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Rubin and New Cap: Foreign Judgments and Insolvency

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RUBIN AND *NEW CAP*: FOREIGN JUDGMENTS AND INSOLVENCY

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The decisions of the UK Supreme Court in 2012 in *Rubin* and *New Cap*, and of the Singapore High Court in 2013 in *Beluga Chartering*, raise in acute form the question of how far the common law of international insolvency and of the recognition of foreign judgments can go when a local court is asked by a court in another country to render particular forms of assistance in relation to an insolvency administration which is taking place there. It asks how the instinct to give assistance for the ultimate benefit of creditors needs to be balanced by the caution which a local court naturally shows when asked to take a foreign court's word that the facts and matters are as it has determined them to be. It also prompts the question whether the common law of England, now overlaid with substantial legislative provision for assisting foreign insolvencies, might have departed from the common law of countries, like Singapore, where the intervention of the legislature has been rather less. The lecture sought to encourage a broader degree of participation in the debate; this paper has a similar aim.

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1. What happened in *Rubin* and in *New Cap*?

Although the topic for this inaugural Jones Day lecture was prompted by judgment in two appeals to the United Kingdom Supreme Court which was handed down in

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* This is a modified text of a lecture given on 10th April 2013. The thoughtfulness of those who took time and trouble to speak to or correspond with me after it was delivered has allowed me the opportunity to make a number of changes which aim to make the argument clearer and easier to follow. I am extremely grateful to all these kind correspondents. Anyone who reads the Law Reports version of the judgment in *Rubin* will see that I was part of the team which made written submissions to the court on behalf a party given leave to intervene in writing. Needless to say, the views expressed herein in my professorial capacity seek to put forward a balanced or questioning view of the way in which the law has developed so far and may be expected to develop in the future. As will be seen, there are several approaches a court, or a legislature, may take, and they all have serious and credible things to be said in their support, and credible and serious things to be said against them.

the second half of 2012, there are in fact four, rather than just two, pieces which make up today's jigsaw. I should start by identifying them. The first two come, as I have just indicated, from a judgment of the Supreme Court of the United Kingdom in two consolidated appeals 2012. The third is a Privy Council appeal from the courts of the Isle of Man; and the fourth piece, rather fortunately for me, was made only last month, in Singapore.

Piece number one was *Rubin v Eurofinance SA* [2012] UKSC 46, [2012] 3 WLR 1019 (noted by me at [2013] LMCLQ 26). In that case, the English courts had to deal with two foreign judgments from courts exercising insolvency jurisdiction. In *Rubin*, an entity – the nature of it is not crucial – was in Chapter 11 administration in the United States. There does not seem to be much doubt that its business was principally carried on in the United States, and that this business was carried on to the detriment of innocent consumers: the US authorities certainly thought so. Substantial sums of money were removed, as it was alleged, into the pockets of its founders, who were in London. In the course of the administration the US court was asked to order these individuals to repay the sums by which they had unlawfully preferred to pay to themselves, but they were in London and they took no part in the proceedings. The US court gave judgments for payment against them in default of appearance; and then issued a letter of request to the United Kingdom (English) authorities, asking for cross-border cooperation in the particular form of enforcing the US judgment against the defendants. The High Court refused to; the Court of Appeal, in a spirited judgment, [2010] EWCA Civ 895, [2011] Ch 133 held that the reasons to enforce the judgment were more compelling than the arguments which opposed this. Some people became very excited, especially at the insolvency bar.

Piece number two was *New Cap Reinsurance Corp (in liq) v Grant*, heard together with *Rubin* and disposed of by the same judgment. A Lloyd's syndicate had received payments from an Australian insurer just before the insurer went into insolvent administration. In proceedings before the courts of NSW the liquidator sought the return of the payments on the basis that the insurer had been insolvent when the payments were made. The syndicate in London disregarded the

proceedings, though it did take part in a small number of creditors' meetings in NSW in respect of a number of unsettled claims which it had against the insolvent insurer. The NSW court duly found the payments to be unlawfully preferential and ordered their repayment. It requested the assistance of the English courts in enforcing them. At first instance and on appeal it was held that the judgment in *Rubin* tied the hands of the court and meant that the assistance should be granted as sought.

The third piece in the jigsaw was the unanimous judgment of the Privy Council on appeal from the High Court of the Isle of Man – a common law jurisdiction to which recent English statute law on insolvency does not extend – in *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508. This judgment served as the basis for the decision in *Rubin* in the Court of Appeal. Though there was a complex of direct and indirect holdings, it boils down to this. A Manx company, Navigator, went into Chapter 11 administration in the US. 70% of its shares were held by Cambridge Gas. The US court decided that C's shareholding should be taken away and the share capital reissued to the committee of unsecured creditors. The US court issued a letter of request to the Manx court. Though Cambridge Gas had not been party to the proceedings in the US, and though the shares in Navigator were situated in the Isle of Man, and even though the traditional rules on the effect of foreign judgments would have meant that C was unaffected by the US judgment, the Privy Council held that Manx common law allowed and required the Manx courts to accede to the US request. Lord Hoffmann regarded displayed little sympathy towards the attempt of the investors to set up corporate structures, involving some of the usual offshore and tax havens, which meant that they could not be touched. He was barely any more sympathetic to their attempts to rely on the traditional rules of private international law of foreign judgments to draw the conclusion that the US judgment could have no effect in the Isle of Man. In insolvency it is all different; the point of the process is to arrive at a collective settlement of claims and liabilities; and as the Manx court could have made such an order itself, there was no good reason not to order the relief requested by the US court. This is probably where the slogan that 'insolvency is different' has its birth.

And we should probably note that in *Re HIH Casualty & General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852, Lord Hoffmann sought to build on the foundation he had laid in *Cambridge Gas*, in using it as part of the reason why the English court should cooperate with the principal insolvency jurisdiction, again, of the NSW courts.

And piece number four was the timely, lengthy, bold, and compelling, judgment, of the Singapore High Court in *Beluga Chartering GmbH (in liq) v Beluga Projects (Singapore) Pte Ltd (in liq)* [2013] SGHC 60. In that case the judge held that s 377(3)(c) of the Companies Act (Cap 50, 2006 Rev Ed) not only permitted but obliged the Singapore liquidators to remit assets out of Singapore and into the hands of the German liquidators conducting the principal liquidators. But he also held that the court had the power to disapply the Singapore liquidators' obligation first to pay off debts incurred or arising in Singapore, as s 377(3)(c) certainly says that they must. The basis for all this was a common law principle applicable in the case of a local but ancillary insolvency which obliged a Singapore court to cooperate with the courts of the principal insolvency so far as consistent with Singapore public policy. It was, perhaps, a pity that having laboured so hard to get so far, the judge eventually exercised his discretion by requiring the Singapore liquidators in the instant case to comply with s 377(3)(c), rather than dispensing them from such need. But as the judge said that this outcome derived from features of the case which were exceptional, we should probably not allow ourselves to be distracted the actual result in the case; and we may instead look to the reasoning in, rather than to the outcome of, the case. He derived support for his reasoning from the decision of the House of Lords, and from the speech of Lord Hoffmann, in *Re HIH Casualty & General Insurance Ltd*, as well he might. He did not appear to be perturbed by the fact, as we shall see, the strength and viability of Lord Hoffmann's foundation has, in the United Kingdom (which may be an important limitation, as the insolvency policy of the United Kingdom may not the same as that of other common law jurisdictions) been shaken and weakened by *Rubin*.

2. What did the Supreme Court decide and why did it decide it?

The excitement of *Beluga Chartering* shows that the question of cross-border assistance in insolvency is a large and vibrant topic. In this lecture, though, we can only hope to deal with a single issue within it, and for that we must return to *Rubin*. The majority of the United Kingdom Supreme Court, speaking through Lord Collins, said the only way to give any effect to a foreign judgment by a court exercising insolvency jurisdiction was to recognise it as a foreign judgment in personam or in rem under the regime summarised in Dicey, Morris & Collins, The Conflict of Laws, Rule 43. There was no special or separate rule for giving any other effect to a judgment given by a court exercising insolvency jurisdiction at the place of incorporation, or at the centre of the insolvent's main interests (generally referred to today as COMI), or to put the same point another way, there was no mechanism for giving effect to a judgment outside the law set out in detail in Dicey's Chapter 14. There is no special common law rule, in England at least, for judgments in foreign insolvency proceedings, for although Parliament has legislated very substantially, it has not provided for this case. It made no difference that the foreign judgment arrived in England clothed in a judicial request for assistance issued by a foreign insolvency court which had what we would regard as properly having insolvency jurisdiction. The result was that the Supreme Court, by a clear majority of 4-1, reversed the Court of Appeal in *Rubin*. It dismissed the appeal in *New Cap*, but only by relying on grounds which had not been relied on below. Although it could not overrule *Cambridge Gas*, a Manx case and not an English one, this decision was said by 3-1, or possibly 3-2, to be wrong.

Whatever the court was going to do in *Rubin* was bound to be controversial, in England at least, for it could not avoid bringing to the surface the true nature of a cultural divide which marks but separates two disciplines. The effect of its judgment does so in a rather remarkable way, for a unanimous decision of the Privy Council exemplifies one perspective, and an almost-unanimous Supreme Court stands just as clearly for the other. Insolvency practitioners, especially those engaged in cross-border mega-insolvencies, appear to regard the idea of cross-border cooperation as fundamental to the way they do their business, not least because every instance in which cooperation is unavailable and something more contentious is triggered, the only losers are the general creditors: the judgment in

Beluga Chartering is a fine example of what an insolvency lawyer's judgment would look like. By contrast, the natural instinct of private international lawyers, when presented with a foreign default judgment, is to apply stringent conditions to its recognition, with the result that a defendant who was not present within the court's territorial jurisdiction, and who did not submit to that jurisdiction, will not be bound by it, and will not be affected by it in any other way: he is either bound, or he is entirely free; there are no half measures. According to the majority in *Rubin*'s case, a judgment from a US bankruptcy court, ordering repayment of sums paid out as unlawful preferences, had no effect as a matter of English law on the persons against whom it was made. They had not been in the US when the proceedings were begun; they had disregarded the summons and had not otherwise submitted to the US jurisdiction. They could therefore ignore the judgment; the fact that it came from a US bankruptcy court, and that this court had requested the cooperation of the English court to recognise and enforce the US judgment, was an irrelevance. It is obvious that this conclusion could not stand with the decision of the Privy Council in *Cambridge Gas*.

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3. Why was the judgment in *Rubin* so conservative?

To begin with, a perception that the persons from whom repayment was sought were fraudsters who had only themselves to blame if the judgment was enforced, which was plainly how the Court of Appeal had seen the matter, needs to be balanced by the reflection that not all those from whom a foreign liquidator demands (or a foreign judge decrees in default of their appearance) payment will be undeserving of sympathy. The first answer may therefore be that the Supreme Court was aware that it did not know, or that a court in another case might not know, what the merits actually were, and that a position of studied neutrality is not an indefensible one.

A second answer is that it seems to have been implicit in the judgment in *Rubin*, at least, that because the judgment in question was *in personam*, against the

defendants, the only material change to the law which could properly be made would have been to add a further case to Dicey's Rule 43, setting out (and adding to) the cases in which a judgment would be recognised, and that everything else – the conclusiveness of the judgment, the limited defences to recognition – would or would have to remain the same.

A third possible answer was that there was no practical need to recognise the US judgment. It appears that there were people in England who, as it was alleged, had bled the company white. There was a view that they should be ordered to put back what they drained from it. Let it be supposed – it cannot be put any more assertively than that – that proceedings ought to have been available against them but that the US judgment requiring repayment was not to be recognised. Though Lord Collins suggested that his conclusion did not lead to bad consequences, this may not convince everybody, for all that was offered as an alternative was to bring original proceedings on behalf of the beneficiaries of the insolvent trust, against the recipients of the money, relying on the ordinary law of restitution rather than the private international law of insolvency. This may be better than nothing, but it is not the most compelling part of the judgment. The bringing of fresh proceedings should surely be a solution of last resort. If it has to be the answer, it is almost bound to consume money which ought, if at all possible, be collected and paid to the general creditors, not frittered away on lawyers and accountants. We need a better answer if we can find one.

A fourth answer might be that this is now a matter for Parliament, which is fair enough as far as it goes. If this is to be a proper answer, it may well make sense in England, where there has been considerable legislation on the issue of cross-border insolvency but which has not addressed this particular question. The *expressio unius* rule might be used to support this aspect of the reasoning of the court. But in common law jurisdictions where legislative intervention has been closer to zero, this reasoning is not so obviously applicable. This may be one reason why we should ask whether the decision of the Privy Council in the *Cambridge Gas* case, disapproved for use in England, may still be usable in common law jurisdictions

which have not had the legislative intervention which the English common law has sustained.

But a fifth answer might be that the judgment was not completely conservative: even if the decision in *Rubin* may be fairly so described, then that in *New Cap* is rather less so. We will come to that.

4. What is wrong with trying harder to assist creditors and those who act for them?

If one views the matter from a distance, one may compare the decision in *Rubin*, and the consequence of declining to give effect to the foreign judgment, with what Lord Templeman said in *Williams & Humbert Ltd v W&H Trade Marks (Jersey) Ltd* [1986] AC 368, at 429. He had been invited to ignore a Spanish judicial decree confiscating the shareholding in a Spanish company, and was shocked by the suggestion: 'a submission which produces such anarchic results and which releases all wrongdoers from liability must be fallacious'. If one were to be satisfied that the individuals who had done as Ward LJ plainly thought they had then got away with it, then the decision in *Rubin* might also be described as anarchic. But of course, it will not always be easy to make that judgment, and we have to make the law which will be fit for those cases in which we simply do not yet know where the merits lie.

Another useful contrast might be made with the approach and judgment of Spigelman CJ in *Robb Evans v European Bank Ltd* [2004] NSWCA 82, (2004) 61 NSWLR 75, whose willingness to enforce foreign (American) judgments which authorised a public official to go and recover from wrongdoers and their accomplices sums of money which had been taken from (and should be recovered for) ordinary creditors, was plain. The only beneficiaries of the foreign judgment in *Rubin* were the creditors of the insolvent trust; and the disposition of the court was to do whatever it could to help.

However, in *Robb Evans*, the defendant had submitted to the jurisdiction of the American court, and was a convicted fraudster. It made every sense for the

Australian court to see the issue as whether the creditors should be allowed to benefit from enforcement of the American judgment. But again, in *Rubin*, whatever else we may think, we simply do not know, with the same degree of confidence, that the defendants were bad; and in tomorrow's case, brought, say, against recipients of funds who were less closely involved, we may have even less idea. And anyway: there is no such thing as free money: in *Rubin*, as in preference cases generally, every penny by which the creditors benefit is a penny taken away from the defendants. If one asks whether we should be disposed to assist the general creditors, of course we should: why wouldn't we? But if one asks whether we should fund this by simply stripping assets from defendants who have not yet been well and truly tried, it is less obvious that we should be so keen. Defendants have rights, and private international law seeks to ensure that these are not trampled in the rush to be seen to do good. There is no free money, only money which a court orders to be paid so as to enrich some at the expense of others.

5. Can the general rules of recognition of foreign judgments be changed?

The answer is that they can. At least some final courts of appeal in foreign countries seem to have thought so: the Supreme Court of Canada has done this very thing: *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, though in the interests of balance we should note that the Irish Supreme Court has declined to follow them: *Re Flightlease (Ireland) (in vol liq)* [2012] IESC 12, [2012] 2 ILRM 461. And anyway, it is surely still possible today to say that *cessante ratione legis, cessat ipsa lex*, allowing a court to reform or remove well-established rules of the common law which have long passed their sell-by date. The Singapore Court of Appeal, no doubt, is free to think similar thoughts: indeed, in *Hong Pian Tee v Les Placements German Gauthier Inc* [2002] 2 SLR 81, dealing with foreign judgments allegedly procured by fraud, it showed no hesitation in rejecting a century of English common law, preferring what it described, at [30], as 'the Canadian-Australian cases'. There is nothing so obviously special about the law on foreign judgments as would carry the issue outside the sphere in which the Supreme Court, or Singapore Court of Appeal, may alter the common law. Of

course it would risk taking some people by surprise, but there can be no vested right to the immobility of the common law.

If they can be changed, should they be changed? It is hard to deny that there is a credible case for thinking very seriously about it. The Supreme Court of Canada has done this very thing: in *Beals v Saldanha* [2003] 3 SCR 416, it established that Canadian common law will recognise generally a foreign judgment from a court which had a real and substantial connection with the claim; provincial courts have evidently taken the lead and applied it, tentatively at least, to orders of foreign courts exercising insolvency jurisdiction: *Re Cavell Insurance Co* (2006) 269 DLR (4th) 679. It is also hard to deny that this is a development which, in an unsettling number of cases, would be very difficult to predict, and therefore very difficult to live with. What amounts to a 'real and substantial connection'? It makes life very hard, for legal advisers among others. This was, as far as I can tell, the reason the Irish Supreme Court in *Re Flightlease* was not prepared to adopt *Beals*. But what the Irish court did not so clearly do was to address why this also justified the rejection of a separate, and self-contained, rule for judgments in insolvency.

On the other hand, in the context of an insolvency, conducted before the courts for the centre of main interests of the insolvent entity, the question whether the forum is one from which to recognise judgments has already been answered. The court at the debtor's centre of main interests is, in the present day, liable to be seen as the most appropriate forum to conduct the insolvency. One would have thought that it was, just as obviously, the most appropriate forum to deal with claims that a recipient of contestable payments ought to pay them back. True, the common law paid more attention to proceedings in the place of incorporation, but this is quickly fading from view as the COMI approach gains ground. So even if such as rule would be an uncertain one for adding onto the general law on foreign judgments, for it may well be unpredictable, in the specific context of insolvency the degree of uncertainty is considerably less.

6. What of judgments from countries and courts which are less sound?

One suspects that, for the Supreme Court, the woolly mammoth in the room was Russia. There is a risk, and probably not a small one, that if the court had been willing to give effect to the US repayment judgment against those who had held office in the *Rubin* case, it would have been rather difficult to explain why the same would not be done in respect of a judgment from a Russian court, purporting to liquidate a company whose patron-oligarch had managed to get on the wrong side of state power. It is not hard to imagine that it could be shown, with reasonable preparation of some documentation (on which the ink may even still be wet), that very large sums were paid to or to the order or benefit of someone living in London. Perhaps the rational solution is simply to refuse to give effect to any of these judgments.

Even so, judgments for the benefit of private creditors are judgments for the benefit of private creditors. If the primary creditor is the state, private international law may deploy the rule about not enforcing, directly or indirectly, a foreign revenue or public law; but if the primary creditor is commercial body, why not? If the foreign proceedings are found to be unjust or oppressive, the judgment can be refused recognition on that ground: *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804. In other words, there may be solutions to the Russian problem which may mean that there is no need to resort to the nuclear one of not recognising any court's judgments unless they fall within Dicey's Rule 43. It may not be necessary for the common law to treat the whole world as though its courts are as biddable or bought, or its law and legal administration as rotten, as is sometimes thought to be the case with certain foreign courts.

And I suspect that the questions raised by having to deal with judgments from Russia, from the vantage point of enforcement in London, might just be capable of being asked, but with different identification of overseas courts, from the perspective of Singapore. That, however, is not a matter for me.

7. If we were to widen the rules for recognition, should we make other changes to the law on foreign judgments to reflect it?

If the law is going to recognise judgments in new circumstances, or on bases which depart from the previous understanding of the law, it is rational to consider whether we would need correspondingly new defences to recognition. For there is no logical reason to suppose that the defences to recognition of judgments falling within Dicey's Rule 43 would have to be the same, and only the same, as those applicable to judgments recognised on grounds lying outside Dicey's current Rule 43. This is the argument: the judgments we recognise on the basis that the defendant was present within or submitted to the jurisdiction of the foreign court are recognised on the basis that the defendant assumed an obligation to abide by them; and this justifies the conclusion that we do not investigate or reinvestigate the merits of the judgment, which cannot be impeached for error of fact or law: Dicey Rule 48.

But it does not have to follow that if we were to accept that there were other foreign judgments which we were prepared to recognise, or other circumstances in which we might recognise them, that we must accord to them the same degree of conclusiveness, and must subject them to the same general defences to recognition. For where the reason for recognition is different, the precise rules which define that recognition may be different as well. For example, it would not be impossible to devise some form of rule of approximate parity, so that we recognise insolvency judgments which are based on substantive grounds which are analogous to those found in English insolvency law. But until someone is able to persuade a court or a legislator that the approach of the majority in *Rubin* should be rethought, this is just thinking aloud.

And anyway, one may ask: what is it about preference claims which is so different, or which explains why they should be accorded different treatment? If judgment on a simple restitutionary claim would not receive special treatment, why would judgment on a preference claim? Can we really justify it on the basis that 'insolvency is different'? Some will think so; others will think not. It seems hard to deny, though, that there is a choice of legal policy to be made, and therefore to be talked about.

8. Or is there is just no national economic interest in recognising judgments of the kind in *Rubin*, so that it would be irrational to do so?

It would be possible; and in *Rubin*, at [129], Lord Collins clearly said that very thing. It is not easy to make a reliable assessment of this point. No doubt it is a proper thing for a legislator to consider whether a proposed change to the law will be of advantage to the state: it is, after all, the legislator's (or the executive's) task. It is perhaps less obvious that this is an assessment which a court should feel comfortable in making when it comes to consider its analysis or development of the common law. After all, if a consideration of the national interest is going to be a point on which a judgment may turn, it may be thought that we need more of a formal mechanism for ascertaining what that interest is and how it might be given effect.

Even if one accepts that assessment of the national economic interest is part of the task, the conclusion that there is no sufficient interest in widening the law on recognition of foreign judgments in insolvency would at any rate contradict a principle, recognised variously by the Privy Council, by the judge in *Beluga Chartering*, and by insolvency lawyers all over the common law world, that cooperation brings more benefits than does chauvinism; that openness is better than isolation; that walling yourself in does less good than reaching out to others. It is certainly possible to conclude that these issues belong to the legislator, and not to counsel or the judges in individual cases. There is indeed a question; working out how it is to be answered is quite a challenge.

II

9. What about recognition of insolvency judgments based on submission? What was decided in *New Cap*?

So much for *Rubin*, at least for now. It becomes more interesting when attention turns to the judgment on the *New Cap* appeal, which should not be seen simply as

the postscript to *Rubin*. Rule 43 of Dicey states that we do recognise foreign judgments on the basis of submission, so we will recognise judgments in insolvency on the basis of submission. It is the idea of submission in the context of insolvency which prompts us to think more carefully: particularly as to whose submission is needed, and how this may be found. It appears that no argument was presented to suggest that there was submission in any sense which would have been material to the judgment in *Rubin*.

10. Submission (1): by a creditor who puts forward a claim for payment of sums which may be due from the estate

Rather unexpectedly, but now as clearly established by *New Cap*, a creditor who makes a claim for payment out of an insolvent estate will be held to have submitted to the general (current and prospective) jurisdiction of the supervising court. The act of submission is done and the Rubicon is crossed, as it appears, by the creditor sending in a form, or maybe no more than a letter, to the liquidator, in which he says that he is owed money. Though the document by which he does so is not a writ, and is not sent to the court, and probably does not even mention a court, it amounts to a submission to a court in relation to claims which have neither been formulated nor served, in a court which has not really seen seised at all: *New Cap*, at [165]-[167]. I think it is fair to say that few saw this coming; it must have arrived as something of a surprise to the creditor syndicate in *New Cap*.

This part of the judgment surely demonstrates that the recognition of foreign judgments in insolvency is, whatever the judgment may otherwise assert, different from the rest of the law on foreign judgments: the only question is to measure how different. The English form by means of which a person who seeks to be added to the list of creditors is provided for by the Insolvency Rules 1986 (SI 1986/1925): the form is Form 4.25. This looks remarkably informal for a document which, when sent to a liquidator, amounts to submission by a creditor to the entire insolvency jurisdiction, including preference and repayment jurisdiction, of the court which is supervising him. Surely one would expect red capital letters and a red hand pointing to such grave consequences? But if this really is enough, one

might deduce that it takes much less to submit to a court which gives a judgment in a matter of insolvency than it does in other contexts.

It is noteworthy that in *New Cap* itself, the NSW court from which the judgment came did not appear to believe that the defendants had submitted to its jurisdiction. It authorised service to be made *ex juris* on the basis that the cause of action had arisen in NSW, rather than on the basis that the defendant syndicate had submitted to the jurisdiction. Yet the Supreme Court held that there had been submission, relying on the peculiar old case of *Ex p Robertson, in re Morton* (1875) LR 20 Eq 733: peculiar because it was concerned with the existence and exercise of insolvency jurisdiction by the English court, as to which, one might see the point made by Lord Collins at [126]; and which found that the defendant had submitted because he had already taken a dividend of four shillings on the pound. Even so, this part of the judgment suggests that there is more flexibility, or uncertainty, or room for fresh thinking, in the area of submission than might have been supposed. It has even led one of my colleagues in chambers to advise that you should never reply to letters from liquidators: it is safe to read them, but very dangerous to reply, for fear that this is taken as submission in the *New Cap* sense. It may be going a little far, but the advice is, at bottom, properly cautious.

11. Submission (2): by being a shareholder in the insolvent company

We need to consider the position of a shareholder in stages, and should take an easy case first. If the company's constitutional documents provide for jurisdiction of a particular court, the submission of the member may not be difficult to see as following from it. In *Powell Duffryn plc v Petereit* (C-214/89) [1992] ECR I-1745, the statutes of the company provided that 'by subscribing for or purchasing shares…the shareholder submits, with regard to all disputes with the company or its organs, to the jurisdiction of the courts ordinarily competent to entertain suits concerning the company'. That must at least mean that the shareholder submits to the courts of the place of incorporation, but it does not take a lot of effort to argue that it may also amount to a submission to the courts at the centre of main interests of the company when, in the ordinary way, suits concerning the company in matter

of insolvency, take place there. At all events, in *Powell Duffryn*, the jurisdiction agreement was liable to cover a claim brought by the company's liquidator against the shareholder who had received wrongfully-made payments. So a jurisdiction clause in a company's corporate documents may be (and if *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] Bus LR 1719, is taken to heart, will be) broad enough to cover insolvency judgments.

Next, consider shareholder submission otherwise than by reference to a jurisdiction clause. By virtue of his becoming a shareholder, a person knows or ought to know that his legal position can be adversely affected by what the company does, including the company's submitting to proceedings before a foreign court: this is the bargain he strikes when he becomes a member. This may be less immediately easy to see as submission by the shareholder, for the English common law has been rather cautious when asked to find that an agreement to submit to a foreign court may be implied. Even so, Diplock J was prepared to find that a sleeping partner had silently submitted to the courts of the partnership's place of establishment in *Blohn v Desser* [1962] 2 QB 116, and the idea has a certain basic appeal: *qui sentit commodum sentire debet et onus*, and so forth.

The perception of the court in *Cambridge Gas* may have been that if company submits to the jurisdiction of a foreign court, the shareholder can be in no better a position when it comes to the recognition of a judgment which purports to affect the shareholder as shareholder, and that this is all the more so if the shareholder has a controlling interest, as in *Cambridge Gas* it did, owning 70% of the common stock in the insolvent corporation. The Supreme Court was not persuaded; there is evidently a high-level difference of judicial perception.

Lord Mance in *New Cap* might have seen that there really was a point worth pursuing at this point; and he may have been on to something. Submission may be a more complex idea than is sometimes acknowledged; and we may yet have occasion to look at it again. What exactly do you agree to (and with whom do you agree it) when you become a member of a company? It could be said that you agree to allow the management of the company to affect the value of your shareholding;

it might not be so easily said that you agree to allow the company to enmesh you in litigation or its aftermath. It is true that Lord Hoffmann's view tends towards treating the case as though it were an action in which the company *represents* the shareholders, rather than as one in which the shareholders simply have an indirect financial interest in litigation conducted by another person, but there is room for real work to be done here, in thinking about submission when the act of submission is the act of a company.

12. Submission (3): by holding office in the insolvent company

If it true for the shareholder, why not also for the office-holder? And, for that matter, for anyone else who enters into a contractual relationship with the company? If the contract of service provides for exclusive jurisdiction of the courts for the place where the insolvency is being conducted, there will seem to be little difficulty. In the absence of a suitable jurisdiction clause it will be more difficult; and in *Masri v Consolidated Contractors International Co (No 4)* [2009] UKHL 43, [2010] 1 AC 90, the House of Lords declined to 'identify' a senior officer of a company, or a senior officer who had demitted office in the nick of time, as subject to the personal jurisdiction of the court to which his company had submitted, at least for the purpose of requiring him to come to England to say where its assets were hidden. Maybe this is right, though I am not so sure: at all events, the substantial question was really whether his position had been materially affected by the decision of his company (for which decision he may well have been responsible) to submit to the jurisdiction of the English courts. Of course, if the service agreement had a jurisdiction clause, the argument would be somewhat easier: no doubt a question of construction will be involved, and *AWB (Geneva) SA v North America Steamships Ltd* [2007] EWCA Civ 739, [2007] 2 Lloyd's Rep 315, suggests that jurisdiction agreements may not always reach to matters of insolvency. But even if the service agreement does not make such jurisdictional provision, anyone who has claimed payment from the company is not so far removed from the creditor who claimed payment from the company in *New Cap*.

But if this is no more than just possibly arguable, it still leads to the reflection that there may just be non-submitters and non-submitters. In a judgment handed down a couple of years ago, *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* [2010] NSWCA 196, (2010) 79 ACSR 383, the New South Wales Court of Appeal had to consider whether persons associated with a contracting party, but who were not privy to a contract which contained a jurisdiction clause, could nevertheless point to the jurisdiction clause to support their objection to being sued, by the 'other' party to the contract outside the jurisdiction designated in the contract to which they were not party. Spigelman CJ answered with a qualified yes, supporting it, at [74], with the acute observation that there were 'non parties and non parties'. Some may think that they can see a similar sentiment in the judgment of the Privy Council in *Cambridge Gas*. One might reflect, and Lord Mance may just have felt, that there are 'non-submitters and non-submitters', and that the position of a shareholder in a company which chooses to submit is not on all fours, as Lord Hoffmann had put it in *Cambridge Gas*, with that of 'any other citizen who had nothing to do with the bankruptcy'. If everything is now going to turn on submission, we may need to reflect further upon the way we deal with those who plainly do submit, those who plainly do not, and those who fall somewhere between these two poles. And, perhaps building further upon this, some of the strands of reasoning in the Supreme Court judgments in *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5, [2013] 2 WLR 398 show that submission, in the broad and reasonable (if less hard-edged) sense of lending yourself to something, may yet come to be recognised as having a status equivalent to its more familiar counterpart. We live in interesting times.

13. Submission (4): by receipt or retention of payment

This is the most challenging; and the idea that one may find any recognizable form of submission in the receipt may be just too difficult to embrace. If there is to be recognition of the judgment at this point, it is going to have to be based on something other than submission to the courts administering the insolvency. At the moment, unless the decision in *Rubin*, rather than *New Cap*, is reconsidered, I cannot see how this can be done. Lord Collins, at [116], regarded any attempt to

justify recognition as unprincipled. For it is one thing to be unsurprised that litigation takes place in a particular court; it is quite another to say that one submitted to its jurisdiction. Foresight and agreement are far from being the same thing; to foresee that something may happen to you is not to consent, submit, or agree to its happening to you. I am still puzzling over whether anything more can be done to make this point work it may be that it simply cannot be done.

It is, however, because of this particular case, the case in which the principle of submission does appears to be unable to assist, but in which there is need for a better solution than the non-solution offered by the judgment in *Rubin*, that some will consider that something needs to be done.

III

14. A broad principle that insolvency is different, and that something should be done for that reason and in that context alone

Of course, if we were simply able to apply the law which the insolvency court is applying, it would be less of a problem, and the suggestion of bringing fresh proceedings in England would not be quite so difficult. But if we cannot do this, the result is that we cannot apply the law which applies in the actual, main, insolvency, and will not recognise the order made by the very court which we consider to be the proper one to deal with the insolvency. That combination of results is not obviously happy. It is liable to lead to the waste of resources or, at any rate, to the diversion of assets away from the creditors. Ever since Hoffmann J looked surveyed the wreckage of the Maxwell fraud in *Barclays Bank plc v Homan* [1993] BCLC 680, the sense that something needs to be done, and that traditional obstacles to doing anything useful just have to be overcome, has been apparent to some and an incentive to others. The Privy Council in *Cambridge Gas* was prepared to develop, or extent, what had previously been understood to be the law; the majority in *Rubin* was not.

Should Singapore do something? This is, in the final analysis, but perhaps also in the first analysis, a matter of legal policy, and not obviously a matter for me. It may be appropriate to make five particular observations.

First, one should note that the Court of Appeal in 2002 did exactly what a final court of appeal should do when asked to consider whether the common law on foreign judgments, as handed down from English legal history, is still the best it could possibly be. It thought not, and it altered it. Whatever one may think of the substance of the change it made, it asked the right question, and used the right techniques to arrive at the answer. Nothing stands in the way of its doing that again. Although in England the amount of legislation now superimposed on the common law might make this unlikely, other common law systems without that constraint will think, and may think rather differently, for themselves, and may not be persuaded by what the UK Supreme Court has done. It is for this specific reason that the disapproval of *Cambridge Gas* may be a strictly English phenomenon which does not travel intact to other parts of the common law world.

Second, the broad theme that insolvency is different, almost a thing apart, was supported by the decision of the Singapore Court of Appeal in 2011, that legal disputes which arise in and because of an insolvency fall outside the usual rule of private international law that disputes should be go to arbitration if that is what the parties have agreed to. In *Larson Oil & Gas Pte Ltd v Petroprod Ltd (in liq)* [2011] SGCA 21, [2011] 3 SLR 414, it was held that where a dispute arose in the context of an insolvency administration (in Singapore and in the Cayman Islands) the usual rules which would have provided for the arbitration of difference are displaced, in a broader public and creditor interest. Paragraphs 45 and 46 of the judgment of the court make for very interesting reading:

> [**45**] A distinction should be drawn between disputes involving an insolvent company that stem from its pre-insolvency rights and obligations, and those that only arise upon the onset of insolvency due to the operation of the insolvency regime. Many of the statutory provisions in the insolvency regime are in place to recoup for the benefit of the company's creditors losses caused by the misfeasance and/or malfeasance of its former management. This is especially true of the

> avoidance and wrongful trading provisions. This objective could be compromised if a company's pre-insolvency management had the ability to restrict the avenues by which the company's creditors could enforce the very statutory remedies which were meant to protect them against the company's management. It is a not unimportant consideration that some of these remedies may include claims against former management who would not be parties to any arbitration agreement. The need to avoid different findings by different adjudicators is another reason why a collective enforcement procedure is clearly in the wider public interest. [**46**] We, therefore, are of the opinion that the insolvency regime's objective of facilitating claims by a company's creditors against the company and its pre-insolvency management overrides the freedom of the company's pre-insolvency management to choose the forum where such disputes are to be heard. The courts should treat disputes arising from the operation of the statutory provisions of the insolvency regime *per se* as non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement.

It does not take much imagination to see how easily that approach to insolvency might be used to support the argument that, when it comes to the reception of foreign judgments from a properly-recognised insolvency court, against the pre-insolvency management of the insolvent company, the traditional rules which allow a defendant to choose whether to be bound by choosing whether to submit are just as much contrary to the public interest and to the interests of creditors. It may therefore be that the Singapore courts are open to arguments which, at the moment, would be harder to put in London. The point is not that the broad context of insolvency must mean that the law on foreign judgments must be altered. The point is that the broad context of insolvency meant that the statutory law of commercial arbitration was made to operate in a specifically different way. The point also is that if this can be done to the law of commercial arbitration, one cannot avoid asking whether something analogous might properly be done to the common law of foreign judgments.

Third, if the common law of Singapore permits and even requires a Singapore court to cooperate with a liquidation which is properly taking place elsewhere, whether that involves treating a parallel Singapore liquidation as ancillary, as *Beluga Chartering* accepts, or by otherwise applying rules of the common law in such as

way as to lend support to the foreign procedure, as tomorrow's case might propose, the only question worth asking is as to the nature of the cooperation which might be, and which may not be, given. Both court and legislator have a part to play in that process.

Fourth: just because a foreign court is exercising insolvency jurisdiction, it does not mean that its judgment is right, or should be taken to be right. Courts make mistakes; in the context of private international law, this is why we have the rules we do. The idea that we might set them aside just because the foreign court is exercising insolvency jurisdiction is, to my mind, not based on coherent reflections. It is necessary to show more caution than that; there is more to virtue than an uncritical faith in universalism; but fifth, the basis on which we recognise foreign judgments is *not* that they are right, and the reason we do not recognise them is that they are wrong. It is because there is a sufficient reason to accept the decision of a foreign judge; and what amounts to sufficiency, in this sense, may properly be seen as context-specific.

With that said, it may be sensible to think a little about two possible avenues of law reform for the case in which there is no plausible basis for recognition of the foreign judgment on the basis of submission. It makes sense to say that though they differ in form, they are not intended to diverge much in substance.

15. Doing something for the case in which there is no basis for finding a submission (1): receiving foreign judgments as requests for cooperation

This is the option which was evidently accepted by *Cambridge Gas*, proposed by the interveners on behalf of the trustees in the *Madoff* case, and rejected by the majority in *Rubin*. A request for cooperation, such cooperation taking the form of an order made to give effect to a judgment coming from the insolvent debtor's centre of main interests (or, more traditionally, place of incorporation), might have been treated as that, and assented to or not according to the discretion of the court. A basis for the exercise of such discretion was shown by the Privy Council in *Cambridge Gas*: that case: the order made by the foreign court was one which the

local (Manx) court would have been able, and might have been (though we shall never know) willing, to make, so the case for cooperation had a practical foundation. This would not have involved treating the foreign judgment as an obligation binding on a judgment debtor, but rather as a basis for one court to make a request, and for the other to accede to it.

The majority in *Rubin* did not agree, on the apparent ground that to accept it would subvert the law on foreign judgments for no sufficient or properly-justified reason. Whatever the merits of the argument – it is clear that they are not all on one side – it is still rare, and noteworthy, event when the decision of a unanimous Privy Council is held to be wrong by the Supreme Court only six years later. Of course it must be right that fundamental changes to the common law, which will (unlike statutes) operate with retrospective effect, should be made with circumspection; this need will be all the greater if the change would have an adverse impact on someone who has taken advice, and has acted, in reliance on the original statement of the law. *Cambridge Gas* was, no doubt, a fundamental change, though whether it had had an unsettling effect is impossible to know. Maybe this is the lesson: that the changes which the common law might make under its own steam are not able to be tailored or nuanced so as not to do damage to those who held legitimate expectations, and that this is any legislation is the best available answer. Even so, the law on requests for judicial assistance is not a blunt instrument, and it might still be possible to allow it to meet the challenges of cases such as these. And, as said, the Privy Council in *Cambridge Gas* was unanimous.

16. Doing something specific (2): accepting foreign judgments as foreign judgments

However, if the path ahead were to be to treat the foreign judgment as a foreign judgment properly so called, the outlines of an alternative, foreign-judgment-oriented, solution are not so hard to see. If the court which has exercised insolvency jurisdiction is at the insolvent's centre of main interests, the jurisdiction is one which we are already and in principle committed to recognising as proper and predominant. True, a little more thought is needed to decide whether we

ascribe the status of principal liquidation to one opened at the COMI of the insolvent, or at the place of its incorporation, but COMI is coming to be a principle of universal acceptance in a way which incorporation never did and never will: where statute law may direct us to the place of incorporation, a bold judge may be able to upgrade it. Whichever it is, we have every reason to regard it as the proper place to deal with the insolvency and everything which needs to be done and determined within it. In principle, therefore, we should recognise and (if they are for money) enforce, judgments from the courts of that place, including judgments which call for the repayment or return of sums which should not have been paid out, or received, or kept.

Within Europe, of course, recognition is automatic at this point: the EU Insolvency Regulation, Regulation (EC) 1346/2000 provides for it. Outside Europe, it is hard to see what is required apart from a check that (i) the court which exercised jurisdiction and gave judgment was jurisdictionally proper in our eyes: something which should have been covered by the COMI point or question; (ii) the person against whom the order was made had proper notice and a proper and effective chance to participate; and (iii) there was no impropriety in the judgment: thus far, the requirements of the law would not be very different from, but would be as demanding as, that applicable to judgments recognised on the basis of Dicey's Rule 43.

Of course this would mean accepting a new basis for the recognition judgments, almost always default judgments, in circumstances in which the judgment debtor was, for one reason or another, not there to put his side of the story. And the truth is that we cannot properly assume that the foreign insolvency court got the merits of the claim right, especially when the defendant is absent from the proceedings. We are prepared to accept the decision of a foreign court, subject only to limited defences, where the defendant was present or submitted to its jurisdiction, for though in such circumstances we do not *know* that it got it all right, it is reasonable to assume that it did if the defendant was there to fight the case. But in a case of payment order made in the form of a judgment by default, however, the court is not saying that it has well and truly tried the merits; and we are therefore required to be

more cautious before simply recognising a default judgment ordering a defendant to pay money into the estate.

Further checks, of a kind not made when a judgment falls within Dicey's Rule 43, may be proposed: (iv) that it was not unreasonable, and would have been practical, for the person against whom the order was made to have defended the claim in that court; (v) the law on liability to repay, on time limits, and on defences to the claim for repayment is analogous to English law; and (vi) enforcing it in England would not be contrary to public policy: the dissenting judgment in Rubin is formulated along such lines.

Would this make life harder for people in the position of the defendants in *Rubin* and *New Cap*? It seems inevitable that it would, though not perhaps irrationally so, and anyway, there is no human right to an uncomplicated, or risk-free, life, and certainly no right to have this funded by the poor general creditors of the insolvent estate. Will it make life more difficult for other, more patently blameless, recipients of money? Or for people who had no real reason to suppose that there might be something wrong with a payment made and taken? Yes, it may do; and these things, which happen in adult societies, need to be thought about seriously when the law comes to balance the many issues which go to establish and underpin confidence in a trading market. A proper response might be to craft a defence of innocent receipt and blameless retention, or something along the lines indicated above. It does not appear to be so very hard to see what it would look like; and even after this rather anti-climactic judgment of the Supreme Court of the United Kingdom, it may yet happen. But it may not be the English courts which bring it about. It may be for the courts, or perhaps legislators, elsewhere in the common law world to show us just how it ought to be done.
