Rubin and New Cap: Foreign Judgments and Insolvency

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Citation
http://ink.library.smu.edu.sg/sol_research/1156
The decisions of the UK Supreme Court in 2012 in *Rubin* and *New Cap*, and of the Singapore High Court in 2013 in *Beluga Chartering*, raise in acute form the question of how far the common law of international insolvency and of the recognition of foreign judgments can go when a local court is asked by a court in another country to render particular forms of assistance in relation to an insolvency administration which is taking place there. It asks how the instinct to give assistance for the ultimate benefit of creditors needs to be balanced by the caution which a local court naturally shows when asked to take a foreign court's word that the facts and matters are as it has determined them to be. It also prompts the question whether the common law of England, now overlaid with substantial legislative provision for assisting foreign insolvencies, might have departed from the common law of countries, like Singapore, where the intervention of the legislature has been rather less. The lecture, given at SMU on 10th April 2013, looks at, and hopes to prompt others to look at, some of the issues which arise.

1. **What happened in *Rubin* and in *New Cap***?

The topic for this inaugural Jones Day lecture was prompted by judgment in two appeals to the United Kingdom Supreme Court, handed down in the second half of 2012. But there are in fact four, rather than just two, pieces making up today’s jigsaw. Let me start by just telling you what they are. The first two come, as I have just indicated, from a judgment of the Supreme Court of the United Kingdom in two consolidated appeals 2012. The third is a Privy Council appeal from the courts of the Isle of Man (a small and rather dismal tax haven off the
northwest coast of the United Kingdom); and the fourth piece, rather fortuitously, was made only last month, here in Singapore.

Piece number one was *Rubin v Eurofinance SA* [2012] UKSC 46, [2012] 3 WLR 1019. In *Rubin*, the English courts were presented with a judgment from foreign courts exercising insolvency jurisdiction and asking for the assistance of the English court in making it effective. A commercial entity was in Chapter 11 administration in the United States. Its business had been principally carried on in the United States, and this business was the duping and fleecing of innocent consumers. Large amounts of money were siphoned out of the trading entity and into the pockets of its founders, who were in London. The US bankruptcy court was asked to order these founders to repay the sums by which they had unlawfully preferred to pay to themselves, but these people were in London and they ignored the proceedings. The US court gave judgment against them, in default of their appearance; and followed this up with a letter of request to the United Kingdom (English) authorities, asking for cross-border cooperation in the form of enforcing the US judgment against the defendants. The High Court refused to; the Court of Appeal, in a truly splendid judgment, held that the reasons to enforce the judgment outweighed the arguments which opposed this. Some people became very excited, especially at the insolvency bar; and the case went to the Supreme Court..

Piece number two was *New Cap Reinsurance Corp (in liq) v Grant*, heard together with *Rubin* and disposed of by the same judgment. A Lloyd’s syndicate had received payments from an Australian insurer just before the insurer went into insolvent administration. In proceedings before the courts of NSW the liquidator applied for orders for the return of the payments on the ground that the insurer had been insolvent when they had been made. Though it had taken part in some creditors’ meetings in NSW, in respect of a number of unsettled claims which it had against the insolvent insurer, the syndicate now ignored the proceedings. The NSW court duly found the payments to be unlawful and ordered their repayment, following this up with a request for the assistance of the English courts in enforcing the judgment. The Court of Appeal held that the judgment in *Rubin* tied
its hands and meant that the assistance should be granted as sought. The case went up.

The third piece in the jigsaw was the 2006 judgment of the Privy Council on appeal from the High Court of the Isle of Man – a common law jurisdiction to which recent English statute law on insolvency does not extend – in Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc, which served as the inspiration for Rubin in the Court of Appeal. The facts can be boiled down to this. A Manx company, N, went into Chapter 11 administration in the US. Most of its shares were held by C. The US court decided that C’s shareholding in N should be taken away and the share capital reissued to the committee of unsecured creditors. The US court could not bring this about itself, so it issued a letter of request to the Manx court. Though C had not been party to the US proceedings, and though the shares in N were situated in the Isle of Man, and even though the traditional rules on the effect of foreign judgments would have meant that C was not bound by the US judgment, the Privy Council held that the common law allowed and required the Manx courts to accede to the US request. Lord Hoffmann viewed the carefully-constructed corporate structures, taking in all the usual sleazy jurisdictions, with open distaste. He was barely any more polite about those who invoked the traditional rules of private international law of foreign judgments to draw the conclusion that the US judgment could have no effect in the Isle of Man. In insolvency, he said, the point of the process is to arrive at a collective settlement of claims and liabilities. As the Manx court could have made such an order itself, there was no reason not to order the relief requested by the US court. This is probably where the slogan that ‘insolvency is different’ has its birth. And we should probably note that in 2008, in re HIH Casualty & General Insurance Ltd, Lord Hoffmann built on the foundation he had laid in Cambridge Gas, in using it as part of the reason why the English court should cooperate with the principal insolvency jurisdiction, again, of the NSW courts, by ordering the remission of assets from London to Sydney.
Piece number four was the timely, lengthy, bold, and almost entirely compelling, judgment, of the Singapore High Court in *Beluga Chartering GmbH (in liq) v Beluga Projects (Singapore) Pte Ltd (in liq)*. The judge held that s 377(3)(c) of the Companies Act not only permitted but obliged the Singapore liquidators to remit assets out of Singapore and into the hands of the German liquidators conducting the principal liquidation. He also held that the court had the power to dis-apply the Singapore liquidators’ statutory obligation first to pay off debts incurred or arising in Singapore, as s 377(3)(c) certainly says that they must. The basis for all this was a common law principle applicable in the case of a local but ancillary insolvency, which bound a Singapore court to cooperate with the courts of the principal insolvency so far as consistent with Singapore public policy. It was, perhaps, a pity that having laboured so hard to get so far, the judge then exercised his discretion by requiring the Singapore liquidators in the instant case to comply with s 377(3)(c), rather than dispensing them from such need: if one may be so bold as to say, without disrespect, it called to mind the Grand Old Duke of York, who had ten thousand men, and who marched them up to the top of the hill and then marched them down again. But as the judge said that this outcome derived from features of the case which were exceptional, we should not be distracted the actual result in the case, not least because it may be that he did, in fact, march his men down the other side of the hill from the one he had climbed. The judge derived support for his reasoning from the decision of the House of Lords, and from the speech of Lord Hoffmann, in *Re HIH Casualty & General Insurance Ltd*, as well he might. He did not appear to be perturbed by the fact, as we shall see, that the strength and viability of that foundation has, in the United Kingdom at least, been shaken and weakened by *Rubin*.

2. **What did the Supreme Court decide and why did it decide it?**

*Beluga Chartering* shows that the question of cross-border assistance in insolvency is a large and vibrant topic, all over the common law world. In this lecture, though, we can only hope to deal with a single issue within it, and for that we must return to *Rubin*. The majority of the United Kingdom Supreme Court, speaking through Lord Collins, said the only way to give any effect to a foreign
judgment from a court exercising insolvency jurisdiction was to recognise it as a foreign judgment in personam or in rem under the ordinary rules summarised in Dicey, Morris & Collins, The Conflict of Laws, Rule 43. There was no special or separate rule for giving different effect to a judgment from a court exercising insolvency jurisdiction at the place of incorporation, or at the COMI, and the addition of a letter of request added nothing. In England, at least, there is no special law rule for foreign judgments in insolvency proceedings, for though Parliament has legislated a lot, it has not provided for this case. It made no difference that the foreign judgment arrived in England clothed in a judicial request for assistance issued by a foreign insolvency court which had what we would regard as properly having insolvency jurisdiction. The result was that the Supreme Court, by 4-1, reversed the Court of Appeal in Rubin. It dismissed the appeal in New Cap, but only by relying on grounds which had not been relied on below, and to which we will turn later. Though it could not overrule Cambridge Gas, a Manx case and not an English one, it was said by 3-1, or possibly 3-2, to be wrong.

The judgment in Rubin was highly controversial, in England at least. It appears to have brought out the true nature and depth of a cultural divide which marks and separates two disciplines. Insolvency practitioners, especially those engaged in large cross-border insolvencies, regard cross-border cooperation as fundamental to the way they do their business, not least because every time cooperation is unavailable and something more contentious is triggered, the only losers are the general creditors. The judgment in Beluga Chartering is a fine example of what an insolvency lawyer’s judgment would look like. By contrast, the natural instinct of private international lawyers, when presented with a foreign default judgment, is to apply strict conditions to its recognition, with the result that a defendant who was not present within the court’s territorial jurisdiction, and who did not submit to that jurisdiction, will not be bound by it, and will not be affected by it in any other way: if he is not bound, he is entirely free. It followed in Rubin’s case that the judgment ordering repayment of sums unlawfully paid out had no effect on the persons against whom it was made as a matter of English law. They were not in the US when the proceedings were begun; they had ignored the summons, and had
not otherwise submitted to the jurisdiction. They could therefore ignore the judgment, and that was that.

I

3. Why was the judgment in Rubin so conservative?

The Court of Appeal, which did not mince its words, was of opinion that the persons from whom repayment was sought were fraudsters who had only themselves to blame if the judgment was enforced. Maybe they were. But one should reflect, perhaps, that not all those from whom a foreign liquidator demands, or a foreign judge decrees, payment will be undeserving of sympathy. The first answer may therefore be that the Supreme Court knew that it did not know, or that a court in another case might not know, what the merits actually were, and that a position of studied neutrality is not an indefensible one.

A second, rather less charitable, answer might be that the court seems to have lost its creative nerve in matters of private international law. In the 1970s the House of Lords invented the doctrine of forum non conveniens, abolished the rule that a court could give judgment only in sterling and in such a way as took no sensible account of the sliding value of the pound, determined that heads of damage were substantive and not part of the law of procedure, and had a jolly good go at sorting out choice of law for torts committed overseas. It is hard to believe that the majority which decided Rubin would have had the nerve to do any of this. Bringing the common law up to date, keeping it fresh, seems to be out of fashion.

A third answer is more technical. It seems to have been implicit in the judgment in Rubin, at least, that because the judgment in question was in personam, against the defendants, the only change which could properly be made would have been to add a further case to Dicey’s Rule 43, setting out the cases in which a foreign judgment would be recognised, and that everything else – the conclusiveness of the judgment, the limited defences to recognition – would or would have to remain the same.
A fourth possible answer was that there was no practical need to recognise the US judgment. It appears that there were people in England who, as it was alleged, had bled the company white. There was a view that they should be ordered to put back what they drained from it. Lord Collins suggested that original proceedings could be brought in England on behalf of the beneficiaries of the insolvent trust, against the recipients of the money, relying on the ordinary law rather than the law of insolvency. This is really disappointing. If we accept that there is no injustice in not recognising a foreign judgment because original proceedings may be brought in England, there would be no point in having a law of foreign judgments at all. It is not the most compelling part of the judgment; the bringing of fresh proceedings should surely be a solution of last resort, not the first option. It might have to be the answer, but it will waste money which ought in all reason be collected and paid to the general creditors, not frittered away on lawyers and accountants. We need to do better than this.

A fifth answer might be that this is now a matter for Parliament, which is fair enough as far as it goes. If this is to be a proper answer, it may be that it makes sense in England, where there has been considerable legislation on the issue of cross-border insolvency but which has not addressed this particular question. A loose application of the expressio unius rule might be used to support the reasoning of the court. But in common law jurisdictions where legislative intervention has been close to zero, this reasoning is not applicable. This may be one reason why, later in this lecture, we should ask whether the decision of the Privy Council in the Cambridge Gas case, disapproved for use in England, may still be usable in common law jurisdictions which have not had the legislative intervention which the English common law has seen.

But a sixth answer might be that the judgment was not completely conservative: even if the decision in Rubin may be fairly so described, then that in New Cap is rather less so. We will come to that.
4. **What is wrong with trying harder to assist creditors and those who act for them?**

To begin with, one may compare the decision in *Rubin*, and the consequence of declining to give effect to the foreign judgment, with what Lord Templeman said in *Williams & Humbert Ltd v W&H Trade Marks (Jersey) Ltd*. He had been invited to ignore a Spanish judicial decree confiscating the shares in a Spanish company, and was shocked by the suggestion: ‘a submission which produces such anarchic results and which releases all wrongdoers from liability must be fallacious’. Good for him. If one were to be satisfied that the individuals who had done as Ward LJ plainly thought they had then got away with it, then the decision in *Rubin* is fairly described as anarchic.

Another useful contrast might be made with the approach and judgment of Spigelman CJ in *Robb Evans v European Bank Ltd*, whose willingness to enforce foreign (American) judgments which authorised a public official to go and recover from wrongdoers and their accomplices sums of money which had been taken from (and should be recovered for) ordinary creditors, was plain. The only beneficiaries of the foreign judgment in *Robb Evans* were the creditors of the insolvent trust; and the disposition of the court was to do whatever it could to help.

On the other hand, in *Robb Evans*, the defendant had submitted to the jurisdiction of the American court, and was a convicted fraudster. It made sense for the Australian court to frame the issue as whether the creditors should be allowed to benefit from enforcement of the American judgment. But in *Rubin*, whatever we may think, we do not know, with the same degree of confidence, that the defendants were fraudsters. And there is no such thing as free money: in *Rubin*, as in preference cases generally, every penny by which the creditors benefit is a penny taken away from the defendants. If one asks whether we should be disposed to assist the general creditors, of course we should: why wouldn’t we? But if one asks whether we should fund this by simply stripping assets from defendants who have not yet been well and truly tried, it is less obvious that we should be so keen.
Defendants have rights, and private international law seeks to ensure that these are not trampled in the rush to do good to someone else. There is no free money, only money which a court orders to be paid from one to another.

5. **Can the general rules of recognition of foreign judgments be changed?**

Surely they can. At least some final courts of appeal in foreign countries seem to have thought so: the Supreme Court of Canada has done this very thing: *Morguard Investments Ltd v De Savoye*, though in the interests of balance we should note that the Irish Supreme Court has declined to follow them: *Re Flightlease (Ireland) (in vol liq)*. It is still possible today to say that *cessante ratione legis, cessat ipsa lex*, and in an earlier age, as said, the House of Lords seemed to think that its job was to reform or remove well-established rules of the common law which had passed their sell-by date. The Singapore Court of Appeal, no doubt, is free to think similar thoughts: indeed, in *Hong Pian Tee v Les Placements German Gauthier Inc*, dealing with foreign judgments allegedly procured by fraud, it did not hesitate to reject a century of English common law, preferring what it described, at [30], as ‘the Canadian-Australian cases’. There is nothing to prevent the Supreme Court, or the Singapore Court of Appeal, upgrading the common law. Of course it would risk taking some people by surprise, but there can be no vested right to the immobility of the common law.

If they can be changed, should they be changed? It is hard to deny that there is a credible case for thinking very seriously about it. The Supreme Court of Canada has done this very thing: in *Beals v Saldanha*, it established that Canadian common law will recognise generally a foreign judgment from a court which had a real and substantial connection with the claim; provincial courts have evidently taken the lead and applied it, tentatively at least, to orders of foreign courts exercising insolvency jurisdiction: *Re Cavell Insurance Co*. It is also hard to deny that this is a development which, in some cases, might be difficult to predict and therefore difficult to live with. What amounts to a ‘real and substantial connection’? It makes life very hard, for legal advisers among others. This was, as far as I can tell, the reason the Irish Supreme Court in *Re Flightlease* was not
prepared to adopt Beals. But what the Irish court did not so clearly do was to address why this also justified the rejection of a separate, and self-contained, rule for judgments in insolvency.

For in the context of an insolvency, conducted before the courts for the centre of main interests of the insolvent entity, the question whether the forum is one from which to recognise judgments has already been answered. The court at the debtor’s centre of main interests, or COMI, is, in the present day, the most appropriate court to conduct the insolvency. One would have thought that it was, equally, the most appropriate forum to deal with claims that a recipient of contestable payments ought to pay them back. So even if such as rule would be an uncertain one for adding onto the general law on foreign judgments, for it may well be unpredictable, in the specific context of insolvency it really is not uncertain at all.

6. What of judgments from countries and courts which are less sound?

One suspects that, for the Supreme Court in Rubin, the woolly mammoth in the room was Russia. There is a risk that if the court had been willing to give effect to the US repayment judgment, it would have been difficult to explain why something similar would not be done for a judgment from a Russian court liquidating a Russian company whose patron-oligarch had managed to get on the wrong side of state power. If that is the fear, one solution is simply to refuse to give effect to any of these judgments. Even so, judgments for the benefit of private creditors are judgments for the benefit of private creditors; most of them have no choice in where the liquidation takes place. Of course, if the foreign proceedings are found to be unjust or oppressive, the judgment can be refused recognition on that ground: AK Investment CJSC v Kyrgyz Mobil Tel Ltd, for example. There may be solutions to problems like the Russian one which may mean that there is no need to throw the baby out with the bathwater and to refuse to recognise any court’s judgments outside the current limits of Dicey’s Rule 43: after all, the problem of judgments from bad courts is not a facet of insolvency, but one which, as AK Investment itself shows, is pervasive in the entire law of
foreign judgments. It may not be necessary for the common law to treat the whole world as though its courts, or its bankruptcy courts, are as biddable, or its law and legal administration as rotten, as is sometimes thought to be the case in Russia.

And I suspect that the question which I ask about having to deal with judgments from Russia, from the vantage point of enforcement in London, might just be capable of being asked, but with different identification of overseas courts, from the perspective of Singapore. That, however, is not a matter for me.

7. **If we were to widen the rules for recognition, should we make other changes to the law on foreign judgments to reflect it?**

If we are going to recognise judgments in new circumstances, or on bases which depart from the previous understanding of the law, it is rational to ask whether we would need a new defence to set against this new basis for recognition. For there is no logical reason to suppose that the defences to recognition of judgments falling within Dicey’s Rule 43 would have to be the same, and only the same, as those applicable to judgments to be recognised on grounds lying outside Dicey’s current Rule 43. This is the argument: the judgments we recognise on the basis that the defendant was present within or submitted to the jurisdiction of the foreign court are recognised on the basis that the defendant assumed an obligation to abide by them; and this justifies the conclusion that we do not investigate or reinvestigate the merits of the judgment, which cannot be impeached for error of fact or law: Dicey Rule 48.

But it does not follow that if we were to accept that there were other foreign judgments which we were prepared to recognise, or other circumstances in which we might recognise them, that we must accord to them the same degree of conclusiveness, and must subject them to the same general, and restricted, defences to recognition. For where the reason for recognition is different, the precise rules which define and qualify that recognition may be different as well. For example, it would not be impossible to devise some form of rule of approximate parity, so that we recognise insolvency judgments which are based
on substantive grounds which are analogous to those found in English insolvency law. But until someone is able to persuade a court that the conservative approach of the majority should be re-thought, all this is just thinking aloud.

Even so, it is also right to ask what is it about preference claims which is so different, or which explains why they should be accorded different treatment? If judgment on an ordinary claim for restitutionary receives no special treatment, why should judgment on a preference claim? Can we really justify it on the basis that ‘insolvency is different’? Some will think not, and for them Lord Collins is either the spokesman or the ringleader. I cannot quite make up my mind which it is.

8. **Or is there just no national economic interest in recognising judgments of the kind in *Rubin*, so that it would be irrational to do so?**

It would be possible to say so; and in *Rubin* Lord Collins very clearly said it. But it is really shocking to see the private law of creditor and debtor prevented from developing because of its perceived and wholly unproven impact on the economy of the United Kingdom. Opinions may legitimately differ, but a judgment which says, more or less precisely, that those who have received preferential or improper payments will be safe if they keep them in London gives off a bit of a pong. No doubt the common law allows economic reality to assert itself, but even if it is true that *pecunia non olet*, that money does not smell, the protection of fraud is still not a fragrant thing. If Lord Collins meant that a refusal to recognise foreign judgments will mean that there will have to be original proceedings in London, and that this will be good for those who carry on legal business there, it would be necessary to hold one’s nose even more tightly.

And even to say this would be to deny the common law principle, recognised variously by Lord Hoffmann, by the judge in *Beluga Chartering*, and by insolvency lawyers all over the common law world, that cooperation brings more benefits than does chauvinism; that openness is better than isolation; that walling yourself in does less good than reaching out to others. It is undeniable that there is
a value judgment to be made, after which everything else is just implementation. The values of the Supreme Court in *Rubin* are not, as I see it, the right ones.

II

9. **What about recognition of insolvency judgments based on submission? What was decided in *New Cap*?**

So much for *Rubin*, at least for now. It becomes more interesting when we turn to the judgment on the appeal in *New Cap*, which should not be seen simply as the postscript to *Rubin*. Let us go forwards by taking a step backwards. Rule 43 of Dicey states that we recognise foreign judgments on the basis of submission, so on the authority of *Rubin* we will recognise judgments given by courts exercising insolvency jurisdiction on the basis of submission by the judgment debtor. It is the idea of submission in the particular context of insolvency which should prompt us to think more carefully: particularly as to whose submission is needed, and how this may be shown to have taken place. Just to note this in passing: it appears that no argument was presented to suggest that there was submission in any sense which would have been material to the judgment in *Rubin*. Perhaps there should have been for the going into Chapter 11 administration was voluntary, not involuntary. But let us think about submission, and various ways it might be found.

10. **Submission (1): by a creditor who puts forward a claim for payment of sums which may be due from the estate**

Rather unexpectedly, but as established by *New Cap*, a creditor who lodges with theliquidator a claim for payment out of an insolvent estate will be held to have submitted to the general (current and prospective) jurisdiction of the supervising court. The act of submission is done, and the Rubicon is crossed, when the creditor sends in a form, or maybe nothing more than a letter, to the liquidator, in which he says that he is owed money. Though the document by which he does so
is not a writ, and is neither issued by nor sent to a court, and though it may not
even mention a court, it amounts to a submission to a court in relation to claims
which have neither been formulated nor served, in a court which has not really
seen seised at all: New Cap, at [165]-[167]. I think it is fair to say that no-one saw
this coming; it must have come as a terrible shock to the creditor syndicate in New
Cap.

But this part of the judgment surely demonstrates that the recognition of foreign
judgments in insolvency is, whatever the judgment may otherwise assert, different
from the rest of the law on foreign judgments: the only question is how different.
In English law, the form by means of which a person who seeks to be added to the
list of creditors is provided for by the Insolvency Rules 1986 (SI 1986/1925): the
form is Form 4.25. This looks remarkably informal for a document which, when
sent to a liquidator, amounts to submission by a creditor to the entire insolvency
jurisdiction, including preference and repayment jurisdiction, of the court which is
supervising him. Surely one would expect red capital letters and a red hand
pointing to such grave consequences? Yet if this really is enough, one might
deduce that it takes less to submit to a court exercising jurisdiction in a matter of
insolvency than it does in other contexts.

It is also noteworthy that in New Cap itself, the NSW court from which the
judgment came did not assert that the defendants had submitted to its jurisdiction.
It authorised service ex juris to be made on the basis that the cause of action had
arisen in NSW, rather than on the basis that the defendant syndicate had submitted
to the jurisdiction. Yet the Supreme Court held that there had been submission. To
do so, it relied on the peculiar old case of Ex p Robertson, in re Morton: peculiar
first because it was concerned with the existence and exercise of insolvency
jurisdiction by the English court, not by a foreign court, and peculiar, second,
because it found that the defendant had submitted because he had already taken a
dividend of four shillings on the pound. Still, this part of the judgment suggests
that there is more flexibility, or uncertainty, or room for fresh thinking, in the area
of submission than might have been supposed. It has even led one of my
colleagues in chambers to advise that you should never reply to letters from
liquidators: it is safe to read them, but very dangerous to reply for fear that this is taken as submission in the New Cap sense. You may think that it is going a little far, but the caution which it displays speaks for itself.

11. Submission (2): by being a shareholder in the insolvent company

We need to consider the position of a shareholder in stages, and to take an easy case first. If a company’s constitutional documents provide for jurisdiction of a particular court, the submission of the member may not be difficult to see as following from it. In *Powell Duffryn plc v Petereit* (C-214/89) [1992] ECR I-1745, the statutes of the company provided that ‘by subscribing for or purchasing shares…the shareholder submits, with regard to all disputes with the company or its organs, to the jurisdiction of the courts ordinarily competent to entertain suits concerning the company’. That must at least mean that the shareholder submits to the courts of the place of incorporation, but it does not take a lot of effort to argue that it may also amount to a submission to the courts at the centre of main interests of the company when, in the ordinary way, suits concerning the company in matter of insolvency, take place there. At all events, in *Powell Duffryn*, the jurisdiction agreement was liable to cover a claim brought by the company’s liquidator against the shareholder who had received wrongfully-made payments. So a jurisdiction clause in a company’s corporate documents may be (and if *Fiona Trust & Holding Corp v Privalov*, is taken to heart, should be) broad enough to cover insolvency judgments.

Next, shareholder submission otherwise than by reference to a jurisdiction clause. Now by virtue of his becoming a shareholder, a person knows or ought to know that his legal position can be adversely affected by what the company does, including by the company’s submitting to proceedings before a foreign court: this is the bargain he strikes when he becomes a member. This may be a less obvious basis for submission by the shareholder, for the English common law has been rather cautious when asked to find that an agreement to submit to a foreign court may be implied. Even so, Diplock J was prepared to find that a sleeping partner had silently submitted to the courts of the partnership’s place of establishment in
Blohn v Desser, and the idea has a certain basic appeal: *qui sentit commodum sentire debet et onus*, and so forth.

Now the perception of Lord Hoffmann in *Cambridge Gas* may have been that if company submits to the jurisdiction of a foreign court, the shareholder can be in no better a position when it comes to the recognition of a judgment which purports to affect the shareholder as shareholder, and that this is all the more so if the shareholder has a controlling interest, as in *Cambridge Gas* it did, owning 70% of the common stock in the insolvent corporation. Lord Collins was not persuaded; I am not so sure that he was right.

Lord Mance in *New Cap* may have seen that there really was a point to be pursued here; and I think he was onto something. Submission may be much more complex an idea than is sometimes acknowledged; and we may yet have occasion to look at it again. What exactly do you agree to (and with whom do you agree it) when you become a member of a company? It could be said that you agree to allow the management of the company to affect the value of your shareholding; it might not be so easy to say that you agree to allow the company to enmesh you in litigation or its aftermath. It is true that Lord Hoffmann’s view tends to treating the case as though it were an action in which the company *represents* the shareholders, rather than as one in which the shareholders simply have an indirect financial interest in litigation conducted by their company, but there is real work to be done here in thinking about submission when the act of submission is the act of a company.

12. Submission (3): by holding office in the insolvent company

If it may be true for the shareholder, what of the office-holder? And, for that matter, of anyone else who enters into a contractual relationship with the company? If the contract of service provides for exclusive jurisdiction of the courts for the place where the insolvency is being conducted, there may be little difficulty. In the absence of a suitable jurisdiction clause it will be more difficult; and in *Masri v Consolidated Contractors International Co (No 4)* the House of Lords declined to ‘identify’ a senior officer of a company, or a senior officer who
had demitted office in the nick of time, as being subject to the personal jurisdiction of the court to which his company had submitted, at least for the purpose of requiring him to come to England to say where its assets were hidden. Maybe this is right, though I am not so sure: at all events, the substantial question was really whether his position had been materially affected by the decision of his company (for which decision he may well have been responsible) to submit to the jurisdiction of the English courts. Of course, if the service agreement had a jurisdiction clause, the argument would be somewhat easier: no doubt a question of construction will be involved, and some cases, of which *AWB (Geneva) SA v North America Steamships Ltd* is one, suggest that jurisdiction agreements may not always reach to matters of insolvency. But even if the service agreement does not make such jurisdictional provision, anyone who has claimed and taken payment from the company is not so far removed from the creditor who claimed and took payment from the company in *New Cap*.

If this, or any of it, is more than just possibly arguable, it leads to the reflection that there may just be non-submitters and non-submitters. In a judgment handed down a couple of years ago, *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)*, the New South Wales Court of Appeal had to consider whether persons associated with a contracting party, but who were not privy to a contract which contained a jurisdiction clause, could nevertheless point to the jurisdiction clause to support their objection to being sued, by the ‘other’ party to the contract outside the jurisdiction designated in the contract to which they were strangers. The wise and canny Spigelman CJ answered with a qualified yes, supporting it with the acute observation that there were ‘non parties and non parties’. Some may think that they can see a similar sentiment in the judgment of Lord Hoffmann in *Cambridge Gas*. One might reflect, and Lord Mance may just have felt, that there are ‘non-submitters and non-submitters’, and that the position of a shareholder in a company which chooses to submit is not on all fours, as Lord Hoffmann had put it in *Cambridge Gas*, with that of ‘any other citizen who had nothing to do with the bankruptcy’. If everything is now going to turn on submission, we surely need to reflect further upon the way we deal with those who plainly do submit, those who plainly do not, and those who fall somewhere between these two poles.
While we think on this, some of the strands of reasoning in the very recent Supreme Court judgments in *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5 show that submission, in the broad and reasonable sense of lending yourself to something, may yet come to be recognised as having a status equivalent to its more familiar counterpart. There is work to be done: advices to be written, papers to be published. The common law never stands still.

13. **Submission (4): by receipt or retention of payment**

Finding submission in the mere receipt and retention of payment is the most challenging; and the idea that one may find any recognizable form of submission in the receipt may be just too difficult to embrace. If there is to be recognition of the foreign judgment at this point, it is going to have to be based on something other than submission to the courts administering the insolvency. And unless the decision in *Rubin*, rather than *New Cap*, is reconsidered, I really struggle to see how this can be done. For it is one thing to be unsurprised that litigation takes place in a particular court; it is quite another to say that one submitted to its jurisdiction. Foresight and agreement are far from being the same thing; to foresee that something may happen to you is not to consent, submit, or agree to its happening to you. I am still puzzling over whether anything more can be done to make this point work; at the moment I am still struggling. If anyone has any ideas, some of the editors of Dicey would love to hear from them.

It is, however, because of this particular case, the case in which the principle of submission seems to be unable to assist, but in which there is need for a better solution than the non-solution offered by the judgment in *Rubin*, that something needs to be done.

III

14. **A broad principle that insolvency is different, and that something should be done for that reason and in that context alone**
If we were simply able to apply the law which the insolvency court is applying, it would be slightly less of a problem. But if we cannot do this, the result is that we cannot apply the law which applies in the actual, main, insolvency, and will not recognise the order made by the very court which we consider to be the proper one to deal with the insolvency: a combination of results which is very odd. It is also bound to lead to the waste of resources or, at any rate, to the diversion of assets away from the creditors. Ever since Hoffmann J looked surveyed the wreckage of the Maxwell fraud in *Barclays Bank plc v Homan* [1993] BCLC 680, the sense that something needs to be done, and that traditional obstacles to doing anything useful just have to be overcome, has been apparent to some and an incentive to others. He was prepared to do it; Lord Collins was not.

Should Singapore do something? This is, in the final analysis, but perhaps also in the first analysis, a matter of legal policy, and therefore not a matter for me. It may still be appropriate to make four observations.

First, one should note that the Court of Appeal in 2002 did exactly what a final court of appeal should do when asked to consider whether the common law on foreign judgments, as handed down from English legal history, was the best it could possibly be. The court thought not, and it altered it. Whatever one may think of the substance of the change it made, it asked the right question, and used the right techniques to arrive at the answer. Nothing stands in the way of its doing that again. Though in England the amount of legislation now superimposed on the common law might make this difficult, other common law systems which are unburdened by such constraint will think for themselves, and may not be persuaded by what the UK Supreme Court has done. It is for this specific reason that the disapproval of *Cambridge Gas* may be a strictly English phenomenon which does not travel to other parts of the common law world.

Second, the broad theme that insolvency is different, almost a thing apart, was supported by the decision of the Singapore Court of Appeal in 2011, that legal disputes which arise in and because of an insolvency fall outside the usual rule of private international law that disputes should be go to arbitration if that is what the
parties have agreed to. In *Larson Oil & Gas Pte Ltd v Petroprod Ltd (in liq)*, it was held that where a dispute arose in the context of an insolvency administration (in Singapore and in the Cayman Islands) the usual rules which would have provided for arbitration may be displaced, in a broader public and creditor interest. Two paragraphs of the judgment of the court make for very interesting reading:

> [45] A distinction should be drawn between disputes involving an insolvent company that stem from its pre-insolvency rights and obligations, and those that only arise upon the onset of insolvency due to the operation of the insolvency regime. Many of the statutory provisions in the insolvency regime are in place to recoup for the benefit of the company’s creditors losses caused by the misfeasance and/or malfeasance of its former management. This is especially true of the avoidance and wrongful trading provisions. This objective could be compromised if a company’s pre-insolvency management had the ability to restrict the avenues by which the company’s creditors could enforce the very statutory remedies which were meant to protect them against the company’s management. It is a not unimportant consideration that some of these remedies may include claims against former management who would not be parties to any arbitration agreement. The need to avoid different findings by different adjudicators is another reason why a collective enforcement procedure is clearly in the wider public interest. [46] We, therefore, are of the opinion that the insolvency regime’s objective of facilitating claims by a company’s creditors against the company and its pre-insolvency management overrides the freedom of the company’s pre-insolvency management to choose the forum where such disputes are to be heard. The courts should treat disputes arising from the operation of the statutory provisions of the insolvency regime *per se* as non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement.

It does not take much imagination to see how easily that clear and principled approach to insolvency would support this argument: that when it comes to the reception of foreign judgments from a properly-recognised insolvency court, against the pre-insolvency management of the insolvent company, the traditional rules which allow a defendant to choose whether to be bound by choosing
whether to submit are contrary to the public interest and to the proper interests of creditors. It may therefore be that the Singapore courts are open to arguments which, at the moment, would be harder to put in London. The point is not that the context of insolvency means that the law on foreign judgments must be altered. The point is that the broad context of insolvency meant that the statutory law of commercial arbitration was made to operate in a specifically different way, and that if this can be done to the statutory law of commercial arbitration, one cannot avoid asking whether something analogous might properly be done to the common law of foreign judgments.

Third, if the common law of Singapore permits and even requires a Singapore court to cooperate with a liquidation which is properly taking place elsewhere, whether that involves treating a parallel Singapore liquidation as ancillary, as Beluga Chartering accepts, or by otherwise applying rules of the common law in such as way as to lend support to the foreign procedure, as tomorrow’s case might propose, the only question worth asking is as to the nature of the cooperation which might be, and which may not be, given.

But fourth: just because a foreign court is exercising insolvency jurisdiction, it does not mean that its judgment is right. Courts make mistakes; in the context of private international law, this is why we have the rules we do. The idea that we might set them aside simply because the foreign court is exercising insolvency jurisdiction is, to my mind, not based on sufficiently coherent reflections. It is necessary to show greater caution than that; there is more to virtue than an uncritical faith in universalism. The question is what can properly be done when a case like Rubin arrives in Singapore.

15. Doing something for the case in which there is no basis for finding a submission (1): receiving foreign judgments as requests for cooperation

This is the option which was arguably supported by Cambridge Gas, proposed by the interveners on behalf of the trustees in the Madoff case, who appeared as
interveners, and rejected by the majority of the Supreme Court in *Rubin*. A request for cooperation, that cooperation being sought to give practical force to a judgment coming from the insolvent debtor’s centre of main interests, might have been treated as just that, and assented to or not according to the discretion of the court. One basis for the exercise of such discretion was shown by Lord Hoffmann for the Privy Council in *Cambridge Gas*: the order made by the foreign court was one which the local (Manx) court would have been able, and probably willing, to make, so the case for cooperation had a rational foundation. It would not have involved treating the foreign judgment as an obligation binding on a judgment debtor, but rather as a basis for one court to make a request to another court, and for the other to accede to it.

Lord Collins seems to have considered all this to be inadmissible, though he prefers to call it unprincipled (a description which is surely unjustified), on the seeming ground that it would subvert the law on foreign judgments for no good reason. Subversion is a strange idea, for the common law only ever develops by subverting itself. Reading the judgment of Lord Collins, some (and not just those who are very old) will hear the echo of Lord Buckmaster, dissenting in *Donoghue v Stevenson* in support of the view that those manufacturers who carelessly adulterate the food they sell owe no duty to anyone other than the retailer, and certainly not to the customer. For the benefit of the younger among us, Lord Buckmaster warned that

> although [common law] principles are capable of application to meet new conditions not contemplated when the law was laid down, these principles cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit.

He was also of opinion that

> the only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty. Yet if a house be, as it sometimes is, negligently built, and in consequence of that negligence the ceiling falls and injures the occupier or anyone else, no
action against the builder exists according to the English law, although I believe that such a right did exist according to the laws of Babylon.

This last comment was not intended, it is understood, as a reference to some choice of law rule not relied on by the other members of the court.

Yet the case for allowing the common law rules of private international law to develop as Lord Hoffmann had wished to see them develop was that there were principles which could be isolated and fashioned to make a general power to cooperate a certain, predictable, and rational thing. But Lord Collins was not of that opinion; Lord Buckmaster will be nodding, grimly; and shame on them both.

Or suppose the foreign court simply asked for the transmission of assets located in England (or Singapore) in order to satisfy a judgment, which it had given, within the territory of the insolvency court. Would that form of request for cooperation, not so directly requiring the foreign judgment to be recognised and enforced within the territory of the receiving state, have had a better chance of success? All one can say is that Beluga Chartering shows that Rubin was not the last word on the subject; and as Lord Collins has retired, the question may even be asked again in England.

16. Doing something specific (2): accepting foreign judgments as foreign judgments

But if the path ahead has to be to treat the foreign judgment as a foreign judgment properly so called, the outlines of an alternative, foreign-judgment-oriented, solution are not so very hard to see. If the court which has exercised insolvency jurisdiction is at the debtor’s centre of main interests, its jurisdiction is something which we are already and in principle committed to recognising as proper and predominant. (True, a little further thought is needed to decide whether we ascribe the status of principal liquidation to one opened at the COMI of the insolvent, or at the place of its incorporation, but COMI is coming to be a principle of universal acceptance in a way which incorporation never did and never will: where statute law may direct us to the place of incorporation, a bold judge may be able to
upgrade it.) If insolvency proceedings are underway at the proper place for such proceedings, perhaps we should just recognise and (if they are for money) enforce, judgments from the courts of that place, including judgments which call for the repayment or return of sums which should not have been paid out, or received, or kept, dealing with intolerable judgments by the application of public policy. Within Europe, of course, recognition is automatic at this point: the EU Insolvency Regulation, Regulation (EC) 1346/2000 provides for it. Outside Europe, it is hard to see what is required apart from a check that (i) the court which exercised jurisdiction and gave judgment was jurisdictionally proper in our eyes: something which should have been covered by the COMI point or question; (ii) the person against whom the order was made had proper notice and a proper and effective chance to participate; and (iii) there was no impropriety in the judgment: thus far, the requirements of the law would not be very different from, but would be as demanding as, that applicable to judgments recognised on the basis of Dicey’s Rule 43.

This would mean accepting a new basis for the recognition judgments, almost always default judgments, in circumstances in which the judgment debtor was not there to put his side of the story. And the truth is that we cannot properly assume that the foreign insolvency court got the merits of the claim right. We are prepared to accept the decision of a foreign court, subject only to limited defences, in those cases in which the defendant was present or submitted to its jurisdiction, for though in such circumstances we do not know that the foreign court got it all right, it is reasonable to assume that it did if the defendant was there to fight the case. But in a case of payment order made in the form of a judgment by default, however, the foreign court is not saying that it has well and truly tried the merits; and we should therefore exercise more caution before simply recognising a default judgment ordering a defendant to pay money into the estate.

It would follow that further checks, of a kind not made when a judgment falls within Dicey’s Rule 43, may be proposed: (iv) that it was not unreasonable, and would have been practical, for the person against whom the order was made to have defended the claim in that court; (v) the law on liability to repay, on time
limits, and on defences to the claim for repayment is analogous to English law; and (vi) enforcing it in England would not be contrary to public policy: Lord Clarke, who dissented, put it in pretty similar terms, and (for good measure) assessed such a development, which he would have supported, as principled. As well he might. The spirit of Beluga Chartering is a similar one.

Would this make life harder for people in the position of the defendants in Rubin and New Cap? Certainly it will, though maybe not in an irrational way. And anyway, there is no human right to an uncomplicated, or risk-free, life, and certainly no right to have this funded and paid for by the poor bloody general creditors. Will it make life more difficult for other, more patently blameless, recipients of money? Or for people who had no real reason to suppose that there might be something wrong with a payment made and taken? Yes, it may do; and these things happen in adult societies when the law comes to balance the many issues which go to establish and underpin confidence in an open market. The proper response is surely to craft a defence of innocent receipt and blameless retention, or something along the lines indicated above. It is not so very hard to see what it would look like; and even after a rather anti-climactic judgment from the Supreme Court of the United Kingdom, it may yet happen. But it may also be that it is not be the English courts which bring it about. It may be for the courts elsewhere in the common law world to show us just how it ought to be done.
**RUBIN AND NEW CAP: FOREIGN JUDGMENTS AND INSOLVENCY**

Adrian Briggs

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References

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1. What happened in *Rubin* and in *New Cap*?

- *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508
- *Re HIH Casualty & General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852
- *Beluga Chartering GmbH (in liq) v Beluga Projects (Singapore) Pte Ltd (in liq)* [2013] SGHC 60
- Companies Act (Cap 50, 2006 Rev Ed), ss 273, 377(3)(c)

2. What did the Supreme Court decide and why did it decide it?


3. Why was the judgment in *Rubin* so conservative?

- *Rubin*, at [131], [154]
- Insolvency Act (UK) 1986, s 426

4. What is wrong with trying harder to assist creditors and those who act for them?

- *Williams & Humbert Ltd v W&H Trade Marks (Jersey) Ltd* [1986] AC 36
5. Can the general rules of recognition of foreign judgments be changed?

- Morguard Investments Ltd v De Savoye [1990] 3 SCR 1077
- Re Flightlease (Ireland) (in vol liqu) [2012] IESC 12, [2012] 2 ILRM 461
- Hong Pian Tee v Les Placements German Gauthier Inc [2002] 2 SLR 81
- Beals v Saldanha [2003] 3 SCR 416

6. What about judgments from countries and courts which are less sound?

- AK Investment CJSC v Kyrgyz Mobil Tel Ltd [2011] UKPC 7, [2012] 1 WLR 1804

7. If we were to widen the rules for recognition, should we make other changes to the law on foreign judgments to reflect it?

- Dicey, Rule 48

8. Or is there is just no national economic interest in recognising judgments of the kind in Rubin, so that it would be irrational to do so?

- Rubin, at [129]

II

9. What about recognition of insolvency judgments based on submission?

What was decided in New Cap?

- Dicey, Rule 43

10. Submission (1): by a creditor who puts forward a claim for payment of sums which may be due from the estate

- New Cap, at [165]-[167], [126]
- Insolvency Rules 1986 (SI 1986/1925), Form 4.25
- Ex parte Robertson, in re Morton (1875) LR 20 Eq 733

11. Submission (2): by being a shareholder in the insolvent company

- Powell Duffryn plc v Peteriet (C-214/89) [1992] ECR I-1745
- Fiona Trust & Holding Corp v Privalov [2007] UKHL 40, [2007] Bus LR 1719
• Blohn v Desser [1962] 2 QB 116

12. Submission (3): by holding office in the insolvent company
• Masri v Consolidated Contractors Int’l Co (No 4) [2009] UKHL 43, [2010] 1 AC 90
• AWB (Geneva) SA v North America Steamships Ltd [2007] EWCA Civ 739, [2007] 2 Lloyd’s Rep 315
• VTB Capital plc v Nutritek International Corp [2013] UKSC 5, [2013] 2 WLR 398

13. Submission (4): by receipt or retention of payment
• Rubin, at [116]

III

14. A broad principle that insolvency is different, and that something should be done for that reason and in that context alone
• Rubin, at [131]
• Barclays Bank plc v Homan [1993] BCLC 680

15. Doing something for the case in which there is no basis for finding a submission (1): receiving foreign judgments as requests for cooperation
• Donoghue v Stevenson [1932] AC 562

16. Doing something specific (2): accepting foreign judgments as foreign judgments
• EU Insolvency Regulation, Regulation (EC) 1346/2000
• Dicey, Rule 43