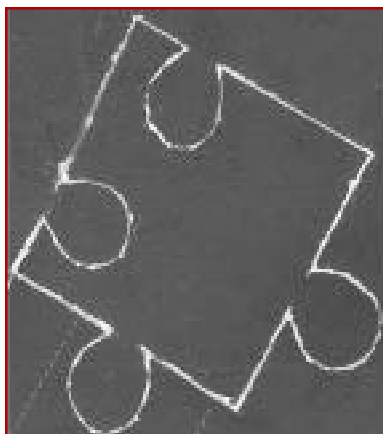


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Guide to Restructuring in Asia 2001

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Foreword

Gerald A. Sumida, General Counsel
Asian Development Bank



Asia is recovering from the financial crisis of 1997–1998. Still, Asian economies must continue to strengthen their legal and regulatory frameworks if they are to avoid a recurrence of such a crisis. In the face of continuing political uncertainties, predictable and transparent legal frameworks are needed now more than ever to encourage credit expansion and private sector investment – factors that are so necessary for economic growth. The establishment and strengthening of legal frameworks and the restructuring of ailing corporations and banks are vital for sustained development in Asia.

The Asian Development Bank (ADB) is actively promoting the development of sound legal frameworks to underpin insolvency and restructuring activities. In 1998, the ADB provided support for a comprehensive review of the insolvency regimes in 11 Asian economies. This has helped to identify and stimulate the development of best practice for insolvency law. Economies that are seeking to assess, revise and amend their insolvency legal regimes can use these standards as operational benchmarks.

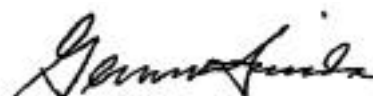
Sound laws, however, have little impact without transparent, predictable and effective judicial and extra-judicial processes, as well as additional enforcement mechanisms. For this reason, the ADB has assisted, and will continue to assist, its developing member countries in legal and judicial reform. Such reforms include alleviating court congestion, increasing access to justice, strengthening legal information systems and developing other related institutional capacities. As recently as December 2000, the ADB approved a technical assistance project that provides training for officials at Thailand's Business Reorganization Office.

Building on its previous innovative work in insolvency law reform, the ADB will launch a regional technical assistance project this year that will include Indonesia, Korea, the Philippines and Thailand. The project aims to strengthen regional cooperation in insolvency law reforms and will look at cross-border issues, informal workouts and judicial cooperation. As

intra-Asian trade and commerce increase, the absence of cross-border legal regimes to deal with insolvency will become a pronounced problem. Top priorities for the project are enhancing cross-border judicial cooperation and increasing understanding throughout the region of case management procedures.

Equally important is the development of a "restructuring friendly" culture. The challenge for Asia is to foster, within the cultural context of each economy, an understanding and acceptance of restructuring's benefits among practitioners, business communities, government regulators and legislators. This will require the comprehension of restructuring and related laws as they are actually applied by these parties and additional stakeholders.

This is why I am very pleased to introduce this Guide to Restructuring in Asia 2001. In association with White Page and the participating law and accounting firms in the region, we have jointly developed a guide to the implementation of restructuring and insolvency laws in 11 Asian jurisdictions, as well as a comparative study of their application. The legal and accounting analyses are accompanied, in most cases, by an evaluation of implementation experience. We hope that the Guide will serve as a good basic reference, and that it will contribute in a practical way to Asia's economic development.



Gerald A. Sumida

Introduction

Ronald Harmer, Staff Consultant
Asian Development Bank

This publication presents a guide to corporate restructuring in 11 Asian jurisdictions. They are Pakistan, Indonesia, Singapore, Malaysia, Thailand, Philippines, Japan, Korea, the People's Republic of China, Hong Kong, China, and Taipei, China. They are collectively referred to as the "11 jurisdictions".

Each jurisdiction is separately covered in the chapters that follow. The aim of the guide is to present, for the benefit of investors and lenders, the major restructuring and insolvency processes in each jurisdiction (this largely presents the legal position through the contributions of the various law firms) and to focus upon important issues that might affect or impede the application of those processes (this, in the main, will be found in the "Financial issues" supplements prepared by Pricewaterhouse-Coopers that accompany each legal chapter). Although the guide is centered upon reconstruction and insolvency processes, these cannot be presented in isolation from other important related considerations. Thus, the guide also briefly reviews debt recovery and security enforcement processes and the judicial and administrative application of the processes.

The main emphasis in the guide is upon the more positive and creative area of corporate restructuring processes and techniques. Accordingly, this introduction contains a presentation of restructuring processes, the forms they may take and their importance to the development and stability of the commercial law systems of the 11 Asian jurisdictions.

The art form of restructuring

Restructuring is variously labeled or titled as "rescue", "reorganization", "reconstruction", "arrangement" and so forth. Whichever of those descriptions might be used, the restructuring of a corporation that is insolvent or in financial difficulty involves the employment of a relatively basic theory of modern microeconomics. This theory, simply stated, is that greater value may be obtained from maintaining the essential components of a business organization together, rather than breaking them up and endeavoring to dispose of them in fragments.

Obtaining more value means that the variety of stakeholder interests that are likely to be involved in or adversely affected by the insolvency of a corporation may obtain greater benefit. These stakeholders include creditors, both secured and unsecured; employees; suppliers of goods or services to the corporation; managers; and shareholders. Restructuring does not imply that all of those interests must be wholly protected or that they should be restored to a financial or commercial position that would be consistent if the event of insolvency had not occurred. Not all of them will benefit from a successful reconstruction. Creditors may not be paid in full (some may not be paid at all); management may be terminated and changed; the equity of shareholders may be reduced to nothing (if it is not already completely lost); employees may be retrenched; and the source of a market for suppliers may disappear.

There are a variety of techniques that may be employed in a corporate restructuring. A restructuring may result, for example, in a sale of the business interests of a corporation and the eventual liquidation and extinguishment of the corporation. It may involve the injection of new capital or the conversion of debt to equity (and a consequent reduction or extinguishment of existing shareholder equity). It may necessitate the recycling or rescheduling of existing debt, to be recovered, in part or in full, over a period of time. But, whatever the form and whatever the label or title of the process, the aim is to provide more value than if the corporation was liquidated or bankrupted.

Over the last two decades restructuring has become the art form of insolvency practice. It involves taking a much more creative, commercial and robust approach to financially troubled corporations than that typified by the employment of the traditional and highly conservative approach of liquidation or bankruptcy. Simple though the concept of restructuring may appear, it may be questioned why

it is that the apparent benefit of restructuring took so long to be recognized and established as a major insolvency process. The validity of the economic theory that supports it is incontestable. Yet for almost a century following the creation and legal recognition of the corporate or juristic form, liquidation dominated the arena of corporate insolvency. That was probably because it took that long to overcome a prevailing economic theory that in a market economy uncompetitive and unproductive businesses should not be entitled to survive and should be immediately removed from the competitive market place. It was also no doubt prolonged by a somewhat moralistic legal theory that suggested that business failure should be greeted with curtailment, censure and, in some cases, penal sanction. However, both theories have now given way to more contemporary models.

Restructuring processes

There are two forms of process that restructuring may take. One is “formal”, the other is “informal”. A formal restructuring process will be provided for as part of an insolvency law regime. An informal restructuring process will be developed through the initiative of the banking and commercial sectors and will not be dependent upon a law for its employment. However, as will be seen, both forms of restructuring process require a law to underpin and support them. It may be fairly claimed that restructuring processes would be unlikely to succeed in the absence of an insolvency law that provided some indirect incentive or persuasive force to encourage a restructuring.

Formal restructuring processes

Modern restructuring laws have a number of identifiable and essential features. These may be broadly identified as follows:

- ▲ Ease of entry into the process, particularly for a debtor corporation that seeks to volunteer to the process.
- ▲ A form of judicial supervision of the process.
- ▲ An automatic and mandatory stay or suspension of actions and proceedings against the property and business activities of the corporation affecting most, if not all, creditors and persons having other interests in the property of a corporation (such as lessors of property and suppliers with a claim of retention of title) for a limited period of time.
- ▲ The continuation of the business of the corporation either by existing management, an independent manager or a combination of both.
- ▲ The formulation of a plan which proposes the manner in which creditors, equity holders and the corporation itself (including its business and assets) will be treated.
- ▲ The consideration of, voting on and acceptance of the plan by creditors.
- ▲ The judicial sanction of a plan.
- ▲ The implementation of the plan.

All of these elements are important. But restructuring laws vary considerably. As this guide shows, this is particularly so in the Asian region.

Informal restructuring

As mentioned earlier, a corporate restructuring may be conducted under an informal process, sometimes referred to as an informal “work out”. The informal process was developed some ten years or so ago by the banking sector, as an alternative to formal restructuring processes. Led and influenced by internationally active banks and financiers, the informal process has gradually spread to a considerable number of jurisdictions.

The application of the informal process is generally restricted to cases of corporate financial difficulty or insolvency in which there is a significant amount of debt owed to banks and financiers. The process is aimed at securing an agreement both between the lenders themselves and the lenders and the debtor corporation for the restructuring of the corporation and/or rearrangement of the financing. An informal restructuring, it is claimed, provides scope for greater flexibility; it enables a more immediate pro-active response to a corporation in financial difficulty and, because of its essentially private nature, results in less adverse publicity and less commercial damage for the debtor.

The informal process is an entirely voluntary co-operative process. However, there will be many cases when the driving force toward any such co-operation will come from the real possibility of a sanction being imposed upon the prospective participants. The sanction is that unless the debtor corporation and its bank and finance creditors take the opportunity, if one is offered, to join together and commence the informal process, it is somewhat inevitable that either the debtor or a creditor will invoke the formal insolvency law. That could result in liquidation, to the detriment of both debtor and creditors.

An efficient insolvency law is sometimes also required, in the context of informal restructuring, to enable an informally agreed restructuring plan to become the basis for a court-approved restructure under the formal law (sometimes referred to as a “fast-track” or “pre-packaged” restructuring). This may be necessary in cases where, despite the bulk of the debt of a corporation being owed to the banking and finance sector, there are other non-bank and finance creditors whose participation in the restructure is necessary. It is thus necessary to use the formal process to produce a legally binding restructuring involving all creditors.

An informal restructuring requires the employment of a number of skills and processes. The main elements in the process are as follows:

- ▲ The creation of a forum for negotiation. Although it may seem a somewhat abstract notion, this involves the development of a commercial environment in which a debtor and its creditors may come together for the purpose of negotiation. This “forum” is not only for the benefit of the debtor, but also for the creditors between themselves. The development of this commercial environment is largely dependent upon the initiative of the banking and finance sector and the presence of an efficient insolvency law regime.
- ▲ The appointment or selection of a “lead creditor” to provide motivation, leadership, organization and administration to enable negotiations to be commenced and advanced.
- ▲ The selection of a “steering committee” that is representative of creditors and the debtor to assist the lead creditor and to act as a provisional sounding board for proposals in respect of the affairs of the debtor.
- ▲ A “standstill” that takes the form of an agreement for the suspension of adverse actions by both creditors and the debtor during a defined time period to enable negotiation to occur.
- ▲ The engagement of professional expert advisors from a variety of possible disciplines.
- ▲ The provision of information regarding the debtor, its business activities, and its current financial and trading position.

One purpose of this guide is to identify the jurisdictions in which informal processes have commenced to develop and to assess their acceptance and relative success.

The relevance of efficient liquidation and secured transaction enforcement processes to restructuring

As mentioned above, the availability of an effective liquidation remedy as part of the formal insolvency law often provides the catalyst for the commencement of an attempt at restructuring, whether formal or informal. Without an effective liquidation process there is no really compelling reason why a financially distressed corporation would be prepared to put itself largely in the hands of its creditors to fashion a restructure. It also needs reiterating that liquidation is also the ultimate remedy for unsecured creditors.

Without such a remedy, an unsecured creditor could never enforce or attempt to enforce a right to payment. The real threat of liquidation can be avoided if a corporation commences a formal reorganization, because the law will generally provide for a stay and suspension of liquidation proceedings during the time that it might take to determine if a formal restructuring is possible. This guide therefore also covers the possible use of the remedy of liquidation in the 11 jurisdictions.

The remedy of enforcement of secured property claims must also not be overlooked. It is also relevant to the reorganization process. If a secured creditor can effectively invoke secured property enforcement processes against a corporate debtor, it is likely that the corporation will seek protection from that enforcement. A modern restructuring law will generally provide for a stay or suspension of enforcement action by secured creditors upon the commencement of the formal rescue process, again in order to give creditors and the debtor the opportunity to determine if a formal restructuring is possible. This guide therefore also surveys the availability of effective secured transaction enforcement processes in the 11 jurisdictions.

The relevance of restructuring to the Asian region

The modern process of restructuring has been a late arrival in the Asian region. The insolvency law regimes of most Asian jurisdictions were derived from overseas conservative models that concentrated considerably on liquidation and bankruptcy processes. Although some provided for a form of restructuring, this was generally a very conservative process, expensive, inefficient and limited in its application. Many of these regimes are old, out-of-date and inadequate for the employment of modern restructuring techniques. Examples may be found in those Asian jurisdictions whose insolvency law regimes were derived from English law models (such as Pakistan, India, Malaysia, Thailand and Hong Kong, China); in countries such as Japan, the Republic of Korea and Taipei, China, in which the restructuring laws were derived from immediate post-Second World War USA models; and in Indonesia where the insolvency law regime was based on a 19th century Dutch insolvency law.

However, modern restructuring laws are now being adopted and employed in many Asian jurisdictions. This development has, undoubtedly, been one of the positive effects of the Asian financial crisis.

The Asian financial crisis

The Asian financial crisis is generally considered to have commenced in July 1997. It precipitated a scramble in the commercial sector as investors and lenders endeavored to retrieve investments and recover loans. These endeavors included attempts to employ debt recovery, security enforcement and insolvency law processes.

In many of the crisis-affected jurisdictions, the employment of these processes proved to be difficult and, in some cases, totally ineffective. As a result, the commercial law systems of many of these jurisdictions were subjected to critical analysis and judgement. In many cases the system was found to be fragile and inadequate.

The gravest of the criticisms came from foreign investor and lending institutions, particularly those that were endeavoring to retrieve investments and recover loans. These criticisms, though understandable, could hardly be claimed to be a surprising revelation. The investment and lending institutions involved were or should have been aware of the very inadequacies of which they subsequently chose to be critical. It would or should have been known, long prior to the crisis, that the insolvency law regimes of some Asian jurisdictions were commercially inadequate and that they were ill-equipped to deal with anything like the devastating effect that the crisis had on domestic private corporate sectors.

In any event, a practical and beneficial consequence of the focus upon the commercial law systems of crisis-affected jurisdictions was projects to develop and reform these systems and, in particular, the insolvency law system.

One major result of this was a regional technical assistance project that the Asian Development Bank initiated in July 1998. It took the form of a comparative study of insolvency law regimes in the Asian region. The aim of that study was to produce a comparative analysis of the insolvency law regimes and associated practices and to develop and present a set of good practice standards to encourage sustained and long-term reform.

That work is now complete. A report entitled “Insolvency Law Reforms in the Asian and Pacific Region” was published in Law and Policy Reform at the Asian Development Bank, 2000 Edition, Vol.I (“the ADB Report”). Of relevance to this guide, the report of the work of the ADB covers 10 of the 11 jurisdictions and covers both formal and informal insolvency practices.

The ADB Report identified a number of economic expectations and commercial needs to which a restructuring law should respond, as follows:

- ▲ The economic need to maximize the value of the enterprise and to lessen the effects of a possible liquidation.
- ▲ Affording corporate debtors the opportunity of determining upon a form of administration that may provide greater value for them.
- ▲ Certainty, predictability, commercial stability, commercial efficiency, and transparency.

The appropriate role of a restructuring law is to provide the means to enable the above expectations and needs to be reached and to provide mechanisms to enable the means to be employed.

To meet those commercial and economic expectations and needs, the ADB Report emphasized a number of “good practice standards” that should be applied in a restructuring law. A survey was then made of the insolvency laws of the 10 jurisdictions to determine the extent to which the standards were applied in the legislation. The report presents the results of the survey. The ADB Report may be obtained from www.adb.org/law.

Formal restructuring and insolvency laws in the 11 Asian jurisdictions

The existing laws relating to restructuring and liquidation in the 11 Asian jurisdictions that are the subject of this guide may be summarized as follows:

Pakistan, Malaysia, Singapore and Hong Kong, China

In these four jurisdictions, both the liquidation and the restructuring processes form part of the general company law. That law was largely inherited from English law. The restructuring provisions are known as “schemes of arrangement”. Pakistan also commenced the development of a quasi-administrative restructuring process under somewhat aptly named “sick company” legislation.

Sadly, with the exception of Singapore, the restructuring laws in the “English” law-based jurisdictions are out of date, inefficient, expensive and little used. In Pakistan that problem is compounded because the liquidation process is largely ineffective. This is caused by delays and inefficiencies in the court system and political and other interference in economic and commercial affairs generally.

Singapore, however, has a modern and effective restructuring process known as “judicial management”. As the report on Singapore states, its formal insolvency law system “balances the need to protect creditors and to hold management accountable with the practical need to try to preserve businesses that are inherently sound but are suffering unanticipated financial crisis”.

Thailand

The restructuring and liquidation processes are contained in the Bankruptcy Law of 1940. The restructuring process, known as “business reorganization”, is the result of a new chapter introduced into the

Bankruptcy Law in April 1998. It commenced operation in August 1998 and is a good example of the response of a crisis-affected economy to the need to modernize insolvency law processes, as observed in the report on Thailand. Thailand has also benefited from the establishment, in April 1999, of a specialized Bankruptcy Court.

Some questions about these formal processes still, however, exist. One of the problems is that the issue of “insolvency” under the Thailand law requires the application of a balance sheet test (liabilities exceeding assets). The report on Thailand states that this “can often be hotly contested when an aggressive petition is filed by creditors without the debtor’s consent”.

Indonesia

The restructuring and liquidation processes are contained in the Bankruptcy Ordinance 1905. The restructuring process is known as “suspension of payments”. This restructuring process was substantially amended by a Government Regulation In Lieu of Law, April 1998. It is another example of a positive response to the financial crisis. The report on Indonesia states that prior to the crisis “here was an almost complete absence of formal insolvencies in Indonesia”.

Indonesia also stood to benefit from the establishment of a Commercial Court. Unfortunately, as the Financial Aspects of the Indonesian report observes: “Several decisions to date demonstrate that the Commercial Court...appears not to fully understand the law or the principles underlying it. Most decisions of the court have tended to favor the local applicant over the foreign creditor and the government as a creditor”.

Further reforms are, however, proposed in Indonesia. In part, these are intended to redress the inadequate language and interpretation problems of the present law, many of which appear to have contributed to some of the decisions of the Commercial Court.

Philippines

The basic liquidation law is contained in the Insolvency Law. This was also, originally, the source for a form of restructuring known as “suspension of payments”. However, in 1976 a presidential decree was declared, known as PD902A. This decree removed jurisdiction in respect of suspension of payments process from the courts and vested the jurisdiction in the corporate regulatory authority, the Securities and Exchange Commission (“SEC”). In addition, the decree provided for a new form of restructuring process that has become known as “rehabilitation” process.

For a time this rehabilitation process appeared to work reasonably well under the jurisdiction of the SEC (the Philippines Airline rehabilitation case was probably the high-water mark), but all that has now been changed. The report from the Philippines states that jurisdiction in corporate insolvency matters has now been transferred to the regular courts and “a proposed bill on Corporate Recovery, encompassing provisions on corporate insolvency, rehabilitation and suspension of payments” is now pending in the Congress. If enacted, it is “expected to change the landscape of Philippine corporate law on insolvency and rehabilitation”.

Japan, Korea and Taipei, China

In these three jurisdictions, the sources from which the formal insolvency law has been derived are the same and it is, therefore, convenient to consider them together.

In Japan the liquidation process is contained in the Bankruptcy Law 1922. Japan has three potential rescue processes contained in separate legislation. The most commonly used are a composition process under the Composition Law and a corporate reorganization process under the Corporate Reorganization Law. Both of these processes originated in the 1950’s. Recently, however, Japan enacted the Civil Reha-

bilitation Law. The Japan report states that: “It is designed to rehabilitate middle and small-sized companies under a more simplified process than corporate reorganization. It is effected by a debtor-in-possession type process”. Somewhat unusually, however, this process does not restrain a secured creditor from enforcing secured property rights separately from the procedure.

The insolvency law regime of the Republic of Korea is very similar to that of Japan. The law relating to corporate liquidation is contained in the Bankruptcy Act 1962. The Republic of Korea has two potential rescue processes contained in separate legislation. One is a composition process under the Composition Act 1962. The other main process is known as “company reorganization” and is contained in the Company Reorganization Act 1962. Prior to the financial crisis the area of insolvency law “was largely under-utilized and somewhat overlooked” according to the Korean report. The report also comments that the shortcomings of legal structures such as the insolvency laws became “all too apparent with the onset of a serious economic crisis”. “Since then a massive revision to insolvency laws has been undertaken...with emphasis...on three specific areas. First, setting out with some clarity and certainty specific procedures to be undertaken in the event of corporate fiscal ill-health.... Second, an improvement of the speed with which such procedures were to be undertaken...Third, a trend toward specialization of the judiciary”.

In Taipei, China the Bankruptcy Law 1935 provides for liquidation and composition processes. However, the restructuring process forms part of the Companies Act. It is known as “reorganization”. The report clearly identifies some serious problems with the application of these laws – mentioned are “the inability/unwillingness of the courts...to enforce compliance with insolvency procedures” and “a mindset among local... banks which is inclined not to recognize the depth of problems”. The report recommends “that creditors involved in Taipei, China insolvencies pursue an aggressive ‘hands on’ role in the restructuring”.

The People’s Republic of China

Insolvency law is relatively new in the People’s Republic of China. The relevant law is the Law on Enterprise Bankruptcy, approved in 1986 and first applied in 1988. Prior to this law, insolvency was virtually unknown in the People’s Republic of China. This law provides for liquidation and a form of restructuring process, but it applies only to state-owned enterprises. It is thus not surprising that the law and practice is not sophisticated and not well developed. As the “Financial issues” commentary states: “The current legislation was not designed to protect creditors and offer restructuring opportunities to debtors, rather it simply provides a set of legalized procedures to terminate certain state-owned enterprises”. However, there are signs that, as a result of the growth of the private sector, the development of commercial education and knowledge and the general expansion of international trade, a massive reform to the insolvency law regime and its application is likely to occur in the People’s Republic of China within the next two years.

Informal restructuring processes in the Asian region

Prior to the Asian financial crisis, there was little evidence of the employment of informal restructuring processes in Asia. One exception was in Hong Kong, China where, because of the long presence and influence of both local and foreign banks, an informal process, similar to that practiced in the UK and the USA, had been developed. The banking sector in Singapore has since also promoted an informal process, similar to that of Hong Kong, China.

The effects of the Asian crisis resulted in the development of a number of informal processes in the crisis-affected jurisdictions – Korea, Thailand, Malaysia and Indonesia. In each of these jurisdictions, a semi-official “structured” form of informal restructure has been developed. These are largely government

or central bank-inspired processes and were developed for the purpose of dealing with systemic financial problems within the banking sector. They follow a relatively common pattern as follows:

- ▲ First, each has a facilitating agency to encourage and, in part, co-ordinate and administer informal restructuring. These agencies were established because it was considered that without such an agency there would be little incentive or motivation for the informal process to develop. In Indonesia the facilitator is the “Jakarta Initiative Task Force”. In Korea there is a “Company Restructuring Committee”. In Thailand the agency is known as the “Corporate Debt Restructuring and Advisory Committee”, similar to the “Corporate Debt Restructuring Committee” in Malaysia.
- ▲ Second, each process is underpinned by an agreement between commercial banks in which the participants agree to follow a set of “rules” in respect of corporate debtors who are indebted to one or more of the banks and which may participate in the process. These rules basically provide the procedures to be followed and the conditions to be imposed in cases of attempts at corporate restructure. In some of the jurisdictions a debtor corporation that seeks to negotiate an informal restructure is required to agree to the application of these “rules”.
- ▲ Third, the processes generally provide for time limits for various parts of the procedures and, in some cases, for agreements in principle to be referred to the relevant court for a formal restructuring to occur under the law.

In Malaysia, a further development was the establishment of a statutory body known as “Danaharta”. This statutory body has extremely wide powers to acquire non-performing loans from the banking and finance sector and then to impose extra-judicial processes upon a defaulting corporate debtor, including a forced or imposed restructuring.

In the People’s Republic of China asset management companies (“AMCs”) were established in 1999. These were created to handle non-performing loans transferred from the four state banks. The AMCs are assigned the task of resolving these bad debts, the great majority of which are owed by state-owned enterprises. Although they have made some progress, the People’s Republic of China report observes that “they are constrained by the current non-commercial insolvency legislation, government approval of most commercial decisions, and an economy that is not large enough or healthy enough to absorb these problem assets” (in total they amount to some US\$1.2 trillion).

In Taipei, China there has been very little development of informal processes.

These processes are all addressed in the chapters that follow. Their importance in corporate restructuring may be best appreciated by reference to the number of corporate restructurings that have occurred through these processes when compared to formal restructuring under the formal court processes. The number of informal restructurings is far greater than formal.

Although the more “structured” informal restructuring mechanisms may be considered as somewhat temporary, stopgap measures (they were all necessitated by the financial crisis), it is likely that they will leave an important legacy for the commercial sector. They have each greatly contributed to the appreciation, understanding and knowledge of the informal restructuring process which, hopefully, will be continued and further developed by the banking and finance sector after the dismantling of the structures that were necessary to initiate them.

The commercial culture of many of the 11 jurisdictions appears to be more conditioned toward non-confrontational dispute resolution, through negotiation and mediation, than by the employment of strict confrontational legal processes. In the context of corporate financial difficulty or insolvency, this suggests that there may be an opportunity for the informal restructuring process to flourish in the Asian region.

Impediments to the employment of restructuring processes in the Asian region

Despite the many advances that have been made in recent years toward the establishment and acceptance of restructuring processes in Asia, there are a number of factors that, individually or in concert, hamper and restrict that development. The reports in this guide underline the problems. The impediments may be most conveniently presented under the following labels:

Corporate governance

In some of the jurisdictions, commercial attitudes and laws directed at proper corporate management either do not exist or, if they do, they are weak and not enforced. Although this is not the task of an insolvency law regime to address, it cannot be ignored because such a regime cannot be expected to operate and to produce positive results in an environment of inadequate corporate governance and financial irresponsibility. Weaknesses in this area result in considerable havoc to any form of insolvency law endeavor. It may be noted from a number of the reports in this guide (see, for example, those of Malaysia, Korea and Thailand) that it is an area in which the development and enforcement of appropriate regulation is required.

Accounts and accounting standards

There are also many fundamental weaknesses in some of the jurisdictions in relation to accounting standards and their application. This includes proper internal financial management and financial control and, also, external auditing standards and their application. Objectively assessed internal financial information in relation to a corporation is vital because it provides an early warning of the onset or possible onset of financial difficulty and can greatly contribute to early restructuring action before it is too late. Proper external audits provide an information system for financiers and suppliers and can be crucial to the prospect of a successful restructure. Singapore and Hong Kong, China provide good examples of the proper application of such standards.

Attitudes to legal processes

In a number of the jurisdictions there appears to be a cultural attitude, particularly evident in the commercial community, that views dispute resolution and problem solving as best-suited to non-confrontational negotiation and mediation. Insolvency law and related practices are primarily a collective form of remedial process, involving a variety of different interests that are often in conflict with one another. There is some difficulty in applying negotiation and mediation techniques to address those differences, particularly when a restructuring process requires a collective agreement or solution. So in some jurisdictions, these cultural attitudes pose a problem for the application of insolvency laws. However, the future development and application of informal restructuring processes may be able to better take account of these cultural attitudes and turn them to advantage.

Court systems and judicial administration

Much of the formal insolvency law system requires the involvement of courts and judges. Corporate insolvency law, particularly restructuring, requires considerable wide commercial knowledge and appreciation of commercial practices. It is a difficult and complex area of commercial law. In some of the Asian jurisdictions there is a negative reaction to the use of the insolvency law because of problems with the court and judicial system (see, for example, Pakistan). The processes are slow (see, in particular Korea and Japan), judges are not suitably qualified nor experienced and the judicial process is unpredictable and unreliable (for example, Taipei, China). Many of the jurisdictions require the establishment of dedi-

cated commercial courts or, even, a specialist bankruptcy court (as, for example, in Thailand). Too often, there is a failure to properly apply the insolvency laws, often as a result of a lack of commercial knowledge and appreciation on the part of the judges. Indonesia is an example.

Professional knowledge and expertise

The handling and administration of insolvency cases requires trained and experienced people. Cases of complex corporate restructuring require professional expertise. A number of the jurisdictions lack this resource. Professionally based organizations are required in these jurisdictions to advance knowledge and expertise. Another area of difficulty is found in attitudes toward the employment of outside experts. Family and dynastic control of corporations often does not allow for the engagement of outsiders. This, coupled with a reluctance to permit control or, even, permit close scrutiny of the affairs of a corporate debtor, often results in a difficulty to advance restructuring proposals. The reports of Japan, Philippines, Indonesia, Korea and Taipei, China are all instructive in this regard.

The effectiveness of the remedy of liquidation in the 11 jurisdictions

The reforms that have occurred in relation to insolvency law and practices appear to have been largely centered upon restructuring. The remedy of liquidation has received little attention.

Liquidation is an effective remedy in Singapore, Malaysia and Hong Kong, China. It is not as effective in Pakistan because of delays in, and interference with, court proceedings in that jurisdiction.

Although liquidation should be effective in Indonesia, Thailand and the Philippines, for a variety of reasons it is not.

In Thailand, for example, a creditor who seeks the liquidation or bankruptcy of a corporation faces a problem of having to establish that the corporation is insolvent on a balance-sheet test. That can cause a creditor significant problems of proof and procedure.

In the Philippines, under the existing law, at least three creditors must join together to bring a liquidation proceeding against an insolvent debtor. Whether or not that presents an obstacle, the fact is that there have been very few cases of liquidation in the Philippines over many years.

In Indonesia the position has improved, although there have been some decisions of the newly established commercial court that have caused considerable doubt and uncertainty.

In Japan, liquidation or bankruptcy proceedings are reasonably certain and predictable. In Korea less so and in Taipei, China liquidation would appear to be quite ineffective.

Although that general survey may not give rise to much hope or expectancy for creditors, there are many signs that this position is changing and the next few years should see some improvement as many of the jurisdictions continue to overhaul and reform their formal regimes.

The position of secured creditors in Asian restructuring processes

It will often be the case that the success or otherwise of a restructuring will depend upon the manner in which creditors who hold security (or collateral) over the assets of a corporation may be involved in, accommodated, or restrained by, the process. The contributions to the guide clearly identify some major differences to the approach to this issue amongst the 11 jurisdictions. In summary, they appear as follows:

- ▲ In Singapore, a creditor who has security over all, or substantially all, of the property of a corporation (often referred to as a floating charge holder) may elect not to be party to, or to be bound by, the judicial management process. However, other secured creditors will be bound, unless they can successfully apply for relief from the stay.

- ▲ In Hong Kong, China and Pakistan secured creditors are not bound by the scheme of arrangement process.
- ▲ In Malaysia secured creditors may, according to some recent judicial decisions, be effectively restrained from enforcement action under the scheme of arrangement process.
- ▲ In Japan, under the new Civil Rehabilitation Law, a secured creditor is not bound by the process and may exercise rights of enforcement.
- ▲ In Korea and Taipei, China the enforcement powers of secured creditors will normally be stayed by an interim order.
- ▲ In Philippines the appointment of a receiver or management committee under the existing rehabilitation procedure has the effect of staying the enforcement rights of secured creditors.
- ▲ In the People's Republic of China secured property enforcement is stayed once the court has accepted the case.
- ▲ In Indonesia the position is a little ambivalent, but it is generally reckoned that a secured creditor can be stayed by a court order.
- ▲ In Thailand a secured creditor cannot enforce a security, without leave of the court, once the reorganization process has commenced.

Measuring the actual results of restructuring in the 11 jurisdictions

The “Financial issues” segments of the reports deserve close attention. They supplement the legal chapters on each jurisdiction by providing objective practical observations on the application and results of the restructuring processes and, in particular, point out the impediments that must be borne in mind and overcome in many of the jurisdictions.

They contain a valuable evaluation of the different restructuring processes. These make it clear that investors and lenders should be wary of judging the effectiveness of corporate restructurings based on sheer numbers of corporations that are subject to a restructuring process. A number of the “Financial issues” segments (for example, those dealing with Indonesia, Thailand, Malaysia and Taipei, China) are critical of some of the so-called “restructurings” in those jurisdictions and assert that many of them are really not much more than a debt rescheduling exercise, which, of course, merely postpones the day of reckoning. Debt rescheduling exercises underscore the unwillingness or inability of the banking and finance sector to take the inevitable “haircut”. The supplements also suggest that very little attention is paid to addressing important and fundamental issues that would normally arise in a genuine restructuring – such as overall corporate structure, organizational structure, management, business evaluation, non-core asset shedding and so forth.

Some conclusions from the contributions to the guide

Significant recent advances have been made in the Asian region in relation to corporate restructuring and insolvency. Moreover, it is apparent that the wave of development and reform will continue, because it is now clearly recognized that insolvency laws and practices are important for economic development and commercial stability.

The benefits that have been achieved are considerable. But there is a risk that some of these may be dimmed or lost. There is some suggestion that economic and commercial conditions have commenced to improve in the region. But it is an unfortunate fact of life that the onset of economic improvement quickly erases memories of economic recession. Moreover, it is by no means clear that the signs of improvement are consistent with recovery. It is therefore important that investors and lenders are fully aware of the state of restructuring and insolvency laws and related processes in the region. It is suggested that a careful reading of the contributions that follow will greatly assist that knowledge and awareness.