THE REVIEW OF
BANKING & FINANCIAL SERVICES
A PERIODIC REVIEW OF SPECIAL LEGAL DEVELOPMENTS AFFECTING LENDING AND OTHER FINANCIAL INSTITUTIONS

Vol. 35 No. 1 January 2019

ENFORCEABILITY OF FOREIGN INSOLVENCY JUDGMENTS: *IN RE AGROKOR D.D., ET AL.*

Judgments, orders, and settlement agreements obtained in home country insolvency proceedings face an uncertain reception when parties seek to enforce them abroad. The authors discuss the varied approaches to enforcement applied in London, Singapore, and by bankruptcy Judge Glenn in the Agrokor *case in New York City. They address in detail Judge Glenn's findings with respect to comity, discretionary relief, and due process in approving the enforcement of a settlement agreement entered into and approved in Agrokor's Croatian insolvency proceeding.*

By Lynn P. Harrison III and Peter J. Buenger *

In today's growing global economy with the proliferation of cross-border investments and trade, cross-border restructurings are becoming increasingly common. When times are good, such expansion can provide large advantages to a company. However, when financial difficulties arise globally and a company is forced to initiate an insolvency proceeding in its home jurisdiction, the issue arises whether orders or settlement agreements approved in such insolvency proceeding will be enforced abroad. Decisions in recent years entered by courts in three of the largest financial centers of the world — London, Singapore and New York City — demonstrate that foreign insolvency judgments may not always be consistently enforced worldwide.

THE UNITED KINGDOM APPROACH

One such example is the case law arising from the *Rubin v. Eurofinance S.A.* line of cases in the United Kingdom and the more recent decision by the UK Supreme Court.[1] In *Rubin*, a U.S. federal bankruptcy court entered a default judgment against residents of England for the recovery of a fraudulent transfer of funds. The English proceedings sought to enforce the U.S. judgment against the individuals.

On appeal, the UK Supreme Court reversed the lower court's decision to enforce the U.S. judgment based on the traditional English common law rules. The court found that if there were different rules governing the enforcement of foreign judgments in avoidance proceedings, the court would be obligated to determine or develop two jurisdictional rules. In the majority opinion, Lord Collins, refusing to enforce the U.S. judgment, declared that it was "wholly unrealistic" that "a person who sells goods to a foreign company accepts

* *LYNN P. HARRISON III is a member and Peter J. Buenger is an associate of Curtis, Mallet-Prevost, Colt & Mosle LLP, a firm established in 1830 with offices worldwide. Both are resident in the firm's New York office. Their e-mail addresses are lharrison@curtis.com and pbuenger@curtis.com.*

[1] *Rubin v Eurofinance SA*, [2012] UKSC 46.

RSCR Publications LLC Published 12 times a year by RSCR Publications LLC. Executive and Editorial Offices, 2628 Broadway, Suite 29A, New York, NY 10025-5055. Subscription rates: $650 per year in U.S., Canada, and Mexico; $695 elsewhere (air mail delivered). A 15% discount is available for qualified academic libraries and full-time teachers. For subscription information and customer service call (937) 387-0473 or visit our website at www.rscrpubs.com. General Editor: Michael O. Finkelstein; tel. 212-876-1715; e-mail mofinkelstein@gmail.com. Associate Editor: Sarah Strauss Himmelfarb; tel. 301-294-6233; e-mail sarah.s.himmelfarb@gmail.com. To submit a manuscript for publication contact Ms. Himmelfarb. ISSN: 1051-1741.

the risk of the insolvency legislation of the place of incorporation."[2]

THE SINGAPORE APPROACH

Justice Kannan Ramesh of the Supreme Court of Singapore, in *Pacific Andes Resources Development Ltd.*,[3] came to conclusions that were contrary to the *Rubin* decision. Judge Ramesh's decision was made in the context of addressing the English century-old "*Gibbs*" rule set forth in the 1890 decision *Antony Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux*.[4] There, Lord Esher characterized the recognition of a foreign insolvency proceeding as an issue of contract law between a single debtor and creditor. Specifically, if the contract was made in England and meant to be performed in England, Lord Esher reasoned that a breach of contract should be determined by the laws in England, not discharged by a foreign insolvency proceeding.[5]

In reviewing the *Gibbs* decision, Justice Ramesh explained that, in his view, the parties to a contractual relationship governed by the law of a jurisdiction adhering to the *Gibbs* rule should be attributed with the expectations that their claims might be discharged in proceedings in a jurisdiction where the debtor had an established connection based on residence or ties of business.[6] He held that if the applicants were "comfortable restructuring debts governed by Hong Kong law and English law under a Singapore scheme, [he] saw no reason why the Court should be slow to assume jurisdiction provided it had subject matter jurisdiction and sufficient nexus to exercise that jurisdiction."[7] Moreover, Justice Ramesh noted the "importance of comity and the need to grant recognition where it is appropriate to do so in the particular circumstances of the case."[8]

THE NEW YORK APPROACH

On October 24, 2018, Judge Glenn of the Bankruptcy Court for the Southern District of New York entered an opinion in the Chapter 15 case of Agrokor d.d. approving the enforcement of a settlement agreement entered into, and approved, in the main foreign insolvency proceeding pending in the Republic of Croatia.[9]

Agrokor is the parent company of more than 155 subsidiaries. Along with its affiliates, it comprises the "Agrokor Group," and is the largest private company by revenue in Croatia. Of the entities within the Agrokor Group, 77 are subject to the Croatian insolvency proceeding, nine of which filed for recognition in the United States before Judge Glenn under Chapter 15 of the U.S. Bankruptcy Code. An additional 80 entities within the Agrokor Group operate primarily outside of Croatia and are not subject to the Croatian insolvency proceeding.

The Agrokor Group has been conducting business since 1989, with Agrokor d.d. structured as a holding company that provides a variety of services to its subsidiaries. In late 2016, Agrokor refinanced its unsecured debt, and granted lenders several springing maturity clauses. Beginning in 2017, concerns over Agrokor's possible failure to refinance certain loans and the springing maturity clauses therein led to a liquidity issue. Agrokor sought new financing to address the issue, but ultimately was unable to avoid an insolvency proceeding.

During this period of time, the Croatian government was observing Agrokor's struggles and was concerned with the impact of a potential financial collapse of a corporate group representing roughly 15% of its GDP.

[2] *Id.* at ¶ 116.

[3] *Pacific Andes Resources Development Ltd.*, [2016] SGHC 210.

[4] *Antony Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux,* (1890) LR 25 QBF 399.

[5] *Id.* at 404.

[6] *Pacific Andes Resources Development Ltd.* at ¶ 48.

[7] *Id.* at ¶ 50.

[8] *Id.* at ¶ 79.

[9] *In re Agrokor d.d.*, No. 18-12104, 2018 Bankr. LEXIS 3267 (Bankr. S.D.N.Y. Oct. 24, 2018).

As a result, the government passed the "Act on the Extraordinary Administration Proceedings in Companies of Systemic Importance of the Republic of Croatia," or the "EA Law."[10] The EA Law provides for the reorganization and adjustment of debts for entities deemed to be systemically important to the Republic of Croatia, and was adopted by the Croatian government on April 7, 2017. Agrokor and certain of its affiliates commenced insolvency proceedings under the new statute on April 10, 2017.

Upon commencement of the insolvency cases, the Agrokor Group debts included over EUR 600 million, governed by New York law, and over EUR 1.5 billion governed by English law. In order to effectively reorganize the Agrokor Group, the Croatian Foreign Representative filed for recognition of the Croatian insolvency proceeding in seven different jurisdictions, including the United States, Slovenia, Serbia, Federation of Bosnia and Herzegovina, Montenegro, Switzerland, and the UK.

AGROKOR RECOGNITION PROCEEDINGS IN OTHER JURISDICTIONS

Prior to the decision by Judge Glenn, numerous foreign jurisdictions previously addressed whether to grant recognition to the Agrokor insolvency proceeding pending in Croatia. Many of the courts abroad, including the Slovenian Supreme Court, the Commercial Appellate Court for the Republic of Serbia, the Federation of Bosnia and Herzegovina, and the Montenegro court, denied recognition on similar grounds that the EA Law served to protect the Croatian economy potentially at the expense of other interests.

However, the Court of the Canton of Zug in Switzerland, and the High Court of England and Wales each granted recognition of the Croatian proceeding. In addition, on July 4, 2018, the European Parliament added the "Recast Insolvency Regulation (EU) 2015/848 to the European Union's Acquis Communautaire the Law on Extraordinary Administration Proceeding for Companies of Systematic Importance for the Republic of Croatia."[11] Under this regulation, the adoption of the EA Law presumably gave the Croatian proceeding automatic recognition as an insolvency proceeding, entitled to recognition across all European Union member states."[12]

With respect to recognition granted in the United Kingdom, the High Court of England and Wales found that the requirements under England's international insolvency law, the CBIR, were met by the EA Law and the Croatian proceeding. Specifically, the court found that (1) the EA Law is a law related to insolvency; (2) the Croatian insolvency proceeding is under the supervision of a court; (3) it is a collective proceeding; (4) the EA Law is for the purposes of reorganization; and (5) recognition is not manifestly contrary to English public policy.

U.S. TREATMENT OF THE CROATIAN SETTLEMENT AGREEMENT

In the Chapter 15 cases pending in the United States, Judge Glenn was asked to recognize the Croatian insolvency proceeding as a foreign main proceeding, and to recognize and enforce the restructuring plan reached in the Croatian insolvency proceeding (the "Settlement Agreement"). Although Judge Glenn previously approved the requests to recognize the Croatian insolvency proceeding as a foreign main proceeding and the Foreign Representative as the "foreign representative" on September 21, 2018, he reserved decision on the request to recognize and enforce the Settlement Agreement, "as it raised more challenging issues."[13] The October 24, 2018 decision addressed these challenging issues.

1. Comity

Judge Glenn began his consideration of whether or not to enforce the Settlement Agreement by recognizing that comity should be extended when there is proper jurisdiction and enforcement does not prejudice the rights of U.S. citizens or violate public policy. He found that the EA Law tracked closely with the Bankruptcy Code, and was itself procedurally fair, regardless of the political reasons for its enactment. On the issue of jurisdiction, he asserted that the *in rem* nature of a bankruptcy proceeding was critical in that no personal jurisdiction was required to administer the debtor's assets and determine the rights of creditors.

Having established that he could extend comity, Judge Glenn then looked to whether it would be appropriate in this case. He took into account the interests of the United States, other involved foreign states, and the efficient functioning of international law.

[10] *Id.* at 10.

[11] *In re Agrokor d.d.* at 25.

[12] *In re Agrokor d.d.* at 25-26.

[13] *In re Agrokor d.d.* at 4.

In doing so, he recognized that post-recognition relief is largely discretionary and that the case at hand involved a myriad of foreign interests. He further noted that a decision to enforce the Croatian court's order could be seen as a decision to ignore the other foreign courts that previously had denied recognition of the Croatian insolvency proceeding. Ultimately, Judge Glenn rejected the idea that he should consider other countries' decisions regarding comity in making his own. He reasoned that as his decision was only effective within the United States, any creditor who had a claim governed by foreign law was entitled to challenge any modification of his claim in a foreign venue.

2. Discretionary Relief

Having dealt with the issue of comity, Judge Glenn turned to the treatment of the Croatian proceeding under the law of the United States. Specifically, he looked at certain factors that a court should take into consideration pursuant to Section 1507(b) of the Bankruptcy Code in determining whether to provide discretionary relief, which may include recognition and enforcement of a plan reached in a foreign proceeding. In addition to Section 1521's provisions regarding "any appropriate relief," in determining whether to provide additional assistance, consistent with the principles of comity, Judge Glenn wrote that courts shall also consider whether the relief "will reasonably assure (1) just treatment of all holders of claims against or interests in the debtor's property; (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (3) prevention of preferential or fraudulent dispositions of property of the debtor; (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns."[14] Judge Glenn noted that the "principal question in determining whether to recognize and enforce the Settlement Agreement's terms under Chapter 15 ultimately boils down to a question of the appropriateness of granting comity to the foreign court approval of the Settlement Agreement."[15] The factors themselves do not differ substantially from the considerations that must be taken into account when deciding whether to extend comity. As such, Judge Glenn analyzed the Settlement Agreement itself to decide whether or not to extend comity and enforce it.

Judge Glenn began his analysis by identifying a litany of factors that past courts have used when recognizing foreign plans and denying foreign plan recognition. He first identified that the EA Law, in both procedure and substance, complies with generally recognized principles of insolvency law. He further noted that distributions to creditors under the Settlement Agreement essentially mirror the waterfall distributions that would take place under the U.S. Bankruptcy Code. In addition, he acknowledged that over two-thirds of non-insider creditors voted to approve the Settlement Agreement. He concluded that the Settlement Agreement was obtained through a procedurally fair process and moved on to the question of due process.

3. Due Process

Judge Glenn again looked to past Second Circuit cases in order to determine whether the standards for due process were met in the Croatian proceeding. He found that creditors had participated in the drafting and approval of the Settlement Agreement, and that throughout the proceeding the Foreign Representative had acted as a fiduciary. He further found that the Croatian court had overseen the entire process. Because several objections had been filed against the Settlement Agreement after confirmation, and the Agrokor Group had filed a response to those objections with the Croatian court, creditors had the opportunity of further recourse even after the Settlement Agreement was confirmed. Additionally, Judge Glenn found that notice of the proceeding was posted on the Croatian court's website, creditors' meetings were held and attended, and that centralized distribution and a stay were provided. Taking all these factors into account, Judge Glenn held that standards of due process were met in the Croatian proceeding.

Having found that the Settlement Agreement was obtained through a procedurally fair process that met the required due process standards, Judge Glenn recognized two more significant facts. The first was that no objections to recognition of the Settlement Agreement were filed in the Chapter 15 cases. The second was that the creditors in this case will be better off than they would be in a liquidation scenario. Based on the various factors and underlying process of the Croatian proceeding, he affirmed that "the essential contours of a foreign proceeding that should be granted comity in the U.S. are present," and ordered enforcement of the Settlement Agreement within the United States.

[14] *In re Agrokor d.d.* at 41 (*citing In re Atlas Shipping A/S*, 404 B.R. 726, 740 (Bankr. S.D.N.Y. 2009)).

[15] *In re Agrokor d.d.* at 42.

4. Reflections on the Gibbs *Rule*

Judge Glenn was highly critical of the *Gibbs* rule, characterizing the English treatment of recognition as a contractual issue as bare territorialism. He went on to assert that the *Gibbs* rule cuts against the modified universalism espoused in the UNCITRAL Model Law on Cross-Border Insolvency, which England adopted in large part as their cross-border statute, the CBIR. He went on to cite case law and scholarly criticism of the *Gibbs* rule, including Justice Ramesh's views in the *Pacific Andes* decision. The scholarly articles reviewed by Judge Glenn maintained that insolvency proceedings, by their very nature, alter contractual rights. Thus, to apply a contractual analysis to determine recognition was nonsensical.

TAKE-AWAYS FROM THE WORLD'S FINANCIAL CENTERS

Courts continue to grapple with whether to enforce a foreign judgment or settlement agreement pursuant to the principles of comity. Outside the United States, multiple courts have rejected enforcement of judgments due to the political reasons behind the enactment of the underlying insolvency law, instead of focusing on how such law applies to creditors and due process concerns. When a foreign entity on the cusp of initiating insolvency proceedings is being counseled, it should be advised of the risk that any potential judgments, orders, or settlement agreements obtained in its home jurisdiction may not be enforced abroad. ■