



## **INSOL International**

The recognition and enforcement  
of foreign insolvency derived  
judgments - *Rubin*

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# Setting the scene - strands of English cross-border insolvency law



COMMON LAW PRINCIPLES OF INSOLVENCY ASSISTANCE

CROSS-BORDER INSOLVENCY REGULATIONS 2006 (UNCITRAL MODEL LAW)

SECTION 426 COUNTRIES

FOREIGN JUDGMENTS  
(RECIPROCAL  
ENFORCEMENT) ACT 1933

ADMINISTRATION OF  
JUSTICE ACT 1920

EU LEGISLATION

DIRECTIVE  
2001/24/EC –  
WINDING UP  
DIRECTIVE FOR  
CREDIT  
INSTITUTIONS

DIRECTIVE  
2001/17/EC –  
WINDING UP  
DIRECTIVE FOR  
INSURERS

EC  
INSOLVENCY  
REGULATION -  
INDIVIDUALS  
& COMPANIES



# Setting the scene – Cambridge Gas

- Isle of Man company's shareholders dispossessed of shares under chapter 11 plan – plan recognised in Isle of Man (Privy Council)
- Shares asset of Cayman parent who was not subject to US chapter 11 and had not submitted to the US jurisdiction
- Traditional “litigation” rules for the recognition and enforcement of judgments did not apply – insolvency concerns the enforcement of collective rights
- Principle of modified universalism – “the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency.”
- The idea of a single insolvency having universal effect
- The golden thread of common law principles of insolvency assistance since 18<sup>th</sup> century



# Setting the scene - litigation common law

Dicey & Morris Rule 43:

English court will allow enforcement of foreign monetary judgment *in personam* if the defendant:

- 1) was **present** in the foreign country when the foreign proceedings were instituted; or
- 2) was a claimant or counterclaimed in the foreign proceedings; or
- 3) **submitted to the foreign jurisdiction**; or
- 4) **agreed**, in respect of the subject matter of the proceedings, **to submit** to the jurisdiction of that court or courts of the country.

# Rubin – the facts



- US chapter 11 proceedings in respect of a business trust
- US liquidators obtained default summary judgment against the trustees (individuals) who were resident in England
- Trustees had no presence in the US and had not submitted to the US jurisdiction
- Judgment based on breach of fiduciary duties, negligence and US “insolvency” transaction avoidance provisions
- Application to the English court seeking
  - Recognition of the chapter 11 proceedings
  - Recognition and enforcement of the US judgment

# Rubin - first instance



- Chapter 11 proceedings recognised in England under the CBIR
- US judgment would not be recognised or enforced by the English courts - not under the common law principles of insolvency assistance nor the CBIR
- CBIR not intended to replace rules of private international law and the defendants had not submitted to the US jurisdiction

# Rubin – Court of Appeal

- Only concerned the transaction avoidance element of the US judgment
- Transaction avoidance proceedings recognised under the CBIR
  - Part and parcel of the US chapter 11 proceedings
  - US and English transaction avoidance provisions strikingly similar
  - Part of the process for enforcing rights in insolvency (not a “standard” court proceeding)
- Transaction avoidance judgment enforced under the common law principles of insolvency assistance
  - Standard common law litigation rules did not apply to insolvency proceedings – part of the process for enforcing rights in insolvency
  - Purpose of recognition of insolvency proceedings is to give foreign officeholder the remedies they would have had if domestic proceedings were opened
  - Individuals aware of claims brought against them

# Rubin – Supreme Court

- Majority decision of the Supreme Court
- No power to enforce foreign insolvency judgments under common law principles of insolvency assistance, CBIR or s426 - enforcement governed by Dicey Rule 43
- Grant of relief by courts under the CBIR does not permit the enforcement of foreign judgments against third parties
- No special rule for insolvency claims. *Cambridge Gas* decision wrongly decided (Lord Mance and Lord Clarke dissenting)
- Recognised that there could be a workable distinction between insolvency claims and other claims BUT such change had to be implemented by legislation
- 1933 Act does apply to insolvency proceedings and therefore enforcement would be by registration under the 1933 Act (but submission to foreign jurisdiction still required)
- If Dicey Rule 43 has been satisfied, judgment will be enforced without re-examination on the merits subject to (narrow) public policy exception

# Impact of Rubin

- Not just about insolvency transaction avoidance – applicable to a wider canon of insolvency derived judgments (including, potentially, the recognition of compositions)
- Retreats from modified universalism
- Essentially says that certain “insolvency derived” judgments are not in fact part of the insolvency process
- Limits the effectiveness of the CBIR (Model Law)
- UK Government has decided cannot legislate to “fix” *Rubin* without amendment to the Model Law
- May weaken arguments for states to adopt the Model Law – not enough tools in the box to warrant implementation?
- Could allow counterparties to “hide” from foreign insolvency jurisdiction
- Should there be a difference between the enforcement of rights established in the insolvency proceedings and the establishment of new rights?

# Is there a quick fix to the Model Law?

- Yes!
- “Article 21 of the Model Law should be amended so that it is clear that the discretionary relief the court can grant in aid of foreign insolvency proceedings includes the ability to recognise and enforce an “insolvency derived” judgment of a foreign insolvency court.”

# Conclusion

- Cross-border insolvency law in a significant part of the world is now uncertain
- Can we fix it? Yes we can!