Law as an Instrument to Facilitate the Success of the ASEAN Economic Community: The Importance of the Rule of Law in Cross-Border Insolvency and Restructuring Regimes

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Legal Scholars, practitioners and corporate leaders from around the world gather in Singapore this week to discuss how law can be used to unlock opportunities for economic development in the ASEAN Economic Community. It is an important and timely topic, as it has been widely predicted that the 21st Century will be an "Asia Century." And the advancements in Asia during the last few decades bear this out.

A. The Impact of Globalization and the Rule of Law

The development of the ASEAN region is, of course, is not a de-coupled phenomenon. It is a direct result of the march of globalization. Globalization drives today's world with a force that is not only unstoppable, but accelerating at an unprecedented pace. No institution, country, or collection of politicians can resist it, other than at their peril.

We have had a first-hand view of this at Jones Day. Over the last twenty years our clients' businesses have grown exponentially outside the United States. By 2009, U.S. domestic companies owned and operated foreign affiliates with a collective $4.8 trillion in sales, employing over 10 million workers.[2] And as these businesses have grown, so have their demands for legal services that cross jurisdictions and national boundaries. We, too, have grown in response to that demand, opening more than 15 new offices during the last twenty years, including our office here in Singapore and four in Australia.

Of course, like any phenomenon, globalization has its adherents and its detractors. The detractors mostly hail from the academic, media and political left. They say globalization makes inequality worse and creates a world where the rich get richer and the poor poorer. The adherents are mostly spokespersons for the great business enterprises of the world who are leading the way in global investment. They see a world in which billions of people have moved from abject poverty to a life that begins to resemble the middle class as viewed from a western perspective. In reality, both are true: While globalization has caused unprecedented rises in the standard of living across

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[2] News Release, U.S. Dep't of Commerce, *Bureau of Econ. Analysis, Summary of Estimates for Multinational Companies: Employment, Sales, and Capital Expenditure for 2009* (Apr. 18, 2011), *available at* https://www.bea.gov/newsreleases/international/mnc/2011/pdf/mnc2009.pdf.

the world, at the same time, there are undoubtedly millions of people who have been left behind and have not benefitted from the gains made to date.

Most people who study the paths and policies to speed economic and human development tend to see it only as an issue of *availability* of capital. But the world is awash in private capital that sits idly on the so-called sidelines while badly needed infrastructure and other investment opportunities in emerging markets go unfinanced because the risk of the investment cannot be adequately assessed and managed. In the end, private capital gravitates toward more predictable, reliable, and less risky opportunities, most often in already rich countries.

If the world is to extend the maximum benefits of globalization to the greatest percentage of the world's population, then the most important undertaking will be aggressive fostering of the authentic development of the rule of law. We don't need the advancement of the rule of rules that can be arbitrarily abused by men, but a genuine system of law administered by an impartial accomplished judiciary served by able members of the bar who present with integrity the evidence and thoughtfully argue the applicable law. It is a straightforward system long ago explained brilliantly by such great jurists as Benjamin Cardozo in "The Nature of the Judicial Process." Any good lawyer recognizes what is needed.

B. The Importance of the Rule of Law in Cross-Border Insolvency Regimes

In many ways, the impact of globalization and the importance of the rule of law can be seen most clearly during a crisis. As the world economy has become increasingly global, so also have recessions. Financial distress in one country no longer stays in that country—disruptions in one region's economy now ripple across the world, even as nations try to limit the fallout. Similarly, because the world's leading companies have businesses, operations, and assets around the globe, when a company faces financial distress or—in the worst case scenario, insolvency—the effects are felt all around the world by the company and its various stakeholders.

The financial distress of global enterprises, however, raises unique problems. For one, the insolvency of a major global company might require the reorganization of operations or the adjudication of rights to property in many jurisdictions, often with different, if not competing, priorities. When this occurs, it is often not clear which law applies, which court (if any) should take the lead in administering the business and assets of the insolvent enterprise, and whether representatives of the insolvent company or its creditors will be able to participate in proceedings in foreign courts or protect their interests in collateral. The necessity of resolving claims against the multinational enterprise in various jurisdictions creates expense, causes delay, and raises the possibility of inconsistent judgments. Even the simple fact that proceedings may be conducted in several different languages, within court systems pursuing different national and public policy goals, adds challenges. Piecemeal liquidation of a global enterprise in competing local jurisdictions cannot be the right outcome.

Given this reality, it is crucial that countries develop cross-border rescue and insolvency regimes grounded in the rule of law—that is, schemes that prioritize access to the courts, respect

for foreign proceedings, preservation of the troubled enterprise's assets, protection (if possible) of its operations, and a fair resolution of claims. This is neither a pro-debtor nor a pro-creditor position—all stakeholders will benefit from such a system. The goal in any insolvency proceeding is to efficiently rehabilitate the company whenever possible, providing for a just payment of creditors while returning corporate assets and resources back into the productive economy in the least costly manner. Absent a well-functioning cross-border insolvency regime, this goal cannot be met—economic resources will remain underutilized, delay and cost will reduce the recovery available for creditors, and jobs will be needlessly lost.

Make no mistake, both companies and investors are paying close attention to the legal regimes in which they do business. When deciding where to invest capital, companies and investors invariably look for four things: (1) a commercial law which they understand, are familiar with, and accept; (2) a strong legal ecosystem of quality judges and practitioners; (3) a strong and efficient dispute resolution system; and (4) a strong system of restructuring laws, enabling investors to understand the risks to the return of their capital.

In particular, when it comes to restructuring, certainty of outcome and transparency of process are important to both companies and their investors. Companies want to know that the jurisdictions in which they have chosen to do business or locate capital have legal regimes that will preserve the enterprise to permit rehabilitation. Investors want to know that their rights in collateral and their priority over equity will be protected even if the enterprise becomes the subject of insolvency proceedings.

Similarly, when a company's operations cross national borders, so also will its insolvency. The company will want to know that it will not become enmired in duplicative, expensive proceedings in every jurisdiction in which it has assets. Absent such an assurance, the company will limit the jurisdictions in which its capital is located. Creditors, likewise, demand transparency and coordination among courts. As the United Nations Commission on International Trade Law (UNCITRAL) has observed, "[t]o the extent that there is a lack of communication and coordination among courts and administrators . . . it is more likely that assets would be dissipated, fraudulently concealed, or possibly liquidated . . . not only is the ability of creditors to receive payment diminished, but so is the possibility of rescuing financially viable businesses and saving jobs." [3]

The result is, as in so many areas of law, that capital flies to jurisdictions with clear, predictable rules and a legal system that fairly applies those rules without bias. Capital demands that countries develop cross-border insolvency regimes that are grounded in an authentic application of the rule of law and that pursue comity and coordination with other jurisdictions. Countries that cannot offer these things will be left behind.

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[3] UNCITRAL, LEGISLATIVE GUIDE ON INSOLVENCY LAW, at 21 (2005), *available at* https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf ("[T]he absence of predictability in the handling of cross-border insolvency cases can impede capital flow and be a disincentive to cross-border investment.").

C. Recent Efforts to Advance the Rule of Law in Cross-Border Insolvencies

Many around the world have recognized the importance of developing insolvency regimes guided by the rule of law and international coordination. These commentators often note that the convergence of commercial laws across political boundaries is a necessary first step in the development of legal regimes that are maximally attractive to private capital. And there are good reasons for this: Companies and investors are notoriously wary of adding legal risk to investments. A convergence of legal standards provides added certainty of outcome, which helps to allay the concerns of investors as to whether the economic potential of an investment can be realized, which, in turn, reduces the cost of investment.

Great strides have already been made toward convergence of cross-border insolvency laws. One prominent example is the UNCITRAL Model Law on Cross-Border Insolvency (Model Law CBI). Model Law CBI makes an invaluable start toward multinational consensus and international cooperation.

Model law CBI applies where the debtor has assets in countries other than the seat of primary insolvency. The centerpiece of Model Law CBI is the establishment of a particular jurisdiction that will serve as the "center of main interest" or COMI for the restructuring. The COMI presumptively provides the primary law and forum for the insolvency proceedings, and the Model Law CBI encourages cooperation between the COMI jurisdiction and other locations in order to maximize the debtors' assets, rescue troubled companies, and protect investments and jobs.

Model Law CBI describes itself as being built on four principles: access, recognition, relief, and coordination.[4] Foreign representatives need *access* to proceedings in other jurisdictions. Courts in different countries must *recognize* the related proceedings going on elsewhere. Debtors should be able to obtain *relief* in courts administering the debtor's insolvency. And courts and professionals should make an effort to *coordinate* as much as possible to ensure that the debtor's estate is administered fairly and efficiently.

Adopting a model law is of obvious importance. But the rule of law also demands that the law is *applied* in a fair and uniform way. To that end, UNCITRAL has also sought to standardize the interpretation and application of Model Law CBI by developing a Practice Guide on Enactment. And it has created a database to compile abstracts and judicial opinions from jurisdictions that have adopted Model Law CBI.

Over 40 countries have already adopted some form of Model Law CBI.[5] The United States, for example, adopted Model Law CBI with only minor changes, making it Chapter 15 of the U.S.

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[4] Diane Chapman, Prishika Raj, Petra Butler, Rosalind Mason & Tim Castle, *Access to Justice in the ASEAN the Key Role of UNCITRAL*, at 18 (2015), *available at* http://uncitralrcap.org/wp-content/uploads/2015/12/Access-to-Justice-in-the-ASEAN-.pdf.

[5] UNCITRAL, *Status: UNCITRAL Model Law on Cross-Border Insolvency (1997), available at* http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (accessed 3 July 2018).

Bankruptcy Code. Within the ASEAN Economic Community, both the Philippines and Singapore have adopted Model Law CBI. And, in the Asia-Pacific region more broadly, it has also been adopted by Australia, Japan, New Zealand, the Republic of Korea, and Vanuatu.[6]

Of particular note is that Singapore last year adopted a new restructuring law which enacts both Model Law CBI and many of the concepts in Chapter 11 of the U.S. Bankruptcy Code. These include key debtor and creditor protections such as a worldwide moratorium to preserve the enterprise's assets, debtors-in-possession, rescue financing, and an ability to bind non-consenting creditors to a plan. This effort builds on the success of Singapore's International Commercial Court, which has already enhanced Singapore's reputation as a hub for international investment and resolution of cross-border disputes. Such efforts toward convergence can go a long way toward minimizing investors' legal risks and encouraging capital to locate in a jurisdiction. And it seems likely that investors and businesses will seek to take advantage of these new laws, which build upon tried and true strategies for debtor rehabilitation and creditor protection.

D. The Role of the Bar and Judiciary in Developing Effective Cross-Border Insolvency Regimes

Model Law CBI and legislative convergence are practical steps to address the lack of harmony and cooperation in cross-border insolvencies. In fact, the increased adoption of model laws or the development of international conventions are the ideal way to achieve convergence and attract capital. These efforts should be encouraged and expanded.

Achieving convergence through legislation, however, takes time, and often economic considerations require a pace of change and reform that the legislative process may not be able to deliver. This is where the bar and judiciary can make an invaluable contribution to the development of stable, predictable, legal systems, grounded in the rule of law.

For one, members of the judiciary can work with their counterparts in other countries to foster increased interaction, communication, and coordination. One prominent example of this already occurring is the new Judicial Insolvency Network (JIN). The JIN was created in October 2016 by a group of judges from the United States, Singapore, England and Wales, Australia, Bermuda, the British Virgin Islands, Canada, and the Cayman Islands. The goal of the JIN is to reduce costs and improve efficiency by enhancing communication and coordination between courts. To that end, the JIN has created guidelines aimed at encouraging communication between courts in different jurisdictions administering related insolvency proceedings. The JIN Guidelines call for courts to collaborate by sharing documents related to the proceedings, ordering notice of related proceedings, allowing parties to appear without submitting to the court's jurisdiction, recognizing governing orders or laws from other jurisdictions, and holding joint hearings where appropriate. And the Guidelines also call upon the bar to draft, propose, and negotiate protocols for conducting parallel insolvency proceedings in an efficient manner.

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[6] Chapman, Raj, Butler, Mason & Castle, *supra* note 3, at 18.

In addition, members of the bar and judiciary can work to identify common principles that underpin the commercial laws of different jurisdictions, despite their differing legal systems and traditions. This, also, has already begun. For example, the Asian Business Law Institute has recently undertaken Phase I of a project aimed at mapping the core principles governing non-Convention or treaty-based recognition of judgments in 15 Asian jurisdictions. Notably, although these jurisdictions each have their own, distinctive legal systems, the project determined that the principles underpinning the recognition of judgments are broadly similar in all but two jurisdictions. Such efforts are also under way in the restructuring sphere, through a joint project of the ABLI and the International Insolvency Institute aimed at identifying core principles of in-court and out-of-court restructurings across Asian jurisdictions. And UNCITRAL also is making strides in this area, having nearly completed a proposed model law regarding the enforcement of judgments relating to insolvency.

These efforts, and more like them, should be encouraged. And we, as lawyers and jurists, should all be looking for opportunities to be involved in projects like these, which seek to identify the core notions of fairness, equity, and justice with which we are all familiar.

E. The Future of Cross-Border Insolvency Laws

Model Law CBI, the JIN Guidelines, and the work of the ABLI are commendable, and international insolvency regimes would benefit by their expansion. But they are not yet perfect, and there remains much work to do to foster an authentic rule of law and international cooperation.

For example, UNCITRAL is currently working on a way to fill the gaps in how Model Law CBI applies to enterprise groups, an increasingly common feature of the modern business world. The Model Law CBI is predicated on the restructuring of a single corporate entity, which has a COMI in one jurisdiction and establishments in others, with deference being given to the proceedings in the COMI. It was conceived at a time when global trade was not as pervasive, and corporate structures were not as complicated as they are today.

Today, many businesses are multi-national and multi-faceted. They function as groups. There are many corporate entities in the group with interlocking and interwoven economic interests. Assets are held and income streams are organized for economic, tax and regulatory reasons. It is often difficult to ascertain the precise economic significance of each member of the group. And it may be equally difficult to determine each member's COMI, let alone the COMI of the whole group. Added complications arise when some members may be solvent but they would nonetheless be integral to the restructuring of the group as a whole.

To address this, UNCITRAL is seeking to craft a model law for the restructuring of group enterprises. While the new model law is still some way from being finalized and presented to the Commission, there are valuable concepts that can be gleaned from the draft and used for restructuring of investments and businesses in the ASEAN Economic Community. Three are worth highlighting:

First is the concept of "planning" or "coordinating" proceedings. These are proceedings opened in the COMI of one of the enterprise group members. The planning proceedings play the role of coordinating the restructuring efforts of the group, including the development of the group restructuring plan.

Second, the model law contemplates the appointment of a Group Representative by the court in which the planning proceedings have been opened. The Group Representative would be authorized to act as a representative of the planning proceeding in proceedings opened by other group members in the jurisdictions where they have their COMI or are incorporated. In fact, the various courts may agree on the appointment of the same Group Representative in each of the parallel proceedings, so that there is a single point of reference.

Third, the model law uses the concept of synthetic proceedings, which was first developed in the English case of *Collins v Aickmen*. In a synthetic proceeding, the court administering the planning proceeding treats claims on the same basis as they would have been treated if parallel proceedings had been opened in another jurisdiction. Synthetic proceedings would therefore centralize the determination of all key issues in the court administering the planning proceeding with a view to avoiding the opening of parallel proceedings by members of the enterprise group.

The concepts in the new model law are a powerful working philosophy that courts, practitioners, policy makers, creditors and debtors should consider, to ensure that restructuring efforts in the ASEAN Economic Community are efficient and effective. Centralization of restructuring efforts and resolution of disputes would be a significant innovation and would facilitate the success of the region.

F. Essential Attributes of Cross-Border Insolvency Regimes Grounded in the Rule of Law and International Cooperation

There are differing views about what the future of cross-border insolvency law should be. Some will emphasize increased universalism, matter consolidation, and a possible UN Convention providing one forum for a worldwide restructuring. Others might argue for the identification of a single country, whose law is known and trusted by investors, to which a region's insolvency proceedings could be channeled. And still others will emphasize the need for separate proceedings, recognition of foreign proceedings, and comity.

My goal today is not to resolve this debate, but to emphasize that whatever form future efforts take, one absolute necessity is a well-functioning legal regime grounded in the rule of law and international cooperation.

At a minimum, such a regime should provide for access to the courts, where disputes can be resolved by an impartial judiciary. Transparency of process will be critical to prevent fraud, insider-dealings, and back-room deals that advantage the debtor or particular creditors. Of course, any legal system is benefited by clear rules that encourage the sort of predictability businesses and investors crave. Comity will be a necessity when dealing with proceedings that cross international lines. And, we must not forget to ensure that the insolvency regime protects basic human rights

and seeks to ensure that the burden of rehabilitating an insolvent company does not fall disproportionately on the most vulnerable of the company's stakeholders.

More specifically, insolvency regimes should seek to promote the two pillars of insolvency law: protection of the debtor's estate and a fair distribution to creditors. They should thus provide some sort of moratorium—such as the automatic stay of the U.S. bankruptcy laws or the moratorium contained in Singapore's new restructuring law—to ensure that the debtor's estate is not dissipated by the actions of a few creditors,. Regimes should discourage a race to the courthouse and forum shopping for jurisdictions with favorable rules. And rules must be adopted that respect the differing priorities of creditors, ensuring that the property interests of secured creditors are respected while also providing that similarly situated creditors are treated similarly.

The law should aim to allow debtors to rehabilitate whenever possible, for example, by allowing rescue financing and pre-negotiated restructuring schemes like those contained in the laws of the U.S. and Singapore. But it should also provide for a fair liquidation when necessary. To that end, rules that emphasize efficiency, speed, transparency, and international coordination are a must.

Not every country is on a speedy path to such a system. The first step will be to adhere to a commercial regime that will encourage and protect investment. Not far behind, there must be a recognition of individual and human rights. How such systems develop and how fast is the responsibility of the legal profession around the world. It is part of the commitment and obligations that they assumed when they took their oaths to become lawyers.

Notwithstanding much handwringing around the world about the profession and its future, this is, in truth, the best time in the history of the world to become a lawyer and the most important time in history for lawyers to make the rule of law a reality everywhere. The profession should lead us to a world where all countries are founded on the same or similar principles of fairness and equity and it is the lawyer's ability to articulate those principles on behalf of clients that will advance the rule of law.

No one knows for sure what path the law of cross-border insolvency will take in the future. However, we as lawyers will play a fundamental role in shaping that path. We must recognize the needs and challenges of the existing structures and seek improvements based on sound legal principles that will be fairly applied by an impartial judiciary. Only then will the ASEAN Economic Community be able to achieve the predictability and efficiency necessary to attract private capital.