**Modern Universalism and its parallel in the South African common law**

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| Introduction | 2 |
| The establishment of Modern Universalism  | 3 |
| The refinement of the principle  | 5 |
| Lurking doubts  | 7 |
| The South African landscape  | 8 |
| Movable vs Immovable property | 8 |
| Conclusion  | 10 |
| Bibliography | 12 |

**A. Introduction- the formulation of a modern “Universalism”**

1. This paper will trace the development of the principle of Modern Universalism in England which changed the paradigm which had until then prevailed in Insolvency and Private International Law discourse. The last section of the paper will compare the most recent application of the principle of Modern Universalism to the common law of South Africa, a jurisdiction which has had a longer history of offering the kind of assistance which was aspired to in the development of Modern Universalism in England.
2. Prior to the introduction of Modified Universalism, the common law approach to the assistance of foreign office holders was significantly more predictable. Predictable, not in reference to matters of stare decisis which admittedly have challenged the application of Modified Universalism, but predictable in the sense that it was more consistent with what one had come to expect. The English Courts would apply English law without thought as to surrendering jurisdiction for the sake of comity. So, for example, in *In re Suidair International Airways, LD. (Application of Vickers-Armstrongs, LD.)[[1]](#footnote-1)* Wynn-Parry J held that the governing principle where the English court sat in a winding-up to administer the assets of a South African company which were within its jurisdiction, was the administration of the relevant English law only.
3. About 56 years following *In re Suidair International Airways, LD* the Judicial Committee of the Privy Council (“the Privy Council”) heard the appeal *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc*[[2]](#footnote-2)*.* It introduced a paradigm shift consistent with what has come to be known as “Universalism” in Insolvency and Private Internal Law discourse. Universalism is the aspiration that there be a single set of bankruptcy proceedings that collects, administers and then distributes all a debtor’s assets wherever those assets may be situated throughout the world[[3]](#footnote-3).
4. In *Cambridge Gas* the Board had to decide whether effect should be given in the Isle of Man to an insolvency order which was made following United States Chapter 11 bankruptcy proceedings. The proceedings related to a group of Liberian ship-owning companies and the effect of the Chapter 11 proceedings was to vest the shares of an Isle of Man company in the committee of creditors. The circumstances of that vesting order was that the US court did not have jurisdiction *in rem* over the shares, they being Isle of Man shares. The US court also did not have jurisdiction *in personam* over the shareholders as they were not present in the US and took no part in the US proceedings.
5. Lord Hoffmann, relying on, among other things, the South African case *In re African Farms Ltd[[4]](#footnote-4)*, which advanced the proposition that recognition of a foreign insolvency by the court carries with it “active assistance”, ascribed to insolvency proceedings a role which had universal application. In addressing the limits of such an approach Lord Hoffman observed that it was doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. He considered though that the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition being to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.
6. The decision, though very controversial for its sidestep of the want of jurisdiction in the enforcement of the US Chapter 11 order, determined that the court has a common law power to assist foreign winding up proceedings so far as it properly can, or the principle of “Modified Universalism”. Secondly, it determined that that includes doing whatever the court could properly have done in a domestic insolvency subject to its own law and public policy.

**B. The establishment of the Principle in England**

1. In *In re HIH Casualty and General Insurance Ltd[[5]](#footnote-5)*, the House of Lords, which included Lord Hoffman, had the occasion to clarify the approach under the English common law in providing cross-border co-operation to an office holder. HIH was an Australian insurance company in liquidation in Australia, however, a winding up petition had been presented in England and provisional liquidators appointed to conduct an “ancillary liquidation”. The English courts have a statutory jurisdiction to wind up unregistered companies and those incorporated outside the United Kingdom by section 221 of the English Insolvency Act 1986. The exercise of the English power has generated a body of practice concerning what has come to be known as ancillary liquidations in which the English court would order the winding up in England of a foreign company providing that, among other things, there was a sufficient connection with England.
2. The question in HIH was whether the English court should accede to a letter of request from an Australian court inviting it to direct the English provisional liquidators to remit the assets in their hands to the Australian liquidators. In those circumstances the assets would be distributed in accordance with statutory priorities which differed from those applicable in England. Although the House agreed that the assets should be remitted to Australia, they were deeply divided in relation to the juridical basis upon which that could be done in deprivation of the statutory rights of creditors proving in England.
3. Lord Hoffmann, who gave the leading judgment, was ready to continue where he had left off in *Cambridge Gas*. He, with whom Lord Walker agreed, considered that the court had an inherent power to direct the remittal of the assets at common law. The rest of the Committee, however, felt that either the power was wholly derived from section 426 of the Insolvency Act 1986 (Lord Scott and Lord Neuberger), or, that the statutory power was a sufficient jurisdictional basis for the proposed direction (Lord Phillips), and declined to decide whether jurisdiction could have been established at common law. In grounding his speech in the principle of “Modified Universalism”, Lord Hoffmann observed as follows:

“*Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets.*

*This was very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds; elsewhere I have described it as an aspiration: see Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508, 517, para 17. Professor Jay Westbrook, a distinguished American writer on international insolvency has called it a principle of ‘modified universalism’: see also Fletcher, Insolvency in Private International Law, 2nd ed (2005), pp 15–17. Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one*.”*[[6]](#footnote-6)*

1. *In re HIH Casualty* proved to be as controversial as *Cambridge Gas* insofar as it decided that there was a common law obligation to cooperate with the foreign principal liquidation to ensure that all the company’s assets were distributed to creditors under a single system of distribution to the prejudice of the English creditors. Both *In re HIH Casualty* and *Cambridge Gas*, however, were ultimately held by the Supreme Court to have been wrongly decided not long after in *Rubin v Eurofinance SA*[[7]](#footnote-7), a case which had similar facts to *Cambridge Gas*. In *Rubin* the Supreme Court decided, essentially, that for there to be a change in the settled law relating to the recognition and enforcement of judgments, and in particular the formulation of a rule concerning the identification of courts which should be regarded as being of competent jurisdiction, legislation was necessary and it was not a matter for judicial innovation regardless the expediency of the decision.
2. The decision in *Rubin*, though it did not explicitly criticize the principle of Modified Universalism, put it in some doubt as the Board in *Al Sabah v Grupo Torras SA[[8]](#footnote-8)*, a case cited in argument in *Cambridge Gas* but not in the advice of the Board, had discredited the principle.

**C. The refinement of Modern Universalism**

1. In *Singularis Holdings Ltd v PricewaterhouseCoopers[[9]](#footnote-9)*, an appeal to the Privy Council from Bermuda, the Board had to consider two issues. The first was whether the Bermuda court has a common law power to assist a foreign liquidation by ordering the production of information (in oral or documentary form), in circumstances where (i) the Bermuda court has no power to wind up an overseas company and (ii) its statutory power to order the production of information is limited to cases where the company has been wound up in Bermuda. The second issue was whether, if such a power exists, it is exercisable in circumstances where an equivalent order could not have been made by the court in which the foreign liquidation is proceeding.
2. Lord Sumption gave the leading decision of the Board with Lords Neuberger and Mance giving minority decisions. There being no legislation in Bermuda to govern cross-border insolvency issues the Board had to specifically consider how the common law should develop following *Cambridge Gas* and *Rubin*. Lord Sumption’s judgment, while not laborious, goes to great lengths to set out developments in the common law relating to the rendering of assistance to a foreign IP.
3. Although the common law of Bermuda is to a large degree the same as that of England, the common law of England concerning cross-border insolvencies has developed to “fill the interstices in what is essentially a statutory framework”[[10]](#footnote-10). That statutory framework is not replicated pari materia in Bermuda. Critically, the ancillary liquidations discussed earlier which are possible in England are not possible under Bermuda legislation.
4. Once again, the South Africa case *In re African Farms Ltd*, which was also cited in *Cambridge Gas*, played a prominent role. In *In re African Farms Ltd* African Farms Ltd was an English company in liquidation with assets in the Transvaal. There was no power to wind it up in the Transvaal for reasons related to the company’s corporate structure and the legislation relating to winding up in Transvaal. The leading judgment of Sir James Rose Innes, then Chief Justice of the Transvaal, in explaining his decision focused on the utility to cross-border insolvency proceedings of the proposed approach in comparison to the corresponding disutility if no such rule were adopted:

“It only remains to consider whether we are justified in recognizing the position of the English liquidator. And by that expression I do not mean a recognition which consists in a mere acknowledgment of the fact that the liquidator has been appointed as such in England, and that he is the representative of the company here; I mean a recognition which carries with it the active assistance of the Court. A declaration, in effect, that the liquidator is entitled to deal with the Transvaal assets in the same way as if they were within the jurisdiction of the English courts, subject only to such conditions as the Court may impose for the protection of local creditors, or in recognition of the requirements of our local laws.

If we are able in that sense to recognise and assist the liquidator, then I thin[k] we should do so; because in that way only will the assets here be duly divided and properly applied in satisfaction of the company's debts. If we cannot do so, then this result follows, that the directors cannot deal with the property here, and that the liquidator cannot prevent creditors seizing it in execution of their judgments. Unnecessary expenses will be incurred, and the estate will be left to be scrambled for among those creditors who are in a position to enforce their claims.”[[11]](#footnote-11)

1. The English officeholder’s entitlement to conduct the estate and deal with the company’s assets in the Transvaal *as if* they were in the jurisdiction of the Company’s domicile was recognised subject to the discretion of the Court to impose conditions for the protection of creditors and local laws.
2. In addressing the decision in *Cambridge Gas* in juxtaposition to *In re African Farms Ltd*, Lord Sumption conceded that though the principle of Modified Universalism was part of the common law, it was important to be cognizant that that was subject to local law and policy and that the court may only act within the ambit of the common law and the jurisdiction’s statutory framework.
3. Given the facts before the Board, the question remained, what were the limits of the common law as they related to the facts in *Singularis*? That is, there being no statutory power in Bermuda to assist an IP in compelling the production of documents from third parties, is there an inherent power to do so at common law? Lord Sumption decided that there was, citing the relatively recent development of the Norwich Pharmacal application, and noting that the courts have never been inhibited in their willingness to develop appropriate remedies to require the provision of information when a sufficiently compelling legal policy calls for it.
4. The Court took strength from another South African case, *Moolman v Builders & Developers[[12]](#footnote-12)*, which was a decision of the country’s Supreme Court. In it a Transkei liquidator sought an order for examination of third parties in South Africa with a view to locating assets of a Transkei company there. The third parties objected on the basis that there was no jurisdiction in the South African courts to examine them arising from the fact that the insolvency proceedings were taking place in Transkei and the orders for examination were made in that country. Notwithstanding that there was no statutory power to wind up such a company in South Africa, the court held that a power at common law existed to recognise the Transkei liquidator and the order for examination as part of the ratio in *In Re African Farms Ltd*.
5. Lord Sumption’s decision, mirroring to a large extent the reasoning in *Moolman v Builders & Developers*, was based on practical reasons. The liquidators required the information for the performance of their ordinary functions and their acknowledged right to deal with the assets would be of little use without a corresponding ability to identify and locate them. The power, Lord Sumption acknowledged, is limited to, among other things, assisting the officers of a foreign court of insolvency jurisdiction or equivalent public officers so it would be unavailable to assist a voluntary winding up, which the Board considered to be essentially a private arrangement though subject to the directions of the court. The power also had to be exercised consistent with the substantive law and public policy of the assisting court as in *In Re African Farms Ltd*.
6. Unfortunately for the Cayman Islands joint liquidators the second limitation to their application proved more difficult to surmount and was eventually the stumbling block to the application. It was held that assistance could only be exercised to assist the foreign office holder in only doing that which they could also do in their own jurisdiction. For that reason, the Board declined to order the relief that was sought by the joint liquidators.

**D. Lurking Doubts**

1. While *Singularis* has, to a degree, resolved some of the questions concerning the boundaries of Modified Universalism, lurking doubts remain regarding whether the principle, even in its restrictive post *Singularis* form, is still too ambitious. Lord Mance, who gave a powerful minority Judgment in *Singularis*, made much of the fact that, if a domestic court had the power to assist a foreign one by doing anything which it could properly have done in that court’s insolvency proceedings, there would always be a possibility that the domestic court would be asked to take steps which are without jurisdiction in a domestic context. Lord Mance had in fact decided *Rubin* on the same basis and preferred the view that the principle of Modified Universalism could stand for no more than the proposition that “a domestic court should, so far as it can consistently with its own law, recognise a foreign bankruptcy order and deal with identifiable assets within its jurisdiction consistently with the way in which the foreign insolvency would deal with them” [[13]](#footnote-13). That is, a proposition much more consistent with the decision in *In re Suidair International Airways, LD*. He attacked the view, therefore, that Modified Universalism could confer jurisdiction on a domestic court and order cross-examination and obtain disclosure from third parties for the sake of expediency. He noted that such relief would not be available to a litigant outside of a full-blown Norwich Pharmacal application and that the common law had thus far not accepted any such jurisdiction.
2. It seems clear that neither the United Kingdom Supreme Court nor, probably, the Privy Council has heard the last of issues concerning the ambit of the principle of Modified Universalism. Lord Mance in *Singularis* reminded that much of the discussion pertaining to the principle of Modified Universalism in *Singularis* was technically obiter, it being strictly speaking irrelevant to the ultimate findings in the appeal. For that reason alone, there are bound to be further cases testing the waters, so to speak, where Modified Universalism is concerned.

**E. The South African landscape**

1. It is not unsurprising that significant support was drawn from South African jurisprudence in the development of the English common law as regards the assistance to be given to foreign office holders. *In re African Farms Ltd* was not only cited in *Singularis* but also *Cambridge Gas* and *Rubin*. As the Board recognised in *Singularis*, South African jurisprudence had been tackling issues which English jurisprudence had little prior occasion to do, in part arising from the statutory intervention in England, until the mid-2000s. *In re African Farms Ltd* appears to be the first recorded common-law decision where under private international law principles assistance was rendered to a foreign office holder where there was no power to wind up the company in the domestic court. In *In re African Farms Ltd*, the difficulty was that the English company did not have enough members for the Transvaal court to liquidate it under local statute.

**F. Movable vs Immovable property**

1. In *Ex Parte Palmer NO: In re Hahn*[[14]](#footnote-14) Berman J set out in great depth the nuances of the South African courts’ common law power to render assistance to a foreign office holder. In that case the issue was whether the Court would grant recognition to a foreign office holder only where the relevant estate was sequestrated by a Court within whose jurisdiction the debtor was domiciled at the time when the sequestration order was issued, or, would simply the residence of the debtor in that jurisdiction be sufficient. The issue was an important one given the heavy Roman-Dutch influence in South Africa, which relies upon the concept of domicile in determining jurisdiction. Ultimately the court found that unless the insolvent was domiciled within the jurisdiction of the foreign Court by whose order his estate was sequestrated, recognition of the trustee appointed pursuant thereto in order that he may act as such in South Africa would not be granted by a local Court[[15]](#footnote-15).
2. In the course of making that finding, Berman J, citing *Re Estate Morris[[16]](#footnote-16)*, noted that insofar as the movable property found in South Africa belonging to an individual whose estate was sequestrated by order of a foreign Court within whose jurisdiction that person was domiciled is concerned, that property automatically vests in the trustee appointed pursuant to that order[[17]](#footnote-17) and is governed by the law of the debtor’s domicile regardless where it is located[[18]](#footnote-18). The effect of that line of authority is that, although it is now so in practice, a foreign trustee does not need to seek court recognition in order to deal with the movable South African property of the debtor so long as they can demonstrate the foregoing[[19]](#footnote-19). To add a gloss to the rule, however, where the debtor is a company and not an individual, its foreign representative will be required by the South African courts to seek local recognition[[20]](#footnote-20).
3. There is no such differentiation in relation to the immovable assets of the debtor as both foreign representatives of corporate and individual debtors must seek formal recognition to deal with them. The grant of recognition is not a formality as the discretion is absolute and only exercised in special circumstances[[21]](#footnote-21); that is, on the basis of comity and convenience as was comprehensively set out by Innes JP in *Ex Parte Stegmann[[22]](#footnote-22)*:

'The proper authority to appoint a curator to the goods of an insolvent debtor (answering to our trustee) is the Judge of his domicile; such appointment will, however, in strict law, confer no rights upon the curator to deal with immovable property of the debtor outside the jurisdiction of the Judge who made the appointment. The Court having jurisdiction at the place where such landed property is situated is fully entitled to deal with that property according to the lex rei sitae, and to refuse in any way to recognise the order of the Judge of the debtor's domicile. But, on the other hand, the same Court, acting from motives of comity or convenience, is equally justified in allowing the order of the Judge of the domicile to operate within its jurisdiction, and in assisting the execution or enforcement of such order. The matter is entirely one for its own discretion. It seems clear, therefore, on the highest authority, that the Judges of the various provinces of the Netherlands, while adhering to the rule that real property could only be dealt with by the law of the place where it was situated, had in any particular case the power, on grounds of comity, to waive the right of insisting on this strict legal rule. They were considered justified in allowing at their absolute discretion a foreign order for the appointment of a curator to operate upon immovable assets within their own jurisdiction.'

1. As Smith and Boraine[[23]](#footnote-23) note, the element of convenience may be decisive in either case. So, in *Re Estate Morris* although the debtor owned immovable property and owed debts to creditors abroad, it was more convenient that the court in which he had acquired a domicile of choice and also movables should be able to supervise the sequestration of his estate. In counterpoint, in *Deutsche Bank AG v. Moser*[[24]](#footnote-24), which although was not an application for recognition, “convenience” was thought to lie in the South African courts owing to the more creditor friendly insolvency provisions there in the context of an application for a provisional order of sequestration. That is, the protection of local creditors was preferred.
2. The protection of local creditors is a particularly important feature of South African cross-border insolvency law[[25]](#footnote-25). Movable or immovable assets of the debtor may only be dealt with by the foreign trustee according to the lex fori and the procedure of the South African courts which extends to issues of priorities and the ranking of claims[[26]](#footnote-26). See for example *Ex parte Steyn[[27]](#footnote-27)* in which Fleming J held that only a creditor whose whole cause of action arose within the Republic of South Africa or who is an incola of the Republic ... shall by virtue of this order acquire any right to prove a secured or preferent claim”[[28]](#footnote-28). The ruling meant that creditors whose whole causes of action did not take place in South Africa could not qualify as a secured/preferential creditor.

**G. Conclusion - applying the South African common law to the facts in *Singularis***

1. How, therefore, would the South African courts have dealt with the facts of *Singularis*? *Moolman v Builders & Developers* demonstrates that redress against third parties (in the form of an oral examination) is available to a foreign representative by the South African courts. In that case the Transkei liquidator sought an order for examination of third parties in South Africa with a view to locating assets of a Transkei company there. Although the third parties objected on the basis that there was no jurisdiction to examine them, they could not *also* object that the Transkei foreign representative was purporting to exercise a power in South Africa which he did not have in Transkei, because he did. The Transkei Companies legislation (which governed the relevant proceedings) itself being a copy of the South African legislation which both provide for the examination of “*any director or officer of the company or person known or suspected to have in his possession any property of the company...*”[[29]](#footnote-29).
2. But could the South African courts have ordered such examination or disclosure by a third party where the foreign representative *would not* have been able to exercise such a power in their home jurisdiction? It would seem that the South African courts could. As the lex fori is the law which governs insolvency proceedings in South Africa[[30]](#footnote-30), that is likely to be as determinative of the issue as it was on the recognition of the foreign representative in *In Re African Farms Ltd*. There the representative was recognised “*as if*” he had been appointed a trustee in similar proceedings in South Africa notwithstanding that there would have been no power to wind up such a company in South Africa at all. It was done by the South African courts based on comity in recognising all such proceedings “*as if*” they were taking place in South Africa providing that the debtor was domiciled in the foreign jurisdiction. Under s. 417(1) and 417(3) of the South African Companies Act[[31]](#footnote-31) an application may be made by a trustee to examine and later seek disclosure from third parties. A foreign representative having been recognised by the South African courts would seem to be entitled to the benefit of the same sections regardless whether similar remedies would be available to them in their home jurisdiction.
3. It seems clear that the common law in South Africa, as well as being more settled than its English counterpart, is also considerably more “progressive”. The foregoing application of the South African common law to the facts in *Singularis* would suggest as much. Additionally, Ex *Parte Palmer NO: In re Hahn*[[32]](#footnote-32), for example, was decided as long ago as 1993. Conversely, the principle of Modern Universalism is still some way from being considered “settled law” and *Singularis* suggests that the development of the principle may not necessarily be heading in the direction that Universalists would appreciate. Time will tell, however, whether these two streams of the common law eventually become more similar.

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