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Modified Universalism and the Proposed Adoption of the UNCITRAL Model Law on Cross-Border Insolvency in Hong Kong—From the Hanjin Shipping Bankruptcy Case

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I
INTRODUCTION

In Hong Kong, the principal piece of legislation governing corporate insolvency is the Companies (Winding Up and Miscellaneous Provisions) Ordinance ("C(WUMP)O").[1] In about October 2015, the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015 ("the 2015 Bill"), was introduced in the Legislative Council of Hong Kong.[2] At the consultation stage, insolvency practitioners and the Hong Kong Institute of Certified Public Accountants proposed that Hong Kong should consider adopting the UNCITRAL Model Law on Cross-Border Insolvency ("Model Law") to give greater certainty to the framework of the cross-border insolvency practice and to align with the development of various developed economies, including

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[1] Chapter 32, Laws of Hong Kong.

[2] Financial Services and the Treasury Bureau of the HKSAR Government, Legislative Council Brief of the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015 (2015).

Australia, the United Kingdom, Canada, the United States, Japan and South Korea.[3] Such a proposal was, however, not taken by the Legislative Council and the Hong Kong Government. It was the view of the Hong Kong Government that there were only 23 signatories adopting the Model Law, and most of the Hong Kong major trading partners had not done so. It would be better for Hong Kong to keep in view international developments before deciding whether to adopt the Model Law.[4] As a result, when the 2015 Bill was passed in May 2016, there were no provisions seeking to incorporate the Model Law into the legislation of Hong Kong.

Neither those proposing the incorporation of the Model Law nor the Hong Kong Government gave a detailed illustration of how the Model Law could possibly lead to a greater certainty to cross-border insolvency, or why it was necessary to adopt a 'wait and see' approach. This paper first seeks to fill such a knowledge gap by: (i) examining the theories of cross-border insolvency; (ii) the provisions of the Model Law; and (iii) other methods of promoting the doctrine of Modified Universalism. The authors of this paper propose that Modified Universalism appears to be the most ideal approach to cross-border insolvency. However, while agreeing to the view that the Model Law is comprehensive and shall promote Modified Universalism and achieve some procedural certainties, it is proposed that adopting the Model Law into local legislation may not be what creditors desire.

And there is a simpler method to achieve Modified Universalism compared to adopting the entire Model Law in Hong Kong. Taking the recent collapse of the Hanjin Shipping Co. Ltd ("Hanjin Shipping") as an example, the authors of this paper shall further illustrate the limitations of adopting the Model Law. It is argued that the creditors of an insolvent debtor company may not be able

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[3]Briscoe Wong Ferrier Limited, Letter to the Legislative Council dated 24th November 2015 (LegCo Ref.: CB(1)203/15–16(04)); Briscoe Wong Ferrier Limited, Letter to the Legislative Council dated 3d December 2015 (LegCo Ref.: CB(1)256/15–16(02)); Hong Kong Institute of Certified Public Accountants, Letter to the Legislative Council dated 26 November 2015 (LegCo Ref.: CB(1)203/15–16(06)).

[4]Financial Services and the Treasury Bureau and Official Receiver's Office, Summary of views of submissions and Government's responses dated 22 January 2016, items 59 and 60.

to gain as much certainty as they thought in terms of how the court in the foreign jurisdiction will decide on the matter of collection, realization and distribution of the debtor's assets.

II
THEORIES OF CROSS-BORDER INSOLVENCY

Cross-border insolvency and its related proceedings could be viewed as the product of international trade and globalization.[5] When commercial deals involve multiple parties from various jurisdictions, the resulting rights and liabilities are subject to different sets of local and international rules. When an entity engaging in such international commercial deals goes into liquidation, it is possible for such an entity to have assets in more than one jurisdiction, and/or have creditors in two or more jurisdictions. Cross-border insolvency issues arise in such circumstances.[6] Creditors may initiate winding-up proceedings in multiple jurisdictions to compete with other local and/or foreign creditors for assets available in different jurisdictions.

A. The 2 Extremes – Universalism and Territorialism

In dealing with the issues of cross-border insolvency, there are two general but opposite approaches: Universalism and Territorialism. Advocates for the Universalism approach contend that regardless of locations of assets, there should be a set of main proceedings covering all debtor's assets and in charge of the collection and distribution of all such assets, with a stay of parallel proceedings initiated in jurisdictions other than that of the main proceedings to be deferred to the jurisdiction of the main

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[5]Sandeep Gopalan and Michael Guihot, Cross-Border Insolvency Law, 2 (Australia: LexisNexis Butterworths, 2016).

[6]The Corporate Law Economic Reform Program of the Commonwealth of Australia, Cross-Border Insolvency—Promoting international cooperation and coordination. Corporate Law Economic Reform Program Proposals for Reform: Paper No. 8, 7 (2002).

proceedings.[7] As a result, the court's decision and legislative provisions of the jurisdiction of the main proceedings should be recognized and enforceable in other jurisdictions. Arguably, this approach promotes efficiency and economy by saving the creditors' cost in bringing parallel proceedings, and avoids duplication of liquidation processes. These will in turn leave more residual assets available for distribution among creditors in different jurisdictions.[8]

Despite the above purported advantages, the implementation of pure Universalism is often seen as difficult and unrealistic.[9] There are many obstacles to overcome. For example, the sovereignty concerns would make it impractical to require a country to fully coordinate (or even defer) its court decisions and/or statutory provisions with/to those of another country. It is also hard for countries to achieve consensus on the criteria of how to determine the main jurisdiction among those involved.[10]

On the other hand, advocates for the Territorialism approach propose that even if there are creditors and/or debtor's assets in multiple jurisdictions, each creditor can commence individual proceedings against the debtor in a jurisdiction where its court would have power to issue orders in relation to the collection and distribution of assets within its border. In doing so, only the laws of local jurisdiction should be applied and only assets within the jurisdiction should be dealt with.[11] Territorialism has been vividly described as a "grab rule" since local creditors will race to secure assets for collection and distribution for their own interests.[12] The concerns often associated with territorialism are the inconsistencies of laws in different jurisdictions, the unfair treatment between local and non-local creditors, and the resulting hesitatancy of creditors

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[7]Kent Anderson, The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience, 21 Penn. J. Intn'l Law 679, 681 (2000); and Leah Barteld, Cross-Border Bankruptcy and the Cooperative Solution, 9 BYU Intn'l L.& Mgmt. Rev. 27, 31 (2012).

[8]Anderson, Cross-Border Insolvency Paradigm, fn 7 at 688.

[9]Barteld, Cross-Border Bankruptcy, fn 7 at 32.

[10]Anderson, fn 7 at 689.

[11]Gopalan and Guihot, fn 5 at 16.

[12]Barteld, fn 7 at 30.

to extend credits to potential debtors operating in jurisdictions in favour of Territorialism.[13]

B. Modified Universalism - Halfway between the Extremes

Along the spectrum between the extreme approaches of Universalism and Territorialism, there is another approach known as Modified Universalism. On the one hand, it subscribes to the Universalism approach by: (i) maintaining the differences between the main proceedings in one jurisdiction and non-main proceedings in other jurisdictions; and (ii) calling for the cooperation and recognition of proceedings among the jurisdictions in order to facilitate the overall efficiency and cost-effectiveness of cross-border insolvency proceedings for creditors in different jurisdictions. Taking into account the sovereignty concerns over the legislative power,[14] Modified Universalism does not require local courts to relinquish complete control over assets in their local jurisdictions. Instead, they are given the discretion in making such decisions after reviewing the proceedings in foreign jurisdictions.[15]

III
THE MODEL LAW AS A VEHICLE TO PROMOTE MODIFIED UNIVERSALISM

In line with the theory of Modified Universalism, the United Nations Commission on International Trade Law ("UNCITRAL") developed the Model Law in the late 1990's to deal with issues of cross-border insolvency in multiple jurisdictions. As suggested by its preamble, the Model Law aims to:

(i) promote cooperation between courts and other competent authorities in multiple jurisdictions in cross-border insolvency cases;

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[13]Gopalan and Guihot, fn 5 at 17.
[14]Anderson, fn 7 at 689–691.
[15]Ibid.

(ii) promote fair and efficient administration of cross-border insolvency cases to protect the interests of creditors and other interested parties;
(iii) protect and maximize the value of the debtor's assets;
(iv) facilitate the corporate rescue to protect investment and to preserve employment; and
(v) promote greater legal certainty for trade and investment.[16]

And to achieve the above-mentioned objectives, the Model Law relies on 4 major tools:

1) *Local Court Access*—allowing access by foreign insolvency practitioners to local court for various types of insolvency-related applications;
2) *Foreign Proceedings' Recognition*—enabling the recognition of foreign insolvency proceedings by local court;
3) *Relief Available upon Recognition*—with the access granted to the foreign insolvency practitioners and/or recognition of the foreign proceedings, there are different types of remedies available to the interested parties; and
4) *Cooperation and/or Coordination*—to avoid the possible conflict of law situations, there are also provisions outlining the cooperation and/or coordination among multiple signatory jurisdictions.

A. Foreign Proceedings, Main Proceedings and COMI Explained

Before proceeding further to the discussion of access, recognition, relief and cooperation/coordination mechanisms in the Model Law, it is necessary to define foreign proceedings. Article 2(a) defines a 'foreign proceeding' as 'a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.'[17] Foreign proceedings can be further divided into 'foreign main proceeding' and 'foreign non-main proceeding.' The

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[16]The UNCITRAL Model Law on Cross-Border Insolvency, Preamble.
[17]Ibid, art 2(a).

former refers to 'a foreign proceeding taking place in the State where the debtor has the centre of its main interests' ("COMI"),[18] whereas the latter refers to 'a foreign proceeding other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article.'[19] Article 2(f) defines 'establishment' as 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.'[20]

While the Model Law does not give a definition for COMI,[21] there is a presumption provision under article 16(3) of the Model Law that in the absence of contrary proof, the debtor's registered office (or for an individual, his or her habitual residence) is presumed to be the COMI.[22] In addition to the reliance on the presumption, the court in the Model Law signatory state may also look into factors like where the debtor company's books and records are kept, where its employees are employed, and how the debtor company holds itself out to the word as to its place of operation in deciding where a company's COMI is.[23]

B. Tool 1—Local Court Access

Article 9 enables a foreign representative to apply directly to a local court for the purpose of the cross-border insolvency related applications.[24] Article 2(d) defines 'foreign representative' as 'as person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.'[25] The foreign

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[18]Ibid, art 2(b).

[19]Ibid, art 2(c).

[20]Ibid, art 2(f).

[21]UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation (2014), [31].

[22]The UNCITRAL Model Law on Cross-Border Insolvency, fn 21, art 16(3).

[23]For an example from the Commonwealth of Australia, see Tai-Soo Suk v Hanjin Shipping Co Ltd (2016) 14 ABC (NS) 463, [16], where the Federal Court of Australia held the COMI of Hanjin Shipping Co Ltd was in the Republic of Korea.

[24]The UNCITRAL Model Law on Cross-Border Insolvency, fn 21, art 9.

[25]Ibid, art 2(d).

representatives are entitled to commence proceedings in the local court and to participate in the proceedings of the local court after the foreign proceedings have been recognized by the local court.[26] Access to the local court is also granted to foreign creditors provided that it will not affect the ranking of claims set out by the local legislation.[27] To ensure such foreign creditors will have knowledge of the local proceedings, a notification system is introduced by virtue of article 14 requiring parties to the local proceedings to notify foreign creditors of the proceedings as if they are local creditors.[28]

C. Tool 2—Foreign Proceedings Recognition

Apart from enabling access to the local court, it is even more important to have a recognition mechanism in place so that if a creditor commences proceedings against the same debtor company in multiple jurisdictions, there is a way for a local court to recognize the proceedings in the foreign jurisdiction before such jurisdictions can coordinate and/or cooperate with each other in cross-border insolvency matters. Article 15 allows foreign representatives in a foreign jurisdiction to apply for a recognition of the foreign proceeding in the local court with necessary documentation.[29] Article 17 sets out when a local court has to recognize the foreign proceeding,[30] and when a foreign proceeding should be recognized as foreign main proceeding or a foreign non-main proceeding.[31] Although there is a provision stipulating that the application for recognition of a foreign proceeding should be decided as early as practicable,[32] such a recognition can be terminated or modified at any time if there are any changes of circumstances.[33] Article 18 imposes positive obligations on foreign representatives to continuously inform the local court of any changes in the status of

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[26]Ibid, arts 11 and 12.
[27]Ibid, art 13.
[28]Ibid, art 14.
[29]Ibid, art 15.
[30]Ibid, art 17(1).
[31]Ibid, art 17(2).
[32]Ibid, art 17(3).
[33]Ibid, art 17(4).

the foreign proceeding recognized and any further foreign proceedings concerning the same debtor which come to the knowledge of the foreign representatives.[34]

D. Tool 3—Relief Available upon Recognition

The relief available upon an application for recognition of foreign proceeding differs depending on: (i) the stage of application; and (ii) whether the foreign proceeding is recognized as a foreign main proceeding or foreign non-main proceeding.

When such an application has been filed but pending the local court's decision, article 19 allows the local court to grant provisional relief to stay the execution against the debtor's assets;[35] to entrust the administration and realization of all or part of the debtor's assets in the local jurisdiction to the foreign representative or other person designated by the court;[36] to suspend the right to transfer, encumber or otherwise dispose of any assets of the debtor;[37] and to examine the witnesses, obtain evidence and to deliver information about the debtor's assets, affairs, rights obligations or liabilities.[38] Unless an extension is granted under article 19(3), the relief granted terminates upon the local court's decision on the application for recognition.[39] It should be noted that although provisional relief is available to an application for recognition pending the local court's decision, the local court will not exercise the power given under article 19 if the relief is not urgently needed to protect the assets of the debtor or the interests of the creditors,[40] or if the grant of relief under article 19 will interfere with the administration of the foreign main proceeding.[41] When granting, denying or modifying any provisional relief, the local court should be satisfied that the interests of the creditors and

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[34]Ibid, art 18.
[35]Ibid, art 19(1)(a).
[36]Ibid, art 19(1)(b).
[37]Ibid, arts 19(1)(c) and 21(1)(c).
[38]Ibid, arts 19(1)(c) and 21(1)(d).
[39]Ibid, art 19(3).
[40]Ibid, art 19(1).
[41]Ibid, art 19(4).

other interested persons are adequately protected.[42] If necessary, the local court may even impose conditions on the relief being granted.[43] Upon the application of the foreign representatives, or any persons being affected by the provisional relief, or upon the local court's own motion, the provisional relief granted may be modified or terminated.[44]

In the event that the local court makes a decision to recognize a foreign proceeding as a foreign main proceeding, article 20 shall come into play. Subject to article 29, there shall be a stay of proceedings concerning the debtor's assets, rights, obligations or liabilities;[45] a stay of execution against debtor's assets;[46] and a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.[47]

Article 21 further sets out the relief available regardless of whether the foreign proceeding is recognized as a foreign main proceeding or a foreign non-main proceeding. In addition to similar relief under article 20 to stay the proceedings;[48] to stay the execution against debtor's assets;[49] and a suspension of right to transfer, encumber or otherwise dispose of any of the debtor's assets,[50] the local court may give orders in relation to examination of witness, taking of evidence and delivery of information concerning the debtor's assets, affairs, obligations or liabilities,[51] and to entrust the administration and realization of all or part of the debtor's assets in the local jurisdiction to the foreign representative or other person designated by the court.[52] If necessary, the local court may extend the provisional relief granted.[53] The foreign representatives may also request the local court to entrust the

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[42]Ibid, art 22(1).
[43]Ibid, art 22(2).
[44]Ibid, art 22(3).
[45]Ibid, art 20(1)(a).
[46]Ibid, art 20(1)(b).
[47]Ibid, art 20(1)(c).
[48]Ibid, art 21(1)(a).
[49]Ibid, art 21(1)(b).
[50]Ibid, art 21(1)(c).
[51]Ibid, art 21(1)(d).
[52]Ibid, art 21(1)(e).
[53]Ibid, art 21(1)(f).

distribution of all or part of the debtor's assets in the local jurisdiction to the foreign representatives or to other persons designated by the court. However, the foreign representatives doing so have to show the local court that the interests of the creditors in the local jurisdiction have been adequately protected.[54] Similar to the provisional relief, the local court should be satisfied that the interests of the creditors and other interested persons are adequately protected when granting relief under article 21 and may impose conditions to the relief granted.[55] Upon the application of the foreign representatives, or any persons being affected by the provisional relief, or at the local court's own motion, the relief granted may be modified or terminated.[56] Article 23 gives foreign representatives the standing to initiate proceedings in local court to avoid acts detrimental to creditors with reference to the local jurisdiction's relevant legislation.[57] Article 24 allows the foreign representatives to intervene in any proceedings held in the local court where the debtor is a party, subject to the requirements set out in the local legislation.[58]

E. Tool 4—Cooperation and/or Coordination

Proper cooperation among foreign courts and representatives is an important element contributing to Modified Universalism. To ensure the proper cooperation of the foreign courts and foreign representatives with the local court, articles 25 and 26 set out mechanisms for the local court to communicate with the foreign courts or foreign representatives. These can either be done directly or through an organisation responsible for the re-organisation or

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[54]Ibid, art 21(2).

[55]Ibid, arts 22(1) and 22(2).

[56]Ibid, art 22(3).

[57]Ibid, art 23(1); for example, liquidators in Hong Kong may apply to the Hong Kong court to set aside unfair preference transactions under section 266 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32).

[58]The UNCITRAL Model Law on Cross-Border Insolvency, fn 21, art 24. In Hong Kong, the joinder of parties in civil proceedings are generally governed by Order 15 rule 4 of the Rules of the High Court (Cap 4A) and the Rules of the District Court (Cap. 336H).

liquidation under the local legislation.[59] Article 27 outlines the possible forms of cooperation between the foreign courts, foreign representatives, local court and the designated organisation responsible for communicating on behalf of the local court.[60] Articles 28-30 set out how the local court (or its designated organisation to communicate on its behalf) should coordinate with the foreign courts or foreign representatives in the event of concurrent proceedings,[61] while article 32 sets out the rule of payment in such concurrent proceedings.[62]

IV
OTHER MEANS TO ACHIEVE MODIFIED UNIVERSALISM?

While the above review of the Model Law's considerably comprehensive provisions may prove that the Model Law is specifically drafted to facilitate and promote the doctrine of Modified Universalism, it does not provide the answer to another important question: is adopting the Model Law the only way to achieve Modified Universalism? If an alternative exists, the Hong Kong Government could be right in taking the 'wait and see' approach and not incorporating the Model Law to the C(WUMP)O.

A. Judicial Application of Modified Universalism

In 2014, it was confirmed by the UK Supreme Court in *Singularis Holdings Ltd v PricewaterhouseCoopers* ("the Singularis") that according to the common law and subject to the limitations set out by its own legislation, the court in one jurisdiction has the power to render assistance to the court in other jurisdictions.[63] Such a judicial recognition of Modified Universalism was applied by the Hong Kong Court in cross-border

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[59]The UNCITRAL Model Law on Cross-Border Insolvency, fn 21, arts 25 and 26.
[60]Ibid, art 27.
[61]Ibid, arts 28–30.
[62]Ibid, art 32.
[63][2015] AC 1675, [51]–[60].

insolvency cases not involving a shipping company.[64] As to whether to Court in Hong Kong would similarly apply Modified Universalism in cases involving cross-border insolvency of a shipping company, it remains unclear partly because of the previous court decision in the case of *International Transportation Service Inc v The Owners and/or Demise Charterers of the Ship or Vessel "the Convenience Container" and others* ("*the Convenience Container*").[65]

On 13th May 2003, a Singaporean company known as Powick Marine (S) Pte Ltd ("Powick") went into liquidation in Singapore.[66] The stevedore and charterer of Powick issued *in rem* writs against 4 vessels ("the Vessels") in Hong Kong for the unpaid charges for stevedoring, wharfage and dockage and for breach of charterparty.[67] Issuing *in rem* writs served at least 2 practical advantages for these creditors.[68] First, when the owner of the Vessels (as on the case of Powick) was an entity incorporated outside Hong Kong, leave of the Court would generally be required if a creditor wished to serve the *in personam* writs on the shipowner outside Hong Kong.[69] Second, *in rem* writs would enable the creditor to apply for a warrant of arrest,[70] which would in turn enable the ship arrest for the creditors to obtain security for the unpaid debts.[71] In cases where these creditors successfully obtained security through ship arrest, they would be able to obtain priority

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[64]Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd [2015] 4 HKC 215, and Re G Ltd [2016] 1 HKLRD 167.

[65]The Convenience Container & Others [2006] 3 HKLRD 610 (Court of First Instance) and The Convenience Container [2007] 3 HKLRD 575 (Court of Appeal).

[66]The Convenience Container & Others [2007] 3 HKLRD 575, [1].

[67]Ibid, [2]–[3].

[68]In the Convenience Container, the in rem writs were issued pursuant to s12B(4) of the High Court Ordinance (Cap 4), Laws of Hong Kong: see The Convenience Container & Others [2006] 3 HKLRD 610, [11].

[69]Order 11 of the Rules of the High Court (Cap. 4A), Laws of Hong Kong; F.W.H. Chan, J.J.M. NG and S.K. Tai, Shipping and Logistics Law – Principles and Practice in Hong Kong, 2nd ed., 570 (Hong Kong: Hong Kong University Press, 2015).

[70]Order 75, rule 5 of the Rules of the High Court (Cap. 4A), Laws of Hong Kong.

[71]F.W.H. Chan, J.J.M. Ng and S.K. Tai, Shipping and Logistics Law – Principles and Practice in Hong Kong, 2nd ed., 569 (Hong Kong: Hong Kong University Press, 2015).

over other unsecured creditors of the ship owners in the event of distribution of the residual assets of the ship owners in liquidation.

In *the Convenience Container*, the Vessels were eventually arrested by other creditors of Powick instead of by the stevedore and charterer plaintiffs.[72] Powick in liquidation nonetheless sought to set aside the *in rem* writs issued against the Vessels after the date of Powick's winding-up on the grounds that:

(i) upon liquidation of Powick, Powick ceased to be the beneficial owner of the Vessels and so the stevedore and charterer plaintiffs could no longer bring a claim under s12B(4) of the High Court Ordinance ("HCO");[73] and

(ii) the case was a contest between the group of Powick's unsecured creditors and the stevedore and charterer plaintiffs in competing for Powick's assets available for realization. The more assets being secured by the stevedore and charterer plaintiffs through arrest and sale of the Vessels, the fewer assets would be available for other unsecured creditors.[74]

Powick's application to set aside the *in rem* writs was dismissed by both the Court of First Instance and the Court of Appeal.[75] From the perspective of the ship owner's creditors, the decision of the *Convenience Container* appeared to be good news. As long as the claims by the creditors fall within any of those specified under s12A(2)(e)-(q) of the HCO, s12B(4)(b) of HCO enables those creditors to commence the *in rem* proceedings against the debtor company. And even if an *in rem* writ is issued after the winding-up date of the ship owner company, the beneficial ownership of the ships shall remain within the ship owner company and should not affect the creditors' eligibility to arrest the ships.

The issue of applying Modified Universalism had never been raised in the judgments of the Court of First Instance and the Court of Appeal in Hong Kong in *the Convenience Container*. If a

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[72]The Convenience Container & Others [2007] 3 HKLRD 575, [4].

[73]Cap 4A, Laws of Hong Kong; The Convenience Container & Others [2007] 3 HKLRD 575, [6].

[74]The Convenience Container & Others [2007] 3 HKLRD 575, [7].

[75]The Convenience Container & Others [2006] 3 HKLRD 610, [72]; The Convenience Container & Others [2007] 3 HKLRD 575, [162] and [170].

creditor of a foreign shipping company in liquidation issues an *in rem* writ against the shipping company's vessels in Hong Kong after obtaining a foreign winding-up order, should the *in rem* writ be set aside pursuant to the Court of Appeal decision in *the Convenience Container*? Or shall the Hong Kong Court apply *the Singularis* and give way to Modified Universalism?

At the time of writing this paper, there were no further decisions about setting aside *in rem* writs after the winding-up of a ship owner company in Hong Kong. In an article published by Professor Anselmo Reyes,[76] who was then Reyes J deciding *the Convenience Container* in the Court of Appeal, it was stated that had the point of modified universalism been raised in *the Convenience Container*, the Court of Appeal might have reached a different decision that upon liquidation, Powick's liquidator was not acting on behalf of the company, but on behalf of the creditors of Powick.[77] With the change of the beneficial ownership, the stevedore and charterer plaintiffs would no longer be able to have the *in rem* writs issued after the winding-up of Powick, leaving them only the avenue to claim the ship owner's debt in the capacity of unsecured creditors. Despite the comment of Professor Reyes on the possible alternative decision upon taking the doctrine of Modified Universalism into account, it can be said that *the Convenience Container* as decided by the Court of Appeal in Hong Kong remains an authority in the situation of issuing *in rem* writs after the winding-up of a shipping company. It is therefore still uncertain as to whether the court will strictly apply *the Convenience Container* or will take *Singularis* into account and reach a decision as proposed by Professor Reyes.

Further, the current C(WUMP)O does not seem to contain any provisions setting out the power or duty of the Hong Kong court to render assistance to foreign insolvency representatives or to courts of other jurisdictions in the event of cross-border insolvency. As discussed by the UK Supreme Court in *Singularis*, the exercise of statutory power or obligations of the English courts formed another

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[76]Anselmo Reyes, Cross-Border Insolvency and Shipping Companies, (2016) Lloyd's Mar. & Comm. L. 517, 518–519.

[77]Ibid, 518–522.

major group of cases realizing the practice of Modified Universalism in addition to the common law powers to stay local proceedings or to enforce foreign proceedings.[78] In the UK, such a statutory power or duty is set out in s426 of the Insolvency Act 1986. As mentioned by Harris J in *Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd*,[79] the court's power to assist the foreign liquidation process is subject to the Hong Kong local insolvency regime.[80] Without any amendments to the existing legislation, the common law power of the court is subject to substantial limitations.

B. Backing up the Judicial Modified Universalism by Legislation?

Having realized that the judicial power of the Court is still ultimately subject to legislative provisions, advocates for adoption of the Model Law may think that even the Court is supporting the adoption of the Model Law. However, it may not be necessary to adopt a set of provisions as comprehensive as the Model Law to give effect to the Judicial Modified Universalism. An addition of a section equivalent to s426 of the Insolvency Act 1986 to the C(WUMP)O may be enough to give and recognise the Hong Kong Court's power or duty to cooperate with foreign jurisdictions while retaining the spirit of Modified Universalism and leaving the discretion to the local courts.[81]

V
THE COLLAPSE OF HANJIN AND LIMITATIONS OF THE MODEL LAW

Having examined possible ways to achieve Modified Universalism, the authors wish to make use the collapse of Hanjin

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[78]Singularis Holdings Ltd v PricewaterhouseCoopers [2015] AC 1675, [54]–[60].

[79]Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd [2015] 4 HKC 215.

[80]Ibid, [11]–[12].

[81]For example, s426(4) of the Insolvency Act 1986 sets out that courts in the UK with the insolvency jurisdiction shall assist the courts in other jurisdictions, while the courts in the UK will still retain their discretion and should observe the rules of private international law.

Shipping as an example to show the limitations of the Model Law in terms of promoting Modified Universalism and/or to give greater legal certainty to the creditors. Before that, it is essential to have an overview of what led to the collapse of Hanjin Shipping.

A. Declining Financial Performance and Position and Impact on the Supply Chain

Among the bankruptcy cases in shipping industry, the bankruptcy of Hanjin Shipping had the largest impact since the 1986 bankruptcy of United States Lines in terms of operating capacity involved, number of shipments around the world being delayed, and number of stakeholders in the supply chain with their operations being affected.[82] Hanjin had a capacity of over 600,000 twenty-foot equivalent units ("TEUs") at the time of filing for bankruptcy, which was far more than other liquidated shipping companies like the United States Lines (with about 100,000 TEUs), Cho Yang Shipping (with about 70,000 TEUs), and Seatrain Lines (with about 45,000 TEUs).[83] Between the financial years 2011 and 2015, Hanjin Shipping had experienced a negative cash flow problem for 4 out of 5 years.[84] These problems were partially attributed to the negative cash flow from: (i) operating activities (in years 2011 and 2012); investing activities (in years 2011 and 2012); and (iii) financing activities (in years 2013, 2014 and 2015).[85] In terms of its financial performance, Hanjin Shipping reported a loss in each of these years.[86] Along with the poor financial performance and negative cashflow, the value of total assets held by Hanjin Shipping shrank by almost 50% between 2011 and 2015.[87] In the first half of 2016, it was estimated that Hanjin Shipping incurred a

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[82]Dupin, C. (2016) Hanjin's bankruptcy was the largest for container shipping in 30 years. (Last accessed on 16 June 2018. https://www.americanshipper.com/main/news/hanjins-bankruptcy-was-the-largest-for-container-s-66388.aspx)

[83]Alphaliner (2016) Alphaliner Weekly Review Volume 2016 Issue 38.

[84]Factiva Inc., Factiva Company Report – Hanjin Shipping Co., Ltd. (2017), Factiva Database, retrieved on 18 July 2017.

[85]Ibid.

[86]Ibid.

[87]Ibid.

loss of up to US$4,331,400.[88] In about late August 2016, the Board of Hanjin Shipping decided to file for bankruptcy to the court in Seoul.[89]

The collapse of Hanjin Shipping also affected the businesses of other key players along the supply chain. With the bad debts incurred by Hanjin Shipping, terminal operators began to reject the berthing of Hanjin's vessels to avoid further failure in receiving the port fees from Hanjin Shipping.[90] With a lot of containers being seized, Hanjin Shipping's clients and business partners were also adversely affected. Electronic giants, including Samsung and LG, using Hanjin to transport 40% and 20% of their exports respectively in that period, had thousands of goods onboard Hanjin Shipping's vessels and encountered product shortages.[91] Terminals and depots suffered because of the outstanding fees and payments from Hanjin. There were ports facing uncertainty of harbour dues payment as Hanjin's vessels were arrested in various cities, including Sydney, Singapore, Shanghai, Shenzhen, Ningbo, Qingdao and Long Beach.[92] With over 67 vessels chartered and 500,000 containers on lease, vessel chartering and container leasing companies encountered the problem of recovering the assets leased to Hanjin Shipping and overdue payment. Hanjin's alliance partners, COSCO, "K" Line, Yang Ming and Evergreen Line, who shared space with the carrier on ships, had problems in handling the loaded Hanjin cargos and cargos loaded on Hanjin ships.[93]

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[88]Seatrade (2018) Hanjin Shipping loss widens to $433m in first half. Seatrade Maritime News (Last accessed on 16 June 2018. http://www.seatrade-maritime.com/news/asia/hanjin-shipping-loss-widens-to-433m-in-first-half.html).

[89]BBC News, South Korean Shipping Giant Hanjin to Enter Receivership (2016), BBC News <http://www.bbc.com/news/business-37227560>, retrieved on 20 July 2017.

[90]Campogrande, S. (2016) The Hanjin "crack" shakes maritime transport operators. (Last accessed on 16 June 2018. https://www.studiozunarelli.com/en/feature-articles-news-maritime-transport/the-hanjin-crack-shakes-maritime-transport-operators/).

[91]Dodwell, D. (2016) Hanjin Shipping collapse may be the beginning of the end for profitable global trade. South China Morning Post. (Last accessed: http://www.scmp.com/business/global-economy/article/2049560/hanjin-shipping-collapse-may-be-beginning-end-profitable).

[92]Alphaliner (2016) Alphaliner Weekly Rev., Vol. 2016 Iss. 40.

[93]Meyer (2017) Death of an ocean carrier. American Shipper. (Last accessed on 28 June 2018: https://www.americanshipper.com/main/news/death-of-an-ocean-carrier-66766.aspx).

B. Potential Claims from Creditors Worldwide

When a company is about to enter into liquidation process, creditors of the company would be concerned about: (i) whether they can recover the outstanding debts owed by dissolving company; and (ii) how they are ranked among other creditors in terms of the priority of claiming the debts from the residual assets of the dissolving company. These same concerns would also be the concerns of various creditors of Hanjin Shipping when the board of Hanjin filed its bankruptcy application in Seoul. These creditors included bank mortgagees of vessels, shippers and consignees, freight forwarders, container leasing companies, shipping companies with slot charter agreements with Hanjin Shipping, shipowners whose vessels were chartered to Hanjin Shipping under time charterparties and/or demise charterparties, stevedores, pilots, and crew members of vessels.[94] If all these creditors had operated within the Republic of Korea and if all the assets and operations of Hanjin Shipping had been within the Republic Korea, there would probably be no cross-border insolvency issues. However, as an international shipping company with multiple subsidiaries and operations around the world,[95] it was reasonable for Hanjin Shipping and its subsidiaries to enter into contracts with parties worldwide. The collapse of Hanjin would inevitably trigger the issues of cross-border insolvency.

C. Problems with Applying the Model Law?

Assuming Hong Kong had already become a signatory to the Model Law as the Republic of Korea is, and there were vessels of Hanjin entering Hong Kong soon after Hanjin's filing of bankruptcy protection in the Republic of Korea, could creditors of Hanjin still issue *in rem* writs to arrest Hanjin's vessels?

While *the Convenience Container* appeared to give an answer of 'yes,' the application of the Model Law could have led to a contrary outcome. It would be likely that the Hong Kong court

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[94]In Hyeon Kim, Legal Implications of Hanjin Shipping's Rehabilitation Proceeding, 47 Hong Kong L. J. 915, 918–925 (2017).

[95]As of September 2016, there were at least 10 subsidiaries under Hanjin Shipping around the world. For details, see MarketLine., Company Profile – Hanjin Shipping Co., Ltd (2016), retrieved on 18 July 2017.

would recognize the Korean Proceedings as the foreign main proceedings under article 2(b) of the Model Law because, under article 16(3) of the Model Law, Hanjin had its COMI in the Republic of Korea. In the absence of any modifications of the Model Law by the Hong Kong Legislative Council to limit the scope of a stay order under article 20(2), it might be the case that other foreign representatives would apply for a stay order to stay the Hong Kong proceedings under article 20(1) and the court in Hong Kong would have to defer to the decisions of the courts of the Republic of Korea according to Korean insolvency law.

With reference to a recent article by Professor In Hyeon Kim,[96] the court of the Republic of Korea has the power to decide whether a rehabilitation proceeding should be commenced to give the debtor company a chance to save its business.[97] If the court grants the rehabilitation proceeding, vessels of the debtor company cannot be arrested by other creditors.[98] This was the case for creditors of Hanjin seeking to arrest the vessels in countries like the United States, the United Kingdom, Japan and Singapore.[99] Had the Model Law been adopted in Hong Kong, Hanjin's vessels would not have been arrested by Hanjin's creditors in the course of Hanjin's rehabilitation.

Undoubtedly, an adoption of the Model Law does give greater certainty to the creditors in terms of which country's insolvency law should be followed. Nevertheless, the Model Law may not be able to address the ultimate concerns and uncertainty in the mind of creditors, i.e. how assets of the debtors should be collected, realised and distributed. This is a question largely based on whether the creditors and their representatives would have an adequate understanding about the insolvency law of the main proceedings' jurisdiction. Taking the Hanjin collapse as an example, Hanjin's creditors based in Hong Kong or foreign jurisdictions other than the Republic of Korea may not know the insolvency law of the Republic of Korea well. Yet because of the operation of the Model Law and the stay order, they would have to seek legal advice from the legal advisers or insolvency practitioners in the Republic of

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[96]In Hyeon Kim, fn 94.
[97]Ibid, 925.
[98]Ibid.
[99]Ibid, 926.

Korea. If creditors are deterred from seeking advice from South-Korean based legal and/or insolvency practitioners, such an arrangement may even bring the practice of cross-border insolvency away from the ideal theory of Modified Universalism and towards Territorialism.

Advocates for the adoption of the Model Law may argue that the uncertainty about the foreign main proceedings would exist in any event. While it is true that all court proceedings have an element of uncertainty, if the only apparent benefit of adopting the Model Law is the recognition of foreign main or non-main proceedings, it would be understandable why the Hong Kong Government wanted to conduct further research before deciding whether to incorporate the Model Law. Furthermore, in the absence of the Model Law, a slight modification of the C(WUMP)O with reference to s426 of the Insolvency Act 1986 in the UK may serve a similar purpose and the Hong Kong court would similarly reach a decision that the Hong Kong court shall recognise the South-Korean proceeding and render assistance to the South Korean Court because of the Hong Kong equivalent of s426 of the Insolvency Act 1986 and the judicial recognition of Modified Universalism in the Singularis without adopting the Model Law.

Finally, even if the Hong Kong Government does decide to adopt the Model Law, it will take time for the Hong Kong Government and the Legislative Council to discuss how the Model Law should be modified to address the concerns in their minds upon the liquidation of a company. For example, what applications by the creditors should be granted an exemption when the stay order of article 20 comes into play? All of these questions require a detailed and in-depth consultation.

VI
CONCLUSION

Cross-border insolvency issues have been raised for years, especially when multinational giant corporations encountered bankruptcy with creditors initiating winding-up proceedings in multiple jurisdictions under various legal systems of different countries. This paper revealed the impact of Hanjin Shipping bankruptcy on the various stakeholders in the supply chain

worldwide and the subsequent cross-border insolvency incurred when each of them initiated compensation for their loss through different jurisdictions in around the world. A review of the universalism and territorialism has been carried out in handling this issue. Adoption of Modified Universalism in the Model has been further proposed with four major tools in achieving an effective and fair mechanism in tackling these problems.

Besides the Hanjin Shipping case discussed in this paper, there are also other similar cases like the collapse of OW Bunker, the world's largest bunker fuel supplier, in 2014. Concerns of demanding an effective and fair mechanism in solving complex and multiple cross-border insolvency needs to be addressed in Hong Kong. If there is no improvement in the cross-border insolvency mechanism, courts in multiple jurisdictions in cases similar to the collapse of Hanjin Shipping and OW Bunker will again produce conflicting and controversial decisions on disputes about the liquidation processes, maritime liens, ship arrest, and assets distribution.

This paper has recognised the fact that Modified Universalism appears to be the most ideal theory in handling cross-border insolvency issues when compared to the extremes of Pure Universalism and Territorialism. It has also been shown that the Model Law contains a comprehensive set of provisions seeking to facilitate Modified Universalism. However, adopting the Model Law is not the only method to promote Modified Universalism. In the context of Hong Kong, a simple addition of a legislative provision like s426 of the Insolvency Act 1986 of the UK could be another alternative to achieve Modified Universalism. Further, as demonstrated by the UK Supreme Court decision in *the Singularis*, the judiciary is ready to recognize and give effect to Modified Universalism as long as there are relevant statutory powers and duties provided in the legislation.

There is indeed a need to further improve the C(WUMP)O in Hong Kong. But this does not have to be done through adopting the Model Law as soon as practicable without further discussion and consultation. As illustrated by the collapse of Hanjin and how other signatories of the Model Law dealt with the resulting cross-border insolvency matters, it was not difficult to spot the limitations to the creditors even if the Model Law was in place. Because of these reasons, it would be prudent for the Hong Kong Government and

the Legislative Council to have further in-depth discussions with stakeholders to decide whether the adoption of the Model Law is the best way to achieve Modified Universalism and to bring greater certainty to creditors. And even if all parties and stakeholders agree that adopting the Model Law is the most ideal way, further deliberations will be required to see how provisions of the Model Law should be customised to suit the needs and expectations of both the creditors and the insolvency practitioners.