

CAPE TOWN CONVENTION  
ACADEMIC PROJECT  
EA ICLR 6TH WORKSHOP  
8 SEPTEMBER 2020

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# ROADMAP

1. Introduction/background
2. ICLC EA Framework
3. Questions about the Framework
4. Some answers and further thoughts

- Who am I?



Jonathan C. Lipson  
Temple Law School

Principal areas of work:  
Corporate reorganization and  
governance; commercial finance;

- Mostly domestic (U.S.)
- Some international (IDLO, EBRD, USAID)
- Former practitioner; still active with ABA, ALI, etc.

## Framework

$$\underline{\mathbf{EI}} = [(\underline{\mathbf{A}} + \underline{\mathbf{B}} + \underline{\mathbf{C}}) \times \underline{\mathbf{D}}] - \underline{\mathbf{E}}$$

WITH CONFIDENCE LEVEL FROM \_\_ [INSERT 1-5]

Where –

- **EI** is economic impact
- **A** is the net, direct impact of the new rules, rather than those applicable in the absence of reform, applied ex ante or ex post
- **B** is the net, impact of the new rules as a network, that is, the existence of international rules, applied ex ante or ex post
- **C** is the net, systemic, including developmental, impact of the new rules, rather than those applicable in the absence of reform, applied ex ante or ex post
- **D** is the extent, measured from 1 to 0, that the new rules have been or will be effectively applied by courts and authorities
- **E** is the expected (ex ante) or actual (ex post) net cost of creating and transitioning to the new rules. E does not increase over time

\*The analytic framework: -

- does not address the question of how the relevant impacts will be distributed
- does not address the non-quantifiable impacts of retaining or changing existing rules
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Why 1-0?

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- would be applied and compared with other law reform proposals to determine the most objective

Why not?

# QUESTIONS

## Questions

1. Why is Variable D 1-0?
2. What hard laws count?
  - If  $>1$ , how to select and weight?
3. What factors affect legal decision-making (legislative and judicial)?

# QUESTIONS

## Questions

1. Why is Variable D 1-0?
  - LLSV & L&E suggest law may have positive value → 0-1+
  - Hard to imagine that UCC Article 9 has no positive economic value and may destroy value
  - Captured by A-C (“net”)?

# QUESTIONS

## 1. In-Framework Answers (Factors)

- a. **Doctrinal issues** of the rule of law (*which law(s)?*);
- b. **Imperfect functioning** of the rule of law (*imperfect in isolation?*);
- c. **Informational limitations** (*understanding the law or the facts?*);
- d. **Institutional**, capacity, or resource related **limitations** (*interbranch interference?*);
- e. **Implementation** related limitations (*weak enforcement mechanisms?*);
- ...
- j. An analysis of the **system as a whole**, looking at regulatory competition put forth by a legal treaty system (*what are the bounds?*).



# ADDITIONAL ANSWER?

## 1. Additional Possible Answer: Legal Hydraulics:

- UCC Article 9 v. Bankruptcy Code
  - Long history of tension and competition
  - Excesses of Article 9 checked by Bankruptcy Code; Excesses of Bankruptcy Code checked by Article 9
  - “Equilibrium” over time cannot exceed 1.0 (e.g., UCC=.6 & Bankruptcy Code =.4)

# FURTHER REFLECTIONS

2. What hard law counts? How to weight?
  - UCC v. Bankruptcy Code is easy
    - What about non-uniform securitization facilitation statutes?
    - What about avoidance powers or entity law constraints?
    - How to assign values in a non-arbitrary way?
    - How to “ring-fence” laws that Variable D assesses?

## 3. What factors affect legal decision-making (legislative and judicial)?

- I.e., why take decisions that seem problematic?
- Sometimes errors and limitations (e.g., Factors a-e & j)
- But distributive effects motivate both legislatures and courts
- Thus, changes in UCC and Bankruptcy Code over time are institutional responses to changing perceptions of law's distributive effects
- → Perhaps Framework should consider distributive effects, at least in ex post analysis?

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# FURTHER REFLECTIONS

3. Ex post assessment of distributive effects
  - Distributive effect of commercial law is locus around which most debates occur
  - Difficult but not impossible to measure
    - Chapter 11 reorganizations generate significant case-level data (Lopucki, Nini & Smith, Ayotte & Elias)

## 4. Mechanisms to address some concerns w/r/t Variable D:

- Ex post assessment of distributive effects (e.g., U.S. absolute priority v. EU “relative” priority (2019))
- Ex ante: GCs alone insufficient. Interview multinational accounting/consulting/law firms; judges; bailiffs/sheriffs;
- Assess legal information systems (e.g., lien notice-systems; corporate charter systems)
- Are there specialized courts (e.g., business courts; bankruptcy courts)?
- Clarify and standardize arbitral decision-making to make it more closely resemble common-law precedent (e.g., published, reasoned decision-making)

# CONCLUSION

ICLC Framework marks an important effort to impose discipline on the analysis of rule of law projects.

- Should Variable D consider “hydraulic” tensions in domestic laws? If so, what laws count? How to “ring fence” laws assessed?
- Various qualitative and quantitative assessments of legal operations can better inform Variable D.