THE COMMON LAW AND CROSS-BORDER COOPERATION – ARE ENGLAND AND JERSEY, CHANNEL ISLANDS, HANGING ON TO THE GOLDEN THREAD?

Contents

Introduction

This short paper briefly analyses the evolution of the approach of the common law courts to cross-border cooperation through existing case law. It goes on to compare the respective in England and Jersey, Channel Islands (**Jersey**), in order to explore whether the principle of universalism still applies.

It is worth acknowledging at the outset the distinction between common law and civil law jurisdictions. Common law being defined as the rule of law developed by the courts as opposed to those created by statute[1] and civil law being defined as a legal system based on Roman law, as distinct from the English system of common law[2].

Jersey is often described as a 'mixed jurisdiction'. It does not always conveniently fall into either definition. The foundation of Jersey law remains the customary law deriving from the Duchy of Normandy[3]. However, were this paper concerned with the Jersey law of contract, it would necessarily have to grapple with at least Roman law (civil law), French (civil law) and English law (common law). Fortunately for the author, corporate and insolvency jurisprudence in Jersey leans heavily on English common law. That is not to say that English law is binding upon the courts of Jersey (it is not), but the principal legislation, the Companies (Jersey) Law 1991 (**CJL**) is predominantly based upon the United Kingdom's (**UK**) Companies Act 1985. Consequently, English common law is often highly persuasive.

That said, Jersey's customary law remains relevant, with article 49 of the Bankruptcy (Désastre) (Jersey) Law 1990 (**BDJL**), concerning the ancient customary law bankruptcy concept of ***désastre***, governing cross-border cooperation in insolvency matters between the Royal Court of Jersey (the **Jersey Court**) and the courts of prescribed jurisdictions[4], discussed further below.

Origins of common law cross-border cooperation

England

The seminal English case of Solomons v Ross[5] demonstrates that from (at least) the late 18th century, the development of the doctrine of comity by the courts in England encouraged international cooperation[6]. Comity can be described as the courtesy accorded between states or their courts on the basis of: *"…accepted rules of mutual conduct as between state and state which each state adopts in relation to other states and expects other states to adopt in relation to itself."*[7].

But was this as altruistic as it might appear? Perhaps not, as comity tended to favour British (rather than foreign) creditors in the 18th and 19th centuries when there was large British imperial trade abroad[8].

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[1] Oxford Dictionary of Law, 10th edition, pp 140.
[2] *Ibid*, pp 124.
[3] Duncan Fairgrieve and Kathryn Purkis, the Law of Unjust Enrichment in the Channel Islands: Recognising the Civil Strand - Jersey & Guernsey Law Review 2019, volume 1, para 4.
A Debtor (Order In Aid No. 1 of 1979) Ex parte Viscount of the Royal Court of Jersey [1981] Ch. 384, 393.
[4] Article 6 of the Bankruptcy (Désastre) (Jersey) Order 2006, being Australia, Finland, Guernsey, the UK and the Republic of Ireland.
[5] (1764) 1 Hy Bl 131n.
[6] Paul Omar, Ghost In The Machine, Survival of the Bankruptcy Cooperation Statute, para 1.
[7] Buck v Attorney General [1965] Ch 745, para 770.
[8] Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1AC 508, para 17. See also Anthony Dessain and Michael Wilkins, How Strong and How Long is "The Golden Thread"? Jurisdictional issues in a globalised world – Jersey & Guernsey Law Review 2014, volume 1, para 2.

In *Solomons*, a firm in Amsterdam was declared bankrupt and assignees were appointed. An English creditor brought garnishee proceedings in London in order to attach £1,200 owing to the Dutch firm, but the English court decided that the bankruptcy had vested all of the firm's moveable assets (including debts owed by English debtors) in the Dutch assignees. The English creditor had to surrender that seized under the garnishee proceedings and prove in the Dutch bankruptcy.[9]

Solomons might well have been the earliest recognition of the principle of universalism[10], the concept that a single insolvency regime will apply to the debtor's affairs wherever situated. The view that *Solomon* identified (and supported) the principle of universalism was also reached by Joseph Story in this text 'Commentaries on the Conflict of Laws[11]', who submitted that:

"*[T]he true rule is, to follow out the lead of the general principle that makes the law of the owner's domicil conclusive upon the disposition of his personal property*," citing *Solomons* as supporting that doctrine.[12]

The reasoning by which the English court reached its decision in *Solomons* has been said to be a matter *"of conjecture"*[13], but ultimately it found a way to reach a just outcome which, in the author's opinion, might be more easily achieved with the autonomy and flexibility bestowed upon a common law court than a civil one in a world which has and continues to experience rapid and exponential change.

As far as English law is concerned, it appears that the next time *Solomons* found itself in the spotlight was in the case of Alivon v Furnival[14]. In *Alivon*, Mr Beuvain was declared bankrupt under an agreement made in France. The French court appointed provisional *syndics* over his estate pursuant to French law. The *syndics* could sue in their own names to recover the debts due from Mr Beuvain, in addition to enforcing all claims that Mr Beuvain had against others. The *syndics* commenced proceedings in England against Mr Furnival to recover amounts due. The case was hard fought (in both France and in England), with the English court siding with the *syndics* and holding as follows:

"*The property in the effects of the bankrupt does not appear to be absolutely transferred to these syndics in the way that those of a bankrupt are in this country, but it should seem that the syndics act as mandatories or agents for the creditors, the whole three, or any two or one of them having the power to sue for and recover the debts in their own names. This is a peculiar right of action, created by the law of that country, and we think it may by the comity of nations be enforced in this as much as the right of foreign assignees or curators, or foreign corporations, appointed or created in a different way from that which the law of this country requires…*"[15] [emphasis added]

English law did not have an equivalent regime to the French law appointed *syndics* and described the right of action rising as *"peculiar"*. Nevertheless, the English court looked beyond this in the interests of comity and cooperation and duly gave judgment in England against Mr Furnival.

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[9] See also Bergerem v Marsh (1921) B&CR 195 (English member of Belgian firm submitted to Belgian bankruptcy proceedings: movable property in England vested in Belgian trustee).
[10] Michael Crystal KC, The Golden Thread: Universalism and Assistance in International Insolvency - Jersey & Guernsey Law Review 2011, para 13.
[11] Commentaries on the Conflict of Laws (1st edition, 1834), pp 340–341, para 406
[12] Rubin and another v Eurofinance SA and others; New Cap Reinsurance Corp Ltd v Grant and others [2012] 2 BCLC 682, para 17.
[13] KH Nadelmann, Solomons v Ross and International Bankruptcy Law (1947) – The Modern Law Review, volume 9, issue 2, page 160.
[14] [1824-34] All ER Rep 705
[15] Alivon and another v Furnival [1824-34] All ER Rep 705, pp 709-710.

The author has identified over twenty English law cases where *Solomons* is referred to – most notably the oft-referred to decisions of *Cambridge Gas*[16], *HIH*[17], *Rubin*[18] and, of course, *Singularis*[19]. There might be more. No published Jersey cases refer to *Solmons* (or *Alivon*) but they do refer to its kin, discussed below.

United States

Let's briefly glance across the Atlantic to another common law jurisdiction, the United States (**US**).

Most transnational bankruptcies in the US were historically based on the judicial concept of comity[20], which has also been described as:

"…the deference of one nation to the legislative, executive, and judicial acts of another—not as an obligation, but as a courtesy serving international duty and convenience—so long as it does not deprive its own citizens of its rights."[21]

This description resembling 'modified' universalism principles as opposed to those of 'pure' universalism. In 1985, before the US adopted the UNCITRAL Model Law (the **Model Law**) in 2005[22] through Chapter 15 of the US Bankruptcy Code (the **US Code**), there was section 304 of the US Code a statutory provision which became effective on 1 October 1979. Section 304 of the US Code authorised "*a foreign representative"* to commence *"a case ancillary to a foreign proceedings"* and permitted the US court to, *inter alia*, order the turnover of the property of the debtor's estate or the proceeds of such property, to the foreign representative[23].

In 1987, Mr Douglass Boshkoff noted that section 304 of the US Code could be a streamlined process, with the main objective being to assist and complement the foreign proceedings. Mr Boshkoff noted that some writers considered it to be a substantial advance in the administration of cross-border insolvencies but, he advocated for caution, stating that *"[t]he new procedure will represent a significant advance only if the uncertainties in practice and statutory language are resolved in a manner consistent with international co-operation"*[24], highlighting the importance of comity.

In Cunard S.S. Co. Ltd. v. Salen Reefer Services AB[25], American creditors had responded to the commencement of Swedish insolvency proceedings by seizing assets of the debtor located in New York (a similar factual matrix to *Solomons*). The creditors obtained attachment orders over the assets of the debtor from the New York court (the **NY Court**). The Swedish interim administrator appeared before the NY Court and asked it to set aside the attachments so that the debtor's assets could be distributed under the laws of Sweden. The NY Court granted this request, holding:

[16] Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1AC 508.
[17] Re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852.
[18] Rubin and another v Eurofinance SA and others; New Cap Reinsurance Corp Ltd v Grant and others [2012] 2 BCLC 682.
[19] Singularis v PricewaterhouseCoopers [2014] UKPC 36.
[20] Godwin, Howse and Ramsay, The Inherent Power of Common Law Courts to Provide Assistance in Cross-Border Insolvencies: From Comity to Complexity (2017) – International Insolvency Review, volume 26, pp 4, citing David Farmer, Chapter 15 Ancillary and Other Cross-Border Cases (2015) – Hawaii Bar Journal, volume 18, pp 16.
[21] *Ibid*.
[22] https://unis.unvienna.org/unis/pressrels/2005/unisl97.htm.
[23] https://uscode.house.gov – 11 US 304.
[24] David Boskhoff, United States Judicial Assistance in Cross-Border Insolvencies (1987). Articles by Maurer Faculty. 2134. pp 739.
[25] 773 F.2d 452, 459 (2nd Circuit 1985).

"…that the public policy of the United States is best served by extending comity to the Swedish court's announcement of Salen's bankruptcy…"[26].

The decision of the NY Court was upheld on appeal, with the sentiment in *Cunard* correlating with an earlier US case that held that "*[t]he road to equity is not a race course for the swiftest*."[27] In the author's experience, this is a view still often expressed today where a major concern is the risk of a sudden race between a debtor's creditors to seize and recover assets in their jurisdiction to the prejudice of the debtor's creditors as a whole.

All in all, an encouraging initial approach to comity and cooperation from the English and US courts, respectively.

Modified universalism

England

Pre-Brexit there were four means of recognition or judicial assistance available in the UK for foreign insolvency proceedings, as follows:

1. the European Insolvency Regulation (now defunct);
2. the Cross-Border Insolvency Regulations 2006 (**CIBR**), implementing the Model Law;
3. section 426 of the Insolvency Act 1986 (**IA**)[28]; and
4. the common law.

This short paper focuses on the common law. In England and elsewhere in the common law world, three cases, in particular, have had a material impact on the common law cooperation landscape, namely, *Cambridge Gas, Rubin* and *Singularis,* which are explored briefly in turn, below.

Cambridge Gas

The Privy Council held that there is a common law power to provide such assistance to foreign insolvencies as could be given in equivalent domestic proceedings. In this instance, a plan approved by the US bankruptcy court could be given effect in the Isle of Man, despite it being neither a judgment in *rem* (over things) nor *in personam* (over people or entities). Such a plan could have been implemented in the Isle of Man under its Companies Act 1931 and could therefore be enforced without the need for parallel domestic insolvency proceedings.

Cambridge Gas put the principle of modified universalism firmly on the map, being a 'middle ground' between territorialism and universalism. It has generally been held to be authority for three propositions, as follows:

1. the court has a common law power to assist foreign winding-up proceedings so far as it can (i.e., with due regard to its own law and policy);
2. the court can do whatever it could properly have done in a domestic insolvency, subject to its own law and policy (i.e., the limitations of the other court are not a relevant consideration); and
3. the absence of jurisdiction *in rem* or *in personam* are not relevant considerations.

[26] Cunard S.S. Co. Ltd. v. Salen Reefer Services AB 614, 618-19 (Bankr. S.D.N.Y. 1985).
[27] Israel–British Bank (London) Ltd. v. Fed. Dep. Ins. Corp 536 F.2d 509, 513 (CA2 1976).
[28] Section 426 of the IA is frequently relied upon in order to place Jersey companies into administration under the IA (Jersey not having an equivalent rehabilitation process). However, an exploration of this statutory route is beyond the scope of this short paper.

Rubin

The Court of Appeal in *Rubin* held that *Cambridge Gas* was authority for orders of a foreign court that were given in the context of insolvency proceedings escaping the limitations for when English law would recognise a foreign court's jurisdiction to give a judgment *in personam* or in *rem.* The Court of Appeal was therefore prepared to enforce a judgment made by a New York court in insolvency proceedings to which the defendant did not submit.

However, the UK Supreme Court (the **Supreme Court**) felt differently. By a majority of four to one, it held that there was no 'insolvency exception' to the principles governing enforcement of foreign judgments in *personam*[29] and that the judgment could not be enforced. Somewhat surprisingly, given the progressive developments to international assistance under banner of modified universalism, the Supreme Court described it as *"…a trend, but only a trend"*[30]. It went on to assert that the common law cases to date had been concerned with less contentious matters such as the vesting of English assets in a foreign officeholder, or the staying of local proceedings, and where the foreign court was of competent jurisdiction as the debtor was domiciled or incorporated there[31].

Ultimately, the Supreme Court made it plain that the *dicta* in *Cambridge Gas "do not justify the result which the Court of Appeal reached. This would not be an incremental development of existing principles, but a radical departure from substantially settled law."*[32]

The author suggests that what might be considered a 'backwards step' is underpinned by sound reasoning. Had the Supreme Court not intervened, English resident or domiciled individuals would be vulnerable to the jurisdiction of foreign courts to which they did not submit, exposing them to exorbitant 'long arm' jurisdiction.

In relation to private international law, the Jersey courts have consistently had regard to English common law, embracing the rules in the prestigious text of Dicey, Morris and Collins[33].

Singularis

The joint liquidators of Singularis Holdings Limited (**Singularis**), incorporated in the Cayman Islands, appealed to the Judicial Committee of the Privy Council against the Bermuda Court of Appeal which held that liquidators were not entitled to an order under section 195 of the Bermuda Companies Act 1981 requiring Pricewaterhouse Coopers (**PWC**) to attend for examination and produce all documents in their possession relating to Singularis.

The Board, by a three to two majority, dismissed the appeal on grounds that the liquidators would not have had the power to compel PWC under the laws of the jurisdiction of the winding up, namely, the Cayman Islands.

In this regard, Lord Sumption explained that "*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" and that, "[s]o far as Cambridge Gas suggests otherwise, the Board is satisfied that it is wrong*"[34].

[29] Boyle and Birds' Company Law, 10th Edition - International Insolvency and Cooperation, para 21.79.
[30] Rubin v. Eurofinance S.A. [2012] UKSC 46 pp 16.
[31] *Ibid*, pp 31.
[32] *Ibid*, pp 128.
[33] Dicey, Morris & Collins: The Conflict of Laws (see Brunei v Fidelis [2008] JRC 152, paras 14 – 15).
[34] Singularis v PricewaterhouseCoopers [2014] UKPC 36, para 18.

This acknowledges, but circumscribes, the ability of courts under the common law to give assistance to overseas insolvency officers. The limitations imposed by *Singularis* are that assistance:

- will not be available to voluntary appointees outside court;
- will not permit the insolvency officer to do something they would be unable to do in the 'home' jurisdiction;
- must be necessary for the exercise of the functions of the insolvency officer; and
- must be consistent with substantive law and policy of the assisting jurisdiction.[35]

Notably, in the relatively recent decision of Kireeva v Bedzhamov[36] the English court, in the absence of statutory authority, refused to recognise and give effect to an order of a foreign court that purported to vest immovable property in England in a foreign office holder. The English common law does not authorise such a course of action and statutory sanction is needed.[37]

The rule in *Gibbs*

This paper would not be complete without acknowledging the controversial English rule in *Gibbs*[38].

This is the principle that the terms of a contract governed by the laws of one jurisdiction can only be modified or discharged under the laws of that jurisdiction and not that of another. The effect of the rule is that contracts with an English choice of law may not be discharged by a foreign insolvency procedure.[39]

Universalism may be set as a goal, but it may not override English principle.[40] Accordingly and by way of example, in Global Distressed Alpha Fund 1 Ltd v PT Balkrie Investindo[41], the judge, while recognising that the courts had embraced the concept of universalism, felt bound to follow the rule in *Gibbs* as to the circumstances in which a guarantee could be discharged in English law. He was therefore unable to recognise an Indonesian court's composition plan under which the guarantee was discharged.[42]

The author suggests that the rule in *Gibbs* is a stride away from universalism and towards territorialism. However, depending on whether and how the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments is adopted, that might dispose of the said rule.

Jersey

Foreign insolvency office holders have no automatic authority to act in or deal with assets in Jersey. To overcome this, there are two means of recognition or judicial assistance available, as follows:

1. article 49 of the BDJL (**Article 49**); and
2. the common law.

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[35] Stuart Tait, Chris Dobby, "*The train now departing": insolvency and cross-border recognition reform — Hong Kong's missed opportunity*? – CRI (2015) 4 CRI 143. There is a fifth limitation, being the exercise of assistance being given on the basis that the applicant is prepared to pay the third party's reasonable costs of compliance.
[36] [2022] EWCA Civ 35.
[37] Gore-Browne on Companies: Part XII Financial Difficulties, Issue 181, June 2023 - chapter 54 Cross-border Insolvency, pp 9.
[38] Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux (1890) LR 25 QBD 399, CA.
[39] Howard, Warner & Beatty: Restructuring Law & Practice, 3rd edition - Rule in Gibbs, pp 15.188.
[40] Bailey & Groves: Corporate Insolvency, 5th Edition – Assistance in Common Law, para 1.22.
[41] [2011] 1 WLR 2038.
[42] Global Distressed Alpha Fund 1 Ltd v PT Balkrie Investindo [2011] 1 WLR 2038, para 27.16.

Both avenues are addressed in this short paper because of the limited body of case law in Jersey, Article 49 being very brief which places an increased emphasis on the common law and, in reality, there appears to be little difference in the approach of the Jersey Court based on Article 49 or the common law[43].

Article 49

Article 49 bears some similarity to section 426 of the IA and gives the Jersey Court substantial latitude as to how to assist a foreign court of a prescribed country or territory[44]. In doing so, the Jersey Court assumes that, in the interests of comity, the prescribed country or territory would give assistance to the Jersey Court[45]. However, unlike section 426 of the IA which refers *"shall assist"*[46], Article 49 refers to *"may assist"*[47], retaining the Jersey Court's discretion as to whether to assist at all[48].

Article 49 refers to (but does not implement) the Model Law[49] and authorises the Jersey Court to exercise any jurisdiction which it or the requesting court could exercise if the matters otherwise fell within its jurisdiction[50], conferring specific authority to exercise powers not only that the Jersey Court has but also powers which the requesting court would have[51] (being consistent with the approach in *Singularis*).

A recent example of this is the Jersey Court's willingness to impose a moratorium in the same, or substantially the same terms as the moratorium under paragraph 43 of Schedule B(1) to the IA at the request of the High Court of England and Wales (the **High Court**) in connection with the recognition of joint administrators in Jersey.

The Jersey Court noted that whilst moratoriums apply under the BDJL[52] and the CJL[53], they do not restrain secured creditors from exercising certain rights. However, the Jersey Court held that it had the power to order a moratorium which did so under Article 49 by applying the laws of England and Wales and under its inherent jurisdiction[54]. The author is aware that this decision has not gone down particularly well with some of the banking lawyers in the island.

Some examples of cooperation[55] under Article 49 are set out below:

1. the recognition of a trustee in bankruptcy appointed by the Australian Federal Court[56];
2. the recognition of a trustee in bankruptcy appointed by the High Court[57];
3. the sending of a letter of request to the High Court for administration orders under the IA in respect of Jersey companies[58];

[43] Dessain and Wilkins : Jersey Insolvency & Asset Tracking, 5th edition, pp 454.
[44] The prescribed countries or territories are Australia, Finland, Guernsey, the Isle of Man, the UK and the Republic of Island pursuant to order 6 of the Bankruptcy (Désastre) (Jersey) Order 2006.
[45] Re REO Powerstatioon Limited [2011] JRC 232A, pp 7.
[46] Section 426(4) of the IA.
[47] Article 49(1) of the BDJL.
[48] The author notes that English court still might have a discretion as to whether to assist, notwithstanding the apparently mandatory wording in section 426(4) of the IA – see Re Duke Group Ltd [2001] BCC 144.
[49] Article 49(1) of the Bankruptcy (Désastre) (Jersey) Law 1990.
[50] Article 49(2) of the Bankruptcy (Désastre) (Jersey) Law 1990.
[51] Re Estates and General Developments Limited (In Liquidation) [2013] JRC 027, pp 27.
[52] Article 10 of the BDJL.
[53] Article 159(4) of the CJL.
[54] Re Smith [2021] JRC 047, para 20.
[55] This short paper does not delve into the distinction between 'recognition' and 'assistance' between cooperating jurisdictions due to the limited word court.
[56] Warner v Equity [2008] JRC 003.
[57] Re Williams [2009] JRC 054.
[58] Re REO Powerstatioon Limited [2011] JRC 232A.

4. the recognition of joint fixed charge receivers appointed over immovable property situate in Jersey[59];
5. the recognition of joint liquidators appointed by the Scottish Court of Session[60]; and
6. the recognition of administrators appointed by the High Court[61].

As part of being recognised in Jersey, the foreign insolvency office holder will typically receive assistance from the Jersey Court and be able to seek orders relating to, for example, the identification and seizure of assets, the disclosure of documentation, the examination of witnesses and freezing orders. However, assistance will not be granted if the applicant is only seeking recovery of foreign revenue, although the Jersey Court has granted assistance where the revenue authority is the majority creditor, and assistance has been granted where non-revenue claims only amounted to 0.2% of the total creditor claims[62].

The Common Law

The BDJL is not a codification of the common (or customary) law of Jersey[63]. Consequently, the Jersey Court can exercise an inherent jurisdiction to assist countries that do not benefit from Article 49.

Importantly, like Article 49, the Jersey Court being invited to make an order which could not be obtained in a Jersey insolvency procedure is not a bar to the order being granted[64]. When deciding whether to assist, the Jersey Court will consider whether the order being sought is inconsistent with public policy or contrary to any fundamental principles of Jersey law. If it is not, then the Jersey Court will have jurisdiction to make the order[65], this approach being consistent with the principle of modified universalism. However, the author expects that the limitations imposed by *Singularis* remain a relevant consideration when considering the powers of the 'home' jurisdiction.

Some examples of cooperation under the common law are set out below:

1. the recognition of a provisional liquidator appointed by the High Court of the British Virgin Islands[66];
2. the recognition of a trustee appointed by the County Court of Zurich[67];
3. the recognition of a trustee appointed under Chapter 7 of the US Code[68];
4. the recognition of a monitor appointed by the Ontario Superior Court[69]; and
5. the recognition of a judicial administrator appointed by the Common District of Belo Horizonte, Brazil[70].

The Jersey Court has repeatedly cited *Singularis* with approval on the basis that there is a powerful public interest argument in support of such an approach, and that it is in the interest of every country that companies with multinational assets and operations should be wound up in an orderly fashion under the law of the place of their incorporation[71].

[59] Re Estates and General Developments [2013] JRC 027.
[60] Re E Trust [2017] JRC 060.
[61] Re Wright and Massey [2020] JRC 199.
[62] Felicity Toube KC, International Asset Tracing in Insolvency para 3.137.
[63] See the preamble of the BDJL.
[64] Re Lydian [2020] JRC 049, paras 22-25.
[65] Re Probank [2020] JRC 105, para 53 (citing Re Lydian [2020] JRC 049, paras 22-25).
[66] Tacon v Nautilus [2007] JRC 107.
[67] F&O Finance AG 2000 JLR N-5a.
[68] Smith v Nedbank [2018] JRC 156.
[69] Re Lydian International [2020] JRC 049.
[70] Re Probank [2020] JRC 105.
[71] See Re HWA 555 [2022] JRC 181, para 48 and Investin Quay v BUJ Architects [2021] JRC 233, para 20.

Two recent cases in this area should be briefly mentioned, Investin Quay v BUJ Architects[72] and Re HWA 555 Owners, LLC[73].

Investin

In *Investin*, the Jersey Court was principally concerned with whether to exercise its discretion to impose an interim injunction, but the underlying legal issue was the application of modified universalism.

Investin Quay House Limited (in liquidation) (the **Company**) was incorporated in Jersey. It developed a commercial property known as Quay House (the **Property**). After the Property was sold, the Company paid its sole director and shareholder in excess of £22.6m, leaving approximately £91,000 of assets against liabilities in excess of £430,000. A creditor, BUJ Architects LLP (**BUJ**), applied to wind up the Company in England (the **Petition**).

In the meantime, the Company resolved to wind itself up under the CJL and issue an *ex parte* (without notice) application to the Jersey Court for injunctive relief to prevent the pursuit of the Petition so that the winding up in Jersey might continue (the **Injunction**).

The Company argued that universalism means that where a company is being wound up in the jurisdiction of its incorporation, the courts of that jurisdiction ought to view their own insolvency proceedings as paramount. The Jersey Court agreed that there is *"a powerful public interest argument in support of such an approach and that it is in the interest of every country that companies with multinational assets and operations should be wound up in an orderly fashion under the law of the place of their incorporation*."[74]

The Jersey Court noted that the alternative to such an approach is, or may be, an unattractive 'free for all' in which the distribution of assets depends upon a race to begin insolvency proceedings in other jurisdictions in which creditors may perceive particular advantages for themselves[75].

In relation to this *"and all things being equal"* the Jersey Court would have granted the Injunction However, it ultimately declined to do so and held as follows (considering the well-known test for granting interim injunctions in American Cyanamid v Ethicon [1975] AC 396):

1. the starting point is that the insolvency proceedings should take place in the jurisdiction where the Company is incorporated;
2. the Company's centre of main interest (**COMI**) was in England but this does not necessarily mean that it is not managed and controlled in another jurisdiction;
3. the balance of convenience favoured the desirability of there being one set of insolvency proceedings in one jurisdiction; but crucially,
4. the Company being wound up in England was advantageous to its creditors due to the IA having a longer period to claim a preference (noting the payments made to the director) than the equivalent provision in the CJL.

The author suggests that this is a reassuring example of the Jersey Court applying the principles of modified universalism to promote a single insolvency process but also to protect the interests of a debtor's creditors. There was a real risk that placing the Company into a winding up process in Jersey was a strategic decision intended to exploit a more restrictive preference regime. When considering the Company's application for leave to appeal, the Court of Appeal very astutely noted that:

[72] [2021] JRC 233.
[73] [2022] JRC 215.
[74] *Ibid*, para 20.
[75] *Ibid*, para 22.

"*In circumstances in which the decision to move towards a creditors' winding-up in Jersey was taken by the only interested person at any level of that decision making process, and the only material effect of the decision would be to preclude other creditors from pursuing a potential remedy, it is clear that the determination of the Royal Court can only be regarded as one in respect of which any reasonable judge, properly directed, could properly have reached the same decision; irrespective of any views as to motivation by Mr Downer as to whether winding-up in Jersey would be more beneficial to himself*."[76]

Perhaps unsurprisingly, the Company's application for leave to appeal the Jersey Court's decision was unsuccessful (twice).

HWA 555

Redox PLC S.A. (**Redox**) is a public company incorporated in Jersey. Redox was also registered as a s*ociété anonyme* (a public limited company) with the Luxembourg Register of Companies and Commerce with its place of central administration being an address in Luxembourg. It has therefore been described as a *'*dual hatted*'* entity. Redox had no economic activity in Jersey, no employees and its administrative functions were carried out in Luxembourg where two of its directors were resident, a third in the UK. Its COMI was deemed to be Luxembourg.

On an application by Redox, the Jersey Court was persuaded to issue a letter of request under its inherent jurisdiction to the District Court of Luxembourg (the **Luxembourg Court**) to facilitate the making of a bankruptcy order in Luxembourg in respect of Redox (the **Luxembourg Bankruptcy**).

A number of Redox's creditors were said to be very aggrieved by this decision and had challenged Redox's application and the efficacy of the Luxembourg Bankruptcy. One of these creditors, HWA 555 Owners, LLC (**HWA**) sought an order for the winding up of Redox under the CJL on the following principal grounds:

1. Redox is incorporated in Jersey and HWA is entitled to an order winding up Redox in its place of incorporation, notwithstanding the ongoing Luxembourg Bankruptcy;
2. the Luxembourg Bankruptcy was unsatisfactory and slow;
3. the regime in the Luxembourg Bankruptcy was unsuitable and prejudicial to Redox's creditors as a whole; and
4. the proposed liquidators under the CJL would have far more extensive powers which are better suited to conducting the necessary investigations and/or progressing any potential claims.

The Jersey Court refused the application. In doing so, it accepted that "*in international insolvency cases, the common law and the principles of private international law all emphasise the importance and primacy of the place of the company's incorporation*."[77]

The Jersey Court had not been given any authority as to how the principles of international insolvency should apply in the case of 'dual hatted' entities but reiterated that it had been persuaded by Redox that it was in the interests of its creditors for bankruptcy proceedings to be conducted in Luxembourg, being Redox's COMI.

In refusing the application, the Jersey Court noted that it was not deferring to the Luxembourg Court, but instead made a positive decision that it was in the interests of Redox's creditors

[76] Investin Quay v BUJ Architects [2021] JCA 299, para 41.
[77] Re HWA 555 [2022] JRC 181, para 48.

that bankruptcy proceedings should be commenced in Luxembourg. Having made that decision, and with Luxembourg Bankruptcy well advanced, the starting point was for the Jersey Court to act in a manner which is consistent with that decision, for so long as it remains in the interests of the creditors as a whole for it to do so[78]. The position would different if the Jersey Court had serious concerns about the Luxembourg Bankruptcy[79], which it did not.

Finally, the Jersey Court noted that the Luxembourg Bankruptcy Trustee had undertaken to seek the assistance of the Jersey Court in connection with potential claims that might be brought in Jersey which could include the opening of parallel proceedings[80].

The author understands that the decision in *HWA 555* has been appealed.

Conclusion

Does the principle of universalism still apply in the common law of England and Jersey, respectively? The author suggests that it does, but not in its 'pure' form, with both jurisdictions favouring a modified approach to universalism, which encourages judicial cooperation with a view to a single insolvency process whilst respecting jurisdictional independence to evaluate the fairness of that process.

In another prominent English case concerning assistance under section 426 of the IA and the common law, HIH Casualty and General Insurance Ltd[81], Lord Hoffman noted that modified universalism *"…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*."[82]

As set out above, assistance under the common law in England and Jersey is subject to the substantive law and public policy of each jurisdiction, respectively. They will strive to reach what they deem to be a just outcome which might not always mean a single insolvency process or complying with a foreign insolvency court's decision.

The English court cannot grant relief or provide assistance that goes further than the powers available to the foreign office holder in their 'home' jurisdiction as per *Singularis*. The same is likely to be true for Jersey bearing in mind the Jersey Court's endorsing of principles arising from *Singularis*, but the point has yet to be determined.

The English court has held that asset realisations in 'ancillary' or 'subordinate' insolvency proceedings in England and Wales to foreign office holders must not prejudice the rights of English creditors[83]. The Jersey Court has said likewise, making made it clear that it will not permit Jersey based creditors to be prejudiced by Jersey companies being placed into a foreign insolvency process or the remission of Jersey assets abroad[84].

The English court will not recognise and enforce a foreign insolvency judgment that does not adhere to English common law[85]. The position under Jersey law has yet to be settled and neither *Cambridge Gas* nor *Rubin* are binding in Jersey, but the author's position is that the English approach will likely be followed in Jersey[86].

[78] Re HWA 555 [2022] JRC 181, para 54.
[79] *Ibid*, para 55(ix).
[80] *Ibid*, para 56.
[81] [2008] 1 WLR 852.
[82] Re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852, paras 6 and 30.
[83] Connock v Fantozzi [2011] EWHC 15 (Ch).
[84] See for example Re Probank [2020] JRC 105, para 37(v), Re Alard Investments [2015] JRC 137
[85] Rubin v. Eurofinance S.A. [2012] UKSC 46.
[86] Brunei v Fidelis [2008] JRC 152.

Interestingly, the BDJL, which contains Article 49, provides for an ancient customary law insolvency process known as ***désastre*** which adopts a 'pure' universalist approach. Upon the ***désastre*** commencing, the BDJL states that all of the debtor's property, whether situated in Jersey or elsewhere, automatically vests in the insolvency office holder[87], the Viscount of Jersey, directly. Whether this provision will be respected by other jurisdictions – particularly those which govern security held over assets of the debtor - remains to be seen.

Returning to the question posed, the universalism versus territorialism debate rages on, but with universalism typically referred to in modified form – the attraction of absolute uniformity advocated for in the early English cases of *Solomons* and *Furrnival* not necessarily reconciling well with a modern approach and a foreign jurisdiction's desire to promote its independence, protect its creditors and maintain its own, often unique, standards.

In *HIH*, Lord Hoffmann described the principle of modified universalism as "*the golden thread running through English cross border insolvency law since the 18th century*"[88]. Lord Collins reeled the principle back by simply describing it as "*a trend, but only a trend*"[89] in *Rubin*. However, the author suggests that there has been no rejection of the principle in *Rubin* or elsewhere that insolvency proceedings should, as far as possible, be universal. Indeed, as is evident from the exploration in this short paper, the English and Jersey courts have actively embraced the principle in order to reach just outcomes and to protect the interests of creditors.

As Lord Hoffman said in *HIH*, pure or full universalism, an aspiration[90], can only be attained by international treaty, which neither England nor Jersey currently have. The author agrees with this proposition. Nevertheless, he also held that even in its modified and pragmatic form, the principle is a potent one[91]. It is suggested that the principle of modified universalism is worth intently guarding and will hopefully continue to influence the common law approach to cross-border assistance in both England and Jersey for years to come.

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[87] Definition of *"property"* in the BDJL and article 8.
[88] Re HIH Insurance (McGrath and others v Riddell and Another) [2008] UKHL 21, para 30.
[89] Rubin v. Eurofinance S.A. [2012] UKSC 46 pp 16.
[90] Re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852, paras 6 and 30.
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AUTHOR STATEMENT
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DECLARATION OF HONOUR

I declare that the paper, titled:

THE COMMON LAW AND CROSS-BORDER COOPERATION – ARE ENGLAND AND JERSEY, CHANNEL ISLANDS, HANGING ON TO THE GOLDEN THREAD?

is my own work, that it has been prepared independently and that all references to, or quotations from, the work of others are fully and correctly cited.

Simon Hurry
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Date: 9 July 2023

Place: Jersey, Channel Islands