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THE worst might be over, but the long-term issues are not.

As the economic crisis affects all and sundry, not just lawyers, we've approached this issue's theme from arenas beyond the law. In the line-up, we hear from a Cabinet Minister, the auditors, the economist, as well as the mature and budding lawyers.

The economic crisis has undoubtedly cast its net of destruction far and wide. As the devastation takes a toll on our livelihoods, we can't step back and examine it objectively with forceps and tweezers. Hence, it comes as no surprise that some personal views have been expressed within whether satirically or stoically. We all deal with challenges differently.

The common thread is the search for answers, and invariably everyone looks to governments worldwide for macro solutions to help lift us out of the doldrums. Some say that, though the problem arose from the West, perhaps the solution lies in the East. Others have pointed to the success of the Chinese economic model, and have gone so far as to term it an alternative to America's.

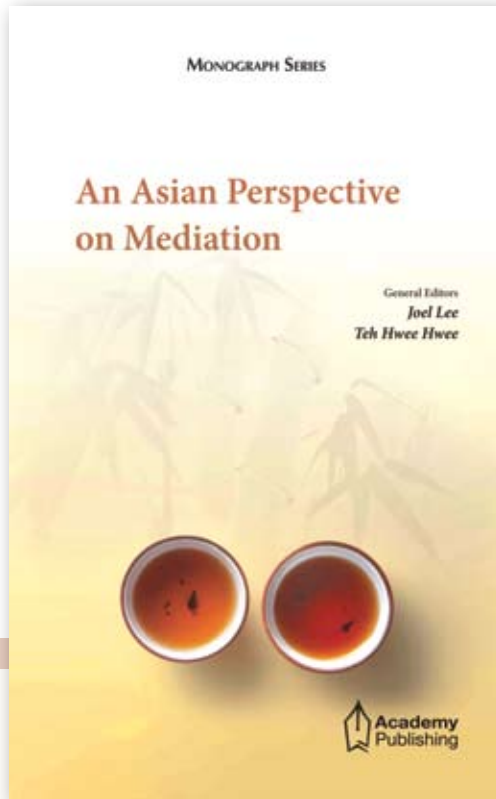
So what are China's main attributes of success? Goal-oriented, leading role by the Government; effective mix of socialism with capitalism; strong roles for public institutions backing the private sector moves towards liberalisation; social stability (requisite for economic growth); and strong Asian core values. Dare we claim some similarities in our own economic model?

The proverbial search for the Holy Grail continues amidst the volatilities of the economy and troubles of the day: seizing new growth areas; attracting talent; creating high-value jobs; cultivating knowledge, human and moral capital; maximising resources; and keeping an open-door policy. These features apply not just to governments, but to organisations.

Equally, for our survival, the Academy has to develop, in the hopes of nurturing a few green shoots of our own.

Warm regards,

Serene Wee



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"The Asian perspective on mediation, contained in this book, provides a nuanced approach to dispute resolution by preserving aspects of Western models that transcend culture and are universally valid, while modifying other aspects which require modification to suit Asian circumstances ... This book is a significant contribution to the field of dispute resolution, and I recommend it to mediators, dispute resolution practitioners and service providers, policy makers and anyone concerned with and interested in conflict management and peacemaking in this part of the world."

— **Professor Tommy Koh**

HIGHLIGHTS:

- (a) offers a framework for thinking, analysing and managing various cultural issues at play in dispute situations;
- (b) contains recommendations of concrete strategies for using the interests-based model, including the 7-Element Framework in the interests-based model of conflict resolution, in the Asian context;
- (c) presents practical approaches and strategies, including a "do's and don'ts" list for each stage of a mediation;
- (d) affords useful examples and illustrations, including sample opening statements for mediators; and
- (e) provides chapter summary tables at the end of chapters 2, 3 and 4 for quick pointers.

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LIFE GOES ON ... ALBEIT WITH TREPIDATION

PART 2 OF INTERVIEWS WITH
SINGAPORE LAW FIRMS.

IN the July 2008 issue, *Inter Se* approached a few prominent local law firms for their views on the changes to the legal landscape brought about by the proposed liberalisation of the legal sector. A year on, we approach these same firms to see how they are grappling with another shake-up to the legal sector: the financial crisis.



How has the downturn in the economy affected your firm? What areas of practice are particularly affected – positively or negatively?

Drew & Napier LLC: Like every other sector, the legal industry has not been spared. But the effect of the downturn varies depending on the core practice area(s) of the individual firm. For now, the impact appears to be largely in the corporate and property segments of legal practice. There has however been significant increase in dispute resolution as well as in insolvency and restructuring.

Rajah & Tann LLP: The current economic downturn clearly has an impact on law firms in Singapore and Rajah & Tann LLP is no exception. Whilst there is an inevitable slow-down within Rajah & Tann LLP in the areas of corporate finance and banking, we have also observed a significant increase in the demand for legal assistance in complex corporate insolvency and restructuring, and particularly in litigation and arbitration cases.

Our lawyers who focus on compliance/regulatory work – particularly for public companies, financial institutions, securities houses and insurers – are also finding themselves busy in these times.

Rodyk & Davidson LLP: Naturally, like everyone else, we feel the change in the economic climate. Fortunately for us, many of our clients are still busy doing business, which means we are keeping our teams busy as well. While some real estate projects (like collective sales) or corporate M&A projects have either been put on hold or are under review, most other projects have stayed on track, including large investment and construction projects. We are also busy with litigation-related advisory as well as court work, and corporate governance and restructuring work.

How is your firm mitigating the negative effects of the financial crisis? What qualities do local law firms have that put them at an advantage or disadvantage in these times?

D&N: The ability to re-allocate resources is a law firm's greatest strength. With increased activity in dispute resolution, insolvency and restructuring, resource re-allocation has helped to keep everyone busy.

In the meantime, because there is very little visibility, all firms are no doubt very carefully monitoring budgets.

R&T: Because of the size and depth of our practices, Rajah & Tann LLP is able to move talent across practices with relative ease. For

example, the increase in the number of complex corporate restructuring transactions saw us re-deploying corporate and finance lawyers familiar with such issues to work on corporate insolvency matters.

Further, our banking/finance lawyers with expertise in complex securities and financial structuring and arrangements are also able to provide assistance to the increasing

number of law suits and arbitration cases having financial and regulatory issues, eg, financial fraud, securities or forex trading disputes, losses arising from complex financial structures.

I believe the majority of local law firms have a lower cost base and are more nimble in seizing opportunities and

implementing market sensitive strategies. Our exposure to relatively fewer volatile markets across the globe also translates into more stability during the current economic downturn.

There is therefore a window of opportunity for local law firms to take advantage of regional opportunities and leverage on the current crisis to position themselves for a post-crisis market.

Rodyk: We have always been disciplined in our cost management, in good times and in bad. I think very early on we focused on addressing and managing our staff's concerns and expectations. It's important that the team pulls together, and be flexible and nimble so that we can react quickly. I think that's always been one of our strengths. Local firms, having fewer overseas offices and comparatively smaller teams, do not have the large overheads that the bigger international firms are exposed to in a downturn. On the flipside, though, being able to rely on more than one market can be an advantage, and could enable the international firms to recover faster when the economic climate changes for the better.

In these hard times, more are seeking legal aid. Whilst lawyers are providing and being encouraged to provide *pro bono* legal services, what are individual firms doing to help each other through the tough times? What role do you see organisations, like the Academy and Law Society, playing to assist the legal community?

D&N: Drew & Napier has been actively involved in the *Pro Bono* Community Legal Clinics ever since its establishment in 2007. Our lawyers go down to the clinics monthly and deal mainly with debt collection, bankruptcy, simple breach of contract and matrimonial cases. Even before

“... the majority of local law firms have a lower cost base and are more nimble in seizing opportunities and implementing market sensitive strategies.”

– Rajah & Tann LLP

the inception of the clinics, individual lawyers from Drew were already participating in other *pro bono* programmes.

R&T: Lawyers in our firm have been involved in *pro bono* work for many years now. Some have lent their legal expertise to voluntary as well as community grass-roots organisations; whilst others have founded and/or led organisations to help the less fortunate. Rajah & Tann LLP was also one of the first law firms to commit a significant number of *pro bono* service hours and is privileged to be associated with the Law Society's *pro bono* community legal clinic initiative since its inception in August 2007. About 50 partners and associates are involved in the Law Society Community Legal Clinics and they cumulatively spend about 250 hours attending to queries arising from such clinics.

We see the Academy and the Law Society as playing important roles not just to facilitate and lead discussions on whether there can be more varied *pro bono* activities (for example, *pro bono* schemes for certain types of civil court cases) but also to launch new initiatives to encourage more participants in *pro bono* work. Currently, only about 34 mostly large- and medium-sized law firms have committed to the Community Legal Clinics scheme. More could be

encouraged to participate including in-house counsel or other legally qualified persons who may not be practising in a law firm.

Rodyk: Rodyk supports the *pro bono* schemes run by the Law Society on behalf of the profession, and naturally in difficult times, it is all the more important that ordinary people get affordable access to justice. I am sure the Academy will continue with its support of the Law Society as the lead agency for mobilising *pro bono* volunteers. In addition, lawyers volunteer their time through other organisations that reach out to the community.

What opportunities for new areas of practice might come forth in the current economic climate?

D&N: There may not truly be new practice areas as such. What many law firms have done is re-train some of their lawyers so they can adapt to other existing practice areas.

R&T: The current downturn has spawned a global demand for governments worldwide to look at financial markets in a completely new light. There is a big push to re-think existing assumptions and to address the pressing question as to whether there is a need to create new regulatory frameworks for the financial and banking market.

There has also been an unprecedented amount of governmental input and control over the market across most countries and sectors. This is something that is rarely witnessed even in the previous recession years.

We also constantly hear of new and creative stimulus plans as well as initiatives to purge “toxic assets” without risking the downside of a major asset sell-down.

The above can only have the effect of throwing up many novel and interesting legal and regulatory issues. Over time, these issues will no doubt give rise to new laws and practices.

Rodyk: There are no new areas of practice, as such, but predictably the climate is more conducive for certain types of work (for example, restructuring work) than others.

In a previous issue of *Inter Se* on Globalisation, we focused on liberalisation of the legal sector. That was in rosy times. The view held currently is that now is



the wrong time to issue QFLF (Qualified Foreign Law Firm) certificates. What are your thoughts on this?

D&N: Liberalisation was always intended for the long-term interests of the country, through ups and downs. Pulling back now will damage Singapore's reputation for consistency and fair play.

R&T: The liberalisation of the Singapore legal market has been ongoing for some years now – albeit on a measured pace – whether during boom or bust years.

It is the Government's assessment that we are now ready for the next stage of the liberalisation process, *ie*, the QFLF scheme. The assessment was probably premised on their view that the local legal sector is sufficiently mature to meet the new challenges which will be brought about by the QFLF scheme.

No one could have anticipated the scale of the financial crisis that has hit the world's economy. But in times of crisis, there are also opportunities. If you read some of the published interviews with QFLF firms, you will find that they remain upbeat about the prospects of expanding their local practices by leveraging on their QFLF status – notwithstanding the economic crisis.

“ Liberalisation was always intended for the long-term interests of the country, through ups and downs. ”

– Drew & Napier LLC

Rodyk: The world is moving towards open doors in the legal profession, meaning that while the law of any jurisdiction must be practised by a lawyer qualified in that jurisdiction, he or she can do so as a member of a law firm where the majority of partners are not so qualified. What's important is that all lawyers who practise Singapore law should be regulated in the same way by a single independent body, namely the Law Society. Singapore law firms will adapt and some will thrive.

Firms in the US and the UK have laid off thousands of legal associates in the wake of this crisis, what is the likelihood of firms in Singapore and Asia following suit? Should one cull the herd or risk hurting the firm? Would large firm layoffs lead to small firm start-ups?

D&N: It is too early to say whether Singapore firms will follow suit. In fact, as work in some areas has increased, hiring continues. A firm looking to the future must find all ways to retain its talent, even in difficult times. Lawyers and law students have long memories.

It is simply not possible to say whether, if there are layoffs, there will be small firm start-ups. Those who are laid off may well think that it is



too difficult to compete or that there is not enough to go around, and change careers.

R&T: Singapore law firms tend to be more conservative in its expansion strategy. As such, I do not foresee any laying off exercise (if at all) being conducted on a similar scale as those seen in the US and UK law firms.

There may of course be lawyers who see the current crisis as giving rise to opportunities to start their own niche practice. As such, it is possible that the current downturn will see more small firm start-ups.

Rodyk: Unless the recession lengthens, I would expect Singapore law firms to avoid retrenchments, and instead rely on cost-cutting and bonus reduction to get through it. Thankfully, so long as a lawyer has a mobile phone and notebook computer, he or she can still make a living, even if it's not in a large firm.

With unemployment rates at a high, what is your advice to graduating law students on their future job prospects in this economic climate?

D&N: There is no need to be discouraged. There will always be a job waiting for the graduate who is hungry and determined to do well.

R&T: My advice is that they should focus on their studies and not worry about future job prospects. If they do well in their studies, there should be no difficulty finding a place with a law firm. As a firm, we are always on the lookout for new talent as we hire lawyers for the long term. Although relevant, the immediate market conditions do not affect our key focus which is to hire lawyers who can continue to maintain and improve on Rajah & Tann LLP's reputation for premium and quality legal service. This is borne out by our recent retention of 35 pupils from last year's graduating class.

“Graduating law students, like young lawyers generally, must temper their expectations.”

– Rodyk & Davidson LLP

Rodyk: Graduating law students, like young lawyers generally, must temper their expectations. All lawyers have to work hard to succeed, but this is especially so when the economy is down, because the competition gets

fiercer. A positive attitude, the drive to learn as much as possible, the ability to adapt, the willingness to take advantage of opportunities as they become available – these are attributes that will serve a young lawyer well, in any type of economic climate. ¹⁵

Inter Se thanks Mr Davinder Singh SC, Mr Steven Chong SC, and Mr Philip Jeyaretnam SC for their time in granting us this interview.

YES TO LOWER PAY ... YET UNCOMPROMISING IN IDEALS

AN ILLUMINATING INSIGHT INTO THE
MINDS OF OUR FUTURE PRACTITIONERS.

IT seemed only right, after soliciting interviews from law firms about the sunny prospects for graduating law students in this economic gloom, that *Inter Se* approach budding lawyers to see if they shared the same sentiment. Hence, an e-mail questionnaire was sent out to law students of the National University of Singapore ("NUS") and the Singapore Management University ("SMU"). Their replies revealed some common threads: (a) awareness of stiffer competition for job placings; (b) lowered expectations; (c) acceptance of lower remuneration; and (d) necessity for good grades, flexibility and a certain quality which sets one apart. What was revealing also was the general view now that a third language, co-curricular activities and studies beyond the LLB programme (especially for students in a dual degree programme) would stand one in better stead.

Below are excerpts of some their replies.

With assistance from **Jason Gabriel Chiang, Krystle Chiang and Yvonne Poon**

What is your dream job?

"My 'dream' job will be to do Litigation in a top offshore firm that allows me to travel the world. But practically, I would like to join the Judiciary upon graduation."

— **Russell Low Tzeh Shyian** (SMU)

"At the moment, I'd love to work in the family and/or juvenile courts, either as a judge or a litigator."

— **Teng Xiaohui** (SMU)

"Not exactly sure what my dream area of practice is as of yet, but it tends towards corporate at the moment, and my dream job is to open my own firm."

— **Matthew Teo** (SMU)

"To work in a place where I truly feel helpful. Something along the lines of working in a place where I am not just a small cog in a huge wheel."

— **Caitlin Yap** (NUS)

In this current economic climate which is said to be an employer's market, how certain are you of landing your dream job?

"Good grades can get you [through] the door for possibly internships and pupilages, but it's almost like 'Law Apprentice', where pupils have to compete to be retained in the law firms. I thought I was quite certain [of] getting into the legal profession without a hitch, but now I [will] have [to] reassess how secure I feel about it ..."

— **Chiang Hai Qiang, Jason Gabriel** (SMU)

"Fairly certain, since lawyers are in demand, especially if you practise insolvency law in this climate."

— **Esther Lee** (SMU)

"... The current economic climate is inconducive to corporate law, which is an area that I intend to practise once I graduate. I think it's made worse by the fact that there will be a surplus of lawyers, with the laxing of the foreign law diplomas requirements as well as the new influx of SMU law undergraduates."

— **David Yong** (SMU)

Entering into the workforce at a time when firms may have frozen head counts, or when certain practice areas may be in the doldrums due to the downturn (eg, conveyancing, corporate), how do you feel about this? How have your expectations changed?

"It is certainly rather worrying. My expectations [have] still not changed with regards to the department that I wish to enter upon graduation, but I am now mentally prepared to be rejected by the biggest law firms, as competition for jobs has definitely gotten stiffer in the economic downturn."

— **Ho Xin Ling** (NUS)

"I feel that this is a process of filtering. You have to shine and let your true worth be shown. If you are worth your bread and butter, you will still be in popular demand regardless of the economic situation. Perhaps certain departments which are more badly hit will have to find alternative specialisations."

— **Russell Low Tzeh Shyian** (SMU)

"I believe that there's a need to realign expectations and come to terms with the fact that the legal industry is not immune to macroeconomic influences, despite its partially countercyclical nature. Personally, I will be prepared to accept a lower income if I am able to practise in my preferred area of law still."

— **Alvin Ong** (SMU)

"... we should probably not be consistently pessimistic about the job prospects. The legal profession is probably relatively quite shock-proof from the economic blow ... I think the onus is on the lawyers themselves to adapt and be more flexible in exploring other areas of law."

— **Charlene Soh** (SMU)

"I am keeping my options open to areas that I might never have considered ... for the employee, it is not the time to be picky."

— **Jeremiah Soh Zi Qing** (SMU)

"I think the skills we pick up in law school can be applied across practice areas. It's more important to keep an open mind and be ready to explore different areas of the law. In this

way we'll lose less sleep over the challenges that the economic situation throws at us – it's not as if lawyers already enjoy enough rest."

— **Jo Tay** (SMU)

"Economic crests and troughs are part and parcel of the capitalist system. It does not matter that certain areas are experiencing the troughs now, for in the long run the opportunities will even themselves out. Accordingly, my expectations have not changed in light of having adopted this long-term view."

— **Clement Yong** (SMU)

"Expectations have definitely changed – I think overall there are more people for lesser jobs = much more competitive ..."

— **David Yong** (SMU)

Are you willing to accept a lower income, or perhaps not working in your preferred area of law?

"I am willing to accept a lower income (and actually this really is not much of an option, as there are pay cuts in every firm, and so law students are already expected to take less salary or risk not getting a job). However, income can increase as the economy recovers, and as long as I can get a job in my preferred department, I shall just treat the starting few years as a learning experience ..."

— **Ho Xin Ling** (NUS)

"My preferred area of law is intellectual property. This is a relatively unpopular area,

and thus, I feel that demand will still be high.”

— **Nathanael Lim Yao Hui** (SMU)

“I am prepared to accept the former but will try hard to secure the latter, as I believe that building my expertise in my preferred area of practice is a form of investment in the future during lean times.”

— **Alvin Ong** (SMU)

“Yes, I wouldn’t rule out accepting either. Not because the economy is bad, but because I believe there are opportunities money can’t buy.”

— **Quek Pin Shen, Roy** (SMU)

“... I think it will be a good time for lawyers to test their skills and to forage new areas of law.”

— **Charlene Soh** (SMU)

“I am rather reluctant to compromise on the income due to certain obligations, though a regular supply of champagne in the pantry might sway me on this. On a more serious note, I am enthusiastic about working in different areas of law – you never know when something exciting will come your way.”

— **Jo Tay** (SMU)

“Yes, I am if the work still gives me a sense of fulfillment.”

— **Teng Xiaohui** (SMU)

At a time when career opportunities may seem scarce, how would you better position yourself?

“I will try to go for more internships and build up relationships with people (partners, associates, and everyone really) in the various firms and also try to boost up my employability by improving on my interview question answering techniques.”

— **Jurena Chan** (SMU)

“I don’t believe that career opportunities are scarce – you just need to look harder. Part of overcoming the problem is in willing to take risks and to explore new options that you never thought possible or viable before.

The other solution of course is to differentiate yourself from other fresh graduates as much as possible. Again this translates into taking risks and opportunities while you’re in school to learn and enrich yourself.

I believe that in an uncertain market, rewards may not have shrunk, in fact they may have grown. But the risk has consequently grown as well. The onus is therefore on us to take calculated risks in order to reap these larger rewards.”

— **Mark Cheng Xin En** (SMU)

“It comes down to work experience, and I think engaging oneself in internship and attachment programmes not only helps [to] learn more about the legal field, but it helps to build relations with the law firms and public sector to help secure future employment.

Moreover, to better position oneself, thought must be put into establishing one’s unique value-addition to a prospective law firm. Law does not function in a vacuum, and neither should our studies.

Oh and one must be more conscious of what type of material is released about oneself on the net, I have heard some persons in interviewing possible candidates for internships, attachments and even pupilage, checking avenues like facebook to get a frank assessment of the candidate's personality and attitude."

— **Chiang Hai Qiang, Jason Gabriel** (SMU)

"Ensure that I am always in touch with legal developments and to continue honing people management skills. Knowing an additional language would also be extremely helpful."

— **Elgina Chua** (SMU)

"Spend another year studying and widening one's area of specialty."

— **Ho Li Ming** (SMU)

"Studying harder, involving myself in more non-academic activities."

— **Esther Lee** (SMU)

"... I am focusing as much as I am on my other degree to ensure I increase my employment capabilities."

— **Nathanael Lim Yao Hui** (SMU)

"I believe in proving yourself. Networking and an illustrious CV will get you through the front door, but you have to prove yourself in order to rise up the ranks and grasp the limited opportunities that come by."

— **Russell Low Tzeh Shyian** (SMU)

"I believe that gaining expertise in specialised areas of law (such as insolvency, shipping, etc) will allow me to better position myself during this period and the following period of economic recovery."

— **Alvin Ong** (SMU)

"I believe that reading widely (apart from the school syllabus), keeping up with world affairs, and engaging oneself in meaningful extra-curricular activities can help to differentiate oneself is key."

— **Jeremiah Soh Zi Qing** (SMU)

"I would take another degree for a wider perspective ..., learn a third language ..., and understand the industry better by talking to the insiders ..."

— **Jo Tay** (SMU)

"Be open to new experiences and come to terms with the fact that the word 'dream' in dream job does mean something. In other words, as much as we would like to be idealistic, it is more practical to be, well, practical."

— **Beverly Wee** (SMU)

"Take a second degree, go for student exchanges, and do internships overseas."

— **Clement Yong** (SMU) ¹⁵

Inter Se thanks Yvonne Poon and Krystle Chiang (of NUS), Jason Gabriel Chiang (of SMU), and the students of NUS and SMU for their time.

THE DOWNWARD SPIRAL

THE SOCIO-LEGAL ISSUES ARISING FROM THE ECONOMIC CRISIS ARE PUT UNDER THE MICROSCOPE. HOW GRAVE IS ITS IMPACT ON THE LEGAL ARENA?

THE current financial crisis was swift in its onset and has been brutal in its impact so far. No significant sector has been spared from the downward spiral in economic performance and output. Pessimism and general anxiety levels are high, and consumer behaviour has changed substantially. Uncertainty remains abound as to when the storm will blow over and in what shape we will emerge.

Whatever its prognosis, the crisis has left deep marks on our legal system and profession, and will undoubtedly leave more before it finally subsides.

CORPORATE PRACTICE

The most topical concern must be the impact on the businesses of law firms. There is much empirical evidence confirming that, as may be expected, corporate and transactional practices are now facing a difficult period. The decrease in the volume of work has been sudden, far



By Lee Eng Beng SC, Legal Practitioner

outpacing any reduction in law firms' fixed costs of mainly rent and salaries. Fee pressure from clients is mounting. Law firms have responded by reducing starting pay, re-allocating lawyers, and revising fee structures. The crisis has also generated some forms of "replacement" transactional work, such as business and debt restructuring and acquisitions of distressed assets and debts. Still, stories of excess capacity, oversized teams and quiet retrenchments are not uncommon, though not large scale or widespread as yet. Those lawyers who have had to leave practice may also find that they do so at a particularly inopportune time, as the popular alternative of taking up a position as in-house corporate counsel may be an opportunity which is hard to come by.

Larger firms, which have tended to have specialised teams catering to specific types of commercial and financial transactions, or particular industries, may be more vulnerable than their smaller counterparts. Much can of course be said in favour of specialisation when it is in demand but, in the current market downturn, it has partially been at the expense of nimbleness and adaptability. It is not easy or appealing for lawyers, who have invested much time and effort in

mastering and gaining exposure to a complex area of the law, to switch to a practice, which is more sustainable under current conditions. Not only is it difficult to identify a profitable area of practice in the current climate, it is costly and risky to re-train lawyers when revenues are weak and prospects are uncertain. The market entry of the international firms who have been awarded the Qualified Foreign Law Firm licences adds a further list of challenges.

There is another balancing act that needs to be carried out at the same time. Corporate and transactional practices have to maintain capacity and retain their best performing lawyers for when the full blast of the recovery hits. That is when the catching up for the lean times will take place. Hopefully, the turnaround for these practices, when it comes, may be as quick and dramatic as the current crisis.

DISPUTE RESOLUTION

Not surprisingly, dispute resolution lawyers handling the large commercial disputes are busy. The inclination to litigate or arbitrate normally goes up when new business or investment opportunities are scarce. More importantly, the crisis has prompted a flurry of consequences

which has simply caused many parties to be incapable of performing or unwilling to perform their contractual obligations. Only the most resilient can weather the dizzying fluctuations in the stock, currency exchange and commodities markets, the chronic lack of liquidity, the severe depreciation of asset values, the withdrawal or cancellation of financing commitments, the defaults of business partners and debtors, and the huge dip in demand for goods and services.

The extraordinary events which precipitated and defined the current crisis have also given rise to a whole host of legal uncertainties which require resolution. Few expected the market freefalls, or that seemingly infallible financial and business conglomerates would be eliminated, have their survivability threatened or their credit standing gravely undermined. Many legal documents would have been drafted, and many commercial or financing transactions entered into, without these contingencies in close contemplation. For instance, contractual clauses providing for the variation of the parties' obligations in the event of material adverse change, *force majeure*, market disruption and the like are likely to be relied upon by one side and disputed by another. In the context of private banking transactions (now a fertile source for dispute resolution work), the validity of clauses in standard bank documentation allowing a few hours' margin call notice to

be given by way of telephone will be called into question. Guarantees or standby letters of credit from a previously reputable financial institution may be rejected and cause a party to be in default of its obligations, and professional valuations may be rendered completely unacceptable or unreliable as a basis for determining parties' rights and obligations.

No doubt that the dispute resolution process will also get longer and more labour-intensive. Generally, the amount of documentary evidence in any commercial dispute nowadays is enormous, due in no small part to the obsessive record-keeping, comprehensive phone recordings and frighteningly long chains of e-mail correspondence made possible by technology. With the large

sums at stake, lawyers can be expected to have to trawl through the whole sea of documentary evidence. Of course, this does not necessarily mean that the work will be very lucrative; in these times, there is every likelihood that either fees will be depressed or fee caps may become the order of the day.

There is also likely to be a surge in other types of dispute work apart from the large litigation and arbitration cases. Inevitably, there will be more commercial disputes of all sizes though, as mentioned below, it is not certain how many of them will be fully litigated or arbitrated in view of the attendant costs. What will probably see more activity in the courts will be the direct fallout

“Resort will have to be had to cross-border insolvency law which, unfortunately, is in a relatively undeveloped state in Singapore.”

from the crisis, that is, criminal prosecutions for “recession crimes”, as well as matrimonial disputes relating to divorce, spousal violence and variation of maintenance orders. However, such work will be similarly subject to fee pressure.

CORPORATE INSOLVENCY AND FRAUD

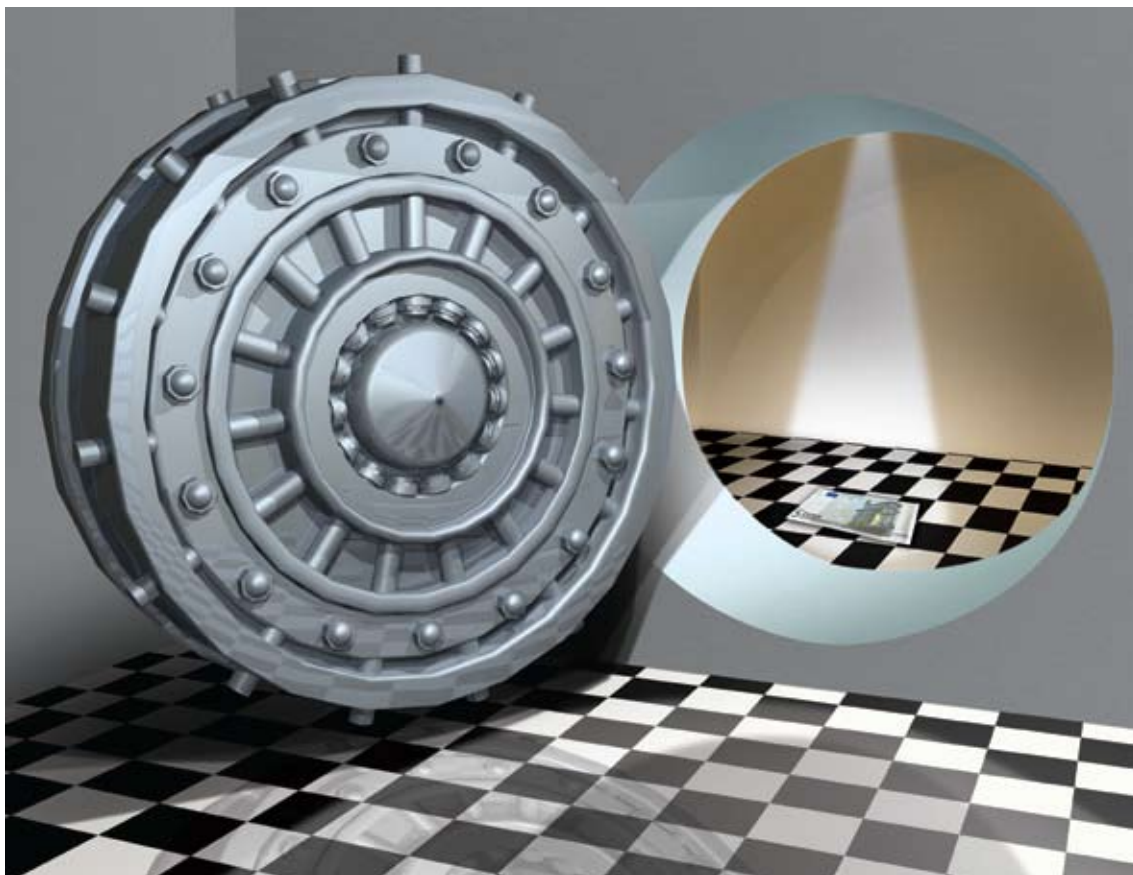
The boom years were quiet times for insolvency practitioners (both lawyers and accountants) but, of course, much has changed. The number of insolvencies, restructurings and loan and security defaults has gone up significantly, along with cases of serious fraud involving listed and other substantial enterprises. Overall, there has been a spike in the instances of applications for winding up, judicial management, bankruptcy and possession of mortgaged properties, as well as investigations by the regulators into accounting irregularities and other corporate wrongdoing.

Nevertheless, the pattern is not quite the same as in past downturns, and it may be observed that Singapore’s corporate insolvency regime is showing more maturity this round. There are more restructurings, whether effected consensually, or schemes of arrangement than enforcement actions or formal insolvency proceedings. Mortgage actions are also not as many as may be expected. On the other hand, there have been more cases involving accounting irregularities and other corporate wrongdoing. There is also a higher incidence of corporate insolvencies involving private equity investors holding substantial claims or stakes, as opposed to just the ubiquitous

bank lenders. There is also a noticeable uptrend in distressed debt trading activity, showing its gradual acceptance as a convenient and speedy cash exit for financial creditors and a potentially high-yield investment for those with the appetite.

Corporate insolvency work in this crisis is likely to be more interesting, demanding and, perhaps, bewildering. The fact is that, for the biggest enterprises, financial, business and ownership structures have become more sophisticated and intricate than ever before, accompanied by even more complicated accounting practices. Large corporate groups habitually “book” their assets, liabilities and transactions, and pool their collective cash in strategically selected member entities. Entities are picked to house employment contracts, which then second the employees to work in another part of the group. All these are done as a matter of paperwork and accounting, and often without any resemblance to the operational realities. However, when such a corporate group collapses into financial difficulty or insolvency, the law, or a basic liquidation analysis, will proceed on the basis that each member is a separate legal entity. The result is that the group breaks up into numerous companies tied up in a web of claims and liabilities with one another, to be unwound, compromised or otherwise resolved by the insolvency practitioners.

Another source of complexity is that there will be, more likely than not, a cross-border dimension in every significant corporate insolvency. In fact, most of the substantial enterprises which have encountered



financial distress in the current crisis maintain only their listing or administrative headquarters in Singapore, and have their subsidiaries, assets and operations in other jurisdictions. Resort will have to be had to cross-border insolvency law which, unfortunately, is in a relatively undeveloped state in Singapore.

BANKRUPTCIES

In many ways, of course, the effects of the financial crisis are more real and painful for insolvent individuals than corporations. Redundancy, joblessness and, for the self-employed, business failure or a sharp dip in income are the main fears, while poor market conditions and wild market swings bring much

anxiety to individuals who have put down their money into investments (and often on a leveraged basis). At the same time, there has been a clampdown on the availability of credit. As a result, many individuals may find themselves unable to meet their personal liabilities such as mortgage or hire-purchase payments, tax on the previous year's income or even maintenance payments to an ex-spouse. Others may encounter the misfortune of having another person on whom they rely financially, such as a debtor, customer, business partner or employer, lapsing into financial ruin.

Bankruptcy numbers will rise, of course. Historically, the bulk of bankruptcies fell into two groups – those who spent (or speculated or gambled) excessively on credit, and those who stood as guarantors for ill-fated businesses. Both groups are likely to continue to be the main contributors to the bankruptcy numbers, but there will no doubt be a significant third group who has simply been caught in the grip of the crisis. It also appears that, in cases where the financial deficit is just too great, more debtors are rightly applying for themselves to be placed under bankruptcy. Bankruptcy relieves the debtor of having to face direct pressure from their creditors,

such as having his property seized and sold in execution of a judgment, being visited or followed by burly gentleman in black tee-shirts emblazoned with the words "Debt Collector", or receiving telephone requests for payment in the dead of night.

Notwithstanding the increase in traffic, our bankruptcy regime is likely to hold up well, and this is attributable to the overhaul of the legislation in 1995 and the various tweaks, which were made then. Bankruptcy now carries less of a stigma and has struck a good balance between the interest in rehabilitating an insolvent debtor and the rights of his or her creditors. Alternatives to bankruptcy, such as the voluntary arrangement procedure and, more recently, the debt repayment scheme, help to ensure that debtors who still have the means of providing a reasonable return to their creditors are not made bankrupts unnecessarily. What is more worrying and problematic to deal with is the increase in illegal moneylending, which falls outside the bankruptcy regime altogether. Stepping up law enforcement is only one aspect of the solution, as it will not completely deter loan sharks as long as there are those who need money urgently and who do not qualify for loans from

regulated lenders. In a crisis of this magnitude, it will be more than a handful of individuals who will find themselves in this situation.

ACCESS TO JUSTICE

It cannot be denied that access to the judicial process in Singapore is not within the reach of everyone, and, oftentimes, those who need it most. While legal fees charged in Singapore are not exorbitant, the fact remains that an individual or small business of modest means will find it daunting or even impossible to prosecute a claim which requires, say, a five-day trial or extended hearings in chambers. Also, the legal costs awarded by the courts to a successful litigant generally represent less than the total legal costs which are in fact incurred. In this difficult period, therefore, access to the courts may simply not be open or a commercially viable option to a claimant who does not have the necessary financial resources or is already under severe financial pressure (or whose complaint is precisely that all his or her wealth has been lost).

As such, while the number of small commercial disputes has probably escalated, they may not generate a corresponding increase in litigation on this front. This does not necessarily imply that such

disputes will not be ventilated. What may be anticipated is that much or even most of the action will take place outside the courts (save for perhaps the Small Claims Tribunal). Disgruntled customers of financial institutions will likely turn to the Financial Disputes Resolution Centre Ltd, while aggrieved employees will lodge complaints with the Labour Court, the Ministry of Manpower, or the Central Provident Fund Board for non-payment of salaries and provident fund contributions. Another possible avenue for resolution is mediation under the auspices of the Small Case Commercial Mediation Scheme run by the Singapore Mediation Centre or the Community, or a Community Mediation Centre.

The financial crisis will undoubtedly test whether these and other extra-judicial forums provide sufficient avenues for claimants to gain access to fair and effective dispute resolution mechanisms. Generally, the scorecard seems to be positive, as there has not been heavy criticism or public backlash in this regard. It should also be noted that the Government has

“It may be no bad thing for any excessive optimism and confidence generated by the heady good times to be balanced by a dose of realism and cautiousness.”

accepted the recommendations of the Committee to Review the Legal Sector to allow conditional fee arrangements and class actions, which will further ameliorate hurdles faced by a claimant without strong financial resources. The only uncertainty is whether they can be implemented in time to help address some of the disputes generated by this crisis.

YOUNG LAWYERS

Just a year or two ago, young Singapore law graduates and lawyers felt on top of the world. Their services were in great demand, not only in Singapore but in major jurisdictions around the world that many felt were decidedly more glamorous and promising than Singapore. Their remuneration packages kept going up, and it was easy to find employment with an employer of their choice.

The crisis has been a hard landing. Pay scales have deflated, and many law firms have imposed a hiring freeze. The large law firms, which have been swallowing up virtually all the fresh law graduates in the past several years, have cut their intake and retention rate of pupils. Smaller law firms actually have the opportunity of taking on pupils and hiring new lawyers, a thing almost unheard of during the good years, though

they may be just as circumspect about adding headcount. Many young lawyers have had to put their dreams on hold for a few years, and realise that the establishment of their careers is not going to be as smooth as they had envisaged.

Though this may be distressing, it is not a grave problem. Promising and diligent young lawyers will continue to be in demand, and with increasing momentum as the recovery approaches. Indeed, there have been few accounts of young lawyers being unable to find employment for extended periods of time. Further, it may be no bad thing for any excessive optimism and confidence generated by the heady good times to be balanced by a dose of realism and cautiousness.

CONCLUSION

The current turmoil will no doubt finally settle, and there are already signs of economies stabilising gradually. The normality that will return may be different in some way from the one we knew prior to the crisis. With the experiences and lessons learnt from this, however, chances are our legal profession and system would have acquired a new level of maturity and be more ready to face the next (and hopefully less malevolent) downturn. ¹⁵

THE GREAT REPRICING

AN EDITED SPEECH BY MINISTER
FOR FOREIGN AFFAIRS GEORGE YEO
AT THE DISTINGUISHED LECTURE
AT THE UNIVERSITY OF CAMBRIDGE
(27 MARCH 2009). PUBLISHED WITH
PERMISSION.



Though not *Inter Se's* usual practice to reproduce articles or speeches, this thought-provoking speech on the current economic crisis and the future post-crisis was far too apt and relevant to pass up.

WHAT THE CURRENT CRISIS REPRESENTS

... the world is heading into a deep recession the likes of which have not been seen for a long time ... Whether this crisis marks a major break in world history we don't know yet. Turning points are only seen for what they are in hindsight.

What is becoming clearer is the severity of the crisis. No one is sure where the bottom is or how long this crisis will last. In the meantime, tens of thousands of companies will go bankrupt and tens of millions of people will lose their jobs – at least. What started as a financial crisis has become a full-blown economic crisis. For many countries. Worsening economic conditions will lead to political crisis. In some, governments acting hastily in response to short-term political pressure will do further harm to the economy.



In an editorial last December, the *Financial Times* commented that the US Federal Reserve was flying blind. But, in fact, all governments are flying with poor vision. Markets are volatile precisely because no one knows for sure which policy responses will work.

I remember an old family doctor once explaining how every disease must run its course. In treating an illness, he said, one works with its progression. Attempting to short-cut the process may worsen the underlying condition. While emergency action may be needed and symptoms can be ameliorated, the body must be healed from within after which its immunological status changes.

The Austrian economist Joseph Schumpeter understood the importance of creative destruction. The end of an economic cycle does not return the economy to where it was at the beginning. During the downturn, firms go bankrupt, people lose jobs, institutions are revamped, governments may be changed. And in the process, resources are re-allocated and the old gives way to the new.

Charles Darwin, whose 200th birth anniversary we mark this year, understood all that. Life is a struggle with old forms giving way to new forms. And human society is part of this struggle.

The question we ask ourselves is, what is the new reality that is struggling to emerge from the old? History is not pre-determined. There is, at any point in time, a number of possible futures, each, as it were,

a state of partial equilibrium. And every crisis is a discontinuity from one partial equilibrium state to another within what scenario analysts call a cone of possibilities.

Well, whatever trajectory history takes within that cone of possibilities in the coming years, there will be a great repricing of assets, of factors of production, of countries, of ideas.

“... all governments are flying with poor vision. Markets are volatile precisely because no one knows for sure which policy responses will work.”

ECONOMIC REPRICING

Let me first talk about economic repricing. Many bubbles have burst in the current crisis starting with sub-prime properties in the US. All over the world, asset prices are plummeting. In the last one year, tens of trillions of dollars have been wiped out. How much further this painful process will continue, no one can be sure. Many months ago, Alan Greenspan, in his usual measured way, peering into the hole said he saw a bottom forming in the fall of asset prices; it turned out to be the darkness of an abyss very few knew existed. That bottom is only reached when assets are sufficiently repriced downwards. Public policies can help or hinder this process. Unfortunately, many stimulus packages being proposed will make the adjustment more difficult. For example, bailing out inefficient automobile companies may end up prolonging the pain of restructuring at tremendous public expense.

The repricing of human beings will be even more traumatic. With globalisation, we have in effect one marketplace for human labour in the world. Directly or indirectly, the wages and salaries of Americans, Europeans and Japanese are being held down by billions of Asians and Africans prepared to work for much less. China and India alone are graduating more scientists and engineers every year than all the developed countries combined. Now, while it is true that trade is a positive sum game, the benefits of trade are never equally distributed. We can therefore expect protectionist pressures to grow in many countries.

Governments will try to protect jobs often at long-term cost to their economies. It is wrong to think that we can force our way out of a recession. Beyond a point, the stress will be taken on exchange rates. If governments try to prevent the repricing of assets and human beings, international markets will force the adjustment on us. A country that is over-leveraged living beyond its means will itself be repriced through its currency. Its currency will be devalued, forcing lower living standards on all its citizens.

The world is in profound imbalance today. All the G7 countries are in recession. The West is consuming too much and saving too little while the East is saving too much and consuming too little. China, India and others need to consume much more of what they produce but they are unable to take up the present slack in global demand because their GDPs (gross domestic products) are still too small. In 10–20 years, they may be able to but certainly not in the next few years. In the meantime, the global economy may suffer a prolonged recession, a global Keynesian paradox of thrift.

POLITICAL REPRICING

When this crisis is finally over, which may take some years, out of it will emerge a multi-polar world with

clearer contours. Although the US will remain the pre-eminent pole for a long time to come, it will no longer be the hyperpower and power will have to be shared. The Western-dominated developed world will have to share significant power with China, India, Russia, Brazil and other countries. Thus, accompanying the economic repricing will be political repricing.

Following the spectacular opening of the Olympic Games in Beijing, Tony Blair wrote in the *Wall Street Journal* of August 26 last year: "This is a historic moment of change. Fast forward 10 years and everyone will know it. For centuries, the power has resided in the West, with various European powers including the British Empire and then, in the 20th century, the US. Now we will have to come to terms with a world in which the power is shared with the Far East. I wonder if we quite understand what that means, we whose culture (not just our politics and economies) has dominated for so long. It will be a rather strange, possibly unnerving experience."

Those words were said by Tony Blair in August last year before the financial meltdown. How much more they ring true today. Sharing power is however easier said than done. But without a major restructuring

of international institutions, including the Bretton Woods institutions, many problems in global governance cannot be properly managed. The meeting of G20 leaders started by President George Bush in November last year is a necessary new beginning. But it is a process. Prime Minister Gordon Brown is hoping that the next meeting on 2 April in London will sketch out the main elements of a global bargain. To be sure, the reform of global institutions is a process that will take years to achieve. During the transition, many things can go wrong. In his analysis of the Great Depression in the last century, the economic historian Charles Kindleberger identified a major cause in the absence of global leadership during a critical period when power was shifting across the Atlantic. Great Britain could not exercise leadership while the US would not. In between, the global economy fell.

In the coming decades, the key relationship in the world will be that between the US and China. Putting it starkly, the US is China's most important export market while China is the most important buyer of US Treasuries. The core challenge is the peaceful incorporation of China into the global system of governance, which in turn will change the global system itself. This was probably what led Secretary Hillary Clinton to make her first overseas visit to East Asia.

Three Points about China


The transformation of China is the most important development in the world today. Much has been written about it, the re-emergence of China. But I would like to touch on three points.

China's Sense of Itself

The first point is China's sense of itself which was written about by Joseph Needham many years ago ...



“ Natural selection has an obvious analogue in man's intellectual and social development. Like biological species, human ideas and systems are also subject to selection ... ”

The image consists of three vertical panels of varying widths, each featuring a silhouette of a person walking from left to right. The background is a vibrant blue with a faint, stylized world map. The first panel on the left is the widest and shows a man in a suit walking with a confident stride. The middle panel is narrower and shows a man in a suit walking with a more measured pace. The third panel on the right is the narrowest and shows a man in a suit walking with a hunched posture, suggesting fatigue or a different mode of transport like a bicycle.

... China's sense of itself is both a strength and a weakness. It is a strength because it gives Chinese civilization its self-confidence and its tenacity. Chinese leaders often say that while China should learn from the rest of the world, China would have to find its own way to the future. But it is also a conceit, and this conceit makes it difficult for Chinese ideas and institutions to become global in a diverse world ...

Cities of the 21st Century

The second point I wish to highlight today about China is the astonishing urban experimentation taking place today. China is urbanising at a speed and on a scale never seen before in human history. Chinese planners know that they do not have the land to build sprawling suburbia like America's ... Recognising the need to conserve land and energy, the Chinese are now embarked on a stupendous effort to build mega-cities, each accommodating tens of millions of people, each the population size of a major country ... This means planned urban infrastructure with high-speed intra-city and inter-city rail, huge airports like Beijing's, forests of skyscrapers, and high tech parks containing universities, research institutes, start-ups and ancillary facilities ...

As we looked to the US for new patterns of urban development in the 20th century with its very rational grid patterns, we will have to look to China for the cities of the 21st century. Urbanisation on such a colossal scale is reshaping Chinese culture, politics and institutions. The Chinese Communist Party which had its origins in Mao's countryside faces

a huge challenge in the management of urban politics ...

China's political culture

My third point is about China's political culture. Over the centuries, China has evolved a political culture that enables a continental-size[d] nation to be governed through a bureaucratic elite.

In the People's Republic, the bureaucratic elite is the Communist Party. When working properly, the mandarin

is imbued with a deep sense of responsibility for the whole country.

...

Although politics in China will change radically as the country urbanises in the coming decades, the core principle of a bureaucratic elite holding the entire country together is not likely to change. Too many state functions affecting the well-being of the country as a whole require central coordination. In its historical memory, a China divided always meant chaos, and chaos could last a long time.

To be sure, China is experimenting with democracy at the lower levels of government because it acts as a useful check

against abuse of power. However, at the level of cities and provinces, leaders are chosen from above after carefully canvassing the views of peers and subordinates. As with socialism, China will evolve a form of 'democracy with Chinese characteristics' quite different from Western liberal democracy. The current world crisis will convince the Chinese even more that they are right not to give up state control of the commanding heights of the economy.

With the world in turmoil, many developing countries are studying the Chinese system wondering whether it might not offer them lessons on good governance. For the first time in a long time, the Western model has a serious competitor.

I make these three points about China to illustrate how complex the process

of incorporating China into a new multi-polar global system will be. The challenge is not only economic, it is also political and cultural. Yet, it must be met and the result will be a world quite different from what we are used to. Developing countries will no longer look only to the West for inspiration; they will also turn to China and, maybe, to India as well.

...

CULTURAL REPRICING

A multi-polar world is a messy world. It means that no particular value system will hold complete sway over others. The current crisis has already caused many people to question the nature of capitalism, socialism and democracy. Chemically-pure capitalism, to use a phrase coined by former French Premier Lionel Jospin, has become a dirty word. In contrast, John Maynard Keynes seems to have been repriced upwards again and all of us have been dusting the old copies of *The General Theory* that we have on our shelves.

“Developing countries will no longer look only to the West for inspiration; they will also turn to China ...”

A recent *Newsweek* cover proclaimed that “we are all socialists now”. Even Karl Marx is being re-read. Ideas, cultural norms are all being repriced as countries search for ways out of the crisis. If high unemployment persists for many more years, dangerous ideas and ideologies may reappear as they did in the 30’s.

Without American leadership, multi-polarity can easily lead to global instability. And there is much expectation of what a new Obama Administration, sensitive to cultural nuances, can do to restore order and growth in the world. Unfortunately, there are no quick or easy solutions. We should expect instead a fairly long period of untidiness and confusion. Most importantly, we should be sceptical of absolute or ultimate solutions for these are often the most dangerous.

THE INSPIRATION OF DARWIN AND NEEDHAM

In responding to the current crisis, let us be inspired by two Cambridge men, Darwin and Needham. Darwin’s publication of *The Origin of Species* 150 years ago represented one of the greatest intellectual leaps by mankind. At the British Museum of Natural History, they call it “The Big Idea”. It was a very big idea. Natural selection has an obvious analogue in man’s intellectual and social development. Like biological species, human ideas and systems are also subject to selection through wars, revolutions, elections, economic crises, academic debates and market competition. Those which survive and flourish should, we hope, raise civilisation to a higher level.

Needham understood China like few other men did. As Simon Winchester wrote in his recent book on Needham, *The Man Who Loved China*, Needham might not be surprised to see the huge transformation of China today.

“A country that is over-leveraged living beyond its means will itself be repriced through its currency.”

Both Darwin and Needham were drawn from our university tradition of being sceptical without losing our moral sense. Only by being sceptical can we be objective, can we see ourselves critically and learn from others. Only with a moral sense will we be motivated to work for a larger

social good. It was China’s corruption and inability to learn from others in an earlier period that led to its long decline. The Qian Long Emperor told George III during Lord McCartney’s mission in 1793 that China had nothing to learn from the

West. That marked the beginning of China’s long decline.

Human civilisations learn from one another more than they realise, more than we realise. In a collection of essays published by Needham on the historic dialogue of East and West in 1969, he chose for his title “Within the Four Seas”. That title was from the *Analects of Confucius*, who said, “Within the Four Seas, all men are brothers”. In the heyday of Third World solidarity in the 50’s, the Indians had a saying – “*Hindi-Chini, bhai bhai*” – Indians and Chinese are brothers. In these confused times, we need to learn from one another on the basis of a deep respect for each other as human beings. ¹⁵

WHEN WILL WE EVER LEARN? THE CORPORATE MESS

By Keith Stephenson, Head of Governance, Risk and Compliance, and
Yeoh Oon Jin, Head of Assurance, PricewaterhouseCoopers LLP

SOME KEY AREAS THAT
BOARDS NEED TO FOCUS
ON IF PAST CORPORATE
SCANDALS ARE TO BE
USED AS GOOD LEARNING
LESSONS FOR THE FUTURE.

HIGH-PROFILE corporate failures and scandals both internationally, for example, Madoff Investments and Stanford Financial Group, and locally, such as Fibrechem and Oriental Century, are back in the news. Senior management is again being accused of cooking the books and bilking investors of money thus inviting such questions as: what, if anything, has changed since the last wave of corporate malfeasance emerged a few years back?

In the business world, reputation, ethics and integrity are everything. Investors need to feel confident about the people, firms and businesses they entrust with their hard-earned money.

That is why many of the corporate scandals and financial misdeeds that have continued to make headlines are so disturbing. It has created the impression that corporate financial reports, the quality of company profits and the standard of corporate governance have suddenly and simultaneously deteriorated. Yet that is wide off the mark. Indeed, following the publication of the Audit Committee Guidance Committee ("ACGC") report here in Singapore in November 2008, the focus on good governance, especially at the Audit Committee level, has never been so high. It is often the peculiarly egregious cases of bad management, misleading accounts and, quite probably, outright fraud that can colour our views. However, the bigger lessons that these scandals offer for accounting and corporate governance makes it all the more urgent to respond and learn from these past mistakes.

LESSONS FROM PAST CORPORATE SCANDALS

After every corporate scandal, plenty of questions are asked: why did the regulators fail to act earlier? Why did the independent directors not act and did they understand the risks in the business models being pursued? Did short-term performance bonuses encourage greed and excessive risk taking? And indeed, where were the auditors?

Despite what many investors think, an audit is not a guarantee of the integrity of the company's financial statements but instead is an opinion on whether or not they present a true and fair view of the company's state of affairs at a certain point in time, based on the information reasonably obtained by the auditors, and in accordance with accounting standards.

The public needs to understand that the auditor's role is not to discover every instance of fraudulent activity. Auditors are only required to provide "reasonable assurance" that the financial statements are not misleading. They rely on client management to provide information, and if that information is false, the auditor does not always have enough of the full picture to uncover the fraud.



We feel that there are several key areas that Boards need to focus on if the problems of the past are to be used as good learning points for the future.

Reinforcing quality

The root cause of almost all corporate frauds is a lack of quality: be it the quality of earnings and cash flow assumptions, the quality of the internal control structure, the quality of accounts receivable or the reliability of vendors. Companies seem to have forsaken quality for short-term gain. In one of the worst examples, investors failed to realise or question why Bernie Madoff's multi-billion dollar fund engaged the services of an auditor nobody had ever heard of and which operated out of a 13ft-by-18ft office on an industrial estate.

Where could the real quality be coming from to give "would be" investors the comfort that Madoff's financials were really sound?

Some of Singapore's S-Chips are also facing similar concerns especially over the quality of their cash balances and accounts receivables. Their apparently large stock piles of cash are being questioned as the companies fail to pay

dividends or institute share buy-back schemes. Furthermore, some of these supposedly cash-rich companies are seeking capital injections thus raising more questions. The scepticism of S-Chips was aptly captured in an article titled, "No Instant Cure-all", *The Straits Times* (25 March 2009). When questioned about its cash reserves, the executive chairman of China Paper Holdings apparently said he welcomed investors to go to Linyi (Shandong), where he would have their bank print out a statement for them.

As we continue through this current recession, all Boards need to really challenge themselves on quality. They must be able to answer one simple question: "How can we demonstrate that we have changed over the last year such that quality is now at the top of our corporate agenda?"

Keep it simple

In recent years, highly-leveraged and opaque business models have been pursued by companies seeking to find new revenue streams. In retrospect, it is clear that such models were inadequately scrutinised and challenged. From Sembcorp Marine's "Unauthorised Transactions" to China Aviation Oil's treasury activities, we see issues

surrounding treasury being continually reported in the newspapers. From our experience where something seems too good to be true, it usually is.

Auditors too cannot so readily accept companies' "mark-to-market" and "mark-to-model" valuations, and need to understand the risks involved behind any complex financial instruments and ensure that directors understand the nature of the complex derivatives on which asset valuations are based.

Complex structures have moved further and further away from financial reality and are sometimes used simply to generate short-term profits.

The clear message for all Boards is to use this basic rule of thumb: "anything too complicated to understand is too complicated to govern", and simply do not do it.

Watch out for control slippage

Control slippage is without doubt the scourge of finance. Companies that experience changes in operational structure, or are moving into new markets and/or products are typically more susceptible to control slippage than those that operate in a stable environment. Where staff lack familiarity with systems, roles, customers and suppliers, due to change, this can create an environment in which the kind of irregularities that lead to control slippage may well go unnoticed. Worse, the situation presents fraudsters with an opportunity to take active advantage of the company. In a nutshell, control slippage often leads to unflattering newspaper headlines.

In the case of China Aviation Oil, its annual report claimed that it had a three-layer control which limits the amount of total net exposure the Group might enter into at any point in time. This turned out be untrue as the company experienced millions of dollars of losses on derivatives

trades despite the fact that it was supposed to have engaged in oil trading only for hedging purposes.

Companies need to adopt a dynamic and flexible approach to ensure that strong internal controls are established and embedded within their organisation, and management needs to continuously share their views with the Board on how controls that may affect the company from achieving its objectives are identified, assessed and managed. The Board must be able to evaluate how well management is preserving such controls in a period of change and preventing slippage.

All Boards must reflect on how they are addressing this major corporate cancer. Can they see what is happening to their control framework? How do they monitor it in a consistently changing working environment? Would they know if they have the disease already?

Train up your Boards

On occasion, the corporate board environment has let down its shareholders by failing to govern and be the chief executive officer's ("CEO's") true conscience, responsible for reining in C-suite excesses and empire-building enterprises.

To be truly effective, directors must really know the business and be able to articulate the right questions. They also need to know when an

answer is acceptable or not. Training of directors in such areas is crucial. More is needed in Singapore and we are delighted to see the Singapore Institute of Directors ("SID") recently reinforce their strategy of increased training "for directors by directors" to ensure a higher practical content.

The acid test for each Board is simply this: "Compared to last year, are your directors doing a significantly larger amount of training?" Good Boards will be able to say "yes" and should shout about it in their next report on governance. Hopefully, it may help them gain some adjustment for bonuses when the next Governance & Transparency Index is issued. If it does not, we would be disappointed.

Without specialist knowledge and training, having independent directors does not necessarily translate into the critical and independent challenges of management that can potentially uncover flaws in complex business strategies.

Poor ethical leadership

A vast majority of current corporate scandals involve senior management, particularly the CEO and/or CFO (chief financial officer). Corporate greed and excessive hubris at the executive level, particularly in the financial services sector, has destroyed companies, drained stockholders of their investments and left innocent

employees without work. These rogue executives were sending a clear (though perhaps unintentional) message to their employees that poor ethical leadership is acceptable as long as it makes the company seem profitable. They were obviously not setting an ethical tone at the top for their employees.

When those in top positions set an unethical example, their employees will take heed and follow in their boss' footsteps. When executives put pressure on their employees to meet unrealistic revenue and profit targets, they are essentially forcing employees to do whatever it takes to achieve those goals. In other words, the end justifies the means.

Boards need to articulate exactly what they are doing *now* to reinforce strong ethical leadership. In particular, they need to publicly pronounce what new actions and measures they are taking to raise their game in this contentious and important area.

Saying nothing or reinforcing the old messages is simply not acceptable.

Focus on corporate governance as a whole

Sound corporate governance has long been recognised as a key element for markets wishing to attract capital. The opportunity now exists to create an enhanced environment for Singapore with resulting increased appeal to foreign investors.

However, clearly this needs to be operated in a "no surprise" environment.

One of the recent messages we have developed arising from our read of the ACGC report is that Boards must be very clear on what their full range of risks are and how they are addressed. From our discussion with Boards and senior management in several of the larger businesses both here and in the region, this is not always a clear cut issue. Yes, Boards are aware of these risks, but the degree to which the Board (rather than the audit or risk sub-committees) ensures the full "360-degree" spectrum of risk and their controls and compliance status are periodically assessed is often slightly less clear cut.

Indeed such discussions often lead to the realisation that the boundary of responsibility of the audit committee in this area is not as clear as one may at first glance think it is.

Have a 360-degree view of all risks and controls by the Board

Clearly, a Board cannot and should not be involved in actual day-to-day risk *management*. Directors should instead, through their risk *oversight* role, satisfy themselves that the risk management processes reduce risk to an acceptable level, and are providing quality compliance comfort to the Board (see Figure 1).



↑ Figure 1

There is often confusion over the roles of the Board, the audit committee and the risk committee and how each of them fits into such an overall risk management process. Often, there is inadequate co-ordinated efforts between the three. Everything may look good on paper but the problem arises when there is an issue or breach. Having world-class disclosures can be a poisoned chalice when things go wrong!

In this current environment, we would recommend all Boards to take a fresh look at this area, and ensure it is not a time bomb waiting to go off.

In doing this, we feel Boards should also take the opportunity to strengthen its focus on:

(a) defining exactly what its risk capacity and appetite is; and

(b) developing a monitoring and reporting process to enable the Board to be aware of “near misses” so that controls in such areas can be continually improved.

Do not cut corners

Of course, once a comprehensive 360-degree review has been undertaken, Boards will need to set aside time to review and monitor their compliance programmes. They also need to satisfy themselves on the quality of the compliance reporting by functions such as their legal counsel, the company’s compliance officer, internal audit, and their health and safety controller’s office. They will then have to ensure sufficient resources are available to address concerns as they need to send a strong signal that they are not going to violate the law or cut corners.

Understand accounting implications

Finally, in these challenging times, there is an increased risk of fraud through both the manipulation of results and the misappropriation of resources.

The chief executive of Informatics Holdings, who was charged for his role behind misleading financial statements, claimed that he was relying on the company’s qualified financial personnel when he allowed accounting policies to change which resulted in an overstatement of

profits. Clearly this reliance was not enough.

To avoid such problems in the future, management must clearly outline unequivocally its understanding of the implications of any accounting policy changes so that the Board can adequately and fully address any associated risks.

CONCLUSION

The recent wave of scandals comes as a shock not just because of the enormity of losses faced by companies, such as China Aviation Oil, but because of the discovery that questionable accounting practices may be far more widespread than previously envisioned. We feel a link between accounting failures and poor corporate governance is beginning to emerge.

Boards must understand that it is no longer business as usual. It is time to adapt and transform. Boards must adopt new tools and approaches, such as more specialist training for directors, reducing complexity and gaining a 360-degree view of its risks and controls, to help prevent control slippage. Management must take ownership of the company's internal control system that is developed to protect employees, employers, and investors. All management and staff must adopt and live good ethical practices.

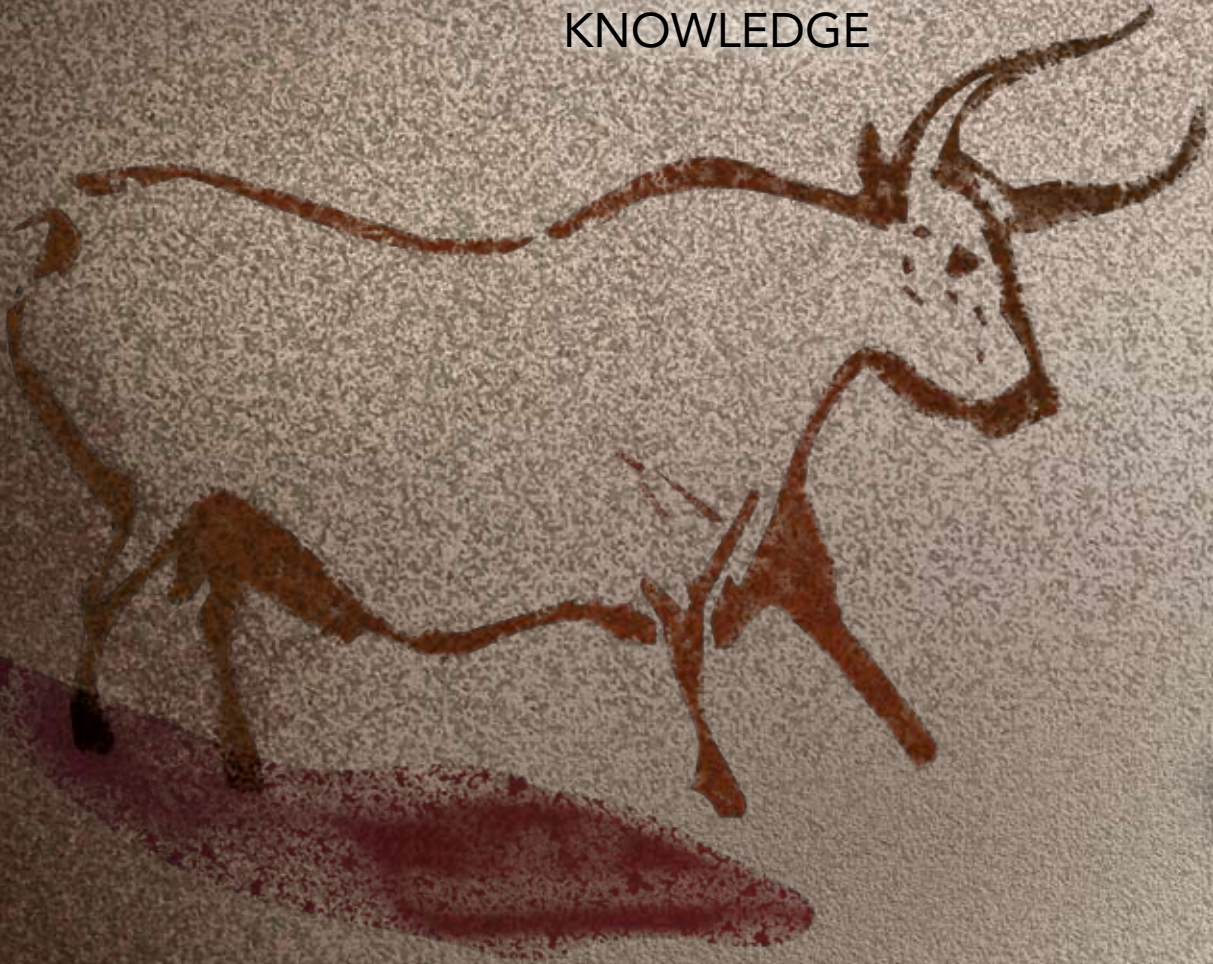


Such tools and philosophies are critical to any Board's ability to prevent and detect fraud, create financial disclosures that are accurate and transparent, and adapt to the constantly changing financial environment. If companies fail to change their governance practices, they are doomed to fall back into the same mess.

Finally, the annual audit is not a guarantee that a business will not fail. Neither is it an endorsement of the business model and corporate strategy pursued by company directors. Fraud, by its very nature, is extremely difficult, if not impossible to uncover. This is especially true for a very carefully and cleverly constructed fraud, which involves collusion. Ultimately, the first line of defence in terms of safeguarding the assets of the company and detecting fraud lies with the directors and management of a company. By the time the auditors and regulators identify fraud, it is already too late. ¹⁵

LOOKING WITHIN FOR SOLUTIONS

BUILDING AND
EXPORTING OUR
KNOWLEDGE



A FORMER SENIOR CIVIL SERVANT
WHO SERVED IN THE ELITE
SINGAPORE ADMINISTRATIVE SERVICE
TELLS US HIS SOLUTION TO LIFTING
THE PEOPLE OUT OF POVERTY AND
IMPROVING THEIR LIVELIHOOD.

*By Ngiam Tong Dow, Adjunct Professor,
School of Humanities and Social Sciences,
Nanyang Technological University*

THE current economic crisis engulfing the world, however intractable it may appear now, is susceptible to human solutions.

The current crisis can be said to originate from the financial excesses of sub-prime housing loans. How a substandard mortgage can be sold as a sub-prime loan is in a knowledge domain outside economics. Unlike forensic accounting, there is as yet no forensic economics.

Toxic financial products have precipitated a full-blown global economic meltdown, threatening to undermine world trade through a credit crisis. For the first time in recent memory, banks are refusing to lend to each other. Without the lubricant of finance, trade will grind to a halt and with it, the real economy.

The economic crisis (2008–2010) threatening the world



today is similar yet different from the great depression of 1929. Then men and machines were idling. Thrift, a virtue, was turned into a millstone round the neck of the economy. Budget deficits were politically out of bounds. Pump priming was vigorously opposed.

A contrarian thinker, John Maynard Keynes, proposed that governments incur budget deficits to stimulate demand so that idle men and machines could be put back to work.

The wheels of economic laws may grind slowly but they grind inexorably. That is why I believe that mainstream economic thinking on the economic crisis today is wrong and even dangerous. Unlike the great depression where lack of demand was caused by excessive thrift, the crisis today is caused by over-leveraging of financial assets fuelled by the US Federal Reserve Bank ("US Fed").

The US Fed cut its discount rate again and again, almost to zero, and hence, opened full throttle the faucets of money supply.

As a regulator, the US Fed should have known that when

banks are flushed with liquidity, bankers, being human, will be less careful, even careless, in lending. Sub-prime mortgage lending was fuelled by easy credit. Banks securitised assets at escalating prices and sold down the risk to millions of retail investors. Sometime, some day, the asset bubble had to burst as it has today.

“The worst predicament we can get into is to slide into becoming a high-cost, low-tech economy.”

At present, governments all over the world including our own are scrambling with “stimulus packages” to mitigate the effects of the economic meltdown. “Stimulus packages” sound good on paper but may turn out to be counterproductive. The American government proposes to spend billions of their taxpayers’ dollars to buy highly leveraged “toxic” financial products from investment banks and hedge funds to enable them to recoup their losses.

The founder and former chairman of the American Insurance Group (“AIG”), after disingenuously declaring that he was blameless for the disastrous fall of the US insurance giant, was reported to have said that “the Government’s

[US\$170bn] bailout had failed and that taxpayers would have been better off letting the company go bankrupt” (Edmund L Andrew, “Ex-chairman of AIG says Bailout has Failed”, *The New York Times* (New York, US) (2 April 2009)).

I have no way of knowing what goes on in Mr Hank Greenberg’s mind but if, by his statement, he means that over-leveraged financial assets should be allowed to decline in value to more realistic levels, I cannot agree with him more. Only then would there be willing buyers for these toxic products. Hopefully, the financial markets would sputter into life again to drive the real economy.

To me “bailouts” mean propping up financial assets at highly inflated prices. No sensible buyer would think that such stratospheric prices are sustainable. What is even more puzzling is how bailouts can “stimulate” an economy.

The local newspaper headlines today are replete with stimulus programmes which seem to change by the day. In my view, many of the stimulus programmes are misconceived. The job credit scheme in Singapore is one glaring example. How a country like Singapore which is a price taker can sustain wage subsidies is beyond my comprehension.

“How a country like Singapore which is a price taker can sustain wage subsidies is beyond my comprehension.”

The way ahead for countries like Singapore is not to attempt stimulating consumption through wage subsidies. By whatever name policymakers may call “job credit schemes”, they are wage subsidies which an open economy like ourselves can never sustain.

Instead of soft stimulus packages, Singapore has to methodically restructure its economy. Our government has rightly introduced schemes for skills upgrading, beefing up our infrastructure and raising our knowledge domains through higher education.

While we will still be able to attract some high-end foreign direct investments because of our technical competence and sound infrastructure, we have to be aware of our relatively higher costs *vis-à-vis* the BRIC (Brazil, Russia, India, China) economies. The worst predicament we can get into is to slide into becoming a high-cost, low-tech economy.

It is said that the current economic crisis is the worst since the great depression. The weaknesses of every economy will be mercilessly exposed. I need not dwell further on our own.

I end with some trepidation. More and more, I hear remarks being made that Singapore being the world's most open economy (not by choice but by necessity I might add) was the first to go into a recession. *Ipso facto*, when recovery comes, we will also be the first off the starting block. This sounds like wishful thinking to me.

In the aftermath of the current crisis, we will need to reposition ourselves for the new international economic structure that is emerging.

Those who are not our friends are already pointing out that our export-

oriented economic model will no longer work in the new, post-crisis global economy. As our costs rise, we will no longer be able to compete with the BRIC economies in the production of goods and services. There is no reason why we should produce goods and services only in or from Singapore.

If we had just gazed at our own navel, there would be no Singapore

“... mainstream economic thinking on the economic crisis today is wrong and even dangerous.”



Airlines ("SIA") today. I was one of the founding directors of SIA. The taunt that SIA is an airline that flies only between Changi and Seletar still rings in my ears.

As Permanent Secretary of the Communications Ministry then, I negotiated a dozen air services agreements with other governments that gave SIA access to intercontinental routes. Such routes helped us overcome our limitations of size.

We need to ask ourselves: what can SIA export? It can export our knowledge of building up an international airline from scratch.

“Enduring achievements have to be won by the people from within.”

As we have shown in SIA, we can develop a dozen more SIAs in other knowledge domains. And we have to do it ourselves. No one else will. We need to wean ourselves from our recently acquired habit of hiring outside consultants or foreign CEOs (chief executive officers) to do the job for us.

Enduring achievements have to be won by the people from within.

To sum up, to survive in the brave new world that is emerging, we need to export knowledge and leverage on the resources of other countries to increase our GNP (gross national product). We have to transform ourselves into an export-oriented, knowledge-based economy. ¹⁵



BEFORE language became a weapon of mass deception and “collateralised debt obligation” was an unborn jargon, those who presumed to know the future went by the honest title of soothsayer. In some enlightened societies, where they call a con a con, diviners dress differently from the public. They carry cockerels for sacrifice or speak into crystal balls, so innocent civilians are in no doubt that it is all cock and bull. In our society, they dress like any self-respecting lawyer, carry charts in place of cockerels and ballpoint pens in place of balls. Much as the present climate calls for more colourful monikers, the politically correct way to address them is “analysts”.


Pundits had gleefully marched millions toward an inexhaustible pot of gold at the end of a smiling

AFTER THE GOLD RUSH

A PIECE ON THE DURABILITY AND ADAPTABILITY OF THE HUMAN SPECIES, ESPECIALLY LAWYERS. AND A REMINDER THAT TEA LEAVES ARE FOR MAKING TEA.



By Chan Leng Sun, Legal Practitioner



circumzenithal rainbow. In the first half of 2008, so many companies were in expansion mode that the equator gained two inches. Law firm surveys declared record profitability and revenue. The party would never end. By September 2008, it became evident that the rainbow was just a multi-hued illusion and the lemmings were falling off the incorporeal bridge. The pundits now fall over themselves coining melodramatic pronouncements. Oracle-turned-flawed policymaker Alan Greenspan declared that we are in a “once in a century” credit crisis.

No doubt, there are serious differences between the hole we are in now, and the dot.com crash of 2002, the collapse of the Long-term Capital Market in 1998 and the crash of 1987. Are they not all different? Some say this is the worst since the “Black Thursday” of 1929. Perhaps. But if we think that we can divine the future by studying the ramblings of witchdoctors, we have not learnt anything at all. As Jon Stewart says, “If only I’d listened to CNBC, I’d have \$1m today – provided I had started with \$100m.” There is one thing that recent history should have taught us: talking heads are as clueless about the future as your pet hamster.

Panicked declarations about the end of civilisation should remind us of another famously premature prediction, by Fukuyama, about the end of history. It may well be that in three months, we will find ourselves in the deepest ever winter of our discontent. That will not be by dint of any clever study of financial data. The economy can either recover or continue to meltdown, so any mug with a mike has an equal chance of getting it right.

Some leaders anticipate recovery in two to five years. Other experts say recovery might be faster but do not rule out a “W” shape recovery – one wonders why they bother to speak at all.

Which is why this piece eschews charts and numbers predicting how certain sectors of the legal profession will perform in the next couple of years. You do not need investigative journalism to reveal that transaction work and revenue are hit hard; while dispute and insolvency lawyers are working hard. Some expect investment disputes to rise as States launch emergency measures bordering on protectionism and discrimination, possibly in breach of bilateral and multilateral

free-trade agreements. Beyond this, we might as well read tea leaves.

Hari Seldon, had he been alive or even real, would have demonstrated that one cannot foresee the future of a small group of people within a narrow time frame. Think the “butterfly effect” of chaos theory applied to the myth of divination.

On the other hand, we can certainly look at things in perspective. The human species has endured more horrifying crises than a million rejected loan applications. So has the legal profession. Well, its Western branch briefly disappeared when the Roman empire fell to the barbarians. Several centuries later, lawyers suddenly flourished like dogbane in summer woods. By the 13th century, our professional forefathers were busy laying the foundations on which we now stand, firmly or shackled, depending on your point of view. Given the accelerated

transmutation of modern age, a century of change in the Dark Ages is equivalent to the time between a Playstation update. Chances are that the profession will not flounder beyond Playstation 5.5.

In Asia, we have seen the legal phoenix rise time and again from the ashes of 20th century upheavals, through the killing fields of Cambodia and the calamity of Mao’s Great Leap Forward. In Europe, the practise of law has continued through the violent Middle Ages, the splintering of States and the return of Voldemort. We are intellectual descendants of principles and practices that have survived two World Wars. If things do turn out as dire as they say, lives may well become solitary, poor, nasty, brutish and short. Then again, to continue in this Hobbesian vein, laws will become all the more necessary to cement rules of social living, to keep us from falling into our dark, natural state of war and strife.



The legal profession will undergo transformation. Business models will be revamped. Some will turn to something else, to business, the arts or politics. Sadly, a rare few may even turn fugitive. Yet, many others will sweat unearthly hours and sacrifice much to earn a place amongst us. The profession will endure as long as society is governed by the rule of law. Perhaps, we can allow ourselves one small indulgent prediction after all. To quote a legal journalist who might very well be the one true seer: "Billable hours will be here till the sun turns supernova." *is*

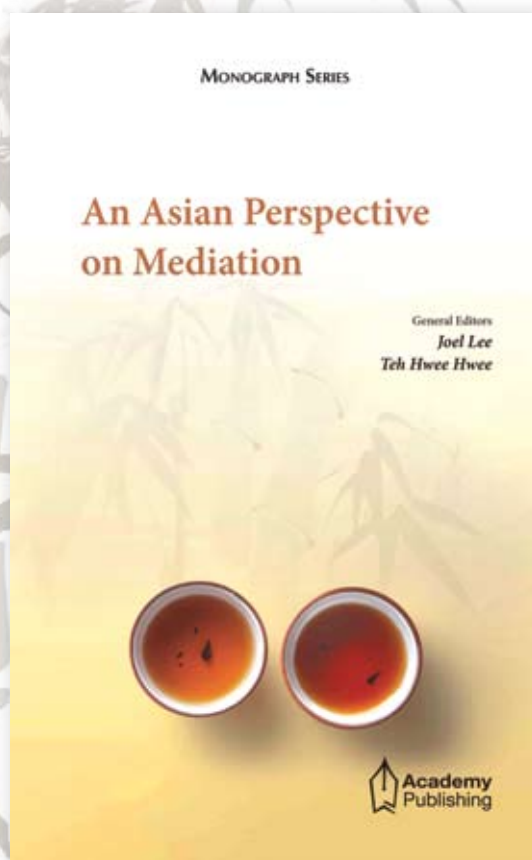
This piece was originally written in March 2009, in the midst of morbid fascination over a sinking economy. By the time of its editorial review in June 2009, the media had switched focus to sightings of land. The writer predicts with confidence that, when it is published, the economy will be heading this way or that.



ON THE BOOKSHELF

WHEN IN ASIA, DO AS THE ASIANS DO

IN 1976, in a speech that has since been regarded as one which launched the mediation movement in the US, Professor Frank Sander of Harvard Law School spoke on the limits of traditional litigation with its use of a third party with coercive power, the usually “win-lose” nature of litigation and the tendency to focus on legal issues rather than the underlying relationship between the parties at the Pound Conference convened to address popular causes of dissatisfaction in the American legal system. Sander envisioned alternatives that may provide far more “effective” conflict resolution, in particular, the use of mediation to help parties to reorient towards each other and reach consensual solutions towards their conflict. Since then, the mediation movement has grown apace, not only in the US but in other countries including those in Asia, which recognised the same limitations of traditional litigation and imported mediation practices from the US.



By Joyce Low, Director, Primary Dispute Resolution Centre

Title:	An Asian Perspective on Mediation
General Editors:	Joel Lee and Teh Hwee Hwee
Contributors:	Joel Lee, Teh Hwee Hwee, Ian Macduff, Melanie Billings-Yun, John S K Ng and Law Siew Fang
Publisher:	Academy Publishing
Extent:	256 pages (softcover)

The concept of mediation is, however, not new in Asia. Many of its countries have indigenous forms of mediation. As Asian countries imported modern mediation practices which contained cultural assumptions that were valid for Western societies, practitioners had to grapple with how to tailor those models for use in Asia where different cultural assumptions may apply. *An Asian Perspective on Mediation* explores the issue of whether there is a model of mediation that is more suited to the Asian context.

The first four chapters of the book are co-contributed by the general editors, Associate Professor Joel Lee of the National University of Singapore and Teh Hwee Hwee, Assistant Chief Executive of the Singapore Academy of Law. In the first chapter, the general editors described indigenous forms of mediation practised in Asia and contrasted it with modern mediation practices originating from Western societies to set the context of

the issue that the book addresses, that is, whether modern mediation models originating from Western societies should be modified to take into account cultural differences between Asian and Western societies. In the subsequent chapters, the general editors surfaced the cultural assumptions implicit in the interests-based model of mediation, suggested Asian-oriented cultural assumptions, and highlighted the tensions that may be created by incompatible cultural characteristics. In the fourth chapter, the general editors proposed one possible Asian perspective on mediation and offered useful practical suggestions on how the interests-based model of mediation may be modified to be culturally sensitive to Asians.

In the second part of the book, four contributors tackled specific issues of relevance to Asian mediators in more detail. These included examining the implications of mediating in a hierarchical and high power distance environment, exploring how

the concepts of trust, *guanxi* and face affect conflicts resolution in the Asian context, and considering how the Asian preference for high-context communication impacts conflicts resolution. In each of the chapters, the contributors made recommendations on how mediation practice may be modified to account for the difference in the dimension that it highlights.

The issue the contributors chose to engage in is not an easy one. There is immense diversity in the countries that make up Asia. There are differences in the social, religious, political and economic situations of countries and even the language they use. This diversity makes it challenging to identify commonalities and craft a model that may be broadly applicable in the Asian context. The general editors recognised the difficulty of the task and stated that the perspective they suggested was not meant to be a definitive prescription but *one* possible framework. In the same vein, their treatment of the difficult topics of culture and Asian values was sensitive and nuanced. Their intent was not to provide a cookie-cutter prescription for all mediations occurring in Asia but only those in which elements of the core Asian themes

of Confucianism, collectivist inclination and prevalence of face concerns are present.

The book is certainly a valuable contribution to the Asian mediation scene. Mediation practitioners will find many useful practical tips on how to modify the interests-based model of mediation to take into account cultural differences in the Asian context. More importantly, the book challenges the mediation profession in Asia to re-examine the role of a mediator as the contributors argue that a mediator should take on a leadership and more active role in the Asian context, instead of a purely facilitative and supportive role advocated by models of mediation imported from Western societies. It is timely to consider how mediation practices imported from Western societies should be modified to suit the Asian context as the practice of institutionalised mediation in Asia is expected to continue growing. I share the general editors' hope that the book will generate more discussion on the topic and advance mediation in Asia. *is*

An Asian Perspective on Mediation is available for purchase through Academy Publishing's online bookshop at www.sal.org.sg and major bookstores.

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