

---

## litigation lawflash

8 May 2013

### **Rubin: Enforcement of US Judgments in England**

*UK Supreme Court decision confirms traditional rules on enforcement of all US judgments in England and reverses a significant liberalisation of cross-border bankruptcy law.*

On 24 October 2012, the UK Supreme Court issued a judgment in the case of *Rubin v Eurofinance SA*,<sup>1</sup> reaffirming the English common law principles relating to enforcement of foreign judgments in England. Although foreign judgments may be enforced in England by a number of mechanisms and European Union regulations or international conventions apply in respect of certain countries, for a large number of jurisdictions (including the United States), it remains the case that English common law rules will determine whether such a judgment can be enforced.

#### **English Common Law Principles**

The common law principles on recognition and enforcement apply to in personam judgments. These principles provide that a foreign judgment will be enforced where the person against whom the judgment was obtained has done one of the following:

- Was present in the foreign jurisdiction when the proceedings commenced
- Claimed or counterclaimed in the foreign proceedings
- Submitted to those proceedings by voluntarily appearing in them
- Agreed to submit to the jurisdiction of the foreign court

#### **A Shift Towards Universalism**

In the bankruptcy area, there has been a move to depart from these established principles. Notably, since the Privy Council issued its decision in *Cambridge Gas*<sup>2</sup> in 2006, English common law principles have come into conflict with the principle of modified universalism. This principle provides that a domestic court may do whatever is required in order to cooperate as far as possible with multinational bankruptcies. It was described by Lord Hoffman in the House of Lords' decision in *In Re HIH* as "the golden thread running through English cross-border insolvency law since the 18th century".<sup>3</sup>

The tension between the two approaches has been particularly prevalent in the domain of foreign bankruptcy judgments, where there has been a shift away from the stricter principles of English common law in favour of modified universalism. This was given impetus by the Court of Appeal's judgment in *Rubin* to the point where it appeared that a separate rule might exist in respect of the enforcement of foreign bankruptcy proceedings in England.

---

1. *Rubin v Eurofinance SA*, [2012] UKSC 46, available at [http://www.supremecourt.gov.uk/decided-cases/docs/UKSC\\_2010\\_0184\\_Judgment.pdf](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0184_Judgment.pdf).

2. *Cambridge Gas Transp. Corp. v Official Comm. of Unsecured Creditors of Navigator Holdings PLC*, [2007] 1 A.C. 508.

3. *In re HIH Cas. & Gen. Ins. Ltd.*, [2008] UKHL 21.

## **Rubin**

*Rubin* concerned a judgment of a US federal bankruptcy court in default of appearance. In its decision, the Court of Appeal held that a foreign bankruptcy judgment could be enforced in England at common law despite the fact that English common law principles were not met. This was because it was believed that special rules applied to foreign judgments in avoidance proceedings in the interests of the universality of bankruptcy proceedings. This decision was supported by reasoning given in *Cambridge Gas* and *In Re HIH*.

The Court of Appeal, accepting that the judgment had been in personam, found that the defendant was neither present in the foreign country nor had submitted to its jurisdiction. It held that, although these were the relevant English common law principles for enforceability at common law, they did not apply to judgments or orders in foreign avoidance proceedings.

The defendant in *Rubin* appealed to the UK Supreme Court, and the appeal was allowed because the defendant had not submitted to the courts in question. On appeal, the Court was tasked with determining when foreign judgments in bankruptcy proceedings to adjust or set aside transactions will be recognised and enforced in England. The question was whether a more liberal rule could be endorsed or introduced by the Supreme Court in respect of, for example, preferences or transactions at an undervalue (avoidance proceedings) in the interests of the universality of bankruptcy procedures.

## **Supreme Court Decision on Separate Rule**

The UK Supreme Court held that, since the judgment was in personam, the English common law principles would apply unless the Court found that there should be a more liberal rule for in personam judgments in bankruptcy proceedings in the interests of the universality of bankruptcy procedures. The Court decided that there should not be a separate rule.

First, the Court found that, although it was possible to differentiate between avoidance claims and normal claims in contract or tort, it was difficult to see a difference of principle between the two. Second, if there were to be a different rule governing the enforcement of foreign judgments in avoidance proceedings, the Court would have to determine or develop two jurisdictional rules. If a foreign bankruptcy judgment were to be outside the scope of the English common law principles, two aspects of jurisdiction would have to be satisfied: (1) the requisite nexus between the bankruptcy and the foreign court and (2) the requisite nexus between the judgment debtor and the foreign court.

In the majority judgment, Lord Collins stated that to follow the Court of Appeal “would not be an incremental development of existing principles, but a radical departure from substantially settled law”. Further, such a change would have “all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation.”

One consequence of this reversing of the trend towards the principle of modified universalism was that *Cambridge Gas* was deemed to have been wrongly decided. This Supreme Court decision reverses a significant liberalisation of cross-border bankruptcy law.

## **Implications and Commentary**

The judgment in *Rubin* makes it clear that if an English defendant takes no part in proceedings in foreign courts—be they bankruptcy or otherwise—any judgment in default of appearance will not be enforceable in England. The result is that a party trying to enforce judgment must enter into costly enforcement proceedings. Defendants, however, will not be required to defend all overseas proceedings in order to protect their position. Overall, there is now greater certainty on these issues, but the position for a foreign party trying to enforce judgment where the defendant has not entered an appearance remains potentially costly and difficult.

## **Contacts**

Morgan Lewis can assist in serving US proceedings in England, shortening the time for service considerably. We can take steps to enforce and register judgments against assets in the jurisdiction and have experience tracing

# Morgan Lewis

defendants' assets. If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis lawyers:

## London

Nicholas Greenwood	+44 (0)20 3201 5570	<a href="mailto:ngreenwood@morganlewis.com">ngreenwood@morganlewis.com</a>
Peter Sharp	+44 (0)20 3201 5580	<a href="mailto:psharp@morganlewis.com">psharp@morganlewis.com</a>
David Waldron	+44 (0)20 3201 5590	<a href="mailto:dwaldron@morganlewis.com">dwaldron@morganlewis.com</a>

## About Morgan, Lewis & Bockius

With 24 offices across Europe, the United States, and Asia, Morgan Lewis provides comprehensive litigation, corporate, transactional, regulatory, intellectual property, and labour and employment legal services to clients of all sizes—from globally established industry leaders to just-conceived start-ups. Our international team of lawyers, patent agents, benefits advisers, regulatory scientists, and other specialists—more than 1,600 legal professionals total—serves clients from locations in Almaty, Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Moscow, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at [www.morganlewis.com](http://www.morganlewis.com).

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some jurisdictions. Please note that the prior results discussed in the material do not guarantee similar outcomes. Links provided from outside sources are subject to expiration or change. © 2013 Morgan, Lewis & Bockius. All Rights Reserved.