In 2000, the Singapore Court of Appeal ruled that Singapore creditors are to be paid in priority to foreign creditors in the liquidation of a registered foreign company carrying on business in Singapore. This was in Tohru Motobayashi v Official Receiver [2000]. This means that the assets of the registered foreign company are to be ring-fenced for the payment of debts and liabilities which the company has incurred in Singapore. If there are surplus assets after the payment of such debts and liabilities, they will then be remitted to the principal place of liquidation of the registered foreign company (usually the place of its incorporation) for distribution to its worldwide creditors.

This position is out-of-line with the modern thinking on the law of cross-border liquidations as stated in common law authorities. Under common law, the liquidation of a foreign company in Singapore is regarded as an ancillary liquidation while its liquidation in the place of its incorporation is the principal liquidation. The common law takes the view that worldwide creditors of the company are to be treated equally and the court should generally direct that the liquidator in an ancillary liquidation to transmit funds to the liquidator in the principal liquidation for pari passu distribution to worldwide creditors.

However, the Court of Appeal cannot be criticised for its ruling. It was merely interpreting Section 377(3)(c) of the Companies Act. That provision states in clear terms that a liquidator of a registered foreign company shall recover and realise the assets of the foreign company in Singapore and shall pay the net amount so recovered and realised to the principal liquidator ‘after paying any debts and satisfying any liabilities incurred in Singapore by the foreign company’. In the face of this unambiguous language, it was not possible for the Court of Appeal to have come to another conclusion. Only legislative amendment can change the position.
Recently, the Singapore High Court in *RBG Resources plc v Credit Lyonnais* [2005] considered the position in relation to the liquidation of an unregistered foreign company. A foreign company needs to be registered if it establishes a place of business or carries on business in Singapore (Section 368 of the Companies Act). However, there are various activities which do not amount to the carrying on of business, such as the holding of meetings, maintenance of bank accounts, soliciting of offers, collection of debts, investment of funds, and holding of property (Section 366(1) of the Companies Act). A foreign company which engages only in these activities in Singapore does not have to be registered.

In *RBG Resources plc*, the Court held that the ring-fencing provision in Section 377(3)(c) of the Companies Act has no application to unregistered foreign companies. This is not particularly controversial, as Section 377(3)(c) refers only to registered foreign companies. What is more striking is that the Court also rejected a contention that the underlying principle of Section 377(3)(c), namely, the ring-fencing of Singapore assets for Singapore creditors, should apply in the liquidation of an unregistered foreign company. The Court decided instead that the common law will apply and that the Singapore assets of the unregistered foreign company will be remitted to the foreign liquidation estate instead of being paid to Singapore creditors. The Court further endorsed the common law philosophy that ring-fencing is retrogressive and out-of-line with internally-accepted standards of a fair and equitable cross-border insolvency regime.

*RBG Resources* has therefore created a divide between the liquidation of registered foreign companies and the liquidation of unregistered foreign companies. In the liquidation of a registered foreign company, Singapore creditors can expect to be paid in priority out of the Singapore assets before the assets are remitted to the principal liquidation. In contrast, in the liquidation of an unregistered foreign company, its assets will be remitted to the principal liquidation and Singapore creditors will have to prove in the principal liquidation on a *pari passu* basis with the company’s worldwide creditors.

Notwithstanding this somewhat confusing position, it is probably correct that the ring-fencing principle...
in Section 377(3)(c) of the Companies Act should itself be ring-fenced as much as possible. As stated above, ring-fencing is outdated and inconsistent with the contemporary ideals of a proper cross-border liquidation regime.

The ring-fencing provision in Section 377(3)(c) also provides an undesirable incentive to Singapore creditors to wind up a registered foreign company at the first hint of insolvency or financial difficulty, so as to secure the Singapore assets for themselves. This problem is compounded by the fact that the judicial management regime, and its moratorium providing distressed companies with a breathing space against creditor action, is not applicable to foreign companies. For instance, if a Singapore creditor of a registered foreign company becomes concerned that it has become insolvent in its home jurisdiction, and that it may send assets and funds back to its insolvent head office, one of the most obvious and immediate responses may be to commence winding up proceedings so as to trigger the ring-fencing provision in Section 377(3)(c). The foreign company will not be able to invoke the judicial management regime to protect itself against the Singapore winding up proceedings.

Finally, the ring-fencing provision in Section 377(3)(c) may ultimately work against Singapore creditors. Singapore creditors who have taken a first bite of the cherry in the liquidation of a registered foreign company in Singapore may find themselves ostracised or discriminated against in the principal liquidation if they need to prove for the balance of their debts. A foreign court may also note Singapore’s ring-fencing philosophy and apply a similar principle in the liquidation of a Singapore-incorporated company in that foreign jurisdiction.

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