

# *The cross-border project – a “dual-track” approach*

**KANNAN Ramesh<sup>1</sup>**

Supreme Court of Singapore

---

## **I. Introduction**

1 Let me begin by expressing my deepest appreciation to the Organising Committee of today’s meeting for having invited me to speak before many of the distinguished insolvency practitioners who are present this evening and who are part of the *Insol-International Group of 36*. I am honoured and privileged to be able to address such an august audience. I should also at the outset extend my warmest congratulations and best wishes to the management of Rajah & Tann Asia LLP on the firm’s induction into this very distinguished and eminent group. Their induction is indeed a testament to the quality of their practice and invaluable contributions to the region in, among other things, the sphere of insolvency and restructuring. The firm’s accession to the highest echelons of the insolvency world reflects warmly on the leadership of Mr Lee Eng Beng, Senior Counsel and Mr Patrick Ang. In equal measure, it symbolises the importance that INSOL International places on Singapore as a jurisdiction of significance in the global insolvency landscape, and is a glowing endorsement of her insolvency practitioners by the very best in the industry.

2 Speaking at an International Arbitration conference some two years ago, the Honourable the Chief Justice Sundaresh Menon highlighted anecdotally that the hallmark of a good speech is one that fuels debate, and receives almost equal measures of acclaim and derision.<sup>2</sup> I take on this point fully. This evening, I will not attempt to be unduly safe in the perspectives I have to share on the way ahead for international insolvency. All of us here deeply care about this industry, and it is important that we steer it forward by being bold and visionary in an economic environment that continues to evolve at a blistering and perhaps

---

<sup>1</sup> Judicial Commissioner, Supreme Court of Singapore. The views and ideas contained here are personal. This speech was delivered at the *INSOL International Group of 36 Meeting* in Singapore on 30 November 2015. I am deeply grateful to my colleague, Kanesh Bala, Justices’ Law Clerk of the Supreme Court, for the considerable assistance he gave me in the research and preparation of this speech.

<sup>2</sup> Sundaresh Menon, *Some Cautionary Notes for an Age of Opportunity* (2013) Chartered Institute of Arbitrators International Arbitration Conference, para 1.

unsettling pace, challenging existing paradigms and, in particular, the law. Thought leadership is needed to anticipate, react to, circumvent, and even eradicate approaching icebergs.

3 Let me begin with the bottom line. The insolvency community has spent a long time developing enabling infrastructure for the handling of cross-border disputes, but the time has come for us to move from *envisioning* to *achieving* greater cooperation and convergence in transnational insolvency law. While we patiently wait for legislatures to work towards comity and convergence of national laws, I believe that national courts will have a vital (and equally important) role to play in *organically* enabling cooperation in cross-border cases and convergence in cross-border laws. I have hence entitled today's address as: *The cross-border project – a "dual-track" approach*. I will be discussing the role of the courts in cross-border disputes, and shall describe how greater cooperation and convergence can be achieved in cross-border insolvency and restructuring.

4 Let me first outline the business case for what I have to say. Globalisation has fuelled the movement to break down economic barriers and transcend boundaries between jurisdictions and economic zones. It would be no exaggeration to say that a by-product of a world knitted by closer economic integration is businesses becoming borderless and borders becoming porous. Jurisdictions are moving closer towards becoming economic communities and groupings in order to create common markets; the European Union has achieved considerable economic integration and the ASEAN Economic Community (or "AEC" for short) is stridently pursuing regional economic integration.<sup>3</sup> While borderless trade is normally associated with large corporations, the AEC and colossal trade deals like the Trans-Pacific Partnership (or "TPP" for short) could potentially rewrite history; just based on the public summary of the TPP we can see that whole chapters have been dedicated to international e-commerce and small and medium-sized companies.<sup>4</sup> We could potentially see small businesses becoming increasingly globalised in the next few years, becoming global behemoths as a result.

---

<sup>3</sup> See generally Association of Southeast Asian Nations Secretariat, *The ASEAN Economic Blueprint* (January 2008) < <http://www.asean.org/archive/5187-10.pdf> >.

<sup>4</sup> Office of the United States Trade Representative, *Summary of the Trans-Pacific Partnership Agreement* (October 2015) < <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership> >.

5 We have also witnessed the emergence of global nuclei in the form of jurisdictions, such as Singapore, which have amassed an impressive network of comprehensive bilateral double-tax treaties and bilateral investment treaties. These central nodes have become attractive destinations for the relocation of certain business assets, the siting of operational headquarters and capital raising.

6 The consequences are clear – with borderless trade, we can, and must, expect that businesses will increasingly and inevitably have their economic footprints and value spread across multiple jurisdictions. Assets, both core and non-core, supporting infrastructure and centres of influence and main interest will be splattered across different jurisdictions. This fragmentation will, if it has not yet done so, raise novel challenges for the law and regulators when disputes arise and – more pertinent to the present audience – when the business fails. I would argue that the new economic reality makes one thing certain – that there is a compelling case for laws, legal systems and indeed, national courts to not be shackled by jurisdictional boundaries so that they can effectively support the insatiable appetite for growth in the spheres of transnational trade and commerce.

7 The bedrock and indeed the *raison d'être* of an effective insolvency process is the maximisation of value for all creditors. It has long been recognised that, left unregulated, the headlong free-for-all attendant upon the pursuit of individual claims will result in the suboptimal realisation of the assets of the insolvent estate. To this end, domestic insolvency regimes have provisions that provide for an orderly collection and realisation of the assets of the insolvent business in order to avoid the chaos that would otherwise result from an unrestrained melee. However, at present, the value of multinational corporate enterprises is vulnerable to being inefficiently dissipated in the parochial rush to assets, and due to unique distortions that occur under the national insolvency regimes of host jurisdictions where the businesses have footprints or centres of main interest.

8 There is also a real and present risk that there may be inconsistent rulings arising from the fact that the insolvency proceedings involving a multinational corporation are fragmented. I need only mention the well-known *Felixstowe*-case to make this point.<sup>5</sup> The problems

---

<sup>5</sup> In *Felixstowe Dock & Railway Co v United States Lines Inc*, the defendants were a large US shipping company which petitioned the US courts for reorganisation under Chapter 11. The US court issued a worldwide restraining order staying all proceedings against the company. The plaintiffs were the English and European trade creditors of the defendant who commenced proceedings in the English court and had obtained a Mareva

relating to fragmented insolvency proceedings sound a clarion call for convergence in cross-border insolvency laws, and greater cooperation and coordination between national courts. Of the “dual track” approach I have highlighted, the first track is the legislative track. Under this track, national legislatures should seek to work together to harmonise cross-border insolvency laws. The second track is the judicial track. It is to this that I now turn.

## II. The Judicial “Track” in Cross-Border Insolvencies

9 The judiciary is where, to put it metaphorically, the rubber meets the road. It is therefore imperative that courts remain relevant to the evolving needs of their end-users. The central point I will be making today is that if courts can work together to handle a transnational insolvency and – by extension – any cross-border dispute, then it is possible to achieve cooperation and convergence at a *functional* level. The problems relating to fragmentation and inconsistent decisions can thus be avoided or at very least ameliorated. I also wish to make the broader point that *functional* convergence will serve as a springboard for greater *formal* convergence in national insolvency laws in the long-run.

10 To this end, I will be covering four points today. All the four points are aimed at furthering the cross-border convergence agenda. The first will be the development of guidelines for the formulation of Court-to-Court Protocols to facilitate communications between courts and thereby promote judicial comity. The second will be the need for the emergence of principles to guide the courts on how they ought to cooperate in cross-border matters and the consequential legal infrastructure that such cooperation will demand. The third will relate to convergence in restructuring principles. Lastly, I will also endeavour to provide some intellectual fodder by talking about whether there is space for the creation of an Asian Collateral Directive.

### A. *Guidelines for Court-to-Court Protocols*

11 The idea of developing cross-border connections between national courts was first mooted by Chief Justice Menon in 2014, when he delivered the Charles N Brower Lecture.<sup>6</sup>

---

injunction restraining the defendant from removing their assets from England. The defendants sought to lift the Mareva injunction arguing, on the ground that the US court ought to govern the disposition of all the defendant’s assets. Even though the judgment of the US court was placed before the English High Court Judge, he dismissed the application and declined to recognise the US restraining order.

<sup>6</sup> Sundaresh Menon, *The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions* (2015) 5 Asian Journal of International Law 219 at 243.

He further developed on this idea earlier this year at an opening lecture at the Dubai International Financial Centre Courts<sup>7</sup> when he proposed the development of a network of courts for collaboration.

12 For courts to have cross-border connections, a necessary ingredient that must be present is the capacity to communicate with each other. It is therefore imperative that national courts develop guidelines for communication between each other in cross-border matters. These guidelines will set the ground rules for developing protocols in individual cases. In the insolvency context, these guidelines should provide a comprehensive framework which deals with all aspects of communication between the various stakeholders in an insolvency. All in all, they should facilitate communication between courts, between courts and insolvency representatives, between insolvency representatives, and perhaps even with non-parties with an interest in the restructuring.

13 How can this be achieved? National courts can enter into a network of bilateral or multilateral agreements in the form of Memoranda of Understanding (or “MOUs” for short). These MOUs should set out the guidelines that will govern the courts’ communications and scope of engagement with each other. The guidelines agreed under such MOUs will then set the parameters for the development of a Court-to-Court Protocol in any given case. The guidelines can be implemented by the signatory courts in their respective jurisdictions by way of a Practice Direction or the like.

14 There is a historical context to this that must be highlighted. Professor Bob Wessels highlights that a significant force in the movement towards *insolvency* protocols – in general – has been the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation.<sup>8</sup>

15 The movement towards the development of Court-to-Court Protocols in cross-border insolvency cases was, however, influenced by the Transnational Insolvency Project (“TIP”) of the American Law Institute (or “ALI” for short). The object of the TIP was to, among other things, provide a non-statutory basis for cooperation and coordination between courts in

---

<sup>7</sup> Sundaresh Menon, *Towards a Transnational System of Dispute Resolution* (2015) Opening Lecture for the DFIC Courts Lecture Series 2015.

<sup>8</sup> Bob Wessels, *Cross-Border Insolvency Agreements: What are they and are they here to stay?* (2012) *Insolventie en Overeenkomst*, Nijmegen

<https://www.insol.org/Fellowship%202012/Literature/Module%20A/Session%201/Additional%20Reading/2011-05%20Wessels%20-%20Cross%20border%20agreements.pdf>.

cross-border insolvency cases involving two or more NAFTA countries. To that end, the ALI developed a set of guidelines applicable to Court-to-Court communications in cross-border insolvency cases. The guidelines developed by the ALI have since been reviewed and promulgated as the Global Guidelines for Court-to-Court Communications in International Insolvency Cases.<sup>9</sup> The Global Guidelines have formed the framework through which courts in a handful of jurisdictions have drawn up their scope of communications with each other. Court-to-Court Protocols in individual cases have then been developed using the Global Guidelines as a reference.

16 Developing Court-to-Court Protocols is not a distant aspiration. Regular judicial communications take place in the sphere of international family law through an established judicial network called the Hague Network of Judges.<sup>10</sup> In the sphere of cross-border insolvency, Court-to-Court Protocols have been established in a number of jurisdictions. One prominent Court-to-Court Protocol which many here might have heard of is the *Maxwell* Protocol.<sup>11</sup> That was put together by, most notably, Lord Hoffmann (when he was sitting as a Judge of the English High Court) and Judge Bronzeman of the United States Bankruptcy Court for the Southern District of New York.

17 Canada has actively embraced the use of Court-to-Court Protocols. The Global Guidelines I referred to earlier are now part of the Practice Directions of the Ontario Supreme Court<sup>12</sup> and the Supreme Court of British Columbia,<sup>13</sup> which together hear the bulk of Canadian insolvency matters. There have also been a number of protocols developed in the context of transnational insolvencies involving the US, Canada, the UK and France.<sup>14</sup>

---

<sup>9</sup> ALI and International Insolvency Institute, *Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases* (American Law Institute, 2012).

<sup>10</sup> See Hague Conference on Private International Law, *The Judges' Newsletter: Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks*, (2009, Vol 56, LexisNexis).

<sup>11</sup> *Re Maxwell Communication [1992] BCC 757* is regarded as the first major case where an English court negotiated a cross-border insolvency protocol with the United States Bankruptcy Court for the Southern District of New York ("the Maxwell Protocol"). In that case, Hoffmann J (as he then was) and Judge Bronzman sensed that they had incomplete information and raised the idea of a court-to-court protocol in the proceedings so as to facilitate timely communications. A protocol was then drafted and the judges cooperated with each other in accordance with the protocol.

<sup>12</sup> See Part XXVI the Consolidated Practice Direction Concerning the Commercial List of the Ontario Superior Court of Justice: Protocol Concerning Court-to-Court Communications in Cross Border Cases.

<sup>13</sup> See Practice Direction No 6 of the Supreme Court of British Columbia: Court to Court Communications in Cross-Border Cases.

<sup>14</sup> In *Re Sendo International Limited* [2006] All ER(D) 338, the Commercial Court of Nanterre, France, developed a protocol with the English High Court to facilitate communications to coordinate the secondary insolvency proceedings in France with the main proceedings in the UK.

18 The guidelines when developed should address a number of points. Let me provide a non-exhaustive list:

- (a) The categories of matters that will fall within their ambit (here, I am referring to the type of substantive matters that will allow for a protocol. This can be for example Insolvency, Intellectual Property or any other matter with a cross-border element);
- (b) Under what circumstances may courts utilise the guidelines;
- (c) Who may activate the guidelines (this could be the court and/or the parties);
- (d) Methods of communication (including e-communication and the circumstances in which the courts may communicate in the absence of parties);
- (e) What type of information can the courts exchange with each other and with the other stakeholders; and
- (f) Whether joint or concurrent hearings are permissible and how they are to be administered.

19 When there is a protocol between courts fashioned under the guidelines, there is scope for the exchange of information at the lower end of the spectrum to full joint hearings at the other end. This means that each court will have a more complete picture of proceedings in the other court. This must surely enable more efficacious judicial determination of the issues at hand. Arguably, this will be the first step away from insularism and towards universalism in cross-border insolvencies.

20 I pause to make the point that it is judicial comity which really underpins the framework through which courts engage with each other through Court-to-Court Protocols. In this regard, I refer to the decision of the Singapore Court of Appeal in *Beluga Chartering v Beluga Projects*, where the court recognised that it had the inherent powers to assist a foreign liquidation through the regulation of its own proceedings.<sup>15</sup> This approach and power resonates with judicial comity and universalism. Judicial attitudes such as this will provide the impetus for the development of the guidelines.

---

<sup>15</sup> See *Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (deugro (Singapore) Pte Ltd, non-party)* [2014] 2 SLR 815 at [98] – [99].

21 Some may wonder how can we leap to talk about Court-to-Court Protocols when there is no convergence in substantive law in the first place? Some say that is talking about procedural convergence without an eye on substantive convergence. This takes us back to the proverbial “chicken or egg” debate. This criticism disappears if one starts to see convergence as a *symbiotic* process. When you have a Court-to-Court Protocol resulting in exchange of information and/or joint hearings, different courts start to work around their own national laws to develop solutions to deal with the case at hand. Over time, courts will begin to reach their own *modus vivendi*, and we may slowly but surely find the *organic* emergence of a corpus of transnational insolvency laws and convergence in judicial philosophy.

22 Of course, the courts are not the only players in the transnational project. Legislatures ought to punch in the same direction by for a start adopting the UNCITRAL Model Law on Cross-Border Insolvency.<sup>16</sup> What we then have is the adoption of a “dual-track” approach where both paths lead towards convergence. The difference is that the judicial track gets around the obstacles that are slowing legislatures from racing ahead towards convergence. The obstacles faced by legislatures are two-tiered: there might be a need to resolve any impasse as between the sovereigns, and then within Parliament. Courts have potentially a path that is less strewn with obstacles.

23 I highlight that Singapore has already made significant progress in convergence on the legislative front. It was announced about a month ago by the Permanent Secretary for Law, Mr Ng How Yue, at the 2nd National Insolvency Conference<sup>17</sup> that the Insolvency Bill that will be soon tabled in Parliament will adopt the UNCITRAL Model Law on Cross-Border Insolvency. This is a commendable move.

24 I must also add that the Singapore Judiciary is, on its part, “walking the talk”. We are working aggressively on the “second” track that I have just discussed. The process of engagement has already started. Exploratory discussions are underway with key Asian jurisdictions on the possibility of executing MOUs, both on a bilateral and multi-lateral basis, which will provide for guidelines for the development of a Court-to-Court Protocols on cross-border matters. Similar MOUs with major jurisdictions such as the US, Canada and the EU

---

<sup>16</sup> See generally UNCITRAL Secretariat, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (2014) < <https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> >.

<sup>17</sup> Ng How Yue, *Opening Address* (2015) 2<sup>nd</sup> National Insolvency Conference 2015.

are also very much on the cards. A grid of key commercial courts interlocked by a multi-lateral MOU may be considered. Further, any guidelines developed have to be a “living” document. In recognition of this, a network of insolvency judges from signatory jurisdictions will be formed to facilitate the exchange of information and ideas, and provide a forum for resolution of issues that may crop up. I am of the view that there will come a time – not long from now – where lenders and investors will also start looking at these MOUs and the judicial network when making their decisions on the “choice of law” for their agreements, and where they would like the principal conduct of an insolvency or restructuring exercise to be sited.

### ***B. Principles for cooperation***

25 Courts talking to one another on common matters is just the start in the spectrum of cooperation. We must cross the Rubicon by taking the guidelines to the next stage of their evolution – the development of guidelines for cooperation in cross-border matters. It is to this I now turn.

26 The ALI has already promulgated principles that have been revised and published as the Global Principles for Cooperation in Insolvency Cases. These principles, most crucially, set out the role of a national court within the dynamics of a cross-border restructuring. For example, Guideline 13 requires the determination of the “centre of main interests” in a cross-border insolvency for the purpose of identifying the jurisdiction where the main insolvency proceeding is deemed located.

27 As a consequence, instead of multiple proceedings that may deal with similar issues, the principles for cooperation allow for the efficient allocation of issues between national courts. When one court – via the principles for cooperation – recognises the proceedings of another, it has a number of tools, such as, for example, the grant of a partial stay, as suggested in the principles, to minimise any conflict that may result from parallel proceedings. Even when such parallel proceedings continue, the principles will also provide guidance on how consistency with the reliefs granted in the main proceedings may be achieved.

28 I note that this also broadly reflects the position under, among other provisions, Article 20 of the UNCITRAL Model Law, which deals with the recognition of “foreign main

proceedings” and Article 29 of the same which deals with “coordination of proceedings.” However, it will take time for the UNCITRAL Model Law to be widely embraced. The principles can serve a forerunner and indeed can also operate alongside the UNCITRAL Model Law.

29 Naturally, when there is a move towards judicial cooperation in cross-border insolvencies, it will be necessary for a court to be at the heart of a cross-border restructuring. This invites the possibility for further developments in the transnational dispute resolution infrastructure framework.

30 In my view, there will be a need for specialist restructuring courts with specialist judges who will have charge of the cross-border restructuring process. These specialist courts will coordinate the cross-border restructuring exercise to achieve efficiency and consistency.

31 Singapore is an open and international economy with massive in-bound and out-bound trade and investment flows. This is indeed a dividend flowing from, among other things, the strong network of double-tax and investment treaties that Singapore has already entered into. Undoubtedly, Singapore will continue to expand its tax and investment treaty framework and network. Singapore is also a global financial centre, having been ranked 4<sup>th</sup> in the Global Financial Centres Index recently.<sup>18</sup> This confluence of factors has encouraged and continues to encourage businesses to hub in Singapore their investments into ASEAN, greater Asia and indeed other parts of the world, or at the very least have some part of their economic activity organised here. The same is true for outbound investments from ASEAN and Asia into other parts of the globe. The flipside of Singapore’s positioning as an investment and financial centre is that there is immense potential for Singapore to serve the regional and global community as a key hub for cross-border restructuring and insolvency. The cross-border “imperative” – if I may so term it – is therefore stronger than ever here. Singapore has already seen its fair share of cross-border insolvencies, having dealt with the insolvencies of Lehman Brothers, MF Global and OW Bunkers.

32 The above view is strengthened when one looks at Singapore’s nonpareil international standing as a transnational legal services and dispute resolution hub. The transnational dispute resolution grid in Singapore is supported by many strong pillars in the form of the

---

<sup>18</sup> Qatar Financial Centre, *The Global Financial Centres Index 17* (2015, Financial Centre Futures) < [http://www.finance-montreal.com/sites/default/files/publications/gfci17\\_23march2015.pdf](http://www.finance-montreal.com/sites/default/files/publications/gfci17_23march2015.pdf) >.

Singapore International Commercial Court, the Singapore International Arbitration Centre, the Singapore International Mediation Centre and the Singapore Mediation Centre.

33 To enhance the already stellar fundamentals, the Singapore judiciary is pushing ahead with the initiative to forge links with key jurisdictions through: (a) the execution of MOUs that will provide for guidelines on Court-to-Court communication and principles for cooperation on cross-border matters including insolvency; (b) the execution of MOUs that will connect courts in key commercial jurisdictions; and, (c) the formation of a network of judges to facilitate and nourish cooperation and comity. On its part, the Government will be introducing a new Insolvency Bill which will provide for a raft of changes including “cram down” provisions, pre-packs, easier recognition of jurisdiction over a foreign debtor in an insolvency and of course, the adoption of the UNCITRAL Model Law. This is the “dual-track” approach.

34 The path-breaking initiative that is the Singapore International Commercial Court is a halcyon example of Singapore’s track record for innovation. The breath-taking speed at which the court was conceived and realised as a unique solution for parties locked in multi-jurisdictional commercial disputes illustrates how sensitive we are to the needs of the global economic community. It therefore not inconceivable that the insolvency eco-system that we are constructing could be made complete by the birth of a specialist restructuring court in Singapore that serves as a hub for cross-border restructurings in Asia.

### ***C. Convergence in Restructuring Principles***

35 Thus far, the stage has been set for judicial cooperation in cross-border cases. However, I believe that apart from guidelines for Court-to-Court communication and principles for cooperation, there is also a need for greater *substantive* convergence in restructuring principles.

36 Divergence of approaches between national courts is anathema to the preservation of economic value in a cross-border restructuring. These are commonly a result of national issues and differences in philosophies. To iron out these wrinkles, greater convergence needs to be achieved in restructuring principles. To this end, I note that after much groundwork, INSOL International completed the Statement of Principles for a Global Approach to Multi-Creditor Workouts, also known as the “INSOL 8 Principles”, in 2000 and recommended that

it be adopted as part of national laws.<sup>19</sup> The INSOL 8 Principles is a fine statement of the fundamental tenets that should undergird national restructuring legislation. It is indeed a buried treasure tool that needs revival.

37 In my view, if we are seriously interested and invested in the cross-border convergence project, then the INSOL 8 Principles have to be reviewed, adapted and worked into national laws. These principles can form the “common language” that will guide restructuring legislation. The whole project can be rendered more manageable if the INSOL 8 Principles can be first reviewed on a regional basis. In relation to Asian countries, I note that Japan has referred to the INSOL 8 Principles in its workout guidelines since 2001;<sup>20</sup> it would be prudent to review the relevant legislation in Asian countries and see if a set of Asian Principles for Restructuring can be promulgated.

38 The creation of common principles to guide the restructuring process is not without precedent. The Asian Bankers’ Association had approved the Asian Bankers’ Association Informal Workout Guidelines<sup>21</sup> and the Model Agreement to Promote Company Restructuring by Informal Workout in 2005. The direction can be taken from there. A set of Asian Principles for Restructuring, broadly modelled on the INSOL 8 Principles will gain traction and serve Asia well. We are really talking about the development of the equivalent of *lex mercatoria* for insolvency laws. There is really no reason why this should not be an aspiration.

39 Singapore has a ready and convenient platform for a project of this importance. The Asian Business Law Institute (“ABLI”) will be launched by the Singapore Academy of Law in January next year to promote legal convergence in Asian commercial law. The Board of the ABLI will be announced in January 2016. It is expected that the Board members will include many eminent jurists and practitioners from Asian jurisdictions, for a start. To my mind, the review of the INSOL 8 Principles appears to be one exciting area where the ABLI and INSOL International may be able to synergistically collaborate.

---

<sup>19</sup> Insol International, *The Statement of Principles for a Global Approach to Multi-Creditor Workouts* (2000) <<http://www.ifecom.cjf.gob.mx/PDF%5Carticulo%5C4.pdf>.

<sup>20</sup> Shinjiro Takagi, *Out of Court Informal Workout in Asia Pacific Region* (2013), INSOL International Tokyo, Japan One Day Seminar package, p 30 <<https://www.insol.org/files/Tokyo.%20Japan%20November%202013/Final%20Folder%20and%20Presentations%20WEB%20FINAL%206%20Nov.pdf>>.

<sup>21</sup> Asian Bankers Association, *Asian Bankers' Association Informal Workout Guidelines – Promoting Corporate Restructuring in Asia* (2005) <<http://www.aba.org.tw/images/upload/files/06-AppendixB-InfWkOutGuidelines.pdf>>.

#### *D. Debt collateralisation*

40 Having touched on how greater convergence can be achieved in cross-border restructuring, I now move on to the last item I have set out to cover – that of collateral directives.

41 Under a collateral directive, the many major obstacles for cross-border use of financial collateral are removed. Administrative and perfection requirements to create and enforce financial collateral are significantly watered down. And importantly, there is recognition of a cross-border right to “re-use” collateral.

42 The European Collateral Directive (or “ECD” for short)<sup>22</sup> is well-known to all from Europe present here as will be the Financial Collateral Regulations of the UK. The ECD was, to my mind, a watershed moment for the law – it was a dynamic response to the needs of cross-border commerce. The ECD was introduced in 2002 and it deals with the use of securities and collateral in financial transactions across jurisdictions.

43 The ECD is a flexible piece of regulation, as it allows member states to decide on a number of things, such as whether the provisions of the ECD should apply to individuals and gives member states the option to add requirements beyond the directive.

44 I must highlight some salient aspects of the ECD. Article 3, for example, disapples many formal requirements for collateralisation, reducing transactional costs. Article 4 mandates that members recognise the right of a collateral taker to realise the collateral on the occurrence of an enforcement event. Lastly, Article 5 recognises the right of re-hypothecation of a collateral taker.

45 The ECD is a real “game-changer” for legal convergence. Throughout this address I have talked about the need for a “common language” for communications in cross-border issues. I highlighted the need for convergence in substantive laws and the use of common principles for restructuring. The ECD takes this to a new level, as it really focuses on jettisoning procedure and recognising a set of rights that all member states would seek to uphold. There is no need to worry about harmonising substantive laws because the directive

---

<sup>22</sup> Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.

states plainly that a collateral taker shall have a bundle of cross-border rights that all member States have to recognise.

46 To my mind, this is indeed the next paradigm of legal convergence; that is – where appropriate – to focus directly on deciding on what rights should be recognised in a cross-border dispute rather than to create cross-border legislation, which might be rendered less effective through imperfect implementation.

47 For my part, I believe that there is room for the start of a conversation on an Asian Collateral Directive. With the AEC and the TPP, the time is ripe to consider, debate and come to a landing on this idea. With diverse legal systems in Asia, we often get entangled in administrative burdens and perfection requirements in collateralisation. Once collateral is taken and there is an enforcement event, there is much uncertainty on whether rights can be enforced in different jurisdictions. A cross-border collateral directive for financial instruments could be the start of a new way in which restructurings and cross-border events of default are handled.

48 The ECD framework might be a good starting point. However, there might be difficulty achieving buy-in from all players in Asia because the right of re-hypothecation, for example, is a novelty in the region, and it is unclear if it will be welcomed by all quarters.

49 Nevertheless, I believe that INSOL International, with its deep understanding of collateral and enforcement events, is well-placed and should consider collaborating with the ABLI to explore the feasibility of an Asian Collateral Directive. I am left with no doubt that the process, let alone the result, will make a great contribution to cross-border cooperation and convergence in Asia.

### **III. Conclusion**

50 I have raised a number of themes today. I will now attempt to stitch them together. At the start of my speech, I talked about a “dual-track” approach to cross-border cases. There is the legislative track which works on convergence in national laws. This is an important prong, but one that functions more slowly because it involves sovereigns. There is, as I have pointed out, also the judicial track. I highlighted that it is imperative that courts start

“talking” to each other. To that end, I outlined the need for courts to enter into MOUs which provide for guidelines on Court-to-Court communication, and principles for cooperation.

51 Many of the problems that are faced in cross-border disputes such as inconsistent orders and enforcement issues can be avoided if courts are able to communicate and cooperate with each other within a judicial insolvency network in the manner I have set out above. While the focus in my discussion has been on cross-border insolvency, I believe that the use of protocols and principles for cooperation might and indeed must also be extended to any case with a cross-border element. That would be a positive development. Also, as I have noted, the rise of judicial cooperation in cross-border cases invites the establishment of specialist restructuring courts with specialist judges as hubs for the restructuring.

52 In relation to substantive convergence, I note that the INSOL 8 Principles have the potential to be a potent tool in leading the way in substantive convergence in insolvency laws. To this end, I have suggested that the INSOL 8 Principles be reviewed by INSOL International with the ABLI to aid in the development of Asian Principles for Restructuring.

53 Lastly, I highlighted the European Collateral Directive and the effect it has had on legal convergence by directly recognising cross-border rights. This has implications for cross-border lending, restructuring and insolvency. It is necessary for Asia to examine whether a similar directive has a role to play in the continent. To this end, I am also of the view that INSOL International is – together with ABLI – well-poised to be a thought leader in this area and steer the effort.

54 All global practitioners of insolvency have at some point faced *double deontology* – the situation where compliance with orders in one jurisdiction might mean non-compliance in another – this *double deontology* stems from national courts behaving as if they are hermetically-sealed containers. The tide of global commerce has risen to unprecedented heights – 51 of the 100 largest economies in the world today are corporations, with the top 500 multinational corporations accounting for nearly 70% of worldwide trade.<sup>23</sup> States must embrace the new reality. Practitioners must show thought leadership. The courts must innovate and stay abreast so that the rule of law is nourished and kept relevant. As

---

<sup>23</sup> World Trade Organisation, “Trade Liberation Statistics”, [http://www.gatt.orf/trastat\\_e.html](http://www.gatt.orf/trastat_e.html) and <http://www.corporations.org/system/top100.html>.

Shakespeare would say: “On such a full sea are we now afloat, and we must take the current when it serves, or lose our ventures”.

55 Let me take this opportunity to wish each and every one of you the very best for the festive season and for the year to come.

56 Thank you very much.