MRL3701

Learning Path:

A Roadmap to Insolvency Law

Debt Collection Road Map

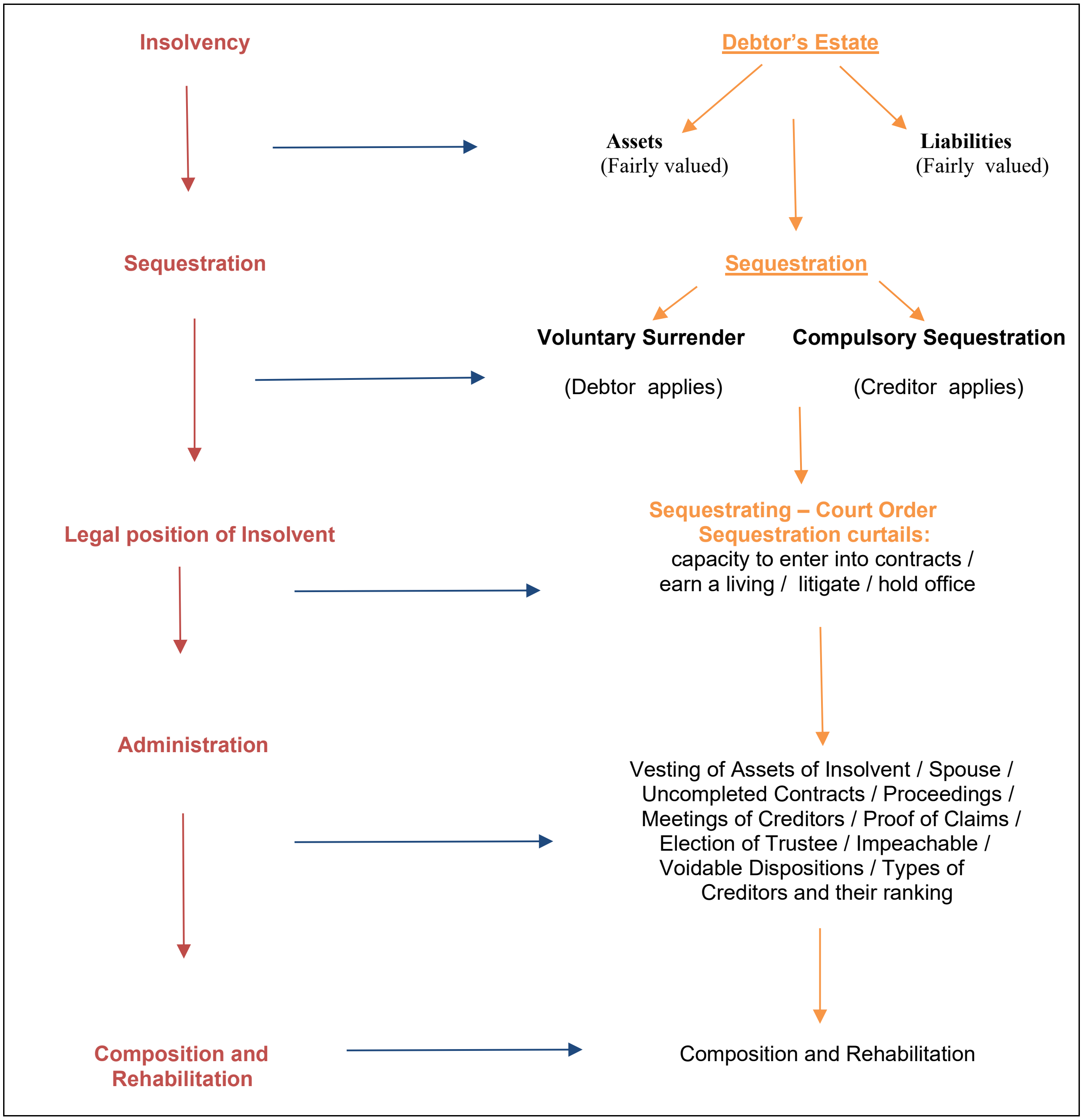
Individual Debt Collection Methods

Individual

Various Methods

Attempts by Creditors before sequestration

Collective Debt Collection (Sequestration)



Learning Unit 1: Introduction to Insolvency Law

When we look at the Law of Insolvency, we first need to know what Insolvency Law truly is! This is of course when a debtor is unable to pay his debts. But it goes much further than that. You can only be considered an insolvent if your estate has in fact been sequestrated by a court. Very important to note is that the debtor is not sequestrated, his estate is sequestrated. An "estate" is basically a collection of all the assets and liabilities that the debtors have. The debtor, after sequestration, is now referred to as the insolvent. A debtor includes many "types of persons", and you can refer to the textbook for that information. It includes, i.e., a natural person, or a partnership, but mostly does not include juristic persons. The main purpose of sequestrating the estate of the debtor is to ensure that the assets of the estate is orderly divided amongst creditors, in cases where the debtor cannot pay his claims anymore. Once this happens, a "*concursus creditorum*" is established, which means there is a "coming together of creditors", and once they prove their claims, they can share with all the other creditors in the proceeds of the estate assets, as it is the primary function of insolvency to benefit creditors.

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Learning Unit 2: Voluntary Surrender

When you look at the Insolvency proceedings, you will note that when a debtor is experiencing financial difficulties, there are various methods he could use, before following the sequestration route (Individual Proceedings). However, when we then come to the Law of Insolvency, and look at the debtor's estate, we will note that every debtor has some assets, but also some liabilities (debts owed). When we look at Voluntary Surrender, this is the case where the debtor applies to court to surrender his estate for sequestration.

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Learning Unit 3: Voluntary Surrender (Continued)

See above.

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Learning Unit 4: Compulsory Sequestration

When you think back to what we have learned so far in our Insolvency Law teachings, you will remember that when a debtor is experiencing financial difficulties, there are various methods he could use, before following the sequestration route (Individual Proceedings). However, when we then come to the Law of Insolvency, and look at the debtor's estate, we noted that every debtor has some assets, but also some liabilities (debts owed). We now understand Voluntary Surrender and that this is the case where the debtor applies to court to surrender his estate for sequestration. But when we take into consideration that one or more creditors may apply to court to have the debtor sequestrated, this is Compulsory Sequestration.

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Learning Unit 5: Compulsory Sequestration (Continued)

See above.

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Learning Unit 6: The Legal Position of the Insolvent

When a debtor is sequestrated, it has an effect on his person. As a consequence of a sequestration order on a debtor's estate, it imposes on him a form of reduction in status, and reduces his capacity to contract, earn a living, to litigate and to hold office.

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Learning Unit 7: Vesting of the assets of the insolvent

When a debtor is sequestrated, the Master appoints a trustee to administer the estate. The trustee collects the assets, realises them, and distributes the proceeds amongst the creditors, according to a predetermined order, provided for in the Insolvency Act. We therefore say that the assets "vests" in the trustee. We will therefore be looking at property that falls into the estate, property which does not fall into the estate, the disposal of new property by the insolvent, and acquisition of a new estate by the insolvent during his insolvency.

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Learning Unit 8 – Vesting of the assets of the solvent spouse

When we look at LU 8, "Vesting of the assets of the solvent spouse", S21 of the Insolvency Act is to vest the property of the spouse of the insolvent also in the Master and then the trustee, just as it makes the trustee owner of the insolvent's property. HOWEVER, the transfer here, as you will see, is not intended to be permanent. The solvent spouse may secure the release of the property and thereby regain ownership. S21 was introduced to prevent or hamper collusion between spouses to the detriment of creditors and to make it difficult for the insolvent and his spouse to deprive the estate of assets to which it is entitled.

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Learning Unit 9: Uncompleted Contracts

We now move to "Uncompleted Contracts". When the estate of the insolvent is sequestrated, the order does not only affect the insolvent's property, but it also affects the contracts to which he is a party. Therefore, if he has not performed.

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Learning Unit 10: Uncompleted Contracts

When the estate of the insolvent is sequestrated, the order does not only affect the insolvent's property, but it also affects the contracts to which he is a party. Therefore, if he has not performed.

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Learning Unit 11: Uncompleted Contracts (Continued)

See above.

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Learning Unit 12: Meeting of Creditors

Meetings of creditors are so that creditors may establish their claims, elect a trustee, and give him (her) directions on how to wind up the estate. There are four different types of meetings.

Learning Unit 13: The Election of the Trustee

With the election of a trustee, one or more are nominated, then elected / appointed. Certain people are disqualified from being a trustee, and others vacate their office, or can be removed from their office.

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Learning Unit 14: Impeachable Dispositions

In addition to being vested with the property belonging to the insolvent at the time of sequestration, the trustee has the means of recovering certain property alienated by the insolvent before his sequestration. The trustee may ask the court to set aside certain dispositions made by the insolvent before sequestration and may, in certain circumstances, treat as void the transfer by the insolvent of his business before sequestration. These are commonly referred to as impeachable dispositions, and voidable dispositions.

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Learning Unit 15: Voidable Dispositions

See above.

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Learning Unit 16: Impeachable dispositions:

In addition to being vested with the property belonging to the insolvent at the time of sequestration, the trustee has the means of recovering certain property alienated by the insolvent before his sequestration. The trustee may ask the court to set aside certain dispositions made by the insolvent before sequestration and may, in certain circumstances, treat as void the transfer by the insolvent of his business before sequestration. These are commonly referred to as impeachable dispositions, and voidable dispositions. Further to impeachable dispositions, we will also now look at transactions of the transfer of a business without the prescribed notice.

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Learning Unit 17: The Different Types of Creditors

Now with reference to the creditor's claim and their ranking, remember that the main objective for the law of insolvency is to ensure that an insolvent debtor's assets are distributed among the different creditors according to a predetermined and fair order of preference.

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Learning Unit 18: The Order of Ranking for Payment

There are different types of creditors, and they have an order in which they are entitled to payment.

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Learning Unit 19: Composition

A debtor in financial difficulty can avert insolvency by entering a compromise with his creditors. When we look at Composition, there are two forms of Compromise. A common-law compromise is based on contract and, hence, requires the approval of all creditors to be of any practical value. By contrast, a s 119 composition is a statutory mechanism under which the decision of the majority of creditors binds the dissenting minority.

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Learning Unit 20: Rehabilitation

Insolvency ends when a party is rehabilitated. It enables the insolvent to make a fresh start, free from his pre-sequestration debts and from the restrictions placed on him by the sequestration. It can take place automatically, by lapse of a prescribed period of time, but the insolvent usually asks the court to rehabilitate him before the prescribed period expires.

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Learning Unit 21: Partnership and Sequestration

You will remember that in learning unit 1, you were introduced to the sequestration of the estate of a "debtor". There you learned that the definition of the word "debtor" in section 2 of the Insolvency Act includes a partnership or the estate of a partnership. A partnership may be described as the legal relationship arising from a contract between at least two, but usually,not more than 20 persons, by which the partners agree to contribute to a common business in order to make a profit that they will divide among themselves. For purposes of the Insolvency Act, a partnership is regarded as a separate entity with an estate which may be sequestrated like that of a natural person. In this learning unit, you will learn how the insolvency law applies to the sequestration of the partnership estate.

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Learning Unit 22: Winding-Up of Companies

In this learning unit, we introduce you to the winding-up of a company, a process also referred to as the liquidation of a company. The definition of 'debtor' in section 2 of the Insolvency Act excludes a company that may be placed in liquidation. A company is a juristic person and thus the estate of the company cannot be sequestrated but instead, it can be wound up or liquidated. Remember that the estates of natural persons (human beings) are sequestrated, but that companies (being juristic persons) are liquidated. Remember also that both solvent and insolvent companies may be wound up in certain circumstances. After a company has been wound up (liquidated), it is dissolved by the Companies and Intellectual Property Commission (the Commission). On dissolution, the company ceases to exist.

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Learning Unit 23: Winding-Up of Close Corporations

A close corporation must have at least one member, but not more than 10 members. As a general rule, a member of a close corporation must be a natural person (a human being). The winding-up of close corporations is largely regulated by the Close Corporations Act 69 of 1984. However, the Close Corporations Act also makes certain provisions of the Companies Act 1973 and the Companies Act, 2008 applicable to close corporations. The Companies Act, 1973, in turn, also incorporates certain provisions of the Insolvency Act. So, when you deal with the winding-up of close corporations you will often find yourself having to consider the Close Corporations Act, the Companies Act, 1973, the Companies Act, 2008, and the Insolvency Act — and even the relevant common law of insolvency that may apply to the particular facts. When you study Hockly chapter 24 on the winding-up of close corporations, keep in mind the principles concerning the winding-up of companies. Note the differences between the two procedures. In this learning unit, we concentrate on the winding-up (liquidation) of close corporations.

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Learning Unit 24: Business Rescue and Compromise

The decision to wind up a company is drastic in that, after winding up, a company will be dissolved — in picturesque language, the company will "die". Two typical consequences of winding-up are that the employees will lose their jobs and that, if the company is insolvent, the creditors will not be paid in full what is due to them. In an attempt to avert such disastrous effects of winding up, the Companies Act 2008 provides for possible alternatives to winding up. In this learning unit, we will introduce you to and examine two such alternatives — business rescue proceedings and compromise.