**the “modified universalism” principle’s shortlived period of expansion in English common law: Opportunity seised by Singapore courts to forge its own path forward?**

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# Introduction

1. This short paper examines the evolution of the approach taken by common law courts towards cross-border cooperation in insolvency proceedings, focusing on Lord Hoffman’s expansive interpretation of the “modified universalism” principle and comparing the reception the expansive interpretation received from the English and Singapore courts.

# The English Common Law Position

1. There is a long history of cross-border judicial cooperation in insolvency proceedings in English common law, going as far back as the 18th century[[1]](#footnote-1).
2. This judicial practice was developed based upon what the 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 or personal.[[2]](#footnote-2) This principle has been said to be based on “*fairness between creditors*”, namely, that “*no one creditor should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated”.[[3]](#footnote-3)* Thus, the idea is that 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 bankrupts’ assets.[[4]](#footnote-4)
3. At the same time, however, common law courts have always retained a degree of discretion to assess whether the overseas proceedings and the cooperation and assistance being sought are consistent with their own principles of justice and public policy. Through this discretion, the common law courts recognised and developed various limitations to cross-border judicial cooperation, resulting in an approach described as “*modified universalism*”[[5]](#footnote-5).
4. Lord Hoffman described this principle as a “*golden thread running through English cross-border insolvency law since the eighteenth century*”, and defined it as follows[[6]](#footnote-6):

“That principle requires that English courts should, so 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 assets are distributed to its creditors under a single system of distribution.”

1. However, the incorporation into English law of international schemes of judicial co-operation have had the effect of arresting the development of the common law in this area.[[7]](#footnote-7)
2. This was until the decisions of the Privy Council in Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc (“**Cambridge Gas**”)[[8]](#footnote-8) and House of Lords in In re HIH Casualty and General Insurance Ltd (“**HIH**”)[[9]](#footnote-9), in which Lord Hoffmann propounded an expansive version of the principle of ‘modified universalism’.

## Cambridge Gas: modified universalism as source of jurisdiction to recognise foreign orders

1. In Cambridge Gas[[10]](#footnote-10), the Privy Council, on appeal from the Isle of Man, had to decide whether an order of the New York court approving a Chapter 11 plan was entitled to recognition and implementation in the Isle of Man. The US order had the effect of vesting the shares of an Isle of Man company in the committee of creditors, in circumstances where (as it was found) the US court had neither jurisdiction *in rem* over the shares (because they were rights situated outside its territorial jurisdiction) nor jurisdiction *in personam* over the shareholders (because they were not present in the US and took no part in the US proceedings). The principal shareholder, Cambridge Gas, whose shares would be vested in the committee of creditors under the Chapter 11 plan, objected on the basis that it was not bound by the decision of the US Court.
2. Delivering the advice of the Board, Lord Hoffman expressed the view that the absence of jurisdiction *in rem* or *in personam* in the US Court was irrelevant, because the jurisdiction was founded not on any obligation on the part Cambridge Gas to comply with the judgements of the US Court, but on the duty of the Isle of Man court to assist a foreign principal liquidation to assist a foreign principal liquidation so as to achieve a universal distribution of the assets on, as far as possible, a common basis[[11]](#footnote-11). In other words, the court’s power to assist the foreign liquidation was itself treated as the *source* of the court’s jurisdiction to recognise the US order and its effect on those affected, including those over whom over the US Court had neither jurisdiction *in rem* or *in personam.*
3. Lord Hoffman drew a distinction between judgments *in rem* and *in personam*, which determines rights over property and against a person, and orders made in bankruptcy proceedings (at [14]):

“14. The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established…”

1. Cambridge Gas marked the furthest that the common law courts have gone in developing the common law powers of the court to assist a foreign liquidation.[[12]](#footnote-12)

## HIH – modified universalism as source of power to disapply local parts of local statutory schemes?

1. The common law court’s power to assist foreign liquidations was revisited by Lord Hoffman in In re HIH Casualty and General Insurance Ltd[[13]](#footnote-13).
2. HIH was an Australian insurance company in liquidation in Australia. A winding up petition had been presented in England and provisional liquidators appointed to conduct an ancillary liquidation. The English court was asked to decide whether they should accede to a letter of request from the Australian court pursuant to s 426(4) of the Insolvency Act 1986 (c 45) inviting it to direct the English provisional liquidators to remit the assets in their hands to the Australian liquidators, in circumstances where they would be distributed there in accordance with statutory priorities which differed from those applicable in a domestic winding up in England.
3. The House of Lords unanimously ordered that the English assets should be remitted to Australia. However, the two leading speeches, delivered by Lord Hoffman and Lord Scott of Foscote respectively, set out two different conceptual approaches to the common law doctrine.
4. Lord Hoffman observed that the judicial practice of treating an English winding up of a foreign company as ancillary to the winding up by the course of its domicile (the ‘ancillary liquidation’ doctrine) was based on the principle of ‘modified universalism’.[[14]](#footnote-14) Under this ‘ancillary liquidation’ doctrine, the court may “disapply” parts of the English statutory scheme by authorising the foreign liquidator to perform certain actions under foreign law, which may or may not be the same as English law[[15]](#footnote-15).
5. Lord Scott disagreed and held that the English courts had a statutory obligation to apply the English statutory scheme and had “*no inherent jurisdiction to deprive creditors proving in an English liquidation of their statutory rights under that scheme*”[[16]](#footnote-16). However, Lord Scott was willing to accede to the request made by the Australian courts by virtue of the court’s power under s 426, which permitted remittal even where the statutory schemes differed.

## Rubin – UK Supreme Court dialled back on Lord Hoffman’s expansive interpretation of the ‘modified universalism’

1. The expansive version of the principle of ‘modified universalism’, as propounded by Lord Hoffman in Cambridge Gas, and later in HIH, was dialled back by the UK Supreme Court decision in Rubin v Euro Finance SA.[[17]](#footnote-17)
2. The question before the UK Supreme Court was whether, and if so, in what circumstances, an avoidance order or judgment of a foreign court will be recognised and enforced in England. This issue gave the UK Supreme Court the occasion to revisit the Privy Council’s decision in Cambridge Gas in regard to the circumstances in which foreign liquidation orders can or should be recognised in common law.
3. Delivering the advice on behalf of the majority, Lord Collins held that the Cambridge Gas was wrongly decided, in that there was no basis for the recognition of the US order in the Isle of Man in circumstances where the US court had neither jurisdiction *in personam* or *in rem* over the affected shareholder (Cambridge Gas)[[18]](#footnote-18). It was emphasised that there is no special rule of recognition and enforcement of avoidance judgments in foreign insolvency proceedings, and that existing principles of enforcement of foreign judgments applied to avoidance judgments as well. Any change to this settled area of law is for the legislature to effect, not the judiciary:

“129. A change in the settled law of the recognition and enforcement of judgments, and in particular the formulation of a rule for the identification of those courts which are to be regarded as courts of competent jurisdiction (such as the country where the insolvent entity has its centre of interests and the country with which the judgment debtor has a sufficient or substantial connection), has all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation.”

1. Lord Mance agreed with Lord Collis’ reasoning and conclusions in his judgment, but reserved his opinion on whether Cambridge Gas was correctly decided. In his view, Cambridge Gas was in any case distinguishable. He examined the nature of the orders at issue in Cambridge Gasand highlighted the Privy Council’s observation in Cambridge Gas that the order at issue related to the vesting of shares in an insolvent company, which were “completely utterly worthless”[[19]](#footnote-19). Thus, Cambridge Gas had no interest of any value to protect and the vesting of its shares in the company’s creditors was no more than a mechanism for giving creditors access to the company’s assets[[20]](#footnote-20).
2. Lord Collin’s unequivocal pronouncement, on behalf of the majority, that “*Cambridge Gas was wrongly decided*” means that the correctness of any decisions which were based, even in part, on the persuasive authority of the Cambridge Gas, will require careful reconsideration, as will any advice or conclusions premised on passages to be found in the judgment of the Privy Council in that case[[21]](#footnote-21).

## ****Singularis – new breath of life for “modified universalism”?****

1. **The “modified universalism” appeared to have received a new breath of life in the Privy Council decision of Singularis Holdings Limited v PricewaterhouseCoopers**[[22]](#footnote-22)**, in which Lord Sumption delivered a robust affirmation of the view that the principle of ‘modified universalism’ was part of the common law, while being careful to add that this is subject to local law and local public policy and that the court only ever act within the limits of its own statutory and common law powers**[[23]](#footnote-23)**. As to what those limits are, in the absence of relevant statutory power, they must depend on the common law, including any proper development of the common law.**
2. **In that case, the Privy Council was asked to decide whether Bermudan court had the power (under common law) to assist a foreign liquidation by ordering PwC to produce information in circumstances where:**
   1. **The Bermuda court has no power to wind up an overseas company and its statutory power to order the production of information is limited to cases where the company has been wound up in Bermuda; and**
   2. **The equivalent order could not have been made by the court in which the foreign liquidation is proceeding.**
3. **The majority of the Board (Lord Sumption, Lord Collins and Lord Clarke) held that there is a power at common law, pursuant to the principle of “modified universalism”, to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral and documentary form which is necessary for the administration of a foreign winding up order.**
4. **Lord Mance and Lord Neuberger disagreed and considered that it was not appropriate to extend the common law power to assist beyond categories which have some recognisable basis in current law,** that is cases where there is (a) evidence that the person ordered to provide the information or documentation has property belonging to the insolvent company, or (b) evidence of some wrongdoing by the person so ordered or (c) evidence of some wrongdoing by another person in which the person so ordered was or is innocently mixed up.
5. The majority’s recognition of the **common law power to assist a foreign insolvency on the basis of “modified universalism”** was ultimately moot in the case, because they were of the view that the power should not be exercised in circumstances where the foreign court itself had no equivalent power. The whole basis of the common law power is the right and duty of the Bermudan court to assist the foreign court so far it properly can. It was not a proper use of the power of assistance to make good a limitation on the powers of a foreign court.
6. **Lord Collins also wrote a concurring judgment in which he revisited another aspect of the Privy Council’s decision in Cambridge Gas, that was at [22], where** Lord Hoffmann said that “*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*” and that the purpose of recognition of the foreign officeholders was to “*to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic foru*m.”
7. **Lord Collins (with whom Lord Sumption agreed) wrote that this aspect of Cambridge Gas involved a fundamental misunderstanding of judicial law-making power. Lord Sumption said that although statute law may influence the policy of the common law, it cannot be assumed, simply because there would be a statutory power to make a particular order in the case of domestic insolvency, that a similar power must exist at common law. He added**[[24]](#footnote-24)**:**

“In my view to apply insolvency legislation by analogy “as if” it applied, even though it does not actually apply, would go so far beyond the traditional judicial development of the common law as to be a plain usurpation of the legislative function.”

1. **It has been suggested that in the aftermath of the Singularis decision, and despite Lord Sumption’s seemingly robust affirmation of the ‘modified universalism’ principle the scope for developing common law power of assistance in response to the ever-changing demands of the modern world of commerce has been drastically curtailed:** [[25]](#footnote-25)

**“The inevitable delays involved in the legislative process will ensure that serious injustices will be perpetrated with impunity by those able to exploit the flaws in the legislative arrangements governing international insolvency matters. The collective act of judicial self-emasculation perpetrated by the judgments of all give members of the Privy Council marks the conclusion – at least for a generation – of a proud tradition of example-setting by the English common law in the field of cross border insolvency.”’**

# Singapore Position

1. The “modified universalism” principle is firmly a part of Singapore law. And unlike the English Courts, the Singapore Courts have been more inclined to adopt Lord Hoffman’s expansive version of the “modified universalism” principle.

## Beluga chartering – modified universalism affirmed

1. In Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (deugro (Singapore) Pte Ltd, non-party)[2014] 2 SLR 815 (“**Beluga**”), the Singapore Court of Appeal had to consider whether the Singaporean liquidators of a German incorporated company were entitled to remit the assets to the seat of the principal liquidation in Germany notwithstanding the existence of the German company’s Singapore subsidiary’s unsatisfied judgment debt.
2. The Court of Appeal began its analysis by affirming at [58] that the ‘ancillary liquidation’ doctrine (a principle that emanates from the modified universalism principle), is a part of Singapore common law and that the court has a power under this doctrine to order the local liquidator to remit assets that are gathered in locally to the principal place of liquidation.
3. The court then considered the two separate approaches to the ancillary liquidation doctrine, as propounded by Lord Hoffman and Lord Scott in HIH respectively. The court ultimately reserved its opinion on which approach represented the common law position, because on the facts of the case, regardless of which approach was taken, the ancillary liquidation doctrine could result in remittal being ordered.
4. Nevertheless, in response to the Official Receiver’s submission that there is a common law discretion for the court to direct that assets be remitted to the principal place of liquidation but only *after* making provision for locally-incurred debts and liabilities, the court said that:

“It has never been thought that the court has the power to confer on a creditor a priority that it does not otherwise have under the statutory regime, and [counsel] could not point us to any common law rule to this effect … Moreover, any impetus as presently exists is towards universalism rather than to favour local creditors or to confer a preference on locally incurred debts”.

1. The Court of Appeal added that the circumstances and the manner in which the Singapore court will render assistance to foreign winding-up proceedings are not closed, and will depend on the particular circumstances before it (at [98]):

“Assistance might, for example, take the form of a stay of a claim if Singapore is not the forum conveniens; or staying an execution or attachment; or exercising a discretion against granting a garnishee order absolute; or refusing leave to serve process out of the jurisdiction; or winding up the company in Singapore.”

## Re Opti-Medix & Re Taisoo Suk: Lord Hoffmans’ expansive interpretation of modified universalism embraced

1. In Re Opti-Medix Ltd (in liquidation) and another matte***r***[2016] 4 SLR 312 (“**Opti-Medix**”), the Singapore High Court had to consider whether a foreign liquidation in a jurisdiction other than that of the place of incorporation may be recognised under common law.
2. In holding that it could, the court agreed with the passage from HIH in which Lord Hoffman indicated that the centre of main interest (“COMI”) test could be a basis for the recognition at common law of foreign insolvency proceedings, and disagreed with Lord Collin’s observations in Rubin that such a matter was to be left to the legislature (at [31]). This case heralded the first reported instance where the COMI approach was recognised as part of the development of the “modified universalism” principle in Singapore common law.
3. The trend *of* embracing a more expansive “modified universalism” principle continued in Re Taisoo Suk [2016] SGHC 195,[[26]](#footnote-26) in which the foreign representative of Hanjin Shipping Co Ltd, a Korean company, filed an urgent *ex parte* application before the Singapore High Court, seeking recognition of Hanjin’s rehabilitation proceedings in Korea and a restraint of all new or pending proceedings against Hanjin and its two wholly-owned Singapore subsidiaries. The Singapore High Court considered the Court of Appeal’s observations in Beluga at [98] as extending to recognition of foreign restructuring and rehabilitation orders and/or proceedings,[[27]](#footnote-27) and that the type of assistance it could provide included a general restraint and stay of all present and further proceedings, including any admiralty *in rem* proceedings by barring the arrests of vessels.
4. It is interesting to note that while the court took into account various broad considerations in deciding whether to recognise the Korean rehabilitation proceedings and grant the general restraining and stay orders sought (at [18]), including the impact of the Korean rehabilitation process on domestic creditors and whether it is fair and equitable in the circumstances, there was no discussion or analysis as to whether any of these domestic creditors were *actually* subject to the jurisdiction of the Korean courts or law, whether by way of submission to the jurisdiction or their domicile. Instead, the court took a similar to the one propounded by Lord Hoffman in Cambridge Gas, that is, one that looks to the ‘modified universalism’ principle as the source of the common law court’s jurisdiction and power to assist the foreign liquidation.

## Reduced relevance of common law following adoption of UNCITRAL Model Law on Cross-Border Insolvency (“Model Law”) in 2017?

1. After Singapore enacted legislations that incorporated the Model Law in 2017, the role of common law in the recognition of foreign insolvency proceedings was significantly reduced.
2. In Re Rooftop Group International Pte Ltd [2019] SGHC 280 (“**Re Rooftop**”), the applicants had sought recognition of ongoing US Chapter 11 proceedings, either through Art 17 of the Model Law or through the common law. The Singapore High Court granted recognition of the US Chapter 11 proceedings as a foreign non-main proceeding. However, when addressing the applicants’ alternative basis of common law recognition, the court held (at [58]):

58 I do not consider that common law recognition is available in the present case. In general, where the Model Law is applicable to the subject matter, the court would be slow to allow common law recognition to be invoked as an alternative. The existence of a detailed recognition regime created by legislation displaces the need for common law doctrine to apply. Thus, in most, if not all, foreign corporate insolvency proceedings, recognition should be made under the Model Law. The invocation of the common law should only be for situations where recognition is not catered for by the Model Law, which would appear to be highly unlikely given its structure. I would thus see the scope for common law recognition to be limited to foreign personal bankruptcy proceedings, and little else besides.

1. That being said, given that the Model Law as adopted by Singapore only covers corporate insolvencies, the common law may continue to be relevant in two ways, firstly, in cases involving foreign bankruptcy proceedings and/or orders; and second, in cases where the Model Law does not apply, for example, cases involving the insolvency of foreign partnerships or business trusts.

## Foreign bankruptcies

1. In Heince Tombak Simanjuntak v Paulus Tannos [2019] SGHC 216, the Singapore High Court held that the modified universalism principle as endorsed in Beluga applied with equal force to personal bankruptcies. The Court held that a foreign bankruptcy order would be recognised if the following requirements were made: first, the foreign bankruptcy order is made by a court of competent jurisdiction; second, that court must have jurisdiction on the basis of the debtor’s domicile or residence, or submission by the debtor to the jurisdiction of the court; third, the foreign bankruptcy order must be final and conclusive. The court was not convinced by the argument against the use of traditional recognition doctrine to bankruptcy orders because such are not judgments but bind the whole world.
2. This decision was subsequently overturned by the Court of Appeal on the basis that the foreign bankruptcy order in that case was obtained in breach of natural justice[[28]](#footnote-28). However, it interesting to note that the Court of Appeal reserved its opinion on the applicability of the “modified universalism” principle to bankruptcy orders:

“22 Since the parties are in agreement on the applicable requirements, since there were no arguments before us on the points raised by the Judge and since the relevant jurisprudence concerning the recognition of foreign corporate insolvency orders at common law all stemmed from a single judge of the High Court (see [15] above), **we do not venture into the philosophical questions relating to the true nature of a bankruptcy order and the principle of modified universalism in this context.** Instead, we leave open the question whether this reasoning is correct.”

1. This was a “missed opportunity” for the courts to clarify, since its seminal decision in Beluga, the scope of the principle of modified universalism, and whether it applies to foreign bankruptcy orders[[29]](#footnote-29).

## Cases in which Model Law does not apply

1. The Model Law as enacted in Singapore only applies to body corporates. The Model Law as enacted in Singapore specifically defines “*debtor*” to mean “*corporation*”[[30]](#footnote-30), which is in turn defined in the Companies Act 1967 to mean “*any body corporate formed or incorporated or existing in Singapore or outside Singapore and includes any foreign company …”[[31]](#footnote-31).* Hence, there are a range of cases in which Model Law does not apply, including the insolvency any business trusts and partnerships.
2. The common law will continue to be relevant in such cases.

# Conclusion

1. Despite the historical dominance of the "modified universalism" principle in common law, its application has witnessed significant fluctuations especially in recent times.
2. Lord Hoffman’s expansive interpretation of the “modified universalism” principle was short-lived, with the English Courts shifting to a more conservative approach, effectively prioritizing adherence to statutory frameworks and limitations on jurisdiction. This has presented an opportunity for the Singapore courts to forge its own path forward. Unlike the English courts, the Singapore courts have displayed a greater willingness to embrace Lord Hoffman's expansive interpretation of this principle, potentially setting the example for other common law jurisdiction seeking to embrace the more modern, pro-universalist philosophy, in the field of cross-border insolvency. However, with the adoption of the UNCITRAL Model Law in Singapore, the role of the common law in cross-border insolvency cases has been significantly reduced, likely relegating it to situations not explicitly covered by the Model Law.

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8. Re Taisoo Suk [2016] 5 SLR 0787
9. Re Rooftop Group International Pte Ltd [2019] SGHC 280
10. Heince Tombak Simanjuntak and others v Paulus Tannos [2019] SGHC 216
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2. Tan Kah Wai, A Golden Thread on the Red Dot and the Law on Cross-border Insolvency in Singapore. Tan Kah Wai. (2023) 35 SAcLJ 364

1. For example, in Solomons v Ross (1764) 1 H B1 131n, the trustees in bankruptcy appointed in Amsterdam were allowed to collect assets in English which has been garnished by an English creditor shortly before the trustees were appointed in Amsterdam. [↑](#footnote-ref-1)
2. Re HIH Casualty and General Insurance [2008] 1 WLR 852 at [6]. [↑](#footnote-ref-2)
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12. Per Lord Sumption in Singularis Holdings Limited v PricewaterhouseCoopers [2014] UKPC at [18]. [↑](#footnote-ref-12)
13. [2008] 1 WLR 852 [↑](#footnote-ref-13)
14. At [7] - [8] [↑](#footnote-ref-14)
15. At [19]. [↑](#footnote-ref-15)
16. At [59]. [↑](#footnote-ref-16)
17. Rubin v Euro Finance SA[2012] UKSC 46 [↑](#footnote-ref-17)
18. At [132]. [↑](#footnote-ref-18)
19. At [183]. [↑](#footnote-ref-19)
20. At [186]. [↑](#footnote-ref-20)
21. Ian F. Fletcher, The Law of Insolvency (Fifth Edition), Sweet & Maxwell (2017), paragraph 28-026. [↑](#footnote-ref-21)
22. [2014] UKPC 36 [↑](#footnote-ref-22)
23. At [19]. See also Ian F. Fletcher, The Law of Insolvency (Fifth Edition), Sweet & Maxwell (2017), paragraph 28-005, footnote 5. [↑](#footnote-ref-23)
24. At [64]. [↑](#footnote-ref-24)
25. Ian F. Fletcher, The Law of Insolvency (Fifth Edition), Sweet & Maxwell (2017), paragraph 28-032. [↑](#footnote-ref-25)
26. [2016] SGHC 195 [↑](#footnote-ref-26)
27. At [16] [↑](#footnote-ref-27)
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29. Tan Kah Wai, A Golden Thread on the Red Dot and the Law on Cross-border Insolvency in Singapore. Tan Kah Wai. (2023) 35 SAcLJ 364 [↑](#footnote-ref-29)
30. Article 2(c), Third Schedule, Insolvency, Restructuring and Dissolution Act 2018 (Singapore). [↑](#footnote-ref-30)
31. Section 4, Companies Act 1967 (Singapore). [↑](#footnote-ref-31)