GLOBAL FORUM ON LAW, JUSTICE AND DEVELOPMENT (GFLJD)

COMMUNITY OF PRACTICE

QUESTIONNAIRE ON INSOLVENCY LAW AND COMPANY LAW

This questionnaire addresses the issues affecting the interface between insolvency law and company law, and should be answered providing a) references to the statutes and provisions quoted; b) relevant cases, if any; c) any other supporting information, such as references to books or articles.

As an introduction to the questionnaire, consider the following examples of interaction and conflicts between insolvency law and company law (the examples, that assume certain characteristics of some legal systems, should be understood as having only illustrative purposes):

1) A company is under a reorganization procedure. Its directors have prepared a reorganization plan that, inter alia, provides for the conversion of creditors’ claims into equity of the company. In more detail, the plan would provide for the cancellation of the existing shares and the issuance of new shares to be allotted according to the plan, exclusively to the company’s creditors, except if the shareholders make a new contribution into the company.

The plan also provides for the transfer of a substantial part of the business to a third party. The shareholders oppose the plan. However, the creditors and the board, with the support of a due diligence analysis, have reason to believe that the opposition is unreasonable, as the value of the company’s liabilities clearly exceeds the value of the assets, and in a liquidation the shareholders would not receive any proceeds.

2) In a company under a reorganization procedure, the plan foresees the issuance of new shares to be allotted to the company’s creditors, diluting the existing shares but without cancelling them. The new shares would have prevailing voting and governance rights over the existing shares. The shareholders oppose the plan.

3) A reorganization plan foresees, inter alia, a capital increase structured in such a way to ensure that a substantial share in the company would be acquired by an external investor, whose resources/business strategies would help save the long-term operation of the company. However, the shareholders opposing the plan decide to exercise their pre-emption rights in the capital increase, thereby defeating the plan’s strategy based on the stepping-in of the significant investor.

4) A company is under a reorganization procedure and the board of directors is designing a plan that, while ensuring the viability of the business, would adversely affect the rights of the shareholders. A minority shareholder requests that a general meeting of the company be held, seeking the approval of several proposals by the meeting, including the removal of the directors of the company in reorganization.

5) A reorganization plan is approved with the decisive support of intra-group (insider) creditors, with the result that unsecured creditors suffer a loss, whereas shareholders retain value in the reorganized company.

These stylized examples, drawn from a number of real cases in different jurisdictions around
the world, illustrate the tension between the shareholders, the creditors and, in general, company law and insolvency law.

The purpose of the following questionnaire is to identify how shareholder rights are affected by the insolvency of the company (including in cases of imminent insolvency), and the interaction between shareholder rights and the normal operations in an insolvency process (either a liquidation or a reorganization process). Although some general questions are also relevant for insolvency procedures applicable to special regulated companies (i.e., for example, financial institutions), the questionnaire is designed to analyse the conflicts between insolvency law and company law, and therefore, reference should be made to the ordinary insolvency procedures as applied to the corporate forms which are generally used in your jurisdiction for both “close” and “open” companies (1).

The main issues can be summarized as follows:

- The respective powers of the board and the shareholders’ meeting in insolvency proceedings;

- The substantive and procedural rights of shareholders in a company subject to insolvency proceedings;

- The possibility of using the old/same corporate entity as a vehicle for the reorganization of the company;

- The possibility of the shareholders to retain a participation in the reorganized company, and, if they are allowed to retain a participation, the allocation of value between creditors and shareholders.

All of these issues are structured around two principal areas of conflict between company law and insolvency law: the individual rights of shareholders and the role of the shareholders’ meeting in an insolvent company.

Dealing with the preceding issues implies, inter alia, addressing the question of the legal position of the shareholders in companies, e.g. the question of whether and to what extent the law considers shareholders as owners of the company in a legal sense. The effects on the legal position of shareholders of an insolvent company may in fact create a conflict with special - even constitutional- safeguards for the protection of property rights. These safeguards, in turn, may be less or more stringent, depending on whether the company is insolvent in the balance-sheet sense (i.e., whether the value of its liabilities exceeds the value of its assets) or not, and whether a liquidation or a reorganization procedure is used.

In addition, the preceding issues may present further variables according to the characteristics of the company involved. Outcomes could be different depending on the fact that the company is closely held or is a listed company, or is a specially regulated company, such as a financial intermediary.

(1) For instance, the questionnaire for the UK will include references to both limited liability companies (LLCs) and public limited companies (PLCs); the questionnaire for Germany will cover both AGs and GmbHs; and the questionnaire for Italy will cover SPAs and SRLs.
I. Introductory questions on the insolvency procedures available in the relevant jurisdiction.

1. What insolvency procedures – either liquidation or reorganization procedures – are available for distressed or insolvent companies?

2. Are there special insolvency procedures available for financial institutions or for other special classes of companies?

3. Are there any specific legal provisions that apply to debt restructurings achieved without a full formal insolvency process?

4. What are the commencement criteria for insolvency procedures?

5. Who can propose a restructuring plan? (e.g. corporate bodies, insolvency representatives, creditors)

6. Please describe whether and to what extent shareholders’ rights can be affected by a situation of distress/insolvency of a company before and/or irrespective of the opening of a formal insolvency proceeding (e.g., are there any fiduciary duties of the shareholders to approve corrective measures/plans proposed by the board?)

II. Shareholders’ Rights in Companies Subject to Insolvency Proceedings

7. Are shareholders notified of the initiation of an insolvency process? If notification is individualized, what are the mechanisms used to identify shareholders?

8. Are shareholders required to file claims in the insolvency proceeding? What are the consequences of not filing a claim?

9. Can shareholders continue to trade and transfer shares after the initiation of an insolvency proceeding affecting the company?

10. Do shareholders have the right to request that a shareholders’ meeting is held, even if the company is insolvent? (If there are separate reorganization and liquidation procedures, does this affect the response?)

11. Do shareholders have the right to request information in an insolvent company? Do they have information rights as to the progress of a reorganization procedure? Can they exercise that right vis-à-vis the directors of the company -if they remain in charge of the company-or vis-à-vis the insolvency representative?

12. Can shareholders make proposals for nomination of directors, if the directors continue managing the company?

13. If special categories of shares exist whose holders are granted additional governance rights, are these additional rights affected by the opening of an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

14. Can shareholders challenge the decisions of the shareholder meeting, if it is still active? Do they retain the possibility of taking action against the acts of the directors? And against the acts of an insolvency representative? Is any authorization by a judicial or
15. Do shareholders have the right to call a special investigation of the affairs of the insolvent company?

16. Does the law provide for the establishment of a shareholders’ committee (or several committees, in case of different share classes)? What are their powers? Who bears the related costs?

17. Can shareholders voluntarily transfer shares of the company undergoing insolvency proceedings against any provisions in the articles/bylaws restricting transfers of shares?

18. Can outstanding shares of the company undergoing insolvency proceedings be assigned to third parties without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e.g., does the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

19. Can outstanding shares of the company undergoing insolvency proceedings be cancelled without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e.g., does the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

20. Do shareholders of the company undergoing insolvency proceedings have pre-emption rights over new issues of shares? (2) Are there special conditions for the suppression of pre-emption rights if the company is insolvent (if there are separate reorganization and liquidation procedures, does this affect the response?).

21. Can shareholders retain a participation in the company that has emerged from an insolvency process (or in the company to which the insolvent company’s assets have been transferred) even if the company was insolvent according to a balance-sheet test? (i.e., where the value of its liabilities exceeds the value of its assets) If yes, under what conditions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

22. Are the ranking of classes of shares and the preferential rights of classes of shares affected (and if yes, to what extent) by the fact that the company is undergoing an insolvency process? (If there are separate reorganization and liquidation procedures, does this affect the response?)

23. Can shareholders, in the course of an insolvency procedure, supply goods, services or financial resources to the company? If yes, under what conditions (e.g., judicial authorization)? What would their ranking position be towards other creditors?

24. Can shareholders, in their capacity as counterparties, be under a duty to continue a contractual relationship with the insolvent company during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the

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(2) Please, note that the power to decide new issues or conversions of shares, as well as the power to decide operations that affect the structure of the corporate entity (e.g., by merger, spin-off, or change of the legal form) are dealt with in Questions 33 and 34 below.
25. Can shareholders (or companies of the same group) holding credit claims against the company under insolvency procedure participate in the creditors’ meeting and vote on the insolvency plan without restrictions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

26. If shareholders (or companies of the same group) do not hold credit claims against the company under insolvency procedure, must/can they participate in the creditors’ meeting? If that is the case, what rights or duties do they have in that meeting? (If there are separate reorganization and liquidation procedures, does this affect the response?)

27. Do shareholders in an individual company have information rights as to the filing of insolvency proceedings by the parent or other related companies?

III. The Role of the Shareholders’ Meeting in Companies Subject to Insolvency Proceedings

28. Does the shareholders’ meeting continue to exist in insolvency proceedings? (If there are separate reorganization and liquidation procedures, does this affect the response?)

29. Does the shareholders’ meeting preserve all of its competences, generally? (If there are separate reorganization and liquidation procedures, does this affect the response?)

30. Does the shareholders’ meeting need to approve the accounts of the distressed/insolvent company?

31. Does the shareholders’ meeting have the power to dismiss directors – if directors are still in charge of the insolvent company? Can the shareholders’ meeting request the removal of the insolvency representative? (If there are separate reorganization and liquidation procedures, does this affect the response?)

32. Is a shareholders’ meeting authorisation required to start an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

33. Does the shareholders’ meeting need to approve an insolvency or reorganization plan? Can shareholders, even individually, challenge an insolvency or reorganization plan?

34. Is a shareholders’ meeting decision required to issue new shares of the company undergoing insolvency proceeding? Can a new share issue be decided by the board? Can a new share issue be decided by the insolvency representative? (3) If a capital increase has to take place through the conversion of claims into new shares, does this affect the response?

35. Can an insolvency/reorganization plan affect the structure of the corporate entity (e.g., by merger, spin-off, or change of the legal form)? Is a shareholders’ meeting decision required to issue new shares of the company undergoing insolvency proceeding? Can a new share issue be decided by the board? Can a new share issue be decided by the insolvency representative? (3) If a capital increase has to take place through the conversion of claims into new shares, does this affect the response?

(3) These questions are aimed at understanding whether the fact that the company is subject to insolvency proceedings allows or causes deviations from the company law rules determining the body competent to take decisions on the issue of new shares of the company, and/or from the company law rules establishing the criteria and purposes with which such decisions must comply.
authorization required for this?

36. On what conditions can the company carry on business during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?) Is a shareholders’ meeting authorisation required?

37. In the course of an insolvency procedure, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business operation of the company? Is a shareholders’ meeting authorisation required? (If there are separate reorganization and liquidation procedures, does this affect the response?)

38. Does the shareholders’ meeting have any power in relation to a decision of the board or the insolvency representative to continue or reject any favourable, unfavourable or essential contract during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?).

39. If an insolvency plan can be presented for a whole corporate group, must that plan be approved by the shareholders’ meetings of each company of the group, including of those that are balance-sheet insolvent? How are the different meetings’ decisions coordinated? Are there specific safeguards (e.g., any veto power or other remedy) for the minority shareholders of the companies that are not insolvent?

40. If companies belonging to the same group file separate insolvency proceedings, are there specific requirements/mechanisms to provide for coordination of those proceedings? Are shareholders’ meetings of the relevant companies involved in the coordination mechanisms, if any?

IV. Other Obstacles for Insolvency Procedures Found in Company Law

41. Please list any other legal provision in company law that, in your opinion or in your experience, may interfere with the insolvency procedure of a company in your jurisdiction.