ENFORCEMENT OF ORDERS MADE IN FOREIGN INSOLVENCY PROCEEDINGS

In Rubin v Eurofinance SA and New Cap Reinsurance Corporation (in liquidation) and another v AE Grant and others [2012] UKSC 46, the UK Supreme Court held that:

- there is no special rule for enforcement of orders made in foreign insolvency proceedings;
- accordingly, the ordinary common law rules governing the recognition and enforcement of foreign judgments apply equally to judgments in foreign insolvency proceedings; and
- the decision of the Privy Council in Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26 recognising and promoting the concept of universality in insolvency proceedings, considered to be an important development in modern international insolvency law, was wrongly decided.

The two appeals

The Supreme Court heard two conjoined appeals which each concerned the same important and novel issue in international insolvency law - the circumstances in which an English court will recognise and enforce a judgment obtained by a foreign insolvency office holder (in these cases US Bankruptcy Trustees appointed under Chapter 11 (Rubin) and a liquidator of an Australian company (New Cap)) within the confines of that insolvency.

In each case, the insolvency office holder had, in its own jurisdiction, obtained avoidance judgments against third parties in relation to antecedent transactions and applied to the English courts to have those judgments recognised and enforced in England.

The judgment

The Supreme Court framed the central question for determination at [91]:

"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?"

With Lord Collins delivering the leading judgment, the majority held that there is no special rule for judgments given in insolvency proceedings, and therefore to enforce a foreign insolvency judgment in England, the foreign office holder would need to satisfy the ordinary common law principles relating to recognition and enforcement of foreign judgments, namely that the judgment debtor:

1. was present in the foreign jurisdiction at the time the proceedings were instituted; or
2. was also a claimant or counter-claimant in the foreign proceedings; or
3. submitted to the foreign proceedings by voluntarily appearing in them; or
4. prior to the commencement of the foreign proceedings, agreed to submit to the jurisdiction of the foreign court.

In making these findings, the majority of the Supreme Court found that Lord Hoffmann's famous dicta in *Cambridge Gas*, which has been followed and applied in a number of English cases, was wrongly decided (Lord Mance did not think the point needed deciding as *Cambridge Gas* could be distinguished and Lord Clarke dissented). In *Cambridge Gas*, Lord Hoffmann determined that a judgment in insolvency proceedings neither constitutes an *in rem* nor an *in personam* judgment (judgments determining proprietary rights and personal rights respectively) but falls into a separate category to which different enforcement rules apply. He pointed out that the purpose of an insolvency process is to provide a mechanism of collective execution, and that therefore, adopting the principle of universality, foreign insolvency judgments should not be subject to the narrow ordinary common law rules and should be recognised regardless of whether the ordinary common law requirements were met.

Applying these principles, the Supreme Court determined that the judgment obtained in *Rubin* could not be recognised or enforced in England as the respondents took no part in the US proceedings and were not present in the US. The judgment in *New Cap* could, however, be recognised and enforced, as although the respondents did not take any steps in the antecedent transaction proceedings themselves, they had submitted proofs of debt in the Australian liquidation and attended and participated in creditors' meetings. These steps constituted a choice to submit to the Australian insolvency proceeding and, having so submitted, they should therefore be taken to have submitted to the jurisdiction of the Australian court responsible for the supervision of the insolvency proceeding. The court held that it was not permissible for the respondent to submit to the jurisdiction for one purpose (submitting a claim in the liquidation) but not for another (being the subject of avoidance claims brought by the liquidators).

**Implications**

Neither *Cambridge Gas* nor *Rubin* and *New Cap* have been yet followed or applied in the key common law Asian jurisdictions of Hong Kong, Singapore and Malaysia. It remains to be seen, therefore, which approach those jurisdictions will adopt in event a similar factual scenario comes before courts in those jurisdictions.

If the approach taken in *Rubin* and *New Cap* is adopted, insolvency practitioners and "innocent" creditors may see this as a backward step in the development of insolvency laws in the region, particularly in circumstances where a fraud or other wrong has been committed on the insolvent company and the wrongdoer does not participate in the insolvency or otherwise flees to a jurisdiction where enforcement is difficult (a scenario not uncommon in insolvencies in Asia). While enforcement problems already exist in a number of Asian jurisdictions, the application of the principles laid down in *Rubin* and *New Cap*, combined with the absence of any commonly applicable convention on cross border insolvency in Asia, would in certain cases further diminish the likelihood of insolvency practitioners being able to effect recoveries for the benefit of creditors as a whole.

The *Rubin* and *New Cap* judgment will only affect the position in common law countries. Enforcement of judgments obtained in foreign insolvency proceedings in civil law jurisdictions such as the People's Republic of China and Indonesia remains subject to a range of different considerations and challenges.