Forum for Asian Insolvency Reform

Insolvency Reforms in Asia: An Assessment of the Implementation Process and the Role of Judiciary

Bali, Indonesia, 7-8 February 2001

SYNTHESIS NOTE [1]

Background and Summary

In the wake of the Asian financial and economic crisis in the late 1990s, insolvency reform has risen to the top of the policy agenda of many Asian economies. A large debt overhang rendered a sizeable part of the Asian corporate sector insolvent and destabilised the financial system. The absence of effective, predictable and orderly ways to deal with insolvency was for the first time keenly felt by government, corporations and creditors. The necessary corporate restructuring and re-organisation on a large scale was very slow to emerge without effective insolvency procedures. Moreover, the new investment needed to resume growth has not been forthcoming in the absence of proper creditor protection, as investors have woken up to the importance of effective bankruptcy regulation.

Against this backdrop, the Forum for Asian Insolvency Reform (FAIR) was created by the Organisation of Economic Co-operation and Development (OECD), the Asia-Pacific Economic Co-operation forum (APEC) and the Asian Development Bank (ADB), with the support of the public and private sector experts who attended the preceding meeting on *Insolvency Systems in Asia: An Efficiency Perspective*, organised in Sydney in November 1999 by the OECD, the World Bank, the Australian Treasury/AusAID and APEC. Bringing together key constituencies for insolvency reform, such as policy makers and senior officials, members of the judiciary, insolvency practitioners, academics, and other private sector experts, FAIR intends to serve as a policy dialogue platform to discuss and promote the formulation and implementation of insolvency reform strategies in the Asian economies.

The first meeting of FAIR took place in Bali, Indonesia on 7-8 February 2001, co-hosted by the Ministry of Finance and the Ministry of Justice and Human Rights of the Government of Indonesia, which also represented APEC at the meeting. It was co-sponsored by AusAID and the Japanese government. Approximately 110 high-level participants from over 20 jurisdictions and 5 international organisations attended the meeting. After a review of recent developments in Asian insolvency reform, participants focused on the role of the judiciary in establishing a sound insolvency framework. Finally, participants reviewed progress in Indonesian insolvency reform.

The meeting was very successful in eliciting active discussion by participants based on focused presentations. One of the concrete outcomes of the meeting was the establishment of a working group within the Ministry of Finance of Indonesia, which the Ministry announced at the end of the meeting, in order to follow up the discussion in the meeting in the Indonesian context. In the concluding session, participants voiced their strong support for continuing dialogue within FAIR and their commitments in active participation in future annual meetings of the group.

Main Conclusions

The presentations and commentary by discussants raised a number of issues for the development of effective insolvency systems in Asia. From the discussion throughout the meeting, the following conclusions may be drawn:

1. In the recent efforts to reform the insolvency system, Asian economies have focused mainly on rescue processes. Little attention has been paid to improving the liquidation process, which constitutes the basis for all insolvency procedures.

Since the outbreak of the financial crisis in 1997-1998, the Asian economies have been trying to improve their insolvency procedures. Reflecting different legal, economical, cultural and historical backgrounds, the strategy pursued varies among the economies of the region and the achievements to date differ significantly. In most cases, however, the major focus has been on the establishment or improvement of the rescue processes, both formal and informal, while little attention has been paid to the reform of the liquidation procedure.

This is understandable, as the systemic nature of corporate distress following the crisis may call for a bias towards rescue operations. There was an urgent need to establish mechanisms to deal with large-scale insolvency. Liquidation was often ruled out due to the potentially huge economic and social impact. The solution was sought, first, in the establishment of the out-of-court workout programs, more or less based on the London approach; and second, in the development of judicial reorganisation or administration procedures. The former include various structured out-of-court workout procedures, such as Jakarta Initiative in Indonesia, the Financial Institution Agreement for the promotion of Company Restructuring in Korea; and the proceedings under the Corporate Debt Restructuring Committee (CDRC) in Malaysia and Corporate Debt Restructuring Advisory Committee (CDRAC) in Thailand. A remarkable number of cases have come under these out-of-court procedures, but their real impact is not yet clear. It was reported that many workout plans had been adopted based on overly optimistic scenarios, and were too often no more than mere debt rescheduling, often under political pressure. In the absence of real restructuring, some of these large corporate debtors and their creditors may experience problems again in the not-too-distant future. In fact, certain Asian companies that have undergone "restructuring" are once again experiencing financial difficulties despite the recovery of the general economy. From the point of view of the banking system restructuring might be addressing the stock rather than the flow problem of non-performing loans.

Concerning judicial reorganisation or administration procedures, Thailand reformed its Bankruptcy Act in 1998 to create a new rescue process. The People's Republic of China, Hong Kong, China, Indonesia, the Philippines and Vietnam have launched projects to introduce or reform several reorganisation procedures, and India, Malaysia and Chinese Taipei have similar plans. Likewise, Japan established a new rescue process, modelled after the Chapter 11 regime of the United States, by enacting the Civil Rescue Law in 1999, which replaced the Composition Law in 1922. Korea has also been conducting a series of reforms since 1998.

Notwithstanding the importance of the formal and informal rescue schemes, liquidation procedures remain the core of the entire insolvency system. Liquidation is the most basic and traditional mechanism to handle insolvent corporations. It provides the basis for other insolvency procedures, such as formal and informal rescue process. Where there is no real threat of liquidation, a debtor (and different classes of creditors) has little incentive to agree on reorganisation plans. An effective liquidation procedure facilitates the rescue process by serving as a benchmark in the negotiation on the value that unsecured creditors (or shareholders) should get. This argument is supported by the observation that the rescue process, whether formal or informal, works fairly efficiently in Hong Kong, China and Singapore, which have a functioning liquidation procedure. By contrast, other emerging economies, particularly Indonesia, the Philippines and Thailand, have faced difficulties in implementing the rescue processes, partly due to the lack of a sufficiently operational liquidation procedure. In the latter economies, the number of the liquidation cases have been astonishingly low, even though a large number of corporations are terminally

insolvent. In Indonesia and the Philippines, for example, cases of corporate bankruptcy were virtually unknown. On the contrary, in Korea, the bankruptcy (i.e., liquidation) cases have dramatically increased from 12 in 1995 to 733 in 1999, which attests that the liquidation procedure has started working. Informality in Asian insolvency systems means that controlling shareholders of the debtor still wield an inordinate amount of influence in the process and outcomes. A key issue in this respect is corporate governance of large domestic creditors. If they remain passive, often as a result of political pressure or debtor capture – implementation will remain low and financial discipline will not improve.

2. The judiciary is the key institution in the insolvency system. In hearing insolvency cases, judges must be independent and knowledgeable. The improvement of their competence is of urgent necessity in the region.

Under any system, judges play a critical function in insolvency proceedings. They make the ultimate decision on whether a given insolvency proceeding should be opened or not. They also need to cope with sometimes complex, multiparty disputes that often arise from insolvency cases. In order to conduct such adjudication effectively and efficiently, judges must be independent and have sufficient expertise in insolvency related matters.

First, judges must be independent. Judicial independence can be defined as the freedom of judges from influence brought to bear by other parts of government in particular the executive or by other external agents. It is noted that in modern democracies, enormous power is wielded by the executive and parliamentary branches of government as well as large local and multinational corporations and other organisations including those who control media. In order to act as a credible and impartial third party, judges must be free to determine cases according to their view of the law without pressure from these external sources. This is especially important in insolvency procedures which often involve very powerful economic and political interests.

There are no universally accepted criteria to measure judicial independence objectively even though some useful benchmarks have been formulated by the UN International Commission of Insolvency [is there really such a body?]. What really matters in the end is public perception. As judiciary can only function effectively when the general populace believes in its independence and has confidence in it. There are some issues that are considered imperative to ensure judicial independence. For example, judges must be protected from external threats, such as arbitrary dismissal, physical violence and financial difficulties. The conditions for their appointment, dismissal, tenure [Simon's comment – however, in some jurisdictions, lifetime appointment may foster corruption and reduce accountability], remuneration and personal security should be established accordingly. The administration and budget of the courts, should be designed to ensure independence of the judiciary as a whole from other organs of government and to provide a fair working environment for judges. These issues have not been satisfactorily addressed in many emerging economies. Moreover, public perception of corruption of judges in some Asian economies severely undermines the independence and therefore competence of judges. In order to establish a functioning judiciary for insolvency (and any other proceedings), effectively curtailing corruption is indispensable.

Independence should be accompanied by accountability. In most OECD member countries, judges are highly accountable, as their hearing is normally open to the public and their decisions along with the reasoning are published and subject to public scrutiny. This accountability is an important source of public confidence in the judiciary. Nevertheless, publicity and access to judicial reasoning behind decisions is not always available in emerging Asian economies. Given the low level of confidence in the judiciary some creditors could benefit from additional mechanisms to enhance accountability. These include increasing publicity of judicial reasoning, and putting in place mechanisms for the removal of judges when corrupt – with due regard to judicial independence. Donor assistance might be very useful in designing and implementing such mechanisms.

Second, in order to be competent in hearing insolvency cases, judges should have sufficient expertise in relevant legal, economic and business issues. The complexity of collective proceedings, coupled with the need to independently access issues of fairness and to supervise the process (as oppose to the usual review of a transition), puts an additional premium on judicial expertise. This poses a significant challenge to many emerging economies in Asia, where commercial literacy of judges is rather low.

There are ways to address this challenge. First is to prepare legal and administrative supports for judges, as discussed more in details below. Second is the training of judges. In many OECD countries, judges who expect to deal with insolvency cases are given special training, often organised by the Supreme Court. In Mexico, a special institution (IFECOM: *Instituo Federal de Especialistas de Concursos Mercantiles*) has been established under the Federal Judiciary Council to provide judges with such training. Third, it might also be beneficial for the judicial authorities to compile manuals to which judges can refer when handling complex cases. In Korea, the judges in the Bankruptcy Division of the Seoul District Court, who handled a number of cases in the last few years, published under the authority of the Supreme Court the "Practical Manual for Corporate Reorganisation". The Supreme Court has also issued a manual for composition procedures.

Another way to improve judicial expertise in insolvency issues is to appoint experienced professionals as judges for insolvency cases. It is fairly common practice in common law countries like the United Kingdom and the United States, where barristers or practitioners with lengthy professional career are often appointed as insolvency judges. In other countries, including Belgium and Denmark, the tribunals for commercial cases are composed of a mixture of a professional judge and commercial representatives. France has had a unique system of *tribunaux de commerce*, which consisted exclusively of part-time, non-professional unpaid judges elected from traders and business executives by their peers through the local chambers of commerce. However, this system is being reformed as it was plagued by a lack of accountability and was often open to corruption. Resources most notably will include professional judges [what does this mean?]. In Indonesia, even though the judiciary is basically staffed with professional judges, several "ad hoc" judges were appointed in 1999 for the newly created Commercial Courts. While the appointment of ad hoc judges might help as a transition measure to increase the credibility of the judiciary, it should not detract from the key objectives of increasing the level of professionalism in the judiciary.

3. When the number of competent judges is limited and institutional capacity is low, the role of the judge in the insolvency system should be limited, requiring them to act rather conservatively than pro-actively.

Judges play a central role in insolvency procedures. Fairness is particularly important in a collective process that involves key property rights. It therefore requires supervision by a credible and impartial institution. An insolvency process may involve a series of events, such as investigation of the state of affairs, commencement of the proceeding, appointment of liquidators or administrators, verification of claims, realisation of assets or formulation of reorganisation plans, etc. The extent to which judges are involved in these events varies across jurisdictions. In some countries, the role of judges is kept at a minimum, such as the decision to open the proceeding and adjudication of disputes, while other countries expect judges to play a more pro-active role to ensure fairness and facilitate, even drive, the process. In the latter, a supervisory judge often directs or controls the proceeding from beginning to end. Not only does the judge monitor the process, but he or she may also give instructions to the administrator or manager of the debtor which could involve business judgements as well as interpretation of the law.

It is pointed out, however, that a pro-active role requires from judges a high level of expertise and skills; it requires rapid action, as the value of the estate might evaporate often in a matter of days; and it requires that the judge has direct independent access to experienced advisers. These requirements often

non-existent in many countries in the region. In order to address these key institutional issues, the legal framework may, until the pool of highly skilled judges and advisers has increased sufficiently, need to limit the role of judges to dispute resolution and overall supervision of insolvency procedures; while limiting their involvement in quintessentially economic and business decisions. For example, it may be stipulated that judges cannot overrule the opinion of a majority of creditors (or an administrator) or can do so only under narrow circumstances in determining whether the reorganisation plan is viable or not or whether it is blatantly unfair to some categories of creditors [this is a different issue that does not go to the skill of judges or a lack of resources – even where the skill of judges is high and there are adequate resources, a jurisdiction may still wish to restrict the power and discretion given to judges] . Creditors passivity should not lead to heavy reliance on the judiciary; it should be dealt with rather through improvements in the corporate governance of creditors mentioned above.

It may be advisable to adopt fixed time frames for certain processes. These may particularly include the decision of whether or not to commence proceedings, the submission of a reorganisation plan, the agreement by creditors on a proposed plan, and the review of transactions that may be preferential or fraudulent. Some argue that it is difficult to decide on a proper time limit for each process and that time limits could sometimes lead to arbitrary results and lack of flexibility. However, such time frames could facilitate the procedure, often by catalysing the parties into more vigorous actions to meet the deadlines. They contribute to greater predictability and confidence in the insolvency system.

Some countries, including the United States and Malaysia, allow for so-called pre-packaged insolvency. In this context, a re-organisation (after debt restructuring) may be negotiated outside of the courts. However, as the out-of-court process cannot bind dissenting creditors, the plan cannot be safely implemented even when the large majority of creditors agree to it. Pre-packaging is a procedure to bring before the courts the plan accepted by the requisite majorities in each class of creditors and seek the confirmation of the courts to make it binding on all third parties. Judicial involvement is quite limited: in the United States, the court should only check the thirteen “confirmation standards” of which the “best interest of creditors” and “feasibility” tests are the most important. However, it has been reported that the judicial check is often superficial partly because all the parties have agreed to the deal. An important lesson from the U.S. approach is that, when abuse of the “feasibility” test may be likely (as in the case of Asian insolvency), subsequent access to rescue mechanisms (i.e. post-confirmation) may need to be strictly limited.

The voluntary administration scheme introduced in Australia in 1992 provides another interesting approach. It is a type of formal insolvency procedure stipulated in the Corporations Law, but does not require any court involvement. When a company is in distress, an administrator is appointed typically by the company. Unless removed at the first meeting of creditors, the administrator investigates the affairs of the company and forms an opinion about necessary arrangements for the company, including those with creditors, which is subject to the vote at the meeting of creditors. If accepted by creditors of simple majority by number and value of debts owed, the company will enter into a deed of company arrangement. The peculiarity of this scheme is that it does not necessarily require the court involvement even though it grants an automatic stay at the time of the appointment of the administrator and allows the agreed plan to bind dissenting (unsecured) creditors. It is pointed out, however, that such a scheme may be properly operational only when its abuse can be avoided primarily by trustful, skilled, independent professionals who act as administrators and also by the efficient courts that can effectively intervene the process where necessary (i.e. when abuse is suspected).

In any event, courts should be in a position to address effectively a number of key issues that include:

(a) insider trading and insider dealing concerns;
(b) the flow of information to the administration and the creditors;

(c) abuses in the process of declaring insolvency, often a result of collision between the debtors and certain creditors; and
(d) issues of private law –such as contracts - arising out of disputes regarding the estate.

4. The establishment of specialised courts is a way to develop judicial capacity for insolvency cases, but its desirability depends on the particular legal and social context of a given economy.

When the number of competent judges for insolvency proceedings is limited, one option for the development of an efficient formal insolvency system is to create courts specialised in insolvency proceedings. A small number of competent judges are appointed to the specialised courts, which have exclusive jurisdiction over insolvency cases. As a prime example, in the wake of the financial crisis, Thailand introduced the Central Bankruptcy Court in 1999.

The establishment of specialised courts has merits. First, by specialisation, a limited number of competent judges may gain expertise quickly and become able to handle insolvency cases efficiently. These judges can enjoy intensive training, which is in fact more cost-efficient than providing training for a large number of judges who may have no chance to hear insolvency cases in their career. The judges appointed to specialised courts can also get hands on experience by handling insolvency cases regularly.

Second, the specialised court system could shape judicial precedent on insolvency relatively swiftly and in a coherent manner. The appointed judges would spare more time to examining the insolvency-related issues and the relevant precedents, and with accumulated expertise and experience, they would be able to make sensible decisions quickly. This will enhance the predictability of the law and court rulings and also the credibility of the courts.

Third, specialised courts could be designed to have a different structure from other ordinary courts. For example, it may be easier to introduce ad hoc judges to a limited number of specialised courts than to the entire court system. This was one of the major motivations to establish the Commercial Courts in Indonesia. However, in the Thai case, specialised courts are staffed with career judges.

By contrast, many other countries opt for courts of general jurisdiction for the adjudication of insolvency cases. That is because there are important downsides with the establishment of specialised courts:

First, the creation of specialised insolvency courts could be costly if there is not sufficient flow of insolvency cases. The crisis created a significant number of insolvency cases, but if the number is likely to decrease considerably, the establishment of such courts may not be rational. One way to address this issue is to establish commercial courts with broader jurisdictions in other areas such as company law and intellectual property, as is seen in some continental European countries.

Second, specialised courts may possibly create inconsistency in the way general areas of law are applied. This could happen when the specialised courts have jurisdiction over general commercial and/or civil issues raised out of insolvency cases. Such inconsistency could be reduced if all relevant decisions of the courts are published and easily accessible, though that is not always the case in some Asian emerging economies. It should also be noted that inconsistency in the decisions by the courts of first instance could be resolved at the appellate courts.

Third, especially when there is only one specialised court is established for the whole country, it may cause inconvenience to the relevant parties, who may have to travel to the court sometimes from a great distance. Liquidators/administrators may also need to make frequent trips to the location of the debtor company in order to administer the case. The costs could be significant if the country is quite large.

Fourth, some countries have a career judge system in which judges rotate from an office to another regularly. Judges are sometimes "promoted" from lower level courts to upper level ones, as they get experienced. If judges in specialised courts change frequently, the merit of such a system could be limited, and the costs involving extensive specialised training very high.

The judicial tradition in a given country matters very much in choosing an adequate system. Some countries have a strong tradition of a unified judicial system and therefore might see a specialised court system as alien. Others, such as Thailand, have already set up specialised courts on tax, on intellectual property and international trade, and therefore are less hesitant to introduce another one for insolvency cases.

Finally, the establishment of specialised courts is not the only solution to address the issue of judicial specialisation with the complex legal and business matters found in insolvency cases. For example, Korea has successfully chosen to create specialised chambers for insolvency cases within the Seoul District Court of general jurisdiction. The low number of insolvency cases filed does not support the establishment of such chambers in other District Courts. Such specialised chambers are also found in a few Japanese District Courts, including Tokyo District Court. It should also be noted that in Thailand the insolvency court is staffed by career judges and its decisions are subject to appeal before the courts of general jurisdiction. In this context, it is more akin to a specialised chamber than a separate institution. In any event, most experts agree that even when specialised insolvency courts exist, the appeal process should be routed through the courts of general jurisdiction in order to maintain coherence in the legal system.

5. Notwithstanding the pivotal role of the judiciary, the institutional infrastructure of insolvency also includes various other important players, whose effective functioning is imperative to the effectiveness and integrity of the system.

The critical role of the judiciary in insolvency proceedings suggests the need for important administrative supports for judges. Administrative supports include various institutional settings and professionals that contribute to insolvency proceedings. The availability of effective administrative supports helps to mitigate the workload of judges considerably and facilitates the proceedings. It is particularly important for emerging economies in which the competence of judges is generally less developed.

Liquidators and administrators (sometimes also called receivers, trustees, etc.) are perhaps the most important agents in insolvency proceedings. It is therefore critical for the successful implementation of the proceedings that competent professionals are available for the tasks. Unlike in some OECD countries where self regulatory organisations fulfil the key regulatory functions, it was felt that in the case of emerging economies a more straightforward regulatory system by state authorities might be more appropriate, at least at the initial state of development of the profession. Nevertheless, the active input and institutionalised participation of insolvency practitioners in such a system is extremely important. Donors could effectively contribute to the design and establishment of regulatory framework and institutions. Some countries, such as Singapore and Thailand as well as the United Kingdom and the United States, a special government agency has been established to provide liquidators and/or administrators for insolvency proceedings. Such a public office is known to contribute to the efficiency of the entire insolvency system especially by dealing with the cases in which the estates are too small to attract private professionals. In Korea, a "management committee" supports all the technical aspects of the judge's work in insolvency cases.

Other types of specialists, such as appraisers, auctioneers and accountants, are also important for effective functioning of insolvency proceedings, as liquidators/administrators and judges often need to rely on their services and advice in managing cases. The availability of adequate mechanisms for the execution of judicial (or the administrator's) decision, such as sheriffs and bailiffs, is also very important.

The establishment of a creditors' committee might also be of great importance, in large cases, especially under the systems which do not rely on an omni-present and practical judicial authority. It could facilitate information flows and negotiation between debtors and creditors, contribute to resolution of inter-creditor disputes, and thereby increase cohesion and efficiency in the process. The functioning of the creditors' committee may, however, entail considerable costs, which should be covered by the estate, these costs should be a serious consideration in the establishment of such a committee.

Finally, judges should be supported by a fair number of the staff, including clerks, registrars and administrative and technical officers as well as by adequate facility and equipment, such as references, database, computers, and so on. It is noteworthy, however, that such supports are never considered sufficient even in the most advanced countries.

6. Indonesia has made substantial efforts to improve its insolvency regime, but there still remains a lot to be done to establish a truly functional insolvency system.

Before the onset of the recent financial crisis, the insolvency proceedings in Indonesia were stipulated in the Bankruptcy Law of 1905 which was based on nineteenth century Dutch legislation. However, the Law had been rarely, if at all, applied in practice. Following the crisis in 1997-1998, in order to improve the insolvency procedure, considerable amendments were made to the Law. These include, among others, the creation of a moratorium on debt payment to facilitate rescue, and the establishment of the new Commercial Courts that have exclusive jurisdiction over insolvency cases.

Despite the legislative changes, the formal insolvency procedures are still considered to be dysfunctional. The judicial system is too weak to implement the law appropriately. In particular, there are few competent judges who are capable of proper understanding and handling insolvency cases based on adequate interpretation of the law. This is partly because judges are generally inexperienced in insolvency cases and more generally commercial matters; and unfamiliar with the newly introduced concepts and procedures. Moreover, it is often said that corruption is prevalent in the judiciary. Judges are neither respected nor well treated in their salaries and facilities. The establishment of the Commercial Courts was intended to change this situation, though it has not been successful so far. In addition to judges, the availability of competent insolvency professionals is also very limited.

It is widely pointed out that the prevailing social norm is to avoid the formal court proceedings to solve disputes. The declaration of bankruptcy is a stigma, and a petition for the insolvency proceeding is regarded as breaking the commercial and social relationship between the debtor and creditor. There is in fact a "chicken and egg" relation with the ineffective judicial system. A change in the social norm, particularly the development of the "rescue culture", should help the judiciary become more effective, which in turn will support a more substantial role for formal legal proceedings.

Timely and credible financial (and other) information is imperative to effective functioning of an insolvency procedure, but is not available in Indonesia. Not many companies are statutorily required to disclose financial information, and the disclosed information may sometimes not be verifiable. Accounting and auditing practices are observed as weak.

Even though the 1998 changes in the Bankruptcy Law have established the fundamental framework for insolvency proceedings, there are still important gaps in the legislation. The examples include the absence of clear definitions of such terms and phrases as "debt" and "due and payable", insufficient protection of secured creditors and the lack of adequate sanctions against insolvent trading by

directors. The Government of Indonesia is aware of these shortcomings, and is preparing further reform in the insolvency legislation, including the establishment of a new corporate reorganisation procedure.[1]

While judicial insolvency procedures have been reformed but not yet sufficiently implemented, a structured out-of-court workout procedure has been developed to deal with the immediate need for corporate restructuring. The Jakarta Initiative Task Force was established in 1998 to manage the out-of-court corporate restructuring procedure, modelled after the "London approach". Although this procedure had not worked well until the first half of 2000, the deals under the Jakarta Initiative seem to have picked up considerably in the second half of 2000. It is pointed out, however, that the increase in deals does not necessarily result from a renewed confidence in the Indonesian insolvency system; it is probably due to "creditor fatigue". Owing to disappointing experience in the last few years, many creditors have come to believe that their legal rights are highly unlikely to be enforced, and they have therefore begun to compromise. Consequently, the increase in reorganisation agreements may not translate in boosting investor confidence and in attracting new investment in the Indonesian economy.

Unsatisfactory functioning of the out-of-court workout procedure is largely ascribable to the lack of effective formal insolvency proceedings, especially, liquidation procedures. However, there are signs that the judiciary may have started to play some role. There have recently been several cases, in which a "pre-negotiated" composition plan was brought to a Commercial Court and the Court approved it in a relatively short period, this making the plan binding on dissenting unsecured creditors. This is certainly a good sign but it remains to be seen whether it will develop into a sustainable trend.

In the meeting, various recommendations were made to strengthen the insolvency system in Indonesia. Among other, the increased effort is needed to develop the capacity of the judiciary.

- Intensive training should be given to the judges of the Commercial Courts. However, there should be some screening process to ensure that competent and honest judges are selected.
- Appointing competent practitioners with sufficient commercial expertise and experience as Ad Hoc Judges in the Commercial Courts might be helpful.
- Combating judicial corruption should also be reinforced, as screening mechanisms needs to be accompanied by reasonable improvement of judges' salaries and work conditions.
- In order to enhance the integrity and accountability of judiciary, court decisions should be published together with the reasoning.

An adequate regulatory framework for insolvency and administration needs to be established. Donor support in all of these areas might be extremely helpful.

The Indonesian Bank Restructuring Agency (IBRA) is a key player in enhancing the application of insolvency cases and asserting a strong attitude towards them. IBRA has acquired a significant amount of non-performing loans and has broad power to enforce restructuring of debtors. Were IBRA to strongly seek resolutions through judicial procedures, this should have a remarkable impact on the social prejudice against insolvency. More generally, improvements in the insolvency context are closely linked to improvements in the corporate governance area. They are part of a broader shift towards market based incentives grounded on a more formalised system of property rights. Corporate governance changes will contribute to a change in the business culture, which is likely to mitigate the stigma associated with the insolvency proceedings.

Last but not least, the fundamental infrastructure for the insolvency operations, including timely and credible financial information, an efficient auction system and effective law enforcement mechanisms,

[1] These issues were discussed in detail in an experts meeting in September 2000, between a small group of FAIR experts and the Indonesian authorities (see attached Synthesis Note)

need further improvement. In addition, relevant legal domains, in particular, the secured transaction law, should also be developed as well.

As a result of the deliberations in the meeting, the Ministry of Finance of Indonesia announced its intention to establish a working group consisting of relevant officials in different divisions and ministries to monitor the implementation of the conclusions and recommendations of the meeting in the future reforms. It was also suggested that this international meeting should be followed up by a series of national seminars to raise the awareness of all interested parties in Indonesia.

Future Work

In the concluding session, there was a broad consensus among participants on the importance ofcontinuing policy dialogue within FAIR in order to encourage and monitor progress of insolvency reforms in the region and keep them at the front burner of reform efforts. There was agreement to have annual meetings of FAIR. Moreover, it was suggested that:

- the next meeting shall focus on one of the following issues: (i) corporate restructuring: an assessment of progress and remaining issues, (ii) the importance of liquidation procedures and its relevance to reorganisation process, or (iii) international aspects of insolvency procedure in the Asian context,

- the hosting jurisdiction should be subject to a more detailed peer review on insolvency reform progress (or effectiveness of its regime), preferably based on the internationally recognised insolvency standards best practices.

The possibility to establish sub-forums for judges and for regulators was also discussed. There was a support for such sub-forums, as some particular technical issues may need to be discussed within their narrow circles.

Lastly, INSOL International, the world-wide association of insolvency practitioners, expressed its willingness to be associated with the organisers of FAIR along with the OECD, ADB and APEC. It was welcomed to join the FAIR organising team. With its expertise and global network, it will contribute to enhance the relevance of FAIR action in the future.