Strengthening Insolvency Systems in Asia and the Pacific

15–16 December 2022

POST-CONFERENCE BOOKLET

ADB

ASIAN DEVELOPMENT BANK
LAW AND POLICY REFORM PROGRAM

THE UNIVERSITY OF CHICAGO
CENTER ON LAW AND FINANCE
The Law School

SMU
SINGAPORE MANAGEMENT UNIVERSITY
Yong Pung How School of Law

Singapore Global Restructuring Initiative

INSOL INTERNATIONAL
ASIA HUB

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Centre for Corporate and Commercial Law

Strengthening Insolvency Systems in Asia and the Pacific

15–16 December 2022

Post-Conference Booklet

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All photos were taken by **Paola Aseron-Dacanay** for ADB.

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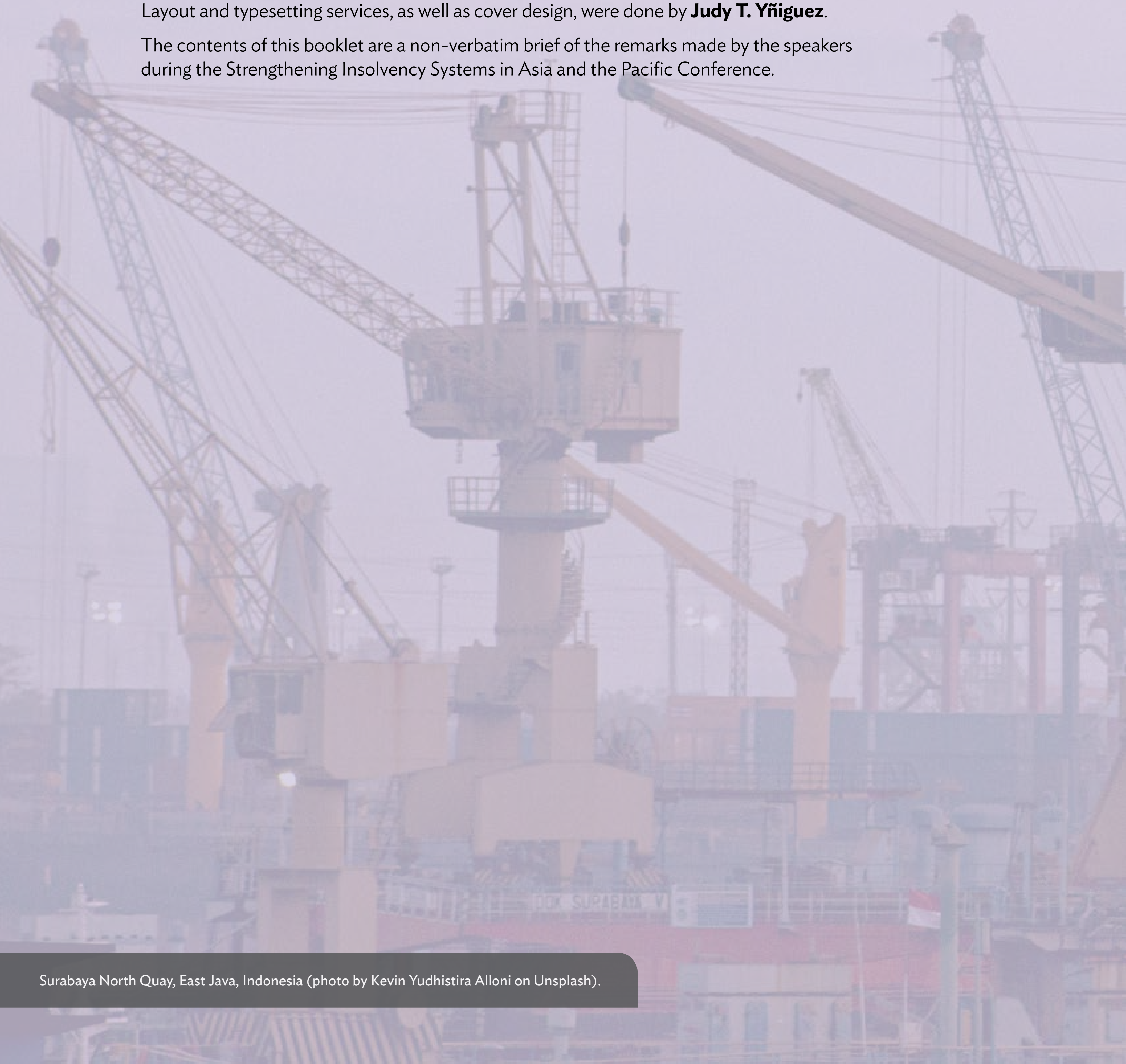
The contents of this booklet are a non-verbatim brief of the remarks made by the speakers during the Strengthening Insolvency Systems in Asia and the Pacific Conference.



Surabaya North Quay, East Java, Indonesia (photo by Kevin Yudhistira Alloni on Unsplash).

CONTENTS

> **Corporate insolvency law** can serve as a powerful tool to promote economic growth. *Ex ante*, a well-functioning insolvency framework can facilitate entrepreneurship, innovation and access to finance. *Ex post*, corporate insolvency law can perform several functions, including the reorganization of viable companies in financial distress, the liquidation of non-viable businesses in a fair and efficient manner, and the maximization of the returns to creditors. Therefore, having an efficient insolvency framework is essential for any economy and even more for emerging markets due to their greater financial needs.
>
> — Aurelio Gurrea-Martínez. 2020. *Insolvency Law in Emerging Markets*, Ibero-American Institute for Law and Finance, Working Paper 3/2020.

Factory ships found on the seas of the Marshall Islands. The Marshall Islands sells fishing rights to other nations as a source of income (photo by Eric Sales/ADB).

The AT&T Plaza in Chicago, Illinois, United States of America (photo by Sawyer Bengtson on Unsplash).

CONFERENCE **AGENDA** and BACKGROUND **MATERIALS**

01

OPENING CEREMONY

15 December 2022
Conference time by location

08:30–19:00	Manila, Philippines Time (GMT +8)
01:30–12:00	London, United Kingdom Time (GMT +0)
19:30–06:00	Chicago, Illinois, United States of America Time (GMT -5)
06:00–16:30	New Delhi, India Time (GMT +5:30)
10:30–21:00	Sydney, Australia Time (GMT +10)

REGISTRATION AND COFFEE

08:30–09:00 Manila
10:30–11:00 Sydney
06:00–06:30 New Delhi
19:30–20:00 Chicago
01:30–02:00 London

WELCOME BY ORGANIZERS

09:00–09:10 Manila
11:00–11:10 Sydney
06:30–06:40 New Delhi
20:00–20:10 Chicago
02:00–02:10 London

Nicholas Moller, *Principal Counsel, Asian Development Bank (ADB)*
Anthony Casey, *Deputy Dean and Donald Ephraim Professor of Law and Economics, The University of Chicago Law School*
Felix Steffek, *Associate Professor, Faculty of Law of the University of Cambridge*
Aurelio Gurrea-Martinez, *Associate Professor of Law and Head, Singapore Global Restructuring Initiative, Singapore Management University*
Scott Atkins, *President, INSOL International and Global Co-Head of Restructuring, Norton Rose Fulbright*

OPENING ADDRESS

09:10–09:15 Manila
11:10–11:15 Sydney
06:40–06:45 New Delhi
20:10–20:15 Chicago
02:10–02:15 London

Thomas M. Clark, *General Counsel, ADB*

PLENARY SESSION 1

PANEL 1

STRATEGIES TO EFFECTIVELY PROMOTE WORKOUTS

(50 mins.)	09:15–10:05 Manila 20:15–21:05 Chicago	11:15–12:05 Sydney 02:15–03:05 London	06:45–07:35 New Delhi

CHAIR

Nicholas Moller, *Principal Counsel, ADB*

PANELISTS

Scott Atkins, *President, INSOL International and Global Co-Head of Restructuring, Norton Rose Fulbright*
Adam Badawi, *Professor of Law, UC Berkeley*
Antonia Menezes, *Senior Financial Sector Specialist, World Bank*
Stephanie Yeo, *Partner, WongPartnership*

PANEL 2

HYBRID PROCEDURES AND FORMAL INSOLVENCY PROCEEDINGS

(55 mins.)	10:05–11:00 Manila 21:05–22:00 Chicago	12:05–13:00 Sydney 03:05–04:00 London	07:35–08:30 New Delhi

CHAIR

Aurelio Gurrea-Martínez, *Associate Professor of Law and Head, Singapore Global Restructuring Initiative, Singapore Management University*

PANELISTS

Scott Atkins, *President, INSOL International and Global Co-Head of Restructuring, Norton Rose Fulbright*
Anthony Casey, *Deputy Dean and Donald Ephraim Professor of Law and Economics, The University of Chicago Law School*
Edmund Ma, *Senior Associate, Baker McKenzie*
Yu-Wen TAN, *Director, Corporate Insolvency Division, Insolvency and Public Trustee's Office – Singapore*
Mahesh Uttamchandani, *Manager for Digital Development in East Asia and the Pacific, World Bank*

COFFEE BREAK (15 mins.)

11:00–11:15 Manila 22:00–22:15 Chicago	13:00–13:15 Sydney 04:00–04:15 London	08:30–08:45 New Delhi

PANEL 3

GOVERNANCE OF INSOLVENCY AND RESTRUCTURING PROCEDURES: DEBTOR IN POSSESSION, INSOLVENCY PRACTITIONER, OR HYBRID MODEL?

(60 mins.)	11:15–12:15 Manila 22:15–23:15 Chicago	13:15–14:15 Sydney 04:15–05:15 London	08:45–09:45 New Delhi

CHAIR

Adriana Robertson, *Donald N. Pritzker Professor of Business Law, The University of Chicago Law School*

PANELISTS

Jared Ellias, *Professor of Law, Harvard Law School*
Kotaro Fuji, *Counsel, Nishimura & Asahi*
Aurelio Gurrea-Martínez, *Associate Professor of Law and Head, Singapore Global Restructuring Initiative, Singapore Management University*
Wai Yee WAN, *Associate Dean (Research and Internationalisation) and Professor, School of Law, City University of Hong Kong*
Paul Zumbro, *Partner, Cravath, Swaine & Moore LLP*

PANEL 4

REGULATORY FRAMEWORK OF INSOLVENCY PRACTITIONERS

(40 mins.)	12:15–12:55 Manila 23:15–23:55 Chicago	14:15–14:55 Sydney 05:15–05:55 London	09:45–10:25 New Delhi

CHAIR

John Martin, *Partner, Norton Rose Fulbright Australia and President, International Insolvency Institute*

PANELISTS

Ravi Mital, *Chairman, Insolvency and Bankruptcy Board of India (IBBI)*
Catherine Robinson, *Senior Lecturer, Faculty of Law, University of Technology Sydney, Australia*

BREAK (1 hour and 5 mins.) Lunch Break for Manila participants

12:55–14:00 Manila 23:55–01:00 Chicago	14:55–16:00 Sydney 05:55–07:00 London	10:25–11:30 New Delhi

PANEL 5

VALUATION OF ASSETS AND TREATMENT OF CLAIMS AND CONTRACTS IN INSOLVENCY PROCEEDINGS

(1 hr. and 30 mins.)	14:00–15:30 Manila 01:00–02:30 Chicago	16:00–17:30 Sydney 07:00–08:30 London	11:30–13:00 New Delhi

CHAIR

Anthony Casey, *Deputy Dean and Donald Ephraim Professor of Law and Economics, The University of Chicago Law School*

PANELISTS

David Chew, *Partner, DHC Capital*
Debanshu Mukherjee, *Co-Founder, Vidhi Centre for Legal Policy, India*
Elizabeth McColm, *Partner, Paul, Weiss, Rifkind, Wharton & Garrison LLP*
Deepak Rao, *General Manager, Insolvency and Bankruptcy Board of India (IBBI)*
Wataru Tanaka, *Professor, Institute of Social Science, The University of Tokyo*

COFFEE BREAK (20 mins.)

15:30–15:50 Manila
02:30–02:50 Chicago
17:30–17:50 Sydney
08:30–08:50 London
13:00–13:20 New Delhi

PANEL 6

DIRECTORS' DUTIES AND LIABILITY IN THE ZONE OF INSOLVENCY

(60 mins.)
15:50–16:50 Manila
02:50–03:50 Chicago
17:50–18:50 Sydney
08:50–09:50 London
13:20–14:20 New Delhi

CHAIR

Felix Steffek, *Associate Professor, Faculty of Law of the University of Cambridge*

PANELISTS

Jared Ellias, *Professor of Law, Harvard Law School*
Aurelio Gurrea-Martínez, *Associate Professor of Law and Head, Singapore Global Restructuring Initiative, Singapore Management University*
Jason Harris, *Professor of Corporate Law, University of Sydney Law School*
Neeti Shikha, *Lecturer, University of Bradford School of Law; Member, Academic Steering Committee, INSOL International; and Chair, Insolvency Scholar Forum, Insolvency Law Academy*
Paul Zumbro, *Partner, Cravath, Swaine & Moore LLP*

PANEL 7

AVOIDANCE ACTIONS

(50 mins.)
16:50–17:40 Manila
03:50–04:40 Chicago
18:50–19:40 Sydney
09:50–10:40 London
14:20–15:10 New Delhi

CHAIR

Jared Ellias, *Professor of Law, Harvard Law School*

PANELISTS

Sumant Batra, *President, Insolvency Law Academy*
Charles D. Booth, *Michael J. Marks Distinguished Professor in Business Law and Director, Institute of Asian-Pacific Business Law (IAPBL), William S. Richardson School of Law, University of Hawai'i at Manoa*
Brook Gotberg, *Francis R. Kirkham Professor of Law, Brigham Young University*
Joshua Macey, *Assistant Professor of Law, The University of Chicago Law School*

RECEPTION

18:00–19:00 Manila
05:00–06:00 Chicago
20:00–21:00 Sydney
11:00–12:00 London
15:30–16:30 New Delhi

DINNER

19:00 Manila
06:00 Chicago
21:00 Sydney
12:00 London
16:30 New Delhi

PLENARY SESSION 2

16 December 2022
Conference time by location

08:00–12:30 Manila, Philippines Time (GMT +8)
01:00–05:30 London, United Kingdom Time (GMT +0)
19:00–23:30 Chicago, United States of America Time (GMT -5)
05:30–10:00 New Delhi, India Time (GMT +5:30)
10:00–14:30 Sydney, Australia Time (GMT +10)

COFFEE

08:00–08:30 Manila
19:00–19:30 Chicago
10:00–10:30 Sydney
01:00–01:30 London
05:30–06:00 New Delhi

PANEL 8

INSOLVENCY FRAMEWORKS FOR INDIVIDUALS AND MICRO AND SMALL ENTERPRISES

(50 mins.)
08:30–09:20 Manila
19:30–20:20 Chicago
10:30–11:20 Sydney
01:30–02:20 London
06:00–06:50 New Delhi

CHAIR

Nicholas Moller, *Principal Counsel, ADB*

PANELISTS

Charles D. Booth, *Michael J. Marks Distinguished Professor in Business Law and Director, Institute of Asian-Pacific Business Law (IAPBL), William S. Richardson School of Law, University of Hawai'i at Manoa*
Jason Harris, *Professor of Corporate Law, University of Sydney Law School*
John Martin, *Partner, Norton Rose Fulbright Australia and President, International Insolvency Institute*
Sergio Muro, *Financial Sector Specialist, World Bank*

PANEL 9

RESCUE FINANCING AND ADMINISTRATIVE EXPENSES

(60 mins.)
09:20–10:20 Manila
20:20–21:20 Chicago
11:20–12:20 Sydney
02:20–03:20 London
06:50–07:50 New Delhi

CHAIR

Richard Squire, *Alpin J. Cameron Chair in Law, Fordham University School of Law*

PANELISTS

Jared Ellias, *Professor of Law, Harvard Law School*
Aurelio Gurrea-Martínez, *Associate Professor of Law and Head, Singapore Global Restructuring Initiative, Singapore Management University*
Justice Christopher Sontchi, *International Judge, Singapore International Commercial Court*
Paul Zumbro, *Partner, Cravath, Swaine & Moore LLP*

COFFEE BREAK (15 mins.)

10:20–10:35 Manila	12:20–12:35 Sydney	07:50–08:05 New Delhi
21:20–21:35 Chicago	03:20–03:35 London	

PANEL 10

CORPORATE GROUPS

(50 mins.)	10:35–11:25 Manila	12:35–13:25 Sydney	08:05–08:55 New Delhi
	21:35–22:25 Chicago	03:35–04:25 London	

CHAIR

Felix Steffek, *Associate Professor, Faculty of Law of the University of Cambridge*

PANELISTS

Edith Hotchkiss, *Professor of Finance, Carroll School of Management, Boston College*
Raelene Pereira, *Partner, Rajah & Tann Singapore LLP*
Richard Squire, *Alpin J. Cameron Chair in Law, Fordham University School of Law*
Urmika Tripathi, *Legal Analyst for Asia, REDD Intelligence*
Timothy Graulich, *Partner and Head of Cross-Border Restructuring, Davis Polk*

PANEL 11

CROSS-BORDER INSOLVENCY

(45 mins.)	11:25–12:30 Manila	13:25–14:30 Sydney	08:55–10:00 New Delhi
	22:25–23:30 Chicago	04:25–05:30 London	

CHAIR

Justice Christopher Sontchi, *International Judge, Singapore International Commercial Court*

PANELISTS

Joshua Macey, *Assistant Professor of Law, The University of Chicago Law School*
Dan T. Moss, *Partner, Jones Day*
Felix Steffek, *Associate Professor, Faculty of Law of the University of Cambridge*
Deeptanshu Singh, *Manager, Insolvency and Bankruptcy Board of India (IBBI)*

ANNEX: Background Materials

PANEL 1. STRATEGIES TO EFFECTIVELY PROMOTE WORKOUTS

An out-of-court restructuring ("workout") provides several advantages, including flexibility, confidentiality, and saving the costs and stigma associated with insolvency proceedings. Therefore, promoting the use of workouts is generally considered a desirable practice, especially in countries without efficient insolvency frameworks. However, for a variety of reasons, including opportunistic behavior of debtors and creditors, regulatory barriers, and lack of a rescue culture, completing a workout is often challenging even for viable companies only facing financial trouble. For that reason, regulators or private actors may be required to adopt certain practices to effectively promote workouts. To that end, jurisdictions around the world have adopted several approaches, including: (i) the publication of good practices for workouts by association of banks or insolvency practitioners; (ii) the enactment of good practices and promotion of inter-creditor agreements facilitated by central banks; (iii) regulation of workouts in the insolvency legislation, even providing workouts with various tools existing in formal reorganization procedures. Likewise, as a means to further incentivize workouts, countries may adopt various changes in the regulatory framework for businesses, including changes in the tax legislation, amendments to the rules governing directors' duties and liability in the zone of insolvency, and changes in the regulatory framework for financial institutions. This panel will discuss the most effective strategies to promote workouts, as well as the country-specific and firm-specific factors that may affect the design and effectiveness of these strategies.

Relevant readings:

- World Bank. 2022. *A Toolkit for Corporate Workouts*. Washington, D.C.
- INSOL International. 2017. *Global Principles for Multi-Creditor Workouts*. London.
- Financial Stability Board. 2022. *Thematic Review on Out-of-Court Corporate Debt Workouts*. Basel, Switzerland.
- Jose M. Garrido. 2012. *Out-of-Court Debt Restructuring*. Washington, D.C.: World Bank Group.
- Scott Atkins and Kai Luck. 2020. *The Value of Informal Workouts and the Framework to Guide their Development in the Asia-Pacific*. Singapore: Singapore Global Restructuring Initiative Blog.

PANEL 2. HYBRID PROCEDURES AND FORMAL INSOLVENCY PROCEEDINGS

Countries around the world design insolvency proceedings very differently. For example, while certain jurisdictions have a single-entry insolvency process that may end up with a reorganization plan, a going concern sale or a piecemeal liquidation, other jurisdictions provide various insolvency proceedings – at least one of them primarily focused on reorganization and at least another one primarily focused on liquidation. Additionally, many jurisdictions provide hybrid procedures, such as a scheme of arrangement, preventive restructuring frameworks and pre-packs, that facilitate a debt restructuring – generally when a company is not formally insolvent yet. This panel will discuss the most desirable way to design an insolvency and restructuring framework, with particular emphasis on the type of procedures that should be ideally adopted taking into account the market and institutional environment existing in a country.

Relevant readings:

- World Bank. 2021. *Principles for Effective Insolvency and Creditor/Debtor Regimes*. Washington, D.C.
- World Bank. 2022. *A Toolkit for Corporate Workouts*. Washington, D.C.

- Jose M. Garrido. 2012. *Out-of-Court Debt Restructuring*. Washington, D.C.: World Bank Group.
- United Nations Commission on International Trade Law (UNCITRAL). 2004. *Legislative Guide on Insolvency Law*. New York.

PANEL 3. GOVERNANCE OF INSOLVENCY AND RESTRUCTURING PROCEEDINGS: DEBTOR IN POSSESSION (DIP), INSOLVENCY PRACTITIONERS (IPs) OR HYBRID MODEL?

The governance of insolvency and restructuring proceedings significantly differs across jurisdictions. Broadly understood, there are three primary models for the governance of insolvency and restructuring procedures: (i) the adoption of a debtor in possession model where the company's management would continue to run the firm without the appointment of an insolvency practitioner ("DIP model"); (ii) the appointment of a trustee/administrator/insolvency practitioner replacing the debtor's management team ("IP model"); and (iii) the appointment of a monitor overseeing the procedure and the debtor's management team ("hybrid model"). This panel will discuss the legal, market, and institutional factors affecting the choice of the governance model of insolvency and restructuring proceedings.

Relevant readings:

- UNCITRAL. 2004. *Legislative Guide on Insolvency Law*. New York.
- Kenneth Ayotte, Edith S. Hotchkiss, and Karin S. Thorburn. 2014. *Governance in Financial Distress and Bankruptcy*, in Mike Wright, Donald Siegel, Kevin Keasey and Igor Filatotchev (eds.). United Kingdom: The Oxford Handbook of Corporate Governance, Oxford University Press.
- Aurelio Gurrea-Martinez. 2020. Insolvency Law in Emerging Markets. Ibero-American Institute for Law and Finance, Working Paper 3/2020.
- World Bank. 2021. *Principles for Effective Insolvency and Creditor/Debtor Regimes*. Washington, D.C.
- Jared A. Ellias, Ehud Kamar, and Kobi Kastiel. 2022. *The Rise of Bankruptcy Directors*. *Southern California Law Review*. 95 (5).

PANEL 4. REGULATORY FRAMEWORK OF INSOLVENCY PRACTITIONERS

This panel will discuss the optimal way to design a regulatory framework for insolvency practitioners. To that end, it will discuss the qualifications of insolvency practitioners and whether countries should adopt a licensing regime for insolvency practitioners and, if so, how. Moreover, it will discuss whether countries should adopt a regulatory agency to oversee insolvency practitioners. Finally, the panel will discuss the duties, liability, and remuneration of insolvency practitioners.

Relevant readings:

- UNCITRAL. 2004. *Legislative Guide on Insolvency Law*. New York.
- International Association of Insolvency Regulators. 2018. *The Regulatory Regime for Insolvency Practitioners*. United Kingdom.
- World Bank. 2021. *Principles for Effective Insolvency and Creditor/Debtor Regimes*. Washington, D.C.

PANEL 5. VALUATION OF ASSETS AND TREATMENT OF CLAIMS AND CONTRACTS IN INSOLVENCY PROCEEDINGS

An insolvency proceeding should maximize the returns to creditors by promoting the most efficient allocation of the debtor's assets. Therefore, valuation will play an essential role when determining the fate of a financially distressed firm. Additionally, creditors should be paid according to a set of contractual and statutory priorities. To that end, while some jurisdictions only respect (if so) the preferential treatment of secured creditors and most unsecured creditors are paid *pari passu*, other jurisdictions provide a preferential treatment to certain creditors such as tax authorities, employees, and tort claimants; and some legislations subordinate certain claims such as shareholder loans. This panel will discuss the most desirable way to determine the valuation and treatment of assets and claims in insolvency proceedings. It will also discuss the treatment of contracts in insolvency and restructuring proceedings, with particular emphasis on the contracts in which none of the parties have materially performed their contractual obligations ("executory contracts") and contractual provisions allowing a party to terminate the contract if the counterparty becomes insolvent ("*ipso facto* clauses").

Relevant readings:

- UNCITRAL. 2004. Legislative Guide on Insolvency Law. New York.
- Lucian A. Bebchuk and Jesse M. Fried. 1997. *The Uneasy Case for the Priority of Secured Claims in Bankruptcy: Further Thoughts and a Reply to Critics*. *Cornell Law Review*. 82 (1279).
- Martin Gelter. 2006. *The subordination of shareholder loans in bankruptcy*. *International Review of Law and Economics*. 26 (478).
- Christopher F. Symes. 2005. *Reminiscing The Taxation Priorities In Insolvency*. *Journal of the Australasian Tax Teachers Association*. 1 (435).
- Christopher S. Sontchi. 2012. *Valuation Methodologies: A Judge's Views*. *ABI Law Review*. 20 (1).
- Michael Crystal and Rizwaan Jameel Mokal. 2006. *The Valuation of Distressed Companies - a Conceptual Framework*.
- Kenneth Ayotte and Edward R. Morrison. 2018. *Valuation Disputes in Corporate Bankruptcy*. *University of Pennsylvania Law Review*. 166 (1819).
- Gerard McCormack, Andrew Keay, Sarah Brown, and Judith Dahlgreen. 2016. *Study on a new approach to business failure and insolvency: Comparative legal analysis of the Member States' relevant provisions and practices*. Brussels: European Commission. pp. 137-183.
- Susana Dávalos. 2017. *The Rejection of Executory Contracts: A Comparative Economic Analysis*. *Mexican Law Review*. 10 (69).
- Jesse M. Fried. 1996. *Executory Contracts and Performance Decisions in Bankruptcy*. *Duke Law Journal*. 46 (517).
- George G. Triantis. 1993. *The Effects of Insolvency and Bankruptcy on Contract Performance and Adjustment*. *The University of Toronto Law Journal*. 43 (679).
- Jay L. Westbrook. 1989. *A Functional Analysis of Executory Contracts*. *Minnesota Law Review*. 74 (227).
- Kwan Kiat Sim Ho, Zi Wei, and Naomi Lim. 2022. *A Comparative Review of Legislative Restrictions on the Enforcement of Ipso Facto Clauses*. INSOL International.

PANEL 6. DIRECTORS' DUTIES AND LIABILITY IN THE ZONE OF INSOLVENCY

When a company becomes factually insolvent but it is not yet subject to a formal insolvency proceeding, the shareholders –or the directors acting on their behalf– may engage in various forms of behavior that can divert or destroy value at the expense of the creditors. For this reason, many jurisdictions around the world impose special directors' duties and liability in the zone of insolvency. The way to regulate directors' duties and responsibilities in the zone of insolvency, however, significantly differs across jurisdictions. Namely, countries around the world have adopted different approaches including: (i) the imposition of a duty to initiate insolvency proceedings; (ii) the imposition of a duty to recapitalize or liquidate companies experiencing significant losses; (iii) the imposition of general duties towards the company's creditors, including a duty to minimize losses for the creditors; (iv) the imposition of a duty to prevent the company from incurring new debts; (v) the imposition of a duty to prevent the company from incurring new debts that cannot be paid in full; and (vi) the imposition of a duty to keep acting in the best interest of the corporation as a whole. This panel will explore the advantages and weaknesses of each regulatory model of directors' duties in the zone of insolvency, as well as a variety of country-specific and firm-specific factors that may affect the desirability of a particular approach. It will also discuss different mechanisms to deal with wrongful behavior in the zone of insolvency, including disqualification and liability of corporate insiders.

Relevant readings:

- INSOL International. 2017. *Directors' in the Twilight Zone V*.
- UNCITRAL. 2020. *Directors' obligations in the period approaching insolvency (including in enterprise groups).*
- Douglas G. Baird. 1991. *The Initiation Problem in Bankruptcy*. *International Review of Law and Economics*. 11 (223).
- Aurelio Gurrea-Martinez. 2021. *Towards an Optimal Model of Directors' Duties in the Zone of Insolvency: An Economic and Comparative Approach*. *Journal of Corporate Law Studies*. 21 (365).
- Jared A. Ellias and Robert J. Stark. 2020. *Delaware Corporate Law and the 'End of History' in Creditor Protection*.
- Jason Harris and Anil Hargovan. 2021. *Potential liability for directors during corporate restructuring: comparative perspectives*, in Paul J. Omar and Jennifer L.L. Gant (eds.), Research Handbook on Corporate Restructuring (Edward Elgar).

PANEL 7. AVOIDANCE ACTIONS

Most insolvency jurisdictions include provisions that facilitate the avoidance of certain transactions entered into by a debtor prior to the commencement of an insolvency proceeding. These transactions seek to prevent or otherwise reverse transactions that can be detrimental for the creditors. Despite the benefits eventually created by these mechanisms, the use –and even existence– of avoidance actions is not costless. On the one hand, the initiation of these actions may generate litigation costs. On the other hand, the existence of avoidance provisions may harm predictability and legal certainty, especially in jurisdictions where it is relatively easy to avoid a transaction, usually because bad faith is not required, the lookback period for the avoidance of transactions is too long, or no financial conditions are required to avoid a transaction. This panel will discuss how countries should design avoidance provisions taking into account the conflicting policy goals often existing in the design of avoidance actions as well as the particular features of a country.

Relevant readings:

- UNCITRAL. 2004. *Legislative Guide on Insolvency Law*. New York.
- Jay Westbrook, Charles D. Booth, Christoph Paulus & Harry Rajak. 2010. A Global View of Business Insolvency Systems (World Bank & Kluwer/Martinius), pp. 105-116.
- Rolef de Weijs. 2011. Towards an Objective European Rule on Transaction Avoidance in Insolvencies. *International Insolvency Review*. 20 (219).
- Brook Gotberg. 2014. Conflicting Preferences: Avoidance Proceedings in Bankruptcy Liquidation and Reorganization. *Iowa Law Review*. 100 (51).
- Gerard McCormack, Andrew Keay, Sarah Brown, and Judith Dahlgreen. 2016. *Study on a new approach to business failure and insolvency: Comparative legal analysis of the Member States' relevant provisions and practices*. Brussels: European Commission. pp. 137-183.
- Aurelio Gurrea-Martinez. 2018. The Avoidance of Pre-bankruptcy Transactions: An Economic and Comparative Approach. *Chicago Kent Law Review*. 93 (711).
- Kristin van Zwieten. 2018. *Related Party Transactions in Insolvency*. European Corporate Governance Institute (ECGI) - Law Working Paper No. 401/2018.
- Oriana Casasola. 2020. *The Harmonisation of Transaction Avoidance: A Compromise Solution*. Norton Journal of Bankruptcy Law.

PANEL 8. INSOLVENCY FRAMEWORKS FOR INDIVIDUALS AND MICRO AND SMALL ENTERPRISES

Micro and small enterprises (MSEs) represent the vast majority of businesses in most countries around the world. Despite the economic relevance of small businesses, most insolvency jurisdictions in Asia – and elsewhere– do not provide suitable insolvency frameworks for MSEs. This panel analyses how countries can adopt more attractive insolvency frameworks for small businesses. To that end, it will take into account the approaches that have been adopted by various jurisdictions, as well as the policy recommendations suggested by organizations such as the Asian Business Law Institute, the International Insolvency Institute, the World Bank, and the United Nations Commission on International Trade Law (UNCITRAL). Moreover, it will discuss how these approaches and policy recommendations should be adjusted to different market and institutional environments. Lastly, this panel will discuss whether and, if so, under which conditions, countries should provide a discharge of debt for consumers and individual entrepreneurs.

Relevant readings:

- UNCITRAL. 2021. *Legislative Recommendations on Insolvency of Micro- and Small Enterprises*.
- World Bank. 2021. *Principles for Effective Insolvency and Creditor/Debtor Regimes*. Washington, D.C.
- Aurelio Gurrea-Martinez. 2022. *Guide on the Treatment of Insolvent Micro and Small Enterprises in Asia*. Singapore: Asian Business Law Institute and International Insolvency Institute.
- Federico J. Díez, Romain Duval, Jiayue Fan, José Garrido, Sebnem Kalemli-Özcan, Chiara Maggi, Soledad Martinez-Peria, and Nicola Pierri. 2021. *Insolvency Prospects Among Small and Medium Enterprises in Advanced Economies: Assessment and Policy Options*, IMF Staff Discussion Notes 2021/002.
- Jason Harris and Christopher Symes. 2021. *The chimera of restructuring reform: An opportunity missed for MSMEs in pt 5.3B, U. of Adelaide Law Research Paper No. 2021-48*.

ANNEX: Background Materials

- Jason J. Kilborn. 2021. *Tightening Up Loose Credit and Loosening Up Tight Bankruptcy in Singapore: An Asian Paradigm For Personal Debt and Insolvency Reform*.
- World Bank. 2014. *Report on the Treatment of the Insolvency of Natural Persons*, Washington, D.C.
- Jose Garrido, Sanaa Nadeem, Nagwa Riad, Chanda DeLong, Nadia Rendak, and Anjum Rosha. 2020. *Tackling Private Over-Indebtedness in Asia: Economic and Legal Aspects*. Washington, D.C.: IMF Working Paper.
- Kenneth Ayotte. 2007. Bankruptcy and Entrepreneurship: The Value of a Fresh Start. *The Journal of Law, Economics, and Organization*. 23 (161).
- John Armour and Douglas Cumming. 2008. Bankruptcy Law and Entrepreneurship. *American Law and Economics Review*. 10 (303).

PANEL 9. RESCUE FINANCING AND ADMINISTRATIVE EXPENSES

When a firm becomes insolvent, it may be unable to obtain new finance. As a result, the lack of finance may lead to the loss of suppliers, investment opportunities, and going concern value. To address this problem, several jurisdictions around the world have adopted a system of rescue or debtor-in-possession ("DIP") or "rescue" financing that seeks to encourage lenders to extend credit to financially distressed firms. This is incentivized by providing DIP lenders with various forms of priority. This panel will discuss the most desirable way to facilitate post-petition financing to viable but insolvent firms. Moreover, it will do so taking into account the particular market and institutional environment existing in a country.

Relevant readings:

- Kenneth Ayotte and David A. Skeel. 2013. Bankruptcy Law as a Liquidity Provider. *The University of Chicago Law Review*. 80 (1557).
- George G. Triantis. 2017. *Debtor-in-Possession Financing in Bankruptcy* in Adler (ed.), Handbook on Corporate Bankruptcy Law, Stanford Public Law Working Paper (Edward Elgar, 2021).
- INSOL International. 2022. *Comparative Review of Approaches to "Rescue" or "Debtor-in-possession" (DIP) Finance in Restructuring and Insolvency Regimes*.
- UNCITRAL. 2004. *Legislative Guide on Insolvency Law*. New York. pp. 113-118.
- Aurelio Gurrea-Martinez. 2022. *The Treatment of Debtor-in-Possession Financing in Reorganization Procedures: An Economic and Comparative Approach*, Singapore Management University School of Law Research Paper No. 3/2022.
- Kenneth Ayotte and Jared A. Ellias. 2022. Bankruptcy Process for Sale. *Yale Journal on Regulation*. 39 (1).

PANEL 10. CORPORATE GROUPS

Many businesses are often organized through corporate group structures. Therefore, an insolvency system should respond to this economic reality. To that end, countries around the world have generally adopted three regulatory approaches to deal with corporate groups in insolvency. First, certain jurisdictions treat individual companies separately. Second, other jurisdictions have taken steps to facilitate the coordination of insolvency proceedings affecting corporate groups ("procedural coordination"). Finally, other jurisdictions allow, even if it is in exceptional cases, the consolidation of assets and liabilities of companies belonging to the same corporate group ("substantive consolidation"). More recently, as a variation of the approach facilitating procedural coordination, some countries have adopted some substantive rules that, without consolidating assets and liabilities, involve the use of certain insolvency provisions to the whole corporate group. Moreover, this latter approach often considers the "interest of the group" instead of the interest of the individual legal entities comprising the corporate group. This panel seeks to explore the most desirable way to deal with corporate groups in insolvency.

Relevant readings:

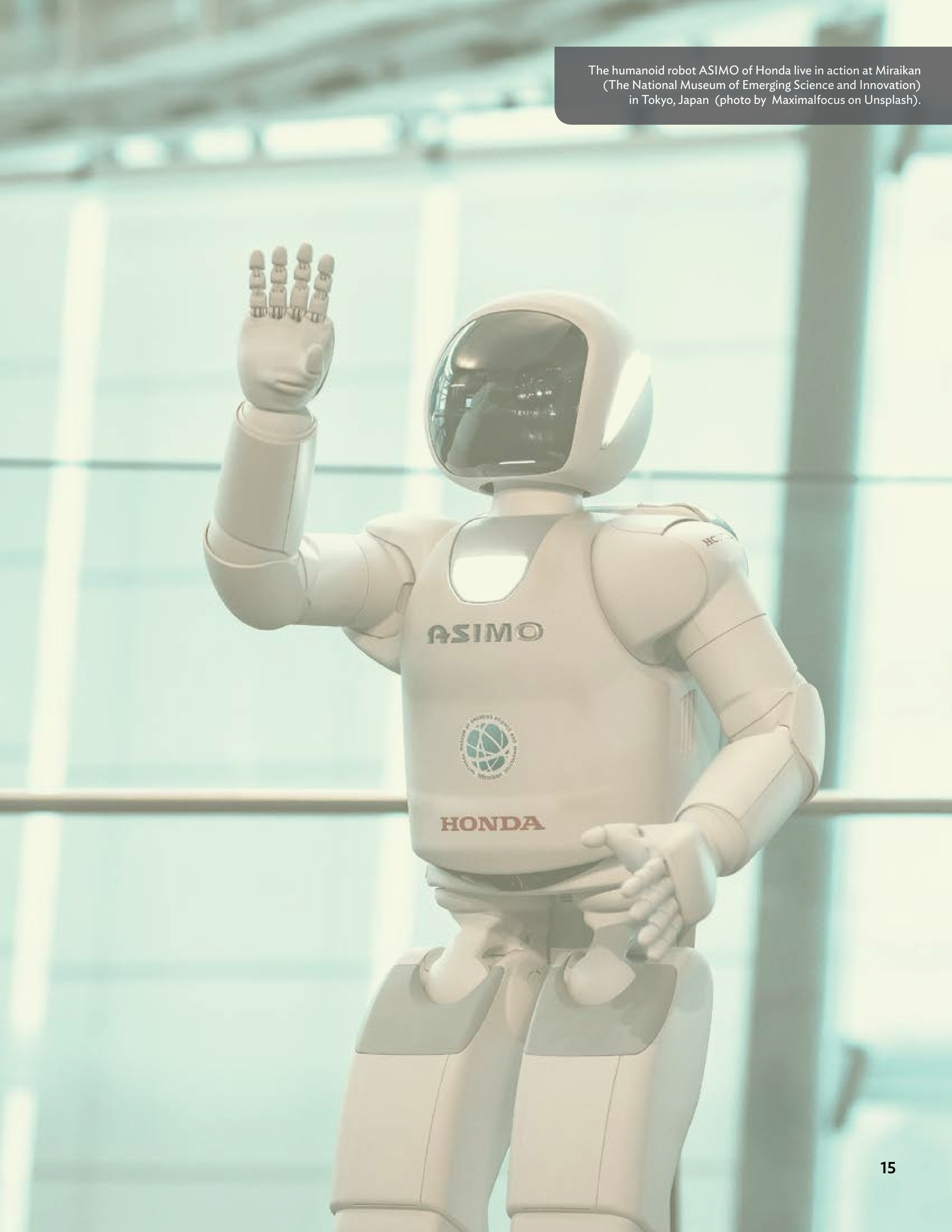
- UNCITRAL. 2020. *Model Law on Enterprise Group Insolvency with Guide to Enactment*.
- INSOL International. 2022. *The Restructuring of Corporate Groups: A Global Analysis of Substantive, Procedural and Synthetic Group Procedures*.

PANEL 11. CROSS-BORDER INSOLVENCY

Many businesses nowadays have assets, creditors, offices, subsidiaries, clients, or employees in different jurisdictions. The existence of an international component may add an additional layer of complexity to a situation of financial distress. To deal with a situation of insolvency with a cross-border element, commentators have generally suggested two different approaches: one of them that seeks to promote a single forum for the management of the insolvency proceeding ("universalism") and another approach consisting of the opening of insolvency proceedings in those jurisdictions where the debtor has assets and creditors ("territorialism"). The disadvantages of both models led to some intermediate approaches. To that end, the most successful model has been the so-called "modified universalism," which was the approach embraced by the UNCITRAL Model Law on Cross-Border Insolvency adopted in many jurisdictions around the world. This panel will discuss various approaches to deal with cross-border insolvency. These approaches will include modified versions of universalism and territorialism, as well as innovative contractual approaches suggested in the academic literature. It will also discuss new trends and developments in cross-border insolvency, including the use of insolvency protocols, the guidelines and modalities enacted by the Judicial Insolvency Network, and the UNCITRAL Model Law on Model Law on Recognition and Enforcement of Insolvency-Related Judgments.

Relevant readings:

- UNCITRAL. 1997. *Model Law on Cross-Border Insolvency*. New York.
- Robert Rasmussen. 1997. A New Approach to Transnational Insolvencies. *Michigan Journal of International Law*. 19 (1).
- Lucian A. Bebchuk and Andrew T. Guzman. 1999. An Economic Analysis of Transnational Bankruptcy. *The Journal of Law and Economics*. 42 (775).
- Lynn M. LoPucki. 2000. The Case for Cooperative Territoriality in International Bankruptcy. *Michigan Law Review*. 98 (2216).
- UNCITRAL. 2018. *Model Law on Recognition and Enforcement of Insolvency-Related Judgment*.
- Jay Lawrence Westbrook. 2018. Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court. *Texas Law Review*. 96 (1473).
- Judicial Insolvency Network. 2016. *Guidelines for communication and cooperation between courts in cross-border insolvency matters*.
- Aurelio Gurrea-Martinez. 2020. Insolvency Law in Emerging Markets, Ibero-American Institute for Law and Finance, Working Paper 3/2020.
- Ministry of Corporate Affairs, Government of India. 2020. *Report on the rules and regulations for cross-border insolvency resolution.* New Delhi.



The humanoid robot ASIMO of Honda live in action at Miraikan (The National Museum of Emerging Science and Innovation) in Tokyo, Japan (photo by Maximalfocus on Unsplash).

Subarnabhumi Airport, Bangkok, Thailand (photo by Ruben Sukatendel on Unsplash).

KEYNOTE **ADDRESS**

02

OPENING REMARKS: THOMAS M. CLARK

General Counsel
Asian Development Bank

Honorable Judges and members of the legal community; our chairpersons and speakers; government officials; distinguished members of the academe and the private sector; and respected colleagues, guests, and friends:

Good morning!

I am Thomas Clark, General Counsel of Asian Development Bank.

On behalf of ADB and our co-organizers—INSOL International, Singapore Global Restructuring Initiative, Singapore Management University, the University of Cambridge's Centre for Corporate and Commercial Law, and the University of Chicago Law School's Center on Law and Finance—I would like to formally welcome you all, including those joining us online, to the conference.

Let me also extend a special welcome to Hon. Justice Christopher Sontchi of the Singapore International Commercial Court, Hon. Justice Jonathan Russell Harris from the High Court of Hong Kong Special Administrative Region, Hon. Judge Heru Hanindyo of the Central Jakarta Commercial Court, as well as the global stars of insolvency law here with us today. We are very pleased that you are here to share your vast knowledge with us.

ADB is honored to co-organize the Strengthening Insolvency Systems in Asia and the Pacific Conference under our Law and Policy Reform Program. With countries all over the world rebooting their economies in the wake of the COVID-19 pandemic, this conference could not have come at a better time.

Scan the QR code to watch the Opening Remarks on YouTube.

A few years ago, the collapse of Hanjin Shipping, one of the largest shipping companies in the world, became headline news. This led to what some called the "chaotic demise of the company's operations" as the shipping company's vessels were either seized by creditors abroad, or stranded at sea as ports refused them entry, or left unable able to sail because suppliers no longer delivered fuel.[1]

The company eventually went bankrupt. The effect of the company's collapse was felt not only by its employees and creditors. It led to a disruption of supply chains around the world—a ripple effect crossing regions and industries, impacting costs, margins, and resource availability. The impacts of an insolvency involve many stakeholders and as here may have an impact beyond the local economy.

I thus commend the organizers of the conference for gathering a great number of experts from around the globe to discuss efficient, effective, and well-functioning insolvency systems. The topic is of great importance because the COVID-19 pandemic brought into focus the vulnerability of the corporate sector.[2] When the world shut down in 2020, mandatory confinement measures led to business establishments shutting down to help contain the virus. But the corresponding responsibility to pay their employees, suppliers and others did not cease for business owners, which could have led to insolvency – save for government interventions around the globe including moratoria on proceedings and other measures such as cash handouts.

Markets thrive on predictability and stability, both of which were severely impacted by the pandemic. To help balance the scales, a well-functioning and credible insolvency system can help assuage the concerns of both creditors and business owners. It provides assurance to stakeholders that, in the event of financial difficulty, businesses will be given a reasonable opportunity to restructure the business in a manner that also protects creditors' interests. Or, in case a business is beyond saving, that there will be an equitable distribution of its assets among stakeholders and also, if appropriate, liability for those who committed acts detrimental to creditors' interests.

I am pleased that the organizers have included a topic on insolvency frameworks for individuals and micro and small enterprises (MSEs), to be chaired by ADB's very own Nick Moller. ADB has undertaken initiatives to support MSEs to recover from the effects of the COVID-19 pandemic.[3] While MSEs are relevant economic drivers, especially in Asia and the Pacific, insolvency frameworks for small businesses are uncommon, if not absent. It is encouraging that

1 A. Illmer. 2016. Hanjin: Final Curtain Falls on Shipping Saga. *BBC News*. 17 February.
2 Organisation for Economic Co-operation and Development. 2020. *Corporate Sector Vulnerabilities during the COVID-19 Outbreak: Assessment and Policy Responses*.
3 E.g., ADB. Regional: Supporting Recovery by Micro, Small, and Medium-Sized Enterprises in the Pacific from the Effects of the COVID-19 Pandemic.

the organizers of the conference devoted some time to discuss this important issue. Hopefully, it will lead to an effective legal and regulatory environment for MSEs in many jurisdictions.

I especially look forward to the panel on directors' duties and liability in the zone of insolvency, considering last month's very controversial news about the collapse of a certain crypto company[4] and the arrest of their former Chief Executive Officer in the Bahamas this week.[5] I am sure that there will be a very dynamic discourse among our speakers on this topic.

To end, I hope that this conference will help our delegates navigate potential reforms to existing insolvency and restructuring frameworks. And, for our attendees who may be about to embark on or are considering reform of insolvency frameworks in their jurisdiction, I hope that this

event will encourage and lead to meaningful legislation and opportunities for improved training and capacity development on the subject for those in our Developing Member Countries and beyond.

Again, congratulations to the organizers. ADB looks forward to similar collaborations with your respective organizations in the future.

Thank you for your kind attention.

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4 D. Yaffe-Bellany. 2022. Sam Bankman-Fried Blames 'Huge Management Failures' for FTX Collapse. *The New York Times*. 30 November.

5 D. Yaffe-Bellany, W. Rashbaum, and M. Goldstein. 2022. FTX's Sam Bankman-Fried is Arrested in the Bahamas. *The New York Times*. 12 December.

Flame Towers in Baku, Azerbaijan (photo by Lloyd Alozie on Unsplash).

Singapore at sundown (photo by Mike Enerio on Unsplash).

PANEL 1
STRATEGIES TO EFFECTIVELY PROMOTE WORKOUTS

03

PANEL DISCUSSION





Chair:

NICHOLAS MOLLER
Principal Counsel, Asian Development Bank (ADB)

Panelists:

SCOTT ATKINS
President, INSOL International and Global Co-Head of Restructuring, Norton Rose Fulbright

ADAM BADAWI
Professor of Law, UC Berkeley

ANTONIA MENEZES
Senior Financial Sector Specialist, World Bank

STEPHANIE YEO
Partner, WongPartnership

Mr. Nicholas Moller, Principal Counsel at the Asian Development Bank (ADB), chaired Panel 1, which discussed effective strategies to promote workouts, as well as country-specific and firm-specific factors that may affect the design and effectiveness of these strategies.

He introduced the panelists. The first panelist was **Professor Adam Badawi**, Professor of Law at the University of California Berkeley. Professor Badawi is widely published in business law and insolvency. The second panelist was **Mr. Scott Atkins**, the President of INSOL International and Global Co-Head of Restructuring of Norton Rose. The third panelist, **Ms. Antonia Menezes**, Senior Financial Sector Specialist of the World Bank, joined the panel virtually. She is part of a team of lawyers that looks at insolvency and debt resolution. The last panelist was

Ms. Stephanie Yeo. She is a Partner at WongPartnership in Singapore, whose particular area of expertise lies in restructuring and insolvency law.

Mr. Moller contextualized Panel 1 by emphasizing the importance of informal workouts, which encourages collaboration among creditors. He explained that, if a company is viable despite its ongoing financial difficulties, it would be in the interest of all the creditors to work together and not to proceed quickly to enforcement action. It is thus important to encourage parties, with the help of experts, to come up with a restructuring plan that is specifically tailored to assist with the eventual turnaround of the debtor.

Nicholas Moller, Principal Counsel at Asian Development Bank, introduces the panelists for Panel 1 (photo by Paola Aseron-Dacanay/ADB).

Further, with a turnaround under a restructuring plan, suppliers, lenders, lessors, and employees should benefit from a continuing business relationship with the company. This contrasts quite distinctly with a "recover what you can, get out quick" approach that is more likely in a formal insolvency process, which is still the prevalent process in many regimes around Asia Pacific and the world.

Formal insolvency proceedings also often include an enforcement moratorium exception for secured creditors, which can be an issue. It is often suggested that the formal insolvency process encourages enforcement at the expense of enterprise value, thus undermining viability and the possibility of a successful turnaround.

Generally, in the Asia Pacific region, most insolvency regimes have formal rescue processes for workouts. However, informal rescue processes are often ill-defined, if at all present. Mr. Moller opined that, in this post-COVID environment, adoption of informal workout principles should be seriously considered, and creditor discussion and collaboration should be encouraged as part of a law reform agenda.

According to Mr. Moller, the World Bank has several publications on this subject, including a new toolkit for workouts that describes many experiences across jurisdictions and various policy options promoting informal workouts.[1] He then framed the Panel 1 discussion using the following questions:

- What are some of the different options and strategies of workouts that have been used around the world?
- What factors impede or limit effective change towards more informal workouts?

Scan the QR code to watch Panel 1 video on YouTube.

1 World Bank. 2022. *A Toolkit for Corporate Workouts*. Washington, D.C.

The chairperson and panelists for Panel 1 (photo by Paola Aseron-Dacanay/ADB).

Ms. Menezes began her response by first describing the work of the World Bank Insolvency and Debt Resolution Team (IDR Team). According to Ms. Menezes, the IDR Team is composed of lawyers who advise public authorities of World Bank client countries on insolvency reform in line with best practices. The team's work varies but ranges from providing inputs to the drafting of legislation. Over the life of the program, they have worked in over a hundred countries in all regions of the world. In this capacity, the team assists countries in developing corporate workout frameworks, quite often in conjunction with non-performing loan (NPL) resolution strategies.

Ms. Menezes emphasized that workout frameworks could take many different forms and be designed in different ways. There is no best practice typology for defining these workout frameworks—which, according to Ms. Menezes, is precisely the appeal of workouts. Because they typically are less formal frameworks and do not necessarily need to be set out in legislation, countries can shape the workout framework to suit their particular needs, as well as financial and economic climate.

For instance, the World Bank saw a variety of different workout models arising from the Asian financial crisis and the global financial crisis. The World Bank Toolkit on Corporate Workouts conceptualized these tools in several ways.[2]

- The first type refers to out-of-court workouts, which are seen as privately negotiated contractual restructurings between the debtor and all or some of its creditors. Typically, the only formal requirement is that the final agreement is a valid and binding contract. Insolvency legislation does not typically provide for out-of-court workouts. Examples of this model include the London Approach (led by the Bank of England from the 1970s) and the INSOL principles. Some countries, such as Mauritius, have put a framework of this kind in place.

[2] Ms. Menezes noted that these categories of workout frameworks are the World Bank's typology for these tools. Other typologies might class workouts differently.

- The second type refers to enhanced workouts, which are defined as restructurings where participants are bound by law, regulation, or contract to follow specific standards introduced by an administrative authority, such as a central bank. However, courts do not have a role to play in these frameworks. Ms. Menezes observed that these models are typically used to deal with high levels of NPLs, or in a crisis scenario. She cited several examples of enhanced workouts, such as the Jakarta Initiative during the Asian financial crisis, the Iceland scheme during the global financial crisis, and Türkiye's so-called Istanbul approach, which was recently revised.
- The third type refers to hybrid workouts, which are private negotiations of restructuring terms pursuant to a procedure that involves the court, whose role nevertheless falls short of supervision of the full procedure. This model can take several forms, e.g., pre-packaged insolvencies and conciliation proceedings, which are used in France and more recently in Egypt.
- The final type refers to preventative workouts, which are restructurings of enterprises that are not yet in a technical state of insolvency, made through a broadly formal process with a stay on creditor action from the procedure's initiation. Ms. Menezes clarified that while there is some debate about whether these procedures could be conceptualized as a type of workout given their level of formality, the World Bank has observed increasing uptake globally in having preventative procedures in place.

Ms. Antonia Menezes, Senior Financial Sector Specialist at the World Bank, discusses different workout models.

Ms. Menezes concluded that these workout models could be conceptualized as being on a spectrum of formality. Following these procedures, the parties will then move onto fully formal proceedings, such as court-supervised reorganizations.

Mr. Moller then turned to Mr. Atkins to briefly describe his experience in law reform in the Asia Pacific region, including whether he has been able to incorporate informal workout mechanisms in these reform initiatives.

Mr. Atkins responded by noting a global proliferation in insolvency law reform activity since 2016 and 2017. During the pandemic, INSOL and the World Bank started to map the jurisdictions that are engaged in some form of insolvency law reform. At last count, there were well over 83 jurisdictions undertaking insolvency law reform of one sort or another.

Mr. Atkins then cited his (and Mr. John Martin's) work in Myanmar, which he described as a major law reform project for two reasons. First, it is a very strong example of the way that the best-practice frameworks, principles and toolkits (that Ms. Menezes mentioned) could be brought to life. Second, it shows how an insolvency system—typically one that is antiquated and often in an economic environment where it is not even operative—could be transformed with the real intent of aiding economic development and spurring economic activity within a country.

Mr. Atkins underscored the importance of on-the-ground engagement. He mentioned that his and Mr. Martin's work was done pre-pandemic, i.e., in person, on the ground, and over 11 visits to Myanmar, pre-Zoom and pre-Teams. He believes that one aspect of effective insolvency law reform that is often not emphasized as much is the critical element of stakeholder engagement in person—despite having the assistance of technology that has evolved during the pandemic. Building trust and confidence in the process is a foundational requirement, before parties even delve into the substantive content of the law.

Mr. Scott Atkins, President of INSOL International, shares his experience in insolvency law reform (photo by Paola Aseron-Dacanay/ADB).

Mr. Atkins opined that this critical engagement piece, which involves engagement with the government, policy makers, practitioners, and the judiciary—often without any prior experience with an insolvency system—followed by capacity building when a new system is implemented, is the absolute key to success. It is the secret ingredient in any insolvency law reform process.

According to Mr. Atkins, one of the most challenging elements of the Myanmar work was that the country did not have any history or tradition of insolvency. Many countries have, at least, some form of historical tradition of insolvency. But the reverse was true in Myanmar—the only semi-reliable pre-existing report was a forced closure of a bank for purposes other than financial distress. The lack of any recorded instance of insolvency posed a very interesting challenge, both in trying to understand the economic, business, and policy settings of the country, and in contemplating what law substantively would work.

Mr. Atkins' team ultimately came up with a system that had at its heart an out-of-court workout model that is debtor-in-possession driven. However, Mr. Atkins clarified that the debtor-in-possession model was not based on Chapter 11. The system was instead designed to allow the debtor, in a very streamlined way, to develop a rescue plan, in some instances with the assistance of a rehabilitation advisor and with specified periods to have in place an effective plan to help resuscitate, turn around, and revive the business. Failing that revival, the law was designed to allow for rapid accelerated entry into liquidation so that, critically, unproductive capital could be recycled as efficiently as possible.

Mr. Atkins circled back to the importance of stakeholder engagement. While the work was sponsored by the ADB, Mr. Atkins and his team engaged with many stakeholders who were working in this space day-to-day, thereby ensuring that best practice feedback could be obtained from those that have genuine broad-based policy and restructuring law development expertise.[3]

Mr. Atkins however raised some concerns about tracking the Myanmar law's effectiveness. Due to the political situation in the country, the project team has difficulty gaining insights into the law's impact. Insights into the effectiveness of the law are anecdotal, with one report suggesting that the law has been used at least 53 times.

Nevertheless, Mr. Atkins and his team are optimistic that the law will continue to have impact, especially as insolvency law reform processes continue to sweep across the globe. Noting that the Myanmar law was tailored for the micro, small, and medium-sized enterprise (MSME) market, Mr. Atkins asserted that it could serve as a framework and precedential example for jurisdictions with a similar economic profile.[4]

Mr. Atkins then described a unique element in the law which demonstrates that it gives more than just lip service to INSOL precepts and workout principles: it enables any rehabilitation advisor, working with the debtor, to appoint a mediator to facilitate the process and enhance efficiency of the procedure. The Myanmar law is the first of its kind to expressly contemplate mediation as a viable restructuring and insolvency tool.

Mr. Atkins then referenced similar reform initiatives in other countries. The ADB team involved in the Myanmar project is now working in Armenia on a very similar intervention, and work in Bhutan is about to commence.

Mr. Atkins concluded by stating that the leadership in this space by the ADB, the World Bank, and many other stakeholders is critically important.

Mr. Moller then turned the panel's attention to a more comparative approach, i.e., looking at different jurisdictions and how they might be encouraging informal out-of-court workouts. He said that many in the Asia Pacific region look to the United States of America (US) for inspiration in developing insolvency systems in their developing market economies. He asked Professor Badawi to discuss the US experience, especially the increased use of institutional investing in debts (including collateralized obligations) and how that may have impacted workouts.

Professor Badawi responded that parties need to pay attention to the investor base when discussing the functionality of out-of-court workouts. The investor base ultimately affects how bargaining—if necessary—happens in the end. In this context, Professor Badawi touched upon the changes in the US market over the past couple of decades.

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[3] According to Mr. Atkins, the following instruments, together with those that have been published since then, remain the bedrock of good guidance principles on the elements of a sound and effective insolvency system:

1. ADB's own guide on promoting regional cooperation in developing insolvency law;
2. The World Bank principles;
3. Similar principles published by the International Monetary Fund (IMF); and
4. The United Nations Commission on International Trade Law (UNCITRAL) legislative guides.

[4] Mr. Atkins noted that 97% to 98% of Myanmar's economy is composed of MSMEs.

Professor Badawi noted that in the early 2000s, the model for corporate lending was a syndicated loan with a relatively small consortium of banks. This small consortium would get together and have a lead agent to negotiate the loan. The loans would have relatively strict covenants based on financial metrics that provide an early warning system.

Professor Badawi continued that those covenants got tripped frequently, e.g., if the enterprise's debt-to-earnings before interest, taxes, depreciation, and amortization (EBITDA) ratio went beyond the acceptable limit, or if one's net worth was imperiled. The syndicate would then do one of two things: (i) the syndicate could waive the violation and just impose minor modifications, or (ii) the syndicate could decide that the situation warrants a more serious approach and the parties would then renegotiate the debt.

According to Professor Badawi, this kind of investor base has several benefits. With a small number of banks, holdout problems (that usually arise when one starts to increase the investor base) will be minimized. Subsequent to the financial crisis, the number of collateralized loan obligations exploded. These collateralized loan obligations, Professor Badawi explained, are very similar to the mortgage-backed securities that caused difficulties during the financial crisis. They are securitized corporate loans, divided into tranches, that have the AAA rating[5] at the top where the first money goes, which then goes down the line until the equity tranche at the end. These loans now represent over half of the corporate debt in the US.

The question now is how this fundamental transformation in the investor base changes the workout process. Professor Badawi stated that the impact is relatively straightforward—instead of a small consortium of banks with a lot of experience liaising with each other and with debtors to work things out, more people are now needed to sign off on the issue. Consequently, contractual covenants are relatively less tight because breach would require a higher level of engagement in the workout process. Professor Badawi explained that this phenomenon is referred to in the literature as "foot faults", i.e., parties do not want covenants that are not indicative of true financial distress.

Professor Badawi then made several observations about this situation. First, the slack in covenants—that is, how difficult it is to trip a covenant—increased quite substantially. He added that these contracts now undergo an increased level of tailoring to ensure that the covenants are more accurate. As an example, Professor Badawi noted that the research definition of EBITDA has over 2,000 words and many carveouts. While not without its downsides, e.g., it can be manipulated, Professor Badawi regarded this highly nuanced definition as probably in service of trying to get a more accurate measure—ultimately to prevent covenant violations requiring negotiations with a high number of parties.

Second, the presence of these parties is also problematic when an entity enters into true distress. Because they have relatively strict requirements on what type of debt they are able to hold, parties typically have fire sales (in an attempt to get rid of debt) when downgrades occur.[6] These debts then often end up in the hands of very aggressive distressed debt hedge funds, which may then make the workout process even more challenging.

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[5] The most senior, least risky, and the lowest return bond.

[6] Downgrades often occur before or after workouts.

Professor Badawi further explained that covenant-lite (cov-lite) loans arose even before the financial crisis. The relatively low interest rates traditionally meant that borrowers had more leverage in how they negotiated, and they therefore steered away from contracts that placed restrictions on them. Professor Badawi then opined that the cov-lite phenomenon, as a concern, has been overblown post-financial crisis because of collateralized loan obligations (CLOs).

Professor Adam Badawi, Professor of Law in University of California Berkeley, talks about the covenant-lite (cov-lite) phenomenon (photo by Paola Aseron-Dacanay/ADB).

Typically, a borrower will have one or two term loans and a revolving credit line in a loan package. These term loans usually are the ones that are farmed out to the CLOs, which in turn do not have covenants due to difficulty in negotiating with borrowers, i.e., "cov-lite." However, Professor Badawi pointed out that the revolver is typically held by banks. Thus, banks do the policing work for the entire loan package, as long as the revolver has covenants. Nonetheless, when these covenants get tripped, parties sometimes still need to get sign off from the CLO, which can be problematic.

Mr. Moller then inquired into how creditors approach covenants and covenant violations.

Professor Badawi reiterated that CLOs have changed the investor base. Additionally, the shift to hyper-aggressive tactics by debtors—usually backed by private equity firms or hedge funds—has affected workouts. Debtors have started to adopt hardball tactics, combing through the agreements to find a way to get out of the workouts the creditors are trying to get them to accept.

He gave J. Crew, a company with private equity backers, as an example. J. Crew entered financial distress. It found a loophole in a highly complex contract that essentially allowed it to strip major parts of the collateral. As a result, J. Crew secured a new loan based on the collateral, essentially leaving the original creditors with very little.

Professor Badawi then reflected on what may have spurred this type of situation. He mentioned that some parties believe fiduciary duties and the shifts seen in the zone of insolvency are contributory factors. He also opined that the evolution of complex contracts is worth looking into.

Finally, Professor Badawi highlighted the role of CLOs. In the past, banks were very invested in the content of these contracts; they would negotiate themselves and hold on to these agreements. With negotiations now being farmed out to CLOs, banks are less invested in making sure that these contracts are airtight, as they retain the revolving loans anyway. Essentially, more aggressive parties are able to exploit the resulting agency cost.

Mr. Moller shifted the topic to Singapore's experience. He said that a lot of countries in the Asia Pacific region are also looking to Singapore—not only because it recently adopted well-known reforms in insolvency, but significant cases where those laws were applied have also been decided. Mr. Moller asked Ms. Yeo about Singapore's reforms in insolvency and how much informal workouts were part of the process.

Nicholas Moller, Principal Counsel at Asian Development Bank, asks the panelists a question (photo by Paola Aseron-Dacanay/ADB).

Ms. Yeo responded that Singapore enacted major legislative changes around five years ago. While these changes would, on their face, relate to hybrid workouts rather than out-of-court workouts, they nevertheless changed the dynamics between debtors and creditors. For instance, now the debtor can go to the lenders; if the debtor has a sufficient majority, it can say that it will file for a pre-packaged insolvency (pre-pack) if the creditor does not agree to an out-of-court workout. Ms. Yeo said that the threat of a pre-pack has enhanced the ability of the debtor to undertake an out-of-court workout.

However, Ms. Yeo opined that the increasing maturity of lenders in the country is what actually drives the growing prevalence of out-of-court workouts. According to Ms. Yeo, the Singapore market is not quite as mature as US or European markets. It has taken some time for market participants to understand that out-of-court workouts are probably more beneficial to the debtor and its lenders, than a court process.

Ms. Yeo cited a recent shipping restructuring facilitated by her law firm, where they told the lenders that they could file for an automatic moratorium if they do not give the debtor (Ms. Yeo's law firm's client) a consensual standstill. More importantly, the firm referenced the experience of Hanjin Shipping, underscoring possible market reaction to an application for court protection. Ms. Yeo believes that this example convinced the lenders to give the consensual standstill, which eventually allowed their client to pursue a pre-negotiated restructuring. Ms. Yeo added that, as the Singapore market grows, it learns from the past lessons and uses them together with new legislation to enhance out-of-court workouts.

Ms. Stephanie Yeo, Partner at WongPartnership, discusses Singapore's recent reforms on insolvency (photo by Paola Aseron-Dacanay/ADB).

Finally, Ms. Yeo emphasized that Singapore—unlike Europe or the US—has very strong safeguards for shareholders. First, one is not able to cram down on shareholders in the event that they dissent. Second, the absolute priority rule in Singapore differs from the US in that dissenting creditors are not packed with shareholders.

While this may appear prohibitive to a workout, Ms. Yeo opined that this perhaps is the Asian way of restructuring. The Asian landscape is marked by a lot of family businesses and, to some extent, state-owned enterprises. The absence of legislation allowing for a cram down 'forces' the parties to do a consensual workout with the family. Ms. Yeo noted that in her firm's restructuring experience, the family does eventually agree to a substantial dilution of the equity stake without the use of any court mechanisms if they feel that the debt restructuring plan is feasible. Ms. Yeo highlighted this observation as an interesting aspect, because it almost seems as if the absence of legislation has enhanced corporate out-of-court workouts.

Mr. Moller then steered the discussion towards informal workouts in Australia. He asked Mr. Atkins to describe safe harbor rules and how they might (or might not) work in favor of out-of-court workouts. Mr. Moller also asked if aspects of Australian law work in favor of informal workouts, including the use of cram downs or the debtor-in-possession model.

Mr. Atkins contextualized his response by noting Australia's past as a penal colony and how this influenced the evolution of its laws. Until recently, directors were assumed to be largely responsible for business failure in Australia. Consequently, over time, the system has evolved to require that, in situations of insolvency or impending insolvency, directors be removed from their positions of control and influence, with independent insolvency practitioners taking over.

As such, Australia had a very formal insolvency-driven process for decades. It had a voluntary administration regime, with empirical data confirming that most enterprises entering voluntary administration would ultimately go into liquidation. On average, the returns were usually less than 10 cents to the dollar.

In 2015, discussions regarding insolvency reforms started. The objective was to provide an alternative mechanism so the directors could undertake, in a more entrepreneurial way, restructuring in situations where an enterprise was approaching a situation of insolvency or possible insolvency.

Mr. Atkins continued that these discussions led to the introduction of safe harbor reforms in 2017, under the Turnbull Liberal Government. A parliamentary review conducted in 2021 and published at the start of 2022 indicated that the safe harbor reforms have been effective in stimulating out-of-court workouts and achieving a much higher level of business rescue than what was likely to have been the case had the legislature not introduced what were considered to be fairly innovative adjustments to Australian law.

Mr. Scott Atkins, President of INSOL International, talks about safe harbor reforms in Australia (photo by Paola Aseron-Dacanay/ADB).

Mr. Atkins further said the significance of Australia's history as a former penal colony also manifested and continues to manifest in the legal consequences for a director who causes the company to become insolvent, or incurs a debt that causes insolvency, or incurs more debt while the company is in that situation. Ultimately, the director can be found personally liable for repayment of that debt—a fairly draconian potential outcome for directors.

The lever of the safe harbor reforms in effect has enabled directors to develop a turnaround plan. As long as that plan leads to a better outcome for the company going into liquidation, the directors are entitled to pursue the implementation of the plan. Consequently and significantly, the director will not be personally liable for corporate debts in the event the company ultimately enters into liquidation. This situation provides a genuine safe harbor within which directors are able to engage in a restructuring process confidentially and very privately, subject to meeting certain other requirements, including continuing to pay tax and employee liabilities.

However, Mr. Atkins cautioned that the pandemic could be one of the reasons why formal insolvency filings were at record low levels during the period within which the study was conducted. He asserted nonetheless that while Australia did not have a great deal of empirical evidence, the results of the large-scale inquiry suggests that, overall, the safe harbor reform innovation has been a success.

To further stimulate the use of the safe harbor provisions, the government review recommended to further soften the barriers to entry and deployment of the safe harbor mechanism, e.g., framing the activation point as the company simply being financially distressed, a much looser point than requiring the directors to believe that the company is insolvent or about to become insolvent. Mr. Atkins clarified that these reforms have not yet been implemented but are under discussion.

Mr. Atkins then discussed the broader deployment of mediation in restructuring situations. He characterized using the toolkit of mediation as a key innovation in two ways: to help, first, in developing restructuring plans, and, second, in resolving creditor claims against one another in the pre-planning phase.

Finally, Mr. Atkins referred to the excitement rippling across the globe regarding Chat GPT. He stated that we are now stepping into the realm of possibilities as to how artificial intelligence (AI) could be deployed in law reform initiatives, e.g., in the formulation of law or restructuring plans.

Mr. Moller then turned to Ms. Menezes to ask her observations in terms of toolkits, policy, strategies, and options to encourage informal workouts across the globe.

Ms. Menezes framed her response by underscoring that the country must first assess the nature of the problem. For instance, what are the levels of non-performing loans (NPL)? Are there large exposures in a small number of debtors or small exposures in a large number of small debtors? How urgent is the problem?

She continued that once these threshold questions are determined, an asset quality review (AQR) is typically required. This review is a critical step and goes into numerous legal questions, such as the underlying quality of the collateral. She gave as an example one country, where the decision was made to set up an enhanced workout model. However, upon conducting the AQR, the World Bank Insolvency Team discovered that 90% of the NPLs were already in a formal court process. Constitutionally, it would have been impossible to pull those cases from the courts and put them through a specialized vehicle.

Secondly, Ms. Menezes believes that developing the appropriate workout framework for any given country requires consideration of its socioeconomic and legal culture. Generally, the World Bank Insolvency Team's on-the-ground experience shows that out-of-court workouts often do not have sufficient teeth, sometimes for cultural reasons, such as stigma and the domestic banking culture. The World Bank Insolvency Team has observed that countries are increasingly interested in hybrid or enhanced models, a trend that seems to be continuing post-pandemic. She then underscored the importance of broad stakeholder consultations, echoing a point also made by Mr. Atkins.

Ms. Antonia Menezes, Senior Financial Sector Specialist at the World Bank, discusses informal workouts across the globe.

Third, Ms. Menezes said that an assessment needs to be done regarding any legislative provisions that might prevent effective restructurings, such as the tax treatment of write-offs and laws relating to credit information and data protection. Another example, for instance, is that bank officials in some South Asian countries face personal criminal liability for debt forgiveness, which might create a culture of reluctance to engage in any restructuring.

Ms. Menezes concluded that implementation is probably the most critical phase of the work, requiring local government champions and appropriately trained staff. She referred to Mr. Atkins' statement that many workout models have mediators or arbitrators. Ms. Menezes said that in many countries these professionals are not adequately qualified.

Finally, Ms. Menezes invited conference participants to read a recently published World Bank publication that summarizes the lessons learned from implementing corporate debt restructuring frameworks in over a hundred countries.[7]

QUESTION-AND-ANSWER WITH THE AUDIENCE

Mr. Moller asked the audience if they have any questions or comments for the panelists.

Hon. Justice Christopher S. Sontchi, International Judge at the Singapore International Commercial Court, referred to a statement made during the panel discussion regarding user diversification, i.e., that workouts are more difficult when more people and entities are involved. He also referred to the differences between cultures where the banks still hold the loans versus cultures where professional distressed investors hold the loans.

Justice Christopher Sontchi, International Judge of the Singapore International Commercial Court, asks a question during Panel 1 (photo by Paola Aseron-Dacanay/ADB).

Justice Sontchi presented a different view. He believes that professional distressed investors make restructuring easier—when the originating bank still owns the debt, one can run into criminal liability for compromising that debt, as opposed to transferring the debt to another entity. He also pointed out that reputational interests are involved when an entity is both the originator and the workout bank. He said that generally banks are unfamiliar with the insolvency process, whereas professional distressed investors are very familiar with the process.

He also expressed his surprise in hearing that the issue is aggressive debtors. He opined that, after 16 years on the bench, he would say the issue is aggressive creditors. Justice Sontchi specifically mentioned distressed investing hedge funds which know the system and are

[7] See *A Toolkit for Corporate Workouts*, supra note 1.

very aggressive. Investing hedge funds are often worried about their reputation and how it may impact succeeding deals, sometimes taking a loss on the current deal so that other parties will be more fearful of them in subsequent deals.

Justice Sontchi then asked Professor Badawi if he is seeing these issues reflected in his research.

Professor Badawi responded it is good to have professionals doing the work on both sides, i.e., debtors who are very good at doing their job and working through workouts, on the one hand, and professional distressed debt investors, on the other. Professionals are able to work it out, and the result will be acceptable.

Professor Adam Badawi, Professor of Law at UC Berkeley, responds to Justice Christopher Sontchi's question (photo by Paola Aseron-Dacanay/ADB).

Professor Badawi expressed his concern about some aggressive debtors. The upstream debt market can be affected when there is uncertainty about the investment, leading investors into thinking they are senior creditors when they are in fact not so. Thus, Professor Badawi believes that having experienced parties on both sides is typically a positive development.

Justice Sontchi agreed with this point. He said that when professionals or repeat players participate in the business of workouts, the upfront costs go down and agency costs are reduced. It is a more efficient way to proceed.

Justice Sontchi next opined that contracts should be more carefully drafted. Because so few companies do go insolvent, sometimes contract drafters do not consider the possibility of the company going insolvent—and therefore do not consult bankruptcy lawyers on the legal consequences of contractual provisions. Justice Sontchi then gave an example of parties still including in credit documents provisions that are 20 years out of date, considering where the case law currently is on the enforceability of these provisions.

Professor Badawi added that the CLO problem exacerbated this situation. It created yet another step between the drafter of the contract and the ultimate person who has to deal with the issue. He ended the panel discussion on a humorous note, sharing that he once heard a lawyer quip that, to eliminate all these problems, the lawyer who drafted the contract would have to be the one to litigate the contract.

Locomotive assembly plant in Astana City, Kazakhstan (photo by Andrey Terekhov/ADB).

PANEL 2

HYBRID PROCEDURES AND FORMAL INSOLVENCY PROCEEDINGS

04

PANEL DISCUSSION

   

 

Chair:

AURELIO GURREA-MARTINEZ
Associate Professor of Law and Head, Singapore Global Restructuring Initiative, Singapore Management University

Panelists:

MAHESH UTTAMCHANDANI
Manager for Digital Development in East Asia and the Pacific, World Bank

ANTHONY CASEY
Deputy Dean and Donald Ephraim Professor of Law and Economics, The University of Chicago Law School

YU-WEN TAN
Director, Insolvency Division of Insolvency and Public Trustee's Office, Singapore

EDMUND MA
Senior Associate, Baker McKenzie

SCOTT ATKINS
President, INSOL International and Global Co-Head of Restructuring, Norton Rose Fulbright

Professor Aurelio Gurrea-Martinez chaired Panel 2, which covered hybrid procedures and formal insolvency proceedings. He introduced the panelists.

The first was **Mr. Scott Atkins**, President of INSOL International and Global Co-Head of Restructuring of Norton Rose Fulbright.

Aurelio Gurrea-Martinez, Associate Professor of Law and Head of the Singapore Global Restructuring Initiative, Singapore Management University, starts the discussion for Panel 2 (photo by Paola Aseron-Dacanay/ADB).

The second panelist was **Professor Anthony Casey** from The University of Chicago.

The third panelist, who joined virtually, was **Mr. Edmund Ma** from BakerMcKenzie Hong Kong.

The fourth panelist was **Ms. Yu-Wen TAN** from the Ministry of Law, Singapore.

Lastly, **Mr. Mahesh Uttamchandani** from the World Bank also joined virtually.

As a starting point for the discussion, **Professor Gurrea-Martinez** defined the term "hybrid procedures" as referring to schemes of arrangements, pre-packs, preventive restructuring frameworks, and some procedures that could be used—and are often used—for debt restructuring, but have not been traditionally classified as formal insolvency proceedings. In addition, Professor Gurrea-Martinez said that the panel would also discuss traditional reorganization liquidation procedures.

Professor Gurrea-Martinez asked the panelists what he characterized as the most basic question: how many procedures should be in a particular legislation? He said that this is a question many countries in the region are now facing.

- Should a country adopt one single-entry insolvency process that may end up in reorganization, liquidation, or asset sale, as Germany, Mexico, Spain, or Uruguay have?
- Or should a country adopt the United States (US) style bankruptcy system, which has one option for reorganization, among others but mainly for corporations, and one option for liquidation?
- Should a country adopt the United Kingdom (UK) approach? The UK approach provides four different options for restructuring: company voluntary arrangement, administration, a scheme of arrangement, and a new restructuring plan. The UK also has a winding up procedure for liquidation, which is another model.

Professor Gurrea-Martinez said that the foregoing questions only refer to formal insolvency proceedings, but the panel would also be dealing with the question of whether a country should adopt hybrid procedures.

For example, the US does not have—at least in legislation—formal hybrid procedures

Scan the QR code to watch Panel 2 video on YouTube.

Aurelio Gurrea-Martinez, Assistant Professor of Law and Head of Singapore Global Restructuring Initiative at the Singapore Management University, introduces the panelists for Panel 2 (photo by Paola Aseron-Dacanay/ADB).

even though pre-packs emerged as a market practice. Some US courts have in fact even enacted some related guidelines. Other jurisdictions, such as France and Singapore, have pre-packs regulated in their frameworks. Many European countries are also adopting these preventive restructuring framework, which looks like a Chapter 11 reorganization procedure, as a kind of hybrid procedure, along with their formal insolvency procedure.

Professor Gurrea-Martinez posed the following questions, particularly for countries embarking on insolvency reforms:

- What is the optimal model, if any?
- What are the country-specific factors that can be relevant in deciding whether to adopt one or different options for insolvency proceedings and/or one or different options for hybrid procedures?

Professor Gurrea-Martinez asked Mr. Uttamchandani to share his views and experience on the different design options for formal insolvency proceedings, specifically in terms of potential advantages, disadvantages, and risks. Professor Gurrea-Martinez also inquired into the various ways in which countries deal with the opportunistic use of reorganization procedures by non-viable companies. Lastly, he asked about the market and institutional factors that could be relevant when deciding on the optimal option.

Mr. Uttamchandani responded that the World Bank's institutional view is that the question does not have a right answer, in the sense that designing and choosing between single- or multi-entry systems has no optimal global approach. He contextualized his response by referring to the World Bank's work in insolvency reform in over a hundred countries, for over 25 years in every region of the world. Mr. Uttamchandani asserted his certainty that everyone in the room would agree that these are highly dependent on country context.

Mr. Uttamchandani opined that country context depends, in turn, on the quality of the insolvency administrators and the judges hearing these cases. He believes that cases are going to be subject to delay if heard by courts that are inclined to look beyond market factors and the best interests of creditors, i.e., courts that almost look at insolvency from a more natural justice point of view, which the World Bank sees in a lot of countries. There will be delays whether one has a single-entry process that ultimately needs to wind its way away from restructuring a business that needs to be liquidated, or one has a multi-entry process where a debtor chooses to avail of a reorganization process when the debtor, in fact, cannot or will not be reorganized. In both those cases, a court that is inclined to allow, or is less able to guard against, abusive process, may allow that abuse to happen.

Furthermore, Mr. Uttamchandani believes that the entry system is not really going to control for abusive process in a significant way. In single-entry systems, parties rely on an evaluation process early on in the insolvency proceeding to determine whether the business is viable or not. This process depends on competent actors (which Mr. Uttamchandani refers to as insolvency administrators) to advise the court and the creditors on whether the business can be rescued. But, ultimately, the question circles back to whether the court is in a position to judge the financial evidence put forth before it and make a reasonable determination in a contested manner.

On the other hand, multi-entry systems permit immediate access to a bankruptcy proceeding or liquidation for a well-intentioned debtor that knows he or she has no hope of restructuring. This saves everybody time and energy. Depending on the jurisdiction, one could argue that many debtors are well-intentioned and are looking for just the quickest outcome, particularly when they know the business cannot be saved. According to Mr. Uttamchandani, the double-entry or multi-entry system leaves the door open for an honest well-intentioned debtor, who is simply looking to put the business out of its misery, to do that more quickly in the best interest of all the stakeholders.

Mahesh Uttamchandani, Manager for Digital Development in East Asia and the Pacific, World Bank, talks about World Bank's work on insolvency reform (photo by Paola Aseron-Dacanay/ADB).

Mr. Uttamchandani mentioned a World Bank survey of about 114 economies that looked into several aspects of restructuring procedures. The World Bank found that three-quarters of the countries have multiple-entry systems, and a quarter of them have single-entry systems. This breakdown does not necessarily speak to the efficacy of those systems, but gives a sense of where countries are investing in design. And, on the whole, economies are seeing multiple-entry systems as the better way to go.

Finally, Mr. Uttamchandani believes that the strength of several other factors is going to determine the quality of the insolvency system, such that that the question of multi-entry versus single-entry almost becomes, not irrelevant, but certainly a marginal part of the overall picture of an insolvency system's effectiveness.

Professor Gurrea-Martinez then turned to hybrid procedures, which are becoming very relevant internationally. He referenced the following examples:

- In 2017, Singapore became one of the first countries in the world to enact new provisions to strengthen the formal restructuring framework.
- A European directive on preventive restructuring framework was also promulgated.
- Thereafter, India adopted a new pre-pack for micro-, small-, and medium-enterprises (MSMEs).
- In 2021, Australia published an inquiry that suggests that it is considering to adopt some US Chapter 11 provisions, similar to Singapore.

Professor Gurrea-Martinez mentioned that the rise of hybrid procedures has some people saying that these procedures may now replace formal reorganization procedures, which sometimes have a stigma and bad reputation. He observed that this seems to be the case in Europe and other jurisdictions, where hybrid procedures are being used as the main restructuring tool.


Anthony Casey, Deputy Dean and Donald Ephraim Professor of Law and Economics at The University of Chicago Law School, discusses hybrid procedures (photo by Paola Aseron-Dacanay/ADB).

He asked Professor Casey about his views on the rise of hybrid procedures internationally, and whether Professor Casey believes that this is a desirable trend.

Professor Casey said that his thoughts on this issue are similar to Mr. Uttamchandani's. Professor Casey believes that this is a positive trend, and almost an unavoidable trend in the following sense: hybrid procedures allow out-of-court restructuring to begin and then get the sanction of the court.

He referred to the pre-packs that happen in the US. These pre-packs happen although they have no formal set of rules (on what people are allowed to do)—people are going to negotiate reorganizations, pre-entering the system no matter where and how the system is set up. Thereafter, the parties have to enter the court at some point if the negotiated reorganization fails or gets disputed later on. As such, if a country does not have a hybrid system, the parties will just end up negotiating outside. If the negotiation fails, the parties will end up with a liquidation system.

Professor Casey then asked the following questions: If parties know that out-of-court negotiation is going on, will parties want to set up a procedure to facilitate it? And will the parties want a procedure to bring it to court in the facilitative sense?

Thinking about the scheme of arrangement, when trying to work through an agreement among creditors (and ultimately parties will want court sanction), such creditors might have it all locked up before even entering the system. If the institutions can jump in at that point and trust the process behind it, that makes a lot of sense. The flip side is that, if the parties think they need the courts involved from day one, a slightly different kind of hybrid system that gets in earlier is needed.

Professor Casey believes that parties wanting to come to this group agreement is what drives the rise of hybrid procedures. Parties want to bind the holdouts, and they are going to do it under basic contract law or under basic bankruptcy law. One just needs to understand the institution or acknowledge that the basic background rule does not work. He believes that the hybrid system allows for the light touch of a judge, i.e., the court will oversee the agreement that the parties have reached, putting a stamp on it without a full-blown reorganization. More would be going on behind closed doors; one never ever sees all of it, yet the judge is able to oversee parts of it. The hybrid system thus allows, if designed right, for that light touch, with the court getting in at the right moment.

Professor Casey reiterated that knowing the point of entry is crucial, which in turn depends on institutional facts on the ground. These institutional facts are (i) what the culture and norm of the financial industry is, (ii) how contracts work, and (iii) how much the courts can make that better or worse.

Professor Gurrea-Martinez then asked Ms. Yu-Wen TAN to share about Singapore's experience in insolvency reform, as well as the rationale behind these reforms.

Ms. TAN began by saying that in 2017, Singapore introduced amendments to its Companies Act to enhance the country's corporate rescue and restructuring laws, and also strengthen it as a forum of choice for debt restructuring. She explained that the amendments to the Companies Act sought to enhance the scheme

Yu-Wen TAN, Director of the Insolvency and Public Trustee's Office - Singapore, describes the insolvency reforms being undertaken in Singapore (photo by Paola Aseron-Dacanay/ADB).

of arrangement framework, which is based on the debtor-in-possession model. The changes included an enhanced moratorium, cross-class cram down, super priority for rescue financing, prohibition of ipso facto clauses, and the pre-pack scheme of arrangement.

According to Ms. TAN, the changes were introduced to (i) allow a company to apply for judicial management more easily by lowering the insolvency threshold for a company's application for judicial management, and (ii) allow a company to be placed under judicial management without an order of court.

The amendments also increased the ease with which non-Singapore companies can access the debt restructuring regime in Singapore. The Singapore courts can assume jurisdiction over a foreign company as long as they can show a substantial connection to the country. An example of a substantial connection is if the company's center of main interest is in Singapore, or if it conducts some business in Singapore. Ms. TAN further explained that the amendments also introduced into Singapore law the United Nations Commission on International Trade Law (UNCITRAL) model law on cross-border insolvency, which facilitated the recognition of cross-border insolvency in Singapore.

Taken together, these amendments significantly improved the legal framework for undertaking major debt restructuring in Singapore and the ease with which foreign companies can access these improved procedures.

In 2018, Singapore introduced the Insolvency Restructuring and Dissolution Act to consolidate its personal and corporate insolvency regime. This act also established a new regulatory framework for the licensing of insolvency practitioners to try and raise the overall standards of the country's insolvency practitioners.

According to Ms. TAN, in 2021, as part of Singapore's response to assist businesses facing financial distress due to the COVID-19 pandemic, the country introduced a simplified insolvency program to provide a simpler, faster, and lower cost venue for micro and small companies to restructure their debt if they are still viable, or to wind up their businesses if they are no longer viable. The application period for this program has recently been extended to 28 January 2024.[1]

These legislative changes, taken together, have helped to position Singapore as a restructuring and insolvency jurisdiction of choice in the region, particularly in specialized sectors such as the restructuring of cryptocurrency platforms. Recently, crypto platforms like Zipmex sought for insolvency protection in Singapore.[2] Hodlnaut was also placed under interim judicial management by the Singapore courts in August 2022.[3]

Professor Gurrea-Martinez then turned to Hong Kong, which he described as interesting because it is one of the few advanced economies in the world that does not have a formal reorganization procedure. Instead, Hong Kong only has a scheme of arrangement sometimes used in conjunction with provisional liquidation. Parties in Hong Kong can thus get the moratorium with the provisional liquidation procedure, as well as the majority rule that the scheme of arrangement provides.

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1 Per communication received from Ms. Tan in November 2023.
2 *Re: Zipmex Co. Ltd.*, [2022] SGHC 196, 17 August 2022.
3 *Re: Hodlnaut Pte. Ltd.*, [2022] SGHC 209, 29 August 2022.

Aurelio Gurrea-Martinez, Associate Professor of Law and Head of the Singapore Global Restructuring Initiative, Singapore Management University, asks about Hong Kong's formal reorganization procedure (photo by Paola Aseron-Dacanay/ADB).

Professor Gurrea-Martinez asked Mr. Ma for his opinion on why Hong Kong has yet to adopt a formal reorganization procedure and how it supports companies in financial distress. He added that Hong Kong has been debating for so many years about the need to introduce a formal corporate rescue procedure, and inquired about the state of the debate now.

Mr. Ma responded that the proposal to enact a statutory regime for corporate rescue was made in 1996 by the Law Reform Commission of Hong Kong. Bills were introduced into the Legislative Council in 2000 and 2001 but they did not pass into law.

In those days, the main sticking point was how the entitlements of employees should be handled. In 2003, the government proposed certain revisions to the initial proposals. But the response at that time was lukewarm and so the whole thing was shelved as a result. It was not until around 2009, after the collapse of Lehman Brothers and the ensuing financial crisis, that the government revisited the legislative proposal. It conducted a public consultation exercise in the same year and published detailed proposals in 2014.

According to Mr. Ma, after numerous engagement exercises and targeted consultations, the government announced in late 2020 that it planned to introduce an updated bill into the Legislative Council in early 2021. Two years later, they are still waiting. He believes that the government officials in charge have the political will to make progress and to effect changes, but they need to overcome various practical hurdles.

As an example, Mr. Ma referred to the Corporate Rescue Bill. As it is substantial and complicated, the Legislative Council will need to devote considerable resources to scrutinize it. This can be a challenge for Hong Kong at the moment given that, understandably, the Legislative Council

Mr. Ma discusses Hong Kong's legal framework (photo by Paola Aseron-Dacanay/ADB).

is more inclined to afford priority to those items in the legislative agenda which have constitutional significance. He added that issues with constitutional significance have increased in the last few years for Hong Kong.

Secondly, Mr. Ma thought it is probably fair to say that, traditionally, Hong Kong is a more creditor-friendly jurisdiction. Any initiative that is seen to have the potential to affect the interests of creditors can easily become sensitive.

To illustrate the point, Mr. Ma said that earlier in 2022, the government announced a plan to enact a rental enforcement moratorium with regard to the tenancies of certain types of business premises. In short, the idea was to suspend the landlords' right to take action against the tenants based on outstanding rental. The suspension was meant to only last for several months, and was intended as one of the government's measures to support business owners who were hit hard by the pandemic. This objective seemed reasonable but the proposal generated widespread controversy. It was enacted in the end but only after the government conceded on certain features of the proposal.

With corporate rescue being an even more substantial topic, Mr. Ma believes that it is quite conceivable that the government will need to explain more, and will need to lobby even more.

Mr. Ma said that he supports the enactment of corporate rescue legislation. He remarked that the very existence of such legislation can hopefully promote a rescue culture in Hong Kong. The solid legislative foundation of the new regime will be an advantage, in his opinion, compared with the hybrid procedure that was mentioned with scheme of arrangements and provisional liquidation. However, he noted that it will probably take much time for the market and for insolvency practitioners to familiarize themselves with a new regime.

Professor Gurrea-Martinez then turned to the Australian experience. He mentioned that the Australian Treasury announced in 2021 that they might consider the possibility of adopting some provisions from the US Chapter 11 regime in their current scheme of arrangement. Professor Gurrea-Martinez noted that this approach sounds similar to the way Singapore went about insolvency reform.

Professor Gurrea-Martinez further remarked that other jurisdictions have adopted a different approach. For example, the UK decided to enhance the restructuring framework, but did not touch the scheme of arrangement. Instead, it enacted a new procedure called a restructuring plan.

Professor Gurrea-Martinez asked Mr. Atkins what approach, in his opinion, would work in Australia:

- The Singapore approach, i.e., strengthening the existing scheme of arrangement, with some provisions from Chapter 11; or
- The UK approach, i.e. enacting a new procedure; or
- Abolition of all the country's existing procedures, followed by adopting directly all of Chapter 11. Professor Gurrea-Martinez mentioned that many countries have in fact adopted this approach.

Mr. Atkins responded that if he were to type that question into ChatGPT, the program might respond that Australia needs to undertake a review of its insolvency laws. Mr. Atkins explained that when he was President of the Australian Restructuring Insolvency and Turnaround Association (ARITA), the organization took the proposition to the then Attorney General. ARITA subsequently gave the Attorney General its proposal, after the latter expressed interest, but they never heard from him again. Mr. Atkins thus cautioned that reforms are accomplished slowly and may take some time.

Scott Atkins, President of INSOL International and Global Co-Head of Restructuring of Norton Rose Fulbright, explains insolvency processes in Australia (photo by Paola Aseron-Dacanay/ADB).

Mr. Atkins further said that the panel gave an excellent framing of the reforms in Singapore, and Professor Gurrea-Martinez offered very good insights on the UK position. Mr. Atkins noted that Australia, Singapore, the UK, and other jurisdictions have a long tradition of learning from one another on the insolvency reform front. He added that he understands that some of the recent innovations introduced in Singapore's laws were inspired by developments in Australia. It is not surprising that the Australian government's August 2021 proposal to review and consider reforms regarding the country's scheme of arrangement was inspired by the cross-class cram down and the possibility of a moratorium, neither of which are currently in Australia's existing scheme laws.

Mr. Atkins said he is uncertain why the consultation process in Australia has seemingly stalled. When the proposal came out to consider these two modifications, Mr. Atkins' review of the submissions that were lodged (including Norton Rose Fulbright's) showed that these submissions were consistently in favor of introducing innovations. The proposals were relatively uncontroversial, especially the moratorium upon implementation or development of a scheme. Furthermore, the cross-class cram down mechanism seemed to have been received with fair favor in jurisdictions. These innovations are subject to oversight by the court, securing in place a very clear safety valve in relation to the implementation and administration of that process.

Mr. Atkins said it is quite possible that this particular initiative has been deferred for now, considering the government's other priorities. It may ultimately get caught up in the root and branch review if that is what comes out of the latest parliamentary inquiry.

Mr. Atkins opined that the innovation on both fronts—the cross-class cram down and the moratorium—make a lot of sense. Australia has not modernized schemes for a long time. The scheme of arrangement is not heavily used in the market typically because of the cost of developing, administering, and seeking court approval of the same. The process is expensive and appears to be the reserve and the preserve of larger listed corporations. However, in the Australian market, most insolvency and restructuring activity occurs in the mid-market segment.

Mr. Atkins admitted that the unavailability of a cross-class cram down and an automatic moratorium means that the scheme will not be deployed more broadly across the market at present. The scheme nevertheless is still a critical tool. He referenced Mr. Uttamchandani's insights in relation to single-entry, dual-entry, and multi-entry points. He noted that Australia has a formal insolvency process—in the form of liquidation and voluntary administration—and safe harbor, which is not formal per se. Against this framework, the scheme process, if it can be categorized as a hybrid, certainly has an important role to play in the Australian market.

Mr. Atkins concluded that some of the more complex, complicated, prolonged, and economically significant restructurings that have occurred over the past 20 to 30 years were deployed through Australia's scheme mechanism. It therefore has an important place in the country's overall toolkit. Similarly, in Mr. Atkins' opinion, the modifications are also good news.

Professor Gurrea-Martinez then turned to the adoption of pre-packs around the world. He mentioned that the idea started in the US and has always been very popular there, as well as in the UK. Other countries have also adopted this scheme of arrangement, such as the Philippines and Singapore, and, more recently, India and Spain. Likewise, many countries in Latin America have adopted pre-packs.

Professor Gurrea-Martinez then asked Professor Casey about the US experience, as well as the benefits and risks of pre-packs.

Aurelio Gurrea-Martinez, Associate Professor of Law and Head of the Singapore Global Restructuring Initiative, Singapore Management University, asks about pre-packs (photo by Paola Aseron-Dacanay/ADB).

Professor Casey responded that pre-packs have been around in the US for at least 30 years. It was first used in the late 1980s and 1990s, although the number of pre-packs filed have significantly increased starting 2007 or 2008.

Related to the pre-pack is the restructuring support agreement, which often forms part of a pre-pack or is made prior to a pre-arranged bankruptcy. Restructuring support agreements have also shown a very steep increase in the last 15 years.

Professor Casey observed that the pre-pack does succeed at speeding up the bankruptcy process. Parties may have these negotiations outside of bankruptcy and, in the time leading up to filing, get the votes in place and everyone on board the plan. When they file, the votes are already secured. The parties cannot do much after that point.

Professor Casey remarked that pre-packs are a good fit for a certain type of bankruptcy, i.e., bankruptcies where a party needs to get the financials restructured. Pre-packs allow parties to do that behind the scenes before filing, without getting the court to jump into the operations of the business. Parties need that stamp of approval at the end of the day, but they do not need the court getting involved from the first day of negotiation.

Professor Casey said that it was interesting that Professor Gurrea-Martinez asked about benefits and costs. He mentioned that in the last five years, the speed of cases has been accelerating. A record 24-hour bankruptcy had been in the headlines, which record was broken subsequently with a 20-hour bankruptcy.[4]

According to Professor Casey, the US Trustee often objected to much longer pre-packaged bankruptcies. Now, with these one-day bankruptcies, the US Trustee is bound to ask how the court can do anything if the issue is in front of the judge for only 20 hours. The US Trustee may argue that there are due process issues if the judge does not get involved until everything is wrapped up, yet only has 20 hours to deal with the issue once he or she does get jurisdiction.

[4] *In re Belk, Inc.*, Case No. 21-30630 (MI) (Bankr. S.D. Tex. 2021) *and In re Mood Media Corporation*, Case No. 20-33768 (MI) (Bankr. S.D. Tex. 2020).

Anthony Casey, Deputy Dean and Donald Ephraim Professor of Law and Economics at The University of Chicago Law School, talks about speed acceleration in some US bankruptcy cases (photo by Paola Aseron-Dacanay/ADB).

Professor Casey thought that the US Trustee's objection is worth considering, as well as the idea that the class or the parties, many of whom are unimpaired, have already voted. However, ultimately, everything has costs and benefits. The costs in this situation are late notice, the class not fully knowing what they are signing up for, and not having the judge oversee the process.

Professor Casey circled back to the question of how much oversight is needed for negotiation. With regard to aggressive creditors or aggressive debtors negotiating outside of court, he asked whether there is a reason to think that conducting negotiations outside of court will lead to a really bad outcome. If so, then a 20-hour pre-pack will produce that same outcome—just without any oversight. He opined that parties need to arrive at what the market can accept, and likewise underscored the importance of judicial oversight.

According to Professor Casey, an argument could even be made on whether parties need 20 hours at all. A party may just have to check a box if everyone agrees and the negotiations have met certain conditions. He remarked that Chapter 11 may have evolved into this kind of approach.

Finally, Professor Casey was skeptical that the US Trustee's objections are as dire as they are made out to be. He believes that, in many of these cases, pre-packs are valuable time-saving mechanisms. Broadly speaking, if the background market rules are reliable, pre-packs are going to be very positive devices.

Professor Gurrea-Martinez then asked Ms. TAN to discuss Singapore's experience with pre-packs, as they are among the reforms that Singapore adopted in 2017.

Ms. TAN responded that since the implementation of pre-packs, Singapore observed the successful implementation of quite a number of cases, starting with the first quarter-proof pre-pack scheme for a Malaysian video streaming service called iFlix in January 2021.[5]

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[5] *Re: iFlix Pte. Ltd.*, SGHC 1168/2020.

Ms. TAN explained that this case was held as a groundbreaking transaction, rewriting the restructuring playbook in Singapore by allowing a distressed company to restructure their debts efficiently.

She said that Singapore's experience has shown that if a debtor company's management, creditors, and professional advisors are prepared to act boldly and quickly to rescue the debtor company, pre-packs can help to achieve success and positive outcomes for stakeholders. Ms. TAN cited the example of Singapore's Pacific International Lines, Southeast Asia's largest carrier. The company's restructuring of its $3.3 billion debt was completed swiftly and with minimum fanfare through a pre-pack scheme in just under four months.[6]

Yu-Wen TAN, Director, Insolvency Division of Insolvency and Public Trustee's Office, Singapore, discusses Singapore's experience with pre-packs, as they are among the reforms that Singapore adopted in 2017 (photo by Paola Aseron-Dacanay/ADB).

She also noted a trend whereby foreign companies in the region increasingly prefer to use Singapore courts and the country's restructuring and solvency laws to structure offshore debts, as it can be done efficiently through pre-pack schemes. For example, two Indonesian conglomerates, MNC Investment[7] and Modernland Reality,[8] have chosen to restructure their debts in Singapore via pre-pack schemes.

Ms. TAN concluded that Singapore's experience with pre-packs has been positive and have led to more efficient negotiations between the debtor company and its creditors, benefiting all stakeholders.

Professor Gurrea-Martinez then asked for Mr. Ma's views on whether, as part of the potential insolvency law reform in Hong Kong, he would be in favor of adopting some forms of pre-packs.

Mr. Ma responded that in terms of the prevailing market practice, he sees, at least, some elements of pre-negotiated restructuring in Hong Kong. Quite often a scheme of arrangement will be promoted only after securing a sufficiently high level of creditor support. Having said that, Mr. Ma stated that the norm in Hong Kong at the moment is for such restructuring negotiations to be handled by a professional liquidator as opposed to the debtor company's Board of Directors.

6 *Re: Pacific International Lines (Pte) Ltd.*, SGHC 106/2021.
7 *Re: PT MNC Investama TBK.*, SGHC 149/2020.
8 *Re: PT Modernland Realty TBK.*, SGHC 960/2020.

He thinks that this may have to do partly with the pro-creditor culture in Hong Kong. Creditors tend to trust an insolvency practitioner to broker a deal more than the directors.

Edmund Ma, Senior Associate at Baker McKenzie, speaks about legislative proposals for corporate rescue in Hong Kong.

Mr. Ma opined that he would prefer to see more options in Hong Kong's toolkits to deal with financial distress. In his view, pre-packs would be a very welcome addition to the existing choices. He anticipates that if Hong Kong were to adopt any form of pre-packs in the future, it will more likely be drawing on the English law model than that of US law, at least before Hong Kong has a mature legislative regime and culture for corporate rescue.

At the same time, Mr. Ma said that based on the experience of other jurisdictions, some degree of regulation is justified to avoid abuse of pre-packs. If pre-packs were to be adopted in Hong Kong, he said that the experience abroad would be very helpful.

Professor Gurrea-Martinez then turned to Mr. Atkins to clarify why Australia is seemingly skeptical about pre-packs. He also asked for his views on whether the adoption of a pre-pack tool—whether US- or UK-style pre-pack—could be a desirable development for Australia.

Mr. Atkins answered that not only is Australia skeptical, it even implemented laws recently to discourage pre-packs. Mr. Atkins again made reference to Australia's past as a penal colony. Consequently, the country is very suspicious of activities of a commercial nature unless they are absolutely transparent. He believes this is the concern, along with some of Australia's legislative provisions, driving resistance to pre-packs.

For instance, Australia has very stringent requirements regarding independence of insolvency practitioners. These requirements are sometimes prohibitive of the insolvency practitioner's ability to pre-negotiate arrangements that can lead to a successful sale. In many situations, independence obligations coming out of the Corporations Act are strictly enforced.

Second, Australia imposes a very strong obligation about obtaining market price when selling or disposing any asset. Australian law has mechanisms regarding the assessment of market price. If the asset does not have a market, how will the price be determined? It is believed that pursuing a pre-pack does not enable a party to test the market in a way that is consistent with the legal obligation to do so.

Third, parties are greatly concerned about public policy and phoenixing activity. Considerable efforts have been made to try to stamp out phoenixing activity, including a February 2020 law that was introduced to discourage phoenixing arrangements.[9] The law is so stringent that directors or other persons who cause a company to make a creditor-defeating disposition are exposed to civil and criminal penalties.

When a new law comes in, parties like to test it. Mr. Atkins referenced Re Intellicoms, a May 2022 case that was Australia's first decision under the anti-phoenixing law.[10] The agreement was a pre-pack style transaction, which the judge found to have been entered into hours before the company was placed into voluntary liquidation. The arrangement was described as having all the hallmarks of a classic phoenixing transaction, designed simply to transfer valuable assets to related parties of the directors.

Mr. Atkins commented that cases like this simply set the Australian approach or consideration of pre-packs back in measurable decades. Parties in the market therefore have no appetite at the moment to pursue pre-packs.

However, Mr. Atkins noted that some examples of more complex schemes of arrangement that look like a pre-pack, smell like a pre-pack, but do not necessarily quack like a pre-pack have

Scott Atkins, President of INSOL International and Global Co-Head of Restructuring of Norton Rose Fulbright, explains about insolvency processes in Australia (photo by Paola Aseron-Dacanay/ADB).

9 The Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020 (Cth).
10 *Re Intellicomms Pty Ltd (in liq.)* [2022] VSC 228.

been approved by courts. But he suggested that it is with great caution that anybody would embark upon a pre-pack transaction in the Australian marketplace.

As for his own view, Mr. Atkins said that the restrictions in Australia are such that the country would need wholesale reform of the approach to pre-packs before they could be propounded. While he does not want to be so negative about the opportunities for pre-packing in Australia, the reality is that they have not moved on all that much in the past 20 years, with pre-packs having been the subject of so much discussion.

Professor Gurrea-Martinez then turned to the various types of pre-packs. First, pre-negotiating bankruptcy involves debtors talking to creditors in advance and then filing for bankruptcy. On the other hand, formal pre-packs are of two main types. In the US-style pre-pack, the debtor solicits and secures the votes prior to filing for bankruptcy. It is a pre-packaged debt restructuring or a pre-packaged reorganization. Singapore adopted the US-style pre-pack. In contrast, the UK-style pre-pack typically consists of a pre-packaged sale of assets, i.e., it is a pre-packaged going-concern sale, where one pre-arranges the sale, then appoints an administrator. The administrator will then sell the assets.

Professor Gurrea-Martinez asked Mr. Uttamchandani, with his experience in providing technical assistance to countries to reform their insolvency frameworks, whether the US pre-pack is better than the UK pre-pack. He also asked whether countries are more skeptical about the UK-style pre-pack than the US-style pre-pack. Lastly, he asked about the main market and institutional factors that should be considered when adopting one of these different forms of pre-packs.

In order for pre-packs to become a frequently used tool, **Mr. Uttamchandani** noted that deep financial markets are basic building blocks for both types of pre-packs. Typically, only a balance sheet restructuring—and not an operational restructuring—will be done. This is only going to work if the jurisdiction has relatively sophisticated financial markets.
According to Mr. Uttamchandani, a very competent and well-resourced bench is needed to hear cases relatively quickly and interpret the evidence, particularly the financial evidence to make sure that ordinary processes are not being circumvented. Pre-packs require a fair degree of sophistication among the various advisors and a business culture of hiring the right lawyers, insolvency advisors, and financial advisors, who will sit around a table and put these packages together. This implies businesses of a certain size and scale in the market.

He likewise believes that pre-packs require a reasonably decent degree of trust in the business community between debtors and creditors. At this juncture, Mr. Uttamchandani differentiated between developed and developing countries. He explained that in the developing country context, insolvency is often seen presumptively as fraud, which is not the case in a lot of economically larger jurisdictions.

Given all of these things that make pre-packs work at scale, Mr. Uttamchandani asserted that only a handful of countries could perceive pre-packs as a useful tool at servicing a big part of the marketplace. The World Bank's view is that countries ought to have the full suite of tools available to debtors and creditors. The World Bank has found that so-called preventive restructuring procedures tend to be much more popular than pre-packs for adoption in emerging markets.

Mr. Uttamchandani believes that the reason is that preventive restructuring procedures tend to be more closely supervised processes. The system requires the debtor to come to the table and initiate a process when it is legally solvent—an important element. It requires the submission of the debtor to a process that is public and court-dominated, as opposed to private negotiations that ultimately lead to some kind of court stamp of approval. This type of procedure tends to operate better in low trust environments. While it puts a burden on the courts, it takes advantage of functions judges are more commonly used to dealing with, rather than interpreting complex business deals that have been negotiated and then put forward to them for a very limited time.

Mahesh Uttamchandani, Manager for Digital Development at the World Bank, responds to a question about the optimal model in designing formal insolvency proceedings.

Mr. Uttamchandani underscored that it is necessary to advocate for the full suite of tools, and certainly for some kind of pre-insolvency proceeding. But he reiterated that a preventive restructuring—a more court-supervised process—or one where a insolvency practitioner might be appointed as an officer of the court, tends to be more popular in developing countries.

He admitted that this discussion might be a little academic for several countries; after all, what ultimately matters is that companies can be liquidated effectively. This is not to say that restructuring provisions are not needed. However, for the insolvency process to work well, countries need an effective and efficient restructure or liquidation that allows both re-entry into the market in a productive way and the creditors maximizing their access to and their recoveries from the assets. Furthermore, it should not allow the proliferation of zombie companies.

Finally, Mr. Uttamchandani highlighted that the taxonomy of countries around the world in terms of market sophistication and average size of the firm indicates different needs at different points. Pre-packs and preventive restructurings may work for a certain size of country or certain size of market, but may be functionally irrelevant in a lot of lower income countries.

QUESTION-AND-ANSWER WITH THE AUDIENCE

Professor Gurrea-Martinez asked the audience if they have any questions or comments for the panelists.

Professor Jason Harris, Professor of Corporate Law at the University of Sydney Law School, asked about the Singapore experience with simplified restructuring, which has been extended until 2024. Professor Harris asked Ms. TAN if there has been popular uptake of the extension. He contextualized his question by referring to the Australian experience, where simplified liquidations have not really worked.

Jason Harris, Professor of Corporate Law at the University of Sydney Law School, asks Ms. Yu-Wen TAN a question (photo by Paola Aseron-Dacanay/ADB).

Ms. TAN responded that the simplified insolvency program is a temporary measure introduced during the COVID-19 pandemic period. The pickup rate has been modest, especially for the simplified restructuring program.

One possible reason is the cost aspect. A number of potential applicants gave feedback that they felt that the simplified restructuring program was too costly, and they would rather use the monies to repay their outstanding loans.

The availability of government assistance schemes to assist micro and small companies during the COVID-19 pandemic period may also explain the modest uptake. These schemes had helped micro and small companies to stay afloat and avoid financial distress.

Yu Wen TAN responds to Professor Jason Harris' question (photo by Paola Aseron-Dacanay/ADB).

Ms. TAN noted that the program has been extended to 2024 as they foresee—especially with the rising inflation and the macroeconomic situation—that there could be more micro and small companies going into distress in 2023 and 2024. Ms. TAN added that there are plans to make certain features of the simplified insolvency program permanent.

Port of Suva, Fiji (photo by Eric Sales/ADB).

PANEL 3

GOVERNANCE OF INSOLVENCY AND RESTRUCTURING PROCEDURES: DEBTOR IN POSSESSION, INSOLVENCY PRACTITIONER, OR HYBRID MODEL?

05

PANEL DISCUSSION






Chair:

ADRIANA ROBERTSON
Donald N. Pritzker Professor of Business Law, The University of Chicago Law School

Panelists:

JARED ELLIAS
Professor of Law, Harvard Law School

KOTARO FUJI
Counsel, Nishimura & Asahi

AURELIO GURREA-MARTINEZ
Associate Professor of Law and Head of the Singapore Global Restructuring Initiative, Singapore Management University

WAI YEE WAN
Associate Dean (Research and Internationalisation) and Professor at the School of Law, City University of Hong Kong

PAUL ZUMBRO
Partner at Cravath, Swaine & Moore LLP

Professor Adriana Robertson, Donald N. Pritzker Professor of Business Law at The University of Chicago Law School, chaired Panel 3.

Professor Robertson provided an overview of the panel's topic. Specifically, the panel would discuss the primary governance models for insolvency and restructuring regimes, as well as the legal, market, and institutional factors that impact the optimal selection of these models.

The chairperson and panelists for Panel 3 (photo by Paola Aseron-Dacanay/ADB).

She introduced the panelists:

- **Mr. Paul Zumbro**, partner at Cravath Swaine & Moore LLP;
- **Professor Jared Ellias**, Professor of Law at Harvard Law School;
- **Mr. Kotaro Fuji**, counsel at Nishimura & Asahi;
- **Professor Wai-Yee WAN**, Professor of Law! and Associate Dean at the University of Hong Kong; and
- **Professor Aurelio Gurrea-Martinez**, Assistant Professor of Law at the Singapore Management University.

Professor Robertson outlined the three broad categories of governance models for insolvency and restructuring regimes. The first is the debtor-in-possession (DIP) model, where the company management continues to run the company. The second involves the appointment of an insolvency practitioner, trustee, or administrator to replace the management team. The third is a hybrid model where a monitor is appointed to oversee the management as they run the company. Professor Robertson stated that the panel would discuss the advantages and disadvantages of each system.

Professor Robertson noted that the DIP model is uncommon outside of the United States (US). She asked Mr. Zumbro to discuss its benefits and risks.

Mr. Zumbro began by saying that it is important to think about what the DIP model is and what it is not. He noted that parties may have misconceptions about the model in the US.

Scan the QR code to watch Panel 3 video on YouTube.


Paul Zumbro, Partner at Cravath Swaine & Moore LLP, explains the debtor-in-possession model (photo by Paola Aseron-Dacanay/ADB).

According to Mr. Zumbro, the US has a tendency to favor restructurings over liquidations whenever possible, which is the basis of the DIP model. The goal is to restructure the company and preserve as many jobs and economic value as possible. Existing management is retained to manage the company throughout the restructuring process. This approach is based on the belief that current management possesses a level of understanding of the business that an insolvency practitioner simply cannot match, even with ample time to come up to speed. The existing management is better equipped to maintain continuity not only with creditors but also with employees, vendors, government regulators, and other stakeholders.

However, existing management should not expect business as usual. Mr. Zumbro noted that once a debtor enters bankruptcy and becomes a debtor-in-possession, significant changes occur. The debtor is not only in possession but is also subject to a high level of transparency and reporting requirements. Importantly, any significant decisions that the company wants to make while in bankruptcy require notice to creditors and a court hearing. Therefore, the management is not operating in a vacuum, as some may perceive.

According to Mr. Zumbro, US bankruptcy judges are skilled at monitoring management and keeping it in check if they get the sense that things are going off the rails. Additionally, the US has creditor committees appointed by the court, whose lawyers and financial advisors are paid for by the estate, providing an additional check on management.

However, Mr. Zumbro stated that there may be situations where current management must be replaced. He referenced the FTX case where all management was terminated and an insolvency professional assumed control. The appointment of a trustee is also a possibility, although this is uncommon in the US. Trustees are primarily utilized for liquidations rather than restructurings.

A Chief Restructuring Officer (CRO) or other restructuring professionals can also come in and report to the board. They do not displace but complement existing management, bringing in a skill set that the latter may not have. The CRO deals with the restructuring components while management continues to run the business. In this sense, this approach is hybrid in nature. The CRO is not a court appointee but an officer of the company.

Finally, an examiner can be appointed. Typically, an examiner focuses on analyzing what happened, why things went wrong, and how the debtor arrived at this situation. Their role is not to shepherd the company through a restructuring.

Mr. Zumbro stated that the US DIP model is effective within the context of the US legal framework. It requires transparency and a well-functioning judiciary to oversee it. However, it may not be suitable for other jurisdictions.

Mr. Zumbro quoted Winston Churchill's famous remark: "Democracy is the worst form of government except all others that have been tried." He believes that this quote perfectly captures the essence of the DIP system.

Mr. Zumbro explained that although some may believe that the "bums" or directors are responsible for the company's bankruptcy and should be removed, the truth is that in most cases, the best course of action to maximize value is to retain the current management. He concluded that companies sometimes need to retain directors to maintain knowledge, relationships, and continuity for the best possible outcome.

Professor Robertson turned to Professor Ellias and recounted taking a class with Professor Richard Squire almost 10 years ago on the transformation of corporate bankruptcy. She believes that the transformation has continued since then and thinks that, in addition to Professor Squire, Professor Ellias is the best-suited person to discuss some of those changes.

She asked Professor Ellias, who extensively studied governance problems that can arise in a DIP model, about his practical insights on this issue.

Professor Ellias responded that the fundamental issue with the DIP framework is that it is often unclear who the debtor-in-possession (i.e. management) is supposed to serve. It is unclear whose interests should be prioritized, and whose opinions matter the most, whether those of the creditors or shareholders.

He stated that when a company enters bankruptcy, it is often unclear what the firm's value will be at the end of the case. The company has various potential insolvency transactions that it can undertake to try to restructure, but lacks a clear framework to guide its decisions. This ambiguity gives the management, which controls the company, significant discretion in using its power over the bankruptcy process to make different choices.

Critics often accuse managers of favoring certain creditors over others. However, according to Professor Ellias, these choices can often be justified. Management likely has a reason for selecting one transaction over another, and it can be difficult to interrogate these assumptions, even for experienced bankruptcy judges. He observed

Jared Ellias, Professor of Law at Harvard Law School, discusses the complications of the debtor-in-possession model (photo by Paola Aseron-Dacanay/ADB).

that these deals are numerous and it is very difficult to push back on management's judgment. Thus, the question of exactly who management ought to work for looms large over any debtor-in-possession system.

Professor Ellias stated that this creates distortions and gives management the power to choose from a menu of transactions and enrich themselves in the process. Managers are often charged with taking side payments in exchange for doing the bidding of one group of creditors or another. Due to this range of discretion, there will be a fight over control as creditors compete for management alignment or favor. Policing these issues can be difficult, even with the involvement of sophisticated bankruptcy judges.

According to Professor Ellias, another issue is that an uneasy marriage arises between corporate law and bankruptcy law. When a company ends up in bankruptcy, it still has to contend with the structure created by corporate law. This means that fundamental business decisions remain with the board, while managers can make day-to-day decisions. However, any actions outside the ordinary course of business require court permission.

Professor Ellias then posed the question of who the board works for. He noted that this is a version of the same problem. Is the board merely there to offer suggestions and the bankruptcy judge makes the final decision, or does it work for itself? Often, fiduciary duty law does not do very much in bankruptcy. When a bankruptcy judge decides a certain act is the right thing to do, attacking this decision retroactively (by saying that it is a violation of fiduciary duty) becomes very challenging.

Professor Ellias mentioned significant governance problems, citing recent developments discussed by Professor Anthony Casey in Panel 2. These include an increase in debtor-in-possession financing transactions where the bank making the loans dictates the restructuring transaction. He stated that this is frequently criticized in his work, as well as in others, as an improper assignment of the control or discretion vested in management to a subgroup of creditors, possibly at the expense of others.

Recently, there has been an effort to revive the board of directors and empower them, potentially at the expense of court proceedings. This has taken the form of elevating the role of independent directors in Chapter 11 bankruptcies and presenting judges with conclusions of purportedly independent investigations. Judges are then asked to evaluate these findings using the business judgment rule, rather than evaluating them based on their substance. Professor Ellias added that this raises questions about the role of the judge in supervising discretion and when the judge should defer to management's decisions.

Professor Robertson then turned to Mr. Fuji and asked him to describe the governance model in insolvency and restructuring regimes in Japan.

Mr. Fuji discussed two types of formal insolvency proceedings for restructuring companies in Japan: civil rehabilitation proceedings and corporate reorganization proceedings.

Civil rehabilitation proceedings are a simple and quick process, while corporate reorganization is more complicated but has greater binding power on relevant parties. According to Mr. Fuji, one of the main differences between these two proceedings is their governance. Civil rehabilitation follows a DIP or hybrid model, while corporate reorganization follows an insolvency practitioner model.

Kotaro Fuji, Counsel at Nishimura & Asahi, gives a backgrounder on formal insolvency proceedings in Japan (photo by Paola Aseron-Dacanay/ADB).

In civil rehabilitation, the court does not appoint a trustee or insolvency practitioner, and the debtor's management retains control over the business. Although the law does not require the appointment of a supervisor, in practice, the court almost always appoints one to ensure transparency. Therefore, civil rehabilitation can be considered a hybrid model.

On the other hand, for corporate reorganization, the court appoints trustees from independent third parties such as lawyers or turnaround professionals. According to Mr. Fuji, corporate reorganization has a long history. It was enacted in 1952 and, at that time, corporate reorganization was almost the only option for corporate restructuring. However, in 2000, civil rehabilitation was introduced based on the Chapter 11 framework of the US.

Civil rehabilitation has become increasingly popular in Japan. Mr. Fuji opined that this is due in part to practitioners recognizing the efficiency of the DIP aspect of civil rehabilitation in quickly restructuring a debtor company's business and preserving its going concern value. He added that civil rehabilitation shares the same benefits as the US Chapter 11 DIP model. Therefore, the advantages previously explained by Mr. Zumbro are also applicable to civil rehabilitation in Japan.

Sometimes, management may hesitate to put a company into insolvency, even if it seems like the most reasonable option, because they do not want to give up control. Mr. Fuji suggested that civil rehabilitation may reduce this disincentive and facilitate earlier decisions to file for insolvency, maximizing distribution to creditors.

Professor Robertson then mentioned that Professor WAN analyzed the insolvency regimes in Hong Kong, India, the People's Republic of China (PRC), and Singapore in her scholarship. She asked Professor WAN to describe the governance models in these jurisdictions and whether they have a DIP model, an insolvency practitioner model, or a hybrid model.

Professor WAN answered that the US DIP model is a rarity in Asia. Singapore adopted the DIP model in 2017, which is an exception.

Professor WAN described Hong Kong's insolvency regime. Hong Kong is a creditor-driven jurisdiction without a formal corporate rescue framework, making it an insolvency practitioner model. A practitioner is appointed once the company goes into financial distress and creditors are able to enforce. Hong Kong, like other common law jurisdictions, also has a scheme of arrangement. However, without a formal rescue regime, a restructuring involving both financial and operational creditors would require a stay of proceedings. To obtain this stay, the company must be put into professional liquidation, making the Hong Kong regime an insolvency practitioner model.

Hong Kong is unique in that about 75% of the large companies listed on the Hong Kong Stock Exchange are incorporated in the Caribbean Islands, the Cayman Islands, and Bermuda. Professor WAN noted that this is relevant because these jurisdictions allow for a soft touch or light touch liquidation. The model is based on an insolvency practitioner framework, but it allows for some degree of management control over day-to-day operations with the practitioner's supervision. This is why parties can undertake some restructuring.

Wai Yee WAN, Associate Dean (Research and Internationalisation) and Professor at the City University of Hong Kong, describes Hong Kong's insolvency regime (photo by Paola Aseron-Dacanay/ADB).

Professor WAN described the insolvency regimes for the PRC and India. In India, the Corporate Insolvency Resolution Process (CIRP) involves the appointment of a resolution professional. Similarly, the PRC also follows an insolvency practitioner model with the appointment of an administrator as part of the restructuring process. Professor WAN stated that the PRC has a unique hybrid model where, with court permission, the debtor can maintain some day-to-day control over the assets and drive the restructuring.

Professor WAN circled back to her earlier point that the DIP model is rarely found in Asia, with Singapore as the exception. Singapore's version of the DIP model is unlike the UK model, as there is no monitor with oversight functions should a party want to get a stay.

Professor Robertson then turned to Professor Gurrea-Martinez. She said that Professor Gurrea-Martinez's academic work has identified a variety of country- and firm-specific factors that can affect the optimal governance model of insolvency and restructuring procedures. She asked him if he could share those factors.

Professor Gurrea-Martinez responded that sometimes many academic and policy debates focus on the pros and cons of different governance models of insolvency proceedings (such as a the debtor-in-possession, insolvency practitioner model, and hybrid models) without taking into account the particular features of the country.

He mentioned that one of the country-specific factors that may affect the optimal governance model of insolvency proceedings is the level of sophistication of insolvency practitioners. Professor Gurrea-Martinez said that it is important to analyze whether the insolvency practitioners in a country have the credibility, independence, expertise, and experience to manage a company in distress or even to supervise the company. He believes that, unfortunately, not many countries have a sophisticated body of insolvency practitioners. If so, the appointment of an insolvency practitioner may end up doing more harm than good because they are not adding value and can reduce the pie available for distribution to the creditors due to their fees. Therefore, a governance model of insolvency proceedings based on the mandatory appointment of an insolvency practitioner might not be a good idea.

Professor Gurrea-Martinez mentioned that another country-specific or sometimes firm-specific factor that may affect the optimal governance model of insolvency proceedings is the corporate ownership structure prevailing in a country. For example, in the US, most listed companies have dispersed ownership structures. They do not have the controlling shareholders typically found in most companies in Africa, Asia, Europe, or Latin America. The only exceptions are generally found in companies with dual-class share structures.

Professor Gurrea-Martinez mentioned that understanding the corporate ownership structure is relevant because it can affect the risk of shareholder opportunism. When a company becomes insolvent, the shareholders may have incentives to gamble for resurrection or to deviate assets. Or, particularly in the context of micro- and small-enterprises, the shareholders may want to keep a non-viable firm alive because they might not even know that the company is no longer viable due to the lack of access to professional advice. This situation can destroy value even if the shareholders do not act in bad faith.

Aurelio Gurrea-Martinez, Assistant Professor of Law and Head of the Singapore Global Restructuring Initiative at the Singapore Management University, explains country-specific and firm-specific factors to consider in analyzing different governance models (photo by Paola Aseron-Dacanay/ADB).

Professor Gurrea-Martinez explained that, if a company has a controlling shareholder, the shareholders will be part of the management or they will be closely influencing the management. Therefore, the appointment of an insolvency practitioner, even in a monitoring capacity, may be justified as a means of reducing the risk of opportunistic behavior of shareholder towards creditors.

He discussed one final point regarding micro-, small-, and medium-enterprises (MSMEs). Namely, he said that insolvency proceedings are very costly for MSMEs. Moreover, an insolvency practitioner might not be needed in many simple cases. Therefore, the adoption of a debtor-in-possession model may be more appropriate. Professor Gurrea-Martinez opined that if the problem is that the people behind the business could not be trusted, the law should empower the creditors to appoint a monitor or even in some cases an insolvency practitioner to replace the management. But the mandatory appointment of an insolvency practitioner does not seem to be justified.

Adriana Robertson, Donald N. Prtizker Professor of Business Law at The University of Chicago Law School, asks the panelists for their opinion on insolvency governance models (photo by Paola Aseron-Dacanay/ADB).

Professor Robertson then asked all of the panelists for their opinion on the best governance model for insolvency and restructuring regimes.

Professor Ellias reiterated Professor Gurrea-Martinez's point that the effectiveness of an insolvency system is heavily dependent on personnel. He explained that the assessment of this factor encompasses (i) the quality of the judges (if judges are involved); (ii) the quality of any trustees or other insolvency professionals who might be appointed by the court; (iii) the existence of a capital market (whether there is a liquid capital market to provide financing to the firm or to buy the firm's assets); (iv) the quality of advisors; and (v) the knowledge of investors of the insolvency system.

Professor Ellias stated that while legislative reform is difficult, minting out of whole cloth a group of new professionals to then take advantage of the law is more challenging. He looked at the trajectory of the Bankruptcy Reform Act of 1978, which created the modern US bankruptcy system. He noted that it took 10 to 15 years before the system was widely understood by lawyers. Even then, some jurisdictions to this day do not necessarily have lawyers who are experts in business restructuring. The US bankruptcy system benefits from the ease of relocating major business insolvencies to areas where experienced judges and professionals in business bankruptcy are present.

Professor Ellias emphasized the difficulty in creating a highly-qualified ecosystem of advisors, capital markets, judges, and insolvency practitioners. He suggested that any design of an insolvency system should be based on the best approximation of the bankruptcy system's level of maturation. He asked whether the bankruptcy system can get to the point where it attracts enough knowledgeable individuals to become involved in the process. He stated that there is a need for sufficient work opportunities that enable individuals to support themselves and their families by doing this for a living, rather than relying on real estate transactions as their primary source of income. He further elaborated that these practical, on-the-ground questions need to be addressed.

Regarding which model works best, Professor Ellias suggested that the success of a model depends on whether a jurisdiction can achieve a free-flowing market-based system like the US. He then asked whether this is where other jurisdictions want to go, or whether they want to have something different. Lastly, he said that it is important to determine the first-order questions that other jurisdictions want to solve.


Jared Ellias, Professor of Law at Harvard Law School, speaks about the quality of personnel involved in an insolvency system (photo by Paola Aseron-Dacanay/ADB).

Mr. Zumbro responded to the question by stating that it does not matter which system one chooses. What truly matters is that the system is reliable, predictable, consistently applied, and transparent. He emphasized the importance of transparency, as the system must not only be fair but also be perceived as fair.

Creditors do not like losing money, especially if he loses more money than another creditor in a similar situation. Therefore, it is crucial to treat similarly situated creditors fairly, maintain transparency throughout the process, and provide predictability. Potential investors, before deciding whether or not to invest, like to have a degree of confidence in knowing what will happen in the event of financial difficulties.

According to Mr. Zumbro, ensuring fairness and transparency are key aspects that increase the likelihood of people accepting the results. People are often upset when deals are made behind closed doors or when similarly situated individuals are treated differently. Therefore, treating everyone equally is crucial for acceptance of the outcome.

A well-functioning insolvency system is crucial from an economic perspective. It is comparable to pruning trees; an efficient system is necessary to handle distressed and failed businesses in a way that is perceived as fair. Mr. Zumbro emphasized the importance of this aspect over the choice of governance model. He mentioned reading an old article by Professor Baird in which it was stated that under the old English system, a debtor who cooperated received five percent of the recovery, while a non-cooperative debtor was punished by hanging. Mr. Zumbro commented that we have come a long way since then.

Mr. Fuji responded that if he had to choose, he would opt for a hybrid model. He explained that, as a practitioner, he had observed the success of the Japanese civil rehabilitation model over the last 20 years. He attributed this success to the merits of the insolvency practitioner aspect of the hybrid model. However, he also agreed with the explanations provided by Professor Ellias and Mr. Zumbro.

According to Mr. Fuji, the debtors council plays a crucial role in Japan's hybrid model. He mentioned a book published by the Tokyo District Court, which emphasized that the council must monitor the debtor's management to ensure fair and good faith actions that benefit the creditors.

Mr. Fuji referred to Professor Gurrea-Martinez's previous statement that the insolvency practitioner model is not appropriate if few sophisticated practitioners are present. Mr. Fuji presented a contrary view that the hybrid model, based on his experience, also requires sophisticated practitioners. The supervisor needs to be very specialized in business restructuring. The debtors council requires a number of sophisticated practitioners who are familiar with insolvency law and can handle the debtor's management.

Kotaro Fuji, Counsel at Nishimura & Asahi, talks about the hybrid model (photo by Paola Aseron-Dacanay/ADB).

Mr. Fuji concluded that Japan had a long history of corporate reorganization before the introduction of civil rehabilitation. As a result, the country has a number of skilled insolvency practitioners. He believes that this was one of the factors that contributed to the success of civil rehabilitation in Japan.

Professor WAN also highlighted another point: the importance of considering the composition and behavior of creditors in addition to the shareholding structures of debtor firms during a restructuring. Her research covering emerging jurisdictions indicates that nonperforming loans (NPLs) are typically dealt with by national asset management companies, which purchase these NPLs. These companies play an important role in restructuring. If they are state-owned or state-controlled, they may have considerations that are not entirely market-led.

Wai Yee WAN, Associate Dean (Research and Internationalisation) and Professor at the City University of Hong Kong, speaks about the need to tailor-fit solutions to the specific needs of each jurisdiction (photo by Paola Aseron-Dacanay/ADB).

According to Professor WAN, a fully DIP model may not work well in jurisdictions where creditors are not solely motivated by value maximization. Therefore, it is crucial for a jurisdiction to choose a model that is predictable and yields results. Professor WAN believes that even if a jurisdiction's model has low recovery for creditors, predictability can ensure the success of restructuring.

As for the insolvency practitioner model, Professor WAN explained that the challenge in Asia has been the lack of an enforceable mechanism for the practitioner to obtain information on the debtor once appointed. This has proven to be a challenge. For instance, she cited India, which has resolution professionals.

However, they often encounter difficulties obtaining information from debtors. This is particularly true for family-owned firms, where shareholders may be unwilling to cooperate. These delays can impede the resolution process.

If a jurisdiction adopts a hybrid model that incentivizes debtors to cooperate with the insolvency practitioner, it may be effective. However, there must be a mechanism in place to ensure that the debtor's management or shareholders actually cooperate. Professor WAN believes this has been a challenge.

Professor WAN concluded that a model should be tailored to fit the specific needs of each jurisdiction; a one-size-fit-all solution will not work. She also observed many variations within the various governance models. Therefore, each jurisdiction should choose a model that fits their country-specific firm factors and the type of creditors expected to participate in the restructuring.

Professor Gurrea-Martinez responded to Professor Robertson's question by distinguishing between reorganization procedures and liquidation procedures.

He stated that he prefers the DIP model for reorganizations. This model can incentivize early initiation of the procedure and allow managers to provide their expertise. However, in cases of mismanagement, the appointment of an insolvency practitioner may be justified.

Aurelio Gurrea-Martinez, Associate Professor of Law and Head of the Singapore Global Restructuring Initiative at the Singapore Management University, talks about the DIP model (photo by Paola Aseron-Dacanay/ADB).

Professor Gurrea-Martinez emphasized the importance of considering who appoints the insolvency practitioner. He mentioned that, in many countries, insolvency practitioners are appointed by courts, even if the judicial system is not very reliable. He does not think this is a desirable system, particularly in countries without a sophisticated, reliable, and efficient judiciary. Instead, he posited that it would be better if the insolvency practitioner is appointed by the debtor, but the creditor always has the ability to remove the practitioner and appoint someone else. Alternatively, he said that the insolvency practitioner can also be directly appointed by the creditors.

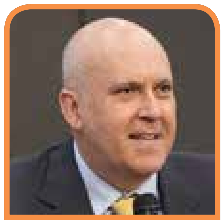
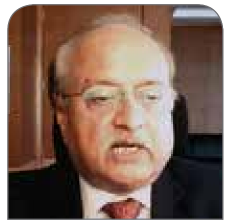
Professor Gurrea-Martinez concluded that for liquidation, an insolvency practitioner model is more advantageous. This is because board investigations in the zone of insolvency are typically conducted. Additionally, the value added by keeping management in the organization may not exist in the context of liquidation.

Construction workers pass through a tunnel in Dagachhu Hydropower Plant in Bhutan (photo by Eric Sales/ADB).

PANEL 4
REGULATORY FRAMEWORK OF INSOLVENCY PRACTITIONERS

06

PANEL DISCUSSION


Chair:

JOHN MARTIN
Partner, Norton Rose Fulbright and President, International Insolvency Institute

Panelists:

RAVI MITAL
Chairperson, Insolvency and Bankruptcy Board of India (IBBI)

DR. CATHERINE ROBINSON
Senior Lecturer, Faculty of Law, University of Technology Sydney, Australia

Mr. John Martin, Partner at Norton Rose Fulbright and President of the International Insolvency Institute, chaired Panel 4. He introduced two panelists who both joined virtually.


John Martin, Partner at Norton Rose Fulbright, introduces the panelists for Panel 4 (photo by Paola Aseron-Dacanay/ADB).

The first panelist was **Mr. Ravi Mital**, Chairperson of the Insolvency and Bankruptcy Board of India (IBBI), which was created in 2016 under the Indian Insolvency and Bankruptcy Code. He has over 35 years of experience in policymaking and implementation as an officer of the Indian Administrative Service. Mr. Mital is also a former director of the State Bank of India and the General Insurance Corporation of India.

The next panelist was **Dr. Catherine Robinson**. She is a Senior Lecturer at the Faculty of Law, University of Technology in Sydney, Australia, where she teaches company law to postgraduate students and undergraduate business students. Dr. Robinson completed her PhD at the University of Adelaide, where she examined the extent to which the Insolvency Law Reform Act of 2016 has been effective in regulating insolvency practitioners, one of the law's policy objectives.

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Panel 4 discussed effective regulation of insolvency practitioners. According to **Mr. Martin**, at its most basic level, a jurisdiction can choose between state regulation of the practitioner body or self-regulation by the profession.

Mr. Martin asked Mr. Mital to discuss the regulatory approach used in India, which is based on the Insolvency and Bankruptcy Code, and how well this approach has worked since the law took effect.

Mr. Mital responded that India's model has dual regulation and is similar to the United Kingdom (UK) model. The country believes in 'guided self-regulation' and currently has three insolvency professional agencies (IPAs) that self-regulate insolvency professionals (IPs). These IPAs, in turn, are regulated by the IBBI. Mr. Mital noted that IBBI has the power to institute disciplinary proceedings both against the IPAs and individual IPs.

India has around 4,000 IPs who are registered with the IPAs, which are then registered with IBBI. The IPAs oversee IPs and also help in industry development. IPAs induct IPs as their members, develop professional standards and a code of ethics under the Insolvency and Bankruptcy Code, audit how members perform their functions, and discipline and take action against members, if necessary. Aside from executive functions, IPAs also have quasi-judicial functions, allowing them to impose monetary penalties as warranted.

Mr. Martin then asked about the Australian experience in regulating insolvency practitioners and whether the regulatory framework is effective.

Dr. Robinson opined that the openness to reform of R3, one of the largest bodies in the UK, is interesting to note. She made the same observation about organizations that are not hard and fast on keeping their self-regulatory model. According to Dr. Robinson, Australia considered the self-regulatory model in 2015, but this model was ultimately rejected.

Catherine Robinson, Senior Lecturer at the Faculty of Law of the University of Technology Sydney Australia, talks about licensing insolvency professionals (photo by Paola Aseron-Dacanay/ADB).

Dr. Robinson then noted that Australia has both a personal insolvency regulator and a corporate insolvency regulator. However, her empirical research of IPs indicates that Australia's industry bodies do not really have a consistent regulatory approach. For instance, one large industry body is adamant about not regulating. On the other hand, Australia has another large industry body that is very supportive of regulators, referring misconduct matters and taking its own members to court.

Dr. Robinson also discussed the effects if the country were to have four or more industry bodies (similar to the UK). Serious questions of who holds power may arise, and inconsistencies as to membership may also evolve over time.

According to Dr. Robinson, Australia's industry bodies are real advocates and educators who raise awareness about ethics. However, the profession is not comfortable about self-regulation to the extent of enforcement. Dr. Robinson opined that she would favor a state regulatory model that is collaborative and engages with the profession in a transparent and non-adversarial way. Her research shows that key insolvency stakeholders are also in favor of this model.

Mr. Martin asked both panelists whether countries should formally license insolvency professionals. In the affirmative, what minimum qualifications should the law mandate? Can an appropriate balance be struck between education and practical experience? Should licensing regulations depend on the type of practitioner and the kind of market he or she serves (i.e., small and medium enterprise [SME] market, the midsize enterprise [MSE] market, and the large enterprise markets)? What factors should be considered when deciding on an appropriate licensing model?

Dr. Robinson opined that a licensing regime is absolutely needed. She quoted the Cork Report, which stated, "An unregulated insolvency sector is unsatisfactory. It undermines business and public confidence."[1]

Dr. Robinson noted that Australia has been tackling the issue of unlicensed untrustworthy practitioners for years. Regulators do not have jurisdiction over these practitioners who abuse the system and prey on vulnerable people. Furthermore, instituting a licensing regime recognizes that formal qualifications should be met to undertake this work and be part of the profession.

Dr. Robinson also underscored the importance of striking the appropriate balance between education and practical experience. The capacity of an individual to satisfactorily perform the tasks of an IP should be of primordial significance; knowledge deficiency can be tested by education and experience.

On this note, she highlighted a problematic situation in Australia that became more pronounced as a result of the pandemic. The country's law prescribes that, to become a registered insolvency practitioner, an individual needs 4,000 hours of relevant experience at a senior level during the five years immediately preceding his or her application for registration. She observed that intervening events may render an applicant unable to satisfy the time-bound aspect of the requirement. For instance, what if a person goes on parental leave, care leave, or ended up with a lower volume of work during the pandemic?

According to Dr. Robinson, Australia's regulatory framework combines very narrow legislative drafting with narrow interpretations by regulators. To get around this, Australia has registration

[1] Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558.

committees that impose conditions on all newly registered practitioners. Dr. Robinson opined that the preferable approach would be to get it right at the beginning—with the drafting of the law, the flexibility in the interpretation of such law, and a focus on the individual applicant.

Finally, Dr. Robinson contrasted insolvency practitioners in a small business restructuring versus those involved in a large liquidation. She believes the academic qualification requirements should be the same, as practitioners need to know both how to deal with the complexities of the small business restructuring process, on the one hand, and how to advise directors of large enterprises on the best course of action, on the other. However, Dr. Robinson believes that having some leeway for a practitioner's experience level may be advisable, i.e., an insolvency practitioner in a large administration may need to have more hours of experience as compared with a practitioner in small business restructurings.

Ravi Mital, Chairperson of Insolvency and Bankruptcy Board of India, discusses the regulatory framework of insolvency practitioners in India (photo by Paola Aseron-Dacanay/ADB).

Mr. Martin then turned to Mr. Mital. **Mr. Mital** responded that in India, individuals who have relevant qualifications are permitted to become practitioners, e.g., chartered accountants need to have 10 years of experience, whereas management graduates need to have 15 years of experience. Once applicants have the required level of experience, they have to complete a pre-registration educational course conducted by a self-regulating agency (the IPA). Thereafter, applicants who pass a mandatory exam conducted by the IBBI can register as individual insolvency practitioners.

Mr. Mital further noted that India has a graduate insolvency program run in several universities or educational institutes, allowing young graduates to enroll as insolvency professionals without having to wait for the 10-year or 15-year experience otherwise prescribed for professionals.

Finally, Mr. Mital explained that India's insolvency professionals are required to undergo continuing education, i.e., complete 60 credits in a time-bound manner, to maintain their level of knowledge.

John Martin, Partner at Norton Rose Fulbright, asks the panelists some questions (photo by Paola Aseron-Dacanay/ADB).

Mr. Martin moved on to what he referred to as the vexed question of practitioner remuneration. He mentioned that, in the work that he did for Asian Development Bank (ADB), this issue was always raised.

Mr. Martin then read a quote from Justice Michael Kirby, a former high court judge in Australia: "The task of an insolvency administration is inherently expensive. It is unreasonable to demand that schooled professionals should perform their functions at low cost."

Mr. Martin noted that everyone in the audience seems to think that Justice Kirby's observation is a fair comment. He then asked the two panelists whether insolvency professionals should not be expected to perform their functions at low cost, and, if this were the case, what its impact on small and medium enterprise (SME) insolvency would be.

Mr. Mital agreed that insolvency professionals have a very tough job in India, primarily because the country has the "creditor in control" model, where getting information from the promoters and managers of the company when the entire board of directors has gone away is extremely difficult. Disputes occur even between the committee of creditors (COC) and insolvency professionals.

Dr. Robinson agreed with Mr. Mital and said that insolvency practitioners also face a tough landscape in Australia. She likewise noted that the reaction of the audience suggests that this observation is universally held.

But Dr. Robinson urged the panel to look at it from a different angle, i.e., in terms of reasonableness and what the profession is prepared to accept. Her empirical work indicates that the reality that lack of funds to pay is inherent in a liquidator's / trustee's work, is accepted. Insolvency practitioners can then account for unremunerated work by charging a higher rate, consistent with the United Nations Commission on International Trade Law's (UNCITRAL) guide.

Dr. Robinson again drew for her research, noting that insolvency practitioners are of the opinion that the profession is not about money and realization. The ultimate objective is not just to realize a return to creditors; instead, practitioners value their service role to the community, including prioritizing vulnerable debtors.

Finally, Dr. Robinson observed that the tit-for-tat strategy with creditors does get used occasionally. This strategy occurs when creditors negotiate, and practitioners accept, a lower fee after the proceedings have taken place, or when practitioners waive fees on the understanding that they would be given more lucrative work in the future.

Mr. Martin then asked both panelists what, in their opinion, is the best model for fixing remuneration. He asked whether it should be time-based charging, a fixed fee, a percentage of realization, or some other approach.

Catherine Robinson, Senior Lecturer at the Faculty of Law of the University of Technology Sydney Australia, talks about remuneration for insolvency professionals (photo by Paola Aseron-Dacanay/ADB).

Dr. Robinson responded that Australian law provides for party autonomy—parties can specify either an amount of remuneration or a method for working it out. She believes that it ultimately comes down to risk. If a lot of uncertainty occurs at the outset, one may need to apply time-based remuneration. Nevertheless, Dr. Robinson opined that even time-based systems should quote a cap.

On the other hand, a case that has a high degree of certainty may be considered a low risk scenario for which a fixed fee may make sense.

Mr. Mital responded that India has a mixture of the methods Mr. Martin had mentioned. Resolution professionals have prescribed fees that function as the minimum or the floor, and the COC can fix a higher amount as they deem fit. India also provides for two kinds of incentives:

(i) for timely completion, and (ii) for getting higher value out of the resolution. When the matter goes into liquidation, the liquidators are paid fees as a percentage of realization.

Mr. Martin then pivoted to oversight of fee-setting. He asked the panelists who in their respective jurisdictions authorizes, reviews, or exercises oversight over the setting of fees. He also asked the panelists their opinion on whether oversight should be exercised by creditors, the court, or both, or some other stakeholder or party.

Mr. Mital answered that creditors are the ones who supervise and fix fees in India. However, if the insolvency professional feels aggrieved in this regard, he or she may go to the bankruptcy court. The bankruptcy court, in turn, often refers the matter to IBBI. However, Mr. Mital noted that referral to the bankruptcy court and the IBBI happens only in a very small minority of cases.

Mr. Martin then turned to **Dr. Robinson**. She explained that Australia has a dual approval system, similar to Singapore, the United States of America (US), and the UK. Referring to Professor Jared Ellias' statement during the last panel, Dr. Robinson opined that oversight of fee-setting depends on the institutional environment of a particular country.

Dr. Robinson also underscored the importance of quality of the personnel system. Australia has a well-established court system, consisting of state courts and federal courts. These courts may be better suited to decide on issues of remuneration. Dr. Robinson then clarified that it might be a different scenario for countries where courts have limited practical experience or capacity.

Mr. Martin turned to the independence of insolvency practitioners. A debtor often receives professional advice during financial difficulties, after which a formal appointment is required. He asked the panelists whether the practitioner who gave that informal advice for weeks or months beforehand should take the appointment. He also asked whether independence considerations militate against the appointment.

Mr. Mital underscored that the independence of insolvency professionals is a very important issue in India. Guidelines have therefore been issued to safeguard their independence. For example, regulators have recently prescribed minimum remuneration fees, which would ensure that insolvency professionals do not get influenced by either the promoters or the resolution applicants.

Ravi Mittal, Chairperson of Insolvency and Bankruptcy Board of India, discusses the independence of insolvency professionals.

Further, India's regulatory approach is based on a balancing exercise between independence and supervision. The COC recommends the insolvency practitioners, while the bankruptcy court appoints them.

Insolvency professionals then work under the supervision of the COC, which has the power to remove them if it believes that they are not doing the work properly. At the same time, India's Insolvency and Bankruptcy Code and the relevant regulations give insolvency professionals independence over certain matters, such as the appointment of valuers and other professionals.

Turning to Australia, **Dr. Robinson** opined that Mr. Martin's questions are difficult to answer because she has not heard of independence being an issue for Australian practitioners. On the contrary, Australian practitioners take pride in their strict compliance with independence considerations, which they see as a way of instilling public trust and confidence in their integrity.

Finally, **Mr. Martin** asked the panelists who they think should appoint insolvency practitioners, i.e., whether it should be the courts, the debtor, or the creditor.

Dr. Robinson opined that debtors and creditors should be the appointing authority, with the court having an overarching supervisory role. The court per se should not have regulatory or governance powers; rather, its supervisory role can be invoked in cases where appointment issues need to be escalated. Dr. Robinson added that this is the system in Australia.

Mr. Mital answered that in India, creditors recommend the insolvency practitioners to be appointed. He asserted that this approach works—he has observed that conflict increases in cases where creditors do not recommend and the judge or the adjudicating authority appoints the resolution professionals. Mr. Mital concluded that, in his opinion, giving the COC the power to recommend who should be appointed reduces conflict. After all, insolvency practitioners and the COC have to act together.

The Muara Laboh Geothermal Power Project in Indonesia (photo by Gerhard Jörén/ADB).

PANEL 5

VALUATION OF ASSETS AND TREATMENT OF CLAIMS AND CONTRACTS IN INSOLVENCY PROCEEDINGS

07

PANEL DISCUSSION






Chair:

ANTHONY CASEY
Deputy Dean and Donald Ephraim Professor of Law and Economics, The University of Chicago Law School

Panelists:

DAVID CHEW
Partner, DHC Capital

DEBANSHU MUKHERJEE
Co-Founder, Vidhi Centre for Legal Policy, India

ELIZABETH MCCOLM
Partner, Paul, Weiss, Rifkind, Wharton & Garrison LLP

DEEPAK RAO
General Manager, Insolvency and Bankruptcy Board of India (IBBI)

WATARU TANAKA
Professor, Institute of Social Science, The University of Tokyo

Professor Anthony Casey, Deputy Dean and Donald Ephraim Professor of Law and Economics at The University of Chicago Law School, chaired Panel 5. He introduced the following virtual panelists:

- **Mr. David Chew**, partner at DHC Capital;
- **Ms. Elizabeth McColm**, partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP; and
- **Professor Wataru Tanaka** from the Institute of Social Science, The University of Tokyo.

Professor Casey also introduced the in-person panelists:

- **Mr. Deepak Rao**, the general manager of the Insolvency Bankruptcy Board of India; and
- **Mr. Debanshu Mukherjee**, co-founder of the Vidhi Centre for Legal Policy, India.

Professor Casey stated that Panel 5 would discuss the valuation of assets and the treatment of claims and contracts in insolvency proceedings. While previous panels provided an overview of insolvency systems in different jurisdictions, this panel would delve into the specifics. He stated that in any insolvency procedure, it is crucial to determine the debtor's assets and how to handle claims and contracts made before filing. The treatment of executory contracts and ipso facto clauses triggered in bankruptcy is a significant contractual issue, regardless of the insolvency system in place.

The panelists discuss the treatment of claims and contracts in insolvency proceedings (photo by Paola Aseron-Dacanay/ADB).

Professor Casey asked Ms. McColm to discuss the importance of valuation procedures in functioning insolvency systems. He also inquired about the key aspects to consider in valuation procedures.

Ms. McColm emphasized that stakeholder entitlements in any insolvency regime depend on company valuation. Certainty in how that valuation is arrived at is crucial.

Valuation is important for several reasons. Firstly, it helps determine the position of the debtor or its asset's value in the debtor's capital structure. Additionally, valuation aids in identifying the fulcrum stakeholders and those entitled to the debtor's residual value. It also helps determine whether secured

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Elizabeth McColm, Partner at Paul Weiss Rifkind Wharton & Garrison LLP, discusses the importance of valuation in insolvency proceedings (photo by Paola Aseron-Dacanay/ADB).

creditors are over- or under-secured and, to the extent that they are under-secured, the amount of their unsecured deficiency claim.

In the United States (US), the point in an insolvency proceeding where the restructuring plan leaves stakeholders no worse off than they would be in liquidation is known as the best interest test. The value of a debtor and whether a debtor is insolvent may be relevant to an insolvency proceeding for a number of other reasons, including to assess whether historical transactions can be unwound under transaction avoidance statutes.

Professor Casey noted that Ms. McColm has experience handling cases in multiple jurisdictions, including cross-border cases. Professor Casey inquired about the effectiveness of various approaches to valuation. He also asked about the key drivers of a good valuation system.

Ms. McColm stated that the ideal and most robust valuation metric is usually a market test. This is because market tests are neutral, objective, and easy to interpret, especially for lawyers. Furthermore, market tests offer a clear remedy for dissenting parties. If they believe an existing bid is too low, they can submit a competing bid, including a credit bid (if applicable) if they are secured creditors.

However, Ms. McColm noted that a market test may not always be appropriate or reliable. For example, if the debtor's business is rapidly depreciating in value, delays in conducting a robust market test could leave stakeholders substantially worse off. Similarly, if the debtor's business involves trade secrets or other confidential information, revealing it to a wide range of potential bidders could substantially decrease its value. If the valuation issue pertains to a hypothetical liquidation value or the debtor's insolvency as of the closing of a historical transaction, it can be difficult to piece together the necessary information.

Ms. McColm believes that parties should be allowed to submit valuation arguments based on non-market approaches. In the US, this is typically done by submitting expert testimony that includes a valuation analysis using broadly accepted methodologies, such as discounted cash flow (DCF) analysis, comparable companies, transaction analysis (which often utilizes price earnings ratios or similar metrics), and asset-based analysis.

She noted that although parties can make arguments based on these methodologies, in her experience, the result of the market test generally carries the most weight. Market tests are becoming increasingly important for evaluating whether to approve a transaction with an insider.

Anthony Casey, Deputy Dean and Donald Ephraim Professor of Law and Economics at The University of Chicago Law School, contextualizes the coverage of Panel 5 (photo by Paola Aseron-Dacanay/ADB).

Professor Casey noted the importance of distinguishing between the market test and expert approach, and when each should be required. He then asked Mr. Chew, a financial advisor, to comment on the valuation methodologies used in a restructuring and insolvency context.

Mr. Chew explained that financial advisors use four primary valuation methods to determine value: discounted cash flow (DCF), relative valuation, asset-based valuation, and liquidation value.

Overview of valuation methodologies

Four primary valuation methodologies in a restructuring context

Discounted cash flow (DCF)

- Discount unlevered free cash flow over the forecast period and the terminal value at the weighted average cost of capital to determine Enterprise Value (EV)
- Terminal value is the value at the end of the forecast period. Use relative valuation or perpetuity approach
- Risk: Significant reliance on assumptions

Relative valuation

- Valuation derived from comparable company analysis and comparable transaction analysis
- Based on commonly used multiples (e.g. EV/EBITDA, EV/EBIT or P/E)
- Important to distinguish between Enterprise Value or Equity Value multiples
- Risk: Identifying comparable companies with similar characteristics

Asset based valuation

- Assumes that the company is a going concern
- Determined based on market value attributed to assets minus the market value of liabilities
- Special consideration: Identifiable intangible assets. Either addition (listing status) or subtraction (goodwill write off)

Liquidation value

- Assumes assets sold on piecemeal basis
- Typically determined based on applying a recovery percentage to each asset category minus costs of realisation
- Used in conjunction with Entity Priority Model (EPM) / Liquidation Analysis Model to determine %'age return to creditors for each entity in the group. Acts as comparator to determine quantum of restructuring surplus

DHC | CAPITAL 3

David Chew, Partner at DHC Capital, provides some key points on valuation during insolvency proceedings (photo by Paola Aseron-Dacanay/ADB).

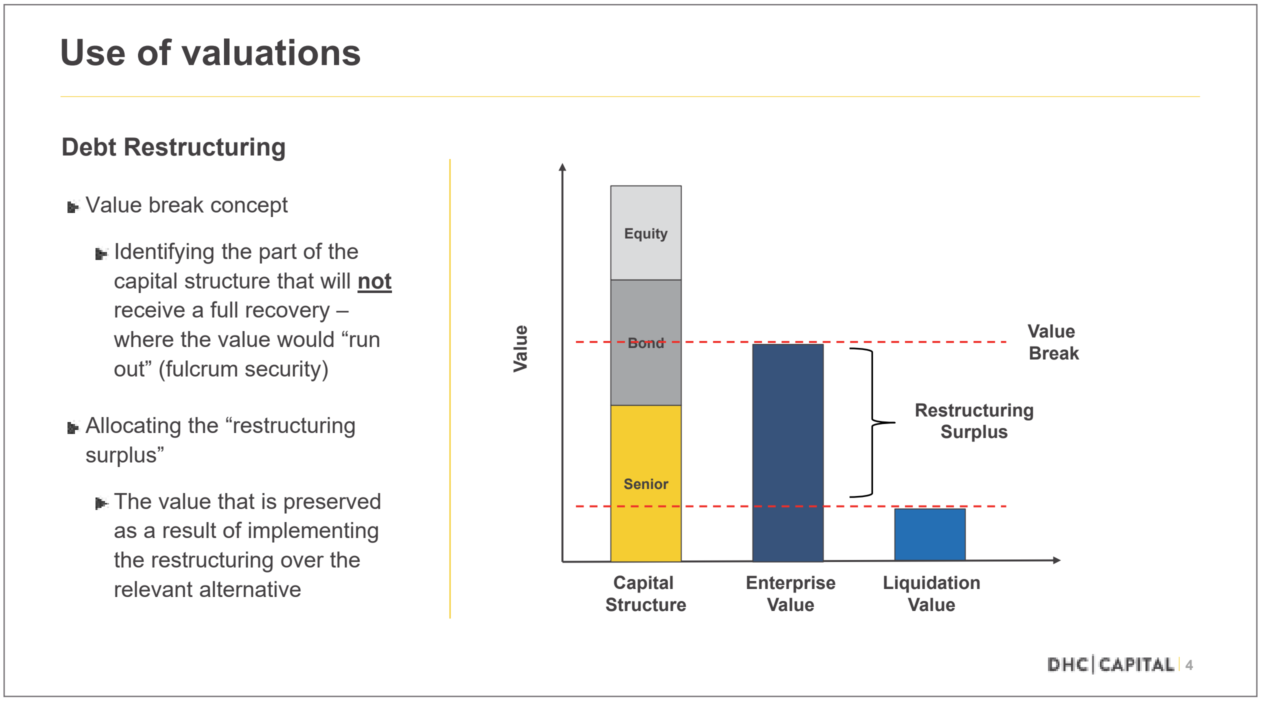
Mr. Chew began by explaining the principal feature of DCF, which involves discounting the free cash flows over the forecast period and the terminal value at a weighted average cost of capital to determine the enterprise value. Parties have a number of ways to calculate the terminal value, including a relative value approach or perpetuity approach. However, the key risk to DCF is the reliance on assumptions to project future cash flows, which can introduce subjectivity into the valuation.

On the other hand, relative valuation is derived based on comparable companies or transactions and applies commonly used multiples such as enterprise value / earnings before interest, taxes, depreciation, and amortization (EV/EBITDA), enterprise value / earnings before interest and taxes (EV/EBIT), or price to earnings multiple (P/E). The main challenge is identifying the right pool of comparable companies that share similar characteristics with the company being valued.

Mr. Chew likewise underscored the importance of distinguishing between enterprise value and equity value. The difference depends on the multiples used.

Third, asset-based valuation assumes that companies are a going concern and adjusts the valuation for the market value of assets and liabilities. For example, if a party has a property, an independent third-party valuation is conducted. If a party has shares listed on a stock exchange, one may then work out the market value of those shares.

Finally, liquidation value assumes that the assets will be sold piecemeal. The financial advisor will typically apply a recovery percentage to each line item on the balance sheet to determine the recoverable value. This value is used with an Entity Priority Model (EPM), also known as a liquidation analysis model, to determine the percentage return to creditors. This acts as the basis for comparison when restructuring. For instance, one might hear, "In a liquidation,



creditors will receive five cents on the dollar, whereas under the scheme, they will receive 20 cents on the dollar.”

In practice, analysts use various valuation approaches as a cross-check because valuation is an art, not a science. They must examine different methods to determine a range of appropriate values.

Mr. Chew demonstrated how financial advisors use valuations in debt restructuring, including concepts such as value break and allocating the restructuring surplus. He presented a simplified illustration.

The chart below illustrates a simple capital structure with senior debt at the bottom, bonds in the middle, and equity at the top. The example features three main stakeholders and demonstrates how the value breaks in the bonds. In other words, the enterprise value covers the senior debt in full but falls short in the bonds, leaving equity out of the money.
Naturally, valuation disputes may arise among stakeholders. To be in the money, equity may argue that the value is higher, while senior debt may have an incentive to lower the value and capture all the value of the company. The bonds become the creditor that is being squeezed out.

According to Mr. Chew, parties consider this aspect to determine which creditors are going to be the key stakeholders—i.e., the ones they need to discuss with during restructuring.
The fulcrum security is where the value breaks. Surplus allocation is the second aspect. The liquidation value sets the recovery floor, and the value break indicates the enterprise value. The additional amount from the liquidation value up to the value break is called the restructuring surplus, representing the benefit of restructuring. The allocation of this surplus among stakeholders will depend on each party’s efforts to justify their valuation and negotiate the terms of the restructuring.

In addition to determining what stakeholders receive during a restructuring, valuation is also used in two other ways, according to Mr. Chew. In distressed mergers and acquisitions (M&A), this can include the sale of a company as a going concern or the sale of non-core assets to raise cash. In this sense, financial advisors use valuations to determine the theoretical price of the business or the theoretical value of the assets.

He suggested supplementing this approach with a market testing process, which may result in a valuation that is either higher or lower than the theoretical valuation. However, market testing can be challenging in certain markets, such as during COVID-type situations when there is too much uncertainty and no real bids are present. In such cases, valuations are used instead of market tests.

At the same time, valuation is useful for equity investors or white knight investors who want to recapitalize the company. It determines the value of the equity by subtracting the sustainable debt on the balance sheet. This helps equity investors or white knight investors determine how much equity they should inject and take. For example, a company undergoes restructuring and a distressed debt investor invests US$ 100 million to end up with 55% of the company.

After discussing these various methods, **Professor Casey** remarked that judges need to figure out which method to apply when deciding cases. He then asked Ms. McColm about principles that can serve as a guide for choosing a methodology and what would make the system most efficient and beneficial for the debtor.

Elizabeth McColm, Partner at Paul Weiss Rifkind Wharton & Garrison LLP, discusses the importance of transparency (photo by Paola Aseron-Dacanay/ADB).

Ms. McColm replied that she wanted to emphasize two key points. One is the importance of transparency in any legal system. She believes that everyone should have access to the same information—the valuations—and be able to test them in a court process with cross-examination.

Ms. McColm believes that a fulsome process is necessary, which can vary depending on the company. Some companies may require only a few weeks, while others may need months.

She emphasizes the importance of an arbiter of value—the judge. Ms. McColm stated that the outcome depends on the experts' credibility and the judge's perception of it.

Professor Casey inquired about the extent to which the issue of valuation was considered during the drafting of India's Insolvency and Bankruptcy Code (IBC) in 2016. He also asked whether the law addressed this issue and how it influenced the drafting process.

Mr. Mukherjee explained that during the design of the IBC, India did not have a market for distressed assets to reference. However, the country did have a relatively robust market for M&A.

In fact, the Bankruptcy Law Reform Committee had lawyers with significant M&A experience, which informed much of the drafting exercise. Similar to M&A, the valuation process under the IBC is primarily left to the stakeholders. Even in schemes of arrangement, the court only has a supervisory role where they generally follow what the parties decide.

Debanshu Mukherjee, Co-Founder of Vidhi Centre for Legal Policy, talks about the Insolvency and Bankruptcy Code adopted in India (photo by Paola Aseron-Dacanay/ADB).

Similarly, under the IBC, it was believed during the law's design phase that the market should largely decide. Therefore, once a case is admitted, the management is displaced by an insolvency practitioner, and a Committee of Creditors (COC) is appointed. An open bidding process then occurs, where anyone can bid to acquire the debtor. The COC can select the highest bid. Valuation is left entirely to the stakeholders based on the information disclosed before the bidding process.

Mr. Mukherjee noted that a major challenge is the quality of disclosure, which can be low when the debtor is no longer in possession and an insolvency practitioner is involved. This can make it difficult for bidders to properly value an asset. However, the law also requires the determination of liquidation value to protect the interests of non-consenting or creditors who do not get to vote on a plan. This is a formal requirement.

Mr. Mukherjee explained that although there are no formal requirements for the actual valuation used to approve the plan, formal requirements do exist for determining the liquidation value, which is crucial for dissenting and non-voting creditors.

He noted that when the law was introduced, this liquidation value was disclosed to bidders. However, in practice, many plans submitted during the process had a plan value around the liquidation number. The regulator later realized that this was problematic and stopped disclosing the number altogether. Further, an additional requirement was added to conduct a fair valuation in addition to the liquidation value. Neither the liquidation value nor the fair value (which essentially represents the going concern value) is disclosed to the bidders. However, they are a crucial reference point for the COC—once the bids are received, the COC can use this band as a benchmark. The valuation is determined by independent valuers who are regulated by the Insolvency and Bankruptcy Board of India (IBBI).

Mr. Mukherjee noted that in most resolutions, they have a number between the liquidation value and the fair market value. This is not based on any formal requirement. The formal requirements were only intended for a limited purpose. In practice, the independent valuation exercise has become a crucial part of the COC's decision-making process when selecting a bid.

One complication in the Indian credit industry is that it is led by public sector banks, which are largely government-owned. Mr. Mukherjee noted that some public sector banks are less sophisticated than others. Therefore, this valuation exercise is crucial, as it helps them make more informed decisions in the COC. For private and foreign banks, their internal valuation processes are typically robust, making this piece less relevant. However, for public sector banks, it remains highly relevant.

However, the role of courts in the IBC is limited. This is due to India's negative experience with the previous bankruptcy law, which was based on a court or administration-driven system that failed miserably. As a result, the new law does not allow for flexibility in court involvement in valuation. Instead, parties must adhere to the decisions made by the COC.

Mr. Mukherjee concluded that valuation is primarily market-driven rather than process-driven in India.

Professor Casey then asked Mr. Rao for his perspective on the development of valuation provisions in India and the lessons learned from this exercise.

Mr. Rao responded from the perspective of the government or regulator, stating that the IBC is a relatively new law.

With the new law came two regulated professions: insolvency practitioners and registered valuers. The insolvency practitioner profession was established with the regulator, while valuers have been present in India for 2,500 years.

Mr. Rao stated that , the writer Chanakya discussed valuers in 'Artha Shastra', the first book on administrative economics in India. Valuers at that time measured the rental value of land based on its fertility. Today, administrators and regulators are responsible for overseeing a profession that has existed for 2,500 years. He highlighted the following points:

- One, the profession of valuers has developed over time based on certain conventions, making it difficult to regulate.
- Two, valuers existed previously but were not regulated. They worked for banks, government departments (e.g., in relation to income tax and wealth tax), and for mergers and acquisitions. With the emergence of the IBC, the profession became regulated. The IBBI must consider several factors when evaluating valuers, including their qualifications and experience.
- Third, IBBI administers an examination for valuer registration. A person can only become a registered valuer by passing this examination.

Deepak Rao, General Manager of the Insolvency and Bankruptcy Board of India, gives the perspective of a regulator regarding India's new law (photo by Paola Aseron-Dacanay/ADB).

- Lastly, the regulator's role is not limited to testing and controlling. IBBI must also ensure that valuers are enhancing their capacity to comprehend the evolving dynamics of the market. Mr. Rao emphasized that the market of valuation' is not stagnant. As the profession is linked to the market, valuers must stay up-to-date with any changes in the market or its dimensions. Therefore, IBBI is prioritizing capacity building.

Regarding his experience as a regulator, Mr. Rao stated that jurisprudence is still evolving because the IBC is a relatively new law. In November 2022, Mr. Rao and his colleagues were surprised by a particular case in India where the adjudicating authority was not satisfied with the valuation. During the insolvency resolution process, a valuer assessed the value of the property in question, which was a parcel of land and a building.

When they could not resolve the issue, liquidation ensued. Another valuer had to perform a second valuation. Mr. Rao highlighted the significant difference between the initial and subsequent valuations. The court considered the matter with great seriousness and concluded that the value of the land and building could not have decreased by 60% to 70% in the second valuation, as it was practically impossible.

Mr. Rao stated that the regulator does not typically have a role in valuation, which is usually handled by the valuers and insolvency professionals. However, in this case, the court ordered the regulator to review the valuation.

Upon reviewing the valuation reports, IBBI determined that there was nothing wrong with the valuations. The property in question was a shop. In the marketplace, the location or visibility of the shop is the primary factor in valuation. However, in this case, the shop was situated in a shopping mall rather than the marketplace. When evaluating a shop in a shopping mall, it is important to consider not only its visibility but also the foot traffic in the mall, as this determines the shop's potential success. The resolution value (initial valuation) was determined while the mall was still operational, but the second valuation—which estimated the liquidation value—was made when the mall's popularity was declining and over 80% of the shops had closed. The mall was also on the verge of closure, causing the liquidation value to decrease significantly.

Mr. Rao observed that, as a regulator, he learned that people often focus too much on numbers, which may not always tell the whole story.

Additionally, in a new regulatory regime, everyone must learn. Valuation is a highly technical task that cannot be left solely to the judiciary. It is unrealistic to expect the judiciary to define every aspect. Therefore, even resolution professionals should have some understanding of valuation. If the resolution professional handling the aforementioned case had properly explained it to the adjudicating authority, the court would not have ordered the regulator to intervene. Everybody needs to learn.

Third, Mr. Rao opined that India can learn from international experience when it comes to valuing assets. Just like prescribing medicine, understanding the type of disease being treated is crucial. In the Indian context, regulators have recognized the importance of considering both fair value and liquidation value. Therefore, the rule mandates the appointment of two valuers. If there is a significant difference in valuation between the two valuers, a third valuer will be appointed.

Mr. Rao pointed out that previously the term 'significant' was undefined, leaving it to the resolution professional to determine. However, what constituted a significant difference was unclear, with 10% sometimes being significant and 50% sometimes not.

To address this issue, the Indian regulator, IBBI, studied cases where third-party valuers were appointed to establish a definition of 'significant.' IBBI observed that in 13 out of 15 cases, the difference between the lowest and highest value was as high as 100%. Mr. Rao then quoted Mark Twain, who famously said, "There are lies, damn lies, and statistics." According to Mr. Rao, IBBI did not solely rely on statistics. Upon reviewing the valuation reports, it became apparent that many of them utilized similar valuation standards. However, due to the absence of fixed and standardized guidelines, significant differences in valuation amounts were observed.

Mr. Rao stated that as a result of this research and evaluation exercise, IBBI now considers a 25% difference as significant.

Mr. Rao referenced Mr. Chew's previous discussion and explained that the discounted cash flow method is used for ongoing units. Parties make assumptions about two things: (i) future cash flows, which depend on the market and its performance; and (ii) discount rates, which depend on the demand and supply of capital.

There were many cases where the assumptions used for valuation lacked clarity. As a regulator, Mr. Rao emphasized that India adheres to international valuation standards. While these standards are good, they can be too broad. Mr. Rao explained that international valuation standards function similarly to a net used to cover a football goal post—the net can stop a football but not a tennis ball. Therefore, it sometimes fails to take into account minor issues that can ultimately make a significant difference.

In the Indian context, particularly in the IBC's context, valuation is not being done for routine properties or assets, but for distressed or insolvent ones. Mr. Rao suggested that there may be a need to define more specific guidelines, as international valuation standards are too broad.

However, Mr. Rao believes that five years (from the effectivity of the law) is too short a time to draw a solid conclusion. Those involved or are dealing with this issue are still gradually learning.

Still, Mr. Rao mentioned that the IBBI has now started working on guidelines for valuations under the IBC. For instance, Mr. Rao mentioned the valuation of trade receivables. How should trade receivables be valued if they are two or three years old? How would the valuation be impacted by the debtor's reputation or credit history? These are crucial considerations, and guidelines are needed to address them.

Mr. Rao mentioned another issue he would like to address: the valuation of inventories. In some cases, inventories held by manufacturing companies are reflected on the balance sheet. The valuation of these inventories is done by a finance professional, a chartered accountant, or a cost accountant, who may not have a good understanding of the nature of the finished product or raw material.

Mr. Rao highlighted a case where a paper mill had inventory of raw paper and finished paper. As the same company had a captive coal plant, they also had coal in their inventories. The value of these inventories was reflected in the books of accounts. However, the valuation was done by a person who was registered for valuation of securities and financial assets.

Mr. Rao also discussed the concept of liquidation value, noting its complexity. He explained that liquidation value can sometimes exceed fair value, because fair value is determined for an ongoing concern. To illustrate this point, he shared the story of a ceiling fan that had been in his family for 60 years. When he sold the fan in the scrap market, he received a price higher than that of a new fan due to the copper content. He sold the scrap for 1300 rupees, which was more than the cost of a new fan at 1200 rupees.

Mr. Rao concluded by cautioning parties to be careful when determining liquidation value. While this example may be an exception, exceptions are part of the rule.

Professor Casey then shifted to the topic of claims against the estate and ipso facto contracts. Priority is a key concept in bankruptcy systems, determining the order in which claims are paid. Professor Casey asked Professor Tanaka to explain the meaning and importance of priority in an insolvency system, as well as the need for a well-defined priority system.

Professor Tanaka stated that, in general, the priority rule specified by the law outside of bankruptcy

Anthony Casey, Deputy Dean and Donald Ephraim Professor of Law and Economics at The University of Chicago Law Schools, talks about the concept of priority (photo by Paola Aseron-Dacanay/ADB).

should also be protected in insolvency proceedings. Otherwise, some rightsholders may have an incentive to use insolvency proceedings to receive preferential treatment, which would not be fair to other rightsholders.

The benefits of receiving preferential treatment only transfer income from other rightsholders and do not increase society's overall benefits. Insolvency proceedings are costly mechanisms and should only be used when they can enhance society's benefits as a whole. They should not be used to transfer income. Professor Tanaka emphasized this as a fundamental concept.

Wataru Tanaka, Professor at the Institute of Science in the University of Tokyo, discusses priority rules in bankruptcy (photo by Paola Aseron-Dacanay/ADB).

Professor Tanaka noted that in practice, most jurisdictions protect the priority relationship among rightsholders. Secured claims generally have priority over unsecured claims, and unsecured claims have priority over share equities. However, it is debatable whether priority among rights needs to be absolutely protected. If protecting the priority of claims is an absolute must, then shareholders will lose all interest in the debtor company once it becomes insolvent. However, this could create a situation where the debtor company, controlled by its shareholders, has little incentive to file for insolvency in the first place.

Also, in privately held companies, the owner-manager's contribution can be crucial to realizing the firm's value. Therefore, it may be advisable to maintain the status of existing shareholders in insolvency proceedings, even if creditors' claims are reduced by reorganization plans.

Professor Tanaka explained that in American reorganization procedures, the absolute priority rule exists in Chapter 11 procedures. However, he noted that absolute priority is only required in cramdown cases. Cramdown cases refer to situations where one or more classes of rightsholders oppose the reorganization plan by a majority decision, but the court still wishes to approve the plan. In such cases, the absolute priority of claims over shares must be protected.

However, if each class whose rights are affected votes in favor of the plan by a majority decision, the absolute priority rule will not apply. It is only necessary to ensure that dissenting claim holders are guaranteed a liquidation value of their claims.

Professor Tanaka thinks the more difficult question is whether there may be instances where departure from the absolute priority rule may be justified even when one or more classes of rightsholders oppose the restructuring plan by a majority vote. Such a deviation from absolute priority could be warranted, for instance, to incentivize the debtor company to initiate the insolvency proceeding.

However, a rule that allows shareholders to retain their position when the corporation goes bankrupt and the creditors are forced to cut off their claims may encourage moral hazard on the part of the debtor company's shareholders. They may undertake risky business ventures at the expense of creditors. Therefore, there is a trade-off between having an absolute or relative priority rule. It is not surprising that rules differ from jurisdiction to jurisdiction.

Professor Tanaka concluded that he is uncertain whether the variations among jurisdictions are reasonable and reflect their respective economic and social conditions. Instead, these differences may be based on political factors, such as the relative political influence of debtor or creditor financial institutions.

Professor Casey then inquired about the significance of the absolute priority rule and whether exceptions should be allowed. He acknowledged the ongoing debates in various jurisdictions regarding absolute and relative priority and sought the panelists' opinions on the matter.

Mr. Chew explained that in Singapore, the main method of restructuring is through schemes of arrangement. This framework includes a cross-class cramdown, similar to the US model, which allows parties to cramdown creditors who are out of the money, as long as they are no worse off than a comparator (usually liquidation). Valuation is crucial in this process, but it only applies to creditors. Equity still votes in Singapore.

David Chew, Partner at DHC Capital, describes the method of restructuring in Singapore (photo by Paola Aseron-Dacanay/ADB).

In a scenario where one class of creditors did not receive full payment, equity may still be able to receive some amount. This often depends on obtaining approval from the shareholders, who can use their leverage to negotiate a better outcome. This serves as an incentive to vote for the deal and ensure its successful passage.

Mr. Chew believes that retaining material equity for families in family-owned companies is crucial. It is especially important in regions where family-owned companies are prevalent, such as Asia. This is because they possess knowledge of the customers, suppliers, and business operations. Mr. Chew emphasized the need to keep family owners aligned.

However, the situation is different when it involves a private equity-sponsored company and a professional management team. In this instance, Mr. Chew suggested that it may be easier to simply pay the private equity firm the consent acceptance fee.

Mr. Chew believes that there may be additional challenges in countries such as Indonesia and the People's Republic of China (PRC), where the creditor is located offshore. This is particularly evident in the PRC's real estate sector, where many developers are undergoing restructuring. Offshore creditors are attempting to form committees and gain leverage in the restructuring process. However, as they are offshore and the company's assets are all onshore, this has proven to be quite difficult.

Ms. McColm emphasized the importance of having a known absolute priority scheme for an efficient insolvency system. She stressed that certainty is crucial in designing such a system. It is essential to know who is entitled to recover what.

However, Ms. McColm believes that domestic priority schemes primarily serve domestic political objectives, such as wealth distribution or protection of less sophisticated stakeholders, rather than insolvency law objectives, which are generally more neutral, such as preserving going concern value.

Ms. McColm stated that countries tend to have a territorialist approach when it comes to determining which insolvency law should apply or whether there should be a unified priority scheme across all countries—i.e., any assets in their country should be distributed according to their own priority scheme. For example, in some countries, pension claims or employee claims

Elizabeth McColm, Partner at Paul Weiss Rifkind Wharton & Garrison LLP, responds to a question about priority schemes in an insolvency system (photo by Paola Aseron-Dacanay/ADB).

must be paid before any creditors receive payment, must be paid first. This reflects the political objectives and agenda at work, as mentioned by Professor Tanaka.

Mr. Rao stated that there are multiple stakeholders, so the key task is to balance their interests properly. When considering the priority system (i.e., absolute priority or another system), he mentioned that from a regulator's perspective, it does not matter if the cat is black or white, as long as it catches mice.

The reason is simple: no law, no matter how good, is foolproof. As time passes, laws must evolve. Mr. Rao cited Section 53 of the IBC as an example of a provision with vague language. When considering a law, parties must understand why certain provisions were included. This consideration must be done within the broad framework of the country's constitutional objectives.

Deepak Rao, General Manager of the Insolvency and Bankruptcy Board of India, discusses the priorty system in India (photo by Paola Aseron-Dacanay/ADB).

Mr. Rao gave an example of the waterfall mechanism in the IBC, where the dues of workmen and secured creditors are given top priority. Although workmen and secured creditors come from different stakeholder groups, the dues of secured creditors are prioritized due to the potential for market and credit system expansion in India. Furthermore, public sector banks are the dominant institutional creditors in India, and most of these banks have rural branches with limited exposure to market risk. Additionally, there are industrial financing institutions. Therefore, supporting institutional creditors is crucial to expanding the credit system and infusing more credit to develop the market. That is one reason why the country prioritizes institutional secured creditors.

Further, the Constitution states that its primary goal is to achieve social and economic equality. As a result, workmen's dues for the preceding 24 months from the commencement of liquidation are treated equally with the claims of secured creditors. It is important to note that the term 'workman' should not be confused with 'employee.' Workmen are individuals who do not have access to social security benefits, unlike employees who are on the company's payroll.

Mr. Rao stated that a system should align with a country's core administrative or political objectives. The political and constitutional objectives of a government or a country's governance system are crucial. He mentioned that government dues were prioritized below those of workmen and secured creditors when the IBC was drafted. The framers of the law believed that this would promote the credit structure and expand the market. The revenue that would have otherwise gone to the government would benefit the economy as a whole.

However, the Supreme Court thereafter ruled that government dues should be treated at par with secured creditors' claims and workmen's dues.[1] The court held that the money that would have been paid to the government will now go to the consolidated fund of the government of India, to be used for the betterment of the masses.

In one case, the Supreme Court stated that the term 'equality' should not be stretched to the point where unequal parties are treated as equals. Therefore, if a party relies heavily on the term 'equality,' it should be clearly defined and spelled out.

Different sets of creditors are involved in any given case, e.g., secured creditors, operational creditors, and unsecured creditors. Mr. Rao believes that a clear definition is necessary. For instance, it is important to differentiate between creditors with a 1% secured interest and those with a 99% secured interest. This clarity, Mr. Rao believes, is currently missing in India's law.

Mr. Rao opined that India could learn a lot from the US system. The key factor is not the creditors, but rather the claims—whether they are unsecured or secured.

He cited another case where insolvency was being resolved. The resolution applicant placed a bid for the corporate debtor and was prepared to take it over. However, the creditors were fighting among themselves over their share. The adjudicating authority decided that if the creditors had time to fight, they could do it once the resolution process was over and the corporate debtor was handed over to the resolution applicant. Mr. Rao again emphasized the importance of clarity—if the members of the Committee of Creditors are in conflict, how will they fight, how long will they fight, and to what extent? A good system requires a certain level of clarity, although it may not always be absolute. However, this should not allow for different interpretations.

Mr. Rao underscored the importance of ensuring a clear objective. The primary goal of IBC is to prevent the liquidation of the corporate debtor. Therefore, the rules should not incentivize any stakeholder to seek liquidation.

In the current scenario, there may be secured creditors in the Committee of Creditors (COC). Such creditors—especially if they are dissenting creditors—may believe that their situation would be better if the matter goes to liquidation. However, Mr. Rao noted that this should be avoided because it defeats the basic purpose of the law. In the case of India's IBC, the aim is to reorganize or revive a distressed firm.

Mr. Mukherjee added that during the design of the law, India was experiencing a severe non-performing loan (NPL) crisis. As a result, the financial creditors, banks, and financial institutions were given a significant role in the resolution process.

He stated that the law only recognizes two types of creditors for resolution purposes: financial creditors and operational creditors. There is no sub-classification of creditors as secured or unsecured for reorganization. This unique design was present in the original version of the law. However, a plan could only be approved with the consent of 75% of the financial creditors, as originally required. There were no rules on priority for financial creditors—they could approve

[1] *State Tax Officer v Rainbow Papers Limited*, Civil Appeal No. 2658, 6 September 2022.

any plan, subject to protection for operational creditors who did not get to vote and who are entitled to their liquidation value. The order of priorities for determining the liquidation value was determined by the liquidation regime, specifically Section 53 as referred to by Mr. Rao.


Debanshu Mukherjee, Co-Founder of Vidhi Centre for Legal Policy, talks about India's transition from a system with no priority to a system of absolute priority (photo by Paola Aseron-Dacanay/ADB).

Mr. Mukherjee explained this approach spawned a lot of litigation, and the COC abused their discretion in several cases. Random assignments or identification of creditors were made for the purpose of payment.

For instance, in one particular case, the COC had a random cut-off, stating that if operational debts were under $100,000.00, then the creditors would be paid the entire amount. If the amount owed is higher than $100,000.00, operational creditors would receive nothing. The argument was that if the Committee of Creditors were to distribute the liquidation value among creditors, everyone would receive nothing. Therefore, some creditors should be satisfied with receiving something.

Many cases were filed on this issue. In one particular case, India's appellate tribunal ordered that the assets be equally distributed among all creditors, including secured creditors, with everyone receiving 60%.[2] This decision caused a huge uproar in the market, with secured creditors claiming that the law was drafted for them and that therefore the ruling could not stand. Subsequently, the law was amended to override that ruling. After the amendment, India now follows a system of absolute priority. To be considered fair, a plan must follow the same order of priorities as outlined in Section 53.

Mr. Mukherjee stated that India has transitioned from a system with no priority to implementing a system of absolute priority, resulting in a reduction of litigation. As Professor Tanaka explained, when individuals are aware of their order of priorities ex ante, the likelihood of legal disputes is reduced. Further, as Mr. Rao mentioned, although the government was initially supposed to have a lower priority, they have since been elevated to the same level as secured creditors due to a Supreme Court ruling.[3]

2 *Standard Chartered Bank vs. Satish Kumar Gupta, R.P. of Essar Steel Ltd.*, National Company Law Appellate Tribunal, Company Appeal No 242 of 2019, 4 July 2019.

3 See *State Tax Officer v Rainbow Papers Limited*, *supra* note 1.

Mr. Mukherjee stated that the government itself is challenging the ruling, as it favored a state government statute review and not a central government statute review. India has a political dynamic between central and state governments, and the IBC falls under the purview of the central government.

Mr. Mukherjee stated that the government itself is challenging the ruling, as it favored a state government statute review and not a central government statute review. India has a political dynamic between central and state governments, and the IBC falls under the purview of the central government.

The final outcome remains uncertain. However, he believes that the government's position is that the government dues should stay down in the order of priorities. After all, the biggest lenders are public sector banks, which are also government-owned. It is, in a way, government versus government—payment to the tax authorities and other statutory creditors, on the one hand, and banks, on the other.

Professor Casey asked Ms. McColm about executory contracts and ipso facto clauses. Specifically, he asked for an explanation of what an executory contract is and how it should be handled.

Ms. McColm explained that an executory contract is a contract under which both parties still have unfulfilled obligations. This means that both the debtor and the counterparty have continuing obligations to perform.

Elizabeth McColm, Partner at Paul Weiss Rifkind Wharton & Garrison LLP, discusses ipso facto clauses (photo by Paola Aseron-Dacanay/ADB).

An *ipso facto clause* is a provision in a contract that allows for termination or modification of the contract if the debtor becomes insolvent or if an insolvency or similar proceeding is initiated. This clause grants the other party the right to terminate the contract.

Ms. McColm noted that in the US and certain other jurisdictions, *ipso facto* clauses in contracts are generally unenforceable. This policy has two objectives: to prevent creditors from contracting around bankruptcy and insolvency law's policy objectives pre-petition, and to prevent creditors from obtaining a preferred position relative to other similarly situated creditors.

That being said, countries that have implemented a ban on *ipso facto* clauses generally have certain exceptions. For example, in the US, certain types of derivatives, including forward contracts, commodities contracts, and swap agreements, are exempt from the ban on *ipso facto* clauses. This reflects a policy choice, as Congress determined that the benefits of a smooth functioning market for these types of derivatives outweigh the policies underlying the ban on *ipso facto* clauses.

Professor Casey asked Professor Tanaka to explain the Japanese approach and his views on whether *ipso facto* clauses should be banned or allowed

Professor Tanaka responded that before discussing *ipso facto* clauses, he would first address executory contracts. He explained that the default rules for executory contracts in Japan are similar to those in American law. In insolvency proceedings, trustees have the option to accept or reject executory contracts.

Wataru Tanaka, Professor at the Institute of Science in the University of Tokyo, speaks about executory contracts (photo by Paola Aseron-Dacanay/ADB).

If a trustee accepts the contract, the counterparty has a claim for performance. This claim will become a claim for administrative expenses and will be paid prior to other claims. If the trustee chooses to cancel or reject the contract, the counterparty has a claim for damages. However, the claim for damages will become an unsecured claim.

Professor Tanaka finds this rule somewhat peculiar. In common law countries, the rule for executory contracts reflects the general principle of contract law. This means that the debtor or promisor has the option to breach a contract and pay damages for expectation interest. However, in civil law countries like Japan, the freedom to breach a contract does not exist because a creditor has the option to demand specific performance of the claim. It is unusual for civil law countries to follow the insolvency proceedings of common law countries.

In scholarly literature, the theory of efficient breach of contract justifies the freedom to breach a contract. If the debtor can breach a contract and pay for expectation interests, then the debtor will only breach the contract when the performance is inefficient. The debtor will only perform when the performance is efficient. However, this argument assumes that the debtor will be able to fully pay for the expected interest damages upon breach of the contract.

In the case of insolvency, if the debtor's trustee chooses to reject the contract, it is highly unlikely that the debtor will be able to afford to pay damages for expectation interests, as long as the claim for damages is treated as a general unsecured claim. If the debtor is unable to fully compensate for expectation interests, giving the trustee the option to accept or reject a contract provides an incentive to excessively breach the contract.

Professor Tanaka is uncertain why civil law countries like Japan adopt the common law approach in insolvency proceedings. He believes that Japan seems to follow the concept of freedom to breach a contract in situations where it is least desirable. He noted that in at least one jurisdiction, Spain, there is a rule that if a debtor chooses to reject an executory contract, the counterparty has a claim for damages treated as a claim for administrative expenses, rather than just an unsecured claim. Professor Tanaka opined that this rule will not distort the incentive to accept or reject executory contracts. Therefore, he thinks it reflects better policy.

Finally, Professor Tanaka noted a Supreme Court decision in Japan that held that ipso facto clauses violate various public policies of insolvency law and are considered invalid. However, insolvency statutes provide an exception for financial contracts.

Professor Casey asked the other panelists for their views on their respective countries' experiences with ipso facto clauses.

Mr. Chew responded that Singapore's Insolvency Restructuring and Dissolution Act includes ipso facto provisions under Section 440.

This section specifically prohibits the termination or amendment of a contract based solely on the company's insolvency. Allowing termination of key contracts, including with suppliers and customers, can predetermine the fate of a distressed company and undermine its ability to continue as a going concern.

In practice, termination can still be justified according to Mr. Chew. For instance, in one case, a construction company had a significant government contract, and the parties were considering termination. Although the law was not in place at that time, there were other reasons why the parties could have terminated if they wished. The company's performance was far behind schedule due to a lack of working capital.

Ipso facto provisions in Singapore do not explicitly prevent a lender from making a claim against the guarantor under a guarantee. Therefore, the guarantor may still be at risk despite the provision being in place, as the protection only applies to the company undergoing the insolvency procedure.

Mr. Mukherjee explained that India's experience is based on the legal framework prior to the implementation of the IBC. Previously, the administrative authority overseeing bankruptcy proceedings had the power to override, suspend, or terminate contracts at their discretion, resulting in significant disruption and issues. Therefore, one of the provisions in the new law requires that the plan must comply with applicable law, including contract law. This upholds the principle of freedom of contract, meaning that any ipso facto clause in a contract must be honored if someone has signed up to it.

However, the drafters of the law recognized that certain services may be essential to the resolution of a company and should not be terminated. As a result, basic services such as electricity, water supply, telecom, and information technology (IT) were classified as essential services and cannot be terminated as long as the suppliers continue to be paid.


Debanshu Mukherjee, Co-Founder of Vidhi Centre for Legal Policy, describes the legal framework in India prior to the implementation of the IBC (photo by Paola Aseron-Dacanay/ADB).

Mr. Mukherjee stated that the law was recently amended to provide insolvency professionals with more flexibility in identifying suppliers essential for the resolution process. Once identified, these suppliers are required to continue supplying the debtor. This change was made to address cases where suppliers stopped providing goods and services, which negatively impacted the proceedings.

Mr. Mukherjee mentioned a major case in India involving a solar power plant.[4] The plant was in distress for a long time. It had only one contract, a government power purchase agreement that included an ipso facto clause. However, if the agreement was terminated, it would be nearly impossible to resolve the bankruptcy because the government was the only customer the company had. Although the law allows for termination, in this particular case, the Supreme Court exercised its discretion to prohibit termination. However, Mr. Mukherjee opined that this case is a very limited exception to the law. The law still upholds the freedom of contract, and one can terminate on the grounds of insolvency if they choose.

In most cases, the insolvency professionals are able to retain the suppliers they want to continue providing goods and services, as the old management is no longer in control. Suppliers generally have confidence in the system. It is only in cases where the company has been in distress for a prolonged period and past payments have not been received, that the other parties to the contract may want to exit.

Mr. Rao then discussed the case of ASL Limited. The company was in the mobile networking business and had been allotted a spectrum. However, the company went into insolvency. The court found that the license granted to the company to operate in the mobile business was fundamental to its operations. Therefore, the court ruled that the license should not be withdrawn.

Mr. Rao noted that there has always been a conflict between contractual freedom and corporate rescue. It is essentially the theory of relativity. He observed that during the coronavirus (COVID) pandemic, several jurisdictions introduced restrictions on the use of

[4] *Gujarat Urja Vikas Nigam Limited Versus Mr. Amit Gupta & Ors.*, Civil Appeal No. 9241 of 2019, 8 March 2021.

Deepak Rao, General Manager of the Insolvency and Bankruptcy Board of India, discusses the conflict between contractual freedom and corporate rescue (photo by Paola Aseron-Dacanay/ADB).

ipso facto clauses because the revival of a debtor was deemed more important. Additionally, most debtors were failing due to reasons beyond anybody's control.

Mr. Rao emphasized two points. Firstly, when parties enter into a contract, they anticipate future problems and incorporate them into the agreement. This allows parties to take advantage of the provisions in the agreement if something goes wrong. This is how markets function, reflecting their independence.

Secondly, it is necessary to rescue these debtors. It is not advantageous to just eliminate them from the market; it is equally important to maintain the size of the market. Therefore, the decision to eliminate a debtor should be made judiciously, taking into account the dynamics and independence of the market as well as its size. During the COVID pandemic, it was necessary to revive and rescue these corporate debtors, leading many jurisdictions to use anti-liquidation laws.

Two engineers Arif Sheikh (left) and Haris Bin Khalid at the Foundation Wind Energy-I Limited (FWEL-I) wind power generation plant located in KhuttiKun New Island, Taluka Mirpur Sakro, Thatta District, Pakistan (photo by Sara Farid/ ADB).

New York Stock Exchange (photo by Aditya Vyas on Unsplash).

PANEL 6
DIRECTORS' DUTIES AND LIABILITY IN THE ZONE OF INSOLVENCY

08

PANEL DISCUSSION






Chair:

FELIX STEFFEK
Associate Professor, Faculty of Law of the University of Cambridge

Panelists:

JARED ELLIAS
Professor of Law, Harvard Law School

AURELIO GURREA-MARTINEZ
Associate Professor of Law and Head, Singapore Global Restructuring Initiative, Singapore Management University

NEETI SHIKHA
Lecturer, University of Bradford School of Law
Member, Academic Steering Committee, INSOL International
Chair, Insolvency Scholar Forum, Insolvency law Academy

JASON HARRIS
Professor of Corporate Law, University of Sydney Law School

PAUL ZUMBRO
Partner, Cravath, Swaine & Moore LLP

Professor Felix Steffek, Associate Professor at the Faculty of Law of the University of Cambridge, chaired Panel 6. He was joined by the following panelists:

- **Professor Jared Ellias**, Professor of Law at Harvard Law School;
- **Professor Aurelio Gurrea-Martinez**, Associate Professor at Singapore Management University;
- **Professor Jason Harris**, Professor at the University of Sydney Law School;
- **Professor Neeti Shikha**, lecturer at the University of Bradford School of Law; and
- **Mr. Paul Zumbro**, partner at Cravath, Swaine & Moore LLP.

The chairperson and panelists for Panel 6 (photo by Paola Aseron-Dacanay/ADB).

According to **Professor Steffek**, when a company becomes insolvent, directors may have incentives that are not aligned with the interests of all stakeholders. This can lead to behavior that either diverts or destroys value that would otherwise go to creditors. For this reason, many jurisdictions worldwide impose specific duties and liabilities on directors in the zone of insolvency before an insolvency proceeding is initiated.

Professor Steffek provided examples of these rules, including the duty to file for insolvency. Directors are mandated to initiate insolvency proceedings in court. Another legal strategy is to ask directors to either recapitalize or liquidate, meaning they must either secure the necessary capital to continue operations or cease activity altogether. A third legal strategy is to impose a general duty in the interest of creditors. Directors' duties shift from being in the interest of shareholders to becoming owed in the interest of creditors.

Scan the QR code to watch Panel 6 video on YouTube.

Felix Steffek, Associate Professor, Faculty of Law of the University of Cambridge, welcomes conference participants to Panel 6 (photo by Paola Aseron-Dacanay/ADB).

He added that the European Commission came up with a new initiative aiming to harmonize insolvency law in Europe. A suggestion was made for all countries in the European Union (EU) to introduce a duty to file for insolvency, a rule that did not previously exist in such a general harmonized way.

Professor Steffek outlined the topics to be discussed in Panel 6, which include examining the strengths and weaknesses of various regulatory models. The panel would also delve into country-specific and firm-specific features and their implications for regulation. Additionally, criminal law would be discussed, as well as disqualification of directors who engage in misconduct during insolvency.

According to Professor Steffek, different legal strategies are available and choosing the best strategy is a challenge that regulators face. Another challenge is combining the space for restructuring with clear directions for directors. He opined that this tension could be seen in the EU directive proposal—an attempt was made to encourage restructuring but asking directors to go to court quickly may prevent restructurings from taking place.

Professor Steffek asked Professor Ellias to discuss why directors in financial distress sometimes misbehave and destroy value. He also inquired about the costs to companies in such situations.

Professor Ellias reframed the issue, stating that the problem is why directors can destroy value, not that they always do. He explained that the root issue arises when a company falls into financial distress, causing the set of incentives that governs how directors make decisions when the firm is solvent to break down. Directors may have incentives to make economically inefficient decisions that could lead to a loss of asset value, to a decrease in the firm's overall value, or even to the firm's liquidation when it could have been saved. He mentioned that one of the challenges is distinguishing when a director is acting on problematic incentives versus when they genuinely believe their chosen course of action to be correct.

Professor Ellias put these negative incentives that motivate directors to make sub-optimal decisions into four different categories:

- The first is the incentive to **gamble**. This incentive arises when a company falls into insolvency. The directors, believing that their job is to maximize the value of the firm for the benefit of shareholders, may engage in risky behavior using the firm's value, under the notion that the firm cannot achieve its goals with its current business plan. Their goal is to turn the situation into a recovery for shareholders. However, if they fail, the firm may cease to be a going concern. The incentive is to take risks in the hope of increasing the return on assets. Directors may choose to prioritize shareholders, but this approach may not always be beneficial for the firm. It is important to balance risk-taking with the company's overall well-being, as sometimes the firm would have done better if the directors did not take on that extra risk.

- The second incentive is to **delay restructuring**. The directors may believe that if shareholders file for Chapter 11, they will lose their investment. Therefore, they may try to postpone the restructuring and hope that the firm can recover—comparable to 'kicking the can down the road' and hoping for the best. The issue with this approach is that during this time, the company may become somewhat of a 'zombie' as it lacks the resources to invest in productive projects. As a result, it cannot allocate capital efficiently due to the debt overhang created by a capital structure that was optimized for different circumstances.
- The third incentive is to **facilitate tunneling**. This occurs when shareholders are out of money and directors do not believe the firm can grow enough to pay all creditors in full and provide shareholders with money. In this case, directors may try to orchestrate a series of transactions and aim to distribute funds to shareholders, sometimes using a tunneling strategy to obtain an option to continue. Directors then leave creditors to pursue legal action if they wish to reclaim them. This strategy, as noted by Professor Ellias, has gained popularity both in the United States (US) and worldwide. There have been several high-profile examples of asset stripping, where value was funneled away from creditors for the benefit of shareholders. As previously mentioned by Professor Adam Badawi, it was utilized in the J. Crew and PetSmart bankruptcies.
- The fourth issue arises when a company declares bankruptcy and the parties involved are uncertain about the ownership of the firm. As a result, the directors may **act in their own self-interest** and attempt to negotiate with creditors or shareholders to obtain additional payments for themselves. Directors can then become their own principal, misallocating resources and resulting in the firm restructuring late or not at all.

Professor Ellias noted that the history of capitalism is filled with companies that waited too long to restructure. The American auto industry in the 2000s was unable to invest productively due to legacy debt. These issues have eroded trust in directors' ability to make the right decisions within the framework of corporate law. Professor Ellias concluded that it would be difficult to determine whether a director's decision was motivated by a negative incentive or if he or she was making what he or she had believed was the best decision for the firm and everyone involved. It could be challenging to discern this from an external perspective.

Professor Steffek then turned to Professor Shikha and asked about any commercial or institutional patterns that should be considered when making laws in the Asia-Pacific region.

Jared Ellias, Professor of Law at Harvard Law School, talks about negative incentives that motivate directors to make sub-optimal decisions (photo by Paola Aseron-Dacanay/ADB).

Professor Shikha provided context before answering the question. She mentioned a study that predicted that Asia would become one of the world's largest economies by Gross Domestic Product (GDP) contribution, contributing to almost 60% of global growth. Prior to the pandemic, global investment data showed that $1 out of every $2 went to Asia. However, Asia has a history of failing firms, making the panel's discussion timely.


Neeti Shikha, Lecturer at University of Bradford School of Law, discusses duties of directors (photo by Paola Aseron-Dacanay/ADB).

Professor Shikha asked, "What are the patterns?" She believes that one aspect often overlooked when discussing director's duties is the issue of multiple directorship. She noted that in Asia, directors typically sit on four to nine boards. Therefore, imagine a director who must act with bounded rationality while serving on the boards of four to nine companies. Due to conflicts of interest and limited information, directors may face challenges in making decisions, especially when some companies are not performing well. This would be particularly relevant when directors lack information or are overwhelmed with data from multiple companies on whose board they sit.

Professor Shikha pointed out an interesting feature seen in Asia: before considering turning around companies, a turnaround of directors often occurs. In many Asian companies, directors would be replaced when the company neared insolvency or was not performing well. Therefore, the new director who stepped in would have to make decisions when he or she may not yet have "skin in the game." In countries like India, the entire leadership team and key personnel may get replaced. The new director would often work without sufficient information. This information asymmetry would lead to directors exhibiting bounded rationality.

The question now is how to make directors more responsible. Laws have been designed to help directors make crucial decisions. Both regulations and legislation have extended the 'failing firm defense' in case of restructuring. Safe harbor provisions have also been implemented.

However, Professor Shikha believes that before discussing the duties of directors when a company is failing, it is important to take a step back and examine the governance of the company, as well as the role of directors in particular and the board of directors in general, to ensure that the company does not fail.

After briefly discussing the problem, **Professor Steffek** then said that the panel would now turn to the solutions. He encouraged the panel to conceptualize potential solutions and consider available strategies in the legal toolbox.

Professor Harris suggested that the panel should consider the difference between the general duties of a director and how these duties apply during financial distress and formal insolvency, as well as the specific duties, prohibitions, and, in some cases, crimes that apply to directors leading up to insolvency or informal insolvency. To evaluate the appropriateness of these approaches in different jurisdictions, Professor Harris emphasized the need to revisit the themes discussed during the conference.

He presented several questions. What are the local conditions? What are the social attitudes and expectations regarding debt payment? How is debt treated in that specific community? Does the community view failure to pay one's debt as a great shame? Does the community consider nonpayment of debt a crime? Does the community perceive debts an inherent part of doing business? Does being a director mean taking risks that may not always pay off?

According to Professor Harris, some directors end up effectively misappropriating the creditors' money and acting improperly. Parties need rules to address this issue. The question now turns to whether those rules have to exist in insolvency law. If the goal of insolvency and restructuring law is to achieve a commercial outcome, then adding criminal offenses or quasi-criminal sanctions to punish directors often defeats the commercial objective of the procedure.

Professor Harris opined that policymakers need to have a nuanced approach to formal insolvency mechanisms. He gave as an example Australian law, which is criticized for having a one-size-fits-all model for most of recent history. Its insolvent trading law, which criminalized the act of a company continuing to trade while insolvent and allows for the directors to be sued civilly, covers all insolvency cases. Insolvency practitioners often use or misuse this mechanism as an extreme method of settling debt—they threaten directors of insolvent companies with court time unless they pay up.

Jason Harris, Professor at the University of Sydney Law School, discusses incentives directors face (photo by Paola Aseron-Dacanay/ADB).

Professor Harris criticized this approach for creating perverse incentives, i.e., incentivizing good directors of bigger companies in financial distress to abandon ship prematurely, for fear of sinking with the ship, instead of encouraging them to stay on board and turn things around. He believes that this approach also does not work for directors of smaller companies whose personal and corporate assets are usually intertwined and therefore are more directly affected by the failure of their businesses. They worry about more immediate problems—losing their wages, their house and even their marriage—than getting sued or imprisoned five or six years later.

Professor Harris then reiterated that, to achieve good commercial outcomes, Australian law needs a more nuanced approach that takes into account the actual incentives of directors; that enables some flexibility in the law; and that gives more options other than "liquidation or nothing". However, Professor Harris also stressed that early intervention is key, since nothing can be done once a company has already been insolvent for years. Therefore, penalties, sanctions, incentives, and assistance should work together to encourage small and medium-sized enterprises to seek out assistance early, rather than trade business into the ground.

Professor Steffek summed up Professor Harris' contribution as a "carrot-and-stick" approach. He asked Mr. Zumbro to draw from his experience in the US and discuss some of the ways directors could be incentivized to do the right thing, i.e., the carrot.

Mr. Zumbro agreed with Professor Harris that nobody benefits from a company's managers fleeing at the first sign of distress. He believes that, in the US, the main incentive for directors to stay on is the absence of crimes, civil penalties or liabilities that are specific to insolvency. There, directors of an insolvent entity continue to benefit from the "business judgment rule", which protects them from liability as long as they act in the best interest of the corporation.

According to Mr. Zumbro, during insolvency, the directors' fiduciary duties—the duty of care, the duty of loyalty, and the duty to maximize the value of the enterprise—remain the same. The only difference is that both creditors and shareholders have the legal right to enforce these fiduciary duties. Outside insolvency, creditors are protected merely by their contracts, their loan agreements and creditors' rights laws, such as fraudulent transfer laws.

Paul Zumbro, Partner at Cravath, Swaine & Moore LLP, discusses directors' duties in the face of insolvency (photo by Paola Aseron-Dacanay/ADB).

He added that in Delaware, the US' main corporate jurisdiction, directors do not face legal liability for taking risky actions—even if those actions do not pan out correctly—as long as they act in good faith for the benefit of the company, and neither breach their duty of loyalty nor enrich themselves or an affiliate of theirs. This helps to keep directors from fleeing. Mr. Zumbro underscored that directors fleeing is never ideal; drawing from his own experiences, he shared that insolvency proceedings became particularly difficult when directors fled, because the new/remaining directors did not have adequate institutional knowledge.

Mr. Zumbro clarified that the 'business judgement rule' does not exempt directors from scrutiny, it just gives them some protection. For example, directors in a Chapter 11 setting who see the proceedings through will likely get an exculpation and a release from the debtors. Most of their decisions while in court—because all major decisions are subject to court approval—are basically bulletproof; parties cannot attack them for doing something in good faith and with court approval.

While Mr. Zumbro acknowledged that no perfect system exists, he stressed the importance of not imposing unduly restrictive or draconian requirements in the face of insolvency, to keep competent directors on boards and incentivize them to continue to exercise sound business judgment and bring order out of chaos.

Professor Steffek characterized this model as a "carrots" approach in which basic legal structures remain in place and the law does not impose stricter duties on creditors. He then asked Professor Gurrea-Martinez to provide a comparative perspective on other jurisdictions' insolvency regimes, where a "sticks" approach is applied to directors, e.g., imposition of stricter and heavy-handed duties, such as the duty to file.

Professor Gurrea-Martinez identified six main regulatory models with varying levels of flexibility.

- The most flexible is the US model, where directors are allowed to keep doing what they are doing, so long as it the best interest of the corporation.
- The second most flexible is the United Kingdom's model, whose wrongful trading provisions allow directors to do whatever they want—restructure, file for bankruptcy or even keep trading without doing anything—provided that they are acting to minimize losses for creditors in the hypothetical event that the firm ends up in insolvent liquidation.
- The Singapore model applies a more rigid approach. Its wrongful trading provisions stipulate that an insolvent firm cannot keep borrowing if it cannot pay debts in full. However, it allows some exceptions; directors cannot be held liable if the borrowings are done in good faith or with the blessing of a court.
- The New Zealand model is similar to the Singapore one, only stricter, in that it has no safe harbor rules.
- In the Australian model, the insolvent trading regime does not allow insolvent firms to keep borrowing. However, a 2017 reform allows firms to keep trading, but only for the purpose of implementing a restructuring plan.
- The European Commission model for EU countries is the most rigid, where the only option for insolvent companies is to file for bankruptcy. However, enforcement varies, as do sanctions for failure to file in a timely manner. Germany requires filing for bankruptcy within three weeks from the moment the directors knew or should have known that the company has become insolvent. Failure to do so exposes them to criminal liability. On the other hand, other countries, such as Spain, allow longer periods within which to file for bankruptcy—up to two months or more.

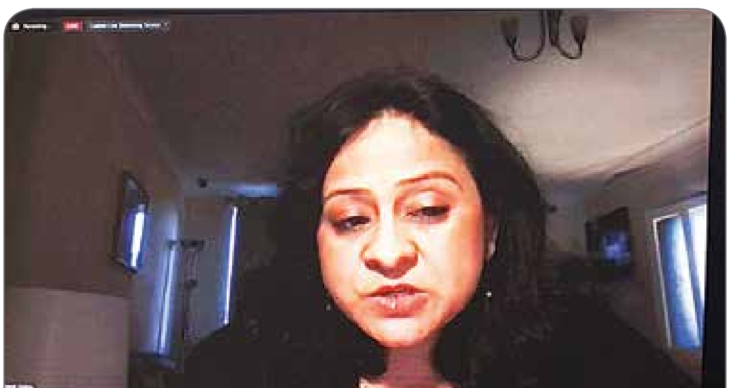
Aurelio Gurrea-Martinez, Associate Professor at Singapore Management University, discusses various regulatory models (photo by Paola Aseron-Dacanay/ADB).

Professor Gurrea-Martinez expressed skepticism about adopting the European Commission model, particularly in countries with inefficient insolvency systems. He reasoned that a duty to file for bankruptcy would drive companies to initiate a procedure that may end up being value-destructive for debtors and creditors,

Professor Steffek clarified that the duty to file for bankruptcy in EU countries varies, in particular according to the definition of insolvency (either balance sheet insolvency or cash flow insolvency). He added that the European Commission, in drafting their initiative, was also very generous in specifying the period to file for insolvency. Professor Steffek then asked Professor Shikha to explore the role and utility of criminal liability in controlling directors of companies in financial distress.

Professor Shikha opened with the fact that most Asian countries have some form of criminal sanctions for directors, especially in cases of fraud and willful negligence. The larger question is whether criminal liability for directors should be a part of policy design for insolvency.

Firstly, Professor Shikha pointed out that certain countries may not wish to implement sanctions/penalties, because they prefer to encourage risk-taking in directors. However, they might work in countries like India, because there is a cultural precedent. Even as the Indian government has taken steps to decriminalize certain corporate provisions, criminal penalties may still have a place in insolvency, especially to address the problem of promoters misusing insolvency laws.



Neeti Shikha, Lecturer at University of Bradford School of Law, talks about criminal sanctions imposed on directors (photo by Paola Aseron-Dacanay/ADB).

Secondly, Professor Shikha asked if courts are equipped to process criminal sanctions. Particularly in developing countries, courts might not be mature enough to determine criminal intent, to prevent abuse of laws, and to deal with the gray areas in this field. What works for one company may not work for the other; a director given the power to take risks may take decisions that go against the interests of the company. In India, there are many cases of directors depleting all their companies' value and running away.

She underscored her belief that criminal penalty may indeed have some deterrent effect, especially in Asia where people believe in fear and in the rule of law. She however reiterated that the maturity of the courts and the legal system is key to implementing the pertinent laws and preventing abuse.

Professor Steffek remarked that now that the panel had discussed the problems and the options, it was time to move on to possible solutions. He asked Professor Ellias which rules should apply to which types of firms, and in which countries. Lastly, he asked how policymakers could develop a good regulatory mix.

Professor Ellias expressed skepticism about crafting fiduciary duty law to solve all the problems that had been identified during the discussion and to address all the ways in which directors


Jared Ellias, Professor of Law at Harvard Law School, talks about fraudulent transfer law (photo by Paola Aseron-Dacanay/ADB).

might act sub-optimally. Fiduciary duty law is not the only place to look for solutions to problems in corporate law, and changing it—for example, to create a duty to file—may cause distortions that would worsen the situation. Instead, Professor Ellias suggested introducing reforms to other bodies of law, reasoning that fiduciary duty law would in any case have to take into account the particular legal system and other bodies of law, such as bankruptcy law and other rules that shape behavior of boards. This could also solve the problem and create fewer distortions.

For example, if one were worried about incentives to gamble or to delay, one could look to creditor monitoring, initiation of bankruptcy without requiring the debtor to initiate bankruptcy proceedings, and other bodies of law that could restrict creditors from pushing companies into bankruptcy. One could also ask if creditors fear lender liability, or if there were other things that would inhibit efficient monitoring, such as insider trading law.

Professor Ellias added that fraudulent transfer law could address tunneling. He warned, however, that this law sometimes does not provide a real remedy for creditors. While this may be the case at present in the US jurisdiction, Professor Ellias noted that it may work better in other jurisdictions.

Professor Ellias added that it is important to avoid, to the extent possible, hard-and-fast rules, because every distress situation comes with nuance. However, he acknowledged that imposing hard-and-fast rules for a certain period of time may be useful for cases where a type of abuse needs to be culturally stamped out or where a certain type of behavior needs to be cultivated. For example, pushing a duty to file for bankruptcy for a decade could develop firms' muscle memory and make using the bankruptcy system second nature to them, and thereby force the relevant body of law to mature.

Professor Ellias shared findings from his own study of fiduciary duty law that showed that the way that judges in the US had been using fiduciary duty law to protect creditors when firms make decisions in insolvency had changed significantly over the past 150 years. Sometimes judges would hammer managers and boards, and sometimes they would leave creditors to their own devices. He emphasized that because judges' behavior changed and the law itself evolved, the current status quo in the US, as described by Mr. Zumbro, might be different in 20 years or even sooner. As a conclusion, Professor Ellias reiterated that, in general, it would not be good to put too much pressure on fiduciary duty law to solve all problems.

Professor Steffek moved the discussion back to the question of liability enforcement. He noted the last 20 years, during which many jurisdictions considered reforming laws governing the enforcement of directorial liability. He recalled some of the questions discussed—such as who could bring actions and how actions would be financed—and asked Mr. Zumbro to talk in more detail about the essential issues and principles to consider when regulating the enforcement of directorial liability.

Mr. Zumbro first asked Professor Ellias to clarify why he believed that the fraudulent transfer law in the US is broken. Professor Ellias replied that bringing and winning such cases is time-consuming, taking up to a decade for large actions.

Mr. Zumbro then addressed Professor Steffek's question, explaining that director duties in the US are typically enforced through litigation. Outside bankruptcy, shareholders have the right to bring derivative claims for a breach of fiduciary duty. During insolvency, creditors also have the right to bring derivative claims. Courts often grant standing to the creditors' committee to pursue such claims, since these claims become part of the bankruptcy estate once the firm files for bankruptcy. However, there are some technical nuances. In Delaware, for example, the creditors of an LLC would not be able bring derivative claims, but the creditors of a corporation could.

Mr. Zumbro then further clarified that parties would generally go after the directors' and officers' (D&O) insurance policy, whose proceeds could be an important source of recovery for unsecured creditors.

According to Mr. Zumbro, courts also have ways other than litigation to incentivize directors to behave. He brought up his recent case where the judge disbanded the entire board and vested all authority in the Chief Restructuring Officer (CRO). In another case, the judge publicly excoriated an independent director on the witness stand for not being prepared, in effect causing him reputational harm. Mr. Zumbro concluded that bankruptcy judges could incentivize directors to take their duties seriously, but reiterated that enforcement would still be trough litigation.

Professor Steffek asked Professor Gurrea-Martinez about his recent research on jurisdictional patterns, firm patterns, and rules, and what findings are applicable to regulating directors in insolvency.

Professor Gurrea-Martinez noted that various country-specific and firm-specific factors affect the desirability of the six regulatory models of directors' duties in the zone of insolvency. He cited several of them.

- **The prevailing corporate ownership structures.** Companies that have controlling shareholders are at a higher risk for shareholder opportunism in the zone of insolvency. In these jurisdictions, interventionist approaches to reduce the discretion of the managers may be desirable. Professor Gurrea-Martinez contrasted this with the US approach, which is effective due to the more dispersed ownership structure in large listed companies there. This structure helps directors maintain independence from shareholders, even when compensation includes stock or stock options.
- **The efficiency of the insolvency system.** If the insolvency system is inefficient, a duty to file for bankruptcy can end up doing more harm than good, as it forces a company to undergo potentially value-destructive proceedings.

- **The quality, credibility, independence, and expertise of the judiciary.** Professor Gurrea-Martinez gave as an example the UK insolvency model, where the judge would be expected to assess ex post whether the directors' decisions minimized losses for the creditors, and would have the additional burden of accounting for hindsight bias. Consequently, the UK approach may not be suitable for countries lacking sophisticated courts.
- **The debt structure of the company.** Professor Gurrea-Martinez said that insolvency proceedings are supposed to solve a collective action problem. However, in many emerging economies, companies do not have many creditors—a few banks, landlords, and suppliers—and thus parties can more easily negotiate and reach an agreement outside the insolvency system. Therefore, forcing these companies to initiate insolvency proceedings might not be a desirable solution.

To conclude, Professor Gurrea-Martinez advocated for a solution somewhere between the New Zealand and the newer Australian system for countries with mixed features, including inefficient judicial systems, controlling shareholders, and concentrated debt structures. He strongly advised against imposing a duty to file for bankruptcy in countries with inefficient insolvency systems, or the UK approach in countries without a sophisticated judiciary.

Professor Steffek asked Professor Harris what his top three regulatory strategies would be.

Professor Harris emphasized the importance of reframing the narrative surrounding financial distress and insolvency. He pointed out that in Australia, experiencing financial difficulties is often seen as a sign of fault, potentially leading to regulatory action and prosecution. To address this stigma, Professor Harris suggested reframing how insolvent companies are viewed. He proposed, for instance, considering them as "honest but unfortunate debtors," echoing Professor Gurrea-Martinez's earlier proposal from another conference. Additionally, Professor Harris argued that the Australian insolvency profession should better communicate its value proposition. He believes they need to go beyond the perception of being simply "corporate undertakers" and highlight their role in facilitating restructuring efforts.

Professor Harris' second strategy is to provide a more flexible menu of accessible, simplified, and cheaper options to deal with the problems of financial distress. He added that small businesses are essentially locked out of the system because they often cannot afford AUD 15,000–20,000 to pay for the services of an insolvency professional. Professor Harris reminded the participants that more than 100,000 companies end up abandoned each year in Australia.


Jason Harris, Professor at the University of Sydney Law School, discusses his top three regulatory strategies (photo by Paola Aseron-Dacanay/ADB).

Professor Harris' third strategy is a whole-of-government early intervention approach. He noted that most businesses, even small ones, do not just fail overnight. They typically exhibit warning signs months before failure. Government agencies interacting with these businesses should be equipped to identify these red flags and intervene promptly. Early intervention could involve the government checking on businesses that fail to meet their obligations, such as filing accounts on time, contributing to employee pensions, or responding to regulators. Professor Harris emphasized that this proactive approach is far more effective than simply offering support services to distressed firms after they file for bankruptcy.

Professor Harris concluded by highlighting the importance of preventative systems to deter directors from misconduct in the first place.

Professor Steffek concurred with Professor Harris. He added that both regulators and academics likely have not dealt extensively with early warning systems and strategies in this context.

QUESTION-AND-ANSWER WITH THE AUDIENCE

Professor Steffek asked the other participants if they had any questions for the panelists.

Hon. Justice Christopher S. Sontchi, International Judge at the Singapore International Commercial Court, offered an observation to the panelists. He suggested that what might appear as misbehavior could simply be incompetence. Drawing from his extensive experience dealing with directors and officers, both in private practice and on the bench, he explained that the issue often lies in expecting too much from directors. He further elaborated that the problem with smart people, notably academics, was that they would often fail to think of directors as ordinary people running regular businesses.

Justice Christopher Sontchi, International Judge at the Singapore International Commercial Court, offers his observation (photo by Paola Aseron-Dacanay/ADB).

Justice Sontchi opined that, at least in the US, the duty of loyalty is the most difficult duty. He believes that directors fail to transition from their duties in a solvent company to their duties in an insolvent company because of their loyalty to equity—either because they are completely vested in it or were even nominated by it. Justice Sontchi asked the panel if the solution would be to appoint independent directors—assuming, for the sake of argument, that directors could be truly independent—to take the duty of loyalty out of the equation and offset incompetence to some degree.

Professor Ellias wondered from where these independent directors would come.

He suggested that perhaps creditors could gain the right to contract independent directors at a certain moment of insolvency. However, he acknowledged that this moment would probably be left for the board to define, which would subject the process to the same delays and denials, especially if there is nefarious intent.

Professor Zumbro questioned whether merely having equity could be construed as a conflict. According to him, there should be no conflict as long as the director continues to do the right thing for the corporate enterprise. Even if the company were to become insolvent and the creditors were to become beneficiaries, the director could still work to recover the maximum value from the company, for the benefit of shareholders.

However, he acknowledged that directors are human beings, and thus susceptible to various influences, including the desire to please "old masters". This could make serving two masters—the creditors and the shareholders—difficult.

Professor Zumbro was also of the opinion that the independent director should not come from creditors, who would also have their own specific interests. He concluded that the current adversarial system, wherein the board is retained, works well enough.

Professor Harris suggested that Justice Sonchi's idea could work in the Australian system. An independent director could be assigned to serve as a CRO and liaise with the restructuring team. However, that person would be exposing himself or herself to huge liabilities—tax, environmental, work, health, safety, employee and other liabilities—which would partly explain why CROs have not gained widespread adoption in Australia.

Panel 6 and conference participants (photo by Paola Aseron-Dacanay/ADB).

Professor Shikha pointed out a concerning trend in India: a mass exodus of independent directors whenever regulations tightened their liability. This exodus, she argued, undermined the effectiveness of these safeguards. Professor Shikha struck a balance, acknowledging the need to protect creditors while cautioning against excessive creditor power. She warned that tipping the scales too far could turn insolvency proceedings into a mere recovery tool, hindering genuine company turnaround.

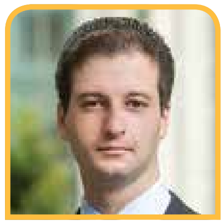
Professor Shikha suggested a potential solution: independent directors drawn from within the company. Equity holders, she reasoned, had a longer-term view and a stronger incentive to revive the company due to their stake in its success. Professor Shikha concluded by acknowledging the complexity of the issue. Resolving corporate distress required addressing not just decision-making flaws but also the underlying market forces.

Shwedagon Pagoda (*Shwedagon Zedi Daw*), also known as Great Dagon Pagoda and the Golden Pagoda in Yangon, Myanmar (photo by Eric Sales/ADB).

PANEL 7
AVOIDANCE ACTIONS

09

PANEL DISCUSSION





Chair:

JARED ELLIAS
Professor of Law, Harvard Law School

Panelists:

BROOK GOTBERG
Francis R. Kirkham Professor of Law, Brigham Young University

SUMANT BATRA
President, Insolvency Law Academy

CHARLES D. BOOTH
Michael J. Marks Distinguished Professor in Business Law and Director, Institute of Asian-Pacific Business Law (IAPBL), William S. Richardson School of Law, University of Hawai'i at Manoa

JOSHUA MACEY
Assistant Professor of Law, The University of Chicago Law School

Professor Jared Ellias, Professor of Law at Harvard Law School, chaired Panel 7 on avoidance actions. He began the discussion by bringing up the overriding question: what should be done about the fact that when debtors file for bankruptcy, some of their property might be in other people's possession?

Scan the QR code to watch Panel 7 video on YouTube.

Jared Ellias, Professor of Law at Harvard Law School, introduces the panelists (photo by Paola Aseron-Dacanay/ADB).

He answered that avoidance actions allow property to be brought back into the bankruptcy estate in order for it to be given to creditors. Additionally, they establish boundaries for financially distressed firms regarding asset transfers, payments to third parties, and preferential treatment of creditors. Avoidance actions are essential to a well-functioning bankruptcy system because they help to shape the incentives with which firms operate while in financial distress.

Professor Ellias introduced the panelists: **Professor Brook Gotberg** from Brigham Young University, **Professor Joshua Macey** from The University of Chicago, **Professor Charles Booth** from the University of Hawai'i at Manoa, and **Mr. Sumant Batra** of the Insolvency Law Academy.

Professor Ellias prefaced the panel discussion by requesting that Professor Gotberg explain the rationale behind avoidance laws and their role within insolvency systems.

Professor Gotberg began by reframing the definition, reasoning that avoidance action is not necessarily a turnover but rather a claw back of the debtor's property from third parties who

The chairperson and speakers of Panel 7 (photo by Paola Aseron-Dacanay/ADB).

were otherwise legally entitled to it. She then listed the types of avoidance actions/claw backs, from the most intuitive to least intuitive.

Brook Gotberg, Francis R. Kirkham Professor of Law, Brigham Young University, talks about the types of avoidance actions (photo by Paola Aseron-Dacanay/ADB).

- The most intuitive claw back is an intentionally fraudulent conveyance where the debtor or an insider gives or transfers away money to defraud creditors. She opined that all cultures and countries could agree that stealing money from creditors is not good, and thus the fraudulent conveyance must be recovered.
- A less intuitive claw back is a constructive fraudulent transfer, wherein the debtor gives something away for nothing or for less than a reasonably equivalent value. In these situations, the avoidance actions prevent creditors from taking unnecessary or unfair losses, and third parties from getting windfalls while the creditors have not yet been paid in full.
- Less intuitive still is a set-off preference. A common law principle, set-off is when two parties owe each other money, and they decide to set the debt off both ways. In the US Code, if a set-off occurred on the eve of bankruptcy, then the transaction is considered preferential, since someone is trying to set themselves up to be better off than other people.
- Insider preference occurs when an insider receives money from the company on the eve of bankruptcy. Even if the transaction was for a legitimate reason, it may seem inappropriate for insiders to take funds right before the company is unable to meet its obligations to others.
- The least intuitive transfer is the general preference law. For example, the debtor owes two people $100 each. If the debtor then pays one creditor $100 and then files for bankruptcy without paying the other creditor, the latter could perceive the situation as unfair, and could call for a claw back. Professor Gotberg opined that this is often counter-intuitive because the party that received the preference had not committed any fraud and wrong-doing. The idea of equality defines the preference transfer, with deterrence an underlying factor. Creditors should be deterred from engaging in a race to the courthouse, or bringing the debtor to the brink of insolvency by attempting to collect. They may be less inclined to do so if they know that their collection, if achieved on the eve of bankruptcy, can be clawed back. But it is universally agreed that this is the least of the incentives because parties are usually in favor of creditors collecting on their debts when they become due.

She concluded that these are the instinctual purposes behind collective actions: preventing wrongdoing, preventing windfalls, and promoting equality.

Professor Ellias acknowledged Professor Gotberg's reframing and noted an ongoing effort to rename some avoidance actions as 'voidable' transfers to avoid the connotation of fraud, particularly since these transfers may not involve fraud at all. He then asked Professor Macey to elaborate on these types of actions and discuss the challenges in determining what should fall under the umbrella of intentional fraudulent transfer law.

Professor Macey responded by asking why avoidance powers need to be limited. In cases of fraud or harmful inequality, he asked why a look-back period is needed; why the burden of proving offense is so high; and why there is a 10-year statute of limitations.

Joshua Macey, Assistant Professor of Law, at The University of Chicago Law School, discusses avoidance powers (photo by Paola Aseron-Dacanay/ADB).

Responding to his own questions, he pointed out that, in dealing with avoidance powers during bankruptcy, different jurisdictions have to strike a balance between policing strategic behavior and allowing market participants to move on with their lives. It is inefficient and harmful to everyone ex ante if jurisdictions do not police strategic behavior or if some creditors are treated more favorably than others. It not only fosters inequality, it also incentivizes strategic behavior leading to a race to the courthouse. Nevertheless, Professor Macey believes that avoidance powers should be cabined, so that people acting in good faith can simply exercise their businesses and move on.

Professor Macey then shared that, in listening to panelists compare different jurisdictions, he was struck by the number of relevant factors that change depending on the location, time period, and the nature/identity of the parties involved. For example, if one is worried about judicial competence, one might prefer private ordering. If udges are perceived as inefficient, corrupt, or lack administrative capacity, one may refrain from excessively policing transfers, as this would require administration. If parties are concerned that there may be corruption within the corporation, one may want to consider moving. Previous panelists had already compared different countries and even different US states.

Professor Macey re-emphasized that the presence of sets of rules and the utility of those rules are contingent not only on the legal system but also on multiple different variables.

Professor Macey then discussed three points regarding avoidance law.

- Actual fraudulent transfers, which are defined as "transfers of property with intent to defraud, hinder, or delay creditors." He made the point that since intent is difficult to prove, badges of fraud are crucial proxies for assuming intent, e.g., if the transfer was made to an insider, was concealed, or was for substantially all the assets; if the debtor absconded; if the assets were concealed; or if there was a lack of consideration.

- Constructive fraud, which Professor Macey framed as "the debtor receiving less than equivalent value in exchange for the transfer, and was either insolvent at the time, or rendered insolvent by the transfer, or left with unreasonably small capital." He noted that there are three terms that must be defined.
  - Transfer is defined quite broadly. It could be a conveyance of real property but also a great deal of other things, including an interest in a debtor's property, an obligation incurred, or even just a promise to transfer assets in the future.
  - Reasonably equivalent value can be established through procedural evidence, e.g., if there were competitive bids, or if the net effect of all funds became available to the unsecured creditors. This would be the case even if the creditor did not receive the value directly, as long as it benefited him or her.
  - Insolvency/solvency can be established via tests. In the US, some jurisdictions use a balance sheet test, which looks at the value of the balance sheet, while others have an income test, which determines whether the debtor can pay its debts as they become due. Other jurisdictions have a subjective test. Having 'unreasonably small capital' means that the transfer resulted in the debtor not having sufficient capital to prepare for future eventualities.
- Voidable preferences, which Professor Macey characterized as the most formulaic. The trustee can seek recovery of a payment made within 90 days of the filing date as long as the transfer was made for the benefit of a creditor on account of an antecedent debt made when debtor was insolvent. Voidable preferences carry a presumption of insolvency, but they are often based on the balancing test within 90 days of the filing, or one year for insiders. More importantly, they enable the creditor to get more than would be available through liquidation.

Professor Macey believes that while these three things serve to ensure that that creditors are treated equally, they can also facilitate strategic behavior. The most obvious example is the voidable preference's 90-day rule—regardless of good or bad faith, the hard cut-off means that there would be very different outcomes for 91 days and 89 days.

Professor Ellias said that now that the bread and butter of avoidance law had been covered, he wanted to move the discussion to the trade-offs that must be made when trying to create a system of law to regulate avoidable transfers. He asked Professor Booth to elaborate on the pitfalls that he has faced when designing avoidance action law in developing economies.

Professor Booth gave five main points to respond to Professor Ellias' question.

First, the complexity of avoidance actions makes them incredibly difficult to translate into economies that never even thought about them. Professor Booth referred to Professor Joshua Macey's statement about advanced economies, where talking about a preference is very difficult because it involves a debtor giving money to his creditor. In less developed economies, it is even trickier to explain why the transaction could be wrong.

Charles D. Booth, Michael J. Marks Distinguished Professor in Business Law at William S. Richardson School of Law, University of Hawai'i at Manoa, discusses the pitfalls that he has faced when designing avoidance action law in developing economies (photo by Paola Aseron-Dacanay/ADB).

Second, when working on law reform, avoidance powers are not the first thing that policymakers consider. Avoidance powers are low on the priority list. Policymakers have many other important aspects to deal with—for example, trying to convey the reasons behind the changing nature of insolvency law from a liquidation-based pre-Asian Financial Crisis (AFC) approach to a post-AFC rehabilitation/reorganization approach. Professor Booth added that Singapore was probably the only jurisdiction in Asia pre-AFC with a modern corporate restructuring framework.

Further, during the AFC, insolvency law reform happened almost everywhere. However, even as the law reform occurred, the number of cases dropped in almost every jurisdiction, except Japan. Professor Booth noted that this is because confidence in a new law takes years to build, with the result that case law is limited or absent in many countries.

Third, civil law jurisdictions need to have very detailed laws, rules and regulations, because judges do not operate well in the gaps. However, across the world, insolvency laws, despite being so procedural, are often enacted without adequate supporting rules and regulations. Professor Booth opined that it is important that detailed rules and regulations are put in place either when the law is enacted or soon thereafter as possible.

He gave his experience in Lao People's Democratic Republic (Lao PDR) as an example. The new Law on Rehabilitation and Bankruptcy of Enterprises has avoidance powers set out in Article 29. It contains the following provision on preferences:

> The administrator has the right to request the court to consider ruling null and void any of the following acts made by a debtor enterprise within one year from the filing date:
>
> (1) the transfer or assignment of assets of the debtor enterprise to creditors or other persons;
>
> (2) the conversion of unsecured debts into secured debts;
>
> (3) the payment of a debt to any creditor before the applicable due date;
>
> ... [and]
>
> (7) other acts in favor or any creditors or persons.

Professor Booth pointed out some issues above this provision.

(a) It just lists the instances where the court can void transactions but it does not provide how the list will be interpreted. He said that the courts are not going to know exactly how to interpret the clauses. He also noted the lack of rules and regulations on how to deal with the provisions. Thus, the provisions will likely just sit there and not be used.

(b) When enacting preference provisions, jurisdictions have different ways of approaching the issue regarding the debtor's intention or mindset. The US approach is to look at the effect of the transfer and to determine if the creditor's position has been improved. The British/Commonwealth approach is to instead focus on the intention/desire of the debtor to improve the creditor's position. Which approach is the Lao PDR adopting?

Professor Booth opined that countries need to get away from looking into intention and desire—figuring out what is happening in the debtor's head takes time and expense and can take years to prove.

(c) Where is the money going to come from for dealing with these actions? In many situations, the creditors do not want to pay for it. The creditors just want to get their money back, so it can be very difficult to proceed.

Fourth, avoidance powers are less likely to be used where the parties are increasingly focusing on restructuring. It is very difficult for debtors in possession to restructure the debtor's operations and debt if parties are going after the debtor's relatives or business associates to try to get them to pay back funds. Often in restructurings, it may be better not to use the avoidance powers (but, in some countries, it may be good to do so). However, since insolvency administrators want creditors to vote in favor of a restructuring plan, they need to tell the creditors what they would get in a liquidation, and that includes the amounts likely to be recovered from the exercise of avoidance powers. With that information, the debtor should, at least, have an idea of a rough amount of what he or she should offer creditors.

Fifth, many jurisdictions in Asia suffer from high levels of fraud. Prof. Booth thinks bankruptcy cannot do everything. Bankruptcy proceedings are all back-end and one cannot undo all the fraud years later using avoidance powers. Thus, in some Asian jurisdictions, insolvency administrators go after third parties (auditors) for failing to uncover the fraud, rather than going after the individuals responsible for the fraud. This is a new area that can perhaps be used rather than using avoidance powers. Prof. Booth concluded that maybe it is an easier route of recovery.

Professor Ellias then asked Mr. Batra about the trade-offs that he has seen in the design of avoidance action regimes.

Mr. Batra agreed with Professor Booth's points, particularly the fourth point on the low priority of avoidance transactions. He revealed that this has been the case in India.

The Insolvency and Bankruptcy Code came into effect in 2016. Although avoidance applications continue to be filed, both the bankruptcy tribunal and the insolvency professionals have not given them the priority or attention they deserve. Consequently, avoidance applications have piled up, locking up a huge amount of value.

Sumant Batra, President of the Insolvency Law Academy, talks about the Insolvency and Bankruptcy Code of India (photo by Paola Aseron-Dacanay/ADB).

However, bankruptcy courts can do little at this point in time—the backlog of applications cannot be taken up at the cost of other priority matters, such as admission of new insolvency petitions or applications for approval of resolution plans. Mr. Batra thus proposed not underestimating the importance of avoidance petitions as a crucial lesson for jurisdictions pursuing legal reform.

Mr. Batra then commented on Professor Macey's point on look-back periods. He shared that, in India, courts could go beyond the look-back period in fraud and wrongful trading cases. However, a one-year limitation is put on other types of avoidance transactions, such as preferential, undervalued, and extortionist transactions. This extends to two years in the case of related parties.

Mr. Batra went back to the topic of fiduciary duty. He reiterated the point that directors of a debtor company should recognize that their fiduciary duty shifts from shareholders to the creditors, once they become aware that financial distress or insolvency is imminent. Their greater duty of care would then be to preserve the value of the enterprise for the benefit of the creditors and other stakeholders, in the event of restructuring or liquidation. Proving whether that duty was applied or not is complex and subjective.

Mr. Batra emphasized that not much jurisprudence on avoidance has developed under the new insolvency law in India. However, there was one major case where an insolvent real estate developer, one year prior to the commencement of its insolvency proceedings, used hundreds of acres of its prime property located near New Delhi to secure [bank] loans for its holding company. The bankruptcy court ruled that this was a preferential transaction, because the real estate developer was in financial distress and defaulting to its own creditors, and therefore had no business using its valuable land assets for the benefit of the creditors of its holding company. This decision was upheld by the Supreme court during appeal.

Mr. Batra added that while he was advising the insolvency professional of the insolvent real estate developer, both he and the insolvency professional faced difficulties. Many of the lending banks—which were large, public sector banks—took offense. Eventually, the issue was settled, and the land was retrieved from the lenders of the holding company.

According to Mr. Batra, avoidance transactions assumes much greater importance in India because most of the lending in the Indian market is done by public sector banks. These loans are typically secure, so the banks would have superior entitlements to the proceeds of a liquidated debtor company. Therefore, these banks are more invested in preserving the value of the enterprises and in clawing back whatever value was taken out. Mr. Batra added that India is mindful that avoidance issues need to be given priority, especially since every fourth [insolvency] case involves avoidance transactions.

Recalling one of Professor Booth's points, Mr. Batra added that establishing who would bear the cost of pursuing avoidance cases is a difficult issue in India. No one wants to pay, because lenders see this cost as spending good money after bad money. Further, the new management rarely wants to commit money, time, and resources to pursue litigation.

However, Mr. Batra sees the maturity of the Indian market as a positive. It is well-equipped to understand avoidance transactions since similar provisions on winding up and liquidation are contained in the 1913 Companies Act, and the jurisprudence is well developed. In addition, the avoidance provisions in the new insolvency law were drafted using best practices from other jurisdictions.

Still, Mr. Batra believes that India needs to pay more attention to avoidance transactions and unlock the significant amount of money lying locked in those proceedings. However, he predicted that there would be difficulties, especially in proving alleged fraud or clawing back assets that have already been conveyed to third parties.

Professor Ellias commented that now that the panel had discussed the causes of avoidance actions, why they are filed, and the challenges of designing avoidance law, it was time to discuss the defenses that may be used against them. He asked Professor Macey to elaborate.

Professor Macey responded that current US law allows for two types of defenses.

- A party can challenge the elements of the transfer. For example, in the case of a constructive fraudulent transfer, a party can claim that the debtor was solvent or that it did receive a reasonable or equivalent value.
- A party can invoke a statutory defense by claiming, for example, that it was a good faith purchaser, that the transaction occurred in the ordinary course of business, or that there was a contemporaneous exchange for new value. However, this defense is not quite as valuable because the party only gets a lien or retains an interest transferred.

Joshua Macey, Assistant Professor of Law, at The University of Chicago Law School, discusses defenses to avoidance actions (photo by Paola Aseron-Dacanay/ADB).

Professor Macey pointed out that one should also consider whether parties would want to limit defenses to prioritize certainty, and to consider which route would be costlier. He agreed with Professor Ellias that fraudulent transfer law in the US is broken, since deterrence is absent. At most, a party recovers what it can. He however acknowledged Professor Squire's point that the litigation costs provide some deterrence, and added that the extended length of litigation could also be a deterrent.

Professor Macey then added that having different defenses for different parties—for example, if unsophisticated creditors need much more significant protections than sophisticated creditors, or if non-adjusting or non-consensual creditors cannot protect themselves through contract—would require a system with exorbitant costs. He opined that the ideal system would thus feature very hard trade-offs based around empirical questions about the parties involved, the relevant administrative capacities of the jurisdiction, or the allowed level of gamesmanship.

Professor Ellias then asked Professor Booth to talk about why developing countries often do not provide any defenses to avoidance transactions.

Professor Booth first made two points regarding the previous statements made in regard to avoidance powers. First, even if the bankruptcy law and the insolvency law do not have provisions about fraud, almost every country has rules against fraudulent transfers in non-bankruptcy law. It is quite clear that those laws have not been enforced in most countries because it is very difficult to prove all the elements of fraud. Thus, when insolvency occurs, it is going to be even more difficult because then parties will often be fighting over the allocation of funds for litigation.

Second—and this might not apply as much in the US—debtors and corporate debtors' officers are very mobile in Asia. It can be challenging to locate parties who have left (or fled) a jurisdiction. As uch, enforcement of service is a real problem.

Charles D. Booth, Michael J. Marks Distinguished Professor in Business Law at William S. Richardson School of Law, University of Hawai'i at Manoa, discusses avoidance actions and defenses that may be invoked against them (photo by Paola Aseron-Dacanay/ADB).

Professor Booth then discussed who would likely be the defendants in avoidance actions. He said that the panel talked in the abstract about these transactions, but generally—especially when dealing with preferences—who are the parties who received the preference? He pointed out that preferential transfers would usually favor the debtor's family, very close friends, and other people personally connected to the debtor who had put money in the debtor's company. Once a debtor realizes that he or she is unable to pay back all debts, he or she may wish to pay back his or her family and friends before the others.

In essence, the insolvency administrators can leverage these very close family and personal relationships as a way to convince parties who received preferences to return the funds. This may be a reason why even if the laws are not great on paper in these jurisdictions, they can still work, and the other creditors might be able to get something back as well.

Regarding the issue of lack of defenses, Professor Booth opined that when countries deal with these provisions for the first time, it is difficult to know what to anticipate. He added that so many of the defenses discussed by the panel—such as those in the US Bankruptcy Code—have emerged over time.

Professor Booth continued that as avoidance cases arise and needs for defenses emerge, countries will specifically address these issues, amend the law, and put in place rules and regulations. He also thinks that, at the outset when countries enact laws for the first time, they are going to go after the low-hanging fruit—the easy ones—where the resources will be focused.

As a segue to the succeeding panels, Professor Booth mentioned that it is even more difficult for small and medium enterprises (SMEs). In these situations, parties often have no money to do anything. Further, there might be a complete mess in terms of the debtor's records, making it difficult to figure out what is going on.

Professor Booth concluded that one of the issues worth thinking about is that countries should consider funding SME insolvency procedures in Asia. He does not think that money can be expected to come from many of these cases to fund everything. He said that if the system is going to work, and if governments really do care about these issues, then funding has to come from outside the actual insolvency case. If this occurs, then perhaps the law can have more teeth.

Professor Ellias then pivoted to the final topic: fraudulent transfer law. He asked Professor Gotberg which issues could arise when avoidance action defendants lack sophistication, and what could be done to educate defendants, especially in jurisdictions where bankruptcy lawyers are scarce.

Professor Gotberg responded that the biggest problem for creditors that lack sophistication is that avoidance action laws are counterintuitive and feel fundamentally unfair. This undermines the legitimacy of the insolvency system.

Professor Gotberg opined that among the different avoidance actions, avoidable preference actions are the least intuitive. This is because the creditors who received payment for a valid claim are expected to return that payment even though they did nothing wrong and are often still owed more money on top of the initial payment. This is particularly harmful in a jurisdiction like the US where avoidance actions are discretionary. For example, in the context of a chapter 11 plan of reorganization, the debtor in possession may choose to bring the preference action or not, in effect also choosing whom they prefer to receive and keep a preference.

Professor Gotberg opined that if she were constructing her own avoidance action, she would consider doing away with preference law entirely. It is expensive to administer and disruptive. Further, there is usually no intent to defraud, which makes it counter-intuitive for parties who are on the receiving end of the preference law.


Brook Gotberg, Francis R. Kirkham Professor of Law, Brigham Young University, talks about avoidance preferences (photo by Paola Aseron-Dacanay/ADB).

Professor Gotberg contrasted this with fraudulent conveyance. She shared that the US and many other common-law countries have fraudulent conveyance laws, because even the least sophisticated recipients of a fraudulent conveyance would understand that someone will come after money given to them by debtors who were hiding that money or were avoiding paying other creditors.

Professor Gotberg explained that she had introduced avoidance actions in order of intuitiveness to emphasize that the more jurisdictions err on the side of the intuitive actions, the easier it would be for unsophisticated parties to appreciate and understand claims brought against them.

Professor Ellias asked Mr. Batra about how the prosecution of avoidance actions could be complicated by cross-border issues.

Mr. Batra responded that the first complication is if a jurisdiction does not have a cross-border law. He recounted that in India, the otherwise robust insolvency law does not have a cross-border service, which complicates the cases of very large enterprises that have assets located in many jurisdictions.

Mr. Batra mentioned that he and his team faced enormous challenges in handling three cases where the assets were located in more than a dozen jurisdictions. Things only went smoothly when the enterprise holding those assets in another jurisdiction itself was also under receivership or insolvency. Thus, Mr. Batra's team was able to coordinate with the professional handling the insolvency in that other jurisdiction, as such professional understood how to deal with the cross-border issues.

Elsewhere, they experienced non-cooperation. Mr. Batra spoke about an instance where his group managed to trace an asset, but could neither assess its actual value nor take control of it. Further, even if they had taken control of the asset, they would not have been able to transfer it or sell it and bring the money back to India anyway, because there were other claimants in

Sumant Batra, President of the Insolvency Law Academy, discusses possible cross-border aspects of avoidance actions (photo by Paola Aseron-Dacanay/ADB).

the other jurisdiction. Mr. Batra expressed hope that that these cases have taught the policymakers, regulators and market in India the importance of having a cross-border insolvency law and a group insolvency law.

Mr. Batra opined that despite the gaps in the law, the Indian judiciary has shown tremendous maturity. It has managed to help recover or retrieve assets that were located in other jurisdictions, with the cooperation of insolvency professionals and the courts in those other jurisdictions.

He cited the classic case of cooperation in the handling of Jet Airways' insolvency.[1] The proceedings started in the Netherlands and then continued in India. Both India and the Netherlands do not have a cross-border insolvency law. Prodded by the Indian bankruptcy court, professionals in both jurisdictions signed a cross-border insolvency protocol, which later allowed Jet Airways' aircraft parked in the Netherlands to be sold, and the proceeds to be used to pay the creditors there, including the insolvency professionals involved.

According to Mr. Batra, the lesson from this case is that it is still possible to resolve cross-border issues in the absence of cross-border insolvency laws, so long as well-informed professionals and mature courts cooperate to help recover assets for their fair and equitable distribution. He also noted that it is essential to respect the respective jurisdictions involved because, ultimately, the parties will have to recognize the supremacy of domestic law.

Regardless, Mr. Batra believes having a cross-border law on insolvency is a must. He acknowledged that the Jet Airways case was more about retrieving assets that were mostly not subject to avoidance. He thus concluded by discussing his other cases where loans taken from Indian banks were used to buy assets in another jurisdiction, with plenty of over invoicing and underpricing involved. Accordingly, the lenders believed this to be a planned and strategic effort to keep the money out of their reach.

Initially, the claimants were unable to get the assets back into India. However, the party that came in to plan the restructuring recognized the value of enterprises in other jurisdictions and

[1] *State Bank of India vs. Jet Airways*, I. A. No. 2081/2020 in C.P. (IB) No. 2205/Mb/2019, 22 June 2021.

The chairperson and in-person speakers of Panel 7 (photo by Paola Aseron-Dacanay/ADB).

offered them to lenders in the resolution plan. The easily recoverable assets were identified and sold, with the proceeds passed-through to the lenders. Some of the other assets were offered to the lenders, to be sold directly by the latter.

Mr. Batra said that the matter, while not entirely handled to the satisfaction of the lenders, allowed for innovative solutions. He concluded that the process would have been easier if India had a cross-border insolvency law.

The Fiaga Power Plant in Samoa (photo by Eric Sales/ADB).

PANEL 8

INSOLVENCY FRAMEWORKS FOR INDIVIDUALS AND MICRO AND SMALL ENTERPRISES

10

PANEL DISCUSSION





Chair:

NICHOLAS MOLLER
Principal Counsel, Asian Development Bank (ADB)

Panelists:

SERGIO MURO
Financial Sector Specialist, World Bank

CHARLES D. BOOTH
Michael J. Marks Distinguished Professor in Business Law and Director, Institute of Asian-Pacific Business Law (IAPBL), William S. Richardson School of Law, University of Hawai'i at Manoa

JOHN MARTIN
Partner, Norton Rose Fulbright and President, International Insolvency Institute

JASON HARRIS
Professor of Corporate Law, University of Sydney Law School

Mr. Nicholas Moller, Principal Counsel at the Asian Development Bank, chaired Panel 8. He said that Panel 8 would discuss micro and small enterprises (MSEs) and the particular needs of MSEs in an insolvency. Mr. Moller introduced the in-person panelists who were **Mr. John Martin**, **Professor Jason Harris**, and **Professor Charles D. Booth**.

Scan the QR code to watch Panel 8 video on YouTube.

Nicholas Moller, Principal Counsel at the Asian Development Bank, introduces the speakers of Panel 8 (photo by Paola Aseron-Dacanay/ADB).

He also introduced the virtual panelist, **Mr. Sergio Muro**, a Financial Sector Specialist with the World Bank Group's Finance, Competitiveness, & Innovation Global Practice (FCI).

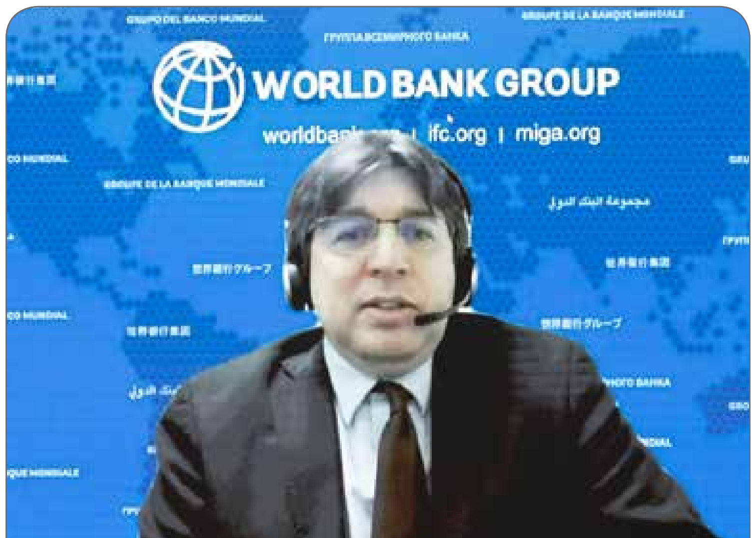
Mr. Moller opened the discussion by stating that MSEs are different from larger companies and should thus be treated differently in an insolvency. However, he noted that many regimes around Asia do not adequately address the special needs of MSEs.

Panel 8 would therefore look at whether there could be particular insolvency frameworks for small businesses. It would also look at approaches that have been adopted by various jurisdictions and the work that has been done by the Asian and Business Law Initiative, INSOL International, United Nations Commission on International Trade Law (UNCITRAL), and the World Bank in this area. Furthermore, the panel would look at how those approaches and policy recommendations could be adjusted and adapte d to the various different markets and institutional environments in the different jurisdictions in Asia.

The chairperson and speakers of Panel 8 (photo by Paola Aseron-Dacanay/ADB).

Mr. Moller recalled that the World Bank published the Principles for Effective Insolvency and Creditor-Debtor Regimes (the Principles) in 2021 to help policymakers to create or improve the regime for micro, small and medium enterprises (MSMEs). He then asked Mr. Muro to elaborate on the changes in this new version of the Principles, the key features or recommendations designed to help MSEs, and how the Principles worked with principles from other organizations like the UNCITRAL Legislative Recommendations on Insolvency of MSEs.

Mr. Muro responded by reminding the participants that the Principles were originally developed in 2001 in the wake of the financial crisis in emerging markets in the late 1990s, which deeply affected many corporations, especially in Asia. The Principles filled the absence of internationally recognized standards for evaluating the effectiveness of domestic creditor-debtor rights and insolvency systems, and thereby helped countries to evaluate and improve core aspects of their commercial law systems.



Sergio Muro, Financial Sector Specialist at the World Bank, talks about the Principles for Effective Insolvency and Creditor-Debtor Regimes.

Mr. Muro explained that the 2021 version of the Principles provides a benchmark for MSE insolvency procedures. They also address the need to simplify insolvency processes and ensure the discharge of debts for natural person entrepreneurs. He noted that the new Principles have several key benchmarks, which include promoting and bolstering informal out-of-court or hybrid workouts, simplified restructuring procedures, and a broad discharge-of-debts regime. He added that the new version of the Principles was designed at a high level and with flexibility in mind, so that it could be adapted to fit the different domestic needs of insolvency systems.

Mr. Muro suggested that policymakers need to keep in mind how broad the issue of MSE insolvency could potentially be. Small businesses represent 95% of all enterprises and account for more than 60% of employment worldwide. Arguably, the role of MSEs is even outsized in emerging economies where they contribute substantially to job creation, the provision of goods and services, and economic growth and poverty reduction.

Mr. Muro highlighted that the Principles:

- place the debt eligibility focus on firm size;
- promote easy access to the procedure, based on rebuttable presumptions that the commencement criteria have been met in the case of voluntary filings;

- emphasize the importance of conversion of proceedings in two dimensions—from simplified to ordinary proceedings, simplified reorganization to simplified liquidation, and vice versa in both these dimensions;
- seek to foster fewer and less complex procedural formalities and shorter deadlines than those required in ordinary insolvency proceedings;
- prefer to vest the administration in the debtor, once the insolvency case is open;
- look to mitigate the effect of creditor apathy, which is very common in the case of smaller debtors in insolvency, by counting abstentions as affirmative votes for the approval of reorganization plans; and
- promote growth and cost-effective mechanisms for discharging debts of good faith debtors.

Mr. Muro then gave more details on how the Principles interact with the UNCITRAL Legislative Recommendations on Insolvency of MSEs. He explained that the World Bank and the UNCITRAL—the core standard-setters in the area of insolvency—have been collaborating extensively since the inception of both documents. UNCITRAL representatives participated in the World Bank's Insolvency and Creditor/Debtor Regimes Task Force's meetings, and World Bank Group representatives participated in the discussions of the UNCITRAL Working Group V on the draft text on new simplified insolvency regimes.

Mr. Muro affirmed that there was a strong interconnection and a high level of consistency between these two documents. Thus, while the Principles can serve as high-level guidance and benchmark, the UNCITRAL Legislative Recommendations on Insolvency of MSEs can be used as a reference tool by national authorities and legislative bodies preparing new insolvency laws or chapters on MSE insolvency.

Mr. Moller asked Mr. Martin and Professor Booth to describe their experiences in law reform in the Asia-Pacific region. He also asked whether the panelists have been able to introduce tailored regimes for MSEs in any of their law reform projects, and whether their law reform efforts have been influenced by the World Bank and UNCITRAL papers.

Professor Booth recalled the fact that after the Asian Financial Crisis and the ensuing corporate insolvency reform in many countries, insolvency cases actually went down for a number of years before starting to pick back up.

He explained that dealing with personal insolvency reform in Asia was a very

Charles D. Booth, Michael J. Marks Distinguished Professor in Business Law at William S. Richardson School of Law, University of Hawai‘i at Manoa, discusses his experience in insolvency law reform in Asia (photo by Paola Aseron-Dacanay/ADB).

different experience. Asia has a huge personal debt overhang; in many civil law jurisdictions, individuals have no option to file for bankruptcy. For other jurisdictions, such as Hong Kong, the law allows for discharges, but only in theory—discharges are almost impossible to achieve in practice. Thus, new insolvency regimes for MSEs will need to provide a discharge for individuals, to account for the debt overhang.

Professor Booth explained that the region has an issue of bankruptcy stigma, which affects whether or not individuals and small businesses will file for bankruptcy. He believes that this stigma and skepticism can be overcome if the discharge works. Once word gets out that the discharge is good, there can be an explosion of cases.

For example, in Hong Kong, before the revised personal bankruptcy law changes came into effect in 1998, bankruptcy cases numbered in the hundreds each year. Once it became clear that the discharge worked, the cases shot up to over 25,000, reaching a high of 26,922 in 2002. Thereafter, the jurisdiction has had a steady number of cases, generally between 7,000 and 10,000 cases a year.

Professor Booth does not think that countries are always focused on the effect of law reform on personal bankruptcy cases. Because on the corporate side there are fewer cases, a jurisdiction often needs to train only a small number of judges to deal with corporate cases. But if personal bankruptcy laws come into operation and lead to an explosion of individual debtor cases, a lot of the systems in Asia will be unable to deal with such an increase.

Professor Booth thinks that when bankruptcy laws are able to work, over time they can overcome stigma. But it will be very difficult. Nobody wants to be the guinea pig. This is why Professor Booth believes that in many countries that have never had laws in this area, there will be a slow uptake. He opined that multilateral organizations play a crucial role by setting the frameworks—these frameworks are key and serve as a starting point for discussions when a jurisdiction is engaged in law reform.

He observed that, contrary to the 1990s, today's governments actually want insolvency laws to be enacted or reformed, probably in recognition of the fact that MSEs comprise roughly 90% of enterprises and provide more than 50% of jobs. Professor Booth further noted that even during pre-COVID times, SMEs were suffering in most countries.

When COVID-19 hit, governments exerted efforts not only in law reform, but also in providing financial stimulus. The financial stimulus stabilized SMEs during the COVID period, but the consensus in most countries is that these efforts did not necessarily improve the small businesses' balance sheets longer term. Hence, there is a sense that another wave of problems will appear.

Professor Booth then shared his experience in Vanuatu, the Lao People's Democratic Republic (Lao PDR), and Bhutan, where he contributed to the drafting of insolvency laws.

Vanuatu enacted a corporate insolvency law [the Companies (Insolvency and Receivership) Act], but the draft personal bankruptcy law was considered too controversial and was not enacted into law. The interesting thing was that Vanuatu enacted a cross-border insolvency law [the Insolvency (Cross-Border) Act], but did not enact a personal insolvency law.


Charles D. Booth, Panel 8's chairperson and in-person speakers (photo by Paola Aseron-Dacanay/ADB).

Turning to Lao PDR, the new law was enacted in 2019 and came into operation in 2020. On the other hand, Bhutan is still in the midst of the insolvency law reform process.

Professor Booth reiterated his recommendation that laws should be very detailed in civil law jurisdictions, and affirmed his belief in hybrid and less formal pre-insolvency procedures. Initially, Professor Booth thought that governments would support these informal procedures because they required less infrastructure and human resources. However, he found that governments of countries that could benefit from informal pre-insolvency procedures were also the most reluctant to enact these procedures, preferring to have more control over the process.

Professor Booth shared that this was the case with his work in Lao PDR. There, law reform specialists tried to have the law structured to include an informal pre-insolvency procedure, whereby the debtor could reach agreement with its unsecured creditors and then get the imprimatur of the court. However, the Lao PDR insolvency law in the end excluded this procedure. Simplified MSE rehabilitation procedures remain in the law in Part VI—but these may only be used after the formal commencement of insolvency proceedings.

Professor Booth added that, historically, this was the way that the British model worked. After a bankruptcy petition was filed, the parties had a short period to negotiate a scheme of arrangement or compromise. If they did not agree, the debtor's assets would be liquidated. In practice, of course, liquidation was the usual result, because by the time the formal petition was filed it was too late to solve the debtor's problems. Professor Booth's view is that agreements with creditors need to be made as early as possible and therefore ideally prior to the filing of a formal petition.

Professor Booth added that the Lao PDR MSE rehabilitation procedures involve qualified advisors—insolvency administrators (IAs)—early in the process, to give professional advice to debtors' businesses, which are often very unsophisticated. Lao PDR also provides training for judges and the IAs, with the goal of developing a group of professionals to guide small businesses through the rehabilitation process. If a rehabilitation cannot be achieved, the process will feed into bankruptcy.

Prior to the enactment of the new law, Lao PDR did not provide for personal bankruptcy. The new law includes personal bankruptcy law provisions, but only for individual MSE sole proprietors and business partners. It provides for their discharge from bankruptcy, but does not include full personal bankruptcy procedures. Professor Booth thinks it would have been better to have a separate part in the law that would include all of the personal insolvency provisions in one place, so that everyone could follow the law more easily.

Professor Booth emphasized that when drafting these laws, the texts have to be as simple and clear as possible. He said that parties have encountered difficulty in a lot of the older bankruptcy legislation in Asia because of the way that these laws were drafted.

Professor Booth then brought up his experience working in Bhutan, where the insolvency law is still being drafted with ADB's help. He added that his work there is different in that it involved modifying an old British-style law to include a pre-insolvency procedure. If the pre-insolvency procedure does not work, it will lead to a formal reorganization procedure (for companies), where the debtor can still have the possibility of negotiation with creditors.

However, unlike in Lao PDR where the pre-insolvency procedure is just for MSEs, the pre-insolvency procedure in Bhutan is for all "insolvent debtors." A small business can choose it, a large business can choose it, and the procedure will then be adapted as necessary. If the procedure does not work for a company, it can go into reorganization. If the procedure does not work for a small business partner or sole proprietor, then the debtor can go into personal bankruptcy, as the draft law includes a full chapter for personal bankruptcy (including consumers).

Based on his experience, Professor Booth said that policymakers need to come up with a mechanism that leads creditors and debtors to use insolvency procedures. He looked back at how insolvency law reform developed. The first law reform projects in Asia happened in the 1990s during the Asian Financial Crisis (AFC). Prior to that, the multilaterals did not engage in law reform work. Formal law reform work began in 1997–1998; in the next few decades, training programs for judges, IAs, and others were developed.

Now that a quarter of a century has passed since the AFC, Professor Booth thinks that law reform projects should also focus on disseminating information and educating stakeholders on the benefits of using insolvency procedures. For example, in countries like Bhutan, Lao PDR, and Myanmar, parties need to be convinced to use insolvency laws. Therefore, dissemination of information is critical.

Professor Booth also noted that banks always seem to be more forgiving of companies, even when more money is involved, but not of individuals. Parties make accusations that individual debtors are fraudulent, should be punished, and that discharge should be farther out. Professor Booth attributed this tendency to the banks' fear that treating people too lightly or letting them off too early would encourage them to take out loans on their credit cards and not repay their debt.

He concluded that with individuals and small businesses, there may be co-mingling of personal and business debts. Insolvency laws should therefore not just focus on one or the other. Banks, being well-placed to facilitate insolvency processes, should be brought to the table and be convinced to support these processes and help individuals through them.

Mr. Martin responded that he has been privileged to work with ADB on law reform across Asia for the last six or seven years. His engagements have been of two different types.

The first type of engagement was in countries, such as Indonesia and Armenia, that have an existing insolvency system. The work there involved modernizing the system and integrating into it tools commonplace in developed economies.

John Martin, Partner at Norton Rose Fulbright and President of the International Insolvency Institute, talks about insolvency law reform in Armenia, Indonesia, and Myanmar (photo by Paola Aseron-Dacanay/ADB).

The second type was more challenging, and involved countries where there has been little or no tradition of insolvency. He brought up the example of Myanmar, which had been a command economy for 50 years and had no credit and recorded insolvencies. The jurisdiction there dealt with debt it in a different way, notably their debtors' prison, which had been abolished across the rest of the world 150 years ago.

Myanmar also had an insolvency law, which was part of their 1914 Companies Act, but was just word-for-word the British statute from the 1860s. This law only provided for liquidation and corporate rescue in the form of a scheme of arrangement, but with two court applications. it also had no other rescue mechanisms for corporate rehabilitation. It did recognize different classes of creditors, but not in a way that would be relevant to MSMEs or the midsize enterprise sector.

Since Myanmar had no insolvency processes, they had no insolvency culture or tradition. Mr. Martin compared their system to a blank sheet of paper, which allowed those working on law reform to adapt the work of others, notably of the World Bank and ADB, the Asian Principles of Business Restructuring published by the Asian Business Law Institute and the International Insolvency Institute (III), and UNCITRAL's MSE chapter released in the last several years. He expressed appreciation for the fact that there was no need to start from scratch to put together an MSE-specific chapter for Myanmar, because the existing body of work on MSE insolvency covers all the practical issues and decision points required for law reform.

Mr. Martin agreed with the other participants that insolvency laws should address the specific needs of the MSE sector, because MSEs always account for north of 90% of businesses and 60% of the employment in Myanmar and most Asian countries. He concluded by saying that Myanmar's MSE chapter in the law provided for quick, simple, and inexpensive resolution of cases. He shared that reports in recent months indicated that quite a few insolvencies have already come before the courts and that the new law is working quite well.

Mr. Moller moved the discussion back to policy. He asked Professor Harris how regulators should look at MSEs, given that MSEs can be sole traders, individuals, partnerships, and companies.

Nicholas Moller, Principal Counsel at the Asian Development Bank, asks Professor Harris how regulators should look at MSEs (photo by Paola Aseron-Dacanay/ADB).

Professor Harris responded that, as a matter of law in Australia and some other Commonwealth countries, parties focused on the legal structure rather than the economic reality. For example, in Australia, the existing law calls for separate insolvency practitioners for individual insolvency and corporate insolvency. This system increases costs and causes conflicts, because the two estates end up suing each other rather than just netting off the difference. This system also causes confusion and delays, because, for instance, directors or owners of MSEs might not fully understand the full implications of what is going on and how the company's problems might impact them personally. Consequently, these directors or owner-managers inevitably delay and keep running the business until some external factor forces them to shut it down.

Professor Harris believes that policymakers need to recognize the personal circumstances of the owner-managers of SMEs. He noted that, in case of financial distress, most of them would likely not seek professional advice as early as possible, because that would trigger personal guarantees that they had given to cover company debts.

Jason Harris, Professor of Corporate Law at University of Sydney Law School, talks about the need to recognize the personal circumstances of the owner-managers of SMEs (photo by Paola Aseron-Dacanay/ ADB).

For example, some of them may lose their family homes—a common occurrence in Australia—because Australian law does not have a homestead exemption for family homes. Bankruptcy would also strain their personal relationships. Thus, owner-managers keep trading, in the hopes that things will change, e.g., maybe Christmas would boost sales or a longstanding debt would be paid.

According to Professor Harris, a lot of small businesses in Australia just bypass the insolvency system entirely, likely because the companies get to the state where they cannot afford to pay insolvency practitioners. Rather than seeking assistance to go through an orderly liquidation process and recycle the remaining capital, business owners just abandon the company.

Professor Harris shared that, every year in the past 10 years before COVID-19, about over 120,000 companies deregister but only 7,000–11,000 companies enter formal insolvency. This means that a vast majority of businesses simply bypass the system. He clarified that some of these businesses that bypass the system are run by honest but unfortunate entrepreneurs; however, others might be involved with illegal phoenix activity, money laundering or other criminal activity. Professor Harris reiterated his point that Australia and other jurisdictions must look at the economic reality, rather than just the legal structure.

Mr. Moller asked Professor Harris whether the regulations for personal and corporate insolvency should be combined, kept separate, or adapted to specific countries and economies.

Professor Harris responded that indeed the specific circumstances in different jurisdictions cannot be ignored. He again cited Australia as an example, explaining that it has always had a dual track system, owing to a quirk of the country's constitutional history. In this system, there is a government-funded bankruptcy trustee for individuals, which handles about 85% of all personal bankruptcies in the country each year. Most of these are consumer debtors, possibly on fixed incomes or unemployed.

Professor Harris added that Australia has never had a government-funded advisory service for corporate insolvency. This service only exists as a private profession, which blocks access to the service for companies lacking the funds to pay for them. He believes that Australia should have a unitary system with an insolvency act that has MSE-specific provisions, as recommended by reports and publications for other jurisdictions.

Professor Harris again stressed the need to focus on the economic reality rather than just a chosen formal legal structure. He shared his suspicion that a lot of MSE owners might not even know which business structure they use, because they just go to their accountants and blindly sign their tax forms. The business may be a partnership, a trust, a company, or maybe all of these rolled up in one. He also suspects that business owners sometimes pay for their business debts using personal funds, or use business funds to pay for personal debts.

Thus, Professor Harris said that it would be pointless to sort business owners into the company box or the personal box. Rather, he believes in having a single system, whose main challenge would be deciding how to define a small business—whether by turnover, number of employees, asset levels, or debt levels.

Professor Harris then gave the example of the small company restructuring law that was enacted in Australia in 2021. The law defined small businesses by their outstanding liabilities, i.e., those whose outstanding liabilities do not exceed AUD 1 million. Professor Harris said that defining small businesses is tricky, but that there are always advantages and disadvantages wherever a line is drawn.

Mr. Moller then asked Professor Harris for his recommendations on how policymakers could make insolvency procedures more affordable and more viable for small businesses.

Professor Harris responded that policymakers needed to focus on economic effects. He shared that Australia's Small Business Ombudsman—which acts an intermediary between small business and large business, facilitates dispute resolutions, and reports on the state of small businesses—recently did an inquiry which showed that insolvency was not a particularly good outcome for small business. Business owners found insolvency proceedings expensive and feared being excluded from the process because of Australia's insolvency professional (IP) external administration model.

Professor Harris related that another major problem for small businesses in Australia was the difficulty of obtaining good professional advice. A small business owner in financial distress would most likely (i) go to their tax accountants, who would not be a good source of advice for this issue; or (ii) search on Google, which would give sponsored search results from pre-insolvency advisors who would require payment and likely advise the small business owner to shift his/her assets instead of paying the debts. A small business person would have difficultu understanding who is a good advisor and who is not.

Here Professor Harris shared a recommendation: the government could compose a list of recognized advisory firms and then give small business owners a voucher for around AUD 5,000 to get proper advice from one of these recognized firms. He opined that if more resources are allotted to providing guardrails higher up the decline curve, there would be better outcomes overall.

Jason Harris, Professor of Corporate Law at University of Sydney Law School, discusses how policymakers can make insolvency procedures more affordable for small businesses (photo by Paola Aseron-Dacanay/ADB).

Professor Harris then shared that another big problem for small businesses in Australia is that large corporations would sometimes pay late. He also shared that the government itself is a huge purchaser of goods and services. Re-emphasizing the idea that an ounce of prevention beats a pound of cure, he suggested that the government could assist small business in financial distress by enforcing procurement guidelines. For example, it could intervene by keeping track of payment times for small businesses and nudging large debtors to pay on time.

Professor Harris reminded participants that, a couple of years before, Australia established a Royal Commission to look into the poor behavior of several large financial institutions. This led to some meaningful changes—most large financial institutions signed the Banking Code of Practice, which included various dispute resolution mechanisms for individual consumers of financial services and small businesses. He also added that Australia has some provisions in its Competition and Consumer Protection Law that protect small businesses.

Professor Harris then summed up his arguments by saying that the government should not make it easy for people to set up small businesses and then just leave them to fend for themselves. He said that he is not advocating for a government undertaker who is going to go around and randomly audit businesses to make sure that they are solvent. But parties need to recognize that a hands-off approach has a real effect on the economy.

The economic impact of failing businesses is massive—more than 100,000 businesses are set up each year, some of whose creditors are not getting paid. Such creditors may become disillusioned with the insolvency system; that is, they may just decide to sign up on the Secure Transactions Register and start requiring payment upfront or cash on delivery. In turn, this would make obtaining small business credit in Australia even more difficult. Professor Harris concluded by reiterating that helping small businesses earlier in the decline curve would result in better economic outcomes.

Mr. Moller then asked the panelists about their experiences on new MSE-related laws from their home jurisdictions or jurisdictions familiar to them. He first asked Professor Harris to talk about the recent inclusion of a chapter on restructuring small businesses in Australia's corporations law.

Professor Harris confirmed that part 5.3 (b) of Australia's Corporations Act has been in place for just two years. He added that aside from liquidation, receivership, and schemes of arrangement, Australia also has a restructuring plan procedure called voluntary administration that has been around for almost 30 years. Professor Harris found that while voluntary administration is regarded as successful, it is more suited

Panel 8 chairperson and speakers share a lighthearted moment (photo by Paola Aseron-Dacanay/ADB).

to larger businesses that have larger asset bases. Voluntary administration involves external administration, requiring a fairly high-cost structure.

Professor Harris then recounted that, in the middle of the pandemic, firms like Deloitte made dire predictions, saying that Australia would have 150,000 business bankruptcies and 100,000 personal bankruptcies. The government then announced that a "one-size-fits-all" procedure, like voluntary administration, would not really be appropriate for small businesses.

The government then created a debtor-in-possession (DIP) model for businesses having outstanding liabilities of no more than AUD $1,000,000. This model was not designed only for MSEs—its limit does not necessarily exclude bigger businesses and it does not require the usual asset or employee tests. However, it does exclude firms that have outstanding employee entitlements.

Professor Harris then added that, at the time the model was being introduced, the Federal Treasurer claimed that it would help thousands of Australian businesses, since 70% of all businesses have liabilities of no more than AUD $1,000,000. But Professor Harris revealed that actually most businesses would have been ineligible for the model, owing to the requirement that all employee entitlements be fully paid prior to filing. He explained that because Australia has a horrendously complex system of employee entitlements, many institutions—including even universities and major law firms—struggle to deal with the rules. Small businesses tend to fall behind in paying pension contributions, whether intentionally or otherwise, and would of course have been ineligible for the DIP model.

Professor Harris then recounted that the Law Council of Australia—of which he was part—met with the Treasury Department and explained why the law would not work. They made representations that businesses should be able to include employee entitlements in the underlying reorganization plan, because paying Australia's pension scheme and the draconian penalties for falling behind was a major cause of debts.

Professor Harris then described how the scheme was implemented. A business would be given three weeks or twenty business days to formulate a plan. An insolvency practitioner would then be appointed as a monitor, to guide the procedure, facilitate the creditor votes, and report any issues to the Securities Commission. Creditors, except related-party creditors, would be given 15 business days to vote on the plan, online or via email. Lastly, the whole procedure would need to be completed within five weeks and the restructuring plan within three years, with creditors getting paid pari passu.

Professor Harris shared that the DIP model turned out to be nowhere near as successful as voluntary administration. The former was used 200 times in its first two years, while the latter was used by 2,500 companies in its first two years. He attributed DIP's lack of success to (i) the inflexibility of the regime; (ii) the strict limitations on what the insolvency practitioners could charge in serving the role of restructuring practitioner; (iii) the aforementioned preconditions on employee entitlements; and (iv) a precondition on completing tax lodgments.

Professor Harris concluded that the enduring theme in Australian insolvency law— particularly for MSE insolvency and restructuring—is inconsistency. For example, Australia would try to give flexibility and options for small business owners, but would scale that back for fear of enabling illegal phoenix activity. Professor Harris recommended that Australia pick a side: it cannot play policeman and expect restructuring to be effective.

Mr. Moller then asked Mr. Martin and Professor Booth for his thoughts on his experience in Australia and in other regions.

Mr. Martin responded that while he is glad that Australia has an MSE process, it would have been better if consultations were undertaken. He opined that the current system is sub-optimal, an opinion supported by statistics. He recommended that the government re-draft the chapter, however taking more time and implementing a consultation process.

Mr. Martin finished with the observation that Australia and a number of Asian countries—notably India, Myanmar and Singapore—now have MSE insolvency regimes where they did not previously. Tailored MSE-specific processes are now being introduced to insolvency statutes, which Mr. Martin finds a welcome development.

John Martin, Partner at Norton Rose Fulbright and President of the International Insolvency Institute, shares his thoughts on Australia's MSE process (photo by Paola Aseron-Dacanay/ADB).

Professor Booth responded that he wanted to provide his perspective about priorities, and especially employee benefits. He said that this is a huge problem in Asia generally. It appears that governments want to help workers so they give top priority to workers. Professor Booth thinks the irony is that many of the measures implemented actually hurt workers.

He explained that the difficulty is that if a lot of priorities are being funded by the insolvent firm, then unsecured creditors are likely to get little, if any, distribution. He cited the panel discussion about Hong Kong regarding worker entitlements. Professor Booth said that the main reason why the corporate rescue bill has not been enacted in Hong Kong is that the treatment of workers was too generous—initially the government proposed to pay / provide for all of the workers' claims (including long service entitlements) in full prior to filing. That was later changed to post-petition payments up to the level that workers would be paid in a liquidation. But, for small businesses, that still was too much.

Charles D. Booth, Michael J. Marks Distinguished Professor in Business Law at William S. Richardson School of Law, University of Hawai'i at Manoa, discusses workers' entitlements and priority schemes (photo by Paola Aseron-Dacanay/ADB).

He said that another solution is possible, but that solution takes money. He cited the US example wherein if companies fire workers, workers then collect unemployment insurance. Thus, another solution for countries that have money is that they can set up a fund that is not from the company itself (because if funds are going to come from the company itself, there is often little or no money to go around to all creditors).

He thinks that workers' entitlements are a huge problem throughout Asia and it carries through in the region's priority schemes. In many Asian countries, secured creditors and DIP financing actually come after workers' entitlements, and this is a problem.

Second, the level of SME filings does not accurately reflect the rate of business failure. Many businesses disappear from the records, but not knowing what happened is a big concern. Professor Booth brought up China as an example; supposedly, for every company that would file for insolvency, 200–250 others would just disappear. He added that the figures for disappearing small businesses would probably be bigger, given that many of them were not properly registered in the first place.

Professor Booth also cited a further problem for MSEs in a civil law jurisdiction that wants to allow only properly registered enterprises (no matter how small they are) to use the insolvency procedures. If so, one of the discussions that those engaged in law reform should have with governments is that if the jurisdiction wants the law to be used, the government has to be flexible at the outset about allowing unregistered companies to use the law. Otherwise, the country will end up passing a law that will not be used.

Third, Professor Booth opined that countries should consider coming up with a trial area or a trial district for their bankruptcy reforms. For example, China does not have a national personal bankruptcy law, but it has a trial law in Shenzhen. Professor Booth stated that other Asian countries which do not have the capacity for rolling out these nationwide laws all at once could follow China's example. They could perhaps choose their biggest city or set a fixed time period to test the law, and then later decide whether to expand its scope or prolong its validity.

Fourth, Professor Booth explained that sometimes the stakeholders were brought into the law reform process too late. He said that sometimes governments do not have a good idea at the outset of what the problems are. Only a few countries do a survey of all the stakeholders before they bring in the outside consultants. Professor Booth said that if stakeholders were brought in sooner, things would move forward more quickly.

Professor Booth concluded that with the problems that COVID-19 caused in Asia for MSEs, he is hopeful that the law reform process would move faster moving forward. Countries now realize where the energy has to be driven.

Mr. Moller asked Mr. Muro for his and the World Bank's perspective on the topic, as final remarks.

Mr. Muro responded that the World Bank recently conducted a survey, which revealed that only about 10% of the economies surveyed have a chapter for MSEs or a law for MSEs. This finding highlights the importance of the MSE sector and of introducing MSE mechanisms.

He concluded by recalling the complexities of the sector, the difficulties and the differences in the countries, the ineffectiveness of "one-size-fits-all" solutions, differences in institutional settings, differences in how laws interact, the informality of the economic sector, and the huge opportunity to improve insolvency systems in many countries.

Sergio Muro, Financial Sector Specialist at the World Bank, highlights the importance of introducing MSE mechanisms.

Aerial shot of the National Capitol Complex of Palau (photo by Eric Sales/ADB).

PANEL 9
RESCUE FINANCING AND ADMINISTRATIVE EXPENSES

11

PANEL DISCUSSION

Chair:

RICHARD SQUIRE
Alpin J. Cameron Chair in Law, Fordham University School of Law

Panelists:

JARED ELLIAS
Professor of Law, Harvard Law School

PAUL ZUMBRO
Partner, Cravath, Swaine & Moore LLP

JUSTICE CHRISTOPHER SONTCHI
International Judge, Singapore International Commercial Court

AURELIO GURREA-MARTINEZ
Associate Professor of Law and Head, Singapore Global Restructuring Initiative, Singapore Management University

Professor Richard Squire, Alpin J. Cameron Chair in Law at Fordham University School of Law, chaired Panel 9. The panelists were:

- **Professor Jared Ellias**, Professor of Law at Harvard Law School;
- **Mr. Paul Zumbro**, partner at Cravath, Swaine & Moore LLP;
- **Hon. Justice Christopher Sontchi**, International Judge at the Singapore International Commercial Court; and
- **Professor Aurelio Gurrea-Martinez**, Associate Professor of Law and Head of the Singapore Global Restructuring Initiative at the Singapore Management University.

Professor Squire provided an overview of the topic regarding administrative expenses and rescue financing. According to Professor Squire, financially insolvent firms lack creditworthiness but still require credit to pay insolvency professionals and continue operating. To enable such firms to borrow, most jurisdictions worldwide have adopted a system of rescue financing to encourage lenders, vendors, and professionals to extend credit to distressed firms. The standard method is to prioritize these new creditors over pre-existing ones.

Scan the QR code to watch Panel 9 video on YouTube.

Panel 9 would address the most effective ways for jurisdictions to promote rescue financing for insolvent but viable firms. The panel would evaluate the advantages and disadvantages of distress financing, including the potential drawbacks such as the risk of prolonged insolvency proceedings and the possibility of administrative insolvency.

The chairperson and panelists for Panel 9 (photo by Paola Aseron-Dacanay/ADB).

Professor Squire stated that priority rescue financing can be coercive as it subordinates the claims of pre-existing creditors without their individual consent, presenting a risk of abuse. Therefore, it is important for a legal system to determine the appropriate amount of priority rescue financing a debtor is allowed to incur.

In the United States (US) bankruptcy system, the bankruptcy judge has significant discretion in determining the amount of post-petition debt that a debtor may incur. Professor Squire inquired of Professor Ellias whether judges typically find the optimal amount of debtor-in-possession (DIP) debt, i.e., the ‘Goldilocks solution’: not too little, not too much, but just the right amount of debt. Additionally, he asked whether this determination varies based on the type of case or debtor.

Professor Ellias explained that DIP financing, also known as rescue financing, has changed dramatically in the US over the past 30 years. In the 1990s, DIP financing typically involved sizable loans with maturity dates of generally two to three years. The traditional narrative around debt financing is that it allows management to reorganize by providing them with breathing space. The debtor files for bankruptcy and then obtains DIP financing to resolve its issues.

Jared Ellias, Professor of Law at Harvard Law School, discusses debtor-in-possession (DIP) financing (photo by Paola Aseron-Dacanay/ADB).

Over the past 20 years, especially in the mid 2000s, there have been significant changes in rescue financing. Modern DIP loans now come with strict covenants that require debtors to reorganize by a certain date—often within 45 days, three months, four months, or nine months. DIP loans payable over two or three years are no longer common. The covenants often provide a specific outline of the transaction that the debtor should restructure, whether it is a sale on a tight timeline or another reorganization transaction.

According to Professor Ellias, DIP financing not only provides money to a company that needs it to preserve value, but also allows the provider to achieve their desired restructuring outcome. Judges can use this information to monitor DIP financing. Although DIP financing is presented as one piece of an integrated transaction, it is the piece that locks in everything else. In the US, a modern bankruptcy judge may be presented with extensive documentation, sometimes spanning over a thousand pages, describing a deal that parties negotiated over a few years or a few months prior to bankruptcy. Given the delicacy of DIP financing, the judge should exercise caution to avoid disrupting the transaction.

DIP financing is considered risky, which justifies the use of extraordinary covenants and relatively high fees for the benefit of the DIP lender. Professor Ellias opined that the ability of the judge to police the system is somewhat limited to the way it is currently being administered. The debtor and DIP lender are not required to present evidence justifying the amount the debtor intends to borrow. Instead, they present the facility to the judge and request authorization to borrow a specific amount of money. It is important to note that the debtor and the DIP lender are not yet aware of the exact amount needed, and the transaction may result in significant fees. This financing is just one component of a larger integrated transaction that will ultimately preserve jobs at the company.

Professor Ellias believes that, using this framework, the DIP financing amount is coercive and the amount of policing for it is relatively limited. He said that this is an unknown empirical question. However, many DIP borrowings appear to actually involve borrowing close to zero new dollars. According to Professor Ellias, management may be motivated to pursue the transaction because it is what they genuinely desire or they may be receiving side payments. Regardless of management's motivation, DIP financing, with the corresponding payment of fees to the DIP lender, is often used to secure control rather than as a form of rescue financing. However, Professor Ellias also conceded that it clearly is rescue financing in some cases.

He circled back to his earlier point that DIP financing is very difficult for judges to police. They often do not have the evidence to justify the amount the debtor seeks to borrow from the DIP lender. Even if the judge reviews cash flow forecasts and other factors, rejecting the amount as excessive requires significant judicial courage. Professor Ellias used an emergency room analogy—telling a patient to take less medicine is difficult for a doctor. In this analogy, money is the medicine that could save the company. If the alternative is liquidation, judges do not want to preside over that.

Professor Ellias concluded that, in general, DIP financing serves purposes beyond providing funds. Policing the inflow of money is almost second order to the other objectives achieved by modern DIP loan agreements. These agreements create a large administrative claim for the benefit of the DIP lender, which may also safeguard the pre-petition claims of banks that provide DIP financing. In general, a 'Goldilocks solution' does not exist.

Professor Squire commented that Professor Ellias' response was interesting. He allowed the other panelists to address Professor Ellias' statements if they wished to do so.

Mr. Zumbro agreed that the DIP loan should not be the main actor in a bankruptcy play. He stated that Professor Ellias is correct in pointing out that over the years, more secured debt has been added to the system, resulting in a compressed timeframe. However, Mr. Zumbro believes that DIP loans are important, even though they should not be the central focus of the proceedings. Milestones and DIP loans benefit not only the lender but also the restructuring process. Having milestones is crucial to keep the process moving forward; otherwise, it remains stagnant. It maintains discipline in the system so that parties do not linger in bankruptcy, which is not in anyone's interest.


Paul Zumbro, Partner at Cravath Swaine & Moore LLP, discusses the importance of DIP loans (photo by Paola Aseron-Dacanay/ADB).

Additionally, Mr. Zumbro does not believe that DIP loans are particularly risky. In the US, DIP loans are intended to be safe loans and are protected by administrative priority. A debtor cannot confirm a plan without fully repaying the DIP loan. While lenders can be a little aggressive in the amount of control they seek to impose on the debtor, judges and creditors' committees are effective at pushing back. The creditors committee can object and the judge will usually accommodate the objection. Judges also have the power to oversee DIP financing.

As an example, Mr. Zumbro cited the LATAM Airlines case, where the judge ruled that the DIP loan was effectively a sub rosa plan.[1] The DIP loan was not supposed to dictate the restructuring, it was supposed to finance the plan. As such, the judge ruled that the DIP loan had gone too far.

Mr. Zumbro thus disagrees with the idea that DIP loans have become overly coercive.

Justice Sontchi responded to Professor Ellias' statements by acknowledging that the factual narrative was correct. However, he voiced his disagreement over some of the conclusions, particularly regarding the proper role of judges. Justice Sontchi mentioned the concept of lender-in-possession, which judges are very cognizant of and careful about when approving loans. The covenants and defaults determine who has the power to operate the estate, and lender-in-possession loans favor the lender over the debtor. During negotiations for rescue financing before filing the case, debtors have little leverage, as they need the money. Therefore, the lender can dictate the terms.

Justice Christopher Sontchi, International Judge at the Singapore International Commercial Court, discusses the role of judges in rescue financing (photo by Paola Aseron-Dacanay/ADB).

Justice Sontchi noted an important difference that has occurred in the last 30 years—previously, there were professional DIP lenders, such as Silverpoint and Highland Capital. This hanged after the financial crisis of 2008 when financing became scarce and the market illiquid.

[1] *In re LATAM Airlines Group S.A.*, 20-11254 (Bankr. S.D.N.Y. Sept. 10, 2020) [Docket No. 1056].

Justice Sontchi stated that defensive loans or DIPs have always existed, where existing lenders put more money in to preserve their existing investments. It may seem like putting good money after bad, but the concept is that the lender will lose everything unless it invests more money, which could potentially lead to the reorganization of the debtor. This became standard practice in 2008 and 2009 and has continued since.

During his time on the bench, Justice Sontchi's DIPs were mostly defensive. He stated that covenants make a difference because it is not just a new lender trying to dictate the outcome of the case. An existing lender is trying to exert control over the case in order to preserve its position and recovery.

He stated that it is now uncommon to have two-year bankruptcies. Parties are only given a certain amount of time before it becomes open season. The cost of cases has increased and lawyers charge more over time.

In response to Professor Ellias' statement about there being no new money in DIP financing, Justice Sontchi disagreed. He explained that new money could come from a total loan obtained through DIP financing. For instance, if a debtor has existing loans amounting to $30 million and an existing creditor provides a $40 million DIP loan, $10 million of that is considered new money while the remaining $30 million is a roll up. The DIP lender will pay itself off and will no longer have a pre-petition secured claim, but will instead have a post-petition DIP claim.

Justice Sontchi explained that lenders have two main reasons for roll ups. Firstly, lenders find it advantageous to lend when the transaction is accompanied by a court order that sets forth all the protections for such DIP loan. Secondly, the DIP lender cannot be crammed down; the debtor must pay the DIP lender in cash at the effective date of the plan. As a result, the DIP lender has more power.

Justice Sontchi further underscored that judges do not approve a roll up without any new money component. During negotiations, the amount of new funds associated with the roll up is often discussed.

Justice Sontchi stated that he never focused on the amount of the loan because he felt that it was not his role. He observed that debtors may require a new loan to demonstrate to trade vendors that the company has sufficient liquidity to receive trade terms again. He said that he approved DIPs that never got drawn down, as they were there solely to maintain the ability to obtain trade credit.

Justice Sontchi explained the process for approving DIP financing in US courts. The 'first day hearing' takes place on the second day of the case. For example, if a debtor files on Monday, they will have a hearing on Tuesday and the debtor will get interim emergency relief. Three weeks later, a second hearing will be held, and a final order will be issued.

For instance, the debtor may receive $5 million in interim financing and $20 million in the final order. However, during this time, all other parties involved in the case, including the official committee of unsecured creditors, have appeared. Individuals have been notified and provided with the opportunity to stay informed. This hearing is where matters such as the loan amount, approved fees, roll up allowance, and other related issues are discussed. Justice Sontchi stated that he would take a step back and listen to the evidence and arguments, once the actual creditors who will advocate for their position are present.

The procedure aims to place new debt on a secured basis, which takes precedence over unsecured creditors. However, existing secured creditors are not affected by this procedure, as the DIP loan (unless it is a priming loan) is subordinate to the existing secured debt.

Professor Squire mentioned that Professor Gurrea-Martinez noted in his scholarship that certain jurisdictions allow pre-existing creditors to veto new financing obtained by companies in insolvency proceedings. Professor Squire inquired about the trade-offs of granting this power to creditors instead of solely to the judge overseeing the case. He also asked whether the optimal rule varies by jurisdiction.

Richard Squire, Alpin J. Cameron Chair in Law at Fordham University School of Law, asks about creditors' right to veto new financing (photo by Paola Aseron-Dacanay/ADB).

Professor Gurrea-Martinez addressed the question by providing a general overview of DIP financing around the world. He mentioned that there are generally five types of priority that can be provided to DIP lenders:

1. Administrative expense priority
2. New lien
3. Junior lien
4. Senior lien
5. Administrative expense priority to be paid ahead of other administrative priorities.

Professor Gurrea-Martinez noted that countries that provide this full range of super priorities are countries with a strong system of DIP financing. Those systems are only Singapore and the US. Temporarily, Colombia also adopted this DIP financing regime in response to the coronavirus (COVID) pandemic. Most countries allow some forms of priority to new financing, typically the administrative expense priority and the new lien.

Another divergence that he has found is in who approves new financing. There are three main systems around the world:

1. New financing approved by the court, which is the system existing in countries like the US and Singapore;
2. New financing approved by the administrator / insolvency practitioner, which is the system existing in Australia, the United Kingdom (UK), and many other jurisdictions; and
3. New financing approved by the creditors.

Professor Gurrea-Martinez further identified some international divergences within this third type of system:

1. For example, in India, the new financing is approved by the committee of creditors. But the committee only comprises financial creditors (i.e., secured and unsecured financial creditors), not operational creditors.
2. In the Dominican Republic, the judge needs to approve the DIP financing, but the creditors can veto the decision made by the judge.
3. In Chile, when a debtor borrows a significant amount of money and the amount exceeds 20% of the debtor's liabilities, the creditors will be the ones approving the new financing.

In response to Professor Squire's inquiry about whether creditors should have the ability to veto the DIP financing regime, Professor Gurrea-M artinez expressed support for the creditor-led model. He explained that many countries lack sophisticated insolvency judges to make such complex business decisions. Furthermore, the new financing is intended to benefit pre-existing creditors by generating or preserving value. Yet, if it does not ultimately create or preserve value, the new lenders are paid ahead of the company's pre-existing creditors. Therefore, it would be reasonable to let the creditors decide.

Aurelio Gurrea-Martinez, Associate Professor of Law and Head of Singapore Global Restructuring Initiative, provides a general overview of DIP financing around the world (photo by Paola Aseron-Dacanay/ADB).

The question then is, who is the right group of creditors to approve or veto new financing?

In India, financial creditors make this decision. However, as they are typically secured creditors, they may not have the proper incentives to make the decision. In Chile, both secured and unsecured creditors have the authority to approve or veto new financing.

According to Professor Gurrea-Martinez, the decision should be made by the creditors directly bearing the costs or benefits of the decision. This depends on the type of priority. If the DIP lender receives an administrative expense priority, the unsecured creditors will be the ones directly affected by the decision. Therefore, they should ideally be the ones approving or vetoing the new financing.

Justice Sontchi disagreed with Professor Gurrea-Martinez. He said that the issue turns on identifying the creditors in an operating restructuring. The presence of various types of creditors—such as trade creditors, funded debt, tort claimants, unpaid pensions, and the government—makes it challenging to determine who exactly should have a veto position.

In the US system, all creditors have the right to be heard and to object, but not to veto. This is a significant difference. Justice Sontchi's experience is that all creditors recognize the necessity of financing. He expressed his disagreement with Professor Gurrea-Martinez's proposal because it could lead to a leverage play. If creditors are given too much power by being able to kill the company early on in the case simply by rejecting a financing plan, then the only option left for all parties involved is to liquidate.

The creditors do not want to liquidate the company. Rather, they have different objectives. Tort creditors seek greater leverage in obtaining a tort settlement, while trade vendors aim for improved market terms. Funded debt, particularly unsecured funded debt, may seek increased leverage in relation to senior funded debt.

Justice Sontchi noted that in his 16 years of experience, objections to DIP financing and calls for liquidation were rare. In the extremely rare event that someone moves for the liquidation of the firm, it may be the right decision—some cases need to be terminated and acting quickly is important to avoid accumulating more debt. Justice Sontchi expressed concern about creating a large amount of leverage for unsecured creditors to achieve goals unrelated to DIP financing.

Professor Squire then turned to priming liens, a rare practice in many jurisdictions. This involves giving a DIP or rescue lender a lien on the debtor's property that primes, i.e., as senior to pre-existing liens, making it the most senior kind of claim a creditor can have on a debtor. According to Professor Squire, only two major jurisdictions, the United States and Singapore, permanently authorize these liens. Colombia did temporarily authorize them.

Jared Ellias, Professor of Law at Harvard Law School, discusses priming liens (photo by Paola Aseron-Dacanay/ADB).

Although priming liens are authorized by the US Bankruptcy Code, statutory restrictions make them difficult to obtain when the debtor's property is already fully encumbered with pre-petition liens. As a result, pre-petition blanket lien holders have great power. They are often the only possible source of DIP financing. Professor Squire asked Professor Ellias whether this is a good thing or whether the rules on priming liens should be relaxed.

Professor Ellias responded that currently, and for at least the past 20 years, most firms filing for bankruptcy are probably administratively insolvent. This means that they do not have enough assets, and all of their assets are encumbered by liens. This leaves them with nothing to offer a new lender, unless the firm obtains permission from the judge to use some of its encumbered value as collateral or to offer lenders an administrative expense claim that overrides pre-bankruptcy priority.

A practice has thus developed where banks carve out a portion of their lien to fund a Chapter 11 process. For instance, a bank may waive $5 million of its lien and allow $5 million to be spent on administrative claims where the debtor has the DIP loan coming in to pay for it. In general, hostile priming liens are relatively uncommon. Therefore, in most cases, the lender that is getting the priming lien is usually priming itself. Problematic situations may arise when a subset of the first lien lenders agree to prime the rest of the issue non-consensually. Although this is not a common occurrence, it does happen.

Professor Ellias further explained that there are a few barriers to easing the process of obtaining priming liens. One issue is lack of information. It is not necessarily the case that outside creditors are in a good position to make a loan even on a priming lien basis. Professor Ellias suggested that judges should delay approving DIP loans at the beginning of the bankruptcy process to help lubricate a competing DIP loan process, allowing other capital to consider the situation. In recent years, particularly during the 2020 restructuring cycle, there have been credible competing DIP loan offers at much higher rates than in the past. Much of this appeared to be linked to the amount of available capital for investment and restructuring opportunities.

Secondly, the information environment has to be improved to make more lenders feel comfortable offering priming loans or making priming lien offers on similar or better terms than those already in the deal. Professor Ellias suggested that increasing competition in the priming lien space would be beneficial, but cautioned against allowing all existing creditors to be primed non-consensually. This could pose a risk to creditor rights where the costs outweigh the benefits.

Professor Squire then turned to Mr. Zumbro. He contextualized his question by referring to Professor Ellias' discussion as relating to a scenario where priming liens were easier to obtain. He then asked Mr. Zumbro to consider the opposite scenario, where either priming liens were more difficult to obtain or did not exist at all. Professor Squire explained that he asked Mr. Zumbro this question because of his experience representing both debtors and creditors. Likewise, Mr. Zumbro has experience working on both sides of the petition, representing both parties in bankruptcy and in workouts.

Professor Squire further inquired whether the absence of priming liens in the US would result in more workouts outside of court, as debtors may be aware that they will not be able to obtain additional credit within the courts. He also asked for Mr. Zumbro's thoughts on how this would work in the context of workouts.

Mr. Zumbro clarified that there is a common misunderstanding regarding priming liens in the US. Many believe that an existing secured creditor can only be primed if it consents or if the parties are able to show that its interest is adequately protected (e.g., with an equity cushion).

However, as discussed during the first day of the conference, valuation is an art not a science. It is complicated and can be expensive. Furthermore, no debtor wants to start its case with a contested valuation fight. A non-consensual priming DIP is very difficult to do.

Mr. Zumbro said the availability of priming loans serves a useful purpose by giving existing senior creditors a right of first refusal over DIP financing. This arrangement prevents anyone from going behind their backs. He believes this is acceptable because the existing senior creditors are already invested in the case.


Paul Zumbro, Partner at Cravath Swaine & Moore LLP, responds to the question about priming liens (Photo by Paola Aseron-Dacanay/ADB).(photo by Paola Aseron-Dacanay/ADB).

According to Mr. Zumbro, junior creditors may sometimes offer loans at a lower interest rate than secured creditors, but only if there will be priming of loans. The existing lender will not consent to the priming, but Mr. Zumbro believes that this serves as a check. Under the Bankruptcy Code, parties must provide evidence to the judge that the debtor marketed its debt and obtained the best available financing.

Mr. Zumbro expressed uncertainty regarding the impact of identity, debt availability, and bankruptcy on workouts, as well as the effect of priming liens. He noted that parties generally prefer to resolve matters outside of court due to the high cost and time commitment associated with court proceedings.

The holdout problem is often the main issue as parties cannot affect maturities or principal amount without a unanimous vote. This is commonly referred to as the sacred right. However, in bankruptcy, parties can affect both maturities and principal amount. For instance, having only 66.67% of the parties involved allows for options such as a pre-packaged insolvency (pre-pack) to be considered. It is also possible for one class to approve a plan, making it feasible to carry out the plan in bankruptcy.

Mr. Zumbro stated that he has handled cases where he needed to persuade holdout lenders. He explained that forcing the issue to go through the bankruptcy system would be costly and would diminish the parties' value, making it more advantageous if the holdout lenders were to consent. He noted that sometimes this consent is given.

He also mentioned that some European facilities have permitted parties to affect these sacred rights with a 90% vote, instead of a 100% vote. He stated that sometimes this is useful—the debtor or its lawyers addressing just that 10% may be easier than getting the entire group. It can be difficult to achieve unanimous agreement due to various factors, such as lack of attention or personal disagreement.

Mr. Zumbro explained that the availability of priming loans does not affect workout mechanics. New money should come in on top, conceptually, to compensate the lender for funding a system already in trouble. However, he was uncertain whether the availability of priming DIPs in bankruptcy has a significant impact on workouts.

Justice Sontchi commented that priming liens are a big deal, as they have turned the structure of secured financing in the US upside down over the last two years.

According to Justice Sontchi, new money is not placed on top, but rather at the bottom, which is the fundamental principle of being secured. He agreed with Mr. Zumbro that the effect of priming liens is often exaggerated. On a hostile basis, it is virtually non-existent. On a conceptual basis, it is almost ubiquitous.
He noted that another party presenting a competing proposal is a great thing for judges— it results in an auction outside the hallway, leading to a better deal, which is advantageous for the company. Justice Sontchi has witnessed more of these incidents in the last decade than in the previous one.

Mr. Zumbro agreed and added that this puts pressure on the secured creditor to be honest, especially regarding fees and interest rates. He said it serves a useful role.

Justice Sontchi emphasized that, in his experience, DIP financing, rescue financing, or cash are ways of infusing new money into the company, which is critical to a successful business reorganization. He noted that it is rare for a case to proceed from petition date to reorganization without an infusion of new capital. It was one of the things that he looked at when trying to figure out the case on the first day and when pushing back on priming liens. Justice Sontchi concluded that, ultimately, it is similar to a 'game of chicken.' The judge will approve financing because not doing so would result in the company's demise.

Justice Christopher Sontchi, International Judge at the Singapore International Commercial Court, discusses his experience handling cases involving DIP financing (photo by Paola Aseron-Dacanay/ADB).

Mr. Zumbro added that a DIP loan has a significant signaling effect. It demonstrates to suppliers, customers, employees, vendors, other constituents, and government regulators that someone is willing to finance the company's operations. This stability is crucial, as without it, the company may end up in a death spiral.

Professor Squire noted that the panelists had heard several compelling arguments in favor of allowing priming liens. One such argument is that their mere availability facilitates negotiation. Additionally, priming liens are often consensual, and actual hostile situations where senior secured creditors have been primed against their consent are rare.

Given these factors, Professor Squire asked Professor Gurrea-Martinez why priming is authorized in so few jurisdictions and why other jurisdictions are so cautious about it.

Professor Gurrea-Martinez began by saying that not many countries, apart from the US and Singapore, allow the possibility of priming existing liens. This is due in part to skepticism

Aurelio Gurrea-Martinez, Associate Professor of Law and Head of Singapore Global Restructuring Initiative, explains why debtors should be given the right to veto priming liens (photo by Paola Aseron-Dacanay/ADB).

about allowing new lenders to prime an existing lien. Such a rule, particularly if applied by non-sophisticated judges, can make secured creditors more cautious when extending credit. Therefore, it can ultimately lead to an increase in the cost of debt in the country.

To address the lack of financing in insolvency proceedings and simultaneously avoid increasing the cost of debt due to uncertainty in the event of financial distress, Professor Gurrea-Martinez suggested that that the decision to authorize new financing should be made by creditors.

Professor Squire then asked the audience if they had any questions. He also asked the panelists if they had any additional comments on the topic.

Professor Ellias highlighted that market actors have the ability to amend insolvency practice, rather than relying solely on the legislature. If financiers who fund bankruptcies restrict their financing terms to address flaws in the legislative regime, it can benefit the insolvency system without requiring the jurisdiction to undergo a formal democratic lawmaking process, which can take years.

He noted that some believe Congress gave debtors in possession too much time to reorganize, considering the current state of the capital markets. However, rather than seeking congressional action, the restructuring industry imposed changes on debtors. Judges pushed back against the excesses resulting from those changes. The system then reaches an equilibrium where people complain—but not too much—because the push to do so is lacking.

Professor Ellias concluded that flexibility is an important feature in allowing a bankruptcy system to evolve without requiring more formal rulemaking. This may be contrary to the ethos of some conference participants, but Professor Ellias noted that it can be helpful.

Justice Sontchi agreed with Professor Ellias' observation. He said that one of the strengths of the US Bankruptcy Code is its flexibility and looseness in the joints. This flexibility allows for market forces to ultimately influence procedures that guide the day-to-day running of the Code.

He said that most of what he did as a US bankruptcy judge was not really in the Code, but was not in conflict with it. Unlike a civil judge who will not do something when the law does not allow for the act, a common law judge can take action if the law does not forbid it.

Justice Sontchi acknowledged that the system gives a lot of power to insiders and professionals who are familiar with the system, can navigate it effectively, and know the judges. This is not necessarily healthy, particularly in cases that involve more than just restructuring balance sheets; or where courts are shifting around the top of the capital stack to figure out who owns the company; or where courts are dealing with operational issues, workers, or tort victims. The lack of transparency to what the real rules are is counterproductive to the court's ability to build confidence in people and entities affected by its decision.

The chairperson and panelists in a lighthearted moment (photo by Paola Aseron-Dacanay/ADB).

Finally, Justice Sontchi mentioned that conference participants might be interested to read Douglas Baird's new book, The Unwritten Law of Corporate Reorganizations. The book examines the Bankruptcy Code and the unwritten rules that have guided bankruptcies in the United States for the last 200 years.[2]

[2] D. Baird. 2022. *The Unwritten Law of Corporate Reorganizations*. Cambridge: Cambridge University Press.

An aerial view of Hong Kong (photo by Pat Whelen on Unsplash).

PANEL 10
CORPORATE GROUPS

12

PANEL DISCUSSION






Chair:

FELIX STEFFEK
Associate Professor, Faculty of Law of the University of Cambridge

Panelists:

EDITH HOTCHKISS
Professor of Finance, Carroll School of Management, Boston College

TIMOTHY GRAULICH
Partner, Davis Polk & Wardwell LLP

RAELENE PEREIRA
Partner, Rajah & Tann Singapore LLP

RICHARD SQUIRE
Alpin J. Cameron Chair in Law, Fordham University School of Law

URMIKA TRIPATHI
Legal Analyst for Asia, REDD Intelligence

Professor Felix Steffek, Associate Professor at the Faculty of Law of the University of Cambridge, chaired Panel 10.

He introduced the panelists who attended virtually: **Mr. Timothy Graulich**, partner at Davis Polk & Wardwell LLP, and **Professor Edith Hotchkiss**, Professor of Finance at Boston College.

The chairperson and in-person panelists for Panel 10 (photo by Paola Aseron-Dacanay/ADB).

Professor Steffek also introduced the in-person panelists: **Professor Richard Squire**, Alpin J. Cameron Chair in Law at Fordham Law School; **Ms. Urmika Tripathi**, legal analyst at REDD Intelligence; and **Ms. Raelene Pereira**, partner at Rajah & Tann.

According to **Professor Steffek**, many businesses are organized as a corporate group. Insolvency systems therefore need to respond to this kind of structure. He has observed that countries have engaged and used three main types of legal strategies:

(i) Treat every company the same and not have any particular rules on corporate groups;

(ii) Procedurally coordinate, i.e., the insolvency law still leaves legal entities separate but such entities need to coordinate restructurings and possibly liquidations; and

(iii) Substantively consolidate, i.e., assets and liabilities are merged and entity separation is disregarded. This is considered the most extreme case.

Professor Steffek introduced corporate groups by way of a brief taxonomy. He explained that corporate groups come in different ways and forms. In particular, their economic integration may differ: some are economically-integrated and others are non-integrated groups.

Corporate groups' legal organization also vary. For example, in the European Union, a party may use a supranational company form, a national company form, subsidiary companies, or establishments.

The crisis differs as well—there may be a profitability crisis, a finance crisis, the whole

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group may be concerned, the subgroup may be concerned, or just a single company may be concerned. The legal solutions needed to address the crisis should also reflect these variations.

Against this backdrop, Professor Steffek asked Professor Hotchkiss about the economic problems that need to be solved with respect to corporate groups in financial distress. Put differently, what is the potential value that insolvency law can create?

Professor Hotchkiss began by saying that she could not help but go back and think about some of the problems that are endemic to insolvency systems in general without even having overlaid the group structure yet. She said that the participants would all agree on what the goals of an Insolvency Code would be. But whether such goals are actually achieved in particular systems is very much debatable, even in the United States of America (US). The Holy Grail is to enable firms to reorganize if their reorganization value is greater than their liquidation value and to achieve a fair allocation of those assets even if disagreements arise about what priority will be given to the employees, retaining ownership for smaller businesses, and so on.

Edith Hotchkiss, Professor of Finance from Boston College, talks about contagion issues in corporate group insolvency (photo by Paola Aseron-Dacanay/ADB).

For example, based on research that Professor Hotchkiss and her colleagues have been doing, the US does a very good job in providing the tools that companies need to reorganize. However, it appears that the bias is towards too much reorganization. Professor Hotchkiss found that about a third of companies that emerged from US Chapter 11 continue to have operating losses, with this trend persisting even up to now. This gives rise to a question for larger companies whether reorganizations are too frequent and whether the tools are, in fact, working too well in the US.

On the flip side, looking into smaller firms in the US, data of the Administrative Office of the Courts shows about 60% of cases do not reach confirmation. Many of the ones that do reach confirmation are liquidating plans anyway.

Professor Hotchkiss suggested that the discussion may begin by examining the apparent issues within the system before even overlaying the corporate groups aspect. She added that the issue of smaller firms not surviving the Chapter 11 process in the US is very similar to other countries, based on the discussion from the prior panels.

Beyond the US, Professor Hotchkiss opined that procedures that are very liquidation-oriented raises the question of whether the firms have incentives to avoid the bankruptcy system altogether. In certain systems where liquidation or a sale is the forced outcome, a sale back to the original owners of smaller firms often occurs.

Having given that background, Professor Hotchkiss discussed some of the additional issues that layer onto the subject. She said that the structures and even the legal form of groups can vary considerably and give rise to different issues.

First, an extremely costly process is a major prohibitive factor for smaller firms. The ability to move assets around within the group helps overcome some of these costs, which can be a good thing. At the same time, the ability to shift assets within a group structure gives rise to the problem of moving assets in bad faith out of the reach of creditors.

Second, Professor Hotchkiss made the observation that supply chain issues, industry contagion, and other issues affect groups even before group structure is taken into account. Contagion issues become even more extreme and complicated once one starts to look within groups. When considering multinationals going through bankruptcy or a restructuring process, asset and debt location is a crucial element. If debt is located in a jurisdiction that is liquidation-oriented, the potential for losing control of the assets in that location may be enough to bring down an entire company.

Third, in many countries outside of the US, even large groups can have family-owned businesses. The question arises whether these companies can survive without those individuals running them, if they really are the source of the company's livelihood. Professor Hotchkiss asserted that this problem is similar to some of the recent SubV Chapter 11 filings that have occurred in the US in that it is sometimes necessary to allow the current owners to continue to be involved in the business and even to hold some ownership because, quite simply, the companies will not survive without them.

Lastly, Professor Hotchkiss stated that coordination issues, in which corporate groups must cope with stark variations in insolvency codes in different jurisdictions, may make it more difficult to reach an agreement.

Professor Steffek then turned to Mr. Graulich and asked whether ignoring the corporate group dimension will lead to market failure, assuming insolvency law does not particularly recognize groups. He also asked whether contracts can solve the corporate group problem.

Mr. Graulich responded that relying on contracts could prove to be an insufficient solution.

According to Mr. Graulich, the risk of ignoring the corporate group dimension in the absence of a more comprehensive solution could lead to an increase in liquidations and intricate

Timothy Graulich, Partner at Davis Polk, discusses substantive consolidation (photo by Paola Aseron-Dacanay/ADB).

in-court restructurings, which would be made even more complex by great differences among the various regimes. Therefore, unless a more fundamental solution to harmonize the various regimes can be found, jurisdictions run the risk of ending up with a group situation where it will be challenging to restructure the business.

In practice, the US has attracted a variety of groups to its courts due in part to a lower eligibility threshold than in other jurisdictions. Additionally, the US permits corporate groups to be kept together. The issue is that many jurisdictions will not accept this kind of reorganization, making it an imperfect solution even in the US. Parties can nonetheless have problems on a prospective basis.

Coming to the question of how companies resolve themselves in the absence of a more holistic solution, Mr. Graulich noted that the focus has primarily been on the parties' ability to identify a single jurisdiction that can serve a group. He concluded that this has been met with some mixed results.

Turning to Ms. Tripathi, **Professor Steffek** asked about the specific patterns or trends that should be taken into account when considering corporate groups in financial distress in Asia and the Pacific.

Ms. Tripathi emphasized the critical role of understanding context in developing legal solutions, a recurring theme throughout the conference. This involves understanding the legal culture and institutional structures that support the existing laws in a given country. She believes this principle also holds true when devising solutions for the issue of corporate group insolvency in Asia.

Unique economic conditions and social norms have led to the proliferation of family-owned conglomerates in Asia. These conglomerates are known by different names: the chaebol of South Korea, keiretsu and zaibatsu of Japan, and the business houses in India. Family-owned business groups typically dominate the economies of these countries. In India, conglomerates are estimated to account for around 56% of the combined assets of all non-financial firms, making them a highly prevalent structure. This prevalence underscores the importance of addressing corporate group insolvency solutions.

Ms. Tripathi noted that the legal and judicial systems in Asia-Pacific economies are often not very sophisticated, and parties must take this into account when developing a solution. For instance, the US has established case law on group insolvency, particularly relating to substantive consolidation. However, Ms. Tripathi opined that leaving this up to the courts in Asian economies may not always be the best thing to do.

Ms. Tripathi remarked that the previous panel discussed the need to limit legislative involvement in bankruptcy reforms. She highlighted India's situation where it was the legislature that intervened to address inconsistent court decisions by amending the law.

Having said that, she explained that in Asia (and elsewhere), policymakers face a challenging balancing act when addressing corporate group insolvency. They must navigate the tension between the principle of separate legal personality and asset partitioning, on one hand, and the advantages of consolidation, whether it is procedural or substantive, on the other. Due to the intertwined nature of group or company insolvency, addressing them together in a holistic proceeding may actually lead to a more efficient outcome.

Ms. Tripathi suggested that policymakers should tailor their solutions based on the jurisdiction and strive for a predictable outcome. This will prevent any adverse impact on the cost of debt due to the ex ante effect of the solution. She explained that if less sophisticated lenders believe the debtor company's insolvency, if things go wrong, may be consolidated with a financially vulnerable member of its group, they may increase the cost of debt as a precautionary measure. Alternatively, the lender may have to conduct further due diligence to determine the overall solvency of the entire group, rather than just the company being lent to.

Ms. Tripathi further said that lenders in India consider not only the borrower but the entire group. In cases where the assets, financing, directors, and control are intertwined, treating them separately in the event of defaults could result in inefficiency and lack of benefits for the lender.

Ms. Tripathi stressed the importance, particularly in Asian markets, of establishing a predictable regime for handling groups when a specific member defaults. While Indian insolvency law does not address group insolvency, courts have found a range of solutions, including procedural

Urmika Tripathi, Legal Analyst for Asia, REDD Intelligence, discusses corporate groups in insolvency (photo by Paola Aseron-Dacanay/ADB).

coordination mechanisms and substantive consolidation. The popular Videocon case resulted in the court merging all assets and liabilities of 13 companies into a single entity.[1]

Ms. Tripathi mentioned that when the Videocon case arose, she was handling a case for two companies within a group. Their businesses were interlinked, with one relying on the other for raw materials and administrative assistance. Moreover, 99% of their creditors were identical. However, the parties faced delays because the registered offices of the two entities were located in two different Indian jurisdictions. The parties had to petition one National Company Law Tribunal (NCLT) bench to grant approval for transferring the case to another NCLT bench, resulting in wasted time. Although the NCLT bench ultimately concurred, the parties had to endure a delay solely to procure the order to transfer the proceedings. Ms. Tripathi suggested a potential solution for this issue: introducing a provision in the law that permits parties to approach the same NCLT if the creditors consent. In such cases, creditors often agree.

Although substantive consolidation may not be feasible in India currently, Ms. Tripathi suggested that introducing simple legal provisions can improve procedural coordination. For example, permitting corporate groups to have a shared insolvency practitioner or to file a joint application for initiating insolvency can ensure that all procedures adhere to the same timeline.

She noted that procedural coordination mechanisms are in place for many group insolvencies in India. However, the problem is that parties may lose precious time in obtaining simple orders from the NCLT for procedural coordination. Ms. Tripathi circled back to her earlier suggestion to introduce procedural coordination mechanisms in the law.

Felix Steffek, Associate Professor at the Faculty of Law of the University of Cambridge, asks about legal strategies to deal with corporate group insolvency (photo by Paola Aseron-Dacanay/ADB).

Moving to solutions, **Professor Steffek** noted that the panel had already addressed them and requested Professor Squire to delve deeper into the matter. He specifically asked about the wide range of available legal strategies and solicited Professor Squire's opinion on them.

Professor Squire responded that in the context of corporate groups, a question arises about respecting boundaries versus crossing them.

[1] *In the Applications of (A) State Bank of India (Applicant in MA 1306/2018) & Mr. Venugopal Dhoot (Applicant in MA 1416/2018) v (1) Videocon Industries Limited, (2) Videocon Telecommunications Limited, (3) KAIL Ltd., (4) Evans Fraser & Co. (India) Ltd., (5) Millennium Appliances (India) Ltd., (6) Applicomp India Ltd., (7) Electroworld Digital Solutions Ltd., (8) Techno Kart India Ltd., (9) Trend Electronics Ltd., (10) Century Appliances Ltd., (11) Techno Electronics Ltd., (12) Value Industries Ltd., (13) PE Electronics Ltd., (14) CE India Ltd., and (15) Sky Appliances Ltd.*, MA 1306/2018 and MA 1416/2018, 8 August 2019.

He clarified that this often operates in the subtext or background. Other questions also operate in the subtext or background, such as whether the boundary formed by a corporate entity is considered solid, such that the court proceedings will not attempt to rearrange assets and liabilities. Alternatively, parties may argue for some other conception of the debtor or enterprise, which could permit the court to adjust certain boundaries.

Professor Spire further said that the law must address two different types of boundaries. The more obvious boundary is when a corporate group and all or most of the entities file for bankruptcy together. Subsidiaries have boundaries among themselves, as do the subsidiary and its parent. Parties could either respect those boundaries, with each entity having its own debtor and balance sheet, or partially or fully collapse the boundaries.

Richard Squire, Professor from Fordham Law School, responds to Professor Felix Steffek's question (photo by Paola Aseron-Dacanay/ADB).

However, the debtor also has boundaries regarding which entities the managers decide to include in or exclude from bankruptcy. It constitutes the external boundary of the legal debtor, but sometimes only a segment of an enterprise or a part of a group of affiliated companies may be subjected to bankruptcy proceedings.

The question then turns to the legal system, i.e., how courts should deal with entities that are underwater in bankruptcy. The courts may either address these entities directly or extend their reach to non-debtors who are part of the same group. Many American bankruptcy lawyers view this approach with a degree of apprehension as it deviates from expectations. However, sometimes it may be appropriate—for instance, when a lot of liabilities were packed into a particular entity and the assets were kept outside.

According to Professor Squire, an inverse scenario (most recently seen in the General Growth case in the US)[2] involves an excessive number of entities included in the bankruptcy proceeding. Despite being solvent, some subsidiaries were also put into bankruptcy alongside the insolvent parent company in hopes of trying to shake down the creditors. The subsidiaries can either argue that it will (i) pose an automatic stay, hoping that the creditor relinquishes its lien so that the subsidiary can get some value up to the parent company, or (ii) claim that the act is in bad

[2] *In re General Growth Properties Inc.*, 409 B.R. 43 (Bankr. S.D.N.Y. 2009), 11 August 2009.

faith (it is perfectly solvent and its creditor should be getting its regular interest payments). Professor Squire also suggested that in some cases, an entity that is perhaps too big is being put in, and some of them should be carved out and released back to freedom.

Professor Squire concluded that in dealing with corporate groups, parties have to grapple with the question of whether internal boundaries are respected and whether the choice of the debtor's managers about which entities to include and exclude are respected.

Professor Steffek then turned to Ms. Tripathi and asked her to explain the core features of the UNCITRAL Model Law on Enterprise Group Insolvency specifically in relation to corporate group insolvency.

Ms. Tripathi explained that the UNCITRAL Model Law offers a framework for handling insolvency proceedings involving multiple debtors in one business group, even if they are located in different jurisdictions. The Model Law supplements the Model Law on Cross-Border Insolvency. It emphasizes principles of procedural coordination instead of substantive consolidation, which Ms. Tripathi asserts is sensible since most jurisdictions prefer it.

Ms. Tripathi then proceeded to broadly summarize the UNCITRAL Model Law on Enterprise Group Insolvency. It lays down guidelines for how coordination between courts, insolvency practitioners, or group insolvency representatives can be carried out. The Model Law provides a mechanism to suggest a group insolvency solution, which it defines as "a proposal or a set of proposals developed in a planning proceeding for the reorganization, sale, or liquidation of some or all of the assets and operations of one or more enterprise group members with the goal of protecting, preserving, realizing, or enhancing the overall combined value of the enterprise group."

Urmika Tripathi, Legal Analyst from REDD Intelligence, discusses UNCITRAL's framework in dealing with multiple debtors (photo by Paola Aseron-Dacanay/ADB).

Ms. Tripathi noted that the definition acts like an enabling provision, allowing parties to come up with solutions which need not necessarily mean consolidating the assets and liabilities of all the members of the group. Instead, parties are permitted to coordinate and come up with a solution that everyone agrees to. Even more, any member of the enterprise group is allowed to participate in this group insolvency solution, even if they are not subject to it.

Participating means parties, including solvent enterprise group members, can go to court and air their concerns. Ms. Tripathi added that a group insolvency practitioner will oversee coordination efforts, including coordination with insolvency practitioners in other jurisdictions where fellow group members are undergoing insolvency proceedings.

But Ms. Tripathi highlighted that the provision respects the jurisdiction of other courts that handle insolvency proceedings of other members. It recognizes that an entity is not subject to a case unless it is subject to the court's jurisdiction. If the court where an entity's center of main interest is located has a different view on what should happen, then that entity will be bound by it, and a court from a different jurisdiction cannot enforce its solution.

Professor Steffek then turned to ask Mr. Graulich what, in his opinion, works and does not work in dealing with corporate groups in insolvency. Professor Steffek requested Mr. Graulich to frame his answer from the US perspective.

Mr. Graulich said that when dealing with a corporate group that is entirely located within the US, specific provisions of the law can mitigate the concerns raised by the panel..

First, once a company files for Chapter 11 in the jurisdiction where it has its principal place of business, its affiliates can also file in the same jurisdiction. If the initial entity files in the appropriate forum as a member of the corporate group, the remaining affiliated group members can file in the same district.

Second, one of the standard requests made by firms on the first day of a case is joint administration, which is usually granted. This allows parties to efficiently manage a case—from the court, creditors', and company's perspectives—regardless of whether it involves two debtors or 200 debtors pending in the same case, by bringing it under the rubric of a single case. However, joint administration does not necessarily imply that every case in the US that involves

Timothy Graulich, Partner at Davis Polk, discusses what works and does not work in dealing with corporate groups in insolvency from the US perspective (photo by Paola Aseron-Dacanay/ADB).

a group has substantive consolidation. It is a procedural rule, but it effectively streamlines the process and mitigates confusion with creditors.

The US also has substantive consolidation, which combines assets and liabilities to make an integrated singular distribution to creditors as if it were one big company. A party can likewise do this in gradations of partial substantive consolidation. With the creditors' consent, it can also be accomplished through deemed consolidation.

Mr. Graulich noted that other jurisdictions currently facing issues with substantive consolidation are in a situation similar to where the United States was at an earlier stage of the Bankruptcy Code process. He explained that although it was not actually a provision of the US Bankruptcy Code, substantive consolidation has been a doctrine in the United States bankruptcy law. But when the Bankruptcy Code was first passed, substantive consolidation had a more permissive standard that permitted (especially in lower court decisions) consolidation based upon facts present in many group situations.

Mr. Graulich explained that the law has become more refined, especially in the Third Circuit, after the Owens Corning case established stricter provisions for substantive consolidation.[3] This ensures that it is now applied more predictably and consistently. Secured creditors are also protected so that consolidation would not be contrary to their contractual expectations.

However, there is a concern that substantive consolidation could impact non-bankruptcy credit markets. For instance, if a lender made a loan to a particular company within a corporate group and has extensively researched the company's financial well-being, it may conclude that the company is still solvent, even if other members of the group may be experiencing financial distress. In such cases, pricing debt becomes challenging for the lender if it expects to share the debtor with other creditors who do not have a direct claim under the applicable non-bankruptcy laws.

As to what may not work so well, Mr. Graulich mentioned corporate groups with international businesses due to jurisdictional limitations on the part of the bankruptcy courts. However, he did note that some non-US companies, or US companies and non-U.S. companies, have successfully filed cases in the US as a group.

A recent example is LATAM.[4] LATAM Airlines is an airline that operates throughout Latin America. It filed in the US for a number of reasons, including financing issues and issues about the ability to reject contracts in the US. But the main reason, according to Mr. Graulich, was the fact that the group alternative was not available under local law because different jurisdictions would not accept a group that had some entities in their jurisdiction while having entities in another jurisdiction.

The US allows a company to file in the country based solely on having property within the jurisdiction, which depending on what court decision remains, includes having US debt. Thus, having a group filing of non-US companies in the US is certainly possible because of the low bar for eligibility.

3 *In re Owens Corning*, 419 F.3d 195 (3d Cir. 2005), 15 August 2005.
4 *In re: LATAM Airlines Group S.A.*, Case No. 20-11254, 14 December 2022.

However, the reason Mr. Graulich said it may not work so well is that it depends on what the party needs to do after filing. If a party needs to enforce the decisions of the US court in a foreign jurisdiction, it can get complicated. As an example, he cited the Aeromexico case involving a Mexican company.[5] The parties had to forego the possibility of filing a separate lawsuit in Mexico because Mexico may not have recognized the filing of a Mexican company in the US.

Filing in the US by an entirely foreign or partly foreign, partly domestic group has practical limitations. But it is not necessarily because there is something wrong with the way the US handles groups. It is simply a practical limitation on how foreign a company must be to have a successful reorganization in the US, which has to do with whether parties are trying to restructure debts that are subject to compromise under US law.

Mr. Graulich concluded that, as far as a groups are concerned, the tools exist and are available under US law. These tools work quite well for US and non-US companies, subject to the natural limitations of US bankruptcy law.

Professor Steffek then turned to Ms. Pereira and asked her to talk about what has and has not worked in Singapore in terms of corporate group insolvency.

Ms. Pereira responded that the doctrine of separate legal personalities is fairly entrenched in Singapore law, as with several other jurisdictions. Most of the country's legislation pertaining to restructuring and insolvency is really based around recognition that companies are separate legal entities from each other.

Raelene Pereira, Partner at Rajah & Tann, gives examples of cases involving corporate groups (photo by Paola Aseron-Dacanay/ADB).

Ms. Pereira observed that since the reforms were introduced in 2017, there has been a general uptick in group restructuring and insolvencies taking place in the country.

Ms. Pereira described how most cases are administered in Singapore. She said that parties will have to file separate court applications for each company that may be undergoing a rescue exercise or a liquidation.

In order to streamline the process and make sure that it is efficiently overseen, what effectively takes place

[5] *In re: Grupo Aeromexico*, S.A.B. de C.V., et al., Case No. 20-11563 (SCC), filed 1 October 2021.

is something similar to a joint administrative order. Case conferences are conducted where a single registrar or judge will oversee all the different case files. Parties usually have an implicit understanding that one specific company will effectively be the lead company throughout the process. Accordingly, while there may be no express legislation requiring or permitting different companies in a group to make a single filing, this is effectively what Singapore achieves by way of the procedural discretion given to the courts.

Legislatively, Singapore has taken a step towards facilitating restructurings under its scheme of arrangement provisions. One of the reforms introduced in 2017 was the enhanced moratorium for schemes of arrangement. An amendment was introduced to allow related companies of a target company to apply for a moratorium in Singapore. While the related company may not itself enter into a scheme of arrangement, if the business, operations and assets of the related company are critical and integral to the restructuring of the subject company, the related company may also apply for a moratorium.

From a legislative perspective, the jurisdiction has taken a step forward. Looking at group reorganizations from a broader perspective, Ms. Pereira said that the question that is often asked as a prelude to any group restructuring is what type of corporate entity the parties are dealing with. This is because different groups are organized in very different ways.

Ms. Pereira shared a couple of recent cryptocurrency cases where Singapore handled group companies. Samtrade Companies applied for judicial management in Singapore.[6] The group comprises of six entities, half of which were companies incorporated in Singapore and three other companies were incorporated elsewhere. The decision to centralize the restructuring in Singapore was based on the fact that the group's decision-making hub is located there.

For all intents and purposes, most of their operations were based in Singapore. Even though they were all separate companies, they were effectively run as a single entity. A holding company contracted with customers; the operations and human resources decisions were all undertaken by another company; and the accounting hub was overseen by another company. All these different companies were effectively organs in one body.

In contrast, the Zipmex Group of Companies is involved in an ongoing scheme process where the holding company of the group is based in Singapore, but it has operating subsidiaries across the region, including Thailand and Indonesia.[7] The operating subsidiaries work independently of the holding company even though the commercial objective is the same. In this case, there are two corporate groups within the same industry but functioning quite differently. As such, the needs in each restructuring process are quite different.

In the case of Samtrade where the companies eventually went into liquidation, one of the issues that the liquidators had to grapple with was what should be done with the assets of the group. Most of these assets—funds deposited by investors—were not held by the holding company.

6 *Samtrade FX Ltd.*, HC/OS 63/2022 and HC/CWU 178/2022; *Samtrade Custodian Limited*, HC/OS 60/2022 and HC/CWU 179/2022; *S.A.M. Trade (V) Limited*, HC/OS 65/2022 and HC/CWU 180/2022; *Samtrade Custodian Pte. Ltd.*, HC/OS 61/2022 and HC/CWU 181/2022; *S.A.M. Fintech Pte. Ltd.*, HC/OS 62/2022 and HC/CWU 182/2022; and *S.A.M. Marketing Private Limited*, HC/OS 64/2022 and HC/CWU 183/2022

7 *Re Zipmex Co Ltd and other matters*, [2022] SGHC 196 and *Re Zipmex Co Ltd and other matters*, [2022] SGHC 306.

At the same time, the other company that holds the funds may have a small pool of vendor creditors that they deal with. In the context of a liquidation, if and when a distribution is made, the question arises as to how assets will be distributed.

In the Zipmex case, each operating subsidiary has its own clear pool of creditors and the assets are quite clearly segregated. Ms. Pereira said that in this scenario, the solutions for these companies are a lot clearer and cleaner.

Ms. Pereira underscored that what is important from a Singapore law perspective is that the jurisdiction has a structure and framework in place that gives the court sufficient flexibility to deal with each corporate group, as it needs to.

Finally, Ms. Pereira noted that the panel has touched quite extensively on the concept in the US that allows for consolidation of assets and liabilities. She remarked that this principle has not really been fully considered by the Singapore courts. Ms. Pereira concluded that Singapore courts can explore how to handle a group restructuring in instances where consolidation may be the appropriate solution in dealing with the assets of the group.

Finally, **Professor Steffek** asked three panelists about their desired changes to the law for corporate groups experiencing financial distress.

Professor Hotchkiss responded that a recurring theme through the different panels was the need to preserve flexibility because one size does not fit all. She also mentioned that Mr. Graulich brought up the point that certain policies have worked very well in the case of more complicated US companies with multiple subsidiaries or multinationals. Firms are very good at figuring out what parts of the company should go into bankruptcy and what parts should

Edith Hotchkiss, Professor of Finance from Boston College, talks about the need for flexibility when dealing with corporate groups in financial distress (photo by Paola Aseron-Dacanay/ADB).

be isolated and left alone. This comes back to the contagion issue that she had previously mentioned. She emphasized that jurisdictions have to be careful in having a rigid procedure that, for example, goes to the extreme of consolidation.

Rather than offering specific laws or regulatory changes, Professor Hotchkiss proposed a broader concept, namely hybrid procedures, which could provide the procedural coordination needed while still maintaining the flexibility to isolate or limit contagion from the pieces of the company that need to be restructured.

According to **Professor Squire**, fraudulent transfer actions are a common occurrence in corporate groups as parties are often tempted to transfer assets within the group. This is akin to a carnival shell game where assets are shuffled around quickly, leaving creditors in the dark as to their location. He noted that sometimes courts use substantive consolidation to make those transfers irrelevant, i.e., transfers do not matter because the whole group is pooled together—same creditor and same assets.

Richard Squire, Professor from Fordham Law School, talks about corporate group insolvency (photo by Paola Aseron-Dacanay/ADB).

But when not consolidating (and Professor Squire opined that courts often should not), then the courts must determine how to allocate assets. How can the courts ascertain whether a specific entity in the group received a reasonably equivalent value when it either transferred assets to another entity in the group or perhaps guaranteed the debt of another group or another entity in the group?

On occasion, judges may inquire about the reasonably equivalent value from the standpoint of the entire group or the entire business. Judges may rule the transfer as beneficial to the entire business because it is considered as one entity (despite involving multiple legal entities) and an equivalent value was received. Alternatively, the judges may require the parties to look at the particular entity, its balance sheet within the corporate group, whether value was received, and whether the value received is concrete, such as new assets on the balance sheet, or a debt that has been secured or has been extinguished. This is how reasonably equivalent value is measured.

Professor Squire expressed his preference for the latter option, assuming the court does not consolidate the group. He explained that when courts look at it from the perspective of a group as a whole, what they are really asking is whether the transfer was rational. Of course, managers are not going to do a transaction unless somebody is going to benefit. Thus, looking for value from the perspective of the group as a whole means that the court will almost always find the transfer to be rational.

However, creditors are not in the same position as the shareholders and creditors of other entities within the group. Professor Squire concluded that, if courts are going to respect the boundaries, the doctrine should be applied, and the value measured, at the entity level.

Raelene Pereira, Partner at Rajah & Tann, emphasizes the need for greater clarity of insolvency rules (photo by Paola Aseron-Dacanay/ADB).

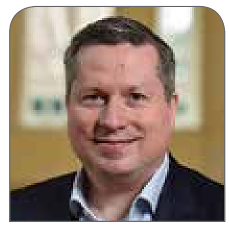
Finally, **Ms. Pereira** stated that she would appreciate greater clarity on consolidation in group restructurings in Singapore. Whether in the form of legislation or guidance notes from the court, such information would prove extremely helpful. Specifically, she is less concerned with how an insolvency practitioner manages the restructuring process, and more interested in determining what safeguards may need to be established for creditors of different companies.

Vientiane, Laos (photo by Alessio Roversi on Unsplash).

PANEL 11
CROSS-BORDER INSOLVENCY

13

PANEL DISCUSSION



Chair:

JUSTICE CHRISTOPHER SONTCHI
International Judge, Singapore International Commercial Court

Panelists:

JOSHUA MACEY
Assistant Professor of Law, The University of Chicago Law School

DAN T. MOSS
Partner, Jones Day

DEEPTANSHU SINGH
Manager, Insolvency and Bankruptcy Board of India

FELIX STEFFEK
Associate Professor, Faculty of Law of the University of Cambridge

Justice Christopher Sontchi, International Judge at the Singapore International Commercial Court, chaired the final panel of the conference.

First, he thanked the organizers for an amazing event and the Asian Development Bank (ADB) for its hospitality. He then introduced the panelists for Panel 11:

- **Professor Joshua Macey** from the University of Chicago;
- **Mr. Dan Moss**, partner at Jones Day;
- **Professor Felix Steffek** from the University of Cambridge; and
- **Mr. Deeptanshu Singh**, manager at the Insolvency and Bankruptcy Board of India (IBBI).

Justice Sontchi then explained Panel 11 would discuss universalism, territorialism, and modified universalism. He said that the Model Law on Cross-Border Insolvency and the European Insolvency Regulation embrace the idea of modified universalism.

Scan the QR code to watch Panel 11 video on YouTube.

He asked Professor Steffek to discuss the distinctions between territorialism, universalism, and modified universalism. He also requested Professor Steffek's opinion on why the Model Law and the European regime chose modified universalism.

Professor Steffek responded that universalism essentially means that one jurisdiction and one law govern one insolvency. As a starting point, this has worldwide application. Debtors, assets, and creditors are covered by the applicable law independent of the territory in which they are situated.

On the other hand, territorialism means that jurisdiction and applicable law are determined by the territory where the assets are situated.

Finally, modified universal universalism is a blend of universalism and territorialism. Modified universalism does not have a single version but has many variations.

Professor Steffek then proceeded to give one argument in favor and against each system, summarized in Table 13.1.

Panel 11 tackles cross-border insolvency (photo by Paola Aseron-Dacanay/ADB).

Table 13.1: Advantages and Disadvantages of Various Approaches to Cross-Border Insolvency

	Advantage	Disadvantage
Universalism	Its application is cheap. One law is applicable and once it is implemented, parties are dealing with just one system.	Essentially, everyone wants their laws imposed. Each country, each legislator, tends to prefer their own laws and they will not accept the others. This gives rise to a political problem.
Territorialism	It protects local expectations. Citizens and businesses know their local laws and they know what to expect.	It splits up businesses and realities. If businesses have assets and creditors in multiple countries, then territorialism will split up one business into multiple procedures.
Modified Universalism	In a way, it tries to blend and get the best of both worlds. It starts with the universalist point of view but then cuts it back where local expectations require deviations from universalism.	An argument against modified universalism would be that it marries the worst of both worlds.

As to why has modified universalism been so successful, Professor Steffek opined that universalism is politically out of the question, territorialism splits up too much, and people can agree on a blend.

According to **Justice Sontchi**, modified universalism sets forth a primary or main procedure opened in the location of the debtor's center of main interests, followed by a succession of subsidiary or non-main procedures in other countries that recognize the main proceeding. Typically, this occurs in the place of the debtor's registered office, but it can be changed.

Some authors have argued that the center of main interest (COMI) should be decided by the debtor either ex ante—say, in the company's organization papers—or, at least, ex post, once the company seeks to initiate the proceedings. Justice Sontchi stated that Professors Joshua Macey and Anthony Casey authored an article supporting the use of ex ante choice of voting rules to determine the selection of the insolvency forum ex post. He asked Professor Macey to talk to about their proposal and why they think it is the right idea.

Professor Macey explained that many cross-border issues are similar to the long-standing debate in the United States (US) about venue shopping that has been ongoing for 35 years. He noted that debtors have good and bad reasons for choosing where to file, both domestically and internationally.

The bad reason is that if the debtor has the power to choose the jurisdiction for their case, one could argue that it may favor incumbent managerial interests, or harm tort victims. Additionally, a judge's familiarity with one side or its lawyers may result in a favorable judgment, or parties may choose a more convenient forum due to varying laws regarding third-party releases. Professor Macey clarified that their paper was neutral on these issues.

However, there are good reasons for choosing a particular jurisdiction for filing, including predictability and efficiency. Professor Macey shared that he has heard that debtors that filed in a US circuit with convenient precedent often disliked that judges were not used to multimillion dollar cases.

He added that the cross-border aspect replicates these issues to some extent but also raises some unique issues.

One issue is that it is difficult for a single country to unilaterally claim that it has a good set of substantive laws and, as such, it will impose them. Professor Macey warned that this will result in competition between and among countries, as well as competition between bankruptcy judges and court circuits.

Second, large corporations face significant administrative costs when they have multiple resolutions, which can quickly become very complex. The race to file a lawsuit is even more challenging to manage at the international level.

The third issue is that countries may have their own agendas and turn it into a race. In their paper, Professors Casey and Macey proposed a solution to facilitate “good shopping” and eliminate “bad shopping.” To achieve this, they adjusted a proposal by Rob Rasmussen and Randal Thomas that suggested debtors should ex ante pick where to file. They did not like this proposal.

To illustrate his point, Professor Macey provided an example of a scenario featuring an excellent judge in a specific venue. It may not be wise to commit to this venue for this reason alone, given the potential for change, such as the judge retiring or shifts in case law and judicial personnel.

Consequently, Professors Casey and Macey proposed a pre-commitment device where parties select a procedure for venue selection. For example, in case of concerns over managers

Joshua Macey, Assistant Professor at The University of Chicago Law School, discusses unique issues about cross-border insolvency (photo by Paola Aseron-Dacanay/ADB).

selecting a location more convenient for themselves, there should be a device for creditors to either have a say or potentially not have one, depending on efficiency or the associated costs. Such a device may vary from company to company. Thus, Professors Casey and Macey opined in their paper that this approach is good both domestically and internationally.

The key lesson from Professors Casey's and Macey's proposal is that COMI should not play a significant role in selecting a filing venue. Rather, the party should just have the market price in the ideal forum. That is, if an American company chooses to file in Singapore because it offers a better forum for resolving or reorganizing distressed companies, the location of its assets should be irrelevant as long as a market process exists to determine the appropriate forum for the proceedings.

Regarding non-adjusting creditors, Professor Macey stated his approval of the Model Law's provision requiring parties to address such creditors in accordance with substantive law. Additionally, situations leading to a race to the courthouse where a party could, for example, potentially take advantage of pensioners or environmental claims, is not a preferred outcome. Because a party needs recognition from each individual location, it should not be able to get recognition for simply opting out of paying environmental claims. Professor Macey expressed appreciation for this, but opined that COMI was not particularly relevant.

Justice Sontchi said that the ideas mentioned by Professor Macey were fascinating. However, enforceability might become a problem.

Justice Christopher Sontchi, International Judge at the Singapore International Commercial Court, shares his observation that many foreign companies file for bankruptcy in the United States of America (photo by Paola Aseron-Dacanay/ADB).

Justice Sontchi then observed that many foreign companies file for bankruptcy in the US. He asked Mr. Moss about the reasons why this is so and how it relates to where the COMI might or might not be.

Mr. Moss responded that filing in the US is a practical choice due to the robust legal system and established precedent. Regardless of their state, parties can expect a relatively consistent outcome since the circuits are not fundamentally different in most cases. Mr. Moss nonetheless noted that, obviously, outliers, facts, and circumstances will change with each particular case.

Mr. Moss believes that foreign debtors can avail of New York law-governed contracts and Section 365's ability to reject contracts. According to the easy affiliate rule, if a party has an entity in a US jurisdiction with a retainer or any other asset—whether it involves, for example, a contract claim or even a litigation claim—the party can tag jurisdictions to effectively bring the entire group into a US-situated bankruptcy case.

From a global perspective, Mr. Moss sees this approach as the way forward in rescuing a business. He explains that when a client approaches him, as a practitioner, his first step is to inspect the entity's organizational chart and ascertain its physical location. Mr. Moss said that the tax-efficient allocation of a corporation will likely tag some major global financial centers that have robust and consistent rule of law and applicable precedent for restructuring. He emphasized the importance of determining the party's objectives for restructuring, whether it be for balance sheet restructuring, operational restructuring, or both.

Dan T. Moss, Partner at Jones Day, discusses the reasons why parties choose the United States of America as venue for bankruptcy cases (photo by Paola Aseron-Dacanay/ADB).

Mr. Moss stated that, bar none, the US is ideal for achieving balance sheet and operational restructurings. However, he also cautioned that if the goal is solely a balance sheet restructuring, the US may be too aggressive with the 24-hour pre-packaged insolvency (pre-packs) or may even be less suitable in certain situations. With an operational financial restructuring, Mr. Moss explained that certain jurisdictions (e.g., a United Kingdom [UK] scheme or a Singapore restructuring, coupled with a Chapter 15) allow a party to hit virtually all—if not completely—the points that one could achieve in a US Chapter 11.

However, Chapter 15 has the added benefits of not having an official committee of unsecured creditors, as well as not necessarily having the same levels of judicial oversight and cost expense. These benefits are in addition to the knock-on effects that can sometimes be imposed as a result of Chapter 11 filing. In contrast, organizing a UK scheme with a Chapter 15 filing may avoid triggering certain ipso facto clauses in contracts.

Mr. Moss then discussed the concept of third party releases, which is somewhat controversial in the US. Third parties are non-debtors who have somehow contributed to the plan in what they view as a material way. In some jurisdictions, this concept is not controversial and is actually embedded in the restructuring regime as part of the code, practice, and precedent. In the US, with respect to the Purdue cases[1] and other cases that are evolving through the circuits, whether or not third parties can get a release and will not be held liable for issues that may arise as a result of restructuring is an open question.

Circling back to the initial question of why companies file for bankruptcy in the US, Mr. Moss opined that the country's rich history in the subject is a major driver. He however added that it is becoming a much more global and competitive market.

[1] *In re: Purdue Pharma L.P., et al.*, Case No. 19-23649 (RDD).

Mr. Moss said that while COMI may still be relevant in certain instances, its relevance relates to what parties are trying to ultimately achieve as a practical nature. For an effective allocation of capital and resources globally, parties must consider how practitioners approach restructuring. What is the ultimate goal, and which jurisdiction is best suited to achieve it? This assumes of course that there is a legitimate basis for the jurisdiction in question.

Justice Sontchi shared that when he announced his intention to leave the Delaware bench and join the Singapore International Commercial Court, people asked him about the basis for Singapore's jurisdiction. He addressed these inquiries by explaining that establishing jurisdiction is relatively simple, while recognition can be challenging.

According to Judge Sontchi, one of the things that attracts cases to the US is that it is incredibly easy to get jurisdiction. As a debtor in the US, all a party has to do is establish property in the jurisdiction, and a retainer can be considered property. For example, a multinational corporation can simply instruct each of its various subsidiaries around the world to send $1,000 to a law firm. He added that Singapore has a much stricter approach to what constitutes jurisdiction.

The US, of course, has had a distinguished reputation over the last 40 years, which makes it fairly easy to get recognition of US decisions. However, for a brand new court like Singapore, judges in the jurisdiction express concerns about the difficulty of gaining recognition for its decisions.

He then asked Mr. Singh about India's announcement that it was going to revise its rules on cross-border insolvency.

Mr. Singh stated that India will soon have regulations on cross-border insolvency after a lengthy debate on the matter. In 2018, a committee recommended enforcing the UNCITRAL

Deeptanshu Singh, Manager at IBBI, describes the development of cross-border insolvency in India (photo by Paola Aseron-Dacanay/ADB).

model for cross-border insolvency, but there were some deviations from this between 2018 and 2020. Another committee in India has also suggested the rules and regulations necessary for formalizing this proposal.

The process continued. In 2021, stakeholders were consulted, and various proposals were received. In the fourth quarter of 2022, India conducted a comprehensive study of the practices followed in all of the 53 jurisdictions worldwide where the UNCITRAL Model Law is implemented. India is currently in the process of further refining the committee's recommendations on adopting the UNCITRAL Model Law, the most pertinent part of which is the issue on relief.

Justice Sontchi then turned to the issue of applicable law. He stated that the Model Law primarily focuses on jurisdiction rather than applicable law. To enhance legal certainty on potentially relevant law or laws, UNCITRAL is currently evaluating the possibility of harmonizing the rules governing applicable law. He asked Professor Steffek for his opinion on whether this assessment is desirable.

Furthermore, Justice Sontchi observed that the European Insolvency Regulation appears to offer increased harmonization regarding applicable law. He also sought Professor Steffek's views on this matter.

Professor Steffek said that the European Insolvency Regulation provides in Article 7:

> The law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened.

This is referred to as the State of the opening of the proceedings, the lex fori concursus.

Justice Christopher Sontchi, International Judge at the Singapore International Commercial Court, asks Professor Felix Steffek about the European Insolvency Regulation (photo by Paola Aseron-Dacanay/ADB).


Felix Steffek, Associate Professor from University of Cambridge, discusses the European Insolvency Regulation (photo by Paola Aseron-Dacanay/ADB).

Essentially, the applicable law is the law of the Member State where the proceedings are opened. Professor Steffek stated that this approach is logical; obtaining permission from the court to apply the laws of another country would require specific reasons. He noted that requesting a court to consistently apply another jurisdiction's laws is not a very practical solution.

Under the European Insolvency Regulation, the lex concursus or the law of the state of the opening of the proceedings determines both procedural and substantive law. Interestingly, this rule has some exceptions. The exceptions concern, for example, third parties' rights in rem, set-off, reservation of title, contracts relating to immovable property, and contracts of employment.

An interesting question is: why are there such exceptions? Professor Steffek stated that there are various reasons, such as avoiding the situation where banks increase the cost of credit if a jurisdiction imposes laws other than the law the banks expect to be applied on their secured credit. Additionally, these exceptions serve to address political concerns where employees in a jurisdiction may find it objectionable that a law other than domestic law will apply to them.

He also noted that within modified universalism as implemented in EU law, parties always have the option of starting a territorial proceeding. This has the effect of taking away much of the central proceedings' power over the creditors and assets in the relevant territory. He gave an example of a party starting a main proceeding. A creditor situated in another country can start a territorial proceeding, which means that the law of that country will apply to such creditor's claim or assets. From this perspective, territorial proceedings offer an exit option.

Regarding whether this should be implemented on a broader scale, Professor Steffek cautiously answered "yes." He suggested that transitioning to a more predictable insolvency law and establishing regulations on the applicable law not only make sense, but also enhances certainty ex ante. However, he acknowledged that forum shopping can still pose challenges.

Applying the COMI concept, the core idea is that third parties, particularly creditors, have an expectation of where an insolvency proceeding will take place, which is at the COMI, i.e., the center of the debtor's main interest. The rules make moving COMI somewhat difficult, so parties have certainty ex ante to some degree. However, COMI can still be moved, creating risks for creditors from an ex-ante perspective.

Professor Steffek stated that, at UNCITRAL level, these risks are impacted by the greater diversity of jurisdictions compared to the European Union (EU). He expressed that the European Insolvency Law relies on the strong similarity of jurisdictions within the EU. Additionally, he mentioned that EU directives aim to harmonize national insolvency laws across the union. Based on this similarity, EU policymakers can make cross-border insolvency laws.

On the other hand, the jurisdictions addressed by UNCITRAL encompass a broader spectrum of countries. Still, Professor Steffek said that counterbalancing the risks that arise from introducing universalist elements is still possible. A possible first step is strengthening territorialist elements (i.e., creating opt-out possibilities). As a result, parties in a particular country are exposed to the main proceeding as a starting point. However, if a party is local and possesses assets locally, and if the party does not like the effects of the primary proceeding, initiating a local territorial proceeding provides a way out.

Second, a jurisdiction may require a certain minimum standard for a foreign insolvency rule to apply. This could be administered by creating a list of countries whose laws reach the minimum standard required. Professor Steffek acknowledged that this process could be more challenging at an international level.

Justice Sontchi said that while conducting research, he discovered that with the exception of the UK (which has left the EU), no EU member has embraced the Model Law. He inquired about this from Professor Steffek.

Justice Sontchi further explained that the issue came up in the context of a case that involved trying to get Irish courts to respect the automatic stay for property in Ireland of a bankruptcy that was filed in Illinois, US. Typically, the solution would be for the concerned party to commence a Chapter 15 proceeding in Ireland. However, this was not possible because Ireland does not have Chapter 15 or the equivalent of the Model Law. The US court also ruled that despite having jurisdiction over the property, it lacked jurisdiction over the parties who violated the automatic stay. This created a significant problem in the US.

Professor Steffek replied that only four countries within the EU adopted the Model Law, specifically Greece, Poland, Romania, and Slovenia. He believes that the EU increasingly takes the approach that, as a supranational body, it should decide on external relationships, particularly in procedural law. The EU decides for the block—either by opting in or not.

Professor Steffek stated that Eurocentricity is the primary reason for the EU's failure to adopt the Model Law. In terms of lawmaking, EU countries often look to the common market. EU member states fall back on their national law when there is no supranational insolvency law, which often leads to more ambiguity and transaction costs. Professor Steffek remarked that the European Insolvency Regulation is currently the most advanced international law for insolvency.

Justice Sontchi then acknowledged India's protocols on bilateral recognition in the Jet Airways case and asked Mr. Singh to expound on these protocols.[2]

Mr. Singh responded that as a regulator, what he fundamentally sees is a debate between bilateralism and multilateralism. India's legislative toolkit lacks provisions for cross-border insolvency. However, Sections 234 and 235 were added, allowing for India to enter into bilateral agreements.

In the Jet Airways case, the insolvency practitioners utilized cross-border insolvency protocols. Similarly, another successful declaration on cross-border insolvency was made in the case of SCL Manufacturing. As a result, India currently has some support due to innovations by the adjudicating authorities and courts in the country. Nonetheless, these are solely mechanisms that can try to cover the legislative vacuum. He stressed the importance of utilizing the UNCITRAL Model Cross Border Insolvency in India moving forward, with necessary adaptations to align with the country's socio-cultural needs.

Deeptanshu Singh, Manager at the Insolvency Bankruptcy Board of India, talks about the Jet Airways case (photo by Paola Aseron-Dacanay/ADB).

Justice Sontchi then turned to the issue of crypto exchanges. He observed that various crypto exchanges have collapsed worldwide. He asked Professor Macey about the challenges raised by this type of insolvency, which often has an international component. He also asked if countries need special insolvency rules to deal with crypto exchanges in general.

Professor Macey responded that cryptocurrency insolvency raises minimal, if any, challenges. He noted that one of the joys of studying crypto and business laws is rediscovering fundamental business tools. When addressing the current state of crypto winter and the challenges facing FTX, he remarked that it was merely a case of ordinary fraud.

When it comes to avoidance actions and recovering funds, the process for crypto bankruptcies is quite comparable to that of traditional bankruptcies. It is worth noting, however, that recovering funds in crypto bankruptcies can be easier from an avoidance perspective, since locating the money is often straightforward for the parties involved. This is not because there is an inherent difference between crypto and traditional bankruptcies, but rather a factual consideration.

[2] *Jet Airways (India) Limited (Offshore Regional Hub) vs State Bank of India & Anr*, Company Appeal (AT) (Insolvency) No. 707 of 2019, 26 September 2019.

The second issue concerns cross-border payments. Professor Macey restated his belief that COMI is not relevant and that parties should file in the most convenient location. However, he pointed out potential difficulties in determining COMI in crypto insolvencies. Since assets may be stored in a million servers in 100 different countries, and parties may choose to file based on asset location, how will they ascertain where COMI is?


Joshua Macey, Assistant Professor at The University of Chicago Law School, talks about crypto bankruptcies (photo by Paola Aseron-Dacanay/ADB).

Professor Macey said COMI is strangely parochial, but ultimately inefficient if a party can select the right forum. However, if a party has assets everywhere, nowhere, or on a decentralized platform, determining where to file becomes a significant issue. Perhaps a party could state that the business is headquartered in a particular location and file there. But, according to Professor Macey, the significance of assets in establishing jurisdiction can lead to difficulties in certain situations. He suggested that this issue could be resolved with a change in the law.

Justice Sontchi then turned to Mr. Moss. According to him, many companies initiating reorganization procedures in the US often have debt contracts subject to English law. He asked Mr. Moss whether the rule in the Gibbs case, which is still applied by English courts, could hamper the reorganization of these companies.[3]

Mr. Moss responded that creditors have become more sophisticated, as demonstrated by the recent syncreon cases.[4] In these cases, US creditors were able to change the governing document from US-governed law to UK-governed law, in order to access the UK scheme. Mr. Moss sees no reason why a party could not have this reversed.

He also mentioned the Modern Land case, which was decided in July 2022 by the New York Southern Bankruptcy Court under Chief Judge Martin Glenn.[5] According to him, it is a fascinating case because it allows a non-US court to impair contracts governed by US law.

Mr. Moss expressed his opinion that if the UK wishes to maintain its competitive advantage in this field and leverage its scheme, it may be necessary to review this matter again as a practical consideration, recognizing that the UK has excellent courts and precedents. But considering the global economic downturn, Mr. Moss agrees that while COMI is relevant, it is not necessarily determinative. Looking at Chapter 15—whether it is a foreign main or non-main—a party can

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3 *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux*, 25 Q.B.D. 399, 26 June 1890.

4 *In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C 36, as Amended and In the matter of syncreon Group B.V. and syncreon Automotive (UK) Ltd.*, Court File No. CV-19624659-00CL; and *syncreon Automotive (UK) Ltd.*, Lead Case No. 19-11702-BLS.

5 *In re: Modern Land (China) Co., Limited*, Case No. 22-10707 (MG).

Dan T. Moss, Partner at Jones Day, discusses some bankruptcy cases decided by UK courts (photo by Paola Aseron-Dacanay/ADB).

ultimately achieve the same results through the US if it provides the proper justification, even for a foreign non-main.

Mr. Moss said the UK courts would be wise to acknowledge that their way of doing things is worth revisiting. He noted that US lawyers may have a slightly biased view on the applicability of the Gibbs rule. However, examining the practical implications of the capital flow in the economy, including crypto, raises several inquiries. Where is it? What is it? What jurisdiction does it fall under? During the FTX proceedings, a public dispute erupted between the Bahamians and the American process.

Mr. Moss then reiterated that a lot remains to be seen because crypto is everywhere and nowhere at the same time. The location of servers versus actual entities, overlaid with the issue of where properties are within those entities, may influence how future companies—whether in the crypto industry or not—consider potential jurisdictions to restructure their operations or finances.

Mr. Moss stated that other jurisdictions (such as the US, Singapore, and to some extent Hong Kong) may chip away at whether the Gibbs rule precludes them from restructuring an operational or financial balance sheet. The location of the creditors may also play a role in this determination. If there are de minimis contacts with the UK, or if it is not necessary for those specific creditors to be involved in the process for it to be successful, then a non-UK court may be able to adjust the debts. This is somewhat the reverse of the Modern Land case, where they chose not to seek recognition in Hong Kong, given the potential issues in seeking recognition due to a Chapter 15 recognition of a foreign proceeding.

Mr. Moss believes there are practical aspects to this issue. However, he concluded that as the law continues to evolve and the restructuring codes modernize, it would not be unexpected for the UK to adopt a slightly different stance, despite the long-standing precedent established in the late 1800s.

Makati City, Metro Manila, Philippines (photo by JC Gellidon on Unsplash).

Asian Development Bank auditorium hall (photo by Paola Aseron-Dacanay/ADB).

CONFERENCE **ON THE GROUND**

Photos from the Asian Development Bank Headquarters

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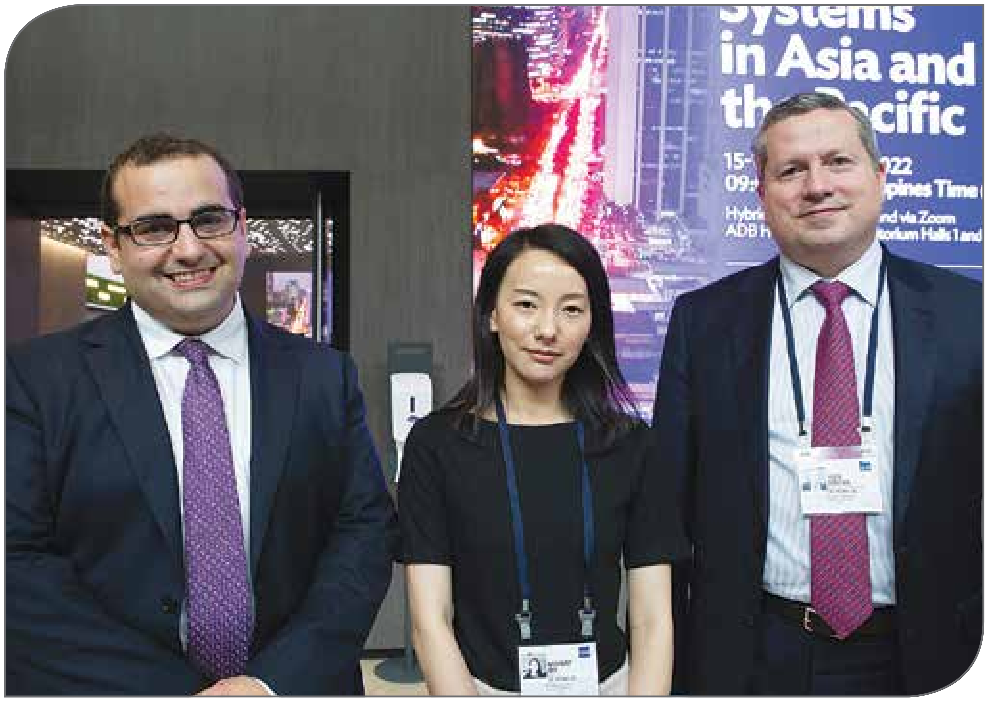
Group photo of the participants of the conference (photo by Paola Aseron-Dacanay/ADB).

Asian Development Bank auditorium hall (photo by Paola Aseron-Dacanay/ADB).

Sheena Heng and Tristan Tan, interns of INSOL International, register for the conference (photo by Paola Aseron-Dacanay/ADB).



Aurelio Gurrea-Martinez of the Singapore Management University, **Namgay Om** from Bhutan's Office of the Attorney General, and **Felix Steffek** from the University Cambridge (photo by Paola Aseron-Dacanay/ADB).

Conference participants interact with each other (photo by Paola Aseron-Dacanay/ADB).

Mariyam Visam from the Ministry of Economic Development of Maldives exchanges pleasantries with ADB's **Nicholas Moller** (photo by Paola Aseron-Dacanay/ADB).

Stephanie Yeo of WongPartnership and **Raelene Pereira** of Rajah & Tann Singapore LLP (photo by Paola Aseron-Dacanay/ADB).

IBBI's **Ansul Agrawal**, **Deeptanshu Singh**, **Pooja Singla**, and **Deepak Rao** with **Debanshu Mukherjee** of Vidhi Centre for Legal Policy (photo by Paola Aseron-Dacanay/ADB).

Justice Christopher Sontchi of the Singapore International Commercial Court, **Brook Gotberg** of Brigham Young University, and **Anthony Casey** of The University of Chicago (photo by Paola Aseron-Dacanay/ADB).

Yu-Wen TAN and **Fanny Teo** of the Singapore Insolvency and Public Trustee's Office (photo by Paola Aseron-Dacanay/ADB).

Jason Harris of University of Sydney Law School, **Judge Heru Hanindyo** of the Central Jakarta Commercial Court, and **Kotaro Fuji** of Nishimura & Asahi (photo by Paola Aseron-Dacanay/ADB).

Conference on the **Ground**

ADB General Counsel **Thomas Clark** with ADB's **Nicholas Moller** and The University of Chicago Law School's **Anthony Casey** (photo by Paola Aseron-Dacanay/ADB).

John Martin of Norton Rose Fulbright and **Charles Booth** from the University of Hawai'i at Manoa (photo by Paola Aseron-Dacanay/ADB).

Nydia Remolina of Singapore Management University, **Fanny Teo** and **Yu-Wen TAN** of the Singapore Insolvency and Public Trustee's Office, and **Urmika Tripathi** from REDD Intelligence (photo by Paola Aseron-Dacanay/ADB).

Stephen Ford of Davis Polk, **Justice Christopher Sontchi** of the Singapore International Commercial Court, **Danielle York** of The University of Chicago, and **Richard Squire** of Fordham Law School (photo by Paola Aseron-Dacanay/ADB).

The University of Chicago Law School's **Adriana Robertson** and **Joshua Macey** (photo by Paola Aseron-Dacanay/ADB).

Libby Seguin from The University of Chicago Law School welcomes the participants to the reception (photo by Paola Aseron-Dacanay/ADB).

Anthony Casey from The University of Chicago Law School delivers a speech before dinner (photo by Paola Aseron-Dacanay/ADB).

John Martin of Norton Rose Fulbright and **Brook Gotberg** of Brigham Young University listen to **Richard Squire** from Fordham Law School (photo by Paola Aseron-Dacanay/ADB).

Conference participants listen to **Anthony Casey** from The University of Chicago Law School (photo by Paola Aseron-Dacanay/ADB).

The participants enjoy a night out after the first day of the conference (photo by Paola Aseron-Dacanay/ADB).

Scott Atkins, President of INSOL International and Global Co-Head of Restructuring of Norton Rose Fulbright, delivers his welcome remarks virtually (photo by Paola Aseron-Dacanay/ADB).

Opening address by ADB General Counsel **Thomas T. Clark** (photo by Paola Aseron-Dacanay/ADB).

Adam Badawi, Professor of Law at UC Berkeley, speaks during Panel 1 (photo by Paola Aseron-Dacanay/ADB).

The chairperson and panelists for Panel 1 (photo by Paola Aseron-Dacanay/ADB).

Edmund Ma, Senior Associate at Baker McKenzie, responds to a question (photo by Paola Aseron-Dacanay/ADB).

Aurelio Gurrea-Martinez, Associate Professor of Law and Head of Singapore Global Restructuring Initiative in the Singapore Management University, begins the Panel 2 discussion (photo by Paola Aseron-Dacanay/ADB).

Jared Ellias, Professor of Law at Harvard University, begins his discussion as the Panel 3 chair (photo by Paola Aseron-Dacanay/ADB).

Adriana Robertson, Donald N. Pritzker Professor of Business Law at The University of Chicago Law School, makes an intervention during the Panel 3 discussion (photo by Paola Aseron-Dacanay/ADB).

John Martin, Partner at Norton Rose Fulbright, chairs Panel 4 (photo by Paola Aseron-Dacanay/ ADB).

Ravi Mital, Chairman of the Insolvency and Bankruptcy Board of India, responds to a question (photo by Paola Aseron-Dacanay/ADB).

Anthony Casey, Deputy Dean and Donald Ephraim Professor of Law and Economics at The University of Chicago Law School, introduces the topic for Panel 5 (photo by Paola Aseron-Dacanay/ADB).

Debanshu Mukherjee, Co-Founder of Vidhi Centre for Legal Policy, responds to a question during the Panel 5 discussion (photo by Paola Aseron-Dacanay/ADB).

Neeti Shikha, Lecturer at the University of Bradford School of Law, joins Panel 6 virtually (photo by Paola Aseron-Dacanay/ADB).

Jason Harris, Professor of Corporate Law at the University of Sydney Law School, delivers his remarks during the Panel 6 discussion (photo by Paola Aseron-Dacanay/ ADB).

Sumant Batra, President of the Insolvency Law Academy, responds to Jared Ellias' question as the rest of the Panel 7 discussants listen (photo by Paola Aseron-Dacanay/ADB).

Jared Ellias, Professor of Law at Harvard Law School, chairs Panel 7 (photo by Paola Aseron-Dacanay/ADB).

Nicholas Moller, Principal Counsel at ADB, introduces the topic for Panel 8 (photo by Paola Aseron-Dacanay/ ADB).

Sergio Muro, Financial Sector Specialist from the World Bank, joins Panel 8 virtually (photo by Paola Aseron-Dacanay/ADB).

Richard Squire, Alpin J. Cameron Chair in Law at Fordham University School of Law, asks a question during Panel 9 (photo by Paola Aseron-Dacanay/ADB).

Panel 9 talks about rescue financing during the second day of the conference (photo by Paola Aseron-Dacanay/ADB).

Richard Squire, Alpin J. Cameron Chair in Law at Fordham University School of Law, responds to a question during Panel 10 (photo by Paola Aseron-Dacanay).

Felix Steffek, Associate Professor at the Faculty of Law of the University of Cambridge, chairs Panel 10 (photo by Paola Aseron-Dacanay/ADB).

Justice Christopher Sontchi, International Judge at the Singapore International Commercial Court, starts the Panel 11 discussion (photo by Paola Aseron-Dacanay/ADB).

The panelists for Panel 11 (photo by Paola Aseron-Dacanay/ADB).

Richard Squire, Alpin J. Cameron Chair in Law at Fordham University School of Law, listens intently (photo by Paola Aseron-Dacanay/ADB).

Adriana Robertson, Donald N. Pritzker Professor of Business Law at The University of Chicago Law School, reacts to a panel discussion (photo by Paola Aseron-Dacanay/ADB).

Paul Zumbro of Cravath Swaine & Moore, **Charles Booth** from the University of Hawai'i at Manoa, and **Justice Christopher Sontchi** of the Singapore International Commercial Court share a lighthearted moment (photo by Paola Aseron-Dacanay/ADB).

ADB General Counsel **Thomas Clark** listens to one of the speakers (photo by Paola Aseron-Dacanay/ADB).

Urmika Tripathi from REDD Intelligence and **Debanshu Mukherjee** of Vidhi Centre for Legal Policy listen intently (photo by Paola Aseron-Dacanay/ADB).

Fanny Teo of the Singapore Insolvency and Public Trustee's Office and **Stephanie Yeo** from Wong Partnership react in amusement (photo by Paola Aseron-Dacanay/ADB).

Aurelio Gurrea-Martinez from the Singapore Management University and **Felix Steffek** from the University of Cambridge (photo by Paola Aseron-Dacanay/ADB).

Stephen Ford from Davis Polk, and The University of Chicago's **Libby Seguin** and **Anthony Casey** react to the panel discussion (photo by Paola Aseron-Dacanay/ADB).

Participants from the United States of America—*from left to right:* **Stephen Ford**, **Danielle York**, **Libby Seguin**, and **Anthony Casey** (photo by Paola Aseron-Dacanay/ADB).

Members of the ADB Secretariat—*from left to right:* **Florenz Jessica A. Buen**, **Kristina P. Castaneda**, **Nicholas Moller**, **Roxanne Ingrid T. Alcala**, and **Jennifer Baui** (photo by Paola Aseron-Dacanay/ADB).

IBBI's representatives to the Conference—*from left to right:* **Deeptanshu Singh**, **Ansul Agrawal**, **Pooja Singla**, **Rahul Khana**, and **Deepak Rao** (photo by Paola Aseron-Dacanay/ADB).

From left to right: **Kotaro Fuji**, **Stephanie Yeo**, **Fanny Teo**, **Yu-Wen TAN**, **Justice Christopher Sontchi**, **Aurelio Gurrea-Martinez**, **Nydia Remolina**, **Tristan Tan**, and **Sheena Heng** (photo by Paola Aseron-Dacanay/ADB).

Zhengzhou, Henan, People's Republic of China (photo by Jéan Béller on Unsplash).

KEYNOTE ADDRESS SPEAKER

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THOMAS M. CLARK

General Counsel, Asian Development Bank (ADB)

Mr. Clark holds a Doctor of Laws degree from Columbia University, where he was Notes Editor of the Columbia Law Review, and a Bachelor of Arts degree in Government from Harvard University. He has over 30 years of experience in legal and government affairs practice, spanning the financial services, energy, and infrastructure sectors. After a judicial clerkship on the U.S. Court of Appeals for the D.C. Circuit, and legal practice at the law firms of Sullivan & Cromwell in New York and WilmerHale in Washington, D.C., Mr. Clark joined the General Electric Company, one of the world's largest infrastructure and technology companies. His 22-year career at GE included 16 years based in Japan and covering the Asia-Pacific region, as General Counsel for GE's largest Asian financial services arm, and as Executive Counsel for Government Affairs and Policy, working with regulators and governments throughout the region on key legal and policy initiatives, and holding leadership roles in industry associations and private sector advisory bodies for APEC and ASEAN.

Most recently, Mr. Clark was Managing Director and Co- Head of Americas for the Global Public Policy Group of BlackRock Inc., the world's largest asset management firm, where he drove regulatory policy engagement and thought leadership on infrastructure finance, ESG and sustainability, disclosures related to climate risk and energy transition issues, data privacy and fintech.

As General Counsel at Asian Development Bank (ADB), he is responsible for driving legal strategy and engagement on public policy reforms to support ADB's mission of achieving a sustainable, prosperous, inclusive, and resilient Asia-Pacific region.

Kuala Lumpur, Malaysia (photo by Izuddin Helmi Adnan on Unsplash).

Brisbane, Australia (photo by Michael on Unsplash).

CHAIRPERSONS

in alphabetical order, by surname

Affiliations and positions indicated are
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SCOTT ATKINS

President, INSOL International and Global Co-Head of Restructuring, Norton Rose Fulbright

Scott Atkins is Global Co-Head of Restructuring at Norton Rose Fulbright and Chair of its Australian practice.

Scott is President of INSOL International and an inaugural INSOL Fellow. INSOL International is the world's peak insolvency and restructuring association. He is repeatedly ranked in global legal directories, most recently by Chambers and Partners, as an Eminent Practitioner.

Scott's practice straddles the globe—a reflection of his deep expertise in cross-border insolvency. He has unique experience in advising nations and their governments on insolvency and restructuring law reform, including the systemic and structural reforms required across economies to facilitate and support the effective operation of such laws.

Scott drafted landmark new insolvency and corporate rescue laws for Myanmar which are now in effect. He is a member of a range of taskforces focused on Micro, Small, and Medium Enterprises (MSME) insolvency law reform, and is working with Armenia and Bhutan to modernize their insolvency laws.

ANTHONY CASEY

Deputy Dean and Donald Ephraim Professor of Law and Economics, The University of Chicago Law School

Anthony Casey is Deputy Dean and Donald M. Ephraim Professor of Law and Economics at The University of Chicago Law School. He is also the Faculty Director of the Law School's Center on Law and Finance. His research examines the intersection of finance and law, with a focus on corporate bankruptcy. He has written about topics including asset valuation, creditor priority, the constitutionality of bankruptcy courts, and intercreditor agreements. His broader projects explore business organization, civil procedure, and complex business disputes.

Before entering the academe, Professor Casey was a partner at Kirkland & Ellis LLP. His legal practice focused on corporate bankruptcy, merger litigation, white-collar investigations, and securities litigation.

Anthony Casey *(continued)*

Professor Casey received his JD (with High Honors) from The University of Chicago Law School in 2002. After law school, he clerked for Chief Judge Joel M. Flaum of the United States Court of Appeals for the Seventh Circuit.

JARED A. ELLIAS

Professor of Law, Harvard Law School

Professor Jared A. Ellias writes and teaches about corporate bankruptcy law and the governance of large firms. He has served as a Teaching Fellow and Lecturer at Stanford Law School; a Visiting Associate Professor at Boston University School of Law; the Bion M. Gregory Chair in Business Law at the University of California, Hastings College of the Law; and the William Nelson Cromwell Visiting Professor of Law at Harvard Law School. He joined the Harvard Law Faculty in July 2022.

His research on corporate bankruptcy topics has been published or is forthcoming in leading peer-reviewed law and social science journals (such as the Journal of Empirical Legal Studies, the Journal of Legal Analysis, and the Journal of Legal Studies), as well as in leading student-edited law reviews (such as the California Law Review, the Columbia Law Review Sidebar, the Southern California Law Review, and the Yale Journal on Regulation). Professor Ellias' work has been selected twice for the Stanford/Yale/Harvard junior faculty forum and for presentation at the Weil, Gotshal & Manges Roundtable at Yale Law School. One of his articles was designated by Corporate Practice Commentator as one of the Top 10 Corporate and Securities Laws Articles of 2020. He has presented research at a wide variety of bankruptcy lawyer conferences and events. He is widely quoted in the press, including Bloomberg News, the Financial Times, the New York Times, the San Francisco Chronicle, the Wall Street Journal, and the Washington Post, among many other media venues.

Professor Ellias frequently advises state and federal lawmakers on bankruptcy-related issues and he has testified on corporate bankruptcy issues before the California State Senate. He advised the California State Senate on the 2019 bankruptcy of the Pacific Gas & Electric Company, one of the top ten largest industrial bankruptcies of all time that touched on many core issues of interest to the State of California.

AURELIO GURREA-MARTÍNEZ

Associate Professor of Law and Head, Singapore Global Restructuring Initiative, Singapore Management University

Aurelio Gurrea-Martínez is an Associate Professor of Law and head of the Singapore Global Restructuring Initiative at Singapore Management University. He is a member of the Academic Steering Committee at INSOL International, founding director of the Ibero-American Institute for Law and Finance, and co-chair of the SMU-Cambridge Roundtable on Corporate Insolvency Law.

Aurelio has taught, studied, or conducted research at several institutions in the United States, the United Kingdom, Continental Europe, Asia, and Latin America, including Harvard Law School, Yale Law School, Columbia Law School, Stanford University, and the University of Oxford. He has also been a Visiting Scholar at the Becker Friedman Institute for Economics at the University of Chicago.

He has been invited to present his academic work before various regulators, governmental agencies, and international organizations, including the World Bank, the International Monetary Fund, the International Organization of Securities Commissions (IOSCO), the Organization for Economic Cooperation and Development (OECD), the Australian Department of the Treasury, and the U.S. Securities and Exchange Commission (SEC). His research interest lies in the intersection of law and finance, with particular emphasis on corporate governance; financial regulation; corporate finance; corporate insolvency law; and how legal and institutional reforms may promote entrepreneurship, innovation, access to finance, and economic growth.

NICHOLAS MOLLER

Principal Counsel, Asian Development Bank

Nicholas Moller is Principal Counsel at the Asian Development Bank (ADB), where he has been working for over 15 years in the Office of the General Counsel. He graduated with BA (Honors) and LLB from the University of Sydney. He obtained his LLM from Washington College of Law. He is admitted to practice in New South Wales Australia. He works on private sector transactions and assists in the management of non-performing loans and workouts. This has included insolvency-related matters in India, Kazakhstan, Papua New Guinea, and the

Nicholas Moller *(continued)*

People's Republic of China, including acting on creditors' steering committees in the banking and finance sector, telecoms, and renewable energy. He takes part in the Special Operations Seminars run by development finance institutions.

Nicholas also works in the Law and Policy Reform team in the Office of the General Counsel and focuses on law reform that seeks to create a better enabling environment for the private sector. This work has included the Myanmar Insolvency Law and an electronic registration system for that law, as well as ongoing insolvency law reform and advisory work in Armenia and Indonesia. He also assisted on business licensing reforms and secured transactions related reform efforts.

Prior to joining ADB, Nicholas worked in a commercial bank and in commercial law firms where he handled banking and finance and infrastructure transactions. This included working for several years in Thailand following the 1998 financial crisis in restructuring and insolvency, for both debtors (listed and non-listed) and local and international creditors.

ADRIANA ROBERTSON

Donald N. Pritzker Professor of Business Law,
The University of Chicago Law School

Adriana Robertson is the Donald N. Pritzker Professor of Business Law at the University of Chicago Law School. Her research interests lie at the intersection of law and finance, including securities law, capital markets regulation, corporate finance, and business law.

Before joining the University of Chicago Law School, Adriana held the Honourable Justice Frank Iacobucci Chair in Capital Markets Regulation at the University of Toronto Faculty of Law, with a joint appointment in the Finance area at the Rotman School of Management. In the autumn quarter of 2019, she was the Daniel R. Fischel and Sylvia M. Neil Distinguished Visiting Assistant Professor of Law at the University of Chicago Law School. She has also held visiting professorships at NYU Law School and Yale Law School.

Adriana holds a BA from the University of Toronto (Trinity College), where she was awarded the Lorne T. Morgan Gold Medal in Economics; a PhD in Finance from the Yale School of Management; and a JD from Yale Law School. Her recent work has been featured in major media outlets including The New York Times, The Wall Street Journal, and the Financial Times.

HON. JUSTICE CHRISTOPHER S. SONTCHI

International Judge, Singapore International Commercial Court

Christopher S. Sontchi is an International Judge of the Singapore International Commercial Court and is the former Chief Judge of the United States Bankruptcy Court for the District of Delaware (from which he recently retired). He is a frequent speaker in the United States and abroad on issues relating to corporate reorganizations. He is a Lecturer in law at The University of Chicago Law School and has taught restructuring to international judges through the auspices of the World Bank and INSOL International.

He was recently elected as a Fellow of the American College of Bankruptcy, and is currently a member of the International American Bankruptcy Institute, INSOL International, Insolvency Institute, Judicial Insolvency Network, and the National Conference of Bankruptcy Judges. He is also a member of the International Advisory Council of the Singapore Global Restructuring Initiative, and the Founders' Committee for The University of Chicago Law School's Center on Law and Finance.

Justice Sontchi has testified before the United States Congress on the safe harbors for financial contracts. He has also published articles on creditors' committees, valuation, asset sales, and safe harbors.

Justice Sontchi attended the University of North Carolina at Chapel Hill where he was elected to *Phi Beta Kappa* and obtained a B.A. with distinction in Political Science. He received his J.D. from The University of Chicago Law School, after which he returned to his native Delaware to serve as a law clerk in the Delaware Supreme Court.

RICHARD SQUIRE

Alpin J. Cameron Chair in Law, Fordham University School of Law

Professor Richard Squire has been a member of the Fordham University School of Law faculty since 2006. He publishes primarily on the subjects of corporate law and corporate bankruptcy, and he has also written articles on antitrust and securities regulation. He has twice been elected Fordham Law School's Teacher of the Year, in 2010 and 2011. He previously taught at Harvard College, where he won the Allyn Young Award for excellence in teaching principles of economics. From 2001 to 2002 he clerked for Judge Robert D. Sack on the U.S. Court

Richard Squire *(continued)*

of Appeals for the Second Circuit, and between 2002 and 2005 he was an associate with Wachtell, Lipton, Rosen & Katz in New York City.

During the fall semester of 2018, he was the Karl W. Leo Visiting Professor of Business Law at Duke Law School.

During the fall semester of 2013, he was the Joseph F. Cunningham Visiting Professor of Commercial & Insurance Law at Columbia Law School.

During the 2012–2013 school year, he was a Florence Rogatz Visiting Professor of Law at Yale Law School.

Professor Squire holds a BA (*summa cum laude*) from Bowdoin College, where he was inducted into the *Phi Beta Kappa* honor society. He obtained an MBA from Harvard Business School and a JD (*magna cum laude*) from Harvard Law School.

FELIX STEFFEK

Associate Professor, Faculty of Law of the University of Cambridge

Felix Steffek is an Associate Professor at the Faculty of Law of the University of Cambridge and Director of Studies at Newnham College. He serves as Co-Director of the Centre for Corporate and Commercial Law (3CL) and Director of International Strategy and Partnerships. He has been awarded a JM Keynes Fellowship in Financial Economics by the University of Cambridge. His research interests cover corporate law, insolvency law, commercial law, dispute resolution, and technology and law.

Felix Steffek is a Member of the European Union (EU) Expert Group on Restructuring and Insolvency Law, the Organization for Economic Co-operation and Development (OECD) Advisory Panel for Access to Justice, and the International Institute for the Unification of Private Law (UNIDROIT) Working Group on Effective Enforcement. He serves on the Editorial Board of the Journal of Corporate Law Studies, the Cambridge Yearbook of European Legal Studies, and other academic journals. He is co-investigator of a UK-Japanese research project on artificial intelligence and legal systems.

He has acted as policy advisor and expert for the European Commission, the European Parliament, the World Bank, the OECD, UNIDROIT, the Financial Stability Board, national governments, courts, parliaments and LawTech start-ups. He received his education at the University of Cambridge (LLM), University of Heidelberg (PhD, undergraduate) and University of Hamburg (Habilitation, court clerkship).

Malé's domestic harbor (Malé North Harbor), the main hub for the distribution of good in the Maldives (photo by Ariel Javellana/ADB).

SPEAKERS

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SCOTT ATKINS

President, INSOL International and Global Co-Head, of Restructuring, Norton Rose Fulbright

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ADAM BADAWI

Professor of Law, University of California, Berkeley

Adam Badawi is a Professor of Law at University of California (UC), Berkeley. He writes widely on issues of law and finance with an emphasis on corporate governance, corporate transactions, and shareholder litigation. Much of his recent work uses text analysis and machine learning to analyze debt agreements, merger documents, and shareholder class action complaints. At Berkeley Law, he teaches Contracts, Corporations, Mergers and Acquisitions, and seminars related to these topics.

Professor Badawi's research includes "Does Voluntary Financial Disclosure Matter? The Case of Fairness Opinions in M&A" (forthcoming, The Journal of Law and Economics) (with Matthew D. Cain and Steven Davidoff Solomon); "How Informative is the Text of Securities Complaints?" (forthcoming, Journal of Law, Economics & Organization); "Social Good and Litigation Risk" (forthcoming, Harvard Business Law Review) (with Frank Partnoy); and "Is There a First-Drafter Advantage in M&A?" (with Elisabeth de Fontenay), which was published in the California Law Review in 2019 and was selected as one of the Top 10 Corporate and Securities Articles of 2019 by Corporate Practice Commentator.

Prior to joining the faculty of Berkeley Law in 2017, Professor Badawi was a Professor of Law at Washington University in St. Louis. He has been a Visiting Professor at Northwestern Pritzker School of Law and he served as a Bigelow Fellow at the University of Chicago Law School. Before joining the academe, he was a litigator in the San Francisco office of Munger, Tolles & Olson LLP and was a law clerk to the Hon. Michael McConnell of the Tenth Circuit Court of Appeals.

SUMANT BATRA

President, Insolvency Law Academy

Sumant Batra is an insolvency lawyer of global eminence with three decades of experience in insolvency and bankruptcy practice. He holds the distinction of being the youngest and the first President of INSOL International from Asia.

Sumant has served on multiple expert committees and working groups constituted by the Government of India and the Insolvency and Bankruptcy Board of India on legislative and regulatory reforms. He has been a senior consultant with the Asian Development Bank, the International Monetary Fund, the Organisation for Economic Co-operation and Development, the World Bank Group, and other developmental institutions.

His book, *Corporate Insolvency–Law & Practice,* is considered the foremost scholarly work on fundamental principles and approaches to the insolvency system.

Sumant is the Founder of Insolvency Law Academy. He is also the Chairman of SIPI, an independent thinktank for the insolvency industry. Sumant is the only Indian to have been conferred the honor of being elected as International Fellow by the American College of Bankruptcy.

CHARLES D. BOOTH

Michael J. Marks Distinguished Professor in Business Law and Director, Institute of Asian-Pacific Business Law (IAPBL), William S. Richardson School of Law, University of Hawai'i at Manoa

Charles Booth is the Michael J. Marks Distinguished Professor in Business Law and Director, Institute of Asian-Pacific Business Law (IAPBL), William S. Richardson School of Law, University of Hawai'i at Manoa. He is also a Senior Adviser for Parabellum Capital and a Management Consultant for Alliant Insurance Services.

Professor Booth practiced at Cleary Gottlieb Steen & Hamilton in New York, USA. He taught at the Richardson School of Law and at the Faculty of Law at the University of Hong Kong before returning to the Richardson School of Law in 2006.

Professor Booth's primary research interests are comparative and cross-border insolvency and commercial law, with a focus on Hong Kong and China, and the development of insolvency and commercial law infrastructures in Asia. He has recently been focusing on the

Charles Booth *(continued)*

development of insolvency regimes for Micro, Small and Medium Enterprises (MSMEs) and Small and Medium-Sized Enterprises (SMEs) in Asia. He has authored/co-authored more than 70 publications (which have been published in 12 jurisdictions,) including: Lawrence Westbrook, Charles Booth, Christoph Paulus, and Harry Rajak (2010; republished in Chinese, 2018), *A Global View of Business Insolvency Systems*; Charles Booth, ELG Tyler, Ludwig Ng, and Terry Kan (4th ed, 2018), *The Hong Kong Corporate Insolvency Manual*; and Charles Booth, Philip Smart, and Stephen Briscoe (2nd ed, 2010; 3rd ed, forthcoming 2022), *The Hong Kong Personal Insolvency Manual*.

Professor Booth has served as a consultant on insolvency and commercial law reform and training projects for the Asian Development Bank, the European Bank for Reconstruction and Development (EBRD), the International Monetary Fund (IMF), the Organization for Economic Co-operation and Development (OECD), and the World Bank. He has contributed to projects in Bhutan, China, Eastern Europe, Greece, Hong Kong, Indonesia, Laos, Mongolia, Russia, Vanuatu, and Vietnam; and in regional and global corporate and personal insolvency and commercial law projects. He recently contributed to the new Lao PDR Law on Rehabilitation and Bankruptcy of Enterprises (which came into operation in June 2020) and co-designed and co-delivered training courses for Lao Insolvency Judges and Insolvency Administrators. His other recent activities include participating in a World Bank out-of-court workout project for Indonesia and an SME project for Mongolia.

ANTHONY CASEY

Deputy Dean and Donald Ephraim Professor of Law and Economics, The University of Chicago Law School

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DAVID CHEW

Partner, DHC Capital

David Chew is a Partner at DHC Capital and has over 25 years of experience in restructuring, turnaround, and special situations. He worked as an advisor with Ernst & Young and Arthur Andersen, and as an investment banker with Morgan Stanley. He also served in senior management positions, such as a Chief Restructuring Officer (CRO), Chief Financial Officer (CFO) and interim CFO, and Board member to distressed companies.

David has worked with and advised private and publicly listed corporates, bank creditors, bond holders, alternative capital providers, and distressed investors across the full range of the restructuring transaction cycle. His work included crisis stabilization, business and strategic reviews, strategic option analysis including planning and implementing in and out of Court solutions, operational restructuring and turnaround, debt restructuring and schemes of arrangement, liquidity management initiatives, distressed mergers and acquisitions (M&A), rescue financing, refinancing, and recapitalizations.

As an investment banker, David was involved in the sourcing, structuring, and execution of high yield, stressed and distressed investment opportunities across Asia Pacific for Morgan Stanley prop books.

JARED A. ELLIAS

Professor of Law, Harvard Law School

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KOTARO FUJI

Counsel, Nishimura & Asahi

Kotaro Fuji is a counsel at Nishimura & Asahi. He has handled numerous corporate restructurings under formal insolvency proceedings or out-of-court workouts in Japan. He represented debtors, sponsors, and other key parties in these cases. His recent practice is more focused on the cross-border aspect of insolvency proceedings.

Kotaro played a key role in the civil rehabilitation proceedings of Daiichi Chuo Kisen Kaisha and its subsidiary with over US$1 billion in debts, which constituted the fifth largest shipping group in Japan and operated over one hundred dry bulk carriers globally. This included obtaining recognition of the civil rehabilitation proceedings in Japan in courts from Australia, Canada, South Africa, South Korea, United Kingdom, and United States of America, while collaborating with other law firms overseas.

Kotaro is a graduate of the Kyoto University Law School (2008, J.D.) and the New York University School of Law (2018, LL.M.). He is admitted to practice in Japan (2009) and in New York (2019). He is a member of the NextGen Leadership Program of the International Insolvency Institute (Class XI).

BROOK GOTBERG

Francis R. Kirkham Professor of Law, Brigham Young University

Brook Gotberg joined the faculty of Brigham Young University (BYU) in 2020. She has since been named the 2022 recipient of the Francis R. Kirkham Professorship, which honors exceptional achievements in scholarship, teaching, or citizenship. Her scholarship focuses primarily on debtor and creditor relations, both in and out of bankruptcy. Her teaching interests include bankruptcy, contracts, secured transactions, securities regulation, and other commercial law subjects. She has been praised for her creativity and willingness to challenge conventional thinking in both her research and her teaching. Recently, she has presented on bankruptcy venue reform; avoidance actions; and the relationship between small businesses, the SBRA, and COVID-19.

Brook Gotberg *(continued)*

Prior to joining the BYU faculty, she was an associate professor at the University of Missouri School of Law. Professor Gotberg's experience with commercial law stems from her time with Sullivan & Cromwell in Los Angeles, where she represented both debtors and creditors in a variety of cases from large antitrust suits to minor contract disputes. She also clerked for Judge Milan D. Smith, Jr. on the Ninth Circuit Court of Appeals, and for Judge Thomas B. Donovan in the bankruptcy court for the Central District of California.

Professor Gotberg was named one of American Bankruptcy Institute's Top 40 under 40 bankruptcy professionals in 2019. Her engagement with many of today's most poignant questions continues to reflect a uniquely powerful perspective that moves the field of bankruptcy law forward in invaluable ways.

TIMOTHY GRAULICH

Partner and Head of Cross-Border Restructuring, Davis Polk

Tim Graulich is a partner and is head of Davis Polk's Cross-Border Restructuring group. He has extensive experience in a broad range of domestic and international restructurings (particularly in Asia and Latin America), including the representation of public and private companies, agent banks and lenders, acquirers and hedge funds in connection with prepackaged and traditional bankruptcies, out-of-court workouts, DIP and exit financings, bankruptcy litigation and Section 363 sales.

He was named an "Outstanding Restructuring Lawyer" by *Turnarounds & Workouts* in 2018, after receiving the same honor five years earlier. He is an INSOL Fellow, co-chair USA / Canada / Caribbean Regional Committee of the International Insolvency Institute, and the Annual Conference Officer of the Insolvency Section of the International Bar Association.

AURELIO GURREA-MARTÍNEZ

Associate Professor of Law and Head, Singapore Global Restructuring Initiative, Singapore Management University

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JASON HARRIS

Professor of Corporate Law, University of Sydney Law School

Jason Harris is a Professor of Corporate Law at the University of Sydney Law School, where he teaches and researches in the areas of Corporate Law and Insolvency. His research is focused on the public and private regulation of financially distressed companies, including debt restructuring, voluntary administration, corporate governance and directors' duties during financial distress, and the regulation of corporate groups. He has published widely in these areas with 13 books and over 90 papers in scholarly and professional journals, which are frequently cited in Australian courts, including in the High Court of Australia.

Jason is an active participant in law reform initiatives through his policy work with the Australian Institute of Company Directors, the Governance Institute of Australia, and both the Corporations Committee and the Insolvency & Restructuring Committee of the Law Council of Australia.

Jason previously held academic positions at the Australian National University (ANU), University of New South Wales (UNSW), and the University of Technology Sydney (UTS). He likewise held visiting teaching positions in Canada, England, and the United States of America. Jason is a Fellow of the Australian Academy of Law and of the Governance Institute of Australia.

EDITH HOTCHKISS

Professor of Finance, Carroll School of Management, Boston College

Edith Hotchkiss is a Professor of Finance at the Carroll School of Management at Boston College. Her research focuses on various aspects of the United States corporate debt markets, and particularly on the efficiency of the Chapter 11 process.

In addition to publications in peer-reviewed academic journals, Dr. Hotchkiss has authored several book chapters on the bankruptcy process, and co-authored: Edith Hotchkiss, Edward Altman, and Wei Wang. 2019. "Corporate Financial Distress, Restructuring and Bankruptcy." New Jersey: John Wiley & Sons Inc.

Edith Hotchkiss *(continued)*

Dr. Hotchkiss has served as an expert for creditor committees of several large Chapter 11 cases, on the national board of the Turnaround Management Association, and as an independent advisor to the Financial Industry Regulatory Authority (FINRA) on issues related to corporate bond market trading and transparency.

Dr. Hotchkiss received her Ph.D. in Finance from the Stern School of Business at New York University and her B.A. from Dartmouth College. Prior to entering the academe, she worked in consulting and for the Financial Institutions Group of Standard & Poor's Corporation.

EDMUND MA

Senior Associate, Baker McKenzie

Edmund Ma is a senior associate in Baker McKenzie's Hong Kong office and a member of the Firm's Dispute Resolution Practice Group.

Edmund has over 10 years of solid experience handling high-profile restructuring and insolvency cases, including the liquidation of Lehman Brothers, and drafting submissions of a key industry body to the Hong Kong Government on its legislative proposals regarding corporate rescue and insolvency law.

His practice focuses on representing corporate clients, financial institutions, and insolvency practitioners in a wide range of restructuring and insolvency matters, ranging from corporate restructuring, compulsory and voluntary liquidations, to commercial disputes and shareholders' rights and remedies.

Prior to joining Baker McKenzie, Edmund was a senior government counsel at the Department of Justice in Hong Kong responsible for policy matters relating to corporate insolvency law. In his posting to the Secretariat of the Law Reform Commission, he served as the secretary to its Sub-committee on Cybercrime. Before entering the public sector, he was an insolvency litigator at an international law firm.

Edmund serves on the Insolvency Law Committee of the Law Society of Hong Kong.

JOSHUA C. MACEY

Assistant Professor of Law, The University of Chicago Law School

Josh Macey specializes in environmental law, energy law, bankruptcy, and the regulation of financial institutions. His work has been featured in the Wall Street Journal and Bloomberg's Money Stuff, and has appeared or is forthcoming in Joule, the Stanford Law Review, the Penn Law Review, the Yale Law Journal, the Michigan Law Review, the Harvard Law Review, the Vanderbilt Law Review, the Texas Law Review, and the Yale Journal on Regulation. He has twice won the Morrison Prize for most influential environmental law article of the previous year (Joshua C. Macey (2020), *Zombie Energy Laws*, 73 (4) Vanderbilt Law Review 1077; and Matthew R. Christiansen & Joshua C. Macey (2021), *Long Live the Federal Power Act's Bright Line*, 134 Harvard Law Review 1361).

Professor Macey graduated from Yale College, the London School of Economics, and Yale Law School. He has worked at Morgan Stanley and clerked for Judge J. Harvie Wilkinson III on the Court of Appeals for the Fourth Circuit.

JOHN MARTIN

Partner, Norton Rose Fulbright Australia and President, International Insolvency Institute

John Martin is one of Australia's leading insolvency and restructuring law experts based in Sydney, with a particular specialty in cross-border insolvency.

John's cross-border experience has included assisting clients with issues in England, US, Fiji, Bermuda, Cambodia, Cayman Islands, Brunei, Myanmar and Norfolk Island.

In June 2016, John was appointed to the Board of the prestigious International Insolvency Institute, and he currently also serves as President. John's appointment is recognition of his commitment to the Institute and his standing in the profession, both within Australia and overseas.

In July 2017, John presented a paper (jointly authored with Professor Ros Mason) to the United Nations' 50th Anniversary UNCITRAL Congress in Vienna, titled "*Conflict and Consistency in Cross-Border Insolvency Judgments*".

John Martin *(continued)*

Together with restructuring partner Scott Atkins, John is drafting new insolvency laws for the Republic of Myanmar, and has twice presented to members of the Parliament's Upper House.

In the field of cross-border insolvency, John has been directly involved in three of the seminal international cases:

- In 2008, he advised the successful appellants in the House of Lords in Re HIH, in which Lord Hoffmann identified the "*golden thread of universalism*" as having been the foundation for cross-border insolvency law.
- In 2012, he advised the successful Australian liquidator of New Cap Re in the Grant proceedings determined jointly with Rubin v Eurofinance, in which a majority of the UK Supreme Court retreated from Lord Hoffmann's embrace of universalism.
- He was also part of the Australian legal team acting for Perpetual Trustees in the so called "*flip clause*" litigation in the US and the UK arising out of the Lehman bankruptcy.

Source: https://www.nortonrosefulbright.com/en/people/132081 (last accessed 2 December 2022)

ELIZABETH McCOLM

Partner, Paul, Weiss, Rifkind, Wharton & Garrison LLP

A partner in the Restructuring Department, Elizabeth McColm specializes in the areas of corporate restructurings and bankruptcy. She has been involved in major restructurings and bankruptcies, representing debtors, creditors, and acquirers of assets. Elizabeth's recent creditor matters include advising key stakeholders in the restructurings of Armstrong Energy, California Resources Corporation, Country Fresh, Dean Foods, Denbury Resources, FULLBEAUTY Brands, GenOn, Pacific Drilling, Seadrill, SquareTwo Financial, and Ultra Petroleum. Her noteworthy company-side representations include David's Bridal, McGraw Hill, Noranda, Pioneer Energy Services Corp., and The Bon-Ton Stores. Elizabeth also has extensive experience advising clients in cross-border matters, including in the restructurings of Lumileds, Oro Negro, Petra Diamonds, Virgin Australia Airlines, and many others.

Elizabeth is widely recognized as a leading restructuring practitioner, including by *Chambers USA*, International Financial Law Review's (IFLR) *IFLR1000*, and *Who's Who Legal*. According to Chambers research, clients recognize that "she is very detail-oriented, hard-working and intelligent." She is listed as a "Leading Lawyer" by *The Legal 500*, in which clients note that Elizabeth "has strong expertise in her field" and "has an art for handling difficult personalities to reach consensus." She is likewise named in *Lawdragon*'s "500 Leading US Bankruptcy

Elizabeth McColm *(continued)*

& Restructuring Lawyers." Elizabeth's representations have been recognized by numerous industry publications. In 2022 and 2021 respectively, she was awarded IFLR's Asia-Pacific "Restructuring Deal of the Year" for her role in the restructuring of Boart Longyear, the sale of Virgin Australia to Bain Capital, and related U.S. chapter 15 cases. The *M&A Advisor* selected the restructuring of Pacific Drilling as the 2019 "Energy Deal of the Year" and The Bon-Ton Stores as the 2018 "Consumer Discretionary Deal of the Year (Over $100 MM). The *Financial Times* has "highly commended" Elizabeth in its annual report on "U.S. Innovative Lawyers" for her work representing certain CEVA Group lenders in the company's restructuring.

Elizabeth co-authors with fellow Paul, Weiss partner, Alan Kornberg, an annual chapter in the *International Comparative Legal Guide (ICLG) To Corporate Recovery and Insolvency*. Elizabeth also co-authors, alongside partner Brian Bolin, the annual "Investment Fund Activity in Chapter 11" chapter in America's *Restructuring Review*. Elizabeth speaks frequently at industry events, including the Annual Wharton Restructuring and Distressed Investing Conference, as well as various seminars hosted by American Bankruptcy Institute, such as the International Insolvency & Restructuring Symposium and the Complex Financial Restructuring Program.

ANTONIA MENEZES

Senior Financial Sector Specialist, Insolvency & Debt Resolution Team, World Bank

Antonia Menezes is a Senior Financial Sector Specialist with the Insolvency & Debt Resolution Team of the World Bank Group based in Washington D.C. Antonia's work focuses on providing technical assistance and advice to governments on insolvency and debt resolution reforms, including legal aspects of non-performing loan (NPL) management, with a particular emphasis on work in Sub-Saharan Africa, the Caribbean, and South Asia.

Antonia has published widely in the field of insolvency and represents the World Bank Group at Working Group V (Insolvency) of the United Nations Commission on International Trade Law (UNCITRAL). She is also a Co-Chair of the World Bank Group Insolvency & Creditor/Debtor Regimes (ICR) Task Force, which is responsible for testing and evaluating the effectiveness of the World Bank Group ICR Principles. She is one of the founders of the World Bank-INSOL International Judicial Insolvency Program.

Antonia is a Member of the International Insolvency Institute, a 2014 INSOL International Fellow, and sits on the INSOL Fellow's Cross-Border Insolvency Committee. She also sits on the Advisory Committee of Columbia University's Committee on Global Thought and the INSOL Academics Steering Committee.

Antonia Menezes *(continued)*

Prior to joining the World Bank Group, Antonia was a UK-qualified solicitor at two leading international law firms in Paris and London. She holds an LL.M from McGill University and an LL.B from the London School of Economics & Political Science.

RAVI MITAL

Chairperson, Insolvency and Bankruptcy Board of India

Mr. Ravi Mital is the Chairperson of the Insolvency and Bankruptcy Board of India (IBBI), which was created under the Insolvency and Bankruptcy Code in 2016 (the "Code"). IBBI has the mandate to review the progress made under the Code and suggest measures to (i) improve and streamline various processes, and (ii) enhance the role of service providers and other stakeholders of the insolvency ecosystem.

Mr. Mital has over 35 years of experience working in policymaking and implementation as an officer of the Indian Administrative Service (IAS).

Mr. Mital has worked in various ministries of the Central and State Governments of India, specifically in the area of finance, banking, and taxation, among others. He also served on the boards of several organizations including the General Insurance Corporation of India (GIC Re), Punjab National Bank, and the State Bank of India.

DAN T. MOSS

Partner, Jones Day

Dan T. Moss is a Partner at Jones Day, a multinational law firm.

Dan has significant experience in the United States of America and cross-border business finance and restructuring, with a particular focus on complex corporate reorganizations and distressed acquisitions. He has represented buyers, debtors, creditors, and creditor committees in significant corporate and government reorganizations. In particular, Dan was co-lead counsel

Dan T. Moss *(continued)*

for the Official Committee of Unsecured Creditors in Toys "R" Us Property Company 1 and Peabody Energy. He has played a significant role in the City of Detroit's historic chapter 9 case.

Dan has counseled clients on avoidance litigation, fiduciary duty, and corporate governance issues. He is an active leader of INSOL International and writes frequently about cross-border matters.

DEBANSHU MUKHERJEE

Co-Founder, Vidhi Centre for Legal Policy, India

Debanshu Mukherjee is one of the co-founders of the Vidhi Centre for Legal Policy, a New Delhi-based independent thinktank that advises the Indian government on law reform projects. He led the Vidhi team that advised the government on designing and drafting India's newly enacted Bankruptcy Code and its subsequent implementation.

Debanshu also worked with a government-appointed committee to develop legislation to resolve failing banks and financial institutions. He also deposed before two Parliamentary committees examining financial sector legislation.

He is an alumnus of Harvard Law School, Hidayatullah National Law University, and the University of Oxford. He attended Harvard as a Fulbright Scholar, where he was awarded the Irving Oberman Memorial Prize in Bankruptcy for a paper on the political economy of bankruptcy reforms in India. He has been quoted in global business papers, such as the Financial Times and The Economist, in connection with legal and policy developments in India. Before co-founding Vidhi, Debanshu practiced as a mergers and acquisition (M&A) and regulatory lawyer with AZB & Partners, a top-tier law firm in India.

SERGIO MURO

Financial Sector Specialist, World Bank

Sergio Muro is a Financial Sector Specialist within the World Bank's Finance, Competitiveness & Innovation Global Practice (FCI GP). In that capacity, he has contributed to many technical projects in Europe and Central Asia (ECA), Latin America, Middle East and North Africa (MENA), and South Asia. He has also co-led collaborative reports with INSOL International and The International Association of Insolvency Regulators (IAIR), as well as research on corporate debt overhang and on zombie firms.

Prior to joining the World Bank, Sergio was a full-time law professor in Argentina where he specialized on insolvency, law and economics, and judicial decision-making. For several years, he co-directed the Argentine Supreme Court Project, an interdisciplinary research project at Universidad Torcuato Di Tella. His research has been published in several peer-reviewed journals, such as the European Business Organization Law Review, the International Review of Law and Economics, and the Journal of Law and Courts.

An Argentine national, Sergio holds an LLB from Universidad Nacional de Rosario, an MA in Law and Economics from Universidad Torcuato Di Tella, and an LLM and Juris Science Doctorate from Cornell University.

RAELENE PEREIRA

Partner, Rajah & Tann Singapore LLP

Raelene Pereira is a Partner with the Restructuring & Insolvency Practice at Rajah & Tann Singapore LLP.

Raelene's areas of practice include commercial and corporate litigation, with an emphasis on banking and financing disputes, and personal and corporate insolvency. She regularly represents a number of financial institutions, banks, and accounting firms in Singapore. Raelene has advised on the restructuring of debts of distressed companies, including the review of restructuring agreements and security documentation. Some of her landmark cases include Hin Leong Trading (Pte.) Ltd., Samtrade group, Hyflux, TT International Limited, and H&C S

Raelene Pereira *(continued)*

Holdings Pte. Ltd. She has also advised on the areas of private equity and trusts, succession planning, and other private client issues.

Raelene has recently been identified as one of the world's current rising stars in restructuring and insolvency, aged under 40, by Global Restructuring Review (GRR) 2022. She is also recommended by Best Lawyers 2023 in the area of Restructuring & Insolvency.

DEEPAK RAO

General Manager, Insolvency and Bankruptcy Board of India

Deepak Rao is a General Manager at the Insolvency and Bankruptcy Board of India (IBBI), where he performs duties in relation to valuation and research.

Mr. Rao is also a member of, and belongs to, the 2008 Batch of the Indian Economic Service (IES), which was constituted to undertake economic analysis, design and formulate development policies, and evaluate public programs of the Government of India.

Before joining IBBI in February 2022, Mr. Rao was posted as Joint Development Commissioner in the Ministry of Micro, Small and Medium Enterprises (MSME). During his tenure of nearly four years in the Ministry of MSME, he had a very diverse portfolio which included MSME policy, credit schemes for MSME, and marketing support schemes. He also handled human

ADRIANA ROBERTSON

Donald N. Pritzker Professor of Business Law,
The University of Chicago Law School

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CATHERINE ROBINSON

Senior Lecturer, Faculty of Law, University of Technology Sydney Australia

Catherine Robinson is a Senior Lecturer at the Faculty of Law, University of Technology Sydney Australia, where she teaches Company Law to postgraduate law students and undergraduate business students.

Catherine was awarded her PhD with a Dean's Commendation for Doctoral Thesis Excellence at the University of Adelaide. She examined the extent to which the Insolvency Law Reform Act 2016 has been effective in achieving its legal and policy objectives in regulating insolvency practitioners in its first five years of operation. She has authored various peer-reviewed articles on this topic.

DR. NEETI SHIKHA

Lecturer, University of Bradford School of Law;
Member, Academic Steering Committee, INSOL International; and
Chair, Insolvency Scholar Forum, Insolvency Law Academy

Dr. Neeti Shikha is a lecturer at the University of Bradford School of Law in the United Kingdom. She holds over a decade of teaching and research experience in insolvency law, corporate law, and governance. She was previously an Associate Dean of the Indian School of Public Policy in New Delhi.

In 2019, Dr. Shikha was appointed as Founding Head of the Centre for Insolvency and Bankruptcy, Indian Institute of Corporate Affairs. The Centre was established by the Government of India to help build a robust insolvency framework, following the enactment of India's Insolvency and Bankruptcy Code in 2016. As Founding Head of the Centre, Neeti ran the Graduate Insolvency Programme, which aims to create a young cadre of insolvency professionals. She has carried out two funded research projects: (i) "*Regulatory Framework for Resolution of Financial Service Providers,*" funded by the Ministry of Corporate Affairs of the Government of India; and (ii) "*Assessment of Corporate Insolvency Resolution Process Timeline,*" funded by the Insolvency and Bankruptcy Board of India. She has given several policy inputs to the Ministry of Corporate Affairs, and continues to take part in industry delegations working on topical issues involving Indian insolvency laws.

Dr. Neeti Shikha *(continued)*

Dr. Shikha serves as a member of the INSOL Academic Steering Committee. She also serves on the board of advisors of India's leading thinktank, the Centre for Civil Society, New Delhi. Likewise, she is on the board of editors of the International Insolvency Review.

Dr. Shikha contributes regularly to leading newspapers in India, including Bloomberg Quint, Financial Express, and Mint. She has also given guest talks at various universities around the world, including the Nanyang Technology University (Singapore), the National University Singapore, and the University of Indonesia.

Dr. Shikha has participated in several conferences and has published widely. She has three books to her credit and has published several research papers in leading national and international journals.

DEEPTANSHU SINGH

Manager, Insolvency and Bankruptcy Board of India

Mr. Deeptanshu Singh works as a manager in the Insolvency and Bankruptcy Board of India, which is the apex regulator of insolvency in the country. He joined the organization at the age of 25 and has since then been involved in matters relating to valuation activities and legal affairs.

Mr. Singh obtained his law degree from Dr. Ram Manohar Lohia National Law University, Lucknow, Uttar Pradesh. He has been associated with several government projects, including the committee to frame the regulatory structure for valuation in India.

Mr. Singh has extensive experience in relation to India's new insolvency regime, following the promulgation of the Insolvency and Bankruptcy Code in 2016.

HON. JUSTICE CHRISTOPHER S. SONTCHI

International Judge, Singapore International Commercial Court

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RICHARD SQUIRE

Alpin J. Cameron Chair in Law, Fordham University School of Law

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FELIX STEFFEK

Associate Professor, Faculty of Law of the University of Cambridge

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YU-WEN TAN

Director, Corporate Insolvency Division,
Insolvency and Public Trustee's Office, Singapore

TAN Yu-Wen is a Director of the Corporate Insolvency Division under the Insolvency and Public Trustee's Office of Singapore. Since 2017, Yu-Wen has been involved in various aspects of the Corporate Insolvency Division's work.

Before this, Yu-Wen was a Deputy Director in the Public Trustee's Office, overseeing its daily operations. She was formerly a Senior Assistant Director (Policy) at the Ministry of Law, Headquarters.

Yu-Wen holds a Bachelor's Degree in Accountancy (2nd Upper) from the Nanyang Technological University and a Master's Degree in Accounting and Finance (Distinction) from the London School of Economics.

WATARU TANAKA

Professor, Institute of Social Science, The University of Tokyo

Wataru Tanaka is a Professor at the Institute of Social Science (ISS), The University of Tokyo. He received his L.L.B. and PhD. (Law) from The University of Tokyo.

Before joining the faculty of ISS in 2007, Professor Tanaka was an Associate Professor of Law at Seikei University. In 2010, he also taught Japanese corporate law and governance at the University of Chicago Law School as Visiting Associate Professor.

Professor Tanaka publishes extensively in the field of corporate law, insolvency law, and commercial law. His main works include: (i) *Corporate Law* (in Japanese). 2021. 3rd ed. The University of Tokyo Press; (ii) "*Cramdown versus Extinguishing Security Interests: Secured Claims in Bankruptcy in the United States and Japan*" in Enterprise Law: Contacts, Markets, and Laws in the US and Japan (Edited by Zenichi Shishido). 2014. Cheltenham: Edward Elgar Publishing. pp. 150-160; and (iii) "*Extinguishing Security Interests: Secured Claims in Japanese Business Reorganization Law and Some Policy Implications for U.S. Law*" in Emory Bankruptcy Developments Journal. 2006. Vol. 22, No. 2. p. 427 *et seq*.

URMIKA TRIPATHI

Legal Analyst for Asia, REDD Intelligence

Urmika Tripathi is a Legal Analyst for Asia at REDD Intelligence. Her work involves analyzing key legal and regulatory developments in the restructuring and distressed space in Asian emerging markets such as China, India, and Indonesia. Her role entails a special focus on analyzing cross-border insolvency related issues in restructuring of high-yield distressed debt issuers in these markets.

As a part of her engagement with REDD Intelligence, Urmika has prepared a series of issue-based analytical reports on complex legal issues affecting restructuring processes in Asian emerging markets. This includes preparing reports on critical regulatory and policy developments, comparing insolvency regimes of Asian emerging markets, and analyzing changes in law in the cross-border insolvency space and its impact on domestic and offshore

Urmika Tripathi *(continued)*

market participants. Her work also involves analyzing regulatory and legal developments in the sustainable or environmental-, social-, and governance (ESG)-focused financing space.

Prior to joining REDD Intelligence, Urmika was a restructuring and insolvency lawyer at AZB & Partners in Mumbai. She has extensive experience in advising insolvency professionals, creditors, and debtors on transactional and regulatory matters. She completed her LLB from NALSAR University of Law, Hyderabad in 2016.

MAHESH UTTAMCHANDANI

Manager for Digital Development in East Asia and the Pacific (EAP), World Bank

Mahesh Uttamchandani is the World Bank's Manager for Digital Development in East Asia and the Pacific (EAP). In this capacity, he oversees the World Bank's lending, advisory, and knowledge programs in the area of digital development in all EAP countries.

Mr. Uttamchandani, a Canadian national, joined the World Bank in April 2006 as Senior Counsel in the Legal Department. He has since held various positions in both the World Bank and the International Finance Corporation. He previously served as the global manager for financial inclusion and infrastructure, where he led the World Bank's work on insolvency, expanding access to finance through digital financial services, and the financial sector aspects of digital ID and digital payments.

Prior to joining the World Bank, Mr. Uttamchandani worked at the European Bank for Reconstitution and Development (EBRD) in London, United Kingdom. He was also a commercial litigator at a leading law firm.

Mr. Uttamchandani has taught and lectured at universities around the world and has published extensively, including as an author in the World Bank's flagship World Development Report, 2022. He is a board member of the insolvency journal, International Corporate Rescue, and an Executive Board member of INSOL International.

WAI YEE WAN

Associate Dean (Research and Internationalisation) and Professor, School of Law, City University of Hong Kong

Wai Yee WAN is Associate Dean (Research and Internationalisation) and Professor at the School of Law, City University of Hong Kong. Her main areas of research are in corporate law, mergers and acquisitions, securities regulation, financial consumer regulation, global restructuring, and insolvency.

Professor WAN's publications have appeared in books and in international peer-reviewed legal journals, including the American Journal of Comparative Law, Journal of Empirical Legal Studies, European Business Organisations Law Review, Journal of Corporate Law Studies, Journal of Business Law, Company and Securities Law Journal, and Lloyd's Maritime and Commercial Law Quarterly. She recently published a monograph, *Court-Supervised Restructurings of Large Distressed Companies in Asia: Law and Policy* (Hart Publishing 2022).

In 2021, Professor WAN successfully obtained the Hong Kong Collaborative Research Fund award of HKD3.11 million for the project "Hong Kong Insolvency and Restructuring Law and Policy in Times of COVID-19 and Beyond" (as Project Coordinator). She is currently the Co-Chair of the Insolvency Scholars Forum established under the umbrella of the Insolvency Law Academy (India).

STEPHANIE YEO

Partner, WongPartnership

Stephanie Yeo's main area of practice is restructuring and insolvency with a focus on formal and out-of-court cross-border restructurings.

She was recently ranked in the Global Restructuring Review's 40 under 40 list (2022), which highlights the next generation of accomplished cross-border restructuring and insolvency specialists around the world and is part of the International Insolvency Institute's NextGen Leadership Program (2021). This program recognizes the most prominent young lawyers, insolvency professionals, and academics in the world.

Stephanie Yeo *(continued)*

Stephanie's expertise has been recognized in The Legal 500: Asia Pacific, International Financial Law Review (IFLR) Rising Stars Awards Asia-Pacific 2022, and Chambers Asia-Pacific. She has been described as a "lawyer who is skilled beyond her years" and one who is "able to balance complexities and sensitivities of the many parties involved in a restructuring matter." Likewise, Stephanie's ability to "to package issues and solutions in easy-to-understand ways" has been praised as "a remarkable skill and one that others aspire to have."

Significant matters which she has handled include acting as one of the lead partners in the US$3.3 billion successful restructuring of Pacific International Lines, acting for the ad hoc committee of bondholders in the restructuring of Noble Group Limited, and acting as lead counsel for the bankruptcy trustee in *Re Opti Medix (in liquidation) and another matter* [2016] SGHC 108.

PAUL H. ZUMBRO

Partner, Cravath, Swaine & Moore LLP

Paul H. Zumbro is Head of the Financial Restructuring & Reorganization (FR&R) Practice of Cravath, Swaine & Moore LLP (Cravath). His practice focuses on restructuring transactions and related financings, both in and out of court, as well as bankruptcy mergers and acquisitions (M&A) transactions.

Mr. Zumbro recently represented Pacific Gas and Electric Company (PG&E)—in one of the largest and most complex bankruptcy cases in U.S. history—to fairly and efficiently resolve liabilities resulting from the 2017 and 2018 Northern California wildfires. He also represented The Weinstein Company (TWC) in its voluntary petition for chapter 11 bankruptcy. Cravath served as lead counsel in the global settlement of potential claims against TWC and potential claims against various parties related to Harvey Weinstein's misconduct. The settlement received overwhelming support from TWC's creditors and is incorporated in TWC's bankruptcy plan, which established a multi-million dollar fund from which survivors of Harvey Weinstein's sexual misconduct may receive compensation.

Mr. Zumbro received a B.A. *cum laude* and with Distinction in the Major from Yale College in 1992 and a J.D. from Columbia Law School in 1997, where he was a Harlan Fiske Stone Scholar.

Mr. Zumbro joined Cravath in 1997 and was elected a partner in 2004.

The University of Cambridge, United Kingdom (photo by Dorin Seremet on Unsplash).

CONFERENCE **ORGANIZERS** and **SECRETARIAT**

Affiliations and positions indicated are
as of conference dates (15–16 December 2022).

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Asian Development Bank

NICHOLAS MOLLER

Principal Counsel, Asian Development Bank (ADB)

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MARIA CECILIA T. SICANGCO

Senior Legal Officer, ADB

Maria Cecilia T. Sicangco is currently a senior legal officer at the Asian Development Bank (ADB). She is involved in the design, processing, and implementation of the Law and Policy Reform Program portfolio, which covers key areas such as environment and climate change law, international arbitration, gender-based violence and access to justice, commercial law and private sector development, digital economy, and Islamic finance.

Cecille works with development partners across Asia and the Pacific to promote the rule of law and establish an enabling environment for sustainable development. She has in-country experience in Afghanistan, Bhutan, Cambodia, Fiji, India, Myanmar, Pakistan, the Philippines, and Samoa. Her work has been published in the Yearbook of International Environmental Law (Oxford University Press) and the Human Rights Education in Asia-Pacific Journal. She authored the *International Climate Change Legal Frameworks* volume of the Climate Change, Coming Soon to a Court Near You report series. She also co-authored the *National Climate Change Legal Frameworks* volume, which synthesized the climate legal and policy frameworks of 32 countries in the region and analyzed key legislative trends and climate-relevant constitutional rights. Under ADB's *Legal Literacy for Women Technical Assistance*, Cecille put together knowledge resources for judges and prosecutors handling gender-based violence cases in Pakistan and Afghanistan. She contributed to and was the secondary editor of the *Court Companion on Gender-Based Violence Cases*, which guides justice sector stakeholders in making justice more accessible to gender-based violence victims.

Cecille holds a Bachelor of Applied Economics and Accountancy double degree (*cum laude*) from De La Salle University and a Bachelor of Laws degree (*cum laude*, salutatorian) from the

Maria Cecilia T. Sicangco *(continued)*

University of the Philippines. She pursued a Master of Laws in International Legal Studies degree at New York University, where she was the Starr Foundation Global Scholar, Hauser Scholar, and Thomas M. Franck Scholar in International Law. She holds a Certificate in Sustainable Finance from the University of Cambridge Institute for Sustainability Leadership and an Associate Qualification in Islamic Finance at the Islamic Banking and Finance Institute Malaysia.

Cecille is a Philippine- and US-qualified lawyer (admitted to the bar in the State of New York), and a certified public accountant. She is a member of the World Commission on Environmental Law.

RYAH ZENDRA MILLARE SANVICENTE

Legal Operations Administrator, ADB

Ms. Ryah Millare Sanvicente has been a staff member of the Asian Development Bank since 2005. She worked with the Office of the General Counsel (OGC) as a Legal Operations Assistant from 2005–2009, and moved to the South Asia Department from 2009–2015 as a Senior Operations Assistant. In 2015, she returned to OGC as the Executive Assistant to the General Counsel. In 2019, she joined the Law and Policy Reform Team of OGC as the Legal Operations Administrator.

She graduated from the University of Sto. Tomas with a Bachelor's Degree in Communications Arts in 2000.

GLADYS CABANILLA-SANGALANG

Senior Legal Operations Assistant, ADB

Ms. Gladys Cabanilla-Sangalang has over 20 years of operations and administrative support experience. Before joining ADB, she worked as a paralegal in a full-service law firm that advises clients in the Banking and Finance, Corporate and Commercial, Dispute Resolution, Employment, Immigration, Intellectual Property, and Tax practice areas. Subsequently she became the Executive Administrator to the Global Chief Operating Officer of a multinational law firm and later a Global Talent Management Specialist, overseeing the performance management tool of the Firm and managing the election of local partnership to international partnership.

She also worked as an Office Administrator and Purchasing Associate in a subsidiary of the largest media conglomerate in the Philippines that brought the first indoor family educational entertainment center to the Bonifacio Global City, Taguig.

She is currently a senior legal operations assistant in the Office of the General Counsel in ADB, supporting the Law and Policy Reform Program, the operations of ADB's Pacific and South Asia regional departments and private sector legal group.

She graduated from the University of the Philippines with a Bachelor of Arts degree in Political Science (with minor in Economics and Psychology) and earned her Certificate as a Paralegal from the University of the Philippines Law Center. She also holds a diploma on Events Specialist that she earned from the School of Professional and Continuing Education of the De La Salle-College of Saint Benilde.

FLORENZ JESSICA A. BUEN

Senior Legal Operations Assistant, ADB

Florenz Jessica A. Buen has been with the Asian Development Bank since 2015. She was with the Budget, People, and Management Systems Department before working in the Office of the General Counsel. She currently supports the Law and Policy Reform Program, the operations of ADB's Central and West Asia and Southeast Asia regional departments, and the private sector legal group.

She holds a Political Science degree from the University of the Philippines and a Master's in Business Administration from the Ateneo de Manila University.

JENNIFER BAUI

Technical Assistance Coordinator (Consultant), Law and Policy Development for Private Sector and Public-Private Partnerships Technical Assistance, ADB

Jennifer Baui started working at the Asian Development Bank as a service provider in 1999, then transitioned to consultancies in 2003. She is currently the Technical Assistance Coordinator (Consultant) for the *Law and Policy Development for Private Sector and Public-Private Partnerships Technical Assistance* under the Office of the General Counsel's Law and Policy Reform Program.

She previously held consultancy assignments in ADB's Budget, Personnel, and Management Systems Department (BPMSD); Strategy, Policy, and Partnerships Department (SPD); Office of Regional Economic Integration (OREI); and Sustainable Development and Climate Change Department (SDCC).

Jenny has performed a wide-array of administrative duties. She brings experience, maturity, and a unique ability to combine strategic thinking with operational work.

KRISTINA P. CASTAÑEDA

Knowledge Management Specialist (Resource Person), Law and Policy Development for Private Sector and Public-Private Partnerships Technical Assistance, ADB

Kristina P. Castañeda is a resource person for the *Law and Policy Development for Private Sector and Public-Private Partnerships Technical Assistance*, under the Law and Policy Reform Program of the Asian Development Bank.

Kristina is the General Counsel of a leading integrated aquaculture company in the Philippines. She exercises general supervision over legal issues surrounding the company's various activities, which range from manufacturing, intensive aquaculture, seafood processing, and retail. Her practice includes general corporate law, litigation, labor law, intellectual property, and property acquisition.

Aside from her role as General Counsel, Kristina serves as Corporate Secretary and Legal Counsel of other corporations engaged in agriculture, retail, restaurant operations, and construction.

Kristina holds a Management Economics degree from Ateneo de Manila University and a Bachelor of Laws degree from the University of the Philippines.

ROXANNE INGRID T. ALCALA
Legal Operations Coordinator (Consultant), ADB

Roxanne Alcala is currently a legal operations coordinator (consultant) for the Office of the General Counsel's Law and Policy Reform Program at the Asian Development Bank.

For almost 6 years, she worked in well-known companies in the Philippines as supervisor and manager, overseeing operations to achieve corporate targets. She has also been engaged in various ADB technical assistance projects on a short-term, intermittent resource person basis, including stints as a Senior Events and Communications Officer with the Islamic Finance Technical Assistance and the Law and Policy Development for Private Sector and Public-Private Partnerships Technical Assistance.

Ms. Alcala holds a Bachelor's degree in Hospitality Management (Major in Hotel, Restaurant and Resort Management) from San Sebastian College-Recoletos in Manila, the Philippines.

INSOL International

CLARE WEE
Regional Head for Asia, INSOL International

Clare Wee is INSOL International's Regional Head for Asia, an Advisory Board member of the Singapore Global Restructuring Initiative (2020 to present), and consultant for the ASEAN Monetary Research Office (AMRO-Asia), an international organization headquartered in Singapore.

Prior to joining INSOL in 2019, Clare was the former Head of the Office of Anticorruption and Integrity (OAI) at the Asian Development Bank (ADB) (2007–2018). Under her leadership, OAI advocated and provided technical assistance for the advancement of stronger governance, anticorruption, anti-money laundering, tax transparency, and anti-tax avoidance laws and systems across Asia. Clare began her career at ADB in the Office of the General Counsel (1995–2007) rising through the ranks to Assistant General Counsel. During that time, she led ADB's development

Clare Wee *(continued)*

work on insolvency law. She represented ADB on the United Nations Commission on International Trade's (UNCITRAL) Working Group V (Insolvency) on the development of the Legislative Guide on Insolvency Law, and on World Bank's Advisory Panel for Insolvency Systems. She will now represent INSOL on Working Group V (Insolvency) addressing civil asset tracing in insolvency proceedings (61st session, Vienna 2022 onwards). She initiated and was responsible for producing ADB's studies of the insolvency laws in 11 Asian jurisdictions; and advocated for national and cross-border insolvency law reform across Asia.

Prior to ADB, Clare was a Bankruptcy and Litigation Associate with Whitman Breed Abbott & Morgan in New York. Memorable cases include being a part of the team that successfully restructured Rocky Mountain Helicopters Inc., obtained multimillion dollar awards for AMC Jeep burn victims in the LTV Steel restructuring, and pursuing director's liability suits in the collapse of SW Banking Corporation.

SHEENA HENG

Intern, INSOL International

Sheena Heng is an intern with INSOL International's Asia Hub. With a keen interest in restructuring and insolvency work, she is also currently a research assistant with the Singapore Global Restructuring Initiative, Singapore Management University.

Ms. Heng supports the Conference in her dual role as INSOL intern and SMU Research Assistant.

Singapore Global Restructuring Initiative, Singapore Management University

AURELIO GURREA-MARTÍNEZ

Associate Professor of Law and Head, Singapore Global Restructuring Initiative, Singapore Management University

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SHEENA HENG

Intern, INSOL International

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Ms. Heng supports the Conference in her dual role as INSOL intern and SMU Research Assistant.

University of Cambridge's Center for Corporate and Commercial Law

FELIX STEFFEK

Associate Professor, Faculty of Law of the University of Cambridge

Please see page 251.

University of Chicago Law School's Center on Law and Finance

ANTHONY CASEY

Deputy Dean and Donald Ephraim Professor of Law and Economics, The University of Chicago Law School

Please see page 246.

LIBBY SEGUIN

Academic Legal Center Manager, Center on Law and Finance and the Constitutional Law Institute, University of Chicago Law School

Libby Seguin is the Academic Legal Center Manager for the Center on Law and Finance at the University of Chicago Law School. She manages the Center's events, communications, and administrative duties.

Greenhouse staff packing tomates in Armenia (photo by Eric Sales/ADB).

CONFERENCE **RAPPORTEURS**

Affiliations and positions indicated are as of conference dates (15–16 December 2022).

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MARIA CECILIA T. SICANGCO

Senior Legal Officer, ADB

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KRISTINA P. CASTAÑEDA

Knowledge Management Specialist (Resource Person), Law and Policy Development for Private Sector and Public-Private Partnerships Technical Assistance, ADB

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Bauerfield International Airport, in Port Vila, Vanuatu (photo by Eric Sales/ADB).

Rosalina is a seamstress at the Turkmenbashi Tekstil Kompleksi – the biggest textile factory in Central Asia. The new technologies used at the facility are said to be environmentally friendly and constitute no danger to the health of the population. Over 3,000 people, 95% women, work in the textile factory (photo by Daro Sulakauri/ADB).

LIST OF **DELEGATES**

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List of **Delegates**

A total of 139 delegates from 30 economies spanning 6 continents attended the *Strengthening Insolvency Systems in Asia and the Pacific Conference* held on 15–16 December 2022.

IN-PERSON PARTICIPANTS

COUNTRY	NAME	TITLE	ORGANIZATION
Australia	Nicholas Moller	Principal Counsel	Asian Development Bank
Australia	Jason Harris	Professor of Corporate Law	University of Sydney Law School
Australia	John Martin	Partner	Norton Rose Fulbright
Australia	Scott Aspinall	Barrister	Wentworth Chambers
Bhutan	Namgay Om	Deputy Chief Attorney	Office of the Attorney General
Bhutan	Tshering Choki	Legal Officer, Legal Division	Ministry of Finance
India	Anshul Agrawal	Manager	Insolvency and Bankruptcy Board of India
India	Debanshu Mukherjee	Co-Founder	Vidhi Centre for Legal Policy
India	Deepak Rao	General Manager	Insolvency and Bankruptcy Board of India
India	Deeptanshu Singh	Manager	Insolvency and Bankruptcy Board of India
India	Pooja Singla	Manager	Insolvency and Bankruptcy Board of India
India	Rahul Khana	Assistant General Manager	Insolvency and Bankruptcy Board of India
India	Urmika Tripathi	Legal Analyst for Asia	REDD Intelligence
Indonesia	Judge Heru Hanindyo	Judge	Central Jakarta Commercial Court
Japan	Kotaro Fuji	Counsel	Nishimura & Asahi
Maldives	Mariyam Visam	Registrar of Companies	Ministry of Economic Development
Philippines	Celeste Cembrano Mallari	Consultant	Asian Development Bank
Philippines	Florenz Jessica A. Buen	Senior Legal Operations Assistant	Asian Development Bank
Philippines	Jennifer Baui	Technical Assistant Coordinator (Consultant)	Asian Development Bank
Philippines	Kristina Castaneda	Knowledge Management Specialist (Resource Person)	Asian Development Bank
Philippines	Kyle Ceasar Filomeno	Associate Remedial Management Officer	Asian Development Bank
Philippines	Roxanne Ingrid T. Alcala	Senior Events and Communications Officer (Resource Person)	Asian Development Bank
Singapore	Aurelio Gurrea-Martinez	Associate Professor	Singapore Management University
Singapore	Fanny Teo	Senior Assistant Director (Financial Management)	Insolvency and Public Trustee's Office – Registries of Moneylenders and Pawnbrokers

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In-Person Participants *continued*

COUNTRY	NAME	TITLE	ORGANIZATION
Singapore	Nydia Remolina	Professor	Singapore Management University
Singapore	Raelene Pereira	Partner	Rajah & Tann Singapore LLP
Singapore	Sheena Heng	Intern	INSOL International
Singapore	Stephanie Yeo	Partner	WongPartnership
Singapore	Tristan Tan	Intern	INSOL International
Singapore	Yu-Wen TAN	Director of Corporate Insolvency Division	Insolvency and Public Trustee's Office - Singapore
United Kingdom	Felix Steffek	Associate Professor	University of Cambridge
United States of America	Adam Badawi	Professor of Law	UC Berkeley
United States of America	Adriana Robertson	Donald N. Pritzker Professor of Business Law	The University of Chicago Law School
United States of America	Anthony Casey	Deputy Dean and Donald Ephraim Professor of Law	The University of Chicago Law School
United States of America	Brook Gotberg	Francis R. Kirkham Professor of Law	Brigham Young University
United States of America	Charles D. Booth	Michael J. Marks Distinguished Professor in Business Law and Director	Institute of Asian-Pacific Business Law (IAPBL), William S. Richardson School of Law, University of Hawai'i at Manoa
United States of America	Christopher Sontchi	International Judge	Singapore International Commercial Court
United States of America	Danielle York	Rapporteur	The University of Chicago Law School
United States of America	Elizabeth Seguin	Academic Legal Center Manager	Center on Law and Finance and the Constitutional Law Institute, The University of Chicago Law School
United States of America	Jared Ellias	Professor of Law	Harvard Law School
United States of America	Joshua Macey	Assistant Professor of Law	The University of Chicago Law School
United States of America	Paul Zumbro	Partner	Cravath, Swaine & Moore LLP
United States of America	Richard Squire	Alpin J. Cameron Chair in Law	Fordham University School of Law
United States of America	Stephen Ford	Associate, Restructuring Practice	Davis Polk
United States of America	Thomas Clark	General Counsel	Asian Development Bank

VIRTUAL PARTICIPANTS

COUNTRY	NAME	TITLE	ORGANIZATION
Argentina	Sergio Muro	Financial Sector Specialist	World Bank
Armenia	Karine Minasyan	Project Implementation and Investment Consultant	Asian Development Bank
Armenia	Narine Avetisyan	Senior Investment Officer	Asian Development Bank
Armenia	Tigran Sahakyan	Bankruptcy Manager	no information available
Australia	Catherine Robinson	Senior Lecturer	Faculty of Law, University of Technology Sydney
Australia	David Brown	Associate Professor	Adelaide Law School
Australia	Scott Atkins	Global Co-Head of Restructuring	Norton Rose Fulbright
Australia	Terry Reid	Consultant	Asian Development Bank
Botswana	Chipo Gaobatwe	Deputy Master	Administration of Justice
Brunei Darussalam	Nursuaidah Tajuddin	no information available	no information available
Brunei Darussalam	Nurul Hidayah Binti Hamdan	Registrar of the Supreme Court/ Deputy Official Receiver	Supreme Court of Brunei
Canada	Mahesh Uttamchandani	Manager for Digital Development in East Asia and the Pacific	World Bank
Colombia	Susana Hidvegi Arango	Former Chief Bankruptcy Justice of Colombia	no information available
Fiji	Mohammed Firdouz Khalim	Legal Officer	Sunil Kumar Esq.
Fiji	Varanisese Tabuhakia	Legal Officer	Sunil Kumar Esquire- Law Firm
Georgia	Nino Machaidze-Dolidze	Head of Certification and Educational Unit	Mediators Association of Georgia
Hong Kong, China	Edmund Ma	Senior Associate	Baker McKenzie
Hong Kong, China	Kevin Lai	Chief Economist	Daiwa Capital Markets Hong Kong Limited
Hong Kong, China	Richard Woodworth	Partner	Linklaters LLP
Hong Kong, China	Wai Yee WAN	Associate Dean (Research and Internationalisation) and Professor	City University of Hong Kong
Hong Kong, China	Wayne Lu	Associate	Kroll (HK) Limited
India	Ajanta Gupta	Private Secretary to Chairperson	Insolvency and Bankruptcy Board of India
India	Amit Pradhan	Executive Director	Insolvency and Bankruptcy Board of India
India	Aniket Sharma	Manager	Insolvency and Bankruptcy Board of India
India	AnKit Verma	no information available	no information available
India	Archana Sharma	Manager	Insolvency and Bankruptcy Board of India
India	Ashwani Yadav	no information available	no information available

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Virtual Participants *continued*

COUNTRY	NAME	TITLE	ORGANIZATION
India	Asit Behera	Manager	Insolvency and Bankruptcy Board of India
India	B Sankaranarayanan	General Manager	Insolvency and Bankruptcy Board of India
India	Cipica Sharma	Research Associate Law	Insolvency and Bankruptcy Board of India
India	Darshil Mashru	Student	Indian Institute of Corporate Affairs
India	Ishana Tripathi	Associate Professor	OP Jindal Global University
India	Jasmine Sudhir	Research Associate	Insolvency and Bankruptcy Board of India
India	Jayanti Prasad	Whole Time Member	Insolvency and Bankruptcy Board of India
India	Manish Kumar	Chief General Manager	Insolvency and Bankruptcy Board of India
India	Manpreet Kaur	Manager	Insolvency and Bankruptcy Board of India
India	Medha Shekar	Manager	Insolvency and Bankruptcy Board of India
India	Namisha Singh	Manager	Insolvency and Bankruptcy Board of India
India	Nitish Saini	no information available	no information available
India	Prachi Apte	Research Associate	Insolvency and Bankruptcy Board of India
India	Raghav Maheshwari	Manager	Insolvency and Bankruptcy Board of India
India	Rajesh Kumar	General Manager	Insolvency and Bankruptcy Board of India
India	Rajesh Kumar Gupta	Chief General Manager	Insolvency and Bankruptcy Board of India
India	Rammilan Yadav	Manager	Insolvency and Bankruptcy Board of India
India	Ravi Mital	Chairperson	Insolvency and Bankruptcy Board of India
India	Ravindra Beleyur	Proprietor	Beleyur & Associates
India	Risham Garg	Professor	National Law University Delhi
India	Santosh Shukla	Executive Director	Insolvency and Bankruptcy Board of India
India	Sneha Vemulapalli	Student	no information available
India	Snigdha Singh	no information available	no information available
India	Srinivasan Venkataraman	Director	Velran Finance

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Virtual Participants *continued*

COUNTRY	NAME	TITLE	ORGANIZATION
India	Srivatsava Beerapalli	Advocate	Indian Institute of Corporate Affairs
India	Sumant Batra	President	Insolvency Law Academy
India	Sunita Umesh	Partner	UCC and Associates LLP
India	Vaishnav Saravana Baskar	Audit Executive	Ramnaresh and Co
India	Yadwinder Singh	Manager	Insolvency and Bankruptcy Board of India
India	Yogendra Singh	no information available	no information available
Indonesia	Faisal Akbaruddin Taqwa	Deputy Chief Judge	Jombang District Court
Indonesia	Geoff Simms	President Director	AJCapital Advisory
Japan	Jin Tanaka	Branch Manager	UNISC International
Japan	Wataru Tanaka	Professor	Institute of Social Science, The University of Tokyo
Malaysia	Elsiy Tingang	Consultant	Asian Development Bank
Malaysia	Grace Sook Fong Loh	Associate Director	KPMG
Malaysia	Ruzita Azmi	Associate Professor (Lecturer)	UUM Kuala Lumpur Campus
Myanmar	Thi Thi Swe	Lawyer	Myanmar Legal MHM
Myanmar	Win Naing	Partner	Myanmar Legal MHM
Nepal	Kul Bhurtel	Faculty	National Judicial Academy
New Zealand	Trish Keeper	Associate Professor	Victoria University of Wellington
Papua New Guinea	Herman Kromnong	Managing Director	Darkrom Consultancy Services
People's Republic of China	Camille Maa	研究员	中国政法大学
Philippines	Angelo O. Jacinto	Consultant	Asian Development Bank
Philippines	Donna Duke	Principal Remedial Management Specialist	Asian Development Bank
Philippines	Izza Waheed	Financial Management Specialist	Asian Development Bank
Philippines	Kyle Filomeno	Associate Remedial Management Officer	Asian Development Bank
Philippines	Richard Ambery	Senior Counsel	Asian Development Bank
Republic of Korea	Jungeun Ko	Attorney	Kim & Chang
Singapore	Clare Wee	Regional Head (Asia)	INSOL International
Singapore	David Chew	Partner	DHC Capital
Singapore	Hariz Lee	Partner	Joseph Tan Jude Benny LLP
Singapore	Lai Kuan Moo	Consultant	nTan Corporate Advisory
Singapore	Shyue Wen Ong	Managing Director	Enduring Advisory Pte Ltd
Singapore	Vera Lim	Associate Director, Turnaround & Restructuring	Deloitte

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Virtual Participants *continued*

COUNTRY	NAME	TITLE	ORGANIZATION
Singapore	Y C Chee	Senior Partner	RSM Singapore
South Africa	Maria Ria Nonyana-Mokabane	Acting Deputy Director-General	Department of Trade, Industry and Competition
Spain	Carlos Pérez	no information available	no information available
Thailand	Kanok Jullamon	Staff	Supreme Court of Thailand
United Kingdom	Neeti Shikha	Lecturer	University of Bradford School of Law
United States of America	Adela Hurtado	Lawyer	no information available
United States of America	Antonia Menezes	Senior Financial Sector Specialist	World Bank
United States of America	Dan T. Moss	Partner	Jones Day
United States of America	Edith Hotchkiss	Professor of Finance	Carroll School of Management, Boston College
United States of America	Elizabeth McColm	Partner	Paul, Weiss, Rifkind, Wharton & Garrison LLP
United States of America	Hnin Thet Wai	Associate	Myanmar Legal MHM
United States of America	Kenneth York	no information available	no information available
United States of America	Timothy Graulich	Partner	Davis Polk & Wardwell LLP
Uzbekistan	Bahtiyor Usmanov	Service Provider	Asian Development Bank

About the Asian Development Bank

ADB is committed to achieving a prosperous, inclusive, resilient, and sustainable Asia and the Pacific, while sustaining its efforts to eradicate extreme poverty. Established in 1966, it is owned by 68 members —49 from the region. Its main instruments for helping its developing member countries are policy dialogue, loans, equity investments, guarantees, grants, and technical assistance.

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