SUMMARY OF SESSIONS

SUMMARY OF SESSION I: RECENT DEVELOPMENTS IN INSOLVENCY REFORM IN ASIA

Moderator: Mr. Henry Pitney, Senior Counsel, ADB

RECENT DEVELOPMENTS IN INSOLVENCY REFORM IN ASIA

Presenter: Mr. Ronald Harmer, Consultant, ADB

Recent developments in insolvency reform in Asia may be divided into five parts:

1. the development in formal insolvency law regime;
2. the application and administration of liquidation and rescue process;
3. the development in informal insolvency process;
4. the relationship between secured transactions and an insolvency law regime; and
5. the treatment of cross-border insolvency issues.

Formal insolvency systems consist mainly of liquidation and rescue. The liquidation effectively underpins both a formal rescue process and an informal rescue process. It also provides unsecured creditors with a critical ultimate right of enforcement, albeit within the framework of a collective procedure. However, according to this analysis, it is somewhat surprising that in a number of countries in the Asian region, so little attention has been given to the liquidation process and its application. In consequence, those countries may experience little benefit from their respective reforms in the more fashionable area of rescue. This analysis should not, however, be interpreted as a call for radical and draconian measures to liquidate enterprises at the first sign of financial difficulty.

Rescue has been at the center of the insolvency law reform movement in Asian. In a liquidation environment the law has a significant regulatory role to perform, while in the rescue process the principal aim of the law is not to regulate but to facilitate the negotiation and to provide the system, the mechanism and the forum with a plan for reorganization.

There are three areas of infrastructure development that are required in most countries in the Asian region in order to implement such processes, namely: the Courts and other tribunals that have jurisdiction under the insolvency

regime, the administration of liquidation cases and the management of reorganization. Many of the informal processes were introduced into countries of the region through semi-official structured processes. The success of purely informal work-out environments, such as those sponsored or encouraged by the banking sector, relies almost entirely on commercial good sense and on the fact that the debtor will be faced with the distinct prospect of liquidation unless an informal process is initiated and progressed.

The use of a rescue process in order to shield an enterprise from a security enforcement action raises a tension between the secured transaction law and the insolvency law. There is a clear need to frame an acceptable balance between the secured transaction regimes and rescue regimes.

The region is an obvious target for cross-border insolvency co-operation. The New Civil Rehabilitation Law of Japan provides that rehabilitation proceedings commenced in a foreign country shall be effective with respect to property situated in Japan and rehabilitation proceedings commenced in Japan (Article 4). In earlier laws insolvency proceedings commenced abroad had no effect upon property situated in Japan. The measures that may be employed include co-operation, provision of information and mutual participation in proceedings. Other countries in the Asian region should rethink and reconsider their attitudes toward cross-border insolvency issues.

RECENT DEVELOPMENTS IN INSOLVENCY REFORM IN JAPAN

Discussant: Prof. Manabu Wagatsuma, Faculty of Law, Tokyo Metropolitan University, Japan

A considerable legislative activity in the field of insolvency law reform in Japan has taken place since 1996. The practice of insolvency proceedings has also been changing. The key player of the screening process and the assessment of the prospect of a case for reorganization is shifting gradually from the Court to the petitioner on behalf of the debtor or supervisor.

There are five types of judicial insolvency proceedings in Japan, namely:

1. Bankruptcy (*Hasan*) is a procedure for liquidation of individuals and judicial persons regulated by the Bankruptcy Law of 1922;
2. Composition (*Wagiho*) is a workout under the supervision of the Court regulated by the Composition Law of 1922;
3. Corporate Arrangement (*Kaishaseiri*) is a workout in order to rescue corporations under the supervision of the Court;
4. Special liquidation is a liquidation procedure under the supervision of the

Court;
5. Corporate Reorganization (*Kaishakoseiho*) is a reorganization proceedure tailored for large stock corporation under the strict supervision of the Court.

Implementation of rescue schemes for financial institutions consists of the rescue package for financial institution and the rescue package for insurance companies. If a financial institution is in trouble, a rescue plan, such as merger and acquisition is carried out under the guidance of the Ministry of Finance. If an insurance company fails, it is handled under the Insurance Company Law.

In order to cope with urgent demands to rescue small businesses, the Bill of Civil Rescue Law was enacted on December 1999. The law is modeled on the United States' Chapter 11 Regime.

Reform of rescue package for financial institutions was conducted through (1) Reform of Deposit Insurance Corporation Law and (2) Reform of Special Law with regards to the reorganization proceedings of financial institutions. Under the latter law the corporate reorganization proceedings apply not only to insurance companies but also to mutual insurance companies.

RECENT DEVELOPMENTS IN THE INSOLVENCY PROCEEDINGS IN KOREA

Discussant: Dr. Il Chong Nam, Senior Fellow, Korean Development Institute

There were some problems in the old insolvency system in Korea, which led many large firms to fall into deep financial trouble. Many criticisms were directed at the insolvency proceedings before 1998. Such problems and criticisms led to the reform of the insolvency regulations. In the settlement of insolvency cases, the use of "workouts" has been widely implemented. However, new criticisms came up recently, focused essentially on the difficulty to trust accounting books and to figure out the true financial state of a company.

Changes in insolvency proceedings in recent years consist of:
1. Introduction of the Economic Criterion Test in the reorganization process of a company;
2. Expedition of the reorganization process;
3. Expedition of the composition process;
4. Creation of a Management Committee within the Court;
5. Mandatory sentencing of "bankruptcy" when reorganization fails under

certain circumstances;
6. Splitting a reorganized firm to induce a more efficient reallocation of resources;
7. Switch between the proceedings made easier; and
8. More stringent approach by the Court for the reorganization and composition.

The implementation of the procedure of workouts produced mixed results and in some cases, large-scale asset-stripping activities occurred.

In the future, steps should be taken to overcome the shortcomings in the current system of insolvency proceedings and to seek the causes of the bankruptcy of many large firms. In addition, reform in the corporate governance of creditor institutions and in the corporate governance of large firms is crucial. Reform in the corporate governance of the firm being reorganized is also important.

Discussion:

Although the law sets a fixed deadline to resolve the bankruptcy, sometimes the owner of the company is so powerful that the law does not work as expected. There are two ways that can be resorted to in Korea to deal with this problem:
1. informal workout, where creditors can demand that their loans be swapped with the shares of the company so that they eventually become majority shareholders of the company; in this way, they can replace the managers and evict the previous dominant shareholders if they want;
2. corporate reorganization, where the Court normally controls the proceedings and fills in the function of the General Meeting of shareholders. The Board of Directors then stops functioning. The management of the company is taken over by the Court, which means that the Court becomes the corporate agent.

There are legal consequences when a company is declared bankrupt. It is not clear whether these consequences also affect the right of the Boards of Directors (or Commissioners) to appoint the person who will take care of the company's assets or to appoint the lawyer. Normally when a company is liquidated the Board of Commissioners becomes unqualified to take any action. In most jurisdictions there is a public office that conducts the process of liquida-

tion. In Korea it seems that it is the judge who takes care of this process and becomes the custodian of the company's assets.

The owner of a company usually tries to maintain his/her strong position, and one of the means of doing so is by seeking the support of so-called "fictitious creditors". Therefore, although according to the law the owner does not have any power, in reality he is still powerful enough to influence the process. There should be a process where some independent person will be in charge, among other things, of examining the existence of the debt and of scrutinizing the claim of a creditor for voting purposes. Another possibility is to have a rule about the so-called "insider voting". This kind of creditors are true creditors but they have some close relationship with the corporation (directors, owners, shareholders, relatives of these persons, etc. of the company) so that the outcome of the meeting can be manipulated to the advantage of the corporation. There should be a special rule that would permit non-related creditors to appeal against the decision made by the insider voting because it does not represent the decision of the greater body of unrelated creditors.

In the process of bankruptcy, attention is not sufficiently given to the importance of the rules regarding the liquidation process. In Korea there is a rule about the mandatory sentencing of bankruptcy when the rehabilitation plan fails. In Indonesia these two rules were already set forth in the draft bill concerning the Restructuring of Companies.

There is a possibility of collusion between the managers of the financial institution and the managers of the company, because it is their common interest to continue the bailout program. This may lead them to agree on an unfeasible reorganization plan. To prevent this from happening, there is a rule in Korea that gives the Court the power to send the company into forced liquidation.

The key point of the Korean legislation is the capture of the financial sector by the debtors. It is, however, still open to question whether this capture is to be dealt with by the mechanism of the insolvency law or by another mechanism such as the financial regulation mechanism. The insolvency mechanism will create a system that depends largely upon the existence of very good and very powerful judges and this is somewhat unrealistic in view of the present conditions. The more realistic perspective for many countries is to solve those cases through a better financial regulation.

SUMMARY OF SESSION II: THE JUDICIARY - ROLE AND TRAINING OF JUDGES

PART A: ROLE AND ACCOUNTABILITY OF JUDGES (PANEL DISCUSSION)

Moderator: Prof. Mardjono Reksodiputro, University of Indonesia, Indonesia

ROLE AND ACCOUNTABILITY OF JUDGES

Presenter: Mr. John Lockhart, Director of the Board, ADB

In some countries, particularly in civil law countries, there are supervisory judges who direct or control the insolvency proceedings from the beginning to the end and have close contacts with the relevant Court officers and trustees. Whatever the system may be, judges are frequently involved in legal proceedings after sequestration or winding up.

Control of Court processes, including pre-trial directions, is the daily task of a judge. Some judges do this competently, others do not. The conduct of a pre-trial litigation is a large discipline by itself with many sophisticated training courses being conducted throughout the world. If the judges are to handle these matters by themselves, they must be trained to do so. Some countries have specialist Courts dealing with insolvency matters. Other countries prefer judges to have general jurisdictions, including insolvency.

Judicial independence is one of the most important rights in a democratic society, together with freedom of speech and association. Without it, other rights would be seriously diminished or lost. The main factors related to judicial independence are the method of dismissal of judges, the system of remuneration of judges, the protection and the personal security of judges, the administration of the Courts, and the accountability of judges.

THE ROLE OF THE JUDICIARY

Presenter: Mr. Manfred Balz, General Counsel, Deutsche Telekom AG, Germany

In Germany there are three legislative options and bankruptcy philosophies:

1. The judge weighs and balances claimant interest and controls all the junctures of the proceedings;

2. The administrator articulates (presumptive) common creditor interest under procedural judicial control;
3. Claimants negotiate in a pluralistic process (individually, or in a structured way- through committees and bodies) essential administration issues under the moderation of the administrator and or of the Court.

Judicial involvement in essential economic issues such as the assumption or rejection of pending contracts, the assessment of the viability of the debtor and the feasibility of the rescue and sale of asset is very limited. The minimum judicial involvement in economic issues is achieved by granting broad powers to a trustee.

Primary liabilities should be that of the State/Government. Judicial liabilities should be enforced only via a recourse action by the Government.

THE ROLE OF JUDGES IN INSOLVENCY, THE INDEPENDENCE AND ACCOUNTABILITIES OF JUDGES

Presenter: Ms. Eliyana Tanzah, Ad Hoc Judges of Commercial Courts, Jakarta, Indonesia

Since Commercial Courts were established in Indonesia in 1998, all cases of insolvency and deferment of debt payment come under the sole competence of the Commercial Courts.

Judges of the Commercial Court (a special chamber within the District Court) have a two-fold role: to examine cases of petition for insolvency and to act as a supervisory judge in insolvency processes. The supervisory judge is appointed from among the judges of the Commercial Court. The role of the supervisory judge commences only when a debtor is declared insolvent.

The commercial judge is independent in performing his duty. His independence is not absolute because a judge should uphold the law and justice through the cases referred to him. No sanction however has been defined in the event that the judge is found to have violated his independence in performing his duty leading him to an abuse of power or if he has committed disgraceful deeds.

THE JUDICIAL INDEPENDENCE, MALAYSIA EXPERIENCE

Discussant: Dato Visu Sinnadurai, Senior Judicial Specialist, World Bank

The judges always have a problem in relation to the question of judicial independence. There are no international standards for measuring the inde-

pendence of judges. The existence of judicial independence is measured from the public perception only. If the public has a positive image of the Court, it can be assumed that there is a judicial independence, and vice versa. There is no universal criteria for measuring judicial independence.

Judicial independence is the communities' right, not the judge's right. Therefore the community has an obligation to support the freedom of judges from the intervention of the Executive and other parties. Improving the conditions of judges is a pre-requisite to ensure the independence of judges.

As with other Asian Countries, the main problem in Malaysia is the lack of expertise or an imperfect understanding of the laws in insolvency cases among the judges. One way to overcome the problem of the lack of knowledge in bankruptcy matters is by setting up a specialized Court and by giving special training to the judges.

Discussion:

Making good decisions is the responsibility of the judges and this should be declared in the Constitution. However, the fact that wrong decisions are sometimes made is not the responsibility of the judges alone. The parties involved and the public are also responsible. Only good and competent judges should be appointed to examine cases and they deserve better rewards to guarantee their independence.

PART B: STRENGTHENING JUDICIAL EXPERTISE (PANEL DISCUSSION)

Moderator: Prof. Mardjono Reksodiputro, University of Indonesia, Indonesia

EDUCATION OF JUDGES

Discussant: Mr. Sijmen de Ranitz, De Brauw Blackstone Westbroek, Linklaters and Alliance, the Netherlands

The main reasons for the involvement of the judiciary in insolvency proceedings are to ensure the fairness of the process and that important decisions are taken swiftly and with authority. Insolvency judges play two main roles:

1. That of a "traffic cop". In this role the judge is asked by a party to take a decision in a dispute arisen between two or more parties. The judgment

only binds the parties involved in the proceedings;
2. That of a captain. The insolvency judge is like the captain of the ship who has to decide in which direction his ship should sail and which harbor it is to seek.

An insolvency judge must be a trained judge with some experience in commercial cases. He should have proper knowledge of the law on contracts, security rights, business disputes. The education an ideal insolvency judge should have received, should provide him with a basic knowledge of commercial economics, of the role and function of corporations, of the role and function of the banking and financing sector, of regulations and tax issues, of accounting principles, and of the importance of information and transparency.

He should also have acquired experience in handling cases in that area. If a specific advice is needed by a judge, the administrator should seek that advice, either on his own request or on request of the judges. The administrator is responsible for being objective in his choice of the external experts and for the objectivity of the expert himself.

Ongoing education is a must for all insolvency professionals, including insolvency judges.

The best training for judges is the training they can be given by experienced senior judges, combined with special courses given by practitioners, financial and economic experts.

BANKRUPTCY DIVISION AND COMMISSIONERS

Discussant: Prof. Soogeun Oh, College of Law, Ewha Woman's University, Korea

The Korean judiciary is very proud of the intelligence of its judges. There were, however, pros and cons regarding the establishment of a specialized Court. The positive factors were the concentration of resources and utilization of outside resources. The negative factors were the small number of cases, fluctuation of cases, rotation of judges, degree of interest, and formation of interest group.

The Government did not adopt the proposal of the establishment of a specialized Court for insolvency matters. It chose the establishment of the Bankruptcy Division in charge of insolvency cases rather than the creation of a specialized Court.

The best way to strengthen judicial expertise is to have honest and intelligent judges handle as many cases as possible.

STRENGTHENING JUDICIAL EXPERTISE IN BANKRUPTCY PROCEEDINGS IN CHINA

Discussant: Prof. Wang Weiguo, Dean, Department of Economic Law, China University of Politics and Law

The implementation of China's Bankruptcy Law relies very much upon judges. China has only one specialized Bankruptcy Court located in Shenzen. Therefore it is difficult to have a sufficient number of qualified bankruptcy judges. There are some predicaments that judges are confronted with, such as the multiplicity of bankruptcy systems, hardship in ensuring an equitable treatment to all creditors, the pressure of workers' rehabilitation, the limited capacity of senior judges and the tendency to use outside expertise.

Qualified bankruptcy judges may be created by:

1. Formulation of elaborate rules for operating bankruptcy proceedings;
2. Establishment of a long-term training program;
3. Taking institutional measures to address the shortage of experienced judges within Bankruptcy Courts.

INSOLVENCY AND JUDICIARY BRANCH IN MEXICO

Discussant: Mr. Luis Manuel Mejan Carrer, Director General, Institute Federal de Especialistor de Concursors Mercantiles, Mexico

Since August 2000 insolvency became a federal matter and is organized by IFECOM with the main authority in order to train judges in insolvency matters, to operate specialist registers (auditor, conciliator, and trustee) and to bring judges and specialists together.

It can be concluded that in insolvency cases there is a need for judges with extensive experience in insolvency matters as well as judges with specialized judicial training. Use of outside expertise can be useful if there is an accountability of the judges. The importance of specialized Courts and ad-hoc judges depends on the specific needs of each country.

Discussion:

Judges are not the kind of persons who know everything. They need more education through training to overcome the problems by improving their knowledge on economic problems. Judges are best in deciding justifiable issues, but decisions on particular parts of business conflicts are made by a trustee. Arbitrators should give advice to both parties. Therefore, in relation to decisions made by ADR (Alternative Dispute Resolution) on insolvency problem, the

person who is appointed to start the process by the Court or by other Authorities should have economic experience and be an expert in dispute resolution.

It is true that sometimes there is no trust from the public in the judiciary authorities. It takes time to get back the trust regarding judiciary tradition. The use of outside expertise would help the judge in fulfilling his main responsibility. However, not all decisions are the sole responsibility of the judge. Other authorities are also liable.

Focusing on judges alone is not enough. The main issue is not whether it is better to have a specialized Court or not. What is needed is to focus on the system as a whole. The whole system should be improved. It is not the judges alone who play the important role. In some countries a trustee is strong enough to resolve a dispute, and a trustee can do it any time the Court ask, him to do it.

SUMMARY OF SESSION III: THE JUDICIARY - LEGAL AND INSTITUTIONAL SUPPORTS

PART A: LEGAL AND ADMINISTRATIVE SUPPORTS

MODERATOR: MR. NEIL COOPER, PRESIDENT, INSOL INTERNATIONAL

THE JUDICIARY - LEGAL AND ADMINISTRATIVE SUPPORTS

PRESENTER: MS. RHODA L. WEEKS, IMF COUNSEL

The main issue is not how the law can limit the discretion of judges, but how the law can be designed so as to increase the likelihood of its application. Greater predictability means greater confidence in an insolvency system, especially in an emerging market jurisdiction. Confidence will benefit debtors, the banking system, non-banking creditors and the country's economy in general. Clear rules give legal certainty and minimize the need for litigation, proceedings are facilitated and costs reduced.

Some considerations to address the predictability are:

1. precise and objective definitions: the law should define concepts and criteria as precisely as possible, in order to provide guidance for the process of judicial interpretation;
2. a limitation of the institutional role: the law should consider limiting the institutional role in matters that involve an assessment of what are essentially economic and commercial issues;
3. time limits should be set for certain processes.

Administrative supports, which play an important role in insolvency proceedings, consist of liquidators, other specialists (appraisers, auctioneers, accountants), facilitating the setting up of creditors' committees, other administrative support such as adequate budgetary resources, training staff, access to legal database on insolvency etc.

ADMINISTRATIVE SUPPORTS TO THE JUDICIARY IN THE UK INSOLVENCY SYSTEM

Discussant: Mr. Desmond Flynn, Deputy Inspector-General, The Insolvency Service, Department of Trade and Industry, London

The 1986 Insolvency Act leaves it to the official receivers and insolvency practitioners to deal with as much of the routine and administration of insolvency cases as possible. The long history of public service of Official Receivers and their staffs have shown their capacity to administer insolvencies in a fair, efficient and objective way. It is clear that the Court would not wish to have any larger role in administrating cases than it has at present.

The other principal area of innovation of the 1986 Insolvency Act was the creation of the insolvency practitioner profession and, later, the formation of what was to become the Insolvency Practitioners Association. The "professionalization" of insolvency practice has been successful. Standards of professional behavior in this area have risen substantially since the coming into force of the 1986 Act.

THE SINGAPORE EXPERIENCE IN THE ADMINISTRATION OF INSOLVENCY REGIME

Discussant: Mr. Tan Kiat Pheng and Ms. Karen Loh, Official Assignees, Insolvency and Public Trustee's Office, Singapore

Bankruptcy regime in Singapore started with the Bankruptcy Ordinance which was introduced in 1888 when Singapore was part of the British Straits Settlement. The ordinance was based on the English 1883 Bankruptcy Act. In 1995, substantial amendments were made to the old bankruptcy law to keep pace with the social and economic conditions in Singapore.

The judiciary in Singapore -both individual and corporate insolvency proceedings- plays a more important role in the initial stages of the insolvency process. After the making of the insolvency orders, it adopts essentially a supervisory role. It is the official assignee or the official receivers who take effective control of the entire administration of the corporation from the date of the bankruptcy or winding up order until the date of discharge. This arrangement has worked well for Singapore's insolvency regime.

The ultimate aim of the Singapore insolvency regime is to combine the laws involving individual and corporate insolvency into a single statute to enable a streamlining of practices and procedures in efforts to administer more effectively and efficiently insolvency matters in Singapore. Relating to those

efforts, the Singapore's Insolvency and Public Trustee's Office has proposed an amendment of the Singaporean Corporate Law.

ADMINISTRATIVE SUPPORT TO JUDGES IN INSOLVENCY PROCEDURE: ROLE OF PLANNER IN THAILAND

Discussant: Mr. Anthony Norman, Managing Director, Ferrier Hodgson, Thailand.

The Planner regime in Thailand gives the Planner a role in supporting the Judges in Insolvency procedure. The critical points related to the planner role are:

1. Petition provided by debtor, creditor or governmental departments;
2. Hearing;
3. Plan Preparation Phase (90 days);
4. The Creditors' Vote;
5. The Business Reorganization Office Recommendation;
6. The Courts sanction;
7. The plan Administrator phase;
8. Retirement of the plan Administrator.

Thailand insolvency system still needs adjustment because of complicated claims, skill levels, claim adjudication timing, feedback on plan content, flexibility on treatment within creditors classes and technical support on insolvency and valuation

Discussion:

One of the important issues in the bankruptcy process is about who will pay for the process. Thailand provides for the taxes exemption for the administrative proceedings of formal Planner regime. In Australia, the trustees involved in the bankruptcy proceedings must disclose their bank account. The important thing in this matter is the check and balance between the public function and the private function, and also what is to be funded by the private sector and what is to be funded by the State. The basic principles in Singapore are as far as possible that the Government should not involve itself in the proceedings and should leave the process to the private sector. The Government will only be involved if the private sector does not have sufficient funds.

Attention should also be given to the new role of the administrative support in insolvency proceedings. The public confidence is not only dependent

on the judiciary, but also on its administrative supports. Therefore the issue is not the replacement of the Court but the increase of administrative supports such as Administrative Receiver and Trustee. For example, in the United Kingdom the Insolvency Practitioners have access to the Court without notice.

Another issue is the protection of independent people that act as a trustee, receiver, or public officer. In the UK, the Official Receiver is not really a civil servant; the immunity from being sued is not questioned. But the immunity has an unanticipated outcome such as creating double standards in the European Commission on Human Rights.

PART B: SPECIALIZED COURT

Moderator: Ms. Kartini Mulyadi, Kartini Mulyadi & Rekan, Indonesia

SPECIALIZED BANKRUPTCY COURT: THAILAND PERSPECTIVE

Presenter: Wisit Wisitsora-At, Ministry of Justice, Business Reorganization Office, Thailand

The main reason for establishing specialized Courts in Thailand is closely related to the economic crisis, the need for reorganization procedure, budget distribution and the urgency of the need to improve economic development. The Central Bankruptcy Court is not the first specialized Court in Thailand. There are various specialized Courts which were established long before such as the Central Tax Court and the Central Intellectual Property and International Trade Court.

In Thailand the Bankruptcy Act provides for reorganization proceedings. The reorganization law gives a rather important role to judges in dealing with business enterprises which is deemed to be quite complicated. Before the establishment of the central bankruptcy Court, some reorganization cases were filed with various Courts, but most of them ended in failure. One way to tackle the problem was to provide urgent training for judges. This suggestion was very impractical for the Ministry of Justice since there were more than 2,000 judges all over the country at the time. Finally, the setting up of a specialized bankruptcy Court emerged as the best option of all.

The Thai Central Bankruptcy Court is centralized. The Court examines both liquidation and reorganization cases. The number of judges is small. The

proceedings are swift. The Court runs efficiently, because there are sufficient bankruptcy cases. There is also a specialized bench in the Supreme Court.

THE NEW SPECIALIZED INSOLVENCY DIVISION OF THE FRENCH COMMERCIAL COURTS

Discussant: Mr. Jean-Marc Baissus, Former President of Péronne Tribunal de Grande Instance, France

The French Commercial Court is a historical exception. It has a self-centered judiciary for traders. However, there is a unicity of Courts in the system of appeal and at the Supreme Court level.

A series of draft bills were introduced for Parliamentary discussion in July 2000, which today meet with a general consensus around three key options:

1. The entrenchment of a judicial treatment of insolvency. The legal reasons imposing a judicial treatment of insolvency are constitutional values (principle of equality and right of access to Courts, principle of independence, principle of impartiality), European Convention obligations, the reinforced option for elected judges;
2. The specialization of insolvency jurisdiction through the creation of a mixed bench insolvency division within Commercial Courts;
3. The "judiciary fixation" of institutional support for insolvency proceedings by remodeling the judicial map through a simplification of area jurisdiction and rapprochement with ordinary Courts and also judicial training.

THE UNITED STATES' SPECIALIZED BANKRUPTCY COURTS

Discussant: Mr. Timothy B. DeSieno, Partner, Bingham Dana LLP, Singapore

In the United States, each State has its own Court system. In addition, the United Federal Constitution establishes the basis for a separate United States Federal Court system. The States' Court may hear and resolve all disputes that arise under the laws of the State but, on the other hand, the United States Federal Courts may only hear and resolve disputes that are specified in the federal Constitution or are sufficiently related to the federal laws of the United States. One of the subjects that the United States Federal Constitution specifically delegates to the United States Federal Government is "bankruptcy cases".

The role of the bankruptcy Courts is to hear and resolve all matters related to bankruptcy proceedings. Those matters include disputes about commence-

ment of proceedings, resolution of such proceedings, supervising liquidation auctions and determining whether to improve reorganizations plans. The judge discretion is limited by the common law principle of precedent—the binding nature of the previous rulings from superior Courts.

Appeals on bankruptcy matters are first heard by the Federal District Court of which the bankruptcy Court is a part. Then there is the possibility of an appeal to the appropriate Federal Court of Appeal, and finally to the US Supreme Court.

Besides the judges who are primarily charged with the expeditious resolution of bankruptcy-related disputes, the officers of the Court who are charged with overseeing the administrative aspect (US Trustees) are also involved in the bankruptcy proceedings. This officer's duties include, among others, appointing creditors' committees, reviewing and commenting on all requests for professionals' compensation and reviewing reorganization plan.

SPECIALIZED COURT SYSTEM FOR INSOLVENCY PROCEEDINGS: THE PHILIPPINE EXPERIENCE

Discussant: Mr. Cesar L. Villanueva, Villanueva, Senior Partner, Bernardo & Gabionza, the Philippines

The Philippine experience in creating specialized Courts may be divided into three main stages:

1. The American transplant
   The American Insolvency Law has been transplanted to the Philippine law since 1909 and until 1980. The law of 1909 is still the basic substantive law today;
2. Martial Law Initiatives (1981 to 2000)
   The 1981 Presidential Decree constituted the charter of the Philippine Securities and Exchange Commission (SEC). SEC is also a quasi-judicial agency, granted original and exclusive jurisdiction over corporate and partnership suspension of payment and rehabilitation proceedings, while Regular Trial Court (RTC) retains the jurisdiction over individual insolvency proceedings and over corporate and partnership simple suspension of payment and insolvency proceedings;
3. Recent Developments: the Securities Regulation Code
   As a reaction to the stock scam at the Philippine Stock Exchange, Philippine Congress fast tracked the passage of the Securities Regulation Code stripping the SEC of all quasi-judicial powers to allow it to concentrate on

its main role to administer and monitor the Philippine capital market. Consequently, all forms of insolvency proceedings, including corporate/partnership rehabilitation proceedings, have been unified within the jurisdiction of the RTC.

The Philippine Insolvency Law deals with three types of bankruptcy proceedings:

1. suspension of payment proceedings;
2. insolvency proceedings; and
3. rehabilitation proceedings.

Discussion:

How far can the specialized Courts in bankruptcy matter deal with other issues such as tax law, administrative law and labor matters? There is a common agreement that it depends entirely on each country's policy. In Thailand the specialized Court could cover all matters related to the Bankruptcy proceedings such as rehabilitation and liquidation.

The specialized Court is said to be typical of the US system, because in the US bankruptcy is a federal issue. To know whether this structure will work for each country, factors such as the speed (of case proceedings) and constitutional issues should be taken into consideration. Also, the key point is that it should have the necessary skill. If a country can get the skill and sufficient speed in dealing with the different situations outside a specialized Court, then the country does not need to have a specialized Court system.

Specializing the Court may have a "danger", because judges and practitioners sometimes only have the experience and knowledge relating to insolvency and are somewhat rusty in other areas of law or in the law in general. One should be aware that insolvency law is not only bankruptcy, but it basically also includes the law on trustees, the law on securities, the law on contracts, the law on revenues and the law on corporations.

Another important issue is the cost of the operation of a specialized bankruptcy Court. In developing countries, a small number of cases appear in specialized Courts compared to the general jurisdiction Courts. For example in the Philippines where the special Court also handles inter-corporation cases, the bankruptcy cases are only five percent. Therefore it should be envisaged that the specialized Court also deal with other cases.

The Thai Court is more similar to the specialized chamber of a general

jurisdiction than to a specialized Court as such. It is much more similar to the Korean Bankruptcy Division in the Seoul District Court than to the US Bankruptcy Court or even more to the French Court that is to a private Court.

There is only one way for the recruitment of new judges in Thailand after the judges passed the examination. To be a judge one must obtain the first degree of law and work for a while in the legal field. Most of the Thai Bankruptcy Court judges have experience relating to bankruptcy such as that of Official Receiver. And they get additional training including accounting. There is no full time accountant in the Bankruptcy Court, but they can rely on the full time accountant from the Official Receiver Office. There are several ways to recruit the judge, but most of the judges come from the new graduates from university or practitioners, and after passing the examination and training for one year, they will be distributed across the whole country.

PART C: RELATIONSHIP BETWEEN INFORMAL WORKOUT AND THE COURTS

Moderator: Mr. Terry Bond, Lending Services Director, Barclays Bank, UK

THE ROLE OF THE COURT IN PRE-PACKAGED AND PRENEGOTIATED PLANS IN THE US

Presenter: Mr. Richard F. Broude, Law Offices of Richard F. Broude, New York, USA

In the USA business reorganization can be achieved through an out-of-Court system or through a formal Court proceedings under Chapter 11 of the US Bankruptcy Code. The out-of-Court process is less formal and less expensive. In the out-of-Court system, debtors and creditors establish a "pre-packaged" or "pre-negotiated" plan by re-negotiating the deal or the term of the debt. Creditors who do not agree to the revised deal, the dissenting creditors, cannot be bound by the will of the majority and those creditors are free to pursue their own attempts to collect their debt.

The pre-packaging or pre-negotiating is usually used when companies have problems with their bondholders. If a default threatens or has occurred on one or more issues of bonds, the holders will generally appoint a committee to represent all bondholders in negotiating with the debtor. If an agreement to

restructure the debt has been approved and that agreement involves issuing new bonds which causes the bonds to be publicly held, an information document should be sent to each of the bondholders.

Under Chapter 11 of the US Bankruptcy Law procedure, the debtor and one or more creditors are required to submit a plan along with a disclosure statement to the bankruptcy Court. The bankruptcy Court will approve the disclosure statement, then the plan along with the related documents are mailed to the creditors who will vote the plan. Once the vote has been made, the bankruptcy judge holds a confirmation hearing and the debtor must satisfy the Court with confirmation standards in the best interest of creditors obeying to feasibility standards. These standards are designed to protect the minority against the majority and to ensure that the debtor will perform the plan.

Plan confirmation is very important both in ordinary cases and in pre-packaged cases. The judge's role in the confirmation process is vital, therefore the bankruptcy judges are required to evaluate the testimony offered to satisfy the confirmation standards. The less oversight exercised over the case by the judge, the more likely it is that the reorganized debtor will find itself in bankruptcy.

RELATIONSHIP BETWEEN INFORMAL WORKOUTS AND THE COURTS IN MALAYSIA

Discussant: Mr. Chris Lee, Corporate Debt Restructuring Committee, Malaysia

When the financial crisis of 1997 shifted away, Malaysian companies sought relief from their financial difficulties from formal insolvency proceedings to a restructuring approach. This change was due to the perception that the existing legal infrastructure was not as responsive as it should have been and was inadequate to deal with the present day's problems, although Malaysia's insolvency legislation and judiciary system had served well the insolvency proceedings for distressed companies in the recessions of the 1970s and the 1980s.

The creation of the Corporate Debt Restructuring Committee (CDRC) with the primary task to assist the restructuring of large "viable" corporate borrowers to avoid unnecessary collapse shows that out-of-Court workouts are usually used in large and strategic companies. However, insolvency proceedings remain an important tool in dealing with problem companies, because not all companies can be restructured.

For informal workouts to be effective, there must be a mechanism in place within the legal infrastructure in order to translate the informal agreement

into legally effective solutions. In restructuring, the support of all stakeholders is essential to reach the common goal. In addition such a proposal must also comply with companies and securities laws and have to be subject to the approval of the Securities Commission and also of the shareholders of the distressed companies.

The restructuring could be effected through the signing of a Debt Restructuring Agreement between the debtor company and its creditors. Section 176 of the Malaysian Companies Act 1965 allows for such legal remedy. The law requires creditors to vote in their respective classes as long as more than 75% in value and 50% in number of creditors in each class support the restructuring scheme, then the proposed scheme will be made binding on all creditors by the Courts. Therefore, the role of the Courts is very important in most debt restructuring, as it is difficult to ensure that 100% of creditors sign a Debt Restructuring Agreement to restructure debts. The Courts also have an important role when companies have to undertake a capital reduction, because the Court is the sole authority under the Companies Act for this purpose.

THE DYNAMIC BETWEEN THE ROLE OF THE COURT AND INFORMAL WORKOUTS

Discussant: Mr. Lampros Vassiliou, Head of Corporate Insolvency & Reorganization, Allens Arthur Robinson Group, Thailand

There is an inherent relationship between the Courts and the informal workouts that take place out of Courts. Countries with efficient Courts that apply an effective insolvency law may do so with the consequence of eliminating the need for informal workouts. For example, in Australia the informal workouts are rare because the Courts provide a simple process of Court proceedings.

In Thailand, the frameworks of informal workouts are fairly satisfactory. Thailand Courts have been fairly predictable in their interpretation of Thailand's rehabilitation law. In the Thailand new rehabilitation law, creditors are able to threaten debtors with rehabilitation if debtors do not co-operate in the debt restructuring negotiations. Some debtors have viewed the formal rehabilitation process as a useful tool for forcing a delay on creditors through requiring an expensive proof of debt thus whittling down the endurance of creditors. If the plans are not approved, the law allows the company to be returned to its original status as the Court can only order bankruptcy if a

bankruptcy petition was pending at the time the rehabilitation was filed.

One of the greatest risks facing Asia at present is that many restructuring plans are not feasible. Many restructurings in Thailand are more rescheduling debts with no real expectation that the debtor will be able to comply with the rescheduled debt reduction program rather than restructuring. Another danger facing restructuring in Asia is the fact that the informal workouts can take place without creditors having the opportunity to make fully informed decisions about the feasibility of the restructuring plans.

The essential nature of out-of-Court workouts is their flexibility and they are only limited by the creativity of the parties and their advisers and by the limits of the law as identified by the participating advisers. When the workouts plans are submitted to the Court to obtain the benefits of a Court process, the Court's identification of the unworkable or illegal aspects of the plan is a crucial quality control aspect, thus allowing debtors and creditors to utilize the Court process to implement pre-agreed workouts.

The dynamic of out-of-Court workouts is affected by the ability of the Court to administer the bankruptcies. If the Court or its agency allows bankruptcy to be an inefficient or unworkable process, debtors will not fear the threat of bankruptcy, as they will realize that creditors do not consider it a realistic option. If practical level creditors are likely to have to wait years to receive any distribution in a bankruptcy, creditors will always prefer any deal in an out-of-Court workout. This can mean that insolvent companies with business that are not viable will be allowed to continue to be in existence.

CORPORATE VOLUNTARY ADMINISTRATION IN AUSTRALIA

Discussant: Mr. Andrew Sellars, Manager, Corporate Insolvency Unit, Australian Treasury

The Voluntary Administration (VA) in Part 5.3A of the Australian Corporation Law commenced operating on 23 June 1993. The primary purpose of Part 5.3A is to provide a flexible and relatively inexpensive procedure pursuant to which a company may obtain a breathing space, so that it can attempt to find a compromise or arrangement with its creditors in order to save the company or the business thus maximizing return to creditors.

In the VA scheme an administrator should be appointed to control the company and its property. The primary task of the administrator is to investigate the company's financial position with a view to make recommendations to a meeting of creditors. The appointment of an administrator leads the trig-

gering of a moratorium on actions against the company. The administrator is required to call a meeting of creditors within five business days of his or her appointment.

The VA system is designed to maximize speed and efficiency by eliminating unnecessary Court involvement. The potential Court involvement in the VA system is in particular to supervise its operation where a party considers the scheme is being abused. Therefore, the Court is empowered to make orders of a supervisory nature towards creditors, administrators and other interested persons including ASIC (the Australian Securities and Investment Commission).

The VA has been and continues to be hugely successful in Australia. VA is now the single most popular formal procedure for dealing with companies in financial difficulty. Despite its popularity, there have been some concerns expressed from time to time about the VA system. Most commonly, complaints are from creditors who consider that directors are abusing the system. More recently, the number of complaints about possible abuse has diminished. Possible causes are that creditors have become more familiar with how the scheme operates, or with their own roles, rights and responsibilities.

The key factor in the success of the VA scheme in Australia is the availability of skilled, honest and independent administrators. Australian debtors and creditors are now quite familiar with the concept of the VA scheme and, by and large, consider it as a useful tool. During the earlier years of its operation there were some teething difficulties, but through the accumulation of Court decisions and experience, creditors accepted the VA scheme as a legitimate means of dealing efficiently with a debtor company in financial difficulty.

Discussion:

It is very important for a trustee or an administrator to know a wide range of laws. The interaction between insolvency law and other laws such as employment law, secure transaction law, equity trust law, corporate law etc. is unavoidable. It is an essential aspect of why insolvency operates in a broad legal framework both in designing insolvency laws and in implementing them in the Court system. For example, one cannot approve a plan if the key element of the plan cannot be implemented because of some other laws.

The experience of the US in bankruptcy law is not necessarily relevant to our discussion except maybe on two points. In the US there are restructuring

lawyers who are in the business group of law firms. The bankruptcy department is in the litigation group of the law firms. Bankruptcy is the last of the great generalist practices. It is unspecific. It is easy to learn bankruptcy law but it is difficult to relate bankruptcy with other disciplines such as environmental law, taxation law and others. The US have a wonderful facility called the Supreme Court of the Constitution.

In the US there is a generation of lawyers that have never dealt with bad business but only with a bad balance sheet.

New Zealand has a very flexible reorganization arrangement, sometimes it may be criticized as too flexible. This country also has good pre-packaged arrangements and formal arrangements that have been very successful. There are two reasons for New Zealand's success. First, New Zealand is a small country. Therefore, the number of people who are experienced in this area and who have the skills to do the viability assessments are known throughout the country Second, there is no automatic stay against secured creditors and this is very important, because there is an incentive for the insolvency practitioners to put up a good plan quickly.

Australia has a very creditor-friendly system. The actual successful rehabilitation process is due to at least two reasons. One is possibly that the secured creditors are the best ones to decide whether the plan is going to work or not. The other reason is that a number of people may or may not take into account what is happening in the Court.

In 1998 when the crisis occurred, Malaysia created three Government agencies. The CDRC (Corporate Debt Restructuring Committee) is only one of them. The others are the Bank Recapitalization Agency called Danamodal and Danaharta Asset Management Company. The emphasis given to the rights of secured creditors in any restructuring program depends on what securities creditors are holding. The concept of secured creditor is that you need the holding of intangible assets or strategic assets. But in Danaharta itself a scheme needs to be approved by secured creditors. So that if the secured creditors agree to the scheme, it can be invoked under the law against the unsecured creditors.

The automatic stay is ingrained in the US culture and it's unlikely to go away even against secured creditors' action. The interesting thing is that in small cases the secured creditors are mostly to get relief promptly from the bankruptcy Court. In big cases secured creditors generally do not want to use the automatic stay clause because it will minimize the value of their collateral against unsecured creditors' action. Apparently, in many cases they are disin-

clined to exercise their right to veto a voluntary arrangement. The bigger the case the less likely it is that it will look at the proceedings as a way to maximize value even though it may not like all the aspects of what is going on and what may happen to it during the plan. Generally they prefer to proceed whether or not there is a stay but it's irrelevant to most countries because the US has 23 exceptions to it.

It is very dangerous to make a comparison assessing the value of an automatic stay on secured creditors in a uniform manner, because it varies from country to country as the consequence of the different security arrangements which also vary from country to country. The Australian administrative law is not well-known and worthy of publication in Australia, if the company appoints a voluntary administrator, there is a 10-day period in which the secured creditor can act to enforce his security During that 10-day period the debtor's choice for the voluntary administrator has to go to the secured creditor. If the secured creditor is not comfortable with the choice of the administrator, he can appoint someone else.

SUMMARY OF SESSION IV: INFORMAL PEER REVIEW – INDONESIA

Moderator: Dr. Jusuf Anwar, Director of the Board, ADB

SOME CHALLENGES FOR INSOLVENCY SYSTEM REFORM IN INDONESIA

Presenter: Prof. Roman Tomasic, Dean Faculty of Business and Law, Victoria University, Australia

Indonesia has a long tradition of using negotiation and other informal methods for handling disputes. This can help in making an insolvency system that is more closely adapted to Indonesian circumstances.

The continued reliance on informal mechanism is essential, because no legal system is able to work with insolvency problems solely through the judicial system. Informal mechanism works best where there is an easy resort to the Court should there be a breakdown in negotiations. Several informal arrangements have been introduced:

1. Jakarta Initiative, to provide a mechanism for debtors and creditors to negotiate a "workout" plans;
2. Indonesian Debt Restructuring Agency (INDRA), to facilitate the settlement of debt and restructuring of non-bank institutions;
3. Indonesian Bank Restructuring Agency (IBRA), to deal with bank restructuring by taking over many non-performing loans and to inject new funds in order to recapitalize banks.

A credible legal infrastructure remains, however, the essential background for an effective informal system of bankruptcy negotiation and settlement. One of the fundamental issues in the adoption of new laws and legal institutions in Asian countries has been the concern over the imposition of a foreign-derived law. Unless the law becomes embedded within a social and legal cultural system, it is unlikely to be accepted by local political and economic forces.

The Indonesian legal system has elements of a civil law based on European (continental) civil law tradition. It may create problems for foreigners who are used to other legal (common-law) system. But in commercial law areas, there are signs of an increasing convergence: UNCITRAL Model Law on Cross-Border Insolvency, use of arbitration in commercial disputes, publication of

comparative reports on good insolvency practices, development of principles of good practice relating to insolvency, and also a forum addressing the subject such as this forum etc.

The Indonesian Bankruptcy Law is based on the old Dutch legislation of the 19th century and its amendment was made in 1998. The law provides two means of dealing with bankruptcy problems: liquidation proceedings and moratorium on debt-payment. The amended law is suitable for dealing with problems relative to slow paying debtors but not for the "deeply-underwater" debtors.

The Indonesian law established a new Commercial Court to process petitions relating to bankruptcy and moratoriums on debt payment. This Court supervises the reorganization or rescue process in order to ensure the efficient conduct of the process. However, it should be said that the new (draft) Bankruptcy Law should be seen as a transitional law that opens the way to a more modern legislation that will reflect the greater range of models available in some other insolvency jurisdictions.

ROLE OF INDONESIAN INSOLVENCY SYSTEM: CASE OF OPTIMISM AND CASE FOR CAUTION

Discussant: Mr. Bacelius Ruru, Chairman of the Jakarta Initiative Task Force (JITF)

No matter how efficient the insolvency system is in practice, many experienced parties will normally prefer to avoid judicial intervention in favor of a mutual and consensual resolution. The out-of-Court settlement for cases such as corporate debt restructuring still plays an important role. The Jakarta Initiative Task Force (JITF) is a mediation body (established by the Government) with the prime duty to facilitate corporate debt restructuring in Indonesia. In the second-half of year 2000, over US$ 9.4 billion in aggregate debt was restructured under the JITF alone.

Although the Indonesian insolvency system has not played a tremendous role in helping parties to determine their negotiating leverage, there are promising signs that the Commercial Court may nevertheless play a constructive role with the implementation of (already) agreed deals. With a workable mechanism to implement the so-called "pre-negotiated" restructuring plan, parties will move more quickly to finalize their deals. This will result in an increased pace of out-of-Court restructuring negotiations.

The implementation of pre-negotiated bankruptcy plans is not without

unexpected excesses. In at least two recent cases there have arisen practices of using allegedly "fictitious" creditors as a tool to influence the outcome of a creditors' meeting that discussed the composition plan put forward by the company. This practice will undermine the fragile process being made in out-of-Court debt restructuring, because it will cause many debtors to walk away from the negotiating table and put the parties into a state of uncertainty.

The solution to this threat lies in a better implementation of the existing insolvency laws. Abuse of the process would damage both the public's faith in the judicial system and the viability of the out-of-Court workout process.

THE INDONESIAN BILL ON RESTRUCTURING DEBTS AND REHABILITATION OF COMPANIES

Discussant: Prof. Sunaryati Hartono, Padjadjaran State University, Indonesia

The drafting team on the Restructuring Debt and Rehabilitation of Companies (RDRC) makes assumptions different from the philosophy of legalistic private law embedded in the old law on bankruptcy. The team views the bankruptcy in a broader perspective, particularly when the bankruptcy occurs *en masse* so that it may involve the whole economy and society. The approach of the team is not purely legal but takes also other economic, social and international factors in consideration.

The team views the insolvency law as covering three kinds of law: law on RDRC, law on Bankruptcy, and law on Liquidation. The existing Bankruptcy Law is only a part of the insolvency law. The two other laws should be made to complete the entire cycle. Restructuring of debt should precede the procedure of bankruptcy, and be followed in turn by liquidation. A bankruptcy petition may only be filed to and be granted by the Court if and after the RDRC procedure fails. And because sufficient time has been given to the RDRC procedure, there is no further delay for the Court's award for bankruptcy and the parties need not go through a long procedure of bankruptcy such as provided for in the present law.

Discussant: Ms. Kartini Mulyadi, Senior Partner, Kartini Mulyadi & Rekan, Indonesia

The result of the implementation of insolvency procedures in Indonesia is rather disappointing. The weak enforcement of this law is clearly shown in two recent cases that involved foreign creditors and domestic debtors. These

two cases are very important for further analysis and study of Court awards. The first case refers to a bankruptcy petition filed by a foreign corporation against an Indonesian finance company to recover US$ 30 million. The second case refers to a successful bid by an insurance company at the Government auction for a 40% shareholding in an Indonesian joint venture, although this Indonesian company had previously been declared bankrupt and its assets were being auctioned.

Actually there is nothing seriously wrong with the present bankruptcy law. The weak implementation may well contribute to the occurrence of these cases. It is mainly a matter of the will of the judiciary, of the litigation lawyers and of the other parties involved in a bankruptcy procedure. One of the possible solutions to prevent similar cases from recurring in the future is by a careful introduction of the precedence system in the Indonesian legal system. It must be carefully implemented because at present there are many inconsistencies and a great unpredictability in the Court awards in this field. An expert group should be set up and given the task of examining the existing Court awards and of selecting which ones are to be put in the "precedence list".

Discussion:

Insolvency law does not operate in a vacuum, but has some relation with other laws in the system. If the ultimate objective of the insolvency law is to encourage local and foreign investment by ensuring certainty in the insolvency proceedings, it is more advantageous to come up with a code rather than to come up with several laws that may have some impact not only on each other but also on other related laws. It will also make it easier not only for local practitioners but also for foreign practitioners, for example in cases of cross-border insolvency.

In order to achieve this, a number of steps must be taken. The law on secured transactions, for example, must be developed hand in hand with the law on insolvency. However, to try to reach all these goals immediately and at the same time is asking too much. The ideal way to legislate is indeed to have a code, especially in civil law countries. However what is really needed in the present situation is not the code, but the speed in making some progress. The method in working out the code may make it longer for the code to be achieved. But by following the step-by-step method, it is still possible to make the necessary arrangements and to achieve some consistency between laws dealing with the same subject.

Recently the OECD initiated a project on comparative company law reform among the member countries. From the 17 member countries that are reviewing the company law, most projects take an average of 4 to 5 years to be achieved. Speed is of essence in insolvency proceedings. But speed is not essential in a long-term commercial law reform.

Some scholars are of the opinion that insolvency law is neutral by nature, so that it can be copied or imitated from the similar law in other countries. Careful consideration should, however, be given to differences in the social and cultural background and also in the economic level of each country.

SUMMARY OF CONCLUDING SESSION: FUTURE WORK

Moderator: Mr. Stilpon Nestor,
Head Corporate Affairs Division, OECD

Presenter: Mr. Takahiro Yasui, Principal Administrator, OECD

FAIR was established to provide a platform for dialog regarding the promotion of insolvency reform in the Asian region. The future work of this forum has not been decided yet, so comments from the present participants will be welcome. The first issue to be dealt with is the continuance of the organization of the meeting. It is just a matter of when, where, and what. When: in view of our human and financial resources, this meeting will be held annually. Where: there is still no clear idea about this point although it should be held in one of the Asian countries, because it is more convenient to the participants. So recommendations or suggestions on this matter are welcome. What: This meeting discussed and studied the role of the judiciary.

For the next meeting, suggestions of the participants are also requested. For the moment there are three proposals of a topic for the next meeting.

The first is corporate restructuring. This may have two aspects: one is to review what has been done up to date. In the present meeting it has been shown that many workouts ended up with rescheduling without any real restructuring. There is also the possibility of discussing the role of the controlling shareholders in insolvency proceedings. In some countries there is a special institution for corporate restructuring that is charged with the task to deal with economic crises. The question is: What kind of system should Asian economy have in the future in the area of corporate restructuring? Of course it could cover not only the informal workout, but also formal procedures such as reorganization, where appropriate.

The second possible topic is the importance of the liquidation proceedings. The questions to be assessed may include: how does the liquidation function in the case of insolvency proceedings, how should liquidation connect to other proceedings in the insolvency context, how could liquidation proceedings be used as a restructuring tool, what are the institutional requirements for effective liquidation proceedings compared to other arrangements.

The third possible topic for the next meeting is the international aspect of the insolvency provisions. The major items in this topic are the cross-border

insurance cooperation. This topic is important for Asian countries. There are some developments regarding this in Japan and India. So it may be appropriate to discuss it at a regional level.

In the FAIR meeting there is also a peer review, which for the present meeting focuses on Indonesia. The present peer review is based on the analytical paper of Prof. Tomasic. For the next meeting the peer review will be conducted differently by giving more attention to the international standards and practices of the insolvency procedure.

These are rough ideas for the next meeting. But there are also a couple of ideas for the future activities of the forum. One of them is the establishment in Indonesia of a small group of judges gathered in a forum for them to exchange views and experiences. There could be another forum for a small group of regulators and receivers for discussing the regulations and the best insolvency practices. Funds for these are sought from the ADB and also from other international institutions.

Another idea for our future work is the dissemination of information and knowledge collected in the meetings. The initial steps would be to put papers and slides of this meeting on a website. Permissions of the authors are expected before posting their works. The author may also submit a revised version before it is posted. A second stage in the dissemination of information would be the creation of an electronic steering group that would guide the FAIR in the preparation of the discussion of the substantial issues.

These are the basic ideas for the future works of the FAIR. There will be a discussion with the partners, especially APEC, OECD, Insol International, and also with the potential hosting country.

Suggestion from the floor:

1. *The first suggestion* for future issues is that the organizers of this forum explore the preventive mechanism for insolvency, a model such as the Australian model where there is an incentive for early option by making directors liable if they do not act otherwise. This may have some negative effects, so a further study based on such idea could be useful.

   The second is the study on the remedial measures to alleviate the losses of the creditors, that is something that can be immediately tapped on separately from the funds of the insolvent obligors. Perhaps a comparative study by the members of Insol can reveal that some jurisdictions in the Asian countries would probably have that already in their laws.

Third, it is suggested that the organizers take a serious look at the process of this forum. We should not only aim at the legislative and policy reform in order to make a better law, but should also give consideration to other aspects such as demographic, cultural, and social aspects. Even if there is a new and better law, attention is to be given to the public perception towards that law. Negative public acceptance or unfavourable feeling towards that law could engender negative effects.

Finally, more attention should be given to the insolvency professionals especially in the matter of drafting regulations and legislation, particularly with regard to their relationship to the Court as well as to the creditors and other parties of the insolvency proceedings;

2. In view of other activities by other multilateral organizations in providing some model of insolvency laws and other out-of-Court workouts, it is important that this FAIR should focus on some challenging aspects of insolvency in the Asian region, such as the stigma of insolvency and the creation of creditor's confidence in an insolvency system and the creation of a corporate rescue culture. These are typical issues in the Asian region, issues that involve cultural, social and political aspects of the region. In order that the FAIR does not duplicate other similar works, it is suggested that the FAIR should concentrate more on these issues.

   It would also be a good idea to have other kinds of participants for a meeting that brings together not only judges or experts but also other players and stakeholders in an insolvency process so that they can share their experiences;

3. It would be a good idea to have mixed participants rather judges and experts. Besides, participants should also come from other organizations in this region that deal with this kind of problems for example LAWASIA.

   Under the heading of cross-border insolvency, it is important to have topics such as regional and sub-regional cooperation between countries in the region, with respect to two things: uniformity and recognition of the laws of each country in relation to insolvency practices and enforcement and related commercial laws.

   There is also a need for a forum that would discuss the education methods, systems and curricula. The education is not only for judges but also for other persons such as post graduates, trustees, administrators, prosecutors, and law enforcers. This forum could focus more on the methodology of such an education;

4. There is one fundamental problem in these regions that must be overcome, that is the lack of trust: judges are not trusted, nor are creditors, directors of companies or professionals. And that is why so many laws in these countries are overburdened with some kind of checks on the lack of trust. For example there are elaborate provisions regulating what the judges should and should not do. This clearly shows the existence of a deep suspicion of insolvency in the back of people's minds in these regions. This goes hand in hand with the attitude of stigma. Therefore success in this area must be preceded with the overcome of this basic issue first. So this Forum is strongly urged to spend a session to overcome this problem.