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A PRACTITIONER'S PERSPECTIVE ON THE CURRENT STATE OF CROSS BORDER INSOLVENCY LAW

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Let me begin by observing how privileged we all are to shortly hear Lord Hoffmann speak on the topic of cross border insolvency. Can I respectfully observe that no judge, in the cross border insolvency field, has made such a contribution to the development of the law as has Lord Hoffmann. Throughout his distinguished judicial career, Lord Hoffmann has promoted an international, modern, commercial approach to cross border insolvency, and given modern expression to what is now emerging in this area as the dominant principle known as modified universalism.

Let me also say that I readily recognise that my role today is as the warm up act for Lord Hoffmann, and also for Professor Mason, Australia's leading academic in this area, as her excellent paper explores whether there is a modern role for the law merchant to assist in the development of cross border insolvency co-operation.

Let me place this session's topic in context, and there is no better way of doing this than to see how a cross border insolvency problem or issue arises in practice. I will do this by giving two recent examples that illustrate the proposition that relatively simple cross border facts can give rise to complex legal controversy.

The first example is HIH. Here, Australia's second largest insurance group also conducted branch operations in England, and provisional liquidators were appointed there as well as in Australia. Those provisional liquidators proceeded to collect the assets in England, and

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this gave rise to the issue as to what they should do with the English proceeds. Should they distribute them in England in their English estate under English rules, or should they be returned to the Australian liquidators so that they could be distributed in Australia, along with all other assets collected by the Australian liquidators internationally? The significance of this issue was that English law provided for a pari passu distribution, whilst Australian law conferred priorities in favour of liabilities in Australia as well as insurance creditors. So a simple question – should the English assets be distributed there, or in Australia? And, for that matter, a simple answer was given until the matter reached the House of Lords, with all 4 lower court judges deciding that the English assets should be distributed in England. I will return to this case later, given the significance of the House of Lords decision unanimously reversing the lower courts' decisions.

My second illustration pertains to one aspect of the massive international insolvency of Lehman Bros. Mahogany Capital, an Australian company, had in rosier times entered into a transaction involving a credit default swap, secured by collateral, with Lehman Bros. Subsequently, as we all know, Lehman Bros entered bankruptcy in the United States. The documentation included what is known as a "*flip clause*", which had become engaged, and Mahogany's mortgagee, Perpetual Trustees, had become entitled to the collateral as a matter of contract law. The collateral that is the subject of the proceedings is located in England. It is held there by an English trustee. The parties have agreed an express choice of law clause, nominating English law. The parties have agreed an express choice of venue clause which is that the English courts have non-exclusive jurisdiction in the matter. Proceedings were commenced in the High Court of Justice in England, and were voluntarily joined and submitted to by Lehman Bros' US Bankruptcy Trustee. In England, flip clauses are enforceable in a bankruptcy, and both the High Court and Court of Appeal (unanimously) have held that Perpetual is entitled to the collateral.[2]

[2] The Court of Appeal's decision is currently on appeal to the Supreme Court of the United Kingdom.

Now, given the location of the collateral, the location of the trustee and the express choice of English law and English courts, the legal position might therefore appear to be simple and uncontroversial.

Not so. Lehman Bros is a US company and reliance on the flip clause is void as a matter of US bankruptcy law. Judge Peck of the US Bankruptcy Court has, in parallel proceedings, held that Lehman Bros is entitled to the collateral, and he has written a letter to the relevant English Judge, stating in part:

> "My Lord,
>
> I write to inform you of my... decision in the above-referenced Adversary Proceeding. ....
>
> Given the nature of the American and English judgments on the priority of payments issue, it is my strong desire that we continue to work together... to reach a mutually satisfactory accord. ...
>
> My ruling contains a finding that rights and interests in the transactions discussed in the opinion are part of the bankruptcy estate. In the bankruptcy context, American Courts uniformly recognise that Bankruptcy Courts have jurisdiction over the assets of the estate, wherever located, and apply the principle that, "the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding"."

The letter proceeds to ask the English Court to cooperate with his administration of the Lehman Bros bankruptcy proceedings, and to do so by giving effect to his Honour's, that is Judge Peck's, decision that it is Lehman Bros, and not Perpetual Trustees (as held by the English courts), that is entitled to the collateral. The letter concludes by drawing the English Court's attention to his Honour's phone number and indicating an availability to discuss the matter by telephone if convenient.

The reason why this case, which continues to be played out between the English and American courts, is so significant is not so much the $125 million in issue in the proceedings, but the $12 billion worth of collateral comprised in near identical transactions with Lehman Bros that is awaiting an outcome and watching the proceedings with very considerable interest.

So having provided context, by way of these two cross border disputes, let me examine why adding an international element to relatively simple facts produces such legal complexity. At the heart of the issue is, of course, the international dimension. The dispute involves the laws of different countries. Those countries may have different approaches to insolvency.[3] Different approaches, indeed different public policy choices, lead to differences in insolvency laws across the world. As the *Lehman Bros* case illustrates, litigating the issue in the courts of one country can produce a completely different outcome to litigating it in the courts of a different country. Throw in issues of national sovereignty, the fact that insolvency law is essentially statutory and the relative absence, until recently, of express provisions addressing how cross border issues are to be dealt with, and it is little wonder that the courts have historically not spoken with one voice when addressing cross border disputes.

In an attempt to overcome many of these problems, the UNCITRAL Model Law on cross border insolvency was formulated, and it has been adopted over the last 5 or 6 years by many major trading countries, including Australian, New Zealand, USA and the United Kingdom. Let me provide a very brief outline of how that law operates and why, unfortunately, it does not provide a clear answer to many of the cross border problems that arise, including both of the examples I have already outlined.

At the heart of the Model Law is the facilitation of co-operation across national boundaries. The law seeks to facilitate co-operation between courts, between appointed officeholders,

[3] Even those countries whose laws have shared origins can have significant legislative differences, as was starkly illustrated in the England/Australia context with the *HIH* case.

such as liquidators, and between those officeholders and the foreign courts. Articles 25 and 26 of the Model Law require that co-operation in these respects is to be "*to the maximum extent possible*". Article 27 specifies that the co-operation is to be implemented by any appropriate means, including through the coordination of concurrent proceedings against the same debtor and by the approval or implementation by courts of coordination protocols entered into between insolvency practitioners.

Article 25 provides that a court is entitled to communicate directly with, or to request information and assistance directly from, a foreign court, and the letter I referred to earlier from Judge Peck of the US Bankruptcy Court addressed to the High Court of Justice in London is one recent example of this.

As well as these broad provisions that seek to facilitate cross border co-operation, there are a number of articles in the Model Law that address with specificity the nature and extent of relief that is available. Primarily relevant are the provisions relating to recognition locally of a foreign insolvency process. Depending upon whether the foreign insolvency process is a main proceeding or a non-main proceeding, recognition of the foreign proceeding will carry with it some automatic relief locally, and will confer upon the local court the ability to grant wider assistance to the foreign officeholder and the foreign court. For example, article 20 provides that upon recognition of a foreign main proceeding, the commencement or continuation of proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed, as is execution against the debtor's assets. Additional relief includes the ability of the local court to make orders suspending the right to transfer assets of the debtor, providing for the compulsory examination of witnesses, permitting the foreign representative to administer the affairs of the debtor locally and granting any additional relief that would be available if the insolvency had been a local insolvency.

So, then, given that the Model Law has been adopted in countries such as Australia, New Zealand, the United States and the United Kingdom, have the problems relating to cross border insolvencies been solved?

The answer, and one of the reasons you have 3 speakers addressing the topic today, is that in complex matters the problem has not been solved by the adoption of the Model Law. It is fair to say that in many, if not most, cross border insolvencies, the Model Law will provide the solution, and facilitate harmony and cross border co-operation. But the Model Law, like any international treaty requiring a high degree of international acceptance in order to be widely adopted, has its limitations:

- While courts and practitioners are obliged to cooperate "*to the maximum extent possible*", there is no identification of the boundaries of such co-operation.[4]
- The more specific provisions providing for cross border assistance are quite basic protections. They say nothing, at least expressly, as to how differences in bankruptcy law of the type in issue in the *Lehman Bros* case are to be addressed across borders.
- There are "carve outs" in the legislation permitting the local court to decline to assist. The local court retains a discretion under article 22 to subject any relief that it grants to conditions it considers appropriate and, for that matter, may terminate that relief. Article 6 is also pertinent in that it permits a court to decline to act under the Model Law "*if the action would be manifestly contrary to the public policy of this state*".
- Excluded from the operation of the Model Law in many countries, including Australia, are banks and insurance companies. The significance of this omission is readily apparent in Australia where many, if not most, of recent cross border

[4] In *Rubin v Eurofinance* SA [2010] EWCA Civ 895, the English Court of Appeal was "troubled" by whether it had the power under article 27 to enforce a foreign unfair preference judgment. It declined to decide the point on the basis that it held it had the power to do so at common law.

insolvency cases have related to insurance companies such as HIH, AFG Insurances and Independent Insurance Company.

If one were therefore to attempt to identify with precision the current position with regard to resolving cross border insolvency issues, one might come up with the following five propositions:

1. First, to the extent that a country has enacted into local law the UNCITRAL Model Law, the courts and insolvency practitioners in that jurisdiction will have available to them the ability to secure basic, yet practical, assistance internationally (other than in relation to banks and insurance companies where they have been excluded from the operation of the law). In perhaps most cases, relief under the Model Law is likely to be sufficient.

2. Secondly, where the provision of such relief would provide an outcome that is different from the outcome that would be produced in a domestic insolvency governed by local statute law, there must be a question mark as to where the boundary is to be drawn between granting the relief notwithstanding the differences, and refusing to make the order based on public policy considerations. Perhaps an obvious example here would be where taking the requested action would result in local employees not receiving the priority that would be accorded to them in a local liquidation. Identifying where the line is to be drawn between, on the one hand, mere differences in legislative approaches, and on the other hand a difference in legislative approach that reflects the manifest public policy of the jurisdiction, may present some scope for debate and dispute in the future.

3. Thirdly, there is the ability under the Model Law, by reference to articles 25, 26 and 27, to seek assistance and co-operation in more complex ways, but the principles that will govern that relief, and address that complexity, as well as the identification of the boundaries of the court's jurisdiction, have yet to be worked out. Certainly,

Justice Barrett of the New South Wales Supreme Court and Lord Neuberger, the Master of Rolls in England, see these articles of the Model Law as playing a significant role in addressing cross border insolvencies in the future.

4. Fourthly, with regard to banks and insurance companies, the insolvencies that arise in these areas with unfortunate regularity will continue to be addressed in most jurisdictions by reference to the pre-existing statutory and common law principles.

5. Finally, as the *Lehman Bros* case demonstrates, there are and will in the future be cases where international differences in bankruptcy regimes will not be solved by the provisions of the Model Law, nor otherwise addressed by statutory prescription, and these disputes will therefore be left to judicial decision-making.

Let me therefore now turn to the importance of judicial decision-making in the context of the future direction of cross border insolvency law. For while there will be many cases where the Model Law will facilitate order and co-operation, there will be numerous other cases where:

- courts will be called upon to determine the boundaries between public policy and mere difference;
- courts will need to grapple with the limits to judicial co-operation; and
- the Model Law does not provide any answer.

This is where it becomes difficult.

It is thankfully less difficult than it could be. As the Honourable Murray Gleeson, former Chief Justice of the High Court of Australia, observed at last year's Federal Court of Australia Conference[5], in transnational litigation outside of the insolvency context, there frequently is no natural forum. Where parallel court proceedings are commenced and an

[5] The Hon Murray Gleeson, "Transnational Litigation – Forensic Pathologies" in KE Lindgren (ed), International Commercial Litigation and Dispute Resolution (2010) 31, 36.

action is brought in one court either for a stay of those proceedings, or for an anti-suit (or anti-anti-suit) injunction, there frequently is no means for objectively identifying any "natural" forum, and therefore courts have of necessity developed tests that accommodate this inherent difficulty. This has, for example, led to a divergence of approaches between Australian and English courts in this area.

Generally speaking, there is no such problem in the cross border insolvency field. In the vast majority of cases there will be a natural forum. It will usually be the jurisdiction that is both the company's place of incorporation and its centre of main interests (**COMI**). If these are in different jurisdictions, modern law suggests a tendency to prefer the company's COMI. While there will be some cases of controversy as to where that exists, in most cases it will be readily identifiable, and where it is not, it can nonetheless be identified by the court through evidence and with the benefit of submissions.

Identification of a company's COMI serves to identify a natural forum for the bankruptcy of that company to be primarily administered. Having identified the natural forum for the bankruptcy, the key issue becomes identifying the significance to be accorded to the laws and courts of that jurisdiction in addressing the insolvency of the debtor. This is where the principle of modified universalism comes into play.

The private international law principle of modified universalism was expressed in the following terms by Lord Hoffmann in *Re HIH*:

> "There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets."[6]

The world, of course, is not that simple, and Lord Hoffmann has variously described universalism as being a principle rather than a rule[7], indeed an "aspiration"[8], and "*the*

[6] *Re HIH* [2008] UKHL 21; [2008] 3 All ER 869, 876.

golden thread running through English cross border insolvency law since the 18th century".

In the Privy Council's judgment which he delivered in the *Cambridge Gas* case, Lord Hoffmann traced the principle back to the 1764 case of *Solomons v Ross*[9], an exceedingly enlightened, for its era, English decision in which the English Court ordered an English creditor to surrender its recoveries in England against a bankrupt Dutch firm and instead prove in the Dutch bankruptcy.

Lord Hoffman's views on this issue are, however, not uniformly held among judges. Whilst there is less apparent controversy regarding the principle in circumstances where the court has a statutory jurisdiction to assist the foreign court or foreign officeholder, there certainly is controversy where the court is asked to exercise a common law power to assist the foreign court or foreign officeholder.

The controversy was identified in the following terms by Chief Justice Spigelman of the New South Wales Supreme Court:

> "The concept of an inherent jurisdiction to provide assistance to foreign courts as a matter of common law principle remains a matter of contention in a context where the artificial legal personality involved is a product of statute and is subject to detailed statutory regulation, including express provision in the relevant respect."[10]

A number of eminent judges have taken a contrary view to that propounded by Lord Hoffmann. For example, Lord Scott has expressed a contrary view, both in his formidable judgment 13 years ago in *Re BCCI (No. 10)*[11] , and more recently in *HIH*. As Lord Scott put it in *HIH*:

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[7] *Re HIH*, 876.
[8] *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings* [2006] 3 WLR 689, 695.
[9] (1764) 1 H Bl 131n.
[10] Chief Justice James Jacob Spigelman, "Cross-Border Insolvency – Co-operation or Conflict?" (2009) 83 Australian Law Journal 44.
[11] [1997] Ch 213

> "The English courts have a statutory obligation in an English winding up to apply the English statutory scheme and have, in my opinion, in respectful disagreement with my noble and learned friend Lord Hoffmann, no inherent jurisdiction to deprive creditors proving in an English liquidation of their statutory rights under that scheme."[12]

That is, the local court has no power to disapply the local statutory regime once that regime has become engaged. Lord Neuberger expressed agreement in *HIH* with Lord Scott, and clearly felt that the notion that the court has an inherent jurisdiction to provide cross border assistance sat "uneasily" with the fact that parliament, in enacting s.426 of the *Insolvency Act*[13], in effect identified the circumstances in which cross border co-operation could be given, and the guidelines for how it was in those circumstances to be given.

The opinions of Lord Scott and Lord Neuberger have come under sustained criticism in a series of articles by leading London insolvency silk, Gabriel Moss QC[14]. The essence of Gabriel Moss' argument is that the statutory regime governing insolvency is not a code:

> "The history and nature of insolvency law in England is a history of an interplay between statutory and case law provisions. This is a history, which if ignored, leads to error and confusion."[15]

Thus, according to Moss, the statutory regime has operated in tandem with the common law, including all of the common law principles that have developed around the "ancillary liquidation" doctrine.

Lord Neuberger, now Master of the Rolls, responded to those criticisms in a speech at an insolvency function last November[16]. In that speech, Lord Neuberger "confesses", to use

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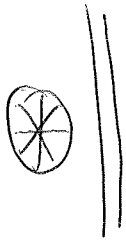
[12] *Re HIH*, 890.
[13] Section 426 of the Insolvency Act (UK) provides that UK courts with insolvency jurisdiction "shall assist" the insolvency courts of a number of specified countries, being mainly Commonwealth countries including Australia.
[14] See, for example, Gabriel Moss QC, "The Secret Code of Insolvency Law", 3-4 Digest, November 2009, 16.
[15] Ibid, 19.

his own word, that Gabriel Moss' criticism "*may well have some merit*" and that there was "*considerable attraction*" in the approach taken by Lord Hoffmann in HIH. On this point, Lord Neuberger concluded that if it is correct that the statute does not set out a complete code, any principled development of the law could only occur in "*areas where the Act was silent and be carried out in ways that did not conflict with the Act*".[17]

This approach would not, however, solve the controversy. Many insolvency statutory regimes do include limited express provisions enabling the local court to act on letters of request from foreign courts seeking assistance. But is this a "fast-track" route to assistance, or an exhaustive statement of the circumstances in which the jurisdiction may be exercised? It is apparent that these provisions were inserted to facilitate cross border judicial co-operation. If it is accepted that a common law jurisdiction to assist a foreign court existed prior to the enactment of those statutory assistance provisions[18], it would at the very least be a perverse outcome if the enactment of the provisions in fact served to limit the circumstances in which cross border judicial co-operation could be provided.



Lord Hoffmann suggested in *HIH* that the inherent jurisdiction is "reinforced" by the statutory co-operation provisions.[19] Both Professor Fletcher[20] and the learned authors of Dicey, Morris and Collins[21] similarly suggest that they sit side-by-side, as does Gabriel Moss QC.

For my part, I think the focus of the debate is slightly too narrow. To focus on the question as to whether the insolvency statute is a code is perhaps to give too little prominence to the international dimension to the issue here. The international dimension can, and certainly

[16] Lord Neuberger, "Insolvency, Internationalism and Supreme Court Judgments" (Speech delivered at the Insolvency Law Dinner, London, 11 November 2009) available at <www.judiciary.gov.uk/publications_media/speeches/index.htm>.
[17] Ibid, 6.
[18] In circumstances where no statutory jurisdiction existed, an inherent jurisdiction to assist has been held to exist in Canada (*Re Cavell Insurance Co* [2006] ILR 1-4510), New Zealand (*Turners & Growers Exporters Limited v The Ship Cornelis Verolme* [1997] 2 NZLR 110), and Cayman Islands (Privy Council decision – *Al Sabah v Grupo Torras* SA [2005] 2 AC 333).
[19] Re *HIH*, 877.
[20] Fletcher (ed), Cross-Border Insolvency: Comparative Dimensions (1990) 21.
[21] *Dicey, Morris and Collins on the Conflict of Laws* (14th edition, 2006) 1389.

did in both *HIH* and *Lehman Bros*, give rise to a conflict of laws, and at least on the face of it, a circumstance calling for the application of private international law principles. Cross border insolvencies will frequently give rise to conflict of laws issues, and an express recognition that this is the territory in which the debate arises would I believe be beneficial.

When one examines the simple facts of *HIH*, one can immediately identify numerous traditional conflict of laws dimensions:

- Property – There is an asset, being the proceeds of collection of the English estate, and two competing parties, the English provisional liquidators and the Australian liquidators, both claiming an entitlement to the asset under the laws of their respective jurisdictions;
- Lis alibi pendens – There are two courts, the High Court of Justice in England and the Supreme Court of New South Wales, that are both seized of the same subject matter, namely the winding up of HIH;
- Conflict of creditor rights – There is the same body of creditors in both the English liquidation and the Australian liquidation – but the laws of England and Australia confer different and conflicting distribution entitlements on those creditors;
- Forum non conveniens/stay - The provisional liquidation in England of HIH was effectively serving its purpose of protecting, preserving and collecting all of the English assets. Given that the making of a winding up order would only serve to create the very conflict that was at the heart of the proceedings, would it have been appropriate to decide that the provisional liquidation should continue, but that no liquidation order should ultimately be made on grounds of forum non conveniens; and
- Modified universalism – The application of universalist principles supporting the primacy of the New South Wales liquidation.

Although Lord Scott and Lord Neuberger considered the judicial co-operation issue to be one of whether the statutory regime left no scope for the concurrent operation of the common law, a private international law perspective perhaps changes the focus of the question. The focus of the question becomes whether parliament has excluded the operation of principles of private international law, and if not, or if only partially, what might those principles say about the matter.

This seems to me to be a slightly different question from whether the *Insolvency Act* is a code, unless of course it is suggested that it is a code that includes within its codified coverage all issues of conflict of laws.

It must of course be recognised that in most jurisdictions, including Australia, there is express provision for the statutory winding up procedures to have application to foreign companies being wound up locally in those jurisdictions. Does this reflect an intention of the legislature to exclude the operation of all rules of private international law to conflict of laws issues that arise in respect of the insolvency of that foreign company? It is fair to say that the statutory provisions here would seem to preclude any choice of law analysis by the Australian court enabling it to apply (by operation of conflict of laws principles) the foreign insolvency law to the issue before it. However, the private international law principle of modified universalism potentially provides a better solution - on grounds of universalism and forum non conveniens, the court could decline to exercise jurisdiction in the matter.[22]

By way of example, should Australian preference avoidance provisions apply to, say, a US company that is being wound up in the US and also in Australia (as a foreign company), where its connection with Australia is slight and the challenged transactions are not susceptible to attack in the US which is both the company's COMI and the location where the transactions occurred? In such a circumstance, an express recognition of the role of conflict of laws principles in the resolution of the issue arguably would enable the Australian

[22] See the English Court of Appeal's analysis of a similar situation in Barclays Bank v Homan [1993] BCLC 680.

court to determine that the Australian avoidance action should, consistent with principles of modified universalism, be stayed[23]. In an appropriate case, perhaps the ancillary winding up of the US company in Australia should itself be stayed or terminated, if it had otherwise served its purpose and run its course.

There are significant examples where cross border insolvency issues have been resolved by express conflict of laws analysis. Perhaps the best example of this is the relatively recent decision of the Privy Council in *Wight v Eckhardt Marine*[24]. In that case, BCCI was being wound up in the Cayman Islands, but a scheme of arrangement was entered into in Bangladesh, which was a jurisdiction in which the bank had operated a branch. Pursuant to the Bangladesh scheme, all liabilities in Bangladesh of the bank were transferred to another entity. The scheme had the effect of discharging debts owed by the bank. The question was whether a claim connected with Bangladesh could receive a dividend in the Cayman Islands' liquidation.

In the judgment of the Privy Council delivered by Lord Hoffmann, the question was resolved by the application of traditional conflict of laws analysis. First, the conflict question which arose in the case was characterised. The lex causae was then identified, and it was applied to the facts. The relevant issue was characterised as being whether the claimant's debt had been discharged by the scheme. The lex causae was determined to be the proper law of the obligation. The proper law of the obligation in question in the proceedings was Bangladeshi law and, in accordance with that law, the debt was held to have been discharged. The claimant therefore could not prove in the Cayman Islands' liquidation.

If it is accepted that we are very much in the territory of private international law, a principled development of cross border insolvency law can in my view be assisted by

[23] The *Maxwell* litigation in the early 1990s in both England and the United States needed to grapple with these and related issues.
[24] [2004] 1 AC 147

greater focus on the scope of application of those private international law principles[25], and to their limitations, rather than on the slightly different apparent focus of the current debate as to whether judges are constrained in exercising jurisdiction beyond that expressly conferred on them in the local insolvency statutes.

A wider recognition of the role of private international law would in my opinion be beneficial in at least three specific respects.

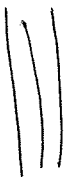
First, it would permit the development in a principled manner of questions of choice of jurisdiction that arise from time to time in cross border matters. That is, should proceedings commenced in the local court proceed, or ought they more properly be prosecuted in the company's COMI (or elsewhere)?

Secondly, conflict of laws jurisprudence has developed around the circumstances in which the courts will decline to apply the usual conflict rules where to do so would be manifestly contrary to the public policy of the jurisdiction. This existing jurisprudence could very usefully provide a framework, or at the very least guidance, to courts that will need to grapple in the future with limits to the application of a universalist approach, where foreign insolvency laws differ substantially from the laws of the forum, and where local priorities may be placed at risk by providing cross border cooperation.

Thirdly, it opens up for further development the law in relation to the recognition that is to be accorded to the effects of the foreign insolvency proceedings, and to judgments delivered by the insolvency courts of that foreign jurisdiction. Just two weeks ago, the English Court of Appeal delivered judgment in *Rubin v Eurofinance*[26] in which, citing Lord Hoffmann's judgments in *HIH* and *Cambridge Gas*, the Court of Appeal decided to embark on what Lord Justice Ward termed "*a desirable development of the common law founded*

[25] Including the extent to which the legislature has excluded their operation.
[26] [2010] EWCA Civ 895

on the principles of modified universalism"[27]. The development of the law was the Court of Appeal's finding that a judgment exceeding $10 million obtained in the US Bankruptcy Court in default of appearance by the defendants for an unfair preference could be enforced against the defendants in England. Under normal principles governing the enforcement of judgments in personam, the law was clear - the judgment could not be enforced. However, the Court of Appeal held that the judgment of the US Bankruptcy Court was not a judgment in personam, but was a judgment in and for the purposes of the collective enforcement regime of the bankruptcy proceedings, and was therefore to be governed by different principles. By way of assistance to the foreign insolvency court, the judgment was ordered to be enforced at common law.



The Court of Appeal's principled development of the common law towards recognising a universal and unitary system of bankruptcy administration is indeed welcome evidence that the common law is alive and well in this field.

I should add that it was argued in the Court of Appeal that the Model Law permitted the same outcome. Lord Justice Ward, with whom Lord Justices Wilson and Henderson agreed, had sufficient concerns about whether the statute permitted the same outcome that no concluded view was expressed on that issue, given that the plaintiff had made out its case at common law.

Where does this leave us?

I think it is uncontroversial to say that both the common law and the Model Law will feature prominently in cross border cases in the future, as bankruptcy continues to cause international trade to collide with national regulation. It must also be clear that competing arguments and contentions remain available at common law and under the Model Law to advance both the universalist and territorialist approach to cross border regulation, at least

[27] Ibid, [61].

in complex cases that raise issues beyond the basic forms of international co-operation set out in the Model Law.

I suspect that the fallout from the global financial crisis has not yet fully trickled into our courts, and that these competing approaches will get a good work out over the next 5 or so years. Lord Hoffmann's judgments in *HIH* and *Cambridge Gas* provide decisions of high authority and strong jurisprudence, and decisions like that of the English Court of Appeal two weeks ago in *Rubin v Eurofinance* provide encouragement that this universalist approach is gaining traction. We will, nonetheless, have to wait and see how matters develop and, for that matter, what approach is ultimately taken by Australian and New Zealand courts in this important area.