The aspiration for universalism… the golden thread, or the noose that could strangle?

Analysis on the evolution of the approach of the common law courts to cross-border cooperation through existing case law, including the Cambridge Gas and Singularis cases. Comparing England with the Cayman Islands, discussing the extent to which the principle of universalism still applies in the common law.

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1. Introduction

Global capital flows are on the rise, driven by the lowering of trade barriers and the disruption of traditional financing methods by digital currencies. In 2020, the total value of cross-border financial assets reached $130 trillion, a remarkable increase of 60% since 2007[1]. As a result, cross-border insolvencies are inevitable and likely to increase in the future.

In light of this reality, the manner in which countries shape their insolvency law will be crucial for their ability to attract future international capital. Countries can use their soft power[2] to enhance their international competitiveness by implementing a well-functioning insolvency regime that reduces the risk and cost of doing business.

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[1] The Economist "The worry about cross-border capital flows" <https://www.economist.com/leaders/2022/01/13/the-worry-about-cross-border-capital-flows>, accessed confirmed 26 February 2024

[2] Kwang-Hoon Lee "The conceptualization of country attractiveness: a review of research" <https://journals.sagepub.com/doi/pdf/10.1177/0020852314566002>, accessed confirmed 26 February 2024

The prevailing view is that a well functioning insolvency regime is one that follows the principle of modified universalism as embraced by the UNCITRAL and enshrined in UNCITRAL Model Law on Cross Border Insolvency (**MLCBI**).

On the face of it modified universalism is well accepted principle of common law, and its ethos predates MLCBI. Lord Hoffmann's address to the House of Lords that the principle of modified universalism is "the golden thread running through English cross-border insolvency law since the eighteenth century" has resonated throughout the common law systems.

This paper examines how United Kingdom and the Cayman Islands, two common law jurisdictions, due to the inherent flexibility of their cross-border insolvency frameworks, have at times swung along the spectrum of universalism, in order to protect their respective countries' interests.

This paper demonstrates that achieving the golden thread of universalism is akin to walking a tightrope. It is imperative for policy makers (including judges, in common law jurisdictions) to navigate this complex and developing area of law, or risk being strangled by the very thread of cooperation they seek to promote. Although, practically[3], they may have little choice.

2. Economic back drop

United Kingdom

In 2022 the gross domestic product of the British economy was GBP2.23 trillion, notably the financial and professional services industries contributed to approximately 10% of this figure.

A critical factor underpinning the success of these industries is the predictability and certainty offered by the United Kingdom's legal system and courts, as distinguishable to other jurisdictions. In this way, the United Kingdom has commoditised its legal system. A key safeguard to ensuring the sanctity of the choice of laws in international insolvency cases, and therefore ensuring its continued use of English law (as a choice of law), is the "Gibbs

[3] For example the USA's more rigid approach to applying the principles of universalism in *Re Agrokor d.d., No. 18-12104 (Bankr. S.D.N.Y. Oct. 24, 2018) (MG)* resulted in the presiding judge determining that the Gibbs Rule should not be an impediment to enforcing a restructuring plan and that it was inconsistent with modified universalism

Rule". Although due to the developing concept of the modified universalism, this may be under threat.

The Cayman Islands

The Cayman Islands facilitates legitimate world trade and in this regard is the leading[4] international financial centre (**IFC**) in Latin America and the Caribbean. Similar to the UK, the financial services sector is of material importance to the Cayman Islands, as it accounts for 40.5% of the GDP[5]. The majority of the jurisdiction's financial services market is attributable to foreign-owned corporate entities incorporated in the Islands but carrying on business overseas.

Consequently, cross-border corporate insolvencies dominate the cases dealt with by Insolvency Practitioners. Debtors with purely domestic insolvency proceedings are comparatively rare in the Cayman Islands.

The Cayman Islands has commoditised it domicile (which provides access to a robust legal subsystem, quality service providers, stable political environment and tax neutral status). A risk to Cayman Islands is if the place of incorporation of the debtor is no longer considered to be of importance to international insolvency cases. If this principle was undermined it could have ramifications to the Cayman Islands being a preferred domicile of choice.

3. Legal framework

The United Kingdom is a common law system based on the doctrine of judicial precedent. Notwithstanding the decolonisation of many parts of the British Empire, remnants of the British rule survive in respect of the adoption of its legal principal byway of the common law. The Cayman Islands, a British Overseas Territory, is one such recipient. Whilst these jurisdictions share commonalities in terms of legal framework and legal principals, there are differences, which have emerged due to unique economic / political agendas (highlighted above).

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[4] The Global financial Centres Index 34 September 2023 <https://www.longfinance.net/media/documents/GFCI_34_Report_2022.09.28_v1.0.pdf? > accessed confirmed on 26 February 2024

[5] Financial Stability Report Cayman Islands Monetary Authority <https://www.cima.ky/upimages/publicationdoc/FinancialStability_1678458235.pdf> accessed confirmed on 26 February 2024

The United Kingdom

In the United Kingdom, there are three[6] juridical bases for providing assistance to insolvency proceedings in other jurisdictions:

- **Insolvency Act 1986** (The **IA**): Section 426 of the Insolvency Act, provides wide ranging statutory power to assist insolvency providers of countries designated under the IA. The designated countries are mostly commonwealth countries save for some exceptions (for example Republic or Ireland). Practically officeholders from designated countries are able to make use of their powers, which can be wider than the powers available under English law. This would not ordinarily be the case with a recognition order under the CBIR (dealt with below).
- **Cross Border Insolvency Regulations 2006** (the **CBIR**)**:** CBIR gave legal effect to the Model Law in the UK. The Model Law provides a framework for the court to grant discretionary relief for the benefit of any recognised foreign proceeding, whether main or non-main. For public policy reasons, there is a carveout in respect certain types of entities eg. credit institutions, insurance companies etc
- **Common Law**: This is judge made law better known as precents. The legal framework detailed above affords a lot of discretion to the judiciary. I will expand on the most relevant case sources below.

The Cayman Islands

The following framework is applicable to cross border insolvency proceedings in the Cayman Islands:

- **The Companies Act**.: Pursuant to part XVII of the Companies Act the court has discretion to grant relief sought by a foreign representative's application, but there is no automatic right to assistance The Companies Act also limits the type of orders that can be obtained which include recognition, enjoining or staying legal proceedings / enforcement requiring the delivery of documents and turning over property. There are also prescribed factors the court must take into account when exercising its discretion.

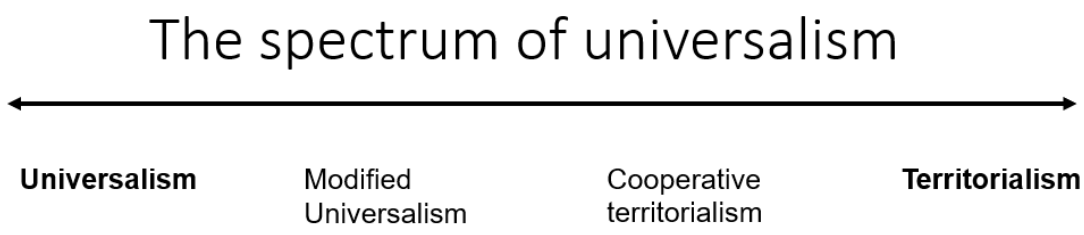
[6] EU Insolvency Regulation (EU 2015/848) no longer applies to main insolvency proceedings opened after 31 December 2020.

- **Foreign Judgments Reciprocal Enforcement Act** (the **FJRE Act**): The FJRE Act prescribes that foreign judgments from certain foreign courts will be treated as if they had been granted domestically. Presently this only applicable to judgments made in Australia.
- **Foreign Bankruptcy Proceedings (International Cooperation) Rules 2008:** This rule regulates applications made under Companies Act.

- **Common Law**: **I**mportantly the Cayman Islands has not adopted MLCBI. Arguably as compared the UK legislation there is a higher degree of discretion afforded to the judiciary. I will expand on the most relevant case sources below.

4. The spectrum of universalism

There is significant research on the spectrum between universalism and territorialism, but for the purposes of this paper only the following will be discussed as shown in the image and detailed below.



- **Universalism**: A system where the home country7 applies a single insolvency regime to all aspects of a debtor's affairs. Whilst some academics believe that the homogenous laws are inevitable with the globalisation of the markets, for the foreseeable, it is unlikely that countries will give up their sovereign rights to make this concept a reality.
- **Modified universalism**: A system where the local courts will have some flexibility to determine whether or to comply with request from the home country. The discretion will be applied against a legal standard (for example does the request impinge on the rights of local creditors or public policy).

[7] Home country is used for simplicity in reality this definition remains a point of contention is international insolvency cases with the United States adopting center of main interest and most common law judications adopt place of incorporation.

- **Territorialism**: In a territorialism system, insolvency proceedings will be brought in each relevant country, not just the home country, resulting in parallel proceedings.
- **Cooperative territorialism**: A system advanced by Professor Lynn LoPucki that has its roots in territorialism ie parallel proceedings are commenced in the relevant jurisdictions, however, what sets it apart is the cooperation between the jurisdictions to coordinate and facilitate the realisation of assets and distribution of the same. In reality often times United Kingdom and the Cayman Islands, approach to international cooperation has been more akin to cooperative territorialism. This will be explored further below.

United Kingdom and the Cayman islands are purported to have a modified universalism approach to international insolvency matters, however, in reality, oftentimes the approach taken by the judiciary, as a result local policies, has been more akin to cooperative territorialism. (This will be shown in the cases cited below).

This however is not wholly inconsistent with the Model Law. UNCITRAL has issued various guides to assist national authorities and legislative bodies on implementing and interpreting the MLCBI. What is clear from these documents is that the Model Law has been designed in way that that affords countries flexibility in its implementation such that it is never at odds, or contrary to, the public policy of the relevant state. For example:

- **The Public Policy exemption**: Pursuant to article 6 of the Model Law, this is exception which notes that nothing in the law should prevent the relevant court from refusing to take an action governed by this law if the action would be manifestly be contrary to the public policy of the state.
- **Dissenting creditors in a restructuring**: Mechanisms are suggested which provides safeguards to dissenting groups, particularly if their rights are being impacted by the proposed plan without their consent. It is highlighted that failing to observe this could have consequences such as "there is a risk that creditors will be unwilling to provide credit in the future[8]".
- **The turnover of assets referenced Article 21 paragraph 2**: It is noted that the turnover of assets is discretionary and there are suggested safeguards to ensure the

[8] UNCITRAL Legislative Guide on Insolvency Law < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf> access confirmed on 26 February 2024

protection of local interests before the assets are turned over to the foreign representative[9].

5. The development of the common law

Th United Kingdom

Before MCIB, common law principles had already evolved such that the English courts *could* provide assistance to foreign representatives in the context of insolvency proceedings. For example the leading[10] case is Solomons v Ross (1764)[11], therein the ruling the English court cooperated with Dutch proceedings, notwithstanding an English creditor had an attachment to the funds.

The principle of assistance is not a new concept in the UK, and more widely its dependencies, see Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc (**Cambridge Gas**)[12]; the "universality of bankruptcy has long been an aspiration". In this case the New York Court sent a Letter of Request to the High Court of Justice of the Isle of Man, asking for assistance in giving effect to a Chapter 11 plan. On appeal the Privy Council found it could give effect to the plan, on the basis that the principle of universality provided the grounds for invoking the common law principes of judicial assistance. As further opined by Lord Hoffman in the same judgment; "The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application." Arguably this was the right decision based on the fact pattern, but it would be dangerous to take this decision out of context and by extension assume that fairness is **always** achieved through a universalist approach.

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[9] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf> access confirmed 26 February 2024

[10] NB: This author is aware of apparent work being prepared by Dr. Stephen Baister and Dr. John Tribe titled "Lord Bathurst's Gift: The Genesis of the Golden Thread, being the Early History of Cross-Border Insolvency and the Theory of Universalism with particular reference to the original Solomons v. Ross case papers"; which challenges that this decision is the genesis of reciprocity between courts. Their research is purported based on findings from the London Metropolitan Archive, the Court of Common Pleas records and the Court of Chancery records at the National Archive.

[11] Solomons v Ross (1764) 1 H Bl 131n

[12] Cambridge Gas Transport Corp v. Official Committee of Unsecured Creditors (of Navigator Holdings PLC and others) (Isle of Man) [2006] UKPC 26 (16 May 2006)

The decision whilst persuasive was not binding on the United Kingdom and hot on the heels of the Cambridge Gas decision, followed a decision from the House of Lords (at the time the highest appeal court in the UK) Re HIH Casualty and General Insurance Ltd[13] (**HIH Casualty**). This was an interesting decision whereby court was asked to consider, byway of a letter of request from the Australian courts, whether assets located in the England, could be transferred to Australia to be administered in accordance with the Australian insolvency laws. One matter that the court had to give due regard to was that, due to differences in the Australian insolvency regime, certain creditors would be worse off than if the English insolvency principles were applied to the proceedings. Notwithstanding this, the House of Lords unanimously agreed the assets should be remitted to Australia to be dealt with in accordance with the Australian insolvency proceedings. Interestingly though only Lord Hoffman and Lord Walker concluded that the court's jurisdiction was derived from both section 426 of the IA **and** common law. The other Lords only agreed on the application of section 426 of the IA, either disagreeing or declining to comment on whether common law was the proper jurisdictional basis.

It has been inferred that similar to Cambridge Gas the court's "justification" for holding its ruling in HIH Casualty is one of fairness, "because policy-holders and creditors dealing with Australian companies likely assumed that Australian laws would determine their rights in the event of bankruptcy"[14]. As a result, the cooperation extended by the English court in HIH Casualty achieved a fair outcome.

Arguably, a disproportionate aspiration to achieve universality in insolvency proceedings, could have started the UK on an economically perilous trajectory, however perhaps in a prudent divergence from this trajectory, came the ruling in Rubin v. Eurofinance SA[15] (**Rubin**). This case turned on the issue of whether judgments made by foreign bankruptcy courts to set aside antecedent transactions in circumstances where a party had not submitted to the jurisdiction was enforceable in England. Notably the lower court found it **was** enforceable under common law. In short the question that the Supreme Court had to determine was whether "As a matter of policy, should the court, in the interests of universality of insolvency proceedings, devise a rule for the recognition and enforcement of judgments in foreign insolvency proceedings which is more expansive…, than the traditional

[13] Re HIH Casualty and General Insurance Ltd [2008] UKHL 21
[14] Toward Standardized Enforcement of Cross-Border Insolvency Decisions: Encouraging the United States to Adopt UNCITRAL's Recent Amendment to its Model Law on Cross-Border Insolvency LIA METREVELI*
[15] In Rubin v Eurofinance SA [2012] UKSC 46

common law rule embodied in the Dicey Rule, or should it be left to legislation preceded by any necessary consultation".

The Supreme Court held by a majority of 4 to1 that the foreign judgment was not enforceable. Notably Lord Walker who formed part of the panel in HIH Casualty was not the dissenting presiding judge.

There are further examples of the UK trend towards more territorialism principles namely in Fibria Celulose S/A v. Pan Ocean Co Ltd[16] and Bakhshiyeva ex rel. International Bank of Azerbaijan v. Sberbank of Russia[17] (**IBA**). In both these rulings the English Court continued to rely on the Rule in Gibbs such that relief obtained outside of the United Kingdom, relating to English law, will not be enforceable in England. In IBA the Court of Appeal[18] notably suggested that a parallel procedure, namely an English scheme could have resolved the issue. This is more akin to cooperative territorialism principles (defined above).

The Cayman Islands

Cases decided in the UK and other common law jurisdictions are persuasive but not binding on the Cayman Islands it is there not unsurprising that the Cayman Islands has generally taken a cooperative approach to cross border matters.

Arguably the Cayman Islands legal framework has greater flexibility than the United Kingdom given that the Model Law has not been implemented, as such the courts have the ability to determine matters on a case by case basis. That being said in reality, as compared to the UK, the Cayman Islands walks a much finer tightrope when it comes to cooperation. Reciprocity is a driving practicality for the local courts and local practitioners where most insolvencies / restructurings require foreign cooperation (with assets, persons and records often located off its shores).

Some notable (but not exhaustive) cases that highlight the Cayman Islands cooperative, but arguably a cooperative territorialism, approach are summarised below:

- Bank of Credit & Commerce International (Overseas) Ltd.[19] In this case the Cayman Islands court exercised its discretion in approving an arrangement between the

[16] Fibria Celulose S/A v. Pan Ocean Co. Ltd. [2014] EWHC 2124
[17] Bakhshiyeva ex rel. Int'l Bank of Azerbaijan v. Sberbank of Russia [2018] EWCA
[18] The parties are reported to have reached a settlement agreement, prior to a further appeal
[19] In Bank of Credit & Commerce International (Overseas) Ltd 16 February 2000

liquidators of the Cayman Islands bank, and the liquidators of the related Luxembourg company, the effect of which pooled the assets so they would be distributed to creditors globally. Importantly it was determined to be in the best interest of the creditors to do this.

- Lancelot Investment Fund Limited.[20] A case where following a petition by creditors in the Cayman Islands the Grand Court appointed a single liquidator to a Cayman islands investment fund notwithstanding US Trustee had already been appointed to the same under Chapter 7. Creatively the Grand Court ordered a stay to enable the Cayman Islands official liquidator and the Chapter 7 trustee "a proper and full opportunity to discuss their respective roles and, if possible, to agree a protocol".

To date development of universalism, from a common law perspective, in some ways has been aligned with Cayman's interests for example see Singularis (a decision referred to the Privy Council by the Bermuda courts)[21]. In Singularis ruling, the Privy Council endorsed the principle of modified universalism but in doing so also gave deference to the place of incorporation. "An important aspect of that public interest is a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally[22]". This rule is not binding but it persuasive precedent in Cayman law has since been referred to in subsequent Cayman decisions[23].

Where it gets interesting (and when we see the Cayman courts flexing their jurisdictional muscles, and exhibiting a territorialism mindset), is when there is a competing petitions from a foreign court in respect of a Cayman domiciled debtor. Cayman does not purport to have exclusive jurisdiction over Cayman debtors, however a key assumption is that deference should be given to the place of incorporation.

Some examples are summarised below:

- Sun Cheong Creative Development Holdings Limited[24]. The Court appointed provisional liquidators notwithstanding that a winding petition has been presented

[20] In Lancelot Investment Fund Limited December 10th, 2008

[21] Singularis Holdings Ltd v Pricewaterhousecoopers (Bermuda) [[2014] UKPC 36 & [2016] UKPC 33 pc 3

[22] 112 of Singularis

[23] Re LATAM Finance Limited (and others) Unreported), 24 August 2020, FSD 105, 106 and 154 of 2020.The Court's jurisdiction to approve a Protocol under the common law duty to assist foreign insolvency courts.

[24] Sun Cheong Creative Development Holdings Limited (Unreported, Smellie CJ, 20 October 2020)

first in time in Hong Kong. In his decision the Chief Justice determined that this was appropriate as it was the correct approach under the Cayman law. “The rights of the [Hong Kong] Petitioners are of course to be determined by the Hong Kong Court in accordance with Hong Kong law in relation to the HK Petitions. However, the foregoing principles reflect how their rights would be viewed had they petitioned in the Cayman Islands."

- In GTI Holdings Limited: The Hong Kong court sought to supplant provisional liquidators appointed by the Grand Court with local liquidators. As a result the Cayman Islands court made a winding up order appointing official liquidators in the Cayman Islands on basis that "an order made by a court in the place of incorporation of the Company should be more effective internationally in accordance with well-established principles of private international law".

6. Conclusion

The Model Law contemplates some careful safeguards to prevent the sovereignty of countries being subverted. This in-built flexibility in the cross border insolvency frameworks of the United Kingdom and the Cayman Islands, allows judges, with the full facts of the case, to swing along the universalism spectrum rather than applying the concepts more rigidly.

The United Kingdom

Following the exit from the European Union, the United Kingdom is going through a period of transition. The United Kingdom is already facing some challenges to its global position as a financial powerhouse[25] and it will be interesting to see whether these uncertainties will develop into insecurities and will cause a further departure from modified universalism as the UK seeks to protect is state’s advantage. One to watch will be whether the UK adopts modification to the MLCBI which would have the effect of overturning the “Rule in Gibbs”.

The Cayman Islands

The Cayman Islands role and significance in cross border insolvency will continue so long as deference is given to the place of incorporation. However in some jurisdictions this

[25] Some examples (1) per the GFI Report London was the leading IFC until 2018, it has since ranked second behind New York and (2) 2021 was the first ever year that annual investment flows have been negative since 1984 (although much of this could be attributable to the disruption caused by the corona virus pandemic.

presumption is rebuttable which casts doubt as to whether Cayman will receive recognition and assistance in internationally.

The Cayman Islands has long battled against misplaced misconceptions, striving to establish itself as a jurisdiction of substance. It is hoped that the implementation of local legislation requiring entities to have economic substance could serve to mitigate these criticisms.