

# JUDICIAL CO-OPERATION IN CROSS-BORDER INSOLVENCY: CHALLENGES AND OPPORTUNITIES IN ASEAN

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Cross-border insolvency cases are on the rise. Judicial co-operation is essential in such cases to avoid fragmented or conflicting proceedings and to ensure fair treatment of creditors and assets across jurisdictions. This article surveys the different avenues currently adopted by judiciaries in the Association of Southeast Asian Nations (“ASEAN”) to co-operate with each other in cross-border insolvency, discusses possible challenges hindering greater embrace of such co-operation in ASEAN, and suggests potential pathways to promote stronger co-operation among regional judiciaries.

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## I. Introduction

1 On 25 August 2025, Cayman-registered Chinese real estate developer China Evergrande Group was taken off the Hong Kong Stock Exchange, about a year and half after it was issued a winding-up order<sup>2</sup> by the Hong Kong High Court for failing

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2 *Re China Evergrande Group* [2024] HKCFI 363.

to present a convincing restructuring plan for its offshore debt totalling \$23bn held by international creditors. The property developer is said to owe over \$300bn in total, more than half of Singapore's 2024 gross domestic product of \$547.39bn based on World Bank data. Its downfall is only one example (although a high-profile one) of multi-jurisdictional corporate failures that the world has seen in the past several years.

2 A myriad of factors point to the rising number of cross-border corporate insolvency<sup>3</sup> over recent times. Despite some pull-back from multilateralism, business activities continue to expand across borders. The market of cross-border business services, defined as the range of services designed to help companies manage their international operations, is expected to grow to \$120.7bn by 2033, a compound annual growth rate of 10.2% from the 2023 value of \$45.3bn.<sup>4</sup> On the flip side, this means that businesses operating across borders have to confront supply chain disruptions, trade policy shifts and technological displacements on multiple fronts, putting increasing strains on their profitability and even viability.

3 An increase in cross-border insolvency cases has thus been observed, often involving jurisdictions that are global or regional commercial and/or legal hubs such as the US, the UK, Singapore and the Hong Kong Special Administrative Region of China ("Hong Kong SAR"). The call for judiciaries to co-operate with each other more closely in these cases has also grown louder.

4 This article focuses on the Association of Southeast Asian Nations ("ASEAN"), but makes references to Asia in general where relevant. It:

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3 This article uses "cross-border insolvency" to mean cross-border insolvency and restructuring, unless the context requires otherwise.

4 DataHorizon, "Cross-Border Business Services Market (By Segment: Financial Services, Logistics And Supply Chain Services, Market Entry Advisory Services) - Global Market Size, Share, Growth, Trends, Statistics Analysis Report, By Region, And Forecast 2024-2033" (2025) <<https://datahorizonresearch.com/cross-border-business-services-market-45553>> (accessed 3 February 2026).

- (a) provides a brief overview of judicial co-operation in cross-border insolvency;<sup>5</sup>
- (b) surveys the different mechanisms by which judiciaries in ASEAN presently co-operate with each other in cross-border insolvency;<sup>6</sup>
- (c) discusses possible challenges hindering greater co-operation among ASEAN judiciaries;<sup>7</sup> and
- (d) suggests potential solutions towards co-operation on a larger scale in the region<sup>8</sup> before concluding.

## **II. Judicial co-operation in cross-border insolvency: a tale of two scenarios**

5 Judicial co-operation in cross-border insolvency is broadly understood to mean the interaction and co-ordination between courts in different jurisdictions in a collective effort to manage multiple insolvency proceedings taking place in those jurisdictions.

6 The UNCITRAL Model Law on Cross-border Insolvency<sup>9</sup> (“Model Law”) is the undisputed authority on judicial co-operation in cross-border insolvency. The principle of “cooperation and coordination” is one of the Model Law’s four elements underpinning the conduct of cross-border insolvency proceedings.

7 Chapter IV of the Model Law requires the courts involved in the principal insolvency proceedings (*ie*, the “home” courts) to co-operate to the maximum extent possible with courts involved in different insolvency proceedings (*ie*, the “foreign” courts) and foreign insolvency representatives, including direct communication between “home” and “foreign” courts and

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5 See paras 5–10 below.

6 See paras 11–27 below.

7 See paras 28–32 below.

8 See paras 33–37 below.

9 United Nations Commission on International Trade Law, UNCITRAL Model Law on Cross-Border Insolvency (1997) (“Model Law”).

between “home” courts and foreign insolvency representatives,<sup>10</sup> as well as communication between insolvency officeholders in the “home” jurisdiction and foreign courts or foreign insolvency representatives.<sup>11</sup> The Model Law also provides an indicative list of “appropriate” forms of co-operation.<sup>12</sup>

8 Chapter V of the Model Law governs co-ordination and co-operation between courts in concurrent or parallel proceedings involving the same debtor. For example, the commencement of domestic proceedings in a jurisdiction after recognition of a foreign main proceeding is restricted to the situation where the debtor has assets in that jurisdiction, and the effects of the domestic proceedings must be limited to those onshore assets and to the extent necessary to carry out co-operation and co-ordination outlined in the paragraph above.<sup>13</sup> Despite not being explicitly provided for in the Model Law, conducting a joint hearing or preparing a co-ordinated restructuring plan which “covers” all proceedings involving the same debtor is one common way to facilitate co-ordination in concurrent proceedings.

9 The essential role of judicial co-operation in cross-border insolvency is self-evident. Imagine a Singapore-headquartered company with manufacturing facilities in Malaysia, warehouses in Indonesia, and creditors in Singapore and Hong Kong SAR. In the event of insolvency, without co-operation, a Malaysian court may order the sale of manufacturing equipment to repay local creditors first, while an Indonesian court may order warehouse inventory to be seized to satisfy domestic claimants on a priority basis. The orders given by the courts in Indonesia and Malaysia may also be in conflict of each other. Further, these orders all target the same pool of assets of the same debtor. They put offshore creditors and other stakeholders (such as employees) at a disadvantage, undermining overall efforts to restructure the company.

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10 Model Law Art 25.

11 Model Law Art 26.

12 Model Law Art 27.

13 Model Law Art 28.

10 The situation will be very different if judiciaries co-operate with each other. In the example above, the courts of all the jurisdictions concerned can work together to agree to a co-ordinated plan to realise the company's assets wherever they are located, and ensure creditor claims are treated in a consistent and fair manner across locations. The innovative protocol<sup>14</sup> devised following the collapse of Lehman Brothers in 2008 is a well-documented real-world example of the benefits of judicial co-operation. That protocol enabled courts in many of the involved jurisdictions to recognise each other's insolvency proceedings, exchange information, and co-ordinate asset distribution to ensure fair treatment of the investment bank's creditors globally.

### **III. Mechanisms for judicial co-operation in cross-border insolvency in ASEAN**

11 With ASEAN projected to become the world's fourth-largest economy by 2030,<sup>15</sup> jurisdictions in the region increasingly find themselves ensnared in multi-jurisdictional insolvency. Over the years, different mechanisms have emerged to empower ASEAN judiciaries to co-operate with each other. They can be broadly categorised into structured, semi-structured, and bespoke mechanisms.

#### **A. Structured mechanism: adopting the Model Law**

12 With its exhortation to courts to "cooperate to the maximum extent possible",<sup>16</sup> the Model Law is the most structured and direct vehicle for judicial co-operation in

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14 The protocol is formally termed the Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies. For a detailed analysis of the protocol, see Jamie Altman, "A Test Case in International Bankruptcy Protocols: The Lehman Brothers Insolvency" (2011) 12(2) *San Diego International Law Journal* 463.

15 Jon Huntsman Jr & Sri Nazir Razak, "ASEAN is a Future Driver of Global Growth. Here's How to Unleash It", *World Economic Forum* (1 December 2025) <<https://www.weforum.org/stories/2025/12/asean-global-growth-digital-economy-wef/>> (accessed 3 February 2026).

16 Model Law Art 25(1).

cross-border insolvency. Adopted in over 60 jurisdictions,<sup>17</sup> it is also the most widely recognised way for co-operation. Model Law adoption has accelerated significantly in the past decade, with approximately 62% of the current adoption taking place between 2015 and 2025,<sup>18</sup> a reflection of the growing importance attached by governments around the world to this area of the law.

13 Malaysia (2025), Myanmar (2020), the Philippines (2010) and Singapore (2017) are ASEAN jurisdictions that have adopted the Model Law. Elsewhere in Asia, Japan (2000) and South Korea (2006), both ASEAN's key trading partners, are also Model Law jurisdictions. Notable non-adopters in Asia include Mainland China, Hong Kong SAR and India.

### ***B. Semi-structured mechanism: pursuing judicial diplomacy***

14 Model Law adoption takes time because of the need for legislative intervention. This contrasts with the urgent need for a judiciary to co-operate with its counterparts in cross-border insolvency. Judiciaries around the world have thus stepped forward on their own accord, and efforts of international and regional judicial diplomacy have flourished over the past decade to promote co-operation in cross-border insolvency.

15 ASEAN judiciaries benefit from the Council of ASEAN Chief Justices ("CACJ"). The CACJ is a regular forum for the Chief Justices of ASEAN Member States ("AMS") to discuss and exchange views on common issues facing their judiciaries and to promote close relations, and build mutual understanding, with each other. "Facilitating judicial cooperation and collaboration to enhance economic growth and development in ASEAN" is explicitly listed

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17 As of 31 January 2026. See United Nations Commission on International Trade Law, "Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)" <[https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\\_insolvency/status](https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status)> (accessed 3 February 2026).

18 United Nations Commission on International Trade Law, "Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)" <[https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\\_insolvency/status](https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status)> (accessed 3 February 2026).

## Judicial Co-operation in Cross-Border Insolvency: Challenges and Opportunities in ASEAN

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in CACJ’s mission statement.<sup>19</sup> Under the auspice of the CACJ, the First Meeting of ASEAN Insolvency Judges was held in November 2024 to “[foster] an understanding of the framework for insolvency and restructuring in the respective ASEAN jurisdictions and [provide] a forum for an exchange of experiences and perspectives on dealing with cross-border insolvency matters”.<sup>20</sup> One year later, the CACJ launched the Model Framework for Communication and Cooperation Between ASEAN Courts in Cross-Border Insolvency Proceedings (“Model Framework”). ASEAN courts are encouraged to voluntarily adopt the Model Framework and designate a point of liaison to facilitate court-to-court communication.<sup>21</sup>

16 Regional platforms like the CACJ have a strong signalling effect in highlighting the importance attached by relevant judiciaries to promoting co-operation and co-ordination among each other in cross-border insolvency.

17 The Judicial Insolvency Network (“JIN”), a network of insolvency judges from across the world, is another prime example of judicial diplomacy. Among others, it aims to develop best practices, and facilitate communication and co-operation among national courts, in cross-border insolvency. It does so by various means, the primary one of which is the Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters, commonly known as the JIN Guidelines.

18 The JIN Guidelines provide parties in cross-border insolvency proceedings with a framework to customise protocols

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19 Council of ASEAN Chief Justices, “Mission Statement” <<https://cacj-ajp.org/about-cacj/mission-statement/>> (accessed 3 February 2026).

20 Council of ASEAN Chief Justices, “First ASEAN Insolvency Judges Meeting” (28 November 2024) <<https://cacj-ajp.org/announcements/first-asean-insolvency-judges-meeting>> (accessed 3 February 2026).

21 Supreme Court of Singapore, “12th Council of ASEAN Chief Justices (CACJ) Meeting: ASEAN Chief Justices Launch Regional Model Framework for Cross-Border Insolvency”, media release (17 November 2025) <[https://www.judiciary.gov.sg/news-and-resources/news/news-details/media-statement--12th-council-of-asean-chief-justices-\(cacj\)-meeting--asean-chief-justices-launch-regional-model-framework-for-cross-border-insolvency](https://www.judiciary.gov.sg/news-and-resources/news/news-details/media-statement--12th-council-of-asean-chief-justices-(cacj)-meeting--asean-chief-justices-launch-regional-model-framework-for-cross-border-insolvency)> (accessed 3 February 2026).

to facilitate communication and co-ordination between courts,<sup>22</sup> with the ultimate objective of preserving enterprise value and reducing legal costs. As of writing, the JIN Guidelines have been adopted by 18 jurisdictions<sup>23</sup> via different forms such as issuance of a registrar’s circular<sup>24</sup> and incorporation into practice directions or notes.<sup>25</sup> They have also been applied to prepare protocols in cross-border insolvency matters.<sup>26</sup>

19 The JIN Guidelines are supported by other JIN initiatives, such as the Modalities of Court-to-Court Communication. The Supreme Court of Singapore is among the first batch of JIN members that contributed to the drafting of the JIN Guidelines. To date, the Supreme Court of Singapore is the only ASEAN court that has joined the JIN, though more ASEAN judiciaries have started to participate in JIN conferences.<sup>27</sup>

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22 Harold Foo, “Universalism on the Ascent, Singapore’s Cross-Border Insolvency Journey” (2023) SA LJ 593 at para 53.

23 See Judiciary Insolvency Network, “JIN Guidelines” (last updated 4 December 2025) <<https://www.jin-global.org/initiatives/jin-guidelines/>> (accessed 3 February 2026).

24 For example, Singapore adopted the Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters (“JIN Guidelines”) via Supreme Court of Singapore, “Issuance of Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters” (Registrar’s Circular No 1 of 2017).

25 For example, the Federal Court of Australia adopted the JIN Guidelines via the amended “Cross-Border Insolvency Practice Note: Cooperation with Foreign Courts or Foreign Representatives (GPN-XBDR)” (31 January 2020).

26 In Case C/13/745737 FT RK 24.103, ECLI:NL:RBAMS:2024:1154, although the District Court of Amsterdam rejected the protocol prepared for the insolvency of the Mercon Coffee Group, it confirmed that it had no objection to making the JIN Guidelines applicable in the case. See Ben Clarke, “Mercon Request to Adopt US-Approved Protocol Rejected by Dutch Court”, *Global Restructuring Review* (18 March 2024) <<https://globalrestructuringreview.com/article/mercon-request-adopt-us-approved-protocol-rejected-dutch-court>> (accessed 3 February 2026).

27 Justice Kannan Ramesh, Supreme Court of Singapore, “Overview of Cross-Border Insolvency and a Sampling of International Legal Instruments for Court-to-Court Communication and Coordination in Cross-Border Insolvency, Including the Model Law on Cross-Border Insolvency”, speech at the First Meeting of ASEAN Insolvency Judges (19 November 2024) at para 37 <<https://www.judiciary.gov.sg/news-and-resources/news/news-details/justice-kannan-ramesh--speech-delivered-at-the-first-meeting-of-asean-insolvency-judges>> (accessed 17 February 2026).

**C. *Bespoke mechanism: practicing bilateral co-operation***

20 In instances where adopting the Model Law or participating in standing international or regional forums is challenging, judiciaries in ASEAN have pioneered innovations to co-operate with each other on a bilateral, or more bespoke, basis.

21 The highest courts of Malaysia and Singapore entered into a set of protocols with a view to facilitating communication and co-operation between each other in specified types of cross-border insolvency proceedings commenced in the two jurisdictions. Specifically, any covered court may initiate a request for court-to-court communication with the relevant foreign court concerning a covered case, in which event the foreign court can respond directly to the request and engage in court-to-court communication whose methods will depend on the agreement by the two courts in each case.<sup>28</sup>

22 The protocol has been employed by the Singapore court in at least one case to communicate with the Malaysian court to apprise the latter of the steps taken in Singapore.<sup>29</sup> It is unclear whether any of the covered courts in Malaysia have made use of the protocol.

23 Although the relevance of the protocol is likely to diminish with Malaysia now being a Model Law jurisdiction, its positive role, at least as an interim solution, is undeniable.

24 In November 2025, the Supreme Court of Singapore and the Supreme Court of the Philippines signed a Memorandum of Understanding to Enhance Cross-Border Communications in

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28 Supreme Court of Singapore, “Malaysia and Singapore Implement Protocols on Court-to-Court Communication and Cooperation in Admiralty, Shipping and Cross-Border Corporate Insolvency Matters”, media release (5 October 2021) <<https://www.judiciary.gov.sg/news-and-resources/news/news-details/media-release-malaysia-and-singapore-implement-protocols-on-court-to-court-communication-and-cooperation-in-admiralty-shipping-and-cross-border-corporate-insolvency-matters>> (accessed 3 February 2026), Annex: Scope of the Protocols at para 5.

29 *Re Sapura 1200 Ltd* [2024] SGHC 242 at [10].

Cross-Border Insolvency Proceedings (“MOU”) to help judiciaries manage proceedings across both jurisdictions more efficiently and promptly.<sup>30</sup>

25 For completeness, outside of ASEAN, another notable example in Asia in this category is the “cross-boundary” co-operation arrangement between Mainland China and Hong Kong SAR.<sup>31</sup> Under this arrangement, liquidators from the Hong Kong SAR may apply to designated Mainland courts for recognition of insolvency proceedings in the Hong Kong SAR, while bankruptcy administrators from the Mainland may apply to the High Court of Hong Kong SAR for recognition of bankruptcy proceedings in the Mainland. Designated Mainland courts are required to “actively communicate and cooperate with courts in the Hong Kong SAR”.<sup>32</sup>

26 As of writing, the High Court of Hong Kong SAR has issued a letter of request seeking assistance from the designated Mainland courts in Shenzhen,<sup>33</sup> Shanghai<sup>34</sup> and Xiamen<sup>35</sup> in at least ten applications made by Hong Kong liquidators under the

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30 Supreme Court of Singapore, “12th Council of ASEAN Chief Justices (CACJ) Meeting: ASEAN Chief Justices Launch Regional Model Framework for Cross-Border Insolvency”, media release (17 November 2025) <[https://www.judiciary.gov.sg/news-and-resources/news/news-details/media-statement--12th-council-of-asean-chief-justices-\(cacj\)-meeting--asean-chief-justices-launch-regional-model-framework-for-cross-border-insolvency](https://www.judiciary.gov.sg/news-and-resources/news/news-details/media-statement--12th-council-of-asean-chief-justices-(cacj)-meeting--asean-chief-justices-launch-regional-model-framework-for-cross-border-insolvency)> (accessed 3 February 2026).

31 “Record of Meeting of the Supreme People’s Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings Between the Courts of the Mainland and of the Hong Kong Special Administrative Region” (signed 14 May 2021).

32 “Opinions of the Supreme People’s Court on the Pilot Work of Recognising and Assisting Bankruptcy Proceedings in the Hong Kong Special Administrative Region” (Supreme People’s Court, 11 May 2021), Art 24.

33 *Re Samson Paper Co Ltd* [2021] HKCFI 2151; *Re Zhaoheng Hydropower (Hong Kong) Ltd* [2022] HKCFI 248; *Re Ozner Water International Holding Ltd* [2022] HKCFI 363.

34 *Re Hong Kong Fresh Water International Group Ltd* [2022] HKCFI 924; *Re Trinity International Brands Ltd* [2023] HKCFI 1581; *Re PPLive Sports International Ltd* [2024] HKCFI 1850.

35 *Re Husk’s Green Technology Holding Co Ltd* [2023] HKCFI 3054; *Re Hong Kong Lee Yuan International Group Ltd* [2024] HKCFI 1971; *Re Doingcom International Ltd* [2025] HKCFI 6221; *Re Ecogreen Fine Chemicals Groups Ltd* [2025] HKCFI 6222.

co-operation arrangement, and at least three<sup>36</sup> of them have been recognised by the Mainland courts. On the other hand, publicly available records only show one such application from a designated Shanghai court being recognised by the High Court of Hong Kong SAR.<sup>37</sup> The exact reasons for this “asymmetry” are unclear, although one may surmise two possible explanations: (a) the small number of pilot Mainland cities included in the co-operation arrangement, reducing the pool of eligible Mainland courts; and (b) companies’ asset distribution strategies in light of economic realities – a company is more likely to have realisable assets such as factories and equipment in the Mainland than in Hong Kong SAR.

27 To be clear, relying on common law principles, Hong Kong SAR courts have recognised Mainland insolvency proceedings before the co-operation arrangement came into effect in 2021,<sup>38</sup> and continue to do so after the co-operation arrangement took effect.<sup>39</sup> As such, one may argue that the co-operation arrangement merely formalises a long-standing practice of the Hong Kong SAR courts. On the other hand, Mainland courts are bound by the codified civil law system, and may also be less experienced in handling cross-border insolvency matters. The co-operation arrangement thus provides a helpful framework, almost like a “judicial sandbox”, within which the courts can seek guidance with confidence and gradually build up experience.

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36 (2021) Yue 03 Ren Gang Po No. 1 (2021) (粤03认港破1号民事裁定) (15 December 2021) which recognised the letter of request issued under *Re Samson Paper Co Ltd* [2021] HKCFI 2151; (2022) Hu 03 Ren Gang Po No. 1 (2022) (沪03认港破1号民事裁定) which recognised the letter of request issued under *Re Hong Kong Fresh Water International Group Ltd* [2022] HKCFI 924; and (2024) Min 02 Ren Gang Po No. 1 (2024) (闽02认港破1号民事裁定) which recognised the letter of request issued under *Re Husk’s Green Technology Holding Co Ltd* [2023] HKCFI 3054.

37 *Re Shanghai Shengi Kecheng Shiye Ltd* (上海昇奕科城实业有限公司) [2025] HKCFI 1744 which recognised the letter of request issued by the Shanghai No. 3 Intermediate People’s Court in (2024) Hu 03 Po No. 854 (2024) (沪03破854号).

38 For example, see *Re CEFC Shanghai International Group Ltd* [2020] 1 HKLRD 676 and *Re Shenzhen Everich Supply Chain Co Ltd* [2020] HKCFI 965.

39 For example, see *Re HNA Group Co Ltd* [2021] HKCFI 2897, *Nuoxi Capital Ltd v Peking University Founder Group Co Ltd* [2021] HKCFI 3817, *Re Guangdong Overseas Construction Corp* [2023] HKCFI 1340, and *Re Yinhe Tiancheng Group Co Ltd* (银河天成集团有限公司) [2024] HKCFI 2016.

#### IV. Challenges to greater judicial co-operation in cross-border insolvency in ASEAN

28 With the mechanisms for judicial co-operation outlined above showing varying degrees of “formality” or “institutionalisation”, judiciaries in ASEAN should have enough flexibility to pursue co-operation in a manner that best suits their respective circumstances. In reality, however, progress of co-operation remains uneven. This may be attributable to the following challenges.

29 AMS have diverse legal traditions. ASEAN is home to a mix of civil law (Cambodia, Indonesia, Laos, Thailand, Timor Leste and Vietnam), common law (Brunei, Malaysia, Myanmar and Singapore) and hybrid (the Philippines) jurisdictions. Within the civil law “group”, the sources of legal influence also vary. Compared to judges sharing the same legal heritage, those from different legal traditions are naturally less familiar with each other’s legal systems and rules, and are more hesitant to co-operate due to this unfamiliarity.

30 The differing features of common law and civil law traditions introduce an added layer of complexity. Common law is often said to have the advantage of being certain yet flexible and adaptable.<sup>40</sup> By virtue of the courts’ “inherent powers”,<sup>41</sup> judges sitting in common law courts can engage in co-operation with foreign common law counterparts in the absence of enabling provisions in statutes. They can also pioneer innovation through case law, and cite or advocate for the importance of soft law instruments, which is important in signalling the stance of the courts and nudging practitioner behaviour. This contrasts with the “tied hands” of judges serving on the benches of civil law courts. Their role is primarily to interpret and apply codified law. Accordingly, they have less discretion and are also expected to

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40 See, *eg*, Lord Sales, “Certainty and Flexibility in the Law” (30 January 2025) <[https://supremecourt.uk/uploads/speech\\_lord\\_sales\\_300125\\_503b317d6a.pdf](https://supremecourt.uk/uploads/speech_lord_sales_300125_503b317d6a.pdf)> (accessed 3 February 2026).

41 Andrew Godwin, Timothy Howse & Ian Ramsay, “The Inherent Power of Common Law Courts to Provide Assistance in Cross-border Insolvencies: From Comity to Complexity” (2017) 26(1) *International Insolvency Review* 5.

exercise discretion (where they have) less frequently than their common law colleagues.<sup>42</sup> As such, in the absence of any explicit empowering provision in statutes, civil law judges are unlikely to attempt to co-operate with foreign counterparts. Further, as case reporting is not mandatory in the civil law system, there is also a lack of publicly available precedents to guide judges and practitioners alike on how judicial co-operation in cross-border insolvency can be conducted, even if such co-operation has indeed happened.

31 In ASEAN, civil law jurisdictions outnumber common law counterparts. Given the need for statutory empowerment before judiciaries in civil law jurisdictions can engage in co-operation, one may argue that the “safest” or “surest” way for judiciaries in ASEAN to co-operate with each other in cross-border insolvency is to adopt the Model Law. However, less than 40% of all AMS have adopted the Model Law, and none of the bloc’s civil law jurisdictions, including its two largest economies, Indonesia and Thailand, is a Model Law jurisdiction. The exact reason behind the limited success of the Model Law in ASEAN’s civil law jurisdictions, absent concrete evidence, is unclear. It has been suggested, however, that civil law jurisdictions have a “general weariness of delegating sovereignty” due to historical baggage,<sup>43</sup> and they are more likely to view the adoption of the Model Law as potentially infringing upon sovereignty. These concerns appear

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42 For example, it has been argued that Japan’s civil law tradition and judicial practice resist provisions of the Model Law that confer broad judicial discretion. For instance, Japan did not adopt Art 25 of the Model Law which requires courts to “cooperate to the maximum extent possible with foreign courts or foreign representatives” on the basis that co-operation would only be relevant where Japanese proceedings are already underway, and even then, only to a limited extent. The Model Law’s wide grant of discretion may in fact cause confusion to civil law judges. See Andrew Godwin, “Convergence, Divergence and Diversity in Financial Law: The Experience of the UNCITRAL Model Law and Cross-Border Insolvency” in *Convergence and Divergence of Private Law in Asia* (Gary Low ed) (Cambridge University Press, 2022), citing Kazuhiko Yamamoto, “New Japanese Legislation on Cross-Border Insolvency as Compared With the UNCITRAL Model Law” (2002) 11(2) *International Insolvency Review* 67.

43 Simon Chesterman, “Asia’s Ambivalence about International Law and Institutions: Past, Present and Futures” 27(4) *European Journal of International Law* 945.

to be particularly pronounced when it comes to onshore assets and creditors in cross-border insolvency.<sup>44</sup>

32 Last but not least, apart from divergent legal traditions, AMS also have vastly different national circumstances, leading to very different government priorities. Adopting the Model Law or reforming insolvency law to enable such co-operation is unlikely to be high on the legislative agenda of AMS with more pressing domestic issues. Accessibility to hardware and software resources by national courts is also uneven. For example, budget constraints mean that not all ASEAN judiciaries have the luxury of capacity-building or training programmes to educate them on judicial co-operation in cross-border insolvency.

## **V. Pathways for greater judicial co-operation in cross-border insolvency in ASEAN**

33 The challenges described above should not deter ASEAN courts from finding ways to co-operate with each other in cross-border insolvency. In fact, as ASEAN becomes more integrated into the global economy and more multinational corporations establish presence in ASEAN, it is imperative to intensify efforts to promote consistent and predictable judicial co-operation in cross-border insolvency. ASEAN may pursue several paths, leveraging existing mechanisms to maximise “cost-effectiveness”.

34 First, a variety of platforms should be leveraged for sustained outreach to encourage more AMS to adopt the Model Law. Those outreach activities may be carried out by the UNCITRAL Secretariat itself or by industry associations at public forums where practitioners, judges and policymakers exchange views and experiences relating to the Model Law. Consistent advocacy enhances awareness and increases the likelihood of fostering local champions to “sponsor” Model Law adoption within their respective jurisdictions. Outreach efforts should be less “preaching” but more pragmatic to secure buy-in.

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44 For example, anecdotally, the reason for the non-adoption of the Model Law by China is concern over the protection of domestic creditors.

For example, the digital economy appears high on the ASEAN agenda. Model Law outreach may therefore prove more effective if the Model Law is presented not so much from insolvency and liquidation angles but from business recovery perspectives, especially amid a growing number of digital platforms whose financial distress has or may have cross-border impact. The critical role of judicial co-operation can also be emphasised from angles such as facilitating the raising of rescue capital by distressed businesses across borders.

35 Second, as there is no “guaranteed return” from even the most consistent Model Law outreach efforts, ASEAN judiciaries should continue to pursue semi-structured and bespoke mechanisms for co-operation. Bilateral arrangements such as the Malaysia-Singapore protocol and the Singapore-Philippine MOU have the advantage of being comparatively easier to conclude. Such an arrangement can also be tailored to focus on specific aspects of co-operation. The impact of bespoke co-operation is, however, necessarily more muted as only two judiciaries are involved. On the other hand, semi-structured initiatives such as the CACJ and its Standing Meeting of ASEAN Insolvency Judges have much wider coverage, higher profile and greater impact. Participation in these initiatives also does not raise any sovereignty concern, a reservation often said to be behind hesitancy towards the Model Law. In fact, the media statement announcing the release of the Model Framework explicitly says that each ASEAN court maintains independence over its modalities of engaging with other ASEAN courts.

36 Lastly, efforts should be made to improve overall judicial access to information, exchanges and capacity-building via both official channels and industry-led initiatives. The fear of the unknown is the greatest fear of all. Hesitancy on the part of one judiciary to co-operate with another in cross-border insolvency may firstly be due to unfamiliarity with each other’s legal framework.<sup>45</sup> This problem is more pronounced in ASEAN

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45 One of the Judicial Insolvency Network’s contributions is said to be the “establishment of personal relationships among commercial judges from different countries” which is “key to success in multinational cases”. See Jay (*cont’d on the next page*)

due to factors such as language difference and public availability of information. Simply making information on a jurisdiction's insolvency regime publicly accessible is a good starting point. Organisations such as the Asian Business Law Institute have already done work in this aspect.<sup>46</sup> Several ASEAN judiciaries also have an education arm to facilitate more frequent exchange and capacity-building programmes among their judges. These are friendly and relatively informal settings for judges to gain an understanding of the regimes of other jurisdictions.

37 Whichever path an ASEAN judiciary chooses to pursue for greater judicial co-operation, the role of practitioners should always be given prominence. In many jurisdictions (whether or not they are Model Law jurisdictions), practitioners are often more sophisticated than judges in matters of co-operation and co-ordination in cross-border insolvency because of their ground experience in dealing with insolvency matters across jurisdictions, such as in relation to recognition of domestic proceedings and enforcement of domestic judgments abroad. They bring the skills, knowledge and experience of handling these matters back to their "home" jurisdictions. Insolvency representatives from jurisdictions with more experience in cross-border insolvency also bring their skills, knowledge and experience to less sophisticated "foreign" jurisdictions where they request for recognition of proceedings or judgments. Practitioners should thus be actively tapped for their expertise. For example, they can be invited to give practice lectures in judicial training programmes and should be consulted before the making of any legislative move.

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Lawrence Westbrook, "Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court" (2018) 96 *Texas Law Review* 1473.

46 For example, the Asian Business Law Institute jointly published with the International Insolvency Institute in April 2020 *Corporate Restructuring and Insolvency in Asia*, a compendium of over 800 pages that has, for the first time, provided a comprehensive mapping of the corporate restructuring regimes of the then all ten ASEAN Member States.

## **VI. Conclusion**

38 The inter-connectedness brought about by technological advancements, continuing economic integration notwithstanding the recent erection of trade barriers, and sustained people-to-people exchange mean that globalisation is not ending but will keep evolving. Multi-jurisdictional insolvency such as what happened to Evergrande will continue to happen. Accordingly, the “recognition that universal co-operation between jurisdictions is a necessary part of the contemporary world”<sup>47</sup> in cross-border insolvency will continue to hold true.

39 ASEAN has made noticeable progress in enabling and promoting judicial co-operation in cross-border insolvency through a variety of structured, semi-structured and bespoke mechanisms. The landscape nevertheless remains uneven, especially among its civil law jurisdictions. By exploring various pathways such as adopting the Model Law, engaging in judicial diplomacy, and improving overall accessibility to resources, more can be done to further move the needle for judicial co-operation in cross-border insolvency in ASEAN for the greater benefit of its economy and people.

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<sup>47</sup> *Re Opti-medix Ltd* [2016] 4 SLR 312 at [18].