By Adrian L. Cohen

Modified Universalism and Comity Among Nations

Adrian L. Cohen
Proskauer Rose LLP
London

Adrian Cohen is a partner in Proskauer Rose LLP's Business Solutions, Governance, Restructuring and Bankruptcy Group in London. His practice includes corporate restructuring and insolvency law, and he has more than 30 years of experience advising sponsors, debtors, lenders, commercial counterparties and insolvency officeholders.

In the 1990s, English common law, and the jurisdictions inspired and influenced by it, were at the forefront of promoting the concept of what is widely referred to as "modified universalism" in insolvency and restructuring law. British judges were well placed to influence the trajectory of common law through the jurisdiction of the Judicial Committee of the Privy Council (hereinafter referred to simply as the "Privy Council") — the tribunal of last resort for a number of Commonwealth jurisdictions — and the normative effect of their judgments through the wider corpus of common law jurisdictions.

Lord Hoffmann

Lord Leonard "Lennie" Hoffmann, a member of the House of Lords (precursor to the Supreme Court) and the Privy Council, was responsible for several judgments and decisions that shaped this area of the law. Perhaps his commitment to comity and universality reached its apogee in two decisions, one in which Lord Hoffmann delivered the judgment on behalf of the Privy Council, *Cambridge Gas Transport Corp. v. The Official Committee of Unsecured Creditors of Navigator Holdings PLC and others* (on appeal from the High Court of Justice of the Isle of Man) in 2007, and the other as a member of the House of Lords, *HIH Casualty & General Insurance Ltd. Re* in 2008.[1] Lord Hoffmann provided a clear exposition of the principle of modified universalism in his judgment in *HIH*:

> 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 U.K. 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.[2]

Universalism was never an absolute principle but was modified by considerations of public policy, which allowed for consideration of fairness and due process, and a degree of territorialism was allowed to also intrude, hence the phrase "modified universalism."

The approach of the common law was buttressed by a specific statutory provision, § 426 of the Insolvency Act 1986, requiring U.K. courts to give assistance both within the U.K. and to the courts of *designated territories* upon receipt of a letter of request, discretion to be exercised with regard to the rules of private international law. The designated territories are predominantly commonwealth territories.

Underlying this jurisprudence, there was a wider sense of where the U.K. fit in the community of nations, in part through the prism of its imperial past. As a country, the wide use of common law in commercial transactions — not only in the Commonwealth but within emerging markets (notwithstanding that in many cases they had civil law traditions) — added to the sense of purpose and the sense of confidence in a post-imperial age. These common law developments will be called "*the first limb*" of the onward march of modified universalism.

European Legislation

In parallel with these common law developments, through its membership of the European Union (EU), the U.K. became even more integrated into Europe through a plethora of European legislation seeking to establish, then enhance, the concept of a single market (and latterly the EU Capital Markets Action Plan). In the context of restructuring and insolvency, this included the European Regulation on Jurisdiction, Recognition and Enforcement of Judgments 2000 (replaced by the Recast Regulation 2012; the Brussels Regulation) and its sister, the Lugano Convention 2007; the European Regulation on Insolvency Proceedings 2000 (subsequently replaced by the Recast Regulation 2015); and European legislation on financial collateral and the winding up of credit institutions and insurance undertakings. English lawyers and insolvency practitioners were enthusiastic users of this legislation and, in the 2000s, often sought to use it to bring non-U.K.-incorporated companies within the jurisdiction of the U.K. courts by either arguing that a debtor's center of main interests (COMI) was in the U.K. or by shifting the COMI to the U.K.

1 [2008] UKPC 26, [2008] UKHL 21.
2 *Id.* at ¶ 30.

Attitudes cooled a little when the Italian courts sought to do something similar to an Irish-incorporated company in the largely Italian-incorporated Parmalat Group and sought to put it into Italian proceedings, sparking a case in 2006 that ended up in the European Court of Justice on the meaning of "COMI."[3] Again, underlying this legislation was the concept of comity and modified universalism, at least within the European context. This trend has continued with, *inter alia*, the European Directive on Preventative Restructuring Frameworks 2019.

Some of this legislation had direct application with others requiring legislation to be passed, some settling the applicable jurisdiction in any given situation and with concomitant recognition, and others for convergence of domestic legislation. These European developments will be called "*the second limb*" of the onward march of modified universalism.

The first and second limb combined to present English insolvency law as something of a bridge between international common law and European civil law. English procedures retained their standing as nimble and well established, due in part to the reputation of English courts and judges and the long history of jurisprudence. In some cases, this was enhanced by the infancy and cumbersome nature of civil law insolvency and restructuring procedures. English law now had a more-extensive basis for recognition in Europe. Paradoxically, this was particularly the case with the English law schemes of arrangement, which, whether by accident or design, avoided the categorization of an insolvency procedure and thereby stood outside European insolvency legislation, or at least arguably there was always a question as to whether they benefited from the Brussels Regulation, yet enjoyed recognition within member states.

UNCITRAL Model Law

However, there is a "*third limb*": The development of the UNCITRAL Model Law on Cross-Border Insolvency Proceedings in 1997. The U.K. and U.S. were among the first states to adopt the UNCITRAL Model Law. The U.S. did so through chapter 15 of the Bankruptcy Code in 2005, and the U.K. through the Cross-Border Insolvency Regulations 2006 (CBIR). Other EU member states were very slow to adopt the new law; even now, it has been adopted by only four members of the EU. This stands in stark contrast to an overall current tally of 58 adopting states, which might suggest that the interests of EU states in harmonizing their insolvency and restructuring laws owe more to a commitment to the single market than to a wider concept of comity or universalism.

This halcyon period of commitment to modified universalism came to an end, some would say, with the British public voting by a small margin in favor of leaving the EU (Brexit) in the 2016 referendum, rendering the U.K. no longer subject to the relevant European legislation and the jurisdiction of the European Court of Justice. Such polling suggests that Brexit was wildly unpopular among British solicitors.[4] Thus, subject to some legacy issues, the second limb has fallen away.

However, the nuances and controversies around the first and third limbs of support for modified universalism (*i.e.*, at common law and in respect of the model law) both predate Brexit and continue to this day. Nevertheless, any such discussion about the British commitment to modified universalism is now, as a practical matter, informed by the consequences of Brexit, along with the insecurities of the legal profession and related policymakers. Let's now consider the relevant issues.

Rubin and *Gibbs*

Two decisions loom large when considering where the U.K. courts are now placed with respect to modified universalism. The first is the late Victorian decision of the English Court of Appeal in *Antony Gibbs & Sons v. La Société Industrielle et Commerciale des Metaux* (1890),[5] which established the rule, and the second is the more recent decision of the English Supreme Court in *Rubin and another v. Eurofinance SA and others* (2012).[6]

The rule in *Gibbs* established that a debt may only be discharged (or varied) by the governing law of that debt. Thus, if a foreign proceeding purports to discharge a debt, and the governing law of that debt does not recognize such a discharge, then as far as the English courts are concerned, such a discharge is ineffective. The exception is where the creditor is present in or submits to the jurisdiction of the foreign proceeding. In practice, from an English perspective, this is most relevant to foreign composition proceedings and English law-governed debt.

Arguments have been developed that recognition of foreign proceedings under the UNCITRAL Model Law on insolvency and, in particular, Article 21 of the CBIR, which confers discretion on the courts to provide assistance with respect to foreign proceedings, effectively overreached the rule in *Gibbs*. This means that the English courts should be able to recognize, by way of a permanent injunction, the effects of a foreign law composition as can be done in the equivalent situation in the U.S. under chapter 15. However, it was established by the Court of Appeal in *Re OJSC International Bank of Azerbijan; Bakhshiyeva v. Sberbank of Russia & Ors*. (2018)[7] that proceedings under the CBIR can only be used to provide procedural assistance to foreign law proceedings — not to give effect to such proceedings in a way that varies substantive English law rights. In summary, the CBIR cannot be used in a way that circumvents the rule in *Gibbs*.

In *Rubin*, the Supreme Court used the opportunity to roll back on the jurisprudence of *Cambridge Gas*. The notion that insolvency or bankruptcy law, when it comes to recognition of insolvency-related judgments, is *sui generis* due to the principles of modified universalism, and not subject to the usual rules of private international law governing recognition and enforcement of foreign judgments, was disavowed. Likewise, Article 21 of the CBIR could not be used to recognize foreign insolvency-related judgments. The case was heard together as *Re New Cap Reinsurance Corp. (in liq-*

3 *Eurofood IFSC Ltd.*, C-341-04, ECLI: EU C 2006 281 (ECJ May 2, 2006).
4 *The Lawyer*, Jan. 17, 2018. As a matter of fact, 82 percent of U.K.-based lawyers voted to remain in the EU in the referendum.
5 (1890) 25 Q.B.D. 399 CA.
6 [2012] UKSC 46.
7 [2018] EWCA Civ 2802.

continued on page 67

from page 37

uidation), which confirmed that where a party submits to the foreign jurisdiction (*e.g.*, by filing a proof in the foreign insolvency proceedings), the English courts can then give effect to those proceedings.

To these cases can be added the Privy Council decision in *Singularis Holdings Ltd. v. PricewaterhouseCoopers* (2014),[8] on appeal from the Court of Appeal of Bermuda, as to whether Cayman Island-appointed liquidators could seek relief under Bermudan common law to compel an auditor to disclose material belonging to it pertaining to the company in liquidation. In refusing the appeal of the liquidators, the Privy Council disavowed any notion in *Cambridge Gas* that the court had jurisdiction over parties simply by virtue of its power to assist.

The rule in *Gibbs* has had a mixed reception internationally. In *In re Agrokorr d.d., et al.* (2018),[9] Hon. **Martin Glenn** of the U.S. Bankruptcy Court for the Southern District of New York stated that it "remains the governing law in England despite its seeming incongruence with the principle of modified universalism espoused by the model law and a broad consensus of international insolvency practitioners and jurists." The courts in Singapore have abandoned the rule in *Gibbs*.

In July 2022, the U.K. government commenced a consultation on two new UNCITRAL Model Laws adopted by the commission: one on Recognition and Enforcement of Insolvency-Related Judgments, and another on Enterprise Group Insolvency.[10] These are expressed to be complimentary to the existing Model Law on Cross-Border Insolvency Proceedings. The U.K. government considers itself to be among the first states to consider the new model laws, but the consultation is now closed.

In relation to the Model Law on Recognition and Enforcement, two approaches are the adoption of an extensive draft model law, or the adoption of a new article (called "Article x"), which clarifies that Article 21 of the existing Model Law provides the courts with the discretion to recognize and enforce a judgment. Because it remains subject to the court's discretion, the consultation paper argues that the provisions cannot be used to cut across the rule in *Gibbs* but will rather deal with the jurisdictional issues raised by *Rubin*. However, not everyone accepts that this will be the outcome.

It is sometimes said that the genius behind humanity's success is the ability to hold two contradictory notions at the same time. What seems reasonably clear is that in this post-Brexit world, in terms of the U.K.'s own self-image, it still sees itself at the cutting edge of progressive development with respect to comity and modified universality, hence the desire to push ahead with the new model laws. At the same time, there is great hesitancy to compromise on the notion that other jurisdictions should be able to vary or discharge English law-governed rights.

Conclusion

In some respects, these two positions can be harmonized. Unmodified universalism is a fantasy, but it is the modified part that is the most interesting. Every state will bring its own priorities to the party. For EU member states, it is the emergent single market that is all important. For the U.S., its more liberal approach to the recognition of the insolvency proceedings of other jurisdictions may reflect its wider commitment to a rules-based international order, which has helped underpin its own international standing. For the U.K., in a period of insecurity regarding its place in the world, and of relative decline, it is the instinct to protect the wide and enduring acceptance of English law throughout much of the world as the basis for international trade and its legacy in any number of common law jurisdictions. The rule in *Gibbs* is not just a parochial concern of English insolvency lawyers; it speaks to something much deeper. abi

8 [2014] UKPC 36.
9 591 B.R. 163 (Bankr. S.D.N.Y. 2018).
10 This will not be addressed in this article, although significant elements of it provide for comity and universalism.