2nd Annual GRR Live New York

26 September 2018

Keynote Address

SYNTHESISING SYNTHETICS:

Lessons learnt from Collins & Aikman

1 Distinguished chairs, Mr Donald Bernstein and Ms Lisa Schweitzer, delegates and guests, a very good afternoon. Let me begin by saying how honoured I am for the opportunity to address you this afternoon at the 2nd Annual GRR Live New York.

2 I would like to speak about two issues that are important in the modern age of cross-border insolvency, but for one reason or another have not been getting their fair share of air time, certainly in Asia. The first pertains to the concept of synthetic secondary proceedings; the second concerns the legal treatment of business groups upon insolvency – specifically, whether it should be an unshakeable principle that companies within an integrated business group should be treated as separate legal entities in a group insolvency. These are important issues with far-reaching

implications, and the purpose of my address this afternoon is to make the case for the wider acceptance and use of synthetic proceedings, and to stir debate and encourage discourse on the treatment of insolvent business groups in cross-border insolvencies. We live in a period of unprecedented change marked by disruption and globalisation. Businesses are evolving at a rapid pace to meet the immense challenges of this new paradigm, and so must the law, as it exists to serve the needs of society. I therefore believe that the time is ripe for an in-depth consideration, or in the case of the synthetic secondary proceeding, a reconsideration, of these issues.

I. Synthetic secondary proceedings

3 The first issue that I want to talk about this afternoon is the concept of the synthetic secondary proceeding.[1] This concept was first introduced some 12 years ago in the English case of *Collins & Aikman*,[2] and to me it holds tremendous promise in revolutionising the way we manage cross-border insolvencies.

4 Any discussion of the synthetic secondary proceeding must start with a brief journey through *Collins & Aikman*. The Collins & Aikman

[1] See generally John A E Pottow, "A New Role for Secondary Proceedings in International Bankruptcies" (2011) 46(3) Texas International Law Journal 579.

[2] *Re Collins & Aikman Europe SA and other companies* [2006] EWHC 1343 (Ch) ("*Re Collins & Aikman*").

Group was a leading supplier of automotive components that was headquartered in Michigan, USA. In its prime, the group had in addition to its operations in the US, 24 companies spread over 10 countries in Europe, including six in England and one in Spain. Unfortunately, the group fell into dire financial straits and as a result, administration proceedings were commenced in England in relation to the 24 European companies. Having assessed the evidence on the organisational structure of the group, the English court concluded that England was the COMI for these companies as their main administrative and sales functions were situated there. The English administration proceedings were therefore the main proceedings. However, as the companies had establishments in various other European jurisdictions, there was the inevitable risk of non-main or secondary proceedings being commenced by local creditors.

5 The companies formed a closely integrated group organised on an Europe-wide basis rather than along national lines. Recognising this, the administrators developed a coordinated strategy for the continuation of the group's businesses on a world-wide basis, with a view towards maximising returns to creditors. However, there was one wrinkle in their plans. Spanish insolvency law contained equitable subordination provisions which would accord the Spanish trade creditors more favourable treatment than they would receive under English insolvency law, and these creditors therefore

threatened to open secondary proceedings in Spain, the very risk I mentioned earlier.[3] The administrators believed that this would cause considerable delay and expense, and disrupt the effective realisation of the group's assets. Faced with this conundrum, the administrators and their advisers thought out of the box, and devised an elegant and creative solution. The administrators assured all the foreign trade creditors that their claims would be dealt with in accordance with the relevant foreign insolvency law of their debts, thus safeguarding any favourable rights they might be able to assert but *without* the need for any *actual* secondary proceedings to be opened. This proposal received broad support from most of the creditors, who accordingly refrained from opening secondary proceedings in other jurisdictions. As a result, the administrators were able to deal with the companies' assets on a consolidated basis, and in so doing, realised $45 million more from the liquidation of the companies' assets than was initially estimated.[4]

6 Of course, the story in *Collins & Aikman* did not end there. After completion of the asset realisation exercise, the administrators sought provisional approval from the English High Court to distribute the assets

[3] Gabriel Moss, "Group Insolvency – Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism" (2007) 32 Brook J. Int'l L 1005 at 1018.

[4] *Re Collins & Aikman* at [8].

in accordance with the assurances they had given the foreign creditors. In a striking illustration of the importance of judicial thought leadership, Justice Lindsay took the view that the court not only had the jurisdiction to, but also ought to, direct the administrators to honour their assurances to apply local insolvency laws to the claims of those creditors in the English administration proceedings. In so ruling, Justice Lindsay endorsed the view of Justice Norris in the earlier case of *MG Rover Belux SA/NV (In Administration)* [2006] EWHC 1296 (Ch) that English law was sufficiently flexible to allow the application of foreign law to aspects of an English administration if warranted by the particular circumstances of the case.

7 It is important to pause here to fully appreciate the significance of *Collins & Aikman.* This was not just about *not* opening secondary proceedings. It was about far more. When the English court sanctioned the arrangement, it was in effect endorsing the parties' autonomy to determine the jurisdiction that the insolvency proceedings ought to be carried out in. For example, as a result of the Spanish trade creditors accepting the administrators' assurance, there was a jurisdictional shift in the resolution of their priorities from Spain to England. The English courts assumed jurisdiction over an issue which would have otherwise fallen to be determined by the Spanish courts. Obviously, this was done to facilitate an efficient restructuring process and an effective outcome. However, it is

perhaps more pertinent that the administrators and the Spanish trade creditors made a deliberate choice to relocate the resolution of the latter's priorities to the main proceedings in England. It is an excellent illustration of party autonomy in forum selection, which is an expression I much prefer to "forum shopping", which carries, unfairly, pejorative connotations. The parties were motivated by the desire to achieve an effective restructuring outcome when they decided to centralise in the administration proceeding in England the resolution of key issues, and I would argue that they were legitimately entitled to make this choice. Indeed, this is no more than what parties embroiled in cross-border disputes do on a regular basis, when they elect the fora or arbitral seats for the resolution of their commercial disputes.

8 Why is the synthetic secondary proceeding important? In my view, it achieves two important objectives. First, it allows all primary issues to be centralised and resolved in the main proceedings, thereby greatly reducing the unsatisfactory prospect of inconsistent outcomes. Centralising control over and determination of the key issues facilitates the development of a cohesive restructuring plan as the court in the main proceedings ("the main court") is able to holistically assess the entire restructuring process, and make decisions in a coordinated, focused and cohesive manner. Indeed, in my view, this was the unarticulated consideration behind the

strategy in *Collins & Aikman*. Taking this course increases predictability for all parties, and promotes the effective realisation of assets. The benefits are plain to see. The additional $45 million that was realised in *Collins & Aikman* represented a staggering one-third of the total pool of assets available for distribution. The gains were so substantial that even creditors who stood to receive *less* under their local laws than they would have if English law was applied uniformly to the distribution of all assets, also supported the proposal, because such loss was "more than off-set" by the additional gains from the enlarged pool.[5] Second, it ensures that the interests and expectations[6] of local creditors are safeguarded by the application of local insolvency laws. The tension between local creditors' interests and the overall interests of the restructuring is therefore balanced and efficiently managed.

9 There must be a familiar ring to the two objectives that I just described. I have in fact described the cornerstone of modified universalism – balancing the tension between on the one hand universalism and its centrifugal exertion towards centralisation, and on the other hand, territorialism and its centripetal push away from the centre. As Lord Hoffman noted in *In re HIH Casualty and General Insurance* [2008] 1

[5] *Re Collins & Aikman* at [49].

[6] See, *eg*, *In re HIH Casualty and General Insurance* [2008] 1 WLR 852 at [33].

WLR 852 ("*HIH*"), modified universalism implicitly recognises the interests of creditors in secondary proceedings by encouraging the ancillary court of the secondary proceeding to cooperate with the main court in "so far as is consistent with justice and [local] public policy".[7] It seems to me that the synthetic secondary proceeding does exactly that, representing a finely-balanced compromise between the universalist vision of a single forum applying *erga omnes* one substantive insolvency law to the debtor's assets and liabilities on a worldwide basis, and the territorialist vision of the primacy of local interests.

10 So the arguments in favour of the synthetic secondary proceeding are clear and seemingly obvious. But admittedly, there are obstacles. Let me mention three. First, courts may be unwilling to relinquish control of secondary proceedings, if, for example, their legislative regimes actively protect creditor interests through direct judicial supervision over the insolvency process. Professor John Pottow gives the example of systems which require judicial assent to lay-offs.[8] In such cases, the courts may be disinclined, or even statutorily enjoined, from relinquishing jurisdiction to the main court. Second, the main court itself may lack jurisdiction to apply

[7] *In re HIH Casualty and General Insurance* [2008] 1 WLR 852 at [30].

[8] John A E Pottow, "A New Role for Secondary Proceedings in International Bankruptcies" (2011) 46(3) Texas International Law Journal 579 at 587–588.

foreign law; or, even if it has such jurisdiction, may be reluctant to exercise it. This may be particularly true of civilian jurisdictions in which such powers must be expressly conferred by statute.[9]

11 Third, synthetic secondary proceedings, like *actual* secondary proceedings, are vulnerable to the criticism of arbitrariness. As Professor Jay Westbrook argues, the fact that certain assets are located in a particular jurisdiction may simply be an "accident of the timing of the insolvency filing and the vagaries of the business",[10] and the presence of an asset within a jurisdiction does not necessarily entail the presence of a legitimate connection to the interests of local creditors. This is acutely demonstrated by assets which are mobile – for example, the proceeds of realisation of assets such as airplanes or ships may be distributed to local creditors simply because the asset happened to be in a particular airport or port at the time of the insolvency filing. Not only would this create unpredictable and sometimes counter-intuitive results, it could also give rise to excessive litigation over the legal location of assets. Professor Westbrook cautions that this could also lead to "forum stashing", where distressed businesses

[9] John A E Pottow, "A New Role for Secondary Proceedings in International Bankruptcies" (2011) 46(3) Texas International Law Journal 579 at 590.

[10] Jay Westbrook, "A Comment on Universal Proceduralism", (2010) 48 Columbia Journal of Transnational Law 503 at 510.

are pressured by creditors to transfer assets to jurisdictions with more favourable priority rules immediately before an insolvency filing.

12 These are fair observations, but they are arguments against secondary proceedings in general, and not against *synthetic* proceedings in particular. I think it is important to emphasise that a synthetic proceeding is merely a tool to relocate the *forum of adjudication*. Accordingly, unless, in the words of Lord Hoffmann in *HIH*, "justice and [local] public policy" speak against the use of synthetic secondary proceedings on the particular facts of any given case, which I would venture to suggest will be rare, there is really no conceptual objection to allowing parties the autonomy to make this choice. As noted earlier, this is not very different to the way that parties choose the fora or seat in which they resolve their disputes. I will explain later how court-to-court communication and cooperation may help to overcome some of the resistance to synthetic secondary proceedings.

13 That the case for synthetic secondary proceedings is compelling is clear from two recent developments. First, Article 36 of the recast European Union Insolvency Regulation (EU 2015/848) (the "Regulation") that came into force last year enables insolvency practitioners in the main proceedings to give an undertaking to local creditors that they will be treated in the same manner as if secondary proceedings had been opened,

provided the undertaking meets a number of conditions, including approval by a qualified majority of local creditors. Article 38(2) of the Regulation also stipulates that where such an undertaking has been given, a court may refuse a request to open secondary proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors. This represents legislative endorsement of the approach in *Collins & Aikman*, and should be applauded as a bold and necessary step forward.

14 Second, the synthetic secondary proceeding is encapsulated in Article 21 of UNCITRAL Working Group V's draft legislative provisions on facilitating the cross-border insolvency of multinational group enterprises.[11] It is significant that the draft provision endorses the use of synthetic secondary proceedings in the context of a multinational group of companies. This demonstrates the inherent adaptability and versatility of the synthetic secondary proceeding. If deployed with proper safeguards – the Regulation being a good example – it is a powerful tool in the

[11] Article 21(1) states: "To facilitate the treatment of claims that could otherwise be brought by creditors in a non-main proceeding in another State, a foreign representative or group representative appointed in this State may commit to, and the court in this State may approve, providing those creditors with the treatment in this State that they would have received in a non-main proceeding in that other State." Article 21(2) states: "A court in this State may stay or decline to open a non-main proceeding if a foreign representative or group representative from another State in which a main proceeding is pending has made a commitment under paragraph 1."

restructuring toolkit for facilitating the centralisation of key issues in a single forum.

15 I suggest that cross-court communication and cooperation could facilitate the wider acceptance and use of synthetic secondary proceedings, and introduce a degree of flexibility into the process. For example, where secondary proceedings have already been commenced, several possible permutations can be considered. First, the ancillary court may be willing to stay the secondary proceedings in favour of the main court deciding the issues, on terms that the main court keep the ancillary court apprised of developments. It is important to stress that this is not an all-or-nothing proposition. In complex restructurings, issues that are unique to the secondary proceedings may be carved out either for determination by both courts in a joint hearing, or by the ancillary court solely. Alternatively, the main court may take the lead in managing the issues in the synthetic proceeding with assistance from the ancillary court on particular issues of foreign law. In this regard, I would mention that Annex A of the Judicial Insolvency Network ("JIN") Guidelines establishes guiding principles on how such joint hearings may be conducted.

16 The discussion thus far has been on the synthetic secondary proceeding. But I ask: is the concept circumscribed by the term

"secondary"? I offer for consideration a fascinating twist to the paradigm. Let us imagine for a moment the possibility of a "reverse" *Collins & Aikman* situation: a synthetic *main* proceeding if you wish. In this paradigm, in appropriate circumstances and with sufficient safeguards, the ancillary court would, subject to the consent of the creditors in the main proceedings or the main court, take on the responsibility of resolving key issues in the main proceedings. This might perhaps appear somewhat counter-intuitive at first, controversial even. Some may even argue that it is doctrinally objectionable as a concept. But is it really so? I am not convinced that it is. If the synthetic secondary proceeding is doctrinally acceptable, is there any reason why a synthetic main proceeding ought to be any different? There is much commercial sense behind enlarging the concept of the synthetic proceeding to include main proceedings.

17 Let me sketch the paradigm with reference to multinational group enterprises. Such enterprises today are organised in a disparate manner across multiple jurisdictions for tax, regulatory, fiscal or other reasons. This means that there is a reasonable prospect that the COMIs of members of the group enterprise will not coincide. In fact, that is the premise that undergirds the draft Model Law on multinational group enterprises. Quite often, the operating entities of the group enterprise would have their principal place of business and possibly their COMI in emerging markets

where the primary growth opportunities are. At the same time, the capital or debt for the investments in these entities might have been raised by holding entities which have their COMI in jurisdictions with a robust and thriving financial, legal and restructuring ecosystem. In the event of a group insolvency, main proceedings are likely to be commenced in the COMI of the holding entity to take advantage of the very ecosystem that I have just described, and to develop the group enterprise plan. The group enterprise plan, however, is about both the holding entity and the operating entities. The latter would be integral to the plan as much of the economic value of the group resides there. If each entity in the group commences its own main proceedings, how do we then ensure that an effective group restructuring solution is achieved? It is here that the synthetic main proceeding, if properly calibrated, can play a vital role. It will help to centralise, in the main proceedings of the holding entity, the resolution of key issues in the insolvency of the operating entities, thereby facilitating the development of a group restructuring plan. This would be much like *Collins & Aikman* in the reverse. The main court of the *holding* entity would be in the position of an ancillary court in relation to the *operating* entities, and would resolve issues concerning the operating entities. Of course a considerable level of trust and cooperation, and comity between the relevant courts, as well as a preparedness to recognise orders that are

made by the main court of the holding entity, would be required for this to work. This can be achieved if two ingredients are present. First, if there is court-to-court communication and cooperation through carefully drafted protocols endorsed by the relevant courts. Second, with appropriate creditor support which is in fact the predicate of synthetic proceedings. I should add that institutions such as the JIN can play a vital role in building a broad consensus amongst judges and courts for such an approach. To my knowledge, synthetic main proceedings have not been attempted; but as *Collins & Aikman* so vividly demonstrates, new approaches should never be discounted. I would suggest that the idea deserves further consideration.

18 This brings me to my last point about synthetic secondary proceedings. Synthetic secondary proceedings can be an alternative to actual secondary proceedings in some cases, but they cannot completely replace them, at least given the current state of affairs. Sometimes they are necessary, particularly where the laws of the ancillary jurisdiction require direct oversight over the insolvency process. It follows that greater harmonisation of insolvency regimes and priority rules would greatly reduce the concerns created by secondary proceedings in the first place. Such efforts have already begun with the Asian Principles of Restructuring Project jointly undertaken by the Asian Business Law Institute and the International Insolvency Institute to formulate restructuring principles for

Asia distilled from an assessment of the regimes in ASEAN and key Asian economies. However, until such principles are embraced widely, the synthetic proceeding, when allied with effective court-to-court communication and cooperation, offers an innovative and perhaps even indispensable solution for regions with vastly diverse legal traditions such as Asia to deal effectively with cross-border insolvencies. With Asia attracting vast investments – some US$26 trillion in the next 15 years – such a solution needs to be given serious consideration.

II. Legal separate personality in group restructurings

19 Moving now to the second part of my address, I would like to focus on the issue of the treatment and legal status of entities within a business group in an insolvency. *Salomon v Salomon*,[12] and the doctrine of separate legal personality which it articulates, is probably the first case that any student of the common law would encounter in the study of company law, and its importance cannot be understated. Multinational corporations rely on the separate legal personality of their constituent entities to allocate risk, and they deliberately structure their businesses in such a way as to insulate each entity from the debts and liabilities of the others. This allows corporations to control their risks even as they expand. An example would

[12] *Salomon v Salomon & Co Ltd* [1897] AC 22.

be the shipping industry, where one-ship companies proliferate. But when a business group enters insolvency, should this *status quo* remain? To what extent is it permissible to disregard the traditionally inviolable separate legal personality of each entity within the group in order to attain an effective restructuring solution for the group as a whole?

20 The idea of treating business groups as a single entity upon insolvency is bound to create significant discomfort for practitioners accustomed to the doctrine of separate legal personality. The question is whether such discomfort rests on grounds of principle and policy, or whether it is more attributable to legal conservatism. By their very nature, insolvency proceedings are communitarian and as a result contemplate the recalibration of legal rights and liabilities in the light of the debtor's inability to meet all its obligations. The overarching philosophy is that the greater good must prevail over minority interests. Thus, contractual transactions may be avoided for unfair preference or undervalue; payments may be made to some categories of creditors in priority to others; secured rights may be subjugated to the interests of new creditors to encourage rescue financing; and cram down provisions may allow the court to approve an arrangement even if it lacks the support of the requisite quorum

of creditors.[13] In jurisdictions such as Australia and the United States and soon Singapore, the scope of contractual *ipso facto* clauses is also considerably curtailed by legislative provisions. If an individual creditor's contractual entitlements and the doctrine of *pacta sunt servanda* may be subordinated to the imperative of restructuring, should the doctrine of separate legal personality be treated differently and as a result serve as a roadblock? Treating each entity strictly as a separate legal personality may prevent the attainment of an effective restructuring solution, be it the rehabilitation of the business group or the maximisation of net returns to creditors. This calls for a careful inquiry into the rationale underpinning the doctrine of separate legal personality and its interaction with the competing objectives that arise in the insolvency context.

21 One common argument against treating business groups as one single entity upon insolvency is the purported expectations of creditors who extend credit to a single entity, and not to the business group as a whole. On this argument, creditors often lend to one entity within a group without assessing the creditworthiness of other entities within the same group, on the understanding that the assets of the different entities are

[13] See, *eg*, ss 211E and 211H of the Companies Act of Singapore (Cap 50, 2006 Rev Ed). See also Sandeep Gopalan & Michael Guihot, "Cross-Border Insolvency Law and Multinational Enterprise Groups: Judicial Innovation as an International Solution" (2016) 48(3) *The George Washington International Law Review* 549 at 551.

partitioned.[14] As the argument goes, disregarding the separate legal personalities of the individual entities in an insolvency would therefore be unfair, and undermines commercial certainty.

22 Yet, we should not accept this critique unthinkingly. Let me suggest three counterarguments. First, is the expectation justified by commercial reality? In the context of a highly integrated business group where the assets of separate entities are often pooled and treated interchangeably when the business was a going concern, creditors arguably extend credit on the implicit understanding that they were lending to the entire business group rather than one particular entity. The prevalence of cross-collateralisation of debt, cross-guarantees and cross-default provisions speaks to this. As another example, in a scheme of arrangement, quite often the discharge extends to contingent debtors, such as guarantors, which are frequently related entities. Clearly the credit assessment at the point of lending was not just of the debtor but also of the related guarantor. Under such circumstances, there might be an impetus to pool the assets of the group for distribution in an insolvency. Secondly, the expectations argument is, in a sense, self-reinforcing. The creditors' expectation that their investment will be undisturbed in a group insolvency is to some extent

[14] See generally Henry Hansmann and Reinier Kraakman, "The Essential Role of Organizational Law" (2000) 110 Yale LJ 387.

a mere reflection of the orthodoxy of separate legal personality. That should not preclude us from reconsidering the normative justifications for that orthodoxy. In fact, if incursions into the separate legal personality doctrine become more common in group insolvencies, creditors' expectations for their investment to be ring-fenced upon insolvency would be less justified. Thirdly, it is clear that creditors' expectations should not be a decisive factor in any case, and should in the appropriate case give way to considerations of policy. This is precisely why creditors' contractual rights are subordinated in an insolvency. One example where policy penetrates the separate legal personality doctrine is in the case of the group structure being used for dishonest or fraudulent purposes. This would certainly justify treating the group of companies as a single entity notwithstanding the expectations of some creditors that they would be treated as legally separate. While I acknowledge that this might be an extreme example, it illustrates that the lifting of the veil is undergirded, at least in part, by a policy imperative to prevent abuse. Similarly, the question must be asked whether there are other compelling policy considerations that warrant embracing consolidation in an insolvency.

23 In this regard, the practice of disregarding separate legal personalities upon insolvency is not without precedent. One example is the doctrine of substantive consolidation, which calls for the treatment of the

assets and liabilities of two or more enterprise group members as if they were part of a single insolvency estate.[15] I accept that the contours of the doctrine are uncertain even in jurisdictions where it has been expressly recognised[16], but this may improve over time as the doctrine matures.

24 In the US, where the doctrine of substantive consolidation is traditionally regarded as one arising out of equity, the courts have in rare cases allowed the pooling of assets upon insolvency in primarily two alternative scenarios: first, where the business group as a going concern disregarded the separate legal personalities of its constituent entities and led creditors to deal with the group as a single economic unit; and second, where the assets and liabilities of the business group upon insolvency are so entangled that attempts at separation would be prohibitively costly.[17] The second of these two categories has been recognised in Part Three of the UNCITRAL Legislative Guide on Insolvency Law, which proposes two grounds for substantive consolidation – first, where the court is satisfied that the assets or liabilities of the enterprise group members are intermingled to such an extent that the ownership of assets and

[15] United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law, Part three: Treatment of enterprise groups in insolvency* (July 2012), Glossary, para 4(e).

[16] See, *eg*, *Re Nortel Networks Corp.* [2015] OJ No 2440 at [213] and [215]–[216].

[17] See, *eg*, *In re Owens Corning*, 419 F.3d 195. 208 (3rd Cir. 2005), *In re Augie/Restivo Co Ltd* 860F.2d 515 (2nd Cir. 1988), *In re Republic Airways Holdings Inc* 565 B.R. 710 (Bankr. S.D.N.Y 2017).

responsibility for liabilities cannot be identified without disproportionate expense or delay, and second, where the court is satisfied that the enterprise group members are engaged in a fraudulent scheme or activity with no legitimate business purpose.[18]

25 It is interesting that many jurisdictions have in recent years taken steps to adapt their insolvency laws to accommodate business groups. In Australia, the Corporations Act 2001 was amended in 2007 to allow for pooling of assets of a group of companies upon liquidation, both voluntarily and by court order.[19] Last year, Singapore introduced amendments to its Companies Act which provide for, *inter alia*, enhanced moratorium relief for companies seeking to restructure their businesses. Of particular note is the newly introduced s 211C which permits subsidiaries and holding companies of the entity being restructured to apply for moratorium relief if those related entities are necessary and integral to the restructuring plan. Such relief may have *in personam* worldwide effect, *ie*, it can apply to any act of any person within the jurisdiction of the court, whether the act takes place in Singapore or elsewhere.[20] For Singapore, this

[18] United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law, Part three: Treatment of enterprise groups in insolvency* (July 2012), Section II (Addressing the insolvency of enterprise groups: domestic issues), para 113.

[19] Corporations Act 2001 (Cth), ss 571, 579E.

[20] Companies Act of Singapore (Cap 50, 2006 Rev Ed), ss 211C(1), 211C(2) and 211C(4)(*b*).

provision is an important first step in taking a consolidated approach to group enterprise restructuring.

26 To be sure, I should not be understood as advocating the sacrifice of the doctrine of separate legal personality at the altar of group restructuring. This may not always lead to increased recovery for each creditor; it could simply increase the amount distributed to some at the expense of others.[21] Given the tremendous disruptive potential of a doctrine such as substantive consolidation, its use must be carefully circumscribed and calibrated with adequate safeguards.[22] A balanced solution can only be arrived at following detailed study, and comprehensive discourse and dialogue. The purpose of my raising the issue this afternoon is to call for an examination as to whether that process should be initiated. That is after all one of the privileges of a keynote address. The complexity of business structures in global commerce today compels us to find effective solutions to address the challenges in preserving enterprise value in the event of an insolvency.

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[21] United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law, Part three: Treatment of enterprise groups in insolvency* (July 2012), Section II (Addressing the insolvency of enterprise groups: domestic issues), para 110. For example, in *Re ZYX Learning Centres Limited (Formerly ABC Learning Centres Limited) (Receivers and Managers Appointed) (in liq)* [2015] FCA 146, the Australian court observed that if the assets of a parent company and its subsidiary were pooled, the subsidiary's employees would be paid in full but the parent's unsecured creditors would receive no return; whereas if they were not pooled, the employees would receive 19 cents on the dollar and the unsecured creditors 0.23 cents on the dollar.

[22] See further, Irit Mevorach, "Is the future bright for enterprise groups in insolvency? – analysis of UNCITRAL's new recommendations on the domestic aspects" in *International Insolvency Law: Reforms and Challenges* (Paul Omar ed) (2013) ch 12.

These are the commercial realities we confront and we are compelled to find compelling answers to them.

III. Conclusion

27 I hope that a theme that emerges from my address this afternoon is the need for the law and its practitioners to find innovative solutions to meet the demands of the new global economic paradigm. There is a need to push boundaries and take bold new steps in that process. But isn't that truly the lesson from *Collins & Aikman*? After all, if you change nothing, nothing will change. On that note, I wish everyone an immensely productive conference in the pursuit of bold solutions. It has been an honour addressing you.

28 Thank you very much.

Kannan Ramesh
Judge, Supreme Court of Singapore