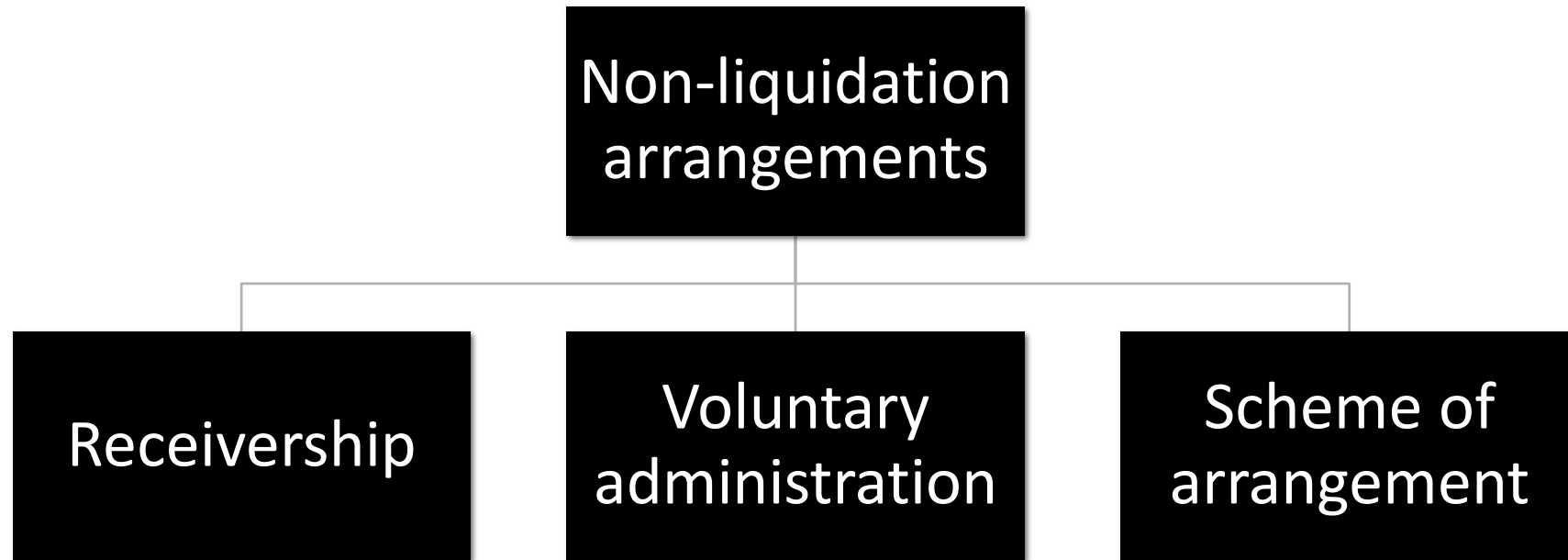


Week 6: Voluntary Administration, Governance during DOCA, Stay on ipso facto clauses

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Voluntary Administration

Any problems with the current framework?

Governance during DOCA

Depends on the terms of the DOCA

Three options:

- (1) no director involvement and no resumption of director management.
- (2) allow the directors to resume their full role in management, while quarantining property or aspects of the rescue for the deed administrator.
- (3) give the directors a major role in the implementation of the DOCA with a limited role for the deed administrator and a full resumption of the directors' management role.

“In all circumstances where directors remain appointed as directors of the company, they continue to owe and must comply with their statutory and common law duties regardless of their level of involvement or managerial power under the DoCA.”

Also have duties under DOCA.

Stay on ipso facto clauses

Ipsa facto = “by the very act”

What is an ipso facto clause?

“An ‘ipso facto’ clause is a provision that allows one party to terminate or modify the operation of a contract upon the occurrence of some specific event, regardless of otherwise continued performance of the counterparty.”

“...parties are free to enter contracts on their own terms but the caveat here is that the terms of such contracts should comply with whatever legislative regime fixes upon that particular contract. The ipso facto clause that can now be stayed by the Corporations Act is a perfect example of this approach in action.”

“A clause may be typically worded ‘Without limiting any other right A may have under this agreement or otherwise at law, A may terminate this agreement by notice in writing to B if an Insolvency Event occurs in respect of B.’”

Be careful what you wish for! Evaluating the ipso facto reforms (2019) 34 Aust Jnl of Corp Law 84

Stay on ipso facto clauses

Rationale? To promote restructuring

Building a Restructuring Hub: Lessons from Singapore:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940512

4.3. Data and analysis

4.3.1. Attractiveness of reorganisation procedures for debtors

As shown in Table 1, the most attractive reorganisation procedure for debtors has been traditionally found in the United States. This is due to several factors, including the existence a DIP regime as a general rule, the lack of a special liability regime for corporate directors, and the availability of DIP financing, restriction on *ipso facto* clauses and a cross-class cramdown. The attractiveness of the US Chapter 11 reorganisation procedure has not

Stay on ipso facto clauses

Rationale in Australia:

“...enabling businesses to continue to trade in order to recover from an insolvency event instead of these clauses preventing their successful rehabilitation.”

Stay on ipso facto clauses:

Apply to: VA, receivership, Schemes of arrangement

“The protections do not apply to liquidation or provisional liquidation as these are not generally used to undertake corporate rescue or restructuring. The protections do not extend to a company under a deed of company arrangement (‘DOCA’) as the restructure formulated during voluntary administration is being implemented at this time.”

What does the new law say?

<https://www.legislation.gov.au/Details/C2017A00112> [Specifically see s 434J]

Corporations Regulations 2001 (Cth) – Reg 5.3A.50

Ministerial Declaration Corporations Amendment (Stay on Enforcing Certain Rights) Declaration 2018

Exclusions/ carve-outs

https://www.youtube.com/watch?v=8fHvtRHP_c8&t=12s (from 1.10)

International view: <https://www.law.ox.ac.uk/business-law-blog/blog/2021/10/promise-and-perils-regulating-ipso-facto-clauses>

How to make the stay on ipso facto clauses work?

Step 1: Clarity

Step 2: Scope

What about the other party?

“...those dealing with struggling businesses may find themselves in relationships which they cannot terminate, dealing with an entity which they never consented to dealing with.” Frederick Finiguerra

The proposed reforms to insolvency laws: great for turning around; not so great for turning off (2017) 30(4) IPLB 79

Step 3: Rights of counterparties

Step 4: Articulate these policy choices clearly so that creditors understand the rationale.

“Finally, it might be expected that the reform of deny the effect of ipso facto clauses will add to the already active moves by some creditors to pre-emptive monitoring of companies and the increased role of pre-insolvency advisors. Contracting parties with the freedom of contract have always had the ability to agree to monitoring and if there is a feeling that the stay on ipso facto clauses has increased their risk then rather than paying attention to an Insolvency Event they will position themselves to know of the counterparty’s financial difficulties.” (Harris and Symes)

434K Lifting the stay

- (1) The Court may order that subsection 434J(1) does not apply for one or more rights against a corporation if the Court is satisfied that this is appropriate in the interests of justice.
- (2) An application for the order may be made by the holder of those rights.

While we are talking about clarity...

The government's response to the independent panel's review and recommendations to improve the safe harbour:

Recommendation 4:

“The Review recommends that a plain English ‘best practice guide’ to safe harbour be developed by Treasury in consultation with key industry groups. The Review recommends that this guide set out general eligibility criteria for appropriately qualified advisers.”

Supplemental suggestion to updating ASIC's Regulatory Guide 217 ‘to refer to the insolvent trading prohibition, and the safe harbour provisions, together with general guidance on the operation of the relevant provisions.

Recommendation 14: Treasury should ‘commission a holistic in-depth review of Australia’s insolvency laws’.