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In pursuit of universality in cross-border insolvency

The Court of Appeal[1] has ruled that foreign judgments in insolvency proceedings may be enforced by the English courts at common law, and that the ordinary principles which may prevent the enforcement of foreign judgments do not apply to insolvency judgments where the action from which the foreign judgment arises is integral to the collective nature of the insolvency proceedings.

Facts

The appellant receivers (the **"Receivers"**) were appointed to an English law trust which had its centre of main interest in the US (the **"Trust"**). The respondent trustees (who were resident in England) used the Trust to operate, through a BVI corporation, a dubious scheme in the US from which they benefited financially. The scheme was challenged under US consumer protection legislation. In light of the prospect of further costly legal actions against the Trust Chapter 11 bankruptcy proceedings in the US were commenced in relation to both Eurofinance and the Trust. In seeking to implement a joint liquidation plan in the Chapter 11 proceedings the Receivers were appointed as the legal representatives of the Trust by the US Bankruptcy Courts, with the power to prosecute all causes of action against potential defendants and obtain relief. This relief included *"the enforcement of judgments of the New York Bankruptcy Court against persons residing or owning property in Great Britain."*

The Receivers commenced actions against the respondents in New York using powers afforded to them under the avoidance provisions of Chapter 11 to recover money paid by the Trust to the respondents (similar to preference and undervalue transaction claims in England)(the **"Adversary Proceedings"**). The respondents elected not to submit to the jurisdiction of the New York court and not to participate in the proceedings. Default and summary judgment was entered in the US court against the respondents and the Receivers applied to the English court under the Cross-Border Insolvency Regulations 2006 (**"CBIR"**) to (i) recognise the proceedings in the New York Bankruptcy Court in respect of the Trust as a *"foreign main proceeding"*[2] and (ii) enforce against the Respondents the judgment in the Adversary Proceedings as a judgment of the English court.

At first instance the High Court granted recognition under the CBIR to the New York proceedings in relation to the Trust and found that the proceedings against the respondents were an integral part of the insolvency proceedings on foot in relation to the Trust in New York. However, the High Court declined to enforce the judgment against the respondents either at common law or under the assistance provisions of the CBIR. In reaching this decision the court held that the judgment was an *in personam* judgment which could not be enforced in circumstances where the Respondents had not submitted to the jurisdiction of the New York court. It was against this finding that the Receivers appealed.

Decision

The central question for the Court of Appeal arose not within the terms of the CBIR but under the common law, and more specifically from the decision of the Privy Council in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc*[3]. In that case Lord Hoffman found that judgments in insolvency proceedings were neither judgments *in rem* or *in personam* but were *sui generis*, such that the principles of English private international law do not govern their enforcement. This conclusion was based on the view that such proceedings do not determine the existence of rights

1 *Rubin & Lau v Eurofinance & Ors* [2010] EWCA Civ 895

2 CBIR, Article 15

3 [2006] UKPC 26

but provide a collective mechanism through which the already established rights of a debtor's creditors can be enforced for the benefit of those creditors.

In reaching its decision the Court of Appeal considered academic works, European and international legislation in addition to the leading authorities. Lord Justice Ward, with whom Lord Justices Wilson and Henderson concurred, agreed with the proposition of Lord Hoffman in *Cambridge* that insolvency proceedings are a category of unique proceedings, being collective actions concerned with the protection of assets for the benefit of a debtor's creditors, and that judgments arising in such proceedings should be enforced in the English courts in the interests of the universality of insolvency proceedings. Lord Ward found that "insolvency proceedings" include avoidance proceedings such as preference and transaction at an undervalue claims available in the Insolvency Act 1986 noting that these are *"special claims maintainable only at the suit of the officeholder"* as opposed to being claims the debtor could have pursued prior to the relevant insolvency proceedings. The US judgment was accepted as being equivalent to these actions such that it could be enforced by the English court at common law notwithstanding the respondents refusal to submit to the jurisdiction of the New York court.

In basing its decision on principles of English common law the Court of Appeal did not need to consider whether the types of assistance and co-operation provided for in the CBIR extend to the enforcement of judgments. However, in light of the dicta of Lord Justice Ward it seems likely that a similar approach would be taken under those regulations.

Implications

The decision of the Court of Appeal in *Rubin* is an important step forward for the principle of unitary and universal insolvency proceedings previously expounded in both *Cambridge* and the more recent decision of *Re HIH*[4], and the enforceability of insolvency judgments in the English courts arguably promotes the effective functioning of cross-border insolvency proceedings. Those judgments which are enforceable under *Rubin* are those integral to insolvency proceedings, being concerned with the collective enforcement of creditors' rights.

If you would like further information on the issues discussed above please contact:

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4 [2008] UKHL 21

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