

Landmark UK Supreme Court Ruling Restricts Enforcement of Foreign Bankruptcy Judgments

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In a ruling disposing of two appeals, the U.K. Supreme Court has held that the enforcement of foreign bankruptcy rulings in England will in certain circumstances be more difficult than had previously been thought. The two cases are *Rubin v. Eurofinance SA* and *New Cap Reinsurance Corp v. Grant* [2012] UKSC 46.

Traditionally, under English conflict of law rules, a foreign judgment may only be enforced in England at common law if the defendant was present in the foreign country when the proceedings were issued. This rule was departed from by the decision of the Privy Council in *Cambridge Gas Transportation Corp. v. Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, where it was held that a U.S. Chapter 11 plan could be given effect to in the Isle of Man without any local insolvency proceeding or plan equivalent to vest the shares in the Isle of Man incorporated Chapter 11 debtor in its creditors notwithstanding the fact that the main shareholder, a Cayman company, had not participated in the Chapter 11 process. Lord Hoffmann, arguably the leading English insolvency judge of his generation, held that bankruptcy judgments were different from judgments *in personam* or *in rem* because their purpose was not to determine the existence of rights but to provide a mechanism of collective execution against the property of a debtor by its creditors. Consequently, the traditional common law rule for recognition did not apply and, in the interests of the universality principle of bankruptcy, the court could adopt a more liberal approach through the development of the common law for such cases. This decision formed the basis of the rulings in the Court of Appeal.

The Supreme Court rejected this analysis, holding that *Cambridge Gas* had been wrongly decided and that such a development of the law should be made by the legislature rather than the courts.

The Facts

In *Rubin*, the U.S. bankruptcy court had made orders for the recovery of fraudulent transfers of funds which had been made to individuals involved in a sales promotion scam. The Defendants were resident in England, and they took no part in the U.S. bankruptcy proceedings against them. The English proceedings sought to enforce the U.S. judgments against the individuals.

In *New Cap Reinsurance*, an Australian reinsurance company went into insolvent liquidation in Australia. Its liquidator obtained a judgment in Australia against a Lloyds syndicate to whom significant payments had been made under a commutation agreement shortly before the company went into liquidation. The liquidator sought to enforce the judgment in England.

The Supreme Court also received submissions from Bernard Madoff's SIPA trustee who was seeking to enforce at common law in the courts of Gibraltar default judgments it had obtained in the U.S. against a BVI and a Cayman company totaling \$247 million relating to alleged preferential payments. Neither the BVI company nor the Cayman company took any part in the U.S. proceedings.

The Ruling and Its Significance

In addition to reaffirming the traditional common law rule for the recognition of foreign judgments, the Supreme Court also held that the United Nations Commission on International Trade Law (UNCITRAL) model law, which has been incorporated into English law in the Cross Border Insolvency Regulations 2006, did not provide an alternative route to enforcement. The UNCITRAL model law does not specifically address the recognition and enforcement of foreign judgments against third parties, and the Supreme Court rejected the argument that such judgments fell within the model law's scope by implication.

However, the appeal in *New Cap Reinsurance* failed because the Supreme Court held that the syndicate, by filing a proof of claim in the Australian liquidation and participating in that process, had in fact submitted to the jurisdiction of the Australian court. Therefore, the Australian judgment was enforceable in England under its common law rules.

The principal significance of this decision is that the English court has decided that in the sphere of international insolvency and the enforcement of foreign judgments there is a proper limit to the role of the court in breaking new ground through its decisions alone. It remains to be seen whether the *Cambridge Gas* decision will be viewed as a high-water mark of judicial innovation in this area. In practical terms, insolvent estates (to which the EU Insolvency Regulation does not apply) may not simply be able to rely upon judgments obtained in their home jurisdiction, but may be compelled to launch other claims where their targets reside in order to achieve their goals.