

**THE FUTURE OF CROSS-BORDER INSOLVENCY: SOME THOUGHTS ON
A FRAMEWORK FIT FOR A FLATTENING WORLD**

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the board of the III;*

Chief Judge Cecelia Morris and fellow judges from around the world;

Distinguished delegates and guests

I. Introduction

1. Thank you very much for that extraordinarily kind introduction, Cecelia, and my sincere thanks to all of you – distinguished members of the International

* Sundaresh Menon, Chief Justice of the Supreme Court of Singapore. I am deeply grateful to Assistant Registrar Scott Tan who assisted me greatly with the research and preparation of this paper; and to my colleagues, Justice Kannan Ramesh, Justice Aedit Abdullah, Registrar Vincent Hoong, Assistant Registrar Jacqueline Lee, and Assistant Registrar Norine Tan, who assisted variously with reviewing the earlier drafts and made many suggestions along the way. All errors are mine.

Insolvency Institute – for your warm welcome! Thank you also for inviting me to the Legendary Dinner last night, when we were treated to superb entertainment, wonderful food and wine served in a magnificent venue, great company and conversation, and a very special celebration as we honoured the heroic work of two of the giants of this community, Jim Peck and Don Bernstein.

2. As I listened to the tributes presented by David Richards and Richard Gitlin, and to the responses from Jim and Don, it was evident that these gentlemen were being honoured not only for their service to the wider insolvency community and to the Institute in particular, but also because their professional lives reflect, uphold, and represent the core values which are central to the mission of the Institute. Key to this is the promotion of cooperation in the field of international insolvency practice and a focus on identifying the problems that affect this vital area so that solutions might be generated. One might ask why this is so vital and precious a mission, and while I will say more on this as I close my remarks this morning, I want to frame the context of my address by drawing on a couple of things that were said last night.

3. Insolvency law and practice is, at its core, about the endeavour to recycle capital, usually in difficult circumstances. It entails the effective deployment of legal tools, human ingenuity, and sound business judgment in the mission to maximise the prospects of business recovery, and, when this is not possible, of maximising the realisation of value. This endeavour has become greatly complicated in a global world where, as you heard last night, business does not operate according to political or geographic borders. Whatever else might seem to be going on at this

time, for the foreseeable future, and in all likelihood beyond that, this reality is unlikely to change, and that underscores the importance of this Institute and its endeavours to address the particular problems presented by cross-border insolvency practice. In that context, Don spoke last night about his dream of a universal framework that would unify the approaches we take to the resolution of these issues by ironing out the differences that inevitably will arise because we live in a world of sovereign states, each with unique laws and legal systems.

4. A cross-border insolvency will inevitably raise the question of what is to be done when multiple jurisdictions are seized of the entirety or of parts of the same legal problem. Consider the following scenario. A multinational company is unable to pay its debts. At once, the insolvency laws of multiple jurisdictions are likely to be engaged. At least four basic issues will arise.¹ The first is one of *jurisdiction*: which court may legitimately exercise jurisdiction, and over which aspects of the matter? The second is one of *governing law*: what system of rules should govern the legal disputes which arise: should it be the law of each forum or should there be a single worldwide choice of law rule? The third is one of *reach*: what is the legal effect of the proceedings in, and the decisions made by, the various courts? Are they going to be confined in their effects only to their own jurisdictions, or do they each have wider, even worldwide, effect – extending to all the assets of the debtor, wherever situate? And last, one of practicality: how might courts in different jurisdictions, dealing with different aspects of an insolvent entity's assets, work together to maximise recovery?

5. These questions turn, ultimately, on the position that one takes on the debate between universalism and territorialism. A consensus on the answers to these questions might lie beyond reach absent a universally ratified insolvency treaty, but what interests me is the way in which the international insolvency community has moved past these theoretical difficulties by devising a *practical mechanism* to (a) facilitate greater cooperation between courts, (b) promote greater legal certainty, (c) improve the fairness and efficiency of the administration of cross-border insolvencies, (d) protect and maximise the value of the debtor's estate, and (e) advance successful rehabilitations to preserve economic value.²

6. I come to this from the perspective of one who did spend a part of his professional life in insolvency, although that was about 20 years ago, when, among other things, I crossed paths with Alan Bloom in the Barings insolvency in the mid-90s; but, mostly, I approach this from the perspective of one, the bulk of whose professional practice was in the area of cross-border litigation and arbitration at a time when many of the unique challenges of globalisation were coming to the fore; and also, more recently, from the perspective of a judge who has spent a number of years working to advance collaboration among judges from across the world in an effort to develop judicial models and frameworks that can better meet the needs of a globalised world.

7. From that perspective, my central message to you today is that the fulfilment of that dream of a unified approach towards cross-border insolvency is closer than you might imagine; and with the right attitude and diligent effort, it will

prove to be a dream that is within reach and well worth the pursuit. In my analysis, I will draw on the journey taken by the international arbitration community, which has likewise been divided between those who subscribe to territorialism, which sees every arbitration as being inextricably linked to a particular jurisdiction, and adherents of delocalisation, who see arbitration as part of a transnational legal order that is independent of any national legal system.³ Yet, despite the absence of consensus, the international arbitration community has been able to develop a durable means for national courts to cooperate and achieve consistency, finality, and certainty for the users of arbitration.

8. I will explore the ways in which these two areas of law have developed and will argue, by analogy with arbitration, that we have the basics of a unifying framework in the principle of modified universalism; that this is a pragmatic compromise that is worth embracing and justified by sound reasons; that the Model Law on Cross Border Insolvency⁴ is a vital tool for driving convergence in a practical way; that we should embrace the notion of sound forum selection as a critical step towards the development of a unified framework; and that this will lead to the emergence of key nodal jurisdictions that possess the essential features to make this unified framework a practical and achievable reality. I will close with some remarks on Asia.

II. A brief history of international arbitration in the 20th century

9. To set the stage, let me briefly recount the modern history of arbitration. By the turn of the twentieth century, arbitration had already established itself as a

favoured means for the resolution of disputes, particularly those relating to construction, shipping, and commodities.⁵ However, it suffered from certain “congenital defects”⁶ that prevented it from being a truly effective means of resolving cross border disputes. There were two intractable problems: first, the general unenforceability of arbitration agreements; and second, the lack of an expeditious method of enforcing arbitral awards across borders.⁷

10. After the First World War, the international business community clamoured for legislative support to strengthen commercial arbitration.⁸ These efforts resulted in the 1923 Geneva Protocol⁹ and the 1927 Geneva Convention,¹⁰ which though helpful, continued to suffer from several critical defects, most notably in the area of enforcement. In 1953, the International Chamber of Commerce (the “ICC”) put forward a draft treaty that posited a completely de-nationalised system of arbitration driven entirely by the “full autonomy of the will of the parties”.¹¹ This radical draft was presented to the United Nations’ Economic and Social Council (the “ECOSOC”), and it triggered a backlash. The member states of ECOSOC quickly produced a competing draft that would have retained the requirement of “double *exequatur*” under which an arbitral award had to first become final in the country in which it was made before it could be enforced elsewhere.¹²

11. As a result, there were two competing visions for the future of international arbitration. On the one hand, there was the ICC proposal, which was radically universalist and had little prospect of securing widespread agreement; on the other hand, the ECOSOC proposal was determinedly territorialist, and would likely have

left arbitration stuck in its pre-War rut. In the end, it was the ECOSOC proposal that was tabled for consideration at the drafting conference of 1958. But fortunately, deft diplomacy saved the day. On the sixth day of the conference, the Dutch delegate, Prof Piet Sanders, presented a set of draft amendments which incorporated key elements of the ICC Proposal, such as the removal of the requirement of double *exequatur*, but avoiding its controversial language.¹³ For the rest of the conference, he skilfully proposed and defended multiple substantive amendments to the ECOSOC draft, all on the basis that he was trying to make it “more easily comprehensible”.¹⁴

12. Eventually, a consensus coalesced around the so-called “Dutch Proposal” and the New York Convention was finally adopted on 19 June 1958.¹⁵ It is a short document, but rather like the US Constitution, its brevity belies its enormous importance. The New York Convention did not seek to displace national courts, but instead enlisted their assistance in recognising and enforcing arbitral awards on the basis of two consistent principles.¹⁶ The first was that full effect should be given to agreements by parties to arbitrate their disputes;¹⁷ the second was that foreign arbitral awards should be capable of being enforced in the same way as domestic awards, such that recognition and enforcement should only be refused on the limited grounds provided for in Article V of the Convention.¹⁸

13. The New York Convention itself did not seek to change national laws; instead, that task of harmonisation was left till the emergence of the 1985 UNCITRAL Model Law on Commercial Arbitration,¹⁹ which sets out a framework

governing every stage of the arbitral process from the arbitration agreement to the enforcement of the arbitral award. Among its core precepts is the rule that courts will not review an award on its merits and that certain remedies, such as the setting aside of an award, can only be sought before a seat court. Many of the principles set out in the New York Convention and Model Law have now achieved virtually universal recognition and acceptance in the community.²⁰

14. The New York Convention, which celebrated its 60th anniversary this year, has 159 states parties,²¹ while 80 states have adopted legislation based on the Model Law.²² Within the framework established by these two instruments, arbitration has undergone a profound and dramatic transformation. Today, it has come to be seen by many as the primary justice system for the global economy.²³ Arbitrations can be heard in almost any corner of the globe and involve any number of diverse issues, but the process of challenge, recognition, and enforcement is relatively stable and uniform.

15. And while the 159 states that are party to the New York Convention contribute to a decentralised network of courts, there are nodes of activity that stand out. These are the key seat jurisdictions of the world. New York is an obvious example, together with London, Paris and Geneva. And in more recent times, they have been joined by Hong Kong and Singapore.²⁴ These jurisdictions share a common basic architecture, which include laws that augment and support the practice of arbitration, judiciaries committed to the principle of minimal curial intervention and a dedication to enforcing arbitral awards.²⁵ Together, they form

what I have called a constellation of effective and efficient arbitral seats.²⁶

16. If we look back on that brief history of international arbitration, three distinct trends may be discerned.

(a) The first is the balance between pragmatism and principle. To be sure, the New York Convention was the product of a *pragmatic* need for compromise, but it was a *principled* compromise inasmuch as it was founded on the twin norms of party autonomy and non-distinction in the enforcement and recognition of arbitral awards. Today, these are rightly considered to be central pillars of the international arbitration regime.²⁷

(b) The second is the importance of soft law and interstitial law-making. Even taken together, the New York Convention and the Model Law do not represent a complete code for arbitration, but what they do is give a vision of arbitration that is underpinned by certain core principles. The gaps were left to be filled in by the efforts of national courts, professional bodies, and arbitral institutions that, together, have developed the law of arbitration to a point where it has attained an impressive level of maturity and sophistication.

(c) The third is the emergence of a constellation of seat courts. They maintain the international arbitration consensus by being fully committed to its central precepts and by upholding its tenets in a fairly consistent manner.²⁸ They are the standard bearers of the core values and central

identity of international commercial arbitration.

17. How then might these three trends illuminate the development of cross border insolvency and its rise as an integral element in aiding the flow of capital and credit in a globalised world?

III. Modified universalism: a pragmatic and principled compromise

18. I begin with what I have described as a pragmatic yet principled compromise. To explain this, it will be useful to briefly sketch the doctrinal territory. Universalism in its purest form calls for cross border insolvencies to be dealt with by a single forum applying one set of laws; pure territorialism, on the other hand, contemplates as many fora and sets of laws as there are states.²⁹ Modified universalism strives for a middle ground. As Lord Hoffmann explained in the *HIH Casualty* case, it requires that “[local] courts should, so far as is consistent with justice and [local] public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company’s assets are distributed to its creditors under a single system of distribution”.³⁰ It envisages the existence of multiple concurrent proceedings, but expects that all the ancillary courts should cooperate with the courts managing the principal insolvency proceedings to ensure that assets are distributed under a broadly unified system, subject to the limited exceptions of justice and public policy.

19. As a principle, although not as a legal rule, modified universalism is of ancient vintage, even if the expression was only coined by Prof Westbrook in 1991.³¹

The Singapore Court of Appeal acknowledged its force in the 2014 *Beluga Chartering* case, where we remarked, *obiter*, that even in the absence of statutory authorisation, a Singapore court might be able to render assistance to foreign insolvency proceedings by staying its own proceedings.³²

20. However, there are many who see modified universalism as a sub-optimal outcome. To examine this, it is helpful to begin by considering *why* many consider universalism to be a good thing. In a lecture delivered in Singapore last year, Sir Geoffrey Vos gave six reasons for preferring universalism, which I summarise under three headings:³³

(a) First, it promotes consistency. The idea is that since markets extend across borders, the same legal rules should apply throughout. This principle of “market symmetry” allows cross-border insolvencies to be resolved more predictably and consistently, and enables market actors to allocate their resources more effectively.³⁴

(b) Second, it is efficient. Universalism respects the principle of collectivity, which calls for the preservation and centralisation of all the assets of the debtor with the view towards maximising their value.³⁵ This reduces the cost of administration, and avoids the possibility of inconsistent results.³⁶

(c) Third, it is fairer. Without universalism, individual outcomes would depend on where the assets, debtors, and creditors happened to be and

this could be arbitrary. With a single forum, all unsecured creditors would stand *pari passu* and be paid rateably.

21. As against this, territorialists not only question the benefits and feasibility of a universalist approach,³⁷ but also mount a powerful sovereignty-based objection.³⁸ They point out that the design of a system of insolvency will be closely aligned with the country's social and political systems and its national goals.³⁹ As a corollary, universalism can sometimes entail the postponement of national public policy considerations in the insolvency law of the secondary proceedings, such as the protection of employees or other vulnerable classes of persons, to the policies and priorities embodied in the insolvency law applicable to the principal proceedings.⁴⁰ This, they contend, leads to systematic bias against developing countries, whose laws will regularly be shunned in favour of those of developed states, where the principal insolvency proceedings will usually be situated.⁴¹

22. These arguments are not without force. As I wrote in *Beluga Chartering*, "insolvency law involves a multitude of social and economic considerations and compromises", and it is not enough to consider commercial and business considerations alone in deciding on the proper course.⁴² This is where I see modified universalism coming in. While some have described it as a "pragmatic" concession,⁴³ and an "awkward, interim solution",⁴⁴ I would see it as a principled way of ensuring as much broad consistency as we need and are going to get in a world of competing sovereigns, while accommodating the legitimate interests of each sovereign.

IV. The Model Law: Soft law and interstitial law-making

23. But even if there were broad agreement that modified universalism should be the guiding principle,⁴⁵ there can be great divergence in its *application*.⁴⁶ This brings me to the second lesson from the brief history of international arbitration, which is the importance of ancillary or interstitial norm-creation, including by way of soft law instruments. The UNCITRAL Guide to Enactment suggests that the Model Law “does not attempt a substantive unification of insolvency law”, but only provides a “framework for cooperation between jurisdictions” to “facilitate and promote a uniform approach towards cross-border insolvency”.⁴⁷ Its lynchpin is the recognition of foreign insolvency proceedings and the grant of appropriate relief, depending on whether the foreign proceeding is classified as main or non-main proceedings.⁴⁸

24. Superficially, the Model Law might appear anodyne, given its apparent focus on matters of procedure.⁴⁹ However, this is a case of the whole being much more than the sum of its parts.⁵⁰ The recognition of foreign insolvency proceedings in itself is not a new idea,⁵¹ but the Model Law also requires classification. Article 17(2) specifies that a foreign proceeding “*shall*” be recognised either as a main proceeding or a non-main proceeding depending on whether it takes place at the debtor’s centre of main interests. This basic distinction, which is fundamental to the structure of the Model Law, is inescapably universalist in spirit. Yet, the Model Law leaves room for national interests in the form of three principal safeguards, namely: first, the public policy exception;⁵² second, the proviso that remittal can be ordered only where the interests of local creditors are adequately protected;⁵³ and third, the

pre-eminence of local proceedings where there are concurrent proceedings.⁵⁴

25. Now, whether one elects to describe this as “modified universalism with a territorialist foundation”⁵⁵ or territorialism with a universalist foundation does not matter. What does matter is that it articulates a powerful normative vision that insolvencies should, in the first instance, be governed primarily by the court and laws of the debtor’s COMI, subject to some safeguards being in place to cater for local interests. This is what subscription to the Model Law entails, and once States accept this, they will be more amenable to embracing other proposals that are similarly premised on a universalist foundation, such as the concept of the “Planning Proceeding”, which is at the heart of the draft Model Law on group enterprise solutions currently being debated by UNCITRAL.⁵⁶ One scholar has rather aptly likened this to wading into a lake rather than jumping in.⁵⁷

26. This is where the choice of instrument is important. Model laws are powerful instruments for driving legal convergence in areas where states may have significant defensive interests, and the consensus necessary for the conclusion of a treaty is hard to come by.⁵⁸ They offer three important advantages. First, they allow progress to be made on the basis of broadly agreed principles, while leaving the specifics of implementation for each state to consider at the stage of enactment. Second, they retain their character as visions of what the law *ought* ultimately to look like, and in that way continue to exert a powerful normative pull over the shape of future developments, even when states do not fully adopt their provisions. Last, and critically, they promote interstitial law-making through, among other things, “judicial

gap-filing” and the publication of instruments of guidance by think tanks and professional bodies.⁵⁹ Examples of the latter include the ILL and Asian Business Law Institute’s “Asian Principles of Restructuring” project, which aims to formulate common principles for in and out of court restructuring for use in Asian jurisdictions,⁶⁰ and the Judicial Insolvency Network’s Guidelines on Communications and Cooperation Between Courts in Cross-Border Insolvency Matters.

27. Here, a comparison with the Model Law on International Commercial Arbitration is apposite. Thus far, 80 states have amended their national arbitration statutes to bring them into broad conformity with the Model Law. But what is perhaps more significant is that its influence is such that “no State[] modernizing its arbitration law will do so without taking it ... into account”.⁶¹ Even the United Kingdom, which was initially sceptical of the Model Law, ended up adopting many of its articles when it passed its 1996 Arbitration Act.⁶² I believe that, in the same way, the Model Law on Cross-Border Insolvency, which has already been adopted by 44 states, including major financial centres like the United States, the United Kingdom, Japan and Singapore,⁶³ will continue to exert a powerful influence over the shape of other national cross border insolvency laws.

V. Forum selection and the rise of nodal jurisdictions

28. This brings me to my third point, which concerns the rise of a “constellation” of “nodal jurisdictions”. But before I get there, I should say something about forum selection or “forum shopping”, as it is more commonly known. When the literature

on this subject is examined, one might perceive a disconnect between what is said and what is done. On the one hand, one often hears of the allegedly pernicious nature of “forum shopping”.⁶⁴ On the other hand, reports of companies shifting their COMI or simply moving assets to another jurisdiction to create a jurisdictional nexus for the opening of insolvency proceedings are not at all uncommon.⁶⁵

A. *Is forum shopping a bad thing?*

29. I think we should begin by asking what “forum shopping” is, and why the term carries pejorative overtones. In its conventional sense, “forum shopping” entails a litigant making a strategic decision to select a forum that offers it the best tactical advantage for *its* case, without regard to the interests of the other litigants or, indeed, of the types of considerations that would point one to what is objectively the most *appropriate* setting for the resolution of the matter. But this is completely different from what is typically the case in insolvency proceedings, where what is meant by “forum shopping” or forum selection is that a debtor is seeking the jurisdiction which, it reasonably believes, will provide the most effective restructuring solution. If it is objectively the case that the chosen forum will offer the best outcome for the widest class of stakeholders, including debtors, creditors, and contributories, why should “forum shopping” in this sense be objectionable? In line with this, Advocate-General Ruiz-Jarabo observed in the *Staubitz-Schreiber* decision, that the search for a favourable forum is a “natural consequence” of the heterogeneity of legal systems and may be seen as the “optimisation of procedural possibilities ... that results from the existence of more than one available forum”.⁶⁶

30. Notably, something very similar happens in international commercial arbitration, where parties are at liberty to select where they wish to seat their arbitrations. Indeed, the choice of a seat is undertaken with great care, because it is thought to be amongst the most consequential decisions the parties will make in the course of an arbitration.⁶⁷

31. To be sure, there is an important difference between arbitration and insolvency. Arbitration is a private mode of dispute resolution while the insolvency process is heavily shaped by public policy. As observed in the influential Cork Committee report in the UK, “[t]he law of insolvency takes the form of a compact to which there are three parties: the debtor, his creditors and society”⁶⁸ and insolvency has “never been treated ... as an exclusively private matter between the debtor and his creditors”.⁶⁹

32. True; but this, if anything, makes the case for allowing parties a measure of discretion in selecting the jurisdiction that will offer the best prospects for achieving an effective restructuring solution even more compelling. Take the example of Vinashin, a Vietnamese state-owned enterprise, which at its peak was the world’s fifth largest shipbuilder.⁷⁰ In 2008, Vinashin fell into financial difficulty and defaulted on the payment of loan facilities totalling US\$600m. It sought to restructure its debts not in Vietnam ,but in England through a scheme of arrangement. Even though Vinashan had no assets in England, the English High Court held that the matter bore a “sufficient connection” with England as the loans to be restructured were governed by English law.⁷¹ Thus, it held that it had jurisdiction to call for a meeting of creditors

and to sanction the scheme, which, in the event, was successfully implemented.⁷²

33. Or take the older example of Garuda, the Indonesian national carrier, during the 1997 Asian Financial Crisis. At the height of its troubles, it elected to restructure in England and Singapore rather than in Indonesia. Garuda's counsel explained to the English court that although Indonesian law allowed companies a moratorium against legal proceedings while they proposed a composition plan, the company would be declared bankrupt if the plan was not approved, which – you can imagine – made it a somewhat risky proposition.⁷³ This, and the advantages afforded by the scheme of arrangement regime, led Garuda to seek to restructure in the UK and Singapore, which again it successfully did.⁷⁴

34. Would the interests of its creditors, and indeed those of the wider national economy, have been better served if Vinashin and Garuda had not been allowed to select the appropriate fora in which to restructure? We may never know the answer, but I suggest that these examples illustrate the value and validity of sound forum selection where it is undertaken for the right reasons. As Mr Justice Neway observed in *Re Codere Finance*, “there can sometimes be good forum shopping”,⁷⁵ a view that was echoed by my colleague Justice Ramesh in the *Pacific Andes* decision a year later.⁷⁶

35. So when is forum shopping “good”? An easy case would be where the creditors consent. If the parties whose interests are most likely to be impacted move the choice of forum, there is little reason for the court to stand in their way.⁷⁷ But this is not the only case; others include where the selection is motivated by a desire to

use a favourable form of proceeding (such as Chapter 11 or the scheme of arrangement); or for reasons of judicial efficiency or even cultural familiarity,⁷⁸ especially where this is all undertaken in the creditors' interest. After all, it is the creditors who must eventually take a view on whether they are better off collecting what they can today or extending a lifeline to the debtor in the hope of a better tomorrow.

36. Conversely, forum shopping would be “bad” if it were driven by the debtor's endeavour to escape its debts or if its choice would interfere with the realisation of the recoverable net assets to satisfy creditors' claims.⁷⁹ Thus, the 2015 European Insolvency Regulations defines forum shopping as the selection of a forum “to obtain a more favourable legal position **to the detriment of the general body of creditors**”.⁸⁰ Another instance of bad forum shopping would be where it leads to “unjustified inequality between the parties to a dispute”,⁸¹ as happened in *Indah Kiat*,⁸² where an application for an order convening a meeting of scheme creditors was refused because of inadequate disclosure and notice, and strong indications that the real objective of the scheme of arrangement was to secure the release of the parent company's debts, and not genuinely to restructure.⁸³

37. Perhaps some of the resistance to the notion of selecting a suitable forum, even when it is for the right reasons, might stem from the unwelcome connotations associated with the expression “forum shopping”.⁸⁴ A more neutral expression like “forum selection” or “selection of the seat of the insolvency” might help, but, ultimately, the use of a label should not be allowed to obscure the substantive

inquiry, which, as Mr Justice Newey rightly observed, is whether a proposed course would lead to the “best possible outcome for creditors”.⁸⁵

38. For these reasons, it seems to me that the case for appropriate forum selection is compelling. Two conclusions would follow from this. The first is that we should rethink and even jettison established shibboleths that impede this. One example, I respectfully suggest, is the *Gibbs* principle,⁸⁶ which provides that the discharge of a debt is only effective if it is undertaken in accordance with the law of the contract. This compels debtors to restructure in the jurisdiction of the law of the debt, even where it did not offer the best prospects for an effective restructuring solution.⁸⁷ The *Gibbs* principle was criticised by the Singapore High Court in the *Pacific Andes* decision,⁸⁸ and eminent jurists like the late Professor Ian Fletcher have described the reasoning as “seriously flawed”.⁸⁹ Notably, Lord Neuberger, in his address at last year’s conference, acknowledged that there were powerful arguments in favour of revisiting this principle.⁹⁰

39. The second is that forum selection is not just permissible, but also, I suggest, the *necessary and responsible* thing to do. When a company approaches insolvency, it is widely accepted that a director has a fiduciary duty to consider the interests of the creditors. This duty should extend, in appropriate cases, to identifying the forum that will allow for the best restructuring outcome.⁹¹

B. The rise of nodal jurisdictions

40. How would this affect the practice of cross-border insolvency? Given the

heterogeneity of possible insolvency regimes, very different results could ensue depending on where proceedings are undertaken. I suggest that as a result, we will increasingly see, as we already have in international arbitration, parties electing to commence insolvency proceedings in certain “nodal jurisdictions”, using these as bases from which to coordinate the restructuring of their global operations. This is already happening within the US, where 70% of public companies that filed for Chapter 11 between 2008 and 2013 did so in districts other than where the company’s principal place of business or assets were located; and 80% of them did so either in the Southern District of New York or in Delaware.⁹² I suggest that New York and Delaware, along with other nodal jurisdictions, will be seen to possess five key features.

i. The architecture of a nodal jurisdiction

41. The first are laws that support cross-border insolvency and provide effective restructuring tools. These include (a) the power to grant effective moratoria against legal actions during the pendency of the restructuring;⁹³ (b) “cram down” provisions; and (c) provisions that allow the court to sanction rescue financing and accord it super-priority status. Another important feature is the restriction on the use of *ipso facto* clauses, which can inhibit effective restructurings by depriving debtors of the ability to continue trading when they most need it. I should mention that the restriction on the use of *ipso facto* clauses is a key feature of the omnibus insolvency reform bill that was tabled in the Singapore Parliament last week.⁹⁴

42. The second is the presence of an independent judiciary experienced in the

fundamental precepts of insolvency law and capable of rendering commercially sound decisions. This is vital because no matter how sophisticated the available tools are, they will be useless if they not deployed effectively. For instance, the popularity of Delaware has been attributed, at least in part, to the view that its judiciary is predictable, fast, and familiar with the principles of insolvency law.⁹⁵ And sometimes, the judiciary can take the lead in fashioning novel solutions. That was the case in *Maxwell*, where courts in New York and London actively encouraged the use of a court-to-court communications protocol;⁹⁶ in *Re Nortel Networks*, where the courts in Canada and Delaware took cooperation one step further by holding a joint trial;⁹⁷ and in *Collins v Aikman*, where the English High Court pioneered the use of the synthetic secondary proceeding.⁹⁸

43. The third is a restructuring and rehabilitation friendly financial ecosystem. One aspect of this is rescue financing, in which the United States is undoubtedly the world leader. A 2014 paper estimated that there were 200 or more distressed debt funds in the US which had invested between US\$400 and 450bn in distressed debts.⁹⁹ Another aspect is litigation funding, which can be essential for ensuring that maximum value is extracted for creditors. Thus, the Singapore High Court recently approved, for the first time, an application by the liquidators of Trikomsel Pte Ltd to accept funds from IMF Bentham, a global litigation funder, to finance investigations and the bringing of claims.¹⁰⁰

44. The fourth feature of a sound nodal jurisdiction is that it will have a strong base of professionals, comprising lawyers, accountants, and others with depth and

breadth of expertise in insolvency and restructuring. Professionals undertaking cross-border restructuring work must grapple with complex (and often novel) financing arrangements and corporate structures, while also managing a large body of debtors and creditors with different commercial considerations and backgrounds. In time, we might see the emergence of “cross-border insolvency specialist”, as a distinct professional category, as has happened in arbitration with the development of what has been described as an “invisible college” of arbitration professionals,¹⁰¹ and the rise of a distinct class of professional arbitrators.¹⁰²

45. Finally, I believe that nodal jurisdictions will lead the way in promoting international judicial cooperation and comity in the practice of cross-border insolvency. By design, the provisions of the Model Law are broadly expressed, and this can lead to a degree of divergence. In this context, national courts have been described as having a significant role as “agents of harmonization” that fill in the gaps in the form and substance of the Model Law by “deliver[ing] outcomes within the letter and spirit of the instrument”.¹⁰³ This, too, finds a parallel in the way that national courts have strengthened the international arbitration framework by contributing to the development of a body of “international common law” on the interpretation of instruments like the New York Convention and the Model Law on International Commercial Arbitration, and in developing principles to address areas that are not exhaustively governed either by national laws or international treaties.¹⁰⁴

46. This is why I see nodal jurisdictions taking a leading role in groupings like the Judicial Insolvency Network (“JIN”). Apart from facilitating direct judicial

communications,¹⁰⁵ the JIN builds trust amongst its members and promotes thought leadership. On this last point, by way of example, the JIN has embarked on a project to develop principles for the recognition of insolvency proceedings so as to drive convergent approaches in this vital area of the law. In this sense, the JIN may be likened to a string which connects the nodal jurisdictions of the world together in a necklace of courts united by common purpose. Courts will increasingly take the lead the lead in developing a unified approach to managing these uniquely complex, commercially vital, cross-border proceedings, that will be geared ultimately to allowing credit to continue on sensible terms even in difficult times.

ii. The Singapore story and Asia

47. It will be evident that one does not become a successful nodal jurisdiction by happenstance, but through deliberate and conscious effort. As a result of the efforts of the Legislature, the Executive, the Judiciary and the legal profession, Singapore has emerged as one of the leading seats in the world for arbitration and in doing so, we believe that we have made a valuable contribution to strengthening the rule of law framework to support regional commerce. In similar fashion, we have undertaken a number of efforts over the past decade to strengthen our insolvency regime. These efforts were spurred, among other things, by the publication of the reports of the Insolvency Law Review and Debt Restructuring Committees in 2013 and 2016, respectively, which recommended a philosophical shift from a liquidation-focused regime to one that places greater emphasis on restructuring and rehabilitation.

48. These recommendations were largely accepted and in 2017 amendments were made to our Companies Act to graft certain features of Chapter 11 of the US Bankruptcy Code on to our English-based scheme of arrangement regime and to enact the provisions of the UNCITRAL Model Law on Cross-Border Insolvency.¹⁰⁶ Just a fortnight ago, the omnibus Insolvency Bill was tabled in Parliament,¹⁰⁷ and it realises the promise of consolidating Singapore's personal and corporate insolvency laws in a single piece of legislation that articulates a culture that is supportive of restructuring and rehabilitation.

49. Why is Singapore so committed to this project? To answer this, it is instructive to examine what is happening in Asia. Simply put, Asia is the fastest-growing region in the world, and currently contributes to more than 60% of global growth.¹⁰⁸ ASEAN, or the Association of South East Asian Nations, is the 6th largest economy in the world, with a combined GDP of USD 2.56 trillion, and is expected to grow at a rate of 5.2% from 2018 to 2022, when regional GDP is projected to be US\$3.3 trillion.¹⁰⁹

50. These are heady statistics, but there is also the reality that Asian insolvency laws have not kept pace. We saw this during the Asian Financial Crisis in the late 1990s, which exposed inadequacies in the region's laws. As a consequence, some businesses that perhaps could have been rehabilitated were forced to liquidate; and in liquidation, creditors were sometimes not able to extract maximum value because of difficulties in coordinating cross-border efforts. Some progress has since been made, but more needs to be done if we are to secure an insolvency and restructuring

regime equal to the task; and the anticipated flow of investment in Asia would suggest that this is best done sooner rather than later.

51. An estimated US\$1trn is expected to be invested under China's Belt and Road Initiative, much of it into projects in Asia.¹¹⁰ Asia in general is expected to require US\$26 trillion in infrastructure investment over the next 15 years.¹¹¹ Singapore, as one of the top 5 financial centres in the world, is a key conduit of these funds and a hub for infrastructure investment.¹¹² Last year, 33% of all outbound BRI investments and 85% of inbound BRI investments made their way to and from China through Singapore,¹¹³ and our banks provided loans for 60% of the infrastructure projects in ASEAN. The BRI will benefit from the development of a robust supporting legal infrastructure. To this end, the supreme courts of China and Singapore have initiated an annual roundtable and have just agreed to form a working group that will focus on this task.

52. With any extension of credit, there comes a risk of default. This is why we in Singapore see the development of a strong cross-border insolvency regime that is supportive of rehabilitation and, in turn, is supported by sound nodal jurisdictions that can serve the needs of the region, as an urgent necessity.

53. But laws alone do not assure a conducive and vibrant restructuring ecosystem. The Singapore International Commercial Court ("the SICC"), which was established to deal with transnational commercial matters and draws on the expertise of some of the world's leading commercial judges, is part of this ecosystem as it will oversee some of these matters. Foreign lawyers are permitted to appear in

the SICC in offshore cases.¹¹⁴ And, given that transnational restructuring cases will often involve complex cross-border issues in which questions of foreign and local law are closely interwoven, possible refinements are being studied to clarify how local and foreign counsel can collaborate in such cases to present arguments to the court most effectively. It is our hope that by combining an innovative legislative framework that supports rehabilitation and restructuring with a commercially sensitive court before which international insolvency specialists can appear, we will be doing our part to assist in the development of a robust restructuring environment to help finance the massive infrastructure investment in the region, and that will ultimately be a critical factor in advancing regional development.

54. Another area of concern is public sector debt. Some of the capital investment in Asia will likely be funded through debts and guarantees issued by public sector enterprises, which, too, come with a risk of default but do not easily or always lend themselves to restructuring before domestic courts. This suggests that the region needs a platform for the negotiation of a cohesive restructuring solution for such debt, and I am pleased to advise that the Permanent Court of Arbitration is taking the lead in studying the development of an arbitral framework to manage the restructuring of such debt in Asia. This initiative, which will be fully supported by the Supreme Court of Singapore and in which the III will play an important advisory role, envisages a mechanism that will take advantage of some of the best features of arbitration, including party autonomy on the choice of seat and procedural flexibility, and could provide an effective mechanism for the management of the overall restructuring of public sector debt.

VI. Conclusion

55. There is a great deal to be excited about as we consider the road ahead. Modified universalism has provided us with the vision of a unified approach to multinational defaults and the Model Law has supplied us with the blueprint needed to help make that vision a reality. What remains now is the hard work of developing practical solutions to meet the challenges that lie ahead. This is where conferences such as these – with the opportunities they afford us to reflect, debate, and learn from each other – are so valuable.

56. I return, in closing, to my opening remarks. I accepted the invitation to address you today because I believe that the work you are engaged in has critical importance that extends far beyond the boardrooms and offices of borrowers and lenders. As I have noted elsewhere, what is sometimes obscured by the dizzying statistics about economic growth in Asia is the story of the alleviation of want.¹¹⁵ In 1990, 966 million people in East-Asia and the Pacific lived in extreme poverty; 23 years later, by 2013, that number had dropped to 71 million.¹¹⁶ As Harvard economist Dani Rodrik observed, economic growth alone is not a panacea for the ills of this world, but, as he puts it, “historically, nothing has worked better ... in enabling societies to improve the life chances of their members, including those at the very bottom”.¹¹⁷ Viewed in this light, the story of economic growth in Asia is also the story of human development, and this, in turn, is the real story of freedom.¹¹⁸ In striving to develop an effective cross-border insolvency regime, we are collectively committing ourselves to the preservation of jobs, investments, and ultimately, of

economic value; and, in a wider sense, to the protection of the freedom they represent.

57. Thank you all very much.

1 Ian F. Fletcher, *The Law of Insolvency*, (Sweet & Maxwell, 5th Ed, 2017) (“*The Law of*
2 *Insolvency*”) at para 28-002.

3 See the preamble to the Model Law at *Guide to Enactment and Interpretation of the*
4 *UNCITRAL Model Law on Cross-Border Insolvency*, available at
5 <<https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>> (last accessed: 16 September 2018) (“*Guide to Enactment and Interpretation of the Model Law*”) at p 3.

6 For an overview of the debate, see Sundaresh Menon, “The Role of National Courts of the
7 Seat in International Arbitration” (2018) 4 SCC J-1 (a similar version was published in the
8 International Construction Law Review at [2018] ICLR 265) (“*The Role of National Courts*
9 *of the Seat*”) and Jonathan Mance, “Arbitration – a Law unto itself?”, 30th Annual Lecture
10 organised by The School of International Arbitration and Freshfields Bruckhaus Deringer
11 (4 November 2015), available at <https://www.supremecourt.uk/docs/speech-151104.pdf>
12 (last accessed: 16 September 2018).

13 GA Res 52/158, UN GAOR 52th Sess, Annex (30 January 1998).

14 Sundaresh Menon, “Standards in Need of Bearers: Encouraging Reform from Within”,
15 keynote address delivered at the Chartered Institute of Arbitrators: Singapore Centenary
16 Conference on 3 September 2015, available at <www.ciarb.org.sg/wp-content/uploads/2015/09/Keynote-Speech-Standards-in-need-of-Bearers-Encouraging-Reform-from-.pdf> (last accessed: 9 September 2018) at para 9.

The history of arbitration is a topic which has been well-traversed in academic literature:
see generally, Michael John Mustill, “Arbitration: History and Background” (1989) 6 *Journal*
of International Arbitration 43 (“*Arbitration: History and Background*”) at p 43 and Earl S
Wolaver, “The Historical Background of Commercial Arbitration” (1934–1935) 83 *University*
of Pennsylvania Law Review 132 at p 132. For an account of the practice in ancient Greece,
see: Derek Roebuck, *Ancient Greek Arbitration* (The Arbitration Press, 2011) at p 164.

6 Arthur Nussbaum, “Treaties on Commercial Arbitration – A Test of International Private
7 Law Legislation” (1942) 56(2) *Harvard Law Review* 219 at 239–240.
8 *Arbitration: History and Background* at p 49.

9 Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2nd
10 Edition, 2014), Vol 1 (“*International Commercial Arbitration*”) at p 63.

11 “Protocol on Arbitration Clauses in Commercial Matters”, 24 September 1923, 27 L.N.T.S.
12 158 (entered into force 28 July 1924).

13 “Convention on the Execution of Foreign Arbitral Awards”, 26 September 1927, 92 L.N.T.S.
14 301 (entered into force 25 July 1929).

15 Convention on the Recognition and Enforcement of Foreign Awards, *Travaux*
16 *Preparatoires - Final Act and Convention on the Recognition and Enforcement of Foreign*
Arbitral Awards, at 32, U.N. DOC E/Conf.26/8/Rev.1 (1958).

This requirement of double *exequatur* was found in the 1927 Geneva Convention, and it
was seen as an impediment to the international enforceability of arbitral awards: see
Sundaresh Menon, “Overview of Arbitration”, in *Arbitration in Singapore* (Thomson
Reuters, 2nd Ed, 2018) at paras 1.001 to 1.017 (*forthcoming*) (“*Overview of Arbitration*”).

13 Piet Sanders, “The History of the New York Convention”, keynote address at the 9th ICCA
Congress in Paris, 1998, available at <www.arbitration-icca.org/media/1/13474348789900/cogress_no._9_keynote_address_prof._pieter_sander_s.pdf> (last accessed: 9 September 2018).

14 Marike Paulsson, *The 1958 New York Convention in Action*, (Kluwer Law International,
2016) at p 6.

15 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958)
330 UNTS 3 (“*New York Convention*”).

16 *Ibid*, p 1.

17 *Ibid*, Art II.
18 *Ibid*, Arts III–V and *Overview of Arbitration* at para 1.022.
19 GA Res 40/72, UN GAOR 40th Sess, Supp No 17, Annex I, UN Doc A/40/17 (1985), 24 ILM
1302, as amended by GA Res 6/31, UN GAOR 61th Sess, Supp No 17, UN Doc A/61/17
20 (2006).
Sundaresh Menon, “The Influence of Public Actors on Lawmaking in International
Arbitration: Domestic Legislatures, Domestic Courts and International Organizations”,
paper delivered at the 19th Congress of the International Council for Commercial Arbitration
to be published in the upcoming ICCA Congress Series No 19.
21 UNCITRAL, “Status of the Convention on the Recognition and Enforcement of Foreign
Arbitral Awards (New York, 1958)”, available at
<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>
(last accessed 16 September 2018).
22 UNCITRAL, “Status of the UNCITRAL Model Law on International Commercial Arbitration
(1985), with amendments as adopted in 2006”, available at
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html
(last accessed 16 September 2018).
23 Catherine A Rogers, “The Vocation of the International Arbitrator” 20 (2005) *Am U Intl Rev*
957.
24 They were selected by the respondents to the 2018 Queen Mary International Arbitration
Survey as the six most preferred arbitral seats in the world: see Queen Mary University of
London and School of International Arbitration, “2018 International Arbitration Survey: The
Evolution of International Arbitration”,
<www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration.PDF> (accessed 24 August 2018)
25 (“2018 QMUL Survey”) at p 9.
When asked what influenced their choice of seat, users routinely list “neutrality and
impartiality of the local legal system”, “national arbitration law”, and “track record in
enforcing agreements to arbitrate and arbitral awards” as the most important factors. The
authors of the survey note that these relate to the “formal legal structure” of the seat and
serve to provide an assurance of impartial treatment by the courts of the seat: see 2018
QMUL Survey at pp 10–11. See also Sundaresh Menon, Patron’s Address, Chartered
Institute of Arbitrators London Centenary Conference (2 July 2015) accessible at
<<https://www.supremecourt.gov.sg/docs/default-soruce/default-document-library/media-room/ciarb-centenary-conference-patron-address.pdf>> (last accessed: 16 September
2018) (“2015 Patron’s Address”) at para 23.
26 *2015 Patron’s Address* at paras 72–78.
27 Sundaresh Menon, “The Influence of Public Actors on Lawmaking in International
Arbitration: Domestic Legislatures, Domestic Courts and International Organizations”,
ICCA Congress Series No 19 (forthcoming).
28 *2015 Patron’s Address* at paras 72–78.
29 Wong Meng Seng, “Lessons for the Development of Singapore’s International Insolvency
Law” (2011) 23 *SAC LJ* 932 at paras 12–16.
30 *In re HIH Casualty and General Insurance* [2008] 1 *WLR* 852 (“*HIH Casualty*”) at [30].
31 Jay L Westbrook, “Choice of Avoidance Law in Global Insolvencies”, 17 *Brook. J. Int’l L.*
499 (1991) at p 517. Some would even say that the principle of modified universalism traces
its roots all the way to the seminal decision of Mr Justice Bathurst more than two and a half
centuries ago in *Solomons v Ross* (1764) 126 *ER* 79: see Richard Sheldon QC,
“Introduction” in *Cross-Border Insolvency* (Richard Sheldon QC gen ed) (Bloomsbury
Professional, 4th Ed, 2015) (“*Cross-Border Insolvency*”), para 1.2. It has been argued that
there are shades of it in the Common Law in the form of the ancillary liquidation doctrine,

which has been widely accepted around the Commonwealth: see *In re Bank of Credit and Commercial International SA (No 10)* [1997] Ch 213, and it has been accepted in Singapore (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 (“*Beluga (CA)*”)), Australia (see *Re Alfred Shaw & Co Ltd ex parte Mackenzie* (1897) 8 QLJ 93 at 96), and Canada (see *Re National Benefit Assurance Co* [1927] 3 DLR 289).

32 *Beluga (CA)* at [91]–[98].

33 Geoffrey Vos, “Modified Universalism: Do we now know what it means?”, lecture at the Singapore Supreme Court delivered on 26 October 2017, available at <www.supremecourt.gov.sg/docs/default-source/default-document-library/sjc/modified-universalism-do-we-now-know-what-it-means.pdf> (last accessed: 9 September 2018) at para 13.

34 Jay Lawrence Westbrook, “A Global Solution to Multinational Default” (2000) 98 Michigan Law Review 2276 (“*A Global Solution to Multinational Default*”) at p 2288.

35 Loke Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell, 2016) at para 6-015.

36 Prof Westbrook described this as a “transactional gain”: see Jay L Westbrook, “Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum” (1991) 65 American Bankruptcy Law Review 457 at 466.

37 See, generally, Lynn M LoPucki, “Global and Out of Control” (2005) 79 American Bankruptcy Law Journal 79, Lynn M. Lo Pucki, “Universalism Unravels” (2005) 79 American Bankruptcy Law Journal 143, Frederick Tung, “Is International Bankruptcy Possible?” (2001) 23 Michigan Journal of International Law 31. The principal target of their criticisms is the difficulty of identifying a single “home” jurisdiction which would have control over the entire insolvency. This impossibility, they contend, eliminates all of the purported benefits arising out of universalism and instead promotes “forum shopping” as companies seek to take advantage of local rules that favour one party over another, and will lead to unhealthy competition between courts.

38 See, generally, *International Bankruptcy* at 46–47 and Chan Sek Keong, “Cross-Border Insolvency Issues Affecting Singapore” (2011) SAclJ 413 at para 15.

39 See the decision of the Singapore High Court in *Beluga Chartering GmbH (in liquidation) v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (Deugro (Singapore) Pte Ltd, non-party)* [2013] 2 SLR 1035 at [166] and *HIH Casualty* at [21]; and see generally, Elizabeth Warren, “Bankruptcy Policymaking in an Imperfect World” (1994) 92 Michigan Law Review 336 and Thomas M Gaa, “Harmonization of International Bankruptcy Law and Practice: Is it Necessary? Is it Possible?” (1993) 27(4) *The International Lawyer* 881.

40 See, generally, Frederick Tung, “Fear of Commitment in International Bankruptcy” (2001) 33 George Washington International Law Review 555 at 568–577.

41 *Ibid* at 576–577.

42 *Beluga Chartering (CA)* at [81].

43 Professor Westbrook, once said, paraphrasing Churchill, that modified universalism is “the worst transitional system, except for all the others”: see *A Global Solution to Multinational Default* at p 2302.

44 At [7] of *HIH Casualty*, Lord Hoffmann described universalism as having been “heavily qualified by exceptions on pragmatic grounds”, thus producing modified universalism. See also, Jay L Westbrook, “Chapter 15 At Last” (2005) 79 American Bankruptcy Law Journal 713 at 716.

45 As Lord Neuberger remarked in his keynote address to this conference last year, even the judges who have taken different sides in the decisions coming from the UK Supreme Court and the Privy Council in the past 10 years would not quibble with the basic statement of principle articulated by Lord Hoffmann: see David Neuberger, “The Supreme Court, the

Privy Council and International Insolvency”, keynote speech at the International Insolvency Institute Annual Conference 2017, 19 June 2017, available at <www.supremecourt.uk/docs/speech-170619.pdf> (last accessed: 9 September 2018), (“*The Supreme Court, the Privy Council and International Insolvency*”) at para 12.

46 Kannan Ramesh, “Cross-Border Insolvencies: A New Paradigm”, speech delivered at the *International Association of Insolvency Regulators’ 2016 Annual Conference and General Meeting* in Singapore on 6 September 2016, available at <www.supremecourt.gov.sg/Data/Editor/Documents/IAIR%202016%20Speech_%206%20September%202016.pdf> (last accessed: 9 September 2018), at para 26. One example is the way that the UK has gone back and forth on the question of the proper approach to the recognition and enforcement of foreign insolvency decisions: see the decisions of the House of Lords, UK Supreme Court, and *Judicial Committee of the Privy Council in Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors (of Navigator Holdings PLC)* [2006] UKPC 26, *McGrath v Riddell* [2008] UKHL 21, *Rubin and another v Eurofinance SA and others* [2012] UKSC 46 (“*Rubin*”), and *Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda)* [2014] UKPC 3.

47 *Guide to Enactment and Interpretation of the Model Law* at para 4.

48 Model Law, Arts 15–21.

49 *Guide to Enactment and Interpretation of the Model Law* at para 20.

50 John A E Pottow, “Procedural Incrementalism: A Model for International Bankruptcy” (2005) 45 *Virginia Journal of International Law* 935 (“*Procedural Incrementalism*”) at 939.

51 The common law has always recognised that a liquidator appointed under the law of a company’s incorporation has authority and title to act behalf of the company (see *Cambridge Gas* at [20] and *Bank of Ethiopia v National Bank of Egypt and Liguori* [1937] Ch 513) and has, in some cases, extended assistance to that foreign liquidator through, among other things, the grant of a stay of curial proceedings (see, generally, *Beluga (CA)* at [92]–[98] and the cases cited therein).

52 Model Law, Art 6.

53 Model Law, Art 22(1).

54 *Guide to Enactment and Interpretation of the Model Law* at para 231.

55 Edward S Adams and Jason K Fincke, “Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism” (2008) 15 *Columbia Journal of European Law* 43 at p 61.

56 See UNCITRAL, *Report of Working Group V (Insolvency Law) on the work of its forty-ninth session (New York, 2-6 May 2016)*, A/CN.9/870.

57 *Procedural Incrementalism*, footnote 219, at 989–990.

58 Mohammad Jaamae Hafeez-Baig, “Navigating the waters between admiralty and cross-border insolvency: a comparison of the Australian, German and French positions” [2018] *LMCLQ* 97 at pp 139–140.

59 *Procedural Incrementalism* at 984–986 and Sandeep Gopalan and Michael Guihot, “Recognition and Enforcement in Cross-Border Insolvency Law: A Proposal for Judicial Gap-Filling” (2015) 48 *Vanderbilt Journal of Transnational Law* 1224 (“Gopalan and Guihot”).

60 The Asian Business Law Institute (“ABLI”) and the ILL has undertaken a project, known as the “Asian Principles of Restructuring”, that aims to eliminate the time and costs inefficiencies that are due to the patchwork of laws with different approaches and philosophies in Asia. The project consists of two phases: the first phase is a mapping exercise of the business reorganisation regimes in jurisdictions in Asia, while the second phase is an examination of the output of the mapping exercise to determine areas of similarity and make recommendations for ways in which the regimes could work more effectively with one another. The aim is to publish a set of Asian Principles of Restructuring:

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- see the website of ABLI available at abli.asia/Asian-Principles-Restructuring (last accessed: 16 September 2018).
61. Pieter Sanders, "Unity and Diversity in the Adoption of the Model Law", 11 *Arbitration International* (1995, no. 1) p 1.
62. Arbitration Act 1996 (c. 23) (United Kingdom) ("the Arbitration Act"). It adopted many provisions which represented changes to English law, such as the provisions empowering tribunals to rule on their own jurisdiction and appoint experts, which can be found at ss 30 and 37 of the Arbitration Act: see Richard Garnett, "International Arbitration Law: Progress Towards Harmonisation" 30 *Melbourne Journal of International Law* (2002, no. 2) 400 at p 408.
63. UNCITRAL, "Status of the UNCITRAL Model Law on Cross-Border Insolvency", available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last accessed 16 September 2018).
64. See for instance, the comment of Lord Simon in *The Atlantic Star* [1974] AC 436 at 471 that "[f]orum-shopping is a dirty word.", and the comments of Andrew Smith J in *Citigroup Global Markets Ltd v Amatra* [2012] EWHC 1331 at [38] on how forum shopping may be inappropriate. Before it was amended in 2015, Recital (4) of the European Insolvency Regulations provided that: "It is necessary for the proper functioning of the internal market to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)".
65. *Cross-Border Insolvency* at para 1.24. It has been said that in the US, insolvency proceedings may even be based on the presence of "a dollar, a dime or peppercorn": *In re McTague*, 198 B. R. (Bankruptcy Reporter) 428 (1996).
66. Opinion of Advocate-General Ruiz-Jarabo in *Staubitz-Schreiber* [2006] ECR I-701-2005 WL 2138235 (ECJ Grand Chamber) ("*Opinion of Advocate-General Ruiz-Jarabo*") at [71] and [72].
67. Indeed, the choice of seat is one which is undertaken with great care, as it is seen as one of the most consequential decisions the parties will make in the course of the arbitration: see Queen Mary University of London and School of International Arbitration, "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration", available at www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf (last accessed: 16 September 2018) ("QMUL Survey 2015") at p 11.
68. UK, Cork Committee, *Insolvency Law and Practice* (Cmnd No. 8558) by Kenneth Cork *et al* (London: Her Majesty's Stationary Office, 1982) at para 192.
69. *Ibid* at para 1734.
70. *Bluecrest Mercantile BV and another v Vietnam Shipbuilding Industry Group and others* [2013] EWHC 1146 (Comm) ("*Bluecrest*") at [2].
71. *Re Vietnam Shipbuilding Industry Group* [2013] EWHC 2476 (Ch) at [8].
72. "Vinashin – An English Solution for an Asian Problem", available at <http://www.allenoverly.com/publications/en-gb/Pages/Vinashin-%E2%80%93-An-English-solution-for-an-Asian-problem.aspx> (accessed: 17 September 2018).
73. *Sea Assets Ltd v Perusahaan Perseroan (Persero) PT Perusahaan Penerbangan Garuda Indonesia* [2001] EWCA Civ 1696 at [6].
74. See Roberto Akyuwen. "The Impact of Restructuring on the Performance of Garuda Indonesia", *World Journal of Management* Vol 3, No 1, March 2011, pp 15 to 33. Garuda later went through another round of restructuring in 2005.
75. *Codere Finance (UK) Limited* [2015] EWHC 3778 (Ch) ("*Codere*") at [18].
76. *Pacific Andes Resources Development Ltd and other matters* [2016] SGHC 210 ("*Pacific Andes*") at [51].

77 See *Re Apcoa Parking Holdings GmbH* [2014] EWHC 3849 (Ch), where Hildyard J decided
to sanction a scheme because, among other things, it was “clearly and consistently
78 supported by a strikingly high proportion” of the creditors.
For example, Schefenacker AG, a German company, elected to move its COMI to England
to make use of insolvency procedures because, among other things, 90% of its creditors
were from the UK and the US and it was reported that the choice of England as a forum
would give its English speaking stakeholders comfort that a familiar restructuring
environment was being used: see I Simensen, “Schefenacker Restructuring Holds Up
Mirror to Cross-Border Differences” *Financial Times* (11 October 2007), cited at Wolf-
Georg Ringe, “Forum Shopping under the EU Insolvency Regulation”, *European Business
Organisation Law Review* (2008) 589.
79 *Codere* at [18].
80 Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on
insolvency proceedings (recast), Recital 5. The clause “to the detriment of the general body
of creditors”, which was not present in the previous version, was added to differentiate
between beneficial and abusive variants of forum shopping: see Wolf-Georg Ringe,
“Insolvency Forum Shopping, Revisited” (2017) *Hamburg Law Review* 38 at 43.
81 *Opinion of AG Ruiz-Jarabo* at [73].
82 *Re Indah Kiat International Finance Company B.V.* [2016] EWHC 246 (Ch).
83 *Ibid* at [34], [38], and [84].
84 As Professor Jeunger wrote, “not all forum shopping merits condemnation” and we should
“not led a disparaging term becloud our thinking”: see Friedrich K Jeunger, “Forum
Shopping, Domestic and International” (1989) 63 *Tulane Law Review* 553 at 570–571.
85 *Codere* at [18].
86 *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD
399.
87 See Kannan Ramesh, “The Gibbs Principle: A Tether on the Feet of Good Forum
Shopping” (2017) 29 *SAC LJ* 42 at [50].
88 *Pacific Andes* at [46]–[52].
89 *The Law of Insolvency* at para 29-066.
90 *The Supreme Court, the Privy Council and International Insolvency* at para 30.
91 Irit Mevorach, “Forum Shopping in Times of Crisis: A Directors’ Duties Perspective” 4
European Company and Financial Law Review 2013, 524-553 at p 531.
92 Written Statement on behalf of National Ad Hoc Group of Bankruptcy Practitioners in
Support of Venue Fairness, submitted in support of testimony of Douglas B. Rosner before
the American Bankruptcy Institute Commission to study the reform of Chapter 11
(November 22, 2013), at p 1.
93 I say “effective” because most stays only take effect *in personam*, and will only be effective
where the issuing court is located in a financial centre and capable of binding major
international creditors that have financial interests and activities there. In a speech
delivered last year that was published as an article in Jay Lawrence Westbrook, “Global
Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a
Central Court”, Vol 96 *Texas Law Review* 1473, Professor Westbrook termed such
jurisdictions as “control countries”, and identified the UK, the US and Singapore as being
three such control countries.
94 Once it is passed into law, counterparties will no longer be able to terminate or amend an
agreement, make a claim for accelerated payment, or forfeiture solely on account of an
insolvency event having taken place: see clause 440(1) of the Insolvency, Restructuring
and Dissolution Bill (No 32/2018); Declan Bush, “Omnibus Insolvency Reform Bill
Welcomed in Singapore”, available at

<https://globalrestructuringreview.com/article/1174024/omnibus-insolvency-reform-bill-welcomed-in-singapore> (last accessed 15 September 2018).

95 Jennifer Payne, “Cross-Border Schemes of Arrangement and Forum Shopping” (2013) 14 European Business Organisation Law Review 563.

96 *Re Maxwell Communication* [1992] BCC 757 and *In re Maxwell Communication Corporation plc* 170 BR 800 (Bankr SDNY 1994), which involved the insolvency of a holding company listed on the London Stock Exchange that held debt in the UK but whose principal assets were located in publishing companies in the US. Insolvency proceedings were commenced in both the UK and the US. Lord Hoffmann sitting in the English High Court and Judge Brozman of the US Bankruptcy Court for the Southern District of New York approved a protocol to facilitate communication between the two courts.

97 The Ontario Superior Court of Justice and the US Bankruptcy Court for the District of Delaware entered into a protocol for communication and cooperation pursuant to which they not only held a joint trial, but also coordinated the timing of the release of their decisions: see *Re Nortel Networks Corporation* 2015 ONSC 2987.

98 *Collins & Aikman Eur S.A.* [2006] EWHC (Ch) 1343 and John A. E. Pottow, “A New Role for Secondary Proceedings in International Bankruptcies” *Tex. Int’l L. J.* 46, no. 3 (2011): 579-99, at p 585.

99 Edward I Altman, “The Role of Distressed Debt Markets, Hedge Funds and Recent Trends in Bankruptcy on the Outcomes of Chapter 11 Reorganizations”, (2014) 22 *American Bankruptcy Institute Law Review* 75 at 76.

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102 Emmanuel Gaillard, “Sociology of International Arbitration” (2015) 31 *Arbitration International* 1 at p 4.

103 Gopalan and Guihot at p 1275, 1279, and 1284.

104 Sundaresh Menon, “The Influence of Public Actors on Lawmaking in International Arbitration: Domestic Legislatures, Domestic Courts and International Organizations”, paper delivered at the 19th Congress of the International Council for Commercial Arbitration to be published in the upcoming ICCA Congress Series No 19.

105 See the Judicial Insolvency Network Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters.

106 Companies (Amendment) Act 2017 (Act 17 of 2017).

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108 International Monetary Fund, *The Regional Economic Outlook: Asia and Pacific*, April 2018, available at < <https://www.imf.org/~media/Files/Publications/REO/APD/2018/apd-reo-full-report.ashx?la=en> > (last accessed: 16 September 2018).

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- 112 “New York Overtakes London as Top Financial Centre; Brexit Blamed”, *Reuters* (12
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- 113 Warren Fernandez, “Singapore can play key role in China-led Belt and Road Initiative:
Chan Chun Sing” (*Straits Times*, 24 January 2018).
- 114 Registered foreign lawyers may also, with leave, be permitted to address the SICC and the
Court of Appeal (in appeals from decisions of the SICC) on matters of foreign law in non-
offshore cases.
- 115 Welcome address delivered by Sundaresh Menon at Emergence Conference 2018 (25 July
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