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**SHORT PAPER**

**CROSS-BORDER COOPERATION IN THE COMMON LAW - COMPARING ITS DEVELOPMENT IN ENGLAND AND BERMUDA: where does universalism stand now*?***

**Paper based on question 10:**

Analyse the evolution of the approach of the common law courts to cross-border cooperation 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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**CROSS-BORDER COOPERATION IN THE COMMON LAW - COMPARING ITS DEVELOPMENT IN ENGLAND AND BERMUDA: where does universalism stand now*?***

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1. **Introduction** 
   1. **Abstract**

This paper analyses the evolution of the approach of the common law courts to cross-border cooperation through existing case law, including the seminal decisions in *Cambridge Gas* and *Singularis*. The paper will discuss the extent to which the principle of universalism, or at least its more pragmatic cousin of modified universalism, still applies in the common law world. This exercise will be undertaken by comparing England and Wales, as an ‘onshore’ jurisdiction with specific domestic legislation concerning judicial cooperation and the adoption of international texts, with Bermuda, as an ‘offshore’ centre currently lacking any modern, express statutory provisions for dealing with cross-border judicial cooperation in insolvency cases.

**1.2 Overview**

Insolvency situations have long had an international aspect, with cases of commercial collapse giving rise to implications which span national borders appearing in English law reports from the eighteenth and nineteenth centuries. These situations have occurred more frequently with the advent of globalisation, sometimes played out in novel ways due to ever more complicated corporate structures and financing. To reflect these developments, competing legal theories have developed with respect to the approach that should be taken by insolvency judges in national courts to cross-border issues, with academic debate centred around the theories of ‘universalism v territorialism’. Between these two poles, is the legal and practical concession to universalism in the form of ‘modified universalism’.

Part I of this paper will examine the development of universalism and its related principle of active assistance, and its modification in practice, with specific regard to its development of the common law in England and Wales, where express legal texts have largely supplanted much of the role of the common law, and Bermuda, where antiquated legislation has required the courts to rely heavily on the use of inherent powers. Part II will consider the at times inconsistent approaches taken by the Supreme Court and Privy Council in the run of seminal cases from *Cambridge Gas* to *Singularis*. Part III will consider where the Privy Council’s decision in the latter leaves the principle of universalism, the extent of a common law court’s inherent powers to grant assistance and specific applications by the courts in Bermuda post-*Singularis*. Part IV concludes.

1. **Part I: Development of the common law**

**2.1 What is universalism?**

The concept of universalism in insolvency proceedings was famously described, if somewhat controversially, by Lord Hoffman as *“the golden thread of the common law”*[[1]](#footnote-1). He elucidated this approach further in *Cambridge Gas[[2]](#footnote-2)* where he stated:

*“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”[[3]](#footnote-3).*

The aim of universalism is to provide a single forum applying a single legal regime to all aspects of a debtor’s affairs on a worldwide basis[[4]](#footnote-4). It is intended that this will produce the fairest and most efficient result, as the best long-term solution to cross-border insolvencies[[5]](#footnote-5). By contrast**,** territorialism, in its purest form, implies that insolvency proceedings should have an exclusively territorial focus, with proceedings applying only to assets within the particular national territory and with little regard for parties or proceedings elsewhere[[6]](#footnote-6).

In most jurisdictions, these approaches will be tempered by practical and legal considerations. As Lord Hoffman stated, universalism is an *“aspiration”* and not a *“rule”*[[7]](#footnote-7)*.* In this context, Professor Westbrook has advocated for the application of modified universalism, where the application of the principle is not automatic but dependent on the local court being satisfied that the ‘main proceedings’ (i.e. those overseas) are fair and the that the interests of local creditors are protected[[8]](#footnote-8).

**2.2 The approach of the English courts historically**

The ‘golden thread’ has an extensive history which can be traced back to bankruptcy proceedings dating *“as far back as the mid eighteenth century”*[[9]](#footnote-9). In the 1764 case of *Solomons v Ross* the English Court recognised that bankruptcy proceedings opened in Holland, being the debtor’s place of incorporation, should be regarded as having extraterritorial effect over all of the debtor’s assets, no matter where they were located. As noted by Lord Hoffman, this early development of the common law did not arise entirely out of the pursuit of lofty universalist aspirations but from commercial and legal pragmatism borne out of England’s position first as a great trading nation and then as an imperial power[[10]](#footnote-10).

Universalism has also long been enshrined in English law in the sense that it is judicially assumed that English insolvency proceedings will have a worldwide effect in relation to the debtor’s assets[[11]](#footnote-11), albeit the powers of the English court in relation to those foreign assets will, in reality, be limited. The reach of the English court also includes the power to wind up foreign companies if there are assets within the jurisdiction or some other sufficient connection. This includes even where the company may already be in liquidation in its place of incorporation[[12]](#footnote-12) or dissolved there, as part of the concept of ‘ancillary winding up’. This is where the foreign proceedings will be treated as the principal proceedings, and proceedings initiated in England to deal with collecting/protecting assets within the jurisdiction and settling the list of local creditors will be of an ancillary nature[[13]](#footnote-13).

From this brief review of the cases, two key principles come to the fore: the principle of universalism on the basis that proceedings instituted in one jurisdiction should be regarded as having universal effect, and secondly the principle of assistance, namely that the courts in one jurisdiction should actively assist insolvency proceedings commenced in a foreign jurisdiction[[14]](#footnote-14). However, the outer borders of these principles have proven hard to delineate.

**2.3 The modern English framework**

While a truly universalist international structure still remains elusive, an express statutory framework in relation to cross-border insolvency cooperation is now in place in England and Wales. There were four gateways for resolving cross border insolvency matters; firstly 426 of the Insolvency Act 1986 (‘Insolvency Act’) which provides for cross-border cooperation covering certain ‘relevant countries’[[15]](#footnote-15), secondly the Recast European Insolvency Regulation 2015 (‘EIR’) in relation to EU insolvencies (now fallen away post Brexit), thirdly the UNCITRAL Model Law on Cross-Border Insolvency 1997 (‘Model Law’), as implemented by the Cross-Border Insolvency Regulations 2006 (‘CBIR’)[[16]](#footnote-16), with its focus upon a debtor’s centre of main interest (‘COMI’), and fourthly (and effectively residually) the inherent jurisdiction of the court under common law. This largely statutory framework has contributed to what Professor Ian Fletcher memorably described as the *“arrested development”* of the English common law[[17]](#footnote-17).

**2.4 Cross-border cooperation in Bermuda**

By contrast, the development of common law cooperation in Bermuda has moved in tandem with the relatively more recent growth of Bermuda as an offshore financial centre. As Kawaley noted, speaking extra judicially to the National Conference of Bankruptcy Judges, until 1970 Bermuda lacked the ability to incorporate companies without an Act of Parliament, did not enjoy much by way of international business, and did not even possess a corporate insolvency statute until 1977. In short, there was little to no pressing need to consider and apply English common law jurisprudence on cross-border cooperation until the mid-1990s[[18]](#footnote-18). The statutory backdrop to this was, and remains, outdated. Insolvency and schemes of arrangement in Bermuda are governed by Part XIII of the Companies Act 1981 (‘Companies Act’) which was based upon the (repealed) English Companies Act 1948. The Act makes no provision for winding up foreign companies except for certain narrow exceptions, does not include any explicit restructuring powers, and there is no legislation whatsoever dealing with cross-border cooperation. The jurisdiction has not, for instance, enacted the Model Law and has no current plans to do so[[19]](#footnote-19). This has required the Bermuda Supreme Court to fill the gaps through creative exercise of its inherent powers on a ‘case by case basis’.

A key example of this innovative approach is *Re ICO Global Satellite Holdings*[[20]](#footnote-20)*,* where a Bermuda incorporated company had filed for US Chapter 11 protection and a plan based on refinancing had been developed. As Bermuda lacked an express restructuring jurisdiction, Austin Ward, CJ, interpreted a provision in section 170 of the Companies Act that allowed the Court to limit a provisional liquidator’s powers on appointment to create a form of light touch liquidation. This application provided for *de facto* debtor in possession restructuring, to run alongside the existing Chapter 11 proceedings, with an automatic stay of claims against the company, and the provisional liquidator using ‘soft powers’ to oversee the process. The Chapter 11 proceedings were in effect treated as the ‘foreign main proceeding’, with the Bermuda proceedings acting in an ancillary role. The Chief Justice described this as “*not a question of surrendering jurisdiction as much as harmonisation of effort”*[[21]](#footnote-21).This approach has been followed in numerous first instance cases over the subsequent twenty years, despite the concept of COMI not formally existing in Bermuda law.

The other important aspect of cross-border cooperation in Bermuda is assistance to a foreign office holder. Recognition is on the basis that Bermuda’s conflict of laws rules will be in most cases no different than the English conflict rules and accordingly the Bermuda Courts will recognise an office holder appointed under insolvency proceedings in the company’s place of incorporation[[22]](#footnote-22). However, it is the nature and scope of the common law power to assist that has proven to be controversial beyond providing private law relief. The extent of the common law power to assist a liquidator appointed in a foreign debtor’s place of incorporation will be further explored in Part II of this paper.

1. **Part II: From *Cambridge Gas*** **to *Singularis***
   1. ***Cambridge Gas***

It is generally thought that *Cambridge Gas[[23]](#footnote-23)* reinvigorated the principle of universalism in the common law. The case concerned an insolvent Isle of Man company, Navigator Holdings plc, which was in Chapter 11. A request was made by the New York Bankruptcy Court to the Isle of Man Court to give assistance to the US proceedings by giving effect at common law to its reorganisation plan. This plan required the transfer of shares in Navigator (which were now of no value) held by a Cayman company, Cambridge Gas Transport Corporation (‘CGTC’). CGTC opposed this application on the grounds that it had never submitted to the jurisdiction of the US Court and therefore, on the basis of established principles of private international law, the US order could not be enforced against it in the Isle of Man. The Privy Council, sitting as the Isle of Man’s final court of appeal, held that if the bankruptcy proceedings fell into the category of *in rem* or *in personam* judgments*,* CGTC would be right. However, as this was a collective insolvency procedure, the principle of universality, together with the principle of assistance, conferred on the Manx Court a jurisdiction at common law to give effect to the plan by doing whatever it could have done in a domestic insolvency[[24]](#footnote-24). As the US plan could have been sanctioned by a Manx scheme of arrangement, the court had the power to give effect to the plan ‘as if’ this step had taken place. Lord Hoffman, in giving the judgment of the Court, cited with approval the methodology of ‘active assistance’ established in *Re African Farms*[[25]](#footnote-25). While the Privy Council doubted that this was likely to mean that foreign insolvency provisions could be applied, 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 is to tenable 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”[[26]](#footnote-26)*.

* 1. **Subsequent case law**

*Cambridge Gas* was followed by *HIH*[[27]](#footnote-27), and quickly picked up in other common law jurisdictions either as binding precedent (as in Bermuda where the Privy Council is the apex appeal court) or simply as persuasive authority, including Australia, Cayman, New Zealand, Jersey, Ireland, as well as in the UK. In Bermuda, the principle of active assistance was endorsed somewhat cautiously in *Re Founding Partners Global Trust Ltd[[28]](#footnote-28)*, where a letter of request from Cayman sought recognition of Caymanian liquidators and for them to be granted the same powers as if they had been appointed in Bermuda. Relief was granted on the basis that the Court had a common law power to apply the statutory remedies available to domestically appointed liquidators ‘as if’ they applied to the foreign liquidator.

These developments were not without resistance. In *Rubin v Eurofinance SA & Ors*[[29]](#footnote-29), the English Supreme Court considered *Cambridge Gas* in detail, and held that a change in the law relating to foreign judgments, which was more expansive and more favourable to liquidators and other office holders than the traditional common law rules should be left to legislation. Lord Collins, giving the majority judgment (Lords Collins, Walker and Sumption), said that for the law to develop in this way would not be an incremental development but a radical departure from settled law[[30]](#footnote-30). It followed, he said, that *Cambridge Gas* had been wrongly decided[[31]](#footnote-31).

* 1. ***Singularis***

In *Singularis[[32]](#footnote-32)*, the tide turned on this expansion of the common law. The facts were that the Grand Court of Cayman appointed a liquidator to wind up a Cayman company, Singularis. That liquidator applied to the Bermuda Court to order PwC, as the former auditors of the company, to provide information and documents. This was a statutory power, under section 195 of the Companies Act, available in domestic liquidations. Chief Justice Kawaley, applying Lord Hoffman’s dicta from *Cambridge Gas* and rejecting *Rubin* (which was not binding), held that the Court could recognise the appointment, and could assist the liquidator by applying section 195 ‘as if’ it applied to the foreign proceedings[[33]](#footnote-33).

On appeal, this approach was rejected by the Court of Appeal[[34]](#footnote-34). Auld, JA, commenting that the notion of legislation by analogy was close to *“legislating from the bench”[[35]](#footnote-35).* On further appeal to the Privy Council, while noting that the extent of the extra-statutory powers of a common law court to assist foreign liquidators is *“a very tricky topic*”[[36]](#footnote-36), the Court, in the lead judgment of Lord Collins, held that parts of the judgment in *Cambridge Gas* were wrongly decided and in particular that common law assistance could not remove the need to implement a parallel scheme in the Isle of Man when dealing with the *in rem* rights of a shareholder who had not submitted to the US proceedings[[37]](#footnote-37). The court also rejected the notion that common law assistance extended to applying domestic law by analogy; this related to both the application of section 195 of the Companies Act in *Singularis* at first instance, and to application of Manx law on approval of schemes of arrangement ‘as if they applied’[[38]](#footnote-38). In short, the great expansion of the law in *Cambridge Gas* was left in tatters[[39]](#footnote-39).

1. **Part III: Post *Singularis***

So what remains of *Cambridge Gas*? As noted by Lord Sumption, that case marked the ‘*”furthest that the common law courts have gone”*[[40]](#footnote-40). In a post-*Singularis* common law world, it could no longer be said that a domestic court had jurisdiction over the parties universally simply by virtue of its inherent power to assist. However, the principle of modified universalism apparently remained unaltered, although ‘active assistance’ could no longer justify the extension of powers beyond the established methods of assistance[[41]](#footnote-41).

The fall out from *Singularis* was considered by the Bermuda Court in *Re Energy XXI Ltd*[[42]](#footnote-42). In this case, where there were light touch winding up proceedings running parallel to US Chapter 11 proceedings, the Court was asked to recognize the Texas Bankruptcy Court’s proposed plan by granting a permanent stay. This was opposed by an equity committee appointed in the US proceedings, who argued that, following the overturning of *Cambridge Gas*, the Court had no jurisdiction to grant the relief sought. In rejecting this argument, the Chief Justice noted that the decision in *Singularis* did not remove the power of the Court to recognize the Chapter 11 proceedings, and that the winding up petition was a perfectly proper filing for the purposes of assisting with a foreign restructuring[[43]](#footnote-43). Further, the grant of a stay was available as an inherent power of the Court, and did not rely upon statute. Moreover, the facts were distinguishable from *Cambridge Gas*, as the equity committee had submitted to the US jurisdiction, and indeed was a ‘creature’ of those proceedings[[44]](#footnote-44). Given the difficulty the Court had found in grappling with the extent of common law assistance in Lord Hoffman’s judgment in *Cambridge Gas*, the clarity of Lord Collins’ judgment in *Singularis* was welcomed by the Court[[45]](#footnote-45).

The reasoning in *Re Energy XXI* was subsequently followed in two further cases with similar fact patterns; first in *C&J Energy Services Ltd*[[46]](#footnote-46) where the Court granted recognition of a US Chapter 11 plan and granted a permanent injunction in aid of it, and second in *Re Seadrill Ltd*[[47]](#footnote-47) where a Chapter 11 plan was recognized and enforced. Thus far, these cases appear to have put paid to further arguments before the Bermuda Courts attacking common law recognition and enforcement on the basis of uncertainty or inconsistency in the law generated by the run of cases before the English Supreme Court and Privy Council. The cumulative effect has been to clarify the law in Bermuda, but with an emphasis on identifying facts or features that distinguish an assistance case from those in *Cambridge Gas* or *Singularis.*  This mirrors the element of gloss applied to these cases in other offshore jurisdictions including Guernsey[[48]](#footnote-48) and the Bahamas[[49]](#footnote-49).

By contrast**,** common law insolvency cooperation in England, although now once again perhaps devolved back to its state of ‘arrested development’, with the common law gateway taking the back seat to the cross-border provisions of the Insolvency Act and CBIR, nonetheless remains *“embedded*”[[50]](#footnote-50). There is also still substantial scope for debate, as can be seen from *Re OJSC International Bank of Azerbaijan*[[51]](#footnote-51), where the Court of Appeal did not take the path of modified universalism and followed the Gibbs rule[[52]](#footnote-52) and refused to grant a permanent stay which in effect would enforce a foreign (Azerbaijani) restructuring plan. The Court of Appeal rejected the charge of ‘parochialism’ in doing so[[53]](#footnote-53).

1. **Conclusion**

While universalism itself has always been in essence theoretical (at least until such time as an international convention is widely embraced), the common law principle of modified universalism is alive and well it seems in England and Wales, Bermuda and other common law jurisdictions. Its development has been incremental and although the rolling back of Lord Hoffman’s innovation in the scope of the principle of assistance might be seen as a setback for liquidators and other office holders, the scrutiny afforded by the Privy Council and Supreme Court has added important clarity to the common law on cross-border insolvency, especially in those offshore jurisdictions where insolvency judges are working without the assistance of a detailed regime of statutory frameworks or the adoption of international texts.

The common law regime in Bermuda is arguably now more delineated, and advice can be given to clients, whether involved in parallel proceedings, or seeking (or challenging) a request for assistance, on a more confident basis. As the Bermuda Court noted, *Singularis* did away with cutting *“through recognised private international law rules”* using *“woolly common law cooperation notions to fill gaping statutory chasms”*”[[54]](#footnote-54). What is left in its place is an active court recognising foreign proceedings and providing assistance where it can (and should) on a thoughtful basis, mindful of the limits of the common law but also still inventive in its application.

Future development is therefore likely to be incremental, rather than radical as in Lord Hoffman’s judgment in *Cambridge Gas[[55]](#footnote-55)*. To a large extent, however, the criteria for the development of inherent powers remains unclear and there were differing opinions on this point in *Singularis*[[56]](#footnote-56). The scope for further, future arguments over the development of the common law remain, and are, due to their absence of statutory frameworks, likely to arise from the offshore jurisdictions. As noted by Lord Neuberger, when referring to universalism; *“as with the Cheshire Cat, the principle’s deceptively benevolent smile still appears to linger”*[[57]](#footnote-57).

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11. *Mitchell v Carter* [1997] 1 BCLC 673, at [686-867], per Millett, LJ. [↑](#footnote-ref-11)
12. This reflects the importance of the place of incorporation of a company in the common law; see Rule 166 Dicey, Morris & Collins, *The Conflict of Laws*, 14th ed, Wildy (2006). [↑](#footnote-ref-12)
13. *Re International Tin Council* [1987] Ch 419,446-447; also *Re BCCI (No 10)* [1997] CH 213. [↑](#footnote-ref-13)
14. *Supra* at footnote 4, page 3. [↑](#footnote-ref-14)
15. Ancillary liquidation is now regulated by sections 221 and 226 of the Insolvency Act. [↑](#footnote-ref-15)
16. The complementary UNCITRAL Model Law on Recognition and Enforcement of Insolvency Related Judgments, published on 19 September 2018, has yet to be adopted. [↑](#footnote-ref-16)
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20. [1999] Bda LR 69. [↑](#footnote-ref-20)
21. *Ibid*, at pages 1-2, per Ward, CJ. [↑](#footnote-ref-21)
22. *Supra* footnote 19, at pages 232-233. [↑](#footnote-ref-22)
23. *Supra* citation at footnote 2. [↑](#footnote-ref-23)
24. *Ibid* at 517, per Lord Hoffman. [↑](#footnote-ref-24)
25. (1906) TS 373, at 377, per Innes, CJ. [↑](#footnote-ref-25)
26. *Cambridge Gas,* at [22], per lord Hoffman. [↑](#footnote-ref-26)
27. *Supra* citation at footnote 1. Although this decision, in the judgments of Lords Scott and Neuberger, was based upon the statutory power in section 426 of the Insolvency Act, Lord Hoffman held that a power to remit assets to a foreign liquidation also existed at common law, at 861-862. [↑](#footnote-ref-27)
28. [2011] Bda LR 22. Kawaley, J., comments at [5] that the *“famous dictum”* of Lord Hoffman in *Cambridge Gas* *“is for me overly compressed”*. [↑](#footnote-ref-28)
29. [2012] UKSC 46. [↑](#footnote-ref-29)
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31. *Ibid*, at [132]. [↑](#footnote-ref-31)
32. *Singularis Holdings Ltd v PwC* [2014] UKPC 36. [↑](#footnote-ref-32)
33. [2013] SC Bda 28 Comm (15 April 2015) at [8]. [↑](#footnote-ref-33)
34. [2013] CA Bda 7 Civ. [↑](#footnote-ref-34)
35. *Ibid*, at [43]. [↑](#footnote-ref-35)
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43. *Ibid* at [24-25]. [↑](#footnote-ref-43)
44. *Ibid* at [26]. [↑](#footnote-ref-44)
45. *Ibid* at [24] and [27]. [↑](#footnote-ref-45)
46. [2017] SC (Bda) 20 Comm (28 February 2017). [↑](#footnote-ref-46)
47. [2018] Bda LR 39. [↑](#footnote-ref-47)
48. *In the Matter of X (A Bankrupt), Brittain v JTC (Guernsey) Ltd* (Judgment 36/2015). [↑](#footnote-ref-48)
49. *Northshore Mainland Services Inc v The Export Import Bank of China* (2015/COM/00039). [↑](#footnote-ref-49)
50. *Supra* footnote 10 (Godwin), at page 27. [↑](#footnote-ref-50)
51. [2018] EWCA Civ. 2802. [↑](#footnote-ref-51)
52. The Gibbs rule provides that English courts will not enforced a foreign insolvency judgment discharging or modifying the terms of English law governed debts. [↑](#footnote-ref-52)
53. At [30]. Mevorach has described this application as a *“narrow interpretation”* of modified universalism; see Mevorach, Iris, Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?, Eur Bus Org Law Rev 22**,** 283–315 (2021), at page 291. [↑](#footnote-ref-53)
54. *Energy XIII*, at [27]. [↑](#footnote-ref-54)
55. *Ibid*, at pages 27-28. [↑](#footnote-ref-55)
56. *Supra* footnote 10 (Godwin), at page 30. [↑](#footnote-ref-56)
57. *Singularis,* at [159]. [↑](#footnote-ref-57)