

Transnational (Transborder) Insolvency, Creditor Rights, and Bankruptcy Practices SYLLABUS (30-hour course)

COURSE INTRODUCTION

Over the last few decades, the homogenization of business and commercial practices has become the norm in cross-border business operations. It is natural for businesses to seek trans-border operational predictability because this helps them to manage risks more effectively. Such trends have been apparent for many years now.

However, no uniform global insolvency laws exist yet. While there is a need for such laws to tackle trans-border financial defaults, there has been no internationalization of redress of private financial defaults. Nevertheless, some patterns in practice have emerged and some issues in cross-border insolvency have stood out over others.

While most legal systems provide little uniformity and depth for dealing with insolvency issues in cross-border operations, the U.S. bankruptcy system is well-developed to address all or most such issues. As a result, the U.S. bankruptcy system is emerging as the model to which most world systems look and conform. This course aims to address the cross-border insolvency practices and issues from the perspective of the U.S. bankruptcy system model.

The U.S. legal system provides both plenary (comprehensive) and ancillary (supplemental) proceeding remedies for cross-border financial defaults. Title 11 of the United States Code (where all U.S. federal laws are codified) provides substantial uniformity of treatment across state, federal, and foreign laws and proceedings.

This course addresses practices and issues connected even in small ways to operational presence in the United States. The course will give students cross-border insolvency insights for the entire spectrum of business existence, including business forms, formations, operations, agreements, financial defaults, creditor rights, collections, and closings. When a business has assets, obligations, clients, customers, and/or vendors in multiple countries, the question of protection proceedings arises in multiple jurisdictions. While it is simple to call a local attorney after the financial default has already occurred, this course aims to give students the acuity to avert altogether or at least minimize losses from the default, well-before it occurs.

I. Introduction to Bankruptcy Fundamentals

A. Insolvency: Burdens and Benefits

B. Creditor Rights

C. The Carrot or The Stick: Cycles Without Dead-Ends

The Biblical Model

No Debtor Prisons

Breaching the Contract: A Viable Business Purpose?

D. Survey of World Bankruptcy Laws

1. UK
2. Others

E. Insolvency Legal System

1. Pre vs. Post Bankruptcy Filing
2. Liquidations vs. Reorganizations
3. Business Bankruptcies
4. Farmer Bankruptcies
5. Individual Reorganization Bankruptcies

II. Introduction to U.S. Bankruptcy Laws

A. Law versus Equity

B. Claims and Remedies

C. Mesh of State and Federal laws

D. Private Parties: The Trustee versus The Debtor In Possession

E. Judicial Power

1. Independent Court System (Separation of Powers)
2. Jurisdiction: The Scope of Judicial Power

(i) In Rem (jurisdiction over property)

(ii) In Personam (aka personal jurisdiction) (jurisdiction over the person)

(iii) Subject Matter Jurisdiction (jurisdiction over the subject matter)

3. Constitutional Limitations: Adjustment of Debtor-Creditor Relationship (vs. Enforcement of Private Rights)

F. The Automatic Stay

G. The Bankruptcy Estate

H. The Bankruptcy Discharge, a Fraud Clearing House: The Ultimate “Carrot”

I. Parties: The Debtor-In-Possession

J. Parties: The Trustee

K. Parties: The Creditors

L. Misrepresentation Fraud

M. Transfer Fraud

N. Other Intentional Torts

1. Embezzlement

2. Larceny

3. Conversion

4. Intentional Interference with Prospective Economic Advantage

5. Intentional Interference with Contractual Relations

III. Types of U.S. Bankruptcies

A. Voluntary

B. Involuntary

C. Liquidations

D. Reorganizations

E. The Court, The Trustee, and The Debtor-In-Possession

1. Court Functions

2. Trustee Functions

(i) The Bankruptcy Estate

3. Parties Represented by Trustee: The Body of Creditors

4. Scope of Trustee Representation

(i) Trustee Duties

5. Parties Represented by The Debtor-In-Possession: The Body of Creditors

6. Scope of DIP Representation

(i) DIP Duties

IV. Trustee and DIP Dichotomies and Powers

A. Trustee versus DIP Dichotomy

B. DIP versus Debtor Dichotomy

C. Trustee and DIP Standing as Debtor

D. Trustee and DIP Standing as Creditor

E. Trustee and DIP Standing as Trustee

V. Remedies Beyond Bankruptcy

1. Pre-Judgment Remedies

(i) Voluntary Encumbrances

Being a secured creditor before seeking a remedy from the court always provides an advantage

Types of Collateral for Encumbrances

Voluntary Liens on Real Property (Deed of Trust)

Voluntary Liens on Personal Property (UCC Financing Statements)

Priorities: Notice Standards

Constructive notice issues and actual notice issues are at the heart of understanding the priorities among different encumbrances

- (ii) Temporary Restraining Orders
- (iii) Preliminary Injunctions
- (iv) Lis Pendens
- (v) Orders for Exams

2. Post-Judgement Remedies

- (i) Recovering the Transfers
- (ii) Recovering the Value of the Transfers
- (iii) Unjust Enrichment
- (iv) Equitable Estoppel
- (v) Equitable Liens
- (vi) Quantum Meruit
- (vii) Alter Ego: Forward and Reverse Piercing of the Corporation Veil
- (viii) Equitable Subrogation
- (ix) Involuntary Liens on Personal Property
- (x) Involuntary Liens on Real Property

VI. Trans-Border Ramifications

A. Plenary Proceeding: Chapter 11

B. Ancillary Proceeding: Chapter 15 (when foreign plenary proceeding)

1. Sword

- (i) Foreign Debtors
- (ii) Filing claims against creditors
- (iii) Doing discovery

2. Shield

- (i) Foreign Debtors
- (ii) Automatic Stay to stay litigation against debtor

C. Plenary vs. Ancillary

1. The Automatic Stay

2. The Bankruptcy Estate

3. Deference to Foreign Proceedings

D. Requirements for Chapter 15 Ancillary Proceeding:

1. Typical Candidate: company doing business in single foreign jurisdiction only with presence in U.S. market

Forms of Presence in U.S. market

2. Foreign *Main* Proceeding vs Foreign *Non-Main* Proceeding

3. Main Proceeding

(i) Stay is Automatic

(ii) Foreign Proceeding must be in country of Center of Main Interests
(aka principles place of business)

4. Non-Main Proceeding

(i) Filed where establishment, incorporated, organized, or registered

(ii) Stay Not Automatic

E. Limitations on Chapter 15 Proceedings

1. No U.S. avoidance powers (except perhaps using foreign law)
2. Foreign representative initiating plenary chapter 11 or chapter 7 proceeding (a way to utilize U.S. avoidance powers)
3. U.S. Avoidance Powers limited to U.S.-based assets

F. Specific Proceedings

1. Enforcement of Foreign Court Orders in the U.S.
2. Filing of Claims
3. Asset Sales
4. Turnover of Debtor's Property
5. Discovery
6. Executory Contracts