Strengthening Insolvency Systems in Asia and the Pacific

Date: 15-16 December 2022

Time: 09:00-17:00 (GMT +8).

Venue: Auditorium Halls 1 & 2, Asian Development Bank Headquarters, 6 ADB Avenue, Mandaluyong City, Metro Manila, The Philippines.

Organizers: Asian Development Bank, Singapore Management University, Singapore Global Restructuring Initiative, University of Chicago Law School's Center on Law and Finance, University of Cambridge's Centre for Corporate and Commercial Law, INSOL International.

Format: Hybrid event.

Audience: The event will be open to regulators, judges, government officials and central banks from all over the world. An invitation-only policy will apply to the rest of participants.

Background and objective: A well-functioning insolvency system is essential for the competitiveness and growth of an economy. Yet, many countries in Asia and the Pacific still have inefficient insolvency frameworks. The lack of an attractive legal, market and institutional environment to deal with financial distress may hamper entrepreneurship, access to finance and economic growth. Additionally, a weak insolvency framework may increase the level of non-performing loans in the banking sector. If so, it can end up jeopardizing the stability of the financial system and even lead to sovereign debt issues. To address those problems while facilitating economic recovery in the post-pandemic world, this event will seek to analyze how countries in Asia and the Pacific can strengthen their insolvency and restructuring frameworks. To this end, the event will discuss modern trends and developments in corporate restructuring and insolvency and how an insolvency system should be designed or improved taking into account the legal, market and institutional features existing in a particular jurisdiction.

Topics to be discussed in the event will include: (i) strategies to effectively promote workouts; (ii) design of hybrid procedures and formal insolvency proceedings; (iii) adoption of simplified insolvency frameworks for micro and small enterprises; (iv) implementation of rescue financing provisions; (v) directors' duties and liability in the zone of insolvency; (vi) governance models of insolvency and restructuring proceedings; (vii) regulatory framework of insolvency practitioners; (viii) treatment of contracts in insolvency and restructuring proceedings; (ix) valuation of assets and ranking of claims in insolvency proceedings; (x) treatment of corporate groups in insolvency; (xi) personal insolvency; and (xii) cross-border insolvency. Additionally, all the panels will be encouraged to discuss market and institutional challenges and reforms that can make an insolvency regime more effective. While the event will provide lessons for the improvement of insolvency regimes in Asia Pacific, it will pay special attention to emerging economies in Asia and the Pacific currently considering the possibility of strengthening their insolvency frameworks. A list of background materials for the event is included as Annex 1.

Program

Day 1 (15 December 2022)

08.30 – 09:00 Registration and coffee

09:00 – 09:10 Welcome by organizers

- Mr. Nicholas Moller, Principal Counsel, Asian Development Bank
- Prof. Anthony J. Casey, Deputy Dean, Donald M. Ephraim Professor of Law and Economics, Faculty Director, The Center on Law and Finance, University of Chicago Law School
- Dr. Felix Steffek, Associate Professor and Co-Director of the Centre for Corporate and Commercial Law, University of Cambridge
- Dr. Aurelio Gurrea-Martinez, Assistant Professor of Law and Head of the Singapore Global Restructuring Initiative, Singapore Management University
- Mr. Scott Atkins, President, INSOL International; Global Co-Head of Financial Restructuring and Insolvency Practice, Norton Rose Fulbright (Virtually)

09:10 – 09.15 Opening address

- Mr Thomas Clark, General Counsel, Asian Development Bank

09:15 – 10:05

Panael 1: Strategies to Effectively Promote Workouts

Chair: Nicholas Moller (Asian Development Bank)

Panelists:

- Scott Atkins (Norton Rose Fulbright & INSOL International) (Virtually)
- Adam Badawi (Berkeley Law)
- Antonia Menezes (World Bank) (Virtually)
- Stephanie Yeo (WongPartnership)

10:05 – 11:00

Panel 2: Hybrid Procedures and Formal Insolvency Proceedings

Chair: Aurelio Gurrea-Martinez (Singapore Management University)

Panelists:

- Scott Atkins (Norton Rose Fulbright and INSOL International) (Virtually)
- Anthony Casey (University of Chicago)
- Edmund Ma (Baker & McKenzie, Hong Kong) (Virtually)
- Yu-Wen Tan (Ministry of Law, Singapore)
- Mahesh Uttamchandani (World Bank) (Virtually)

11:00 – 11:15 Coffee break

11:15 – 12:15

Panel 3: Governance of Insolvency and Restructuring Procedures: Debtor in Possession, Insolvency Practitioner or Hybrid model?

Chair: Adriana Robertson (University of Chicago)

Panelists:

- Jared Ellias (Harvard Law School)
- Kotaro Fuji (Nishimura & Asahi)
- Aurelio Gurrea-Martinez (Singapore Management University)
- Wan Wai Yee (City University of Hong Kong) (Virtually)
- Paul Zumbro (Cravath, Swaine & Moore)

12:15 – 12:55

Panel 4: Regulatory Framework of Insolvency Practitioners

Chair: Scott Atkins (Norton Rose Fulbright and INSOL International) (Virtually)

Panelists:

- Ravi Mital (Insolvency and Bankruptcy Board of India) (Virtually)
- Catherine Robinson (University of Technology Sydney) (Virtually)

12:55 – 14:00 Lunch

14:00 – 15:30

Panel 5: Valuation of Assets and Treatment of Claims and Contracts in Insolvency Proceedings

Chair: Anthony Casey (University of Chicago)

Panelists:

- David Chew (DHC Capital) (Virtually)
- Debanshu Mukherjee (Vidhi Centre for Legal Policy)
- Elizabeth McColm (Paul Weiss) (Virtually)
- Deepak Rao (Insolvency and Bankruptcy Board of India)
- Wataru Tanaka (Tokyo University) (Virtually)

15:30 – 15:50 Coffee break

15:50 – 16:50

Panel 6: Directors' Duties and Liability in the Zone of Insolvency

Chair: Felix Steffek (University of Cambridge)

Panelists:

- Jared Ellias (Harvard Law School)
- Aurelio Gurrea-Martinez (Singapore Management University)
- Jason Harris (Sydney Law School)
- Neeti Shikha (University of Bradford School of Law) (Virtually)
- Paul Zumbro (Cravath, Swaine & Moore)

16:50 – 17:40

Panel 7: Avoidance Actions

Chair: Jared Ellias (Harvard Law School)

Panelists:

- Sumant Batra (Insolvency Law Academy)
- Charles Booth (University of Hawaii)
- Brook E. Gotberg (Brigham Young University)
- Josh Macey (University of Chicago)

18:00 – 19:00 Reception

19:00 Dinner

Day 2 (16 December)

08:00 – 8:30 Coffee

08:30 – 09:20

Panel 8: Insolvency Frameworks for Individuals and Micro and Small Enterprises

Chair: Nicholas Moller (Asian Development Bank)

Panelists:

- John Martin (Norton Rose Fulbright and International Insolvency Institute)
- Charles Booth (University of Hawaii)
- Jason Harris (Sydney Law School)
- Andres Martinez (World Bank) (Virtually)

09:20 – 10:20

Panel 9: Rescue Financing and Administrative Expenses

Chair: Richard Squire (Fordham Law School)

Panelists:

- Jared Ellias (Harvard Law School)
- Aurelio Gurrea-Martinez (Singapore Management University)
- Justice Christopher Sontchi (Singapore International Commercial Court)
- Paul Zumbro (Cravath, Swaine & Moore)

10:20 – 10:35 Coffee break

10:35 – 11:25

Panel 10: Corporate Groups

Chair: Felix Steffek (University of Cambridge)

Panelists:

- Edith Hotchkiss (Boston College) (Virtually)
- Raelene Pereira (Rajah & Tann)
- Richard Squire (Fordham Law School)
- Urmika Tripathi (REDD Intelligence)

11:25 – 12:30

Panel 11: Cross-Border Insolvency

Chair: Justice Christopher Sontchi (Singapore International Commercial Court)

Panelists:

- Josh Macey (University of Chicago)
- Dan T Moss (Jones Day) (Virtually)
- Felix Steffek (University of Cambridge)
- Deeptanshu Singh (Insolvency and Bankruptcy Board of India)

Annex 1: Background materials

Panel 1. Strategies to Effectively Promote Workouts

An out-of-court restructuring ("workout") provides several advantages, including flexibility, confidentiality, and saving the costs and stigma associated with insolvency proceedings. Therefore, promoting the use of workouts is generally considered a desirable practice, especially in countries without efficient insolvency frameworks. However, for a variety of reasons, including opportunistic behavior of debtors and creditors, regulatory barriers, and lack of a rescue culture, completing a workout is often challenging even for viable companies only facing financial trouble. For that reason, regulators or private actors may be required to adopt certain practices to effectively promote workouts. To that end, jurisdictions around the world have adopted several approaches, including: (i) the publication of good practices for workouts by association of banks or insolvency practitioners; (ii) the enactment of good practices and promotion of inter-creditor agreements facilitated by central banks; (iii) regulation of workouts in the insolvency legislation, even providing workouts with various tools existing in formal reorganization procedures. Likewise, as a means to further incentivise workouts, countries may adopt various changes in the regulatory framework for businesses, including changes in the tax legislation, amendments to the rules governing directors' duties and liability in the zone of insolvency, and changes in the regulatory framework for financial institutions. This panel will discuss the most effective strategies to promote workouts, as well as the country-specific and firm-specific factors that may affect the design and effectiveness of these strategies.

Relevant readings:

- World Bank (2022), *A Toolkit for Corporate Workouts*. Washington, D.C.
- INSOL (2017), *Global Principles for Multi-Creditor Workouts*, London, UK.
- Financial Stability Board (2022), *Thematic Review on Out-of-Court Corporate Debt Workouts*. Basel, Switzerland.
- Jose M. Garrido (2012), *Out-of-Court Debt Restructuring*. World Bank Group, Washington, D.C.
- Scott Atkins and Kai Luck (2020), *The Value of Informal Workouts and the Framework to Guide their Development in the Asia-Pacific*. Singapore Global Restructuring Initiative Blog. Singapore.

Panel 2. Hybrid Procedures and Formal Insolvency Proceedings

Countries around the world design insolvency proceedings very differently. For example, while certain jurisdictions have a single-entry insolvency process that may end up with a reorganization plan, a going concern sale or a piecemeal liquidation, other jurisdictions provide various insolvency proceedings – at least one of them primarily focused on reorganization and at least another one primarily focused on liquidation. Additionally, many jurisdictions provide hybrid procedures, such as a scheme of arrangement, preventive restructuring frameworks and pre-packs, that facilitate a debt restructuring – generally when a company is not formally insolvent yet. This panel will discuss the most desirable way to design an insolvency and restructuring framework, with particular emphasis on the type of procedures that should be ideally adopted taking into account the market and institutional environment existing in a country.

Relevant readings:

- World Bank (2021), *Principles for Effective Insolvency and Creditor/Debtor Regimes*. Washington, D.C.
- World Bank (2022), *A Toolkit for Corporate Workouts*. Washington, D.C.
- Jose M. Garrido (2012), *Out-of-Court Debt Restructuring*. World Bank Group. Washington, D.C.
- UNCITRAL (2004), Legislative Guide on Insolvency Law. New York.

Panel 3. Governance of Insolvency and Restructuring Proceedings: DIP, IPs or Hybrid Model?

The governance of insolvency and restructuring proceedings significantly differs across jurisdictions. Broadly understood, there are three primary models for the governance of insolvency and restructuring procedures: (i) the adoption of a debtor in possession model where the company's management would continue to run the firm without the appointment of an insolvency practitioner ("DIP model"); (ii) the appointment of a trustee/administrator/insolvency practitioner replacing the debtor's management team ("IP model"); and (ii) the appointment of a monitor overseeing the procedure and the debtor's management team ("hybrid model"). This panel will discuss the legal, market and institutional factors affecting the choice of the governance model of insolvency and restructuring proceedings.

Relevant readings:

- UNCITRAL (2004), *Legislative Guide on Insolvency Law*. New York.
- Kenneth Ayotte, Edith S. Hotchkiss and Karin S. Thorburn (2014), *Governance in Financial Distress and Bankruptcy*, in Mike Wright, Donald Siegel, Kevin Keasey and Igor Filatotchev (eds.), The Oxford Handbook of Corporate Governance, Oxford University Press, United Kingdom.
- Aurelio Gurrea-Martinez (2020), Insolvency Law in Emerging Markets, Ibero-American Institute for Law and Finance, Working Paper 3/2020.
- World Bank (2021), *Principles for Effective Insolvency and Creditor/Debtor Regimes*. Washington, D.C.
- Jared A. Ellias, Ehud Kamar and Kobi Kastiel (2022), *The Rise of Bankruptcy Directors*, 95 (5) Southern California Law Review.

Panel 4. Regulatory Framework of Insolvency Practitioners

This panel will discuss the optimal way to design a regulatory framework for insolvency practitioners. To that end, it will discuss the qualifications of insolvency practitioners and whether countries should adopt a licensing regime for insolvency practitioners and, if so, how. Moreover, it will discuss whether countries should adopt a regulatory agency to oversee insolvency practitioners. Finally, the panel will discuss the duties, liability and remuneration of insolvency practitioners.

Relevant readings:

- UNCITRAL (2004), *Legislative Guide on Insolvency Law*. New York.
- International Association of Insolvency Regulators (2018), *The Regulatory Regime for Insolvency Practitioners*. United Kingdom.
- World Bank (2021), *Principles for Effective Insolvency and Creditor/Debtor Regimes*. Washington, D.C.

Panel 5. Valuation of Assets and Treatment Claims and Contracts in Insolvency Proceedings

An insolvency proceeding should maximize the returns to creditors by promoting the most efficient allocation of the debtor's assets. Therefore, valuation will play an essential role when determining the fate of a financially distressed firm. Additionally, creditors should be paid according to a set of contractual and statutory priorities. To that end, while some jurisdictions only respect (if so) the preferential treatment of secured creditors and most unsecured creditors are paid *pari passu*, other jurisdictions provide a preferential treatment to certain creditors such as tax authorities, employees, and tort claimants, and some legislations subordinate certain claims such as shareholder loans. This panel will discuss the most desirable way to determine the valuation and treatment of assets and claims in insolvency proceedings. It will also discuss the treatment of contracts in insolvency and restructuring proceedings, with particular emphasis on the contracts in which none of the parties have materially performed their contractual obligations ("executory contracts") and contractual provisions allowing a party to terminate the contract if the counterparty becomes insolvent ("*ipso facto* clauses").

Relevant readings:

- UNCITRAL (2004), *Legislative Guide on Insolvency Law*. New York.
- Lucian A. Bebchuk and Jesse M. Fried (1997), *The Uneasy Case for the Priority of Secured Claims in Bankruptcy: Further Thoughts and a Reply to Critics*, 82 Cornell Law Review 1279.
- Martin Gelter (2006), *The subordination of shareholder loans in bankruptcy*, 26 International Review of Law and Economics 478.
- Christopher F. Symes (2005), *Reminiscing The Taxation Priorities In Insolvency*, 1 (2) Journal of the Australasian Tax Teachers Association 435.
- Christopher S. Sontchi (2012), *Valuation Methodologies: A Judge's Views*, 20 ABI Law Review 1.
- Michael Crystal and Rizwaan Jameel Mokal (2006). *The Valuation of Distressed Companies - a Conceptual Framework*.
- Kenneth Ayotte and Edward R. Morrison (2018), *Valuation Disputes in Corporate Bankruptcy*, 166 University of Pennsylvania Law Review 1819.
- Gerard McCormack, Andrew Keay, Sarah Brown and Judith Dahlgreen (2016), *Study on a new approach to business failure and insolvency: Comparative legal analysis of the Member States' relevant provisions and practices*, pp. 137-183.
- Susana Dávalos (2017), *The Rejection of Executory Contracts: A Comparative Economic Analysis*, 10 (1) Mexican Law Review 69.
- Jesse M. Fried (1996), *Executory Contracts and Performance Decisions in Bankruptcy*, 46 Duke Law Journal 517.

- George G. Triantis (1993), *The Effects of Insolvency and Bankruptcy on Contract Performance and Adjustment*, 43 (3) The University of Toronto Law Journal 679.

- Jay L. Westbrook (1989), *A Functional Analysis of Executory Contracts*, 74 Minnesota Law Review 227.

- Kwan Kiat Sim Ho, Zi Wei and Naomi Lim (2022), *A Comparative Review of Legislative Restrictions on the Enforcement of Ipso Facto Clauses*, INSOL International.

Panel 6. Directors' Duties and Liability in the Zone of Insolvency

When a company becomes factually insolvent but it is not yet subject to a formal insolvency proceeding, the shareholders –or the directors acting on their behalf– may engage in various forms of behavior that can divert or destroy value at the expense of the creditors. For this reason, many jurisdictions around the world impose special directors' duties and liability in the zone of insolvency. The way to regulate directors' duties and responsibilities in the zone of insolvency, however, significantly differs across jurisdictions. Namely, countries around the world have adopted different approaches including: (i) the imposition of a duty to initiate insolvency proceedings; (ii) the imposition of a duty to recapitalise or liquidate companies experiencing significant losses; (iii) the imposition of general duties towards the company's creditors, including a duty to minimize losses for the creditors; (iv) the imposition of a duty to prevent the company from incurring new debts; (v) the imposition of a duty to prevent the company from incurring new debts that cannot be paid in full; and (vi) the imposition of a duty to keep acting in the best interest of the corporation as a whole. This panel will explore the advantages and weaknesses of each regulatory model of directors' duties in the zone of insolvency, as well as a variety of country-specific and firm-specific factors that may affect the desirability of a particular approach. It will also discuss different mechanisms to deal with wrongful behavior in the zone of insolvency, including disqualification and liability of corporate insiders.

Relevant readings:

- INSOL International (2017), *Directors' in the Twilight Zone V.*
- UNCITRAL (2020), *Directors' obligations in the period approaching insolvency (including in enterprise groups)*.
- Douglas G. Baird (1991), *The Initiation Problem in Bankruptcy*, 11 International Review of Law and Economics 223.
- Aurelio Gurrea-Martinez (2021), *Towards an Optimal Model of Directors' Duties in the Zone of Insolvency: An Economic and Comparative Approach,* 21 (2) Journal of Corporate Law Studies 365.
- Jared A. Ellias and Robert J. Stark (2020), *Delaware Corporate Law and the 'End of History' in Creditor Protection*.
- Jason Harris and Anil Hargovan (2021), *Potential liability for directors during corporate restructuring: comparative perspectives*, in Paul J. Omar and Jennifer L.L. Gant (eds.), Research Handbook on Corporate Restructuring (Edward Elgar).

Panel 7. Avoidance Actions

Most insolvency jurisdictions include provisions that facilitate the avoidance of certain transactions entered into by a debtor prior to the commencement of an insolvency proceeding. These transactions seek to prevent or otherwise reverse transactions that can be detrimental for the creditors. Despite the benefits eventually created by these mechanisms, the use –and even existence– of avoidance actions is not costless. On the one hand, the initiation of these actions may generate litigation costs. On the other hand, the existence of avoidance provisions may harm predictability and legal certainty, especially in jurisdictions where it is relatively easy to avoid a transaction, usually because bad faith is not required, the lookback period for the avoidance of transactions is too long, or no financial conditions are required to avoid a transaction. This panel will discuss how countries should design avoidance provisions taking into account the conflicting policy goals often existing in the design of avoidance actions as well as the particular features of a country.

Relevant readings:

- UNCITRAL (2004), *Legislative Guide on Insolvency Law*. New York.
- Jay Westbrook, Charles D. Booth, Christoph Paulus & Harry Rajak (2010), A Global View of Business Insolvency Systems (World Bank & Kluwer/Martinius), pp. 105-116.
- Rolef de Weijs (2011), Towards an Objective European Rule on Transaction Avoidance in Insolvencies, International Insolvency Review.
- Brook Gotberg (2014). Conflicting Preferences: Avoidance Proceedings in Bankruptcy Liquidation and Reorganization, 100 Iowa Law Review 51.
- Gerard McCormack, Andrew Keay, Sarah Brown and Judith Dahlgreen (2016), *Study on a new approach to business failure and insolvency: Comparative legal analysis of the Member States' relevant provisions and practices*, pp. 137-183.
- Aurelio Gurrea-Martinez (2018), *The Avoidance of Pre-bankruptcy Transactions: An Economic and Comparative Approach*, 93 (3) Chicago Kent Law Review 711.
- Kristin van Zwieten (2018), *Related Party Transactions in Insolvency*, European Corporate Governance Institute (ECGI) - Law Working Paper No. 401/2018.
- Oriana Casasola (2020), *The Harmonisation of Transaction Avoidance: A Compromise Solution*, Norton Journal of Bankruptcy Law.

Panel 8. Insolvency Frameworks for Individuals and Micro and Small Enterprises

Micro and small enterprises (MSEs) represent the vast majority of businesses in most countries around the world. Despite the economic relevance of small businesses, most insolvency jurisdictions in Asia – and elsewhere– do not provide suitable insolvency frameworks for MSEs. This panel analyses how countries can adopt more attractive insolvency frameworks for small businesses. To that end, it will take into account the approaches that have been adopted by various jurisdictions, as well as the policy recommendations suggested by organisations such as the World Bank, UNCITRAL, and the International Insolvency Institute/Asian Business Law Institute. Moreover, it will discuss how these approaches and policy recommendations should be adjusted to different market and institutional environments. Lastly, this panel will discuss whether and, if so, under which conditions, countries should provide a discharge of debt for consumers and individual entrepreneurs.

Relevant readings:

- UNCITRAL (2021), *Legislative Recommendations on Insolvency of Micro- and Small Enterprises*.
- World Bank (2021), *Principles for Effective Insolvency and Creditor/Debtor Regimes*. Washington, D.C.
- Aurelio Gurrea-Martinez (2022), *Guide on the Treatment of Insolvent Micro and Small Enterprises in Asia*, Asian Business Law Institute and International Insolvency Institute. Singapore.
- Federico J. Díez, Romain Duval, Jiayue Fan, José Garrido, Sebnem Kalemli-Özcan, Chiara Maggi, Soledad Martinez-Peria, and Nicola Pierri (2021), *Insolvency Prospects Among Small and Medium Enterprises in Advanced Economies: Assessment and Policy Options*. IMF Staff Discussion Notes 2021/002.
- Jason Harris and Christopher Symes (2021), *The chimera of restructuring reform: An opportunity missed for MSMEs in pt 5.3B, U. of Adelaide Law Research Paper No. 2021-48*.
- Jason J. Kilborn (2021), *Tightening Up Loose Credit and Loosening Up Tight Bankruptcy in Singapore: An Asian Paradigm For Personal Debt and Insolvency Reform*.
- World Bank (2014), *Report on the Treatment of the Insolvency of Natural Persons*. Washington, D.C.
- Jose Garrido, Sanaa Nadeem, Nagwa Riad, Chanda DeLong, Nadia Rendak, and Anjum Rosha (2020), *Tackling Private Over-Indebtedness in Asia: Economic and Legal Aspects*. IMF Working Paper. Washington, D.C.
- Kenneth Ayotte (2007), *Bankruptcy and Entrepreneurship: The Value of a Fresh Start*, 23 (1) The Journal of Law, Economics, and Organization 161.

- John Armour and Douglas Cumming (2008), *Bankruptcy Law and Entrepreneurship*, 10 (2) American Law and Economics Review 303.

Panel 9. Rescue Financing and Administrative Expenses

When a firm becomes insolvent, it may be unable to obtain new finance. As a result, the lack of finance may lead to the loss of suppliers, investment opportunities and going concern value. To address this problem, several jurisdictions around the world have adopted a system of rescue or debtor-in-possession ("DIP") financing that seeks to encourage lenders to extend credit to viable but financially distressed firms. This is incentivized by providing DIP lenders with various forms of priority. This panel will discuss the most desirable way to facilitate post-petition financing to viable but insolvent firms. Moreover, it will do so taking into account the particular market and institutional environment existing in a country.

Relevant readings:

- Kenneth Ayotte and David A. Skeel (2013), *Bankruptcy Law as a Liquidity Provider*, 80 (4) The University of Chicago Law Review 1557.

- George G. Triantis (2017), *Debtor-in-Possession Financing in Bankruptcy* in Adler (ed.), Handbook on Corporate Bankruptcy Law, Stanford Public Law Working Paper (Edward Elgar, 2021).

- INSOL International (2022), *Comparative Review of Approaches to "Rescue" or "Debtor-in-possession" (DIP) Finance in Restructuring and Insolvency Regimes*.

- UNCITRAL (2004), *Legislative Guide on Insolvency Law*, New York, pp. 113-118.

- Aurelio Gurrea-Martinez (2022), *The Treatment of Debtor-in-Possession Financing in Reorganization Procedures: An Economic and Comparative Approach*, Singapore Management University School of Law Research Paper No. 3/2022.

- Kenneth Ayotte and Jared A. Ellias (2022), *Bankruptcy Process for Sale*, 39 Yale Journal on Regulation 1.

Panel 10. Corporate Groups

Many businesses are often organised through corporate group structures. Therefore, an insolvency system should respond to this economic reality. To that end, countries around the world have generally adopted three regulatory approaches to deal with corporate groups in insolvency. First, certain jurisdictions treat individual companies separately. Second, other jurisdictions have taken steps to facilitate the coordination of insolvency proceedings affecting corporate groups ("procedural coordination"). Finally, other jurisdictions allow, even if it is in exceptional cases, the consolidation of assets and liabilities of companies belonging to the same corporate group ("substantive consolidation"). More recently, as a variation of the approach facilitating procedural coordination, some countries have adopted some substantive rules that, without consolidating assets and liabilities, involve the use of certain insolvency provisions to the whole corporate group. Moreover, this latter approach often considers the "interest of the group" instead of the interest of the individual legal entities comprising the corporate group. This panel seeks to explore the most desirable way to deal with corporate groups in insolvency.

Relevant readings:

- UNCITRAL (2020), *Model Law on Enterprise Group Insolvency with Guide to Enactment*.

- INSOL International (2022), *The Restructuring of Corporate Groups: A Global Analysis of Substantive, Procedural and Synthetic Group Procedures*.

Panel 11. Cross-Border Insolvency

Many businesses nowadays have assets, creditors, offices, subsidiaries, clients or employees in different jurisdictions. The existence of an international component may add an additional layer of complexity to a situation of financial distress. To deal with a situation of insolvency with an cross-border element, commentators have generally suggested two different approach: one of them that seeks to promote a single forum for the management of the insolvency proceeding ("universalism") and another approach consisting of the opening of insolvency proceedings in those jurisdictions where the debtor has assets and creditors ("territorialism"). The disadvantages of both models led to some intermediate approaches. To that end, the most successful model has been the so-called "modified universalism", which was the approach embraced by the UNCITRAL Model Law on Cross-Border Insolvency adopted in many jurisdictions around the world. This panel will discuss various approaches to deal with cross-border insolvency. These approaches will include modified versions of universalism and territorialism, as well as innovative contractual approaches suggested in the academic literature. It will also discuss new trends and developments in cross-border insolvency, including the use of insolvency protocols, the guidelines and modalities enacted by the Judicial Insolvency Network, and the UNCITRAL Model Law on Model Law on Recognition and Enforcement of Insolvency-Related Judgments.

Relevant readings:

- UNCITRAL (1997), *Model Law on Cross-Border Insolvency*. New York.
- Robert Rasmussen (1997), *A New Approach to Transnational Insolvencies*, 19 (1) Michigan Journal of International Law 1.
- Lucian A. Bebchuk and Andrew T. Guzman (1999), *An Economic Analysis of Transnational Bankruptcy*, 42 The Journal of Law and Economics 775.
- Lynn M. LoPucki (2000), *The Case for Cooperative Territoriality in International Bankruptcy*. 98 (7) Michigan Law Review 2216.
- UNCITRAL (2018), *Model Law on Recognition and Enforcement of Insolvency-Related Judgment*.
- Jay Lawrence Westbrook (2018), *Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court*, 96 Texas Law Review 1473.
- Judicial Insolvency Network (2016), *Guidelines for communication and cooperation between courts in cross-border insolvency matters*.
- Aurelio Gurrea-Martinez (2020), Insolvency Law in Emerging Markets, Ibero-American Institute for Law and Finance, Working Paper 3/2020.
- Ministry of Corporate Affairs, Government of India (2020), *Report on the rules and regulations for cross-border insolvency resolution*.