Enforcement of Foreign Judgments

The Usual Rules Apply
(no exception for insolvency)

The Supreme Court has just given judgment (24 October 2012) in *Rubin and another v Eurofinance SA and others* and *New Cap Reinsurance Corporation (In Liquidation) and another (Respondents/Cross Appellants) v A E Grant and others as Members of Lloyd's Syndicate 991 for the 1997 Year of Account and another (Appellants/Cross Respondents).*

The decision is important, because since the Court of Appeal decision in *Rubin*, which was followed in *New Cap*, it appeared that a different rule applied to enforcement of judgments in foreign insolvency proceedings, as opposed to other foreign judgments.

The Court of Appeal decision

In *David Rubin & Another v Euro Finance SA & Others* [2010] EWCA Civ 895 the Court of Appeal stated,

> "It is common ground that the respondents were not resident in New York when the proceedings were instituted, nor did they submit to the jurisdiction of the New York Court by voluntarily appearing in the proceedings. At first blush, the respondents will seem to have an impregnable defence."

The Court of Appeal referred to the collective nature of insolvency proceedings and stated broadly as follows:

> "The ordinary rules for enforcing, or more precisely not enforcing, foreign judgments in personam do not apply to bankruptcy proceedings."

The Court of Appeal continued:

> "Albeit that they have the indicia of judgments in personam, the judgments of the New York court made in the Adversary Proceedings, are nonetheless judgments in and for the purposes of the collective enforcement regime of the bankruptcy proceedings and as such are governed by the sui generis private international law rules relating to bankruptcy and are not subject to the ordinary private international law rules preventing enforcement of judgments because the defendant were not subject to the jurisdiction of the foreign court. This is a desirable development of the common law founded on the principles of modified universalism. It does not require the court to enforce anything that it could not do, mutatis mutandis, in a domestic context."

The Court of Appeal made a clear distinction between the principals of English private international law relating to the enforcement of foreign judgments, when dealing with cross-border insolvency, as opposed to other cases.

Part of the rationale is that bankruptcy proceedings should have universal application and no creditor should have an advantage, because he lives in a jurisdiction where more of the assets or fewer of the creditors are situated.

Accordingly, when dealing with cross-border insolvency, the Court of Appeal considered that different considerations apply to the enforcement of foreign judgments than in other cases.

The Court of Appeal concluded its judgment in the Rubin case as follows:

> "I see no unfairness to the respondents in upholding the judgments of the New York court. The respondents were fully aware of the claims being brought against them. After taking advice they chose not to participate in the New York proceedings. … Whatever their reasons, they made an informed judgment. I have no sympathy for them when it transpires that they were wrong."

The Supreme Court decision

The case was argued before the Supreme Court in May 2012 and judgment was given on 24 October 2012.

Insolvency

Lord Collins, giving the majority judgment, referred to the advice to the Privy Council of Lord Hoffman in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, where he said,

> "13. … Judgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.
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> 14. The purpose of bankruptcy proceedings, 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. …"

The basis upon which foreign judgments are enforced at common law

Lord Collins referred to Rule 43 (*Dicey, Morris and Collins, Conflict of Laws*, 15th ed, 2012, para 14R-054) which states:

"a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases:

> *First Case*—If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.
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> *Second Case*—If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.
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> *Third Case*—If the person against whom the judgment was given submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.
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> *Fourth Case*—If the person against whom the judgment was given had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country."

Lord Collins commented that,

> "108. The principles in the *Dicey* Rule have never received the express approval of the House of Lords or the UK Supreme Court and the leading decisions remain *Adams v Cape Industries plc* [1990] Ch 433 and the older Court of Appeal authorities which it re-states or re-interprets. But there can be no doubt that the references by the House of Lords in the context of foreign judgments to the foreign court of "competent jurisdiction" are implicit references to the common law rule: eg *In re Henderson*, *Nouvion v Freeman* (1890) 15 App Cas 1, 8; *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 484.
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> …
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> 113. But there is no suggestion on this appeal that the principles embodied in the *Dicey* Rule should be abandoned. Instead the *Rubin* respondents suggest that the principles should not apply to foreign insolvency orders.
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> 114. The respondents accept that the *Dicey* Rule applies to claims which may be of considerable significance by an officeholder in a foreign insolvency, such as a claim for breach of contract, or a tort claim, or a claim to recover debts. It is clear that such claims may affect the size of the insolvent estate just as much, and often more, than avoidance claims. Like claims to recover money due to the insolvent estate such as restitutionary claims not involving avoidance, avoidance claims may establish a liability to pay or repay money to the bankrupt estate (as in the present cases). There is no difference of principle."

The New Cap Case

In this case, the court at first instance and the Court of Appeal had followed the *Rubin* decision and decided than an Australian judgment was not enforceable under the Foreign Judgments (Reciprocal Enforcement) Act 1933, as that Act does not apply to insolvency proceedings, but was enforceable under the assistance provision of s. 426 Insolvency Act 1986. The Court of Appeal found that s.6 of the 1933 Act would preclude an action at common law.

The Supreme Court stated,

> "76. The Australian court (White J in a judgment in September 2008, and Barrett J in a judgment in July 2009) recognised that there had been no submission by the Syndicate to the jurisdiction of the Australian court in that it did not enter an appearance, but White J held that the Australian court had jurisdiction over the Syndicate because a cause of action available under the Australian Act for the recovery of a preferential payment to an overseas party made when the company is insolvent was a cause of action which arose in New South Wales for the purposes of the New South Wales provisions for service out of the jurisdiction."

The Supreme Court went on the find that having submitted a proof of debt and proxy form in relation to the New Cap's liquidation, the Syndicate had submitted to the jurisdiction of the Australian court and therefore the Australian judgment would be enforceable against it.

Policy

The judgment went on to consider the question of whether policy should dictate a different rule in relation to insolvency proceedings. The judgments considered the question as follows:

> "115. The question, therefore, is one of policy. Should there be a more liberal rule for avoidance judgments in the interests of the universality of bankruptcy and similar procedures? In my judgment the answer is in the negative for the following reasons.
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> 116. First, although I accept that it is possible to distinguish between avoidance claims and normal claims, for example in contract or tort, it is difficult to see in the present context a difference of principle between a foreign judgment against a debtor on a substantial debt due to a company in liquidation and a foreign judgment against a creditor for repayment of a preferential payment. The respondents suggest that a person who sells goods to a foreign company accepts the risk of the insolvency legislation of the place of incorporation. Quite apart from the fact that the suggestion is wholly unrealistic, why should the seller/creditor be in a worse position than a buyer/debtor?
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> 117. The second reason is that if there is to be a different rule for foreign judgments in such proceedings as avoidance proceedings, the court will have to ascertain (or, more accurately, develop) two jurisdictional rules. There are two aspects of jurisdiction which would have to be satisfied if a foreign insolvency judgment or

> order is to be outside the scope of the *Dicey* Rule: the first is the requisite nexus between the insolvency and the foreign court, and the second is the requisite nexus between the judgment debtor and the foreign court."

The Court was very definite in its answer to the policy question.

> "115. The question, therefore, is one of policy. Should there be a more liberal rule for avoidance judgments in the interests of the universality of bankruptcy and similar procedures? In my judgment the answer is in the negative…"

The boundaries of judicial innovation

The judgment was careful to draw the distinction between the Court being involved in an incremental development of the law, as opposed to changing the law to an extent which it should not do and which changes, if they are to be made, should be made by legislation. Lord Collins continued the judgment by saying,

> "128. In my judgment, the dicta in *Cambridge Gas* and *HIH* do not justify the result which the Court of Appeal reached. This would not be an incremental development of existing principles, but a radical departure from substantially settled law. There is a reason for the limited scope of the *Dicey* Rule and that is that there is no expectation of reciprocity on the part of foreign countries. Typically today the introduction of new rules for enforcement of judgments depends on a degree of reciprocity. The EC Insolvency Regulation and the Model Law were the product of lengthy negotiation and consultation.
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> 129. A change in the settled law of the recognition and enforcement of judgments, and in particular the formulation of a rule for the identification of those courts which are to be regarded as courts of competent jurisdiction (such as the country where the insolvent entity has its centre of interests and the country with which the judgment debtor has a sufficient or substantial connection), has all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation. 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. As Lord Bridge of Harwich put it in relation to a proposed change in the common law rule relating to fraud as a defence to the enforcement of a foreign judgment, "if the law is now in need of reform, it is for the legislature, not the judiciary, to effect it": *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 489.
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> 130. Furthermore, the introduction of judge-made law extending the recognition and enforcement of foreign judgments would be only to the detriment of United Kingdom businesses without any corresponding benefit. I accept the appellants' point that if recognition and enforcement were simply left to the discretion of the court, based on a factor like "sufficient connection," a person in England who might have connections with a foreign territory which were only arguably "sufficient" would have to actively defend foreign proceedings which could result in an in personam judgment against him, only because the proceedings are incidental to bankruptcy proceedings in the courts of that territory. Although I say nothing about the facts of

the *Madoff* case, it might suggest that foreigners who have bona fide dealings with the United States might have to face the dilemma of the expense of defending enormous claims in the United States or not defending them and being at risk of having a default judgment enforced abroad.

Summary

The Supreme Court rejected the suggestion that there should be different rules applicable to the enforcement of foreign judgments from insolvency as opposed to any other proceedings. The Court was also not prepared to accede to the Respondents' argument "that each of these issues be resolved, not by a black letter rule like the common law rule for enforcement of judgments, but instead by an appeal to what was said in oral argument to be the discretion of the English court to assist the foreign court."

Whilst the decision is undoubtedly a disappointment to insolvency practitioners, it has the welcome benefit of retaining rules on the enforcement of foreign judgments which have developed over nearly two centuries and are predictable, and avoided the court having to "ascertain (or, more accurately, develop) two jurisdictional rules. There are two aspects of jurisdiction which would have to be satisfied if a foreign insolvency judgment or order is to be outside the scope of the *Dicey* Rule: the first is the requisite nexus between the insolvency and the foreign court, and the second is the requisite nexus between the judgment debtor and the foreign court." (judgment at paragraph 117).

The Supreme Court implicitly approved the decision in *Adams v Cape* (in which I acted for the claimants). This decision provides greater certainty as to the enforceability of foreign judgments.

Clearly, claimants should take advice on enforceability of an eventual judgment before committing time and legal fees to foreign proceeding to avoid obtaining an unenforceable judgment.

Defendants to foreign proceedings should take advice on the potential enforceability of a possible judgment in those proceedings before taking any step which might make a judgment enforceable in England which would otherwise be unenforceable as result of taking steps in the foreign proceeding.

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Steven has been in practice as a solicitor in London for 28 years.

Chambers' Global Directory 2012 states:

"Steven Loble offers a wide-ranging international dispute resolution practice. He speaks German, French and Italian, as well as *"offering extraordinary expertise in the intersection of US and UK law."* In addition, he is *"a hard-working and accessible individual, and as clients we are very happy with the results that he has achieved."*"

Steven is described in the 2010 edition of **Legal 500** as "*extremely knowledgeable and efficient."*

He has acted in over 50 reported cases and has wide experience of international and commercial litigation. He has been involved in a number of the leading cases on enforcing foreign judgments, obtaining evidence for foreign proceedings, privilege, interest rate swaps, legal costs, and financial disputes.

Many of Steven's clients are based outside the United Kingdom. With years of experience acting for foreign clients, he has substantial expertise in dealing with the issues which arise in cross-border litigation - choice of law, jurisdictional disputes, enforcement of judgments, obtaining evidence, dealing with questions of foreign law and sovereign immunity.

He frequently advises in relation to public and private international law and represents the government of a friendly foreign state in litigation in England on a regular basis.

Steven has expertise in the use of the latest technology, to manage cases with large numbers of documents both efficiently and cost-effectively.

Steven uses alternative dispute resolution where appropriate.

Recent work includes:

- advising Citigroup in obtaining vital evidence in England in connection with an $8 billion claim against it by Guy Hands' Terra Firma private equity group arising out its purchase of EMI music
- a case which clarified the rules on Part 36 offers to settle
- obtaining evidence in a number of cases brought against banks in the United States for facilitating terrorism by maintaining accounts for terrorist organisations
- advising a foreign regulator in relation to a case against an English company which is alleged to be in breach of the regulations of the foreign country
- acting for an investment bank in relation to the Lehman Brothers' bankruptcy
- other credit-crunch related litigation.

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