

Core Principles for an Insolvency Law Regime

1. The ILR should at all times promote economy, transparency and speedy resolution.

All insolvency processes are inherently disruptive to the community and should, therefore, be resolved as quickly as possible. A lengthy process is almost always consistent with a deterioration in the value of the debtor's assets. In addition, in order for the process to be acceptable to as wide a group of stakeholders as possible, it should be seen to be public in nature and, unless absolutely necessary, avoid permitting secret resolutions and compromises.

2. The ILR should provide clear tests for the initiation of an insolvency proceeding and should require notice to be given to all known creditors of such proceeding.

It should be clear to both creditors and debtors as to what constitutes the legal definition of insolvency and what evidence needs to be provided to support such definition. In addition, the ILR should require the Insolvency Administrator (such as a trustee or liquidator) to give notice to all known creditors of the initiation of the insolvency proceeding.

3. The ILR should permit both bankruptcy (liquidation/wind-up) and restructuring (re-organization/workouts).

Liquidations are necessary to cull inefficient or unprofitable business from the marketplace and redistribute resources to more efficient or profitable ones. A modern ILR, however, must permit re-organisation, where appropriate, as a way of preserving the going-concern value of a debtor's assets, enhancing stability within the debtor's community and encouraging debtors and creditors to work with one another toward amicable resolutions.

4. The ILR should provide for immediate interim conservatory and protective measures.

Often there is a time gap between the initiation of the insolvency proceeding (such as the filing of a petition) and the administration of the insolvent estate. While this time gap should be kept as small as possible, the ILR should provide interim protection, for the benefit of the debtor and the creditors, to ensure that the assets of the debtor are safeguarded during this period. Where re-organisation is appropriate, interim protective measures will permit the debtor reasonable time to restructure its affairs and protect its assets from being stripped away by anxious creditors.

5. Where liquidation is appropriate, the ILR should strive to interfere as little as possible with the efficient realisation by secured creditors of their security.

Where no going concern value is to be preserved, the ILR should limit its conflict with the existing contractual rights of secured creditors. Any interference with these

rights (such as the elevation of wage and tax amounts above secured claims or the requirement that the Insolvency Administrator be the sole party with the right to liquidate encumbered assets) likely increases the cost of obtaining credit. While it may be appropriate to have a mechanism by which the Insolvency Administrator can challenge the rights of secured creditors, such challenges must be completed quickly and cost-effectively. To the extent that there are residual claims after the realization of the secured creditors' security, such claims should be permitted to be treated like all other unsecured claims.

6. The ILR should treat like parties in a like fashion

Where voting is required or distributions are made, stakeholders of equal status should be given equal treatment, without regard to nationality, residency, political affiliation or economic status.

7. The ILR should provide for the independent review of transactions and actions by the debtor and the imposition of sanctions in case of misconduct.

An essential component of liquidation and re-organisation is the ability to impose sanctions upon parties who attempt to frustrate the insolvency process. This should typically include the ability to reverse fraudulent, below market or preferential transactions that occurred on the eve of the debtor's insolvency and the ability to sanction high-ranking officers and directors of the insolvent company for fraudulent or uncooperative behaviour.

8. Where re-organisation is appropriate, the ILR should permit new priority financing during the restructuring process.

Most insolvent companies will require additional working capital during the re-organisation process to complete their restructuring activities. While each insolvency must be treated on a case-by-case basis to determine if such financing is appropriate, a mechanism is needed to give this financing "super-priority".

9. The Insolvency Administrator should be an impartial third party.

The Insolvency Administrator should not be a servant to the debtor or to any single or multiple creditors. The liquidation or restructuring of an insolvent corporation impacts the debtor, the creditors, the employees, the state and the community. While these parties are accorded different levels of priority and importance in the insolvency process, the Insolvency Administrator must be seen as able to balance these competing interests so that the process itself is seen to be fair. In that regard, the Insolvency Administrator should be accountable to and regulated by a state agency or court.

10. The ILR should facilitate cross-border insolvencies.

Given the trans-national nature of many corporations, a modern ILR should not ignore the added complexities caused by the insolvency of a debtor that operates in multiple countries, either directly or through affiliated entities. Ideally, the ILR will have clear rules for the recognition, where appropriate, of foreign court orders and a clear

mechanism for determining how conflicts between different national ILR's will be resolved.