

## **SINGAPORE INSOLVENCY CONFERENCE 2018 – KEYNOTE ADDRESS**

**23 JULY 2018**

### **I. Introduction**

1 Good morning. It gives me immense pleasure to deliver the keynote address at this flagship conference, now in its seventh year. These are exciting times for insolvency practitioners in Singapore. The groundbreaking reforms to Singapore’s insolvency and restructuring laws that came into force in May 2017 have strengthened Singapore’s position as an international centre for debt restructuring for Asia and beyond, and have heralded a wave of optimism that a new dawn full of opportunities for debt restructuring has arrived. The pace of change is relentless and new chapters are being constantly written. As the brochure for this year’s conference notes, more than 15 new cases, many with a significant international dimension, have already been brought before the courts under the new amendments in slightly over a year. New opportunities apart, as the caseload and the complexity of cases rise, there will be tremendous scope for the development of important jurisprudence on cutting-edge legal issues.

2 We can safely say that we are looking at a new paradigm in Singapore’s debt restructuring landscape. The theme of this year’s conference – “Cross-border Restructuring and Insolvency – An Interdisciplinary Approach” – recognises this in part by acknowledging that international debt restructuring is a collaborative multi-disciplinary effort involving various interconnected and cross-fertilised disciplines. I am gratified that the conference has adopted a multi-disciplinary approach to the subject of restructuring combining legal, economic, technical, and fiscal aspects. I must commend the organisers for their insight in this regard.

3       The importance of cross-disciplinary capacity building was highlighted in the report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (“the Committee”). The Committee made two recommendations in this regard. First, to develop a specialist post-graduate diploma programme for restructuring professionals. Second, to offer specialist restructuring courses for undergraduates and full-time masters programme students who are interested in pursuing a career in the industry. I am delighted that the Insolvency Practitioners Association of Singapore and the School of Accountancy of the Singapore Management University have shown leadership in implementing the second of these recommendations by designing a cross-disciplinary undergraduate programme taught by practitioners and academics at the School of Law and the School of Accountancy. This is an immensely pleasing development and is demonstrative of the commitment of the insolvency community and academic institutions in Singapore to the efforts to transform the restructuring landscape. I am hopeful that the first of these recommendations will take form soon as well.

4       New paradigms must be allied with and require innovation and bold ideas. There must be a willingness to think out of the box and embrace new ways, as change without progress serves little purpose. The objective of a conference such as this must be about harnessing the collective talent and wisdom present to identify new paths and solutions to achieving better outcomes in international debt restructuring. Also, it must not just be about discussing issues which have been debated in past conferences. The conference has to look forward and anticipate the issues that shifts in the global economy, and the emergence of new businesses and areas of growth, will create.

5       And so today, I want to talk about how we can innovate in the area of cross-border restructuring to achieve effective restructuring outcomes. I offer four areas for consideration. First, the use of planning proceedings in cross-border restructuring, in particular one involving

group enterprises, to centralise the determination of key issues including the formulation of the restructuring plan. Second, reducing the risk of inconsistent outcomes and increasing the prospects for greater convergence of judicial philosophy and comity through wider adoption of court-to-court communication and cooperation. Third, as a significant step towards convergence, the development of a common set of principles for cross-border restructuring that will inform judges, policy makers and regulators, and of course insolvency professionals. Fourth, the use of alternative dispute resolution such as mediation and arbitration in resolving thorny knots in cross-border restructuring. Some of these have been spoken about in the past but there is great value in resonating the points again. I will consider each in turn.

## **II. Planning Proceedings**

6 I start with the proposition that an “effective restructuring outcome” in a cross-border restructuring requires the centralisation of the determination of all issues concerning a restructuring in one forum. This of course is not really saying anything new. It is the cornerstone of the theory of modified universalism and it undergirds the UNCITRAL Model Law on Cross-Border Insolvency (“the Model Law”). Indeed, philosophically, an insolvency process is a collective statutory proceeding that involves the centralisation of claims and issues in one forum in order to achieve economic efficiency and optimal returns for creditors.<sup>1</sup> This is an easy objective to achieve if the business is conducted in a single jurisdiction. But that is not the reality today and therein lies the challenge. Globalisation has resulted in many businesses spanning multiple jurisdictions. Economic footprints are myriad and multi-jurisdictional. Thus, where claims are settled across different jurisdictions, many thorny issues inevitably arise. Differences in domestic insolvency laws, for example, result in differences in relation to the

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<sup>1</sup> *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [1].

recognition of creditors' claims, as well as the recognition and enforcement of foreign insolvency proceedings and judgments. Each jurisdiction in which an insolvent corporation has a presence can choose to manage that insolvency in an isolationist manner without regard to the reality that the business is a multinational one. But it does so at the risk of, *inter alia*, subjecting the corporation to conflicting outcomes from different jurisdictions. The issues are compounded where the business is organised in a myriad web of companies sprinkled over many jurisdictions.

7        Restructuring a group enterprise spread over more than one jurisdiction poses a particularly difficult challenge as the failure is of the business of the group as a whole and not of a single corporation. Preserving the economic value of the group enterprise must be the principal objective of the restructuring, but the general approach of insolvency and restructuring laws is to look at each corporation as an independent entity. Accordingly, developing a group restructuring solution will involve addressing issues and claims in relation to more than one corporation in more than one jurisdiction.

8        Therefore, the challenge in developing a group enterprise restructuring plan is multifarious and distinctly complicated. Centralising claims and issues in a single forum is a great challenge. But an “effective restructuring outcome” in cross-border restructuring demands exactly that, and a multinational enterprise should not have to worry about such issues. At the same time, its creditors also should not have to worry about being prejudiced.

9        Consider for example the collapse of Lehman Brothers. On 15 September 2008, Lehman Brothers Holdings Incorporated filed Chapter 11 bankruptcy proceedings in the United

States of America (“the US”),<sup>2</sup> which in turn triggered over 80 bankruptcy proceedings around the world.<sup>3</sup> Prior to the filing of the Chapter 11 proceedings, the Lehman Brothers Group consisted of over 7000 legal entities in 40 different countries. Following the Chapter 11 filing, similar proceedings were brought against Lehman Brothers subsidiaries and their affiliates in Europe, Asia, and Australia, amongst other regions.<sup>4</sup> According to court documents in the US proceedings, “[t]he chaos that ensued was unprecedented and presented the potential for highly fractious proceedings permeated by years of extended, complex and expensive litigation among competing interests and entities.”<sup>5</sup> Fortunately, the thought leadership and foresight of Judge James Peck, who presided over the US proceedings, significantly minimised the chaos. His reformist move to introduce a memorandum of understanding, which provided for cooperation and communication amongst the various estates, and the communication that ensued between the various courts, were hugely important in this regard. The stewardship of Judge Peck and the other judges involved in the Lehman Brothers insolvency demonstrates the importance of the role of judges in a cross-border restructuring, a point which I will return to later.

10 These are issues posed by the law not synchronising with economic reality. The law must keep pace with and facilitate commerce, and not be a roadblock. Jurisdictional arbitrage should be minimised if not eradicated. Presently, there is no legal framework governing the insolvency of a multinational group enterprise. The Model Law only contemplates situations where a single legal entity becomes insolvent, and as a result of which, there are cross-

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<sup>2</sup> Michael Guihot, “Cross-border Insolvency: A Case for a Transaction Cost Economics Analysis”, submission for the III *Prize in International Insolvency Studies, 2016*, at p 39—40.

<sup>3</sup> Debtors’ Amended Response to Objections to Approval of Proposed Disclosure Statement, *In re Lehman Bros. Holdings*, No. 08-13555 (Bankr. SDNY Aug 23, 2011), at [1].

<sup>4</sup> Michael Guihot, “Cross-border Insolvency: A Case for a Transaction Cost Economics Analysis”, submission for the III *Prize in International Insolvency Studies, 2016*, at p 40.

<sup>5</sup> Debtors’ Amended Response to Objections to Approval of Proposed Disclosure Statement, *In re Lehman Bros. Holdings*, No. 08-13555 (Bankr. SDNY Aug 23, 2011), at [1].

jurisdictional implications. But in practice, as I have mentioned earlier, a multinational group enterprise like Lehman Brothers would consist of many members, each with a separate COMI located in different jurisdictions, leading potentially to proceedings being commenced in each of these jurisdictions.<sup>6</sup> One can see the unique challenges that such a scenario poses to the legal framework that we have at present.<sup>7</sup> *Legally*, each and every member is a separate entity and if insolvent, is so in its own right. Yet, the economic reality is that the failure is of the group as a whole, and not just a single member. This is especially relevant in highly economically-integrated groups, where the fiscal failure of one member creates a domino effect that inevitably affects the rest of the members in the group.<sup>8</sup> Applying the modified universalism of the Model Law in such cases achieves the exact opposite effect of creating multiple, diverse satellite proceedings that undermine the value of the multinational group enterprise as a whole. The complexity is compounded in some cases by the insolvency not afflicting all members of the group. Due to the manner in which the business or the debt obligations of the group are organised, you could have the tenuous situation of only some members being insolvent with the economic value of the group residing in solvent members. The doctrine of separate legal personality protects the latter from the former.

11 Recognising the problem, UNCITRAL Working Group V has started developing a model law (“the Draft Model Law”) for resolving insolvencies of multinational group enterprises.<sup>9</sup> Draft provisions have been prepared and are under consideration by the Working

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<sup>6</sup> See UNCITRAL, *Report of Working Group V (Insolvency Law) on the work of its thirty-first session (Vienna, 11-15 December 2006)*, A/CN.9/618, at [51].

<sup>7</sup> See generally, Irit Mevorach, “Cross-Border Insolvency of Enterprise Groups: The Choice of Law Challenge” (2014) 9 BJCFL 226.

<sup>8</sup> Irit Mevorach, “Cross-Border Insolvency of Enterprise Groups: The Choice of Law Challenge” (2014) 9 BJCFL 226 at 234—235.

<sup>9</sup> 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.

Group. However, finalisation of the Draft Model Law is still some years away. And even then, it will take time before it finds broad acceptance through adoption by national legislatures. The pace of adoption of the Model Law since it was introduced in 1997 speaks to this. What then do we do in the interim? Do we just stand still, and watch and wait? In the first place, do we really need a model law to be finalised and thereafter widely enacted before we can progress towards achieving effective restructuring outcomes in a multinational group enterprise? I would suggest not. I would argue that we must be innovative and bold in formulating solutions, unshackling ourselves from conservatism and embracing pragmatism and progressivism in the process.

12 So how do we innovate? I would argue that there is nothing to stop the insolvency community from borrowing the concepts in the Draft Model Law. They provide a powerful working philosophy that can be readily subscribed to and adapted by the insolvency community. At the heart of the Draft Model Law is the concept of the planning or coordinating proceedings and the appointment of a Group Representative to represent those proceedings. The planning proceedings build on the premise I had stated at the start, namely, that the insolvency process is a *collective* statutory proceeding that involves the *centralisation* of disputes to maximise returns. The stakeholders in a group enterprise restructuring must subscribe to the concept of centralising the development of the group restructuring plan and the resolution of key issues in the restructuring in a single forum where the COMI of a key member of the group is located. That would be the planning proceedings. Allied to this is the appointment of a Group Representative who is authorised to represent the planning proceedings in parallel proceedings opened by other members who are part of or committed to the group restructuring plan. It is incontrovertibly logical for a single jurisdiction and a single representative to take charge of the restructuring effort of the group so as to devise a coordinated, group-wide solution. Any restructuring plan that results is likely to be more

coherent, rational, and less myopic than if every single entity entertained its own proceedings without regard for the enterprise value of the group as a whole. Furthermore, fragmented litigation “means the incurring of more costs, the prospect of parallel or satellite proceedings and inconsistent judgments, and the corresponding diminishment of the remaining value of the enterprise”.<sup>10</sup> The benefits are obvious.

13 To be sure, resorting to planning proceedings is in no way infringing upon the sovereignty and independence of national legal regimes. The planning proceedings merely play the *procedural* role of coordinating and facilitating parallel proceedings with a view to reducing the risk of inconsistent outcomes and developing a cohesive group restructuring plan.<sup>11</sup> As an objective, there surely cannot be any disagreement with this. Resolving claims under foreign law, if and when engaged, can still be determined in parallel proceedings commenced in the appropriate jurisdiction that would work with the planning proceedings towards achieving the common objective of maximising enterprise value in the insolvency. Alternatively, “synthetic secondary proceedings”<sup>12</sup> could be commenced in the planning proceedings for determination of such claims without the need for opening parallel proceedings elsewhere, saving the parties additional costs and expense. Conceptually, this is not unprecedented given the English High Court decision of *Collins & Aikman*,<sup>13</sup> which used this as an innovative alternative to the opening of secondary proceedings. The concept of the synthetic proceedings is again a feature of the Draft Model Law. It finds form in Article 21 of the draft that is presently under consideration. In my view, the concept of a “synthetic secondary proceeding” could be an

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<sup>10</sup> Kannan Ramesh, “Cross-Border Insolvencies: A New Paradigm” at [41].

<sup>11</sup> Kannan Ramesh, “Cross-Border Insolvencies: A New Paradigm” at [42].

<sup>12</sup> See generally, John Pottow, “A New Role for Secondary Proceedings in International Bankruptcies” (2011) 46 TILJ 579.

<sup>13</sup> [2006] EWHC (Ch) 1343



immensely important tool in centralising the resolution of issues in a cross-border restructuring of a multinational group enterprise.

14 As one would begin to appreciate, the role of the planning proceedings is a critical one. For reasons of principle and practicality, the planning proceedings must be commenced, first and foremost, in a jurisdiction with a sufficient nexus to the multinational group enterprise. But over and beyond that, the planning proceedings ought to be commenced in a jurisdiction that is best-placed to achieve a group-wide solution. There must exist a viable and flourishing ecosystem for restructuring and firm adherence to the rule of law. The DNA must include the presence of a strong rescue culture, “a thriving capital market with the presence of financial institutions and distressed debt lenders willing to undertake rescue financing”,<sup>14</sup> a strong and commercially attuned judiciary, the right legal and legislative architecture, and the relevant professional expertise.

15 It is therefore unsurprising that many of the major global restructuring hubs are also the major global legal and financial hubs. London, New York, Singapore, Tokyo and Hong Kong, just to name a few, are well-established nerve centres where multi-national companies raise capital and financing, and list their securities. Many of the key members of multinational group enterprises already have their COMIs situated in these jurisdictions. These jurisdictions can conceivably serve as the seat of the planning proceedings.

16 I therefore invite the insolvency community to give serious thought to implementing the concept of the planning proceeding in the restructuring of multinational group enterprises. The invitation extends to also considering the use of the other concepts that are being developed

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<sup>14</sup> Kannan Ramesh, “Cross-Border Insolvencies: A New Paradigm” at [43].

by Working Group V such as the appointment of a Group Representative and the use of synthetic proceedings.

### **III. Judicial Communication and Cooperation**

17 I recognise that there are challenges to implementing these concepts. That brings me to the second point I wish I make – the importance of judicial communication and cooperation, and comity.

18 It is evident that judicial communication and cooperation, and comity are necessary ingredients for the optimisation of the planning proceedings. The seat court of the planning proceedings will need to communicate and cooperate with the courts where parallel proceedings concerning members of the group enterprise have been commenced to ensure that the development of the group restructuring solution is facilitated, not disrupted. This will require a convergence of judicial philosophy on the importance of communication, cooperation, and comity, and the recognition of the planning proceedings and the orders made there.

19 It is important to remember that achieving effective restructuring outcomes in cross-border restructuring must be assessed against the reality that substantial aspects of practice in this realm are still not governed by any hard law, so to speak, and will conceivably remain so at the very least in the short-to-medium term. That said, it is imperative that there is a common basis upon which courts in different jurisdictions are able to act so as to achieve the effective restructuring outcomes that I refer to. All this requires a greater measure of convergence in judicial attitudes towards a philosophy of communication and cooperation, and comity.

20 In an ideal world, convergence towards a common philosophy ought to result in the concretisation of laws and practices in the form of treaties and domestic legislation – the “hard law” which I have alluded to earlier. Yet, it is an incontrovertible fact that the hard law that emanates from treaties and legislation can take some time to realise. Any progress on those fronts will inevitably be subject to the long-drawn out processes of political compromise and concession. The courts, in this regard, are in a better position to effect swifter convergence by adopting a common philosophy of cooperation and coordination in the management of cross-border insolvencies.

21 I am heartened to note that this process has already begun. In October 2016, a network of insolvency judges from key commercial jurisdictions and economies was formed in Singapore at the inaugural conference of the Judicial Insolvency Network (“JIN”). That conference culminated in the issuance of the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (“the JIN Guidelines”). The JIN Guidelines sought to introduce a greater measure of certainty in cross-border restructuring by opening lines of communication and cooperation between the courts of different jurisdictions dealing in a cross-border restructuring. The JIN Guidelines declare at the outset that the objective is to improve the efficiency and effectiveness of cross-border insolvency proceedings in the interests of all stakeholders, by enhancing coordination and cooperation amongst courts. The network, which continues to grow, presently has judges from the US, Singapore, England and Wales, Canada, Australia, Brazil, Argentina, Bermuda, the British Virgin Islands and the Cayman Islands.<sup>15</sup> Japan, South Korea and Hong Kong are observers to the JIN. The JIN Guidelines themselves have been formally adopted by the US Bankruptcy Court for Delaware, the US Bankruptcy Court for the Southern District of New York, the Supreme Court of

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<sup>15</sup> Kannan Ramesh, “International Commercial Courts: Unicorns on a Journey of a Thousand Miles”, *Conference on the Rise of International Commercial Courts*, 13 May 2018, at [15].

Bermuda, the Supreme Court of Singapore, the Supreme Court of New South Wales, the British Virgin Islands, and the Chancery Division of the High Court of England and Wales. I understand that the Cayman Islands, Ontario, Canada and the Federal Court of Australia will be adopting the JIN Guidelines soon. This demonstrates that there is a shared appreciation for the conviction that underlies the JIN Guidelines – that convergence through inter-jurisdictional judicial cooperation and communication can better achieve effective outcomes in cross-border restructuring efforts. The JIN Guidelines have been recently invoked for the first time by the US Bankruptcy Court for the Southern District of New York and the Supreme Court of Singapore. A protocol based on the JIN Guidelines has been framed by the parties and endorsed by both courts which provides for communication and cooperation, and a joint hearing of certain core issues common to the proceedings before both courts. This is a development that must be warmly welcomed.

22     Though the JIN and the wide adoption of the JIN Guidelines show rich promise, it must be allied with a significant shift in philosophy and attitude towards embracing court-to-court communication and cooperation, and comity. This would require a collective and collaborative effort of the insolvency profession and judges. The endeavour to achieve convergence in judicial philosophies is important, and communication and cooperation between courts is a critical first step in this regard. Why is this endeavour imperative? Here I can do no better than to quote the words of the then-Chief Justice of New South Wales James Spigelman, in his address at the INSOL International Annual Regional Conference of 2008 in Shanghai. Chief Justice Spigelman said that “the fear of the unknown inhibits creditors when dealing with multinational corporations in the absence of a significant level of assurance that the difficulties of cross-border enforcement in insolvency will not impede the collection of debts”.<sup>16</sup> Against

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<sup>16</sup>     J J Spigelman, “Cross-border Insolvency: Co-operation or Conflict?”, 83(2009) Australian Law Journal 44 at 44.

that reality, he said, “[o]ne object of co-operation between courts in the context of transnational insolvency is to minimise these risks and transaction costs so that transnational trade and investment is not unduly burdened”.<sup>17</sup> There is therefore an economic impetus for the convergence of laws and practices in cross-border insolvencies.

23 This economic impetus is all the more compelling for Asia as its economies expand. As recent as April this year, the Asian Development Bank has forecasted that the region as a whole is expected to grow at over 6.0% this year, which is more than double the expected growths of other regions in the world.<sup>18</sup> In this year’s Budget Statement, Singapore’s Finance Minister Mr Heng Swee Keat noted that Asia will play a larger role in global trade and investment flows as China sets up a regional infrastructure bank and lays out bold plans under the Belt and Road Initiative, and as India makes reforms to its economy and eases restrictions on foreign investment. Indeed, India has made transformative reforms to her insolvency laws at a breathtaking pace in part in anticipation of strong economic growth. Closer to home, ASEAN countries are moving up the value chain and their middle-class populations are growing rapidly.<sup>19</sup> The ASEAN Economic Community, now in its second phase of economic integration, will benefit tremendously as well with the convergence of laws and judicial attitudes towards communication and cooperation in the management of cross-border restructurings and insolvencies. Singapore too has readied herself for this influx of investment by formulating the Infrastructure Hub initiative.

24 Such a convergence in judicial philosophy ought to refocus attitudes from a purely domestic perspective to placing the maximisation of enterprise value as the core consideration.

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<sup>17</sup> J J Spigelman, “Cross-border Insolvency: Co-operation or Conflict?”, 83(2009) Australian Law Journal 44 at 45.

<sup>18</sup> Asian Development Bank, *Asian Development Outlook 2018*, April 2018.

<sup>19</sup> Ministry of Finance, *Budget 2018: Together, A Better Future*.

The World Bank has recognised that the cooperation of courts and administrators in international insolvency proceedings only helps to support the goal of maximising the value of the debtor's worldwide assets, protecting the rights of the debtors and creditors, and furthering the just administration of the proceedings.<sup>20</sup> In the absence of hard law in this area, the key to greater cooperation is judicial willingness to converge around a common set of principles. And although philosophies and experiences may differ across different jurisdictions, I believe most courts can agree most of the time on a few select issues in the area of cross-border restructuring and insolvency. Thus for example, the Singapore Court of Appeal in *Beluga Chartering v Beluga Projects*<sup>21</sup> recognised that it had the inherent powers to assist a foreign liquidation through the regulation of its own proceedings, and ordered a Singapore liquidator to remit the realised assets of the insolvent company in Singapore to the foreign liquidator without first satisfying the judgment debts owed to Singapore creditors. This philosophy of coordination and cooperation is also seen in the decision of the Hong Kong High Court in *CCIC Finance v Guangdong International Trust & Investment Corporation*,<sup>22</sup> where the court refused an application for a garnishee order to be made absolute, for otherwise the creditor would obtain an unfair preference over similarly ranked creditors of a company that was undergoing liquidation in mainland China.

25 In fact, what these courts have done was to act in a manner consistent with the spirit underlying the Model Law as well as the JIN Guidelines of maximising enterprise value. They illustrate that court-to-court communication and cooperation, and comity have a vital role to play in ensuring effective restructuring outcomes in cross-border restructuring.

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<sup>20</sup> World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*, April 2001.

<sup>21</sup> *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.

<sup>22</sup> *CCIC Finance Ltd v Guangdong International Trust & Investment Corporation* [2005] 2 HKC 589.

#### **IV. Working towards a long-term solution – the Asian Principles of Restructuring**

26 Judicial convergence towards a common philosophy of communication and cooperation is but part of the picture. Potential issues remain as highlighted by the very recent judgment of the High Court of Hong Kong in *In the Matter of CWU Advanced Technologies*<sup>23</sup> (“CWU”) where the question of whether recognition would be given in Hong Kong of a Singapore moratorium granted in a scheme application was raised but ultimately not decided. This brings me to my third point. The long-term solution is the development of a common framework for cross-jurisdictional insolvency and debt restructuring. And here, I cannot neglect to mention the good work of the Asian Business Law Institute (“ABLI”), which is a permanent research institution that was launched in 2016.

27 The ABLI, at its heart, seeks to stimulate the drive towards legal convergence in Asia. The idea for such an institute was first introduced by Chief Justice Sundaresh Menon at the opening of the legal year 2015, in which Chief Justice Menon stated that “[s]uch an institute will bring together Judges, academics, legal practitioners, in-house lawyers and legal think-tanks from the region and beyond to collaborate on the incubation of Asian business law.”<sup>24</sup> ABLI was conceived because the economic impetus for convergence is even more compelling if we consider the patchwork quilt of laws that is characteristic of the Asian legal landscape. Indeed, Asia does not have a common colonial heritage; its countries had varying experiences in the era of emerging nationhood; and certainly, Asia is nowhere near the sort of integration one sees with the EU or NAFTA.

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<sup>23</sup> [2015] HKCFI 1705

<sup>24</sup> Sundaresh Menon, “Response by the Chief Justice Sundaresh Menon at the Opening of the Legal Year 2015” at [27].

28 The significant heterogeneity of laws that we experience in Asia presents a less than inviting picture for the modern commercial enterprise. A region with fragmented business laws presents a tricky cost-benefit calculus and can add to the cost of expansion in the region. Higher transaction costs can arise in a number of ways – first, there is the cost of familiarisation, which rises with greater divergence in laws; secondly, there is the cost of adapting business and transactional structures when doing business across different jurisdictions; and thirdly, there is the higher cost of resolving cross-border disputes as and when they arise.<sup>25</sup> In the specific context of cross-border insolvency proceedings, for example, a lack of common ground on which courts operate can lead to much uncertainty for debtors and creditors.

29 It is therefore important for Asia to develop a common set of principles which forms a basis upon which courts, regulators, policy makers and insolvency professionals of diverse persuasions can agree to act in a cross-border insolvency. This is where the work and expertise of ABLI becomes so important. One of the earliest projects that ABLI embarked on was a study to determine the best means of harmonising the recognition and enforcement of foreign judgment rules in ASEAN and its major trade partners like Australia, China, India, Japan, and South Korea. As part of that project, a compendium of country reports was published in December 2017, upon which further work is currently in progress to extract common principles for the recognition of judgments. In the field of cross-border insolvency and restructuring, a similar project is already underway. Titled the “Asian Principles of Restructuring Project”, or “the Restructuring Project” for short, this is a project that is jointly undertaken by ABLI and the International Insolvency Institute (“IIP”). The genesis of the project was to address the concerns I had mentioned earlier by conceptualising a common framework for both in-court and out-of-court restructuring in Asia.

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<sup>25</sup> See Sundaresh Menon, “Doing Business Across Asia: Legal Convergence in an Asian Century”, 21 January 2016 at [5]—[6].



30 The Restructuring Project is a collaborative effort involving some of the leading judges, academics, and practitioners from Asia, Europe, and North America. It consists of two phases. The first phase has already begun, and entails a mapping exercise of the business reorganisation regimes (both in-court and out-of-court) in ASEAN, Australia, China, Hong Kong, India, Japan, and South Korea. The target outcome of the first phase is to publish a compendium of the reports. In the second phase, the results from the mapping exercise will be used to distill and formulate common principles for in-court and out-of-court restructuring which will be published as the Asian Principles of Restructuring.

31 The significance and potential impact of this project on cross-border insolvency and restructuring practice cannot be underestimated. When Chief Justice Menon spoke at the launch of ABLI in 2016, he underscored the practice-oriented identity of ABLI.<sup>26</sup> In this vein, the research projects that ABLI undertakes are not purely of academic value; they are intended to effect change and achieve common understanding in the field of practice. Indeed, similar projects undertaken by UNCITRAL, the American Law Institute, and the International Chamber of Commerce, just to name a few, have culminated in success stories like the CISG, the Uniform Commercial Code, and the Incoterms rules respectively. In time to come, it is hoped that, given the stakeholders involved, the product of the project – the Asian Principles of Restructuring – will serve as an integral and authoritative reference tool for judges, legislators, policy-makers and insolvency professionals in Asia.

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<sup>26</sup> Sundaresh Menon, “Doing Business Across Asia: Legal Convergence in an Asian Century”, 21 January 2016 at [28].

## V. Alternative Dispute Resolution

32 Another way in which we can innovate in the field of cross-border restructuring is to have recourse to alternative dispute resolution. This is my fourth point. In my view, alternative dispute resolution, both mediation and arbitration, has not been sufficiently embraced in Asia as a tool in restructuring. I will first touch on mediation.

### *Mediation*

33 Sections 104 and 105 of the US Bankruptcy Code (“the US Code”) confer on the US bankruptcy courts the power to appoint mediators to address discrete disputes. Additionally, the US Code provides that courts may promulgate procedures by local rules which address the use of mediation, voluntary arbitration and early neutral evaluation in bankruptcy proceedings before the court. The use of alternative dispute resolution in combination with main court proceedings has been particularly successful in the US bankruptcy courts in large complex cases. Between 2000 and 2011, mediation was used in the majority of Chapter 11 cases where debtors with assets over US\$1 billion were involved.

34 The importance of mediation as a tool for finding effective restructuring solutions particularly in complex restructurings was a point emphasized by the Committee in its report. The Committee noted that there was significant scope for mediation in two situations:

- (a) the resolution of bilateral or multilateral disputes between debtor and creditor;
- and
- (b) the development of the restructuring plan by facilitating consensus between the debtor and the creditors.

35 The first scenario is exemplified in the expeditious resolution of derivatives related claims in the US insolvency proceedings of Lehman Brothers by the use of a structured mediation protocol. There was a tremendous saving of costs and time as a result.

36 An illustration of the second scenario is the resolution of disputes, through mediation, between the estates in the US and the United Kingdom in the insolvency of MF Global Holdings, which led to substantial assets of the collective estate being distributed to creditors.

37 To facilitate the use of mediation in restructurings, the Singapore Mediation Centre (“SMC”) has constituted a panel of specialist insolvency mediators comprising some of the leading names in the Singapore insolvency scene. A specialist insolvency mediation programme was also conducted by Judge James Peck for the SMC. The courts too have actively encouraged the use of mediation.

38 I am of the view that this is an area that has not been sufficiently tapped and used as a tool for achieving effective restructuring outcomes. Mediation promotes consensus and reduces acrimony, resulting in costs and time savings. These are important considerations in any restructuring but particularly so in a cross-border restructuring. Building consensus and resolving issues between estates in different jurisdictions will, for example, undoubtedly facilitate the development of a group restructuring plan in the planning proceedings. It will also circumvent difficult issues of jurisdiction, and recognition and enforcement by reducing or even removing challenges brought on those grounds. Given the heterogeneity of Asia, the benefits of mediation are even more apparent.

39 It is also important to emphasise the economic potential of mediation for insolvency professionals. Mediation could prove to be an entirely new source of work and revenue for

insolvency professionals. Many professionals, particularly in the US, have built substantial practices based on insolvency mediation. I see no reason why that cannot be replicated here.

### *Arbitration*

40 The Committee also emphasised the use of arbitration in resolving issues in a cross-border restructuring. Three areas were highlighted:

- (a) the resolution of intercompany claims between affiliates across multiple jurisdictions in a group enterprise restructuring;
- (b) the resolution of disputes between estates on the proceeds of disposal in a group enterprise restructuring. The Nortel Networks insolvency springs to mind in this regard; and
- (c) the determination of a debtor's COMI where the primary administration of the debtor is claimed by different jurisdictions.

41 While the Committee acknowledged that there were some challenges to the use of arbitration, namely, issues concerning the arbitrability of certain 'core' aspects of insolvency law, and concluding or finding an agreement to arbitrate, the recommendation was that arbitration could play a useful role in cross-border restructuring. In my view, these are surmountable challenges. For example, in the context of the first and second areas highlighted by the Committee, these challenges should not pose an obstacle. The appointed insolvency representatives of the relevant estates could enter into an arbitration agreement for the resolution of the claims. Further, arbitrability is not an issue here. It should not be forgotten that arbitration carries the incidental but important benefit of enforceability under the New York Convention.

42 In fact, the III has submitted a proposal to UNCITRAL to convene a working group to study the feasibility of a convention or model law on arbitration which will address, amongst others, the concerns the Committee has highlighted. The proposal was penned by Professor Samuel Bufford of the Penn State School of Law. Further, I would commend for reading the excellent article by Professor Allan Gropper from the Fordham Law School on this subject. Both Professors Bufford and Gropper were eminent judges of the bankruptcy courts in the US before assuming their present positions.

43 The momentum behind arbitration is building. I would therefore urge the insolvency community to consider the use of arbitration in appropriate situations in cross-border restructuring.

## **VI. A Brief Segue**

44 Before I conclude, a brief segue into three areas. First, the need to re-examine the applicability of the concepts that presently underpin the architecture of insolvency laws to new-age businesses. The present architecture of insolvency laws globally is based on businesses that I would describe as conventional. These businesses are readily understood in terms of the type of transactions they undertake, and the nature and type of assets they hold. But technology is a massive disrupter in the global economy and it is reshaping the face of business and indeed businesses. New companies have sprung driven by technology as their primary if not sole business. They are often massive in scale and size, and global in their foot print. Frequently, they pervade many segments of modern society. Many operate in cyberspace and depart significantly from conventional businesses in that the enterprise value rests in cyberspace and the assets are not readily identifiable, unlike for example real estate. This makes valuation of the business particularly challenging. Further, there is also the rising tide of alternative assets

such as Bitcoins and blockchains, and the related smart contracts and distributed ledgers that serve to increase the level of complexity.

45 Moreover, advances in technology have meant that intellectual property rights have moved beyond traditional classifications of copyright, trademarks, patents and registered designs. The entire realm of intellectual property rights may eventually, sooner rather than later, have to undergo serious introspection with a view to redefining how such rights are recognised. Recognition of intellectual property rights is of particular significance in new technology companies, as such rights inevitably form a significant part of the asset base. This then becomes pertinent to an insolvency.

46 This is the new reality. Technology and companies that feed on and off technology are here to stay and are seen by many economies as offering the most potential for economic growth. The key question is whether our present insolvency laws are fully capable of addressing this paradigm. I am not entirely persuaded or at very least unsure that they are. I would urge that this be an area of study and analysis by the insolvency community. Solutions and answers ought to be found before the issues and problems are upon us.

47 Second, I would urge that consensus be built on whether a restructuring undertaken under a scheme of arrangement is a collective insolvency proceeding. As noted in *CWU*, there is perhaps some difference in the comparative authorities on this issue. This is unfortunate given that so many restructurings today are undertaken under a scheme of arrangement as a proxy for a debtor-in-possession restructuring regime. Indeed, the Singapore reforms proceed on the basis that such applications are collective insolvency proceedings. Notably, so does Chapter 15 of the US Code. In attempting to achieve consensus, I would also urge re-examination of the principle in the 1890 decision of the English Court of Appeal in *Anthony*

*Gibbs & Sons v La Societe Industrielle et Commerciale des Mestaux*,<sup>27</sup> frequently described as the *Gibbs* principle. Questions have been raised in both judicial and non-judicial settings on the continued applicability of the principle. At his recent keynote address at the III annual conference in London 2017, Lord Neuberger of Abbotsbury raised the very same question. This issue is likely to be considered by the English Court of Appeal later this year in the case of *Bakshiyeva v Sberbank of Russia*<sup>28</sup>. It is important that convergence is achieved in these areas.

48 Third, I would suggest that consensus be achieved on the issue of submission to jurisdiction in the context of insolvency proceedings. This is again an area where the question lacks a clear answer and it is important that there is one. Restructuring proceedings, unlike conventional litigation, do not have a clearly identified counterparty such as a defendant. The debtor faces a multifarious community of different stakeholders with often unaligned interests. Given the collective nature of insolvency proceedings, it is important that all stakeholders participate in and be bound by the outcome of the proceedings. This assumes greater significance in the context of the planning proceedings. The need for clarity in this regard is evident. Having said that, note should be taken of the language that has been used in s 211C(4)(b) of the Companies Act (Cap. 50), which concerns restraining the acts of parties against the debtor, *inter alia*, outside Singapore. The specific language is “any act of any person in Singapore or within the jurisdiction of the Court”. It is important to note the manner in which the Court’s jurisdiction in relation to the party sought to be restrained has been defined. Regard should also be had to the relevant discussion and recommendation in the Committee’s report that was the genesis of the provision.

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<sup>27</sup> (1890) 25 25 QBD 399

<sup>28</sup> [2018] EWHC 59(Ch)

## **VII. Conclusion**

49 Let me conclude. A major theme of this keynote is the observation that the law is perpetually playing catch-up with the dynamic and fast-changing reality that it is intended to govern. So even as we take one step forward, we remain static if we do not adapt our mindsets. A territorialist flavour and approach to insolvency is not the best environment for multinational enterprises to take root and flourish. It is imperative that the path of cooperation and communication, and comity in cross-border restructuring is pursued, and convergence achieved. In this regard, courts, legislators, regulators and the insolvency community must work hand-in-hand to develop the right approaches and solutions.

50 Singapore has positioned itself as a hub for international debt restructuring. Moving forward, opportunities abound for practitioners and businesses alike to leverage on Singapore's unique position in the international insolvency scene. It is therefore absolutely critical for the relevant stakeholders to seize the moment and be forward-looking, and not be wedded to history and tradition. Innovation and foresight must be the buzzwords.

51 Thank you very much. I wish all of you a very fruitful and successful conference.

Kannan Ramesh  
Judge  
Supreme Court of Singapore