

Judgment Proof: The English Supreme Court Pushes Back On U.S. Bankruptcy Court Jurisdiction

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In a case with truly global implications, the Supreme Court of England and Wales held earlier today that judgments of U.S. Bankruptcy Courts against foreign defendants who had not submitted to the Bankruptcy Court's jurisdiction were not enforceable in England and Wales in the case of *Rubin v. Eurofinance SA*.

Factual Background

The Consumer Trust (the "Debtor") was a trust created by Eurofinance S.A. ("Eurofinance") to hold money for beneficiaries of a sales promotion scheme in which merchants issued cashable vouchers to customers who purchased certain products. Although Eurofinance was a British Virgin Islands entity initially controlled by Adrian Roman, a British citizen, all of the merchants and consumers involved in the scheme were located in the U.S. and Canada.

The Debtor proved to be a financially profitable enterprise for Eurofinance (and, in turn, Mr. Roman) but was forced to file for chapter 11 bankruptcy protection after it reached a settlement in excess of \$1.6 million with the Missouri Attorney General's Office for violation of consumer protection laws. Fearing that other states would soon follow Missouri's lead, Eurofinance applied to the English High Court of Justice to appoint certain representatives of the Debtor as receivers (the "Receivers") to file a chapter 11 case on behalf of the Debtor in the U.S. Bankruptcy Court Southern District of New York (the "Bankruptcy Court"). Following approval of the appointment by the High Court, the chapter 11 bankruptcy petition was filed on behalf of the Debtor in the Bankruptcy Court on December 5, 2005 (the "Bankruptcy Case").

Nearly two years after the Bankruptcy Case was filed, the Bankruptcy Court approved the Debtor's Plan of Reorganization which provided that, among other things, the Receivers and the Unsecured Creditor's Committee could pursue broadly defined "Causes of Action" against a number of potential defendants, including Mr. Roman. The same day it approved the Plan, the Bankruptcy Court also appointed the Receivers as foreign representatives on behalf of the Debtor to seek recognition of the

case in Great Britain as a foreign main proceeding under the Cross-Border Insolvency Regulations 2006 (the “Regulations”), which gave effect to the UNCITRAL Model Law relating to cross-border insolvency, and which would, presumably, result in the enforcement of the Bankruptcy Court’s judgments in England.

On December 3, 2007 the Receivers filed adversary proceedings against a number of defendants, including Mr. Roman, to recover amounts allegedly fraudulently transferred by the Debtor to Mr. Roman and others prior to the filing of the Bankruptcy Case. Although Mr. Roman was served with the complaint, he did not appear in Bankruptcy Court nor was he resident in New York during the course of the adversary proceeding. Despite this, the Bankruptcy Court determined it could exercise long-arm jurisdiction over Mr. Roman and the other defendants under the Federal Rules of Bankruptcy Procedure because the defendants chose the United States as their place of business. Ultimately on July 23, 2006 the Bankruptcy Court entered a default judgment, jointly and severally against all of the defendants in the amount of \$10 million (the “Judgment”).

The Lower Courts Rulings

Following entry of the Judgment, the Receivers applied to the High Court for orders that (i) the Bankruptcy Case, including the adversary proceedings, be recognised as a foreign proceeding under the Regulations, and (ii) the Judgment be enforced as a judgment by the English courts. The High Court found that the Bankruptcy Case, including the adversary proceedings, were a foreign main proceeding under the Regulations and the Receivers were foreign representatives. It also found, however, that the Judgment should not be enforced in Great Britain because it was an *in personam* judgment (i.e. a judgment enforceable against an individual) and *in personam* judgments entered by foreign courts could only be enforced when the defendant had submitted, or was otherwise subject, to the foreign court’s jurisdiction.

Both parties appealed the High Court’s judgment to the English Court of Appeal. The Court of Appeal held that the ordinary rules relating to enforcing *in personam* foreign judgments did not apply to bankruptcy proceedings and that bankruptcy was unique in allowing actions to be brought against third parties for the collective benefit of all creditors. Although appearing similar to *in personam* judgments, the Judgment entered by the bankruptcy court was in furtherance of this collective enforcement regime and should be given worldwide recognition. As such, the Court of Appeal held that the Judgment should be enforced by the English courts at common law.

The Supreme Court's Ruling

In its decision this morning the Supreme Court held by a 4 to 1 majority that U.S. bankruptcy proceedings were subject to the same rules as other court proceedings, and English Courts would not recognize judgments entered against a defendant who was not subject to the jurisdiction of the bankruptcy court, either by being physically within the jurisdiction of the court or voluntarily exposing himself to the court's jurisdiction. Noting that there were no provisions in the UNCITRAL Model Law or Regulations regarding recognition or enforcement of foreign judgments against third parties, the Supreme Court stated that to expand the law with regards to bankruptcy judgments would be too great a departure from the existing settled law and was a matter that should be left to the legislature to consider if it saw fit. Finally, from a policy standpoint, the Supreme Court found that to allow differently would result in a detriment to United Kingdom businesses, without any resulting benefit.

Implications and Impacts

Given the global nature of the business community and the multi-jurisdictional bankruptcy cases that have been filed in recent years, the English Supreme Court's Rubin decision calls into question the power and ability of a U.S. Bankruptcy Court to fully and finally adjudicate a bankruptcy case where the parties do not submit to its jurisdiction. The English Supreme Court's decision has rendered Mr. Roman, and other foreign third parties, effectively judgment-proof from U.S. bankruptcy court avoidance actions.

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