INSOL GIPC SHORT PAPER

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

INTRODUCTION

1. This short paper addresses the two issues posed in the question, in the following sections: (i) why cross-border insolvency recognition processes are so important (**pgs 2-3 at [4]-[9]**); (ii) the main and competing philosophical foundations of cross-border insolvency (**3-5 at [10]-[15]**); (iii) the evolution of the English common law courts to cross-border recognition, and their existing approach to common law recognition of foreign insolvency processes (**5-12 at [16]-[27]**); (iv) how the common law courts in Hong Kong have evolved common law recognition, and their existing approach (**12-21 at [28]-[40]**); and finally, (v) drawing on both the English and Hong Kong decisions, the extent to which the principle of universalism still applies in the common law, and whether it ever did (**21-24 at [41]-[50]**).

2. The first two sections set the scene for the commentary on the two issues in the question. Each section is intended to build on the next from the policy question, through the philosophical approaches, to what the Courts have done, and what they have said they have done and why in the case law – in each of England and Hong Kong – concluding with an assessment of both as against the philosophical approaches.

3. The overall thesis I put forward is that (i) cross-border insolvency recognition is not best left to development by common law judges – experience shows it is fraught with issues which cause serious and avoidable inefficiencies in dealing with cross-border insolvencies and restructurings; (ii) that statutory provision is preferable and better suited to considering and balancing the various, complex, competing, and domestic and international policy interests at play, ultimately making dealing with the issues more efficient; (iii) this in turn makes life easier for common law judges (and, in fact, appears to be preferred by at least some of them); and (iv) despite the need for international co-operation being loudly and regularly espoused by virtually all, often at least implicit (and sometimes explicit) in common law recognition judgments dealing with cross-border insolvencies, is an understandable (conscious or sub-conscious) desire to protect the territorial position of the relevant court and jurisdiction, often for good reasons, including as part of a globalized competition between jurisdictions for complex cross-border restructuring and insolvency work. In short, it seems that common law judges, *applying common law recognition*, will tend over time, more often than not, to produce more territorialist outcomes. I also say that this outcome is perfectly understandable and reasonable given their role, and the characteristics for which common law judges are rightly renowned, both in their home jurisdictions, and abroad.

THE IMPORTANCE OF CROSS-BORDER INSOLVENCY RECOGNITION

4. *Two competing realities* underscore the importance of cross-border insolvency recognition. *First*, the fact that the world is politically organized, in the main, along sovereign national lines according to a territorial world order. *Secondly*, and despite this, the world's business, trade and finance take place across this territorial patch-work of multiple national jurisdictions. So (i) business, (ii) communications, (iii) groups of companies, (iv) branches, (v) subsidiaries, and (vi) the free flow of capital and assets, all invariably (and increasingly) take place or operate across-national borders. It is standardly the case in the modern globalized capitalist economy to have complex cross-border structures and transactions, which business-people and those financing them treat (at least when times are good) as increasingly irrelevant.[1]

5. The reality of national borders, law, and jurisdiction very quickly comes into focus, however, when there is an actual or threatened business failure, and a potential fight for differently nationally-located assets, between differently nationally-located creditors. For these reasons, most modern significant corporate collapses involve more than one jurisdiction such that issues of co-operation and recognition between national courts and legal orders in addressing the insolvency issues become critically important.[2]

6. Without such co-operation there would or could be (i) an anarchic race for assets in which weaker creditors lose out, with attendant risks of fraud and forum shopping; (ii) multiple and duplicative insolvency proceedings causing unnecessary expenses to creditors; and (iii) different regimes taking a different approach to the process (whether more pro-creditor, or pro-debtor), as well as applying different substantive law to the questions that arise, including e.g. as to the priorities of ultimate distribution to creditors.[3]

7. At the highest level of abstraction, Professor Fletcher has said the three key questions to be answered in this context are (i) in which jurisdictions may insolvency proceedings be opened? (ii) which country's laws should be applied to different aspects of the case? and (iii) which international effects of enforcement will be accorded to proceedings conducted in a particular forum? Building on this, Professor Westbrook has identified nine more specific key issues which fall to be addressed by any cross-border insolvency co-operation and organization process: (i) the standing of a foreign liquidator; (ii) a moratorium on creditor actions; (iii) the approach to creditor participation; (iv) the approach to executory contracts; (v) provision for co-ordinated claims procedures by creditors; (vi) priorities and preferences; (vii) avoidance powers; (viii) discharges of debt; and (ix) conflicts of laws issues.[4]

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[1] Professor Boraine *Module A, Session 1 Study Notes*, pgs 33- 41.
[2] Ibid.
[3] Ibid.
[4] Ibid.

8. What can be seen from both the real-world issues, and the questions and issues highlighted by Professors Fletcher and Westbrook is that there is a need for considerable substantive and procedural co-operation and co-ordination in cross-border insolvency cases. There have been various approaches taken in common law legal systems to addressing this need: (i) common law recognition (the original approach, and the focus of this short paper); (ii) national legislation enacting global initiatives such as the UNCITRAL Model Law (which focuses on procedural co-operation); (iii) the development of court to court protocols, guidelines and standards to guide the relationship between parallel national processes (e.g. the JIN Guidelines); and (iv) supranational legislation, such as the EU Regulation.[5]

9. Whichever of these approaches is adopted (and they all have been), there is a need to address the prior question arising out of the *two competing realities* mentioned at the outset (of a *global* economy, operating across *national* borders), and that is: *to what extent should a national or a global approach be preferred, and how should the two be synthesized?*[6]

THE PHILOSPHICAL FOUNDATIONS OF CROSS-BORDER INSOLVENCY

10. In seeking the best answer to that prior question, there has been considerable academic, judicial and practitioner debate as to the proper philosophical foundations of cross-border insolvency. There are those who support a (i) global or universalist approach; those who support (ii) a territorial approach, and those who argue (iii) that the best approach is a modified version of one or the other.

11. Professor Westbrook[7] leads those favoring universalism, which he defines as *"administration of multinational bankruptcies, by a leading Court applying a single bankruptcy law."*[8] He says this is *"necessarily the correct legal long-term solution*"[9] as the law of insolvency is a legal system which, to be effective in achieving its purposes of binding all creditors and the debtor and applying to all assets and claims, needs to be *symmetrical with the market* which it serves: *"Because bankruptcy is a market symmetrical law a global market requires a global bankruptcy law. A global default – that is the general default of a multinational company – requires a single bankruptcy proceeding that can apply rules and reach results that are conclusive with respect to all stakeholders throughout the global market. Anything short of that procedure is, at best, a temporary accommodation that awaits the political will to achieve the proper legal result."*[10] His preference would be to go further than having one court lead and others to be ancillary or to defer, in favour of an entirely unitary system under which there would be *"a single international bankruptcy law administered by a single international court*

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[5] Ibid.
[6] Ibid.
[7] Professor Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 Michigan Law Review 2276 (June 2000). (**Westbrook**).
[8] Ibid., at pg 2277.
[9] Ibid.
[10] Ibid., at pg 2287.

system."[11] He doubts that any bankruptcy scholar would not consider this *"the correct ultimate goal internationally"*[12] and that the real question is how to get there. It is accepted that universalism is not the best philosophical explanation of the current position, but it is advanced as the philosophically best answer to be striven for in the future, e.g. by international treaty.

12. It has been said that *"universalism is to be contrasted with territorialism where each country is regarded as determining according to its own law the distribution of the assets of an insolvent company located within its territorial jurisdiction."*[13] A philosophically territorial approach would give rise to multiple concurrent parallel insolvency proceedings dealing with local pools of assets and liabilities, in every state where the debtor has assets. But neither of these extremes on the two ends of the spectrum can represent the current philosophical foundations of cross-border insolvency, since neither grapples fully with the two competing realities. Universalism gives insufficient weight to the existence of national borders, national interests, national territories, and local jurisdiction. Territorialism disastrously underweights the global nature of business, and the potential for conflicting approaches being taken by different national courts. Each denies of one of the two competing realities.

13. Two competing *realistic* philosophical positions which do accommodate the two competing realities, albeit with a different emphasis in each case, are: (i) *modified territorialism*; and (ii) *modified universalism*. Professor LoPucki has suggested that a modified territorialist approach is to be preferred and is one under which although each national court would exercise power over the assets in its territorial jurisdiction, where in any given case it would be useful to co-operate with another court dealing with assets of the same corporate group in another jurisdiction, the national courts should co-ordinate and co-operate with one another.[14]

14. Modified universalism on the other hand *"attempts to achieve some of the benefits of universalism in a multi-party multi-law world. It requires each Court to become part of an international system for maximizing value and fairness in the management of the default. In either an ancillary or parallel approach in national law, modified universalism permits the court to view the default and its resolution (liquidation or reorganization) from a worldwide perspective and to cooperate with other courts produce results as close to those that would arise form a single proceeding as local law will permit."*[15] The universalists, recognizing that their preferred philosophical approach is not yet borne out in the real world, view *modified* universalism as the *"right bridge"* from the current cross-border philosophical position to the *"right answer"* of universalism.[16]

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[11] Ibid., at pg 2297.
[12] Ibid.
[13] Harris J in Re Global Brands [2022] HKCFI 1789 23 June 2022 at [24].
[14] Westbrook at pg 2307 *et seq*.
[15] Ibid., at pg 2302.
[16] Ibid., at pg 2325.

15. Albeit not stated in the same terms, modified universalism has been described in the cases we shall come on to as *"the golden thread running through English cross-border cases since the 18th century. That principle requires that English Courts should as far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."*[17] As we shall see, common law Judges consistently cite the principle of modified universalism as being the true philosophical foundation of cross-border insolvency, in their judgments dealing with common law recognition of foreign insolvency process.

THE ENGLISH COURTS' EVOLUTION OF COMMON LAW RECOGNITION

16. There are three forms of cross-border recognition available in England: (i) statutory recognition under section 426 of the Insolvency Act 1986; (ii) recognition under the 2006 Cross-Border Insolvency Regulations, which implement the UNCITRAL Model Law, and (iii) *common law* recognition. The question is focused on the evolution of the latter, but it is right to point out (and judges have pointed out) that in England the evolution of the common law is now curtailed and hemmed in by those different regimes and provisions, and its importance in England is to a large degree diminished by them.[18]

17. But that is not true of other jurisdictions which do not have any, or any similarly extensive statutory provisions dealing with cross-border recognition. In those jurisdictions, common law recognition remains vitally important as part of their cross-border insolvency tool-kit, and they have regularly looked to the English position (despite the different statutory setting) for guidance as to the proper approach. For that reason, the evolution and the current position as to common law recognition remains important.

18. That evolution can be described in five stages, discussed below: (i) the early cases from the 18th century onwards; (ii) Lord Hoffmann's judgment in Cambridge Gas;[19] (iii) the Judgments in HIH,[20] including Lord Hoffmann's; and the decisions in (iv) Rubin[21] and (v) Singularis.[22] The trend from Cambridge Gas[23] onwards has been a steady and inexorable restriction on the extent to which the common law permits assistance under common law recognition, relative to that *"high water mark"*[24] of a more universalist-tending approach.

[17] Re HIH [2008] 1 WLR 852, per Lord Hoffmann at [30].
[18] The resulting position in England has been described by Anderson at [22.39] – [22.40] variously as a *"characteristically Anglo-Saxon cocktail of measures;"* one which requires *"a form of legal archaeology"* when searching for a solution in a given case; *"incoherent," "complex",* but (crucially) one which has *"flexibility from retaining the old whilst also embracing the new."*
[19] [2006] UKPC 26.
[20] [2008] 1 WLR 852.
[21] [2012] UKSC 46.
[22] [2014] UKPC 36.
[23] [2006] UKPC 26.
[24] Anderson at [22.07].

The Early Cases

19. A number of early cases are referred to in the later judgments of Lords Hoffmann, Sumption and Collins, as examples of the evolution of common law cross-border recognition, supporting the views that (i) there should be *"a single bankruptcy in which all creditors are entitled and required to prove"* and (ii) *"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."* So in the 1764 case of Solomons v. Ross,[25] an English creditor was forced by the English Court to surrender the fruits of garnishee proceedings against English assets (debts) of an Amsterdam firm which was in bankruptcy in Holland, and was required to prove there. As to the same principle being applied in corporate insolvency, the cases refer repeatedly to (i) the 1884 case of Matheson,[26] as establishing the English judicial practice of opening an ancillary liquidation in England over a foreign company, with main liquidation proceedings in their home jurisdiction, with the purpose of securing and remitting English assets to that home liquidation, in which the English creditors would prove and be treated *pari passu* with the New Zealand creditors; (ii) the 1906 Transvaal case of In re African Farms,[27] in which an English company with assets in the Transvaal had been voluntarily wound up in England, and Innes CJ in the Transvaal Court granted recognition to the English liquidators, *"recognition which carried with it the active assistance of the Court."*[28] This meant that the English liquidators were entitled to deal with the Transvaal assets as if they were in the jurisdiction of the English Courts *"subject only to such conditions as the court may impose for the protection of local creditors or in recognition of the requirements of our local laws."*[29] The decision involved staying execution in the Transvaal by a creditor of the English company. Other cases referred to as part of the same developing principle of recognition and assistance, or as examples of it, include (i) the 1993 case of Banque Indosuez,[30] in which it was said the English Court would *"do its utmost to co-operate with the US Bankruptcy Court and avoid any action which might disturb the orderly administration of the company in Chapter 11;"*[31] (ii) the 1997 case of BCCI,[32] which involved the remittal of English assets from an English ancillary liquidation to the main Luxembourg liquidation of a Luxembourg company; and (iii) the 1998 case of Cuoghi[33] in which it was said although comity required respect for the territorial integrity of other courts: *"this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former."*[34]

[25] (1764) 1 H Bl 131n.
[26] (1884) 27 Ch D 225.
[27] [1906] TS 373.
[28] Ibid. at 377.
[29] Ibid.
[30] [1993] BCLC 112.
[31] Ibid. at 117.
[32] [1997] Ch 213.
[33] [1998] Q.B. 818, 827
[34] Ibid. at 827.

Cambridge Gas

20. In this Privy Council case in 2006,[35] on appeal from the Isle of Man, Lord Hoffmann, giving the Judgment of the Board as a whole, granted common law recognition to US Chapter 11 representatives, and assisted them by granting an order vesting shares in Manx companies, consistently with the US approved plan. He did so even though the owner of the shares had not participated in the Chapter 11 and therefore had not submitted to the jurisdiction as would ordinarily be required to enforce a foreign judgment against domestic assets. The key parts of his decision, following drawing on some of the earlier cases just mentioned, were that: (i) *"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*;*"*[36] (ii) the universality approach he said was adopted in the early cases worked to the benefit of British creditors in that it was they who were trading and financing development all over the world at that time, such that it was often the case that the principal creditors were in Britain but the assets were in foreign jurisdictions; (iii) *"…universality of bankruptcy has long been an aspiration, if not always fully achieved, of UK law. And with increasing world trade and globalization, other countries have come round to the same view*;*"*[37] (iv) he dealt with limitations on the court's assistance by reference to whether there was prejudice to local creditors, or to local law, being doubtful that provisions of foreign law could be applied where they found no counterpart in local law: *"as there is no suggestion of prejudice to any creditor in the Isle of Man or local law which might be infringed, there can be no discretionary reason for withholding such assistance… 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 the recognition is to enable the foreign office holder or 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."*[38]

HIH

21. Two years later, in 2008, this time in the UK Supreme Court[39] based on English law rather than Manx law (which only had common law recognition available), Lord Hoffmann returned to his theme in the context of an ancillary English provisional liquidation to the main insolvency proceedings in Australia relating to an insurance group. English assets (monies payable under reinsurance contracts placed at Lloyds) were secured by the English process, and the Australian Courts sent a letter of request for the remittal of those assets to be distributed

[35] [2006] UKPC 26.
[36] Ibid., at [16].
[37] Ibid., at [17].
[38] Ibid., at [21].
[39] [2008] 1 WLR 852.

there. The application was put on the basis of both: (i) common law recognition; and (ii) the English statutory provisions of section 426. Although Lords Hoffmann and Walker would have granted the order based on the common law, the majority did not do so (Lords Scott and Neuberger said it could not be done on a common law basis where the scheme for distribution in Australia differed from the order of priorities in an English liquidation; with Lord Phillips not stating a position on the common law approach). So, although Lord Hoffmann made the insightful comments set out below on his view of common law recognition, they were not shared by sufficient of their Lordships for this to represent the common law as it stood at that time. Arguably, this was the beginning of the turning point for a more restrictive approach being taken to common law recognition and assistance, but one which it is obvious was informed by the availability of the statutory power at section 426. Lord Hoffmann referred to (i) "*what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets.*"[40] (ii) this was very much a principle rather than a rule, heavily qualified by exceptions on pragmatic grounds; *"an aspiration….Professor Jay Westbrook…has called it a principle of modified universalism….Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one."*[41] (iii) ancillary winding up in England to foreign winding up in place of domicile, grew up as a practice in late 19th century *"based upon the principle of universalism."*[42] (iv) *"...the court had jurisdiction at common law under its established practice of giving directions to ancillary liquidators, to direct remittal of the English assets, notwithstanding any differences between the English and foreign systems of distribution. These differences are relevant only to discretion."*[43] and (v) *"The primary rule of private international law which seems to me to be applicable to this case is the principle of (modified) universalism which has been the golden thread running through English cross-border cases since the 18th century. That principle requires that English Courts should as far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution. That is the purpose of the power to direct remittal."*[44] According to Lord Hoffmann, the case was one *"in which it is appropriate to give the principle of universalism full rein"*[45] since the companies were incorporated in Australia, managed in Australia, the majority of assets and liabilities were in Australia, applying the Australian scheme of distribution was more likely to give effect to creditor expectations, it was entirely adventitious that reinsurance assets were in London; and there was no prejudice to English creditors. Finally, and relevantly for the discussion of the Hong Kong case-law to follow, he said (vii) *"in some cases there may be doubt about how to determine the appropriate jurisdiction which should*

[40] Ibid., at [6].
[41] Ibid., at [7].
[42] Ibid., at [8].
[43] Ibid., at [24].
[44] Ibid., at [30].
[45] Ibid., at [36].

be regarded as the seat of the principal liquidation….usually it means the place where the company is incorporated but that may be some offshore island with which the company's business has no real connection…[the 2006 CBIR, implementing the Model Law] uses the concept of the "centre of a debtor's main interests as a test; with a presumption that it is the place where the registered office is situated: see art 3(1). That may be more appropriate."[46]

Rubin

22. Even after HIH, lower courts continued to adopt a more liberal approach to recognition (the unanimous result at least having been that remittal of assets was permissible). But by 2012, and the case of Rubin,[47] which was concerned (as was Cambridge Gas) with seeking assistance by way of confirming and enforcing bankruptcy judgments given in US Chapter 11 and Australian proceedings, this more liberal approach was *"arrested."*[48] The UK Supreme Court by a majority refused to grant assistance in the US case, on the basis that doing so offended against the well-established legal principles of enforcement of *in personam* judgments *viz.* that the respondent needed to have been subject to the jurisdiction of the foreign court, and the debtor had not been present in the US, and had not submitted to the Chapter 11 process. Section 426 assistance was also refused in the Australian case, on the basis that (given the debtor had proved and there was therefore submission), the judgment creditor could enforce in the usual way under the statutes for enforcement of foreign judgments. Lord Collins and the majority decided that Cambridge Gas had been wrongly decided, in that there was no power to enforce bankruptcy judgments as a special category on grounds of a universalist approach to cross-border recognition and assistance. The key parts of his judgment for present purposes were these: (i) *"there has been a trend, but only a trend, to what is called universalism that is the administration in multinational insolvencies by a leading court applying a single bankruptcy law*;"[49] (ii) *"the question is therefore one of policy. Should there be a more liberal rule for avoidance judgments in the interests of the universality of bankruptcy and similar procedures? In my judgment, the answer is in the negative…"*[50] The Judge concluded that cross-border insolvency co-operation had not been left to judge-made law in recent years; that if the law was in need of reform, it was for the legislature, not the judiciary to effect it, including in respect of formulating any new rule for which court had competent jurisdiction, whether on the basis of COMI or sufficient substantial connection.[51]

Singularis

23. In 2014, two years on from Rubin, and back in the Privy Council on a Bermudian appeal, the Court refused to grant assistance to Cayman liquidators seeking recognition and assistance in Bermuda to exercise wider powers available under the Bermuda statute (for the obtaining of

[46] Ibid., at [31].
[47] [2012] UKSC 46.
[48] Anderson at [22.08].
[49] [2012] UKSC 46 at [16].
[50] Ibid., at [115].
[51] Ibid., at [129].

information from the auditors to the relevant company) than were available to them in their home jurisdiction in the Cayman Islands.[52] The majority held that although there was a common law power to grant assistance to foreign insolvency court officeholders or their equivalents, by ordering production of necessary information, that assistance could not involve granting them powers which they did not have and could not obtain under the foreign law under which they were appointed, and the Court could not make available Bermuda powers by analogy. In the leading Judgment, Lord Sumption held that (i) *"the principle of modified universalism is part of the common law but it is necessary to bear in mind first that it is subject to local law and local public policy and secondly that the court can only ever act within the limits of its own statutory and common law powers. What are those limits? In the absence of a relevant statutory power they must depend on the common law including any proper development of the common law."*[53] (ii) there could be no single universal answer to whether it was appropriate to develop an equivalent power, as everything depends on the nature of the power the court is being asked to exercise; (iii) assistance is only available where it is necessary for proper performance of the foreign office holders' functions, which meant that it could not be used to *expand* their process and functions; (iv) where other statutory routes of assistance are available (as there were, *viz.* for obtaining documents for use in foreign proceedings), common law assistance would not be appropriate; and (v) it was not appropriate to use assistance to remedy a perceived limitation in powers in the home jurisdiction. That was what was said to be going on in this case i.e. 'forum shopping' to obtain wider powers, as had been held by the Bermudian Court of Appeal, below. Following this, and as explained by Lord Sumption, it was wrong to suggest that the Court had jurisdiction over the parties simply arising from its power to assist, and it was also wrong to assume that the Court would have the power to assist by granting any power that was available in a domestic insolvency. On that point, Lord Collins (having been the harbinger of the more restrictive approach to enforcement of bankruptcy judgments on common law assistance in Rubin) was again forceful in his rejection of the sought-after assistance to obtain documents: (i) *"the common thread in those cases in which assistance has been given is the application or extension of the existing common law or procedural powers of the court*;*"*[54] (ii) *"to apply insolvency legislation by analogy as if it applied, even if it did not actually apply would go so far beyond the traditional development of the common law as to be a plain usurpation of the legislative function*;*"*[55] (iii) *"to have allowed the appeal would have involved Her Majesty's judges in a development of the law and their law-making powers which would have been wholly inconsistent with established principles governing the relationship between the judiciary and the legislature and therefore profoundly unconstitutional."*[56]

[52] [2014] UKPC 36.
[53] Ibid., at [19].
[54] Ibid., at [53].
[55] Ibid., at [64].
[56] Ibid., at [108].

24. Notwithstanding this steady restriction on the extent to which the common law permits assistance under common law recognition, relative to the *"high water mark"*[57] of Cambridge Gas, it is fair to say that since Singularis, although there have been decisions in which foreign insolvency process has not been recognized (e.g. Kireeva [2022] EWCA Civ 35, where there were public policy concerns the Russian bankruptcy recognized at first instance had been obtained by fraud); there have still been decisions in which common law recognition has been invoked by common law Courts – and in both the easier *outbound* form (protecting the primacy of its own process), but also in the more challenging *inbound* form (protecting and deferring to a foreign process).

25. As to outbound recognition, in its first examination of the principle of modified universalism, the Scottish Court in Hooley[58] relied on Singularis to refuse to recognize an Indian administration over Scottish companies as anything other than an ancillary process, thereby refusing to recognize the administrators' rejection of the rights of Scottish creditors of the companies on the basis that those rights were incompatible with substantive Indian law: *"any proceedings in India must, according to that principle as enunciated in Singularis, be regarded as ancillary to insolvency proceedings in Scotland."*[59] Lord Tyre went on to state that: *"the principle of modified universalism has not been recognised by the Supreme Court or the Privy Council as applying beyond the situation where winding up proceedings are taking place in the jurisdiction in which the company is incorporated. This appears most clearly from the opinion of Lord Sumption in Singularis… In re HIH Casualty and General Insurance Ltd, Lord Hoffmann suggested ([2008] 1 W.L.R., p.862, para.31) that in determining which jurisdiction ought to be regarded as the appropriate seat of the principal liquidation, somewhere other than the place of incorporation might be selected where, for example, the place of incorporation was "some offshore island with which the company's business has no real connection". This suggestion has received no subsequent support and in Rubin v Eurofinance SA (above), Lord Collins (at p.277, para.129) characterised the formulation of a new rule for the identification of courts which were to be regarded as courts of competent jurisdiction as being a matter for the legislature and not for judicial innovation. The opinions of the majority of the members of the Privy Council in Singularis are notably cautious about extending the scope of the common law principle that the court has power to recognise and grant assistance to foreign insolvency proceedings. I find no support for the proposition that that principle applies or ought to be applied to a court in the country of incorporation with regard to insolvency proceedings in another jurisdiction…"*[60] Another example of a *"robust assertion of universalism in its easier outbound form"* post Singularis, was the case of Stichting Shell Pensionfonds v. Krys,[61] in which the Privy Council on a BVI appeal upheld an anti-suit injunction granted to restrain Dutch proceedings by Shell's pension funds against the assets of a Madoff feeder fund, which had later been put into liquidation in the BVI.

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[57] Anderson at [22.07].
[58] Hooley v Ganges Jute Private Ltd [2016] CSOH 141.
[59] Ibid., at [37].
[60] Ibid., at [35].
[61] [2014] UKPC 41.

26. As well as these recognitions in *outbound* form, the English Courts also effectively applied an *inbound* common law recognition approach in Erste Group Bank,[62] when (in an action in England on an English governed loan and guarantee by a banking creditor against a debtor in bankruptcy in Russia, in the process of which the guarantee had been ruled invalid) the Court of Appeal held that (i) the judge should have refused jurisdiction on the basis that the bank had participated in the Russian bankruptcy and had thereby submitted to that process; and (ii) there was no utility in the Court trying the bank's claims, given the Russian insolvency process.

27. However, the lingering limitations on *common law* recognition, following Singularis, are evident in the New Zealand decision of Batty.[63] In that case, the New Zealand court decided that under the common law following Singularis, it could not simply grant domestic insolvency information gathering powers to foreign office-holders, but that it could grant assistance under statute as the relevant provisions expressly authorized the Court to make any order by way of assistance as could be made in New Zealand, thus differentiating the position from Singularis: *"I have considered whether there is anything in the most recent judgment of the Privy Council, Singularis Holdings Ltd v PricewaterhouseCoopers (above), that might militate against the grant of relief in favour of Mr Batty. I am satisfied that there is not. 12. Section 8(3) authorises this court to make an order that it could exercise if the issue had arisen in New Zealand (see [9] above). That distinguishes this case from the type of situation with which the Privy Council dealt in Singularis. It declined to develop the common law of Bermuda to permit aid of a similar type to be granted (Singularis Holdings Ltd v PricewaterhouseCoopers (above) at [19] (Lord Sumption), [38] (Lord Collins), [112] (Lord Clarke)). 13. While overruling Cambridge Gas, so far as the particular jurisdiction was exercised in that case, the Privy Council specifically acknowledged that such assistance could be given "within the limits of [the receiving court's] own statutory" powers (at [19]). I am satisfied that the grant of assistance on "universalist" principles can be exercised when a statute expressly permits that course. [Members of the Privy Council in Singularis referred to the principle of "modified universalism". I use "universalist" as a shorthand expression to capture the same principle. For example, see Lord Sumption's judgment, at [19]. My use of the term should not be regarded as broader than that contemplated in the Singularis judgment.] In Singularis the criticism of Cambridge Gas (and the decision of the Supreme Court of Bermuda from which the appeal was brought) was based on a view that those courts had engaged in illegitimate judicial legislation by purporting to extend the boundaries of the common law to achieve that goal."*[64]

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[62] [2015] EWCA Civ 379.
[63] Batty v. Reeves [2015] NZHC 908; [2015] BCC 568.
[64] Ibid., at [12] – [13].

THE HONG KONG COURTS' APPROACH TO CROSS-BORDER INSOLVENCY AND COMMON LAW RECOGNITION

28. Unlike common law jurisdictions like New Zealand and England, Hong Kong does not have any *general* statutory provision for cross-border insolvency assistance. For that reason, common law recognition and other techniques for providing cross-border assistance (such as ancillary liquidations of foreign companies) are of paramount importance, and yet, on the face of things, the Hong Kong Courts are limited by reference to the approach taken to common law recognition on the principle of modified universalism as set out in Singularis. Importantly, there has now been some legislative provision for the mutual recognition of PRC and Hong Kong insolvency processes, introduced on 14 May 2021, based on a COMI approach to recognition, applicable to 3 pilot areas in the PRC.

29. There have been challenges to cross-border recognition in Hong Kong for some time. One example of that is the Court will not recognize foreign schemes with broad based moratoria beyond unsecured creditors, there being no equivalent administration regime in Hong Kong, thus allowing secured creditor action in Hong Kong in the face of English administration: African Minerals.[65] In that case, applying Singularis, Harris J stated that: *"although in my opinion the Hong Kong Court can take a generous view of its power to assist a foreign liquidation process this is limited by the extent to which the type of order sought is available to a liquidator in Hong Kong under our insolvency regime and common law and equitable principles"* and *"there is no equivalent statutory, common law or equitable power in Hong Kong…this would be an impermissible extension of the common law principle that requires the court to recognise foreign liquidators and assist them."*[66]

30. There are, however, some notable examples of the Hong Kong Court providing recognition and assistance to foreign office-holders. So in 2016 in Centaur SPC,[67] the Court recognized Cayman liquidators appointed over Cayman companies, and provided assistance by way of an extensive powers on a letter of request from the Cayman Court, granting powers *"as are available to them as a matter of Cayman Islands law and would be available to them under the laws of Hong Kong as if they had been appointed…under the laws of Hong Kong."*[68] This included the powers (i) to conduct oral examinations of officers and other parties in Hong Kong relating to the affairs of the company; (ii) wide-ranging information-gathering powers to allow seizure of books and accounts, and to gather in assets; and (iii) powers to bring legal proceedings including for freezing orders, search and seizure orders, and for delivery up of documents. In doing so, Harris J confirmed he was following the approach in Singularis: *"Applications of this sort have become increasingly common since my decision in* The Joint Official Liquidators of Company A Co *which recognises that the Hong Kong High Court has the power to recognise foreign liquidators and provide assistance to them in order that they can carry out their functions. Recently the Privy Council in* Singularis Holdings Ltd v

[65] [2015] HKEC 641.
[66] Ibid., at [10].
[67] [2016] HKCFI 413.
[68] Ibid., at Appendix at [2].

PricewaterhouseCooper have confirmed this and explained comprehensively the applicable common law principles."[69]

31. Similar orders following a similar short form process, and letter of request (this time from a BVI Court) were granted in 2017 in Pacific Andes.[70] It is clear from his Judgment that Harris J was seeking to apply the common law faithfully, in order to constructively provide the required cross-border assistance: *"I have explained the Hong Kong Companies Court's power to provide assistance and recognition to a liquidator of a foreign incorporated company appointed by the court of the company's place of incorporation if the insolvency laws of the place of incorporation grant similar powers to a liquidator to those available under our own insolvency legislation. It is not necessary for me to repeat what is already explained in the authorities to which I have referred. The increasing number of applications for recognition and assistance in recent years has allowed a form of order to emerge that this Court will generally be prepared to grant on written application made pursuant to a letter of request. Such applications can be granted very quickly…"*[71]

32. Other constructive applications of common law recognition, in the results at least, can be seen in (i) the Court's common law recognition and assistance to PRC officeholders both before the Pilot Mechanism (CEFC)[72] and after its introduction, for non-pilot regions (HNA[73] and Guangdong);[74] as well as in (ii) the Court's creation in 2017 of the Z-Obee[75] technique to assist with cross-border co-operation in respect of insolvency and restructuring of the many groups of companies conducting business in Hong Kong which have (i) an offshore holding company in Cayman, BVI or Bermuda, (ii) listed on the Hong Kong stock exchange, (iii) owning offshore and/or Hong Kong subsidiaries, which in turn (iv) own PRC operating companies, doing business in the PRC.

33. In the case of Legend in 2006, the Hong Kong Court of Appeal held that provisional liquidation in Hong Kong could not, as it had been elsewhere, be used for the purposes of a corporate restructuring.[76] The Z-Obee technique, developed by the Hong Kong Courts in April 2017 was for the relevant offshore holding company to enter provisional liquidation in the offshore jurisdiction (which did permit such an approach), and then for those provisional liquidators to seek common law recognition and assistance in Hong Kong (often adjourning any winding up petition in Hong Kong pending the restructuring). Harris J explained the technique as follows in the case itself: *"8…The limitations of our legislative framework and restrictions on the use of provisional liquidators in Hong Kong to restructure companies in financial distress, created a risk that the court might be constrained to wind up Z-Obee, precluding the proposed restructuring. In order to alleviate these concerns, Z-Obee acting by its board took steps to*

[69] Ibid., at [3].
[70] [2017] HKCFI 649.
[71] Ibid., at [5] – [6].
[72] [2020] HKCFI 167.
[73] [2021] HKCFI 2897.
[74] [2023] HKCFI 1340
[75] [2017] HKCFI 2204.
[76] [2006] 2 HKLRD 192 (CA).

invoke the jurisdiction of its place of incorporation, Bermuda (where provisional liquidation may in appropriate circumstances be used to facilitate a restructuring), to cause provisional liquidators to be appointed in that jurisdiction. By the order of the Supreme Court of Bermuda dated 17 February 2017, Donald Edward Osborn, Yat Kit Jong and Man Chun So were appointed as the joint provisional liquidators of Z-Obee and are authorised to, inter alia, undertake the restructuring. The provisional liquidators applied for, and were granted by this Court on 17 March 2017, a letter of request for recognition of and assistance to them at common law. 9. By the orders of the court dated 27 March 2017 and 29 March 2017 and both sealed on 11 April 2017, the court discharged Donald Edward Osborn, Yat Kit Jong and Man Chun So as provisional liquidators appointed by the court and granted their recognition as provisional liquidators appointed by the court in Bermuda…16. The circumstances in which the Companies Court has and will exercise its discretionary jurisdiction to sanction a scheme of arrangement made between the creditors of a company incorporated in a foreign jurisdiction and its creditors have been discussed in a number of recent Hong Kong authorities, in particular the decision which I have just referred to, Re Winsway Enterprises Holdings Ltd , paras 23 to 31…17. In this regard the present case is straightforward. As I have already mentioned a substantial proportion of the debt is governed by Hong Kong law. It is an established principle of Hong Kong law that a debt can only be compromised under the law governing the debt: Gibbs v Societe Industrielle. That and the desire to protect Z-Obee's listed status in Hong Kong, which is central to the efficacy of this cross-border restructuring, clearly provide sufficient connection between Hong Kong and the scheme to justify this court exercising jurisdiction under section 673."[77]

34. That there was a genuine desire for, and pride being taken in the Hong Kong Court acting constructively to assist in cross-border insolvency co-operation (as well as being apparent from the Judgment itself) is clear from an interview with Harris J in the HK Lawyer following the decision. In the interview, he is quoted as saying: *"That has never been done before. It illustrates how you can use recognition and assistance techniques as an alternative to a domestic winding up to mitigate the effects of the Legend decision in an intended restructuring of a foreign company listed in Hong Kong."*[78]

35. The direction of travel in Hong Kong from around 2019 onwards has, however, been distinctly different. The first signs of a change in approach came in the judgment Deputy Judge Wong SC in Da Yu,[79] which was a case involving what was an established practice at that time in offshore/Hong Kong restructuring to seek sanction of parallel schemes in both jurisdictions, to ensure there was no hostile creditor action in either jurisdiction, seeking to disrupt the smooth operation of the scheme. Despite approving the scheme (by applying the domestic scheme sanctioning principles, and the tests relevant to cross-border cases of whether there was a sufficient connection between scheme and Hong Kong, and whether the scheme would be effective in other relevant jurisdictions, such that there was a purpose in Hong Kong sanction),

[77] [2017] HKCFI 2204 at [8] – [9]; [16] – [17].
[78] HK Lawyer, *"Face to face with Justice Jonathan Harris, Court of First Instance, HK SAR."* (May 2017).
[79] [2019] HKCFI 2531.

the Judge went on to make some comments on cross-border co-ordination which struck a different tone to the previous approach, and called into question the established practice:

"49. I am of the view that the idea that parallel schemes are needed in such circumstances appears to be an outmoded way of conducting cross-border restructuring. Requiring foreign office-holders to commence parallel proceedings is the very antithesis of cross-border insolvency cooperation. A crucial feature of cross-border insolvency cooperation is the recognition of foreign proceedings. In Look Chan Ho, Cross-Border Insolvency: Principles and Practice (Sweet & Maxwell, 2016), the learned author at p 61 said:" Recognition of international bankruptcy orders and judgments is particularly needed because the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding." 50. The raison d'être for recognising foreign proceedings is the avoidance of parallel proceedings. As pointed out by Lord Hoffmann in Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508 *at §22, "[t]he purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum". 51. Indeed, where Hong Kong and English schemes of arrangement need practical effectiveness in the United States, the standard procedure is to obtain recognition of the schemes in the United States (as opposed to commencing plenary US* Chapter 11 *proceedings to create a parallel* Chapter 11 *reorganisation plan). 52. Therefore, in my view, it would be beneficial, in the spirit of cross-border cooperation that all jurisdictions do take to heart this question (mutatis mutandis) posed by Lord Hoffmann in Cambridge Gas (at §25):"Why…should the [offshore] court not provide assistance by giving effect to the [Hong Kong scheme of arrangement] without requiring the [Hong Kong office-holders] to go to the trouble of parallel insolvency proceedings in the [offshore jurisdiction]?" 53. A substantive recognition in the offshore jurisdictions of foreign schemes of arrangement would seem to tie in well with the advanced procedural coordination that Mr Justice Segal was aptly advocating. Progress in cross-border procedural coordination should march in lockstep with progress in cross-border substantive recognition."*[80]

36. This challenge to the offshore jurisdictions to be more accepting of inbound forms of recognition and assistance, on modified universalist principles, was then followed by (i) a series of cases leading to the reversal of the Z-Obee technique – Hong Kong Court's own previously co-operative inbound recognition and assistance of offshore restructurings by recognition of, and assistance to, offshore provisional liquidators appointed for that purpose; and (ii) further decisions calling into question, as had Deputy Judge Wong in Da Yu,[81] the previous practice of parallel schemes offshore and in Hong Kong, and strongly suggesting that

[80] Ibid., at [49] – [52].
[81] [2019] HKCFI 2531.

the Hong Kong Courts viewed greater offshore recognition of Hong Kong schemes as preferable.[82]

37. The death-knells for the Z-Obee technique in Hong Kong common law recognition were rung-in over a number of cases, including the four which follow. In China Huiyan Juice Group,[83] the Hong Kong Court was faced with an application for a winding up order on a petition in respect of a foreign, Cayman company, presented by a Hong Kong creditor. The company sought an adjournment to allow time for a restructuring, although there was not yet any parallel offshore process. After granting the adjournment, Harris J concluded his judgment with this: "*I have endeavoured to deal with petitions in respect of listed companies and applications for recognition and assistance quickly and robustly. However, the increasing complexity of the cases and the state of the list will result in petitions having to be adjourned for comprehensive argument. This will inevitably lead to some delay. This presupposes that creditors, or for that matter shareholders, consider it worth petitioning in Hong Kong rather than going straight to the relevant offshore jurisdiction. As will be apparent from this decision the practice has developed of Mainland businesses listing in Hong Kong using corporate vehicles which have no connection with the Mainland, which is commonly the COMI, or Hong Kong where the business is to be listed. The structure is made more complicated by group architecture which involves inserting between the listed company and the mainland companies at least one, and my impression is commonly more than one, intermediate subsidiary incorporated in a different offshore jurisdiction. As this decision demonstrates this structure creates a significant barrier to steps being taken by creditors and shareholders to enforce rights using the courts of Hong Kong, which is the legal system that they have probably assumed they will be able to access if they need to take steps to enforce their legal rights against a company listed here. The realisation by creditors and shareholders of the impact of these structures along with the increasing familiarity of the advantages of the Z-Obee technique risks significantly reducing the role of the courts of Hong Kong in regulating insolvency and the protection of shareholders' rights.*"[84] The Judge also (i) stated that the relevant Cayman case-law (China Agrotech,[85] Sun Cheong)[86] made clear that the Cayman Islands would likely not recognize a Hong Kong liquidator as not being appointed in the place of incorporation, unless such recognition was for the limited purpose of introducing a scheme of arrangement; and (ii) then went on to make further comments on the desirability of Hong Kong schemes, over Cayman Islands schemes: *"I would note in passing that when deciding, which of a choice of jurisdictions should be chosen to implement a restructuring regard will commonly need to be had to recognition and in this respect the place of incorporation can be of peripheral importance. Jurisdictions which have enacted the UNCITRAL model will have regard to COMI when deciding whether or not an order made to facilitate a restructuring in another jurisdiction should be recognised and enforced. This is highly relevant in the context of many Mainland businesses listed in Hong Kong, which commonly have US$ denominated debt. Recognition in the US, normally New*

[82] China Oil Gangram [2021] HKCFI 1592; Rare Earth [2022] HKCFI 1686.
[83] [2020] HKCFI 2940.
[84] [2020] HKCFI 2940 at [57] – [58].
[85] Grand Court of the Cayman Islands, Financial Services Division, Segal J, 22 July 2019.
[86] Grand Court of the Cayman Islands, Financial Services Division, Chief Justice, 20 October 2020.

York, will be of central importance and as Winsway and subsequent cases demonstrate, the New York Bankruptcy courts will recognise and enforce a Hong Kong scheme because the companies are listed here and that gives them sufficient connection with Hong Kong to support recognition as a matter US Bankruptcy law. As I understand the position the fact alone that the jurisdiction sanctioning a scheme is also the place of incorporation of a company whose debt is being restructured is not sufficient connection to obtain recognition in the United States. Similarly, regard needs to be had to the impact of the Rule in Gibbs, which is part of the law of Hong Kong. A Cayman scheme will not be effective to compromise in Hong Kong debt governed by Hong Kong law or laws other than that of the Cayman Islands."[87]

38. In China Bozza,[88] Cayman Islands provisional liquidators appointed over a Cayman company for restructuring purposes sought Hong Kong recognition on the papers, after official liquidators had been appointed over the company in Hong Kong. The Judge refused to grant the application on the papers, and although recognition was granted, raised concerns about whether assistance should follow, given his perception that the Z-Obee technique was being abused: *"Until recently applications for recognition of soft-touch provisional liquidators appointed in a company's place of incorporation took place in respect of listed companies, which were not subject to winding up petitions in Hong Kong. The applications occurred in cases in which a company was using a technique commonly called the Z-Obee technique to restructure debt. I had become aware that with increasing frequency such applications are being made after a petition had been presented in Hong Kong…I was concerned that the Z-Obee technique…is being abused to obtain a de facto moratorium of enforcement action by creditors in Hong Kong…I informed the JPLs that the papers told me little about the circumstances in which the application in the Cayman Islands came to be made. Although I had some of the papers put before the Cayman court they suggested that at the time the application had been made the Company did not have any restructuring plan, which it wished to implement out of provisional liquidation, rather it was seeking to appoint soft-touch provisional liquidators, who would then make efforts to formulate such a plan. This was done without any creditor input or regard to the proceedings in the Hong Kong SAR, the jurisdiction in which the Company is listed and in which, along with the Mainland, most of its creditors appear to be based…the court needs to supervise closely the use of the Z-Obee technique to avoid it being misused by professionals more concerned with generating fees than the interests of creditors…the fact that provisional liquidators have been appointed in the place of incorporation does not mean that the Hong Kong Court will automatically adjourn a petition issued in Hong Kong… I note, however, that there does appear to be a material difference in the approach of the Cayman Court and Hong Kong Court to granting adjournments at the request of a company seeking time to restructure its debt…the Hong Kong Court will grant an adjournment if it is demonstrated by a company that it has a proposal to address its financial difficulties that is in the best interests of the general body of unsecured creditors… practitioners need to be mindful of the differences in the approach of the Cayman and Hong Kong Courts and their consequences… Simply referring to a possible "debt*

[87] [2020] HKCFI 2940 at [42].
[88] [2021] HKCFI 1235.

restructuring" and treating the expression as a kind of magical incantation, the recitation of which will conjure up an adjournment of the petition is as inadequate as it is facile."[89]

39. In GTI Holdings,[90] Linda Chan J commented adversely on an abandoned application for common law recognition and assistance by Cayman Islands' provisional liquidators who had been appointed for restructuring purposes, made *after* the Cayman company had already been ordered to be wound up in Hong Kong. The Judge held that (i) the Hong Kong liquidators had sought to reverse the findings in the Hong Kong Judgment granting the petition – after a 20 month adjournment on the basis that a scheme did not appear to be viable – *"through the backdoor by asking the Cayman court to re-open the issues already decided by this Court, and invited the Cayman court to conclude that the proposed Scheme is viable*;*"*[91] and (ii) the Cayman Court had not been properly informed on the application for provisional liquidation, and that this was abusive 'forum-shopping', seeking to circumvent the Hong Kong regime, interfering with the rights of Hong Kong creditors, in a jurisdiction where the company had substantial connections: *"The bases upon which the PLs sought the orders from the Cayman court were their views that (1) the Scheme remained feasible and that it would be in the interests of the creditors to pursue the same; and (2) only the PLs had the requisite knowledge and resources to pursue the Scheme including applying for directions from Harris J to convene meeting for the creditors to consider and approve the Scheme. Even if the PLs' views were well founded (which they are not), the obvious avenue available to the PLs would be to request the OR to appoint them as her special managers for the specific purpose of pursuing the Scheme. Such avenue is envisaged in s.216 of the CWUO but never pursued. Had the Cayman court been told by the PLs about the availability of this avenue, it would have no difficulty in concluding that there was no justification for the PLs to take the elaborate (and costly) steps of seeking orders from the Cayman court for the purpose of pursuing the Scheme."*[92]

40. The denouement then came in Global Brands,[93] in which restructuring liquidators in Bermuda appointed over a Bermuda company, sought recognition and assistance in Hong Kong, again following the previous practice of the Z-Obee technique. Although Harris J granted the order, the Judgment made clear the sea-change in the Hong Kong Court's attitude to this type of common law recognition and assistance in the future: *"the criteria to be adopted in future in determining whether or not foreign insolvency proceedings should be recognised and assisted are, in short, that the foreign proceedings constitute a collective insolvency process and that the proceedings (subject to limited exceptions) are conducted in the jurisdiction in which the Company's COMI is located."*[94] As Harris J appreciated, this represented a radical departure from (i) the common law on recognition and assistance as stated in Singularis (based on place of incorporation), (ii) the cautionary words of Lord Collins in respect of judicial legislation in Rubin, and (iii) the Hong Kong Court's previous statements of the orthodox common law

[89] Ibid., at [4] – [5]; [24] – [25].
[90] [2022] HKCFI 2598.
[91] Ibid., at [3].
[92] Ibid., at [36].
[93] [2022] HKCFI 1789.
[94] Ibid., at [17].

position based on place of incorporation (despite previous suggestions that it might develop towards COMI), and its Z-Obee practice. As to these matters, he said: *"It can readily be understood why the courts in England would approach the development of the common law relating to international insolvency as Lord Collins describes. Judge initiated developments in the law, which in the context of a system, which has introduced deliberate and comprehensive legislation to regulate cross-border insolvency, may be viewed as judicial overreach, are not necessarily to be viewed similarly in a jurisdiction, which lacks comparable legislation and whose current circumstances justify modifying the common law to implement more effectively an established legal principle. The development of the basis upon which foreign liquidations are recognised which I am considering does not involve the creation of a new legal principle. It involves a modification of an existing one, namely, recognition and assistance of a foreign insolvency process. The purpose of the modification is to implement the principle in a manner better suited to the circumstances in which transnational insolvencies currently arise in Hong Kong and the development of the principle in comparable jurisdictions…it is entirely consistent with modified universalism and the established common law principles of recognition and assistance for the Hong Kong court to grant powers intended to assist a foreign liquidator appointed in the jurisdiction of a company's COMI effectively to exercise rights, which arise from the liquidator's status in the COMI jurisdiction."*[95] As well as these matters, Harris J drew support for this new approach from, *inter alia*, (i) the Singaporean Court's adoption of COMI at common law in Opti-mex (Abdullah J);[96] (ii) references in case law (Eurofood) and commentary (Professors Westbrook and Paulus) as to offshore 'letter box jurisdictions' rendering place of incorporation an inappropriate recognition criterion for the main or home jurisdiction in cross-border insolvency;[97] and (iii) Lord Sumption's statement in Singularis as to common law assistance including *'any proper development of the common law.'*[98] As to that, he continued that: *"It is clear from this passage that modified universalism is the foundation of the common law power to recognise and assist a foreign insolvency process and that the power may be developed if the development is consistent with modified universalism and is consistent with the applicable domestic legal framework."*[99] The Court also confirmed a number of important subsidiary practical matters:[100] (i) the relevant date for assessing COMI would be the date of the application for recognition; (ii) there was no need for any presumption in favour of the place of incorporation being the COMI; (iii) that the Court did not have to consider in that case the possibility of COMI shifting before the recognition application, as seen in other jurisdictions applying the test, (e.g. O-Rig in US Chapter 15), but that similar matters would be relevant in Hong Kong; (iv) the Court can recognize a COMI appointed office-holder whether or not an ancillary liquidation (one form of assistance) is to take place; (v) where COMI is unclear the Court may still grant recognition and assistance for practical reasons (including comity, business practicality, protection of local creditors, and there being no competing jurisdiction interested in the winding up). Finally, even if the

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[95] Ibid., at [20].
[96] Ibid., at [29].
[97] Ibid., at [13].
[98] Ibid., at [25].
[99] Ibid., at [26].
[100] Ibid., at [33] – [42].

applicant is not held to have been appointed in the COMI jurisdiction, (i) recognition of simple authority ('managerial assistance') and (ii) limited and carefully prescribed assistance beyond that, may still be granted. The Court also considered how this new approach would play out in practice; particularly its interplay with the Co-operation Mechanism with the PRC: *"If a company's COMI is in Hong Kong I would not normally expect there to be any difficulty in a petitioner demonstrating that the court can properly exercise its discretion to wind up a foreign incorporated company. A winding up order made in Hong Kong will allow the liquidator to use the powers available under the Ordinance and, importantly, seek recognition and assistance in the Mainland, which is normally where a company's business is primarily conducted and its assets located. The Cooperation Mechanism I have referred to in permits the relevant Mainland courts to recognise liquidators appointed in Hong Kong over companies whose COMI is located in Hong Kong at the time the application for recognition and assistance is commenced. Adopting the COMI criteria would bring Hong Kong in line with the approach in the Mainland…"*[101]

THE EXTENT TO WHICH UNIVERSALISM STILL APPLIES IN THE COMMON LAW

41. Based on the definitions of universalism above, it seems to me that it is impossible to conclude that 'universalism' as such, has ever applied in the common law. It has been expressly said to be a matter for the future, and an aspiration not always fully realized, by both its academic and judicial supporters – a matter of how cross-border insolvency *ought to proceed*, rather than how it does. It is obviously only the principle of *modified* universalism that receives express approval in the currently authoritative common law judgments.

42. As discussed above, that principle has been defined as requiring (i) *"each Court to become part of an international system for maximizing value and fairness in the management of the default. In either an ancillary or parallel approach in national law, modified universalism permits the court to view the default and its resolution (liquidation or reorganization) from a worldwide perspective and to cooperate with other courts produce results as close to those that would arise form a single proceeding as local law will permit."*[102] (ii) that common law courts *"should as far as is consistent with justice and…public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."*[103]

43. An immediate issue is that the first of these definitions permits truly parallel processes, the other only permits a principal (main)/ancillary(non-main) relationship to parallel processes. But leaving the problem inherent in the differing definitions of the principle itself to one side, in assessing the extent to which the common law still applies modified universalism, it is possible to give that an unqualified yes. But the key reason it is possible to do so, is the amount of 'wiggle-room' available in the above definitions – how 'fuzzy' they are. It is possible for

[101] Ibid., at [32].
[102] Westbrook, at pg 2302.
[103] Lord Hoffmann in HIH [2008] 1 WLR 852 at [30].

any outcome or any statement in any given case to be rendered consistent with the definition of principle. So, where there are the clearest nationally and territorially-favoured outcomes or statements in the case-law, as we have seen, they may yet still be said to remain consistent with the principle of modified universalism under the exceptions for local law, public policy and justice – an extremely broad set of exceptions.

44. In his 2012 article following Cambridge Gas, and HIH, but before the UKSC decision in Rubin, Professor McCormack made a number of these and further points, which seem to me to be even more apposite in light of the case-law since (in particular the Hong Kong cases we have seen).[104] In his view (i) the common law has not so much reflected a universalist ideal, as steered a pragmatic course that *"owes more to realpolitik than to principle;"*[105] (ii) this is hardly surprising given the national and competing interests at stake in insolvency; (iii) *"the shape of insolvency law in a jurisdiction owes a lot to the balance of political power and the nature of the social arrangements in that jurisdiction....the local often wins out against the international. This state of affairs is unlikely to change in the forseeable future;"*[106] and (iv) there is now a *"paradox of greater diversity in a world ostensibly committed to a centralizing ideal. A universalist aspiration has had to give way to pragmatic realities."*[107]

45. I do think it is possible, however, to draw two fair conclusions from the comparison of common law recognition and assistance in England and Hong Kong. *First*, that where common law judges have genuinely attempted to be more universalist in their approach to common law recognition and assistance – in particular Lord Hoffmann in England in Cambridge Gas, and HIH, and Harris J by his endorsement of the Z-Obee technique in Hong Kong, this has *ultimately tended to reined-in by being met with some sort of local back-lash* – in England from Lord Collins (notably where the effect of Lord Hoffmann's attempt was to ride rough-shod over the area of law in which Lord Collins is himself the leading expert), and in Hong Kong by Harris J himself (in his later judgments culminating in Global Brands). *Secondly*, that, over time, common law judges invoking the principle of modified universalism for common law recognition and assistance tend to do so in a way which will more regularly – and more often than not – favour their own Court, their own law, and local territorial interests and jurisdiction.

46. As I put forward at the outset, there is nothing surprising or nefarious about that – it is perfectly understandable and reasonable. As Anderson has said: *"Naturally, states find it easier to espouse outbound universalism for their own proceedings than to accord full inbound effects to foreign proceedings."*[108] Examples of this can clearly be seen (i) in Lord Hoffmann's comments in Cambridge Gas itself as to how the more universalist approach developed in the early cases, favoured the interests of British financiers of worldwide business; (ii) in Scotland's

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[104] Professor McCormack, *Universalism in Insolvency Proceedings and the Common Law,* (2012) OJLS at pgs 325 – 347 (**McCormack**).
[105] Ibid., at pg 326.
[106] Ibid., at pg 326 – 327.
[107] Ibid., at pg 347.
[108] Anderson at [22.03].

robust first adoption of modified universalism applying place of incorporation in Hooley (result, Scotland); and (iii) in Hong Kong's adoption in Global Brands of the same principle but developing it to prefer COMI (result, Hong Kong). It is ironic that it did so in precisely the manner that the Scottish court had concluded was *clearly impermissible*, despite both Courts basing themselves on the same English authority (Singularis).

47. I also mentioned at the outset that this outcome is perfectly understandable and reasonable given the role, and the characteristics for which common law judges are rightly renowned, both in their home jurisdictions, and abroad. Common law judges are a part of one side of the two competing realities – their *very role and appointment is a territorial, not a global, one*. They are the guardians of the *law* and the *Courts* in their territorial jurisdiction. They literally form one branch of the government of their territory. They are most likely to be defined in the eyes of both the local professional and lay communities as upholding and embodying both. They are highly respected in that territorial role, in which they work daily, by that territorial constituency, and are positively selected for, and protected in, their independence. Given all of that, it is not just unsurprising, but perfectly understandable and reasonable that common law judges – applying and developing a common law test for recognition and assistance – both consciously and sub-consciously act so as to protect territorial interests, and over time will do that more often than they will favour universalist outcomes (which require some subordination of territorial interests).

48. Clearly, one of the reasonable and conscious or sub-conscious ways in which common law judges can prefer territorial over universalist interests over time – when applying and developing a common law test – is in respect of the globalized competition between jurisdictions for cross-border insolvency and restructuring work. That is explicit, for example, in (i) the Hong Kong decision in Global Brands, and (ii) in this statement in the interview of Harris J in HK Lawyer: *"Implementing reforms would obviously stop some of the seepage Hong Kong currently faces and could generate a bit more work. However, not all restructuring is court supervised; some is consensual. What is fundamental if Hong Kong is to remain a competitive restructuring hub is for it to position itself to capture new work in the face of aggressive competition from other jurisdictions. It is unclear whether this is appreciated by the Administration. Of course, if Hong Kong can innovate and introduce the necessary tools, it will become the principal restructuring destination in Asia, particularly for work generated in the Greater China region…There is potentially a large reservoir of work and it is an area where Hong Kong could find a constructive role to play in terms of its interface and relationship with the Mainland."*[109]

49. Rather than relying on the common law, general statutory provision for cross-border insolvency recognition is preferable and better suited to considering and balancing the various, complex, competing, and domestic and international policy interests at play, ultimately making dealing with the issues more efficient, and more consistent internationally. It is not suggested

[109] HK Lawyer, *"Face to face with Justice Jonathan Harris, Court of First Instance, HK SAR."* (May 2017).

that general statutory provisions entirely remove any territorial tendencies of territorial judges. Their role and characteristics remain the same, as does (i) the globalized competition for work, and (ii) the international network of practitioners practicing it. The statutory tests under, e.g. the Model Law, remain to some degree *"fuzzy, manipulable, and indeterminate."*[110]

50. But rather than requiring complex multi-factorial policy decisions involving international realpolitik to be undertaken by Judges *via* an inapt form of (common law legal) reasoning, general statutory provision for cross-border recognition of insolvency processes makes life easier for common law judges[111] and, in fact, appears to be preferred by them themselves. It is certainly preferable for the global business community, and its advisers, by providing a greater degree of predictability than common law recognition in cross-border insolvency cases has hitherto been able to provide.

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[110] McCormack at pg 328.
[111] See e.g. the simpler statutory approaches in HIH, and in Batty.

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