Is there a principle of Modified Universality in Insolvency in the Cayman Islands?

The title gives rise to an immediate question: what is universality or universalism as it is often called, and what does it mean to say that the principle has been modified. Modified How?

The expression of the basic principle most frequently quoted is that of Lord Hoffmann in *HIH [2008] 1 WLR 852* , para 30, where he said:

"The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. 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's assets are distributed to its creditors under a single system of distribution."

And in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc ("Cambridge Gas") [2007] 1 AC 508, para 16 he said, speaking for the Privy Council* :

"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."

Although aspects of Cambridge Gas have been disapproved by Lord Collins in the Supreme Court (in *Eurofinance v Rubin [2013] 1 AC 236*) this extract from the speech was fully endorsed.

Note that it is a principle about co-operation, not about interference with local laws.

This was well expressed by the US Bankruptcy Court in *In re Maxwell Communication Corpn (1994) 170 BR 800 (Bankr SDNY)* where it was said that the United States courts have adopted modified universalism as the approach to international insolvency:

"the United States in ancillary bankruptcy cases has embraced an approach to international insolvency which is a modified form of universalism accepting the central premise of universalism, that is, that assets should be collected and distributed on a worldwide basis, but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors."

This has been described as an 'aspiration' frequently: in *PricewaterhouseCoopers v SAAD Investments in the Court of Appeal for Bermuda [2013] CA 7 CIV,* and as recently as 16th April of this year the Court of Appeal of these islands described the principle as 'an aspiration, not reality' in *Picard v Primeo Fund.*

The dual aims immediately set up a tension between the desirability of collecting assets on a worldwide basis, and the respect which must be afforded to foreign courts exercising such powers as they may have in home jurisdictions to protect local creditors. It must also , necessarily in my view, be limited by the powers actually given to the court of the

main liquidation by the legislature. I was glad to read that your C 0f A in Primeo reached the same view in a case relating to the application of avoidance provisions, when it held that the Cayman court applies provisions of Cayman law in transaction avoidance cases [but the whole case is likely to go to the PC]. Likewise in the SAAD case in Bermuda, the Court of Appeal warned that the principles underlying the inclination of courts to grant assistance to foreign insolvencies would not necessarily involve foreign liquidators or foreign companies (in that case a Cayman company) being permitted to exercise powers granted to a Bermudan liquidator by legislation in Bermuda, which were not available in Cayman. A new form of forum shopping in insolvency! It is not, in my view, carte blanche to cast off the shackles of territorial limitations on powers granted by the legislature. Tensions are there, but it is not a principle which should be subverted to create conflict and override comity.

The subject of international recognition and co-operation in insolvency was the subject of early discussion by the International Law Association (1879), and the Hague Conference on Private International Law (1904).

Now in Europe we have also the European Community/Union initiative which has taken 40 years to come to fruition as the Council Regulation, which resulted in the EC Insolvency Regulation in 2000 (Council Regulation No 1346/2000).

Meanwhile, the United Nations Commission on International Trade Law ("UNCITRAL") adopted a Model Law on cross-border insolvency in 1997. It was a reforming model which was effectively led by the insolvency profession itself, rather than by legislatures. It was adopted following initiatives in the 1980s by the International Bar Association and later by

INSOL International (the International Association of Restructuring, Insolvency and Bankruptcy Professionals). Following a series of reports and drafts, UNCITRAL adopted the Model Law in May 1997. The Model Law provides for a wide range of assistance to foreign courts and office-holders. It has been implemented by 19 countries and territories, including the United States and Great Britain (although by some states only on the basis of reciprocity). It was not enacted into law in Great Britain until 2006, by the CBIR . It has not been adopted by the Cayman Islands, but it has been adopted in the BVI.

Consequently, there are four main methods under English law for assisting insolvency proceedings in other jurisdictions, two of which are part of regionally or internationally agreed schemes. First, section 426 of the Insolvency Act 1986 provides a statutory power to assist corporate as well as personal insolvency proceedings in countries specified in the Act or designated for that purpose by the Secretary of State. All the countries to which it currently applies are common law countries or countries sharing a common legal tradition with England. The Cayman Islands are of course a designated country, as are the Virgin Islands. The court conducting a liquidation here of a Cayman company or an individual bankruptcy can expect to and will have requests for assistance heard by the English court.

Second, the EC Insolvency Regulation applies to insolvency proceedings in respect of debtors with their centres of main interests (COMI) within the European Union (excluding Denmark).

Third, the CBIR came into force in the UK on 4 April 2006, implementing the Model Law. The CBIR supplement the common law, but do not supersede it. Article 7 of the Model Law provides: “Nothing in this Law

limits the power of a court or British insolvency office-holder to provide additional assistance to a foreign representative under other laws of Great Britain."

Fourth, under the common law of E&W the court has power to recognise and grant assistance to foreign insolvency proceedings. The Laws of the Cayman Islands specifically provide for powers to recognize and assist foreign bankruptcies in Sections 240 and following of the Companies Law, and in the Foreign Bankruptcy Proceedings (International Co-Operation Rules) 2008. The common law principle is that assistance may be given to foreign office-holders in insolvencies with an international element. The underlying principle has been stated in different ways: "recognition … carries with it the active assistance of the court": *In re African Farms Ltd [1906] TS 373 , 377;* "This court … will 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 Texas under ch 11": *Banque Indosuez SA v Ferromet Resources Inc [1993] BCLC 112* , 117. That line of thinking has led some companies to seek chapter 11 in the USA with a view to avoiding the consequences of a Cayman insolvency, obviously a clever twist on the reasoning. Thus, in the *Soundview case in 2013*, Ch 11 proceedings were filed despite the Cayman companies having notice of the presentation of proceedings to wind up. The Chief Justice ordered winding up - you can tell he was distinctly unimpressed, as it was obviously purely tactical – the funds had never given any reason at all why they had not met the redemption claims of the investors petitioning to wind up.

In *Credit Suisse Fides Trust v Cuoghi [1998] QB 818* , 827, Millett LJ said:

"In other areas of law, such as cross-border insolvency, commercial

necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention … It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that 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." In this area reliance is often placed on an inherent jurisdiction, for example in the cases about the issuance of letters of request to foreign courts to assist in the conduct of a home insolvency. Here in Cayman in 2008 the Grand Court decided, in the case of *Basis Yield Alpha Fund 2008 CILR 50*, that the Cayman Court has an inherent jurisdiction to issue letters of request. In that case it was desired to obtain recognition in England & Wales and in Australia, and to obtain information and documents from Morgan Stanley in Australia. But I see no reason in principle why the jurisdiction should be confined to the obtaining of documents or information.

In E&W, for example, the common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign office-holder, or the staying of local proceedings, or orders for examination in support of the foreign proceedings, or orders for the remittal of assets to a foreign liquidation, and have involved cases in which the foreign court was a court of competent jurisdiction in the sense that the bankrupt was domiciled in the foreign country or, if a company, was incorporated there.

Looking for example at the group of cases which involved local

proceedings which were stayed or orders which were discharged because of foreign insolvency proceedings, in *Banque Indosuez SA v Ferromet Resources Inc [1993] BCLC 112* an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; cf In re *African Farms Ltd [1906] TS 373* (execution in Transvaal by creditor in proceedings against English company in liquidation in England stayed by **Transvaal** court), and there are many other examples, including , interestingly, in post handover Hong Kong: *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn [2005] 2 HKC 589* (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency). Cases of judicial assistance in the traditional sense include *In re Impex Services Worldwide Ltd [2004] BPIR 564* , where a Manx order for examination and production of documents was made in aid of the provisional liquidation in England of an English company

Cases involving remittal of assets from England to a foreign office-holder include *In re Bank of Credit and Commerce International SA (No 10) [1997] Ch 213* (Luxembourg liquidation of Luxembourg company); and *HIH [2008] 1 WLR 852* (the view of Lord Hoffmann and Lord Walker of Gestingthorpe) (Australian liquidation of Australian insurance company); and *In re SwissAir Schweizerische Luftverkehr-Aktiengesellschaft [2010] BCC 667* (Swiss liquidation of Swiss company).

"Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon 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."

So much for the aspirational and friendly side of things: co-operation. But what of respect for the differences of others? What if, for example, there is an insolvency here, but there are assets of the insolvent located abroad in a country which has procedures allowing local creditors to steal a march/obtain local rights over local assets by court procedures [choose which you prefer, depending on which side of the case you are on]. The Cayman liquidator may be arguing that the debtor's assets should be got in so that they may be distributed under one scheme of distribution, but the foreign court may not wholly agree. What then?

Enter the anti suit injunction, a powerful tool which can be used to prevent foreigners from suing in countries other than that of the insolvency, maybe even in their own home countries, operating in personam on the litigant. But it is a very strong thing to prevent, say, a foreigner from suing in his home court. Indeed it has recently been described as an exorbitant jurisdiction: by Hildyard J in Bank St Petersburg v Ark hang elsky. In what circumstances will the litigant be subject to the jurisdiction of the Cayman court considering the grant of such an injunction?

Consider the automatic stay provided for by S 97 of the Companies Law of Cayman in very similar terms to similar provisions in E&W and BVI (and probably others) . In England, the BVI and Cayman and I daresay elsewhere, these provisions do not have extraterritorial effect particularly where the Claimant in the foreign proceedings is not

naturally subject to the jurisdiction of the home court. The Liquidators will want an anti suit injunction. But in which jurisdiction?

The reluctance of the court to interfere with proceedings in a foreign court by the grant of anti-suit injunctions is demonstrated by the important judgment of the *Privy Council in Société Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871* and in *Mitchell v Carter [1997] 1 BCLC 673* , 687 Millett LJ said: "The position today is that stated by Hoffmann J in *Barclays Bank plc v Homan [1993] BCLC 680* . There must be a good reason why the decision to stop foreign proceedings should be made here rather than there. The normal assumption is that the foreign judge is the person best qualified to decide if the proceedings in his court should be allowed to continue. Comity demands a policy of non-intervention."

Maugham J in *In re Vocalion (Foreign) Ltd [1932] 2 Ch 196* said:

"The court can, however, in the exercise of its equitable jurisdiction in personam restrain a respondent properly served in this country from proceeding with an action brought in a foreign or colonial court to enforce a liability incurred abroad. But as against a respondent domiciled abroad, substantial justice is more likely to be attained by allowing the foreign proceedings to continue, and in such a case the court will not as a rule exercise that jurisdiction."

Not as a rule. So when can the local court intervene?

The leading case in England is *Bloom v Harms [2010] Ch 187*. There two creditors of an English company which had entered administration pursuant to an order of the High Court commenced proceedings in New York seeking judgment for sums allegedly due from the company and an attachment and garnishment of its property sufficient to answer their

claims. That claim was made without notice to the administrators and without the New York court being informed either that the High Court had made an administration order or that the charterparties under which the claims were made had exclusive London arbitration clauses. The New York court made ex parte orders attaching the property of the company within the Southern District of New York. On the same date a summons was issued naming the company as defendant, and shortly thereafter writs of attachment and garnishment were issued against the property of the company, including property held for its benefit or moving through or within the possession of several named banks. In ignorance of the attachments the administrators sought to make a substantial payment to a post-administration supplier of services to the company. An injunction was sought to prevent the New York proceedings from going forward.

First, the court held that there was no real difference, for these purposes, between administration and liquidation; the court had jurisdiction to protect the assets of a company in administration from foreign attachments and executions. Then they held that although the comity owed by the courts would normally make it inappropriate to grant injunctive relief affecting procedures in a court of foreign jurisdiction, in an exceptional case the conduct of the creditor against whom an injunction was sought, particularly if oppressive, vexatious or otherwise unfair or improper, and the circumstances of the attachment of the company's property might justify the grant of such an injunction. The creditors had behaved very badly indeed and an injunction was granted, but on the facts not all of the relief sought was in fact obtained.

The principles for the grant of such an injunction in Cayman are very similar to the principles in England & Wales. In *Reserve Management Co Inc v Branch Banking Trust Co 19 April 2010* Justice Jones said that an anti suit injunction would be granted only where the ends of justice require it, where the foreign proceedings are vexatious or oppressive or are or will be an illegitimate interference with the processes of the Cayman Islands courts. The case was one where the Defendants in the case sought to prevent determination of an issue in the Cayman court and have it tried in the Atlanta Bankruptcy Court.

Does a foreign creditor who seeks to prove in a liquidation here automatically submit to the jurisdiction for all purposes so that he may be injuncted from continuing proceedings against the company abroad? Many English cases, going back over 100 years, seem to say that the answer is yes. But in *Eurofinance v Rubin (the New Cap Re part)* Lord Collins said that submission was not automatic because ' the question whether there has been a submission is to be inferred from the facts'. The English cases are almost all cases where the applicant to prove was admitted as a creditor and in some had indeed taken a benefit from the liquidation. In the case of redeeming members of funds, depending on the fund structure such persons may not be admitted as creditors at all, but may rank behind creditors. Many wait years before knowing whether their claims are even going to be admitted or not. Is it right, in such circumstances, that they should be treated as having submitted all their claims against the company, whatever the cause of action, to the jurisdiction of the home court? In the BVI the CA says yes it is: *Shell PSF*

v Fairfield Sentry. That is going to be heard by the PC in October, I act for Shell, and we will give it our best shot.