CROSS-BORDER INSOLVENCY AND TRANSFERS OF LIQUIDATION ESTATES FROM ANCILLARY PROCEEDINGS TO THE PRINCIPAL PLACE OF BANKRUPTCY

In the recent case of *RBG Resources v Credit Lyonnais*, the High Court held that s 377(3) of the Companies Act, which has been interpreted as requiring a ring-fencing of the local estate of a registered foreign company for the benefit of paying debts and liabilities incurred in Singapore, does not apply to an unregistered foreign company. This article discusses the case in the light of recent developments in international insolvency in English, European and American law. It is argued that at common law Singapore should not adopt a dogmatic approach on whether to ring-fence local assets or to order their transfer to the main liquidation, but should adopt a flexible approach that requires close co-operation between the Singapore and foreign liquidators in the quest to achieve practical justice.

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I. Introduction

1 In an insolvent liquidation or reorganisation, the chief concern of all interested parties is with the constituency of the debtor's estate. The liquidator or equivalent party, and the unsecured creditors, obviously benefit the greater the assets available for distribution to them. Professor Thomas Jackson took the view that the concern of creditors was similarly reflected from the vantage point of either the assets or the liabilities of the debtor since only that which was owned beneficially by the debtor formed part of the common pool for distribution amongst the general creditors.[1] In other words, the assets that are reachable by the unsecured creditors consist of the residual amount after priority liabilities of the debtor are

1 TH Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge, Mass: Harvard University Press, 1986) at pp 90–91.

settled. A secured party, for example, is not required to prove in the debtor's insolvency for a dividend.

2 Bankruptcy today, however, cannot be viewed in the isolation of national boundaries. As multinational companies proliferate, we should expect more cross-border insolvencies, with the assets and liabilities mismatched not only in temporal terms (the possible cause of the insolvency in the first place), but also in terms of their geographical locations. Starting from the premise that economic efficiency requires the preservation of going concern values, or an orderly liquidation, we can see the importance of an international framework to co-ordinate the reorganisation or distribution of assets spread out all over the world. Failure to do this could see a worldwide common pool problem, with not just creditors but nation states (and their judiciary) involved.

3 The concept of unity or universality of bankruptcy is one which argues for only one set of insolvency proceedings that is given effect to elsewhere. The first step in achieving this is to recognise that there is a main insolvency forum. This has been achieved within the European Community ("EC"), where the EC Regulation on Insolvency Proceedings[2] gives a member state main jurisdiction over a winding up where the company has its centre of main interests. A company cannot have more than one such centre, and it is presumed to be the company's registered office unless the contrary is proved.[3] This can be shown "only if factors that are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect".[4]

4 Ideally, what will happen is that ancillary proceedings in states other than the main forum freeze the assets within their jurisdiction and transfer them over to the main forum. Unfortunately, the cross-border nature of corporate insolvency today means that there may be persons recognised as secured or quasi-secured creditors in one jurisdiction and not another. For example, while it is clear that foreign creditors are entitled to prove in the winding up in the same manner as English creditors,[5] the priority laws that would apply there is English law. But, under s 221 of the English Companies Act 1985, the jurisdiction of an English court to wind up a foreign company is a wide one. It was thought that while the foreign company did not have to establish a place of

2 Council Regulation No 1346/2000.

3 Council Regulation No 1346/2000, Art 3(1).

4 *Re Eurofood IFSC Ltd* (ECJ Case C-341/04) [2006] Ch 508 at 542. See also *Hans Brochier Holdings Ltd v Exner* [2006] EWHC 2594.

5 *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 (Ch D) ("*Re BCCI (No 10)*") at 242. See also *Re Azoff-Don Commercial Bank* [1954] Ch 315 (Ch D).

business there,[6] it had to have assets and creditors there,[7] in order for a court here to have jurisdiction to make the winding-up order. It has, however, more recently been held that it is not necessary for a foreign unregistered company which carries on a business there to have assets present in the jurisdiction. What is important is that there is a sufficient connection between the company and England, and reasonable possibility that, if a winding-up order is made, there is benefit to those applying for the winding-up order and the court is able to exercise jurisdiction over one or more persons interested in the distribution of assets.[8]

5 The real difficulty is if English proceedings are ancillary, in the sense that the liquidators there can only get in and realise English assets,[9] for there the question is whether the court will send over the English liquidation estate, as well as English unsecured creditors (and foreign creditors who have proved their debts in England) to the insolvency proceedings in the main forum. The latter may have significantly different insolvency provisions (either offering less protection to English creditors as in *Re BCCI (No 10)*[10], or greater protection to its domestic creditors, which was the case recently in *Re HIH*[11].

6 Initially, it appeared as if the foreign company had to have an established place of business there: see *Re Lloyd Generale-Italiano* (1885) 29 Ch D 219 (decided under the Companies Act 1862). In *Re Tovarishestvo Manufactur Liudvig-Rabenek* [1944] Ch 404 (Ch D) at 409, it was held that, while this was not the case, there was still a need to show a "place of business" there for the purposes of s 338(1) of the Companies Act 1929, and this test was satisfied as the directors had transacted business from the same hotel in which they resided on visits over nine consecutive years. However, the Court of Appeal in *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] Ch 112 at 126–128, held that even this lesser requirement was unnecessary, and it was through having assets and creditors in England that a court usually had jurisdiction to wind up a foreign company.

7 *Re Compania Merabello San Nicolas SA* [1973] Ch 75 (Ch D) at 91; *Re Azoff-Don Commercial Bank* [1954] Ch 315 (Ch D), both applying the decision in *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] Ch 112.

8 *Re Real Estate Development Co* [1991] 1 BCLC 210 (Ch D) at 217. See also *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116 at 137 and now *Re HIH Casualty and General Insurance Ltd; McMahon v McGrath* [2006] EWCA Civ 732, [2007] 1 All ER 177 (CA) ("*Re HIH*") at [37].

9 *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 at 246.

10 *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 at 246.

11 *Re HIH Casualty and General Insurance Ltd; McMahon v McGrath* [2006] EWCA Civ 732, [2007] 1 All ER 177 (CA).

II. *Re BCCI No 10* and *Re HIH*

6 The former situation was experienced in *Re BCCI (No 10)*,[12] which involved the worldwide insolvency of Bank of Credit and Commerce International SA ("BCCI"), a bank incorporated in Luxembourg and in the process of being wound up there, as well as in other countries around the world. In ancillary proceedings in England, the English liquidators applied to court for directions as to certain matters before it transferred assets obtained both from global realisations (from which the English liquidation estate was given about half), as well as $655m in English realisations, to Luxembourg. In the background was the agreement between BCCI's liquidators around the world that the liquidation process should be a joint enterprise that created a common pool from which all creditors wherever situate would receive the same percentage dividend payout.

7 The main issue was whether the English Insolvency Rules 1986, r 4.90, providing for insolvency set-off should be applied before the assets were transmitted to Luxembourg, which did not have similar insolvency set-off rules.[13] Scott VC stated three principles of international insolvency that were recently accepted by a Singapore court[14] in *RBG Resources v Credit Lyonnais*:[15]

> (1) Where a foreign company is in liquidation in its country of incorporation, a winding-up order made in England will normally be regarded as giving rise to a winding up ancillary to that being conducted in the country of incorporation. (2) The winding up in England will be ancillary in the sense that it will not be within the power of the English liquidators to get in and realise all the assets of the company worldwide. They will necessarily have to concentrate on getting in and realising the English assets. (3) Since in order to achieve a *pari passu* distribution between all the company's creditors it will be necessary for there to be a pooling of the company's assets worldwide and for a dividend to be declared out of the assets comprised in that pool, the winding up in England will be ancillary in the sense, also, *that it will be the liquidators in the principal liquidation who will be best placed to declare the dividend and to distribute the assets in the pool accordingly*. [emphasis added]

12 *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 at 246.

13 It was common ground that the preferential claims of employees working for branches of BCCI in England should be paid off first: *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 at 235.

14 [2006] 1 SLR 240 at [38].

15 *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 at 242.

8 Scott VC thought that the US courts, in contrast, usually ring-fenced assets for domestic creditors, which as we shall see was probably a mistaken assumption even at that time.[16] Yet, this nod to comity in international insolvency was immediately followed by a fourth proposition, in which Scott VC held on some forum mandatory statute basis, that he had no jurisdiction to disregard r 4.90 but, in the event he had, also declined to exercise his jurisdiction in that regard.

9 In contrast, in *Re HIH*, the English court felt that English creditors would have been disadvantaged if the proceeds of HIH, a large insolvent Australian insurer with three companies registered as overseas companies (on the assumption that these, and a fourth, which was not registered, were being wound up in England[17]), were remitted to Australia for distribution in accordance with Australian law. Here, there were statutory provisions applicable to insolvent insurance companies in Australia that would have prejudiced English creditors.[18] At first instance,[19] Richards J rejected the letter of request from the Supreme Court of New South Wales for the transfer of assets on the basis that the extended principle drawn from *Re BCCI (No 10)* was that the court had no power to order a transfer if the *pari passu* rule of the principal jurisdiction were not substantially the same as that under English law. While the Court of Appeal agreed with the decision below,[20] Sir Andrew Morritt C thought that Richards J had wrongly limited the jurisdiction given to the court by the s 426 of the Insolvency Act 1986 (applicable to a "relevant country", which included Australia but not Luxembourg).[21] Rather the test for the exercise of the court's discretion was simply one of balancing the advantages and disadvantages to the creditors in the ancillary jurisdiction resulting from a transfer to the principal place of bankruptcy. Here, the advantage for some insurance and reinsurance creditors resulting from a transfer did not outweigh the prejudice suffered by the other creditors. There was thus no countervailing advantage to the

16 See n 37 below.

17 The Court of Appeal approached the question of whether the court could direct the English provisional liquidators to remit the assets to Australia in two stages: first, whether such a direction could be given if the companies were in liquidation in England, and if so, whether it made any difference that they were not currently being wound up in England. In the event, the Court of Appeal thought that it would not have made a difference: *Re HIH Casualty and General Insurance Ltd; McMahon v McGrath* [2006] EWCA Civ 732, [2007] 1 All ER 177 (CA) at [61].

18 In particular, s 562A of Corporations Act 2001 (Cth) (Aust).

19 *McMahon v McGrath* [2005] EWHC 2125, [2006] 2 All ER 671 (Ch D) at [112].

20 [2006] EWCA Civ 732, [2007] 1 All ER 177 (CA).

21 [2006] EWCA Civ 732, [2007] 1 All ER 177 (CA) at [41]. The relevant countries are designated by the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (SI 1986 No 2123) (UK), the Co-operation of Insolvency Courts (Designation of Relevant Countries) Order 1996 (SI 1996 No 253) (UK) and the Co-operation of Insolvency Courts (Designation of Relevant Countries) Order 1998 (SI 1998 No 2766).

estate as a whole that could justify an interference with the statutory scheme of distribution imposed under the Insolvency Act 1986.

III. Singapore cases

10 We have had some experience with cross border insolvencies in Singapore. In *Tohru Motobayashi v Official Receiver*,[22] the Singapore Court of Appeal held that the Singapore assets of a Japanese company that operated as a branch here and was registered as a "foreign company" under the Companies Act had to be ring-fenced for distribution to creditors in Singapore. This was partly because s 377(3)(*c*) of the Companies Act stated that a liquidator for a foreign company in Singapore:

> (*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), 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]

11 The application by the Japanese liquidator was for only the Singapore assets net of the claims of preferential creditors under s 328 of the Companies Act (which is specifically provided for in s 377(7) as described in the paragraph above) to be transferred to the trustee in bankruptcy in Japan, but this was rejected on a construction of the section itself, especially the italicised parts above. The legislative history of the provision also showed a conscious decision to adopt a different position from that which existed in s 352(3)(c) of Victoria's Companies Act 1961, that was adopted verbatim in s 340(3)(c) of Malaysia's Companies Act 1965 and which was first considered in our Companies Bill during its First Reading. During the Select Committee stage, however, changes were proposed that found their way into the Bill by the time of the Second Reading. It would appear that the additional words were originally intended only for insolvencies involving Singapore and Malaysian companies, as they came under the proposed heading "Reciprocal Provisions with Malaysia" but this restriction did not appear in the final Bill that was presented to Parliament.[23]

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22 [2000] 4 SLR 529 (CA).

23 See the discussion of the legislative history of s 377(3)(*c*) by Woo J in *RBG Resources v Credit Lyonnais* [2006] 1 SLR 240 at [41]. The then s 340(3), containing the additional words, was passed and came into force, along with the Companies Act, in December 1967. Interestingly, Malaysia amended their s 340(3) *vide* the Companies (Amendment) Act 1985 and their relevant provision today is very similar to our current s 377(3)(*c*).

12 The court was clearly guided by the way in which the provision was drafted, and a different result may have been obtained had it involved an unregistered foreign company under the Companies Act. In *RBG Resources v Credit Lyonnais*,[24] Woo J at first instance distinguished *Tohru* on the basis that the case before him involved just such a company (for the purposes of the case, he assumed that the plaintiff English-incorporated company in question had either established a place of business or carried on a business here, which is what triggered off the registration requirement) and consequently was outside the scope of s 377(3)(*c*). Section 365 expressly states that Pt XI Div 2 "applies to a foreign company which ... is registered under this Division".

13 As a matter of statutory construction, this must be right, since the ring-fencing provisions are drafted with a registered foreign company in mind, even if it does create a *lacuna* in the law. Part XI Div 2 could simply be avoided by the act of non-registration. While criminal sanctions clearly exist for non-registration,[25] this is not a satisfactory solution. In contrast, the new English Companies Act 2006, which relevant provisions considered here will come into force in October 2008, applies many of its Pt 34 (Overseas Companies) provisions to "an overseas company that is *required* to register particulars under s 1046" [emphasis added], even if it is not in fact registered. The one exception is with the registration of company charges, which is only expressed to apply to a "registered overseas company", which is defined in s 1052(6) as "an overseas company that has registered particulars under s 1046(1)". But this is because of the problems that they have had with their "Slavenburg" register under the previous regime which applied regardless of whether the foreign company was in fact registered.[26]

24 [2006] 1 SLR 240.

25 Companies Act (Cap 50, 2006 Rev Ed), s 386.

26 Presently, s 409 of the English Companies Act 1985, which requires charges granted by a company incorporated outside Great Britain over property situate in England and Wales to be registered, applies if a foreign company has an "established place of business" in England and Wales or a "place of business" in Scotland (s 424), and it is irrelevant whether the foreign company was registered under Pt XXIII. But it is the practice for the registrar not to register a charge where a foreign company has failed to comply with the registration requirements, and this would then render the charge void against the liquidators (which includes a liquidator appointed in a foreign winding up where the latter is similar in character to an English winding up). In *NV Slavenburg's Bank v Intercontinental Natural Resources Ltd* [1980] 1 WLR 1076 (QBD), Lloyd J held that the lack of registration would not affect the validity of the charge if the charge-holder delivered particulars of the charge, together with the instrument (if any) creating or evidencing it. Searching the "Slavenburg register" is, however, difficult as there is no company number to search against or to verify corporate information.

14 The same point has been made of the loophole in s 376 regarding service of notice here under the Companies Act on a foreign company, and the consequent need to rely on other avenues of service.[27] But it is clear that Woo J in *RBG Resources* was influenced by two articles by Lee Eng Beng arguing for judicial comity in such cases, and he cited the international insolvency principles from *Re BCCI (No 10)*[28] that were set out above. This was where Scott VC spelt out the importance of recognising the unity of bankruptcy in cross-border insolvency and consequently the need to transfer assets from an ancillary place of bankruptcy to the principal place of bankruptcy. Woo J thought that the propositions from there were, in the main, suitable for our courts as common law principles.

15 But we have seen that Scott VC in *Re BCCI (No 10)* had attached the fourth point about the mandatory nature of English insolvency set-off rules, which really meant that the rule was far from an unequivocal one embracing judicial comity. We have also seen how Richards J, in particular, in *Re HIH* applied the principle propounded by Scott VC, when he concluded "that the substantive rules of distribution under the English statutory scheme are mandatory and the court has no power to make an order which has the effect of disapplying them",[29] although the Court of Appeal thought that he wrongly narrowed the jurisdiction afforded by s 426 of the English Companies Act 1985.[30] Even so, the appellate court thought that the discretion to transfer would be exercised only if there was no justifiable prejudice to the English creditors. Lee's articles were, however, written in 2000 and 2003, which was before the first instance decision of Richards J in *Re HIH*, and this later case (which was decided on 7 October 2005) was not drawn to Woo J's attention (who handed down his decision on 28 October 2005).

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27 Toh Kian Sing, "Jurisdiction over Foreign Corporations: A Comparative Commonwealth Survey" in 8th Singapore Conferences on International Business Law, *Current Legal Issues in International Commercial Litigation* (Faculty of Law, NUS, 1997) p 218 at pp 232–3, contrasting the Singapore provisions with the present s 695(2)(a) of the English Companies Act 1985. But compare *Walter Woon on Company Law* (Sweet & Maxwell, 3rd Ed, 2005) at para 1.73. It was held in *South Indian Shipping Corporation v Export-Import Bank of Korea* [1985] 1 WLR 585 that the relevant provision covering a company that is in default of lodging the name and address of a person who is authorised to accept service, *ie*, s 695(2), also applied to a company that has de-registered itself but continued to maintain a place of business in England.

28 See para 7 of the main text above.

29 *McMahon v McGrath* [2005] EWHC 2125, [2006] 2 All ER 671 (Ch D) at [175]. See also [184].

30 [2006] EWCA Civ 732, [2007] 1 All ER 177 (CA) at [41].

16 But the decision in *RBG Resources* was correct. It is quite understandable that the court held that it had no jurisdiction or reason to pay Credit Lyonnais' debts out of the Singapore liquidation estate before transmitting it to the main seat of bankruptcy in England. The defendant's claim was for breach of contract and this was founded on a debt that was incurred in England, not Singapore. Credit Lyonnais was thus trying to steal a march on other foreign creditors by proving its debt in Singapore, and arguing for the Singapore estate to be ring-fenced. In the event, Woo J did not let it prove its claim in the Singapore liquidation estate.

17 But although the result was right, another way of obtaining it would have been to allow the defendant to prove in the liquidation estate, which as we have seen, is something all foreign creditors are allowed to do. But that does not mean that Credit Lyonnais would have been paid out of that estate before the assets were transferred to England, although it is something that can happen in certain circumstances. On the facts of *RBG Resources*, some five foreign creditors did in fact obtain payment by settling their claims with the Singapore liquidator, which Credit Lyonnais refused to do, and which Woo J took to be an important consideration.[31] But the facts of *RBG Resources* show that either a total ring-fencing approach or one whole-heartedly embracing judicial comity is not appropriate. In the former instance, Credit Lyonnais would have in effect gained priority over other foreign unsecured creditors. In the latter case, the Singapore liquidator would not have been able to accommodate the settlements it reached with the other five foreign creditors. A court seized of the ancillary winding up of a foreign company therefore needs to have the discretion to act, and also the room to provide partial solutions. It is practical justice that is sought in international insolvency. Any fundamentalist notions of unity of bankruptcy must therefore be resisted. The difficulty is, of course, with how a court is to exercise its discretion in the ancillary proceeding.

IV. Bounded discretion

18 There are a number of positions that we should seriously consider, and it may be useful to have our legislation expressly state the principle governing the transfer of assets and list of creditors from a Singapore liquidation estate to the principal place of bankruptcy.

19 We have seen that the underlying principle, that determines if this happens under s 426 of the English Insolvency Act 1986, is whether the rights of those creditors would be prejudiced by the transfer and there are no countervailing advantages in the place where the main liquidation

31 *RBG Resources v Credit Lyonnais* [2006] 1 SLR 240 at [62]–[63].

occurs. Indeed, this may be the case outside of s 426 as well. It was recently stated by the Privy Council in *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc*,[32] where assistance was sought by a New York court in respect of a company in Chapter 11 proceedings, there from a Manx Court, that the test to be applied was, *inter alia*, whether there was any prejudice to a creditor in the Isle of Man. Consequently, if there is a common law position at all, which may be applicable to an unregistered foreign company in Singapore as in *RBG Resources*, this may come close to it.

20 Conversely, reg 2 of the Cross-Border Insolvency Regulations 2006, which provides that the UNCITRAL Model Law on Cross-Border Insolvency shall have the force of law in Great Britain, appears only to ask whether "the interests of creditors in Great Britain are adequately protected".[33] The Court of Appeal in *Re HIH*[34] declined to comment on the extent to which protection would be considered "adequate". However, the general tenor of its discussion of insolvency regimes suggests that this is likely to be a more pro-unity of bankruptcy approach than under s 426. The Model Law has also been adopted by the United States, but with the test of whether "the interests of the creditors are *sufficiently* protected"[35] [emphasis added]. Both Richards J and the Court of Appeal in *Re HIH* noted that US courts tended to be more favourably disposed to transferring assets to the main seat of bankruptcy even under the older position provided by s 304 of the United States Bankruptcy Code,[36] which, on its face, required that there be substantial similarity in the respective laws before they would transfer assets over to the main forum.[37]

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32 [2006] UKPC 26, [2007] 1 AC 508, noted CH Tham, "Insolvency Proceedings and Shareholdings: When is a Foreign Judgment not a Judgment?" [2007] LMCLQ 129; A Walters, "Judicial Assistance in Cross-Border Insolvency at Common Law" (2007) 28 Company Lawyer 73.

33 Article 21 of the Cross-Border Insolvency Regulations 2006 (SI 2006 No 1030) (UK), which came into force on 4 April 2006.

34 [2006] EWCA Civ 732, [2007] 1 All ER 177 (CA) at [54].

35 11 USC (US) §1521(b), as inserted by the Bankruptcy Abuse Prevention and Consumer Protection Act 2005.

36 11 USC (US) §304, as amended by the Bankruptcy Reform Act 1978.

37 See, respectively, *McMahon v McGrath* [2005] EWHC 2125, [2006] 2 All ER 671 (Ch D) at [151] and [2006] EWCA Civ 732, [2007] 1 All ER 177 (CA) at [20] respectively, citing *Re Blackwell* 270 BR 814 (2001). Scott VC in *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 at 227 stated that US courts tended to ring-fence its assets but even at the time of that judgment, the balance of cases favoured comity. In practice, assets were transferred where attachment liens were at issue: *Cunard Steamship Co Ltd v Salen Reefer Serv AB* 773 F 2d 458 (2nd Cir, 1985). It was said that the rationale for s 304 was that it is in the interests of the creditors that liquidation occurs in "an equitable, orderly and systemic manner, rather than in a haphazard, erratic or piecemeal fashion": *Re Culmer* 25 BR 621 at 624 (Bankr SDNY, 1982). See also JL Westbrook, "Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum" (1991) 65 American Bankruptcy Law Journal 457 at 473.

In a sense, law and practice there has therefore been brought closer together by the new Chapter 15 of the Bankruptcy Code, although, in this regard, the English Court of Appeal also declined to comment on whether the new US test in r 1521 was similar to that under the Insolvency Regulations 2006.[38]

21 As a practical measure, wider insolvency co-operation cannot extend beyond treating the unsecured creditors as part of the worldwide pool, although there were cases in the US where the old substantial similarity test was applied to even quasi-secured creditors.[39] *Pari passu* does not mean equality, but only that claimants on the same footing are treated equally. As was the case with jurisdiction, the European Community's position may be the clearest from this standpoint. Previously the Strasbourg Convention[40] only envisaged the transfer of assets to the home country net of secured and preferential claims which are distributed in the recognising country according to the *lex situs*. The exception for the *lex situs* presently serves the ends of practical justice but favours an orderly liquidation over reorganisation. For the latter to work in an international insolvency situation, we must not only work out the conflict rules but also substantive internal laws, especially those governing priorities.[41]

22 Presently, the EC Regulation on Insolvency Proceedings also does not impose a pure universality or unity principle of bankruptcy proceedings on its member states. It acknowledges that due to widely differing substantive national laws, it is not practical to introduce insolvency proceedings with universal scope in the entire Community.[42] Hence although the Regulation gives primacy to main proceedings which effects are to be recognised in all the member states, secondary proceedings covering only assets situated in the state in which the proceedings are opened are allowed alongside the main proceedings.[43]

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38 [2006] EWCA Civ 732, [2007] 1 All ER 177 (CA) at [54].

39 Such as claimants under a constructive trust: *Re Koreag* 130 Bankr 705 (1991), Bankr Lexis 1200 and *Remington Rand Corporation v Business Systems* (1988) 82 AJIL 580 but compare *Interpool, Ltd v Certain Freights* 102 BR 373 (DNJ, 1988) and *Re Toga Manufacturing* 28 BR 165, 167 (Bankr ED Mich, 1983).

40 The European Convention on Certain International Aspects of Insolvency, Art 14, European TS No 136 (1990), which opened for signature in June 1990.

41 On the need for the rough similarity of laws in international insolvency, see JL Westbrook, "Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum" (1991) 65 American Bankruptcy Law Journal 457 at 468–9; and for reorganisation particularly at 482–3.

42 Recital 11 of the EC Regulation on Insolvency Proceedings 2000 (No 1346/2000).

43 EC Regulation on Insolvency Proceedings 2000 (No 1346/2000), Art 3. Where secondary proceedings are opened before the opening of main proceedings, they are referred to as territorial proceedings in the Regulations: Art 3(2). In addition to allowing secondary proceedings, provisions are also made for special conflict rules in the case of particularly significant rights and legal relationships, *eg*, rights in *rem* and

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The courts of any member state where the debtor has an establishment, which means any place of operations where the debtor carries on a non-transitory economic activity with human means and goods, have jurisdiction to open secondary proceedings.[44] A creditor is allowed to claim in the main proceedings and in any secondary proceedings.[45] There is a certain degree of ring-fencing to the extent that claims accepted in secondary proceedings, particularly those entitled to preferential treatment, can be satisfied before anything is remitted to the main proceedings. Creditors who receive full or partial satisfaction of their debts in proceedings in one state are entitled to keep them, except that a partially paid creditor would not receive any thing from proceedings in another state where it has claimed until creditors in those proceedings have received the same percentage of payment as it has.[46] To this extent the Regulation does not, in terms, guarantee *pari passu* treatment of all the unsecured non-preferential creditors. In practice, however, this may be achieved if all the liquidators of the main and secondary proceedings discharge their duties of co-operation and communication of information imposed on them by the Regulation.[47] This is further enhanced by the requirement that each liquidator is required to lodge claims which are lodged in the proceedings in which he is appointed in other proceedings, provided that the interests of creditors in the former proceedings are served thereby.[48] This helps creditors to overcome the language and other barriers of having to lodge claims in foreign proceedings, and may create a "global" list of creditors and their claims. The result is that while the administration of a cross-border insolvency within the EU (European Union) may take place largely within territorial proceedings, at the end there is still unity of estate if the liquidators are able to co-operate and co-ordinate their conduct of their proceedings.

V. Conclusion

23 The approach advocated here for a court administering an insolvency proceeding in Singapore,[49] when faced with a request from a foreign liquidator to transfer the liquidation estate to the main

contracts of employment. See Recital 11 of the EC Regulation on Insolvency Proceedings 2000 (No 1346/2000).

44 EC Regulation on Insolvency Proceedings 2000 (No 1346/2000), Art 2 read with Art 3(2).

45 EC Regulation on Insolvency Proceedings 2000 (No 1346/2000), Art 32(1).

46 EC Regulation on Insolvency Proceedings 2000 (No 1346/2000), Art 20(2).

47 EC Regulation on Insolvency Proceedings 2000 (No 1346/2000), Art 31(1) and (2).

48 EC Regulation on Insolvency Proceedings 2000 (No 1346/2000), Art 32(2).

49 In *Re HIH Casualty and General Insurance Ltd; McMahon v McGrath* [2006] EWCA Civ 732, [2007] 1 All ER 177 (CA) at [61], the Court of Appeal thought that there would have been no difference in the directions given to the provisional liquidators appointed in England for the transfers requested by the Supreme Court of New South Wales even if the companies were not currently being wound up in England.

bankruptcy forum, is that it should neither absolutely ring-fence those assets, nor completely abdicate its responsibility to unsecured creditors here by always requiring them to prove in the main proceeding overseas.

24 Although this case has been criticised, not least for its misreading of the US position (which Scott VC in *Re BCCI (No 10)* may have also been guilty of) the position was perhaps best set out in *Felixstowe Dock & Railway Co v United States Lines Inc*.[50] This concerned a US company that was in Chapter 11 proceedings. By way of a restraining order, a US court had stayed all claims against the company worldwide. Hirst J was asked to recognise this order in England. He accepted counsel's submission that:[51]

> ... the English practice is to regard the courts of the country of incorporation as the principal forum for controlling the winding up of a company, but that in so far as that company has assets here, the usual practice is to carry out an ancillary winding up in England in accordance with our own rules, while working in harmony with the foreign courts. Applying this principle, they submit that the English courts would not and should not favour an order which removed the English assets entirely outside their control.

25 Our experience in *RBG Resources* suggests that this should not be the case either in Singapore. If the EC Regulation on Insolvency Proceedings which represents the fruit of protracted negotiations over four decades accepts that at this stage universality and unity are goals which cannot be achieved, there is no reason for Singapore to adopt a dogmatic approach on the issue of transferring the assets of a company in insolvency proceedings to the main forum. Outside of conventions, probably the best approach is that stated by the Privy Council in *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc*,[52] which is that the assets should not be transferred over if the prejudice suffered by creditors in Singapore proceedings is not overcome by countervailing advantages. This is to be preferred to Scott J's fourth principle in *Re BCCI (No 10)* that adopts a strict approach on what constitutes a mandatory statutory provision of the forum which must be strictly adhered to.

26 What this means is that the process of administering a cross-border insolvency will be a highly involved one. Liquidators cannot escape having to co-operate with each other, with appropriate deference. Courts will have to continue balancing the interests of creditors, both domestic and foreign, in deciding whether and how much of a domestic

50 [1989] QB 360, criticised by JL Westbrook, "Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum" (1991) 65 American Bankruptcy Law Journal 457 at 481 *et al*.

51 *Felixstowe Dock & Railway Co v United States Lines Inc* [1989] QB 360 at 379.

52 [2006] UKPC 26, [2007] 1 AC 508.

liquidation estate to transfer from an ancillary proceeding to the main bankruptcy hearing. What is sought is justice or fairness from a realistic perspective.