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A GOLDEN THREAD ON THE RED DOT

Modified Universalism and the Law on Cross-border Insolvency in Singapore

"Everything has its limit – iron ore cannot be educated into gold." Mark Twain's words are an apt description of the court's powers in facilitating cross-border insolvency. However, that "golden thread" of modified universalism has lost its lustre in the UK ever since the Supreme Court's controversial decision in *Rubin v Eurofinance SA* [2013] 1 AC 236. In Singapore, the thread continues to flourish, and the potential for its development may well be limitless. This article surveys the existing case law in Singapore and considers the common law's role in the brave new world of cross-border insolvencies.

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I. Introduction

1 In resolving disputes arising out of international trade, national courts must mediate the tensions between the borderless nature of international trade and the territorial limits that delineate the domestic courts' authority.[2]

2 Such tensions manifest particularly in the area of cross-border insolvency. Whether natural persons or corporate bodies are concerned, either may have assets or operations spread across multiple jurisdictions. If they become bankrupt or insolvent, the insolvency officeholder and

1 The author is particularly grateful to Associate Professor Adeline Chong, Rabin Kok, Marcus Teo and the anonymous reviewer for their helpful comments on earlier drafts of this article. The law is stated as of 1 April 2023. All views expressed are in the author's personal capacity and all errors remain his own.

2 V K Rajah, "Judicial Dynamism in International Trade in Hong Kong and Singapore – An Indivisible Link" (2010) 40 *Hong Kong Law Journal* 815 at 821.

the aggrieved creditors must consider the effect of one jurisdiction's insolvency proceedings on other states.[3]

3 In this regard, it is relevant to examine how the courts exercise the concept of modified universalism as a juridical basis in the common law to facilitate international insolvency proceedings. In Singapore, the courts have taken a clear endorsement and approval of the principle of modified universalism. Yet, it remains to be seen how far the courts would apply this principle, particularly in such troubling economic times.

4 This article will be split into four parts. Part II briefly introduces the theoretical concept of modified universalism. Part III sets out a brief overview of Singapore's judicial philosophy in cross-border insolvency law. Part IV then closely examines how the Singapore courts have invoked the principle of modified universalism and critiques the court's application in these cases. Finally, Part V sets out this author's general observations on the future of this principle in Singapore.

II. Introducing the principle of modified universalism

5 To understand the principle of modified universalism, we first explain a pair of antithetical propositions on the effect of insolvency proceedings opened under the law of a given state.[4] The first theoretical proposition is "universalism". The central concept of universalism is that the debtor's assets should be collected and distributed on a worldwide basis in a single judicial proceeding.[5] For its proponents such as Professor Westbrook, the key argument is that it is impossible to maximise value for creditors without a unified regime for realising the debtor's assets under a common scheme.[6]

6 This is contrasted with the doctrine of "territorialism" where the administration of insolvency is confined to each territorial jurisdiction,[7] and that such proceedings are restricted to assets within that particular

3 Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell, 2016) ("LC Ho") at para 4.01; Andrew Keay & Peter Walton, *Insolvency Law: Corporate and Personal* (Jordan Publishing, 4th Ed, 2017) at para 25.1.

4 Readers interested in a more detailed but easily understandable exposition of the theoretical debates are referred to Wee Meng Seng, "Lessons for the Development of Singapore's International Insolvency Law" (2011) 23 SAcLJ 932.

5 *Cross-Border Insolvency* (Richard Sheldon QC gen ed) (Bloomsbury, 4th Ed, 2017) at para 6.4.

6 Jay Lawrence Westbrook, "A Global Solution to Multinational Default" (2000) 98 Mich L Rev 2276.

7 Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018) at p 4.

jurisdiction and local creditors.[8] For territorialists, the fundamental problem with universalists is that the concept of universalism is politically implausible. The imposition of foreign law and foreign courts on domestic relationships may confuse local creditors and be detrimental to the rights and priorities they acquired under their own laws.[9]

7 Over the years, there has been a convergence of these competing theories, with modified universalism emerging as the prevailing principle. On one hand, one must recognise that pure territorialism is insular and anachronistic in an interconnected world. On the other hand, pure universalism is merely a theoretical construct that does not reflect real-world conditions. The global economy operates within nation-states. Adopting a pure form of universalism allows a foreign state's policies to override the state's own policies in such areas.[10] Different countries also have varying degrees of homogeneity in their insolvency laws.[11] Hence, universalism is "modified" to accommodate these socio-political realities since each court retains its discretion to refuse co-operation where it is inconsistent with the country's justice and public policy.[12]

8 Hence, the principle of modified universalism is defined by Lord Hoffmann in the seminal House of Lords decision of *In Re HIH Casualty and General Insurance Ltd*[13] ("*HIH*") as follows:

> 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 of the company's assets are distributed to its creditors under a single system of distribution.

8 Adeline Chong, "Recognition of Foreign Judgments and Cross-border Insolvencies" (2014) LMCLQ 241 at 255. See also Gerard McCormack, "Universalism in Insolvency Proceedings and the Common Law" (2012) 32(2) OJLS 325.

9 See for instance, Frederick Tung, "Is International Bankruptcy Possible?" (2001) 23 Mich J Intl Law 31 and Lynn LoPucki, "The Case for Cooperative Territoriality in International Bankruptcy" (2000) 98 Mich L Rev 2216.

10 Adeline Chong, "Recognition of Foreign Judgments and Cross-border Insolvencies" (2014) LMCLQ 241 at 256.

11 Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018) at pp 13–14.

12 Adeline Chong, "Recognition of Foreign Judgments and Cross-border Insolvencies" (2014) LMCLQ 241 at 257.

13 [2008] 1 WLR 852 at [30].

9 The basis of modified universalism, according to Lord Sumption in the UK Supreme Court's ("UKSC") decision in *Singularis Holdings Ltd v PricewaterhouseCoopers* ("*Singularis*"), is:[14]

> … not only comity, but 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.

10 However, modified universalism is not a unified theory with a universally-agreed set of characteristics. In fact, as a theory itself, the principle of modified universalism has different variations.[15] For instance, Professor Walters drew a distinction between a "centralising" version of modified universalism espoused in the US, where judges are expected to defer to the law of the foreign insolvency proceedings, and contrasted it with a "co-ordinating" version of modified universalism in the UK, which supports effective co-ordination of insolvency proceedings without an express commitment to the aspirations of universalism.[16]

11 Until the theoretical foundations of modified universalism are well and truly settled, it may be easier to conceptualise the principle of modified universalism as not so much a true theoretical principle, but more of an uneasy compromise between a puritanical pursuit for universality, and the practical need to recognise the sovereignty and territoriality of jurisdictions.[17] Hence, when a court has to decide whether the principle of modified universalism applies in common law, what it does in reality is not so much about determining the scope of a true principle, but determining the true content of this pragmatic compromise.[18]

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14 [2015] 2 WLR 971 at 986.

15 Adrian Walters, "Modified Universalisms & The Role of Local Legal Culture in the Making of Cross-border Insolvency Law" (2019) 93(1) *American Bankruptcy Law Journal* 47 at 53.

16 Adrian Walters, "Modified Universalisms & The Role of Local Legal Culture in the Making of Cross-border Insolvency Law" (2019) 93(1) *American Bankruptcy Law Journal* 47 at 53.

17 See *Re Global Brands Group* [2022] HKCFI 1789 at [24]. See also Sundaresh Menon CJ, "The Future of Cross-border Insolvency: Some Thoughts on a Framework Fit for a Flattening World", keynote address at the 18th Annual Conference of the International Insolvency Institute (25 September 2018) at para 22, where His Honour considered it a "principled way of ensuring as much broad consistency as we need and are going to get in a world of competing sovereigns, while accommodating the legitimate interests of each sovereign".

18 See Kah-Wai Tan, "All that Glisters is not Gold? Deconstructing *Rubin v Eurofinance SA* and its Impact on the Recognition and Enforcement of Foreign Insolvency Judgments at Common Law" (2020) 16(3) *Journal of Private International Law* 465 at 469–474.

12 This leads us to ask a more important question – what is the true content of this pragmatic compromise? There are two contrasting visions of the principle of modified universalism. The first vision suggests that the principle is merely a broad aspirational statement that the courts should co-operate with the court of the foreign insolvency liquidation, to facilitate a single collective insolvency process as far as possible. Based on this viewpoint, the court's powers to change the rules of private international law is significantly limited. It is only meant to facilitate co-operation and nothing more. In more graphic terms, the golden thread of "modified universalism" is one that is "thin" in its substance. By contrast, the other school of thought is that the principle of modified universalism is not so much an aspirational statement, but a toolkit of solutions that adjusts the rules of private international law to provide for an optimal system for cross-border insolvencies.[19] This is what one considers a "thick" strand of modified universalism.[20]

III. The prevailing judicial philosophy in Singapore

13 Before we consider which strand of modified universalism is applied in Singapore, it is important to examine the prevailing judicial philosophy for cross-border insolvency law here. As Professor Walters wisely observed, judicial authority is constrained by legal frameworks and cultures. These very cultures do prominently exert a gravitational force when judges encounter difficult cases.

14 As a starting point, it is apposite to consider the Court of Appeal's decision of *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd*[21] ("*Beluga*"). This was a case that concerned, *inter alia*, 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 Singaporean subsidiary's unsatisfied judgment debt.

15 The Court of Appeal first considered that the question of remittal of assets was based on the common law since the now-defunct ringfencing provisions in s 377(3)(*c*) of the Companies Act[22] did not apply to Beluga because it was not a company that was obliged to register under s 368(1).

19 Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018) at pp 14–15.

20 Kah-Wai Tan, "All that Glisters is not Gold? Deconstructing *Rubin v Eurofinance SA* and its Impact on the Recognition and Enforcement of Foreign Insolvency Judgments at Common Law" (2020) 16(3) *Journal of Private International Law* 465 at 469–474.

21 [2014] 2 SLR 815.

22 2006 Rev Ed.

Hence, the issue must be decided on the basis of the common law's ancillary liquidation doctrine, which gave the courts the power to order the local liquidator to remit the assets that are gathered in locally to the principal place of liquidation.[23]

16 The court considered two separate approaches towards the ancillary liquidation doctrine, as gleaned from *HIH*. The more conventional approach, as espoused by Lord Scott of Foscote, was that the courts in exercising their powers under the common law ancillary liquidation doctrine had no discretion to remit assets to a foreign jurisdiction such that it effectively disapplies a statutory insolvency regime or deprive creditors of any of their statutory rights.[24] The other approach considered was Lord Hoffmann's view in *HIH*, that the courts had a discretion premised on the principle of modified universalism to order assets collected locally in the ancillary liquidation to be remitted to the liquidators regardless of any statutory provision.[25]

17 It is interesting to point out that the Court of Appeal expressed no explicit opinion on whether Lord Hoffmann was correct, instead preferring to reserve their opinion for a future decision in the absence of clear authority.[26] The court then suggested that on the facts of this case, since the Singapore subsidiaries of the German company were unsecured creditors and enjoyed no priority under the statutory insolvency scheme, there was no question as to whether the statute can be disapplied or not. The court took the view that regardless of which approach was taken, the ancillary liquidation doctrine could result in remittal being ordered.

18 If we simply view the Court of Appeal's decision on the ancillary liquidation doctrine alone, then it is questionable whether *Beluga* is a ringing endorsement of the principle of modified universalism since it reserved its opinion on whether Lord Hoffmann's approach represents what the common law ought to be.

19 However, things got more interesting when the Court of Appeal considered one of counsel's submissions – 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

23 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [58].

24 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [70].

25 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [73].

26 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [76].

debts and liabilities. Counsel's submission appeared to rest on the territorialist ideology of prioritising local debts over foreign debts.

20 The Court of Appeal rejected this argument on the basis that there was nothing in the development of the ancillary liquidation doctrine to suggest that a statutory scheme on priority can be applied by analogy under the common law doctrine to situations that have not been contemplated by Parliament.[27]

21 In a telling excerpt, Menon CJ further explained that: "Moreover, any impetus as presently exists is towards universalism rather than to favour local creditors or to confer a preference on locally incurred debtors."[28]

22 The court ultimately noted that most courts recognised that it is desirable and practical for a universal collection and distribution of assets; creditors should not be able to gain an unfair priority by an attachment of execution on assets that are located within the court's jurisdiction subsequent to a winding up order made overseas.[29]

23 Hence, it can be seen from the above excerpts of the Court of Appeal's decision in *Beluga* that it has largely endorsed the principle of modified universalism.

24 The Singapore judiciary's favour of this principle of modified universalism and disdain of territorialism can also be gleaned through various extra-judicial speeches. One of the notable advocates for a universalist approach is the Honourable Judge of the Appellate Division Justice Kannan Ramesh, a respected insolvency lawyer himself prior to his elevation to the bench. In an illuminating extra-judicial speech,[30] His Honour highlighted that the majority of insolvency laws were formulated for a purely domestic context and are ill-suited to address the modern reality of cross-border insolvencies, where the failure of multi-national

27 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [80].

28 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [80].

29 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [99].

30 Kannan Ramesh JC, "Cross-border Insolvencies: A New Paradigm", speech at the International Association of Insolvency Regulators Annual Conference and General Meeting 2016 (6 September 2016).

corporations would invoke the insolvency processes of multiple jurisdictions.[31]

25 Ramesh J then expressed his firm view that while it would be ideal for legislatures to implement national legal frameworks and laws that facilitate cross-border insolvencies, the courts do have an "immense responsibility" in developing a coherent set of principles for regulating cross-border insolvencies.[32] His Honour then cited *Re Opti-Medix Ltd*[33] ("*Re Opti-Medix*") (a decision which we will discuss in greater length shortly) as reflective of the judicial philosophy of recognising and assisting foreign insolvency proceedings where this is in line with local legislation and where such assistance makes practical and commercial sense. His Honour then noted that such a philosophy is "consonant" with Singapore's embracing of judicial comity to achieve efficient administration of cross-border insolvencies.[34]

26 Hence, in light of the above, it is patently clear that the courts here in Singapore will be heavily inclined towards facilitating cross-border restructurings rather than allowing arguments of territoriality to hamper them. Any argument rooted on territorialism needs to carry significant weight before a court can be persuaded on its merits.

IV. The application of modified universalism in Singapore courts

27 It is true that the Singapore courts do have a "strong impetus" towards universalism in their judicial philosophy.[35] However, the real question remains: How do the courts apply the principle of modified universalism in common law? Notwithstanding the Court of Appeal's ringing endorsement of the principle of modified universalism in *Beluga*, it did not have the opportunity to closely examine or delineate the contours of said principle. In this section, we consider how the Singapore courts applied this principle in various topics on cross-border insolvency law.

31 Kannan Ramesh JC, "Cross-border Insolvencies: A New Paradigm", speech at the International Association of Insolvency Regulators Annual Conference and General Meeting 2016 (6 September 2016) at para 11.

32 Kannan Ramesh JC, "Cross-border Insolvencies: A New Paradigm", speech at the International Association of Insolvency Regulators Annual Conference and General Meeting 2016 (6 September 2016) at para 24.

33 [2016] 4 SLR 312.

34 Kannan Ramesh JC, "Cross-border Insolvencies: A New Paradigm", speech at the International Association of Insolvency Regulators Annual Conference and General Meeting 2016 (6 September 2016) at para 28.

35 Kannan Ramesh JC, "The *Gibbs* Principle – A Tether on the Feet of Good Forum Shopping" (2017) 29 SAcLJ 42 at para 78.

A. Recognition of discharge of foreign debts

28 A key issue in cross-border insolvency law is the effect of a national court's jurisdiction over debts that were incurred pursuant to a contract entered between the insolvent entity and an overseas contracting party.

29 The traditional and conventional English position was set out in *Antony Gibbs & Sons v La Societe Industrielle et Commerciale Des Metaux*[36] ("*Gibbs*"). In *Gibbs*, the English Court of Appeal held that a discharge of a debt is not effective unless it is in accordance with the law governing the debt. Therefore, if a debt was discharged in French bankruptcy proceedings, that discharge cannot operate as a discharge in respect of a contract made in England, even if the defendants were domiciled in France.[37]

30 In essence, the *Gibbs* rule prevents a local court from recognition of foreign court decisions if the effect is to discharge debts that are governed by the laws of the local jurisdiction.

31 The *Gibbs* rule is criticised by judges and academics for various reasons. First, it leads to the unhappy and inefficient consequence of companies having to conduct parallel restructurings or other arrangements to achieve an effective compromise when the debtor has multiple obligations governed by different laws.[38] Second, as a rule based on territorialism, it does not sit easily with the principle of modified universalism, since the recognition of discharging a foreign debt is limited by the governing law of the debt itself.[39] As Professor Ian Fletcher QC pointed out, if the *Gibbs* position was correct, "then English private international law in this respect is insular and xenophobic to the extreme, and is plainly guilty of maintaining dual standards with regard to the principle of universality of bankruptcy".[40] Third, when parties enter into contracts, they would expect that a single law closely associated with

36 (1890) 25 QBD 399.

37 *Antony Gibbs & Sons v La Societe Industrielle et Commerciale Des Metaux* (1890) 25 QBD 399 at 411, *per* Lopes LJ.

38 *Cross-Border Insolvency* (Richard Sheldon QC gen ed) (Bloomsbury, 4th Ed, 2017) at para 3.110.

39 *Cross-Border Insolvency* (Richard Sheldon QC gen ed) (Bloomsbury, 4th Ed, 2017) at para 13.10.

40 Ian Fletcher QC, *The Law of Insolvency* (Sweet & Maxwell, 5th Ed, 2017) ch 29, at para 29-066, but *cf*, Henderson LJ's judgment in *Bakhshiyeva v Sberbank of Russia* [2018] EWCA Civ 2802 at [30] where His Lordship opined that the charge appears unfair since a court would still have recognised the effect of the restructuring if the relevant contracts were governed by Azeri as opposed to English law.

a party should govern the rights of its creditors, regardless of where the assets are situated and its proper law of the contract.[41]

32 The question of whether the *Gibbs* rule applied arose in the Singapore High Court's decision of *Re Pacific Andes Resources Development Ltd*[42] ("*Andes*"). This was a case involving a group of foreign companies that filed applications under s 210(10) of the Companies Act[43] for a moratorium against proceedings brought or to be brought against them by their creditors in Singapore. It is notable that the debts incurred were subject to Hong Kong law. Hence, counsel argued that the *Gibbs* principle applied, such that the Singapore courts should not assume jurisdiction over the applications since the debts were governed by Hong Kong law.

33 The Singapore High Court dismissed this argument. Kannan Ramesh JC cited with approval Look Chan Ho's critique that the *Gibbs* principle was philosophically incompatible and practically irreconcilable with the UNCITRAL Model Law on Cross-Border Insolvency ("Model Law"). Ramesh JC favoured a reformulation of the *Gibbs* principle that was suggested by the late Professor Fletcher. The reformulated rule was as follows – the court is not barred from exercising jurisdiction even if a debt is not subject to Singapore law or the Singapore courts' jurisdiction. However, the claimant or applicant must still show a sufficient nexus or that the assets are within jurisdiction.

34 In Ramesh JC's view, the reformulation is "an important and timely step in the global insolvency landscape" because to adhere to the traditional *Gibbs* principle would be to discourage "good forum shopping" – which essentially is when the debtors seek to resort to the law of a particular jurisdiction to achieve the best possible outcome for creditors[44] (as opposed to seeking a different jurisdiction to evade debts).

B. Recognition of foreign insolvency proceedings

35 In cross-border insolvency law, one important issue is the courts' recognition of foreign insolvency proceedings. In this context, recognition concerns acknowledging and confirming the status of a foreign insolvency process and officer.[45] This is because requiring foreign office-holders to commence parallel proceedings is said to be the "very

41 See *Bakhshiyeva v Sberbank of Russia* [2018] EWCA Civ 2802 at [31].
42 [2018] 5 SLR 125.
43 2006 Rev Ed.
44 *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch) at [17]–[18].
45 See *Re Global Brands Group Holding Limited* [2022] HKCFI 1789 at [15].

antithesis" of cross-border insolvency co-operation.[46] The purpose of recognition is therefore to enable the foreign office holder to avoid commencing parallel proceedings and to gain access to remedies which they may be entitled to if equivalent proceedings had taken place in the domestic forum.[47]

36 Prior to the advent of the Model Law, recognition of foreign insolvency proceedings by the Singapore courts was based on the common law. In *Re Taisoo Suk*[48] the foreign representative of Hanjin Shipping Co Ltd, a Korean company, had 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.

37 Abdullah JC considered that the Court of Appeal's observations in *Beluga* to recognise foreign winding up proceedings and render assistance to them by regulating its own proceedings, would apply equally to other forms of foreign insolvency proceedings such as restructuring and rehabilitations. His Honour considered that an orderly collection and distribution of all available assets to creditors would be to the ultimate benefit of all creditors, but so too would an orderly marshalling and compromise or arrangement in respect of restructuring and rehabilitation.[49]

38 Abdullah JC granted the interim orders sought and emphasised that the imperative of orderly restructuring of companies with business operations spanning multiple jurisdictions could amount to strong grounds for the courts to exercise their inherent powers to grant such interim orders.

39 As a side note, *Re Taisoo Suk* is not without its critics, in particular because the court's decision does not sit easily with the trite principles of admiralty law.[50] In that case, the court's recognition of the Korean rehabilitation orders involved not just the restraint of all pending

46 *Re Da Yu Financial Holdings* [2019] HKCFI 2531 at [49].
47 *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 at [22].
48 [2016] 5 SLR 787.
49 *Re Taisoo Suk* [2016] 5 SLR 787 at [16].
50 See the Honourable Justice Belinda Ang's extra-judicial paper, "Arrest and Cross-border Insolvency: The Singapore Experience" in *The Arrest Conventions: International Enforcement of Maritime Claims* (Paul Myburgh ed) (Hart Publishing, 2019) at pp 207–208. See also Toh Kian Sing SC & Chan Leng Sun SC "Admiralty and Shipping Law" (2016) 17 SAL Ann Rev 51 at paras 2.37–2.40.

lawsuits, but also the restraint of admiralty *in rem* proceedings by barring the arrests of vessels.

40 In this regard, there are two levels by which *Re Taisoo Suk* may be criticised. First, it goes against the long-established principles of admiralty law that the commencement of insolvency proceedings does not preclude or stop the issuance of *in rem* proceedings or ship arrests. This is simply because the filing of an *in rem* writ is against the *res* and not the shipowner,[51] and its effect is to create a security interest (*ie*, the statutory lien).[52] A debtor's insolvency does not defeat a plaintiff's claim or the granting of an *in rem* judgment. To rule otherwise deprives a claimant of the advantage of pursuing an *in rem* action which is to provide a prejudgment security for its claim before an *in rem* judgment is obtained.[53] Second, concerns were also expressed over whether it was appropriate for the court to disregard the operation of the High Court (Admiralty Jurisdiction) Act,[54] a statute that is significant to Singapore's shipping interests, just to simply support the Korean rehabilitation orders.[55] Since then, Parliament has clarified the legal position by re-enacting the scheme moratorium as s 64 of the Insolvency, Restructuring and Dissolution Act 2018[56] ("IRDA"). In particular, s 64(12)(*e*) of the IRDA read together with reg 4 of the Insolvency, Restructuring and Dissolution (Prescribed Arrangements and Proceedings) Regulations 2020[57] now provides that admiralty proceedings[58] can be commenced notwithstanding a moratorium order under s 64(1) of the IRDA nor the automatic moratorium period under s 64(8) of the IRDA.

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51 *The Kusu Island* [1989] 2 SLR(R) 267 at [32].

52 See *The Ocean Winner* [2021] 4 SLR 526 where Ang Cheng Hock J held at [71] that the plaintiffs' filing of admiralty *in rem* writs against the ships without leave of court while there was a subsisting moratorium under s 211B(8)(*c*) of the Companies Act (2006 Rev Ed) was permissible as it did not amount to commencement of proceedings against the company under that section. Although it is difficult to understand why the filing of an *in rem* writ is not commencement of *in rem* proceedings – see Tan Siew Chi & Koh Thiam Kwee, "Reconciling the Tension between Insolvency Law and Admiralty *In Rem* Claims – *The Ocean Winner* [2021] 4 SLR 526" [2021] SAL Prac 25 at paras 13–14.

53 See Karthigesu JA's judgment in the Court of Appeal's decision of *Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 2 SLR(R) 793 at [33].

54 2001 Rev Ed.

55 Colin Liew, "To Infinity and Beyond: Where to Next for the Court's Inherent Powers" *Singapore Law Blog* (3 October 2016) <https://singaporelawblog.sg/blog/article/171> (accessed 18 April 2023).

56 Act 38 of 2018.

57 S 615/2020.

58 "Admiralty proceedings" is defined as meaning "any proceedings in which the admiralty jurisdiction of the General Division of the High Court under section 3 of the High Court (Admiralty Jurisdiction) Act (Cap 123) is invoked by an action *in rem* brought against a ship under section 4(2), (3) or (4) of that Act".

41 We now remove ourselves from the seas and turn to another decision on the recognition of foreign insolvency proceedings. In the High Court's decision of *Re Opti-Medix*,[59] the applicant applied for the recognition of Japanese insolvency proceedings and of his appointment as bankruptcy trustee in Japan so as to ascertain and administer the companies' assets in Singapore. Abdullah JC allowed the application and considered that "there has been a general movement away from the traditional, territorial focus on the interests of local creditors, towards recognition that universal cooperation between jurisdictions is a necessary part of the contemporary world".[60]

42 However, the common law's role is now more circumscribed with Singapore in 2017 being a signatory to the Model Law which gives parties a statutory avenue to recognise foreign insolvency proceedings.

43 Article 17 of the Model Law, which has the force of law in Singapore by virtue of s 252(1) of the IRDA read together with the Third Schedule of the IRDA, allows creditors and insolvency office-holders the opportunity for foreign insolvency proceedings to be recognised and given effect to by the Singapore courts.

44 The Model Law reflects the aims of universalism in cross-border insolvency since it seeks to have the debtor's worldwide assets be collected and distributed in a single judicial proceeding by promoting co-operation between the courts of various states, without basing the recognition of the insolvency proceedings on mutual reciprocity.

45 As such, the presence of the statutorily enacted Model Law means that there is very little room for the courts to use the principle of modified universalism to recognise foreign insolvency proceedings. This was a point made by the High Court in *Re Rooftop Group International Pte Ltd*[61] ("*Re Rooftop*"). In *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.

46 Abdullah J 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, His Honour stated as follows:[62]

59 *Re Opti-Medix Ltd* [2016] 4 SLR 312.
60 *Re Opti-Medix Ltd* [2016] 4 SLR 312 at [18].
61 [2020] 4 SLR 680.
62 *Re Rooftop Group International Pte Ltd* [2020] 4 SLR 680 at [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. [emphasis added]

47 In this regard, Abdullah J's view is certainly correct. Article 17 of the Model Law is broadly phrased that even if the foreign insolvency proceedings do not take place in the state where the debtor corporation has its centre of main interests, it would still be recognised as a foreign non-main proceeding so long as the foreign proceeding takes place in a state where the debtor has a place of operations where he carries out a non-transitory economic activity with human means and goods or services. In this sense, it is indeed difficult to see why the courts would need to exercise the common law powers to recognise foreign insolvency proceedings when it falls outside the scope of the Model Law, given that the foreign debtor's presence in that foreign state is said to be transitory.

C. Recognition of foreign insolvency judgments

48 In contrast to the issue of recognising foreign insolvency proceedings, the issue of whether the principle of modified universalism can apply to foreign insolvency judgments is more controversial.

49 The law on this specific area was previously in a state of stagnant development. This can be traced to the controversial UKSC decision of *Rubin v Eurofinance SA*[63] ("*Rubin*"). In that decision, Lord Collins, delivering the majority's decision, held that for reasons of policy and principle, the traditional rules as set out in Dicey's Rule 43[64] would apply to foreign insolvency judgments, and that there can be no *sui generis* rule for such judgments based on the doctrine of modified universalism.

63 [2013] 1 AC 236.

64 For the uninitiated reader, Dicey Rule 43 is a rule at common law where a court recognises and enforces *in personam* judgments under four categories. First, where the party against whom judgment was given was present at the foreign country when proceedings have commenced. Second, where the party was a claimant or counterclaimant in the foreign court proceedings. Third, the party voluntarily appeared in the foreign proceedings. Last, where the party agreed to submit to the court's jurisdiction. See *Rubin v Eurofinance SA* [2013] 1 AC 236 at [7].

50 The consequence of the *Rubin* decision was such that modified universalism can only be used as a basis to assist foreign insolvency proceedings but it is not expansive enough to be used as a basis for recognising foreign insolvency judgments.

51 *Rubin* was widely criticised.[65] These objections are distilled into the following grounds.[66] First, it is questionable whether the traditional rules in Dicey's Rule 43 were meant to be applicable to international corporate insolvencies, given that it only arose in the early 19th century, and was not intended to apply to insolvent foreign companies in the first place.[67] Second, the application of Dicey's Rule 43 is out of tune with present-day needs in a globalised world where parties can engage in significant transactions across frontiers without ever having to establish traditional forms of "presence" or "submission".[68] Third, the policy objections that Lord Collins espoused do not justify why the courts should refrain from making the law altogether when there is clearly a legal lacuna in enforcing foreign insolvency judgments.[69]

52 The Singapore courts notably adopted a negative view of the narrow reasoning by Lord Collins in *Rubin*. One such case is the Singapore High Court's decision of *Re Opti-Medix*.[70]

53 While, strictly speaking, this was a case involving the recognition of foreign insolvency proceedings as opposed to judgments, in this case, the court disagreed with Lord Collins' opinion in *Rubin* that it is for the Legislature to introduce a new basis for recognising insolvency proceedings, and held that "the development of the common law should

65 See for instance Ian Fletcher, *The Law on Insolvency* (Sweet & Maxwell, 5th Ed, 2017) ch 28, at para 28-032 and Gabriel Moss & Ian Fletcher, "A *Saad* Affair" (2015) 28(4) Insolv Int 49.

66 See Kah-Wai Tan, "All that Glisters is not Gold? Deconstructing *Rubin v Eurofinance SA* and its Impact on the Recognition and Enforcement of Foreign Insolvency Judgments at Common Law" (2020) 16(3) *Journal of Private International Law* 465 at 475–478.

67 See Kah-Wai Tan, "All that Glisters is not Gold? Deconstructing *Rubin v Eurofinance SA* and its Impact on the Recognition and Enforcement of Foreign Insolvency Judgments at Common Law" (2020) 16(3) *Journal of Private International Law* 465 at 476.

68 Ian Fletcher QC, "Rowing back from *Rubin*: The Court of Appeal Reaffirms the Policy of Modified Universalism in the Granting of Judicial Assistance" (2014) 27(3) Insolv Int 43 at 44.

69 See Kah-Wai Tan, "All that Glisters is not Gold? Deconstructing *Rubin v Eurofinance SA* and its Impact on the Recognition and Enforcement of Foreign Insolvency Judgments at Common Law" (2020) 16(3) *Journal of Private International Law* 465 at 479–480.

70 *Re Opti-Medix Ltd* [2016] 4 SLR 312.

not be so constrained".[71] The court then held that the recognition of the Tokyo order could be justified on the "bases of not only comity but also of business practicality".[72] Hence to hinder the orderly dissolution of the companies in Japan served no practical purpose since there was already an undertaking by the foreign liquidator that all preferential debts and other debts in Singapore would be paid before any such funds be remitted out of Singapore.

54 *Re Opti-Medix* is interesting for a few reasons. Firstly, the High Court's rejection of Lord Collins' reasoning suggests that there can be a *sui generis* basis for recognising and enforcing foreign insolvency judgments. In other words, there is the possibility that a foreign liquidator or insolvency office-holder need not be required to satisfy the court that the judgment falls within the stipulated situations in Dicey's Rule 43. Secondly, not only did the High Court think that the recognition of the foreign insolvency judgment is not restrained by the common law rules, it can be enforced on the basis of "comity" or "practicality". This reflects a patently different judicial philosophy from the one adopted by the majority in *Rubin*.[73]

55 The High Court's liberal approach in *Re Opti-Medix* must be contrasted with its decision in *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK*[74] ("*Humpuss*"). *Humpuss* concerned an application to strike out the liquidators' claim commencing action in Singapore to set aside transactions and recover inter-company loans. The defendant company had sought to strike out the action for being an "abuse of process of the Court" under O 18 r 19(1)(*d*) of the old Rules of Court 2014.[75] The defendant had sought to prove that there was an abuse of process by virtue of the fact that there was a homologation judgment in Indonesia where the court had approved a composition plan to its creditors to restructure its debts and reorganise its business operations.

56 The court in *Humpuss* dismissed the claims since it could not be said that the subject matter of the liquidator's claims had been included in the composition plan.[76] What was more interesting, however, was

71 *Re Opti-Medix Ltd* [2016] 4 SLR 312 at [21].
72 *Re Opti-Medix Ltd* [2016] 4 SLR 312 at [26].
73 Kannan Ramesh JC, "Cross-border Insolvencies: A New Paradigm", speech at the International Association of Insolvency Regulators Annual Conference and General Meeting 2016 (6 September 2016) at paras 27–28.
74 [2016] 5 SLR 1322.
75 2014 Rev Ed.
76 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [45]–[56].

the court's *obiter* observations when it held that in any event that the Indonesian homologation judgment was not *res judicata* before the Singapore courts.

57 One of the requirements for the Indonesian homologation judgment to be recognised (and thus *res judicata*) is that the Singapore High Court must be satisfied, according to its private international law rules, that the Indonesian court must have jurisdiction to give that judgment.[77] When discussing this particular requirement, Steven Chong J cited Dicey's Rule 43 and *Rubin* with approval. His Honour even explicitly stated without any qualification whatsoever that, "Rule 43 applies equally to judgments in foreign insolvency proceedings".[78]

58 Chong J then stated on the facts that he would have found that the Indonesian court did not have jurisdiction over the plaintiff since the plaintiff did not participate at all in the Indonesian insolvency proceedings. The mere fact that the first defendant had unilaterally included the plaintiff as a creditor did not constitute submission for the purposes of Dicey's Rule 43.[79] Since there was no voluntary submission to the Indonesian court in respect of such proceedings, thus the Indonesian judgment was not *res judicata*. The striking-out application was dismissed.

59 While the High Court's observations in *Humpuss* were strictly *obiter*, its approval of *Rubin* and its conservative application of the common law private international law rules is inconsistent with the High Court's swift rejection of *Rubin* in *Re Opti-Medix*. It was also unfortunate that it appears that the *Humpuss* decision was not brought to the court's attention in *Re Opti-Medix*.

60 The differences in the courts' approach in *Re Opti-Medix* and *Humpuss* reflect a sharp cultural schism between insolvency practitioners and private international lawyers.[80] For private international lawyers, their main concern is that a court must be first satisfied that the party against whom the judgment has granted does have the proper opportunity to present their arguments before the foreign court. Otherwise, it

77 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [66].

78 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [71].

79 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [82]–[83].

80 Adrian Briggs, "*Rubin* and *New Cap*: Foreign Judgments and Insolvency", 2013 Jones Day Professorship of Commercial Law Lecture at pp 5–6. <https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1000&context=jday_lect> (accessed 12 May 2023)

would be wholly undesirable for a foreign insolvency judgment to be entered against a party when they have not participated in the foreign proceedings. For the insolvency practitioner, the concern is that debtors should not make use of the courts to damage the interests of innocent foreign creditors by deliberately absenting themselves from the foreign insolvency proceedings.

61 So was the High Court in *Re Opti-Medix* correct in its swift rejection of the UKSC's decision in *Rubin*? Notwithstanding the brevity of the court's reasoning in *Re Opti-Medix*, one must acknowledge that *Rubin* gives rise to undesirable consequences. It has been observed that the UKSC's decisions in *Rubin* and *Singularis* have now made it "virtually impossible to obtain a single judgment in collective proceedings which can be enforced against all persons in England".[81]

62 On the other hand, one must be careful with relying on the High Court's decision in *Re Opti-Medix* as good authority to reject the UKSC's decision in *Rubin*. With respect, the brevity of the court's reasoning there suggests that it did not consider how entrenched the common law requirements for foreign judgments are, and how any changes in this area may be a significant departure from the existing rules of private international law.

63 Furthermore, it is submitted that the High Court's proposed basis for recognising and enforcing a foreign insolvency judgment should not be on such broad and indefinable ideas as "comity"[82] or "practicality". It may be helpful to invoke the principle of modified universalism as an aspirational principle, however just stating that principle itself provides little guidance on how the courts should fashion an appropriate basis for enforcing foreign insolvency judgments.[83]

64 A more fundamental objection is that the development of any *sui generis* basis should be best left to the Legislature.[84] For instance, if we make reference to the Court of Appeal's decision in *Beluga*, counsel tried

81 Nick Segal, Jonathan Harris QC and Matthew Morrison, "Assistance to Foreign Insolvency Office-holders in the Conflict of Laws: Is the Common Law Fit for Purpose?" (2017) 30(8) *Insolvency Intelligence* 117 at 125.

82 That is not to say that "comity" is not a relevant legal consideration. See *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [31]–[34].

83 Adeline Chong, "Recognition of Foreign Judgments and Cross-border Insolvencies" (2014) LMCLQ 241 at 258–259.

84 See Lord Collins in *Rubin v Eurofinance SA* [2013] 1 AC 236 at [129], and in *Re Flightlease* [2012] 1 IR 722, though *cf* Lord Clarke in *Rubin v Eurofinance SA* [2013] 1 AC 236 at [199] who opined that any development by the courts here is principled.

to raise the argument that the court should exercise a discretion that was similar to the now-abolished ring-fencing provision in s 377(3)(*c*) of the Companies Act, to direct that assets be remitted to the principal place of liquidation only after making provision for locally-incurred debts and liabilities.[85] The Court of Appeal rejected this view as being made without any basis, and noted that insolvency law "involves a multitude of social and economic considerations and compromises", and it is an area that is being reviewed actively by the Legislature.[86] Nevertheless, it can still be argued that the Legislature's silence on this issue does not preclude the courts from developing their own principles in respect of the common law, such as the ancillary liquidation doctrine.[87]

65 However, recent case law appears to now suggest that this fundamental objection has been overcome – *ie*, the Legislature in Singapore has already provided a basis for recognising foreign insolvency judgments. It is apposite to refer to the High Court's latest decision of *Re Tantleff, Alan*.[88] This was a foreign trustee's application for the recognition of a US Chapter 11 restructuring of a Singapore-listed real estate investment trust. Abdullah J held that the US Bankruptcy Court's order confirming a restructuring plan could be recognised under Art 21(1)(*g*) of the Model Law.

66 In His Honour's view, Art 21(1)(*g*) allows foreign insolvency-related judgments to be recognised and enforced, although the Singapore court must carefully scrutinise the circumstances in which the foreign order would be granted and ensure that interested parties be given an opportunity to be heard and that the relevant creditors and shareholders are adequately protected.[89]

67 Article 21(1)(*g*) of the Model Law reads:

> 1. Upon recognition of a foreign proceeding … where necessary to protect the property of the debtor or the interests of the creditors, the Court may … grant any appropriate relief, including –
>
> …

85 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [80].

86 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [81]–[82]; see also Adeline Chong, "Recognition of Foreign Judgments and Cross-border Insolvencies" (2014) LMCLQ 241 at 260.

87 Gabriel Moss, "Modified Universalism and the Quest for the Golden Thread" (2008) 21 *Insolvency Intelligence* 145 at 151.

88 [2023] 3 SLR 250. Discussed in Rabin Kok, "Cross-border REIT 'Insolvencies' and Recognising Foreign Insolvency-related Judgments in Singapore" (2023) 35 SAcLJ 153.

89 *Re Tantleff, Alan* [2023] 3 SLR 250 at [81].

> (*g*) granting any additional relief that may be available to a Singapore insolvency officeholder, including any relief granted under section 96(4) of this Act.

68 Abdullah J reached this conclusion by pointing out that in enacting Art 21(1)(*g*) of the Model Law, Parliament omitted a crucial phrase which would have limited the additional relief available to a Singapore insolvency officeholder "under the law of Singapore". His Honour then relied on the Ministry of Law's "Response to Feedback from Public Consultation on the Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring" ("Response"). In the Response, the Ministry of Law had stated that the provision of Art 21(1)(*g*) was amended intentionally to "align the wording with the US provision in chapter 15". Abdullah J then reiterated his disapproval of the UKSC's decision in *Rubin*, stating that the holding in *Rubin* was not endorsed in Singapore. He also rejected Lord Collins' view that the Model Law was not intended to deal with foreign insolvency-related judgments, and favoured the US approach.

69 There are important practical consequences arising out of *Re Tantleff, Alan*. First, it opens the door for parties and particularly foreign insolvency officeholders to apply to have the foreign insolvency judgments recognised under the Model Law. This necessarily means that there will be little reason for parties to apply for common law recognition. If this is correct, there is no legal lacuna to speak of. Second, it is also a strong signal from the courts that any English authorities, in so far as they suggest a conservative application of the principle of modified universalism, are less likely to be regarded as authoritative.

70 Respectfully, it is this author's view that it remains insufficient for the court in *Re Tantleff, Alan* to rely on the Ministry of Law's Response to expand the Model Law's coverage to include foreign insolvency-related judgments. It is true that the Ministry of Law's Response is admissible as extraneous material to assist the court in interpreting Art 21(1)(*g*).[90] It is also true that Parliament shuns tautology and does not legislate in vain.[91] However, given the significant implications it has on private international law, there remain concerns over whether the Ministry of Law's response is a sufficiently clear and unequivocal indicator of Parliament's intention for the Model Law to be used as a new legal basis for the recognition and enforcement of foreign insolvency related judgments.[92] In rejecting

90 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [54(c)(iv)].

91 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [38].

92 Rabin Kok, "Cross-border REIT 'Insolvencies' and Recognising Foreign Insolvency-related Judgments in Singapore" (2023) 35 SAcLJ 153. See also *Re Rams Challenge Shipping Pte Ltd* [2022] SGHC 220 at [10] where Abdullah J observed

(cont'd on the next page)

Rubin, the court in *Re Tantleff, Alan* also did not take into account the decision of *Humpuss* where *Rubin* was expressly approved.

71 An interesting endnote to this section is the introduction of the UNCITRAL Model Law for Cross-Border Insolvency Judgments. This new model law seeks to introduce a separate legislative scheme for parties to utilise in enforcing their foreign insolvency judgments, by satisfying certain limited requirements (as found in Arts 9 and 13). While certain provisions of the UNCITRAL Model Law for Cross-Border Insolvency Judgments can be criticised for their vague drafting,[93] if Singapore does adopt the Model Law, it removes the legal lacuna that we have seen in *Rubin*, and ameliorates the necessity of relying on the principle of modified universalism as a normative basis to justify a separate set of rules for recognising foreign insolvency judgments.

D. Recognition of foreign bankruptcy judgments

72 While the Singapore courts have yet to speak definitively on whether *Rubin* should apply to foreign insolvency judgments, the courts have at least commented on whether the principle of modified universalism applies to foreign bankruptcy judgments.

73 In *Heince Tombak Simanjuntak v Paulus Tannos*[94] ("*Simanjuntak*") the foreign debtors applied to the Singapore High Court to set aside the recognition of the bankruptcy orders granted under the Indonesian courts which gave the Indonesian receivers the right to administer, realise and distribute the debtors' property in Singapore.

74 The debtors argued that the doctrine of recognition of foreign judgments in common law should not be extended to personal bankruptcy orders. Abdullah J was not convinced that this was a valid distinction. Just because a bankruptcy order affects the whole world does not mean it should be different from other judgments at all.[95]

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that "most insolvency or restructuring orders over the world will be readily accommodated, though there may be outliers", and the main consideration is the opportunity for local creditors to participate and be heard in the insolvency process.

93 Kah-Wai Tan, "All that Glisters is not Gold? Deconstructing *Rubin v Eurofinance SA* and its Impact on the Recognition and Enforcement of Foreign Insolvency Judgments at Common Law" (2020) 16(3) *Journal of Private International Law* 465 at 485–488.

94 [2020] 4 SLR 816, noted by Tan Kah Wai in "Recognising Foreign Personal Bankruptcy Judgments in Singapore – A Critical Assessment of the Common Law's Role and its Difficulties" *Singapore Law Blog* (29 October 2019) <https://singaporelawblog.sg/blog/article/242> (accessed 18 April 2023).

95 *Heince Tombak Simanjuntak v Paulus Tannos* [2020] 4 SLR 816 at [21].

75 Interestingly, the judge once again referred to the modified universalist approach endorsed in *Beluga*, and stated that the principle applies with equal force to personal bankruptcies.[96] In Abdullah J's opinion, His Honour thought that the authorities invoked by the debtors' counsel were "much older" and noted that they came from an era in which there was less international co-operation.[97] It is implicit in the decision that Abdullah J found that the older authorities, such as *Ex Parte Stegmann*,[98] were of less persuasion since they do not accord with the modern commercial realities of foreign debtors with assets spread across multiple jurisdictions.

76 Abdullah J then eventually held that the court would recognise a foreign bankruptcy order if the following requirements were met.[99] First, the foreign bankruptcy order is made by a court of competent jurisdiction. Second, the court must have jurisdiction, either on the basis of the debtor's domicile or residence, or the debtor's submission to the court's jurisdiction. Third, the foreign bankruptcy order must be final and conclusive. Fourth, no defences to recognition would be applicable.

77 As an interesting side note, Abdullah J also asked parties to submit on whether it was open to the court to introduce a requirement of reciprocity in recognising the Indonesian courts' insolvency decision. While counsel did suggest doing so, the court eventually declined, stating that this was a "significant departure" from the common law that fell outside his remit as a puisne judge.[100]

78 The dissatisfied Indonesian debtors appealed against the High Court's decision.[101] While one was hopeful that the Court of Appeal's decision may be able to shed light on the law of foreign bankruptcy orders, the case was eventually decided on whether the Indonesian bankruptcy orders were obtained in breach of natural justice.[102]

79 The reason for why the cross-border insolvency issues were not determined rests primarily on how both parties presented the appeals. Before the Court of Appeal, the appellants initially contested almost all

96 *Heince Tombak Simanjuntak v Paulus Tannos* [2020] 4 SLR 816 at [21].
97 *Heince Tombak Simanjuntak v Paulus Tannos* [2020] 4 SLR 816 at [21].
98 (1902) TS 40.
99 *Heince Tombak Simanjuntak v Paulus Tannos* [2020] 4 SLR 816 at [19].
100 *Heince Tombak Simanjuntak v Paulus Tannos* [2020] 4 SLR 816 at [54].
101 *Goh Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061.
102 The court was divided with the majority (Woo Bih Li J dissenting) holding that the appellants received no notice of the Indonesian court proceedings and were thus denied a fair opportunity to be heard by the Indonesian court and the Indonesian bankruptcy orders were not to be made.

the legal requirements for recognition of foreign judgments at common law. However, eventually, both parties proceeded on the basis that the requirements for common law recognition for foreign judgments were those stated in *Humpuss*. This means that parties were content not to challenge the orthodox position of Dicey's Rule 43. It also appears that there were no arguments on the point of whether a distinction should be drawn between foreign judgments as *in personam* judgments and bankruptcy judgments *in rem*.

80 However, the majority in the Court of Appeal left an intriguing endnote to their brief discussion on the cross-border insolvency issues:[103]

> 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 … 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.

81 From a tactical perspective, it is understandable why both parties focused on the issue of whether the rules of natural justice were breached such that the court could refuse recognition of the Indonesian bankruptcy orders. However, that inevitably means that there is 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.

V. Some observations on the application of modified universalism in Singapore

82 It is patently clear from our survey of the existing case law that the principle of modified universalism exists as a matter of Singapore cross-border insolvency law. It is foolish to deny its existence. Yet, several general observations can be made on how the Singapore courts have applied the principle of modified universalism.

A. Scope of the principle of modified universalism

83 First, it is clear that the scope of the principle of modified universalism should be narrow, with the advent of international

103 *Goh Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [22]. It should also be noted that in Woo J's dissent, His Honour did not express any opposing opinion on the cross-border insolvency issues.

conventions such as the Model Law. After all, the principle is seen as being a transitional means for a global insolvency convention. With a convention now in place to govern this specific issue, the utility of these transitional means through the common law is largely rendered moot.[104]

84 Hence, as we can see from *Re Rooftop*, it will be very difficult to raise an argument for a common law basis for recognition of foreign insolvency proceedings, when the Model Law has such expansive coverage. It is also difficult to see why the court could allow itself to blatantly ignore the Legislature's mechanism for facilitating insolvency judgments and rely on the doctrine of modified universalism.

85 However, as insolvency practitioners are well aware, the Model Law is not the panacea of all problems. It is certainly useful when insolvency officeholders seek relief upon the recognition of foreign insolvency proceedings.[105] However, barring the decision of *Re Tantleff, Alan*, the enforcement of an insolvency-related judgment itself as of today remains squarely within the realm of the common law. This observation is, however, subject to Singapore adopting the latest UNCITRAL Model Law on Foreign Insolvency Judgments for corporate insolvencies. Furthermore, the Model Law does not apply to foreign personal bankruptcies.

86 On a conceptual level, one should understand the principle of modified universalism as being a residual bed of powers which the courts may apply in resolving cross-border insolvency issues, in the absence of any international convention or statute.

B. Territorialism on the wane

87 This leads us to the second observation: that the courts in Singapore have repeatedly expressed their discomfort in relying on overseas authorities that expressed a territorialist preference in resolving cross-border insolvency issues. It is this judicial discomfort with the parochial vision of territorialism that has spurred the courts to embrace the principle of modified universalism, which, as Professor Walters

104 Adrian Walters, "Modified Universalisms & The Role of Local Legal Culture in the Making of Cross-border Insolvency Law" (2019) 93(1) *American Bankruptcy Law Journal* 47 at 63.

105 See *United Securities Sdn Bhd v United Overseas Bank Ltd* [2021] 2 SLR 950.

correctly pointed out, creates a workable proxy for universalism in the absence of an international convention.[106]

88 The discomfort with relying on these decisions is perfectly understandable. It bears observing that examples such as the notorious *Gibbs* rule arose out of a time when there was no globalisation, and there was no sense of judicial co-operation to speak of.[107]

89 It is also apposite to refer to O'Donnell J's observations in the Irish Supreme Court's decision of *Re Flightlease*[108] where His Honour commented that:[109]

> … it is asking a lot that the outlook of the British empire at its height, with its justifiable pride in its own legal system, and perhaps less justifiable suspicion of others, should provide enduring rules which are well adapted to the circumstances of a world in which international travel is commonplace, and global trade an essential feature of modern economies.

90 O'Donnell J's views are further amplified when one considers Singapore's unique position. As a country with no natural resources, international trade is Singapore's lifeblood. To invoke or espouse a territorialist view on such matters is anathema to Singapore's national interests. Furthermore, as a fairly young jurisdiction whose independence from English law was entrenched by the Application of English Law Act 1993,[110] Singapore's courts enjoy a wide latitude to mould its common law to suit its unique circumstances.[111]

C. Two conflicting visions of modified universalism

91 While the courts are unlikely to be in favour of adopting any explicit or normative arguments based on territorialism, it is worth noting that the legal position on how the principle of modified universalism can be applied remains unsettled. At its highest, the Court of Appeal in *Beluga*

106 Adrian Walters, "Modified Universalisms & The Role of Local Legal Culture in the Making of Cross-border Insolvency Law" (2019) 93(1) *American Bankruptcy Law Journal* 47 at 63.

107 See Look Chan Ho, "Recognising Foreign Insolvency Discharge and *Stare Decisis*", (2011) 26(6) *Journal of International Banking Law and Regulation* 266 at 275, where the author concluded that "territorialism or the grab rule promoted by *Gibbs* looks more like a nostalgic relic than a serious legal ideology in contemporary cross-border insolvency thinking".

108 [2012] 1 IR 722.

109 *Re Flightlease* [2012] 1 IR 722 at [5].

110 2020 Rev Ed.

111 V K Rajah, "Judicial Dynamism in International Trade in Hong Kong and Singapore – An Indivisible Link" (2010) 40 HKLJ 815 at 827.

may have described it as an "aspirational principle",[112] but the highest court has not had the opportunity to consider whether the "thick" vision of modified universalism applies – that the principles can be applied as an avenue to drive changes to the rules of private international law.

92 Not all courts in Singapore have adopted such a liberal vision. It is apposite to refer to the High Court's decision in *Allenger, Shiona v Pelletier, Olga*[113] ("*Allenger*"). This was a case where a bankruptcy trustee appointed under Cayman bankruptcy law applied *inter alia* for a Mareva injunction in Singapore against the defendants. The defendants challenged the application on the basis that the Singapore courts had no subject-matter jurisdiction in this dispute, with the subject-matter being foreign insolvency laws.

93 In trying to justify its position that the Singapore courts had subject-matter jurisdiction over the dispute, the plaintiff argued that the principle of modified universalism called upon the Singapore courts to hear claims involving foreign insolvency proceedings.[114] However, Andrew Ang SJ noted that the principle of modified universalism only operates as a "broad statement of principle".[115] The fact that this principle is adopted only serves as a general indication that the courts will be less inclined to find that it has no subject-matter jurisdiction. Whether the courts did have subject-matter jurisdiction is a logically anterior question. In Ang SJ's view, the court "would be getting ahead of itself by utilising the principle of modified universalism to find such subject-matter jurisdiction".[116]

94 While Ang SJ's comments are, strictly speaking, *obiter*,[117] it reflects a "thin" view of the principle of modified universalism, that it is only more of a general indication rather than a true legal basis to change or supplement the rules of private international law.

95 However, with respect to the court in *Allenger*, it is difficult to see why modified universalism should remain confined to being just an "aspirational principle". Restricting modified universalism to being a

112 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [75].

113 [2022] 3 SLR 353.

114 *Allenger, Shiona v Pelletier, Olga* [2022] 3 SLR 353 at [88].

115 *Allenger, Shiona v Pelletier, Olga* [2022] 3 SLR 353 at [91].

116 *Allenger, Shiona v Pelletier, Olga* [2022] 3 SLR 353 at [92].

117 His Honour did eventually find that the courts have subject-matter jurisdiction over foreign insolvency laws by virtue of s 16(1) of the Supreme Court of Judicature Act (2007 Rev Ed) and that there were no laws that circumscribed its subject-matter jurisdiction over foreign insolvency laws.

mere general indicator deprives the principle of its practical utility, which is to supplant or remove certain clearly outdated principles of private international law that are completely ill-suited to the modern context of international insolvencies (such as the *Gibbs* rule). In fact, it is arguable that to restrict modified universalism as a mere aspiration is to ironically entrench the outdated rules of private international law (such as in *Rubin*) – which defeats the purposes of having the principles of modified universalism in the first place.

D. Insolvency proceedings being sui generis

96 Ultimately, whether a "thick" or "thin" vision of the principle of modified universalism is applicable in Singapore remains dependent on the courts addressing one key foundational question: Are international insolvency proceedings so unique that a *sui generis* set of rules should be formulated at common law?

97 From our previous discussion, it is evident that the current rules of private international law are parochial and entrenched at a time and place where even the concept of international insolvency is not recognised. One needs to look no further than the *Gibbs* rule to see how that has presented immense difficulties in commercial practice.

98 The law should keep pace with the realities of commerce. It should facilitate commerce and not be an obstacle to it. It is true that the law of insolvency is perhaps an area of law most influenced by considerations of national economic policy and commercial philosophy.[118] It is also true that the Legislature here in Singapore can and does play an active role in reviewing the law on insolvency. However, that should not foreclose the courts from determining issues on cross-border insolvency.

99 It is further submitted that neither national economic policy nor commercial philosophy should foreclose the Singapore courts from recognising the challenges of cross-border insolvencies and using the principle of modified universalism as a solution to the problems. There are two reasons for this. First, depending on the context, it simply cannot be Parliament's intention that our courts remain dictated by a set of rules that are not fit for the purpose of facilitating international insolvencies, or more importantly, facilitating Singapore's position as a debt restructuring hub here in Asia. It is submitted that this is the reason that motivated the courts in *Re Opti-Medix* and *Andes* to make short shrift of the territorialist rules of private international law. Furthermore, one can raise the

118 See Sir Peter Millett, "Cross-border Insolvency: The Judicial Approach" (1997) 6 *International Insolvency Review* 99 at 109.

argument that the Legislature in Singapore, by adopting the Model Law itself, has already implicitly recognised that insolvency proceedings pose unique challenges and that the considerations of modified universalism which underpin this very Model Law should be recognised and applied.

E. Guidelines on using the principle of modified universalism

100 If the courts do proceed on the foundational understanding that insolvency proceedings themselves are *sui generis*, then there is little reason why the courts should restrain their usage of the principle of modified universalism as being a statement of aspiration. This is especially true in the area of personal foreign bankruptcies where the Model Law does not apply, and one can expect more litigation surrounding the application of the principles of modified universalism.[119]

101 This brings us to the question of how far the courts can use the principle of modified universalism to change the law. It is beyond the scope of this article to suggest the substantive changes for each specific legal issue.[120] However, it is this author's view that when a court applies the principle of modified universalism, four guiding steps should be considered.

102 First, in developing the law on cross-border insolvency based on the principle of modified universalism, a court must be mindful of managing the tensions such developments may have with other bodies of law and its consequential impact. This is evident from *Re Taisoo Suk*, where the consequences of recognising overseas rehabilitation proceedings on the basis of modified universalism contradicted the fundamental premise of protecting *in rem* creditors that relied on the filing of *in rem* writs as security of their claims.

103 *Re Taisoo Suk* therefore presented a true clash of the tensions between insolvency law and admiralty law. In insolvency law, the primary concern is to satisfy all creditors as a body, regardless of the nature of their

119 See *Heince Tombak Simanjuntak v Paulus Tannos* [2020] 4 SLR 816. See also the recent English Court of Appeal decision in *Kireeva v Bedzhamov* [2022] EWCA Civ 35 where the court in a 2:1 decision at [101] rejected the argument that the principle of modified universalism could be used as a basis for the court to assist a foreign officeholder to obtain title to English immovable property or deprive the owner of what under English law would have been in his property.

120 See for example Rabin Kok, "Cross-border REIT 'Insolvencies' and Recognising Foreign Insolvency-related Judgments in Singapore" (2023) 35 SAcLJ 153 at para 49, where the learned author suggests a set of guiding principles for the enforcement of foreign judgments, which is fairly consistent with the general principles provided for in private international law.

claims, by realising all of the debtor's assets in one collective proceeding. This is in stark contrast with admiralty law, a specialised body of rules, entrenched in statute, international conventions and mercantile practice, which addresses only maritime claims. More importantly, admiralty law contains special features which may appear alien to insolvency law such as the fundamental concept of the ship as a pre-judgment security to satisfy maritime claims.[121]

104 Therefore, the court, in developing the principle of modified universalism, needs to be sensitive to the impact it may present on different areas of law, particularly in areas where there are significant commercial and policy interests at stake – such as in admiralty law, where disregarding these rules could result in an overnight upending of the shipping industry and undermine stability and confidence in maritime commerce.[122]

105 Second, where the existing legal rules and principles remain useful, the court should retain them as part of its *sui generis* rules for cross-border insolvencies. One should not discard something valuable along with something that is unwanted. This essentially means that the courts should avoid a significant departure from the common law unless there are compelling juridical and commercial reasons to do so. While the law on cross-border insolvency can be *sui generis*, it is still an area where the laws of insolvency and private international law do intersect. It would be artificial, if not unrealistic, for a court to thoroughly deny the influences of private international law in the law of cross-border insolvency.

106 It is apposite to refer to *Simanjuntak*. In that case, the High Court purported to state a new set of rules for recognising foreign bankruptcy judgments based on modified universalism. While the court's decision threatens to elide the time-honoured distinction between judgments *in rem* and judgments *in personam* in private international law, it is worth noting that even the court's requirements for recognising foreign bankruptcy orders are entirely consistent with the original requirements for recognising a foreign *in rem* judgment.[123]

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121 Steven Chong JCA, "When Worlds Collide: The Interaction between Insolvency and Maritime Law", keynote address at the 2nd meeting of the Judicial Insolvency Network (22 September 2018) at paras 15–16.

122 Steven Chong JCA, "When Worlds Collide: The Interaction between Insolvency and Maritime Law", keynote address at the 2nd meeting of the Judicial Insolvency Network (22 September 2018) at para 21. See also Binnie J in *Holt Cargo Systems v Trustees of ABC Container Line NV* [2001] 3 SCR 207 at [27].

123 See *Rubin v Eurofinance SA* [2013] 1 AC 236 at [103]. See also Tan Kah Wai in "Recognising Foreign Personal Bankruptcy Judgments in Singapore – A Critical Assessment of the Common Law's Role and its Difficulties" *Singapore Law Blog*

(cont'd on the next page)

107 Third, if there are any developments based on the principle of modified universalism, such rules should, as far as possible, strive to achieve certainty. The existing rules of private international law (such as Dicey's Rule 43) had the appeal of being stable and certain. Commercial parties and their counsel had the benefit of knowing where they absolutely stand, no matter how disagreeable the position was. Therefore, a court, in applying the principle of modified universalism to fashion a set of new rules, should strive to introduce rules that can be easily understood, as opposed to making reference to broad and vague concepts such as "comity" or "practicality".

108 Last but not least, the principle of modified universalism cannot be used as a basis to override any statutory regime. Therefore, the courts must be mindful that notwithstanding their desire to, for instance, facilitate the assistance of foreign insolvency officeholders, no orders should be made that contravene or circumvent any local laws or regulations. Not every instance of departing from the statute would be impermissible provided that the rule itself is not mandatory in nature.[124]

109 Pulling these strands together, it is apposite to refer to Steven Chong JCA's extra-judicial speech where His Honour stated that the courts, in managing the tensions between insolvency law and maritime law, should adopt the attitude of "accommodation where possible; balance, where it is not and in all things, respect and comity".[125] These observations apply with equal force towards the issue of the courts' development of the principle of modified universalism and other discrete bodies of law. After all, the courts in their quest for universality must not lose sight of the fact that cross-border insolvency law does not operate in a vacuum, and its content necessarily differs based on the legal and cultural context where such issues may arise.

VI. Conclusion

110 Lord Hoffmann's "golden thread" of modified universalism remains alive and well in Singapore, though there remains the occasional untidy knot, especially when the thread interfaces with other bodies of law. Nevertheless, one looks forward to how the courts in Singapore will

(29 October 2019) <https://singaporelawblog.sg/blog/article/242> (accessed 18 April 2023).

124 Sim Kwan Kiat, "Jurisdictional Basis of Synthetic Proceedings in Cross-border Insolvency" [2019] SAL Prac 10 at [21].

125 The Honourable Judge of Appeal Steven Chong, "When Worlds Collide: The Interaction between Insolvency and Maritime Law", keynote address at the 2nd meeting of the Judicial Insolvency Network (22 September 2018) at para 33.

continue to sew this golden thread into the complex and diverse fabric of cross-border insolvency law in Singapore.