THE REMUNERATION OF CORPORATE INSOLVENCY PRACTITIONERS AND CERTAIN RELATED MATTERS

A LAW REFORM DISCUSSION PAPER

OCTOBER 2005

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A. EXECUTIVE SUMMARY

1. In October 2005, the Law Reform Committee ("the LRC") of the Singapore Academy of Law considered a sub-committee's report on 'The *Remuneration of Corporate Insolvency Practitioners and Certain Related Matters'*. The sub-committee's report was prepared in the wake of a judgement delivered by VK Rajah, JC (as he then was) in March 2004 in *Re Econ Corp Ltd (in provisional liquidation) (No. 2), ("Econ Corp"),* [1] which *inter alia* expressed concern over the paucity of an adequate regulatory framework in Singapore to govern the issue of a liquidator's remuneration. As stated in the judgement:

> "[T]he present position in Singapore, bereft of guidelines, is far from satisfactory. In the circumstances, it is only appropriate that clearly articulated criteria and parameters be firmly established so that the Court, Committees of inspection, creditor committees and all interested creditors can properly assess whether insolvency practitioners are justly and adequately remunerated."[2]

2. The specific issues that the sub-committee dealt with are as follows -

   a. whether the legislative requirement for a third party (apart from the company in question and the insolvency practitioner) to approve and review the private liquidators' fees should also cover those of Judicial Managers ("JMs"), Receivers & Managers ("R&Ms") (appointed by Court or otherwise), and/or Scheme Administrators ("SAs") for section 210 schemes of arrangement;

   b. what the appropriate procedure would be for approving the fees of such insolvency practitioners, including whether the present procedure of taxation by the High Court Registrar of private liquidators' fees is preferable; and

   c. whether guidelines should be issued as to what fees are recoverable and for which items of work including the form in which bills are to be presented; and if so, what the content of those guidelines should be.

3. The sub-committee's views on the above issues can be summarised as follows:

   a. As regards the issue of whether the legislative requirements for a third party to approve private liquidator's fees should also cover those of JMs, R&Ms and SAs, the sub-committee is of the view that the legislative requirements should be extended to cover JMs and R&Ms appointed by order of court but should not

[1] *Re Econ Corp Ltd* (in provisional liquidation) (No 2), [2004] 2 SLR 264; [2004] SGHC 49.
[2] *Id*, at para 4.

include R&Ms appointed pursuant to an instrument or SAs appointed pursuant to section 210 of the Companies Act ("the Act").

b. As regards the issue of what procedure should be adopted, the sub-committee is of the view that the existing practice for liquidators' remuneration of taxation by the High Court Registrar should be adopted, but it may be preferable to constitute a panel of insolvency specialists, who could act as technical assessors (upon application by the parties or on the Registrar's own motion) and assist the Registrar in assessing the appropriate level of remuneration.

c. As regards the issue of whether guidelines should be laid out to govern the fees charged by insolvency practitioners, the sub-committee is of the view that such guidelines will be beneficial. The sub-committee is also strongly of the view that insolvency practitioners must furnish adequate explanation and details of the tasks carried out and the complexity and quantum of work involved.

4. The Law Reform Committee is grateful to the Institute of Certified Public Accountants of Singapore ("the ICPAS") for nominating Mr Don Ho Mun-Tuke and Mr Tam Chee Chong to be part of this sub-committee. Their assistance in preparing this report has been much appreciated.

5. The sub-committee's report and its recommendations, which have been considered by the LRC, are now consolidated in this discussion paper.

B. INTRODUCTORY

6. We were tasked by the Law Reform Committee to consider certain issues in relation to the regulatory framework governing *'Remuneration of Insolvency Practitioners'* in Singapore and to make recommendations as to the same.

7. The full form of our terms of reference is set out in at ***Annex A*** to this report.

8. The names of the members of the sub-committee are set out at ***Annex B***.

9. The concerns raised in the judgement of *Re Econ Corp* have been a major impetus for the establishment of this review. Most of the issues raised in the judgement have been mentioned throughout this paper.

10. We realise that the issue concerning insolvency practitioners' fees is not typical to Singapore alone. Other jurisdictions too have faced this issue and have attempted to resolve it. In making our recommendations we have closely examined the recommendations made by similar law reform bodies in the UK and Australia.[3] In formulating our recommendations, we have taken a similar approach to our overseas counterparts and have not let ourselves be overly constrained by the terms of the existing statutory provisions and rules, although we recognise that there may be more difficulty in cases where our recommendations require a change of primary or secondary legislation than in cases where they do not. It is our belief, however, that a substantial measure of what we recommend could be achieved without legislative changes but by means of Practice Directions issued by the Courts and Statements of Insolvency Practice ("SIPs") which may be issued under the approval of the Institute of Certified Public Accountants of Singapore ("the ICPAS"). As examples of how such Practice Directions and Statements of Insolvency Practice could be formulated, we have thought it fit to include a set of Practice Directions and Statement of Insolvency Practice (SIP 9) used in UK. This is set out at ***Annex C***.

11. At the outset, it needs to be mentioned that the term "corporate insolvency practitioner" broadly used in this paper refers to an office holder appointed under the various provisions of the Companies Act i.e. winding up under part X, Receivers and Managers under Part VIII, Judicial Managers under Part VIIIA, and Scheme Administrators under section 210 of the Act.

[3] UK, Department of Constitutional Affairs, Report of Mr Justice Ferris' Working Party on 'The remuneration of office-holders and certain related matters'.

C. THE EXISTING FRAMEWORK FOR FIXING REMUNERATION

12. There are four basic types of corporate insolvency procedures under Singapore law:

d. a petition for the winding up of the company;[4]

e. the appointment of a receiver or a receiver and a manager by order of court or under the provisions of debenture;[5]

f. a petition for judicial management; [6] and

g. a scheme of arrangement.[7]

13. The statutory framework relating to insolvency practitioners' remuneration (applicable largely to liquidators) is largely provided by sections 268 and 311 of the Companies Act (Cap 50, 1994 Rev Ed) ("the Act") and the relevant rules of the Companies (Winding Up) Rules (Cap 50, R1, 1990 Rev Ed) ("the Rules").

14. Sections 268(2) and 268(3) of the Act provide three alternate means to liquidators for settling their remuneration. The relevant sections are reproduced below:

> **Section 268 -**
>
> (2) A provisional liquidator, other than the Official Receiver, shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined by the Court.
>
> (3) A liquidator, other than the Official Receiver, shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined —
>
> (a) by agreement between the liquidator and the committee of inspection, if any;
>
> (b) failing such agreement, or where there is no committee of inspection by a resolution passed at a meeting of creditors by a majority of not less than 75% in value and 50% in number of the creditors present in person or by proxy and voting at the meeting and whose debts have been admitted for the purpose of voting, which meeting shall be convened by the liquidator by a notice to each creditor to which notice shall be attached a statement of all receipts and expenditure by the liquidator and the amount of remuneration sought by him; or

[4] Under Part X of the Companies Act.
[5] Under Part VIII of the Companies Act.
[6] Under Part VIIIA of the Companies Act.
[7] Under Section 210 of the Companies Act.

(c) failing a determination in a manner referred to in paragraph (a) or (b), by the Court.

15. A liquidator is entitled to receive such remuneration by way of percentage or otherwise as is determined:

a. If there is a Committee of Inspection - by agreement with the liquidator and the Committee of Inspection

b. If there is no Committee of Inspection of if the liquidator and the Committee of Inspection fail to agree then by resolution of the creditors; or if no such resolution is passed - by the Court.

16. Section 268 of the Act gives precedence to approval by the Committee of Inspection as it is assumed that the Committee would have the most intimate knowledge of precisely what efforts have been exerted, the complexities involved and the value that a liquidator has contributed to the process.

17. Rule 188 of the Rules allows the official receiver, subject to the directions of court, to exercise any of the functions of the Committee of Inspection.

18. Section 311 of the Act accords all "proper costs, charges and expenses of and incidental to the winding up including the remuneration of the liquidator" priority over all other claims to the assets of the company. This is later clarified by section 328(1)(a) of the Act as priority over all unsecured debts.

19. Section 219 of the Act provides for the liquidator to refer to the court the assessment of the remuneration of a receiver and manager appointed under an instrument, should the need arise.

20. As regards to the Rules, Rule 142(1) confers on the official receiver the right to apply to court to review the remuneration of a liquidator, if he is of the view that the remuneration as fixed by the committee of inspection is "unnecessarily large". Thereupon the Court is mandated to fix the amount of the remuneration of the liquidator. Rule 142(2) of the Rules, however, states that this rule only applies to court-appointed liquidators.

21. Rule 171 of the Rules states that a liquidator or special manager cannot recover on behalf of another person, remuneration for work that he ought to perform himself. Rule 165 requires all solicitors, accountants, brokers and others employed by a liquidator in a winding up to deliver their bills or charges to the taxing master for the purposes of taxation. Rule 173 requires taxation to be completed before any amount is paid out of the assets of the company.

D. ADEQUACY OF THE EXISTING FRAMEWORK

22. The sub-committee considered that the provisions summarised above do not provide a comprehensive framework for regulating the remuneration of insolvency practitioners.

23. In particular, the following gaps or weaknesses are noted:

a. No guidelines to regulate the rates charged by insolvency practitioners

24. Currently there are no guidelines or yardsticks spelt out in the provisions that can be used by the Court to set out fair and acceptable rates for insolvency practitioners, or otherwise to remunerate according to the qualifications / experience of the individual practitioner(s) involved or the complexity of the tasks involved.

b. Should Liquidator's fees continue to be fixed on a percentage basis?

25. The existing statutory framework relating to liquidator's remuneration provides for a liquidator's fees to be fixed on a percentage basis. Section 268 (2) of the Act clearly stipulates that a liquidator -

> "shall be entitled to receive such salary or remuneration by way of percentage or otherwise..."

26. Also, pursuant to the Fees (Winding Up of Companies) Order (Cap 106, O35, 2001 Rev Ed), the official receiver when acting as a liquidator is entitled to levy fees on a percentage basis to the realised assets and distributions.

27. As noted in *Econ Corp*, the practice of liquidator's fees being fixed on a percentage basis is incongruous with commercial reality and such an Order is of little guidance in assisting to fix the remuneration of private insolvency practitioners. It is further stated in the judgement that a scale fee of this nature, despite its statutory sanction, would be arbitrary; andif applied as an inflexible rule, would be unfair to insolvency practitioners. It is also noted that most jurisdictions have, quite correctly, rejected as being unfashionable any notion of rewarding insolvency practitioners on a percentage basis tied to realisation.

c. Should insolvency practitioners' remuneration continue to be based on time-cost?

28. The current practice among insolvency practitioners in Singapore is to value and assess their efforts on a time-costing basis, often without differentiation for factors such as complexity, speed, actual effort and value added. Taking strong exception to the current trend, the *Econ Corp* judgement states that while insolvency practitioners have a right to be fairly and reasonably remunerated, they have no legitimate expectation to be remunerated on a time-costing basis as of

right. As such, the judgement goes on to state that the time spent by insolvency practitioners should be only one of several criteria, albeit an important one, that the court will take into account in determining the appropriate level of remuneration.

d. Lack of clarity in role of official receiver in determining remuneration

29. Except for Rule 142(1) of the Rules, which confers on the official liquidator the right to apply to court to review the remuneration of a liquidator, it appears that the official receiver does not play a direct role in the remuneration of insolvency practitioners. The current practice is for the official receiver to review the fees of a liquidator if and only when liquidators apply for a discharge. In such cases, it is not clear what criteria the official receiver employs when he reviews a liquidator's remuneration. Also, Rule 142(2) restricts the right of the official receiver to review the remuneration of liquidators to only court-appointed liquidators. This implies that the official receiver has no right to apply to court to fix the remuneration of privately appointed liquidators. Should this practice be extended to privately appointed liquidators and to JMs and R&Ms appointed by the Court?

e. Is the Registrar or the Judge the ideal arbiter for determining fees?

30. At present, the procedure by which remuneration is to be dealt with is not addressed by section 268(2) of the Act or any other applicable provisions. As such, some confusion exists as to whether the Registrar or the Judge is the ideal arbiter to determine the remuneration of insolvency practitioners.

f. No statutory provision dealing with payment of remuneration to judicial managers

31. The *Econ Corp* judgement also notes that there is no statutory provision in the Act dealing with a specific procedure for determining the remuneration of judicial managers. The judgement has cautioned that judicial managers should not construe the absence of such statutory provision as a licence to freely determine their own remuneration.

32. As such, it has been suggested that all judicial managers should submit their claim for remuneration to the company's committee of creditors for approval. If there is no such committee of creditors, or in the case of interim judicial managers, it has been suggested that the judicial managers should then submit their claim for remuneration to the court for approval. This application for approval could take the form of directions pursuant to section 227G (5) of the Act.

g. Lack of clarity as to whether interim payments need to be approved

33. Currently, while in practice, interim payments for liquidators are approved by the Court, there is no explicit provision providing for the same. This needs to be clarified. Also, it needs to be considered whether the same provision should extend to JMs and R&Ms appointed by the Court.

E. THE SUB-COMMITTEE'S OBSERVATIONS

34. Our report does not intend to look into all the weaknesses of the systems highlighted in the paragraph above. That task is better left to policy makers and legal experts who are presently working on the Omnibus Insolvency Law reform. Our report instead focuses on three core issues relating to insolvency practitioners' remuneration which we believe are in need of review and have been highlighted in the *Econ Corp* judgment. These are encapsulated in the 3 specific terms of reference set out in paragraph 3 above and which have been adopted by this sub-committee.

REVIEW OF REMUNERATION OF LIQUIDATORS TO APPLY IN SIMILAR MEASURE TO JMS & R&MS APPOINTED BY COURT

35. Under the present framework, the remuneration of provisional liquidators is set by the court and there are no provisions in the Companies Act dealing with review. In court-ordered liquidations, remuneration can be set by the committee of inspection and, failing that, by a resolution of creditors, or finally by the court itself.

36. In a creditors' winding up, the liquidator's remuneration is set at first instance by the committee of inspection or, failing that, by a resolution of creditors. The liquidator and any creditor or member may apply to the court for review of the remuneration, and the court's decision is expressly stated to be final and conclusive.

37. As there are currently no specific provisions dealing with the review of remuneration of JMs, R&Ms and SAs, the sub-committee recommends that the remuneration of JMs and R&Ms appointed by court should be subject to a similar process of review, by the creditors or, failing that, by the court. If remuneration is fixed by resolution of creditors, the court should have the power to review the remuneration on the application of the administrator or an officer, member or creditor of the company.

38. However, it needs to be noted that unlike the regulatory mechanism relating to liquidators where a provision for constituting a Committee of Inspection exists, no such provision exists for JMs. The sub-committee therefore recommends the introduction of provisions dealing with the formation of a Steering Committee whose functions will be similar to the functions of the Committee of Inspection, including dealing with the fees of a Judicial Manager.

39. As regards R&Ms appointed under a debenture and SAs, in most cases the remuneration of the insolvency practitioner is agreed between him and the party who appoints him. Such remuneration is, of course, payable out of the assets dealt

with in the course of the receivership rather than by the appointer personally. It may be thought that this provides an opportunity for cosy arrangements to be made between the secured creditor who appoints the receiver and the receiver himself.

40. In practice, however, there seems to be no evidence of this. On the contrary, the remuneration of receivers appointed by debenture holders appears to be one area in which market forces tend to hold down remuneration. The debenture holder is often a bank which has considerable experience in appointing receivers, is not lacking in market power and has a good deal of knowledge of the abilities and charging rates of potential receivers. Moreover there is always the risk, which not infrequently develops into reality, that the receiver will be unable to recover sufficient assets to satisfy the debenture-holder's debt. To the extent of any shortfall, the debenture-holder will, in substance, bear the receiver's remuneration himself. This represents a powerful incentive for him to negotiate an advantageous rate of remuneration. It appears to us that the arrangements described in the preceding paragraph work reasonably well in practice and need not be amended.

41. **The sub-committee therefore recommends that**

a. **The existing framework to review remuneration of liquidators should apply in similar measure to JMs and R&Ms appointed by Court.**

b. **Unlike the regulatory framework relating to liquidators where provision for constituting a COI exists, no such provisions exist for JMs. The sub-committee therefore recommends provisions for constituting a steering committee whose functions will be similar to the COI, including dealing with JMs fees.**

c. **The sub-committee recommends that the Court should retain the right to review the remuneration of JMs or R&Ms appointed by the Court, even where the remuneration has been approved by a committee of creditors similar to the power they exercise over liquidators' remuneration.**

ASSESSMENT OF REMUNERATION – WHICH PROCEDURE WORKS BEST?

42. In Singapore, the fee-setting mechanisms for insolvency practitioners have traditionally been on a time-costing basis, although there is no legal requirement in that regard. As alluded to in the judgement-

> "Insolvency practitioners now usually value and assess their efforts on a time-costing basis, often without due regard to critical factors such as complexity, speed, actual effort and value added."

TIME –COSTING

43. The present system of time-costing has a number of advantages. It is probably best-suited to insolvency situations where owing to the nature of an insolvency situation, there is a high level of uncertainty at the outset as to how complex and resource-intensive a piece of work may be. Even after some preliminary work has been carried out, there is the ever–present prospect of new issues arising during the course of the administration.

44. Practitioners working on a time-costing remuneration system have an incentive to maximise the time that they spend working on an administration, subject to their obligations to account for all time spent. In cases where assets are available, practitioners are likely to conduct a very thorough administration.

45. Although time-costing has some benefits, complaints may be made about practitioners' excessive charge-out rates.

46. On the issue of extremely high hourly charge-out rates being charged by practitioners, the judgment has proposed two approaches to solve this conundrum. The first approach is to peg the remuneration rates of such practitioners to the hourly rates charged by solicitors. In the absence of acceptable industry standards, it appears that the court could consider the rate it would allow a solicitor of similar experience on an indemnity basis as a possible yardstick in determining the applicable hourly rate for an insolvency practitioner. The second approach requires insolvency practitioners to provide evidence of what is being charged by other insolvency practitioners in the industry. However, it appears that the court may not be inclined to rely too much on this approach as a majority of the industry rates could be excessive and thereby be of little utility.

FIXED FEES

47. Another alternative for practitioners is to charge a fixed fee, perhaps based on a quantum given after an initial meeting with the party who wishes to investigate the administration. Quoting a fixed price for an uncertain level of work carries some degree of risk for the service provider and, as a result, quotations are likely to be higher to take account of unknown factors. Alternatively, if lower quotes are given for competitive reasons, this might encourage practitioners who found themselves in this position, to "cut corners".

48. The sub-committee accordingly does not consider fixed-fee quotes as appropriate for determining the remuneration of insolvency practitioners.

COMMISSION

49. A further method of charging which could be used for insolvency services is a commission system. A commission-based system has the advantages of closely aligning the practitioner's pecuniary interest with that of the creditors because the practitioner has an incentive to maximise the return to creditors. However, commission-based fees have been criticised because they encourage practitioners to focus on a quick and easy realisation of assets and the maximum return that can be obtained for a minimum cost in terms of work performed. Practitioners may be discouraged from looking at alternatives which require more work but, in the longer term, could be more beneficial to creditors, employees and the wider good. This involves the practitioner being remunerated on the basis of a percentage of the assets recovered for the benefit of creditors. This form of charging is allowed under the provisions of the Companies Act. The existing statutory framework relating to liquidator's remuneration provides for a liquidator's fees to be fixed on a percentage basis. Section 268(2) of the Act clearly stipulates that a liquidator -

> "shall be entitled to receive such salary or remuneration by way of percentage or otherwise...".

50. Also, pursuant to the Fees (Winding Up of Companies) Order (Cap 106, O35, 2001 Rev Ed), the official receiver when acting as a liquidator is entitled to levy fees on a percentage basis to the realised assets and distributions.

51. From the creditors' perspective, commissions offer the advantage that at least a proportion (and probably most) of the assets recovered will be distributed to them. However, from the practitioner's viewpoint, commissions are an uncertain method of calculating remuneration because the amount of work involved in an administration is not necessarily proportional to the value of the assets available for distribution. In many cases, practitioners may require a fairly high percentage rate to compensate for those administrations in which the percentage-based remuneration does not cover their costs. It is difficult to make any general remarks about whether a commission-based fee calculation would be less costly than a time-based or fixed-fee based one. Clearly it depends on the percentage figure arrived at, the value of the assets available for distribution and the work conducted in each particular case.

VALUE-ADDED ASSESSMENT

52. This involves an assessment of the added value of particular actions or steps taken by an insolvency practitioner, over and above the time-costs incurred. This carries the obvious dangers of having to pass a subjective judgment on a particular course of action. However, the sub-committee considers that there must be some incentive, in the form of appropriate remuneration, for a course of action that limits or reduces the time that a practitioner would otherwise take to resolve a situation, for instance settling a dispute at an early stage rather than to pursue it all the way to trial. The other situation envisaged is where the step taken is

particularly beneficial, like achieving a sale of a business at a price higher than its stated value. Without such assurance, the practitioner is in a sense working against his own interest by taking a course which serves to reduce his own time charges. To assist in this subjective assessment, the assessing body can be assisted by an insolvency specialist which is discussed in the next section.

CONCLUSION

53. Having considered the different fee-setting mechanisms, the sub-committee feels that time-costing is still the most feasible mechanism to assess remuneration. As regards introduction of fixed scale rates, the sub-committee is of the view that its introduction may tend to incentivise more qualified practitioners who would otherwise command higher fee rates However, consideration should be given towards introducing a guideline range against which the reasonableness of fees may be assessed. In addition, there should be scope for the assessing body to award an amount for value-added service, to encourage practitioners to adopt expedient and cost-effective solutions.

54. **The sub-committee therefore recommends that:**

a. **Time Costing should continue to be the primary basis for assessing remuneration**

b. **In addition to time-cost, where the practitioner is able to deliver results expeditiously and efficiently, the practitioner must be allowed to charge separately for his value-added service. In such case, the practitioner must justify the value added by outlining certain factors such as the complexity of the case, the effectiveness of performance, the responsibility assumed and the value and maturity of property dealt with. Allowing practitioners to charge for value-added service will provide an incentive to complete their job quickly and not to drag the restructuring with the aim of recovering greater time costs.**

c. **The practice of charging fees by way of percentage is irrelevant in modern day insolvency practice and should be repealed in the Act.**

d. **Where the scope of the administration is more certain, the practice of 'capping' fees should continue to be encouraged; and**

e. **An hourly rate guide, particularly in connection with overheads and disbursements, should be prepared to serve for benchmarking purposes**

PROCEDURE FOR DETERMINATION – WHO SHOULD ASSESS?

55. Our review of the present rules and provisions shows that the persons or bodies who have power to fix the remuneration of an insolvency practitioner presently

fall into two categories. In the first category fall liquidation committees, creditors' committees, general bodies of creditors or, in some cases, the persons appointing the insolvency practitioner in question. The second category consists of "the court".

56. The first category should certainly be retained. Where creditors, either as represented by a committee or in general meeting, approve remuneration, they should be taken as being best placed to look after their own interests, which relates to the assets of the company. Our primary concern is with cases where the remuneration cannot be agreed by the creditors and is to be fixed "by the court" or some other body. This brings to the fore the debate about whether the High Court Judge / Registrar is more equipped to deal with issues of remuneration or some specialist panel.

57. It could be argued that the present system of the High Court assessing costs does not represent a particularly satisfactory solution, except perhaps on an appeal on a question of principle rather than quantum, or where points of principle need to be settled in advance of the determination of quantum. The reason why this is so was expressed by Hoffmann J as follows in *Re Potter's Oils Ltd* [1986] 1 WLR 201 at page 207, when he said, in relation to the remuneration of a receiver appointed by a debenture holder:

> [T]he court is ill-equipped to conduct a detailed investigation of receivers' charges on an itemised basis. A judge could not do so without being expensively educated by expert evidence.

58. However the alternative of forming a specialist panel to carry out the assessment poses significant problems. First, the persons who would have the most relevant experience in this area would be other insolvency practitioners, which does give rise to a certain conflict of interest since there would be an incentive (in their private capacity) to keep costs high. Secondly, there would be considerable legislative, administrative and logistical issues in setting up this new body.

59. For those reasons, the sub-committee feels that the practice of reviewing remuneration by the High Court Registrars is beneficial and should continue. The fixing of remuneration is a process not unlike that of the taxation of legal costs, in which the Registrars have great expertise based on long experience and well - established procedures. There may however be some concerns raised in some quarters about their ability to deal with the problems which arise in respect of remuneration of insolvency practitioners, particularly when large amounts are claimed.

60. In such cases, the sub-committee suggests that another step which could be taken in order to facilitate the fixing of remuneration by the court in the more substantial cases would be to make provision for the Registrar to sit with an assessor who has expertise in the relevant field, rather in the same way that assessors may be appointed to sit with a judge on a review of the taxation of costs. The assessor appointed is such cases could be selected from a panel of experts.

We consider that this would be of great assistance to the Registrar, although we recognise that the consequential costs would need to be borne in mind and that the procedure would only be appropriate where a considerable sum is at stake. We anticipate that there would be little difficulty in obtaining the services of such persons as retired insolvency practitioners to sit as assessors.

61. We are also mindful of the fact that our recommendation to constitute a panel of assessors may cause some difficulties to the Registrar as parties may request that every case be deferred to the expert panel. This cannot be allowed. To mitigate this problem, we have chosen to prescribe certain monetary thresholds for applying for an assessor to advise the Registrar. One suggestion in this regard should be to set up a monetary threshold i.e. to apply for an assessor only in cases where claims exceed $250,000. Another suggestion is where the complexity and nature of the transactions require an assessor's input. Finally, the Registrar should be able to appoint an assessor of his own motion, where he considers the circumstances warrant it.

62. **The sub-committee therefore recommends that:**

a. the present system of reviewing fees is satisfactory. In the present circumstances, High Court Registrars present the most pragmatic option to determine the appropriate levels of remuneration;

b. upon application by one or both parties, or on his own motion, the Registrar may seek assistance from independent assessors;

c. certain benchmarks could be set up for appointing an assessor – this could be based on monetary thresholds of $250,000 and above or based on other factors such as complexity and value of transaction.

F. THE CRITERIA BY REFERENCE TO WHICH THE AMOUNT OF REMUNERATION IS TO BE FIXED

63. The judgment in *Econ Corp* has spelt out the guiding principles to be taken into account in determining remuneration. While we think that these are all potentially relevant factors, we are inclined to the view that they are all embraced within one or other of the factors set out below -

64. The factors which should be taken into account in fixing remuneration may be summarised as follows:

a. time spent;

b. complexity or otherwise of the case;

c. exceptional responsibility assumed;

d. effectiveness of performance;

e. value and nature of the property dealt with.

65. We have considered whether there are other criteria which ought to be taken into account. The following have been suggested:

a. the need for and desirability of investigatory work leading to additional realisations and / or to assist investigative agencies;

b. the commercial and/or personal risks involved;

c. the applicable time rates for insolvency practitioners of differing qualifications and experience;

d. the need for co-ordination with external parties, especially overseas, where there is an international aspect involved.

66. We think that the adoption of the relevant criteria, suggested above, will encourage the insolvency practitioner to provide, in support of his claim for remuneration, a detailed account of what he has done and why it was necessary or advantageous for him to do it. In contrast, if he is presented with a list of specific principles which have to be satisfied, there will, we think, be a tendency to regard this as a mere check-list susceptible to formal answers.

67. We recommend that the Rules should be amended so as to provide that in every case where remuneration is not to be fixed solely by reference to a scale or percentage, it should be fixed at such a level as is reasonable in all the circumstances of the case, due regard being had to the factors suggested above.

68. We think we should say something more about the weight which is to be given to time spent. This is a matter which was to some extent addressed by VK Rajah JC (as he then was) in his judgment in *Econ Corp*. He shared the concern about what appears to have become the modern tendency for insolvency practitioners to charge mainly, or even solely, by reference to hourly rates. To do so assumes that whatever time was in fact spent on a particular task was necessarily and properly spent by a person of the seniority and experience of the person who actually carried out that task. Although in an ideal world this would be the case, it seems optimistic to suppose that this ideal is invariably, or perhaps even frequently, achieved. We emphasise strongly the need for the body, which fixes the remuneration of an insolvency practitioner, to take account of all the factors stated in paras 72 and 73 above. Where the assessment of the other factors indicates that the overall results of the insolvency practitioner's activity are mediocre or disappointing, this may cast doubt upon the effectiveness of the time spent, and should be reflected in the assessment of his remuneration.

69. A corollary of this is that where the insolvency practitioner has performed particularly efficiently and achieved realisation in a cost-effective manner, he

should be able to claim a rate of remuneration, which represents more than his standard charging rate for the time he has spent. This is addressed by the value - added component referred to in the proceeding section. Needless to say, where such a claim is made, it is for the insolvency practitioner to substantiate it.

G. SUMMARY OF FINDINGS

70. The existing statutory provisions and rules for the fixing of the remuneration of insolvency practitioners are not comprehensive enough to provide an adequate regulatory framework relating to the remuneration of insolvency practitioners.

71. It is not necessarily in the interests of creditors and others similarly placed that the remuneration of insolvency practitioners be kept as low as possible. Creditors require that persons having proper qualifications, experience, skill and integrity be available to perform the duties of insolvency practitioners. This will only be so if such persons receive reasonable remuneration.

72. In all matters relating to the control of the remuneration of insolvency practitioners, the need for "proportionality" (in the sense of matching the remuneration to the size and complexity of the tasks undertaken and the value of the assets at stake) must be kept in mind. This makes it impossible to prescribe, except in general terms, a universal approach applicable to all cases.

73. While we do not consider it beneficial to adopt a "one size fits all" approach of fixed hourly rates or scales of professional charges as a basis of remuneration, we think that significant advantages would result from the compilation and dissemination of information as to charging rates actually applied by insolvency practitioners in Singapore or for particular types of work. This is particularly relevant where time charges continue to represent the main basis of remuneration

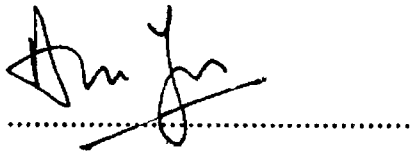
74. It is important to have a value-added basis upon which to remunerate practitioners for managing insolvencies in a cost effective manner, for the obvious benefit of encouraging efficient administrations.

75. Where the remuneration of an insolvency practitioner is being reviewed by a Registrar in the High Court, he should have the power, upon application or on his own motion, to seek the assistance of an independent assessor, from a panel of suitably qualified persons. It is envisaged that this power would only be exercised in cases of special size or complexity. New procedures would have to be devised for this purpose.

76. As to the records which an insolvency practitioner is required to keep in order to justify his claim for remuneration, the principles are those stated in the *Econ Corp*

judgment. Progress needs to be made in establishing a statement of practice which ensures that these principles are applied in future cases.

77. The appropriate bodies (ICPAS and the Law Society) must formulate guidance as to the way in which a claim for remuneration ought to be presented. This could take the form of a Statement of Insolvency Practice or Practice Directions.



ALVIN YEO SC

Chairman
Sub-Committee on the Remuneration of
Corporate Insolvency Practitioners &
Certain Related Matters

Law Reform Committee
Singapore Academy of Law

Annex A - Terms of Reference

1. Sub-Committee on the Remuneration of Corporate Insolvency Practitioners and Certain Related Matters

2. The Sub-Committee is asked to consider and make recommendations concerning the basis on which and the procedures by which the following matters ought to be fixed or determined by the court:

   a. (a) whether the legislative requirement for a third party (apart from the company in question and the insolvency practitioner) to approve and review the private liquidators' fees should also cover those of Judicial Managers ("JMs"), Receivers & Managers ("R&Ms") (appointed by Court or otherwise), and/or Scheme Administrators ("SAs") for section 210 schemes of arrangement,

   b. (b) what the appropriate procedure would be for approving the fees of such insolvency practitioners, including whether the present procedure of taxation by the High Court Registrar of private liquidators' fees is preferable,

   c. (c) whether guidelines should be issued as to what fees are recoverable and for which items of work including the form in which bills are to presented, and if so, what the content of those guidelines should be.

ANNEX B – COMPOSITION OF THE SUB-COMMITTEE

S.No.	Members Name
1	Mr Alvin Yeo, SC Chairman
2	Mr Leslie Chew, SC
3	Mr Don Ho Mun-Tuke (ICPAS nominee)
4	Mr Tam Chee Chong (ICPAS nominee)
5	Mr Chou Sean Yu
6	Mr Cavinder Bull
7	Mr Sriram Chakravarthi