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JURISDICTIONAL BASIS OF SYNTHETIC PROCEEDINGS IN CROSS-BORDER INSOLVENCY

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Synthetic proceedings involve the application of foreign law by a domestic court in insolvency proceedings to create an effect which would have been achieved had secondary insolvency proceedings been commenced in a foreign jurisdiction. A domestic court faced with an application to conduct synthetic proceedings would generally consider if it has the jurisdiction or power to do so, and whether it should exercise its discretion to do so. This article looks at the source of a court's jurisdiction to conduct synthetic proceedings – whether it is statute or common law – and the factors to be considered in the exercise of judicial discretion.

SIM Kwan Kiat
LLB (Hons) (NUS); LLM (NYU);
Advocate & Solicitor (Supreme Court of Singapore);
Attorney and Counsellor-at-law (New York State);
Rajah & Tann Singapore LLP.

I. Introduction

1 The general rule is that a domestic court applies the *lex concursus* (or *lex fori concursus*)[1] in the administration of the estate of a company undergoing a domestic insolvency process. This applies even for foreign incorporated companies wound up in the domestic court. There was a time when the English courts, in particular, were adamant that the predominant role of the *lex concursus* in insolvency proceedings was firmly entrenched, both in matters of procedure and substance. As noted by the late Prof Ian Fletcher, "[the] dominant consideration appears to be that, as a procedure that is entirely the product of statutory provisions in which the requirements of public policy are

1 The law of the jurisdiction where the insolvency proceedings are opened.

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constantly to the fore, it would be unthinkable to attempt a fusion of legal cultures within the framework of an English liquidation."[2]

2 But as the decisions in *Re Collins & Aikman Europe SA*[3] ("*Collins & Aikman*") and *Re MG Rover Belux SA/NV*[4] ("*MG Rover*") demonstrate, it is open to a domestic court to apply foreign law to an issue in a domestic insolvency proceeding, so as to create a similar effect to how a foreign jurisdiction may have dealt with such issue had secondary proceedings been commenced there. This has come to be known as the utilisation of "synthetic" proceedings.[5] *Collins & Aikman* and *MG Rover* appear to be the only reported English decisions to date to have expounded on the use of synthetic proceedings.[6] What is the source of the domestic court's power or jurisdiction to conduct synthetic proceedings?

II. *Re Collins & Aikman Europe SA*[7]

3 The Collins & Aikman group commenced administration proceedings in the UK, which was the centre of main interest of certain subsidiaries in the group. One issue was how certain Spanish creditors would be treated in the administration and

2 Ian F Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd Ed, 2005) at paras 3.72–3.73, citing, *inter alia*, *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385 at 384 *per* Vaughan Williams J.

3 [2006] BCC 861.

4 [2007] BCC 446.

5 See Kannan Ramesh J, "Synthesising Synthetics: Lessons learnt from *Collins & Aikman*", keynote address at the 2nd Annual GRR Live New York (26 September 2018); John A E Pottow, "A New Role for Secondary Proceedings in International Bankruptcies" (2011) 46(3) Tex Int'l L J 579; Charles W Mooney Jr, "Harmonizing Choice-of-Law Rules for International Insolvency Cases: Virtual Territoriality, Virtual Universalism, and the Problem of Local Interests" (2014) *Faculty Scholarship at Penn Law* 1418.

6 See also *Eurotunnel Finance Ltd No. 200647559* (Paris Commercial Court, 2 August 2006) and *Re Alitalia Linee Aeree Italiane SpA* [2011] 1 WLR 2049 (see below).

7 See Gabriel Moss QC, "Group Insolvency – Choice of Forum and Law: the European Experience under the Influence of English Pragmatism" (2007) 32(3) Brook J Int'l Law 1005 at 1017.

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distribution of assets of the group. If the assets of the group were distributed under English law in the UK proceedings, they would not enjoy the favourable treatment they would have received under Spanish law had secondary proceedings been commenced in Spain. The commencement of secondary proceedings in Spain was not ideal as it would lead to additional costs and possibly delay the resolution of the restructuring. The administrators had assured the Spanish creditors that, in the UK proceedings, they would be accorded the treatment they would receive under Spanish law, and sought directions from the English court to allow that.

4 The issue was whether the English court had the power or jurisdiction to grant the directions sought. The court in *Collins & Aikman* considered three possible sources of jurisdiction – legislation (the UK Insolvency Act 1986[8]), the principle in *Re Condon, ex parte James*[9] ("*ex parte James*") and inherent jurisdiction.

A. Legislation

5 Schedule B1 (read with Schedule 1) of the UK Insolvency Act sets out the functions and powers of administrators under English law. The court in *Collins & Aikman* reviewed the following paragraphs of Schedules B1 and 1:

(a) Paragraph 5 (Schedule B1) – An administrator is an officer of the court (whether or not he is appointed by the court).

(b) Paragraph 13 (Schedule 1) – Power to make any payment which is necessary or incidental to the performance of his functions.

(c) Paragraph 23 (Schedule 1) – Power to do all other things incidental to the exercise of the foregoing powers.

8 c 45.
9 (1873–74) L R 9 Ch App 609.

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(d) Paragraph 63 (Schedule B1) – The administrator of a company may apply to the court for directions in connection with his functions.

(e) Paragraph 65 (1) (Schedule B1) – The administrator of a company may make a distribution to a creditor of the company.

(2) Section 175[10] shall apply in relation to a distribution under this paragraph as it applies in relation to a winding up.

(3) A payment may not be made by way of distribution under this paragraph to a creditor of the company who is neither secured or preferential unless the court gives permission.

(f) Paragraph 66 (Schedule B1) – The administrator of a company may make a payment otherwise than in accordance with paragraph 65 or paragraph 13 of Schedule 1 if he thinks it likely to assist achievement of the purpose of administration.

(g) Paragraph 68(2)[11] (Schedule B1) - If the court gives directions to the administrator of a company in connection with any aspect of his management of the company's affairs, business or property, the administrator shall comply with the directions.

6 The court was not entirely persuaded that the administrators could rely on para 65 of Schedule B1 as it was intended to apply to creditors regarded as preferential under English law. The court however accepted that para 66 of Schedule B1 provides the route for the administrators to seek the direction they need.[12] Putting aside inherent jurisdiction and *ex parte James* for the moment, the question is whether a Singapore court has a similar power under statute.

10 Section 175 of the UK Insolvency Act (c 45) (read with s 386 of Pt 12 of the Act) provides, *inter alia*, that preferential debts are to rank in priority to all other debts.

11 Paragraph 68(3) specifies the one or more conditions which have to be present before the court can give directions under para 68(2).

12 *Re Collins & Aikman* [2006] BCC 861 at [27]–[36].

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7 The powers of a judicial manager are set out in the Eleventh Schedule of the Companies Act.[13] In particular, paras (*m*) and (*v*) of the Eleventh Schedule are the respective equivalents of paras 13 and 23 of Schedule 1 of the UK Insolvency Act. Singapore has no direct equivalent to paras 65 and 66 of Schedule B1, which expressly confer on an administrator the power to make distributions or payments pursuant to s 175 of the UK Insolvency Act (the counterpart of s 328 of the Companies Act), or otherwise than in accordance with s 175 if so permitted by the court.[14]

8 It does not, however, mean that a Singapore court has no jurisdiction to consider an application to conduct synthetic proceedings simply because of differences in the legislation. Like an administrator in the UK, a Singapore judicial manager is an officer of the court and subject to its supervision. Section 227G(3) of the Companies Act allows a judicial manager to (a) do all such things as may be necessary for the management of the affairs, business and property of the company; and (b) do all such other things as the court may by order sanction.

9 The powers set out in para (*m*) of the Eleventh Schedule ("power to make any payment which is necessary or incidental to the performance of his functions") and para (*v*) ("power to do all other things incidental to the exercise of the foregoing powers") are framed in wide terms. Further, the judicial manager may apply to court for directions in relation to any matter arising in connection with the carrying out of his functions (s 227G(5)). Notably, the new s 99(6)(*d*) of the Insolvency, Restructuring and Dissolution Act[15] expressly authorises a judicial manager to pay a debt existing at the time of the company's entry into judicial management where "such payment is necessary to assist the

13 Cap 50, 2006 Rev Ed.

14 Section 328 of the Companies Act (Cap 50, 2006 Rev Ed), which falls within Pt X, does not apply in judicial management unless specifically imported via s 227X. See *Re Wan Soon Construction Pte Ltd* [2005] 3 SLR(R) 375.

15 Act 40 of 2018, which was passed into law on 1 October 2018. It will come into effect on a date to be notified in the *Gazette*.

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achievement of one or more of the purposes of the judicial management".[16]

10 There appears to be no discernible Parliamentary intention that the statutory provisions preclude a distribution of the company's assets to creditors in a manner different from that under Singapore law in an appropriate case. As a judicial management order can be made over a foreign company,[17] it cannot be entirely unforeseeable that some aspect of foreign law may be relevant in a judicial management. Given the wide import of a judicial manager's powers, a Singapore court should have the jurisdiction under statute to consider an application by a judicial manager[18] to conduct a synthetic proceeding to accord treatment to certain creditors which they would have enjoyed under foreign law but not under Singapore law.

11 The court in *Collins & Aikman* considered whether Arts 3 and 4 of the EU Insolvency Regulation applicable then[19] proscribe the application of foreign law in a domestic insolvency proceeding. Article 3 provides for the jurisdiction of a member state, where the centre of main interest is situated, to open

16 Compare s 227G(6) of the Companies Act (Cap 50, 2006 Rev Ed) with the new s 99(6) of the Insolvency, Restructuring and Dissolution Act (Act 40 of 2018) which provides that:

> Nothing in this section authorises the judicial manager of a company to make any payment towards discharging any debt to which the company was subject on the date of the company's entry into judicial management, unless —
>
> ...
>
> (*c*) such payment is necessary or incidental to the performance of the judicial manager's functions; or
>
> (*d*) such payment is necessary to assist the achievement of one or more of the purposes of the judicial management mentioned in section 89(1).

17 Section 227AA read with ss 351(1)(*d*) and 351(2A) of the Companies Act (Cap 50, 2006 Rev Ed).

18 Similar arguments may be made for a Singapore liquidator – see, *eg*, ss 272 and 273 of the Companies Act (Cap 50, 2006 Rev Ed) and ss 144 and 145 of the Insolvency, Restructuring and Dissolution Act (Act 40 of 2018).

19 EU Regulation on Insolvency Proceedings (Council Regulation (EC) 1346/2000).

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insolvency proceedings. Article 4 is a choice of law rule. It states, among other things, that the law of the State of the opening of proceedings shall determine the conditions of the opening of those proceedings, their conduct and their closure. Recital 23 of the EU Insolvency Regulation emphasises the point:

> Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (*lex concursus*). This rule on conflict of laws should be valid both for the main proceedings and for local proceedings; the *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.

Article 4, read with Recital 23, codifies the application of the *lex concursus* in insolvency proceedings in the EU. Notwithstanding that, the court in *Collins & Aikman* held that English law was sufficiently flexible to allow the application of foreign law, and nothing in Art 3 of the EU Insolvency Regulation precludes that.[20]

12 It is not clear from the judgment whether the court considered if Art 4 read with Recital 23 may change the analysis. That point is now moot. The EU Insolvency Regulation has since been recast. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (the "Recast Regulation") came into effect on 20 June 2017 and applies to insolvency proceedings opened after that date.[21] Article 29a of the Recast Regulation has validated the approach in *Collins & Aikman* (and *MG Rover*). Article 29a requires a court of a member state which is requested to open secondary proceedings to notify the liquidator in the main proceedings. Upon request by the liquidator in the main proceeding, the court of the member state shall postpone the decision to open secondary proceedings if doing so "is not necessary to protect the interest of local creditors, *in particular*, when the liquidator in

20 *Re Collins & Aikman Europe SA* [2006] BCC 861 at [34].

21 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 ("Recast Regulation") has effect in the UK until it leaves the EU.

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the main proceedings has given the undertaking under Article 18(1) *that the distribution and priority rights which local creditors would have had if secondary proceedings had been opened will be respected in the main proceedings*" [emphasis added].

13 The Recast Regulation not only makes it clear that a domestic court has the jurisdiction to conduct synthetic proceedings, it provides a mechanism for the avoidance of secondary proceedings if a more efficient outcome can be achieved by conducting synthetic proceedings in the main proceedings. A similar approach has been adopted by the United Nations Commission on International Trade Law ("UNCITRAL") Working Group V (Insolvency Law) in the draft legislative provisions to facilitate the cross-border insolvency of enterprise groups.[22]

14 Both the Recast Regulation and the UNCITRAL Working Group V recognise the merits of conducting synthetic proceedings, particularly where it is not necessary to open secondary proceedings because the interests of foreign creditors can be safeguarded by an appropriate undertaking by the domestic insolvency office holder.[23]

15 Clearly, the Recast Regulation and draft legislative provisions prepared by the UNCITRAL Working Group V do not have the force of law in Singapore. Nonetheless, the commonality in the approach demonstrates a growing acceptance of the benefits of synthetic proceedings. It reflects an important trend in the cross-border insolvency landscape which the Singapore courts can consider in deciding whether to grant directions for synthetic proceedings. Singapore is currently not a party to any international convention on choice of law rules in

22 United Nations Commission on International Trade Law ("UNCITRAL") Working Group V, Fifty-third session, A/CN.9/WG.V/WP.158 (26 February 2018).

23 See Kannan Ramesh J, "Synthesising Synthetics: Lessons learnt from *Collins & Aikman*", keynote address at the 2nd Annual GRR Live New York (26 September 2018) at paras 13–14.

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cross-border insolvency[24] which mandates the application of the *lex concursus*, and *a fortiori*, the Singapore regime should have the flexibility to conduct a synthetic proceeding in an appropriate case.

B. **Re Condon, ex parte James** ***and inherent jurisdiction***

16 Do *ex parte James* and inherent jurisdiction change the analysis on the jurisdiction to conduct synthetic proceedings? The principle in *ex parte James* focuses on the conduct and conscience of a court-appointed officer and may be invoked to enjoin a liquidator or judicial manager from breaching a promise he had made. Even though the principle is flexible, it is unclear that the *ex parte James* line of cases[25] has ever been extended, or was intended to extend, to permit distribution of assets of an insolvent company to its creditors in accordance with foreign law. In the end, the court in *Collins & Aikman* did not have to decide whether *ex parte James*, on its own, could have grounded jurisdiction.

17 Having concluded that statute provides the jurisdiction, the court in *Collins & Aikman* felt it was unnecessary to delve into a detailed examination of the interaction between statute law and inherent jurisdiction,[26] and so did not have to decide whether inherent jurisdiction alone would suffice. In any event, reliance on inherent jurisdiction alone as a basis to depart from the *lex concursus* may lead to other issues, as it engages the debate whether a domestic court can "disapply" parts of the local statutory scheme to alter creditors' rights.[27] The highwater mark

24 It is generally accepted that the UNCITRAL Model Law on Cross-border Insolvency does not provide choice of law rules (see *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (January 2014) at para 194; *Cross Border Insolvency* (Richard Sheldon QC gen ed) (Bloomsbury, 4th Ed, 2015) at paras 3.91–3.97).

25 See, *eg*, *Re PCChip Computer Manufacturer (S) Pte Ltd* [2001] 2 SLR(R) 180; *Re Pinkroccade Educational Services Pte Ltd* [2002] 2 SLR(R) 789.

26 *Re Collins & Aikman Europe SA* [2006] BCC 861 at [40].

27 See *Cross Border Insolvency* (Richard Sheldon QC gen ed) (Bloomsbury, 4th Ed, 2015) at paras 7.33–7.40.

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of this debate can perhaps be seen in the oft-cited case of *Re HIH Casualty & General Insurance Ltd*[28] ("*Re HIH*"). The key issue in that case was whether the English court should direct remission of assets in England to Australia in response to a letter of request from the New South Wales courts (the venue of the principal liquidation of the companies), even though the English and Australian regimes differed on the treatment of certain creditors.

18 Lord Hoffmann was of the view that the common law and the principle of modified universalism were broad enough to permit the remission of assets to the principal liquidation notwithstanding such differences. Lord Scott, however, emphasised that the power to remit assets where the distribution would not be in accordance with English law could only come from statute. It was mandatory to apply English law in an English winding up and there is no jurisdiction to deprive creditors of their rights under English law. In the end, Lord Scott was satisfied that statutory power to remit is found in s 426 of the UK Insolvency Act.[29]

19 Notwithstanding the difference in contexts between, on the one hand, the remission of assets to a foreign jurisdiction (cases such as *Re HIH*[30]), and on the other, the accordance of treatment to creditors they would have enjoyed under foreign law had secondary proceedings been commenced (*Collins & Aikman* and *MG Rover*), there appears to be a common thread and issue – the extent to which a domestic court, in its interaction with an actual or putative foreign insolvency proceeding, should be prepared to give effect to or apply foreign law which differs from the domestic law, and consequently, directly or indirectly, depart from the *lex concursus*. There seems to be some reluctance in relying solely on the common law as a malleable tool to justify a departure from the *lex concursus*, and the domestic courts

28 [2008] 1 WLR 852.

29 See also *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36 at [17].

30 See also *Re Swissair Schweizerische Luftverkehr-Aktiengesellschaft* [2010] BCC 667 and *Beluga Chartering GmBH v Beluga Projects* [2014] 2 SLR 815.

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appear more comfortable with relying on statute as the source of jurisdiction.

20 What is the force of a similar "disapplication" argument in Singapore? In the context of the ancillary liquidation doctrine, the High Court in *Beluga Chartering GmBH v Beluga Projects (Singapore) Pte Ltd*[31] considered whether the court has the power to disapply the statutory regime. The High Court preferred Lord Hoffmann's approach in *Re HIH* and was of the view that the courts have the power to do so in appropriate cases.[32] The decision on this point was not disturbed by the Court of Appeal, whose decision on the remittal of assets was unaffected whether one applies Lord Hoffmann's or Lord Scott's approach.[33]

21 Not every instance of departing from the default statutory position constitutes impermissible "disapplication". The issue is whether a particular statutory rule is mandatory, or whether it is ultimately subject to the court's direction. For instance, the *pari passu* rule does not apply in schemes of arrangement,[34] and the priority rules in s 328 of the Companies Act do not apply in judicial management unless specifically imported. In any event, the conduct of synthetic proceedings by a Singapore court arguably does not "disapply" Singapore law, because the current statutory framework confers broad powers on a judicial manager (and liquidator) which can include seeking the kind of directions sought in *Collins & Aikman* and *MG Rover*.

C. Exercise of discretion

22 After deciding that it had the jurisdiction to conduct synthetic proceedings, the court in *Collins & Aikman* considered whether it should exercise its discretion to grant the application

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31 [2013] 2 SLR 1035.

32 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2013] 2 SLR 1035 at [208]–[219].

33 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [78]–[79].

34 *Hitachi Plant Engineering & Construction Co Ltd v Eltraco International Pte Ltd* [2003] 4 SLR(R) 384 at [80]–[87].

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by the administrators. On the facts, it is not surprising that the court did so. The Spanish creditors had relied on the assurances given by the administrators and generally refrained from commencing secondary proceedings in Spain. It was undisputed that the treatment given to the Spanish creditors facilitated the speedy resolution of the administration and resulted in a better recovery for creditors overall. More importantly, the key creditors of the Collins & Aikman group either supported or did not oppose the application.

23 In any event, as a principle which regulates the conduct of court-appointed officers, *ex parte James* could apply to prevent the administrator from reneging on his assurances to the Spanish creditors that they will be accorded treatment which they would have received under Spanish law. This was perhaps the overlay which would be relevant to the exercise of the court's discretion. Consistent with that, both the Recast Regulation and the UNCITRAL Working Group V recognise the role of such undertakings in synthetic proceedings and go further to say that such undertakings are enforceable and binding on the insolvency estate.

III. *Re MG Rover Belux SA/NV*

24 In *MG Rover*, the administrators of a Belgian company under a UK administration applied under para 65(3) of Schedule B1 of the UK Insolvency Act for permission to make a distribution to certain creditors in accordance with Belgian law. The UK administration was about to expire and if not extended, the administrators faced the options of placing the company in winding up, or to commence secondary proceedings in Belgium. The issue was whether to extend the administration to, in effect, conduct a synthetic proceeding.

25 The court was satisfied it had the jurisdiction to conduct synthetic proceedings. It held that the discretion given to the

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court by para 65(3) of Schedule B1 of the UK Insolvency Act was entirely at large, and set out the following considerations:[35]

(a) the matter was to be judged at the time when permission was sought;

(b) the court must at that time be satisfied that the proposed distribution was conducive to the achievement of the then current objectives of the administration;

(c) the court must be satisfied that the distribution was in the interests of the company's creditors as a whole;

(d) the court must be satisfied that proper provision has been made for secured and preferential creditors;

(e) the court must consider the realistic alternatives to the proposed distribution sought by the administrators, consider the merits and demerits of adopting a course other than that proposed and assess whether the proposed distribution adversely affected the entitlement of others;

(f) the court must take into account the basis on which the administration has been conducted so far as the creditors were concerned and in particular whether the creditors have approved (or not objected to) any proposal concerning the relevant distribution;

(g) the court must consider the nature and terms of the distribution; and

(h) the court must consider the impact of the distribution upon any proposed exit route from the administration.

(See *Re GHE Realisations Ltd*.[36])

26 The court extended the administration to allow the process of distribution according to Belgian law to continue.

35 *Re MG Rover Belux SA/NV* [2007] BCC 446 at [7].
36 [2006] BCC 139.

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An English liquidation was not a realistic alternative. The Belgian company had mostly Belgian creditors whose administration had been conducted on the premise that local (Belgian) priorities would prevail; unsecured creditors had already approved the payment of employees' claims according to Belgian law. The court considered that a Belgian liquidation suffered disadvantages – a Belgian liquidator could not conveniently dispose of disputed preferential claims and a Belgian liquidation was also likely to be more expensive and slower than a distribution in the UK administration.[37] In addition, there were no secured creditors and proper provision had been made for the actual and claimed preferential creditors under Belgian law.[38]

27 By approving the proposed distribution, the court recognised that it would be approving the indirect application of Belgian insolvency rules. The court remarked that it should permit payment that did not strictly accord with English law if it was just and convenient to do so and helped achieve the objective of the administration.[39] Again, on the facts, it was not surprising that the court granted the application.

28 The English court in *Re Alitalia Linee Aeree Italiane SpA*[40] ("*Re Alitalia*") reached a different conclusion on whether assets in a domestic liquidation should be applied otherwise than in accordance with domestic law. The main proceedings (administration) in that case were opened in Italy and secondary proceedings (liquidation) in England. The Italian administrator claimed in the English courts that certain moneys held in a bank account in England should be paid to employees in full in accordance with a compromise agreement between the Italian administrator and the employees. The English liquidators objected on the basis that the moneys should be distributed *pari passu* pursuant to English law.

37 *Re MG Rover Belux SA/NV* [2007] BCC 446 at [8].
38 *Re MG Rover Belux SA/NV* [2007] BCC 446 at [9].
39 *Re MG Rover Belux SA/NV* [2007] BCC 446 at [10].
40 [2011] 1 WLR 2049.

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29 Apart from arguments based on the EU Insolvency Regulation, the Italian administrator sought to rely on *Collins & Aikman* and *MG Rover* to justify paying the employees in full. The court disagreed. It accepted the English liquidators' argument that there were two key distinctions between *Re Alitalia*, and *Collins & Aikman* and *MG Rover*. First, the latter two cases involved distributions being made in accordance with the laws of countries where secondary proceedings had (or rather could have) been brought; in *Re Alitalia* the reverse was requested – to distribute assets in accordance with the laws of the main proceedings in Italy instead of the secondary proceedings in the UK. Secondly, *Collins & Aikman* and *MG Rover* involved companies in administration, whereas in *Re Alitalia* the company was in liquidation.[41]

30 With respect, neither distinction raised by the English liquidators seems particularly persuasive. It is difficult to see why the Italian administrator's case should be weaker just because the proposed distribution was to be in accordance with the laws of the main proceedings. The question should be whether there is anything in the domestic law, whether in the main or secondary proceedings, which prohibits the proposed distribution. It is also unclear why it makes a difference that the company was in administration and not liquidation. It is not unusual in the restructuring of a group of companies that certain entities may be liquidated but others preserved. That does not answer the question whether and why distribution to creditors should be governed by a different law.

31 The court was also not persuaded that *ex parte James* assisted the Italian administrator.[42] In the court's view, there was nothing dishonourable in not paying the employees in accordance with the compromise agreement with the Italian administrator. The English liquidators did not give any undertaking similar to that in *Collins & Aikman*. Importantly, the court noted that the employees would be paid in full regardless

41 *Re Alitalia Linee Aeree Italiane SpA* [2011] 1 WLR 2049 at [41].
42 *Re Alitalia Linee Aeree Italiane SpA* [2011] 1 WLR 2049 at [47].

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of the outcome of the application.[43] That may be the real and defensible basis for the decision in *Re Alitalia*. On the facts, there appears to be no compelling reason to accord the employees a different treatment from that under English law since they would be no worse off.

32 The following points can be distilled from *Collins & Aikman* and *MG Rover*:

(a) The statutory framework for administration (and for judicial management and liquidation in Singapore) is flexible enough to provide a jurisdictional basis for the courts to conduct a synthetic proceeding in order to, for instance, allow distribution to creditors according to foreign law, which may depart from the *lex concursus*.

(b) In exercising its discretion, the court would consider factors which should at least include those set out in *MG Rover*.[44] An overriding consideration is whether the synthetic proceedings would be in the interests of and help achieve the objectives of the insolvency proceedings as a whole.

(c) If there was an agreement between the insolvency office holder and the creditors, or if he has given an assurance or undertaking to them, that they would enjoy treatment under the applicable foreign law which does not accord with the *lex concursus*, there is the overlay of the principle in *ex parte James* which the court may invoke to give effect to such an agreement, or to hold the office holder to his assurance or undertaking.

(d) The position of the creditors – whether they support or oppose the application of foreign law – would be a significant factor. Ideally, the key creditors and the insolvency office holders should approach the issue in the spirit of co-operation and mutual assistance, as was the case in *MG Rover*.

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43 *Re Alitalia Linee Aeree Italiane SpA* [2011] 1 WLR 2049 at [47].

44 See para 25 above.

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IV. Coda – Limitations of synthetic proceedings?

33 Do synthetic proceedings remove the need for secondary proceedings? *Collins & Aikman* and *MG Rover* dealt with monetary claims and there was effectively no objection by the other major creditors to the application of foreign law in favour of the particular classes of creditors. However, not all cases can do without secondary proceedings or be comfortably or adequately addressed in synthetic proceedings.[45] Examples include real estate claims (governed by the *lex situs*), and proprietary or non-monetary claims. It may not be so much that a domestic court cannot or does not wish to take cognizance of or address such claims, but that a foreign court may not cede control over certain matters which involve the *lex situs* or governmental policies and intervention (*eg*, in employment matters), whether or not the creditors agree to participate in synthetic proceedings.

34 How does the court address the potential "priority fights" where the foreign claims, if accorded treatment under foreign law, may eclipse the claims of domestic creditors? Prof John A E Pottow has suggested an international registry of priority claims as a possible solution.[46] There is no ready answer to the issues, and efforts to forge international consensus take time. The court in *MG Rover* stated that, in deciding to allow treatment of certain creditors' claims according to foreign law, one of the considerations is whether proper provision has been made for secured and preferential creditors. It appears from the judgment that the court was referring to preferential creditors under Belgian law,[47] but there is no reason why the interests of preferential creditors under domestic law should be disregarded. In other words, it should be open to a domestic court to ensure

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45 Kannan Ramesh J, "Synthesising Synthetics: Lessons learnt from Collins & Aikman", keynote address at the 2nd Annual GRR Live New York (26 September 2018) at paras 10–11; John A E Pottow, "A New Role for Secondary Proceedings in International Bankruptcies" (2011) 46(3) Tex Int'l L J 579 at 586–589.

46 John A E Pottow, "A New Role for Secondary Proceedings in International Bankruptcies" (2011) 46(3) Tex Int'l L J 579 at 592.

47 *Re MG Rover Belux SA/NV* [2007] BCC 446 at [9].

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that foreign unsecured creditors' claims do not eclipse the claims of secured or preferential creditors under domestic law.

35 It is perhaps unsurprising that successful synthetic proceedings have hitherto not been seriously opposed. In the foreseeable future, secondary proceedings will continue to have a role, simply because there will always be cases where national or localised interests come to the fore and compete with considerations of efficiency and expediency. This, however, takes nothing away from the rationale and benefits of synthetic proceedings in appropriate cases. The proper utilisation of synthetic proceedings enhances efficiency and reduces costs by doing away with unnecessary secondary proceedings, which potentially means better recovery for the creditors of the company.

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