BRIEFING

SUMMARY AUGUST 2010

US bankruptcy judgment can be enforced by the English courts

THE COURT OF APPEAL USES COMMON LAW PRINCIPLES TO ALLOW DIRECT ENFORCEMENT

In the case of *Rubin and Lan v Eurofinance SA and others*[1], the Court of Appeal was asked to consider (1) whether foreign proceedings (in this case Chapter 11 proceedings under the US Bankruptcy Code) should be recognised as foreign main proceedings in accordance with the UNCITRAL Model Law on Cross-Border Insolvency (and whether the appointment of the applicants in the case as foreign representatives should be similarly recognised) and (2) whether a judgment of the US Bankruptcy Court against the respondents should be enforced as a judgment of the English courts in accordance with the relevant provisions of the Civil Procedure Rules. The Court of Appeal answered both questions in the affirmative.

Facts

The case concerned a trust (TCT) created by Eurofinance SA, which was governed by English law. The trustees of TCT were the respondents, and the beneficiaries of the trust were resident in the US and Canada. Proceedings were brought against TCT under consumer protection legislation in Missouri and it soon became clear that TCT could expect similar proceedings in other states. Receivers (the applicants) were appointed in respect of TCT on 11 November 2005 and a Chapter 11 plan was approved in New York on 24 October 2007. The reason for the Chapter 11 proceedings was that most of the creditors (and the assets) were located in the US or Canada – and also because in New York TCT would be treated as a separate legal entity as a 'business trust' even though it would not be recognised as a separate legal person under English law.

The US bankruptcy judge applied to the English High Court for recognition of the Chapter 11 proceedings as foreign main proceedings under the Cross-Border Insolvency Regulations 2006[2] (CBIR; which gave the UNCITRAL Model Law on Cross-Border Insolvency force of law in England) and to 'seek aid, assistance and co-operation from the High Court… in particular… in the prosecution of litigation which may be commenced in [the US Bankruptcy] court, including… the enforcement of judgments of [the US Bankruptcy] court that may be obtained against persons and entities residing or owning property in Great Britain… '

On 3 December 2007, proceedings were brought in the US Bankruptcy Court against, among others, the respondents (the proceedings). The respondents, on advice, decided not to submit to the jurisdiction of the New York court and not to defend the proceedings. This seems to be because of the English common law principle that a foreign judgment is not enforceable in England if the respondents were not present in the foreign jurisdiction and had not submitted to the jurisdiction. Default and summary judgments were subsequently entered against the respondents. The applicants applied to the English courts for an order (a) recognising the Chapter 11 proceedings as 'a foreign main proceedings' under the CBIR and (b) the enforcement against the respondents of the proceedings in accordance with the Civil Procedure Rules parts 70 and 73.

At first instance, Mr Nicholas Strauss QC decided that the Chapter 11 proceedings should be recognised as foreign main proceedings, but dismissed the application for enforcement of the proceedings.

The Court of Appeal decision

It is clear that the Chapter 11 proceedings were a collective and judicial proceeding, made pursuant to a law relating to insolvency, as required by the CBIR, and that the conditions for recognition set out in article 17

[1] [2010] EWCA Civ 895.

[2] SI 2006/1030.

had been fulfilled. Therefore the Chapter 11 proceedings were a 'foreign proceeding' pursuant to the CBIR. This is despite the fact that TCT was a trust with no separate legal personality under English law. What was less clear was whether the proceedings were also capable of recognition and enforcement.

The case focused heavily on the decision of the Privy Council in the *Cambridge Gas* case[3], which held that bankruptcy proceedings were neither judgments in rem (ie rights over property) nor judgments in personam (rights against a person) and the rules of private international law concerning the recognition and enforcement of judgments therefore did not apply. A bankruptcy proceeding was '… an order to provide a mechanism for collective execution against the property of the debtor by creditors whose rights are already admitted or established… ' and as such should be given effect by a foreign court.

The Court of Appeal, following the reasoning of the High Court, held that the proceedings were central to the purpose of the main insolvency proceeding and were not merely incidental to it, as was contended by the respondents. Bankruptcy proceedings include the antecedent transaction mechanisms under English law, and their equivalent provisions under New York law, which are 'integral to and are central to the collective nature of bankruptcy and are not merely incidental procedural matters'. The proceedings were therefore a foreign main proceeding and the applicants recognised as foreign representatives.

As stated by Lord Hoffman in *Cambridge Gas*, 'The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum'. Lord Justice Ward accepted the general principle of private international law 'that bankruptcy… should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets'. Recognition carries with it the active assistance of the court and that assistance extended to enforcing the proceedings. It is important to note that the Court of Appeal decision relates only to the enforcement of certain parts of the proceedings, concerning the avoidance of antecedent transactions. The applicants did not seek recognition in England of other aspects of the proceedings.

Commentary

The decision to allow enforcement of the proceedings was therefore founded on common law principles rather than under the provisions of the CBIR. The judgment makes it clear that foreign judgments that are integral to an English insolvency process (such as antecedent transactions) will be enforceable as if the judgment had been made by the English court. The Court of Appeal was not required to consider whether it would have reached the same decision relying on the CBIR, but comments made towards the end of his judgment by Lord Justice Ward suggest that it may well have done.

The respondents relied heavily on the fact that they had not submitted to the jurisdiction of the New York courts and were not present in the US and, therefore, in accordance with common law, the English courts did not have jurisdiction to enforce or recognise the proceedings. The Court of Appeal held that this common law rule did not apply, because the English court must recognise and enforce the jurisdiction of a foreign court over the foreign insolvency proceeding as a whole (and all that forms part of that proceeding), rather than over the person himself.

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[3] *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings* [2006] UKPC 26, [2007] AC 508.

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