INSOL International

Cross-border Insolvency in Singapore: The Effectiveness of the Judicial Insolvency Network and the JIN Guidelines on the Administration of Cross-border Insolvency Matters

May 2018

Technical Series Issue No. 40

Cross-border Insolvency in Singapore: The Effectiveness of the Judicial Insolvency Network and the JIN Guidelines on the Administration of Cross-border Insolvency Matters

	Contents	i
	Acknowledgement	ii
1.	Introduction	1
1.1	The need for an efficient system in managing cross-border insolvencies	1
1.2	Limitations to the Model Law approach	7
2.	The Judicial Insolvency Network	9
3.	Guidelines for Communication and Cooperation between courts in cross-border insolvency matters	11
3.1	Substantive exposition of the Guidelines	12
3.2	Evaluating of the Guidelines	13
4.	The way forward	14
4.1	Managing cross-border insolvency proceedings with court-to-court communication protocols	14
4.2	Predictable framework for cooperation and communication	14
4.3	JIN and the Guidelines in Asia: some challenges and opportunities	15
5.	Conclusion	17

INSOL International
6-7 Queen Street, London, EC4N 1SP
Tel: +44 (0) 20 7248 3333 Fax: +44 (0) 20 7248 3384

Copyright © No part of this document may be reproduced or transmitted in any form or by any means without the prior permission of INSOL International. The publishers and authors accept no responsibility for any loss occasioned to any person acting or refraining from acting as a result of any view expressed herein.

Copyright © INSOL INTERNATIONAL 2018. All Rights Reserved. Registered in England and Wales, No. 0307353. INSOL, INSOL INTERNATIONAL, INSOL Globe are trademarks of INSOL INTERNATIONAL.

Acknowledgement

The proliferation of globalisation, the breakdown of geographical barriers and the increasing multi-jurisdictional nature of doing business around the world have all resulted in the need to dedicate a substantial amount of time, expertise and coordination across jurisdictions to handle the insolvency and restructuring of multinational enterprises.

The adoption of the UNCITRAL Model Law on Cross-Border Insolvency, the creation and inaugural conference of the Judicial Insolvency Network (JIN) and the formulation of the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters developed by the JIN (the Guidelines) represents a concerted effort by both the legislature and the judiciary of Singapore to create a place for Singapore as a leading regional hub for international debt-restructuring, insolvency and corporate rescue.

This paper explores the effectiveness of the JIN and the Guidelines in the administration of cross-border insolvency matters and compares them with the UNCITRAL Model Law on Cross-Border Insolvency. This paper then examines some unique challenges and opportunities faced by the JIN and the Guidelines in the administration of multi-national cross-border insolvencies.

INSOL International sincerely thanks Ajinderpal Singh and Ng Guo Xi of Dentons Rodyk & Davidson LLP for this detailed analysis and for writing this excellent technical paper.

May 2018

Ajinderpal Singh
Dentons Rodyk & Davidson LLP

Ng Guo Xi
Dentons Rodyk & Davidson LLP

Cross-border Insolvency in Singapore: The Effectiveness of the Judicial Insolvency Network and the JIN Guidelines on the Administration of Cross-border Insolvency Matters

By

Ajinderpal Singh and Ng Guo Xi *
Dentons Rodyk & Davidson LLP

1. Introduction

In a globalised and inter-connected world where electronic transactions facilitate the flow of money instantly across borders, businesses and companies have an increased international presence with complex, corporate groups spanning across multiple countries and jurisdictions. As borders break down and nations pursue greater economic integration, even small and medium sized enterprises may transcend borders to have a footprint across multiple continents, countries and jurisdictions[1]. The ever-evolving multi-jurisdictional nature of businesses around the world has resulted in the pressing need to devote an increasingly substantial amount of time, expertise and coordination across jurisdictions to handle their insolvencies and restructuring processes.

1.1 The need for an efficient system in managing cross-border insolvencies

At its heart, the insolvency process is concerned with the orderly management of a failure of a corporate enterprise. In this regard, English, and by extension, Singaporean corporate insolvency law achieves this result via two central principles[2]:

- maintaining the orderly distribution of assets by controlling the priority of creditors; and

- safeguarding the assets by placing them in the hands of a court-appointed manager acting in the interests of the creditors at large followed by a distribution of the realised assets amongst the creditors by way of a statutory scheme of distribution.

It therefore follows that these principles, which apply on a domestic level, should be no less relevant in the context of a business undertaking spanning across multiple jurisdictions. The presence of several bankruptcy regimes potentially governing the same multinational / bankruptcy are counter-intuitive to the realisation of value and / or the corporate rescue of a viable business enterprise. The takeaway and the view of many prominent academics[3] is that the sale of a whole business intact realises more value than dismantling the business piecemeal across different jurisdictions. This realises more value for the creditors and results in a greater realisation of value in the bankruptcy. In Singapore, the courts have recognised both the desirability and practicality of having a universal collection and distribution of assets, and that a creditor should not be able to steal an unfair advantage or a march over the rest of the creditors located within a

* The views expressed in this paper are the views of the authors and not of INSOL International, London.
[1] Kannan Ramesh, Judicial Commissioner, Supreme Court of Singapore, *The cross-border project – a "dual-track" approach (2015)* – Speech delivered at the *INSOL International Group of 36* Meeting on 30 November 2015 at paragraph 4
[2] See Professor Roy Goode, *"Principles of Corporate Insolvency Law"* Sweet & Maxwell, 4th Edition (2011), at para 2-02
[3] *See* Associate Professor Wee Meng Seng, *"Lessons for the Development of Singapore's International Insolvency Law" (2011) 23 SAcLJ 932;* Hans Tjio & Wee Meng Seng, *"Cross-Border Insolvency and Transfers of Liquidation Estates from Ancillary Proceedings to the Principal Place of Bankruptcy"* (2008) 20 SAcLJ 35; Lord Leonard Hoffman, *"Cross-Border Insolvency: A British Perspective" (1996) 64 Fordham L. Rev. 2507*

jurisdiction of a court after a winding-up order has been made in another jurisdiction[4]. This broad statement of principle extends to other forms of insolvency proceedings, such as restructuring and rehabilitation processes[5].

The broad statement of principle above is often balanced against the need to take into account the interests of domestic creditors and stakeholders, who may be prejudiced by the imposition of an insolvency regime from a foreign jurisdiction which they may be unfamiliar with. Every jurisdiction will have their own insolvency laws and correspondingly, different rules regarding priority and bankruptcy. This is the product of local political, economic and social considerations[6]. These redistributive considerations are important factors in determining a society's choice for a certain bankruptcy regime, and because these considerations often diverge across jurisdictions, many jurisdictions choose the bankruptcy laws which are appropriate for their society[7]. Since each jurisdiction's bankruptcy regime often reflects their own value judgments on redistribution, this would explain a state's natural aversion to the application of foreign insolvency laws, and the preference for a jurisdiction to adopt the distributional outcome of its own bankruptcy laws.

Broadly speaking, these concerns are embodied in the two main legal regimes governing the administration of cross-border insolvencies around the world: territorialism and universalism.

1.1.1 Territorialism

At a fundamental level, territorialism is concerned with administering the assets of an insolvent company *in situ* by reference to local insolvency laws, placing little to no regard on the effect of foreign insolvency proceedings on the said company. The local or municipal court would divide and distribute the assets of the insolvent company to satisfy local creditors first. The remaining assets (if any) would then be remitted to the foreign liquidator for distribution amongst the foreign creditors. The net result of territorialism in a cross-border insolvency situation would be that local creditors get preferred and / or ranked ahead in terms of a distribution of assets to the detriment of foreign creditors. However, this may hinder the efficient administration of a cross-border insolvency, as demonstrated by two of the following case examples: *Felixstowe Dock & Railway Co v United States Lines Inc [1989] 1 QB 360* (*Felixstowe*) *and Re TPC Korea [2010] 2 SLR 617* (*Re TPC Korea*).

In *Felixstowe*, United States Line Inc. (USL), a company incorporated in the United States of America was registered as an overseas company under the English Companies Act. Following severe financial difficulties, USL petitioned the US Bankruptcy Court for reorganisation under Chapter 11 of the US Bankruptcy Code. Under the Chapter 11 reorganisation plan, USL would close down their English and European operations and concentrate their activities in North America. The United States Bankruptcy Court made a restraining order under the Chapter 11 plan restraining all claims against USL within and outside the United States. Felixstowe Dock & Railway C. (FDR) and another European trade creditor applied ex parte and obtained a mareva injunction restraining USL from removing the English assets out of the jurisdiction. USL then applied to set aside the

[4] *Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (deugro (Singapore) Pte Ltd, non-party) [2014] 2 SLR 815 ("Beluga Chartering")*
[5] *Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd) [2016] 5 SLR 787 ("Re Taisoo Suk")*
[6] See Sefa M. Franken, *Cross-Border Insolvency Law: A Comparative Institutional Analysis (2014) Oxford Journal of Legal Studies, Vol 34 No 1*
[7] Sefa M. Franken, *Cross-Border Insolvency Law: A Comparative Institutional Analysis (2014) Oxford Journal of Legal Studies, Vol 34 No 1* at 108 – 109

injunction so that the English assets could be remitted back to the US for its reorganisation. The basis of USL's application was that the English Court should recognise the US restraining order and allow the US Court to govern the reorganisation.

Hirst J dismissed USL's application. He noted that although a desire to concentrate the proceedings in the United States is fully understandable, this aspiration must and does yield to the exigencies of the local situation, including the prejudice suffered by the local creditors[8]. The decision by Hirst J has been widely criticised[9]. Lord Millet noted that:-

> *"The decision did great harm to the relations between the courts of the two countries, and seriously damage the esteem in which the UK courts had previously been held by insolvency practitioners and judges abroad. There was clearly a very difficult issue to resolve – the relative weight to be given to competing claims of the creditors outside the United States and the survival of the company and its business in the United States – but, with great respect to Hirst J, it was not for him to resolve. The English and European creditors had dealt with a US corporation (i.e. a corporation that was amenable to Chapter 11) and had to take the consequences. The creditors had a case because they were entirely excluded from the scope of the proposed reconstruction; but, in my view, it was a case which should have been presented to the New York court."*

Associate Professor Wee Meng Seng has noted that it is an example of how the confluence of a foreign bankruptcy regime and a real prejudice caused to local creditors caused Hirst J to reject a universalist approach[10].

Closer to home, a similar approach was taken in the case of *Re TPC Korea*[11]. A company incorporated in the Republic of Korea and in the business of shipping, trading and other related business applied for rehabilitation in Korea under proceedings analogous to Chapter 11 under the United States Bankruptcy Code. The company had no presence or assets in Singapore other than interests in five vessels which regularly plied the ports of Singapore. Further to the reorganisation plan, the company managed to obtain a preservation order, a stay order and a commencement order from the Korean courts. Under these orders, any existing proceedings against any ship owned by the company covered by the rehabilitation would automatically be stayed whereas new proceedings would be prohibited.

Thereafter, the company pre-emptively applied for an order of court to convene a meeting of its creditors in Singapore for the purpose of considering and approving the Korean Rehabilitation plan pursuant to section 210(10) of the Singapore Companies Act, and that pending the court approval of the scheme of arrangement or the Korean Rehabilitation Plan, all actions against the company's assets (including the five vessels) were to be restrained. The company was worried that if any of these vessels were arrested in Singapore, it would jeopardise the entire rehabilitation process.

---

[8] *Felixstowe [1989] QB 360* at 389 – In *Felixstowe*, the proposed reorganisation scheme would have severely prejudiced the European and English creditors since USL only intended to continue the business in the United States and would have given up its European business. Therefore, it would have been very likely that the American creditors would receive greater dividends in the reorganisation scheme than the plaintiffs in Felixstowe. Hirst J therefore made the finding that the plaintiffs would have had nothing to gain and much to lose were the *Mareva* injunction be discharged

[9] See Sir Peter Millet, "Cross-Border Insolvency: The Judicial Approach" (1997) 6 IIR 99 and Associate Professor Wee Meng Seng, "Lessons for the Development of Singapore's International Insolvency Law" (2011) 23 SAcLJ 932

[10] *Associate Professor Wee Meng Seng, "Lessons for the Development of Singapore's International Insolvency Law" (2011) 23 SAcLJ 932* at 957

[11] [2010] 2 SLR 617

The learned Judicial Commissioner Philip Pillai declined to grant the application. Although Philip Pillai JC acknowledged that the Singapore court order would be beneficial to or facilitate the rehabilitation process and would be something a Singapore court would be minded to support in the interests of comity, he rejected the application on the grounds that he had simply no jurisdiction to grant the said order. In this regard, he noted that the Singapore High Court has no jurisdiction to apply the scheme of arrangement provisions on a foreign corporation which has no assets in Singapore or not sufficient nexus or connection with Singapore[12].

In this author's view, the case of *Re TPC Korea* is a local example of where the Singapore Court adopted a narrow territorial approach to the administration of cross-border insolvency proceedings opened in multiple jurisdictions. Although Philip Pillai JC was alive to the fact that the Singaporean court order would facilitate the rehabilitation process of the company in Korea[13], he also noted that the primary concern of any insolvency proceedings of a foreign company in Singapore would be the protection of local creditors[14]. The reluctance of the Singapore Courts to assist foreign rehabilitation proceedings was noted in the 2016 Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring at paragraph 3.4 to 3.6, where the Committee recommended that rules should be promulgated setting out a list of factors the court will take into account in determining if they have jurisdiction over foreign corporate debtors[15]. In particular, the Committee noted that the Singapore Court may still determine that it has jurisdiction to act in a particular case even though the foreign corporate debtor has not satisfied any of the factors on the list.

1.1.2 Universalism

In contrast, universalism in transnational insolvencies states that it is in the interests of all creditors for a multinational bankruptcy to be handled by a single court in a foreign main proceeding, with the other foreign courts assisting in that single proceeding[16]. In such a scenario, all creditors of the multinational bankruptcy are dealt with collectively by one set of proceedings, which deal with all of the company's assets and creditors' claims together. Universalism therefore makes the administration of the cross-border insolvency proceedings more efficient, resulting in less inconsistent / conflicting orders and resulting in greater realisation of value for distribution to creditors in the insolvent estate. It preserves and enhances the value of the debtor's estate and lowers transaction costs[17] by enhancing predictability to creditors of the outcome of multinational insolvencies, leading to a more efficient management of the debtor's estate[18]. Unfortunately, as one prominent academic has noted, true universalism in the sense of a single international forum applying a single international insolvency law is at the very least, many years away, especially given other political considerations such as issues of national sovereignty[19].

---

[12] *Re TPC Korea [2010] 2 SLR 620 at [19]*
[13] *Re TPC Korea [2010] 2 SLR 620 at [6]*
[14] *Re TPC Korea [2010] 2 SLR 620* at [12]
[15] This proposal was eventually accepted and incorporated under *section 351(2A) of the Companies Act (CAP 50, 2006 Rev. Ed.)*
[16] See *Akers as a joint foreign representative of Saad Investments Company Limited (in Official Liquidation) v Deputy Commissioner of Taxation* [2014] FCAFC 57 at 112 and 114
[17] See Sefa M. Franken, *Cross-Border Insolvency Law: A Comparative Institutional Analysis (2014) Oxford Journal of Legal Studies, Vol 34 No 1* at page 111
[18] See also *Professor Andrew T. Guzman, "International Bankruptcy: In Defense of Universalism" (1999) 98 Mich. L. Rev. 2177*
[19] Associate Professor Wee Meng Seng, *"Lessons for the Development of Singapore's International Insolvency Law" (2011) 23 SAcLJ 932 at [13]*

In terms of managing a bankrupt estate, one commentator has observed[20] that "*it makes [more] sense to deal with the affairs of an insolvent group company as a whole rather than in bits and pieces, the principle being that the corporate enterprise is more valuable as a group rather than in fragments.*" Indeed, the effective maximisation and realisation of value of an insolvent enterprise is the fundamental bedrock of any insolvency process, whether that process takes place within a single jurisdiction or across multiple jurisdictions. Therefore, one of the primary concerns of any insolvency or re-organisation process would be maintaining the integrity / constituency of the insolvent estate[21]. Furthermore, the value of any insolvent business is greatly increased if it is sold as a going concern rather than broken up[22]. For example, in the case of the Nortel Networks Group of Companies[23] (the Nortel Group), the major creditors of the Nortel Group agreed to liquidate the group assets as a going concern on a consolidated basis rather than breaking them up and selling them piecemeal. As a result, the fast high-value sales of the assets produced about USD 7 billion worth of proceeds[24]; a much greater amount than had been expected.

It is now increasingly a widely accepted view that universalism as a principle is better for multi-national businesses than territorialism[25]. Universalism enhances the predictability of outcomes for lenders to multi-national businesses, thus lowering the transactional costs of lending and facilitating the provision of credit[26]. An eminent scholar in international insolvency law also propounded several benefits of universalism[27], including as follows:

- a more efficient allocation of capital, reduced administrative and transaction costs associated with the administration of the bankrupt's estate;
- a reduction in the number of insolvency proceedings across multiple jurisdictions;
- avoidance of forum shopping;
- facilitating the reorganisation of viable businesses;
- increasing the realised value of liquidation; and
- increasing clarity and certainty to all the stakeholders of a multi-national insolvency.

1.1.3 The Model Law and the concept of modified universalism

The Model Law has its roots in the theory of modified universalism[28]. The legal framework under the Model Law contemplates one main proceeding taking place where the debtor has its centre of main interests (COMI) with multiple parallel non-main proceedings in other jurisdictions distributing assets in accordance with its local laws before remitting any remaining assets back to the main proceeding[29]. Therefore, there is a centralisation of the

[20] Patrick Ang, Insolvency Practice Committee, Rajah & Tann LLP, *"Cross-Border Insolvency Issues in Asia*" (2012) Law Gazette Issue, June 2012
[21] See Hans Tjio & Wee Meng Seng, *"Cross-Border Insolvency and Transfers of Liquidation Estates from Ancillary Proceedings to the Principal Place of Bankruptcy"* (2008) 20 SAcLJ 35 at [1]
[22] Lord Leonard Hoffman, *"Cross-Border Insolvency: A British Perspective" (1996) 64 Fordham L. Rev. 2507*
[23] See *Re Nortel Networks Corp. [2015] ONSC 2987*; *Re Nortel Networks Corp. [2015] ONSC 2987* and *In Re Nortel Networks Inc., et al., Debtors 532 B.R. 494 (2015),* the Canadian and US decisions collectively referred to as *"Nortel"*
[24] See Professor Jay Lawrence Westbrook, "*Nortel: the cross-border insolvency case of the century" (2015) Buttersworth Journal of International Banking and Financial Law 498*
[25] See *Associate Professor Wee Meng Seng, "Lessons for the Development of Singapore's International Insolvency Law" (2011)*
[23] *SAcLJ 932* at page 939 and 940; See also Millet LJ's comments in *Credit Suisse Fides Trust v Cuoghi [1998] QB 818* at 827; *Singularis Holdings Ltd v PricewaterhouseCoopers [2014] 2 WLR 971* at [23]; *Rubin and another v Eurofinance SA and others [2013] 1 AC 236; Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation) [2014] 2 SLR 815* at [81] and [99]
[26] See Sefa M. Franken, *Cross-Border Insolvency Law: A Comparative Institutional Analysis***,** supra Note 7 at page 111
[27] See *Professor Andrew T. Guzman, "International Bankruptcy: In Defense of Universalism" (1999) 98 Mich. L. Rev. 2177*
[28] See *Marcela Ouatu, "Modified Universalism for Cross-Border Insolvencies: Does it work in practice?" (2014)*; see also *Andrew J. Berends, UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview, (1998) 6 Tul. J. Int'L & Comp L. 309; Akshaya Kamalnath "Cross-Border Insolvency Protocols: A Success Story?" (2013) IJLSR Volume 2 172*
[29] See Model Law Guide at para 30 to 32

administration of the cross-border insolvency process, which brings about the efficiency, fairness and predictability associated with universalism.

However, the Model Law also provides a framework of procedural insolvency law which takes into account the differences in the substantive insolvency law of each signatory state[30]. It also safeguards the interests of local creditors. The Model Law does not attempt to reach a substantive uniformity in insolvency laws, but instead fashions a framework for cooperation between jurisdictions in order to reach the efficient and orderly administration of an insolvent debtor's estate across multiple jurisdictions.

The beauty of the Model Law is that it provides a flexible, workable framework in managing a cross-border insolvency that also takes into account the domestic political, social and economic factors of different countries. By limiting its scope to some procedural aspects of cross-border insolvencies, it leaves the local substantive aspects of the insolvency laws untouched[31], and gives the courts a substantial discretion to shape the law. The Model Law therefore attempts to combine the benefits of universalism with those of territorialism and melds them into a system that achieves the best of both worlds.

One fine example of the efficacy of the Model Law approach is embodied in the cross-border insolvency of the Nortel. As a result of the early cooperation and coordination between the various parties as well as the US and Canadian courts, the Nortel Group was able to develop a framework to liquidate its main lines of business and other assets on a collective level. The framework developed by the parties enabled the Nortel Group to "carve-out" each line of business as a bundle of assets, rights and obligations that would have to be conveyed in a sale to enable for the business to be sold on a "stand-alone" basis. By the end of June 2011, the sale of the main lines of business as well as Nortel Group's significant intellectual property portfolio allowed the Nortel Group to realise approximately US$ 7.3 billion in proceeds available for distribution among the creditors[32]. These breakthroughs were made possible via the procedural framework for cooperation and coordination between jurisdictions laid down by the Model Law.

Another example would be the case of *Re Blue Ocean Resources Pte Ltd, OS No. 55 of 2013.* The Committee to Strengthen Singapore as an International Centre for Debt Restructuring cited the case as a scheme of arrangement that was approved in the

[30] See Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (2013) (the "Model Law Guide"); see also the preamble of the Model Law, which states that:-

"*The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of –*

(a) Cooperation between courts and other competent authorities of Singapore and foreign States involved in cases of cross-border insolvency;

(b) Greater legal certainty for trade and investment;

(c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(d) Protection and maximisation of the value of the debtor's property; and

(e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment."

[31] See the Model Law Guide at para 3 and 20

[32] See Professor Jay Lawrence Westbrook, "*Nortel: the cross-border insolvency case of the century" (2015) Buttersworth Journal of International Banking and Financial Law 498*

Singapore High Court which was later recognised under Chapter 15 of the US Bankruptcy Code.

1.1.4 Adoption of the Model Law in Singapore

The Model Law has been adopted by 45 jurisdictions around the world[33]. On 23 May 2017, as part of a suite of amendments to the Companies Act (CAP 50, 2006 Rev. Ed.) (the Companies Act) and as part of a bid to transform itself into a hub for cross-border and transnational insolvencies, Singapore adopted the Model Law (see sections 354A, 354B, 354C and the XIV Schedule of the Companies Act). The Model Law represents an explicit decree to the Singapore courts to cooperate with and assist foreign jurisdictions in the administration of foreign insolvency proceedings. It gives a foreign liquidator, referred to as the foreign representative, a direct right of audience before a Singapore court[34] to seek assistance with insolvency proceedings in its home country by commencing an ancillary liquidation process in Singapore[35]. Upon the commencement of such ancillary proceedings, the Singapore court is empowered to, amongst other things:

(a) stay all executions against the debtor's property[36];
(b) entrust the administration or realisation of the entire debtor's property in Singapore to the foreign representative[37], including turning over the assets to the foreign representative's home country; and
(c) grant any relief to the foreign representative as though he / she were a liquidator appointed in Singapore[38].

Procedurally, this allows a foreign representative a wide range of powers that were previously limited in scope under the common law. In this regard, the Model Law Approach was most recently[39] applied in the Singapore High Court decision of *Re Zetta Jet Pte Ltd and others [2018] SGHC 16* (Zetta Jet). In *Zetta Jet*, some shareholders of Zetta Jet Singapore commenced proceedings against the company in Singapore for commencing chapter 11 proceedings in alleged breach of a shareholder's agreement. The High Court granted a Singapore Injunction to restrain Zetta Jet from taking any further steps in and relating to the bankruptcy filings in the US Bankruptcy Court. Subsequent to the issuance of the Singapore Injunction, bankruptcy proceedings in the US continued *in breach of the Singapore Injunction* and the Chapter 11 proceedings were converted into Chapter 7 proceedings. The Chapter 7 Trustee was later appointed and was given leave by the US Bankruptcy Court to commence recognition proceedings in Singapore. Whilst the High Court of Singapore denied the Chapter 7 Trustee general recognition under the Model Law, Aedit Abdullah J, in a show of international comity[40], exercised his discretion to grant the Chapter 7 Trustee very limited recognition for the purposes of setting aside, appealing or varying the Singapore Injunction[41]. The decision therefore showcases the flexibility of the Model Law approach in administering cross-border insolvency proceedings and is a welcome addition to Singapore cross-border insolvency law.

---

[33] See *Status – UNCITRAL Model Law on Cross-Border Insolvency (1997), <www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html>*
[34] Article 9 of the Model Law
[35] Article 11, Article 15 and Article 17 of the Model Law
[36] Article 21(a), (b) and (c) (see also Article 19 for the provision of interim relief)
[37] Article 21(e)
[38] Article 21(g)
[39] 24 January 2018
[40] *Zetta Jet* at [34]
[41] *Zetta Jet* at [36]

Lastly, the adoption of the Model Law was also followed by an abolition of the ring-fencing provision under section 377 of the Companies Act[42], marking an express intention by the legislature of Singapore to adopt the universalist approach in the management of cross-border insolvencies.

1.2 Limitations to the Model Law approach

Solely relying on the Model Law to manage cross-border insolvency in Singapore, however, is neither practical nor effective. As at the date of writing of this paper, only 44 States in a total of 46 jurisdictions have adopted the Model Law[43]. Furthermore, most of the jurisdictions in South-east Asia have not adopted the Model Law and do not have an equivalent legal framework to recognise foreign insolvencies and restructurings. The management of cross-border insolvency will require the assistance of local authorities from multiple fora. It seems, therefore, that many other jurisdictions around the world may not have a sufficient legal framework in place to deal with cooperation and coordination in the context of cross-border or international insolvency matters[44]. Despite the apparent benefits of the Model Law approach, many jurisdictions are still reluctant to implement the same into their national laws.

As some commentators[45] have pointed out, the Model Law approach has had only limited success in Asia, citing reasons such as a general reluctance to apply foreign insolvency laws to the prejudice of local creditors or a "*need to preserve the sovereignty of a country[46]"* by dealing with the assets of an insolvent debtor in accordance with its own redistributive concerns.

Furthermore, it appears that most of the emerging economies in Asia seem to have adopted a "wait and see" approach in respect of adopting the Model Law[47], as policymakers want to observe the impact of the Model Law on other advanced jurisdictions before making a move to adopt the same. This has also resulted in deadlock amongst the Asian countries because each jurisdiction is waiting for the other to make the first move to adopt the Model Law.

Therefore, amongst the non-Model Law countries, there are few formal avenues for recourse when parties face problems in administering cross-border insolvency proceedings. This problem may be especially prevalent in Asia, where most local cross-border insolvency laws are often inadequate to deal with the administration of multinational corporate bankruptcies[48].

As one local prominent author has put it[49], parties to a cross-border insolvency without a legal framework for cooperation and coordination in place *"currently rely on rational thinking and goodwill to generate co-operation and the establishment of protocols to*

[42] Save in respect of certain classes of creditors in specific industries such as banking and insurance
[43] See *Status – UNCITRAL Model Law on Cross-Border Insolvency (1997), <www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html>*
[44] In this regard, the Committee had cited, for example, that any restructuring approved by the Singapore courts may not be recognised and enforced in the foreign jurisdiction, rendering the debtor's assets vulnerable to expropriation by local creditors
[45] See Patrick Ang, Insolvency Practice Committee, Rajah & Tann LLP, *"Cross-Border Insolvency Issues in Asia*" (2012) Law Gazette Issue, June 2012; See also *S Chandra Mohan*, *"Cross-Border Insolvency Problems: Is the UNCITRAL Model Law the Answer?"* (2012) International Insolvency Review 21 (3), 199 – 223 at page 19 to 21
[46] *S Chandra Mohan*, *"Cross-Border Insolvency Problems: Is the UNCITRAL Model Law the Answer?"* (2012) International Insolvency Review 21 (3), 199 – 223 at page 19
[47] See Patrick Ang, Insolvency Practice Committee, Rajah & Tann LLP, *"Cross-Border Insolvency Issues in Asia*" (2012) Law Gazette Issue, June 2012
[48] Patrick Ang, Insolvency Practice Committee, Rajah & Tann LLP, *"Cross-Border Insolvency Issues in Asia*" (2012) Law Gazette Issue, June 2012
[49] See Patrick Ang, Insolvency Practice Committee, Rajah & Tann LLP, *"Cross-Border Insolvency Issues in Asia*" (2012) Law Gazette Issue, June 2012 at page 1

resolve issues across borders." Therefore, the outcome of such cross-border insolvencies will largely depend on whether relevant stakeholders are able to set aside their differences to communicate and work with one another in managing the insolvent estate efficiently.

The recent decision of *Pacific Andes Resources Development Ltd [2016] SGHC 219* (*Pacific Andes*) decided prior to Singapore's adoption of the Model Law demonstrates the importance of a predictable and systematic legal framework to manage cross-border insolvencies in non-Model Law jurisdictions.

Pacific Andes Resource Development Ltd (Pacific Andes Resources) is the Bermudian parent company of China Fishery Group. Its shares were listed on the Singapore stock exchange and it had in addition issued some SGD 200 million dollars' worth of bonds locally in 2014. On 30 June 2016, the China Fishery Group commenced restructuring proceedings in Peru and filed for Chapter 11 in the United States Bankruptcy Courts. Pacific Andes and a number of its subsidiaries (collectively, the Pacific Andes Group) then commenced restructuring proceedings in Singapore on 1 July 2016. The Pacific Andes Group had three main lines of business, of which two were commercially significant: the production of fishmeal and fish oil (the Peruvian Business) and the supply of frozen fish and related products (the Frozen Fish Business).

The Pacific Andes Group sought a moratorium on proceedings in Singapore or overseas against the Pacific Andes Group under section 210(10) and section 210(11) of the Companies Act[50]. The primary purpose of the application was to buy the Pacific Andes Group time to enact a group-wide restructuring plan that would encompass both the Peruvian proceedings and the Chapter 11 proceedings in the United States.

The Singapore High Court only granted a moratorium on proceedings against Pacific Andes Resources. It refused to grant a moratorium in respect of (1) proceedings against the subsidiaries of Pacific Andes Resources and (2) proceedings against the Pacific Andes Group outside of Singapore. Ramesh JC held that the court had no jurisdiction under section 210 of the Companies Act or its inherent jurisdiction to restrain the creditors of the Pacific Andes Group from commencing proceedings outside of Singapore, due to the territorial nature of the section. He further held that the subsidiaries of Pacific Andes Resources had insufficient nexus to Singapore to seek relief under section 210(10) of the Companies Act.

Unsurprisingly, after Ramesh JC handed down his decision on 27 September 2016, creditors of the Pacific Andes Group commenced winding up proceedings against the beleaguered group in Bermuda and the BVI. The Pacific Andes Group had therefore no choice but to withdraw the Singaporean scheme and file for Chapter 11 in the US, together with an accompanying application for a worldwide stay of proceedings[51].

---

[50] Section 210(10) and 210(11) of the Companies Act read as follows:-
Power of Court to restrain proceedings
210(10) – Where no order has been made or resolution passed for the winding up of a company and any such compromise or arrangement has been proposed between the company and its creditors or any class of such creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or of any member, creditor or holder of units of shares of the company restrain further proceedings in any action or proceeding against the company except by leave of the Court and subject to such terms as the Court imposes.
210(11) – (11) In this section — "arrangement" includes a reorganisation of the share capital of a company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both these methods;
"company" means any corporation liable to be wound up under this Act;
"holder of units of shares" does not include a person who holds units of shares only beneficially.

[51] See *"Pacific Andes files in US as Singapore court puts end to global moratorium"* at <www.globalrestructuringreview.com> 30 September 2016

Ultimately, the *Pacific Andes* decision is not just illustrative of the need for communication and cooperation, but also the presence of a predictable and coherent common framework across jurisdictions to formulate the group restructuring plan. Had the Guidelines between the relevant courts been in place at the relevant time, the parties may have conducted themselves differently in organising parallel restructuring schemes before seeking the court's sanction of the same. Moreover, given the availability of communication, cooperation and coordination between courts as facilitated by the Guidelines, the Singapore court may have done more to assist the parties in obtaining the necessary orders for the subsidiaries of Pacific Andes Resources.

This has led one commentator to regard *Pacific Andes* as "*a missed opportunity for the use of a protocol for court-to-court communication and cooperation*".[52] In this regard, Kannan Ramesh JC had noted that the formulation of a group restructuring plan involved many moving parts, and required the involvement of multiple jurisdictions[53]. He suggested that given the moratorium was territorial, the proposition of a parallel scheme in the COMI of the subsidiaries may have been the appropriate solution in this case[54]. In closing, Kannan Ramesh JC noted that the case was "*illustrative of the need for communication and cooperation between courts and the insolvency administrators of the respective insolvency proceedings in the formulation of what is effectively a group restructuring plan".*

In this regard, another commentator, Mannan has proposed utilising cross-border insolvency communication protocols on an ad-hoc basis to deal with cross-border insolvency proceedings as they arise. The advantage to this approach would be the flexibility and adaptability afforded to parties in developing solutions to any difficulties that arise out of cross-border insolvency proceedings which could be better tailored to fit individual circumstances [55]. It is perhaps this approach that may be a better approach to managing cross-border insolvency proceedings given the limitations of the Model Law.

2. The Judicial Insolvency Network

The adoption of the Model Law by Singapore on 23 May 2017 as well as a suite of amendments to the Companies Act represented an active step by the legislature in pushing Singapore toward becoming an international hub for debt-restructuring and insolvency. However, the wheels had been set in motion many months before. Shortly after the decision in *Pacific Andes* was handed down in late September 2016, 11 insolvency judges from 8 different territories convened in Singapore for the inaugural Judicial Insolvency Network (the "JIN") Conference on 10 and 11 October 2016[56]. The Supreme Court of Singapore announced that the establishment of the JIN was to encourage inter-court communications and cooperation between courts from various jurisdictions in respect of cross-border insolvencies. Since then, participants of the JIN have included the Judges of the National Commercial Courts of Bueno Aires, Argentina,

[52] *See Zeslene Mao, "Heralding Protocols for Court-to-Court Communication and Cooperation in Cross-Border Insolvency Matters in Singapore" (21 November 2016)*.
[53] *Pacific Andes* at [72]
[54] *Pacific Andes* at [52]
[55] Morshed Mannan, *"The Prospects and Challenges of Adopting the UNCITRAL Model Law on Cross-Border Insolvency in South Asia (Bangladesh, India and Pakistan)"* (2015) Thesis LLM – Leiden University, Leiden Law School at page 92
[56] *Supreme Court of Singapore Press Releases, "Judicial Insolvency Network Initiated by the Supreme Court of Singapore" 6 October 2016; participating insolvency judges from the following jurisdictions were present at the conference:* Australia (Federal Court and New South Wales), the British Virgin Islands, Canada (Ontario), the Cayman Islands, England & Wales, Hong Kong SAR and the United States (Delaware and Southern District of New York). Judges from Bermuda, South Korea and Japan were not present at the conference, but their judiciaries requested to be kept informed on the discussions and outcome of the conference (*See Zeslene Mao, "Heralding Protocols for Court-to-Court Communication and Cooperation in Cross-Border Insolvency Matters in Singapore" (21 November 2016)*.

the Sao Paulo State Court of Justice and the First Bankruptcy Court of Sao Paulo, Brazil[57], the Tokyo District Court and the Seoul Bankruptcy Court[58]. Not all of these jurisdictions have adopted the Model Law into their legislation[59]. The JIN is now comprised of judges from the following countries[60]:-

Australia (Federal Court of Australia and the Supreme Court of New South Wales)	Argentina (Buenos Aires, National Commercial Courts) *(Non-Model Law Jurisdiction)*	Bermuda (Supreme Court of Bermuda)	Brazil (Sao Paulo State Court of Justice) *(Non-Model Law Jurisdiction)*
British Virgin Islands (Supreme Court of the Virgin Islands)	Cayman Islands (Financial Services Division of the Cayman Islands Grand Court) *(Non-Model Law Jurisdiction)*	Canada (Ontario Superior Court of Justice (Commercial List))	England and Wales (The Business and Property Courts of England and Wales)
Hong Kong (High Court of Hong Kong Special Administrative Region) (as Observers) *(Non-Model Law Jurisdiction)*	Japan (Tokyo District Court) (as Observers)	Republic of Korea (Seoul Bankruptcy Court) (as Observers)	Singapore (Supreme Court of Singapore)
United States of America (US Bankruptcy Courts for the District of Delaware; the Southern District of New York; and the Southern District of Florida)			

With insolvency judges from key commercial jurisdictions in North America, Latin America, the Caribbean, Europe, Australia and Asia, participation of these jurisdictions in the JIN demonstrates that an increasing number of jurisdictions are actively taking an interest in improving their cross-border insolvency laws.

[57] *Supreme Court of Singapore Press Releases, "Argentina and Brazil – Latest to join the Judicial Insolvency Network"* 18 September 2017

[58] *Supreme Court of Singapore Press Releases, "Japan and South Korea Joins the Judicial Insolvency Network as Observers" 7 February 2018*

[59] See *Status, UNCITRAL Model Law on Cross-Border Insolvency (1997) at <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html>* updated as at 17 November 2017

[60] As of 22 May 2018

Development of the JIN nicely dovetails with the increasing focus and attention paid by various stakeholders to Singapore's cross-border insolvency laws[61]. As Associate Professor Wee Meng Seng pointed out in 2011[62], Singapore's international insolvency laws were underdeveloped and out of line with international developments. At the INSOL International Group of 36 Meeting in Singapore on 30 November 2015, the learned Judicial Commissioner (as he then was) Kannan Ramesh spoke of a dual-track approach in harmonising cross-border insolvency laws where the judiciary would lead one track whereas the legislature would work towards the other[63]. He notes that the courts are ultimately where the substantive insolvency laws of any jurisdiction are put into practice[64]. He makes the further point that where there is a system in place by which national courts communicate and cooperate with one another to handle cross-border insolvency, it would lead to a convergence on how such cross-border insolvencies are dealt with on a functional level. Over time, Ramesh J believes that convergence on a functional level would lead to a greater convergence of substantive insolvency laws across national boundaries.

The JIN is a network of insolvency judges around the world which aims to encourage communication and cooperation amongst national courts around the world as a means of managing cross-border restructuring and insolvency cases by way of formal and informal approaches. Informally, the JIN aims to facilitate the sharing and pooling together of insolvency knowledge, best practices and information in order to foster a spirit of court-to-court communication and cooperation between judges around the world, which has become increasingly critical in today's globalised economy[65].

The establishment of the JIN will encourage communication amongst signatory national courts by providing them with a platform to share their views, exchange information and ideas. By creating a community composed of specialist insolvency judges from jurisdictions all around the world, best practices can be identified, developed and adopted and the JIN may also discuss new cross-border insolvency initiatives to be developed and implemented. This will also create awareness among the judges regarding the interests of the stakeholders in insolvency proceedings regardless of their nationality and hopefully persuade them to place those interests above issues of national sovereignty. In addition to improving the insolvency profession as a whole, the regular communication and interaction between judges within the JIN can also enable these judges to leverage on their relationships to expedite matters and issues that come before them.

The end goal is a greater *formal* convergence of national insolvency laws to facilitate international trade and commerce. By providing a platform for sustained engagement and continuous communication between specialist insolvency judges across jurisdictions, the judges have a resource to share ideas and experiences with one another and develop best practices in dealing with insolvency cases and issues. Finally, a platform for networking and communication would also give judges around the world greater insight and understanding into the peculiarities in the national laws of a particular jurisdiction and allow them to make more informed decisions and judgments should the opportunity arise.

[61] *Supreme Court of Singapore Press Releases, "Judicial Insolvency Network Initiated by the Supreme Court of Singapore" 6 October 2016*
[62] Associate Professor Wee Meng Seng, *"Lessons for the Development of Singapore's International Insolvency Law" (2011) 23 SAcLJ 932* at [2]
[63] See Kannan Ramesh, Judicial Commissioner, Supreme Court of Singapore, *The cross-border project – a "dual-track" approach (2015)* – Speech delivered at the *INSOL International Group of 36* Meeting on 30 November 2015 at page 4
[64] Kannan Ramesh, Judicial Commissioner, Supreme Court of Singapore, *The cross-border project – a "dual-track" approach (2015)* – Speech delivered at the *INSOL International Group of 36* Meeting on 30 November 2015 at para 9 where the learned author so eloquently states: "*The judiciary is where, to put it metaphorically, the rubber meets the road."*
[65] *Supreme Court of Singapore Press Releases, "Judicial Insolvency Network Initiated by the Supreme Court of Singapore" 6 October 2016*

However, the JIN alone is insufficient because the judges still lack a means to deal directly with one another in order to administer a cross-border insolvency proceeding.

3. Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters

At the first ever JIN Conference in October 2016, the fashioning of a common set of guidelines for the communication and collaboration between courts in cross-border restructuring and insolvency cases was the first item on the agenda. A set of draft guidelines were also circulated amongst the attendees for their consideration, addressing various key aspects including court-to-court communication and cooperation as well as providing for joint hearings. Judges at the conference also discussed other interesting issues, including the recognition and enforcement of foreign insolvency judgments and the use of alternative tools for dispute resolution including mediation and arbitration in the context of cross-border insolvency. Further to the maiden conference of the JIN in October 2016, the Supreme Court of Singapore and the United States Bankruptcy Court for the District of Delaware formally implemented the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters on 1 February 2017[66]. In a helpful infographic released simultaneously with the Guidelines, the Supreme Court of Singapore identified four benefits of the use of the Guidelines in cross-border insolvency cases as follows:-

i) Providing a roadmap on how courts may communicate with each other;
ii) Avoiding or minimising the costs of litigation;
iii) Efficient and effective coordination between courts for the interests of all stakeholders; and
iv) Facilitating cooperation between the different courts without the relinquishment by the courts of their independence and impartiality.

The Guidelines are unique because they were the first set of court-to-court communication insolvency protocols that were developed solely by insolvency judges. They are intended to reflect a harmonisation of procedure in the way insolvency cases are handled across jurisdictions, and do not deal with substantive issues such as ranking and priority. By coordinating and harmonising the procedural aspects of the case across jurisdictions in a clear and transparent manner, the Guidelines ensure that relevant stakeholders will be able to obtain the necessary court orders to quickly repatriate and consolidate assets, realise the maximum sale value of the businesses and coordinate the distribution of assets amongst the general pool of unsecured creditors. The Guidelines therefore facilitate an international understanding amongst adopting jurisdictions that a fair and predictable regime, which favours and promotes international trade and commerce, will be applied in the event of a multi-jurisdictional insolvency.

As of the date of writing, seven courts within the JIN have adopted the Guidelines, comprising of the following:-

- Supreme Court of Singapore
- Chancery Division of the High Court of England & Wales
- United States Bankruptcy Court for the District of Delaware
- United States Bankruptcy Court for the Southern District of New York;
- United States Bankruptcy Court for the Southern District of Florida;

[66] *Supreme Court of Singapore Press Releases, "Paving the Way for Improved Coordination of Cross-Border Insolvency Proceedings: Adoption of the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters" 1 February 2017*

- The Supreme Court of New South Wales, Australia; and
- the Supreme Court of Bermuda.

3.1 Substantive exposition of the Guidelines

3.1.1 Principles for cooperation

The Guidelines begin with a short exposition on the overarching objectives of the guidelines.

> *"The overarching objectives of these Guidelines is to improve in the interests of all stakeholders the efficiency and effectiveness of cross-border insolvency proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction (*"Parallel Proceedings"*) by enhancing coordination and cooperation amongst courts under whose supervision such proceedings are being conducted. These Guidelines represent best practice for dealing with Parallel Proceedings."*

It should be noted that the Guidelines prescribe that it should be the first port of call where a court which has adopted the Guidelines faces Parallel Proceedings[67].

It is pertinent to note that the Guidelines do not actually state whether a court, in administering Parallel Proceedings should take into account principles of universalism or territorialism. Rather, the court should consider the interests of all stakeholders involved, giving the court a flexibility to favour the interests of local creditors over foreign creditors. It is acknowledged that this flexibility in approach should enhance its receptiveness across all jurisdictions, regardless of whether their local laws favour adopting a territorial approach to cross-border insolvencies or not.

The Guidelines then set out the aims at paragraph C of the Preamble, which include the efficient and timely coordination and administration of Parallel Proceedings, the preservation and maximisation of value of the debtor's estate and the minimisation of litigation and inconvenience to the parties in Parallel Proceedings. The latter may be a veiled reference to the *Felixstowe* decision or the *Nortel Networks* litigation, where almost US$1.3 billion was spent on legal fees involved[68] in the international allocation litigation of the assets of *Nortel*.

Following the preamble, the Guidelines then (interestingly) set out the principles and safeguards to be applied in implementing and interpreting their practical application. Under Guideline 2, implementation of the Guidelines requires a judge hearing the matter to endorse the Guidelines (in whole or in part with or without modifications) and affirmatively adopt it by way of a court order. Guideline 4 in particular, sets out certain boundaries which the court cannot cross in applying the Guidelines. The gist of Guideline 4 is that the substantive and practical application of the Guidelines is left largely to the local laws of the adopting court's resident jurisdiction. However, Guideline 4 is strangely silent on the principles of judicial independence, a feature which is present in the General Principles for Judicial Communications under the Hague Network of Judges[69].

The next portion of the Guidelines deals with facilitating communication between courts in parallel proceedings and the appearance in court by foreign parties to the parallel proceedings. Several points may be drawn from these sections. Firstly, the traditional

[67] See Guideline B of the Guidelines
[68] See Professor Jay Lawrence Westbrook, "*Nortel: the cross-border insolvency case of the century" (2015) Buttersworth Journal of International Banking and Financial Law 498*
[69] See Principle No. 6.2 and 6.3 under the *General Principles for Judicial Communications within the context of the Hague Convention of 25 October 1980 on the Civil Aspects of Child Abduction*

means by which courts seek the cooperation of courts in other jurisdictions would be by way of letters rogatory. These letters usually take time, it may sometimes take at least a week before the court of one jurisdiction formally makes a request for assistance from a court in another jurisdiction. This sort of delay is often unacceptable in the context of insolvency, where the administrator / liquidator must act quickly to save the value of a business which would otherwise trickle away with *"every hour of uncertainty*[70]". Pursuant to the Guidelines, the court may agree to allow parties to appear by electronic means, or to transmit or deliver information by electronic means, leveraging on modern technology to allow parties to obtain the necessary orders as quickly as possible. Secondly, Guideline 8 prescribes a minimum level of decorum which parties must satisfy in order to preserve the integrity of the court process. These due process safeguards are necessary to protect the rights of parties who may be prejudiced by adverse court orders. Lastly, a court may authorise a party to appear before the court and make submissions without submitting to the jurisdiction of the court. This encourages a party to cooperate across jurisdictions that have adopted the Guidelines, since it reduces its exposure to being dragged into unwanted legal proceedings.

The last section deals with consequential and / or savings provisions, which are frequently found in statutory common law provisions. These savings provisions allow the court to make the necessary orders in the appropriate situation having regard to the circumstances and facts before them.

One of the most important features of the Guidelines are the provisions relating to joint hearings with other adopting courts in order to facilitate the expeditious resolution of issues that may arise from time to time in the insolvency proceedings. Annex A of the Guidelines allows for an adopting court to conduct joint hearings with a foreign jurisdiction for the purposes of managing a cross-border insolvency dispute. A perusal of Annex A shows that it draws heavy inspiration from Guideline 10 of the EU Insolvency Protocol and Guideline 9 of the ALI Insolvency Guidelines. Therefore, it is clear that the provision for joint hearings amongst different courts is a common theme among court-to-court protocols and the JIN chose not to reinvent the wheel in drafting Annex A.

3.1.2 Evaluation of the Guidelines

The Guidelines should be seen as one means to an end. At one level, the key aim of the Guidelines is to encourage communication and comity between national courts which handle parallel insolvency proceedings in order to harmonise proceedings, expedite matters, achieve a better realisation of value for all stakeholders in the cross-border insolvency of a company and avoid contradictory or conflicting court orders across multiple courts. This will enable the courts to have a more complete picture of the proceedings across the multiple courts, and allow them to make more informed judicial determinations of the issues at hand[71]. However, on another level, one instantly notices that the Guidelines are the means by which the aims of the JIN are to be implemented on a *functional* level.

[70] To borrow the words of Lord Hoffman, *supra* note 6 at page 2515
[71] Kannan Ramesh, Judicial Commissioner, Supreme Court of Singapore, *The cross-border project – a "dual-track" approach (2015)* – Speech delivered at the *INSOL International Group of 36* Meeting on 30 November 2015 at paragraph 19

4. The way forward

4.1 Managing cross-border insolvency proceedings with court-to-court communication protocols

Jurisdictions are completely capable of using only court-to-court communication protocols to deal with cross-border insolvency matters. Cooperation in cross-border insolvency matters before the proliferation of the Model Law was not unheard of. One of the very first examples of cross-border insolvency cooperation was the insolvency of Maxwell Communication Corporation (MCC) in 1991.

When Robert Maxwell disappeared from his yacht in 1991, his publishing empire followed with him. Robert Maxwell's multinational printing and media company, MCC, was a British listed company and one of the ten largest media groups in the world at the time. However, its principal assets were primarily in the form of American subsidiaries such as Macmillan Publishing Inc, Official Airlines Guide Inc and Berlitz International Inc. The American assets were estimated to be worth between US$700 million to US$1 billion at the time[72]. The insolvency of MCC involved two primary insolvency proceedings in the United Kingdom and the United States of America. MCC had first petitioned for an administration order in England, and Hoffman J who heard the case in the High Court of Justice in London appointed the MCC's major bank creditors' nominees, PriceWaterhouseCoopers (PWC) as administrators of the MCC estate. Unhappy with the result, MCC's management immediately went to New York to petition for Chapter 11 proceedings and invited the US Bankruptcy Judge to appoint an Examiner[73]. MCC had hoped that this would block the attempts by the English administrators to take control of the American assets. In a show of comity and judicial restraint, US Bankruptcy Judge Brozman decided to appoint an Examiner, as a neutral, to engage with the UK administrators and jointly manage the MCC estate. The English administrators then negotiated an overarching agreement with the Examiner, called the *Maxwell Protocol*, which laid down general guidelines and principles for managing the concurrent US and English proceedings in order to maximise value of the MCC estate, avoid delay, expense and any jurisdictional conflicts between the two courts[74]. Both US and UK courts immediately approved the Maxwell Protocol, and the MCC estate was able to reach a plan of reorganisation and scheme of arrangement within 16 months[75].

It is clear that countries are more than capable of cooperating in the administration of cross-border insolvencies using solely court to court protocols. They allow for multiple national courts to handle concurrent insolvency proceedings via the application of their own domestic insolvency laws. However, the lessons from *Re Felixstowe Dock, Re TPC Korea* and *Pacific Andes* tell us that such cooperation should not be taken for granted. The parties and courts still need a predictable legal framework in order to deal with cross-border insolvencies.

4.2 Predictable framework for cooperation and communication

Amongst the countries that have adopted them, the Guidelines will lay down a consistent and predictable framework of communication and cooperation that the relevant stakeholders may use in handling cross-border insolvency proceedings.

[72] See *Barclays Bank plc v Homan and others [1993] BCLC 680* at page 683
[73] See Lord Leonard Hoffman, *"Cross-Border Insolvency: A British Perspective" (1996) 64 Fordham L. Rev. 2507* at page 2514
[74] Lord Leonard Hoffman, *"Cross-Border Insolvency: A British Perspective" (1996) 64 Fordham L. Rev. 2507*at page 2515
[75] See *Akshaya Kamalnath "Cross-Border Insolvency Protocols: A Success Story?" (2013) IJLSR Volume 2 172* at page 183

Entry into the Guidelines by the adopting jurisdictions already evinces the intention to cooperate. Therefore, communication and cooperation across the different jurisdictions that have adopted the Guidelines will no longer be on an ad-hoc basis; the parties would be able to plan their restructurings ahead of time and go to multiple courts with an assurance that the multiple courts would communicate and cooperate with one another to implement the pre-packaged restructuring plan. In this regard, the Singapore Courts are already actively applying the Guidelines in the administration of cross-border insolvency proceedings. The High Court of Singapore, had, in the restructuring of Ezra Holdings Limited, recently endorsed a Cross-Border Insolvency Protocol which adopted the Guidelines by reference on 12 March 2018. The Ezra Holdings Limited restructuring involved parallel insolvency proceedings in Singapore and the United States, with a Chapter 11 Restructuring Plan filed in the United States and a parallel scheme of arrangement application before the Singapore Courts. In that case, Kannan Ramesh J approved a Cross-Border Insolvency Protocol which involved the wholesale incorporation of the Guidelines without modification in order to facilitate communication and cooperation with his counterpart in the US bankruptcy proceedings.

The advantages of using protocols such as the Guidelines to deal with cross-border insolvency proceedings are numerous. It allows the courts and parties to avoid dealing with conflicts of law issues by directly proceeding to deal with the conduct of insolvency proceedings, minimising the costs of proceedings. As noted in the *Nortel* example above, protocols allow the courts and the parties to coordinate the insolvency of large transnational business entities by ensuring that large corporate groups are dealt with as a whole, as opposed to being disposed of as individual, disparate subsidiaries and entities, thereby maximising value and increasing efficiency.

More importantly, through the use of coordination and communication across jurisdictions as facilitated by the Guidelines, the courts are able to apply and / or develop local substantive laws to tailor the appropriate response to any issues arising out of the cross-border insolvency. The Guidelines therefore allow a body of substantive law which, on the one hand, pays homage to principles of universalism, comity and reciprocity in the context of cross-border insolvency, but also takes into account local factors, considerations and circumstances on the other, to develop organically within the adopting jurisdictions. The JIN may also supplement the development of such a body of law within jurisdictions that have adopted the Guidelines, by facilitating the flow of information and ideas amongst the judiciary and allowing them to create coherent and robust principles of law. The organic development of a domestic body of cross-border insolvency law would also help to overcome one of the main challenges many countries face in adopting the Model Law: the general reluctance of a state to apply the distributional outcomes of foreign insolvency laws within its own borders[76].

As noted above, since most Asian countries currently lag behind commercial and practical realities in terms of their cross-border insolvency laws, the JIN and the Guidelines currently present some unique challenges and opportunities for growth and development in Asia.

4.3 JIN and the Guidelines in Asia: some challenges and opportunities

Many Asian countries do not have a framework for managing transnational insolvencies[77]. Moving forward, the challenge ahead may be to convince other countries of the benefits

[76] See Sefa M. Franken, *Cross-Border Insolvency Law: A Comparative Institutional Analysis (2014) Oxford Journal of Legal Studies, Vol 34 No 1* at page 109

[77] Patrick Ang, Insolvency Practice Committee, Rajah & Tann LLP, *"Cross-Border Insolvency Issues in Asia*" (2012) Law Gazette Issue, June 2012 at page 1 & 2

of and to persuade them to join the JIN. Given the amount of commitment and legislative approval required for adoption of the Model Law, the use of an informal network or collection of judges may be a more palatable alternative for countries that wish to develop their insolvency laws. In this regard, the JIN presents a unique opportunity for Singapore, as the only ASEAN member of the JIN, to leverage on its pivotal role in the regional bloc to convince other the judiciaries of other South-east Asian countries to become party to the JIN. As the benefits of being party to the JIN become more evident and the JIN slowly grows in membership, it may become easier to convince member nations of the JIN to adopt the Guidelines[78]. In times to come, this may possibly lead to a formal convergence of insolvency laws and possible adoption of the Model Law amongst member nations.

4.3.1 Adopting a cooperative approach

The use of the JIN and the Guidelines may encourage different national courts to adapt their national insolvency laws in order to give effect to cross-border insolvency principles of universalism. At present, there is deadlock amongst Asian countries because each jurisdiction is waiting for the other to make the first move to adopt the Model Law[79]. This issue is similar to Westbrook's "Prisoner's Dilemma" to collective action within the context of cross-border insolvencies[80]. The usual solution to a deadlock and / or prisoner's dilemma problem would be to adopt a cooperative approach. Yet there is always a risk that adopting a cooperative approach will result in a net transfer of wealth to other countries who adopt a territorial approach to insolvency. Some jurisdictions may actively prefer the interests of local creditors at the expense of international creditors as a result of socio-political and economic choices, resulting in a territorial insolvency regime. This may be a conscious decision by the particular society to adopt such an insolvency regime, taking into account socio-political and economic circumstances. However, as argued above, nations need to move away from a territorial frame of mind in dealing with cross-border insolvency issues toward a more universalist regime.

The JIN may indirectly assist states in overcoming this Prisoner's Dilemma by promoting universalism, removing barriers and encouraging a culture of communication and transparency between the judiciary in the recognition and enforcement of multi-jurisdictional insolvency proceedings. As Kannan Ramesh J pointed out in his speech in 2015[81], the judiciary is where "*the rubber meets the road.*" By joining the JIN, the judiciary of the participating states evince a firm commitment to communicate and cooperate with one another in transnational insolvency situations, achieving "*cooperation and convergence on a functional level*[82]". This may also help overcome the deadlock problem identified in Patrick Ang's article above[83].

---

[78] *Kannan Ramesh, Judicial Commissioner, Supreme Court of Singapore, Speech delivered at the International Association of Insolvency Regulators 2016 Annual Conference and General Meeting in Singapore* on 6 September 2016 at page 19

[79] Patrick Ang, Insolvency Practice Committee, Rajah & Tann LLP, *"Cross-Border Insolvency Issues in Asia*" (2012) Law Gazette Issue, June 2012

[80] For example, in any given case of a Cross-Border Insolvency commenced in State A, State B will have to make a choice whether to cooperate or not. If the creditors in State B may realise significantly more value from the Cross-Border Insolvency than in State A, it may not be in the interests of State B's creditors to cooperate. Consequently, if the game is only played once, State B will have no incentive to cooperate since State B realises its maximum gains from territoriality. However, game theory demonstrates that if the game is repeated enough times, the net benefits to State B of multiple-cooperative plays may be greater than the one-off benefits of defection in a single game. Consequently, since the benefits of cooperation over time outweigh the benefits of a one-off defection, strategically-behaving states should opt for cooperation in anticipation of future benefits.

[81] See Kannan Ramesh, Judicial Commissioner, Supreme Court of Singapore, *The cross-border project – a "dual-track" approach (2015)* – Speech delivered at the *INSOL International Group of 36* Meeting on 30 November 2015

[82] Kannan Ramesh, Judicial Commissioner, Supreme Court of Singapore, *The cross-border project – a "dual-track" approach (2015)* – Speech delivered at the *INSOL International Group of 36* Meeting on 30 November 2015 at page 4

[83] Patrick Ang, Insolvency Practice Committee, Rajah & Tann LLP, *"Cross-Border Insolvency Issues in Asia*" (2012) Law Gazette Issue, June 2012

4.3.2 *Reinforcing universalism*

The JIN may also help reinforce universalism in cross-border insolvencies as a prevailing norm. The means by which this is achieved is via "*critical-mass reciprocity*"; a term coined by Westbrook[84] to define an extent of multilateral cooperation that is sufficient to convince each cooperating state that enough states have joined in reciprocal relationships to ensure the obtaining of the benefits expected to flow from a particular sort of cooperation. Since there is a firm commitment toward communication, cooperation and reciprocity (via the JIN), the network of participating jurisdictions would be more inclined to cooperate in cases where deference would result in a deficit, thus allaying fears of excessive free-riding amongst member nations.

4.3.3 *Facilitating the flow and exchange of ideas*

Given the increasingly complex and complicated nature of cross-border insolvency proceedings, not all judges may be equipped or trained to deal with such issues as they arise, especially in the emerging economies of Asia. The JIN may alleviate this problem by facilitating the flow and exchange of ideas, as well as providing guidance in dealing with common issues that have arisen in the past. The training and guidance provided by the JIN may allow for the development of a body or corpus of soft law instruments applying similar principles of cross-border insolvency law. This may gradually lead to a convergence in judicial philosophies and harmonisation of legal principles amongst member nations of the JIN[85].

4.3.4 *Convergence of national insolvency laws*

The eventual convergence of judicial philosophies (via the JIN) and the promulgation of universalist insolvency principles (through use of the Guidelines) would work in tandem to encourage universalist outcomes in transnational insolvencies managed by member nations. Over time, the consistent application of universalist rules in transnational insolvencies would result in a substantive convergence of national insolvency laws in the long-run.

4.3.5 *Springboard for the Model Law*

Lastly, Mannen has also observed that the use of ad-hoc protocols such as the Guidelines may serve as an excellent "confidence-building" measure for states to eventually adopt and enact the Model Law[86]. Participation in the JIN and the use of the Guidelines may also serve as an excellent springboard for further proliferation of the Model Law amongst member nations. As illustrated by the insolvency of *Nortel*, the formal adoption of the Model Law coupled with soft law tools such as the use of court-to-court protocols (like the Guidelines) will enable Model Law jurisdictions to manage transnational insolvencies smoothly and efficiently in order to maximise value for all stakeholders involved. The JIN, as a platform to "*share experiences, exchange ideas, identify areas for judicial cooperation and develop best practices*[87]*"* may then be used as an excellent springboard for judges from non-Model Law jurisdictions around the globe to learn from the experiences of other Model Law jurisdictions like Singapore. Over time, these

[84] See Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum (1991) 65 Am. Bankr. L.J. 457*
[85] *Kannan Ramesh, Judicial Commissioner, Supreme Court of Singapore, Speech delivered at the International Association of Insolvency Regulators 2016 Annual Conference and General Meeting in Singapore* on 6 September 2016 at page 22
[86] Morshed Mannan, *"The Prospects and Challenges of Adopting the UNCITRAL Model Law on Cross-Border Insolvency in South Asia (Bangladesh, India and Pakistan)"* (2015) Thesis LLM – Leiden University, Leiden Law School at page 92
[87] See *Supreme Court of Singapore Media Releases* dated 11 October 2016

jurisdictions may eventually be convinced of the benefits of the Model Law and adopt the same. Given that Argentina, Brazil and the Cayman Islands are party to the JIN but have not adopted the Model Law, their participation in the JIN presents an excellent opportunity for these jurisdictions to examine the Model Law and put this notion to the test.

5. Conclusion

The advent of globalisation and the increasing multi-jurisdictional nature of businesses around the world have resulted in the need to dedicate a substantial amount of time, expertise and coordination across jurisdictions to handle the insolvency and restructuring of such businesses. In this regard, two new tools have been recently developed by Singapore's judiciary to manage transnational insolvencies; the JIN and the Guidelines.

This paper has proposed that the Model Law approach may not be the only answer to cross-border insolvency problems, since the proliferation of the Guidelines complemented by the JIN may serve as a viable alternative to the Model Law in administering cross-border insolvencies. As these measures are relatively new (with the JIN being relatively novel in the insolvency sphere), the results of the proliferation of the Guidelines (complemented by the JIN) as compared to the tried and tested Model Law approach in dealing with cross-border insolvencies remains to be seen. Given the general reluctance of many jurisdictions to adopt the Model Law, this may be a viable half-way house that may serve to bridge the gap between Model Law and non-Model Law countries and is a step in the right direction.

Given that this paper has proposed that the JIN and Guidelines may eventually lead to a further proliferation of the Model Law, perhaps the solution to solving cross-border insolvency issues will entail the adoption of the Model Law and complementing the same with the JIN and the Guidelines. With all these tools working in tandem, the relevant stakeholders would then have all available options to properly manage multinational restructurings and insolvencies effectively. Given the mix of Model Law and non-Model Law jurisdictions within the JIN, only time will tell us the eventuality of such an outcome.

INSOL International
GROUP THIRTY-SIX

AlixPartners LLP
Allen & Overy LLP
Alvarez & Marsal
Baker McKenzie
BDO
Brown Rudnick LLP
BTG Global Advisory
Clayton Utz
Cleary Gottlieb Steen & Hamilton
Clifford Chance LLP
Conyers Dill & Pearman
Davis Polk & Wardwell LLP
De Brauw Blackstone Westbroek
Deloitte LLP
Dentons
DLA Piper
EY
Ferrier Hodgson
Freshfields Bruckhaus Deringer LLP
FTI Consulting
Goodmans LLP
Grant Thornton
Greenberg Traurig LLP
Hogan Lovells
Huron Consulting Group
Jones Day
King & Wood Mallesons
Kirkland & Ellis LLP
KPMG LLP
Linklaters LLP
Morgan Lewis & Bockius LLP
Norton Rose Fulbright
Pepper Hamilton LLP
Pinheiro Neto Advogados
PPB Advisory
PwC
Rajah & Tann Asia
RBS
RSM
Shearman & Sterling LLP
Skadden, Arps, Slate, Meagher & Flom LLP
South Square
Weil, Gotshal & Manges LLP
White & Case LLP