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# English Supreme Court Refuses to Enforce U.S. Bankruptcy Avoidance Action Judgment

**29 October 2012**

## Summary

The recent judgment of the Supreme Court in the joined cases of *Rubin and another v Eurofinance SA and others* and *New Cap Reinsurance Corporation (in liquidation) and another v A E Grant and others* [2012] UKSC 46, issued on 24 October 2012, established that judgments avoiding pre-bankruptcy transactions ("**avoidance judgments**") made by non-EU foreign courts (including U.S. bankruptcy courts) have no special enforceability status in England and Wales compared to ordinary judgments.

In particular, the decision confirmed that if the U.S. Bankruptcy Court makes a default avoidance judgment against a person with no presence in the U.S. and who has not otherwise submitted to the jurisdiction of the U.S. Bankruptcy Court, that judgment would be unenforceable in England and Wales.

*Rubin* highlights the existence of certain jurisdictional limits in cross-border insolvency proceedings, and provides certainty to non-U.S. persons who are counterparties to a debtor in U.S. bankruptcy court proceedings.

## English Legal Framework for Recognition of Foreign Insolvency Judgments

*Rubin* concerns the judgments made against the counterparties of a debtor who were not present in the U.S. and who had not submitted themselves to U.S. jurisdiction.

Under English common law, judgments made by a foreign court against a person would typically only be recognized if the defendant is within, or has submitted to, the jurisdiction of the foreign court. Judgments against persons with no presence in the foreign country and who have not agreed to, or participated in, the proceedings of that foreign court would therefore not be enforceable in England.

The critical issue in *Rubin* was whether the common law position described above should apply to avoidance judgments or if there should be additional circumstances in which the English

Court could recognize these judgments, given their close connection to insolvency proceedings. In particular, the Court considered whether:

(i) there should be a separate set of rules applicable to avoidance judgments under English common law, in accordance with the controversial decision by the English Privy Council in the *Cambridge Gas/Navigator*[1] case; and

(ii) the UNCITRAL Model Law implemented by the Cross Border Insolvency Regulations 2006 (the "**Model Law**") enabled the English Court to recognize avoidance judgments made by a foreign court where the centre of main interests of the debtor fell within the jurisdiction of that foreign court.

In the joined case of *New Cap Reinsurance Corporation*, the Court also considered whether section 426 of the Insolvency Act 1986 gave the English Court the ability to recognize avoidance judgments by courts of certain other Commonwealth countries, the relevant country being Australia in this case. This issue was not applicable to *Rubin* as the United States does not fall within the ambit of section 426.

**Background to Rubin**

Eurofinance SA, a BVI company, settled an English trust, The Consumers Trust ("**TCT**"), which was administered by the Appellants. In December 2005, TCT was placed into Chapter 11 proceedings in New York. Two years later, adversary proceedings were commenced against, *inter alia*, the Appellants in the U.S. Bankruptcy Court in respect of fraudulent transfer pre- and post Chapter 11 proceedings. The Appellants did not defend or otherwise submit to the jurisdiction of the U.S. Bankruptcy Court. As a result, a judgment was entered against the Appellants, in July 2008, in default of appearance.

**Supreme Court Judgment**

The Supreme Court (overturning the position reached by the Court of Appeal on these points) ruled that:

(i) *Cambridge Gas/Navigator* had been wrongly decided, and that there was no basis under English common law to recognize foreign avoidance judgments in circumstances where ordinary judgments would not have been recognized (i.e. where the defendant had not submitted to the jurisdiction of the foreign court)

(ii) Neither the Model Law nor section 426 gave the English Court additional powers to recognize avoidance judgments made by a foreign court.

[1] *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26*

This conclusion goes some way towards resolving prior uncertainties in the market, by closing down a number of avenues under which foreign avoidance judgments might arguably have been capable of being recognized in England.

It should be noted that an aspect of English cross-border insolvency recognition that was not addressed by these cases is the impact of the EU Regulation on Cross-border Insolvency (the "**EU Regulation**"). It is accepted that English Courts are able under the EU Regulation to recognize avoidance judgments made by foreign courts of another EU country (other than Denmark) if the debtor's centre of main interest falls within that EU country. However, the debtors in *Rubin* and *New Cap Reinsurance Corporation* were based outside of the EU.

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Please feel free to contact any of the following Cadwalader lawyers if you have any questions about this memorandum.


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