RECOGNITION OF FOREIGN JUDGEMENTS AND INSOLVENCY

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Whether or not one should make a claim against the insolvent counterparty's estate one has to navigate a complex domestic legal landscape to determine the fact particularly where there are mutual debts or claims between the party and counterparty. The recent judgements of UK's Supreme Court and that of Privy Council rule that parties to the dispute should appropriately examine the requirements of law. This write up accordingly examines the effect of recent judgements and the potential dangers revealed by them on the enforceability of Foreign Judgement in this regard.

The existing rule in the UK states that bankruptcy proceedings did not constitute judgements in *rem* or in *personam* but instead constitute special category of judgement peculiar to insolvency proceedings[1] which should be universally enforced. However, there are no special rules applying to foreign insolvency orders requiring their universal enforcement.[2]

In Rubin, the English courts were presented with a judgement from foreign courts exercising insolvency jurisdiction and asking for the assistance of the English court in making it effective. A commercial entity was in Chapter 11 administration in the United States. Its business had been principally carried on in the United States, and this business was the duping and fleecing of innocent consumers. Large amounts of money were siphoned out of the trading entity and into the pockets of its founders, who were in London. The US bankruptcy court was asked to order these founders to repay the sums, by which they had unlawfully

[1] Cambridge Gas Transport Corp v. Official Committee of Unsecured Creditors of Navigator Holdings PLC, [2006] All ER [D] 255: [2006] 3 WLR 689.
[2] Rubin v. Euro finance SA [2012] UKSC 46 and New Cap Reinsurance Corp Ltd v. Grant.

preferred to pay to themselves, but these people were in London and they ignored the proceedings. The US court gave judgement against them, in default of their appearance; and followed this up with a letter of request to the United Kingdom (English) authorities, asking for cross-border cooperation in the form of enforcing the US judgement against the defendants. The UK High Court refused to; the Court of Appeal, in a truly splendid judgement, held that the reasons to enforce the judgement outweighed the arguments which opposed this.

The question of cross-border assistance in insolvency is a large and vibrant topic, all over the common law world. The majority of the United Kingdom Supreme Court in Robin's case, [speaking through Lord Collins] held that the only way to give any effect to a foreign judgement from a court exercising insolvency jurisdiction was to recognise it as a foreign judgement in *personam* or in *rem* under the ordinary rules.[3] There was no special or separate rule for giving different effect to a judgement

[3] A.V. Dicey, the Conflict of Laws, [Rule 43], Morris and Collins.

from a court exercising insolvency jurisdiction at the place of incorporation.

The highpoint of universalism was not accepted per se by the UK Supreme Court.[4] The court held that there are no special rules applying to foreign insolvency orders requiring their universal enforcement. Under the English common law, a foreign court has jurisdiction to give judgement in *personam* capable of enforcement where the person against whom it was given was present in or submitted to the jurisdiction of the foreign court. However, submission will typically involve voluntarily participation in the foreign proceedings or being present in the foreign country where the proceedings are instituted. For example in Rubin, the English defendant had taken no step in a New York bankruptcy proceeding so had not submitted to the jurisdiction of the New York courts. The New York order against the defendant was not

[4] Id. n2, the court held that where foreign officeholders had brought claims in a foreign court on behalf of a foreign insolvent entity against an English defendant and obtained a default judgement, the English Court must consider whether to enforce that order in *personam* in accordance with the ordinary rules of private international law and the Supreme Court defined the common law principle of modified universalism whereby assistance should be given to a foreign court's insolvency proceedings but only where necessary and consistent with English law (including private international law) and public policy.

enforced in England. In Rubin[5], it was recognized that a judgement against the English defendant can be enforced in England where the foreign counterparty's claim had been brought in England, whether based on English or foreign law.[6]

Here the question arises that why would an English party with a claim against foreign insolvent counterparty that is worth more than the counterparty's potential counterclaims effectively give up significant value and avoid any participation in the foreign insolvency proceedings? Imagine the English party is owed $60m by its counterparty. The counterparty has a potential claim against the English party worth $12m. At face value, the English party would claim its $60m in the counterparty's insolvency proceeding and profit even after paying the $12m counterclaim. However, the English party is unlikely to recover $60m from the counterparty. Creditors generally share rateably in the shortfall in the counterparty's estate. The English party's claim is, in practice,

[5] Id. n2

[6] In UK laws there are statutory provisions permitting a foreign shareholder to bring a foreign insolvency claim, see Section 426 (4) of the Insolvency Act, 1986, and schedule 1, article 23 of the Cross Border Insolvency Regulations 2006.

worth less than $60m but it is not generally known how much less until all claims against the counterparty have been submitted and a bar date imposed. Without that crucial information, the English party cannot fully assess the likely return on their claim. They must make a decision before the bar date, not knowing whether that is the best course or not.

The decision in *Stichting Shell Pensioenfonds vs. Krys* has provided a stark illustration of the impact of submission. A fund in the British Virgin Island Company (BVI) went into liquidation and its remaining cash was held by a Dutch bank. Shell applied to the Dutch courts for an attachment over the sums held by the bank so as to preserve that cash to be distributed in the Netherlands in satisfaction of any claim by Shell rather than in the BVI to the general body of creditors.

The court held that Shell could be prevented from taking any steps in the Dutch courts by a BVI anti-suit injunction. Shell had submitted a proof in the BVI against the fund company that means that subject matter was subject to the BVI court's

jurisdiction in *personam* and could be the subject of an injunction. An injunction could only be resisted if Shell could overcome the need to protect the integrity of one distribution to creditors supervised by the BVI courts.[7]

Creditors seeking to obtain priority over other creditors as a result of any advantages available to them in their home courts must now generally choose whether to pursue those advantages (and potentially end up with nothing if that pursuit proves unsuccessful) or submit to the insolvency proceeding in the debtor's court (sharing the shortfall in the debtor's estate with other creditors).

The Privy Council recognised for the first time a common law power to compel the provision of information for foreign liquidators if necessary for the administration of a foreign winding up. It follows that an English creditor of a foreign debtor may be required to provide information by way of assistance to the

[7] *Stichting Shell Pensioenfonds vs. Krys,* [2014] UKPC 41.

debtor's winding up, even where the creditor has not submitted to the foreign court's jurisdiction.

However, the liquidators could not ask the Bermudan court to do something which they could not do under the law by which they were appointed, namely compel delivery up of documents 'relating to' a company, so in this case the liquidators could not be assisted.

The learning lessons from the debate are that:

i. Legal disputes which arise in and become of and insolvency fall outside the usual rule of private international law.

ii. A greater caution should be shown before refusing to enforce a foreign judgement in insolvency cases; there is more to virtue than an uncritical faith in universalism.

iii. Determination is necessary as to recognize the nature and level of the co-operation which might be and which may not be given by domestic courts.

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