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English Courts are not Obliged to Enforce Foreign Judgments under UNCITRAL Model Law on Cross-Border Insolvency: *Rubin and Lan v Eurofinance SA and others* [2009] EWHC 2129 (Ch)

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Introduction

Cross-border matters within restructuring and insolvency situations are becoming increasingly important in determining the appropriate approach to dealing with financially distressed companies. In 1997 the United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on Cross-Border Insolvency (the 'Model Law') and it was implemented in Great Britain[1] by the Cross Border Insolvency Regulations 2006 (the '2006 Regulations'). The Model Law is designed to provide a uniform legislative framework to deal with the recognition of foreign insolvency proceedings and the coordination of simultaneous proceedings in different jurisdictions.

In the Eurofinance case, one of the principal issues to be considered concerned the recognition of foreign proceedings by the British courts. Under Article 15 of the 2006 Regulations, a foreign representative administering a foreign insolvency proceeding can apply to the British courts for recognition of such foreign proceeding, such recognition being given where those conditions outlined in Article 17 are met.

The applicants, who were the joint receivers and managers (the 'Applicants') of a trust fund in the US, The Consumer Trust ('TCT'), applied to the Chancery Division of the High Court under the 2006 Regulations for recognition of Chapter 11 insolvency proceedings in the United States as foreign main proceedings and recognition of the Applicants as foreign representatives of TCT. The Applicants further sought an order enforcing a decision of the US bankruptcy court holding the respondents, who were Eurofinance S.A., Adrian Roman and his sons Justin Roman and Nicholas Roman (the 'Respondents'), liable for the debts of TCT.

The High Court recognised the Chapter 11 proceedings as foreign main proceedings under the 2006 Regulations. However, on the application of common law principles, it could not consent to a request by a foreign insolvency court to enforce a US Court judgment in Great Britain where a defendant was not present within the foreign jurisdiction (or had not otherwise submitted itself to the jurisdiction of the foreign court) at the time that the US Court gave the judgment in question.

Background

TCT was a trust fund. The trustees were two solicitors, Mr. Caplan and Mr. Harrison, and two accountants, Mr. Davis and Mr. Bonley, all of whom practiced in Harrow, London (the 'Trustees'). The beneficiaries were predominantly consumers located in the US and Canada. TCT was controlled by Eurofinance S.A. which was owned by Adrian Roman who had assets located in the United Kingdom.

The constitution of TCT meant that it had no separate legal personality under English law, but under US law TCT was classified as a business trust and therefore, as a separate legal entity, it could be placed into Chapter 11 proceedings.

In October 2007, TCT was placed in liquidation in New York and a plan of liquidation was approved by the US Bankruptcy Court. On the same day, the court also appointed the present Applicants to serve as foreign representatives on behalf of TCT and to seek recognition of the US Bankruptcy Proceedings in Great Britain as a foreign main proceeding under Articles 15 and 17 of the 2006 Regulations. In particular, the Applicants were authorised to seek relief regarding service of process, discovery, and the enforcement of judgments of the US Court that may be obtained against persons and entities residing or owning property in Great Britain.

In December 2007, the liquidators of TCT brought proceedings in New York against a number of parties

Notes

1 Article 1 of Schedule 1 to the Cross Border Insolvency Regulations 2006, Great Britain includes England, Scotland and Wales.

including the Respondents, which were described as 'the adversary proceedings' (a formal contentious proceeding) by the US Court. They were not defended and in July 2008, default summary judgment (the 'US Judgment') was given against all the defendants, including the Respondents. The judgment was given pursuant to claims of breach of fiduciary duty and negligence on the basis that the defendants were general partners in TCT and liable for its debts.[2] The Trustees had not participated in these proceedings and had not submitted themselves to the jurisdiction of the US Bankruptcy Court. The US Court stated that the relevant provisions of the US Bankruptcy Rules permitted the US Court to apply the 'long-arm' personal jurisdiction over the trustees.[3]

Application

The application was made under the 2006 Regulations for:

- recognition under Article 17 of bankruptcy proceedings in the US Bankruptcy Court as a 'foreign main proceeding', together with recognition of the Applicants as foreign representatives (the 'Recognition Application'); and
- an order by the English Courts pursuant to their powers under Article 25 of the 2006 Regulations, enforcing the US Judgment and holding the Respondents liable for debts of TCT (the 'Enforcement Application').

The Recognition Application

Applicants' arguments

The Applicants claimed that the conditions for recognition of foreign proceedings as set out in Article 17 of the 2006 Regulations had been fulfilled because (i) the United States bankruptcy proceedings were a 'foreign proceeding' as defined within Article 2(i) of the 2006 Regulations; the Applicants were each a 'foreign representatives' by virtue of the order of US Bankruptcy Court dated 24 October 2007; (iii) the documents required by Article 15 (2) and (3) had been submitted; and (iv) pursuant to Article 4, the application had been properly submitted to the Chancery Division.

The Applicants further claimed that the satisfaction of conditions set out in Article 17 would mean that, under Article 20 of the 2006 Regulations, they were entitled to a stay of any proceedings commenced in the UK concerning the debtor's assets, rights, obligations or liabilities and assets. In response, Mr Justice Strauss expressed concern regarding the enforcement of the automatic stay under Article 20 where the debtor is not a legal entity under English law. He concluded, however, there would be no great difficulty in applying the stay to TCT as it would apply to proceedings involving, or assets held by, the trustees in their capacity as trustees.

Respondents' arguments

The Respondents' defended the action on three principal grounds:

1. Whilst TCT was an insolvent corporate entity, it was not a legal entity under English Law. Articles 15 and 17 of the 2006 Regulations require the existence of a debtor. The term 'debtor' should be given its ordinary meaning in English law; there was no 'debtor' and therefore the 2006 Regulations could not be applied. The Respondents argued that the uniform interpretation of the 2006 Regulations was unnecessary, and the words used should be given their ordinary domestic meaning.[4]
2. Arguing an artificial separation between the adversary proceedings (effectively the summary judgment application) and the judicial proceedings (effectively the liquidation proceedings), the Respondents sought to argue that the Applicants could only seek recognition under the 2006 Regulations in relation to the judicial proceedings (which they argued were the only insolvency proceedings).
3. The adversary proceedings were outside the scope and application of the 2006 Regulations (outlined in Article 1 of the 2006 Regulations) because the assets and affairs of the debtor were no longer subject to control and supervision by a foreign court. This was a result of the proceedings being terminated by the US Judgment.[5]

Judgment

Mr Justice Strauss in his response held that Article 8 of the 2006 Regulations provided that regard was to be had to the origin of the 2006 Regulations and the

Notes

2 See judgment, paragraph 15.
3 See judgment, paragraph 17.
4 *HIH Casualty & General Insurance Ltd, re (2005) EWHC 2125 (CH)*, (2006) 2All ER 671 considered.
5 See judgment, paragraph 49.

need to promote uniformity in its application. The court would be disregarding these considerations if it adopted 'a parochial interpretation of debtor'.[6] Thus, the word 'debtor' should be given the same meaning as it would be given in the foreign proceedings. The court, therefore, recognised the Chapter 11 insolvency proceedings as the foreign main proceedings.

In relation to adversary proceedings, the court held that they are part of the collective judicial proceedings because bringing adversary proceedings against debtors of the bankrupt is part of collecting the bankrupt's assets with the aim of distributing them to the creditors.

Furthermore, adversary proceedings are an integral part of the Chapter 11 proceedings and even if that were not the case, the adversary proceedings relate to insolvency and were not outside the ambit of the Model Law and thus the Regulations. The 2006 Regulations were applicable because a purposive interpretation was to be given to its provisions. The purpose of the provisions was to facilitate co-operation between different jurisdictions in relation to insolvency proceedings.

The Enforcement Application

The Applicants argued that Article 21.1(e) and Article 25.1 of the 2006 Regulations conferred jurisdiction on the English court to enforce the US Judgment. Article 21.1(e) permits the Court to grant any appropriate relief including 'entrusting the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court'. Article 25.1 permits the court to 'co-operate to the maximum extent possible' with foreign courts or foreign representatives.

The Applicants referred to *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc*[7] and argued in the case of bankruptcy proceedings, the UK courts were able to circumvent the usual common law requirements on the basis of the overarching principle of comity (which is effectively one of international co-operation). The principle of comity recognises that bankruptcy proceedings should be given universal application and as a result English courts should be able to provide assistance and co-operation in foreign bankruptcy proceedings (also known as the principle of universalism). The common law principle referred to is that the US Judgment could be enforced in England successfully only if the defendant in the action was present in the foreign country at a time when the proceedings were instituted, counterclaimed in the proceedings, voluntarily appeared or agreed to submit to the jurisdiction.

Judgment

The court held that Article 21.1(e) of the 2006 Regulations, which gives the court a discretion to empower the foreign representatives with the realisation of all or part of the debtor's assets located in Great Britain, will not assist the Applicants. Mr Justice Strauss cited two reasons for this conclusion. First, the US Judgment (which was effectively the debtor's asset) was given or 'located' in New York. This asset could only be 'located' in Great Britain if the English Court made an order to enforce it. Secondly, even if the enforcement order was granted, Article 21.1(e) would not permit any realisations by the foreign representatives which conflicted with the common law.

Mr Justice Strauss rejected the Article 25 contention submitted by the Respondents that the UK court is permitted to assist to the maximum extent possible with foreign courts or foreign representatives. He stated that the forms of co-operation in Article 27 (which states that Article 25 may be implemented by any appropriate means and provides a list of examples) provide for co-ordination of proceedings and not for the proceedings in one country to be treated as proceedings in another country. The court held that permitting the US Judgment to be enforced in England does not fall within the meaning of co-operation and communication in Articles 25 or 27. If the intention of Articles 25 and 27 was to allow the enforcement of foreign judgment in Great Britain, then the wording of the article would have stated that purpose clearly.

Addressing the principle of comity put forward by the Applicants, Mr Justice Strauss confirmed that 'there is no case in which it has been applied to justify enforcement of a foreign judgment otherwise than in accordance with the domestic rules of private international law.'[8] The principle of universalism was intended to ensure fairness in the distribution of assets between creditors and shareholders of an insolvent estate where there were assets in more than one jurisdiction, rather than, effectively, creating an asset in a jurisdiction through the agreement of the English court to enforce a foreign judgment.

Notes

6 See judgment, paragraph 40.

7 *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1A.C. 508 (Privy Council held that the New York order and plan involved neither a judgment in rem nor a judgment in personam, but was to be regarded as collective proceeding to enforce rights, not to establish them).

8 See judgment, paragraph 52.

Conclusion

The decision provides guidance on the approach the courts will take when implementing the 2006 Regulations. In particular, the present case throws light on the position of the English courts on two important issues raised by cross-border insolvency proceedings. First, whether the 2006 Regulations apply to a foreign bankruptcy proceeding where the debtor under English law has no legal personality either as an individual or as a body corporate. Second, whether a monetary judgment given in a foreign bankruptcy proceedings can be enforced under the 2006 Regulations.

With regard to the first issue, the English courts emphasised the importance of interpreting Article 8 in the context of its international origins and the need to promote uniformity. Thus, even though TCT did not have a legal personality under English law, it did not hinder the recognition of foreign bankruptcy proceedings under the 2006 Regulations. The reason cited by Mr Justice Strauss for arriving at this decision was that the word 'debtor' under the relevant provisions of the 2006 Regulations must be interpreted in the same manner as it would have been by the foreign court. The word 'debtor' must not be given a restrictive meaning often ascribed to it under English domestic law.

The part of the decision which did not permit the enforcement of the U.S. Judgment was based on the principle of English private international law. The 2006 Regulations had not been enacted to replace or override the rules of private international law of any enacting state. Therefore the 2006 Regulations did not permit the English courts to side-step English law, which states that the judgment of a foreign court is not enforceable unless the defendant was present within the jurisdiction, or in some way submitted himself to the jurisdiction, of the foreign court.[9] Furthermore, it would be unfair to the Respondents who were entitled to rely on such a principle.

Notes

9 This principle applies both at common law and under the Administration of Justice Act 1920 and foreign Judgments (Reciprocal Enforcement) Act 1933: see Dicey paras 14-49 and 14-50.

International Corporate Rescue

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