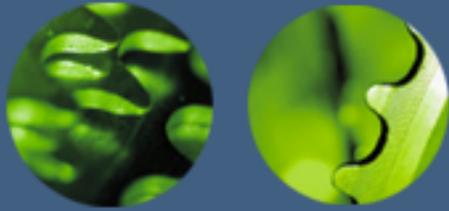




***80th Annual Meeting of the State
Bar of California***
**Laws Governing “Doing Business
in China”**

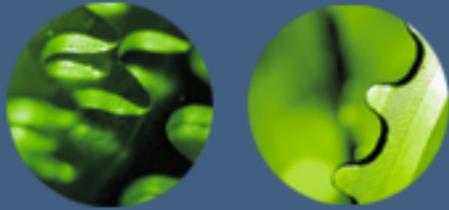
**Enterprise Insolvency Law of
the People’s Republic of
China:
A Cross-Border Comparison**

**South Bay Law Firm
Torrance, California
Michael D. Good**



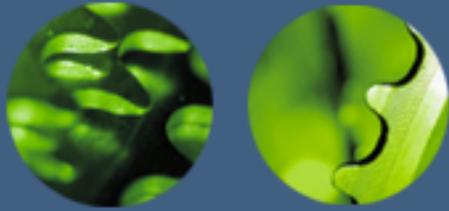
New Enterprise Insolvency Law: A “Snap-Shot” Overview

- 136 Articles
- 12 Chapters covering:
 - Insolvency Petition and Acceptance of Case (Chapter 2)
 - Administrator’s Powers and Duties (Chapter 3)
 - Debtor’s Property (Chapter 4)
 - Insolvency Cost and “Common Interest” Debt (Chapter 5)
 - Claims Declaration and Adjudication (Chapter 6)
 - Creditors’ Meetings (Chapter 7)
 - Reorganization (Chapter 8)
 - Composition (Chapter 9)
 - Liquidation (Chapter 10)
 - Personal Liabilities (Chapter 11)
- Adopted at 23d Session of Standing Committee of 10th National People’s Congress and in effect since June 1, 2007.
- Covers all entities with “legal enterprise status” (except for certain SOE’s covered under Article 134).



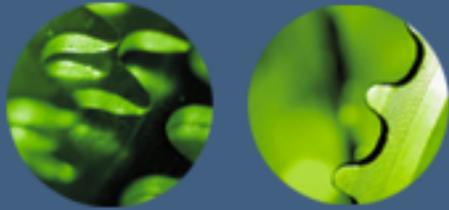
Intended and Potential Effects of the New Enterprise Insolvency Law

- Appears designed to conform more closely to insolvency schemes already in place in jurisdictions that host sophisticated credit economies (i.e., England and the U.S.)
- Appears to meld the law of these jurisdictions and offer a “hybrid” approach, featuring (i) prominent role for “administrators” (as in English insolvency law); and (ii) well-developed “reorganization” and “debtor-in-possession” provisions (similar to the provisions of Chapter 11 of the U.S. Code).
- Appears designed to attract foreign investment – creditors (especially secured creditors) afforded considerable benefits and improvement in status over the former law. See Art’s. 87(1), 109.



Intended and Potential Effects of the New Enterprise Insolvency Law

- Appears to contemplate and provide the legal mechanisms necessary for “corporate rescue” procedures which have become a focus of reform efforts in other jurisdictions. A departure from the insolvency schemes of many other regional schemes (*cf.* Hong Kong law, which recognizes no court-supervised “corporate rescue” mechanism).
- Creditors’ Committees hold significant sway – anticipate considerable maneuvering for positions on Committee (and, in particular, for Chairmanship). See Chapter 7.
- Officers, Directors, Management, “Operators,” and “Legal Representatives” remain under significant strictures. See Chapters 1, 11.



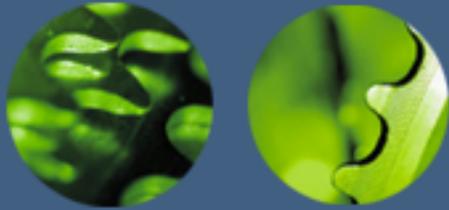
Comparing the Enterprise Insolvency Law v. U.S. Insolvency Law: Why?

- Could an adverse ruling against my client in P.R.C. insolvency proceedings be enforced in U.S. Courts?
- Could U.S.-based litigation involving my client be dismissed in favor of claims or other litigation in a P.R.C. proceeding?
- Are there tactical advantages or disadvantages to litigating in one forum or another? If so, will a ruling or judgment in one forum get recognition in the other?
- The answer to these and many other important questions depends on the application of a single principle . . .



Comity

Historical U.S. Case
Law and Principles

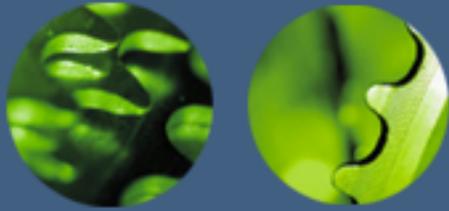


Comity – A Basic Definition

- **[R]ecognition** which one nation allows within its territory to the legislative, executive or judicial acts of another nation *Hilton v. Guyot*, 159 U.S. 113, 163-64(1895).
- [A] nation's **expression of understanding** which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws”. *Somportex, Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. Pa. 1971), *cert. denied*, 405 U.S. 1017, 31 L. Ed. 2d 479, 92 S. Ct. 1294(1972); see also *Hilton v. Guyot*, 159 U.S. at 164.

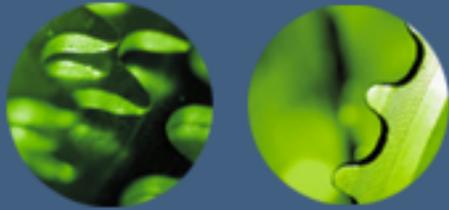
Comity = *Respect for the Substantive Law or Rulings of Another Forum*

- U.S. courts will recognize the “[a]cts of foreign governments purporting to have extraterritorial effect” when those acts are consistent with U.S. law and policy. *Allied Bank Intern. v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 522 (2d Cir. 1985) (distinguishing such acts from those subject to application of “act of state” doctrine).



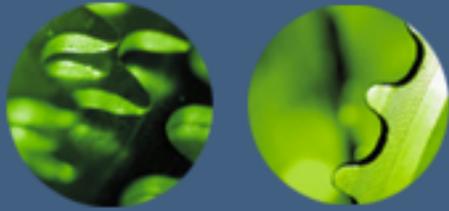
How Do Courts Show Respect? Three Types of Comity

- “Prescriptive Comity”: “[T]he respect sovereign nations afford each other by limiting the reach of their laws.” *Hartford Fire Ins. v California*, 125 L. Ed. 2d 612, 113 S. Ct. 2891, 2920 (1993) (Scalia, J., dissenting).
- “Judicial Comity”: The principle whereby courts “decline to exercise jurisdiction over matters appropriately adjudged elsewhere.” *Hartford Fire Ins.*, 113 S. Ct. at 2920. See also *In re Spanish Cay Co., Ltd.*, 161 B.R. 715, 725 (Bankr. S.D. Fla. 1993) (citing *Cunard Steamship Co., Ltd. v. Salen Reefer Services AB*, 773 F.2d 452, 458 (2d Cir.1985) (“American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities”)).
- “Substantive Comity”: Requested recognition and/or enforcement of non-U.S. orders or proceedings, or of non-U.S. law.



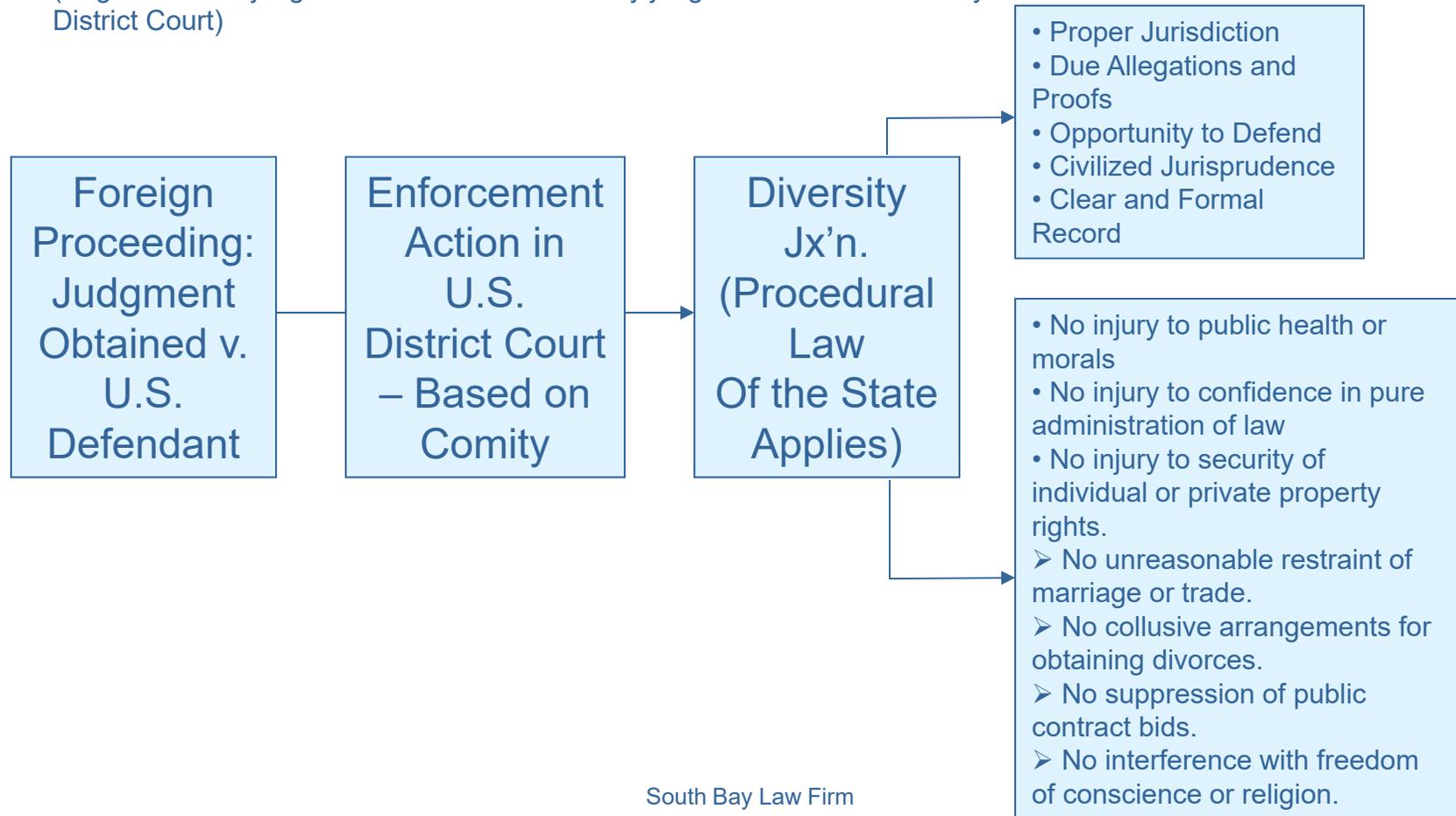
Comity – What’s the Point?

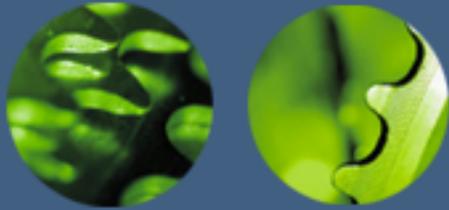
- ***Predictability*** – Vital to Encouraging International Business Transactions.
- Corollary: ***Minimized Legal Risk.***
- ***Comity: Critical When Planning or Dealing With Trans-National Insolvency Proceedings***
- “[C]omity is particularly appropriate where . . . the court is confronted with foreign bankruptcy proceedings.” *Allstate Life Insurance Co. v. Linter Group Limited*, 994 F.2d 996, 999 (2d Cir. 1993).



Tactical Application of Comity: An “Offensive” Example

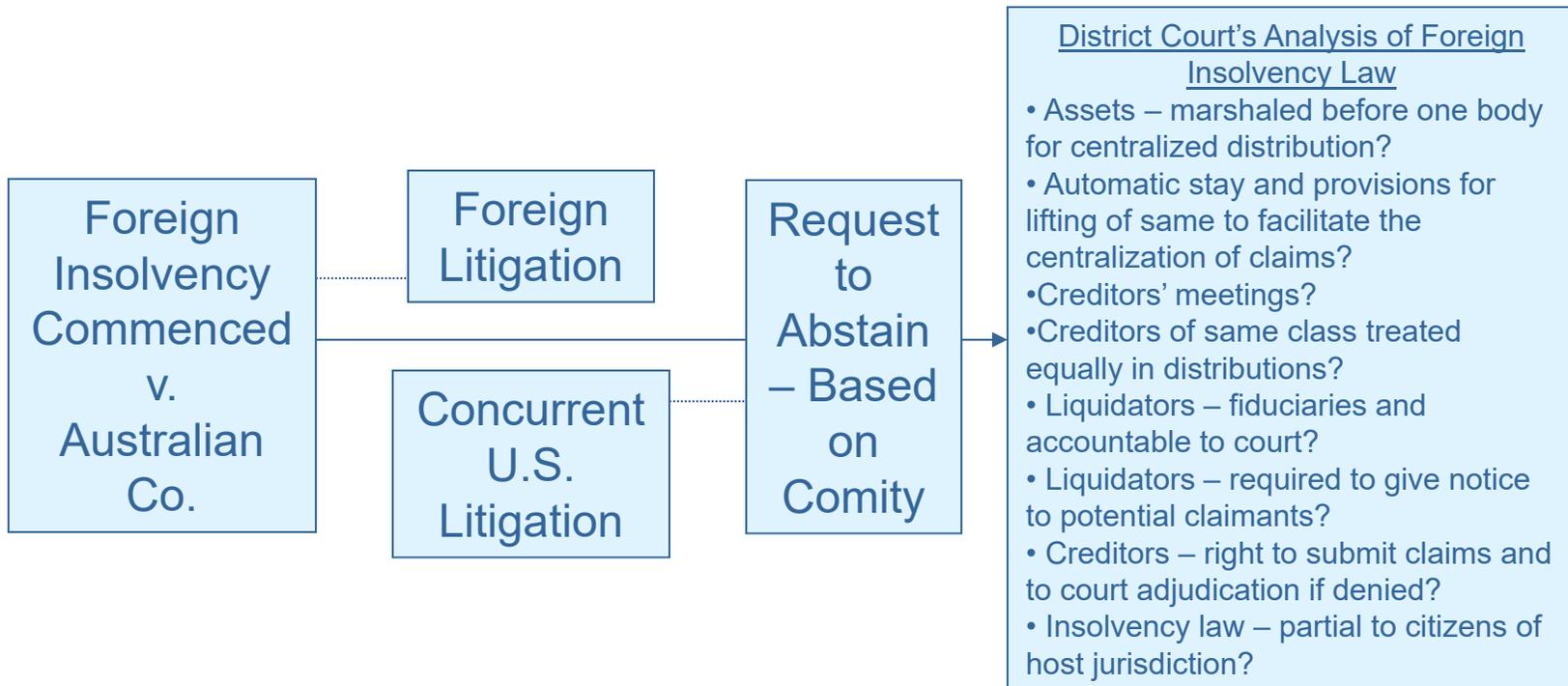
Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971)
(English default judgment enforced on summary judgment motion in Pennsylvania District Court)

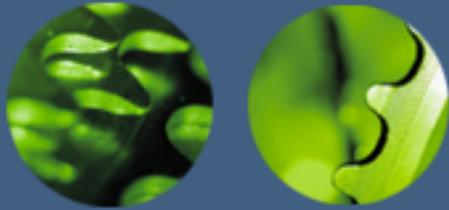




Tactical Application of Comity: A “Defensive” Example

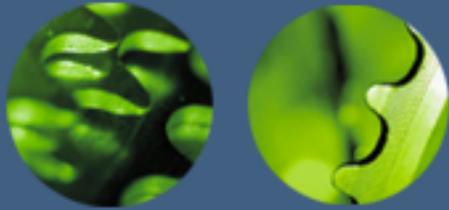
Allstate Life Ins. Co. v. Linter Group Ltd., 994 F.2d 996 (2d Cir. 1993)
(U.S. securities litigation dismissed from U.S. District Court on grounds of comity and *forum non conveniens*)





More Examples From Case Law Involving Application of Comity to International Insolvency Proceedings

- Recognition of Foreign Discharge
- Recognition of Determinations in Foreign Proceedings
- Dismissal of an insolvency proceeding that has served its purpose.
- Respecting a non-U.S. judgment.
- Staying or dismissing a lawsuit in favor of an insolvency proceeding in another country.
- Harmonizing an administration case in the U.S. with an administration case in another country.



Analysis: Should the Court Grant Comity?

- Proper Jurisdiction
- Due Allegations and Proofs
- Opportunity to Defend
- Civilized Jurisprudence
- Clear and Formal Record

- No injury to public health or morals.
- No injury to confidence in pure administration of law.
- No injury to security of individual or private property rights.

Fundamental Analysis

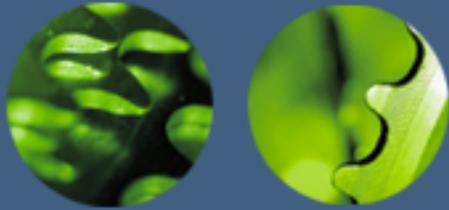
- Does the substantive ruling prejudice individual or private property rights, or injure health, morals, or the rule of law?
- Does the ruling stand on due process?

Foreign Bankruptcy Law Analysis

- Assets – marshaled before one body for centralized distribution?
- Automatic stay and provisions for lifting of same to facilitate the centralization of claims?
- Creditors' meetings?
- Creditors of same class treated equally in distributions?
- Liquidators – fiduciaries and accountable to court?
- Liquidators – required to give notice to potential claimants?
- Creditors – right to submit claims and to court adjudication if denied?
- Insolvency law – partial to citizens of host jurisdiction?

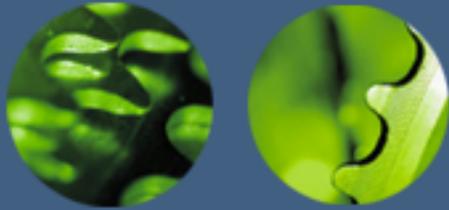
Somportex

Allstate



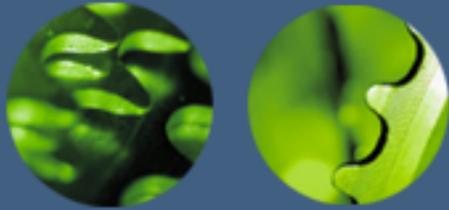
The Key to Comity: Consistency

- Public Policy Consistency - When significant non-constitutional U.S. policies, particularly regulatory- or compliance-oriented policies, are perceived as being in conflict with the bankruptcy laws of another jurisdiction, comity may not be extended. *See, e.g., Overseas Inns S.A. P.A. v. United States*, 911 F.2d 1146, 1149 (5th Cir. Tex. 1990) (upholding validity of tax lien despite Luxembourg court's treatment of claim as unsecured, on the grounds that "[c]omity does not reach so far as to allow one country to adversely affect another's tax revenues.").
- Protective Consistency – No comity when the recognition of a non-U.S. judgment, ruling, or proceeding “would be contrary or prejudicial to the interest of a nation called upon to give it effect.” *Somportex*, 453 F.2d at 440.



The Key to Comity: Consistency

- Substantive Consistency – The law as written must be consistent; so also must the law as applied. *In re Banco de Descuento*, 78 B.R. 337, 340 (Bankr. S.D. Fla. 1987) (emphasis in original) ([T]he General Law of Banks of the Republic of Ecuador **as written** prohibits preferences and provides for equal treatment for all claimants and creditors. Respondent First Palm Beach contends, however, that an overly generous settlement of a strike and collective bargaining dispute by Petitioner in Ecuador resulted in a preference. . . . This Court cannot now determine whether the Labor Court in Ecuador reached its decision in accordance with regular and fair proceedings consistent with fundamental standards of due process. The Court will therefore require the maintenance in the United States of the assets and property of *Banco de Descuento* now in the United States pending further order of this Court. As the proceedings in Ecuador progress, the Court will be able to assess whether the General Law of Banks of the Republic of Ecuador, **as applied**, provides fair treatment to United States creditors.).

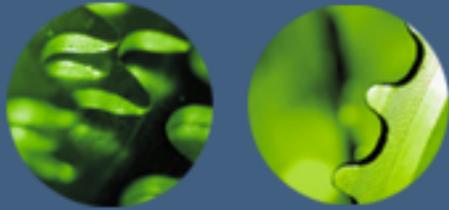


Consistency = “Procedural Fairness”

“Procedural Fairness” in Insolvency Matters

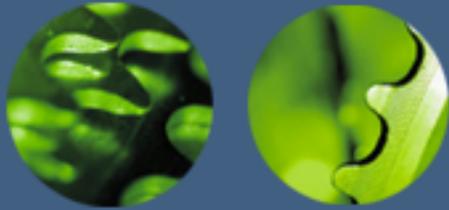
Allstate, 994 F.2d at 999 (citing cases):

- Equal treatment for creditors of the same class;
- Administrators are fiduciaries, accountable to the court;
- Creditors’ right to assert and adjudicate claims;
- Potential claimants entitled to notice;
- Creditors' meetings;
- Partial treatment of other forum’s citizens;
- Marshaling of assets for centralized distribution; and
- Automatic stay and modification for claims administration.



“Procedural Fairness” ≠ “Mirror Image” of U.S. Law

- *Allstate*, 994 F.2d at 999: (“[T]here is no requirement that Australian liquidation proceedings be identical to United States bankruptcy proceedings.”)
- *In re Axona Int’l Credit & Commerce, Ltd.*, 88 B.R. 597, 610 (Bankr. S.D.N.Y. 1988), *aff’d*, 115 B.R. 442 (S.D.N.Y. 1990), *appeal dismissed*, 924 F.2d 31 (2d Cir. N.Y. 1991) (“Comity does not require the laws of different jurisdictions to be *identical*. Instead, the “foreign law must abide by standards of fundamental fairness.”).
- *In re Brierly*, 145 B.R. 151, 166 (Bankr.S.D.N.Y.1992) (“Nothing dictates that the foreign law be a carbon copy of our law....”).
- *Lindner Fund, Inc. v. Polly Peck Int’l PLC*, 143 B.R. 807, 810 (Bankr.S.D.N.Y.1992) (“ Foreign proceedings need not be identical to those under the Bankruptcy Code”).



Procedural Fairness: How Close is “Close Enough?”

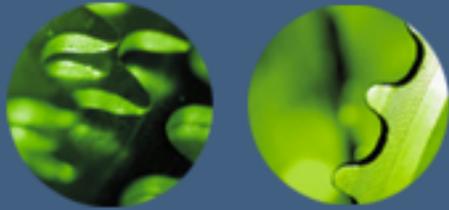
Some Examples from Case Law

- Claims adjudication. *New Line Int'l Releasing, Inc. v. Ivex Films, S.A.*, 140 B.R. 342, 345-46 (S.D.N.Y. 1992) (U.S. film company's District Court suit against insolvent Spanish distributor dismissed on grounds of comity, despite apparent differences in procedures and remedies for resolution of executory contract disputes).
- Notice to potential claimants. *In re Enercons Virginia, Inc.*, 812 F.2d 1469, 1473 (4th Cir. 1987) (alleged lack of notice to banks not sufficient to deny comity to Italian court's *Ex Parte* order appointing trustee of Italian debtor's estate for purposes of filing claims in American case). *In re Gee*, 53 B.R. 891, 902 (Bankr. S.D.N.Y. 1985) (procedures used in the Cayman Islands proceedings provided creditors sufficient notice and opportunity to be heard; therefore, Cayman liquidator would be recognized as liquidator under Cayman liquidation proceedings and involuntary Chapter 11 case would be dismissed).
- Automatic stay. *Allstate*, 99 F.2d at 999 (non-“automatic” nature of stay under Australian proceedings not sufficient to warrant denial of comity).
- General similarity. Often accorded rulings from other, “common law” jurisdictions. *Lindner Fund, Inc. v. Polly Peck Int'l PLC*, 143 B.R. 807, 810 (S.D.N.Y. 1992) (“Comity is regularly accorded to bankruptcy proceedings in sister common-law jurisdictions because there is a presumption that such proceedings are fair and comport with American notions of due process.”)



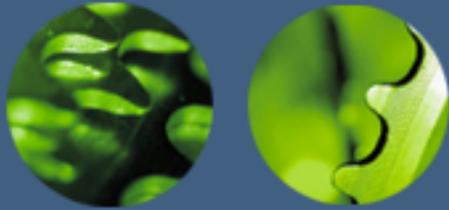
Chapter 15: “Statutory” Comity?



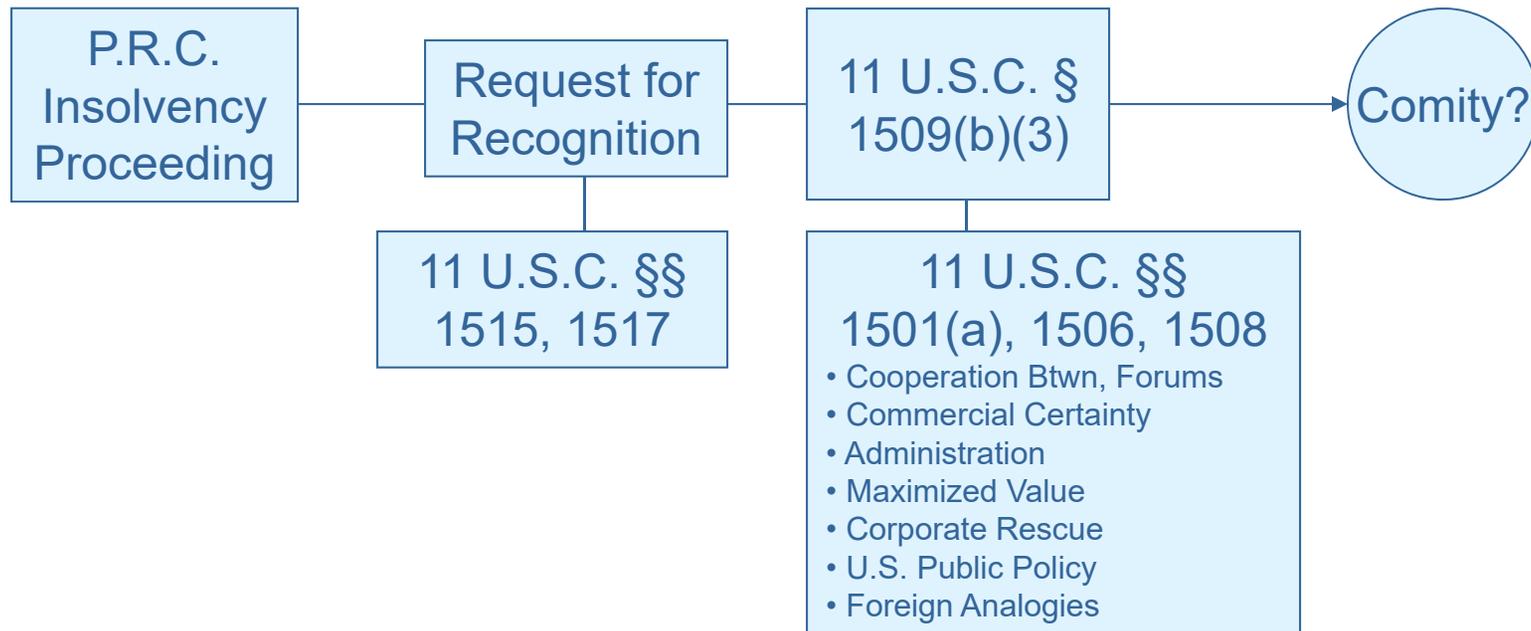


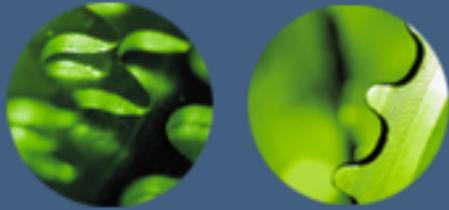
11 U.S.C. § 1509(b)(3)

- “If the [bankruptcy] court grants recognition [of a foreign proceeding], and subject to any limitations that the court may impose consistent with the policy of this chapter – . . . (3) a court in the United States *shall* grant comity or cooperation to the foreign representative.”



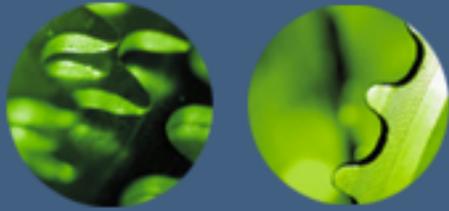
U.S. – Based Comity Under the 2005 Bankruptcy Code





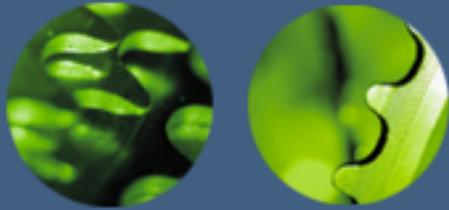
Legislative History and Purpose Behind 1509(b)(3)

- “Subsections (b)(2), (b)(3), and (c) [of section 1509] make it clear that ***chapter 15 is intended to be the exclusive door to ancillary assistance to foreign proceedings. . . .*** [T]here is room for abuse of comity ***This section concentrates the recognition and deference process in one United States court, ensures against abuse, and empowers a court that will be fully informed of the current status of all foreign proceedings involving the debtor.***” H.R. REP. 109-31(I), 110 (April 14, 2005).



“Statutory” Comity in Cross-Border Insolvency Proceedings: A Trade-Off

- All questions of recognition concentrated in one court.
- Questions of deference to be answered in the affirmative, subject to the limits of policies articulated in Chapter 15.
- This approach consistent with requests for deference made under prior law (11 U.S.C. § 304(b)), which “expresse[d] Congressional recognition of an American policy favoring comity for foreign bankruptcy proceedings.” *See In re Manning*, 236 B.R. 14 Bankr. 9th Cir., 1999 (quoting *Remington Rand Corporation-Delaware v. Business Sys. Inc.*, 830 F.2d 1260, 1271 (3d Cir.1987)).



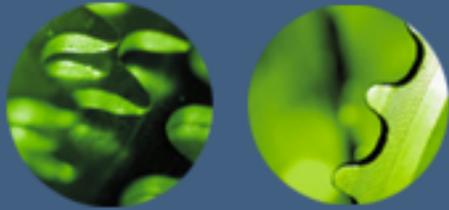
Chapter 15's Policy-Based Limitations on Comity

- Policies set forth in Section 1501(a).
 - International Cooperation
 - Commercial Certainty
 - Administration
 - Maximized Value
 - Corporate Rescue
- General “U.S. public policy” exception set forth at Section 1506.
- “Interpretive” provisions of Section 1508.



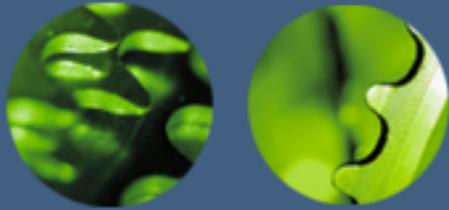
“Comity” In The P.R.C. – Acceptance and Execution Under Article 5



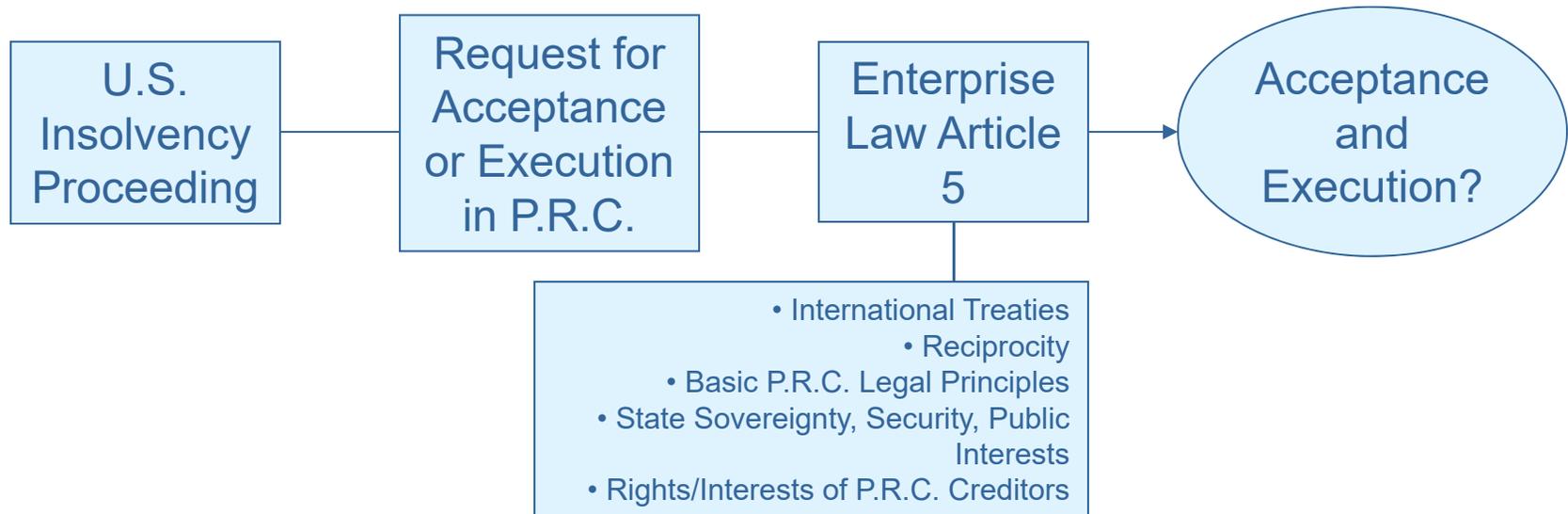


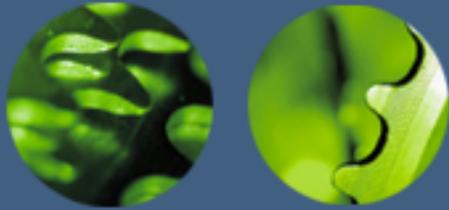
Enterprise Insolvency Law's Acceptance Provisions – Article 5

- “Insolvency procedures commenced in accordance with this Law [are] binding on debtor's property located outside the territory of the People's Republic of China (the P.R.C.). Where the verdict or ruling entered into by foreign court involving the debtor's property within P.R.C.'s territory requires the acceptance and execution by the Chinese Court, the Chinese Court shall, based upon relevant petition or requests, check the foreign verdict or ruling and render the ruling of acceptance and execution in accordance with the ***international agreements to which P.R.C. is a party*** or based on ***mutual reciprocity principle*** after ascertaining that there is no violation of ***basic principles of P.R.C. Laws***, no detriment to ***state sovereignty, security and social public interests***, no harm to the ***legitimate rights and interests of creditors*** in P.R.C.”



P.R.C. – Based Acceptance and Execution





Article 5's Limitations on Acceptance and Execution

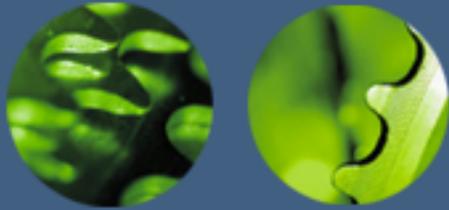
- “relevant treaties”
- “principles of reciprocity”
- “basic principles of the laws of the People's Republic of China”
- “sovereignty, safety or social public interests of the state”
- “legitimate rights and interests of the creditors within the territory of the People's Republic of China”



Points of Intersection Between the U.S. Bankruptcy Code and P.R.C. Enterprise Insolvency Law

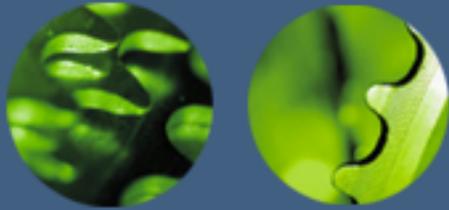


Similarities and
Differences



Commencement of a Proceeding Under the New Enterprise Law

- **Application** - Commencement initiated by “application” – submitted either by creditors (i.e., involuntary) or by debtor (i.e. voluntary).
- **“Gap Period”** - All cases have a “gap period,” during which the debtor may (i) contest the filing; (ii) consent to a liquidation; (iii) seek a reorganization; or (iv) request a composition. Unlike U.S. law, “conversion” to reorganization or to composition is not a matter of election at any time – instead, it must take place during the preliminary “gap period.” Like U.S. law, the “gap period” will likely become a forum for litigation as parties maneuver for position.
- **Acceptance and Appointment** - Administrator appointed upon acceptance of application (except in some reorganization proceedings).
- Some question as to the nature of the administrator’s “agency role” – Agent of the Creditors? The People’s Court? The Debtor? The precise nature of the role appears dependent on the nature of the proceeding.

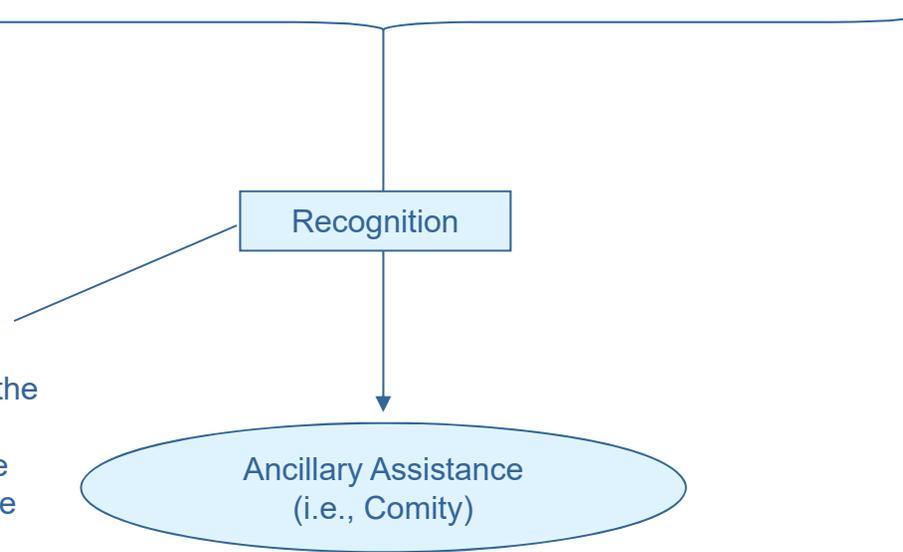


Commencement of a Proceeding Under the New Enterprise Law

P.R.C.



U.S.



Supervisory role of the People's Court and precise relationship of the administrator to the Court will likely be an important factor in determining whether or not to recognize the administrator's request for recognition of the case in a U.S.-based ancillary proceeding.



Enterprise Insolvency Law: Substantive Provisions

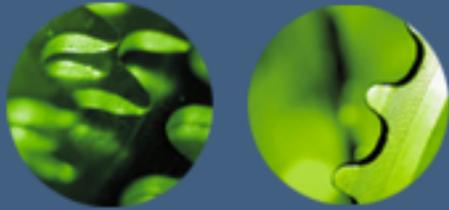
A Cross-Border Comparison

- Infrastructure and Value Preservation
- Corporate Rescue: Reorganization and Composition
- Liquidation: Procedure, Claims, Priorities, Distributions



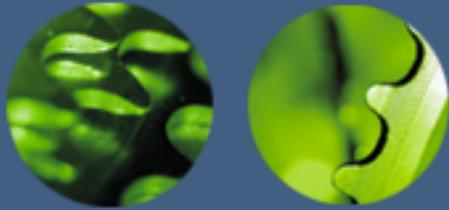
Infrastructure and Value Preservation

- Administration and Procedure
- Defining and Augmenting the Estate
- Executory Contracts



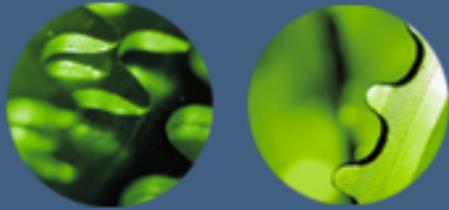
Administrative and Procedural Provisions

- Types of Proceedings – Like U.S. law, P.R.C. law recognizes 2 basic types of insolvency proceeding: reorganization and liquidation. The P.R.C. law also recognizes a 3d type of proceeding: composition. See Art. 7.
- Insolvency Test – Potentially confusing test for insolvency as prerequisite for filing. See Art. 2 (“unable to pay off debts falling due *and* its asset fails to meet the debts or it obviously lacks of liquidity”). Language suggests a “balance sheet” *and* a “liquidity” test.
- Venue Selection – More restrictive than those recognized under the U.S. Code – *cf.* Art. 3 (“domicile”), 11 U.S.C. 109 (location of property, place of business).
- Management Responsibility from Application → Acceptance or Rejection – Management appears personally liable for safeguarding the rights and interests of employees. See Art. 6.



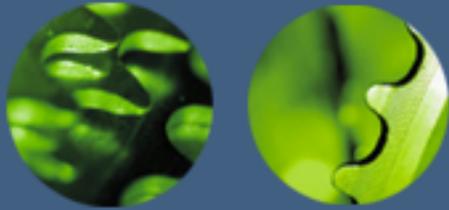
Administrative and Procedural Provisions

- Appointment and Role of Administrator – Administrator appointed upon acceptance of application. See Art. 13. Administrator’s role is ambiguous – Is administrator an agent of the Court (Art. 26)? Of creditors (Art. 69)? Of the debtor (Art. 73)?
- Administrator’s Standards of Conduct – Different from those imposed on trustees? *Cf.* Art. 130, 28 U.S.C. § 959(b).
- Debtor’s Responsibilities – May differ from those under U.S. law. See Art. 15, 73, 74. Debtor’s “relevant personnel” cannot leave jurisdiction without prior People’s Court approval. See Art. 15; Art. 129 for penalties if this provision is violated.



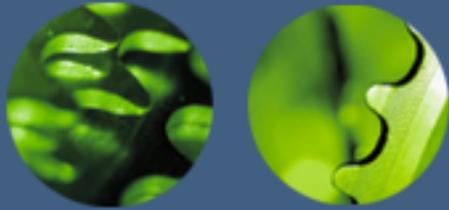
Administrative and Procedural Provisions

- Debtor's Liabilities – Personal liability for directors' supervisors', senior managers' violation of fiduciary duties (i.e., where “violat[ion] [of] obligations of being honest and diligent . . . leads to enterprise bankruptcy”). See Art. 125. Further penalties for (i) failure to attend creditors' meeting; (ii) failure to provide documentation; (iii) acts leading to avoidance actions; (iv) general criminal liability.
- Automatic stay provisions –
 - Stay of execution, attachment, etc. See Art. 19. Creditors can liquidate their claims but cannot collect. See Art. 44. Similar restrictions on the rights of secured creditors during reorganization (See Art. 75) and capital contributors (Art. 77).
 - Stay of existing litigation (See Art. 20), but *only* until the Administrator assumes control. See Art. 13, 22.
 - Restrictions on further litigation – all civil cases involving the debtor shall only be brought before the People's Court with the debtor's case. See Art. 21.
- First Creditors' Meeting – Held 1-3 months from publication of ruling of acceptance in the event of liquidation (See Art. 45, 62); 1 month after receipt of reorganization (i.e., “rectification”) draft plan (See Art. 79, 84) (i.e., 7-10 months after ruling of acceptance).



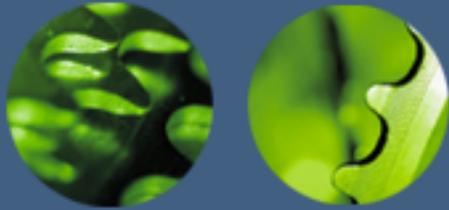
Administrative and Procedural Provisions

- “Ordinary Course” Operations – Prior Court approval for business operations or shut-down required if initiated before the first creditors’ meeting. See Art. 26, 69.
- “Adequate Protection” and Post-Application Liens – Article 37 unclear as to whether and under what circumstances court approval is required for (i) the determination and provision of adequate security; and/or (ii) valuation and payment of substitute security. See Art. 37; *see also* Art. 75 – no further guidance provided.
- Intellectual Property Rights – Intellectual property rights transfer is contemplated by new law. Much different from U.S. law in a majority of U.S. jurisdictions. See Art. 69(2).



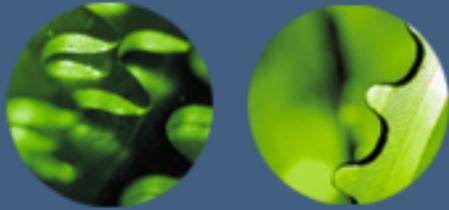
Administrative and Procedural Provisions

- Creditors' Meeting – Detailed provisions for formation and powers of creditors' meeting and designated creditors' committees. See Art. 60, 61 (chairmanship, functions and duties of creditors' meetings); Art. 67, 68 (formation of creditors' committee, functions and duties); Art. 69 (review of administrator's acts); Art. 65 (unresolved issues re: management, distribution, or conversion plan subject to people's court review); Art. 66 (ability to appeal people's court's rulings re: management, conversion, or distribution plan).
- Creditors' Voting Eligibility – Permitted based on allowed claims only; disputed claims cannot vote, except in case of temporary allowance (similar to Chapter 11 voting under U.S. law). See Art. 59.
- Creditors' Resolution Requirements – $\geq \frac{1}{2}$ creditors in attendance + $\geq \frac{1}{2}$ of aggregate amount of unsecured claims. See Art. 64.
- Conversion from Reorganization to Liquidation – See Art. 78. Analogous to 11 U.S.C. § 1112(b).
- Termination (i.e., Case Closure or Dismissal) – Provided where there is (i) no distribution; or (ii) a conclusive distribution. See Art. 120. Administrator's duties and cessation thereof outlined at Art's. 121, 122.



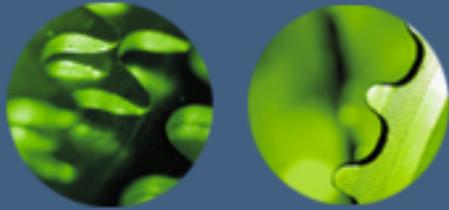
The Estate – Defining It And Augmenting It Through Avoidance and Other Recoveries

- Debtor's Estate Defined – See Article 30. Apparently focused on the *timing* of the acquisition of property. But what is an “asset”?
 - Legal property interest?
 - Equitable property interest?
 - Both?
- No Unauthorized Post-Acceptance Transfers – See Art. 16 (analogous to 11 U.S.C. § 549).
- “Turnover” Provisions – Analogous to 11 U.S.C. § 542. “Indemnification” provisions for failure to comply. See Art. 17.
- Constructive Fraudulent Transfers – Analogous to 11 U.S.C. § 548.
 - *Note* that there appears to be no insolvency test, as would be required under U.S. law. See Art. 31.
- Avoidance For Actual Fraud – Art. 33, 34, 36.



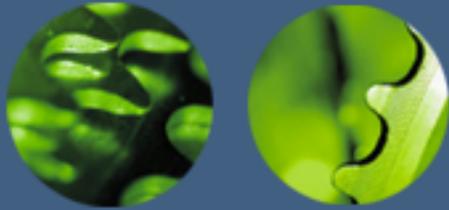
The Estate – Defining It And Augmenting It Through Avoidance and Other Recoveries

- Preferential Transfer Recoveries – Analogous to 11 U.S.C. § 547.
 - *Note* that there is no “benchmark” prerequisite for the ability to pursue such recoveries.
 - *Note also* a 6-month reach-back provision; a carve-out for transferees who can demonstrate that the “specific payment is beneficial to the debtor’s property.” Art. 32.
- Capital Calls – Administrator has the right to make “capital calls” from equity holders. See Art. 35.
- Recovery Of Property Not The Debtor’s – Owner of debtor-occupied property may take it back. See Art. 38, 76.
 - “Legal” v. “equitable” title?
- “Reclamation” – (*cf.* 11 U.S.C. § 546(c)). See Art. 39. Appears to apply to goods in transit.
- Off-Sets – Creditors with “off-sets” may do so without violating the recovery provisions of Art. 17. See Art. 40.



Treatment of Executory Contracts – Article 18

- Applies to contracts that are “executory” in nature.
- Analogous to 11 U.S.C. § 365(a), but with important differences:
 - Transfer of intellectual property rights. See *also* Art. 69, which specifically contemplates the “[t]ransfer of such property rights as the right to mine exploitation, tenure and ***intellectual property rights***” as one of the actions which may be presented to a creditors’ meeting for approval.
 - The Article contemplates rescission (or “dissolution”), not rejection (i.e., breach), as in U.S. law.
 - *Automatic* dissolution within 60 days, unless otherwise accepted by the administrator.
 - Decision to dissolve the contract (or to “accept” the contract with attendant performance guaranty) may be triggered earlier by the counter-party, upon 30 days’ notice.



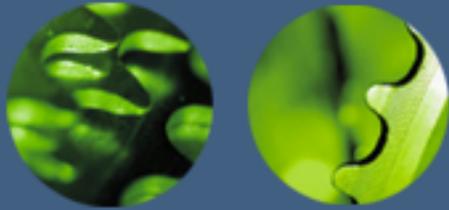
Treatment of Executory Contracts – Article 18

- *Note* that in a liquidation, the timing of Art. 18 effectively leaves the decision to “accept” a contract within the hands of the bankruptcy administrator.
- *Note* also that the Article appears to vest power of “dissolution” or “acceptance” *only* in the Administrator (also consistent with the requirement that the Administrator provide a “performance guaranty”).
 - Is the *debtor* is never empowered to deal with executory contracts in a reorganization?

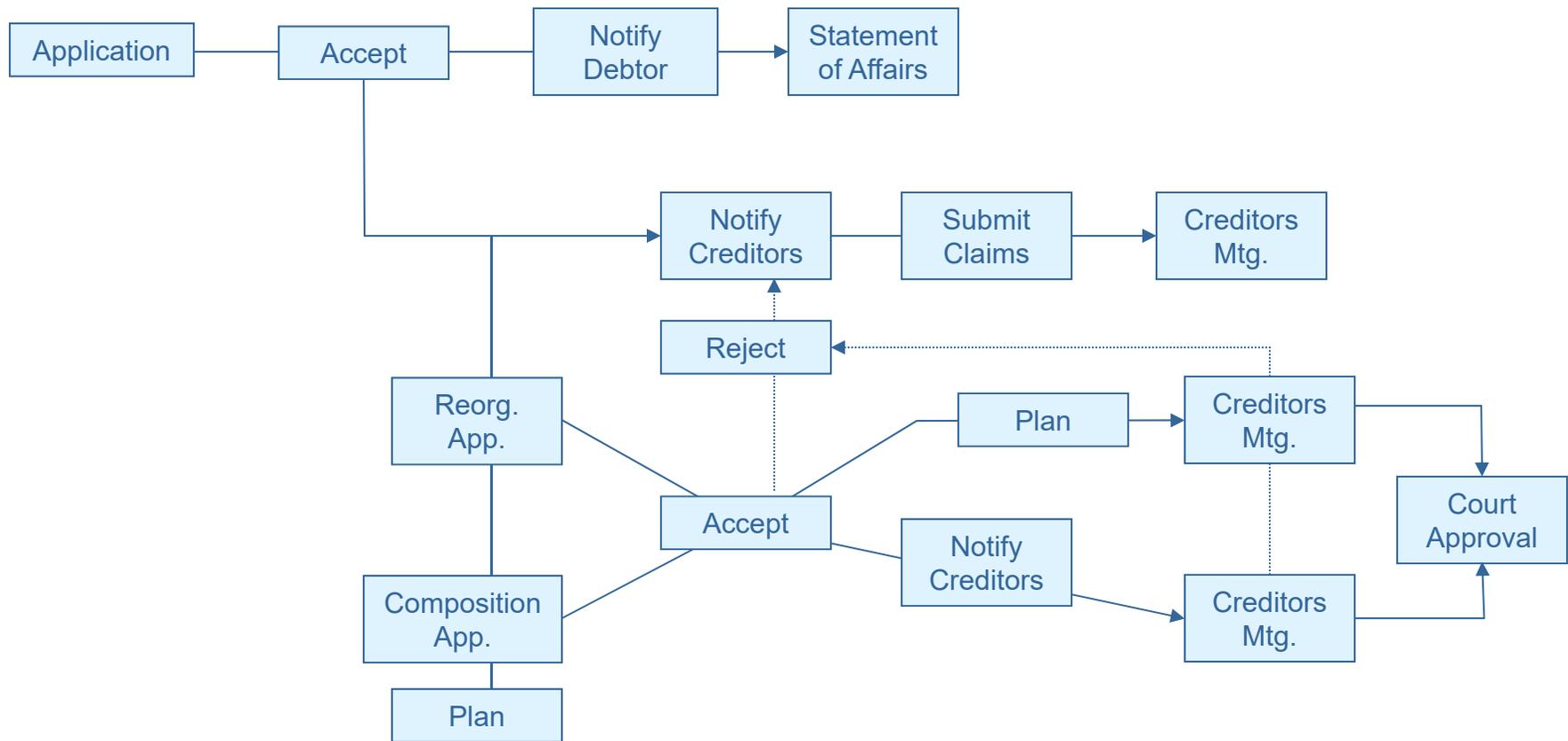


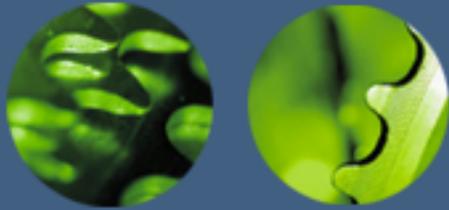
Reorganization and Composition





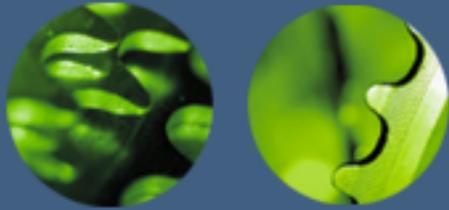
Reorganization and Composition





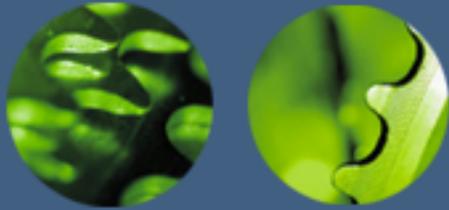
Reorganization

- Commencement of Reorganization Proceedings – Application may be filed by creditor, debtor, or “10%+” equity holder. Art. 70.
 - By debtor or by a “10%+” equity holder within the “gap period” between acceptance of the case and “declaration of insolvency” (i.e., about 15 days).
 - No such time limitations for creditors.
- Further Application to Operate as “Debtor-in-Possession” –
 - May be filed at any time “during the Reorganization period.” Administrator supervision required.
 - If granted, turnover provisions analogous to 11 U.S.C. § 543(b) are applicable to the administrator. Art. 73.
 - Alternative arrangement – administrator may remain in charge, but employ the debtor’s management and other personnel to manage the business. Art. 74.
- Plan Drafting – Either the administrator or debtor has ability to draft and propose plan of reorganization (i.e., “rectification”). See Art. 80.
- Plan Contents – See Art. 81.



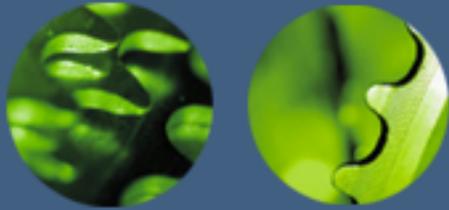
Reorganization

- Timing of Plan – Debtor or administrator has 6 months from date of approval of application to file Plan of Reorganization (plan period extendable for 3 additional months “on justifiable ground”). See Art. 79.
- Voting on Plan – Creditors’ meeting to be convened for voting within 30 days of receipt of reorganization draft plan. See Art. 84.
 - Art. 82 defines “voting tranches.”
 - Certain “social insurance premiums” exempted from plan treatment and voting. See Art. 83.
 - Equity can participate to the extent its rights are affected. See Art. 85.



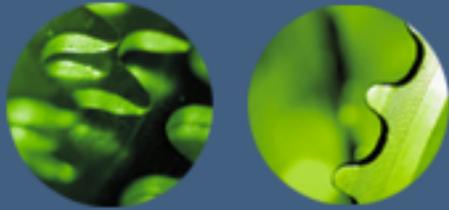
Reorganization

- Creditors' Adoption of Plan – Unanimous acceptance required; approval by People's Court w/in 40 days of acceptance (i.e., 10 days to apply for approval, 30 days to issue approval). See Art. 86.
- Art. 87: "Cram-Down" – Failure to obtain unanimous acceptance = negotiation with dissenting class, followed by further vote. Negotiated resolution cannot "impair the interests" other, previously accepting classes. If 2d vote fails to achieve adoption by dissenting class, approval nevertheless possible if plan meets requirements of Art. 87(1) – (6).
 - Art. 87(1) – Satisfaction of secured claims from collateral and payment for costs of delay in enforcement (or consent to different treatment).
 - Art. 87(2) – Satisfaction of priority (i.e., labor) and tax claims (or consent to different treatment).
 - Art. 87(3) – Treatment of general unsecured creditors must meet or exceed that of liquidation (*cf.* 11 U.S.C. § 1129(a)(7) – "best interests" test) (or consent to different treatment).
 - Art. 87(4) – "Fair and impartial" treatment of equity (or consent to different treatment).
 - Art. 87(5) – Fair treatment for all members of the same class + compliance with Art. 113 (setting forth distributive priorities).
 - Art. 87(6) – Plan is feasible.



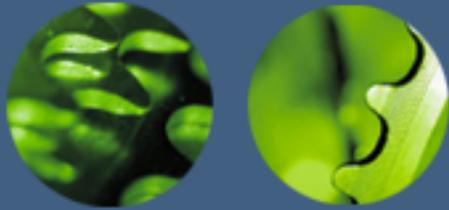
Reorganization

- Approval (i.e., Confirmation) – Approval within 30 days of application if compliance with Art. 87(1) – (6).
- Consummation of Plan – Debtor to implement plan, under Administrator’s supervision. See Art’s. 89, 90.
- Default = Conversion to Liquidation Proceeding –
 - Security provided for implementation remains in effect.
 - Partially paid creditors may retain distributions; however, they must wait until others of similar priority are “caught up” before receiving further distributions. See Art. 93.
 - See Art. 104 for similar treatment of creditors in case of failed “composition.”
- Conclusion of Proceeding – Upon expiration of “supervision term,” the Administrator submits a report to the People’s Court, reviewable by “interested parties.” “Supervision term” extendable upon application by Administrator. See Art. 91.
- Effect of Successfully Implemented Reorganization Plan – Plan binding on creditors and on debtor – all relevant claims and interests treated under its terms.
 - Appears to permit creditors without properly filed claims to wait until after implementation of the Plan to realize any payment – and then only under the same terms as those afforded to other members of their class (*Note* that this is different from the treatment of late-filed claims under U.S. law).
 - Protection limited *only* to debtor; guarantors and co-debtors receive no protection (*Note* that this is similar to U.S. law in federal bankruptcy proceedings). See Art. 92.
 - Debtor no longer obligated to pay treated debts that are reduced or discharged in conformity with Plan. See Art. 94.



Composition

- Composition – Also available *in lieu* of reorganization.
 - Debtor may file – same “gap period” as for reorganization. Draft composition agreement must be submitted concurrent with application for same. See Art. 95.
 - People’s Court rules on acceptability *before* submission to creditors’ meeting. See Art. 96. *Note* that there are no specifically articulated statutory standards for approval; only “satisf[action] [of] requirements provided for in this Law.”
 - Secured creditors may exercise their rights upon acceptance. See Art. 96.
- Voting - $\geq \frac{1}{2}$ creditors present, voting $\geq \frac{2}{3}$ total unsecured claims amount. See Art. 97.
- Final Approval – Composition agreement as adopted subject to final approval by People’s Court. See Art. 98.
- Consummation of Plan – Similar to that of reorganization plan. See Art. 102.
- Default = Conversion to Liquidation Proceeding – See Art. 104. Same effect on prior distributions as under reorganization plan (Art. 93).
- Effect of Approved and Successfully Implemented Composition Plan – Similar to that of approved reorganization plan.
 - Debtor obligated to repay according to terms (See Art. 102).
 - Binding on all parties (See Art. 100); no protection for guarantors/co-debtors (See Art. 101).
 - Debtor no longer obligated to pay treated debts that are reduced or discharged in conformity with Plan (See Art. 106).



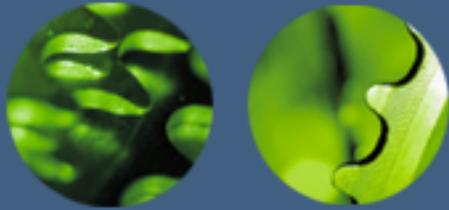
Composition

- Termination → Liquidation – When?
 - If no approval of reorganization plan. See Art. 88.
 - If no adoption or approval of composition plan. See Art. 99.
 - In case of fraudulently procured composition. See Art. 103. *Note* that in the case of fraud, previously paid creditors may retain distributions insofar as such distributions are *pro rata* with other creditors.

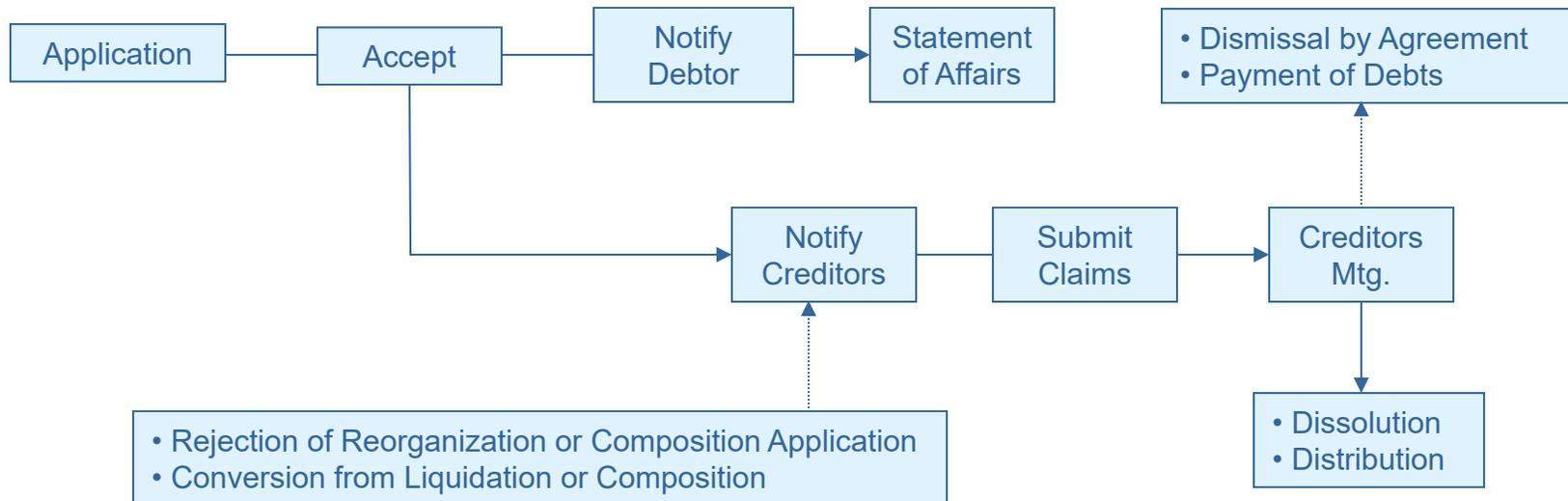


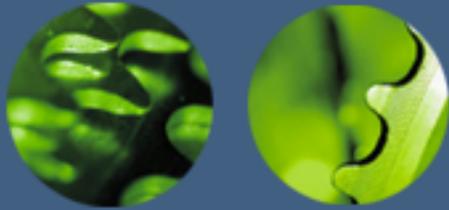
Liquidation

- Procedure
- Claims, Priorities, Distribution



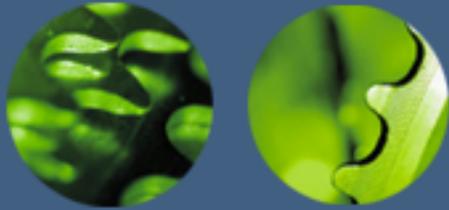
Liquidation





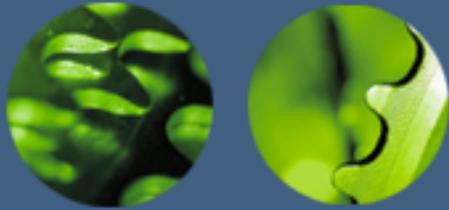
Liquidation

- “Default” Procedure Upon Declaration of Bankruptcy
- Procedure – Service of declaration of bankruptcy on debtor within 5 days of issuance; announcement and notification to creditors within 10 days of issuance. See Art. 107.
- Disposition of Assets – Administrator to formulate and submit disposition plan to creditors’ meeting for approval. See Art. 111. The Article provide for People’s Court disposition of residual disputes where attendees at creditors’ meeting can’t agree. *Id.* (referring to Art. 65, ¶1 (itself referring to Art. 61(8), (9)).
- Default Disposition Method – Auction Sale. See Art. 112.
- Distribution of Proceeds – Per “Plan of Distribution” as described at Art. 115. Implemented by Administrator per Art. 116. See Claims, Priorities, Distribution for further discussion of distribution procedure and rules.
- Liquidation “Escape” Clauses –
 - Unanimous agreement between debtor and creditors, in absence of formal composition application. Consensual agreement must be approved. See Art. 105.
 - Third party provides security or pays debtor’s obligations, or debtor pays in full. See Art. 108.



Claims, Priorities, Distribution

- Debtor to Provide Statement of Scheduled Liabilities – Art. 48. Final claims scheduling under the control of the Administrator. Art. 57.
- Claims Bar Date and Proofs of Claim – Art. 45.
- Creditors Must File Proofs of Claim – Art. 49.
 - “Class proofs of claim” OK (*cf.* U.S. law, which in some jurisdictions appears to preclude use of class proofs of claim). Art. 50.
 - Claims v. related “joint and several” debtors. Art. 52.
 - Allowance of contingent (i.e., non-adjudicated) and contractual “dissolution” claims – Art. 47. *See also* Art. 18, 53 (setting forth similar provisions for dealing with “dissolved” executory contracts).
 - Subrogation claims filed by guarantors who have paid on debtor’s behalf – Art. 51. Similar provisions at Art. 55 cover payments made by parties who have made payments or accepted a bill where the debtor is the bill drawer.
 - Claims arising from “agency” operations, undertaken without knowledge of the debtor’s insolvency proceedings – Art. 54.
 - Undersecured claims are deemed general unsecured claims – Art. 110.
- No Post-Acceptance Interest – Art. 46.
- No Late-Filed Proofs of Claim – Art. 56.
- Disputed Claims Adjudicated by People’s Court – Art. 58.



Claims, Priorities, Distribution

- Secured Creditors – entitled to “payment in priority over [the] debtor’s specific asset.” Art. 109.
 - *Note*, however, an important exception: “labor claims” (as construed by Article 113) accrued prior to 6/1/07 are “grandfathered” and may be satisfied from the debtor’s “specific assets prior to the secured claims enjoyed by secured creditors stated in Article 109.” See Art. 132.
- Administrative Expense Provisions (*cf.* 11 U.S.C. § 503(b)). See Art. 41.
 - “Administrative expense” priority extends to “community debts” or “debts of common interest.” See Art. 42.
 - Administrative costs and “common interest” debts must be “paid off instantly from the debtor’s property.” See Art. 43.
 - These provisions must be read in context with provisions giving the secured creditor “payment in priority over [the] debtor’s specific asset.” See Art. 109.
- Priority Distribution Scheme – See Art. 113. Distributions to be in cash unless otherwise determined at the creditors’ meeting. See Art. 114.
- Guarantors and Co-Debtors Still Liable. See Art. 124.
- Reserves for Disputed Claims – See Art. 117.
- Distributions. Deposited amounts must be distributed within 2 years after termination of the insolvency proceeding. See Art. 119.
 - Additional distributions are recoverable within 2 years of the proceeding through: (i) additional avoidance recoveries per Art’s. 31, 32, 33, 36; (ii) additional recoveries from the debtor.
 - Where administrative insolvency would result from recovery efforts, recovery excused. See Art. 123.
- Uncollected Distributions *Escheat* to the State – See Art. 118.



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