Case Note

PUSHING THE LIMITS OF JUDICIAL ASSISTANCE IN CROSS-BORDER INSOLVENCIES

In re HIH Casualty and General Insurance Ltd
[2008] 1 WLR 852

Cambridge Gas v Navigator Holdings
[2007] 1 AC 508

The recent House of Lords decision of *In re HIH Casualty and General Insurance Ltd* and the opinion by the Privy Council in *Cambridge Gas v Navigator Holdings* can be seen as significant steps towards greater collaboration between courts in the context of cross-border insolvencies, although it will be argued the former more so than the latter. This note critically analyses the decisions, including through a somewhat traditional common law conflict of laws perspective. Our local court also has not too long ago showed signs favourable to universalism in insolvency administration, and it remains to be seen how Singapore case law will react to these developments, hopefully with the aid of some legislative amendments.

TEO Guan Siew[1]
BCL (Oxford), LLB (Hons) (National University of Singapore); Assistant Registrar, Supreme Court of Singapore

I. Introduction

1 A local creditor of an insolvent foreign company can no longer take comfort in the certainty that the company's assets within jurisdiction will be distributed in accordance with the country's own statutory regime in the event of a winding up. In aid of insolvency proceedings somewhere else, the local court may well remit those local assets to the foreign jurisdiction to be dealt with by a system with materially different rules of distribution and priorities. Conversely, a

1 The author is grateful to Professors Adrian Briggs and Yeo Tiong Min for their suggestions, ideas and contagious academic enthusiasm. Special thanks also go out to Professor Hans Tjio for his always insightful views. All errors in this note remain the author's own, and the views herein do not represent those of the Supreme Court.

shareholder of a locally incorporated company must be alert to the possibility that judicial assistance of reorganisation efforts of the company taking place abroad may extend to stripping him of his title to the shares he owns, even if he did not personally submit to the jurisdiction of the courts of that foreign country. Such is the wide purport of two recent decisions emanating from the highest courts in the UK.[2] The degree of the courts' co-operation, when placed beside a more territorially-oriented perception of insolvency proceedings, may appear striking. Are these significant moves towards the goal of universalism in insolvency administration? Probably, although it will be suggested that one decision, *In re HIH Casualty and General Insurance Ltd* ("*Re HIH*")[3], has a greater impact in this regard than the other, *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* ("*Cambridge Gas*").[4] And the decision in *Re HIH*, particularly the speech of Lord Hoffmann, is not only desirable in its *ratio* of promoting a unified insolvency process but is further to be welcomed in helping to, subtly at any rate, show how the analytical treatment of cross-border insolvency cases can fit relatively nicely within the traditional common law conflict of laws framework. By comparison, the *Cambridge Gas* ruling, though seemingly radical at first glance and on its express terms, may on its proper analysis be nothing more than a product of the combination of an application of ordinary conflicts rules on recognition of foreign judgments and the peculiar nature of shareholding in company law. It will be interesting to see how our local courts respond to these foreign developments when the appropriate case comes along, although their ability to whole-heartedly embrace the pursuit of universalism is likely to be handicapped unless there are to be some legislative amendments forthcoming.

II. A different look at *Cambridge Gas*

2 It is always more exciting to keep the more interesting and significant to be discussed later, and so it is to *Cambridge Gas* that we first address our minds. Four European businessmen had decided to invest in a shipping venture, and had borrowed from the New York bond market in order to finance the purchase of some gas transport vessels. With the business quickly turning out to be a flop, they petitioned for Chapter 11 relief in New York. The complication lay in the way the business was structured: the ships were owned by a group of Isle of Man companies incorporated by the businessmen, with Navigator Holdings plc ("Navigator") at the top of the chain. Navigator in turn was held through a web of companies in other offshore

2 One a decision by the Privy Council on appeal from the Isle of Man.
3 [2008] 1 WLR 852.
4 [2007] 1 AC 508.

jurisdictions, the most important of which for our purposes was Cambridge Gas Transport Corp ("Cambridge"), a Cayman company which owned about 70% of Navigator and which was a wholly-owned subsidiary of a Bahamian company, Vela Energy Holdings Ltd ("Vela"). A reorganisation plan was confirmed by a court in New York for the assets of Navigator to be taken over by the creditors, and the way to do so was to vest the shares in Navigator in the creditors' representatives. In order to carry this out, the New York court sent a letter of request to the High Court of Justice of the Isle of Man for assistance in implementing the plan. Following that, the creditors' committee petitioned the Manx court for an order vesting the shares in their representatives, which was resisted by Cambridge principally on the ground that the order from New York cannot be binding against it since it had never submitted to the jurisdiction of the US court.

3 To someone familiar with the conflict of laws rules on recognition of foreign judgments, Cambridge's argument appears to be a perfectly sensible one: if it had not submitted and was not present in the US, the New York court order simply could not affect Cambridge's rights in the shares, at any rate if it is regarded as a judgment *in personam*.[5] If it were a judgment *in rem*, then still less can it be recognised because it would be a foreign judgment adjudicating on property situated outside the jurisdiction of the foreign court.[6] To get out of this seeming impasse, Lord Hoffmann, in acceding to the request and divesting Cambridge of the title to its shares, adopted the perhaps radical track of declaring that the New York order is neither a judgment *in rem* nor *in personam*. According to him, insolvency proceedings merely provide the mechanism for collective execution against the debtor's property and do not entail an adjudication of rights.

4 While probably to some a questionable proposition,[7] Lord Hoffmann appears to have been very much influenced by proceduralist theories of insolvency law which see its role as merely that of constructing an effective collective *procedure* to give maximum effect to pre-insolvency rights: it is not concerned with substantively how rights should be allocated, a question totally deferred to pre-insolvency laws of obligations, property and so on.[8] As such, there is, as it were, no fresh

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5 See A Briggs & P Rees, *Civil Jurisdiction and Judgments* (London, Singapore: Informa/LLP, 4th Ed, 2005) at para 7.37.

6 See *Dicey, Morris and Collins on the Conflict of Laws* (London: Sweet & Maxwell, 14th Ed, 2006) Rule 40 at para 14R-099.

7 See criticisms of the decision on this point by A Briggs in (2006) 77 BYBIL at 578-581. Also see C H Tham, "Insolvency Proceedings and Shareholdings: When is a Foreign Judgment not a Judgment" [2007] LMCLQ 129.

8 Lord Hoffmann said at [15] of the decision that "bankruptcy, whether personal or corporate, is a collective procedure to enforce rights and not establish them". For proceduralist theories which emphasise solely on creditor wealth maximisation,

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adjudication of rights that takes place. But to the opposing school who advocates a redistributive role of insolvency law,[9] reorganisation of existing rights as well as the constitution of new ones is inherent in the insolvency process, such that it seems heretical to suggest that an order from a winding-up court is not an adjudication as to rights. Moreover, even from the purely proceduralist view, such an order can surely be argued to nevertheless involve judicially affirming and giving effect to, post-insolvency, rights that were acquired prior to liquidation's onset. An improvement in approach could have been to accept that notwithstanding that these orders made in foreign insolvency proceedings are judgments determining rights, they are nevertheless a uniquely different type of judgments that calls for a different basis of recognition and enforcement than the usual rules of private international law. Even so, it obviously cannot be the case that in deciding whether foreign liquidation proceedings should be recognised, the court merely proceeds based on the need for international comity and a blanket approach of promoting universality in insolvency proceedings, as the general tenor of Lord Hoffmann's judgment would seem to suggest. To be sure, his Lordship did appear to have considered some relevant factors, such as whether the foreign order made was something which could just as easily have been obtained in the local court,[10] and whether any prejudice to local creditors would be caused.[11] In comparison, commentators have also interpreted previous English decisions as establishing that the recognition of foreign liquidations is generally dependent upon whether those proceedings took place in the place of incorporation of the company, although that is not regarded as the sole basis, with some propounding that the test should be whether there is a sufficiently substantial connection between the company and the jurisdiction in question.[12] Yet, Navigator was not incorporated in

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see, for example, T H Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge, Mass: Harvard University Press, 1986).

9 See, for example, V Finch, *Corporate Insolvency Law: Perspectives and Principles* (UK, New York: Cambridge University Press, 2002) ch 2.

10 Lord Hoffmann considered that the creditors could have achieved the same result as their Chapter 11 plan if they had instead started proceedings to wind up Navigator in the Manx courts and to propose a scheme of arrangement under s 152 of the Manx Companies Act 1931: see [24] of the judgment in *Cambridge Gas*.

11 See [21] of the judgment in *Cambridge Gas*.

12 See I F Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd Ed, 2005) at p 204. The author suggests that while generally one should look to the place of incorporation as the basis for recognition, the English courts should "retain an element of discretion whether to recognise liquidations which take place outside the country of incorporation, and that the basis for recognition should be expressed with reference to whether there is a sufficiently substantial connection between the company and the jurisdiction in question for it to be appropriate for the proceedings to be commenced there". Also see P J Smart, *Cross-Border Insolvency* (Butterworths, 2nd Ed, 1998) at pp 168–177 where he discusses other possible bases of recognition of foreign liquidation other than the place of

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New York, and one would surely hesitate to suggest that New York was a place which had a substantial connection with the company.[13]

5 The better view would be to simply rationalise the decision as a case where Cambridge must be regarded as having submitted to the New York court's jurisdiction. On this, there are two possibilities. First, Cambridge was a wholly-owned subsidiary of Vela, which, on the facts, had clearly submitted to the New York court by participating in the Chapter 11 proceedings and, in particular, making proposals in the reorganisation efforts. There are hints that this, and especially the fact that Cambridge and Vela further shared a common director, influenced Lord Hoffmann's decision.[14] But this restrictive interpretation does not respect the doctrine of separate legal personality, and the Privy Council did not go so far as to expressly lift the corporate veil. The second approach is to start by understanding the nature of shareholding. There is much debate as to what should be the appropriate legal conception of a share, in particular whether it is truly a form of personal proprietary right that cannot be expropriated[15] or whether it is something much less and nothing more than a right to an income stream.[16] But even if shares are treated as a form of property, they are a special type in that the incidents of ownership are intrinsically tied to the owner's status as a shareholder. The shareholder is inherently bound by the company's constitution and what the company does. If he wishes to object to, for example, a line of business that is being undertaken by the company, his recourse lies in what is prescribed under the company's books such as through members' meetings and resolutions. It may be no different where the company (Navigator) decides to submit to the jurisdiction of a foreign court: the shareholder (Cambridge) is no less bound and is regarded as equally subject to that court's jurisdiction, but of course

incorporation, such as the presence of assets and the carrying on of business in that jurisdiction.

13 The mere fact that New York bonds were responsible for financing the purchase of the ships probably does not suffice. Notably, nor were the assets of the company situated in New York: the ships were registered in Liberia.

14 Lord Hoffmann stated at [8] of the judgment, after examining the nature of the corporate structure, that "the claim that [Cambridge] had not submitted to the jurisdiction was technical in the highest degree".

15 As the Australian decision of *Gambotto v WCP Ltd* (1995) 182 CLR 432 ("*Gambotto*") will suggest. By comparison, the Privy Council recently in *Citco Banking Corp v Pusser's Ltd* [2007] BCC 205 reaffirmed that the court would not interfere with amendments to the articles of association which adversely affect the rights of certain shareholders, as long as the amendment was *bona fide* for the benefit of the company as a whole. The Privy Council, however, stopped short of expressly disagreeing with *Gambotto*, saying that the latter dealt specifically with expropriation which was not the case before them.

16 See R Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) CLJ 554 which describes the law's progressive attenuation of shareholder rights and argues that one can no longer conceive of shareholder rights as a consequence of ownership.

only *qua* shareholder.[17] The shareholder is bound (whether it be by virtue of the company's submission to the foreign jurisdiction or because the company is present within that jurisdiction) by the rulings of that foreign court which affect his rights as a shareholder.[18]

6 If that be the reading of the case, *Cambridge Gas* goes no further than an application of the specific nature of shareholding in the context of traditional conflict of laws rules on recognition of foreign judgments although the decision itself might have been motivated by a desire to achieve universalism of insolvency. Its impact would clearly be restricted only to the specific context where what is sought to be deprived is the title of a shareholder to the shares of the insolvent company. This interpretation will also indicate that the ordinary rules of recognition in private international law can apply equally to cross-border insolvencies. One would venture to think that in Singapore, on those same facts, a similar result will probably be reached, although it is submitted that the approach suggested herein should be preferred to the House of Lords' express reasoning in *Cambridge Gas*.

III. *Re HIH* – A significant step towards universalism in insolvency, and more

7 Unlike *Cambridge Gas*, it will be argued that the decision in *Re HIH* (at least Lord Hoffmann's grounds) makes a more substantial contribution to unity in insolvency administration. The case concerned the question of whether a company's assets in England should be remitted to be dealt with in an Australian liquidation of the company. One may be forgiven for thinking that this should probably be rather inconsequential as the English and Australian insolvency regimes are similar and have common roots. However, a crucial distinction did exist in the rules of distribution which made a difference in the case: Australian insolvency law had a provision which required the proceeds of reinsurance policies taken up by the company to be distributed first to those creditors who had insurance claims against the company, in priority to other claims.[19] English law had no such equivalent

17 Indication that this is a viable construction of the decision comes near the end of Lord Hoffmann's judgment, where he stated at [26] that a shareholder's rights may be varied or extinguished by the mechanisms provided by the company's articles and the relevant statute, and that, as a shareholder, Cambridge was bound by the transactions into which the company has entered, including a plan under Chapter 11. This approach is also supported by C H Tham, "Insolvency Proceedings and Shareholdings: When is a Foreign Judgment not a Judgment" [2007] LMCLQ 129 at 135–136.

18 It must be conceded though that *Cambridge Gas* would represent a more extreme case where such interference with the shareholder's rights extended to depriving him entirely of the title to his shares.

19 Australian Corporations Act 2001 s 562A.

distribution rule which favoured insurance claimants at the relevant time.[20] If the local assets were transferred to Australia rather than not, the overall effect was that the non-insurance creditors would be worse off. The Australian liquidators (supported by two Australian insurance creditors who would benefit from the application of Australian rules of distribution) sent a letter of request to the English High Court asking that the provisional liquidators who had been appointed in England be directed to remit the assets located in England to Australia for distribution.

8 Section 426(4) of the UK Insolvency Act 1986 expressly provides for the judicial assistance of foreign insolvency proceedings:

> The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in … any relevant country …

9 Australia has been designated as a "relevant country". Subsection 5 further states that:

> [A] request made to a court in any part of the United Kingdom by a court … in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.
>
> In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law.

10 At first instance, the judge took the view that the English court had no power to direct the liquidator to remit assets for distribution in Australia where the scheme for *pari passu* distribution there was not substantially the same as under English law.[21] The reason lay in the mandatory nature of the English statutory scheme, and it made no difference that s 426 was applicable. The English Court of Appeal similarly refused to order the remittance, but on the different ground that while the English court did have the jurisdiction under s 426 to so transfer local assets to another place of liquidation even if the foreign rules of distribution were at variance with the local equivalent, such power should only be exercised as a matter of discretion if any prejudice suffered by creditors is counteracted by other countervailing advantages, which in the court's view was not so in the instant case.[22]

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20 The UK has since adopted a regime with special rules of distribution for insolvent insurers (Insurers (Reorganisation and Winding Up) Regulations 2004), but these were not in force at the material time and hence not applicable to the instant case.

21 [2006] 2 All ER 671 at [112] *per* David Richards J.

22 [2007] 1 All ER 177.

11 On appeal to the House of Lords, Lord Hoffmann (with whom Lord Walker agreed) gave a decisive boost to judicial collaboration by holding that the English courts could order transfers of assets to the foreign liquidation with different distribution rules even without s 426. The jurisdiction was founded at common law, and s 426 merely adds on to that inherent jurisdiction.[23] The section's other significance was in terms of the applicable law to be applied to the insolvency administration. That the rules of distribution in the foreign court are dissimilar to England's own regime was only a matter that may affect the exercise of discretion whether or not to transfer.[24] The other two Law Lords[25] who delivered substantive judgments reached the same ultimate result of allowing the appeal and ordering the remittance, but for crucially different reasons.[26] Both were of the view that remittance was permissible in this case only by virtue of the applicability of s 426, without which there could be no common law power to order the transfer where its effect would be that the assets end up being distributed differently than under English rules. Lord Scott thought that since s 426 is as much part of England's statutory insolvency regime as the rules of *pari passu* distribution, sending assets abroad pursuant to the section to be distributed differently does not involve "disapplying" the English insolvency scheme. But matters stand differently where recourse is merely had to common law powers in the absence of s 426, since in that case the court would then indeed be guilty of not performing its statutory obligation to apply the English insolvency scheme. Lord Neuberger's analysis very much mirrors that of Lord Scott, and he added that an inherent jurisdiction to transfer at common law does not sit well with s 426 as it would then be difficult to see what the significance of designating a country under s 426 would be. As to when the discretion to transfer should be exercised, for Lord Hoffmann pursuant to common law powers and for Lords Scott and Neuberger in reliance on s 426, there appears to be broad agreement that the test should be whether it would be against England's public policy, or offensive to any fundamental principles of justice and fairness, for the assets to be distributed in the way that they are going to be in the foreign jurisdiction.[27]

23 At [24]–[28] of Lord Hoffmann's judgment.

24 At [18] of Lord Hoffmann's judgment.

25 Lord Scott of Foscote and Lord Neuberger of Abbotsbury.

26 Lord Philips of Worth Matravers too reached the same conclusion, although he refused to enter the fray to consider whether the jurisdiction to transfer is founded only upon statute or at common law as well.

27 See Lord Hoffmann's judgment at [31]–[34], Lord Scott's judgment at [62], and Lord Neuberger's judgment at [80].

12 Lord Hoffmann's conclusion can be defended, in preference to the other Law Lords' reasoning, from at least four angles. First, it must be right to draw a distinction, as Lord Hoffmann does, between the existence of the jurisdiction to transfer and the exercise of it. Jurisdiction to remit assets to another foreign liquidation should exist because of the goal of universalism in bankruptcy: the common law develops and must respond to the increasing recognition that there should be unitary insolvency proceedings preferably at the principal place of liquidation.[28] The only issue is whether discretion should be exercised in favour of such a transfer. In this respect, we can draw a close parallel with the general doctrine of *forum non conveniens*. Just as the common law courts since *Spiliada Maritime Corp v Cansulex Ltd*[29] have come to terms with the fact that there may be another more appropriate forum for the resolution of particular disputes (and that their jurisdiction should be stayed in favour of such a natural forum), so too should the courts accept that there may be a better place for the assets to be distributed in an insolvent winding up. There seems little reason for a dogmatic insistence that the local court must exercise its jurisdiction over locally situated assets so that local distribution rules will apply, just like how forum-centric ideas have fallen out of favour. In fact, it will be suggested below that such questions involving transfers of local assets to foreign liquidations may be viewed as subsumed within the usual *forum non conveniens* inquiry in the specific context of insolvencies (albeit with some slight modifications as explained below). Second, one should not presume that it is mandatory for the forum's statutory insolvency scheme of distribution to apply, which was what Lord Scott and the first instance judge did. For a start, it is always a question of statutory interpretation whether Parliament intended that statutory provision in question to apply to such facts in the first place. And even if the statute on its express wording does seem to apply to the case at hand, it may not even necessarily be a foregone conclusion that it must apply: it has been interestingly pointed out that doubts may be raised if there is shown to be no real or substantial connection with the country in question.[30] Notably, it is clear that in an English liquidation, its statutory rules of distribution are meant to apply universally to all assets, whether local or

28 Variously referred to also as the "domicile" of the company, or its "real seat", or its "centre of main interest". For examples of pro-universalism literature, see J L Westbrook, "A Global Solution to Multinational Default" (2000) 98 Mich L Rev 2276; I Fletcher, "International Insolvency – A Case Study and Treatment" in *International Banking Operations and Practices: Current Developments* (Dordrecht, Boston: M Nijhoff, 1994) ch 5. For a good summary of the competing theories of universalism versus territorialism, see I F Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd Ed, 2005)ch 1; R Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 3rd Ed, 2005) ch 14 at pp 619–624.

29 [1987] AC 460.

30 A Briggs, "A Note on the Application of the Statute Law of Singapore within its Private International Law" [2005] SJLS 189 at 198–201.

overseas. Yet, no one bats an eyelid when those English distribution rules are not applied to assets located abroad. As Lord Hoffmann pointed out, English cases have invariably taken the position that the liquidator in ancillary liquidation proceedings is authorised to leave the collection and distribution of foreign assets to the principal liquidator, notwithstanding that the statute in fact requires him to perform those functions even in respect of foreign assets.[31] So if the statute is already consistently "disapplied" for foreign assets, one can scarcely stubbornly assert that its application is mandatory. Third, contrary to the view of Lord Neuberger, the existence of jurisdiction to transfer at common law does not render s 426 redundant or irreconcilable; much less does it (as Lord Scott suggests) entail a judicial usurpation of Parliament's role. The section, rather than conferring a jurisdiction that never existed, could be seen as indicating the countries in favour of which the English court should more readily exercise its jurisdiction to remit assets. In other words, s 426 goes to the question of discretion. Further, s 426 is clearly important also for its choice of law component in that it permits the English court to itself apply another country's insolvency laws in an English liquidation.[32] Fourthly, as to the proposition that the power to transfer should only be exercised at common law if the court is satisfied that the foreign liquidator will also distribute *pari passu* in accordance with English rules of distribution,[33] the first response is to question the assumption of the fundamental nature of the *pari passu* notion, a principle trenchantly criticised for being more a myth than bedrock of insolvency law.[34] Leaving that aside or assuming that we are merely using the term *pari passu* as an abbreviation for the general statutory scheme of distribution, it will almost never be the case that the foreign rules of distribution will be identical to local ones: these are heavily dependent on the prevailing social and economic policies as to how the risk of insolvencies should be allocated, and can almost always be expected to diverge.[35] Even assuming that we can sometimes find an exact match, what use would the transfer to the foreign jurisdiction then be, short of merely creating some administrative convenience? And if the reply is that what we should be looking for are instances where the rules of distribution are not necessarily identical but rather substantially similar,[36] that is a difficult question of degree that seems clearly more directed at an exercise of discretion rather than the threshold question of whether jurisdiction exists in the first place.

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31 At [19] of his judgment in *Re HIH*.

32 As opposed to remitting assets to the foreign liquidation for them to be distributed there either based on that foreign country's own rules of distribution or that of another country (depending on that foreign country's own rules on choice of law).

33 As is the view of Lord Neuberger: see [75] of his judgment in *Re HIH*.

34 R I Mokal, "Priority as Pathology: The *Pari Passu* Myth" (2001) 60 CLJ 581.

35 Particularly on the identification and treatment of preferential unsecured creditors.

36 As the first instance judge in *Re HIH* will seem to suggest.

13 The significance of defending Lord Hoffmann's conclusion is that, if he is right, that would mean that the Singapore courts, which do not have the benefit of an equivalent to s 426, can similarly direct that local assets be transferred to a foreign liquidation to be distributed possibly based on materially different rules of priorities. The trouble is that not only do we not have a statutory provision expressly requiring our courts to render judicial assistance in cross-border insolvencies, we also have instead a ring-fencing provision which seems rather inimical to the goals of a unified distribution process. Section 377(3) of the Companies Act[37] provides as follows:

> A liquidator of a foreign company appointed for Singapore by the Court or a person exercising the powers and functions of such a liquidator –
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> …
>
> (c) shall, unless otherwise ordered by the Court, only recover and realise the assets of a foreign company in Singapore and shall … 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*. [emphasis added]

This, as interpreted by the Court of Appeal,[38] requires that in a Singapore liquidation of a foreign registered company, the local assets be used to pay local creditors first. Effectively, local creditors are given priority over their counterparts abroad in respect of these ring-fenced assets. Happily, the High Court in the subsequent case of *RBG Resources plc v Credit Lyonnais*[39] managed to avoid the section's operation because it was dealing with an *unregistered* foreign company to which s 377(3)(c) strangely does not apply. The High Court accordingly did not allow the application by a creditor for certain debts to be paid out to it from the Singapore liquidation estate first before the same was transferred to the main liquidation in England. The court did so seemingly without considering whether the rules of distribution there differ from Singapore's. One would not expect the position to be any different even if that issue was expressly dealt with,[40] and it is submitted that the state of the local case law does leave the door open for a similar position as Lord Hoffmann's to be taken in Singapore.

37 (Cap 50, 2006 Rev Ed).

38 *Tohru Motorbayashi v Official Receiver* [2000] 4 SLR 529.

39 [2006] 1 SLR 240.

40 It being quite clear that the rules of distribution in the UK, particularly the preferential debts regime, are different from that in Singapore.

14 But moving forward, there remain certain key issues to be addressed, the first of which clearly is that one hopes for a legislative amendment of s 377(3)(c), not least because it would seem obviously desirable to remove the anomaly in the treatment of registered and unregistered foreign companies in Singapore. More to the point, it has been pointed out elsewhere that the provision is simply out of line with prevailing discourse on cross-border insolvencies which favours a single, centralised place of liquidation as far as possible.[41] This is not to say that the policy behind s 377(3) is necessarily to be discarded out of the window. The section could well have been motivated by a perceived need to protect the legitimate expectations of local creditors that the company's assets in Singapore would be available for distribution here. That would probably be a factor to consider in determining whether the discretion to remit assets abroad should be exercised, but it ought not to be a conclusive bar to such remittance.

15 We would have to work out the test and other factors to be considered in deciding when the discretion to transfer assets to a foreign place of liquidation should or should not be exercised. The general orthodoxy is to identify a principal place of liquidation, which would usually be the place of incorporation but not necessarily so: other possible points of reference include "the centre of the debtor's main interest",[42] or the real "seat" of the company.[43] Insolvency proceedings opened in other countries will be regarded as ancillary to this main or primary liquidation. In determining whether assets should be remitted from the ancillary to the principal place of liquidation, it is submitted that the House of Lords' test of whether such transfers would be against public policy or violate any basic principle of justice and fairness may be too restrictive. Put another way, one would expect instances where the local courts should *not* transfer assets to the foreign liquidation even though doing so cannot be said to be such an affront to the forum's fundamental perception of justice or its public policies. The answer, however, is also not simply whether the interests of local creditors are sufficiently protected, as that strikes one as a blatant retreat to territorialism.[44] Nor does it seem that the test should be whether any

41 E B Lee, "Recent Developments in Insolvency Laws and Business Rehabilitation – National and Cross-Border Issues" Asean Law Association Workshop VI, Paper V (December 2003) at pp 294–295.

42 Under the EC Regulation in Insolvency Proceedings (Council Regulation (EC) 1346/2000), as well as under the UNCITRAL Model Law on Cross-Border Insolvency.

43 Following the approach of civil law jurisdictions.

44 Interestingly though, the test of whether local creditors will be prejudiced does appear to be the present test under US law, which is generally regarded as rather pro-universalism: see Chapter 15 of the US Bankruptcy Code which adopts the UNCITRAL Model Law, in particular para 1521(b) which requires the interests of creditors in the US to be sufficiently protected before assets in the US will be entrusted to the foreign representative.

prejudice to creditors is sufficiently balanced by countervailing advantages to other creditors, an approach proposed by the English Court of Appeal in *Re HIH* and which has found favour with some local commentators.[45] Why should the utilitarian ideal of collective wealth maximisation for creditors as a whole necessarily form the basis for the exercise of discretion? Instead, what is called for is a thorough examination of what our fundamental policies of insolvency law are and require. To what extent do rights of set-off need to be recognised and how much importance should we accord to the enforcement of security rights in a liquidation setting? And is it that transactions at an undervalue or which involve an unfair preference must always in every case be impugned? It is beyond the scope of this note to engage in a detailed discussion, but suffice to mention that there should be certain aspects of insolvency law policies which are regarded as so important as to override any motivation to achieve unity in bankruptcy administration.[46] These will have to be worked out by our courts, or by the Legislature. Ultimately, much will depend on how the balance between universalism in bankruptcy on the one hand, and the need for territoriality and safeguarding of local insolvency policies on the other, is to be struck in Singapore.

16 The decision in *Re HIH* also helpfully highlights the distinction between the stages of jurisdiction and choice of law, which may sometimes be somewhat overlooked in cross-border insolvency cases. Lord Hoffmann observed thus:[47]

> The power to remit assets to the principal liquidation is exercised when the English court decides that there is a foreign jurisdiction more appropriate than England for the purpose of dealing with all outstanding questions in the winding up. It is not a decision on the choice of law to be applied to those questions. That will be a matter for the court of the principal jurisdiction to decide. Ordinarily one would expect it to apply its own insolvency laws but in some cases its rules of the conflict of laws may point in a different direction. Section 426, on the other hand, extends the jurisdiction of the English court and the

45 H Tjio & M S Wee, "Cross-Border Insolvency and Transfers of Liquidation Estates from Ancillary Proceedings to the Principal Place of Bankruptcy" (2008) 20 SAcLJ 35.

46 For what it is worth, Lord Hoffmann's view appears to be that the English policy behind the rule of set-off will fall within such a category: see [17] of his judgment, where he defended the decision in *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 ("*Re BCCI (No 10)*") not to remit assets to the foreign jurisdiction because the foreign court will disallow the English rule on set-off, a rule described by Lord Hoffmann as a matter of substantial justice between the parties. But it must be pointed out that in *Re BCCI (No 10)*, the debts in question were found to be governed by English law.

47 At [28] of the judgment in *Re HIH*. This is echoed by Lord Neuberger who opined at [78] of his judgment that he agrees with Lord Hoffmann that the power to remit assets is about choice of jurisdiction, while s 426 is concerned with choice of law.

choice of law which it can make in the exercise of its own jurisdiction, whether original or extended.

17 Hence, it seems clear that the question of whether remittance of assets to foreign liquidations should take place is a jurisdictional matter. In Singapore, it would appear that the courts have jurisdiction to wind up foreign companies under the Companies Act,[48] but the otherwise exorbitant jurisdiction has been judicially restricted to such companies with substantial assets in Singapore,[49] or where there is sufficient connection with Singapore and a reasonable possibility of benefit for the creditors from the winding up.[50] Once jurisdiction is established, however, there ought to be the further consideration of whether it should be exercised. There should not be an assumption that just because the company has assets in Singapore or some other connection with Singapore, the local courts must necessarily exercise the jurisdiction to wind up the company and distribute those assets in accordance with Singapore's rules of insolvency law. The doctrine of *forum non conveniens* does not appear to have been frequently referred to in international insolvencies, but there seems no reason why not. Just as in any other non-insolvency cases, the *forum non conveniens* inquiry should come into the picture such that the court asks itself whether there is a more appropriate forum for the liquidation estate in Singapore to be dealt with.[51] If there is, the Singapore court ought to decline to exercise its jurisdiction to deal with those assets and should instead remit them to the natural forum, which in this context would (as mentioned above) usually be the place of incorporation although not necessarily so. But in exercising its discretion, the court must of course (as contended earlier) have regard to whether there are any fundamental domestic insolvency policies that need to be given effect to and which require that the local assets be dealt with in accordance with our own rules. In every country, there will always be pressures to deal with assets located within its sovereign territory instead of remitting them to the

48 For unregistered foreign companies, the jurisdiction to do so is expressly provided under s 351 of the Companies Act (Cap 50, 2006 Rev Ed). Rather ironically, the position seems less clear-cut for registered foreign companies, although s 377 of the same Act does indicate that such jurisdiction exists.

49 See *Tong Aik (Far East) Ltd v Eastern Minerals & Trading (1959) Ltd* [1965] 2 MLJ 149.

50 See *Re Griffin Securities Corp* [1999] 3 SLR 346.

51 Support for this proposition can be found in some English cases such as *Re A Company 24 (No 00359 of 1987)* [1988] Ch 210, where Peter Gibson J, after finding that the company had a sufficiently close connection with England so as to found the English court's jurisdiction in the winding up of the company, said at 226 that it is further "appropriate for the court to consider whether any other jurisdiction is more appropriate for the winding up". For further arguments in favour of the application of *forum non conveniens* in the winding up of foreign companies, see K Dawson, "The Doctrine of Forum Non Conveniens and the Winding Up of Insolvent Foreign Companies" [2005] JBL 28.

foreign jurisdiction. That is the reason why, generally, the quest is not for unbridled but rather only modified universalism.[52] This tussle between universalism and territorialism is the very reason why the concept of a principal and ancillary place of liquidation arose. That, therefore, is the additional complexion to the *forum non conveniens* inquiry in relation to international insolvencies: unlike other cases, the court must in addition to considering the usual connecting factors also decide how to strike the proper balance between universalism and territorialism. And since there is a clear limit to absolute universalism, there can be expected to be generally a greater degree of tolerance for multiplicity or concurrency of proceedings in the insolvency context than in the typical natural forum inquiry, with potentially one or more ancillary liquidations taking place concurrently with winding-up proceedings in the principal place of liquidation.

18 Once we establish that the court has jurisdiction and should exercise it, the conflicts lawyer will know that the next step is to enter the choice of law inquiry, and it is submitted that it should be no different for cross-border insolvency cases. In determining what law is to be applied, we must of course first characterise the issue: is it one of insolvency administration, or are we looking at determining pre-insolvency entitlements? Alternatively, one could look at it in stages: *ie*, to first determine using the *lex causae* (whether it be the applicable law for contract, property and so forth, as the case may be) the existence and content of those entitlements; and second, to apply the applicable law for insolvency administration to ascertain to what extent those rights are to be recognised or modified.[53] It is the stage of ascertaining the applicable law for insolvency administration that may be frequently neglected. The choice of law inquiry here typically receives little attention, not least because the assumption would usually be that the *lex fori* or the *lex concursus*[54] will necessarily be the applicable law.[55]

19 The reason could well be because the bulk of insolvency law is found in statutory provisions, which more often than not are perceived

52 It is worthy to note that even the EC Regulation recognised that there are limits to having only a single universal place of liquidation. Under the Regulation, it is accepted that while there is a main place of liquidation to be identified based on the debtor's centre of main interest, other Member States can also open insolvency proceedings which are regarded as ancillary to the main proceedings.

53 R Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 3rd Ed, 2005) at pp 596–597.

54 The law of the place where the insolvency proceedings are opened.

55 See *Dicey, Morris and Collins on the Conflict of Laws* (London: Sweet & Maxwell, 14th Ed, 2006) at para 30-081; I F Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd Ed, 2005) at pp 185–188; *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213; *Re Suidair International Airways Ltd* [1951] Ch 165. The position is likewise under the EC Regulation: see Art 4.

as having a mandatory character. Statutes have always had an uncomfortable relationship with the conflict of laws. In fact, on traditional analysis, the statute can only apply in a cross-border case if the common law rules of the conflict of laws determine that the *lex causae* is the *lex fori*, unless the statutory provision in question amounts to the forum's mandatory rule which has to be applied regardless of what the applicable law may be.[56] If that is so, then saying that an insolvency rule is found in a statute actually says nothing about whether it should be applied until we consider the common law conflicts rules. But this approach has its dissenters, one of whom persuasively points out that it cannot be the case that the Parliament "legislates only within the straitjacket of the rules of the conflict of laws".[57] Ultimately, it seems that the starting point must be one of statutory interpretation: did the Parliament intend this specific statutory provision to apply in a case such as this with transnational elements? If the words of the statute are clear in that it applies, then that ought to be the end of the matter. Yet, unfortunately, legislative draftsmen are notoriously ambiguous when it comes to the territorial reach of the statute.[58] When that is so, recourse must then be had to the conflict of laws rules on choice of law. And once within the scope of that inquiry, it is not immediately obvious why the *lex fori* must invariably be the governing law for issues of insolvency administration, especially where the principal place of liquidation is somewhere else. It may be that where the exercise of the court's jurisdiction is based on compelling domestic policies of insolvency law that demand the application of our own rules of distribution, the application of the *lex fori* can be expected to be a foregone conclusion. But short of that, one may venture the perhaps controversial view that the *lex fori* need not always be the applicable law. Section 426, and Lord Hoffmann's interpretation of it in *Re HIH*, clearly leaves this controversial option open now in England for some other law to be applied to resolve insolvency issues. It is submitted that the Singapore Legislature may do well to follow suit, but even without a s 426 equivalent there seems to be nothing against our courts applying some other law as the *lex causae* in relation to a point on insolvency, as long as the issue is not regarded as procedural in nature. Of course, much more work will have to be done to determine what the appropriate applicable law should be for the many different aspects of liquidation. The point to be made is that the decision in *Re HIH* does serve as a useful reminder[59]

56 See F A Mann, "Statutes and the Conflict of Laws" (1972) 46 BYBIL 117.

57 A Briggs, "A Note on the Application of the Statute Law of Singapore within its Private International Law" [2005] SJLS 189 at 195.

58 For examples of cases where the court had to grapple with the difficult question of the territorial reach of statutory provisions, see the English decisions of *Lawson v Serco Ltd* [2006] ICR 250; *Office of Fair Trading v Lloyds TSB Bank plc* [2008] 1 AC 316.

59 Or starting point, depending on how you look at it.

that the question of choice of law is a legitimate query in the context of cross-border insolvencies as much as in other cases.

IV. Conclusion

20 We see in these two decisions the possibility that cross-border insolvency issues, specifically as regards judicial assistance, can be analysed rather comfortably within the framework of traditional common law conflict of laws principles. This is of particular significance to Singapore, not only because our existing statutory provisions do not expressly provide for assistance of foreign liquidations, but also because Singapore is not party to any convention or other international instruments as to co-ordination of cross-border insolvencies. It is believed that such interpretation of the decisions as suggested herein provides room for the Singapore courts to do much the same as their foreign counterparts, although some obstacles such as s 377(3) of the Companies Act will have to be removed along the way.