CROSS-BORDER INSOLVENCY ISSUES AFFECTING SINGAPORE

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I. Introduction

1 This is the ninth judicial colloquium but it is the first to be held in an Asian city – the previous colloquia having been held at more attractive cities like Toronto (1995), New Orleans (1997), Munich (1999), London (2001), Las Vegas (2002), Sydney (2005) and Cape Town (2007). One can see from the geographical progression of these venues that the direction has been moving from west to east, in line with the direction of the shift of economic power, or prowess, from west to east. More economic growth from more trade and investments in Asia will mean more cross-border insolvencies in Asia, and for this reason, holding this colloquium in Singapore this year may be said to be timely.

2 Indeed, only last month Borders Group Inc, which owns hundreds of bookstores all over the world, filed for Chapter 11 bankruptcy protection,[1] and one day later, REDGroup Retail, an Australian company which owns the Borders bookstores in Australia, New Zealand and Singapore, also announced that it was going into voluntary administration in Australia. Just about three weeks ago, South Korea's second-biggest dry bulk shipping company, Korean Line Corporation, announced that it had commenced restructuring after a local Korean court placed the financially-strapped dry bulk group in receivership. These three insolvencies show that there is a need to put in place an efficient legal framework for the orderly governance of international or regional insolvency proceedings.

3 Initially, I was asked to speak on cross-border insolvency issues in a more regional context, and the need to foster cross-border co-operation and communication. When I expressed some apprehension about my ability to speak on such a broad front since I am not familiar with the insolvency laws and practices of the other countries in the region, it was suggested that it would be most productive if I could focus

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1 Under Chapter 11 of the US's Bankruptcy Code (11 USC).

on the state of insolvency regulation in Singapore and on the numerous cases that have been brought before the Singapore courts. The organisers felt that an analysis of cross-border insolvency from a Singapore viewpoint would be interesting to participants in this colloquium, Singapore being one of the most internationalised jurisdictions in Asia. I am happy to do so.

4 Singapore was a British colony and therefore belongs to the small family of common law countries in Asia, along with Malaysia, Brunei, India, Pakistan, Sri Lanka, and Australia and New Zealand (if the latter two countries count themselves as part of Asia). We are considerably outnumbered by the civil law countries and the Islamic law countries in Asia. Even in ASEAN (Association of Southeast Asian Nations), seven out of the ten countries are civil law countries.[2] There is, of course, a great deal of intra-ASEAN trade and even greater ASEAN-China or ASEAN-India trade. However, even among the members of ASEAN, after more than 40 years from its formation, there is still considerable unfamiliarity or ignorance among ASEAN legislators and lawyers of one another's legal systems and laws. ASEAN has not even reached the stage of political and economic integration when having a common or harmonised trade and commercial law can be seriously discussed. There are many reasons for this, the language of the laws being one of the more significant reasons. Lawyers in the common law group consisting of Brunei, Malaysia and Singapore have no problem understanding one another's laws and legal systems, but the same cannot be said of the other countries whose legal systems are based broadly on the civil law system.

II. Singapore's Free Trade Agreements ("FTAs")

5 Hence, although ASEAN has established a free trade area ("AFTA"), and although Singapore has signed FTAs with (a) Australia and New Zealand, (b) China, (c) India, (d) Japan, and (e) the Republic of Korea, the principal trading nations in Asia, I am not aware that there is any discussion among ASEAN itself to establish a common insolvency regime for its members, much less with ASEAN's other trading blocs. There are, of course, many reasons for this apparent lack of urgency or even interest in the subject, notwithstanding the argument that insolvency practice plays a vital role in ensuring the efficiency of capital markets. ASEAN states have many more important and pressing political, economic and social issues to resolve among themselves. They are at different levels and stages of economic development. Their economies are very different from one another's.

2 The member countries of ASEAN are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

6 Each ASEAN state already has its own legal framework to regulate insolvencies, whether corporate or personal. Harmonisation of insolvency laws and practices will not come about unless there are compelling reasons for it to take place. While globalisation of trade, services and investments over the last few decades has raised economic standards in the whole of ASEAN, the need for a common insolvency regime to deal with personal and/or corporate insolvencies is not apparent. The Asian financial crisis in 1997 should have given the impetus for regional co-operation in establishing such a regime among the ASEAN states, but nothing happened: insolvency issues were completely dwarfed by the political, economic and social problems facing the Asian economies that were seriously impaired by the crisis. Again, even the recent global credit and financial crisis that led to so many insolvencies in the developed economies of the West had no serious impact on creditors in the ASEAN states. Investors in the region and Hong Kong had very substantial sums of money invested in ~~Enron~~ CDOs (collateralised debt obligations), but no bank in Singapore or most of the ASEAN states needed to be "tarped", or bailed out, unlike those in the US, the UK and other European states. The insolvency of Lehman and many other global corporations and investment entities generated a large volume of litigation on insolvency issues in the US, the UK and some EU states, but none appears to have surfaced in Singapore. I have no knowledge if such issues arose in the rest of ASEAN.

7 ASEAN has set 2015 as the target for creating a single regional economic market known as the ASEAN Economic Community. Perhaps then, if and when the member states encounter more cross-border insolvencies among themselves, the need for action in this area of the law will appear on the radar screen.

III. The United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-Border Insolvency ("the Model Law") in ASEAN

8 Let me now comment on the UNCITRAL Model Law in the context of ASEAN. The Model Law has been in existence since 1997 but has only been adopted in some form or another by, now I am told, 20 countries. Of this number, not more than a handful of them are likely to require the degree or scope of judicial and other forms of co-operation needed to maximise the recovery of assets for creditors. The fact is that the large majority of the world's economies are recipients of capital from a small number of rich, developed countries and therefore do not experience the problems of cross-border insolvency affecting global companies from those economies that invest in them. Of the Asian economies, only Korea and Japan have adopted the Model Law, presumably because their respective governments see

the benefits of adopting the Model Law, since they, unlike the rest of the Asian economies, have very large global investments in manufacturing, trade and services. It will be interesting to know the experiences of these countries in tackling cross-border insolvency problems confronting Korean and Japanese creditors of failed enterprises.

9 Chief Justice Spigelman of the Supreme Court of New South Wales, in his address made at the INSOL International Annual Regional Conference held in Shanghai in 2008[3] ("2008 Address") pointed out that the BRIC economies (Brazil, Russia, India and China) have not adopted the Model Law and that "[t]hroughout the Asian region there appears to be a great deal of reluctance to adopt the Model Law or to enter into regional arrangements". He suggested that a more promising approach would be to persuade Asian countries to enter into bilateral arrangements, particularly between nations with similar legal systems and similar stages of economic development, or regional arrangements where there is a broader-based agreement about trade and commerce. He also stated that the difficulties of international agreement on cross-border insolvency are, in almost all respects, identical to those which arise in the course of seeking international agreement with respect to trade and investment issues generally. He suggested that attempting to piggy-back on whatever bilateral or regional negotiations in trade and investments there may be may prove to be the most fruitful course.

10 There is merit in this approach and it may work for some countries. But in this connection, I may mention that Singapore's bilateral free trade agreements are largely based on the liberalisation and facilitation of trade and investment. Singapore signed AFTA in 1993, and has since expanded its network of free trade agreements to cover 18 regional and bilateral free trade agreements with 24 trading partners. They include Australia, China, India, Japan and the US. They focus on increasing bilateral trade and investments. Successful investments create much more mutual benefits than failed enterprises. Hence, to my knowledge, none of Singapore's free trade agreements contains any provisions relating to cross-border issues in the context of insolvency. And as I have said earlier, neither has there been any discussion on these issues within ASEAN. So there is much to be done if progress is to be made in this area.

3 "*Cross-Border Insolvency: Co-Operation Or Conflict*", address by The Honourable JJ Spigelman AC, Chief Justice of New South Wales, delivered at the INSOL International Annual Regional Conference, Shanghai, 16 September 2008.

IV. The Insolvency Regime in Singapore

11 Let me now discuss the insolvency regime in Singapore. The main legislation, the Companies Act,[4] is modelled on the UK and Australian companies' legislation, but the insolvency provisions regulating Singapore companies and foreign companies were initially derived from the UK Companies Act of 1948[5] and, subsequently, another part of it from the UK Insolvency Act of 1986.[6] With respect to insolvent Singapore companies, not all creditors are treated equally. Policy considerations dictate that certain creditors be preferred. But all other unsecured creditors are treated equally on the principle of *pari passu*. With respect to foreign companies, s 351 of the Companies Act provides for a foreign company to be wound up as an unregistered company notwithstanding that it is being wound up or has been dissolved or has otherwise ceased to exist as a company under the laws of the place of its incorporation. Section 354 provides that the outstanding property of a defunct unregistered foreign company whose place of incorporation or origin is a country designated by the Minister, shall vest in its liquidator at the date the company was dissolved. This provision is derived from s 318 of the Companies Act of Victoria (Australia) of 1961 ("the Victoria Companies Act") but no country has yet been designated under this provision by the Minister.

12 The more important provision is s 377(3)(*c*), which provides for the ring-fencing of the assets of foreign companies registered to carry on business in Singapore. This provision is derived from s 413(2) of the UK Companies Act of 1948 and s 352 of the Victoria Companies Act. It provides that:

> (3) A liquidator of a foreign company appointed for Singapore by the Court or a person exercising the powers and functions of such a liquidator –
>
> > (a) shall, before any distribution of the foreign company's assets is made, by advertisement in a newspaper circulating generally in each country where the foreign company had been carrying on business prior to the liquidation if no liquidator has been appointed for that place, invite all creditors to make their claims against the foreign company within a reasonable time prior to the distribution;
> >
> > (b) subject to subsection (7), shall not, without obtaining an order of the Court, pay out any creditor to the exclusion of any other creditor of the foreign company; and
> >
> > (c) shall, unless otherwise ordered by the Court, only recover and realise the assets of the foreign company in Singapore and shall, subject to paragraph (b) and subsection (7),

4 Cap 50, 2006 Rev Ed.
5 Companies Act 1948 (c 38) (UK).
6 Insolvency Act 1986 (c 45) (UK).

pay the net amount so recovered and realised to the liquidator of that foreign company for the place where it was formed or incorporated after paying any debts and satisfying any liabilities incurred in Singapore by the foreign company.

V. The rationale of ring fencing

13 The rationale of s 377(3)(*c*) is that local creditors must be preferred to foreign creditors, even though the winding up in Singapore may be ancillary to the main foreign winding up of the company. It represents, I suppose, what is known as the territorialist approach to insolvency. It is contrary to the unitary theory of insolvency which says that insolvency should be a unitary process with only one set of proceedings recognised throughout the world. Section 377(3)(*c*) creates its own separate insolvency process to pay all Singapore creditors from Singapore assets, with any surplus to be paid to the main liquidator. It is also contrary to the universality theory of insolvency, which claims that an insolvency proceeding has worldwide effect over all the assets of the insolvent company, wherever they may be. The provision is therefore anathema to insolvency judges, practitioners and academics wedded to the principle of "all for one and one for all" in international insolvency. From what I have read,[7] the universalist school of thought, or what is second best, modified universalism, prevails in our two law schools which would prefer s 377(3)(*c*) to be repealed on a number of grounds, among which are the following:

(a) the provision is out of line with modern developments in insolvency law;

(b) it is not possible to ring-fence assets which can be moved out of the jurisdiction easily; and

(c) it may invite reciprocal treatment by other jurisdictions which may affect Singapore assets invested abroad.

14 In his 2008 Address, Chief Justice Spigelman gave another reason why ring-fencing is economically indefensible. He said:

> The starting point is the recognition that imposing domestic policy priorities, or ensuring that local assets are retained for the purpose of maximising the payout to local creditors, are forms of preferential treatment, equivalent, in their commercial substance, to non-tariff barriers on trade and investment. 'Ring-fencing' local assets is plainly a form of preference, equivalent to the kinds of restrictions on trade, commerce and investment which have long been the subject of

7 See Wee Meng Seng, "A Lost Opportunity Towards Modified Universalism" [2009] LMCLQ 18–27 and Tham Chee Ho, "Ancillary Liquidations and *pari passu* Distribution in a Winding-up by the Court" [2009] LMCLQ 113–134.

> international negotiations at bilateral, regional and multilateral levels. It does not seem to me that there is any reason why issues associated with cross-border insolvency could not be added to these continuing high level negotiations.

I think the argument based on non-tariff barriers overstates the case against the practice of ring-fencing of assets, especially by developing countries with small economies. This does not appear to be a significant factor in the promotion of bilateral trade and investments, as otherwise, s 377(3)(*c*) of the Companies Act would either have been modified or repealed. Ring-fencing can work to the advantage or benefit of a foreign creditor in circumstances where the pool of local assets is sufficient to meet his entire claim, whereas adding them to the foreign pool may actually dilute the payout of his claim.

15 Ring-fencing of assets of foreign companies for the benefit of local creditors has been a feature of the Singapore insolvency regime since 1967 when Singapore was a developing economy with no capital to invest in other countries. Territorialism had, and still has, a lot of advantages for local creditors individually in practical terms. It may amount to a preference, but it may be justified in that local creditors' claims have also contributed to the assets of the insolvent company, whereas the claims of foreign creditors have not. As a practice, it may offend the theory of universalism or modified universalism, but the theory is not without its difficulties in implementation. The crucial question is: for whose benefit is this theory propounded or implemented? National economies are not and will never be equal, and the question is whether universalism will simply produce more benefits for bigger and richer economies as against smaller and poorer economies.

16 In this respect, I should also mention that the ring-fencing of Singapore assets of foreign banks carrying on business in Singapore has been a feature of the Singapore insolvency regime since our first Banking Act was enacted in 1970.[8] The original s 56 read as follows:

> Where a bank becomes unable to meet its obligations or becomes insolvent or suspends payment, the assets of that bank in Singapore shall be available to meet all depositor liabilities of the bank in Singapore; and such depositor liabilities shall have priority over all other liabilities of the bank.

The current provisions, ss 61–62A of the Banking Act,[9] are much more elaborate:

8 See the Banking Act 1970 (Act 41 of 1970).
9 Cap 19, 2008 Rev Ed.

Priority of specified liabilities

61.—(1) Where a bank becomes unable to meet its obligations or becomes insolvent or suspends payment, the assets of that bank in Singapore shall be available to meet all liabilities in Singapore of the bank specified in section 62(1).

(2) The liabilities in Singapore of the bank specified in section 62(1) shall have priority over all unsecured liabilities of the bank other than the preferential debts specified in section 328(1) of the Companies Act (Cap. 50).

Priority of specified liabilities *inter se*

62.—(1) Notwithstanding the provisions of any written law or rule of law relating to the winding up of companies, in the event of a winding up of a bank, the following liabilities in Singapore of the bank shall, amongst themselves, rank in the following order of priority:

(*a*) firstly, any premium contributions due and payable by the bank under the Deposit Insurance Act (Cap. 77A);

(*b*) secondly, liabilities incurred by the bank in respect of insured deposits, up to the amount of compensation paid or payable out of the Fund by the Agency under the Deposit Insurance Act in respect of such insured deposits;

(*c*) thirdly, deposit liabilities incurred by the bank with non-bank customers other than those specified in paragraphs (*b*) and (*d*);

(*d*) fourthly, deposit liabilities incurred by the bank with non-bank customers when operating an Asian Currency Unit approved under section 77.

(2) The liabilities in each class specified in subsection (1) shall –

(*a*) rank in the order specified therein but as between liabilities of the same class shall rank equally between themselves; and

(*b*) be paid in full unless the assets of the bank are insufficient to meet them in which case they shall abate in equal proportions between themselves.

(3) For the purposes of section 61 and this section, 'deposit liabilities of a bank' means the liabilities of the bank in respect of –

(*a*) sums of money paid to the bank on terms –

(i) under which they will be repaid, with or without interest or at a premium, or with any consideration in money or money's worth, either on demand or at a time or in circumstances agreed by or on behalf of the persons making the payments and the bank; and

(ii) which are not referable to the provision of property or services or to the giving of security; and (*b*) such other product as may be prescribed, but does not include –

(i) in the case of a bank incorporated in Singapore, liabilities of the bank arising from loans –

(A) granted by creditors whose claims are fully subordinated to the claims of all un-subordinated creditors; and

(B) the terms of which comply with the criteria for the treatment of the liabilities as capital in the computation of the bank's capital adequacy ratio under section 10, whether or not the entire amount of such liabilities is treated as capital in the computation; and

(ii) liabilities of the bank in respect of such other product as may be prescribed.

(4) For the purposes of subsection (3)(*a*)(ii), money is paid on terms which are referable to the provision of property or services or to the giving of security if, and only if –

(*a*) it is paid by way of advance or part payment under a contract for the sale, hire or other provision of property or services, and is repayable only in the event that the property or services is or are not in fact sold, hired or otherwise provided;

(*b*) it is paid by way of security for the performance of a contract or by way of security in respect of loss which may result from the non-performance of the contract; or

(*c*) it is paid by way of security for the delivery up or return of any property, whether in a particular state of repair or otherwise.

(4A) For the avoidance of doubt, any liability of a bank excluded from the definition of 'deposit liabilities of a bank' in subsection (3) shall rank *pari passu* with all other unsecured liabilities of the bank.

(5) In this section, 'Agency', 'Fund' and 'insured deposit' have the same respective meanings as in section 2(1) of the Deposit Insurance Act (Cap. 77A).

Priorities for set-off in winding up of bank

62A. Notwithstanding any written law or rule of law relating to the winding up of companies, in the event of the winding up of a bank in Singapore, a liquidator shall first set-off a depositor's liabilities to the bank (whether or not incurred in the Asian Currency Unit of the bank) against any deposit of the depositor placed with the bank other than with the Asian Currency Unit of the bank.

17 Similar preferential treatment is given to claims against finance companies under the Finance Companies Act.[10] The relevant section provides as follows:

> **Priority of specified liabilities *inter se***
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> 44A.—(1) Notwithstanding the provisions of any written law or rule of law relating to the winding up of companies, in the event of a winding up of a finance company, the following liabilities in Singapore of the finance company shall, amongst themselves, rank in the following order of priority:
>
> (*a*) firstly, any premium contributions due and payable by the finance company under the Deposit Insurance Act 2005;
>
> (*b*) secondly, liabilities incurred by the finance company under the Deposit Insurance Act 2005 in respect of insured deposits, up to the amount of compensation paid or payable out of the Fund by the Agency under the Deposit Insurance Act 2005 in respect of such insured deposits.
>
> (2) The liabilities in each class specified in subsection (1) shall –
>
> (*a*) rank in the order specified but as between liabilities of the same class, such liabilities shall rank equally between themselves; and
>
> (*b*) be paid in full unless the assets of the finance company are insufficient to meet them in which case they shall abate in equal proportions between themselves.

18 Reverting to the argument that ring-fencing assets is futile and does not protect local creditors given that assets may be moved out of Singapore with ease, it is, of course, true with respect to intangible assets. But that argument also applies to the ring-fencing of preferential or priority debts and, to that extent, the argument may lose some force. In any case, it is an offence under Singapore law to siphon off such assets. Section 422 of the Penal Code[11] provides:

> Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment for a term which may extend to 3 years, or with fine or with both.

There are similar provisions in the Banking Act, the Finance Companies Act and the Insurance Act[12] that make it an offence to contravene the priority provisions of these Acts. The punishments are as follows:

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10 Cap 108, 2000 Rev Ed. (See now Cap 108, 2011 Rev Ed, which came into effect on 15 July 2011.)

11 Cap 224, 2008 Rev Ed.

12 Cap 142, 2002 Rev Ed.

(a) Banking Act – imprisonment of up to three years or a fine not exceeding $125,000 or both;

(b) Finance Companies Act – imprisonment of up to three years or a fine not exceeding $20,000 or both; and

(c) Insurance Act – a fine not exceeding $12,500, and where the offence is committed by a corporation, any individual guilty of the offence shall be liable on conviction to imprisonment for a term not exceeding 12 months in addition to or in substitution for any fine.

Whether any officer or employee of a foreign company would want to risk prosecution is for him to decide. All of these offences are extraditable offences.

19 Also pertinent to protecting Singapore assets and claims are the provisions in Division 4 of Part III of the Securities and Futures Act[13] which are designed to override the effects of insolvency of stock-broking firms. They protect both the designated clearing house and the integrity of the market by giving primacy to the default rules of a designated clearing house over the general laws of insolvency. The Securities and Futures Act also provides for the creation of trust accounts that insulate customers from the insolvency of a broker, and for compensation out of the fidelity fund that the Singapore Stock Exchange ("SGX") is required to establish. These rules are designed, in part, to override Singapore's insolvency laws and ensure that the ordinary investor who may have invested all his life-savings does not lose all of it because of the insolvency of a brokerage firm. Without legislative intervention, such a scenario is possible because the normal insolvency rules, and in particular the anti-netting rules attributable to the case of *British Eagle International Air Lines Ltd v Companie Nationale Air France*,[14] will allow an insolvent broker to disclaim all onerous contracts and enforce only the favourable ones. In an extreme case, this will cause financial difficulties for the central clearing house through which all securities on the SGX are cleared[15] and that, in turn, will create systemic risks that affect all securities brokers and possibly their end clients, *ie*, those who trade on the stock exchange.[16]

20 As for the argument that ring-fencing may invite retaliatory measures by other countries, this is a policy issue of balancing

13 Cap 289, 2006 Rev Ed.
14 [1975] 1 WLR 758.
15 The Central Depository (Pte) Limited.
16 See Hans Tjio, *Principles and Practice of Securities Regulation in Singapore* (LexisNexis, 2nd Ed, 2011) at para 4.23.

competing interests within the larger economic goals of Singapore, which I am not qualified to evaluate.

21 Accordingly, with all these provisions in the statute book, the degree of judicial co-operation which Singapore courts can give to foreign courts in relation to the remittance of the assets of an insolvent foreign company is very limited. They cannot exercise any power to assist foreign courts or foreign liquidators that is inconsistent with the legislative scheme. The decision of the House of Lords in *Re HIH Casualty and General Insurance Ltd*[17] ("*HIH Casualty*") has been praised as a model of international co-operation even though the five members of the court could not agree on whether to base their decision on s 426 of the UK Insolvency Act of 1986 and/or also on the common law as part of the court's inherent jurisdiction. In view of the express provisions of the Singapore Companies Act, Singapore courts are spared the dilemma of having to consider this issue. The common law principle espoused by Lord Hoffman in *HIH Casualty* has now been followed by the English Court of Appeal in *Rubin v Eurofinance SA*[18] ("*Rubin*") where the court recognised a New York judgment given in Chapter 11 proceedings on the grounds, *inter alia*, that:

> Since there should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which received worldwide recognition and should apply universally to all the bankrupt's assets and since recognition carried with it the active assistance of the court which should include assistance by doing whatever the English court could have done in the case of domestic insolvency, the judgment of the New York court could be enforced against the defendants at common law.

22 Whilst insolvency practitioners and academics in Singapore, and indeed, throughout the common law world, may be excited by such developments in the UK, it remains to be seen how much impact they will have on insolvencies in the countries of ASEAN or Asia, the majority of which are civil law countries, and which are not designated as "relevant countries" under s 426 of the UK Insolvency Act of 1986. It is interesting to note that whilst Brunei and Malaysia have been designated as "relevant countries", Singapore has not been so designated even though the insolvency regime concerning foreign companies under the Malaysian Companies Act[19] is the same as that of Singapore. If Singapore has not been so designated, it is probably due to the fact that there was no necessity to seek designation under that provision.

17 [2008] UKHL 21.
18 [2010] EWCA Civ 895.
19 See the Companies Act 1965 (Act 125) (3rd Reprint, 2000) (M'sia).

VI. Singapore decisions on cross-border insolvency

23 So much for the general background on the situation in the region, and Singapore's adherence to the territoriality principle in cross-border insolvency. I will now discuss the recent decisions of the Singapore courts which show that our judges are very much alive to the ongoing debate on the merits of modified universalism as against territorialism. I believe our judges are sympathetic to providing such assistance as is proper to foreign courts and liquidators in the tradition of common law judges.

24 I start with *Re China Underwriters Life and General Insurance Co Ltd*[20] ("*Re China Underwriters*"), which I decided in 1988 as a High Court judge. In that case, a Hong Kong insurance company was wound up in Hong Kong and a liquidator was appointed. The company was registered as a foreign company in Singapore, but had not been wound up here. In the course of investigating the company's affairs, the Hong Kong liquidator applied under the Companies Act[21] to examine several connected individuals. One issue was whether the court could recognise him as a liquidator, which I did. Another issue was whether, if he were recognised, the court had the power to grant the order. I held that the jurisdiction of the court was statutory in nature, that the court could only exercise the power in the case of a foreign company that was being wound up under the Companies Act, and that the court did not have any inherent jurisdiction to grant the order. The decision was approved by the Court of Appeal in *Official Receiver of Hong Kong v Kao Wei Tseng*.[22] As far as I can recall, the decision in *Re China Underwriters* was not influenced by any particular theory of insolvency, but was simply based on a construction of the provisions of the Companies Act. In that case, the Hong Kong liquidator could have obtained his remedy by applying to wind up the Hong Kong company under the Companies Act.

25 The next case is *Tohru Motobayashi v Official Receiver*[23] ("*Tohru*"). In that case, a Japanese company and its registered branch in Singapore were both wound up, and liquidators were appointed for both companies. The Singapore liquidator, at the request of the Japanese liquidator, applied to the court for an order to remit the net assets of the company in Singapore to the Japanese liquidator after paying off all the preferential creditors only. The High Court made no order on the application. The Japanese liquidator understood the "no order" to mean that all Singapore claims must be paid first, and accordingly requested the Singapore liquidator to appeal. The Singapore liquidator refused

20 [1988] 1 SLR(R) 40.
21 Cap 50, 1988 Rev Ed.
22 [1990] 1 SLR(R) 315.
23 [2000] 3 SLR(R) 435.

because of the costs involved. The Japanese liquidator then filed his own application to the court for, *inter alia*, a declaration that the Companies Act[24] required a Singapore liquidator of a foreign company to pay the net assets of the company to him after paying off only the preferential debts. The High Court dismissed the application on the grounds of abuse of process and estoppel. On appeal, a further issue of the *locus standi* of the Japanese liquidator was raised as a local liquidator had been appointed. The Court of Appeal held that there was no estoppel and that the Japanese liquidator had *locus standi* to make the application as, under the Companies Act, he had an interest in any net proceeds of the Singapore liquidation after paying off all local creditors first.

26 Does *Tohru* mark a shift towards modified universalism in recognising the standing of the Japanese liquidator under the Companies Act? Perhaps. The difference between *Tohru* and *Re China Underwriters* is merely in the facts, not in the law. In *Tohru*, the foreign company was wound up under the Companies Act, whereas in *Re China Underwriters*, the company was not. Certainly, the Court of Appeal in *Tohru* assisted the Japanese liquidator by granting him *locus standi* to be heard. But the outcome would still have been the same if the Japanese liquidator had not been heard at all, since s 377(3)(*c*) is clear beyond doubt that all Singapore creditors must be paid first before any money can be remitted to the Japanese liquidator. The decision shows the court's willingness to assist a foreign liquidation in whatever way it can, consistent with the local insolvency regime.

27 The third case is *RBG Resources plc v Credit Lyonnais*.[25] In that case, RBG, an English company, was wound up in England. RBG was an unregistered company with assets in Singapore. The English liquidator applied for and obtained an order from the (Singapore) High Court to wind up RBG in Singapore and was appointed the local liquidator. He then applied to the court for an order to transmit the assets which he had recovered to the English liquidator. CL, a foreign creditor who had filed a proof of debt in the Singapore liquidation, objected to the transmission application. CL wanted its debt to be paid from the Singapore assets, and not to share *pari passu* with the English creditors from a common pool of assets. The High Court held that: (a) s 377(3)(*c*) did not apply to RBG and its Singapore liquidator as RBG was not registered as a foreign company; and (b) CL's debt, which was incurred outside Singapore, could not be admitted in the Singapore liquidation as CL would then (if its debt were admitted) be entitled to share *pari passu* with local creditors, which s 377(3)(*c*) prohibited. The High Court held that the common law position as stated in *Re Bank of Credit and*

24 Cap 50, 1994 Rev Ed.
25 [2006] 1 SLR(R) 240.

Commerce International SA (No 10),[26] *ie*, all creditors wherever situated should be treated equally, would only apply to CL if its debt was incurred in Singapore. This statement was superfluous because s 377(3)(*c*) mandated a *pari passu* distribution.

28 In his judgment, the judge said and I quote:[27]

> 65 … As I have mentioned, Mr Lee [Eng Beng] had said in his 2000 article ([see (2000) 1 SAL Ann Rev 201]) that ring-fencing is retrogressive and out-of-line with internationally-accepted standards of a fair and equitable cross-border insolvency regime. He reiterated this view in a subsequent paper delivered in 2003 entitled 'Recent Developments in Insolvency Laws and Business Rehabilitation – National and Cross-Border Issues' (Asean Law Association Workshop VI, Paper V (December 2003)). He said (at p 295):
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> > The modern orthodoxy is that all assets of a foreign company should be remitted to the "seat of liquidation" for centralised administration and distribution for the collective benefit of all creditors worldwide. Ring-fencing of assets is directly contrary to this philosophy, and will likely affect the credibility of Singapore's cross-border insolvency law. It may also lead courts in other jurisdictions to be more reluctant to give assistance to Singapore-based insolvency proceedings, in view of the less than cooperative stance taken by section 377(3)(c).
>
> 66 Also, Philip St J Smart, *Cross-Border Insolvency* (Butterworths, 1998) states at p 376:
>
> > But it must never be thought that an ancillary winding up order creates a separate fund of assets reserved for, and to be divided up amongst, the English creditors. The ultimate objective of an ancillary winding up is to hand over the proceeds of the realisation of assets in England to the court conducting the main liquidation abroad. The desire, as far as possible, to have a single set of proceedings for distribution of assets is readily comprehensible.
>
> 67 In any event, it is for Parliament to decide whether ring-fencing should continue to apply at all and, if so, whether the distinction between registered and non-registered foreign companies should remain.

29 The last and most recent Singapore case on cross-border insolvency is *Re Projector SA*.[28] Projector SA, a Belize company, was wound up in Belize and provisional liquidators were appointed. It was registered as a foreign company in Singapore. ING, a Belgian company, with the agreement of the Belize liquidators, applied to wind up Projector SA in Singapore under s 253(1)(*b*) of the Companies Act. Two

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26 [1997] Ch 213.

27 *RBG Resources plc v Credit Lyonnais* [2006] 1 SLR(R) 240 at [65]–[67].

28 [2009] 2 SLR(R) 151.

local creditors, Mitsui and Samsung, objected to ING's application. Mitsui, a judgment creditor by default, had sought to attach Projector SA's assets in the form of shares in a Singapore company. It accordingly objected to the winding-up application which it claimed was filed to frustrate the attachment. Samsung had also obtained a Singapore judgment against Projector SA, but had not taken out attachment proceedings.

30 Mitsui objected to Projector SA being wound up in Singapore on the grounds that:

(a) ING had no standing to make the application;

(b) ING's action was an abuse of process as it was brought for collateral purposes;

(c) appointing a Singapore liquidator was unnecessary and of no legitimate benefit to any relevant party; and

(d) ING had not shown a sufficient nexus between Projector SA and Singapore.

Samsung objected on the ground that Projector SA had no assets in Singapore and the court had no jurisdiction to order the winding up of Projector SA in Singapore.

31 The High Court held that:

(a) Projector SA had assets in Singapore;

(b) ING had standing to wind up Projector SA as s 253(1) of the Companies Act allowed "any creditor" to apply; and

(c) s 377(3)(*c*) did not affect ING's standing to apply to wind up Projector SA.

32 The judge made the following observations:

> 44 If all interests are balanced, an order for Projector SA to be wound up in Singapore appears to be the better option. To begin with, such an order, which will reinforce the insolvency regime which the Belize court put in place on 10 October 2008, will result in the general body of creditors receiving the benefit of the statutory protection available under the Companies Act, including the automatic stay of proceedings, the prohibition on the disposal of assets and the inhibition on execution proceedings. The limited assets of Projector SA will be conserved and not depleted by unnecessary legal challenges. In fact, fearing that ING's application to wind up Projector SA may not be successful, the Belize liquidators have already filed a separate application to wind up Projector SA in Singapore. Furthermore, if a winding-up order is not made, Projector SA's Belize liquidators will need to utilise Projector SA's assets to challenge the execution

> proceedings commenced by Mitsui and potential execution proceedings which may be commenced by Samsung.
>
> 45 The winding-up order in Singapore will vest control of Projector SA's Singapore assets in Singapore liquidators to administer those assets in line with Singapore law for the benefit of the general body of creditors. The Singapore liquidators can exercise powers under the Companies Act to investigate the affairs of the company and to claw back assets, all of which are not available to the Belize liquidators.

33 These passages show that the judge short-circuited the whole winding-up process by according *locus standi* to ING to wind up Projector SA even though ING really had no claim to the assets of the company in Singapore. His order gave effect to the theory of modified universalism, but ultimately, it gave no benefit to ING since he did not decide: (a) that ING was entitled to share *pari passu* with the local creditors, or (b) that Mitsui and Samsung were not entitled to prove their debts in the Singapore liquidation. The judgment, of course, affected Mitsui's attempt to attach Projector SA's assets. But the outcome for Mitsui would be exactly the same if Projector SA had sufficient assets in Singapore to pay its debt, and also Samsung's debt. One can understand why Mitsui did not appeal. What the court did was to protect the interests of other creditors, if any, who had not taken the trouble to wind up Projector SA. We can therefore say that the judge went out of his way to give effect to modified universalism at the expense of territorialism.

34 Before I conclude my discussion of the attitude of the Singapore courts as evidenced by their judgments, I should like to discuss the case of Asia Pulp and Paper ("APP") because it may have been misunderstood by aggrieved creditors and some insolvency practitioners. Chief Justice Spigelman referred to this case in his 2008 Address where he said:

> Perhaps most significantly, the fear of the unknown inhibits creditors when dealing with multinational corporations in the absence of a significant level of assurance that the difficulties of cross-border enforcement in insolvency will not impede the collection of debts.
>
> The history of the Asia Pulp and Paper collapse in 2001, when the company unilaterally declared a moratorium on US$13.9 billion in debt, without substantial consequences to the company or its controllers, remains a sobering example for any creditor. The inability of international creditors to pursue assets, particularly in Indonesia but also in China, forced virtually everyone to submit to what was euphemistically called a restructuring which they had no choice but to accept.

35 These two passages are rather cryptic and may not tell the full story of how the APP group of about 150 subsidiary companies in China, Indonesia, Mauritius and the US ("the APP Group") managed to incur such enormous liabilities to creditors all over the world. Asia Pulp

& Paper Co Ltd ("APP Singapore"), a company incorporated in Singapore, was the holding company and the guarantor of those liabilities, but its income came (in part) from the fees it charged for providing services to its operating subsidiaries around the world. The bulk of the assets of the APP Group, which was one of the world's largest producer of pulp and paper products, were vested in Indonesian and Chinese subsidiaries, and charged to creditors in Indonesia and China. What happened was that the creditors bought the unsecured bonds and/or notes issued by the APP subsidiaries in the Cayman Islands. Hence, when APP Singapore declared a moratorium on the debts of the APP Group, the unsecured creditors found themselves completely exposed. That is probably why Chief Justice Spigelman said that the creditors had no choice but to submit to the "restructuring" carried out in that case.

36 However, if you read the judgments of the Singapore High Court and of the Singapore Court of Appeal,[29] you would discover the following facts. There was considerable delay in the restructuring of the debts of the APP Group. Many creditors cried foul and also fraud. In Singapore, APP Singapore had been sued by numerous creditors for sums approximating US$210m, while two creditors (Cellmark AB and Union De Banques Arabes Et Francaises UBAF) had filed winding-up petitions. The creditors could have let APP Singapore be wound up, but they did not want to do that because if APP Singapore were wound up, they could not get access to the assets in China and Indonesia which were already charged to other creditors. So, the creditors chose to commence judicial management proceedings against APP Singapore under the Companies Act.[30] But, both the High Court and the Court of Appeal held that the statutory requisites of judicial management could not be satisfied. Instead, judicial management would only encumber APP Singapore with more liabilities in the form of fees and other expenses, with no prospect of APP Singapore getting out of judicial management or recovering assets to pay off the creditors.

37 So, what does the APP case tell us? It does not tell us that the difficulties of cross-border enforcement in insolvency impeded the collection of debts, as APP Singapore was not wound up. There were no assets to collect because they all belonged to the subsidiaries and had all been charged to other creditors. The lesson to be learnt from the APP case is not that it illustrated the inadequacy of Singapore's insolvency laws or the failure of the Singapore courts to provide judicial co-operation to foreign courts or foreign creditors. In fact, the winding-up petitions were not proceeded with after the dismissal of the judicial

29 *Deutsche Bank AG v Asia Pulp & Paper Co Ltd* [2002] SGHC 257, and *Deutsche Bank AG v Asia Pulp & Paper Co Ltd* [2003] 2 SLR(R) 320.

30 Cap 50, 1994 Rev Ed.

management proceedings. The APP case was simply a case of the creditors assuming the risk of unsecured loans turning sour, for whatever reasons. They forgot to ask themselves where APP Singapore's assets were located. It was a case of *caveat emptor*.

38 I can summarise the Singapore position as follows:

(a) the decision in *HIH Casualty*, whether based on s 426 of the UK Insolvency Act of 1986 or the common law, has no application in Singapore because of s 377(3)(*c*) of the (Singapore) Companies Act;

(b) there is no inherent jurisdiction to "disapply" s 377(3)(*c*); and

(c) the decision in *Rubin* (that the court should recognise a foreign judgment in winding-up proceedings on the basis that it is a *sui generis* judgment) may receive a sympathetic reception if it is not contrary to any other law in Singapore, *eg*, the Limitation Act.[31]

VII. International trends

39 Let me now turn to some international trends on managing international insolvencies. I will not discuss the efforts made to promote the use of the Model Law as these are well known. Singapore has not adopted it, but my own view is that, even so, where our courts can assist in an international insolvency in which Singapore interests are affected or involved, they will surely do so unless prevented by law or public policy. In a paper entitled "Is Cross Border Cooperation a Legal and Practical Reality",[32] Sir Gavin Lightman and Adam Al-Attar advocated the use of protocols and other informal workouts between cross-border liquidators of various branches or entities of a multinational company.

40 Insolvency practitioners in Singapore may consider relying on such informal workouts and protocols. To ensure a co-ordinated approach to the liquidation of a company, office holders may agree to a protocol[33] in cross-border insolvencies to draw together the administration of the company's assets to produce a more orderly realisation for the benefit of creditors. Where the liquidator is under the

31 Cap 163, 1996 Rev Ed.

32 "Cross Border Cooperation? Is Cross Border Cooperation a Legal and Practical Reality?", lecture by Sir Gavin Lightman, delivered at the Insolvency Practitioners Association of Singapore and Singapore Academy of Law Seminar on Cross Border Insolvency, Singapore, 11 November 2009.

33 See the use of protocols developed in the light of the collapse of Lehman Brothers, which involved several Asian countries, even though the concept of using protocols is fairly new in Asia.

control of the court, he has to obtain the sanction of the court to enter into a protocol, as otherwise, he would breach his statutory duty if he acts in accordance with some other law in a way that prejudices the rights of local creditors without authorisation from the court. Therefore, a protocol can only be effective if it is supported by a jurisdiction adopting an essentially universalist or modified universalist philosophy to cross-border insolvency. The Singapore courts have not had occasion to consider such a protocol; and given the discernable judicial shifts I have mentioned, it will be interesting to see what our courts will make of such a protocol if an appropriate case comes before us.

41 However, it may still be possible for office holders to have informal agreements among themselves to render co-operation that will not breach the law. A good illustration of what is possible can be seen in the liquidation of Bank of Credit and Commerce International SA ("BCCI"). According to an abstract published by Deloitte, the liquidators of the BCCI companies worldwide (BCCI operated in 70 countries, but not in Singapore) agreed among themselves that, rather than competing with or even suing each other, they should pour all recovered assets into an international pool. Claims would be admitted under local rules, and creditors would receive the same percentage dividends. Presumably, the relevant local laws allowed the liquidators to proceed in that way. Notably the abstract states that the liquidators were able to recover 75 cents in the dollar against an estimate of no more than 10 cents in the dollar at the commencement of the liquidation.

VIII. The role of protocols

42 Another useful example is the protocol that was sanctioned by the US Bankruptcy Court in the Chapter 11 proceedings concerning Lehman Brothers Holdings Inc ("Lehman Brothers"). I noticed that there are four judges from that Bankruptcy Court here so I am not sure I should be talking about this. The court approved a comprehensive cross-border insolvency protocol for the Lehman Brothers group of companies with the following terms:

> 1.1 The parties acknowledge that this Protocol represents a statement of intentions and guidelines designed to minimize the costs and maximize recoveries for all creditors of the Proceedings, by promoting the sharing of relevant information among the parties and the international coordination of related activities in the Proceedings, while respecting the separate interests of creditors and other interested parties to each Proceeding (which shall be subject at all times to the local laws of the jurisdiction applicable to each Official Representative), and the independence, sovereignty, and authority of each Tribunal.
>
> 1.2 In recognition of the substantive differences among the Proceedings in each jurisdiction, this Protocol shall not be legally enforceable nor impose on Official Representatives any duties or

obligations, including (but not limited to) any obligations (i) that may be inconsistent with or that may conflict with the duties or obligations to which the Official Representative is subject under applicable law, or (ii) that are not in the interests of the Debtor's estate represented by the Official Representative and/or its creditors. Furthermore, nothing in this Protocol should be interpreted in any way so as to interfere with (i) the proper discharge of any duty, obligation or function of an Official Representative, or (ii) the exercise of statutory or other powers otherwise available to an Official Representative under applicable law.

1.3 Official Representatives should coordinate with each other and cooperate in all aspects of the Proceedings, subject in appropriate cases to bilateral protocols and protocols for communication among Official Representatives, Tribunals and Committees, that may be executed in furtherance of this Protocol. In doing so, the Official Representatives acknowledge and agree that the parties shall deal in good faith with each other in the interests of maximizing recovery for all of the Debtor's creditors.

43 The protocol sanctioned by the US Bankruptcy Court also adopted the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases adopted by the International Insolvency Institute in June 2001. However, these guidelines would not apply to the voluntary winding up of the Lehman Brothers entities in Singapore as those entities are debtors of Lehman Brothers.

44 I can now conclude by stating that the Singapore government is fully aware of the continuing tensions in this area of the law. Given current global trends in trade and investment, and the imminence of the ASEAN Economic Community, it may be timely for Singapore to examine cross-border insolvency issues that will inevitably arise. I have been informed that the Minister for Law has commissioned an Insolvency Law Review Committee comprising experienced insolvency practitioners and representatives of the respective stakeholders. The Review Committee has been tasked with carrying out a comprehensive review of Singapore's insolvency law regime. The Review Committee will be advised by a panel of advisers comprising foreign experts in the field. They have many models for co-operation to look at – which include the Model Law, s 426 of the UK Insolvency Act of 1986, the UK's insolvency regulations and Chapter 15 of the US Bankruptcy Code.[34] Ultimately, the Government will have to make a judgment call on what is best for Singapore, taking into account its own economic interests and its place in the ASEAN Economic Community and in the global economic environment. So, we will have to wait and see.

34 11 USC (US).