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TREATMENT OF FOREIGN AVOIDANCE JUDGMENTS: *RUBIN* AND MODIFIED UNIVERSALITY

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RUBIN AND MODIFIED UNIVERSALITY

Chapter 15 and UNCITRAL are based on a balancing of pure territoriality and pure universality approaches to multi-jurisdictional bankruptcy cases that is often referred to as modified universality. In a modified universality system, a main proceeding governs the distribution of the debtor's property to all creditors, with other jurisdictions recognizing the main proceeding and cooperating in the marshaling of assets located outside the jurisdiction of the main proceeding. The Rubin decision by the UK Supreme Court has been disappointing to the advocates of universality, and raises substantial obstacles to the prosecution of avoidance actions involving transfers beyond the jurisdiction of the main jurisdiction.

I. Modified Universality

A. Bankruptcy Code chapter 15

1. Based on the United Nations Commission on International Trade Law Model Law ("UNCITRAL").
2. A foreign representative appointed in a foreign proceeding may apply to a U.S. Bankruptcy Court for recognition of the foreign proceeding. Bankruptcy Code § 1515.
3. After notice and a hearing, the Bankruptcy Court will recognize the foreign proceeding as a "foreign main proceeding" if the debtor has the "center of its main interests" (often referred to as its "COMI") in the country in which the foreign proceeding is pending. Bankruptcy Code § 1517.
4. Automatically upon recognition as a foreign main proceeding, specified provisions intended to preserve the debtor's property within the U.S. become applicable. Bankruptcy Code § 1520(a). The automatically applicable provisions are Bankruptcy Code §§ 361 (adequate protection), 362 (automatic stay), 363 (use, sale or lease of property), 549 (postpetition transactions) and 552 (postpetition effect of security interest.
5. Additionally, following recognition the Bankruptcy Court may, pursuant to Bankruptcy Code § 1521(a), at the request of the foreign representative, grant any of six enumerated classes of possible appropriate relief, followed by this catch-all clause:

"(7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)."

6. The sections listed in § 1521(a)(7) (the "Bankruptcy Code Avoidance Provisions") quoted above are the principal avoidance provisions of the Bankruptcy Code. Thus, the foreign representative is statutorily blocked from prosecuting a U.S. law-based avoidance action in the context of a chapter 15 case. This outline will address below whether a foreign representative can prosecute a foreign law-based avoidance action in the context of a chapter 15 case.
7. Note, however, that upon recognition, the foreign representative may file a chapter 7 or chapter 11 petition and use that as a platform to pursue U.S.

law-based avoidance actions, Bankruptcy Code § 1511(a). Pursuant to Bankruptcy Code § 1523(a), the foreign representative has standing to initiate actions under the Bankruptcy Code Avoidance Provisions, as well as Bankruptcy Code § 553. If the foreign proceeding is not a main proceeding, the foreign representative obtains standing only if the court is satisfied that the subject assets should be administered in such foreign proceeding. Bankruptcy Code § 1523(b). While Bankruptcy Code § 1523(a) gives the foreign representative standing to bring an avoidance action pursuant to the Bankruptcy Code Avoidance Provisions, it does not resolve the choice of laws issues as to whether the U.S. avoidance provisions or some foreign avoidance provisions (if any) apply to the subject transaction. Those choice of law issues are beyond the scope of this outline, and can be quite significant in view of the relative scope and strength of the U.S. provisions.

B. Pure universality and territoriality

1. Pure territoriality approach

a) Separate proceedings in each country in which the debtor has assets.

b) Each country would consider its proceeding to be the main proceeding.

c) Best designed to give effect to the expectations of local creditors that local law and policies would be applied to assets and creditors in their own jurisdiction.

d) Poorly designed for efficient, cooperative and proportionate realization, collection and distribution on and of a multi-national debtor's assets. Also vulnerable to particularly inequitable results where debts and assets are in different jurisdictions.

2. Pure universalism approach

a) A single collective proceeding with jurisdiction over all of the debtor's assets and creditors.

b) All of the assets would be brought to the debtor's home country for equitable allocation among creditors.

c) Best designed to preserve going concern value and achieve an efficient and proportionate realization, collection and distribution on and of the debtor's assets.

d) Poorly designed to protect the local interests of creditors in jurisdictions outside the home jurisdiction in which the debtor's assets are located.

C. Balancing universality and territoriality - modified universality

1. Epitomized by the chapter 15 approach described in I.A. above.
2. Blends universality and territoriality to obtain most of the collective ben-

efits of universality while affording respect to non-home jurisdictions and the expectations of non-home jurisdiction creditors. *See* Barteld, *Cross-Broder Bankruptcy and the Cooperative Solution,* BYU Intl L & Mgmt Rev. 27 (Winter 2012).

3. The treatment of avoidance actions against transferees outside the COMI jurisdiction presents a clear conflict between the collective interests of a universalist system and the protection of local interests under a territorial approach, and remains the subject of dispute in jurisdictions that have adopted the UNCITRAL modified universality approach.

II. The *Rubin* Case[1]

A. The decision

1. U.K. consolidated appeals of *Rubin v Eurofinance SA*[2] and *New Cap Reinsurance Corp Ltd. v Grant*[3], plus submissions of parties to a factually similar matters arising from the *Madoff* case.
2. In each case, the key issue was whether the U.K. courts (which have adopted UNCITRAL) were bound to enforce default judgments in avoidance actions rendered in foreign main proceedings (U.S. in the case of *Rubin* and *Madoff,* and Australia in the case of *New Cap*). With some variation in circumstances between the appeals, the transferees in the appeals were in the U.K. and were found in the majority decision not to have appeared or defended themselves in the proceedings in which the judgments were entered.
3. The majority decision (joined in by 3 of the 5 judges) by Lord Collins makes the following points, among others:[4]

a) **The U.K. common law rule is set forth in *Dicey, Morris & Collins, Conflict of Laws (14th edition, 2006),* to the effect that a court outside the U.K. has jurisdiction to give an *in personam* judgment capable of enforcement by a U.K. court as against the person against whom it was given if the person (i) was present in the foreign country, (ii) was the claimant or counterclaimed in the relevant proceedings, (iii) submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings, or (iv) the person agreed to submit to the jurisdiction of the foreign court with respect to the relevant subject matters. The U.K. Supreme Court refers to this as the "*Dicey* Rule."**

b) **The court noted that English common law generally favors universalism and fairness of distribution among creditors in multinational insolvency proceedings, and that there are several ways in which U.K. courts offer cooperation to foreign insolvency pro-**

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

2 [2010] EWCA Civ 895, [2011] Ch 133.

3 [2011] EWCA Civ 971, [2012] 2 WLR 1095

4 The author of this outline is not admitted to practice law in the U.K., and is qualified to describe the *Rubin* case solely by his admission to practice law in the U.S. and his ability to read and write English. Accordingly, the usual caveats as to limits on admission apply here with particular force.

ceedings. An interesting quote:

"Fifth, there has been a trend, but only a trend, to what is called universalism, that is the 'administration of multinational insolvencies by a leading court applying a single bankruptcy law": Westbrook, 'A Global Solution to Multinational Default' (2000) 98 Mich L Rev 2276, 2277. What has emerged is called by specialists 'modified universalism.'" *Rubin* **at ¶ 16.**

c) **In the *Rubin* decision being appealed, the Court of Appeals accepted that the judgment was *in personam* but decided that the *Dicey* Rule did not apply to foreign judgments in avoidance proceedings because they are central to the collective enforcement regime in insolvency proceedings and thus governed by special rules.**[5]

d) **While recognizing the policies underlying avoidance actions and the ability to distinguish such actions from other *in personam* proceedings, the Supreme Court held that there were no special rules for insolvency proceedings, the *Dicey* Rule applied and, therefore, refused to enforce the default judgment in *Rubin* (the *New Cap* judgment was held enforceable on the basis that the respondent had submitted to the jurisdiction of the Australian court). A key quote:**

> "129. A change in the settled law of the recognition and enforcement of judgments, and in particular the formulation of a rule for the identification of those courts which are to be regarded as courts of competent jurisdiction (such as the country where the insolvent entity has its centre of interests and the country with which the judgment debtor has a sufficient or substantial connection), has all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation." ***
> 130. Furthermore, the introduction of judge-made law extending the recognition and enforcement of foreign judgment would be only to the detriment of United Kingdom businesses without any corresponding benefit. I accept the appellants' position that if recognition and enforcement were simply left to the discretion of the court, based on a factor like "sufficient connection," a person in England who might have connections with a foreign territory which were only arguably "sufficient" would have to actively defend foreign

5 The Supreme Court noted that Canada and Ireland had moved away from the *Dicey* Rule in favor of an inquiry to determine whether the person against whom the judgment was rendered had a "real and substantial connection" with the jurisdiction in which the judgment was rendered. *Rubin* at ¶¶ 109 and 111. The respondents in *Rubin* did not ask the Supreme Court to abandon the *Dicey* Rule entirely, but merely to confirm that a special rule applied to foreign insolvency orders. *Id.* at ¶ 113.

proceedings which could result in an in personam judgment against him, only because the proceedings are incidental to bankruptcy proceedings in the courts of that territory. Although I say nothing about the facts of the *Madoff* case, it might suggest that foreigners who have bona fide dealings with the United States might have to face the dilemma of the expense of defending enormous claims in the United States or not defending them and being at risk of having a default judgment enforced abroad." *Rubin* at ¶¶ 129 and 130.[6]

e) **The majority decision went on to rule that, notwithstanding recognition of the foreign proceedings in which the default judgments were rendered, the international assistance provisions of the UNCITRAL model law implemented by the Cross-Border Insolvency Regulations 2006 does not provide for the enforcement of foreign avoidance judgments.**

f) **The decision noted that the foreign representatives might have been able to achieve their aims by prosecuting litigation in the U.K., and gave some procedural examples. *Rubin* at ¶131. The decision noted that "there might be ... issues as to the governing law." *Id.* As noted above, the choice of law issues are beyond the scope of this outline.**

B. Impact on the *Cambridge Gas* Precedent

1. The majority decision discusses at length the opinion of Lord Hoffman, speaking for the Privy Council, in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508, which was a principal decision relied upon by the Court of Appeal in *Rubin* and *New Cap.* Navigator Holdings plc ("Navigator") was an Isle of Man company that, through other Isle of Man companies, owned five ships. Navigator defaulted on its bonds, and filed a chapter 11 petition in the Southern District of New York. 70% of Navigator was owned by Cambridge Gas Transportation Corporation ("Cambridge Gas"), a Cayman Islands company, which was owned by Vela Energy Holdings Ltd ("Vela"), a Bahamian company, which in turn was owned by individual European investors. The investors proposed a chapter 11 plan under which the ships would purportedly be auctioned, but which was designed to cause the ships to be sold to the investors. Instead, the bondholders proposed a plan that would transfer the equity of Navigator to the bondholders' representatives, and extinguish the interests of the investors. The Bankruptcy Court confirmed the bondholders' plan.
2. Under Isle of Man law, the shares of Navigator equity were deemed to be situated in the Isle of Man. Therefore, Lord Hoffman noted that the Bankruptcy Court's order could not affect title to the shares if it were a

6 The following observation by the U.K. Supreme Court was also quite interesting: "There is a reason for the limited scope of the *Dicey* Rule and that is that there is no expectation of reciprocity on the part of foreign countries." *Rubin* at ¶ 128.

judgment *in rem*. In accordance with the provisions of the confirmed plan, the Bankruptcy Judge sent a letter to the Manx court requesting its assistance in effectuating the bondholders' plan and the confirmation order. The Manx court held that Cambridge Gas (the Cayman Islands company that was the principal owner of the shares) had *not* submitted to the jurisdiction of the U.S. Bankruptcy Court, though Lord Hoffman noted that this bore little relation to economic reality due to the heavy involvement of Cambridge Gas's owners and the entities owned directly and indirectly by Cambridge Gas. Nonetheless, he concluded that the Bankruptcy Court did not have *in personam* jurisdiction over Cambridge Gas.

3. If the U.S. Bankruptcy Court had *in rem* jurisdiction over the Navigator shares or *in personam* jurisdiction over Cambridge Gas, the confirmation order would have been treated by the Manx court as a source of the right sought to be enforced by the creditors' committee. Notwithstanding that it found neither *in rem* nor *in personam* jurisdiction, the Privy Council held that the confirmed plan could be enforced in the Isle of Man to transfer the shares to the creditors' committee on the basis that the chapter 11 case was a collective proceeding to enforce rights and not to establish them. *Cambridge Gas* at ¶¶ 13-15.
4. The Privy Council also held, among other things, that the principle of universality underlay the common law principles of judicial assistance in international insolvency, those principles were sufficient to confer jurisdiction on the Manx court to assist by doing whatever it could have done in a domestic insolvency case, and the same result could have been reached in a scheme under Manx law. *Cambridge Gas* at ¶¶ 21 and 22.
5. Lord Hoffman also made a subsequent speech in the House of Lords in *In re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852, in which he characterized universality as a principle of English private law favoring worldwide recognition of insolvency proceedings.
6. The majority decision in *Rubin* describes Lord Hoffman's opinion in *Cambridge Gas* as "brilliantly expressed" and his speech in *HIH* as "equally brilliant." *Rubin* at ¶92. While noting that *Cambridge Gas* should have been viewed as in *in rem* order, in contrast to the *in personam* avoidance orders in the *Rubin* and *New Cap* appeals, the court did not distinguish the cases on that ground. Instead, after questioning (without resolving) the bases on which the *Cambridge Gas* court considered, or might have considered, whether the U.S court and proceeding had sufficient contacts with Navigator and Cambridge Gas on which to basis jurisdiction for the actions it took, the *Rubin* majority concluded:

"128. In my judgment, the dicta in *Cambridge Gas* and *HIH* do not justify the result which the Court of Appeal reached. This would not be an incremental development of existing principles, but a radical departure from substantially settled law...."

One could interpret the foregoing as meaning that the Court of Appeal read too much into the *Cambridge Gas* and *HIH* opinions. But, after discussing avoidance litigation alternatives for the foreign representatives in the U.K. courts, the *Rubin* majority then lowered the boom on *Cambridge Gas*:

"132. It follows that, in my judgment, *Cambridge Gas* was wrongly decided. The Privy Council accepted (in view of the conclusion that there had been no submission to the jurisdiction of the court in New York) that Cambridge Gas was not subject to the personal jurisdiction of the US Bankruptcy Court. The property in question, namely the shares in Navigator, was situate in the Isle of Man, and therefore also not subject to the in rem jurisdiction of the US Bankruptcy Court. There was therefore no basis for the recognition of the order of the US Bankruptcy Court in the Isle of Man." *Rubin* at ¶132.

7. Note that Lord Mance in his concurring decision, though coming to the same conclusion as Lord Collins' majority decision, would have distinguished *Cambridge Gas* rather than concluding it was wrongly decided. Lord Clarke in his dissenting opinion notes that, in his view, *Cambridge Gas* was both distinguishable and correctly decided.

8. It is difficult to see how the avoidance litigation alternatives identified by the *Rubin* court would have been helpful to the Navigator creditors' committee trying to effectuate the hard-won victory that it achieved over Navigator's previous owners. After *Rubin,* what viable course would be available to the Navigator creditors' committee?

III. Back in the U.S.

A. Treatment of foreign avoidance judgments in the U.S.

1. The author has not discovered any U.S. case considering the enforcement of a foreign avoidance default judgment in a U.S. court.

a) This may be explained in part by the fact that U.S. avoidance laws are generally more sweeping than foreign avoidance laws.

b) Because of the relative strength of the U.S. laws, as well as the case law trend in the U.S. in favor of permitting foreign representatives to bring avoidance actions under foreign law in the context of chapter 15 cases (*see* B below), the enforcement of default judgments in foreign courts is more likely to be a "hot issue" where a U.S. court is the source of the default judgment rather than the court in which the judgment is sought to be enforced.

2. In addition to the cases discussed in B below, two cases in the Southern District of New York contain interesting discussions of the enforcement of foreign orders that arguably provided relief that would not have been available directly from a U.S. court.

a) ***In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010)(Glenn, B.J.). A foreign representative of debtors in a proceeding under the Canadian Creditors Arrangement Act ("CCAA") moved for recognition of the CCAA proceeding and enforcement against U.S. creditors of a release of non-debtors approved by the Canadian courts as part of a consensual CCAA restructuring plan. Judge Glenn noted that the releases might not be permissible in the context of a chapter 11 plan, but enforced the Canadian court orders under principles of comity and cooperation.***

b) ***In re Ephedra Products Liability Litigation*, 349 B.R. 333 (S.D.N.Y. 2006)(Rakoff, D.J.). A foreign representative of a debtor in CCAA proceeding moved in a U.S. multi-district litigation relating to personal injury cases arising from the use of the debtor's product moved for**

recognition of the CCAA proceeding (prior to the cited decision) and then for enforcement of a negotiated "Claims Resolution Procedure" that had been approved by the Canadian courts. Even though the court noted that the Claims Resolution Procedure "effectively denies the objecting plaintiffs the right to jury trial that they would have retained if their cases went to trial in the United States," Id. at 335, Judge Rakoff enforced the order in accordance with chapter 15 and principles of comity.

B. Avoidance actions by foreign representatives in the U.S. under chapter 15

1. The portion of Bankruptcy Code § 1521(a)(7) expressly excluding actions under the Bankruptcy Code Avoidance Provisions from the catch-all authorization of that provision is a non-uniform adoption of the UNCITRAL model law. This apparently reflects concerns that foreign representatives might commence chapter 15 proceedings in the U.S. to take advantage of powerful U.S. law avoidance provisions.
2. Section 1521(a)(7) might be interpreted to imply that the foreign representatives are not authorized to bring avoidance actions under chapter 15. Such an interpretation might transform the process from modified universality to something closer to territoriality if the foreign representative was thus forced to file a chapter 7 or 11 petition to prosecute avoidance actions to recover from transferees located in the U.S, although it is possible that the result of the chapter 7 or chapter 11 process might be to transfer the proceeds for distribution in the foreign proceeding.
3. Case law to date interpreting Bankruptcy Code § 1521(a)(7) has permitted the foreign representative to prosecute avoidance actions under foreign law in the context of a chapter 15 proceeding, without commencing a chapter 7 or 11 case. *See In re Condor Ins. Ltd.,* 601 F.3d 319 (5th Cir. 2010), *discussed in In re Fairfield Sentry Ltd. Litigation*, 458 BR. 665, 681 (S.D.N.Y. 2011). *See also* the criticism of the *Condor* District Court decision that was reversed by the 5th Circuit in *In re Atlas Shipping A/S*, 404 B.R. 726, 743 (Bankr. S.D.N.Y. 2009).
4. This is a developing area, and the *Condor* and *Fairfield Sentry* decisions have been the subject of some criticism. *See* Trionfetti, *The Use of Foreign Avoiding Powers under Section 1521(a)(7) in Chapter 15 Cases*, 21 Am. Bankr. Inst. L. Rev. 279 (2013).