The Case for Cooperation and Communication in Cross-Border Insolvency Proceedings[1]

Bengaluru, India

Introduction

1 The Honourable Shri Ramalingam Sudhakar, President, National Company Law Tribunal, Mr Chandru K Iyer, Deputy High Commissioner for Britain, Mr Ravi Mittal, Chairperson, the Insolvency and Bankruptcy Board of India, Professor Rikshikesha Krishnan, Director, Indian Institute of Management Bangalore, Distinguished Chairs, ladies and gentlemen, a very good afternoon. I am privileged to be invited to address you this afternoon at the 2nd International Research Conference on Insolvency and Bankruptcy organised jointly by the Insolvency and Bankruptcy Board of India and the Indian Institute of Management Bangalore. It is indeed a great honour. I start by acknowledging the wisdom of the organisers in curating an excellent selection of topics, which is both topical and prescient. It speaks to growing voice and thought leadership of India in this space.

2 In *McGrath v Riddell*,[2] Lord Hoffmann said that modified universalism "has been the golden thread running through English cross-border insolvency law since the eighteenth century".[3] For many years therefore, the central tenet of the jurisprudence and legislative instruments on cross-border insolvency has been comity and modified universalism.[4] In this period, the world has changed

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1 2nd International Research Conference on Insolvency and Bankruptcy.

2 *McGrath and others v Riddell and others* [2008] All ER (D) 116 (Apr) ("*McGrath*").

3 *McGrath* at [30].

4 See also the UK Privy Council's landmark decision in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, which marked a watershed in the approach of the English-based common law to international comity in cross-border insolvency. The Privy Council in that case

immensely, straining our commitment to this cause. But we must stay true to this path, and indeed must safeguard it, as it offers us the best opportunity for realising effective solutions in a cross-border failure. This afternoon, to underscore our commitment to this cause, I shall advance the case that cooperation and communication between courts is, and indeed must be, a critical and integral dimension of cross-border insolvency.

3 Why is it so important for courts to cooperate and communicate? The question is best answered by the opening words JIN Guidelines, the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters issued by Judicial Insolvency Network[5] (the "JIN"):

> "The overarching objective of these Guidelines is to improve *in the interests of all stakeholders* the efficiency and effectiveness of cross-border proceedings …. by enhancing coordination and cooperation amongst courts under whose supervision such proceedings are being conducted." [emphasis added]

4 To understand the importance of the message in these words, we must first appreciate the contemporary challenges faced in resolving cross-border failures.

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recognised that there should be a single insolvency proceeding under the common law, be it domestic or foreign, and that therefore a foreign insolvency representative must be extended recognition and assistance by the court.

5 The Judicial Insolvency Network is "a network of insolvency judges from across the world with the aim of providing judicial thought leadership, developing best practices and facilitating communication and cooperation amongst national courts in cross-border insolvency and restructuring matters". See https://www.supremecourt.gov.sg/news/media-releases/judges-of-the-worldwide-judicial-insolvency-network-to-meet-in-new-york-city-this-september (accessed 22 February 2023).

The problem faced in modern cross-border insolvency

5 I begin by situating the context in which modern commerce operates. The paradigm is an interconnected, common market with relatively unrestricted flow of goods and services, and capital and labour. As businesses grow in scale and sophistication, and reach across jurisdictions in the pursuit of economic opportunities, corporate failures will inevitably involve stakeholders in multiple jurisdictions. The sudden and stunning collapse of FTX, the world's then second-largest cryptocurrency exchange, and its 130 affiliated entities, is a prime example. Millions of investors worldwide, many retail and some institutional including sovereign wealth funds, were impacted, as a result occupying courts, regulators and other government authorities from Australia to the Bahamas and the United States. Difficult questions of asset tracing, valuation of crypto assets, and the location of class action proceedings arose. This is just one illustration of the complexities of a cross-border failure of a debtor with subsidiaries, operations, assets and creditors located across multiple jurisdictions.

6 It is apparent that the absence of a coordinated and holistic response in such circumstances encourages a race to the bottom with a mad scramble for assets, and the concomitant erosion of enterprise and asset value. This is inimical to the collective interest of all stakeholders. Indeed, it undermines the *raison d'etre* of an insolvency process and poses a serious challenge to the efforts of courts and insolvency practitioners to marshal the assets of the debtor, coordinate the insolvency for the benefit of creditors, and find the best solutions to the debtor's economic malaise.[6]

7 These problems exist to a significant extent because of the constraints of territoriality. A State's jurisdiction is, generally speaking, limited by its

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[6] Dr Wolf-Georg Ringe, "Insolvency Forum Shopping, Revisited" in *Recasting the Insolvency Regulation* (TMC Asser Press, 2020) (Vesna Lazić and Steven Stuij eds) ch 1, at para 16-03. See also UNCITRAL, "Legislative Guide on Insolvency Law, Part Three: Treatment of enterprise groups in insolvency" (2012) at p 86.

national borders. The limit of territoriality is fertile ground for fragmentation, inconsistency in outcomes, and jurisdictional arbitrage, unless courts are prepared to cooperate and communicate.

8 The thorny issue of fragmentation is not new nor unique to cross-border insolvency. It is an evolving issue in the recognition and enforcement of international arbitration awards as exemplified by the different outcomes that the French and English courts have reached regarding the validity of an arbitration agreement and its consequent impact on the enforceability of the arbitral award.[7] This is a state of affairs that is undesirable as the very purpose of the New York Convention and the Model Law on International Commercial Arbitration is to facilitate consistent enforcement outcomes of international arbitral awards in signatory states to the Convention. This same issue may in fact present itself in the context of the recognition of foreign insolvency proceedings under the Model Law on Cross-Border Insolvency (the "Model Law"). There may be differing outcomes on recognition and relief in various courts in which recognition is sought, which is antithetical to the very purpose of the Model Law.

9 To address the issue in the context of international commercial arbitration, Chief Justice Sundaresh Menon has argued[8] for the application of the doctrine of transnational issue estoppel extending concepts of *res judicata* and issue estoppel to the transnational arena. This would have the preclusive effect of preventing parties from relitigating an issue that has been decided by

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7 The differences between the English and French approaches in deciding the law applicable to the arbitration agreement have caused significant disharmony in international arbitration. In the most recent *Kabab-ji v Kout Food Group* dispute, both the English and French courts came to opposite views regarding the governing law of the arbitration agreement and hence the conclusion as to whether Kout Food Group was a party to the arbitration agreement. A similar issue also arose in the *Dallah v Pakistan* case, where the English and French courts reached diametrically opposing conclusions regarding the validity of the arbitration agreement.

8 See Sundaresh Menon, "The Role of the National Courts of the Seat in International Arbitration" (2018) *The International Construction Law Review* 265.

another court in prior enforcement proceedings.[9] I suggest that there is no reason why the same doctrine ought not to apply in cross-border insolvency in relation to recognition applications. However, to facilitate the application of the doctrine, in either scenario, there must be cooperation and communication between the relevant courts, including the sharing of information.

10 The picture I have sketched speaks to the importance of cooperation and communication between courts. If the starting point for the orderly resolution of a cross-border insolvency is the initiation of court-to-court communication and cooperation, this would enable courts to collaborate and coordinate proceedings. Debtors would then be able to strategically employ their limited resources to safeguard value and coordinate the insolvency process. I return to the JIN Guidelines to drive my point home. Guideline 1 captures the essence of the argument I make for cooperation and communication. It states:

> "… courts should encourage administrators in Parallel Proceedings to cooperate in *all aspects of the case*, including the necessity of notifying the courts at the earliest opportunity of *issues present and potential* that may (a) affect those proceedings; and (b) benefit from communication and coordination between the courts. …" [emphasis added]

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9 See the Singapore Court of Appeal's decision in *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102. In that case, the Court of Appeal had the occasion to consider the question of whether and how transnational issue estoppel (*ie*, issue estoppel which arises from a prior foreign decision) should apply, and whether different considerations would arise as compared to a case of domestic issue estoppel (*ie*, issue estoppel which arises from a prior local decision). In answering the first question in the affirmative, the Court of Appeal accepted that the doctrine of issue estoppel applies to a prior foreign judgment as it does to a prior domestic judgment. In respect of the second question, the Court of Appeal observed that the scope and principles applicable to domestic judgments had to be modified when foreign judgments were involved as other considerations, including transnational comity, had to be taken on board.

11 A good example of this, which preceded the JIN Guidelines, is the *Maxwell Communications Corporation* proceedings in 1991, in which parallel insolvency proceedings in the United States and England were successfully co-ordinated through a court-approved protocol providing for mechanisms to resolve conflicts and facilitate the exchange of information.[10] Another excellent example is the Lehman Protocol that was endorsed by Judge James Peck of the Southern District of New York in the much talked about and dissected collapse of Lehman Brothers.[11]

12 This brings me to my next point – the obligation to cooperate and communicate.

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[10] See UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009) at pp 128–129. Another notable example is the *Nortel Networks* case involving Nortel's concurrent insolvency proceedings in North America and Canada. Both the US Bankruptcy Court for the District of Delaware and the Ontario Court of Justice adopted a Protocol to facilitate coordination and cooperation in the conduct of Nortel's insolvency proceedings and culminated in a joint electronic trial using video link.

[11] The Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies was created to minimize costs and maximize recoveries for all parties involved in the Lehman Brothers collapse, and to manage all individual cases effectively with consistent results. The aims of the Lehman Protocol focuses on (1) coordination, (2) communication, (3) information and data sharing, (4) asset preservation, (5) claims reconciliation, (6) maximization of recoveries, and (7) comity. These objectives are met by addressing the following elements in coordinating the Lehman Brothers bankruptcy: (1) Notice, (2) Rights of Official Representatives and Creditors to Appear, (3) Communication and Access to Data and Information Among Official Representatives, (4) Communication Among Tribunals, (5) Communication Among Committees, (6) Asset Preservation, and (7) Claims. For a more in-depth commentary on the Lehman Protocol, see Jamie Altman, "A Test Case in International Bankruptcy Protocols: The Lehman Brothers Insolvency" (2011) 12(2) *San Diego International Law Journal* 463.

The obligation to cooperate and communicate in cross-border insolvency

13 The obligation to cooperate and communicate is a central tenet of the model instruments on cross-border insolvency promulgated by UNCITRAL. I illustrate with reference to two such instruments.

14 First, the Model Law. The objective of the Model Law is to provide effective mechanisms for dealing with cross-border insolvencies in order to promote various objectives. It is significant that cooperation between courts is the very first objective in paragraph (a) of the preamble to the Model Law, which in turn facilitates the further objective of the fair and efficient administration of a debtor's insolvency in order to maximise benefits for creditors. Thus, Article 25 mandates cooperation and communication between foreign court and receiving court "to the maximum extent possible".[12] Article 27 is also pertinent. It provides a list of the types of cooperation that are permissible under the Model Law, one of which involves the "[a]pproval or implementation … of agreements concerning the coordination of proceedings".[13]

15 Second, the more recent Model Law on Enterprise Groups (the "MLG") which is tailored for needs of a group enterprise insolvency,[14] substantially mirrors the Model Law in its prescription of cooperation and communication.[15] Indeed, cooperation and communication assume even greater significance in the

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[12] Article 25(1) of the UNCITRAL Model Law on Cross-Border Insolvency ("Model Law").

[13] Article 27(d) of the Model Law.

[14] Model Law on Enterprise Group Insolvency with a Guide to Enactment ("MLG Guide") at para 3.

[15] Articles 9, 10 and 12 of the MLG. These Articles prescribe cooperation and coordination between courts and insolvency representatives of different group members, and mandate that they share information and participate in discussions to resolve outstanding issues or potential conflicts.

MLG, as the centrepiece of the instrument is the "planning proceeding", which seeks to centralise the conversation on the development of the group restructuring plan in one setting by inviting or seeking the participation of the group members integral to the plan in the planning proceeding.[16]

16 It is therefore evident that the central element in these instruments is the obligation to communicate and cooperate, in order to manage concurrent cross-border insolvency proceedings to facilitate effective and efficient outcomes. However, the obligation to communicate and cooperate need to find live only through codification in instruments. I submit that courts must see it as a free-standing responsibility that they must embrace as part of their adjudicatory duties in a cross-border insolvency. That is an adjunct of comity and modified universalism.

17 Having addressed the obligation, I turn to the question of the modalities for cooperation and communication. What are the tools to facilitate cooperation and communication? This is my next point.

Tools to facilitate cooperation and communication

18 It is necessary for a workable structure to be in place to facilitate cooperation and communication. The JIN Guidelines and the JIN Modalities of Court-to-Court Communication ("JIN Modalities")[17] offer such a workable structure. While the JIN Guidelines prescribes guidelines for administering court-to-court communication amongst supervising courts, the JIN Modalities focuses on prescribing the mechanics for initiating, receiving and engaging in such communication.

19 The JIN Guidelines and the JIN Modalities were the result of the efforts of the JIN. The JIN was an initiative born out of an inaugural conference in

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[16] Dr Irit Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press, 2018) at p 233.

[17] Modalities of Court-to-Court Communication ("JIN Modalities").

Singapore in October 2016 where judges from key insolvency courts met and agreed to collaborate to provide thought leadership on cross-border insolvency matters. This was ground-breaking because this was the first occasion when insolvency judges came together to offer guidance to the insolvency community on how cross-border insolvency proceedings ought to be best managed. This was judges recognising the criticality of cooperation and communication.

20 The JIN Guidelines and the JIN Modalities have been warmly received by courts the world over. It has been adopted by 16 courts in 11 jurisdictions in the Americas, Asia and Europe.[18]

21 I should add that soft law instruments such as memorandums of understanding between relevant courts can also function as powerful tools in fostering court-to-court communication and cooperation. For example, the Supreme Court of Singapore has entered into Memoranda of Understanding with the United States Bankruptcy Court for the Southern District of New York and the District of Delaware aimed at improving the efficiency and effectiveness of insolvency proceedings involving both courts by encouraging cooperation.[19]

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[18] At the time of writing, the JIN Guidelines and JIN Modalities have been adopted by courts in Australia (Federal Court of Australia, New South Wales); Bermuda; Brazil, Canada (Ontario, British Columbia); Cayman Islands; Eastern Caribbean; England and Wales; Singapore; South Korea (Seoul); The Netherlands (Midden-Nederland); and the US (Delaware, Southern District of Florida, Southern District of Texas, and Southern District of New York Bankruptcy Courts).

[19] The Memorandum of Understanding notes that both the Singapore and United States courts have adopted cross-border insolvency laws based on the Model Law and the JIN Guidelines, and that the relationship between the Courts is an important element in enhancing the efficiency and effectiveness of cross-border insolvency procedures. Through the Memorandum of Understanding, both courts have agreed to implement cooperation based upon principles of mutual understanding and respect.

The benefits of cooperation

22 I turn to my final point – and that is the benefits that accrue if there is court-to-court cooperation and communication.

23 First, the wider use of alternative dispute resolution. Much has been said about the benefits of mediation as a tool for facilitating the resolution of intra-estate issues and inter-estate issues across borders. Mediation undoubtedly promotes compromise, saves time, minimizes costs and yields more favourable consensual outcomes. I say without reservation that court-to-court communication and cooperation will enhance the effectiveness of insolvency mediation in a cross-border setting. In coordinating insolvency proceedings, the relevant courts may work together or even direct parties, if this is permissible, to enter into protocols for the mediation of intra- or inter-estate disputes. This, in turn, provides (to quote Judge James Peck) "a negotiation shock absorber to increase the odds that stakeholders will figure out that a resolution is in their mutual interest", thereby promoting a settlement to the benefit of the parties and the court.[20] Indeed, a similar approach can be taken to the use of arbitration to resolve intra- or inter-estate issues in a cross-border insolvency. This is an idea I have advanced in other settings. This is a subject for another day.

24 Second, active court-to-court communication can minimise the risk of fragmentation caused by the opening of multiple parallel proceedings. An example would be the synthetic secondary proceeding codified in Article 28 of the MLG.[21] I have spoken on the benefits of the synthetic secondary proceeding

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[20] The Hon. James M Peck, "Plan Mediation as an Effective Restructuring Tool" (1 April 2019) Speech given at the Singapore Academy of Law <https://www.sal.org.sg/sites/default/files/PDF%20Files/Speeches/Plan%20Mediation%20as%20an%20Effective%20Restructuring%20Tool.pdf?ver=2019-04-23-134607-833> (accessed 21 February 2023).

[21] Prior to that, this solution was already in Article 36 of the EIR.

at the GRR conference in New York in 2018.[22] In brief, this innovative procedural tool, first introduced some 16 years ago in *Collins & Aikman*,[23] involves moving the resolution of issues in freshly opened or putative secondary proceedings to the main proceeding on the undertaking given to the court in the putative secondary proceedings that its laws would apply to the resolution of those issues, thereby obviating the need to open parallel proceedings. This procedural innovation strikes a delicate balance between safeguarding the interests and expectations of foreign creditors on the one hand, while paving the way for a coordinated, focused and cohesive restructuring plan through the centralisation of key issues in one forum on the other.[24] But the effectiveness of this tool, in my view, can only be fully capitalised when combined with effective court-to-court communication mechanisms. Court-to-court communication is necessary to allow the main and ancillary courts to assist each other to transfer issues in the ancillary proceedings to the main proceeding.

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22 "Synthesising Synthetics: Lessons learnt from *Collins & Aikman*", keynote address at the 2nd Annual GRR Live New York (26 September 2018).

23 *Re Collins & Aikman Europe SA and other companies* [2006] EWHC 1343 (Ch) ("Re Collins & Aikman").

24 John A E Pottow, "A New Role for Secondary Proceedings in International Bankruptcies" (2011) 46 TILJ 579 at 585. In *Re Collins & Aikman*, several foreign creditors threatened to open secondary proceedings in Spain as Spanish law would guarantee these creditors more favorable treatment than under English insolvency law. These creditors refrained from doing so upon receiving assurances from the administrators that their claims would be dealt with in accordance with the relevant foreign insolvency law of their debts, thus safeguarding any favourable rights they might be able to assert but without the need for any actual secondary proceedings to be opened. The administrators then sought provisional approval from the English High Court to distribute the assets in accordance with the assurances they had given the foreign creditors. The English High Court directed the administrators to honour their assurances to apply local insolvency laws to the claims of those creditors in the English administration proceedings. The practical benefits of doing so was to enable the realization of $45m more from the liquidation of the company's assets than initially estimated.

25 It is therefore evident that court-to-court communication opens up a wide array of benefits for a smoother conduct of cross-border insolvency proceedings.

Conclusion

26 I conclude by expressing the hope that I have made good on the thesis I have advanced this afternoon. The enterprise of cross-border insolvency rests on the bedrock of cooperation and communication between courts. Indeed, I suggest that there is no other viable alternative, short of a Convention. The successful implementation and coordination of cross-border insolvency proceedings rest in-between, on the one hand, a universalist view of insolvency and the pursuit of a consolidated forum for resolving all insolvency law issues on the one hand, and, on the other, the territorialist view focusing solely on domestic interests at the expense of the interests of *all* creditors. The central lodestar that guides the effective facilitation of cross-border insolvency must be founded on principles of modified universalism and the goal of securing cooperation between domestic courts, in "so far as is consistent with justice and [local] public policy".[25]

27 On that note, I wish everyone a fruitful and productive conference. Thank you very much for giving me the privilege.

Justice Kannan Ramesh
Judge of the Appellate Division
Supreme Court of Singapore
23 February 2023

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[25] *McGrath* at [30].