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ARTICLE

# *Eurofinance*: Carving its own Character. Further Steps along the Road to Developing Cross-border Insolvency Law Principles

**Dominic McCahill**, Partner and **Sally Willcock**, Senior Associate, Weil, Gotshal & Manges, London, UK

## Introduction and Overview

The long-awaited decision of the Court of Appeal in *Rubin and Ors v (1) Eurofinance SA (2) Adrian Roman (3) Justin Roman and (4) Nicholas Roman* 2010 EWCA Civ 895, handed down just before the summer recess, represents a further step forward in the development of cross-border insolvency law, an area of jurisprudence which has only recently been acknowledged by the judiciary to be in an 'arrested state of development.'[1]

The issues which the Appeal Court was asked to consider by the time of the conclusion of the appeal hearing had considerably narrowed from those before the High Court.[2] The respondents did not challenge the High Court decision recognising the receivers, Messrs Rubin and Lan, as the foreign representatives of chapter 11 proceedings (comprising foreign main proceedings) filed by a trust entity, The Consumers Trust ('TCT'). The issue as to whether TCT was an 'insolvent corporate entity', given that under English law as a trust it did not enjoy the status of a separate legal entity, had therefore fallen away. The questions which remained in issue were as to whether separately issued adversary proceedings, brought in the US Bankruptcy Court pursuant to the terms of an approved chapter 11 plan, should be recognised as part and parcel of the foreign insolvency proceedings. If they were so recognised, the parties also disagreed whether a money judgment obtained in the adversary proceedings could (and should) be enforced as a judgment of the English Court. The respondents to the adversary proceedings had not submitted to the jurisdiction of the US Bankruptcy Court in relation to the adversary proceedings.

At the appeal stage the applicants sought orders to enforce only those parts of the judgment in the adversary proceedings which represented the elements of their claims brought pursuant to transaction avoidance provisions under the US Bankruptcy Code (ss 547 and 548). The US bankruptcy provisions were accepted by the parties to bear striking similarity to the transaction avoidance provisions available under the Insolvency Act 1986.

In a single judgment the Appeal Court found on both issues in favour of the applicant receivers after concluding that the adversary proceedings were part and parcel of the US bankruptcy proceedings and, applying nascent common law principles, held that the ordinary common law rules for enforcing foreign judgments *in personam* do not apply to bankruptcy proceedings. As was acknowledged by the parties, had the judgments in the adversary proceedings been characterised as ordinary *in personam* claims, they would not have been capable of enforcement because the respondents had not submitted to the jurisdiction of the US Court. The Appeal Court then went on to hold that the judgment obtained in the adversary proceedings should in the circumstances, again applying common law principles, be enforced against the respondents as a judgment of the English Court, having noted that the US transaction avoidance provisions were 'integral to and are central to the collective nature of bankruptcy and are not merely incidental procedural matters.'[3]

The Court of Appeal left open the question (as unnecessary to be determined for the purposes of the case) of the extent to which the English Court can give assistance to foreign representatives recognised under the Cross-border Insolvency Regulations 2006 ('CBIR') pursuant to powers contained in those regulations.

Inevitably, the *Eurofinance* decision has added vigour to the debate concerning the extent to which the English Court can give assistance to foreign insolvency office holders, whether under the common law or the CBIR.

*Notes*

1 Professor Fletcher, *Insolvency in Private International Law* (1st edn, 1999), p. 93, cited with approval by Lord Hoffman in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006]UKPC 26 [2007] 1 AC 508.

2 *Rubin and Lan v Eurofinance SA and others* [2009] EWHC 2129 (Ch), reviewed in (2010) 1 *International Corporate Rescue* 60.

3 Para. 61(2).

## Background

Eurofinance S.A. is a British Virgin Islands registered company which set up the trust TCT. The purpose of TCT was to run what appears to have been a fraudulent sales promotion scheme in the United States and Canada. Participating retailers would provide their customers with a cashable voucher from TCT capable of being exchanged for up to 100% of the sale price of the goods. Redeeming the voucher required the customer to jump through a series of hoops designed to ensure that very few customers would ultimately receive anything from TCT. The retailers paid TCT 15% of the face value of the cashable vouchers. However, most of the funds received by TCT were not retained to redeem the cashable vouchers but instead were distributed to various parties involved in setting up and running the scheme. In addition to Eurofinance, these included certain individuals in England. The effect was that from the outset TCT was underfunded and consumers were actively misled about their prospects of recouping the purchase price of their goods.

Following the settlement of litigation brought by the Attorney-General for the state of Mississippi, it became apparent that proceedings in other US states would likely follow and that the 'business model' was spent. Insolvency practitioners were appointed by the English court as receivers over TCT who in December 2005 initiated TCT's voluntary filing under chapter 11 of the US Bankruptcy in New York. TCT had debts amounting to USD 160 million. It was common ground that TCT's COMI was in New York. Although no analysis touching upon this issue appears in the judgment, it is worth noting that the proper law of the trust was English law and the trust was expressly subject to the jurisdiction of and the laws of England.

On 24 October 2007, Judge Gerber of the US Bankruptcy Court approved a plan of liquidation. The plan authorised the receivers to bring claims through further adversary proceedings in the US Bankruptcy Court against all potential defendants, including the respondents to the English appeal. The US Bankruptcy Court also authorised the receivers to act as TCT's foreign representatives for the purpose of seeking recognition of the chapter 11 proceedings in London, including the then contemplated adversary proceedings.[4] The US authorisation expressly contemplated the receivers applying to the English Court for assistance in the prospective litigation and in enforcing any US judgment which was subsequently obtained against any party residing or having property in Great Britain.

Claims were duly issued in adversary proceedings in the US Bankruptcy Court against various persons including the respondents to the appeal. The respondents were served personally, but upon advice, they chose not to submit to the jurisdiction of the New York Court. Default judgment was entered against them on 22 July 2008 for sums totalling circa USD 160 million.

At the hearing before the Court of Appeal, the receivers sought to enforce only those parts of the judgment in the adversary proceedings which related to fraudulent conveyance and fraudulent transfer claims.

## The decision of the High Court

Mr Nicholas Strauss QC (sitting as a deputy judge) had held at first instance that the adversary proceedings should be recognised as part and parcel of the foreign main proceedings and he granted recognition of those proceedings accordingly. However, he went on to refuse the receivers' request to enforce the judgment obtained in the adversary proceedings, holding that the judgment which they sought to enforce was a judgment *in personam* and that, applying clear common law principles, the English Court had no jurisdiction to permit enforcement of such a judgment on the facts as the respondents had not submitted to the US jurisdiction. He characterised the judgment in the adversary proceedings as a judgment *in personam*, having found that the adversary proceedings established TCT's rights against third parties rather than merely served as a mechanism for collective distribution. This meant that those proceedings could not be dealt with as a bankruptcy proceeding exception to the usual private international law rule. He rejected the receivers' arguments that his decision was inconsistent with the common law principles established by *Cambridge Gas*. He went on to conclude that the CBIR did not replace the rules of private international law and could not be invoked to by-pass its requirements.

## The decision on appeal

As had the judge at first instance, the Appeal Court approached its decision by considering arguments on two separate but related issues. First, should the adversary proceedings be recognised as part of the insolvency proceedings, and secondly, if they were so recognised, should the judgment in the adversary proceedings be enforced? On the first issue the Appeal Court agreed with the High Court judge that the adversary proceedings formed part and parcel of the main insolvency proceedings so that applying Article 17, Schedule 1 of the CBIR they should be recognised. Although having

*Notes*

4 Such authorisation from the US court before any overseas application for recognition is made is a requirement under Sec 1505, chapter 15 US Bankruptcy Code.


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a separate case number, the adversary proceedings should not be considered 'a separate proceeding not being one which forms part of a collective judicial proceeding concerned with collecting and distributing the debtor's assets, but one which serves a wholly different purpose, namely to establish the debtor's rights against third parties.' The Appeal Court also held that the Court would also or alternatively be required to recognise the receivers and including the adversary proceedings under the common law. What was critical in both of the alternative routes to recognition was the court's finding that what was sought to be recognised could on the facts be properly characterised as bankruptcy proceedings.

The Court's characterisation of the judgment in respect of the US transaction avoidance claims as being claims which were 'integral and central to the collective nature of bankruptcy and not merely an incidental procedural matter' was also of fundamental importance as it considered the second question of its power to enforce the judgment in England. On this point it should be noted that rule 36 in the 14th edn of Dicey, Morris and Collins' *The Conflict of Laws,* in the chapter on foreign judgments, the jurisdiction of foreign courts at common law and jurisdiction *in personam* provides as follows:

> 'Rule 36 – Subject to rules 37-39 [which have no application to this case], a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment *in personam* capable of enforcement or recognition in the following cases:
>
> First case – If the judgment debtor was, at the time the proceedings were initially instituted, present in the foreign country.
>
> Second Case – If the judgment debtor was claimant, or counterclaimed, in the proceedings in the foreign court.
>
> Third Case – If the judgment debtor being a defendant in the foreign case submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.
>
> Fourth Case – If the judgment debtor being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.'

At paragraph 47 of the judgment Lord Ward said as follows:

> 'The case now turns on what is meant by and what falls within "bankruptcy proceedings": if a judgment *in personam* is made in and as part of bankruptcy proceedings as those proceedings are to be properly characterised, then does Rule 36 still apply or does the special character of bankruptcy proceedings prevail?'

Looking at the nature of the claims which the receivers sought to enforce, the Appeal Court held that they were generally equivalent to claims for the adjustment of prior transactions under Sections 238 and 239 Insolvency Act 1986. Importantly, the Court noted

> 'These are not ordinary claims which may be brought by any (interested) party. They are special bankruptcy claims maintainable only at the suit of the office-holder.'[5]

On this issue, the Appeal Court disagreed with the High Court and found in favour of the receivers holding as follows:

> 'Albeit that they have the indicia of judgments *in personam*, the judgments of the New York court made in the Adversary Proceedings, are nonetheless judgments in and for the purposes of the collective enforcement regime of the bankruptcy proceedings and as such are governed by the sui generis private international law rules relating to bankruptcy and are not subject to the ordinary private international rules preventing enforcement of judgments because the defendants were not subject to the jurisdiction of the foreign court.'[6]

The Appeal Court concluded that it should provide assistance by enforcing the orders made against the respondents by the New York Court. The Appeal Court, reached its decision on this issue on the basis of the common law only and declined to express a concluded view on the alternative jurisdictional basis potentially available to the Court through the CBIR.

## Comment and analysis

The judgment in *Eurofinance* represents an application and endorsement of the developing principles applicable in private international law in bankruptcy proceedings championed by Lord Hoffman in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26 [2007] 1 AC 508 and developed by him in

**Notes**

5 Para. 49.
6 Para. 61(4).


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*McGrath v Riddell* [2008] UKHL 21 (aka *HIH Insurance*) where he stated:

> 'The primary rule of private international law ... is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.'

Although the judgment includes a fairly limited analysis of the *HIH* case, *Eurofinance* appears to be an endorsement of Lord Hoffman's line of jurisprudence in that case as the approach to the decision on whether to order enforcement of the judgment in *Eurofinance* is implicitly approached as a question of the court's discretion, with a factor weighing heavily on the court that the judgment related to claims which were similar to ones available under English legislation. No part of the reasoning of the Appeal Court suggests that the foreign proceedings in respect of which enforcement is sought must be the same as those available in the UK. Indeed, on that point Lord Ward expressly endorsed comments of Lord Hoffman in *HIH* relating to this point as follows:

> 'Furthermore, the process of collection of assets will include, for example, the use of powers to set aside voidable dispositions which may differ very considerably from those in the English statutory scheme.'[7]

It would be interesting to see how the English Court exercises its discretion where the court of the foreign main bankruptcy proceedings makes a finding which differs from the purely domestic English insolvency law view, particularly where the parties have elected that their contractual relations are to be determined in accordance with English law. Potentially, such issues may shortly be before the Court in the on-going litigation between Lehman Brothers Special Financing Inc and BNY Corporate Trustee Services and others.[8]

Returning to the decision in *Eurofinance,* it is also significant that the receivers had by the appeal stage abandoned their arguments to enforce the whole of the judgment – i.e. they were not trying to enforce those elements amounting to ordinary non-bankruptcy claims. The Appeal Court's decision dealt only with the claims which it characterised as bankruptcy proceedings and it found that these elements of the judgment were not subject to the ordinary rules of private international law.

Although the judgment does include some analysis of cases under the EC Insolvency Regulation, the recent decision in *Byers & ors (liquidators of Madoff Securities International Limited) v Yacht Bull Corporation and Financiere Meesschaeft SA* (aka the *Yacht Bull* case)[9] is not considered, judgment having been handed down in that case after the argument in the Appeal Court was underway. The *Yacht Bull* case raised the question, in a slightly different context, of how proceedings should be characterised when they include both ordinary claims which could be brought outside of bankruptcy and claims which are only available at the suit of an office-holder. The issue was of relevance in that case as the court had to decide whether jurisdiction was governed by the rules of the EC Insolvency Regulation, alternatively by the different rules in the Brussels Regulation on jurisdiction and enforcement of Judgments. In the *Yacht Bull* case the Vice Chancellor decided that the court in these circumstances was required to characterise the proceedings according to the principal claim. On the facts, although the claim included a cause of action under S238 Insolvency Act 1986, the court found that the principal claim concerned the ownership of the yacht and went on to conclude that the issue of jurisdiction should be governed by the Brussels Regulation.

It will be interesting to see if the approach of identifying the principal claim is approved and endorsed by the higher courts in future as part of their approach to the characterisation of claims. In the meantime, the receivers' decision to seek to enforce only that part of the US judgment as could be characterised as a bankruptcy claim appears to have deftly side-stepped this issue in *Eurofinance.*

By way of postscript, it is understood that the respondents to the appeal have applied to the Supreme Court for permission to appeal. We await with interest further developments in this and other pending cases.

**Notes**

7 Para. 61(3) of *Eurofinance*, quoting from paragraph 19 of *HIH Insurance.*

8 In *Re Lehman Bros Holdings Inc, et al* 422 BR 407(Bkrtcy. SDNY 2010) and *Perpetual Trustee Company Limited(1), Belmont Park Investments Pty Limited(2) v BNY Corporate Trustee Services Limited (1) and Lehman Brothers Special Financing Inc* [2009] EWCA Civ 1160.

9 [2010] EWHC 133 Ch.


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