

# Recognition of foreign insolvency judgments: Back to basics?

The English Courts have been moving enthusiastically towards a universal approach to all insolvencies, even though this carried them further than Parliament or international convention has so far been prepared to go. However, in refusing to recognise a default judgment given in a US insolvency in *Rubin v Eurofinance S.A.* [2012] UKSC 46, the Supreme Court has brought this movement to an abrupt halt.

Philip Hertz, Partner in the Restructuring and Insolvency Group in London commented that "this long awaited decision will have a significant impact on the English court's ability to recognise and enforce judgments handed down in the course of a foreign insolvency and appears to cut across the trend of "universalism" that appeared to be gaining momentum in the wake of recent Privy Council and House of Lord's decisions."

## Background

Eurofinance S.A., a BVI company, established an entity called The Consumers Trust to carry on a sales promotion scheme in the USA and Canada. The beneficiaries under the Trust were customers who, after three years, were entitled to redeem "cashable vouchers" issued at the time of their purchase of goods or services subject to strict conditions. The success of the scheme for the Trust depended on customers forgetting to redeem the vouchers or being unsuccessful in meeting the conditions.

The scheme ceased after the Attorney General of Missouri brought

proceedings against the Trust under consumer protection legislation. This resulted in a settlement requiring the trustees to pay US\$1.65 million and costs. When it became clear that other claims would follow, Rubin and Lan were appointed as receivers of the Trust and they in turn obtained protection for the Trust under Chapter 11 of the US Bankruptcy Code.

In December 2007 proceedings were commenced in the US Bankruptcy Court against Eurofinance and others as defendants to recover funds paid to them by the Trust prior to the commencement of the Chapter 11 proceedings. The claims fell within the category of "adversary" proceedings under US Bankruptcy legislation (often referred to as "clawback" proceedings in the UK). The defendants did not participate in the adversary proceedings and in July 2008 default and summary judgment was entered against them in the US. In November 2008, the receivers applied to the English Court for an order recognising the US judgment so that it could be enforced in England, where some of the defendants had assets. This request gave rise to a

## Key issues

- Supreme court refuses to give effect to US judgment on claw back actions
- Limits universal effect of bankruptcy process

novel and important issue of international insolvency law.

At first instance the English Court refused to enforce the US judgment in the adversary proceedings, but that decision was reversed on appeal (see our Client Briefing entitled UK and US bankruptcy judges rekindling that special relationship?, August 2010). The Court of Appeal in that case relied heavily on two previous cases (*Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508 and *HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852). The defendants appealed that judgment to the UK Supreme Court, which, by a 4 to 1 majority, allowed the appeal.

The principal issue before the Supreme Court was whether, and if so, in what circumstances, a judgment of a foreign court in proceedings to adjust or set aside prior transactions, would be enforced in England. It was argued on behalf of the receivers that the US judgment could be given effect under English common law principles or through the application of the UNCITRAL Model Law (implemented in the UK by the Cross Border Insolvency Regulations 2006).

### The common law rule

Lord Collins gave the leading judgment in the case (Lords Walker and Sumption agreeing with him). He started with a consideration of the common law position. In summary, the common law rule is that a judgment of a foreign court against a person will be capable of enforcement in England where that person was present in the foreign jurisdiction at a relevant time, participated in the proceedings or otherwise submitted to the jurisdiction of the foreign court. In *Rubin* none of those conditions applied. As a result, the US judgment was not enforceable in England under the common law rule.

The question that then arose was whether there should be a separate, more liberal, rule allowing the enforcement of judgments given in foreign insolvency proceedings where the judgment was part of the mechanism of collective execution for the benefit of creditors as a whole. Lord Collins's view was that there should not be a separate rule. His reasoning for this was twofold. First, he found it difficult to see a difference of principle between a foreign judgment against a debtor on a debt due to a company in liquidation and a foreign judgment against a creditor for

the repayment of a preferential payment. Both were personal judgments requiring the judgment debtor to pay a sum of money to the company for the benefit of creditors as a whole. Second, any separate rule for foreign insolvency proceedings would require the court to develop two new jurisdictional rules: one to determine what foreign insolvencies should be entitled to benefit from the separate rule; and another to determine what connection a judgment debtor needed to have with the foreign insolvency for a judgment to be enforced against it. Both raised difficult policy issues.

Lord Collins went on to state that the dicta in the *Cambridge Gas* and *HIH* cases on which the Court of Appeal had relied in reaching its decision did not support the result and that *Cambridge Gas* was wrongly decided. He continued that the Court of Appeal's decision did not represent an incremental development of existing principles but a radical departure from settled law. This was more appropriately the domain of the legislature and not judicial innovation, particularly as he considered that it would be to the detriment of UK businesses unless it was adopted on an international and reciprocal basis.

Finally, Lord Collins noted that he did not consider that there was any serious injustice in the English Court declining to sanction a departure from the traditional common law rule. He considered that there were various ways in which the claims in the US proceedings could have led to proceedings in England for the benefit of the creditors.

### The Cross Border Insolvency Regulations

The receivers also argued that the US judgment could also be enforced through the CBIR on the basis that the adversary proceedings were part of the Chapter 11 proceedings which the English Court had recognised at first instance. Lord Collins disagreed. The CBIR says nothing about the enforcement of foreign judgments against third parties and is not designed for this purpose. Recognition and enforcement of judgments in civil and commercial matters (but not in insolvency matters) have been the subject of intense international negotiations at the Hague Conference on Private International Law which ultimately failed because of an inability to agree on recognised international bases of jurisdiction. If the CBIR had intended to allow the enforcement of foreign judgments, it would have done so expressly.

The appeal in the *Rubin* case was heard at the same time as an appeal on substantially similar matters in the case of *New Cap Reinsurance Corporation (in liquidation) and another v EA Grant and others*. However, in that case the Supreme Court determined that, by filing proofs of debt in the Australian insolvency, the defendants had submitted to the jurisdiction of the Australian Courts, including for the purposes of the clawback proceedings. The common law rule was therefore met, allowing the enforcement of the Australian judgment under the Foreign Judgments (Reciprocal Enforcement Act) 1933 (which reflects the common law rule).

The EC Insolvency Regulation had no role to play in either appeal as none

of the debtors had its centre of main interests in the European Union.

Lord Mance substantially agreed with Lord Collins, although reserved his opinion as to whether *Cambridge Gas* had been wrongly decided. Lord Clarke dissented.

## Conclusion

Adrian Cohen, Partner in the Restructuring and Insolvency Group in London concluded that: "Lord Hoffmann's dicta in *Cambridge Gas* and *HIH* may well have represented the high tide in the universalist trend of English jurisprudence on matters of comity, with this judgment signalling a return to a more cautious and conservative approach." A foreign judgment, whether given in an insolvency or in ordinary commercial proceedings, will only be enforced in England if it meets conventional rules. If insolvency is to be treated as a special case, legislators must develop that case on the back of international agreement.

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