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Finding a path to a global restructuring solution

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Introduction

Since *Rubin v Eurofinance SA*[1], the circumstances in which English law will enforce a foreign insolvency-related judgment are limited[2] in the same way as a foreign non-insolvency related judgment. This is notwithstanding that there are only limited circumstances in which English law will not recognise and give effect (e.g. by way of granting a stay) to the foreign proceeding that directly led to the granting of the foreign insolvency-related judgment[3].

In the context of a simple restructuring case study, this note briefly explores the limiting effect that *Rubin* has. It also considers the efforts currently being made to stem the extent of *Rubin*.

Policy considerations for insolvency cases

Before looking into the case study and law, it is worthwhile pausing to consider whether insolvency gives rise to special policy considerations.

This note is premised on the position that a global 'once and for all' restructuring solution executed at a single point, which is subject to limited and defined exceptions, is a laudable goal. Whilst there are clearly understandable policy reasons for *Rubin*, in the context of insolvency (where the primacy of the individual creditor's interests is subordinated to the interests of the entire body of creditors[4]), other opposing policy issues come into play.

It is apt to recall Lord Sumption's words in *Singularis Holdings Limited v PWC*[5], in reference to the principle of universalism as being:

> *"founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally."*

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[1] [2013] 1 AC 236. In *Rubin*, the Supreme Court refused to enforce a foreign judgment setting aside a transaction prior to the insolvency on the basis that the defendant was not present in the jurisdiction in which the judgment was made at the time the proceedings were issued and had not submitted to the jurisdiction of the foreign court.

[2] This is the case unless it originates from a European Member State. The Recast European Insolvency Regulation (EIR) (subject to some exceptions), gives pre-eminence to the laws of the jurisdiction where COMI is located, regardless of the governing law of the instrument.

[3] See Article 17 Cross-Border Insolvency Regulations 2006 (UK) ('CBIR'). The CBIR is the UK legislation adopting UNCITRAL's Model Law on Cross-Border Insolvency (the 'Model Law').

[4] As evidenced by the fundamental rule of *pari passu* treatment of creditors and other such rules.

[5] [2014] UKPC 36.

If this stands good in the case of winding up, it should stand good in the case of a restructuring.

A short case-study

A restructuring is agreed under the law of the debtor's incorporation and COMI and a judgment in that jurisdiction endorsing the agreement is granted

Consider a simple scenario: a Ruritanian issuer[6] has issued bonds governed by English law and the parties have subjected themselves to the jurisdiction of the English courts. Prior to maturity, the issuer falls into financial distress and enters into court-supervised restructuring proceedings in Ruritania under its own insolvency laws. The issuer has some assets in the UK and so the insolvency officer appointed to supervise the restructuring, in the interests of protecting those assets from pre-emptive enforcement action during the course of the restructuring, seeks recognition (both for himself and in respect of the Ruritanian proceedings) in the English court under the CBIR. The English court, finding the issuer's Centre of Main interest ('COMI') to be in Ruritania and the other tests in the CBIR to be satisfied[7] duly grants the recognition sought, with the consequence that a mandatory stay in the UK of commencement or continuation of legal proceedings and execution against the issuer's assets is imposed[8]. The restructuring progresses and the requisite number and value of bondholders under the Ruritanian restructuring law vote to extend the maturity and reduce the principal amount outstanding under the bonds and the Ruritanian court grants the necessary order giving effect to the majority's vote. The restructuring proceeding successfully concludes, the issuer exits the insolvency process and continues its business in the ordinary course.

What effect does the restructuring have under English law?

However, one of the bondholders had refused to submit to the Ruritanian reorganisation proceedings and to the jurisdiction of the Ruritanian court. Is the bondholder bound by the Ruritanian restructuring[9]?

Under current English law, the bondholder will have a strong argument that it is not bound by the restructuring[10] and so, upon the conclusion of the 'foreign proceedings', it can exercise its remedies in the UK in accordance with the original terms of the bond instrument, with the purpose of executing against the issuer's assets located in the UK. This would be on the basis of at least two principles of English law:

- Firstly, the decision in *Rubin*, to the effect that a foreign judgment cannot be enforced in England if the judgment could not have been granted on its terms in England. In *Rubin*, the Supreme Court refused to enforce a foreign judgment *in personam* (specifically an avoidance action), even though it was granted in the context of insolvency, since the defendant (like in our scenario) was not present in the jurisdiction in which the judgment was made at the time the proceedings were issued and had not submitted to the jurisdiction of the foreign court[11]. In doing so,

[6] Ruritania is a fictional non-EU Member State. If Ruritania were an EU Member State, the Recast European Insolvency Regulation (EIR) would apply.
[7] One such condition is that the insolvency officer is a 'foreign representative' within the meaning of [Article 2(j) Schedule 1 CBIR] and another such condition is that the restructuring proceedings are a 'foreign proceeding' [Article 2(i) Schedule 1 CBIR].
[8] Article 20(1) Schedule 1 CBIR.
[9] This note does not consider whether the terms of the bonds permit a bond trustee to submit to the proceeding on behalf of the bondholders.
[10] However consider whether *obiter dicta* of the Privy Council in *Singularis* might be of assistance if Ruritania's voting thresholds and processes for amending the terms of the bonds are materially the same as under an English process.
[11] The court rejected the pragmatic *sui generis* characterisation of insolvency judgments identified by Lord Hoffman in the earlier case of *Cambridge Gas Transportation Corp v Official Committee of*

the Supreme Court upheld a long-standing principle of common law that a judgment *in personam* cannot be enforced against a person who had not submitted to the jurisdiction of the court[12]. Thus, in such a case, English common law requires fresh proceedings in England to be opened. The court further held that neither Article 21(1)(g) CBIR (which allows the English court to 'grant any additional relief that may be available to a British insolvency officeholder under the law of Great Britain') nor Article 27 CBIR (which provides that co-operation with the foreign representative may be implemented by 'any appropriate means') assists in such a case. In short, the court in *Rubin* held that the CBIR is not intended to provide for enforcement of an insolvency-related foreign judgment, or permit the English court to do something, it could not otherwise have given or done under the common law[13].

- Secondly, the long-standing '*Rule in Gibbs*'[14] to the effect that the laws of a foreign country cannot discharge an English law obligation because English law considers that a discharge of a contract is governed by the law of the contract on the basis that contracting parties cannot be presumed to have agreed to be discharged by proceedings under a law different from the law governing the contract[15].

The dilemma – 'universalism' or 'territorialism'?

This limitation naturally calls into question the purpose of the recognition and stay facilitated by the CBIR if the restructuring solution granted in furtherance of the foreign proceeding so recognised is not also recognised and enforced by the English court.

Referring to the *Rule in Gibbs*, Lord Neuberger recently stated in his key-note speech given at the London 2017 III Conference that '*There are powerful arguments for revisiting this common law principle*'. But he noted (also in the context of *Rubin*) the difficulty in this being done in the court by judges as opposed to parliament:

> '*All UK judges recognise, indeed I think we all strongly support, the desirability of international cooperation and co-ordination in the field of insolvency. The question which sometimes divides us is how far a common law judge can take this principle. The judges who are more cautious and may appear less internationally minded are only cautious about judges developing the law for themselves. The caution may actually serve to act as a spur to the agreeing of legislative measures increasing international cooperation, such as the UNCITRAL Model law.*'

Working Group V of UNCITRAL's draft proposals

Working Group V of UNCITRAL has been developing a model law for the recognition and enforcement of insolvency-related judgments since December 2014. The latest draft (thrashed out during the 51st working session in NY during 10 – 19 May 2017) shows that

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Unsecured Creditors of Navigator Holdings plc and others [2007] 1 AC 508. Lord Hoffman had reasoned that insolvency proceedings fall outside the *in personam* and *in rem* categories; insolvency proceedings are merely a collective proceeding to enforce the existing rights of creditors against the property of the debtor (such rights having already been determined by the insolvency law of the relevant jurisdiction).

[12] Rule 43 of Dicey, Morris and Collins on the Conflict of Laws (15th ed, 2012); *Williams v Jones* (1845) 13 M&W 628.

[13] Chapter 15 jurisprudence is not so narrow – see for example *Re Condor Insurance Co Ltd* 601 F 3d 319 (5th Circuit 2010); *Ad Hoc Grp. of Vitro Noteholders v. Vitro S.A.B. de C.V.* 701 F.3d 1031 (5th Circuit 2012); *In re Rede Energia SA*, 515 BR 69 Bankr SDNY 2014.

[14] The rule in *Gibbs* refers to the case of *Anthony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399.

[15] *Dicey, Morris & Collins on the Conflict of Laws, 14th edition, Sweet & Maxwell, at paragraph 31-093* (Dicey).

progress is steadily being made towards the goal of a single point of global restructuring, including as it does a clear and unambiguous direction to the court to recognise and enforce an insolvency-related foreign judgment[16], subject to a public policy[17] exception (similar to the one in the Model Law on Cross-Border Insolvency) and other specifically drafted exceptions that give a court discretion to refuse to recognise or enforce[18].

While the latest draft suggests that the problem of the rule in Gibbs is intended to be solved[19], the drafting suggests that the group is grappling with the problem in *Rubin*.

On the one hand it includes a provision[20] that strikes at the heart of one of the core principles of *Rubin* – by expressly stating that one of the reliefs available in Article 21(1)(g) of the CBIR version of the Model Law shall now be taken to include recognition and enforcement of a foreign insolvency-related judgment. But on the other hand, there is also a provision suggesting that another core aspect of *Rubin* – the distinctions between the *in personam* and *in rem* - are to be maintained. Draft article 12(g) provides as follows:

> '*Recognition and enforcement of an insolvency-related foreign judgment may be refused if... the [Ruritanian] court did not satisfy one of the following conditions:*
>
> *(i) the court exercised jurisdiction on the basis of the [express] consent [or submission] of the party against whom the judgment was issued; [The court exercised jurisdiction on the basis that the party against whom the judgment was issued entered an appearance and presented their case without contesting jurisdiction, provided that the law of [Ruritania] permitted jurisdiction to be contested];*
>
> *(ii) the court exercised jurisdiction on a basis on which a court in [the UK] could have exercised jurisdiction;*
>
> *(iii) the court exercised jurisdiction on a basis that was not inconsistent with the law of [the UK].*'

In light of *Rubin* and faced with the apparent discretion in Article 12(g), how would the English court exercise its discretion in the example of our case study, where the defendant did not submit to the jurisdiction of the Ruritanian court? Faced with discretion, in what circumstances would the English court decide against a fundamental principle of common law such as *Rubin*?

Article 12 contains other sensible grounds for exercising discretion to refuse to recognise and enforce, including absence of timely notification of the proceeding, fraud and conflict with outstanding local proceedings or prior local judgments. Would these grounds, together with the public policy exception referred to above, be sufficient to protect a defendant, balancing the objective of giving authority to a debtor's 'home state' to effect a meaningful and universal restructuring?

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[16] An 'insolvency related judgment' is defined as being '*a judgment that (i) is related to an insolvency proceeding, (ii) was issued [on or] after the commencement of the insolvency proceeding to which it is related and (iii) affects the [interests of the] insolvency estate*'.

[17] Article 7 of the draft gives the court a right to refuse to recognise and enforce the judgment if to do so would be 'manifestly contrary to the public policy, including the fundamental principles of procedural fairness' of the jurisdiction.

[18] Article 11(e).

[19] None of the exceptions to Article 11 refer to the governing law of the agreement.

[20] Article 16, Variant 2.

Conclusion

Segal, Harrison and Morrison[21] mooted a coherent resolution to have the global seat of restructuring as the debtor's place of incorporation (regardless of a creditor's submission to or presence in that jurisdiction), the policy rationale being that a person dealing with a company must at least accept the risk of proceedings occurring in its place of incorporation. Similar policy issues were tackled in the Recast EIR where COMI is treated as the lynch pin.

Whatever solution is settled on by Working Group V, difficult compromises will be required. To Lord Neuberger's point, the risk is that, without clear legislative direction on the issue, there may be too many competing policy issues at stake for the English judges comfortably to exercise discretion to decide against the principles in *Rubin*.

[21] See working draft paper delivered at 17th Annual III Conference, 2017: Assistance to foreign insolvency office-holders in the conflict of laws: Is the common law fit for purpose?