THE SINGAPORE INTERNATIONAL COMMERCIAL COURT AND BEYOND: CHARTING THE NEXT FRONTIER FOR CROSS-BORDER INSOLVENCY

This article outlines the growth of the Singapore International Commercial Court ("SICC") as a forum of choice for debtors and creditors in international restructuring matters in the Asia-Pacific region. The authors also discuss the opportunities for greater convergence in procedural and substantive insolvency laws in the region in the future, via judicial diplomacy activities and the promotion of soft law frameworks such as the Asian Principles of Business Restructuring. This could lay the foundation for a future regional insolvency court, with the SICC ideally placed to function as the seat of that court.

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I. Introduction

1 With effect from October 2022, new court rules came into operation that expanded the jurisdiction of the Singapore International Commercial Court ("SICC") to include insolvency matters that are commercial and international in nature. The new rules have been viewed as a key component of Singapore's aspiration to become a leading centre for debt restructuring in the Asia-Pacific region, with the SICC serving as a central forum in a Singapore-led regional restructuring for debtors with assets and creditors in multiple jurisdictions.

2 The position of the SICC in this regard can indeed be considered a significant step in the development of the broader restructuring and insolvency landscape in the region – providing businesses in the Asia-Pacific with a reliable and competent forum to resolve international restructuring and insolvency issues, which increasingly traverse jurisdictions and are increasingly complex in an era of digital and technological innovation, rapidly evolving regulatory issues and a volatile economy.

3 Some within the restructuring and insolvency industry have already envisaged the SICC, in time, functioning as a regional international insolvency court with the potential to promote greater harmonisation of insolvency laws, and a consistent approach to recognition, that may lead to more predictable and consistent outcomes in cross-border matters. This would come close to the universalist ideal of establishing a single forum and a single law for cross-border insolvency matters within the Asia-Pacific region.

4 However, while the enhanced SICC – working in conjunction with Singapore's flexible and modern insolvency laws and its optimal legal and financial system – might attract more cross-border, international insolvency cases in the future, this will not automatically lead to greater convergence in insolvency laws and processes as matters currently stand.

5 The key limitation to achieving greater convergence at present is the fact that any judgment of the SICC, as with any other commercial judgment, still needs to be recognised in other jurisdictions to have effect and to be capable of enforcement beyond Singapore's borders. Currently, there is no regional (or global) bilateral or multilateral framework for the recognition and enforcement of insolvency-related judgments, and no state has yet adopted the UNCITRAL Model Law on the Recognition and Enforcement of Insolvency-Related Judgments ("MLIJ").

6 Nevertheless, there is the potential for advancements to be made in judicial co-operation and communication within the Asia-Pacific region – through official judicial forums such as the Judicial Insolvency Network ("JIN") and the Standing International Forum of Commercial Courts ("SIFoCC") – as well as other channels such as the capacity-building, education and research initiatives of the International Association of Restructuring, Insolvency & Bankruptcy Professionals ("INSOL International"), the World Bank, UNCITRAL, the Singapore Global Restructuring Initiative ("SGRI") and the Singapore Academy of Law ("SAL"). Collectively, these forums and activities lead to an enhanced degree of "judicial diplomacy", encouraging greater familiarity among courts and judges within the region with their respective legal processes, and building the exchange of knowledge and shared experiences that can lead to greater consistency – and ultimately convergence – in recognition, enforcement and applicable law in cross-border insolvency matters.

7 Along with judicial diplomacy, advancements in "soft law" measures, such as the Asian Principles for Business Restructuring project,[1]

1 A project jointly undertaken by the Asian Business Law Institute and the International Insolvency Institute. More materials may be found at "Asian Principles of Business
(cont'd on the next page)

may lead to a move towards more consistent substantive insolvency laws in countries in the Asia-Pacific.

8 Ultimately, convergence in procedural and substantive insolvency systems and processes could lay the foundation needed to bring to life the vision of a regional insolvency court in the Asia-Pacific. With its flexible rules and proactive case management powers, along with its panel of esteemed international judges – backed by a world-leading restructuring and insolvency system and financial and trade hub in Singapore – the SICC could viably function as the seat of that court in future years.

II. The bold vision of the Singapore International Commercial Court

9 The ambition for Singapore to become a leading restructuring hub in the Asia-Pacific region was first articulated in the work of the Insolvency Law Review Committee in 2013, and the Committee to Strengthen Singapore as an International Centre for Debt Restructuring in 2016 ("2016 Committee").

10 The reports from those Committees led to landmark reforms in 2017, which included the introduction of worldwide moratorium protections, pre-pack schemes of arrangement, super-priority for rescue finance and a cross-class cramdown to bind dissenting creditors in a scheme of arrangement.[2] With effect from 30 July 2020, restrictions on the enforcement of *ipso facto* clauses in an insolvency event have also applied under the Insolvency, Restructuring and Dissolution Act 2018.[3]

11 These reforms were designed to, in the words of the 2016 Committee, increase Singapore's status and reputation within the Asia-Pacific region as "a convenient base which combines efficiency,

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Restructuring" *Asian Business Law Institute* <https://abli.asia/abli-projects/asian-principles-of-business-restructuring/> (accessed 12 September 2023).

2 Additionally, there is now a 30-day automatic moratorium where a company proposes or intends to propose a scheme of arrangement. The moratorium extends to enforcement by secured creditors. Further, the 2017 reforms:

(a) enhanced the effectiveness of the judicial management regime, including by extending the availability of judicial management to pre-insolvency scenarios where a company is likely to become unable to pay its debts;

(b) led to the adoption of the UNCITRAL Model Law on Cross-Border Insolvency in Singapore; and

(c) clarified the ability of foreign debtors to pursue a restructuring under Singapore law in circumstances where there is a "substantial connection" with Singapore.

3 2020 Rev Ed.

expertise and a clear and certain legal framework from which to conduct a restructuring".[4]

12 Apart from its modern, best-practice restructuring and insolvency laws, Singapore's appeal as a restructuring hub in the Asia-Pacific region arises from its attractive business and institutional environment, having become a leading centre for international trade and legal and financial services, and with a sophisticated and highly respected Judiciary. Singapore also has a strong commitment to the rule of law. In recent research commissioned by the SAL, it was found that Singapore law is now the second most widely adopted in cross-border transactions in Asia after English law.[5]

13 Singapore is also developing a sophisticated restructuring ecosystem – comprising investors, financiers, insolvency practitioners, lawyers, accountants and academics working with the Judiciary.

14 The SICC has had express jurisdiction to hear cross-border insolvency cases since August 2021. Amended rules, which came into effect on 1 October 2022,[6] now specifically extend the SICC's processes to "proceedings relating to corporate insolvency, restructuring or dissolution that are international and commercial in nature".[7] The amended rules enable the SICC to exercise jurisdiction in applications for recognition and ancillary relief under the UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI"). They also provide for the SICC to make orders for *substantive relief* where a foreign company has a "substantial connection" with Singapore. The SICC has a broad discretion under the amended

4 Committee to Strengthen Singapore as an International Centre for Debt Restructuring, *Report of the Committee* (20 April 2016) at para 2.4 (Co-Chairpersons: Ms Indranee Rajah & Mr Kannan Ramesh).

5 See the commentary and analysis in Tan Ly-Ru & Tony Grundy, "Current Perspectives on the Choice of Singapore Jurisdiction and Governing Law in Cross-Border Transactions in Asia" [2022] SAL Prac 19.

6 Singapore International Commercial Court (Amendment No 2) Rules 2022 (S 754/2022).

7 Singapore International Commercial Court Rules 2021 (S 924/2021) O 2 r 1(2)(*da*). Under the new O 23A of the Singapore International Commercial Court Rules 2021, it is stated that insolvency proceedings are "commercial" if "the subject of those proceedings and any affected person have a relationship of a commercial nature, whether contractual or not". Insolvency proceedings are "international" if: (a) they are commenced under Pt 11 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (which deals with cross-border insolvency) and the Third Schedule to that Act (which sets out the UNCITRAL Model Law on Cross-Border Insolvency); or (b) the subject is a company or a foreign company that has a substantial connection with Singapore, and at least one of a prescribed list of factors applies to the subject (such as the place of business, assets, liabilities, creditors or contractual obligations being in a foreign country).

rules to adopt practices and procedures it sees fit, and to make any orders "likely to secure substantial justice".[8]

15 In that sense, the amended rules provide the SICC with the necessary flexibility to design and implement creative and forward-thinking restructuring outcomes, which appeal to both debtors and creditors in selecting an optimal restructuring forum. The SICC also has proactive case management powers, including the ability to order mediation in certain circumstances, and these powers can help to achieve greater efficiency and cost-savings, while promoting a more collective approach among creditors that may facilitate effective restructuring outcomes.

16 The SICC is also made up of an esteemed panel of international judges. Notably, Judge Christopher Sontchi, who commenced his term as a judge of the SICC on 4 July 2022, is one of the leading insolvency judges in the world – a former Chief Judge of the United States Bankruptcy Court for the District of Delaware, where he served for 16 years. The benefit of the international judicial panel on the SICC is aptly captured by Sundaresh Menon CJ:[9]

> In a world that brings legal issues of ever-growing complexity to the fore, there is tremendous benefit in harnessing a range of talents to resolve them … Beyond the obvious immediate benefits of having these international judges adjudicate disputes before the SICC, our foreign and local judges alike benefit from their interactions working alongside each other and applying their unique sets of experience and knowledge to the legal issues that arise in international commercial disputes. The kind of judicial exchange that takes place in this context promotes the cross-pollination of ideas and perspectives between judges, and even between jurisdictions, both on matters of substantive law, as well as in best practices in case management.

17 In addition to the amended SICC rules, amended legal profession rules[10] now also facilitate equal participation by both Singapore solicitors and foreign lawyers granted full registration to appear before the SICC in insolvency, restructuring and dissolution matters concerning offshore issues. This will help to build the underlying restructuring ecosystem of

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8 Singapore International Commercial Court Rules 2021 (S 924/2021) O 23A r 3(2)(*b*).

9 The Honourable the Chief Justice Sundaresh Menon, "Dispute Resolution at the Intersection of Domestic and Transnational Justice Systems: The Case for International Commercial Courts", speech at the Seventh International Bar Association Asia-Pacific Regional Forum Biennial Conference (23 February 2023) at paras 15–16.

10 Legal Profession (Representation in Singapore International Commercial Court) (Amendment No 2) Rules 2022 (S 755/2022).

experienced professionals needed to support Singapore's position as a major restructuring hub.

III. Is the Singapore International Commercial Court a precursor to greater insolvency convergence in the Asia-Pacific?

18 While the expanded jurisdiction of the SICC, amidst the broader institutional, economic, legal and financial appeal of Singapore, may lead to an increase in the number of international restructurings pursued within Singapore as the lead jurisdiction of choice, there is a question as to whether this will, of itself, lead to greater convergence in insolvency systems and cross-border insolvency law throughout the Asia-Pacific region.

A. Limitations on the enforcement of judgments

19 As matters currently stand, the answer to this question is a clear "no". This derives principally from difficulties with the enforcement of judgments issued by the SICC.

20 Note 7 (Enforcement of SICC Judgments) of the *Singapore International Commercial Court's User Guides*[11] envisages several "usual modes" by which SICC judgments may be enforced, including enforcement under the common law cause of action on a debt, enforcement under a civil law procedure (based on reciprocity in the recognition and enforcement of judgments between the court issuing the judgment and the court asked to enforce the judgment) and enforcement under the 2005 Hague Convention on Choice of Court Agreements[12] ("Hague Convention").

21 However, these enforcement options are not available in the case of insolvency-related judgments. Such judgments are not actions on a debt, and there are no reciprocity arrangements in place specifically in relation to insolvency judgments within the Asia-Pacific region. The Hague Convention also specifically provides that it does not extend to "insolvency, composition and analogous matters".[13]

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11 19 May 2023.

12 *Singapore International Commercial Court User Guides* (19 May 2023) Note 7, at para 3.

13 Convention of 30 June 2005 on Choice of Court Agreements (entered into force 1 October 2015), Art 2(e).

22 Indeed, the exclusion of insolvency-related judgments from the enforceability regime applicable to most other commercial judgments is the primary motivation behind UNCITRAL's adoption of the MLIJ in 2018.

23 Additionally, the MLCBI, adopted by UNCITRAL in 1997, does not confer express authority on courts to recognise judgments given in the course of foreign insolvency proceedings. Courts in the US have taken the position that the discretionary relief provisions in Art 21 of the MLCBI provide a basis for the recognition and enforcement of insolvency-related judgments.[14] However, decisions in the UK – most notably *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux*[15] ("*Gibbs*") and *Rubin v Eurofinance SA*[16] – have led to fragmentation in the application of the MLCBI, and there is currently no uniform framework to guide courts in the mutual recognition and enforcement of insolvency-related judgments.

24 These policy motivations for the adoption of the MLIJ are noted in the Guide to Enactment:[17]

> The concerns about the application and interpretation of the MLCBI together with the general absence of an applicable international convention or other regime to address the recognition and enforcement of insolvency-related judgments and the exclusion of judgments relating to insolvency matters from the instruments that do exist, led to the proposal to UNCITRAL in 2014 to develop a model law or model legislative provisions on the recognition and enforcement of insolvency-related judgments.

25 The practical effect is that the attractiveness to parties of the SICC as a forum for pursuing an international insolvency matter depends on the extent to which the parties can be confident any judgment issued will be enforceable in jurisdictions where the debtor has other assets and creditors. If not, the debtor will need to be prepared to file parallel proceedings, as commonly occurs with the filing of non-main proceedings in the UK given the limitation under the rule in *Gibbs*, according to which a foreign restructuring plan is incapable of binding creditors whose debts are governed by English law.

26 The prospect of the widespread adoption of the MLIJ in the Asia-Pacific in future years is limited, given the slow uptake of the MLCBI

14 *In re Metcalfe & Mansfield Alternative Investments* 421 BR 685 (Bankr SDNY, 2010).
15 (1890) LR 25 QBD 399.
16 [2013] 1 AC 236.
17 *UNCITRAL Model Law on the Recognition and Enforcement of Insolvency-Related Judgments: Guide to Enactment* (January 2019) at p 12.

from Asian nations. The MLCBI, to date, has been adopted in 58 states in 61 jurisdictions worldwide. Within the Asia-Pacific, it has been adopted by Singapore, Japan, South Korea and the Philippines, but not other nations such as China, Hong Kong, Indonesia, India, Thailand, Malaysia, Pakistan, Bangladesh, Sri Lanka, Laos and Brunei. As commentators have noted previously, "the Model Law approach has had only limited success in Asia", due to, among other things:[18]

> A general reluctance to apply foreign insolvency laws to the prejudice of local creditors [and] a need to preserve the sovereignty of a country by dealing with the assets of an insolvent debtor in accordance with its own redistributive concerns.

27 There is also the "wait and see" effect in Asia – which has "resulted in deadlock amongst the Asian countries because each jurisdiction is waiting for the other to make the first move to adopt the Model Law".[19]

28 This reflects a tension between:

(a) the modified universalism goal of the Model Law framework – the idea that, to the extent consistent with public policy and unique domestic circumstances, an insolvency matter involving a debtor with assets and creditors in multiple jurisdictions ought to be resolved in a single forum with a uniform process of administration; and

(b) the territorial approach, under which insolvency proceedings taking place in a particular jurisdiction only have effect within that jurisdiction. If the debtor's affairs extend across jurisdictional borders, insolvency processes will need to be invoked in every one of those other jurisdictions. This leads to a multiplicity of proceedings, with the potential for significant additional costs and inconsistent orders. Indeed, territorialism has been labelled as "anathema to the maximisation of enterprise value, which is the core goal of any effective insolvency regime".[20]

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18 Ajinderpal Singh & Ng Guo Xi, "Cross-Border Insolvency in Singapore: The Effectiveness of the Judicial Insolvency Network and the JIN Guidelines on the Administration of Cross-Border Insolvency Matters" *INSOL International Technical Paper No 40* (May 2018) at p 8.

19 Ajinderpal Singh & Ng Guo Xi, "Cross-Border Insolvency in Singapore: The Effectiveness of the Judicial Insolvency Network and the JIN Guidelines on the Administration of Cross-Border Insolvency Matters" *INSOL International Technical Paper No 40* (May 2018) at p 8.

20 Justice Kannan Ramesh, "Cross-Border Insolvencies: A New Paradigm", speech at the International Association of Insolvency Regulators Annual Conference and General Meeting, Singapore (6 September 2016) at para 25.

29 The current disparate approaches taken to the recognition of foreign insolvency processes and judgments throughout the Asia-Pacific results in not only a lack of certainty for commercial parties, but also a substantial practical impediment to the aspirations for greater convergence and concentration in insolvency proceedings in the region notwithstanding the institutional strength of the SICC and the broader insolvency ecosystem it seeks to be at the forefront of.

B. The idea of a regional insolvency court

30 These same difficulties limit the current potential for the realisation of the vision that some in the restructuring and insolvency industry have advanced of the SICC eventually functioning as the seat of a regional insolvency court within the Asia-Pacific.

31 The idea of an international insolvency court was first advanced by the United Nations Conference on Trade and Development ("UNCTAD") in 1998 in the context of the establishment of an international framework for *sovereign* debtors (that is, state debtors rather than private debtors).[21] It has since been advocated for in this context by various policy makers, particularly as the scope of sovereign debt default has increased in recent times with defaults in Greece, Argentina, Belize and Ecuador, and with Sri Lanka, Lebanon and Zambia also currently in default (and Ghana, Pakistan and El Salvador on the brink of sovereign debt crises). The view that has been taken is that International Monetary Fund bailouts tend to be conducted in an *ad hoc* manner – often with rival creditor committees and protracted resolutions when litigious distressed debt investors become involved. Bailouts may not have the transparency and independence that a multilateral, neutral body would offer in convening negotiations between a sovereign debtor in default and multiple creditors (public and private) and in establishing fair terms for a debt restructuring. An independent body could also deal with the complexities of sovereign immunity and conflicting provisions in bilateral investment treaties, and could centralise claims in a co-ordinated fashion.

32 But the vision for a regional insolvency court in the Asia-Pacific is now being spoken about in the context of private debtors. This would be a substantial step towards a universalist approach in international insolvency matters.

33 While this would, in theory, promote greater consistency, uniformity and predictability in insolvency outcomes, it would require

21 *Trade and Development Report, 1998* (United Nations, 1998).

local courts to cede authority to a central court and to recognise judgments made by that court, even where the substantive law applicable to key assets and transactions arising in an insolvency context may be very different among states. This is an important consideration too – indeed, the Model Law framework is a *procedural* framework. It does not address matters of *substantive* law, leaving this to be determined according to the local laws of different jurisdictions.

34 In the absence of greater consistency on applicable substantive law, as well as a common regional approach to the recognition and enforcement of judgments and the complexities of enterprise group insolvencies, the operation of a single regional insolvency court does not appear to be capable of being realised in the near-term.

IV. Indirect convergence – judicial diplomacy and regional soft law approaches

35 Nevertheless, the vision of a regional insolvency court – with the SICC functioning as the potential seat of that court – could come about in an indirect manner, via the convergence that can be achieved through judicial diplomacy and the promotion of soft law.

A. Judicial diplomacy

(1) Formal protocols

36 In terms of formal judicial co-operation and communication protocols, the earliest example of multilateral protocols in cross-border insolvency matters came in 2000, when the American Law Institute ("ALI") developed the *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases*[22] in advancing its transnational insolvency work in countries covered by the North American Free Trade Agreement. These Guidelines were endorsed by the International Insolvency Institute ("III") and the Insolvency Institute of Canada, and were also used by courts in cross-border insolvency cases such as PSINet and Matlack. They were subsequently developed into the joint *ALI-III Global Principles*

22 American Law Institute, 2003. See https://www.bccourts.ca/supreme_court/practice_and_procedure/practice_directions_and_notices/General/Guidelines%20Cross-Border%20Cases.pdf.

for Cooperation in International Insolvency Cases 2012[23] ("ALI-III Global Principles").[24]

37 The ALI-III Global Principles were drawn on to inform the *EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines* (more commonly known as the "JudgeCo Principles and Guidelines"), released in 2014.[25] This framework is intended to guide co-operation exclusively between EU nations under the framework of the European Insolvency Regulation[26] and the European Insolvency Regulation (Recast).[27]

38 Another influential multilateral framework that has facilitated judicial co-operation is the principles devised by the JIN – a network of insolvency judges from North America, South America, Europe, Asia, Australia and the Caribbean. The JIN is intended to serve as a platform for sustained and continuous engagement to further co-operation and communication, best practices and judicial thought leadership. It was initiated by the Supreme Court of Singapore, with the inaugural JIN Conference held in Singapore in October 2016.

39 At the conclusion of that conference, the JIN released its *Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters*[28] ("JIN Guidelines").[29]

40 The primary aim of the JIN Guidelines is to facilitate the preservation of enterprise value and the reduction of costs for distressed debtors in cross-border insolvency matters, by setting out principles for communication, joint hearings and other means of co-ordination between courts in different jurisdictions. The JIN Guidelines have now been adopted by 16 courts globally,[30] and are supplemented by specific

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23 International Insolvency Institute, August 2017. See <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.iiiglobal.org%2Ffile.cfm%2F10%2Fdocs%2Ffinal%2520ali-iii%2520global%2520principles%2520booklet.docx&wdOrigin=BROWSELINK> (accessed 12 September 2023).

24 This framework includes 37 global principles for co-operation in international insolvency cases, and 18 global guidelines for court-to-court communications in international insolvency cases.

25 See <https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/fiscaal-en-economische-vakken/cross-border.pdf> (accessed 12 September 2023).

26 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.

27 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

28 Issued at the Judicial Insolvency Network Conference (10–11 October 2016).

29 See <https://www.jin-global.org/jin-guidelines.html> (accessed 12 September 2023).

30 Including United States Bankruptcy Courts in Delaware, New York, Florida and Texas, the Supreme Court of Singapore, the Chancery Division of England and

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Modalities of Court-to-Court Cooperation[31] ("JIN Modalities"),[32] issued in 2019, that deal with the mechanics for engaging in communication.

41 The JIN Guidelines recently formed the basis of the cross-border insolvency protocol in the Canadian case of *Aralez Pharmaceuticals*.

(2) Forums for judicial diplomacy

42 While the JIN Guidelines and JIN Modalities (as well as the other formal protocols referred to above) are important as standalone communication and co-operation protocols, the *forum* represented by the JIN serves perhaps an even greater purpose in promoting judicial diplomacy and direct judge-to-judge linkages and exchanges. Indeed, judges belonging to signatory courts of the JIN attend specially convened conferences to exchange ideas and approaches to the interpretation of cross-border insolvency laws, and to share practical case experiences and suggestions for enhancements to communication.

43 These judicial exchanges are critical in building a thriving cross-border restructuring and insolvency ecosystem – and in enhancing the likelihood of co-operative approaches being taken between courts in substantive matters.

44 In this context, Professor Jay Lawrence Westbrook makes the point that:[33]

> A special virtue of the JIN initiative comes from the fact that the establishment of personal relationships among commercial judges from different countries is a key to success in multinational cases.

45 Likewise, it has been noted in a research paper commissioned by INSOL International that the platform created by the JIN for the exchange of information, ideas and perspectives on the development, interpretation and implementation of best practice insolvency laws and cross-border insolvency protocols serves to:[34]

Wales, the Federal Court of Australia, the Supreme Court of New South Wales and relevant bankruptcy courts in Seoul, Brazil and the Netherlands.

31 "Modalities of Court-to-Court Communication" *Judicial Insolvency Network* <https://jin-global.org/modalities.html> (accessed 6 September 2023).

32 See <https://jin-global.org/modalities.html> (accessed 12 September 2023).

33 Jay 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.

34 Ajinderpal Singh & Ng Guo Xi, "Cross-Border Insolvency in Singapore: The Effectiveness of the Judicial Insolvency Network and the JIN Guidelines on the

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> Create awareness among the judges regarding the interests of the stakeholders in insolvency proceedings regardless of their nationality and hopefully persuade them to place those interests above issues of national sovereignty. In addition to improving the insolvency profession as a whole, the regular communication and interaction between judges within the JIN can also enable these judges to leverage on their relationships to expedite matters and issues that come before them.

46 However, the ability of the JIN to function as a forum for judicial diplomacy in the Asia-Pacific is currently limited. Only the Supreme Court of Singapore and the Seoul Bankruptcy Court are current members of the JIN, while the High Court of Hong Kong, the Tokyo District Court and the Supreme Court of Japan are observers.

47 That said, there are other forums for judicial diplomacy that could advance convergence in restructuring and insolvency laws and processes in the Asia-Pacific region. One such forum is the SIFoCC, established in 2017 following an invitation from Lord Thomas (former Lord Chief Justice of England and Wales).

48 The SIFoCC seeks to bring together judges from commercial courts across the world. Judges meet every 12 to 18 months with a view to advancing best practice commercial laws and the consistent, just and effective resolution of commercial disputes. The SIFoCC currently has 36 member nations (and local commercial courts in those nations) – including, within the Asia-Pacific, Australia, China, India, Indonesia, Japan, Malaysia, New Zealand, the Philippines, South Korea, Singapore and Sri Lanka.

49 The Terms of Reference for the SIFoCC make the point that:[35]

> It is generally accepted that the proper functioning of commercial dispute resolution through effective commercial court systems contributes towards worldwide stability and prosperity. Those ends are in the interests of all users and all states. Commercial courts can provide predictability and reduce uncertainty. Sustainable economic development, and investor confidence, is promoted by adherence to the rule of law across the world. Commercial courts can develop best practice that is of wider use in national legal systems.

50 One of the express areas of identified co-operation for judges and courts comprising the SIFoCC – within the rubric of commercial law – is insolvency.

Administration of Cross-Border Insolvency Matters" *INSOL International Technical Paper No 40* (May 2018) at pp 11–12.

35 "About Us" *Standing International Forum of Commercial Courts* <https://sifocc.org/about-us/> (accessed 24 August 2023).

51 In the Fourth Full Meeting of the SIFoCC, jointly hosted by the Federal Court of Australia and the Supreme Court of New South Wales in October 2022, one of the key themes for discussion was the resolution of cross-jurisdictional conflicts, and the "increased need for cooperation and discussion between national courts". The objective, "taking cross-border insolvency as a focused lens", was to both examine how commercial courts can resolve international and cross-border issues, and to reflect on the SIFoCC's role as a forum for exchange between commercial courts.

52 Among other things, judges noted the importance of proactive "judicial dialogue" and co-operation, with "exchanges between judges, rather than just relying on the parties", and canvassed the potential for joint hearings between courts of different jurisdictions.

53 In facilitating those exchanges, the SIFoCC also runs a Judicial Observation Program. Under this Program, Chief Justices from a number of member jurisdictions are invited to nominate one or two serving judges to spend an intensive week in the commercial courts of another host jurisdiction. This is intended to develop closer judicial relationships and familiarity with international legal processes, and is a viable means to enhance cross-border insolvency and broader commercial co-operation.

54 Menon CJ delivered the keynote address at the Fourth Full Meeting of the SIFoCC and noted the potential for the SIFoCC to advance a transnational system of commercial justice. The Chief Justice made the astute observation that:[36]

> International judicial dialogue is an important driver of meaningful convergence. This takes place not only through the publication of judgments which are considered by courts in other jurisdictions, but also through direct communication and collaboration between judges across jurisdictions.

36 The Honourable the Chief Justice Sundaresh Menon, "SIFoCC Playing its Part as a Cornerstone of a Transnational System of Commercial Justice", keynote address at The Standing International Forum of Commercial Courts: Fourth Full Meeting (20 October 2022) at para 32.

55 According to Menon CJ, judges can, through the auspices of the SIFoCC, "dare to go further" by intentionally working together to enhance the transnational system of commercial justice that regulates cross-border commercial activity, noting that this will:[37]

> Surely facilitate the development of coherent and consistent transnational legal norms in many of these diverse areas of procedural and substantive law. That would better serve the needs of international commerce by promoting what Chief Justice James Allsop has called 'a culture of problem solving' that goes beyond black letter law and discrete processes, and instead focuses on the sensible and effective resolution of disputes as part of a system.

(3) Other initiatives that advance judicial diplomacy

56 Apart from the official forums offered by the JIN and the SIFoCC, INSOL and the World Bank have developed the Judicial Insolvency Program to assist with the capacity-building of judges, primarily in emerging markets and developing countries. The focus of the training is on insolvency and restructuring law through a particular lens of court procedure and judicial analysis. Further, INSOL and UNCITRAL have been holding joint Judicial Colloquia since 1995. In 2007, the World Bank joined INSOL and UNCITRAL as a partner in delivering these Colloquia. They are attended by judges, civil servants from relevant ministries and judicial administrators worldwide. To complement these biennial Colloquia, INSOL, UNCITRAL and the World Bank collaborate to organise regional Judicial Roundtables to encourage discussion at a regional level and enable a greater number of judges and justice officials to participate. The Roundtables compare judicial practice in dealing with practical and theoretical issues arising in cross-border insolvency cases within a particular region, including in the Asia-Pacific.

57 These innovative initiatives provide a platform for sharing and understanding best practice laws and court processes, identifying opportunities for the harmonisation of insolvency laws and the resolution of conflicts of law, the recognition of areas of common ground in furtherance of comity, and advancing the recognition of foreign insolvency proceedings.

58 In turn, the initiatives help to enhance the likelihood of proactive co-operation and engagement in cross-border insolvency matters. They also increase the potential for greater consistency in substantive outcomes.

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37 The Honourable the Chief Justice Sundaresh Menon, "SIFoCC Playing its Part as a Cornerstone of a Transnational System of Commercial Justice", keynote address at The Standing International Forum of Commercial Courts: Fourth Full Meeting (20 October 2022) at para 32.

59 Additionally, the SGRI – a project launched by Singapore Management University with the support of the Ministry of Law Singapore – also seeks to advance co-operation and collaboration among judges, as well as policy makers and academics, through its Annual Roundtable events, conferences and seminars. These events provide an opportunity for dialogue and policy discussions on insolvency law reform and best practices, and cutting-edge research on restructuring and insolvency law. This facilitates the exchange of information and ideas, and also further builds the people-to-people linkages so crucial to convergence in insolvency systems and processes in the Asia-Pacific region.

B. Soft law approaches

60 The SAL – a promotion and development agency for Singapore's legal industry, with the vision to make Singapore the legal hub of Asia – launched the Asian Business Law Institute ("ABLI") in 2016. The ABLI is a transnational institute based in Singapore that initiates, conducts and facilitates research with a view to providing practical guidance in the field of Asian legal development and promoting the convergence of Asian business laws, including insolvency law.

61 The Asian Principles of Business Restructuring are currently being drafted in partnership between the ABLI and the III. The long term aspiration is that these Principles will promote greater convergence in substantive insolvency laws throughout the Asia-Pacific region, serving as a common language in the design and implementation of local insolvency legislation.

62 The first phase of the Asian Principles of Business Restructuring project saw the ABLI and the III publish a compendium of jurisdictional reports entitled "Corporate Restructuring and Insolvency in Asia 2020", which paints a comprehensive picture of the insolvency regimes in 16 different jurisdictions across the Asia-Pacific region. The project has since moved on to the development of guidelines on distinct insolvency topics. In May 2022, the ABLI and the III published the first of these guidelines – the "Guide on the Treatment of Insolvent Micro and Small Enterprises in Asia". A new guideline is now being developed on out of court workouts, with the aim of synchronising key workout phases and managing the complexities that arise in the course of multi-jurisdictional workouts.

C. Convergence and the potential long-term role of the Singapore International Commercial Court

63 All of these judicial diplomacy and soft law measures can be viewed as an "indirect strategy" to "improving understanding and co-operation in insolvency" in the Asian region.[38]

64 Eventually, this may lead the movement away from territorialist approaches in the region, as courts and regulators see the benefit of co-operative procedural mechanisms, and harmonised substantive insolvency laws, to ensure greater efficiency in insolvency outcomes, and ultimately maximised returns for creditors and the continuation of viable businesses whose affairs extend across borders. This is achieved through the benefit of "soft persuasion rather than a treaty or agreement which may wrongly be associated with a 'hard sell'".[39]

65 Practically, this could result in a willingness among countries in the Asia-Pacific to accede to the jurisdiction exercised by the SICC in international insolvency matters as a leading institution within the region, with corresponding advancements on protocols for the recognition of insolvency-related judgments that may avert the need for parallel insolvency proceedings in multiple courts in cross-border matters.

66 Indeed, Kannan Ramesh J, Judge of the Appellate Division of the Supreme Court of Singapore and a Judge of the SICC, has identified the benefit of a "dual-track approach in harmonising cross-border insolvency laws" – the Legislature leading the adoption of harmonised substantive laws, and the Judiciary, as the institution responsible for interpreting those substantive laws, co-operating on procedural matters and a common framework for application across jurisdictions.[40]

67 In relation to judicial co-operation and exchanges – including through the official forums provided by the JIN and the SIFoCC as well as the broader initiatives noted above – Ramesh J notes the "spirit of trust between insolvency judges [that] may be formed, leading to greater comity and convergence of judicial philosophies".[41]

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38 Wee Meng Seng & Hans Tjio, "Singapore as an International Debt Restructuring Centre: Aspiration and Challenges" (2021) 57(1) Tex Int'l L J 1.

39 Wee Meng Seng & Hans Tjio, "Singapore as an International Debt Restructuring Centre: Aspiration and Challenges" (2021) 57(1) Tex Int'l L J 1.

40 Justice Kannan Ramesh, "The Cross-Border Project: A Dual Track Approach", speech at the INSOL International Group of 36 Meeting (30 November 2015).

41 Justice Kannan Ramesh, "Cross-Border Insolvencies: A New Paradigm", speech at the International Association of Insolvency Regulators Annual Conference and General Meeting, Singapore (6 September 2016) at para 37.

68 As Ramesh J identifies, judicial familiarity and communication can itself promote convergence on how cross-border insolvencies are dealt with on a functional level. And convergence on a functional level can spark greater convergence of substantive insolvency laws across different jurisdictions.

69 One example may be a common approach to the application of the rule in *Gibbs* in the Asia-Pacific, which could advance a consistent cross-border recognition regime in relation to insolvency judgments in the region. In that regard, Singapore courts have taken an expansive view to the interpretation of the MLCBI, similar to that of US courts. In June 2022, Aedit Abdullah J in the Singapore High Court in *Re Tantleff, Alan*[42] made orders not only recognising the US Chapter 11 proceedings of a Singapore publicly-held real estate investment trust and its subsidiaries as foreign main proceedings under the Model Law, but also recognising the Chapter 11 plan and the US Bankruptcy Court's confirmation of the plan. Abdullah J held that recognition of the plan and the confirmation order was properly considered to fall within the "form of additional relief" set out in Art 21(1)(*g*) of the MLCBI, finding that while the MLCBI "does not explicitly provide for the recognition and enforcement of foreign insolvency orders and judgments", the scope of relief in Art 21 is non-exhaustive and should not prevent a court from "grant[ing] any type of relief that is required in the circumstances of the case".[43]

70 Abdullah J cited with approval the US authorities which favour the approach that "foreign insolvency orders and judgments may be recognised and enforced locally, subject to limited exceptions such as public policy considerations".[44] The UK approach in *Gibbs*, described by Abdullah J as being "much more conservative",[45] was not followed.

71 With the expansion of judicial diplomacy – and the resultant consistency in judicial interpretation, experiences and familiarity with insolvency laws and processes in the Asia-Pacific region – this approach could inspire a mutual judgment recognition regime for insolvency in the region. This would advance the role of the SICC, and the impact of its orders in achieving the vision for the SICC to serve as the primary forum for the resolution of restructuring and insolvency matters in the Asia-Pacific – in substance, the regional insolvency court which is currently being conceptualised by many in the industry.

42 [2023] 3 SLR 250.
43 *Re Tantleff, Alan* [2023] 3 SLR 250 at [68].
44 *Re Tantleff, Alan* [2023] 3 SLR 250 at [70].
45 *Re Tantleff, Alan* [2023] 3 SLR 250 at [75].

V. Conclusion

72 The establishment of the SICC, now with an expanded jurisdiction to hear commercial international insolvency matters and with a panel of international judges experienced in commercial and insolvency law, has changed the landscape for the efficient resolution of complex insolvency matters and the potential to achieve successful outcomes in major cross-border restructuring cases. The SICC is now poised to become a forum of choice for debtors and creditors in international restructuring matters in the Asia-Pacific region.

73 However, the ability of the SICC to function as a truly regional forum which localises insolvency proceedings and advances the universalist ideal of modern cross-border insolvency law is still limited by the fact the SICC's judgments must be recognised and enforced by courts in other jurisdictions to have extra-territorial effect. The absence of a consistent approach to the recognition and enforcement of insolvency-related judgments in the Asia-Pacific region at present reflects a territorialist approach that also explains in part why so many nations in the region are yet to adopt the Model Law framework.

74 Nevertheless, there are strong opportunities for convergence in procedural, and substantive, insolvency laws in the region in the future, via judicial diplomacy activities and the promotion of soft law frameworks such as the Asian Principles of Business Restructuring.

75 That could result in a greater willingness among other countries in the Asia-Pacific to use Singapore as central point of co-ordination for insolvency matters, potentially without the need for concurrent proceedings before local courts and with the benefit of a consistent approach to the recognition of judgments issued and greater harmonisation in applicable law.

76 In that sense, judicial diplomacy and soft law measures may create the enabling conditions that will achieve the vision of a regional insolvency court currently being spoken about within the restructuring and insolvency industry – with the SICC ideally placed to function as the seat of that court.