Short Paper

Global Insolvency Practice Course

Analyse the evolution of the approach of the common law courts to cross-border co-operation through existing case law, including the Cambridge Gas and Singularis cases. Comparing England and one other jurisdiction in the common law family, discuss the extent to which the principle of universalism still applies in the common law.

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A - Introduction

1. Lord Hoffman remarked that the supposed 'golden thread' of modified universalism is more of an aspiration than a rule.[1] While Lord Hoffman was there commenting on the uneven development and application of modified universalism within the insolvency law of the United Kingdom, it is a comment that is applicable to the approach to modified universalism by courts across the commonwealth.
2. Quite apart from any insolvency legislation or international treaty, the common law can achieve the aspiration of modified universalism through the tools of recognition of, and assistance to, foreign insolvency officeholders. In the development of modified universalism in the commonwealth, Cambridge Gas Corpn v Official Committee of Unsecured Creditors [2007] 1 AC 58 represents a possible high-water mark. The subsequent case of Singularis Holdings Limited v Price Waterhouse Coopers [2015] AC 1675 saw the Privy Council temper Cambridge Gas in a significant way. A recent judgment of the Eastern Caribbean Court of Appeal, Net International Property Limited v Erez (BVIHCMAP2020/0010; judgment delivered 22

[1] Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc and others [2007] 1 AC 508 at 517.

February 2021) demonstrates that the development of modified universalism across the common law world will always be subject to local legislation, and in the case of the BVI, the concept is possibly even dead.

3. In this paper, it is proposed to look at the concept of modified universalism by first defining it and briefly tracing its origins. The paper will then analyse the reasoning of the Privy Council in Cambridge Gas before turning to analyse the reasoning in Singularis. It is hoped that this will provide a solid foundation for then moving to analyse what the Eastern Caribbean Court of Appeal decided in Erez. Finally, the paper will consider the implications of Erez, both for the concept of modified universalism and for the Territory of the Virgin Islands.

B - What is modified universalism?

4. Lord Hoffman succinctly defined modified universalism thus:

> *"The primary rule of private international law which seems to me applicable in this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."*[2]

5. The early cases commonly cited as evidence of a common law ability to recognise and assist foreign insolvency officeholders are Solomons v Ross (1764) 1 H BL 131n and Re African Farms 1906 TS 373. While Lord Hoffman noted in Cambridge Gas that the development of the common law towards a modified universalism had been uneven, and that differences between personal and corporate insolvency, and between personal and real property, have been thrown up in some of the case law, the aspiration towards modified universalism remains a very real part of the common law. Lord Hoffman opined that the position of the British Empire as a centre of commerce and trade may have been a driving force behind this aspiration, which was not always shared by other less trade-oriented countries.[3]
6. The increase in global trade, particularly after the Second World War and with the onset of globalisation, perhaps made it inevitable that the common law would be set on a course for coherent development towards modified universalism in the early 21st century.
7. Statute began to encroach on this territory as early as the 1980s. In section 426 of the Insolvency Act, 1986 there was made provision for the reciprocal assistance in matters of insolvency of the

[2] Re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852 at paragraph 30.
[3] Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc and others [2007] 1 AC 508 at 517.

courts of the three United Kingdom jurisdictions[4], together with the courts of the Isle of Man, Guernsey and Jersey.

8. Similarly, the Insolvency Act, 2000 gave statutory force to the UNCITRAL Model Law on Cross-Border Insolvency, which invites the United Kingdom courts to co-operate with foreign insolvency regimes. Given the developments in the Eastern Caribbean Court of Appeal (discussed below) it remains unclear whether these provisions could have an effect on the existence of common law assistance to foreign insolvency officeholders in the United Kingdom.

C - The Cambridge Gas Case

9. At common law, orders by foreign courts are divided between judgments *in rem* and judgments *in personam*. As a rule, foreign judgments *in personam* will only be enforced where the foreign court had authority over the subject of the judgment. Usually, this is where the individual or company in question has submitted to the jurisdiction of the foreign court.[5] Judgments *in rem* are, again as a rule, enforced if the property in question was at the relevant time situate in the jurisdiction of the foreign court.[6]

10. Cambridge Gas concerned the ability of the courts of the Isle of Man to assist the Federal Bankruptcy Court in the USA which was seeking assistance from the Manx court to give effect to a plan under Chapter 11 Bankruptcy in the USA. At first instance the Manx court determined that the US Court's judgment was a judgment *in rem* and that since the property was situate outside of its jurisdiction, the judgment was unenforceable. On appeal it was decided that the order of the Federal Bankruptcy Court was in fact an enforceable judgment *in personam* and that the relevant company had submitted to the jurisdiction.

11. The Privy Council (Lord Hoffman) held that the order of the Federal Bankruptcy Court was neither a judgment *in rem* nor a judgment *in personam*. Rather, the purpose of the bankruptcy proceedings was not to determine the rights of the parties (as in an ordinary claim) but to provide a mechanism for the collective execution against the property of the debtor by creditors whose rights had already been admitted or established.

12. In a comparatively short judgment, Lord Hoffman held:

> "*The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated."*

[4] England & Wales, Scotland and Northern Ireland
[5] See generally Torremans *et al* eds. *Chesire North & Fawcett Private International Law* (London, 2017) at pp 528-544
[6] *Ibid* at pp 544 - 551

13. Lord Hoffman went on to provide very faint limits on the ability of the court to assist a foreign bankruptcy: *"At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system.*"

14. In the case before it, the Board determined that the Manx scheme of arrangement was capable of achieving the same outcome as the plan under the US Chapter 11 proceedings. On that basis the Board was satisfied that the domestic court had the common law power to give effect to the Chapter 11 plan as though it were a plan under a Manx scheme of arrangement.

15. The very broad and even idealistic principles set down in Cambridge Gas received much criticism. Professor Briggs (now Lord Briggs) said that "the decision in [Cambridge Gas] is wrong, for it requires a Manx court to give effect to a confiscation order made by a foreign court of property belonging to a person who was not subject to the personal jurisdiction of the foreign court. That a Manx court could have done so itself is nothing to the point."[7]

16. Elsewhere, the Irish Supreme Court specifically rejected Cambridge Gas in Re Flightlease (Ireland) Ltd [2012] IESC 12 where Finnegan J held "*As to whether, notwithstanding its uncertain state this court should adopt the approach in* Cambridge Gas Transportation Corporation. *I am satisfied that it should not. In the area of conflicts of law, it is desirable to await development of a broad consensus before developing the common law and it has not been suggested that such a consensus exists among common law jurisdictions. It is in any event desirable that such a significant change in the common law should be by legislation […]*"

17. Even in the United Kingdom, the countertrend began almost immediately in Rubin v Eurofinance SA [2013] 1 AC 236 where the Privy Council disavowed the Cambridge Gas decision. Lord Collins stated: "a*lthough statute law may influence the policy of the common law, it cannot be assumed, simply because there would be a statutory power to make a particular order in the case of domestic insolvency, that a similar power must exist at common law. So far as* Cambridge Gas *suggests otherwise, the Board is satisfied that it is wrong*".

18. The Board also rejected the earlier statements of Lord Hoffman that insolvency proceedings were, by their nature, different from civil claims. The effect of Rubin is that whether a judgment of a foreign court in insolvency proceedings will be recognised or not will depend upon the ordinary principles of recognition of foreign judgments in the law of the relevant forum. Insolvency proceedings do not form a category apart.

[7] Briggs, Adrian (2006) 77 BYIL 575, 581; cited by Lord Collins in Rubin v Eurofinance SA [2013] 1 AC 236 at paragraph 53

19. Interestingly, Lord Collins echoed the concerns of the Irish Supreme Court, saying that a change in the settled law on the recognition and enforcement of judgments had all the hallmarks of legislation and that any such change is for parliament to make.

D - The Singularis Case

20. Singularis provided the Privy Council with yet another opportunity to critique Cambridge Gas and to reshape modified universalism. In 2009 the Cayman Court made winding-up orders in respect of two Cayman companies. The auditor of both companies (PwC) was a Bermudan partnership. The liquidators of both companies obtained orders in the Cayman Islands as against PwC for the production of certain documents, but the law in the Cayman Islands only provided for the production of documents belonging to the insolvent company. Although PwC complied, the liquidators were dissatisfied with the disclosure received and wanted a wider form of relief to include PwC's working papers. The liquidators sought to move against PwC in Bermuda.
21. In the context of one of the companies (Singularis) the liquidators sought to be recognised by the Bermudan courts and to have the assistance of the Bermudan courts. Applying the principles of Cambridge Gas, the Bermudan court recognised the liquidators and made an order for disclosure against PwC under Bermudan legislation which was wider than Cayman legislation and provided for the production of documents "relating" to the company, not just belonging to it. This order was overturned on appeal. The liquidators then failed in their appeal to the Privy Council.
22. While the Privy Council accepted that the common law doctrine of modified universalism in cross-border insolvencies gave the Bermudan court the jurisdiction to assist foreign liquidators, the Bermudan court could not make orders in aid of a foreign insolvency which the foreign court could not make for itself.
23. Lord Sumption noted that Cambridge Gas marked the furthest that the common law courts have gone in developing the powers of the court to assist a foreign liquidation, but he was in agreement with much of the criticism directed against the judgment of Lord Hoffman.
24. Lord Sumption remarked that one of the weaknesses of Cambridge Gas was that, insofar as it was an authority for the proposition that the domestic court had a common law power to assist the foreign court by doing whatever it could have done in a domestic insolvency, Lord Hoffman had provided no basis or source for that assertion.
25. Importantly, Lord Sumption had this to say about exercising a power in aid of foreign insolvencies:

> "[…] the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers.
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> "[…]

> "[…] there is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information […] In recognising the existence of such a power, the Board would not wish to encourage the promiscuous creation of other common law powers […]
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> "[…]
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> "The Cayman court has no power to require third parties to provide to its office-holders anything other than information belonging to the company. It does not appear to the board to be a proper use of the power of assistance to make good a limitation on the powers of a foreign court of insolvency jurisdiction under its own law."

26. Lord Collins was a little stronger in his remarks, saying that "*to apply insolvency legislation by analogy 'as if' it applied, even though it does not actually apply, would go so far beyond the traditional judicial development of the common law as to be a plain usurpation of the legislative function.*"[8] This was a direct criticism of Lord Hoffman's attempt in Cambridge Gas to align Chapter 11 Bankruptcy in the USA with schemes of arrangement under Manx law.

27. While some might lament Singularis as being a body blow to modified universalism, it is my view that it does nothing more than to rein the concept in and try to remove some of the very wide discretion afforded it in Cambridge Gas. It is correct that the Board in Singularis rejected much of the reasoning and broad statements in Cambridge Gas, but it has not thrown out modified universalism as a concept. Rather, Singularis represents a greater emphasis on "modified" than it does on "universalism". The facts in Singularis were quite stark with a clear gap between the law of the Cayman Islands and the law of Bermuda. There is no reason to suppose that a more generous view of modified universalism cannot still be found in future cases.[9]

E - British Virgin Islands – the unravelling of the golden thread

28. The British Virgin Islands is a common law country which derives much of its jurisprudence from England. Indeed, its final appeal court is the Privy Council. Having said that, the BVI has its own unique company law and insolvency law. While many of the ideas and principles are readily recognisable to any English lawyer, it would be a mistake to assume that English and BVI law are identical, or that English case law can be imported wholesale into the Territory.

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[8] Singularis Holdings Limited v Price Waterhouse Coopers [2015] AC 1675 at paragraph 64

[9] While it is outside the scope of this particular paper, the recent Jersey case of Investin Quay Architects (In Liquidation) v BUJ Architects LLP & Ors [2021] JRC 233 is a good example of this. There, an English creditor had obtained in the High Court in London permission to serve a winding up petition against a Jersey company. Before the return date, the Jersey company placed itself in voluntary liquidation and sought an injunction in Jersey against the English creditor to prevent it from pursuing its petition in England. The Royal Court of Jersey dismissed the injunction application, citing modified universalism. Despite the relevant "look back" periods for preference payments being different in England and Jersey, the Jersey court ceded control of the liquidation of the company to England because not to do so would have prejudiced the English creditor who could not have challenged the preference payment in Jersey.

29. In the recent Eastern Caribbean Court of Appeal case, Erez[10], the interplay between common law assistance of foreign liquidators and statutory assistance of foreign liquidators was much discussed. The case concerned an Israeli trustee in bankruptcy who succeeded at first instance in obtaining an order for his recognition in the BVI, and an order, by way of common law assistance, rectifying a BVI company's register of members to record the trustee in bankruptcy as a shareholder.
30. Part XIX of the Insolvency Act, 2003 (the "**Act**") relates to orders in aid of foreign proceedings. Under that part, foreign insolvency officeholders from certain designated countries[11] can apply to the BVI court for a range of relief as set out in the Act, without first seeking to be recognised. Part XIX of the Act is narrower in scope than the recognition envisaged by the UNCITRAL Model Law on Cross-Border Insolvency, but it still allows a foreign insolvency officeholder to take steps to secure property within the Territory in aid of foreign insolvency proceedings.
31. Part XVIII of the Act reflects the wider concept of recognition and provides for wider forms of relief and is not limited to the list of designated countries cited above. Part XVIII, however, has not yet been commenced.
32. In Re C (a bankrupt) (BVIHC(COM) 2013/0080; judgment delivered 31 July 2013), Hong Kong trustees in bankruptcy sought the assistance of the BVI Court in aid of a Hong Kong bankruptcy proceeding, pursuant to Part XIX of the Act. In his judgment, Bannister J expressed *obiter* views that Part XIX had abolished any common law form of assistance to foreign insolvency officeholders.
33. In the Erez case, since Israel was not a designated country for the purposes of Part XIX, and since Part XVIII has not yet been commenced, the trustee in bankruptcy had no option to seek the common law assistance of the BVI Court. When the trustee in bankruptcy succeeded, the order was appealed, and the Eastern Caribbean Court of Appeal had to decide the issue of whether common law assistance of a foreign insolvency officeholder had been abolished by the Act.
34. Webster JA held that recognition and assistance are not the same thing. Recognition is a formal act by the BVI Court giving a foreign insolvency officeholder some status in the BVI. The assistance that the Court gives to such an officeholder is separate. Webster JA accepted that the Israeli trustee in bankruptcy could be recognised at common law in the BVI, but could not receive assistance. Relying on speeches by Lord Scott and Lord Neuberger in Re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852, Webster JA held:

> "[…] that where Parliament creates a power that is available to designated countries, that power cannot be exercised by insolvency officeholders from other countries. Had

[10] Net International Property Limited v Erez (BVIHCMAP2020/0010; judgment delivered 22 February 2021)
[11] It is a short list. The countries included are Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, United Kingdom and USA.

the power to remit assets been available under the inherent jurisdiction of the court this would mean that office holders from non-designated countries could apply for the remission of assets to countries that are not relevant countries. […] Bannister J was obviously mindful of the situation when he found, albeit *obiter*, that extending the common law power of assistance to office holders from non-designated countries would amount to usurpation by the judiciary of the power expressly reserved by Parliament to designated countries."

35. Accordingly, the Israeli trustee in bankruptcy could not seek assistance either at common law or pursuant to Part XIX of the Act. Part XVIII not being in force, that avenue was also closed to him. Wester JA recognised the implications of the decision and expressed regret that his decision would not further the principle of modified universalism.
36. While the judgment in Erez confirms the ability of a BVI court to recognise a foreign insolvency officeholder at common law, what use that recognition can have in the absence of actual assistance remains unclear. On the facts of Erez, it seems possible that the recognition alone might give the trustee in bankruptcy the requisite standing to launch a claim for rectification of the register of members, or for declaratory relief. If this is the import of Erez, the result will be a multiplicity of proceedings.
37. It should be noted that Webster JA's reliance on Re HIH Casualty Insurance Ltd was on a knife edge. Lord Scott and Lord Neuberger considered that the effect of section 426 of the Insolvency Act, 1986 was to abolish any inherent jurisdiction of the court to remit assets to a foreign country. Lord Walker and Lord Hoffman disagreed and found that the inherent jurisdiction of the court existed in parallel with the court's powers under section 426. Lord Phillips, having decided that the remission of assets in that case should happen pursuant to section 426, expressly declined to give an opinion on whether the court retained an inherent jurisdiction to do the same. Webster JA did not express a reason why he felt he needed to go one way as opposed to the other (although he would not have been bound in the sense of *stare decisis* since Re HIH Casualty and General Insurance Ltd is a House of Lords case).
38. Further judicial treatment of this issue in the Caribbean is quite possible, if not in fact probable. In the meantime, it would appear that the golden thread is badly frayed so far as the BVI is concerned.

F - Conclusion

39. Cambridge Gas has been much criticised, and it would be easy to misinterpret Singularis as being a significant departure from modified universalism. I do not think that is the case. Singularis actually strengthens modified universalism by fastening it to other existing legal principles (such as the recognition and enforcement of judgments) and by returning it to gradual and incremental development. The turn away from the kind of wide judicial discretion implicit

in Cambridge Gas avoids the risk that the principle will develop erratically and inconsistently. Gradual development must be a surer foundation.

40. The most damaging blow to modified universalism seems to have come from the West Indies. The BVI is an important centre for the incorporation of offshore companies and is a key player in the offshore market. The availability of the Territory's insolvency regime to interested parties the world over is important to the appeal of the Territory as an offshore centre, as is the ease with which that regime can be used. It may be that the rapid expansion of the list of designated countries under Part XIX of the Act, or the commencement of Part XVIII, will operate as a patchwork solution to the problem posed by Erez. The BVI government has yet to announce any such moves. In the absence of a judicial about-turn, however, it appears that the golden thread of the principle of modified universalism as a matter of common law in the BVI has been quite badly severed.

Shane Quinn

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