KAYE SCHOLER

Viewpoint: U.K. Supreme Court Deals Blow to 'Universalist' Approach

The U.K. Supreme Court has handed down its judgment in the joined cases of Rubin and another v Eurofinance SA and others and New Cap Reinsurance Corporation (in liquidation) and another v A E Grant and others [2012] UKSC 46. (24 October 2012)

Key points:

• The U.K. Supreme Court has refused to give effect a U.S. bankruptcy court judgment in a clawback action.

• U.K. judiciary seems to be stepping back from the concept of the universalist effect of insolvency proceedings, a trend which had been gaining momentum.

These decisions had been eagerly awaited by the U.K.'s restructuring and insolvency community. The appeals took place in the context of assisting foreign courts to enforce money judgments closely related to insolvency. Previous cases on cross-border insolvencies had seemed to indicate a steady trend in the U.K. towards a "universalist" approach to cross-border insolvencies, in which foreign court decisions taken in insolvency proceedings were recognized and given effect to in the U.K., even where this took them beyond the scope of any existing statute or case law. This appeared to be consistent with a broader international trend towards the administration of multinational insolvencies by a leading court applying a single bankruptcy law. However, in light of this latest decision, the high water mark in the U.K. at least appears to already have been reached and the waters are receding...

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In Eurofinance, the Court of Appeal had earlier recognized proceedings brought under Chapter 11 in a U.S. bankruptcy court, and held that certain judgments relating to preferential payments were enforceable in England against English resident judgment debtors. The court found that English common law permitted the enforcement of those aspects of the U.S. judgment against the judgment debtors,

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even though the judgment would not be enforceable against them under the English rules of private international law, in this case because the defendants had not submitted to the jurisdiction of the relevant U.S. court.

In New Cap, the liquidator of the Australian claimant brought proceedings in Australia in respect of a voidable transaction (a preference) against a defendant based in England. The defendant took no part in the preference proceedings and the Australian court made an order against it. The Australian insolvency proceedings were subsequently recognized in the U.K. and the judgment obtained against the defendant was enforced by the English court under section 426 of the Insolvency Act 1986 despite the absence of in personam jurisdiction over the defendant.

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Section 426 allows courts of certain designated non-U.K. jurisdictions to request assistance including for the transfer of assets from an English insolvency estate into foreign insolvency proceedings (see Re HIH Insurance (McGrath and Others v Riddell and another)[2008] UKHL 21,) even where local U.K. creditors would be worse off.

The defendants in Eurofinance and New Cap appealed. In the course of the proceedings, the claimants relied heavily upon HIH and another earlier case, Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508, both of which seemed to lend significant support to the universalist approach.

In Cambridge Gas, for example, the Privy Council (the court of final appeal for certain commonwealth jurisdictions) gave effect to an order of the court of the Southern District of New York holding that the shareholders of an insolvent Isle of Man company could be bound by a plan of reorganization approved by a U.S. court, even if they had not submitted to its jurisdiction.

The issue before the Supreme Court was whether a foreign insolvency judgment could be enforced in England. Were there special rules pertaining to insolvencies (arising out of the universalist approach), or did the "usual" English rules pertaining to the enforcement of foreign judgments apply? Did the UNCITRAL Model Law on Cross Border Insolvency have any application?

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Under the usual common law rules, for a foreign order to be enforceable in England, the defendant would have had to be present in that foreign country at a relevant time, participated in the proceedings or submitted to the jurisdiction of the foreign court.

Unfortunately for those who espoused the idea of a collective unifying enforcement regime in insolvency, the Supreme Court decided that the usual English rules could not be displaced or added to and that there could be no special judgemade rules for the recognition or enforcement of insolvency orders. This was a matter for legislation. As far as the court was concerned, as a matter of policy, there should not be more liberal rules for the enforcement of foreign judgments in insolvency proceedings, than for judgments made outside insolvency proceedings.

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Moreover, the UNCITRAL Model law on Cross-Border Insolvency does not relate, either expressly or by implication, to the recognition or enforcement of foreign judgments against third parties. Accordingly, the Cross-Border Insolvency Regulations 2006 (SI 2006/1030), which implement the Model Law in the UK, could not be used to enforce a foreign judgment in personam.

The appeal in Rubin was upheld, however the outcome for the New Cap defendant was less happy. Its appeal was dismissed. The court held that the actions of the defendant to prove in and receive dividends from the liquidation of New Cap were sufficient to constitute submission to the jurisdiction of the Australian court. The defendant was not permitted to benefit from the Australian insolvency proceedings without the burden of complying with orders made in those proceedings (despite the fact that even the Australian Judge had acknowledged that the defendant had refused to submit to the jurisdiction of the Australian court) otherwise it would have benefitted from the distributions in the liquidation, safe from pursuit in the U.K. for receipt of preference payments.