CROSS-BORDER CONTROVERSY -
A TALE OF TWO SHIPS PASSING IN THE NIGHT?

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Introduction

The 21st century is the age of Facebook, the patenting of the human genome, and information on demand. Commerce similarly is in a state of dynamic change with globalisation a major theme. Companies trade relatively unhindered by national borders. Production occurs in low cost jurisdictions. Business functions such as IT and finance are "offshored". Parent company and treasury functions are conducted from tax havens and domiciles of convenience. Money can move countries at the click of a mouse. Capital flows seamlessly across borders in search of a home, as do goods and services in search of consumers.

But one thing that remains constant is that in a market economy, businesses still fail.

Insolvency laws are there to address such failure. But insolvency laws are the product of national legislatures. Where the company has conducted business internationally, there is asymmetry. Although a business operated internationally, perhaps globally, national borders will impede the effective operation of the laws that will govern its insolvency, and the effective reach of the court with supervisory jurisdiction.

In an attempt to address this asymmetry, the cross-border insolvency model law was formulated by UNCITRAL and, so far, has been adopted by 20 countries and territories, including Australia in 2008 and New Zealand in 2006. But the model law has its limitations. These are not confined to its lack of reach beyond the 20 adopting jurisdictions (out of 193 UN member states). In participating countries, its application is often excluded in respect of certain insurance companies and banks, its operation is substantially confined to procedural and relatively basic assistance[1], and as a recent decision[2] of the UK Supreme Court evidences, there may be a judicial reluctance to assume jurisdiction beyond what is unambiguously spelled out in the express text of the law.

Global trade is not new, though, and cross-border insolvencies have been addressed in judicial decision-making for at least 250 years. But two things are relatively new. First, globalisation, aided and abetted by the global financial crisis, has led to an increased regularity of cross-border failures that require judicial attention. Secondly, commerce has embraced financial and deal structuring complexity like never before.

In this context, no less than 4 cross-border insolvency cases have fallen for consideration at the highest level in the UK in the last 7 years. Two UK Supreme Court cases, *Rubin v Eurofinance* and *Grant v New Cap Re* were heard together, with judgment delivered last October.[3] Re *HIH*[4] was decided by the House of Lords in 2008 and *Cambridge Gas*[5] by the Privy Council in 2006. What arises from these decisions is a controversy, as two

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1 Such assistance will, though, be sufficient in many if not most cases.

2 *Rubin v Eurofinance SA; New Cap Reinsurance Corp (in liquidation) v Grant* [2013] 1 AC 236.

3 Ibid.

4 *HIH Casualty and General Insurance Ltd, In re; McGrath & Ors v Riddell & Anor* [2008]1 WLR 852.

5 *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings PLC* [2007] 1 AC 508.

distinguished Law Lords with impeccable credentials in the cross-border sphere take starkly divergent approaches to the principles underpinning the availability of substantive cross-border judicial assistance. The controversy arises between the approach of Lord Hoffmann, who carried the Privy Council in *Cambridge Gas*, and that of Lord Collins, the current editor of Dicey, Morris and Collins, whose judgment in *Rubin*/*New Cap Re* found favour with the majority in that case.

The UK Supreme Court's decision in Rubin v Eurofinance and *New Cap Re v Grant*

In these two jointly determined cases, the majority held that the bankruptcy character of the preference judgments issued by courts in the US and Australia did not take them outside of the normal rules for enforcement of in personam judgments, which these default judgments were held to be. The US judgment was not enforced in England[6] as the US Court lacked in personam jurisdiction over the defendant, whilst the Australian judgment was enforced, but only because the English defendant's conduct in lodging proofs of debt in the liquidation was held to be a submission to the jurisdiction of the court supervising that liquidation.

The decision itself, though interesting, is of far less relevance in the cross-border field than the passage in Lord Collins judgment in which his Lordship declared *Cambridge Gas* to have been wrongly decided, and the reasoning deployed in so deciding.

The Privy Council's decision in Cambridge Gas

The decision in *Cambridge Gas* presents a formidable illustration of judicial co-operation across borders. This was a bankruptcy with international dimensions, being the insolvency of a holding company of a shipping group, Navigator Holdings PLC (**Navigator**) incorporated in the Isle of Man. Given the absence of creditors and stakeholders (and their assets and personnel) in the Isle of Man, a bankruptcy filing there may have faced practical problems in securing compliance outside of the Isle of Man with orders of the Manx Court and with Manx insolvency legislation. So a bankruptcy filing in the US, an international centre of commerce (which may well have been the company's centre of main business, or "COMI") was undertaken, and the Chapter 11 process culminated in the adoption by creditors, and sanctioning by the US Bankruptcy Court, of a plan of reorganisation for Navigator. However, the plan of reorganisation required that the shares in Navigator be transferred to the committee of creditors so they could implement the plan. As Navigator was incorporated in the Isle of Man, its shares (described in the judgment as "*completely and utterly worthless*"[7]) were located there. The US Court, recognising that its jurisdiction to achieve this objective would not be recognised outside of the US, issued a letter of request to the Manx Court requesting that the Manx Court provide assistance by transferring the shares in order to enable creditors to give effect to the plan.

Thus, the involvement of one court was required in order to protect assets and proceed effectively to a plan of reorganisation, and the involvement of another jurisdiction's court was required to give efficacy to that plan. Neither court could with certainty achieve the process from start to finish by itself. Both courts, acting together, could achieve what creditors considered to be the most advantageous outcome.

Could the two courts successfully co-operate in this way to protect and reorganise this insolvent international shipping company so as to pay its creditors? Lord Hoffmann, speaking for the Privy Council in *Cambridge Gas*, held they could. In *Rubin*, Lord Collins (with Lord Walker and Lord Sumption concurring) effectively held they could not.

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6 Lord Clarke dissenting.

7 [2007] 1 AC 508 at 515; [9].

The controversy at a technical level

The controversy in *Cambridge Gas* arose because the owner (Cambridge Gas) of the shares in Navigator was a Cayman company that had not submitted to the jurisdiction of the US Court. The owner argued that the US Court lacked both in personam jurisdiction against Cambridge Gas, and in rem jurisdiction in respect of the shares (located in the Isle of Man).

Lord Hoffmann, delivering the advice of the Privy Council, accepted these submissions as correctly stating the law vis-à-vis enforcement of in personam and in rem judgments, but held that a bankruptcy proceeding such as the Navigator proceeding, was neither in rem nor in personam, it being "*a collective proceeding to enforce rights and not to establish them*"[8]. Lord Hoffmann proceeded to identify the existence of a common law power of assistance, and observed that the same outcome as the plan could have been achieved via a scheme of arrangement in the Isle of Man. It was held to be appropriate (and consistent with universalist principles) for the Manx Court to exercise its common law power of assistance by giving effect to the plan rather than requiring creditors to go to the trouble of commencing parallel Manx insolvency proceedings for no purpose other than to achieve the same outcome.

In *Rubin v Eurofinance*, Lord Collins' basis for overruling *Cambridge Gas* is succinctly set out in paragraphs 118 and 132:

> "118. … The shares in Navigator owned by Cambridge Gas (a Cayman Islands company) were, on ordinary principles of the conflict of laws, situated in the Isle of Man, and the shareholder relationship between Navigator and Cambridge Gas was governed by Manx law. The Privy Council, as noted above, did not articulate any rule for the jurisdiction of the US Bankruptcy Court over Navigator (although it had plainly submitted to its jurisdiction) or over Cambridge Gas (which the Manx Courts had held and the Privy Council accepted, had not submitted) or over Cambridge Gas' Manx assets.
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> …
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> 132. It follows that, in my judgment, Cambridge Gas was wrongly decided. The Privy Council accepted (in view of the conclusion that there had been no submission to the jurisdiction of the Court in New York) that Cambridge Gas was not subject to the personal jurisdiction of the US Bankruptcy Court. The property in question, namely the shares in Navigator, was situated in the Isle of Man, and therefore also not subject to the in rem jurisdiction of the US Bankruptcy Court. There was therefore no basis for the recognition of the order of the US Bankruptcy Court in the Isle of Man."

Significantly, Lord Hoffmann's judgment in *Cambridge Gas* evidences agreement with all three of the legal propositions set out in paragraph 132.[9] In particular, Lord Hoffmann accepts that there was no basis for the recognition and enforcement of the US Court's order in the Isle of Man in the sense that Isle of Man law was obliged to recognise the US Court's order as having vested the shares in the creditors committee.

Here the common ground concludes. Lord Hoffmann provides a different characterisation of the US Court's order. Secondly, and contrary to Lord Collins assertion that (in view of the stated premises) there was "*no basis*" for the requested relief, Lord Hoffmann identifies such a basis - the Court's "*common law power of assistance*".[10]

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8 [2007] 1 AC 508 at 516; [13], [14].
9 Ibid, at [6], [12], [13] and [23].
10 [2007] 1 AC 508 at 518; [23].

The significance of the controversy

The implications of Lord Collins' judgment are potentially very significant. Indeed, outside of matters of procedural assistance (to which, it may be inferred, Lord Collins' observations are not directed), a circumstance where a request for judicial assistance is made is because a party and/or property is not within the jurisdictional reach of the court administering the insolvency. It would be the very circumstance that necessitated the issue of a request for assistance that would, on this analysis, deny the entitlement to assistance.

The issue is significant in another respect. In addressing the specific controversy in issue in *Rubin v Eurofinance*, Lord Collins declined to "enforce" the US default preference judgment under article 25 of the model law (as enacted in the UK), which provides that "*the court may cooperate to the maximum extent possible with foreign courts or foreign representatives*". The reasoning deployed was that a number of specific examples of permissible cooperation were provided in article 27 and they did not include "enforcement" of judgments. Recognition and enforcement are fundamental matters in private international law. Lord Collins concluded that even applying a purposive interpretation to article 25, the model law had not been designed to enable the recognition and enforcement of such judgments.

The specific examples given in article 27 of judicial cooperation are quite narrow and largely procedural. Many requests for assistance will fall outside of these examples. Lord Collins' approach to the issue, if followed in future cases, will on the face of it give somewhat limited scope to the jurisdiction conferred by article 25. But his Lordship's approach to interpretation must be subject to one important qualification. If a common law power of assistance existed **prior to** the enactment of the model law, the enactment of article 25 would not serve to diminish that jurisdiction. The language of the provision is unambiguously to the contrary. If the jurisdiction already existed, it would remain in existence following the enactment of the model law. The interpretation of article 25 in this circumstance, with its statutory encouragement to "*cooperate to the maximum extent possible*", would no doubt be quite different.

Therefore, from the important perspective in Australia and other adopting countries of determining the scope of permissible judicial cooperation under article 25, it is imperative to determine whether there already existed a potent common law power of assistance.

Bankruptcy Orders - Deciding Rights or Collective Enforcement Remedy?

A "bankruptcy order" may consist of an order that a company be wound up, or that a scheme of arrangement be sanctioned, or as evidenced by *Cambridge Gas*, that a plan of reorganisation under Chapter 11 of the US Bankruptcy Code be confirmed. The proper characterisation of such an order is one important aspect of the divergent approaches evident between Lord Hoffmann and Lord Collins.

Lord Hoffmann held the order of the US Bankruptcy Court was neither in personam nor in rem – it was a bankruptcy order and the purpose of bankruptcy proceedings is to provide a mechanism of collective execution. The shares in Navigators (owned by Cambridge Gas) were to be transferred to the creditors committee "*to enable the creditors to control the* [subsidiary] *shipping companies and implement the plan*"[11].

Lord Collins, in contrast, after first observing that the US Court's order was not of an in personam character, then said this:

[11] Ibid at 514;[5].

> "The order vested the shares in Navigator in the creditors' committee. It did not declare existing property rights. Indeed the whole purpose of what was the functional equivalent of a scheme of arrangement was to alter property rights. But it is not easy to see why it was not an in rem order in relation to property in the Isle of Man in the sense of deciding the status of a thing and purporting to bind the world."[12]

Several observations may be offered in respect of these competing characterisations.

First, there appears to be a difference of view as to whether the US Court's order is "*deciding the status of a thing*" in respect of the shares, and in this sense possibly an in rem order. Characterisation is important because an identification of the nature of a bankruptcy order will guide the selection of the appropriate theory to govern its recognition internationally.

In the author's view, Lord Hoffmann's analysis on this point is to be preferred. There was no issue in the US Court as to who owned the shares. There was, indeed, no adjudication of private rights (albeit there was an alteration of private rights). The shares were, without contest, owned by Cambridge Gas. But Navigator was hopelessly insolvent, under a formal insolvency process, and the US Bankruptcy Act (as well as Manx legislation) provides means to address, collectively, the claims of creditors in this context. The order, indeed, presupposed Cambridge Gas' uncontested ownership of the shares (this fact necessitating the vesting clause in the plan). As Lord Mance puts it in *Rubin*, indicating why he was not prepared to subscribe to Lord Collins' view as the incorrectness of *Cambridge Gas*[13], the vesting of the shares in the creditor's committee "*was no more than a mechanism for disposing of Navigators' assets, which did not affect or concern Cambridge Gas. The Board was therefore, in its view (rightly or wrongly), concerned with the distribution of the insolvent company's assets in a narrow and traditional sense* "[14].

Secondly, it may be questioned whether it is the US Court's order, rather than the US Bankruptcy Act itself, that had the operative effect on the share ownership. Clarifying this issue is important given that Lord Collins' approach is premised on it being the foreign court's order that is, or is not, to be recognised and enforced.

Lord Collins clearly sees the order of the US Bankruptcy Court as having the operative effect, framing the ultimate legal issue as being one of whether **the order** is entitled to recognition in the Isle of Man. In this characterisation, Lord Collins, though supported by Australian authority in this respect, would appear to have overruled another recent Privy Council decision, that of *Kempe v Ambassador Insurance Company (in liquidation)*[15], delivered on behalf of the Board, it should be noted, by Lord Hoffmann.

The WA Court of Appeal has held that the effects of a scheme of arrangement are "*created*" by the Court's order.[16] This case was followed at first instance in Western Australian by Anderson J in *Bond Corporation Holdings Limited v State of Western Australia (No 2)*[17], his Honour expressly holding that it is the Court's order that has the operative effect "*not the resolution of the creditors and not the statute*"[18]. Delivering the opinion of the Privy Council in *Kempe*, however, Lord Hoffmann expressly disagreed with the above Australian authorities:

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12 Rubin v Eurofinance at [103].
13 Instead remaining neutral on the correctness of *Cambridge Gas*.
14 *Rubin v Eurofinance* at [182].
15 [1998] 1 WLR 271.
16 *Caratti v Hillman* [1974] WAR 92 at 95.
17 (1992) WAR 61.
18 Ibid at 68.

> "It is true that the sanction of the Court is necessary for the Scheme to become binding and that it takes effect when the order expressing that sanction is delivered to the Registrar. But this is not enough to enable one to say that the Court (rather than the liquidators who proposed the Scheme or the creditors who agreed to it) has by its order made the scheme. It is rather like saying that because Royal assent is required for an Act of Parliament, a statute is an expression of the Royal will. Under section 99 it is for the liquidators to propose the scheme, for the creditors by the necessary majority to agree to it and for the Court to sanction it. It is the statute which gives binding force to the Scheme when there has been a combination of these three Acts, just as the rules of the constitution give validity to acts duly passed by the Queen in Parliament."[19] (citations omitted)

Moving from a scheme of arrangement (and US plan of reorganisation) to liquidation, the position appears clearer with regard to a winding up order made by a Court. It is legislation that attaches the consequences to a winding up order, including the many and varied effects on property rights such as the stay on proceedings, the protection of the company's property against attachment, the restrictions on dealings with shares in the company, and the mechanisms that may, if deployed, displace or deplete property rights of stakeholders. When the supervising court seeks the assistance of a foreign court to protect assets located there, it is not seeking to enforce the order that the company be wound up, but instead requesting that the foreign court assist by affording protection consistent with the legislated winding up regime. It is recognition and assistance of the bankruptcy proceeding/process – the statutory effects as well as any specific court order – that is being sought.

Cross-border judicial assistance – jurisprudential underpinnings

Lord Collins analysed the issue in *Cambridge Gas* through the prism of judgment enforcement principles, bringing into play the forensic tests for international jurisdiction that are essential foundations for the application of the doctrine of obligation.

In contrast, there is no attempt by Lord Hoffmann to base the *Cambridge Gas* decision on any rule or principle that a "bankruptcy proceeding" is entitled, internationally, to be recognised and enforced in the same sense (though governed by different rules) as in personam orders and in rem orders are recognised and enforced internationally. In contrast, Lord Hoffmann indicated there was only one source of jurisdiction for the Manx Court to make such an order – pursuant to its common law power of assistance.[20]

Fundamental to evaluating the correctness of the *Cambridge Gas* decision is recognition that the jurisprudence deployed respectively by Lord Collins and Lord Hoffmann is fundamentally different. Lord Collins' approach is firmly rooted in the doctrine of obligation, resting on the public interest in limiting re-litigation. It is a black letter rule with no ambiguity and limited scope for contest as to its application. As Lord Hoffmann describes the doctrine:

> "When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further enquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right[21]."

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19 *Kempe v Ambassador Insurance Company* [1997] UKPC 55 at [12].

20 Indeed, as Lord Hoffmann observes at [13], the New York Court was similarly aware that the vesting "could not automatically have effect under the law of the Isle of Man" which is why the order the US Court made confirming the plan recorded an intention to request judicial assistance.

21 *Cambridge Gas* at 516; [13].

Lord Hoffmann took no issue with the doctrine; rather, his Lordship considered it had no relevant application to the question of how the Manx Court ought to respond to the letter of request. Lord Hoffmann's alternative process of reasoning can be summarised as follows:

First, Lord Hoffmann discerned from the authorities the private international law principle of modified universalism, evident from the case law as far back as 1764 (*Solomons v Ross*[22]*),* and which his Lordship subsequently described in *Re HIH*[23] as being "*the golden thread running through English cross-border insolvency law since the 18th century*".[24] This principle requires a Court to recognise locally the person who is empowered to act on behalf of the company under the foreign bankruptcy law.

Secondly, bankruptcy proceedings should ideally have universal application where there is a single bankruptcy in which all creditors are entitled and obliged to prove, so that no single creditor should be advantaged (or disadvantaged) simply because the creditor resides in a jurisdiction where more of the assets or fewer of the creditors are located.

Thirdly, citing a South African case, *Re African Farms*[25] Lord Hoffmann held that such recognition "*carries with it the active assistance of the Court*". Again citing the *African Farms* decision, Lord Hoffmann went on to hold that active assistance could include permitting the foreign office holder to deal with the local assets in the same way as if they were within the jurisdiction of the foreign court administering the insolvency.

Fourthly, in applying these principles to the facts at hand in *Cambridge Gas*, Lord Hoffmann observed that the same outcome as under the US Plan could have been achieved via a scheme of arrangement in the Isle of Man, and it was therefore appropriate for the Manx Court to provide assistance by giving effect to the plan rather than requiring creditors to go to the trouble of commencing parallel Manx insolvency proceedings simply to achieve the same outcome.

Finally, the Court's power was subject to several constraints[26], including that the assistance did not infringe any local laws, and that it was not manifestly contrary to public policy. The relief could also, where appropriate, be subject to any conditions as may be imposed for the protection of local creditors[27].

Universalism or Obligation?

Universalism and obligation are very different theories and are underpinned by quite different considerations. Indeed, they are chalk and cheese. Where private rights of litigants are in issue in adversarial proceedings, the doctrine of obligation has much to commend it, but its underlying rationale sits ill at ease within the framework of an international insolvency:

> "The rationale underlying the granting of comity to a final foreign judgment is that litigation should end after the parties have had an opportunity to present their cases fully and fairly to a court of competent jurisdiction. The extension of comity to a foreign bankruptcy proceeding, by staying or enjoining the commencement or continuation of an action against a debtor or its property, has a somewhat different rationale. The granting of comity to a foreign bankruptcy proceeding enables the

22 (1764) 1H Bl 131n.
23 [2008] 1 WLR 852.
24 [2008] 1 WLR 852 at 861.
25 In *Re African Farms* [1906] TS 373 at 377.
26 Hence the inclusion of the word "modified" in the description "modified universalism".
27 [2007] 1 AC 508 at 518.

> assets of a debtor to be disbursed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion."[28]

In the author's view, the distinctions drawn above by a US Appeals Court are compelling, but the problems with any suggested application to cross border insolvency of the doctrine of obligation (or of the tests for international jurisdiction that are considered essential to the doctrine's efficacy) do not end there.

To begin with, authority is against the doctrine being the underlying rationale, in the sense that cross border judicial assistance has been provided in substantive ways where the supervising court lacked relevant in personam or in rem jurisdiction. There are many cases where courts in foreign jurisdictions have recognised an insolvency proceeding and assisted the liquidator or trustee take control of the assets of a bankrupt within that jurisdiction Most of these cases can perhaps be justified on the basis of other private international law principles[29]. This is not always the case, however. Take, for example, the Transvaal decision of *Ex parte B.Z. Stegmann*[30] where the application by a foreign trustee related to real property in Transvaal assigned to him as a matter of Cape law. The foreign trustee had no legally recognised entitlement (as a matter of Transvaal law) to have the assignment to him of that real property recognised and enforced. Judicial assistance was nonetheless provided in accordance with comity principles. This same issue came up more recently in Ireland, with the same outcome, the Irish Court assisting at common law.[31]

A second illustration can be found in the cases where a court has stayed local court proceedings by a creditor against a company that is in liquidation overseas. It is clear law that the stay imposed by insolvency legislation does not have extra territorial operation even though the surrounding insolvency provisions do. That is, Parliament in one country does not legislate to bind the courts of another country.[32] Notwithstanding that there was no foreign statutory provision, nor foreign Court order, effecting a stay of local proceedings, courts have nonetheless ordered a stay locally. To take but one example, from Lord Hoffmann's early judicial career, *Banque Indosuez SA v Ferromet Resources Inc*[33], Hoffmann J held:

> "This Court is not of course bound by the stay under United States Law but will do its utmost to cooperate with the United States Bankruptcy Court and avoid any action which might disturb the orderly administration of Inc in Texas under Ch11. This court has jurisdiction to make interlocutory orders for the preservation of Inc's property in this country by way of assistance to the United States Bankruptcy Court …"

A third example is provided by the ancillary liquidation doctrine.

Closer to home, in *ML Ubase Holdings Co Limited v Trigem Computer Inc*[34], Brereton J refused to exercise the NSW Supreme Court's discretion to make a garnishee order absolute because the creditor seeking the order had also proven in the Korean scheme for reorganisation of the corporation. Again, it is clear from his Honour's judgment that Korean

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28 *Cunard Steamship Company Limited v Salen Reefer Services* (1985) 773 F.2d 452 at 457-458.

29 For example, principles pertaining to assignments of moveable property in the case of individual bankrupts where their assets have been transferred to a trustee, or in the case of a corporate insolvency, the principle that the law of the place of incorporation determines who has capacity on behalf of the company to deal with its assets.

30 [1902] TS 40.

31 *In the matter of David K Drumm, a bankrupt*, unreported, 13 December 2010, High Court, Dunne J.

32 As a matter of authority, these propositions were confirmed as long ago as 1874 in *re Oriental Inland Steam Co* (1874) R9Ch App 557, and recently confirmed in the English Court of Appeal in *Blooms v Harms* [2010] Ch187.

33 [1993] BCLC 112.

34 (2007) 69 NSWLR 577.

law did not prevent or preclude garnishee proceedings in Australia, but "*it is far more just and convenient that the claims of all creditors be resolved according to the law of the place of incorporation, where there can if necessary be a general pro-rata-distribution …*"[35].

A further objection to the applicability of the doctrine of obligation as the relevant rule governing the circumstances where substantive rights of stakeholders affected by an insolvency can be enforced internationally is that the doctrine pertains only to Court orders. Frequently, the assistance being sought internationally arises not out of any order of the Court, but exclusively in respect of the legislative regime. There are many formal insolvency processes, illustrated in Australia by voluntary windings up, voluntary administrations, and deeds of company arrangement, where there is no necessary court involvement in the insolvency. Any theory for international recognition and assistance that is based on judgment enforcement theory, or its applicable tests for international jurisdiction, will struggle at a conceptual level to explain cross-border judicial assistance granted in respect of such processes.

A competing theory, comity, is more often cited as the underlying rationale for a court of one country assisting a foreign insolvency court (or liquidator).

Comity

The US Supreme Court, in *Hilton v Guyot*,[36] described comity in the following terms:

> "'Comity', in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."*37*

If not a matter of "*absolute obligation*" nor "*mere courtesy and goodwill*", what then is comity's underlying rationale? Examination of an early analysis of comity by Story[38] provides some insightful analysis. In Story's review of the then existing literature in the area, the recurring themes were "*mutual interest"* and *"utility*", grounded in the observation that even though the laws of one country do not have direct force in another country, "*nothing could be more inconvenient in the commerce and general intercourse of nations, than that what is valid by the laws of one place should become without effect by the diversity of laws of another*."[39] Story concludes:

> "The true foundation, on which the administration of international law must rest, is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconvenience, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return[40]."

Supporting this conclusion, Story cites the jurist Rodenburg. The quotation is in Latin but is worth translating and reproducing as, though written two centuries ago in a different context, its rationale would appear to have clear parallels to the circumstances of the winding up of a company operating internationally:

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35 Ibid at [76].
36 159 U.S 113 (1895)
37 (Ibid at 163-164.
38 Story, J, *Commentaries on the Conflict of Laws* (1st ed, 1834), pp 1-38.
39 Ibid at 30.
40 Ibid at 34.

> "What manner of thing is there in the explanation that means that personal statutes should apply outside the territory? This alone: that the very nature of the thing or necessity entails that the law of only one jurisdiction, that of the domicile, should be held to be universal, as when it is a question of a person's status or condition; since it is necessary for a law to take the status of a man from one fixed place, because it would be absurd, and there would naturally be a conflict between those things, if the status or condition of a man who was travelling or sailing changed with each place to which he was carried, such that at one and the same time he would be independent in one place but subject to another's authority in another place, such that a wife would at the same time be subject to her husband's authority and free of it, such that in one place a man would be held to be wasteful and in another place frugal."[41]

While, contrary to Story's conclusion, comity is no longer seen as the theoretical underpinning of private international law, it nonetheless continues to play a major role in that field. Lord Collins, writing extra-judicially, has written of "*the resurgence of the doctrine of comity, not as a basis for the system of private international law, but as a basis for the development of particular rules and attitudes in the resolution of international disputes*".[42]

There has recently in Australia been a resurgence in interest in comity, both in its relevance in the cross-border insolvency field and in other areas. There have been judicial protocols entered into between the New South Wales Supreme Court and the equivalent courts in New York and Singapore to facilitate resolution of foreign law issues. Secondly, in recent proceedings relating to the admissibility of a debt in the liquidation of an HIH subsidiary in New Zealand, there was effectively a division of responsibilities between the New Zealand Court and Justice Brereton in the NSW Supreme Court, with each Court addressing the respective issues of law governed by their laws. Thirdly, speaking at an INSOL conference in Singapore, Justice Barrett considered the future may witness a "*strengthening of the principles of comity*" which would, according to his Honour, "*go hand in hand with the implementation of the model law where it is in force, with each likely to underwrite and strengthen the other*".[43] Finally, the Honourable JJ Spigelman AC, former Chief Justice of New South Wales, has spoken of the increasing opportunities (at conferences, for example) for interactions amongst judges from different jurisdictions, and "*an enhanced sense of international collegiality*" that has developed. "*This has considerably expanded the mutual understanding among judges of other legal systems. It has transformed the concept of judicial comity.*"[44]

In the author's view, the attribution in almost all of the authorities to comity as the foundation both for a Court's obligation not to "*interfere*" with a foreign insolvency, and for its power to act in aid of it, is securely grounded, and is to be favoured over any application of the doctrine of obligation or the tests for international jurisdiction that underpin it.

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41 Ibid at 35.

42 Lawrence Collins, 'Comity in Modern Private International Law' in Fawcett JJ (ed), Reform and Development of Private International Law (OUP, Oxford, 2002), p 91.

43 *Judicial Reflections on Insurance Insolvency* presented by Hon. Justice Barrett to the INSOL International Insurance Insolvency Ancillary Meeting, Singapore,13 March 2011<http://nswca.jc.nsw.gov.au/courtofappeal/Speeches/barrett130311.pdf> viewed 8 August 2013, at p 10. .

44 *MOU between New York and New South Wales* presented by the Honourable JJ Spigelman AC, Chief Justice of New South Wales to the New York State Bar Association International Section Meeting, Sydney, 28 October 2010 <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/spigelman281010.pdf/$file/spigelman281010.pdf> viewed 8 August 2010, at p 9.

Looking into the future - the rise and rise of the scheme of arrangement

The insolvency community is not immune from the dynamic change happening in society and commerce, and the last 10 years has seen some significant changes in the administration of insolvent estates, particularly at the large end of town. One driver of this change has been the recent emergence of hedge funds as a significant player in this space, bringing ideas, patience and (importantly) capital to the resolution of complex problems. By investing their equity as capital in the insolvent company (or converting debt that they have acquired into equity), they have a particular focus on preserving value, and a longer term horizon within which to secure a return on their investment. As formal insolvency processes such as liquidation and receivership are frequently accompanied by a destruction in value[45], there has been a renewed interest in the use of schemes of arrangement in an attempt to restructure a distressed company's balance sheet so as to return it to a state of solvency. Recent high profile examples in this country include Alinta and Centro.

The law surrounding schemes of arrangement is complex enough where such schemes have purely domestic factors at play, but where there are international creditors sought to be bound by the scheme, or creditors with foreign law as the designated proper law, additional legal complexities arise. According to settled principles of private international law, some issues that may be central to a scheme, such as discharge of a debt, are to be addressed by reference to the proper law of the contract. If the scheme is to be entered into in a jurisdiction other than that selected by the proper law clause, the effect of the scheme on that debt will not (or may not) be recognised internationally. Other private international law principles have also been applied to preclude effective international recognition of the effects of a scheme, even to schemes pertaining to insolvent companies, and to a scheme entered into by a company in liquidation.[46] Australian Courts have been mindful of these issues when considering whether to sanction a scheme of arrangement[47].

These authorities suggest that schemes purporting to bind all creditors, including those located overseas or with a selected overseas proper law will, or the very least may, face difficulties in securing compliance with the scheme in respect of those creditors. It would be an understatement to say that this is problematic. Absent a solution, it may mean that a distressed company may have no alternative but to pursue an alternative formal insolvency route, such as liquidation or administration (with all the value destruction risks).

There are two potential solutions to this dilemma. One is to undertake parallel schemes of arrangement in all of the relevant jurisdictions (as occurred with HIH, where business had been conducted in both England and Australia). This is, of course, an expensive solution, and the costs, delay and uncertainty associated with it is one of the reasons cited by Lord Hoffmann for the second alternative, being a solution based on universalist principles. That alternative is for the scheme to proceed in the natural forum[48], and for the position to be addressed in other relevant jurisdictions by the supervising court issuing a letter of request to the courts of those other jurisdictions asking that those courts assist by giving effect to the scheme locally. This is, indeed, what happened in *Cambridge Gas*.[49]

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45 For example, as ipso facto clauses are triggered, and "fire sale" connotations attach to asset sales.

46 *New Zealand Loan & Mercantile Agency Company Ltd v Morrison* [1898] AC 349.

47 See *Re Bulong Nickel Pty Limited* [2002] WASC 226, *Re Glencore Nickel Pty Limited* 44 ACSR 210, and *Re HIH Casualty & General* 215 ALR 562.

48 Generally the place of incorporation, though possibly the centre of main interest if that is different.

49 For completeness, it is noted that the UNCITRAL model law would also provide jurisdiction to order the necessary relief, but this solution will be confined to the 20 jurisdictions that have enacted the model law within their jurisdiction.

The other aspect associated with the rise of schemes of arrangement is that they are increasingly deployed not as an alternative means for winding up the company's affairs, but instead to restructure the insolvent company's balance sheet so as to restore solvency to the company. Such a process is directed at the same outcome as a formal liquidation or (quasi-liquidation) scheme, namely the best return for creditors from a company unable to pay its debts. It is therefore to be hoped that cross-border assistance will similarly be provided in respect of schemes aimed at such an outcome, notwithstanding that the company itself will continue to trade into the future as a viable entity[50].

Conclusion

In Australia at least, the Cross Border Insolvency Act will provide the solution in many, if not most, cross-border liquidations. But this will not always be so, particularly where complexity takes the matter into novel territory. The jurisdiction conferred by article 25 of the model law may also very much be dependent on the view a court takes as to its pre-existing power to assist.

Lord Hoffmann, in identifying the "*golden thread*" of universalism that has guided the common law for more than 200 years, is simply the latest distinguished judge to provide cross border assistance that is, at the same time, practical and representative of a principled development of the law.

It is suggested that the jurisprudence underpinning comity provides a secure foundation for this approach. Illustrating one aspect of that jurisprudence, Innes J in *Ex parte B.Z. Stegman* remarked, in granting assistance to the Cape Courts, that in doing so his Honour was "*trusting to receive reciprocal recognition in the future from those Courts."*[51] And as Millett LJ (as his Lordship then was) said[52]:

> "In other areas, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention … it is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former."

To do any less would be to place at risk the delivery of fairness and equality of treatment to creditors and other stakeholders in the administration of an insolvent company.

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50 Indeed, that is exactly what happened in *Re Glencore Nickel* (2003) 44 ACSR 210 at 225 where McLure J sanctioned a scheme upon receipt of evidence that a US Court would likely "under the comity principle" restrain US creditors from acting contrary to the terms of the scheme.

51 [1902] TS 40 at 54.

52 [1998] Q.B. 81.