English High Court assists Australian Court to effect clawback from Lloyd's Syndicate

On 15 March 2011, the High Court of Justice (the **"English Court"**) used its statutory powers under s.426 of the Insolvency Act 1986 (the **"Act"**) to order a Lloyd's syndicate to pay the amount due under a judgment of the Supreme Court of New South Wales in Australia (the **"Australian Court"**) relating to unfair preference payments. It did so pursuant to a letter of request issued by the Australian Court requesting the English Court's assistance. The English Court also ruled that it had the power to and would assist under common law in the same manner[1].

The Facts

The respondents, members of a Lloyd's syndicate for two years of account (the **"Syndicate"**) had entered into certain reinsurance contracts with New Cap Reinsurance Corporation Limited (**"New Cap Re"**), an Australian reinsurance company.

The Syndicate and New Cap Re subsequently entered into a commutation agreement, pursuant to which New Cap Re made lump sum payments to the Syndicate just over three months before New Cap Re went into administration (and subsequently liquidation) in Australia. New Cap Re's liquidator commenced proceedings against the Syndicate in Australia alleging that the payments constituted "unfair preferences" and were thus "voidable transactions" under relevant Australian insolvency legislation. The Syndicate did not formally file an appearance before the Australian Court, although their solicitors' correspondence on various matters was placed before the Australian Court and considered in its judgment.

The Australian Court held that the payments were preferential under Australian insolvency law and ordered the Syndicate to pay corresponding sums plus interest. The Australian Court also issued a letter of request seeking the English Courts' assistance in giving effect to the judgment through making orders for payment of the sums due from the Syndicate.

1 *In the matter of New Cap Reinsurance Corporation Limited (in liquidation) and in the matter of the Insolvency Act 1986*

The Decision

The English Court exercised its discretionary powers under s.426 of the Act in favour of assisting the Australian Court and ordered the Syndicate to pay amounts corresponding to the Australian judgment. The Syndicate had argued that proceedings could not be brought under s.426 of the Act or at common law since s.6 of the Foreign Judgments (Reciprocal Enforcement) Act 1933 (the **"1933 Act"**) prohibits proceedings for the recovery of a sum of money payable under an Australian judgment other than by way of registration of the judgment under the 1933 Act. The English Court ruled that the 1933 Act did not apply, because insolvency proceedings (which included preference proceedings) are not intended to be included within the ambit of the 1933 Act.

Applying the principle of "modified universalism" hailed by Lord Hoffman in *Cambridge Gas*[2], and applying *Rubin*[3], the English Court held that the preference actions were part of the Australian insolvency proceedings. As such, the Australian Court was the proper court to determine the claims and the ordinary rules of private international law relating to enforcement of judgments in personam did not apply.

Although the case was decided on the grounds of s.426 of the Act, the English Court also held, on the basis that common law powers to assist subsist in parallel[4], that the same discretionary considerations would lead the English Court to exercise its common law powers of assistance if that were necessary.

Permission to appeal has been granted. Mayer Brown acted for New Cap Re and its liquidator, together with Henry Davis York in Australia.

2 *Cambridge Gas Transportation Corp v. Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508

3 *Rubin v. Eurofinance SA* [2011] 2 WLR 121

4 Following the approach of Lords Hoffman and Walker in *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, as the Court of Appeal have done in *Rubin v. Eurofinance SA* [2011] 2 WLR 121.

If you have any questions or require specific advice on any matter discussed in this alert, please contact:

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March 2011