

A Restructuring Odyssey – From Judging Lehman to Judicial Management Hearings in Singapore



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I am looking forward to this summer's anticipated blockbuster "The Odyssey" which ambitiously depicts the classic story of Odysseus confronting and overcoming twists of fate to realise his destiny.

Such mythic adventures function as metaphors for the mysteries of life and the twists of fate and uncertain career trajectories affecting all of us. These universal mysteries have been top of mind for me lately as I have thought back on my own career path.

I started out as a business bankruptcy lawyer, was appointed a bankruptcy judge in New York about twenty years ago, retired from the bench to return to a "big law" private practice for a decade and now practice as an independent consultant, arbitrator, and mediator.

But I also have the exceptional opportunity to serve as an International Judge on the Singapore International Commercial Court (SICC) focusing on cross-border insolvency and restructuring. How did this latest career defining pivot come about and how did a native New Yorker end up presiding over transnational commercial disputes in Southeast Asia is a question that frequently intrigues my peers.

Destiny came knocking on my courtroom door at One Bowling Green in Manhattan when I was assigned to preside over the Lehman Brothers bankruptcy.

In an instant, a random case assignment changed everything. I found myself at the center of the global financial crisis responsible for addressing the unprecedented challenges of the biggest bankruptcy of all time. I was thrust by circumstance into the role of having to approve transactions impacting creditors and the global economy under extreme time pressure and managing a massive number of complex competing claims presented by creditors from all over the world. These claims included the multi-billion-dollar intercompany claims of affiliated Lehman businesses.

The impact on my career was immediate. The vast international nature of the case was a unique challenge that accelerated changes in

the field of international insolvency law.

The competing claims of Lehman's foreign affiliates required a novel case management strategy.

These massive intercompany claims grew out of arcane financial structures and derivative transactions and needed to be sorted responsibly and efficiently.

Trustees and estate representatives from all over the world were in their separate silos and limited by the lack of procedures and precedent to guide them. A judicially sanctioned process for engagement was needed.

Because the Model Law on Cross Border Insolvency applies only to individual corporate entities and not multiple affiliated members of an enterprise group such as Lehman, I proposed a bespoke approach to foster cross border cooperation among separate estates that might generate constructive dialogue and substantive negotiations.

A court approved protocol became the procedural vehicle that provided justification and encouragement for adverse estate fiduciaries to negotiate with one another to resolve disputed claim amounts, establish entitlements based on verified accounting data and develop a joint plan of reorganisation.

The process took time, but it worked. The pragmatic and successful implementation of the Lehman cross-border protocol demonstrated that even the most complex disputes arising within an interconnected global enterprise group can be resolved when parties are given access to relevant financial information and can rely on a well-developed restructuring regime such as Chapter 11.

It helped that the parties were sophisticated and motivated to overcome obstacles, manage transaction costs and guard against unwanted value destruction. Despite a few reluctant participants, the protocol's underlying premise of information sharing and cooperation was sound and encouraged constructive dialogue without being overly prescriptive.

The experiment, I am delighted to tell you, was a great success. An overwhelmingly

consensual joint plan was confirmed after little more than three years of bankruptcy; that plan has exceeded expectations and distributed considerably greater value than initially projected or that was even thought possible. In retrospect, the Lehman plan serves as a remarkable example of enlightened compromise based on sensitivity to commercial reality and the desire to maximize distributable value as markets stabilized and recovered.

The negotiated framework reallocated value from subsidiaries to the holding company as the means to settle contested positions on whether it was proper or not for the Lehman estates to be treated as a consolidated entity. The settlement avoided costs and accelerated the timing of distributions to creditors.

This pragmatic resolution was seen as a much better alternative than waiting for the uncertain conclusion of a lengthy litigation with attendant appellate risks and delays.

The success of the plan negotiations in Lehman fifteen years ago was a tremendous achievement for stakeholders that validated the effectiveness of the Chapter 11 process in relation to any kind of business, no matter how large it might be.

It is quite clear to me that my Lehman past became the prologue that augured my present judicial work.

After the Lehman consensual plan, I became actively engaged in alternative dispute resolution and international organisations like INSOL and International Insolvency Institute devoted to cooperation in cross-border insolvency law, and a variety of international projects and guest lectures.

My travels included various speaking engagements and collaborative trips to Singapore that happened to take place during the same time period that Singapore was actively considering updating its insolvency and restructuring laws.

I learned about contemplated revisions and reforms that included many of the newest restructuring tools (e.g. prepack schemes) and the adoption of the Model Law on Cross-Border Insolvency as part of a new

continued from page 4

Insolvency, Restructuring and Dissolution Act (IRDA) which became law in 2018.

Singapore's commitment to becoming a respected hub jurisdiction for cross-border restructuring was enormously impressive to me.

Within the past decade, Singapore has become an undisputed global leader in cross border insolvency law and practice and is on the verge of becoming the first jurisdiction in the world to enact two new model laws promulgated by UNCITRAL: one dealing with enterprise group insolvency cases like Lehman and a second that concerns the recognition of insolvency related judgments.

That same open-minded approach to innovation was evident to me when I participated in discussions regarding the Restructuring and Insolvency Arbitration Protocol introduced by the Singapore International Arbitration Centre (SIAC) – a novel framework geared to the resolution of insolvency and restructuring disputes.

While in Singapore for this initiative, I visited the Supreme Court and received an irresistible offer to join my colleague, Justice Christopher Sontchi, as an International Judge on the SICC to concentrate on cross-border restructuring cases.

Being on the SICC has proven to be an immensely rewarding experience. My cases have included a prepack scheme for a company from Vietnam, cross-border cases involving the recognition of Chapter 11 restructuring plans confirmed in the Delaware bankruptcy court and very recently, presiding over a contested application for judicial management.

For those interested in the logistics of being a judge in a court that is twelve time zones away from my home, the SICC has the technology and resources to make remote judging seamless.

Case management conferences and most hearings are routinely conducted virtually via video conference, allowing for administrative efficiency and significant transaction cost savings for international litigants.

We have entered a new age in which globally distributed restructuring solutions are available and well suited to remote utilisation. In the aftermath of Lehman and the Global Financial Crisis, many jurisdictions have enacted the Model Law and have updated their insolvency laws in a manner that shows respect (even admiration) for Chapter 11 reorganisation principles. These newly enacted regimes have been designed to meet the expectations of global investors and to

promote administrative efficiency.

Parties now have the option to select from an array of restructuring alternatives that have all become law since Lehman. These include (i) restructuring plans in the UK with cross-class cramdown, (ii) WHOA plans in the Netherlands with independent restructuring experts and (iii) restructurings, prepacks and judicial management cases in Singapore under the revised IRDA. The common theme is innovation and a commercially aware process for meeting the needs and expectations of companies in distress and their stakeholders.

We have, it seems, entered a period of unprecedented restructuring optionality on a global scale. Senior management and corporate boards are no longer restrained by the limitations of their home jurisdictions (including courts that may be slow in granting relief). With the guidance of astute advisors and the consent of relevant stakeholders, it has become increasingly commonplace to consider the merits of restructuring options that may beckon beyond domestic borders.

Singapore has positioned itself as an attractive jurisdiction of choice for this new era of cross-border restructurings. I am pleased to be part of it, to have the opportunity to continue my work in this dynamic field and to be associated with a distinguished judiciary that soon will be celebrating its 200th anniversary of unbroken commitment to the rule of law. It seems that my odyssey has brought me to a very appropriate place.

Singapore to be first in world signing UNCITRAL laws on judgments and groups

The Singapore Government is preparing to be the first jurisdiction in the world to sign up to the UNCITRAL Model Law on Enterprise Group Insolvency and the Model Law of Recognition and Enforcement of Insolvency-Related Judgments (MLIJ), in a clear bid for leadership as a global restructuring hub.

The City State was an early adopter of the original UNCITRAL Model Law on Cross Border Insolvency 1997, and the current chair of UNCITRAL's influential Working Group V on insolvency law is Harold Foo, who also serves as deputy director and counsel for Parliamentary Affairs at the Ministry of Law, Singapore.

Singapore's Committee to Enhance Singapore's Corporate Restructuring and Insolvency Regime recommended adoption of the two new laws earlier this year, saying that, if enacted, Singapore will be one of the first states to do so, demonstrating its commitment to

mutual cooperation and innovation in international insolvency law.

While 62 states in 65 jurisdictions have used the Model Law on Cross-Border Insolvency (1997) and accompanying Guide to Enactment (and Interpretation) in reforming their cross-border insolvency law and systems, none have signed up to the second and third Model Laws on groups and judgments.

Meanwhile India recently became the latest country to sign up to the law on cross border insolvency, although it has not yet enforced it. India follows Malaysia, which has also adopted the insolvency Model Law but has yet to put it into force. The extent to which each country's resulting framework incorporates the provisions of the Model Law varies, as that framework also reflects legal traditions, domestic policy and other objectives.

- The Model Law on Enterprise Group Insolvency outlines provisions for coordinating and cooperating in cross-border insolvency cases involving enterprise groups. It enables the development of a group insolvency solution through a single insolvency proceeding, typically at the location of a group member's centre of main interests (COMI), with voluntary participation from multiple group members.
- The MLIJ provides a streamlined framework for the recognition and enforcement of insolvency-related judgments, facilitating the recovery of value for financially distressed businesses with assets across multiple states.