

Comparing the corporate insolvency framework: UK, Singapore and India

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Part I

What drives optimal insolvency law design

What is optimal design?

- Insolvency laws in various countries differ substantially in many respects.
- The variation reflects the underlying differences in:
 - Economic and institutional conditions including legal tradition;
 - Path dependency of economic and institutional development; and
 - Political economy factors.
- While the law deals with firms that are already insolvent, it affects the behaviour of all debtors and creditors in the economy.
- There is no generally applicable best solution.

Objectives and outcomes

- Theoretical underpinning:
 - Creditors wealth maximisation and the creditors' bargain (Jackson) – German Insolvency Law.
 - Broad based contractarian approach (Korobkin) – The US Insolvency Law.
 - Multiple values/eclectic approach (Warren)
- Choice of objectives determines design and outcomes.
- For multiple objectives, priority of objectives needs to be stated.
- Measures of evaluation: **efficiency, expertise, accountability and fairness.**

Central questions in insolvency

- Central questions in insolvency:
 - 1 **Control** – who makes the critical decisions and with what level of discretion.
 - 2 **Priority** – order of distribution of assets as a matter of substantive law.
- There exists a trade off between ex post and ex ante efficiency.

Objectives of insolvency law (Warren, 1993)

- 1 To maximise return to creditor by enhancing value of failing debtor.
 - Early recognition of distress and collective action.
 - Value as going concern versus in liquidation.
 - Preserving value of insolvency estate.
 - Dealing with frivolous petitions.
- 2 To distribute value , as far as possible, in the pre-insolvency order of claims.
 - Priority.
 - Equitable treatment of similar creditors.
 - Rights of creditors that do not have legal claims to assets.
- 3 To internalise the costs of the business failure to parties to the process.
 - Minimising externalisation.
 - Decision making by experts and concerned parties rather than courts.
 - Costs associated with public goods, courts, regulatory and information systems.
- 4 Reducing strategic behaviour.
 - Liability for frivolous/fraudulent behaviour or not taking suitable actions in discharge of duties.

Resolution outcomes

- Rescue:
 - Methods – reorganisation, restructuring, refinance, downsizing, partial sell-offs, management buy-outs, debt equity swaps, take overs.
 - Informal vs. formal.
 - If not initiated early, may just be a step before liquidation.
 - Require expert judgment of viability and rescue possibility.
- Liquidation:
 - Methods – sale of business or assets followed by winding up.
 - Distribution of proceeds according to a pre-defined priority. The design of the priority impacts credit markets ex-ante.
 - Specialised skills required for valuation and realisation.

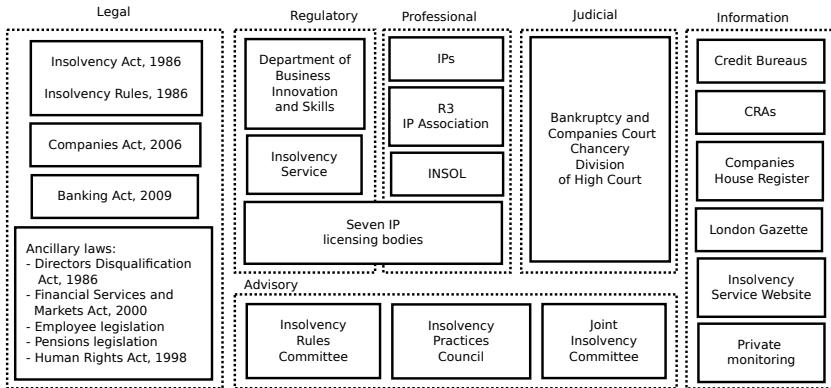
Part II

The UK corporate insolvency code

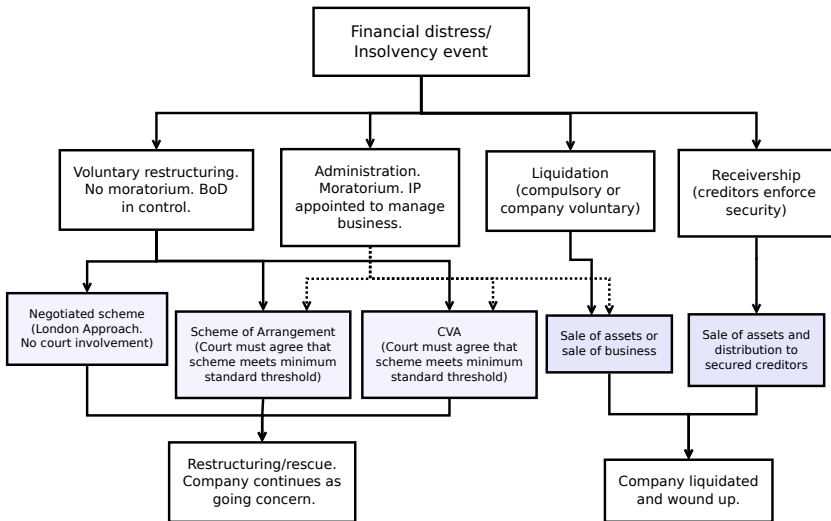
Evolution of the corporate insolvency framework

- Joint Stock Companies Winding up Act, 1844.
- Amendments in 1848, 1849 and 1857 – winding up jurisdiction with Chancery Court. Formal separation of the procedures for companies and individuals.
- Companies Act (1862-1985) – detailed provisions for winding up and pari passu distribution. Several provisions of various Bankruptcy Acts such as provable debt and fraudulent preference incorporated over time.
- Insolvency Act, 1986 – consolidated insolvency provisions for companies and repealed repealed insolvency provisions in Companies Act. Few insolvency provisions remaining in Companies Act:
 - Provisions for safe harbors in insolvency law for financial market contracts/arrangements (Part VII).
 - S. 754 (priority in case debentures are secured by floating charge), Pt. 25 (registration of charges) and Pt. 26 (Scheme of Arrangements and reconstructions).
- Amended in 2000 – new provisions for company voluntary arrangement (CVA) and moratorium.
- Enterprise Act, 2002– replaced Administrative Receivership with Administration. Reserved part of floating charge realisations for unsecured creditor and abolished Crown preference.

The framework and institutional setting



Insolvency procedures



Details of procedure

	Administration	CVA	Scheme	CVL	CL
Objective	To hold a company together while plans are made for its rescue, sale or liquidation.	CVA can be for reorganising or liquidating a company and can be stand alone or within an Administration or Liquidation. Most CVAs involve sale of business of the company, followed by winding up.	Used by companies with complex capital structures to reach a compromise on debts . They are useful as they are binding even on secured creditors.	Winding up of an insolvent company through a special resolution by shareholders and a vote by creditors to appoint a Liquidator.	Winding up of a company by order of the Court following a petition.
Trigger	For a QFC holder no requirement for actual or impending insolvency . In all other cases, court requires actual or impending insolvency to be established.	No default or insolvency trigger.	No default or insolvency trigger.	Voluntary winding up without declaration of solvency by Directors.	Default on an undisputed debt of GBP 750, inability to pay debts as they fall due , assets less than liabilities, application that voluntary winding up not being properly conducted.
Who can trigger	Holder of a QFC or the company or its BoD by filing a notice and other prescribed documents at court. Court can also order an Administration in some cases.	BoD for a stand alone CVA, Administrator or Liquidator in case CVA in within an Administration or a Liquidation. Members and creditors cannot propose a CVA.	BoD in consultation with major creditors or creditors or members .	BoD	Any creditor, company, Directors, members and Administrator . All or any of these parties can petition separately or together.

CVA - Company voluntary arrangement; CVL - Creditor voluntary liquidation; CL - Compulsory liquidation

Details of procedure

	Administration	CVA	Scheme	CVL	CL
Control	<p>Administrator manages the company and the process. Company's BoD lose control. If Administration results in a CVA or a Scheme, the BoD is likely to regain control. If it results in a liquidation, Liquidator gets control.</p>	<p>BoD in case of stand alone CVA. If CVA is an outcome of Administration or Liquidation, the Administrator or Liquidator is in control.</p>	<p>BoD.</p>	<p>Creditors through the Liquidator.</p>	<p>Court and Liquidation committee.</p>
Role of IP	<p>As Administrator has full management powers and is required to take any actions to (1) rescue as a going concern, or (2) achieve better value than in winding up, or (3) realise property for distribution to secured and preferential creditors. Usually appointed by the BoD but responsible to creditors as a whole.</p>	<p>Drafting of the CVA proposal, as an "intended nominee" for recommending the CVA for voting, as a "supervisor" of the debtor's compliance with CVA terms.</p>	<p>No requirement of an IP, unless Scheme precedes a Liquidation or is part of an Administration. In such cases IP acts as Administrator/Liquidator.</p>	<p>As Liquidator collect and realise assets for distribution as per statutory priority. Responsible for running the company in winding up. Required to investigate causes of failure and bring to book delinquent Directors. Appointed by the company or by creditors and responsible to creditors as a whole.</p>	<p>Same as in voluntary liquidation. Initially court appointed but creditors can later appoint a private Liquidator.</p>

Details of procedure

	Administration	CVA	Scheme	CVL	CL
Role of Court	Administration application by BoD or a QFC holder can be by filing forms and documents at court . Only where unsecured creditor or company itself apply, court may consider appropriateness. Court has oversight through the Administrator . Administration can conclude without any involvement by a judge.	Company BoD apply to court for permission to propose CVA to creditors . Court cannot vary the terms of a validly approved CVA.	Court involvement at each stage of the approval process to ensure that procedure is complied with and is without prejudice to any stakeholder.	Court generally not involved apart from its supervisory role .	Court adjudicates insolvency and makes an order for a compulsory liquidation.
Moratorium	Interim moratorium on filing of an Administration application. Moratorium continues through the process, covers all creditors and lasts for 1 year + 6 months with court approval.	No moratorium except for small eligible companies.	No moratorium.	No automatic stay on proceedings against the company. Liquidator can apply to Court for a stay.	Automatic stay on proceedings against the company except by secured creditors.
Cram down		Possible on dissenting creditors and members except on secured and preferential creditors.	Scheme binding on all creditors , including secured creditors.		

Creditor waterfall or priority

- Statutory order of priority or creditors' waterfall. Applicable to both Administration and Liquidation.
 - Proceeds from fixed charge assets net of costs of realisation to fixed charge holders.
 - Liquidation/administration expense, including contracts entered into by them as agents, to the counterparty.
 - Preferential debts, primarily employee dues, subject to statutory maximums.
 - Prescribed part, up to a maximum of GBP 600,000 set aside from proceeds of floating charge assets, for unsecured creditors.
 - Proceeds of floating charge assets net of costs of realisations to floating charge holders.
 - Unsecured creditors.
 - Deferred creditors *pari passu*.
 - Any surplus to company/shareholders in accordance with Articles.

Insolvency statistics

Procedure	2008	2009	2010	2011	2012	2013	2014
CL (%)	34	35	29	31	26	22	23
CVL (%)	61	82	69	73	73	69	63
Administration (%)	29	25	17	17	15	14	11
CVA (%)	4	4	5	5	5	4	3
Receiverships (%)	5	9	8	9	7	6	4
Total new cases	21,811	25,432	20,954	21,858	20,749	18,849	17,120

Source: Insolvency Service. CL - Compulsory liquidation; CVL - Creditor voluntary liquidation; CVA - Company voluntary arrangement.

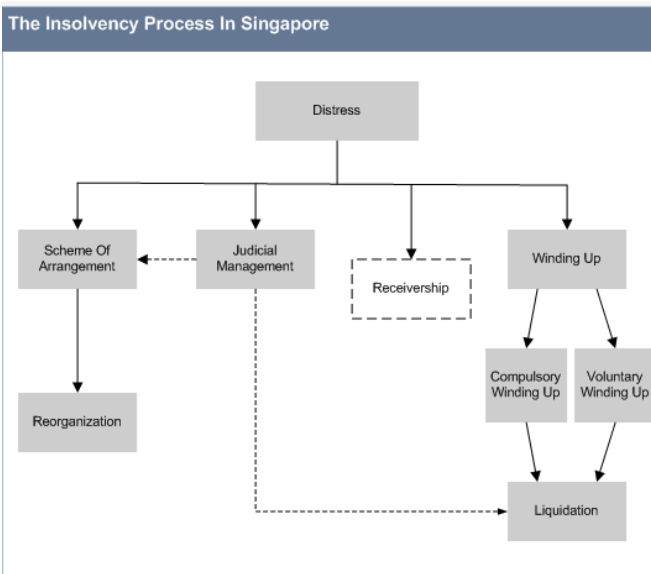
Part III

The Singapore corporate insolvency framework

Overview

- The Singapore Bankruptcy Act deals with individual insolvency.
- Statutory provisions for insolvency of companies is in the Companies Act 2006.
- The provisions for companies are largely modeled on the legislative provisions of UK and Australia.
- The Singapore Companies Act was enacted in 1967. It was modeled on Companies Act, 1961 of Victoria, Australia.
- While the law is based on principles established in UK, it differs in the detail.

Insolvency procedures



Details of procedure

	Judicial Management	Scheme	Compulsory Liquidation	Receivership
Objective	To give viable companies in financial distress a chance to rehabilitate themselves. Likely to achieve: (1) survival of company or part of it as a going concern, (2) implementation of a scheme of arrangement, or (3) a more advantageous realization of company's assets than in liquidation	To rehabilitate debtors through a compromise with creditors	Winding up of company by order of the Court following a petition.	Discharge of debts secured by floating charge.
Trigger	Company is unable to pay its debts.	No requirement of default or insolvency.	Company is unable to pay its debts either on the basis of cash-flow test or the balance sheet test. Petitioner may also show company has failed to pay a dues in excess of SGD 10,000 on demand within 3 weeks after demand.	Actual or impending insolvency. The right to appoint a receiver and manager included in security documents.
Who can trigger	The company, its directors or its creditors. If Receiver/Manager is appointed, no order can be made.	Company prepares a sample scheme and makes an application to court for a meeting ("Scheme Meeting") of the creditors.	Creditors, the company and judicial manager can petition.	A secured creditor appoints a receiver in circumstances where a company is already insolvent or nearing insolvency.

Details of procedure

	Judicial Management	Scheme	Compulsory Liquidation	Receivership
Control	Judicial Manager takes over running of company and management is displaced. JM responsible for managing business and property of company. Creditors may establish committee to monitor the process. Any revisions require approval of majority of creditors.	Management retains control of business while restructuring.	Liquidator nominated by creditor, appointed by court has responsibility to wind up affairs of company. From time to time he needs to report to the official receiver. Creditors may form a committee of inspection.	Receiver controls running of business.
Role of IP	Preserve part or all of business as going concern. Present rescue plan to creditors, takes into custody all property and manage company's affairs according to plan.	No requirement of an IP.	Collect assets and creditors' claims. Carry on business during the proceedings. Post assessment, adjudicate claims lodged against company, realise company's assets and distribute proceeds in order of statutory priority.	Take control of all or most of company's assets. Cannot be displaced even if company is placed under liquidation. Liquidator has to wait until receiver has completed his task.

Details of procedure

	Judicial Management	Scheme	Compulsory Liquidation	Receivership
Role of Court	Application for procedure is presented to court which appoints the JM if it is satisfied that company is unable to pay debts. Court has power to adjourn creditors' meeting, allow amendments to rescue plan and make interim orders. It also extend duration of the procedure at JM's request.	Two fold function of court: ensuring statutory procedure has been complied with, resolutions are passed by requisite majority of creditors at scheme meetings as well as determining that scheme is fair and reasonable.	Court involvement in initial stage of petition and order. Any disposition of company's property made after commencement of winding up is void without court's sanction.	
Moratorium	Automatic and immediate moratorium.	No automatic moratorium while Scheme is being proposed. Application may be made to court for stay of proceedings pending against the company.	Post winding up order, automatic stay on proceedings against company unless court permits proceedings to continue.	No moratorium.
Cram down		A validly approved Scheme is binding on all creditors (if requisite majority of each creditor class (simple majority in number and 75% in value) approves scheme and court confirms it).		

Creditor waterfall or priority

- Secured creditors have priority over all other claims.
- Claims of creditors secured by floating charge rank behind liquidator's fees and expenses and preferential claims.
- The general order of payment priority:
 - Receivers' expenses.
 - Claims secured by fixed charges.
 - Costs and expenses of winding up.
 - Employees' remuneration and other payments due to employees.
 - All taxes assessed before date of commencement of winding up or assessed at any time before expiration of time fixed for proving of debts.
 - Claims secured by a floating charge.
 - Unsecured creditors.
 - Any surplus to company/shareholders.

Insolvency statistics

- Since its introduction in 1987, Judicial Management has not been used very successfully.
 - From 2001 to 2010, only 124 cases were filed.
 - A review of 105 of these cases found that only 26% of them were successful.
 - 48% were unsuccessful and 26% were dismissed or withdrawn.
- Scheme of Arrangement has emerged as the favored corporate rescue regime in Singapore.
 - Of the cases filed between 2002 and 2009, 77% of companies for which a Scheme had been sanctioned by the court continue as going concerns.

Part IV

World Bank indicators

World Bank indicators (I)

Indicator	India	UK	Singapore
Time (years)	4.3	1.0	0.8
Cost (% of estate)	9.0	6.0	3.0
Outcome (0-sale; 1-going concern)	0	1.0	1.0
Recovery rate (cents on dollar)	25.6	88.6	89.6
Strength of insolvency framework (0-16)	6.0	11.0	9.5
Commencement of proceedings (0-3)	2.0	3.0	3.0
● Procedures available to debtor	Liquidation only (0.5)	Liquidation & reorganization (1.0)	Liquidation & reorganization (1.0)
● Creditor filing for debtor's insolvency	Yes, liquidation only (0.5)	Yes, liquidation & reorganization (1.0)	Yes, liquidation & reorganization (1.0)
● Basis for insolvency commencement	Inability to pay debts (1.0)	Inability to pay debts or financial distress (1.0)	Inability to pay debts (1.0)
Management of debtor's assets (0-6)	3.0	5.0	4.0
● Continuation of contracts supplying essential goods & services	No (0.0)	No (0.0)	Yes (1.0)
● Debtor's rejection of burdensome contracts	Yes (1.0)	Yes (1.0)	Yes (1.0)
● Avoidance of preferential transactions	Yes (1.0)	Yes (1.0)	Yes (1.0)
● Avoidance of undervalued transactions	Yes (1.0)	Yes (1.0)	Yes (1.0)
● Debtor obtaining credit post commencement	No (0.0)	Yes (1.0)	No (0.0)
● Priority to post commencement credit	No (0.0)	Yes, over unsecured creditors (1.0)	No (0.0)

World Bank indicators (II)

Indicator	India	UK	Singapore
Reorganization proceedings (0-3)	0.0	1.0	0.5
<ul style="list-style-type: none"> ● Creditors voting on plan 	N/A	Only creditors whose rights are affected by proposed plan (1.0)	All creditors (0.5)
<ul style="list-style-type: none"> ● Dissenting creditors receive at least as much as in liquidation 	No (0.0)	No (0.0)	No (0.0)
<ul style="list-style-type: none"> ● Creditor class-based voting and equal treatment 	No (0.0)	No (0.0)	No (0.0)
Creditor Participation (0-4)	1.0	2.0	2.0
<ul style="list-style-type: none"> ● Creditor approval for selection/appointment of IP 	No (0.0)	Yes (1.0)	No (0.0)
<ul style="list-style-type: none"> ● Creditor approval for sale of debtor's assets 	No (0.0)	No (0.0)	No (0.0)
<ul style="list-style-type: none"> ● Creditor right to request information from IP 	Yes (1.0)	No (0.0)	Yes (1.0)
<ul style="list-style-type: none"> ● Creditor right to object to decisions accepting/rejecting claims 	No (0.0)	Yes (1.0)	Yes (1.0)

World Bank indicators (III)

	India	U.K.	Singapore
Getting Credit (Rank)	28	1	3
● Index of legal rights strength (1..10)	8	10	10
● Private bureau coverage (%)	19.8	100	60.3
Enforcing Contracts (Rank)	186	56	12
● Time (Days)	1420	437	150
● Procedures (No.)	46	28	21
Resolving Insolvency (Rank)	121	7	4
● Time (Years)	4.3	1	0.8
● Recovery rate (cents per \$)	25.6	88.6	89.4
Domestic Credit by financial sector (% of GDP)	77.1	195.6	112.6

Source: World Bank Doing Business Report, 2014

World Bank World Development Indicators, 2014

Thank you