Recognition of Insolvency Judgments in the UK – The Retreat from Universalism

BY IAN McKIM

The UK Supreme Court has handed down its judgment in the much anticipated appeals of Rubin v Eurofinance SA and New Cap Re v Grant. The case involved attempts by overseas insolvency officeholders to enforce in England judgments obtained in insolvency proceedings abroad (a US Chapter 11 in Rubin and an Australian liquidation in New Cap). In its decision the court declined to extend the concept of universal bankruptcy jurisdiction, as advocated in cases such as Cambridge Gas and HIH, instead holding that the principles that apply to the recognition of judgments in overseas bankruptcy proceedings are the same as those applicable to general civil judgments. This decision will come as a disappointment to many who saw the principle of universal jurisdiction as an increasingly important tool in the management of international insolvencies, particularly those who wanted to see the English court stake its claim to be the venue for more of these proceedings, but it arguably places the law on a firmer and more certain technical footing.

Recognition of Overseas Judgments

At common law, the English court will generally recognise a decision of an overseas court where the defendant was present or incorporated in the jurisdiction in question when the proceedings were commenced, has brought a claim or counterclaim in that jurisdiction, or has otherwise submitted to the jurisdiction. This position was substantially replicated by the Foreign Judgments (Reciprocal Enforcement) Act 1933, which provides a statutory basis of the recognition of judgments from certain jurisdictions.

On the other hand, a wider approach known as the principle of universality is evident in some insolvency cases. The concept is that it is desirable for cross-border insolvencies to be managed by a single officeholder as a single estate, and that this should be recognised globally. In practice, courts have set some parameters on the recognition of insolvency proceedings, such that the major courts apply a principle of “modified universality” – courts will retain a discretion to assess whether the overseas proceedings are consistent with their principles of justice and public policy, but will generally defer to the “main” proceedings for the purposes of getting in and distributing assets.

In the international insolvency sphere, the common law position has been added to by other legislative material, in particular section 426 of the Insolvency Act 1986, the EC Insolvency Regulation, and the UNCITRAL Model Law (as effected by the Cross-Border Insolvency Regulations 2006). These provide potential alternative means for an overseas officeholder to obtain the assistance of the UK courts; however, it was not clear whether any of them could be utilised by the Rubin and New Cap officeholders in the manner they required, and this was also a matter for discussion in the Supreme Court.
The Cambridge Gas and HIH Decisions

As was noted in the judgment of Lord Collins, two recent decisions of Lord Hoffmann in Cambridge Gas and HIH had had such influence on the judgments in the Court of Appeal in Rubin and New Cap that they deserved close attention.

In the Cambridge Gas case, a Cayman company (“Cambridge Gas”) owned about 70% of the shares of an Isle of Man company (“Navigator”). Navigator filed for Chapter 11, the ultimate result of which was the confirmation of a plan that required the shares in Navigator to be transferred to its creditors. The creditors then sought an order from the Manx court that would give effect to the Chapter 11 plan. The main issue was that it was accepted that the defendant had not submitted to the jurisdiction of the US court; it was also apparent that the asset in question – the shareholding in Navigator – was situated in the Isle of Man, also outside the jurisdiction of the US court. The basis on which the judgment should have been enforceable in the Isle of Man was therefore far from clear.

Lord Hoffman dealt with this problem by holding that the categorisation of a judgment as being in rem or in personam was irrelevant to insolvency law, as insolvency and bankruptcy were processes for collective exercise of rights against an estate rather than an adjudication as to whether rights against the estate existed. The correct approach was to apply principles of international judicial assistance to assess whether the Manx court (in this case) could act to further this exercise of rights. He had little difficulty in holding that as analogous proceedings in the Isle of Man (such as a scheme of arrangement) could have similar results, justice required that recognition be granted on the creditors’ committee’s application.

However, Lord Hoffman provided very little in the way of analysis as to whether a scheme of arrangement would actually have been workable in that case, and equally little analysis as to why the doctrine of corporate personality should be disregarded – something that, in English law, usually only happens in exceptional circumstances. The decision attracted both criticism and approval after it was handed down, and was not followed in the subsequent Irish case of Re Flightlease.

HIH did not consider the enforcement of an overseas judgment, but the remission of assets in the UK to Australia, where there were material differences in the distribution regime. Section 426 of the Insolvency Act 1986 was available to assist and this is what the majority of the House of Lords based their decision on; however, Lord Hoffman also considered that the principle of universality could be applied to order remission in furtherance of the goal of having all of the company’s assets distributed to its creditors under a single system of distribution – even one with different consequences for some of the creditors.

The Supreme Court’s Analysis

On the question as to what rule should be applied to the recognition of insolvency judgments at common law, the Supreme Court acknowledged the influence of Lord Hoffmann’s views on the inferior courts, but did not accept that when it came to insolvency judgments there was a distinction in principle that warranted separate treatment from other civil judgments. In particular, while the court acknowledged the existence of the principle of universality, it did not give the principle the prominence that it received in Cambridge Gas or HIH – indeed, the court considered that universality was really just a label attached to a trend apparent from the classic cases and instruments on the recognition of proceedings, rather than being an overarching rule of law in itself.
The principles relating to recognition of judgments were adequately set out in the existing authorities and international instruments, and while the common law could move things forward incrementally, the leap necessary to grant recognition in the present cases was too great and would require legislation. The court noted that the legislative instruments that did exist were the product of lengthy negotiation and ratification, typically based on reciprocity, reinforcing the conclusion that the common law should not intervene lightly.

Therefore, even in the case of insolvency judgments, English courts should only recognise them where the court in question had jurisdiction over the defendants in the classic sense.

In Lord Collins’ view, it followed that Cambridge Gas was wrongly decided; Lords Walker and Sumption agreed with Lord Collins’ judgment without giving reasoned speeches of their own, while Lords Mance and Clarke did not see the need to expressly disapprove Cambridge Gas, especially as its correctness was not put in issue by the parties. Nevertheless, the status of Lord Hoffmann’s decision in that case must be considered to be gravely weakened.

Lord Collins went on to conclude that the Cross-Border Insolvency Regulations did not extend to enforcement of judgments – following on from his reasoning on the common law question, he considered that if the Regulations had been intended to have this effect, they would have said so explicitly. He reached the same result with regard to section 426(4) of the Insolvency Act 1986, which had been raised in the New Cap appeal, though he found that the defendants in that case had in fact submitted to the jurisdiction of the Australian court and that therefore recognition could be granted on that basis.

**Conclusion**

As noted above, the decision in Cambridge Gas attracted both praise and criticism – many saw an opportunity for the English courts to lead the way in taking control of international insolvencies and cutting through some of the issues that currently slow down cross-border proceedings. Others, however, were less impressed by the brevity of the reasoning in the case. The retreat from Cambridge Gas evident in the Rubin judgment will disappoint some in the UK insolvency community, but it is obvious that Lord Collins analysed the issues in much greater detail than Lord Hoffmann and the law is now on a more certain technical footing.

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1 Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508
2 Re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852
3 In re Flightlease (Ireland) Ltd [2012] IESC 12