

Cross-Border Insolvencies: A New Paradigm

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Distinguished Guests, Ladies and Gentlemen

I. Welcome and Introduction

1 Good morning. It gives me immense pleasure to be here this morning at the International Association of Insolvency Regulators' ("IAIR") Annual Conference and General Meeting 2016. I extend a warm welcome to all our guests from overseas. This is the second time that the IAIR's Annual Conference has been held in Singapore, and that in itself is a privilege and an honour for us. Whilst the conference promises to keep everyone busy over the next three days, I hope that all our guests will be able find some time to enjoy the many sights and attractions that our island nation has to offer.

2 Let me begin by first congratulating the IAIR on having grown from strength to strength. From its inception in 1995 with nine participating countries, it has shown

¹ Judicial Commissioner, Supreme Court of Singapore. The views and ideas contained here are personal. This speech was delivered at the *International Association of Insolvency Regulators' 2016 Annual Conference and General Meeting* in Singapore on 6 September 2016. I am grateful to my colleague, Zeslene Mao, Justices' Law Clerk of the Supreme Court of Singapore, for the assistance she gave me in the research and preparation of this speech.

remarkable growth in flourishing to its present membership, comprising members from 26 countries. I am deeply heartened by this trajectory, and see it as a clear endorsement by insolvency regulators of the importance of the IAIR. The significance of the wonderful work of the IAIR in bringing together insolvency regulators from across the globe cannot be gainsaid. The IAIR plays a critical role in providing a valuable, if not essential, platform for insolvency regulators to meet, discuss and exchange ideas on hot-button issues and challenges facing the global insolvency landscape. These issues and challenges are particularly exigent today given the rapid globalisation of trade and the current tepid global economic environment with worrisome red flags sprouting with alarming regularity in various industries and jurisdictions. The confluence of these factors has created a new paradigm for lawmakers, regulators, practitioners and the courts. The process of learning by imbibing each other's experiences and discussing collaborative solutions will undoubtedly arm insolvency regulators with the bandwidth to confront and address the new paradigm. I encourage all participants to work towards fortifying the IAIR as an indispensable arena for the germination of new ideas and the evolution of the very best practices to address the challenges in the field of insolvency.

II. The new paradigm in cross-border insolvency

3 The theme of this year's conference is "Creating Connections". I must congratulate the organisers on selecting an apt theme. I say this because it is an inarguable proposition that the present landscape for corporate insolvency demands that there be greater connection, integration and convergence between jurisdictions. It is a fact that in the insatiable pursuit for economic opportunities and growth, businesses have become increasingly without borders. As a result, capital and trade have seamlessly

flowed through economies in the search for new markets and opportunities spurred undoubtedly by the execution of bilateral or multilateral trade and investment treaties, and the formation of multilateral economic pacts and groupings. Businesses therefore are often spread across multiple jurisdictions, organised with reference to economic and fiscal considerations and *not* necessarily insolvency laws. Indeed, insolvency is perhaps the furthest consideration in the calculus when investment decisions are made. To any intelligent observer, the question that must spring to mind is: Have insolvency laws evolved sufficiently to satisfactorily deal with this new paradigm? I would argue that they have not and would offer the thesis that there is a pressing need for an attitudinal shift in thinking and philosophies amongst lawmakers, policymakers and judges to embrace this new reality or run the risk of the law becoming ossified. This shall be the focus of my presentation this morning.

- 4 When I began my career in the law some twenty odd years ago, corporate insolvency work was largely undertaken within the hermetically sealed confines of jurisdictional boundaries. Laws, philosophies, both judicial and academic, and indeed mind-sets were built on this attitudinal bedrock. The Asian financial crisis in the late 1990s brought some intellectual soul searching in this regard, but it was only a small scratch on an otherwise indelible traditional canvass. Global economic recovery in the new millennium brought a resuscitation of economic activity but it unfortunately was a silver bullet to any real debate in this regard. This was simply because insolvency was not regarded as particularly topical. The new millennium also heralded a dramatic spurt in international trade. In the past decade, world trade in goods saw a large rise, increasing from US\$10 trillion in 2004 to more than US\$18.5 trillion in 2015.

Similarly, trade in services also increased from just over US\$2 trillion in 2004 to almost US\$5 trillion in 2014.²

5 This trend towards economic convergence is inexorable as businesses seek to establish economic footprints across multiple economies and economic zones. The precept for this is the drive by many countries to pursue global and regional trade and economic linkages in an effort to uncover or cultivate new markets outside jurisdictional and geographical boundaries. It can be reasonably said that the European Union (“EU”) was one of the earliest incarnations of such efforts creating a common economic zone in 1999. It now boasts a total gross domestic product (“GDP”) of US\$18 trillion.³ Of more recent vintage is the highly anticipated Trans-Pacific Partnership (“TPP”), the implementation of which will occur once – or should I say if – it has been ratified by the requisite number of signatory nations. Another significant recent development was the establishment of the Asian Infrastructure Investment Bank (“AIIB”) late last year, one of the objectives of which is to promote connectivity and economic integration within Asia.⁴ Closer to Singapore, the Association of South East Asian Nations (“ASEAN”) established the ASEAN Economic Community in 2015, with the aim of working towards a highly integrated and cohesive economic community by 2025.⁵ Indeed, even though the United Kingdom stunned the world by voting to leave the EU in June this year, that vote does not mean that the British seek economic isolation from the EU. Instead, the British

² United Nations Conference on Trade and Development, *Key Statistics and Trends in International Trade 2015*, p 11, <http://unctad.org/en/PublicationsLibrary/ditctab2015d1_en.pdf>.

³ Mike W Peng, *Global Business* (Cengage Learning, 4th Ed, 2016), p 247.

⁴ Chen Jia, “Firm footing for Asia’s economic growth – New Asian bank and Silk Road Fund can be the driving force for ambitious infrastructure push” (The Telegraph, 26 July 2015), <<http://www.telegraph.co.uk/sponsored/china-watch/business/11762805/aiib-new-silk-road-fund-economic-growth-asia.html>>.

⁵ Wolfgang Lehmacher, “The ASEAN Economic Community: what you need to know” (World Economic Forum, 31 May 2016), <<https://www.weforum.org/agenda/2016/05/asean-economic-community-what-you-need-to-know/>>.

Prime Minister, Mrs Theresa May, was at pains to emphasise the United Kingdom's pledge to continue trade with the EU by securing a trade deal with the bloc.⁶

6 All of these speak to a landscape that has changed irreversibly, and which continues to morph and evolve even as we speak. The surge in cross-border trade, fuelled by sustained economic growth, technological advances and the decrease in or eradication of trade barriers amongst nations, has heralded a new operating environment. The inevitable by-product is that more businesses than ever are spread across national borders, raising capital and financing in financial hubs and conducting operations in growth markets. The economic value of these multi-national enterprises is a composite of businesses situated in various jurisdictions, with no one jurisdiction being able to claim primacy.

7 The increasingly borderless nature of trade does not apply only to multinational corporations possessing large market capitalisation. Small and medium enterprises ("SMEs") too are progressively able to partake in the global economy. Developments in technology aid this in part by decreasing the barriers to cross-border trade. The internet is after all borderless. In fact, the United Nations Conference on Trade and Development observed in 2015 that trade growth in the future could be fuelled by the increased participation of small and medium enterprises in global trade.⁷ In a few years' time, one may be hard-pressed to find any business that does not involve some cross-border element. Also, it must not be forgotten that many of these SMEs are plugged into the businesses of global behemoths as important integers in their supply

⁶ Rowen Mason and Alex Duval Smith, "Theresa May takes Brexit's immigration message to eastern Europe" (The Guardian, 28 July 2016), <<http://www.theguardian.com/politics/2016/jul/28/theresa-may-on-brexit-tour-of-eastern-europe>>.

⁷ United Nations Conference on Trade and Development, *Key Statistics and Trends in International Trade 2015*, p 10, <http://unctad.org/en/PublicationsLibrary/ditctab2015d1_en.pdf>.

chain. If any of these global corporations catch a nasty cold, that could spell the death knell for these SMEs. As SMEs are often the primary employers and significant borrowers in many economies, the downstream impact of the collapse of a global corporation could be quite disastrous.

8 Multinational enterprise groups present an even greater challenge. Where entities within the group fail, discrete insolvency proceedings have to be commenced in multiple jurisdictions. If the corporate group was one that was highly integrated, the unravelling of the complex web of interlocking interests and cross-shareholdings to determine the assets and liabilities of the particular entity within the group can often be tricky and mind-boggling. The insolvency of Nortel Networks speaks to this.⁸ In such a case, it would be almost inevitable that each entity within the group would be involved in separate insolvency proceedings in distinct jurisdictions, each with its own set of applicable laws, procedural rules and insolvency administrators. As an illustration, the collapse of Lehman Brothers in 2008 engendered more than 75 proceedings across many jurisdictions, including the United States, Australia, the United Kingdom, Switzerland and Singapore, just to name a few.⁹

9 All of this is an anathema to the traditional parochial approach of insolvency laws. Gone, therefore, are the halcyon days when the failure of corporations invoked the insolvency processes of only *one* jurisdiction.

10 The big question that must be asked and answered is whether insolvency laws have adjusted satisfactorily to address this new paradigm. It must be remembered that at its

⁸ See *Re Nortel Networks Corp* 2015 CanLII 2987.

⁹ Alvarez & Marshall, "Lehman Brothers Holdings Inc: International Protocol Proposal" (11 February 2009), p 3-4.

heart, insolvency involves a collective proceeding that seeks to centralise disputes to achieve economic efficiency in the restructuring or the economic disintegration of a business, in the process optimising returns for creditors and all stakeholders.¹⁰ Instead of allowing creditors a free rein to pursue their individual claims against the debtor, sometimes described as a “free-for-all”, insolvency laws impose a mechanism for the orderly collection and realisation of assets for distribution in accordance with a scheme of distribution often laid down by statute.¹¹

- 11 However, the majority of insolvency laws have been formulated for a purely *domestic* context and are ill-suited to address cross-border insolvencies. Even where insolvency laws cater for cross-border insolvencies, the differences in laws across jurisdictions engender a multitude of difficult issues, especially as regards the recognition of the claims of foreign creditors and the recognition and enforcement of foreign insolvency proceedings and judgments. Other concerns that arise include whether the insolvent corporation’s affairs should be dealt with through a primary proceeding that coordinates and manages the restructuring efforts with a view to implementing a universal restructuring plan, or whether each jurisdiction in which the corporation has an interest should deal with the same in an isolationist manner ignoring realities and the economic value of the business. Furthermore, if there is to be a coordinating jurisdiction, which jurisdiction should assume this role and what exactly are its parameters? These are undoubtedly thorny questions for which a global answer has yet to be found. The failure to do so creates uncertainty which is fertile ground for opportunities for distortion and arbitrage. These are indisputable obstacles to the preservation of economic value. Also, they increase restructuring costs, eroding

¹⁰ *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [1].

¹¹ Roy Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4th Ed, 2011), p 8.

whatever value that remains of the already financially-troubled business. Again, the case of *Nortel Networks* clearly demonstrates this with costs to-date being in the region of US\$1.3 billion.¹² All these militate against the *raison d'être* of an effective insolvency regime. It is therefore *essential* that such distortions are reduced if not eradicated. The case for the development of a fair, efficient and effective international insolvency regime is crystal clear.

III. Working towards convergence in cross-border insolvencies

12 So where do we start? It has been observed that the international legal landscape for cross-border insolvency is characterised by a “patchwork of national laws” that have their provenance in a “different commercial age”.¹³ There is a great deal of truth in this. It is also true that this is no longer a satisfactory state of affairs. The expansion of global trade and investment and the concomitant rise in cross-border insolvencies commends itself to only one conclusion – the need for convergence.

13 There is in my view an importunate cry for a shift towards greater convergence in practices and laws, refocusing attitudes from a purely domestic perspective to placing the maximisation of enterprise value as the core consideration. This is a big task as it requires one to perhaps jettison the traditional approach and embrace universalism. But it is a task that *must* be undertaken. Building connections between regulators will be a significant step in this regard.

¹² Jim Christie, “Slim odds for clawbacks of attorney’s fees in Nortel bankruptcy” (Reuters, 28 May 2015), <<http://www.reuters.com/article/bankruptcy-nortel-idUSL1N0YJ0J120150528>>.

¹³ 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* 1225 at p 1228–1229.

14 Why is this movement towards convergence important? As a matter of justice and fairness, convergence will enhance consistency in outcomes and transparency of processes, dis-incentivising undesirable behaviour such as “forum-shopping”. Embracing convergence is also conducive to achieving the *raison d’être* of an effective insolvency regime. Where an international framework is capable of providing an efficient and predictable insolvency or restructuring process, the risk of investment decreases which results in a concomitant reduction in the cost of funding. The result will be a boon for cross-border investment and the creation of jobs, leading to significant economic and social benefits. In my view, the movement towards convergence is not something that is just merely a nice or good-to-have; it is an *imperative*.

15 How then can we achieve convergence? I make three points. First, convergence must happen at a transnational level. Lawmakers and policymakers should strive towards convergence of legal principles applicable in the context of cross-border insolvency, and in turn reflect those principles in domestic laws and policies. Second, there should be convergence of judicial attitudes and philosophies leading to greater judicial comity between courts. Third, there must be increased cooperation and communication between courts when dealing with cases of cross-border insolvency. Let me elaborate on each in turn.

A. *Convergence of legal philosophies and principles*

16 The foundational strength of an insolvency regime is the effectiveness of the statutory framework that exists in achieving its objectives. It is therefore axiomatic that legislatures and policymakers must continually and actively assess whether the laws

that they have enacted or will be enacting are relevant or instead anachronistic. In the context of the new paradigm, the question of relevance must be examined through the lenses of modern commerce, subject, of course, to unique domestic socio-economic considerations. There ought to be a drive towards transnational convergence by actively examining and assessing whether domestic laws are compliant with international norms and attitudes.

17 Let me provide an example where this has been done in Singapore. Under Singapore's current insolvency legislation, the liquidator of a foreign company that is registered or liable to be registered in Singapore is required to ring-fence assets of the foreign company in Singapore to satisfy debts incurred in Singapore first before remitting the remainder to the main liquidator of the foreign company.¹⁴ In a recent review of Singapore's insolvency regime by the Insolvency Law Review Committee ("ILRC"), it was observed that such a ring-fencing provision is inconsistent with internationally-accepted standards of a fair and equitable cross-border insolvency regime. The ILRC has recommended that the provision be abolished generally in favour of a discretionary regime for the remittal of assets of foreign companies,¹⁵ a suggestion which has been accepted, in principle, by the Singapore government. This is a small but a significant step.

18 The Model Law on Cross Border Insolvency ("the Model Law"), promulgated by the United Nations Commission on International Trade Law ("UNCITRAL") in 1997, is a significant step in the efforts to achieve convergence. The scope of the Model Law is limited only to certain procedural aspects of cross-border insolvency cases, which

¹⁴ Companies Act (Cap 50, 2006 Rev Ed), s 377(3)(c).

¹⁵ Report of Insolvency Law Review Committee, p 239–243. Ring-fencing requirements will still be retained for specific financial institutions, such as banks and insurance companies.

include (a) access by foreign insolvency representatives to the court of the enacting state, (b) recognition by the enacting state of foreign insolvency proceedings, (c) the granting of relief to assist foreign proceedings, and (d) cooperation and coordination between courts and insolvency administrators. It seems reasonably evident from these facets of the Model Law that it ought to be the minimum starting point.

19 However, its adoption has been slow, with only 41 states to-date making the Model Law part of their domestic insolvency laws.¹⁶ This leaves a large number of jurisdictions out of its reach. I am pleased to say that Singapore has confirmed that it will adopt the Model Law and is in the process of doing so. Again, this is a significant demonstration of Singapore's commitment to convergence.

20 It seems obvious that the adoption of the Model Law ought to be widespread. The Model Law will assist in the establishment of a common procedural baseline for the handling of cross-border insolvencies. Therefore, the case for adoption of the Model Law has to be made with vigour.

21 The Model Law is, however, largely procedural. It does not address substantive law. I believe that a compelling case exists for broad convergence in substantive principles applicable to cross-border insolvency and restructurings. It may sound ambitious, but it is an aim that lawmakers and policymakers should strive towards. Why do I say this? Restructuring an enterprise with economic value in more than one jurisdiction

¹⁶ As of 16 August 2016. The 41 States are namely: Australia, Benin, Burkina Faso, Cameroon, Canada, Central African Republic, Chad, Chile, Colombia, Comoros, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Greece, Guinea, Guinea-Bissau, Japan, Kenya, Malawi, Mauritius, Mexico, Montenegro, New Zealand, Niger, Philippines, Poland, Republic of Korea, Romania, Senegal, Serbia, Seychelles, Slovenia, South Africa, Togo, Uganda, United Kingdom of Great Britain and Northern Ireland (including the British Virgin Islands and Gibraltar), United States of America, Vanuatu. See <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html>.

ought to be approached on a holistic basis, because it is, at its heart, a restructuring of a single business enterprise. To segregate the value into individual units would be to introduce a degree of artificiality not in keeping with the manner in which the enterprise functions. It also distorts the true value of the enterprise. It is important therefore to have common principles that would serve to guide how such an enterprise should be restructured. Such an approach can only enhance the prospect of a better end result.

22 One effort at an articulation of common principles is INSOL International’s Statement of Principles for a Global Approach to Multi-Creditor Workouts, also known as the “INSOL 8 Principles”.¹⁷ In a speech to the INSOL International Group of 36 Meeting in Singapore in November last year, I posited that the INSOL 8 Principles could form a “common language” that could guide national insolvency legislation.¹⁸ I also spoke about the possibility of reviewing the INSOL 8 Principles on a regional basis, with the aim of – at least in the Asian context – promulgating a set of Asian Principles for Restructuring. I have since formed the view that we should be more ambitious.

23 January 2016 saw the launch of the Asian Business Law Institute (“ABLI”) in Singapore at an extremely successful conference with a stellar cast of speakers. The title of that conference was “Doing Business Across Asia – Legal Convergence in an Asian Century”.¹⁹ The ABLI is a transnational institute, and not a Singapore institute. Eminent members of the judiciary, academia and legal industry hailing from

¹⁷ INSOL International, *The Statement of Principles for a Global Approach to Multi-Creditor Workouts* (2000).

¹⁸ Kannan Ramesh, “The cross-border project – a “dual-track” approach” (INSOL International Group of 36 Meeting, 30 November 2015).

¹⁹ See, Sundaresh Menon, “Doing Business Across Asia: Legal Convergence in an Asian Century”, Keynote Address, (21 January 2016), <[http://www.supremecourt.gov.sg/Data/Editor/Documents/'Doing%20Business%20Across%20Asia%20-%20Legal%20Convergence%20in%20an%20Asian%20Century'%20\(Final%20version%20after%20delivery-%20260116\).pdf](http://www.supremecourt.gov.sg/Data/Editor/Documents/'Doing%20Business%20Across%20Asia%20-%20Legal%20Convergence%20in%20an%20Asian%20Century'%20(Final%20version%20after%20delivery-%20260116).pdf)>.

Australia, China, India and Singapore comprise its Board of Governors. The *raison d'être* of the ABLI is to promote convergence of business laws in Asia. The ABLI initiates, conducts and facilitates research with a view to producing authoritative texts that will serve to provide practical guidance in the field of Asian legal development. As a transnational institute, the ABLI is ideally placed and well-suited to embark on the task of formulating common principles that can serve as a reference tool for domestic cross-border legislation, especially in the Asia-Pacific context. This can be undertaken in synergistic collaboration with suitable partners. Indeed, I am able to say with enthusiasm that the process has already started within the ABLI. It is hoped that this could lay the platform for substantive convergence in Asian insolvency laws, or even an Asian *lex mercatoria* for insolvency.

B. *Convergence of judicial attitudes*

24 Whilst it would be ideal for legislatures to implement national legal frameworks and laws that are conducive to cross-border insolvencies, this is not an overnight process. Significant time and effort will be required. The pace of adoption of the Model Law illustrates this clearly. However, the convergence of laws and legal principle is but one part of the equation. The other is the role that courts can play in building a coherent set of principles for regulating cross-border insolvencies. I am firmly of the view that the courts have an immense responsibility in this regard.

25 Everyone present here this morning knows that that there are two competing legal theories in this context: universalism and territorialism. Universalism aims to provide a single forum applying a single legal regime to administer the debtor's assets and liabilities on a worldwide basis. In contrast, territorialism envisages that insolvency

proceedings within a jurisdiction have effect only within that jurisdiction. In other words, local assets are meant for local creditors, regardless of proceedings occurring elsewhere.²⁰ Whilst territorialism is advantageous for local creditors as it prioritises repayment of local debts, it encourages a multiplicity of proceedings which in turn escalates costs. To this extent, territorialism may be seen as anathema to the maximisation of enterprise value, which is the core goal of any effective insolvency regime. It is therefore encouraging and advantageous to the efficient administration of cross-border insolvency that the prevailing judicial philosophy is that of universalism, or more accurately, “modified universalism”.²¹ This posits that courts should, as far as is consistent with justice, public policy and unique domestic considerations, actively assist and cooperate with the courts of the country of the “principal liquidation”.²² An indication of the trend towards universalist notions in Singapore may be found in the decision of the Singapore Court of Appeal in *Beluga Chartering*,²³ where the court recognised its inherent discretion to assist foreign liquidation proceedings.

26 However, whilst there appears to be a general convergence towards the theory of modified universalism in global judicial attitudes, there also appears to be a divergence in the *application* of the theory. In this regard, the Singapore and United Kingdom courts have taken opposing approaches to the issue of the recognition and enforcement of foreign insolvency proceedings. In the well-known decision of the

²⁰ Richard Sheldon QC (Gen Ed), *Cross-Border Insolvency* (Bloomsbury Professional, 4th Ed, 2015), para 6.3.

²¹ For the position in the United Kingdom, see *Rubin and another v Eurofinance SA and others* [2013] 1 AC 236 at [16]. For the position in the United States, see *In re Maxwell Communication Corporation* 170 BR 800, US Bankruptcy Court for the Southern District of New York, Judge Broznan. See also Bob Wessels, *International Insolvency Law Part I: Global Perspectives on Cross-Border Insolvency Law* (Wolters Kluwer, 4th Ed, 2015) at para 10025: “In most countries, including English speaking countries and the USA, models are, or have been used, which fall between the stringent principle of territoriality on the one hand and the panoramic principle of universality on the other ... Such models which ‘fall between’ are usually referred to as ‘modified’, ‘limited’, ‘curtailed’ or ‘controlled’ universalism, as most of them have a universalist element at their core.”

²² *In re HIH Casualty and General Insurance* [2008] 1 WLR 852 at [30].

²³ *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.

United Kingdom Supreme Court in *Rubin v Eurofinance SA*,²⁴ the court declined to uphold a new basis for recognition in relation to insolvency proceedings, preferring to rely instead on traditional bases for the recognition and enforcement of foreign judgments.

27 The decision in *Rubin* has reverberated in international insolvency circles. It has been said by Professor Bob Wessels that the decision is “at odds with tendencies of convergence ... to a more efficient and coordinated multi-jurisdictional system with an openness for the interests of the global spread of all parties involved”.²⁵ I do not propose today to analyse the merits of the decision in *Rubin*, save to point out that it appears that a *different* judicial philosophy has been adopted in Singapore.

28 I refer, in this regard, to the decision of the Singapore High Court in *Re Opti-Medix*, which was handed down in June this year.²⁶ In that case, the court recognised the title of a foreign liquidator even though that liquidator had *not* been appointed by the court of the place of the company’s incorporation. What is interesting about *Re Opti-Medix* is the court’s observation that while Singapore had yet to adopt the Model Law, there was no impairment to the recognition of insolvency proceedings in the corporation’s centre of main interests (“COMI”) *under the common law*. The decision thus reflects the judicial philosophy in Singapore to recognise and assist foreign insolvency proceedings where this is in line with local legislation and where the assistance makes practical and commercial sense. This is consonant with the direction that Singapore is

²⁴ *Rubin and another v Eurofinance SA and others* [2013] 1 AC 236.

²⁵ Bob Wessels, *International Insolvency Law Part I: Global Perspectives on Cross-Border Insolvency Law* (Wolters Kluwer, 4th Ed, 2015) at para 10054f.

²⁶ *Re Opti-Medix Ltd (in liquidation) and another matter* [2016] 4 SLR 312.

moving towards – embracing judicial comity so as to achieve the efficient administration of cross-border insolvencies.

29 It seems to me to self-evident that if courts embrace universalism, convergence in judicial philosophies will inevitably result. While judges may not always agree, judges do approach issues broadly in a similar fashion. Greater comity will facilitate the integration of judicial philosophies and ideas, and thereby promote convergence.

C. *Communication and cooperation between courts*

30 I now turn to the issue of increased communication and cooperation between courts. I have just spoken about the insolvency court's *internal* attitude in specific cross-border insolvency cases. I come now to the need for courts to engage in *external* outreach. Although courts have traditionally confined their work only to the particular cases that come before them, I firmly believe that in the modern context, courts can no longer afford to function purely within their jurisdictional silos. There is a need for courts to pre-empt the market and put in place systems and processes that will allow them to tackle more effectively and efficiently cross-border matters.

31 The creation of connections between courts can occur on two levels. First, courts can “talk” to each other. This is what I mean by communication. Second, courts can “work” with each other. This is what I mean by cooperation.

32 Communication and cooperation between courts pertaining to a specific case is not a new concept. There are numerous examples where courts have devised protocols for such communication and cooperation. These protocols would usually encompass communication between courts, between courts and foreign insolvency

representatives, and between insolvency representatives and non-parties with an interest in the administration of the insolvent company. As protocols are entered into on a case-by-case basis, they have the advantage of being tailored to fit the peculiarities of the case.

33 One of the earliest examples where a protocol for court-to-court communication was implemented was in the case of *Re Maxwell*²⁷ in the 1990s. That case involved the insolvency of a holding company that was listed on the London Stock Exchange which held debt in the United Kingdom but whose principal assets were located in publishing companies in the United States. The company filed for insolvency in both the United States and the United Kingdom. In a pioneering move, Lord Hoffmann (sitting as he then was in the English High Court) and Judge Brozman of the United States Bankruptcy Court for the Southern District of New York approved a protocol to facilitate communication.

34 Since *Re Maxwell*, international organisations such as the American Law Institute (“ALI”), International Insolvency Institute (“IIF”) and the International Bar Association (“IBA”) have led efforts to work out guidelines and principles for communication and cooperation which courts could adopt or modify to suit the needs of a particular case. Some examples of the fruits of this effort are the promulgation of the Cross-Border Insolvency Concordat by the IBA²⁸ and the Global Guidelines for Court-to-Court Communications in International Insolvency Cases and the Global

²⁷ See *Re Maxwell Communication* [1992] BCC 757 and *In re Maxwell Commercial Corporation plc* 170 BR 800 (Bankr SDNY 1994).

²⁸ Adopted by the Council of the International Bar Association Section on Business Law (Paris, 17 September 1995) and by the Council of the International Bar Association (Madrid, 31 May 1996).

Principles for Cooperation in Insolvency Cases by the ALI and III.²⁹ The protocol in the *Lehman Brothers* case which facilitated coordination between the various estates of the group is also another recent example of a case where a protocol was implemented (“the *Lehman* protocol”).³⁰

35 However, there is little predictability as to when a protocol would be used. This is because the use of protocols is dependent on a request from the court or the parties and the preparedness by other involved courts to engage in communication and cooperation. This may not always materialise. Indeed, the *Lehman* protocol would not have happened if Judge James Peck had not initiated and pushed the idea.³¹ This unpredictability results as there is an absence of an institutional framework to encourage communication and cooperation. To address this, Singapore has mooted and is currently in the process of exploring an initiative to bring together a network of insolvency judges from participating courts in major financial centres and economies in what is termed as the Judicial Insolvency Network (or “JIN” for short). The JIN will work towards formulating guidelines for communication and cooperation in cross-border insolvency cases (the “Guidelines”). The Guidelines will guide the preparation of protocols in cross-border insolvency matters that involve the participating courts. Also, the Guidelines will not remain static. The JIN will continually refine and improve the Guidelines based on shared experiences and the needs of the restructuring community.

²⁹ American Law Institute and International Insolvency Institute, *Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases* (American Law Institute, 2012).

³⁰ See Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies 1 (2009), available at <<http://dm.epiq11.com/LBH/Project>> (access “Key Documents”).

³¹ See James Peck, “Lehman Brothers and the Limits of Universalism” (Insolvency Lawyers Association Annual Dinner, 27 November 2014).

- 36 What will the Guidelines encompass? At a basic level, the Guidelines are intended to cover communications and the rendering of assistance between participating courts. Such assistance may take the form of the recognition of judgments or orders made by a foreign court or the staying of proceedings, executions or attachments. The Guidelines may also enable participating courts to issue orders or directions permitting a duly authorised insolvency administrator to appear and be heard before a foreign court and *vice versa*. At its most cutting-edge, the Guidelines may provide for the conduct of joint hearings between courts.
- 37 The JIN will also serve another vital purpose. It will provide a platform for judges to come together to share experiences, exchange ideas, identify areas for judicial cooperation and develop best practices – in short, thought leadership in the global insolvency landscape. Over time, a “spirit of trust” between insolvency judges may be formed, leading to greater comity and convergence of judicial philosophies, which is a point that I had discussed earlier.
- 38 It is hoped that the JIN will grow its membership as the benefits of being part of the network become more apparent. With increased membership to the JIN, there will be increased subscription to the Guidelines thereby setting an institutionalised platform for court-to-court communication and cooperation. As the Guidelines evolve with constant refinement and improvement by the JIN, the seeds for an effective and efficient court-based cross-border restructuring regime will take root. I am tremendously excited by this initiative.

IV. Facilitating the insolvency or restructuring of multinational corporate groups

39 The three areas which I have just spoken on – convergence of legal principles and judicial philosophies, and the pursuit of increased communication and cooperation between courts – are critical elements which will undoubtedly lay the groundwork for the establishment of an international framework to facilitate the insolvency or reorganisation of a multinational corporate group. That said, there is at present no legal framework governing the insolvency of multinational group enterprises. Whilst the Model Law has set out an international legal framework for cross-border insolvency, it only addresses the scenario of the insolvency of a *single-entity* that has cross-jurisdictional repercussions. UNCITRAL Working Group V is in the process of discussing and formulating a Model Law to facilitate the resolution of insolvencies involving multinational enterprise groups,³² but it may still be some time before the draft is agreed upon and ratified by the UN Commission. Then there is the long and arduous process of having that Model Law adopted by nations. It is within this fluid area of cross-border insolvency that we may have to take bold strides, and it is with this background in mind that I wish to share what I envision as being the appropriate or ideal approach to address group insolvencies.

40 In speaking of a multinational corporate group, I am referring to an enterprise that operates in a number of jurisdictions through entities incorporated or governed by local laws. Such multinational corporate groups adopt a wide range of corporate structures. In some instances, the various entities may be centrally controlled through a parent corporation or holding company, whereas in other cases, the entities are loosely spread over jurisdictions without significant integration of operations. As I

³² See, generally, United Nations Commission on International Trade Law, *Report of Working Group V (Insolvency Law) on the work of its forty-ninth session (New York, 2-6 May 2016)*.

have alluded to at the beginning of my address, the insolvencies of multinational corporate groups pose unique challenges. In cases where the group is highly economically integrated, the financial distress of one entity inevitably has a cascading or “domino” effect, resulting in the failure of the whole group enterprise. Although *legally* speaking, each entity is discrete and insolvent in its own right, the *economic* reality in such situations is that the economic or fiscal failure is of the corporate group as a whole.

- 41 How can the failure of a multinational corporate group be managed in a sensible and productive manner? In my view, there is much to commend an approach where a single jurisdiction takes charge of the insolvency proceedings for the entire group, especially where the solution sought is for a restructuring of the enterprise as a whole or a sale of certain arms of business as a going concern. Indeed, it is difficult to envision a restructuring plan succeeding in such circumstances in an isolated and piecemeal fashion in the absence of a group-wide solution. Where discrete and fragmented insolvency proceedings are commenced in separate jurisdictions, the sheer number of parties involved adds many layers of complexity and hampers the realisation of a coordinated resolution.³³ More importantly, the presence of disparate proceedings 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. The benefits of a coordinating jurisdiction taking charge of the group insolvency are obvious.

³³ Irit Mevorach, “Cross-Border Insolvency of Enterprise Groups: The Choice of Law Challenge” (2014) 9 Brooklyn Journal of Corporate, Financial & Commercial Law 226 at p 235.

42 I hasten to add that the use of a coordinating jurisdiction or proceeding is in no way intended to infringe on the sovereignty and independence of national legal regimes. Rather, a coordinating jurisdiction merely plays a *procedural* role to coordinate and facilitate the group insolvency or restructuring. Where foreign laws are engaged, secondary proceedings may be commenced in the appropriate jurisdiction that will work with the coordinating proceedings towards achieving a common objective. Alternatively, “synthetic secondary proceedings” may also be opened in the coordinating jurisdiction, which would allow the coordinating court to determine the issues under foreign law, without parties having to go to the expense of opening proceedings in another forum.³⁴ Coming full circle, this harks back to the need to work towards greater convergence through the harmonisation of legal principles, judicial philosophies and cooperation and communication between courts. The success of the use of a coordinating jurisdiction to facilitate the orderly restructuring or liquidation of a multinational corporate group depends, to a large extent, on collaboration and comity between jurisdictions. Where there is harmonisation of legal principles, judicial philosophies and increased communication and communication between courts, all these may be more readily accomplished.

43 The search then begins for the appropriate jurisdiction where the coordinating proceedings ought to be located. First and most importantly, in order to avoid the scourge of “forum shopping”, coordinating jurisdictions must have a sufficient nexus to the multinational corporate enterprise in that at least one entity in the multinational corporate enterprise must have its COMI located in the coordinating jurisdiction. This

³⁴ See generally, John Pottow, “A New Role for Secondary Proceedings in International Bankruptcies” (2011) 46 TILJ 579.

is also the direction that UNCITRAL Working Group V is moving towards.³⁵ Secondly, an appropriate coordinating jurisdiction should have in place a flourishing ecosystem for restructuring. Underperforming or nonperforming assets need to be sold while core or potentially profitable aspects of the business need to be re-energised. This would require the input of new funds into the business, which may take the form of a recapitalisation of equity or an increase in the company's liabilities. Other more complex options in a restructuring include reverse takeovers, the sale of instruments involving a hybrid of debt and equity, or the change of ownership or ownership structure of the company. Hence, an ecosystem for restructuring must possess a thriving capital market with the presence of financial institutions and distressed debt lenders willing to undertake rescue financing. Alongside the requirement for financing, restructuring also tends to take place against a backdrop of a robust legal system that provides the requisite legal expertise and support and which has a court system that ensures the efficiency and enforceability of the process.

44 Often, these two factors work in tandem. Indeed, because jurisdictions that have a flourishing restructuring practice are key global financial centres, it is almost ineluctable that a multinational corporate enterprise would have a significant nerve centre in these jurisdictions, being the location where capital or financing had been raised, where a parent or holding company was incorporated or where securities were listed. It should therefore come as no surprise that the typical jurisdictions in which restructuring of distressed businesses take place are global financial and legal hubs such as New York, London, Hong Kong, Singapore and Tokyo. These jurisdictions are ideally placed as they are the main global arenas where businesses raise capital,

³⁵ United Nations Commission on International Trade Law, "Insolvency Law – Facilitating the cross-border insolvency of multinational enterprise groups: compilation of principles and draft articles" (Note by the Secretariat, New York, 2-6 May 2016), p 9.

list securities, or source for funds in order to conduct operations in other jurisdictions. It is therefore often the case that an entity in a multinational corporate group would already have their COMI in such a jurisdiction. In the unfortunate event of corporate group failure, these jurisdictions are thus well-placed to function as global restructuring hubs.

45 In this regard, Singapore has positioned herself to become a centre for cross-border debt restructuring in the Asia-Pacific region and beyond. Following a review of the local insolvency regime, the ILRC recommended that cram-down provisions be enacted which would allow courts to sanction reorganisation arrangements where the requisite majorities have been met, even in circumstances where there is a dissenting class of creditors.³⁶ The ILRC also recommended the enactment of provisions to allow super-priority for rescue financing.³⁷ These developments aid in the financial rehabilitation of enterprises and the availability of such tools makes Singapore an attractive place for distressed businesses in need of restructuring.

46 In April this year, the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (“Committee”) presented its recommendations for initiatives or reforms that could improve Singapore’s effectiveness as a centre for debt restructuring,³⁸ which have been accepted by the Government.³⁹ Some of the recommendations the Committee made include: (a) the enhancement of moratoriums for restructuring by giving automatic moratoriums which may have *in personam*

³⁶ Report of Insolvency Law Review Committee, recommendation 7.11.

³⁷ *Ibid*, recommendation 6.15 and 7.10.

³⁸ Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (20 April 2016).

³⁹ MinLaw Accepts Committee Recommendations to Strengthen Singapore’s Debt Restructuring Framework (20 July 2016), <<https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/minlaw-accepts-committee-recommendations-to-strengthen-singapore.html>>.

effect worldwide and which may be extended to a debtor's related entities which are part of the group restructuring plan; (b) allowing for the fast tracking of pre-packaged restructuring plans; and (c) the introduction of provisions to allow for super-priority liens for rescue financiers. Another important recommendation is the setting up of a dedicated bench of Specialist Judges to hear restructuring cases. I am pleased to say this has already happened. This dedicated bench of Specialist Judges may include both local Judges as well as leading international restructuring experts appointed as International Judges of the Singapore International Commercial Court ("SICC"). The option to have an International Judge in the SICC hear a restructuring matter would be particularly attractive to parties whose debts are governed by foreign law.

47 The legislative arsenal of tools have been extensively revamped and enhanced and the ecosystem is in the process of being made even more conducive for cross-border debt restructuring than before. Coupled with the strong support of the Supreme Court bench as well as the implementation of the JIN initiative, Singapore has positioned herself and is well-placed to play the role of a restructuring hub in the region and beyond.

V. Concluding remarks

48 Let me conclude. I have spoken on a number of varied themes today, but within all of these themes is a common thread. The insolvency framework of practically all jurisdictions includes some form of restructuring legislation that assumes a court-based restructuring. However, in many jurisdictions, such legislation was drafted from a *domestic* perspective which is generally inept to deal with the challenges raised by the increasing incidence of cross-border insolvencies. This has led some creditors to

turn to out-of-court solutions. In line with this, regional organisations have laid down principles guiding the implementation of informal workouts. An example is the Asian Bankers' Association Informal Workout Guidelines⁴⁰ approved by the Asian Bankers' Association in 2005 which lays down principles for financial institutions to facilitate out-of-court solutions in dealing with distressed businesses with multiple financial institutions as creditors.

49 In my view, the widespread adoption of out-of-court solutions is an indictment of the efficacy of the current state of court-based restructuring processes. As I see it, there are significant disadvantages if out-of-court restructuring becomes the default mechanism for reorganisation in the market. This is because without the court's coercive powers to grant a stay or moratorium on legal proceedings, or the court's ability to bind dissenting classes of creditors, there is always a real risk that an out-of-court reorganisation may be derailed, or held to ransom, by a significant recalcitrant creditor. The court process is also a transparent and objective one, and provides a fairer and more equitable playing field for all creditors. There are therefore advantages to a court-based process. However, unless and until greater convergence is achieved amongst jurisdictions, there is real risk that out-of-court solutions may be preferred over a court-based one.

50 This is, to me, an undesirable phenomenon. I trust that all of us here believe that the court, as the bastion of justice, ought not to be relegated to the role of last resort. Therefore, lawmakers, policymakers and courts must work together to facilitate an effective court-based restructuring and insolvency regime for cross-border

⁴⁰ Asian Bankers' Association, *Asian Bankers' Association Informal Workout Guidelines – Promoting Corporate Restructuring in Asia* (2005), <<http://www.aba.org.tw/images/upload/files/06-AppendixB-InfWkOutGuidelines.pdf>>.

insolvencies. In order to achieve this, greater convergence in substantive laws and judicial philosophies must be pursued, national courts must speak and work with each other, and ultimately the international community must pursue a globally coherent court-based solution for the restructuring of multinational corporate groups.

51 These are exciting and yet challenging times for all players in the insolvency and restructuring industry. The current and anticipated growth in cross-border trade and investment over the next few decades will present many areas of opportunities. As the market and the commercial environment do not stand still, so we as courts and regulators alike cannot stand still as we navigate within this new paradigm. Insolvency law, after all, operates within the wider commercial context, and it must respond to the needs of its users in order to avoid being rendered otiose. In this new paradigm, the seeds of cross-border insolvency and restructuring have been sowed all over the globe. It is only a matter of time before these seeds germinate and take root, if they have not already. It is therefore critical that all stakeholders in this industry act fast and decisively, and not be a prisoner to history and tradition.

52 Thank you very much, and I wish this conference, and all its participants, every success.