

## **SUMMARY OF SYMPOSIUM**

The symposium on insolvency law reform in the RETA economies was held at the offices of the Asian Development Bank, Manila, Philippines on 25–26 January 1999.

The symposium was opened by Tadao Chino, President of the Asian Development Bank. President Chino spoke of the increasing emphasis that the Asian Development Bank places on the provision of assistance that will help, establish, or develop an enabling legal, policy and institutional environment that would be conducive to economic development. He observed that the symposium was part of the evolution of this law and development program. The regional economic crises had exposed weaknesses in the regional legal system, in particular in the area of insolvency relating to financial and corporate restore restructuring. The promotion of insolvency law reform would help to improve the legal and regulatory environment for economic recovery of the region.

In his introductory remarks, the General Counsel of the Asian Development Bank spoke of the absence of insolvency law reform and development, despite the thirty years of extraordinary transformation in the economies and legal systems of many Asian countries. It was important to learn of experiences in the 11 Asian economies and to open channels of communication between policy makers and practitioners in the region so that experience, problems and solutions in relation to insolvency law can be shared on an on-going basis.

The symposium was conducted through a series of discussion topics in which representatives from the RETA economies and other participants spoke of the experiences, developments and deficiencies in those economies. A summary of the major issues which emerged from these discussions follows.

### **1. Knowledge and Information**

The comparative report expressed concern about, firstly, the availability and quality of reliable statistical information relating to insolvency and, secondly, when such information was available, the apparent low incidence of cases of formal insolvency in many of the RETA economies (this despite the obvious effects of the regional economic crisis over the last 18 months). The report also observed on the general absence of information about and reports of cases of insolvency in some of the RETA economies.

The discussion confirmed that there is an alarming (though, perhaps, predictable) absence of knowledge and information concerning insolvency in many of the RETA economies. This extends not only to that which might be termed "real" information (such as statistics about insolvency, causes, effects and so forth) but also to knowledge about insolvency processes generally. For example, there is very little knowledge about the informal work-out process. Some have the view that such a process can only deal with bank debts and cannot be used as a means of dealing with all the debts of an insolvent corporate debtor.

In some cases the absence of such material was attributed to the fact that in the past there had been very little recourse to formal insolvency procedures and that the introduction of new and reformed procedures (both formal and informal) had been only of recent origin. It was still too early to gauge the effect of these reformed laws. In addition, the necessary infrastructure to enable the new laws and new informal procedures to be applied was still being developed.

It was also suggested that an explanation of the low numbers of formal insolvency cases might be because the economic crisis had affected asset values and debt recovery prospects so severely that creditors (particularly bank creditors) and debtors alike had

adopted a general "wait and see" attitude and have postponed individual enforcement and collective remedial actions.

It was, however, generally accepted that most of the RETA economies would benefit from considerable education and training in many aspects of insolvency law and practice. This should extend to a number of interest groups such as banks, entrepreneurs and government officials.

Secondly, the process of gathering and recording of statistical information about insolvency should be commenced and encouraged in a number of the RETA economies.

## **2. The Insolvency Laws**

This discussion concerned the standard of formal insolvency laws in the RETA economies. Although, as noted in the comparative report, all of the RETA economies had formal laws which dealt with both liquidation and rescue of corporate debtors, many of them were either outdated or inadequate. The representatives of the Philippines, India, Pakistan and Taipei, China spoke of the considerable deficiencies in their respective formal rescue laws and of very little endeavour to effect new or reformed laws to correct the deficiencies.

The representatives of Japan, Hong Kong, China and Malaysia were hopeful that their respective governments would soon reform their respective systems.

Singapore, by comparison, had effected reforms well prior to the economic crisis which were working efficiently.

The representatives of Indonesia were concerned that, although the recently introduced reforms were overdue and necessary, they had stopped short of a much needed general overhaul of the insolvency law and other related laws.

In Thailand the new reforms had commenced to have some effect but complementary reforms (for example, concerning the enforcement of security rights) were still outstanding.

It appears that at present the economies of Pakistan, the Philippines, India and Taipei, China, would benefit most from a comprehensive reform of their respective insolvency law systems.

## **3. Court System**

Continued discussion concerning the absence of or only recent established necessary infrastructure and systems to deal with formal and informal insolvency procedures revealed that in many of the RETA economies the court system is not equipped to handle formal insolvency cases. In the economies of Indonesia, Thailand, Pakistan and the Philippines the court system is not sufficiently structured to properly deal with insolvency cases. Many judges are not competent to understand even the most basic of the complexities which are normally involved in a case of corporate insolvency. A complex case of corporate reorganisation and financial restructuring would appear to be beyond the knowledge and experience of most judges and officials.

The representatives of these economies identified the organisation of the courts, the status and the general accountability of judges and court officials as areas requiring considerable improvement.

Some of the representatives also mentioned that their systems also required suitably trained and qualified insolvency case management administrators. This is particularly true of government agencies whose task it might be to administer cases of both liquidation and

rescue, but it is also true of the private sector where there is an absence of trained and qualified insolvency practitioners.

It follows that intensive education and training of judges, court officials and insolvency administrators is most necessary in many of the RETA economies.

#### **4. Systemic Problems**

Many of the insolvency law reform initiatives that have been recently taken in a number of the RETA economies, which have been highly desirable and commendable, have been affected in their operation and application by the fact that the banking and financial sector in those economies has been badly affected by the economic crises. This has created a systemic problem which has intruded upon and created considerable difficulty in the normal application of insolvency law and related procedures. Some considerable attention and discussion was given to the Danharta law of Malaysia. This law was specifically directed toward the systemic problem area and, at the same time, provided for the possible rehabilitation of debt burdened corporations. It is instructive that this legal process is operated through an administrative board which has been accorded significant powers. It appeared to be a good example of the type of methodology that is sometimes required to deal with systemic insolvency problems.

Other sessions of the symposium discussed the informal "work out" processes, particularly those which have been initiated in Indonesia, Thailand and Korea. These contrast with similar initiatives taken in Malaysia, Hong Kong, China and Singapore. The former are primarily directed at the banking sector and appear to be designed to facilitate the preservation of the value of debts owed to banks by the corporate sector. The latter are more generally directed at providing alternative procedures to rescue corporate debtors outside of formal "out-of-court" procedures.

It was generally agreed and accepted that alternative informal procedures should be encouraged. Concerns were, however, expressed by the representatives of a number of the RETA economies that such procedures might only be successful if there was significant education and training among banks and financial institutions and owners and managers of corporations about the methodology and processes involved in such processes. This also extended to the absence in a number of the RETA economies of professional and other advisors who were experienced in the work-out process.

It was also observed that the presence of a facilitating agency to bring debtor and creditors together (as, for example, under the Malaysian and Korean schemes) was most useful in those countries which had no experience of the informal process. Representatives of some of the RETA economies also pointed to the absence of lending practices based on cash flow and income as a reason for difficulty in bringing lenders and corporate debtors together at a time of corporate debtor financial crisis.

It was to be hoped that once the systemic debt problem of the banking sectors in many of the RETA countries had been arrested, the informal processes might be reviewed so that they would be more directed at solving the problems of corporate debt for the benefit of all creditors (and not solely the banking sector). Representatives of observer organisations, such as the International Law Institute and the OECD, expressed concern that, at present, the informal processes did not take proper account of important collective characteristics.

#### **5. Individual Creditor Rights and Collective Insolvency Processes**

The comparative report raised the issue of the clash of values between the enforcement of individual creditor rights and the imposition of collective creditor procedures. Specifically it

pointed to the need to balance individual rights (particularly those of secured and other like creditors) with the restraint that is sometimes necessary in the context of a formal rescue process. It also, however, pointed to problems caused by deficiencies in the law and the processes relating to enforcement of rights over secured property.

In the discussion it became apparent that a number of the RETA economies need to address a number of unresolved issues concerning the enforcement of individual creditor rights, particularly those involving or related to enforcement of securities, lease property rights and guarantees. In some of the economies the enforcement of these rights are affected by such things as inadequate laws and inadequate legal processes. This results in a very unequal position between debtor and creditor.

The representative from India spoke of a radical initiative that may soon be taken in India to overcome the considerable difficulties in enforcing secured property rights through court related processes. The initiative proposes that the parties to a secured lending contract would submit to a form of arbitration for the determination of such issues as the right to enforce, the method of realising the value of the secured property and any consequent liability for the shortfall.

In Thailand legislative progress toward improved enforcement rights for secured creditors had begun but was the subject of considerable opposition because of the effect of the economic crisis.

On the issue of balancing individual enforcement rights and the restraints that are necessary for the practical operation of a collective rescue regime, the discussion agreed the need for such restraints and considered that the policy outlined in Tentative Proposal 8.8 of the comparative report might serve as an acceptable guide.

It was accepted that many of the economies need to revisit this aspect and carefully consider the balancing of individual rights against the application of collective insolvency processes.

## **6. Corporate Governance**

Although much of this subject is beyond the competence of an insolvency law to regulate, the discussion agreed that a fundamental problem of any insolvency law system was that it was often expected to operate and produce positive results in an environment of inadequate corporate governance and financial responsibility.

The representatives of Pakistan and the Philippines mentioned the problems caused by political favouritism and "cronyism" which often contributed to a considerable lack of corporate responsibility among owners and management. Representatives of some other RETA economies considered that there had been a general lack of attention to the issue of corporate governance which may have been the product of insufficient infrastructure development and education.

Standards of corporate governance and accountability of managers and owners need to be considerably improved in a number of the RETA economies. The greater involvement of many of these economies in both regional and world trade commerce carries with it a need to exact compliance with basic standards of transparency, accountability and responsibility. Insolvency law and practices cannot operate in a vacuum. There is a need to insure that standards are set and applied if the insolvency laws are to have any prospect of producing positive results.

It was generally accepted in the symposium discussions that it was of fundamental importance that the insolvency laws of the region contain adequate sanctions to penalise managers and owners of insolvent corporations for fraudulent behaviour and also for behaviour which fell short of proper standards. This requires that adequate resources are made available to insolvency administrators to investigate and report on corporate governance breaches. Some representatives also considered that there is difficulty in determining whether such sanctions should be applied in both liquidation and rescue processes. Although there was general agreement that sanctions were appropriate in a liquidation context, opinions varied whether sanctions were appropriate to the rescue process since this might often involve negotiations and bargaining designed to compensate for breaches of corporate governance standards.

## **7. Cultural Influences**

The discussion of attitudes in the RETA economies to legal processes, the "stigma" of insolvency and the fear of loss of control and the effect of such influences produced some interesting proposals. It was suggested, for example, that the result of economic development, the increased involvement in both regional and world trade and commerce and the overall effect of globalisation in the RETA economies meant that cultural and other attitudes, which might have once been of considerable importance within the commercial community of many of the RETA economies, could no longer be considered a realistic barrier to the adoption and employment of laws and processes, such as insolvency law and its processes, which were part of the commercial society of most trading economies. The response, therefore, had to come from within.

Another view was that the tendency to regard many of these influences as negative barriers, might be overcome if, instead, their existence might be used as incentives to promote recourse to insolvency processes. Thus, for example, the so-called "stigma" of insolvency might be avoided by actual recourse to modern forms of both formal and informal rescue processes.

## **8. Globalisation**

This last mentioned topic was also relevant to subsequent discussion which briefly considered the historical imposition of many foreign insolvency laws and processes among the RETA economies and the more contemporary process of globalisation and the importation of other commercial laws and practices as a result of that process.

It was generally accepted that globalisation should be considered an advantage rather than a disadvantage, although some representatives questioned the pace of introducing new laws and commercial practices, believing that sometimes this process was too fast and afforded insufficient time for absorption.

The issue was posed whether it might be preferable for the insolvency law process to be completely rebuilt in some of the RETA economies and whether the process of globalisation brought problems. There was general agreement that not too many difficulties had been experienced as a result of the imposition or adoption of foreign based insolvency laws, although this appeared more confined to the common law economies.

In Indonesia, for example, there was a strong suggestion that the existing base of Dutch colonial insolvency law should be repealed and a completely new law should be structured and developed.

## 9. Essential Reforms

In a session that was given over to the representatives of the RETA economies proposing ideas for improvements in their respective domestic insolvency law systems, a number of essential "needs" were mentioned. These included the desirability of promoting effective cross-border insolvency law measures in the region. During the discussion on this issue it became apparent that there was a lack of knowledge generally of problems and of the different approaches that might be taken toward issues of cross-border insolvency particularly the possible adoption within the region of the UNICTRAL model law on cross-border insolvency.

Another essential "need" was providing for the on-going funding of an insolvent corporation as part of a possible rescue. Many of the insolvency law regimes of the RETA economies did not provide for the concept of the "super priority" in order to safeguard and protect, for example, a bank that might be prepared to advance further funding to ensure the survival of the insolvent corporation at the commencement of or during a rescue process.

Other representatives spoke of a need to have comprehensive reform of the insolvency law; of the need to insure that judges were independent and immune from influence; and of the need for sufficient sanctions to enable the proceeds of fraud to be recovered under an insolvency law regime.

## 10. Conclusions

1. Some of the RETA economies would greatly benefit from technical assistance programs in the area of insolvency law and practice. The economies which would appear to require such assistance are Indonesia, Thailand, Philippines, Pakistan and Taipei,China.
2. The particular technical and other assistance needs of those identified RETA economies should be further investigated and identified through a more detailed examination of the application and operation of their existing insolvency laws and informal processes. Following that more detailed examination, a further symposium (primarily involving only those RETA economies) should be convened in approximately 6 months time.
3. The identified RETA economies would clearly benefit from education and training programs for judges, court officials and officials of government agencies whose functions include the administration of cases of liquidation of insolvent corporations and cases of restructuring insolvent corporations.
4. All of the RETA economies (and other economies in the region, such as Vietnam, the People's Republic of China, Mongolia, Cambodia and Laos) would benefit from the establishment of a semi-permanent forum for the exchange of experience, information, new developments and education in the area of insolvency law and practice. If this brought together government policy makers, legislators, judges, officials and insolvency practitioners on an annual or bi-annual basis, the region would greatly benefit. For this purpose a permanent secretariat needs to be established with resources to enable the initial forums to be convened and held.
5. All of the RETA economies might benefit from a comprehensive program of education and training in connection with the restructuring, rehabilitation and refinancing of corporate debtors both under formal and informal processes.
6. All of the RETA economies would benefit from a detailed consideration of and a multilateral approach to the problems of cross-border insolvency.