GRR Live, New York: Uncertainty will be weaponised

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Lisa Schweitzer, Don Bernstein, Judge Sean Lane, Patrick Ang and Lynn Harrison

Cross-border insolvencies are growing in number and bringing with them new challenges to jurisdiction and recognition that raise doubts on the continued validity of old common law rules. Unless the world moves towards a borderless, more harmonised system the uncertainty will be weaponised, a panel at GRR Live New York warned.

In every cross-border insolvency there are three decisions to be made, said conference co-chair **Don Bernstein** of Davis Polk & Wardwell: should it take place in a single forum, do you apply a single law and should you treat a corporate group as a single entity? These questions always run against the issue of sovereignty, he noted: something that so far has "been very difficult for most countries to let go of".

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Though many cross-border insolvency practitioners thought the UNCITRAL Model Law had solved a plethora of recognition and jurisdiction issues, some recent "surprising cases" have shown questions remain unanswered, Bernstein said.

Common law

Lynn Harrison, a partner and practice group chair at Curtis Mallet-Prevost Colt & Mosle in New York, described the impact of the UK Supreme Court's 2012 decision *Rubin v Eurofinance* on enforceability. "Without enforceability in a restructuring, you potentially risk loss of value, return, equality of distribution, confidence, growth," he said.

"And I might add life, liberty and the pursuit of happiness."

In *Rubin*, the UK Supreme Court found that enforceability of foreign judgments is determined by the common law Dicey rule, which requires foreign courts to have in personam jurisdiction over a natural or legal person in order to issue a judgment against them.

The court applied the rule to two appeals pending before it: *Rubin*, concerning the enforcement of default judgments against the English insiders of an insolvent US trust, who had been targeted in avoidance actions in the trust's Chapter 11 case; and *New Cap Reinsurance*, where an Australian liquidator was seeking to enforce judgments from an adversary proceeding brought against members of a Lloyds syndicate who had placed reinsurance with New Cap.

Despite the UK courts having recognised the Chapter 11 proceedings in *Rubin* under the UK's Cross Border Insolvency Rules, the Supreme Court refused to enforce the default judgments against the trust's English insiders, because they had failed to appear in either the avoidance actions or the Chapter 11. However, in *New Cap Reinsurance*, the Supreme Court found the syndicate had submitted to the jurisdiction, by filing claims and participating in the Australian insolvency proceedings.

Harrison explained how the *Rubin* decision – handed down by majority and authored by **Lord Collins** – had criticised and moved away from *Cambridge Gas*, a 2007 decision by the UK Privy Council in which **Lord Hoffman** conceded bankruptcy judgments were different to other judgments because the purpose of bankruptcy was to provide a mechanism of collective execution. Lord Hoffman found that English common law should evolve to provide for the enforcement of collective rights that override individual rights for the purposes of implementing a plan and redistributing assets. However, Harrison said, Lord Collins stated: "It was unfair for British businesses to be compelled to take part in foreign proceedings given the current state of the common law."

Bernstein pointed to *Rubin* as an example of "running up against this sovereignty question directly". Insolvency practitioners might like to think the "collective" notion in *Cambridge Gas* applies to all types of claims running alongside bankruptcy

proceedings, such as avoidance actions, he said. But if the action was a tort claim, would they feel the same?

Bernstein suggested the question for those insolvency practitioners to ask was: "how far along the insolvency spectrum should getting affirmative recoveries be?" Dividing the estate could be considered part of the "collective" proceedings, but getting affirmative recoveries could be something else, he offered.

Bernstein asked panel members whether enforceability was a consideration when advising a group where to file. He highlighted the restructuring of the International Bank of Azerbaijan (IBA), where two of the bank's holdout creditors refused to participate in its local proceedings because their debt was governed by English law, and filed claims before the UK courts when the Azeri restructuring appeared to be complete.

The IBA's foreign representative tried to prevent the claims by seeking a permanent moratorium in the English courts, but failed at first instance and on appeal. The case is now believed to be heading to the UK Supreme Court.

Bernstein said some might argue that, under the century-old *Gibbs* rule, if your debt is governed by English law, you cannot get a discharge of the debt anywhere other than in England.

Judge Sean Lane, from the US Bankruptcy Court for the Southern District of New York, exclaimed that the Azeri bank's holdout creditors certainly thought *Gibbs* was the answer for them.

"And it was," Harrison quipped, to laughter from the audience. He noted that the choice of where to commence an insolvency proceeding generally depends on where property interests and creditors are located, but equally important are laws that support global solutions, an independent judiciary, a local rescue culture and a strong base of professionals who are able to address particular issues.

"I think those items are at least at the top of my list – and whether or not the subsequent judgments or plan can be enforced in a foreign jurisdiction," Harrison noted.

Later in the panel, Harrison pointed out that *Gibbs* has increasingly come under attack, starting with the 2016 *Pacific Andes* decision by **Justice Kannan Ramesh** in the Singapore High Court. "I think that's going to be one of the burdens placed upon the courts, to do a more granular analysis of where these cases should be filed, what law should be applied and whether some of these rules like *Gibbs* or Dicey are somewhat outdated in the era of globalisation," he said. "I think a lot of courts are beginning to take that on and not accept it at face value."

Singapore

Rajah & Tan partner **Patrick Ang** in Singapore highlighted a recent case that questioned the recognition of Singaporean moratorium proceedings in Hong Kong.

CW Advanced Technologies, a Singapore-headquartered group with entities in Hong Kong and the Cayman Islands, applied to restructure via schemes of arrangement in Singapore and parallel provisional liquidations in Hong Kong and Cayman – but **Justice Jonathan Harris** in the Hong Kong leg questioned whether Singapore's nascent moratorium regime could be recognised locally. Ang explained that Justice Harris never went on to consider the issue because the company's largest creditor, Bank of China, was against a scheme so the entity withdrew.

Ultimately, Ang noted that Singapore was not reliant on other countries to enforce its insolvency judgments – historically, Indonesia has never really been keen to enforce them anyway. Instead, it is focusing on the Singaporean courts' ability to enforce on people and entities already present in the city-state.

Many Indonesian businesses are family-owned and often have accounts, trusts and property in Singapore. That's where the courts get jurisdiction, practically speaking, Ang said.

The reason why Chapter 11 is so effective, Ang added, is because New York has financial clout in the world and many financial institutions have to go through the US. Although Singapore doesn't have quite the same clout, it is one of the top financial centres in Asia. "If you are a serious banker in the world, you will have some presence and some business in Singapore, and to that extent we have a similar reason why you should bring your case to Singapore for the same reason that you bring your case to Chapter 11 in the States," he said.

Bernstein asked Ang whether he could see an evolution in submission and jurisdiction clauses for insolvency relief, particularly in contracts with Asian state-owned enterprises. Putting in a clause that all parties will submit to the jurisdiction of Singapore in the event of an insolvency could help Asian projects raise capital, he suggested. Ang replied that jurisdictional clauses pointing to the Singapore International Arbitration Centre for the resolution of disputes are already extremely popular for infrastructure projects where the project finance remits to English or New York law. "I think that's a signal in my view as to how things could be moved in future," he said.

He later pointed out that Japan, Korea, the Philippines and now Singapore have all signed up to the UNCITRAL Model Law, meaning "there's a bit more impetus" in Asia to think carefully about enforcement and recognition issues.

Ang subsequently discussed two instances where Singaporean law – which has a tradition of borrowing from UK law, but recently cherry-picked multiple amendments from the US – has departed from Chapter 11, to give "a flavour where the tensions may lie in enforceability issues". In the first instance, Singapore's absolute priority rules don't apply to shareholders, who cannot be crammed down.

"Family-owned companies remain very, very much the strength of all economies in Asia, so the idea of trying to wipe out shareholder equity does not sit well, even with creditors," Ang explained. The way restructurings are achieved without shareholders getting in the way is more pragmatic than legal, as a result – through the

threat of liquidation. “If you want to play tough and you want to try and get more, then creditors will liquidate the company,” he said. The second instance is that Singapore has not introduced rules related to creditor committees on meetings, procedures and funding, he added.

Lisa Schweitzer, a partner at Cleary Gottlieb Steen & Hamilton and co-chair of GRR Live New York, asked whether insolvency proceedings in Singapore are public, to which Ang responded that the dockets are available if you make a request to the court. But they aren’t open in the US sense that you can click a link on the internet and obtain documents.

COMI – competing regimes

Judge Lane moved on to talk about the Chapter 15 case for Brazilian telecoms company Oi, which recently presented him with competing regimes governing the determination of COMIs. When the Oi group first applied for recognition of its Brazilian bankruptcy in 2016, the application went through unopposed, he explained.

Spotting that one of the entities – Coöp, a special purpose financing vehicle for its Brazilian affiliates – was Dutch, Judge Lane read through all the papers, raised issues sua sponte and then for the purposes of recognition made an independent call that Coöp’s COMI was in Brazil like the rest of the restructuring companies. Fast forward a year and another recognition proceeding was filed, reflecting the fact Coöp had filed a Dutch insolvency process. Coöp’s Dutch bankruptcy trustee asked him to overturn the recognition of its restructuring in Brazil, because its COMI was actually in the Netherlands for the purposes of the EU Insolvency Regulation.

The judge considered two different sections of Chapter 15: section 1517(b), which considers the location of a COMI de novo; and section 1517(d), which talks about the termination or modification of a COMI. He decided section 1517(d) was more relevant to Coöp’s application – “the idea that you would get to come in and, like in the American movie Groundhog Day, restart the day over and over again, really at any time without consequence from a prior ruling, didn’t sit particularly well with me” – and found that the facts before him were much the same as before, when he had found the COMI to be in Brazil. Events in the Dutch process had not changed Coöp’s circumstances so much that the COMI had shifted.

Ultimately, Judge Lane told delegates at the event that judges need statutes and principles to apply. In the case of Oi, Chapter 15 provided that – so that even where there wasn’t a lot of case law and the facts were unusual, there was a standard applying the principles of modified universalism.

Although the 2000 EU Insolvency Regulation did contain a presumption that the COMI would be the location of Coöp’s headquarters, under US law, office location was just a starting point to the determination of the COMI. “The argument was made to me that the EU Regulations solved the problem and gave the answer to the question that was in front of me, and I concluded it didn’t,” he said.

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Bernstein pointed out that several parties were advocating for an adjustment of the COMI because they wanted to use Dutch law to make double recoveries against Oi's Brazilian parents as Coöp's guarantors, and against Coöp, whose assets would be managed locally. Despite raising that in his decision, Judge Lane did not determine that the creditors' actions were bad faith.

Schweitzer pointed out that in UK scheme proceedings, lawyers have to show the court that the scheme will be recognised by the courts where the relevant creditors reside. Bankruptcy judges in the US, however, are not expected to ask about enforceability for a Chapter 11 case to go forward.

Justice Nick Segal from the Grand Court of the Cayman Islands, commenting from the floor, pondered whether US judges had to think about enforcement issues when applying the feasibility standard in the confirmation of a Chapter 11 plan. Feasibility is relevant, Judge Lane agreed, but comes much, much later in the process. Concluding, Judge Lane noted that the Southern District of New York Bankruptcy Court was seeing more cross-border cases overall, and also seeing more litigation in those cross-border cases – whether to do with discovery disputes, or just significant and protracted disputes. "It's not something you normally expect to have to schedule, a trial in a cross-border case," he told delegates, adding that it just reflects the increasing amount of activity.

With more of these cases facing litigation over jurisdiction and recognition, a lot of judicial time and litigators' money is being spent, Bernstein observed. "Unless we move to a more borderless system, we're going to get bogged down," he noted, adding that stresses may occur in a recessionary period when the courts begin to see so many cases that, unless they find a more efficient way to deal with them, they are not going to be able to cope.

Judge Lane agreed recalling a phrase often used by his former SDNY colleague **Judge James Peck** in connection with the Lehman case, that if there were any new legal wrinkles, someone was bound to weaponise them.

This has happened in the US since the 2011 decision *Stern v Marshall* – where the Supreme Court ruled that a bankruptcy court lacked jurisdiction to enter a final judgment on a state law counterclaim that had not been resolved in the process of ruling on a creditors' proof of claim. "We sometimes had people come in and cite [*Stern v Marshall*], and you'd say, 'what's your argument?' And they'd say, 'I don't know, just *Stern v Marshall*'."

You may see some of these types of arguments going forward, Judge Lane said: "To the extent there is increasing uncertainty, that uncertainty will be weaponised."
GRR Live New York took place at the offices of Cleary Gottlieb Steen & Hamilton on 26 September.

Conference reports