HARNEYS
British Virgin Islands

legal update

Enforcing orders made in foreign insolvency proceedings

The UK Supreme Court decision in Rubin v Eurofinance SA *and what it means for BVI and Cayman*

This article sets out the potential impact in the BVI and Cayman of the much anticipated Supreme Court decision in *Rubin v. Eurofinance SA* [2012] UKSC 46, which was handed down on 24 October 2012. *Rubin* deals with the issue of whether orders made in Chapter 11 bankruptcy proceedings in the United States can be enforced as judgments of the English Courts.

COMPETING SETS OF RULES AND PRINCIPLES

There are two sets of legal rules, each developed with very different aims in mind, which might provide the answer to this issue. First, the well-established conflict of laws rules applicable to the enforcement of foreign judgments. Secondly, the rules and principles of cross-border insolvency. Broadly speaking, the first set of rules is aimed at keeping a sovereign nation's law and authority within its proper bounds. The second set of rules is aimed at achieving a single insolvency in the place of the debtor's main domicile and encouraging the co-operation of other jurisdictions in support of that insolvency, without the need for parallel proceedings. *Rubin* is a case in which these two sets of rules, and the principles underlying them, have clashed (with different results) as the case has worked its way through the English Courts, culminating in the Supreme Court decision.

THE FACTS IN RUBIN

Before discussing that decision, the judgments of the Courts below and the potential impact in BVI and Cayman, we should briefly set out the facts of the case. Eurofinance SA created The Consumers Trust under a 2002 Trust Deed, governed by English law, with a jurisdiction clause selecting English Courts, and with English Trustees. The Trust operated a voucher programme which supposedly allowed rebates to consumers of white-goods of up to 100% of the purchase price, provided that certain strict procedures were followed. As those procedures were complex and obscure, as well as pedantically operated by the Trust, very few rebates were in fact given out. Eventually, US consumer protection laws were used by plaintiffs in Missouri to start proceedings against the Trust, which were then settled by the Trustees by the payment of significant sums. However, this did not bring an end to the Trust's troubles as word quickly spread about the way the scheme was being operated. In light of the turning tide, the Trustees then successfully sought to appoint Receivers in England and those Receivers then instituted Chapter 11 proceedings in the US. As part of those proceedings, ten claims were issued in the US Bankruptcy

Court for the recovery of various sums said to have been paid away from the Trust unlawfully, on various grounds including unjust enrichment, fraudulent transfers and transfers that could be avoided as preferences. The respondents to those claims (i.e. the transferees) took no part in the proceedings, and were not otherwise present in the jurisdiction of the US bankruptcy court. Default and summary judgments were given in the Receivers' favour on all ten claims. The Receivers then applied to the Chancery Division of the English High Court under the Cross-Border Insolvency Regulations 2006 for orders recognising the US bankruptcy and enforcing the judgments.

THE HIGH COURT DECISION

At first instance, Nicholas Strauss QC, sitting as a Deputy Judge of the High Court made an order recognising the US bankruptcy proceedings under the 2006 Regulations. However, he refused to order that the US judgments be enforced in England because, in his view, the US Court had established the debtor's rights in personam and the case of *Cambridge Gas v. Official Committee of Unsecured Creditors Navigator Holdings plc* [2006] UKPC 26 was authority for the proposition that "*at common law, an English court could not accede to a request by a foreign insolvency court to enforce a judgment in personam contrary to the rules of English private international law*." Those rules provide that where a judgment debtor took no part in the foreign proceedings, was never present in the jurisdiction and never agreed to submit to the jurisdiction, the foreign judgment could not be enforced in England at common law (a position set out in Rule 43 (formerly Rule 36) of Dicey, Morris and Collins).

The Receivers appealed the Deputy Judge's refusal to enforce the US judgments.

THE COURT OF APPEAL DECISION

In the Court of Appeal, Ward LJ overturned the Deputy Judge's decision. He set out the question for the Court as follows: *"if a judgment in personam is made in and as a part of bankruptcy proceedings as those proceedings are to be properly characterised, then does r36 still apply or does the special character of bankruptcy proceedings prevail?"* He set out Lord Hoffmann's position in *Cambridge Gas* that "*judgments in rem and in personam are judicial determinations of the existence of rights…the purpose of bankruptcy, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established…bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them*." Ward LJ then asked whether the avoidance provisions relied on to obtain the US judgments were *"to be characterised as part of the bankruptcy proceedings i.e. part of the collective proceedings to enforce rights and not to establish them*."

Having quoted extensively from two Guides to the UNCITRAL Model Law and from the leading insolvency works of Professor Fletcher and Professor Goode, Ward LJ held, first, that "*the ordinary rules for enforcing, or more precisely, not enforcing, foreign*

judgments in personam do not apply to bankruptcy proceedings" and, secondly, that the avoidance provisions in English and US bankruptcy proceedings (including those which had been relied on to obtain the US judgments) "*are integral to and are central to the collective nature of bankruptcy and are not merely incidental procedural matters*." Ward LJ based his decision on what he saw as the true extent of the common law rule, rather than under the 2006 Regulations, in respect of which he "*expressed no concluded view*" (at [63]).

THE UK SUPREME COURT DECISION

The Supreme Court has now overturned the Court of Appeal's decision. Giving the leading judgment of the Supreme Court, Lord Collins re-stated the application of the common law rules on the enforcement of foreign judgments to insolvency orders. Contrary to what had been said by the Court of Appeal, his Lordship confirmed that there is no separate rule for judgments given in insolvency proceedings. To enforce foreign insolvency orders at common law in England, foreign officeholders will have to show that the judgment debtor:

(a) was present in the jurisdiction at the time proceedings were instituted,
(b) was the claimant or counter-claimant in the foreign proceedings,
(c) had submitted to the foreign proceedings by voluntarily appearing, or
(d) had submitted to the foreign proceedings by agreement.

The fundamental question on the appeal was: "*As a matter of policy, should the court, in the interests of universality of insolvency proceedings, devise a rule for the recognition and enforcement of judgments in foreign insolvency proceedings which is more expansive, and more favourable to liquidators, trustees in bankruptcy, receivers and other officeholders, than the traditional common law rule…or should it be left to legislation preceded by any necessary consultation*?" (at [91])

Declining to devise that kind of rule, the Supreme Court (save for Lord Clarke) preferred the latter course.

The main reasons for the decision were that:

(a) There is no difference in principle between a foreign insolvency judgment on an ordinary debt claim (caught by Rule 43 on both sides' arguments) and an order for repayment of a preference (not caught by Rule 43 on the respondents' argument on the basis that such an order is integral to the insolvency), yet under the respondents' arguments there would be an unwarranted procedural advantage to the debtor by the adoption of the insolvency exception to the common law rule.

(b) To allow the exception sought by the respondents would require a test to answer whether there was sufficient nexus between the insolvency and the foreign court and between the judgment debtor and the foreign court. To leave these issues to be determined by "*the discretion of the English court to assist the foreign court*", as suggested by the respondents, was insufficient. The black letter common law rule had more certainty.

(c) What the court was being asked to do had "*all the hallmarks of legislation*" and "*is a matter for the legislature and not for judicial innovation*". He continued to say that "*The law relating to the enforcement of foreign judgments and the law relating to international insolvency are not areas of law which have in recent times been left to be developed by judge-made law*."

(d) There was not likely to be any serious injustice if the court declined to sanction a departure from the traditional rule.

(e) *Cambridge Gas* was wrongly decided because the US bankruptcy order in that case was a decision *in rem* affecting the ownership of shares, being property belonging to someone who was not subject to the jurisdiction of the foreign court. This view, expressed in an academic context by Professor Briggs and relied on by the Court, is contrary to Lord Hoffmann's classification of the US bankruptcy order in *Cambridge Gas* as neither *in personam*, nor *in rem*, but, rather, *sui generis*.

(f) The 2006 Regulations, giving effect to the Model Law, are not designed to provide for the reciprocal enforcement of judgments.

The Supreme Court judgment has the effect of re-asserting the importance of the territorial limits of foreign jurisdiction and that any changes require implementation of treaties such as the UNCITRAL Model Law or local legislation.

POTENTIAL IMPACT IN BVI AND CAYMAN

How then might this decision affect the enforcement of foreign insolvency judgments in the BVI and Cayman? The question is best approached by considering the BVI and Cayman rules on enforcing foreign judgments on the one hand, and on assisting cross-border insolvency on the other. Could a *Rubin* type clash occur in these jurisdictions and, if so, does *Rubin* provide the answer?

(a) BVI

In BVI, the enforceability and registration of foreign judgments is governed by the Reciprocal Enforcement of Judgments Act and the common law. [1] The statutory regime applies to certain Commonwealth jurisdictions, but not to major European jurisdictions such as Germany or France, or to the US, or Canada. The common law then, still has an important role in the enforcement of judgments and the BVI Courts will follow the same restrictions on enforcement of foreign judgments as were relied on by Eurofinance SA in *Rubin*, that is to say, Rule 43 of Dicey, Morris and Collins, such that judgments obtained in circumstances where the judgment debtor played no part in the proceedings will generally not be enforced.

The BVI law on assistance in cross-border insolvency is found in Part XIX of the Insolvency Act 2003 (Part XVIII, which enacts the UNCITRAL Model Law on Cross-Border Insolvency into domestic law, has not yet been brought into force by the

[1] Although there is an additional statutory basis under the Foreign Judgments (Reciprocal Enforcement) Act, the designations made thereunder are generally seen to have been legally ineffective.

legislature). Part XIX however provides for assistance to foreign representatives and in broad terms Section 467(3)(h) provides that the Court may *"make such order or grant such other relief as it considers appropriate*."

This drafting broadly mirrors the widely drafted provisions of the English 2006 Regulations (article 21 provides for an English Court to grant "all appropriate relief"). It would seem at least unlikely however that the BVI Court would construe the provision to cover the enforcement of a foreign insolvency order. The only known dicta in this regard2 strongly suggests that the provision is aimed at providing case by case assistance to foreign representatives only.

Following on from *Rubin*, the prospects of successfully using Part XIX to enforce orders which would not be enforced under the common law rules, must now be very slim indeed.

(b) Cayman

In Cayman, although there is a statutory basis for enforcing judgments in the form of the Foreign Judgments Reciprocal Enforcement Law (1996 Revision), it is effectively moribund as it only applies to judgments from Australia and its territories. Foreign judgments are generally enforced at common law. Again, the Cayman Courts will follow the same restrictions on enforcement of foreign judgments as the English Courts under Rule 43.

Cayman law on cross-border insolvency has a considerably different footing to that in England, which has enacted into domestic law the UNCITRAL Model Law on Cross-Border Insolvency (the 2006 Regulations). That has not happened in Cayman, which provides assistance to foreign insolvency office-holders pursuant to Part XVII (International Co-operation) of the Companies Law (2012 Revision) (ss.240 to 243).

Section 241 of the Companies Law provides as follows:

"(1) Upon the application of a foreign representative the Court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of –

(a) recognising the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor;

(b) enjoining the commencement or staying the continuation of legal proceedings against a debtor;

(c) staying the enforcement of any judgment against a debtor;

(d) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and

(e) ordering the turnover to a foreign representative of any property belonging to a debtor."

[2] Picard v BLMS 140/210

Unlike the provisions of the English 2006 Regulations referred to above, in Cayman section 241 is not drafted widely enough to potentially provide for assistance for the purposes of enforcing judgments in the foreign insolvency proceedings, unless the courts adopt a particularly strained interpretation of section 241(e) *("…the turnover…of any property belonging to a debtor"*).

In light of this, the clash of rules and principles seen in *Rubin* is unlikely to be replicated in Cayman as the assistance provisions are not drafted widely enough to permit a Cayman Court to assist a foreign insolvency by enforcing orders made in that insolvency against parties in Cayman. Even if the wording was wider, however, as above, the *Rubin* decision makes it virtually certain that such an argument would fail.

If that is the case though, where does this leave foreign insolvency office holders seeking to enforce their judgments and orders in the BVI and Cayman, where those orders would not satisfy the common law rule for enforcement? Instead of being able to enforce directly, they will need to apply to be recognised and then initiate fresh proceedings seeking the relief ordered in the foreign insolvency.

There have been a number of cases in which foreign insolvency office holders have been recognised in BVI and Cayman for that very purpose. In the BVI, there has been *Picard and Bernard L. Madoff Investment Securities LLC (in SIPA Liquidation)* (BVI High Court, Bannister J, 12 November 2010) (recognition of Irving Picard, the Madoff bankruptcy trustee, to file protective writs and to issue a claim form against a fund in liquidation). In Cayman, there have been the decisions *of Canadian Arab Financial Corporation v. Player [1984 - 1985] CILR 63* (recognition of a receiver appointed by the Supreme Court of Ontario to allow Cayman proceedings to be issued), and, more recently, the decisions of *Bernard L. Madoff Investment Securities LLC (in SIPA Liquidation)* (Unreported, Grand Court, FSD, 5 February 2010, Hon. Mr Justice Andrew Jones QC) (again, recognition of Mr Picard, the Madoff bankruptcy trustee, for recovery proceedings already on foot and contemplated in Cayman) and *Reserve International Liquidity Fund Limited (in Liquidation)* (Unreported, Grand Court, FSD, 16 April 2010, Hon. Mr Justice Andrew Jones QC) (recognition of joint liquidators appointed by the BVI High Court in part to deal with US$10m on deposit at two banks in Cayman).

SUMMARY OF THE OFFSHORE IMPACT OF RUBIN

Notwithstanding the different legislative approaches to recognising and assisting foreign officeholders, the effect of *Rubin* is likely to be that such legislation cannot be used to seek to enforce foreign insolvency orders.

The Supreme Court decision will be generally welcome to those operating in offshore jurisdictions such as the BVI or Cayman. Utilising the common law to enforce foreign insolvency orders against an entity which has not submitted to the foreign jurisdiction would marginalise the importance of the corporate domicile, especially for offshore vehicles which will frequently hold assets beyond their own borders.

CONCLUSION

Investors and corporate entities choose jurisdictions with knowledge that they have mature insolvency regimes that will apply in the event of insolvency. The potential of being subject to a foreign insolvency process and its subsequent enforcement without submission to that jurisdiction or recourse to local procedure would have made for greater uncertainty and potential injustice. By rejecting the arguments promoted by the modified universalist approach, it seems likely that legislation and the considered adoption of appropriate legislation will signal the future.

24 October 2012

FURTHER INFORMATION

Please contact any of the following Harneys lawyers if you require additional information on the Rubin decision and its impact in the BVI and Cayman.

British Virgin Islands

Andrew Thorp
Partner
andrew.thorp@harneys.com
+1 284 494 3267

Cayman Islands

David Herbert
Partner
david.herbert@harneys.com
+1 345 815 2901

The foregoing discussion and analysis is for general information purposes only and not intended to be relied upon for legal advice in any specific or individual situation.

www.harneys.com