Subject: “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.”

Title: The principle of universalism as deux ex machina.

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1. Introduction

The distinctiveness of common law in our time is that it can still be used by the courts of different jurisdictions to adopt a common approach in interpreting identical or very similar legislative provisions found in their corresponding legislations. Despite the fact that, while the legislations of most common law jurisdictions have derived from identical main statutes, they have developed separately and may now consist of various different provisions and new legislation, case law relating to certain legislative provisions that are common to two different jurisdictions can still be interpreted and applied by the courts in a common manner.

It is on this basis that the approach of cross-border co-operation in insolvency case law has evolved by common law courts. Yet, as every common law principle, it is not to be applied without limitations, that are there to prevent the exertion of this judicial law-making power to the extent that it contravenes the power of legislature; whether that may be by interpreting legislation in a manner that it contradicts new legislative provisions introduced in that specific jurisdiction that differ somehow from the legislation of other common law jurisdictions that have introduced the case law purported to be applied or by introducing new principles that the legislature may purposefully avoided to introduce thus far.

The most usual limitation to this judicial law-making power of common law is in fact the development of the statutory framework in one jurisdiction so that it adopts and possibly regulates more strictly what was previously applied as a common law principle, while other common law jurisdictions have not developed their statutory framework to this extent and thus may only use older case law where it has been applied as a stand-alone common law principle. Needless to say, that this is in most cases the issue in using most recent English case law, due to the fast-pace enhancement of the English statutory framework when compared to other common law jurisdictions.

This paper purports to examine the extent to which the principle of universalism in judicial co-operation in cross-border insolvencies still applies in common law, with particular reference to the jurisdictions of England and Bermuda.

2. The English statutory framework in aid of foreign insolvencies

In England recognition of foreign insolvency proceedings has in fact long been established by the judiciary using in fact their statutory powers through the existing statutory framework that, in its own drafting, in fact explicitly allows for the liquidation of foreign companies in England. In particular, the Companies Act of 1862 provided in section 199 that English Courts have jurisdiction to rule for the liquidation of companies that are not registered, encompassing to that effect also companies incorporated abroad. This same provision can be found today in section 221 of the Insolvency Act of 1986, which reads *"(1) Subject to the provisions of this Part, any unregistered company may be wound up under this Act; and all the provisions of this Act about winding up apply to an unregistered company (with specific exceptions)(…) (4) no unregistered company shall be wound up under this Act shall be wound up voluntarily(…)"*[1].

Hence the judiciary developed this statutory provision further by ordering the ancillary liquidation in England of companies already in liquidation under the law of their incorporation, if there is sufficient connection with the UK and some benefit to the petitioners; which could simply be to facilitate taking control of assets of the insolvent company in England. From there on, it goes without saying that the ancillary liquidation is restricted within the regional boundaries of the Court that has allowed it. As Millet J. clarified in *Re International Tin Council*

[1] Insolvency Act of 1986, section 221

"Although a winding up in the country of incorporation will normally be given extra-territorial effect, a winding up elsewhere has only local operation".[2]

The extent and limits of the English ancillary liquidation regime are best analysed in *In Re Bank of Credit and Commerce International SA* as follows: (1) the winding up order issued in UK would always follow and be ancillary to a preceding liquidation order of the company in its country of incorporation (2) the powers of the liquidators of the ancillary liquidation are restricted to getting control of and realising the assets of the company in UK (3) the power to distribute the liquidation estate and declare dividend vests with the liquidators of the principal liquidation in the company's country of incorporation (4) in any matters of the winding up process that the English courts have jurisdiction they are obliged to apply English law, including English insolvency law.[3]

Similarly to s. 221 providing the statutory basis for the development of the English ancillary liquidation, s. 426 of the Insolvency Act of 1986 formed the basis for judicial co-operation in cross border insolvency proceedings in *In Re HIH Casualty and General Insurance Ltd.*[4] Section 426 of the Insolvency Act of 1986 subsections (4) and (5) provide rather generally that *"(4)The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.*

(5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.

In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law".[5]

Thus, in *In Re HIH Casualty* the House of Lords applied section 426 and recognised the power of the English court to order the ancillary liquidators of the company in England to remit the assets in their control to the principal liquidators in Australia, following such letter of request by the Australian court.[6]

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[2] *Re International Tin Council [1987] Ch 419, pp. 446-447*
[3] *In Re Bank of Credit and Commerce International SA (No. 10)* [1997] Ch 213, p. 246
[4] *In Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852
[5] Insolvency Act of 1986, section 426

[6] *In Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852

In addition to the vast provisions of the Insolvency Law of 1986, as amended to date, the UK has more recently introduced also the Cross-Border Insolvency Regulations of 2006[7], by which it gave effect to the provisions of UNCITRAL Model Law on Cross Border Insolvency[8], providing on the recognition of foreign insolvency proceedings[9] effecting also automatically stay of all proceedings[10], the power of the English court, upon recognition of foreign proceeding, to grant appropriate relief, including the examination of witnesses and taking of evidence or collection of information concerning the debtor's assets[11], the co-operation of British Courts to the maximum extent possible with foreign courts or foreign representatives[12] and so on.

However, not all countries have developed their statutory framework in insolvencies to the extent that England did and, as such, their courts cannot always rely on some national legislation in order to recognise foreign insolvency proceedings or to provide assistance to foreign courts in exercising their duty to oversee and regulate such insolvency proceedings.

3. The common law principle of universalism

Perhaps the first case to be cited as an authority on the common law principle of universalism is *In Re African Farms Ltd* [13]. This case was about an English company in liquidation with substantial assets in Transvaal, South Africa. The Court noted that there was no statutory power to wind up the company in Transvaal, but went on to examine whether they could recognise the powers of the liquidator appointed by the English Court so that he can take control those assets in Transvaal. In doing so, the Court stressed the fact that mere recognition of the appointment of the liquidator in England was not enough to protect the liquidation estate in Transvaal from creditors' petitions; this could only be done if somehow a stay of proceedings was effected in Transvaal and control over the company's assets was secured with the liquidator.

[7] Cross-Border Insolvency Regulations of 2006 (SI2006/1030)
[8] UNCITRAL Model Law on Cross Border Insolvency (1997)
[9] Article 15, Schedule I, Cross-Border Insolvency Regulations of 2006
[10] Article 20, Schedule I, Cross-Border Insolvency Regulations of 2006
[11] Article 21, Schedule I, Cross-Border Insolvency Regulations of 2006
[12] Article 25, Schedule I, Cross-Border Insolvency Regulations of 2006
[13] *In Re African Farms Ltd [13][1906] TS 373*

Having discussed *"whether our recognising of the foreign liquidation is actually prohibited by any local rules: whether it is against the policy of the laws, or whether its consequences would be unfair to local creditors"*[14] the Court recognised that the liquidator appointed by the English Courts was entitled to the administration of the company's assets in Transvaal on condition that *"all questions of mortgage or preference in respect of such assets, shall be regulated by the laws of this colony as if the company had been placed in liquidation here"*. On this, the South African judge, Innes CJ, explained the Court's reasoning in that *"recognition…carries with it the active assistance of the court".*[15]

By these statements and the limitations set by the Transvaal Court mentioned above, it is apparent that the court was guided in this judgement by the core insolvency law principles found in most jurisdictions, such as the principle of protection of the trust, securing the legitimate interests of secured creditors; the *pari passu* principle on equal treatment of unsecured creditors; the principle of priority, in that a first set of insolvency proceedings excludes the opening of a second one; and the principle of legal certainty, in that creditors should be in a position to foresee their legal position and how they may exercise their rights in the event of insolvency of the debtor, with regard to the applicable insolvency legislation of the country they are operating in.[16]

The principle of universality as set out in *In Re African* followed and discussed further by the Privy Council in the more recent case, *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc*[17]. This case related to approval by a New York court of a reorganisation plan under Chapter 11 of the US Bankruptcy Code, which included s provision on vesting the shares of a subsidiary registered in the Isle of Man from the investors to the committee of creditors. To effect this the New York court sent also a letter to the Manx court requiring its assistance on this matter, yet the investors in the Manx company petitioned against it and succeeded at the court of first instance, yet failed thereafter at the Court of Appeal, leading to this appeal before the Privy Council.[18]

Lord Hoffman, giving their lordships judgement, clarified first that this was not a case of establishing any *right in rem* or *in personam* of the petitioners in the shares of the company

[14] Ibid. pp 381-382
[15] Ibid. 377
[16] Prof. Reinhard Bork, *"Clash of principles: A new Approach to Harmonisation of Transactions Avoidance Laws?",* October 2018 found in INSOL Europe publication, *Party Autonomy and Third-Party Protection in Insolvency Law, Papers from the INSOL Europe Academic Forum Annual Conference, Athens, Greece, 3-4 October 2018.*
[17] *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508.
[18] Ibid.

as *"…bankruptcy proceedings do not fall in either category. (…) The important point is that bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them".*[19] On this, he then cited the case of *In Re Lines Bros Ltd* [1983]Ch 1 20 on that this necessity to establish rights in bankruptcy proceedings may only come up incidentally on very specific cases where proof of debts are rejected or where the ownership of a particular item by the debtor is challenged. [20]

Following this, Lord Hoffman, went on to explain that the common law doctrine of universal application of bankruptcy proceedings has effect in this case, citing *In Re African Farms* on this point and stating that in such cases *"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".*[21] This statement implies in fact that domestic law can be applied in foreign insolvency proceedings by analogy, just like in *Re African Farms Ltd* the court allowed in essence for the application of Transvaal insolvency law in a foreign company's winding up process on an 'as if' basis, while in fact the specific statutory provisions applied by the Transvaal Court did not extent to foreign companies in winding up. This suggestion in particular was later on reversed, or rather differed I would say, in *Singularis*[22]*.*

In that case, the Court, having recognised the liquidators' appointed by the Grand Court of the Cayman Islands in the company, had to examine whether they could grant specific injunctions applied by these liquidators based on Bermuda insolvency law statutory provisions. Namely, the liquidators achieved an order under the provisions of the Bermuda Companies Act of 1981 that provides *(1) The Court may, at any time after the appointment of a provisional liquidator or the making of a winding up order, summon before it any officer of the company or persons known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company. (2) The Court may examine such person on oath, concerning the maters aforesaid, either by word of mouth or on written interrogatories and may reduce his answers to writing and require him to sign them"*[23]*.*

The Court of Appeal then overruled this order on the following grounds: (1) s. 195 of the Bermuda Companies Act, that is the statutory framework that was relied upon by the

[19] Ibid. para. 13-15
[20] Ibid. para. 15
[21] Ibid. para. 22
[22] *Singularis Holdings Limited -v- PricewaterhouseCoopers (Bermuda)*, [2014] UKPC 36, 10 November 2014
[23] Bermuda Companies Act 1981 s. 195

appellants, limits this power to cases that the winding up order had been or could be made in Bermuda. (2) such an order could not have been made in the Cayman Islands that the liquidators were appointed, as there was no similar statutory provision, so allowing it in Bermuda would be "unjustifiable forum-shopping".[24]

In upholding this Court of Appeal judgement, the Privy Council acknowledged that *"there is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up"*[25], yet elaborated on that there are certain limitations to this common law power that applied to this case. In particular, Lord Sumption, in giving this judgement by majority of the Privy Council, listed the following limitations: (1) it's applied only where the liquidators are acting as officers of the court or equivalent public officers (2) since it's a power of assistance in nature, it may not be used to exert powers that are not available to them in the jurisdiction of their appointment (3) the element of necessity to perform the office holder's functions should be present (4) as stated in *Re African Farms Ltd* it must be consistent with the public policy and substantive law of the assisting court (5) it's conditional on the applicant being able to pay any costs incurred by any third party to be compliant with the said order.[26] Following on these the Privy Council dismissed this appeal as it failed to comply with limitations (2) and (4) stated above.[27]

It's important to note though that the liquidators in this case required relief based on s. 195 of Bermuda Companies Act, that is on a statutory provision of Bermuda insolvency law that did not exist in Cayman Islands insolvency legislation, and were not relying as such solely on the common law principle of universality, as applied in *In Re African Farms*[28] and in *Cambridge Gas*[29] for purposes of providing the court's assistance in getting the required information. Further, in these two preceding cases domestic law of the assisting court on the subject matter at hand was similar to that of the foreign court that has ordered the winding up of the company, while in the case of *Singularis*[30] there was no similar provision to s. 195 of the Bermuda Companies Act in Cayman Islands legislation.

[24] *Singularis Holdings Limited -v- PricewaterhouseCoopers (Bermuda)*, [2014] UKPC 36, 10 November 2014
[25] Ibid, Lord Sumption par.25
[26] Ibid.
[27] Ibid. par. 28-31
[28] *In Re African Farms Ltd [1906] TS 373*
[29] *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508.
[30] *Singularis Holdings Limited -v- PricewaterhouseCoopers (Bermuda)*, [2014] UKPC 36, 10 November 2014

The extent to which the common law principle of universalism was applied in *Cambridge Gas* in assisting a foreign court is probably the furthest ever allowed by common law courts. In fact *Cambridge Gas*[31] was heavily criticised thereafter by academics and most notably by the Court in *Rubin v Eurofinance SA*[32], which considered that it was wrong to establish that there was jurisdiction on such matters simply by relying on the common law principle of the court's power to assist in insolvency proceedings. While *Rubin v Eurofinance SA*[33] the Board recognised indeed the existence of the common law principle of universalism, it stressed also the fact that there are certain limits to it such as that it should be subject to local law and public policy and the locality of the jurisdiction of the Court.[34]

Although this judicial law-making power exercised by common law courts in interpreting or applying similar legislative provisions has led in establishing many equitable and just doctrines and principles, it is not without limits that were set over the years to safeguard some more vital doctrines of justice, such as the separation of powers, namely between the judiciary and the legislature. As Lord Goff rightfully explained this, the judge in exercising this law-making power *"must act within he confines of the doctrine of precedence, but that the change so made must be seen as a development, usually a very modest development, of existing principle and so can take its place as a congruent part of common law as a whole(…)".*[35]

4. Does the principle of universalism still apply in common law?

Despite the fact that the Board in *Singularis*[36] have unanimously agreed to dismiss the appeal, its members were separated on the justification. In particular, Lord Mance and Lord Neuberger concluded that the common law power to assist a foreign court by requiring the provision of information does not exist and it should not be invented thereafter by relying on *"the extreme version of "the principle of universality", as propounded by Lord Hoffman in Cambridge Gas, (which) has, as Lord Sumption explains, effectively disappeared"*.[37] What led their Lordships to this conclusion is most definitely the sparse use and analysis by the courts of this common law principle, its implications, extent and limitations, in recent times.

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[31] *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508
[32] *Rubin v Eurofinance SA* [2013] 1 AC 236
[33] *Rubin v Eurofinance SA* [2013] 1 AC 236
[34] Ibid.
[35] *Kleinworth Benson Ltd v Lincoln City Council* [1992] 2 AC 349
[36] *Singularis Holdings Limited -v- PricewaterhouseCoopers (Bermuda)*, [2014] UKPC 36, 10 November 2014
[37] Ibid. para. 157

As Lord Collins has identified in that same judgement *"The problem in this and other similar or analogous cases has arisen largely in relation to those British colonies, dependencies, and overseas territories such as Bermuda, and the Isle of Man, which do not have the statutory powers to assist foreign office holders which exist under UK law".*[38] Therefore, what should be examined is whether this "problem" has been solved nowadays, in that whether these jurisdictions have developed their statutory framework to facilitate and simultaneously set the limits for recognition of insolvency proceeding and judicial cooperation in their enforcement.

In the case of Bermuda in particular legislature has not adopted any statutory provisions neither on the recognition of foreign insolvency proceedings, nor on judicial cooperation in such proceedings. This was brought up in the "mirror case" of *Singularis*[39] , *PricewaterhouseCoopers v Saad Investments Co Limited*[40], where the Privy Council overruled the Court of Appeal of Bermuda judgement affirming an order for the winding up of the Cayman Islands' company, that was already in winding up in the Cayman Islands, on grounds that there was no jurisdiction on the Bermuda Court to order for the liquidation of any company incorporated outside Bermuda.[41]

The respective national legislation of Bermuda has not changed to this date, nor did Bermuda adopt the UNCITRAL Model Law on cross-border insolvencies, as in the case of UK mentioned above.

5. Conclusion

The above case of Bermuda indicates that, although many common law jurisdictions have adopted UNCITRAL Model Law on cross border insolvencies, such as England did by enacting the Cross-border insolvency regulations of 2006 and simultaneously at the time with the European Insolvency Regulation and Recast Regulation 848/2015, there are still some other common law jurisdictions that have neither adopted UNCITRAL Model Law on cross order insolvencies nor any equivalent provisions in their national legislation to this effect.

In this respect, one can say that it is only a matter of time when the next case will come up where some common law court will seek to apply the principle of universalism, possibly

[38] *Singularis Holdings Limited -v- PricewaterhouseCoopers (Bermuda)*, [2014] UKPC 36, 10 November 2014, 42
[39] Ibid.
[40] *PricewaterhouseCoopers v Saad Investments Co Limited* [2014] UKPC 35
[41] Ibid.

alongside further powers of the court to assist in the implementation of foreign insolvency proceedings, in another case.

To this effect it can be said that common law principles resemble Greek myths and Homer's epic poems in some way; where gods may be forgotten for some time, yet when a seemingly unresolved problem arises, the gods will appear once more as *deux ex machina* and use their usual powers to resolve the problem in the same magical manner that they've resolved similar problems in the past.

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