

# **The Supreme Court, the Privy Council and International Insolvency<sup>1</sup>**

## **Keynote speech at the International Insolvency Institute Annual Conference 2017, London**

### **Lord Neuberger, President of the Supreme Court**

**19 June 2017**

1. It is an honour and a pleasure to be asked to give the keynote speech this morning and to welcome the members of the International Insolvency Institute to London for their 17<sup>th</sup> annual conference. Although not a topic likely to engage the average person, an efficient and effective insolvency regime is of prime importance to a socially civilised and economically successful country. And, in an increasingly global world, cross-border insolvency is fast becoming an aspect of insolvency which is of prime importance. Given the inherent complexities of national insolvency regimes and the inevitable differences between such regimes, the problems thrown up by cross-border insolvencies are very demanding. International insolvency organisations and international meetings between insolvency experts therefore perform a very valuable function. They ensure that insolvency experts in different jurisdictions can understand and learn from each other, and improve their ability to work together. That is of great value to insolvent companies, their creditors and shareholders in particular, and to the economic and social well-being of the world more generally.
2. London is a particularly appropriate place for your meeting. It is certainly one of the main business centres of the world and arguably the financial and legal services centre of the world. We pride ourselves on our legal services and our dispute resolution procedures in general and our insolvency expertise in particular. That is true whether we are lawyers, accountants, financiers, insolvency experts, arbitrators or judges. The UK judges of the Chancery Division and the Commercial Court have long enjoyed a justified reputation for commercial and financial expertise, including in the field of insolvency, and the recently created Financial List ensures that judges with particularly appropriate expertise are selected to hear the most complex financial cases. And we aim to ensure that this expertise is found all the way up the court system.

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<sup>1</sup> I am very much indebted to Tony Zacaroli QC for his invaluable advice and expertise in connection with this talk

3. The UK Supreme Court is the top court in the United Kingdom; indeed, in our idiosyncratic system, the Supreme Court is the only court with UK-wide jurisdiction. All lower courts have a jurisdiction which is limited to England and Wales or Scotland or Northern Ireland. As in all common law countries the UK Supreme Court is also the constitutional court and the supreme administrative court. Very few cases, no more than 80 a year, only those of real public importance, come to the Supreme Court, but they include commercial and insolvency cases, and other private law cases, as well as public law and constitutional cases. Although the British pride themselves on the long and unbroken traditions of their legal system, the Supreme Court is not even eight years old. Until October 2009, the top UK court was, rather quaintly, a committee of the House of Lords, which consisted of the UK's most senior judges who were known as the Law Lords. In 2005, it was decided that it was constitutionally inappropriate for judges to be sitting in the legislature. And so, four years later, the Law Lords changed their name to Justices of the UK Supreme Court, and changed their location from the House of Lords to their own rather idiosyncratic, but not unengaging, building (refurbished it must be said to a high standard) on the opposite side of Parliament Square. Having control of our own building and our own arrangements has enabled us to engage with the public much more effectively than before, and to inform them about the rule of law in general, and the court system in particular. One thing which has not, however, changed is the powers or functions of the UK top court, which is to hear important appeals and address any devolution issue which is referred to us.
  
4. The Law Lords did not spend all their time sitting as a House of Lords. They also sat in the Judicial Committee of the Privy Council (known often as the JCPC), which was an even older body than the Law Lords, and the Supreme Court Justices now sit in the JCPC in the same way. The JCPC used to sit in 11 Downing Street next door to the Prime Minister's house, but it now sits in Court 3 in the Supreme Court building. It used to hear appeals from all the courts of the British Empire. No longer does the JCPC hear appeals from India, Canada, Australia, New Zealand, South Africa, Hong Kong, Malaysia or Singapore: they all have their own top courts of course. But the JCPC still hears appeals, around 45 in total each year, from many other smaller jurisdictions, including the Channel Islands and the Isle of Man, and, further away from the UK, Jamaica, Bermuda, BVI, Cayman, Trinidad and Mauritius. Some of these appeals involve a lot of money

(unsurprisingly as many of the jurisdictions are important financial centres), sometimes they are very small – eg a domestic boundary dispute. It is an unusual privilege for a domestic judge to sit on foreign appeals, and the smaller cases help us keep our feet on the ground.

5. Both the Supreme Court and the JCPC have had insolvency appeals over the years. Thus, in the last three years, the Supreme Court has had to consider two appeals relating to the Lehman Brothers insolvency<sup>2</sup>, one of which resulted in a judgment last month. More directly in point for this conference, both the Supreme Court and the JCPC have been called on to make important decisions in cross-border insolvency issues. This is unsurprising. So far as the UK Supreme Court is concerned, London can, as I mentioned earlier, realistically claim to be the world's leading global financial and legal services centre, and, when it comes to JCPC's jurisdiction, there are very significant financial centres including the Channel Islands, the Isle of Man, the BVI, Bermuda and Cayman, places where a number of companies at the heart of global business are situated. There is a degree of difference in the approach of the Supreme Court and the JCPC. Almost all the states which have appeals to the JCPC have the same basic common law as England and Wales, and, like the UK, they are parties to most of the insolvency treaties. However, legislative intervention by statute has been more extensive in the UK than in, I think, any of the JCPC jurisdictions.
  
6. When it comes to dealing with cross-border issues, whether in the insolvency field or in other fields, the law in this country was initially developed in an incremental, case-by-case, way by the judiciary, which of course is the way in which the law traditionally develops in a common law system. The judges gradually developed a set of rules applicable to private international law issues, or conflict of laws issues, and those rules were usefully codified and explained by the great constitutional lawyer, AV Dicey in his *Conflicts of Laws* first published 120 years ago<sup>3</sup>. Although a great lawyer, Professor Dicey was a man of his times and not of ours: he was violently opposed to Irish independence and to women having the vote. His great work is still published, and is now in its 15<sup>th</sup> edition, with its leading editor being the eminent academic, practitioner and my former

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<sup>2</sup> *Re Nortel Companies and re Lehman Companies* [2013] UKSC 52 and *The Joint Administrators of LB Holdings Intermediate 2 Limited (Appellant) v The Joint Administrators of Lehman Brothers International (Europe)* [2017] UKSC 38

<sup>3</sup> A V Dicey, *Conflict of Laws* (1896)

Supreme Court colleague, the much more enlightened Lawrence Collins<sup>4</sup> (of whom more later).

7. There is a great deal to be said for letting judges develop the law on a case-by-case basis, in that it relies on experience and incrementalism and it should be flexible and responsive. But such a system has its drawbacks, particularly in an age when detailed laws and regulations are thought to be appropriate in many areas. At least as a matter of theory, this should not present problems, because detailed rules and regulations should be in legislation, and the legislature can legislate as it considers appropriate, including legislating into our law international treaties negotiated by the government. And in any area where Parliament has legislated, the law-making, as opposed to law-interpreting, function of the common law judge is displaced.
8. Domestic insolvency in the UK has been subject to detailed legislative provisions since 1949<sup>5</sup>, and an even more detailed legislative regime was introduced in 1986<sup>6</sup>, and that regime has been substantially amended subsequently<sup>7</sup>. Nonetheless, as was pointed out by the Supreme Court in the later of the two *Lehman* cases, the legislation does not represent a complete code, and some (but by no means all<sup>8</sup>) of the judge-made rules still survive<sup>9</sup>, and as was decided in that case, the courts can develop and extend existing judge-made rules<sup>10</sup> or even create new ones, provided always there is no inconsistency with the legislation. This does not seem to be an unsatisfactory state of affairs (the unkind might think that I would say that, as the writer of the leading judgment in the *Lehman* case): provided that Parliament legislates wisely and judges are restrained in exercising their common law powers, it enables domestic insolvency law to have the best of both the legislative and the common law worlds.
9. When it comes to cross-border issues, the position for domestic judges is self-evidently more complex than when deciding more familiar domestic issues. On the one hand, they are on familiar ground: subject to adhering to established domestic legal principles and to

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<sup>4</sup> *Dicey, Morris & Collins on the Conflict of Laws* (2016)

<sup>5</sup> Companies (Winding-Up) Rules 1949 (SI 1949/330)

<sup>6</sup> Insolvency Act 1986 and Insolvency Rules 1986 (SI 1986/1925) – presaged by the Insolvency Act 1985

<sup>7</sup> Especially pursuant to the Enterprise Act 2002

<sup>8</sup> *LB Holdings Intermediate* cited in footnote 1, para 125

<sup>9</sup> *Ibid*, para 13

<sup>10</sup> *Ibid*, paras 172-186

existing domestic legislation, what is the right way to declare or develop the law? On the other hand, they cannot sensibly ignore the international dimension: one of the guiding lights for any judge is to ensure that the law is practical and coherent, and in today's world that often means internationally coherent as well as nationally. Accordingly, given often very significant variations in the laws of different jurisdictions, cross-border issues can lead to obvious tensions between the domestic, or territorial, imperative, and the internationalist, or universalist, imperative. This is no more true than in the field of cross-border insolvency, where the courts have an unusually direct involvement and unusually wide-ranging responsibility, where the law is particularly complex and technical, and where the basic principle of collective enforcement exacerbates the need for cross-border coherence and cooperation.

10. The rules developed by the judges in previous centuries in relation to cross-border insolvency reflected a time when business was conducted on a more territorial basis than today. It is therefore inevitable that they will not be wholly fit for purpose in the present age which requires courts to tackle collapses of global businesses, many of which are conducted through groups of companies incorporated in a large number of different jurisdictions throughout the world. And while there are benefits from the law developing incrementally by reference to the facts of individual cases, it can fairly be asked whether such an approach is as well suited to many aspects of insolvency, which involves a collective enforcement process involving many creditors, and which appears to give rise to a perennial debate between territorialism and universalism.
11. If there is a good case for up-dating or changing existing common law principles or rules relating to cross-border insolvency, to what extent is it the job of the judges or the legislature to develop appropriate principles? And where is the line drawn between the two? As with many such issues, the judges will develop the law if they feel that they properly can until such time as the legislature grasps the nettle. Sometimes, judges will hold off deciding an issue in the expectation that the legislature will step up to the plate, and sometimes that expectation is fulfilled. In other cases, judges eventually abandon that expectation and grasp the nettle themselves – and hope that they don't get stung. A recent example of judicial nettle-grasping after it had become clear that pleas to Parliament were fruitless has been the Supreme Court *Patel v Mirza* decision last year on

the effect of illegality on contractual and tortious claims<sup>11</sup> - and, reading some of the academic comment<sup>12</sup>, we are being stung at least in some quarters.

12. In relation to cross-border insolvency, in 2006, Lord Hoffmann said, somewhat tautologically, that in this field, “the underdeveloped state of the common law means that unifying principles which apply to both personal and corporate insolvency have not been fully worked out”<sup>13</sup>, and over the last ten years, the Supreme Court and JCPC have struggled with this problem. A quartet of cases can be said to demonstrate a degree of uncertainty about the answer. I doubt that any of the Judges who decided the five cases would quarrel with the basic principle expressed by Lord Hoffmann in the 2008 House of Lords *HHH* case<sup>14</sup>, “English courts should, so far as consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company’s assets are distributed to its creditors under a single system of distribution”, provided that the reference to “UK public policy” extends to legislation. In other words, where a company is subject to a foreign insolvency regime, domestic courts exercising a common law jurisdiction will ensure, so far as is consistent with domestic public policy, including common law principles and UK legislation, that assets in the domestic jurisdiction are distributed in accordance with the rules of the relevant foreign insolvency regime.

13. All UK judges recognise, indeed I think we all strongly support, the desirability of international cooperation and co-ordination in the field of insolvency. The question which sometimes divides us is how far a common law judge can take this principle. The judges who are more cautious and may appear less internationally minded are only cautious about judges developing the law for themselves. The caution may actually serve to act as a spur to the agreeing of legislative measures increasing international cooperation, such as the UNCITRAL Model law.

14. In the 2006 Isle of Man *Cambridge Gas* case<sup>15</sup>, where he first discussed common aw universality, Lord Hoffmann described universality as having “long been an aspiration, if

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<sup>11</sup> *Patel v Mirza* [2016] UKSC 63

<sup>12</sup> See eg *Trusts & Trustees* (2016) 22 (10): 1090

<sup>13</sup> *Cambridge Gas Transport Corp v. Official Committee of Unsecured Creditors (of Navigator Holdings PLC)* [2006] UKPC 26, para 19

<sup>14</sup> *McGrath v Riddell* [2008] UKHL 21, para 30

<sup>15</sup> *Cambridge Gas*, footnote 13, paras 17-18

not always fully achieved” of the common law, partly because “a good deal of the ground has been occupied by statutory provisions”, domestic, EU and international. However, he said, the issue in that case was not covered by any such legislation, so the JCPC unanimously held that it could give effect to a New York-based chapter 11 order so as to give effect to the enforcement of collective rights. The New York order vested in the insolvent company’s creditors committee shares in an Isle of Man company owned by a Cayman Islands company, and, even though the Cayman Islands company had not submitted to the New York jurisdiction, the JCPC held that the Isle of Man courts could and should give effect to that order. This was the high water mark of UK universalism.

15. In the subsequent 2008 House of Lords decision in the *HHH* case<sup>16</sup>, common law universalism suffered a bit of a setback. Lord Hoffmann effectively followed his previous line and invoked universalism in order to remit to New South Wales English assets owned by an Australian insurance company, which had UK-based creditors, to enable New South Wales court-appointed liquidators to sell those assets and distribute the proceeds in accordance with Australian insolvency law, which was different from UK law. Lord Hoffmann (with whom Lord Walker agreed) based his conclusion on the “general principle of private international law, namely that bankruptcy ... should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt’s domicile which receives world-wide recognition and it should apply universally to all the bankrupt’s assets”<sup>17</sup>, which he described as “very much a principle rather than a rule”<sup>18</sup>. However, although we agreed in the result, Lord Scott and I arrived at the same conclusion by applying a specific domestic statutory provision, section 426 of the insolvency legislation,<sup>19</sup> which only applied to countries designated by a government minister, which included Australia. Lord Scott accepted that it was “desirable as a general proposition that there should be one universally applicable scheme of distribution of the assets of an insolvent company” and that the scheme should normally be that laid down by “the principal winding-up being conducted in the country of its incorporation”<sup>20</sup>. However, he and I considered that a common law power could not be created or exercised for two reasons. First, it would deprive creditors in the UK jurisdiction of their

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<sup>16</sup> *McGrath*, see footnote 14

<sup>17</sup> *Ibid*, para 6

<sup>18</sup> *Ibid*

<sup>19</sup> Section 426 of the Insolvency Act 1986

<sup>20</sup> *McGrath*, footnote 14 above, para 61

statutorily given rights under the insolvency legislation. Secondly, as section 426 could be invoked, to apply the principle of universalism would “constitut[e] the usurpation by the judiciary of a role expressly conferred by Parliament on the Secretary of State”<sup>21</sup> as Lord Scott put it, and I agreed<sup>22</sup>. We therefore all agreed on the existence of the principle of universalism, but we were split 2-2 as to whether it could be invoked in that case. The fifth member of the court, Lord Phillips, while agreeing with all four of us in the result, rather hedged his bets on universalism – so I suppose we were 2½-2½.

16. Four years later, the common law universalist ball passed to the Supreme Court in the 2012 *Rubin* case<sup>23</sup>, where it suffered something more than a setback: on one view it was killed off; on another view it was severely circumscribed. *Rubin* involved two cases where liquidators were seeking to enforce in England a default judgment made by a foreign insolvency court (New York in one case New South Wales in the other) setting aside a prior transaction entered into by an insolvent company on the ground that it involved a fraudulent preference or the like. Lord Collins, with whom Lord Walker and Lord Sumption agreed, held that the normal private international law conflict rules applied, and, as the foreign court order operated *in personam*, it could only be enforced against a person who had submitted to the foreign court’s jurisdiction (which he had in the Australian case but not in the US case). Basically, Lord Collins’s view was that it was inappropriate to invent a new judge-made rule that a foreign court judgment made in an insolvency context should be enforceable in the UK, if well-established principles meant that it would have been unenforceable if it had not been made in that context. Such a course said Lord Collins “would not be an incremental development of existing principles, but a radical departure from substantially settled law”<sup>24</sup>. He also made the point that it would be to the UK’s disadvantage if UK judges developed such a principle without the certainty of reciprocity in other jurisdictions<sup>25</sup>. Lord Collins accepted that it followed from this that *Cambridge Gas* had been wrongly decided<sup>26</sup>. Lord Mance agreed with Lord Collins, save that he left open the question whether *Cambridge Gas* had been

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<sup>21</sup> *Ibid*

<sup>22</sup> *Ibid*, paras 76-77

<sup>23</sup> *Rubin v Eurofinance SA* [2012] UKSC 46

<sup>24</sup> *Ibid*, para 129

<sup>25</sup> *Ibid*, para 130

<sup>26</sup> *Ibid*, para 132

wrongly decided<sup>27</sup>. Lord Clarke dissented, subscribing in full to Lord Hoffmann’s more expansionist view of universalism<sup>28</sup>.

17. But common law universalism was resuscitated, albeit to something of a shadow of its former *Cambridge Gas* glory, when two of its apparent assassins in *Rubin*, Lord Collins and Lord Sumption, joined its champion, Lord Clarke, in the most recent instalment in this saga, the 2014 JCPC Bermuda *Singularis* case<sup>29</sup>. The issue was whether the Bermuda court could order the former auditors of a Cayman company in liquidation to give information to the Cayman liquidators. All five members of the JCPC agreed that the court could not, but only a minority (Lord Mance and myself) thought that the Bermuda Court had no common law universalist-type power to make such an order. The majority thought that it did, but that it could not be exercised. Lord Sumption said in the leading judgment, that none of the Justices who had expressed views doubted the existence of modified universalism<sup>30</sup>; they merely disagreed as to how circumscribed it should be (my description not his). Lord Sumption reiterated that *Cambridge Gas* was wrongly decided<sup>31</sup>, but re-affirmed that “the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers”<sup>32</sup>. Lord Sumption concluded that “there is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up”<sup>33</sup>. However, no assistance should be granted in that case because it would involve the Cayman court having greater powers in foreign liquidations than it had been accorded statutorily in domestic liquidations<sup>34</sup>. Lord Sumption was supported by a very thoughtful judgment from Lord Collins and a shorter judgment from Lord Clarke. Like Lord Mance, I was more sceptical saying “[t]he extreme version of the ‘principle of universality’, as propounded by Lord Hoffmann in *Cambridge Gas*, has, effectively disappeared... . However, as with the Cheshire Cat, the principle’s deceptively benevolent smile still appears to linger, and it is now invoked to

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<sup>27</sup> *Ibid*, para 178

<sup>28</sup> *Ibid*, paras 191-204

<sup>29</sup> *Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda)* [2014] UKPC 3

<sup>30</sup> *Ibid*, para 17

<sup>31</sup> *Ibid*, para 18

<sup>32</sup> *Ibid*, para 19

<sup>33</sup> *Ibid*, para 25

<sup>34</sup> *Ibid*, para 29

justify the creation of this new common law power”, and added that “the logic of the withdrawal from the more extreme version of the principle of universality is that we should not invent a new common law power based on the principle”<sup>35</sup>.

18. So, having started with relatively broad common law universalism in *Cambridge Gas* and flirted with no common law universalism through the minority in *Singularis*, we seem to have ended up with modified universalism as exemplified by the majority view in *Singularis*. As Lord Collins pointed out in *Singularis*<sup>36</sup>, Lord Bingham has written<sup>37</sup> that in the UK “[o]n the whole, the law advances in small steps, not by giant bounds”, and in the US Justice Oliver Wendell Holmes observed that “judges do and must legislate, but they can do so only interstitially”<sup>38</sup>. It may be that the mistake in relation to common law universalism was to indulge in an initial giant bound of an insufficiently interstitial nature in *Cambridge Gas*, which then led to the considered regrouping and reformulation (if you want to be kind) or rather confused inconsistencies (if you want to be unkind) in the subsequent three cases. Although I dissented in *Singularis*, I do not consider that the result is unsatisfactory: it is a suitably cautious but progressive judicial decision in relation to an issue where the practical and principled arguments for and against judicial development of the law are pretty evenly balanced. Ironically, the only one of the four decisions in this field which was unanimous was *Cambridge Gas*, and it was the only decision which appears to have been wrong.

19. I believe that there are lessons which can be learned from this history. First, judges should try and develop the law so that it keeps pace with commercial and social and technological changes, but they should do so in a cautious and principled way, and consistently with legislation. If there are no applicable legislative or treaty provisions, judges should not be frightened of developing the law, but they must be suitably diffident.

20. Secondly, however, in highly technical fields, and where cross-border issues are involved, judicial development of the law presents obvious difficulties, when compared with domestic and cross-border law-making by governments and legislators. As I have

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<sup>35</sup> *Ibid*, para 157

<sup>36</sup> *Ibid*, para 66

<sup>37</sup> Tom Bingham, *The Business of Judging* (2000), p 32

<sup>38</sup> *Southern Pacific Co. v. Jensen* (1917) 244 U.S. 205, 221

explained earlier, I did not dissent in *Singularis* because I am a little Englisher. *Au contraire*: I think that universalism is a noble aim, but I think it is normally better achieved by legislation and treaty-making.

21. Thirdly, despite this, there must be room for judicial law-making, as judges can react more quickly to specific and urgent problems, and, however well-drafted they are, legislation and treaties cannot cover every eventuality or development. Indeed, the very fast changing world in which we live calls for interstitial judicial law-making in some areas more than ever.
22. Fourthly, it follows that, as far as possible, legislation and treaties, which being as clear and complete as possible should be drafted so as to allow for such interstitial judicial law-making. Easier said than done I accept, but a worthwhile aim to bear in mind.
23. Fifthly, international consistency is very important, so dialogue between judges of different jurisdictions, and even sitting together, is desirable. I do not see why judges of different jurisdictions should not be able to communicate with each other in cases which involve both jurisdictions. Indeed, this already happens from time to time.
24. Sixthly, conferences such as this one are to be greatly welcomed because they enable all those involved in this difficult and important area to exchange views and experiences and to plan for the future. In a number of recent cases concerned with topics as various as proprietary interests, passing off and illegality<sup>39</sup>, the UK Supreme Court has emphasised the importance of common law courts of different countries developing the common law consistently with each other and in a way which we learn from each other. This is even more important in the insolvency field, and it does not just of course apply to common law courts: it applies to all courts whether common law or civilian: we should work together and learn from each other.
25. These points lead quite naturally to considering the UNCITRAL Model Law on Cross-Border Insolvency, which has now been substantially implemented into the domestic

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<sup>39</sup> *FHR European Ventures LLP & Ors v Cedar Capital Partners LLC* [2014] UKSC 45, para 45, *Starbucks (HK) Ltd v British Sky Broadcasting Group PLC* [2015] UKSC 31, para 50, *Patel v Mirza*[2016] UKSC 42, *passim*

legislation of over 20 states<sup>40</sup> including many common law countries – US, UK, Canada, Australia and New Zealand, and very recently Singapore<sup>41</sup>. The basic principle of the Model Law is that a company will have a centre of main interest, COMI, and in the event of a company becoming insolvent the laws and courts of its COMI should prevail and courts of other jurisdictions should assist in that connection. However, this is subject to qualifications, so the Model Law does not apply to enforcement of securities (eg to receiverships) and it includes a public policy exception.

26. The extent to which the Model Law promotes substantive universalism (i.e. the application of the law governing the foreign insolvency proceeding) appears to be answered differently in different jurisdictions. Thus, the US courts seem to have adopted a rather more universalist approach than the courts of the UK. This is apparent from an instructive discussion in the judgment in the Chancery Division of the English High Court by Mr Justice Morgan in the 2014 *Fibria v Pan Ocean* case<sup>42</sup>. One of the issues in the case concerned the effect of article 21 of the Cross-Border Insolvency Regulations 2006<sup>43</sup> (the “CBIR”), and the CBIR were intended to give effect in the UK to the UNCITRAL Model Law. Article 21 of CBIR provides that, upon recognising any foreign insolvency proceedings, “where necessary to protect the assets of the debtor or the interests of the creditors”, a UK court “may, at the request of the foreign representative, grant any appropriate relief”, The Judge rejected the contention that, where the COMI of an insolvent company was Korea and the Korean court had put the company into administration, article 21 enabled the UK court “to order [any] relief which would be available to the administrator in the Korean court applying Korean insolvency law”<sup>44</sup>. However, Morgan J referred to a number of US and Canadian court cases<sup>45</sup>, including a 2010 decision<sup>46</sup> of the Fifth Circuit Federal Court of Appeals, which had reached the opposite conclusion. Although he accepted that it was not directly in point, Morgan J referred to the *Rubin* case<sup>47</sup>, and may well have relied on its rather restrained approach to internationalism when reaching his conclusion. Hopefully, this is another example of national inconsistencies which will encourage more international legislative action.

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<sup>40</sup> [Status - UNCITRAL Model Law on Cross-Border Insolvency \(1997\)](#)". UNCITRAL. Retrieved 7 June 2015

<sup>41</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html)

<sup>42</sup> *Fibria Celulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch)

<sup>43</sup> SI 2006/1030 made on 3 April 2006 and coming into force a day later

<sup>44</sup> *Ibid*, para 77 and paras 105-108

<sup>45</sup> *Ibid*, paras 95-101

<sup>46</sup> *Re Condor Insurance Co Ltd*, 601 F 3d 319 (Fifth Circuit 2010)

<sup>47</sup> *Fibria Celulose*, see footnote 40, paras 90 and 111

27. Working Group V of UNCITRAL is currently working on proposals to reverse parts of the reasoning in *Rubin*. For instance, it is considering additions to the Model Law to enable “insolvency-related judgments” in one jurisdiction to be recognised and enforced in other jurisdictions. This gives rise to a number of considerations which I believe are generating substantial debate.
28. I shall end with three rather disparate questions, which seem to me to be worth mentioning as they serve to indicate the sort of problems which cross-border insolvency continues to give domestic courts, and to serve to explain the dilemmas faced by domestic judges especially in a common law system, where they have the ability, and therefore sometimes the duty, to change the law.
29. The first of the disparate questions is: from which jurisdiction or jurisdictions should insolvency-related judgments be recognised? Consensus seems to be forming around the state in which the debtor has its COMI. However, COMI is a creation of a treaty, and, where that treaty is incorporated into law, of statute. It may be difficult for judges to justify taking it on themselves to develop the common law so that it accepts COMI as the touchstone for recognition. However, if courts were specifically required to do so by legislation (e.g. if Parliament was to enact a new UNCITRAL system which has that effect), that would of course be fine.
30. The second question is whether foreign law should be applied where it would result in giving effect to the discharge of debts governed by the law of a third country (or even of English law)? Any discussion of the tension between universalism and territorialism must also face up to the long-embedded principle of English law established by the Court of Appeal 125 years ago in the *Anthony Gibbs* case<sup>48</sup> that the discharge of a debt under the laws of a particular foreign country will be recognised only if the debt is governed by the law of that foreign country. There are powerful arguments for revisiting this common law principle in any event, as Mr Justice Teare said in a 2011 English Commercial Court case<sup>49</sup>, and as is demonstrated by a more recent<sup>50</sup> rejection of the principle by the Singapore High Court<sup>51</sup>, although the Hong Kong courts applied it in 2004<sup>51</sup>.

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<sup>48</sup> *Anthony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399

<sup>49</sup> *Global Distressed Alpha Fund 1 LP v PT Bakrie Investindo* [2011] EWHC 256 (Comm)

<sup>50</sup> *Pacific Andes Resources Development Ltd and other matters* [2016] SGHC 210

<sup>51</sup> *Hong Kong Institute of Education v Aoki* [2004] 2 HKLRD 760

31. The third question is: When is a judgment sufficiently related to insolvency to justify this special treatment? There are a number of candidates. The first and most extreme and the most simple possibility would be special treatment for any judgment in a claim under the general law that happens to be pursued by an office holder? That would cover a very wide category of claims and would mean that office-holders were placed in a very special position, and, by the same token, insolvent companies were given a very privileged position. It might even result in arguable abuses in the form of tactical insolvencies, designed simply to enable a company to take advantage of a privilege available only to insolvent companies. I very much doubt that such a rule would be appropriate or acceptable, despite the fact that it would be very simple and clear. More limited and more likely to be acceptable would be judgment in claims brought by the office holder against third parties that exist only in insolvency proceedings – such as claims brought on the basis of alleged preferences, undervalues, wrongful trading or their foreign equivalent. But that raises the question whether it should extend to all such claims, or only those pursued against insiders (ie, at least normally, directors or shareholders) where the privilege of limited liability might justify application of the law of the COMI state. And what about judgments affecting title or other rights in movable assets, immovable assets, and intangible assets, such as shares (thus restoring *Cambridge Gas*)? And what about interim judgments?

32. Well, having raised those questions, I will leave it to this conference to answer them. It has been famously said that even the greatest fool can ask a question that the wisest person cannot answer. And as Francis Bacon, the great 16<sup>th</sup>/17<sup>th</sup> century essayist, scientist, alleged writer of Shakespeare's plays, Attorney General and Lord Chancellor said in one of his essays, "What is truth?" said jesting Pilate, and would not stay for an answer"<sup>52</sup>. Like Bacon's Pilate, I have raised these questions, but, because I have to hear an appeal on trade mark law, I cannot stay for your answers. I hope that my fate is better than that of Pilate who allegedly killed himself or than that of Bacon who had to resign for accepting bribes.

33. I started by welcoming the members of the International Insolvency Institute to London. I end by repeating that welcome, and making it clear that the judiciary and the legal

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<sup>52</sup> F Bacon, *Of Truth in Essayes: Religious Meditations. Places of Perswasion and Disswasion. Seene and Allowed* (1597)

profession, and I believe the government, are determined the United Kingdom's forthcoming exit from the European Union will in no way undermine London's status as the world centre for legal services generally and dispute resolution in particular. English substantive and procedural law, our common law which is so attuned to the needs and realities of the commercial world, will remain as attuned to the demands of international business as it ever was. Indeed, left, once again, to our own devices, I would suggest that our law will in some respects be able to react more quickly and freely to changes and advances in our fast-changing world. Brexit does not alter the fact that lawyers and judges in the UK are as internationally minded and expert as they ever have been. Indeed, like any significant change, Brexit will operate, and it is already operating, as a spur to encourage all involved in the provision of legal services in London to strive to ensure that those services are even better than they already are.

David Neuberger

London, 19 June 2017