Ian Fletcher and the Internationalist Principle

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Introduction

I remember so well my first meeting with that great scholar and teacher Ian Fletcher. I had been astounded to come upon Cross-Border Insolvency: Comparative Dimensions (The Aberystwyth Papers). At a time when international and comparative insolvency was in its infancy, to come upon so sophisticated an editor and author was remarkable. As soon as I could, I hied myself to the very tip of Wales to meet him. I have learned from him and enjoyed his friendship ever since. One reason we fell in so quickly together was a common conviction that international juridical cooperation was a growing necessity and that insolvency presented perhaps the most pressing case for it. As he later put it in his outstanding treatise on international insolvency:

“...The increased awareness in recent times of the negative consequences of [the] international fragmentation of policy and approach to cross-border insolvency issues has fueled the quest for improved solutions.”

2 As part of the Internationalist Principle, he wisely advised that:

“...flexibility and pragmatism must be substituted for the dogmas so beloved of former ages.”

3 In that positive spirit of cooperation, this paper expresses a hope for a move toward reconciliation of the American and English insolvency regimes in some important respects. Despite our high and continuing respect for the British courts, many of us on the west side of the Atlantic have been distressed by In re Rubin and its progeny. While our concern has certainly included the negative

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3 Ibid., at 17.
5 See, e.g., Fibria Celulose S/A v. Pan Ocean Co. [2014] EWHC 2124 (Ch).
implications *Rubin* created for enforcement of avoiding actions and claims by the bankruptcy estate, our greatest apprehension was that the English courts might not enforce reorganization judgments from the United States against parties that chose to manipulate the corporate form to avoid a narrowly defined personal jurisdiction. That fear arose from the overruling of *Cambridge Gas* by *Rubin* and *Singularis*.

Our two nations have enjoyed such remarkable harmony in international insolvency cases, along with so many other areas of public and private life, that all of us must wish for the fullest comity between our courts. In no insolvency matter is that more essential than in the mutual recognition of reorganization judgments.

4 What is proposed here is a modest step. It is to distinguish affirmative money judgments from judgments enforcing reorganizations. The idea is supported by the approach taken by the United States Supreme Court a few years ago in a purely domestic case. The underlying notion is the expansion of “in rem” notions of jurisdiction in a universalist way that can be distinguished from money judgments like the one in *Rubin* or judgments affecting a corporation’s property as in *Cambridge Gas*.

5 Without for a moment resting content with *Rubin*, one can nonetheless appreciate that a bankruptcy judgment for money might be hard to distinguish from any other affirmative judgment. In that context, it may be easier for a court to fail to see the exceptional requirements of insolvency law, especially a court most accustomed to judge “between man and man” rather than to preside over collective proceedings involving, at a minimum, the financial fate of hundreds or thousands of creditors and other stakeholders all over the world.

6 If one were to distinguish between enforcing money judgments arising in bankruptcy and enforcing the discharge that lies at the heart of all reorganization proceedings, it would be because enforcement of a reorganization judgment represents a sort of *in rem* jurisdiction. A court that professes itself committed to modified universalism in insolvency matters (itself a recognition that bankruptcy questions are rather different form ordinary litigation) will want to ensure that a reorganization binds all who have fair notice—local or foreign, participants or not—just as a decision in insolvency binds all claimants to a res that lies within the

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7 *Singularis Holdings Ltd. v. PricewaterhouseCoopers* [2014] UKPC 36 (appeal taken from Bermuda) (“*Singularis*”).


10 Below note 22.

11 One can see an appreciation of the distinction in Lord Sumption’s judgment in *Singularis*, at paragraph 23.

12 *Rubin*, at paragraph 119; *Singularis*, at paragraphs 19, 23.
jurisdiction of the presiding court. The reason for both types of recognition lies in a mutual international acceptance of the necessity for some basis for universal jurisdiction in such matters.

7 Thanks to the UNCITRAL Model Law on Cross-Border Insolvency (“Model law”), adopted by both the United States and the United Kingdom, we have a common basis for assigning that jurisdiction to the COMI (“centre of main interests”) of the debtor. We also have a tradition of cooperation in such matters between our two countries, including a very active current American practice enforcing English schemes of arrangement in the United States.\(^\text{13}\) The discretionary relief provisions of the Model Law provide more than adequate safeguards against rogue proceedings.

### Background

8 In Rubin, the Supreme Court of the United Kingdom refused to enforce a judgment obtained in an American bankruptcy case against various parties, including Eurofinance, a company that had not appeared in the United States proceeding. The United States court had found that Eurofinance was sufficiently active in the United States to justify “long-arm” jurisdiction under United States law and entered judgment against it along with other defendants found to have participated in a large fraud on thousands of United States consumers. The United Kingdom Supreme Court found that the United States court did not have personal jurisdiction over Eurofinance within the quite narrow common law requirements for enforcement of foreign judgments.\(^\text{14}\) It refused to accept the argument that

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\(^\text{14}\) In Rubin, at paragraph 126, Lord Collins noted a traditional English rule that foreign judgments might not be held to be based on personal jurisdiction even though an English court would have asserted equivalent jurisdiction in an English case. He explained that the reason was the lack of expectation of reciprocity. Whatever that expectation might be in global terms, the record of the United States courts in enforcing English judgments is very strong. See, e.g., In re Hashim, 213 F.3d 1169 (9th Cir 2000) (reversing bankruptcy court’s disallowance of judgment creditor’s claims for attorney fees and costs awarded pursuant to judgment entered in English court); Soc’y of Lloyd’s v. Ashenden, 233 F.3d 473 (7th Cir 2000) (affirming district court’s enforcement of English judgments against American members of English insurance syndicates); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 318 F. Supp. 161 (ED Pa 1970), affirmed 453 F.2d 435 (3d Cir 1971) (enforcing English default judgment against American corporation); see also Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 894 (ND Tex 1980) (“Where, as here, the rendering forum’s system of jurisprudence has been a model for other countries in the free world, and whose judges are of unquestioned integrity independent of the political winds of the moment, the judgment rendered is entitled to a more ministerial, less technocratic, recognition decisional process.”)
judgments in international insolvency cases might be subject to a more liberal rule, especially in light of the adoption by the United Kingdom of the Model Law.\textsuperscript{15}

9 In the process, the Court also disapproved of a Privy Council decision called \textit{Cambridge Gas}. In that famous case, an American reorganization plan had purported to transfer the shares of the Chapter 11 debtor, an Isle of Man company, to the committee administering the Chapter 11 plan. The shares belonged to Cambridge Gas, a Cayman Islands company. The committee applied to the Isle of Man court for enforcement of the Chapter 11 plan and judgment. The Privy Council held that the request should be granted in light of the need for international cooperation in matters of insolvency. (I ignore here the nuances of the position because I do not pretend to be an English lawyer.)

\textbf{International Enforcement of Reorganization Plans}

10 The United States insolvency community was quite upset about \textit{Rubin}, but the concern was especially strong with regard to the overruling of \textit{Cambridge Gas}. It was a real blow to think that many fraudulent conveyance cases would have to be relitigated to be enforceable in the United Kingdom, but of far greater concern was the possibility that a United States reorganization judgment could be ignored by manipulating corporate shells that would carefully avoid contact with the United States debtor while their sister companies and principals had a full and fair opportunity to object to the United States proceedings.\textsuperscript{16}

11 If that were permitted, the judgment arising from approval of a reorganization would be of dramatically reduced value. For example, an off-shore shell that had taken assignment of the debt could sue the reorganized company in England for the full amount originally owed while the rest of the creditors had settled for less. In turn, that prospect would make it far less likely the other creditors would agree to a plan in the first place—the classic holdout problem that both United Kingdom and United States reorganization (or rescue) provisions are designed to overcome. Given the great commercial importance of the United Kingdom, especially to United States-based companies, American reorganization efforts could be crippled by a United Kingdom refusal to give full effect to a United States reorganization judgment.

\textsuperscript{15} See Article 25, Cross-Border Insolvency Regulations 2006 (SI 2006/1030) ("CBIR"), stating that a United Kingdom court may cooperate with foreign courts. See \textit{Rubin}, at paragraphs 133–144. The Chapter 11 case had been recognized in the United Kingdom under these provisions (at paragraphs 66, 134).

\textsuperscript{16} \textit{Cambridge Gas}, at paragraphs 13–14; see also paragraph 8 discussing such participation by the Cambridge Gas and Navigator principals.
12 The point is nicely illustrated by the Canadian–American case *In re Metcalfe*. The United States court there was requested to enforce what amounted to a Canadian reorganization discharge. The Canadian case had resolved the Great Recession’s commercial paper paralysis in Canada. The Canadian debtors in *Metcalfe* had been central parties to settlement that included parties who were not debtors in the Canadian proceedings. They sought an American enforcement order. There are rather strict rules in the United States against releasing third parties through a reorganization plan, with only limited exceptions. Although the releases in *Metcalfe* would probably not have been enforceable if entered in a United States proceeding, under Chapter 15 (the United States version of the Model Law) and general principles of comity, the court granted enforcement of the Canadian orders. Without that relief, the Canadian releases at the heart of the arrangement would have been of little value to the multinational parties involved and serious harm would likely have resulted to the Canadian economy.

13 The good news, as we say in the United States, is that *Rubin* was not a case in which enforcement of a reorganization plan was sought nor was it a case where property in the form of corporate shares was sought to be transferred (as in *Cambridge*), so one may hope that the United Kingdom Supreme Court would be open to innovation in considering international insolvency cooperation with regard to enforcement of a reorganization judgment.

14 It is essential to reorganization to bind all creditors to a reorganization plan and to reduce all of the debtor’s liabilities going forward to those debts the plan promises to pay. In that way, all of the creditors and other stakeholders in the debtor company can be content that the debtor’s financial obligations at a moment in time are knowable and fixed. Not only does that encourage cooperation to arrive at an agreement, but it enables each creditor to price its investment with more confidence. Equally important, the discharge deals with the holdout problem. There is no point to trying to dodge an agreement reached by the great majority of fellow creditors because the holdout’s debt will be effectively unenforceable after approval of the plan. Better to come to the table and be part of the arrangement.

15 In the case of a true multinational, the comfort of the reorganization judgment is of little value unless it is extended throughout the relevant market. In a globalized world, that means in every country in which the reorganized debtor has significant

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17 *In re Metcalfe & Mansfield Alternative Investments*, 421 BR 685 (Bankr SDNY 2010).
18 *Singularis*, at paragraphs 23, 112.
19 The key cases since *Cambridge Gas* have involved liquidations, a point that by itself might distinguish them from a judgment approving a reorganization.
20 In the United States, a majority in number of creditors and two-thirds in amount, 11 U.S.C. § 1126(c) (2012).
assets or operations. For most multinational Chapter 11 debtors, finding that comfort in the United Kingdom is essential.

16 It seems that a key to the Rubin decision was the difficulty of distinguishing between a money judgment rendered in an insolvency case and judgments in other sorts of cases. Unless there was something about an insolvency judgment that was quite distinct, why wouldn’t the traditional common law rules about personal jurisdiction apply?

17 It was argued in Rubin that cross-border insolvency cases were no longer like other cases in the United Kingdom since the adoption of the Model Law on Cross-Border Insolvency, a law also adopted in the United States. The Model Law was designed to encourage and enable cooperation in insolvency matters internationally, suggesting a special emphasis on mutual enforcement of actions taken or requested in insolvency matters. The Court rejected this argument on the basis that judgment enforcement is an especially thorny problem. Absent a specific mention, the Court reasoned, such enforcement could not have been intended to be included in the United Kingdom’s adoption of the Model Law.

18 In that context, it seems easy to see the difference between enforcement of judgments of the sort found in ordinary civil litigation and the enforcement of a reorganization judgment that binds all creditors. Judgments about money or property operate in much the same way in insolvency cases as in other civil litigation, especially in the sense that they act affirmatively upon the defendants. Enforcement of a reorganization plan is fundamentally defensive. More important is that fact that avoidance actions or claims litigation can be relitigated in foreign fora, undesirable as that may be. It is not feasible to redo a reorganization in every country where an asset might come to rest and an undischarged creditor might seize it under local law. In some cases it may be possible to have parallel reorganizations in a few key countries, but most of the time such an approach will be too expensive and cumbersome to succeed, even where professionals act in a disinterested and cooperative way.

19 While it is certainly not up to me to say how British laws should be interpreted, it seems plausible to suggest that the policy behind the CBIR could be understood to support the recognition of a foreign reorganization decree, especially in the case

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22 The Supreme Court’s position is a bit difficult to follow on this point, given that elsewhere Lord Collins says that the distinction is an easy one. He appears to mean that it can be made easily, but is not relevant in the context of in personam jurisdiction. That is, one can easily distinguish insolvency judgments, but should not.


24 Rubin, at paragraphs 142-143.
of a “main” proceeding that has taken place in the COMI of the debtor company. The definition of a foreign proceeding in the CBIR includes reorganization as well as liquidation. Thus reorganizations are at the heart of the proceedings for which cooperation and coordination are provided by Articles 25–27 of the CBIR. Because many foreign reorganization proceedings cannot be effective without international recognition, it seems to me to follow that recognition of the discharge must be within the intendment of the legislation following recognition under the CBIR. Such a result would recognize the practical commercial necessities of rescue proceedings.

20 Enforcement of a reorganization plan has a similarity to discharge of an individual bankruptcy, but involves many fewer sensitive issues of policy. Individual bankruptcies implicate many areas of the law, such as divorce and child support, that are quite different from the dry realities of commercial life. I am aware that the traditional common law rule permits only a narrow recognition of foreign discharges of natural persons, but I hope that enforcement of a reorganization discharge would be seen as a form of relief much easier to grant. The enforcement of reorganization judgments across borders would reflect the universalist necessity in commercial cases, just as the notion of in rem jurisdiction has done for centuries as to title to property.

An American Case That Might Be Useful

21 An American case that recognizes the in rem nature of the discharge is Tennessee Student Assistance Corporation v. Hood. A bit of background is necessary to understand its relevance. First, the United States Supreme Court in recent years has expanded and strengthened the reach of the Eleventh Amendment to the Constitution which declares the immunity of American states from suit in federal courts. The prohibition is jurisdictional. In Hood, the question arose whether the prohibition extended to an action to permit discharge of a student loan made or guaranteed by a state.

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25 As I understand the judgments in Singularis, at paragraph 28, the Court found that common law powers could not be deduced from statutory policy but also were not blocked by the existence of a related statute.
26 Article 2(i), CBIR.
27 Professor Fletcher himself has pointed out that the English courts have expected a much broader and more universal treatment of an English discharge by foreign courts in the case of a natural person. Fletcher, above note 2, at 108–09.
30 Ibid., at § 3524.1.
22 Unlike other unsecured credit, student loans cannot be discharged in bankruptcy without a special finding that repayment would be an “undue hardship” and that finding is often quite difficult to obtain from the bankruptcy courts. In addition, the burden is on the debtor to initiate a sort of mini-lawsuit within the bankruptcy to establish the hardship, with the lender or guarantor as defendant. Ms. Hood opened such a proceeding with the state of Tennessee as the defendant. Tennessee demanded dismissal on the ground that it was immune from suit under the Eleventh Amendment and thus the bankruptcy court had no jurisdiction. The Supreme Court held that the bankruptcy discharge is an exception to general immunity under the amendment and permitted the action.

23 At the centre of the Court’s holding was the idea that the granting of a discharge is essentially an in rem proceeding that binds the whole world:31

“A bankruptcy court is able to provide the debtor a fresh start in this manner, despite the lack of participation of all of his creditors, because the court’s jurisdiction is premised on the debtor and his estate, and not on the creditors.”32

Conclusion

24 A particular moment enshrines for me the spirit of international cooperation that has united me in aspiration with Professor Fletcher. Some years ago we conducted what must have been among the earliest classes ever taught in real time across the Atlantic. We had concocted a multinational insolvency problem with substantial contacts with both the United Kingdom and the United States. Each of us had prepared a team of students to serve as “advisors” to the English and American clients concerned in the case. With the dynamic assistance of the late Ron Harmer, we worked through the problem with the student advisors and their classmates who spoke directly to each other over the video hook-up. As those young lawyers-to-be sought advantage for their clients in a system of cooperative problem solving, I believe we each saw the future. It was one more component of the privilege of knowing this remarkable man.

31 Hood, at 447. The Court stated that in rem jurisdiction does not always override sovereign immunity, but that it permits the state to be a defendant in connection with the discharge (footnote 5).
32 Idem. Even the two-justice dissent accepted that the grant of a discharge is in the nature of an in rem proceeding (at 460, Thomas J dissenting).