outside your jurisdiction?

2.9.4 Are there any exclusions from a stay under the laws of your jurisdiction? If so, what are they?

2.9.5 Is a stay subject to any time limit under the laws of your jurisdiction?

2.9.6 Does the law of your jurisdiction recognise a contractual stay (i.e. standstill agreement) between the parties in an informal restructuring? Does the law provide any form of stay protection for rescue plan negotiations that are conducted outside formal insolvency proceedings?

For instance: is a stay available in a case where the debtor is in the course of negotiations leading to a rescue plan? How does such a stay arise (e.g. by statute automatically or by court order) and what conditions is the stay subject (e.g. demonstration of the potential benefits of the restructuring, demonstration of a certain percentage of creditors interested in further negotiations, application by specific creditors participating in the process or assets that are essential to the restructuring, etc.)? What is the maximum duration of such a stay?

2.9.7 What penalties can be imposed for breaching a statutory or court-ordered stay?

2.9.8 Does a stay under informal or non-court-supervised restructuring proceedings prevent a formal application for insolvency from going forward, and, if so, under what conditions?

For instance: if an application for liquidation has been submitted but the proceedings have not been opened, would commencement of insolvency proceedings be stayed until the restructuring proceedings are either completed or terminated?

2.10 Ordinary and Special Contracts

NB. See also Section 2.14 (page 22) below dealing with employment contracts and collective bargaining agreements.

This section seeks to understand the fate of contracts during pre-/insolvency proceedings. Where the debtor is party to a contract, there may be an interest in suspending performance or execution of that contract pending an assessment of the debtor's position. In some situations, requiring the debtor to continue performing a contract on terms that are significantly above existing market rates may be detrimental to other creditors. In such cases, many domestic laws provide for the possibility of the contract being suspended or terminated. In these cases, domestic laws may also provide for a process by which the party contracting with the debtor can establish a claim in relation to any losses suffered as a result of such suspension or termination. Domestic laws may also regulate different types of contracts in different ways, allowing for suspension/termination in the case of some but not others. Domestic laws may also allow the insolvency office-holder to elect whether the debtor will continue to perform a contract and/or may allow the insolvency office-holder to require performance of the contract by the contracting party.

2.10.1 How are executory contracts affected in general by the commencement of pre-/insolvency proceedings?

For instance: who has the power to terminate or continue such contracts, and subject to what conditions? In the case of termination, what remedies are available to the counterparty or counterparties?

In the case of continuation, do ongoing payments attract any particular treatment (e.g. a priority) in pre-/insolvency proceedings?

2.10.2 Generally, are there any specific rules of your jurisdiction to decide whether a contract will continue to be performed or not? If so, what are the rules and do rules vary for different types of contracts?

2.10.3 Describe any specific rules of your jurisdiction regarding the treatment of hire-purchase and lease contracts (including any lease contracts related to business premises).

2.10.4 Describe any specific rules of your jurisdiction regarding the treatment of utility contracts.

For instance: does the law restrain utility suppliers from demanding "ransom" payments from the debtor in exchange for the continuing supply of utilities?

2.10.5 Describe any specific rules of your jurisdiction regarding the use, sale, lease or assignment of assets or contracts involving intellectual property and its licensing, as well as domain names.

2.10.6 Describe any specific rules of your jurisdiction regarding financial derivative contracts.

For instance: is the insolvency office-holder taking over the administration of the debtor's estate bound by such contracts or does the law allow counterparties to such contracts to exercise rights of set-off and netting (subject to avoidance rules)? Does the law prevent or allow assignment of the benefits of such contracts?

2.10.7 Does the law of your jurisdiction address the validity of contractual clauses that purport to entitle the counterparty to terminate or modify contractual rights in the event of the debtor's insolvency or its entry into pre-/insolvency proceedings (known as *ipso facto* clauses), and, if so, how?

2.10.8 Can contracts to which the debtor is a party be transferred or assigned to a purchaser of the debtor's business and, if so, how and in what circumstances, and what, if any, restrictions are imposed on such assignment?

For instance: are assignments prohibited for contracts involving irreplaceable or personal services of the type that the law would not require acceptance of performance from another party? Does the law of your jurisdiction prohibit an assignee from exercising a right of subrogation in respect of legal proceedings to which the debtor is the plaintiff (e.g. because such subrogation results in the re-commencement of those legal proceedings by the assignee as the new plaintiff outside of the time period by which such proceedings must be brought)?

2.11 Ranking, Priority and Resolution of Creditor Claims

This section contains questions relating to any ranking and priority of creditor claims in the context of a business rescue where the quantification of claims and/or a distribution of assets may need to take place or there may be a difference in the treatment of creditors depending on the priority they may enjoy. Most domestic laws will contain a hierarchy of claims for the purpose of distribution, especially in liquidation procedures. In some instances, the same ranking may be useful for determining entitlements for the purpose of any rescue plan that envisages some returns being made to the creditors as part of plan performance.

2.11.1 Generally, is there any distinction made between debts owed to private entities and public entities under the laws of your jurisdiction?

2.11.2 How do creditors organise in your jurisdiction? For example, do banks (given their shared interests) join together or are otherwise deemed as a separate group? Are there any dynamics between creditor constituencies?

2.11.3 How are pre-commencement creditors[6] ranked for the purpose of distribution of the debtor's assets? (list in order of priority)

2.11.4 How are any costs and expenses incurred for the administration of any procedure available to debtors/creditors dealt with? What is their ranking in comparison to creditor claims?

2.11.5 What is the claims resolution process for admission/exclusion of claims in your jurisdiction? Specifically:

(a) How are creditor claims verified prior to distribution? By affidavit? Does the debtor submit a list of claims, do creditors individually submit their claims, or both?

(b) Who adjudicates these claims: a creditors' committee, the insolvency office-holder and/or the court?

(c) Can the admission/exclusion of claims be challenged? If so, on what grounds and by whom? Who determines the challenge (e.g. the court)? If it is the court that determines the challenge, is the hearing a trial *de novo* or is it an appeal of the decision on admission/exclusion?

(d) Are ADR techniques permissible or mandatory under certain proceedings for resolving disputed claims, such as in an out-of-court or pre-insolvency process? Describe the ADR procedure and how it differs from the regular process in scope, timing and binding effect.

2.11.6 Are there any particular time limits applicable to the submission of claims? If claims are not submitted in time, is there any appeal against exclusion?

2.11.7 Which, if any, creditor claims enjoy preferential status, and to what extent?

---

[6] Pre-commencement creditors are creditors whose claims arise out of obligations entered into before the commencement of insolvency proceedings, even though sums due under those obligations may become payable only at a date after the commencement of such proceedings.

For instance: are special preferences given to certain classes of unsecured claims (e.g. claims by tax authorities, government authorities intervening in banks, pension benefit guarantors, personal injury or disability claims, unpaid employees, creditors who have financially assisted the insolvency office-holder to recover/preserve the estate)?

2.11.8 Which, if any, creditor claims are subordinated, and to what extent? Under what conditions are subordinated creditors admitted for the purpose of voting and payment?

2.11.9 Can creditor claims be traded during pre-/insolvency proceedings, and do claims purchasers enjoy full rights of subrogation to the claims?

For instance: can the purchaser of creditor claims exercise a right of subrogation in pending litigation against the debtor or another third party (i.e. by purchasing the right to sue, aka, purchasing the chose in action)? For the purpose of voting, is the purchaser's voting entitlement equal to the value of the claims as admitted or is it limited to the price for which it was paid?

2.11.10 Does the law of your jurisdiction contain any special provisions on the treatment of debts incurred by a DIP or insolvency office-holder after the commencement of pre-/insolvency proceedings? If so, what does the law prescribe? If not, how are such claims treated?

2.12 Treatment of Foreign Creditors

NB See also Part 5 (page 32) below dealing with international and cross-border insolvency matters.

Given the increasing cross-border nature of business today, how laws deal with foreign creditors (including foreign revenue creditors) is of particular interest. While theoretically, there is no reason to discriminate between similarly-situated domestic and foreign creditors and doing so would indeed be contrary to best practices, the precise wording of domestic legislation and its interpretation may affect how foreign creditors are, in effect, treated in insolvency proceedings in your jurisdiction.

2.12.1 Does the law of your jurisdiction contain any provision that affords domestic tax authorities preference over claims by their foreign counterparts? Are claims by foreign tax authorities treated as general unsecured claims?

2.12.2 Does the law of your jurisdiction prejudice a foreign creditor who claims from the same pool of bankruptcy assets alongside domestic creditors?

2.12.3 How does the law of your jurisdiction treat a foreign creditor who has managed to collect against "foreign" assets of a domestic debtor, such as the debtor's bank accounts seized outside your jurisdiction?

2.13 Creditor Supervision of Proceedings

Domestic laws generally offer creditors a privileged role in insolvency. This may occur through a committee, meeting or other body that is formally constituted under the law and that may have a precise role to play at various stages in the process (including approval of decision-making by the insolvency office-holder, and approval of any rescue plan and/or decision consequent on the adoption of any such plan). The law may also set out a particular threshold for a majority (in terms of the number of creditors or the quantum of debts owed to such creditors) by which the decisions by the creditors need to be taken.

2.13.1 Does the law of your jurisdiction provide for a creditors' meeting and/or committee in pre-/insolvency proceedings? Where the law provides for more than one body to represent the interests of creditors, what is the difference in the general function and/or scope of action of such bodies?

2.13.2 How is a creditors' meeting/committee constituted in your jurisdiction? By what rules? Do members of a creditors' meeting/committee have to be creditors? In other words, is it possible to get expertise from outside into the creditors' meeting/committee? Are lenders who may be related to equity shareholders of a debtor restricted, in any manner, from being part of the creditors' committee?

2.13.3 What voting rules apply in a creditors' meeting? What is the required quorum? Are there any rights of appeal against the outcome of any voting? Can creditors attend a meeting and vote online or by email? Is there a process to protect against the suppression of minority interests during voting at such meetings?

2.13.4 What is the role and powers of a creditors' meeting/committee?

2.13.5 Are members of a creditors' meeting/committee exposed to personal liability by virtue of acting as members and, if so, on what basis?

2.13.6 Are members of a creditors' meeting/committee remunerated and, if so, how and on what basis?

2.13.7 To the extent that the law of your jurisdiction does not provide for a creditors' meeting/committee, is there any alternative form of creditor representation?

2.14 Employment, Stakeholding and Pension Issues

This section seeks to discover whether employment contracts are treated differently from other contracts to which the debtor is a party and where the debtor is deemed to act as an employer. Such contracts can also include collective bargaining agreements.

2.14.1 Are there any special insolvency, contract, company or employment law provisions of your jurisdiction regarding the treatment of employment contracts or collective bargaining agreements where the employer is in distress or in pre-/insolvency proceedings?

For instance: are there specific rules on the termination of these contracts, e.g. requiring prior court approval or some notice period? Under which circumstances can an employee sue the insolvent debtor or (where applicable) an insolvency office-holder for wrongful termination?

2.14.2 What restrictions exist under the laws governing employees of your jurisdiction with respect to the transfer of employees with the business when the business or the equity thereof or its assets are sold? Does the insolvency law of your jurisdiction provide any special or additional tools for restructuring employment contracts or collective bargaining agreements?

For instance: does the law require or specially permit the transfer of employees to a new owner of the business and does the insolvency law contain provisions for the employment obligations of the debtor to be transferred to a third party if it buys the debtor's business on a going concern basis in the context of pre-/insolvency proceedings? Could a third-party purchaser restrict the number of employees transferred or select specific employees to be transferred? Would new contracts have to be entered into or would the terms of the prior employment contracts remain intact (i.e. there would be a novation of the contracts)?

2.14.3 How are claims regarding unpaid salary entitlements (and any associated benefits, e.g. holidays) of employees treated/protected in pre-/insolvency proceedings?

For instance: do unpaid salary entitlements receive any preferential status in the distribution of the proceeds of the sale of the debtor's assets? Does the State provide for any other mechanism by which such accrued sums are paid?

2.14.4 Is there any difference in treatment of employees/employment contracts depending on whether the employee is a director/manager of the affected entity?

2.14.5 Do employees and/or their representatives have any participation rights in pre/insolvency proceedings? If so, what is their role and what rights available to them?

2.14.6 Does insolvency law, company law, employment law or social security law provide special protection for the pension entitlements of employees of distressed or insolvent debtors?

For instance: what rules apply to the recovery of pension entitlements that are accrued by employees of the debtor prior to the commencement of pre-/insolvency proceedings but remain unpaid? Does the debtor or insolvency office-holder have any obligation to continue payments that accrue after the commencement of pre-/insolvency proceedings?

Do employees enjoy protection through recourse to a State fund when their pension entitlements are unpaid? Is a Pension Fund or Payment Guarantee Fund that satisfies the unpaid claims of employees entitled to subrogate to the claims of the employees and enjoy the same priority, or is it subject to a different priority for repayment?

2.14.7 Can pre-commencement pension entitlements[7] be restructured in a business rescue, and, if so, how?

2.14.8 Are there any laws of your jurisdiction that deal with the mobility of employees? For example, if employees lose their jobs, are they able to move to another part of the jurisdiction or are there employee licensing or local permit procedures that prevent such moves?

2.14.9 Are there any other stakeholders, other than employees, for whom special provision is made in pre-/insolvency proceedings? Examples of such other stakeholders include consumers, trade unions, etc.

2.15 Avoidance/Clawback Rules and Safe Harbour Provisions

Avoidance or clawback rules are important tools available to an insolvency office-holder to increase the estate by clawing back assets that may have been disposed of to the detriment of creditors, whether via fraud, at undervalue (for example, as may occur in a forced sale) or where the effect of the payment of funds to a creditor puts that creditor in a better position compared to other similarly-situated creditors having claims against the same debtor. Safe harbour provisions seek to recognise the treatment of avoidance or clawback rules where a rescue is attempted. In some jurisdictions, as a result of a successful adoption of a rescue plan, any and all asset disposals that have already taken place are immunised against further scrutiny and no liability will attach to the debtor, creditors or third parties that have taken part in those asset disposal transactions. In other jurisdictions, any such transactions must be disclosed to creditors before they vote on a proposed rescue plan.

2.15.1 Does the law of your jurisdiction provide for the avoidance of transactions entered into by the debtor prior to the commencement of pre-/insolvency proceedings, and, if so, under what pre-/insolvency procedure and on what basis?

For instance: does the law provide for the avoidance of preference payments to creditors in the lead-up to insolvency, including with respect to any security granted without consideration? Do such provisions focus primarily on the intent/desire or mindset of the debtor? Or do they focus primarily on the preferential effect of the payments to the creditor? Does the law provide for the avoidance of asset transfers at undervalue or in fraud of creditors? Who is empowered to avoid such transactions, and in what circumstances? Is there any

[7] Pre-commencement pension entitlements refer to pension entitlements that are accrued before the commencement of insolvency proceedings.

difference in treatment between transactions involving related and unrelated parties? In the case of related parties, are there any presumptions the law uses (e.g. reversal of burden of proof)? Are there any particular time limits for action/ "long stops" (i.e., ultimate limitation periods)?

2.15.2 What is the effect of a successful avoidance being brought?

For instance: does the outcome of an avoidance action result in restitution of an asset and/or its value? What is the position of innocent third-parties in receipt of such an asset (i.e. bona fide purchases for value without notice)? Are other orders possible as a result of a successful avoidance action: restructuring or discharge, whether total or partial, of contract liabilities/asset security/guarantees?

2.15.3 How is litigation to pursue an avoidance action financed?

For instance: are State funds or funds from the debtor's estate available to finance particular actions of the insolvency office-holder (e.g. to combat wrongful trading and fraudulent transactions)? Can an insolvency office-holder, on behalf of the insolvent company, obtain private funding to pursue such actions?

Can creditors provide funding in return for preferential treatment in the ultimate distribution of the estate? If so, what types of funders are present in the market that may be willing to finance such actions (e.g. is third-party litigation funding permitted and available)?

2.15.4 Who has standing to make an application for avoidance of transactions? Can creditors also apply directly to the court to set aside a transaction entered into by the debtor? If several parties possess these rights, who has precedence to bring an avoidance action?

2.15.5 Are any avoidance powers available in pre-insolvency proceedings or out-of-court workout procedures?

For instance: are there avoidance powers that enable some transactions (for example, fraudulent conveyances) to be set aside regardless of whether or not the debtor is in formal insolvency proceedings?

2.15.6 Does the law of your jurisdiction provide any special protection from avoidance of agreements reached in an out-of-court workout or pre-insolvency proceeding?

For instance: is new financing, asset sales or a restructuring agreement protected against challenges under the avoidance and clawback provisions of the insolvency law? Are directors/managers, or creditors protected against liability to other creditors, parties, stakeholders or government entities based on their decisions or support for a restructuring?

2.16 Rescue Plans and Sales as a Going Concern

The adoption of a rescue plan is generally the objective of rescue, rehabilitation or reorganisation proceedings. A rescue plan may envisage a restructuring of debts and/or associated asset security/guarantees (i.e. financial restructuring) and/or a review of the business of the debtor (with sale/acquisition of business and/or key assets, entry to/exit from markets, a restructuring of employment and other outgoings, etc.) (i.e. operational restructuring) or a combination of both. Rescue plans are generally adopted with the consent of creditors and may involve substantial concessions from them to ensure success of the plans. As such, creditors may have rights of intervention and/or rights to challenge a rescue plan, its contents and the way it is implemented.

2.16.1 Is there a range of options and methodologies available under the law for rescue plans in your jurisdiction?

For instance: can rescue plans foresee continuation of the business, sale of all or part of the assets, modification of repayment terms of claims, modification or issuance of replacement debts, cancellation of indebtedness, cancellation or amendment of contracts and leases, execution or modification of security interests, conversion of debt-to-equity, compromise of claims, issuance of new securities, obtaining of investment and new capital, mergers, consolidations or other changes to the corporate structure, changes to management and governance, changes to equity holder claims or rights, or a combination of the foregoing? What is the usual course — e.g. voting on a rescue plan or a sale of the debtor's assets?

2.16.2 Are rescue plans possible in pre-/insolvency proceedings in your jurisdiction?

2.16.3 Does the law of your jurisdiction prescribe any limitation or eligibility requirements on who can submit a rescue plan? If so, what steps can be taken by a person to cure its ineligibility?

2.16.4 Who prepares/negotiates rescue plans and who needs to authorise them?

2.16.5 Are there any deadlines or time limits specified for the conclusion of a rescue plan? If so, please give an overall timeline and indicate appropriate points in time with regard to the various stages of the negotiation, conclusion and approval of such a plan.

2.16.6 Does the law of your jurisdiction specify any requirements or restrictions on the operation of a rescue plan?

For instance: if assets are realised by the insolvency office-holder, do they need to be sold by public auction or can they be realised via a private sale? Does a private sale need to be authorised by the court and/or a creditors' committee? How are creditors protected (e.g. independent valuation of the business, information disclosure, authorisation, etc.)?

2.16.7 Is it possible for a "pre-packaged" sale[8] to be achieved in your jurisdiction?

For instance: with respect to a "pre-packaged" sale (whether the sale takes place before or after a court order), are there substantive and procedural provisions in the law that would govern, for example, notice and opportunity for the submission of counterbids? What are the requirements that must be met to justify the sale (description of the pre-filing marketing efforts, appraisal/valuation of the assets, expert testimony, etc.)? Since all businesses require access to operating cash, in regimes where super priority lending/DIP financing does not exist, are there situations where debtors may raise cash/facilities by utilising non-essential assets (e.g. inventory, equipment, raw materials, etc.) in pre-/insolvency proceedings and, if so, what are the requirements?

2.16.8 Are there any other forms of "pre-packaged" rescue plans available in your jurisdiction?

2.16.9 Where a rescue plan is being negotiated, can a debtor seek court authority to sell all or substantially all the assets outside of a plan (with the proceeds then being distributed under a plan/scheme)? Alternatively, can a debtor seek authority for the sale of some assets (e.g. non-essential assets) outside of a plan?

2.16.10 Is authority necessary for all sales, whether within or outside a rescue plan, i.e. including sales in the ordinary course of business?

2.16.11 What formal tools are available under the laws of your jurisdiction for the negotiation and sanction of a rescue plan that is capable of binding dissenting stakeholders?

For instance: class/voting requirements, cram-down[9] provisions, or other forms of court sanction.

2.16.12 Are the formal tools identified under 2.16.11 available in all pre-/insolvency proceedings?

2.16.13 Are the formal tools identified under 2.16.11 available outside pre-/insolvency proceedings?

---

[8] A "pre-packaged" sale is a sale in which the contract for sale is negotiated confidentially prior to the commencement of formal insolvency proceedings, without consultation with all creditors, which takes effect immediately on the commencement of such proceedings.

[9] Under the UNCITRAL Legislative Guide (2004), Part II(IV), points 28, 29 and 54, and The World Bank, Principles for effective Insolvency and Creditor-Debtor Regimes (2016), Principle C14.5, cram-down refers to the mechanism by which a restructuring plan, that has been adopted by the requisite majority, is made binding on dissenting creditors (including secured, unsecured and priority creditors).

2.16.14 Which classes of creditor claim can be affected by a rescue plan?

For instance: can secured or preferential creditors be bound by a rescue plan? Can prospective or contingent creditors (such as potential tort creditors) be bound by a rescue plan? Can debts owed to the State (e.g. tax, social security, etc.) be part of a rescue plan?

2.16.15 Does the law of your jurisdiction prescribe the number and types of classes of creditors?

For instance: does the number of classes of creditors depend on the individual case or are the classes fixed by law (e.g. secured and unsecured; financial and trade; public and private entities, etc.)?

2.16.16 Where secured or preferential creditors can be affected by a rescue plan, does the law of your jurisdiction afford them any special protection in the negotiation and/or sanction of the plan?

2.16.17 Are all creditors potentially affected by a proposed rescue plan entitled to receive notice of it, and to participate in negotiations over its content?

2.16.18 Can creditors propose a rescue plan, and, if so, may they do so in competition with a plan proposed by the debtor? If so, does the debtor have an exclusive period in which to submit a plan, which must first expire before creditors may submit their plan?

2.16.19 Can shareholders' rights be affected by a rescue plan, and, if so, in what circumstances? What disclosure requirements are necessary for listed companies?

2.16.20 Are third-party releases permissible in a rescue plan?

2.16.21 Are there any statutory limitations as to the content and/or scope of a rescue plan?

For instance: are there any restrictions on reducing the principal amount of debts owed to creditors in the plan or modifying any secured interest? Are there differences in the treatment of debts owed to private and public creditors as part of any plan?

2.16.22 What rights do stakeholders have to notice of a proposed rescue plan, and to participate in negotiations over its content?

2.16.23 Who is entitled to vote on a rescue plan, and who determines this?

For Instance: does the law prevent votes by "disputed claims" (e.g. claims based on pending litigation), insider creditors, affiliated or connected parties, or beneficial or ultimate beneficial owners? In the case of a disputed claim, is there any process to allow the claim in some amount for voting purposes?

2.16.24 How are disputes over voting entitlements with regard to a rescue plan resolved?

2.16.25 What modes of rescue plan voting are permissible?

For instance: are creditors allowed to vote on a rescue plan using electronic means of communication? Are they permitted proxies?

2.16.26 What quorum rules apply to a meeting to vote on a rescue plan?

2.16.27 By what majority (in value or number or both) does a rescue plan have to be approved?

For instance: are stakeholders divided into classes, and is each class required to approve the plan by a particular majority?

2.16.28 Where the debtor is a corporate entity, do shareholders have to approve the rescue plan?

2.16.29 If the requisite majority of stakeholders or classes of stakeholders approve a rescue plan, is there any further requirement for confirmation of the plan and, if so, what are the conditions for obtaining this confirmation?

For instance: are there requirements for court confirmation, and, if so, what factors will influence the court to confirm the plan? (e.g. (i) that procedural requirements for the notification of affected creditors and for the adoption of the plan are fulfilled; (ii) that the plan does not reduce the rights of dissenting and unknown creditors below what they would reasonably receive if the company goes into liquidation; (iii) that the plan does not change the order of priority which would be afforded to creditors in the event of liquidation; and/or (iv) that the plan does not alter the security of any creditor without their express consent.)

2.16.30 Does a rescue plan come under independent scrutiny?

For instance: is there a prerequisite that before a plan is approved, an independent review needs to be conducted to check its commercial viability and that it represents a better return to creditors than if the company goes into liquidation?

2.16.31 Does the court examine the overall fairness of a rescue plan, including the constitution of classes of creditors for voting purposes?

2.16.32 Can a confirmation order by the court be appealed and, if so, by whom?

2.16.33 Does an appeal described in 2.16.32 have suspensory effect (i.e. delaying the implementation of a confirmed rescue plan)?

2.16.34 Once confirmed, who does a rescue plan bind and does it bind creditors that either have not received notice or those that have received notice but elected not to appear at the general assembly or to vote on the plan? Does a court have the power to amend the terms of the rescue plan subsequent to its adoption and for what reasons?

2.16.35 Where a rescue plan is partially approved, does the law of your jurisdiction permit the application of the plan to approving and/or non-approving creditors? Does a court have the power to amend the terms of the plan prior to making it applicable and for what reason?

2.16.36 Where a rescue plan is rejected, does the law of your jurisdiction foresee any circumstances under which it is possible for the plan to have an impact on the debtor/creditors (e.g. by a cram-down being applied to some or all of the creditors in relation to some or all of the debts owed to them)? If a cram-down is available, what are the requirements for its availability/use? Alternatively, does the rejection of a rescue plan automatically lead to liquidation of the affected entity?

2.16.37 In the case of a successful rescue plan involving a sale of the business and/or its main assets, what happens to the debtor entity? Would the entity be reregistered under new ownership or, if listed, would the old entity be delisted and the new entity relisted?

2.16.38 What are the typical lengths of rescue plans in your jurisdiction?

3 Group Insolvencies

This part deals with the insolvency of a group, defined to mean any enterprise group consisting of two or more entities related by common ownership, control or concerted business strategy. The intention here is to collect information on whether domestic law contains special provisions in the case of insolvent entities that are part of a group and whether such provisions have an impact on the ability of other members of the group to continue to function.

3.1.1 Is there a legal definition of what would constitute a group of companies under the insolvency law of your jurisdiction?

3.1.2 Does the insolvency law of your jurisdiction contain special provisions on insolvent groups of companies in a domestic context? If not, how are such cases handled?

For instance: does the law contain special provisions for cooperation between insolvency office-holders or courts at the domestic level in insolvent group cases?

3.1.3 Does the insolvency law of your jurisdiction allow for procedural consolidation of domestic insolvency proceedings concerning companies in a corporate group? If so, how and subject to what limitations?

For instance: does the insolvency law allow for any kind of joint administration (i.e. the consistent and joint procedural treatment of insolvency proceedings), for example through a single court rather than through different courts within the jurisdiction? Does the insolvency law allow for the appointment of a single and same insolvency representative for all group members concerned? In the case of a single appointment, can the insolvency office-holder consolidate his or her remuneration over the joint insolvent estates?

3.1.4 Does the insolvency law allow for substantive consolidation of domestic insolvency proceedings across a corporate group into a single procedure and, if so, how and subject to what limitations?

For instance: if consolidation takes place to the detriment of individual creditors, are such creditors entitled to compensation out of the consolidated estates?

3.1.5 Where procedural/substantive consolidation occurs, does the law of your jurisdiction authorise cases to be heard by a single court and, if so, how is this court selected?

3.1.6 In the case of a successful rescue plan involving a sale of the group business and/or its main assets, what happens to the group and/or its constituent entities?

3.1.7 Where inter-company claims exist, does the law of your jurisdiction provide for treatment of such claims on the same basis as ordinary creditors or subordinate or disallow the payment of such claims? Are affiliated corporate group creditors allowed to vote on a rescue plan, or are such claims disallowed for voting purposes but otherwise entitled to a distribution on the same terms as the voting class?

4 MSMEs

This part deals with the insolvency of MSMEs which tend to form a substantial majority of trading entities in all jurisdictions, especially those jurisdictions that are developing and emerging. Because of their size, these entities tend to have different needs in the event of insolvency. Often these needs are not considered and/or met through normal insolvency frameworks, leading to particular difficulties in attempts to restructure them.

4.1.1 Does the law of your jurisdiction contain any special provisions on resolving distress in MSMEs? If so, what, if any, is the stated purpose of such provisions?

For instance: does the law provide for a simple rescue plan or simplified insolvency proceedings for use by MSMEs?

4.1.2 In practice, what are the usual outcomes or objectives of the law of your jurisdiction in an MSME insolvency? (e.g. winding up or selling assets on a piecemeal basis, reorganisation, going concern sale, etc.)

4.1.3 In cases where the MSME debtor has no realisable asset, are any of the insolvency proceedings identified in 4.1.1 available?

4.1.4 Is a discharge available for the MSME entrepreneur in your jurisdiction?

4.1.5 In cases involving MSME entrepreneurs, are there special protections for their personal assets, such as their homes, basic living essentials and other assets?[10]

4.1.6 Are such MSME laws included in the corporate insolvency law or are they part of the personal bankruptcy law in your jurisdiction?

5 International and Cross-Border Insolvency Law

This part seeks to discover the cross-border and international framework in use in your jurisdiction.

5.1.1 Does the law of your jurisdiction have an extra-territorial effect and what is the scope of the effect? What is the procedure, if any, to recognise judgments and/or proceedings that have been opened in other jurisdictions?

For instance: does the law confine its jurisdiction to assets and creditors located within the territory of the local jurisdiction (i.e. approach of territoriality), or does it extend to assets, claims and stakeholders located outside the jurisdiction (i.e. approach of universality)? Where a stay or moratorium protects assets of the debtor's estate, would that be interpreted to apply to estate assets located in foreign jurisdictions? In contrast, where there are foreign proceedings involving foreign debtors with local assets or business interests, would the law recognise foreign judgments and decisions?

5.1.2 Does the law of your jurisdiction pursue the approach of universality or territoriality with regard to outbound transactions? In other words, may insolvency office-holders seek to recover assets from outside your jurisdiction? Is your law explicit in this regard or is a court order necessary? Are the avoidance powers extra-territorial?

5.1.3 To your knowledge, have there been instances where the appointments, judgments and/or proceedings made, rendered and/or opened in your jurisdiction have been recognised by other jurisdictions? In such cases, did such recognition occur through a treaty or other convention or bilateral agreement?

5.1.4 Has your jurisdiction adopted the *UNCITRAL Model Law on Cross-border Insolvency (1997)*? If so, give a brief description of any domestic differences from the text of the Model Law. If not, are there any plans to consider it for adoption in the future?

---

[10] These issues would normally be addressed in a consumer bankruptcy proceeding, but do not arise in corporate proceedings. The MSME entrepreneur is a hybrid corporate and consumer entity.

5.1.5 Is your jurisdiction considering the adoption of the *UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments 2018*? If not, are there any plans to consider it for adoption in the future?

5.1.6 Has your jurisdiction entered into any cross-border cooperation treaties or memoranda of understanding? If so, with which jurisdictions?

5.1.7 Do judges in your jurisdiction participate in any guidelines for cooperation between courts, such as the JIN ("Judicial Insolvency Network") Guidelines?

5.1.8 Can you provide any examples from your jurisdiction where protocols[11] were used?

5.1.9 Does insolvency law of your jurisdiction contain special provisions on insolvent groups of companies in a cross-border context? If not, how are such cases handled?

5.1.10 In order to facilitate cross-border insolvency of multinational enterprise groups (including to strengthen cross-border cooperation and coordination as well as facilitate cross-border recognition and relief for insolvency proceedings of enterprise group members), UNCITRAL is currently preparing another model law on the insolvency of enterprise groups, which will likely be adopted in 2019. Is your jurisdiction considering improvement of your insolvency regime to facilitate cross-border insolvency of enterprise groups, including the adoption of the above new model law?

6 Statistics

6.1.1 Are there sources for statistics of insolvency and reorganisation cases indicating the number of cases each year in your jurisdiction?

6.1.2 Do the statistics identified in 6.1.1 indicate the length of time taken for these cases in your jurisdiction? If available, please provide statistics of out-of-court workouts and pre-insolvency proceedings. In addition, if available, please also provide statistics for cases of pre-packaged, pre-negotiated and/or pre-arranged rescue plans per year in your jurisdiction.

6.1.3 Please describe the additional statistics that your jurisdiction collects. Are these statistics released to the general public on a regular basis or are they only available upon request?

7 Useful Sources/Reading

Please indicate any useful sources that could be consulted for further information about the insolvency regime in your jurisdiction (particularly any sources available in the English language).

[11] A protocol is usually an accord between practitioners and sanctioned by the court that deals with the conduct of joint elements of an insolvency case, such as the one used in the bankruptcy of Lehman Brothers.

8 Any Other Matters

8.1.1 Please list any other issues not covered above that may be relevant to the information set out in the answers given above, including, for example, special rules or procedures pertaining to the use of ADR techniques. Briefly describe the scope of use and application of ADR techniques and procedures.

8.1.2 In your opinion, is there any perception of the stigma of insolvency in the wider business world and/or the general public of your jurisdiction that impedes the efforts to restructure debtors within or outside formal insolvency proceedings?

Asian Principles of Business Restructuring
A joint project by the International Insolvency Institute and the Asian Business Law Institute

Jurisdictional Reporters

Mr Scott ATKINS, Norton Rose Fulbright, Sydney, Australia

Mr Shin-ichiro ABE, Kasumigaseki International Law Office, Tokyo, Japan

Mr Andrew CHIEW Ean Voon, Lee Hishamuddin Allen & Gledhill, Kuala Lumpur, Malaysia

Mr Jay COHEN, Tilleke & Gibbons, Phnom Penh, Cambodia

Mr Sinnosuke FUKUOKA, Nishimura & Asahi, Tokyo Japan

Mr Pulkit GUPTA, EY, New Delhi, India

Ms Indri Pramitaswari "Mita" GURITNO, Hadiputranto, Hadinoto & Partners, Jakarta, Indonesia

The Honourable Justice Dr Kanok JULLAMON, Bankruptcy Division, Supreme Court of Thailand, Bangkok, Thailand

Mr Andi Y KADIR, Hadiputranto, Hadinoto & Partners, Jakarta, Indonesia

Mr Yosuke KANEGAE, Nagashima Ohno & Tsunematsu, Tokyo, Japan

Mr Zentaro NIHEI, Anderson Mori & Tomotsune, Tokyo, Japan

Ms Maria O'BRIEN, Baker McKenzie, Sydney, Australia

Mr Nava PALANIANDY, Ahmad Isa & Partners, Brunei Darussalam

Mr Antonio Jose Gerardo T. PAZ, Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW), Manila, the Philippines

Mr PENG Fei, Legal Daily, Beijing, China

Mr Ketsana PHOMMACHANE, Department of International Cooperation, Ministry of Justice, Vientiane, Lao PDR

Mr Tom PUGH, Mayer Brown, Hong Kong

Mr Chiyong RIM, Kim & Chang, Seoul, South Korea

Mr Tim SACKAR, Clayton Utz, Sydney, Australia

Mr Manoj Pillay SANDRASEGARA, Wong Partnership, Singapore

Mr Timur SUKIRNO, Hadiputranto, Hadinoto & Partners, Jakarta, Indonesia

Ms SHEN Yuhan, King & Wood Mallesons, Shanghai China

Mr SIM Kwan Kiat, Rajah & Tann, Singapore

Dr Vu Thanh VAN, Avenir Legal, Ho Chi Minh City, Vietnam

Mr Agung WIJAYA, Hadiputranto, Hadinoto & Partners, Jakarta, Indonesia

Steering Committee

The Honourable Chief Justice James ALLSOP

Mr Sumant BATRA

Professor Charles BOOTH

President Luciano PANZANI

The Honourable James PECK

The Honourable Justice Kannan RAMESH

Professor WANG Weiguo