LESSONS FOR THE DEVELOPMENT OF SINGAPORE'S INTERNATIONAL INSOLVENCY LAW

This article argues that Singapore's international insolvency law is outdated and makes some suggestions for its reform. Drawing on the established conflicts methodology of choice of jurisdiction and choice of law, it gives a new exposition of the theories of universalism and territorialism. This forms the backdrop to an examination of the history of the ring fencing provision of s 377(3)(*c*) of the Companies Act and recent international developments. The article contends that, from both theoretical and practical perspectives, it is in Singapore's interest to repeal s 377(3)(*c*) and enact the UNCITRAL Model Law on Cross-Border Insolvency.

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I. Introduction

1 Multinational companies are ubiquitous in most developed economies today. They play important roles in promoting trade and investments between different countries of the world. When they do well they help to generate jobs and wealth. But competitive forces in the market place mean that sometimes the less successful ones will fail. When a multinational company becomes insolvent it gives rise to an international insolvency[1] as it will have assets or debts in more than one country. Each of these countries concerned will naturally want to lay claims to the assets of the company, especially where they are found within the jurisdiction of the country, or to have a say in the conduct of the insolvency proceeding or part thereof. Almost invariably these countries will have different insolvency laws. The conduct of an international insolvency may therefore give rise to difficult problems of how to mediate the conflicting claims of the countries involved and the interaction of the different laws. A main object of international insolvency law is to develop the theories, doctrines and rules of law to ensure that an international insolvency is conducted in an efficient, fair and just manner for the benefit of the creditors and possibly other stakeholders of the insolvent company. This will usually require

1 This is not the only term used to describe this occurrence. Two other terms, cross-border insolvency and transnational insolvency, are also in use.

co-operation and co-ordination between the different courts and office-holders in the countries having an interest in the insolvency.

2 Singapore's international insolvency law is underdeveloped and out of line with recent international developments.[2] The main reason for this unsatisfactory state of affairs is the existence of s 377(3)(*c*) of the Companies Act.[3] It ring-fences the Singaporean assets of a foreign company that is registered under the Act to pay the debts and liabilities incurred in Singapore by the foreign company before the balance, if any, is transmitted to the liquidator of the foreign company for the place where it was formed or incorporated. This is a territorial approach to an international insolvency that is contrary to the recent emphasis on co-operation and co-ordination in the measures adopted by various countries to reform their international insolvency laws. Singapore has not adopted any of these measures.

3 Just as the domestic insolvency law is part of the package of commercial and corporate laws affecting a country's economic competitiveness, so is its international insolvency law. Our dependence on trade with and investments in or from other countries to generate growth and the close integration of our economy in the global economy mean that we should be well prepared to cope with any international insolvency that may arise. There is an urgent need to modernise our international insolvency law.

4 The main purpose of this article is to draw lessons from some recent developments in the theories and practices of international insolvency law. It begins by discussing the two theories of universalism and territorialism through unpacking the positions they take on the two building blocks of choice of jurisdictions and choice of laws. Next, it argues that universalism should be preferred over territorialism. It then examines some recent developments, *viz*, the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-Border Insolvency, the EC Regulation on Insolvency Proceedings, and the recent House of Lords decision in *Re HIH Casualty and General Insurance Ltd*.[4] After that it traces the historical background of s 377(3)(*c*) and contends that it should be repealed, followed by arguments on why it is in Singapore's interests to adopt the UNCITRAL Model Law on Cross-Border Insolvency. The article concludes with suggestions on the steps to take to reform Singapore's international insolvency law.

2 For a contrary view, see Chan Sek Keong, "Cross-border Insolvency Issues Affecting Singapore" (2011) 23 SAcLJ 413.

3 Cap 50, 2006 Rev Ed.

4 [2008] UKHL 21, [2008] 1 WLR 852.

II. Universalism and territorialism

A. Introduction

5 There is as yet no universal agreement on the terminology used to describe the theories. English academics tend to use the more traditional terms of universality and territoriality,[5] whereas their American counterparts use the newer terms of universalism and territorialism. Since the debates on the theories have been most intense in the US, this article will follow the American usage.

6 There are two broad, established theories to international insolvency law: universalism and territorialism. In recent years, contractualism has been proffered as an alternative.[6] It is an extension to the international level of the contractual theories of bankruptcy. As this new theory is not as influential as the two older theories, this article will not discuss it. At the most basic level, territorialism envisages that each country will seize local assets and apply them for the benefit of local creditors, with little or no regard for foreign proceedings. By contrast, universalism advocates that a court administers the bankruptcy of a debtor on a worldwide basis with the help of other courts in each affected country. It will be seen shortly that pure versions of universalism and territorialism represent the extreme ends of a spectrum within which different shades of territorialism and universalism have been developed. In practice, the real battle is fought between modified territorialism and modified universalism.

B. Traditional exposition

7 The traditional way of explaining the theories of international insolvency law is based on two pairs of antithetical propositions.[7] One pair juxtaposes the principle of "unity of bankruptcy" with its opposite, that of plurality. The other pair addresses the issue of the effects of insolvency proceedings opened under the law of a given state, and places the principle of "universality of bankruptcy" in opposition to that of "territoriality".

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5 It is interesting to note that Lord Hoffmann switched from using the term universality in *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508 at [17] and [20] to the term universalism in *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at [7], [8], [9], [30] and [36].

6 Robert Rasmussen, "A New Approach to Transactional Insolvencies" (1997) 19 *Michigan Journal of International Law* 1.

7 See, *eg*, Ian Fletcher, *Insolvency in Private International Law: National and International Approaches* (Oxford University Press, 2nd Ed, 2005) at paras 1.11–1.13.

8 It is said that under the unity or unitary principle, there should only be one set of proceedings, recognised throughout the world, which should deal with all the company's assets and all the creditors' claims. This jurisdiction can be the company's state of incorporation, its principal place of business or its centre of main interests. This principle, if strictly adhered to, would preclude any subdivision of insolvency proceedings into two or more distinct administrations governed by the laws of separate states, although it seems that this does not extend to prohibiting all decentralisation so that even ministerial or administrative acts may not be carried out in other jurisdictions. The opposing principle of plurality admits of concurrent proceedings in different jurisdictions, based on some connecting factor such as assets, a place of business or creditors within the jurisdiction.

9 The other pair of propositions is universality and territoriality. The principle of universality advances the claim that an insolvency proceeding has worldwide effect over all the assets of the debtor, wheresoever these may be found. The principle of territoriality, on the other hand, argues that the effects of insolvency proceedings are confined to such property as is located within the territory of the jurisdiction in which the proceedings are opened, and carries no consequences with respect to foreign assets of the debtor.

10 The two pairs of antithetical propositions are linked. If the jurisdiction claimed by the courts of the different states involved in an international insolvency is only territorial, this necessarily means that there will be a plurality of proceedings. However, the reverse is not necessarily true. Multiple proceedings may not mean that the court of each state regards its own competence as only territorial. In fact, the more usual approach is one whereby a state regards its own, domestic bankruptcy laws as producing universal effects, particularly if the debtor's relationship with the country is a close one which enables the case to be classified as a "domiciliary" proceeding. But the State applies the notion of territoriality towards foreign proceedings involving debtors with assets which lie within the jurisdiction of the State. This enables the State to deny the capability of the foreign proceedings to produce any effects regarding those assets, thus enabling local actions to be taken with regards to the assets.

11 If examined carefully, it can be seen that the principle of unity or plurality on the one hand and that of universality or territoriality on the other are actually concerned with whether an international insolvency is run by a single forum or multiple forums, and whether a single law or multiple laws govern most aspects of the insolvency case, respectively. In other words, they relate to the issues of choice of forum and choice of law respectively. The concepts and terminology of forum and governing law are well established in conflict of laws. They are more

readily understood compared to the old terms of unity/plurality and universality/territoriality and will be used to analyse the theories of universalism and territorialism.

C. New exposition – Forum and governing law

12 The best way to understand the various theories that have been propounded is to unpack them and examine the two factors that are the building blocks of the theories. The interaction between the two factors determines the extent to which the theory is closer to universalism or territorialism. The two factors are forum and law governing the international insolvency ("law"). Forum here means the lead court where the main or principal liquidation will be conducted, and law here means the law which will govern most aspects of an international insolvency. Just as in other areas of conflict of laws, forum and law are distinct but linked concepts.[8] An international insolvency may be conducted by a single forum or by multiple forums, and it may be subject to a single law or multiple laws. *Prima facie*, there are four possible permutations arising from the interaction of forum and law.[9]

13 The first is a single international forum and single international insolvency law. This is true universalism. In theory, this will secure the kind of benefits that a national insolvency law confers on a domestic insolvency at the international level to an international insolvency. In practice, however, due to the very different insolvency laws of different countries and many other hurdles, not least sovereignty considerations, it is not clear whether this ideal will ever be reached. Even Westbrook, the most ardent and influential proponent of universalism, accepts that true universalism is many years away.[10]

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8 It is essential to keep them distinct although that is not always observed. For example, in her note on *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852, Pippa Rogerson suggested that "all their Lordships utilised classic choice of law techniques to arrive at the answer": "International Insolvency: Law Applied to Distribution" (2008) 67 CLJ 476 at 477. It is not clear that was the case. Lord Phillips, Lord Scott and Lord Neuberger based their decision on s 426 of the Insolvency Act 1986 (c 45) (UK) which authorised them to apply the law of another country. Lord Hoffmann, with whom Lord Walker concurred, based his decision on Australia being the appropriate forum for him to order the remittal of the company's assets in England: [28]. For discussion on the relationship between choice of forum and choice of law in international insolvency, see Jay Westbrook, "Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum" (1991) *American Bankruptcy Law Journal* 457; Jay Westbrook, "Universalism and Choice of Law" (2005) 23 Penn St Int'l L Rev 625.

9 The discussion draws heavily on Jay Westbrook, "A Global Solution to Multinational Default" (2000) 98 Mich L Rev 2276 at 2315–2318.

10 Jay Westbrook, "A Global Solution to Multinational Default" (2000) 98 Mich L Rev 2276 at 2315.

14 The second combination is a single international forum but with no single international insolvency law to govern an international insolvency. The universalism content here is less than true universalism. Westbrook termed this form of lesser universalism "single court, national laws universalism".[11] Here, an international court applies the national insolvency law of a country to govern most aspects of the international insolvency. The law will be chosen pursuant to an internationally agreed choice-of-law rule. This system would not be as good as true universalism. There would be a lower level of predictability because the single court would not have a single international bankruptcy law to apply. The choice-of-law decisions would multiply and grow greatly in complexity.

15 The third combination is multiple forums and a single international insolvency law. This is again a lesser form of universalism that Westbrook termed "single law, national courts universalism".[12] The national courts will apply a single international insolvency law. There will be a main proceeding with universal effect and ancillary proceedings in other jurisdictions. These courts will be chosen pursuant to connecting factors with the case, such as place of incorporation of the company and centre of main interests of the company, *etc*. Such a system would be the mirror-image of the single court system described immediately above.

16 The fourth combination is multiple forums and multiple laws. *Prima facie*, this may appear to be territorialism, but that is not necessarily so. If there is a high degree of co-operation between the multiple forums having jurisdiction over the international insolvency, it may still amount to universalism, though it will be a more diluted form of universalism than the others considered above.

D. Different versions of universalism and territorialism

17 Proponents of universalism accept that true universalism and even the lesser forms of universalism examined above do not represent the current state of law but are ideals which we should work towards. They are not found even in treaties and conventions, such as the EC Regulation on Insolvency Proceedings.[13] The real battle is over modified

11 Jay Westbrook, "A Global Solution to Multinational Default" (2000) 98 Mich L Rev 2276 at 2315.

12 Jay Westbrook, "A Global Solution to Multinational Default" (2000) 98 Mich L Rev 2276 at 2317.

13 This refers to the Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings ("EC Regulation") which has the force of directly applicable law in every Member State of the European Union except Denmark and takes precedence over any inconsistent provisions of existing domestic law.

versions of universalism and territorialism. All of them involve multiple forums and multiple laws. As explained above, it is the interaction between the forums and laws that determine the extent to which a system is more universalist or more territorialist.

18 "Modified universalism is universalism tempered by a sense of what is practical at the current stage of international legal development, while modified territorialism represents a movement away from territorialism in recognition of the increasing integration of the world economy."[14] It should not be thought that the only difference between the two is their different starting points. The essential difference between the two approaches, as Westbrook points out, is that modified universalism takes a worldwide perspective, seeking solutions that come as close as possible to the ideal of a single-court, single-law resolution, while territorialism, even modified territorialism, subscribes to the view that local creditors have vested rights in whatever assets can be seized by their courts in an insolvency proceeding.[15]

III. Arguments in favour of universalism

19 The relative merits of universalism and territorialism have been a subject of heated debates between academics.[16] As is to be expected, the arguments marshalled by the proponents of the two theories are sophisticated, complex and operate at macro levels. The high theories are useful as guides to formulating policies on international treaties or conventions and domestic legislation. This author had thought at one stage that it was difficult for judges to operationalise them into detailed rules at common law to resolve real life conflicts. Hence, in a joint paper with a colleague commenting on some English and Singaporean cases,[17] the position was taken that our courts, instead of adopting a dogmatic approach on whether to ring-fence local assets or order their transfer to

14 American Law Institute, *Principles of Cooperation Among the NAFTA Countries* (2003) at p 8.

15 Jay Westbrook, "A Global Solution to Multinational Default" (2000) 98 Mich L Rev 2276 at 2301.

16 The literature on this is enormous. A non-representative sampling includes the following: Fletcher, "The Quest for a Global Insolvency Law: A Challenge for Our Time" [2002] *Current Legal Problems* 427; Jay Westbrook, "A Global Solution to Multinational Default" (2000) 98 Mich L Rev 2276; Lynn M LoPucki, "The Case for Cooperative Territoriality in International Bankruptcy" (2000) 98 Mich L Rev 2216; Frederick Tung, "Is International Bankruptcy Possible?" (2001) 23 *Michigan Journal of International Law* 31; Jay Westbrook, "Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation" (2002) 76 *American Bankruptcy Law Journal* 1; Lynn M LoPucki, "Universalism Unravels" (2005) 79 *American Bankruptcy Law Journal* 143.

17 Hans Tjio & Wee Meng Seng, "Cross-Border Insolvency and Transfers of Liquidation Estates from Ancillary Proceedings to the Principal Place of Bankruptcy" (2008) 20 SAcLJ 35.

the main liquidation, should adopt a flexible approach that required close co-operation between the Singapore and foreign liquidators in the quest to achieve practical justice. It did not take a firm position on which theory to prefer, although the call for close co-operation between the different proceedings, in contrast to the absence of support for the vested rights idea,[18] means that it tends towards a weak form of universalism.

20 The paper was written before the House of Lords delivered its judgment in *Re HIH Casualty and General Insurance Ltd*[19] where Lord Hoffmann argued forcefully in favour of universalism, albeit acknowledging that it was a principle rather than a rule and that it was heavily qualified by exceptions on pragmatic grounds.[20] This author has since been convinced by the arguments for universalism, and now believes that accepting universalism as a guiding principle will help to develop the common law consistently with the global trends towards greater co-operation between different countries in international insolvency. Some aspects of that global trend will be examined in the next few sections.

21 Although this article is not primarily concerned with the theories of international insolvency law, it is necessary to explain why theoretically universalism is to be preferred over territorialism. The exposition will help to inform the lessons we can learn from the recent global trends. Drawing heavily on an earlier paper by this author,[21] the reasons for preferring universalism may be summarised as follows.

22 First, insolvency law should so far as practicable be co-terminus with the market in which the insolvent party has operated. Westbrook has termed this "market symmetry".[22] To similar effect is the extra-judicial observation of Sir Peter Millett that "[l]egal theory, based on the territorial jurisdiction of the courts of the national state, has parted company with commercial reality and the needs of modern business",

18 This argument is at the heart of territorialism. The argument is that persons who deal with multinational companies have vested rights in the application of their local law. See Lynn M LoPucki, "The Case for Cooperative Territoriality in International Bankruptcy" (2000) 98 Mich L Rev 2216 at 2221–2223. It has been accepted by Lord Scott in *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at [61].

19 [2008] UKHL 21, [2008] 1 WLR 852.

20 *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at [7].

21 Meng Seng Wee, "A Lost Opportunity towards Modified Universalism" [2009] LMCLQ 18.

22 Jay Westbrook, "A Global Solution to Multinational Default" (2000) 98 Michigan L Rev 2276 at 2283.

and that universalism is "surely the only proper response to practical commercial needs".[23]

23 Secondly, modified universalism is conducive in an international liquidation to maximising recoveries of a multinational company with assets spanning different countries. International insolvency law is an extension of domestic insolvency law beyond sovereign borders. Our understanding of the nature and purpose of domestic insolvency law has improved greatly over the last few decades due to debates between insolvency law scholars[24] and law reform efforts.[25] It is now generally accepted that the collective nature of a domestic insolvency proceeding is conducive to maximising the returns to creditors of the insolvent company. This rationale applies similarly at the international level.[26]

24 Thirdly, modified universalism enhances the prospects of corporate or business rescue.[27] The rescue of a financially distressed multinational company requires a high level of co-operation to administer. It is impossible to achieve this if the courts involved adopt an essentially territorialist approach. Without a more or less unified international approach, the business of the insolvent company will become fragmented and asset values will be quickly destroyed. The simultaneous administration of Maxwell Communications Corp plc in England and Chapter 11 proceeding in New York was only possible because of the high degree of co-operation between Hoffmann J and Judge Brozman.[28]

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23 Sir Peter Millett, "Cross-Border Insolvency: The Judicial Approach" (1997) 6 IIR 99 at 99.

24 The most prominent is that between Professors Jackson and Baird on the one hand, and Professor Warren on the other. See Thomas Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press, 1986); Elizabeth Warren, "Bankruptcy Policymaking in an Imperfect World" (1993) 92 Mich L Rev 336; Douglas Baird, "Bankruptcy's Uncontested Axioms" (1998) 108 Yale LJ 573. For an excellent overview by an English scholar of some of the principal theories advanced, see Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (Cambridge University Press, 2 Ed, 2009) ch 2.

25 See, *eg*, the work by the committee chaired by Sir Kenneth Cork, *Insolvency Law and Practice: Report of the Review Committee* (Cmnd 8558, 1982).

26 Jay Westbrook, "A Global Solution to Multinational Default" (2000) 98 Mich L Review 2276 at 2283; Jay Westbrook, "Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation" (2002) 76 *American Bankruptcy Law Journal* 1 at 6.

27 Jay Westbrook, "A Global Solution to Multinational Default" (2000) 98 Mich L Rev 2276 at 2285–2286 and 2293.

28 *Barclays Bank plc v Homan* [1993] BCLC 680, affirmed [1993] BCLC 680 (CA); *In re Maxwell Communications Corp plc* 170 BR 800 (Bankr SDNY 1994), affirmed 186 BR 807 (SDNY 1995), affirmed 93 F 3d 1036 (2d Cir, 1996). See Ian F Fletcher, "The Ascendance of Comity from the Ashes of Felixstowe Dock" (1993) 6 *Insolvency Intelligence* 10.

25 On the other hand, the vested rights idea, which is at the core of territorialism, should be rejected firmly – at least where it is applied rigidly. The case of *Re HIH Casualty and General Insurance Ltd*,[29] which will be examined in some detail later, demonstrates that its unbending application will lead to the ring-fencing of assets. Such an approach is flawed because it renders the consequences of a general default dependent on the location of the assets of a company when it enters into an insolvency proceeding, and the law of that place is likely to differ from that of another place where the asset might otherwise be located.[30] At the critical time of a general default, the places where the assets of a multinational company are found may be quite fortuitous, or their "stay" at a particular place may be transient. The increasing ease of transfer of assets across jurisdictions opens up the possibility that an insolvent company can engage in strategic behaviour of a spectrum that goes up to and includes fraud, by manipulation of asset location. These considerations render any claim that local expectations or social policies of each nation may be protected through a territorial approach very weak. It is true that modified universalism is not able to resolve all these problems completely, but by providing courts with the discretion to co-operate with foreign courts to achieve a universalist approach where possible, it at least provides a much better solution than modified territorialism.

IV. Some recent developments

26 It is not possible within the confines of this article to undertake a comprehensive survey of the developments of international insolvency law globally. Some of the more notable measures in recent years are set out below.

27 At the international level, more and more countries have adopted the UNCITRAL Model Law on Cross-Border Insolvency[31] ("Model Law"). According to the UN website,[32] 18 countries have adopted the Model Law and they include some of the largest economies of the world, for example, Japan, the US, Australia, Republic of Korea and the UK.

29 [2008] UKHL 21, [2008] 1 WLR 852.

30 Jay Westbrook, "A Global Solution to Multinational Default" (2000) 98 Mich L Rev 2276 at 2309.

31 Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law ("UNCITRAL") on 30 May 1997 ("Model Law").

32 <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html> (accessed 24 May 2011).

28 Next, there have also been regional initiatives. For example, the EC Council Regulation 1346/2000 on Insolvency Proceedings, which came into force on 31 May 2002, has the force of directly applicable law in every Member State of the European Union ("EU") except Denmark and takes precedence over any inconsistent provision of existing domestic law.

29 Thirdly, unilateral measures have been taken by countries to inject some elements of universalism in their international insolvency laws. A good example is s 426 of the English Insolvency Act 1986.[33] It allowed for reciprocal assistance between the UK and designated countries or territories. They include Australia, Brunei, Canada, Malaysia, New Zealand and South Africa, but not Singapore.[34] Considering that we were a former British colony, our insolvency law is very similar to English insolvency law, and the relationship between the two countries is broad based and very close, it is surprising that we are not one of the designated countries. It is submitted that our government should take the matter up with the English government with a view to having us included as one of the designated countries.

30 Cumulatively, the developments indicate that the global community has achieved some success in addressing the problems of how best to liquidate or rescue failing multinational corporations. As will be seen from the discussion that follows, although the measures, including treaties and conventions, cannot be said to implement true or even lesser universalism, they have sought to be as universalist as possible within current constraints. In that spirit, the developments are towards some weak forms of universalism rather than modified territorialism.

V. UNCITRAL Model Law

A. Overview

31 The Model Law is a modest but positive development towards greater co-operation in international insolvencies. Its main strength lies in seeking to achieve what is realistically possible in the current world where the national insolvency laws of different countries vary significantly. For that purpose, the Model Law is designed in such a way

33 Insolvency Act 1986 (c 45) (UK).

34 The relevant countries are designated by the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (SI 1986 No 2123), the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1996 (SI 1996 No 253), and the Insolvency Courts (Designation of Relevant Countries and Territories) Order 1998 (SI 1998 No 2766).

to ensure that it may be adopted by any state that is interested to do so easily, while at the same time offering solutions that help in several modest but significant ways.[35] Generally, a state is not required to overhaul its existing national insolvency law in order to enact the Model Law. That has helped in its adoption by countries with diverse insolvency laws. At the same time, however, this strength of the Model Law is also a source of its weakness. Its drafters have no illusion that its scope is limited to some procedural aspects of international insolvency law.[36] It either leaves the controversial issues untouched or gives courts substantial discretion to shape the law.

B. Recognition of foreign proceedings and effects of recognition

32 The Model Law advances co-operation between different states in an international insolvency in several ways. The key to all the benefits which are available under the Model Law is the recognition of foreign proceedings by the courts of enacting states. This is the central premise, around which all else revolves.

33 There is no automatic recognition of a foreign proceeding under the Model Law.[37] An application to the relevant court in the enacting state is required, but it is relatively easy to comply. Provided that a foreign proceeding falls within its definition,[38] the Model Law renders its recognition into an exercise on documentary evidence.[39] No doubt an enacting state may decline to recognise on overriding policy ground,[40] but overall it is expected to trust the integrity of the foreign legal process, and should only refuse recognition if the foreign proceeding amounts to a flagrant and unacceptable violation of the

35 *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency* ("*Guide to Model Law*") para 3. It was prepared by UNCITRAL to provide a resource for those charged with the task of preparing legislation to be enacted by their country to bring about the adoption of the Model Law within its domestic legal order: para 9 of the *Guide to Model Law*. But as it presents an article-by-article explanation of the Model Law, it also belongs to the domain of *travaux préparatoires*.

36 See *Guide to Model Law* at paras 3 and 20.

37 This is unlike the position under the EC Regulation which provided for automatic recognition and immediate effects in all the Member States of the European Union except Denmark.

38 A foreign proceeding is defined as a collective proceeding, whether judicial or administrative in nature, pursuant to a law relating to insolvency in the foreign state in which the proceeding originates, and it must be a proceeding in which the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation: see Art 2(a) of the Model Law.

39 Model Law Art 17(1).

40 Model Law.

standards of justice which the enacting state and its institutions are committed to uphold.[41]

34 Next, the Model Law provides for positive effects to arise out of the recognition of a foreign proceeding. The scope and extent of those positive effects depend on whether the foreign proceeding is a main or non-main proceeding. A foreign main proceeding is a proceeding which takes place in the State where the debtor has the centre of its main interests ("COMI").[42] It will be seen shortly that the term COMI is also used in the EC Regulation on Cross-Border Insolvency. The Model Law does not define what is meant by COMI. It merely provides that in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the COMI.[43] A foreign non-main proceeding, on the other hand, is any proceeding where the debtor has an establishment, which means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods and services.[44] There is a third kind of proceeding under the Model Law which is based on the presence of assets within the jurisdiction of the State where the proceeding is opened.[45] Unlike a main or non-main proceeding, the Model Law itself does not impose an obligation on an enacting state to recognise such asset-based proceeding.

35 When a foreign proceeding is recognised as a foreign main proceeding, a moratorium similar to that granted to a like proceeding in the recognising state to preserve the assets of the debtor and to prevent their removal across borders is triggered automatically.[46] For example, the commencement or continuation of an individual proceeding or execution against the debtor's assets is stayed, unless it is allowed under the domestic law of the recognising state as an exception to the automatic stay. Assets of the debtor outside of the foreign main proceeding are therefore protected from being seized by local creditors in the recognising state, but the law providing the protection is not that of the State where the main proceeding is taking place; rather it is that of the recognising state. This is a vivid illustration of how the Model Law tries to strike a balance between universal and territorial interests.

36 A foreign non-main proceeding does not attract the aforesaid automatic moratorium. Nevertheless, the court which recognises such a proceeding may grant any appropriate relief "where necessary to protect

41 *Guide to Model Law* paras 86–89.
42 Model Law Art 2(b).
43 Model Law Art 16(3).
44 Model Law Art 2(c).
45 Model Law Art 28.
46 Model Law Art 20.

the assets of the debtor or the interests of the creditors"[47] at the request of the foreign representative. The court is thus left to determine the extent to which it will exercise its jurisdiction to grant relief, and indeed whether to do so at all. In a sense, the approach here, by leaving the domestic law of the recognising state to govern the matter, is similar to that with regards to the scope and extent of the automatic moratorium that arises in a foreign main proceeding. It would, however, be erroneous to think that there is no difference between the two. The automatic moratorium that arises when a foreign main proceeding is recognised is no different from that of the moratorium under the domestic law of the recognising state, but it is possible that a court in a recognising state may not grant a moratorium equivalent to that under its local law in a foreign non-main proceeding; for example, it may lean more in favour of protecting local interests at the expense of creditors in other states.

C. Relief and assistance

37 Two key issues in any international insolvency are how the assets of the debtor located in different parts of the world are to be realised, and how the proceeds are to be distributed. In fact, these issues are seen as hallmarks of whether an insolvency law is more universalist or more territorialist. Building on the recognition of a foreign proceeding, whether main or non-main, the Model Law seeks to encourage a recognising state to adopt a more universalist approach on those two issues.[48]

38 The court in a recognising state may entrust the *realisation* of the debtor's assets in the State to the foreign representative of a foreign proceeding,[49] and/or entrust the *distribution* of the debtor's local assets to the foreign representative.[50] The former is usually necessary to achieve a co-ordinated administration of assets dispersed across two or more jurisdictions. The latter involves further considerations, as the turnover of assets will mean, unless the foreign representative has agreed otherwise, that the assets would be assimilated into the general pool and will be distributed in accordance with the distribution scheme of the State in which he had been appointed. To assuage the concerns of enacting states that a grant of turnover relief may prejudice the interests of local creditors, the Model Law contains several safeguards to protect local interests; for example, turnover relief would only be granted if the

47 Model Law Art 21(1).
48 Model Law Art 21.
49 Model Law Art 21(1)(e).
50 Model Law Art 21(2).

court is satisfied that the interests of local creditors are adequately protected.[51]

D. Co-operation, communication and co-ordination

39 The above are the more substantive consequences to flow out from the recognition of a foreign proceeding. In addition thereto, the Model Law also provides for other consequences of a more procedural nature. They relate mainly to the co-operation and communication between courts and representatives and the co-ordination of concurrent proceedings.

40 The court of a recognising state is required to co-operate to the maximum extent possible with foreign courts or foreign representatives, either directly or through the office holder of the local proceeding.[52] This is facilitated by another article in the Model Law which authorises the court to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.[53] The same applies to an office-holder of the local proceeding in the exercise of his function and subject to the supervision of the court.[54]

41 As for the co-ordination of concurrent proceedings, the need arises because the Model Law allows for concurrent *full* insolvency proceedings in different states. The Model Law provides generally that a foreign main proceeding can trump a foreign non-main proceeding.[55] This is logical as the former is "ranked higher" than the latter in the Model Law and is thus entitled to greater recognition. What is more problematic, from the perspective of universalism, is that the Model Law also provides that local proceedings can trump foreign proceedings, even where the foreign proceeding is a foreign main proceeding.[56] For example, orders in favour of a foreign representative must be made consistent with the existence of the local proceeding, including modification or termination of relief that had been previously granted to the foreign representative as necessary.[57] The approach here is rather territorialist and is quite unlike the provisions on communication and co-operation, which require courts in enacting states to be universalist

51 Model Law Art 21(2). Other safeguards are: the general principle of protection of local interests in Art 22(1), and the power of the court under Art 22(2) to subject the relief that it grants to conditions it considers appropriate. See also the *Guide to Model Law* para 157.
52 Model Law Art 25(1).
53 Model Law Art 25(2).
54 Model Law Art 26.
55 Model Law Art 29.
56 Model Law Art 29.
57 Model Law Arts 29(a) and 29(b).

minded. The reason for that is because there would have been no Model Law if that had not been adopted.[58]

E. Evaluation

42 The above survey of the Model Law shows that the starting point of some of its provisions tends towards universalism while that of others tends towards territorialism. It does not fall neatly within the competing theories of universalism or territorialism. On the one hand, it utilises some concepts commonly associated with universalism, such as COMI and main proceeding, but this is heavily qualified as potentially independent non-main proceedings are allowed. On the other hand, it is equally wrong to think that the Model Law espouses territorialism. It requires an enacting state to be as universalist as possible under its domestic law; for example, on the remittal of assets to a foreign proceeding, and on co-operating to the maximum extent possible with foreign courts and foreign representatives.

VI. EC Regulation on Insolvency Proceedings

A. Relevance to Singapore

43 The EC Regulation on Insolvency Proceedings ("EC Regulation")[59] has the force of law in every Member State of the EU except Denmark. For ease of exposition, this article will henceforth simply treat the EC Regulation as applying throughout the EU. It should always be remembered that this is a gloss on the actual position.

44 The EC Regulation is important to Singapore for two reasons. The first is that the EU is a very important region of the world, whether in terms of its economic weight, political clout or legal influence. The direction taken by the EC Regulation helps to shape the global development of international insolvency law towards or away from universalism. Secondly, the countries in the EU are important trading partners and investment sources and destinations of the Singapore government and companies. While previously the insolvency of an European counterparty would normally be resolved in accordance with

58 Jay Westbrook, "Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation" (2002) 76 *American Bankruptcy Law Journal* 1 at 17.

59 For a brief introduction, see Ian Fletcher, "A New Age of International Insolvency – The Countdown has Begun: Part 1" (2000) 13 *Insolvency Intelligence* 57. Detailed discussion can be found in *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide* (Gabriel Moss QC, Ian Fletcher & Stuart Isaacs QC eds) (Oxford University Press, 2nd Ed, 2009).

the domestic insolvency law of the country where the counterparty was incorporated or located, the enactment of the EC Regulation means that the insolvency is now subject to a completely different regime. As insolvency is a foreseeable risk which any potential creditor or investor with the resources will want to assess in advance before extending credit or investing, it is essential for Singaporean entities with European interests to understand how this new regime operates.

B. Purposes and policies

45 The purposes and policies of the EC Regulation may be gleaned from its recitals, which are also important in the interpretation of the text. They reveal that the main reason for the passing of the EC Regulation was to ensure the proper functioning of the internal market.[60] As the activities of undertakings have more and more cross-border effects, their insolvency affects the proper functioning of the internal market; there is therefore a need for a community law to co-ordinate the measures to be taken regarding an insolvent debtor's assets.[61] This rationale is identical to the most persuasive case for universalism put up by the commentators – "market symmetry", as explained above. The EU has thus accepted that universalism is the way forward for the community's international insolvency law to develop.

46 The commitment to universalism is, however, not fully operationalised in the detailed rules. Even though it is a piece of community law, the EC Regulation does not harmonise insolvency laws within the EU. The substantive national laws of the Member States of the EU are too different to allow for the introduction of insolvency proceedings with universal scope in the entire EU.[62] If the domestic law of any Member State where an insolvency proceeding is opened is allowed to apply without exceptions, it would frequently lead to difficulties; for example, with regards to the recognition of security interests and the protection of the rights of preferential creditors. This tension between the desire for the law to be universalist and the need to cater for local interests is nothing new; we have seen that in the design of the Model Law. But the EC Regulation resolves this tension rather differently from the Model Law.

60 EC Regulation recital 2.
61 EC Regulation recital 3.
62 EC Regulation recital 11.

C. Main and territorial proceedings

47 Like the Model Law, there are two types of proceeding, main and local proceedings, under the EC Regulation.[63] Other than the different nomenclature used – the local proceeding is called a territorial or secondary proceeding[64] ("territorial proceeding") in the EC Regulation and a non-main proceeding in the Model Law – there is substantial similarity in how the proceedings may be opened under the two laws. Both use the debtor's COMI and the debtor's establishment as the criteria to determine where the main and local proceeding may be opened respectively. Even the definition or description of COMI and establishment is largely similar.[65] But the consequences of a main proceeding under the two laws are quite different. Whereas a main proceeding attracts few universal effects under the Model Law, that under the EC Regulation is potentially universal. Where a debtor is the subject of *only* the main insolvency proceeding, the EC Regulation is remarkably universal within the EU. Main proceedings are accorded the fullest benefits under the EC Regulation and enjoy extraterritorial effects throughout all the Member States. Such proceedings have universal scope and are intended to encompass all the debtor's assets within the EU and to affect all creditors, wherever located.[66]

48 But universalism is not the only theme of the EC Regulation. The universal effect of a main proceeding is substantially qualified if a territorial proceeding is extant at the same time. As the basic choice of

63 For a brief comparison between the Model Law and the EC Regulation, see Ian Fletcher, "A New Age of International Insolvency – The Countdown has Begun" (2000) 13 *Insolvency Intelligence* 68.

64 Territorial proceedings are of two kinds: free-standing or secondary proceedings. If it is opened after the main proceeding, it is a secondary proceeding: Art 3(2) of the EC Regulation. If no main proceeding is in existence when a territorial proceeding is opened under Art 3(4), the main proceeding may or may not be opened later. If it is not, the territorial proceeding will continue on a free-standing basis. But if it is, recital 17 provides that the territorial proceeding becomes a secondary proceeding. The effects of a territorial proceeding, whether free-standing or secondary, are largely similar.

65 Both the Model Law and EC Regulation do not define COMI ("centre of main interests"). Article 16(3) of the Model Law declares that in the absence of proof to the contrary, the debtor's registered office is presumed to be the centre of the debtor's COMI. The EC Regulation gives more guidance on the meaning of COMI, but the approach is similar. Recital 13 states that "[t]he centre of main interests should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties", and Art 3(1) states that the place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary. As for the meaning of establishment, it is defined in Art 2(h) of the EC Regulation as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods". The definition of that term in the Model Law is identical save that it has the words "or services" added at the end to the EC Regulation definition.

66 EC Regulation Art 17(1).

law rule[67] is that the *lex concursus* (the law of the State of opening of the proceeding) applies to the proceeding and most of its effects, a territorial proceeding once opened is decisive in its effect on the assets of the debtor located in the territory of the State where it is opened.[68] The main proceeding has little effect on it. Therefore, there is a certain degree of ring-fencing; the claims of creditors who have proved in the territorial proceeding will be satisfied before anything is remitted to the main proceeding.[69] The EC Regulation does not in terms guarantee *pari passu* treatment of all the unsecured non-preferential creditors.

49 In practice, however, some unity of the debtor's estate can be achieved. This depends on all the liquidators of the main and secondary proceedings discharging their duties of co-operation and communication of information imposed on them by the EC Regulation,[70] in particular, the duty of each liquidator to lodge claims which are lodged in the proceeding in which he is appointed in other proceedings, provided that the interests of creditors in the former proceeding are served thereby.[71] This helps creditors to overcome the language and other barriers of having to lodge claims in foreign proceedings, and may create a "global" list of creditors and their claims. Westbrook has coined the phrase "Universal Cross Filing" to describe this system of filing of claims, and thinks that it is one of the most progressive in the EC Regulation, at least potentially.[72] The result of the operation of Universal Cross Filing is that while the administration of a cross-border insolvency within the EU may take place largely within territorial proceedings, at the end there is still unity of estate if the liquidators are able to co-operate and co-ordinate their conduct of the proceedings.

D. Evaluation

50 The EC Regulation allows for multiple forums and multiple laws. Even though it has taken the Europeans decades in negotiations

67 EC Regulation Art 4. This basic rule is subject to special choice of law rules in the case of particularly significant rights and legal relationships, for example, rights *in rem* and contracts of employment. The exceptions are contained in Arts 5–15.

68 EC Regulation Art 3(2).

69 A creditor is allowed to claim in the main proceeding and in any secondary proceeding: EC Regulation Art 32(1). Creditors who receive full or partial satisfaction of their debts in proceedings in one state are entitled to keep them, except that a partially paid creditor would not receive any thing from proceedings in another state where it has claimed until creditors in those proceedings have received the same percentage of payment as it has: EC Regulation Art 20(2).

70 EC Regulation Arts 31(1) and 31(2).

71 EC Regulation Art 32(2).

72 Jay Westbrook, "Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation" (2002) 76 *American Bankruptcy Law Journal* 1 at 35.

before the law was finally enacted,[73] it still does not qualify for lesser universalism as Westbrook has described, let alone true universalism. It is a powerful demonstration that universalism remains an ideal that will not be fulfilled any time soon. At the same time, its achievements should not be underrated. Its universalist features represent a significant advance upon the pre-existing, piecemeal arrangements of the laws of individual EU Member States.

VII. Common law

A. Missed opportunity towards universalism

51 The most important case, within the Commonwealth, on the common law of international insolvency is *Re HIH Casualty and General Insurance Ltd*[74] ("*Re HIH*"). Although the case was concerned with a request by an Australian court to the English court for judicial assistance under s 426 of the English Insolvency Act 1986 by ordering the remittal of English assets to the Australian liquidators, the dicta on the common law was more significant. Most of the cases on the common law were first instance decisions. They were of some antiquity and their reasoning was brief. *Re HIH* was the first case where the House of Lords had the opportunity to examine the common law.[75]

52 Unfortunately, the law lords hearing the case were split in their judgments on the scope and extent to which the common law was a source of law for international insolvency, and in particular, its interaction with statute law. Lord Scott of Foscote and Lord Neuberger of Abbotsbury held that where the distribution laws of England and the seat of the principal liquidation were different, remittal could only take place under s 426,[76] while Lord Hoffmann, with the concurrence of Lord Walker of Gestingthorpe, denied that the common law power was so restricted.[77] Lord Phillips of Worth Matravers refused to express an

73 For the tortured history leading up to the passing of the EC Regulation, see Ian Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd Ed, 2005) at paras 7.03–7.10.

74 [2008] UKHL 21, [2008] 1 WLR 852.

75 Before that the Privy Council decided *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508. It was a case on the common law, but the scope of the discussion in the judgment was narrower than that in *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852.

76 *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at [59] and [61], *per* Lord Scott, [74] and [82], *per* Lord Neuberger.

77 *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at [19]–[21], *per* Lord Hoffmann, [63] *per* Lord Walker.

opinion on the matter, resting his decision on the common ground that a power to remit existed under s 426.[78]

53 Lord Hoffmann held that modified universalism "has been the golden thread running through English cross-border insolvency law since the eighteenth century".[79] A judicial practice had developed where courts exercised power at common law to achieve international co-operation in insolvency cases. Therefore, so far as is consistent with justice and UK public policy, the English court in an ancillary liquidation will co-operate with the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.[80] Lord Hoffmann did not discuss what is involved in the two conditions of justice and UK public policy which must be satisfied for co-operation to take place. But some guidance may be obtained from his application of the principle to the facts. He attached great importance to the seat of the principal liquidation, the expectations of the creditors as a whole and whether the foreign insolvency law accorded national treatment to English creditors.

54 Lord Scott and Lord Neuberger did not deny that a power to order remittal exists at common law, but restricted this power to those cases where the distribution rules of the principal liquidation are identical to English distribution rules. Various reasons were given, but the two key reasons were these. First, creditors in an English liquidation enjoy statutory rights which cannot be overridden by an exercise of inherent jurisdiction by the court.[81] Although there was no mention of modified territorialism in their judgments, this is the "vested rights" idea which forms the intellectual justification for that school of thought. Secondly, courts are conferred power under s 426 to render judicial assistance to foreign courts, which includes the remittal of assets. But this power is only exercisable where the jurisdiction concerned is a "relevant country or territory" designated by the Secretary of State. To order remittal to a jurisdiction that is not so designated is a usurpation by the Judiciary of a role expressly conferred by Parliament on the Executive.[82]

78 *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at [44].

79 *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at [30].

80 *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at [30].

81 *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at [59] and [61], *per* Lord Scott.

82 *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at [61], *per* Lord Scott, [76], *per* Lord Neuberger.

55 It is submitted that Lord Hoffmann's judgment is to be preferred. First, it has already been explained that in theory universalism is the better solution that countries of the world should strive to work towards. In contrast, the "vested rights" argument, at least where it is applied rigidly, should be firmly rejected. Second, it has been shown that although we are far from achieving that, measures such as the Model Law and EC Regulation reflect current attempts to encourage as much co-operation as possible between different countries interested in an international insolvency. In particular, the EC Regulation has succeeded in creating a largely universalist regime where there is only a main proceeding, and even when a territorial proceeding exists alongside the main proceeding, it has put in place methods whereby some unity of the debtor's estate may be achieved. The momentum of developments is towards universalism, though a weak form of universalism, rather than territorialism. Thirdly, academics and practitioners have either received Lord Hoffmann's judgment favourably[83] or at least welcomed the case as taking an important step towards international co-operation.[84] Finally, in a victory of sorts for Lord Hoffmann, Lord Neuberger seemed to have a change of mind when he acknowledged extra-judicially the force of Moss QC's criticisms of his judgment,[85] and that "on revisiting the decision …, I [Lord Neuberger] think that there is considerable attraction in the Hoffmann-Walker view".[86]

B. Extent and scope

56 The most important question in the common law of international insolvency is the extent and scope of its operation *vis-à-vis* insolvency legislation. This was very probably raised for the first time by Scott V-C in *Re Bank of Credit and Commerce International SA (No 10)*[87] ("*Re BCCI SA (No 10)*"), where he held that the court had no inherent power to disapply the statutory scheme in an international insolvency where the English winding up is an ancillary winding up. Put simply, an ancillary winding up is one where the English liquidator collects and

83 See, *eg*, Gabriel Moss QC, "'Modified Universalism' and the Quest for the Golden Thread" (2008) 21 *Insolvency Intelligence* 145; John Townsend, "International Co-operation in Cross-Border Insolvency: *HIH Insurance*" (2008) 71 MLR 811; Philip Smart, "Cross-Border Insolvency Co-operation" (2008) 124 LQR 554; Chee Ho Tham, "Ancillary Liquidations and *Pari Passu* Distribution in a Winding-Up by the Court" [2009] LMCLQ 113.

84 See, *eg*, Pippa Rogerson, "International Insolvency: Law Applied to Distribution" (2008) 67 CLJ 476; Blanca Mamutse, "*McGrath v Riddell*: A Flexible Approach to the Insolvency Distribution Rules?" (2010) 19 IIR 23.

85 Lord Neuberger, "The International Dimension of Insolvency" (2010) 23 *Insolvency Intelligence* 42 at 43.

86 Lord Neuberger, "The International Dimension of Insolvency" (2010) 23 *Insolvency Intelligence* 42 at 44. See also p 45 (the adoption of the Model Law in the UK may on its own provide a necessary spur to the development of a universalist approach).

87 [1997] Ch 213 at 246.

realises only English assets and, after paying off the preferential creditors, remits the proceeds to the liquidator in the principal liquidation for a global distribution. However, due to the accumulation of precedents that endorsed the concept of ancillary liquidation, Scott V-C felt that he was compelled to concede that it had become established law that in an ancillary liquidation the courts have power to direct liquidators to remit the proceeds.

57 The substance of Scott V-C's query in *Re BCCI SA (No 10)* is to challenge the entire basis of modified universalism, and this became apparent when he sat as Lord Scott in *Re HIH*. He held that creditors in an English liquidation enjoy statutory rights which cannot be overridden by an exercise of inherent jurisdiction by the court.[88] Although there was no mention of modified territorialism in his opinion, this was the "vested rights" idea which formed the intellectual justification of that school of thought.

58 In addition to the above argument, it is arguable that a universalist approach is prohibited by s 221(1) of the English Insolvency Act 1986, which states that *all* the provisions of that Act about winding up apply to an unregistered company.[89] It has a Singaporean counterpart in s 351(1) of the Companies Act. The provision, taken literally, requires that an English liquidation of a foreign company has to be a full blown liquidation, even one with very little connection with England.[90] This means that the English assets of the company will have to be ring-fenced and distributed according to English distribution rules. There is therefore no room for modified universalism.

59 It is submitted that the force of the above arguments disappear once we take into account the historical development of the common law on international insolvency. This author has argued elsewhere that case law does not provide much support either for Lord Hoffmann or Lord Scott, for the reason that although there is *prima facie* an impressive body of authorities, in truth they do not give us much

88 *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at [59] and [61], *per* Lord Scott.

89 *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at [69]. Lord Scott did not rely on this argument in his opinion.

90 An English court is given jurisdiction under s 221 of the Insolvency Act 1986 (c 45) (UK) to wind up a foreign company, but the section does not lay down any guideline on the exercise of the jurisdiction. Previously, the courts required more substantial connection between the foreign company and England before it would exercise its jurisdiction, for example, a place of business or the presence of assets. That is no longer the case. In *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116, it was held that what was required was a sufficient connection with England which may, but does not necessarily have to, consist of assets within the jurisdiction. This new approach has been followed in Singapore: *Re Griffin Securities Corp* [1999] 1 SLR(R) 219; *Re Projector SA* [2009] 2 SLR(R) 151.

guidance.[91] The reasons include the lack of consistency in the exercise of the discretionary powers, the brief and vague reasoning in the judgments and the fact that most of them were delivered *ex tempore*. On further reflection, however, it is now submitted that more can be inferred from the cases than earlier thought.

60 First, whilst it is true that the reasoning in most of the cases that supported modified universalism was brief, that need not necessarily detract from their force. It could be that the judges, rightly or wrongly, thought that the reasons they gave sufficed to dispose of the issues before them. The cases therefore provide support for Lord Hoffmann's assertion that modified universalism "has been the golden thread running through English cross-border insolvency law since the eighteenth century".[92] Secondly, in any event, the brevity of the reasoning is consistent with another explanation, that the judges who decided the cases in the late 19th and early 20th centuries did not think that modified universalism was controversial. Instead, they thought that it represented the law and thus it was unnecessary for them to expend more effort to justify their decisions. They could well have thought that the common law was a source of law for international insolvency and that the Companies Acts in force then were not exhaustive codes. As such, it would be wrong to seek to find the juridical basis for modified universalism in the successive versions of the Companies Act then or the Insolvency Act of 1986 now.

61 Moss QC provided a strong clue that the above probably represented the attitude of the judges in his discussion of Re HIH.[93] In the previous authorities, apart from *Re BCCI SA (No 10)*, where remission was ordered or discussed, it would have been from one jurisdiction to another with substantially similar rules on the ranking of debts. That was so because the main and ancillary liquidations occurred

91 Meng Seng Wee, "A Lost Opportunity towards Modified Universalism" [2009] LMCLQ 18 at 24–25.

92 *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at [30]. That said, the brevity of reasoning remains unsatisfactory. It behoves the judges and jurists today to work hard and creatively to supply the missing bits and develop a coherent body of case law. Lord Hoffmann has contributed much through his judgments in *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112; *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508; and *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852. Amongst the academics in the Commonwealth, Professor Fletcher and the late Professor Smart have been the pioneers in building up this branch of law as a serious academic discipline.

93 Gabriel Moss QC, "'Modified Universalism' and the Quest for the Golden Thread" (2008) 21 *Insolvency Intelligence* 145 at 146.

in different parts of the British Empire.[94] It was thus understandable that the judges proceeded on the basis that modified universalism was the law and had little difficulty ordering the remissions. Where, however, debts were ranked rather differently in the main liquidation from English rules, English judges became much more cautious and began to query the juridical basis of ancillary liquidation. It was no coincidence that this first occurred in *Re BCCI SA (No 10)*.

62 The point made by Moss QC in fact exemplifies a more general proposition. When a judge in an international insolvency is asked to rule in a manner detrimental to the interests of local creditors, he is far less likely to be swayed by appeals to uphold universalism where the rules of the other jurisdiction are alien or different from English rules than where the rules are substantially similar.[95] This has been termed "outcome difference"[96] by Westbrook. Two examples will be given here to illustrate the proposition.

63 The first is *Felixstowe Dock and Railway Co v US Lines Inc*.[97] A US company was in Chapter 11 of the US Bankruptcy Code. Under the reorganisation plan, the company intended to close down its English and European operations and to concentrate its activities in North America. English and European creditors sued the company for payment for the services they had provided and obtained a *Mareva* injunction restraining the company from removing its English assets from the jurisdiction. An attempt by the company to set aside the injunction so that the English assets may be repatriated to the US for its reorganisation failed. The judge, Hirst J, held that while a desire to concentrate proceedings in the US was fully understandable, this aspiration must yield to the exigencies of the local situation.[98] The decision has been heavily criticised.[99] It is an example of how an alien

94 See, *eg*, *Re Alfred Shaw & Co Ltd, ex parte MacKenzie* (1897) 8 QLJ 93 (from Queensland to England); *Re National Benefit Assurance Co* [1927] 3 DLR 289 (from Canada to England); *Re Australian Federal Life and General Assurance Co Ltd* [1931] VLR 317 (from Victoria to New South Wales); *Re Standard Insurance Co Ltd* [1968] Qd R 118 (from Queensland to New Zealand).

95 On the need for the rough similarity of laws in international insolvency, see Jay Westbrook, "Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum" (1991) 65 *American Bankruptcy Law Journal* 457 at 468–469; and for reorganisation particularly at 482–483.

96 See Jay Westbrook, "Global Insolvencies in a World of Nation States" in *Current Issues in Insolvency Law* (A Clarke ed) (Stevens & Sons, 1991) at pp 27 and 43–44.

97 [1989] QB 360.

98 *Felixstowe Dock and Railway Co v US Lines Inc* [1989] QB 360 at 389.

99 See, *eg*, Ian F Fletcher, "The Ascendance of Comity from the Ashes of Felixstowe Dock" (1993) 6 *Insolvency Intelligence* 10 at 11; Sir Peter Millett, "Cross-Border Insolvency: The Judicial Approach" (1997) 6 IIR 99 at 108 and 113.

rule[100] and outcome difference had conspired to cause Hirst J to reject a more universalist solution.

64 The second example is *Re Suidair International Airways Ltd.*[101] The English branch of a South African company owed money to a creditor. It gave false promises on repayment repeatedly and defaulted on agreed instalments. The creditor finally obtained a judgment and commenced execution process. Meanwhile, the company was wound up in South Africa, and then in England. The creditor applied to court to exercise its discretion to allow it to retain the benefit of its uncompleted execution. It was accepted by the parties that the English liquidation was ancillary to the South African liquidation and that the execution would have been *void* under South African insolvency law. Wynn-Parry J cited with approval a *dictum* of Vaughan Williams J in *Re English, Scottish and Australian Chartered Bank*[102] that the desire of the court to act as ancillary to the court of the country of the main liquidation would not ever make the court give up the rules governing the conduct of its own liquidation. On that basis he applied English law, rejecting the liquidator's argument that he ought to refuse to exercise his discretion in favour of the creditor so as to give effect to South African law. This case has similarly been heavily criticised.[103]

65 The above account provides at least a highly plausible explanation for the lack of discussion in the cases, until very recently, of the extent and scope of the common law as a source of law for international insolvency. If so, it would be wrong to seek to find the juridical basis of modified universalism in the Companies Acts previously or the Insolvency Act of 1986 now.[104] Section 221(1) of the Insolvency Act 1986 can be traced back to at least s 199(1) of the Companies Act of 1862. Modified universalism was accepted by the courts before the Act of 1862 was enacted. However, it may be argued that was in relation to personal bankruptcies,[105] and that the same

100 According to Jay Westbrook, "Global Insolvencies in a World of Nation States" in *Current Issues in Insolvency Law* (A Clarke ed) (Stevens & Sons, 1991) at pp 27 and 44–45, Hirst J erred in his then understanding of the US case law on s 304 of the US Bankruptcy Code, which then governed US law on international insolvency.

101 [1951] Ch 165.

102 [1893] 3 Ch 385 at 394.

103 Philip Smart, *Cross-Border Insolvency* (Butterworths, 2nd Ed, 1998) at pp 379–381; Sir Peter Millett, "Cross-Border Insolvency: The Judicial Approach" (1997) 6 IIR 99 at 105.

104 An alternative argument is that the insolvency legislation, closely read, reveals more support for the application of the ancillary liquidation doctrine so as to permit remission of assets than might initially be assumed: Chee Ho Tham, "Ancillary Liquidations and *Pari Passu* Distribution in a Winding-Up by the Court" [2009] LMCLQ 113.

105 See, *eg*, *Solomons v Ross* (1764) 1 Hy Bl 131n, 126 ER 79; *Odwin v Forbes* (1817) 1 Buck 57 (PC). For a detailed discussion of universalism by English courts, see Ian

(*cont'd on the next page*)

acceptance in the sphere of company liquidations came about later, in the late 19th century after the Act of 1862 was enacted.[106] Even assuming that the judges then had misunderstood the law in thinking that the common law was a source of law for international insolvencies, which the next paragraph will dispute, that "mistake" has since been "ratified" by Parliament. Parliament had ample opportunities to overrule the early cases but did not do so. It must therefore be taken that Parliament had accepted that the common law was a source of law for international insolvency, and that s 221(1) was not to be interpreted literally.

66 Finally, as pointed out by Moss QC, the judgments of Lord Scott and Lord Neuberger proceeded on the premise that the Insolvency Act 1986 is "some sort of code of insolvency law which is meant to encompass all cases."[107] This is a fundamental misunderstanding of the Insolvency Act 1986:[108]

> The statute is not and was never intended to be a code of insolvency law. No British statute dealing with insolvency has ever been intended to or purported to be a code. There has from the first been a set of equitable and a set of conflict of laws principles operating alongside the statutory provisions, in a very real sense supplementing and correcting them where necessary and sometimes giving rise to a different outcome from that suggested by the statute.

C. Evaluation

67 Where the Model Law is enacted as a piece of domestic legislation, it will supersede the common law for cases that fall within its scope. The Model Law will thus provide the impetus to the development of a more universalist approach. However, the common law remains important in countries where the Model Law has not been adopted, or for cases that fall outside it, for example insurance or banking companies.

68 It is not possible to compare the two systems of law in any detail here. At the macro level, however, it seems that if Lord Hoffmann's judgment in *Re HIH* is followed, the shape of the common law may not be that different from the Model Law. The common law is no less universalist in spirit than the Model Law. Two examples will be given here.

Fletcher, *Insolvency in the Private International Law* (Oxford University Press, 2nd Ed, 2005) at paras 1.20–1.23.

106 An early case was *Re Matheson Brothers Ltd* (1884) 27 Ch D 225.

107 Gabriel Moss QC, "'Modified Universalism' and the Quest for the Golden Thread" (2008) 21 *Insolvency Intelligence* 145 at 151.

108 Gabriel Moss QC, "'Modified Universalism' and the Quest for the Golden Thread" (2008) 21 *Insolvency Intelligence* 145 at 151.

69 First, the common law allows for multiple proceedings, but will give the proceeding in the company's domicile or home country the most say, with proceedings in other countries where the company has an interest playing a subsidiary role. It is usual to describe the former as a principal liquidation and the latter as ancillary liquidations. The Model Law adopts a similar design to the common law in that it permits main and non-main proceedings, although it is acknowledged that the connecting factors between those proceedings and the states where the proceedings are opened are somewhat different under the two laws.[109]

70 Second, it seems that there is much overlap between the two laws on the test that governs the remittal of assets from one proceeding to another. Lord Hoffmann in *Re HIH* provided the following test: an English court should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.[110] *Prima facie*, this test for the remittal of assets seems quite similar to the test of adequate protection of local creditors under the Model Law.[111]

VIII. Ring fencing under section 377(3)(*c*)[112]

A. History

71 The words providing for ring-fencing in s 377(3)(*c*) were the result of a conscious legislative decision. The provision was previously

109 A main difference is the location of the main proceeding. The Model Law uses the centre of a debtor's main interests. The traditional approach at common law is that it is the country of incorporation of the company. In *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at [30], Lord Hoffmann suggested that it may be more appropriate to use the centre of a debtor's main interests. Another difference is that a non-main proceeding under the Model Law will only be recognised if the debtor has a place of operations in that country where it carries out a non-transitory economic activity with human means and goods or services. The Model Law itself does not recognise a proceeding based only on the presence of assets within the jurisdiction of the country, although that is permitted if other laws of the enacting state would so recognise it. The position at common law is not entirely clear: see Philip Smart, *Cross-Border Insolvency* (Butterworths, 2nd Ed, 1998) at pp 164–177; Ian Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd Ed, 2005) at pp 200–204.

110 *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at [30].

111 Model Law Art 21(2).

112 The Chief Justice of Singapore, writing extra-judicially, has argued in favour of this provision; see Chan Sek Keong, "Cross-border Insolvency Issues Affecting Singapore" (2011) 23 SAcLJ 413 at 418–424. The article was published too late for this writer to address it fully here, save for limited references allowed at the proof stage.

s 340(3)(*c*) in the Companies Act when it was enacted in 1967. The Companies Bill 1966 during its first and second reading did not contain the words on ring-fencing in cl 340(3)(c). They were added during the Select Committee stage. To understand this history, it is necessary to explain what happened during the legislative process in some detail.[113]

72 The original version of the Companies Bill 1966 contained a Pt XIII entitled "Reciprocal Provisions with Malaysia". It authorised the Minister to make arrangements with Malaysia for their extension to Singapore of winding-up orders made in Malaysia and for the extension to Malaysia of winding-up orders made in Singapore. During the second reading of the Bill, the Minister in charge, Mr E W Barker, explained that he understood that the Malaysian government was prepared to enact legislation containing reciprocal provisions.[114] The sections in Pt XIII were not new; they were brought over from the then Companies Ordinance.[115] It is easy to understand the reasons for wanting to continue with the reciprocal arrangements with Malaysia. Although Singapore had separated from Malaysia and became independent on 9 August 1965, the ties between the two countries' economies could not be closer. It made a lot of sense to create a largely universalist regime for winding up covering Singapore and Malaysia. The intended regime, which provided for a pure scheme of principal and ancillary winding ups, was far more universalist than the EC Regulation.

73 Due to its importance, the Bill was sent to a Select Committee after the second reading. It was not clear what transpired during the one year when the Bill was considered by the Committee. In any event, the words on ring-fencing were added to cl 340 of the Companies Bill 1966.[116] At the third reading, the Minister did not refer to the momentous decision to ring-fence. Any reference to ring-fencing can only be inferred from his speech on Pt XIII. He stated that Pt XIII had been deleted and explained that the deletion was considered necessary

113 For a different analysis of the legislative history, see the judgment of Woo J in *RBG Resources plc v Credit Lyonnais* [2006] 1 SLR(R) 240 at [41]. The history was also examined in *Tohru Motobayashi v Official Receiver* [2000] 3 SLR(R) 435 at [39] where the Court of Appeal left the issue of the legislative intention for the ring-fencing open.

114 *Singapore Parliamentary Debates, Official Report* (21 December 1966) vol 25 at col 1076.

115 Cap 174.

116 It was stated in Chan Sek Keong, "Cross-border Insolvency Issues Affecting Singapore" (2011) 23 SAcLJ 413 at 417, para 12 that this provision was "derived from s 413(2) of the UK Companies Act of 1948 and s 352 of the Victoria Companies Act". With respect, that was erroneous. There was no similar ring-fencing provision in those foreign legislations. On the contrary, s 352(3)(c) of the Victoria Companies Act required the liquidator, unless otherwise ordered by the court, to remit the net proceeds of realisation to the liquidator of the foreign company where it was formed or incorporated.

as "clause 340 of the Malaysian Companies Act", with necessary modifications agreed to between Singapore and Malaysia, should meet the reciprocal requirements.[117] Clause 340 of the Malaysian Companies Act was the Malaysian equivalent to cl 340 in our Companies Bill 1966. As the Minister did not elaborate on what he meant by the anticipated modifications to the Malaysian legislation, one cannot be certain of what he had in mind. This author submits that the best explanation for what he meant was that the Malaysian provision would be amended in like manner as the Singaporean provision to provide for ring-fencing. It is difficult to think of any other explanation.

74 With all respect, the Minister's explanation is self-contradictory. This is, however, not a criticism of him, for he operated under severe constraints at that time, which will be explained shortly. The explanation is self-contradictory because the ring-fencing by Singapore, and the intended ring-fencing by Malaysia, could not have achieved the same objective as the replaced sections on reciprocal arrangement. On the contrary, their territorial effect was completely at odds with the initial attempt to create a universalist regime for winding up covering Singapore and Malaysia. It seems, however, that this is not something that the Minister could be transparent about at that time. As Malaysia did not have a ring-fencing provision then, its inclusion being only anticipated by the Minister, it is arguable that the effect of the ring-fencing at that time would fall largely on Malaysian companies with Singapore branches, since the presence of *other* foreign multinationals in Singapore then was few and far between. If so, that would have been a very sensitive issue. In view of the extremely delicate relations between Singapore and Malaysia at that time, it would be unrealistic to expect the Minister to be more forthcoming in his speech. As such, it is not safe to take his speech at face value. In passing, it may be noted that Malaysia amended its s 340(3) *vide* the Companies (Amendment) Act 1985 and its relevant provision today is very similar to our current s 377(3)(*c*).

75 The ring-fencing words that were added by the Select Committee apply to all foreign companies in Singapore. They gave priority to debts incurred by those companies in Singapore. Looking at the matter today, it seems that the unstated intention was to benefit Singaporean creditors, since it is likely in the 1960s that most of the debts incurred by a foreign company operating in Singapore would be incurred in Singapore.

117 *Singapore Parliamentary Debates, Official Report* (21 December 1967) vol 26 at col 1036.

B. Fallacies

76 The approach embodied in s 377(3)(*c*) is clearly territorial. It ring-fences the Singapore assets of a registered foreign company to pay the debts and liabilities incurred by the company in Singapore first before paying foreign debts. It is important to note that the basis on which different treatment is given is not based on nationality; rather it is based on the *locus* where the debts are contracted.

77 When considering s 377(3)(*c*), it is easy to be misled into thinking that the provision favours Singaporean creditors (*ie*, Singapore incorporated companies or Singapore citizens) over foreign creditors.[118] That was probably the case when the provision was initially enacted in 1967, as explained above, even though the basis for preferential treatment is not based on nationality. Since then the structure of our economy has changed dramatically. Technological advances, in particular electronic modes of communication, have also altered the way businesses are conducted. A debt may be incurred in Singapore *vis-à-vis* a foreigner without the foreigner being in Singapore.[119] In practice, the beneficiaries of s 377(3)(*c*) today are as likely to be Singaporean creditors as foreign creditors. A similar point was made by Woo J in *RBG Resources plc v Credit Lyonnais*.[120] He emphasised that s 340(3)(*c*) did not apply to all creditors in Singapore and Malaysia but to debts and liabilities *incurred* in Singapore. He accordingly rejected counsel's argument that the ring-fencing was meant to protect creditors in Singapore and Malaysia dealing with companies operating in those countries.

78 The fallacious belief that s 377(3)(*c*) "protects" Singaporean creditors is not the only fallacy. Another fallacy is that a territorial approach "protects" them by ensuring that they are paid ahead of foreign creditors. That may be so in an individual case, but looking at the matter more broadly it is fallacious for at least two reasons. First, the ease with which assets may be moved across borders in this day and age means that the approach may not achieve its objective of protecting Singaporean interests.[121] Next, our practice of ring-fencing may encourage other countries to do the same. As more Singaporean companies have been investing overseas, more of their assets are found overseas rather than in Singapore. Singapore also trades heavily with

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118 *Cf* Chan Sek Keong, "Cross-border Insolvency Issues Affecting Singapore" (2011) 23 SAcLJ 413 at 418, para 13.

119 In *RBG Resources Inc v Credit Lyonnais* [2006] 1 SLR(R) 240 at [52]–[53], there was some discussion of whether the liability which arose out of a breach of contract was incurred in Singapore.

120 [2006] 1 SLR(R) 240 at [41].

121 It is an offence where the assets are siphoned away dishonestly or fraudulently; see, *eg*, s 422 of the Penal Code (Cap 224, 2008 Rev Ed). See Chan Sek Keong, "Cross-border Insolvency Issues Affecting Singapore" (2011) 23 SAcLJ 413 at 422, para 18.

other countries. If these countries decide to ring-fence their assets in favour of their domestic creditors, that will be at the expense of Singaporean creditors.

C. Case for repeal

79 There are a few options going forward. The first is to keep the *status quo*. The second is to extend the ring-fencing to all foreign companies, regardless of whether they are registered or not. The third is to extend it even further to include also companies incorporated under the Companies Act and its predecessor legislations. The fourth is to repeal s 377(3)(*c*), subject perhaps to its retention in specific industries. This author is firmly in favour of the fourth option.

80 The theoretical and practical arguments for repealing s 377(3)(*c*) and for Singapore to move towards modified universalism have been set out above. Such a move will also be in line with the trend of developments worldwide as analysed, which is to move towards some weak forms of universalism. Next, commentators are overwhelmingly in favour of abolishing s 377(3)(*c*).[122] Thirdly, it seems that the judicial attitude is also in favour of repeal.[123] It was held by the Court of Appeal in *Tohru Motobayashi v Official Receiver*[124] that as a matter of construction s 377(3)(*c*) ring-fences the Singapore assets of a registered company for the benefit of debts incurred in Singapore. Subsequently in *RBG Resources plc v Credit Lyonnias*,[125] the issue arose whether s 377(3)(*c*) applied to an unregistered foreign company as well. Woo J held that as a matter of construction it did not, and approved arguments in favour of universalism; in particular, the argument that ring-fencing is retrogressive and out-of-line with internationally accepted standards of a fair and equitable international insolvency regime.[126]

81 Further, if the experience of big trading nations is anything to go by, it seems that the repeal of ring-fencing would not leave Singapore worse off. Rather, it may benefit Singapore by encouraging other

122 See, *eg*, Lee Eng Beng, "Insolvency Law" (2000) 1 SAL Ann Rev 201 at 203–205; Lee Eng Beng, "Recent Developments in Insolvency Laws and Business Rehabilitation – National and Cross-Border Issues" Asean Law Association Workshop VI, Paper V, (December 2003) at p 294 *et seq* (available at <http://www.aseanlawassociation.org/docs/w6_sing.pdf> (accessed 15 September 2011)); Teo Guan Siew, "Pushing the Limits of Judicial Assistance in Cross-Border Insolvencies" (2008) 20 SAcLJ 784 at 795, para 14.

123 See, however, Chan Sek Keong, "Cross-border Insolvency Issues Affecting Singapore" (2011) 23 SAcLJ 413 at 418–424 where the Chief Justice of Singapore, writing extra-judicially, seems to be in favour of ring-fencing.

124 [2000] 3 SLR(R) 435.

125 [2006] 1 SLR(R) 240.

126 *RBG Resources plc v Credit Lyonnias* [2006] 1 SLR(R) 240 at [65]–[66].

countries to extend reciprocal treatment to a request for recognition or assistance by our court or liquidator. Both Lord Hoffmann[127] and Sir Peter Millett writing extra-judicially[128] have explained that English law's preference for universalism may have been due to Britain's past as the pre-eminent global trading power. Usually the principal creditors were in Britain but many of the debtor's assets were in foreign jurisdictions. Universality of winding up protected the position of British creditors. Applying their reasoning, in view of Singapore's heavy involvement in international trade[129] and status as a financial centre,[130] *prima facie* it would be in our interests to repeal ring-fencing and move decisively towards modified universalism.

82 Finally, it may be in the interest of a state with a high degree of foreign investment (whether equity or debt), like Singapore, to repudiate ring-fencing. It may not be that it is only beneficial for a country to repudiate ring-fencing in the reverse situation, *ie*, where it has more creditors within its jurisdiction possessing claims against assets in other jurisdictions. Lord Hoffmann and Sir Peter Millett, in addition to proffering their views on why England preferred universalism as referred to in the above paragraph, also said that countries less engaged in international commerce and finance did not always see it as being in their interest to allow foreign creditors to share equally with domestic creditors.[131] Assuming that is the case, countries that hold that belief and practice ring-fencing may have failed to take into account the costs of that approach. This point was made succinctly by the Law Commission of New Zealand:[132]

> Economic analysis stresses the need for fair treatment of foreign creditors (Bebchuk and Guzman 1998, 19–23). One of the issues that

127 *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508 at [17].

128 Sir Peter Millett, "Cross-Border Insolvency: The Judicial Approach" (1997) 6 IIR 99 at 101.

129 According to the Central Intelligence Agency World Factbook, Singapore's current account balance, which includes its net trade in goods and services, is ranked ninth in the world based on 2010 figures. The information is available at <https://www.cia.gov/library/publications/the-world-factbook/geos/sn.html> (accessed 15 September 2011).

130 Singapore is ranked fourth in the world according to the Global Financial Centres Index published in March 2011. The information is available at <http://www.zyen.com/GFCI/GFCI%209.pdf> (accessed 15 September 2011).

131 *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508 at [17]; Sir Peter Millett, "Cross-Border Insolvency: The Judicial Approach" (1997) 6 IIR 99 at 101.

132 Law Commission, *Cross-Border Insolvency: Should New Zealand adopt the UNCITRAL Model Law on Cross-Border Insolvency?* (Report 52, February 1999) at para E8. The reference in the quote is to the article by Lucian A Bebchuk & Andrew T Guzman, "An Economic Analysis of Transnational Bankruptcies" (National Bureau of Economic Research, Working Paper 6521, Cambridge, 1998).

> an investor must address before making a major investment overseas is the ability, if things turn sour, to recover money. If the state in which the investment is made allows its creditors to be given preference over foreign creditors or, alternatively, makes or appears to make it difficult for foreign creditors to receive a just dividend, the investment may not proceed or, if it does, the price to be paid by way of interest may be inflated.

83 Generally, the repeal of s 377(3)(*c*) should not cause difficulty in practice. However, it *may* be that public policies require that certain classes of creditors in specific industries, for example, financial institutions or insurance companies, should enjoy preferential treatment over other creditors. In principle it is more likely that where there is such a policy it will be effected through specific provisions for that purpose rather than through s 377(3)(*c*).[133] Where that is so, the repeal of ring-fencing in s 377(3)(*c*) will have no effect on the policy. But where that is not so, new provisions will have to be drafted to ensure that the policy is continued after the repeal. Not having undertaken a comprehensive research on the issue, this author is not able to state categorically what the correct position is.

84 It may, however, be pointed out that we indeed have a special ring-fencing provision in respect of specified assets for the benefit of certain creditors of insurance companies.[134] The ring-fencing is similar to s 116(3) of the Australian Insurance Act 1973 (Cth), which requires *Australian* assets[135] in an insurance liquidation to be applied first in discharge of debts payable in Australia. In *Re HIH*, it was held that the provision did not prejudice the interests of *English* creditors in English assets.[136] Nevertheless, s 116(3) is no less a territorial provision than our s 377(3)(*c*).[137] The question of whether this approach is justified may be

133 For example, assets are ring-fenced for the protection of local depositors and creditors in a winding up of a bank under ss 61, 62 and 62A of the Banking Act (Cap 19, 2008 Rev Ed) for distribution to depositors according to the prescribed priority of specified liabilities.

134 Insurance Act (Cap 142, 2002 Rev Ed) s 49FR.

135 This has been interpreted to mean assets in Australia at the time of the winding up so that it does not apply to assets transferred or remitted to Australia after the commencement of winding up: *New Cap Reinsurance Corp Ltd v Faraday Underwriting Ltd* (2003) 117 FLR 52; *Re HIH Casualty and General Insurance Ltd* (2005) 215 ALR 562.

136 *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at [34]. In the High Court, David Richards J held that the section did not constitute a bar to an order directing remission to Australia of English assets and there was no appeal on that point: *Re HIH Casualty and General Insurance Ltd* [2005] EWHC 2125 (Ch), [2006] 2 All ER 671.

137 The prejudice to creditors whose debts are payable outside of Australia is mitigated by the principle of hotchpotch. Creditors with debts in Australia who receive distributions from the proceeds of Australian assets are not entitled to participate in a distribution of the proceeds of other assets until the same level of dividend is

(*cont'd on the next page*)

addressed another day. The point that is made here is that it is not justified to have a general ring-fencing provision as provided in s 377(3)(*c*).

IX. Case for enacting Model Law

85 The Company Legislation and Regulatory Framework Committee[138] stated in its report that it has reviewed developments relating to the Model Law and would recommend that we await further developments which would indicate how these would impact the insolvency legislation of the major common law jurisdictions.[139] Since the submission of that report in October 2002, some of the most important common law jurisdictions have adopted the Model Law. They include the US in 2005,[140] New Zealand[141] and the UK[142] in 2006, Australia in 2008[143] and Canada in 2009.[144] The time has come for the Government to review those developments and consider whether we should adopt the Model Law. This author submits that the case for adopting the Model Law is overwhelming.

86 First, it seems that commentators who have written on Singapore's international insolvency law are agreed that its development should be guided by universalism.[145] It has specifically been said that "the fact that Singapore has not adopted the UNCITRAL Model Law on

paid on debts outside of Australia. See *New Cap Reinsurance Corp Ltd v Faraday Underwriting Ltd* (2003) 117 FLR 52.

138 This was a committee set up by the Singapore government in 1999 to undertake a comprehensive review of Singapore's company law. It submitted its final report in 2002.

139 Company Legislation and Regulatory Framework Committee, *Final Report* (2002) ch 4, para 1.3.

140 Bankruptcy Code (11, US Code) ch 15. For a concise account, see Jay Westbrook, "Chapter 15 at Last" (2005) 79 *American Bankruptcy Law Journal* 713.

141 Insolvency (Cross-Border) Act 2006 (New Zealand) Sched 1.

142 Insolvency Act 2000 (c 39) (UK) s 14 gave the Secretary of State power to adopt the Model Law by making the necessary regulations. The Model Law is brought in by virtue of the Cross-Border Insolvency Regulations 2006 Sched 1.

143 Cross-Border Insolvency Act 2008 (Cth) (Australia) Sched 1.

144 Bankruptcy and Insolvency Act (RSC 1985, c B-3) (Canada) Pt XIII (Cross-Border Insolvencies) and Companies' Creditors Arrangement Act (RSC 1985, c C-36) (Canada) Pt IV (Cross-Border Insolvencies).

145 See, eg, Lee Eng Beng, "Insolvency Law' (2000) 1 SAL Ann Rev 201 at 203–205; Lee Eng Beng, "Recent Developments in Insolvency Laws and Business Rehabilitation – National and Cross-Border Issues" Asean Law Association Workshop VI, Paper V, (December 2003) at p 295 (available at <http://www.aseanlawassociation.org/docs/w6_sing.pdf> (accessed 15 September 2011)); Hans Tjio & Wee Meng Seng, "Cross-Border Insolvency and Transfers of Liquidation Estates from Ancillary Proceedings to the Principal Place of Bankruptcy" (2008) 20 SAcLJ 35 (lukewarm support); Teo Guan Siew, "Pushing the Limits of Judicial Assistance in Cross-Border Insolvencies" (2008) 20 SAcLJ 784.

Cross-Border Insolvency does present particular challenges insofar as our special economic circumstances are concerned".[146]

87 Secondly, the repeal of the ring-fencing provision in s 377(3)(*c*) is necessary but insufficient in itself to modernise our international insolvency law. While that will give our judges room to develop our common law on international insolvency, including preferring Lord Hoffmann's judgment to that of Lord Scott in *Re HIH* that modified universalism is the guiding principle of the common law, it is not satisfactory to rely solely on the common law. Legislative support in the form of adopting the Model Law will help to provide direction and certainty in this area of law. Although the Model Law embraced only a weak form of universalism, it is nevertheless a positive development towards greater co-operation in international insolvencies. Its great advantage over the common law is that it has been enacted by some 18 countries of the world, and is familiar to others who have not enacted it, unlike the common law which is alien to countries without a common law tradition and is in any event more difficult to access. As the above analysis of *Felixstowe Dock and Railway Co v US Lines Inc*[147] and *Re Suidair International Airways Ltd*[148] shows, the benefits of familiarity of law and process to an effective and efficient conduct of an international insolvency can hardly be overemphasised.

88 Thirdly, the above examination of the Model Law shows that it may be adopted relatively easily within the existing framework of our insolvency law. Most of the provisions of the Model Law deal with procedural or administrative aspects of international insolvency law. It seems that the only major "hindrance" to the adoption of the Model Law is the ring-fencing words in s 377(3)(*c*). Ring-fencing in such a general manner is inconsistent with the spirit of the Model Law as a measure encouraging a state that enacts it to move towards universalism. It also sits ill with Art 21(2) of the Model Law which provides that turnover relief might be granted if the court is satisfied that the interests of local creditors are adequately protected. It has been argued forcefully that s 377(3)(*c*) should be repealed, subject to the need to ensure that any preferential treatment given to certain creditors in specific industries would not, where applicable, be prejudiced by the repeal. This issue of protecting creditors relates potentially to a bigger issue of delineating the scope of the Model Law.

89 It is anticipated in the Model Law that countries that enact it may nevertheless want to exclude companies in certain industries from

146 Lee Kiat Seng, "Cross-Border Insolvency Issues" *Singapore Law Gazette* (April 2009) 20 at 23.

147 [1989] QB 360.

148 [1951] Ch 165.

its operation, for example, banks or insurance companies.[149] It has been pointed out above that we ring-fence specified assets of insurance companies for the benefit of certain creditors.[150] If we choose to exclude insurance companies from the scope of the Model Law, ring-fencing will not be in issue in relation to the enactment of the Model Law.[151] It is submitted that was the case with s 116(3) of the Australian Insurance Act 1973 (Cth), which as we have seen is a ring-fencing provision. Australia adopted the Model Law when it passed the Cross-Border Insolvency Act 2008 (Cth). Section 116(3) is inconsistent with the spirit of the Model Law but it is not an issue as the Model Law does not apply to insurance companies.[152]

90 The decision on whether to exclude a particular type of company from the Model Law is obviously a much bigger question than that of whether the assets of that type of company should be ring-fenced. For example, the former may relate to policies on such crucial matters as the stability and integrity of the country's financial system. The New Zealand experience is instructive. The Law Commission of New Zealand recommended that registered banks, which are subject to the statutory management procedure established by the Reserve Bank of New Zealand Act 1989, should be excluded from the Model Law's application.[153] The reason given was that statutory management of a registered bank should only be commenced when there is potential systemic risk to the New Zealand financial system, and that such a problem should be dealt with within New Zealand alone. This recommendation was accepted by the New Zealand government and registered banks were excluded from the Model Law when it was adopted via the Insolvency (Cross-Border) Act 2006.[154] Another example is that of England, though it excludes very many more types of company from the Model Law than New Zealand. When England enacted the Model Law, a whole list of entities such as utility companies, transport undertakings, building societies, and public private partnership companies established under various UK statutes, together with certain credit institutions, insurance and reinsurance undertakings, were excluded from it.[155]

149 Model Law Art 1(2).

150 Insurance Act (Cap 142, 2002 Rev Ed) s 49FR.

151 It may be necessary to examine whether the ring-fencing in insurance companies is justifiable, but that is a separate issue.

152 They are excluded by virtue of the Cross-Border Insolvency Regulations 2008 (Select Legislative Instrument 2008 No 123).

153 Law Commission, *Cross-Border Insolvency: Should New Zealand Adopt the UNCITRAL Model Law on Cross-Border Insolvency?* (Report 52, February 1999) at para E11. It is interesting to note that it recommended that life insurance companies should not be excluded: para 138–141.

154 Insolvency (Cross-Border) Act 2006 (New Zealand) Sched 1, Art 1(2).

155 Cross-Border Insolvency Regulations 2006 Sched 1, Art 1(2).

91 An industry that is not often discussed in the international insolvency literature but may be a ripe candidate for exclusion from the Model Law is the shipping industry.[156] Space constraints do not permit discussion of whether the application of the Model Law to the shipping industry is desirable.[157] This is, however, a good example that the Model Law is very much in its infancy and that the profession will still need to put in much effort to develop it further. In view of Singapore's substantial interest in shipping, this is certainly a matter requiring close examination should we decide to adopt the Model Law.

92 Fourthly, we may draw on the experience of the common law countries that have adopted the Model Law. They have prepared extensive materials which we can usefully draw on to inform and expedite our consideration and implementation of the Model Law. For example, the Law Commission of New Zealand conducted an excellent analysis of the issues presented to a policy maker in considering whether to adopt the Model Law,[158] the English Insolvency Service prepared a consultation paper and summarised the fruits of the consultative exercise in a further document,[159] and Australia prepared a concise paper seeking comments on the possible adoption by Australia of the Model Law.[160]

X. Conclusion

93 Singapore's international insolvency law is underdeveloped and out of sync with current international norms, at least with regards to those countries that have adopted one or more international or regional measures promoting co-operation and co-ordination in international insolvencies. The main reason for this unsatisfactory state of affairs is that s 377(3)(*c*) provides for ring-fencing. A subsidiary reason is that whilst some of Singapore's most important trading partners and sources and destinations of investments have enacted the Model Law or are members of regional initiatives such as the EC Regulation, we have

156 The author thanks the referee for bringing this point to his attention.

157 The intersection of maritime law and international insolvency law is very complex. For a helpful discussion on why the Model Law is not suitable in an international insolvency of a shipping company, see Jennifer Devlin, "The UNCITRAL Model Law on Cross-Border Insolvency and its impact on maritime creditors" (2010) 21 *Journal of Banking and Finance Law and Practice* 95.

158 See, *eg*, Law Commission, *Cross-Border Insolvency: Should New Zealand Adopt the UNCITRAL Model Law on Cross-Border Insolvency?* (Report 52, February 1999).

159 The Insolvency Service, *Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain* (August 2005) and *Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain: Summary of Responses and Government Reply* (March 2006) respectively.

160 *Cross-Border Insolvency: Promoting International Cooperation and Coordination* (Corporate Law Economic Reform Program Paper No 8, 2002).

neither adopted the Model Law nor ratified any convention or treaty on international insolvency. To a certain extent, this problem may be ameliorated if the ring-fencing in s 377(3)(*c*) is removed and our courts accept universalism as the guiding principle. It is, however, not a substitute for adopting the Model Law.

94 The most urgent step to modernise our international insolvency law is to repeal the ring-fencing words in s 377(3)(*c*). This in itself could not have been a simpler legislative act. The matter that requires more effort is the point made above that in repealing those words we need to ensure that it does not prejudice any policy of protecting certain classes of creditors of specific industries, for example, depositors in banks and policyholders in insurance companies. It has been suggested that it is unlikely that such a policy will be effected through a general provision like s 377(3)(*c*) instead of a specific provision for the particular type of company concerned. Still, that possibility cannot be ruled out completely. It is therefore necessary for the body set up to reform this area of law to conduct a comprehensive inquiry into this matter and where necessary amend the relevant written law.

95 The removal of the ring-fencing will allow common law to take centre stage in Singapore's international insolvency law. Although the common law is not a substitute for the Model Law, it has the potential of developing solutions largely similar to that of the Model Law if our courts accept universalism as the guiding principle of the common law. It has been argued that our courts should follow and build on the judgment of Lord Hoffmann in *Re HIH*.

96 The next step in the reform is to adopt the Model Law. This exercise will require much more effort and time than the repeal of s 377(3)(*c*). However, if we are able to leverage on the experience of other common law countries that have adopted the Model Law in recent years, we should be able to expedite that process without compromising on the quality of the final product.

97 Should we decide to enact the Model Law, it is very likely that we will have to exclude certain entities, for example, financial institutions, insurance companies and perhaps shipping companies, from its operation. If so, it raises the further question of whether special regimes are required to deal with the international insolvency of those entities. This will be the final step in the reform of our international insolvency law, if we go so far. Due to the special positions or sensitive nature of these entities, a treaty or convention between Singapore and another country will be required before such a regime may be implemented. The EU offers some examples. The EC Regulation does not harmonise insolvency laws within the EU and does not apply to some types of companies, including financial institutions. Insolvency

proceedings relating to financial institutions have their own regimes established by a series of Directives which are then implemented in the individual legal orders of the Member States.[161] That includes Directives on insolvency proceedings concerning insurance undertakings[162] and credit institutions[163] which are implemented in the UK by the Insurers (Reorganisation and Winding up) Regulations 2004 and the Credit Institutions (Reorganisation and Winding up) Regulations 2004 respectively.

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161 Unlike the EC Regulation, the Directives are not directly applicable to the Member States.

162 Council Directive (EC) 2001/17 on the reorganisation and winding-up of insurance undertakings [2001] OJ L110/28.

163 Council Directive (EC) 2001/24 on the reorganisation and winding up of credit institutions [2001] OJ L125/15.