COLUMBIA LAW REVIEW
SIDEBAR

VOL. 111 **APRIL 27, 2011** **PAGES 38–50**

RUBIN V. EUROFINANCE: UNIVERSAL BANKRUPTCY JURISDICTION OR A COMITY OF ERRORS?

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Basic due process requirements ordinarily permit a defendant the opportunity to contest a prior default judgment for lack of personal jurisdiction.[1] In the July 2010 decision in *Rubin v. Eurofinance SA*,[2] an English appeals court held that these safeguards did not apply to judgments entered "for the purposes of the collective enforcement regime of [a] bankruptcy proceeding[]."[3]

The court's holding, which amounts to the pronouncement of a "bankruptcy" exception to due process, lacks a principled basis and was unwarranted under the circumstances. In the case preceding *Rubin*, a U.S. bankruptcy court had entered a default judgment holding defendants liable on a variety of federal and state law fraud and related claims.[4] Although the defendants were not U.S. citizens and did not submit to the bankruptcy court's jurisdiction, the U.S. bankruptcy court determined that its exercise of personal jurisdiction over the defendants satisfied the requirements for due process.[5] When the plaintiffs sought to enforce the default judgment in England, both the lower court and appeals court held that the U.S. court's exercise of personal jurisdiction was incompatible with traditional principles of English law.[6]

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1. See, e.g., Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinée, 456 U.S. 694, 702, 706 (1982) (explaining that the personal jurisdiction requirement flows from the Due Process Clause to "recognize[] and protect[] an individual liberty interest" and that under this requirement "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding").

2. [2010] EWCA (Civ) 895, [2011] 2 W.L.R. 121 (Eng.).

3. Id. at [61(4)].

4. Rubin v. Roman (In re The Consumers Trust), Ch. 11 Case No. 05-60155 (REG), Adv. No. 07-03138 (REG), slip op. at 2, 26–28 (Bankr. S.D.N.Y. July 18, 2008) (granting summary judgment against defendants).

5. Id. at 23–24; see also *Rubin*, [2010] EWCA (Civ) 895 at [38] (stating that it was "common ground that the defendants were not resident in New York when the proceedings were instituted, nor did they submit to the jurisdiction of the New York court by voluntarily appearing in the proceedings").

6. See *Rubin*, [2010] EWCA (Civ) 895 at [38] (remarking that defendants' lack of U.S. residency and failure to appear in the U.S. would appear "at first blush" to provide "impregnable defence" under English law to enforcement of judgment); Rubin v. Eurofinance SA, [2009]

Though faced with a conflict between U.S. and English requirements for personal jurisdiction, the English appeals court did not consider endorsing the framework applied by the U.S. court to evaluate its own jurisdiction. Rather, the appeals court departed from the established procedural safeguards of *both* countries and upheld the U.S. bankruptcy court's judgment through flawed logic that has a potentially broader application than intended. The defendants appealed to the U.K. Supreme Court.[7]

Unless and until it is vacated or its reasoning is otherwise rejected, the appeals court's *Rubin* decision will have the immediate practical effect of subjecting any person who may have any property or interest worth attaching in the U.K. to the jurisdiction of all bankruptcy courts worldwide. The decision also has broader ramifications. As technology facilitates cross-border interaction—and disputes—courts will increasingly encounter multijurisdictional conflicts that established rules do not neatly resolve.[8] The *Rubin* decision could empower courts faced with novel conflicts questions to dispense with all conventions, foreign *and* domestic, to achieve what they deem to be the right outcome.

This piece proceeds in four parts. Part I describes the proceedings before the U.S. bankruptcy court and the court's entry of default judgment against the defendants. Part II identifies the principles of English and U.S. law that are in conflict in *Rubin* and explains how the English appeals court seized on the special bankruptcy circumstances of the case to overcome traditional barriers to recognition of the judgment. Part III uncovers the faulty logic relied on by the English appeals court in its *Rubin* decision. Part IV demonstrates how the English appeals court missed an opportunity in *Rubin* to sustainably modernize England's rules on the recognition of foreign judgments.

I. BANKRUPTCY COURT PROCEEDING AND ENTRY OF DEFAULT JUDGMENT

Adrian Roman and his two sons allegedly operated a sales promotion scheme across the U.S. and Canada through an entity called The Consumers Trust ("TCT").[9] Under the scheme, participating merchants induced customers to purchase goods or services by offering a voucher that could be redeemed for 100% of the purchase price if the customer successfully passed a complex

EWHC (Ch) 2129, [72], [2010] 1 All E.R. (Comm.) 81, [72] (Eng.) (decision of English lower court explaining that "it is, and has for centuries been, a fundamental principle of English private international law that the judgment of a foreign court is not enforceable unless the defendant was present within the jurisdiction, or in some way submitted himself to the jurisdiction, of the foreign court").

7. The U.K. Supreme Court has agreed to hear the defendants' appeal. See *Rubin*, [2010] EWCA (Civ) 895, perm. app. granted, [2010] UKSC (No. 0184), at http://www.supremecourt.gov.uk/docs/PTA-1010.pdf (on file with the *Columbia Law Review*).

8. Cf. Eric Schmidt & Jared Cohen, The Digital Disruption: Connectivity and the Diffusion of Power, Foreign Aff., Nov.–Dec. 2010, at 75, 75–76 (arguing that rise of connection technologies, like social media and web-enabled mobile devices, will lead to clash between democratic ideals like freedom and openness and other concerns, like national security).

9. Complaint for Declaratory & Further Relief, Breach of Fiduciary Duty, Negligence, Unjust Enrichment & Restitution, Veil Piercing, Fraudulent Conveyance, Fraudulent Transfers, Preference at 1, 15–25, *Rubin v. Roman*, Ch. 11 Case No. 05-60155 (REG), Adv. No. 07-03138 (REG) (Bankr. S.D.N.Y. Dec. 3, 2007) [hereinafter Complaint].

series of memory and comprehension tests.[10] Merchants paid funds into TCT for possible reimbursement to customers.[11] Expecting a high failure rate, TCT retained enough cash to cover only 6% of potential customer claims, and transferred most of the funds to defendants and entities they controlled.[12] The Missouri Attorney General sued TCT under the state's consumer protection laws, resulting in a $1.85 million settlement.[13]

Anticipating similar suits, Eurofinance appointed David Rubin and Henry Lan receivers for TCT, and shortly thereafter TCT filed for voluntary chapter 11 protection in the United States Bankruptcy Court for the Southern District of New York.[14] Most of TCT's assets and creditors were in the United States and Canada.[15] TCT's liquidating chapter 11 plan granted Rubin and Lan the power to prosecute all the bankruptcy estate's causes of action.[16] They filed a complaint in the bankruptcy court against defendants Eurofinance S.A., Adrian Roman, and Roman's two sons, among others.[17] The complaint asserted claims under U.S. federal bankruptcy law, Canadian law, and the laws of New York and Missouri for breaches of fiduciary duty, negligence, unjust enrichment, restitution, veil piercing, fraud, and related claims to avoid and recover millions of dollars that defendants had allegedly received in the sales promotion scheme.[18]

The U.S. bankruptcy court held that it had personal and subject matter jurisdiction over the defendants and the claims.[19] Eurofinance is a British Virgin Islands company, and the Romans were believed to be citizens of the United Kingdom.[20] None were physically present in the United States or appeared in the adversary proceeding.[21] Nonetheless, the bankruptcy court found that grounds existed for both specific and general jurisdiction over Eurofinance and the Romans because they "specifically sought out the United States as a place to do business and specifically sought out U.S. merchants and U.S. consumers with whom to do business."[22] The bankruptcy court concluded that the exercise of personal jurisdiction over defendants satisfied the Fifth Amendment's requirements for due process because the defendants had "sufficient minimum contacts with the United States, and the exercise of personal jurisdiction would not offend traditional notions of fair play and substantial justice."[23] The court also found that defendants had received

10. *Roman*, slip op. at 19–20; *Rubin*, [2010] EWCA (Civ) 895 at [4].
11. *Roman*, slip op. at 11; *Rubin*, [2010] EWCA (Civ) 895 at [5].
12. *Roman*, slip op. at 15–17; *Rubin*, [2010] EWCA (Civ) 895 at [5].
13. *Roman*, slip op. at 18, 22–23; *Rubin*, [2010] EWCA (Civ) 895 at [6].
14. *Roman*, slip op. at 7–8, 18; *Rubin*, [2010] EWCA (Civ) 895 [6]–[7].
15. *Roman*, slip op. at 23–24; *Rubin*, [2010] EWCA (Civ) 895 at [7].
16. *Roman*, slip op. at 3; *Rubin*, [2010] EWCA (Civ) 895 at [9].
17. Complaint, supra note 9, at 1. The filing of a complaint commenced an action, called an "adversary proceeding," that is associated with, but technically separate from, TCT's main bankruptcy case.
18. Id. at 15–24.
19. *Roman*, slip op. at 2, 23–24.
20. Complaint, supra note 9, at 5.
21. *Rubin*, [2010] EWCA (Civ) 895 at [38].
22. *Roman*, slip op. at 23.
23. Id. at 24.

personal delivery of the complaint by process servers, consistent with U.S. law and the Hague Convention.[24]

As to the merits of the claims asserted in the complaint, the bankruptcy court ruled that defendants had breached their fiduciary duties by, among other things, "inadequately capitalizing TCT and skimming off the majority of Merchants' payments to TCT."[25] Under a state law theory of veil piercing, the bankruptcy court held the defendants liable for TCT's debts in the amount of $160 million.[26] The court held defendants liable under federal and state law for fraudulent transfers in excess of $8 million.[27] Finally, the court held defendants liable for unjust enrichment and restitution claims of $1.85 million.[28]

II. ENGLISH ENFORCEMENT PROCEEDINGS

The plaintiffs applied to the English court to enforce the U.S. bankruptcy court's order granting summary judgment.[29] The trial court agreed to recognize the U.S. bankruptcy case as a "foreign main proceeding" under England's Cross-Border Insolvency Regulations,[30] but declined to recognize the order on the basis that the U.S. bankruptcy court lacked personal jurisdiction over the defendants.[31] The plaintiffs appealed the trial court's decision as to the unjust enrichment, restitution, and fraudulent conveyance counts,[32] and the English appeals court reversed. The court concluded that judgments rendered "for the purposes of the collective enforcement regime of the bankruptcy proceedings" are exempt from the ordinary private international law rules for enforcing in personam judgments[33] and should receive "worldwide recognition."[34] Having made an informed judgment not to appear in the adversary proceeding before the U.S. bankruptcy court, defendants lost the right to set aside the bankruptcy court's order granting summary judgment.[35]

A. *Identifying the Conflicts*

In assessing whether to enforce the U.S. court's entry of default judgment against the defendants, the English appeals court in *Rubin* confronted two discrete conflicts, namely: (1) the conflict between U.S. and English law requirements for personal jurisdiction, and (2) the conflict between U.S. and

24. Id. at 23.
25. Id. at 24.
26. Id. at 26, 28.
27. Id. at 2, 26–28.
28. Id. at 25, 27.
29. Rubin v. Eurofinance SA, [2010] EWCA (Civ) 895, [2011] 2 W.L.R. 121 (Eng.).
30. Id. at [1]–[2] (citing Rubin v. Eurofinance SA, [2009] EWHC (Ch) 2129, [2010] 1 All E.R. (Comm.) 81 (Eng.)); see also infra note 62 and accompanying text (discussing Cross-Border Insolvency Regulations).
31. *Rubin*, [2010] EWCA (Civ) 895 at [1]–[2] (citing *Rubin*, [2009] EWHC (Ch) 2129).
32. Id. at [12].
33. Id. at [61(4)].
34. Id. at [62].
35. Id. at [64].

English approaches to the recognition of foreign judgments.

The incompatibility of these laws is not initially apparent. Under both countries' laws, a court cannot act without valid personal jurisdiction over the persons before it. Limitations on a court's ability to enforce a foreign judgment naturally issue from this principle. In deciding whether to recognize a judgment, English courts "'will not enforce the decisions of foreign courts which have no jurisdiction . . . over the subject matter or over the persons brought before them.'"[36] This approach conforms to basic requirements for procedural due process in the United States, which permit any defendant the opportunity to contest a default judgment for lack of personal jurisdiction.[37]

Despite their shared interests in protecting citizens from courts that lack jurisdictional competence, English and U.S. courts have, however, adopted quite different approaches to the question of whether the rendering court properly exercised personal jurisdiction over a defendant. U.S. courts are permitted to ask if the rendering court complied with that court's own jurisdictional rules, even if the rendering court is a foreign state or country.[38] English courts, in contrast, consider whether personal jurisdiction could have been obtained under principles of English law.[39]

Turning to these, the English appeals court explained that a foreign court can obtain personal jurisdiction over a defendant only by way of "'territorial competence'"[40]—that is, through either (1) the defendant's physical presence in the foreign court's jurisdiction, or (2) the defendant's voluntary submission to the court.[41] In contrast, U.S. law permits a court to exercise personal jurisdiction without physical presence or express consent as long as the defendant has personally established sufficient minimum contacts with the forum such that the exercise of personal jurisdiction would not offend traditional notions of fair play and substantial justice.[42]

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36. Id. at [35] (quoting Pemberton v. Hughes, [1899] 1 Ch. 781 (C.A.) at 791 (Eng.)).

37. See Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinée, 456 U.S. 694, 702, 706 (1982) (noting that "defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding"); Norex Petroleum Ltd. v. Access Indus., Inc., 416 F.3d 146, 160–61 (2d Cir. 2005) (holding that defendant, if not properly served, could ignore court proceedings in Russia and American court could decline to afford preclusive effect to Russian default judgment); In re Tuli, 172 F.3d 707, 712 (9th Cir. 1999) (considering personal jurisdiction sua sponte "[t]o avoid entering a default judgment that can later be successfully attacked as void").

38. See, e.g., *Norex*, 416 F.3d at 161–62 (suggesting that precise requirements of Russian law would inform propriety of Russian court's exercise of jurisdiction); A.L.T. Corp. v. Small Bus. Admin., 801 F.2d 1451, 1456 (5th Cir. 1986) (applying Texas state law to determine whether Texas court properly exercised jurisdiction over defendant); Tahan v. Hodgson, 662 F.2d 862 (D.C. Cir. 1981) (upholding default judgment entered by Israeli court even though Israeli procedural requirements differed from those in the United States).

39. *Rubin*, [2010] EWCA (Civ) 895 at [35] ("[I]n deciding whether the foreign court was one of competent jurisdiction, our courts will apply not the law of the foreign court itself but our own rules of private international law." (citing Adams v. Cape Indus. plc, [1990] 1 Ch. 433 (C.A.) at 514 (Eng.))).

40. Id. at [35] (quoting *Adams* [1990] 1 Ch. 433 at 513–514).

41. Id. at [33], [36] (citing *Adams*, [1990] 1 Ch. 433 at 517–518, 519).

42. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474–76 (1985). In bankruptcy cases, personal jurisdiction can be premised on sufficient minimum contacts with the United States as a

In *Rubin*, the English appeals court confronted a classic conflict between these English and U.S. law requirements for personal jurisdiction and the recognition of foreign judgments. The U.S. bankruptcy court entered a judgment against the defendants after finding that they had established sufficient minimum contacts with the United States, even though they were not physically present in the United States and had not voluntarily submitted to the jurisdiction of the U.S. court.[43] Without one of these latter two conditions satisfied, the English appeals court decided that the U.S. court lacked a cognizable basis for personal jurisdiction over the defendants under English law.[44] Further, the traditional approach to recognition of judgments constrained the English appeals court against selecting the application of U.S. law.[45] Combined, these two elements—the strict territorial approach to personal jurisdiction under English law and the apparent inability to invoke U.S. law—seemed to provide, in the court's words, "an impregnable defence" to enforcement of the default judgment of the U.S. court.[46] To enforce the judgment the English appeals court would have to relax at least one of these two standards. Instead, it chose to dispense with both.

B. Rubin's *Holding: Seizing on Bankruptcy's Exceptionalism*

The English appeals court held that judgments rendered "for the purposes of the collective enforcement regime of the bankruptcy proceedings" are exempt from the ordinary private international law rules for enforcing in personam judgments[47] and should receive "worldwide recognition."[48] Thus, the appeals court enforced the default judgment entered by the U.S. bankruptcy court without considering whether the U.S. bankruptcy court had exercised valid personal jurisdiction over the defendants. To defend its exceptional decision, the court sought to portray it as the logical progression in a line of authorities differentiating bankruptcy proceedings from ordinary civil cases.

Bankruptcy laws aim to achieve a fair, equitable, and usually final distribution of value under circumstances where, typically, the debtor lacks sufficient assets to pay all of its creditors.[49] The appeals court recognized that modern bankruptcy laws and procedures have developed to "'ensure that an orderly regime is imposed upon all interested parties, so that none of them individually may enhance his position by exploiting some fortuitous

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whole, not just the forum state. In re Enron Corp., 316 B.R. 434, 444–45 (Bankr. S.D.N.Y. 2004).

43. Rubin v. Roman, Ch. 11 Case No. 05-60155 (REG), Adv. No. 07-03138 (REG), slip op. at 23–24 (Bankr. S.D.N.Y. July 18, 2008); *Rubin*, [2010] EWCA (Civ) 895 at [38]; see also supra notes 19–24 and accompanying text.

44. *Rubin*, [2010] EWCA (Civ) 895 at [38].

45. See supra note 39 and accompanying text.

46. *Rubin*, [2010] EWCA (Civ) 895 at [38].

47. Id. at [61(4)].

48. Id. at [62].

49. Id. at [43] (noting that the "'purpose of bankruptcy proceedings . . . is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established'" (emphasis omitted) (quoting Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors of Navigator Holdings plc, [2006] UKPC 26, [2007] 1 A.C. 508 (P.C.) [14] (appeal taken from Isle of Man))).

circumstance which may yield an unfair personal advantage.'"[50]

In contrast to many other courts, the jurisdictional competence of a bankruptcy court is not necessarily predicated on territory. Bankruptcy courts in the United States have exclusive jurisdiction over the debtor's property[51] "wherever located and by whomever held."[52] The collective action to resolve claims against the debtor's property is understood as an in rem proceeding under U.S. law.[53] As a consequence, creditors and interested parties, upon sufficient notice, can be bound by many (though not all) judgments of a U.S. bankruptcy court, even if the court could not have exercised valid personal jurisdiction over those parties.[54] The English appeals court noted that courts in the U.K. are less certain about whether to treat bankruptcy proceedings as in rem or in personam, and at least some courts have elected to treat them as neither.[55]

Substantive bankruptcy laws also promote distributional fairness by granting the representatives of bankruptcy estates the right to sue third parties to recover assets or interests that the debtor distributed to friends or favored creditors shortly before the bankruptcy, or transferred without authorization after the bankruptcy.[56] In *Rubin*, the defendants were sued under, among others, laws allowing for the reversal of fraudulent and preferential transactions "whose consequences have been detrimental to the collective interest of the creditors."[57] In the view of the English appeals court, these "mechanisms" to deter and punish fraud and enhance the fairness of distributions "are integral to and are central to the collective nature of bankruptcy."[58]

The appeals court also observed that bankruptcy courts, out of necessity, have developed approaches to the recognition of foreign judgments and foreign laws that differ from ordinary civil litigation. With universal and exclusive jurisdiction, a bankruptcy court may exercise jurisdiction over property that lies within a foreign territory, increasing the potential for jurisdictional conflicts. International customs and procedures to enhance cooperation among bankruptcy courts and resolve conflicts are widely accepted. "American courts

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50. Id. at [54] (quoting Ian F. Fletcher, The Law of Insolvency § 26-001 (4th ed. 2009)).

51. 28 U.S.C. § 1334(e) (2006).

52. 11 U.S.C. § 541 (2006).

53. See Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 369 (2006) ("Bankruptcy jurisdiction . . . is principally an *in rem* jurisdiction.").

54. Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 452–53 (2004) (holding that sovereign state could be bound by bankruptcy discharge order because "[c]reditors generally are not entitled to personal service before a bankruptcy court may discharge a debt" (citing Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 192 (1902)); Jones v. Chemetron Corp., 72 F.3d 341, 346, 350 (3d Cir. 1995) (stating that "[i]nadequate notice is a defect which precludes discharge of a claim in bankruptcy," but binding creditors who had received constructive notice of claims bar date through publication notice to debtor's discharge absent showing of excusable neglect).

55. See *Rubin*, [2010] EWCA (Civ) 895 at [28], [43], [45] (discussing notable court opinions finding neither in rem nor in personam jurisdiction).

56. Id. at [52] (quoting U.N. Comm'n on Int'l Trade Law, Legislative Guide on Insolvency Law, at 135–36, U.N. Sales No. E.05.V.10 (2005)).

57. *Rubin*, [2010] EWCA (Civ) 895 at [54] (quoting Fletcher, supra note 50, § 26–002 (emphasis omitted)); Complaint, supra note 9, at 22–26.

58. *Rubin*, [2010] EWCA (Civ) 895 at [61(2)].

have long recognized the particular need to extend comity to foreign bankruptcy proceedings," because "[t]he equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding; if all creditors could not be bound, a plan of reorganization would fail."[59] In England, "universality of bankruptcy has always been an aspiration, if not always fully achieved, of United Kingdom law."[60] The English appeals court was mindful of the link between fairness and universality in bankruptcy cases, as expressed by Lord Hoffmann in the *Navigator* opinion:

> *The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application.* . . . No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated. . . . And with increasing world trade and globalisation, many other countries have come round to the same view.[61]

Legislative bodies in the U.S. and England have reinforced these court-developed principles by enacting laws that authorize judicial assistance to foreign bankruptcy administrators.[62] Under many such laws courts are permitted, if not required, to extend comity to substantive bankruptcy laws of other countries to facilitate the administration of cross-border bankruptcy cases.[63]

The English appeals court drew from its extensive survey of bankruptcy law and practice a series of principles. First, the court concluded that ordinary rules for enforcing—or more precisely not enforcing—foreign judgments in personam do not apply to bankruptcy proceedings.[64] Second, the court

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59. Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 713–14 (2d Cir. 1987); see also In re Artimm, S.r.L., 335 B.R. 149, 157 (Bankr. C.D. Cal. 2005) (describing "philosophy of . . . deference to the country where the main insolvency case is located and flexible cooperation in administration of assets").

60. *Rubin*, [2010] EWCA (Civ) 895 at [43] (emphasis omitted) (quoting Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors of Navigator Holdings plc, [2006] UKPC 26, [2007] 1 A.C. 508 (P.C.) [16]–[17] (appeal taken from Isle of Man)).

61. Id. (quoting *Cambridge Gas*, [2006] UKPC 26 at [16]–[17]).

62. 11 U.S.C. §§ 1501–1532 (2006) (special provisions for cross-border and ancillary bankruptcy proceedings). Under English law there is a formal process allowing a foreign insolvency representative to obtain "recognition" by the English court to act on behalf of the insolvent company in England with all the powers enjoyed by a representative of an English company. See *Rubin*, [2010] EWCA (Civ) 895 at [15]–[23] (discussing England's Cross-Border Insolvency Regulations); id. at [61]–[62] ("'The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.'" (quoting *Cambridge Gas*, [2006] UKPC 26 at [22])).

63. See, e.g., 11 U.S.C. § 1509(b)(3) (providing that upon recognition of a foreign bankruptcy proceeding, "a court in the United States shall grant comity or cooperation to the foreign representative"); Maxwell Commc'n Corp. plc v. Societe Generale (In re Maxwell Commc'n Corp. plc), 93 F.3d 1036, 1051 (2d Cir. 1996) (applying substantive rules of English bankruptcy law where related bankruptcy proceedings were underway in England and United States).

64. *Rubin*, [2010] EWCA (Civ) 895 at [61(1)]; see also id. at [43] (noting that the "'purpose of bankruptcy proceedings . . . is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established'" (emphasis omitted) (quoting *Cambridge Gas*, [2006] UKPC

concluded that it has authority to shape as a vehicle of common law the "sui generis private international law rules" relating to enforcement of bankruptcy judgments, without regard to ordinary private international law rules that might otherwise prevent enforcement of judgments.[65] Third, exercising this authority, the court concluded that any judgment rendered "for the purposes of the collective enforcement regime of the bankruptcy proceedings" should receive "worldwide recognition" and "apply universally to all the bankrupt's assets."[66]

The plaintiffs had obtained official recognition from the English court under the relevant U.K. insolvency rules.[67] They sought to enforce a judgment against defendants in respect of claims arising under substantive laws enacted to protect creditors, and which the plaintiffs had the exclusive right to assert for the benefit of creditors.[68] In the court's view this qualified as a judgment "for the purposes of the collective enforcement regime of the bankruptcy proceeding[]" that should be enforceable against defendants.[69]

Except for noting that as a factual matter the defendants, after receiving actual notice, made an informed decision not to appear in the adversary proceeding,[70] the English appeals court did not otherwise address the requirements for the U.S. court's exercise of personal jurisdiction over the defendants.

Ironically, the English appeals court maintains that, in effect, it did not establish new law and its ruling follows from special rules regarding recognition of judgments that already apply in bankruptcy proceedings: namely, that having been "recognized" by the English court, a foreign estate representative can obtain the same remedies to which it would be entitled if the first proceeding had taken place in a domestic court, including enforcement of judgments.[71] This reasoning is untenable given that the court's invocation of these special bankruptcy rules allowed it to do exactly what it believed it could not otherwise do under ordinary domestic law—enforce an in personam judgment without considering the jurisdictional competence of the rendering court.

III. *RUBIN*'S UNINTENDED CONSEQUENCES

Whereas ordinary principles of English law appeared to foreclose enforcement of the U.S. court's judgment, the English appeals court decided that it had authority in furtherance of the "collective enforcement regime" of a bankruptcy proceeding to deviate from these conventions.[72] The court's

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26 at [14])).

65. Id. at [44], [61(4)] (explaining that even in absence of statutory authority, some degree of international cooperation in corporate insolvency has been achieved by judicial practice).

66. Id. at [61(4)], [62].

67. Id. at [24]–[25], [62].

68. Id. at [61(2)].

69. Id. at [61(4)], [62].

70. Id. at [64].

71. Id. at [62]; see also supra note 62 (discussing formal process under which foreign insolvency representative obtains recognition by English court).

72. Id. at [61]–[62]; see also supra note 66 and accompanying text.

assertion of authority to modify the common law may itself represent a significant departure from the relevant English law precedents. However, this could have been a departure without a difference if the English appeals court had not then used this authority to pronounce an undue change in the law with profound implications: Any defendant sued in a foreign bankruptcy court must now appear to defend itself, even if the court has no legitimate basis for the exercise of personal jurisdiction. By abolishing personal jurisdiction requirements, the *Rubin* decision, if affirmed, would also achieve the de facto expansion of a bankruptcy court's universal jurisdiction to include property belonging to third parties.[73]

The suggestion by the English appeals court that its ruling is limited to judgments rendered "for the purposes of the collective enforcement regime of the bankruptcy proceedings"[74] offers no comfort. In the United States, even lawsuits asserting only claims arising under substantive bankruptcy law are filed the same way as any other civil case: with a complaint and a demand for judgment.[75] In any action to avoid or recover a transfer of the debtor's property, U.S. bankruptcy law mandates the commencement of a separate proceeding (called an "adversary proceeding") within the larger bankruptcy case to ensure that the requirements for personal and subject matter jurisdiction are met.[76] A defendant accused of bankruptcy-related fraud should be entitled to no less protection than a defendant accused of a state law fraud or tort claim[77]—especially since avoidance claims arising under bankruptcy laws for fraudulent and preferential transfers often carry a lower burden of proof than fraud or tort claims outside of bankruptcy.[78]

Rubin's flaws are compounded when considering how the decision might be applied in future cases. The ruling eliminates personal jurisdiction requirements for judgments that are entered "for the purposes of the collective enforcement regime of the bankruptcy proceedings."[79] Just what this

73. Under U.S. bankruptcy law, property of third parties that a bankruptcy trustee seeks to recover does not constitute property of the estate until after entry of a judgment ordering its avoidance and recovery. 11 U.S.C. § 541(a)(3) (2010) (defining bankruptcy estate to include property recovered under, inter alia, 11 U.S.C. §§ 550, 553).

74. *Rubin*, [2010] EWCA (Civ) 895 at [61]–[62]; see also supra text accompanying notes 64–66.

75. See Fed. R. Bankr. P. 7001(1) (mandating commencement of adversary proceeding in order to recover money or property from third party); Fed. R. Bankr. P. 7003 (providing for commencement of adversary proceeding by filing of complaint).

76. Fed. R. Bankr. P. 7001(1); see generally In re Paques, Inc., 277 B.R. 615, 625 (Bankr. E.D. Pa. 2000) ("The constitutional limitations on a federal [bankruptcy court's] use of a long-arm statute to compel a foreign defendant to appear in the forum is intended to preserve the liberty of the defendant.").

77. Under U.S. law, the need for finality and efficiency ultimately gives way to constitutional requirements for individual due process. See, e.g., Jackson v. Fie Corp., 302 F.3d 515, 529 (5th Cir. 2002) ("[T]he *res judicata* doctrine protects private and public values—such as repose, finality, and efficiency—that are important, but have not yet found much expression as constitutional principles, at least in the civil context.").

78. See, e.g., 11 U.S.C. § 547(f) (establishing rebuttable presumption of debtor's insolvency for purposes of a preference cause of action); id. at § 548(a)(1)(B) (defining cause of action to avoid transfers as constructively fraudulent).

79. *Rubin*, [2010] EWCA (Civ) 895 at [61(4)].

definition encompasses remains to be seen. The English appeals court implies that it includes judgments based on claims that plaintiffs have the exclusive right to assert for the benefit of creditors and judgments arising under substantive bankruptcy laws enacted to protect creditors.[80] If intended as constraints, neither limitation holds up to scrutiny.

First, there is a real risk that the disputes qualifying under *Rubin* need not relate in any way to substantive bankruptcy law. U.S. bankruptcy courts may exercise jurisdiction over all property of the estate, wherever located.[81] Thus, property of the estate is not limited to avoidance claims arising under bankruptcy law, but also includes ordinary contract and tort claims. Trustees and other representatives of the bankruptcy estate have exclusive authority to assert claims on behalf of the estate and the debtor, and the recovery from any such lawsuit will inure to the benefit of all creditors. Furthermore, because bankruptcy courts in the United States will generally preside over all litigation concerning or *relating to* a debtor, in some cases even the connection to the debtor could be very tenuous.[82] Finally, it bears noting that even the English appeals court fails to adhere to the stated limitation, inasmuch as it enforces default judgments on state law-based claims for fraud and unjust enrichment that do not arise under substantive bankruptcy law.[83]

On the other hand, *Rubin*'s qualification that the claim or judgment serve the purposes of a collective enforcement regime may also prove underinclusive. The laws of many U.S. states (which federal bankruptcy law incorporates) grant *individual* creditors the right to undo transactions aimed at defrauding them, and the recoveries from a successful action need not benefit anyone other than the individual creditor.[84] Federal bankruptcy law affords the trustee or representative of the bankruptcy estate the right to assert these state law causes of action and retain the proceeds for the benefit of all creditors.[85] Thus, to the extent that courts after *Rubin* decide to focus on the source and origin of the underlying claim, judgments based on certain nonbankruptcy causes of action, while similar to claims arising under substantive bankruptcy law, may not qualify for recognition.

IV. A MISSED OPPORTUNITY

Traditional English doctrines regarding personal jurisdiction and recognition of judgments prevented the English court from considering whether the U.S. court's assumption of jurisdiction was consistent with U.S. law. The appeals court acknowledged that these were ripe for modernization,

80. Id. at [61(2)].

81. 11 U.S.C. § 541(a)(1) (describing bankruptcy estate to include legal and equitable interests of debtor in property "wherever located and by whomever held").

82. See In re Manshul Constr. Corp., 225 B.R. 41, 45 (Bankr. S.D.N.Y. 1998) (noting that "[e]ven if a case does not 'arise in' or 'arise under' Title 11, a bankruptcy court may still have jurisdiction over the matter if the proceeding is 'related to' a Title 11 case," including "suits between third parties which have an effect on the bankruptcy estate" (quoting Celotex Corp. v. Edwards, 514 U.S. 300, 307 n.5 (1995))).

83. *Rubin*, [2010] EWCA (Civ) 895 at [12].

84. See, e.g., N.Y. Debt. & Cred. Law § 278 (McKinney 1999).

85. 11 U.S.C. § 544.

stating "en passant" that "the Canadian Supreme Court has decided that international comity and the prevalence of international cross-border transactions and movement has called for a modernisation of the private international law and that the test of a real and substantial connection should apply equally to the recognition and enforcement of foreign judgments."[86] The appeals court recognized, further, that it enjoyed discretion under "the common law" to modernize these rules by providing active assistance to foreign bankruptcy courts in order to achieve a "unitary and universal" bankruptcy.[87] Unfortunately, the court's idea of active assistance provides no assurance that defendants are afforded a full and fair opportunity to defend themselves in the first suit. The court should have used the occasion to instead implement one of several alternative common law tests for recognition that balance the interests of defendants with those of the foreign rendering court.[88]

As explained above in Part II, U.S. courts may consider whether the rendering court complied with that court's own jurisdictional rules to determine its competence over a person or thing.[89] Rather than dispense with personal jurisdiction requirements altogether, the English court could have exercised its discretion under the common law simply to extend comity to the U.S. law *standards* for personal jurisdiction applied by the U.S. bankruptcy court and to consider whether the U.S. court had correctly applied these standards. The defendants would have had the right to offer evidence and arguments on the jurisdictional facts and the legal standard for personal jurisdiction, without necessarily reaching the substantive merits of the claims. If, through fraudulent conduct or otherwise, the defendants indeed had sufficient "minimum contacts" with the United States, the English appeals court likely could have upheld the U.S. bankruptcy court judgment without abolishing the defendants' due process rights.

The House of Lords' 1967 decision in the matrimonial case of *Indyka v. Indyka* illustrates another path by which the English court could have accorded comity to the U.S. proceeding while protecting the defendants' reasonable expectations.[90] In *Indyka*, several of the lords urged a view that England should recognize divorces issued by foreign countries if a "real and substantial connection" exists between the parties and the country granting the divorce, "regardless of the existence or nonexistence of a comparable English

86. *Rubin*, [2010] EWCA (Civ) 895 at [37] (citing Beals v. Saldanha, [2003] 3 S.C.R. 416 (Can.)).

87. Id. at [62]–[63]; see generally supra notes 59–63 and accompanying text (describing statutory and common law framework under which bankruptcy courts can extend comity to substantive bankruptcy laws of other countries).

88. The English appeals court decided not to address the parties' statutory arguments. Id. at [63]. But, other scholars have argued that the court could have relied directly on provisions of the English Cross-Border Insolvency Regulations to grant discretionary relief. See Look Chan Ho, Recognition Born of Fiction—*Rubin v. Eurofinance SA*, 25 J. Int'l Banking. L. & Reg. 579, 586 (2010) (explaining that one of three ways the court could "rescue" the outcome in *Rubin* would be to apply foreign law when granting discretionary relief under article 21 of Cross-Border Insolvency Regulations).

89. See supra note 38 and accompanying text (noting that U.S. courts examine whether rendering court complied with its own jurisdictional rules).

90. [1967] 3 W.L.R. 516 (H.L.) (appeal taken from Eng. (C.A.)).

jurisdictional basis."[91] The *Indyka* precedent is apt given that matrimonial cases, like bankruptcy cases, constitute an area in the law in which the line between in rem and in personam jurisdiction is blurred.[92] Furthermore, the *Indyka* rule seems remarkably similar to the Canadian test cited favorably by the English appeals court.[93] If the factual allegations in the *Rubin* complaint are determined to be true and defendants sought out U.S. participants and victims for the alleged scheme, the court likely could have upheld the judgment on the basis that a real and substantial connection existed between the defendants and the United States.

As a further alternative, the English appeals court could have considered whether a defendant may "voluntarily submit" itself to the jurisdiction of a foreign court through a range of conduct directed toward the foreign country or its citizens. By way of example, the U.S. Supreme Court has recognized that when an individual or corporation "'purposefully avails itself of the privilege of conducting activities within the forum State,'" it has clear notice that it is subject to suits there and can act to reduce the attendant risks, including by discontinuing business altogether.[94] A holistic rule that assesses defendants' submission to jurisdiction based on conduct and intent may be especially warranted in bankruptcy cases where the estate representative has limited resources to prosecute claims in foreign countries. If defendants intentionally engineered a deceptive scam aimed at U.S. consumers, the court likely could have upheld the judgment by concluding that defendants, through their prior conduct, had in fact submitted themselves to the U.S. court's jurisdiction.

V. CONCLUSION

Uncertain of its ability to recognize and apply the relevant principles of U.S. law, the English appeals court set aside defendants' fundamental procedural rights under both U.S. and English law to achieve the desired outcome. Even if the U.K. Supreme Court reverses it, the *Rubin* decision illustrates the hazards inherent in any regime that lacks a flexible mechanism for the consideration and application of foreign law.

Preferred Citation: Rebecca R. Zubaty, *Rubin v. Eurofinance*: Universal Bankruptcy Jurisdiction Or A Comity Of Errors?, 111 COLUM. L. REV. SIDEBAR 38 (2011), http://www.columbialawreview.org/assets/sidebar/volume/111/38_Zubaty.pdf.

91. Arthur T. von Mehren & Donald T. Trautman, Recognition of Foreign Adjudications: A Survey and a Suggested Approach, 81 Harv. L. Rev. 1601, 1618–19 (1968) (citing *Indyka*, [1967] 3 W.L.R. 516).

92. See Williams v. North Carolina, 317 U.S. 287, 297 (1942) ("The historical view that a proceeding for a divorce was a proceeding *in rem* . . . was rejected by the *Haddock* case. We likewise agree that it does not aid in the solution of the problem presented by this case to label these proceedings as proceedings *in rem*. Such a suit, however, is not a mere *in personam* action.").

93. See supra note 86 and accompanying text.

94. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).