The Supreme Court has sent a clear message in the Rubin/New Cap decisions handed down on 24 October[1] that judgments in foreign insolvency proceedings are not to be accorded any special status for enforcement purposes in England. This is good news for English judgment debtors, but not such good news for lenders who put insolvent borrowers abroad into liquidation in the hope of being able to recover a reasonable dividend through the insolvency office-holder pursuing claims against foreign creditors where they are neither resident nor submit to the foreign jurisdiction.

BACKGROUND

The usual rule in England, whether pursuant to the Brussels Regulation, under a treaty or convention, or otherwise at private international law, requires a defendant either to have been present in the foreign country or to have submitted to jurisdiction there before a judgment of the foreign court can be enforced here. As a result, English domiciled defendants have been able to keep their assets safe by "staying at home" where neither pre-condition is satisfied, including in the case of foreign insolvency proceedings.

The decisions of the Court of Appeal in Rubin and New Cap in 2010 and 2011 changed that, according foreign insolvency proceedings special status, but it appears only temporarily.

In Rubin, the English Court of Appeal held that a US$10m judgment of the US Bankruptcy Court in respect of fraudulent transfers and conveyances in a Chapter 11 bankruptcy was enforceable in England at common law, despite the defendant not having been present in the US nor having submitted to US jurisdiction. The Court of Appeal did so, among other things, on the basis of two principles said to form part of the English common law, as follows:

- First, a "principle of private international law that bankruptcy should be unitary and universal, and there should be a unitary insolvency proceeding in the court of the bankrupt's domicile which receives worldwide recognition and should apply universally to all the bankrupt's assets" [2], with such assets including the fruits of a judgment in favour of the bankrupt estate; and

- Second, a "further principle that recognition carried with it the active assistance of the court which included assistance by doing whatever the English court could do in the case of a domestic insolvency …" [3]

In New Cap, bound by the prior decision in Rubin, the English Court enforced a US$8m default judgment of the New South Wales Supreme Court in similar circumstances under the Foreign Judgments (Reciprocal Enforcement) Act 1933 and, alternatively, pursuant to s.426 Insolvency Act 1986, which applies to a number of limited countries, including Australia.
REASONS

In a majority judgment (Lord Clarke dissenting), the Supreme Court rejected the reasoning of the Court of Appeal in Rubin, allowing the appeal. Among other things, the Court held that:

- As a matter of policy, it is not in the interests of the universality of bankruptcy for there to be a more liberal rule for judgments given in foreign insolvency proceedings;
- The restricted scope of the existing rules reflects the fact there is no expectation of reciprocity by foreign countries and expanding the principle to England would be detrimental to UK PLC, without any corresponding benefit; and
- There is nothing expressly or by implication in the UNICITRAL Model Law implemented by the Cross-Border Insolvency Regulations 2006 which permits recognition or enforcement of foreign judgments against third parties.

Lord Clarke dissented on the basis that he favours the principle of modified universalism adopted by the Court below and supported a single system of distribution for a bankrupt's assets.

In New Cap, the Supreme Court found it unnecessary to determine these issues because the Court held that the defendant had, in fact, submitted to Australian jurisdiction by filing a proof of debt. Importantly, the Court held that as a matter of English Law, the filing of a proof constituted taking a step in the foreign insolvency which amounted to a submission, observing that "[i]t should not be allowed to benefit from the insolvency proceeding without the burden of complying with the orders made in that proceeding." [4]

CONCLUSION

The Supreme Court has made it plain that judgments of courts in foreign insolvency proceedings are not to be accorded any special status. In so doing, the Court has curtailed the operation of the principle of universalism. The Court observed that there were other routes to obtaining an enforceable judgment in England, eg under art.23 Cross-Border Insolvency Regulations involving the appointment of a foreign representative in England empowered to take action here, including the bringing of English court proceedings. But in the absence of any such steps, the Court had a limited appetite for "judge-made" law in this area.

So, English debtors can continue to "stay at home" in certain circumstances, [5] safe in the knowledge that a judgment of a foreign insolvency court cannot be enforced here provided they were not present in the foreign country concerned and did not otherwise submit to the jurisdiction there, but at the price of not being able to prove in the foreign insolvency.

This is cold comfort for banks pursuing recovery through foreign insolvencies where the creditors are resident in England, but it is nevertheless a principled decision which refocuses attention on the established cross-border insolvency statutes and regulations enacted to achieve a degree of harmonisation, although not universalism in the sense advocated by the Court of Appeal in Rubin, which has now been overruled.

To view the full decision Click here

For further information please contact:

Jean-Pierre Douglas Henry
Partner, London
T +44 (0)20 7153 7373
JP.DouglasHenry@dlapiper.com

[1] Rubin and another (Respondents) v Eurofinance SA and others (Appellants) 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) [2012] UKSC 46.

[2] Ibid at para 89.

[3] Ibid.


[5] Depending (among other things) on which foreign country is involved, e.g. this would not be the case where the insolvent estate has its centre of main interests in the EU because judgments would be enforceable in England under art.23 EC Insolvency Regulation (1346/2000).